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Consumer Panel

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CONCURRENT SESSION

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11 U.S. Code § 501 - Filing of proofs of claims or interests

(a) A creditor or an indenture trustee may file a proof of claim. An equity security holder may file a proof of interest.

(b) If a creditor does not timely file a proof of such creditor's claim, an entity that is liable to such creditor with the debtor, or that has secured such creditor, may file a proof of such claim.

(c) If a creditor does not timely file a proof of such creditor's claim, the debtor or the trustee may file a proof of such claim.

(d) A claim of a kind specified in section 502(e)(2), 502(f), 502(g), 502(h) or 502(i) of this title may be filed under subsection (a), (b), or (c) of this section the same as if such claim were a claim against the debtor and had arisen before the date of the filing of the petition.

(e) A claim arising from the liability of a debtor for fuel use tax assessed consistent with the requirements of section 31705 of title 49 may be filed by the base jurisdiction designated pursuant to the International Fuel Tax Agreement (as defined in section 31701 of title 49) and, if so filed, shall be allowed as a single claim.

11 U.S. Code § 502 - Allowance of claims or interests

(a) A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest, including a creditor of a general partner in a partnership that is a debtor in a case under chapter 7 of this title, objects.

(b) Except as provided in subsections (e)(2), (f), (g), (h) and (i) of this section, if such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition, and shall allow such claim in such amount, except to the extent that—

(1) such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured;

(2) such claim is for unmatured interest;

(3) if such claim is for a tax assessed against property of the estate, such claim exceeds the value of the interest of the estate in such property;

(4) if such claim is for services of an insider or attorney of the debtor, such claim exceeds the reasonable value of such services;

(5) such claim is for a debt that is unmatured on the date of the filing of the petition and that is excepted from discharge under section 523(a)(5) of this title;

(6)if such claim is the claim of a lessor for damages resulting from the termination of a lease of real property, such claim exceeds—

(A)the rent reserved by such lease, without acceleration, for the greater of one year, or 15 percent, not to exceed three years, of the remaining term of such lease, following the earlier of—

(i) the date of the filing of the petition; and

(ii) the date on which such lessor repossessed, or the lessee surrendered, the leased property; plus

(B) any unpaid rent due under such lease, without acceleration, on the earlier of such dates;

(7)if such claim is the claim of an employee for damages resulting from the termination of an employment contract, such claim exceeds—

(A)the compensation provided by such contract, without acceleration, for one year following the earlier of—

(i) the date of the filing of the petition; or

(ii) the date on which the employer directed the employee to terminate, or such employee terminated, performance under such contract; plus

(B) any unpaid compensation due under such contract, without acceleration, on the earlier of such dates;

(8) such claim results from a reduction, due to late payment, in the amount of an otherwise applicable credit available to the debtor in connection with an employment tax on wages, salaries, or commissions earned from the debtor; or

(9)proof of such claim is not timely filed, except to the extent tardily filed as permitted under paragraph (1), (2), or (3) of section 726(a) or under the Federal Rules of Bankruptcy Procedure, except that—

(A) a claim of a governmental unit shall be timely filed if it is filed before 180 days after the date of the order for relief or such later time as the Federal Rules of Bankruptcy Procedure may provide; and

(B) in a case under chapter 13, a claim of a governmental unit for a tax with respect to a return filed under section 1308 shall be timely if the claim is filed on or

before the date that is 60 days after the date on which such return was filed as required.

(c) There shall be estimated for purpose of allowance under this section—

(1) any contingent or unliquidated claim, the fixing or liquidation of which, as the case may be, would unduly delay the administration of the case; or

(2) any right to payment arising from a right to an equitable remedy for breach of performance.

(d) Notwithstanding subsections (a) and (b) of this section, the court shall disallow any claim of any entity from which property is recoverable under section 542, 543, 550, or 553 of this title or that is a transferee of a transfer avoidable under section 522(f), 522(h), 544, 545, 547, 548, 549, or 724(a) of this title, unless such entity or transferee has paid the amount, or turned over any such property, for which such entity or transferee is liable under section 522(i), 542, 543, 550, or 553 of this title.

(e) **(1)**Notwithstanding subsections (a), (b), and (c) of this section and paragraph (2) of this subsection, the court shall disallow any claim for reimbursement or contribution of an entity that is liable with the debtor on or has secured the claim of a creditor, to the extent that—

(A) such creditor's claim against the estate is disallowed;

(B) such claim for reimbursement or contribution is contingent as of the time of allowance or disallowance of such claim for reimbursement or contribution; or

(C) such entity asserts a right of subrogation to the rights of such creditor under section 509 of this title.

(2) A claim for reimbursement or contribution of such an entity that becomes fixed after the commencement of the case shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section, or disallowed under subsection (d) of this section, the same as if such claim had become fixed before the date of the filing of the petition.

(f) In an involuntary case, a claim arising in the ordinary course of the debtor's business or financial affairs after the commencement of the case but before the earlier of the appointment of a trustee and the order for relief shall be determined as of the date such claim arises, and shall be allowed under subsection (a), (b), or (c) of this section or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

(g) **(1)** A claim arising from the rejection, under section 365 of this title or under a plan under chapter 9, 11, 12, or 13 of this title, of an executory contract or unexpired lease of

the debtor that has not been assumed shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

(2) A claim for damages calculated in accordance with section 562 shall be allowed under subsection (a), (b), or (c), or disallowed under subsection (d) or (e), as if such claim had arisen before the date of the filing of the petition.

(h) A claim arising from the recovery of property under section 522, 550, or 553 of this title shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section, or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

(i) A claim that does not arise until after the commencement of the case for a tax entitled to priority under section 507(a)(8) of this title shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section, or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

(j) A claim that has been allowed or disallowed may be reconsidered for cause. A reconsidered claim may be allowed or disallowed according to the equities of the case. Reconsideration of a claim under this subsection does not affect the validity of any payment or transfer from the estate made to a holder of an allowed claim on account of such allowed claim that is not reconsidered, but if a reconsidered claim is allowed and is of the same class as such holder's claim, such holder may not receive any additional payment or transfer from the estate on account of such holder's allowed claim until the holder of such reconsidered and allowed claim receives payment on account of such claim proportionate in value to that already received by such other holder. This subsection does not alter or modify the trustee's right to recover from a creditor any excess payment or transfer made to such creditor.

(k) **(1)**The court, on the motion of the debtor and after a hearing, may reduce a claim filed under this section based in whole on an unsecured consumer debt by not more than 20 percent of the claim, if—

(A) the claim was filed by a creditor who unreasonably refused to negotiate a reasonable alternative repayment schedule proposed on behalf of the debtor by an approved nonprofit budget and credit counseling agency described in section 111;

(B)the offer of the debtor under subparagraph (A)—

(i) was made at least 60 days before the date of the filing of the petition; and

(ii) provided for payment of at least 60 percent of the amount of the debt over a period not to exceed the repayment period of the loan, or a reasonable extension thereof; and

(C) no part of the debt under the alternative repayment schedule is nondischargeable.

(2) The debtor shall have the burden of proving, by clear and convincing evidence, that—

(A) the creditor unreasonably refused to consider the debtor's proposal; and

(B) the proposed alternative repayment schedule was made prior to expiration of the 60-day period specified in paragraph (1)(B)(i).

11 U.S. Code § 505 - Determination of tax liability

(a) **(1)** Except as provided in paragraph (2) of this subsection, the court may determine the amount or legality of any tax, any fine or penalty relating to a tax, or any addition to tax, whether or not previously assessed, whether or not paid, and whether or not contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction.

(2) The court may not so determine—

(A) the amount or legality of a tax, fine, penalty, or addition to tax if such amount or legality was contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction before the commencement of the case under this title;

(B)any right of the estate to a tax refund, before the earlier of—

(i) 120 days after the trustee properly requests such refund from the governmental unit from which such refund is claimed; or

(ii)a determination by such governmental unit of such request; or

(C)the amount or legality of any amount arising in connection with an ad valorem tax on real or personal property of the estate, if the applicable period for contesting or redetermining that amount under applicable nonbankruptcy law has expired.

(b) **(1)**

(A) The clerk shall maintain a list under which a Federal, State, or local governmental unit responsible for the collection of taxes within the district may—

(i) designate an address for service of requests under this subsection; and

(ii)describe where further information concerning additional requirements for filing such requests may be found.

(B) If such governmental unit does not designate an address and provide such address to the clerk under subparagraph (A), any request made under this subsection may be served at the address for the filing of a tax return or protest with the appropriate taxing authority of such governmental unit.

(2)A trustee may request a determination of any unpaid liability of the estate for any tax incurred during the administration of the case by submitting a tax return for such tax and a request for such a determination to the governmental unit charged with responsibility for collection or determination of such tax at the address and in the manner designated in paragraph (1). Unless such return is fraudulent, or contains a material misrepresentation, the estate, the trustee, the debtor, and any successor to the debtor are discharged from any liability for such tax—

(A)upon payment of the tax shown on such return, if—

(i) such governmental unit does not notify the trustee, within 60 days after such request, that such return has been selected for examination; or

(ii) such governmental unit does not complete such an examination and notify the trustee of any tax due, within 180 days after such request or within such additional time as the court, for cause, permits;

(B) upon payment of the tax determined by the court, after notice and a hearing, after completion by such governmental unit of such examination; or

(C) upon payment of the tax determined by such governmental unit to be due.

(c) Notwithstanding section 362 of this title, after determination by the court of a tax under this section, the governmental unit charged with responsibility for collection of such tax may assess such tax against the estate, the debtor, or a successor to the debtor, as the case may be, subject to any otherwise applicable law.

11 U.S. Code § 506 - Determination of secured status

(a) **(1)** An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

(2) If the debtor is an individual in a case under chapter 7 or 13, such value with respect to personal property securing an allowed claim shall be determined based on the replacement value of such property as of the date of the filing of the petition without deduction for costs of sale or marketing. With respect to property acquired for personal, family, or household purposes, replacement value shall mean the price a retail merchant would charge for property of that kind considering the age and condition of the property at the time value is determined.

(b) To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement or State statute under which such claim arose.

(c) The trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim, including the payment of all ad valorem property taxes with respect to the property.

(d) To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void, unless—

(1) such claim was disallowed only under section 502(b)(5) or 502(e) of this title; or

(2) such claim is not an allowed secured claim due only to the failure of any entity to file a proof of such claim under section 501 of this title.

11 U.S. Code § 507 - Priorities

(a) The following expenses and claims have priority in the following order:

(1) First:

(A) Allowed unsecured claims for domestic support obligations that, as of the date of the filing of the petition in a case under this title, are owed to or recoverable by a spouse, former spouse, or child of the debtor, or such child's parent, legal guardian, or responsible relative, without regard to whether the claim is filed by such person or is filed by a governmental unit on behalf of such person, on the condition that funds received under this paragraph by a governmental unit under this title after the date of the filing of the petition shall be applied and distributed in accordance with applicable nonbankruptcy law.

(B) Subject to claims under subparagraph (A), allowed unsecured claims for domestic support obligations that, as of the date of the filing of the petition, are assigned by a spouse, former spouse, child of the debtor, or such child's parent, legal guardian, or responsible relative to a governmental unit (unless such obligation is assigned voluntarily by the spouse, former spouse, child, parent, legal guardian, or responsible relative of the child for the purpose of collecting the debt) or are owed directly to or recoverable by a governmental unit under applicable nonbankruptcy law, on the condition that funds received under this paragraph by a governmental unit under this title after the date of the filing of the petition be applied and distributed in accordance with applicable nonbankruptcy law.

(C) If a trustee is appointed or elected under section 701, 702, 703, 1104, 1202, or 1302, the administrative expenses of the trustee allowed under paragraphs (1)(A), (2), and (6) of section 503(b) shall be paid before payment of claims under subparagraphs (A) and (B), to the extent that the trustee administers assets that are otherwise available for the payment of such claims.

(2) Second, administrative expenses allowed under section 503(b) of this title, unsecured claims of any Federal reserve bank related to loans made through programs or facilities authorized under section 13(3) of the Federal Reserve Act (12 U.S.C. 343),[1] and any fees and charges assessed against the estate under chapter 123 of title 28.

(3) Third, unsecured claims allowed under section 502(f) of this title.

(4) Fourth, allowed unsecured claims, but only to the extent of $10,000 [2] for each individual or corporation, as the case may be, earned within 180 days before

the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first, for—

(A) wages, salaries, or commissions, including vacation, severance, and sick leave pay earned by an individual; or

(B) sales commissions earned by an individual or by a corporation with only 1 employee, acting as an independent contractor in the sale of goods or services for the debtor in the ordinary course of the debtor's business if, and only if, during the 12 months preceding that date, at least 75 percent of the amount that the individual or corporation earned by acting as an independent contractor in the sale of goods or services was earned from the debtor.

(5) Fifth, allowed unsecured claims for contributions to an employee benefit plan—

(A) arising from services rendered within 180 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first; but only

(B)for each such plan, to the extent of—

(i) the number of employees covered by each such plan multiplied by $10,000; [2] less

(ii) the aggregate amount paid to such employees under paragraph (4) of this subsection, plus the aggregate amount paid by the estate on behalf of such employees to any other employee benefit plan.

(6) Sixth, allowed unsecured claims of persons—

(A) engaged in the production or raising of grain, as defined in section 557(b) of this title, against a debtor who owns or operates a grain storage facility, as defined in section 557(b) of this title, for grain or the proceeds of grain, or

(B) engaged as a United States fisherman against a debtor who has acquired fish or fish produce from a fisherman through a sale or conversion, and who is engaged in operating a fish produce storage or processing facility—

but only to the extent of $4,000 [2] for each such individual.

(7) Seventh, allowed unsecured claims of individuals, to the extent of $1,800 [2] for each such individual, arising from the deposit, before the commencement of the case, of money in connection with the purchase, lease, or rental of property, or the purchase of services, for the personal, family, or household use of such individuals, that were not delivered or provided.

(8) Eighth, allowed unsecured claims of governmental units, only to the extent that such claims are for—

(A)a tax on or measured by income or gross receipts for a taxable year ending on or before the date of the filing of the petition—

(i) for which a return, if required, is last due, including extensions, after three years before the date of the filing of the petition;

(ii)assessed within 240 days before the date of the filing of the petition, exclusive of—

(I) any time during which an offer in compromise with respect to that tax was pending or in effect during that 240-day period, plus 30 days; and

(II) any time during which a stay of proceedings against collections was in effect in a prior case under this title during that 240-day period, plus 90 days; or

(iii) other than a tax of a kind specified in section 523(a)(1)(B) or 523(a)(1)(C) of this title, not assessed before, but assessable, under applicable law or by agreement, after, the commencement of the case;

(B) a property tax incurred before the commencement of the case and last payable without penalty after one year before the date of the filing of the petition;

(C) a tax required to be collected or withheld and for which the debtor is liable in whatever capacity;

(D) an employment tax on a wage, salary, or commission of a kind specified in paragraph (4) of this subsection earned from the debtor before the date of the filing of the petition, whether or not actually paid before such date, for which a return is last due, under applicable law or under any extension, after three years before the date of the filing of the petition;

(E)an excise tax on—

(i) a transaction occurring before the date of the filing of the petition for which a return, if required, is last due, under applicable law or under any extension, after three years before the date of the filing of the petition; or

(ii) if a return is not required, a transaction occurring during the three years immediately preceding the date of the filing of the petition;

(F)a customs duty arising out of the importation of merchandise—

(i) entered for consumption within one year before the date of the filing of the petition;

(ii) covered by an entry liquidated or reliquidated within one year before the date of the filing of the petition; or

(iii) entered for consumption within four years before the date of the filing of the petition but unliquidated on such date, if the Secretary of the Treasury certifies that failure to liquidate such entry was due to an investigation pending on such date into assessment of antidumping or countervailing duties or fraud, or if information needed for the proper appraisement or classification of such merchandise was not available to the appropriate customs officer before such date; or

(G) a penalty related to a claim of a kind specified in this paragraph and in compensation for actual pecuniary loss.

An otherwise applicable time period specified in this paragraph shall be suspended for any period during which a governmental unit is prohibited under applicable nonbankruptcy law from collecting a tax as a result of a request by the debtor for a hearing and an appeal of any collection action taken or proposed against the debtor, plus 90 days; plus any time during which the stay of proceedings was in effect in a prior case under this title or during which collection was precluded by the existence of 1 or more confirmed plans under this title, plus 90 days.

(9) Ninth, allowed unsecured claims based upon any commitment by the debtor to a Federal depository institutions regulatory agency (or predecessor to such agency) to maintain the capital of an insured depository institution.

(10) Tenth, allowed claims for death or personal injury resulting from the operation of a motor vehicle or vessel if such operation was unlawful because the debtor was intoxicated from using alcohol, a drug, or another substance.

(b) If the trustee, under section 362, 363, or 364 of this title, provides adequate protection of the interest of a holder of a claim secured by a lien on property of the debtor and if, notwithstanding such protection, such creditor has a claim allowable under subsection (a)(2) of this section arising from the stay of action against such property under section 362 of this title, from the use, sale, or lease of such property under section 363 of this title, or from the granting of a lien under section 364(d) of this title, then such creditor's claim under such subsection shall have priority over every other claim allowable under such subsection.

(c) For the purpose of subsection (a) of this section, a claim of a governmental unit arising from an erroneous refund or credit of a tax has the same priority as a claim for the tax to which such refund or credit relates.

(d) An entity that is subrogated to the rights of a holder of a claim of a kind specified in subsection (a)(1), (a)(4), (a)(5), (a)(6), (a)(7), (a)(8), or (a)(9) of this section

is not subrogated to the right of the holder of such claim to priority under such subsection.

Rule 3001. Proof of Claim

(a) FORM AND CONTENT. A proof of claim is a written statement setting forth a creditor's claim. A proof of claim shall conform substantially to the appropriate Official Form.

(b) WHO MAY EXECUTE. A proof of claim shall be executed by the creditor or the creditor's authorized agent except as provided in Rules 3004 and 3005.

(c) SUPPORTING INFORMATION.

(1) *Claim Based on a Writing.* Except for a claim governed by paragraph (3) of this subdivision, when a claim, or an interest in property of the debtor securing the claim, is based on a writing, a copy of the writing shall be filed with the proof of claim. If the writing has been lost or destroyed, a statement of the circumstances of the loss or destruction shall be filed with the claim.

(2) *Additional Requirements in an Individual Debtor Case; Sanctions for Failure to Comply.* In a case in which the debtor is an individual:

(A) If, in addition to its principal amount, a claim includes interest, fees, expenses, or other charges incurred before the petition was filed, an itemized statement of the interest, fees, expenses, or charges shall be filed with the proof of claim.

(B) If a security interest is claimed in the debtor's property, a statement of the amount necessary to cure any default as of the date of the petition shall be filed with the proof of claim.

(C) If a security interest is claimed in property that is the debtor's principal residence, the attachment prescribed by the appropriate Official Form shall be filed with the proof of claim. If an escrow account has been established in connection with the claim, an escrow account statement prepared as of the date the petition was filed and in a form consistent with applicable nonbankruptcy law shall be filed with the attachment to the proof of claim.

(D) If the holder of a claim fails to provide any information required by this subdivision (c), the court may, after notice and hearing, take either or both of the following actions:

(i) preclude the holder from presenting the omitted information, in any form, as evidence in any contested matter or adversary proceeding in the case, unless the court determines that the failure was substantially justified or is harmless; or

(ii) award other appropriate relief, including reasonable expenses and attorney's fees caused by the failure.

(3) *Claim Based on an Open-End or Revolving Consumer Credit Agreement.*

(A) When a claim is based on an open-end or revolving consumer credit agreement — except one for which a security interest is claimed in the debtor's real property — a statement shall be filed with the proof of claim, including all of the following information that applies to the account:

(i)the name of the entity from whom the creditor purchased the account;

(ii) the name of the entity to whom the debt was owed at the time of an account holder's last transaction on the account;

(iii) the date of an account holder's last transaction;

(iv) the date of the last payment on the account; and

(v) the date on which the account was charged to profit and loss.

(B) On written request by a party in interest, the holder of a claim based on an open-end or revolving consumer credit agreement shall, within 30 days after the request is sent, provide the requesting party a copy of the writing specified in paragraph (1) of this subdivision.

(d) EVIDENCE OF PERFECTION OF SECURITY INTEREST. If a security interest in property of the debtor is claimed, the proof of claim shall be accompanied by evidence that the security interest has been perfected.

(e) TRANSFERRED CLAIM.

(1) *Transfer of Claim Other Than for Security Before Proof Filed*. If a claim has been transferred other than for security before proof of the claim has been filed, the proof of claim may be filed only by the transferee or an indenture trustee.

(2) *Transfer of Claim Other than for Security after Proof Filed*. If a claim other than one based on a publicly traded note, bond, or debenture has been transferred other than for security after the proof of claim has been filed, evidence of the transfer shall be filed by the transferee. The clerk shall immediately notify the alleged transferor by mail of the filing of the evidence of transfer and that objection thereto, if any, must be filed within 21 days of the mailing of the notice or within any additional time allowed by the court. If the alleged transferor files a timely objection and the court finds, after notice and a hearing, that the claim has been transferred other than for security, it shall enter an order substituting the transferee for the transferor. If a timely objection is not filed by the alleged transferor, the transferee shall be substituted for the transferor.

(3) *Transfer of Claim for Security Before Proof Filed*. If a claim other than one based on a publicly traded note, bond, or debenture has been transferred for security before proof of the claim has been filed, the transferor or transferee or both may file a proof of claim for the full amount. The proof shall be supported by a statement setting forth the terms of the transfer. If either the transferor or the transferee files a proof of claim, the clerk shall immediately notify the other by mail of the right to join in the filed claim. If both transferor and transferee file proofs of the same claim, the proofs shall be consolidated. If the transferor or transferee does not file an agreement regarding its relative rights respecting voting of the claim, payment of dividends thereon, or participation in the administration of the estate, on motion by a party in interest and after notice and a hearing, the court shall enter such orders respecting these matters as may be appropriate.

(4) *Transfer of Claim for Security after Proof Filed*. If a claim other than one based on a publicly traded note, bond, or debenture has been transferred for security after the proof of claim has been filed, evidence of the terms of the transfer shall be filed by the transferee. The clerk shall immediately notify the alleged transferor by mail of the filing of the evidence of

transfer and that objection thereto, if any, must be filed within 21 days of the mailing of the notice or within any additional time allowed by the court. If a timely objection is filed by the alleged transferor, the court, after notice and a hearing, shall determine whether the claim has been transferred for security. If the transferor or transferee does not file an agreement regarding its relative rights respecting voting of the claim, payment of dividends thereon, or participation in the administration of the estate, on motion by a party in interest and after notice and a hearing, the court shall enter such orders respecting these matters as may be appropriate.

(5) *Service of Objection or Motion; Notice of Hearing*. A copy of an objection filed pursuant to paragraph (2) or (4) or a motion filed pursuant to paragraph (3) or (4) of this subdivision together with a notice of a hearing shall be mailed or otherwise delivered to the transferor or transferee, whichever is appropriate, at least 30 days prior to the hearing.

(f) EVIDENTIARY EFFECT. A proof of claim executed and filed in accordance with these rules shall constitute prima facie evidence of the validity and amount of the claim.

(g) To the extent not inconsistent with the United States Warehouse Act or applicable State law, a warehouse receipt, scale ticket, or similar document of the type routinely issued as evidence of title by a grain storage facility, as defined in section 557 of title 11, shall constitute prima facie evidence of the validity and amount of a claim of ownership of a quantity of grain.

Rule 3002. Filing Proof of Claim or Interest

(a) NECESSITY FOR FILING. A secured creditor, unsecured creditor or equity security holder must file a proof of claim or interest for the claim or interest to be allowed, except as provided in Rules 1019(3), 3003, 3004, and 3005. A lien that secures a claim against the debtor is not void due only to the failure of any entity to file a proof of claim.

(b) PLACE OF FILING. A proof of claim or interest shall be filed in accordance with Rule 5005.

(c) TIME FOR FILING. In a voluntary chapter 7 case, chapter 12 case, or chapter 13 case, a proof of claim is timely filed if it is filed not later than 70 days after the order for relief under that chapter or the date of the order of conversion to a case under chapter 12 or 13. In an involuntary chapter 7 case, a proof of claim is timely filed if it is filed not later than 90 days after the order for relief under that chapter is entered. But in all these cases, the following exceptions apply:

(1) A proof of claim filed by a governmental unit, other than for a claim resulting from a tax return filed under §1308, is timely filed if it is filed not later than 180 days after the date of the order for relief. A proof of claim filed by a governmental unit for a claim resulting from a tax return filed under §1308 is timely filed if it is filed no later than 180 days after the date of the order for relief or 60 days after the date of the filing of the tax return. The court may, for cause, enlarge the time for a governmental unit to file a proof of claim only upon motion of the governmental unit made before expiration of the period for filing a timely proof of claim.

(2) In the interest of justice and if it will not unduly delay the administration of the case, the court may extend the time for filing a proof of claim by an infant or incompetent person or the representative of either.

(3) An unsecured claim which arises in favor of an entity or becomes allowable as a result of a judgment may be filed within 30 days after the judgment becomes final if the judgment is for the recovery of money or property from that entity or denies or avoids the entity's interest in property. If the judgment imposes a liability which is not satisfied, or a duty which is not performed within such period or such further time as the court may permit, the claim shall not be allowed.

(4) A claim arising from the rejection of an executory contract or unexpired lease of the debtor may be filed within such time as the court may direct.

(5) If notice of insufficient assets to pay a dividend was given to creditors under Rule 2002(e), and subsequently the trustee notifies the court that payment of a dividend appears possible, the clerk shall give at least 90 days' notice by mail to creditors of that fact and of the date by which proofs of claim must be filed.

(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 the notice was insufficient under the circumstances to give the creditor a reasonable time to file a proof of claim.

(7) A proof of claim filed by the holder of a claim that is secured by a security interest in the debtor's principal residence is timely filed if:

(A) the proof of claim, together with the attachments required by Rule 3001(c)(2)(C), is filed not later than 70 days after the order for relief is entered; and

(B) any attachments required by Rule 3001(c)(1) and (d) are filed as a supplement to the holder's claim not later than 120 days after the order for relief is entered.

Rule 3002.1 Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence

(a) IN GENERAL. This rule applies in a chapter 13 case to claims (1) that are secured by a security interest in the debtor's principal residence, and (2) for which the plan provides that either the trustee or the debtor will make contractual installment payments. Unless the court orders otherwise, the notice requirements of this rule cease to apply when an order terminating or annulling the automatic stay becomes effective with respect to the residence that secures the claim.

(b) NOTICE OF PAYMENT CHANGES;OBJECTION. The holder of the claim shall file and serve on the debtor, debtor's counsel, and the trustee a notice of any change in the payment amount, including any change that results from an interest rate or escrow account adjustment, no later than 21 days before a payment in the new amount is due.

(1) *Notice*. The hold of the claim shall file and serve on the debtor, debtor's counsel, and the trustee a notice of any change that results in the payment amount, including any change that results from an interest-rate or escrow-account adjustment, not later than 21 days before a payment in the new amount is due. If the claim arises from a home-equity line of credit, this requirement may be modified by court order.

(2) *Objection*. A party in interest who objects to the payment change may file a motion to determine whether the change is required to maintain payments in accordance with § 1322(b)(5) of the Code. If no motion is filed by the day before the new amount is due, the change goes into effect, unless the court orders otherwise.

(c) NOTICE OF FEES, EXPENSES, AND CHARGES. The holder of the claim shall file and serve on the debtor, debtor's counsel, and the trustee a notice itemizing all fees, expenses, or charges (1) that were incurred in connection with the claim after the bankruptcy case was filed, and (2) that the holder asserts are recoverable against the debtor or against the debtor's principal residence. The notice shall be served within 180 days after the date on which the fees, expenses, or charges are incurred.

(d) FORM AND CONTENT. A notice filed and served under subdivision (b) or (c) of this rule shall be prepared as prescribed by the appropriate Official Form, and filed as a supplement to the holder's proof of claim. The notice is not subject to Rule 3001(f).

(e) DETERMINATION OF FEES, EXPENSES, OR CHARGES. On motion of a party in interest filed within one year after service of a notice under subdivision (c) of this rule, the court shall, after notice and hearing, determine whether payment of any claimed fee, expense, or charge is required by

the underlying agreement and applicable nonbankruptcy law to cure a default or maintain payments in accordance with § 1322(b)(5) of the Code.

(f) NOTICE OF FINAL CURE PAYMENT. Within 30 days after the debtor completes all payments under the plan, the trustee shall file and serve on the holder of the claim, the debtor, and debtor's counsel a notice stating that the debtor has paid in full the amount required to cure any default on the claim. The notice shall also inform the holder of its obligation to file and serve a response under subdivision (g). If the debtor contends that final cure payment has been made and all plan payments have been completed, and the trustee does not timely file and serve the notice required by this subdivision, the debtor may file and serve the notice.

(g) RESPONSE TO NOTICE OF FINAL CURE PAYMENT. Within 21 days after service of the notice under subdivision (f) of this rule, the holder shall file and serve on the debtor, debtor's counsel, and the trustee a statement indicating (1) whether it agrees that the debtor has paid in full the amount required to cure the default on the claim, and (2) whether the debtor is otherwise current on all payments consistent with § 1322(b)(5) of the Code. The statement shall itemize the required cure or postpetition amounts, if any, that the holder contends remain unpaid as of the date of the statement. The statement shall be filed as a supplement to the holder's proof of claim and is not subject to Rule 3001(f).

(h) DETERMINATION OF FINAL CURE AND PAYMENT. On motion of the debtor or trustee filed within 21 days after service of the statement under subdivision (g) of this rule, the court shall, after notice and hearing, determine whether the debtor has cured the default and paid all required postpetition amounts.

(i) FAILURE TO NOTIFY. If the holder of a claim fails to provide any information as required by subdivision (b), (c), or (g) of this rule, the court may, after notice and hearing, take either or both of the following actions:

(1) preclude the holder from presenting the omitted information, in any form, as evidence in any contested matter or adversary proceeding in the case, unless the court determines that the failure was substantially justified or is harmless; or

(2) award other appropriate relief, including reasonable expenses and attorney's fees caused by the failure.

Rule 3004. Filing of Claims by Debtor or Trustee

If a creditor does not timely file a proof of claim under Rule 3002(c) or 3003(c), the debtor or trustee may file a proof of the claim within 30 days after the expiration of the time for filing claims prescribed by Rule 3002(c) or 3003(c), whichever is applicable. The clerk shall forthwith give notice of the filing to the creditor, the debtor and the trustee.

Rule 3005. Filing of Claim, Acceptance, or Rejection by Guarantor, Surety, Indorser, or Other Codebtor

(a) FILING OF CLAIM. If a creditor does not timely file a proof of claim under Rule 3002(c) or 3003(c), any entity that is or may be liable with the debtor to that creditor, or who has secured that creditor, may file a proof of the claim within 30 days after the expiration of the time for filing claims prescribed by Rule 3002(c) or Rule 3003(c) whichever is applicable. No distribution shall be made on the claim except on satisfactory proof that the original debt will be diminished by the amount of distribution.

(b) FILING OF ACCEPTANCE OR REJECTION; SUBSTITUTION OF CREDITOR. An entity which has filed a claim pursuant to the first sentence of subdivision (a) of this rule may file an acceptance or rejection of a plan in the name of the creditor, if known, or if unknown, in the entity's own name but if the creditor files a proof of claim within the time permitted by Rule 3003(c) or files a notice prior to confirmation of a plan of the creditor's intention to act in the creditor's own behalf, the creditor shall be substituted for the obligor with respect to that claim.

Rule 3006. Withdrawal of Claim; Effect on Acceptance or Rejection of Plan

A creditor may withdraw a claim as of right by filing a notice of withdrawal, except as provided in this rule. If after a creditor has filed a proof of claim an objection is filed thereto or a complaint is filed against that creditor in an adversary proceeding, or the creditor has accepted or rejected the plan or otherwise has participated significantly in the case, the creditor may not withdraw the claim except on order of the court after a hearing on notice to the trustee or debtor in possession, and any creditors' committee elected pursuant to §705(a) or appointed pursuant to §1102 of the Code. The order of the court shall contain such terms and conditions as the court deems proper. Unless the court orders otherwise, an authorized withdrawal of a claim shall constitute withdrawal of any related acceptance or rejection of a plan.

Rule 3007. Objections to Claims

(a) TIME AND MANNER OF SERVICE.

(1) *Time of Service*. An objection to the allowance of a claim and a notice of objection that substantially conforms to the appropriate Official Form shall be filed and served at least 30 days before any scheduled hearing on the objection or any deadline for the claimant to request a hearing.

(2) *Manner of Service*.

(A) The objection and notice shall be served on a claimant by first-class mail to the person most recently designated on the claimant's original or amended proof of claim as the person to receive notices, at the address so indicated; and

(i) if the objection is to a claim of the United States, or any of its officers or agencies, in the manner provided for service of a summons and complaint by Rule 7004(b)(4) or (5); or

(ii) if the objection is to a claim of an insured depository institution as defined in section 3 of the Federal Deposit Insurance Act, in the manner provided in Rule 7004(h).

(B) Service of the objection and notice shall also be made by first-class mail or other permitted means on the debtor or debtor in possession, the trustee, and, if applicable, the entity filing the proof of claim under Rule 3005.

(b) DEMAND FOR RELIEF REQUIRING AN ADVERSARY PROCEEDING. A party in interest shall not include a demand for relief of a kind specified in Rule 7001 in an objection to the allowance of a claim, but may include the objection in an adversary proceeding.

(c) LIMITATION ON JOINDER OF CLAIMS OBJECTIONS. Unless otherwise ordered by the court or permitted by subdivision (d), objections to more than one claim shall not be joined in a single objection.

(d) OMNIBUS OBJECTION. Subject to subdivision (e), objections to more than one claim may be joined in an omnibus objection if all the claims were filed by the same entity, or the objections are based solely on the grounds that the claims should be disallowed, in whole or in part, because:

(1) they duplicate other claims;

(2) they have been filed in the wrong case;

(3) they have been amended by subsequently filed proofs of claim;

(4) they were not timely filed;

(5) they have been satisfied or released during the case in accordance with the Code, applicable rules, or a court order;

(6) they were presented in a form that does not comply with applicable rules, and the objection states that the objector is unable to determine the validity of the claim because of the noncompliance;

(7) they are interests, rather than claims; or

(8) they assert priority in an amount that exceeds the maximum amount under §507 of the Code.

(e) REQUIREMENTS FOR OMNIBUS OBJECTION. An omnibus objection shall:

(1) state in a conspicuous place that claimants receiving the objection should locate their names and claims in the objection;

(2) list claimants alphabetically, provide a cross-reference to claim numbers, and, if appropriate, list claimants by category of claims;

(3) state the grounds of the objection to each claim and provide a cross-reference to the pages in the omnibus objection pertinent to the stated grounds;

(4) state in the title the identity of the objector and the grounds for the objections;

(5) be numbered consecutively with other omnibus objections filed by the same objector; and

(6) contain objections to no more than 100 claims.

(f) FINALITY OF OBJECTION. The finality of any order regarding a claim objection included in an omnibus objection shall be determined as though the claim had been subject to an individual objection.

Rule 3008. Reconsideration of Claims

A party in interest may move for reconsideration of an order allowing or disallowing a claim against the estate. The court after a hearing on notice shall enter an appropriate order.

Rule 3012. Determining the Amount of Secured and Priority Claims

(a) Determination of Amount of Claim. On request by a party in interest and after notice—to the holder of the claim and any other entity the court designates—and a hearing, the court may determine:

(1) the amount of a secured claim under § 506(a) of the Code; or

(2) the amount of a claim entitled to priority under § 507 of the Code.

(b) Request for Determination; How Made. Except as provided in subdivision (c), a request to determine the amount of a secured claim may be made by motion, in a claim objection, or in a plan filed in a chapter 12 or chapter 13 case. When the request is made in a chapter 12 or chapter 13 plan, the plan shall be served on the holder of the claim and any other entity the court designates in the manner provided for service of a summons and complaint by Rule 7004. A request to determine the amount of a claim entitled to priority may be made only by motion after a claim is filed or in a claim objection.

(c) Claims of Governmental Units. A request to determine the amount of a secured claim of a governmental unit may be made only by motion or in a claim objection after the governmental unit files a proof of claim or after the time for filing one under Rule 3002(c)(1) has expired.

Rule 3013. Classification of Claims and Interests

For the purposes of the plan and its acceptance, the court may, on motion after hearing on notice as the court may direct, determine classes of creditors and equity security holders pursuant to §§1122, 1222(b)(1), and 1322(b)(1) of the Code.

274 B.R. 686
In re Rodney DANSEREAU and Hiltrude Dansereau, Robert Morgan and Tracy Krings, Michael Madrid and Liselotte Madrid, Christopher Hoffman and Rochelle Hoffman, Joan Rosenbrock, Willie Lee Hodges and Dyrenda Tutavena Hodges, Demetrius Dudley Davis and Mary Ann Davis, Debtors.
No. 01-61970-LEK.
No. 01-61996-LEK.
No. 01-62054-LEK.
No. 01-62148-LEK.
No. 01-62150-LEK.
No. 01-62243-LEK.
No. 01-62403-LEK.
United States Bankruptcy Court, W.D. Texas, Waco Division.
February 21, 2002.

Page 687

William B. Phillips, Rachelle Crouch, Smith & Carlson, PC, Killeen, TX, James O. Cure, Temple, TX, James C. Herring & Assoc., Waco, TX, for debtors.

G. Ray Hendren, Austin, TX, Chapter 13 Trustee.

Ronald E. Pearson, Temple, TX, for claimant.

ORDER ALLOWING CLAIMS OF CASH N ADVANCED[1] AND/OR CASH IN ADVANCE 1 AS GENERAL UNSECURED CLAIMS IN THE AMOUNT OF $1.00

Page 688

JOHN C. AKARD, Bankruptcy Judge.[2]

On February 5, 2002, came on for hearing the court's Order to Show Cause why the claims filed by Cash N Advanced and/or Cash in Advance (the "Claimant" 1) in the above Chapter 13 cases should not each be reduced to $1.00. In each of the cases, the Claimant asserted, without apparent factual or legal basis, a priority status for its claim, which it described as being the result of the debtors' NSF checks to it.

At the hearing, counsel for the Claimant appeared as did the various debtors' counsel and the Chapter 13 Trustee. No testimony or other evidence was presented by the Claimant. Its counsel did not dispute that there was no basis for claiming priority status for its claims. Instead, counsel argued that this court should not or could not reduce the amount of the claim because the Order to Show Cause represented an attempt to exercise criminal contempt powers not within this court's jurisdiction, because the Claimant was entitled to and demanded a jury trial, and/or because there was no evidence that the Claimant had intentionally filed the claims knowing that there were no grounds for priority status.

After consideration of the arguments and such evidence as was presented, including that of which the court takes judicial notice, and for the reasons stated orally on the record, the court found and ordered that each claim would be reduced to $1.00.

In summary, the number of claims filed as priority claims by the Claimant establishes a pattern, indicating that such filings were not the result of mere typos or misunderstandings of the form. On the contrary, the Official Form for the proof of claim used by the Claimant (Exh. T-1) in each case gave sufficient notice and an explanation of the distinction between a general unsecured claim and a priority unsecured claim, so as to put the Claimant on notice of that distinction. *See Lenior v. GE Capital Corporation* (In re Lenior), 231 B.R. 662, 672 (Bankr.N.D.Ill.1999) (where the proof of claim form explained that a secured claim should be bifurcated into secured and unsecured claims based on the value of the collateral, and the claimant did not do so, sanctions under Fed.R.Bankr.P. 9011 may be imposed).

Rule 9011 provides that

[b]y presenting to the court ... a petition, pleading, written motion, or other paper, an

attorney or unrepresented party is certifying that to the best of the person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances, ... the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law ....

Rule 9011 applies to proofs of claim filed in bankruptcy cases. *Timmons v. Cassell* (*In re Cassell*), 254 B.R. 687, 691 (6th Cir. BAP 2000); *accord, Knox v. Sunstar Acceptance Corp.* (In re Knox), 237 B.R. 687, 697 (Bankr.N.D.Ill.1999); *e.g., In re McAllister,* 123 B.R. 393 (Bankr.D.Or.1991) (Rule 9011 sanctions imposed against Oregon Department of Revenue which filed proof of claim for income taxes allegedly owed by debtor when taxes were not in fact owed) *and Hamilton v. United States (In re Hamilton),* 104 B.R. 525 (Bankr.M.D.Ga.

Page 689

1989) (Rule 9011 sanctions imposed upon the IRS for filing a proof of claim for taxes not owed, that claim having been filed without prior reasonable inquiry).

"The standard used to determine whether a party made a reasonable inquiry before filing a claim is the reasonableness of its conduct under the circumstances." *Lenior,* 231 B.R. at 672; *Cassell,* 254 B.R. at 691. After noting that the proof of claim form used by the claimant instructed that the claim be bifurcated according to the value of the collateral, the court indicated that the claimant may be sanctioned under Rule 9011 if the evidence showed that there was no factual basis to support the allegedly fully secured status of the claim. *Lenior* at 672.

In this case, counsel for the Claimant did not dispute that there was no basis for the alleged priority status of the claims. Under these circumstances, a claimant's use of a proof of claim form that contains instructions on how to fill it out may be evidence that the claimant "neglected their obligations to make reasonable inquiry" before filing the claim, resulting in sanctions against the claimant. *Id.* Here, the repeated filing by Cash N Advanced and/or Cash in Advance of priority claims using the Official Form and without any legal or factual basis for that priority status cannot be said to be inadvertent or innocent. Whether that filing was intentional or merely reckless, it is clear that the Claimant neglected its obligation to make reasonable inquiry into the status of its claims before it filed them.

Under 11 U.S.C. § 105 "the court may issue any order ... that is necessary or appropriate to carry out the provisions of ... title [11 of the United States Code]."

Section 105(a) simply authorizes a bankruptcy court to fashion such orders as are necessary to further the purposes of the substantive provisions of the Bankruptcy Code. The section is described in the legislative history as being `similar in effect to the All Writs Statute.' Thus, it authorizes bankruptcy courts to issue injunctions and take other necessary steps in aid of their jurisdiction.

United States v. Sutton, 786 F.2d 1305, 1307 (5th Cir.1986). Section 105 permits courts to impose contempt sanctions in certain circumstances. *Holloway v. Household Automotive Finance Corporation,* 227 B.R. 501, 504-05 (N.D.Ill.1998).

The claims filed by the Claimant in these cases required the Trustee and/or the Debtors to file objections to them, resulting in added costs and time for the parties and the court. An order sanctioning Cash N Advanced and Cash in Advance for filing these claims and enjoining them from future such filings is appropriate and necessary to carry out the Bankruptcy Code's provision that a claim is allowed as filed unless objected to.[3] 11 U.S.C. § 502(a). This court has the power to control its docket and to prevent abuses

Page 690

of that docket such as has been caused by Cash N Advanced's and/or Cash in Advance's groundless assertion of priority status for the claims in these cases.

Therefore, based on § 105 or, alternatively, under Fed.R.Bankr.P. 9011 the court finds that the claims of Cash N Advanced and/or Cash in Advance in each of the above-referenced cases should each be reduced to $1.00 and allowed as a general unsecured claim. The court further finds that Cash N Advanced and Cash in Advance should be enjoined from filing such claims in the future.

IT, THEREFORE, ORDERED that the claim(s) of Cash N Advanced and/or Cash in Advance in each of the above-referenced cases shall be ALLOWED as general unsecured claims in the amount of $1.00 each.

IT IS FURTHER ORDERED that Cash N Advanced and Cash in Advance, and all their employees, agents and any and all persons acting on behalf of either or both of them, are hereby ENJOINED from filing in any case before this court any proof of claim alleging a priority status for the claim, unless the proof of claim also provides the factual and legal basis for such priority status as provided in 11 U.S.C. 507.

IT IS FURTHER ORDERED that the Clerk of the Court shall serve a copy of this order on each of the persons named on the attached list, at the addresses provided therein.[4]

Notes:

1. In the Dansereau case and in the Morgan and Krings case, the claimant listed its name as "Cash N Advanced" at 2127 E. Hwy. 190, Copperas Cove, TX 76522. In all other cases, it listed its name as "Cash in Advance" at 404 W. Rancier Ave., Killeen, TX 76541. Counsel for the claimant(s) did not differentiate between the two at the hearing, and the court has assumed that the two names represent the same or related entities.

2. United States Bankruptcy Judge (retired), recalled for service in the Western District of Texas.

3. This court respectfully disagrees with *In re Simmons,* 237 B.R. 672, 676 (Bankr.N.D.Ill.1999), where the court found that it had no authority under § 105 to sanction a party for consistently filing proofs of claim that did not bifurcate claims into secured and unsecured claims. The *Simmons* court noted that the debtor in that case "simply ha[d] not shown" that her adversary complaint for damages and to enjoin further filings would fulfill either of the two goals of § 105: to carry out the provisions of the Bankruptcy Code or Rules, or to prevent an abuse of process. *Id.* at 674. The court, at least in part, reasoned that sanctions or an injunction was not necessary to carry out any Bankruptcy Code provision or Rule, because no objection to the allegedly fully secured claim was required for the debtor or trustee to treat it as partially unsecured. *Id.* at 675 ("debtor's ability to challenge the secured classification is not affected by [the claimant's] claims filing practice even if debtor fails to object to the proof of claim"). This is clearly not the law in the Fifth Circuit with regard to secured claims. *See Simmons v. Savell* (In re Simmons), 765 F.2d 547 (5th Cir.1985). In any event, this court finds that the claims of Cash N Advanced and Cash in Advance would have been entitled to priority treatment unless objections to the claims were filed, and therefore an order under § 105 is warranted.

4. This Order will be published.

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226 B.R. 204 (1998)

**In re KIEFFER-MICKES, INC., Debtor.
Carolynne M. KIEFFER and Kieffer-Mickes, Inc., Appellants,
v.
Charles W. RISKE, Appellee.**

BAP No. 98-6029.

United States Bankruptcy Appellate Panel of the Eighth Circuit.

Submitted September 9, 1998.

Decided November 3, 1998.

[226 BR 205]

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[226 BR 206]

Carolynne Kieffer, St. Louis, MO, pro se.

Charles W. Riske, St. Louis, MO, for appellee.

Before KOGER, Chief Judge, HILL, and DREHER, Bankruptcy Judges.

DREHER, Bankruptcy Judge.

This is an appeal from an order of the bankruptcy court dated January 20, 1998,[1] denying a motion by Appellant, Carolynne M. Kieffer (Kieffer), for an order revoking distribution of funds made pursuant to the bankruptcy court's order of September 20, 1996. We affirm.[2]

PROCEDURAL HISTORY

A. The Order Allowing Claim Number 7

Appellant, Kieffer-Mickes, Inc. (Debtor), filed a petition for relief under Chapter 11 of the Bankruptcy Code on March 26, 1991. Kieffer was Debtor's sole shareholder and President. The case was subsequently converted to one under Chapter 7 and Appellee, Charles W. Riske (Trustee), was appointed as trustee.

In the course of administering the estate the Trustee reviewed the claims that had been filed and determined to object to several, including Claim Number 7 in the amount of $185,000 filed by Luttrell Construction Co. and Claim Number 10 in the amount of $42,140 filed by Kieffer. After the Trustee had been supplied with supporting documentation, however, he concluded that Claim Number 7 should be allowed in the amount of $104,000. However, he continued to press his objection to Claim Number 10. Well in advance of the hearing on objections, the Trustee advised Kieffer of his position and further that, if she wished to make her views known, she could do so at the hearing.

A hearing on claim objections was held on November 10, 1993. Kieffer appeared at the hearing and orally objected to the allowance of a number of claims that had been filed,

[226 BR 207]

including Claim Number 7. She also filed a written objection in which she made many complaints and insisted that the Trustee had failed to adequately investigate claims, including Claim Number 7.

On November 19, 1993, the bankruptcy court issued its order overruling Kieffer's objections to Claim Number 7, finding that the Trustee had adequately investigated the claim, noting that Kieffer's arguments regarding the claim had either been determined adversely to her in the bankruptcy case or in prior nonbankruptcy proceedings, and allowing the claim in the sum of $104,000 as a general unsecured claim. Kieffer did not appeal the November 19, 1993 order. The court also sustained the trustee's objection to Kieffer's claim in its entirety. Kieffer filed an appeal from this adverse ruling, but her appeal was subsequently dismissed.

B. The Order Approving Distributions

On July 16, 1996, the Trustee filed a "Final Report, Proposed Distribution and Motion for Abandonment." In it, the Trustee proposed to distribute $42,120.25 to Luttrell Construction on Claim Number 7 (its pro rata share of the $45,817.44 available to pay general unsecured claims based on its allowed claim of $104,000). There would be no distribution to Kieffer on her claim. Kieffer was served with a copy of the report. Kieffer objected to several proposed distributions to creditors, including an objection to any distribution on Claim Number 7. She asserted that Claim Number 7 was not supported by reliable evidence, had not been adequately investigated, and was supported by "misleading and bogus documents."

By order dated September 20, 1996 (the September 20 order), the bankruptcy court overruled her objections, specifically finding that her objections to a distribution on Claim Number 7 were repetitious and untimely and did not present any legal basis for denial of payment.

Kieffer then filed a "Motion to Set Aside The Order to Pay Out Distribution on the Basis of Fraud." She specifically stated: "The claims and invoices presented to the Trustee and to the Court by Bob F. Luttrell President of Luttrell Construction Co. represent misleading documents and statements with little or no basis in truth, and there is no legitimate basis for his claims." By order dated October 2, 1996, the bankruptcy court denied her motion. Kieffer filed an appeal from the September 20 order and she and the Debtor also made a motion before the bankruptcy court for a stay of any distributions, a stay pending appeal, and a rehearing on the September 20 order. By order dated October 10, 1996, the bankruptcy court denied these motions, finding that the matters raised in the motion had been fully litigated previously and that the movants had presented no credible evidence to support any allegation of "newly found evidence." No appeal was taken from this order.

By order dated September 27, 1997, the district court subsequently dismissed the appeal from the September 20 order for failure to prosecute. A motion to reconsider was denied by the district court on November 10, 1997. Kieffer and the Debtor have appealed the dismissal to the Eighth Circuit Court of Appeals and their appeal is still pending. No stay having been obtained, however, the Trustee has made the distributions to creditors authorized by the September 20 order.

C. The Motion to Revoke Distribution

Between 1994 and December 1997, Kieffer asserts Bob Luttrell lived in her home over her objection. She asserts the relationship was abusive. She further states that she obtained a protective order and had him removed from the home in December 1997. On December 30, 1997, Kieffer made a motion seeking to have the bankruptcy court revoke the distribution that had been made to Luttrell Construction Co. on Claim Number 7 pursuant to the September 20 order. In this motion Kieffer asserted, once again, that she had new evidence to establish the fraudulent nature of Claim Number 7 and that no distribution should ever have been made on Claim Number 7.

In an order dated January 20, 1998, which is the subject of the present appeal, the bankruptcy court denied the request for relief and specifically found that the motion was repetitive of prior motions, the allegations

[226 BR 208]

of newly discovered evidence had not been established, and unsupported and generalized allegations of fraud provided no basis for setting aside the September 20 order.

DISCUSSION

A. Positions of the Parties

Appellants contend that they have newly discovered evidence which establishes that Claim Number 7 should never have been allowed because it was supported by fraudulent or misleading information. Appellants' briefs

continue to assert that the Trustee has failed to conduct a thorough investigation of the claim and that the Trustee "conspired" with the claimant so as to allow the claim.

Appellee asserts that since the September 20 order is on appeal, this court is without jurisdiction to act in the present appeal. He also asserts that the October 10, 1996 order, which denied reconsideration of the September 20 order, addressed these very allegations and, under the doctrine of res judicata, bars further litigation on the issues raised in this appeal. Finally, Appellee asserts that issues raised in this appeal have been rendered moot because distributions have been made pursuant to the September 20 order.

B. Standard of Review

We review the legal conclusions of the bankruptcy court *de novo*. *First Nat'l Bank v. Pontow,* 111 F.3d 604, 609 (8th Cir.1997); *Chamberlain v. Kula* (*In re Kula*), 213 B.R. 729, 735 (8th Cir. BAP 1997). We review discretionary actions of the bankruptcy court for abuse of discretion, which may only be found if the lower court's judgment was based upon clearly erroneous factual findings or erroneous legal conclusions. *Barger v. Hayes County Non-Stock Co-op* (*In re Barger*), 219 B.R. 238, 243 (8th Cir. BAP 1998) (citing *Mathenia v. Delo,* 99 F.3d 1476, 1480 (8th Cir.1996), *cert. denied,* ___ U.S. ___, 117 S.Ct. 2518, 138 L.Ed.2d 1020 (1997)). "Under an abuse of discretion standard, this court cannot reverse the bankruptcy court's ruling unless it `has a definite and firm conviction that the bankruptcy court committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors.'" *Nelson v. Siouxland Fed. Credit Union* (*In re Nelson*), 223 B.R. 349, 352 (8th Cir. BAP 1998) (quoting *Beguelin v. Volcano Vision, Inc.* (*In re Beguelin*), 220 B.R. 94, 97 (9th Cir. BAP 1998)).

C. Standing

We first address an issue which neither party raised and which the bankruptcy court did not consider, that is whether Kieffer and/or the Debtor have standing to pursue this appeal. To have standing to pursue an appeal, a party must make an independent showing that the party is aggrieved by the order or judgment which is subject of the appeal. *LaBarge v. Benda* (*In re Merrifield*), 214 B.R. 362, 365 (8th Cir. BAP 1997). In this context, an "aggrieved party is one who is `directly and adversely affected pecuniarily by the order of the bankruptcy court.'" *Id.* (quoting *Fondiller v. Robertson* (*In re Fondiller*), 707 F.2d 441, 443 (9th Cir.1983)); *Cult Awareness Network, Inc. v. Martino,* 151 F.3d 605, 607 (7th Cir.1998) (only persons affected pecuniarily by a bankruptcy order have standing to appeal that order).

Kieffer no longer has any individual claim in the bankruptcy estate. Her claim was objected to by the Trustee and disallowed by the bankruptcy court. Her appeal from that disallowance has been dismissed. Thus, no assets of the estate can possibly go to Kieffer. Therefore, the distribution of estate assets does not pecuniarily affect Kieffer and she does not have standing in this matter. *Merrifield,* 214 B.R. at 365. *See also In re Green,* 133 B.R. 185, 186-87 (E.D.Va.1991) (holding that dismissal of a creditor's claim precluded further standing in the case).

Typically, a Debtor has no standing to object to claims or orders relating to them because the debtor does not have a pecuniary interest in the distribution of the assets of the estate. *Kapp v. Naturelle, Inc.,* (*In re Kapp*), 611 F.2d 703, 706-07 (8th Cir.1979); *Broady v. Miner* (*In re Broady*), 96 B.R. 221, 223 (Bankr.E.D.Mo.1988) (citing *Kapp*). This is because an objection to a proposed distribution only affects how much each creditor

[226 BR 209]

will receive and does not affect the debtor's rights. *See Merrifield,* 214 B.R. at 366; *In re El San Juan Hotel,* 809 F.2d 151, 154-55 (1st Cir.1987). The exception is where it appears that, if the contested claims are disallowed, there will be a surplus. *Kapp,* 611 F.2d at 707; *see also McGuirl v. White,*

86 F.3d 1232, 1234 (D.C.Cir.1996); *San Juan Hotel,* 809 F.2d at 155 n. 6. In this case, this exception applies. The Trustee's Final Report and Account reflects that $45,817.44 was available for payment to general unsecured creditors. Excluding Claim Number 7, which is the subject of this appeal, general unsecured claims totaled $8,243.64. Thus, if there is no distribution on Claim Number 7 and the other general unsecured creditors were paid in full, there would be a $37,573.80 surplus left to be returned to the Debtor. Because of this potential surplus, the Debtor, at least, has standing to contest issues relating to the distribution. *Kapp,* 611 F.2d at 706-07; *McGuirl,* 86 F.3d at 1234; *San Juan Hotel,* 809 F.2d at 155 n. 6.

D. Relief Under Bankruptcy Rule 9024

On the assumption that at least one Appellant has standing, we move to the merits. Stripped to its basics, this appeal is one which challenges the September 20 order on two grounds. Each ground is without merit for a separate reason.

First, Appellants assert that the September 20 order was erroneous in the first instance. According to Appellants, no order allowing distributions should have been entered because Claim Number 7 was not allowable under the applicable provisions of the Bankruptcy Code. That question, and the responsive arguments of mootness and res judicata, are currently pending before a different appellate court, the Eighth Circuit Court of Appeals. Since the Circuit Court is deciding those issues, we obviously lack jurisdiction to consider them. *Liddell v. Board of Educ.,* 73 F.3d 819, 822 (8th Cir.1996) ("Once appealed, issues before the appellate court should not be undermined or altered." (citing *Griggs v. Provident Consumer Discount Co.,* 459 U.S. 56, 58, 103 S.Ct. 400, 74 L.Ed.2d 225 (1982) ("The filing of a notice of appeal is an event of jurisdictional significance — it confers jurisdiction on the court of appeals. . . . "))).

Appellants' real argument, however, is made in an entirely different procedural context. Appellants argue that the September 20 order authorizing the distribution to creditors should be revoked because Appellants have newly discovered evidence suggesting the order was procured by fraud. Although not framed as such, Appellants essentially are requesting relief from the September 20 order under Fed. R. Bankr.P. 9024, which incorporates Fed.R.Civ.P. 60. This rule allows a court to relieve a party from the effects of an order or judgment under limited circumstances, including (1) "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)," (2) "fraud (whether heretofore denominated intrinsic or extrinsic)," or (3) "any other reason justifying relief from the operation of the judgment." Fed.R.Civ.P. 60(b)(2), (3), and (6). Relief under Rule 60(b) is "an extraordinary remedy that allows the court `to preserve the delicate balance between the sanctity of final judgments and the incessant command of a court's conscience that justice be done in light of all the facts.'" *Hoover v. Valley West D M,* 823 F.2d 227, 230 (8th Cir.1987) (quoting *Rosebud Sioux Tribe v. A & P Steel, Inc.,* 733 F.2d 509, 515 (8th Cir. 1984)); *see also Design Classics, Inc. v. Westphal (In re Design Classics, Inc.),* 788 F.2d 1384, 1386 (8th Cir.1986). Granting or denying a motion under Rule 60(b) is within the discretion of the trial court and may only be reviewed for an abuse of discretion. *Design Classics,* 788 F.2d at 1386.

1. Jurisdiction

While courts have differed on the question, *see* 11 Charles Alan Wright et al., *Federal Practice and Procedure* § 2873, (2d ed.1995), the law in this circuit is clear. A motion for relief from a judgment or order filed after a notice of appeal from the same order has been taken may be considered on its merits and *denied,* but not *granted,* by the trial court. *Brode v. Cohn,* 966 F.2d 1237, 1240 (8th Cir.1992) (citing *Winter v. Cerro Gordo County Conservation Bd.,* 925 F.2d

[226 BR 210]

1069, 1073 (8th Cir.1991)). The trial court may also indicate its willingness to grant such an order

and instruct the parties to seek an order staying further proceedings on appeal and remanding the case to the trial court for a ruling on the motion. *Winter v. Cerro Gordo County Conservation Bd.,* 925 F.2d 1069, 1073 (8th Cir.1991). Accordingly, the bankruptcy court had jurisdiction to hear appellants' motion for relief from the September 20 order and to *deny* it, which it did.

2. Asserted Grounds for Relief from the Judgment

Essentially, Appellants' arguments fall within Rule 60(b)(2) and (b)(3) because they allege the discovery of new evidence and the existence of fraud. In order to obtain relief under (b)(2), the moving party must show that "(1) the evidence was discovered after trial; (2) the party exercised due diligence to discover the evidence before the end of the trial; (3) the evidence is material and not merely cumulative or impeaching; and (4) a new trial considering the evidence would probably produce a different result." *McCormack v. Citibank, N.A.,* 100 F.3d 532, 542 (8th Cir.1996); *see also, e.g., Mitchell v. Shalala,* 48 F.3d 1039, 1041 (8th Cir.1995). Under (b)(3), the moving party must show by clear and convincing evidence that her opponent engaged in a fraud or misrepresentation that prevented the movant from fully and fairly presenting her case. *Cowan v. Strafford R-VI School Dist.,* 140 F.3d 1153, 1159 (8th Cir.1998) (citing *E.F. Hutton & Co. v. Berns,* 757 F.2d 215, 216-17 (8th Cir.1985)); *see also, e.g., Greiner v. City of Champlin,* 152 F.3d 787, 789 (8th Cir. 1998).

Under either Rule 60(b)(2) or (b)(3), the moving party bears a heavy burden. Rule 60 provides extraordinary relief; and, therefore, it is viewed with disfavor. *See Rosebud Sioux Tribe v. A & P Steel, Inc.,* 733 F.2d 509, 515 (8th Cir.1984). In addition to this heavy burden, such a motion must be made within a reasonable time and, in any event, not more than one year after the order was entered. Fed. R. Civ. P 60(b); *MacLean v. Ozark Mountain Country Mall, Inc.* (*In re Branson Mall, Inc.*), 970 F.2d 456, 462 (8th Cir.1992); *Pioneer Ins. Co. v. Gelt,* 558 F.2d 1303, 1311 (8th Cir.1977). Appellants' motion for relief from the September 20 order was not made within this one year time frame. In any event, Appellants' motion is woefully deficient in meeting the stringent evidentiary requirements for achieving success on the merits. Appellants simply vaguely complain about the outcome of the matter. A Rule 60 motion is not the vehicle for restating old complaints and rearguing old evidence dealt with earlier in the proceedings. *Design Classics v. Westphal* (*In re Design Classics*), 788 F.2d 1384, 1386 (8th Cir.1986) (stating that the proper vehicle for addressing concerns such as these is the direct appeal).

Nor is relief available under Rule 60(b)(6), which may, in an appropriate circumstance, not be subject to the outside one year time bar. *Schultz v. Commerce First Financial,* 24 F.3d 1023, 1025 (8th Cir.1994). Subdivisions (b)(2) and (b)(3) of Rule 60, on the one hand, and subdivision (6), on the other, are mutually exclusive. Thus, a motion for relief under Rule 60(b)(6) cannot be premised on one of the grounds for relief enumerated in subdivisions (b)(2) and (b)(3). *Liljeberg v. Health Servs. Acquisition Corp.,* 486 U.S. 847, 863 & n. 11, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988); *see also United States v. Dakota Cheese, Inc.,* 923 F.2d 576, 577 (8th Cir.1991). As Appellants' motion falls squarely under (b)(2) and (b)(3), they cannot seek relief under (b)(6).

The bankruptcy court did not abuse its discretion in denying the motion to revoke the distribution made pursuant to the September 20 order.

ACCORDINGLY, for the reasons stated, we AFFIRM.

Notes:

1 The Honorable James J. Barta, United States Bankruptcy Judge, Eastern District of Missouri.

2 Appellants seek oral argument which we have determined is unnecessary.

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318 B.R. 147
In re Phyllis Michele DOVE-NATION, Debtor.
Phyllis Michele Dove-Nation, Debtor-Appellant,
v.
eCast Settlement Corporation, Claimant-Appellee.
BAP No. 04-6049 EA.
United States Bankruptcy Appellate Panel for the Eighth Circuit.
Submitted: December 1, 2004.
Filed: December 17, 2004.

Page 148

Barbara J. May, Arden Hills, MN, Kathy A. Cruz, Hot Springs, AR, Robert C. Lowry, Little Rock, AR, on brief, for appellant.

Kimberly Wood Tucker, Little Rock, AR, Alane A. Becket, Malvern, PA, on brief, for appellee.

Before SCHERMER, FEDERMAN and VENTERS, Bankruptcy Judges.

SCHERMER, Bankruptcy Judge.

Debtor Phylis Michele Dove-Nation ("Debtor") appeals the bankruptcy court[1] order overruling her objections to claims filed by eCast Settlement Corporation ("Claimant").[2] We have jurisdiction over the appeal of a final order issued by the bankruptcy court. *See* 28 U.S.C. § 158(b). For the reasons set forth below, we affirm the order overruling the Debtor's objections to the claims filed by the Claimant.

ISSUE

The issue on appeal is whether the bankruptcy court erred when it overruled the Debtor's objections to the claims based on the Claimant's alleged failure to comply with Federal Rule of Bankruptcy Procedure 3001(c). This issue has recently been raised by debtors' attorneys in various courts with mixed results.[3] We conclude that the bankruptcy court did not err in overruling the objections.

BACKGROUND

The Debtor filed a voluntary petition for relief under Chapter 13 of the United States Bankruptcy Code ("Bankruptcy Code") on October 22, 2003. In her schedules, the Debtor listed a nonpriority unsecured

Page 149

credit card debt to Exxon/ Mobil in the amount of $1,256.00 and a nonpriority unsecured credit card debt to Providian Financial in the amount of $2,024.00. The Debtor did not list either of these obligations as contingent, unliquidated, or disputed.

On January 19, 2004, the Claimant filed a nonpriority unsecured claim in the amount of $1,278.10 as assignee of General Electric/Exxon Mobil ("Claim Number 8") and a nonpriority unsecured claim in the amount of $2,008.65 as assignee of Providian National Bank ("Claim Number 9"). Each claim was signed by an attorney/agent for the Claimant and each included a single-page attachment entitled "Accounting Summary" which listed the Debtor's name, address, and last four digits of her social security number; the bankruptcy case number, filing date, and chapter; the last four digits of the account number and the account type which was listed as credit card for each; the balance at filing date; and a paragraph explaining that the account information was derived from the account database of the assignor and other sources including the bankruptcy court and that the assignor has verified that the balance recorded thereon is the outstanding balance of the account as of the close of business on the business day immediately preceding the bankruptcy filing date. In addition, paragraph 8 of each claim stated as follows:

8. SUPPORTING DOCUMENTS: Itemized monthly statements of account were mailed to the debtor pre-petition; claimant maintains copies of

said statements on microfilm or image processing and reproduction of same absent a dispute as to the balance would be unduly time consuming and burdensome; nevertheless, where an interested party so requests, claimant will search its records to provide copies of said month accounts (*sic*) statements. To request further documentation please call Becket & Lee LLP at 1-800-###-#### and ask to speak to the Claims Servicing Supervisor. Claim may include contractual interest and/or late charges.

On March 23, 2004, the Debtor filed an objection to each claim, asserting the following grounds with respect to each claim: (1) the documentation does not comply with Federal Rules of Bankruptcy Procedure 3001 or 3002 nor with the instructions on the Proof of Claim Form B10; (2) the Claimant did not attach the original or duplicate of the writing with the proof of claim nor allege that it was lost or destroyed; and (3) the Claimant failed to file as an exhibit all the documents which support the claim.

On April 2, 2004, the Debtor amended her Schedule F to list the obligations to Exxon/Mobil and to Providian Financial as disputed. In response to the claim objections, the Claimant filed amended claims. Claim Number 8 was amended by Claim Number 11 which included documentation evidencing the Claimant's purchase of the claim from GE. Claim Number 9 was amended by Claim Number 12 which included documentation evidencing the Claimant's purchase of the claim from Providian and the Debtor's monthly account statements for September, October, and November, 2003.

The bankruptcy court conducted a hearing on the Debtor's objections to the claims on May 28, 2004. In support of its claim objections, the Debtor called an attorney for the Chapter 13 Trustee who testified about a blank proof of claim form, the instructions for the proof of claim form, and the committee notes to the proof of claim form. The attorney also testified that the Chapter 13 Trustee's office reviewed

the claims and found no reason to object to them. The Debtor presented no other evidence. The court overruled the objections to the claims. The court entered its order overruling the objections on June 9, 2004 ("June Order"). On June 16, 2004, the Debtor filed a motion to alter or amend the June Order. The court denied the motion to alter or amend by order dated August 13, 2004 ("August Order"). The Debtor filed her notice of appeal of the August Order on August 19, 2004.

By appealing the August Order, the Debtor has technically only appealed the issue of whether the court abused its discretion in denying the motion to alter or amend. The Debtor should have filed a notice of appeal of the June Order. She could have accomplished this by mentioning the June Order in the notice of appeal. The notice of appeal was timely as to the June Order because the motion to alter or amend the June Order extended the deadline to appeal the June Order. Fed. R. Bankr.P. 8002(b). Despite her failure to mention the June Order in the notice of appeal, the Debtor's brief on appeal addresses the merits of the June Order and not the August Order. The Claimant's brief likewise addresses the June Order and does not address the infirmity of the notice of appeal as it relates to the June Order. Consequently, we shall address the merits of the June Order in this opinion. However, we caution counsel to be more careful in drafting notices of appeal in the future.

STANDARD OF REVIEW

We review the bankruptcy court's findings of fact for clear error and its conclusions of law *de novo*. Fed. R. Bankr.P. 8013; *Halverson v. Estate of Cameron (In re Mathiason),* 16 F.3d 234, 235 (8th Cir.1994); *On-Line Services Ltd. L.L.C. v. Bradley & Riley, PC (In re Internet Navigator, Inc.),* 301 B.R. 1, 2 (8th Cir. BAP 2003); *White v. Coors Distrib. Co. (In re White),* 260 B.R. 870, 874 (8th Cir. BAP 2001); *Kimmons v. Innovative Software Designs, Inc. (In re Innovative Software Designs, Inc.),* 253 B.R. 40, 44 (8th Cir. BAP 2000); *Consumers Realty & Dev. Co., Inc. v. Goetze (In re Consumers Realty & Dev. Co., Inc.),* 238 B.R. 418, 422 (8th Cir. BAP 1999). In the

instant case the facts are not in dispute. The sole issue on appeal is a legal issue which we review *de novo*.

DISCUSSION

In the bankruptcy context, a claim is any right to payment. 11 U.S.C. § 101(5). A creditor includes any entity which has a claim against the debtor that arose at or prior to the entry of the order for relief under the Bankruptcy Code, 11 U.S.C. § 101(10)(A). A creditor may file with the bankruptcy court a proof of its claim against a debtor. 11 U.S.C. § 501(a). In the event the creditor does not timely file a proof of claim, the debtor or another entity who is also liable on that claim may file a proof of the claim. 11 U.S.C. § 501(b) and (c). A claim, proof of which is filed pursuant to Section 501 of the Bankruptcy Code, is deemed allowed unless a party in interest objects. 11 U.S.C. § 502(a). If an objection to a claim is filed, the court shall determine the amount of such claim as of the date of the bankruptcy petition and shall allow such claim in such amount except to the extent that any of nine enumerated exceptions apply. 11 U.S.C. § 502(b)(1)-(9). Section 502(b) sets forth the sole grounds for objecting to a claim and directs the court to allow the claim unless one of the exceptions applies. In the instant case, the Debtor concedes that none of the exceptions applies. Therefore, the claim is allowed.

The Debtor, however, asserts that the clear and unambiguous language of the

Page 151

Bankruptcy Code is modified by the Federal Rules of Bankruptcy Procedure which, according to the Debtor, provide the Debtor with additional grounds to object to a claim. According to the applicable rules, a proof of claim is a written statement setting forth a creditor's claim. Fed. R. Bankr.P. 3001(a). A proof of claim shall conform substantially to the appropriate official form. *Id.* When a claim is based on a writing, the original or a duplicate shall be filed with the proof of claim. Fed. R. Bankr.P. 3001(c). If the writing has been lost or destroyed, a statement of the circumstances of the loss or destruction shall be filed with the claim. *Id.* A proof of claim executed and filed in accordance with the rules shall constitute prima facie evidence of the validity and amount of the claim. Fed. R. Bankr.P. 3001(f).

An unsecured creditor must file a proof of claim for the claim to be allowed in a Chapter 13 case unless the debtor, the trustee, or another entity that may also be liable to the creditor files a proof of claim with respect to the claim. Fed. R. Bankr.P. 3002(a). In a Chapter 7, 12, or 13 case, a proof of claim is timely if it is filed no later than 90 days after the first date set for the meeting of creditors under Section 341(a) of the Bankruptcy Code. Fed. R. Bankr.P. 3002(c). Several exceptions to this deadline exist, none of which is applicable in the present case. Fed. R. Bankr.P. 3002(c)(1)-(5).

The Debtor argues that a claim may be disallowed for failure to attach the original or duplicate writing upon which the claim is based as required by Fed. R. Bankr.P. 3001(c) and the directions contained in paragraph 8 of the Official Proof of Claim Form. Paragraph 8 of the Official Proof of Claim Form states as follows:

8. **Supporting Documents:** *Attach copies of supporting documents,* such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, court judgments, mortgages, security agreements, and evidence of perfection of lien. DO NOT SEND ORIGINAL DOCUMENTS. If the documents are not available, explain. If the documents are voluminous, attach a summary.

The Debtor's argument attempts to place form over substance and elevate the status of rules to override the clear language of the Bankruptcy Code. The rules are designed to supplement the statute, not replace it. 28 U.S.C. § 2075.[4]

Furthermore, the rules and instructions upon which the Debtor relies acknowledge some variance from the Debtor's stringent reading of

select language. For example, Rule 3001(a) acknowledges that a proof of claim need only conform substantially to the appropriate official form. It need not conform exactly. Rule 3001(c), which requires the attachment of the writing, excuses such attachment if the writing has been lost or destroyed. Likewise, the instructions on the official form instruct the claimant to explain if the documents are not available and to attach a summary if the documents are voluminous.

In the instant case, the Claimant complied substantially with the rules and the instruction on the proof of claim form. The Claimant identified the claims almost to the exact dollar amounts listed by the Debtor in her schedules, attached summaries of the claims, provided explanations why additional documentation was not attached, and provided instructions to request additional documentation if desired.

Page 152

The claims complied with the spirit of the applicable rules and as such constituted prima facie evidence of the validity and amount of the claims. Fed. R. Bankr.P. 3001(f). However, even if the claims had not substantially complied with Rule 3001, the claims are still allowed claims under Section 502 of the Bankruptcy Code unless the Debtor establishes an exception under Section 502(b). 11 U.S.C. § 502(a) and (b).

A proof of claim is allowed unless someone objects to it. If the proof of claim conforms with the rules it constitutes prima facie evidence of the claim. The burden of proof then shifts to the objector to establish that the claim fits within one of the exceptions set forth in Section 502(b) of the Bankruptcy Code. 11 U.S.C. § 502(b)(1)-(9); *Innovative Software Designs, Inc.*, 253 B.R. at 44; *Consumers Realty & Dev. Co., Inc.*, 238 B.R. at 422-23. Even if the proofs of claim are not entitled to prima facie validity, they are some evidence of the Claimant's claims. *Cluff*, 313 B.R. at 340. Here, the Debtor never presented any evidence to contradict the claims, much less any evidence that the claims fall within one of the exceptions set forth in Section 502(b); therefore, the claims' validity stands.

Had the Debtor presented any evidence supporting an objection to the claim, the ultimate burden of persuasion would have shifted to the Claimant to establish its entitlement to the claims. At that point, the Debtor's original schedules, signed under oath, admitting liability on the Exxon/Mobil credit card in the amount of $1,256.00 and liability on the Providian Financial credit card in the amount of $2,024.00, would have been additional evidence supporting the claims, with the Claimant bearing the burden of explaining the differences between the amounts scheduled by the Debtor and the amounts listed by the Claimant.[5] Had the Debtor presented the amended schedules which did not change the amounts of the debts but listed them as disputed, the Court would have evaluated the credibility of the Debtor in light of the inconsistent statements, taking into account the timing of the amendment.

The Debtor argues by analogy that claims may be objected to as tardy even though such a basis is not enumerated in Section 502(b) of the Bankruptcy Code. Ergo, according to the Debtor, the rules supplement the grounds for disallowance of a claim set forth in Section 502(b). The Debtor's argument is misguided. It is true that the rules rather than the statute establish whether a claim is timely or tardy. Fed. R. Bankr P. 3002(c). However, the concept of tardiness is recognized in the Code. 11 U.S.C. § 726(a)(2)(C) and (3). Furthermore, tardiness does not affect the allowance of the claim; rather, it affects the treatment to which the allowed claim is entitled. For example, Section 726 specifies when tardily filed claims shall receive distributions in a Chapter 7 case. 11 U.S.C. § 726(a)(2)(C) and (3). Such language has implications in a Chapter 13 case because the plan must provide creditors with at least as much as they would receive in a hypothetical liquidation under Chapter 7. 11 U.S.C. § 1325(a)(4).

The Debtor's argument flies in the face of the rule of construction which requires us to apply the plain meaning of any unambiguous statutory

language. *Lamie v. U.S. Trustee,* 540 U.S. 526, 124 S.Ct. 1023, 1030, 157 L.Ed.2d 1024 (2004); *U.S. v. Ron Pair Enterprises, Inc.,* 489 U.S. 235, 241-42, 109 S.Ct. 1026, 1030, 103

Page 153

L.Ed.2d 290 (1989). The Bankruptcy Code could not be more clear: a claim, proof of which is filed, shall be allowed unless it falls within one of the exceptions set forth in Section 502(b). The Claimant filed proofs of claims and the Debtor failed to allege much less present any evidence that the claims fell within one of the exceptions. Consequently, the claims were properly allowed.

CONCLUSION

Section 502 of the Bankruptcy Code governs the allowance and disallowance of claims filed against bankruptcy estates. Neither procedural rules nor instructional language on official forms overrides clear statutory language. Therefore, the court properly overruled the Debtor's objections to claims based solely on grounds not recognized by Section 502 of the Code. Accordingly, we AFFIRM the bankruptcy court order overruling the Debtor's objections to the Claimant's claims.

Notes:

1. The Honorable James G. Mixon, United States Bankruptcy Judge for the Eastern and Western Districts of Arkansas.

2. Technically, the Debtor did not appeal the order overruling her objections to claims. Rather, she appealed a later order denying her motion to alter or amend the order overruling her objections to the claims. This issue is discussed later in the opinion.

3. For cases involving similar claims filed by the Claimant, see, e.g., *In re Cluff,* 313 B.R. 323 (Bankr.D.Utah 2004), and *In re Hughes,* 313 B.R. 205 (Bankr.E.D.Mich.2004), overruling objections to the Claimant's claims, and *In re Henry,* 311 B.R. 813 (Bankr.W.D.Wash.2004), striking the Claimant's claim while granting the Claimant thirty days to file an amended claim.

4. "The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure in cases under [the Bankruptcy Code]. Such rules shall not abridge, enlarge, or modify any substantive right." 28 U.S.C. § 2075.

5. With respect to the Exxon/Mobil account, the amount sought by the Claimant exceeded the amount scheduled by the Debtor by $22.10. With respect to the Providian Financial account, the amount sought by the Claimant was $15.35 less than the amount scheduled by the Debtor.

In re: VIRGINIA OBASI, Debtor.

Case No. 10-10494 (SHL)

UNITED STATES BANKRUPTCY COURT SOUTHERN DISTRICT OF NEW YORK

Dated: December 19, 2011

Chapter 13

MEMORANDUM OPINION AND ORDER

APPEARANCES:

OFFICE OF THE UNITED STATES TRUSTEE
Tracy Hope Davis, United States Trustee for Region 2
By: Greg M. Zipes, Esq.

WILLKIE FARR & GALLAGHER LLP
Counsel to Brice, Vander Linden & Wernick, P.C. and Lawrence J. Buckley
By: Alan J. Lipkin, Esq.

Jared R. Jamesson, Esq.
SHAEV & FLEISCHMAN, LLP
Counsel to the Debtor
By: David B. Shaev, Esq.

SEAN H. LANE UNITED STATES BANKRUPTCY JUDGE

Before the Court is an order to show cause brought on motion of the United States Trustee (the "UST") as to why the law firm of Brice, Vander, Linden & Wernick, P.C. (the "Brice Firm") and Lawrence J. Buckley ("Buckley"), an attorney with the firm, should not be held in civil contempt or, alternatively, subject to sanctions. The principal issue before the

Page 2

Court is Buckley's failure to review a proof of claim in this case before it was submitted to the Court with Buckley's electronic signature. The Court finds that the practice of Buckely, and the Brice Firm, of submitting proofs of claim without review by the signing attorney is a clear violation of Bankruptcy Rule 9011, the bankruptcy equivalent of Rule 11 of the Federal Rules of Civil Procedure. While the Court finds that this practice violates Bankruptcy Rule 9011, it denies the UST's request for civil contempt and sanctions because the UST's motion was not first served upon Buckley and the Brice Firm as required by the safe harbor provision of Bankruptcy Rule 9011.

BACKGROUND

On January 29, 2010, Virginia Obasi (the "Debtor") filed a petition for relief under Chapter 13 of the Bankruptcy Code. The Debtor's schedules of assets and liabilities included her interest in a two-family house located at 1255 Harrod Avenue, Bronx, New York (the "Property"). (ECF Doc. # 1.) On February 5, 2010, a proof of claim (the "Claim")[1] was electronically filed in the Debtor's case on behalf of Deutsche Bank National Trust Company, as Trustee for the Certificateholders of Soundview Home Loan Trust 2005-OPT3, Asset-Backed Certificates, Series 2005-OPT3 ("Deutsche Bank"). The Claim was filed using the electronic case filing login and password of Buckley. It was signed electronically in Buckley's name using the "/s/" signifier, with Buckley identified as the "Creditor's Authorized Agent." (Zipes Decl. Ex. A.) Attached to the Claim was a note and mortgage held by Option One Mortgage Corporation ("Option One") on the Property. (*Id.*)[2] The Claim did not include an assignment of mortgage from Option One to Deutsche Bank, or any

Page 3

other document explaining the basis for Deutsche Bank to seek payment based upon the mortgage between the Debtor and Option One. Exhibit A to the Claim was an itemization of amounts asserted to be due and owing by the Debtor, including attorney's fees and costs. (*Id.*)

On May 10, 2010, the Debtor objected to the Claim on the grounds that Deutsche Bank lacked

standing to file a proof of claim against the Debtor. (ECF Doc. # 13.) The Debtor argued that the Claim failed to demonstrate a complete chain of title for the Property from Option One to Deutsche Bank. Due to an alleged discrepancy in the request for attorney's fees, the Debtor's objection also asked for an accounting of all charges related to the Claim. The UST filed a statement in support of the Debtor's objection. (ECF Doc. # 23.) On June 30, 2010, counsel to Deutsche Bank filed a response to the objection. It explained that Buckley was an employee of American Home Mortgage Services, Inc. ("AHMSI"),[3] that he had prepared the Claim, and that AHMSI was authorized to execute the Claim on behalf of Deutsche Bank. (ECF Doc. # 18, at 4.)

In connection with the objection, Buckley was deposed and provided information regarding the preparation of the Claim. Buckley testified that, in addition to practicing law with the Brice Firm and being employed by AHMSI, he was also a part-owner and vice-president of National Bankruptcy Services ("NBS"), which provided paralegal and other support services to the Brice Firm. (Zipes Decl. Ex. B, Buckley Dep. Tr., 13:25 - 14:2, Mar. 7, 2011.) The internal procedures at the Brice Firm provided that NBS prepared proofs of claim, which were then submitted to the firm for review by an attorney at or near the time of filing. (*Id.* at 38:20 - 40:3.) Buckley further testified that he did not physically sign the

Page 4

Claim, and he did not see the Claim before it was filed with his electronic signature. (*Id.* at 28:24 - 30:4.) Rather, an attorney at the firm named Craig Edelman ("Edelman") reviewed the Claim. (Second Decl. of Lawrence J. Buckley, October 5, 2011, ¶ 6.) Edelman was under the general supervision of Buckley, and had been trained by Buckley to review proofs of claim through the use of an internal checklist. (Decl. of Lawrence J. Buckley, Sept. 26, 2011, ¶ 16.) Based on pre-authorization from Buckley, Edelman directed that the Claim be filed using Buckley's ECF login and password. (*Id.* at ¶ 17.) Edelman used Buckley's ECF login and password presumably because Buckley was the only attorney at the firm who had such a login and password for this Court. (*See* Zipes Decl. Ex. B, Buckley Dep. Tr., 108:6 - 18, Mar. 7, 2011.)

After the order to show cause was issued in this case, Buckley and the Brice Firm further explained the procedures that had been followed in preparing the Claim and presumably all mortgage claims they have filed in this district:

> • Obtain and review copies of the Note, Mortgage, and related AHMSI and Deutsche Bank business records.
> • Compare the Note and Mortgage with the Debtor's Chapter 13 Petition and Schedules both to confirm the Debtor was the obligor on the Note and to check related information.
> • Confirm that AHMSI's business records reflected it was the servicer for the current holder of the Note and Mortgage.
> • Confirm that the Mortgage was perfected.
> • Review AHMSI's business records to calculate the Debtor's liability for principal, interest, and other amounts due under the Note as of the Debtor's petition date, including reviewing invoices for services performed in connection with AHMSI's efforts to foreclose on the Mortgage.
> • Redact personal identifiers of the Debtor as required by Bankruptcy Rule 9037.

Page 5

> • Compare the proof of claim with the Note, Mortgage, and related attorney invoices.

(Memo. of Law ¶ 13.)[4] While these steps are described as having been taken by the Brice Firm, a footnote in respondents' briefing acknowledges

that "assistance" was provided by NBS pursuant to an agreement with the Firm to provide "certain back office services." (*Id.* at n. 7.) Indeed, Buckley testified that the firm's internal procedures provided for NBS to prepare the proofs of claim, which were then submitted to the firm for review by an attorney at or near the time of filing. (Zipes Decl. Ex. B, Buckley Dep. Tr., 38:20 - 40:3, Mar. 7, 2011.) It appears, therefore, that the steps identified above were performed by paralegals and support staff, before the Claim was reviewed by Edelman and submitted using Buckley's ECF login and password.

The UST argues that the procedures utilized by Buckley and his firm violate this Court's requirements for the filing and signing of documents submitted by electronic means on the Court's electronic filing system, as set forth in M-242. The UST also asserts that they violate Bankruptcy Rule 9011 and Local Bankruptcy Rule 9011-1. The UST seeks to have the respondents held in civil contempt or, in the alternative, subject to sanctions under Section 105 of the Bankruptcy Code. Buckley and the Brice Firm assert that the UST misinterprets the requirements of M-242, that their activities are not sanctionable, and that neither civil contempt nor sanctions may be imposed because there was no compliance with the safe harbor provision of Bankruptcy Rule 9011.

Page 6

DISCUSSION

Under Bankruptcy Rule 5005, "[a] court may by local rule permit or require documents to be filed, signed, or verified by electronic means . . . ." Fed. R. Bankr. P. 5005(a)(2). During the relevant period at issue, Bankruptcy Rule 5005 was implemented through M-242, which provides for the electronic filing, signing and verification of documents in this Court.[5] Under M-242, pleadings filed in accordance with the electronic filing procedures must "identify the initials and last four digits of the social security number of the attorney signing such pleading or other document. Additionally, the electronically filed document shall indicate an 'electronic signature,' e.g., 's/Jane Doe'." (M-242, Ex. 1, p. 6.) M-242 further requires that "[n]o attorney or other person shall knowingly permit or cause to permit the attorney's password to be utilized by anyone other than an authorized member or employee of the attorney's law firm." (M-242, ¶ 3.) Notably, M-242 explicitly incorporates Bankruptcy Rule 9011 by stating that "the use of an attorney's password to file a document electronically shall constitute the signature of that attorney for purposes of FRBP 9011 and LRBP 9011-1." (*Id.*, ¶ 4.)

While the parties have debated whether the conduct at issue violates the rules regarding the electronic filing of documents, the Court believes the real issue concerns an attorney's obligations when submitting documents to the Court. Those obligations are governed by Bankruptcy Rule 9011. That Rule provides that an attorney presenting a

Page 7

document to the Court is personally responsible for reviewing the document for a variety of reasons going to the good faith basis for and accuracy of the document's contents. The Rule provides:

> By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, *an attorney . . . is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,*--
>
> > (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

Fed. R. Bankr. P. 9011(b)(3) (emphasis added). By its provisions, Bankruptcy Rule 9011 places "an affirmative duty on attorneys and litigants to make a reasonable investigation (under the circumstances) of the facts and the law before signing and submitting any petition, pleading, motion or other paper.'" 10 Collier on Bankruptcy ¶ 9011.04[2][a] at 9011-7.

Bankruptcy Rule 9011 allows the imposition of "appropriate sanctions upon the attorneys, law firms, or parties that have violated [Bankruptcy Rule 9011(b)] or are responsible for the violation. . . . Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees." Fed. R. Bankr. P. 9011(c). The authority to impose sanctions "extends to out-of-state partners of

Page 8

multi-state firms." *In re Ulmer,* 363 B.R. 777, 782 (Bankr. D.S.C. 2007) (citing *In re Rivera,* 342 B.R. 435, 465-66 (Bankr. D.N.J. 2006)).

Respondents raise four arguments in support of their position that their conduct did not violate Bankruptcy Rule 9011. The Court rejects these arguments as flatly inconsistent with the language and spirit of the Rule.

First, they contend that Bankruptcy Rule 9011's requirement of reasonable inquiry was satisfied by the procedures employed by the firm before filing the Claim. But their argument ignores the personal nature of an attorney's obligations under Bankruptcy Rule 9011. As the Advisory Committee Notes to the Rule make abundantly clear, "[t]he person signing, filing, submitting, or advocating a document has a *nondelegable* responsibility to the court . . . ." Fed. R. Civ. P. 11 advisory committee's note (emphasis added). The statutory history of Rule 11 of the Federal Rules of Civil Procedure[6] also clearly supports the notion that a party whose signature appears on a document must personally review such document prior to filing. Rule 11 was amended in 1993 to delete language stating that "[t]he signature of an attorney . . . constitutes a certificate that the attorney . . . has read the document." Fed. R. Civ. P. 11 (amended 1993). The Advisory Committee Notes associated with the amendment observe that this language was deleted only because such an obligation was clear even without the language:

> The provision in the former rule that signing a paper constitutes a certificate that it has been read by the signer also has been eliminated as unnecessary. *The obligations imposed under subdivision (b) obviously require that a pleading,*

> *written motion, or other paper be read before it is filed or submitted to the court*.

Page 9

Fed. R. Civ. P. 11 advisory committee's note (emphasis added). Bankruptcy Rule 9011 was amended in 1997 "to conform to the 1993 changes to F.R.Civ.P. 11." Fed. R. Bankr. P. 9011 advisory committee's note.

Consistent with the plan language of the Rule, the case law uniformly supports the view that an attorney who has signed a document must review the document prior to filing. *See In re Hurd,* 2010 Bankr. Lexis 2656, at *5 (Bankr. D. *Id*. Aug. 11, 2010) ("Counsel did not review the final documents prior to their submission and, thus did not catch the patent error in the first order's terms, or question why the Debtor's attorney or Trustee would approve such an order. He did not personally confirm the approvals were obtained. His approach and his delegated system were flawed."); *In re Ulmer,* 363 B.R. 777, 783 (Bankr. D.S.C. 2007) ("By failing to review and sign the documents submitted to this Court and that bear her signature, [the attorney] violated Rule 9011(a) and (b). . . . This practice of submitting documents containing an electronic signature of a party that has not actually reviewed and signed the documents is not proper."); *In re KTMA Acquisition Corp.,* 153 B.R. 238, 249 (Bankr. D. Minn. 1993) ("[J]ust reading the filing supports the conclusion that the signer did not do a reasonable amount of pre-filing inquiry.") (citing *Mars Steel Corp. v. Continental Bank, N.A.,* 880 F.2d 928, 932 (7th Cir. 1989)). Thus, this Court concludes that an attorney's advance authorization to use his signature, without any intention to personally review the pleading prior to filing, does not constitute a reasonable inquiry under Bankruptcy Rule 9011 regardless of the steps taken by the firm.[7]

Page 10

Second, respondents question where the dividing line must be drawn with respect to a reasonable inquiry under Bankruptcy Rule 9011. *See* Hr'g Tr., dated Oct. 5, 2011, 42:25 -43:4 ("Let's say I'm filing a 100-page brief and I'm signing it. I'm the partner and I'm signing it. Now, of course, I'm going to have reviewed the brief but . . . there could be hundreds of cases cited in there. Have I reviewed every single case?"); *see id.* at 58:12 - 16 ("What's the standard? Does he have to ask five questions and then he can say okay? Does he have to ask ten questions and say okay? Does he have to read the document twice? I mean, the . . . Rule is totally vague."). It is true that "[t]here is no litmus test that can be applied to a given filing to determine whether Rule 9011 has been violated." *In re KTMA Acquisition Corp.,* 153 B.R. at 249. An inquiry must be made on a case-by-case basis, taking into account the circumstances of each case. *See id.* (internal citations omitted). "At times, however, the violation is so obvious that the filing speaks for itself." *Id.* at 249.

Such are the circumstances of this case. The attorney in question did not review the document and had no intention of doing so prior to filing. Instead, he authorized - in advance - an associate under his supervision to sign his name to whatever document that associate produced. While he set out a "checklist" for the associate to follow, he had no way of ensuring that the associate would comply with that checklist or the resulting written product would otherwise meet the requirements of Bankruptcy Rule 9011. "A signer may not drop papers into the hopper and insist that the court or opposing counsel undertake bothersome factual and legal investigation. . . . At a minimum, the reasonable inquiry

Page 11

standard requires at least some affirmative investigation on the part of the signer." *Id.* at 248-49 (citing *Cleveland Demolition Co. v. Azcon Scrap Corp.,* 827 F.2d 984, 987 (4th Cir. 1987); *McCabe v. General Foods Corp.,* 811 F.2d 1336, 1340-41 (9th Cir. 1987); *Stewart v. RCA Corp.,* 790 F.2d 624, 633 (7th Cir. 1986); *Lieb v. Topstone Indus., Inc.,* 788 F.2d 151, 157 (3d Cir.

1986) (Rule 11 "imposes on [the signer] a duty to look before leaping and may be seen as a litigation version of the familiar railroad crossing admonition to 'stop, look and listen.'")); *see also In re Taub,* 439 B.R. 276, 281 (Bankr. E.D.N.Y. 2010) ("Rule 9011 serves the purpose of assuring courts and litigants that motions, pleadings, and other written submissions signed by an attorney bear the attorney's certification that he or she has acted in a manner that is objectively professional and reasonable under the circumstances.") (quoting *In re Ambotiene,* 316 B.R. 25, 34 (Bankr. E.D.N.Y. 2004)). Of course, the investigation performed by a signatory "need not be to the point of certainty to be reasonable." *In re KTMA Acquisition Corp.,* 153 B.R. at 249 (citing *Nemmers v. U.S.,* 795 F.2d 628, 632 (7th Cir. 1986)). "However, the signer must explore readily available avenues of factual inquiry." *In re KTMA Acquisition Corp.,* 153 B.R. at 249 (citing *Chapman & Cole v. Itel Container Int'l. B.V.,* 865 F.2d 676, 684 n.11 (5th Cir. 1989), *cert. denied,* 493 U.S. 872 (1989)).

Third, Buckley and the Brice Firm argue that Bankruptcy Rule 9011 sanctions are only appropriate where "a particular allegation is utterly lacking in support" and thus are inappropriate here because evidentiary support exists for the factual assertions in the Claim. (Post-Hearing Memo., at 8) (quoting *Klein v. Wilson, Elser, Moskowitz, Edelman & Dicker (In re Highgate Equities, Ltd.),* 279 F.3d 148, 154 (2d Cir. 2000)). As a threshold matter, their argument ignores the plain text of Bankruptcy Rule 9011, which provides for a "certification] . . . to the best of the person's knowledge, information, and belief [that is]

Page 12

formed after an inquiry reasonable under the circumstances." Fed. R. Bankr. P. 9011(b).[8] It cannot be that an attorney satisfies his obligation under Bankruptcy Rule 9011 when he conducts no review of the document submitted to the Court. Indeed, some courts have concluded that "[t]he fact that the information contained in documents bearing [the attorney's] signature may have been accurate is not a defense to a Fed. R. Bankr. P. 9011 sanction." *In re Ulmer,* 363 B.R. at 782; *see also Calloway v. Marvel Entertainment Group,* 854 F.2d 1452, 1470 (2d Cir. 1988) ("Rule 11 applies to all papers filed in a lawsuit and . . . the signer's conduct should be judged at the time the paper is signed."), *rev'd in part on other grounds,* 493 U.S. 120 (1989); *In re KTMA Acquisition Corp.,* 153 B.R. at 249 ("Whether the signer's conduct was reasonable is an inquiry that focuses on what should have been done by the filer before filing rather than how things turned out; conduct rather than result."). As the court in *In re Rivera* wisely observed:

> [S]omething more than claimed accuracy is required. The rules of this court should be followed . . . [The attorney's] seeking of refuge in the purported accuracy of her data submission is therefore rejected as a defense to violation of Rule 9011. A certifying party must be responsible for that data submission. The [law firm's practice] has annulled the purpose of the responsible party requirement: that is, to prompt diligent inquiry by the certifying individual, and a resulting careful statement made under penalty of perjury, with all of its attendant solemnity.
> *In re Rivera,* 342 B.R. at 461 - 462.[9]

Page 13

In any event, this argument fails because the Claim as originally filed lacked an evidentiary basis. The Claim was not "buttressed by several documentary exhibits," as was the case in the *Highgate* decision relied on by respondents. *Highgate,* 279 F.3d at 155. Rather, the Claim attached a note and mortgage between the Debtor and Option One, with no documentation to connect Option One to Deutsche Bank or to AHMSI. Under the precedent in this jurisdiction, therefore, the Claim was facially deficient as a basis for Deutsche Bank to foreclose or to recover on its Claim because it did not establish the

assignment of the note and mortgage from Option One to Deutsche Bank. As Judge Glenn of this Court has explained:

> [I]n the mortgage context, the creditor may initially attach only a summary of its claim, containing the debtor's name, account number, the prepetition account balance, interest rate, and a breakdown of the interest charges, finance charges and other fees that make up the balance of the debt. If the creditor is an assignee, it must also provide an affidavit attesting to the assignment of the note and mortgage.

In re Minbatiwalla, 424 B.R. 104, 117 (Bankr. S.D.N.Y. 2010); *see also In re Mims,* 438 B.R. 52, 56 - 7 (Bankr. S.D.N.Y. 2010) (in the lift stay context, stating that "Wells Fargo has not supplied the Court with any evidence that the Note was physically delivered or assigned pursuant to a written agreement. Here, the Note only indicates a transfer from Lend America to Washington Mutual Bank and not to Wells Fargo. Wells Fargo has not presented any evidence that it is in possession of the original Note, or that it received the Note via a valid written assignment.")

Fourth and finally, respondents suggested at oral argument that Bankruptcy Rule 9011 is not implicated because the document in question was merely a proof of claim and the

Page 14

amount paid for its preparation was modest. *See* Hr'g Tr. 33:13 - 15, Oct. 5, 2011 ("This is a proof of claim. A garden variety proof of claim fill in the blanks for which the firm is paid $150.00."); *Id.* at 42:18-23 ("Typically proofs of claim as Mr. Zipes, in fact, said are fine -filed by - signed by clients. That's all the Brice Firm does is they help prepare and file the proof of claim."); *Id.* at 56:16-20. But proofs of claim are central to the bankruptcy process as they are the vehicle through which a creditor recovers on its claim. Compliance with Bankruptcy Rule 9011 is particularly important for proofs of claim because a properly filed proof of claim constitutes "prima facie evidence of the validity and amount of the claim." Fed. R. Bankr. P. 3001(f). Unlike most litigation, the burden is initially placed on the party objecting to the claim to come forward with "evidence equal in force to the prima facie case . . . which, if believed, would refute at least one of the allegations that is essential to the claim's legal sufficiency." *In re Oneida Ltd.,* 400 B.R. 384, 389 (Bankr. S.D.N.Y. 2009) (quoting *In re Allegheny Int'l, Inc.,* 954 F.2d 167, 173-74 (3d Cir. 1992)). Under Section 502(a) of the Bankruptcy Code, such a claim is deemed allowed unless a party objects. 11 U.S.C. § 502(a). The Court must therefore be able to rely on the integrity of the proofs of claim before it. Not surprisingly then, Bankruptcy Rule 9011 has specifically been held to apply to proofs of claim. *See Hannon v. Countrywide Home Loans, Inc. (In re Hannon),* 421 B.R. 728, 731 (Bankr. M.D. Pa. 2009); *see also In re Thomas,* 337 B.R. 879, 895 (Bankr. S.D. Tex. 2006), *aff'd,* 223 Fed. Appx. 310 (5th Cir. 2007); *Knox v. Sunstar Acceptance Corp. (In re Knox),* 237 B.R. 687, 699 (Bankr. N.D. Ill. 1999).[10]

Page 15

Indeed, serious issues of public policy are raised by the practices at issue here. The country is in the midst of a foreclosure crisis, and the news is replete with examples of misleading, inaccurate or incomplete mortgage related pleadings that have been filed in both the federal and state courts.[11] It is easy to find examples in this Court and other local bankruptcy courts of the problems caused by the filing of inadequate documentation related to mortgage obligations. *See In re Lippold,* 2011 Bankr. LEXIS 3282, at *13-14 (Bankr. S.D.N.Y. Sept. 6, 2011); *In re Agard,* 444 B.R. 231, 245-46 (Bankr. E.D.N.Y. 2011); *Bank of New York v. Silverberg,* 926 N.Y.S.2d 532, 538 (2d Dept. 2011). Thus, it is of the utmost importance that the attorneys practicing before this Court maintain integrity in preparing the documentation of such mortgage obligations. Doing otherwise causes risk that "[t]he debtor and his/her family may lose their

home, and the debtor and other creditors may lose significant equity in foreclosure." *In re Gorshtein,* 285 B.R. 118, 122 (Bankr. S.D.N.Y. 2002).

Having found that the conduct here runs afoul of Bankruptcy Rule 9011, the Court turns to the question of whether sanctions should be imposed. The Second Circuit has stated that "[t]he Bankruptcy Court's discretion to award sanctions may be exercised only on the basis of the specific authority invoked by that court. Because an award might be based on 'any of a number of rules or statutory provisions,' each 'governed by differing standards,' we

Page 16

have found it 'imperative that the court explain its sanctions order with care, specificity, and attention to the sources of its power.'" *Solow v. Kalikow (In re Kalikow),* 602 F.3d 82, 96 (2d Cir. 2010) (quoting *Sakon v. Andreo,* 119 F.3d 109, 113 (2d Cir. 1997)). The UST argues that it does not seek relief under Bankruptcy Rule 9011, but rather requests that the respondents be held in contempt for violation of M-242 or through the Court's authority under Section 105 of the Bankruptcy Code. For the reasons set forth earlier, however, it is clear that the applicable provision is Bankruptcy Rule 9011, and the Court must therefore address the issue of sanctions as provided for therein.[12]

"Rule 9011, like its counterpart Federal Rule of Civil Procedure 11, plays an important role in maintaining the professionalism of the bar and the integrity of court processes. That role is best effectuated when the Rule is invoked sparingly, and '[a] request for sanctions under Rule 11 is not a tactical device.'" *In re Taub,* 439 B.R. at 281 (quoting *Nakash v. U.S. Dep't of Justice,* 708 F. Supp. 1354, 1370 (S.D.N.Y. 1988)). Parties facing sanctions under Bankruptcy Rule 9011 must be provided with "notice and a reasonable opportunity to respond." Fed. R. Bankr. P. 9011(c). The Second Circuit has held that "a sanctioned attorney must receive specific notice of the conduct alleged to be sanctionable and

Page 17

the standard by which that conduct will be assessed, and an opportunity to be heard on that matter." *In re Highgate Equities, Ltd.,* 279 F.3d at 152 (quoting *Nuwesra v. Merrill Lynch, Fenner, & Smith, Inc.,* 174 F.3d 87, 92 (2d Cir. 1999)). These requirements "reflect the importance of according fair procedural protections to an attorney or other party facing sanction." *Id.* (citing *Ted Lapidus, S.A. v. Vann,* 112 F.3d 91, 96 (2d Cir. 1997), *cert. denied,* 522 U.S. 932 (1997)).

Buckley and the Brice Firm argue that sanctions cannot be imposed because the "safe harbor" provisions of Bankruptcy Rule 9011 have not been met. Bankruptcy Rule 9011(c) sets forth the requirements of this safe harbor:

> a motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate [Rule 9011(b)] . . . . The motion for sanctions may not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected . . . .

Fed. R. Bankr. P. 9011(c)(1)(A). The procedural safeguards afforded by the safe harbor provisions of Bankruptcy Rule 9011 "are intended to reduce the number of motions for sanctions and to provide opportunities for parties to avoid sanctions altogether." *Perpetual Secs., Inc. v. Tang,* 290 F.3d 132, 141 (2d Cir. 2002) (citing *Hadges v. Yonkers Racing Corp.,* 48 F.3d 1320, 1327 (2d Cir. 1995)); *see Vuitton et Fils S.A. v. Carousel Handbags,* 592 F.2d 126, 130 (2d Cir. 1979) ("[S]anctions imposed after a finding of civil contempt serve two functions: to coerce future compliance and to remedy past noncompliance."). As no evidence has been

presented that the UST has complied with the safe harbor provisions by

Page 18

serving a copy of its motion on Buckley and his firm before filing it with this Court, the Court declines to enter sanctions in this case.[13]

Of course, Bankruptcy Rule 9011(c) also states that "[o]n its own initiative, the court may enter an order describing the specific conduct that appears to violate [Rule 9011(b)] and directing an attorney, law firm, or party to show cause why it has not violated [Rule 9011(b)] with respect thereto." Fed. R. Bankr. P. 9011(c)(1)(B). It is true that this matter was technically brought on by an order to show cause issued by the Court. The safe harbor provision is nonetheless implicated because the order was not issued *sua sponte,* but rather in response to a motion made by the UST. *See Hadges v. Yonkers Racing Corp.,* 48 F.3d 1320, 1329 (2d Cir. 1995) (finding that a request for sanctions under Federal Rule of Civil Procedure 11 had not been brought on the district court's own initiative because "the court indicated that it was imposing sanctions in response to [movant's] request and did not state that it was imposing sanctions on [respondent] *sua sponte.")*.

In any event, the Court notes that Buckley and his firm have taken steps to remedy the defects in the procedures employed in filing the Claim. To begin with, the Claim filed in this case has been amended to include the electronic signature of Edelman, the same attorney that reviewed the Claim prior to its filing. Beginning in March 2011, the Brice Firm also

Page 19

revised its procedures for filings in this jurisdiction, so that the attorney whose signature appears on a proof of claim will be the same individual that has reviewed the claim.[14] (*See* Fourth Declaration of Lawrence J. Buckley, Oct. 17, 2011, at ¶ 3) ("As to the Brice Firm's new procedures, in March 2011 . . . the Brice Firm improved the procedure *for SDNY ECF filings* by requiring that the attorney whose ECF signature appears on a proof of claim is the same attorney who reviewed the claim to ensure the Checklist was satisfied.") (emphasis added). The Court assumes that respondents are taking any other steps necessary in this Court and in other jurisdictions so as to be in compliance with Rule 9011 going forward and to remedy any past deficiencies.[15]

CONCLUSION

For the reasons set forth above, the Court concludes that the conduct of the respondents was in violation of Bankruptcy Rule 9011, but denies the request for civil contempt and sanctions based on the safe harbor provision of Bankruptcy Rule 9011. **IT IS SO ORDERED.**

Dated: New York, New York
December 19, 2011

Sean H. Lane
UNITED STATES BANKRUPTCY JUDGE

Notes:

[1.] The Clam is designated on the Debtor's claims register as Claim No. 2. A copy of the Claim is attached as Exhibit A to the Declaration of Greg M. Zipes, dated August 26, 2011 (ECF Doc. # 58) (the "Zipes Declaration"). The Claim was amended on October 13, 2011.

[2.] Beneficial Homeowner Service Corporation appears to hold a second mortgage on the Property in the amount of $47,925.02.

[3.] AHMSI is the current servicer of the mortgage loan. (Decl. of Lawrence J. Buckley, Sept. 26, 2011, ¶ 8.)

[4.] The respondents cite to certain portions of Buckley's deposition transcript to support the assertion that these steps were taken in preparing the Claim. As the pages of the deposition

transcript cited by the respondents were not provided to the Court, however, the Court relies instead on the information contained in the publicly filed pleadings, including the Buckley Declarations.

5. The Court's current administrative order regarding the electronic filing, signing and verification of documents is M-399. However, the relevant order for purposes of this discussion is M-242, which was in effect at the time the Claim was filed. *See Schwartz v. Kujawa (In re Kujawa),* 256 B.R. 598, 614 (B.A.P. 8th Cir. 2000), *rev'd in part on other grounds,* 270 F.3d 578 (8th Cir. 2001) ("[An attorney's] conduct is to be reviewed under the standards applicable when his conduct took place.") (citing *Retired Chicago Police Ass'n v. Firemen's Annuity & Benefit Fund,* 145 F.3d 929, 933 (7th Cir. 1998); *Runfola & Assocs. Inc. v. Spectrum Reporting II, Inc.,* 88 F.3d 368, 373 (6th Cir. 1996)). As M-399 does not contain any material revisions from M-242 regarding electronic filing, the results of this decision would be the same under either order.

6. The Second Circuit has stated that Rule 9011 "parallels Federal Rule of Civil Procedure 11, containing only such modifications as are appropriate in bankruptcy matters. . . . Accordingly, our review of the lower courts' application of Rule 9011 is informed by Rule 11 jurisprudence." *In re Cohoes Indus. Terminal, Inc.,* 931 F.2d 222, 227 (2d Cir. 1991) (internal citations and quotations omitted).

7. Buckley and the Brice Firm argue that several of these cases can be distinguished as situations where paralegals performed work and no attorney was involved in any capacity. But they ignore that the courts in these cases imposed sanctions based upon the attorney's failure to personally review the papers that he or she signed. Indeed, practices like those of Buckley and the Brice Firm have garnered criticism from the courts. One such decision is *In re Rivera,* 342 B.R. 435 (Bankr. D.N.J. 2006), where a law firm engaged in the systematic use of pre-signed certifications in support of motions filed in various bankruptcy and state court proceedings. In holding the firm and attorneys subject to sanctions, the court stated that "[n]o reasonable attorney would consider [the filed documents] to be certifications, nor would any reasonable attorney engage in the practice of using "on-file" signature forms. This practice is in violation of Rule 9011 - because writings were presented for an "improper purpose," i.e., to have the court believe they were certifications. Moreover, the threshold "factual contention" in each of the ersatz submissions - that the signatory read and signed the document - is flatly untrue (not to mention without any evidentiary support)." *Id.* at 458.

8. Each of the Second Circuit cases cited by the respondents is factually distinct from the case at hand because none involve a situation where an attorney did not personally review the document that he signed and submitted to the court. *See In re Highgate Equities, Ltd.,* 279 F.3d 148 (2d Cir. 2002) (sanctions sought against attorney for letter he drafted and sent to bankruptcy court for which he allegedly did not make reasonable inquiry as to the evidentiary basis and which was allegedly submitted for improper purpose); *Sussman v. Bank of Israel,* 56 F.3d 450 (2d Cir. 1995) (sanctions sought against attorney with respect to a complaint and letters allegedly lacking factual or legal basis and allegedly filed for an improper purpose); *Hadges v. Yonkers Racing Corp.,* 48 F.3d 1320 (2d Cir. 1995) (sanctions sought against attorney for misstatements made in pleadings that were based on client representations, as well as for failure to disclose a state court action to the district court).

9. The lack of diligence before affixing one's signature has also historically been frowned upon. Thomas Jefferson derisively commented about King Louis XIV's practice of signing whatever documents were presented to him. *See* Letter from Thomas Jefferson to John Jay (Oct. 8, 1787), reprinted in 2 *Memoir, Correspondence and Miscellanies from the Papers of Thomas Jefferson,* 249 (Thomas Jefferson Randolph ed., Gray and Bowen 2d ed. 1830) (observing that the King "hunts one half the day . . . and signs whatever he is bid").

[10.] Recent amendments to Bankruptcy Rule 3001 have bolstered the protections afforded to individual debtors with respect to proofs of claim. The Rule has been amended to require that proofs of claim based on a security interest in an individual debtor's property contain certain specific information in support of the claim, including a statement of the amount necessary to cure any prepetition default and, if the security interest is in the debtor's principal residence, an escrow account statement prepared as of the date of the petition. *See Comm'n from the Chief Justice, The Supreme Court of the United States Transmitting Amendments to the Federal Rules of Bankruptcy Procedure,* May 24, 2011, p. 65-6. The Rule also was amended to state that failure to provide such information may result in preclusion of "the holder from presenting the omitted information, in any form, as evidence in any contested matter or adversary proceeding in the case . . . [or the] award [of] other appropriate relief, including reasonable expenses and attorney's fees caused by the failure." *Id.* at p. 66. The amendments took effect on December 1, 2011.

[11.] *See* Andrew Keshner, *Upstate Foreclosure Firm Fined $2 Million, Agrees to Overhaul Its Filing Practices,* N.Y.L.J., Oct. 7, 2011, at 1; U.S. Gov't Accountability Office, GAO-11-433, *Mortgage Foreclosures: Documentation Problems Reveal Need for Ongoing Regulatory Oversight* (2011); Testimony of Gov. Elizabeth A. Duke on Foreclosure Documentation Issues: *Robo-Signing, Chain of Title, Loss Mitigation, and Other Issues in Mortgage Servicing Hearing Before the Subcomm. on Housing and Community Opportunity of the House Comm. on Financial Services,* 11th Cong. 2 (2010).

[12.] At the hearing, Buckley and the Brice Firm argued that they had not been given proper notice that Rule 9011 was implicated and requested the opportunity to submit post-hearing briefing. Substantial post-hearing submissions were provided to the Court. *See Post-Hearing Memorandum of Law of Brice, Vander Linden & Wernick, P.C. and Lawrence J. Buckley in Opposition to Motion of United States Trustee Requesting that Such Parties Be Held in Civil Contempt or Be Subject to Sanctions Under 11 U.S.C. § 105* (ECF Doc. # 75); *Third Declaration of Lawrence J. Buckley in Support of Memoranda of Law of Brice, Vander Linden & Wernick, P.C. and Lawrence J. Buckley in Opposition to Motion of United States Trustee Requesting that Such Parties Be Held in Civil Contempt or Be Subject to Sanctions Under 11 U.S.C. § 105* (ECF Doc. # 76); *Declaration by David B. Shaev, Esq. on Behalf of Debtor, Virginia Obasi in Support of the United States Trustee's Motion Requesting that Brice Vander Linden & Wernick, P. C. and Lawrence J. Buckley Should Be (A) Held in Civil Contempt, or Alternatively, (B) Subject to Sanctions Under 11 U.S.C. Section 105* (ECF Doc. # 78); *Post-Hearing Response in Further Support of the United States Trustee's Motion for an Order to Show Cause Why Brice Vander Linden & Wernick, P.C. and Lawrence J. Buckley Should Not Be: (A) Held in Civil Contempt, or Alternatively, (B) Subject to Sanctions Under 11 U.S.C. § 105* (ECF Doc. # 79); *Motion of Brice, Vander Linden & Wernick, P.C. and Lawrence J. Buckley for Authority to File Fourth Declaration of Lawrence J. Buckley in Response to Issues Raised by the United States Trustee* (ECF Doc. # 80). The Court has considered all these post-hearing submissions in rendering its decision.

[13.] The facts that form the basis of the UST's motion for sanctions came to light during Buckley's deposition on March 7, 2011. (*See* Zipes Decl. Ex. B, Buckley Dep. Tr., 28:24 - 30:4, Mar. 7, 2011.) Given that this motion was not filed until more than five months later, one can reasonably assume that the conduct here was the subject of extensive discussion between the UST and the respondents before the UST filed its motion. At least one court outside this circuit has found that Bankruptcy Rule 9011's safe harbor requirement can be satisfied by giving appropriate notice to a party other than by the service of a motion. *See Raymond Prof'l Grp., Inc. v. William A. Pope Co. (In re Raymond Prof'l Grp., Inc.),* 420 B.R. 420, 463 (Bankr. N.D. Ill. 2009) ("The Rule 9011 letter was sufficient in this case to give [respondent] the notice and opportunity to withdraw as is required by the safe harbor provision. The letter contained

a detailed recitation of the same violations set forth in the Debtors motion for sanctions and expressly informed [respondent] of the Debtors' intent to seek Rule 9011 sanctions . . . . In this case, [respondent] did thereby receive the intended benefit of the full safe harbor period, and therefore the Debtors are entitled to a decision on the merits of their request for sanctions.") As no argument or evidence has been presented on that issue, however, the Court declines to address it here.

[14.] As a related matter, the Brice Firm has instituted a process to review and report on unresolved claims filed by the Brice Firm in this jurisdiction since January 1, 2010.

[15.] The Court is disturbed by respondents' suggestions that, despite these changes, their original filing procedures were adequate. *(See* Fourth Declaration of Lawrence J. Buckley, Oct. 17, 2011, at ¶ 4) ("[T]he Brice Firm believes all proofs of claim filed in the SDNY by the firm are accurate due, in part, to the prior attorney review to ensure compliance with the Firm's Checklist."); Hr'g Tr., 57:13 - 19 ("[A] preauthorization as done here is effectively an inquiry for purposes of 911 [sic] because it's the same inquiry you would have made afterwards."). The Court's refusal to impose sanctions is a direct result of Rule 9011's safe harbor provision and not in any way an approval of the patently unacceptable conduct that is the subject of this decision.

IN RE: DIANE M. DAVIS, Debtor.

Case No. 09-42865

UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TEXAS SHERMAN DIVISION

Signed: March 31, 2011

MEMORANDUM OPINION

This is a case about an affluent debtor who sought to manipulate bankruptcy procedures to accomplish what the Code prohibits - the elimination of all of her credit card debts despite her obvious ability to repay those debts over time. The debtor, Diane Davis, obtained confirmation of a plan in which she proposed to pay her credit card debts in full. The debtor subsequently objected to every claim filed by her creditors based on their alleged failure to attach sufficient documents to their proofs of claim. The debtor withdrew several objections after the creditors responded. The Court has before it the debtor's request for a default order sustaining the remaining objections. The Court exercises its core jurisdiction over this matter, *see* 28 U.S.C. §§ 157(b)(B), and makes the following findings of fact and conclusions of law, *see* Fed. R. Bankr. P. 7052.

I. BACKGROUND

The debtor filed a voluntary petition for relief under chapter 13 of the Bankruptcy Code on September 11, 2009. She is represented by Armstrong Kellett Bartholow P.C. in her bankruptcy case.

The debtor is a single woman with no dependants. She had been employed as a sales manager for more than three-and-a-half years as of the petition date. Her gross annual income was $121,760 during 2008. As of the petition date, she was receiving

gross monthly wages of $10,428 and a monthly income, net of taxes and retirement contributions, of $7,425.05. Her monthly disposable income was $3,923.92.

The debtor owns a home in which she has significant equity. She was current on her payments to the mortgage holder when she filed her bankruptcy petition. She was driving a 2002 BMW 325, which she owned free and clear of any lien. Her bankruptcy schedules reveal that she initiated a chapter 13 case solely for the purpose of addressing her credit card debts. As an above-median-income debtor, the Code would have presumed her case to be abusive if she had sought to receive a discharge of her unsecured debts under chapter 7. *See* 11 U.S.C. § 707(b) (providing for dismissal of chapter 7 cases based on "abuse").[1]

The debtor's Statement of Financial Affairs (Official Form 7) shows that, in the months prior to bankruptcy, she made payments on her credit card accounts with Neiman Marcus and Nordstrom. She listed eight creditors with claims totaling $81,564 in her schedule of general unsecured creditors (Official Form 6, Schedule F), as follows: (1) American Express, with a disputed debt of $3,436; (2) Ameriprise Bank, with a disputed debt of $10,060; (3) Discover Card, with a disputed debt of $15,575; (4) Great Indoors Mastercard, with a disputed debt of $3,888; (5) Neiman Marcus, with a disputed debt of $15,925; (6) Nordstrom Visa, with a disputed debt $13,570; (7) Sears Gold Mastercard, with a disputed debt of $9,960; and (8) Target National Bank, with a disputed debt of $9,150. With respect to each of these debts, the debtor included the following remark in her Schedule F: "Debtor listed the balance shown on last statement; debtor [sic] not

presently able to determine if balance is correct and is uncertain if trade name is correct legal creditor."

The debtor filed a proposed chapter 13 plan on same date she filed her bankruptcy petition. In paragraph 2, she proposed to make monthly payments of $3,190 to the chapter 13 trustee for 60 months. She estimated that these monthly payments would result in payment in full to all of her general unsecured creditors, whose claims she estimated at $150,360 in paragraph 7 of her proposed plan.[2]

The debtor estimated the amount of unsecured debts in her plan because she did not know, at the time, which unsecured creditors would file claims in her bankruptcy case. In a chapter 13 case, general unsecured creditors must file proof of their claims against the debtor in order to receive any distributions from the plan. *See* 11 U.S.C. § 1325(a)(4) - (5) (requiring the treatment of allowed unsecured claims in a chapter 13 plan). If an unsecured creditor files a claim, the claim is deemed allowed in the absence of a substantive objection. *See* 11 U.S.C. § 502(a).

The last day to file claims against the debtor was January 28, 2010. *See* Fed. R. Bankr. P. 3001(c). By that date, twelve creditors had filed claims using the official proof of claim form (Official Form 10). Their claims totaled $147,400.68. The following creditors filed claims in the total amount of $121,902.50 relating to the "disputed" debts described in the debtor's Schedule F:[3]

> (1) Discover Bank filed a claim for $15,757 and attached billing statements for June - November 2009. The debtor's schedules included a "disputed" claim

> for this account in the precise amount claimed by Discover Bank. The Court denominated the claim filed by Discover Bank as claim number one.
>
> (2) Target National Bank filed a claim for $9,366.03 for a credit card account ending in numbers 7590. The debtor scheduled Target National Bank with a "disputed" claim for this account in the amount of $9,150. The Court denominated Target National Bank's claim as claim number three. Target National Bank subsequently transferred its claim to Roundup Funding, LLC, pursuant to Federal Rule of Bankruptcy Procedure 3001(e)(2).
>
> (3) American Express Bank, FSB, filed a claim for $47,454.21 for a credit card account ending in numbers 2004. American Express attached a copy of the billing statement for the period ending September 4, 2009, to the claim. The debtor's schedules included a "disputed" claim for this account in the amount of only $3,436, which is approximately the minimum amount due each month (according to the billing statement). The Court denominated the claim filed by American Express as claim number five.
>
> (4) Ameriprise Bank, FSB, filed a claim for $9,808.68 for a line of credit ending in numbers 9864. Ameriprise Bank attached an account history to the proof of claim. The debtor's schedules included a "disputed" claim for this account in the amount of $10,060. The Court denominated the claim filed by Ameriprise Bank as claim number seven.
>
> (5) Nordstrom fsb filed a claim for $13,568.56 for a credit card account ending in numbers 8701. Nordstrom attached what appears to be a computer screen shot showing basic information about the account. The debtor's schedules included a

"disputed" claim for this account in the amount of $13,570. The Court denominated the claim filed by Nordstrom as claim number eight.

(6) PRA Receivables Management, LLC as agent of Portfolio Recovery Assocs, successor in interest to Citibank (South Dakota), N.A. filed a claim in the amount of $9,958 for a "Sears MC" credit card account ending in numbers 4128. PRA Receivables Management attached a one-page summary of account information to its claim. The debtor's schedules included a "disputed" claim in the amount of $9,960 for a Sears Gold Mastercard account ending in numbers 4128. The Court denominated PRA Receivables' claim as claim number ten.

(7) HSBC Bank Nevada, N.A. (Neiman Marcus) filed a claim for $15,922.91 for an account ending in numbers 9392. The debtor's schedules included a "disputed claim" for Neiman Marcus in the amount of $15,925 for an account ending in numbers 9392. The Court denominated the claim filed by Neiman Marcus as claim number twelve.

Page 5

The following unscheduled creditors filed claims in the total amount of $25,498.18:

(1) American Express Bank, FSB, filed a claim for $14,114.48 for a credit card account ending in numbers 2006. American Express attached a copy of the billing statement for the period ending September 14, 2009, to the claim. The Court denominated this claim as claim number two.

(2) PRA Receivables Management, as agent for Advanta Bank Corp., filed a claim for $7,236.95 for a credit card account ending in numbers 1395. PRA Receivables attached a one-page summary of account information to the claim form. The Court denominated this claim as claim number four.

(3) American Express Bank, FSB, filed a claim for $3,539 for an account ending in numbers 3005. American Express attached a copy of the billing statement for the period ending September 1, 2009, to the claim. The Court denominated this claim as claim number six.

(4) PRA Receivables Management as agent for Portfolio Recovery Associates, LLC, successor in interest to Citibank (South Dakota), N.A., filed a claim for $3,886.75 regarding a "Sears MC" credit card account ending in numbers 0216. PRA Receivables Management attached a one-page summary of account information to its claim. The Court denominated the claim filed by PRA Receivables Management as claim number nine.

(5) PRA Receivables Management as agent of Portfolio Recovery Associates, L.L.C., successor in interest to Citibank (South Dakota), N.A. filed a claim for $260 regarding a "J.Jill/D.M. Mgmt" credit card account ending in numbers 1337. PRA Receivables attached a one-page summary of account information to its claim. The Court denominated the claim filed by PRA Receivables as claim number eleven.

Not surprisingly, none of the debtor's general unsecured creditors objected to her proposed

plan. The plan proposed to pay $190,400 to her creditors over 60 months, which would have been more than enough to pay their claims in full. The Court conducted a hearing on confirmation on February 10, 2010. The Court entered an order confirming the debtor's proposed plan on February 17, 2010.

On April 21, 2010, the chapter 13 trustee filed the Trustee's Recommendation Concerning Claims ("TRCC") pursuant to the Local Rules of Bankruptcy Procedure.

Page 6

The chapter 13 trustee recommended payment to all of the debtor's general unsecured creditors pursuant to the terms of the debtor's confirmed plan. The TRCC required any party who disagreed with the chapter 13 trustee's recommendation to object to the TRCC or to any disputed claim. The debtor timely filed objections to the claims of each and every one of her general unsecured creditors.

As previously discussed, twelve general unsecured creditors filed timely claims in the debtor's case. The debtor disclosed some of these creditors in her schedules; some were not disclosed. Some of the creditors attached the latest billing statement sent to the debtor; some did not. Some of the claims were filed by the original creditors; some were filed by agents or assignees.

Regardless of the identity of the filers or the documents attached to the claims, if any, the debtor raised the identical objection to each of the claims:[4]

> 3. The Debtor objects to [the claim] filed by Claimant because Claimant filed an Unsecured Proof of Claim but did not attach sufficient documents to account for the amount of the debt allegedly owed, to establish that the debt alleged is a legal obligation of Debtor, or that state the terms of the account or debt. Debtor objects to the claim *because there is no document showing any valid, enforceable contractual relationship between Claimant and the Debtor*. Debtor is unable to verify, *based on the documentation filed,* that she owes the amount alleged to the Claimant or that the Claim is due, valid, enforceable, and owing. Therefore, Debtor denies that she owes the Claimant the amount alleged in the Claim.
>
> 4. Upon submission to Debtor's counsel of sufficient documentation to establish the validity, enforceability, and amount of the claim, Debtor will withdraw this objection.

(Emphasis added.) The debtor submitted substantially identical affidavits in support of each of her claim objections. She states in these affidavits that, "I cannot determine that

Page 7

the amount stated on the claim is accurate *because there are no ledgers or other accounting records attached to the proof of claim."* (Emphasis added.) She also states in her affidavits that, *due to the lack of documentation provided by the claimant,* she cannot verify the account, establish that the charges were made within the limitations period, or determine whether the claim was enforceable against her.[5] The affidavits are "bare bones" and do not include any facts which would establish reliability or credibility.

The debtor promptly withdrew several objections after the creditors responded.[6]On June 3, 2010, approximately one month after filing objections to all of her unsecured creditors' claims, the debtor withdrew her objections to the three claims filed by American Express - claim number two (in the amount of $14,114.18), claim number five (in the amount of $47,454.21), and claim number six (in the amount of $3,539.00). In addition, on June 22, 2010, the debtor

withdrew her objection to claim number one by Discover Bank (in the amount of $15,575).

On June 11, 2010, Ameriprise Bank filed a response to the debtor's objection to its claim number seven in the amount of $9,808.68. In addition, Ameriprise Bank amended claim number seven to attach additional documentation. In particular, Ameriprise Bank supplemented the account history previously attached to the claim form by attaching copies of the documents signed by the debtor opening a $10,000.00 line of credit. The documents reveal that the debtor originally opened the account in November

Page 8

1999 for the purpose of paying $5,000.00 to Diners Club and $5,000.00 to Nieman Marcus. On July 15, 2010, the debtor withdrew her objection to the claim filed by Ameriprise Bank.

In response to the debtor's objection, Neiman Marcus amended its claim number twelve in the amount of $15,922.91. In particular, Neiman Marcus attached 35 pages of account history to its amended claim. The debtor has not withdrawn her objection to the claim filed by Neiman Marcus and requests that the Court enter a default order sustaining her objection and disallowing the claim. The debtor likewise seeks a default order sustaining her objection and disallowing the claims of Target National Bank (claim number three in the amount of $9,366.03), Advanta Bank Corp. (claim number four in the amount of $7,236.95), Nordstrom (claim number eight in the amount of $13,568.56), PRA Receivables (for the two Sears credit cards described in claim numbers nine and ten in the total amount of $13,845.61), and PRA Receivables (for the J.Jill/D.M. Mgmt credit card described in claim number eleven in the amount of $260.00). These claimants have not filed responses to the debtor's objections to their claims.

The Court scheduled a hearing on the debtor's remaining objections to claims to be conducted on July 21, 2010. The debtor's counsel appeared without the debtor. After reviewing the objections at the podium, counsel confirmed that he was objecting to the lack of documentation attached to the claim forms. He emphasized in his presentation that none of the creditors had responded to the objections that he was pressing. According to counsel's arguments, he and his client did not need to conduct any investigation of his client's records prior to filing a claim objection, nor did they need to assert a substantive objection to a proof of claim. He argued that he and his client had

Page 9

complied with *In re Leverett,* 378 B.R. 793 (Bankr. E.D. Tex. 2007), by disputing all of his client's unsecured debts in her bankruptcy schedules.[7] He further argued that he had complied with *In re Armstrong,* 320 B.R. 97 (Bankr. N.D. Tex. 2005), by withdrawing the claim objections to the extent the debtor's creditors responded.[8]

According to counsel's arguments, Federal Rule of Bankruptcy Procedure 3001 requires claimants to attach documents to their proofs of claim, and he is the final arbiter on whether creditors have attached sufficient documentation. His view of the claims allowance process is that he may file objections to whatever proofs of claim he believes do not meet the formal requirements of Bankruptcy Rule 3001 - without conducting any investigation of the factual basis for the objections and without regard to his client's personal knowledge of her obligations to her creditors. If the creditors respond to his satisfaction, he withdraws the objections. If the creditors do not contest the objections, or do not respond to his satisfaction, then, according to the debtor's counsel, this Court's only role is to sustain the objections.

At the hearing on July 21, 2010, the Court pointed out to counsel that the debtor had not articulated a substantive grounds for disallowance of the disputed claims under 11 U.S.C. § 502(b)(1). Rather, the debtor had objected to every single claim filed in her case based on her creditors'

failure to attach all of the documents that her counsel alleges are required by Bankruptcy Rule 3001. The Court raised several concerns about the conduct of the debtor and her counsel: (i) the debtor and her counsel appeared to be

Page 10

playing games by filing objections based solely on a narrow reading of the proofs of claim - objections that ignored the debtor's personal knowledge of her liabilities to creditors as well as her counsel's duty to conduct a reasonable inquiry prior to filing the objections, and (ii) the debtor's objections appeared to have been filed in bad faith inasmuch as her counsel represented that he had withdrawn every objection to which a creditor had responded. In light of these concerns, the Court provided the debtor with an opportunity to present testimony regarding any substantive objection to the claims in her case as well as what investigation she did prior to filing each objection to her creditors' claims. Since the debtor was not present, the Court continued the hearing to August 25, 2010. The debtor's counsel subsequently filed a motion to continue the August 25th hearing to September 29th in order to accommodate the debtor's schedule, which the Court granted.

At the continued hearing, several members of the firm representing the debtor appeared. They represented that their client was present in the courtroom. They did not offer any testimony from her and, once again, failed to establish substantive grounds for disallowance of the disputed claims. They also failed to offer evidence establishing that they or their client conducted any investigation of the factual basis for her claims objections. Instead, they filed a legal brief and made legal arguments relating to Bankruptcy Rule 3001 and the shifting burden of proof in the context of an objection to a proof of claim. As discussed more fully below, however, the cases addressing the parties' respective burdens of proof assume that the underlying claim objection raises substantive grounds for disallowance and that the objection was filed in compliance with Bankruptcy Rule 9011.

Page 11

II. LEGAL DISCUSSION

The filing of an objection to a proof of claim initiates a contested matter in which the default requirements of Federal Rule of Civil Procedure 55 apply. *See* Fed. R. Bankr. P. 7055, 9014. Those default rules do not permit entry of judgments that are not warranted on the merits. A creditor's failure to respond to a claim objection does not automatically entitle a debtor to the entry of a default judgment. *See, e.g., In re Jasinski,* 406 B.R. 653 (Bankr. W.D. Pa. 2009). Indeed, a request for entry of default judgment may be denied when objection lacks merit. *Id.* at 656.

This Court may sustain an objection to a proof of claim only if the objection complies with the requirements of the Code. Section 502(a) of the Code provides that a timely filed proof of claim is deemed allowed by the bankruptcy court unless a party in interest objects. 11 U.S.C. § 502(a). If an objection to a claim is raised, § 502(b) provides that the court *"shall allow* such claim in such amount, *except* to the extent that" a grounds for allowance provided by § 502(b)(1) - (9) applies. *Id.* (emphasis added). *See also B-Line, LLC v. Kirkland (In re Kirkland),* 379 B.R. 341, 345 (B.A.P. 10th Cir. 2007). Thus, the Code requires this to overrule a claim objection that does not comply with § 502(b) - even if the claimant does not appear to raise the issue. *Cf: United Student Aid Funds, Inc. v. Espinosa,* 130 U.S. 1367, 1381 n. 14 (2010) (noting that § 1325(a), which provides that a bankruptcy court "shall confirm a plan" if the plan "complies with the provisions" of chapter 13 and "other applicable provisions" of the Code, *"requires* bankruptcy courts to address and correct a defect in a debtor's proposed plan even if no creditor raises the issue.").

Page 12

A. The Debtor's Claim Objections

1. Section 502(b) Sets Out the Grounds for Disallowance

Section 502(b) of the Code sets forth nine grounds for disallowance of a claim. 11 U.S.C. § 502(b)(1) - (9). In particular, a bankruptcy court may disallow a claim if the claim is "unenforceable against the debtor ... under any agreement or applicable law," § 502(b)(1); "is for unmatured interest," § 502(b)(2); "is for [property tax that] exceeds the value of the [estate's] interest" in the property, § 502(b)(3); "is for services of an insider or attorney of the debtor" and "exceeds the reasonable value of such services," § 502(b)(4); is for unmatured debt on certain alimony and child support obligations, § 502(b)(5); is for certain "damages resulting from the termination" of a lease or employment contract, §§ 502(b)(6) and (7); "results from a reduction, due to late payment, in the amount of... credit available to the debtor in connection with an employment tax on wages, salaries, or commissions earned from the debtor," § 502(b)(8); or was not timely filed, § 502(b)(9).

The debtor in this case has not asserted any of the § 502(b) grounds for disallowance. The debtor, instead, seeks to disallow the claims at issue based on the failure to attach documents as required by Federal Rule of Bankruptcy Procedure 3001. Bankruptcy Rule 3001 addresses the form and content of claims, requiring, among other things that "[w]hen a claim ... is based on a writing, the original or a duplicate shall be filed with the proof of claim." Fed. R. Bankr. P. 3001(c). The stated purpose of Bankruptcy Rule 3001(c) is to authenticate a claim for evidentiary purposes. *See id.,* Advisory Committee Note (1983). A proof of claim "executed and filed" in accordance with Bankruptcy Rule 3001 "shall constitute prima facie evidence of the validity and

Page 13

amount of the claim" in the event of an objection to the claim. Fed. R. Bankr. P. 3001(f).

Bankruptcy Rule 3001 does not, by itself, establish grounds for disallowance of a claim. Rather, Bankruptcy Rule 3001 allocates the burden of proof with respect to a proof of claim for which an objecting party has raised an objection that would warrant disallowance under § 502(b). As the Bankruptcy Appellate Panel for the Tenth Circuit recently explained: "Bankruptcy Rule 3001 does not enlarge the Debtors' statutory reasons to disallow a claim; it merely 'defines the process by which [the claims] may be effected.'" *In re Kirkland,* 379 B.R. at 345 (citing *In re Cluff,* 313 B.R. 323, 332 (Bankr. D. Utah 2004)). If an objecting party asserts only that the claimant's proof of claim does not comply with Bankruptcy Rule 3001, without asserting a ground for disallowance provided under § 502(b), a cognizable claim must be allowed. *Id.* at 343-44 (Section 502(b) "mandates that the court 'shall allow' the claim, except to the extent it falls within one of nine enumerated categories of prohibited claims. The statute does not list among the grounds for disallowance the proof of claim's failure to adhere to the requirements of the Federal Rules of Bankruptcy Procedure, namely Rule 3001."). *See also In re Heath,* 331 B.R. 424, 435 (B.A.P. 9th Cir. 2005) ("objections that relied solely on the alleged lack of prima facie validity of the proofs of claims ... [are] not a sufficient objection recognized by Section 502, which deems claims allowed and directs that the bankruptcy court 'shall' allow claims with limited exceptions ..."); *Dove-Nation v. eCast Settlement Corp. (In re Dove-Nation),* 318 B.R. 147, at 152 (B.A.P. 8th Cir. 2004) ("even if the claims had not substantially complied with Rule 3001, the claims are still allowed claims under Section 502 of the Bankruptcy Code unless the Debtor establishes an exception

Page 14

under Section 502(b)"). The Bankruptcy Rules do not and cannot contravene the substantive rights contained in the Bankruptcy Code. 28 U.S.C. 2075; *In re Waindel,* 65 F.3d 1307, 1309 (5th Cir. 2009).

In a legal brief in support of her claim objections, the debtor urges this Court to conclude that § 502(b) does not set forth the exclusive grounds for disallowance of a claim. The debtor quotes extensively from *In re Gilbreath,* 395 B.R. 356 (Bankr. S.D. Tex. 2008), arguing

that "[p]roofs of claim that are not *prima facie* valid are not automatically deemed allowed." This argument misreads *Gilbreath* and misses the point in this case.[9] As the bankruptcy court explained in *Gilbreath,* "[a]lthough incomplete or insufficient proofs of claim are not *prima facie* valid, they are not automatically disallowed." *Id.* at 364 (citation omitted). Rather, the insufficiency affects the burdens of proof and production once the debtor objects to the claim. In this case, however, the debtor asserts no objection to the disputed claims other than the lack of documentation, *i.e.,* their insufficiency.

For all the foregoing reasons, the Court concludes that the plain language of § 502(b) and the Supreme Court's recent opinion in *Espinosa* do not support a "nonexclusive" approach. Notably, even if the Court were to disallow an otherwise valid claim based solely on the creditor's alleged failure to comply with Bankruptcy Rule

Page 15

3001, the debtor would remain obligated to repay the claim after emerging from bankruptcy. The discharge in a chapter 13 case is different than in a chapter 7 case. *Compare* 11 U.S.C. § 727(b) *with* § 1328(a). In a chapter 13 case, upon completion of plan payments, a debtor generally is discharged of all the debts "provided for by the plan or disallowed under section 502" of the Code. *See* 11 U.S.C. § 1328(a). Section 1328(a) does not, by its terms, discharge a chapter 13 debtor of her obligation to repay claims disallowed solely under Bankruptcy Rule 3001.

2. The Disputed Claims Are Cognizable

This does not end the Court's analysis. The debtor appears to argue that the lack of documentation has prevented her from recognizing the claims at issue. Although the debtor has artfully avoided any discussion of her personal knowledge and does not appear to deny that she incurred the underlying debts,[10] she nonetheless argues that the Court must disallow the disputed claims because she cannot determine whether she is obligated to the claimants *based solely on the documentation attached to the claims.*

In order to be cognizable in bankruptcy, a pre-petition claim must be based on state or federal law creating a substantive obligation. *See In Matter of Chicago, Milwaukee, St. Paul and Pacific Rv. Co.,* 878 F.2d 182, 184 (7th Cir. 1989) (citing *Vanston Committee v. Green,* 329 U.S. 156, 170 (1946) (Frankfurter, J., concurring)). Although a proof of claim need not include all of the evidence that might be necessary at trial, the proof must contain sufficient information for parties to discern the general basis of the claim. This information generally includes the information required by

Page 16

Bankruptcy Rule 3001, namely, (1) the creditor's name and address, (2) the basis for claim (e.g., credit card debt), (3) the date debt was incurred, (4) the amount of claim, (5) the classification of claim *(i.e.,* secured vs. unsecured), and (6) supporting documents. *In re Armstrong,* 320 B.R. 97, 104 (Bankr. N.D. Tex. 2005) (quoting *In re Dow Corning Corp.,* 250 B.R. 298, 321 (Bankr. E.D. Mich. 2000)).

Bankruptcy Rule 3001, however, is not inflexible. Rule 3001 provides that a proof of claim "shall conform *substantially* to the appropriate Official Form." Fed. R. Bankr. P. 3001(a) (emphasis added). The information required by Bankruptcy Rule 3001 and Official Form 10 is designed to streamline the claims allowance process by facilitating the administration of claims. Although "compliance is certainly important," a creditor's "mere failure to comply with rules concerning the form and content of proof of claim is not justification under the Bankruptcy Code for judicially invalidating a creditor's otherwise lawful claim." *In re Shaffner,* 320 B.R. 870, 876 (Bankr. W.D. Mich. 2005).

In her legal brief, the debtor cites to numerous cases where a debtor joined a substantive objection to a creditor's claim with an

argument that the creditor's claim failed to attach sufficient documentation and so was not *prima facie* valid under Bankruptcy Rule 3001(f). *See, e.g., In re Tran,* 351 B.R. 440, 447-448 (Bankr. S.D. Tex. 2008) (debtor objected that he did not owe a debt to the claimant and that the claimant had failed to attach documents to the claim form sufficient to establish a debt under Texas law); *In re Leverett,* 378 B.R. at 798 (debtor affirmatively denied liability to the claimant and argued that the documents attached to the claim were insufficient to establish a debt under relevant law); *In re Gilbreath,* 395 B.R. at 359 (debtors denied

Page 17

owing the debts and issue and complained that the creditor had failed to attach sufficient documents to its claims). The debtor, however, has not raised a substantive objection to the claims at issue. The debtor is attempting to bootstrap a non-substantive objection into a substantive one by asserting that she cannot determine from the documents attached to the claims whether she is obligated to her creditors.

The debtor's protestations of ignorance are puzzling and alarming in light of her personal knowledge of the claims asserted by Neiman Marcus, Target National Bank, and Nordstrom. The debtor's Schedule F shows that she reviewed billing statements from these creditors when preparing her bankruptcy schedules. The debtor's Schedule F also acknowledges that she owes a credit card debt relating to a Sears Gold Mastercard account that appears to match the claim filed by PRA Receivables for the balance owed on a "Sears MC." The only claims the debtor is seeking to disallow that do not appear in her Schedule F are the $260 debt alleged by PRA Receivables for a "J.Jill/D.M. Mgmt" credit card account and the $3,886.75 debt alleged by PRA Receivables for a "Sears MC" account ending in numbers 0216.

Though the proofs of claim to which the debtor objects do not all include elaborate documentation, they sufficiently inform the debtor of the basis of the claims. Each proof of claim was filed using Official Form 10, and each claim describes the basis of the claim as credit card debt, the identity of the holder of the debt, the outstanding balance, the date of the debtor's last payment, and the account number. It appears to the Court that the creditors made a good faith attempt to comply with Bankruptcy Rule 3001. Moreover, the proofs fulfill Bankruptcy Rule 3001's essential purpose of providing objecting parties with sufficient information to evaluate the nature of the claims. As

Page 18

other courts have concluded on similar facts, this Court finds and concludes that the disputed claims "substantially conform" to Official Form 10. *See, e.g., In re Today's Destiny, Inc.,* 2008 WL 5479109 (Bankr. S.D. Tex. Nov. 26, 2008).

In response to a non-substantive objection, the Court should allow a claim so long as the claim contains sufficient information for an objecting party to discern its basis. *In re Kirkland,* 379 B.R. 341. The claims in this case more than satisfy this standard. The Court, therefore, overrules the debtor's Bankruptcy Rule 3001 objections to the claims of Target National Bank (claim number three in the amount of $9,366.03), Advanta Bank Corp. (claim number four in the amount of $7,236.95), Nordstrom (claim number eight in the amount of $13,568.56), PRA Receivables (for the two Sears credit cards described in claim numbers nine and ten in the total amount of $13,845.61), and PRA Receivables (for the J.Jill/D.M. Mgmt credit card described in claim number eleven in the amount of $260.00).

3. The Documentation is Sufficient

Even if the debtor had properly triggered the claims allowance process by raising a substantive objection to the claims at issue, her objections would nonetheless fail. The disputed claims substantially conform to Bankruptcy Rule 3001 and, therefore, constitute "prima facie evidence of the validity and amount of the claim." Fed. R.

Bankr. P. 3002(f). The debtor has failed to produce evidence at least equal in probative force to that offered by the proofs of claim. *In re Rally Partners,* 306 B.R. at 169 (citing *Lundell v. Anchor Const. Specialists, Inc. (In re Lundell),* 223 F.3d 1035, 1041 (9th Cir. 2000); *Sherman v. Novak (In re Reilly),* 245 B.R. 768, 773 (B.A.P. 2nd Cir.2000)). The debtor's affidavits in support of her objections conflict with the statements in her Schedule F and

Page 19

fail to address her personal knowledge of the claims at issue.[11] The claimants, therefore, were not required to produce additional documentation to the debtor (or her counsel) in order to overcome the debtor's objections. *See, e.g., In re Sandifer,* 318 B.R. 609, 611 (Bankr. M.D. Fla. 2004) (discussing the shifting burden of proof at hearings on claims objections).

B. The Ethical Obligations of the Debtor's Counsel

Having overruled the pending claim objections, the Court next addresses some of the troubling legal questions raised by the conduct of the debtor's counsel. The Court first alerted counsel to her concerns in her remarks at the hearings on the objections. Although the creditors have not requested sanctions against the debtor's counsel, this Court may issue an order *sua sponte* for counsel to appear and show cause why they have not violated Bankruptcy Rule 9011(b). *See* Fed. R. Bankr. P. 9011(c)(1)(B). *See also Merriman v. Security Insurance Co. of Hartford,* 100 F.3d 1187, 1191 (5th Cir. 1996); *Goldin v Bartholow,* 166 F.3d 710 (5th Cir. 1999). This Court also has the inherent power to impose sanctions in order to protect and maintain the authority and dignity of the court. *See, e.g., Chambers v. NASCO, Inc.,* 501 U.S. 32, 45-46 (1991); *See Chaves v. M/V Medina Star,* 47 F.3d 153 (5th Cir. 1995). Further, in cases involving an abuse of process, § 105(a) of the Code grants this Court statutory authority to impose "necessary

Page 20

and appropriate" sanctions. *See, e.g., Support Systems Int'l, Inc. v. Mack,* 45 F.3d 185, 186 (7th Cir. 1995).

Bankruptcy Rule 9011 defines the standard conduct an attorney or party must comply with before signing any petition, pleading, motion or paper. Bankruptcy Rule 9011 states in pertinent part:

> (b) By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying to the best of the person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances, --
>
> > (1) it is not being presented for any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation;
> >
> > (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
> >
> > (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to

> have evidentiary support after a reasonable opportunity for further investigation or discovery; and
>
> (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information and belief.

Fed. R. Bankr. P. 9011(b). Bankruptcy Rule 9011 places an affirmative duty on the attorney or party to investigate the facts and the law prior to the subscription and submission of any pleading, motion or paper. In other words, it imposes a duty "to stop, think and investigate more carefully before serving and filing papers." *Cooter & Gell v. Hartmarx Corp.,* 496 U.S. 384, 398 (1990).

Here, the debtor admitted in her Schedule F that she had been receiving billing statements from Nordstrom, Target National Bank, and Sears Gold Mastercard, among other creditors, prior to bankruptcy. Further, she admitted in her Statement of Financial Affairs that she had sent payments to Nordstrom and Nieman Marcus in the months prior to bankruptcy. The debtor estimated her unsecured indebtedness at $150,360 - not $0.00

Page 21

- in her chapter 13 plan. The debtor, however, indicated that all of her unsecured debts were "disputed" in her bankruptcy schedules and signed affidavits in which she stated that she was unable to assess any of the unsecured claims filed in her case due to inadequate documentation attached to the official claim forms.

In their arguments and briefs to this Court, counsel has not addressed the obligation of a debtor's attorney to assure to the best of his or her ability that the schedules are complete and accurate before they are filed. *See* 11 U.S.C. § 521(a)(1)(B) (requiring the filing of schedules and statements). *See generally* 4 Collier on Bankruptcy ¶ 521.03[3] (15th ed. Rev. 2010) ("The attorney should carefully investigate the affairs of the debtor and make certain that the attorney has all the information needed to prepare full and complete schedules, for it is the duty of the debtor to present intelligible and true schedules."). It seems clear that counsel deliberately chose to (i) ignore the debtor's personal knowledge, and (ii) conduct no independent investigation prior to filing the debtor's bankruptcy schedules and claim objections.[12]The debtor's Schedule F describes the same dispute as to all of her unsecured debts. Likewise, the debtor's counsel filed the same objection to all of the unsecured claims in the debtor's case - regardless of whether the creditor attached documents to its claim or the nature of those documents, if any.

It appears to the Court that the debtor and her counsel were motivated by the off-chance that the claimants would not respond to the objections and, consequently, that this Court would sustain the objections without substantive review. "An off-chance does not

Page 22

satisfy [Bankruptcy] Rule [9011] (investigation must precede litigation)." *Nisenbaum v. Milwaukee County,* 333 F.3d 804, 809 (7th Cir. 2003). "This approach of 'throwing it against the wall and seeing what sticks' is precisely the sort of conduct [Bankruptcy Rule 9011] seeks to counter." *Bernal v. All American Investment Realty, Inc.,* 479 F.Supp.2d 1291, 1329 (S.D. Fla. 2007) (citing *Southern Leasing Partners, Ltd.,* 801 F.2d. at 788 ("[Plaintiffs] sued [defendant] without knowing how he fit into the picture, apparently hoping that later discovery would uncover something. If Rule 11 is to mean anything, and we think it does, it must mean an end to such expeditionary pleadings....")).

The Court is not "blindsiding" the debtor's counsel. After raising concerns about their conduct in open court, the Court invited the debtor and her counsel to present evidence in support of the claim objections as well as their compliance with Bankruptcy Rule 9011. The debtor and her counsel failed to avail themselves of this opportunity. It appears to the Court that the debtor's counsel is unwilling to recognize the ethical obligations of an attorney in preparing bankruptcy schedules, or, with respect to claim objections, distinguish form (Bankruptcy Rule 3001) from substance (11 U.S.C. § 502(b)). Based on the record as it stands, there may be a basis for finding that counsel violated Bankruptcy Rule 9011.

C. The Debtor's Obligation to Act in Good Faith

Regardless of the advice the debtor may have received from her counsel regarding the claims allowance process, she has an obligation to this Court to act in good faith. To confirm a chapter 13 plan, the bankruptcy court must find, among other elements, that "the plan has been proposed in good faith." 11 U.S.C. § 1325(a)(3). The bankruptcy court also must find, among other elements, "the action of the debtor in filing the petition

Page 23

was in good faith." 11 U.S.C. § 1325(a)(7). Good faith-bad faith in this context is not an esoteric legal concept that only lawyers and judges can understand. The question is whether the totality of the circumstances indicates that the plan is unreasonable or that the debtor is attempting to abuse the spirit of the Code. *Matter of Chaffin,* 816 F.2d 1070, 1073 (5th Cir. 1987).

Here, the debtor is an affluent single woman with stable employment, a six-figure income, and no dependents. She filed a chapter 13 petition for the sole purpose of addressing her credit card debts. The debtor did not incur these debts as a result of any calamity such as an illness or job loss. Further, she was making payments on at least two of her credit card debts in the months prior to bankruptcy.

The only creditors treated under the debtor's plan are her bankruptcy counsel and her general unsecured creditors. In her chapter 13 plan, she proposed to make monthly payments of $3,190 per month. She proposed to use these payments, first, to pay $1,750 to her counsel to satisfy the balance she owed for counsel's fees. She proposed to use the remainder of her monthly payments to repay all of her unsecured debts in full. The debtor estimated her total unsecured debts at $150,360, and she predicted that her payments to unsecured creditors over sixty months would total $170,510. The Court confirmed her plan based, in part, on the debtor's stated intent to pay her unsecured creditors in full.

The debtor, however, did not intend to pay her unsecured creditors in full. She intended to seek disallowance of every single unsecured claim that might be filed in her case when she filed her plan. This intent is evidenced by the fact that she had previously

Page 24

listed the claims of all of her unsecured creditors as "disputed" in her Schedule F.[13] If all of these claims had been disallowed, as she originally requested, then she could have sought a discharge after her attorneys were paid in full *(i.e.,* approximately one month after confirmation). Section 1328(a) provides that when a debtor has completed the repayments required by a confirmed plan, a bankruptcy court "shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title ..." Thus, the debtor was attempting to effectuate a quick liquidation in her chapter 13 case - a result that, as an above-median debtor, she could not achieve in a chapter 7 case.

The debtor failed to articulate any substantive grounds for disallowance of any of the disputed claims under § 502(b). She did not, for example, deny that she owed unsecured credit card debt to Neiman Marcus. She simply objected

that Neiman Marcus had not supplied her with enough documents. The debtor's "over-reliance on nonsubstantive objections to claims," in this case, is "evidence of abuse of the bankruptcy process." *In re Armstrong,* 320 B.R. at 108. Unfortunately, the debtor's abuse of the bankruptcy process was not revealed to the Court in time to prevent confirmation of her plan. The Court, therefore, turns to the question of whether to vacate the confirmation order.

D. Authority to Vacate Confirmation Order

Section 1330 of the Bankruptcy Code provides:

> On request of a party in interest at any time within 180 days after the date of the entry of an order of confirmation under section 1325 of this title, and after notice and a hearing, the court may revoke such order if such order was obtained by fraud.

Page 25

11 U.S.C. § 1330. The Bankruptcy Code also provides that a bankruptcy court "may issue any order, process or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). In addition, bankruptcy courts have the inherent power to vacate a confirmation order that has been obtained through a fraud upon the bankruptcy court. *In re Thomas,* 337 B.R. 879, 888 - 89 (Bankr. S.D. Tex. 2006), *affirmed,* 223 Fed. Appx. 310, 2007 WL 654241 (5th Cir. 2007).

A "fraud on the court" is commonly defined as follows:

> Fraud upon the court should embrace only that species of fraud which does or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication.

Browning v. Navarro, 826 F.2d 335, 345 n.12 (5th Cir. 1987) (citing 7 Moore, *Federal Practice* ¶ 60.33 at 515 (1971)). Misconduct such as nondisclosure of facts allegedly pertinent to the matter before the court ordinarily will not constitute fraud on the court. *Rozier v. Ford Motor Co.,* 573 F.2d 1332, 1338 (5th Cir. 1978) (citing *Kupferman v. Consolidated Research & Mfg. Co.,* 459 F.2d 1072 (2nd Cir. 1972)).

Here, the debtor obtained confirmation of her chapter 13 plan by representing that she intended to pay all of her unsecured creditors in full. The Court relied on this representation in finding that the debtor had filed her petition and her reorganization plan in good faith. The debtor, however, intended to seek disallowance of every single claim filed in her case based on non-substantive objections to their claims. The Court finds that the conduct of the debtor and her counsel throughout this case establishes that they have acted in bad faith and abused the bankruptcy process. Their conduct even calls into question the veracity of the schedules filed by the debtor.

Page 26

The purpose of chapter 13 of the Bankruptcy Code is to allow the long-term repayment of debt through wages. *See* 11 U.S.C. § 1307(a)-(b). The debtor and her counsel deliberately sought to avoid this result. The debtor filed a chapter 13 petition for the sole purpose of using the claims allowance process as a litigation tactic to eliminate any obligation to repay her credit card debts. Importantly, this is not a case where debtor raised legitimate, substantial objections to the merits of the claims against her. The debtor asserted non-substantive objections to all of the claims against her, and her objections deliberately and artfully avoided addressing her personal knowledge, if any, of the debts upon which those claims were based.

As a court of equity, this Court may modify or vacate its confirmation order so long as no intervening right has become vested in reliance thereon. *In re Thomas,* 223 Fed. Appx. at 314 fn.4 (citing *Meyer v. Lenox (In re Lenox),* 902 F.2d 737, 739-40 (9th Cir. 1990)). *See also, e.g, In re Chinichian,* 784 F.2d 1440 (9th Cir. 1986) (chapter 13 plan confirmation order revoked, *sua sponte,* where debtor filed bankruptcy to "defeat the state court litigation"). The debtor in this case has no right to discharge debts pursuant to a plan that the Court confirmed based on fraudulent and misleading representations of full payment to unsecured creditors. *See In re Thomas,* 223 Fed. Appx. at 314. This Court relies on good faith to function efficiently, *id.* at 315 (citing 11 U.S.C. § 1325(a)(3)), and the Court will not aid and abet the debtor's fraud or her counsel's non-compliance with Bankruptcy Rule 9011. The Court, for all of the foregoing reasons, concludes that grounds exist to revoke the confirmation order.

Page 27

III. CONCLUSION

The Court will enter a separate order overruling the debtor's objections to claims and vacating the order confirming the debtor's plan. The chapter 13 trustee is directed to terminate distributions under the plan. The debtor will have 30 days from the date of the Court's order to file an amended plan if she cares to do so. If the debtor does not file a new plan, or if the Court does not confirm the debtor's new plan, the Court may consider dismissal of this case.

It appears from the face of the claim objections and the debtor's affidavits that the debtor's counsel at Armstrong Kellett Bartholow P.C. may have ignored the debtor's personal knowledge and may have failed to conduct any investigation of the objections prior to filing them. This investigation should have included, at a minimum, a review of the records used by the debtor to prepare her bankruptcy schedules. The Court will schedule a separate hearing to consider whether the debtor's counsel has abused the bankruptcy process or violated Bankruptcy Rule 9011(b) and, if so, appropriate sanctions, including disgorgement of any fees received by counsel in this case.

HONORABLE BRENDA T. RHOADES, CHIEF UNITED STATES BANKRUPTCY JUDGE

Notes:

[1] As of the petition date, the median annual income for a household size of one in Texas was $38,545. The Bankruptcy Abuse and Consumer Protection Act of 2005 amended § 702(b) to require above-median debtors, who are presumably capable of repaying their creditors, to file Chapter 13 and pay them.

[2] She chose the estimated amount of $150,360 based on a miscalculation in her bankruptcy schedules. The debtor's schedules state that the total amount of unsecured non-priority debt listed in Schedule F is $150,360. The total amount of non-priority unsecured debt actually listed in the debtor's Schedule F, in fact, is $81,564.

[3] Great Indoors Mastercard is the only creditor described in the debtor's Schedule F that did not file a claim.

[4] The debtor's counsel has filed similar objections to unsecured claims in other consumer bankruptcy cases. Indeed, the objections asserted by counsel on behalf of a different client in another chapter 13 case (Case No. 09-43831) are currently under advisement. The objections and affidavits in the present case and Case No. 09-43831 follow a very similar form.

[5] Like the debtor's claim objections, the supporting affidavits were nearly identical. The only substantive variation was the debtor's inclusion of an objection that the claimant had failed to attach proof of an assignment of debt to the extent the claimant filed the claim as a

successor-in-interest to the original credit card issuer.

[6] At a hearing on September 29, 2010, the debtor's counsel orally represented that he withdrew these objections because the creditors had provided him with all of the documents he deemed necessary to establish a claim against his client. Counsel did not offer any testimony or other evidence supporting this representation. Moreover, he did not offer any evidence regarding what documents the creditors allegedly provided to him.

[7] In *Leverett,* this Court treated the debtor's statement that he owed an undisputed debt to the claimant as a judicial admission. *Leverett,* 378 B.R. at 804.

[8] In *Armstrong,* the bankruptcy court for the Northern District of Texas warned that it expected a debtor who filed non-substantive objections to claims to withdraw those objections to the extent the creditors responded. *Armstrong,* 320 B.R. at 108.

[9] In *Gilbreath,* the claimant filed several claims without attaching supporting documentation. Unlike this case, the debtor in *Gilbreath* denied owing any debt to the claimant - thereby raising a § 502(b) objection to the allowance of the claims. The court set a hearing on the debtor's objections and then continued the hearing. The claimant sought to attach documentation to its claims on the eve of the continued hearing. The bankruptcy court determined that "[c]reditors should not be permitted to file woefully deficient proofs of claim in hopes that the debtor will not object, but then, when the debtor does object, to file amendments at the eleventh hour and rely on those amendments at the hearing. This is one of the reasons Rule 15 was enacted - to prevent undue prejudice and surprise to litigants and to permit opposing parties time to prepare for trial." *In re Gilbreath,* 395 B.R. at 367 (citing *United States v. Saenz,* 282 F.3d 354, 356 (5th Cir. 2002).

[10] The debtor does not, deny that she made significant purchases at Nordstrom and Nieman Marcus, for example, and she does not appear to contend that the billing statements she looked at to prepare her schedules were somehow erroneous. The debtor also did not seem to have any trouble recognizing her creditors when she made pre-petition payments to them.

[11] As to the scheduled creditors, the debtor's affidavits contain what appears to be a false statement. The debtor states in each of her affidavits, "I do not have any independent documentation that establishes the amount owed, the correct name of the creditor, the method and amount of any fees, charges, or interest accruing on the account." In her Schedule F, however, the debtor states that she is listing the balance owed to her general unsecured creditors based on the last billing statements she received from them. The debtor verified the truth and accuracy of her schedules when she filed them. *See* Fed. R. Bankr. P. 1008. If all of the debtor's statements were true when made, and the debtor had billing statements when she filed for bankruptcy, it would be improper for the debtor to destroy the documents prior to filing objections to all of her creditor's claims. *See* 18 U.S.C. § 152(7) ("A person who ... after the filing of a case under title 11 or in contemplation thereof, knowingly and fraudulently ... destroys ... any recorded information ... relating to the property or financial affairs of the debtor ... shall be fined under this title, imprisoned not more than 5 years, or both.").

[12] The debtor's counsel, at best, relied upon the debtor's willingness to sign the affidavits he prepared in support of the claims objections. However, "[b]lind reliance on the client is seldom a sufficient inquiry...." *Southern Leasing Partners, Ltd. v. McMullan,* 801 F.2d 783, 788 (5th Cir. 1986). This is especially true in a case such as this where several of the affidavits contain statements that are at odds with her sworn schedules.

[13] If the debtor had legitimate objections to all of the unsecured claims against her, then it is not clear why the debtor needed to file for bankruptcy.

23 Fla. L. Weekly Fed. B 267
465 B.R. 912

In re Paul VELEZ & Merle Duplessis, Debtors.

No. 11–16560–JKO.

United States Bankruptcy Court, S.D. Florida,Fort Lauderdale Division.

Feb. 10, 2012.

[465 B.R. 914]

Alberto H. Hernandez, Miami, FL, for Debtors.

Order:
(1) Sanctioning Attorney;
(2) Overruling Claim Objections;
(3) Scheduling Status Conference.
JOHN K. OLSON, Bankruptcy Judge.

On November 2, 2011, this court entered an Order to Show Cause which directed attorney Alberto Hernandez to appear on December 7, 2011 and explain apparent violations of Fed. R. Bankr.P. 9011(b) and 11 U.S.C. § 526(a)(2). For the reasons below, Mr. Hernandez is hereby sanctioned for prosecuting five claim objections in violation of Rule 9011(b). The offending claim objections are hereby overruled and the court will conduct a status conference to address when Mr. Hernandez' suspension should begin.

I. Procedural Background

Debtors Paul Velez and Merle Duplessis filed schedules on March 25, 2011. *See* [ECF No. 9]. Schedule F listed fifty-two unsecured nonpriority creditors. *See id.* at 12–19. Forty-one of those debts were marked as "disputed," eight were marked "unliquidated" (despite being scheduled in precise amounts), one entry was a notification placeholder, and one debt owed to "Gemb/jcp" in the amount of $0.01 (one cent) was not marked as contingent, unliquidated, or disputed.

Creditors timely filed twelve claims before the July 25, 2011 claims bar date, and the Debtor objected to eight of them:

ECF No. 44 Objection to Claim # 2 of Chase Bank (for Kohl's Dept. Stores)

Basis—"Debtor asserts that the claim is filed in violation of Local Rule 3000–1(A)(3), as the proof of claim is based on a writing that does not attach a list of invoices or other attachments and documentation to show that Debtor owes the actual amount claimed, such as the accounts application or contract or most recent statement provided to Debtor prior to the filing date. The document does not attach any documents and/or evidence of lawful assignment of note as provided on F.S. 727.104. The assignment of the negotiable instrument and/or note does not substantially confirm and/or comply with the strict language of 727.104. Florida Statutes (2010) failed to state the basis for the deficiency. The claim should be Stricken and Disallowed."

Claim # 2 Amt: $ 506.02

Schedule F Amt: $ 492.00 (marked as unliquidated & owed to Kohl's)

Last four digits of acct. # listed on proof of claim—5095

Corresponding four digits of acct. # listed on Schedule F—5095

Debtor recommendation—strike & disallow

Status—objection heard 09/07/2011 ... Mr. Hernandez submits proposed eOrder # 275958 after hearing striking & disallowing the claim ... court refrains from entering proposed order and instead enters Order to Show Cause on 11/02/2011

ECF No. 44 Objection to Claim # 3 of FIA Card Svcs. (for Bank of America)

Basis—Debtor asserts that the claim is filed in violation of Local Rule 3000–1(A)(3), as the proof of claim

[465 B.R. 915]

is based on a writing that does not attach a list of invoices or other attachments and documentation to show that Debtor owes the actual amount claimed, such as the accounts application or contract or most recent statement provided to Debtor prior to the filing date. The document does not attach any documents and/or evidence of lawful assignment of note as provided on F.S. 727.104. The assignment of the negotiable instrument and/or note does not substantially confirm and/or comply with the strict language of 727.104. Florida Statutes (2010) failed to state the basis for the deficiency. The claim should be Stricken and Disallowed.

Claim # 3 Amt: $ 17,268.74

Schedule F Amt: $17,268.00 (marked as unliquidated & owed to BofA)

Last four digits of acct. # listed on proof of claim—0084

Corresponding four digits of acct. # listed on Schedule F—0084

Debtor recommendation—strike & disallow

Status—objection heard 09/07/2011 ... Mr. Hernandez submits proposed eOrder # 275958 after hearing striking & disallowing the claim ... court refrains from entering proposed order and instead enters Order to Show Cause on 11/02/2011

ECF No. 44 Objection to Claim # 5 of Candica, LLC (for Barclay's Bank)

Basis—"Debtor asserts that the claim is filed in violation of Local Rule 3000–1(A)(3), as the proof of claim is based on a writing that does not attach a list of invoices or other attachments and documentation to show that Debtor owes the actual amount claimed, such as the accounts application or contract or most recent statement provided to Debtor prior to the filing date. The document does not attach any documents and/or evidence of lawful assignment of note as provided on F.S. 727.104. The assignment of the negotiable instrument and/or note does not substantially confirm and/or comply with the strict language of 727.104. Florida Statutes (2010) failed to state the basis for the deficiency. The claim should be Stricken and Disallowed."

Claim # 5 Amt: $8,380.69

Schedule F Amt: $ 8,295.00 (marked unliquidated & owed to Barclays)

Last four digits of acct. # listed on proof of claim—4346

Corresponding four digits of acct. # listed on Schedule F—4346

Debtor recommendation—strike & disallow

Status—objection heard 09/07/2011 ... Mr. Hernandez submits proposed eOrder # 275958 after hearing striking & disallowing the claim ... court refrains from entering proposed order and instead enters Order to Show Cause on 11/02/2011

ECF No. 44 Objection to Claim # 6 of Portfolio Recover Assoc. (for Chase)

Basis—"Debtor asserts that the claim is filed in violation of Local Rule 3000–1(A)(3), as the proof of claim is based on a writing that does not attach a list of invoices or other attachments and documentation to show that Debtor owes the actual amount claimed, such as the accounts application or contract or most recent statement provided to Debtor prior to the filing date. The document does not attach any documents and/or evidence of lawful assignment of note as provided on

[465 B.R. 916]

F.S. 727.104. The assignment of the negotiable instrument and/or note does not substantially confirm and/or comply with the strict language of 727.104. Florida Statutes (2010) failed to state the basis for the deficiency. The claim should be Stricken and Disallowed."

Claim # 6 Amt: $31,828.45

Schedule F Amt: $31,828.00 (marked unliquidated & owed to Chase)

Last four digits of acct. # listed on proof of claim—4138

Corresponding four digits of acct. # listed on Schedule F—4138

Debtor recommendation—strike & disallow

Status—objection withdrawn by Mr. Hernandez's on record at 09/07/2011 claim objection hearing ... Mr. Hernandez fails to file formal notice of withdrawal ... court *sua sponte* enters order on 09/15/2011 at ECF No. 51 to clarify docket and deem objection withdrawn ... original POC # 6–1 allowed

ECF No. 44 Objection to Claim # 7 of CR Evergreen (for Chase)

Basis—"Debtor asserts that the claim is filed in violation of Local Rule 3000–1(A)(3), as the proof of claim is based on a writing that does not attach a list of invoices or other attachments and documentation to show that Debtor owes the actual amount claimed, such as the accounts application or contract or most recent statement provided to Debtor prior to the filing date. The document does not attach any documents and/or evidence of lawful assignment of note as provided on F.S. 727.104. The assignment of the negotiable instrument and/or note does not substantially confirm and/or comply with the strict language of 727.104. Florida Statutes (2010) failed to state the basis for the deficiency. The claim should be Stricken and Disallowed."

Claim # 7 Amt: $6,240.33

Schedule F Amt: $6,240.00 (marked unliquidated & owed to Chase)

Last four digits of acct. # listed on proof of claim—1273

Corresponding four digits of acct. # listed on Schedule F—1273

Debtor recommendation—strike & disallow

Status—objection heard 09/07/2011 ... Mr. Hernandez submits proposed eOrder # 275958 after hearing striking & disallowing the claim ... court refrains from entering proposed order and instead enters Order to Show Cause on 11/02/2011

ECF No. 44 Objection to Claim # 8 of Portfolio Recovery Assoc. (for Chase)

Basis—"Debtor asserts that the claim is filed in violation of Local Rule 3000–1(A)(3), as the proof of claim is based on a writing that does not attach a list of invoices or other attachments and documentation to show that Debtor owes the actual amount claimed, such as the accounts application or contract or most recent statement provided to Debtor prior to the filing date. The document does not attach any documents and/or evidence of lawful assignment of note as provided on F.S. 727.104. The assignment of the negotiable instrument and/or note does not substantially confirm and/or comply with the strict language of 727.104. Florida Statutes (2010) failed to state the basis for the deficiency. The claim should be Stricken and Disallowed."

Claim # 8 Amt: $23,103.96

[465 B.R. 917]

Schedule F Amt: $23,103.00 (marked unliquidated & owed to Chase)

Last four digits of acct. # listed on proof of claim—0605

Corresponding four digits of acct. # listed on Schedule F—0605

Debtor recommendation—strike & disallow

Status—objection heard 09/07/2011 ... Mr. Hernandez submits proposed eOrder # 275958 after hearing striking & disallowing the claim ... court refrains from entering proposed order and instead enters Order to Show Cause on 11/02/2011

ECF No. 44 Objection to Claim # 11 of Quantum3 Group LLC

Basis—"Debtor asserts that the claim is filed in violation of Local Rule 3000–1(A)(3), as the proof of claim is based on a writing that does not attach a list of invoices or other attachments and documentation to show that Debtor owes the actual amount claimed, such as the accounts application or contract or most recent statement provided to Debtor prior to the filing date. The document does not attach any documents and/or evidence of lawful assignment of note as provided on F.S. 727.104. The assignment of the negotiable instrument and/or note does not substantially confirm and/or comply with the strict language of 727.104. Florida Statutes (2010) failed to state the basis for the deficiency. The claim should be Stricken and Disallowed."

Claim # 11 Amt: $21,920.78

Schedule F Amt: N/A (not scheduled)

Last four digits of acct. # listed on proof of claim—9001

Corresponding four digits of acct. # listed on Schedule F—N/A (not scheduled)

Debtor recommendation—strike & disallow

Status—objection heard 09/07/2011 ... Mr. Hernandez submits proposed eOrder # 275958 after hearing striking & disallowing the claim ... court modifies and enters proposed order sustaining objection to Claim # 11 on 11/04/2011

ECF No. 44 Objection to Claim # 12 of Quantum3 Group LLC

Basis—"Debtor asserts that the claim is filed in violation of Local Rule 3000–1(A)(3), as the proof of claim is based on a writing that does not attach a list of invoices or other attachments and documentation to show that Debtor owes the actual amount claimed, such as the accounts application or contract or most recent statement provided to Debtor prior to the filing date. The document does not attach any documents and/or evidence of lawful assignment of note as provided on F.S. 727.104. The assignment of the negotiable instrument and/or note does not substantially confirm and/or comply with the strict language of 727.104. Florida Statutes (2010) failed to state the basis for the deficiency. The claim should be Stricken and Disallowed."

Claim # 11 Amt: $64.00

Schedule F Amt: N/A (not scheduled)

Last four digits of acct. # listed on proof of claim—1001

Corresponding four digits of acct. # listed on Schedule F—N/A (not scheduled)

Debtor recommendation—strike & disallow

[465 B.R. 918]

Status—objection heard 09/07/2011 ... Mr. Hernandez submits proposed eOrder # 275958 after hearing striking & disallowing the claim ... court modifies and enters proposed order sustaining objection to Claim # 12 on 11/04/2011

There is no such thing as "Local Rule 3000–l(A)(3)," and § 727.104 of the Florida Statutes has nothing to do with the validity of assignments for any of these claims. Section 727.103 defines "assignment" as "an assignment for the benefit of creditors made under this chapter" which, pursuant to § 727.102, is a proceeding in a Florida state circuit court. Pursuant to § 727.101, "[t]he intent of this chapter is to provide a uniform procedure for the administration of insolvent estates, and to ensure full reporting to creditors and equal distribution of assets according to

priorities as established under this chapter." Fla. Stat. § 727.101. There is nothing in the record to indicate that a state court ABC was commenced before this voluntary bankruptcy filing. Accordingly, there was no requirement of a written "irrevocable assignment and schedules" conforming to the form contained within § 727.104 and "providing for an equal distribution of the estate according to the priorities set forth in s. 727.114" Fla. Stat. § 727.104(1)(a). The notion that the above claims should be stricken and disallowed in their entirety for failure to conform to a state court ABC procedure is a position that—viewed objectively from the bench—constitutes a bad faith attempt to strike and disallow claims for debts which the Debtors admitted under penalty of perjury in their schedules to owing.[1]

A common law assignment or delegation of a contractual right or obligation which does not relate to a Florida state court "ABC" ("assignment for the benefit of creditors") proceeding is not governed by § 727.104. "Florida law recognizes the general right to assign common law and statutory rights, unless there is an express prohibition in a statute, or a showing that an assignment would clearly offend an identifiable public policy." *VOSR Industries, Inc. v. Martin Properties, Inc.,* 919 So.2d 554, 556 (Fla. 4th DCA 2005) (citing *Forgione v. Dennis Pirtle Agency Inc.,* 701 So.2d 557, 559 (Fla.1997)). Debtors' counsel did not cite to any statute or case law giving rise to a good faith argument that the assignments were statutorily prohibited or against public policy.

Even if the court were to ignore the fact that Debtors' counsel relied upon a nonexistent local rule and an irrelevant Florida statute, the core issue here is that he objected on technical grounds to claims corresponding to debts which his clients admitted under penalty of perjury in their schedules to owing. [2] This is the thrust of the discussion section below. Six of the eight objections concerned debts which were scheduled as both noncontingent and undisputed. Each proof of claim contained

[465 B.R. 919]

sufficient information for Debtors' counsel to match the claim with the scheduled debts, and three of the claims were within $1 of the scheduled amount. Mr. Hernandez submitted proposed orders striking five of the claims when his clients had already conceded under penalty of perjury that the debts were due and owing in substantially the same amounts. Further, the Debtors marked all but one of their Schedule F debts as either unliquidated or disputed, and the one debt marked as neither contingent, unliquidated, nor disputed was in the amount of $0.01 (one cent). The court accordingly entered its Order to Show Cause on November 2, 2011 to determine whether sanctions should be imposed upon Mr. Hernandez for violating 11 U.S.C. § 526(a)(2) in Schedule F and for prosecuting five claim objections in violation of Fed. R. Bankr.P. 9011(b).

II. Discussion

Section 502(a) of the Bankruptcy Code states that a timely filed claim "is deemed allowed, unless a party in interest ... objects." Section 502 continues in subsections (b)(1)–(9) with an exhaustive list of reasons for claim disallowance, and failure to accompany a proof of claim with the appropriate writing is not one of the reasons listed. Because there is no independent basis for claim disallowance created by Fed. R. Bankr.P. 3001(c), failure to comply with that rule is an evidentiary defect which only deprives a claim of its *prima facie* validity.

A proof of claim, when considered together with the relevant admissions in the schedules, establishes a *prima facie* case of the debtor's liability on the claim and shifts the evidentiary burden to the debtor. *See In re Jorczak,* 314 B.R. 474, 481 (Bankr.D.Conn.2004). If a debt is undisputed, no other creditor has filed a proof of claim for the debt, and the debtor doesn't present any evidence to dispute the debt or ownership of the debt, the objection to claim should be overruled based upon the preponderance of the evidence. *See In re Kincaid,* 388 B.R. 610, 617–18 (Bankr.E.D.Pa.2008). To hold otherwise is to invite mischief:

Debtors with no evidence that the claims are invalid may be inclined to launch "fishing expeditions" for documents that the claimants simply cannot produce timely or economically. Creditors who have executed their claims under penalty of fines and imprisonment will be forced to decide whether producing documentation is economically feasible for a $5,000 claim, while debtors who have signed bankruptcy schedules under penalty of perjury are relieved of their obligations to include those claims in a chapter 13 plan based on a technicality.

In re Habiballa, 337 B.R. 911, 916 (Bankr.E.D.Wis.2006). This district has at least three published opinions concerning claim disallowance under 11 U.S.C. § 502 and Fed. R. Bankr.P. 3001(c) which explain why a creditor's failure to attach a signed application or statements supporting its claim is not a basis for claim disallowance when a debtor has conceded to owing the debt in her schedules. *See In re Orozco,* No. 09–34626–BKC–RAM (Bankr.S.D.Fla. July 30, 2011) (Mark, J.) (Westlaw & Lexis citations not yet available); *In re Moreno,* 341 B.R. 813 (Bankr.S.D.Fla.2006) (Mark, J.); *Paul Mason & Assocs. v. Cordero (In re Felipe),* 319 B.R. 730 (Bankr.S.D.Fla.2005) (Mark, J.).

"If a claim is scheduled by a debtor as undisputed and in an amount equal to or greater than the amount in the proof of claim, little, if any, documentation is necessary." *Moreno,* 341 B.R. at 818. If "a claim correlates by account number to a claim scheduled by the debtor, but the amount of the claim exceeds the scheduled

[465 B.R. 920]

amount," the debtor should only object to the extent that the unsubstantiated claim amount exceeds the scheduled amount. *Id.* at 819. Claim objections "should only address that portion of a claim actually in dispute." *Felipe,* 319 B.R. at 735 n. 3. It is therefore inappropriate to seek an order striking a claim in its entirety if the debtor has scheduled the claim as undisputed in any amount. *Id.*

Further, in *Moreno,* Judge Mark warned that "The Court's bar to raising objections to claims scheduled as undisputed should not be read as an invitation to schedule credit card debt as disputed in the hope of shifting the burden back to the creditor." *Moreno,* 341 B.R. at 818. A debtor's "scheduling a claim as contingent, unliquidated, or disputed, without thereafter affirmatively asserting in an objection that the debtor owes nothing or owes less than the amount claimed, does not change the result." *Id.* A claim objection seeking to strike and disallow must contain both an affirmative assertion and a reasonable basis to conclude the debtor owes nothing or owes less than the amount claimed. *See id.* Simply marking a debt as contingent, unliquidated, or disputed will not change the result, and doing so disingenuously or without reasonable care will subject the debtor's attorney to sanctions under 11 U.S.C. § 526(b)(5)(B) as well as Fed. R. Bankr.P. 9011(b).

At the December 7, 2011 show-cause hearing in this case, Mr. Hernandez attempted a series of explanations on the record that (roughly paraphrased) amounted to an admission that he negligently filed claim objections with inaccurate and/or incomplete factual bases. *See* Hr'g Tr., 3–9, Dec. 7, 2011. In an effort to focus Mr. Hernandez's soliloquy, this court asked, "What evidence did you have before you, Mr. Hernandez, at the time that you filed the objections to these claims which would support striking them or disallowing them, when the claims that were filed were the only claims that related to these specific accounts, and that they were in substantially the same amount as the claims which had been scheduled by the debtor?" Hr'g Tr., 9, Dec. 7, 2011. Mr. Hernandez was unable to provide any evidence or even supply a meaningful explanation to justify filing of any of the offending claim objections. *See* Hr'g Tr., 9–10, Dec. 7, 2011. Mr. Hernandez sought to strike and disallow five claims which his clients had already admitted (under penalty of perjury) to owing in substantially similar amounts. "The gig is up ... on debtors taking advantage of the cost of responding to claims objections and obtaining orders striking claims which the debtor has

acknowledged owing in whole or substantial part." *Moreno,* 341 B.R. at 819–820.

Sanctions Imposed by this Order are Warranted and Appropriate.

If there is no substantive objection to a claim, the creditor should not be required to provide further documentation because it serves no purpose other than to decrease the likelihood that a valid claim against the estate will be disallowed on specious grounds. *See In re Shank,* 315 B.R. 799, 813 (Bankr.N.D.Ga.2004). The Federal Rules of Bankruptcy Procedure provide that the "rules shall be construed to secure the just, speedy, and inexpensive determination of every case and proceeding." Fed. R. Bankr.P. 1001. The purpose of the rules governing claims is to require creditors to provide sufficient information so that a debtor may identify creditors and match their claims with scheduled debts. *See generally In re Habiballa,* 337 B.R. at 915 (explaining "the purpose of Rule 3001 is to provide certain minimum evidentiary standards for proofs of claim"). To require creditors to produce voluminous account information for

[465 B.R. 921]

every claim imposes an unnecessary burden on creditors without conferring a commensurate benefit to debtors. *See Shank,* 315 B.R. at 813. Instead, it increases abuse and litigation. *See id.* So long as the proof of claim contains sufficient information to match it with a scheduled debt, the debt is undisputed, no other creditor has filed a proof of claim for the debt, and the debtor doesn't present any evidence to dispute the debt or ownership of the debt, the objection to claim is specious. *See Kincaid,* 388 B.R. at 617–18.

The court has entered orders to show-cause in this case and others with a singular aim—to address what has become a pervasive problem within this district stemming from wholesale unjustified claim objections, and to stop that practice. Fed. R. Bankr.P. 9011 places an affirmative duty upon attorneys to make a reasonable investigation of the facts and the law before signing and submitting any petition, pleading, motion, or other paper. *B–Line, LLC v. Wingerter (In re Wingerter),* 594 F.3d 931, 939 (6th Cir.2010); *Briggs v. Labarge (In re Phillips),* 433 F.3d 1068 (8th Cir.2006). Attorneys are required to "think first and file later." *Stewart v. RCA Corp.,* 790 F.2d 624, 633 (7th Cir.1986); *see also Lieb v. Topstone Indus., Inc.,* 788 F.2d 151, 157 (3d Cir.1986) (telling attorneys to "look before leaping"). The filing of claim objections with little investigation into the facts or law has become commonplace in this district. In an attempt to stop this practice, the court is entering this and other similar sanctions orders. Attorneys who have filed claim objections in violation of Fed. R. Bankr.P. 9011(b) are being sanctioned in accordance with Rule 9011:

A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated.

Fed. R. Bankr.P. 9011(c)(2). While a certain sanction may be sufficient to deter repetition by an attorney who got caught, that very same sanction may not be sufficient to deter comparable conduct by others similarly situated. The sanctions imposed by this order must be tailored to deter those who may choose to take a calculated risk when deciding whether to object to a creditor's claim.

III. Conclusion

Albert H. Hernandez filed and prosecuted five claim objections in this case without reasonable investigation into the facts or the law. He sought to strike and disallow the claims in their entirety when his clients had already admitted under penalty of perjury to owing the money. "The gig is up ... on debtors taking advantage of the cost of responding to claims objections and obtaining orders striking claims which the debtor has acknowledged owing in whole or substantial part." *Moreno,* 341 B.R. at 819–820. Mr. Hernandez violated Fed. R. Bankr.P. 9011(b), and sanctions under Rule 9011(b)(2) must be tailored to deter repeat

behavior and to deter similar conduct by others similarly situated.

It is accordingly ORDERED that:

(1) Alberto H. Hernandez, Esq. is hereby suspended from practice in the United States Bankruptcy Court, Southern District of Florida for 31 days. The suspension period shall begin on a date to be set by separate order of court after the time for reconsideration and appeal of this order has run;

(2) the Debtors' objections to claims 2, 3, 5, 7, & 8, which Mr. Hernandez filed at ECF No. 44 in violation of

[465 B.R. 922]

Fed. R. Bankr.P. 9011(b), are hereby OVERRULED and claims 2, 3, 5, 7, & 8 are hereby ALLOWED as filed;

(3) a status conference is hereby scheduled for March 5, 2012 at 1:00 p.m. in Courtroom 301, 299 East Broward Blvd., Fort Lauderdale, FL 33301 to address the issue of when Mr. Hernandez' suspension should begin.

Notes:

[1.] The Debtors admitted in their schedules to owing debts corresponding to claims 2, 3, 5, 6, 7, & 8. They did not schedule undisputed debt corresponding to claims 11 & 12 (such that those claims could be disputed if the Debtors, in good faith, denied owing the money).

[2.] Claims 11 & 12 could not be matched to debt conceded as owed on Schedule F and, in light of the absence of any Debtor concession, the creditor did not attach enough supporting documentation to substantiate the claims. In other words, claims 11 & 12 seemed to "come out of the blue," the court construed the Debtors' technical objections to those claims as a denial that they owed the money, and accordingly sustained the Debtors' objections on November 4, 2011. *See* [ECF No. 61]. Debtors' counsel withdrew his objection to claim 6 before the court entered it order to show cause, and the objections to claims 2, 3, 5, 7, & 8 are the subject of this sanctions order.

1

In re: Kyle Lee Kinderknecht Chasity Dawn Kinderknecht, Debtors.

No. 17-12530-13

United States Bankruptcy Court, D. Kansas

January 18, 2023

MEMORANDUM OPINION AND ORDER GRANTING DEBTORS' MOTION TO DETERMINE MORTGAGE PAYMENT AND FOR SANCTIONS

DALE L. SOMERS UNITED STATES CHIEF BANKRUPTCY JUDGE

Debtors Kyle and Chasity Kinderknecht have maintained payments on their mortgage debt through their Chapter 13 plan. After completion of plan payments, the Chapter 13 Trustee filed a "notice of final cure payment," indicating Debtors had made all postpetition mortgage payments and were current on their mortgage debt as of June 13, 2022. The mortgage creditor, Golden Belt Bank, did not file a response to that notice. Instead, Golden Belt

2

Bank sent a letter to Debtors seeking increased monthly payments on the mortgage debt, due to an escrow deficiency. Debtors filed a motion seeking a determination that their mortgage payment is current and for sanctions.[1]

The Court concludes Golden Belt Bank failed to timely notify Debtors of changes to their interest rate and escrow account payment requirements under Federal Rule of Bankruptcy Procedure 3002.1(b).[2] As a result, under Rule 3002.1(i), the Court excludes evidence of those changes, and under Rule 3002.1(h) confirms the mortgage is current as of the Chapter 13 Trustee's notice of final cure payment on June 13, 2022. Golden Belt Bank must credit the deficient escrow account the amount needed to be current as of June 13, 2022, and then run a new escrow analysis. Further, Golden Belt Bank is prohibited from charging any fees against Debtors for work surrounding this matter. Debtors' counsel should file a notice with an itemization of fees related to this matter, and the Court will consider that itemization and then enter a separate order requiring Golden Belt Bank to pay those fees.

3

I. Findings of Fact and Procedural History[3]

Debtors filed a Chapter 13 bankruptcy petition on December 29, 2017. Golden Belt Bank filed multiple claims in Debtors' case,[4] but only one of them is relevant herein: Proof of Claim No. 12, for a first mortgage loan, with a balance at filing of $120,721.29.[5] Debtors had no arrearage on the first mortgage at filing, and this was confirmed by Golden Belt Bank.[6]

Debtors' plan was confirmed on March 13, 2018. Debtors agreed to make direct monthly payments of $1041.30 to Golden Belt Bank on the first mortgage.

Regarding the payment on the first mortgage, the payment included an escrow account, and at the time the bankruptcy case was filed, the monthly escrow payment was $312.39. The interest rate on the first mortgage loan

4

was variable and could be adjusted annually beginning with the payment due July 1, 2019. At filing, the interest rate was 5.25%.

About six months after plan confirmation, on September 19, 2018, Golden Belt Bank filed a motion for relief from stay, indicating Debtors were delinquent on mortgage payments and had not made a payment since May 2018. Debtors objected to stay relief and proposed to modify their confirmed plan. An agreed order was entered modifying the plan on January 10, 2019.[7] Under the agreed order, Debtors agreed

to pay the first mortgage through the Trustee beginning in December 2018 and agreed that the arrearage of $7523.30 would also be paid through the plan at 6% interest. Regarding the monthly mortgage payment, the agreed order stated:

> The ongoing mortgage payment, including escrow amounts, is $1,037.11, beginning July 1, 2018, which is a reduction from $1,041.30. Late fees are $36.45 per month. This order shall satisfy as the Notice of Mortgage Payment Change for this change, however, future changes in the mortgage payment shall be filed with the proper Notice of Mortgage Payment Change pursuant to Rule 3002.1[.][8]

The agreed order did not specify the portion of the payment that was principal and interest versus escrow and did not state the then-current interest rate. The agreed order does commit to filing a "proper Notice of Mortgage Payment Change pursuant to Rule 3002.1" going forward.

5

About a year and a half passed. On July 9, 2020, Golden Belt Bank filed a Notice of Mortgage Payment Change, changing the monthly payment from $1037.11 to $1034.23, due to an interest rate adjustment from 5.38% to 5.25%.[9] The principal and interest was reduced from $734.44 to $726.03, and $308.20 was stated as the escrow payment. Obviously, at some point, the interest rate had been changed from the 5.25% applicable at the time Debtors' petition was filed.

Nothing was filed in the case regarding this issue for almost two years. On April 1, 2022, the Chapter 13 Trustee filed a notice that Debtors' plan was approaching completion. On June 13, 2022, the Chapter 13 Trustee then filed three documents:

> (1) a Final Accounting, noting $52,779.54 had been paid to Golden Belt Bank on Proof of Claim No. 12 ($43,579.06 principal, $8500.48 for the postpetition arrearage, and $700 attorney's fee), the first mortgage;[10]
>
> (2) a Notice of Completion of Plan Payments, indicating all payments required under Debtors' plan had been completed;[11] and
>
> (3) the Trustee's Notice of Final Cure Payment Pursuant to Federal Rule of Bankruptcy Procedure 3002.1(f), indicating Debtors had cured all defaults and were current on their first mortgage.[12]

6

In addition to stating Debtors were current on the first mortgage, the Notice of Final Cure also stated:

> Within 21 days of the service of this Notice, the creditor must file and serve same on debtor, debtor's counsel, and Trustee, pursuant to Federal Bankruptcy Rule 3002.1(g), a statement indicating whether it agrees that the debtor has paid in full the amount required to cure the claimed default, has paid all outstanding post-petition fees, costs or escrow amounts due, and whether, consistent with § 1322(b)(5), the debtor(s) is current on all post-petition payments as of the date of this Notice or be subject to further action of the Court including possible sanctions.[13]

An order was entered approving the Chapter 13 Trustee's Final Accounting, and Debtors' discharge was entered July 7, 2022. It is undisputed that Golden Belt Bank did not file a statement responding to the Trustee's Notice of Final Cure, as required by Rule 3002.1(g).

On August 18, 2022, before Debtors' case was closed but after the entry of discharge, Debtors filed their motion for determination of final cure and motion for sanctions. Debtors indicated they received an annual escrow analysis from Golden Belt Bank, dated June 17, 2022, stating an escrow deficiency of $2918.35. As a result of receiving this letter, Debtors contacted Golden Belt Bank to provide correct insurance information. A corrected escrow analysis provided June 28, 2022, then stated an escrow deficiency of

7

$2849.69, with the escrow payment increasing from $308.20 to $546.04, and a required monthly payment increasing to $1272.07.

The loan transaction history and escrow analysis provided by Golden Belt Bank will be discussed in more detail below, but to sum, they both indicate the Bank should have advised Debtors to make increased payments. The loan transaction history shows a negative escrow account balance, with a shortage in the escrow account, since June 2018.[14] The escrow analysis states the current escrow payment is $308.20, but then shows prior year projections requiring a monthly escrow payment of $383.46 for the twelve-month period of July 2021 through June 2022, and states the escrow deficiency is $1615.35 and the escrow shortage is $1234.34, for a total negative escrow of $2849.69.[15]

Debtors thereafter filed their motion seeking relief from this Court. Debtors' motion seeks: a determination they are current on their mortgage payments through June 2022, an order to Golden Belt Bank to credit Debtors' escrow account in the amount of the escrow deficiency and shortage and then run a new escrow analysis, an order that Golden Belt Bank be prohibited from charging any fees against Debtors for work surrounding this matter,

8

and an order requiring Golden Belt Bank to pay Debtors' fees related to this matter.[16]

II. Conclusions of Law

Contested matters concerning the "allowance or disallowance of claims against the estate" are core matters under 28 U.S.C. § 157(b)(2)(B) over which this Court may exercise subject matter jurisdiction.[17]

A. Federal Rules of Bankruptcy Procedure

Under 11 U.S.C. § 1322(b)(5),[18] a Chapter 13 debtor may maintain home mortgage payments through a plan where the last payment on the secured claim is due after the final payment under the plan. The Federal Rules of Bankruptcy Procedure contain procedures for filing proofs of claim related to security interests in an individual debtor's real property and for notices related to those claims. As applicable here, under Rule 3001(c)(2)(C), a mortgage proof of claim attachment must be filed with the proof of claim,

9

and "[i]f an escrow account has been established in connection with the claim, an escrow account statement prepared as of the date the petition was filed and in a form consistent with applicable nonbankruptcy law shall be filed with the attachment to the proof of claim."

Rule 3002.1 then addresses changes to mortgage claims.[19] The Advisory Committee Notes to the Rule succinctly state its objectives:

> In order to be able to fulfill the obligations of § 1322(b)(5), a debtor and the trustee must be informed of . . . the amount of the postpetition payment obligations. If the . . . amount changes over time, due to the adjustment of the interest rate, escrow account adjustments, or the assessment of fees, expenses, or other charges, notice of any change

> in payment amount needs to be conveyed to the debtor and trustee. Timely notice of these changes will permit the debtor or trustee to challenge the validity of any such charges, if necessary, and to adjust postpetition mortgage payments to cover any properly claimed adjustment.[20]

If a debtor does not know about a payment change, how can that payment change be addressed during the pendency of the Chapter 13 case? Rule 3002.1 "was adopted . . . to address a significant problem caused when mortgage companies applied fees and costs to a debtor's mortgage while the debtor was in bankruptcy without giving notice to the debtor and then, based on these post-petition defaults, sought to

10

foreclose upon the debtor's property after the debtor completed the plan."[21]

To combat the issue of un-noticed mortgage payment changes, under Rule 3002.1(b)(1), a mortgage holder "shall file and serve . . . notice of any change in the payment amount, including any change that results from an interest-rate or escrow-account adjustment, no later than 21 days before a payment in the new amount is due." The debtor can then object to that notice of payment change and seek a determination from the Court "whether the change is required to maintain payments in accordance with § 1322(b)(5) of the Code."[22]

Additional procedures are in place at the end of a Chapter 13 debtor's case. Under Rule 3002.1(f) through (h), the following procedure should occur at the end of a Chapter 13 bankruptcy:

> **(f) Notice of final cure payment**
>
> Within 30 days after the debtor completes all payments under the plan, the trustee shall file and serve on the holder of the claim, the debtor, and debtor's counsel a notice stating that the debtor has paid in full the amount required to cure any default on the claim.
>
> . . .
>
> **(g) Response to notice of final cure payment**
>
> Within 21 days after service of the notice under subdivision (f) of this rule, the holder shall file and serve on the debtor, debtor's counsel, and the trustee a statement indicating (1) whether it agrees that the debtor has paid in full the amount required to cure

11

> the default on the claim, and (2) whether the debtor is otherwise current on all payments consistent with § 1322(b)(5) of the Code. The statement shall itemize the required cure or postpetition amounts, if any, that the holder contends remain unpaid as of the date of the statement. The statement shall be filed as a supplement to the holder's proof of claim and is not subject to Rule 3001(f).
>
> **(h) Determination of final cure and payment**
>
> On motion of the debtor or trustee filed within 21 days after service of the statement under subdivision (g) of this rule, the court shall, after notice and hearing, determine whether the debtor has cured the default and paid all required postpetition amounts.

By using this notice of final cure payment strategy, all parties can be ensured of the footing they leave bankruptcy on.

The failure to "provide any information" required by Rule 3002.1(b) during the case, or required by Rule 3002.1(g) at the end of plan payments, has consequences. Under Rule 3002.1(i), a court "may:"

> (1) preclude the holder from presenting the omitted information, in any form, as evidence in any contested matter . . . in the case, unless the court determines that the failure was substantially justified or is harmless; or (2) award other appropriate relief, including reasonable expenses and attorney's fees caused by the failure.

A court may grant either or both remedies available under Rule 3002.1(i).[23]

12

A mortgage creditor bears the burden of proof under Rule 3002.1-the mortgage creditor has access to the needed information, and the responsibility to share that information.[24]

B. Golden Belt Bank Failed under Rule 3002.1(b)

Once Debtors filed their bankruptcy petition, under Rule 3002.1(b), Golden Belt Bank was required to ("shall") notify Debtors of "any change" to the mortgage "payment amount," including "any change" resulting from an "interest-rate or escrow-account adjustment." That notice is required "no later than 21 days before a payment in the new amount is due."

The loan transaction history provided by Golden Belt Bank shows the creditor was deficient in communicating the maintenance of the escrow account, almost from the beginning of Debtors' bankruptcy case. On December 29, 2017, the date Debtors' Chapter 13 petition was filed, there was a positive escrow balance of $1418.90.[25] The mortgage proof of claim attachment to the proof of claim that was filed by Golden Belt Bank at filing, required by Rule 3001, showed the interest rate was 5.25% and the monthly required payment was $1041.30 (with $728.91 principal and interest and

13

$312.39 for "monthly escrow").[26] That $312.39 "monthly escrow" requirement is reflected in the loan transaction history as correct through February 6, 2019.[27]

Debtors stopped making their postpetition monthly mortgage payments with the May 2018 monthly payment. This is reflected in the loan transaction history. As noted above, after several months passed with no payment, in September 2018, Golden Belt Bank understandably sought relief from the automatic stay to pursue their remedies under the mortgage. A modification was agreed to in January 2019, setting the ongoing mortgage payment, including escrow amounts, at $1,037.11.[28] Unfortunately, the order stating this $1037.11 payment is not broken down into principal and interest versus escrow, but the parties apparently agree that at this point, the monthly escrow payment was reduced to $308.20. No interest rate is stated.

Despite the January 2019 modification, which undoubtedly caused Golden Belt Bank to analyze Debtors' mortgage and escrow account, Debtors' escrow account has been deficient since June 2018. The mortgage allowed Golden Belt Bank to create an escrow account, requiring payment of yearly taxes and insurance.[29] Golden Belt Bank does nothing to address, or even

14

acknowledge, the negative escrow balance beginning in June 2018 or why no escrow analysis was done. In addition, Debtors' mortgage included a variable interest rate, and provisions for that rate to be updated annually.[30] Again,

Golden Belt Bank does not acknowledge, or address, the failure of Golden Belt Bank to do so.

Regardless, an escrow analysis should have been done in the summer of 2018; it apparently was not. The escrow account remained deficient throughout 2019, 2020, and 2021. In July 2020, Golden Belt Bank filed a Notice of Mortgage Payment Change, changing the monthly payment due to an interest rate change (from 5.38% to 5.25%), but nothing was done to address the significant escrow deficiency at that time either.[31] Further, there is no explanation for when the interest rate increased from the 5.25% it was at the petition date, to the 5.38% it was before it went back down to 5.25% with the July 2020 notice of payment change. For years, Golden Belt Bank essentially advanced money toward Debtors' insurance and taxes that should have been paid by Debtors.

The loan transaction history simply provides no explanation or clarity for much of the facts needed in this matter. The June 2022 escrow analysis

15

fares no better. It states the current escrow payment-current being June 2022-at $308.20, and says the new escrow payment as of September 1, 2022 will need to increase to $546.04 due to the escrow deficiency and shortage. But it also contains a "prior year projection," which presumably would be from July 2021 through June 2022. In that "prior year projection," the monthly payment for escrow is stated as $383.46. The Court can only assume that in July 2021, Golden Belt Bank did perform an escrow analysis and recognize the need for increased payments, but failed to inform Debtors, the Trustee, or the Bankruptcy Court, of this needed new escrow payment. This is an assumption; again, Golden Belt Bank does not assist the Court in understanding this "prior year projection."

As noted, Golden Belt Bank does not attempt to explain the loan transaction history or the escrow analysis, but it does attempt to justify its failures. First, Golden Belt Bank argues the need for the increased escrow monthly payment "resulted from advances made by [Golden Belt Bank] on May 2, 2022 in the amount of $1,084.95 for real estate taxes and made by [Golden Belt Bank] on June 24, 2022 for an insurance premium . . . in the amount of $1,533.00."[32] Golden Belt Bank contends it was these recent escrow disbursements and the timing of Debtors' May and June 2022

16

payments that caused the escrow deficiency and shortage, and therefore, it has not failed to notify Debtors of a payment increase because the increase just occurred. This appears to be wishful thinking-as noted, the loan transaction history shows a negative escrow account balance since June 2018. And Golden Belt Bank's own June 2022 escrow analysis reflects prior year escrow projections requiring a higher monthly payment. This argument just does not make sense when looking at the entirety of the loan history.

Second, Golden Belt Bank argues it was exempt from disclosing escrow account payment changes because of a subsection of the Real Estate Settlement Procedures Act ("RESPA"), namely 12 C.F.R. § 1024.17(i)(2). Section 1024.17 sets out the requirements for escrow accounts on federally related mortgage loans. Under 12 C.F.R. § 1024.17(f)(1), a servicer must conduct an escrow account analysis "at the completion of the escrow account computation year." Then under 12 C.F.R. § 1024.17(i), the servicer must submit the annual escrow account statement to the borrower within 30 days of completion. But there is an exception to the requirement to provide the escrow account statement to the borrower "where the borrower is in bankruptcy proceedings."[33] Golden Belt Bank argues that because it was exempt under RESPA from providing the annual escrow account statement to

17

Debtors because Debtors were in bankruptcy, it did not actually make any escrow adjustments to Debtors' account and did not violate Rule 3002.1. But just because RESPA creates an exception for a servicer to provide a statement to a debtor in bankruptcy, does not mean that creditor is exempt from the requirements of RESPA to run the escrow analysis, exempt from the requirements of an individual contract, or exempt from the requirements of the Bankruptcy Rules.

Finally, Golden Belt Bank argues Debtors have suffered no harm from the deficiencies. Golden Belt Bank points out Debtors are not in default on their mortgage, and it has not sought to foreclose. Golden Belt Bank also notes Debtors' bankruptcy case is still open and Debtors could (theoretically) pay the needed escrow amount in a lump sum before the case is closed.[34] But the harm Debtors are experiencing is the exact harm Rule 3002.1 was designed to avoid. Debtors have completed payments on their Chapter 13 plan. Debtors' discharge has been entered. Golden Belt Bank had "numerous, obvious opportunities" to identify the needed increase to the escrow payment

18

at any point between June 2018 and June 2022, but failed to do so.[35] Instead, Golden Belt Bank ignored the Bankruptcy Rule's requirements and did nothing until the case was being closed.[36] Rule 3002.1 is designed to prevent the exact harm that is present in this case.[37]

To sum, Golden Belt Bank has not carried its burden under Rule 3002.1. At some point, presumably in July 2019, Golden Belt Bank changed the interest rate on the mortgage without informing the Court under Rule 3002.1(b). At some point, possibly in July 2021, Golden Belt Bank ran an escrow analysis and projected a needed increase to escrow payments, but again did not inform the Court, the Chapter 13 Trustee, or the Debtors under Rule 3002.1(b). These are just the facts the Court can cobble together, poring

19

over the loan transaction history and the June 2022 escrow analysis. Golden Belt Bank has not itself explained or analyzed the data. Golden Belt Bank does not explain or address the negative escrow account balance that has existed since June 2018. The bottom line is that Golden Belt Bank has failed in its duties under Rule 3002.1(b) and has not caried its burden of proof.

Further, Golden Belt Bank has not persuaded the Court that its failures were "substantially justified or harmless" under Rule 3002.1(i)(1). As a result, the Court relies on Rule 3002.1(i)(1) to exclude evidence from Golden Belt Bank that there is an escrow deficiency and finds the mortgage is current as of the Chapter 13 Trustee's notice of final cure payment on June 13, 2022. Golden Belt Bank must credit the deficient escrow account the amount needed to be current as of June 13, 2022, and then run a new escrow analysis. In this case, Golden Belt Bank advanced money that should have been paid by Debtors, and it may appear inequitable to require Golden Belt Bank to now credit the escrow account. But the Bankruptcy Rules are in place to instill certainty in the bankruptcy process and eliminate surprises. Golden Belt Bank did not follow those systems, and the Rules mandate this result.

20

C. Golden Belt Bank's Failures under Rule 3002.1(g)

The parties agree and stipulate that under Rule 3002.1(g), Golden Belt Bank had twenty-one days to file a response to the Trustee's Notice of Final Cure Payment, and Golden Belt Bank did not file a response.

Golden Belt Bank argues that even though it did not comply with the requirements of Rule 3002.1(g) by filing a response to the Chapter 13 Trustee's notice of final cure payment, it provided the "information" required by Rule 3002.1(g) when it supplied its June 2022 escrow account analysis to Debtors by mail, so it should not be

penalized by any of the actions permitted of the Court in Rule 3002.1(i). The Court concludes it does not need to address Golden Belt Bank's failure to respond as required by Rule 3002.1(g), because the Court is not basing its decision on Rule 3002.1(g). Instead, the Court relies on Golden Belt Bank's failures to provide information under Rule 3002.1(b) to exclude the evidence of an escrow deficiency. Under Rule 3002.1(i), the Court may award remedies to Debtors based on a mortgage holder's failures under either Rule 3002.1(b) or Rule 3002.1(g).

D. Additional Relief Awarded to Debtors

The Court excludes evidence from Golden Belt Bank claiming an escrow deficiency or shortage under Rule 3002.1(i)(1). Under Rule 3002.1(h), the Court confirms Debtors' first mortgage is current as of the Chapter 13 Trustee's notice of final cure payment on June 13, 2022. Golden Belt Bank

21

must credit the deficient escrow account the amount to be current as of June 13, 2022, and then run a new escrow analysis as of that date.

Debtors also seek an Order prohibiting Golden Belt Bank from assessing any fees, including attorney fees, against Debtors for work related to this matter, and requiring Golden Belt Bank to pay Debtors' attorney fees, under Rule 3002.1(i)(2). Under the circumstances of this case, the Court exercises its discretion to grant the requested relief. Rule 3002.1(i)(2) authorizes the Court to award the reasonable attorney's fees and costs associated with litigating any failure to notify under the Rule. As discussed herein, Golden Belt Bank failed to provide notices required by Rule 3002.1(b). Prohibiting Golden Belt Bank from assessing fees on this matter, and requiring the Bank to pay Debtors' fees regarding this matter, will enforce the requirements of the Rule. Without a penalty, there is no justification to change systems to ensure compliance.

Golden Belt Bank is prohibited from charging any fees against Debtors for work surrounding this matter. Debtors' counsel should file an itemization of its attorney's fees related to this matter. The Court will then enter a separate order requiring Golden Belt Bank to pay fees as determined therein.

22

III. Conclusion

Debtors' motion for a determination their mortgage payment is current and for sanctions[38] is granted. Golden Belt Bank shall credit the deficient escrow account the amount of the shortage to be current as of June 13, 2022, and then run a new escrow analysis as of that date. Golden Belt Bank is prohibited from collecting this escrow adjustment in any way and in any court.

All regular, postpetition mortgage payments, including principal and interest, and escrow, have been made by Debtors on Proof of Claim No. 12. This mortgage obligation is deemed current as of June 13, 2022. Golden Belt Bank shall adjust its escrow account balance to reflect this status.

Debtors' counsel should file an itemization of Debtors' attorney's fees related to this matter, indicating the "reasonable expenses and attorney's fees" requested by Debtors under Rule 3002.1(i)(2). The Court will then enter a separate order stipulating the fee award.

It is so Ordered.

Notes:

[1] Doc. 122. Debtors appear by January Bailey; Golden Belt Bank appears by Nicholas Grillot.

[2] All further references in the text to "Rule" shall be to the Federal Rules of Bankruptcy Procedure.

[3] The parties filed a joint Stipulation of Facts, Doc. 131, and the Court also gathered factual and

procedural background from the docket in this bankruptcy case. *See St. Louis Baptist Temple, Inc. v. Fed. Deposit Ins. Corp.*, 605 F.2d 1169, 1172 (10th Cir. 1979) (holding that a court may *sua sponte* take judicial notice of its docket).

[4] Other claims filed by Golden Belt Bank are: Proof of Claim No. 7, for $41,717.10; Proof of Claim No. 8, for $74,064.73, secured by equipment and machinery; Proof of Claim No. 9, for $30,007.16, secured by a motor vehicle; Proof of Claim No. 10, for $42,809.32, secured by a motor vehicle; Proof of Claim No. 11, for $11,103.74, secured by a motor vehicle; and Proof of Claim No. 13, for a second mortgage on the real property, for $855.51.

[5] Debtors initially also moved for certain relief regarding their second mortgage, Proof of Claim No. 13, but report all issues regarding the second mortgage have been resolved. Debtors' confirmed plan proposed to pay off the second mortgage of $855.51 through plan payments, and Debtors apparently did so.

[6] Doc. 2 (plan); Doc. 25 (agreed order resolving Golden Belt Bank's treatment under plan).

[7] Doc. 55.

[8] *Id.* p. 2 ¶ 4.

[9] Proof of Claim No. 12, Notice of Mortgage Payment Change dated July 9, 2020.

[10] Doc. 113. The Trustee paid Golden Belt Bank $1,041.30 per month for the payments due December 1, 2018, to July 1, 2020, and $1,034.23 per month for the payments due August 1, 2020, to May 1, 2022.

[11] Doc. 114.

[12] Doc. 115.

[13] *Id.* p. 2.

[14] Doc. 131, Ex. C, pages 9 to 11 of 15.

[15] Doc. 131, Ex. D, pages 12 to 15 of 15.

[16] Debtors also requested Golden Belt Bank provide them a Satisfaction of Mortgage statement, indicating their second mortgage was paid in full. As noted above, the requested statement was provided, and the second mortgage is no longer at issue.

[17] This Court has jurisdiction pursuant to 28 U.S.C. § 157(a) and §§ 1334(a) and (b) and the Amended Standing Order of the United States District Court for the District of Kansas that exercised authority conferred by § 157(a) to refer to the District's Bankruptcy Judges all matters under the Bankruptcy Code and all proceedings arising under the Code or arising in or related to a case under the Code, effective June 24, 2013. D. Kan. Standing Order 13-1, *printed in* D. Kan. Rules of Practice and Procedure (March 2018).

[18] All future references in the text to title 11 are to the section number only.

[19] Rule 3002.1 was adopted in 2011 and amended in 2016 to apply to any Chapter 13 plans that have provisions for maintenance of a home mortgage on a debtor's principal residence under § 1322(b)(5). Fed.R.Bankr.P. 3002.1, Advisory Committee Notes. The parties do not dispute that Rule 3002.1 applies here.

[20] Rule 3002.1, Advisory Committee Notes (2011).

[21] *In re Howard*, 563 B.R. 308, 313 (Bankr. N.D. Cal. 2016).

[22] Rule 3002.1(b)(2).

[23] Rule 3002.1(i). *See also In re Roe*, No. 18-50046, 2021 WL 2946167, at *4 (Bankr. W.D. Mo. July 13, 2021) ("Rule 3002.1(i) affords the court discretion to impose consequences against the bank under either or both Rule 3002.1(i)(1) and (2).").

[24] *In re Morris*, 603 B.R. 127, 132 (Bankr. W.D. Okla. 2019) (despite it being the debtor filing a motion for determination of the mortgage payment, it is the creditor who has access to the information concerning the mortgage and

therefore the creditor bears the burden of proving entitlement to the charges).

[25] Doc. 131, Ex. C, p. 11 of 15.

[26] Proof of Claim No. 12-1, p. 18 of 20.

[27] Doc. 131, Ex. C, p. 11 of 15.

[28] Doc. 55.

[29] Proof of Claim No. 12-1, p. 13 of 20, p. 15 of 20.

[30] *Id.* p. 6 of 20.

[31] In July 2020, the loan transaction history shows an escrow deficiency of $2638.51. Doc. 131, Ex. C, p. 10 of 15.

[32] Doc. 135 p. 6 ¶ 20.

[33] 12 C.F.R. § 1027.17(i)(2).

[34] Golden Belt Bank also argues Debtors were not harmed because even if there had been an earlier escrow analysis, Debtors would have still had to pay the increased escrow amount. Which is of course true, but that is the point - Debtors should have been given the opportunity to pay the increased amount at the time it increased.

[35] *See In re Clark*, No. 11-11723-R, 2018 WL 6266179, at *12 (Bankr. N.D. Okla. Nov. 26, 2018) ("the Mortgagee had numerous, obvious opportunities to notify the Clarks that the monthly mortgage payment stated in the Plan was incorrect").

[36] *See, e.g.*, *In re Roper*, 621 B.R. 899, 902 (Bankr. D. Colo. 2020) (concluding Rule 3002.1 "does not allow the secured creditor to silently accrue additional amounts and then spring a 'gotcha' foreclosure after the debtor has completed her plan and emerged from bankruptcy protection"); *In re Hoyt-Kieckhaben*, 546 B.R. 868, 870 (Bankr. D. Colo. 2016) ("Why this lender, and many others recently, have chosen to remain silent in the face of such substantial defaults remains a mystery to the Court. At any time, these lenders could seek relief from the automatic stay or file a motion to dismiss. Instead they do nothing until they respond to the Rule 3002.1 notice near the conclusion of the plan.").

[37] *In re Humes*, 579 B.R. 557, 565 (Bankr. D. Colo. 2018) ("The main purpose behind Rule 3002.1 is to force mortgage lenders to give timely notice to a debtor of any postpetition changes in their mortgage payment. The process had previously been problematic because mortgage holders would frequently fail to inform a debtor of significant postpetition payment changes and charges until after discharge, thereby leaving a significant arrearage even though the debtor had diligently made all plan payments.").

[38] Doc. 122.

Faculty

January M. Bailey is a shareholder at Prelle Eron & Bailey in Wichita, Kan., where her practice focuses on bankruptcy, primarily representing consumer debtors. She obtained her first job after law school by talking about the movie *Office Space* and the red stapler that her future boss had on his desk; the job involved bankruptcy practice, and since that time, she has been actively involved in the local and state bankruptcy communities. Ms. Bailey chaired the Bankruptcy Committee for the Wichita Bar Association from 2016-22 and serves on the District of Kansas Bankruptcy Bench Bar Committee. She also is the immediate past president of the Wichita Women Attorney's Association and is a member in the Wesley E. Brown Inn of Court. in addition, she was named a "Rising Star" in bankruptcy by *Super Lawyers* in 2019 and was selected to participate in NCBJ's NextGen program in 2018. Ms. Bailey is the editor of ABI's *Best of ABI 2021: The Year in Consumer Bankruptcy*, and she is Board Certified in Consumer Bankruptcy Law by the American Board of Certification. She received her B.S. in business administration and B.A. in French from the University of Kansas, and her M.B.A. and J.D. from the University of Cincinnati.

Pamela Nix is a bankruptcy specialist for the Internal Revenue Service in Lee's Summit, Mo. She has worked for the IRS for 19 years and in bankruptcy for 10 years. Ms. Nix specializes in chapters 13, 7, 11 and 12 bankruptcies. She received her Bachelor's degree from the University of Missouri and her Master's degree from Central Missouri State University.

Jill D. Olsen is a solo practitioner at The Olsen Law Firm, LLC in Kansas City, Mo., practicing primarily in the areas of bankruptcy, collections and commercial litigation. She represents both creditors and debtors and is a chapter 7 panel trustee for the U.S. Bankruptcy Court for the Western District of Missouri. Ms. Olsen is admitted to practice in Missouri, Kansas, the Western District of Missouri and the District of Kansas, as well as in the Eighth and Tenth Circuits. She was on the Bankruptcy Bench-Bar Committee for the District of Kansas and the Ac-Hoc Advisory Committee for the Western District of Missouri Bankruptcy Court. Ms. Olsen is a member of multiple local and national bar associations, and she was the past chairperson for the Kansas City Women's Bankruptcy Association and ABI's Midwestern Bankruptcy Institute. She received her J.D. with honors in 2000 from the University of Missouri at Kansas City School of Law.

Lynda K. Walker is president and CEO of The Tax Council in Washington, D.C., and the Tax Council Policy Institute (TCPI). The Tax Council is a nonprofit, nonpartisan, membership-based organization promoting sound tax and fiscal policies and is comprised of Fortune 500 companies, leading accounting and law firms, and major trade associations. The Tax Council Policy Institute is a nonprofit and nonpartisan public policy research and educational organization with the goal to provide better understanding of the impact significant tax policies may have on the economy and business through careful study, thoughtful evaluation and open discussion. Through symposia and other means, TCPI promotes and facilitates candid dialogue among all stakeholders. Immediately prior to joining TTC and TCPI, Ms. Walker served as international tax counsel to the United States Council for International Business, representing member views to the U.S. government and in various international forums, including the Organization for Economic Cooperation and Development (OECD). While there, she served as a del-

egate to numerous technical consultations and on numerous working groups, and provided leadership as a vice chair of the OECD's Business Industry and Advisory Committee's (BIAC) Taxation and Fiscal Policy Committee. With experience as a public policy attorney, Ms. Walker served as tax counsel and finance advisor to Senator John Heinz, who was a member of the U.S. Senate Finance, Banking, and Aging Committees. Upon leaving government service, she formed McKay Walker, a legislative strategic consulting practice specializing in federal tax and financial policy that focused on issues of market competitiveness and fairness. Over her career, Ms. Walker has advised trade associations, policy groups, and some of the largest U.S. businesses on a range of legislative and regulatory matters. She began her career as in-house counsel at a major regional financial institution and formerly headed the tax practice at a federal legislative law firm, serving as counsel on taxation and financial policy, and providing strategic advice to Fortune 100 companies, national industry groups and governments. Ms. Walker is a member of the U.S. Supreme Court, American, District of Columbia and Alabama Bar Associations; The Tax Coalition (for which she served as chair); and the boards of the Hugo Black Foundation and the Public Leadership Education Network. She received her B.A.Sc. in engineering/industrial management from Auburn University and her J.D. from Samford University Cumberland School of Law.