AMERICAN BANKRUPTCY INSTITUTE

2021 Virtual Annual Spring Meeting

Nightmarish Consumer Issues

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CONCURRENT SESSION

2021

Nightmarish Consumer Issues

Nightmare No. 1: Former clients call their attorney to say they can't refinance their home because the title insurance company claims there is a judicial lien on their home for a credit card debt that was never voided in their chapter 7 case. The title insurance company claims $26,678 is needed to release the lien, which includes over $6,000 in additional interest since the discharge was entered.

Nightmare No. 2: Debtor emails her counsel to advise that she received the Trustee's request for a TON of documents last week and that, although she felt it was burdensome to provide so many documents again, she sent them to the Trustee (directly) in fifteen separate emails, none of which were copied to counsel.

Nightmare No. 3: During a § 341(a) Meeting, Trustee asks debtor about a withdrawal of $3,000 that appears on his bank statement in the months preceding the filing. Debtor advises he repaid his grandmother because she helped him pay rent when he was out of work. The payment to grandma does not appear on the debtor's Statement of Financial Affairs and counsel intimates during the meeting that he had no prior knowledge of the transaction.

Nightmare No. 4: Debtor files a list of creditor names and addresses as required by Rule 1007(a) but either omits the creditor or lists the creditor at the wrong address. The creditor does not file a claim by the deadline. Creditor otherwise receives notice of the bankruptcy filing and files a claim after the deadline. Debtor or the Trustee objects to the late claim. Creditor argues it did not receive notice of the bankruptcy in time to file a claim.

Nightmare No. 5: Debtor's attorney files and serves a notice of a request for chapter 13 plan modification under Rule 3015(h), and pursuant to the court's new local rule implementing Rule 2002(h), he serves the notice only on creditor's who have filed a proof of claim. The modified plan seeks to void a judicial lien held by a creditor who did not file a claim. Trustee objects to the plan modification asserting improper notice.

Nightmare No. 6: Former client calls his attorney to complain that his credit score is really low three (3) years after his bankruptcy and he believes it is because of an auto loan counsel helped him reaffirm. Former client states that counsel told him reaffirming would help him rebuild his credit, but it has done the opposite. Former client threatens to seek sanctions for violation of 11 U.S.C. § 524(c) because counsel did not explain that making payments late would be harmful to his credit score.

Nightmare No. 7: Debtor's attorney receives letter from bank attorney threatening to file motion to reopen a closed chapter 13 case and vacate an order obtained by the attorney voiding the second mortgage that was held by the bank. Bank claims that the motion to value and strip off the lien filed by the attorney was sent to P.O. Box 82708, Irvine, CA 92619 but that the bank's actual address is P.O. Box 52708, Irvine, CA 92619.

Nightmare No. 8: Clients call to say that they received a letter from the Town about the unregistered clunker parked on the side of their home that they listed in their schedules with a value of $150. A neighbor has complained that the car is a nuisance and the Town is giving them 30 days to remove it or they will be fined. The bank will not pick up the car but said they would release the lien if the clients get a licensed mechanic to send a letter stating the car is inoperable and has a value of less than $200. The clients want the attorney to intervene and solve the problem.

Nightmare No. 9: Reaffirmation agreement between debtor and creditor is denied because the underlying contract is a Lease, not subject to reaffirmation under § 524(c).

Nightmarish Consumer Issues

Nightmare No. 1: Former clients call their attorney to say they can't refinance their home because the title insurance company claims there is a judicial lien on their home for a credit card debt that was never voided in their chapter 7 case. The title insurance company claims $26,678 is needed to release the lien, which includes over $6,000 in additional interest since the discharge was entered.

This section focuses on the question of whether a lien may be avoided after a bankruptcy case is closed. (The due diligence requirements for debtor's counsel in handling a bankruptcy case are addressed elsewhere in these materials). Section 522(f) does not specify whether lien avoidance has to take place prior to discharge or the closing of the case. Exemptions generally are afforded continued protection after the bankruptcy, so they could continue to be impaired after the bankruptcy by an otherwise avoidable lien. Unlike many of the other Bankruptcy Rules, the Rules providing for debtor lien avoidance set no time limits.

Thus, most courts have held that a debtor may be permitted to bring a proceeding to avoid a lien after the discharge and case closing, and that lien avoidance can be cause for reopening a case because it "accord[s] relief to the debtor." 11 U.S.C. § 350(b). These decisions typically apply the equitable doctrine of laches and consider matters such as the reasons for the delay in bringing the lien avoidance proceeding and whether there has been prejudice to the creditor. *See, e,g, In re Wilding*, 475 F.3d 428 (1st Cir. 2007) (debtor permitted to avoid judicial lien under section 522(f) two years after discharge even if he has satisfied the lien prior to filing a motion to avoid, so long as the lien in question impaired an exemption as of the bankruptcy petition date); *In re McCoy*, 560 B.R. 684 (B.A.P. 6th Cir. 2016) (bankruptcy court abused discretion by refusing to allow lien avoidance four years after case closed where there was no showing of prejudice to creditors); *In re Goswami*, 304 B.R. 386 (B.A.P. 9th Cir. 2003) (debtors have right to amend exemptions after case closing for purpose of lien avoidance absent bad faith or prejudice); *but see Hawkins v. Landmark Fin.*, 727 F.2d 324 (4th Cir. 1984) (court has discretion to refuse to reopen a case for amendment of exemptions and lien avoidance).

In a recent decision, *In re Horvath*, 2021 WL 371771 (Bankr. N.D. Ohio Feb. 2, 2021), the debtors reopened their chapter 7 case and filed a motion to avoid a lien approximately 10 years after they had received a discharge. In denying the motion, the court initially noted that the "Debtors' failure to identify the lien at the time the case was filed is particularly troublesome." The court found that because debtors had listed the underlying lawsuit that gave rise to the lien in their schedules, and since they owned real property, "a lien check should have been perfunctory." The court found that a lien search is not burdensome because "[n]ot only were the records available through a simple online search of county records, electronic services providing public record searches were also available." *In re Horvath* is included with your materials (pages 20-24).

The *Horvath* court also held that the creditor was prejudiced by the debtors' failure to take timely action. The creditor claimed that it responded to two title searches inquiring about the balance of the lien since the initial bankruptcy case. The creditor also "incurred additional costs to maintain the lien, renewing it twice." Finally, the creditor asserted that it would be difficult to assess the merits of the avoidance action because it would have to obtain a retrospective valuation of the property as of the date of filing, and determine the balance of other liens as of that date.

Nightmare No. 2: Debtor emails her counsel to advise that she received the Trustee's request for a TON of documents last week and that, although she felt it was burdensome to provide so many documents again, she sent them to the Trustee (directly) in fifteen separate emails, none of which were copied to counsel.

Debtors and counsel across the country are struggling to respond to initial document requests from individual case trustees. Each Trustee uses his/her own preferred lists/questionnaire forms, and they vary widely, not only across the country but also within individual districts.

The Bankruptcy Code provides that all debtors "shall provide not later than 7 days before the date first set for the first meeting of creditors, to the trustee a copy of the Federal income tax return required under applicable law (or at the election of the debtor, a transcript of such return) for the most recent tax year ending immediately before the commencement of the case and for which a Federal income tax return was filed." 11. U.S.C. § 521(e)(2)(A)(i). The Code further provides that if the debtor fails to comply, "the court shall dismiss the case unless the debtor demonstrates that the failure to so comply is due to circumstances beyond the control of the debtor." See § 521(e)(2)(B).

The United States Trustee Program has developed a document titled "Best Practices for Document Production Requests by Trustees in Consumer Bankruptcy Cases." The Best Practices document states that sending questionnaires and requiring "all debtors to submit documents and information that supplement and expand upon the detail required by the Bankruptcy Code and Rules…is excessive" and recommends that Trustees in a given jurisdiction should adopt "a uniform method of receiving information by email" (barring special circumstance requiring hard copies). The purpose is to provide nationwide guidance to Trustees to ensure their document requests do not cross the line to unreasonable/overburdensome. The Best Practices document was developed in coordination with the National Association of Bankruptcy Trustees, the National Association of Chapter 13 Trustees, and the National Association of Consumer Bankruptcy Attorneys.

The Best Practices for Document Production Requests by Trustees in Consumer Bankruptcy Cases is included with your materials (pages 25-28). Also included is a written copy of the address given by Clifford J. White (Director of the United States Trustee Program) on the topic, given at the 35th Annual Convention of the National Association of Bankruptcy Trustees in September, 2017 (pages 29-35).

The ABI Commission on Consumer Bankruptcy has endorsed the Best Practices document and advocates that it should be part of the Handbook for Chapter 7 Trustees. See § 3.09 of the ABI's Commission on Consumer Bankruptcy (pages 144-146).

Nightmare No. 3: During a § 341(a) Meeting, Trustee asks debtor about a withdrawal of $3,000 that appears on his bank statement in the months preceding the filing. Debtor advises he repaid his grandmother because she helped him pay rent when he was out of work. The payment to grandma does not appear on the debtor's Statement of Financial Affairs and counsel intimates during the meeting that he had no prior knowledge of the transaction.

The Bankruptcy Code and Rules require consumer debtors' counsel to make diligent inquiry into the affairs of the debtor and ensure none of the information contained in the Petition, Schedules, and Statements is inaccurate. See 11 U.S.C. § 707(b)(4)(D) and Rules 1008 & 9011(b). As one Court put it, the "9011-like requirements" of § 707(b)(4)(B) & (D) "confirm that chapter 7 debtor's counsel must undertake an inquiry as to the information reported in the schedules and certify that the schedules are accurate based on the knowledge acquired in that inquiry. *In re Gistis*, Case No. 18-10710 (Bankr. D. Me. November 20, 2020) (*In re Gistis* is included with your materials at pages 36-48).

"[U]nder Rule 1008, an attorney 'who files schedules and statements on a debtor's behalf makes a certification regarding the representations contained therein' —one which constitutes an 'endorsement' formed after a reasonable inquiry." *In re Santos*, 616 B.R. 332 (Bankr. N.D. Tex. 2020), citing *In re Withrow*, 405 B.R. 505 (B.A.P. 1st Cir. 2009). (*In re Santos* is included with your materials at pages 49-70).

"[A]ny attorney who files schedules and statements on a debtor's behalf makes a certification regarding the representations contained therein. Although the certification is not an absolute guaranty of accuracy, it must be based upon the attorney's best knowledge, information and belief, 'formed after an inquiry reasonable under the circumstances.'..." *In re Withrow*, 405 B.R. 505 (B.A.P. 1st Cir. 2009). (*In re Withrow* is included with your materials at pages 71-78).

Best practice is to require that all clients provide myriad source documents (bank statements, tax returns, paystubs, etc.) - and that all documentation be reviewed prior to filing. A sample list of "Required Documents" is included with these materials (pages 79-80). Requiring Debtors to provide you with these documents in advance of the filing not only ensures you can make your certifications under § 707 with confidence, but also helps equip you with the documents that will be required by the Trustee.

Where to draw the line? In 2021 in the Northern District of Ohio, a couple's effort to reopen their case remove a judgment lien from their homestead approximately ten years after entry of their bankruptcy discharge was barred by the doctrine of laches, stating "[t]he importance of an attorney's prepetition due diligence, including lien searches, cannot be understated." See *In re Horvath*, Case No. 10-60520. The opinion implies that it may be malpractice for a consumer debtor attorney to fail to perform a title search on real property owned by the debtor at the time of the bankruptcy filing.

External verification tools should always be used to the extent possible. Where available, counsel should perform online searches of public records. In some states, requiring debtor to pay for title searches may be necessary. Title searches can be performed by a local Title Company or online service such as LexisNexis.

Other examples of counsel's failure to adhere to due diligence requirements of the Code and Rules:

Debtor's counsel is sanctioned for filing Petition, Schedules, and Statements with a date that is approximately one month after debtor actually reviewed and signed the documents. The Bankruptcy Judge sitting in the District of Maine acknowledged that debtor had authorized the filing, but noted that counsel did not have original signed and concurrently dated documents as he purported to have when filing the electronically signed documents on ECF, in violation of the Local Rules and Administrative Procedures incorporated therein. Sanction imposed: $400, payable to the Trustee. *In re Gistis*, Case No. 18-10710 (Bankr. D. Me. November 20, 2020).

Debtor's counsel is sanctioned for including erroneous homestead exemption on debtor's Schedule C although he knew debtor was not eligible for the exemption (counsel also had shown a propensity for lacking care and diligence). The Court held that counsel "prepared the Schedule C with culpable carelessness, but he did not subjectively intend to mislead the Court, the Trustee, or creditors." Sanction imposed: $6,600, payable to the Trustee (Trustee had requested $10,000). "In sum, a sanction of $6,600 payable to the Trustee is appropriate to deter other attorneys from forging ahead with a filing without taking the time necessary to verify that the claims presented to the Court have some basis in fact and law." *In re Gistis*, Case No. 18-10710 (Bankr. D. Me. November 20, 2020)

Debtor's counsel fails to list FDCPA lawsuits (or settlement funds derived therefrom) in 48 out of 70 cases, although his own (national) firm prosecuted the lawsuits and received payment of fees and costs incurred through those settlements. Court founds that the omissions of the FDCPA lawsuits and payments to the law firm of attorneys' fees stemming therefrom on the SofA constituted "untrue and misleading statements, and statements that upon the exercise of reasonable care, should have been known to [counsel and the firm] to be untrue and misleading." Sanctions awarded: $0 (counsel had previously disgorged all fees). *In re Foster*, 586 B.R. 62 (Bankr. W.D. Wash. 2018). (*In re Foster* is included with your materials at pages 81-100).

11 U.S.C. § 707(b)(4)(B): If the court finds that the attorney for the debtor violated Rule 9011 of the Federal Rules of Bankruptcy Procedure, the court, on its own initiative or on the motion of a party in interest, in accordance with such procedures, may order…the assessment of an appropriate civil penalty against the attorney for the debtor.

11 U.S.C. § 707(b)(4)(D): The signature of an attorney on the petition shall constitute a certification that the attorney has no knowledge after an inquiry that the information in the schedules filed with such petition is incorrect.

Rule 1008: All petitions, lists, schedules, statements and amendments thereto shall be verified or contain an unsworn declaration as provided in 28 U.S.C. § 1746.

Rule 9011(b): Representations to the court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances…the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

Local Rule 5005-1 (in most jurisdictions) requires counsel to maintain original signatures for a prescribed period of time and that the originals must be available for production is requested.

Nightmare No. 4: Debtor files a list of creditor names and addresses as required by Rule 1007(a) but either omits the creditor or lists the creditor at the wrong address. The creditor does not file a claim by the deadline. Creditor otherwise receives notice of the bankruptcy filing and files a claim after the deadline. Debtor or the Trustee objects to the late claim. Creditor argues it did not receive notice of the bankruptcy in time to file a claim.

A creditor's claim can be barred for untimeliness only upon a showing that it received reasonable notice. *Oppenheim, Appel, Dixon & Co. v. Bullock (In re Robintech, Inc.)*, 863 F.2d 393, 396 (5th Cir.), *cert. denied,* 493 U.S. 811, 110 S. Ct. 55, 107 L. Ed. 2d 24 (1989).

Due process requires that a creditor receive proper notice of the need to file a proof of claim as a constitutional right that overrides the express language of Section 502(b)(9) [related to disallowance of tardily filed claims] of the Bankruptcy Code. *In re Namusyule*, 300 B.R. 100 (Dist of Columbia 2003) *citing Aboody v. United States (In re Aboody),* 223 B.R. 36, 40 (1st Cir. BAP 1998); *I.R.S. v, Hildebrand*, 245 B.R. 287 (M.D. Tenn. 2000), *rev'g* 228 B.R. 408; *In re Eaton,* 327 B.R. 79, 82–83 (Bankr. D.N.H. 2005) (internal citations omitted) ("Creditors in bankruptcy cases are entitled to the due process rights granted by the Fifth Amendment."); *In re Melton,* 2011 WL 1600506, at *4 (Bankr. E.D.N.Y. 2011) ("Proceedings in Bankruptcy are subject to the due process requirements of the Fifth Amendment to the United States Constitution. Due process requires that notice be 'reasonably calculated,['] under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present objections.")

Federal Rule of Bankruptcy Procedure 3002(c): Filing Proof of Claim or Interest states in subsection (6):

> On motion filed by a creditor before or after the expiration of the time to file a proof of claim, the court may extend the time by not more than 60 days from the date of the order granting the motion. The motion may be granted if the court finds that:

> (A) the notice was insufficient under the circumstances to give the creditor a reasonable time to file a proof of claim because the debtor failed to timely file the list of creditors' names and addresses required by Rule 1007(a) … .

A narrow reading of the Rule would only allow it to apply when the debtor fails to timely file the Creditor Matrix. *See In re Wulff,* 598 BR 459 (E.D. Wisc. February 11, 2019). However, "[r]eading the rule narrowly would render it all but superfluous." *In re Vanderpol,* 2019 WL 4880065 (Bankr. D. Colo. August 28, 2019). "[I]t will simply never apply." *Id.*

The Advisory Committee Note to the 2017 amendment of Fed. R. Bankr. P. 3002(c)(6)(A) states the purpose of the Rule is "to *expand* the exception to the bar date for cases in which a creditor received insufficient notice of the time to file a proof of claim." (emphasis added).

One Court has thoroughly discussed the practical application of Fed. R. Bankr. P. 3002(c)(6)(A) and "believes that the intent of Congress is best effectuated by reading this rule to apply whenever the debtor fails to timely file a *full and complete* Creditor Matrix. If the purpose of the rule is to provide the Court with discretion when a creditor's due process rights have been abridged, then this broader reading will support that goal." *Id.; see also In re Mazik*, 592 B.R. 812, 818 (Bankr. E.D. Pa. 2018) (the court reasoning that a Debtor's failure to comply with Rule 1007(a) by listing a creditor in a timely fashion warranted an extension of the proof of claim filing deadline under Rule 3002(c)(6)(A).) *But see In re Fryman,* 2019 WL 2612763, Bankr. E.D. Ky 2019.

Claims not filed timely due to lack of notice are not discharged. 11 U.S.C. § 523(a)(3), 11 U.S.C. § 1328(a). Debtors may therefore consider filing a claim on behalf of the creditor, or the creditor may request Debtor file a claim. Fed. Rule Bankr. P. 3004. *See James J. Haller and Orlando Velazquez, How to File a Late Claim in a Chapter 13 Case, XXXVI ABI Journal 4, 50, 110-11, April 2017* (included with your materials at pages 101-102). Reprinted with permission from ABI Journal. Copyright © 2017.

Nightmare No. 5: Debtor's attorney files and serves a notice of a request for chapter 13 plan modification under Rule 3015(h), and pursuant to the court's new local rule implementing Rule 2002(h), he serves the notice only on creditor's who have filed a proof of claim. The modified plan seeks to void a judicial lien held by a creditor who did not file a claim. Trustee objects to the plan modification asserting improper notice.

Rule 2002(h) deals with notices that are mailed to creditors who have filed a timely proof of claim in a bankruptcy case. The rule had previously provided, only for chapter 7 cases, that some notices do not need to be mailed to creditors who fail to file a proof of claim before the bar date. A recent rule amendment now makes this possible not only for chapter 7, but also in chapter 12 and 13 cases.

Rule 2002(h) was amended, effective December 1, 2020, to provide that after 70 days following the filing of a chapter 7, 12 or 13 case, or the date of the order converting the case to chapter 12 or chapter 13, the court may direct that all notices required by Rule 2002(a) be mailed only to the debtor, the trustee, all indenture trustees, creditors that hold claims for which proofs of claim have been filed, and creditors that are still permitted to file claims because an extension was granted under Rule 3002(c)(1) or (c)(2). This means that certain notices of events in a case that occur after the bar date may no longer be required to be sent to nongovernmental creditors who have not filed a timely proof of claim (or not been granted an extension to file a claim).

Importantly, this rule change requires action by the court to be implemented. The amended language in Rule 2002(h) states that the "court may direct that all notices required by" Rule 2002(a) be mailed only to the parties discussed above. Without an order from the court directing this notice, all creditors, even those who have not filed timely claims, must continue to be mailed any notice required by Rule 2002(a). Some courts have adopted a local court rule or entered a standing order that will apply in all chapter 13 cases, rather than direct such notice in individual cases.

In a chapter 13 case, the most common notices required by Rule 2002(a) that would be mailed after the claim filing bar date are the notice of the time for filing objections to a proposed plan modification and notice of the time fixed for filing objections to confirmation of a chapter 13 plan. These notices no longer need to be provided to a creditor who has not filed a timely claim, if the court so directs.

The question arises whether the debtor must still serve a request to modify the plan, and a copy of the amended plan, on creditors who have not filed a timely claim. A separate rule, Rule 3015(h), generally governs requests for plan modifications. It provides that notice shall be given by mail to all creditors of the time fixed for filing objections, and if an objection is filed, the hearing to consider a proposed plan modification. A copy of the proposed modification (or a summary of it) must be included with the notice. This notice of a proposed plan modification is the notice also described in Rule 2002(a).

While it would have been helpful if the amendment to Rule 2002(h) avoided any ambiguity by referring to Rule 3015(h), it would seem that the more specific language in Rule 2002(h) as to notice to creditors whose claims are filed should control. Moreover, Rule 3015(h) gives a court authority to direct that the clerk or debtor do not need to serve the notice of a proposed modification and amended plan on "creditors who are not affected by the proposed modification." This should arguably include creditors who have not timely filed a proof of claim, since they are not able to receive distributions under the plan.

Rule 3015(h) also provides that "an objection to a proposed modification is governed by Rule 9014." This suggests that a contested matter exists only if an objection to the modification is filed, assuming no other rule applies to the proposed modification. Thus, courts that implement the amendment to Rule 2002(h) may also direct in the same local rule or standing order that requests to modify and copies of an amended plan do not need to be mailed to creditors who have not filed a timely claim.

However, any local rule implementing Rule 2002(h) should not apply to the holder of a secured claim if the request for modification seeks to value that claim under Rule 3012(b), as that Rule 3012(b) specifically provides that the plan shall be served on the claim holder in the manner provided for service of a summons and complaint under Rule 7004. The same reasoning would apply to a plan modification that seeks to avoid a lien under Rule 4003(d).

Nightmare No. 6: Former client calls his attorney to complain that his credit score is really low three (3) years after his bankruptcy and he believes it is because of an auto loan counsel helped him reaffirm. Former client states that counsel told him reaffirming would help him rebuild his credit, but it has done the opposite. Former client threatens to seek sanctions for violation of 11 U.S.C. § 524(c) because counsel did not explain that making payments late would be harmful to his credit score.

Credit reporting after bankruptcy is dubious at best, as is made evident by a decision recently published by the United States Bankruptcy Court for the Southern District of California "in an attempt to assist consumer bankruptcy attorneys in advising their clients about the complex reaffirmation process." *In re Anzaldo*, 612 B.R. 205 (Bankr. S.D. Cal. 2020). In this case, Wells Fargo appeared before the Court after entry of an Order to Show Cause because "it appeared Wells Fargo may have been pressuring [debtor] to reaffirm the debt." Those concerns were assuaged according to the opinion, but the Court went to great lengths to elicit testimony (and post-hearing Declarations) from Wells Fargo regarding its post-bankruptcy repossession and credit reporting policies.

Wells Fargo averred to the Court that it does not repossess a debtor's car if the payments are current, regardless of whether the debt is reaffirmed in bankruptcy. One of the main reasons counsel signed the Reaffirmation Agreement as being in the debtor's best interest was to ensure the vehicle was safe from repossession. In light of these facts, the Court found that the debtor was misinformed by her counsel that reaffirmation was necessary to protect the vehicle from repossession.

With respect to the credit reporting issue, the opinion states that the testimony was "murky at best" (stating "neither of [Wells Fargo's] experts could provide a knowledgeable response to the court's questions about whether the agreement had to be enforceable before the payments are reported"

The Court noted that in one of the Declarations Wells Fargo submitted to the Court, the declarant averred that the impact of entering into a reaffirmation agreement on a debtor's credit score is "none if very low, and that the negative impact of future missed payments would likely outweigh the benefit of any positive payments.

Ultimately, the Court held that counsel's certification on the Reaffirmation Agreement that his client was "fully advised…of the legal effect and consequences" of reaffirming failed to comply with 11 U.S.C. § 524(c) and the requirements of Rule 9011, and "must be treated as void," so it was stricken. The Court held that "[e]ven though counsel cannot be faulted for being unaware of the credit reporting practices of the industry which remain elusively opaque here, counsel's certification was also not based on an objective assessment of [debtor's] ability to repay the reaffirmed debt. Although a Rule 9011(b) violation occurred, non-monetary sanctions suffice to deter future conduct since the problem was informational and no further sanctions need be issued."

In its conclusion, the Court acknowledged the heavy burden on debtor's counsel and placed a call for action to the creditors:

> The court is sympathetic to the heavy burden imposed on debtors' counsel by BAPCPA in certifying a reaffirmation agreement for a car that their financially struggling clients desperately need for transportation. This responsibility is further encumbered by the lack of reliable information about the practices of both the CRAs and the car lenders about when a debtor is deemed to reaffirm the debt. The industry policy may be to report payments to the CRAs only if the debt is reaffirmed, but whether determination is merely a temporal one, or whether court approval also affects the reporting decision is unclear. Reaffirming the debt cannot be said to affirmatively help debtors rebuild their credit since the benefit is minimal at best and offset by more severe damage to the credit score if the debtors default. Clarification from the industry or a regulatory authority body on when a debt is deemed "reaffirmed" and how "in rem" liability is treated by the system12 would be of great value to the consumers of this nation.
>
> Despite the difficulties in representing debtors in reaffirmation agreements, consumer attorneys must still discharge their obligations to their clients adequately. Counsel is duty bound to decline to sign the certification where this is not warranted and to reflect realistic budget information in the schedules and reaffirmation agreement. In this event, the agreement will become unenforceable without a hearing, but the clients will still be protected against repossession risk in those courts that follow Moustafi, 371 B.R. at 438 until controlling authority determines whether ride through remains a reaffirmation option after BAPCPA.
>
> *In re Anzaldo*, 612 B.R. at 217-218 (included with your materials at pages 104-114).

See also *In re Moustafi*, 371 B.R. 434, 438 (Bankr. D. Ariz. 2007) (debtor who timely indicated an intention to reaffirm the debt and signed and filed a reaffirmation agreement could retain her car free of the risk of repossession so long as she keeps current on the payments).

See Ryan W. Johnson, 24 Variations of a Reaffirmation Agreement and the Corresponding Actions Required by the Court, XXXVII ABI Journal 2, 26-27, 59-60, February 2018 (included with your materials at pages 115-117)*.* Reprinted with permission from ABI Journal. Copyright © 2018.

Nightmare No. 7: Debtor's attorney receives letter from bank attorney threatening to file motion to reopen a closed chapter 13 case and vacate an order obtained by the attorney voiding the second mortgage that was held by the bank. Bank claims that the motion to value and strip off the lien filed by the attorney was sent to P.O. Box 82708, Irvine, CA 92619 but that the bank's actual address is P.O. Box 52708, Irvine, CA 92619.

A judgment or order stripping off a lien is only as good as the process that was used to serve the mortgage holder in the bankruptcy proceeding. In other words, a lot of effort and expense may be wasted if it turns out that the order is ineffective because the wrong party was named or proper service was never made. Fortunately, there are a number of inexpensive tools available to attorneys to help identify the owner of a mortgage or deed of trust. Several of these tools are derived from consumer protection statutes. A written request under the Real Estate Settlement Procedures Act should provide the quickest and most effective method for getting this information.

Obtaining good service for lien stripping purposes is generally a two-step process as follows: 1) identify the name and mailing address for the owner of the mortgage, deed of trust or judicial lien, and 2) determine if the owner is an insured depository institution.

A. Identify the Name and Mailing Address for the Lien Owner

1. Send a "Request for Information" under RESPA)

The party most often known to the debtor is the servicer of the mortgage. This is the party that deals most regularly with the client, by requesting and accepting payments and providing mortgage and escrow statements. As an agent for the mortgage owner, the servicer is also the party that should have accurate information about the entity that owns and holds the mortgage. Thus, several federal statutes require the servicer to identify the mortgage owner if a proper request is made.

A written inquiry sent to a mortgage servicer that seeks information about the borrower's mortgage loan is referred to as a "request for information" (also known as a "qualified written request"). For most requests for information that do not seek information about the mortgage owner, a servicer will need to acknowledge the request within 5 business days of receipt, and respond within 30 business days of receipt. 12 C.F.R. § 1024.36(c) and (d). If the borrower or borrower's agent sends a written request seeking the identity, address or other relevant contact information for the owner or assignee of a mortgage loan, the servicer must respond within 10 business days. 12 C.F.R. § 1024.36(d)(2)(i)(A).

2. Send a TILA § 1641(f)(2) Request to the Servicer

Similar to RESPA, the Truth in Lending Act contains a provision that requires the loan servicer to tell the borrower who is the actual holder of the mortgage. 15 U.S.C. § 1641(f). Upon written request from the borrower, the servicer must state the name, address, and telephone number of the owner of the obligation or the master servicer of the obligation.

3. Review Transfer of Ownership Notices

TILA also requires that whenever ownership of a mortgage loan securing a consumer's principal dwelling is transferred, the creditor that is the new owner or assignee must notify the borrower in writing, within 30 days after the loan is sold or assigned. 15 U.S.C. § 1641(g)(1)(A) - (E). This law applies to any transfers made after May 20, 2009. Attorneys should request that clients provide copies of any transfer ownership notices they have received under this law. The notices should contain the following information:

- the new creditor's name, address, and telephone number;
- the date of transfer;
- location where the transfer of ownership is recorded;
- the name, address, and telephone number for the agent or other party having authority to receive a rescission notice and resolve issues concerning loan payments; and
- any other relevant information regarding the new owner.

4. Check Fannie and Freddie's Web Portals

Both Fannie Mae and Freddie Mac have implemented procedures to help borrowers to determine if Fannie Mae or Freddie Mac owns their loan. Borrowers and advocates can either call a toll-free number or enter a street address, unit, city, state, and ZIP code for the property location on a website set up to provide the ownership information. *See* Fannie Mae Loan Lookup, at https://knowyouroptions.com/loanlookup; Freddie Mac Self-Service Lookup, at https://ww3.freddiemac.com/corporate. The website information, however, may in some cases refer to Fannie Mae or Freddie Mac as "owners" when in fact their participation may have been as the party that had initially purchased the loans on the secondary market and later arranged for their securitization and transfer to a trust entity which ultimately holds the loan.

5. Check the Local Registry of Deeds

Checking the local registry where deeds and assignments are recorded is another way to identify the actual owner. However, attorneys should not rely solely on the registry of deeds to identify the current holder of the obligation, as many assignments are not recorded. In fact, if the Mortgage Electronic Registration System (MERS) is named as the mortgagee, typically as "nominee" for the lender and its assigns, then assignments of the mortgage will not be recorded in the local registry of deeds. In addition, some assignments may be solely for the administrative convenience of the servicer, in which case the servicer is the owner of the mortgage loan.

B. Determine if the Owner is an Insured Depository Institution

Once the proper party or parties have been identified, the next step is to properly serve them with the applicable motion, adversary proceeding or chapter 13 plan. This will require compliance with the requirements under Bankruptcy Rule 7004.

Rule 7004(h) requires that service of process on an insured depository institution in a contested matter or adversary proceeding be made by certified mail addressed to an officer of the institution. If the party to be served is a corporation or partnership but not an insured depository institution, service must be made pursuant to Rule 7004(b)(3), which provides that first-class mail may be used and addressed "to the attention of an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service ...."

A judgment or order obtained in a contested matter or adversary proceeding may be declared invalid for failure to comply with these requirements, even if the affected party received actual notice. *See, e.g.*, *Jacobo v. BAC Home Loans Servicing*, LP, 477 B.R. 533 (D. N.J. 2012); *PNC Mortgage v. Rhiel*, 2011 WL 1043949 (S.D. Ohio Mar. 18, 2011). The following are steps a debtor's attorney should take to avoid defective service issues.

1. Determine if the Named Party is an Insured Depository Institution

Unlike the definition of an insured depository institution found in 11 U.S.C. § 101(35), which includes an insured credit union, Bankruptcy Rule 7004(h) applies only to an insured depository institution "as defined in section 3 of the Federal Deposit Insurance Act." Thus, the institution must have deposits that are insured by the FDIC under the Federal Deposit Insurance Act. *See also In re Cornejo*, 2010 WL 7892449 (Bankr. D. Alaska Aug. 2, 2010) (Rule 7004(h) does not apply to a federal credit union). *But see In re Fisher*, 2008 WL 4280388 (Bankr. N.D.Ala. Sep 12, 2008) (applying definition in 11 U.S.C. § 101(35)(B) and concluding that term "insured depository institution" for purposes of Rule 7004(h) includes an insured credit union).

This position has been adopted by the Rules Committee in a proposed amendment to Rule 3007, at least with respect to objections to claims. The amendment adds "as defined in section 3 of the Federal Deposit Insurance Act" to the reference to an insured depository institution in Rule 3003(a)(2)(A)(ii). The proposed amendment will become effective on December 1, 2021, absent congressional action. The Advisory Committee Notes explain the reason for the change:

> Subdivision (a)(2)(A)(ii) is amended to clarify that the special service method required by Rule 7004(h) must be used for service of objections to claims only on insured depository institutions as defined in section 3 of the Federal Deposit Insurance Act, 12 U.S.C. § 1813. Rule 7004(h) was enacted by Congress as part of the Bankruptcy Reform Act of 1994. It applies only to insured depository institutions that are insured by the Federal Deposit Insurance Corporation and does not include credit unions, which are instead insured by the National Credit

Union Administration. A credit union, therefore, may be served with an objection to a claim according to Rule 3007(a)(2)(A)—by first-class mail sent to the person designated for receipt of notice on the credit union's proof of claim.

To confirm whether a party is an insured depository institution for purposes of Rule 7004(h), the attorney should use the BankFind program on the FDIC's website at http://research.fdic.gov/bankfind/. In most cases all that is needed to be entered in the program is the name of the institution. Care should be taken to enter the precise name as many financial institutions have subsidiary or affiliated corporations with similar names. For example, entering simply "Citibank" will provide over 20 different insured depository institutions that use "Citibank" in some way in the corporate name. In some cases the entity that has been identified as the mortgage holder may not be an insured depository institution even though there may be other similarly named, separate entities that are insured depository institutions.

2. Obtain the Name of an Officer of the Institution

Courts have wrestled with whether the requirement in Rule 7004(h) that service should be "addressed to an officer of the institution" means that a specific officer must be named, or that service can simply be sent in care of "Officer" or a specific office like "President." Some courts suggest that it is easy to find the names of bank officers through online searches, and use that to justify requiring named officers for service of process. *See, e.g.*, *In re Cornejo*, 2010 WL 7892449 (Bankr. D. Alaska Aug. 2, 2010); *In re McCumber*, 2012 WL 893061 (Bankr. D. Alaska Mar. 7, 2012).

Even courts that have acknowledged that finding names of officers may not be such an easy task may conclude that general service to an "officer" is not sufficient. For example, in *In re Eimers*, 2013 WL 1739645 (Bankr. D. Alaska Apr. 23, 2013), despite an affidavit from the debtor's attorney that both he and his assistant had searched but were unable to find the names of officers, the court held that service addressed to "Bank Officer" at the proper address was inadequate because it should have been addressed to a specific office, such as "President."

In construing the similar though arguably less stringent requirement in Rule 7004(b)(3), the Ninth Circuit B.A.P. in *In re Villar*, 317 B.R. 88 (B.A.P. 9th Cir. 2004) held that sending notice simply to a post office box number, without specifying either a person or an office, is not sufficient. *See also In re Miller*, 428 B.R. 791, 794-95 (Bankr. S.D. Ohio 2010) (service sent by regular mail, not addressed to any individual, officer or department, and to varying addresses, was inadequate). Courts have also held that while service upon a registered agent may satisfy the requirements of Rule 7004(b)(3) with respect to an entity, service upon a registered agent is not service upon an "officer of the institution" for purposes of Rule 7004(h). *E.g., In re Stewart*, 408 B.R. 215, 217-18 (Bankr. N.D. Ind. 2009). In general, most courts have required that a specific officer of the institution be named. *See In re Field*, 2012 WL 1655602 (Bankr. D. Alaska May 10, 2012) (service not sent by certified mail and addressed only to "Manager or General Agent" was inadequate); *In re Franchi*, 451 B.R. 604, 607 (Bankr. S.D. Fla. 2011) (addressing service "c/o Any Officer Authorized to Accept Service" is inadequate).

It should be noted that the Rules Committee has proposed to resolve some of these issues through the adoption of new Rule 7004(i). The proposed rule would become effective on December 1, 2022, subject to further revision by the Rules Committee and absent congressional action. The proposed rule provides as follows:

> (i) SERVICE OF PROCESS BY TITLE. This subdivision (i) applies to service on a domestic or foreign corporation or partnership or other unincorporated association under Rule 7004(b)(3), or on an officer of an insured depository institution under Rule 7004(h). The defendant's officer or agent need not be correctly named in the address – or even be named – if the envelope is addressed to the defendant's proper address and directed to the attention of the officer's or agent's position or title.

The Advisory Committee Notes for the proposed rule state:

> New Rule 7004(i) is intended to reject those cases interpreting Rule 7004(b)(3) and Rule 7004(h) to require service on a named officer, managing or general agent or other agent, rather than use of their titles. Service to a corporation or partnership, unincorporated association or insured depository institution at its proper address directed to the attention of the "Chief Executive Officer," "President," "Officer for Receiving Service of Process," "Managing Agent," "General Agent," "Officer," or "Agent" (or other similar titles) is sufficient.

Given the unsettled law on this issue, and at least until the proposed rule is adopted, attorneys should attempt to serve a specific named officer of an institution. Unfortunately, the BankFind search program on the FDIC's website does not provide the names of officers of insured depository institutions, and it sometimes lists addresses where officers are not located. To get this information, internet search tools and websites should be used. As with the FDIC BankFind search, it is important that the precise name of the institution be used to avoid searches directed at subsidiaries, affiliated entities or similarly named entities that are not the proper party.

The corporate website for the institution should be checked as it may list the officers and addresses, or that information may be contained in annual reports that may be available on the website. These corporate websites may also provide access to filings made by the institution with the U.S. Securities and Exchange Commission which contain the names and addresses of officers. The SEC's website also provides access to these filings using the EDGAR search engine. All companies are required to file registration statements, periodic reports, and other forms electronically through EDGAR. Anyone can access and download this information for free at: http://www.sec.gov/edgar.shtml. Finally, information about public and private companies, including the names of corporate officers, can be obtained using the search engine on the Bloomberg BusinessWeek website.

3. Determine if the Exception for Attorney Appearance is Applicable

An exception to the service requirements under Rule 7004(h) applies if there has been an appearance by an attorney for the institution. Rule 7004(h)(1) provides that if "the institution has appeared by its attorney," service may be made on the attorney by first class mail rather than upon an officer of the institution by certified mail. Courts are not in agreement as to what constitutes an "appearance" by the attorney.

In *In re Hildreth*, 362 B.R. 523, 525-26 (Bankr. M.D. Ala. 2007), the bank argued that an attorney retained to file a motion in a bankruptcy case had not "appeared" for the purposes of Rule 7004(h)(1). The court disagreed, saying that a formal appearance was not necessary where an attorney filed multiple motions on the bank's behalf in the case. Similarly, the court in *In re Baron*, 2010 WL 2354341 (C.D. Cal. June 8, 2010), found that there was no need for an appearance in the subject adversary proceeding as long as the attorney had appeared at some stage in the bankruptcy case.

On the other hand, a bank in *In re Kennedy*, 403 B.R. 363, 366 (Bankr. D.S.C. 2009), succeeded in arguing that service to an attorney was inadequate where that attorney had only appeared in the state court litigation leading up the bankruptcy, but not in the bankruptcy case itself. Most courts agree with this view that the exception does not apply if the attorney has not made some appearance in the bankruptcy case or subject proceeding, even if the attorney has represented the entity in the past in other matters. *In re Archer*, 2012 WL 5205823 (Bankr. N.D. Ga. Oct. 1, 2012). Even the filing of a proof of claim and a request for special notice on behalf of the institution in the bankruptcy case by the attorney may not be sufficient to establish an appearance by the attorney for purposes of Rule 7004(h)(1). *In re Gordon*, 2013 WL 1163773 (Bankr. D. Nev. Mar. 20, 2013).

If an attorney for the institution has made some form of appearance in the bankruptcy case, notice should be provided to that attorney. In general, however, it is not advisable to rely solely upon this method of service. Without some clear statement from the attorney or the institution indicating that the institution has appeared by its attorney in the matter or proceeding and that the attorney shall accept service, it is advisable to serve the institution directly in accordance with Rule 7004.

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Nightmare No. 8: Clients call to say that they received a letter from the Town about the unregistered clunker parked on the side of their home that they listed in their schedules with a value of $150. A neighbor has complained that the car is a nuisance and the Town is giving them 30 days to remove it or they will be fined. The bank will not pick up the car but said they would release the lien if the clients get a licensed mechanic to send a letter stating the car is inoperable and has a value of less than $200. The clients want the attorney to intervene and solve the problem.

Most courts have held that stating an intention to surrender does not compel the debtor to physically turn over the property or transfer title to the property by executing and delivering a deed to the creditor. *See, e.g., In re Pratt*, 462 F.3d 14 (1st Cir. 2006) ("surrender" means the debtor must make the collateral available to the secured creditor but does not contemplate that debtor physically transfer the collateral to the secured creditor); *In re Theobald*, 218 B.R. 133 (B.A.P. 10th Cir. 1998) (surrender option does not alter nonbankruptcy law and require debtor to deliver title to manufactured home to lienholder), *but see Hospital Auth. Credit Union v. Smith* (*In re Smith*), 207 B.R. 26, 30 (Bankr. N.D. Ga. 1997).

The secured creditor is therefore left to state law rights with respect to the collateral as the lien passes through the bankruptcy process unaffected. The bankruptcy court cannot order turnover of property to the creditor, replevin or foreclosure. *In re Gregory*, 572 B.R. 220 (Bankr. W.D. Mo. 2017) (bankruptcy court does not have authority to enforce statement of intention by requiring debtor to surrender property); *In re Williamson*, 540 B.R. 460 (Bankr. D.N.M. 2015) (Code does not authorize court to enter order compelling debtors to reaffirm or redeem manufactured home); *In re Steinhaus*, 349 B.R. 694 (Bankr. D. Idaho 2006) (creditor not entitled to order directing that debtor turn over vehicle; rather, creditor left only with state law rights).

Similarly, debtors generally have not been successful in obtaining bankruptcy court orders compelling secured creditors to take possession of, foreclose, or release the lien on collateral. This is particularly true with respect to real property.

Some courts have permitted the debtor to obtain an order transferring title to the property through a plan provision under section 1322(b)(9) providing for the vesting of the property in the secured creditor, but usually only if the secured creditor fails to object. *In re Peterson*, 581 B.R. 789 (Bankr. D. Md. 2018) (condominium bound by vesting provision in confirmed plan); *In re Olszewski*, 580 B.R. 189 (Bankr. D.S.C. 2017); *In re Rosa*, 495 B.R. 522 (Bankr. D. Haw. 2013). However, most courts have held that the right to surrender property under section 1325(a)(5)(C) does not authorize the court to compel the creditor to accept title to the property. *In re Sagendorph*, 562 B.R. 545 (D. Mass. 2017); *HSBC Bank v. Zair*, 550 B.R. 188 (E.D.N.Y. 2016).

Debtors generally have not been successful in arguing that a secured creditor's refusal to foreclose or release a lien by itself, without any direct attempt to collect the underlying debt as a personal obligation of the debtor, is a violation of the discharge injunction. *See In re Canning*, 706 F.3d 64 (1st Cir. 2013) (mortgage lender's refusal to foreclose did not violate discharge injunction); *In re Bentley*, 607 B.R. 889 (Bankr. E.D. Ky. 2019), *aff'd*, 2020 WL 3833069 (B.A.P. 6th Cir. July 8, 2020).

The ABI Commission on Consumer Bankruptcy has offered a policy recommendation on a process that would result in sale of real property if a secured creditor refuses to accept transfer of the property. *See* ABI Consumer Commission Report § 4.04 Chapter 13 Transfer of Debtor's Principal Residence Subject to an Underwater Mortgage.

For personal property with low value that the debtor has claimed as exempt, such as the car in this Nightmare No. 8, the debtor's counsel could file a motion to redeem the property under section 722 by paying the secured creditor the value of the property. It is likely that the secured creditor will not object to the motion and the debtor can obtain an order compelling the release of the lien.

Nightmare No. 9: Reaffirmation agreement between debtor and creditor is denied because the underlying contract is a Lease, not subject to reaffirmation under § 524(c).

The Lessor and Lessee both desired that the subject Lease be assumed by the debtor in her bankruptcy case, but the Court denied approval, stating "if the Code were to require a reaffirmation agreement before a lease becomes effective, it is difficult to see how section 365(p)(2) serves any purpose." *In re Kearns*, Case No. 20-20252-BPH (Bankr. Mont. 2021) (not for publication), quoting the Ninth Circuit in *Bobka v. Toyota Motor Credit Corp.*, 968 F.3d 946 (9th Cir. 2020). The court noted that "the procedure (i.e. compliance with § 524(c)) utilized by the parties to accomplish their collective goal of assumption was unnecessary" and found that "approval of the Agreement cannot occur under § 524(c)." *Id*. (*In re Kearns* is in your materials at pages 121-123; *In re Bobka* is at pages 124-130).

Leases are subject to the provisions of 11 U.S.C. § 365(p)(2). If an individual chapter 7 debtor is leasing personal property and wishes to assume the lease, he must "notify the creditor in writing that the debtor desires to assume the lease" and the creditor may then notify the debtor if it is willing to allow the assumption. If debtor notifies the Lessor that the lease is assumed within 30 days after the notice previously described, the Lease is effectively assumed. Note that no Court review or approval is required to effectively assume a lease. Contrariwise, loans secured by personal property are subject to the myriad, stringent provisions of 11 U.S.C. § 524.

The court incorporates by reference in this paragraph and adopts as the findings and orders of this court the document set forth below. This document was signed electronically at the time and date indicated, which may be materially different from its entry on the record.

Russ Kendig
United States Bankruptcy Judge

Dated: 12:22 PM February 2, 2021

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:	)	CHAPTER 7
	)	
ERIC JOHN HORVATH AND	)	CASE NO. 10-60520
LAURIE LYNN HORVATH,	)	
	)	JUDGE RUSS KENDIG
Debtors.	)	
	)	**MEMORANDUM OF OPINION**
	)	

Debtors reopened their chapter 7 bankruptcy case to file a motion to avoid a judgment lien first recorded in 2009. The lienholder, First Ohio Community Federal Credit Union ("First Ohio") objects to avoidance. The court held a hearing on October 26, 2020. Nicole Rohr-Metzger,[1] counsel for Debtors, and Stephen Ginella, counsel for First Ohio, participated in the hearing. Both parties declined to submit additional briefs on the issue and the court took the matter under advisement.

The court has subject matter jurisdiction of this case under 28 U.S.C. § 1334 and the general order of reference issued by the United States District Court for the Northern District of Ohio. General Order 2012-7. This is a statutorily core proceeding under 28 U.S.C. § 157(b)(2)(K). The court has authority to enter final orders in this matter. Pursuant to 28 U.S.C. § 1409, venue in this court is proper. The following constitutes the court's findings of fact and conclusions of law under Bankruptcy Rule 7052.

1 Ms. Rohr-Metzger was not original counsel in this case. Debtors' filing attorney, Donald Little, is deceased.

BACKGROUND

Debtors filed this case on February 17, 2010. First Ohio Credit was listed as an unsecured creditor on Schedule F. In response to question four in the Statement of Financial Affairs, Debtors acknowledged First Ohio filed a prepetition civil lawsuit against them.

First Ohio sued Debtors in Canton Municipal Court in September 2009, obtained summary judgment on November 9, 2009, and filed a judgment lien on November 16, 2009. Debtors deny knowledge of the judgment lien at the time of filing their bankruptcy case. Debtors' case was deemed a no-asset case and they received a discharge on June 9, 2010. First Ohio renewed its judgment lien in 2014 and 2019.

Debtors reopened their case on September 1, 2020 and filed a motion to avoid the First Ohio lien on September 2, 2020. First Ohio opposed the reopening and attempted avoidance.

DISCUSSION

Debtors seek to avoid First Ohio's judgment lien under 11 U.S.C. § 522(f), contending it impaired their homestead exemption at the time they filed their bankruptcy case. In opposition, First Ohio argues laches prevents their decade-late avoidance attempt. Although the Sixth Circuit Court of Appeals has not spoken directly on this issue, the Bankruptcy Appellate Panel has addressed laches in the context of reopening for the purpose of belated avoidance.[2] In re McCoy, 560 B.R. 684 (B.A.P. 6th Cir. 2016); In re Yonish, 2016 WL 832587 (B.A.P. 6th Cir. 2016).

The BAP acknowledges lien avoidance constitutes cause for reopening because it accords relief to the debtor. 11 U.S.C. § 350(b); McCoy at 688 (citations omitted). Since Rule 5010 does not establish a time limit for a debtor to reopen a case in order to avoid a lien, the BAP determined the appropriate inquiry is 'whether the delay associated with the reopening of the case is accompanied by a demonstration of prejudice to the creditor as a result of the debtor's conduct.' Id. (citing In re Tarkington, 301 B.R. 502, 507 (Bankr. E.D. Tenn. 2003) (quotation omitted)). Thus, First Ohio cannot rely solely on the passage of time, it must also show Debtors' delay was prejudicial to stop their attempt to avoid the lien.

Debtors' failure to identify the lien at the time the case was filed is particularly troublesome. Debtors do not dispute that the lien existed at the time they filed their bankruptcy case and there is no suggestion it was not properly recorded. Not only were the records available through a simple online search of county records, electronic services providing public record searches were also available. Courts acknowledge the importance of lien searches. For example, in analyzing whether sanctions should be imposed on counsel under 11 U.S.C. § 707(b)(4)(C), one court considered whether "the attorney employ[ed] such external verification tools as were available and not time or cost prohibitive (e.g., on-line real estate title compilations, on-line lien

2 Most cases discuss laches in connection with a motion to reopen. Since the case was reopened as a matter of course before First Ohio had opportunity to respond, the court will determine whether laches prevents Debtors from proceeding on the avoidance motion using considerations as a motion to reopen.

search, tax "scripts")." In re Withrow, 391 B.R. 217, 228 (Bankr. D. Mass 2008). Counsel in another case forfeited fees because of his failure to verify lien information provided by the debtors. In re Dean, 401 B.R. 917 (Bankr. D. Idaho 2008).

The importance of an attorney's prepetition due diligence, including lien searches, cannot be understated. Per Bankruptcy Rule 9011(b), a petition presented to the court certifies the representations contained therein are presented "to the best of the person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances." Failure to adhere to this duty may open counsel to sanctions. Rule 9011(b) is enhanced by newer Code provisions, including 11 U.S.C. § 707(b)(4)(C)(i)[3] (signature of counsel certifies s/he "performed a reasonable investigation into the circumstances that gave rise to the petition [and it is] well grounded in fact") and § 707(b)(4)(D) (specifying the signature is "a certification that the attorney has no knowledge after an inquiry that the information in the schedules filed with such petition is incorrect"). An attorney has a clear duty to make a reasonable investigation into the facts contained in the petition, schedules and other pleadings presented to the court. What is reasonable is driven by the facts and circumstances of the case. In re Parikh, 508 B.R. 572, 585 (Bankr. E.D.N.Y. 2014) (citing Cooter & Gell v. Harmarx Corp., 496 U.S. 384, 404, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990)).

Debtors listed the underlying civil lawsuit and the judgment they "believed" First Ohio obtained. Since they owned real estate, a lien check should have been perfunctory. Accord Tarkington, 301 B.R. at 508 ("It is not unreasonable to expect that the Debtors' attorney should have checked to see if, in fact, the Credit Union had recorded the final judgment, and thus, created a judgment lien that the Debtors could have sought to avoid during the approximately twenty-two months pendency of their Chapter 7 case.")

The failure to conduct a simple lien search, especially in light of knowledge of a lawsuit against a debtor who owns real estate, does not satisfy the "reasonable investigation" requirement. Knowledge of a lawsuit provides notice that additional investigation may be necessary. For example, the Ninth Circuit BAP affirmed a bankruptcy court's order imposing sanctions on an attorney who listed a debtor's state court action on a promissory note but never listed the promissory note as an asset. Orton v. Hoffman (In re Kayne), 453 B.R. 372 (B.A.P. 9th Cir. 2011). Moreover, case law amply supports a higher investigative obligation when an attorney has special knowledge of a fact or issue. Dean, 401 B.R. 917 (sanctioning attorney for not checking status of lien on motor home title after referring them to an attorney to place a lien on the title); In re Parikh, 508 B.R. 762 (citing counsel's failure to review a previous, recently-filed chapter 13 petition and schedules when filing a new chapter 7 petition); In re Alessandro, 2010 WL 3522255 (Bankr. S.D.N.Y. 2010) (ordering disgorgement of attorney who accepted debtor's word and failed to check PACER to find client's five previous bankruptcy filings prior to filing an emergency new case to stop a foreclosure).

3 National bankruptcy form B1, signed by Attorney Little, contained the following disclaimer: "In a case in which § 707(b)(4)(D) applies, this signature also constitutes a certification that the attorney has no knowledge after an inquiry that the information in the schedules is incorrect."

Debtors failed to disclose the lien and to take timely action to avoid it. Even if they were not personally aware of the lien in 2009, and fault rests with their attorney, they are bound by his act or omission. Dreier v. Love (In re Love), 3 Fed.Appx. 497, 498 (6th Cir. 2001) (unpublished) (citing Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship, 507 U.S. 380, 396–97, 113 S.Ct. 1489 (1993). In discussing a client's accountability for the actions of counsel, the Supreme Court reasoned

> Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have "notice of all facts, notice of which can be charged upon the attorney."

Id. at 396 (quoting Link v. Wabash R. Co., 370 U.S. 626, 633-34 (1962) (quoting Smith v. Ayer, 101 U.S. 320, 326 (1880)).

Debtors are fully responsible for the failure to locate and list the lien in their schedules when they filed their case in 2010. Attempting to avoid it over ten years later because of the original failure to conduct a reasonable investigation of the lawsuit identified in their schedules is prejudicial to First Ohio.

Since discharge, First Ohio claims it responded to two title searches inquiring about the balance of the lien, one in 2017 and one this year. Although Debtors deny knowledge of the lien, they did refinance their mortgage in 2017, the date of the first inquiry, making their lack of knowledge of the lien surprising. Debtors contend they learned of the lien this year in connection with another refinance.

In the period between the bankruptcy case and the present motion, First Ohio has incurred additional costs to maintain the lien, renewing it twice. It has spent resources maintaining records of the loan and accruing interest for the past decade. It responded to two inquiries following title searches in 2017 and 2019 and is defending itself now. Additionally, First Ohio also points out the difficulty in now assessing avoidance. It would have to obtain a valuation of the property as of the date of filing, as well as the balance of other liens as of that date. None of the prejudicial time or cost would have been expended had Debtors been diligent in their initial bankruptcy filing.

Debtors offer several counterpoints. They state that First Ohio's expenses would have been incurred regardless because the judgment is also against a non-debtor third party, lessening any prejudice to First Ohio. Although they do not deny there may be some additional expense to determine avoidance a decade later, they offer to mitigate the expenses. They contend they only became aware of the lien through a title search in 2019. Debtors' counterpoints recognize the implicit prejudice to First Ohio but ask the court to balance the equities. There is no requirement to do so. First Ohio demonstrated prejudice as well as unacceptable delay and therefore met its burden of proof.

CONCLUSION

The court finds that First Ohio was prejudiced by more than the passage of time. It bears no culpability for the delay, has expended time and money renewing the lien over the past ten years, and would face challenges in obtaining values from ten-plus years ago to defend the avoidance action.

Debtors' motion to avoid the lien is barred by laches and will be denied by a separate order to be entered immediately.

# # #

Service List:

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BEST PRACTICES FOR DOCUMENT PRODUCTION REQUESTS BY TRUSTEES IN CONSUMER BANKRUPTCY CASES

Shortly after the effective date of BAPCPA, the United States Trustee Program ("USTP") reviewed its document production requirements and decided that USTP staff would not routinely request from debtors any documentation that is not otherwise required by the Bankruptcy Code ("Code") or Federal Rules of Bankruptcy Procedure ("Rules"). The USTP similarly notified chapter 7 and chapter 13 trustees that we did not require them to collect additional documents without a specific need for additional information. In an effort to control the cost of consumer bankruptcy without interfering with a trustee's obligation to investigate the financial affairs of the debtor, the USTP consulted with the National Association of Bankruptcy Trustees ("NABT"), National Association of Chapter 13 Trustees ("NACTT"), and the National Association of Consumer Bankruptcy Attorneys ("NACBA") to consider prevailing document request practices in consumer bankruptcy cases. After reviewing its own practices and considering the input of those entities, the USTP developed the best practices set forth below.

By identifying common examples of potentially unreasonable or burdensome document requests and some of the most common situations that may reasonably lead a trustee to make further inquiry, this USTP guidance is intended to ensure that all parties in interest are focused on documentation that is likely to advance the proper and efficient administration of a particular bankruptcy case.

These best practices are not intended to override the requirements of the Code, Rules or local bankruptcy rules. Nor are they intended to interfere with the reasonable judgments made by trustees in light of the facts and circumstances in specific cases.

I. Common Examples of Potentially Unreasonable or Overly Burdensome Document Requests

A. A trustee asks every debtor to supply copies of automobile titles, copies of a county treasurer's tax statement for real property, six months of bank statements, three years of tax returns, an itemized inventory of household goods, copies of divorce decrees or property settlements entered in the last three years, and copies of the complaint and answer in any legal proceeding to which the debtor is a party. This request is excessive. There may be good reasons to make any or all of these requests in an individual case, but a blanket request for all of these documents should not be made in all cases.

B. Trustees in a particular jurisdiction have met and agreed upon a uniform letter request or questionnaire that requires all debtors to submit documents and information that supplement and expand upon the detail required by the Bankruptcy Code and Rules. This request is excessive. In a specific case, there may be valid reasons to make such a request, but that request should not be made routinely in all cases.

C. A trustee routinely rejects liquidation analyses and plan calculations that contain *de minimis* mathematical errors that will not affect the ultimate distribution to creditors. Generally, before rejecting a plan with minor errors, the trustee should weigh the cost to the debtor of preparing a new plan against the benefit to creditors.

II. <u>Common Examples That May Lead to Further Inquiry and Document Requests</u>

A. The debtor's schedules show an expensive home but value household goods and furniture at a disproportionately nominal amount (e.g., $500). The inconsistency between the value of the debtor's home and the value of the household goods and furnishings may cause the trustee to make further inquiry and request additional documents.

B. On Schedule I, the debtor lists monthly pay but does not itemize deductions or identify his employer. On the Statement of Financial Affairs ("SOFA"), Question 1, the debtor lists income for the previous year only. Since Schedule I and question 1 of the SOFA appear to be incomplete, the trustee might request additional information regarding the source of the debtor's income for the current and prior years as well as the monthly deductions from the debtor's pay.

C. On Schedule D, the debtor lists a secured automobile loan that is owed to a relative. The fact that the debt is owed to an insider may cause the trustee to request proof that the security interest has been properly perfected or other documents relating to this transaction.

D. The debtor lists a value for his residence that, in the trustee's experience, is significantly lower than homes in that neighborhood or town. The apparent asset undervaluation may cause the trustee to request some proof of value, particularly if there appears to be equity in the property. However, trustees should not request proof of value if the asset is fully exempt under state law or there is clearly no equity.

E. A debtor's attorney files a large number of cases in which the same questions on Schedule B are left blank, or lists the identical value on Schedule B for all of his debtors. To the extent that the trustee believes Schedule B to be inaccurate or incomplete in a particular case, the trustee may request documents in that case to supplement the incomplete information provided.

F. The debtor lists significant unsecured debts on his Schedule F, including recent and high credit card debt, but minimal or no assets on Schedule B. The trustee might request additional documentation, including credit card and bank statements, to determine whether the debtor has dissipated or failed to disclose assets.

G. A debtor's attorney files cases in which the means test forms are frequently completed improperly or contain significant mathematical errors. To the extent that the trustee believes the improperly completed or miscalculated means test form will have a material impact on a debtor's case, the form deficiencies may cause the trustee to request documents to supplement the incomplete or miscalculated information provided.

H. The debtor lists a vehicle that appears to be a "classic" or vintage car and values it at a nominal amount (e.g., $250). The apparent undervaluation may cause the trustee to request that the debtor provide proof of the car's value, which proof may include an appraisal or documentation regarding the purchase price.

I. The debtor lists her past-due federal tax debt and child support as "secured" debts on Schedule D. The categorization of these debts, which usually are unsecured liabilities, may cause the trustee to request that the debtor provide proof that the debts are secured.

J. The debtor works for an hourly wage with differing hours each pay period, sometimes resulting in overtime. The debtor supplies a recent payment advice that lists cumulative year-to-date information and provides only a rough estimate of the debtor's earnings in the six months prior to filing. The variance in hours and pay may cause the trustee to request additional information to confirm the debtor's income in order to conduct a proper means-test analysis.

K. A trustee requests additional documents such as six months of bank statements and credit card statements based on a "feeling" or "hunch" following the debtor's testimony at the meeting of creditors. The debtor's testimony may cause the trustee to make such requests in order to fully investigate the debtor's compliance with the Code and Rules. However, the trustee should be able to provide debtor's counsel or an unrepresented debtor with a reasonable explanation for the “feeling” or “hunch”.

III. Submission of Documents to the Trustee

Currently, there is no uniformity in the manner in which debtors furnish documents, information, verification of identity, and other materials to the trustee. Even in the same geographic locality, trustees may have different preferences on the production and receipt of information and documents; and debtors and debtors’ attorneys can have different preferences on the assembly and production of this material. To avoid confusion and promote judicial efficiency, it is in the interest of all parties to the bankruptcy system to agree on a uniform manner or process through which documents, information, verification of identity, and other materials are timely furnished by debtors and debtors’ counsel to trustees. Ideally, a uniform process, such as email, should impose the least burden and cost on both trustees and debtors. Examples of uniform procedures that trustees could adopt are set forth below.

A. Trustees in a jurisdiction have adopted a uniform method of receiving information by email. Trustees allow pro se debtors and counsel without access to email to submit their additional information in hard copy.

B. Trustees in a jurisdiction have set up a system that allows debtors and debtors’ attorneys to send copies of encrypted information and documents to a central file-transfer-protocol site or third-party repository. Trustees allow debtors and debtors’ counsel to submit documents by another method on a case-by-case basis to accommodate specific needs or requests.

JUSTICE NEWS

Director Addresses the 35th Annual Convention of the National Association of Bankruptcy Trustees

Thursday, September 14, 2017

INTRODUCTION

Good morning. It is always a special occasion for me to come to the NABT Annual Convention and share some updates and thoughts with you about the United States Trustee Program (USTP) and bankruptcy practice.

Let me begin by expressing my deep appreciation to NABT President Dwayne Murray for his service to the bankruptcy community over the past year. He is not just an advocate for trustees, but also an advocate for the best interests of the bankruptcy system. I am grateful for the opportunity to have worked with him during his term. Your incoming President Ron Peterson fits the same profile as his predecessor. He has a keen understanding of the needs of trustees and also a deep knowledge of broader bankruptcy practice. I am indebted to Ron for coming to Washington, DC, a few months ago to make a presentation to a group of insolvency administrators from China that was visiting the Executive Office. I look forward to working with Ron during the coming year.

We are meeting during a time of great concern for our fellow citizens who were affected by the devastation of Hurricanes Harvey and Irma. Some lost lives, and many more lost their homes or property. Our heart goes out to all of those who were adversely impacted by these horrible storms. I will have more to say about the hurricanes in a few minutes.

35th Anniversary

This year marks a special anniversary for the NABT. For 35 years, this association has played a vital role in serving trustees through, among other things, an annual educational program, a regular newsletter that is now a quarterly magazine covering important legal and practice issues, and *amicus* briefs filed in cases of critical interest to your members. The NABT serves as a focal point on chapter 7 practice for the entire bankruptcy community.

Let us think for just a moment about all the changes in the world of chapter 7 trustees over the history of NABT.

- Although my numbers may not be exact, at least 38 of your members are sitting bankruptcy judges, and at least 10 from your ranks joined the United States Trustee Program. In fact, three of your former Presidents came to the USTP, including past Director Larry Friedman, former United States Trustee Saul Eisen, and the current United States Trustee for Regions 8 and 20, the legendary Sam Crocker.
- The number of active chapter 7 panel trustees has gone up and down, reaching a high of about 1,200 trustees in 2001 to the near low of 918 trustees today. This has been a function both of fluctuating caseloads and regional United States Trustees taking a more analytical approach to the management of local panels.
- From 2001 – when the USTP began posting distribution data – to 2015, chapter 7 trustees administered about 875,000 asset cases and distributed more than $37 billion.
- With your help, we have established a comprehensive Handbook on trustee responsibilities, implemented a financial and case management auditing system, instituted performance reviews, and taken other steps to document that trustees are satisfying the highest fiduciary standards.
- Together, we collaborated in implementing many of the far-reaching changes enacted in the 2005 bankruptcy reform amendments, revised the Uniform Depository Agreement so bank fees could better reflect market conditions, and played a key role in many other important projects. More recently, we worked together on new policies on trustee succession and best practices for collecting documents from debtors.

The USTP and chapter 7 trustees have not always agreed on everything over the years. But I think we all have learned that not every difference merits an argument, and our foremost role is to ensure that the bankruptcy system is serving its stakeholders, which includes the American public whose national economy depends upon its effectiveness.

You have had a noteworthy 35 years and I know the next 35 years promise further accomplishments.

USTP Staff Changes

Our effective working relationship is due both to the good works of the NABT and the outstanding trustee oversight team in the USTP. All of us have enormous respect for Deputy Assistant Director Suzanne Hazard, who has expertly guided chapter 7 practice for so many years. And, of course, Assistant Director for Oversight Doreen Solomon is another essential ingredient in our trustee oversight system. That is why it pains me more than I can say that Doreen has announced that she will be retiring at the end of the year. Her common sense and collegial approach, both within the USTP and in her dealings with chapter 7 and 13 trustees and other constituencies, have made her an invaluable asset. We will miss her greatly.

Please join me in a round of applause to thank Doreen for her many years of service to the bankruptcy community.

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Now let me turn to a few topics that may be of special interest to all of you.

GUIDANCE ON NATURAL DISASTERS

A moment ago I mentioned the terrible damage inflicted by Hurricanes Harvey and Irma. Some of those affected are or will become parties in bankruptcy cases. Accordingly, today, I reissued the USTP's enforcement guidelines for debtors affected by natural disasters. The guidelines were developed to ensure that we administer bankruptcy cases in a manner that takes into account the hardships experienced by victims of hurricanes and other natural disasters. The guidelines comply with our statutory authorities and follow principles of prudent prosecutorial discretion.

Among the areas addressed by the guidelines are:

- We will not take enforcement action against debtors who are unable to file or produce documents required by the Code as a result of a natural disaster, if they otherwise are eligible for relief.
- We will not move to dismiss under the "means test" if income loss, increased expenses, or other consequences of a natural disaster constitute "special circumstances" sufficient to rebut the presumption of abuse.
- Even if conditions do not justify a United States Trustee granted statutory waiver of the credit counseling requirements under 11 U.S.C. § 109(h)(2) for a district, we will exercise prosecutorial discretion in considering whether to take action to dismiss the case of a debtor who, as a result of a natural disaster, experiences difficulty in obtaining a credit counseling certificate or whose filing was delayed beyond the 180-day period following the debtor's receipt of credit counseling.
- We will not seek to convert or dismiss small business cases in which the debtor cannot attend an initial debtor interview or timely file financial reports because of the natural disaster. Moreover, we will not oppose reasonable and necessary extensions of time to file a disclosure statement or reorganization plan as a result of the natural disaster, assuming there are reasonable prospects for reorganization.
- And, we will be flexible on how we allow debtors dislocated by a natural disaster to attend mandatory section 341 meetings. Trustees should be flexible in scheduling meetings by alternative means – such as by telephone or appearance outside the district – as long as the debtor takes an oath and produces proper identification.

We also are mindful of the disruption the recent hurricanes may have caused chapter 7 and chapter 13 trustees themselves. We will be flexible in our oversight of trustee requirements and assist those trustees affected by the hurricanes in any way we can to ensure they can perform their fiduciary duties.

MARIJUANA ASSETS IN BANKRUPTCY

Another bankruptcy topic sometimes in the news pertains to marijuana. As you know, in April, I sent a letter to all chapter 7 and 13 trustees restating the USTP's long-standing legal position that marijuana assets cannot be administered in bankruptcy. It has been the Program's practice to move to dismiss, object to confirmation, or take other appropriate action when there are marijuana assets in a case. Although small in number in relation to the many hundreds of thousands of bankruptcy cases filed each year, it is important that the USTP be consistent in its position on these matters. That requires that we be informed of all cases that involve marijuana assets.

The point of my letter to you was two-fold: to direct your cooperation by informing your United States Trustee when you think a marijuana asset case has been assigned to you; and to reassure you that we will intervene to protect private trustees from the untenable position of administering assets, or proceeds from assets, that are prohibited by the federal Controlled Substances Act.

I can tell from communications with our field offices that you have been conscientious in reporting these cases to us. Our offices are analyzing every case that you refer, or that we uncover through our ordinary oversight, and we are handling them consistently in every district where they arise.

As you review cases assigned to you, please keep a few points in mind. First, state law and regulations are immaterial to whether a case involves an illicit marijuana asset. It does not matter if the state in which the case was filed has legalized marijuana in any way. We operate in federal courts under federal law that designates marijuana as an illicit substance. Second, a marijuana asset does not merely include the marijuana plant. In some cases, the marijuana asset is a by-product of the plant, such as oil. In other cases, the asset is equipment used to grow marijuana or an ownership interest in a marijuana asset. There are many other potential fact scenarios in which the bankruptcy case may involve a marijuana asset in some form. Third, a debtor with a marijuana asset cannot obtain bankruptcy relief even if that debtor intends to take the marijuana asset out of the bankruptcy estate. That means we may take enforcement action even if the debtor exempts the marijuana asset or the proceeds of a marijuana asset.

Given the wide variety of fact scenarios in which marijuana assets may be present, it is vital that you promptly notify us whenever you think a case may involve a marijuana asset. It is the USTP's job – not a job we are transferring to you – to analyze the particular facts of the case to decide if it is a marijuana case and what enforcement action we should take.

From the USTP's perspective, our position can be summed up by saying that we simply will not allow the Bankruptcy Code to be used to evade federal law regardless of state statutes. This also means that we will not allow trustees to be misused by possessing, selling, or in any way administering marijuana assets. This has been our position under three Attorneys General and we will vigorously advocate this position in the bankruptcy and appellate courts. I am grateful for your continuing assistance in this very important matter.

STALE DEBT CLAIMS

I reported to you last year on the Program's efforts to curb the practice of a small number of consumer debt buyers filing a large volume of stale debt claims knowing that those claims must be withdrawn or denied upon objection. These claims are beyond state statutes of limitations and may not be pursued through state court action.

This practice of intentionally filing stale claims may harm debtors in some circumstances, but its certain harm is to legitimate creditors and the integrity and efficiency of the bankruptcy system. These claims may cause legitimate creditors to receive a lower distribution either because a stale debt claim is paid from their share of the distribution or the trustee's cost of objecting to such a claim is passed on to creditors. Furthermore, judicial resources are expended in processing these claims and objections.

In mid-May, the Supreme Court ruled in *Midland Funding, LLC v. Johnson*, __ U.S. __, 137 S. Ct. 1407 (2017), that filing stale debt claims in bankruptcy does not violate the Fair Debt Collection Practices Act. It is important to note that the Court was not called upon to address, and did not address, the USTP's litigation in which we have asserted that the intentional filing of a large volume of stale debt claims is an abuse of process. But the Court did express the expectation that trustees would object to these claims in bankruptcy court.

Just two weeks ago, a bankruptcy court made a similar point when declining to impose sanctions requested by the United States Trustee against a volume stale debt filer. The court described the relevant conduct at issue as "unsettling and perhaps even distasteful or unseemly in some respects." But the court decided that the sole remedy is disallowance on a claim-by-claim basis.

That still leaves us with the issue of the trustees' obligation to review claims. Because stale debt claims are indisputably subject to disallowance, stale debt filers rely upon these claims progressing undetected through the claims payment process. Under the Bankruptcy Code, trustees have a fiduciary duty "if a purpose would be served, [to] examine proofs of claims and object to the allowance of any claim that is improper." 11 U.S.C. § 704(a)(5). In chapter 13, that duty is more clear-cut because the costs of administration are more broadly spread out among perhaps millions of creditors across many thousands of cases. But, in chapter 7, deciding whether "a purpose would be served" by objecting to stale claims is more complex.

If a chapter 7 trustee determines that the cost of objecting to stale claims is greater than the additional recovery that will be realized by legitimate creditors in that case, then the stale claim often will be paid. In the aggregate of all cases, the effect is to deprive legitimate creditors of millions of dollars in distributions that instead are paid to a small number of stale debt filers whose collection efforts would be subject to sanctions if filed in state courts. These filers operate only in the bankruptcy system – and nowhere else – because they know that some objectionable claims will slip through the system.

Without a system-wide solution, this problem will persist. For now, I ask all chapter 7 trustees to consider their fiduciary obligations in a case and their role in the bankruptcy system. Once present litigation is resolved, the USTP will consider formal guidance.

OTHER USTP EFFORTS TO COMBAT FRAUD AND ABUSE

The USTP remains involved on a number of other fronts in its mission to combat fraud and abuse by debtors, creditors, professionals, and other participants in the bankruptcy system. More than half of the 31,000 formal and informal enforcement actions we took last year were against debtors, including actions based upon the means test and more serious misconduct, such as concealment of assets, that merited the denial of discharge. Many of the remainder focused on the protection of debtors, including actions to address continuing issues in the mortgage servicing arena and the problem of underperforming consumer attorneys.

Mortgage Servicer Misconduct

Our field offices continue to monitor mortgage servicer misconduct. We have a number of actions and negotiations pending. As you know, in early May, we filed a settlement with JPMorgan Chase Bank, N.A., resolving additional violations of the Bankruptcy Code and Rules. Chase will remediate about 16,000 homeowners by making approximately $2.8 million in refunds or credits for two violations. First, Chase sent inaccurate account statements to customers in bankruptcy; and, second, Chase filed certificates of service with inaccurate dates of mailing that resulted in debtors receiving less than the mandatory 21 days' notice before imposing a mortgage payment change.

Underperforming Consumer Attorneys

You may recall that last year I announced a new initiative to address the persistent problem of poor performance by some debtors' lawyers. Their failure to satisfy their obligations under the Bankruptcy Code and Rules is detrimental to their clients, trustees, creditors, the courts, and the entire bankruptcy system.

Last year, the USTP increased by about 30 percent the number of actions taken under the disgorgement provisions of section 329 and the debt relief agency provisions of section 526. Although we cannot expect such a magnitude of increases in actions in the future, it does show a concerted crackdown by the Program. We also formed teams to address special problems created by national law firms, including those who recruit clients through advertisements on the Internet. We attacked system-wide violations and sought broad relief. We have enjoyed success in court, but remain in some protracted litigation.

In one recent chapter 7 case, we obtained a bankruptcy court ruling that may help deter bad attorney behavior. The attorney attempted to bifurcate fees for core services into pre-petition and post-petition amounts, and threatened to take action against the debtor for non-payment that would violate the automatic stay and discharge injunction. The attorney also failed to properly disclose fees to be paid under the retention agreement. The bankruptcy judge called the law firm's conduct "reprehensible" and ordered disgorgement of all fees. The bankruptcy court's ruling is on appeal.

One of the fruits of our initiative has been uncovering evidence of the use of schemes to reel in clients by offering unneeded, if not fraudulent, legal and non-legal services. I ask all chapter 7 trustees to communicate regularly with your United States Trustee about your observations of debtor counsels' practices. As in the mortgage servicer and other areas, sometimes we identify national patterns that allow us to address problems on a system-wide basis. You stand as a bulwark against fraud, abuse, and bad practices. Your continued assistance in this joint endeavor is much needed and appreciated.

CREDIT COUNSELING AND DEBTOR EDUCATION

Our work to protect debtors from bankruptcy petition preparers and legal professionals who fail to serve their clients highlights for us the vulnerability of those in financial distress. Honest and needy debtors deserve comprehensive advice and assistance about financial options, including bankruptcy.

After passage of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), the USTP retooled its operations to carry out our substantial new duties under the law. To do our jobs properly, we considered both objectives of the Congress: to combat abuse and to protect consumers. Those are consistent goals because many scams perpetrated against debtors also harm creditors and the integrity of the whole bankruptcy system.

Currently, there is some renewed attention on the requirement for debtors to obtain credit counseling before filing bankruptcy. The purpose of the requirement is to ensure that debtors are made aware of any feasible alternatives to bankruptcy, including repayment plans. The USTP is charged with the responsibility to approve credit counselors who will deliver the counseling services mandated in the statute. The good news is that there are about 120 credit counseling agencies that provide services through 700 walk-in facilities, over the telephone, and over the Internet. Basically, there is universal access to credit counseling. The other good news is that the average cost of credit counseling is about $25. While that is not inconsequential to a consumer in dire financial straits, it is as affordable as any one of us would have imagined when BAPCPA was passed. Moreover, that average cost calculation excludes about 19 percent of debtors whose fees are reduced or waived entirely based upon income, as required by our regulations.

Bankruptcy commentators often opine upon the effectiveness of the counseling. That is a legitimate inquiry that deserves scholarly research. Initial reviews comparing the number of petitions to the number of certificates issued indicated that about 10 to 15 percent of debtors seeking a credit counseling certificate do not file bankruptcy, at least not immediately. There are challenges to calculating this percentage, including our inability to track the same debtor through the process. But the number does suggest that counseling may assist some individuals in identifying non-bankruptcy options to resolve their financial turmoil.

There probably are a number of reasons why counseling does not lead to more debt repayment plans or other alternatives to bankruptcy. Let me suggest two possible explanations. First, most debtors choose bankruptcy as a last resort, not as a preferred option out of extreme financial difficulties. As almost every consumer practitioner will tell you, by the time debtors visit a lawyer, their situation is usually pretty dire. The second reason I suggest is a bit more subject to dispute. Consumer lawyers generally are very critical of credit counseling. If that is reflected in their legal counsel to the clients or in their interactions with counseling agencies, then perhaps the counseling process becomes less valuable, thereby only adding to the criticism of its ineffectiveness.

Loss mitigation by mortgage servicers, fair and reasonable debt repayment plans, and other alternatives to bankruptcy are worthwhile pursuits. I think that current commentaries about credit counseling would benefit from a more balanced consideration of the potential consumer benefits of counseling and more consideration of how the content of the counseling sessions could be more useful for debtors and creditors alike.

CONSISTENCY IN CHAPTER 7 PRACTICE

The next topic I would like to cover is consistency in chapter 7 trustee practices. Earlier this year, the American Bankruptcy Institute's Commission on Consumer Bankruptcy, on which I serve *ex officio* as a non-voting member, held a public meeting in conjunction with the annual conference of the National Association of Consumer Bankruptcy Attorneys. Many consumer lawyers appeared at the public meeting to express their views on consumer issues. There were a fair number of comments about inconsistencies among trustees supervised by the USTP. The problems cited included overly burdensome document production requests.

The USTP had many long discussions with the NABT and others before issuing its "Best Practices for Document Production Requests by Trustees in Consumer Bankruptcy Cases." Too often, debtors' counsel fail to act with the necessary alacrity to provide records that trustees legitimately need to value assets and to complete the administration of the case. And some trustees impose unreasonable burdens on debtors by making blanket document requests that should not be required absent a particularized need. The "Best Practices" were designed to guide both debtors' lawyers and trustees in making reasonable judgments and taking reasonable actions.

Several weeks ago, I learned about an isolated instance of trustees in one district making a new and unusual demand of all debtors that was intrusive and unnecessary. We did not support the new practice and the trustees promptly ceased collecting the information before further corrective action was required. After all the emphasis both the USTP and NABT have placed on this topic, I am disappointed to hear about instances of trustees unilaterally imposing new routine requirements and issuing new forms for debtors to fill out that are not required under the Bankruptcy Code and Rules. Many times, additional documentation is required. But there needs to be a reason for those requests.

Almost all trustees administer their cases efficiently and effectively. I ask all of you to consider whether there is maximum coordination and consistency within your district and also how the USTP may promote greater consistency in document production and other trustee practices.

CHAPTER 7 TRUSTEE COMPENSATION

No discussion of chapter 7 practice is complete without consideration of chapter 7 trustee compensation. Last year, total trustee compensation – including payments to trustees for trustee work and for legal services – rose by five percent. That was good news because compensation had been down in the previous three years and we have no indication that compensation will be up again this year.

In June, I testified before Congress on general oversight matters. In my prepared statement and in response to a question from a member of Congress, I noted that the chapter 7 trustee "no asset" fee has not increased since 1994 and that the amount of the fee should be increased. It seems that everyone agrees that the fee should be increased, but there has been no consensus on the best method for funding the increase. And while I cannot comment on pending legislation or specific proposals, the NABT has been forceful in presenting its views to Congress and other policymakers.

CONCLUSION

Thank you again for the opportunity to discuss my appreciation for all that chapter 7 trustees do to serve debtors, creditors, and the public. My job is so much easier because I can rely on the NABT leadership for sound advice and collaboration.

You have a difficult job and you do it well. Your work contributes to our national economic well-being. Your sensitivity to the hardships faced by debtors and small creditors in chapter 7 cases is a mark of your professionalism and your humanity.

I congratulate the NABT for 35 years as an important advocate and problem-solver. I look forward to seeing your accomplishments over the next 35 years.

You have my best wishes for a very productive and enjoyable annual convention.

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Speaker:
Clifford J. White III, Director of the United States Trustee Program

Component(s):
U.S. Trustee Program

Updated September 18, 2017

In re: Christopher D. Gistis, Debtor

Case No. 18-10710

UNITED STATES BANKRUPTCY COURT DISTRICT OF MAINE

November 20, 2020

Chapter 7

ORDER IMPOSING SANCTIONS

Jeffrey P. White was a member of the bar of this Court for decades, providing services to many debtors, mostly individuals in chapter 7 and 13 cases. In recent years, Mr. White found himself on the defensive before disciplinary authorities on multiple occasions. That disciplinary history ended with a nine-month suspension from the practice of law. Shortly before that suspension began, Mr. White assisted the Debtor with the commencement of this chapter 7 case. Roughly six months later, the Trustee moved the Court for an order imposing sanctions on Mr. White, alleging that he violated certain provisions of the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure. After an evidentiary hearing, the Court agreed with the Trustee in some respects, but not others. Now, after considering the evidence, along with the stipulated record and post-hearing briefs, the Court concludes that sanctions are warranted.

BACKGROUND

When the Trustee filed his motion in July 2019, he asked the Court to impose sanctions against Mr. White including the "disgorgement of all fees paid in this case" and "an award of the attorneys' fees and costs associated with the Trustee's investigation and pursuit of this matter[.]" [Dkt. No. 28.] In support of this request, the Trustee invoked multiple authorities: 11 U.S.C. §§ 105(a) and 707(b)(4), Fed. R. Bankr. P. 9011, and this Court's inherent powers. The Trustee claimed that Mr. White violated Fed. R. Bankr. P. 9011(b) and 11 U.S.C. § 707(b)(4)(D) when

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he filed several documents in this case, including Schedule C, Schedule G, and the Statement of Intent. Although the Trustee did "not believe or concede the so-called 'safe harbor' provisions of Federal Rule of Bankruptcy Procedure 9011 appl[ied]" he "served a copy of [the] Motion for Sanctions in substantially the same form upon Jeffrey P. White, Esq. as provided for in Federal Rule[s] of Bankruptcy Procedure[] 7004, 9006, & 9011." [Dkt. No. 28, ¶ 42.]

In response, Mr. White denied that his conduct in this case fell short of the obligations imposed by Rule 9011(b) and section 707(b)(4)(D). He admitted that the Trustee served a draft of the motion on him before the motion was filed with the Court. He did not assert that the Trustee had failed to comply with the Rule 9011 safe harbor.

The Court bifurcated the contested matter into two stages: First, the Court would determine whether Mr. White had engaged in sanctionable conduct. Then, if appropriate, the Court would determine the nature and extent of any sanction to be imposed. In the pretrial phase—which included several hearings regarding discovery and a pretrial conference—Mr. White did not raise the Rule 9011 safe harbor as a defense to the Trustee's motion. He did not draw the Court's attention to the amended Schedule C that had been filed in May 2019, after Mr. White withdrew from his representation of the Debtor and before the Trustee filed his motion for sanctions. *See* [Dkt. No. 24].

At trial, Mr. White attempted to justify the residence exemption claimed in the original Schedule C by citing In re Bennett, 192 B.R. 584 (Bankr. D. Me. 1996). That decision, which focuses on the concept of constructive occupancy, does not support the exemption claimed in this case. In Bennett, the debtors demonstrated no immediate ability to occupy the property as to which the exemption was claimed; they planned to move there, but their plans were uncertain. *See* id. at 586-88. Under the circumstances, the trustee's objection to their claimed exemption

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was sustained. Id. at 588. Here—as the Court previously found—there was no reasonable basis for Mr. White to believe that the Debtor or his dependents had any plans to move to the property claimed as exempt. The residence exemption was not justified under Bennett or any other cognizable legal theory.

After trial, the Court issued a decision, making findings and conclusions that are fully incorporated, but not entirely reproduced, here. *See* [Dkt. No. 74]. In that decision, the Court determined that Mr. White violated Rule 9011(b) and section 707(b)(4)(D) when he filed Schedule C in this case because he knew or should have known that the Debtor had no reasonable basis to claim the residence exemption. Id. In light of this Court's Administrative Procedures for the filing of documents on the ECF system, the Court also concluded that Mr. White had improperly affixed the Debtor's electronic signature to the petition, schedules, and statements dated December 12, 2018, one month after the Debtor himself executed the original version of those documents. Id. n.2. As for the other shortcomings alleged by the Trustee, the Court did not find a violation of the Code or the Rules but agreed that Mr. White should have been more careful when gathering information from the Debtor and then incorporating that information into the documents filed with the Court. Id.

Unfortunately, Mr. White's failure to observe the rules and procedures applicable to him in this case was part of a larger pattern of deficient practice before this Court—a pattern particularly troubling in light of Mr. White's substantial experience as an attorney generally and in the bankruptcy system in particular. This finding (namely, that Mr. White engaged in a pattern of deficient practice) is informed by this Court's experience with cases in which Mr. White served as counsel, including the following examples:

• In 2016, after Mr. White failed to appear for a hearing on confirmation of his clients' chapter 13 plan and failed to file a proposed form of confirmation order by the deadline,

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the Court extended the deadline and imposed a small monetary sanction against Mr. White payable if the form of order was not filed by the extended deadline. *See* Case No. 15-20854, Dkt. No. 31.

• That same year, Mr. White commenced a chapter 13 case for a debtor who was prohibited from filing by an order of the Court entered in a prior case, and the debtor obtained the benefits of a stay to which he was not entitled. The chapter 13 case was later dismissed, with the Court retaining jurisdiction to determine whether Mr. White should be required to disgorge his fees and whether any other sanction was appropriate. Mr. White assured the Court that his failure to discover the bar on refiling had not been intentional and resolved the order to show cause by disgorging the fees paid by the debtor. *See* Case No. 16-20023, Dkt. Nos. 20, 25 & 26.[1]

• Also in 2016, the Court dismissed a chapter 7 case due to the debtors' failure to file the certificates of credit counseling. Mr. White moved to vacate the dismissal order, asserting that the credit counseling had been completed prepetition, and that he had failed to file the certificates through inadvertence. After a hearing, the Court granted that motion "with considerable reluctance" and vacated the order of dismissal. *See* Case No. 16-20332, Dkt. Nos. 15, 16, 25 & 26.

These specific examples—all involving Mr. White's failure to observe deadlines or Court orders followed by apologetic excuses of innocent inadvertence—are illustrative of the problems that have beset his practice before this Court for some time.

This pattern of deficient practice is also described in the Findings, Conclusions and Order [Dkt. No. 86 Ex. D] and the Sanctions Order [Dkt. No. 86 Ex. E] issued by the Maine Supreme Judicial Court in Mr. White's disciplinary proceedings. The parties have stipulated to the inclusion of these orders in the record of this contested matter, and Mr. White's disciplinary history features prominently in the parties' arguments about the propriety of sanctions here. The following summary of the Law Court's findings and conclusions informs this Court's response to those arguments.

• Prior to his suspension, Mr. White practiced law for 37 years. He had considerable experience in bankruptcy matters, with nearly all of his practice devoted to bankruptcies.

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• In 2013, Mr. White was retained to defend a foreclosure action. He did not defend the action or perform any other work for the clients, and then failed to return the unused retainer when the clients asked for a refund in 2015. Later, after the clients filed a complaint with the Board of Overseers of the Bar, Mr. White refunded the retainer, and advised that workload and staffing issues had caused the delay. When testifying before the Law Court about the matter, Mr. White falsely stated that the clients had retained him to proceed with a bankruptcy if their unrepresented defense of the foreclosure action was unsuccessful. The Law Court concluded that Mr. White's conduct in the matter violated a number of the Maine Rules of Professional Conduct, including Rule 8.4(c), concerning dishonesty, deceit, or misrepresentation.

• In a non-bankruptcy matter, Mr. White failed to do the work that he was engaged to do, or to return the retainer for that work upon request. When the clients filed a complaint with the Board, Mr. White described that complaint as a "clarion call" to improve his communication with clients and reduce his caseload. The Law Court determined that Mr. White's dilatory conduct in that matter violated a number of the Maine Rules of Professional Conduct, including Rule 1.4(a) relating to client communication.

• In 2015, Mr. White was retained as chapter 11 counsel, and agreed to a retainer of $25,000 to $30,000 to be paid at a monthly rate of $7,500. Mr. White received an initial payment of $7,500 prior to filing the case. After receiving a second payment of $7,500 post-petition, Mr. White filed an application to employ himself as counsel, disclosing the prepetition payment, but not the post-petition payment or the total commitment of $25,000 to $30,000. Mr. White then caused or approved a deposit of that second payment into his business operating account, rather than the firm's trust account, without approval from this Court. When these matters were brought to this Court's attention on motion by the U.S. Trustee, Mr. White agreed to (i) pay a sanction of $500 to a legal aid organization;

and (ii) participate in a continuing legal education program targeted toward office management for a solo practitioner or small firm.[2] In the subsequent disciplinary proceedings, the Law Court determined that Mr. White's actions in the chapter 11 case violated Fed. R. Bankr. P. 2016 and D. Me. LBR 2016-1 and multiple provisions of the Maine Rules of Professional Conduct, including Rule 3.3(a) relating to candor toward the tribunal, Rule 4.1(a) pertaining to false statements of material fact, and Rule 8.4(c) concerning deceit or misrepresentation.

• In 2016, while representing a corporation in a chapter 11 case, Mr. White presented to the Court an affidavit purportedly signed by his client's principal and acknowledged by him. This took place during an evidentiary hearing. At the hearing, the client principal testified that although she had reviewed the information in the affidavit with Mr. White by telephone, and agreed with the contents of the affidavit, she had neither seen it nor signed it. In proceedings before the Board, Mr. White admitted that he submitted the document purporting to be a signed affidavit, even though it was never actually signed by his client. The Law Court concluded that Mr. White's submission of the affidavit

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violated Maine Rules of Professional Conduct 3.3(a) governing candor toward a tribunal, 3.4(b) pertaining to the falsification of evidence, and 4.1(a) relating to truthfulness in statements to others.

• For Mr. White's conduct in submission of the affidavit purportedly, but not actually, signed by his client's principal, the Law Court issued a public reprimand.

• For the other conduct described above, the Law Court suspended Mr. White from the practice of law for a period of nine months. In fashioning this sanction, the Court reasoned that Mr. White's prior brushes with the disciplinary process, which resulted in dismissals with warnings, demonstrated that Mr. White's poor management practices were longstanding and endured despite those warnings. This longstanding pattern of shoddy practice management served as a significant aggravating factor. In eschewing the Board's recommended sanction including a period of probation and monitoring, the Law Court noted that Mr. White's "apparently limited resources" suggested an inability to fund that service. [Dkt. No. 86 Ex. E.]

In his brief, the Trustee asks the Court to impose a significant sanction against Mr. White, and award to the Trustee on behalf of the estate not less than $10,000. [Dkt. No. 87.] This figure is derived from the parties' stipulation that the estate has incurred no less than $10,000 in legal fees in connection with the Trustee's prosecution of the sanctions motion. [Dkt. No. 86, ¶ 8.][3] The Trustee contends that a substantial monetary sanction is warranted because Mr. White made unfounded representations to courts on several other occasions, and that conduct was part of the pattern of problematic behavior that led to his suspension from practice. The Trustee further asserts that a significant sanction will discourage similar conduct by other attorneys.

Mr. White's brief advances the view that no sanction may be imposed under Rule 9011(c). He asserts that the unsupported homestead exemption was withdrawn when the amended Schedule C was filed, and that the safe harbor consequently bars the Trustee's request. Beyond that, Mr. White contends that monetary sanctions are unjustified because he did not

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intentionally submit an unsupported claim, and that claim did not cause any harm. Mr. White seeks to distinguish the conduct featured in his disciplinary history and asserts that if that history serves as "the basis for imposing sanctions in this case" he will effectively be "punish[ed] . . . twice for the same offenses." [Dkt. No. 88.] Finally, Mr. White contends that legal fees may not be awarded because the Trustee has not established the amount of the fees fairly ascribable to the unsupported residence exemption—the conduct that violated Rule 9011(b)—as opposed to the other conduct targeted by the Trustee.

ANALYSIS

There are two aspects of Mr. White's conduct in this case that merit sanctions. The first is his violation of the Court's Administrative Procedures for the filing of documents on the ECF system. In relevant part, the Administrative Procedures provide:

> Signatures
>
> 1. Petitions, lists, schedules, statements, amendments, pleadings, affidavits, and other documents which must contain original signatures . . . shall be filed electronically and in accordance with these Administrative Procedures. The electronically filed document shall indicate a signature with the party's name typed in full, *e.g.*, "/s/ Jane Doe." Original, executed documents that contain the signature of a party *other than the registered filer* must be maintained by the filer until two (2) years following the closing of the case or the expiration of all appeal periods, whichever is later. Upon request of the Court or any interested party, the filer must provide original documents for review.
>
> 2. For a stipulation or other document to be signed by two or more persons:
>
> > (i) The filing party shall file the document electronically, indicating the signatories, e.g., "/s/ Jane Doe," "/s/ John Doe," etc.
> >
> > (ii) By submitting such a document, the filing attorney certifies that each of the other signatories has expressly agreed to the form and substance of the document and that the filing attorney has their actual authority to submit the document electronically.
> >
> > (iii) The filing party shall retain any records evidencing this concurrence for future production, if necessary, in accordance with subparagraph II(D)(1)

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> > above. A non-filing signatory or party who disputes the

> authenticity of an electronically filed document must file an objection to the document within ten days of the date on the Notice of Electronic Filing.

Administrative Procedures for Filing, Signing, Maintaining and Verifying Pleadings and Other Documents in the Electronic Case Filing (ECF) System § II(D) (March 2011).

In this case, Mr. White ran afoul of these procedures by affixing the Debtor's electronic signature to the petition, schedules, and statements and dating those documents December 12, 2018, one month after the Debtor himself signed and dated the petition, schedules, and statements. Mr. White did not have an original set of documents signed by the Debtor and dated December 12, but he improperly represented that he did when he commenced this case.

As the days passed between the date that the Debtor signed the documents (in mid-November 2018) and the date that Mr. White filed them (December 12, 2018), the Debtor's circumstances changed and some of the information on the schedules and statements became inaccurate. During this period, Mr. White's suspension became imminent. He filed the case in haste, without securing updated signatures or effectively engaging the Debtor in a thorough review of the schedules. The Court infers from Mr. White's testimony that he filed the case on the eve of his suspension without taking the necessary care to secure updated signatures from the client because he had already expended a substantial amount of work in a fixed fee case. By commencing the case without taking the care necessary to ensure the accuracy of the representations in the documents filed with the Court, Mr. White put his own economic interests ahead of his obligations to the Court.

A sanction for this conduct is warranted to vindicate the Court's authority to manage the commencement of cases by way of electronic filing. Debtors' counsel frequently face pressure to file petitions to halt foreclosures or the exercise of other creditor remedies. In some cases,

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counsel may put many prepetition hours into a case and review numerous iterations of the schedules and statements with a client. But, regardless of the time pressures and other exigencies of practice faced by debtors' counsel, the requirements of client review and signature must be observed. The integrity of the bankruptcy system depends upon and demands accurate information in the petition, schedules, and statements. None of the participants in the system should have to question whether documents filed with the Court were, in fact, signed or whether they were signed on a date different from the date electronically affixed to them. To reinforce this message, imposition of a sanction under 11 U.S.C. § 105(a) and the Court's inherent powers is appropriate.

Section 105(a) may "serve as a source of authority for the bankruptcy court's imposition of sanctions in an appropriate case." Resurgent Capital Servs., L.P. v. Harrington (In re Cushman), 589 B.R. 469, 500 (Bankr. D. Me. 2018) (quotation marks omitted).

> Specifically, a court may invoke § 105(a) if the equitable remedy utilized is demonstrably necessary to preserve a right elsewhere provided in the Code, so long as the court acts consistent with the Code and does not alter the Code's distribution of other substantive rights. For example, section 105(a) may appropriately be used to enforce a specific code provision, such as the discharge injunction of section 524. In the absence of an antecedent violation of the Code or a related court order, section 105(a)

will not ordinarily provide a basis for sanctions.

Id. (quotation marks omitted). In addition to the authority conferred by section 105(a), the Court has "certain inherent powers, not conferred by rule or statute, to manage [its] own affairs so as to achieve the orderly and expeditious disposition of cases." Id. at 501 (quotation marks omitted); *accord* Charbono v. Sumski (In re Charbono), 790 F.3d 80, 86-87 (1st Cir. 2015) ("[B]ankruptcy courts . . . by the nature of their institution must possess inherent power sufficient to manage their own affairs and impose . . . submission to their lawful mandates.") (quotation marks omitted). "'That authority includes the ability to fashion an appropriate sanction for conduct

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which abuses the judicial process[,]' such as failure to comply with a court order[.]" In re Cushman, 589 B.R. at 501 (quoting In re Charbono, 790 F.3d at 83).

The Administrative Procedures for the filing of documents on the ECF system is akin to an order of the Court—a uniform procedure that all attorneys must observe in order to file documents with the Court. *See* Standing Order Re the Electronic Filing of Pleadings and Papers in the District of Maine (Bankr. D. Me. Nov. 7, 2003) (requiring, in general, documents filed with the Court to be filed electronically through the ECF system); Standing Order Re Administrative Procedures for Electronically Filed Cases (Bankr. D. Me. Aug. 12, 2002) (approving the Administrative Procedures and providing that they "shall govern the use of the [ECF] system" including "filing" and "signature maintenance"). Effective implementation of the ECF system provided the justification for the Court's adoption of the Administrative Procedures, and electronic filing was mandated for most filings made by represented parties due to the benefits provided by a wholly electronic system. *See* Standing Order Re Electronic Filing (Nov. 7, 2003); Standing Order Re Administrative Procedures (Aug. 12, 2002). These procedures were adopted to further the orderly and expeditious administration of cases. Those goals are undermined, and the judicial process is abused by conduct like that at issue here.

In fashioning a sanction for Mr. White's violation of the Administrative Procedures, the Court is mindful of several factors. First, Mr. White was a member of the bar of this Court when these procedures were adopted. He practiced here for many years and cannot claim ignorance of the signature retention provisions of Administrative Procedures or the Standing Orders adopting those procedures. Second, the signature retention provisions are sufficiently specific to support an award of sanctions. *Cf.* Ameriquest Mortg. Co. v. Nosek, 544 F.3d 34, 47 (1st Cir. 2008) (concluding that the terms of a plan allegedly violated by a creditor were not specific enough to

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support an award of sanctions under section 105(a)). Under the Administrative Procedures, Mr. White was required to obtain his client's signature on an original petition and set of schedules and statements, to retain those original documents, and to file through the ECF system an electronic version of the documents signed by his client. Instead, Mr. White affixed his client's signature to a petition with a date that fell roughly one month after the day that his client signed the petition. He may have had his client's authority to commence the case. But he did not have an original copy of the petition signed and dated by the Debtor on December 12, 2018 and he admitted as much at trial. This conduct is similar to a prior episode of conduct before this Court that resulted in a referral to disciplinary authorities. That referral—which was made after Mr. White submitted an affidavit in litigation purportedly, but not actually, signed by his client—should have placed Mr. White on notice that this Court does not take lightly the representations that an attorney makes when he submits a document purportedly signed by a client.

Sanctions are appropriate here, where Mr. White's violation of the Administrative Procedures resulted in the commencement of a case more than a month after the Debtor himself signed the petition. To vindicate this Court's authority to police electronic filings, the Court imposes a civil sanction of $400 under section 105(a) and the Court's inherent powers, and orders Mr. White to pay that sum to the Trustee. Under the circumstances, payment of the sanction to the Trustee is appropriate because it was his efforts that brought Mr. White's failure to observe the requirements of the Administrative Procedures to the Court's attention.

The other aspect of Mr. White's conduct in this case that merits sanction is his violation of Rule 9011(b), which took place when he asserted a homestead exemption in Schedule C without any factual or legal basis to make that assertion. Rule 9011(c) provides that if Rule 9011(b) has been violated, the Court may—subject to certain conditions—impose an appropriate

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sanction upon the person responsible for the violation. Rule 9011(c) goes on to describe the manner in which the question of compliance with Rule 9011(b) may be raised—either by motion or on the court's own initiative—and to describe the nature of, and limitations on, any sanctions imposed.

In certain respects, section 707(b)(4) reinforces Rule 9011. In relevant part, the statute provides that:

> (B) If the court finds that the attorney for the debtor violated rule 9011 of the Federal Rules of Bankruptcy Procedure, the court, . . . on the motion of a party in interest, in accordance with such procedures, may order—
>
> > (i) the assessment of an appropriate civil penalty against the attorney for the debtor; and
> > (ii) the payment of such civil penalty to the trustee[.]
>
> . . .
>
> (D) The signature of an attorney on the petition shall constitute a certification that the attorney has no knowledge after an inquiry that the information in the schedules filed with such petition is incorrect.

11 U.S.C. § 707(b)(4)(B) & (D). This statute has not garnered much attention in the caselaw. Its 9011-like requirements confirm that chapter 7 debtor's counsel must undertake an inquiry as to the information reported in the schedules and certify that the schedules are accurate based on the knowledge acquired in that inquiry. *See* id. § 707(b)(4)(D). And the civil penalty provisions amplify the sanctions provided in Rule 9011 by specifying that chapter 7 debtor's counsel may be ordered to pay a civil penalty to the trustee. Id. § 707(b)(4)(B).

A motion under Rule 9011 "may not be filed with or presented to the court" unless the motion is first served on the party who allegedly violated the rule, and that party fails to withdraw or correct the challenged claim. Fed. R. Bankr. P. 9011(c)(1)(A). This safe harbor is designed to give the party accused of a rule violation notice and the opportunity to take

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corrective action. *See* Fed. R. Civ. P. 11 Advisory Committee Notes to 1993 Amendment.[4] Some courts view compliance with the safe harbor as a jurisdictional requirement; others view the safe harbor as a defense capable of being waived. *See* 5A Fed. Prac. & Proc. Civ. § 1337.2 & nn.12-13 (4th ed.) (collecting cases). Although the First Circuit has not definitively aligned with either view, it has ruled that the safe harbor defense is waived for appellate purposes if not seasonably raised before the trial court. *See* Nyer v.

Winterthur, Int'l, 290 F.3d 456, 460 (1st Cir. 2002); *but cf.* Lamboy-Ortiz v. Ortiz-Vélez, 630 F.3d 228, 245 (1st Cir. 2010) (citing, in dicta, a decision in which the Ninth Circuit characterized the safe harbor as "mandatory").

Mr. White has belatedly claimed that the Rule 9011 safe harbor should shield him from the imposition of sanctions. Mr. White did not raise the safe harbor when the motion was "filed with or presented to" the Court. *See* Fed. R. Bankr. P. 9011(c). Instead, he waited until after trial. He insists that the safe harbor should bar sanctions—even though he had advance notice of the motion—because the unsupported homestead exemption in Schedule C was withdrawn when successor counsel filed the amended Schedule C, and that amendment occurred before the Trustee filed his motion for sanctions. He did not raise this issue in his written response to the Trustee's motion, during the lengthy pretrial proceedings, or at trial. Instead, he conceded that the Trustee gave him more than twenty-one days' notice of his intent to seek sanctions for specific conduct by serving him with a copy of the sanctions motion substantially similar to that filed. There is nothing in the record suggesting that, after the receipt of the draft sanctions motion, Mr. White insisted that the motion should not be filed as drafted because Schedule C had

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been amended.[5] At trial, he argued that the homestead exemption claimed on the original Schedule C was not violative of Rule 9011; he did not refer to the amended Schedule C.

While Mr. White apparently kept the safe harbor defense in his back pocket, the Court conducted a trial and rendered a decision on the first bifurcated aspect of the matter. The Trustee pressed his position, incurring fees along the way, and the Court expended judicial resources determining that Rule 9011 had been violated. Now, after all of this effort, Mr. White trots out the amended Schedule C and points back to the safe harbor. This is not how litigation should unfold. Mr. White failed to raise the safe harbor in a seasonable manner and therefore waived its protections. *See generally* Winterthur, 290 F.3d at 460 (holding that the safe harbor defense is waived for appellate purposes if not seasonably raised in the trial court).

To merit sanctions under Rule 9011, "it is not enough that the filer's claim lacked merit — it must be so plainly unmeritorious as to warrant the imposition of sanctions." *See* Eldridge v. Gordon Bros. Grp., 863 F.3d 66, 88 (1st Cir. 2017) (quotation marks omitted). With respect to the original Schedule C, this test is met. As the Court previously determined, "[t]here was no reasonable basis for Mr. White to believe that either the Debtor or his dependents lived in the Property or had any present intention to move to the Property such that the claimed residence exemption might be justified under any legal theory." [Dkt. No. 74, p. 8.] In addition, "there was an obvious conflict between the residence exemption claimed on Schedule C" and the other documents Mr. White filed in the case. Id. The claimed exemption was not a close call; it was the product of Mr. White's careless preparation of documents that were filed with the Court.

In deciding whether to impose sanctions, and what an appropriate sanction would be, a number of factors may be properly considered, including:

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> Whether the improper conduct was willful, or negligent; whether it was part of a pattern of activity, or an isolated event; whether it infected the entire pleading, or only one particular count or defense; whether the person has engaged in similar conduct in other litigation; whether it was intended to injure; what effect it had on the litigation process in time or expense; whether the responsible person is trained in the law; what amount, given the financial resources of the responsible person, is needed to deter that person from repetition in

> the same case; [and] what amount is needed to deter similar activity by other litigants[.]

Fed. R. Civ. P. 11 Advisory Committee Notes to 1993 Amendment. A few of these factors weigh against the imposition of significant sanctions in this case. Mr. White did not willfully claim an exemption that lacked any basis in fact or law, and he did not claim the residence exemption with the intent to injure any other party; he did so negligently, without taking the proper care to ensure that the document he filed accurately reflected the information in his possession. When the other factors are considered, however, the balance tips in the Trustee's favor. Mr. White's lack of care in the preparation of documents filed with the Court was a part of a larger pattern, and he did engage in similar conduct in other litigation, that ultimately led to his suspension from the practice of law. He was trained in the law, and he routinely failed to treat his obligations to the Court with a sufficient measure of seriousness. Although sanctions may not be necessary to deter similar conduct by Mr. White, either in this case or generally, sanctions are warranted to deter similar activity by other litigants.[6]

As for the extent of a sanction imposed for violation of Rule 9011(b), it must "be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated." Fed. R. Bankr. P. 9011(c)(2). Such a sanction may consist of, or include, nonmonetary directives, "an order to pay a penalty into court, or, if imposed on motion and

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warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation." Id.

Two variables determine the appropriateness of a particular sanction: the facts presented and the purpose of the sanction. Anderson v. Beatrice Foods Co., 900 F.2d 388, 394 (1st Cir. 1990). The purpose of sanctions under Rule 9011 is deterrence. *See* Fed. R. Civ. P. 11 Advisory Committee Notes to 1993 Amendment. Monetary sanctions designed to serve the purpose of deterrence are constrained by parameters of proportionality. *See* Navarro-Ayala v. Nunez, 968 F.2d 1421, 1427 (1st Cir. 1992). A "monetary sanction aimed at deterrence is appropriate only when the amount of the sanction falls within the minimum range reasonably required to deter the abusive behavior." Id.

"As a deterrent, sanctions speak largely to systemic concerns." Anderson, 900 F.2d at 394. In the bankruptcy system, the accuracy of the information presented in the schedules is paramount. Counsel must undertake a reasonable inquiry, and then incorporate the information obtained through that inquiry into the schedules filed with the Court. Imposing sanctions here will further the object of general deterrence by reinforcing the seriousness of the obligations undertaken by debtors' counsel when making written representations to the Court in the form schedules filed with every chapter 7 case. *Cf.* Ameriquest Mortg. Co. v. Nosek (In re Nosek), 609 F.3d 6, 9 (1st Cir. 2010) ("Bankruptcy courts have a legitimate interest in policing the filings submitted, and sanctions can sometimes serve a useful function in this endeavor.").

The Trustee asserts that he incurred more than $10,000 in fees to prosecute his motion, and he seeks a sanction in that amount. Because this matter was initiated by motion, and sanctions are warranted for effective deterrence, the sanction may consist of an order directing

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payment of "some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation." Fed. R. Bankr. P. 9011(c)(2).

A sanction in the form of an order directing Mr. White to pay some of the Trustee's reasonable fees is fitting. A non-monetary sanction such as a reprimand, mandatory continuing legal education, or a referral to disciplinary authorities would lack utility because Mr. White has been suspended from, and apparently does not intend to reapply for admission to, the bar. And, unless the Trustee is compensated for at least some of his efforts, it is unlikely that in future cases, the Trustee—or others similarly situated—will bring violations of Rule 9011 to the Court's attention in cases like this one.

Under the circumstances, the Court orders Mr. White and his former firm to pay a civil sanction of $6,600 under section 707(b)(4)(B) and Rule 9011(c). Notwithstanding Mr. White's contentions to the contrary, the Court concludes that it is unnecessary to precisely separate the fees directly tied to the Rule 9011 violations that the Trustee did not prove at trial from those tied to the Rule 9011 violation that he did prove at trial. At the blended hourly rate of $320 per hour, it would have taken the Trustee nearly twenty-one hours to bring his total fees up to $6,600. This contested matter was initiated by the Trustee's fourteen-page motion [Dkt. No. 28] and involved five hearings prior to trial: (1) the initial hearing that ran more than twenty-four minutes [Dkt. No. 36]; (2) two hearings that collectively ran for about an hour [Dkt. No. 53 & 57] on the Trustee's related motion to compel the disclosure of allegedly privileged communications [Dkt. No. 46] and the Debtor's motion to modify a subpoena [Dkt. No. 42]; (3) a pretrial hearing that ran more than seven minutes [Dkt. No. 63]; and (4) another hearing regarding a discovery dispute that ran more than twenty-three minutes [Dkt. No. 67]. The Trustee dutifully filed a detailed witness and exhibit list [Dkt. No. 68], participated in preparation of the exhibit binders

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for trial, and participated in a trial that ran nearly four hours, including a lunch break, plus travel time to and from Bangor [Dkt. No. 70-72]. He also participated in two post-trial hearings that collectively ran more than thirty-three minutes [Dkt. No. 78 & 84], conducted additional discovery *see* [Dkt. No. 80], compiled and filed a stipulated post-trial record [Dkt. No. 86], and submitted a detailed, eleven-page memorandum of law in support of the motion [Dkt. No. 87]. Even if the Trustee's motion had been predicated solely on the baseless residence exemption, and had not addressed any other issues, it would have taken him at least twenty-one hours to prosecute his motion through the pretrial, trial, and post-trial stages that have defined the path of this contested matter.

More detailed proration of the Trustee's fees to the point of the clarity of an audit is impracticable. If the Court were to review a billing detail under the familiar rubric supplied by 11 U.S.C. § 330, many of the entries there would almost certainly relate to tasks that the Trustee would have pursued even if the sole arrow in his quiver was the claimed homestead exemption. *Cf.* Goodyear Tire & Rubber Co. v. Haeger, 137 S. Ct. 1178, 1187 (2017) ("The essential goal in shifting fees is to do rough justice, not to achieve auditing perfection.") (quotation marks omitted).

In imposing a lesser sanction than that sought by the Trustee, the Court is mindful of the rule at issue. A sanction for violation of Rule 9011 may take the form of an "order directing payment to the movant of *some or all* of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation." Fed. R. Bankr. P. 9011(c)(2) (emphasis added). The Court is also mindful of several factors. First, Mr. White prepared the Schedule C with culpable carelessness, but he did not subjectively intend to mislead the Court, the Trustee, or creditors. *See generally* In re Nosek, 609 F.3d at 10 (suggesting that subjective intent should be considered

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in fashioning a sanction). Second—other than the fees incurred by the Trustee in his pursuit of this matter—no prejudice has befallen any party, the estate, or the Court in consequence of the unsupported claim of a homestead exemption. *See* id. (suggesting that prejudice caused by the sanctionable conduct should also factor into the amount of the sanction imposed). Third, the unsupported claim has, in fact, been withdrawn by the filing of the amended Schedule C. Fourth, Mr. White has lost his law license, and it is fair to infer that his income may have declined since his suspension. All of these factors, including a concern about Mr. White's ability to pay the sanction imposed, lead to a belief that it is appropriate to award some, but not all, of the Trustee's legal fees.

That said, the sanction of $6,600 is justified not only by Mr. White's deficient practices in this case, but by their part in a longstanding pattern. Over the course of several years, Mr. White failed to communicate effectively with certain clients, and that failure resulted in disciplinary action. He was sanctioned on multiple occasions for failing to observe deadlines and orders. He failed to accurately disclose his compensation for work as chapter 11 counsel on a routine bankruptcy form, in violation of certain rules of procedure, and then agreed to sanctions when the matter was brought to the attention of this Court.

That the conduct at issue in this case features into a larger pattern of deficient practice is a factor that the Court may appropriately consider in fashioning an appropriate sanction. *See* Anderson, 900 F.2d at 394 ("The trial judge is best positioned to decide what sanction . . . best responds to a particular episode or pattern of errant conduct."). A pattern of that nature speaks to Mr. White's state of mind and conduct as an officer of the Court. Mr. White cannot wield his suspension as a shield from this Court's consideration of his prior disciplinary history. Yes, Mr. White was suspended from the practice of law for a period, but that period of suspension is now

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over, and he may now be eligible to reapply—even if he does not intend to do so. Finally, considering Mr. White's prior disciplinary history does not result in an impermissible double-punishment for the same conduct, despite his contentions to the contrary. The "purpose of lawyer discipline is not punishment but protection of the public and the courts[.]" Bd. of Overseers of the Bar v. Carey, 215 A.3d 229, 240 (Me. 2019).

In sum, a sanction of $6,600 payable to the Trustee is appropriate to deter other attorneys from forging ahead with a filing without taking the time necessary to verify that the claims presented to the Court have some basis in fact and law.[7]

CONCLUSION

Mr. White shall pay a total of $7,000 to the Trustee as a civil sanction in this matter. The parties shall have twenty-eight days to attempt to agree upon a schedule for payment of the sanctions. Within that time period, they must either file a statement regarding and identifying the agreed schedule or a request for the Court to convene one or more hearings for the purpose of setting a schedule of payments in light of Mr. White's current and anticipated income and expenses.

Dated: November 20, 2020

/s/______________
Michael A. Fagone
United States Bankruptcy Judge
District of Maine

Footnotes:

[1.] Although this particular chapter 13 case was not assigned to this judicial officer, the Court takes judicial notice of the contents of the docket and the audio of the hearings before Chief Judge Cary.

[2.] Although the Law Court did not describe the nature of this stipulated sanction, the Court takes judicial notice of its own order in Case No. 16-10005, at Dkt. No. 54.

[3.] The record contains no other details about the services provided, or the amount of time spent by the Trustee on the various aspects of this litigation. But the Court observes that in 2020 the

Trustee has generally charged a billable rate of $325 per hour for his services as counsel. *See* Case No. 19-10648, Dkt. No. 9, ¶ 14. In 2019, the Trustee's services as counsel were billed at the rate of $315 per hour. *See* Case No. 19-10111, Dkt. No. 12, ¶ 14.

[4.] Because Rule 9011 and Fed. R. Civ. P. 11 are generally "couched in the same terms and have a common etiology," the First Circuit has indicated that "Rule 11 jurisprudence is largely transferable to Rule 9011 cases[.]" Featherston v. Goldman (In re D.C. Sullivan Co.), 843 F.2d 596, 598 (1st Cir. 1988). In this order, the Court draws from Rule 11 jurisprudence and other commentary regarding Rule 11 freely, without pausing to say as much in each instance.

[5.] The filing of the amended Schedule C would not have insulated Mr. White from the Trustee's motion entirely, because that motion also alleged rule violations with respect to other documents filed in the case.

[6.] Mr. White has completed his suspension from the practice of law, but he must be reinstated before resuming practice in the State of Maine. He has represented that he has no present intention to return to practice. But intentions can change over time and it is at least possible that Mr. White may seek reinstatement. In light of that possibility, however likely or remote, an award of sanctions against Mr. White may serve some deterrent effect as to him.

[7.] If the Court had not imposed a separate civil sanction the amount of $400 for Mr. White's violation of the Administrative Procedures, the sanction for his violation of Rule 9011 would have been greater than $6,600. Using any type of familiar lodestar analysis yields reasonable legal fees of at least $7,000 for the Trustee.

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616 B.R. 332

IN RE: Cynthia SANTOS, Purported Debtor.

CASE NO. 19-33256-SGJ13

United States Bankruptcy Court, N.D. Texas, Dallas Division.

Signed March 17, 2020

[616 B.R. 337]

Steve Le, Law Office of Steve Le, Grand Prairie, TX, for Purported Debtor.

MEMORANDUM OPINION AND ORDER ON SHOW CAUSE ORDER REQUIRING STEVE LE AND GABRIEL SANTOS TO APPEAR AND SHOW CAUSE WHY THEY SHOULD NOT BE SANCTIONED FOR CONDUCT DESCRIBED HEREIN WITH RESPECT TO THE FILING OF AN UNAUTHORIZED CHAPTER 13 PETITION AND RELATED SCHEDULES AND STATEMENTS

Stacey G. C. Jernigan, United State Bankruptcy Judge

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I. INTRODUCTION

This is the story of Gabriel Santos's wrongheaded scheme to manipulate the bankruptcy system, of attorney Steve Le's failure to uphold the integrity of his profession, and of the stress they both caused to Cynthia Ramos—Gabriel Santos's ex-wife, an innocent victim, and the Purported Debtor in this case.[1]

In a nutshell, Gabriel Santos, who had filed bankruptcy three times, was barred from filing bankruptcy for 180 days after having his most recent Chapter 13 case dismissed with prejudice. To work around this bar, Mr. Santos sought to file bankruptcy ***in his ex-wife's name*** , without a power of attorney or any other form of authorization, to prevent imminent foreclosure on his house.[2] He falsified emails purportedly from his ex-wife authorizing the bankruptcy and sent them to Mr. Le, an attorney, the day before the scheduled foreclosure. Mr. Santos also brought Mr. Le $3,500 cash. Mr. Le, perhaps well-intentioned, nevertheless ignored his ten years of experience as a debtor's attorney (and his many hours of ethics training) and filed a Voluntary Chapter 13 Petition, Bankruptcy Schedules, a Statement of Financial Affairs ("SOFA") and other items, using Mrs. Ramos's name and social security number. Mr. Le never spoke to Mrs. Ramos or obtained a single wet signature. Mr. Santos said his ex-wife was out-of-town and unavailable to talk to Mr. Le on the telephone—yet, somehow, she was supposedly able to take credit counseling from a remote location and email Mr. Le purported profit and loss statements for a business. Instead of taking reasonable steps to protect himself and the Purported Debtor in light of the strange circumstances he faced, Mr. Le decided to forge Mrs. Ramos's electronic signature at least six times on documents filed with the court—allegedly assuming, in good faith, that he had her permission—via her ex-husband—to do so.

The results of these men's actions were unquestionably harmful for Mrs. Ramos, whose credit has been adversely affected and whose name is now permanently etched in the bankruptcy database to be searched by banks, employers, and the public at large. Now, Mrs. Ramos, the court, Mr. Le, and all attorneys involved in this matter must commit untold hours and resources to try to unwind a grievous mistake that was easily preventable had Mr. Le, the attorney at the center of this mess, simply remembered his ethics training.

II. PROCEDURAL HISTORY

On September 30, 2019, attorney Steve Le filed a Chapter 13 Bankruptcy Petition on behalf of the Purported Debtor using the CM/ECF system.[3] The electronic file

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containing the Petition also contained the Purported Debtor's (a) Schedules; (b) Declaration; (c) SOFA; (d) Statement of Current Monthly Income; (e) Verification of Mailing List for the Creditor Matrix; and several other documents. In all, the first docket entry filed in this case contains six electronic signatures that read, "/s/ Cynthia Santos."

The same day, Mr. Le also filed a Certificate of Credit Counseling,[4] which indicates that the Purported Debtor completed online credit counseling, and a Form 121 Social Security Number Verification,[5] which contains Mrs. Ramos's social security number and an electronic signature that reads, "/s/ Cynthia Santos."

Eight days later, on October 8, 2019, the standing Chapter 13 Trustee, Mr. Tom Powers, filed a Motion for a Show Cause Order, alleging that "Cynthia Ramos f/k/a Cynthia Santos contacted the Trustee's office and stated that she did not file the Voluntary Petition and did not give anyone permission to do so on her behalf."[6] The Chapter 13 Trustee also filed a Motion to Dismiss,[7] and Mr. Le, in an attempt to undo his mistake, filed a Motion to Expunge the case on behalf of Mrs. Ramos.[8]

The court held a hearing on the Trustee's Motion for a Show Cause Order and Motion to Dismiss on

November 18, 2019.[9] Mr. Powers and an attorney for the U.S. Trustee, Erin Schmidt, both appeared. Mr. Le, represented by Corbet Bryant, testified. Finally, Mrs. Ramos testified and Mr. Santos, her ex-husband, also testified.[10]

After hearing from all parties-in-interest, the court found that this bankruptcy case was improperly filed without Mrs. Ramos's authorization. Reticent to eliminate evidence of potential bankruptcy fraud and preempt any potential criminal referral against Mr. Santos, the court declined to expunge the case.[11] Instead, the court requested that the Chapter 13 Trustee submit an order of dismissal. The court further requested that the order contain strong language indicating in the clearest possible terms that what happened to Mrs. Ramos was tantamount to identity theft, so that she may use the order to clear her name with regard to the credit reporting agencies, banks, and anyone else who may become aware of the purported bankruptcy filing. On November 26, 2019, the court entered its Memorandum Opinion and Order Dismissing Unauthorized Bankruptcy to that effect.[12]

At the November 18 hearing, the court also granted the Chapter 13 Trustee's Motion for a Show Cause Order and requested that he submit a form of show cause order that directed Mr. Le and Mr. Santos

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to appear at a future hearing.[13] After advising everyone in the room that this unauthorized filing triggered Title 18 implications and after explaining to Mr. Santos and Mrs. Ramos that those implications meant the court would consider referring the case to the U.S. Attorney's office for criminal prosecution, the court exhorted Mr. Santos to hire a lawyer to represent him at the next hearing. Accordingly, on November 26, 2019, the court entered its Show Cause Order Directing Steven Le and Gabriel Santos to Appear for another hearing on February 3, 2020.[14]

On February 3, 2020, the same parties-in-interest returned to court pursuant to the Show Cause Order. This time, Mr. Santos appeared represented by attorney Willie Cantu. Before the evidentiary hearing began, Mr. Cantu made an oral motion to continue the hearing on grounds that he was unprepared to provide effective assistance of counsel to Mr. Santos. Mr. Cantu represented to the court that he was not aware of the nature of this show cause hearing before arriving at court that day because the ECF transcript of the last hearing was still unavailable to the public at that time. Mr. Cantu also stated that he was only hired by Mr. Santos on Friday, January 30 (just three days prior) and that Mr. Santos had given him a different idea of what would happen at the February 3 hearing. The Chapter 13 Trustee, counsel for Mr. Le, and counsel for Mrs. Ramos, Julianne Parker, each opposed the oral motion to continue. The court denied the oral motion to continue on grounds that Mr. Santos had been afforded ***two-and-a-half months' notice*** of the February 3 hearing (and the nature of it), and that the court had strongly urged Mr. Santos to hire counsel.[15] Accordingly, the parties proceeded to put on evidence and make arguments on the record.

III. JURISDICTION

Bankruptcy subject matter jurisdiction exists in this proceeding pursuant to 28 U.S.C. § 1334 and 28 U.S.C. § 157(b). The bankruptcy court has authority to adjudicate this matter pursuant to Miscellaneous Rule No. 33 for the Northern District of Texas.

IV. FINDINGS OF FACT

A. The Parties and Counsel.

There are, essentially, four individuals involved in various capacities in this bankruptcy matter, one of whom is known by a different name than the name used on all the documents filed with this court. Each party was represented by counsel at one or both of the hearings before this court. The following table is intended to make clear who participated in the proceedings.

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Person	Relation to Case	Counsel	Representation
Cynthia Ramos f/k/a Cynthia Santos	Victim of identity theft and forged bankruptcy filing. Former spouse of Gabriel Santos (divorced 2009).	Julianne Parker	At the February 3 hearing only.
Gabriel Santos	Perpetrator of identity theft and forged bankruptcy filing. Hired Mr. Le to file bankruptcy in his ex-wife's former name.	Willie Cantu	At the February 3 hearing only.
Steve Le	Attorney hired by Gabriel Santos to file bankruptcy using Cynthia Ramos's social security number. Testified at both the November 18 and February 3 hearings.	Corbet Bryant	At both the November 18 and February 3 hearings.
Tom Powers	Standing Chapter 13 Trustee. Testified at both the November 18 and February 3 hearings.	Erin Schmidt	At both the November 18 and February 3 hearings.

B. Mr. Le's Testimony, Public Disciplinary Record and Experience Before this Court as a Debtor's Attorney.

The court makes these findings of fact based in part on Mr. Le's testimony and Mrs. Ramos's testimony from the November 18 and February 3 hearings. The court finds Mr. Le and Mrs. Ramos to be credible witnesses. The court does not find Mr. Santos to be a credible witness but will address his testimony in a separate section, below. In making its findings of fact, this court also takes judicial notice of the evidentiary record made at both hearings and of all documents filed with the court in this bankruptcy case.[16]

On Thursday, September 26, 2019, the Purported Debtor's ex-husband, Mr. Santos, arrived at the offices of Mr. Le with $3,500 cash in hand seeking to stop a foreclosure on his home that was scheduled for October 1, 2019—five days later. Mr. Santos and Mr. Le discussed the possibility of filing bankruptcy as a means to prevent the foreclosure. Then, on Friday, September 27, 2019, Mr. Le ran an ECF/PACER check to determine Mr. Santos's eligibility to file bankruptcy and found that Mr. Santos, who had filed bankruptcy multiple times, was barred from refiling by an order entered on April 23, 2019 dismissing his prior Chapter 13 case with prejudice for 180 days.[17] So, Mr. Le

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notified Mr. Santos that he was barred from refiling. According to Mr. Le, Mr. Santos called him later that day and "asked [him] whether his ***ex-wife*** can file."[18] Mr. Le then explained to Mr. Santos that if the home mortgage note was under Mrs. Santos's (*i.e.* , Mrs. Ramos's) name, she could file bankruptcy to stop the foreclosure.[19] Mr. Santos then told Mr. Le that he would call Mrs. Ramos and get back to him.[20]

On Monday, September 30, 2019—the day before the scheduled foreclosure—Mr. Santos called Mr. Le and asked if he could come to Mr. Le's office to file bankruptcy. Mr. Le explained that he needed information from Mrs. Ramos to file for her. That is when Mr. Le received two emails purportedly from Mrs. Ramos, with her former name in both the email address and the signature; one, sent at 8:15 a.m., containing a credit counseling certificate, and the other, sent at 8:50 a.m., containing a profit and loss statement for a business.[21] The court believes, based on the preponderance of the evidence, that it was Mr. Santos who created the email address and sent the emails to Mr. Le to induce him to file bankruptcy. The second email, sent to Mr. Le at 8:50 a.m., read as follows:

> Steve,
>
> My name is Cynthia Santos, and my ***ex husband*** [sic] has filled me on [sic] everything. I have never filed for bankruptcy before. I will be filing for bankruptcy. I sent you my certificate from the credit counseling class to your email. Attached is my profit and loss statement verifying my income. Gabriel stated he had sent you all documents need [sic] from him. I am attending a funeral this morning and will be able to answer any questions you may need afterwards. If you have questions or need anything else please let me know.
>
> Sincerely,
>
> Cynthia Santos[22]

After receiving the emails, Mr. Le told Mr. Santos that he would still have to speak to Mrs. Ramos to make sure she wanted to file. At that point, Mr. Santos allegedly dialed a number that went straight to voicemail and explained to Mr. Le that Mrs. Ramos was unavailable because she was at a funeral in a remote location without any signal (despite her having purportedly completed credit counseling and sent two emails to Mr. Le earlier that morning).[23] Mr. Santos allegedly assured Mr. Le that Mrs. Ramos would come to his office to provide additional

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information and documents, including a tax return and a copy of her driver license, after she returned from the funeral on Wednesday, October 2.[24] At no point leading up to the filing of the bankruptcy Petition did Mr. Le receive a purported power of attorney from Mr. Santos or Mrs. Ramos. Mr. Le testified that the emails and Mr. Santos's assurances were the impetus of his ill-fated decision to file bankruptcy using Cynthia Ramos's social security number.[25]

The Chapter 13 Trustee examined Mr. Le again at the February 3 hearing. Mr. Le's testimony revealed what the court considers to be a number of additional red flags that should have prevented him from filing the bankruptcy Petition. For example,

> i. Mr. Le testified that he knew a client's wet signature was required ***before*** an attorney could file a bankruptcy Petition on the client's behalf—nevertheless, he ignored his knowledge and training and proceeded to file a Petition, Schedules, Statement of Financial Affairs, and other documents without Mrs. Ramos's actual signature.[26]
>
> ii. Mr. Le further testified that Mr. Santos paid Mr. Le's fee of $3,500 in cash.[27] A person with $3,500 cash-in-hand wanting to file bankruptcy in someone else's name is unusual, to say the least, and should have made Mr. Le suspicious. Perhaps it did, considering Mr. Le marked "Debtor," rather than "Other (specify)," as the source of compensation paid to him on the Disclosure of Compensation of Attorney for Debtor and then signed the certification at the bottom of the form.[28]

iii. Mr. Le further testified that Mr. Santos provided Mrs. Ramos's social security number, included in response to Question 3 of the Voluntary Petition.[29]

iv. Mr. Le further testified that, at the time he was completing the bankruptcy Petition, he believed the Purported Debtor's address was 14864 Ledgeview Ct., Balch Springs, TX 75180, as indicated in response to Question 5 of the Voluntary Petition.[30] This is unusual because this is the address of the house that was scheduled for foreclosure, where Mr. Santos lived. Given that one of the purported Cynthia Santos emails referred to Gabriel Santos as her ex-husband and that Mr. Le received the email before completing the Petition, Mr. Le had reason to know Mrs. Ramos and Mr. Santos were divorced. And, generally speaking, divorced persons do not live together.

v. Mr. Le further testified that he could not have known whether Mrs. Ramos owned any property that posed an imminent threat to public

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health or safety because he was going through the questions line-by-line with Mr. Santos, not Mrs. Ramos. He said he may have marked "No" in response to Question 14 simply because Question 14 is not normally marked "Yes" on Voluntary Petitions.[31] In other words, Mr. Le was consciously aware that he was fabricating answers to questions and, yet, it never crossed his mind that he should get the information from Mrs. Ramos, not from her ex-husband.

vi. Mr. Le testified that, despite the electronic signature dated September 30, 2019 and located on Page 6 of the Voluntary Petition, he did not actually obtain a wet signature from Mrs. Ramos on that date.[32]

vii. Mr. Le further testified that, by signing the Petition on page 7, he certified to the court that he communicated a number of things to the Purported Debtor, Mrs. Ramos, even though he knew he had communicated none of those things to her and had not made a reasonable inquiry regarding the accuracy of the information in the schedules at that time.[33]

viii. Mr. Le further testified that he marked "No" in response to Question 7 regarding whether the Purported Debtor owned any household electronics even though he knew it was highly unlikely that she did not own any household electronics, such as a television.[34]

ix. Mr. Le further testified that he marked "No" in response to Question 8 regarding whether the Purported Debtor owned any collectibles of value. When pressed as to why he marked no, Mr. Le testified that he marked no without making any inquiry whatsoever.[35]

x. Mr. Le further testified that he marked "No" in response to Question 12 regarding whether the Purported Debtor owned any Jewelry and that, despite marking no, it was unlikely that Mrs. Ramos, a woman, owned no jewelry whatsoever.[36]

xi. Mr. Le further testified that he knew that he could file a barebones bankruptcy Petition without filing the Schedules. When asked why he did not wait to file the Schedules and SOFAs until the Purported Debtor could come to his office on Wednesday, Mr. Le responded that he had planned to verify the Schedules with Mrs. Ramos on Wednesday and make amendments as necessary. The Chapter 13 Trustee asked Mr. Le whether he knew that the Schedules constituted representations to the court under penalty of perjury and that his client could face sanctions if amended filings were highly contradictory. To that, Mr. Le was unresponsive.[37]

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xii. Mr. Le further testified that, despite marking "No" in response to Question 1 on Schedule H, with regard to whether the Purported Debtor had any co-debtors, he knew from reviewing a copy of the home mortgage loan, which Mr. Santos furnished, that Mr. Santos and Mrs. Ramos (who went by Mrs. Santos at the time the loan was executed) were both named on the note.[38]

xiii. Mr. Le further testified that he populated Question 8a. on Schedule I using the Purported Debtor's alleged profit and loss statement, which was attached to one of the two emails he received on September 30, 2019. The second column, which reads "For Debtor 2 ***or non-filing spouse*** ," (emphasis added) is marked "N/A" in response to each question, suggesting that Mr. Le knew Mr. Santos and Mrs. Ramos were no longer married as of September 30, 2019.[39]

xiv. Mr. Le further testified that he populated Schedule J, Expenses, using numbers he received from Mr. Santos. When asked whether, at that time, he thought Mr. Santos and Mrs. Ramos were living together, Mr. Le said he did not remember, but that, at one point, Mr. Santos stated in a text that Mrs. Ramos had to go to her apartment to get a tax return and that it appeared odd to him. When pressed as to whether, at that point, Mr. Le made any change in the Petition to Question 5 regarding where the Purported Debtor lived, Mr. Le said he did not.[40]

xv. Mr. Le further testified that he signed "/s/ Cynthia Santos" underneath the statement reading "Under penalty of perjury, I declare that I have read the summary and schedules filed with this declaration and that they are true and correct," even though Mrs. Ramos had not, in fact, read the summary and schedules or provided a wet signature.[41]

xvi. Mr. Le further testified that he marked "Not married" in response to Question 1, which reads "What is your current marital status," on the SOFA that he completed on September 30, 2019, suggesting that Mr. Le knew Mr. Santos and Mrs. Ramos were no longer married as of that date.[42]

xvii. Mr. Le further testified that, on the SOFA, he marked "No" in response to Questions 7 through 13 without having any idea whether the Purported Debtor had made payments to insiders within one year prepetition, was party to a lawsuit within one year prepetition, was subject to a creditors' set-off rights within 90 days prepetition, etc.[43]

xviii. Mr. Le further testified that he signed "/s/ Cynthia Santos" underneath the penalty of perjury statement on the last page of the

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SOFA even though Mrs. Ramos had not provided answers to the questions on the SOFA or a wet signature.[44]

xix. Mr. Le further testified that he signed "/s/ Cynthia Santos" underneath the penalty of perjury statement on the last page of Official Form 122C-1 Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period even though Mrs. Ramos had not provided six months of income or a wet signature.[45]

xx. Mr. Le further testified that he signed "/s/ Cynthia Santos" on the Verification of Mailing List even though Mrs. Ramos had not actually signed the document. He also testified that he listed only one creditor, Select Portfolio Services—presumably the mortgage loan servicer—even though it was unreasonable that Mrs. Ramos would have only one creditor to notify of a bankruptcy filing.[46]

xxi. Mr. Le further testified that he understood he was not required to file the SOFA with the Petition and that he could have waited until after he had a chance to meet with Mrs. Ramos to file it—just like the Schedules.[47]

It was not until Wednesday, October 2, 2019, when Mrs. Ramos—upon receiving a credit alert regarding a bankruptcy filing using her social security number—reached out to Mr. Le to ask why he filed a bankruptcy on her behalf, that Mr. Le realized that Mrs. Ramos had not authorized Mr. Santos to file the bankruptcy.[48] Mr. Le testified on numerous occasions, during both the November 18 hearing and the February 3 hearing, that he had only filed the bankruptcy Petition because he wanted to help Mr. Santos save his home.[49]

According to Mr. Le's profile on the State Bar of Texas's website, he has been licensed to practice law in Texas since May 1, 2009 and he has no public disciplinary history in the State of Texas or any other state.[50] Furthermore, according to the Bankruptcy Clerk's records, Mr. Le has filed 120 bankruptcy cases dating back to August 2010, nine of which remain active.

C. Mr. Santos's Testimony.

At the November 18 hearing, the Chapter 13 Trustee called Mr. Santos to testify second, after Mr. Le but before Mrs. Ramos. Mr. Santos's testimony reflects a story that does not comport with any of the other testimony heard in this case, including, importantly, the testimony of Mrs. Ramos—his ex-wife and the victim of his unscrupulous behavior. During examination, Mr. Santos represented that Mrs. Ramos had actually authorized the bankruptcy. [51]

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The court did not find this statement credible. He also stated that Mr. Le knew Mrs. Ramos and Mr. Santos were divorced from the outset. Mr. Santos's assertion that Mr. Le knew Cynthia Ramos was not Mr. Santos's wife is, perhaps, the only credible testimony Mr. Santos provided to the court. This is because in the very first line of one of the phony emails that Mr. Le received, the sender, purporting to be "Cynthia Santos," specifically identified Gabriel Santos as her "ex husband."[52]

Later, at the February 3 hearing, Mr. Santos was examined by the Chapter 13 Trustee again, and also by Mr. Bryant and by Ms. Parker. However, Mr. Santos asserted his Fifth Amendment privilege against self-incrimination in response to nearly every question asked of him, other than requests to identify himself or a document placed in front of him. Consequently, in making its findings of fact in this civil matter, the court can and does draw an adverse inference against Mr. Santos as to each question on which he invoked his Fifth Amendment privilege against self-incrimination.[53]

After hearing the testimony of Mrs. Ramos and Mr. Le, and considering the other evidence submitted by the Chapter 13 Trustee and the many adverse inferences drawn against Mr. Santos, the court finds that Mr. Santos's story was false and that he lacked all credibility as a witness. The court believes that Mr. Santos falsified the two emails and other documents in order to dupe Steve Le into helping him file a fictitious bankruptcy case, amounting to identity theft against his ex-wife, Cynthia Ramos. It is also likely that Mr. Santos perjured himself during his testimony at the November 18 hearing. As is discussed in more detail below, Mr. Santos's actions are grounds for civil sanctions and for criminal referral to the United States Attorney.[54]

D. Mrs. Ramos's Testimony.

Mrs. Ramos testified last at the November 18 hearing, following Mr. Le and Mr. Santos. She said that she had received a phone call from Mr. Santos on September 30, 2019, after having not heard from him in quite some time, and that Mr. Santos asked her to file bankruptcy to save the house they once shared (but which he now occupied). She responded to his request by saying, "[y]ou are out of your mind. I would never put my family in that situation."[55] She ended her conversation with Mr. Santos having reason to think that she was happy about the prospect of a foreclosure because she could finally sever her last tie to Mr. Santos.[56] Mrs. Ramos also testified that she and Mr. Santos had been divorced for ten years, since 2009.

Unfortunately, Mrs. Ramos received an email from Experian just two days later,

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on October 2, 2019, notifying her that there had been a change to her credit report because a Chapter 13 bankruptcy Petition had been filed under her social security number.[57] She immediately called the Bankruptcy Clerk's office and received Mr. Le's contact information as the attorney of record.[58] Then, she got in touch with Mr. Le and learned the details behind the bankruptcy filing.

Mrs. Ramos testified that, contrary to Mr. Santos's testimony, she was not out of town for a funeral on September 30, but was in Dallas, at work, easily reachable by phone.[59] Mrs. Ramos said that she did not recognize the email address on the two emails sent to Mr. Le on September 30, 2019 because she had not sent them, and that she did not recognize the purported profit and loss statement for a fictitious business that was attached to one of the emails.[60] Finally, during cross-examination by Mr. Bryant, Mrs. Ramos said that Mr. Le had done everything he possibly could to minimize the harm to her since the moment she notified him that she had not authorized the bankruptcy filing.[61]

The court finds the testimony of Mrs. Ramos to have been credible.

V. <u>CONCLUSIONS OF LAW</u>

A. The Bankruptcy Code Provisions and Rules that Mr. Le Violated.

The court concludes that in filing the unauthorized Voluntary Petition, Schedules, SOFA, Verification of Mailing, and other documents using Mrs. Ramos's social security number and former name, Mr. Le acted in bad faith and violated several Bankruptcy Code Provisions, Federal and Local Rules of Bankruptcy Procedure, as well as the ethical rules imposed by the Texas Disciplinary Rules of Professional Conduct ("TDRPC").

1. Mr. Le Violated 11 U.S.C. § 526.

Section 526 of the Bankruptcy Code restricts "debt relief agencies" from undertaking certain actions.[62] Under the Bankruptcy Code, a bankruptcy attorney falls within the definition of a "debt relief agency."[63] Subsection 526(a)(2) specifically prohibits a debt relief agency from making:

> ...any statement, or counsel or advise any assisted person or prospective assisted person to make a statement in a document filed in a case or proceeding under this title, that is untrue or misleading, or that upon the exercise of reasonable care, should have been known by such agency to be untrue or misleading[.][64]

Mr. Le violated 11 U.S.C. § 526(a)(2) in several manners:

> • As catalogued in the court's Findings of Fact, Mr. Le violated 11 U.S.C. § 526(a)(2) by making numerous untrue and misleading statements in the Voluntary Petition and its attachments, including the Schedules, the SOFA, and the Verification of Mailing, among others.
>
> • Moreover, the court concludes that Mr. Le's failure to exercise reasonable care caused him to make several

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> untrue statements that he should have known were untrue. Through reasonable care, he would have realized that the Purported Debtor, Mrs. Ramos, was not involved in the bankruptcy case being filed on her behalf and that it was Mr. Santos who took the credit counseling course and sent the two emails to Mr. Le. And the fact that Mr. Le forged the Purported Debtor's electronic signature at least six times constitutes a violation of 11 U.S.C. § 526(a)(2) for each forgery.

Mr. Le admitted throughout his testimony at the February 3 hearing that he was well aware Mrs. Ramos did not sign the documents or provide any information to him directly. Mr. Le testified that he either received the information used to complete the documents from Mr. Santos or made it up. In fact, Mr. Le admitted that the first time he actually spoke to Mrs. Ramos was when she called him on Wednesday, October 2, 2019—two days after he had already filed the Petition, Schedules, SOFA, and Verification of Mailing, containing a total of six forged electronic signatures in the aggregate.

2. Mr. Le Violated 11 U.S.C. § 527.

Section 527 of the Bankruptcy Code requires attorneys to make certain disclosures or take certain actions:

> • Attorneys must provide "clear and conspicuous written notice" advising the debtor that all information disclosed in the required filings and schedules must be "complete, accurate, and truthful" and that failure to comply may result in dismissal and/or sanctions;[65]
>
> • Attorneys must provide prospective debtors with a copy of the statement included in Section 527(b), which is intended to enable prospective debtors to make an informed decision whether or not to file;[66] and
>
> • Attorneys must either obtain accurate information that their debtor clients are required to disclose or supply their debtor clients with enough directions on

> how to acquire all the information that they need in order to file.[67]

Given that Mr. Le never actually met with Mrs. Ramos or spoke with her before using her social security number to file bankruptcy, he neglected to perform any of the duties Section 527 required him to perform. Mr. Le did not provide a clear and conspicuous statement to Mrs. Ramos. He did not obtain accurate and truthful information from her before he filed a bankruptcy Petition using her social security number. Consequently, Mr. Le's actions caused direct financial harm to Mrs. Ramos.

> It is imperative that an attorney ensure, prior to filing a bankruptcy petition, that a potential debtor understands all of the consequences of filing bankruptcy and the responsibilities of being a debtor in a bankruptcy case. An attorney must also ensure that a potential debtor, knowing and appreciating the consequences of filing a bankruptcy petition, has the present intention of filing bankruptcy.[68]

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For the foregoing reasons, court concludes that Mr. Le violated Section 527 of the Bankruptcy Code.

3. Mr. Le Violated 11 U.S.C. § 528.

Section 528 of the Bankruptcy Code governs retainer agreements formed between attorneys and their debtor clients.[69] Section 528 imposes certain requirements on attorneys regarding their retainer agreements, including:

> • Attorneys must execute a written contract ***with the debtor*** that explains clearly and conspicuously (A) the services to be provided and (B) the fees or charges for such services, including terms of payment;[70] and
>
> • Attorneys must then provide a "fully executed and completed contract" ***to the debtor*** .[71]

Mr. Le never formed a written contract with Mrs. Ramos before filing the Petition. He never even spoke with her before filing. Instead, Mr. Le accepted $3,500 in cash from Mr. Santos—whom Mr. Le had good reason to know was the Purported Debtor's ***ex-husband*** —and filed the bankruptcy Petition using Mrs. Ramos's social security number, furnished by Mr. Santos.[72] For the foregoing reasons, the court concludes that Mr. Le violated Section 528 of the Bankruptcy Code.

4. Mr. Le Violated Federal Rule of Bankruptcy Procedure 1008.

Federal Rule of Bankruptcy Procedure 1008 is a brief Rule, but it operates as a vitally important safeguard against fraudulent and unauthorized filings:

> All petitions, lists, schedules, statements and amendments thereto shall be verified or contain an unsworn declaration as provided in 28 U.S.C. § 1746.[73]

Rule 1008 has been interpreted to impose requirements on two parties: the debtor and the debtor's attorney.[74] Under Rule 1008, ***the debtor must sign*** "all petitions, lists, schedules, statements and amendments thereto" as a means of (i) authorizing the filing of the documents, (ii) verifying, under penalty of perjury, that the debtor has reviewed the information, and (iii) verifying that the information is "truthful and accurate to a degree that

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only the debtor [*herself*] could verify."[75] Additionally, under Rule 1008, ***an attorney*** "who files schedules and statements on a debtor's behalf ***makes a certification regarding the representations contained therein" —one***

which constitutes an "endorsement" formed after a reasonable inquiry .[76]

Mr. Le filed the Petition, Schedules, SOFA and more on behalf of Mrs. Ramos without first (a) making a reasonable inquiry (or any inquiry whatsoever) into the accuracy of the information, which he received primarily from Mr. Santos, or (b) obtaining Mrs. Ramos's wet signature. Had Mr. Le abided by his duties under Rule 1008, the bankruptcy Petition would never have been filed and Mrs. Ramos would never have suffered the financial harm she has credibly described. Mr. Le's actions violated Rule 1008.

5. Mr. Le Violated Federal Rule of Bankruptcy Procedure 5005.

Federal Rule of Bankruptcy Procedure 5005 is related to Rule 1008 and establishes the legal significance of making an electronic filing:

> (2) Electronic filing and signing
>
> ...
>
> (C) Signing. ***A filing made through a person's electronic-filing account*** and authorized by that person, together with that person's name on a signature block, ***constitutes the person's signature*** .
>
> (D) Same as a Written Paper. ***A paper filed electronically is a written paper for purposes of these rules*** , the Federal Rules of Civil Procedure made applicable by these rules, and § 107 of the Code.[77]

In other words, when an attorney files documents electronically in a bankruptcy case, he represents to the court and the world that he has "secured an originally executed petition [or other document] ***physically signed by the debtor prior to electronically filing*** the case [or document]."[78] Mr. Le admitted in his testimony that he did not obtain an original, physical signature from Mrs. Ramos before he electronically signed "/s/ Cynthia Santos" at least six times in the documents filed with this court on September 30, 2019. Thus, Mr. Le violated Rule 5005 by intentionally misrepresenting that he had secured original, physical documents ***signed by Mrs. Ramos*** prior to electronically filing the Petition and other documents.

6. Mr. Le Violated Federal Rule of Bankruptcy Procedure 9011.

Rule 9011 is a fundamental rule in protecting the integrity of the bankruptcy courts. It establishes guidelines governing the signing of papers filed with the court, representations made to the court, and the parameters of sanctions that may be imposed on parties or counsel who violate Rule 9011.[79] Judge Woodard neatly summarized Rule 9011, subsection (b) as follows:

> by presenting a signed petition to the court, an attorney certifies to the court that to the best of the attorney's knowledge,

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> formed after reasonable inquiry, that (1) the petition is not being presented for an improper purpose; (2) that the legal contentions therein are warranted by existing law; (3) that the allegations and factual contentions have evidentiary support; and (4) the denials of factual contentions are warranted.[80]

Furthermore, Subsection (c) of Rule 9011 empowers the court, upon a motion of a party-in-interest or upon the court's own initiative, to impose sanctions on those who violate Rule 9011.[81] Lastly, in determining whether a person violated Rule 9011, the court does not need to find bad faith; rather, the court needs to find only that the conduct was "objectively unreasonable ... under the circumstances."[82]

The court concludes that Mr. Le's filing of falsified documents was objectively unreasonable and that his willful violations were an abuse of the judicial process, despite his purported motive of simply wanting to help save a house. Specifically:

- It was objectively unreasonable under the circumstances for Mr. Le to believe that Mr. Santos could file a voluntary Petition on behalf of his ex-wife, Mrs. Ramos.[83] Mr. Santos quite likely committed one or more crimes, including identity theft and bankruptcy fraud, when he used his ex-wife's social security number to file bankruptcy without her authorization, and Mr. Le enabled Mr. Santos's behavior. That Mr. Le may have been well-intentioned does not absolve him of responsibility for his unethical actions.

- It was objectively unreasonable under the circumstances for Mr. Le to file Schedules, a SOFA and a Statement of Current Monthly Income with falsified information and/or forged signatures on September 30, 2019. Federal Rule of Bankruptcy Procedure 1007(c) affords debtor's counsel fourteen (14) days from the Petition date to file these required documents.[84] Mr. Le learned from Mrs. Ramos herself that the bankruptcy was unauthorized a mere ***two days*** after filing the Petition. Therefore, Mr. Le could have avoided committing multiple forgeries and making additional misrepresentations to the court had he simply waited to speak with Mrs. Ramos before filing anything other than the Petition.

- It was objectively unreasonable under the circumstances for Mr. Le to neglect his duty to perform a reasonable investigation or inquiry regardless of the imminent foreclosure, or any other exigent circumstances, he may have sought to prevent.[85]

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- It was objectively unreasonable under the circumstances for Mr. Le to make no effort whatsoever to verify the accuracy of the information with the Purported Debtor.[86]

- Mr. Le further violated Rule 9011 by forging the Purported Debtor's signature at least six times in documents filed with the court and, thus, misrepresenting to the court that "the allegations and other factual contentions have evidentiary support."[87]

Mr. Le's actions were objectively unreasonable on several grounds and, for the foregoing reasons, the court concludes that Mr. Le violated Rule 9011.

7. Mr. Le Violated the Texas Disciplinary Rules of Professional Conduct (the "TDRPC").

The court concludes that Mr. Le violated other rules governing the practice of bankruptcy law, beyond the Bankruptcy Code and Federal Rules of Bankruptcy Procedure. For instance, when considering attorney misconduct and Rule 9011 violations, a bankruptcy court may also take into consideration the rules of professional conduct of the state in which the court sits.[88] Some of the applicable TDRPC are as follows:

- Rule 1.01. Competent and Diligent Representation—prohibiting lawyers from "frequently fail[ing] to carry out completely the obligations that the lawyer owes to a client or clients."[89] In this odd fact scenario before the court, it is hard to define who should be defined as the real client of Mr. Le. However, having listed Cynthia Santos as the debtor on the Voluntary Chapter 13 Petition that he filed and his purported client, Mr. Le owed an ethical duty to competently and diligently represent her interests. Yet, every action he took before learning that the bankruptcy was unauthorized was an utter failure of his duties.

• Rule 1.02. Scope and Objectives of Representation—prohibiting a lawyer from assisting a client to engage in conduct that the lawyer knows is criminal or fraudulent and requiring a lawyer to "promptly make reasonable efforts ... to dissuade the client from committing the crime or fraud."[90] Mr. Le, having seemingly accepted Mr. Santos as a client, should have heeded the red flags regarding this unauthorized bankruptcy filing and counseled Mr. Santos on the consequences of bankruptcy fraud, perjury, and identity theft. He did not. Instead, Mr. Le enabled Mr. Santos to engage in potentially criminal behavior.

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• Rule 1.03. Communication—requiring a lawyer to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."[91] Mr. Le failed yet another duty that he owed to Mrs. Ramos—his duty counsel her to enable her to make an informed decision as to whether ***she*** , not Mr. Santos, wanted to file a bankruptcy Petition with her name and social security number on it.

• Rule 3.03. Candor Toward the Tribunal—prohibiting a lawyer from knowingly making a false statement of material fact or law, failing to disclose a fact to the tribunal when disclosure is necessary to avoid a criminal or fraudulent act, offering or using evidence that the lawyer knows to be false, and failing to make a good faith effort to persuade the client to authorize the lawyer to correct or withdraw the false evidence when the lawyer comes to know of its falsity.[92] The court does not need to repeat the myriad misrepresentations Mr. Le intentionally made in the documents he filed with this court on September 30, 2019, each of which constitutes a violation of Rule 3.03.[93]

Before a law student or other prospective licensee can become eligible to practice law in the state of Texas, the state requires them to take a Professional Responsibility course in law school and pass the Multistate Professional Responsibility Examination (which tests the students' understanding of model rules nearly identical to those published by the State Bar of Texas). No attorney, including Mr. Le, can be excused from violating these fundamental, basic rules—for any reason.

8. Local Bankruptcy Rule 2090-2(b) Authorizes this Court to Discipline Mr. Le for Unethical Behavior and Failure to Comply with Other Rules.

Finally, Local Rule 2090-2(b) permits a "Presiding Judge, after giving opportunity to show cause to the contrary, to take ***any*** appropriate disciplinary action against a member of the bar for:

(1) conduct unbecoming a member of the bar;

(2) failure to comply with any rule or order of the Bankruptcy Court; [or]

(3) unethical behavior ..."[94]

Furthermore, the Local Rules define "unethical behavior" as "conduct undertaken in or related to a case or proceeding in this court that violates the Texas Disciplinary Rules of Professional Conduct."[95] And, as just discussed, Mr. Le violated the TDRPC. Thus, there are at least three grounds stated in the Local Rules upon which this court may take disciplinary action against Mr. Le as a member of the Northern District of Texas bar.

B. Sanctions to be Imposed on Mr. Le: Indefinite Suspension, Disgorgement of Fees, and Additional Ethics CLE.

1. A Note on the Case Law this Court Considered.

At the February 3 hearing, Mr. Le's counsel presented to the court a well-reasoned

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Memorandum Opinion from the Southern District of Texas from a case called *In re Stomberg* .[96] In the opinion, the court ordered a Chapter 11 debtor's attorney named Braun to appear and show cause why he should not be sanctioned for electronically filing certain Schedules and a SOFA without first obtaining the debtor's original signatures (*i.e.* by forging the debtor's electronic signature).[97] The court found that Braun had violated numerous Bankruptcy Code Provisions and Rules, but the court ultimately limited sanctions to the monetary variety, declining to disbar or suspend Braun despite multiple instances of ethical violations and disciplinary reviews.[98] Mr. Le's counsel argued that, in this case, should Mr. Le face sanctions, they should be limited to monetary sanctions because it would be inappropriate to suspend or disbar Mr. Le (who, until now, has had a clean disciplinary record)—noting that in *In re Stomberg* , the court refused to disbar or suspend Braun, a repeat offender.[99] Mr. Bryant's reliance on *In re Stomberg* is misplaced. Whereas Braun faced sanctions for forging the debtor's signature on Schedules and the SOFA, ***but not on the Petition, which the debtor had voluntarily signed*** , here, ***Mr. Le forged the Purported Debtor's signature on the Petition*** , initiating a bankruptcy that never should have happened in the first place.[100] There is a ***notable difference*** between forging signatures on Schedules in a bankruptcy case that the debtor has already authorized and forging a signature on a Petition to file an unauthorized bankruptcy case. For that reason, this court chose not to follow *In re Stomberg* in considering the appropriate sanctions to impose on Mr. Le.

On the other hand, the court found Judge Jason Woodard's comprehensive, well-reasoned Memorandum Opinion in *In re Dobbs* instrumental in guiding the court's analysis here.[101] *In re Dobbs* involved facts that were similar to the facts now before this court—Judge Woodard ordered an attorney, Labovitz, to show cause why he should not be sanctioned after Labovitz ***forged a former client's signature on a Voluntary Chapter 13 Petition*** and filed a case in the Purported Debtor's name without notice to and without authorization from the Purported Debtor.[102] After conducting an evidentiary hearing and finding that Labovitz had intentionally violated many of the same provisions and rules that this court believes Mr. Le intentionally violated, Judge Woodard permanently disbarred Labovitz from the practice of law in the Bankruptcy Court for the Northern District of Mississippi.[103] And while the court does not believe that Mr. Le should be permanently disbarred because his conduct does not rise to the level of Labovitz's, the court does believe suspension is appropriate, in addition to monetary

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sanctions and court-ordered ethics training.

2. Indefinite Suspension, Disgorgement of Fees, and Ethics CLE are Appropriate.

After hearing Mr. Le's contrite testimony, it is clear to the court that he had some well-meaning intentions: Mr. Le sought to help Mr. Santos and he never wished to hurt Mrs. Ramos. But the many Rules and Bankruptcy Code Provisions that Mr. Le shirked were put into place to protect lawyers, their clients, and innocent third parties alike. By failing to adhere to those rules, Mr. Le helped perpetuate a financial cataclysm in the life of Mrs. Ramos.[104]

The court expects Mr. Le—and, indeed, ***all attorneys*** —to know the rather obvious truism that ***forging a debtor's signature and presenting it to the court as if it were an authentic signature is never reasonable, under any circumstances*** . The Bankruptcy Clerk's records show that Mr. Le has filed 120 bankruptcy cases since 2010, a year after he was licensed to practice law in Texas, and that he currently has nine active bankruptcy cases in the Northern District of Texas. Mr. Le is not an inexperienced bankruptcy practitioner. On the contrary, he is highly experienced. He should have appreciated the risk he accepted when he decided to file a Bankruptcy Petition using the social security number of somebody he had never met. Unfortunately for everyone, the risk materialized, and now Mr. Le must face the consequences. The court must be vigilant in protecting innocent people like Mrs. Ramos from what amounts to identity theft in bankruptcy. Sanctioning the lawyers who facilitate it, regardless of their alleged well-meaning intentions, is one of the only tools the court has at its disposal to prevent this kind of reckless behavior from reoccurring. Accordingly, for the foregoing reasons, it is

ORDERED, ADJUDGED and **DECREED** that Steve Le is hereby **SUSPENDED FROM THE PRACTICE OF LAW** in the United States Bankruptcy Court for the Northern District of Texas effective **March 17, 2020** , at which time the Clerk of the Bankruptcy Court is directed to terminate Mr. Le's CM/ECF privileges. Within seven (7) days of the date of entry of this Order, Mr. Le shall give notice to each of his clients with cases or adversary proceedings pending in this court of his inability to act as an attorney in the bankruptcy court. The notice shall advise his clients to promptly substitute another attorney in his place, otherwise they will be proceeding *pro se* . Mr. Le shall do everything within his power to facilitate the transition of his live cases to new counsel, including, but not limited to, transmission of electronic and paper documents, or face additional sanctions. The Bankruptcy Clerk is further directed to provide notice of Mr. Le's inability to practice law in this court to all parties listed on the matrices for any pending cases and adversary proceedings in which Mr. Le is an attorney of record. Mr. Le may petition the Chief Judge of the Bankruptcy Court for the Northern District of Texas for reinstatement after a period of **TWO YEARS** from the entry date of this Order, at which time the presiding Chief Judge may conduct a hearing to consider reinstatement. Notice of that hearing will be provided to the United States Trustee, the Chapter 13 Trustee, and to such other parties as the court deems appropriate. It is further

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ORDERED, ADJUDGED and **DECREED** that Steve Le is hereby **PROHIBITED** from filing any new bankruptcy cases in this court effective immediately upon entry of this Order. Additionally, because of the ethical violations Mr. Le committed, the court believed he requires additional continuing legal education. Thus, it is further

ORDERED, ADJUDGED and **DECREED** that Steve Le shall, within the next 12 months, attend 15 hours of ethics continuing legal education, in addition to the standard requirements imposed by the State of Texas. Mr. Le shall provide proof of such attendance to the court *in camera* no later than **March 17, 2021** . Finally, it is further

ORDERED, ADJUDGED and **DECREED** that Steve Le shall pay $3,500 to Cynthia Ramos, the victim in this case, representing the disgorgement of the fee Mr. Le received from Mr. Santos. This sanction shall be paid in full to Mrs. Ramos within thirty (30) days of the entry of this Order. This sanction is not punitive but is the appropriate measure to deter Mr. Le and other attorneys that practice before this court from repeating such disturbing, reckless conduct in the future.

C. Sanctions to be Imposed on Mr. Santos: Ten-Year Bar on Filing Bankruptcy; Criminal Referral to the United States Attorney.

After considering all the evidence, the court found that Gabriel Santos not only abused the bankruptcy system but also manipulated Steve Le into assisting Mr. Santos in what appears to be a scheme to commit bankruptcy fraud and identity theft against his ex-wife, Cynthia Ramos. Bankruptcy fraud is a crime:

> A person who, having devised or intending to devise a scheme or artifice to defraud and for the purpose of executing or concealing such a scheme or artifice or attempting to do so—
>
> (1) files a petition under title 11, including a fraudulent involuntary petition under section 303 of such title;
>
> (2) files a document in a proceeding under title 11; or
>
> (3) makes a false or fraudulent representation, claim, or promise concerning or in relation to a proceeding under title 11, at any time before or after the filing of the petition, or in relation to a proceeding falsely asserted to be pending under such title,
>
> shall be fined under this title, imprisoned not more than 5 years, or both.[105]

It is likewise a crime to commit perjury in a Title 11 proceeding and falsify documents in contemplation of filing a bankruptcy case under Title 11:

> A person who—
>
> ...
>
> (2) knowingly and fraudulently makes a false oath or account in or in relation to any case under title 11;
>
> (3) knowingly and fraudulently makes a false declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, in or in relation to any case under title 11; [or]
>
> ...
>
> (8) after the filing of a case under title 11 or in contemplation thereof, knowingly and fraudulently ... falsifies, or makes a false entry in any recorded information (including books, documents, records, and papers) relating to the property or financial affairs of a debtor ...

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> shall be fined under this title, imprisoned not more than 5 years, or both.[106]

Therefore, in light of Mr. Santos's apparent scheme to defraud the court, Mr. Le, Mrs. Ramos, and the mortgagee of his house, and in light of Mr. Santos's false oaths or representations in a proceeding under Title 11, the court will be making a criminal referral to the United States Attorney. Finally, apart from the criminal referral, it is also hereby

ORDERED, ADJUDGED and **DECREED** that Gabriel Santos shall be prohibited from filing bankruptcy for a period of ten years from the entry date of this Order.

Notes:

[1] "Cynthia Santos" is the name listed as the debtor in the Voluntary Chapter 13 Petition and other documents filed with the court. Cynthia Santos is the former name of Cynthia Ramos, the victim of an apparent bankruptcy fraud in this case. As described herein, Mrs. Ramos never intended to file bankruptcy, so she is not a debtor—she is a "Purported Debtor." Furthermore, out of respect for Mrs. Ramos, this court will refer to her in this Memorandum Opinion and Order either by her actual name, Mrs. Ramos, or as the "Purported Debtor," but not by the former name that was forged on the documents filed with the court.

[2] For reasons that are immaterial to this court's analysis, Mrs. Ramos's name was still on the bank note for Mr. Santos's house, despite their having divorced more than a decade earlier in 2009.

[3] Case No. 19-33256-sgj13, Docket No. 1. Herein, docket entries will be cited as "ECF [#]" because all docket entries relate to the same bankruptcy case and are, at this point, accessible through the CM/ECF system.

[4] ECF 2.

[5] ECF 3.

[6] ECF 9.

[7] ECF 10.

[8] ECF 11.

[9] ECF 9. Herein, the court will refer to the hearing held on November 18, 2019 as the "November 18 hearing."

[10] Neither Mrs. Ramos nor Mr. Santos were represented by counsel at the November 18 hearing. However, by this point, Mr. Le had already taken it upon himself to try and undo the unauthorized bankruptcy in order to help Mrs. Ramos and Mrs. Ramos was aware of Mr. Le's intent.

[11] *See In re Dick* , Case No. 05-80347-BJH13, 2006 WL 6544157, at *5 n. 3 (Bankr. N.D. Tex. May 19, 2006) ("The Court is also hesitant to order expunction, as its practical effect would be to destroy evidence of conduct which may be criminal.").

[12] ECF 25.

[13] The court reserved jurisdiction post-dismissal to address the issues raised in the Chapter 13 Trustee's Motion.

[14] ECF 23. Herein, the court will refer to the hearing held on February 3, 2020 as the "February 3 hearing."

[15] The court recognizes that Mr. Le never challenged whether notice of the show cause hearing was proper against him. In fact, Mr. Le attended both the November 18 hearing and the February 3 hearing—both times represented by separate counsel. Thus, Mr. Le has been afforded complete due process under the law in this matter.

[16] Under Fifth Circuit law, a court may take judicial notice of (a) prior court proceedings as a matter of public record; (b) its own records; (c) related proceedings and records in cases before that court; and (d) all documents filed with the court in the bankruptcy case. *See In re Deepwater Horizon* , 934 F.3d 434, 440 (5th Cir. 2019) ; *State of Fla. Bd. of Trustees of Internal Imp. Tr. Fund v. Charley Toppino & Sons, Inc.* , 514 F.2d 700, 704 (5th Cir. 1975) ; *Sherman v. Greenstone Farm Credit Services, ACA* , Case No. 3:11-CV-0710-N, 2011 WL 2038573, at *3 n. 6 (N.D. Tex. May 24, 2011) ; *In re Texas Rangers Baseball Partners* , 521 B.R. 134, 142 n. 13 (Bankr. N.D. Tex. 2014).

[17] *See* Case No. 19-30455-HDH13, Docket No. 27. The 180-day bar prevented Mr. Santos from refiling bankruptcy until late-October—well past the October 1 foreclosure date.

18 ECF 31 at 7:15-16 (emphasis added). The court interrupted Mr. Le's testimony to clarify whether Mr. Santos truly said "ex-wife" and when exactly Mr. Le learned that Mrs. Ramos was no longer married to Mr. Santos, but Mr. Le could not provide a straightforward answer, instead asserting that he was unsure of their marital status because Mr. Santos referred to Mrs. Ramos as his wife in text messages. *See id.* at 7:17-8:13. To the contrary, Mr. Santos testified that he had always referred to Cynthia Ramos as his ex-wife when speaking with Mr. Le. *Id.* at 16:19-25.

19 *Id.* at 9:8-13.

20 *Id.*

21 *See id.* at 9:14-11:7. The two emails were sent from the same email address: cynthiasantos1029@yahoo.com. Copies of the two emails were marked as Exhibits 1 and 2, respectively, and admitted into evidence at the November 18 hearing. The Chapter 13 Trustee also presented the emails as Exhibits 2 and 3 in its argument at the February 3 hearing.

22 *See* Exhibit 2 (emphasis added), Chapter 13 Trustee's Witness and Exhibit List for the February 3, 2020 hearing.

23 *See* ECF 31 at 11:9-23.

24 *Id.*

25 *See Id.* at 11:24-12:7.

26 Audio Recording, 2/3/2020 Hearing at 10:28:17 a.m.

27 Audio Recording, 2/3/2020 Hearing at 10:29:23 a.m.

28 Audio Recording, 2/3/2020 Hearing at 10:54:00 a.m.; ECF 1 at 41 (*i.e.* the Voluntary Petition, which was marked as Chapter 13 Trustee's Exhibit 1 at the February 3 hearing).

29 Audio Recording, 2/3/2020 Hearing at 10:29:55 a.m.; ECF 1 at 1. Mrs. Ramos's social security number is also included on the Verification of Mailing List form attached to the Petition. ECF 1 at 42.

30 Audio Recording, 2/3/2020 Hearing at 10:30:12 a.m.; ECF 1 at 2.

31 Audio Recording, 2/3/2020 Hearing at 10:31:30 a.m.; ECF 1 at 4.

32 Audio Recording, 2/3/2020 Hearing at 10:33:17 a.m.; ECF 1 at 6.

33 Audio Recording, 2/3/2020 Hearing at 10:33:42 a.m.; ECF 1 at 7.

34 Audio Recording, 2/3/2020 Hearing at 10:35:50 a.m.; ECF 1 at 11.

35 Audio Recording, 2/3/2020 Hearing at 10:36:38 a.m.; ECF 1 at 11.

36 Audio Recording, 2/3/2020 Hearing at 10:37:28 a.m.; ECF 1 at 12.

37 Audio Recording, 2/3/2020 Hearing at 10:40:50 a.m.; *see also* Fed. R. Bankr. P. 1007(c).

38 Audio Recording, 2/3/2020 Hearing at 10:42:49 a.m.; ECF 1 at 21.

39 Audio Recording, 2/3/2020 Hearing at 10:43:35 a.m.; ECF 1 at 22-23.

40 Audio Recording, 2/3/2020 Hearing at 10:44:11 a.m.; ECF 1 at 25.

41 Audio Recording, 2/3/2020 Hearing at 10:46:00 a.m.; ECF 1 at 26.

42 Audio Recording, 2/3/2020 Hearing at 10:46:29 a.m.; ECF 1 at 27.

43 Audio Recording, 2/3/2020 Hearing at 10:50:25 a.m.; ECF 1 at 28.

44 Audio Recording, 2/3/2020 Hearing at 10:52:42 a.m.; ECF 1 at 33.

45 Audio Recording, 2/3/2020 Hearing at 10:53:40 a.m.; ECF 1 at 36.

46 Audio Recording, 2/3/2020 Hearing at 10:54:51 a.m.; ECF 1 at 42-43.

47 Audio Recording, 2/3/2020 Hearing at 10:55:45 a.m.; *see also* Fed. R. Bankr. P. 1007(c).

48 *See* ECF 31 at 8:5-12.

49 *See, e.g.* , *id.* at 12:5-7.

50 State Bar of Texas, Profile of Attorney Steve Le (License No. 24067723), https://www.texasbar.com/AM/Template.cfm?Section=Find_A_Lawyer&template=/Customsource/MemberDirectory/MemberDirectoryDetail.cfm&ContactID=307541, accessed 2/6/2020 at 4:12 p.m.

51 ECF 31 at 15:13-17:10.

52 *See* discussion *supra* Section III.B. Mr. Le testified that he decided to file bankruptcy at least partially because of these phony emails, so he must have known Gabriel Santos was no longer married to the Purported Debtor before he filed the Petition. Regardless, the court finds that nearly every other statement Mr. Santos made at the November 18 hearing to be a lie and in direct contradiction to the facts of this case and the testimonies of Mrs. Ramos and Mr. Le.

53 It is well settled that the court may draw an adverse inference from Mr. Santos's refusal to testify in response to each line of questioning. *See e.g.* , *In re Binnion* , Case No. 13-30234, 2014 WL 1047858, at *9 (Bankr. S.D. Tex. Mar. 18, 2014) (citing *Baxter v. Palmigiano* , 425 U.S. 308, 318, 96 S.Ct. 1551, 47 L.Ed.2d 810 (1976)).

54 *See* discussion *infra* Section IV.C.

55 ECF 31 at 26:13-25. *Id.* at 25:10-27:15.

56 *See id.* at 30:20-31:1.

57 *Id.* at 31:2-16.

58 *Id.* at 31:17-32:5.

59 *Id.* at 25:23-26:8.

60 *Id.* at 32:7-25.

61 *Id.* at 33:11-2

62 *See In re Dobbs* , 535 B.R. 675, 683 (Bankr. N.D. Miss. 2015).

63 *See id.* (citing 11 U.S.C. § 101(12A)).

64 11 U.S.C. § 526(a)(2) (West 2019).

65 *Id.* § 527(a)(2). As discussed in this Memorandum Opinion *supra* Section IV.A.1., attorneys fall within the term "debt relief agency" as it is defined in the Bankruptcy Code.

66 *See id.* § 527(b).

67 *See id.* § 527(c).

68 *In re T.H.* , 529 B.R. 112, 139 (Bankr. E.D. Va. 2015).

69 *See* 11 U.S.C. § 528 (West 2019).

70 *See id.* §§ 528(a)(1)(A), (B).

71 *See id.* § 528(b).

72 *See* discussion *supra* Section III.B.; *see also* ECF 31 at 12:3-7.

73 Fed. R. Bankr. P. 1008. The cross-referenced declaration found in 28 U.S.C. § 1746. Unsworn declarations under penalty of perjury is as follows:

Wherever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form:

> (1) If executed without the United States: "I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date). (Signature)".
>
> (2) If executed within the United States, its territories, possessions, or commonwealths: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature)".

28 U.S.C. § 1746 (West 2019).

74 *See In re Dobbs* , 535 B.R. at 685-86.

75 *See id.* (citing *Briggs v. LaBarge (In re Phillips)* , 317 B.R. 518, 523 (8th Cir. BAP 2004)).

76 *See id.* (citing *In re Withrow* , 405 B.R. 505, 512 (1st Cir. BAP 2009)).

77 Fed. R. Bankr. P. 5005(a)(2).

78 *See In re Dobbs* , 535 B.R. at 686 (emphasis added) (quoting *In re Wenk* , 296 B.R. 719, 724 (Bankr. E.D. Va. 2002)).

79 *See* Fed. R. Bankr. P. 9011 ; *see also In re Dobbs* , 535 B.R. at 686-88 (discussing violations of Fed. R. Bankr. P. 9011).

80 *In re Dobbs* , 535 B.R. at 686.

81 Fed. R. Bankr. P. 9011(c).

82 *See In re Dobbs* , 535 B.R. at 686-87 (quoting *In re Taylor* , 655 F.3d 274, 282 (3d Cir. 2011) ; *Bus. Guides, Inc. v. Chromatic Commc'ns Enter., Inc.* , 498 U.S. 533, 551, 111 S.Ct. 922, 112 L.Ed.2d 1140 (1991)).

83 As noted by Judge Woodard, "only the prospective debtor may file a bankruptcy petition on his or her own behalf. Pursuant to 11 U.S.C. § 301(a), a voluntary case ‘is commenced by the filing with the bankruptcy court of a petition under such chapter ***by*** an entity that may be a debtor under such chapter’ ... By their very nature, ***voluntary*** bankruptcy cases must be undertaken on the debtor's ***own volition*** ." *In re Dobbs* , 535 B.R. at 687 (emphasis added).

84 Fed. R. Bankr. P. 1007(c).

85 "[T]he fact that a client's home is scheduled for imminent foreclosure does not excuse the reasonable inquiry requirement of Rule 9011(b)." *In re Dobbs* , 535 B.R. at 688 (quoting *In re Tran* , No. 14-11837, 2014 WL 5421575, at *7 (Bankr. E.D. Va. Oct. 17, 2014)); *see also In re T.H.* , 529 B.R. at 128 ("The Court does not consider even the most exigent of circumstances as a justification for an attorney to disregard or ignore the duties of care and due diligence ...").

86 "There can be no ‘inquiry reasonable under the circumstances’ where the attorney has not met with the client prior to filing the petition." *In re Dobbs* , 535 B.R. at 688 (quoting *In re Tran* , 2014 WL 5421575, at *7).

87 *Id.* (citing Fed. R. Bankr. P. 9011(b)(3)); *see also In re Phillips* , 317 B.R. at 524 (holding that "the petition [the attorney] filed did not have the debtor's original signature and therefore lacked a verification of the facts. With no verification, the factual contentions have no evidentiary support and thus the petition violate[d] Rule 9011(b)(3).").

88 *In re Dobbs* , 535 B.R. at 689 (citing *In re Zuniga* , 332 B.R. 760, 772 (Bankr. S.D. Tex. 2005)).

89 TX ST RPC Rule 1.01(b)(2).

90 TX ST RPC Rule 1.02(c), (d) and (e).

91 TX ST RPC Rule 1.03(b).

92 TX ST RPC Rule 3.03(a)(1), (2), (5) and Rule 3.03(b).

93 *See* Discussion *supra* Section III.B.

94 N.D. Tex. L.B.R. 2090-2(b)(1)-(3).

[95] N.D. Tex. L.B.R. 2090-2(d).

[96] 487 B.R. 775 (Bankr. S.D. Tex. 2013).

[97] *Id.* at 780.

[98] *See id.* at 822-24.

[99] *See id.* ; *see also* Audio Recording, 2/3/2020 Hearing at 12:22:00: p.m.

[100] *See In re Stomberg* , 487 B.R. at 784 ("On December 23, 2010, the Debtor went to the Firm's office and met with Braun ... One purpose of the meeting was for the Debtor to sign the Chapter 11 petition (the Petition), which he in fact did ... Then, Braun electronically filed the 'barebones' Petition, ***which both he and the Debtor had signed*** , initiating the Debtor's Chapter 11 case. [Doc. No. 1]. By signing the Petition as counsel for the Debtor, Braun became the attorney-in-charge of the Debtor's case.").

[101] 535 B.R. 675 (Bankr. N.D. Miss. 2015).

[102] *Id.* at 678-79.

[103] *Id.* at 699

[104] "The road to hell is paved with good intentions." Henry G. Bohn, A Handbook of Proverbs , 514 (London, 1st ed. 1855).

[105] 18 U.S.C. § 157 (West 2019).

[106] 18 U.S.C. § 152 (West 2019).

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405 B.R. 505
Daryl WITHROW, Debtor.
Francis Lafayette, Appellant,
v.
Joseph B. Collins, Chapter 7 Trustee, and Phoebe Morse, United States Trustee, Appellees.
BAP No. MW 08-055.
Bankruptcy No. 07-41243-HJB.
United States Bankruptcy Appellate Panel of the First Circuit.
May 26, 2009.

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Francis Lafayette, pro se, on brief for Appellant.

Joseph B. Collins, on brief for Appellee, Joseph B. Collins, Chapter 7 Trustee.

Ramona D. Elliot, and P. Matthew Sutko, on brief for Appellee, Phoebe Morse, United States Trustee.

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Before VAUGHN, KORNREICH, and TESTER, United States Bankruptcy Appellate Panel Judges.

TESTER, U.S. Bankruptcy Appellate Panel Judge.

Francis Lafayette ("Attorney Lafayette") appeals from the bankruptcy court's order (the "Sanctions Order") imposing monetary sanctions against him for violating Bankruptcy Rule 9011 and §§ 707(b)(4)(C) and (D).[1] Attorney Lafayette argues that the alleged errors in the Debtor's bankruptcy schedules, statement of financial affairs, and other documents were due to the Debtor's "memory failure" rather than his own actions (or inactions), and, therefore, he did not violate Bankruptcy Rule 9011. For the reasons set forth below, we **AFFIRM.**

BACKGROUND

Attorney Lafayette filed a skeleton chapter 13 petition on behalf of the debtor, Daryl Withrow (the "Debtor"). Less than two weeks later, the Debtor converted his case to chapter 7. Thereafter, he filed the Debtor's schedules, statement of financial affairs, and Official Form B 22A. He also filed the Debtor's Rebuttal of Presumption of Abuse (the "Rebuttal"), wherein the Debtor sought to counteract the presumption of abuse otherwise suggested by the calculations on Form B 22A and preserve his discharge due to "special circumstances." Specifically, the Debtor noted that his average monthly income of $5,333.33 (as set forth on Form B 22A) was based on overtime that he no longer received, and that his actual average monthly income was $4,000.00. In addition, the Debtor claimed that he now needed to provide monthly support of $100 to his mother due to a stroke she suffered after the filing of the Debtor's Chapter 13 case.

The chapter 7 trustee (the "Trustee") filed a response to the Rebuttal (the "Rebuttal Response"), asserting that the Rebuttal was "false and misleading" for several reasons. First, the Trustee noted that the Debtor's Form B 22A did not list average monthly income of $5,333.33; rather, the average monthly income actually reported was $4,834.22. Second, recent pay stubs for postpetition work revealed that the Debtor was still receiving overtime pay. Third, the Trustee claimed that the Debtor's mother suffered a stroke *prior* to and not *after* the filing of his case.

Thereafter, Attorney Lafayette filed an interim application for compensation (the "Fee Application"), requesting professional fees of $1,195.00.[2] The Trustee objected. After repeating the concerns set forth in his Rebuttal Response, the Trustee asserted that because the Debtor testified at the § 341 meeting that he had "fully and truthfully" informed Attorney Lafayette of the facts and circumstances related to the schedules, statement of financial affairs, and the Rebuttal, the Trustee concluded that any errors were Attorney Lafayette's fault, and, therefore, the compensation should be denied. The U.S. Trustee also objected to Attorney Lafayette's Fee Application, adopting the reasons proffered by the Trustee.

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The Debtor filed an affidavit seeking to clarify the discrepancies raised by the Trustee in his objection to the Fee Application. Among other things, the Debtor stated that his failure to list all of his bank accounts on his schedules and statement of financial affairs was due to his own forgetfulness. He also restated his commitment to provide financial support to his mother.

At a hearing on the Fee Application, the Trustee and Attorney Lafayette proposed a "settlement" in which Attorney Lafayette would pay the Trustee $1,000.00 to compensate him for time and expenses incurred due to Attorney Lafayette's errors in this case. The U.S. Trustee did not object to the proposed settlement. The bankruptcy court did not approve the settlement, however, suggesting that a Bankruptcy Rule 9011 sanction might be more appropriate. Attorney Lafayette objected to the imposition of a sanction and requested an evidentiary hearing on the matter. The bankruptcy court then entered a show cause order ("Show Cause Order") to provide Attorney Lafayette with the evidentiary hearing he requested.

In the meantime, the Trustee filed an affidavit citing additional concerns with the Debtor's schedules and statement of financial affairs. Among other things, he noted that the Debtor's schedules failed to exempt the equity in either the Debtor's residence or his automobile, and that although Attorney Lafayette promised at the § 341 meeting to amend the schedules, he had not done so. In addition, the Trustee restated his concerns about the discrepancies between the Debtor's schedules, statement of financial affairs and his testimony at the § 341 meeting regarding his mother, his income and his overtime pay.

In a responsive affidavit ("Response Affidavit"), the Debtor claimed, among other things, that his schedules had been amended to accurately reflect the true value of his residence and vehicle.[3] He also continued to deny that he received overtime pay, and stated, for the first time, that certain medication caused him to make mistakes when answering questions.

Three days later, the bankruptcy court held an evidentiary hearing as set forth in the Show Cause Order. At the hearing, Attorney Lafayette admitted that the schedules were erroneous because they did not include an exemption for the Debtor's residence or his vehicle, that he told the Trustee at the § 341 meeting that he intended to amend the schedules, and that he helped the Debtor prepare his Response Affidavit which stated that the amended schedules had been filed when, in fact, they were not filed until *after* the filing of the Debtor's Response Affidavit. Attorney Lafayette also testified that the omission of open or recently closed bank accounts on the schedules and statement of financial affairs was due to the Debtor's forgetfulness, which he claims was justified because the accounts had minimal balances.

When questioned about discrepancies between the Debtor's Rebuttal and his actual Form B 22A regarding the Debtor's average current monthly income, Attorney Lafayette admitted that he had made a mistake, but was unable to explain why or elaborate further. In addition, when questioned about discrepancies between the Debtor's Schedule J, which provided that the Debtor had no reason to anticipate a reduction in income, and his Rebuttal, which provided that the Debtor would

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have less income due to support provided to his mother, Attorney Lafayette testified that the omission was due to the fact that the Debtor did not provide monetary support to his mother at the start of the case. This testimony, however, was inconsistent with the Debtor's affidavit wherein he stated that he began providing support to his mother months before filing his case.

On July 3, 2008, the bankruptcy court issued a Memorandum of Decision concluding that Attorney Lafayette had violated § 707(b)(4)(C) and Bankruptcy Rule 9011 in his preparation of the Debtor's schedules, statement of financial affairs and the Rebuttal.[4] The bankruptcy court stated:

On the facts here, this Court can not find that Attorney Lafayette has met his Rule 9011 and § 707(b)(4)(C) obligations. After all of the argument and testimony, the Court still is not sure what the Debtor earned in the six months prior to the filing of the petition or what the Debtor earns now. Nor is the Court sure whether the Debtor intended to mislead the Court with respect to the information provided in his bankruptcy papers or his Section 341 meeting testimony. But the Court is sure of this-that Attorney Lafayette, at the very least, failed to (1) properly review information provided by the Debtor with respect to his prepetition income; (2) identify contradictions and inconsistencies in the schedules, Statement of Financial Affairs, Rebuttal and affidavits submitted on behalf of the Debtor before the filing of those documents; (3) promptly correct those contradictions and inconsistencies, even when identified by the Chapter 7 Trustee, on anything close to a timely basis; and (4) to place himself in a position of being able to explain the reasons for those contradictions and inconsistencies to the Court even in the context of an evidentiary hearing of which he had more than adequate notice. Certainly, there is no bright line that surrounds § 707(b)(4)(C) and (D) and Rule 9011. But wherever that line lies, this Court agrees with the Chapter 7 Trustee and the UST that Attorney Lafayette has crossed it.

Withrow, 391 B.R. at 229. Based on these findings, the bankruptcy court entered the Sanctions Order directing Attorney Lafayette to pay the Trustee the sum of $3,585.00 as sanctions. This appeal followed.[5] Although Attorney Lafayette sought a stay pending appeal of the Sanctions Order, his request was denied.

JURISDICTION

Before addressing the merits of an appeal, the Panel must determine that it has jurisdiction, even if the issue is not raised by the litigants. *See Boylan v. George E. Bumpus, Jr. Constr. Co. (In re George E. Bumpus, Jr. Constr. Co.),* 226 B.R. 724 (1st Cir. BAP 1998). The Panel has jurisdiction to hear appeals from: (1) final judgments, orders and decrees; or (2) with leave of court, from certain interlocutory orders. 28 U.S.C. § 158(a); *Fleet Data Processing Corp. v. Branch (In re Bank of New Eng. Corp.),* 218 B.R. 643, 645 (1st Cir. BAP 1998). A decision is considered final if it "ends the litigation on the merits and leaves nothing for the court

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to do but execute the judgment," *id.* at 646 (citations omitted), whereas an interlocutory order "only decides some intervening matter pertaining to the cause, and requires further steps to be taken in order to enable the court to adjudicate the cause on the merits." *Id.* (quoting *In re American Colonial Broad. Corp.,* 758 F.2d 794, 801 (1st Cir.1985)). A bankruptcy court's order imposing sanctions under Bankruptcy Rule 9011 is a final, appealable order where, as here, it resolves all of the issues pertaining to a discrete claim. *See White v. Burdick (In re CK Liquidation Corp.),* 321 B.R. 355, 361 (1st Cir. BAP 2005) (citing 10 Lawrence P. King, *Collier on Bankruptcy,* ¶ 9011.10 (15th ed. rev.2004)); *see also Tringali v. Hathaway Machinery Co., Inc.,* 796 F.2d 553, 558 (1st Cir.1986); *Caterpillar Fin. Servs. Corp. v. Braunstein (In re Henriquez),* 261 B.R. 67, 70 (1st Cir. BAP 2001).

STANDARD OF REVIEW

The Panel generally reviews findings of fact for clear error and conclusions of law *de novo*. *See TI Fed. Credit Union v. DelBonis,* 72 F.3d 921, 928 (1st Cir.1995); *Western Auto Supply Co. v. Savage Arms, Inc. (In re Savage Indus., Inc.),* 43 F.3d 714, 719 n. 8 (1st Cir.1994). The Panel reviews the bankruptcy court's decision to impose sanctions under Bankruptcy Rule 9011 for manifest abuse of discretion. *See CK Liquidation,* 321 B.R. at 361 (citations omitted). An abuse of discretion occurs when the court ignores a material factor deserving significant weight, relies upon an improper factor, or makes a serious mistake in weighing proper factors. *See id.* (citing *Colon v. Rivera (In re Colon),* 265 B.R. 639 (1st Cir. BAP 2001)).

DISCUSSION

I. Violations of Bankruptcy Rule 9011 and § 707(b)(4)

Pursuant to Bankruptcy Rule 9011(b), an attorney or *pro se* party who presents a document (whether by signing, filing, submitting, or later advocating) certifies, among other things, that "the allegations and other factual contentions have evidentiary support, or if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." Fed. R. Bankr.P. 9011(b).[6] In addition, under new §§ 707(b)(4)(C) and (D) (as revised by BAPCPA), a debtor's attorney has a duty, equivalent to that under Bankruptcy Rule 9011, to perform a reasonable investigation into the circumstances giving rise to the documents before filing them in a chapter 7 case.[7] For example, under new § 707(b)(4)(C), attorneys are subject to an automatic certification of meritoriousness, based upon a reasonable investigation, as to any "petition, pleading, or written motion" signed by them. *See* 11 U.S.C. § 707(b)(4)(C).[8] Furthermore, under new

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§ 707(b)(4)(D), an attorney's signature on a client's bankruptcy petition is deemed a representation that "the attorney has no knowledge after an inquiry that the information in the schedules filed with such petition is incorrect." *See* 11 U.S.C. § 707(b)(4)(D).[9] One court, though critical of the wording of § 707(b)(4), stated that the legislature made its point explicitly:

> [T]heir general drift is clear: debtors' counsel are to exercise significant care as to the completeness and accuracy of *all* recitations on their clients schedules, after they have made a factual investigation and legal evaluation that conforms to the standards applicable to any attorney filing a pleading, motion, or other document in a federal court. The content of a debtor's petition and schedules is relied on, and should have the quality to merit that reliance.

In re Robertson, 370 B.R. 804, 809 n. 8 (Bankr.D.Minn.2007).

Accordingly, any attorney who files schedules and statements on a debtor's behalf makes a certification regarding the representations contained therein. Although the certification is not an absolute guaranty of accuracy, it must be based upon the attorney's best knowledge, information and belief, "formed after an inquiry reasonable under the circumstances." *Nosek v. Ameriquest Mortg. Co. (In re Nosek),* 386 B.R. 374, 381 (Bankr.D.Mass. 2008). The First Circuit has held that the standard to be applied is "an objective standard of reasonableness under the circumstances." *Id.* (quoting *Cruz v. Savage,* 896 F.2d 626, 631 (1st Cir.1990)). "Courts, therefore, must inquiry as to whether `a reasonable attorney in like circumstances could believe his actions to be factually and legally justified.'" *Id.* (quoting *Cabell v. Petty,* 810 F.2d 463, 466 (4th Cir.1987)).

Thus, Attorney Lafayette had an affirmative duty to conduct a reasonable inquiry into the facts set forth in the Debtor's schedules, statement of financial affairs and Rebuttal before filing them. There is evidence in the record, however, that Attorney Lafayette violated that obligation. It is undisputed that there were numerous errors and discrepancies in the documents filed by Attorney Lafayette on the Debtor's behalf. In fact, Attorney Lafayette admitted as much at the show cause hearing. For example, he conceded error regarding the inconsistent treatment of current monthly income on the Debtor's Rebuttal (which reflected that the Debtor's average current monthly income as set forth on Form B 22A was $5,333.33), and the Debtor's actual Form B 22A (which reflected $4,834.22 in current monthly income). In addition, there were discrepancies between the Debtor's Rebuttal (which listed actual monthly income without overtime pay in the amount of $4,000) and the Debtor's Schedule I (which listed actual monthly income without overtime pay in

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the amount of $3,309.73). There were also differences between the Debtor's Rebuttal (wherein he indicated that he anticipated that he would have to assist his mother financially for an indefinite period of time after the filing of his case) and his Schedule J (wherein he stated that he did not reasonably anticipate a significant increase or decrease in expenses in the upcoming year). There were also inconsistencies regarding whether the Debtor was actually receiving overtime and the frequency and extent of financial support being provided to his mother.

Although Attorney Lafayette conceded that there were numerous mistakes in the documents he filed on the Debtor's behalf, he blames the errors on his personal health issues and/or his client's faulty memory. He claims that the inconsistencies in the documents were not attributable to him, but were the fault of his client, stating: "The debtor got in the way of the process of the preparation of the documents with his mental condition" and his "personal forgetfulness." Attorney Lafayette's excuses are not persuasive and fail to justify why the mistakes were made and why they were not corrected in a timely fashion. Even if his excuses that the Debtor provided him with inaccurate information are true, they do not explain the numerous inconsistent statements in the various documents regarding the Debtor's income, entitlement to overpay and his support obligations to his mother. They are not sufficient to overcome the sloppy and careless actions (or inactions) of Attorney Lafayette in this case. Therefore, the evidence shows that Attorney Lafayette failed to conduct a reasonable investigation into the underlying facts before filing the Debtor's schedules, statement of financial affairs and Rebuttal, and that he was careless when preparing the documents. In addition, Attorney Lafayette fails to recognize that he had a duty to conduct a reasonable inquiry into the underlying facts before filing the documents, and that if he had done so, many, if not all, of the inconsistencies could have been prevented.

Based on the foregoing, the Panel concludes that there is sufficient evidence in the record to support the bankruptcy court's conclusion that Attorney Lafayette violated his § 707(b)(4) and Bankruptcy Rule 9011 obligations.

II. Imposition of Sanctions Under Bankruptcy Rule 9011 and § 707(b)(4)

Pursuant to Bankruptcy Rule 9011(c), if, after notice and an opportunity to respond, the bankruptcy court determines that an attorney has violated Bankruptcy Rule 9011(b), it may impose "an appropriate sanction." *See* Fed. R. Bankr.P. 9011(c). In addition, § 707(b)(4) provides authority for bankruptcy courts to order the attorney for the debtor to reimburse the trustee for reasonable costs in prosecuting a § 707(b) motion brought by the trustee if the court grants the motion and "finds that the action of the attorney for the debtor in filing a case under this chapter violated [Bankruptcy R]ule 9011." 11 U.S.C. § 707(b)(4)(A). As the *Robertson* court noted:

Though this new verbiage [of § 707(b)] has no directly-associated enforcement mechanism, § 707(b) now contains a basis in statute for the bankruptcy court to impose sanctions. These can take the form of "all reasonable costs" incurred by a successful movant under § 707(b), where "the action of the attorney for the debtor in filing a case under [the Bankruptcy Code] violated rule 9011 of the Federal Rules of Bankruptcy Procedure." 11 U.S.C. § 707(b)(4)(A)(i)-(ii). It also provides for "the assessment of an appropriate civil penalty against the

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attorney for the debtor," § 707(b)(4)(B)(i), payable to the trustee or the UST, § 707(b)(4)(B)(ii), if "the attorney for the debtor violated rule 9011 of the Federal Rules of Bankruptcy Procedure," 11 U.S.C. § 707(b)(4) (prefatory language).

Robertson, 370 B.R. at 809 n. 8.

The bankruptcy court has discretion to determine what sanctions are appropriate under the circumstances when there has been a violation of Bankruptcy Rule 9011. *In re Thomson,* 329 B.R. 359, 362 (Bankr.D.Mass.2005). The bankruptcy court usually considers several factors in determining whether to impose a sanction and what type of sanction to impose, including:

whether the conduct was willful, or negligent; whether it was part of a pattern of activity, or an isolated event; whether it infected the entire pleading, or only one particular count or defense; whether the person has engaged in similar conduct in other litigation; whether it was intended to injure; what effect it had on the litigation process in time or expense; whether the responsible person is trained in the law, what amount, given the financial resources of the responsible person, is needed to deter that person from repetition in the same case; and what amount is needed to deter similar activity by other litigants.

Id. (citing *CK Liquidation,* 321 B.R. at 362). This is not an exhaustive list of the factors that the bankruptcy court may consider. *Id.*

Sanctions are meant to serve the dual purposes of deterrence and compensation under Bankruptcy Rule 9011, and must be designed to satisfy both purposes. *Id.* (citing *1095 Commonwealth Corp. v. Citizens Bank of Mass. (In re 1095 Commonwealth Corp.),* 236 B.R. 530, 538 (D.Mass.1999)). In cases of deterrence, the court must limit the sanction "to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated." *Id.* (citing Fed. R. Bankr.P. 9011(c)(2)). In cases of compensation, the reasonable costs incurred as a result of the sanctionable conduct may appropriately form the sanction. *Id.* (citations omitted).

In reaching its decision to impose sanctions, the bankruptcy court noted that Attorney Lafayette has a history of "sloppy, careless and unprofessional" practices in representing consumer debtors. *Withrow,* 391 B.R. at 229 (citing *In re LaFrance,* 311 B.R. 1, 25 (Bankr.D.Mass.2004)). In *LaFrance,* the bankruptcy court disallowed Attorney Lafayette's fee application and ordered him to disgorge those fees. The court further ordered that in all future cases in which he represented consumer debtors, Attorney Lafayette was required to deposit all client compensation in his client trust account and not withdraw funds unless the court allowed his fee application. 311 B.R. at 25. However, despite the strict mandate of the *LaFrance* decision, many fee applications of Attorney Lafayette have been denied because he continued to provide poor quality services to his clients. *See, e.g., In re LaClair,* 360 B.R. 388 (Bankr.D.Mass.2006). As a result, the bankruptcy court concluded that the sanctions imposed by *LaFrance* were not sufficient to meet the bankruptcy court's intended goal of deterring Attorney Lafayette's sloppy and careless representation of his clients. Therefore, the bankruptcy court imposed sanctions against Attorney Lafayette in the amount of $3,585, representing three times the amount which he intended to charge his client.

Attorney Lafayette does not argue that the sanction amount is inappropriate.

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Rather, he argues that the bankruptcy court should not have imposed sanctions at all. However, the evidence supports the bankruptcy court's conclusion that Attorney Lafayette violated Bankruptcy Rule 9011 and § 707(b)(4)(C) and, therefore, sanctions were warranted. The sanctions amount imposed by the bankruptcy court appears to be appropriate as it is designed to satisfy both purposes of deterrence and compensation. Moreover, there is no evidence that in imposing the $3,585 sanction, the bankruptcy court ignored a material factor deserving significant weight, relied upon an improper factor, or made a serious mistake in weighing proper factors. *See CK Liquidation,* 321 B.R. at 366 (citing *Colon,* 265 B.R. at 639).

Under the circumstances, there is no evidence that the bankruptcy court abused its discretion in ordering sanctions against Attorney Lafayette in the amount of $3,585.

CONCLUSION

For the reasons set forth above, the Sanctions Order is **AFFIRMED.**

Notes:

1. Unless expressly stated otherwise, all references to "Bankruptcy Code" or to specific statutory sections shall be to the Bankruptcy Reform Act of 1978, as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), Pub.L. No. 109-8, 119 Stat. 23, 11 U.S.C. §§ 101, *et seq*. All references to "Bankruptcy Rule" shall be to the Federal Rules of Bankruptcy Procedure.

2. Attorney Lafayette is required to file fee applications in all cases in the District of Massachusetts in which he represents debtors. *See In re LaFrance,* 311 B.R. 1, 25 (Bankr.D.Mass.2004).

3. In fact, the Debtor had not yet filed his amended schedules and would not do so for two more days.

4. The bankruptcy court's Memorandum of Decision is published. *See In re Withrow,* 391 B.R. 217 (Bankr.D.Mass.2008).

5. On July 14, 2008, Attorney Lafayette filed a "Notice of Appeal to the District Court." App. at 44. However, he failed to file a separate statement of election to appeal to the district court, as required by Fed. R. Bankr.P. 8001(e) and 28 U.S.C. § 158(c)(1). Consequently, the Panel denied the transfer of the appeal to the district court.

6. Rule 9011(b) is not limited to statements below which appear an attorney's signature. Rather, the rule provides that filing, submitting or even advocating with respect to a document filed with a court has the same effect as signing the document. Therefore, it is well established that Bankruptcy Rule 9011(b) applies to debtors' attorneys even with respect to a debtor's schedules, statement of affairs and other documents disclosing assets, which debtors, but not counsel, are required to sign. *See, e.g., In re M.A.S. Realty Corp.,* 326 B.R. 31, 38 (Bankr.D.Mass.2005).

7. Although this case was commenced under chapter 13, the schedules, statements and Form B 22A were completed after the conversion to chapter 7. Thus the provisions of chapter 7, including section 707, are applicable. *See* 11 U.S.C. § 103(b).

8. Section 707(b)(4)(C) provides, in relevant part:

The signature of an attorney on a petition, pleading, or written motion shall constitute a certification that the attorney has—

(i) performed a reasonable investigation into the circumstances that gave rise to the petition, pleading, or written motion; and

(ii) determined that the petition, pleading, or written motion—

(I) is well grounded in fact; and

(II) is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law and does not constitute an abuse under paragraph (1).

11 U.S.C. § 707(b)(4)(C).

9. Section 707(b)(4)(D) provides:

The signature of an attorney on the petition shall constitute a certification that the attorney has no knowledge after an inquiry that the information in the schedules filed with such petition is incorrect.

11 U.S.C. § 707(b)(4)(D).

KAHN & AHART, PLLC
BANKRUPTCY LEGAL CENTER™
Phone 602-266-1717

REQUIRED DOCUMENTS

NAME: ________________________

FIRST:

Gather all of the following documents that pertain to you, and check the appropriate box next to each request. We request one, complete stack of paper documents; please - no emails or faxes.

IMPORTANT NOTE: you will be signing your bankruptcy documents under penalty of perjury; it is important that you provide all documents so we have an adequate opportunity to help you address any issues that may arise in your case. We are required to review and process your documents **BEFORE** we can proceed with your bankruptcy filing.

SECOND:

Put **ALL** pertinent information from the documents into your Online Bankruptcy Questionnaire (refer to our email regarding login instructions). When it is COMPLETE, click Send.

THIRD:

Give us a call for an appointment to deliver the Required Documents. FYI, we will need an opportunity to review your completed questionnaire *before* you deliver the Required Documents to us.

N/A	Enclosed (please mark a box for each item)		
☐	☐	1.	Signed Engagement Agreement.
☐	☐	2.	All Credit Card statements received in the past 90 days.
☐	☐	3.	Transunion Credit Report from www.annualcreditreport.com (one free report per bureau, per yr)
☐	☐	4.	Car loan and/or car lease, mortgage loan & student loan statements for the past 90 days
☐	☐	5.	Medical bills (unpaid only) received in the past 90 days
☐	☐	6.	All statements/letters/notices/documents received in the past 90 days for all other Creditors to whom you owe(d) money that does not fall into any of the above categories
☐	☐	7.	If any of your creditors haven't sent statements/letters/notices/documents in the past 90 days, provide one older document showing the account information
☐	☐	8.	Bank Statements covering the past **six** (6) months for **ALL accounts** (including checking, savings, PayPal, Venmo, and stock/bond/investment accounts) on which you have or had signature authority (including child/parent accounts and business accounts) whether the account is presently opened or closed (all pages, please)
☐	☐	9.	Copy of your Driver's License(s) and Social Security Card(s)
☐	☐	10.	Copy of Federal **&** State Tax Returns for the last two years, **including all W-2's & 1099's**.
☐	☐	11.	Copies of documents regarding any lawsuits in which you are involved.
☐	☐	12.	Valuation print out from www.kbb.com for each vehicle in the above item. Select Private Party Value if there is a loan on the vehicle; select Trade-In value if you own it free & clear
☐	☐	13.	"Motor Vehicle Record - Title and Registration" from the Motor Vehicles Department for each vehicle in your name or owned by you; please obtain this record online at: https://azmvdnow.gov/titleregistration/motorvehiclerecord (a $3 fee applies).

☐ ☐ 14. Copies of all lease agreements for apartments, vehicles, rent-to-own property, furniture, or any other personal property

☐ ☐ 15. All documents concerning all mortgages presently on your home(s) (i.e. the large packet received from the title company at time of closing)

☐ ☐ 16. All other purchase/loan documents regarding any other secured debts such as vehicles, boats, timeshares, furniture, TV's stereos, business lines of credit

☐ ☐ 17. Appraisals:
   A. If any of your property has been appraised in the last 12 months, please provide a complete copy of the appraisal
   B. If you have high-end or particularly valuable items, we strongly recommend you obtain one.

☐ ☐ 18. Copy of all promissory notes, security agreements, financing statements

☐ ☐ 19. Income:
   A. Copies of paycheck stubs from your employer(s) for the past seven months, including ALL pay and deduction information; and
   B. Documents reflecting income from any other source for the past seven months.

☐ ☐ 20. Copies of all documents regarding all of your Pension Plans.

☐ ☐ 21. Copies of all documents regarding all of your 401(k) or similar plans.

☐ ☐ 22. Copies of all documents regarding all of your annuities.

☐ ☐ 23. Documents regarding future interest in property (i.e. Wills and Trusts).

☐ ☐ 24. If you have a Trust (or have had one in the last ten (10) years, please provide the complete Trust binder, with all Trust documents.

☐ ☐ 25. Copies of Declaration page and current statement for all of your life insurance policies (term, whole, universal, etc.). Be sure that the name(s) of your beneficiary(ies) is included with the documents you provide to us.

☐ ☐ 26. Divorce decrees, separation agreements, decrees of dissolution, or support obligations, including child support and spousal support filed within the past 2 years.

☐ ☐ 27. All documents regarding the sale or transfer of ***any*** assets (including vehicle trade-ins) in the last two years.

☐ ☐ 28. If you are entitled to "disabled veteran" status, provide documents.

X X ☐ < Please check to confirm you have read this Required Documents list

As to all homes owned in the past three and a half years, fill in the following details:

Address	Date Purchased	Date Sold	Cash received from the sale	What did you do with the cash?
			$	
			$	

586 B.R. 62

IN RE: Michael Paul FOSTER and Juryleen Marzan Foster, Debtor

Case No. 16–12802–MLB

United States Bankruptcy Court, W.D. Washington, at Seattle.

Signed April 6, 2018

[586 B.R. 67]

Jared D. Bellum, UpRight Law LLC, Port Orchard, WA, Kevin Chern, James Leighton O'Connell–Miller, Craig B. Sonnenschein, Law Solutions Chicago LLC, Chicago, IL, Davisson D. Culbertson, Attorney at Law, Seattle, WA, for Debtor.

FINDINGS OF FACT AND CONCLUSIONS OF LAW FOLLOWING EVIDENTIARY HEARING

Marc Barreca, U.S. Bankruptcy Court Judge

INTRODUCTION

The United States Trustee ("**U.S. Trustee** ") has filed an Amended Motion for Examination of Fee, Disgorgement, and Civil Penalty, seeking an order requiring UpRight Law (defined below), and Jared D. Bellum ("**Mr. Bellum** ") to refund some or all of the fees that the debtors, Michael Paul Foster and Juryleen Marzan Foster (the "**Fosters** "), paid to UpRight in Fair Debt Collection Practices Act (the "**FDCPA** ") litigation, and imposing sanctions, a civil penalty, and injunctive relief against UpRight and Mr. Bellum (the "**Motion** ").[1] This matter came before me for an evidentiary hearing on December 14, 2017. The U.S. Trustee was represented by Carole Ryczek and Sarah Flynn. UpRight Law and Mr. Bellum were represented by Craig B. Sonnenschein and

[586 B.R. 68]

James Leighton O'Connell–Miller. At the conclusion of the hearing, I took the matter under advisement and requested further briefing.

I have considered the testimony presented at the evidentiary hearing, the exhibits admitted into evidence, the briefing,[2] and the arguments of counsel. Being fully advised, I make the following findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052.[3] In short, I find that Mr. Bellum and UpRight Law violated, *inter alia* , 11 U.S.C. §§ 526 and 707(b)(4), Fed. R. Bankr. P. 9011(b) (" **Rule 9011(b)** "), and Local Rules W.D. Wash. Bankr. 5005–1(d) ("**LBR 5005–1(d)** ") in the Fosters' case and other cases, but that these violations do not warrant sanctions given the voluntary disgorgement of bankruptcy fees which has already occurred and other factors.

JURISDICTION

I have jurisdiction over this adversary proceeding and the parties pursuant to 28 U.S.C. §§ 157(a) and 1334, and Local Rule 87(a). Venue is proper pursuant to 28 U.S.C. §§ 1408(1) and 1409(a).

FINDINGS OF FACT

<u>UpRight Law</u>

1. Jason Allen Law LLC is a trade name of Law Solutions Chicago LLC, an Illinois limited liability company. (Amended Joint Prehearing Order: Admitted Facts ("**Prehearing Order** ") ¶ 1.) Law Solutions Chicago filed articles of organization with the Illinois Secretary of State on October 10, 2008, and is authorized to transact business in Illinois under the following active assumed names: Jason Allen Law LLC; Allen Chern Law; UpRight Law LLC; and Allen & Associates, LLC (collectively, "**UpRight Law** "). (*Id.* at ¶ 2.)

2. Law Solutions Chicago LLC is registered as a foreign limited liability company in the State of Washington. (*Id.* at ¶ 3.)

3. UpRight Law is a debt relief agency, as that term is defined in 11 U.S.C. § 101(12A). (Id. at ¶ 4.)

4. UpRight Law represents clients in all 50 states. (Transcript of Dec. 14, 2017 Hearing ("Tr.") 166:16–20.) UpRight Law began representing clients in the Western District of Washington in 2014. (*Id.* at 192:22–25.) Between 2014 and December 2017, UpRight Law filed almost 21,000 bankruptcy petitions nationally, and approximately 367 bankruptcy petitions in the Western District of Washington. (*Id.* at 192:16–193:5.)

5. UpRight Law advertises to the public at www.UpRightlaw.com. (Prehearing Order ¶ 7.) Starting as early as September 27, 2014, and until at least January 23, 2017, UpRight Law's website included the following statements:

> UpRight Law takes a holistic approach to debt. Many firms focus entirely on bankruptcy and consider their work done when the bankruptcy discharge is entered. Our goal is to help you make a long-term change that will improve your

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> finances and your life. We'll invest in finding the right solution for you, prosecuting violations of consumer protection laws, getting you a fresh financial start and then protecting that new beginning by monitoring your credit report and fighting creditors and debt collectors who aren't following the rules.

(*Id.* at ¶ 8.)

6. UpRight Litigation LLC ("**UpRight Litigation** ")[4] is a majority owned subsidiary of UpRight Law LLC. (Tr. 168:19–22.) UpRight Litigation, in coordination with UpRight Law LLC, represented clients of UpRight Law LLC in consumer protection actions, including lawsuits filed under the FDCPA. (*Id.* at 168:22–23.) Specifically, UpRight Law would refer consumer protection claims to UpRight Litigation, and UpRight Litigation would execute a legal services agreement with the client. (*Id.* at 169:1–4.)

7. UpRight Law advertised UpRight Litigation's services to bankruptcy attorneys in the 2015 summer issue of the Consumer Bankruptcy Journal in an attempt to generate referrals from bankruptcy practitioners to UpRight Litigation. (*Id.* at 169:8–10; 171:12–18.) The advertisement described UpRight Law as a "Nationwide Consumer Protection and Bankruptcy Litigation Law Firm," and included the statement, "Accelerate payment of your bankruptcy fees by applying client's proceeds of FDCPA settlements." (Ex. P1.)

8. During the December 14 hearing, Kevin Chern ("**Mr. Chern** "), the managing partner of UpRight Law, testified that during client intake calls, UpRight Law employees may have told prospective clients that an advantage of hiring UpRight Law was that, in addition to handling their bankruptcy cases, UpRight Law would make sure that they were free from harassment and other abusive creditor practices. (*Id.* at 172:16–23.)

<u>Mr. Bellum</u>

9. Mr. Bellum is a Washington-licensed attorney. (*Id.* at 128:1–3.) He became licensed to practice in Washington in 2010 and was admitted to practice in the Western District of Washington that same year. (*Id.*) Mr. Bellum has never been disciplined by the disciplinary authorities in the State of Washington or disciplined or sanctioned by the courts of the Western District of Washington. (*Id.* at 128:6–11.)

10. Mr. Bellum became a partner of UpRight Law in August of 2015. (Prehearing Order ¶ 12.) At the time he became a partner of UpRight Law, he had been practicing bankruptcy law for approximately 5 years. (Tr. 129:2–4.) During the time period before he joined UpRight Law, he filed between 90 and 100 bankruptcy petitions. (*Id.* at 129:5–8.)

He was not the subject of a motion for sanctions relating to any of those cases. (*Id.* at 129:9–11.) Mr. Bellum continued to operate his own law practice after joining UpRight Law. (*Id.* at 128:24–129:1.)

11. During his time as a partner of UpRight Law, Mr. Bellum filed between 90 and 100 bankruptcy petitions in his capacity as a partner of UpRight Law. (*Id.* at 132:2–8.) He filed all of those petitions between August 2015 and October 2016. (*See id.* at 131:19–132:1.) He has not filed any bankruptcy petitions in his capacity as a partner of UpRight Law since October 2016. (*Id.* at 131:25–132:1.)

12. Mr. Bellum moved to Rhode Island in May 2017. (*Id.* at 126:21–23; Prehearing

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Order ¶ 95.) Other than continuing to have an appearance in this case, and four related cases, Mr. Bellum has not practiced bankruptcy law since he moved to Rhode Island. (Tr. 130:9–13; Prehearing Order ¶ 95.) Mr. Bellum concluded his individual law practice before he moved to Rhode Island, and he has not filed any bankruptcy petitions at all since March 2017. (Tr. 130:13–18; 130:22–131:3.)

13. Mr. Bellum has no plans to continue to practice consumer bankruptcy law. (*Id.* at 131:12–14.) As soon as the cases involving the Fosters, and the four clients impacted by related motions, are resolved, Mr. Bellum intends to resign from UpRight Law. (*Id.* at 131:15–18.)

<u>The Fosters' Initial Contacts with UpRight Law Regarding Potential Bankruptcy Relief</u>

14. The Fosters are assisted persons, as that term is defined in 11 U.S.C. § 101(3). (Prehearing Order ¶ 15.)

15. On June 22, 2015, the Fosters contacted UpRight Law regarding their desire to file for bankruptcy relief. (*Id.* at ¶ 16.) Prior to contacting UpRight Law, the Fosters had been contacted by collection agencies and creditors attempting to collect debts. (Tr. 36:25–37:1–2.) On the same day, June 22, 2015, the Fosters decided to hire UpRight Law. They made an initial $100 payment toward their bankruptcy attorneys' fees, and arranged to pay the balance of their bankruptcy fees in installments. (Prehearing Order ¶ 17–¶ 18.) UpRight Law initially assigned Thomas McAvity ("**Mr. McAvity** ") to represent the Fosters in bankruptcy. (Ex. P30–24.)

16. Also on June 22, 2015, the Fosters executed an Attorney Client Base Retainer Agreement for Chapter 7 Bankruptcy Related Services (the "**Retainer Agreement** "). In paragraph 9 of the Retainer Agreement, the Fosters authorized UpRight Law to investigate the "existence of violations of the automatic stay, the discharge injunction, or for breach of any state/federal consumer protection statutes or bankruptcy code violations, and to prosecute them with or with the assistance [*sic*] designated counsel as Firm deems necessary to pursue such claims." (*Id.* ; Prehearing Order ¶ 34.)

17. UpRight Law advised the Fosters to report any creditor calls to UpRight Law, and provided them with the contact information to use when reporting such calls. (Tr. 37:15–19.)

18. After the Fosters hired UpRight Law in June 2015, they continued to receive calls from collection agencies and creditors. (*Id.* at 37:7–13.)

19. On or around June 30, 2015, the Fosters received a call from a collection agency, Northland Group, LLC ("**Northland** "). (*Id.* at 41:8–9.) The Fosters advised Northland that they were represented by UpRight Law. (*Id.* at 41:16–18.) On July 2, 2015, Northland called the Fosters again. (*Id.* at 41:19–20.)

20. On July 2, 2015, Andrew Hall ("**Mr. Hall** "), a legal assistant at UpRight Law, advised Ms. Foster that UpRight Law's consumer rights department provided services intended to help the Fosters "get some extra money to pay off your bankruptcy." (Prehearing Order ¶ 20.)

The Fosters' FDCPA Litigation

21. Also on July 2, 2015, the Fosters executed a Consumer Rights Attorney/Client Agreement with "UpRight Litigation LLC, UpRight Law LLC, and/or one of its affiliated law firms." (*Id.* at ¶ 22; Ex. P4–3.)

22. The Consumer Rights Attorney/Client Agreement explained that the firm would advance all expenses associated with representation, that the client would not be required to reimburse the firm in

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the event that the representation was not successful, and that any such expenses would be deducted from any recovery before calculating the client's share. (*See* Ex. P4 at 2.)

23. The Consumer Rights Attorney/Client Agreement provided that:

> Lawyers and legal fees can be expensive. So that you are provided access to the legal system at no out-of-pocket cost to you, we have agreed to enter into the following fee arrangement. In the event of a settlement or judgment entered on your behalf, we agree that your portion of the recovery will be calculated as follows:
>
> ? $250 of the first $2,000 of the Recovery
>
> ? Plus 20% of any portion of the Recovery between $2,001–$5,000
>
> ? Plus 30% of any portion of the Recovery between $5,001–$10,000
>
> ? Plus 40% of any portion of the Recovery between $10,001–$25,000
>
> ? Plus 50% of any portion of the Recovery in excess of $25,000
>
> ? If you lose your case, you will not owe us anything for our attorneys' fees.

(Prehearing Order ¶ 23; Ex. P4–1.)

24. The Consumer Right Attorney/Client Agreement further provided that:

> The balance of the recovery after deducting your portion as set forth above shall constitute our attorneys' fees. This Agreement takes into account that we may have to spend a significant amount of time to recover a relatively small amount of money for you. As a result, our fees may be significantly greater than your portion of the recovery. If we were not allowed to be fairly compensated for our time in working on consumer protection cases, we may not have been willing to do this sort of work and you might be defenseless against the tactics of large unscrupulous businesses. Keep in mind that the primary goal of our representation is to stop the collection harassment and abuses, with cash compensation being a possible secondary benefit.

(Prehearing Order ¶ 24; Ex. P4–1.)

25. At the time the Fosters signed the Consumer Rights Attorney/Client Agreement with UpRight Litigation and UpRight Law, they were still making installment payments of their bankruptcy fees to UpRight Law. (Tr. 39:3–25, 40:1.)

26. On July 24, 2015, UpRight Law initiated a lawsuit on behalf of the Fosters in the United States District Court for the Western District of Washington against Northland for Northland's alleged violation of the FDCPA. (Prehearing Order ¶ 25; Ex. P3.) The Fosters were represented in the

FDCPA lawsuit by Mr. McAvity in his capacity as a partner of UpRight Law. (*Id.* at ¶ 26; Ex. P3–5.)

27. The Fosters' motivation for filing the FDCPA lawsuit included stopping unlawful collection activity from the Northland Group. (Tr. 49:21–50:6.) As Ms. Foster explained, she filed suit because "they kept calling me despite the fact that I already told them I had a lawyer. And then it was just—caused me a lot of grief that they were calling me at work." (*Id.*) Ms. Foster testified that the harassment "caused me stress. I couldn't sleep. I couldn't eat." (*Id.*)

28. At the time the Fosters filed their FDCPA lawsuit, they were still planning to file for bankruptcy. (*Id.* at 44:2–4.)

29. The Fosters intended to apply some or all of their recovery from the FDCPA lawsuit they filed against Northland to pay the bankruptcy fees they owed UpRight Law. (*Id.* at 42:11–13.)

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30. UpRight Law's bankruptcy representation of the Fosters was an element of a claim in their FDCPA lawsuit against Northland. In particular, the Fosters' FDCPA complaint contained a count alleging that Northland had violated the FDCPA by continuing to contact the Fosters after they had advised Northland that UpRight Law represented them in connection with the debt that Northland was attempting to collect. (Ex. P3.)

31. In late October 2015, the Fosters and Northland agreed to settle the Fosters' FDCPA claim. (Prehearing Order ¶ 27; Ex. P3–5.) On January 8, 2016, the Fosters signed a settlement agreement concerning their claim against Northland. (Prehearing Order ¶ 28; Ex. P31–4.) The agreement provided that Northland was to pay $2,750 to resolve the Fosters' FDCPA claim. (Prehearing Order ¶ 28; Ex. P31–1.) On January 21, 2016, Northland issued a check for the settlement proceeds, made out to UpRight Litigation, in the amount of $2,750. (Prehearing Order ¶ 30.)

32. On February 8, 2016, the United States District Court for the Western District of Washington entered a stipulated judgment dismissing the Fosters' lawsuit against Northland. (Ex. P41). The judgment provides that, based on the parties' stipulation, the Fosters' claims were dismissed with prejudice and without attorneys' fees or costs to either party. (*Id.* ; Tr. 184:14–21.)

33. UpRight Litigation's attorney's fees and costs for representing the Fosters in the lawsuit against Northland were paid from the settlement proceeds, according to the terms of the Consumer Rights Attorney/Client Agreement. (Prehearing Order ¶ 30; Ex. P4.)

34. On February 9, 2016, UpRight Law transferred $303 of the settlement proceeds to the Fosters. (Prehearing Order ¶ 31.) UpRight Law retained the balance of the settlement proceeds, representing attorneys' fees of $1,962 and costs of $485. (*Id.*)

<u>Transfer of the Fosters' Bankruptcy File to Mr. Bellum</u>

35. On or around August 21, 2015, UpRight Law changed the attorney assigned to the Fosters' bankruptcy file from Mr. McAvity to Mr. Bellum. (*Id.* at ¶ 32.)

36. The Fosters made installment payments toward their bankruptcy attorney's fees and costs for a period of months, and had paid them in full by December 28, 2015. (*Id.* at ¶ 18.)

37. The Fosters did not actually apply any of their recovery from the FDCPA lawsuit toward their bankruptcy fees. (Tr: 162:23–163:1.)

38. On or about December 28, 2015, a member of UpRight Law's Chicago staff notified Mr. Bellum via email that the Fosters had paid their bankruptcy attorney's fees in full. (Prehearing Order ¶ 33.) The December 28 "handoff" email to Mr. Bellum made no mention of the Fosters' FDCPA case, the settlement of the case, the settlement funds the Fosters received, or the

attorney's fees that UpRight Law received in the FDCPA litigation. (*Id.*)

39. On January 4, 2016, David Levin ("**Mr. Levin** "), the head of the consumer litigation department at UpRight Law, emailed Mr. Bellum and informed him that the Fosters would receive $303 in settlement of their FDCPA case against Northland. (*Id.* at ¶ 35.) The email from Mr. Levin to Mr. Bellum further stated, "The case was settled 2 months ago and I expected that they would have their money by now. The idea was to apply it to the balance of their bankruptcy fees." (*Id.*)

40. Upright Law's internal Salesforce record for the Fosters contained a "red flag," indicating that there was something

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needing extra attention from the partner. (Tr. 138:18–20; Ex P30–12).[5]

41. The Salesforce red flag had the name "FDCPA settlement" and a note stating "FDCPA case settled 10/30/2015. We should have payment by now. Defendant is stalling. Contact David Levin for details." (Prehearing Order ¶ 36.) The Salesforce records do not indicate when this entry was made. (*Id.*)

The Fosters' Bankruptcy

42. On May 25, 2016, Mr. Bellum, in his capacity as a partner with UpRight Law, filed a chapter 7 petition on behalf of the Fosters, initiating Case No. 16–12802. (*Id.* at ¶ 37.)

43. Mr. Bellum sent the Fosters a questionnaire before preparing their bankruptcy petition. (Ex. P30 at 9.) On or about January 13, 2016, Mr. Bellum sent the Fosters a copy of the petition with questions, and then he called to follow up with them that day to assure they had received it. (Ex. P30 at 9). Ms. Foster testified at the evidentiary hearing that she reviewed the petition, schedules, and SOFA and then she and Mr. Foster reviewed them line by line with Mr. Bellum over the phone. (Tr. 50:7–16.)

44. In response to item no. 35 of Schedule A/B, the Fosters disclosed a "Settlement from FDCPA claim settled by UpRight. Fosters received $303 in settlement of their claims." (Prehearing Order ¶ 43.) In response to item no. 2 of Schedule C, the Fosters exempted $303 under 11 U.S.C. § 522(d)(5) and referenced "Line from Schedule A/B 35.1[,]". (*Id.* at ¶ 44.) At the time Mr. Bellum was preparing the Fosters' bankruptcy documents, he knew that the FDCPA claim had been settled prepetition (Tr. 119:22–25), but he did not investigate further to get additional information about the claim. (Tr. 119:22–25.) In his testimony at the December 14 hearing, he admitted that he should have inquired further regarding the FDCPA claim. (*Id.* at 120:1–2.)

45. Two portions of the bankruptcy documents which Mr. Bellum filed on behalf of the Fosters had been prepared by UpRight Law staff at the Chicago office: the Disclosure of Compensation of Attorney for Debtor(s) (also known as a "**Form 2030** "), and the response to question number 16 on the statement of financial affairs (the "**SOFA** "), which asks, "Within 1 year before you filed for bankruptcy, did you or anyone else acting on your behalf pay or transfer any property to anyone you consulted about seeking bankruptcy or preparing a bankruptcy petition?" (Prehearing Order ¶¶ 39, 42.)

The Fosters' Initial SOFA

46. The Fosters' FDCPA lawsuit, settlement of the lawsuit, and payment of $2,447 in settlement proceeds to UpRight Law was not disclosed anywhere in the SOFA that UpRight Law and Mr. Bellum filed in the Fosters' case on May 25, 2016 (the "**Initial SOFA** "). (*Id.* at ¶ 45.)

47. Ms. Foster testified at the December 14 hearing that she did not know why the FDCPA lawsuit was not disclosed on the Initial SOFA, and that she would have disclosed the lawsuit to Mr. Bellum if she had been asked about it. (Tr. 46:3–12.)

48. UpRight Law and Mr. Bellum agree that the FDCPA lawsuit should have been included on the Initial SOFA at Question No. 9 (*Id.* at 173:10–13), and that the $303

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that the Fosters received should have been included in response to Question No. 5. (*See id* . at 187:21–188:1.)

49. Virginia Burdette ("**Ms. Burdette** "), the chapter 7 trustee in the Fosters' bankruptcy case, testified that she relies on debtors understanding the questions on the bankruptcy schedules and SOFA and answering them accurately, as well as on debtors' attorneys "to basically endorse everything they know is in the schedules and that they are true, accurate, and complete." (Burdette Dep. 7:11–14; 31:6–32:4.)

50. Ms. Burdette further testified that although she did not deem significant the $303 FDCPA recovery that the Fosters listed on their Schedule A/B, she would have felt differently had she known that the full amount of the settlement was closer to $3,000. (*Id.* at 32:5–10.) Ms. Burdette testified that if she had known the full amount, she would have asked for more information. (*Id.* at 32:5–16.)

The Fosters' Initial Form 2030

51. On the initial Disclosure of Compensation of Attorney for Debtor(s) filed with the petition (the "**Initial Foster Form 2030** "), Mr. Bellum certified that he, as an UpRight Law partner, received $1,650 in legal fees paid "in contemplation of or in connection with the bankruptcy case," plus $335 for the filing fee. (Prehearing Order ¶ 38.) Mr. Bellum and UpRight Law did not disclose UpRight Law's receipt of $2,447 of proceeds from the settlement of the Fosters' FDCPA claim on the Initial Foster Form 2030. (*Id.* at ¶ 41.)

52. The Initial Foster Form 2030 states in paragraph 7 that "[b]y agreement with the debtor(s), the above-disclosed fee does not include the following services: Representation of the debtors in any dischargeability actions, judicial lien avoidances, relief from stay actions or any other adversary proceeding." (*Id.* at ¶ 40.) No other legal services are excluded from the scope of representation. (*Id.*)

Amendments to the Fosters' Bankruptcy Filings

53. Mr. Bellum made three sets of amendments to the Fosters' bankruptcy filings over the course of their bankruptcy to date. (Tr. 141:10–12.)

54. On July 13, 2016, the Fosters filed an amendment to the Initial SOFA, disclosing a $2,100 payment to a friend in response to question no. 6 (the "**First Amended SOFA** "). (Prehearing Order ¶ 46.) The Fosters made no other amendments to the SOFA or their bankruptcy schedules. (*Id.*) Ms. Burdette requested that Mr. Bellum make that amendment after the meeting of creditors. (Tr. 142:22–24.)

55. The Fosters' FDCPA lawsuit, settlement of the lawsuit, and payment of $2,447 in settlement proceeds to UpRight Law were not disclosed anywhere in the First Amended SOFA. (*Id.* at ¶ 47.)

56. On November 10, 2016, Mr. Bellum filed an amended Disclosure of Compensation of Attorney for Debtor(s) (the "**Amended Foster Form 2030** "). (Prehearing Order ¶ 50.) Mr. Bellum and UpRight Law did not disclose UpRight Law's receipt of $2,447 in proceeds from the settlement of the Fosters' FDCPA claim on the Amended Foster Form 2030. (*Id.* at ¶ 51.)

57. Along with the Amended Foster Form 2030, Mr. Bellum filed a copy of the Attorney Client Base Retainer Agreement for Chapter 7 Bankruptcy Related Services the Fosters executed with UpRight Law. The Agreement contains a longer list of unbundled services (i.e. services excluded from those covered by the flat fee for the bankruptcy engagement) than the exclusions that Mr. Bellum and UpRight Law disclosed in the Initial Foster Form 2030. (*Id.* at ¶ 52.)

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58. On December 7, 2016, the Fosters filed a second amended SOFA (the "**Second Amended SOFA** "), in which the Fosters disclosed the FDCPA lawsuit in response to SOFA 9, their receipt of $303 in settlement proceeds from the FDCPA Lawsuit, and the full settlement value of $2,750. (*Id.* at ¶ 48.) UpRight Law's receipt of $2,447 of proceeds from the settlement of the Fosters' FDCPA claim was not disclosed in the Second Amended SOFA. (*Id.* at ¶ 49.)

59. Mr. Bellum filed the Amended Foster Form 2030 after reflecting on Judge Lynch's rulings in the *Vanderhoof,* 16–40619–BDL, *Perlee* , 16–42859–BDL, and *Owen* , 16–43235–BDL cases. (Tr. 143:11–23; Ex. P9.)

60. In motions that the U.S. Trustee filed in *In re Vanderhoof, In re Perlee* , and *In re Owen* , the U.S. Trustee sought penalties under 11 U.S.C. § 526(c)(5) for the same improper "unbundling disclosure" allegations in this case based on the same 20 cases that the U.S. Trustee identifies in the Motion.

61. Specifically, the U.S. Trustee argued in *Vanderhoof, Perlee, and Owen* :

> As previously discussed, [the] Disclosure of Compensation filed by Mr. Bellum contains statements that are untrue and misleading, and which Mr. Bellum knew or should have known were untrue or misleading. In addition to filing the misleading statement in the Debtor's case, Mr. Bellum has engaged in a clear and consistent pattern of filing false and misleading disclosures of compensation in the Other UpRight Cases. Mr. Bellum's conduct is therefore subject to sanction under either prong of § 526(c)(5).

In re Perlee, 3:16–bk–42859–BDL, Dkt. No. 10 at 10; *In re Owen* , 3:16–bk–43235–BDL, Dkt. No. 8 at 10; *In re Vanderhoof* , 3:16–bk–40619–BDL, Dkt. No. 21 at 11.

62. The Motion in *Foster* similarly defines the "Other UpRight Cases" to "include": *Stacy LeAnn Stalter,* 16–40099–PBS; *Ofelia Ygonia Mann* , 16–40135–PBS; *Michael Joel Waters* , 16–40494–BDL; *Liesilottie Maria Smith* 16–40595–BDL; *Ashley Marie Lee,* 16–40979–BDL; *Jay Christopher Rosenow,* 16–41189–BDL; *Brent AnsonVasboe* , 16–41256–PBS; *Rachel Elizabeth Stum* , 16–41276–BDL; *Denise Bonita Crump* , 16–41562–BDL; *Kaye Brozina,* 16–42266–PBS; *Robert Clarence Santos and Rhonda Sue Santos* , 16–12835–MLB; *Christopher David Pinney and Becky Jane Pinney* , 16–13003–CMA; *Janice Diana Hallstrom* , 16–42427–PBS; *Ivan Hampton* , 16–13126–MLB; *Brenda Cameron,* 16–13124–MLB; *Michael Ellis Hankins* , 16–13445–CMA; *Helen Amada Darling* , 16–42908–BDL; *Robert James Vanderhoof and Stacey Ann Vanderhoof* , 16–40619; *Penny Irene Perlee* , 16–42859–BDL; and *Jesse Dean Owen* , 16–43235–BDL. (Am. Mot. By United States Trustee at p. 9, n.7., ECF No. 60.)

63. Following the November 8, 2016 hearing, Judge Lynch found "no intent on the part of Mr. Bellum or UpRight Law sufficient to impose a penalty under 11 U.S.C. § 526 ; and, the Court does not find a clear and consistent pattern or practice of violating 11 U.S.C. § 526 to impose a civil penalty since this is the first time these issues have been brought to the Court's attention." (*In re Perlee,* 3:16–bk–42859–BDL, Dkt. No. 36; *In re Owen* , 3:16–bk–43235–BDL, Dkt. No. 26; *In re Vanderhoof* , 3:16–bk–40619–BDL, Dkt. No. 51.)

<u>UpRight Law's Policy Regarding Claim Scheduling</u>

64. By October or November 2016, UpRight Law concluded that its existing policies were not adequate to ensure that the lawsuits it filed on behalf of its debtor-clients within a year of the petition date

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were disclosed in the bankruptcy documents. (Tr. 208:18–24, 209:12–23.) To ensure that FDCPA lawsuits were disclosed on clients' bankruptcy documents, UpRight Law established a policy for scheduling potential claims. (Tr. 209:23–24, 210:2–4, 210:7–9.) Under this policy, UpRight Law's Consumer Protection Claims Department was to enter information about any lawsuit that UpRight Law was handling for the clients directly into UpRight Law's document preparation software, Best Case Bankruptcy, so that the clients' bankruptcy schedules and statements would include information about the lawsuit when UpRight Law's Chicago staff handed off the case to the local partner. (*Id.* at 210:9–25.) Prior to implementation of this policy, UpRight Law's Chicago staff completed only three portions of a debtor's bankruptcy documents: basic information about the debtor(s) on the petition; Form 2030; and SOFA question number 16. (*Id.* at 211:8–17.) The local partner completed all other portions of a debtor's bankruptcy petition, schedules, and statements. (*Id.* at 211:17–23.)

<u>UpRight Signature Policy</u>

65. UpRight Law provided Mr. Bellum with a copy of its Partner Handbook at or around the time he joined UpRight Law as a partner in August of 2015. (Prehearing Order ¶ 13.) Although UpRight Law has revised the Partner Handbook several times, at all relevant times the Handbook advised:

> Always have the client sign duplicate original signature pages and mail the duplicates to Chicago (*see below*) at least once a month so that we can retain an original set in Chicago in case there's ever a regulatory inquiry.
>
> UpRight Law
>
> Attn: Documents
>
> 79 W. Monroe Street
>
> 5th Floor
>
> Chicago, IL 60603.

(*Id.* at ¶ 14; Ex. P28–11.)

66. Notwithstanding the stated policy in the Partner Handbook, UpRight Law did not require its partners, including Mr. Bellum, to send duplicate original signature pages to the Chicago office. (Tr. 99:4–9, 213:9–18.)

67. Mr. Chern testified that he received pushback relating to this policy because of the burden and expense of having to mail in the actual handwritten signatures on a monthly basis. (*Id.* at 213:11–13.) Because it was not apparent to Mr. Chern that the firm was experiencing an issue with partners not obtaining handwritten signatures in violation of the firm's policy, he acquiesced to the requests of partners to not have to mail those to the Chicago office. (*Id.* at 213:13–18.)

68. In May 2017, UpRight Law implemented a signature audit policy to ensure that the firm's Partners obtain handwritten signatures, irrespective of what their local jurisdictions' rules require. (*Id.* at 213:19–215:15; Ex. R50.)

<u>Mr. Bellum's Practices Regarding Original Signatures</u>

69. Before late May 2016, Mr. Bellum did not consistently obtain handwritten signatures from bankruptcy clients on their petitions, including in his own law practice. (Tr. 147:2–10.) Mr. Bellum did, however, attempt to ensure that his clients verified the information contained in their petitions before he filed them. (*Id.* at 149:16–150:1.)

70. Mr. Bellum changed his practices relating to handwritten signatures following a Continuing Legal Education ("CLE") course he attended in San Francisco, California in late May 2016, after which time he began to obtain handwritten signatures. (*Id.* at 147:21–148:7.)

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71. At the time Mr. Bellum filed the Fosters bankruptcy petition, he requested that they provide their handwritten signatures. (*Id.* at 150:7–11.) Mr. Bellum believes that the Fosters provided their handwritten signatures, but he could not locate them when he was later requested to provide them. (*Id.* at 150:13–14.) I find his testimony to be credible. Ms. Foster testified that she believed she had handsigned the initial petition before it was filed, and that she had mailed it to Mr. Bellum. (*Id.* at 50:17–22.) I find her testimony to be credible.

72. Nevertheless, neither Mr. Bellum nor UpRight Law possesses the Fosters' original, "blue ink" signatures, or copies of their original, "blue ink" signatures created prior to the filing of the Fosters' (a) petition, bankruptcy schedules, and Initial SOFA filed on May 25, 2016, at ECF no. 1; (b) chapter 7 statement of current monthly income, filed on May 25, 2016, at ECF no. 2; or (c) declaration about individual debtors' schedules, filed on July 13, 2016, at ECF no. 10. (Prehearing Order ¶ 54.)

<u>Other Cases</u>

73. In addition to the Fosters' case, from January 13, 2016, to September 8, 2016, Mr. Bellum filed twenty cases in his capacity as a partner with UpRight Law. (*Id.* at ¶ 57.) Each of the debtors in these cases was an assisted person as that term is defined in 11 U.S.C. § 101(3). (*Id.* at ¶ 58.)

74. The Form 2030s Mr. Bellum filed in each of the cases he filed in his capacity as a partner with UpRight Law from January 13, 2016, to September 8, 2016, contained the same statement concerning limitations on legal services, namely that "[b]y agreement with the debtor(s), the above-disclosed fee does not include the following services: Representation of the debtors in any dischargeability actions, judicial lien avoidances, relief from stay actions or any other adversary proceeding." (*Id.* at ¶ 59.) However, the retainer agreements executed by UpRight Law and the debtors in these cases included a longer list of legal services excluded from UpRight Law's base fee, including: motions to redeem personal property; bankruptcy rule 2004 examinations; motions to avoid liens/judgments, contested matters or adversary proceedings; contested matters regarding exemptions; amendments to any list, schedule, statement, and/or document; motions to continue the § 341 hearing; motions or adversary complaints to abandon/refinance/sell/purchase property; assistance carrying out the Debtor's Statement of Intentions; monitoring an asset case; reaffirmation agreements; and re-opening a bankruptcy case to submit post-filing proof of pre-discharge counseling. (Ex. P40.) None of these exclusions were disclosed on Mr. Bellum's initial Form 2030s. (Prehearing Order ¶ 59.)

75. In response to Judge Lynch's decision in *In re Vanderhoof, In re Owen* , and *In re Perlee* , Mr. Bellum filed amended Forms 2030s in each of the open cases he filed in his capacity as a partner with UpRight Law, in order to accurately disclose the services excluded from the base fee. (Tr. 120:22–25, 121:1–3.)

76. Mr. Bellum has not filed any new bankruptcy petitions in his capacity as a partner of UpRight Law after Judge Lynch's November 2016 oral ruling. (*Id.* at 131:8–11.)

77. Specifically, Mr. Bellum, in his capacity as a partner with UpRight Law, represented the debtors in *In re Stalter* , 16–40099–MJH, *In re Mellott* , 16–43236–MJH, *In re Keating* , 15–45278–MJH, and *In re Jones* , 15–45525–BDL, in their chapter 7 bankruptcy cases (collectively, the "**Similar Cases** "). (Prehearing Order ¶ 64.)

78. Each of the debtors in the Similar Cases is an assisted person, as that term is defined in 11 U.S.C. § 101(3). (*Id.* at ¶ 65.)

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79. Each of the debtors in the Similar Cases contacted UpRight Law seeking representation in bankruptcy. (*Id.* at ¶ 66.) UpRight Law initially assigned Mr. McAvity to represent the debtors in the Similar Cases in bankruptcy, but later

reassigned each of their bankruptcy cases to Mr. Bellum. (*Id.* at ¶ 67.)

80. Each of the debtors in the Similar Cases executed an Attorney Client Base Retainer Agreement for Chapter 7 Bankruptcy Related Services with UpRight Law, which authorized UpRight Law to investigate the "existence of violations of the automatic stay, the discharge injunction, or for breach of any state/federal consumer protection statutes or bankruptcy code violations, and to prosecute them with or with the assistance [sic] designated counsel as Firm deems necessary to pursue such claims." (*Id.* at ¶ 68.)

81. Each of the debtors in the Similar Cases executed a Consumer Rights Attorney/Client Agreement, hiring UpRight Litigation LLC, UpRight Law LLC, and/or one of its affiliated law firms to represent him/her in any potential claims against his/her creditors, debt collectors, and or credit reporting bureaus. (*Id.* at ¶ 69.)

82. Each of the debtors in the Similar Cases, in the year prior to filing for bankruptcy, was represented by Mr. McAvity, in his capacity as a partner with UpRight Law, in a prepetition lawsuit filed in the District Court for the Western District of Washington pursuant to the FDCPA. (*Id.* at ¶ 70.)

83. Each of the debtors in the Similar Cases had entered into a bankruptcy retainer agreement with UpRight Law at the time he/she filed a lawsuit under the FDCPA. (*Id.* at ¶ 71.)

84. Each of the debtors in the Similar Cases was contemplating bankruptcy at the time he/she initiated a lawsuit under the FDCPA. (Exs. P9, R14, R15, R16, R17.)

85. UpRight Law's bankruptcy representation of the debtors in the Similar Cases formed the basis of a claim in their FDCPA lawsuits. Specifically, each of the FDCPA complaints that UpRight Law filed for the Similar Case debtors included a count alleging that the defendant collection agencies violated the FDCPA by continuing to contact the debtors after they had advised the collection agencies that UpRight Law represented them with respect to the debts the agencies were trying to collect. (Exs. R65, R66, R67, R68.)

86. Each of the debtors in the Similar Cases settled his/her FDCPA claim for monetary consideration prior to filing for bankruptcy. (Prehearing Order ¶ 72.)

87. UpRight Law received a portion of the settlement proceeds in each of the FDCPA lawsuits it filed for the debtors in the Similar Cases as payment for its attorney's fees and reimbursement of costs for UpRight Law's contingency fee representation in the FDCPA lawsuits. (*Id.* at ¶ 73.)

88. The Fosters, and each of the clients in the Similar Cases, reviewed and approved the petitions before Mr. Bellum filed them, although Mr. Keating testified he did not review his petition in its entirety. (Tr. 50:7–16; Dkt. No. 151, Admissible Evid. Stip. Ex. F—Stalter Dep. 11:13–15, 11:24–12:1; Ex. E—Mellott Dep. 11:6–10; Ex. C—Jones Dep. 18:5–16; Ex. D—Keating Dep. 9:3–20.)

89. Mr. Bellum obtained the handwritten signature for Sherri Mellott before he filed her petition in August 2016. (Tr. 150:17–21.)

90. With respect to the other three debtors in the Similar Cases (Ms. Jones, Ms. Stalter, and Mr. Keating), their petitions were filed before May 2016, which was before the CLE Mr. Bellum attended that

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resulted in him changing his practices and he presumably did not obtain their signatures on the petitions. (*Id.* at 150:22–25.)

91. Neither Mr. Bellum nor UpRight Law possesses Mr. Keating's, Ms. Stalter's, or Ms. Jones's original, "blue ink" signatures, or copies of their original, "blue ink" signatures, on the petition, schedules, and initial SOFA, or the chapter 7 statement of current monthly income,

filed in their respective cases at ECF nos. 1 and 2. (Prehearing Order ¶ 90.)

92. Mr. Bellum testified that for each of the four clients at issue in the Similar Cases, at the time he filed each of their bankruptcies, he was not aware of their FDCPA settlements or lawsuits. (Tr. 151:18–25.) During the course of interviewing these clients, Mr. Bellum did not learn about their FDCPA lawsuits. (*See id.* at 155:9–15; 157:14–18; 46:3–12; Dkt. No. 151, Admissible Evid. Stip., Ex. C—Jones Dep 34:6–10; Ex. E—Mellott Dep. 40:16–23; Ex. F—Stalter Dep. 37:9–16.)

93. A draft of the petition, response to SOFA question number 16, and a Form 2030 filed in each of the Similar Cases was prepared by someone other than Mr. Bellum at UpRight Law. (Prehearing Order ¶ 81, 87; Tr. 211:8–17.)

94. Upright's Salesforce records for Ms. Mellott, Mr. Keating, and Ms. Jones included red flags and notations that the clients were involved in prepetition litigation. (Prehearing Order ¶¶ 74–76.) On November 10, 2015, UpRight Law's Chicago staff also alerted Mr. Bellum by email that Ms. Jones had a "potential FDCPA case." (*Id.* at ¶ 77.)

95. Mr. Bellum and UpRight Law did not disclose the existence of the FDCPA lawsuits or settlements in the schedules and SOFAs it prepared and filed on behalf of the debtors in the Similar Cases. (*Id.* at ¶ 79.)

96. Mr. Bellum and UpRight Law also did not disclose the compensation UpRight Law received in the prepetition FDCPA lawsuits in the initial schedules and statements it prepared and filed on behalf of the debtors in the Similar Cases. (*Id.* at ¶ 86.)

97. After the United States Trustee initiated this contested matter, Mr. Bellum filed amended SOFAs in the Similar Cases, disclosing the prepetition FDCPA lawsuits UpRight Law filed on behalf of the debtors in the Similar Cases, the full amount of the settlements of the FDCPA lawsuits, and the settlement proceeds received by the debtors. (*Id.* at ¶¶ 82–85.) Mr. Chern and Ryan Galloway, Associate General Counsel at UpRight Law, reviewed each of the amended SOFAs before Mr. Bellum filed the documents with the Court. (Tr. 111:18–20, 114:11–17, 116: 19–22, 124:24–25, 125:1–2.)

98. Mr. Bellum and UpRight Law have never disclosed, in the Similar Cases, the compensation UpRight Law received from representing the debtors in the Similar Cases in the prepetition FDCPA lawsuits—on the initial Form 2030s, or otherwise. (Prehearing Order ¶ 89; Tr. 124:12–16, 125:7–13, 145:5–17.)

99. At the evidentiary hearing, Mr. Chern testified that he believed there was no obligation to report the FDCPA attorney fees on Form 2030 because "form 2030 asks for fees that were paid in connection with the representation of the client in the bankruptcy matter. And representing a debtor in a separate FDCPA claim, it was concluded, even before the bankruptcy case was filed. It's got no place on form 2030 at all." (*Id.* at 207:7–12).

100. The initial Form 2030s filed in *In re Foster* and the Similar Cases did not fully or accurately disclose the legal services excluded from the base fee in the Attorney

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Client Base Retainer Agreements for Chapter 7 Bankruptcy Related Services executed by the Fosters, Mr. Keating, Ms. Jones, Ms. Stalter, and Ms. Mellott. (Prehearing Order ¶ 88.)

101. UpRight Law decided that it need not disclose the fees it received in connection with the FDCPA cases on its clients' SOFAs. (Tr. 179:21–180:10.) According to Mr. Chern, this position is based on UpRight Law's belief that the fees came from the defendants in the FDCPA cases, rather than the debtors themselves, and was not the debtors' money. (*Id.* at 179:21–180:10; 188:18–22.)

102. At the evidentiary hearing, Mr. Chern testified that he "did not believe that [SOFA

question] 17 was the place where you're supposed to be disclosing attorneys' fees that were paid by a collection agency as part of a settlement of an FDCPA case." (Tr. 206:7–17.) He thought that "[s]pecific preferences would be listed there, as well as payments to, say, a debt settlement program or some kind of debt resolution solution that the debtor had engaged in immediately prior to the bankruptcy case to notify the estate so if the estate wanted to try to recover payments into a debt settlement program, that that would be identified on that portion." (*Id.*)

103. Mr. Chern testified that it was UpRight Law that calculated its clients' portions of, and UpRight Law's attorney's fees from, funds that debt collectors paid to settle FDCPA lawsuits UpRight Law had filed for its clients. (*Id.* at 182:12–16.) He further testified that this calculation was based on the terms of the Consumer Rights Attorney/Client Agreement. (*Id.*)

104. From January 1, 2014, to December 31, 2016, UpRight Law filed 75 complaints on behalf of clients seeking relief under the FDCPA, and, within the year following the filing of the complaint, represented the client in a bankruptcy case. (Prehearing Order ¶ 92.) During the same time, UpRight Law filed one FDCPA complaint on behalf of a debtor-plaintiff postpetition, while the client's bankruptcy case was pending. (*Id.*) UpRight Law filed 70 bankruptcy cases for these clients, some of whom had multiple FDCPA cases. (*Id.*)

105. At least 57 of the 76 FDCPA cases filed for its bankruptcy clients during that two-year period resulted in a settlement of the plaintiff's claims for monetary consideration. (*Id.* at ¶ 93.)

106. In 48 of the 70 bankruptcy cases in which UpRight Law had previously represented the debtor in a FDCPA lawsuit, or was preparing to file a FDCPA claim on behalf of the debtor, UpRight Law did not disclose the existence of the FDCPA lawsuit or potential lawsuit anywhere in the initial bankruptcy schedules or statements it prepared and filed on the debtors' behalves. (Ex. P36; Tr. 72:4–8.)

107. UpRight Law later made amendments to 11 of those 48 cases to disclose the FDCPA lawsuits. (*Id.* at 72:9–15).

108. UpRight Law was contractually entitled to attorneys' fees of $121,228.56 from its representation of the clients in the 57 known FDCPA cases that settled for monetary consideration. (Ex. P36; Tr. 76:10–12.) With the exception of one bankruptcy case, *In re Javinsky* , filed in the Middle District of Florida in February 2016, UpRight Law did not disclose on the SOFAs filed in the subsequent bankruptcies of the settling plaintiffs any compensation it had received or anticipated receiving from the FDCPA cases. (Tr. 74:20–25, 75:1–13, 77:13–19.) Similarly, UpRight Law did not disclose on the Form 2030s required by Federal Rule of Bankruptcy Procedure 2016(b) filed in the subsequent bankruptcies of the settling plaintiffs any compensation it received or anticipated receiving

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from the FDCPA cases. (*Id.* at 74:20–25, 75:1–13.)

109. UpRight Law and UpRight Litigation stopped taking on new FDCPA clients in May 2017. (Prehearing Order ¶ 94.) The entities stopped taking on new FDCPA clients in May 2017 because they concluded it was not feasible economically to represent those clients. (Tr. 193:11–13.). The firm believed it could not generate enough income relative to the amount of work that was required to prosecute the cases for them to be profitable. (*See id* . at 193:18–20.) When asked whether UpRight Law might return to representing clients in consumer protection litigation at some point, Mr. Chern testified, "it's possible." (*Id.* at 178:5–7.)

110. Collectively, UpRight Law charged the Fosters and the debtors in the Similar Cases $7,850 in legal fees for their bankruptcies. (Ex.

P9–1; Ex. P.17–1; Ex. P21–1; Ex. P.25–1; and P32–1.) UpRight Law has refunded these bankruptcy attorneys' fees to the Debtors in the *Foster* Matter and the Similar Cases. (Prehearing Order ¶ 91.)

111. The Fosters and each of the debtors in the Similar Cases obtained discharges in their chapter 7 bankruptcy cases. (*See* Dkt. No. 24; *In re Stalter* , 3:16–bk–40099–MJH, Dkt. No. 9; *In re Mellott* , 3:16–bk–43236–MJH, Dkt. No. 9; *In re Keating* , 3:15–bk–45278–MJH, Dkt. No. 9; and *In re Jones* , 3:15–bk–45525–BDL, Dkt. No. 11.)

112. The U.S. Trustee advised each of the debtors in the Similar Cases that it had no interest in taking any action to modify their discharges, and had opened their bankruptcy cases solely for the sake of pursuing UpRight Law. (Dkt. No. 151, Admissible Evid. Stip., Ex. E—Mellott Dep. 5:11–15; Ex. F—Stalter Dep. 4:22–5:5; Ex. D—Keating Dep. 4:20–5:11; Ex. C—Jones at 4:23–5:8.)

CONCLUSIONS OF LAW

<u>FDCPA Fees and Statement of Financial Affairs</u>

1. 11 U.S.C. § 526(a)(2) provides that a debt relief agency shall not "make any statement, or counsel or advise any assisted person or prospective assisted person to make a statement in a document filed in a case or proceeding under this title, that is untrue or misleading, or that upon the exercise of reasonable care, should have been known by such agency to be untrue or misleading."

2. 11 U.S.C. § 526(c)(5) provides that

> Notwithstanding any other provision of Federal law and in addition to any other remedy provided under Federal or State law, if the court, on its own motion or on the motion of the United States trustee or the debtor, finds that a person intentionally violated this section, or engaged in a clear and consistent pattern or practice of violating this section, the court may—(A) enjoin the violation of such section; or (B) impose an appropriate civil penalty against such person.

3. UpRight Law and Mr. Bellum were required by SOFA question 5 and 9[6]

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to disclose respectively, "money collected from lawsuits" and all lawsuits in which the Fosters and debtors in the Similar Cases were parties in the year preceding their petition dates. UpRight Law and Mr. Bellum's omissions of FDCPA lawsuits on the SOFAs in those cases constitute untrue and misleading statements, and statements that upon the exercise of reasonable care, should have been known by UpRight Law and Mr. Bellum to be untrue and misleading, in violation of 11 U.S.C. § 526(a)(2).

4. UpRight Law and Mr. Bellum were required by the plain language of SOFA questions 16 and/or 17, and less clearly 18[7] to disclose the transfer of settlement proceeds from the FDCPA cases to UpRight Law. UpRight Law and Mr. Bellum's omissions of payments to UpRight Law of attorneys' fees from the settlements of prepetition FDCPA lawsuits on SOFAs it prepared and filed in *In re Foster* and the Similar Cases constitute untrue and misleading statements, and statements that upon the exercise of reasonable care, should have been known by UpRight Law and Mr. Bellum to be untrue and misleading, in violation of 11 U.S.C. § 526(a)(2).

5. Similar to the U.S. Trustee's argument that UpRight Law and Mr. Bellum's omissions in the SOFA violated § 526(a)(2), the U.S. Trustee also asserts that the omissions in the SOFA violated Rule 9011(b) and § 707(b)(4). Rule 9011(b) and (c) provide, in relevant part,

> (b) Representations to the court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading,

> written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,—
>
> (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery...
>
> (c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

§ 707(b)(4)(B) and (D) provide, in relevant part,

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> (B) If the court finds that the attorney for the debtor violated Rule 9011 of the Federal Rules of Bankruptcy Procedure, the court, on its own initiative or on the motion of a party in interest, in accordance with such procedures, may order—
>
> (i) the assessment of an appropriate civil penalty against the attorney for the debtor...
>
> (D) The signature of an attorney on the petition shall constitute a certification that the attorney has no knowledge after an inquiry that the information in the schedules filed with such petition is incorrect.

6. UpRight Law and Mr. Bellum should have made further inquiry into the factual contentions in the SOFAs in *In re Foster* and the Similar Cases, and the omissions of the FDCPA lawsuit constitute a violation of Rule 9011(b). Because I find the omissions in the SOFAs violate Rule 9011(b), they inherently violate § 707(b)(4)(B). Similarly, UpRight Law and Mr. Bellum violated § 707(b)(4)(D) because upon further inquiry, Mr. Bellum should have known the information in the schedules to be incorrect.

<u>FDCPA Fees and Form 2030</u>

7. 11 U.S.C. § 329(a) provides that "[a]ny attorney representing a debtor in a case under this title, or in connection with such a case, whether or not such attorney applies for compensation under this title, shall file with the court a statement of the compensation paid or agreed to be paid, if such payment or agreement was made after one year before the date of the filing of the petition, for services rendered or to be rendered in contemplation of or in connection with the case by such attorney, and the source of such compensation."

8. Courts broadly apply a subjective test to determine whether fee payments were made "in contemplation of" bankruptcy. *In re Perrine* , 369 B.R. 571, 581 (Bankr. C.D. Cal. 2007) (citing cases). The inquiry is "whether the debtor was influenced by the possibility or imminence of a bankruptcy proceeding in making the transfer." Id. (citing *In re Zepecki* , 258 B.R. 719, 724 (8th Cir. BAP 2001), *aff'd* , 277 F.3d 1041 (8th Cir. 2002). Here, the Fosters had already engaged Upright Law to prepare a bankruptcy filing and a creditor whose debt was potentially to be included in the bankruptcy was putting pressure on them. The Fosters were influenced by the imminence of bankruptcy even if the transfer was not a necessary step for the bankruptcy. Even fees related to avoiding bankruptcy may be in contemplation of bankruptcy let alone fees connected with preventing abuse by a creditor contemplated to have its debt discharged in bankruptcy. *See In re Perrine* , 369 B.R. 571, 581 (Bankr. C.D. Cal. 2007). The Fosters retained

UpRight Law first and foremost as bankruptcy counsel. Retention of UpRight Law for FDCPA representation would not have occurred but for the bankruptcy representation, and the FDCPA representation involved one of various creditors creating pressure that motivated the bankruptcy. Additionally, the Retainer Agreement specifically authorized not only preparation of a bankruptcy petition and schedules but also investigation of violations of consumer protection statutes. The imminent bankruptcy filing in this context was surely in the Fosters' contemplation. The "in contemplation of" test has therefore been satisfied.

9. The "in connection with" prong involves an objective test that looks to a causal connection or impact on the bankruptcy from the work performed by the attorney in the non-bankruptcy matter. *See Wasserman v. Bressman* (*In re Bressman*), 327 F.3d 229, 241 (3d Cir. 2003).

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See also, *In re Gorski* , 519 B.R. 67 (Bankr. S.D.N.Y. 2014). The settlement obtained in the FDCPA action did not assist in payment for the Foster's bankruptcy case and did not have an impact on the bankruptcy. The U.S. Trustee has failed to show that the "in connection with" prong has been satisfied.[8]

10. Payment of attorneys' fees from the Fosters' FDCPA settlement to UpRight Law was compensation for services rendered in contemplation of their bankruptcy case even if not shown to be in connection with their bankruptcy case. However, as Sec. 329 and Rule 2016(b) is worded in the disjunctive, satisfaction of the subjective "in contemplation of" prong is sufficient. The FDCPA related fees should have been disclosed in the Rule 2016(b) Statement.

11. The FDCPA case related fees collected by UpRight Law for its clients in the Similar Cases would for the same reasons be transfers "in contemplation of bankruptcy." Both 11 U.S.C. § 329(a) and Federal Rule of Bankruptcy Procedure 2016(b)[9] required UpRight Law and Mr. Bellum to disclose on the statements of compensation they filed with the court, in *In re Foster* and the Similar Cases, the attorneys' fees UpRight Law received, or expected to receive, from the FDCPA settlements.

12. UpRight Law and Mr. Bellum's omissions of the attorneys' fees received from the FDCPA settlement from the Form 2030s constitute untrue and misleading statements in violation of 11 U.S.C. § 526(a)(2).

Form 2030 and Scope of Services

13. UpRight Law and Mr. Bellum also violated 11 U.S.C. § 526(a)(2) by filing Form 2030s for the Fosters and debtors in the Similar Cases which did not accurately disclose the scope of services excluded from UpRight Law's base fee in the legal services agreement.

Sanctions and Injunctive Relief

14. With respect to UpRight Law's filing of SOFAs which failed to disclose prepetition FDCPA litigation, I decline to impose a civil penalty under § 526(c)(5). Although the Initial SOFA in *In re Foster* and the original SOFAs in the Similar Cases did not make these disclosures, the evidence did not demonstrate that these omissions were deliberate or intended to conceal the lawsuits or the settlements or had any material impact on administration of the cases. Moreover, Upright appears to have taken steps to avoid similar SOFA inaccuracies for future cases. Sanctions for future SOFA inaccuracies may certainly be imposed if UpRight's corrective actions fail.

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15. With respect to the filing of SOFAS which failed to disclose the compensation that UpRight Law received from representation in pre-petition FDCPA lawsuits. I also decline to impose a civil penalty under 11 U.S.C. § 526(c)(5). The firm's *bankruptcy* fees in the Foster case were disclosed in response to Question No. 16. The FDCPA fee should have been disclosed in answer to SOFA

Question 16 as it was a transfer on behalf of the debtors to a party, UpRight Law, which the debtors consulted about bankruptcy. Alternatively, the fees, even if not paid by the creditor, were transfers indirectly from the debtors to a party "who promised to help deal with" the Fosters' creditors.

16. For the same reason I do not impose sanctions under § 526(c)(5), I do not impose sanctions under Rule 9011(c) or civil penalties under § 707(b)(4).

17. With respect to filing Form 2030s which failed to disclose all compensation for services rendered in contemplation of or in connection with the bankruptcy cases, I similarly decline to impose a civil penalty under § 526(c)(5). Although I concluded that the Foster and Similar Case FDCPA fees were in contemplation of bankruptcy, the matter is a close question and was subject to good faith dispute by UpRight Law.

18. With respect to filing Form 2030s which failed to disclose excluded services listed in the legal services agreement, no further sanction is warranted. Judge Lynch previously addressed this issue in *In re Vanderhoof* , *In re Owen* , and *In re Perlee* , and in response, Mr. Bellum filed amended Form 2030s in each of his open cases to accurately disclose the services excluded from the base fee. UpRight Law has already disgorged the fees associated with the bankruptcy case of the Fosters and the debtors in the Similar Cases, and I decline to impose sanctions, civil penalties, or additional disgorgement beyond the voluntary disgorgement which has already occurred.

LBR 5005–1(d) Violations

19. LBR 5005–1(d)(2) provides that:

> Pleadings, affidavits, and other documents that must contain original signatures or that require verification under Fed. R. Bankr. P. 1008 or an unsworn declaration as provided in 28 U.S.C. § 1746, shall be filed electronically. The original signed document, in hard copy or electronic form, shall be maintained by the attorney of record or the party originating the document for a period not less than 5 years. Upon request, the original document must be provided to other parties or the court for review. The pleading or other document electronically filed shall indicate a signature; e.g., "/s/."

20. I conclude that LBR 5005–1(d)(2) is not ambiguous and that there is no reasonable way of interpreting it to not require obtaining and retaining original, handwritten, "blue ink" signatures for a period of at least five years. Although Upright Law argues to the contrary, in context, "original signed document" could not mean the document marked "/s/" to indicate signature. Retention of such document, already filed with the court, would be pointless.

21. Although Mr. Bellum was unable to locate the document, I find that Mr. Bellum obtained an original "blue ink" signature from the Fosters on the original bankruptcy petition. Mr. Bellum testified that he remembered requesting original signatures, and Ms. Foster testified that she recalled mailing the schedules with the original signatures back to Mr. Bellum. However, Mr. Bellum admittedly did not obtain original signatures from the Fosters

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on numerous other documents he filed in their case. Mr. Bellum also admittedly failed to obtain original signatures on numerous documents he filed in various other bankruptcy cases, and neither Mr. Bellum nor UpRight Law possess "blue ink signatures" in the case of Mr. Keating, Ms. Jones, and Ms. Stalter.

22. I conclude that UpRight Law and Mr. Bellum violated LBR 5005–1(d)(2) by filing with the court schedules, and SOFAs on which Mr. Bellum and UpRight Law had placed debtors' electronic signatures even though the debtors had not provided original "blue ink" signatures for those

documents and by not maintaining original signatures.

23. Mr. Bellum has engaged in a pattern prior to May, 2016 of filing bankruptcy documents bearing debtors' electronic signatures even though the debtors had not provided original "blue ink" signatures for those documents. He subsequently corrected this practice but in the Fosters' case, failed to retain original signatures for the petition and thirteen other documents. The U.S. Trustee asserts that pursuant to inherent authority, sanctions should be imposed against UpRight Law and Mr. Bellum for their failure to comply with LBR 5005–1(d)(2). Under a court's inherent sanctioning authority, a court must make an explicit finding of bad faith or willful misconduct. *In re Lehtinen* , 564 F.3d 1052, 1058 (9th Cir. 2009) (citing *Fink v. Gomez* , 239 F.3d 989, 992–93 (9th Cir. 2001). Bad faith or willful misconduct consists of something more egregious than mere negligence or recklessness. *Id.* Here, I find bad faith does not exist because the evidence does not demonstrate that these oversights were deliberate or had any material impact on administration of the cases especially given evidence that the Fosters and debtors in the Similar Cases authorized the court submissions in question. As the U.S. Trustee indicates, some courts have enforced sanctions, absent a finding a bad faith, where there is a local rule permitting sanctions. *See In re Singh* , 2014 WL 842102 (9th Cir. BAP March 4, 2014). To the extent I am not required to find bad faith to impose sanctions under a local rule, I still decline to impose sanctions here as I find that UpRight Law and Mr. Bellum have taken corrective measures and the misconduct is unlikely to repeat itself again.

24. I deny the Trustee's request for an injunction pursuant to 11 U.S.C. § 526(c)(5)(A) to require Mr. Bellum and Upright Law to comply with LBR 5005–1(d)(2) in all future cases. Under Fed. R. Civ. P. 65(d)(1)(C), every injunction must "describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required." The purpose of Rule 65(d) is to prevent confusion on the part of those faced with injunctive orders, and to avoid a decree too vague to be understood. *See Fed. Election Comm'n v. Furgatch* , 869 F.2d 1256, 1263 (9th Cir. 1989) (holding that an injunction that enjoins "future violations" of a statute fails to specify the precise conduct prohibited); *see also Parsons v. Ryan* , 754 F.3d 657, 689 n. 35 (9th Cir. 2014) (requiring that an injunction be "more specific than a bare injunction to follow the law.") The U.S. Trustee's request to enjoin Mr. Bellum and Upright Law from all future violations of LBR 5005–1(d)(2) is impermissibly vague. To the extent the requested injunction would simply require UpRight Law and Mr. Bellum to follow the local rule, it is unwarranted.

25. The Fosters and the debtors in the Similar Cases reviewed and authorized electronic signatures on their filings. In fact, Ms. Mellott did provide handwritten signatures prior to her initial filings. Additionally,

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the U.S. Trustee has not established the need for an injunction. The evidence established that UpRight Law did require its partners to obtain handwritten signatures at all relevant times, and that it introduced a signature audit policy in May 2017 to ensure compliance with that firm policy. Further, the evidence established that as of December 2017, UpRight Law had filed 367 cases in the Western District of Washington, but the U.S. Trustee provided evidence of only three cases in which Mr. Bellum had not requested handwritten signatures in advance of filing petitions. The evidence also established that Mr. Bellum modified his procedures following his attendance of a Continuing Legal Education Program in May 2016.

Summary

Although I find that UpRight Law and Mr. Bellum violated 11 U.S.C. §§ 526 and 707(b)(4), Rule 9011(b), and LBR 5005–1(d), I decline to impose sanctions, further disgorgement, a civil penalty or injunctive relief for the reasons stated above.[10] UpRight Law should submit a form of order denying the motion.

Notes:

[1] The U.S. Trustee requested an "order requiring UpRight Law and Bellum to comply with LBR 5005–1(d)(2) in all future cases filed in this District, disgorge $1,962 pursuant to § 329; pay a civil penalty pursuant to § 526(c)(5) in the amount of $23,400; pay sanctions pursuant to § 707(b)(4) and Rule 9011 in the amount of $1,650; and pay sanctions pursuant to the Court's inherent authority to enforce LBR 5005–1(d)(2) in the amount of $1,400; and providing such other relief as is just and proper." *See* Dkt. No. 132.

[2] I considered all of the relevant briefing including, but not limited to, the original briefing and the supplemental briefing submitted after the deadlines set forth in my letter requesting further briefing and the Order Granting Respondents' Motion for Extension of Time to File Final Brief. *See* Dkt. Nos. 158 and 172. Although certain briefing from both parties was late (*see* Dkt. Nos. 168 and 173), I conclude that the late submissions are appropriate under the circumstances, and I will consider both submissions.

[3] To the extent findings of fact are characterized as conclusions of law, or vice versa, they should be construed as though recited in their appropriate respective sections.

[4] Although some of the findings herein relate to UpRight Litigation separately from UpRight Law, no party appears to argue that UpRight Litigation's separate legal existence from UpRight Law is relevant to any of the issues in this case.

[5] Since approximately February 2015, UpRight Law has utilized a customer relationship management system built on a Salesforce platform to hold client information, record case-file related events, and organize its clients' files. (Prehearing Order at ¶ 6.) The general purpose of a "red flag" in the Salesforce database is to let a Partner know that there is something about a bankruptcy case that requires extra attention. (Tr. 138:21–25).

[6] SOFA question 5 queries,

> Did you receive any other income during this year or the two previous calendar years? Include income regardless of whether that income is taxable. Examples of *other income* are alimony; child support; Social Security, unemployment, and other public benefits; pensions; rental income; interest; dividends; money collected from lawsuits; royalties; and gambling and lottery winnings.

SOFA question 9 queries,

> Within 1 year before you filed for bankruptcy, were you a party in any lawsuit, court action, or administrative proceeding? List all such matters, including personal injury cases, small claims actions, divorces, collection suits, paternity actions, support or custody modifications, and contract disputes.

[7] SOFA question 16 queries,

> Within 1 year before you filed for bankruptcy, did you or anyone else acting on your behalf pay or transfer any property to anyone you consulted about seeking bankruptcy or preparing a bankruptcy petition? Include any attorneys, bankruptcy petition preparers, or credit counseling agencies for services required in your bankruptcy.

SOFA question 17 queries,

> Within 1 year before you filed for bankruptcy, did you or anyone else acting on your behalf pay or transfer any property to anyone who promised to help you deal with your creditors or to make payments to your creditors? Do not include any

> payment or transfer that you listed on line 16.

SOFA question 18 queries,

> Within 2 years before you filed for bankruptcy, did you sell, trade, or otherwise transfer any property to anyone, other than property transferred in the ordinary course of your business or financial affairs? Include both outright transfers and transfers made as security (such as the granting of a security interest or mortgage on your property). Do not include gifts and transfers that you have already listed on this statement.

[8] The "in connection with" prong may well have been satisfied in other UpRight Law cases if the FDCPA representations impacted the bankruptcies.

[9] Federal Rule of Bankruptcy Procedure 2016(b) provides that

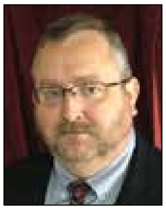
Every attorney for a debtor, whether or not the attorney applies for compensation, shall file and transmit to the United States trustee within 14 days after the order for relief, or at another time as the court may direct, the statement required by § 329 of the Code including whether the attorney has shared or agreed to share the compensation with any other entity. The statement shall include the particulars of any such sharing or agreement to share by the attorney, but the details of any agreement for the sharing of the compensation with a member or regular associate of the attorney's law firm shall not be required. A supplemental statement shall be filed and transmitted to the United States trustee within 14 days after any payment or agreement not previously disclosed.

[10] The facts found regarding UpRight Law in the Virginia and Louisiana bankruptcy actions referenced at Docket No. 168 may well explain the United States Trustee's investment of effort in the present matter, however, the egregious behavior of Upright Law addressed in those opinions is in stark contrast to the level of problematic behavior found in this case.

Building Blocks

By James J. Haller and Orlando Velazquez

How to File a Late Claim in a Chapter 13 Case



James J. Haller
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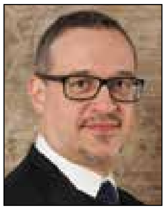

Orlando Velazquez
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Jim Haller is director of the Bankruptcy Department at the Sulaiman Law Group Ltd. in Oak Brook, Ill., and serves as president of the National Association of Consumer Bankruptcy Attorneys. Orlando Velazquez is an associate with Sulaiman Law Group Ltd. and has been practicing consumer bankruptcy law in the Chicago area since 1992.

Occasionally, there are times when a debtor needs to file a late claim in a consumer bankruptcy case. The question arises frequently in chapter 13 cases when payment of a claim is necessary to achieve the goal of the chapter 13 plan (*e.g.*, payment of taxes, child support arrearage, mortgage arrearage, etc.). Many jurisdictions address the allowance of late claims differently. This article is written from the standpoint of a conservative jurisdiction so that it may assist as many practitioners as possible.

The Claims Process

The Bankruptcy Code addresses claims at 11 U.S.C. §§ 501 and 502. Relevant to this discussion, § 502(a) states, "A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest ... objects." This provision is expanded upon by Rule 3002(c) of the Federal Rules of Bankruptcy Procedure, which states, "In a chapter 7 liquidation, chapter 12 family farmer's debt adjustment, or chapter 13 individual's debt-adjustment case, a proof of claim is timely filed if it is filed not later than 90 days after the first date set for the meeting of creditors called under § 341(a) of the Code."[1] This rule applies to both secured and unsecured creditors in many jurisdictions.[2] Furthermore, proposed amendments to Bankruptcy Rule 3002(a) clarify the rule to specify that Bankruptcy Rule 3002(a) applies to secured creditors. If approved by the Judicial Conference in March 2017 and subsequently by the U.S. Supreme Court and Congress, the amended rule would become effective on Dec. 1, 2017.[3]

A creditor must file a claim in order to receive disbursement from the bankruptcy trustee on that claim.[4] If a claim is filed beyond 90 days, it might be disallowed (after motion and hearing) under 11 U.S.C. § 502(b)(9).

Identifying the Missing Claim as Timely

The best practice for consumer attorneys is to check filed claims soon after the claims bar dates expire.[5] In the event that a necessary claim is not filed, the Bankruptcy Rules provide a mechanism for a debtor to file a late claim for a creditor. Bankruptcy Rule 3004 states:

> If a creditor does not timely file a proof of claim under Rule 3002(c) or 3003(c), the debtor or trustee may file a proof of the claim within 30 days after the expiration of the time for filing claims prescribed by Rule 3002(c) or 3003(c), whichever is applicable. The clerk shall forthwith give notice of the filing to the creditor, the debtor and the trustee.

A debtor can file a claim for a creditor during the 30-day period after the expiration date for the creditor to file a claim.

Identifying the Missing Claim as Late

The missing claim is often discovered beyond the 30-day period to file a proof of claim. Even in this situation, however, a claim may still be filed. Under Bankruptcy Rule 9006(b)(1), the bankruptcy court can enlarge the period to file a proof of claim upon a showing of excusable neglect. Bankruptcy Rule 9006(b)(1) states:

> *In General*. Except as provided in paragraphs (2) and (3) of this subdivision, when an act is required or allowed to be done at or within a specified period by these rules or

1 What follows are narrowly drawn exceptions to this rule that are inapplicable to most situations. Other limited exceptions apply to claims filed in a chapter 7 case. *See* 11 U.S.C. § 726(a)(1)-(3).

2 *See In re Dumain*, 492 B.R. 140, 143-49 (Bankr. S.D.N.Y. 2013) (collecting cases, dividing cases into "three approaches" and concluding that Rule 3002(c) applies to secured claims); *In re Nwonwu*, 362 B.R. 705, 708-09 (Bankr. E.D. Va. 2007) (recognizing disagreement, citing cases and concluding that deadline for timely filing under Rule 3002(c) applies to secured claims); *see also In re Pajian*, 785 F.3d 1161, 1162 (7th Cir. 2015) (Rule 3002(c) applies to secured claims); *In re Dennis*, 230 B.R. 244, 246-54 (Bankr. D.N.J. 1999) (same); Keith M. Lundin, *Chapter 13 Bankruptcy* § 280.1 (4th ed. 2009) ("Something this basic should be clear in the Code and Rules. It isn't."); Mark Glover, "Note, Timely Filing in Chapter 13 Bankruptcy Cases: Does Rule 3002(c)'s Deadline Apply to Secured Creditors?," 87 *B.U. L. Rev.* 1231 (2007) (arguing that Rule 3002(c) applies to secured creditors); *In re Mehl*, No. 04-85570, 2005 Bankr. LEXIS 2092, 2005 WL 2806676, at *2-3 (Bankr. C.D. Ill. Oct. 25, 2005) (secured creditors need not comply with deadline, although there might be some point after which they cannot file proof of claim); and *In re Strong*, 203 B.R. at 112-13 (Rule 3002(c) deadline does not apply to secured creditors).

3 *See* Advisory Committee on Bankruptcy Rules of the Judicial Conference of the United States, Report of the Advisory Committee on Bankruptcy Rules (December 2016), *available at* uscourts.gov/rules-policies/pending-rules-and-forms-amendments/pending-changes-bankruptcy-forms (unless otherwise indicated, links in this article were last visited on Feb. 24, 2017).

4 *See* Bankruptcy Rule 3021. *See also In re Dumain*, 492 B.R. 140, 143 (Bankr. S.D.N.Y. 2013); *In re Hogan*, 346 B.R. 715, 720 (Bankr. N.D. Tex. 2006); *In re Baldridge*, 232 B.R. 394, 396 (Bankr. N.D. Ind. 1999); and *In re Minbatiwalla*, 424 B.R. 104, 118 n.8 (Bankr. S.D.N.Y. 2010) ("[I]f the secured creditor wants to receive payments under a confirmed plan, the creditor must file a proof of claim.").

5 Bankruptcy Rule 3002(c) requires nongovernmental claims to be filed 90 days after the first date set for the meeting of creditors, and Bankruptcy Rule 3002(c)(1) requires governmental claims to be filed not later than 180 days after the date the bankruptcy petition was filed.

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Building Blocks: How to File a Late Claim in a Chapter 13 Case

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by a notice given thereunder or by order of court, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if the request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.

Unfortunately, the bankruptcy court cannot extend the time for a creditor to file a claim. Bankruptcy Rule 9006(b)(3) states in pertinent part, "*Enlargement Governed By Other Rules*. The court may enlarge the time for taking action under Rules ... 3002(c) ... only to the extent and under the conditions stated in those rules." Even in inequitable situations, the majority of cases have held that the bankruptcy court was not vested with the equitable power to allow a claim outside the exceptions contained in Bankruptcy Rule 3002(c).[6]

Fortunately, Bankruptcy Rule 9006(b)(1) does apply to Bankruptcy Rule 3004. This means that a debtor can file a motion under Bankruptcy Rule 9006(b)(1) for an approval to file a claim beyond the 30-day limit of Bankruptcy Rule 3004. In this situation, the debtor will need to plead and prove excusable neglect.[7] There are four factors to determine whether a finding of excusable neglect is warranted: (1) the danger of prejudice to the debtor; (2) the length of the delay and its potential impact on judicial proceedings; (3) the reason for the delay, including whether it was within the reasonable control of the movant; and (4) whether the movant acted in good faith.[8]

The motion to extend time should set forth the facts and circumstances demonstrating these factors. For example, if the claim is for mortgage arrears, then prejudice to the debtor would occur if the arrearage claim is not allowed and paid. If the confirmed plan already funds the arrears, then allowance of the claim will have minimal impact on judicial proceedings. In order to file an arrears claim, the debtor may not have access to the information and documentation to timely file a proof of claim. Finally, the debtor's motion to pay his/her creditors demonstrates good faith. Other situations with similar circumstances could include tax debts discovered after filing an amended return, as well as child support or student loan obligations not known at the time of filing for bankruptcy.

> **Do not file the claim without permission, and do not file a motion to allow a late claim. Remember, the motion is for permission to extend the time to file a claim under Bankruptcy Rule 3004.**

The recommended process for using this rule is to file a motion to allow the late filing of a claim and attach the proposed claim as an exhibit, so cite the Bankruptcy Rules in the motion. If the court finds the argument convincing, then the court will allow the late filing of the claim. Enlist the support of the creditor and the trustee whenever possible before the hearing to support the motion.

Practice Tips

Follow this recommended procedure when asking the bankruptcy court to extend the time to file a late claim. Do not file the claim without permission, and do not file a motion to allow a late claim. Remember, the motion is for permission to extend the time to file a claim under Bankruptcy Rule 3004. If you have further questions, ask a seasoned bankruptcy practitioner.[9] abi

6 *In re Greenig*, 152 F.3d 631, 635 (7th Cir. 1998); *In re Gardenhire*, 209 F.3d 1145 (9th Cir. 2000); *In re Quinones*, 2011 Bankr. LEXIS 727 (Bankr. D.P.R. March 2, 2011); *In re Daniels*, 466 B.R. 214, 218 (Bankr. S.D.N.Y. 2010); *In re Nwonwu*, 362 B.R. 705, 708 (Bankr. E.D. Va. 2007); *In re McNeely*, 309 B.R. 711, 712 (Bankr. M.D. Pa. 2004); *In re Kristiniak*, 208 B.R. 132 (Bankr. E.D. Pa. 1997); *In re Marty*, 25 Fla. L. Weekly Fed. B 203 (Bankr. S.D. Fla. 2014); and *In re Brogden*, 274 B.R. 287, 289 (Bankr. M.D. Tenn. 2001) (J. Lundin) ("In Chapter 13 cases, the Code and Rules make no exception to the 180-day timeliness deadline when faulty notice or other circumstances disable a governmental creditor to file a timely claim."); *but see In re Collier*, 307 B.R. 20 (Bankr. D. Mass. 2004); *In re Stacy*, 405 B.R. 872 (Bankr. N.D. Ohio 2009); and *In re Russo*, 2009 U.S. Dist. LEXIS 113865, 2009 WL 4672669 (D.N.J. 2009) (three cases that recognized general lack of authority to extend time, but allowed claims on due-process grounds).

7 Excusable neglect is not defined in the Bankruptcy Code. However, the Supreme Court, in *Pioneer Inv. Servs. v. Brunswick Assoc. Ltd. P'ship*, 507 U.S. 380 (1993), constructed a test for excusable neglect under Bankruptcy Rule 9006(b)(1). This case established a two-part test: (1) the movant must establish neglect by showing either circumstances beyond the movant's control or the movant's inadvertence, mistake or carelessness; and (2) after neglect is established, the court must determine whether the neglect was excusable. *Nat'l Steel Corp.*, 316 B.R. 510, 515 (Bankr. N.D. Ill. 2004). The Court noted that the ordinary meaning of "neglect" is to give little attention or respect to a matter or to leave undone or unattended to especially through carelessness. *Id.* at 516. The determination of whether "neglect" is excusable is at bottom an equitable one, taking into account all relevant circumstances surrounding the party's omission. *Id.*

8 *Id.*

9 A list of qualified attorneys can be found at nacba.org/find-an-attorney, as well as ABI's Bankruptcy Resources website at bankruptcyresources.org.

Rule 2002. Notices to Creditors, Equity Security Holders, Administrators In Foreign Proceedings, Persons Against Whom Provisional Relief Is Sought In Ancillary And Other Cross-Border Cases, United States, and United States Trustee

…
…
(h) Notices to Creditors Whose Claims Are Filed.

(1) Voluntary Case. In a voluntary chapter 7 case, chapter 12 case, or chapter 13 case, after 70 days following the order for relief under that chapter or the date of the order converting the case to chapter 12 or chapter 13, the court may direct that all notices required by subdivision (a) of this rule be mailed only to:

- the debtor;
- the trustee;
- all indenture trustees;
- creditors that hold claims for which proofs of claim have been filed; and
- creditors, if any, that are still permitted to file claims because an extension was granted under Rule 3002(c)(1) or (c)(2).

(2) Involuntary Case. In an involuntary chapter 7 case, after 90 days following the order for relief under that chapter, the court may direct that all notices required by subdivision (a) of this rule be mailed only to:

- the debtor;
- the trustee;
- all indenture trustees;
- creditors that hold claims for which proofs of claim have been filed; AND
- creditors, if any, that are still permitted to file claims because an extension was granted under Rule 3002(c)(1) or (c)(2).

(3) Insufficient Assets. In a case where notice of insufficient assets to pay a dividend has been given to creditors under subdivision (e) of this rule, after 90 days following the mailing of a notice of the time for filing claims under Rule 3002(c)(5), the court may direct that notices be mailed only to the entities specified in the preceding sentence.

612 B.R. 205

IN RE: Beatriz ANZALDO, Debtor,

BANKRUPTCY NO: 19-00882-MM7

United States Bankruptcy Court, S.D. California.

Signed January 7, 2020
DATE: October 24, 2019

[612 B.R. 208]

Andrew J. Miller, San Diego, CA, for Debtor.

MEMORANDUM DECISION

MARGARET M. MANN, CHIEF JUDGE, United States Bankruptcy Court

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") erected a structure of safeguards for debtors in bankruptcy who reaffirm certain debts, thereby waiving their discharge as to those debts. For personal property secured loans, including primarily car loans, this structure requires debtors to first indicate an intent to reaffirm the debt at the outset of the case, and then sign a reaffirmation agreement with the lender. This agreement must include a certification from counsel that the decision to reaffirm the debt was informed, voluntary, and did not impose an undue hardship. If these safeguards are properly met, court review is limited, and the agreement becomes enforceable 60 days after it is filed.

But if the debtors are not represented by an attorney when negotiating the agreement, the court must step in and review the agreement and discuss the consequences with the debtors. Court review is also required, regardless of whether the debtors are represented, if the agreement reflects budgeted income less than the debtors' expenses including the reaffirmed debt. Where the court becomes concerned about the validity of the counsel's certification as factually sound, the court is also obliged to review the reaffirmation decision.

In this case, the court's concerns arose when the reaffirmation agreement reflected a slight budget surplus resulting from significantly understated expenses. The agreement also concealed the car loan deficiency reflected in the schedules creating a risk of further financial distress for Anzaldo if she were to default after the bankruptcy. The court scheduled a hearing and questioned counsel about these problems, which were conceded. But counsel could not explain why he certified the agreement as in Anzaldo's best interest under the circumstances. Instead, he admitted that he certified the agreement to protect the car from repossession and to help Chapter 7 Debtor Beatriz Anzaldo rebuild her credit.

The court issued an order to show cause ("OSC") to Anzaldo's car lender, Wells Fargo Bank, N.A. ("WF"), because it appeared WF may have been pressuring Anzaldo to reaffirm the debt. While those concerns have been assuaged, the proceedings revealed that counsel here, and other attorneys who appear in this court, are misinformed about how their clients' credit scores are impacted by reaffirmation agreements, which affects how they discharge their responsibilities in counseling reaffirmation decisions. The court will strike counsel's certification because it was admittedly misinformed. Alternatively, the court will disapprove the agreement.

This opinion is published to attempt to assist consumer bankruptcy attorneys in advising their clients about the complex reaffirmation process. Despite the questions which remain unanswered despite the testimony presented by WF about the credit reporting industry, some guidance may be provided by the record in this case.

I. Factual Background

A. Anzaldo's Finances and Reaffirmation Decision.

Anzaldo's income is well below the median for this district, despite her stable employment.

[612 B.R. 209]

She continues to work as a custodian at the University of California San Diego, as she has for the past 13 years, commuting more than 40 miles to work each day. Her attempts to manage her finances under a frugal, but unrealistic, budget led to unpaid debts and the need to file bankruptcy. In both her schedules and her reaffirmation agreement, Anzaldo reports a below median monthly income of $2,247.03, with expenses of $2,232.14 (including the $436.86 per month payment to WF), or less than half the national standard. This yields a budget surplus of merely $14.89 to cover unexpected expenses or contingencies. A comparison of Anzaldo's expenses with the applicable standards follows:

	Debtor's Sch. J Expenses	National and Local Standards
Food & Housekeeping Supplies	$200	$369[1]
Apparel & Services	$25	$89
Personal Care Products & Services	$25	$38
Miscellaneous[2]	$202.28	$151
Healthcare Expenses[3]	$50	$52
Utilities/Housing Expenses (not including mortgage/rent)[4]	$235	$502
Mortgage/Rent	$858	$1,751
Transportation Operating Costs[5]	$200	$261
Total	$1,795.28	$3,213

[**Editor's Note** : The preceding image contains the reference for footnote[1] ,[2] ,[3] ,[4] ,[5]].

Anzaldo owes WF $13,837.02 secured by her 2014 Honda CR-V. The car is her most valuable asset and the car loan is her largest debt. The car is over-encumbered. It was valued at $11,000 in Anzaldo's schedules, although the reaffirmation agreement values the car at $15,125, an increase of over a third. This delta resulted from different valuation measures. WF

[612 B.R. 210]

used retail value and Anzaldo used blue book value. The testimony was undisputed that Anzaldo's value was a more accurate prediction of what would be achieved if she defaulted and the car was sold after repossession. Her other debts, which total approximately $12,000, are for consumer goods, internet service, or basic living expenses incurred as an apparent result of her inability to afford expenses on her budget.

Like most debtors in this district, the lack of reliable public transportation means having a car is critical to Anzaldo's livelihood. *See Pamela Foohey et al., Driven to Bankruptcy* , 55 Wake Forest L. Rev. (forthcoming 2020) (manuscript at 2) (on file with authors) ("Household financial distress can threaten automobile ownership and, with it, the day-to-day life stability and upward mobility that car ownership brings.") (citing AnnaMaria Andriotis, Ken Brown & Shane Shifflett, *Families Go Deep in Debt to Stay in the Middle Class* , Wall St. J. (Aug. 1, 2019), xmlns:_ufe="http://www.arbortext.com/namespace/Styler/UserFormattingElements"key="9">xmlns:_ufe="http://www.arbortext.com/namespace/Styler/UserFormattingElements"key="9">xmlns:_ufe="http://www.arbortext.com/namespace/Styler/UserFormattingElements"key="9">https//www.wsj.com/articles/families-go-deep-in-debt-to-stay-in-the-middle-class-11564673734>>>) (identifying auto loans as a main component of economic risk as American families go deeper into debt to maintain middle class lifestyles). Living 40 miles from work, Anzaldo needs her car. She intends to pay her debt and reaffirmed it by signing the reaffirmation agreement.

Her counsel for an unexplained reason signed the schedules and the disclosures in the reaffirmation agreement with the understated budget. In fact, he certified that her income and expenses were enough to make the monthly payment and that it would not impose an undue hardship in the agreement. He also certified that Anzaldo was fully informed of the legal effect and consequences of reaffirmation, when he admitted based on the testimony at the OSC hearing that neither he nor his client understood the ramifications of reaffirmation on her credit score.

B. Procedural History

The court's concerns about Anzaldo's budget led it to schedule a hearing for April 25, 2019. Only counsel appeared since Anzaldo did not want to miss work. Counsel volunteered that he had discussed the deficiency with his client, but it was her only car. He continued:

> Wells Fargo, without the reaffirmation, won't report the payments on her credit report and won't help her rebuild her credit.
>
> They - without the reaffirmation agreement, they deem it as discharged. And if you tell them that it just passes through, they can't repo. But so in that sense, I mean, she's asking to help her credit. It's - you know, according to Wells Fargo, it's not upside down. On our schedules, it was upside down by three grand or so. She's able to make the payments. She wants to go forward with the reaffirmation agreement.

Anzaldo thus had two objectives in reaffirming the debt; to protect her car from repossession and to rebuild her credit score. The court requested evidence from counsel as to what he understood to be WF's credit reporting practices and issued the OSC. WF responded to the OSC averring it does not repossess a debtor's car if the payments are current, regardless of

[612 B.R. 211]

whether the debt is reaffirmed.[6] It also explained its credit reporting practices are standard in the industry and not coercing or harassing.

WF's response raised other issues about the reaffirmation that the court noted in a tentative ruling. WF then supplemented its response with a declaration from its Vice President in Operations Risk/Control, Amanda Gilroy, who did not appear to testify. WF also submitted a declaration from a consumer credit reporting expert, Dean Binder, who has been employed by both Equifax Credit Information Services and by the Fair Isaac Corporation, who compiles and provides "FICO" credit scores, widely used in the consumer credit and lending environment.

The court questioned Gilroy, Binder, and Alisa A. Giventel at the OSC hearing on October 24, 2019. Giventel was identified as an expert on the Fair Credit Reporting Act ("FCRA"). It also questioned counsel who was ordered to attend the hearing. After the hearing, since the experts could not answer the court's questions, WF was directed to supplement the record with testimony from Joe Ibarra, a bankruptcy manager with WF, which it filed. The matter was then taken under submission.

C. Impact of Credit Reporting Practices on Anzaldo's Reaffirmation Decision

WF, along with most car lenders, are "furnishers" of data to credit reporting agencies ("CRAs"). Although common parlance is that WF "reports" this data to the CRAs, the technical verb for the provision of data to CRAs is to "furnish." The CRAs then prepare credit reports with the data and calculate consumer credit scores.

All furnishers, including WF, who access credit reports must reporting data consistent with the Credit Data Industry Association's ("CDIA's")

Credit Reporting Resource Guide ("CRRG"). The CDIA is a trade association comprised of representatives who are primarily Experian, Equifax, Transamerica, Transunion, and Novus. The CDIA publishes the CRRG to advise furnishers how to provide accurate information through the CDIA's electronic reporting system referred to as "Metro 2." As the CRRG is designed to assist furnishers in electronic reporting through the Metro 2 system, it is often referred to as the "Metro 2 Guidelines." These guidelines are generated by the industry for its purposes and not in response to any regulatory requirement.

Although furnishers must be compliant to participate in the Metro 2 system, they retain discretion on how to interpret and follow the guidelines. The system is not static since the Metro 2 Guidelines are updated annually. The CDIA is expected to publish revisions to these guidelines in the next year to address "practical complexities faced by furnishers in the bankruptcy context." The upcoming revisions are intended to prevent the need for edits to loan level data in the bankruptcy context, but how that will be accomplished is unknown at this time. Changes to the Metro 2 system could render some aspects of this decision obsolete.

[612 B.R. 212]

The Metro 2 system currently records four bankruptcy events for an account such as a car loan: 1) the filing of the bankruptcy; 2) the period after the bankruptcy and when it is resolved; 3) reaffirmation of a debt or lease assumption; and 4) the entry of a discharge. Information on these events is either furnished by the lenders or obtained from public records.

The industry standard, which WF follows, is not to report payments after bankruptcy unless the debt is "reaffirmed," the testimony about when a debt should be categorized as "reaffirmed" is murky at best. WF's communications with Anzaldo's counsel suggested that WF would not furnish payment information if the court denied approval of the agreement. But neither of WF's experts could provide a knowledgeable response to the court's questions about whether the agreement had to be enforceable before the payments are reported. The only specific evidence provided by WF in response to the court's question whether a determination of enforceability of a reaffirmation was germane was from Ibarra, who averred:

> For auto accounts of Chapter 7 debtors who agree to reaffirm their debts, Wells Fargo does not furnish the reaffirmation consumer information indicator until after the period to rescind the reaffirmation agreement has expired.

This testimony suggests that WF considers a debt to be reaffirmed after the rescission period expires 60 days after it is signed and filed under 11 U.S.C. § 524(c)(4)[7] , regardless of whether the agreement is later disapproved or rendered unenforceable. Anzaldo signed, filed, and never rescinded the reaffirmation agreement. Since more than 60 days has elapsed, then WF may already be reporting the payments Anzaldo has been making since this bankruptcy was filed. Further clarification for the benefit of the consumer bankruptcy community is in order.

But even if WF is continuing to report Anzaldo's payments to the CRA's as she hoped, this will not necessarily rebuild her Anzaldo's credit score. Binder's opinion is to the contrary. He avers in his declaration:

> The reporting of positive payment history on an account that has a discharged in bankruptcy indicator would not be beneficial for a consumer from a scoring perspective.

He explained this is because:

> An account included in bankruptcy is considered a major derogatory by FICO. As such, any positive payment history would not be evaluated by the scoring model.

Binder concluded that the impact of entering into the reaffirmation agreement on a debtor's credit score is "none if very low." Binder also noted that entering into a reaffirmation agreement and having payments reported could also backfire because reporting newer negative late payment information would lower the consumer's credit score. In short, Binder's view is that the negative impact of missed payments outweighs the benefit of any positive payments. Binder declined to hypothesize about what would happen if furnishers reported payments to the CRA if the debt was not reaffirmed.

Neither Anzaldo nor counsel were aware of this testimony about the impact of reaffirmation on Anzaldo's credit score when she decided to reaffirm the debt. For this reason, counsel admitted at the OSC hearing he would have given different advice based on information he learned in these proceedings. Counsel would now advise his

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clients of WF's policy not to repossess the car if a debtor is current on the payments, and of WF's reporting practices. Knowing about the repossession policy, counsel conceded that Anzaldo's only reason to reaffirm the debt was to improve her credit score, which is of dubious value.

II. <u>The Court Has Authority to Examine Anzaldo's Reaffirmation Agreement</u>

WF contends this court lacks authority to review its reaffirmation agreement with Anzaldo for two reasons; first, because her attorney filed a § 524(c)(3) certification that was timely and technically proper so that the agreement became enforceable 60 days after it was filed with the court. Second, no presumption of undue hardship arose under § 524(m)(1) because her budget was positive. WF relies on *Bay Fed. Credit Union v. Ong (In re Ong)* , 461 B.R. 559, 562 (9th Cir. BAP 2011) (reaffirmation agreement where budget was positive became immediately enforceable after expiration of the rescission period for debtors represented by counsel provided the certification complies with § 524(c) and the presumption of undue hardship is not applicable since the lender was a credit union). Anzaldo's case involves different facts, and requires a different outcome, however.

A. <u>The Limits to Immediate Enforceability</u>

For a reaffirmation agreement to be immediately enforceable under § 524(c), it must be signed before the discharge is entered, include the disclosures of debtors' monthly income and expenses under § 524(k)(6)(a), including the reaffirmed debt; be certified by the debtor's attorney, and be enforceable under state law. *Salyersville Nat'l Bank v. Bailey (In re Bailey)* , 664 F.3d 1026, 1031 (6th Cir. 2011) (interpreting § 524(c)). The requirements of § 524(c) "must be strictly complied with in order for a reaffirmation agreement to be enforceable." *In re McHale* , 593 B.R. 670, 675 (Bankr. M.D. Fla. 2018) ; *Mejia v. Partners for Payment Relief LLC (In re Mejia)* , 559 B.R. 431, 439 (Bankr. D. Md. 2016). If the agreement does not comply with § 524(c), it is void and unenforceable without any involvement of the court. *Venture Bank v. Lapides* , 800 F.3d 442, 446 (8th Cir. 2015) (reaffirmation agreement that was never filed with the court is void and not enforceable).

Although all the boxes necessary for enforceability of Anzaldo's reaffirmation agreement were checked, a superficial review is not appropriate here.

B. <u>Roles of Attorneys and Courts Regarding Reaffirmation Agreements</u>

Both the oversight authority of the court and the role of debtors' attorneys in the reaffirmation process were emphasized in the BAPCA. *In re Laynas* , 345 B.R. 505, 516 (Bankr. E.D. Pa. 2006) (noting court review authority expanded under BAPCPA with the enactment of § 524(m) and Fed. R. Bankr. P. 4008). The attorneys' role remains paramount, however. *In re Minardi* , 399 B.R. 841, 847 (Bankr. N.D. Okla. 2009) ("[W]hether an attorney represented a debtor during the course of negotiating a reaffirmation agreement is of critical importance in determining when and if the agreement becomes effective, and whether the Court has any remaining obligations under § 524(d) with respect to the agreement after it is filed.") (emphasis in original). *In re Miller* , 575 B.R. 87, 90 n.4 (Bankr. E.D. Pa. 2017) (proper certification "removes all judicial review of a debtor's reaffirmation agreement").

Court review is necessary in three circumstances: if the certification is not proper, if a presumption of undue

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hardship arises, or if the debtors are unrepresented. Where debtors are unrepresented, the court must hold a hearing under §§ 524(c)(6) and (d) to ensure the debtor is informed of the legal consequences and voluntary nature of reaffirming a debt. The court must determine whether the reaffirmation agreement is in the debtor's best interest and not an undue hardship, regardless of whether an undue hardship presumption arises under §§ 524(c)(6)(A)(i) and (ii). *San Diego Cty. Credit Union v. Obmann (In re Obmann)* , No. CC-11-1156-HKiMk, 2011 WL 7145760, at *4, 2011 Bankr. LEXIS 5298, at *10-11 (9th Cir. BAP Dec. 9, 2011), cited in *Ong* , 461 B.R. at 563.

Second, court review is also required if the § 524(k) (6) (A) disclosures reflect a presumption of undue hardship arises under § 524(m) because the debtors' budget is negative, even if the attorney certifies the agreement. Disapproval is mandated unless the debtor can rebut the presumption by identifying "additional sources of funds to make the payments." § 524(m)(1). If the lienholder is a credit union as in *Ong* , 461 B.R. at 562-63, the presumption does not apply, and consideration of the debtor's best interest is not permitted. *Ong* , 461 B.R. at 562-63. Even if no presumption of undue hardship technically arises, other information in the record can authorize the court to review whether the debtor can afford the car payment as required by § 524(m). *In re Griffin* , 563 B.R. 171, 173 (Bankr. M.D.N.C. 2017) (court reviewed agreement even though the reaffirmation agreement reflected expenses exactly equal to monthly income); *In re Carrington* , 509 B.R. 337, 341 (Bankr. E.D. Wash. 2014) (presumption of undue hardship arose under § 524(m)(1) where schedules showed a negative monthly income and the reaffirmation agreement did not); *In re Caldwell* , 464 B.R. 694, 695 (Bankr. W.D. Pa. 2012) (presumption of undue hardship arose under § 524(m)(1) because the reaffirmed payment was not listed on the debtor's schedules and the positive monthly income on the schedules was insufficient to make the payment on the reaffirmed debt); *In re Payton* , 338 B.R. 899, 903 (Bankr. D.N.M. 2006) (court need not "rely only on the income and expense figures set out in part D of a reaffirmation agreement"); *Laynas* , 345 B.R. at 511 (the court should not "woodenly" review the reaffirmation agreement budget because "sometimes looks deceive").

The third review requirement is for the court to "determine the bona fides" of an attorney's § 524(c) (3) certification. Although the common avenue to evaluating the certification is Fed. R. Bankr. P. 9011[8] , invoking that rule is not necessary to invalidate a flawed certification. *Miller* , 575 B.R. at 89 n.2 ; *In re Izzo* , 197 B.R. 11, 12 (Bankr. D.R.I. 1996) (improper reaffirmation declared void without expressly relying on Rule 9011.) Many cases apply Rule 9011 instead. *In re Vargas* , 257 B.R. 157, 160 (Bankr. D.N.J. 2001) (attorney required to disgorge fees under Rule 9011); *In re Melendez* , 235 B.R. 173, 196-97 (Bankr. D. Mass. 1999) (Rule 9011 permitted the attorney certification to be reviewed); *In re Bruzzese* , 214 B.R. 444, 450-51 (Bankr. E.D.N.Y. 1997) ; *In re Hovestadt* , 193 B.R. 382, 383 (Bankr. D. Mass. 1996) (a pre-BAPCPA case in which the court held it had "an independent obligation to review reaffirmation agreements to ensure that all the elements of section 524(c) are fully satisfied," including whether the attorney violated Rule 9011 in executing the applicable certification);

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The court's review authority was triggered in this case because Anzaldo was misinformed by her attorney about the legal effect and consequences of reaffirming her debt, and because her budget information was unreasonable giving rise to a presumption of undue hardship.

III. The Attorney Certification Was Misinformed and Understated Anzaldo's Ability to Make the Payment under the Car Loan

A. The Reaffirmation Agreement and Schedules Stated an Unrealistic Budget

Anzaldo's vulnerable financial condition creates a significant risk of default on the reaffirmed debt that counsel never explained. While Anzaldo has a steady job, her annual income is 25% below the California median family income for her family size. She has no non-exempt assets and her only significant asset, other than her state pension, is her over-encumbered car at issue here. Her net positive income is only the result of expenses which fall well below the median average and appear to be unsustainable given her bankruptcy filing.

Neither Anzaldo, nor her attorney, explained how she can keep her monthly expenses $1,417.72 below the median average, beyond a vague reference to Anzaldo having roommates. Her low rent may be unsustainable. If her expenses were listed at the median average, her monthly income would be a negative $596.97, and she would not be able to afford the reaffirmed payment. *See* 4 *Collier on Bankruptcy* ¶ 524.04 (16th ed. 2019) (Internal Revenue Service standards can be used to "assess whether debtors have ... inadequately budgeted for food and other necessities").[9]

Other evidence in the record reflects that Anzaldo struggles to cover her living expenses. Although she was current on her car payments at the various hearings in this case, the nature of the unpaid debts she scheduled indicate she had to resort to credit cards for other purchases and living expenses such as cable and phone bills. There is no evidence Anzaldo spends money on luxury items or is profligate. Because Anzaldo will not be able to seek another discharge for eight years under § 727(a) (8), her access to bankruptcy relief will be limited.

Because this unrealistic budget leaves Anzaldo at risk of default in making her car payments, despite her best intentions, the court finds a presumption of undue hardship arose under § 524(m). Since this presumption was not rebutted by Anzaldo's counsel, the agreement cannot be approved.

B. Anzaldo was Misinformed that Reaffirmation was Necessary to Protect the Car from Repossession

Counsel certified the reaffirmation agreement was in Anzaldo's best interest mistakenly assuming this was necessary to protect her car from repossession. He admitted his error after WF responded to the OSC and he learned Anzaldo did not have to reaffirm the debt to manage the repossession risk. This policy is not unusual. As a matter of economics, many lenders, including WF, will not repossess debtors' cars unless they default on the

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payments.[10]

Counsel's certification here erroneously stated that Anzaldo was "fully advised ... of the legal effect and consequences" of reaffirming her debt as required by § 524(c)(3), when he later admitted that his advice was flawed. As such, the certification must be treated as void for failing to strictly comply with the requirements of § 524(c)(3). *Ong* , 461 B.R. at 563-64 (attorney certifications can be disregarded "when close scrutiny compels the conclusion that the elements set forth in § 524(c) are either lacking altogether, insufficient or void as having been filed in violation of Rule 9011"). The certification requirement is strictly construed as necessary to protect debtors from compromising their fresh start by making unwise agreements to repay debts. *Gordon v. Hines (In re Hines)* , 147 F.3d

1185, 1190 (9th Cir. 1998). Counsel's certification does not meet this exacting standard.

C. Anzaldo was Misinformed that Reaffirmation was Necessary to Improve her Credit Score

Anzaldo's primary reason to reaffirm the car, once she learned that reaffirmation was not necessary to protect her car from repossession, was to improve her credit score. This decision was also misinformed. WF's expert opined that reporting the payments after bankruptcy does not have much of a positive impact on her credit score and the negative impact of missing a payment is exacerbated. It may also be that Anzaldo's payments have been and will continue to be reported by WF to the CRAs since she has not rescinded the agreement, and approval by the court is not apparently a factor as to whether payments will be reported.

This misunderstanding is significant. After hearing the testimony, counsel in fact admitted he would give different advice to his clients in the future. Again, strictly construed, the certification is invalid for this additional reason.

D. Anzaldo Was Misinformed of the Risk of a Deficiency Judgment

Anzaldo's counsel also failed to give due consideration to the detriment of waiving her discharge in reaffirming the car loan in explaining his decision to the court. That reaffirmation is a detriment has been recognized by the Ninth Circuit. *McClellan Fed. Credit Union v. Parker (In re Parker)* , 139 F.3d 668, 671 (9th Cir. 1998) (only car lenders and not debtors benefit from reaffirmation agreement because debtors are required to pay any deficiency as an unsecured debt upon default by waiving their discharge).

The court cannot find counsel fully advised Anzaldo of the consequences of a default as required by § 524(c)(3)(c)(ii). The risk of a deficiency judgment here is significant because Anzaldo's schedules reflect her car is encumbered by a debt greater than its value. Counsel testified the schedules employed the blue book liquidation value measure as that was more realistic in his experience. WF used the retail value measure that was over $4,000 greater than the blue book value, even though that was a less accurate prediction of the potential deficiency judgment if Anzaldo missed the payments. But counsel attorney never explained why he signed schedules with a significant deficiency, and then certified a reaffirmation agreement that eliminated the deficiency using what he knew to be an improper value after repossession. He also never explained how this known risk was considered in his advice to his client, which left her uninformed

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about the risk. The attorney certification is improper for this final reason.

IV. The Attorney Certification Did Not Satisfy the Requirements of Rule 9011

Striking counsel's certification is justified without resort to Rule 9011. *Miller* , 575 B.R. at 89 n.2 ; *Izzo* , 197 B.R. at 12. Even if the court were to invoke Rule 9011 to evaluate counsel's certification which is the more common approach, *supra* , the court would order the same relief. Rule 9011(c) expressly authorizes "non-monetary directives" to address violations of Rule 9011 (b) as necessary to deter future conduct. *Counsel v. Cardinale (In re DeVille)* , 361 F.3d 539, 551-555 (9th Cir. 2004) (affirming $23,597 monetary penalty to deter future conduct to the court rather than the opposing party).

Counsel here did not consider the range of circumstances here for Anzaldo, who was misinformed by counsel about numerous aspects of the reaffirmation decision. Even though counsel cannot be faulted for being unaware of the credit reporting practices of the industry which remain elusively opaque here, counsel's certification was also not based on an objective assessment of Anzaldo's ability to repay the reaffirmed debt. Although a Rule 9011 (b) violation occurred, non-monetary sanctions suffice to deter future conduct since the problem was informational, and no further sanctions need be issued.[11]

V. The Reaffirmation Agreement is Unenforceable

When the certification in a reaffirmation agreement is absent or improper, the effect on its enforceability is not well settled. One court has concluded court approval is then required. *In re Cockrell* , 496 B.R. 596, 598 (Bankr. W.D. Ark. 2013) (reaffirmation which debtor's attorney did not certify could not be approved because it was not in debtor's best interest as there was no distinction between instances where the debtor's counsel refused to sign the certification and instances where the debtor was not represented by counsel in negotiating the agreement).

Other courts conclude that the agreement becomes unenforceable, and court review is not required. *In re Barron* , 441 B.R. 131, 134 (Bankr. D. Ariz. 2010) (treating attorney who did not sign the certification precluded court review because the agreement was rendered immediately unenforceable); *In re Harvey* , 452 B.R. 179, 182 (Bankr. W.D. Va. 2010) ; (*In re Isom* , No. 07-31469-KRH, 2007 WL 2110318, at *4, 2007 Bankr. LEXIS 2437, at *13 (Bankr. E.D. Va. July 17, 2007)). This court agrees that the effect of an invalid certification means it is unenforceable consistent with the statutory analysis of *Ong* , 461 B.R. at 563. Alternatively, the court would not approve the agreement as not in debtor's best interest under Cockrell.

VI. Conclusion

The court is sympathetic to the heavy burden imposed on debtors' counsel by BAPCPA in certifying a reaffirmation agreement for a car that their financially struggling clients desperately need for transportation. This responsibility is further encumbered by the lack of reliable information about the practices of both the CRAs and the car lenders about when a debtor is deemed to reaffirm the debt. The industry policy may be to report payments to the CRAs only if the debt is reaffirmed, but whether determination is merely a

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temporal one, or whether court approval also affects the reporting decision is unclear. Reaffirming the debt cannot be said to affirmatively help debtors rebuild their credit since the benefit is minimal at best and offset by more severe damage to the credit score if the debtors default. Clarification from the industry or a regulatory authority body on when a debt is deemed "reaffirmed" and how "in rem" liability is treated by the system[12] would be of great value to the consumers of this nation.

Despite the difficulties in representing debtors in reaffirmation agreements, consumer attorneys must still discharge their obligations to their clients adequately. Counsel is duty bound to decline to sign the certification where this is not warranted and to reflect realistic budget information in the schedules and reaffirmation agreement. In this event, the agreement will become unenforceable without a hearing, but the clients will still be protected against repossession risk in those courts that follow *Moustafi* , 371 B.R. at 438 until controlling authority determines whether ride through remains a reaffirmation option after BAPCPA.

Because of counsel's misapprehension of the effect of reaffirmation and understatement of her budget, court review was required in this case. Because the certification is stricken, and the presumption of undue hardship not rebutted, the reaffirmation agreement Anzaldo signed is unenforceable but she may retain her car if she stays current on the payments. Her discharge may then be entered.

WHEREFORE:

Based on the findings of fact and conclusions of law in this Memorandum Decision:

1. The OSC against WF is discharged;

2. The certification does not satisfy the strict requirements of § 524(c)(6) as Anzaldo was not fully informed of the consequences of the agreement.

3. The certification is stricken under Rule 9011 rendering the agreement unenforceable, but no monetary sanctions are awarded;

4. The presumption of undue hardship having not been rebutted, the reaffirmation agreement is not approved and is unenforceable on this alternative ground.

IT IS SO ORDERED.

Notes:

[1] The expense guidelines list these separately as Food and Housekeeping Supplies, respectively $334 and $35 for the applicable time period. *IRS National Standard for Allowable Living Expenses* , https://www.justice.gov/ust/eo/bapcpa/20181101/bci_data/national_expense_standards.htm (last visited Jan. 6, 2020).

[2] Debtor did not list any miscellaneous expenses on her Sch. J; however, the court includes here the other costs listed on her Sch. J: car and renters insurance ($142.28 and $10 respectively) and entertainment ($50).

[3] *IRS National Standards for Out-of-Pocket Health Care* , https://www.justice.gov/ust/eo/bapcpa/20181101/bci_data/national_oop_healthcare.htm (last visited Jan. 6, 2020).

[4] *Bankruptcy Allowable Living Expenses* , https://www.justice.gov/ust/eo/bapcpa/20181101/bci_data/housing_charts/irs_housing_charts_CA.htm (last visited Jan. 6, 2020).

[5] *IRS Local Transportation Expense Standards - West Consensus Region* , https://www.justice.gov/ust/eo/bapcpa/20181101 /bci_data/IRS_Trans_Exp_Stds_WE.htm (last visited Jan. 6, 2020).

[6] WF's policy not to repossess Anzaldo's car if she is current on her payments regardless of whether she reaffirms the debt renders moot any analysis of 11 U.S.C. §§ 362(h)(1) and 521(d) and the viability *In re Moustafi* , 371 B.R. 434, 438 (Bankr. D. Ariz. 2007) (debtor who, like here, timely indicated an intention to reaffirm the debt and signed and filed a reaffirmation agreement could retain her car free of the risk of repossession so long as she keeps current on the payments). This practice could change if controlling law eliminates the ride through option or if WF changes its policy.

[7] All statutory citations are to Title 11 of the United States Code unless otherwise stated.

[8] All citations are to Fed. R. Bankr. P. unless otherwise stated.

[9] The Internal Revenue Service national and local expense standards are published by the United States Census Bureau on a website maintained by the United States Trustee's Program which is updated each year pursuant to § 101(39A)(B). *See Means Testing* , Mps://www.justice.gov/ust/means-testing/20181101 (last updated Nov. 20, 2019). These standards are used to calculate means test eligibility for Chapter 7 bankruptcy and to determine a taxpayer's ability to pay a delinquent tax liability. *Id.*

[10] *Foohey* , et al., *supra* (manuscript at 4).

[11] Since the court did not notice an order to show cause regarding monetary sanctions, this outcome is appropriate on due process grounds as well.

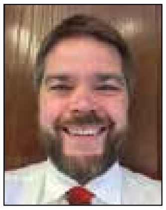
[12] The industry interprets a debt that is discharged in bankruptcy as one in which no payments are purportedly contractually "owed and collectable." This interpretation does not consider the *in rem* liability that remains on non-recourse debts post-

discharge. *Johnson v. Home State Bank* , 501 U.S. 78, 84, 111 S. Ct. 2150, 2154, 115 L.Ed.2d 66 (1991) (a discharged debt is still a claim that may be restructured in a Chapter 13 plan because the mortgage holder retains a "right to payment" in the form of its right to the proceeds from the sale of the debtor's property). While this failure could conceivably result in the reporting being inaccurate under the FCRA, 15 U.S.C. § 1681s-2, and the California Credit Reporting Agencies Act ("CCRAA"), Cal. Civ. Code § 1785.25(a), no such claims are implicated in this decision, and there is no controlling law expressly on point.

Clerk Commentary

By Ryan W. Johnson

24 Variations of a Reaffirmation Agreement and the Corresponding Actions Required by the Court



Ryan W. Johnson
U.S. Bankruptcy Court (N.D. W.Va.); Wheeling

Ryan Johnson is the clerk of court for the U.S. Bankruptcy Court for the Northern District of West Virginia.

Reaffirmation agreements are the antithesis of a chapter 7 discharge. Instead of discharging a personal obligation on a debt, a debtor agrees to forgo the benefits of bankruptcy with respect to a single creditor and enter into a new contract with that entity, the consideration for which is based in whole or in part on an obligation that would otherwise be dischargeable.[1]

Reaffirmation agreements are pervasive. For example, in calendar year 2016, individuals filed 1,082 chapter 7 petitions in the Northern District of West Virginia.[2] During the same 12-month period, parties filed 456 reaffirmation agreements.[3]

Debtor choose to execute a reaffirmation agreement for various reasons. However, more than 90 percent of all reaffirmation agreements pertain to debts secured by assets, such as an automobile or real property.[4] A reaffirmation agreement may (1) result in better loan terms,[5] (2) allow a debtor's payments to be reflected on a credit report, and (3) allow for a later refinancing with the same lender.

Many reasons also exist to deny a reaffirmation agreement. For mortgages and car loans, the debtor may not be able to afford the debt obligation sought to be reaffirmed while meeting other household budget items. For a reaffirmation agreement on an unsecured debt, the court may determine that voluntary payments[6] are a better option for a debtor than a new contractual obligation. When necessitated, judicial review of a reaffirmation agreement is largely a paternalistic endeavor wherein a bankruptcy court is obligated to independently consider and reject, if appropriate, an agreement between private parties.

The purpose of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) was, among other things, to help ensure that reaffirmation agreements are consistent with the debtor's best interest, and BAPCPA enhanced a court's obligation to review certain reaffirmation agreements.[7] Consequently, 24 variations of reaffirmation agreements exist, and discerning the applicable rules, procedures and burdens of proof can be challenging. The reaffirmation agreement matrix accompanying this article assists in determining when a reaffirmation agreement is effective as filed, when a court must intervene and, if so, what type of intervention is required.

Preliminarily, a reaffirmation agreement must meet the requirements of § 524(c)(1)-(6). For purposes of this article, it is assumed that reaffirmation agreement satisfies the requirements of § 524(c)(1)-(4) are satisfied[8] and the parties submitted the proper reaffirmation agreement official form. The remaining provisions of 11 U.S.C. § 524(c)(5)-(6), (d) and (m) form the core of the matrix included in this article.[9] In the matrix, certain terms have defined meanings.

"Admonitions"

The term "admonitions" refers to the requirement of § 524(d)(1)-(2), which applies when a debtor is not represented by an attorney during the course of negotiating a reaffirmation agreement. The court must, in person, inform the debtor (1) that the reaffirmation agreement is not required under the Bankruptcy Code, is not required under nonbankruptcy law and is not required by any other nonbankruptcy agreement; and (2) of the legal effect and consequences of the reaffirmation agreement and of default under the agreement.

"Best Interests — § 524(c)(6)(A)(ii)"

When an individual debtor is proceeding with a reaffirmation agreement without an attorney, the court must determine whether the reaffirmation agreement is in the best interests of the debtor. A

1 11 U.S.C. § 524(c).
2 The Northern District of West Virginia had the 13th-fewest chapter 7 case filings, by district, in the nation for the calendar year 2016.
3 About 85 percent of those agreements are filed electronically; the remainder are submitted by U.S. mail.
4 "Bankruptcy, Implementation of Reform Act's Debt Reaffirmation Agreement Provisions," U.S. Government Accountability Office, December 2002, at 6, *available at* gao.gov/assets/270/269997.pdf (last visited on Nov. 15, 2017).
5 *Id.* at 7 (noting that in 44 percent of reaffirmation agreements filed in WV-S, reaffirmed interest rate was less than the original contract rate).
6 11 U.S.C. § 524(f).
7 *See* § 203, entitled, "Discouraging Abuse of Reaffirmation Agreement Practices," H.R. Rep. No. 109-31, 109th Cong., 1st Sess. at 57 (April 8, 2005).
8 This article is based on an assumption that (1) the agreement was made before the entry of the chapter 7 discharge, (2) the debtor received the required disclosures at or before the time the debtor signed the agreement, (3) the agreement was filed with the court and (4) the debtor has not timely rescinded the agreement.
9 Unlike Neo, the protagonist in *The Matrix* (Warner Bros. Pictures 1999) who was played by Keanu Reeves, you do not have to consume the red pill to proceed further in this article to enter "The Reaffirmation Matrix."

reaffirmation agreement is generally in a debtor's best interest if the agreement yields some benefit to the debtor. For example, a benefit might exist if a debtor is able to retain and use an automobile for transportation to and from work when an open-market replacement is not an economical or practical alternative.

"Undue Hardship — § 524(a)(6)(A)(i)"

When an individual is proceeding with a reaffirmation agreement without an attorney, the court must determine whether the reaffirmation agreement imposes an undue hardship on the debtor or a dependent of the debtor.[10] Generally, this means that the debtor can afford to make the payments as required by the agreement and meet other household budgetary requirements, such that a default post-bankruptcy is not probable. Under this inquiry, the court may consider the totality of the debtor's circumstances, not just whether the debtor can afford to make the required payment based on the debtor's budget. Notably, this inquiry also considers whether the reaffirmation agreement would impose an undue hardship on a dependent of the debtor.

"Rebuttal of Presumption — § 524(m)"

The reaffirmation agreement is presumed to constitute an undue hardship on the debtor when the debtor's budget shows insufficient income to make the payments as required by the reaffirmation agreement. This is a separate inquiry from the undue-hardship determination required by § 524(c)(6).[11] While § 524(c)(6) is a substantive requirement for a reaffirmation agreement, § 524(m) does not determine the validity of the agreement; rather, it only provides a mechanism for the court to disapprove an otherwise valid agreement. The statutory impact of the two subsections differs in important ways, as shown in Table 1.

Each of the terms in Table 1 is simplistically defined. In practice, the application of the terms can be much more nuanced. An understanding of the basic differences in the these terms, however, is necessary to understand their impact on the reaffirmation agreement matrix, which is categorized into four inquiries: (1) is the debtor proceeding *pro se* or with an attorney; (2) is the debt to be reaffirmed secured by real or personal property or is it an unsecured debt; (3) is the creditor a credit union; and (4) is the presumption of undue hardship in § 524(m) applicable in the case? Of the 24 variations (see Table 2), 12 are effective as filed without any need for court intervention, although the court may choose to intervene even when such intervention is not required by the Bankruptcy Code.[12]

Having defined the conditions of court action — or inaction — in a matrix, the next step is to apply conditional logic to the electronic filing event such that the parties, the clerk's office and the court can be immediately informed of what further action might be required before the reaffirmation agreement is effective. For example, when a represented debtor is seeking to reaffirm a debt secured by personal property with a non-credit union and the presumption of undue hardship arises (No. 8 on the Reaffirmation Agreement Matrix), the docket text may read as follows:

> *Pro Se* Reaffirmation Agreement, 2015 Ford Focus for $12,500 with Cty Credit, on a debt secured by personal property. To be effective, the court must hold a hearing to: (1) inform the debtor that such an agreement is not required, (2) inform the debtor of the legal effect and consequences of the agreement and of default under the agreement, (3) determine whether the agreement imposes an undue hardship on the debtor or a dependent of the debtor, and (4) determine whether the agreement is in the best interest of the debtor. This reaffirmation agreement is presumed to be an undue hardship on the debtor for a period of 60 days after it is filed. The agreement shall not be disapproved without notice and a hearing to the debtor and creditor. Filed by Cty Credit Union. (Entered: 11/16/2017).

The language of the docket text might be configured by a particular district. However, this language is far more infor-

Table 1

§ 524(c)(6)(A)(i): Undue Hardship	§ 524(m): Presumption of Undue Hardship
Consideration is given as to whether the agreement imposes an undue hardship on (1) the debtor or (2) a dependent of the debtor.	Consideration is given only with regard to the debtor.
Consideration is based on the totality of the circumstances.	Consideration is only based on the financial condition as stated on the reaffirmation agreement (income less expenses).
The statutory burden of proof is unclear as to whether the establishment of the absence of undue hardship is on the debtor or creditor.	The presumption may only be rebutted by the debtor.
No stated time frame exists to make an undue hardship inquiry, and the inquiry is a substantive requirement for the effectiveness of a reaffirmation agreement.	The presumption of undue hardship only lasts for 60 days after the reaffirmation agreement is filed.
When a debtor is proceeding without an attorney, the court makes the determination of whether the agreement imposes an undue hardship.	The court determines whether the presumption of undue hardship is overcome even when the debtor was represented by an attorney in the course of negotiating the reaffirmation agreement.

10 The phrase "undue hardship" is also found in 11 U.S.C. § 523(a)(8), which allows the discharge of certain student loans when repayment would impose an "undue hardship on the debtor and the debtor's dependents." In the context of student loan discharge, many courts have interpreted this standard to require a "certainty of hopelessness ... that the debtor will not be able to repay [the debt]." *Educ. Credit Mgmt. Corp. v. Frushour (In re Frushour)*, 433 F.3d 393, 401 (4th Cir. 2005). However, to date, "undue hardship" in §§ 524(a)(6)(i) and 523(a)(8) have not been afforded the same meaning. *See* Rafael I. Pardo and Michelle R. Lacey, "Undue Hardship in the Bankruptcy Courts: An Empirical Assessment of the Discharge of Educational Debt," 74 *Cin. L. Rev.* 405, 511-14 (Winter 2005).

11 *See, e.g., In re Cooper*, No. 10-41895, 2012 WL 566070, at *5 (Bankr. D. Kan. Feb. 21, 2012) ("The requirements of § 524(c)(6) operate wholly independently of the requirements of § 524(m)(1)....").

12 *See generally In re Vargas*, 257 B.R. 157, 166 (Bankr. D.N.J. 2001) ("[J]udges have the power to independently review reaffirmation agreements to ascertain that reasonable bases exist for the accompanying declarations. If the court is unable to determine advisability of the agreement from a review, then it should hold a hearing. Finding no reasonable basis for reaffirming is grounds to disapprove a reaffirmation agreement.") (internal citations omitted).

continued on page 59

Clerk Commentary: 24 Variations of a Reaffirmation Agreement

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mative to the court, clerk's office and the parties than a rote statement that a reaffirmation agreement was filed, as is often used in docket text as follows:

Pro Se Reaffirmation Agreement Between Debtor and Ally Bank Filed by Ally Bank. (Ally Financial) (Entered: 10/24/2017).

Using conditional logic in the filing event to answer a few simple questions requires an interdependent relationship among the court, the clerk's office and the bar, which (when properly facilitated and implemented) can (1) reduce duplication of effort in reviewing reaffirmation agreements, (2) speed the case processing, and (3) provide certainty to a party regarding the status of a filed reaffirmation agreement, resulting in an overall cost savings for all parties to the bankruptcy system. abi

Table 2: Reaffirmation Agreement Matrix

	Property Type	Represented Status	Creditor Identity	Presumption of Undue Hardship	Court Action Required
1.	Personal	*Pro Se*	Credit Union	No	Admonitions, Best Interest — § 524(c)(6), Undue Hardship — § 524(c)(6)
2.	Personal	*Pro Se*	Credit Union	Yes	Admonitions, Best Interest — § 524(c)(6), Undue Hardship — § 524(c)(6)
3.	Personal	*Pro Se*	Not a Credit Union	No	Admonitions, Best Interest — § 524(c)(6), Undue Hardship — § 524(c)(6)
4.	Personal	*Pro Se*	Not a Credit Union	Yes	Admonitions, Best Interest — § 524(c)(6), Undue Hardship — § 524(c)(6), Rebuttal of Presumption — § 524(m)
5.	Personal	Attorney	Credit Union	No	No Action Required
6.	Personal	Attorney	Credit Union	Yes	No Action Required
7.	Personal	Attorney	Not a Credit Union	No	No Action Required
8.	Personal	Attorney	Not a Credit Union	Yes	Rebuttal of Presumption — § 524(m)
9.	Real	*Pro Se*	Credit Union	No	Admonitions
10.	Real	*Pro Se*	Credit Union	Yes	Admonitions
11.	Real	*Pro Se*	Not a Credit Union	No	Admonitions
12.	Real	*Pro Se*	Not a Credit Union	Yes	Admonitions, Rebuttal of Presumption — § 524(m)
13.	Real	Attorney	Credit Union	No	No Action Required
14.	Real	Attorney	Credit Union	Yes	No Action Required
15.	Real	Attorney	Not a Credit Union	No	No Action Required
16.	Real	Attorney	Not a Credit Union	Yes	Rebuttal of Presumption — § 524(m)
17.	Unsecured	*Pro Se*	Credit Union	No	Admonitions, Best Interest — § 524(c)(6), Undue Hardship — § 524(c)(6)
18.	Unsecured	*Pro Se*	Credit Union	Yes	Admonitions, Best Interest — § 524(c)(6), Undue Hardship — § 524(c)(6)
19.	Unsecured	*Pro Se*	Not a Credit Union	No	Admonitions, Best Interest — § 524(c)(6), Undue Hardship — § 524(c)(6)
20.	Unsecured	*Pro Se*	Not a Credit Union	Yes	Admonitions, Best Interest — § 524(c)(6), Undue Hardship — § 524(c)(6), Rebuttal of Presumption — § 524(m)
21.	Unsecured	Attorney	Credit Union	No	No Action Required
22.	Unsecured	Attorney	Credit Union	Yes	No Action Required
23.	Unsecured	Attorney	Not a Credit Union	No	No Action Required
24.	Unsecured	Attorney	Not a Credit Union	Yes	Rebuttal of Presumption — § 524(m)

Rule 7004 Process; Service of Summons, Complaint

(a) Summons; Service; Proof of Service.

(1) Except as provided in Rule 7004(a)(2), Rule 4(a), (b), (c)(1), (d)(5), (e)-(j), (l), and (m) F.R.Civ.P. applies in adversary proceedings. Personal service under Rule 4(e)-(j) F.R.Civ.P. may be made by any person at least 18 years of age who is not a party, and the summons may be delivered by the clerk to any such person.

(2) The clerk may sign, seal, and issue a summons electronically by putting an "s/" before the clerk's name and including the court's seal on the summons.

(b) Service by First Class Mail. Except as provided in subdivision (h), in addition to the methods of service authorized by Rule 4(e) -(j) F.R.Civ.P., service may be made within the United States by first class mail postage prepaid as follows:

(1) Upon an individual other than an infant or incompetent, by mailing a copy of the summons and complaint to the individual's dwelling house or usual place of abode or to the place where the individual regularly conducts a business or profession.

(2) Upon an infant or an incompetent person, by mailing a copy of the summons and complaint to the person upon whom process is prescribed to be served by the law of the state in which service is made when an action is brought against such a defendant in the courts of general jurisdiction of that state. The summons and complaint in that case shall be addressed to the person required to be served at that person's dwelling house or usual place of abode or at the place where the person regularly conducts a business or profession.

(3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association, by mailing a copy of the summons and complaint to the attention of an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

(4) Upon the United States, by mailing a copy of the summons and complaint addressed to the civil process clerk at the office of the United States attorney for the district in which the action is brought and by mailing a copy of the summons and complaint to the Attorney General of the United States at Washington, District of Columbia, and in any action attacking the validity of an order of an officer or an agency of the United States not made a party, by also mailing a copy of the summons and complaint to that officer or agency. The court shall allow a reasonable time for service pursuant to this subdivision for the purpose of curing the failure to mail a copy of the summons and complaint to multiple officers, agencies, or corporations of the United States if the plaintiff has mailed a copy of the summons and complaint either to the civil process clerk at the office of the United States attorney or to the Attorney General of the United States.

(5) Upon any officer or agency of the United States, by mailing a copy of the summons and complaint to the United States as prescribed in paragraph (4) of this subdivision and also to the officer or agency. If the agency is a corporation, the mailing shall be as prescribed in paragraph (3) of this subdivision of this rule. The court shall allow a reasonable time for service pursuant to this subdivision for the purpose of curing the failure to mail a copy of the summons and complaint to multiple officers, agencies, or corporations of the United States if the plaintiff has mailed a copy of the summons and complaint either to the civil process clerk at the office of the United States attorney or to the Attorney General of the United States. If the United States trustee is the trustee in the case and service is made upon the United States trustee solely as trustee, service may be made as prescribed in paragraph (10) of this subdivision of this rule.

(6) Upon a state or municipal corporation or other governmental organization thereof subject to suit, by mailing a copy of the summons and complaint to the person or office upon whom process is prescribed to be served by the law of the state in which service is made when an action is brought against such a defendant in the courts of general jurisdiction of that state, or in the absence of the designation of any such person or office by state law, then to the chief executive officer thereof.

(7) Upon a defendant of any class referred to in paragraph (1) or (3) of this subdivision of this rule, it is also sufficient if a copy of the summons and complaint is mailed to the entity upon whom service is prescribed to be served by any statute of the United States or by the law of the state in which service is made when an action is brought against such a defendant in the court of general jurisdiction of that state.

(8) Upon any defendant, it is also sufficient if a copy of the summons and complaint is mailed to an agent of such defendant authorized by appointment or by law to receive service of process, at the agent's dwelling house or usual place of abode or at the place where the agent regularly carries on a business or profession and, if the authorization so requires, by mailing also a copy of the summons and complaint to the defendant as provided in this subdivision.

(9) Upon the debtor, after a petition has been filed by or served upon the debtor and until the case is dismissed or closed, by mailing a copy of the summons and complaint to the debtor at the address shown in the petition or to such other address as the debtor may designate in a filed writing.

(10) Upon the United States trustee, when the United States trustee is the trustee in the case and service is made upon the United States trustee solely as trustee, by mailing a copy of the summons and complaint to an office of the United States trustee or another place designated by the United States trustee in the district where the case under the Code is pending.

(c) Service by Publication. If a party to an adversary proceeding to determine or protect rights in property in the custody of the court cannot be served as provided in Rule 4(e)-(j) F.R.Civ.P. or subdivision (b) of this rule, the court may order the summons and complaint to be served by mailing copies thereof by first class mail, postage prepaid, to the party's last known address, and by at least one publication in such manner and form as the court may direct.

(d) Nationwide Service of Process. The summons and complaint and all other process except a subpoena may be served anywhere in the United States.

(e) Summons: Time Limit for Service Within the United States. Service made under Rule 4(e), (g), (h)(1), (i), or (j)(2) F.R.Civ.P. shall be by delivery of the summons and complaint within 7 days after the summons is issued. If service is by any authorized form of mail, the summons and complaint shall be deposited in the mail within 7 days after the summons is issued. If a summons is not timely delivered or mailed, another summons will be issued for service. This subdivision does not apply to service in a foreign country.

(f) Personal Jurisdiction. If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing a waiver of service in accordance with this rule or the subdivisions of Rule 4 F.R.Civ.P. made applicable by these rules is effective to establish personal jurisdiction over the person of any defendant with respect to a case under the Code or a civil proceeding arising under the Code, or arising in or related to a case under the Code.

(g) Service on the Debtor's Attorney. If the debtor is represented by an attorney, whenever service is made upon the debtor under this Rule, service shall also be made upon the debtor's attorney by any means authorized under Rule 5(b) F. R. Civ. P.

(h) Service of Process on an Insured Depository Institution. Service on an insured depository institution (as defined in section 3 of the Federal Deposit Insurance Act) in a contested matter or adversary proceeding shall be made by certified mail addressed to an officer of the institution unless —

(1) the institution has appeared by its attorney, in which case the attorney shall be served by first class mail;

(2) the court orders otherwise after service upon the institution by certified mail of notice of an application to permit service on the institution by first class mail sent to an officer of the institution designated by the institution; or

(3) the institution has waived in writing its entitlement to service by certified mail by designating an officer to receive service.

In re GAYL E. KEARNS, Debtor.

Case No. 20-20252-BPH

UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF MONTANA

February 12, 2021

NOT FOR PUBLICATION

MEMORANDUM OF DECISION

INTRODUCTION

In this Chapter 7 bankruptcy, Debtor and American Honda Finance Corporation ("Creditor") entered into a reaffirmation agreement that was filed with the Court on January 13, 2021, at ECF No. 7 ("Agreement"). According to the Agreement, Debtor seeks to reaffirm a debt with Creditor in the principal amount of $9,957.92 that stems from a "Lease Agreement" ("Lease") for a 2019 Acura Mdx, VIN No. 5J8YD7H72KL000733 ("Acura").

Section 524(c)[1] of the Bankruptcy Code allows a debtor to voluntarily "reaffirm" their personal liability for a debt, and such debts are not discharged. Section 365(p) permits the assumption of a personal property lease by individual debtors in Chapter 7 cases. To afford the Debtor an opportunity to clarify whether she was seeking relief under § 524(c) or § 365(p), the Court entered an Order at ECF No. 8 setting the matter for hearing.[2] A telephonic hearing was

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held on February 3, 2021.

At the hearing, Debtor's counsel explained that when his clients engage in post-petition efforts to assume a lease, his strong preference is to obtain the Court's approval by submitting a reaffirmation agreement related to the lease sought to be assumed. Debtor's counsel indicated that the only communication between Debtor and Creditor consisted of a letter from Creditor enclosing a proposed reaffirmation agreement related to the Lease. The Court acknowledged Debtor's counsel's preference in obtaining judicial approval in this case but indicated that § 365(p) is applicable when assuming a personal property lease in a chapter 7 case.

ANALYSIS

"When the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Lamie v. U.S. Trustee*, 540 U.S. 526, 534, 124 S.Ct. 1023, 157 L.Ed.2d 1024 (2004). The plain language of §365(p) and § 524(c) describe two separate processes: one for the reaffirmation of otherwise dischargeable debts and one for the assumption of personal property leases by a debtor. For the reasons stated below, this Court determines that §§ 524(c) and 365(p) each serve discrete purposes that are independent from the other. Accordingly, it declines to permit Debtor to utilize the reaffirmation process set forth in § 524(c) to assume the Lease.

I. Section 524(c).

In chapter 7 cases, a debtor is typically "discharge[d]...from all debts that arose before the date of the order for relief" when a bankruptcy proceeding ends. § 727(b). However, § 524(c) provides "a limited exception to that rule by allowing an agreement 'based on a debt that is dischargeable' to be reaffirmed and thus remain enforceable after discharge." *Bobka v. Toyota Motor Credit Corp.*, 968 F.3d 946, 950 (9th Cir. 2020) (quoting § 524(c)). "Because

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reaffirmation agreements are contrary to the stated goal of a debtor receiving a fresh start, they are subject to intense judicial scrutiny and must comply with all statutory requirements." *In re Ebbrecht*, 451 B.R. 241, 243 (Bankr. E.D.N.Y. 2011). For example, reaffirmation agreements must be filed and approved by the court prior to its granting of discharge. § 524(c)(1). Additionally, courts must ensure that a debtor bound by a reaffirmation agreement is aware of the legal consequences associated with the agreement and, if a debtor is *pro se*, ensure that the agreement does not impose an undue hardship on the debtor and is in their best interest. § 524(c)(2)-(6). Such statutory requirements appear nowhere in § 365(p).

II. Section 365(p).

Section 365(p) was added to the Code as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCA") "to fill a void in the existing law by providing a vehicle for a debtor to assume leases of personal property not assumed by a chapter 7 trustee." *In re Anderson*, 607 B.R. 133, 136 (Bankr. D. Mass 2019). Section 365(p)(2) describes a consensual procedure for the assumption of a personal property lease by a debtor that begins with the debtor transmitting a written offer to assume the lease obligations to the lessor. § 365(p)(2)(A). The Code does not require that this offer be transmitted within any specific time frame. Upon receipt, the lessor then decides whether to accept the offer. *Id*. Again, the Code does not impose a temporal requirement for it to do so. If the lessor chooses to assume the lease, it then notifies the debtor that it is willing to permit the debtor to assume the lease "and may condition such assumption on cure of any outstanding default on terms set by the contract." *Id*. "If, not later than 30 days after notice is provided under [§365(p)(2)(A)], the debtor notifies the lessor in writing that the lease is assumed, the liability under the lease will be assumed by the debtor and not by the estate." § 365(p)(2)(A).

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Unlike the reaffirmation procedure outlined in § 524(c), the lease assumption procedure set forth in § 365(p) requires no judicial involvement. The statute does not place any responsibility on the court to ensure that, for example, assumption of the lease is in the debtor's best interest or that it does not impose an undue hardship on the debtor. Those determinations are left to the parties. The absence of any reference to judicial involvement or to rigid timing requirements in the text of § 365(p) is telling. It suggests that "[h]ad Congress intended the lease assumption and reaffirmation agreement provisions of the Bankruptcy Code to be interchangeable, it would have said so, but it has not." *Ebbrecht*, 451 B.R. at 247. As the Ninth Circuit has observed, if the Code were to require a reaffirmation agreement before a lease assumption becomes effective, "it is difficult to see how section 365(p)(2) serves any purpose." *Bobka*, 968 F.3d at 952. Absent any indicia of congressional intent to permit debtors to assume leases according to the procedures set forth in § 524(c), this Court is reluctant to do so.

In this case, the filing of the Agreement, the evidence in the record, and the statements made at the hearing clearly establish that both Debtor and Creditor wish to remain bound by the terms of the Lease. Debtor's counsel represented that Debtor wishes to continue to perform and make payments under the Lease and Creditor's transmission of a proposed reaffirmation agreement indicates that it has no objection to her doing so.[3] However, the procedure (i.e. compliance with § 524(c)) utilized by the parties to accomplish their collective goal of assumption was unnecessary. Instead, the provisions of § 365(p) are applicable. Accordingly, approval of the Agreement cannot occur under § 524(c).

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CONCLUSION

For the reasons stated above, the Court will enter a separate order denying approval of the Agreement between Debtor and Creditor.

Dated: February 12, 2021.

BY THE COURT:

/s/__________
Hon. Benjamin P. Hursh
United States Bankruptcy Court
District of Montana

Footnotes:

[1] Unless specified otherwise, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, all "Rule" references are to the Federal Rules of Bankruptcy Procedure, and all "Civil Rule" references are to the Federal Rules of Civil Procedure.

[2] Over the last 12 months, the incidence of reaffirmation agreements accompanied by leases has increased. The analysis included in this memorandum has been expressed at prior hearings on the record, but is provided in this memorandum to assist other practitioners in this District.

[3] Although the Court has taken the additional step in this case of analyzing the intent of the parties in this case, and concluding that their efforts are in furtherance of assumption under § 365(p), it is not likely to take this additional step in the future when presented with a reaffirmation agreement based upon a personal property lease that is subject to assumption under § 365(p).

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968 F.3d 946

Melissa Carin Mather BOBKA, Appellant,
v.
TOYOTA MOTOR CREDIT CORPORATION, Appellee.

No. 18-55688

United States Court of Appeals, Ninth Circuit.

Argued and Submitted October 16, 2019
Pasadena, California
Filed August 3, 2020

[968 F.3d 948]

Michael G. Doan (argued), Doan Law Firm, Oceanside, California, for Appellant.

Aaron J. Malo (argued) and Karin Dougan Vogel, Sheppard Mullin Richter & Hampton LLP, San Diego, California, for Appellee.

Jan T. Chilton and Mark Joseph Kenney, Severson & Werson, San Francisco California, for Amicus Curiae American Financial Services Association.

Tara Twomey, National Consumer Bankruptcy Rights Center, San Jose, California, for Amici Curiae National Consumer Bankruptcy Rights Center and National Association of Consumer Bankruptcy Attorneys.

Before: Jacqueline H. Nguyen and Eric D. Miller, Circuit Judges, and Eric N. Vitaliano,[*] District Judge.

MILLER, Circuit Judge:

When Melissa Mather Bobka filed for Chapter 7 bankruptcy, she wanted to keep her leased Toyota Rav4. She called Toyota and was told that to keep the vehicle, she would need to assume the lease. Two months later, Mather sent Toyota a signed assumption agreement. She received her bankruptcy discharge the next day. By then, Mather had stopped making lease payments, and when Toyota sought to collect Mather's past-due balance, she refused to pay. Mather asserted that her obligations under the lease did not survive the bankruptcy discharge because the assumption agreement had not been reaffirmed under 11 U.S.C. § 524(c). When Toyota continued its collection efforts, Mather sought sanctions, alleging that Toyota had violated section 524 's discharge

[968 F.3d 949]

injunction. She also argued that the assumption agreement was independently invalid because she and Toyota had not followed the required procedures for a lease assumption under 11 U.S.C. § 365(p).

The bankruptcy court and the district court rejected Mather's interpretation of the Bankruptcy Code. We agree with both courts that lease assumptions survive discharge even if they are not reaffirmed, and that Mather and Toyota mutually waived section 365(p) 's procedural requirements. We therefore affirm.

I

In 2016, Mather filed a petition for bankruptcy under Chapter 7. She listed $51,252 in assets—consisting primarily of a Toyota Tundra and a Toyota Rav4—against $145,411 in liabilities. In her statement of intention filed with the petition, Mather mistakenly described Toyota as the owner of a secured claim against the Rav4, rather than as a lessor, and stated her intent to reaffirm what she described as a secured debt.

When a debtor enters Chapter 7 bankruptcy, the creditors appoint a trustee, who is responsible for administering the bankruptcy estate, and who has authority to assume or reject any unexpired contracts—including leases—to which the debtor is a party. 11 U.S.C. §§ 365(a), 365(d)(1), 702. If the trustee assumes the lease, the estate is liable for the debtor's obligations under the lease, and in exchange, the estate can obtain the benefits of the lease. *Id* . § 365(b)(1), (e)(1). If the trustee rejects the lease, the rejection is deemed a breach of the lease, and the claim created by that breach is treated as one that arose before the petition was filed. *Id* . § 502(g)(1).

Before 2005, only the trustee could assume or reject a lease. Trustees ordinarily did not assume individual debtors' leases of personal property because doing so would not benefit the creditors or the estate. But in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), Pub. L. No. 109-8, § 309(b), 119 Stat. 23, 82, Congress added section 365(p), which allows the debtor to assume a lease of personal property. 11 U.S.C. § 365(p). Paragraph (2) of that subsection provides:

> (A) If the debtor in a case under chapter 7 is an individual, the debtor may notify the creditor in writing that the debtor desires to assume the lease. Upon being so notified, the creditor may, at its option, notify the debtor that it is willing to have the lease assumed by the debtor and may condition such assumption on cure of any outstanding default on terms set by the contract.
>
> (B) If, not later than 30 days after notice is provided under subparagraph (A), the debtor notifies the lessor in writing that the lease is assumed, the liability under the lease will be assumed by the debtor and not by the estate.
>
> (C) The stay under section 362 and the injunction under section 524(a)(2) shall not be violated by notification of the debtor and negotiation of cure under this subsection.

Id . § 365(p)(2).

Although Mather sought to keep her leased Rav4, she did not follow the procedures set out in section 365(p)(2). On September 8, 2016, Mather called Toyota to ask about keeping the vehicle. Toyota's agent told Mather that she would need to enter into a lease assumption. The agent did not ask Mather to confirm her request in writing as required by section 365(p)(2)(A), and she did not do so. Instead, the agent sent an assumption agreement to Mather and her attorneys, explaining that the agreement would constitute an assumption of the lease effective upon Toyota's receipt of the signed agreement.

[968 F.3d 950]

Mather did not return the agreement until December 5—well more than 30 days after she orally informed Toyota that she wished to keep her leased vehicle. Mather received her bankruptcy discharge the next day.

Although Mather was current on her lease when she entered bankruptcy, she began missing payments in November 2016. After the discharge was entered, Toyota contacted Mather to recover the missed payments. Mather ultimately surrendered the Rav4, but she did not pay back her overdue balance on the lease. She told Toyota that the debt had been discharged in bankruptcy, and she denied that her assumption of the lease was effective.

Toyota continued its collection efforts, and Mather responded by seeking relief in the bankruptcy court, including an injunction, sanctions, fees, and more than $50,000 in damages. In her request for an order to show cause, Mather alleged that Toyota had violated the automatic stay by sending her the lease assumption agreement, *see* 11 U.S.C. § 362, and that its collection efforts violated the discharge injunction, *see id.* § 524(a)(2). According to Mather, obligations under a lease survive discharge only if they are reaffirmed under section 524(c). That statute provides that "[a]n agreement between a holder of a claim and the debtor, the consideration for which, in whole or in part, is based on a debt that is dischargeable ... is enforceable only to any extent enforceable under applicable nonbankruptcy law," and only if certain procedural requirements are met, including that (1) the debtor received certain disclosures, and (2) the agreement has been filed with the court together with a declaration from the debtor's attorney stating that the agreement is fully informed and voluntary and does not impose an undue hardship. *Id.* § 524(c). If the debtor was unrepresented while negotiating the agreement, the court must approve the agreement before it can become effective. *Id.* § 524(c)(6)(A).

The bankruptcy court rejected Mather's claims, concluding that a lease assumption under section 365(p) need not comply with the reaffirmation procedures of section 524(c). The bankruptcy court also held that Mather had successfully assumed the lease, despite the procedural infirmities in her agreement with Toyota. The district court affirmed.

II

We begin by considering whether a lease assumption can survive discharge even though it is not reaffirmed. That is a purely legal issue, so our review is de novo. *See Blausey v. U.S. Tr.* , 552 F.3d 1124, 1132 (9th Cir. 2009) (per curiam).

The question of statutory interpretation presented here turns on the resolution of an apparent conflict between sections 365(p) and 524(c). Normally, when a bankruptcy proceeding ends, the debtor is "discharge[d] ... from all debts that arose before the date of the order for relief." 11 U.S.C. § 727(b). Section 524(c) provides for a limited exception to that rule by allowing an agreement "based on a debt that is dischargeable" to be reaffirmed and thus remain enforceable after discharge. *Id.* § 524(c). But reaffirmation can occur only when the debtor receives certain procedural protections, including the involvement of the bankruptcy court. *Id.* On the other hand, section 365(p) provides that when a lease is assumed, "the liability under the lease will be assumed by the debtor and not by the estate." *Id.* § 365(p)(2)(B). In Mather's view, section 365(p) would conflict with section 524(c) if it allowed a lease assumption agreement to survive discharge, because such an agreement would be "based on a debt that is dischargeable" and thus would need to meet the conditions

[968 F.3d 951]

of section 524(c) before a lessor could enforce it against a lessee. No court of appeals has yet considered whether lease assumptions under section 365(p) require reaffirmation under section 524(c), and bankruptcy courts have reached differing conclusions. *Compare, e.g.* , *In re Anderson* , 607 B.R. 133 (Bankr. D. Mass. 2019) (lease assumption does not require reaffirmation), *In re Abdemur* , 587 B.R. 167 (Bankr. S.D. Fla. 2018) (same), *and In re Ebbrecht* , 451 B.R. 241 (Bankr. E.D.N.Y. 2011) (same), *with In re Rogers* , 359 B.R. 591 (Bankr. D.S.C. 2007) (lease assumption requires reaffirmation), *and In re Creighton* , 427 B.R. 24 (Bankr. D. Mass. 2007) (same).

According to Mather, the text of section 365(p) indicates that a lease assumption can create an obligation that survives discharge only if it is reaffirmed. Mather emphasizes that the provision says that "liability under the lease *will be* assumed"; in her view, the use of the future tense suggests that some further action—specifically, reaffirmation—must be completed before a lease assumption can effectively impose liability on the debtor. According to Mather, "it's no coincidence" that section 365(p) uses the same phrase ("will be") as the disclosure that must be given to a debtor who wishes to enter into a reaffirmation agreement, namely, that the debtor's "obligations will be determined by the reaffirmation agreement." 11 U.S.C. § 524(k)(3)(J)(i).

We think it probably is a coincidence. The phrase "will be" occurs more than 100 times in the Bankruptcy Code, mostly in contexts having nothing to do with either assumptions or discharges. The more natural explanation for the use of "will be" is not that the provision contemplates some separate future action, but rather that the future tense is dictated by the conditional clause that begins the sentence: "If" the debtor notifies the lessor within 30 days that the lease is assumed, then "the liability under the lease will be assumed by the debtor." The sentence uses "will be" because both events are expected to occur in the future.

Although the language of section 365(p) does not directly answer the question presented, three indications in the text and overall structure of the Code lead us to conclude that a lease assumption need not be reaffirmed in order to survive discharge. That interpretation is further supported by the settled understanding of assumptions under the pre-2005 version of section 365.

First, "[i]t is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.' " *TRW Inc. v. Andrews* , 534 U.S. 19, 31, 122 S.Ct. 441, 151 L.Ed.2d 339 (2001) (quoting *Duncan v. Walker* , 533 U.S. 167, 174, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001)). If lease assumptions do not survive discharge unless they are reaffirmed, then section 365(p) would be superfluous in at least two ways.

Most specifically, requiring debtors to reaffirm lease assumptions would make section 365(p) 's safe-harbor provisions superfluous. Section 365(p)(2)(C) clarifies that if the parties contact each other to negotiate an assumption agreement, their communications will not violate either the "stay under section 362 [or] the injunction under section 524(a)(2)." But the section 524 injunction exists only after discharge. 11 U.S.C. § 524(a)(2). If a lease assumption must be reaffirmed to survive discharge—a process that must be completed "before the granting of the discharge," *id* . § 524(c)(1) —then, logically, the negotiation of a lease assumption could never violate the post-discharge injunction. Under Mather's reading, section 365(p) 's protection

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against violating the discharge injunction would be surplusage.

More broadly, if every lease assumption must be reaffirmed to survive discharge, then section 524(c) 's more onerous requirements would displace section 365(p) 's more informal ones. To initiate a lease assumption under section 365(p), a lessee need only write to the lessor. From there, the creditor may decide whether to agree to a lease assumption and whether to condition its agreement on cure; the debtor then has another chance to decide whether to assume the lease. 11 U.S.C. § 365(p)(2)(A)–(B). In contrast, section 524(c) dictates court involvement in most cases: the reaffirmation agreement must be "filed with the court," and under certain circumstances, the court must hold a hearing to inform the debtor that reaffirmation is not required and that the debt would otherwise be discharged. *Id.* § 524(c)(3), (d). If the Code requires a separate reaffirmation agreement in order to make a lease assumption effective, it is difficult to see how section 365(p)(2) serves any purpose.

Mather responds by arguing that a lease assumption must be reaffirmed under section 524(c) only if the parties want it to continue past discharge; otherwise, she says, the parties can simply agree to an assumption that lasts only until discharge, a creation she terms a "non-recourse lease." But that interpretation runs headlong into the same problems it purports to solve. Nothing in the text of sections 365(p) and 524(c) suggests the structure Mather proposes, and Mather does not explain how a "non-recourse lease"—which, by her definition, could be created only before discharge—avoids making surplusage of section 365(p) 's safe harbor for post-discharge negotiation. Nor can we see why a lessor would ever agree to enter into such an arrangement. An assumption that does not create personal liability for future lease payments would give the lessor nothing to compensate it for the debtor's continued use of the leased property and the depreciation of the property's value. No rational lessor would accept a "non-recourse lease" like the one Mather proposes: in this case, a lease that allows Mather to keep using the Rav4 but prohibits Toyota from enforcing the lease terms against her if she breaches them.

Second, "it is a commonplace of statutory construction that the specific governs the general." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank* , 566 U.S. 639, 645, 132 S.Ct. 2065, 182 L.Ed.2d 967 (2012) (quoting *Morales v. Trans World Airlines, Inc.* , 504 U.S. 374, 384, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992)). Here, that principle supports the conclusion that section 365(p), which sets out procedures specifically applicable to individual debtors' assumptions of leases of personal property, should control over the more general reaffirmation procedures of section 524(c). Mather notes that section 524(c) "actually contains more procedural steps and more words" than section 365(p). But we do not measure specificity by the number of words in a provision. Section 524(c) is logically broader than section 365(p) because it governs many different types of agreements involving otherwise dischargeable debt, in contrast to the narrower issue of leases of personal property addressed by section 365(p).

Third, other provisions of the Bankruptcy Code suggest that lease assumptions under section 365(p) do not require reaffirmation under section 524(c). For example, section 362(h) requires individual debtors under some circumstances to indicate in their statement of intention whether they will "*either* redeem ... personal property pursuant to section 722, enter into an agreement of the kind specified in section 524(c) applicable to the debt secured by such personal property, *or* assume

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such unexpired lease pursuant to section 365(p) if the trustee does not do so." 11 U.S.C. § 362(h)(1)(A) (emphasis added). As we have previously explained, that provision's use of "either ... or" indicates that it designates distinct options. *In re Dumont* , 581 F.3d 1104, 1114 (9th Cir. 2009). The separate listing of reaffirmation under section 524(c) and assumption under section 365(p) undermines the suggestion that a debtor opting for assumption must also pursue reaffirmation.

Our interpretation is also supported by section 524(k), which specifies the disclosures that must be provided to a debtor who elects reaffirmation. None of the required disclosures is well tailored to a lease assumption, and many of them—such as the "amount reaffirmed" and the interest rate—make little sense in that context. 11 U.S.C. § 524(k)(3)(C), (k)(3)(E). The mismatch between those disclosure requirements and leases of personal property is particularly striking because Congress added the disclosures to the Bankruptcy Code in 2005, at the same time that it added section 365(p). *See* BAPCPA § 203, 119 Stat. at 43–49. As the bankruptcy court correctly observed, "[i]t is illogical to assume that Congress would require reaffirmation in a personal property lease assumption situation yet require not a single disclosure relevant to a consumer lease."

The historical understanding of lease assumptions by a trustee further supports our conclusion that lease assumptions under section 365(p) are not subject to section 524(c) 's requirements for agreements "based on a debt that is dischargeable." Before the 2005 amendment, only a trustee could assume a lease once a debtor entered Chapter 7 bankruptcy. *See* 11 U.S.C. § 365(a), (d). When a trustee decided to assume a lease, that assumption was "in effect a decision to continue performance," and it "continue[d] the parties' rights to future performance under the contract or lease." *In re Penn Traffic Co.* , 524 F.3d 373, 378 (2d Cir. 2008). An assumed lease was assumed "subject to all of its provisions, including the *in personam* liabilities flowing from assumption." *Abdemur* , 587 B.R. at 172. Significantly, the breach of an assumed lease became a post-petition debt under the Code—meaning that it was not dischargeable and was not subject to section 524(c) 's reaffirmation requirements. 11 U.S.C. § 365(g)(2). We see no reason to deviate from that understanding just because a debtor initiates the lease assumption rather than a trustee. *See Cohen v. de la Cruz* , 523 U.S. 213, 221, 118 S.Ct. 1212, 140 L.Ed.2d 341 (1998) (refusing to "read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure") (quoting *Pa. Dep't of Pub. Welfare v. Davenport* , 495 U.S. 552, 563, 110 S.Ct. 2126, 109 L.Ed.2d 588 (1990)).

For similar reasons, we reject Mather's suggestion that section 365(p) provides statutory authorization for a form of "ride-through." Before 2005, ride-through permitted debtors to continue payments on a secured debt—most commonly, a car loan—and maintain possession through bankruptcy if they did not indicate that they planned to reaffirm the debt or redeem or surrender the collateral. We need not decide whether any form of "ride-through" survived the 2005 amendments, a question we previously left open. *See Dumont* , 581 F.3d at 1112 n.14. But we agree with Toyota that the limited circumstances in which courts have allowed ride-through after 2005 are not presented here because they involved secured loans, not leases. *See In re Moustafi* , 371 B.R. 434, 439 (Bankr. D. Ariz. 2007).

Finally, Mather argues that in light of the statute's broad consumer-protection purposes, it would be "ludicrous" to

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allow a Chapter 7 debtor—who might be unrepresented, though Mather was not—to bypass judicial review of a lease assumption when the Bankruptcy Code requires such review for reaffirmation agreements. We cannot depart from the most natural reading of the statutory text in order to advance our understanding of better policy. "[W]hen 'the statute's language is plain, the sole function of the courts'—at least where the disposition required by the text is not absurd—'is to enforce it according to its terms.' " *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.* , 530 U.S. 1, 6, 120 S.Ct. 1942, 147 L.Ed.2d 1 (2000) (quoting *United States v. Ron Pair Enters., Inc.* , 489 U.S. 235, 241, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989)).

The result here is hardly absurd, and the policy considerations are not as one-sided as Mather suggests. Not all agreements subject to section 524(c) require judicial approval. For example, under section 524(c)(6)(B), no court approval is required for agreements to reaffirm consumer debts secured by real property. We see no absurdity in allowing a debtor to assume a car lease without judicial approval when she can also reaffirm a home mortgage without judicial approval. In addition, we note that the provision of the 2005 statute adding section 365(p) was entitled, "Giving Debtors the Ability to Keep Leased Personal Property by Assumption." BAPCPA § 309(b), 119 Stat. at 82; *see INS v. Nat'l Ctr. for Immigrants' Rights, Inc.* , 502 U.S. 183, 189, 112 S.Ct. 551, 116 L.Ed.2d 546 (1991) ("[T]he title of a statute or section can aid in resolving an ambiguity in the legislation's text"). The section title indicates that the purpose of adding section 365(p) was to give debtors a way to continue using their leased vehicles—the most common type of leased personal property—during and after bankruptcy without engaging in the more onerous requirements of section 524(c). After all, in order to obtain a genuine fresh start after discharge, many debtors will need to keep their cars so that they can continue to work. Mather's interpretation would frustrate that purpose by eliminating the debtor-friendly option that Congress provided.

III

We next consider whether the parties' failure to comply with the procedures of section 365(p) nullifies Mather's agreement to assume the Rav4 lease. We conclude that it does not.

Toyota and Mather agree that they followed only one of section 365(p) 's three procedural requirements. In order to assume a lease, (1) the debtor must "notify the creditor in writing that the debtor desires to assume the lease"; (2) the creditor may then "at its option, notify the debtor that it is willing to have the lease assumed by the debtor and may condition such assumption on cure of any outstanding default"; and (3) "[i]f, not later than 30 days after notice is provided ... the debtor notifies the lessor in writing that the lease is assumed," then "the liability under the lease will be assumed by the debtor and not by the estate." 11 U.S.C. § 365(p)(2)(A)–(B). Toyota notified Mather that it was willing to agree to Mather's lease assumption, satisfying step two. But Mather initially requested assumption in a phone call, not in writing (contrary to step one), and she did not return the lease assumption agreement within 30 days (contrary to step three).

Mather's failure to follow section 365(p) 's requirements cannot excuse her from the lease assumption to which she agreed. The Supreme Court has held that "absent some affirmative indication of Congress' intent to preclude waiver, ... statutory provisions are subject to waiver by voluntary agreement of the parties." *United States v. Mezzanatto* , 513 U.S. 196, 201, 115 S.Ct. 797, 130 L.Ed.2d 697 (1995) ;

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accord Clark v. Capital Credit & Collection Servs., Inc. , 460 F.3d 1162, 1170 (9th Cir. 2006). To be sure, "a statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy." *Brooklyn Sav. Bank v. O'Neil* , 324 U.S. 697, 704, 65 S.Ct. 895, 89 L.Ed. 1296 (1945). Thus, we have held that provisions of the Bankruptcy Code protecting the interests of third parties may not be waived. *See* , *e.g.* , *In re Sun Runner Marine, Inc.* , 945 F.2d 1089, 1093–94 (9th Cir. 1991) (section 365(c) 's prohibition on assuming financial accommodation contracts benefits other creditors, and so may not be waived). But because a lease assumption under section 365(p) affects no other creditors' recovery, neither the Bankruptcy Code nor our case law prohibits waiver.

Nor do we have any difficulty concluding that the parties mutually waived section 365(p) 's writing and timing requirements here. After declaring her intent to reaffirm the Rav4 lease in her statement of intention, Mather initiated contact with Toyota by phone. The requirement that a request be in writing helps to ensure its genuineness and offers some protection against hasty or ill-considered requests. But Mather, who was represented by counsel, signed the lease assumption agreement after Toyota mailed it to her. She does not suggest that Toyota wrongfully induced her to call rather than write in the first instance, nor does she argue that she did not understand what she was agreeing to. And although Mather returned the agreement after the 30-day period, that time limit serves to protect lessors from belated agreements, so it was Toyota, not Mather, that had the right to reject the belatedly executed agreement. We will not excuse Mather from the obligations of her lease assumption agreement based on procedural defects that she created and benefited from during her bankruptcy.

AFFIRMED .

Notes:

* The Honorable Eric N. Vitaliano, United States District Judge for the Eastern District of New York, sitting by designation.

Faculty

Krystal M. Ahart is a partner at Kahn & Ahart, PLLC, dba Bankruptcy Legal Center™, in Phoenix and has helped numerous individuals and businesses through the bankruptcy process in chapters 7, 11 and 13 since becoming licensed in 2012. She has helped many chapter 13 debtors save their homes (through the Mortgage Modification Mediation Program and otherwise) and enjoys helping clients through the chapter 11 process. Although her practice is mostly debtor-focused, Ms. Ahart also represents landlords in bankruptcy cases. She was the fourth female to become certified as a Bankruptcy Specialist by the State Bar of Arizona and was selected for the 2020 class of ABI's "40 Under 40" program and in *Super Lawyers*' 2021 Southwest Rising Stars list. Ms. Ahart works closely with the Volunteer Lawyers Program (VLP) on the Friend of the Court Reaffirmation program at the bankruptcy court, where she teaches law students various skills, including effective client communication, interviewing, courtroom decorum and presentation; the law students then represent *pro se* debtors at their reaffirmation hearings. She is a past-president of the Young Lawyers Division Board of the Maricopa County Bar Association and currently serves as chair of VLP's Advisory Committee and as co-executive director of the Arizona Consumer Bankruptcy Counsel. In 2014, she was the first recipient of the Hon. Sarah Sharer Curley Self-Help Center Volunteer Award in recognition of her commitment to the success of the bankruptcy court's Self-Help Center. Ms. Ahart received her B.S.A. in business administration, management and operations from DeVry University Phoenix in 2004 and her J.D. in 2011 from Arizona Summit School of Law.

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Advisory Committee on Bankruptcy Rules from 2006-12, appointed by Chief Justice John Roberts, and has served as an expert witness and testified before Congress on consumer matters. He is a conferee of the National Bankruptcy Conference, a Fellow of the American College of Bankruptcy, board member of the National Association of Consumer Bankruptcy Attorneys and the National Consumer Bankruptcy Rights Center, and is a former ABI Board member. He has also served as an adjunct faculty member at Boston College School of Law. Mr. Rao is a graduate of Boston University and received his J.D. from the University of California.

Hon. Tracey N. Wise is a Chief U.S. Bankruptcy Judge for the Eastern District of Kentucky in Lexington, appointed on March 31, 2010. She served as Chief Judge from Oct. 1, 2011, until Sept. 30, 2019. She also was appointed to the Sixth Circuit Bankruptcy Appellate Panel in 2016, and was elevated to Chief Judge again on Oct. 1, 2019. Prior to her appointment, Judge Wise practiced in the areas of bankruptcy and debt restructuring, served on numerous court-appointed committees, chaired the Bankruptcy Sections of the Fayette County and Kentucky Bar Associations, served as a trustee of the Kentucky Bar Association Client's Security Fund, and was a member of the board of directors of the Lexington Affiliate of the Susan G. Komen for the Cure Breast Cancer Foundation. She also served on the executive board of the Midwest Regional Bankruptcy Seminar from 2000-03, is a Fellow in the American College of Bankruptcy (2001) and a member of the National Conference of Bankruptcy Judges, and she has served as the bankruptcy representative on various U.S. District Court and Sixth Circuit Committees. Judge Wise was listed in *The Best Lawyers in America* from 1997-09 and in *Super Lawyers Kentucky* as a "Top 50 Lawyer" and "Top 25 Female Lawyer." She received her B.A. *magna cum laude* and Phi Beta Kappa in 1980 from Indiana University and her J.D. from Indiana University School of Law, where she was a member of the Order of the Coif and note editor of the *Indiana Law Journal.*