AMERICAN BANKRUPTCY INSTITUTE

2021 Winter Leadership Conference

60 Consumer Tips in 60 Minutes

Hon. Bruce A. Harwood
U.S. Bankruptcy Court (D. N.H.); Concord

John R. Bollinger
Boleman Law Firm, P.C.: Richmond, Va.

Summer M. Shaw
Shaw & Hanover PC; Palm Desert, Calif.

CONCURRENT SESSION

2021

Top 6 Tips from John Bollinger

1) **Business Development and Marketing Your Practice:** [1]

Times are changing, in the world of consumer bankruptcy. While marketing budgets have diminished, the costs associated with obtaining clients has steadily increased. Ten to fifteen years ago, back in the olden days, a typical firm spent 10-15% of their annual budget on marketing. Most consumer practitioners turned to the yellow pages or yellow book, billboards, and television to advertise to their prospective clients. The costs were very high and tracking the costs per client was critical to a successful marketing campaign. Marketing trends shifted regularly and staying on top of the numbers was crucial to running a successful practice. Fast forward to today, and there is significant debate as to whether these "old fashioned" marketing tools are still effective.

Many firms primary marketing sources are: current and past clients, professional referrals, online search engines; social media advertising; and direct website leads. Many of these different options can increase business.

Internet (Search engine optimization); Search Engine Optimization ("SEO"), or where and when your firm's website appears in organic search results, can cost you an arm and a leg, with mixed results, however it is a very important tool. Search engines are the primary method of navigation for most internet users, with the most common search engines being Google, Yahoo!, and Bing. Controlling where your website appears in the results is vital to online success. Being in the top 10 search results means that web traffic will be driven to your website, any lower and you are inconsequential.

Monitoring how you are spending your money is vital in SEO, and tracking your rate of return is the very important. Organic traffic, or non-paid traffic, is the gold standard in online marketing, it means that your website generating business. To improve your firms SEO you must utilize both the technical and creative elements to improve your rankings in search results and drive traffic to your website. Organic results are driven by many different elements such as:

- The number of words on your website
- The number of individual pages on your website
- The newness of the content

[1] John Bollinger of Boleman Law Firm, P.C.; jrbollinger@bolemanlaw.com.

- The number of other websites that have linked your site
- Even the structure of your website can make it achieve a higher ranking

Basically, search engines are designed so that the more popular the website, the more relevant it is in search results. The search engines use mathematical algorithms to determine results and then rank them by popularity. Ranking factors, or the factors considered in the algorithm, comprise hundreds of variables. There is a reason most law firms hire outside consultants to manage and increase their SEO. The simplest way to explain it is to boil it all down to the one common denominator. All search engine traffic is generated by one thing: the search query, or the words the end user types in. They carry extraordinary value and your site needs to contain the words your target market types when looking for the services you provide. Ultimately, it is up to you to determine the content you need to have on your website to generate the most client traffic.

Social Media- top 7 media websites in 2020. [2]

Instagram- 1st largest social media website in 2020. This is the place where everyone posts pictures of their kids, cats, and exceptionally prepared meals. While social media sites like Facebook rely on linking other internet sites, Instagram relies on user created content. Instagram is for the social media minimalist. Perhaps this is why the younger generations are so drawn to it. Millennials have been advertised to in loud voices since they were infants. Places like Instagram offer a softer approach. The savvy marketer must offer visual pleasing content if they want to be successful. Many individual lawyers have very successful Instagram pages that allow clients and prospective clients to engage with them. Instagram is about accessibility and is a great way to encourage top-of–the-mind awareness and encourage referrals from past clients. Firms can also pay to advertise on Instagram.

YouTube; 2nd largest social media website in 2020. YouTube is a place where people post videos of themselves doing weird/stupid/informative/amazing/funny things. Successful YouTubers generate content that fits into one of the aforementioned adjectives. YouTube has over a 2.3 billion users, which is almost half of all people on the Internet.[3] Youtube is the fifth most used social media platform for marketers.[4]

[2] *https://www.adobe.com/express/learn/blog/top-social-media-sites- The 7 top media sites you need to care about in 2020, last visited 11/29/21*

[3] https://backlinko.com/youtube-users, *last visited 11/29/21*

[4] https://www.omnicoreagency.com/youtube-statistics/, *last visited 11/29/21*

Eight-one percent of the entire US Population uses YouTube. [5] It is a free resource for direct marketing. 1 in 3 baby boomers go on YouTube and 44% go on YouTube daily.

Regardless of its high potential, many small business owners in the U.S. are yet to make good use of YouTube, as only 9% of small businesses are on YouTube.

Facebook (Meta); 3rd largest social media website in 2020. So is Facebook a dinosaur? The answer is…it depends on who you are trying to reach. Younger generations of Facebook users are looking to other social networks. After all, it's not really cool to hangout with your friends at the same place your grandma and grandpa hangout with their friends. The greatest benefit of advertising on Facebook is your ability to advertise directly to members of your target demographic. Facebook amasses a ton of information on its members. It knows where its members work, where they went to school, if they are married, how long they have been married, their age, their race, the number of children they have, the city they live in, what they do for a living, what they like based on "likes" and "follows." Essentially, they offer a pretty painless way of targeting to your prefect client, if that client is on Facebook.

Twitter; 4th largest social media website in 2020 It seems like most of the world's press releases start with Twitter. Twitter differs from Facebook in that it is for more steam-of-thought content. It is a much faster paced environment than Facebook. Tweeters are limited to a speedy 280 characters per tweet to expound their views, and you are too! Marketing on Twitter is all about linking interesting content, and then getting your "followers" to retweet, or share it, with their followers. Most law firms use this as a way to share their successes and charitable outreaches. Tweeting aids in promoting top-of-the-mind awareness and lends creditability to your firm. Your followers see your name, even if you are not generating original content, just sharing news updates puts your name in front of them. The more followers, the better your chances of generating leads.

Tik Tok 5th largest social media website in 2020 This new kid on the block is less than five years old, but TikTok reportedly sees over one billion monthly users[6], which instantly places it amongst the top social media platforms in the world in terms of sheer user figures. Who's on TikTok (and Why): TikTok users consist of the following age allocation: 10-19 – 32.5%, 20-29 – 29.5%, 30-39 – 16.4%, 40-49 – 13.9%, 50+ – 7.1%. This

[5] See id.

[6] https://variety.com/2021/digital/news/tiktok-1-billion-monthly-active-users-1235075119/, *last visited 11/29/21*

means that the TikTok userbase is aging up.[7] The Content that Works Best on TikTok: Entertaining, interesting, comedic and sometimes nonsensical short-form video content, usually set to the tune of popular songs. Think fun, catchy music-video style content. You Should Prioritize TikTok if: You want to reach (and entertain) a young audience with fun video-based content that doesn't often have a direct connection to your products or services. Being overly self-promotional on this platform won't build you a loyal following, so be prepared to take the approach of entertaining first.

Pinterest: 6th largest social media website in 2020 Pinterest has become a very popular social bookmarking tool for saving ideas and finding creative inspiration when it comes to everything from cooking to DIY home projects, vacation ideas, interior design, business and everything in between. With an audience predominantly consisting of adult women, this social media platform is also often cited as a crucial part of the product discovery journey. Who's on Pinterest (and Why): With over 450 million monthly users[8], Pinterest boasts one of the most concentrated audiences of women amongst all social media sites. Nearly 60% of their users are female, with a heavy concentration amongst millennials. [9]The Content that Works Best on Pinterest: Vertically-formatted images do best on this platform, due largely to the browsing experience users are presented with. Polished imagery with clear copy that conveys what the Pinner will see if they click through performs best. Numbers, lists, and quotes should be a big part of your strategy here. And don't forget to consider keywords and search terms in your imagery.

Snapchat; 7th largest social media website in 2020. Snapchat is the new age version of instant messaging and the most popular mobile messaging app. Now instead of kids leaving witty "away messages" on their AIM accounts, they post pictures and videos for their friends to see. The videos and pictures are meant to be temporary. The user controls how many times an end user can watch a video, or how many seconds they can view a picture. Snapchatters can also send pictures and videos privately to their friends. Like, OMG, I can't imagine how people lived before it! As the graphic to the right illustrates it is very popular with the younger audience. The key to Snapchat success? Well, companies are still figuring this one out. It's much like Twitter, it's all about amassing "friends" and then generating fun content. Snapchat's focus is accessibility: they get to know the fun side of your firm and can feel connected to individual attorneys.

Other ones that did not make the list:

---

[7] https://wallaroomedia.com/blog/social-media/tiktok-statistics/, *last visited 11/29/21*

[8] https://sproutsocial.com/insights/pinterest-statistics/, *last visited 11/29/21*

[9] See id

LinkedIn; A LinkedIn profile is the new business card/resume. LinkedIn is great place to list your speaking engagements, publications and professional associations It serves two main functions: (1) It generates referrals from connected professionals, and (2) it lends legitimacy to your competency when clients are researching you. The key to utilizing LinkedIn effectively is to actually use it.

AVVO Lawyers.com, Martindale Hubbell, and Other Legal Review Sites: Legal review sites are the new yellow pages. They target people searching for attorneys and collect client and peer reviews for your prospective clients to consider when choosing an attorney. They typically are one of the top search results when someone either searches for an attorney by name or searches for a generic term such as "bankruptcy attorney." These types of sites usually offer a free and a paid service. Usually, on the free versions you can list some basic information about yourself and receive client and peer reviews that will increase your ranking on that particular website. Usually, the paid versions guarantee that your name appears in their results when clients search for an attorney in your practice area.

Blawgs/Blogs. Most legal blogs are hosted on individual firm's websites, although there are some standalone Blawgs such as abovethelaw.com, which serve as informal news sources and mostly feature op-ed pieces. Website hosted Blawgs are a great way to answer basic client questions, which can reduce phone calls and emails, and break through the barriers to entry to filling a bankruptcy. Blawgs are also a great way to gain legal referrals. Offering insight to industry specific issues may bolster your creditability in the local market and encourage other lawyers and professionals to refer business to you.

2) Understand and spot post-petition Inheritance issues:

When it is disclosed that the debtor has inherited something, this should trigger the need for further inquiry and disclosure. Understanding the following is critical in determining how to handle the issue: when did the inheritance come to arise; what is the nature of the inherited property; and can the inherited property be protected.

Leading case regarding inheriting an IRA is the Rameker. Clark v. Rameker, 573 U.S. 122 (U.S. Sup. Ct. 2014). Facts: Prior to filing the Chapter 7 case, the debtor inherited an IRA from her mother; she was the sole beneficiary on the account; and she elected to take monthly distributions from the account. Issue: Whether the funds that were in the inherited individual IRA were exempt. The court ruled that the funds were not exempt "retirement funds" as provided in 11 USC § 523(b)(3)(C). Id at 129-130

Rameker, addressed the applicability of 11 USC § 523(b)(3)(C), but did not eliminate the ability to look to available state exemptions. Not every state has an exemption to provde a protection, you must know the law of your state or the applicable state to determine whether it can be protected

Upon the discovery that a debtor becomes eligible to receive an inheritance, whether within the 180 days on a Chapter 7 filing or anytime within the term of a chapter 13 case, it always best to err on the side of caution and inform the Court and the Trustee. Know the law in your jurisdiction on whether the schedules have to be amended. [10]

Property of the estate:

Chapter 7 and Chapter 13 create different estate property issues. The code provides a definition for "property of the estate" in 11 U.S.C. § 541(a)(5) and it appears to provide clear guidance of what is property of the estate consists of prior to filing and after filing in the Chapter 7 context. [11]

Chapter 13 incorporates 11 USC § 1306 and further expands property of the estate.[12] Majority view is it is property of the estate. [13] Minority view is that it is not property of the estate. [14]

3) Understand the benefits of Conversion

[10] *See In re Waldron, 536 F.3d 1239 (11th Cir. 2008)*)(Inheritance received by a chapter 13 debtor more than 180 days after the petition date and after confirmation of the chapter 13 plan was property of the estate)*; In re Foreman, 378 B.R. 717, (Bankr. S.D. Ga. 2007)(no ongoing duty to disclose a wrongful death claim that arose post-confirmation); In re Batten, 351 B.R. 256 (Bankr. S.D. Ga. 2006)(no disclosure was required since for post confirmation personal injury claim arose post confirmation); In re White, 510 B.R. 884 (Bankr. N.D. Ala. 2014)(Debtor waited 46 months to disclose an inheritance. The court denied part of the exemption due to bad faith and stated that honest and forthright reporting is required,); In re Green), 268 B.R. 628 (Bankr. M.D. Fla. 2001)(debtors waited 18 months to amend their schedules to disclose life insurance policies and IRAs and propose exemptions. The court ruled that the exemptions were proposed in bad faith and sustained the trustee's.*

[11] *See 11 U.S.C. § 541(a)(5).*

[12] See 11 USC § 1306 in relevant part: "(a) Property of the estate includes, in addition to the property specified in section 541 of this title- (1) all property of the kind specified in such section that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, or 11, or 12 of this title whichever occurs first . . . . (b) Except as provided in a confirmed plan or order confirming a plan, the debtor shall remain in possession of all property of the estate."

[13] *In re Carroll, 735 F.3d 147 (4th Cir. 2013); In re Moore, 602 B.R. 40, 46 (Bankr. E.D. Tenn. 2019)*

[14] *In re Tinney, 2012 Bankr. LEXIS 3092 (Bankr. N.D Al. 2012)(citing In re Key, 465 B.R. 709 (Bankr. S.D. Ga. 2012);*

Conversion of Chapter 7 to Chapter 13: If the Trustee attempts to take an interest in property that appeared to be exempt, this may be an option. Only the debtor may convert a case to one under Chapter 11, 12 or 13 at any time, if the case had not been converted under section 1112, 1208 or 1307. [15] Bad faith can be a consideration when converting. [16]

Conversion of Chapter to a 13 to 7: can be requested by the debtor at any time, or by a party in interest or the United States trustee, if cause is shown. [17] Totality of the circumstances and bad faith can also be considered. [18]

4) Understand the benefits of the Hardship discharge of 11 U.S.C. § 1328

Hardship discharge: If plan modification is not possible, another alternative would be moving for a hardship discharge. Requesting a hardship discharge requires that a motion be filed and 11 U.S.C. § 1328 generally provides the following requirements: 1) the failure to complete plan payments is due to circumstances for which the debtor should not justly be held accountable; 2) the value of the property distributed under the plan is not less than the amount that would have been paid if the debtor had liquidated under Chapter 7 on the effective date of the plan; and 3) modification of the plan is not practicable. These types of requests are fairly common and regularly granted.[19] However, not every court will grant a hardship discharge. [20]

5) Benefits conferred in a Chapter 13 when employing the Co-Debtor stay and 11 U.S.C. § 1301 coupled with 11 U.S.C. § 1322(b)(1).

Upon the filing of a Chapter 13 case, § 1301 imposes the "co-debtor stay" and prevents a creditor from collecting "all or any part of a consumer debt of the debtor from any individual that is liable on such debt with the debtor or that secured such debt." In order for the co-debtor stay to apply, the debt cannot have been incurred in the ordinary course of the debtor's business. Be careful and make sure the stay is in effect

---

[15] *11 U.S.C. § 706(b)(1).*

[16] See *Marrama v. Citizens Bank of Mass., 549 U.S. 365, 127 S. Ct. 1105, 166 L. Ed. 2d 956 (2007)*

[17] *11 U.S.C.S. § 1307.*

[18] *In re Stillwagon, 2014 WL 1087898; In re Doetsch, 2007 Bankr. LEXIS 3161(Bankr. N.D.N.Y. 2007)*

[19] In re Shorter, 544 B.R. 654, (Bankr. ED Ar. 2015In re Kosinski, 2015 Bankr. LEXIS 779, (Bankr. N.D. Ill., 2015); In re Hoover, 2015 Bankr. LEXIS 924, (Bankr. N.D. Cal., 2015); In re Conn, 2015 WL 3777958 (Bankr. N.D. Ohio, 2015).

[20] *In re Miller, 526 B.R. 857, 2014 U.S. Dist. LEXIS 133435 (D. Ct. Colo. September 23, 2014); In re Wilson, 2016 Bankr. LEXIS 595 (Bankr. S.D. W. Va. 2016)*

see the following case- community property state- debt was solely in non-debtor husband's name and not in debtors name- community debt does not rise to the level to protect the co-debtor under 1301, but 362 still protects community property. See *Smith v. Capital One Bank (USA) NA,* 545 B.R. 249 (E.D. Wis. 2016).

The creditor has the ability to seek relief from the stay. Relief could be sought and obtained if the co-debtor was the one that received the consideration of the debt owing; the plan does not propose to pay such claim; or the creditor's interest would be irreparably harmed if the stay is in effect. Unless the debtor defends the co-debtor stay or the co-debtor hires an attorney to defend, the probability that will be granted is high. The debtor also has another tool to protect a co-debtor, 11 USC 1322 (b)(1) provides that an extra level of protection by allowing for a debtor discriminate on jointly held consumer claims- pay the debt back at 100%.

6) Know and understand the local practices.

Attorneys that are new to bankruptcy or are new to a particular locality should get to know the local rules and practices. Go to bar functions; reach out to other practitioners; reach out to the local Chapter 7 and Chapter 13 Trustee's to better understand how things work.

2021 BNH 006

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

In re:

Paul E. Vrusho,
Debtor

Bk. No. 20-10813-BAH
Chapter 13

Sandra Kuhn
Family Legal Services, PC
Concord, New Hampshire
Attorney for Debtor

Kathleen E. McKenzie
Raymond J. DiLucci, P.A.
Concord, New Hampshire
Attorney for Vermont Center Wreaths, Inc.

MEMORANDUM OPINION

I. INTRODUCTION[1]

Before the Court is the Motion for Leave to File Claim After Bar Date Nunc Pro Tunc (Doc. No. 88) (the "Motion") filed by Vermont Center Wreaths, Inc. ("Vermont Center"), and Debtor Paul E. Vrusho's objection thereto (Doc. No. 103) (the "Objection").[2] In its Motion, Vermont Center requests an extension of the November 24, 2020, filing deadline for non-governmental proofs of claims in this case (the "Bar Date"), pursuant to Federal Rule of Bankruptcy Procedure 3002(c)(6)(A). Vermont Center asserts that it received insufficient notice

[1] Unless otherwise indicated, the terms "Bankruptcy Code," "Code," "chapter," "section" and "§" refer to Title 11 of the United States Code, 11 U.S.C. §§ 101, et seq., as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub L. No. 109-8, 119 Stat. 37. References to the "Bankruptcy Rules" or "Rule" shall mean the Federal Rules of Bankruptcy Procedure.

[2] The Court also has before it the Debtor's Objection to Claim Number 13 (Doc. No. 84) (the "Claim Objection") and Vermont Center's Response to Debtor's Objection to Claim Number 13 (Doc. No. 89) (the "Response to Claim Objection"). As explained to the parties during the hearing held on September 8, 2021, the scope of this opinion is limited to the sufficiency of the notice provided to Vermont Center and does not include any substantive findings regarding the merits of Vermont Center's underlying claim.

of the Bar Date because the Debtor's verified list of creditors (Doc. No. 1 at 50) (the "Creditors Matrix") listed Vermont Center only at the address of an attorney representing Vermont Center in a related (and still pending) state court proceeding against the Debtor and his company, and not at Vermont Center's own business address. The Debtor argues that Vermont Center received sufficient notice of the Bar Date.

The Court held a hearing on the Motion and Objection on September 8, 2021, and took the matter under advisement.[3] For the reasons discussed herein, the Court concludes that Vermont Center had sufficient notice of the Bar Date because its attorney in the related state court proceeding received actual notice of the bankruptcy filing and the Bar Date.

II. JURISDICTION

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and Local Rule 77.4(a) of the United States District Court for the District of New Hampshire. This is a core proceeding in accordance with 28 U.S.C. § 157(b)(2)(K).

III. FACTS

The Debtor filed a chapter 13 petition on September 15, 2020 (Doc. No. 1). On the filing date, the Debtor and his business, Granite State Greenhouse and Nursery, Inc. ("Granite State"), were co-defendants in an ongoing collection lawsuit filed by Vermont Center in the Rockingham County Superior Court on October 24, 2019 (the "Collection Litigation").[4] Id. at 11. Vermont Center's attorney of record in the Collection Litigation is Daniel Proctor. On his Bankruptcy

[3] At the conclusion of the hearing, the Court ordered the parties to file supporting memoranda of law by September 20, 2021 (Doc. No. 107). The Debtor filed his memorandum on September 20, 2021 (Doc. No. 111). Vermont Center sought leave from the Court to file its memorandum the next day (Doc. No. 112), which the Court granted (Doc. No. 114). Vermont Center timely complied (Doc. No. 117).

[4] See Vermont Center Wreaths Inc. v. Paul Vrusho, et al., 218-2019-CV-01507.

Schedule E/F, the Debtor listed "Daniel Proctor for Vermont Center Wreaths, Inc." as a nonpriority unsecured creditor with a claim of $75,000, which the Debtor described as "[l]awsuit related." Id. at 27. Likewise, the Debtor's verified Creditors Matrix listed "Daniel Proctor for Vermont Center Wreaths, Inc." as a creditor, with a mailing address of "PO BOX 3544, Concord, NH 03302-3544"—which is Attorney Proctor's mailing address. Id. at 50. Neither form listed Vermont Center's direct mailing address. Thus, the Clerk of Court mailed the Notice of Chapter 13 Bankruptcy Filing (Doc. No. 4) (the "Notice of Bankruptcy") to Attorney Proctor at the address shown on the Creditors Matrix (Doc. No. 8).[5] The Notice of Bankruptcy included the first date of the § 341 Creditors Meeting, the deadline to object to discharge/dischargeability, and the Bar Date.

Shortly after the filing date, Attorney Proctor notified Vermont Center of the Debtor's bankruptcy filing by speaking with Paulette Sicard, a shareholder and officer of Vermont Center. Although Attorney Proctor was Vermont Center's counsel in the Collection Litigation and offered to represent Vermont Center in the Debtor's chapter 13 case, Vermont Center did not accept that offer.[6]

In June of 2021, Ms. Sicard, contacted the chapter 13 Trustee and learned of the proof of claim filing requirement, prompting Vermont Center to retain counsel.[7] On July 9, 2021, more than seven months after the Bar Date, Vermont Center filed a nonpriority unsecured proof of

[5] The docket in this case indicates that the Clerk of Court continued to mail bankruptcy pleadings and notices to Attorney Proctor, in the absence of any amendment of the Creditors Matrix.

[6] During the September 8 hearing, Ms. Sicard stated that Attorney Proctor told her that it was unlikely that Vermont Center would receive a distribution in the chapter 13 case. As discussed hereinafter, Attorney Proctor has not participated in the chapter 13 case, and the Court makes no findings as to what was or was not said during that conversation. For the purposes of this opinion, it only matters that Attorney Proctor received the Notice of Bankruptcy while representing Vermont Center in litigation against the Debtor on the same claim that Vermont Center now seeks to assert in the Debtor's chapter 13 case, and that he discussed it with Ms. Sicard.

[7] Specifically, Ms. Sicard explained that she called the Trustee to inquire about the status of the Debtor's bankruptcy case. She stated that the Trustee informed her for the first time that Vermont Center's ability to share in any distribution to unsecured creditors was qualified by the filing of a proof of claim by the Bar Date.

claim in the amount of $74,556.50, based on a pre-petition partial summary judgment order issued in the Collection Litigation (Claim. No. 13) (the "Proof of Claim").[8] On July 15, 2021, the Debtor filed its Claim Objection, asserting that the Court should disallow the tardily filed Proof of Claim in its entirety (Doc. No. 84).

On August 5, 2021, Vermont Center filed the Motion, Ms. Sicard's supporting affidavit (Doc. No. 88, Exhibit 3) (the "Affidavit"), and its Response to Claim Objection. In her Affidavit, Ms. Sicard stated that while Attorney Proctor had informed Vermont Center of the Debtor's bankruptcy filing, he failed to explain the need to file a proof of claim by the Bar Date in order to be paid. On September 1, 2021, the Debtor filed his Objection to the Motion.[9] During the September 8 hearing, Vermont Center acknowledged that Attorney Proctor received the Notice of Bankruptcy, which contained the Bar Date.[10] At the conclusion of hearing, the Court took the matter under advisement.

IV. THE POSITIONS OF THE PARTIES

A. Vermont Center

[8] Vermont Center attached to its Proof of Claim an incomplete copy of an "Order on Plaintiff's Motion for Summary Judgment" issued by the Rockingham County Superior Court on April 30, 2020 (Claim No. 13, Exhibit A) (the "Partial Summary Judgment Order"). The Partial Summary Judgment Order granted Vermont Center's Motion for Summary Judgment as to its breach of contract claim against Granite State and denied summary judgment on the Debtor's personal guaranty of that claim. While the copy of the Partial Summary Judgment Order contains only its odd-numbered pages (1, 3, 5, 7 and 9), it is sufficient to indicate that the underlying debt in the Collection Litigation includes the Debtor's personal guaranty of Granite State's debt to Vermont Center, at least for purposes of this proceeding.

[9] The Debtor also filed an Exhibit in support of his Objection, which appears to be a case summary of the Collection Litigation docket (Doc. No. 104). The Exhibit includes three entries, dated "9/23/20" or "9/24/20." The entries reference the Debtor's bankruptcy filing and notice thereof. See Doc. No. 104 at 3.

[10] During the hearing, Ms. Sicard described the conversation she had with Attorney Proctor regarding the Debtor's bankruptcy filing and his offer to represent Vermont Center in the bankruptcy court case. She explained how she discovered the proof of claim filing requirement and the Bar Date. Vermont Center's bankruptcy counsel made an offer of proof of Ms. Sicard's statements. The Debtor's attorney did not object to the offer of proof. Attorney Proctor was not present at the hearing, nor was he required to be, since Vermont Center did not retain him in connection with this chapter 13 case.

Vermont Center requests an extension of the Bar Date pursuant to Rule 3002(c)(6)(A), asserting that notice was not sufficient under the circumstances of the case because the Notice of Bankruptcy, and thus notice of the Bar Date, was only sent to Attorney Proctor. While Vermont Center concedes that proper notice to a creditor's attorney can be imputed to the creditor where there is "a nexus between the creditor's retention of the attorney and the creditor's claim against the debtor," it maintains that the Court cannot reasonably impute notice to Attorney Proctor to it because their attorney-client relationship did not extend beyond the Collection Litigation. Importantly, Vermont Center does not argue that Attorney Proctor did not receive the Notice of the Bankruptcy, or that Attorney Proctor failed to inform it about the Debtor's bankruptcy filing well in advance of the Bar Date. Instead, Vermont Center contends that the Debtor should have included its direct mailing address on the "schedules and statements" because of its long-standing business relationship with the Debtor. It further asserts that the Debtor's failure to do so prevented it from receiving the Notice of Bankruptcy, and thus, sufficient notice of the Bar Date.

B. The Debtor

The Debtor asserts that the Motion should be denied because it properly listed Attorney Proctor as counsel for Vermont Center on the Creditors Matrix, causing Attorney Proctor to receive actual notice of the bankruptcy filing and Bar Date by virtue of Notice of Bankruptcy. The Debtor contends that the actual notice provided to Attorney Proctor imputes to Vermont Center because Attorney Proctor represented Vermont Center in the Collection Litigation, which resulted in the issuance of the Partial Summary Judgment Order on which the Proof of Claim is based. Specifically, the Debtor argues that Attorney Proctor's representation of Vermont Center in the Collection Litigation is sufficiently related to the Proof of Claim, allowing the Court to

impute Attorney Proctor's actual notice of the bankruptcy filing and Bar Date to Vermont Center.

V. DISCUSSION

A. Rule 3002

"In chapter 13 cases, a timely filed proof of claim is a precondition to allowance of the claim and the creditor's right to receive a distribution." San Miguel Sandoval v. Sandoval (In re San Miguel Sandoval), 327 B.R. 493, 512 (B.A.P. 1st Cir. 2005). See also Fed. R. Bankr. P. 3002(a) (requiring creditors to file proofs of claim for the claim to be allowed). Under Rule 3002(c) "a proof of claim is timely filed if it is filed not later than 70 days after the order for relief . . . ." Fed. R. Bankr. P. 3002(c).[11] Generally, tardily filed proofs of claim are disallowed. See 11 U.S.C. § 502(b)(9). A court may extend the time in which a creditor must file a proof of claim if one of seven exceptions is met. See Fed. R. Bankr. P. 3002(c)(1)-(7).

Rule 3002(c)(6)(A) provides, in pertinent part:

> (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) . . . .

Fed. R. Bankr. P. 3002(c)(6)(A). Thus, as a threshold matter, a creditor moving under subsection (A) must show that it received insufficient notice of the proof of claim filing deadline. See In re Price, No. 18-71260, 2019 WL 2895006, at *2 (Bankr. W.D. Va. July 3, 2019) (citing In re

[11] Rule 3002 was amended in 2017. Prior to the 2017 amendments, the general deadline for creditors to file proofs of claim was 90 days from the § 341 Creditors Meeting.

Wulff, 598 B.R. 459, 465 (Bankr. E.D. Wis. 2019) ("If insufficient notice alone were grounds for an extension, [the creditor] would be entitled to one. But the rule requires more—the insufficient notice must result from one of the two conditions outlined in the rule.")). In deciding whether to extend the proof of claim filing deadline, courts may consider the following factors:

> (i) whether a chapter 13 plan has been confirmed, (ii) whether the failure to list the creditor properly was the result of inadvertence or was ill-intentioned, (iii) whether the creditor acted diligently in bringing its motion under Rule 3002(b)(6), (iv) whether the inclusion of the creditor's claim among allowed claims at that juncture in the case would significantly prejudice other creditors or make untenable the chapter 13 trustee's administration of the case, (v) whether the extension of the bar date would prove futile, as where the claim would be disallowed for a reason other than untimeliness, and (vi) whether the denial of an extension would likely subject the debtor to additional proceedings which might prove costly, frustrate the debtor's efforts to perform under the chapter 13 plan, or impair the debtor's fresh start should a discharge be obtained.

In re Fitzgerald, No. 8:19-BK-07741-RCT, 2020 WL 5745973, at *4 (Bankr. M.D. Fla. May 18, 2020). A court "should consider whether the creditor had actual notice of the bankruptcy notwithstanding the failure to include or accurately list the creditor on the [list of creditors]." Id. (citing In re Price, 2019 WL 2895006, at *3 (denying creditor's motion to extend proof of claim filing deadline under Rule 3002(c)(6) where the creditor had actual notice of the bankruptcy despite the debtor's failure to accurately list the creditor's address on the list of creditors)).

Thus, in determining whether to extend the Bar Date pursuant to Rule 3002(c)(6), the Court must first examine the sufficiency of the notice provided to Vermont Center and, if insufficient, whether it was due to the Debtor's failure to list Vermont Center's direct mailing address on the Creditors Matrix.

B. Due Process and Sufficiency of Notice

A debtor seeking the benefits of bankruptcy protection must comply with specific filing and disclosure requirements designed to "ensure sufficient notice to parties in interest of various

events in [the debtor's] bankruptcy case[.]" In re San Miguel Sandoval, 327 B.R. at 507. Among these requirements is a debtor's duty to file a verified list of creditors. See 11 U.S.C. § 521(a)(1)(A); Fed. R. Bankr. P. 1007(a)(1) (requiring a debtor to file "a list containing the name and address of each entity included or to be included on Schedules D, E/F, G, and H as prescribed by the Official Forms"); Fed. R. Bankr. P. 1008 (requiring all filings to "be verified or contain an unsworn declaration"). Debtors seeking bankruptcy protection in the District of New Hampshire must provide the Clerk of Court with a verified "master address list in the matrix form specified [in LBR 1007-2] . . . contain[ing] the names, addresses and ZIP codes of all creditors and parties in interest . . . ." LBR 1007-2(a). Although the list of creditors "provides no [other] information about the creditors or the nature of the debts owed to them[,]" it "is critically important in any bankruptcy case because it is used by the Clerk of Court, [d]ebtor, and all other parties in interest as the master service list when the Code or Rules require[] service of a pleading, notice, or paper 'on all creditors.'" In re Fitzgerald, 2020 WL 5745973, at *2.

For example, Rule 2002(f) requires the Clerk of Court to "give the debtor, the trustee, all creditors and indenture trustees notice by mail of . . . the time allowed for filing claims pursuant to Rule 3002 . . . ." Fed. R. Bankr. P. 2002(f)(3). Under Rule 2002(g), the mailed notice "shall be addressed as such entity or an authorized agent has directed in its last request filed in the particular case." Fed. R. Bankr. P. 2002(g)(1). "[I]f a creditor . . . has not filed a request designating a mailing address under Rule 2002(g)(1) . . . the notices shall be mailed to the address shown on the list of creditors or schedule of liabilities, whichever is filed later." Fed. R. Bankr. P. 2002(g)(2). Thus, in order to satisfy the requirements of due process and Rule 2002(f), "[t]he creditor list submitted by the debtor must . . . contain information reasonably calculated to provide notice to the creditor." In re San Miguel Sandoval, 327 B.R. at 507 (citing 9 Lawrence P. King, Collier on Bankruptcy ¶ 1007.02[2] (15th ed. Supp. 2004)). See also In re Price, 2019

WL 2895006, at *2 ("Due process does not require that a party receive actual notice, however, but notice 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'") (quoting United Student Aid Funds, Inc. v. Espinosa, 559 U.S. 260, 272 (2010) (quoting Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950))).

i. Imputed Notice and Actual Notice

"The general rule in bankruptcy cases, as well as other types of cases, is that notice served upon counsel satisfies any requirement to give notice to the party." In re Griggs, 306 B.R. 660, 665 (Bankr. W.D. Mo. 2004) (citing Irwin v. Veterans Affairs, 498 U.S. 89, 92 (1990)). Nevertheless, imputed notice requires more than an attorney-client relationship. See In re Barnes, BKR 07-31157, 2008 WL 2397618, at *3 (Bankr. D.N.D. June 10, 2008) ("Mailing notice to [a] [c]reditor's attorney in a prior state court proceeding located in a different state than [the] [c]reditor is not proper notice."). "Generally, a debtor may schedule a creditor in care of the creditor's attorney for the purpose of providing notice of the case, provided that the attorney is the creditor's agent in matters related to the bankruptcy case." Id. at *1 (citing Chanute Prod. Credit Ass'n v. Schicke (In re Schicke), 290 B.R. 792, 801 (B.A.P. 10th Cir. 2003)). "While an attorney need not have been retained to represent a creditor in a bankruptcy case or be a bankruptcy attorney [for this general rule to apply], it is important that there be some nexus between the creditor's retention of the attorney and the creditor's issues with the debtor." In re Schicke, 290 B.R. at 802-03; see also In re Linzer, 264 B.R. 243, 249 (Bankr. E.D.N.Y. 2001) (finding that creditors' non-bankruptcy counsel, who was actively engaged in prosecuting creditors' claim against debtor before a non-bankruptcy tribunal, was deemed an authorized agent of creditors, for purpose of receiving notice of debtor's bankruptcy case due to "well-settled law").

"In most of the cases where an agent's knowledge of bankruptcy proceedings is imputed to a creditor, the agent is an attorney who has been authorized either to collect the balance due on a defaulted debt or to represent the creditor in bankruptcy proceedings." In re Barnes, 2008 WL 2397618, at *1; see also In re Schicke, 290 B.R. at 805-06 (imputing notice from attorney, who did not appear in the bankruptcy case, to the creditor for purposes of the filing deadline for nondischargeability complaints where the attorney had had represented the creditor in prepetition fraud litigation against the debtor); In re Griggs, 306 B.R. at 666 (imputing notice of the bankruptcy filing and proofs of claim filing deadline to a creditor where the noticed attorney represented the creditor in a prior state court action against the debtors, which resulted in a judgment against the debtors and served as the basis for the creditor's claim). But see In re Barnes, 2008 WL 2397618, at *2 (finding insufficient notice to a creditor residing in Brookings, South Dakota where the debtor served an attorney, who represented the creditor in a previous state court matter, in Fargo, North Dakota).

Courts have also declined to extend the proof of claim deadline where the creditor had actual notice of the bankruptcy and/or proofs of claim filing deadline notwithstanding the debtor's failure to accurately list the creditor's address on the list of creditors. See In re Price, 2019 WL 2895006, at *3 (denying creditor's motion to extend deadline where the post office put the notice of bankruptcy filing in the creditor's post office box despite being addressed incorrectly); In re Blakely, 440 B.R. 443, 446 (Bankr E.D. Va. 2010) (sustaining chapter 13 trustee's objection to creditor-bank's tardily filed proof of claim where the creditor discovered the debtor's bankruptcy filing in a PACER search prior to the proof of claim filing deadline).

C. Analysis

Based on a review of the record in this case and the applicable case law, Vermont Center received sufficient notice of the Bar Date. Here, the Debtor's listing of Attorney Proctor "for

Vermont Center Wreaths, Inc." and the use of Attorney Proctor's mailing address on the schedules and Creditors Matrix was reasonable under the circumstances of this case due to his continued representation of Vermont Center in the Collection Litigation, which involved the very same claim that Vermont Center seeks to assert here.[12] For these reasons, there was a sufficient nexus between Vermont Center's retention of Attorney Proctor and its Proof of Claim against the Debtor.

Furthermore, the parties agree that Attorney Proctor received the Notice of Bankruptcy, which contained the Bar Date and other important dates, shortly after the bankruptcy filing and well before the expiration of the Bar Date. Under these circumstances, that was sufficient notice to inform Vermont Center of its duty to monitor the bankruptcy case. See In re San Miguel Sandoval, 327 B.R. at 510 (concluding that service of the notice of bankruptcy filing on the creditors' original counsel "constituted adequate notice" to the creditors and "was sufficient to impose upon [original counsel], successor counsel and the [c]reditors the obligation to monitor the proceedings and the deadlines"). While the Court is cognizant that the scope of an attorney-client relationship may or may not change or be refined by agreement of the parties *after* notice is given to the attorney, Vermont Center failed to provide the Court with any case law suggesting that an after-the-fact agreement alone prevents a court from imputing otherwise proper notice from counsel to its client.

In addition to imputed notice, Vermont Center received actual notice of the bankruptcy from Attorney Proctor. Vermont Center acknowledged that Attorney Proctor promptly notified it about the Debtor's bankruptcy filing and offered to pursue the Proof of Claim on its behalf,

[12] Although the facts of this particular case support this conclusion, the Court nonetheless believes that including Vermont Center's mailing address, alternatively or in addition to Attorney Proctor's address, on the Creditors Matrix and Schedules would obviously have been a better practice, and would have provided direct notice to Vermont Center. Part 3 of Official Form 106E/F specifically provides for listing agents who are engaged in collecting debts on behalf of a creditor who is already listed on Part 2, and in this Court's experience it is common for debtors to do so.

which Vermont Center declined. Although the Court need not decide whether Vermont Center had actual notice of the bankruptcy filing and/or Bar Date due to its finding of imputed notice, it is a factor that further supports the Court's finding of sufficient notice, and its denial of the Motion. See In re Fitzgerald, 2020 WL 5745973, at *4 (citing In re Price, 2019 WL 2895006, at *3).[13]

VI. CONCLUSION

For the reasons stated herein, Vermont Center's Motion is DENIED, and the Debtor's Claim Objection is SUSTAINED in part on the basis that Vermont Center did not timely file the Proof of Claim. The balance of the Claim Objection is OVERRULED as moot. This opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. The Court will issue separate orders consistent with this opinion.

ENTERED at Concord, New Hampshire.

Date: December 3, 2021

/s/ Bruce A. Harwood
Bruce A. Harwood
Chief Bankruptcy Judge

[13] The Court reiterates that it makes no findings concerning the scope of Attorney Proctor's obligations to Vermont Center once he received the Notice of Bankruptcy and informed Vermont Center of the Debtor's case. For purposes of this matter, the Court must only consider whether Attorney Proctor's representation of Vermont Center with respect to its Proof of Claim against the Debtor imputes to Vermont Center his notice of the chapter 13 case and the information contained in the Notice of Bankruptcy, including the Bar Date.

43 and More: A Certified Specialist's Definitive Checklist for Consumer Chapter 7 Cases

Having now been in the bankruptcy legal field for almost two decades, first as a paralegal for a sole bankruptcy practitioner and now as a certified practitioner and having filed hundreds of petitions under the bankruptcy code, I have learned that checklists are key to being thorough and efficient in handling consumer bankruptcy cases. We all know there is a never-ending struggle between being thorough and profitable. With changes, to the bankruptcy code in response to the global pandemic and similar changes to state statutes, my checklist is constantly being updated and modified to meet the everchanging body of law we call "bankruptcy". To be good at what we do, not only do we have to be conversant with regard to the bankruptcy code, bankruptcy rules and local rules, we must also have a good working knowledge of our state law. Below is the most current checklist that I go through for each of my consumer Chapter 7 matters before I click the mouse to file!

☐ **Received Client Questionnaire ("CQ")-** The key to properly preparing a client for bankruptcy is knowing them and how they arrived in your office. My questionnaire is about 8 pages long, follows the petition in a condensed manner and hits all the important time periods for federal and state statutes applicable to where I file cases. There are two camps of thought; you just have to decide what is best for your practice: One, is the camp I sit in, which is that you want something comprehensive and thorough from your client to avoid the "I told you about that" when something is not disclosed. The second camp of thought, is that you don't need anything from the client and you sit down with them and fill out the petition with what they "tell" you. Either camp you sit in, get the information from the client in a specific and organized manner.

☐ **Provide Required Disclosures pursuant to 11 U.S.C. § 527 and §342-** Section 527 requires that a "debt relief agency" providing bankruptcy assistance, provide written notice required under section 342(b)(1) as well as some other disclosures laid out in 527. Make these forms to give to every potential client.

☐ **Consultation Held-** I require that my CQ is filled out completely in order for the potential client to receive a free hour of my time. Without the CQ filled out, they may pay for an hour of my time to discuss whatever it is they want to discuss. The consultation is where I get to know my client, give them their options, thoroughly prepare them for the bankruptcy process, and formulate a plan for them to obtain their "fresh start." This is also the time we determine how much work a case will take and what type of demands a case will put on our practice/staff. As a wise attorney once told me "Profitability is determined at case intake."

☐ **SIGNED Fee Agreement Received-** Once you have decided to take on a client's matter, get the details in writing for both your benefit and your client's. Most states require a written fee agreement/retainer agreement if the fee is over a certain amount and many states are now

requiring special clauses for flat fee cases.[1] Check your state bar rules. It is also helpful to have at least two types of agreements- one for flat rate cases and one for hourly cases where it is uncertain, at least at the outset of the matter, how much time the matter will take. Lastly, be sure you have incorporated proper limited scope disclosures; don't accidentally "throw in the kitchen sink". For example: My retainer agreement says exactly what they get and that everything else is excluded. I further say that "the excluded items include, but are not limited to...". Many Chapter 7 clients paying a flat fee think you are the equivalent of an all-you-can-eat restaurant buffet. Make sure that your time and that of your staff's is valued by setting parameters of what a flat rate fee includes (Practice Tip: Have your client(s) initial each page of the fee agreement).

☐ **Provided "Bankruptcy Memo" To Client-** The more you can automate, the more efficient you can be. We have an internal memo we provide each of our clients to help educate them on what to expect during the bankruptcy process, both before and after filing, and certain "warnings"/"reminders" that are applicable to almost all Chapter 7 cases. Our memo specifically makes clear such things as their "duty to cooperate" and legal consequences of certain items like failing to disclose assets and prepetition conveyances.

☐ **Fees & Costs Received-** "Don't take a post-dated check" if you have to file quickly. Be sure you are paid **before** you file, including all appropriate costs. If you are going to use one of these programs where fees are paid after filing be sure it complies local, state and federal rules.

☐ **Intake Appointment to Review Initial Draft and Collect the Source Documents Completed-** Whichever camp you are in with regard to, a CQ, or not to CQ, at the very least, be sure to collect the bare minimum of source documents to back-up what is in the petition. Never take a client's word for something; be ready to prove your entire petition. The bare minimum I would suggest obtaining is below. My current "Required Document List" is approximately 24 items long (not including subcategories) and I am happy to share it with anyone that would like something to use as a sample:

- Identification- This should be an Identification Card or Driver's License or Military I.D., plus the Social Security Card;
- Credit Report for Debtor and any non-filing spouse- In many states, such as CA, a non-filing spouse's debts must be given notice of the spouse's bankruptcy and may affect 11 U.S.C. §109 analysis;

[1] *See* California State Bar Rule of Professional Conduct 1.15(b) for an example, which states: "(b) Notwithstanding paragraph (a), a flat fee paid in advance for legal services may be deposited in a lawyer's or law firm's operating account, provided: (1) the lawyer or law firm* discloses to the client in writing* (i) that the client has a right under paragraph (a) to require that the flat fee be deposited in an identified trust account until the fee is earned, and (ii) that the client is entitled to a refund of any amount of the fee that has not been earned in the event the representation is terminated or the services for which the fee has been paid are not completed; and (2) if the flat fee exceeds $1,000.00, the client's agreement to deposit the flat fee in the lawyer's operating account and the disclosures required by paragraph (b)(1) are set forth in a writing* signed by the client."

- Grant deeds for all real estate owned by the Debtor(s)- keep an eye out for 522(g), (o), (p) and (q) issues with transfers of property. If property held in "joint tenancy," is this separate property or community property;
- Proof of income (60 days for the declaration regarding Debtor's income, 6 months to complete the Means Test calculations, and year-to-date to complete SOFA)- Examples: wage paystubs, unemployment benefits, pension distributions, disability payments, Social Security income statements, interest statements, and profit and loss statements from a business;
- No less than three (3) years of tax returns;
- Bank Statements- the last 12 months of bank statements for individuals and up to 36 months of bank statements for individuals with businesses or corporations. This includes all financial accounts (trade accounts, investment accounts, Venmo, PayPal, Bitcoin, reloadable ATM cards);
- Proof of out-of-the-ordinary-expenses (i.e. Daycare, insurance premiums, charitable contributions, etc.);
- Documents for prebankruptcy transfers- this will depend on your state's avoidance statutes so be familiar with them. You want to be sure you know about all possible preferences and fraudulent transfers;
- Court Ordered payments- Do not take your client's word that a payment is "court ordered;"
- Community Property vs. Separate Property documents: I ask for a list of non-filing spouse's assets AND evidence to support any separate property characterization(s);
- Documents supporting the client's intangible claims (i.e. Class actions, PI claims, worker's comp claims, etc.). Also, be sure to list any claim the debtor might pursue in the future, even if remote, to avoid a Trustee reopening to administer an "undisclosed asset;"
- Mortgage statements;
- All complaints, judgments, wage garnishments, bank levies, abstracts of judgment. (Practice Tip: Be sure to find out if your client has been served with a Notice of Appearance at Debtor's Exam (as it is called in CA) or the equivalent in your state. Some states (like CA) have a statute that creates a "floating lien" on all assets of the "Debtor" for one (1) year from the service of the Debtor's Exam notice;
- Car registrations;
- Loan statements for secured loans. Debtors will grant security interests in vehicles, solar panels, furniture, jewelry, and more;
- Real property documents- I want to see the grant deed (to confirm who really is on title), mortgage or deed of trust (to confirm the loan is actually secured and for which the loan is payable), appraisals, and homeowner's association dues statement;
- Leases- I want to see real property and personal property leases (Is it really a lease?);
- Proof of auto insurance and homeowner or renter's insurance;
- Pension and 401k documentation, including loans from the retirement account (When was the loan(s) taken out and what was done with the funds?);
- Information about past and expected inheritances;

- Divorce decrees and judgments (Did they arise from a trial? A marital settlement agreement subject to possible avoidance by the Trustee? Assets included in the disclosures/MSA/Judgment that need to be disclosed in Sch A/B or SOFA?);
- All recent bills, credit card statements, medical bills, collection letters, and communications from creditors if anything is missing from the credit report we pull for the client;
- Timeshare contracts;
- A balance sheet of the debtor's business assets;
- Purchase or sales agreements, including escrow documents, for any real estate transaction in the prior five years (Again, making sure you have no 522 issues, avoidable transfers, etc.);
- Documents regarding transfers of assets to third parties in the past five years; and
- A list of all payments or gifts to friends, family, or partners in the past year.

☐ **Attorney Review of Source Documents Completed-** Don't just collect them, review them. And again, do not take your client's word for anything. You must have evidence to substantiate what you put in the petition for your client who will be signing their schedules under penalty of perjury. The documents will also help you determine the right *time* to file.

☐ **Means Test ("MT") Calculations & Evidence Prepared-** I prepare an excel sheet for every case and input all paystubs/income calculations and deductions from paystubs/business expenses into the excel sheet so that it can easily be updated if there is a delay in filing. It is better to do this as soon as possible, to confirm that a Chapter 7 is the proper chapter to file. If you do this at the beginning of case preparation you do not have unexpected surprises just before filing. Gather the evidence for the MT:

- **Six Months of Paystubs/Profit & Losses-** Be sure you have the income for all "household members" you plan to claim as a part of the household. A common error I see is counsel claiming a household of 3 which includes an adult child but the income calculations don't include the adult child's income, when there is income earned;
- **Exemption from MT-** If client is going to claim they are exempt be sure to have the evidence to provide to your US Trustee/Trustee to prove the exemption (i.e. consumer vs. non-consumer debt chart, veteran status, etc.);
- **"Presumption of Abuse"**- If it arises and you are proceeding with filing, be sure to have all back up documentation for "Special Circumstances" for line 43 of the MT explanation (Practice Tip: If you have to file quickly and there has been a recent drop in income use line 43 to explain why the 6 month average, prior to filing, is higher than the current income and post the adjustment here so that the Trustee/US Trustee/Creditors know why your client is still seeking relief under Chapter 7);
- **Claiming More than the Allowance-** If client is claiming above average expenses in any category where there is a UST guideline amount (i.e. health care expenses,

utilities, housing, etc.) be sure you can back up the amount and it is "reasonable and necessary;" and

- **Line 16 through 31 Expenses-** If your client is claiming any expenses with no UST guidelines amount (i.e. term life insurance, disability insurance, health insurance, child care, etc.) be sure you can, similarly, back up the amount claimed.

☐ **Analysis for Exemptions Completed-** This is another issue to review at the front end of the case so you have ample time to do any lawful exemption planning and warn your client before you get too far into the process. If you discover there will or even MIGHT be non-exempt assets CONFIRM IT IN WRITING WITH YOUR CLIENT and avoid the "They are going to take my what?!?" after filing. Exemption challenges (homestead exemption disallowance or limitations under 522, non-exempt equity, limitation of exemption regarding "reasonable and necessary" standard, etc.) can often become costly battles to litigate so avoid them if at all possible and be prepared with evidence as to any defenses.

☐ **Review title history of residence/any other assets with title history, to confirm no possible transfer issues-** You will never know what issues there are unless you "look under the hood." Review title history to make sure there are no possible 522(g), (o), (p), and (q) issues. You should also review the Final Closing Statement for any real property that was bought and sold in the appropriate transfer period for your state avoidance statutes (Ex: No less than 4 years here in CA) but if the IRS is a creditor then you should go back 10 years and if there is any possibility of a 522(o) issue then go back 10 years to be safe.

☐ **Review tax returns-** I have a specific checklist I run through for tax returns, to be sure there is nothing the client(s) forgot to tell me:

- Income properly represented;
- Sch B- Interest and ordinary dividends flowing from assets that need to be on Sch A/B of the petition or in SOFA because they were closed;
- Sch C- "Business income" that may not be regular for Sch I, wages being paid to insiders that could be questioned, and any large expenses for purchases of assets by the business that would affect a valuation for Sch A/B of the business;
- Sch D- Capital gains or losses from assets/transfers to disclose;
- Sch E- Income from rental properties, royalties, partnerships, S corporations, estates, trusts, etc. that should be on Sch A/B or SOFA;
- Additional expenses client did not include in their Sch J may often be spotted in returns;
- Under withholding issues- may help with "phantom disposable income"/making a Ch 7 the appropriate chapter to file rather than an 11 or 13; and
- Rental income on a "residence" they plan to claim a homestead exemption in.

☐ **Review bank statements-** For the same reason I review tax returns, I specifically have a reminder to review bank statements and their transactions in addition to:

- Transfer of funds to friends or family as gifts (i.e. "preference payments" which require you to review one year of statements);
- Payments on loans secured by assets they did not mention before (i.e. avoid "I don't own it, my sister does" or "I don't want to include that debt");
- Large dissipation of asset(s) just before filing that will need to be explained pursuant to 727 requirements;
- Seasonal Income, rental income, bonuses, items client forgot to mention all together; and
- General preference payments review (requires you to review statements for the 90 days prior to filing for any payments of $600 or more, depending on whether your case will be a consumer or non-consumer case).

☐ **Review Dischargeability of Taxes (3-2-240 rule)** OR confirm who you referred the client's tax matter to OR that the client declined to have the matter reviewed by someone else, that you have given no opinion on the dischargeability of the client's taxes, and the client still wants to proceed with filing.

☐ **Review Recent Charges/Cash Advances (70-90 day rule)-** Review credit card statements for the 90 days prior to filing to be sure that your client does not run afoul of 523(a)(2)(A) and (C) with recent charges/cash advances for luxury goods or services (Practice Tip: Wait 90 days to file, from the last charge the client made, so as not to run afoul of 523).

☐ **Exemption Planning for Non-Exempt Assets Completed-** Again, be sure to educate your client about the risks of exemption planning just before filing and determine the right time to file [Examples: 522 (o), (p) and (q)].

☐ **Send Client Written Communications Detailing Any "Issues"/"Problems"/"Warnings" That Are Case Specific-** Set reasonable expectations- No one ever gets mad if you do better than forecasted. Be sure to cover:

- Non-exempt assets;
- 522(g), (o), (p), and (q) issues/risks;
- Recent transfers/insiders that may be targets (Avoid "I never would have filed if I knew X was going to get sued by my bankruptcy trustee!");
- Business valuation issues; and
- Potential 523/727 issues.

☐ **Additional Follow-up Meeting(s) Held**- Every case is different; treat each accordingly and set your fee accordingly. If you know certain clients/issues will need additional time, be sure to budget for that and take the time necessary to complete the case properly.

☐ **Signing Appointment Held**- This is the final review of the petition before filing and where the client reviews every page of the petition and schedules. Be sure every asset is listed and described properly to avoid "estoppel issues" later; make sure nothing has changed since your initial meeting was held (Examples: residency, marital status, income, valuations, etc.); and have the client sign everything needed to commence the case. This is a good time to remind client(s) that they are signing everything under penalty of perjury. This is also the time to review the post-filing procedures with the client so they know what to expect after filing and what is expected of them to obtain their discharge.

☐ **Pre-filing Credit Counseling Certificate Received**

☐ **Update Client Documents/File-** Be sure to update your file one last time before hitting the "file" button. Often times, clients will come in to retain and take several months to pay fees, gather documents, exemption plan, etc., and the initial submittal of documents will need to be updated before filing

☐ **File the Petition (and make sure you file it in the right division)**

☐ **Calendar Post-filing Tasks such as:**

- Filing of any deficient schedules or statements;
- Filing of any immediate turnover motion needed;
- 341(a) hearing;
- Sending documents to Trustee prior to 341(a)/ FRBP 4002(b)(3) AND (4);
- Follow up date to be certain that the "No Distribution Report"/"No Asset Report" ("NDR") is filed so that follow-up can be sent to the Trustee/a Motion to Compel Abandonment can be filed;
- Deadline to Object to Discharge and Nondischargeablility of Debt;
- Filing of Financial Management Certificate(s);
- Reaffirmation Agreement Deadline(s);
- Assumption or Rejection Deadline(s);
- Fulfilling Statement of Intent; and
- Filing of necessary adversaries (Discharge of Student Loans, Determination of a Claim, etc.).

☐ **Send Post-filing Email/Communication to Client-** Be sure to include, at least:

- a copy of the conformed petition for the client to review before the 341(a) hearing [Practice Tip: Have the client pull the conformed copy of the petition up in front of them during the 341(a) so that if the Trustee references a specific item/page everyone is on the same page];
- the 341(a) hearing info (date, time, Trustee, call-in number, zoom link, or location);
- where to go to complete post-filing Financial Management Certificate; and

- the US Trustee's Informational Sheet that must be reviewed before concluding the 341(a).

☐ **Prepare and Send Notice of Stay of Proceeding to Anyone Suing Client to Avoid a Waiver of the Stay/Discharge Later-** You can create your own notice or you can use a local form from where the suit is pending.

☐ **Prepare Package of Documents for Trustee and Transmit no less than 10 days prior to 341(a) Meeting-** To avoid unnecessary continuances, documents should be sent, preferably, 21 days prior to 341(a) so Trustee has time to review and ask for additional information**.** With telephonic/virtual hearings being held, it is imperative to transmit client's Driver's License and Social Security Card to the Trustee prior to the hearing.

☐ **Pre-341(a) Client Meeting Held:**

- Go over each of the mandatory questions Trustees must ask from the UST Guidelines;
- Remind client they are under penalty of perjury during 341(a) and confirm they reviewed their schedules and statements and all are accurate so you can prepare any amendments prior to the hearing if any are required; and
- Provide details to your client about any specifics/"pet peeves" the client's Trustee might have.

☐ **File Financial Management Certificate**

☐ **Attend 341(a) Meeting-** Keep written notes of what transpires at the 341(a) including:

- When the hearing began;
- What track the hearing can be found at (if you ever need a copy of the recording);
- Who attended (client, from your office, from the Trustee's office, creditors, UST's office, etc.);
- Whether the hearing was concluded or not;
- If the hearing was not concluded, when it was continued; and
- What documents/information the Trustee requested for the next hearing and when the Trustee would like them by.

☐ **Confirm NDR is Filed OR Discuss with Client a Motion to Compel Abandonment-** Consider whether there is a rising market issue, post-filing improvements/repairs needed to property, client needs to sell or encumber property for some reason, fees need to be spent on debtor owned litigation claims, etc..

☐ **File 522(f)['s] if Needed-** If the Judge assigned to your case requires an appraisal, be sure to obtain the appraisal as of the date of filing, not months after filing; it may make a difference.

☐ **Send Client Discharge/"Fresh Start Letter" Notifying Them of Discharge Being Entered:**

- Disengagement Letter- The finish line has been reached but further advise/remind the client that the discharge eliminates personal liability on dischargeable debts but it does not remove obligations to pay secured debt if they wish to keep the underlying asset; and
- If Assets are being administered be sure to send a letter that notifies client they have been discharged but they are still required to cooperate with the Trustee/comply with Debtor's duties to assist in liquidation of whatever the Trustee is administering.

☐ **Prepare 722 Redemption Motion(s)/Stipulation(s)**

☐ **If a 523/727 Action is filed:**

- Advise client immediately, in writing, of the filing of the Complaint and that you are NOT retained to represent the client and that they need to enter into a new retainer agreement with you before you will render services if you have a limited scope agreement;
- Send letter to client summarizing the Complaint and their options (i.e. "my office can handle the matter," "I suggest you contact…who handles these types of matters," "I am happy to reach out to…and see if a settlement of the matter can be reached," etc.);
- Calendar deadline to respond (even if client is not retaining you to represent them) to be sure response is filed/someone else is retained to handle the matter;
- File a Request for Electronic Notice in the adversary so you receive notice of filings if it affects anything you are assisting the client with in the main case;
- If you are retained to handle the matter calendar all appropriate deadlines;

☐ **If Notice of Assets is Filed - Calendar the following, at a minimum:**

- Deadline to file claims- file claims for client(s)' nondischargeable taxes, domestic support obligations, and any student loans/other claims that are not dischargeable and your client(s) wants them to be paid from any distribution the Trustee may make;
- Review Claims after deadline has passed to determine if any claim objections need to be filed;
- Review whether conversion to 11/13 is appropriate;
- Calendar a deadline to follow up on administration to be sure it is proceeding timely (especially when there are claims that are incurring post-petition interest/penalties that are nondischargeable and will remain partially unpaid after administration); and
- Calendar Motions to Abandon other assets (Example: Don't let a house with no equity sit exposed, in a rising market, while the Trustee administers other assets).

- ☐ **Send Disengagement Letter-** Don't forget to Disengage when your job is done to begin the statute of limitations**.** Also, remind the client to contact you if they are ever contacted by a creditor/receive any collection efforts against them. This is a great way to retain additional work or refer client to someone you trust to handle any post-discharge litigation.

After reading the above, one might wonder how it is even remotely possible to represent debtors in Chapter 7 and charge a "flat fee" as is often customary in this field of work. One may also wonder how a practitioner makes a profit and still remains competitive with all of the work that must be done to meet your ethical obligations under the Code. One of the most important components to being successful in representing Chapter 7 debtors is to hire the very best support staff you can and pay them as well as you can. This checklist only works if each one of your employees embraces it and follows it. Secondly, have a very good practice management software or some type of calendaring system to keep track of all that you must do in your Chapter 7 matters. And thirdly, automate as much as you can. Besides checklists for you and your staff to follow, email/letter templates, workflows, and an electronic document storage system, are immensely helpful time-saving mechanisms you can implement into your practice to safeguard against missing something on the master checklist.

43 and More: A Certified Specialist's Definitive Checklist for Consumer Chapter 13 Cases

By Summer Shaw[1]

Having now been in the bankruptcy legal field for almost two decades, first as a paralegal for a sole bankruptcy practitioner and now as a certified practitioner and having filed hundreds of petitions under the bankruptcy code, I have learned that checklists are key to being thorough and efficient in handling consumer bankruptcy cases. We all know there is a never-ending struggle between being thorough and profitable. With changes, to the bankruptcy code in response to the global pandemic and similar changes to state statutes, my checklist is constantly being updated and modified to meet the everchanging body of law we call "bankruptcy". To be good at what we do, not only do we have to be conversant with regard to the bankruptcy code, bankruptcy rules and local rules, we must also have a good working knowledge of our state law. Below is the most current checklist that I go through for each of my consumer Chapter 13 matters before I click the mouse to file!

☐ **Received Client Questionnaire ("CQ")-** The key to properly preparing a client for bankruptcy is knowing them and how they arrived in your office. My questionnaire is about 8 pages long, follows the petition in a condensed manner and hits all the important time periods for federal and state statutes applicable to where I file cases. There are two camps of thought; you just have to decide what is best for your practice: One, is the camp I sit in, which is that you want something comprehensive and thorough from your client to avoid the "I told you about that" when something is not disclosed. The second camp of thought, is that you don't need anything from the client and you sit down with them and fill out the petition with what they "tell" you. Either camp you sit in, get the information from the client in a specific and organized manner.

☐ **Provide Required Disclosures pursuant to 11 U.S.C. 527 and 342-** Section 527 requires that a "debt relief agency" providing bankruptcy assistance, provide written notice required under section 342(b)(1) as well as some other disclosures laid out in 527. Make these forms to give to every potential client.

☐ **Consultation Held-** I require that my CQ is filled out completely in order for the potential client to receive a free hour of my time. Without the CQ filled out, they may pay for an hour of my time to discuss whatever it is they want to discuss. The consultation is where I get to know my client, give them their options, thoroughly prepare them for the bankruptcy process, and formulate a plan for them to obtain their "fresh start." This is also the time we determine how much work a case will take and what type of demands a case will put on our practice/staff. As a wise attorney once told me "Profitability is determined at case intake."

☐ **SIGNED Fee Agreement Received-** Once you have decided to take on a client's matter, get the details in writing for both your benefit and your client's. Most states require a written fee agreement/retainer agreement if the fee is over a certain amount and many states are now requiring special clauses for flat fee cases. [2] Check your state bar rules. It is also helpful to have at least two types of agreements- one for flat

---

[1] Summer Shaw of Shaw & Hanover, PC, Palm Desert, CA; ss@shaw.law.

[2] *See* California State Bar Rule of Professional Conduct 1.15(b) for an example, which states: "(b) Notwithstanding paragraph (a), a flat fee paid in advance for legal services may be deposited in a lawyer's or law firm's operating account, provided: (1) the lawyer or law firm* discloses to the client in writing* (i) that the

rate cases and one for hourly cases where it is uncertain, at least at the outset of the matter, how much time the matter will take. Lastly, be sure you have incorporated proper limited scope disclosures; don't accidentally "throw in the kitchen sink". For example: My retainer agreement says exactly what they get and that everything else is excluded. I further say that "the excluded items include, but are not limited to...". Many Chapter 13 clients paying a flat fee think you are the equivalent of an all-you-can-eat restaurant buffet. Make sure that your time and that of your staff's is valued by setting parameters of what a flat rate fee includes (Practice Tip: Have your client(s) initial each page of the fee agreement).

☐ **Provided "Bankruptcy Memo" To Client-** The more you can automate, the more efficient you can be. We have an internal memo we provide each of our clients to help educate them on what to expect during the bankruptcy process, both before and after filing, and certain "warnings"/"reminders" that are applicable to almost all Chapter 13 cases. Our memo specifically makes clear such things as their "duty to cooperate" and consequences of certain things like failing to disclose assets and prepetition conveyances.

☐ **Fees & Costs Received-** "Don't take a post-dated check" if you have to file quickly. Be sure you are paid **before** you file, including all appropriate costs. If you are going to use one of these programs where fees are paid after filing be sure it complies local, state and federal rules.

☐ **Intake Appointment to Review Initial Draft and Collect the Source Documents Completed-** Whichever camp you are in with regard to, a CQ, or not to CQ, at the very least, be sure to collect the bare minimum of source documents to back-up what is in the petition. Never take a client's word for something; be ready to prove your entire petition. The bare minimum I would suggest obtaining is below. My current "Required Document List" is approximately 24 items long (not including subcategories) and I am happy to share it with anyone that would like something to use as a sample:

- Identification- This should be an Identification Card or Driver's License or Military I.D., plus the Social Security Card;
- Credit Report for Debtor and any non-filing spouse[3]- In many states, such as CA, a non-filing spouse's debts must be given notice of the spouse's bankruptcy and may affect 11 U.S.C. §109 analysis;
- Grant deeds for all real estate owned by the Debtor(s)- keep an eye out for 522(g), (o), (p) and (q) issues with transfers of property. If property held in "joint tenancy," is this separate property or community property;

---

client has a right under paragraph (a) to require that the flat fee be deposited in an identified trust account until the fee is earned, and (ii) that the client is entitled to a refund of any amount of the fee that has not been earned in the event the representation is terminated or the services for which the fee has been paid are not completed; and (2) if the flat fee exceeds $1,000.00, the client's agreement to deposit the flat fee in the lawyer's operating account and the disclosures required by paragraph (b)(1) are set forth in a writing* signed by the client."

[3] In addition to listing all of the creditors as they appear on your client's credit report and statements provided to you by your client, make sure you also have all the proper service addresses for corporations/partnerships and federally insured entities. If and when you have to file motions affecting secured creditors, for example, all of this information will be ready to input into your motion(s)'s proof of service. *See* FRBP 9014 and 7004. Check your Secretary of State's website for a "Business Search" that will allow you to find the name and address of "agents for service of process," "officer, director or managing agent" for a corporation; and/or the FDIC's website for this information as it relates to federally insured entity. *See* https://banks.data.fdic.gov/bankfind-suite/bankfind and https://businesssearch.sos.ca.gov/ for an example of a state website search engine.

- Proof of income (60 days for the declaration regarding Debtor's income, 6 months to complete the Means Test calculations, and year-to-date to complete SOFA)- Examples: wage paystubs, unemployment benefits, pension distributions, disability payments, Social Security income statements, interest statements, and profit and loss statements from a business;
- No less than three (3) years of tax returns;
- Bank Statements- the last 12 months of bank statements for individuals and up to 36 months of bank statements for individuals with businesses or corporations. This includes all financial accounts (trade accounts, investment accounts, Venmo, PayPal, Bitcoin, reloadable ATM cards);
- Proof of out-of-the-ordinary-expenses (i.e. Daycare, insurance premiums, charitable contributions, etc.);
- Documents for prebankruptcy transfers- this will depend on your state's avoidance statutes so be familiar with them. You want to be sure you know about all possible preferences and fraudulent transfers;
- Court Ordered payments- Do not take your client's word that a payment is "court ordered;"
- Community Property vs. Separate Property documents: I ask for a list of non-filing spouse's assets AND evidence to support any separate property characterization(s);
- Documents supporting the client's intangible claims (i.e. Class actions, PI claims, worker's comp claims, etc.). Also, be sure to list any claim the debtor might pursue in the future, even if remote, to avoid a Trustee reopening to administer an "undisclosed asset;"
- Mortgage statements;
- All complaints, judgments, wage garnishments, bank levies, abstracts of judgment. (Practice Tip: Be sure to find out if your client has been served with a Notice of Appearance at Debtor's Exam (as it is called in CA) or the equivalent in your state. Some states (like CA) have a statute that creates a "floating lien" on all assets of the "Debtor" for one (1) year from the service of the Debtor's Exam notice. Also, be sure to serve any attorneys representing parties suing your client and be sure to reference who the attorney's client is, in addition to the attorney's name, on the address;
- Car registrations;
- Loan statements for secured loans. Debtors will grant security interests in vehicles, solar panels, furniture, jewelry, and more;
- Real property documents- I want to see the grant deed (to confirm who really is on title), mortgage or deed of trust (to confirm the loan is actually secured and for which the loan is payable), appraisals, and homeowner's association dues statement;
- Leases- I want to see real property and personal property leases (Is it really a lease?);
- Proof of auto insurance and homeowner or renter's insurance;
- Pension and 401k documentation, including loans from the retirement account (When was the loan(s) taken out and what was done with the funds?);
- Information about past and expected inheritances;
- Divorce decrees and judgments (Did they arise from a trial? A marital settlement agreement subject to possible avoidance by the Trustee? Assets included in the disclosures/MSA/Judgment that need to be disclosed in Sch A/B or SOFA?);
- All recent bills, credit card statements, medical bills, collection letters, and communications from creditors if anything is missing from the credit report we pull for the client;
- Timeshare contracts;
- A balance sheet of the debtor's business assets;
- Purchase or sales agreements, including escrow documents, for any real estate transaction in the prior five years (Again, making sure you have no 522 issues, avoidable transfers, etc.);
- Documents regarding transfers of assets to third parties in the past five years; and

- A list of all payments or gifts to friends, family, or partners in the past year.

☐ **Attorney Review of Source Documents Completed-** Don't just collect them, review them. And again, do not take your client's word for anything. You must have evidence to substantiate what you put in the petition for your client who will be signing their schedules under penalty of perjury. The documents will also help you determine the right *time* to file.

☐ **Means Test ("MT") Calculations & Evidence Prepared-** I prepare an excel sheet for every case and input all paystubs/income calculations and deductions from paystubs/business expenses into the excel sheet so that it can easily be updated if there is a delay in filing. It is better to do this as soon as possible, to confirm that a Chapter 13 is the proper chapter to file. If you do this at the beginning of case preparation you do not have unexpected surprises just before filing. Gather the evidence for the MT:

- **Six Months of Paystubs/Profit & Losses-** Be sure you have the income for all "household members" you plan to claim as a part of the household. A common error I see is counsel claiming a household of 3 which includes an adult child but the income calculations don't include the adult child's income, when there is income earned;
- **Exemption from MT-** If client is going to claim they are exempt be sure to have the evidence to provide to your US Trustee/Trustee to prove the exemption (i.e. consumer vs. non-consumer debt chart, veteran status, etc.);
- **"Presumption of Abuse"**- If it arises and you are proceeding with filing, be sure to have all back up documentation for "Special Circumstances" for line 43 of the MT explanation (Practice Tip: If you have to file quickly and there has been a recent drop in income, use line 43 to explain why the 6 month average, prior to filing, is higher than the current income and post the adjustment here so that the Trustee/US Trustee/Creditors know why your client is seeking to pay a lesser amount in their proposed Plan, than that which is stated in the MT);
- **Claiming More than the Allowance-** If client is claiming above average expenses in any category where there is a UST guideline amount (i.e. health care expenses, utilities, housing, etc.) be sure you can back up the amount and it is "reasonable and necessary;" and
- **Line 16 through 31 Expenses-** If your client is claiming any expenses with no UST guidelines amount (i.e. term life insurance, disability insurance, health insurance, child care, etc.) be sure you can, similarly, back up the amount claimed.

☐ **Analysis for Exemptions Completed-** This is another issue to review at the front end of the case so you have ample time to do any lawful exemption planning and warn your client before you get too far into the process. If you discover there will or even MIGHT be non-exempt assets CONFIRM IT IN WRITING WITH YOUR CLIENT and avoid the "They are going to take my what?!?" after filing. Exemption challenges (homestead exemption disallowance or limitations under 522, non-exempt equity, limitation of exemption regarding "reasonable and necessary" standard, etc.) can often become costly battles to litigate so avoid them if at all possible and be prepared with evidence as to any defenses.

☐ **Review title history of residence/any other assets with title history, to confirm no possible transfer issues-** You will never know what issues there are unless you "look under the hood." Review title history to make sure there are no possible 522(g), (o), (p), and (q) issues. You should also review the Final Closing Statement for any real property that was bought and sold in the appropriate transfer period for your state avoidance statutes (Ex: No less than 4 years here in CA) but if the IRS is a creditor then you should go back

10 years and if there is any possibility of a 522(o) issue then go back 10 years to be safe. If your client can obtain a Preliminary Title Report or some type of "property profile" that tells you what types of title transfers occurred since your client obtained ownership of the property, this is ideal. (Practice Tip: Check to see if your County recorder has a website where you can search your client's name to find all deed executed by your client(s) AND see all liens recorded against your client(s). Most counties then allow you to order copies of documents you may want to physically see/need for your file. However, there are services, like CourthouseDirect.com, that will let you pull the document immediately from the web for a fee and is very helpful if you are needing to obtain and review documents quickly).

☐ **Review tax returns-** I have a specific checklist I run through for tax returns, to be sure there is nothing the client(s) forgot to tell me:

- Income properly represented;
- Sch B- Interest and ordinary dividends flowing from assets that need to be on Sch A/B of the petition or in SOFA because they were closed;
- Sch C- "Business income" that may not be regular for Sch I, wages being paid to insiders that could be questioned, and any large expenses for purchases of assets by the business that would affect a valuation for Sch A/B of the business;
- Sch D- Capital gains or losses from assets/transfers to disclose;
- Sch E- Income from rental properties, royalties, partnerships, S corporations, estates, trusts, etc. that should be on Sch A/B or SOFA;
- Additional expenses client did not include in their Sch J may often be spotted in returns;
- Under withholding issues- may help with "phantom disposable income"/making a Ch 7 the appropriate chapter to file rather than an 11 or 13; and
- Rental income on a "residence" they plan to claim a homestead exemption in.
- Also, has the Debtor "notified" the state taxing authority of additional assessments, if any, by the IRS? See discussion regarding this issue in *Berkovich v. Cal. Franchise Tax Bd. (In re Berkovich),* 619 B.R. 397 (B.A.P 9th Cir. 2020) aff'd by 9th Cir. Oct. 14, 2021.

☐ **Review bank statements-** For the same reason I review tax returns, I specifically have a reminder to review bank statements and their transactions in addition to:

- Transfer of funds to friends or family as gifts (i.e. "preference payments" which require you to review one year of statements);
- Payments on loans secured by assets they did not mention before (i.e. avoid "I don't own it, my sister does" or "I don't want to include that debt");
- Large dissipation of asset(s) just before filing that will need to be explained pursuant to 727 requirements;
- Seasonal Income, rental income, bonuses, items client forgot to mention all together; and
- General preference payments review (requires you to review statements for the 90 days prior to filing for any payments of $600 or more, depending on whether your case will be a consumer or non-consumer case).

☐ **Review Dischargeability of Taxes [3-2-240 rule/§507(a)(8) and 523(a)(1)]** OR confirm who you referred the client's tax matter to OR that the client declined to have the matter reviewed by someone else, that you

have given no opinion on the dischargeability of the client's taxes, and the client still wants to proceed with filing.

☐ **Review Recent Charges/Cash Advances (70-90 day rule)-** Review credit card statements for the 90 days prior to filing to be sure that your client does not run afoul of 523(a)(2)(A) and (C) with recent charges/cash advances for luxury goods or services (Practice Tip: Wait 90 days to file, from the last charge the client made, so as not to, *hopefully*, run afoul of 523).

☐ **Exemption Planning for Non-Exempt Assets Completed-** Again, be sure to educate your client about the risks of exemption planning just before filing and determine the right time to file [Examples: 522 (o), (p) and (q)]. And remember: "Pig get fed and hogs get slaughtered."

☐ **Send Client Written Communications Detailing Any "Issues"/"Problems"/"Warnings" That Are Case Specific-** Set reasonable expectations- No one ever gets mad if you do better than forecasted. Be sure to cover:

- Non-exempt assets;
- 522(g), (o), (p), and (q) issues/risks;
- Recent transfers/insiders that may be targets (Avoid "I never would have filed if I knew X was going to get sued by my bankruptcy trustee!");
- Business valuation issues; and
- Potential 523/727 issues.

☐ **FINALIZE PETITION AND PLAN AND REVIEW IT WITH CLIENT**- Make sure to review your local form plan, that you have complied with all of the requirements of code, and that § 1322.

☐ **Additional Follow-up Meeting(s) Held**- Every case is different; treat each accordingly and set your fee accordingly. If you know certain clients/issues will need additional time, be sure to budget for that and take the time necessary to complete the case properly.

☐ **Signing Appointment Held**- This is the final review of the petition before filing and where the client reviews every page of the petition and schedules. Be sure every asset is listed and described properly to avoid "estoppel issues" later; make sure nothing has changed since your initial meeting was held (Examples: residency, marital status, income, valuations, etc.); and have the client sign everything needed to commence the case. This is a good time to remind client(s) that they are signing everything under penalty of perjury. This is also the time to review the post-filing procedures with the client so they know what to expect after filing and what is expected of them to obtain their discharge.

☐ **Pre-filing Credit Counseling Certificate Received-** Practice Tip- To make things easy for yourself and your staff, register with one credit counseling company to provide all of your clients' their credit counseling certificates. Typically, registering will allow you to receive a copy of the certificate as soon as the class is done and allows you to track the status of the counseling. Additionally, most companies will file the post-filing certificate for you, once the class is completed.

☐ **Update Client Documents/File-** Be sure to update your file one last time before hitting the "file" button. Often times, clients will come in to retain and take several months to pay fees, gather documents, exemption plan, etc., and the initial submittal of documents will need to be updated before filing.

☐ **File the Petition and Plan (and make sure you file it in the right division)**

☐ **IMMEDIATELY Check your assigned Judge's procedures-** many judges have their own specific requirements, deadlines, and procedures that will affect your calendaring discussed further below. KNOW YOUR LOCAL RULES AND JUDGE/CHAPTER 13 TRUSTEE SPECIFIC RULES.

☐ **Calendar Post-filing Tasks such as:**

- Filing of any deficient schedules or statements;
- Filing of any immediate motions needed- turnover, valuation motions, or lien avoidance motions that will affect your plan (Practice Tip: Be sure to check your local rules for deadlines associated with these motions. Some divisions require that these be filed by a certain date that typically runs with the confirmation hearing date);
- Deadline for submission for Plan payment;
- Attendance at the 341(a) hearing;
- Sending documents to Trustee prior to 341(a)/ FRBP 4002(b)(3) AND (4)???;
- Attendance at the Confirmation hearing;
- Deadline for Proof of Claims (non-governmental and governmental)
- Deadline to file claims for tax claims and any other claims you want to receive distributions from the Plan in case they do not file a claim;
- Deadline to Object to Nondischargeablility of Debt;
- Service of the Plan on all creditors;
- Filing of all appropriate post-filing declarations regarding:
  - filing of tax returns,
  - existence of DSO's,
  - payment of post-petition pre-confirmation secured debt payments (prior to the 341(a) AND the confirmation hearing);
- Filing of other necessary motions or adversaries- claim objections, discharge of student loan amounts, determination of a claim;
- Filing of Financial Management Certificate(s);
- Deadline to send tax returns to the Trustee each year of the Plan;
- End of Plan!

☐ **Send Post-filing Email/Communication to Client-** Be sure to include, at least:

- a copy of the conformed petition for the client to review before the 341(a) hearing [Practice Tip: Have the client pull the **conformed** copy of the petition up in front of them during the 341(a) so that if the Trustee references a specific item/page everyone is on the same page];
- the 341(a) hearing info (date, time, Trustee, call-in number, zoom link, or location);
- the confirmation hearing info (and whether your jurisdiction/judge requires their attendance);
- Amount of proposed Plan payment and due date of plan payment;
- Your Chapter 13 Trustee's requirements and procedure, if available (Practice Tip: Check your Chapter 13 Trustee's website, if any, for PDF of their specific guidelines, requirements, procedures handbook, etc. and send a copy of that to your client as well);
- Instructions on how client can set-up an electronic payment (ACH, TFS, etc.), preferably automatically deducted from their account by the Trustee's office;
- the US Trustee's Informational Sheet that must be reviewed by your client(s) before concluding the 341(a).

☐ **Prepare and Send Notice of Stay of Proceeding to Anyone with Pending Foreclosure or Suing Client to Avoid a Waiver of the Stay/Discharge Later-** You can create your own notice or you can use a local form from where the suit is pending. [4]

☐ **Prepare Package of Documents for Trustee and Transmit no less than 10 days prior to 341(a) Meeting-** To avoid unnecessary continuances, documents should be sent, preferably, 21 days prior to 341(a) so Trustee has time to review and ask for additional information**.** With telephonic/virtual hearings being held, it is imperative to transmit client's Driver's License and Social Security Card to the Trustee prior to the hearing. And, again, be sure to check the requirements of your local Chapter 13 Trustee.

☐ **Pre-341(a) Client Meeting Held:**

- Go over each of the mandatory questions Trustees must ask from the UST Guidelines;
- Remind client they are under penalty of perjury during 341(a) and confirm they reviewed their schedules and statements and all are accurate so you can prepare any amendments prior to the hearing if any are required; and
- Provide details to your client about any specifics/"pet peeves" the client's Trustee might have.

☐ **File Financial Management Certificate-** Have your clients do this immediately. Practice Tip: If your debtor passes during the case, it is helpful to have this done, in some divisions, where a deceased debtor is allowed to obtain their discharge. *See* FRBP 1016.

☐ **Attend 341(a) Meeting-** Keep written notes of what transpires at the 341(a) including:

- When the hearing began;
- What track the hearing can be found at (if you ever need a copy of the recording);
- Who attended (client, from your office, from the Trustee's office, creditors, UST's office, etc.);
- Whether the hearing was concluded or not;
- If the hearing was not concluded, to when it was continued; and
- What documents/information the Trustee requested for the next hearing and when the Trustee would like them by.

☐ **File Motions/Adversaries, if Needed-** (Practice Tip**:** If the Judge assigned to your case requires an appraisal for Motions to Value or Avoid, be sure to obtain the appraisal as of the date of filing, not months after filing; it may make a difference.

☐ **Attend Confirmation Hearing-** Again, keep written notes of what transpires and calendar any additional hearings or issues that need to be resolved by the next hearing/in order to get the Plan confirmed/after confirmation. Practice Tip: Create a form for hearings that has all the important information on it, that you

[4] *See* **California Rules of Court Rule 3.650** which states: **(a) Notice of stay** The party who requested or caused a stay of a proceeding must immediately serve and file a notice of the stay and attach a copy of the order or other document showing that the proceeding is stayed. If the person who requested or caused the stay has not appeared, or is not subject to the jurisdiction of the court, the plaintiff must immediately file a notice of the stay and attach a copy of the order or other document showing that the proceeding is stayed. The notice of stay must be served on all parties who have appeared in the case.

need to gather [i.e. date, time the hearing was set, the time the hearing was called, judge's name, client's name, place for notes, calendar number (if your judge posts tentative rulings with the hearing number on it), who appeared, whether the hearing was continued, and to when, etc.) on the form to check a box, fill in a blank, etc., so you don't forget to take down the information for your file.

☐ **Lodge appropriate orders-**

☐ **If a 523 Action is filed:**

- Advise client immediately, in writing, of the filing of the Complaint and that you are NOT retained to represent the client and that they need to enter into a new retainer agreement with you before you will render services if you have a limited scope agreement;
- Send letter to client summarizing the Complaint and their options (i.e. "my office can handle the matter," "I suggest you contact…who handles these types of matters," "I am happy to reach out to…and see if a settlement of the matter can be reached," etc.);
- Calendar deadline to respond (even if client is not retaining you to represent them) to be sure response is filed/someone else is retained to handle the matter;
- File a Request for Electronic Notice in the adversary so you receive notice of filings if it affects anything you are assisting the client with in the main case;
- If you are retained to handle the matter calendar all appropriate deadlines;

☐ **Submit Yearly Tax Returns to the Trustee-** Practice Tip: When the Yearly Tax Returns Come In, REVIEW THEM!...then submit them to the Chapter 13 Trustee with any refunds to be turned over the Trustee pursuant to the Plan. Often times, this is when you will find out clients have not been making mortgage payments if their deductible interest has dropped significantly, you will see a change in income that may justify a modification upward or downward- Was there a one-time bonus received? Something out of the ordinary changed? Change in employment? New dependent?

☐ **Complete DEBTOR'S CERTIFICATION OF COMPLIANCE UNDER 11 U.S.C. § 1328(a) AND APPLICATION FOR ENTRY OF DISCHARGE -** Once the last payment is made (other than having a celebration for your client 😊) prepare, obtain signature from your client(s), and file the Debtor's Certification and Application for Discharge form for your district.

☐ **Review and File Appropriate Response to Any Notice of Final Cure pursuant to §**

☐ **Review Trustee's Final Report**

☐ **Obtain Appropriate Orders on Any Valuation Motions or Lien Avoidances That Required Payments to be Completed/Discharge to be Entered AND Record the Orders**

☐ **Send Client Discharge/"Fresh Start Letter" Notifying Them of Discharge Being Entered**

-

☐ **Send Disengagement Letter-** Don't forget to Disengage when your job is done, to begin the statute of limitations**.** Also, remind the client to contact you if they are ever contacted by a creditor/receive any collection efforts against them. This is a great way to retain additional work or refer client to someone you trust to handle any post-discharge litigation.

After reading the above, just as with the Chapter 7 checklist, one might wonder how it is even remotely possible to represent debtors in Chapter 13 and charge a "flat fee" at the outset of a matter, as is also often customary in this field of work. Keep in mind, that every Chapter 13 is not always a fit for a flat fee and handling the matter on an hourly billable rate is often the safest. One may also wonder, as with the Chapter 7 practice, how a practitioner makes a profit and still remains competitive with all of the work that must be done to meet your ethical obligations under the Code. Just as with Chapter 7 practice, one of the most important components to being successful in representing Chapter 13 debtors is to hire the very best support staff you can and pay them as well as you can. This checklist only works if each one of your employees embraces it and follows it. Secondly, have a very good practice management software or some type of calendaring system to keep track of all that you must do in your Chapter 13 matters. And thirdly, automate as much as you can. Besides checklists for you and your staff to follow, email/letter templates, workflows, and an electronic document storage system are immensely helpful time-saving mechanisms you can implement into your practice to safeguard against missing something on the master checklist.

10 Observations from a Consumer Attorney Representing Parties Under SBRA After the First Year of Its Effectiveness:

1. Know your limits and know the Code. Seek experienced co-counsel if you are embarking on new territory in Chapter 11.
2. Be sure that you consider your debtor's "affiliate(s)" debts and confirm that 1182(1)(a) does not cause your debtor's applicable debts to exceed the debt limits. 1182(1)(a) requires you count the debtor's affiliate(s)' debt, for debt limit purposes. 11 USC 101(2) defines "affiliate," and it is quite broad. 1182(1)(a) does not require that your debtor be a guarantor or have any liability for the debts of the affiliate(s). It only requires that your debtor's debts "…or those of its affiliates" be at or under the debt limits specified in 1182.
3. If you may have litigation over the Sub V election for your debtor, try to stay as quiet as possible in the case, until the deadline to object has passed, to hopefully save your client the legal fees related to possible objection to the Sub V election. *See* FRBP 1020(b).
4. Be sure to consider whether Sub V election is the best election for your client or not. Evaluate your creditor body (For Example: Consenting class?), whether Sub V gives your client benefits they would not otherwise have in a regular Chapter 11, evaluate US Trustee quarterly fees versus a Sub V Trustee's fees, and be sure to review the costs of administration under your client's circumstances/goal.
5. Sub V Trustees, from my experience thus far, are wonderful assets to the Sub V process, for both debtors and creditors. Most likely, thanks to the excellent direction the US Trustee in our area, all of the Sub V Trustees assigned to my cases have been efficient, facilitative and have been very reasonable in their fees. Additionally, in all of my cases, the fees charged by the Trustees were reasonable and correlated to the result obtained in the case, or the lack thereof.
6. Make sure the books and records, are in order BEFORE you file, for 1) your debtor; AND 2) any entity where the debtor's estate holds a controlling or substantial interest; AND immediately enlist the assistance of a qualified and experienced bankruptcy experienced bookkeeper/accountant, if possible, to do post-filing reports and have

forms set up/obtain local forms for the post-filing reporting [i.e. Monthly Operating Report's (https://www.justice.gov/ust/chapter-11-operating-reports), reporting pursuant to FRBP 2015.3 (https://www.justice.gov/sites/default/files/ust-regions/legacy/2011/07/13/B26_Form26.pdf), post-petition Estimated Cash Budget, etc.).

7. Know your local practices/opinions- What is needed for formal "consent" and are ballots needed; does your debtor need to do a motion for a final decree and an order closing the case? Can a debtor use SBRA to liquidate/wind-down a business/deal with debt leftover from a closed business?
8. § 1190(3) can be a fabulous tool!
9. Have a checklist of all the deadlines and tasks that need to be addressed in a SBRA case. *See* attached sample forms.
10. There is some uncertainty in the application and administration of SBRA but lots of benefits that can be seen after a year of its effectiveness and parties and courts are working hard to make it as efficient as possible.

Attorney or Party Name, Address, Telephone & Fax Nos., State Bar No. & Email Address ☐ *Individual appearing without attorney* ☐ *Attorney for:*	FOR COURT USE ONLY

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA - SAN FERNANDO VALLEY DIVISION

In re:	CASE NO. CHAPTER 11 (Subchapter V)
	SUBCHAPTER V STATUS REPORT
	Status Conference: DATE: TIME: COURTROOM:

Status Conference Location:

☐ 255 East Temple Street, Los Angeles, CA 90012

☐ 411 West Fourth Street, Santa Ana, CA 92701

☐ 21041 Burbank Boulevard, Woodland Hills, CA 91367

☐ 1415 State Street, Santa Barbara, CA 93101

☐ 3420 Twelfth Street, Riverside, CA 92501

TO THE UNITED STATES BANKRUPTCY COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, THE SUBCHAPTER V TRUSTEE, ALL PARTIES IN INTEREST, AND THEIR COUNSEL:

PLEASE TAKE NOTICE that the debtor and debtor-in-possession in this case ("Debtor") is proceeding under subchapter V of chapter 11 of Title 11 of the United States Code ("Bankruptcy Code" or "U.S.C."),[1] and the Bankruptcy Court will hold a status conference at the date, time, and place set forth above. The Debtor is filing this Status Report pursuant to 11 U.S.C. § 1188(c) and LBR 2015-3(b).[2] Check your presiding judge's procedures to see if, in addition to this Status Report, you must also file Local Form F 2081-1.1.C11.STATUS.RPT, or any other form of Status Report.

1. <u>The Plan:</u>

1.1 What type of plan will the Debtor propose?

☐ Consensual (i.e., with agreement or consent of creditors and other interested parties)
☐ Nonconsensual[3]
☐ Undetermined

1.2 Explain why the Debtor expects the plan to be consensual or nonconsensual, or the reason why it is undetermined at this time:

1.3 Will the Debtor file the plan within the deadline of 90 days from the petition date imposed by § 1189(b)?

☐ Yes
☐ No

If "No," explain why, and state when the Debtor will file its[4] plan:

[1] Subchapter V of chapter 11 (11 U.S.C. §§ 1181-1195) was adopted by the Small Business Reorganization Act of 2019, Pub. L. No. 116-54, and became effective on February 19, 2020. All references to "Section" or "§" are to the Bankruptcy Code or Title 11 of the United States Code.

[2] "Not later than 14 days before the date of the status conference under subsection (a), the debtor shall file with the court and serve on the trustee and all parties in interest a report that details the efforts the debtor has undertaken and will undertake to attain a consensual plan of reorganization." 11 U.S.C. § 1188(c).

[3] The term "nonconsensual plan" for purposes of this Status Report means a plan confirmed under § 1191(b).

[4] In this Status Report, "it" in referring to the Debtor also refers to "him" or "her."

1.4 Please summarize the basic nature of the plan:

2. Efforts Toward Consensual Plan:[5]

2.1 Describe the efforts the Debtor has taken so far to obtain the consent of creditors for a consensual plan:

2.2 Describe the efforts the Debtor will take in the future to obtain the consent of creditors for a consensual plan:

2.3 Describe the efforts that Debtor has taken so far to reach out to creditors and other parties in interest about a plan, and if none, explain the Debtor's reasons for not reaching out to creditors and parties in interest about a plan:

2.4 Identify the parties with whom the Debtor has discussed a plan. Select all that apply:

☐ Secured creditors
☐ Priority creditors
☐ Unsecured creditors
☐ Equity interest holders
☐ The subchapter V trustee
☐ Others (describe: <fill in>)

3. Appointment of Committees and Disclosure Statement:

3.1 In the Debtor's view, is there any "cause" for the Court to order the appointment of a committee of creditors pursuant to § 1181(b) and § 1102(b)?

☐ Yes
☐ No

[5] This Status Report does not ask the Debtor to disclose any confidential, secret, and/or privileged information. *See generally* 11 U.S.C. § 1188(c). Please govern your responses accordingly.

Explain your answer:

3.2 In the Debtor's view, is there any "cause" for the Court to order the filing of a separate disclosure statement pursuant to § 1181(b) and § 1125?

☐ Yes
☐ No

Explain your answer:

4. Reporting Compliance:

4.1 Has the Debtor filed all the documents required under § 1187(a)?[6]

☐ Yes
☐ No

If "No," identify the documents that were required to be filed[7] but were not:

☐ (a) the Debtor's most recent balance sheet

☐ (b) the most recent statement of the Debtor's operations

☐ (c) the Debtor's most recent cash-flow statement

☐ (d) the Debtor's most recent Federal income tax return

Has the Debtor filed a statement under penalty of perjury that the Debtor has not prepared a balance sheet, statement of operations, and/or cash-flow statement and/or that Debtor has not filed its Federal income tax return as required by § 1116(1)(B)?

☐ Yes
☐ No
☐ Not applicable

[6] The filing of this Status Report does not relieve the Debtor of the requirements of 11 U.S.C. § 1187(a) and § 1116(1)(A) to append the required documents to the bankruptcy petition.

[7] Section 1116(1) requires these documents to be "append[ed] to the voluntary petition."

If "Yes," identify each unprepared or unfiled document, and explain why the document was not prepared or filed and how the Debtor intends to prepare or file the document:

4.2 Has the Debtor filed all Small Business Monthly Operating Reports (Official Form B 425C) ("MORs") as required under § 308?

☐ Yes
☐ No

If "No," or if portions of the MORs are deficient, identify which portions are deficient or not reported fully:

☐ (a) Reports regarding Debtor's profitability

☐ (b) Reports regarding reasonable approximations of projected cash receipts and disbursements over a reasonable period

☐ (c) Reports regarding comparisons of actual cash receipts and disbursements with projections in prior reports

☐ (d) Reports regarding whether the Debtor is (i) in compliance in all material respects with postpetition requirements imposed by the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure, and (ii) timely filing tax returns and other required government filings and paying taxes and other administrative expenses when due

☐ (e) Reports regarding Debtor's failure to make either of the reports in the immediately preceding paragraph (d) (as required by § 308(b)(5))

☐ (f) Reports regarding such other matters as are in the best interests of the Debtor and creditors, and in the public interest in fair and efficient procedures under chapter 11

For any deficiencies in the MORs, identify each specific portion that is deficient, and explain why it is deficient and how Debtor intends to correct the deficiency:

5. Other Code Compliance:

5.1 Did the Debtor attend the initial debtor interview, the § 341(a) meeting of creditors, and otherwise comply with § 1116(2)?

☐ Yes
☐ No

If "No," explain why and when the Debtor intends to comply with these requirements:

5.2 Has the Debtor filed all schedules and statements of financial affairs, or otherwise complied with exceptions or extensions in § 1116(3)?

☐ Yes
☐ No

If "No," explain why and when the Debtor intends to comply with these requirements:

5.3 Has the Debtor maintained insurance customary and appropriate to the industry, subject to § 363(c)(2), in compliance with § 1116(5)?

☐ Yes
☐ No

If "No," explain why and when the Debtor intends to comply with this requirement:

5.4 Has the Debtor timely filed tax returns and other governmental filings with the appropriate governmental entities, and paid all taxes entitled to administrative expense priority required to be paid under § 1116(6)?

☐ Yes
☐ No

If "No," explain why the Debtor has not timely filed tax returns and other governmental filings or paid all required administrative expense priority taxes and when the Debtor intends to comply with these requirements:

5.5 Has the Debtor allowed the United States Trustee to inspect the Debtor's premises, books, and records, and otherwise complied with § 1116(7)?

☐ Yes
☐ No

If "No," explain why and when the Debtor intends to comply with this requirement:

6. Cash Collateral:

6.1 Does any entity assert that any property of the bankruptcy estate constitutes its cash collateral?

☐ Yes
☐ No

If "Yes," identify each such entity and what is the property that the entity asserts is its cash collateral.

6.2 Is the Debtor currently using, selling, and/or leasing any property of the bankruptcy estate that any entity contends is its cash collateral?

☐ Yes
☐ No

If "Yes," identify each such entity and what is the property that the entity asserts is its cash collateral.

6.3 Since the filing of this bankruptcy case, has the Debtor used, sold, and/or leased any property of the bankruptcy estate that an entity contends is its cash collateral?

☐ Yes
☐ No

If "Yes," identify each such entity and what is the property that the entity asserts is its cash collateral.

6.4 Has the Court approved any orders authorizing the use of cash collateral?

☐ Yes
☐ No

6.5 Has every entity having any interest in cash collateral that is property of the bankruptcy estate consented to its use?

☐ Yes
☐ No
☐ Not applicable

7. "First Day" Motions:

7.1 Has the Debtor filed any of the following "first day" motions, if applicable:

☐ Cash collateral
☐ DIP financing
☐ Prepetition non-insider wage payments
☐ Cash management authority
☐ Utilities
☐ Limit notice
☐ Joint administration
☐ Critical vendor
☐ Others:

7.2 Do prepetition plan support agreements exist?

☐ Yes
☐ No

If "Yes," attach copies to this Status Report.

8. Additional Information:

8.1 What additional information would the Debtor like to disclose to the Court concerning this chapter 11 case or the plan (e.g., executory contracts or unexpired leases, extending bar date for proofs of claims or interests, sale or surrender of real and/or personal property, the Debtor's exit strategy)?

Dated: _____

Respectfully submitted,

_____
Name of Debtor's Counsel

_____
Signature of Debtor's Counsel

Name of Law Firm:
Address:

Telephone number:
Email Address:

I/we declare, under penalty of perjury, that I/we have read and reviewed all of the information provided in this Status Report and that it is true, correct, and accurate.

Dated: _____

_____
Name of Debtor/Debtor Representative

_____
Relation to Debtor

_____
Signature of Debtor/Debtor Representative

Dated: _____

_____
Name of Co-Debtor (if any)

_____
Signature of Co-Debtor

Attorney or Party Name, Address, Telephone & FAX Nos., State Bar No. & Email Address	FOR COURT USE ONLY
☐ *Individual appearing without attorney* ☐ *Attorney for:*	

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA – LOS ANGELES DIVISION

In re:	CASE NO.: CHAPTER: 11
	NOTICE OF DATES RELATED TO CONFIRMATION OF SUBCHAPTER V PLAN, AND DEADLINES TO: **(A) SUBMIT BALLOTS;** **(B) FILE PRELIMINARY OBJECTION TO CONFIRMATION OF PLAN ; AND** **(C) FILE RESPONSE TO MOTION TO CONFIRM PLAN** [11 U.S.C. § 1128; FRBP 3018, 3020(b); LBR 3018-1]
Debtor(s).	**Hearing on Motion to Confirm Subchapter V Plan** DATE: TIME: COURTROOM: 1368, Roybal Federal Building ADDRESS: 255 E. Temple Street, Los Angeles, CA 90012

1. Subchapter V Plan. The Debtor filed a "Subchapter V Plan of Reorganization" (the "**Plan**", docket entry #), which is being served with this Notice. The Plan includes the Debtor's proposed treatment of all claims and interests; **the terms of the Plan become binding if the court enters an order confirming the Plan**.

2. Exhibits and Declarations in Support of Plan. The Debtor filed "Exhibits and Declarations in Support of Subchapter V Plan ("Plan Exhibits and Declarations", docket entry #), which are being served with this Notice.

3. Hearing on Confirmation of Plan. This hearing is required by 11 U.S.C. § 1128 and FRBP 3020(b) and is set on at least 42 days of notice to the U.S. trustee, Subchapter V trustee, Debtor, and to all creditors and parties in interest.

4. Motion to Confirm Plan. Pursuant to FRBP 9014 and LBR 9013-1(c)-(d), no later than 21 days before the hearing the Debtor will file a motion to confirm the Plan ("Motion to Confirm Plan"). The Debtor will serve the Motion to Confirm Plan on the U.S. trustee, the Subchapter V trustee, the Debtor, and all parties who vote against the Plan or file a preliminary objection to the Plan. At the hearing the court will determine if the Plan complies with the requirements of 11 U.S.C. §§ 1121-1129 and 1190-1191, except provisions that do not apply pursuant to 11 U.S.C. § 1181(a).

5. ☐ Notice of Additional Injunction. Pursuant to FRBP 2002(c)(3), if the Plan provides for an injunction against conduct not otherwise enjoined under the Bankruptcy Code, this notice must (a) include a statement in conspicuous language that the plan proposes an injunction; (b) describe briefly the nature of the injunction; and (c) identify the entities that would be subject to the injunction. That information is contained in **Exhibit A** to this Notice.

6. Dates and Deadlines.

   a. **Submitting a Ballot to Vote on Plan Treatment.** FRBP 3018 and LBR 3018-1 require the Debtor to file a summary of ballots received from claimants and interest holders who voted to accept or reject the proposed treatment of their claim(s) and interests.

      1. Ballot. A ballot accompanies this Notice.

      2. Who Has the Right to Submit a Ballot to Vote? As explained in **section(s) of the Plan**, creditors and interest-holders with an impaired claim or interest have the right to submit a ballot to indicate their vote on whether to accept or reject their treatment under the Plan. Creditors and interest-holders who hold an impaired claim or interest, but do not submit a ballot, are deemed to have accepted the proposed treatment of their claim or interest. To determine if your claim or interest is impaired, please see **section(s) of the Plan** to locate the proposed treatment of your claim or interest.

      3. Submitting a Ballot. If your claim is impaired, please submit a completed ballot so that it is **RECEIVED** no later than the following deadline at the following address:

         A. DEADLINE: (*date*) _____

         B. ADDRESS TO MAIL BALLOT:

   b. **Filing a Preliminary Objection to Confirmation of the Plan**

      1. Preliminary Objection. A preliminary objection to confirmation ("Preliminary Objection") is filed before the Debtor files a Motion to Confirm Plan. This provides the Debtor the opportunity to resolve objections before filing a Motion to Confirm Plan or, if necessary, to file an amended Plan.

      2. Who May File a Preliminary Objection? All parties in interest may file a Preliminary Objection. With the exception of the U.S. trustee, the Subchapter V trustee and the debtor, the Motion to Confirm will not be served on you if you do not vote against the Plan or you do not file a Preliminary Objection.

      3. Filing and Serving a Preliminary Objection: Pursuant to FRBP 2002(b) this notice provides at least 28 days of notice of the deadline to file an objection to the Plan. Serve a Preliminary Objection at the address(es) identified below; then, file the Preliminary Objection with the court by the following deadline:

         DEADLINE: (*date*) _____

         DEBTOR'S ADDRESS:

         DEBTOR'S ATTORNEY'S ADDRESS:

         ☐ Do not mail the response. The Debtor's attorney will be served by Notice of Electronic Filing; **or**

         ☐ Mailing Address:

c. Filing a Response to Motion to Confirm Plan. FRBP 3020(b); LBR 9013-1(f)

1. Response to Motion. A response to a Motion to Confirm Plan ("Response to Motion to Confirm Plan") is a way to object to the Plan after the Debtor files a Motion to Confirm Plan. If you filed a Preliminary Objection, the Debtor will serve you with a copy of the Motion to Confirm Plan, which may contain additional information and declarations to determine whether to file a response. If you did not file a Preliminary Objection, you may consult the court's docket for this case 21 days before the hearing to review the Motion to Confirm Plan.

2. Who May File a Response? All parties in interest may file a Response to the Motion to Confirm Plan.

3. Filing and Serving a Response. Serve a Response to Motion to Confirm Plan at the addresses identified below; then, file the Response to Motion to Confirm Plan with the court by the following deadline:

   DEADLINE: (*date*) _____

   ADDRESS OF DEBTOR AND DEBTOR'S ATTORNEY: See above, section 6.b.3.

Date: _____

_____
Signature of Debtor

_____
Printed name of Debtor

Date: _____

_____
Signature of attorney for Debtor, if any

_____
Printed name of attorney for Debtor, if any

PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is:

A true and correct copy of the foregoing document entitled: **NOTICE OF DATES RELATED TO CONFIRMATION OF SUBCHAPTER V PLAN OF REORGANIZATION AND DEADLINES TO: (A) SUBMIT BALLOTS; (B) FILE PRELIMINARY OBJECTION TO PLAN CONFIRMATION; AND (C) FILE RESPONSE TO MOTION TO CONFIRM PLAN** [11 U.S.C. § 1128; FRBP 3018, 3020(b); LBR 3018-1] will be served or was served **(a)** on the judge in chambers in the form and manner required by LBR 5005-2(d); and **(b)** in the manner stated below:

1. **TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF)**: Pursuant to controlling General Orders and LBR, the foregoing document will be served by the court via NEF and hyperlink to the document. On (*date*) _____, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following persons are on the Electronic Mail Notice List to receive NEF transmission at the email addresses stated below:

☐ Service information continued on attached page

2. SERVED BY UNITED STATES MAIL:
On (*date*) _____, I served the following persons and/or entities at the last known addresses in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States mail, first class, postage prepaid, and addressed as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

☐ Service information continued on attached page

3. SERVED BY PERSONAL DELIVERY, OVERNIGHT MAIL, FACSIMILE TRANSMISSION OR EMAIL (state method for each person or entity served): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on (*date*) _____, I served the following persons and/or entities by personal delivery, overnight mail service, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that personal delivery on, or overnight mail to, the judge will be completed no later than 24 hours after the document is filed.

☐ Service information continued on attached page

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Date	*Printed Name*	*Signature*

This form has been approved for use in Subchapter V cases assigned to Judge Vincent P. Zurzolo.

INSTRUCTIONS FOR UST FORM 11-MOR: MONTHLY OPERATING REPORT AND SUPPORTING DOCUMENTATION

TABLE OF CONTENTS

GENERAL INSTRUCTIONS AND FAQs

This document provides instructions for completing the monthly operating report, *UST Form 11-MOR* ("MOR"), required to be filed in certain chapter 11 bankruptcy cases. **It is recommended that these instructions be viewed online, as they contain helpful hyperlinks.**

Use the Guide for Opening the MOR/PCR Forms for instructions on how to download the MOR form from the Chapter 11 Operating Reports webpage on the U.S. Trustee Program's website at https://www.justice.gov/ust.

Before beginning, users should ensure they are using the latest version of the form available on the U.S. Trustee's webpage. To receive notification of updates related to periodic reporting, an e-mail subscription service is available on the U.S. Trustee Program's website.

The MOR is a data-enabled "smart form," meaning the properly completed and filed reports are data-embedded, i.e., form data is available for extraction and searching, which facilitates reporting, analysis, and public access to chapter 11 financial information.

This form contains a watermark that remains on the document unless and until the "Generate PDF for Court Filing and Remove Watermark" process described here is completed. This process will remove the watermark and automatically embed data on the MOR using standard barcode technology. The MOR should not be filed with the Court unless and until the watermark has been removed and barcodes have been added to the end of the MOR.

These instructions are intended to assist with the preparation of the MOR and are not a substitute for legal advice. The form and the instructions should both be thoroughly reviewed before preparing the MOR. The debtor in possession ("debtor"[1]) or trustee, if appointed in the case, is ultimately responsible for the information reported on the MOR.

What is the MOR and who must complete it? A chapter 11 debtor who does not qualify as a "small business debtor" under 11 U.S.C. § 101(51D) or a subchapter V debtor, as defined in 11. U.S.C. § 1182, or trustee, if appointed in the case, must complete a report of the debtor's financial condition and status of operations for each calendar month using *UST Form 11-MOR* together with any required supporting documentation. Any required supporting documentation must be filed with the court as separate attachments to the MOR.

- Use *Official Form 425C*, not UST Form 11-MOR, in a small business or subchapter V bankruptcy case in which a plan has not yet been confirmed. This form can be downloaded from the U.S. Courts' website.
- Use *UST Form 11-PCR* ("PCR"), not UST Form 11-MOR, in a non-small business or non-subchapter V bankruptcy case with a confirmed plan that is effective. This form can be downloaded from the Chapter 11 Operating Reports webpage on the U.S. Trustee Program's website.
- Consult the U.S. Trustee in the district in which the case is pending regarding which form to use once a plan has been confirmed in a small business or subchapter V bankruptcy case.

[1] For purposes of these instructions the term "debtor" may refer to individual joint debtors or substantively consolidated debtors.

When must the MOR be filed? The MOR must be filed with the court no later than the 21st day of the month immediately following the reporting period covered by the MOR, unless otherwise provided by the local rules of the court where the case is pending. For example, the MOR for the calendar month of June must be filed no later than July 21.

For how long must the MOR be filed? The MOR, together with any required supporting documentation filed as separate attachments, must be filed each calendar month until one of the following occurs: (1) the effective date of a confirmed plan of reorganization; (2) the conversion of the case to a case under another chapter; or (3) the dismissal of the case. In a case that does not have an effective plan, if an order has been entered on the docket that vacates the above orders or reopens it for a reason other than that which is purely administrative (e.g., the court is making a correction on the docket) the debtor or trustee, if appointed in the case, must resume the filing of MORs.

What are the signature requirements for the MOR? Two signatures are required on the MOR:

1. The cover page must be signed by the individual responsible for *filing* the MOR with the court. This is typically the debtor's or trustee's attorney, or the debtor, if a pro se individual, i.e., not represented by an attorney.

2. The last page of the MOR must be signed by the individual who is authorized under applicable law and is responsible for certifying under penalty of perjury that the MOR and its supporting documentation are true and correct on behalf of the debtor, or trustee, if appointed. **NOTE: The failure of the responsible party to sign the last page of the MOR will render the MOR incomplete and may result in a motion to dismiss, convert, or appoint a trustee in the case.**

To preserve the data-embedded features, the MOR must be electronically filed with the court and signed by entering "/s/" followed by the printed name of the appropriate responsible party on the designated signature lines of both the cover page and last page of the MOR. The drop-down calendar must be used to enter the date signed.

Who files the MOR and how is it filed? If represented by an attorney, the debtor's or trustee's attorney files the MOR. The MOR is filed electronically with the court using the United States Bankruptcy Courts' Case Management/Electronic Case Filing System ("CM/ECF").

Prior to filing the MOR with the court, refer to Preparing the MOR for Filing for important information on how to activate the data-embedded features of the MOR. Supporting documentation must be filed as separate attachments to the MOR.

A pro se individual debtor who does not have access to the CM/ECF system or cannot file the MOR electronically should consult the bankruptcy court where the case is pending to obtain information on how to properly file the MOR.

NOTE: Filers must comply with Federal Rule of Bankruptcy Procedure 9037 regarding redaction of information.

Who should receive a copy of the MOR once it is filed? When the MOR is filed with the court, copies should be provided to the U.S. Trustee in the district in which the case is pending, any official committee appointed under 11 U.S.C. § 1102, any governmental unit charged with responsibility for collection or determination of any tax arising out of such operation, and any requesting party in interest. Consult the local rules of the court where the case is pending to ensure that all copies of the MOR are properly provided to those who should receive a copy.

Who should retain a copy of the MOR once it is filed? The debtor's or trustee's attorney must maintain possession of the MOR with original holographic signatures for five years, unless otherwise provided by local rule. A pro se debtor must submit the MOR with original holographic signatures to the Office of the U.S. Trustee in the district in which the bankruptcy case is pending.

Whose financial information should be included in the MOR? The financial information reported in the MOR is limited to that of the debtor. If the debtor holds a business interest in a separate legal entity (e.g., corporation, limited liability company, or partnership), report only the income or distributions the debtor received from the separate entity and do not report the business operations of that separate entity in the MOR; however, the debtor, or trustee, if appointed, may be required to prepare semi-annual periodic reports pursuant to Bankruptcy Rule 2015.3 for the separate entity using *Official Form 426*.

How are MORs prepared and filed in jointly administered cases? In jointly administered cases, unless otherwise required by the U.S. Trustee in the U.S. Trustee's discretion, each jointly administered debtor, or trustee, if appointed, is required to file a separate MOR on a non-consolidated basis. MORs may be filed in either the lead case or in the specific child case, but not both. If

consolidated financial information is maintained for affiliated or related entities, for purposes of preparing the MOR, unless the court has entered an order substantively consolidating the estates of multiple cases, the debtor, or trustee, if appointed, must deconsolidate the financial information so that only the financial information for each case is reported on the MOR. However, the U.S. Trustee in the district in which the cases are pending, may require that consolidating or consolidated information be provided as Supporting Documentation.

Must the MOR be filed if there was no financial activity in the reporting period? Yes, the MOR must be completed even if there is no activity in the reporting period.

When must MORs be filed in an involuntary case? MORs are only required to be filed in an involuntary chapter 11 case when an order for relief has been granted by the court or a chapter 11 trustee is appointed, whichever occurs first. If relief is subsequently granted, MORs for the involuntary period must be submitted retroactive to the original chapter 11 involuntary petition date no later than the 21st day of the month immediately following the reporting period in which the order for relief was entered. For example, if the involuntary chapter 11 petition was filed on March 24 and an order for relief was entered on May 18, MORs for the months of March (March 24 to March 31), April (April 1 to April 30), and May (May 1 to May 31) must be submitted by June 21. If the involuntary case was originally filed as a chapter 7 and converted to a chapter 11, MORs would be required from the date of the order for relief for the now converted chapter 11 case.

What accounting methods must be used? Generally Accepted Accounting Principles (GAAP) are required to be used when completing the MOR, except: (a) if the debtor used a different set of accounting standards prepetition; or (b) if the U.S. Trustee in the district in which the case is pending or an order of the court otherwise modifies the GAAP requirement. If the debtor uses GAAP accounting, supporting documents must comply with GAAP, for example, the Financial Accounting Standards Board Accounting Standards Codification 852, Reorganizations (ASC 852). Note, however, that some debtors may need to provide both cash and accrual information on various Parts of the MOR.

What information is included on the first MOR? The MOR must be completed for the partial period from the petition date to the last day of the calendar month in the reporting period, even if that partial period is for one day. For example, if the case was filed on April 25, then the MOR must be filed for the partial period of April 25 to April 30. Do not combine activity for a partial calendar month with the MOR for the following calendar month.

When a plan has been confirmed but is not yet effective, what report is filed? The debtor, or trustee, if appointed, should continue filing MORs until the plan becomes effective. After the plan becomes effective, the debtor, or trustee, if appointed, should begin filing the PCR.

When a plan becomes effective, what information is included on the final MOR and the first PCR? Once a plan becomes effective, PCRs must be filed on a quarterly basis beginning with the first day of that calendar quarter, even if prior MORs have already been filed for calendar months in that quarter. For example, if the plan became effective on November 25, a PCR must be filed for the 4th calendar quarter that reflects activity for the full calendar quarter from October 1 to December 31, even though MORs should have already been filed for October and November. ***Disbursements will not be double counted for purposes of calculating quarterly fees.***

If a plan becomes effective in the last month of a calendar quarter and no payments have been made that would be reported in Part 3 of the PCR, a final MOR may alternatively be filed for that calendar month to close the quarter, and then the PCR must be filed beginning with the first day of the next full calendar quarter. For example, if the confirmed plan became effective on June 12 and no plan payments have been made in the month of June, an MOR may be filed for June that reflects activity for that full calendar month (i.e., June 1 to June 30) and then quarterly PCRs must be filed beginning with activity on July 1.

Refer to the instructions for *UST Form 11-PCR* for additional information on how to file an operating report in a case with a plan that is effective.

What information is included in the final MOR when the case is dismissed or converted? An MOR must be completed for the partial period from the first day of the calendar month through the date the court enters on the docket an order dismissing or converting the case, even if that partial period is for one day. For example, if an order dismissing the case is entered on October 3, then a final MOR must be filed for the partial period of October 1 to October 3. Do not combine activity for a partial calendar month with the MOR for the preceding calendar month.

What Parts of the MOR must an individual debtor complete? In a bankruptcy case where the debtor is an individual, all parts of the MOR must be completed, including Part 8. Every question in each Part must be answered

even if it does not apply. When a field within a Part requiring a numerical answer does not apply, enter zero in the space provided. Parts 2 and 4 generally do not apply to individual debtors (e.g., an individual debtor who is not self-employed may not have accounts receivable or inventory so zero would be entered on lines (a), (b), and (c) of Part 2). At the discretion of the U.S. Trustee in the district in which the case is pending, supporting documentation may also be required to be filed with the court.

If a Part in the MOR does not apply, how should that Part be completed? Every question in each Part must be answered even if it does not apply. When a field within a Part requiring a numerical answer does not apply enter zero in the space provided. For more detailed information on how to respond to a non-numerical question that may not apply, refer to the line by line instructions below.

What if the MOR needs to be amended? To amend an MOR, use the drop-down list under report type to select "Amended Monthly Operating Report," and then prepare and file an updated MOR for the period that needs to be corrected.

Further Questions? Contact the U.S. Trustee's Office in the district in which the case is pending.

LINE BY LINE INSTRUCTIONS FOR COMPLETING THE MOR

General

- Do not alter the form. Changes made to the form itself may affect the data-embedded features.
- Shaded fields are automatically populated or calculated.
- Figures must be rounded to the nearest whole dollar. **NOTE: If the documentation used to complete the MOR uses a dollar convention other than actual ("thousands," "millions," etc.), those figures must be converted to actual dollars when inputting them into the MOR.**
- Every question in each Part must be answered even if it does not apply. When a field requiring a numerical answer does not apply, enter zero in the space provided (zeros are automatically generated when clicking on or tabbing through fields). For more detailed information on how to respond to a non-numerical question that may not apply, refer to the line by line instructions.
- Unless otherwise indicated, all figures must reflect the amounts as of the end of the reporting period.
- Fields marked "Cumulative" cover the petition filing date through the end of the reporting period.
- Helpful hints have been embedded in the electronic version of the MOR that can be revealed by hovering over certain fields.

Clear All Fields Button

WARNING!

Once this button has been selected it cannot be undone and any information previously entered into the MOR will be permanently deleted.

Use the "Clear All Fields" button in the righthand corner of the form to remove all data from the completed form and reset to a blank form. If selected, the user will receive a warning prompt to confirm whether to continue to prevent the inadvertent deletion of data.

Cover Page

United States Bankruptcy Court. Where indicated in the form header, input the appropriate District, State, and Division for the bankruptcy court where the chapter 11 case is pending. If there is no Division, then leave this field blank. A listing of bankruptcy courts can be found on the U.S. Courts' website.

Debtor(s). Enter the name of the debtor as it appears on the bankruptcy petition.

Case No. Enter the 7-digit bankruptcy case number in the following format: xx-xxxxx. If this is a jointly administered case, enter the child or subsidiary case number that relates to the information in the MOR.

Jointly Administered. If an order has been entered that jointly administers this case with another bankruptcy case(s), check this box on the form.

Lead Case No. If the jointly administered box above has been checked, this additional field will appear on the form. Enter the 7-digit bankruptcy case number for the lead case in the following format: xx-xxxxx. If the MOR being prepared is for the lead case, then the Case No. and Lead Case No. will be the same.

Report Type. Use the drop-down list to select "Monthly Operating Report" or "Amended Monthly Operating Report" if correcting an MOR previously filed.

Reporting Period Ended. The drop-down calendar must be used to enter the month-end date for the reporting period (e.g., 06/30/2021). If this is the final MOR for a converted or dismissed case enter the date the applicable order was entered on the docket and refer to What information is included in the final MOR when the case is dismissed or converted? in the General Instructions and FAQs. If this is the final MOR in a case with a confirmed plan that has become effective refer to When a plan becomes effective, what information is included on the final MOR and the first PCR? in the General Instructions and FAQs.

Petition Date. The drop-down calendar must be used to enter the date on which the voluntary or involuntary petition for the chapter 11 case was filed with the court.

Months Pending. This is an automatically calculated field, which subtracts the reporting period ended date from the petition date and rounds up to the next full month.

Industry Classification. If the debtor is a non-individual, enter the North American Industry Classification System ("NAICS") 4-digit code that best describes the business conducted by the debtor. This code should match what was reported on line 7 of the bankruptcy petition. If the debtor is an individual, enter "0000" in this field.

Reporting Method. Select the accounting method that corresponds to how the debtor maintained its books and records prepetition. Note, however, that some debtors may need to provide both cash and accrual information on various Parts of the MOR.

Debtor's Full-Time Employees (current). Enter the number of full-time equivalent employees ("FTEs") on the debtor's payroll as of the end of the reporting period.

To calculate FTEs:

1. Divide total hours worked in the month by all full- and part-time employees by 173.33. If any employee worked more than 173.33 hours, reduce their hours to 173.33 hours for this calculation.
2. If the result is not a whole number, round to the next lowest whole number. If the result is less than one, round up to one FTE.

Debtor's Full-Time Employees (as of date of order for relief). Using the FTE calculation above, enter the number of FTEs on the debtor's payroll as of the date the order for relief was entered on the docket. Unless an involuntary petition was filed commencing the case, the date of the order for relief is the petition date.

Supporting Documentation. Any non-individual debtor or trustee, if appointed in the case, is required to prepare and file with the MOR a *Statement of Cash Receipts and Disbursements*, *Balance Sheet*, and a *Statement of Operations (Profit or Loss Statement)*, as specified in the Supporting Documentation section of these instructions, unless otherwise provided by the U.S. Trustee in the district in which the case is pending. Additional supporting documentation as specified in the Additional Supporting Documentation section of these instructions may also be required by the U.S. Trustee in the district in which the case is pending to be filed with the MOR. Check the applicable box for each document filed as a separate attachment to the MOR. A brief description of each document is provided in the above referenced sections of these instructions.

Signature Requirements. The cover page is signed by the individual responsible for *filing* the MOR with the court. This is typically the debtor's or trustee's attorney, or the debtor, if a pro se individual. Refer to What are the signature requirements for the MOR? in the General Instructions and FAQs.

Part 1: Cash Receipts and Disbursements

The *Statement of Cash Receipts and Disbursements*, if required, typically provides the information used to complete Part 1. Report the total cash receipts and disbursements in all bank and investment accounts for both the current reporting period and cumulatively since the petition date. If the debtor has a centralized cash management system with other related entities, the MOR must

reflect the cash receipts and disbursements solely for the debtor, even if the funds were not deposited or disbursed by the debtor.

If a *Statement of Cash Receipts and Disbursements* is required, it must be filed as a separate attachment to the MOR and should match the difference between lines (b) and (c), i.e., net cash flow, in Part 1. These figures may not match the bank statements due to transactions being recorded at different times (these differences are accounted for in the *Bank Reconciliation* report which may also be required).

Line a. Cash balance beginning of month. On the first MOR this is the total cash balance in all accounts (e.g., petty cash, checking, savings, brokerage, money market, and mutual fund accounts) on the petition date.

NOTE for the first MOR only: Do not enter a negative number and do not net any negative account balances against other accounts with positive balances for line (a). If any accounts were overdrawn as of the petition date, use zero as the beginning cash for those accounts, since overdrawn accounts are not *assets* of the debtor but rather *claims* against the debtor. For example, if on the petition date the debtor has three bank accounts with balances of $33,123, -$5,679, and $4,345, the debtor would enter $37,468 ($33,123 + $0 + $4,345) on line (a).
In subsequent MORs, line (a) is the same as the ending balance on line (d) of the prior month's MOR. This amount could be negative if any accounts are overdrawn postpetition.

Line b. Total receipts (net of transfers between accounts). Enter the total cash receipts the debtor received during the current reporting period and cumulatively since the petition date. Do not include transfers between the debtor's bank accounts or intercompany transfers between debtor affiliates, such as jointly administered debtors. Do include any income or distributions the debtor received from affiliated or related non-debtor parties.

Line c. Total disbursements (net of transfers between accounts). The term "disbursements" is construed broadly to mean all payments made by, or on behalf of, a debtor or estate during the chapter 11 case. On this line, enter only disbursements made by the estate fiduciary or other responsible person (e.g., debtor or trustee) during the current reporting period and cumulatively since the petition date. Do not include transfers between the debtor's bank accounts or intercompany transfers between affiliated or jointly administered debtors that occur only as a matter of cash management.

Line d. Cash balance end of month. This is an automatically calculated field that takes the beginning cash on line (a), adds the total receipts on line (b), and subtracts the disbursements on line (c). Other than allowances made for rounding or adjustments made to account for a consolidated or centralized accounting system, this figure should match the ending cash balance on the debtor's books.

Line e. Disbursements made by third party for the benefit of the estate. The term "disbursements" is construed broadly to mean all payments made by, or on behalf of, a debtor or estate during the chapter 11 case. On this line, enter only disbursements made by a third party on behalf of, or for the benefit of, a debtor or estate during the current reporting period and cumulatively since the petition date. For example, include on this line proceeds from a sale paid out of escrow or payments made by a principal of the debtor on behalf of the debtor. Do not duplicate amounts reported on lines (c) and (e).

Line f. Total disbursements for quarterly fee calculation. This is an automatically calculated field, which is the sum of lines (c) and (e). This figure is used to calculate quarterly fees to be paid to the U.S. Trustee Program. Consult the Chapter 11 Quarterly Fee webpage on the U.S. Trustee Program's website for additional information regarding the calculation of quarterly fees.

Part 2: Asset and Liability Status

The *Balance Sheet*, if required, typically provides the information used to complete Part 2 and must be filed as a separate attachment to the MOR. Report the total assets and liabilities for the current reporting period. Zeros must be entered in all numerical fields that do not apply. If the debtor is an individual, some of the information reported in Part 2 may be duplicative of information disclosed in Part 8.

Line a. Accounts receivable (total net of allowance). Enter the accounts receivable balance as of the end of the current reporting period, net of the allowance for uncollectible or doubtful accounts (include both prepetition and postpetition amounts). The *Accounts Receivable Aging*, if required, provides additional detail for this line and must be filed as a separate attachment to the MOR.

Line b. Accounts receivable over 90 days outstanding (net of allowance). Enter the portion (if any) of the accounts receivable balance reported on line (a) that is over 90 days outstanding, net of the allowance for uncollectible or doubtful accounts.

Line c. Inventory. Enter the ending inventory balance and indicate the method used to value it. If a method of valuation other than book or market is used, a written explanation must be filed as a separate attachment to the MOR. If the debtor does not have inventory, enter zero on line (c) and indicate "Other" as the valuation method (no written explanation is needed).

Line d. Total current assets. Current assets are assets reasonably expected to be converted into cash within one year. **NOTE: Only specific asset categories are reported on the MOR so do not calculate line (d) using the preceding fields shown on the MOR.** Accounts receivable reported on line (a) and inventory reported on line (c) should be *included* in line (d) along with other current assets such as cash, prepaid expenses, and marketable securities, which are not separately reported in Part 2.

Line e. Total assets. Enter the total of all current assets reported on line (d) and the net value of all noncurrent assets, which are not separately reported in Part 2. Noncurrent assets are long-term or fixed assets that will not be converted to cash within one year such as real property, equipment, investments in other companies, and intangibles (e.g., patents, trademarks, and goodwill). The net value is the cost of the asset less any accumulated depreciation or amortization. **NOTE: Only specific asset categories are reported on the MOR so do not calculate line (e) using only the fields shown on the MOR.** If a *Balance Sheet* is required, it must be filed as a separate attachment to the MOR and line (e) should match the total asset figure on the supporting financial statement.

Line f. Postpetition payables (excluding taxes). Enter the total postpetition debt, excluding postpetition taxes. Include both short and long-term debts such as accounts payable, notes payable, court approved financing, and administrative or professional fees that have not yet been paid regardless of whether they have been included in Part 5.

Line g. Postpetition payables past due (excluding taxes). Enter the portion (if any) of postpetition payables reported on line (f) that are past due, i.e., debts owed since the bankruptcy was filed that have not yet been paid per agreed upon terms.

Line h. Postpetition taxes payable. Enter the total postpetition taxes payable (e.g., income, payroll, real or personal property, sales and use, excise, and occupational taxes).

Line i. Postpetition taxes past due. Enter the portion (if any) of postpetition taxes payable reported on line (h) that are past due.

Line j. Total postpetition debt. This is an automatically calculated field, which is the sum of lines (f) and (h). The *Postpetition Liabilities Aging*, if required, provides additional detail for this line and must be filed as a separate attachment to the MOR.

Lines k. through m. Prepetition debts. Enter the current balance of each prepetition debt category on the appropriate line. These balances should reflect the secured, priority, and general unsecured debts as disclosed on the most recently filed bankruptcy schedules less any payments made on these debts since the bankruptcy was filed (if any payments were made on prepetition debts during the reporting period, also answer "Yes" to line (a) in Part 7 of the MOR).

Line n. Total liabilities (debt). This is an automatically calculated field, which is the sum of lines (j) through (m), i.e., the total of the debtor's prepetition and postpetition debts.

Line o. Ending equity/net worth. This is an automatically calculated field, which subtracts the total liabilities on line (n) from the total assets on line (e).

Part 3: Assets Sold or Transferred

Enter the information for all assets sold or transferred for both the current reporting period and cumulatively since the petition date in Part 3. The *Schedule of Asset Sales*, if required, provides additional detail for Part 3 and must be filed as a separate attachment to the MOR.

Line a. Total cash sales price for assets sold/transferred outside the ordinary course of business. Enter the *gross* sales price.

Line b. Total payments to third parties incident to assets being sold/transferred outside the ordinary course of business. Enter the total of all payments made by or on behalf of the debtor (e.g., payments made from escrow or the registry of the court).

Line c. Net cash proceeds from assets sold/transferred outside the ordinary course of business. This is an automatically calculated field, which subtracts line (b) from line (a).

Part 4: Income Statement

The *Income Statement*, also known as a *Statement of Operations* or *Profit or Loss Statement*, if required, typically provides the information to complete Part 4 and must be filed as a separate attachment to the MOR. Report income and expense items for each of the specific categories listed on the MOR for the current reporting period and profit or loss figures for both the current reporting period and cumulatively since the petition date. Zeros must be entered in all numerical fields that do not apply. If the debtor is an individual some of the information reported in Part 4 may be duplicative of information disclosed in Part 8.

Line a. Gross income/sales (net of returns and allowances). Enter the total gross income and/or sales, net of returns and allowances or reductions in price by the seller.

Line b. Cost of goods sold (inclusive of depreciation, if applicable). Enter the total cost of goods sold, inclusive of depreciation and/or amortization, if applicable. This amount includes the cost of any material and labor, i.e., direct costs used to create any goods or products that are sold by the debtor.

Line c. Gross profit. This is an automatically calculated field, which subtracts line (b) from line (a).

Lines d. through i. Expenses. Enter the debtor's expenses for each of the specific categories listed on the MOR. Include nonbankruptcy professionals on line (e). All uncategorized expenses not reported on any other lines in this section should be reported on line (f). Do not report the same expense figures in more than one category in Part 4.

Line j. Reorganization items. Enter the net income or expense items resulting from the bankruptcy filing (for this entry, input a net income figure as a negative number and net expense figure as a positive number). This figure includes bankruptcy related professional fees, U.S. Trustee quarterly fees, interest income, and realized gains and losses resulting from the reorganization and restructuring of the business. Do not report these figures on any other line in Part 4.

Line k. Profit (loss). Enter the net profit or loss figure from the debtor's books and records for both the current reporting period and cumulatively since the petition date. **NOTE: Because not all income categories are reported on the MOR, do not calculate line (k) using only the fields shown on the MOR. Instead, use the profit or loss figure from the debtor's books and records, which may include other income and expense categories not reported in Part 4.** If a *Statement of Operations* is required, it must be filed as a separate attachment to the MOR and line (k) should match the profit or loss figure on the supporting financial statement.

Part 5: Professional Fees and Expenses

The *Schedule of Payments to Professionals,* if required, provides additional detail for Part 5 and must be filed as a separate attachment to the MOR.

Section a. For each of the debtor's, or trustee's, if appointed, *bankruptcy* professionals, i.e., those retained as a result of the bankruptcy case, enter the firm name, select the role from the drop-down list, and enter the professional fees and expenses paid and any amounts approved by the court during the reporting period and cumulatively since the petition date. The *Aggregate Total* in the shaded fields are automatically calculated based on the information input. Use the Add and Delete buttons as appropriate to add or remove a professional from the MOR. The form will expand as needed to accommodate additional professionals. To ensure sequential row numbering, use only consecutive rows.

Section b. For each of the debtor's, or trustee's, if appointed, *nonbankruptcy* professionals, i.e., those that would have been retained absent a bankruptcy case, enter the firm name, select the role from the drop-down list, and enter the professional fees and expenses paid and any amounts approved by the court during the reporting period and cumulatively since the petition date. Include in this section payments to ordinary course professionals. The *Aggregate Total* in the shaded fields are automatically calculated based on the information input. Use the Add and Delete buttons as appropriate to add or remove a professional from the MOR. The form will expand as needed to accommodate additional professionals. To ensure sequential row numbering, use only consecutive rows.

Section c. All professional fees and expenses (debtor and committees). For all professionals employed in the bankruptcy case, enter the total professional fees and expenses paid and any amounts approved by the court during the reporting period and cumulatively since the petition date. Include in this total the amounts reported in Section (a), Section (b), *and other professional fees and expenses that are not separately reported in Part 5*, such as ombudsmen, examiners, and professionals employed

by any official committee appointed by the U.S. Trustee in the district in which the case is pending.

Part 6: Postpetition Taxes

Enter the appropriate tax information for both the current reporting period and cumulatively since the petition date. If the debtor is an individual, payroll taxes deducted by an employer from the debtor's wages are not reported on lines (c) and (d) in Part 6 and must instead be reported on line (e) in Part 8.

Lines a., c., and f. Postpetition taxes accrued. Enter the postpetition taxes accrued, i.e., taxes assessed that have not yet been paid, on the appropriate line for the type of tax.

Lines b., d., e., and g. Postpetition taxes paid. Enter the postpetition taxes paid on the appropriate line for the type of tax.

Part 7: Questionnaire

Answer each of the questions in Part 7 as indicated below. Do not leave any responses blank.

Question a. Answer whether any payments were made on prepetition debts, i.e., amounts owed prior to the date the bankruptcy case was filed, during the reporting period. If yes, a detailed explanation must be filed as a separate attachment to the MOR that includes the date, name of each payee, and amount of each payment.

Question b. Answer whether any payments were made outside the ordinary course of business, i.e., transactions that are not part of the regular business operations of the debtor, without prior court approval during the reporting period. If yes, a detailed explanation must be filed as a separate attachment to the MOR that includes the date, name of each payee, and amount of each payment.

Question c. Answer whether any cash or non-cash payments were made by the debtor to or on behalf of "insiders," as defined in 11 U.S.C. § 101(31), during the reporting period. Examples of cash payments include salaries, expense reimbursements, and life insurance premium payments. Examples of non-cash payments include use of the debtor's equipment, planes, automobiles, or real property. The *Schedule of Payment to Insiders*, if required, provides additional detail for this line and must be filed as a separate attachment to the MOR.

Question d. Answer whether the debtor, or trustee, if appointed, filed all required postpetition tax returns (e.g., income tax, payroll, sales, etc.) due as of the end of the reporting period. Respond "Yes" if the tax returns were not yet due.

Question e. Answer whether the debtor, or trustee, if appointed, paid all required postpetition estimated tax payments as of the end of the reporting period. Estimated tax payments are made on taxable income that is not subject to withholding (e.g., earned income, dividends and interest, rental income, and capital gains). Respond "Yes" if the debtor, or trustee, if appointed, is not required to make estimated tax payments, or they were not yet due.

Question f. Answer whether the debtor, or trustee, if appointed, remitted all trust fund taxes that were due as of the end of the reporting period. Trust fund taxes are taxes held in trust by the debtor, or trustee, if appointed, and remitted to taxing authorities (e.g., payroll and sales taxes). Respond "Yes" if the debtor, or trustee, if appointed, is not required to make such payments, or they were not yet due.

Question g. Answer whether the debtor, or trustee, if appointed, borrowed any funds postpetition, other than trade credit, during the reporting period (e.g., DIP financing, loans from insiders, etc.). If yes, a detailed explanation must be filed as a separate attachment to the MOR.

Question h. Answer whether all payments made to or on behalf of professionals, including those made to ordinary course professionals, during the reporting period were approved by the court. If the payment to an ordinary course or other professional exceeds the amount the court has approved, respond "No." Respond "N/A" if no payments were made to any professionals during the reporting period.

Question i. For each type of insurance listed, answer whether the debtor, or trustee, if appointed, has that type of insurance. If the answer to whether the debtor, or trustee, if appointed, has that type of insurance is "Yes," answer the follow up question as to whether the premiums are current as of the end of the reporting period. If the premiums are not current, a detailed explanation must be filed as a separate attachment to the MOR. If the answer to whether the debtor, or trustee, if appointed, has a particular type of insurance is "No," then answer "N/A" to the follow up question as to whether the premiums are current. **NOTE: Risk management products such as swaps and other derivatives are not considered insurance for the purposes of the MOR.**

Question j. Answer whether the debtor, or trustee, if appointed, has filed a plan of reorganization with the court as of the end of the reporting period.

Question k. Answer whether the debtor, or trustee, if appointed, has filed a disclosure statement with the court as of the end of the reporting period.

Question l. Answer whether the debtor, or trustee, if appointed, has paid all U.S. Trustee quarterly fees owed as of the end of the reporting period. Respond "Yes" if the fees were not yet due.

Part 8: Individual Chapter 11 Debtors (Only)

If the debtor is an individual, Part 8 must be completed. Some of the information reported in Part 8 may duplicate information disclosed in other parts of the MOR. If the debtor is not an individual, enter zeros in all numerical fields and indicate "No" for line (l) and "N/A" for line (m).

Line a. Gross income (receipts) from salary and wages. Enter the gross income received from salary and wages for the current reporting period.

Line b. Gross income (receipts) from self-employment. Enter the gross income received from self-employment or sole proprietorship activity for the current reporting period.

Line c. Gross income from all other sources. Enter the gross income from all other sources not included in line (a) or (b) for the current reporting period. This figure may include items such as social security, unemployment, domestic support payments received, interest, or distributions from a separate entity in which the debtor holds interest.

Line d. Total income. This is an automatically calculated field, which is the sum of lines (a) through (c).

Line e. Payroll deductions. Enter the total amount deducted from the debtor's gross income reported on line (a). This amount should include all federal and state withholding taxes, retirement and health care deductions, domestic support obligations, and any other deductions made by the debtor's employer.

Line f. Self-employment related expenses. Enter all expenses paid by or on behalf of the debtor that are related to self-employment or sole proprietorship activity for the current reporting period.

Line g. Living expenses. Enter the total living expenses (e.g., rent, mortgage payments, vehicle payments and related expenses, utilities, food, clothing, medical expenses, etc.) paid by or on behalf of the debtor for the current reporting period.

Line h. All other expenses. Enter all other expenses paid for the current reporting period not previously reported on lines (e) through (g).

Line i. Total expenses in the reporting period. This is an automatically calculated field, which is the sum of lines (e) through (h).

Line j. Difference between total income and total expenses. This is an automatically calculated field, which subtracts line (i) from line (d).

Line k. List the total amount of all postpetition debts that are past due. Enter the total past due postpetition liabilities, i.e., debts owed since the bankruptcy was filed that have not yet been paid per agreed upon terms.

Lines l. and m. Domestic Support Obligations. Indicate on line (l) whether the debtor has any domestic support obligations ("DSOs") as defined in 11 U.S.C. § 101(14A), i.e., alimony, maintenance, or child support. If the answer to line (l) is "Yes," indicate on line (m) whether the debtor is current on all *postpetition* payments. If the answer to line (l) is "No," indicate "N/A" on line (m).

Signature Requirements

The last page of the MOR must be signed by the individual authorized under applicable law and responsible for certifying under penalty of perjury that the MOR and its supporting documentation are true and correct on behalf of the debtor, or trustee, if appointed. Refer to What are the signature requirements for the MOR? in the General Instructions and FAQs.

SUPPORTING DOCUMENTATION

Unless the U.S. Trustee in the district in which the case is pending provides otherwise, any non-individual debtor or trustee, if appointed in the case, must file with the court a *Statement of Cash Receipts and Disbursements*, *Balance Sheet*, and *Statement of Operations (Profit or Loss Statement)*. At the discretion of the U.S. Trustee in the district in which the case is pending, an individual debtor may also be required to file these documents with the court. Additional supporting documentation, such as those listed below, may also be required by the U.S. Trustee in the district in which the case is pending.

The debtor and the U.S. Trustee in the case in which the district is pending should confer early in the case, whether at the Initial Debtor Interview ("IDI") or some other initial meeting, to discuss the debtor's reporting capabilities and the supplemental documentation that the debtor will be required to file. This initial meeting should occur before both the first MOR due date and the Section 341 Meeting. Failure to submit required supporting documentation will render the MOR incomplete and may result in a motion to dismiss, convert, or appoint a trustee in the case.

Privacy Protection for Filings Made with the Court

Filers must comply with Federal Rule of Bankruptcy Procedure 9037 regarding redaction of information.

Notes to the MOR or Supporting Documentation

Notes to the MOR or supporting documentation are permissible when necessary to disclose assumptions, such as those made by accountants or other financial personnel, to provide a full understanding of the documents. "Global Notes" or notes other than those set forth in the preceding sentence, and in particular, any notes that seek to undermine or minimize the gravity of the certifications made by the signatories to the periodic reports, are not permitted.

Presentation of Figures in Supporting Documentation

Supporting documentation may be presented in the dollar convention (e.g., "actual," "thousands," "millions," etc.) most often utilized by the debtor. Such convention must be clearly identified on the supporting documentation.

SUPPORTING DOCUMENTATION

Statement of Cash Receipts and Disbursements

The *Statement of Cash Receipts and Disbursements* provides additional detail for information summarized in Part 1 of the MOR. It includes a detailed reporting of the debtor's cash receipts and disbursements from all sources (e.g., petty cash, checking, savings, brokerage, money market, and mutual fund accounts) and the total amounts for specific categories of receipts and disbursements. For example, the debtor should report receipts categorized as cash sales, accounts receivable collections, loans and advances, sale of assets, lease and rental income, gifts, equity contributions, etc. The debtor should report disbursements categorized as inventory purchases, payroll, mortgage or lease payments, utilities, professional fees and expenses, capital improvements, debt service (including debt satisfied by a daily sweep of a lockbox or concentration account by a DIP lender), etc. Inter- and intra-company transfers must be separately reported.

Balance Sheet

The *Balance Sheet* is a financial statement that reports the total debtor's assets, liabilities, and equity as of the last day of the reporting period. This statement provides the basis for the information reported in Part 2 of the MOR. The debtor should close its books and records on the date the petition was filed (or the order for relief if an involuntary petition was filed) to determine prepetition liabilities and retained earnings as of that date. Prepetition and postpetition liabilities must be reported as separate line items.

Statement of Operations

The *Statement of Operations*, also known as an *Income Statement* or *Profit or Loss Statement*, is a financial statement that reports the debtor's profitability (income less expenses) for the reporting period. This statement provides the basis for Part 4 of the MOR.

ADDITIONAL SUPPORTING DOCUMENTATION

Accounts Receivable Aging

This schedule is an aged *summary* of total accounts receivable, net of allowance for uncollectible or doubtful accounts. The total of this schedule should match line (a) in Part 2 of the MOR.

Postpetition Liabilities Aging

This schedule is an aged *summary* of postpetition liabilities segregated by major category (e.g., general payables, unpaid professional fees and expenses and unpaid taxes). The total of this schedule should match line (j) in Part 2 of the MOR.

Statement of Capital Assets

This schedule provides detailed information for capital assets and changes in their value. For businesses, capital assets are those tangible or intangible assets with a useful life longer than a year that are not intended for sale in the regular or ordinary course of business operations (e.g., buildings, equipment, trademarks, or licenses). For individuals, capital assets are items owned for personal or investment purposes (e.g., homes, vehicles, investment properties, stocks, bonds, and artwork). For each of the debtor's capital assets the following information is required:

- Book value on the petition date;
- Book value at the beginning of the reporting period;
- Increases or decreases (including depreciation) in the assets or asset values; and
- Book value at the end of the reporting period.

Schedule of Payments to Professionals

This schedule provides additional detail for information summarized in Part 5 of the MOR. It should include information related to all professionals employed in this bankruptcy case (including bankruptcy, nonbankruptcy, and ordinary course professionals), either by the debtor, trustee, ombudsmen, examiners, or any official committee appointed by the U.S. Trustee in the district in which the case is pending. For each professional the following information is required:

- Name of professional and role;
- Date of retention;
- Amount of any retainers (irrespective of the source) received during the reporting period and cumulatively since the petition date whether received prepetition or postpetition;
- Amount of compensation and expenses (separately stated) approved by the court during the reporting period and cumulatively since the petition date;
- Amount of retainer (if any) applied to pay the compensation and expenses (separately stated) during the reporting period and cumulatively since the petition date; and
- Amounts paid by the estate for the compensation and expenses (separately stated) over and above retainers applied during the reporting period and cumulatively since the petition date.

Schedule of Payments to Insiders

This schedule provides additional detail for question (c) in Part 7 of the MOR. It includes all cash and non-cash payments made by or on behalf of the debtor to every insider (individual or entity) during the period covered by the MOR. The term "insiders" is defined in 11 U.S.C. § 101(31). Examples of cash payments include salaries, expense reimbursements, and life insurance premium payments. Examples of non-cash payments include use of the debtor's equipment, plane, automobiles, or real property. For each insider payment made during the reporting period the following information is required:

- Recipient;
- Date of payment or benefit provided;
- Amount of cash payment or market value of non-cash payment;
- Account used; and
- Reason for each payment made.

Bank Statements and Bank Reconciliations

If requested by the Office of the U.S. Trustee, the debtor, or trustee, if appointed, must file account or bank statements prepared by each financial institution or investment account detailing activity in the reporting period as separate attachments to the MOR.

A *Bank Reconciliation* is a summary of banking and business activity that reconciles the balance(s) on the bank account or investment statement(s) to the debtor's books and records (as reported in Part 1 of the MOR) and outlines the deposits, withdrawals, and other activity affecting a bank or investment account for a specific period.

Schedule of Asset Sales

This schedule provides additional detail for information summarized in Part 3 of the MOR. For each sale

transition or transfer of property made during the reporting period the following information is required:

- Date of the sale or transfer;
- Description of the asset sold or transferred;
- Gross sales price;
- Payments made from the sale proceeds to or by third parties, if any; and
- Net sale proceeds received on behalf of the estate, if any.

Statement of Cash Flows

The *Statement of Cash Flows* is a financial statement that shows how changes in the accounts on the *Balance Sheet* and *Statement of Operations* affect cash and cash equivalents and breaks the analysis down to operating, investing, and financing activities.

Other Documents That May Be Required

- Registers or ledgers documenting the estate's cash disbursements during the reporting period.
- Other transactional documents, including real estate settlement documents, contracts, or loan documents for the reporting period.
- Other financial records, including but not limited to, statement of changes in equity (deficit), and statement of intercompany account balances.

PREPARING THE MOR FOR FILING

Save Buttons

To save an editable working copy of the MOR until it is ready for filing with the court, select any one of the "Save" buttons that appear throughout the document. Each time a "Save" button is selected, a prompt will appear for a file name. Use the same file name to overwrite a prior editable working copy. The watermark will remain on the saved MOR until the data-embedded features have been activated. To active the data-embedded features, complete the "Generate PDF for Court Filing and Remove Watermark" steps below. **Do not file the MOR with the court until the data-embedded features have been activated, the watermark has been removed, and barcodes have been added to the end of the form.**

Generate PDF for Court Filing and Remove Watermark Button

After the MOR has been completed, thoroughly reviewed, signed with "/s/" by the responsible parties, and is ready for filing with the court, follow this procedure:

1. Select the "Generate PDF for Court Filing" button to begin the process of activating the data-embedded features. A prompt will appear to save an editable working copy of the MOR.
2. Address any error messages shown in red and repeat step 1. The watermark will remain until all errors are resolved.
3. Once all errors are resolved, a data-embedded version of the MOR is created that removes the watermark and adds barcodes at the end of the form. It may take a moment for this process to complete. **Note that this step does not file the MOR with the court.**
4. **A final copy of this data-embedded version must be saved before filing with the court**. Be sure to use a different file name to avoid overwriting the editable working copy.
5. Print a hard copy of the data-embedded version of the MOR (including all barcodes), affix original holographic signatures, and provide this copy to the debtor's or trustee's attorney for retention purposes.
6. File the data-embedded version of the MOR (including all barcodes) with the court using CM/ECF with supporting documentation filed as separate attachments to the MOR. In jointly administered cases, MORs may be filed in either the lead case or in the specific child case, but not both. Refer to Who files the MOR and how is it filed? and in the General Instructions and FAQs.

Preserving Data-Embedded Features

To ensure that the data-embedded features of the MOR are preserved:

- Supporting documentation must be filed as separate attachments or exhibits to the MOR via the CM/ECF system. The MOR and the supporting documentation must not be filed as a single PDF.
- Do not use the "Print to PDF" function.
- Do not file a scanned version of the MOR.
- Do not alter or change the form.

Technical Questions?

If you have technical questions concerning the MOR form, please contact us by E-mail: ust.mor.help@usdoj.gov.

FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MONTANA

In re: SHOOT THE MOON, LLC, Debtor.	Case No. 2:15-bk-60979-WLH
CAP CALL, LLC, Plaintiff and Counterclaim-defendant, v. JEREMIAH J. FOSTER, Defendant and Counterclaim-plaintiff.	Adv. Proc. No. 2:17-ap-00028-WLH **MEMORANDUM OPINION**

Legal relationships between private parties are largely defined by contract. When these contracts are implicated in litigation, courts must assess the terms and other relevant evidence to classify and determine the parties' rights and liabilities, often months or years after the original deal. In some instances, this after-the-fact analysis reveals legally significant aspects of the contractual relationship that the parties might not have appreciated when contracting.

In this adversary proceeding, a bankruptcy trustee and CapCall, LLC disagree about the legal classification and ramifications of prepetition transactions. After fully considering the evidence presented at trial, as well as briefing and oral argument offered by both sides, the court has determined that the trustee is entitled to entry of a judgment against CapCall. The details follow below.[1]

[1] This opinion sets forth the court's findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052 and Federal Rule of Civil Procedure 52(a). If any findings of fact are more properly construed as conclusions of law, or vice versa, they are adopted and should be construed as such.

FACTUAL BACKGROUND & PROCEDURAL POSTURE

The Shoot the Moon Enterprise Generally

In the early 2000s, Kenneth Hatzenbeller and two other principal investors created a business generally known as Shoot the Moon. Over time this enterprise grew to consist of nineteen LLCs formed pursuant to Idaho, Montana, and Washington law that owned and operated sixteen restaurants located throughout the three states.[2] Among other forms of customer payment, the restaurants accepted credit cards, which generated a revenue stream for the Shoot the Moon entities through a processing company called Heartland Payment Systems, Inc.[3] Until shortly before the underlying Shoot the Moon bankruptcy case discussed later, Mr. Hatzenbeller exercised day-to-day management and control of all Shoot the Moon entities from his office in Great Falls, Montana.

The Shoot the Moon restaurants eventually encountered various financial pressures, including due to the 2007-2009 Great Recession and improvements demanded by some of the restaurants' franchisors. Hoping to combat these pressures, Mr. Hatzenbeller sought additional financing from various sources. Initial sources included himself and the original investors, family and friends, additional third-party investors, traditional bank lenders, and trade creditors. Some creditors obtained and perfected security interests regarding all assets of various of the entities (including accounts receivable) via UCC-1 financing statements that predate the CapCall transactions.[4]

Prepetition Merchant Cash Transactions With CapCall, LLC

Once the Shoot the Moon entities exhausted the sources of capital mentioned above, several sought additional financing from merchant cash advance companies such as CapCall. Between October 2014 and September 2015, the Shoot the Moon entities and CapCall consummated eighteen transactions. The parties detailed the terms in written Merchant Agreements and associated documents (including confessions of judgment, personal guaranties by Shoot the Moon's principals, and

---

[2] *See* Final Pretrial Order ¶¶ IV.1, 3-5, ECF No. 260.

[3] *See, e.g.*, Trial Exs. 30-77.

[4] *See, e.g.*, Trial Exs. 147 (Prairie Mountain Bank filings with the Idaho and Montana Secretaries of State), 148 (American Express Bank filings with the Montana Secretary of State), 149 (US Foods filing with the Montana Secretary of State).

UCC-1 financing statements).[5] The Merchant Agreements are generally similar but contain minor variations.

The economic core of these transactions was that CapCall provided the Shoot the Moon entities with immediate cash (and hence liquidity to operate) upon closing. In exchange, CapCall received a portion of future receivables generated through the restaurant operations. The amounts promised to CapCall substantially exceeded the amount of cash CapCall paid, which created possible profit for CapCall and represented the cost to the Shoot the Moon entities of obtaining financing in this fashion.

Return transfers to CapCall were effected via fixed daily ACH debits (in the "Specified Daily Amount" per each agreement) against bank accounts Mr. Hatzenbeller specified. The debits continued regarding a given agreement until CapCall received a total "Receipts Purchased Amount" set forth in that agreement. A significant majority of the transfers were made using the bank account of an entity – Shoot the Moon Grizzly, LLC – that was not party to any of the agreements and did not operate any restaurants generating receivables.[6] Jason Leak, the primary representative of CapCall, knew about this mismatch between the contractual counterparty entities and the entity used to fund payments. Mr. Leak expressed no concern other than to request that there was "an account that will clear all the time."[7]

Mr. Hatzenbeller and Mr. Leak arranged each transaction via email.[8] In these emails, the two primarily addressed the amount CapCall would advance to a particular Shoot the Moon entity. Before funding, Mr. Leak emailed Mr. Hatzenbeller legal documents for signature – CapCall apparently never countersigned any of the agreements. CapCall and each specific entity

---

5 *See* Final Pretrial Order ¶ IV.6, ECF No. 260; Trial Exs. 19 (the date of the agreement listed as item no. 6 was orally corrected at trial as 4/6/15), 101-118, 204-211.

6 *See, e.g.*, Trial Ex. 144.

7 Trial Ex. 138. *See also, e.g.*, Trial Exs. 130, 133; Leak Dep. 38:14-41:9, ECF No. 268-1; Leak 30(b)(6) Dep. 38:2-39:19, ECF No. 268-2.

8 In his emails, Mr. Leak's signature block represented that he was a "Sr. Underwriting Manager" of CapCall, however, he worked as an independent contractor for CapCall rather than as an employee. *See, e.g.*, Trial Ex. 127. In letters printed on CapCall letterhead, Mr. Leak also called himself a "Managing Director" of CapCall. *See* Trial Exs. 140-141. Aspects of the email arrangements Mr. Leak used seem highly unusual. For example, on March 10, 2015, Mr. Hatzenbeller wrote Mr. Leak at his usual email address, but appears to have received a response from a "Josh Altman" from a different email address, followed five minutes later by a textually-identical response from Mr. Leak. *See* Trial Ex. 127. No explanation was provided at trial regarding who Mr. Altman is or why he was responding to emails sent to Mr. Leak.

documented each transaction via a separate, standalone Merchant Agreement. CapCall selected the terms and conditions of these agreements by using its form documents; Mr. Hatzenbeller testified that the two negotiated no specific terms beyond the basic economics and that he in fact did not read the documents before signing them. Although Mr. Leak occasionally suggested to Mr. Hatzenbeller that he could obtain regular financing, there was no binding commitment to lend or make future advances and each new transaction was subject to separate investor approval and documentation.[9] Emails between Mr. Hatzenbeller and Mr. Leak often referred to the transactions as "loans" or "notes" and on at least one occasion, there was specific negotiation regarding the temporal "term" of a transaction.[10]

The Shoot the Moon Bankruptcy Generally

On October 20, 2015, all nineteen Shoot the Moon entities merged into Shoot the Moon, LLC.[11] The following day, this entity filed the underlying chapter 11 bankruptcy petition here.[12]

During the bankruptcy case, Jeremiah J. Foster (the "Trustee") was appointed as the chapter 11 trustee and then as trustee of the STM Liquidating Trust pursuant to the confirmed chapter 11 plan.[13]

For purposes of this dispute, material events during the course of the bankruptcy case include:

- The Trustee sold substantially all of the bankruptcy estate's business assets via Bankruptcy Code section 363(b). The net proceeds realized from this sale were substantially less than the amount of the claims of numerous secured creditors (including those with perfected security interests senior to CapCall), leaving them with significant unsecured deficiency claims under Bankruptcy Code section 506(a).[14] CapCall did not object to the sale or to a stipulation regarding distribution of the proceeds to certain of the senior secured creditors.

---

[9] *See, e.g.*, Trial Exs. 133, 136.

[10] *See* Trial Exs. 127-129, 136, 139.

[11] *See* Final Pretrial Order ¶ IV.8, ECF No. 260; Trial Exs. 180-192.

[12] *See* Final Pretrial Order ¶ IV.9, ECF No. 260.

[13] *See, e.g.*, Trial Ex. 155.

[14] *See* Trial Ex. 152 (column for claims that were "Secured Converted to Unsecured after Sale Closure").

- The Trustee moved to obtain turnover of certain funds held by Heartland consisting of restaurant customer credit card payments processed prepetition but not transferred to any Shoot the Moon accounts before the petition date.[15] The Trustee and CapCall subsequently stipulated to segregate these funds pending resolution of the parties' disputes. The balance is $228,449.93.[16]

- CapCall filed a proof of claim asserting a claim for conversion of receivables that CapCall contended it owned. CapCall acknowledged that the claim was unsecured and that CapCall held no security interest in property of the debtor.[17]

Posture of This Adversary Proceeding

In August 2017, CapCall commenced this adversary proceeding. CapCall seeks declaratory relief that it owns the remaining balance deposited in the segregated account, a judgment against the Trustee for converting postpetition receipts, and other miscellaneous fees, costs, and interest components. The Trustee counterclaimed seeking declaratory relief about which state's law applies to the transactions and that the transactions are disguised loans rather than sales. The Trustee also seeks unencumbered title to the segregated account, avoidance and recovery of allegedly preferential transfers, and remedies stemming from CapCall's alleged usurious interest rates.

The court conducted a trial commencing June 29, 2021, and concluding the following day. At trial, the court admitted numerous exhibits and deposition excerpts.[18] The parties presented the following testimony:

- **Evan Marmott**. Mr. Marmott is the CEO and owner of CapCall. He testified about the general nature of CapCall's business and his understanding of how the Merchant Agreements operate, including features of the documents that he believes are standard industry practice. Mr. Marmott testified about the due diligence CapCall did before entering into transactions, including reviewing account statements from the credit-card

[15] *See* Final Pretrial Order ¶ IV.10, ECF No. 260.

[16] *See id.* ¶¶ IV.11-12; Trial Exs. 161-162.

[17] *See* Final Pretrial Order ¶ IV.13, ECF No. 260; Trial Ex. 142.

[18] *See* ECF Nos. 268, 271, 272.

payment processer and checking Mr. Hatzenbeller's credit report. Mr. Marmott conceded on cross-examination that he had no direct personal contact with Mr. Hatzenbeller and that such interactions occurred with CapCall's "outside brokers" such as Mr. Leak. Aside from this basic background information, the court did not find Mr. Marmott credible or persuasive. He was often evasive, his description of the relationship between CapCall and the Shoot the Moon entities was largely conclusory and self-serving (and hearsay due to his lack of interaction with Mr. Hatzenbeller), and his description of the Merchant Agreements frequently conflicted with the plain terms of the documents. For example, Mr. Marmott adamantly disclaimed the expansive scope of the collateral package granted to CapCall in the documents despite being shown the specific and unambiguous language.

- **Jeremiah Foster**. The Trustee testified about his experience as a turnaround professional and his involvement with the Shoot the Moon entities. Mr. Foster explained that Western Alliance Bank brought him into the situation, that he participated in a pre-bankruptcy meeting of creditors, and that he then became chapter 11 trustee. Mr. Foster detailed the section 363(b) sales process he coordinated, the resolution regarding distribution of the proceeds to various secured creditors (specifically noting the reasons CapCall was not invited to participate in the settlement process and that CapCall received notice but did not object to the final resolution), and the shift into a litigation mode. Overall, the court found Mr. Foster professional and credible. His testimony provided helpful context about events occurring during the bankruptcy case.

- **Nicole Manos**. Ms. Manos is a Senior Managing Director of Resolute, a financial services firm headed by Mr. Foster and retained to provide litigation support and financial advisory services to the Trustee. The Trustee offered Ms. Manos as an expert witness regarding the Shoot the Moon entities' financial condition and transactions. CapCall did not file a *Daubert* motion or otherwise challenge Ms. Manos' qualifications. Ms. Manos explained that she reviewed the assets and liabilities of the Shoot the Moon entities and concluded all relevant entities were insolvent both individually and collectively.[19] Ms. Manos further testified that she reviewed the entities' bank statements and prepared a schedule of transfers made to or for

[19] *See* Trial Ex. 157.

the benefit of CapCall within the 90 days prior to the petition date.[20] Based on the premise that the transactions at issue constitute loans governed by Montana law, Ms. Manos also detailed her analysis used to compute the imputed interest rate of the loans and the applicable usury penalty.[21] Ms. Manos also analyzed whether prepetition transfers to CapCall allowed it to receive more than if the Shoot the Moon entities liquidated in chapter 7. Based on a valuation of the Shoot the Moon entities' assets and the existence of various creditors with undersecured liens, but still senior to CapCall, Ms. Manos' analysis revealed that: (i) CapCall received a greater recovery than possible in a hypothetical chapter 7 case absent the transfers and (ii) CapCall has no viable security interest in the receivables the Trustee allegedly converted or in the segregated funds. Overall, the court found Ms. Manos clear and credible. Ms. Manos' written materials and supporting testimony appear both comprehensive and easy to comprehend.

- **Kenneth Hatzenbeller (testimony via Zoom)**. Mr. Hatzenbeller is one of the founders and former manager of Shoot the Moon. He testified about the general history of the business and how he ended up dealing with merchant cash advance parties and CapCall specifically. Mr. Hatzenbeller described his understanding of the CapCall transactions and discussed his interactions with Mr. Leak regarding new transactions. Mr. Hatzenbeller explained how the transactions evolved into a series of "stacked" or "rolled" contracts whereby a portion of CapCall's later advances were used to pay off obligations from earlier agreements.[22] Mr. Hatzenbeller outlined how he used the bank account of a defunct entity, Shoot the Moon Grizzly, LLC, as a central clearinghouse to fund payments for various other Shoot the Moon entities, including to CapCall. Mr. Hatzenbeller detailed how the individual transactions with CapCall were not negotiated, but instead were "take-it-or-leave-it" deals offered using form documents Mr. Leak emailed; Mr. Hatzenbeller explained that he would look at the topline economic terms but otherwise did not read the contracts before signing. Mr. Hatzenbeller acknowledged that he pled guilty for certain crimes relating to Shoot the Moon, but noted that he served his prison sentence and that the criminal activities were unrelated to anything involving CapCall. On cross-examination, Mr. Hatzenbeller admitted that he made bad decisions as

---

[20] *See* Trial Ex. 144; *see also* Trial Exs. 158-160 (compilations of the underlying bank statements).

[21] *See* Trial Ex. 145.

[22] *See also* Trial Ex. 129 (reflecting the arrangement of such a transaction).

manager of the Shoot the Moon entities and that he could have had legal counsel review the CapCall contracts but chose not to. Mr. Hatzenbeller further testified that funds received from CapCall were commingled and used to pay expenses across the entire Shoot the Moon enterprise, although he noted on redirect that he recorded movement of money across different entities via intercompany payables and receivables.[23] Overall, the court found Mr. Hatzenbeller sincere and genuinely contrite about events that occurred during his management of the Shoot the Moon entities, including regarding the CapCall transactions.

After trial, the court requested written submissions regarding several specified issues and heard closing argument. The matter is now ready for decision.

LEGAL ANALYSIS

Jurisdiction & Power

The court has subject matter jurisdiction regarding this adversary proceeding pursuant to 28 U.S.C. §§ 1334(b) & 157(a) and Standing Order No. DLC-43 (D. Mont. Jan. 16, 2019). This court is a proper venue for this litigation as a result of the pendency of the underlying Shoot the Moon bankruptcy case in this district.[24] Previous orders entered in this adversary proceeding reflect the parties' agreement that this is a "core" proceeding as well as each side's express consent to a final adjudication by this bankruptcy court.[25] Accordingly, the court may properly exercise the judicial power necessary to finally decide this dispute.[26]

Constitutional & Other Standing Issues

In its post-trial submission, CapCall maintains that the Trustee lacks standing to pursue its declaratory relief claims.[27] The thrust of the argument is not clear, but CapCall appears to contend that the Trustee's claims are predicated on past, not recurring or "prospective," injuries and that the legal issues are not sufficiently related to a cause of action separately supporting federal jurisdiction.

---

[23] *See also* Hatzenbeller Dep. 19:18-22:20, 34:14-23, ECF No. 271-1.

[24] *See* 28 U.S.C. § 1409(a).

[25] *See, e.g.*, Preliminary Pretrial Order ¶ 2, ECF No. 26; Stipulated Sch. Order ¶ 4, ECF No. 53, Final Pretrial Order ¶ II, ECF No. 260 (bilateral order recites that the adversary proceeding is core).

[26] *See* 28 U.S.C. § 157(b)(1), (c)(2); *Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 674-81 (2015).

[27] *See* Suppl. Post Trial Br. 8-12, ECF No. 275.

Although CapCall's counsel declined to press the point during closing argument, because CapCall frames things as at least partially a matter of "constitutional standing" implicating this court's jurisdiction, the court is compelled to address this threshold consideration.[28] For the reasons set forth below, the court concludes that the Trustee possesses the requisite standing.

To begin, this litigation involves an obvious case or controversary in which the Trustee has standing generally. The Trustee's counterclaims (1) are based on an injury in fact that is concrete and particularized insofar as the Trustee, on behalf of the bankruptcy estate, seeks to recover for allegedly usurious payments made to CapCall and to avoid and recover allegedly preferential transfers made to or for the benefit of CapCall; (2) stem from an injury that is directly traceable to the challenged actions of CapCall insofar as CapCall is the transactional counterparty of the Shoot the Moon entities and transferee of the challenged transfers; and (3) are causes of action as to which it is highly likely that the injury will be redressed by a favorable decision insofar as the court can enter a monetary judgment against CapCall. In short, this litigation involves particularized and non-theoretical claims against CapCall for losses that can be redressed by a decision for the Trustee, which provides Article III standing.[29]

More specifically, in the present context the Trustee may appropriately seek a judicial determination whether the transactions at issue were sales or loans – a question the Trustee frames as declaratory relief.[30] Indeed, this is a predicate question requiring resolution en route to the court's determination of the Trustee's preference claims – claims arising under the Bankruptcy Code. As discussed in detail later, without classifying the transactions as the Trustee requests, the court cannot determine whether payments made to CapCall on account of the transactions were preferences. Notably, while CapCall now contends that the Trustee lacks standing to seek declaratory relief on this question, CapCall asks the court to resolve the very same issue. In its own amended complaint, CapCall seeks

---

[28] *See, e.g.*, *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-97 (1998).

[29] *See, e.g.*, *Czyzewski v. Jevic Holding Corp*., 137 S. Ct. 973, 983 (2017).

[30] CapCall's arguments regarding the Trustee's standing to pursue claims for declaratory relief are analytically odd. The usual problem courts address regarding attacks on claims asserted under the Declaratory Relief Act occurs when those claims are pursued as standalone claims (often seeking what amounts to an advisory opinion) without an independent basis for federal jurisdiction. *See, e.g.*, *Shell Gulf of Mex. Inc. v. Ctr. for Biological Diversity, Inc*., 771 F.3d 632, 635 (9th Cir. 2014). Here, however, there is no dispute that the court has federal bankruptcy jurisdiction pursuant to 28 U.S.C. §§ 1334(b) & 157(a). *See, e.g.*, Final Pretrial Order ¶ II, ECF No. 260. Indeed, it was CapCall that commenced this adversary proceeding and first invoked this court's federal bankruptcy jurisdiction. *See* Compl., ECF No. 1 ¶ 1.

the same relief in order to address whether CapCall's purported purchase of the receivables entitles it to funds currently held in the segregated account and those the Trustee allegedly converted. CapCall fails to reconcile the discrepancy.

Further, like the classification issue, the court must determine whether Montana law applies to the transactions to resolve the Trustee's usury claim.

In sum, CapCall provides no basis (and the court sees none) to conclude that standing principles prevent the Trustee from pressing issues central to the outcome of this litigation, even if these issues are not technically cognizable as standalone causes of action under the Declaratory Judgment Act.[31] Thus, the court concludes that there is no "standing" issue here, constitutional or otherwise.[32]

Classification of the Transactions as True Sales or Loans

As mentioned, the parties disagree about the legal classification of the transactions at issue: CapCall argues they are sales and the Trustee contends they are loans. If sales, CapCall acquired absolute ownership of the subject receivables. If loans, CapCall's advances entitled it to a security, rather than an ownership, interest in the receivables junior to several other interests. As also stated, the court must resolve this threshold question before addressing whether certain transfers to CapCall were preferences and whether CapCall violated Montana usury law. If CapCall's advanced funds purchased property, any subsequent transfer of that property to CapCall would not be a preference. Likewise, if there was no loan, CapCall could not have violated usury laws. The court now turns to this question.

I. Applicable Substantive Law

Absent a contrary rule in the Bankruptcy Code, the contours of claims and property rights in bankruptcy cases are sculpted by applicable nonbankruptcy

---

[31] *See, e.g.*, *Seitz v. 6130 W., LLC (In re Joey's Steakhouse, LLC)*, 474 B.R. 167, 183-84 (Bankr. E.D. Pa. 2012) (concluding that request for declaratory relief was moot when the parties were "engaged in full-blown litigation" requiring adjudication of substantive issues that "will perforce determine the rights of each party").

[32] To conclude otherwise would render strange results. Since state law largely dictates property rights in bankruptcy, a party's inability to press a dispute about an interest in property would render meaningless many statutory rights and powers conferred by the Bankruptcy Code. The rules of procedure recognize these rights and powers and specifically require "a proceeding to determine the validity, priority, or extent of a lien or other interest in property" to commence by adversary complaint. Fed. R. Bankr. P. 7001(2).

law.[33] Neither the Bankruptcy Code nor any other federal statute prescribes how to differentiate true sales from loans, which means bankruptcy courts must turn to state law.[34]

Of course, the parties disagree about which state's law the court should apply to classify the transactions; CapCall maintains that New York law applies while the Trustee urges application of Montana law. This appears to tee up a potential choice-of-law issue. But the outcome of the true-sale-or-loan dispute remains the same regardless which state's law applies. The court therefore is constrained by the principle that a "choice-of-law determination is necessary only when a difference in the law will result in a different outcome."[35] Thus, the court need not make such a generalized determination at this step (though we will revisit the question later in connection with the usury claim).

II. Differentiating True Sales from Loans

An entity seeking liquidity may monetize its present or future accounts receivable in two primary ways: by either selling or borrowing against the receivables.[36] While the monetization methods differ in obvious and key respects,

---

[33] *See, e.g.*, *Midland Funding, LLC v. Johnson*, 137 S. Ct. 1407, 1411-12 (2017); *Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec.*, 549 U.S. 443, 450-51 (2007); *Butner v. United States*, 440 U.S. 48, 55-57 (1979); *Official Comm. of Unsecured Creditors v. Hancock Park Capital II, L.P. (In re Fitness Holdings Int'l, Inc.)*, 714 F.3d 1141, 1146-49 (9th Cir. 2013). This modern approach is in tension with older Supreme Court precedent, which reflects a tradition of allowing bankruptcy courts to determine transactional substance as a matter of generalized bankruptcy law. *See, e.g.*, *Pepper v. Litton*, 308 U.S. 295, 304-06 (1939) (Douglas, J.); *Sawyer v. Hoag*, 84 U.S. (17 Wall.) 610, 619-22 (1873). When the applicable state law adopts a searching, fact-specific, and holistic inquiry into the substance of the transaction, however, this often will be a distinction that makes little or no difference to the ultimate outcome. *See, e.g.*, *United Airlines, Inc. v. HSBC Bank USA, N.A.*, 416 F.3d 609, 613-15 (7th Cir. 2005).

[34] *See, e.g.*, *In re R&J Pizza Corp.*, 2014 Bankr. LEXIS 5461, at *5-6 (Bankr. E.D.N.Y. Oct. 14, 2014); *Paloian v. LaSalle Bank Nat'l Ass'n (In re Doctors Hosp. of Hyde Park, Inc.)*, 507 B.R. 558, 708 (Bankr. N.D. Ill. 2013); *In re Criimi Mae, Inc.*, 251 B.R. 796, 801 (Bankr. D. Md. 2000).

[35] *Villarreal v. Arnold*, 2016 U.S. Dist. LEXIS 176103, at *5 (N.D. Ill. Dec. 20, 2016). *See also, e.g.*, *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1175 (9th Cir. 2014) (explaining that a choice-of-law inquiry is not necessary when both options "dictate the same outcome"); *In re Aircrash Disaster Near Roselawn*, 948 F. Supp. 747, 750 (N.D. Ill. 1996) ("A court need not conduct a choice of law determination unless there is an actual conflict in the substantive law such that the case could have a different outcome depending on which law is applied.").

[36] The most straightforward sale transaction occurs when party A sells receivables to party B. A "securitization" is a more complex form of sale transaction whereby the seller transfers the receivables to a special purpose entity, which entity then issues to third parties debt securities collateralized by the receivables in exchange for capital that completes the purchase transaction. *See generally* Kenneth N. Klee & Brendt C. Butler, *Asset-Backed Securitization, Special Purpose Vehicles and Other Securitization Issues*, ALI-ABA Course of Study Materials SJ082 (June 2004). Securitizations are commonly used in the context of mortgage loans, student loans, and assorted other debt obligations.

they are not entirely dissimilar. The shared aspects are reflected in the commentary to Article 9 of the Uniform Commercial Code where the drafters recognize that "[i]n many commercial financing transactions the distinction is blurred."[37] In light of this, Article 9 treats both secured loans and "a sale of accounts, chattel paper, payment intangibles, or promissory notes" as secured transactions subject to that statute's detailed rules regarding perfection and priority.[38] The statute stops short of "delineat[ing] how a particular transaction is to be classified" and, by design, the "issue is left to the courts."[39]

Courts have formulated a holistic, multipart framework to examine a transaction on the way to classifying it as a sale or a loan. In a notable article, Robert D. Aicher and William J. Fellerhoff catalog factors courts often consider:

(1) whether the buyer has a right of recourse against the seller;

(2) whether the seller continues to service the accounts and commingles receipts with its operating funds;

(3) whether there was an independent investigation by the buyer of the account debtor;

(4) whether the seller has a right to excess collections;

(5) whether the seller retains an option to repurchase accounts;

(6) whether the buyer can unilaterally alter the pricing terms;

(7) whether the seller has the absolute power to alter or compromise the terms of the underlying asset; and

(8) the language of the agreement and the conduct of the parties.[40]

---

[37] U.C.C. § 9-109 Official Comment 4.

[38] *See id.* § 9-109(a)(3). There are some specific exceptions to this general rule. *See id.* § 9-109(d)(4)-(7). There are also some Article 9 provisions providing rules specifically for sold rights to payment. *See, e.g.*, *id.* §§ 9-309(3)-(4); 9-318.

[39] *Id.* § 9-109 Official Comment 4. *See also id.* § 9-318 Official Comment 2 (similarly noting that "[n]either this article nor the definition of 'security interest' in section 1-201 provides rules for distinguishing sales transactions from those that create a security interest securing an obligation").

[40] *See* Robert D. Aicher & William J. Fellerhoff, *Characterization of a Transfer of Receivables as a Sale or a Secured Loan Upon Bankruptcy of the Transferor*, 65 AM. BANKR. L.J. 181, 186-94 (1991). The Aicher and

As with many multi-factor tests, no individual factor or combination thereof is determinative.[41] The inquiry is not a quantitative exercise susceptible to replication by a computer program, but a comprehensive and heavily contextual endeavor. A court's "[a]nalysis of the various factors and their impact on the nature of the parties' agreement is fact-intensive, and a determination must be made based on the totality of the circumstances."[42] That said, a consideration that overlays and unites the factors is how the parties allocated ***risk***.[43] A sale typically occurs when the risk of loss from the purchased assets passes to the buyer – a gamble usually reflected in the purchase price. Conversely, in a disguised loan, the parties may employ various methods to allocate risk – the putative seller typically remains exposed to the underlying receivables and may grant the putative buyer recourse to sources of recovery beyond the receivables.

To elaborate on a point touched earlier, the court perceives no material difference in particular states' laws regarding the distinction between sales and loans. Nor do the parties clearly frame one (both have cited case law from assorted jurisdictions). Courts applying New York law look to the same sorts of factors, including those described in the Aicher and Fellerhoff article, as courts applying other states' law.[44] Moreover, New York courts have long approached this sort of problem by examining "the substance of the transaction between the parties" and identifying "the essential character of the transaction."[45] In New York, a

---

Fellerhoff article cites and collects various cases to support its inventory of the relevant factors. Other courts have since relied on this articulation of the relevant legal principles. *See, e.g.*, *Dryden Advisory Grp., LLC v. Beneficial Mut. Sav. Bank (In re Dryden Advisory Grp., LLC)*, 534 B.R. 612, 620 (Bankr. M.D. Pa. 2015); *In re R&J Pizza Corp*., 2014 Bankr. LEXIS 5461, at *7-8 (Bankr. E.D.N.Y. Oct. 14, 2014); *Sterling Vision, Inc. v. Sterling Optical Corp. (In re Sterling Optical Corp.)*, 371 B.R. 680, 686-87 (Bankr. S.D.N.Y. 2007).

41 *Official Comm. of Unsecured Creditors v. LG Funding, LLC (In re Cornerstone Tower Servs.)*, 2018 Bankr. LEXIS 3562, at *13 (Bankr. D. Neb. Nov. 9, 2018).

42 *In re Dryden Advisory Grp.*, 534 B.R. at 620.

43 *See, e.g.*, *S & H Packing & Sales Co. v. Tanimura Distrib*., 883 F.3d 797, 802 (9th Cir. 2018) (en banc) (holding, in the PACA trust context, that a "court should look to the substance of the transaction to determine whether the transaction is a true sale or a secured loan" and "[i]n doing so, the transfer of risk should be a primary factor to which a court looks"); *Endico Potatoes, Inc. v. CIT Group/Factoring, Inc.*, 67 F.3d 1063, 1069 (2d Cir. 1995) (explaining that "[t]he root of all of these factors is the transfer of risk"); *Major's Furniture Mart, Inc. v. Castle Credit Corp*., 602 F.2d 538, 545-46 (3d Cir. 1979) (discussing various aspects of how a transaction allocated risk and concluding "that on this record none of the risks present in a true sale is present here"); *In re Dryden Advisory Grp.*, 534 B.R. at 620 ("To classify a transaction accurately, several attributes must be examined, primarily the allocation of risk."); *In re Cornerstone Tower Servs*., 2018 Bankr. LEXIS 3562, at *13 (emphasizing how, across the holistic analysis, "the allocation of risk is primary to the determination").

44 *See, e.g.*, *In re Dryden Advisory Grp*., 534 B.R. at 620-26; *In re Cornerstone Tower Servs*., 2018 Bankr. LEXIS 3562, at *12-22.

45 *See, e.g.*, *Hall v. Eagle Ins.*, 151 A.D. 815, 822-26 (N.Y. App. Div. 1912), *aff'd*, 211 N.Y. 507 (1914).

"transaction must be judged by its real character, rather than by the form and color which the parties have seen fit to give it."[46] Montana, too, is a jurisdiction where "[t]he law looks to the substance rather than the form."[47] Thus, the court will apply those factors from the Aicher and Fellerhoff article and look to the overall transactional substance rather than attempt to formulate a material discrepancy between New York and Montana law on the matter.

III. Application of the Law to the Facts

Applying the standards discussed above to the totality of the record established at trial, the court determines that the transactions at issue are loans. The following findings and conclusions support this determination.

First, the security interests reflected in the transaction documents are significantly broader than those associated with a sale and much more akin to those associated with a loan. For instance, a January 22, 2015 Merchant Agreement purports to secure the Shoot the Moon entity's "payment and performance obligations to" CapCall with "a security interest in all . . . payment and general intangibles (including but not limited to tax refunds, registered and unregistered patents, trademarks, service marks, copyrights, trade names, trade secrets, customer lists, licenses, [etc.]); goods; inventory; equipment and fixtures . . ., and all proceeds of the foregoing."[48] While this represents only a single example, other agreements contain substantially similar language conferring security interests overly generous for a sale. Consistent with these broad granting clauses, CapCall's UCC-1 financing statements usually describe the collateral as "[a]ll assets of the ***Debtor***, now existing and hereafter arising, wherever located" (emphasis added).[49]

---

[46] *Quackenbos v. Sayer*, 62 N.Y. 344, 346 (1875). *See also, e.g.*, *Fast Trak Inv. Co. v. Sax*, 962 F.3d 455, 467 (9th Cir. 2020) (noting how the court is "bound by New York law to analyze the transaction and determine its 'real character'").

[47] *Stanhope v. Shambow*, 54 Mont. 360, 363 (1918). *See also, e.g.*, Mont. Code Ann. § 1-3-219 ("The law respects form less than substance."); *In re Charles M. Bair Family Trust*, 343 Mont. 138, 148 (2008) (discussing how Montana courts "emphasize substance over form" when interpreting legal instruments).

[48] Trial Ex. 102 at p. 2.

[49] *See* Trial Exs. 204, 206, 208-211. One financing statement has a longer and more precise description of the collateral, but it too extends far beyond receivables by including, among other things, "general intangibles," "goods," "inventory equipment and fixtures," and "all computer programs." *See* Trial Ex. 205.

The filing of a financing statement by itself is not indicative of a loan,[50] but the content of CapCall's statements is. Outside the context of a secured loan, there is no reason why CapCall should receive and perfect security interests in assorted assets other than the purchased receivables. Yet, as shown above, the typical Merchant Agreement and financing statement awarded CapCall a liberal security interest in the Shoot the Moon entity's assets. The restaurants' inventory, equipment, service marks, and other assets swept into the security agreements have little relation to the accounts that CapCall purportedly purchased.[51] The fact that the documents contemplate a broad security package for CapCall to generally collateralize payment obligations is indicative of a loan, not a sale.

To address CapCall's motive for filing UCC-1 financing statements, Mr. Marmott testified that merchant cash advance parties file UCC-1 financing statements as a matter of industry practice. This is undoubtedly true as far as it goes for the reasons already discussed. But Mr. Marmott's testimony did not rebut – nor did any other evidence – that collateral packages and financing statements of the exceptionally broad scope seen here are well beyond those associated with sales.[52] This evidence alone weighs powerfully in favor of classifying the transactions as loans. Mr. Marmott no doubt recognized this. At trial, he chose to outright deny CapCall's security interests in anything but the receivables despite being shown the broad scope of the granting clause explicit in the Merchant Agreements.

CapCall's financing statements contain another revealing indicator that they relate to secured loans: they identify each applicable Shoot the Moon entity as a

---

[50] Recall that Article 9 of the UCC applies to sales of accounts. So, it is not surprising that CapCall filed financing statements to perfect its interest in the putative purchased accounts – a buyer of accounts who fails to perfect its interest in that property by filing a financing statement runs the risk of becoming subordinate to a subsequent buyer or other secured party who is perfected. *See* U.C.C. § 9-318 Official Comment 3 (example describing contest between Buyer-1 and Buyer-2).

[51] To crystalize the point by analogy, someone agreeing to buy a house six months in the future may record an interest against the house in order to protect against intervening buyers or judgment creditors (or a bankruptcy trustee) but would not record any interest against the seller's car or personal property.

[52] Even assuming CapCall introduced evidence of an on-point "industry practice" or "commercial expectation," it is questionable its relevance to resolving the dispute before the court. The court's task is to apply the law to the facts before it; policy arguments related to industry practices, asserted market expectations, or the like are properly left to the legislative branch. *See, e.g.*, *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 649 (2012); *W. Pac. Airlines v. GATX Capital (In re W. Pac. Airlines)*, 221 B.R. 1, 6 (D. Colo. 1998); *Lehman Bros. Special Fin. Inc. v. BNY Corporate Tr. Servs. Ltd. (In re Lehman Bros. Holdings Inc.)*, 422 B.R. 407, 422 n.9 (Bankr. S.D.N.Y. 2010). That said, if what occurred in this case actually is the industry's practice in the context of transactions intended to be true sales of receivables, it is misguided and warrants reconsideration, including in light of the Uniform Commercial Code sections and commentary cited above.

"debtor." This is telling because CapCall could have easily referred to each as a "seller" or words of similar import if CapCall deemed such designation more accurate.[53]

Second, the transaction documents give CapCall rights and recourse against property in addition to the overbroad collateral package. To provide a common example, a March 16, 2015 Merchant Agreement and related documents provide the following:

- A broad personal guaranty by Shoot the Moon's principal that "is an absolute, primary, and continuing guaranty of ***payment and performance***" (emphasis added), "is a guaranty of payment and not merely a guaranty of collection," renders the guarantor "primarily liable, jointly and severally," with the Shoot the Moon entity, and includes various waivers such as of any requirement that CapCall "take any action . . . against any security or collateral" before demanding payment from the guarantor.[54]

- An affidavit of confession of judgment whereby both the Shoot the Moon entity and the personal guarantor confess to a generalized judgment in a fixed sum equal to the total amount to be paid to CapCall plus legal fees and "interest at the rate of 16% per annum." The "judgment is for a debt due to [CapCall] arising from Defendants' failure to pay to [CapCall], [the Shoot the Moon entity's] accounts-receivable . . . and for Defendants' breach of the secured Merchant Agreement" more generally.[55]

- Various "Protections Against Default" and other extraordinary rights, including provisions creating a broad power of attorney for CapCall, generally accelerating "[t]he full uncollected Purchased Amount,"

---

[53] *See* U.C.C. § 9-505(a).

[54] Trial Ex. 105 at p. 2. Once again, the plain terms of the documents are inconsistent with Mr. Marmott's trial testimony. Mr. Marmott testified that all the guaranties were ***only*** of performance, not payment. The emphasized language quoted above says precisely the opposite. Indeed, more than half of the Merchant Agreements include language expressly creating an "absolute . . . guaranty of payment" (i.e., trial exhibits 101-108, 110, 113). The other Merchant Agreements are somewhat more limited in the scope of the guaranty, but that is a distinction without a difference insofar as the personal guaranty of "performance" of an "obligation" to pay money to CapCall is functionally a payment guaranty, as the affidavits of confession of judgment imposing accelerated liquidated sums due by the guarantors demonstrate.

[55] Trial Ex. 105 at pp. bates stamped Cap Call - 000052 through 000054.

allowing CapCall to "enforce its security interest in the Collateral identified herein" (recall that this "Collateral" is far broader than just the putative purchased receivables), permitting CapCall to generally enforce "its rights and remedies by lawsuit," authorizing CapCall to exercise rights under an assignment of lease of the Shoot the Moon entity's premises (it is unclear how this would work in practice, but in theory it allows CapCall to take over the Shoot the Moon restaurants), and enabling CapCall to debit any of the Shoot the Moon entity's deposit accounts.[56]

- A continuing requirement that the Shoot the Moon entity provide CapCall with financial statements within five business days of CapCall's request; "failure to do so is a material breach of this Agreement."[57]

Although none of these features is dispositive alone, their collective effect weighs heavily in favor of characterizing the transactions as loans. As a whole, they provide CapCall with at least conditional recourse and expanded legal rights against the Shoot the Moon entities and the personal guarantors. Plus, they allocate great risk to the Shoot the Moon counterparty while protecting CapCall with much more than just the receivables. CapCall's panoply of rights, remedies, and potential control is highly unusual in the context of an asset sale. Such an overall arrangement is consistent with a debtor-creditor relationship, not a seller-buyer relationship.

This certainly did not escape Mr. Marmott. In familiar fashion, he tried to extinguish the extensive rights created for CapCall by simply denying that CapCall ever enforced them. These efforts are unavailing. As a foundational matter, Mr. Marmott's generous, and unilateral, waiver of CapCall's remedies is meaningless. Mr. Hatzenbeller testified that he was not made aware of any such waiver. What's more, the Merchant Agreements contain typical integration provisions stating that they embody the entire agreement.[58] So, Mr. Hatezenbeller could not rely on an undisclosed waiver much less one that conflicts with the agreements' terms. More significantly, it is immaterial whether CapCall exercised its rights. Many contracts

---

[56] *See* Trial Ex. 105 at pp. 3-5 §§ 1.10, 1.11, 3.1, 3.2. The agreements are not uniform in terms of the ramifications of a Shoot the Moon bankruptcy filing. Some simply provide that a bankruptcy filing will trigger the "protections" related to the confessions of judgment and personal guaranties. Others treat a bankruptcy filing as a broader event of default that could perhaps support broader remedies (or "claims" in the bankruptcy case). These Merchant Agreements are not models of precision or legal drafting.

[57] *See id.* at p. 4 § 2.1.

[58] *See id.* at p. 5 § 4.8.

crafted in myriad contexts – such as credit agreements, bond indentures, M&A agreements, intercreditor agreements, commercial leases, insurance contracts, and bankruptcy plans – have detailed (if not mind-numbing) provisions specifying the contracting parties' rights, remedies, and options in various scenarios. Most will never come to pass; others may, but a party might elect not to enforce or to forgo some or all of its rights (either formally, as in a forbearance agreement, or informally, such as by simple inaction). Refraining from enforcement does not render forgone rights void ab initio or strip them from a contract. In fact, the Merchant Agreements explicitly preserved for CapCall any rights it declined to enforce.[59] CapCall drafted the agreements and, in doing so, extended itself significant protections. CapCall cannot now simply disclaim those features to reframe the transactions as sales.

Third, the parties' course of performance also reflects a debtor-creditor relationship. The evidence at trial demonstrated that:

- The business actors often discussed the transactions in vernacular reserved for debtor-creditor relationships, such as "loans" with "terms" and "balances." Contemporaneous emails between Mr. Leak and Mr. Hatzenbeller are replete with references to and discussions of the parties' "loans" and economic arrangements (such as balances and terms) consistent with loans.[60] And recall from an earlier discussion that CapCall's financing statements labelled the Shoot the Moon entities as "***debtors***." This jargon reflected the parties' subjective understanding of their transactions. Indeed, Mr. Hatzenbeller specifically testified that he conceptualized the transactions as "notes" akin to the promissory notes he signed when obtaining a traditional bank loan.

- Mr. Hatzenbeller funded many payments to CapCall through the deposit account of an entity having no operations or relationship to CapCall. The account commingled receivables CapCall purportedly bought with other funds, including those used to operate the restaurants. Mr. Leak, acting on CapCall's behalf, knew about the commingling, expressed no

[59] *See id.* at p. 5 § 4.4.

[60] *See* Trial Exs. 127 (email subject "Loan"), 128 (Hatzenbeller requesting list of "the notes I have with you and the amount left on them"), 129 (Hatzenbeller asking, "Which loan are we going to pay off?"; Leak responding with "the balance on that one"), 136 (email subject "Loans" and Hatzenbeller requesting summary of "all the loans I have with you and the amounts owing on each"; later messages about refinancing the "balance" owed on one of the "loans"), 139 (Hatzenbeller requesting a "statement for the out standing [sic] loans with you"; Hatzenbeller and Leak then negotiating for a "six month term").

objection, and encouraged Mr. Hatzenbeller to structure the flow of funds however he preferred. Mr. Hatzenbeller testified that CapCall wanted only payment and communicated no interest in the source.

- The parties "stacked" or "rolled" funds from one transaction to the next. This practice committed a portion of the proceeds from a later transaction to satisfy the outstanding obligations of earlier transactions, effectively refinancing the earlier transactions.[61] This makes sense only in the context of a loan. Although theoretically possible, the transaction steps in the sale context would require the Shoot the Moon entities to rebuy future receivables previously sold to CapCall only to turn around and immediately resell the same receivables, and others, back to CapCall. Such circuitous behavior is nonsensical.

This evidence reveals a course of dealing deeply inconsistent with true sales of receivables. CapCall presented no countervailing evidence to the contrary. As such, the court concludes that the parties' actions show that they intended to transact via loans.

Specifically applying the Aicher and Fellerhoff factors to the discussion above, the court notes that three weigh heavily in favor of classifying the transactions as loans.[62] First, as contemplated in the first factor, CapCall retained a definite right of recourse against the Shoot the Moon entities and several other parties. Second, as the second factor contemplates, the Shoot the Moon entities

---

[61] In its post-trial submission CapCall asserts that there is insufficient evidence these "rolling" transactions actually occurred. *See* Suppl. Post Trial Br. 2-3, ECF No. 275. The court disagrees. First, as CapCall acknowledges, Mr. Hatzenbeller specifically testified that transactions with CapCall were rolled; this testimony was not rebutted by any other witness or challenged through cross-examination. Second, Mr. Hatzenbeller's testimony is corroborated by contemporaneous emails in which he and Mr. Leak are negotiating a "rolling" or "stacking" transaction. *See* Trial Ex. 129. Third, the absence of lump-sum payments in the Trustee's accounting of prepetition transfers does not prove that no "rolling" transactions happened – there is no reason why CapCall would need to advance 100% of the new money to the Shoot the Moon entity only to have the Shoot the Moon entity immediately pay some portion back to CapCall in satisfaction of the preexisting Merchant Agreement. Rather, as is typical in many debt refinancing transactions, CapCall could simply adjust the balances on its own books and transfer only the net amount of any new advance. In fact, this appears to be exactly what happened with the transaction Mr. Hatzenbeller and Mr. Leak were arranging. *See* Trial Exs. 109 at p.1 (new cash advance of nominal $175,000), 159 at p. bates stamped STM 004323 (July 2 credit to account of $136,541), 129 (Leak citing balance of preexisting agreement to be satisfied as $40,158 a couple days earlier, which would leave a net advance of approximately what was actually credited once the intervening days of ACH debits are subtracted from Leak's stated balance). In sum, the weight of the evidence supports a factual finding that the transactions to which Mr. Hatzenbeller testified occurred.

[62] Some of the factors do not tilt in either direction or are irrelevant. For example, since CapCall purportedly bought "future" receivables (i.e., payments made by customers who ate at the restaurants after the transactions closed), there were no account debtors who could be investigated by CapCall.

commingled funds from the accounts receivable with other funds and specifically those used to operate the restaurants, with CapCall's approval to boot. Finally, as contemplated by the eighth factor, the language contained in the agreements and the conduct of the parties reveal an apparent debtor-creditor, rather than seller-buyer, relationship. Considered in conjunction with the overall economic substance and risk allocation that connects the factors, the court concludes that the transactions are substantially similar to a loan.

While so concluding, the court acknowledges that the evidence is not entirely one-sided. The Merchant Agreements include lengthy provisions regarding how the central transaction "is not intended to be, nor shall it be construed as a loan" but instead is a purchase of receipts for an amount that "equals the fair market value of such [r]eceipts."[63] But this *ipse dixit* is hardly convincing; "[s]imply calling transactions 'sales' does not make them so" because "[l]abels cannot change the true nature of the underlying transactions."[64] In this case, the countervailing evidence reveals that the term "sale" in the agreements is nothing more than a conclusory and self-serving label. Perhaps a little more favorable to CapCall is case law in which courts found somewhat similar agreements to be sale transactions based on the inclusion of reconciliation provisions and the absence of fixed terms.[65] Here, at least some agreements include reconciliation provisions and none specify a fixed term. These aspects, however, do not outweigh the overwhelming other loan-like aspects of the transactions or the parties' dealings (including the express negotiation of de facto "terms" for some transactions). Finally, a few of the Aicher and Fellerhoff factors support CapCall's position to

---

63 Trial Ex. 105 at p. 3 § 1.9.

64 *Fireman's Fund Ins. v. Grover (In re Woodson Co.)*, 813 F.2d 266, 272 (9th Cir. 1987).

65 *See, e.g.*, *K9 Bytes, Inc. v. Arch Capital Funding, LLC*, 56 Misc. 3d 807, 817-18 (N.Y. Sup. Ct. 2017). The court finds unpersuasive CapCall's arguments and authorities regarding how transactions should be classified as sales when the buyer cannot "be assured of repayment, because its agreements are contingent on a merchant's success." *Id.* at 818. Many lenders are not "assured of repayment" if the borrower's business does not succeed. In countless chapter 11 and chapter 7 cases, unsecured and undersecured creditors have received cents on the dollar when a business they financed failed to blossom. In the context of a restaurant business such as Shoot the Moon, most of the value of the enterprise and the debtor's ability to generate liquidity for debt service depends on successful future operations. When operations are impacted – because the restaurant is no longer serving food that people want to eat, is unable to open due to governmental restrictions such as those occasioned by the COVID-19 situation, is impacted by broader economic or cultural shifts, or is affected by any of the many other events that can cause a deterioration in performance – many or all of the restaurant's creditors will likely suffer losses, particularly since food inventory and fixtures rarely have substantial residual liquidation value. The analysis should not focus on whether the counterparty is "assured of repayment" or depends "on a merchant's success," but instead on whether the counterparty's right to recovery is limited to a specific *res* of purchased assets. When the counterparty has a ***legal right*** to be paid in full by the business, the existence of that legal right would be indicative of a debtor-creditor relationship even if ***practical realization of that legal right*** is "contingent on a merchant's success" and hence not assured.

some extent. These include the absence of any provisions allowing the Shoot the Moon entities to repurchase the receivables as contemplated in factor five or permitting CapCall to alter the pricing terms as contemplated in factor six. It would be the rare case, though, when every factor points in the same direction. The applicable legal test requires a holistic approach keyed to specific facts and a weighing of factors. Here, the court has taken this approach and, after fully considering all the evidentiary support in CapCall's favor, concludes that it is comparatively insignificant and insufficient to overcome the determination the court reached above.

Montana Usury Claim

Now that the transactions are properly classified, the court can proceed to the Trustee's claim that the economic terms of certain loans expose CapCall to a usury penalty under Montana law. The Trustee limits this claim to the eleven transactions involving a Shoot the Moon LLC formed under Montana law. CapCall, in opposition, addresses little of the substance but strongly disputes that Montana law applies and urges application of New York law. Since New York lacks a usury statute analogous to Montana's, adopting the law of either state has drastic implications on the outcome of the Trustee's claim. As such, the court must resolve the choice-of-law question.

I. Choice of Law Analysis

In federal cases predicated on bankruptcy jurisdiction, courts in the Ninth Circuit apply the "federal" choice-of-law rules based on the Restatement (Second) of Conflict of Laws.[66]

Restatement section 187(2) sets forth a general rule for disputes involving contracts with two exceptions:

[66] *See, e.g.*, *First Cmty. Bank v. Gaughan (In re Miller)*, 853 F.3d 508, 515-16 (9th Cir. 2017). This approach is not used everywhere. *See PNC Bank v. Sterba (In re Sterba)*, 852 F.3d 1175, 1177 & 1177 n.1 (9th Cir. 2017) (noting that "[w]hen it comes to conflicts of law, bankruptcy is a bit of an odd duck" and highlighting a circuit split regarding which choice-of-law rules should apply).

> The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either
>
> > (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties choice, or
> >
> > (b) application of the law of the chosen state would be [1] contrary to a fundamental policy of a state which [2] has a materially greater interest than the chosen state in the determination of the particular issue and [3] which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.[67]

The Restatement commentary explains that contract law generally operates "to protect the justified expectations of the parties and to make it possible for them to foretell with accuracy what will be their rights and liabilities under the contract," but this predictability value is overcome when a fundamental policy of a state that would otherwise provide the applicable law is in play since judicial "regard must also be had for state interests and for state regulation."[68]

Before applying this framework, the court must consider the scope of its application. Broadly, CapCall urges the court to construe the arrangements as part of a single larger agreement rather than several discrete agreements. Based on this construction, CapCall recasts its relationship with the Shoot the Moon entities as one involving a "multistate transaction" since CapCall also transacted with entities formed and operating in Idaho and Washington. CapCall insists that this construction is most faithful to the predictability rules endorsed by the Restatement.[69] CapCall's position is flawed.

---

67 RESTATEMENT (SECOND) OF CONFLICT OF LAWS (Am. Law Inst. 1971) ("RESTATEMENT") § 187(2).

68 *Id.* § 187 cmts. e, g.

69 *See, e.g.*, *id.* § 187 cmt. e. ("Prime objectives of contract law are to protect the justified expectations of the parties and to make it possible for them to foretell with accuracy what will be their rights and liabilities under the contract. These objectives may best be attained in multistate transactions by letting the parties choose the law to govern the validity of the contract and the rights created thereby."); § 188 cmt. b. (highlighting "the fact that in multistate cases it is essential that the rules of decision promote mutually harmonious and beneficial relationships in the interdependent community, federal or international").

CapCall's argument is predicated on an inaccurate characterization of the arrangements – there was not one multistate transaction ***among*** all parties, but a series of eighteen separately documented, standalone transactions ***between*** CapCall and each applicable Shoot the Moon entity.[70] CapCall asserts that the court can disregard the separateness of the eighteen transactions for two reasons. First, CapCall suggests the Shoot the Moon entities should not be treated as distinct legal persons. The record, however, provides no evidence to justify disregarding the foundational boundaries separating entities. Although Mr. Hatzenbeller used a consolidated account to move money throughout the enterprise, he documented the flow of funds as intercompany loans. Further, there is no evidence of hopeless entanglement among the entities or of any creditor confusion.[71] Second, CapCall argues that the individual transactions should be collapsed into a single integrated deal. Again, the record does not support this theory. Although there is some loose relationship among the transactions (particularly those refinancing others), the documents clearly set forth discrete, self-contained transactions with integration clauses that cut against the consideration of external factors as CapCall proposes.[72] Any evidence suggesting stronger linkage lacks clarity and weight.[73] Unfortunately for CapCall's current litigation position, it chose not to structure these transactions as part of a single, larger agreement.[74] The court declines

---

[70] Case law demonstrates that the choice-of-law analysis should be performed on a contract-by-contract basis when a dispute involves multiple contracts that are related but nevertheless separate. *See, e.g.*, *Barnes Grp, Inc. v. C & C Prods., Inc*., 716 F.2d 1023, 1026-32 (4th Cir. 1983); *Discover Prop. & Cas. Ins. v. TETCO, Inc*., 2014 U.S. Dist. LEXIS 20306, at *15-17 (D. Conn. Feb. 19, 2014); *In re Titanium Dioxide Antitrust Litig*., 962 F. Supp. 2d 840, 862 (D. Md. 2013).

[71] *Cf. Alexander v. Compton (In re Bonham)*, 229 F.3d 750, 765-67 (9th Cir. 2000) (outlining factors that could support substantive consolidation of separate legal persons in bankruptcy).

[72] *See, e.g.*, Trial Ex. 105 at p. 5 § 4.8.

[73] For example, CapCall points to two letters Mr. Leak signed that reference a series of four transactions recurring every two weeks. *See* Trial Exs. 140-141. The purpose of these letters is unclear as they do not request any action by the putative recipients or explain the details of any intended "information purpose." In any event, it is unclear whether these letters were actually sent to anyone, the letters are extrinsic to written agreements containing integration clauses, and the letters are facially inaccurate when describing the transactions as being "between your account holder, Ken Hatzenbeller, and CapCall." Indeed, one of the letters appears nonsensical as it is addressed to "Stockman Bank Account Manager." *See* Trial Ex. 141. Mr. Hatzenbeller's unrebutted testimony is that the Shoot the Moon entities never had accounts at Stockman Bank. It is difficult to draw much of consequence from these two documents and they are certainly not a sufficient basis on which to justify collapsing eighteen separately documented transactions.

[74] There are many examples of transaction structures in which a single, backbone agreement is used to accommodate numerous individual transactions. Some exemplars include: revolving lines of credit, debt issuances in which a base indenture is coupled with supplemental indentures for specific issuances, commercial leasing in multiple locations subject to a master lease and individual location leases, derivative transactions using an ISDA master agreement and individual trade confirmations, law firm engagements utilizing a master retention agreement and separate addenda for each individual matter, and film distribution agreements whereby a uniform distribution agreement is supplemented with the details for individual films.

CapCall's invitation to construe the agreements in such a manner now and applies the Restatement's framework on a contract-by-contract basis.

The eleven agreements at issue all provide that New York law applies.[75] Thus, this provision controls unless a Restatement section 187(2) exception applies.[76] The first, under paragraph (a), does not. CapCall is based and operates in New York, which creates the necessary relationship and some reasonable basis for the choice-of-law clause. If Montana law is to apply, then, all three conjunctive factors found in paragraph (b) must favor application of that state's law. The court concludes that each factor supports application of Montana law based on the following analysis.

Factor one: Applying New York law is inimical to the fundamental policy animating Montana's usury law. A "fundamental" policy is one reflected by a substantive rule, rather than a mere legal formality, such as "in a statute which makes one or more kinds of contracts illegal or which is designed to protect a person against the oppressive use of superior bargaining power."[77] This is the very policy and purpose of Montana's usury statute. As the Montana Supreme Court highlighted, "[u]sury statutes protect borrowers who lack real bargaining power against overreaching by creditors" and advance an important "public policy in favor of protecting the debtor."[78] And, as mentioned, New York lacks an analogous statute. Thus, applying that state's law would circumvent Montana's protections entirely. As such, the first factor is satisfied.[79]

Factor two: Montana has a materially greater interest in the determination of this particular issue than does New York. The borrowers in these transactions were legal entities formed under and governed by Montana law, owned by individual Montana citizens, and operated by an individual Montana citizen

---

[75] *See, e.g.*, Trial Ex. 105 at p. 5 § 4.5.

[76] Although the court ultimately does not reach or decide this issue, the record contains evidence that could support a general invalidation of the New York choice-of-law provisions given the minimal bargaining leverage of Mr. Hatzenbeller and the "take-it-or-leave-it" basis on which the deals were offered to him. *See* RESTATEMENT § 187 cmt. b, illus. 3.

[77] *Id.* § 187 cmt. g.

[78] *Scarr v. Boyer*, 250 Mont. 248, 252 (1991).

[79] *See, e.g.*, *Kaneff v. Del. Title Loans, Inc*., 587 F.3d 616, 624 (3d Cir. 2009) (determining "that Pennsylvania's interest in the dispute, particularly its antipathy to high interest rates such as the 300.01 percent interest charged in the contract at issue, represents such a fundamental policy that we must apply Pennsylvania law"); *Fleetwood Servs., LLC v. Complete Bus. Sols. Grp., Inc.*, 374 F. Supp. 3d 361, 372 (E.D. Pa. 2019) (concluding that Texas usury law constituted a fundamental public policy of that state when applying Restatement section 187(2)(b)).

working from a Montana office. The only relevant link to New York is CapCall's place of business. This superficial connection generates little to no stake for New York in the outcome here. By contrast, among Montana's significant interests in regulating lending transactions involving its citizens is the harm to borrowers and collateral damage to other Montanans and the local economy when problematic transactions break bad. The underlying bankruptcy case here illustrates these interests well. As the evidence shows, the extremely high cost of the CapCall loans contributed to the Shoot the Moon entities' downward spiral. In turn, the failure of the businesses resulted in, among other things, financial losses for numerous Montana citizens.[80] As between the two states, Montana has a substantially greater interest in preventing lenders from circumventing its usury laws in transactions involving Montana borrowers.[81] Because of this materially greater interest, the second factor is satisfied.

Factor three: Under Restatement section 188, Montana law would control in the absence of an effective choice of law. Section 188(1) generally provides that "[t]he rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the" overarching choice-of-law principles in Restatement section 6.[82] When applying those overarching principles, Restatement section 188(2) illustrates relevant contacts for consideration: "(a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance, (d) the location of the subject matter of the contract, and (e) the domicile, residence, nationality, place of incorporation and place of business of the parties."[83] The "contacts are to be evaluated according

---

[80] *See, e.g.*, Trial Ex. 152 (listing creditors that will receive significantly less than recovery in full, including various Montana business and governmental entities). *Cf. Colorado v. W. Sky Fin., L.L.C.*, 845 F. Supp. 2d 1178, 1181 (D. Colo. 2011) (observing, in litigation about allegedly improper lending practices, how "[t]he impact of the allegedly excessive charges was felt in Colorado").

[81] This point is highlighted later in the Restatement. *See* RESTATEMENT § 188 cmt. c. ("So the state where a party to the contract is domiciled has an obvious interest in the application of its contract rule designed to protect that party against the unfair use of superior bargaining power."); *see also, e.g.*, *DJR Assocs., LLC v. Hammonds*, 241 F. Supp. 3d 1208, 1232 n.11 (N.D. Ala. 2017) ("[A]n operating principle the court must respect is that each state is entitled to determine its own policies, and no state may insist that its laws be applied within other states to the exclusion of the power of such other states to decide for themselves what is good policy for regulating economic relationships within their own borders."); *Ribbens Int'l, S.A. de C.V. v. Transp. Int'l Pool, Inc*., 47 F. Supp. 2d 1117, 1123 (C.D. Cal. 1999) (noting, during choice-of-law analysis, that "California, on the other hand, maintains a weighty and substantial interest in regulating commercial transactions that take place within its border").

[82] RESTATEMENT § 188(1).

[83] *Id.* § 188(2).

to their relative importance with respect to the particular issue."[84] The commentary further instructs that "the interest of a state in having its contract rule applied in the determination of a particular issue will depend upon the purpose sought to be achieved by that rule and upon the relation of the state to the transaction and the parties."[85] Finally, the section 188(2) "factors are not to be applied mechanistically but qualitatively (based on the nature of the contract) in deciding which state has the most significant relationship to the parties and the contract."[86]

A holistic and qualitative evaluation of the relevant contacts in this proceeding demonstrates that Montana has the most significant relationship to the transactions and parties. Specifically:

- Though negotiations occurred via telephone and internet, the signatures necessary to make the documents binding always physically occurred in Montana.[87] No corresponding act occurred in New York.

- Montana was also the hub of performance. CapCall processed the agreed upon funding to fulfill its role while the Shoot the Moon entities fulfilled their primary role by repaying the "Specified Daily Amount." As Mr. Leak encouraged as CapCall's representative, both sides channeled the monetary performance through a Montana entity (Shoot the Moon Grizzly) using its account at a Montana bank (Prairie Mountain Bank).[88] Other than repayment, the agreements required the Shoot the Moon entities to comply with various negative covenants and other restrictions. These restrictions constrained how Mr. Hatzenbeller could operate the restaurants located in Montana from his Great Falls office.

- The subject matter of the agreements is also largely concentrated in Montana. The cash advances were intended to fund Montana entities, operating restaurants in Montana, managed solely by a Montana resident,

---

[84] *Id.*

[85] *Id.* cmt. c.

[86] *Bixler v. Next Fin. Grp., Inc*., 858 F. Supp. 2d 1136, 1143 (D. Mont. 2012).

[87] RESTATEMENT § 188 cmt. e. (explaining that "the place of contracting is the place where occurred the last act necessary . . . to give the contract binding effect" and that the place of negotiation "is of less importance when there is no one single place of negotiation and agreement, as, for example, when the parties do not meet but rather conduct their negotiations from separate states by mail or telephone").

[88] *See, e.g.*, Trial Ex. 130.

from an office located in Montana, and utilizing accounts at a Montana bank. The ineluctable connection to Montana is evident on the face of each Merchant Agreement CapCall prepared as well as the UCC-1 financing statements CapCall filed with the Montana Secretary of State.[89]

- Finally, aside from CapCall, all players domiciled, resided, incorporated, and operated in Montana. CapCall is a Delaware LLC with a principal place of business in New York. The relevant Shoot the Moon entities all organized and conducted business in Montana – the same locale where Mr. Hatzenbeller resided and operated the businesses. Likewise, the personal guarantors and signatories of confessions of judgment all resided in Montana.

Montana's contacts permeate every aspect of the relevant agreements while any contacts attributable elsewhere, including New York, are de minimis. As such, the court concludes that Montana has, by a wide margin, the most significant relationship to the transactions and parties as contemplated by Restatement section 188(1). This conclusion satisfies the third factor of section 187(2)(b). Since all three criteria are satisfied, Montana law applies to the Trustee's claim concerning the eleven agreements with Montana entities.[90]

II. Application of Montana Law

Montana enacted statutes limiting the interest lenders (other than "regulated lenders") may charge.[91] Accordingly, contracting "[p]arties may agree in writing to the payment of any rate of interest that does not exceed the greater of 15% or an amount that is 6 percentage points per year above the prime rate published by the federal reserve system in its statistical release H.15 Selected Interest Rates for bank

---

[89] *See* Trial Exs. 102 at p. 1, 103 at p. 1, 104 at p. 1, 106 at p. 1, 109 at p. 1, 110 at p. 1, 111 at p. 1, 113 at p. 1, 115 at p. 1 (note that this agreement erroneously identifies the particular Shoot the Moon entity as being organized in Idaho despite CapCall contracting with that entity and correctly identifying it as a Montana entity twice before, *see* Trial Exs. 103, 104), 116 at p. 1, 118 at p. 1, 204, 205, 209, 210, 211.

[90] *Cf. Casarotto v. Lombardi*, 268 Mont. 369, 373-75 (1994) (applying Restatement sections 187(2)(b) and 188 and concluding that Montana law applied to franchise dispute when franchisee restaurant would be operated in Great Falls by Great Falls residents and the primary connection to a different state was that the franchisor "was incorporated in that state and apparently had its home office in that state at the time of the parties' agreement"), *rev'd on other grounds sub nom. Doctor's Assocs. Inc. v. Casarotto*, 517 U.S. 681 (1995).

[91] *See* Mont. Code Ann. § 31-1-111 (defining "regulated lender"). CapCall does not contend it qualifies as a "regulated lender" and the record contains no evidence supporting such qualification.

prime loans dated 3 business days prior to the execution of the agreement."[92] Here, there appears to be no dispute that the greater of the two amounts is 15%.

When a lender has taken, received, reserved, or charged interest greater than legally permitted, the statutory penalty is "forfeiture of a sum double the amount of interest" charged and an express remedy for the borrower or its successor to recover "a sum double the amount of interest paid."[93] The lender "need not know that the particular interest rate is usurious and illegal" but merely needs to consummate a transaction charging an interest rate that is usurious in fact.[94] "[B]efore any suit may be brought to recover the usurious interest, the party bringing suit" must make "written demand for return of the interest paid."[95]

The Trustee made the required written demand in relation to the eleven loans here.[96] The Trustee's expert witness, Ms. Manos, performed a detailed analysis of the relevant transactions to calculate (i) the effective rate of interest CapCall charged and (ii) the applicable usury penalty under Montana law.[97] CapCall did not challenge the details of the calculations or introduce evidence or analysis supporting alternative amounts. Based on the lack of objection, Ms. Manos' credibility, and an independent review of her analysis, the court finds that the calculations appropriately quantify the interest rates applicable to the specified transactions and the resulting penalty.[98] Additionally, based on the parties' relative sophistication and the overall context of the transactions, specifically CapCall's vast experience transacting with merchants and its exclusive control over the legal documentation, the court concludes that there is no equitable consideration

---

92 *Id.* § 31-1-107(1).

93 *See id.* § 31-1-108(1), (2).

94 *Scarr*, 250 Mont. at 253. *See also Bowden v. Gabel*, 105 Mont. 477, 477 (1937).

95 Mont. Code Ann. § 31-1-108(2).

96 *See* Trial Ex. 146.

97 *See* Trial Ex. 145. Although CapCall did not make any argument regarding the special usury rule in Restatement section 203, the court notes that the effective interest rates Ms. Manos calculated (between 82.7% at the low end and 175.13% at the high end) are many multiples of the permissible 15% and therefore are "greatly in excess of the rate permitted by the general usury law of the state of the otherwise applicable law under the rule of § 188." RESTATEMENT § 203.

98 Ms. Manos' approach to calculating the applicable interest rates squares with the broad statutory definition of interest as any "compensation allowed by law or fixed by the parties for the use or forbearance or detention of money and includes loan origination fees, points, and prepaid finance charges, as defined in 12 CFR 226.2." Mont. Code Ann. § 31-1-104. *See also, e.g.*, *Brummer v. TMG Life Ins. Co. (In re Brummer)*, 147 B.R. 552, 558-59 (Bankr. D. Mont. 1992) (discussing how amounts are treated as interest under this statute "[r]egardless of the label used" if "the substance of the transaction" is to compensate the lender for an advance of money).

weighing against enforcing the full penalty.[99] To the contrary, straightforward application of Montana law advances the statutory purpose of "protect[ing] borrowers who lack real bargaining power against overreaching by creditors."[100] Thus, the court imposes the statutory penalty in its entirety.

III. Judgment

Based on the above analysis, the Trustee is entitled to judgment on his usury claim against CapCall in the amount of $1,216,685.

Preference Claim

According to the Trustee's second claim, CapCall received funds within the 90 days immediately preceding the petition date on account of its loans to the Shoot the Moon entities. The Trustee asserts these transfers are avoidable and recoverable pursuant to Bankruptcy Code sections 547 and 550. Preference actions under the Bankruptcy Code are intended to deter the proverbial "race to courthouse" or other collection activity against an insolvent debtor and to further the prime bankruptcy policy of equality of distribution among similarly situated creditors.[101] Indeed, the authority "to avoid preferential transfers and to recover the transferred property . . . has been a core aspect of the administration of bankrupt estates since at least the 18th century."[102]

I. Statutory Preference Elements

To prevail on his preference claim, the Trustee has the burden of proving, by a preponderance of the evidence,[103] the following seven elements:[104]

---

99 *Cf. In re Dale*, 2021 Bankr. LEXIS 348, at *8-10 (Bankr. D. Mont. Feb. 12, 2021) (reducing usury penalty based on equitable considerations including the document drafting history and the parties' relative business experience).

100 *Scarr*, 250 Mont. at 252.

101 *See, e.g.*, *Union Bank v. Wolas*, 502 U.S. 151, 160-61 (1991).

102 *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 372 (2006).

103 *See, e.g.*, 11 U.S.C. § 547(g); *Batlan v. TransAm. Com. Fin. Corp. (In re Smith's Home Furnishings, Inc.)*, 265 F.3d 959, 967 (9th Cir. 2001).

104 The Small Business Reorganization Act of 2019 amended section 547(b) to require "reasonable due diligence in the circumstances of the case and taking into account a party's known or reasonably knowable affirmative defenses under subsection (c)" as part of a trustee's prima facie case. The legislation was not effective until after the relevant time period here and was not retroactive regarding pending preference claims.

(1) a transfer

(2) of the debtor's property

(3) to or for the benefit of a creditor

(4) for or on account of an antecedent debt

(5) made while the debtor was insolvent

(6) within 90 days of the filing of the petition in bankruptcy

(7) that enables the creditor to receive more than he would under a Chapter 7 liquidation.[105]

Based on the totality of the record established at trial, the court determines that the Trustee has sustained this burden and, therefore, is entitled to avoid and recover the challenged transfers from CapCall, subject to one caveat discussed below. Following the elements above in turn, the record demonstrates that:

First, transfers in the aggregate of $1,129,071.00 were made to or for the benefit of CapCall.[106] CapCall has offered no evidence or allegation otherwise.

Second, the $1,129,071 transferred was the debtor's property. While CapCall does not dispute that the funds belonged to the various Shoot the Moon entities upon transfer, it does dispute that these funds belonged to the debtor. The argument is that the several entities merged on the eve of bankruptcy to form a single entity that became the debtor, hence the funds could not have belonged to the "debtor" because it did not exist at the relevant date. Bankruptcy Judge Terry L. Myers rejected an identical argument made in one of the several related adversary proceedings.[107] The court agrees with and adopts Judge Myers' analysis regarding the issue.[108] The rationale is consistent with precedent giving a broad

---

[105] *United States v. Daniel (In re R & T Roofing Structures & Com. Framing)*, 887 F.2d 981, 984 (9th Cir. 1989).

[106] *See* Trial Ex. 144. Ms. Manos testified that she prepared this document after evaluating the underlying bank statements. *See* Trial Exs. 158-160.

[107] *See Foster v. IOU Cent., Inc. (In re Shoot the Moon, LLC)*, 2020 Bankr. LEXIS 1374, at *13-16, *26-29 (Bankr. D. Mont. May 21, 2020).

[108] The court has a different perspective regarding another aspect of Judge Myers' opinion, which deals with an argument that CapCall generally deploys based on anti-assignment provisions in the Merchant Agreements.

construction to the scope of property in the bankruptcy context.[109] Moreover, "'property of the debtor' subject to the preferential transfer provision is best understood as that property that would have been part of the estate had it not been transferred before the commencement of bankruptcy proceedings."[110] In short, if the funds were not transferred to CapCall, they would have remained property of the Shoot the Moon entities before the merger, then property of the merged entity, and finally property of the estate. These transfers ultimately diminished the Shoot the Moon bankruptcy estate, which means they were transfers of the debtor's property for purposes of Bankruptcy Code section 547.[111]

Third, the $1,129,071 in transfers were to or for the benefit of CapCall in its capacity as a "creditor."[112]

Fourth, the transferred funds were used to satisfy the prepetition loan obligations already discussed. Thus, the transfers were for or on account of an antecedent debt.[113]

See, e.g., Trial Ex. 105 at p. 5 § 4.2 (precluding the Shoot the Moon entity "from transferring or assigning this Agreement, or any of its rights or obligations hereunder, without [CapCall]'s written consent"). Judge Myers concluded that "rights are generally assignable unless the contract provides otherwise or an exception applies" and "the right to avoid a preferential transfer or challenge allegedly usurious interest rates does not fall into the enumerated exceptions." *See* 2020 Bankr. LEXIS 1374, at *12. The right to avoid a preference, however, was never one the debtor enjoyed – preference actions are creatures of the Bankruptcy Code that exist only postpetition for the benefit of the estate, not the debtor, and hence are unaffected by prepetition acts of the debtor. *See, e.g.*, *Cont'l Ins. v. Thorpe Insulation Co. (In re Thorpe Insulation Co.)*, 671 F.3d 1011, 1026 (9th Cir. 2012) (explaining how "purported prepetition waivers of the protections of the Bankruptcy Code" are generally unenforceable); *Bakst v. Bank Leumi, USA (In re D.I.T., Inc.)*, 575 B.R. 534, 536 (Bankr. S.D. Fla. 2017) (describing how various nonbankruptcy defenses, such as *in pari delicto*, "may not be raised in response to an action brought by the estate representative under the provisions of the Bankruptcy Code itself, including fraudulent transfer and preference actions"). Additionally, neither a preference claim nor a Montana usury claim is a right arising under or pursuant to the Merchant Agreements. Rather, both rights are the product of statutory regimes that exist apart from the agreements. Because the Trustee is not seeking to assert any of the Shoot the Moon entities' "rights or obligations hereunder," the anti-assignment provisions in the Merchant Agreements are irrelevant to the preference and usury claims.

[109] *See, e.g.*, *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 204-05 (1983).

[110] *Begier v. IRS*, 496 U.S. 53, 58 (1990). *See also, e.g.*, *United States v. Sims (In re Feiler)*, 218 F.3d 948, 953 (9th Cir. 2000) (explaining that avoidance actions allow "a trustee to avoid transfers of property that *should have been* the property of the estate, but for an improper transfer"); *Mardick v. Stover*, 392 F.2d 561, 565 (9th Cir. 1968) (discussing how "the concept of voidable preference" is intended to capture "property of any bankrupt which would, but for transfer, have constituted part of his estate").

[111] *See, e.g.*, *Adams v. Anderson (In re Superior Stamp & Coin Co.)*, 223 F.3d 1004, 1007 (9th Cir. 2000).

[112] *See* 11 U.S.C. § 101(5)(A), (10)(A) (defining the terms "claim" and "creditor").

[113] *See id.* § 101(12) (defining the term "debt").

Fifth, the transfers were made while the Shoot the Moon entities were insolvent. As an initial matter, the Trustee enjoys a presumption of insolvency[114] and CapCall introduced no evidence or argument to rebut the presumption. Aside from this, the Trustee presented evidence of insolvency. Ms. Manos testified that the entities were insolvent, both individually and collectively, and she offered documents showing the work she used to arrive at this conclusion.[115] Mr. Hatzenbeller also testified that the Shoot the Moon enterprise had effectively become trapped in a death spiral by no later than the summer of 2015.

Sixth, all the challenged transfers were made within 90 days of the petition date. The bankruptcy case was filed on October 21, 2015, and Ms. Manos' calculations are specifically limited to payments within the previous 90 days.[116]

Seventh, the transfers enabled CapCall to receive more than it would have in a chapter 7 liquidation. This final inquiry is "sometimes referred to as the 'greater amount' test [and] requires the court to construct a hypothetical chapter 7 case and determine what the creditor would have received if the case had proceeded under chapter 7."[117] In this case, the scenario is something less than hypothetical because the Trustee actually liquidated most of the bankruptcy estate property in the same manner a hypothetical chapter 7 trustee would proceed. Nevertheless, the court will embark on the complete exercise.

In a hypothetical chapter 7 case, the funds transferred to CapCall would have instead become property of the chapter 7 estate subject to the security interests of CapCall that are junior to other security interests in the same assets. A chapter 7 trustee might seek to use this cash collateral to operate the restaurants for a limited period to preserve assets.[118] The chapter 7 trustee then would try to do what the Trustee actually did here – reduce the business assets to cash via a section 363 sale.[119] The hypothetical sale could not have obtained a greater net purchase price than the Trustee's actual sale and likely would have obtained less. The chapter 7 trustee thus would be left with, at best, the same sale proceeds and the cash that counterfactually was not transferred to CapCall. As with the present case, this

---

[114] *See id.* § 547(f).

[115] *See* Trial Ex. 157.

[116] *See* Trial Ex. 144.

[117] *Alvarado v. Walsh (In re LCO Enters.)*, 12 F.3d 938, 941 (9th Cir. 1993).

[118] *See* 11 U.S.C. § 721.

[119] *See id.* § 704(a)(1).

amount would be insufficient to satisfy secured claims senior to CapCall.[120] CapCall therefore would have only a general unsecured claim,[121] which would generate a limited, if any, distribution from the chapter 7 estate. As Ms. Manos testified at trial, then, the prepetition transfers to CapCall enabled CapCall to recover significantly more than CapCall would have received in a hypothetical chapter 7 liquidation and the "greater amount" test is satisfied.[122]

In its post-trial submission, CapCall offers the following arguments regarding the "greater amount" test:

> CapCall's claims in a hypothetical Chapter 7 would have resulted in an enforceable lien both at the time of filing said petition for Chapter 7 protection as well as during the pendency of the case administration. Specifically, CapCall would have had a lien on the debtor's accounts at the time of filing. The extent to which there were other creditors that similarly had liens does not affect the extent to which the lien would be legally enforceable. Further, the primary asset secured by CapCall's lien would be not just the accounts of the debtor but the *future* receivables as well and their proceeds as liquidated.[123]

These points ignore fundamentals of the Bankruptcy Code. The "extent to which there were other creditors that similarly had liens" on the same collateral certainly ***does*** "affect the extent to which the lien would be legally enforceable" under Bankruptcy Code section 506. This section limits a secured claim "to the extent of the value of such creditor's interest in the estate's interest in such property" and bifurcates the remainder as "an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim."[124] Thus, if liens senior to CapCall's exceed the value of the collateral, then CapCall is left with an unsecured claim (because the value of its junior, out-of-the-money interest

---

120 *See* Trial Ex. 152 (column for claims that were "Secured Converted to Unsecured after Sale Closure," which include deficiency claim amounts significantly in excess of the aggregate amount of the CapCall transfers).

121 *See* 11 U.S.C. § 506(a).

122 *See, e.g.*, *Am. Honda Fin. Corp. v. A. Angelle, Inc. (In re A. Angelle, Inc.)*, 230 B.R. 287, 300 (Bankr. W.D. La. 1998) (concluding that greater amount test was satisfied when the transferee "did not enjoy a senior secured position with respect to [the collateral], nor to the proceeds resulting from the sale thereof, and, accordingly, was not fully secured with respect to that transfer").

123 Suppl. Post Trial Br. 8, ECF No. 275.

124 11 U.S.C. § 506(a).

is $0) and no enforceable lien.[125] Further, CapCall's security interest regarding future receivables not existing on the petition date terminates under Bankruptcy Code section 552 insofar as those future receivables are "property acquired by the estate or by the debtor after the commencement of the case" but not "proceeds, products, offspring, or profits" of property in which CapCall had a security interest and which was extant on the petition date.[126] And, even absent section 552, CapCall's lien would still be junior to senior, but undersecured, lienholders and CapCall would be back where it started: with an unsecured claim and an unenforceable lien. Despite CapCall's efforts, it cannot spoil the Bankruptcy Code fruits growing from the seed of senior-yet-undersecured liens on the collateral granted to secure the Shoot the Moon entities' obligations to CapCall.[127]

II. Recovery Limitations

Although the Trustee prevails on the preference claim under Bankruptcy Code section 547(b), he is "entitled to only a single satisfaction" in an avoidance action.[128] Consistent with this mandate, the court should eliminate any overlap between recovery on the claim here and recovery on the usury claim above.[129] Some preferential transfers include interest CapCall must return because of the judgment on the usury claim. The Trustee could obtain more than a single recovery if CapCall is required to return the same money to satisfy each judgment separately. Therefore, the Trustee is entitled to a judgment in the full amount of the preferential transfers subject to a reduction on a dollar-for-dollar basis equal to any imputed interest included within the preferential payments, but only to the

---

125 *See id.* § 506(d).

126 *See id.* § 552(a)-(b)(1); *see also, e.g.*, *Fin. Oversight & Mgmt. Bd. for P.R. v. Andalusian Glob. Designated Activity Co. (In re Fin. Oversight & Mgmt. Bd. for P.R.)*, 948 F.3d 457, 466-72 (1st Cir.), *cert. denied*, 141 S. Ct. 844 (2020); *Sims v. Jamison*, 67 F.2d 409, 411 (9th Cir. 1933).

127 It bears noting that CapCall could have avoided the position in which it now finds itself. Mr. Marmott testified that he is familiar with the operation of UCC-1 financing statements and that it is standard practice in the industry for merchant cash advance parties to file such financing statements. If it is not industry practice to perform a precautionary search for other financing statements before making a cash advance, it certainly should be. Had CapCall performed such a search, CapCall likely would have realized that there were preexisting lenders with first-in-time financing statements encumbering all assets of the relevant Shoot the Moon entities, including their accounts receivable, which may have deterred CapCall from engaging in the transactions.

128 11 U.S.C. § 550(d).

129 *See, e.g.*, *Samson v. W. Cap. Partners, LLC (In re Blixseth)*, 489 B.R. 154, 202 (Bankr. D. Mont. 2013) (describing similar issue when there was an overlap between amounts recoverable based on fraudulent transfer theory and amounts recoverable under the Montana usury statute), *aff'd*, 514 B.R. 871 (D. Mont. 2014), *aff'd in part, rev'd in part*, 679 F. App'x 611 (9th Cir. 2017) (the basis for reversal related to a totally separate issue).

extent CapCall actually satisfies in full its liability to the Trustee under the Montana usury statute.

III. Judgment

Subject to the judgment-reduction provision above, the Trustee is entitled to avoidance and recovery of preferential transfers totaling $1,129,071.

Other Issues

The parties raise a handful of other claims and issues requiring attention.

I. CapCall's Claims

After the petition date, credit card payments continued to be processed from business operations. CapCall asserts ownership of the funds based on its purported purchase of the receivables. The Trustee received and utilized a portion of those funds, and the balance is held in the segregated account mentioned previously. CapCall seeks (i) a monetary judgment against the Trustee for conversion of the portion of the funds the Trustee received and (ii) a declaratory judgment that the remaining balance held in the segregated account belongs to CapCall. The court effectively disposed of these claims upon determining that CapCall did not purchase the receivables but extended loans collateralized by the assets – loans that are ultimately unsecured for the reasons described above.[130] Because CapCall

[130] In its post-trial submission, CapCall contends that "there are no claims either pleaded or proofs offered toward claims of lien stripping under 11 U.S.C. § 506(d)." Suppl. Post Trial Br. 7, ECF No. 275. Regarding the former point, CapCall is correct that the Trustee did not plead a formal count under Bankruptcy Code section 506(d). It is unclear that such formal pleading is necessary, however; section 506(d) by its terms is self-operative when it declares that that a lien falling within its scope "is void" as opposed to being potentially "voidable" through litigation. *Compare* 11 U.S.C. § 506(d), *with, e.g.*, *id.* §§ 544(a)-(b)(1), 545, 547(b), 548(a)-(c), 549(a); *see also, e.g.*, *id.* § 551 (clearly differentiating between a transfer that "is avoided" under various sections and "any lien void under section 506(d)"); *Bank of N.Y. Mellon v. Enchantment at Sunset Bay Condo. Ass'n*, 2 F.4th 1229, 1235-37 (9th Cir. 2021) (VanDyke, J., concurring) (tracing historical distinction between the separate concepts of "void" and "voidable" in the context of the automatic stay; noting that "[i]f a transaction is void, it is null—it is as if it never existed"). In any event, the Trustee's position throughout this litigation has been that CapCall's potential collateral is unencumbered property of the estate, which necessarily challenges any lien that CapCall asserts. *See, e.g.*, Def.'s Countercl. 11 ¶ 45, ECF No. 17; Final Pretrial Order 8-9, 24, ECF No. 260. Regarding the latter point, CapCall is incorrect that there were no "proofs offered" in support of lien-stripping – the Trustee introduced clear evidence, which CapCall failed to rebut, demonstrating the existence of senior liens on all of CapCall's collateral and that those senior liens are undersecured, which is all the proof necessary to leave CapCall with no allowable secured claim under Bankruptcy Code section 506(a) and hence only void liens under section 506(d).

lacks an ownership or enforceable security interest in the receivables, these claims are nonstarters and the Trustee is entitled to the remaining segregated account.[131]

II. CapCall's General Unsecured Claim: Allowance & Subordination

Because CapCall is obligated to the bankruptcy estate on the preference claim, CapCall is not entitled to payment on its proof of claim until it has satisfied the judgment set forth herein.[132] Thus, CapCall's claim is presently disallowed. CapCall may file an amended proof of claim, within 30 days after satisfying the judgment related to the preference claim, detailing any additional amounts that CapCall asserts under Bankruptcy Code section 502(h). The Trustee must object within 60 days or CapCall's amended proof of claim will constitute CapCall's allowed general unsecured claim for all purposes in the bankruptcy case.[133]

III. Attorneys' Fees and Costs

The Trustee asserts a right to an award of attorneys' fees against CapCall pursuant to Montana's reciprocal fee statute, which makes unilateral fee provisions bilateral regarding "any action on the contract" and entitles the prevailing party in

---

[131] Adding to these considerations, CapCall is also bound by the terms of the confirmed plan providing that "[a]ny creditor with a lien that no longer has any value will become a general unsecured creditor." *See In re Shoot the Moon, LLC*, No. 2:15-bk-60979-WLH (Bankr. D. Mont.), Plan of Liquidation § 3.9, ECF No. 1056; *see also id.* § 1.0 (advising parties to carefully review the disclosure statement and evaluate "the impact of the plan upon your claims or security interests" (all-caps font removed)). CapCall received notice of the plan and had participated in the Shoot the Moon bankruptcy (including through the stipulation regarding the segregated funds and by filing a proof of claim) and thus CapCall is bound by the plan as well as by Bankruptcy Code section 1141(c)'s generalized free-and-clear provision. *See* 11 U.S.C. § 1141(c) (providing that, subject to certain inapplicable exceptions, "except as otherwise provided in the plan or in the order confirming the plan, after confirmation of a plan, the property dealt with by the plan is free and clear of all claims and interests of creditors, equity security holders, and of general partners in the debtor"). The segregated account is "dealt with" in section 2.15 of the confirmed plan, which transfers "all remaining assets of the Estate" to the STM Liquidating Trust. *See also* Trial Ex. 155 § 2.2. Given the terms of the confirmed plan and CapCall's participation in the bankruptcy case, this is not a context where the "ride through" doctrine has any application. *See, e.g.*, *Acceptance Loan Co. v. S. White Transp., Inc. (In re S. White Transp., Inc.)*, 725 F.3d 494, 496 (5th Cir. 2013); *In re Penrod*, 50 F.3d 459, 461-64 (7th Cir. 1995). The unpublished case CapCall cites regarding the "ride through" doctrine is distinguishable because that litigation arose from a chapter 7 case in which there was no plan and no role for section 1141(c). *See Nagata v. HFS Fed. Credit Union (In re Nagata)*, 2006 Bankr. LEXIS 1634, at *2, *6-7 (Bankr. D. Haw. July 20, 2006).

[132] *See* 11 U.S.C. § 502(d).

[133] The Trustee argued in post-trial briefing that the court should equitably subordinate all of CapCall's claims pursuant to Bankruptcy Code section 510(c). *See* Trustee's Post-Trial Br. 13-16, ECF No. 274. The court need not reach the details of this theory because counsel withdrew the new claim during closing argument and acknowledged that the issue was not raised before trial. *See, e.g.*, *Greenstar, LLC v. Heller*, 934 F. Supp. 2d 672, 696 (D. Del. 2013).

such an action "to recover reasonable attorney fees from the losing party."[134] The eleven agreements subject to Montana law each create an express right for CapCall to recover court costs and attorneys' fees associated with CapCall's enforcement of its broadly-defined rights and remedies.[135] Thus, the court must assess whether these proceedings involve an action "on the contract."[136]

i. This Litigation Arises From the Merchant Agreements

In answering such questions, Montana courts apply the concept broadly and award reciprocal fees in varied contexts even when a contract is successfully attacked.[137] This broad approach is consistent with decisions of the Ninth Circuit Court of Appeals applying similar reciprocal fee statutes of other states and concluding that actions are "on a contract" when the litigation generally "involves" that contract or a party's efforts "to enforce, or avoid enforcement of, the provisions of the contract."[138] That the litigation arises in a bankruptcy context, involves some bankruptcy issues, or perhaps is even largely premised on a dispute about the Bankruptcy Code's operation does not affect whether an action is on the contract.[139] Rather, the focus should be on the role and import of the contract in the litigation as well as whether the losing party "*could have* sought fees under the contract" had it prevailed.[140]

---

[134] Mont. Code Ann. § 28-3-704(1). As with the Montana usury statute, the policy purposes served by Montana's reciprocal fee statute are expansive and grounded in protecting parties with inferior bargaining power from contractual overreaching, which means the fee statute likewise represents a fundamental policy of the state for purposes of any choice-of-law analysis. *See, e.g.*, *Medcorp Int'l, L.L.C. v. Leslie*, 1998 U.S. App. LEXIS 21714, at *14 (9th Cir. Sept. 3, 1998).

[135] *See* Trial Exs. 102 at p. 5 §§ 3.2-3.3, 103 at p. 5 §§ 3.2-3.3, 104 at p. 5 §§ 3.2-3.3, 106 at p. 5 §§ 3.2-3.3, 109 at p. 5 §§ 3.2-3.3, 110 at p. 5 §§ 3.2-3.3, 111 at p. 5 §§ 3.2-3.3, 113 at p. 5 §§ 3.2-3.3, 115 at p. 5 §§ 3.2-3.3, 116 at p. 5 §§ 3.2-3.3, 118 at p. 2 §§ 3.2-3.3.

[136] This reciprocal right is one arising under Montana statute, not under the Merchant Agreements themselves. As such, the anti-assignment provisions in the Merchant Agreements are not violated by their own terms and do not bear on the Trustee's ability to assert a claim to reciprocal attorneys' fees as successor to the applicable Shoot the Moon entities. *See* note 108, *supra*.

[137] *See, e.g.*, *Gandy v. Eschler*, 261 Mont. 355, 360-61 (1993); *Carey v. Wallner*, 223 Mont. 260, 267 (1986); *Preston v. McDonnell*, 203 Mont. 64, 68 (1983); *Bartmess v. Bourassa*, 196 Mont. 231, 234 (1982); *see also generally Dickman v. Ford New Holland*, 1993 U.S. App. LEXIS 28731, at *6-7 (9th Cir. Oct. 25, 1993) (describing how "the Montana Supreme Court has construed" fee-shifting provisions such as section 28-3-704 "very liberally").

[138] *Penrod v. AmeriCredit Fin. Servs. (In re Penrod)*, 802 F.3d 1084, 1088 (9th Cir. 2015). *See also, e.g.*, *Heritage Ford v. Baroff (In re Baroff)*, 105 F.3d 439, 442-43 (9th Cir. 1997).

[139] *See In re Penrod*, 802 F.3d at 1088-89.

[140] *See id.* at 1090.

The court concludes that the following aspects of this adversary proceeding constitute an "action on the contract" for purposes of Montana's fee-shifting statute:

- **True sales vs. disguised loans, conversion, and segregated funds**. The parties' dispute regarding these matters stems entirely from CapCall's efforts to enforce provisions of the Merchant Agreements based on its interpretation of those agreements. As the court's extensive earlier discussion demonstrates, resolution of the dispute requires significant review and interpretation of numerous aspects of the agreements and related documents.

- **Choice-of-law and usury disputes**. The genesis of both issues is again the Merchant Agreements. To reach the usury claim, the court needed to resolve two threshold questions: first, whether the transactions amounted to loans or sales and, second, whether New York or Montana law applies. Again, these issues cannot be resolved without closely considering the substance of the Merchant Agreements. Once resolved, the next step required the court to examine the payment obligations under the agreements to determine the imputed interest rates for the transactions, as Ms. Manos did during her expert testimony.

- **Preference claim**. As Bankruptcy Judge Charles Novack explained in the context of California's similar reciprocal fee statute, "[a] preference action is premised on an 'antecedent debt' (i.e. a contractual obligation) and payments being made on that debt (which payments the Trustee sought to avoid)."[141] As in Judge Novack's case, resolution of the preference claim here required consideration of the Merchant Agreements and related documents and, of course, determination whether CapCall was a creditor or a purchaser.

The broad fee provisions in sections 3.2 and 3.3 of the agreements would entitle CapCall to attorneys' fees upon prevailing in the adversary proceeding. CapCall has in fact sought such fees. Therefore, CapCall recognizes that this litigation arises from the Merchant Agreements and triggers their fee provisions.

[141] *In re Mac-Go Corp*., 541 B.R. 706, 715 (Bankr. N.D. Cal. 2015).

ii. Fee Award

An award of attorneys' fees under Montana Code section 28-3-704 must be "reasonable." The determination of a reasonable fee amount is committed to the trial court's discretion.[142] The Trustee argues that the court should key an award to the contingency-fee arrangement with his counsel and "award attorney's fees in the amount of 40% of the gross sum of any judgment entered in this matter."[143] When fixing the amount of a reasonable fee, the trial court may consider but "is not bound [by] a contingent fee agreement."[144] Rather, the overarching inquiry must incorporate the typical factors Montana courts use to determine a reasonable award.[145]

Here, many factors support a substantial award for the Trustee. This litigation has been pending for four years and involved significant legal work, including discovery, several rounds of motion practice, a formal mediation and other settlement efforts, a multiday trial, and post-trial briefing and argument. The amount of money at stake is substantial and the issues are largely binary, which creates a material risk of no recovery for the Trustee's counsel. As this opinion evinces, the issues involved in this case are complicated and highly factual.[146] Moreover, the litigation has been hard-fought by competent lawyers zealously advocating for CapCall (including, at one point, lawyers with a national practice based in New York, as well as several experienced and reputable Montana lawyers). To the best of the court's knowledge, the Trustee counsel have a fine

---

142 *See, e.g.*, *Transaction Network v. Wellington Techs*., 301 Mont. 212, 221 (2000); *Majers v. Shining Mountains*, 230 Mont. 373, 380 (1988).

143 Trustee's Post-Trial Br. 13, ECF No. 274. Pursuant to Federal Rule of Evidence 201(c)(1) & (d), the court takes judicial notice of the fee agreement containing the 40% contingency amount, which was filed and approved in the underlying bankruptcy case. *See In re Shoot the Moon, LLC*, No. 2:15-bk-60979-WLH (Bankr. D. Mont.), ECF Nos. 1052, 1072.

144 *Weinberg v. Farmers State Bank*, 231 Mont. 10, 34 (1988), *superseded by statute on other grounds*, Mont. Code Ann. § 27-1-220(1), *as recognized in Folsom v. Mont. Pub. Emps. Ass'n*, 388 Mont. 307 (2017). *See also, e.g.*, *West v. Club at Spanish Peaks L.L.C.*, 343 Mont. 434, 460-62 (2008) (affirming use of 40% contingency fee arrangement to calculate reasonable fee for the prevailing party).

145 *See Weinberg*, 231 Mont. at 35 (quoting factors as "the amount and character of the services rendered; the labor, time, and trouble involved, the character and importance of litigation in which the services were rendered, the amount of money or the value of property to be affected, the professional skill and experience called for, the character and standing in the profession of the attorneys; . . . the result secured by the services of the attorneys may be considered as an important element in determining their value").

146 The complexity associated with this litigation is amplified somewhat by the assignment of three different bankruptcy judges to the Shoot the Moon bankruptcy case. Whenever a new judge, such as the undersigned, takes over, there is additional work counsel must do to familiarize that judge with past events bearing on the litigation. The Trustee's counsel has done a fine job here.

reputation for character and standing in the profession and the court has been impressed with the quality of their legal work, particularly the efficient and professional presentation of evidence and witness examination at trial. Finally, the results secured by counsel's service are significant – this adversary proceeding yields a multi-million-dollar judgment and potential recovery for the benefit of the bankruptcy estate – and there may be additional work the Trustee's counsel must do in connection with any appeals or to enforce the judgment.

All that said, the court deems it excessive to require CapCall to pay an additional 40% of the entire gross judgment. Some amounts reflect a penalty component (such as the usury claim). Awarding a full contingency fee based on these penalties is simply inflating the judgment.[147] Additionally, the nominal amount of the judgment to be entered regarding the preference claim will be reduced by a yet-to-be-determined amount if and when CapCall pays the full amount of the Montana usury penalty. And some of the preferential transfers related to Merchant Agreements that did not involve Montana parties. Thus, a downward adjustment is warranted.

After considering the totality of the circumstances and the specific factors courts utilize under Montana law, the court concludes that a reasonable fee under Montana Code section 28-3-704 is: **[a]** 30% of the balance of the segregated funds ($68,512.48), **[b]** 20% of the amount of the Montana usury penalty ($243,337), and **[c]** 10% of the amount of the avoided preferential transfers ($112,907.10), which results in a total fee award of $424,756.58.[148]

iii. Costs

The Trustee also seeks recovery of $2,159.75 in costs. The plain text of Montana Code section 28-3-704 does not mention costs and imposes a reciprocal obligation only regarding attorneys' fees.[149] The Trustee identifies no other basis for an award of costs and the court therefore denies the request.

---

[147] For example, a 40% fee regarding the usury penalty would by itself equal 80% of the interest CapCall was paid in the first instance.

[148] To be clear, this is the amount that the Trustee is entitled to include in a judgment against CapCall pursuant to Montana Code section 28-3-704. The amount that the Trustee's counsel is entitled to receive for payment of their services is a separate matter governed by the terms of the operative agreement with the Trustee.

[149] *See Masters Grp. Int'l, Inc. v. Comerica Bank*, 404 Mont. 434, 471 (2021).

SUMMATION

The Trustee is entitled to a judgment against CapCall consistent with this opinion. The Trustee should submit a proposed form of final judgment and indicate whether CapCall agrees to or contests the proposed form.

DATED: September 10, 2021.

WHITMAN L. HOLT
U.S. BANKRUPTCY JUDGE

creditor includes such a provision in the initial agreement.

(3) Change any term, except that a creditor may:

(i) Provide in the initial agreement that it may prohibit additional extensions of credit or reduce the credit limit during any period in which the maximum annual percentage rate is reached. A creditor also may provide in the initial agreement that specified changes will occur if a specified event takes place (for example, that the annual percentage rate will increase a specified amount if the consumer leaves the creditor's employment).

(ii) Change the index and margin used under the plan if the original index is no longer available, the new index has an historical movement substantially similar to that of the original index, and the new index and margin would have resulted in an annual percentage rate substantially similar to the rate in effect at the time the original index became unavailable.

(iii) Make a specified change if the consumer specifically agrees to it in writing at that time.

(iv) Make a change that will unequivocally benefit the consumer throughout the remainder of the plan.

(v) Make an insignificant change to terms.

(vi) Prohibit additional extensions of credit or reduce the credit limit applicable to an agreement during any period in which:

(A) The value of the dwelling that secures the plan declines significantly below the dwelling's appraised value for purposes of the plan;

(B) The creditor reasonably believes that the consumer will be unable to fulfill the repayment obligations under the plan because of a material change in the consumer's financial circumstances;

(C) The consumer is in default of any material obligation under the agreement;

(D) The creditor is precluded by government action from imposing the annual percentage rate provided for in the agreement;

(E) The priority of the creditor's security interest is adversely affected by government action to the extent that the value of the security interest is less than 120 percent of the credit line; or

(F) The creditor is notified by its regulatory agency that continued advances constitute an unsafe and unsound practice.

(4) For reverse mortgage transactions that are subject to §1026.33, terminate a plan and demand repayment of the entire outstanding balance in advance of the original term except:

(i) In the case of default;

(ii) If the consumer transfers title to the property securing the note;

(iii) If the consumer ceases using the property securing the note as the primary dwelling; or

(iv) Upon the consumer's death.

(g) *Refund of fees.* A creditor shall refund all fees paid by the consumer to anyone in connection with an application if any term required to be disclosed under paragraph (d) of this section changes (other than a change due to fluctuations in the index in a variable-rate plan) before the plan is opened and, as a result, the consumer elects not to open the plan.

(h) *Imposition of nonrefundable fees.* Neither a creditor nor any other person may impose a nonrefundable fee in connection with an application until three business days after the consumer receives the disclosures and brochure required under this section. If the disclosures and brochure are mailed to the consumer, the consumer is considered to have received them three business days after they are mailed.

§1026.41 Periodic statements for residential mortgage loans.

(a) *In general*—(1) *Scope.* This section applies to a closed-end consumer credit transaction secured by a dwelling, unless an exemption in paragraph (e) of this section applies. A closed-end consumer credit transaction secured by a dwelling is referred to as a *mortgage loan* for purposes of this section.

(2) *Periodic statements.* A servicer of a transaction subject to this section shall provide the consumer, for each billing cycle, a periodic statement meeting the requirements of paragraphs (b), (c), and (d) of this section. If a mortgage loan has a billing cycle shorter than a period of 31 days (for example, a bi-weekly billing cycle), a

periodic statement covering an entire month may be used. For the purposes of this section, *servicer* includes the creditor, assignee, or servicer, as applicable. A creditor or assignee that does not currently own the mortgage loan or the mortgage servicing rights is not subject to the requirement in this section to provide a periodic statement.

(b) *Timing of the periodic statement.* The periodic statement must be delivered or placed in the mail within a reasonably prompt time after the payment due date or the end of any courtesy period provided for the previous billing cycle.

(c) *Form of the periodic statement.* The servicer must make the disclosures required by this section clearly and conspicuously in writing, or electronically if the consumer agrees, and in a form that the consumer may keep. Sample forms for periodic statements are provided in appendix H–30. Proper use of these forms complies with the requirements of this paragraph (c) and the layout requirements in paragraph (d) of this section.

(d) *Content and layout of the periodic statement.* The periodic statement required by this section shall include:

(1) *Amount due.* Grouped together in close proximity to each other and located at the top of the first page of the statement:

(i) The payment due date;

(ii) The amount of any late payment fee, and the date on which that fee will be imposed if payment has not been received; and

(iii) The amount due, shown more prominently than other disclosures on the page and, if the transaction has multiple payment options, the amount due under each of the payment options.

(2) *Explanation of amount due.* The following items, grouped together in close proximity to each other and located on the first page of the statement:

(i) The monthly payment amount, including a breakdown showing how much, if any, will be applied to principal, interest, and escrow and, if a mortgage loan has multiple payment options, a breakdown of each of the payment options along with information on whether the principal balance will increase, decrease, or stay the same for each option listed;

(ii) The total sum of any fees or charges imposed since the last statement; and

(iii) Any payment amount past due.

(3) *Past payment breakdown.* The following items, grouped together in close proximity to each other and located on the first page of the statement:

(i) The total of all payments received since the last statement, including a breakdown showing the amount, if any, that was applied to principal, interest, escrow, fees and charges, and the amount, if any, sent to any suspense or unapplied funds account; and

(ii) The total of all payments received since the beginning of the current calendar year, including a breakdown of that total showing the amount, if any, that was applied to principal, interest, escrow, fees and charges, and the amount, if any, currently held in any suspense or unapplied funds account.

(4) *Transaction activity.* A list of all the transaction activity that occurred since the last statement. For purposes of this paragraph (d)(4), *transaction activity* means any activity that causes a credit or debit to the amount currently due. This list must include the date of the transaction, a brief description of the transaction, and the amount of the transaction for each activity on the list.

(5) *Partial payment information.* If a statement reflects a partial payment that was placed in a suspense or unapplied funds account, information explaining what must be done for the funds to be applied. The information must be on the front page of the statement or, alternatively, may be included on a separate page enclosed with the periodic statement or in a separate letter.

(6) *Contact information.* A toll-free telephone number and, if applicable, an electronic mailing address that may be used by the consumer to obtain information about the consumer's account, located on the front page of the statement.

(7) *Account information.* The following information:

(i) The amount of the outstanding principal balance;

(ii) The current interest rate in effect for the mortgage loan;

(iii) The date after which the interest rate may next change;

(iv) The existence of any prepayment penalty, as defined in §1026.32(b)(6)(i), that may be charged;

(v) The Web site to access either the Bureau list or the HUD list of homeownership counselors and counseling organizations and the HUD toll-free telephone number to access contact information for homeownership counselors or counseling organizations; and

(8) *Delinquency information.* If the consumer is more than 45 days delinquent, the following items, grouped together in close proximity to each other and located on the first page of the statement or, alternatively, on a separate page enclosed with the periodic statement or in a separate letter:

(i) The length of the consumer's delinquency;

(ii) A notification of possible risks, such as foreclosure, and expenses, that may be incurred if the delinquency is not cured;

(iii) An account history showing, for the previous six months or the period since the last time the account was current, whichever is shorter, the amount remaining past due from each billing cycle or, if any such payment was fully paid, the date on which it was credited as fully paid;

(iv) A notice indicating any loss mitigation program to which the consumer has agreed, if applicable;

(v) A notice of whether the servicer has made the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process, if applicable;

(vi) The total payment amount needed to bring the account current; and

(vii) A reference to the homeownership counselor information disclosed pursuant to paragraph (d)(7)(v) of this section.

(e) *Exemptions*—(1) *Reverse mortgages.* Reverse mortgage transactions, as defined by §1026.33(a), are exempt from the requirements of this section.

(2) *Timeshare plans.* Transactions secured by consumers' interests in timeshare plans, as defined by 11 U.S.C. 101(53D), are exempt from the requirements of this section.

(3) *Coupon books.* The requirements of paragraph (a) of this section do not apply to fixed-rate loans if the servicer:

(i) Provides the consumer with a coupon book that includes on each coupon the information listed in paragraph (d)(1) of this section;

(ii) Provides the consumer with a coupon book that includes anywhere in the coupon book:

(A) The account information listed in paragraph (d)(7) of this section;

(B) The contact information for the servicer, listed in paragraph (d)(6) of this section; and

(C) Information on how the consumer can obtain the information listed in paragraph (e)(3)(iii) of this section;

(iii) Makes available upon request to the consumer by telephone, in writing, in person, or electronically, if the consumer consents, the information listed in paragraph (d)(2) through (5) of this section; and

(iv) Provides the consumer the information listed in paragraph (d)(8) of this section in writing, for any billing cycle during which the consumer is more than 45 days delinquent.

(4) *Small servicers*—(i) *Exemption.* A creditor, assignee, or servicer is exempt from the requirements of this section for mortgage loans serviced by a small servicer.

(ii) *Small servicer defined.* A small servicer is a servicer that:

(A) Services, together with any affiliates, 5,000 or fewer mortgage loans, for all of which the servicer (or an affiliate) is the creditor or assignee;

(B) Is a Housing Finance Agency, as defined in 24 CFR 266.5; or

(C) Is a nonprofit entity that services 5,000 or fewer mortgage loans, including any mortgage loans serviced on behalf of associated nonprofit entities, for all of which the servicer or an associated nonprofit entity is the creditor. For purposes of this paragraph (e)(4)(ii)(C), the following definitions apply:

(*1*) The term ''nonprofit entity'' means an entity having a tax exemption ruling or determination letter from the Internal Revenue Service under section 501(c)(3) of the Internal Revenue Code of 1986 (26 U.S.C. 501(c)(3); 26 CFR 1.501(c)(3)–1), and;

(*2*) The term ''associated nonprofit entities'' means nonprofit entities that

by agreement operate using a common name, trademark, or servicemark to further and support a common charitable mission or purpose.

(iii) *Small servicer determination.* In determining whether a servicer satisfies paragraph (e)(4)(ii)(A) of this section, the servicer is evaluated based on the mortgage loans serviced by the servicer and any affiliates as of January 1 and for the remainder of the calendar year. In determining whether a servicer satisfies paragraph (e)(4)(ii)(C) of this section, the servicer is evaluated based on the mortgage loans serviced by the servicer as of January 1 and for the remainder of the calendar year. A servicer that ceases to qualify as a small servicer will have six months from the time it ceases to qualify or until the next January 1, whichever is later, to comply with any requirements from which the servicer is no longer exempt as a small servicer. The following mortgage loans are not considered in determining whether a servicer qualifies as a small servicer:

(A) Mortgage loans voluntarily serviced by the servicer for a non-affiliate of the servicer and for which the servicer does not receive any compensation or fees.

(B) Reverse mortgage transactions.

(C) Mortgage loans secured by consumers' interests in timeshare plans.

(D) Transactions serviced by the servicer for a seller financer that meets all of the criteria identified in §1026.36(a)(5).

(5) *Certain consumers in bankruptcy*—(i) *Exemption.* Except as provided in paragraph (e)(5)(ii) of this section, a servicer is exempt from the requirements of this section with regard to a mortgage loan if:

(A) Any consumer on the mortgage loan is a debtor in bankruptcy under title 11 of the United States Code or has discharged personal liability for the mortgage loan pursuant to 11 U.S.C. 727, 1141, 1228, or 1328; and

(B) With regard to any consumer on the mortgage loan:

(*1*) The consumer requests in writing that the servicer cease providing a periodic statement or coupon book;

(*2*) The consumer's bankruptcy plan provides that the consumer will surrender the dwelling securing the mortgage loan, provides for the avoidance of the lien securing the mortgage loan, or otherwise does not provide for, as applicable, the payment of pre-bankruptcy arrearage or the maintenance of payments due under the mortgage loan;

(*3*) A court enters an order in the bankruptcy case providing for the avoidance of the lien securing the mortgage loan, lifting the automatic stay pursuant to 11 U.S.C. 362 with regard to the dwelling securing the mortgage loan, or requiring the servicer to cease providing a periodic statement or coupon book; or

(*4*) The consumer files with the court overseeing the bankruptcy case a statement of intention pursuant to 11 U.S.C. 521(a) identifying an intent to surrender the dwelling securing the mortgage loan and a consumer has not made any partial or periodic payment on the mortgage loan after the commencement of the consumer's bankruptcy case.

(ii) *Reaffirmation or consumer request to receive statement or coupon book.* A servicer ceases to qualify for an exemption pursuant to paragraph (e)(5)(i) of this section with respect to a mortgage loan if the consumer reaffirms personal liability for the loan or any consumer on the loan requests in writing that the servicer provide a periodic statement or coupon book, unless a court enters an order in the bankruptcy case requiring the servicer to cease providing a periodic statement or coupon book.

(iii) *Exclusive address.* A servicer may establish an address that a consumer must use to submit a written request under paragraph (e)(5)(i)(B)(*1*) or (e)(5)(ii) of this section, provided that the servicer notifies the consumer of the address in a manner that is reasonably designed to inform the consumer of the address. If a servicer designates a specific address for requests under paragraph (e)(5)(i)(B)(*1*) or (e)(5)(ii) of this section, the servicer shall designate the same address for purposes of both paragraphs (e)(5)(i)(B)(*1*) and (e)(5)(ii) of this section.

(iv) *Timing of compliance following transition*—(A) *Triggering events for transitioning to modified and unmodified periodic statements.* A servicer transitions to providing a periodic statement

or coupon book with the modifications set forth in paragraph (f) of this section or to providing a periodic statement or coupon book without such modifications when one of the following three events occurs:

(*1*) A mortgage loan becomes subject to the requirements of paragraph (f) of this section;

(*2*) A mortgage loan ceases to be subject to the requirements of paragraph (f) of this section; or

(*3*) A servicer ceases to qualify for an exemption pursuant to paragraph (e)(5)(i) of this section with respect to a mortgage loan.

(B) *Single-statement exemption.* As of the date on which one of the events listed in paragraph (e)(5)(iv)(A) of this section occurs, a servicer is exempt from the requirements of this section with respect to the next periodic statement or coupon book that would otherwise be required but thereafter must provide modified or unmodified periodic statements or coupon books that comply with the requirements of this section.

(6) *Charged-off loans.* (i) A servicer is exempt from the requirements of this section for a mortgage loan if the servicer:

(A) Has charged off the loan in accordance with loan-loss provisions and will not charge any additional fees or interest on the account; and

(B) Provides, within 30 days of charge-off or the most recent periodic statement, a periodic statement, clearly and conspicuously labeled ''Suspension of Statements & Notice of Charge Off—Retain This Copy for Your Records.'' The periodic statement must clearly and conspicuously explain that, as applicable, the mortgage loan has been charged off and the servicer will not charge any additional fees or interest on the account; the servicer will no longer provide the consumer a periodic statement for each billing cycle; the lien on the property remains in place and the consumer remains liable for the mortgage loan obligation and any obligations arising from or related to the property, which may include property taxes; the consumer may be required to pay the balance on the account in the future, for example, upon sale of the property; the balance on the account is not being canceled or forgiven; and the loan may be purchased, assigned, or transferred.

(ii) *Resuming compliance.* (A) If a servicer fails at any time to treat a mortgage loan that is exempt under paragraph (e)(6)(i) of this section as charged off or charges any additional fees or interest on the account, the obligation to provide a periodic statement pursuant to this section resumes.

(B) *Prohibition on retroactive fees.* A servicer may not retroactively assess fees or interest on the account for the period of time during which the exemption in paragraph (e)(6)(i) of this section applied.

(f) *Modified periodic statements and coupon books for certain consumers in bankruptcy.* While any consumer on a mortgage loan is a debtor in bankruptcy under title 11 of the United States Code, or if such consumer has discharged personal liability for the mortgage loan pursuant to 11 U.S.C. 727, 1141, 1228, or 1328, the requirements of this section are subject to the following modifications with regard to that mortgage loan:

(1) *Requirements not applicable.* The periodic statement may omit the information set forth in paragraphs (d)(1)(ii) and (d)(8)(i), (ii), and (v) of this section. The requirement in paragraph (d)(1)(iii) of this section that the amount due must be shown more prominently than other disclosures on the page shall not apply.

(2) *Bankruptcy notices.* The periodic statement must include the following:

(i) A statement identifying the consumer's status as a debtor in bankruptcy or the discharged status of the mortgage loan; and

(ii) A statement that the periodic statement is for informational purposes only.

(3) *Chapter 12 and chapter 13 consumers.* In addition to any other provisions of this paragraph (f) that may apply, with regard to a mortgage loan for which any consumer with primary liability is a debtor in a chapter 12 or chapter 13 bankruptcy case, the requirements of this section are subject to the following modifications:

(i) *Requirements not applicable.* In addition to omitting the information set forth in paragraph (f)(1) of this section,

the periodic statement may also omit the information set forth in paragraphs (d)(8)(iii), (iv), (vi), and (vii) of this section.

(ii) *Amount due.* The amount due information set forth in paragraph (d)(1) of this section may be limited to the date and amount of the post-petition payments due and any post-petition fees and charges imposed by the servicer.

(iii) *Explanation of amount due.* The explanation of amount due information set forth in paragraph (d)(2) of this section may be limited to:

(A) The monthly post-petition payment amount, including a breakdown showing how much, if any, will be applied to principal, interest, and escrow;

(B) The total sum of any post-petition fees or charges imposed since the last statement; and

(C) Any post-petition payment amount past due.

(iv) *Transaction activity.* The transaction activity information set forth in paragraph (d)(4) of this section must include all payments the servicer has received since the last statement, including all post-petition and pre-petition payments and payments of post-petition fees and charges, and all post-petition fees and charges the servicer has imposed since the last statement. The brief description of the activity need not identify the source of any payments.

(v) *Pre-petition arrearage.* If applicable, a servicer must disclose, grouped in close proximity to each other and located on the first page of the statement or, alternatively, on a separate page enclosed with the periodic statement or in a separate letter:

(A) The total of all pre-petition payments received since the last statement;

(B) The total of all pre-petition payments received since the beginning of the consumer's bankruptcy case; and

(C) The current balance of the consumer's pre-petition arrearage.

(vi) *Additional disclosures.* The periodic statement must include, as applicable:

(A) A statement that the amount due includes only post-petition payments and does not include other payments that may be due under the terms of the consumer's bankruptcy plan;

(B) If the consumer's bankruptcy plan requires the consumer to make the post-petition mortgage payments directly to a bankruptcy trustee, a statement that the consumer should send the payment to the trustee and not to the servicer;

(C) A statement that the information disclosed on the periodic statement may not include payments the consumer has made to the trustee and may not be consistent with the trustee's records;

(D) A statement that encourages the consumer to contact the consumer's attorney or the trustee with questions regarding the application of payments; and

(E) If the consumer is more than 45 days delinquent on post-petition payments, a statement that the servicer has not received all the payments that became due since the consumer filed for bankruptcy.

(4) *Multiple obligors.* If this paragraph (f) applies in connection with a mortgage loan with more than one primary obligor, the servicer may provide the modified statement to any or all of the primary obligors, even if a primary obligor to whom the servicer provides the modified statement is not a debtor in bankruptcy.

(5) *Coupon books.* A servicer that provides a coupon book instead of a periodic statement under paragraph (e)(3) of this section must include in the coupon book the disclosures set forth in paragraphs (f)(2) and (f)(3)(vi) of this section, as applicable. The servicer may include these disclosures anywhere in the coupon book provided to the consumer or on a separate page enclosed with the coupon book. The servicer must make available upon request to the consumer by telephone, in writing, in person, or electronically, if the consumer consents, the information listed in paragraph (f)(3)(v) of this section, as applicable. The modifications set forth in paragraphs (f)(1) and (f)(3)(i) through (iv) and (vi) of this section apply to a coupon book and other information a servicer provides to the consumer under paragraph (e)(3) of this section.

(g) *Successor in interest.* If, upon confirmation, a servicer provides a confirmed successor in interest who is not liable on the mortgage loan obligation with a written notice and acknowledgment form in accordance with Regulation X, §1024.32(c)(1) of this chapter, the servicer is not required to provide to the confirmed successor in interest any written disclosure required by this section unless and until the confirmed successor in interest either assumes the mortgage loan obligation under State law or has provided the servicer an executed acknowledgment in accordance with Regulation X, §1024.32(c)(1)(iv) of this chapter, that the confirmed successor in interest has not revoked.

[78 FR 11007, Feb. 14, 2013, as amended at 78 FR 44718, July 24, 2013; 78 FR 63005, Oct. 23, 2013; 79 FR 65322, Nov. 3, 2014; 81 FR 72388, Oct. 19, 2016; 83 FR 10559, Mar. 12, 2018]

§1026.42 Valuation independence.

(a) *Scope.* This section applies to any consumer credit transaction secured by the consumer's principal dwelling.

(b) *Definitions.* For purposes of this section:

(1) ''Covered person'' means a creditor with respect to a covered transaction or a person that provides ''settlement services,'' as defined in 12 U.S.C. 2602(3) and implementing regulations, in connection with a covered transaction.

(2) ''Covered transaction'' means an extension of consumer credit that is or will be secured by the consumer's principal dwelling, as defined in §1026.2(a)(19).

(3) ''Valuation'' means an estimate of the value of the consumer's principal dwelling in written or electronic form, other than one produced solely by an automated model or system.

(4) ''Valuation management functions'' means:

(i) Recruiting, selecting, or retaining a person to prepare a valuation;

(ii) Contracting with or employing a person to prepare a valuation;

(iii) Managing or overseeing the process of preparing a valuation, including by providing administrative services such as receiving orders for and receiving a valuation, submitting a completed valuation to creditors and underwriters, collecting fees from creditors and underwriters for services provided in connection with a valuation, and compensating a person that prepares valuations; or

(iv) Reviewing or verifying the work of a person that prepares valuations.

(c) *Valuation of consumer's principal dwelling*—(1) *Coercion.* In connection with a covered transaction, no covered person shall or shall attempt to directly or indirectly cause the value assigned to the consumer's principal dwelling to be based on any factor other than the independent judgment of a person that prepares valuations, through coercion, extortion, inducement, bribery, or intimidation of, compensation or instruction to, or collusion with a person that prepares valuations or performs valuation management functions.

(i) Examples of actions that violate paragraph (c)(1) include:

(A) Seeking to influence a person that prepares a valuation to report a minimum or maximum value for the consumer's principal dwelling;

(B) Withholding or threatening to withhold timely payment to a person that prepares a valuation or performs valuation management functions because the person does not value the consumer's principal dwelling at or above a certain amount;

(C) Implying to a person that prepares valuations that current or future retention of the person depends on the amount at which the person estimates the value of the consumer's principal dwelling;

(D) Excluding a person that prepares a valuation from consideration for future engagement because the person reports a value for the consumer's principal dwelling that does not meet or exceed a predetermined threshold; and

(E) Conditioning the compensation paid to a person that prepares a valuation on consummation of the covered transaction.

(2) *Mischaracterization of value*—(i) *Misrepresentation.* In connection with a covered transaction, no person that prepares valuations shall materially misrepresent the value of the consumer's principal dwelling in a valuation. A misrepresentation is material for purposes of this paragraph (c)(2)(i)

Faculty

John R. Bollinger is a shareholder with the Boleman Law Firm, P.C. in Richmond, Va. The firm focuses exclusively in the area of consumer bankruptcy law and is the largest consumer bankruptcy practice in Virginia. He is a frequent speaker at local, regional and national organizations and is past president of the board of the Tidewater Bankruptcy Bar Association. Mr. Bollinger has spoken before ABI, J. Sargeant Reynolds Community College, T. C. Williams School of Law at the University of Richmond, Virginia Bar Association (VBA), Tidewater Bankruptcy Bar Association (TBBA), Virginia Governors Conference on Housing, the National Association of Chapter Thirteen Trustees and the Virginia Trial Lawyer's Association, as well as a number of civic and business organizations. Additionally, he has served as the past president of the board for the Tidewater Bankruptcy Bar Association. Mr. Bollinger most recently served on the 2019 ABI Strategic Planning Committee and the 2019 and 2020 ABI "40 Under 40" Steering Committees. He currently serves as the Education Director of ABI's Consumer Bankruptcy Committee and is an editor for ABI's VOLO project. Mr. Bollinger has been has been recognized by *Super Lawyers* as a "Virginia Rising Star" in the area of Consumer Bankruptcy Law. He received his J.D. from the University of Richmond T.C. Williams School of Law.

Hon. Bruce A. Harwood is Chief U.S. Bankruptcy Judge for the District of New Hampshire in Concord, appointed to the bench in March 2013. He also serves on the First Circuit's Bankruptcy Appellate Panel. Prior to his appointment to the bench, Judge Harwood chaired the Bankruptcy, Insolvency and Creditors' Rights Group at Sheehan Phinney Bass + Green in Manchester, N.H., representing business debtors, asset-purchasers, secured and unsecured creditors, creditors' committees, trustees in bankruptcy, and insurance and banking regulators in connection with the rehabilitation and liquidation of insolvent insurers and trust companies. He was a chapter 7 panel trustee in the District of New Hampshire and mediated disputes arising in debtor/creditor relations. Judge Harwood serves on ABI's Board of Directors on its Communication, Information and Technology Committee. He served as co-chair of ABI's Commercial Fraud Committee, as program co-chair of (and presently as judicial advisor to) ABI's Northeast Bankruptcy Conference; and as Northeast Regional Chair of the ABI Endowment Fund's Development Committee. He also served on ABI's Civility Task Force. Judge Harwood is a Fellow in the American College of Bankruptcy and was consistently recognized in the bankruptcy law section of *The Best Lawyers in America*, in *New England SuperLawyers* and by *Chambers USA*. He received his B.A. from Northwestern University and his J.D. from Washington University School of Law.

Summer M. Shaw is the founder of Shaw & Hanover PC, a bankruptcy boutique law firm serving Southern California with its main office located in Palm Desert, Calif. She is a Bankruptcy Specialist certified by the State Bar of California and represents creditors and debtors in chapter 7, 11, 12 and 13 bankruptcy proceedings and litigation matters. Ms. Shaw is admitted to practice in all state and federal courts in California, handling appeals in district court and the Ninth Circuit BAP. She also is admitted to practice before the U.S. Ninth Circuit Court of Appeals and the Tenth Circuit Court of Appeals with experience in handling appeals in both circuits. Ms. Shaw is a very active member of the bankruptcy bar, presently serving as a board member of the Inland Empire Bankruptcy Forum and having served as a past president and program chair. She has also served as an education co-chair

for the Consumer Education Programs at the Annual California Bankruptcy Forum Conferences for 2016 and 2019, and she has been invited to speak at various education programs covering secured debt litigation, small business bankruptcies, individual chapter 11s, and bankruptcy law and cross-over issues with civil litigation, family law, probate law and criminal law. Ms. Shaw is a member of the Board of Trustees for the Desert Bar Association, and she is one of the founders and co-chairs of its Real Estate, Business, and Bankruptcy subsection. In addition, she is a professor of bankruptcy law at the California Desert Trial Academy (CDTA). Ms. Shaw was a selected as a member of the inaugural class of ABI's "40 Under 40" in 2017, and in 2018, she received the National Association of Consumer Bankruptcy Attorney's National Distinguished Service Award. She has also been named one of *Palm Springs Life Magazine*'s Top Bankruptcy Lawyers and was honored to be a part of the 2015 and 2016 Central District of California Bankruptcy Court's *Pro Bono* Honor Roll. Ms. Shaw received her B.S. in political science with a minor in law and society from the University of California, Riverside and her J.D. from Western State College of Law.