7. Bankruptcy ⇐2021.1

Statutes ⇐205

Statutory construction, and construction of the Bankruptcy Code in particular, is holistic endeavor.

8. Statutes ⇐223.1

Provisions in different statutes should, if possible, be interpreted so as to effectuate both provisions.

9. Statutes ⇐206

Text of statute should not be read in such a way as to make part of statute superfluous or redundant.

10. Statutes ⇐212.1

When Congress enacts a new statute, courts presume that legislators considered previous laws and passed the later law in harmony with policy embodied in the earlier statute, in absence of any express repudiation or modification.

11. Bankruptcy ⇐3041

United States Trustee (UST) has authority, pursuant to statutory grant of power to appear and be heard on any issue in any bankruptcy case or proceeding, to seek and obtain a Rule 2004 examination in proper circumstances. 11 U.S.C.A. § 307; Fed.Rules Bankr.Proc.Rule 2004, 11 U.S.C.A.

12. Bankruptcy ⇐2204.1

Section of the Bankruptcy Code that authorizes the United States Trustee (UST) to raise, and to appear and be heard, on any issue in any bankruptcy case or proceeding is not mere standing provision, that is not to be interpreted as conferring any additional powers on the USTs, but as authorizing them to appear in bankruptcy court merely for purposes of performing the laundry list of duties set forth in separate federal statute; rather, Code provision is best seen as grant of expanded power to the USTs, in light of perceived success of the UST pilot program. 11 U.S.C.A. § 307; 28 U.S.C.A. § 586(a).

13. Bankruptcy ⇐2204.1

Interpreting section of the Bankruptcy Code that authorizes the United States Trustee (UST) to raise, and to appear and be heard, on any issue in any bankruptcy case or proceeding as broad grant of power to the UST to act in areas where Congress had not expressly foreseen that UST involvement might be necessary would not violate basic rule of statutory construction, by rendering laundry list of UST duties and powers in another federal statute superfluous; this statutory list of duties and powers, while perhaps not "necessary" as matter of strict logic given the overarching grant of power to the UST provided in this Code provision, was nonetheless meaningful in its own right based on insight that it provided into how Congress intended the UST to exercise this broad, overarching power. 11 U.S.C.A. § 307; 28 U.S.C.A. § 586(a).

14. Bankruptcy ⇐3041

While power granted to the United States Trustee (UST) to appear and be heard on any issue in any bankruptcy case or proceeding was, by its terms, specifically limited to appearing in case or proceeding, and did not include power to proceed on matters unrelated to any case or proceeding, this "case or proceeding" requirement was satisfied where notices to appear for Rule 2004 examination that the UST had issued to residential mortgage lender, so that the UST could obtain information bearing on whether lender was accurately calculating escrow account balances and accurately calculating mortgage arrearages in Chapter 13 cases in which it appeared, were issued in context of Chapter 13 cases that were previously filed in bank-

ruptcy court. 11 U.S.C.A. § 307; Fed. Rules Bankr.Proc.Rule 2004, 11 U.S.C.A.

15. Bankruptcy ⇐3041

United States Trustee (UST), as party charged by Congress to act as watchdog to protect integrity of bankruptcy system, had sufficient stake in bankruptcy cases to qualify as "party in interest," upon whose motion bankruptcy court was authorized, in appropriate case, to order a Rule 2004 examination. 11 U.S.C.A. § 307; Fed. Rules Bankr.Proc.Rule 2004(a), 11 U.S.C.A.

See publication Words and Phrases for other judicial constructions and definitions.

16. Bankruptcy ⇐3041

While the United States Trustee (UST) was undoubtedly intended to be watchdog of bankruptcy system, that cannot and should not be viewed as providing the UST with license to engage in potentially invasive and expensive Rule 2004 discovery, based on nothing more than the UST's own curiosity. 11 U.S.C.A. § 307; Fed.Rules Bankr.Proc.Rule 2004(a), 11 U.S.C.A.

17. Bankruptcy ⇐3043, 3044

When creditor objects, the United States Trustee (UST) must meet threshold standard of "good cause" before he or she will be permitted to conduct Rule 2004 examination of creditor and to require production of documents. 11 U.S.C.A. § 307; Fed.Rules Bankr.Proc.Rule 2004(a), 11 U.S.C.A.

18. Bankruptcy ⇐3040.1, 3043

Question of whether the United States Trustee (UST) has made sufficient showing of "good cause" to be permitted to pursue a Rule 2004 examination and the type of discovery implicitly allowed by the Rule over creditor's objection is not question that court may answer by applying any mechanical test, but requires totality-of-circumstances approach, under which court considers all relevant factors. 11 U.S.C.A. § 307; Fed.Rules Bankr.Proc. Rule 2004(a), 11 U.S.C.A.

19. Bankruptcy ⇐3044, 3047(1)

Level of "good cause" that United States Trustee (UST) must establish before he or she can obtain certain documents or pursue certain line of inquiry in Rule 2004 examination of an objecting creditor will vary depending upon the potential intrusiveness involved; while inquiries that are tightly-focused on creditor will require relatively low level of good cause, because they represent a low level of intrusion, inquiries that seek far-reaching information on policies and procedures of general application in creditor's operation will require a correspondingly higher showing of good cause, because they are inherently more intrusive and present greater potential for abuse. 11 U.S.C.A. § 307; Fed.Rules Bankr.Proc.Rule 2004(a), 11 U.S.C.A.

20. Bankruptcy ⇐3047(1)

While Rule 2004 examination may be used, to some extent, as fishing expedition, it may not be used as device to launch into wholesale investigation of non-debtor's private business affairs. Fed.Rules Bankr. Proc.Rule 2004, 11 U.S.C.A.

21. Bankruptcy ⇐3044
Federal Courts ⇐13

Bankruptcy court did not have to determine whether the United States Trustee (UST) had shown a sufficiently high level of "good cause" to obtain production from home mortgage lender, pursuant to Bankruptcy Rule 2004, of documents relating, not to specific accounts of individual debtor-borrowers, but to lender's general policies and procedures bearing on manner in which it calculated escrow account balances and mortgage arrearages, where

lender had voluntarily agreed to produce such documents in related bankruptcy case, thereby mooting the UST's request for production of such documents.

22. Bankruptcy ⇐3044

United States Trustee (UST) made sufficient showing of "good cause" to obtain production from home mortgage lender, pursuant to Bankruptcy Rule 2004, of documents relating to specific accounts of individual debtor-borrowers, and to lender's calculation of escrow account balances and mortgage arrearages for purposes of the administratively consolidated matters, by showing a common thread of potential wrongdoing by lender in each of the Chapter 13 cases that related to lender's computation of its bankruptcy claim and that bore on propriety of its stay relief motions and motions to dismiss in these separate cases. 11 U.S.C.A. § 307; Fed.Rules Bankr.Proc.Rule 2004(a), 11 U.S.C.A.

23. Bankruptcy ⇐3047(1)

Proposed scope of the United States Trustee's (UST's) Rule 2004 examination of residential mortgage lender, which sought inquiry as to lender's general practices throughout entire bankruptcy case as they bore on the bankruptcy claim calculation process, was consistent with broad scope of Rule 2004 examinations and with level of "good cause" demonstrated by the UST in showing a common thread of potential wrongdoing by lender that related to lender's computation of its bankruptcy claim and that bore on propriety of its stay relief motions and motions to dismiss. 11 U.S.C.A. § 307; Fed.Rules Bankr.Proc. Rule 2004(a), 11 U.S.C.A.

24. Judgment ⇐540

In general, res judicata doctrine has three requirements: (1) a final judgment on merits in prior suit involving (2) same parties or their privies, and (3) a subsequent suit based on same cause of action.

25. Judgment ⇐703, 707

Fact that United States Trustee (UST) had not appeared as party in, and was not alleged to be in privity with party to, prior proceedings in which final orders had been entered resolving the issues which the UST sought to raise regarding computation of residential mortgage lender's bankruptcy claim was itself sufficient reason to reject lender's res judicata argument, i.e., that the UST was barred by these prior orders from seeking Rule 2004 discovery of lender as to policies and procedures that it employed in calculating its claim. 11 U.S.C.A. § 307; Fed.Rules Bankr.Proc.Rule 2004(a), 11 U.S.C.A.

26. Judgment ⇐540

Even ignoring the fact that the United States Trustee (UST) had not appeared as party in, and was not alleged to be in privity with party to, prior proceedings in which final orders had been entered resolving the issues which the UST sought to raise regarding computation of residential mortgage lender's bankruptcy claim, the UST's current request for Rule 2004 discovery from lender regarding policies and procedures that it employed in calculating its claim was not equivalent to subsequent suit based upon same cause of action that had been resolved by prior orders, and any res judicata argument by lender was at best premature until the UST, after reviewing information that he obtained pursuant to Rule 2004, decided that lender was either abusing, or not abusing, bankruptcy system and, if abuse was found, filed motion for sanctions, commenced adversary proceeding, or initiated some other contested matter. 11 U.S.C.A. § 307; Fed. Rules Bankr.Proc.Rule 2004(a), 11 U.S.C.A.

27. Bankruptcy ⇐3046(1), 3441, 3444.60

Mere fact that some of the context cases under review had previously been

closed did not prevent the United States Trustee (UST) from conducting Rule 2004 examination, where all the context cases had been reopened before the UST served her Notice of Examination. 11 U.S.C.A. § 307; Fed.Rules Bankr.Proc.Rule 2004(a), 11 U.S.C.A.

28. Bankruptcy ⇐3715(10)

Chapter 13 plan confirmation order that was entered in one of the context cases was not res judicata on United States Trustee's (UST's) ability to pursue Rule 2004 examination in that case, where acts by lender which triggered the UST's Notice of Examination took place after plan confirmation order was entered. 11 U.S.C.A. § 1327; Fed.Rules Bankr.Proc. Rule 2004, 11 U.S.C.A.

29. Bankruptcy ⇐3715(10)

Claims for postconfirmation acts are not barred by res judicata effect of Chapter 13 plan confirmation order. 11 U.S.C.A. § 1327.

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David W. Ross, Esq., for the Ch. 13 Trustee.

1. The Court's jurisdiction under *28 U.S.C. §§ 157* and *1334* was not at issue. This is a core proceeding pursuant to *28 U.S.C. §§ 157(b)(2)(A)* and *(O)*. This Opinion constitutes the Court's findings of fact and conclusions of law pursuant to *Fed.R.Bankr.P. 7052 and 9014(c)*.

MEMORANDUM OPINION

THOMAS P. AGRESTI, Bankruptcy Judge.

This case concerns the power of the office of the United States Trustee ("UST") to obtain information from a secured creditor in a number of bankruptcy cases pursuant to *Notices of Examination under Fed.R.Bankr.P.2004* and *Subpoenas Duces Tecum*. The creditor, Countrywide Home Loans, Inc. ("Countrywide"), has filed an objection to the *Notices of Examination* and *Subpoenas* and seeks to have them quashed. For the reasons that follow, the Court will deny Countrywide the relief it seeks and permit the requested examination to go forward under the parameters as set forth herein.[1]

BACKGROUND

Procedural history of the case

Several months ago the Chapter 13 Trustee for this District filed substantially identical motions entitled *Trustee's Motion to Compel Countrywide Home Loans, Inc./ f/k/a Countrywide Funding Corp. to Provide Loan Histories and for Sanctions* in 293 separate cases in which Countrywide was a creditor. On October 18, 2007, the Court entered a consolidation order which consolidated all of these separate motions for administrative purposes at Misc. No. 07–00203. Subsequently, in 10 of those 293 cases[2] the UST ("context cases") filed substantially identical documents entitled *Notice of Examination Under Fed.R.Bankr.P.2004 and Service of Subpoena (Duces Tecum)* ("Notice of Examination").[3] In each of these 10 cases,

2. The United States Trustee for this District (Region 3) is Kelly Beaudin Stapleton.

3. The ten cases, collectively referred to as the "context" cases, are: *Hill* (Case No. 01–22574–JAD); *Ramsey* (Case No. 01–31062–JAD); *Benvenuto* (Case No. 02–20946–JKF); *Stemple* (Case No. 03–11792–WWB); *Karleski*

the UST identified actions engaged in by Countrywide that she claims were questionable or raised issues going to the integrity of the bankruptcy system.

On November 2, 2007, the Court entered another consolidation order, this one consolidating the 10 cases in which the UST had filed the *Notices of Examination* under Misc. No. 07–00204. Since the 10 *Notices of Examination* were substantially identical, the Court further ordered the UST to file a single *Notice of Examination* (with an attached Subpoena Duces Tecum ("Subpoena")) by November 7, 2007, with such single *Notice of Examination* to then have effect in all of the context cases.[4]

The UST timely filed the single *Notice of Examination*, Document No. 6. On November 9, 2007, Countrywide filed an *Objection to Notices of Examination*, Document No. 12, and a *Motion to Quash Notices of Examination*, Document No. 13. On November 13, 2007, the UST filed a *Response to Objection to Notice of Examination*, Document No. 15, and an *Objection to Motion to Quash*, Document No. 16. On November 15, 2007, the Court convened a status conference to discuss all pending matters in this consolidated proceeding. The Court issued an Order on November 20, 2007, which stayed Countrywide's obligation to respond to the *Notice of Examination* and *Subpoenas*, set a briefing schedule, and directed the Parties to address a number of pertinent issues in their briefs.

The Court heard final oral arguments from the Parties on February 28, 2008, and allowed for the filing of supplemental briefs by each Party as of March 17, 2008. All such briefs have been filed. The matter is now ripe for decision.

The Documents and Testimony Sought by the UST

The *Notice of Examination*, which the UST says was filed pursuant to *Fed. R.Bankr.P.2004(c)* and *9016*, indicates that the UST seeks to examine the "corporate representative" of Countrywide regarding "its bankruptcy procedures as they relate to the Debtors' financial affairs, the administration of their estate, and the impact of Countrywide's bankruptcy procedures on the integrity of the bankruptcy process in the Western District of Pennsylvania." The *Subpoena Duces Tecum* ("Subpoena") component of the *Notice of Examination* directs Countrywide to produce a variety of documents,[5] and Countrywide is further directed to produce an authorized representative of the company to be examined on a variety of topics.[6]

Countrywide's Objections

Countrywide objected to the *Notice of Examination* on a number of grounds.

(Case No. 04–31355–JKF), *Bock* (Case No. 04–32812–BM), *Olbeter* (Case No. 04–33361–JKF); *Ennis* (Case No. 05–11985–WWB); *Topper* (Case No. 05–20772–TPA), and *Roberts* (Case No. 05–25324–TPA). Shortly before the final hearing on this matter, the UST notified the Court that she was unable to secure a consent for disclosure of financial information from the Debtors in three of the cases: *Ramsey*, *Ennis*, and *Roberts*. The UST withdrew these three cases from consideration and has apparently abandoned her efforts to conduct witness examinations and secure documents in those cases. Thus, only seven, "context" cases remain in dispute.

4. Reference in this Opinion to *Notice of Examination* or *Subpoena*, in the singular, should be understood in the context of this "effectiveness" in all of the context cases unless otherwise stated.

5. The full text of Exhibit "A" to the *Subpoena* is set forth in Appendix "A" to this Opinion and Order.

6. The full text of Exhibit "B" to the *Subpoena* is set forth in Appendix "B" to this Opinion and Order.

Most generally, and most significantly for purposes of this *Opinion*, Countrywide objects that the *Notice of Examination* exceeds the statutory scope of the UST's powers and duties and contends that the UST lacks standing to conduct the examination or compel production of the requested documents. A fair summary of Countrywide's position in this regard is found in the conclusion portion of its *Objections*, which states:

> The UST cannot show a basis under 28 U.S.C. § 586, 11 U.S.C. § 307, or Fed. R.Bankr.P.2004 for the discovery it seeks. The mere pendency of a bankruptcy case does not open the door for the UST to hale a creditor into an examination room to give sworn testimony and produce documents relating to its general corporate affairs. The UST's powers are not without limit and Rule 2004 has its bounds. Both would be exceeded exponentially if the Notices of Examination and Subpoenas are not quashed.

Countrywide's *Objections to Notices of Examination*, at 7, Document No. 12. Whether the UST possesses the authority to conduct a *Rule 2004* examination is the primary objection raised by Countrywide to be resolved in deciding this matter. If Countrywide is correct, the *Rule 2004* process may not move forward and any other objections become moot. Countrywide also raises various other general or "per se" objections based on overbreadth and vagueness, exceeding the scope of *Rule 2004(c)*, inconvenience and burden, invasion of the attorney-client and work-product privileges, proprietary and confidential nature of information sought, impermissible fishing expedition, and relevance. Only if the primary objection is overruled, must these other objections be considered as necessary.

The *Motion to Quash* filed by Countrywide raises essentially the same issue as the *Objections* although elaborating on Countrywide's position. Countrywide contends that the UST's powers and duties are circumscribed by the list set forth in *28 U.S.C. § 586(a)* and that none of those powers and duties permits the UST to proceed with the *Notice of Examination* and *Subpoena*. Countrywide further argues that *Section 307* of the Bankruptcy Code, *11 U.S.C. § 307*, which provides that the UST "may raise and may appear and be heard on any issue in any case or proceeding under this title", does not serve as a basis for the UST to obtain the information it seeks in this case. Countrywide claims the power granted the UST under that statute may only be exercised in a particular case or proceeding whereas here the UST is essentially seeking discovery related to general policies and procedures employed by Countrywide in its business affairs. Countrywide also argues that the scope of the *Notice of Examination* is beyond what is allowed by *Fed.R.Bankr.P. 2004(b)*. Countrywide argues that *Rule 2004* exists for the purpose of identifying assets and transactions involving the Debtor's estate and it may not be used as a device to launch into a wholesale investigation of a non-debtor's private business affairs. Finally, Countrywide asserts there is no statutory foundation for the UST to take on the role of a "watchdog" to protect the integrity of the bankruptcy system.

The UST's Response

Not surprisingly, the UST has a different view of matters. The UST claims she enjoys broad legal authority pursuant to *11 U.S.C. § 307, 28 U.S.C. §§ 586(a)(3)(G)* and *(a)(5)*, and *Rule 2004* to conduct the "examination" at issue in this case. She argues that Congress intended the UST to actively oversee the administration of bankruptcy cases and to intervene whenever particular actions threaten an abuse of

the bankruptcy system or its procedures. The UST denies being engaged in any kind of fishing expedition for "whim or curiosity" and points to issues existing in the context cases related to inaccurate proofs of claim, unwarranted motions for relief from stay, and unfounded demands for payment after debtor discharge. The UST contends that these issues call for an inquiry into whether Countrywide has accurately accounted for funds received from the Debtors and the Chapter 13 Trustee, accurately calculated escrow account balances, and accurately calculated mortgage arrearages. The UST believes that, pursuant to the powers conferred upon her by *11 U.S.C. § 307,* an examination of Countrywide is necessary, if not essential, to her efforts to determine whether any further action against Countrywide is appropriate.

DISCUSSION

History of the Office of the UST

In order to properly evaluate the extent of the UST's power to subpoena documents and conduct the examination at issue in this case, it will be helpful to begin with a brief look at the history underlying the creation of that office. Prior to passage of the *Bankruptcy Reform Act of 1978* ("1978 Act"), *P.L. 95–598,* all administrative and judicial functions in the bankruptcy system were handled by the bankruptcy court judges themselves. Many observers concluded that the handling of both administrative and judicial functions by the bankruptcy courts had eroded public confidence in the bankruptcy system. For instance, a bankruptcy judge might appoint a private trustee to administer an estate who would subsequently appear before that same judge to make recommendations regarding estate matters. In such circumstances, it is not hard to understand a trustee's possible reluctance to vigorously take a position contrary to the view of the judge who made the appointment.

To correct the situation, the *1978 Act* sought to create a separation between the administrative and judicial aspects of bankruptcy, leaving bankruptcy judges free to resolve disputes untainted by knowledge of and involvement in administrative matters that were unnecessary and perhaps even prejudicial to an unbiased judicial determination. The *1978 Act* addressed this goal by creating the UST pilot program originally scheduled to run through 1984 but later extended to 1986. *See P.L. 98–353.* The USTs who were appointed in this pilot program were given responsibility for many of the administrative functions that had previously been handled by the bankruptcy courts.

In order to provide the new pilot program office of UST with additional separation and independence from the bankruptcy courts, Congress housed the UST within the Department of Justice. The UST was to be a appointed by the Attorney General, and was therefore a part of the executive branch of government, not the judicial. The *1978 Act* created a new Chapter 39 under Title 28 of the United States Code. *See P.L. 95–598 at § 224; 28 U.S.C. §§ 581 et. seq.* This new Chapter, entitled "United States Trustees", includes the previously mentioned *28 U.S.C. § 586* which sets forth a list of the various duties of the UST and outlines the supervision of the UST to be exercised by the Attorney General.

After the UST pilot program operated for a number of years, and as was required by a provision of the *1978 Act,* the Attorney General submitted a report to Congress in April 1983 that outlined the results of the pilot program. In this report the Attorney General strongly supported a continuation and expansion of the program. Congress agreed that the UST pilot program had been successful. The

program was expanded to a nationwide basis (with the exception of a few judicial districts) and the office of UST was made a permanent part of the bankruptcy system by the passage and enactment of the *Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986* ("1986 Act"), *P.L. 99–554*. The Attorney General's report also strongly recommended that the UST program be continued as part of the Department of Justice. Congress adopted that approach as well in the *1986 Act*. The *1986 Act* also added a new provision to the Bankruptcy Code, entitled "United States Trustee", which states:

> The United States trustee may raise and may appear and be heard on any issue in any case or proceeding under this title but may not file a plan pursuant to section 1121(c) of this title.

11 U.S.C. § 307.

The Power of the UST

To a large extent, the Court's decision in this case depends on a choice between the competing views expressed by the UST and Countrywide as to the relationship between *28 U.S.C. § 586(a)* and *11 U.S.C. § 307*. As indicated in the discussion above, *Section 586* was created by the *1978 Act* and it contains a "laundry list" of fairly particularized UST duties.[7] On the other hand, *Section 307* was created by the *1986 Act* and contains a broad and general authorization for the UST to raise, appear and be heard on any issue in any case or proceeding. The position of the Parties with respect to the interplay between these two statutory provisions can be briefly summarized.

Countrywide argues that the UST, as an agency of the United States government, has only the powers specifically granted to her by Congress. Countrywide says that the powers of the UST are primarily set forth in *Section 586(a)*, although there are some additional specific duties set forth in a number of provisions scattered throughout the Bankruptcy Code.[8] According to Countrywide, it is these provisions that

7. Since its enactment in the *1978 Act, Section 586* has been the subject of several amendments. *See, e.g., P.L. 99 –554* (October 27, 1986); *P.L. 103–394* (October 22, 1994); *P.L. 109–8* (April 20, 2005). When first enacted as part of the *1978 Act, Section 586(a)(3)* was a relatively simple provision with no subsections simply directing that each UST shall "supervise the administration of cases and trustees in cases under Chapter 7, 11, or 13 of Title 11." P.L. 96–598 at § 224(a). The current version of *Section 586(a)(3)*, with its "laundry list" feature of UST duties set forth in subsections (A) through (L) was substantially the product of the *1986 Act*. See P.L. 99–554 at § 113(a)(3). As relevant to the present case (which involves only chapter 7 and 13 proceedings), the current version of *Section 586(a)(3)* directs the UST to "supervise the administration of cases ... under chapter 7[and] 13 ... by, whenever the United States trustee considers it to be appropriate": reviewing applications for compensation and reimbursement under *Section 330* of the Bankruptcy Code and filing comments regarding the same *(Section 586(a)(3)(A))*; monitoring plans under chapter 13 and filing comments regarding the same *(Section 586(a)(3)(C))*; taking action the UST deems appropriate to ensure that all required reports, schedules and fees are timely and properly filed *(Section 586(a)(3)(D))*; notifying the U.S. attorney of all matters relating to actions which may constitute a crime and assisting the U.S. Attorney in carrying out prosecutions *(Section 586(a)(3)(F))*; monitoring the progress of cases and taking action to prevent undue delay in such cases *(Section 586(a)(3)(G))*; and monitoring applications filed under *Section 327* and filing comments regarding the same *(Section 586(a)(3)(I))*. Additionally, *Section 586(a)(5)* directs the UST to "perform the duties prescribed for the United States trustee under title 11 and this title, and such duties consistent with title 11 and this title as the Attorney General may prescribe".

8. Countrywide points to the following Bankruptcy Code provisions as extending powers and duties to the UST in addition to those set

delineate the powers of the UST, with *Section 307* merely functioning as an enabling provision to grant the UST the standing necessary to perform her duties. Countrywide argues that "*Section 307* simply does not contain any substantive power—it is a grant of standing to participate in cases and proceedings and perform statutorily defined and limited duties." Countrywide's *Brief in Support of Its Objections and Motion to Quash*, at 10, Document No. 30 ("Countrywide's Brief"). Countrywide points out that nowhere in *Section 586* (or in any of the other Bankruptcy Code provisions identified in footnote 8, above) is there a grant of power to the UST to conduct the sort of "investigation" being attempted here. Countrywide further argues that the standing conferred on the UST by *Section 307* is limited to actual (pending) cases or proceedings. Countrywide believes there is no such actual case or proceeding with respect to any of the context cases that had previously been closed when the UST filed its *Notices of Examination* or in any of the open cases in which the matters of controversy identified by the UST had already been resolved.

On the other hand, according to the UST the Court's primary focus should be directed to *Section 307* which the UST argues gives her broad authority to raise and be heard on any issue under the Bankruptcy Code.[9] The UST argues that *Section 586* cannot be viewed as a limitation on her powers. Rather, *Section 586* and the other Bankruptcy Code provisions delineating specific duties of the UST are non-exclusive, non-limiting complements to the broad power conferred by *Section 307*. Finally, the UST argues that even under the more circumscribed view of her power as advanced by Countrywide, she nevertheless has the statutory authority to look into Countrywide activities by conducting *Rule 2004* examinations, pointing to *Sections 586(a)(3)(G)*, and *586(a)(5)* as specific statutory bases for such action.

After careful consideration of the arguments made by both sides, the Court concludes that the UST's position is the correct one.

The Statutory Language

[1–7] When interpreting a statute, the role of the Court is to give effect to the

forth in *28 U.S.C. § 586(a): Section 110(j)* (bring civil actions against bankruptcy petition preparer); *Section 111* (review and approve non-profit budget and credit counseling agencies); *Section 303(g)* (appoint interim trustee in an involuntary case); *Section 321* (serve as trustee in case if necessary); *Section 327(c)* (object to trustee's employment of a professional); *Section 330(a)* (participate in hearings on compensation of officers); *Section 332* (appoint consumer ombudsman); *Section 341* (convene and preside at first meeting of creditors); *Section 343* (examine the debtor); *Section 345* (approve certain corporate sureties); *Section 526* (bring action against debt relief agency); *Sections 701(a)* and *703(a)* (appoint or serve as interim trustee); *Section 704* (file reports on whether individual debtor filing is presumptively abusive); *Section 705(b)* (consult with creditors' committee); *Section 707(a)(3)* (move for dismissal of a Chapter 7 case); *Section 707(b)* (move to dismiss an individual debtor case found to be abusive); *Section 727* (object to or seek revocation of a discharge); *Section 1102* (appoint Chapter 11 committees); *Section 1104* (request appointment of a trustee or examiner); *Section 1105* (request removal Chapter 11 trustee); *Section 1112(e)* (seek conversion of Chapter 11 case); *Section 1114* (appoint a committee of retired employees); *Section 1163* (appoint a person from a specified list in a railroad case); *Section 1202* (appoint a Chapter 12 trustee); *Section 1224* (object to confirmation of a Chapter 12 plan); *Section 1302* (appoint the standing Chapter 13 trustee); and *Section 1307* (request conversion or dismissal of Chapter 13 case).

9. Except, as is clear from the specific terms of *Section 307*, the UST may not file a reorganization plan under Chapter 11.

intent of Congress. *See Negonsott v. Samuels,* 507 U.S. 99, 104, 113 S.Ct. 1119, 122 L.Ed.2d 457 (1993); *Rosenberg v. XM Ventures,* 274 F.3d 137, 141 (3d Cir.2001). It is presumed that Congress expresses its intent through the ordinary meaning of its language, so every exercise of statutory interpretation begins with an examination of the plain language of the statute. *Id.; In re Alberts,* 381 B.R. 171, 177 (Bankr. W.D.Pa.2008) (citing *Lamie v. United States Trustee,* 540 U.S. 526, 534, 124 S.Ct. 1023, 157 L.Ed.2d 1024 (2004), and *BP America Production Co. v. Burton,* 549 U.S. 84, 127 S.Ct. 638, 644, 166 L.Ed.2d 494 (2006)). If the meaning of the statute is clear, and implementation of it does not lead to an absurd result, the inquiry ends there. *Hartford Underwriters Insurance Co. v. Union Planters Bank, N.A.,* 530 U.S. 1, 6, 120 S.Ct. 1942, 147 L.Ed.2d 1 (2000). If, however, the plain meaning of a provision is not self-evident because it is capable of more than one meaning the Court may need to go further. As the Third Circuit has explained:

> But just because a particular provision may be, by itself, susceptible to differing constructions does not mean that the provision is therefore ambiguous. "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.,* 519 U.S. 337, 341, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997). Statutory context can suggest the natural reading of a provision that in isolation might yield contestable interpretations. Specifically, in interpreting the Bankruptcy Code, the Supreme Court has been reluctant to declare its provisions ambiguous, preferring instead to take a broader, contextual view, and urging courts to "not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *Kelly v. Robinson,* 479 U.S. 36, 43, 107 S.Ct. 353, 93 L.Ed.2d 216 (1986).

In re Price, 370 F.3d 362, 369 (3d Cir. 2004). The *Price* court further noted that statutory construction is a "holistic endeavor," something that is particularly true with respect to construction of the Bankruptcy Code. *Id.*

[8] Rather than the interpretation of a single statutory provision, the task for the Court in this case involves the reconciliation of two provisions in different statutes.[10] It is a well-established canon of statutory construction that provisions in different statutes should, if possible, be interpreted so as to effectuate both provisions. *See In re Udell,* 454 F.3d 180, 184 (3d Cir.2006). Thus, while remaining faithful to a "plain reading" of the provisions at issue, the Court must also strive for an interpretation of *Sections 307* and *586* that gives effect to both if possible.

[9, 10] There are several other rules of statutory construction that may be relevant in the present case. One is that the text of a statute should not be read in such a way as to make part of the statute superfluous or redundant. *Connecticut National Bank v. Germain,* 503 U.S. 249, 252–54, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992); *National Association of Home Builders v. Defenders of Wildlife,* —— U.S.

10. Although *Sections 307* and *586* are in different statutes, *Titles 11* and *28,* respectively, they both address the same subject matter and should thus be construed *in pari materia. See, e.g., Federal Trade Comm. v. A.P.W. Paper Co.,* 328 U.S. 193, 202, 66 S.Ct. 932, 90 L.Ed. 1165 (1946); *In re Kaiser Aluminum Corp.,* 2005 WL 735551 *3 (D.Del.2005) *(Section 1341* of ERISA construed *in pari materia* with *Section 1113* of the Bankruptcy Code.)

——, 127 S.Ct. 2518, 2536, 168 L.Ed.2d 467 (2007). Another is that when Congress enacts a new statute courts presume that the legislators considered previous laws and passed the later law in harmony with the policy embodied in the earlier statute, in the absence of any express repudiation or modification. *Hellon & Associates, Inc. v. Phoenix Resort Corp.*, 958 F.2d 295 (9th Cir.1992).

[11, 12] Applying the above principles leads to the conclusion that the UST does have the authority to seek and obtain a 2004 Examination in the proper circumstances. Clearly, *Section 307* is written in extremely broad language. Indeed, it is difficult to conceive of how *Section 307* could have been written in any broader language. The Court thus has no difficulty concluding that the plain meaning of the power to "raise" and to "appear and be heard" as to any issue in any bankruptcy case or proceeding includes the ability to conduct examinations pursuant to *Rule 2004* in the right circumstances. Countrywide, in apparent acknowledgment as to the otherwise far-reaching scope of the *Section 307* language, argues that it was only intended to be an enabling statute with the limited purpose of granting standing to the UST to perform the many specific duties set forth in *Section 586* and the various provisions of the Bankruptcy Code noted previously. *See n. 8, above.*

In that vein, Countrywide suggests that *Section 307* was only enacted to address the purported "confusion" that then existed (i.e., in 1986) as to whether the UST had standing to perform the specific duties listed in *Section 586* and the other, related provisions. *See Countrywide's Brief,* pg 9. Countrywide's argument in this regard must fail. There is nothing whatsoever in the statutory language of *Section 307* that supports Countrywide's argument. Countrywide has cited no other, substantial authority in support of such a construction.[11] If there truly had been confusion in the courts over whether the UST had standing to perform duties prior to the enactment of *Section 307,* one would assume that would be reflected in the case law of the period, but none has been cited. Moreover, if the Congressional intent behind *Section 307* was merely to confer standing and not to grant additional power, it would have been easy and natural to simply state that in the language of the statute. *See, e.g., 18 U.S.C. § 1956(b)(4)* (federal receiver appointed in money laundering cases "shall have standing equivalent to that of a Federal prosecutor" in seeking certain information about a defendant's assets). Thus, the Court believes that the most natural and plain meaning of *Section 307* is that of a grant of expanded power to an office that was widely perceived to have proven its

11. The only authority Countrywide cites to establish the alleged "confusion" that existed as to the UST's standing to perform duties prior to the enactment of *Section 307* is an article in a state bar journal. *See* Ericka Palmer Rogers, *United States Trustee System,* 2 March–Nevada Lawyer 16 (1994). The author of that article states:

> Early in the development of the U.S. Trustee system there was discussion as to the standing of the United States Trustee. The resolution of this issue is 11 U.S.C. § 307 which provides that the U.S. Trustee may raise, appear and be heard on any issue in any case or proceeding with the exception that the U.S. Trustee may not file a plan in a Chapter 11 case.

Id. at 17. Presumably, this is the point of the article upon which Countrywide is relying. (Countrywide simply cites to the article in general, so it is difficult to be sure). There is, however, no citation to any authority in the article to support the author's contention respecting the purpose behind *Section 307.* As such, the Court can only view this as the opinion of the author entitled to little consideration.

merit during the pilot program era.[12]

The Court readily acknowledges that the drafting "across statutes" found here between *Section 307* and *Section 586* does not present a model of legislative clarity. After all, if the scope of *Section 307* is really as broad as the Court believes it to be, was it even necessary for Congress to add the specific laundry list of duties under *Section 586(a)(3)* in the same legislation (the *1986 Act)* that created *Section 307? See n. 7, supra.* Perhaps not as a matter of pure logic since the broad power created by *Section 307* in the UST encompasses the "lesser" powers of that laundry list, making the list redundant.

However, statutes, particularly complex ones like the Bankruptcy Code and its related provisions in Title 28, cannot simply be reduced to their component parts and then subjected to tests of strict semantic logic. The numerous provisions and amendatory accretions over time in the Bankruptcy Code make it almost inevitable that certain inconsistencies will become apparent on close examination. Along those lines, the Supreme Court has noted that redundancies across statutes are not unusual events in drafting, and so long as there is no "positive repugnancy" between the two laws, a court must give effect to both. *See Connecticut National Bank,* 503 U.S. at 253, 112 S.Ct. 1146.

At bottom, the Court cannot avoid the fact that the overall tenor of the *1986 Act* was a recognition of the success of the UST program and the intent to expand its presence, both geographically and in the scope of its powers and duties. Given that, the Court believes that the most natural reading of the statute is the one set forth in this Opinion. Additionally, *Section 586(a)(5),* with its reference to the UST's performance of duties "prescribed ... under Title 11", as well as to those "consistent with Title 11 ... as the Attorney General may prescribe", is a further indication of an intent for expansiveness in the UST's power and not the cramped power that would result in giving the *Section 586(a)(3)* "laundry list" priority over *Section 307.*

Countrywide also argues that giving *Section 307* its plain meaning would render *Section 586* and the other specific-duty provisions in the Bankruptcy Code superfluous. However, the Court concludes that under its reading *Section 307* can be "harmonized" with *Section 586* and the other provisions so that they are not rendered superfluous.

[13] The Court views *Section 586* and the others referenced statutory provisions as setting forth specific matters in which Congress has concluded that the UST could or should become involved, within the overall context of the broad power granted by *Section 307.* While many of the issues that Congress intended the UST

12. Although the Court finds that the broad, general power of *Section 307* provides a statutory basis for the UST to proceed under *Rule 2004,* as previously noted, the UST has also advanced *Sections 586(a)(3)(G)* and *586(a)(5)* as alternative sources of such power. *Section 586(a)(3)(G)* authorizes the UST to "monitor the progress" of cases and "take such action" as she deems appropriate to prevent undue delay. It is somewhat of a stretch to conclude that the *Rule 2004* exams sought by the UST here would be done to prevent undue delay. As for *Section 586(a)(5),* it provides that the UST shall perform the duties prescribed for her under Titles 11 and 28. Title 11 of course, includes *Section 307* with its broadly worded grant of power. Thus, *Section 586(a)(5)* is certainly consistent with, and perhaps strengthens, the conclusion that the UST has the power to act here pursuant to *Section 307.* However, *Section 586(a)(5)* does not itself contain any independent grant of power. If it does, it adds nothing beyond what is in *Section 307.* Therefore, the Court sees no need to base its decision on that provision.

to become involved in were foreseeable, and thus amenable to specific grants of power or duty, others were not. The deliberately broad language of *Section 307* ensures that the UST has the ability to act in areas where Congress did not specifically foresee and provide an explicit provision for the UST to do so. This reading of the statute does not render *Section 586* and the other provisions superfluous. These provisions, although perhaps not "necessary" as a matter of strict logic given the overarching grant of power to the UST provided in *Section 307*, are nevertheless meaningful in their own right because of the insight they provide into how Congress intends the UST to exercise that power.[13] On the other hand, if the Court were to adopt Countrywide's suggested reading of the statutes it would have to effectively "read out" the "any issue" language from *Section 307* by ignoring that language and treating it as superfluous.

Although only mentioned in passing in its Brief, at final argument Countrywide claimed that *11 U.S.C. § 1109(b)* supports its view that the UST lacks the power to act here. *Section 1109(b)* provides:

> A party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee may raise and may appear and be heard on any issue in any case under this chapter.

11 U.S.C. § 11109(b). It is obvious that the operative language in this provision is very similar to the language of *Section 307.* Countrywide argues that if the UST is permitted to conduct a *Rule 2004* examination under *Section 307* then by the same token creditors, equity security holders, and other parties in interest may do so under *Section 1109(b).* Countrywide raises the prospect of creditors taking advantage of this opportunity to examine other creditors not only on matters in connection with the particular case in question but as to their involvement in any other Title 11 or Chapter 11 matter. The apparent point of Countrywide's argument is that recognizing the authority of the UST to conduct these examinations could have the unintended consequence of leading to an unregulated "free-for all" of examinations by parties in interest at least in Chapter 11 cases and by analogy, in Chapter 13 cases.

The Court finds Countrywide's argument concerning *Section 1109(b)* also to be without merit. In the first place, the picture painted by Countrywide is a purely hypothetical one. Aside from the UST's effort currently under consideration, the Court is not aware of any clamor to conduct *Rule 2004* examinations of non-debtors. Countrywide has offered no evidence in support of such anticipated conduct. Nor is there any apparent reason why such activity may suddenly begin simply because of the ruling in this case. The decision in this matter should not be based

13. An analogous example selected at random may help explain. Pursuant to *28 U.S.C. § 516* the U.S. Attorney General is given broad authority to conduct all litigation in which the United States or one of its agencies or officers is a party. In the year 2000 Congress created the *Valles Caldera Trust* as a wholly-owned government corporation for the purpose of managing the Valles Caldera Nature Preserve in New Mexico. *See 16 U.S.C. § 698v–4.* The statute provides that the *Valles Caldera Trust* "shall be represented by the Attorney General" in any litigation arising out of its activities. *16 U.S.C. § 698v–4(j).* Could it be seriously contended that the Attorney General would not have the power to represent the Trust in litigation if Congress had not included this provision? It is clear that Congress was not broadening the power of the Attorney General by enacting *Section 698v–4(j),* but rather highlighting its intention for the Attorney General to act in an area where he already had the power to do so pursuant to *Section 516.*

on a scenario that will likely never occur. Second, the Court is not convinced that its ruling in favor of the UST's right to conduct a *Rule 2004* examination pursuant to *Section 307* in the present case necessarily requires it to conclude that a party in interest possesses the same power pursuant to *Section 1109(b)*. The UST occupies a unique position within the bankruptcy system, and it may well be that the Court would arrive at a different conclusion on the issue of a party in interest's power to conduct *Rule 2004* examinations pursuant to *Section 1109(b)* despite the similarity in language between it and *Section 307*. As it is, that issue is not presently before the Court and no ruling is made on it.

Finally, even assuming Countrywide is correct in its analysis, Countrywide neglects to factor in the Court's ability to monitor and control *Rule 2004* activities to prevent the abuse of that process. According to Countrywide, allowing any party in interest (in this case the UST) to exam a third party to the extent requested in this case opens the floodgates for potential abuse of the *Rule 2004* exam process. Such a position is grounded more in hyperbole than fact. The Court always remains available to rein in or restrict any attempt to abuse the process. *See, e.g., In re Analytical Systems, Inc.*, 71 B.R. 408, 412 (Bankr.N.D.Ga.1987) (courts can fashion appropriate protective order with respect to *Rule 2004* exams to provide any necessary due process safeguards.) *See also, Matter of Marin Motor Oil, Inc.*, 689 F.2d 445, 453 (3d Cir.1982) (rejecting the contention that multitudes of individual creditors and stockholders were likely to intervene in adversary proceedings pursuant to *Section 1109(b)* if that provision were given a broad interpretation and finding that bankruptcy courts have sufficient means to control any confusion, disorder or expense that might result from those who do seek to intervene.)

Case Law Supporting a Broad View of the UST's Powers

In addition to the conclusion derived from the plain meaning interpretation of the statute, applicable case law supports a finding that the powers of the UST in this regard are broad indeed. This recognition serves as another factor favoring the view that *Section 586* and the other provisions should not be construed to function as "brakes" on what the UST is permitted to do.

The Court of Appeals for the Third Circuit has made the broad nature of the UST's authority clear in a series of cases. In *U.S. Trustee v. Price Waterhouse*, 19 F.3d 138 (3d Cir.1994), the UST appealed from a district court order affirming a bankruptcy court order which approved the employment by several debtors-in-possession of an accounting firm that held a claim against their respective estates for pre-petition services. No creditor had objected to the employment, only the UST. The Third Circuit asked the parties to brief the question as to whether the UST possessed the necessary standing to pursue the appeal. After considering the parties' responses the court concluded, without an extended discussion, that the UST did possess standing to pursue the appeal pursuant to the broad general grant of power found in *Section 307*. No mention was made by the court of a need to find a specific grant of power in *Section 586* or elsewhere before the UST could so act.

In the subsequent case of *In re Columbia Gas Systems, Inc.*, 33 F.3d 294 (3d Cir.1994), the Third Circuit again found in favor of the UST on an issue of standing, this time providing a more detailed discussion. The debtor in that case had submitted proposed investment guidelines which the bankruptcy court approved over an objection by the UST who claimed the

proposed guidelines were in violation of *11 U.S.C. § 345(b)*. The UST appealed and the district court reversed finding that the proposed investment guidelines did not meet the requirements of *Section 345(b)* which are mandatory, not merely suggestions. The debtors then appealed to the Third Circuit arguing, *inter alia*, that the UST lacked standing to object to the investment guidelines because the UST had no pecuniary interest in the case and no "pertinent statutory duties" that would provide a basis for standing. The Court flatly rejected the debtors' argument regarding the UST's standing, citing to *H.R.Rep. No. 764, 99th Congress, 2d Sess. 24* (1986), reprinted in *1986 U.S.C.C.A.N. 5227, 5237*, as evidence of congressional intent that the UST be given standing to raise, appear and be heard on any issue in any case or proceeding. 33 F.3d at 295–96.

The *Columbia Gas* Court noted that, although the House report does list certain specific matters within the responsibilities of the UST, "in discussing the standing of the U.S. Trustee the Report did not limit it to the specific duties" set forth in the Report. 33 F.3d at 296. The Court held that Congress had enacted *Section 307* to reflect this intent, and that "[it] is difficult to conceive of a statute that more clearly signifies Congress's intent to confer standing." *Id.* In addition to *Price Waterhouse*, the Court cited with approval cases from other circuits in which various challenges to the UST's standing were rejected and *Section 307* was found to provide the UST public-interest standing without the need to assert a pecuniary interest. *See, e.g., In re Revco D.S., Inc.*, 898 F.2d 498 (6th Cir.1990) (UST had standing to appeal bankruptcy court's decision not to appoint an examiner under 11 U.S.C. § 1104(b)(2)); *In re Plaza de Diego Shopping Center, Inc.*, 911 F.2d 820 (1st Cir.1990) (UST had standing to appeal district court appointment of a trustee based on statutory responsibility to represent and protect the public); *In re Clark*, 927 F.2d 793 (4th Cir.1991) (UST had standing to appeal the denial of a motion to dismiss Chapter 7 case for substantial abuse). *See* 33 F.3d at 296–97, and additional cases cited therein.[14]

14. Another Third Circuit case, *Matter of Marin Motor Oil, Inc, supra*, provides some further guidance here on several points germane to the present case. In *Marin* the Chapter 11 trustee initiated two adversary proceedings and the official creditors' committee sought to intervene in them, relying upon *11 U.S.C. § 1109(b)*, which in relevant language and as previously noted, is very similar to that found in *Section 307* providing that a party in interest "may raise and may appear and be heard on any issue in a case under this chapter." (The only differences are that *Section 307* refers to "case or proceeding" rather than just "case", and refers to "this title" rather than "this chapter"). The parties opposing the creditors' committee's attempted intervention argued that the term "case" used in *Section 1109(b)* did not encompass adversary proceedings. The court rejected that "narrow interpretation" of the term. It noted that most litigated matters in a bankruptcy case occur in adversary proceedings, and that the narrow interpretation being proposed would "drastically restrict the rights of parties to appear and be heard", something the court was not willing to do.

The *Marin* court's broad interpretation of the power of a party in interest pursuant to *Section 1109(b)*, of course, mirrors the expansive reading of the UST's powers under *Section 307* as made in *Columbia Gas* and the other cases cited. The opposing parties in *Marin* also pointed out that the provision in the Bankruptcy Code authorizing the creation of creditor committees and setting forth their responsibilities, *11 U.S.C. § 1102*, does not specifically mention the right of such committees to appear and be heard. The court found that to be of no help to the opposing parties because *Section 1109(b)* does specifically deal with that subject and permits a committee to act. In other words, the *Marin* court rejected an argument much like the one Countrywide makes here concerning *Section 307* and found

In the more recent case of *United Artists Theatre Co. v. Walton*, 315 F.3d 217 (3d Cir.2003), the court reaffirmed its broad view of the UST's powers under *Section 307*. Citing *Columbia Gas*, the court held that the lack of pecuniary interest in the outcome of a bankruptcy proceeding did not deny the UST standing to challenge a proposed indemnification provision. The court noted that USTs are "officers of the Department of Justice who protect the public interest by aiding bankruptcy judges and monitoring certain aspects of bankruptcy proceedings." 315 F.3d at 225.

The Court also finds persuasive a number of bankruptcy cases in which courts have specifically addressed the interrelationship between *Sections 307* and *586*. For instance, in *In re Miles*, 330 B.R. 848 (Bankr.M.D.Ga.2005), the UST moved to dismiss or transfer venue in a Chapter 13 case filed in the Middle District of Georgia by debtors who were Alabama residents. The debtors, much like Countrywide in the present case, argued that the UST lacked standing to make such a motion under *Section 307* because the broad language of that provision was subject to the specific duties enumerated in *Section 586*. The bankruptcy court in *Miles* flatly rejected the debtors' argument, finding that there was nothing in the Bankruptcy Code or case law which would limit the UST's ability to be heard under *Section 307* and no authority existed to suggest that the list of duties under *Section 586* was exclusive. 330 B.R. at 849–50. The *Miles* court also referred to the legislative history of *Section 307* to the effect that when Congress adopted that provision it was not meant to be limited to the duties delineated under *Section 586*. *Id.* at *850* (quoting from H.R.Rep. No. 99–764, at 27 (1986), reprinted in 1986 U.S.C.C.A.N. 5227, 5240.) To similar effect, *see In re LWD, Inc.*, 342 B.R. 514 (Bankr.W.D.Ky.2006) (UST could bring adversary proceeding pursuant to *Section 307* alleging that defendants' actions resulted in improper diminishment of the estate's assets to the detriment of creditors notwithstanding contention that UST had exceeded the scope of duties and responsibilities set forth under *Section 586)*.

[14] In addition to its position that *Section 307* does not provide a general source of power for the UST to conduct an examination and obtain discovery under *Rule 2004*, Countrywide also argues that the UST should not be permitted to proceed in this matter because the *Notice of Examination* is unrelated to any "case" or "proceeding" within the meaning of *Section 307*. Countrywide cites *In re Attorneys at Law and Debt Relief Agencies*, 353 B.R. 318 (S.D.Ga.2006), in support. In that case, the court held that the UST lacked standing to prosecute an appeal of a *sua sponte* general order issued by the bankruptcy court to the effect that certain provisions regulating debt relief agencies did not apply to attorneys whose activities fell within the scope of the practice of law. The court in *In re Attorneys at Law* acknowledged that the power Congress granted to the UST under *Section 307* is "undeniably broad", but is not uncondition-

that *Section 1109(b)* was a substantive source of power. Finally, the court found that the power given to the committee in *Section 1109(b)* was more than merely the right to participate as an amicus, noting that the power to "raise" an issue went beyond the ability to submit briefs on an issue that had already been raised by someone else. *Id.* at 454. Thus, the court recognized the committee's full right of participation in the matter.

Although *Marin* was decided in a somewhat different context, the Court views it as being entirely consistent with a determination in the present case that the UST has the power to act under *Rule 2004*.

al. In particular, the court noted that *Section 307* limited the UST to the authority to appear in active cases and proceedings. It found that a "case" refers to a matter initiated by the filing of a bankruptcy petition, and a "proceeding" refers to everything that happens within the context of a bankruptcy case. 353 B.R. at 322–23. The court pointed out that no bankruptcy petition had ever been filed initiating the *sua sponte* general order in dispute and no case or proceeding was in existence at the bankruptcy court level or created by the order. Thus, the court concluded that the UST lacked standing to pursue the appeal.

Without even needing to comment further on the decision in *In re Attorneys at Law,* it is apparent that the case is clearly distinguishable from the matter before this Court. All of the *Notices of Examination* under consideration were issued in the context of bankruptcy cases that were previously filed in this Court.[15] The requirement under *Section 307* for the existence of a case or proceeding has clearly been met.

The Language of Rule 2004

[15] Despite determining that the UST is authorized to raise and be heard on any appropriate matter in the current proceedings, because of the issues currently pending before it, the Court's review is not ended. When considering whether the UST can actually request and convene a 2004 Exam, in addition to reviewing the UST's statutory authority, the Court is also required to consider the specific language of *Rule 2004,* the vehicle under which the UST is attempting to proceed. In straightforward fashion, *Rule 2004(a)* provides:

> On motion of any party in interest, the court may order the examination of any entity.

Fed.R.Bankr.P.2004(a). Based on the clear language and construction of the Rule, coupled with the statutory authority granted the UST by *Section 307,* if the UST qualifies as a "party in interest" then *Rule 2004* contemplates that she can convene a 2004 Exam and engage in discovery pursuant to the Rule. Unfortunately, the term "party in interest" is not expressly defined in either the Bankruptcy Code or the Bankruptcy Rules.

The Bankruptcy Code does include a provision that contains examples of who or what qualifies as a "party in interest", at least for cases under Chapter 11. *See 11 U.S.C. § 1109(b)* ("including the debtor,

15. Countrywide points out that some of the cases had already been closed at the time the Notices of Examination were served. See Countrywide *Brief* at 11. Strictly speaking, however, at the time the UST's Notices of Examination were filed any closed cases had already been reopened pursuant to the Consolidation Order in the Chapter 13 Trustee matter docketed at Misc. No. 07–00203. The Consolidation Order in that case, entered on October 18, 2007, provided that any of the 293 cases in which the Chapter 13 Trustee had filed a *Motion to Compel* that were then closed were thereby reopened. The UST filed its *Notices of Examination* in the 10 "context cases" on October 19, 2007. Even if the closed cases had not already been reopened, the Bankruptcy Code contemplates reopening closed cases on a liberal basis. The UST possesses standing to move to reopen a closed case. *See 11 U.S.C. § 350(b); Fed.R. Bankr.P. 5010; In re Winburn,* 196 B.R. 894, 900 (Bankr.N.D.Fla.1996); *In re Stewart,* 154 B.R. 711 (Bankr.N.D.Ill.1993). Thus, the fact that some of the 10 (now 7) "context cases" had been closed, for the above reasons and for reasons to become apparent later in this Opinion, is of no moment in the Court's determination in this matter. Furthermore, as is discussed *infra,* the Court will "consolidate" all of the *Rule 2004* requests for documentation at issue here under the *Hill* case proceedings, a matter that was indisputably an open case with pending issues raised by the Debtor at all relevant times.

the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee"). However, pursuant to *11 U.S.C. § 102(3)* the word "including" is not to be construed as a limiting term. As such, the list in *Section 1109(b)* is not an exhaustive list. *See In re Amatex Corp.*, 755 F.2d 1034, 1042 (3d Cir.1985); *In re Combustion Engineering, Inc.*, 391 F.3d 190, 214, n. 21 (3d Cir.2004). The holding in *Amatex* required courts to "determine on a case by case basis whether the prospective party in interest has a sufficient stake in the proceeding so as to require representation." 755 F.2d at 1042.

Applying this test for purposes of *Rule 2004*, the Court concludes that the UST is a "party in interest" in this case. The UST has a sufficient stake in this case because she has been charged to act as a watchdog to protect the integrity of the bankruptcy system. *See, e.g., In re Revco D. S., Inc., supra*, 898 F.2d at 500, *In re Mazzocone*, 183 B.R. 402, 411 (Bankr. E.D.Pa.1995), *In re Georgetown Steel Co., LLC*, 306 B.R. 549, 556 (Bankr.D.S.C. 2004), *In re EaglePicher Holdings, Inc.*, 2005 WL 4030132, *4 (Bankr.S.D.Ohio 2005), *In re Fibermark*, 2006 WL 723495 *8 (Bankr.D.Vt.2006), *In re Ventura*, 375 B.R. 103, 107 (Bankr.E.D.N.Y.2007), *In re South Beach Securities, Inc.*, 376 B.R. 881, 892–93 (Bankr.N.D.Ill.2007). *See also In re Parsley*, 384 B.R. 138, 145–47 (Bankr. S.D.Tex.2008). Assuming for the moment that the UST has at least averred sufficient allegations of fact to raise the possibility of Countrywide's abuse of the bankruptcy system, the UST certainly has an interest in looking further into this possibility for no other reason than she is required to do so because of her statutory duties as interpreted by applicable case law. *See, e.g., In re Castillo*, 297 F.3d 940, 950 (9th Cir.2002) (UST is the watchdog of the bankruptcy system charged with preventing fraud and abuse).

Considerable case law exists in further support of this Court's finding that the UST qualifies for various purposes as a "party in interest" under the Bankruptcy Code. Many of those courts' findings in this regard rely upon the clear language of *Section 307* to reach that conclusion. *See In re Interwest Business Equipment, Inc.*, 23 F.3d 311, 317 (10th Cir.1994); *In re Columbia Western, Inc.*, 183 B.R. 660, 664 (Bankr.D.Mass.1995); *In re Gold Standard Baking, Inc.*, 179 B.R. 98, 104 (Bankr.N.D.Ill.1995); *In re Gideon, Inc.*, 158 B.R. 528, 530 (Bankr.S.D.Fla.1993); *In re BAB Enterprises, Inc.*, 100 B.R. 982, 985 (Bankr.W.D.Tenn.1989); *In re Allen*, 2007 WL 1747018 *2, n. 5 (Bankr.S.D.Tex. 2007); *In re Costello*, 150 B.R. 675, 678 (Bankr.E.D.Ky.1992). The Court agrees with these cases. The UST is equivalent to a party in interest for many purposes, including for purposes of *Rule 2004*. As such, the language of *Rule 2004(a)* provides further support for the conclusion that the UST has the power to require Countrywide to produce documents and provide a witness for purposes of examination.

Therefore, based upon the statutory language, as well as the relevant case law, the Court concludes that it is within the power of the UST to seek the production of documents and the examination of witnesses pursuant to *Rule 2004*. However, this authority is not unfettered. The Court agrees with Countrywide's position that there must be some limitation on this power to prevent it from being abusively exercised. As such, consideration of the appropriate limitations to place on the UST's power in the context of this case is necessary for the purpose of determining the

extent to which the document production and examination may proceed.[16]

The UST's Burden and Scope of Her Power

[16] Countrywide points out that a finding of an unchecked power in the UST to pursue examinations of creditors under *Rule 2004* could lead to full-scale "investigations" by the UST that would unfairly intrude into the private business affairs of creditors and chill their participation in the bankruptcy process.[17] That is a legitimate concern which the Court takes seriously. While the UST was undoubtedly intended to be a "watchdog" of the bankruptcy system, that cannot and should not be viewed as providing a license for the UST to engage in potentially invasive and expensive *Rule 2004* discovery based on nothing more than her own curiosity. Such a license would be inimical to bedrock principles underlying the relationship between the federal government and the people (intended in the broad sense, including corporations such as Countrywide.)[18]

16. There is another possible limitation on the UST's ability to invoke the *Rule 2004* procedure. Some courts have found that when an adversary proceeding or a contested matter is pending that it is improper for one of the parties to use a *Rule 2004* examination as a substitute for, or in addition to, the normal discovery provided by *Fed.R.Civ.P. 26, et. seq.* (incorporated into bankruptcy proceedings by *Fed.R.Bankr.P. 7026–7036* and *9014(c)). See 10 Collier on Bankruptcy* at ¶ 7026.1 (2007) at n. 10, and cases cited therein. Consistent therewith, Countrywide believes the UST may never conduct a *Rule 2004* examination. *Transcript of Hearing* February 28, 2008 at 38, Document No. 60. However, this potential limitation does not appear to be applicable here because there is no pending adversary proceeding or contested matter at this docket. And, while there is a pending contested matter in *Hill* (a Motion to Enforce Discharge) in which the UST has participated to an extent, she has not sought leave to join as a party in that matter. Accordingly, even if the Court were to adopt this limitation it would not change the result of this decision.

17. In fact, throughout its closing argument in this matter Countrywide chose to characterize the UST's actions in this case as an "investigation" rather than an examination under *Rule 2004*.

18. The Fourth Amendment protection against unreasonable searches and seizures applies to commercial buildings and corporations as well as to individuals. *See Marshall v. Barlow's, Inc.*, 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978). Thus, cause and concern for possible abuse if the UST were given completely free rein to proceed under *Rule 2004* is justified. Courts have recognized in similar contexts, that the mere possibility of abuse cannot be used to thwart legitimate government inquiry. For instance, in *United States v. Bisceglia*, 420 U.S. 141, 95 S.Ct. 915, 43 L.Ed.2d 88 (1975) the Court found that the Internal Revenue Service had the statutory authority to issue a "John Doe" summons to a bank to discover the identity of a person engaged in bank transactions suggesting the possibility of liability for unpaid taxes. In so holding, the Court recognized that "investigations" pursued by the IRS do involve some invasion of privacy and "may be abused, as all power is subject to abuse." However, the Court held that the solution to that possibility was not to restrict the IRS's authority. The Court noted:

> Substantial protection is afforded by the provision that an Internal Revenue Service summons can be enforced only by the courts.... Once a summons is challenged it must be scrutinized by a court to determine whether it seeks information relevant to a legitimate investigative purpose and is not meant 'to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any further purpose reflecting on the good faith of the particular investigation.'... The cases show that the federal courts have taken seriously their obligation to apply this standard to fit particular situations, either by refusing enforcement or narrowing the scope of the summons.

420 U.S. at 146, 95 S.Ct. 915 (citations omitted). This Court is adopting the same approach with respect to *Rule 2004* examinations by the UST. If the UST's effort in that regard is challenged, as it has been here, the Court will scrutinize the effort to ensure that the UST is acting with a legitimate purpose and not abusing her power.

[17] Accordingly, the Court concludes that when a creditor objects the UST must meet a threshold standard of "good cause" before she will be permitted to conduct examinations and require the production of documents pursuant to *Rule 2004. See, e.g., Matter of Wilcher* 56 B.R. 428 (Bankr. N.D.Ill.1985) (imposing standard of good cause for Rule 2004 discovery directed to creditor); *In re Continental Forge Company, Inc.*, 73 B.R. 1005 (Bankr.W.D.Pa. 1987) (examinations of witnesses having no relationship to the debtor's affairs and no effect on the administration of the estate is improper; a threshold requirement of good cause determined on a case by case basis must first exist.); *Fed.R.Bankr.P. 2004(b).*

[18, 19] The question of whether the UST has shown sufficient good cause to pursue a *Rule 2004* examination and the type of discovery implicitly allowed by the Rule in a given matter is not suited to application of a mechanical test. Rather, a totality of circumstances approach is required, taking into account all relevant factors. Consistent with this approach it is appropriate to apply the "good cause" standard in what may be termed a "sliding scale" manner or balancing test. That is to say, the level of good cause required to be established by the UST before she can obtain certain documents or pursue a certain line of inquiry in a *Rule 2004* examination involving a creditor will vary depending on the potential intrusiveness involved. *See, e.g., In re Fearn,* 96 B.R. 135, 138 (Bankr.S.D.Ohio 1989) (scope of Rule 2004 examination should not be so broad as to be more disruptive and costly to the party to be examined than beneficial to the party seeking discovery); *In re Express One International, Inc.,* 217 B.R. 215, 217 (Bankr.E.D.Tex.1998) (same); *In re Eagle–Picher Industries, Inc.,* 169 B.R. 130, 134 (Bankr.S.D.Ohio 1994) (same); *In re Texaco, Inc.,* 79 B.R. 551, 556 (Bankr. S.D.N.Y.1987) (same). *See also In re Hammond,* 140 B.R. 197, 201 (S.D.Ohio 1992) (court must balance the examiner's interests against the debtor's interest in avoiding the cost and burden of disclosure.)

Under this standard inquiries that are tightly-focused on the creditor's relationship with a particular debtor will require a relatively low level of good cause because they represent a low level of intrusion into the creditor's business affairs and a low risk of abuse. Inquiries that seek far-reaching information on policies and procedures of general application in the creditor's operation will require a correspondingly higher showing of good cause because they are inherently more intrusive and present a greater potential for abuse. This initial burden on the UST to justify its *Rule 2004* examination and the concomitant scope of the exam are necessarily interrelated concepts. Use of this sliding scale approach will provide the Court with the flexibility to analyze a *Rule 2004* examination request by the UST on a case-by-case basis and tailor an acceptable scope when it is challenged by the creditor.

[20] Regardless of whether the UST has met the required good cause standard, the Court is also mindful of the permitted scope of discovery under *Rule 2004,* which is limited to:

> the acts, conduct, or property or to the liabilities and financial condition of the debtor, or to any matter which may effect the administration of the debtor's estate, or to the debtor's right to a discharge.

Fed.R.Bankr.P.2004(b). The Court is further mindful that, while *Rule 2004* allows a fishing expedition to some extent, it may not be used as a device to launch into a wholesale investigation of a non-debtor's

private business affairs. *Matter of Wilcher, supra.* Subject to the foregoing considerations, it is appropriate to review the scope of what is being sought by the UST and determine the extent of discovery to be permitted. Before turning to that task, however, it is first necessary to consider recent occurrences in two, other pending matters that affect this case.

Developments in Related Cases

Thus far the Court has described the approach it would take in regards to the pending issues if the matter were being decided in a vacuum. Such is not the case. Instead, developments in two related matters are highly relevant here, which in the end, significantly simplify the Court's analysis. The two matters in question involve the *Consolidated Proceedings* filed at Misc. No. 07–00203 which were initiated by the Chapter 13 Trustee and *In re Hill,* Case No. 01–22574, one of the individual, "context cases" involved in this proceeding as well as in Misc. No. 07–00203. Because of the significance of the developments in those related matters it is necessary to explain them both in some detail.[19]

In Re Consolidated Proceedings, Misc. No. 07–00203

As was indicated, this matter concerns 293 separate but similar motions filed by the Chapter 13 Trustee asking the Court to compel Countrywide to provide loan histories and to impose sanctions for Countrywide's alleged failure to timely process Chapter 13 Trustee distribution payments in pending cases. These 293 motions were consolidated by the Court at Misc. No. 07–00203. Among the 293 cases are the seven, remaining, individual "context cases" involved in this matter.[20] At a December 5, 2007 status conference in Misc. No. 07–00203 the Parties advised the Court that they had agreed to submit the entire matter to mediation. The Court approved the approach and entered an Order on December 6, 2007, directing the Parties to report back with a proposed time frame for mediation, and if possible, an agreed-upon mediator. On December 10, 2007, based on an agreement between the Parties, the Court entered its *Consent Order Establishing Procedures for Countrywide Home Loans, Inc.'s Production of Loan Histories to the Chapter 13 Trustee,* Document No. 93 ("Consent Order"). By this *Consent Order* Countrywide became obligated to provide the respective "loan history" to the Chapter 13 Trustee for each of the 293 Debtors involved in the proceeding except for any who might "opt out" by filing a timely objection to disclosure of their loan history before the date for the planned disclosure.

The *Consent Order* directed the Chapter 13 Trustee to hold the respective loan histories in confidence. The following provision was also included in the *Consent Order:*

19. The *Federal Rules of Evidence* apply in bankruptcy proceedings. *Fed.R.Evid. 101; Fed.R.Bankr.P.9017.* This includes *Fed.R.Evid. 201(c)* which permits a court to take judicial notice of adjudicative facts whether requested to do so by the parties or not. This authority includes the power to examine the record of prior bankruptcy proceedings and take judicial notice of them. See, e.g., *Oneida Motor Freight, Inc. v. United Jersey Bank,* 848 F.2d 414, 416 n. 3 (3d Cir.1988). In this case, the Court believes it is necessary to take judicial notice of relevant events occurring in both the *Hill* case and the Chapter 13 Trustee's case at Misc. No. 07–00203, particularly as they relate to Countrywide's voluntary agreement to provide discovery in those cases. The Court would further note that both Countrywide and the UST have participated in those other proceedings and were obviously aware that what happened there might well have an effect or impact on this case.

20. See n. 3, above.

(8) The Trustee has represented that she has no intention of disclosing the Loan Histories to the UST merely because of the UST's initiation of the matters pending at *Miscellaneous No. 07–00204.* However, nothing in this Order shall be deemed as a restriction on the Trustee's duty to make any disclosure pursuant to her obligations under *18 U.S.C. § 3057.*

Consent Order dated December 10, 2007, Document No. 93. The Court views Countrywide's voluntary agreement to turn over the respective loan histories to the Chapter 13 Trustee, including those from the seven, context cases, as highly relevant to the present case. At the very least, it negates any objection by Countrywide in this matter that requiring it to turn over the seven, specific loan histories involved herein would be "overly burdensome" or would implicate any insurmountable confidentiality concerns.

In Re Hill, Case No. 01–22574

On June 25, 2007, the Debtor in this case filed a *Motion to Enforce Discharge,* Document No. 59 ("Sanctions Motion") alleging that Countrywide had violated the Discharge Order entered by the Court in March 2007 in various respects. The case, which had been closed, was formally reopened on August 8, 2007 by Court Order resulting from a Motion filed by the Debtor, not the UST. It is significant that all of this occurred prior to any action taken by the Chapter 13 Trustee in Misc. No. 07–00203 or the UST in Misc. No. 07–00204. As part of the proceeding on the *Sanctions Motion,* the Debtor, the Chapter 13 Trustee and the UST each served discovery requests on Countrywide. This discovery consisted of the typical discovery sought by a litigant pursuant to *Fed.R.Bankr.P. 7033, 7034,* and *7036,* and not pursuant to *Rule 2004.* Countrywide initially resisted certain of the discovery requests from the Debtor and the Chapter 13 Trustee by filing a *Motion for Protective Order,* Document No. 127. However, at a hearing held on February 14, 2008 Countrywide informed the Court that it had agreed to withdraw the *Motion for Protective Order.* Thereafter, Countrywide agreed to provide all of the discovery being sought without further objection. *See Transcript of Hearing on Motion for Protective Order,* February 14, 2008, at 64–66, Document No. 160. It was agreed by the parties that a copy of the discovery responses were also to be served on the UST. *Id.* at 67–68. This agreement by Countrywide was made part of a *Consent Order* entered by the Court on February 19, 2008, Document No. 154.

The Court views the voluntary agreement by Countrywide to provide the requested discovery in the *Hill* case as tantamount to a waiver of any objections as to any corresponding discovery requests in question here.[21] Therefore, to the extent that any of those discovery requests are duplicative of what is being sought in the present case, the Court overrules Countrywide's objections in that regard without more.

The effect of the developments in these two cases on the present case will be discussed in more detail below.

The Documents Being Sought by the UST, Generally

The documents being sought by the UST in this matter are set forth in Exhibit "A" to the *Subpoenas.* 12 categories of documents are described. *See Appendix*

21. At the time of oral argument on this matter, Countrywide essentially agreed to this prospect. *See Transcript of Hearing on Motion for Protective Order,* February 14, 2008, at 64–66, Document No. 160.

"A", below. For purposes of this analysis, the documents can be conveniently organized into two groups. The documents in the first group (consisting of Categories 1–4) are general in nature, relating to Countrywide's policies and procedures and requiring production of the same documents in response to each of the *Subpoenas.* Obviously, if production of these documents is made with respect to any one of the context cases, the UST will receive the same documents as if production were made as to all the context cases. The document requests in this first group represent the highest potential for intrusion into the private business affairs of Countrywide, hence a higher level of "good cause" must be shown before disclosure will be required. The documents in the second group (consisting of Categories 5–12) are specific to each of the context cases because they relate to the account of the individual debtors in each context case rather than to the general policies and procedures of Countrywide. Before requiring a response to these documents a lower level of "good cause" will be required.

The Documents in Categories 1–4

[21] As indicated above, if production of the documents in these categories is made as to any one of the context cases there is no need to consider any of the other context cases because they all involve the same documents. That is exactly the situation in which Countrywide finds itself because of its voluntary agreement to turn over the documents requested by the Debtor and the Chapter 13 Trustee in the *Hill* case. Without getting into an extensive discussion as to a comparison between the document requests in *Hill* and those at issue in the present case, it suffices to say that the UST has acknowledged that the documents it will receive (or already has received) in *Hill* will be satisfactory as a response to Categories 1–4 in this case. The Court took care to confirm this at the February 28, 2008 oral argument:

> Court: But having said that, in the first four items that you're requesting, how do they differ from what, on consent, is being provided by Countrywide [in *Hill*]?
>
> DePasquale: Indeed, your Honor, they don't, and I'm not asserting—One, I'm not asking for redundant discovery. They are the same. If—
>
> Court: All right, let me stop you there. Then it's a moot question, isn't it?
>
> DePasquale: Indeed, your Honor.
>
> . . .
>
> Court: Is that your position? You agree that the *Hill* case provides one through four of the request for production—
>
> DePasquale: Yes, your Honor.

Transcript of Hearing, February 28, 2008 at 72–73, Document No. 60. Thereafter, Mr. DePasquale, on behalf of the UST, was asked "point blank" by the Court if the UST was withdrawing her request for Categories 1–4 documents in light of the agreement by Countrywide in *Hill* at which time the UST answered in the affirmative. *Id* at 74.

Because the UST has conceded that in *Hill* she will be receiving all documents responsive to Categories 1–4 in the *Subpoenas,* and because she has actually withdrawn those document requests, the Court need not make a determination whether the UST has shown a sufficiently high level of "good cause" to obtain those documents pursuant to *Rule 2004.* The matter is moot.

The Documents in Categories 5–12

[22] The documents being sought in Categories 5–12 are specific as to each of the debtors in the seven context cases. The exact language of the requests is set

forth in *Appendix "A"* to this Opinion, *infra*, but in general they include such things as the particular note and mortgage for each "context" case, the respective loan payment history, documents related to preparation of and support for the specific proof of claim, documents related to receipt and recordation of payments on the specific loan, and documents related to attempts to collect the debt from the respective debtor or otherwise communicate with each debtor.

The exact, current status of Countrywide's objections to these document requests is somewhat unclear. The following exchange between the Court and counsel for Countrywide occurred at the February 28, 2008 argument:

> Court: But tell me, what is your problem with items five through 12(sic) in every case other than *Hill?*
>
> . . .
>
> Connop: The Court has made pretty clear today what its position is on our fundamental arguments dealing with the powers of the U.S. Trustee to perform the examinations. That was the basis for our dispute with Mr. DePasquale concerning the specific issues. We did not feel they had the legal authority to engage in that discovery, and we would not agree to simply turn those matters over.
>
> However, your Honor, should you ultimately determine that, indeed, the U.S. Trustee is entitled to this discovery, we are not going to lodge continued objections. We will produce that information subject to the final determination of their authority to conduct these examinations.

See Transcript of Hearing, February 28, 2008, at 75–76. As is apparent from the preceding sections of this Opinion, the Court has in fact now finally determined that the UST has the power to obtain discovery pursuant to *Rule 2004* provided she demonstrates the requisite good cause. On one reading of Counsel's statement quoted above, it may be that Countrywide is therefore pressing no further objection to these document requests because of the Court's ruling. However, because Countrywide's position on that issue is less than clear, and because of the element of "good cause" that the Court has found must be shown, the Court will proceed to rule on Countrywide's remaining objections.

General Showing of Good Cause by Trustee in this Case

The Court has little difficulty concluding that the UST has met her initial burden of sufficient "good cause" to proceed with the Countrywide *Rule 2004* exam and obtain receipt of the documentation sought by her in advance of the examination in Categories 5–12. There are a number of reasons for this conclusion. Most importantly, the UST has shown sufficient proof of a "common thread" running throughout the context cases sufficient to at least raise the possibility of a systemic problem worthy of the UST's attention. That is to say, the UST has not simply randomly chosen cases and demanded documentation from Countrywide.

As an initial matter, the documents at issue relate very precisely to the specific debtors' loans, the interaction between Countrywide and each debtor, and the interaction between Countrywide and this Bankruptcy Court. These are not documents that will implicate any private business affairs or strategies of Countrywide, and there is no question that they would be discoverable in traditional litigation between the debtor and Countrywide over the respective loan if the proceeding had been brought as an adversary proceeding or contested matter. Thus, because turning over the documents will not subject

Countrywide to an unfair intrusion into its private business affairs, the UST's burden of demonstrating good cause to obtain them is a modest one.

In a vacuum, a number of the events sought to be examined by the UST in the context cases may ultimately be explained away as counsel error, negligence or procedural failings. In reviewing the seven, remaining context cases on an individual basis, the majority of the problems sought to be examined by the UST appear somewhat benign. Then again, the issues currently at play in the *Hill* case, at least based upon the state of the current record, appear somewhat problematic for Countrywide. However, as of now, that proceeding involves mere allegations without any formal findings as yet by the Court. Those specific matters are being addressed in the pending contested matter.

More broadly and as noted, the UST has sufficiently identified a common thread among the context cases to warrant some inquiry on her part. Viewed collectively as a group, the context cases appear to reflect a common pattern, thread, or theme that runs through them involving the manner in which Countrywide, generally, calculates and determines the extent of its bankruptcy claims.

Several relief from stay cases are involved in the group of context cases (*In re Topper,* Case No. 05–20772–TPA; *In re Olbeter,* Case No. 04–33361–JKF; *In re Bock,* Case No. 04–32812–BM). A motion to dismiss case (*In re Karleski,* Case No. 04–31355–JKF), several proof of claim issues (*In re Stemple,* Case No. 03–11792; *In re Olbeter)* and two post-discharge injunction violation cases (*In re Hill,* Case No. 01–22574–JAD; *In re Benvenuto,* Case No. 02–20946–JKF) are also identified. All of these cases generally involve and call in question the calculation by Countrywide of the debtor's obligation to it while in bankruptcy or after discharge. The common thread running through all the cases is the manner in which Countrywide computes its bankruptcy claim at various stages of the bankruptcy process.

In the "relief from stay" cases, as in the "motion to dismiss" case, Countrywide's computation of its bankruptcy claim for purposes of filing and prosecuting the motions, and the reasons for any miscalculations and errors made by Countrywide in the claim determination process when making the initial decision to file the motions, is at issue.

In the "proof of claim" cases, again, the essence of the issue goes to Countrywide's "in house" calculation of its claim for purposes of the pending bankruptcy. As to be expected, in the proof of claim cases the miscalculation of the Countrywide claim occurs in the earlier stages of the cases while the claim calculation in the relief from stay type cases can arise at any time during the case.

Finally, the "post-discharge injunction" cases also involve the manner in which Countrywide computes its outstanding claim even though the focus of the claim computation process arises after Countrywide receives the notice of the debtor's discharge and the bankruptcy case is closed. Questions surely arise as to why Countrywide fails to honor the terms of the respective discharge orders or the orders approving the Trustee's final account which, in this District, specifically state that all payments are current as of the date of the Trustee's last distribution payment. How is notice of these particular orders handled internally by the staff person(s) receiving the notice? How are they posted on the respective accounts? It might be argued that many of these same questions will also arise in and most likely be answered in the *Hill* contested matter. Nevertheless, the scope of the *Hill* con-

tested matter is technically restricted solely to the claim calculation process after a case is closed as opposed to issues arising generally throughout the course of a bankruptcy case and involving general issues as to Countrywide's claim calculation process.

It has certainly not been proven that Countrywide did anything wrong in any of these cases and the Court specifically is not making any finding in that regard by this Opinion. The Court merely finds that the UST has made a showing of a common thread of potential wrongdoing in each of the cases that is sufficient to meet the general standard of good cause necessary for her to proceed under *Rule 2004.*

As was indicated previously, not only must the UST demonstrate good cause to proceed under *Rule 2004,* she must also be pursuing discovery that falls within that which is permitted by the Rule. In this case the Court finds that the matters sought to be examined by the UST "relate ... to the liabilities and financial condition of the debtor" and also "affect the administration of the debtors' estates" in the seven, context cases as they arise at various times during the bankruptcy case. *Fed. R.Bankr.P.2004(b).* Simply stated, this requirement of *Rule 2004(b)* has been met.

Good Cause as to the Documents

As stated above, the Court generally finds that the UST has shown sufficient good cause to proceed under *Rule 2004.* Before proceeding further a brief discussion related specifically to the documents sought by the UST in Categories 5–12 (i.e., the ones which remain at issue) will be helpful followed by a similar discussion about the examination.

The Court cannot ignore that Countrywide has already voluntarily agreed to turn over loan histories to the Chapter 13 Trustee in Misc. No. 07–00203. That act by Countrywide will include the "loan histories" of the debtors in the seven cases involved in this proceeding. Although it is not entirely clear what materials are included in those loan histories, it would seem self-evident that to a large extent it will consist of the same documents being sought here in Categories 5–12.[22] For instance, Counsel for Countrywide at Misc. No. 07–00203 represented to the Court that the "master loan history" which Countrywide would be providing for each debtor "contains every debit and credit to that loan from its inception to the date it's printed ... so it is a comprehensive list of the activity on that loan." *Transcript of Hearing* dated Dec. 5, 2007, at 45, Document No. 106. Since Countrywide has already voluntarily agreed to provide this information to the Chapter 13 Trustee there is no reason why the UST should not also receive similar information here. Moreover, Countrywide has already agreed to provide information to the UST in the currently pending contested matter in *Hill* that is potentially far more "intrusive" into its private business affairs than would be the materials sought in Categories 5–12, which are narrowly tailored to the individual debtors in the context cases.

The Court has also considered Countrywide's other, "per se" objections with respect to the documents in Categories 5–12 (overbreadth and vagueness, exceeding the scope of *Rule 2004(c),* inconvenience and burden, invasion of the attorney-client and work-product privileges, proprietary and confidential nature of information sought, impermissible fishing expedition, and relevance). The Court finds no basis for any of these objections, at least on the evidence

22. At the time of oral argument Counsel for Countrywide conceded as much advising the Court that once the legal issue was decided Countrywide would not interject any specific objections to the items requested in Categories 5–12 of the *Subpoena.*

presented. These objections will also be denied. Although based on the current record, it appears Countrywide has waived the right to do so since it failed to provide any specific evidence of the same, if there are any specific documents that Countrywide believes are protected by privilege the Court will entertain a further, focused motion solely in that regard from Countrywide.

Good Cause and Permissible Scope of the Rule 2004 Examination

[23] The proposed scope of the *Rule 2004* examination is consistent with the level of good cause demonstrated by the UST. The *Notice of Examination* itself describes the scope of the exam as:

> . . . regarding [Countrywide's] bankruptcy procedures as they relate to the Debtors' financial affairs, the administration of their estate, and the impact of Countrywide's bankruptcy procedures on the integrity of the bankruptcy process in the Western District of Pennsylvania.

See Notice of Examination, Document No. 6. *See also Appendix "B", below,* for a list of the topics for the examination that was attached to the *Subpoenas* as Exhibit "B." Countrywide has raised four, specific objections related to the examination. First, it objects to the *Notice of Examination* since it claims the UST has no authority to convene or conduct the same and it exceeds the UST's powers and duties. The Court has previously found that the UST does have the power to proceed under *Rule 2004,* therefore that objection is overruled.

Second, Countrywide claims the scope of the examination is "overly broad, unreasonably vague and ambiguous" as to use by the UST of the phrase "bankruptcy procedures" in its document request. The Court finds no merit to this objection. As indicated above, in the *Hill* matter Countrywide has previously withdrawn its objections to producing its policies and procedures concerning debtors generally in bankruptcy, proofs of claim, and filing motions for relief from stay, that is, Categories 1–4 of the document requests herein. It appears fairly clear that the UST seeks to examine the Countrywide representatives about these policies and procedures. To the extent there is any question as to overbreadth or vagueness regarding the scope of the exam identified in the *Notice of Examination* itself, that problem is cured by the detailed list of topics attached to the *Subpoena* as Exhibit "B" which is to be read in conjunction with the *Notice of Examination.* The Court further notes that in this list the UST has restricted the scope of the exam to Chapter 7 and 13 bankruptcy cases. This limitation is appropriate and in overruling the objection the Court will direct that it be honored.

Third, Countrywide objects that the *Notice of Examination* is beyond the scope of *Rule 2004.* Again, the Court disagrees. The scope of *Rule 2004* examinations is recognized as broad, unfettered and in the nature of a "fishing expedition." *See In re Lev,* 2008 WL 207523 *3 (Bankr.D.N.J. 2008), *In re Silverman,* 36 B.R. 254 (Bankr.S.D.N.Y.1984), *In re Vantage Petroleum Corp.,* 34 B.R. 650 (Bankr. E.D.N.Y.1983). It is therefore proper to give the "scope of examination" provision set forth in *Rule 2004(b)* a broad reading to effectuate the overall purpose behind the Rule. Applying that standard, the Court finds that the examination the UST seeks to conduct here comfortably falls within the allowed limits under *Rule 2004(b),* that is, an inquiry into the liability of the respective debtor(s) and into any matter which may affect the administration of their respective estates. This objection is overruled.

Finally, Countrywide objects because the *Notice of Examination* fails to include a time and location for the examination that meets the requirements of *Rule 2004* or *Fed.R. Civ.P. 45*, rendering the examination inconvenient or unduly burdensome. This objection is moot. It has now been several months since the *Notice of Examination* was served, and any timing issue that may have existed under either the *Bankruptcy Rules* or the *Federal Rules of Civil Procedure* has been cured by the passage of time while these objections were being considered. The Court anticipates that the Parties will be able to agree on a mutually convenient time and place for the examination and is prepared to issue an order setting a time and place upon proper motion if they cannot do so.

In summary, the UST has demonstrated the required good cause for the *Rule 2004* examination at issue here. Furthermore, the difference between what is sought from Countrywide by the UST for purposes of the *Rule 2004* examination is broader in degree than that which is sought through normal discovery channels by the Chapter 13 Trustee and the Debtor in the underlying contested matter in *Hill*. Here what is sought is the examination of Countrywide's general practices throughout the entire bankruptcy case for purpose of the bankruptcy claim calculation process as opposed to calculation of the Countrywide claim only after the bankruptcy is closed. Clearly, the basis for the exam is distinguishable from the discovery sought in the *Hill* contested matter, so the pendency of that contested matter is no impediment to the *Rule 2004* examination sought here. *See n 16, supra.*

Res Judicata

One, final issue must be addressed by this Opinion. Countrywide argues that even if the UST possesses the general authority to conduct examinations under *Rule 2004*, the principle of *res judicata* precludes her from doing so here. Countrywide notes that a number of the seven, context cases had previously been closed and that in all of the other matters except *Hill* the issues raised by the UST were resolved by prior, final orders. The Court has considered Countrywide's contentions on this point and concludes that *res judicata* does not bar the UST from conducting an examination in this case.

[24, 25] In general, the *res judicata* doctrine has three requirements: (1) a final judgment on the merits in a prior suit involving (2) the same parties or their privies, and (3) a subsequent suit based on the same cause of action. See *Post v. Hartford Insurance Co.*, 501 F.3d 154, 169 (3d Cir.2007). Leaving the first of these requirements aside for the moment, it is apparent that Countrywide's argument founders on the second and third. With respect to the second requirement, Countrywide has provided no evidence that the UST was a party in any of the context cases. In fact, quite to the contrary, Countrywide acknowledges that the UST did not appear in those cases. *Countrywide's Brief* at 12. Nor has it even attempted to argue that the UST should be deemed to be in privity with any other party. The failure to meet the second requirement is in itself a sufficient reason to reject Countrywide's *res judicata* argument.

[26] With respect to the third *res judicata* requirement, the Court is not convinced that Countrywide can establish that the UST's present effort under *Rule 2004* is equivalent to a subsequent suit based on the same cause of action as to any of the context cases. The UST is not even pursuing a "suit" at this point. She is merely exercising a procedural device to secure documents and testimony related to a suspicion (based on events occurring in the

context cases) that Countrywide is somehow abusing the bankruptcy system. It may well be that after reviewing the documents and hearing the testimony the UST will conclude that there has been no abuse of the system and the matter will simply be dropped, with no suit of any kind ever being pursued. On the other hand, if the UST concludes otherwise and she does wish to pursue this matter further by seeking relief against Countrywide, she will be required to file a motion for sanctions, adversary proceeding, or some other "contested matter" in the nature of a "suit" at which point Countrywide could raise the *res judicata* issue. Thus, as to the third requirement, Countrywide's argument is at best premature.

Given Countrywide's failure to establish either of the final two requirements for *res judicata* discussed above, this argument could be dismissed without further discussion. For the sake of completeness, however, the Court will turn to a discussion of the specific points raised by Countrywide as to closed cases and the finality of the plan confirmation orders.

[27] As to the "closed case" question, merely because some of the context cases under review here had previously been closed does not prevent the UST from conducting an examination. As discussed elsewhere in this Opinion, all of the context cases had been reopened by the time the UST served her *Notice of Examination. See n. 15, supra.* Even if they had not, the Bankruptcy Code provides a liberal standard for reopening closed cases which includes the right of the UST to petition for reopening. Closed bankruptcy cases are routinely reopened for a variety of reasons. Here, the Court is not willing to prevent the UST from acting in this regard simply because some of the cases had been previously closed at one point. Moreover, the *Hill* case was reopened by the Debtor without any prompting by the UST or the Chapter 13 Trustee, before the *Notice of Examination* was ever served.

[28] In support of its argument on finality, Countrywide cites *11 U.S.C. § 1327* and *In re Szostek,* 886 F.2d 1405, 1408 (3d Cir.1989) for the proposition that a plan confirmation order is *res judicata* and thus bars the UST from acting in this case. However, the court in *Szostek* merely said that "[u]nder § 1327, a confirmation order is *res judicata* as to all issues decided or which could have been decided at the hearing on confirmation." *Id. See also, In re Mellors,* 372 B.R. 763, 769 (Bankr.W.D.Pa. 2007). In this case, the acts and conduct of Countrywide forming the basis for the UST's *Rule 2004* effort in *Hill* (which is also the subject of the *Motion to Enforce Discharge* filed by the Debtor in that case) all occurred *following* the entry of the confirmation order in that case. Thus, even assuming that the entry of the confirmation order in *Hill* would be a *res judicata* event for purposes of what had taken place before its entry, pre-existence of the formal confirmation order cannot serve to preclude the UST from acting here.

[29] In *Donaldson v. Bernstein,* 104 F.3d 547 (3d Cir.1997), the court rejected an argument similar to the one Countrywide is making here, finding that a prior plan confirmation order did not have *res judicata* effect with respect to an adversary proceeding for breach of fiduciary duty brought by a Chapter 7 Trustee against the debtor's two principals. The *Donaldson* court distinguished *Szostek* because the alleged liability of the principals was not based on pre-confirmation actions, but rather on post-confirmation failures to comply with the plan and diversion of business opportunities. In so finding, the court flatly stated that "[c]laims for post-confirmation acts are not barred by the res judicata effect of the confirmation order."

104 F.3d at 555. Similarly here, because the acts of Countrywide that triggered the UST's *Notice of Examination* in *Hill* took place after the confirmation order was entered, the UST is not prevented by *res judicata* from conducting the examination.[23]

The *Hill* case represents the most clear-cut instance among the context cases where the UST served her *Notice of Examination* of an ongoing and unresolved matter. Thus, there can be no doubt that the "case or proceeding" requirement of *Section 307* is met as to *Hill* and no doubt that *res judicata* presents no impediment.

Likewise, there is no dispute that the request for documentation in Categories 1–4 accompanying the *Notice of Examination* in each of the context cases is identical. Furthermore, this information has previously been provided in the underlying, contested matter continuing to pend in the *Hill* case. It is apparent that the UST can obtain the very same information by pursuing the document production and examination solely in the *Hill* case as she could if all of the context cases were to similarly proceed. As such, it makes little sense to risk the confusion and potential "clouding" of legal issues that will arise if all of the context cases do proceed when that can be easily avoided. For this reason it is appropriate that the *Rule 2004* examinations and accompanying requests for production contained in the respective *Subpoenas* for all the context cases, but for the *Hill* case, be stayed until further order.

As noted, it was the Debtor, not the UST, who opened the *Hill* case to allow for hearing on the Debtor's *Motion to Enforce Discharge Injunction.* This event occurred well before the UST filed her *Notices of Examination* in the seven, context cases. By staying the other six, context cases, Countrywide's objection going to the authority of the UST to open previously closed cases is rendered moot. Similarly, the defense of *res judicata* is obviated by allowing the *Rule 2004* examination in *Hill* to proceed unabated since no dispute exists that all of the complained of UST conduct post-dates the *Hill* confirmation order. Therefore, such conduct is irrelevant to the defense of *res judicata* rendering the defense moot as it pertains to *Hill.* Since the scope of the examination in all seven context cases is identical, the underlying purpose for the UST in seeking a *Rule 2004* examination in those cases is not frustrated and further duplicative filings and proceedings are avoided.

Finally, because of the "common thread" among the context cases, it is appropriate for Countrywide to produce the documents requested by document Categories 5–12 in each of the stayed, six, context cases under the "umbrella" of the *Rule 2004* examination to be conducted in the *Hill* case. Although evidence of other acts pursuant to *Fed.R.Evid. 404(b)* may not be admissible as proof of the character of a person, or in this case a corporate entity, in order to show action in conformity therewith such conduct is admissible for other purposes such as demonstrating intent, preparation, plan or absence of mistake. Also, pursuant to *Fed.R.Evid. 406* proof of the routine practice of an organization is relevant to show that the conduct of the organization on a particular occasion was in conformity with the routine practice.

Thus, even though except for *Hill* the context cases will be stayed, under traditional notions of discovery pursuant to

23. The same analysis applies with respect to any possible effect of the discharge order since all of Countrywide's actions in question took place after the entry of that order as well.

F.R.C.P. 26(b)(1),[24] evidence of how Countrywide acted in connection with the Debtors in those stayed cases may be relevant in *Hill* thereby providing a basis for the UST to obtain that very information in *Hill. See also Fed.R.Evid. 401.* Since the scope of the examination is so much broader for *Rule 2004* purposes (i.e., a "fishing expedition") discovery that falls within the traditional scope of litigation discovery and is not otherwise offensive to the *Federal Rules of Civil Procedure,* is appropriate in this case. Furthermore, because the context cases other than *Hill* are being stayed, the Court need not consider whether the principle of *res judicata* prevents the UST from conducting *Rule 2004* examinations in any other of those cases.

CONCLUSION

Pursuant to *11 U.S.C. § 307,* the UST, as a party in interest, possesses the authority to conduct examinations and require the production of documents pursuant to *Fed.R.Bankr.P.2004.* However, that right is not unqualified. In recognition of the potential for abuse of this power, if the party to be examined properly objects, the UST must demonstrate the appropriate "good cause" before she will be allowed to proceed, with the level of good cause evaluated on a sliding scale that requires more justification as the level of intrusiveness increases. The UST must also show that the scope of the proposed discovery fits within that which is allowed by *Rule 2004.*

In this case the Court specifically finds that the UST has met her burden of good cause and that the documents and examination contemplated by the *Notice of Examination* and *Subpoena* fit within the parameters of *Rule 2004* because they relate to the financial condition and liabilities of the debtors and to matters that may affect the administration of the Debtors' estates. The Court also finds that the UST has shown a common thread among the seven context cases in that all of them involve questions as to Countrywide's calculation of its claims against debtors in various stages of the bankruptcy process, including post-discharge.

Finally, for the sake of administrative convenience and to avoid any potential *res judicata* issues, the Court will stay the *Notice of Examination* and *Subpoena* in all context cases except *In re Hill,* Case No. 01–22574–JAD. In that case, the Court will direct Countrywide to produce documents in Categories 5–12 as to each of the Debtors in the context cases and will direct Countrywide to make a witness or witnesses available to be examined on the topics identified by the UST.

An appropriate Order will be issued.

ORDER

The United States Trustee ("UST") having filed a ***Notice of Examination,*** together with an attached ***Subpoena Duces Tecum*** at Document No. 6 and Countrywide Home Loans, Inc. ("Countrywide") having filed an ***Objection to Notices of Examination*** at Document No. 12 and a ***Motion to Quash Notices of Examination*** at Document No. 13, in response to which the UST filed a ***Response to Objection to Notice of Examination*** at Document No. 15 and an ***Objection to Motion to Quash*** at Document No. 16, and the Court having considered the Parties' briefs and oral arguments as to all these matters,

AND NOW, this ***1st*** day of ***April, 2008,*** for the reasons as set forth in the foregoing Memorandum Opinion, it is hereby

24. That is, the scope of discovery includes any matter relevant to a pending claim or reasonably calculated to lead to discovery of admissible evidence.

ORDERED, ADJUDGED and DECREED as follows:

(1) The United States Trustee ("UST") having notified the Court that for administrative purposes she was withdrawing the *Notice of Examination* and *Subpoena Duces Tecum* from three of the cases previously consolidated under this Miscellaneous Case Number, to wit, the cases of *Ramsey* (Case No. 01–31062–JAD), *Ennis* (Case No. 05–20772–TPA) and *Roberts* (Case No. 05–25324–TPA), the *Notices of Examination* and *Subpoenas Duces Tecum* previously served on Countrywide Home Loans, Inc. ("Countrywide") in those cases are ***DISMISSED*** and said cases are ***DECONSOLIDATED*** from this proceeding for all purposes.

(2) Countrywide's *Motion to Quash Notices of Examination* is ***DENIED*** and the UST's *Objection to Motion to Quash* is therefore ***DENIED*** as moot.

(3) The UST having withdrawn Categories 1–4 of the documents in the *Subpoenas Duces Tecum* in all of the remaining consolidated cases in light of Countrywide's voluntary agreement to produce the identical documents in connection with a proceeding in the consolidated case of *In re Hill,* Case No. 01–22574, all *Objections* as to those Categories by Countrywide are ***DENIED*** as moot.

(4) All further proceedings as to the *Notices of Examination* and *Subpoenas Duces Tecum* in the consolidated cases of *Benvenuto* (Case No. 02–20946–JKF), *Stemple* (Case No. 03–11792–WWB), *Karleski* (Case No. 04–31355–JKF), *Bock* (Case No. 04–32812–BM), *Olbeter* (Case No. 04–33361–JKF), and *Topper* (Case No. 05–20772–TPA) are hereby ***STAYED*** pending further Order of Court.

(5) All of Countrywide's *Objections* to Categories 5–12 of the documents in the *Subpoenas Duces Tecum* are ***DENIED.***

(6) ***On or before April 15, 2008,*** pursuant to the *Notice of Examination* and *Subpoena Duces Tecum* issued in *In re Hill,* Case No. 01–22574, Countrywide shall provide the UST with all items responsive to Categories 5–12 as to each of the remaining context cases, including the six, consolidated cases stayed pursuant to this Order to the extent it has not already done so pursuant to its voluntary agreement in the pending matter known as *In Re Selected Cases in Which the Chapter 13 Trustee Seeks Relief Against Countrywide Home Loans, Inc./fka Countrywide Funding Corp.,* Misc. No. 07–00203

(7) In *Hill,* the UST and Countrywide shall confer in good faith to schedule one or more *Fed.R.Bankr.P.2004* examinations of a Countrywide designated representative(s) within a reasonable time and a convenient place within this District to cover the topics of examination as identified in the *Notice of Examination* and *Subpoena Duces Tecum,* and as limited to Chapter 7 and Chapter 13 bankruptcy cases.

APPENDIX "A"

Exhibit "A" to the *Subpoena* identifies the following documents to be produced by Countrywide:

1. All documents evidencing, relating or referring to, or concerning any policy or procedure, written or otherwise published, regarding:
   a. The protocol for *receiving* payments made to Countrywide by or on behalf of debtors in bankruptcy cases; and
   b. The protocol for *recording* payments that are received by Countrywide, from or on behalf of debtors in bankruptcy cases; and
   c. The protocol for *handling and/or internal processing* of payments made

APPENDIX "A"—Continued

to Countrywide by or on behalf of debtors in bankruptcy cases; and

e. [sic] The protocol for *accounting and applying* payments made to Countrywide by or on behalf of debtors in bankruptcy cases.

2.. All documents evidencing, relating or referring to, or concerning any policy or procedure, written or otherwise published, regarding Countrywide's drafting, verifying and filing of proofs of claim in bankruptcy cases.

3. All documents evidencing, relating or referring to, or concerning any policy or procedure for Countrywide to collect on pre-petition or post-petition debts or claims from debtors in bankruptcy cases, including but not limited to policies or procedures regarding communications or correspondence with debtors in pending bankruptcy cases.

4. All documents evidencing, relating or referring to, or concerning any policy or procedure, written or otherwise published, regarding the filing, by or on behalf of Countrywide, of Motions for Relief from the Automatic Stay in bankruptcy cases.

5. A copy of the note and mortgage evidencing the secured status of the mortgage of the Debtors.

6. All documents evidencing, relating to, or referring to the payment history of the Debtors before and after the bankruptcy case petition date.

7. All documents evidencing, relating to, or referring to the preparation of and/or the support for the Proofs of Claim filed by or on behalf of Countrywide against the Debtors.

8. All documents supporting the computation of the amounts reflected in the Proofs of Claim filed by or on behalf of

APPENDIX "A"—Continued

Countrywide for the Debtors, including but not limited to the principal amount of the claim; the total arrearage claimed; the post-petition amounts claimed; the monthly payment amount; and the interest rate.

9.. All documents evidencing, relating to, or referring to all internal and external communications relating to the mortgage of the Debtors.

10. All documents evidencing, relating to, or referring to any attempt by Countrywide to collect on its debt from the Debtors.

11. All documents evidencing, relating to, or referring to Countrywide's communication with the Debtors in the above-captioned case before and after the Petition Date.

12. All documents relating to:

a. The *receipt* of payments made to Countrywide by or on behalf of the Debtors; and

b. The *recordation* of payments that are received by Countrywide, from or on behalf of Debtors; and

c. The *handling and/or internal processing* of payments made to Countrywide by or on behalf of Debtors; and

e. [sic] The *accounting and application* of payments made to Countrywide by or on behalf of Debtors. (emphasis in original)

APPENDIX "B"

Exhibit "B" to the *Subpoena* lists the following topics for examination of Countrywide:

1. [Countrywide] policies and procedures regarding application of payments on accounts of customers that have filed bankruptcy under Title 11 of the United States Code under chapters 7 and 13.

APPENDIX "B"—Continued

2. Countrywide's policies and procedures for filing proofs of claim in bankruptcy cases of customers in chapters 7 and 13.
3. Countrywide's policies and procedures for filing Motions to Lift the Automatic Stay in bankruptcy cases filed in chapters 7 and 13.
4. Countrywide's policies and procedures for collection on accounts of customers that have filed bankruptcy under Chapters 7 and 13.
5. Countrywide's policies and procedures for the treatment of mortgage arrearages for customers that have filed bankruptcy under Chapters 7 and 13 in calculating pre-petition amounts and the applications of post-petition payments.
6. Countrywide's policies and procedures regarding calculation of escrow accounts and disbursements from escrow accounts.
7. Countrywide's format or media used for the storage of customer records and the location of the records of customers who have filed bankruptcy under Chapters 7 and 13.
8. Handbooks, computer files and any other media materials for the training of employees of Countrywide instructing them on how to analyze accounts, apply payments, disburse funds and satisfy or settle the debts of customers that have filed bankruptcy under Chapters 7 and 13.
9. All documents requested in Exhibit "A" to the subpoena.

In re Ronald Nelson PRICE, Mary C. Price, Debtors.

No. 05–42744–DOT.

United States Bankruptcy Court, E.D. Virginia, Richmond Division.

Feb. 8, 2008.

Background: Chapter 7 trustee moved for authority to set off and/or surcharge debtors' exempt property, based on debtors' alleged concealment of nonexempt assets and refusal to turn over such assets upon discovery by trustee.

Holdings: The Bankruptcy Court, Douglas O. Tice, Jr., Chief Judge, held that:

(1) trustee would be allowed to set off any exempt funds that came into her possession, in connection with sale of real property in which debtors had claimed an $8,799 Virginia homestead exemption, against debtors' liability to estate for failing to turn over the more than $400,000 in unscheduled nonexempt assets discovered by trustee; and

(2) trustee, in alternative, would be allowed to surcharge debtors' exemption.

Motion granted.

1. Bankruptcy ⇐2797.1

Chapter 7 trustee would be allowed to set off any exempt funds that came into her possession, in connection with sale of real property in which debtors had claimed an $8,799 Virginia homestead exemption, against debtors' liability to estate for failing to turn over the more than $400,000 in unscheduled nonexempt assets discovered by trustee; allowing setoff would not deny debtors the benefit of homestead exemption, but was necessary to preserve integrity of bankruptcy process, to make estate whole, and to prevent debtors from, in

face of everyday experience. Generally bank customers do not have to pay ATM fees when they use the ATM of their bank, and potential customers can find checking accounts with no or low minimum balance requirements and accounts where they do not have to pay a significant amount for each check. Furthermore, the Court's experience has been that money orders generally cost more than writing a check and are less convenient, since obtaining them requires a visit to a merchant who sells them. Furthermore, considering his other testimony, Bressler is asking the Court to believe that he found having a personal checking account less practical than asking a third party, Ayers, for assistance in cashing his paychecks and paying other bills by money orders. That defies logic. Bressler's strained explanations raise the possibility that Bressler chose to close the account for less innocent reasons, such as the desire to have an untraceable and unattachable financial record. Although the Court has found that the Plaintiffs failed to establish that Bressler's action regarding his method of paying his rent and cashing his pay check demonstrated an "actual intent to hinder, delay, or defraud" under section 727(a)(2), Bressler generally lacked credibility and his illogical explanations only serve to reinforce that conclusion.

Conclusion

For the foregoing reasons, the Court concludes that the Defendant's discharge is denied pursuant to section 727(a)(4). For the sake of completeness, the Court also concludes that Bressler's debt to Strum should not be found to be nondischargeable pursuant to section 523 and that the Plaintiffs' objection to discharge pursuant to section 727(a)(2) is denied.

Counsel for Forrest and Steibel is to settle an order consistent with this opinion, and should provide in that order that the chapter 7 trustee shall investigate potential assets of Bressler's including but not limited to referral fees from Epstein or any other attorney and Bressler's claim for $10,000 in fees for his representation of Forrest and Steibel.

Further, that order should provide for an order paragraph directing Bressler to amend his schedule to list the holder of his student loans as a creditor.

In re COUNTRYWIDE HOME LOANS, INC., f/k/a Countrywide Funding Corp.

No. 07-00204.

United States Bankruptcy Court, W.D. Pennsylvania.

May 2, 2008.

Background: United States Trustee (UST) filed notices of examination to obtain information from residential mortgage lender regarding computation of claims in Chapter 13 cases. Lender objected and filed motion to quash. The Bankruptcy Court, 384 B.R. 373, denied motion to quash and objections respecting documents sought by UST's subpoenas, directing that subpoena and examination proceed in one case. After filing notice of appeal, lender moved for stay pending appeal.

Holdings: The Bankruptcy Court, Thomas P. Agresti, J., held that:

(1) lender did not establish strong likelihood of success on the merits of appeal;

(2) lender failed to establish that it would suffer irreparable harm absent stay;

(3) neither debtors nor UST would suffer substantial harm from issuance of stay; and

(4) stay pending appeal was not warranted.

Motion for stay denied.

1. Bankruptcy ⇐3776.5(2)

Bankruptcy court had to consider four factors in ruling on lender's motion for stay pending its appeal of order denying its motion to quash notices of examination filed by United States Trustee (UST) to obtain information regarding lender's computation of claims in Chapter 13 cases and its objections to related subpoenas: (1) whether lender was likely to succeed on the merits of the appeal, (2) whether lender would suffer irreparable injury if a stay was not granted, (3) whether a stay would substantially harm other parties in the litigation, and, (4) whether a stay was in the public interest.

2. Bankruptcy ⇐3776.5(4)

Party seeking stay of bankruptcy court order pending appeal bears the burden of proof on governing factors by a preponderance of the evidence.

3. Bankruptcy ⇐3776.5(2)

In deciding lender's motion for stay pending appeal of order in which bankruptcy court denied both lender's motion to quash notices of examination filed by United States Trustee (UST) to obtain information regarding lender's computation of claims in Chapter 13 cases and lender's objections to related subpoenas, bankruptcy court would balance governing factors, such that lender's failure to demonstrate one or more factors would not necessarily be fatal to stay request.

4. Bankruptcy ⇐3776.5(2)

Although, in seeking stay pending appeal of order in which bankruptcy court denied both lender's motion to quash notice of examination filed by United States Trustee (UST) to obtain information regarding lender's computation of claims in Chapter 13 cases and lender's objections to related subpoena, lender identified serious and substantial question respecting nature and extent of UST's power to act as watchdog of bankruptcy system and conduct associated discovery, lender did not establish strong likelihood of success on the merits of appeal, which challenged bankruptcy court's jurisdiction to authorize requested examination, UST's power to take examinations in the absence of contested matter, and UST's status as "party in interest" under examination rule, particularly given that abuse of discretion standard would likely govern on appeal. 11 U.S.C.A. § 307; Fed.Rules Bankr.Proc.Rule 2004, 11 U.S.C.A.

5. Bankruptcy ⇐2041.1

Bankruptcy court's subject matter jurisdiction over a particular matter may be questioned at any time during the proceedings.

6. Bankruptcy ⇐3776.5(2)

Lender failed to establish that it would suffer irreparable harm absent requested stay pending appeal of order in which bankruptcy court denied both lender's motion to quash notice of examination filed by United States Trustee (UST) to obtain information regarding lender's computation of claims in Chapter 13 cases and lender's objections to related subpoena, notwithstanding lender's contention that, absent stay, it would be required to undergo intrusive and invasive investigation by government agency acting outside its statutory powers, given that lender had already produced and been examined on good portion of documents sought and lacked high expectation of privacy in documents yet to be produced, and that lender

did not show that its appellate rights would be rendered moot without a stay. 11 U.S.C.A. § 307; Fed.Rules Bankr.Proc. Rule 2004, 11 U.S.C.A.

7. Bankruptcy ⇐3776.5(2)

Mere litigation expense, even if substantial and unrecoupable, does not constitute irreparable injury supporting motion for stay pending appeal.

8. Bankruptcy ⇐3776.5(2)

Neither debtors nor United States Trustee (UST) would suffer substantial harm if bankruptcy court granted lender's motion for stay pending appeal of court's order denying both lender's motion to quash UST's notice of examination to obtain information regarding lender's computation of claims in Chapter 13 cases and lender's objections to related subpoena, given that most affected debtors had already resolved or failed to pursue any dispute they had with lender, and any harm faced by UST would be largely self-inflicted. Fed.Rules Bankr.Proc.Rule 2004, 11 U.S.C.A.

9. Bankruptcy ⇐3776.5(4)

In deciding lender's motion for stay pending appeal of order in which bankruptcy court denied both lender's motion to quash notice of examination filed by United States Trustee (UST) to obtain information regarding lender's computation of claims in Chapter 13 cases and lender's objections to related subpoena, bankruptcy court could take judicial notice of court records from bankruptcy cases in another state in which UST obtained court orders authorizing essentially unfettered examinations of lender. Fed.Rules Bankr.Proc. Rule 2004, 11 U.S.C.A.

10. Bankruptcy ⇐3776.5(2)

Public interest did not weigh either in favor of or against granting of lender's motion for stay pending appeal of order in which bankruptcy court denied both lender's motion to quash notice of examination filed by United States Trustee (UST) to obtain information regarding lender's computation of claims in Chapter 13 cases and lender's objections to related subpoena, given that public policy would be served by any determination that lender was acting improperly in pursuing claims against debtors in bankruptcy and correction of those actions, but would also be served by preventing UST from intruding into lender's private affairs by any overstepping of its authority. Fed.Rules Bankr.Proc.Rule 2004, 11 U.S.C.A.

11. Bankruptcy ⇐3776.5(2)

Stay pending appeal was not warranted with respect to order in which bankruptcy court denied both lender's motion to quash notice of examination filed by United States Trustee (UST) to obtain information regarding lender's computation of claims in Chapter 13 cases and lender's objections to related subpoena, given that lender did not demonstrate strong likelihood of success on the merits on appeal, that lender would not be irreparably harmed if stay was not granted, and that substantial issue which lender did present for appeal would not be lost if stay was not granted. Fed.Rules Bankr.Proc.Rule 2004, 11 U.S.C.A.

Thomas A. Connop, Dallas, TX, for Countrywide.

Dorothy A. Davis, Pittsburgh, PA, for Countrywide.

T. Patrick Tinker, Esq., for the UST.

Joseph Sisca, Esq., for the UST.

MEMORANDUM OPINION

THOMAS P. AGRESTI, Bankruptcy Judge.

Presently before the Court are a ***Motion for Stay Pending Appeal Pursuant to Fed.R.Bankr.P. 8005*** ("Stay Motion") (Document No.72) filed by Countrywide Home Loans, Inc. ("Countrywide") and a ***Response in Opposition to Countrywide Home Loans, Inc.'s Emergency Motion for Stay Pending Appeal*** ("Response") (Document No. 89) filed by the United States Trustee ("UST"). For the reasons that follow, the Court will deny the *Stay Motion.*[1]

BACKGROUND

Relevant Procedural History

On April 1, 2008, the Court issued a Memorandum Opinion and Order concerning subpoenas duces tecum and *Rule 2004* exam notices that the UST had served on Countrywide in 10 (subsequently reduced to seven) "context cases," all of which were consolidated under this docket number. (Document No. 64).[2] See *In re Countrywide Home Loans, Inc.*, 384 B.R. 373 (Bankr.W.D.Pa.2008). The Court denied Countrywide's Motion to Quash the examination notices and denied Countrywide's objections to Categories 5–12 of the documents identified in the subpoenas. (Countrywide's objections to documents in Categories 1–4 became moot when Countrywide voluntarily agreed to turn over the same materials in connection with a pending Motion to Enforce Discharge in one of the context cases, *In re Sharon Hill,* Case No. 01–22574, in which the UST is participating, though not as a formal party). For simplicity and to avoid any potential issues related to *res judicata* and the reopening of closed cases, the Court stayed proceedings in six of the context cases and directed the subpoena and exam to proceed in the seventh case, *Hill.* The April 1, 2008 Order directed Countrywide to produce the documents by April 15, 2008 and directed the Parties to confer in good faith to schedule the *Rule 2004* exam(s).

On April 11, 2008, Countrywide filed a *Notice of Appeal* of the April 1, 2008 Order ("April 1st Order") (Document No. 66), as well as a *Motion for Leave to Appeal Filed Subject to Its Notice of Appeal ("Appeal Motion")* (Document No. 68) in the event the Order is otherwise deemed not to be a final appealable order. Pursuant to 28 U.S.C. § 158(a)(3) and Fed.R.Bankr.P. 8003(b), it is the District Court, rather than this Court, which will decide the *Appeal Motion.*

On April 14, 2008, Countrywide filed the *Stay Motion* currently at issue. On April 15, 2008 an *Agreed Motion for Temporary Stay Pending Appeal* (Document No. 75) was filed by Countrywide indicating that the UST had agreed to a temporary stay of the *April 1st Order* through April 29, 2008, so as to allow the Court time to

1. The Court's jurisdiction to hear and determine the *Stay Motion* arises under 28 U.S.C. §§ 1334 and 157. This is a core matter pursuant to 28 U.S.C. § 157(b)(2)(A). Pursuant to Fed.R.Bankr.P. 8005, a motion for stay pending appeal must ordinarily be presented to the bankruptcy judge in the first instance. This Opinion constitutes the Court's findings of fact and conclusions of law pursuant to Fed.R.Bankr.P. 7052 which is made applicable to contested matters by Fed.R.Bankr.P. 9014.

2. This opinion will assume familiarity with the April 1, 2008 Memorandum Opinion and Order. Reference should be made to it for a more detailed history of the case and for a description of the documents being sought by the UST and the areas of inquiry for the *Rule 2004* examination which the UST seeks to take.

consider the *Stay Motion.* On April 16, 2008, the Court entered an order granting a temporary stay until April 29, 2008 (Document No. 79). On April 21, 2008, the Court entered an order enlarging the UST's time to file an answer to the *Appeal Motion* to May 5, 2008 (Document No. 88).

Oral argument on the *Stay Motion* was held on April 23, 2008 and both sides were given a full opportunity to present their positions. The Court indicated that the previously agreed upon temporary stay should be honored by the UST until the Court issued its decision on the *Stay Motion* to which the UST agreed without the need for entry of an order to that effect.

DISCUSSION

[1, 2] Both sides agree that the Court must consider four factors when ruling on the *Stay Motion:* (1) whether Countrywide is likely to succeed on the merits of the appeal; (2) whether Countrywide will suffer irreparable injury if a stay is not granted; (3) whether a stay would substantially harm other parties in the litigation; and, (4) whether a stay is in the public interest. *See Republic of the Philippines v. Westinghouse Elec. Corp.,* 949 F.2d 653, 658 (3d Cir.1991), *In re S.A. Holding Co. L.L.C.,* 2007 WL 1598113 *1 (D.N.J.2007), *In re Cujas,* 376 B.R. 480, 485 (Bankr.E.D.Pa.2007). As the party seeking a stay, Countrywide bears the burden of proof on these factors by a preponderance of the evidence. *See, e.g., In re Wire Rope Corp. of Am., Inc.,* 302 B.R. 646, 648 (Bankr.W.D.Mo.2003), *In re Level Propane Gases, Inc.,* 304 B.R. 775, 777 (Bankr.N.D.Ohio 2004), *In re Texas Health Enters., Inc.,* 255 B.R. 185, 187 (Bankr.E.D.Tex.2000), *In re Eastman Kodak Co. v. Bayer Corp.,* 2005 WL 3090985 *1 (S.D.N.Y.2005).

[3] While the stay factors themselves are well-established, there is not a uniformity of judicial opinion as to what test to apply when deciding whether to grant a stay. Some courts hold that a movant's failure to satisfy any one of the four factors will defeat a motion to stay. *See, e.g., In re Blackwell,* 162 B.R. 117 (E.D.Pa. 1993), *In re S.N.A, Nut Co.,* 1996 WL 31155 (N.D.Ill.1996). However, other courts stress a more flexible overall "balancing" of all the factors, so that a movant's failure to demonstrate one or more of the factors is not necessarily fatal to the stay request. *See, e.g., In re Bankr. Appeal of Allegheny Health, Educ. & Research Found.,* 252 B.R. 309, 321 (W.D.Pa. 1999). The Third Circuit has stressed that a decision on a motion for stay should reflect the "individualized considerations relevant to the case at hand." *Republic of Philippines,* 949 F.2d at 658. In light of this direction, the Court concludes that the balancing approach represents the better view and adopts it in analyzing Countrywide's *Stay Motion.* The Court now turns to a review of the four stay factors.

(1) *Likelihood of Success on the Merits*

[4] As is true with the overall test for a stay, courts have taken several approaches with respect to this particular factor. Some courts have simply indicated that this factor requires a focus on the strength of the case the movant will be able to present on appeal. *See, e.g., In re Polaroid Corp.,* 2004 WL 253477 * 1 (D.Del. 2004). Taking this approach does put a court in the somewhat awkward, though not impossible, position of trying to objectively assess the likelihood that its ruling will be upheld on appeal. Other courts avoid this self-assessment difficulty by instead focusing on whether the movant seeks to raise issues on appeal that are substantial, serious, and doubtful so as to make them fair ground for litigation. *See, e.g., In re Lickman,* 301 B.R. 739, 743

(Bankr.M.D.Fla.2003). Finally, a few courts have adopted a "sliding scale" measure under which the movant's burden of showing a likelihood of success will vary depending on the "balance of hardships" the parties will suffer if a stay is not granted. *Cujas*, 376 B.R. at 486. In other words, under this view if the balance of harm tips decidedly to the movant, then the movant need not show as strong a likelihood of success on the merits as when the balance is more even, or in the respondent's favor. *Id.*

The Court sees some merit in all of these approaches and does not view them as necessarily being mutually exclusive in application. Rather, they are different ways of looking at the same thing and all may be brought to bear in reaching an overall conclusion as to whether Countrywide has met its burden as to this factor. With that in mind, the Court turns now to a review of the specifics of the present case as they relate to Countrywide's likelihood of success on appeal.

As an initial matter, it is important to be clear exactly what Countrywide intends to raise as issues on appeal. The issues are stated by Countrywide as follows:

a. Whether the Bankruptcy Court has subject matter jurisdiction to authorize an examination by the United States Trustee ("UST") pursuant to Rule 2004 of the Federal Rules of Bankruptcy Procedure when there is no connection between the proposed examination and any effect on a debtor's estate.

b. Whether the Bankruptcy Court erred in holding that the UST is a "party in interest" for the purposes of Rule 2004 of the Federal Rules of Bankruptcy Procedure.

c. Whether the Bankruptcy Court erred in holding that the UST has the power to take an examination pursuant to Rule 2004 of the Federal Rules of Bankruptcy Procedure in the absence of a contested matter.

d. Whether the Bankruptcy Court erred in finding that 11 U.S.C. § 307 does not require that there be a contested matter for the UST to appear and be heard.

See Statement of Issues on Appeal, Document No. 86 at 3.

These four issues represent the "universe" of what Countrywide seeks to present for appellate review. *See, e.g., In re Columbia Gas System, Inc.*, 146 B.R. 106, 110 n. 2 (D.Del.1992) (referencing cases for the proposition that issues not included in the appellant's statement of issues under Fed.R.Bankr.P. 8006 are waived on appeal). The Court, while striving to remain as detached and objective as possible, finds little in these four, narrowly focused issues to suggest that Countrywide is likely to succeed on appeal. This is particularly true when the issues are considered in context, i.e., that this Court's *April 1st Order* will most likely be reviewed on appeal under a deferential abuse of discretion standard. *See, e.g., In re Dinubilo*, 177 B.R. 932, 939 (E.D.Cal.1993), *In re Metiom, Inc.*, 318 B.R. 263, 267 (S.D.N.Y. 2004).

[5] The first issue raised by Countrywide questions whether it was within this Court's subject matter jurisdiction to authorize the *Rule 2004* examination. While it is certainly possible that the Court erred in permitting the UST to go forward with an examination in this case, it is frankly puzzling and a bit astonishing that the Court's subject matter jurisdiction to even make that decision would be called into question.[3] 28 U.S.C. § 157(b)(1) provides

3. The Court realizes that its subject matter jurisdiction over a particular matter may be

that bankruptcy judges may hear and determine all cases under Title 11, and Fed. R.Bankr.P.2004(a) provides that "[O]n motion of any party in interest, *the court* may order the examination of any entity" (emphasis added). The Court concludes there is little likelihood that Countrywide will succeed on this issue.

The second issue presents a closer question.[4] Based on arguments by the Parties, and its own research, the Court acknowledges that the term "party in interest" is not used with perfect consistency throughout the Bankruptcy Code and Bankruptcy Rules. After carefully considering the question this Court concluded that the UST was a party in interest under Rule 2004. *See In re Countrywide Home Loans, Inc.*, 2008 WL 868041 * 11–12. However, in recognition that this issue is one on which reasonable minds may differ, the Court finds that Countrywide has at least some chance of success on appeal as to it.

The third and fourth issues on appeal are best considered together since both posit that the existence of a "contested matter" is a necessary condition for the UST to act, one pursuant to *Rule 2004* and the other pursuant to 11 U.S.C. § 307. As appellate issues go, these two are pretty narrowly-drawn, and the Court concludes that Countrywide has shown little likelihood of success on them. As to *Rule 2004*, nothing in that Rule indicates that examinations thereunder are limited to the setting of a contested matter. At oral argument on the *Stay Motion*, Counsel for Countrywide conceded that *Rule 2004* exams are routinely taken in bankruptcy cases when no contested matter is pending.[5] As to *Section 307*, the statutory language provides that the UST "may raise and may appear and be heard on any issue *in any case or proceeding*" (emphasis added). The term "case or proceeding" is clearly broader than and encompasses the term "contested matter." *See, e.g., In re Attorneys at Law and Debt Relief Agencies*, 353 B.R. 318, 322–23 (S.D.Ga. 2006) ("case" refers to a matter initiated by the filing of a petition seeking relief under the Bankruptcy Code, and "proceeding" refers to everything which happens within the context of a bankruptcy case). It is difficult to see how Countrywide will convince the appellate court that there must be a contested matter before the UST can act.

questioned at any time during the proceedings. The first time the Court encountered the issue in the context of this case was when Countrywide raised it in its *Notice of Appeal*.

4. It is interesting to note that the issue of whether the UST qualifies as a "party in interest" under *Rule 2004* was raised not by Countrywide, but rather *sua sponte* by the Court at the February 28, 2008 oral argument. The Court then directed the parties to brief the question (Order of February 29, 2008 at ¶ 4, Document No. 53) and they did so (Document Nos. 61, 62). For purposes of the *Stay Motion* the Court will assume this issue has been preserved for appeal by Countrywide.

5. Countrywide has another obstacle to success on the third issue it has raised for appeal because the premise on which that issue rests is completely at odds with the position Countrywide had previously taken with this Court. More specifically, Countrywide previously argued to the Court that the UST could not conduct a *Rule 2004* exam within the context of a contested matter or an adversary proceeding because in those settings any discovery would have to be done through the "normal" channel provided by Fed.R. Civ.P. 26–36. (incorporated into bankruptcy proceedings by Fed.R.Bankr.P. 7026–7036 and 9014(c)). *See In re Countrywide Home Loans, Inc.*, 2008 WL 868041 * 12, n. 16. For Countrywide to now raise as an issue that this Court erred by holding that the UST can take a *Rule 2004* exam "in the absence of a contested matter" is logically inconsistent with Countrywide's prior position.

With the possible exception of the second appellate issue, from a purely "strength of case" aspect, Countrywide has not demonstrated a likelihood of success on appeal. Countrywide does fare better when the focus is shifted to the substantiality and seriousness of the appeal. The Court has no difficulty concluding that the question of the nature and extent of the UST's power to act as a watchdog of the bankruptcy system, and to conduct "discovery" in connection therewith, is an important one.[6] Depending on how that question is answered on appeal, it will make a great deal of difference not only in this case, but in others in which the UST may see a reason to act. The Court is also sensitive to the potentially intrusive consequences of its decision. For these reasons, the seriousness of the appeal would seem to favor a stay.

The last item for consideration in connection with this first factor is whether the balance of hardships is such that it should be taken into account when this factor is analyzed. The actual "hardships" the Parties may face if a stay is or is not granted will be discussed later in this opinion. It will suffice for now to say that there does not seem to be a decidedly tilted balance of hardship one way or the other. Therefore, the Court will not need to employ a sliding scale measurement, as was done for example in *Cujas,* to vary what would otherwise be the standard by which Countrywide's likelihood of success will be measured.

To sum up the review of this first factor, on balance, Countrywide has not demonstrated a strong likelihood of success on appeal even though it has identified a serious and substantial question to present to the appellate court.

(2) *Irreparable Injury to Countrywide*

[6, 7] In the *Stay Motion* Countrywide argues that it will be irreparably harmed in the absence of a stay because the UST's investigation will be "costly and intrusive" and because the "cost, expense and invasion of Countrywide's private business practices by a government agency acting beyond the scope of its powers as a self-appointed investigator cannot be undone once it has started." *Stay Motion* at ¶ 14. To the extent that this is a complaint about cost and expense, this Court can summarily conclude that it is an insufficient basis to impose a stay. It has long been recognized that mere litigation expense, even if substantial and unrecoupable, does not constitute irreparable injury. *See, e.g., Renegotiation Bd. v. Bannercraft Clothing Co., Inc.,* 415 U.S. 1, 24, 94 S.Ct. 1028, 39 L.Ed.2d 123 (1974).[7] Thus, Countrywide's argument as to irreparable injury appears to be reduced to simply having to undergo what it considers an intrusive and invasive "investigation" by a government agency which Countrywide believes to be acting beyond its statutory powers.

In analyzing the potential for any irreparable injury that Countrywide may suffer if its *Stay Motion* is denied, it is first important to be clear on the current status of this matter. It appears that many of the activities contemplated by the Court's

6. Based on the issues for appeal as framed by Countrywide, the Court has serious doubts about whether Countrywide has preserved for appeal the question of the UST's power, in the broad sense, as the Court portrays it here. For purposes of appeal, nowhere does Countrywide simply phrase the issue as to whether or not the UST possesses the power pursuant to 11 U.S.C. § 307 to schedule and conduct a *Rule 2004* exam which was the central focus of Countrywide's objections in the underlying matter. Nevertheless, for purposes of this analysis, the Court will assume the "broad issue" has been preserved.

7. Even if such a consideration were relevant, Countrywide has failed to offer any record proof to support such a finding.

April 1st Order have already been completed. Countrywide has already turned over approximately 6600 pages of documents to the UST. These are related to the Countrywide policies and procedures described in Categories 1–4 of the document requests, and presumably, the individual loan history, Categories 5–12, for the Debtor in the *Hill* case. Furthermore, the UST has already examined some Countrywide witnesses with respect to the policies and procedures. At the oral argument on the *Stay Motion*, counsel for the UST indicated that the only documents remaining to be turned over by Countrywide are the individual loan histories of the Debtors in the other six context cases and that the scope of the remaining *Rule 2004* exam that the UST seeks to conduct would be limited to those materials and an exploration of whether there is any thread of potential wrongdoing by Countrywide among all of the context cases as outlined in the April 1, 2008 Memorandum Opinion.

In other words, a good part of the "discovery" which formed the backdrop for the Court's decision, including the part that Countrywide had initially argued would be most intrusive, has already occurred and would not be undone by a stay.[8] A stay would only prevent Countrywide from having to turn over the loan histories of document Categories 5–12 in the other six context cases and to produce one or more witnesses to be examined about those documents and any potential thread of wrongdoing. In these circumstances, Countrywide is only able to show a minimal level of irreparable harm if the stay is not granted.

Countrywide cannot have a high expectation of privacy interest in the documents yet to be produced. These relate only to the loan histories of six Debtors, each of which has signed a document consenting to the release of their loan histories to the UST. These are not the type of confidential or trade secret documents that Countrywide might reasonably expect could be shielded from outside review. Moreover, these are just the type of documents that would routinely be requested and turned over by litigants involved in a dispute as to the amount owed on a loan. In fact, the Court has previously noted that the loan histories for these other cases would be discoverable in the *Hill* case pursuant to Fed.R.Evid. 404(b) and 406 to show intent, preparation, plan, absence of mistake, or conduct in conformity with the routine practice of Countrywide. *See In re Countrywide Home Loans, Inc.*, 2008 WL 868041 *24. Thus, even if this Court is found to be wrong on appeal, it is difficult to see how Countrywide would have been irreparably harmed in the mean time by having to turn over these documents.

The *Rule 2004* exams that would proceed if the *Stay Motion* is denied could potentially be somewhat more intrusive, if only because the inherent nature of a witness examination makes it more burdensome then being required to simply turn over documents. Even here, however, it is difficult to see how Countrywide would in any meaningful sense be irreparably harmed if no stay is granted and this Court is ultimately reversed on appeal. The subject matter and the scope of the

8. It needs to be reiterated that Countrywide voluntarily agreed to turn over the documents in Categories 1–4. Generally speaking, those are the documents relating to Countrywide's policies and procedures for dealing with bankruptcy cases. Prior to agreeing to the voluntary turnover of the documents, they were the focal point of Countrywide's argument as to the intrusiveness of the UST's inquiry. Not only have these documents already been produced, Counsel for the UST represented to the Court at the oral argument that Countrywide witnesses have already been examined about the policies, apparently with no objection by Countrywide.

proposed *Rule 2004* exam is well-defined by the Court's April 1, 2008 Memorandum Opinion and Order. At the oral argument, Counsel for the UST confirmed that the only remaining purpose to be covered in the exam would be the individual Debtor loan histories in the other six context cases and the common thread of any potential wrongdoing among the context cases. The Court takes the word of the UST on that matter and would further note that nothing of record to date would preclude Countrywide from seeking a protective order if the UST were to try to exceed the permissible scope of the exam.

At bottom, the ultimate irreparable harm that Countrywide seems to be claiming it will experience if a stay is not granted is the mere fact of having to produce documents and undergo an examination that it would have been able to avoid if its position is vindicated on appeal. That certainly counts for something although it is highly questionable whether it, alone, can serve as a sufficient basis for a finding of irreparable injury. Courts have been sensitive to the potential harm that could be caused if a litigant is required to turn over privileged or confidential materials pending an appeal challenging a ruling on the protected nature of the materials. *See, e.g., Joint Stock Soc. v. UDV N. Am., Inc.*, 104 F.Supp.2d 390, 406 (D.Del.2000) (court would stay order unsealing putatively protected materials to allow defendant to pursue an appeal because once the materials were unsealed any rights or interests defendant was seeking to protect would be lost). However, in the present case, Countrywide does not appear to be arguing that the documents and other information (i.e., testimony) to be disclosed is protected in and of itself because of some privilege or secrecy concern. Rather, it appears Countrywide is only alleging that it is "protected" in the sense that the UST does not have the *authority* to obtain the information. While the issue of the UST's authority is clearly a significant one, under the circumstances of this case, the Court does not believe Countrywide would be irreparably harmed if a stay is not granted.

One final point to consider with regard to this factor is whether irreparable harm can arise because of the possibility that Countrywide's appeal could become "moot" if a stay is not granted. Countrywide did not raise this as an issue in the *Stay Motion* although it did feature prominently as part of the April 23, 2008 oral argument presented by Counsel for Countrywide. In general, the Court does not approve of the practice of raising issues at oral argument that are not even addressed in the corresponding motion or brief of the party. Such a tactic is unfair to opposing counsel and to the Court. Nevertheless, the Court will overlook any issue of waiver or unfairness in this case and examine Countrywide's argument.

Countrywide relied largely on the decision of *In re Cujas, supra*, where the court, referring to *In re Adelphia Commc's Corp.*, 361 B.R. 337 (S.D.N.Y. 2007), concluded that upon review of the relevant case law, the majority view holds that "risk of mootness," standing alone, does not constitute irreparable harm while a significant, minority view recognizes that the potential loss of a party's appellate rights through the mootness doctrine may constitute irreparable harm. *See Cujas*, 376 B.R. at 487. The *Cujas* court elected to adopt the minority view, but with a significant caveat, stating:

> Thus, in considering the [stay] Motion, I accept the proposition that the potential loss of a party's appellate rights through the mootness doctrine may constitute irreparable harm. I hasten to add, however, that the existence of such harm is no guarantee that an appellant is enti-

tled to a stay pending appeal. It is also necessary to go one step further and consider the nature of the underlying dispute and the harm that the loss of appellate rights may have on the moving party. That harm must then be balanced against the potential harm other parties may suffer if the stay is granted.

Id.

The Court's initial reaction is that there may be some merit to the minority view as adopted in *Cujas*. However, there is no need to make a decision whether that same view should be adopted here because Countrywide's argument founders on a preliminary point, *viz.*, it has not shown that its appellate rights would be rendered moot if a stay is not granted. Even assuming that denial of a stay would mean that Countrywide will have turned over the remaining documents and presented witnesses for examination before its appeal can be heard, that does not mean the appellate court could not provide relief. In analogous circumstances appellate courts have rejected mootness arguments because they have noted that if it is determined that the required discovery under review is found to be unlawful they can still provide a remedy of requiring the return of documents and possibly issuing a future-use injunction against the use of witness testimony. *See, e.g., In re Grand Jury Investigation*, 445 F.3d 266, 270–73 (3d Cir.2006) (appeal of order compelling attorney to produce his notes and to provide testimony was not moot even though attorney had already complied). These same potential remedies would be available to Countrywide, and thus it cannot show that its appellate rights would be made moot if a stay is not granted.

(3) *Substantial Harm to Other Parties in the Litigation*

[8] Countrywide argues that neither the Debtors in the context cases nor the UST will suffer substantial harm if a stay is granted. The Court is inclined to agree with Countrywide on this point. With respect to the Debtors in the six context cases other than *Hill*, Countrywide correctly points out that in most of the cases the purported misconduct by Countrywide occurred quite some time ago and the Debtors in those cases have either resolved any dispute they had with Countrywide over it or have not pursued it. As to *Hill*, the Debtor in that case does have an ongoing and unresolved dispute with Countrywide concerning Countrywide's post-discharge activities that is the subject of an Amended Motion to Enforce Discharge filed by that Debtor. That Motion is the subject of a scheduling order with discovery set to end on May 16, 2008, and a final pre-trial conference set for June 24, 2008. However, even if the Court were to grant a stay in the present matter, that would not prevent the parties in *Hill* from proceeding with discovery and with the presentation of the Debtor's case on her Motion.[9] It thus appears that none of the

9. Although the UST is not formally a party to the Amended Motion to Enforce Discharge in *Hill*, she along with the Chapter 13 Trustee have been participating in that matter. Near the end of the status conference held in that case on December 20, 2007 the Court stated it would schedule an evidentiary hearing after a period of discovery, which was to include the UST and the Chapter 13 trustee as participants in discovery. (*See Transcript of Status Conference*, December 20, 2007, at 20, Document). In regard to this approach, Counsel for Countrywide raised no objection to the effect that the UST or the Chapter 13 Trustee should not be permitted to engage in discovery. On December 21, 2007, a scheduling order (Document No. 103) was entered confirming that both Trustees were permitted to engage in discovery in *Hill*. Countrywide never raised any objection to this Order or sought reconsideration of it. The UST thereafter served discovery requests on Countrywide.

Debtors would be substantially harmed by the grant of a stay.

The UST claims she will be substantially harmed if a stay is granted because "a stay pending appeal would preclude the United States Trustee from conducting the examination as contemplated by the [April 1, 2008] Order even if the District Court were to affirm the Order." UST's *Response* at ¶ 17. It is not readily apparent what the UST means by this, since if she is successful on appeal there would not seem to be anything to preclude the UST from then conducting a *Rule 2004* exam, even if it is after the May 16, 2008 discovery deadline in the *Hill* contested matter, which is not a deadline applicable here. Perhaps the UST is concerned that the *Hill* contested matter will be completely resolved by the time this appeal is concluded, leaving the UST without a "vehicle" for conducting the *Rule 2004* examination, or perhaps vulnerable to a renewed challenge by Countrywide on grounds of *res judicata* or mootness. The Court will not presume substantial harm to the UST on the basis of such a speculative possibility.

[9] Additionally, it is significant that any harm that the UST may face if a stay is granted would be largely self-inflicted. In two separate actions in Florida bankruptcy courts several months ago the UST obtained court orders authorizing essentially unfettered *Rule 2004* exams of Countrywide. *See In re Del Castillo,* Case No. 07–13601–AJC (Bankr.S.D.Fla.2007) (Order of November 28, 2007, Document No. 132) and *In re Chadwick,* Case No. 05–37014–PJH (Bankr.S.D.Fla.2005) (Order of December 10, 2007, Document No, 86).[10] The Court understands that Countrywide attempted to take appeals from those orders, but was rebuffed because the orders in question were found to be interlocutory. The Court is unaware of any present impediment to the UST conducting a *Rule 2004* exam of Countrywide pursuant to the orders in the Florida cases and made inquiries to Counsel for the UST along those lines at the oral argument on the *Stay Motion.* Counsel confirmed that the UST

Countrywide provided answers. In late January 2008 Countrywide filed an Amended Motion for Protective Order (Document No. 127) against the Debtor and the Chapter 13 Trustee, only. At the hearing on that Motion, Countrywide noted that it had previously responded to the UST's discovery and the UST was not involved in the Motion. *(See Transcript hearing on Amended Motion for Entry of Protective Order,* February 14, 2008, at 30, Document No. 160). Later in that same hearing Countrywide made a request to withdraw the Amended Motion for Protective Order because of an agreement it reached with the Debtor and the Chapter 13 Trustee during a recess in the hearing. The Court granted that request. A few days later Countrywide filed a Motion for Entry of Consent Order Regarding *Countrywide Home Loans, Inc.'s Motion for Protective Order and Discovery Deadlines* (Document No. 153) which included an acknowledgment that the UST was part of the discovery process in that case. On February 20, 2008, the Court signed the proposed Consent Order. It too includes a representation that "discovery will close for all parties, including the UST, on April 16, 2008". (Document No. 154). (Note: the discovery deadline was subsequently extended to May 16, 2008 at request of the Parties).

The Court has gone through this rather lengthy recitation to make clear its view that Countrywide has consented without objection to the UST's participation in discovery in the *Hill* matter and that the UST's status in that regard represents the law of that case.

10. The existence of these cases was initially brought to the attention of this Court in a brief filed by the UST in this matter (Document No. 31 at 11–12), and in the reply brief filed by Countrywide (Document No. 34 at 4). The Court may take judicial notice of the court records from these cases. *Oneida Motor Freight, Inc. v. United Jersey Bank,* 848 F.2d 414, 416 n. 3 (3d Cir.1988), *Total Control, Inc. v. Danaher Corp.,* 359 F.Supp.2d 380, 383 (E.D.Pa.2005).

has not attempted to conduct exams in the Florida cases and could only provide some vague legal strategic reason for preferring to lead with an exam in this case rather than there. That is not a sufficient reason for this Court to conclude that the UST would be substantially harmed if a stay is granted.

(4) The Public Interest

[10] The final point for consideration is whether it would be in the public interest to grant a stay. This factor does not tip decidedly in either direction. On the one hand, if Countrywide is doing anything improperly with respect to its policies and procedures for pursuing claims against debtors in bankruptcy, it would obviously be in the public interest for that to be determined and corrected as soon as possible, something that would argue against the grant of a stay. On the other hand, it is also clearly in the public interest that a governmental agency, such as the UST, not be permitted to intrude into the private affairs of a business by overstepping its authority, something which may counsel in favor of granting a stay while this important matter is decided on appeal.

There are thus good arguments on both sides of the "public interest" issue in this case. Therefore, the Court finds that there will not be a significant difference in the affect on the public interest whether or not a stay is granted.

CONCLUSION

[11] As can be seen from the above discussion, the pertinent factors are mixed at best. As to the first factor, "Likelihood of Success on the Merits", Countrywide has failed to establish that it has a strong likelihood of success on the merits in its appeal of the underlying case. Nevertheless, the issue that Countrywide seeks to pursue on appeal is a substantial and serious one, and that needs to be taken into account in the Court's overall balancing of the stay factors. As to the second factor, "Irreparable Harm", Countrywide has failed to show how it would be injured to any significant degree that could not be remedied by a successful appeal even if a stay is not granted. The cost and expense of complying with the Court's order during the pendency of the appeal is not a relevant consideration. Although it will be required to produce the loan history files for the six, context cases and testimony in regards to the same, Countrywide has not shown any likelihood that it would lose important appellate rights because of the mootness doctrine in the absence of a stay.

The third factor, "Substantial Harm to Other Parties in Litigation," favors Countrywide's request for a stay because there is no good evidence that either the UST or the Debtors would be harmed in any significant way if a stay was entered. Finally, the fourth factor, "Public Interest" is essentially a wash. The public interest is likely to be harmed, albeit only marginally, whether a stay is granted or not.

It can thus be seen that Countrywide has failed to carry its burden with respect to at least two, and possibly three, of the stay factors. Were this Court to apply the standard that the movant must establish every one of the factors in order to be granted a stay pending appeal, it would be clear that the *Stay Motion* must be denied. However, as indicated previously, the Court believes that a balancing approach is more appropriate than a somewhat mechanical test. Thus, even though Countrywide has failed to establish one or more of the stay factors, it is conceivable that a stay could still be warranted if Countrywide can show exceptional merit as to the other factors. The Court finds the following helpful as a guide to conducting the necessary analysis:

> "[i]n considering whether to grant a stay pending appeal, this court assesses movant's chances for success on appeal and weighs the equities as they affect the parties and the public." Thus, the analysis applied is flexible. The "factors, taken individually, are not dispositive; rather, the district court must weigh and measure each factor against the other factors and against the form and magnitude of the relief requested." Under weight-based assessments, when the movant is more likely to succeed, the harm required to be shown is less; if success is less likely, then the harm needed must weigh more heavily in the movant's favor. Therefore, "[w]here the likelihood of success 'is less forceful . . . a movant would have to make a stronger showing of irreparable harm in order to tip the balance of equity in his favor.' "

Honeywell Intern., Inc. v. Universal Avionics Systems Corp., 397 F.Supp.2d 537, 548 (D.Del.2005) (footnotes and citations omitted).

After careful consideration, the Court concludes that the same result is reached when applying the balancing test. Key to the Court's conclusion is Countrywide's failure to demonstrate a likelihood of success on the merits on appeal. The cases make clear that this factor is of prime importance to the question of whether a stay should be granted, to the point that some courts have referred to this factor as a *sine qua non* of the issuance of a stay pending appeal. *See, e.g., Long John Silver's Restaurants, Inc. v. Cole*, 2006 WL 1129403 *1 (D.S.C.2006). While the balancing approach allows a failure to demonstrate a likelihood of success to be overcome if the movant can nonetheless demonstrate that it has a substantial issue to raise on appeal (as the Court assumes Countrywide does), that is only true provided the other factors also militate in the movant's favor. *Honeywell*, 397 F.Supp.2d at 548. In this case, the other factors clearly do not do so. Countrywide has failed to establish that it will be irreparably harmed and has failed to establish that a stay is in the public interest. The Court also finds it significant that the substantial issue Countrywide seeks to raise on appeal will not be lost if a stay is not granted.

After much thought and careful consideration, for these reasons the Court is compelled to find that the overall balancing test favors the position of the UST and therefore concludes that the *Stay Motion* must be denied. An appropriate order will issue.

ORDER

AND NOW, this 3rd day of ***May, 2008,*** for the reasons set forth in the accompanying Memorandum Opinion, which includes the Court's findings of fact and conclusion of law pursuant to Fed.R.Bankr.P. 7052 made applicable to contested matters by Fed.R.Bankr.P. 9014,

It is ***ORDERED, ADJUDGED and DECREED*** that Countrywide Home Loan Inc.'s *Motion for Stay Pending Appeal Pursuant to Fed.R.Bankr.P. 8005* is hereby ***DENIED.***

In re James Joseph CRANSTON, IV, Debtor.

No. 04-36493-WIL.

United States Bankruptcy Court, D. Maryland, Greenbelt Division.

March 3, 2008.

Background: Chapter 13 debtor objected to secured proof of claim based on clients'

ous. Section 18 "solely appl[ies] to work, services, material or equipment furnished under a residential construction contract," and provides for the release of liens on proportionate shares of the residential property upon payment for that proportionate share. N.J.S.A. § 2A:44A–18. Section 18 directs that in the case of condominiums or cooperatives, in which the master deed or declaration, respectively, is filed before the lien attaches, "then the proportionate share shall be allocated in an amount equal to the percentage of common elements attributable to each unit." *Id.* The references to condominiums and cooperatives in this section demonstrate the Legislature's intent to include construction contracts for multiple-unit dwellings as part of the broader "residential construction contracts" definition. To read Section 18 in isolation and without reference to the larger legislative scheme would be against the direct mandate of the New Jersey Supreme Court. *See Craft*, 179 N.J. at 68, 843 A.2d 1076.

Although not considered in the instant appeal, the Court notes that this interpretation is consistent with proposed amendments to the Lien Law drafted by the New Jersey Law Revision Commission.[4] *See* N.J. Law Revision Comm'n, Draft Tentative Report Relating to Constr. Lien Law, at 9 (Sept.2008).

IV. CONCLUSION

For the forgoing reasons, the Bankruptcy Court's September 12, 2007 and April 22, 2008 orders awarding summary judgment to Appellees are affirmed. An appropriate order accompanies this opinion.

4. The Commission was created by the New Jersey State Legislature to simplify, clarify, and modernize New Jersey statutes pursuant to an on-going review of the state's statutes. *See* N.J.S.A. § 1:12A–1 *et seq.*

In re SELECTED CASES IN WHICH the CHAPTER 13 TRUSTEE SEEKS RELIEF AGAINST COUNTRYWIDE HOME LOANS, INC., f/k/a Countrywide Funding Corp.

Ronda J. Winnecour, Trustee, Movant,

v.

Countrywide Home Loans, Inc., f/k/a Countrywide Funding Corp., Respondent.

No. 07–00203 TPA.

United States Bankruptcy Court, W.D. Pennsylvania.

Aug. 14, 2008.

Background: Chapter 13 trustee and residential mortgage lender filed joint motion for approval of proposed settlement resolving the motions to compel that trustee had filed to compel lender to provide loan histories in each of the 293 Chapter 13 cases it which in had filed proofs of claim that were to be dealt with in debtors' proposed plans, out of concern that lender had not properly accounted for payments on mortgage debts.

Holding: The Bankruptcy Court, Thomas P. Agresti, J., held that concerns as to whether proposed settlement adequately protected interests of debtor-mortgagors prevented court from approving proposed settlement in its entirety and in its present form.

Motion granted in part and consideration of motion stayed in part.

1. Bankruptcy ⇐3033

On motion for approval of proposed settlement, bankruptcy court has obli-

gation to scrutinize the settlement to ensure that it is fair and equitable to persons who are not settling, but who will nevertheless be impacted by settlement. Fed. Rules Bankr.Proc.Rule 9019, 11 U.S.C.A.

2. Bankruptcy ⇐3033

On motion for approval of proposed settlement of contested matters arising out of trustee's motions to compel residential mortgage lender to provide loan histories in each of the 293 Chapter 13 cases in which it had filed proofs of claim that were to be dealt with in debtors' proposed plans, bankruptcy court had to be vigilant to ensure that any settlement adequately protected interests of the debtor-mortgagors, especially where impetus for trustee's motions to compel was her concern that mortgage payments were not being properly applied by mortgage lender, and that debtors had been damaged thereby, and where court had denied debtors' motions for leave to join in trustee's motion upon assumption that debtors' interests were adequately represented by trustee. Fed. Rules Bankr.Proc.Rule 9019, 11 U.S.C.A.

3. Bankruptcy ⇐3033

Bankruptcy court could not approve, in its entirety and in its present form, proposed settlement of contested matters arising out of trustee's motions to compel residential mortgage lender to provide loan histories in each of the 293 Chapter 13 cases in which it had filed proofs of claim that were to be dealt with in debtors' proposed plans, as failing to address principal concern that led to filing of motions to compel in the first place, i.e., that mortgage payments were not being properly applied by mortgage lender, and that debtors had been damaged thereby, where entire $325,000 settlement payment was to go to Chapter 13 trustee, with none of it allocated to individual debtors who may have been damaged, and where no definite timetable was set for lender to complete the reconciliation process that it had promised to undertake as part of settlement, nor was any defined procedure identified or put in writing for carrying out this reconciliation. Fed.Rules Bankr.Proc.Rule 9019, 11 U.S.C.A.

4. Bankruptcy ⇐3033

While court could not approve, in its entirety and its present form, proposed settlement of contested matters arising out of trustee's motions to compel residential mortgage lender to provide loan histories in each of the 293 Chapter 13 cases in which it had filed proofs of claim that were to be dealt with in debtors' proposed plans, as failing to adequately protect interests of debtor-mortgagors on whose behalf trustee's motions to compel were filed initially, other aspects of settlement, such as proposals for enhanced communication between Chapter 13 trustee and lender with respect to final accounting process and issuance of "payoff statements" to debtors, appeared to provide solid foundation for overall resolution of issues before court, and warranted stay of court's consideration of motion to approve settlement to provide parties with opportunity to address bankruptcy court's concerns. Fed. Rules Bankr.Proc.Rule 9019, 11 U.S.C.A.

MEMORANDUM ORDER

THOMAS P. AGRESTI, Bankruptcy Judge.

This matter involves 293 Chapter 13 cases in which virtually identical documents entitled ***Trustee's Motion to Compel Countrywide Home Loans Inc., fka Countrywide Funding Corp. to Provide Loan Histories and for Sanctions*** ("Motions to Compel") were filed by Ronda J. Winnecour, the Standing Chapter 13 Trustee for this District ("Chapter 13 Trustee") against Countrywide Home Loans, Inc.

("Countrywide"). The *Motions to Compel* all allege that Countrywide failed to properly post mortgage payments received from the Chapter 13 Trustee in the form of approximately eight "voucher check" payments that were being made by her during the period of 2005–2007 on behalf of the Debtors in the 293 cases. As a result, according to the allegations of the Chapter 13 Trustee, all of the 293 Debtors had been damaged and the integrity of the bankruptcy process was threatened.

On October 18, 2007, the Court entered a Consolidation Order at the above number to allow for a more manageable resolution of the *Motions to Compel.* After the Consolidation Order was signed, a number of the Debtors or their Counsel attempted to formally join in or otherwise actively participate in this matter. At the December 5, 2007 hearing, the Court denied all such requests for several reasons, but primarily because to do otherwise would have needlessly complicated the process, especially since the Debtors' interests would be satisfactorily protected by the Chapter 13 Trustee as implicitly represented by her in filing the *Motions to Compel. See e.g., In re Beverly Charlton,* Case No. 00–11849, Document No. 51 at ¶ 29 (wherein the Chapter 13 Trustee cited her superior knowledge as one of the reasons for bringing the respective action). *See also Chapter 13 Trustee's Report of Fees and Expenses in Response to Order of Court Dated July 15, 2008,* Document No. 129 at ¶ 29 (citing with approval the Court's conclusion to deny joinder requests made by the Debtors because the Chapter 13 Trustee "was best able to pursue the issues presented in the *Motions to Compel*"). At the same December 5, 2007 hearing the Court referred the matter to mediation at the request of the Parties.

At a June 24, 2008 Status Conference the Parties informed the Court that the mediation had been successful and they had reached a tentative settlement subject to approval by the Court. The Court entered an Order that same date, at Document No. 119, directing the Parties to submit a joint motion by July 14, 2008, seeking Court approval of the settlement, including a detailed explanation of the proposed settlement. On July 14, 2008, a ***Joint Motion for Order Pursuant to Bankruptcy Rule 9019 Approving Settlement and Compromise*** ("Joint Motion") was filed at Document No. 122 by the Chapter 13 Trustee and Countrywide. A copy of a ***Settlement Agreement and General Release of Claims*** ("Settlement Agreement") memorializing the proposed settlement was attached as an exhibit to the *Joint Motion.*

Broadly speaking, the *Settlement Agreement* provides for a payment of $325,000 by Countrywide to the Chapter 13 Trustee as reimbursement for expenses purportedly incurred by her in pursuing these matters, together with the implementation of various prospective procedural steps to provide a framework for addressing both the affected Debtors' cases as well as any pending future cases involving Countrywide. None of the settlement money is proposed to go to the respective Debtors or their counsel for the damages originally alleged in this regard by the Chapter 13 Trustee in each of the 293 *Motions to Compel.* In addition to the proposed settlement between the Chapter 13 Trustee and Countrywide, the *Settlement Agreement* also included a discrete, proposed settlement of one of the 293 cases, i.e., the "Thompson Matter", involving the bankruptcy case of *In re Rodney and Lori Thompson,* Case No. 02–22982, upon payment by Countrywide of an additional $7,000 to those Debtors and their attorney.

A hearing date on the *Joint Motion* was set for August 11, 2008. Notice of the

Joint Motion and the hearing date, together with an informative cover letter, were served on the affected Debtors and their counsel of record, as well as the United States Trustee ("UST") informing them that any Response to the *Joint Motion* was required to be filed by no later than August 4, 2008. The Court also ordered that the Chapter 13 Trustee and any attorney who was anticipating receipt of funds and/or compensation from the proposed settlement monies were to file a "standard fee application with the Court including a narrative statement and a detailed breakdown of the time and services, the amount of compensation sought from the settlement funds, the explanation and purpose for payment of the fees or funds to be received and for which approval is sought, and a copy of any fee agreement upon which such payment is based." *See Order dated July 15, 2008,* Document No. 123 at ¶ 5.

Three Responses to the *Joint Motion* were filed. Attorney Frank Yourick, who represents the Debtors in *In re Kevin and Rose Marie Berkavich,* Case No. 04–28578 and *In re George and Dierda Willis,* Case No. 06–21968, filed an ***Objection to Proposed Settlement and Compromise*** ("Yourick Objection"), Document No. 127. Attorney Dennis Spyra, who represents the Debtors in *In re Jerry and Paula Miller,* Case No. 04–23270, *In re Connie Martino,* Case No. 04–30058, *In re Mark Gunkle and Anita Mascuch–Gunkle,* Case No. 05–25571, and *In re Gregory Olslowski,* Case No. 06–22584, filed an ***Objection to Proposed Settlement and Compromise*** ("Spyra Objection"), Document No. 130. The UST filed ***The United States Trustee's Response to Joint Motion for Approval of Settlement and Compromise Between Countrywide Home Loans, Inc, Chapter 13 Trustee Ronda J. Winnecour, and Rodney and Lori Thompson*** ("UST Response"), Document No. 131.

Two "fee applications" were also filed in response to the July 15, 2008 Order. Attorney Dennis Sloan filed ***Application of Dennis M. Sloan & Associates, P.C. for Compensation as Counsel for Rodney E. And Lori M. Thompson*** ("Sloan Application"), Document No. 128, seeking payment of $4,000 in attorney fees out of the proposed settlement proceeds in the Thompson Matter. Also filed in the nature of a fee application was the ***Chapter 13 Trustee's Report of Fees and Expenses in Response to the Order of Court Dated July 15, 2008*** ("Trustee's Report"), Document No. 129. The Court found the *Trustee's Report* to be insufficiently informative and non-responsive to its July 15th *Order* for a number of reasons. As a result, on August 4, 2008, the Court issued a *Supplemental Order,* Document No. 132, directing the Chapter 13 Trustee, along with the law firm that is representing her (Babst, Calland, Clements & Zomnir, P.C.) to file a *Supplement to Trustee's Report* correcting the deficiencies by noon on August 7, 2008, so the scheduled hearing date could go forward as planned.

In advance of the August 11, 2008 hearing, the Chapter 13 Trustee did file a *Supplement to Trustee's Report,* Document No. 134, which the Court also found to be lacking in sufficient information so as to allow it to approve the proposed settlement. Prior to the hearing, the Court caused the Chapter 13 Trustee's Counsel to be informed that the *Supplement to Trustee's Report* remained insufficient but that due to the lack of time for any further corrective action in advance of the hearing, the Court would permit the hearing to go forward as scheduled in the hope that perhaps the necessary information would be furnished at the hearing itself—something

that did not come to pass.[1]

In considering the *Joint Motion* and related filings, and after having now heard from Counsel representing various interested parties at the August 11, 2008 hearing, the Court is guided in its task by the stated, original purpose behind the filings of the *Motions to Compel.* As aptly summed up by the Chapter 13 Trustee herself:

> The Countrywide litigation was commenced by the Chapter 13 Trustee to ensure that Countrywide was timely cashing monthly disbursement checks and properly applying the funds to the affected Debtors' accounts. The Chapter 13 Trustee also wanted to verify that the Debtors' records accurately reflected all of the Chapter 13 Plan payments and that no impermissible fees or expenses were added to the Debtors' accounts as a result of Countrywide's failure to timely cash checks and apply plan payments. Lastly, the Chapter 13 Trustee wanted to promote the integrity of this Court and the Bankruptcy system by seeking full disclosure from Countrywide regarding the status of the Debtors' accounts.

Supplement to Trustee's Report at ¶ 4, Document No. 134 filed August 7, 2008.

[1, 2] The Court is also mindful of its obligation to scrutinize the proposed settlement to ensure that it is "fair and equitable" to the persons who did not settle but who would nevertheless be impacted by the settlement, *i.e.,* the individual Debtors. *See, e.g., In re Nutraquest, Inc.,* 434 F.3d 639, 645 (3d Cir.2006). The need to proceed in such a manner is particularly acute in this case because one of the underlying premises of the *Motions to Compel* was that the Debtors were being damaged by Countrywide's actions (*Motions to Compel* at ¶ 35) and were in fact "those who are most affected by Countrywide's mismanagement" (*Id.* at ¶ 34). Moreover, the Court denied all requests for joinder by individual Debtors because of the explicitly stated assumption, not disputed by the Chapter 13 Trustee, that she would be pursuing this matter on behalf of all the Debtors. *See Transcript of Hearing on Motions to Compel,* December 5, 2007 at p. 26, Document No. 26. The Court must therefore be vigilant in making sure that any settlement adequately protects the interests of these Debtors.

[3] After viewing the proposed *Settlement Agreement* through this lens, the Court has mixed impressions because, although the proposed settlement is commendable in many respects, it does not appear to address all of the critical objectives underlying the stated purposes for filing the 293 separate *Motions to Compel* in the first place.

On the one hand, the Court does not believe the proposed *Settlement Agreement* in its current form has sufficient protections for the remaining 291 Debtors

1. At this same hearing the Court considered and approved a separate settlement between the Debtor and Countrywide in the case of *In re Sharon Hill,* Case No. 01–22574. Although the *Hill* case was one of the 293 in which the Chapter 13 Trustee filed her *Motions to Compel* it has always been on something of a separate footing from the others because the Debtor in that case had already been pursuing relief from Countrywide, through her own counsel, at the time the *Motions to Compel* were filed. (See ***Motion to Enforce Discharge,*** Document No. 59, and ***Amended Motion to Enforce Discharge,*** Document No. 165 filed in *Hill*). Although the Chapter 13 Trustee has never been formally joined as a party in the *Hill* enforcement of discharge matter (a pending motion to that effect by her has yet to be ruled on by the Court, see Document No. 170), she has been an active participant in the process and claims that the case has served as a vehicle for much of the discovery conducted by the Chapter 13 Trustee related to issues raised in this proceeding.

upon whose behalf the *Motions to Compel* were brought.[2] While there definitely appears to be good intention in this regard, the Court is concerned that the essential substance of the *Settlement Agreement* leaves too much open to future contingencies to be worthy of current approval.

At the August 11th hearing, Countrywide and the Chapter 13 Trustee expressed optimism that the "reconciliation process" set forth in the *Settlement Agreement* can be completed expeditiously after settlement approval in such a manner so as to allow for a "prospective" resolution of the "Debtor issues" originally raised by the Chapter 13 Trustee in her *Motions to Compel*.[3] However, no set timetable for doing so is spelled out and there would not seem to be any real impetus for the process to be completed once the settlement is approved. Furthermore, no defined procedure is identified or put in writing, the Parties simply agreeing in concept and "agreeing to agree" to the details of the process at a later time.

Under the *Settlement Agreement*, Countrywide secures its release of future claims related to issues raised in the *Motions to Compel* and the Chapter 13 Trustee is paid. As noted, there is also room for uncertainty as to how the contemplated reconciliation process will turn out. At the August 11th hearing both Parties indicated an expectation that the "reconciliation" would show that no improper fees had been imposed on any of the Debtors' loans, but neither one was in a position to make a commitment to the Court to that effect. To the extent the Parties' optimism in that regard is misplaced, it would be the Debtors who would suffer the consequences, with minimal protection afforded to them at that point by the *Settlement Agreement*.

The Court's concern over the uncertainty surrounding the reconciliation process is compounded by the proposal that the entire $325,000 settlement amount go to the

2. The debtors in *Hill* and *Thompson*, having struck separate settlements with Countrywide, are no longer in the group of Debtors who will need to rely on the proposed settlement between the Chapter 13 Trustee and Countrywide to protect their interests.

3. Although the Parties represented the "reconciliation process" as one of the key features of the proposed settlement, the actual mechanics of that process are left surprisingly vague in the *Settlement Agreement*. *See id.* at ¶ 3(d)(i). Paraphrasing that provision, the Parties have merely agreed that Countrywide will reconcile its records regarding all amounts it believes are due from each of the affected Debtors and then provide that information to the Chapter 13 Trustee. If the Chapter 13 Trustee agrees with Countrywide's figure, the matter is resolved; if the Chapter 13 Trustee disagrees then Countrywide will either adjust its records to conform to what the Chapter 13 Trustee believes the figure should be or provide her with information to show why it believes her records are inaccurate. If the Parties cannot come to an agreement, the matter will be submitted to the Court for determination. This seems to add very little to the process already in place following submission of the Trustee's Final Report and Account, a procedure already available to the Parties. Furthermore, as is indicated above, no time frame is specified for any of this to occur. At the August 11th hearing the Parties informed the Court that they had not yet worked out the details of this reconciliation process but expected to do so after the settlement was approved. The Court is not comfortable with approving a settlement when the implementation of such an important part thereof is still to be determined. The Parties also said that one potential, additional benefit to the Debtors as set forth in this provision of the *Settlement Agreement* is that Countrywide may agree to waive loan charges to the extent its records differ from the Chapter 13 Trustee's. However, without more than that, the Court is unwilling to presume that there will be any such waivers except perhaps with respect to *de minimis* differences, so that aspect of the proposed settlement bears little weight on whether it should be approved.

Chapter 13 Trustee with none of it allocated to the Debtors despite the allegations in the *Motions to Compel* that the individual Debtors had been damaged by Countrywide's actions. The prayer for relief in the *Motions to Compel* ask for a total sanction of $3,000 in each of the cases, with $2,000 to go to the Chapter 13 Trustee and $1,000 to go to counsel for the Debtor. Applying this 2/3–1/3 split as a rough guide, the Court would have anticipated that over $100,000 of the settlement fund would be designated to go to the Debtors or their counsel rather than the $0 that is actually being proposed. Perhaps there is a justifiable reason for such a one-sided allocation, but the information which has been submitted to date concerning the attorney fees and other expenses allegedly incurred by the Chapter 13 Trustee in pursuing this and related matters is not sufficient to make that case.[4]

[4] On the other hand, despite the misgivings expressed above, as noted, there are positive aspects to the proposed settlement as well. The Court is impressed that the Chapter 13 Trustee and Countrywide were able to reach an agreement on what had seemed a potentially intractable dispute, and moreover, an agreement with some praiseworthy features. The proposals for enhanced communication between the chapter 13 Trustee and Countrywide with respect to the final accounting process and the issuance of a "payoff statement" to debtors, among other things, have the potential to significantly improve the Chapter 13 process in this District. For this reason, although the Court is not willing to approve the *Settlement Agreement* in its current form because of its failure to adequately protect the rights of the 291 affected Debtors, the Court nevertheless believes the *Settlement Agreement* provides a solid foundation for an overall resolution of the issues before it. As such, the Court believes the Parties should be given an opportunity to take some additional steps to alleviate the Court's concerns and reservations in approving the *Settlement Agreement* in its current form in hope that a revised settlement can be proposed which ultimately meets with the Court's approval. Therefore,

AND NOW, this ***14th*** day of ***August, 2008,*** with the above as background and for the reasons stated further on the record at the August 11, 2008 hearing, it is hereby ***ORDERED, ADJUDGED and DECREED*** as follows:

(1) The *Joint Motion* is ***GRANTED*** in part, insofar as it seeks approval of the settlement of the "Thompson Matter" upon the terms and conditions as set forth in the current version of the *Settlement Agreement* with the *Sloan Application* to be approved by separate order. In all other respects, consideration of the *Joint Motion* is ***STAYED*** subject to the further provisions of this Order;

(2) ***On or before August 18, 2008,*** Countrywide shall provide the Chapter 13 Trustee with an updated loan history and payoff statement for the loans in the cases involving the *Yourick Objection* and the *Spyra Objection* so as to enable the Chapter 13 Trustee to complete an audit in

4. In fairness to the Chapter 13 Trustee, part of the consideration for the $325,000 settlement amount is designated toward resolution of all claims she may have in the *Sharon Hill* matter. *See n. 1,* above. The Court has previously recognized the contributions of the Chapter 13 Trustee in that specific matter but they are not necessarily related to the issues raised in the *Motions to Compel.* Unfortunately, the *Settlement Agreement* provides no breakdown or allocation of the settlement funds for this purpose. It is for this reason the Court has required the Chapter 13 Trustee to detail her services and expenses in this regard.

those cases, as "test cases", to further support the Parties' belief that no fees or charges of any kind were added to any of the loans as a result of Countrywide's alleged mishandling of any payment voucher checks as set forth in the *Motions to Compel;*

(3) ***On or before September 3, 2008,*** the Chapter 13 Trustee shall file with the Court a ***Status Report*** on the results of her completed audits in the cases involved in the *Yourick Objection* and the *Spyra Objection* (as well as in any other cases in which she may have completed an audit as of that time) with copies of said *Status Report* also to be served on Countrywide, the UST, and Attorneys Yourick and Spyra;

(4) ***On or before September 3, 2008,*** the Chapter 13 Trustee shall file a *Second Supplement to Trustee's Report* to provide additional information, consistent with the requirements of the Court as stated in its prior Orders and at the August 11th hearing, to support the justification for her recovery of attorney fees and expenses as part of the settlement of this matter in manner and form as contemplated by the Court's *Local Rules* as they relate to filing fee applications. *See L.R. 2016–1* and related rules, forms and procedures. In particular, both the Chapter 13 Trustee and her law firm shall provide:

(a) time records that provide detailed explanation of the tasks performed and which, to the extent possible, separately assign time entries to those actions/services involving the present case and those involving the individual proceeding at *In re Sharon Hill,* Case No. 01–22574;

(b) a Category Listing consistent with *L.R. 2016–1* shall be included to show a breakdown, explanation and/or general purpose for the various time entries;

(c) in the case of Chapter 13 Trustee office employees, an explanation as to the basis for the asserted hourly rate to be applied shall be provided, including the job title of the person performing the task as well as identifying paralegal services or simply office staff services; and,

(d) to the extent that any of the time entries may reasonably be deemed to be clerical in nature, a justification as to why the Court should consider them as representing compensable expenses for purposes of determining whether the settlement should be approved. *See generally, In re Busy Beaver Building Centers, Inc.,* 19 F.3d 833 (3d Cir.1994);

(5) ***On or before September 3, 2008,*** the Chapter 13 Trustee and Countrywide shall jointly report back to the Court whether they have been able to reach an accord regarding the modification of the *Settlement Agreement* which would address the concerns of the Court with respect to protection of the Debtors interests in the reconciliation process by either:

(a) waiting to approve any settlement until completion of the reconciliation process as to all remaining 291 cases thereby assuring the identification of any problem issues revealed thereby, and if possible, their respective resolution; or,

(b) providing a mechanism whereby Debtors will be protected by Countrywide agreeing to pay their legal expenses incurred in the event of successfully challenging any amount later to be claimed by Countrywide to be due on any of the affected loans as a result of the issues raised in the *Motions to Compel;* or,

(c) such other approach as will substantially protect the interests of the Debtors if the instant matter is to be

resolved prior to the completion of the 291 reconciliations.

(6) ***On or before September 3, 2008,*** Attorneys Yourick and Spyra shall each file ***Fee Applications*** compliant with *L.R. 2016–1* for all cases involved in this matter in which they allege they are entitled to receive attorney fees or expenses, *provided however,* that they may combine applications for multiple cases into a single application so long as the information they provide is broken down for each individual case involved. ***On or before September 20, 2008,*** any ***Responses*** to the *Fee Applications* shall be filed by any interested parties.

(7) ***On or before September 3, 2008,*** Countrywide shall file a ***Reply*** to the *UST's Response,* particularly addressing the points raised in Paragraphs 8 and 9 thereof requesting clarification as to the scope of the releases provided in the proposed *Settlement Agreement* on any claims or causes of action which the UST has or is currently prosecuting, or in the future may pursue against Countrywide, and the non-disparagement provision found at Paragraph 3(p) of the *Settlement Agreement* (including whether Countrywide is willing to delete or modify it as requested by the UST); and,

(8) A further ***Status Conference*** in this matter is scheduled for ***Thursday, October 2, 2008 at 2:00 P.M.*** in Courtroom D, 54th Floor, U.S. Steel Tower, 600 Grant Street, Pittsburgh, PA 15219.

In re BROKERS, INCORPORATED. Debtor.

Carlton Eugene Anderson, et al, Plaintiffs,

v.

Brokers, Incorporated et al, Defendants.

Bankruptcy No. 04–53451. Adversary No. 04–06074.

United States Bankruptcy Court, M.D. North Carolina, Winston–Salem Division.

Oct. 17, 2008.

Background: Former president of Chapter 11 debtor-development company, who also had served as a director of debtor, brought prepetition state-court action against debtor, and debtor asserted various counterclaims against former president. Matter was subsequently removed to federal court and, following entry of order granting in part and denying in part motions for summary judgment, trial was held.

Holdings: The Bankruptcy Court, Catharine R. Carruthers, J., held that:

(1) former president engaged in "unfair or deceptive acts or practices" within the meaning of the North Carolina Unfair and Deceptive Trade Practices Act (UDTPA);

(2) former president's acts were not "in or affecting commerce" within the meaning of the UDTPA;

(3) although the court imposed a constructive trust as a remedy for former president's constructive fraud and breach of his fiduciary duties, it declined to award a money judgment against former president's wife or her limited liability company (LLC), as third party recipients of the funds subject to the

allow it to proceed with the pending state court ejectment action.

An appropriate Order will be entered.

In re Sharon Diane HILL, Debtor,

Roberta A. DeAngelis, Acting United States Trustee for Region 3, Movant,

v.

Countrywide Home Loans, Inc., Goldbeck, McCafferty and McKeever, and Attorney Leslie Puida, Respondents.

No. 01-22574 JAD.

United States Bankruptcy Court, W.D. Pennsylvania.

Oct. 5, 2010.

Background: Residential mortgage lender, against which order to show cause had been entered why sanctions should not be imposed based, inter alia, on its failure to properly apply postpetition payments from Chapter 13 debtor-mortgagor and trustee, moved to dismiss following comprehensive settlement between lender and the Federal Trade Commission (FTC).

Holding: The Bankruptcy Court, Thomas P. Agresti, Chief Judge, held that lateness of lender's motion to dismiss, after extensive discovery, a long trial, and the filing of proposed findings of fact and conclusions of law, and fact that court was not convinced that matters covered by settlement fully corresponded with matters at issue under order to show cause not convinced that matters covered by settlement fully corresponded with matters at issue under order to show cause, counseled against dismissal.

Motion denied.

1. Bankruptcy ⇐2187

Initial decision whether to issue order to show cause why sanctions should not be imposed is within sound discretion of bankruptcy court, as is ultimate decision whether to impose sanctions.

2. Bankruptcy ⇐2187

Decision whether to dismiss order to show cause why sanctions should not be imposed once it has been issued is akin to decision not to award sanctions, and is subject to same discretionary standard.

3. Bankruptcy ⇐2187

Subsequent settlement between residential mortgage lender and Federal Trade Commission (FTC) did not warrant dismissal of order to show cause that bankruptcy court had earlier entered against this same lender why sanctions should not be imposed based, inter alia, on its failure to properly apply postpetition payments from Chapter 13 debtor-mortgagor and trustee, unilateral changing of monthly payment amount without requisite notice to debtor, her counsel or trustee, and subsequent presentation to debtor's counsel, in attempt to justify increase in payment amount and postbankruptcy foreclosure actions, what purported to be copies of change-of-payment letters mailed to debtor's counsel, but which were actually after-the-fact creations by lender's employee; while FTC settlement purported to be "global" in nature, court was not convinced that matters covered by settlement fully corresponded with matters at issue under order to show cause, lender's motion to dismiss was filed extremely late in process, after extensive discovery, a long trial, and the filing of proposed findings of fact and conclusions of law, and benefit to be gained

by fully airing bankruptcy court's findings, given the occasionally egregious nature of lender's conduct, outweighed any consideration of simply dismissing order to show cause in part.

Donald R. Calaiaro, Calaiaro & Corbett, P.C., Kenneth Steidl, Steidl & Steinberg, Robert O. Lampl, Pittsburgh, PA, for Debtor.

MEMORANDUM ORDER

THOMAS P. AGRESTI, Chief Judge.

Presently before the Court is the ***Motion to Dismiss with Prejudice the Court's July 29, 2009 Amended Rule to Show Cause As to It*** ("Motion"), Document No. 541 filed by Respondent Countrywide Home Loans, Inc. The United States Trustee ("UST") filed a ***Statement in Support*** of the *Motion* at Document No. 547. A ***Response*** by the remaining Respondents, Goldbeck, McCafferty and McKeever and Leslie Puida ("collectively "GMM") was filed at Document No. 553.

The *Motion* seeks dismissal of the *Rule to Show Cause* issued by the Court on July 29, 2009.[1] The basis for the *Motion* is alleged to be "material developments" that have occurred subsequent to the trial on the *Rule* that was held in December 2009, namely, the consummation of a settlement agreement between Countrywide and the Federal Trade Commission effected by a *Consent Order* entered in the Central District of California which is intended to be "comprehensive" and "global" in nature. As part of that settlement, the UST agreed to voluntarily dismiss certain pending adversary proceedings and other bankruptcy-related matters in other bankruptcy courts involving Countrywide. However, since the present matter was initiated by this Court and could not be unilaterally dismissed by the UST, it was agreed that Countrywide would seek dismissal and the UST would support that request, which she has done. GMM generally opposes the *Motion*, but claims that if it is granted the Court should dismiss the entire *Rule*. For the reasons which follow, the *Motion* will be denied.

[1–3] The initial decision whether to issue the *Rule* was within the sound discretion of the Court, and likewise, the ultimate decision whether to impose sanctions. *See, e.g., Chambers v. NASCO, Inc.* 501 U.S. 32, 50, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991), *In re Prudential Ins. Co. of America Sales Practice Litigation Agent Actions,* 278 F.3d 175 (3d Cir.2002), *Arrow Drilling Co., Inc. v. Carpenter,* 125 Fed. Appx. 423 (3d Cir.2005), *Sermak v. Manuel* 194 F.3d 1314 (6th Cir.1999), and *Sumler v. Secretary of Health and Human Services,* 834 F.2d 711, 713 (8th Cir.1987). Although there is scant authority on the test for dismissing a rule once it has been issued, such is obviously akin to a decision not to award sanctions and subject to the same standard of discretion. *See, e.g., Eagle Comtronics, Inc. v. Arrow Communication Laboratories,* 305 F.3d 1303 (Fed. Cir.2002) (court found that district court abused its discretion by not imposing sanctions pursuant to its inherent power where an order, clear and unambiguous on its face, was violated). After considering the *Motion* and all pertinent facts the Court concludes that dismissal is not warranted.

In the first place, in a reversal of the normal pattern, the *Rule* was issued only

1. The Motion mistakenly refers to a "Amended Rule to Show Cause." In fact only one *Rule* was issued.

after extensive discovery had been conducted. In a sense, the UST had to convince the Court that there was sufficient evidence for a rule to show cause to be issued, and that threshold having been crossed, the matter became of institutional interest to the Court. Before it could do so, the Court would have to be presented with a compelling reason to drop the *Rule* in these circumstances. That compelling reason has not been provided.

Secondly, the Court is not convinced that the matters covered in the *Consent Order* fully correspond with the matters at issue under the *Rule.* Despite some broadly-worded language from the UST in the process leading up to the issuance of the *Rule,* by which she tried to couch the present case as an example of alleged national and systemic abuses by Countrywide, when the Court issued the *Rule* it did so only on narrow and well-defined grounds highly specific to the Sharon Hill case. Furthermore, the evidence presented at trial was similarly focused, with the UST making only fleeting references to anything that might be viewed as evidence of a system-wide problem. The Court has reviewed the *Consent Order* attached to the *Motion* and while some of its wide scope may partially encompass the conduct at issue under the *Rule,* it does not fully capture the *Rule.*

Third, the *Motion* was filed extremely late in the process. As noted, extensive discovery was conducted, a long trial was held, closing arguments were made, and proposed findings of fact and conclusions of law were filed—all by early March 2010. The Court was reviewing the voluminous evidence and working on an opinion when Countrywide and the UST filed a "Status Report" on May 20, 2010, in which they stated that they had reached a "conditional resolution" of the issues between them and asked the Court to defer a decision on the *Rule* pending certain conditions precedent to such resolution. In response to that development, the Court put the preparation of the Opinion on the "back burner" and scheduled a hearing for June 11, 2010, to discuss the *Status Report.* At the hearing, the Court informed the Parties that it would not be bound by any "outside" settlement between Countrywide and the UST but would certainly consider any motion to dismiss that might be filed. If such motion was to be filed, the Court anticipated it would be done fairly soon but, in fact, the *Motion* was not filed until more than two months later, by which time the Court had resumed work on the opinion in earnest.

The Court understands that Countrywide's dealings with FTC leading to the settlement in the California court were on a separate track and not tied to this case. The Court is not "blaming" Countrywide in that sense for the late filing here. Nevertheless, the Court is very reluctant to grant a request to dismiss a case at this juncture in the process. For the Court to do so in a matter of this nature would almost seem to be a shirking of its duty.

Fourth, in deciding the *Motion,* the Court had the benefit of effectively completing its opinion on the *Rule* and tentatively concluded that Countrywide would only be sanctioned as to Item 4 of the *Rule*—for filing a false pleading in this Court. That is a matter highly specific to this case and in no sense within the four corners of the *Consent Order.* The Court has since finalized this view, as will be apparent from the opinion on the *Rule* being concurrently issued. Given the finding that the *Rule* will be vacated with respect to Items 1, 2 and 3 contained in it, that may have been a sufficient reason to grant the *Motion* with respect to that part of the *Rule.* Although the Court considered that possibility, it ultimately decided

that the more appropriate approach was to deny the *Motion* in its entirety so that the portion of the Opinion addressing Items 1, 2 and 3 would still be included. Even though sanctions were not imposed against Countrywide for a number of reasons as to those Items, Countrywide's actions were not blameless and were at times, egregious. The Court finds that the benefit to be gained by fully airing its findings outweighs any consideration of simply dismissing the *Rule* in part.

AND NOW, this ***5th*** day of ***October, 2010,*** for the foregoing reasons, it is ***ORDERED, ADJUDGED and DECREED*** that the *Motion to Dismiss with Prejudice the Court's July 29, 2009 Amended Rule to Show Cause As to It* is ***DENIED.***

In re Frank A. AMELUNG and Eugenia Marie Amelung, Debtors.

Michael R. Bakst, Plaintiff,

v.

Robert J. Probst, Defendant.

Bankruptcy Nos. 09–90004–DD, 07–15492–PGH.
Adversary No. 09–80182–DD.

United States Bankruptcy Court, D. South Carolina.

Sept. 17, 2010.

Background: Chapter 7 trustee brought adversary proceeding to set aside transfer in exercise of strong-arm powers as creditor holding an allowed unsecured claim.

Holding: The Bankruptcy Court, David R. Duncan, J., held that prepetition transfer that Chapter 7 debtor made for no consideration, at time when he was indebted to two creditors that currently held allowed unsecured claims against estate, was avoidable by trustee in exercise of strong-arm powers as creditor holding an allowed unsecured claim.

Judgment for trustee.

1. Bankruptcy ⇐2704

Strong-arm provision authorizing trustee to avoid transfer of interest of the debtor in property that is avoidable under applicable law by creditor holding an unsecured claim does not establish any substantive provisions for avoiding transfers, but merely gives trustee the status of unsecured creditor under state law. 11 U.S.C.A. § 544(b)(1).

2. Bankruptcy ⇐2726.1(1)

In strong-arm proceeding to avoid transfer as avoidable under applicable law by creditor with unsecured claim, burden of demonstrating existence of actual creditor with viable, allowed claim is on trustee. 11 U.S.C.A. § 544(b)(1).

3. Bankruptcy ⇐2727(1)

In strong-arm proceeding to avoid transfer as avoidable under applicable law by creditor with unsecured claim, trustee satisfied burden of demonstrating existence of such a creditor by identifying two creditors that held unsecured claims against debtor at time of transfer, and that had allowed claims in bankruptcy case. 11 U.S.C.A. § 544(b)(1).

4. Fraudulent Conveyances ⇐74(1), 206(2)

Under South Carolina law, elements of fraudulent transfer avoidance action depend on status of creditor pursuing cause of action, as creditor in existence at time of challenged transfer or only subsequent

rate parties in the course of a matter of common interest, (2) the communication was designed to further that effort, and (3) the privilege has not otherwise been waived. The Debtor has met that burden. Thus, all 26 documents at issue are protected from discovery. The Debtor is instructed to submit an order under certification of counsel.

Yours very truly,

Christopher S. Sontchi
United States Bankruptcy Judge

In re Sharon Diane HILL, Debtor.

Roberta A. DeAngelis, Acting United States Trustee for Region 3, Movant,

v.

Countrywide Home Loans, Inc., Goldbeck, McCafferty and McKeever, and Attorney Leslie Puida, Respondents.

No. 01–22574 JAD.

United States Bankruptcy Court, W.D. Pennsylvania.

Oct. 5, 2010.

Background: Order to show cause was issued against residential mortgage lender and its attorneys why sanctions should not be imposed for their alleged misconduct in failing to properly credit payments received under Chapter 13 debtor's cure-and-maintenance plan, in attempting to collect what they should have realized was highly doubtful deficiency, and in engaging in allegedly deceptive conduct in settlement negotiations with debtor's attorney and in their representations to bankruptcy court.

Holdings: The Bankruptcy Court, Thomas P. Agresti, Chief Judge, held that:

(1) mortgage lender's mistakes in handling debtor's account did not rise to level of conduct sanctionable in exercise of court's inherent power;

(2) residential mortgage lender's continuing attempts to collect alleged deficiency, even after employees who engage in this collection activity learned that debtor, trustee and bankruptcy court had never been given requisite notice of increase in monthly payment amount and should have realized that there was no deficiency, did not warrant imposition of sanctions;

(3) no sanctions could be imposed on lender for erroneously presenting, as copies of actual change-in-payment letters mailed to debtor, after-the-fact formulations;

(4) false statement in motion to quash notices of Rule 2004 examinations was such as to warrant imposition of Rule 9011 sanctions; and

(5) lender's attorneys also engaged in sanctionable conduct in failing to promptly notify debtor's attorney of fact that change-in-payment letters were never sent, while engaging in settlement negotiations with debtor's attorney, and in deliberately or at least recklessly misrepresenting to bankruptcy court that they had apprised debtor's attorney of fact that letters were never mailed.

So ordered.

1. Bankruptcy ⇐2187

Bankruptcy courts have inherent power, as federal courts, to sanction those appearing before them in order to achieve

orderly and expeditious disposition of cases by controlling conduct of litigants.

2. Bankruptcy ⇐2134, 2187

Bankruptcy court's inherent power to sanction those appearing before it is distinct from its contempt power.

3. Bankruptcy ⇐2187

Level of misconduct that must be found to justify the imposition of sanction pursuant to court's inherent power exceeds that which is merely inadvertent or even negligent.

4. Bankruptcy ⇐2187

Generally, court's inherent power to sanction should be reserved for those cases in which the conduct of party or attorney is egregious, in sense of being conspicuously bad or offensive, and no other basis for sanctions exists.

5. Bankruptcy ⇐2187

While residential mortgage lender failed to properly account for payments that Chapter 13 debtor-borrower made over course of her cure-and-maintenance plan, and also failed to provide requisite notice of changes in payment amount, with result that payment increases were invalid and that it improperly instituted foreclosure proceedings at time when, having successfully completed her plan and made all payments owing after case was closed, debtor was current on mortgage debt, mortgage lender's mistakes did not rise to level of conduct sanctionable in exercise of court's inherent powers.

6. Bankruptcy ⇐2187

Residential mortgage lender's continuing attempts to collect alleged deficiency, even after employees who engaged in this collection activity learned that Chapter 13 debtor-borrower, trustee and bankruptcy court had never been given requisite notice of increase in monthly payment amount and should have realized that there was no deficiency, did not warrant imposition of sanctions in exercise of bankruptcy court's inherent authority, where mortgage lender was able to articulate a legal argument for why deficiency was still collectible, where there was lack of evidence of any pervasive or systematic abuse by lender, and where lender and debtor had entered into settlement which compensated debtor for any injury that she sustained as result of lender's actions.

7. Bankruptcy ⇐2187

While change-of-payment letters that mortgage lender provided to attorney who represented mortgage borrower during her successful Chapter 13 case, to show that it had given requisite notice of increase in debtor-borrower's monthly payment and to demonstrate that there was shortfall in debtor's payments at conclusion of case and that it was justified in pursuing postbankruptcy foreclosure proceedings, did not represent copies of any letters that lender had actually mailed to debtor, her attorney or trustee, but were after-the-fact productions of lower level employee of lender, generated by employee only in attempt to disclose information about debtor's account, no sanctions could be imposed on lender for erroneously presenting these letters to debtor's attorney in belief that they were something else, where lender promptly notified its attorneys after discovering true nature of these letters and was not clearly shown to have been aware of attorneys' failure to immediately pass this information on to debtor's attorney; while lender's failure to adjust its settlement demands after learning of true nature of letters was suspicious, court could not find the egregious conduct required for imposition of sanctions in exercise of its inherent power based upon such circumstantial evidence and inferences that could be drawn therefrom.

8. Bankruptcy ⇐2187

Bankruptcy Rule 9011 is intended to deter the filing of pleadings or other documents with frivolous legal arguments or questionable factual assertions. Fed.Rules Bankr.Proc.Rule 9011, 11 U.S.C.A.

9. Bankruptcy ⇐2187

Imposition of Rule 9011 sanctions is based upon an objective standard of reasonableness under the circumstances; showing of bad faith is not required. Fed. Rules Bankr.Proc.Rule 9011, 11 U.S.C.A.

10. Bankruptcy ⇐2187

False statement in motion to quash notices of Rule 2004 examinations that was filed by mortgage lender's attorney, indicating that lender believed that issues regarding debtor's purported postpetition default related to Chapter 13 trustee's and debtor's failure to adjust their payments "despite having received proper notices of increases in postpetition mortgage payment," was such as to warrant imposition of Rule 9011 sanctions against lender, as party most responsible for this falsehood, where, two weeks prior to filing of this motion to quash, two of lender's employees involved in production of motion had learned that change-of-payment letters were never mailed to debtor, her attorney, or trustee, such that representation was either intentionally false or result of lack of communication between attorney and the four employees of mortgage lender involved in production of motion. Fed. Rules Bankr.Proc.Rule 9011, 11 U.S.C.A.

11. Bankruptcy ⇐2187

Use of the word "believes" to qualify false representation made in motion to quash did not preclude imposition of Rule 9011 sanctions where, pursuant to Rule, any such belief had to be formed after reasonable inquiry, and no such inquiry was present with regard to a representation, even a representation made on belief, which two of the individuals involved in production of motion knew at the time to be false. Fed.Rules Bankr.Proc.Rule 9011, 11 U.S.C.A.

12. Bankruptcy ⇐2187

Mere fact that, at time mortgage lender was participating in production of motion to quash that contained a statement that was demonstrably false and known by two of its employees involved in production to be false, it was also facing a number of other actions by Chapter 13 trustee did not excuse this falsehood or preclude imposition of Rule 9011 sanctions, given lender's status as large entity with extensive resources at its disposal; no credible evidence was presented to show that it would have been impossible, or even unduly burdensome, for lender to comply with its obligations under Bankruptcy Rule 9011. Fed.Rules Bankr.Proc.Rule 9011, 11 U.S.C.A.

13. Bankruptcy ⇐2187

Bankruptcy court's discretion with respect to imposition of Rule 9011 sanctions includes power to impose sanctions on client alone, solely on counsel, or on both client and counsel. Fed.Rules Bankr.Proc. Rule 9011, 11 U.S.C.A.

14. Bankruptcy ⇐2187

Rule 9011 sanctions should fall on client rather than on counsel, where counsel has reasonably relied on client's misrepresentations or client's failure to disclose relevant facts; however, attorney's reliance must be reasonable under the circumstances. Fed.Rules Bankr.Proc.Rule 9011, 11 U.S.C.A.

15. Bankruptcy ⇐2187

Sanction imposed for violation of Bankruptcy Rule 9011 must be limited to that which is sufficient to deter repetition of such conduct or comparable conduct by

others similarly situated. Fed.Rules Bankr.Proc.Rule 9011(c)(2), 11 U.S.C.A.

16. Bankruptcy ⇐2187

Public censure of mortgage lender, for allowing attorney that represented it in filing motion to quash to make factual representation that was known to be false by two of the four employees of lender involved in production of motion, was most appropriate Rule 9011 sanction, where lender had already incurred attorney fees and settlement costs in connection with its conduct and imposition of additional monetary penalty would have minimal further effect. Fed.Rules Bankr.Proc.Rule 9011(c)(2), 11 U.S.C.A.

17. Bankruptcy ⇐2187

Absent any evidence that local counsel representing mortgage lender in proceedings in bankruptcy court had ever passed on to lender's main attorneys a bankruptcy judge's suggestion that counsel consult two recent decisions of court, these main attorneys, in connection with later order to show cause why they should not be sanctioned for their conduct in bankruptcy case, would not be required to justify their conduct in light of these judicial decisions.

18. Bankruptcy ⇐2187

Bankruptcy court's doubts as to whether residential mortgage lender's attorneys truly believed that lender was entitled to collect alleged deficiency, despite fact that it had never mailed change-in-payment letters to Chapter 13 debtor, debtor's attorney or bankruptcy trustee to notify them of increase in monthly payment as required by bankruptcy court order, or whether explanation that attorneys offered for why they had this belief was an after-the-fact rationalization which attorneys invented only to avoid being sanctioned for continuing to engage in their collection efforts after learning that these change-in-payment letters were never mailed, was insufficient basis upon which to impose sanctions in exercise of court's inherent powers.

19. Bankruptcy ⇐2187

Residential mortgage lender's attorneys engaged in conduct sanctionable by bankruptcy court, after learning that mortgage lender had never mailed to Chapter 13 debtor-borrower, debtor's attorney or bankruptcy trustee the change-in-payment letters on which lender relied in asserting that their was postpetition deficiency in debtor's payments, in failing to promptly notify debtor's attorney of this fact while engaging in settlement negotiations with him and in deliberately or at least recklessly misrepresenting to bankruptcy court that they had apprised attorney of fact that letters were never mailed.

20. Bankruptcy ⇐2187

On order to show cause why sanctions should not be imposed on mortgage lender's attorneys, not just for presenting to Chapter 13 debtor-borrower's attorney, as copies of change-in-payment letters supposedly mailed to debtor, after-the-fact compositions of lender's employee, but for failing to promptly notify debtor's attorney of true nature of these letters once they discovered the truth, and while they engaged in settlement negotiations with debtor's attorney, burden was upon mortgage lender's attorneys to prove that they had given prompt notice.

21. Attorney and Client ⇐32(14)

Attorney who holds out false letters to opposing counsel as being real, even if innocently so, and then subsequently becomes aware of their falsity, has obligation to correct matters by informing opposing counsel.

22. Bankruptcy ⇐2164.1, 3030

Attorney's loyalty to bankruptcy court, as an officer thereof, demands integ-

rity and honest dealing with court, and when attorney departs from that standard in conduct of case, he perpetrates a fraud on court.

23. Attorney and Client ⇐32(4)

If adversary system of justice is to function according to design, court must assume that attorney will observe his responsibilities to legal system, as well as to client.

24. Bankruptcy ⇐3030

Firm attorneys who had knowledge, in light of privileged e-mails of which they were aware, of misleading nature of testimony of member of firm in proceedings in bankruptcy court had duty to take some remedial action, even though it could potentially require divulging attorney-client privileged material.

25. Bankruptcy ⇐2129, 2187, 3030

Conduct of counsel in permitting another attorney in his firm to "sign" document on behalf of counsel, even though counsel did not review document in question before it was filed with bankruptcy court, and even though attorney using signature stamp was not member of bar of bankruptcy court and was not admitted pro hac vice to appear before it, was deceptive and violative of spirit, if not the letter, of Bankruptcy Rules. Fed.Rules Bankr.Proc.Rules 9010(a), 9011(a), 11 U.S.C.A.

Patrick S. Layng, Esq., Chicago, IL, United States Trustee.

Lisa D. Tingue, Esq., Norma Hildenbrand, Esq., for United States Trustee.

Thomas A. Connop, Esq., Dallas, TX, Dorothy A. Davis, Esq., Pittsburgh, PA, for Countrywide Home Loans, Inc.

Francis Manning, Esq., for Goldbeck, McCafferty and McKeever/Atty. Leslie Puida.

MEMORANDUM OPINION AND ORDER

THOMAS P. AGRESTI, Chief Judge.

Presently under consideration by the Court is a ***Rule to Show Cause Order*** ("Rule") issued by the Court on July 29, 2009, at Document No. 465, by which the Respondents were directed to establish cause as to why they should not be subject to "public censure, monetary sanctions, restrictions on the right to appear before this Court or any combination thereof" for seven, specifically identified areas of potentially sanctionable conduct.[1]

The *Rule* arises from the allegation by the UST in her *Amended Motion for Rule to Show Cause,* Document No. 236, that the Respondents engaged in sanctionable conduct with respect to post-discharge collection efforts on a mortgage loan obligation of Sharon Hill, the Chapter 13 Debtor. There is a dense factual background that must be considered by the Court in reaching a decision on whether sanctions should be imposed. Before turning to a detailed review of the facts, however, it may be beneficial to provide a thumbnail sketch of the event that more than anything else caused a seemingly routine post-discharge dispute to snowball

1. The Court's jurisdiction to hear and determine the *Rule to Show Cause* it issued arises under *28 U.S.C. §§ 1334* and *157* as well as the inherent power of the federal courts which includes *11 U.S.C. § 105.* This is a core matter pursuant to *28 U.S.C. § 157(b)(2)(A).* This Opinion constitutes the Court's findings of fact and conclusions of law pursuant to *Fed.R.Bankr.P. 7052* made applicable to contested matters pursuant to *Fed. R.Bankr.P. 9014.*

into an involved proceeding that has been ongoing for several years in this Court.

The event in question occurred on December 20, 2007, during a hearing on a *Motion to Enforce Discharge,* Document No. 59 ("Motion to Enforce"), which the Debtor had filed against her mortgage servicer, Respondent Countrywide Home Loans, Inc. ("Countrywide"), on June 25, 2007. The *Motion to Enforce* alleged that the Debtor's mortgage to Countrywide had been brought current during the course of her 60–month Chapter 13 plan, as evidenced by a March 9, 2007 Order, Document No. 46, ("Cure Order") issued after the completion of the plan. The *Motion to Enforce* further alleged that as soon as the Chapter 13 Trustee completed making payments in the case, the Debtor herself seamlessly began making regular monthly payments due under the mortgage to Countrywide to keep it current. Despite that, shortly after the discharge, Countrywide began attempting to collect on the mortgage and asserted that the Debtor was more than $4700 in arrears on the mortgage.

At the time the *Motion to Enforce* was filed, the Hill case was assigned to the Honorable Jeffery A. Deller and he held several hearings on the *Motion to Enforce,* continuing the matter in each instance at the request of the Parties. On November 19, 2007, responsibility for deciding the *Motion* was transferred to the Undersigned as part of an overall consolidation and assignment of some matters involving Countrywide and its practices in a number of cases within this District. *See* Document Nos. 86, 88, 90, 94 and 96. *See also* Misc. Nos. 07–00203–TPA and 07–00204–TPA. Following this reassignment, the December 20, 2007 hearing was the Undersigned's first opportunity to consider the *Motion to Enforce.*

Prior to the hearing the Court reviewed the relevant pleadings and it quickly became apparent that the *Motion to Enforce* might become far more involved than could have been reasonably anticipated based solely on a cold reading of the documents. The first person to speak, Debtor's Counsel Julie Steidl ("Ms. Steidl") [2], made a rather startling announcement. In reviewing the file in preparation for the hearing she had discovered that a photocopy of a payment change letter that had been produced by Countrywide in discovery (one of three such letters) that appeared on its face to be a letter dated September 22, 2003 from Countrywide to the Debtor, with a copy shown going to the Chapter 13 Trustee and to Debtor's counsel, indicated an address for Counsel's office at "Suite 2830 Gulf Tower, 707 Grant Street," Pittsburgh, PA. That was puzzling to counsel—and the Court as well—because Ms. Steidl reported that on September 22, 2003 the office was still located at 210 Grant Street; Counsel's office did not move to the present "707 Grant Street" address until October 27, 2003. Countrywide's counsel, Leslie Puida ("Puida"), one of the Respondents here, replied that the Payment Change Letters had not been held out as genuine, but were merely a convenient vehicle to show payment changes that had occurred in the mortgage over the years. Nevertheless, there were enough questions raised by the Letters and Counsel's explanation of them that the

2. In this Opinion the Court will generally use the full name the first time a person is mentioned and use only the last name thereafter, with two exceptions. First, both Julie Steidl and her law partner and husband, Ken Steidl, represented the Debtor, so they will be referred to as "Ms. Steidl" and "Mr. Steidl" to avoid confusion. Second, there was a Countrywide employee named Kimberly Hill (no relation to Debtor), so her full name will always be used.

Court permitted discovery, and ultimately issued the *Rule* which was the subject of the trial.[3]

This *Opinion* will begin with findings of fact and then move into a legal discussion, wherein any further factual amplification will be made as necessary. For the reasons that follow, the *Rule* will be vacated with respect to the first three of the "counts" directed against Countrywide, but sanctions will be imposed as to the fourth count. As to Goldbeck, McCafferty and McKeever ("GMM") and Puida, the Court finds that the *Rule* should be vacated with respect to the first count directed against them, but that sufficient evidence exists which require the imposition of sanctions the remaining two counts of the *Rule.* Therefore, a further hearing will be scheduled as to those Respondents limited to the issue of an appropriate sanction.

FACTS

Roberta A. DeAngelis is the acting United States Trustee for Region 3 ("UST"). Countrywide is incorporated under the laws of the State of New York and maintains its principal place of business in California. At all relevant times Countrywide was a servicer of consumer mortgages in the United States. GMM was, and is, a law firm with a business address of Suite 5000 Mellon Independence Center, 701 Market Street, Philadelphia, Pennsylvania. Puida is an attorney licensed to practice law in the Commonwealth of Pennsylvania. She is employed by GMM and is admitted to practice before the United States District Court for the Western District of Pennsylvania. GMM is primarily owned by two partners, attorney Michael McKeever and attorney Gary McCafferty, with each owning 47% of the firm, and the rest owned by others, including Puida, who owns 1%. As explained further below, GMM and Puida represented Countrywide at all relevant times herein in connection with the matters involving the Debtor.

On March 19, 2001, the Debtor, appearing *pro se,* filed a voluntary Chapter 13 Petition in the United States Bankruptcy Court for the Western District of Pennsylvania. On or about April 16, 2001, National City Mortgage Company ("National City") filed a proof of claim asserting a $7,210.89 arrearage on the Debtor's home mortgage. The mortgage and note was a fixed rate loan, so principal and interest never changed. At some time around June, 2001 the Debtor retained attorney Kenneth Steidl ("Mr. Steidl") to represent her. On June 15, 2001, Mr. Steidl filed an *Amended Plan* on behalf of the Debtor (Doc. No. 12). Under the terms of the *Amended Plan,* the Debtor proposed to pay National City, an estimated amount of $7,930 over 45 months to cure her prepetition mortgage arrearage, together with her post-petition mortgage payments. National City did not object to the *Amended Plan.*

An *Order Confirming Plan as Modified* ("Confirmation Order") was entered on July 3, 2001 (Doc. No. 14), which provided, *inter alia,* that "[a]ny creditor whose payment changes due to variable interest rates, change in escrow, or change in monthly payment shall notify Trustee and the Debtor at least 20 days prior to the change taking effect." This language is consistent with this Court's Chapter 13 Procedure # 9, which became effective July 1, 2004, and states:

> All notices of postpetition monthly payment changes must be served on the debtor, debtor's counsel and the Trustee. This applies not only to the mortgage changes but to any monthly payment currently being paid by the

3. *See* Page 26 of this *Opinion* for the specific Items of inquiry as set forth in the *Rule.*

Trustee. Service of such a notice shall not be construed as a violation of the automatic stay.

Thereafter, the Debtor made her regular plan payments to the Chapter 13 Trustee. The Trustee then disbursed plan payments in accordance with the *Amended Plan* including the required payments to National City.

On June 23, 2003, a *Notice of Transfer of Claim* was filed with the Court, stating that the Debtor's loan was being transferred from National City to Countrywide effective July 1, 2003. On June 25, 2003, a few days prior to Countrywide acquiring the Debtor's loan, the Chapter 13 Trustee made a payment, check # 0374360, in the amount of $971.74 to National City. This payment was not credited to the Debtor by National City prior to the transfer of the loan to Countrywide on July 1, 2003. Upon transfer of the Hill loan, Countrywide failed to account for all of the *Amended Plan* payments previously made to National City by the Trustee. Countrywide's loan history only reflected that Debtor's post-petition mortgage payments were paid through March 2003 (due for April 2003), rather than June 2003 (due for July 2003). Upon acquisition of the loan Countrywide was therefore wrong in the paid-through date by three months.

Under Countrywide's internal procedures, when a loan is in bankruptcy, it is the responsibility of a case technician in Countrywide's Bankruptcy Department to order an escrow analysis on an annual basis. The escrow analysis is completed by the Escrow Department and a report is sent to an assistant manager and manager in the Bankruptcy Department where any necessary payment change letters are supposed to be generated. On October 22, 2003, Countrywide audited the Chapter 13 Trustee's website as to the Debtor's loan and discovered that check # 0374360 had not been applied to the Debtor's account, but for whatever reason, it did not correct that omission at that time. On October 25, 2004, Countrywide conducted an escrow analysis and changed the Debtor's stated monthly payment amount to $639.98 from $486.31, effective on December 1, 2004. However, despite the notice requirements in the *Confirmation Order* and this Court's Procedure # 9, Countrywide failed to provide notices of this payment change to the Debtor, her attorney, or the Chapter 13 Trustee. Subsequently, Countrywide applied the increased payment amount to the Debtor's account eight times between December 2005 and February 2007. Contrary to its own procedures, as well as the requirements of the *Real Estate Settlement Practice Act,* see *12 U.S.C. § 2609* and *24 C.F.R. § 3500.17(c)(3),* Countrywide failed to do an annual escrow analysis on the Debtor's account in 2005 or 2006.

On February 1, 2007, the Chapter 13 Trustee filed an *Application for Approval of Final Report of Completion of Chapter 13 Plan* ("Application"), together with a proposed *Order,* Document No. 43. The *Application* reflected that all plan payments required under the *Amended Plan* had been paid and the mortgage payments were current through the December 6, 2006 mortgage payment. The Trustee's last distribution to Countrywide was made on November 22, 2006 in advance of the December 2006 regular monthly mortgage payment. During the course of the *Amended Plan,* the Debtor fully paid her mortgage arrearage of $7,210.89 as set out in National City's Proof of Claim. The Chapter 13 Trustee made arrearage-related disbursements of $4,007.19 to National City and $3,203.70 to Countrywide. In addition, $33,853 was disbursed for current monthly mortgage payments during the course of the *Amended Plan.* The *Appli-*

cation requested, among other things, that the Court enter an order determining that the *Amended Plan* had been completed and was binding on all creditors.

On February 4, 2007, Countrywide was served by first class United States mail with copies of the *Application*, the *Final Report*, the proposed *Order*, and the *Order* setting hearing date at the address it listed on its notice of transfer. Countrywide did not file a response to the *Application* or the *Final Report*. On March 9, 2007 this Court entered an *Order* ("Cure Order"), Document No. 46, which approved the Trustee's Final Report and Account and provided in part:

> Each and every creditor is bound by the provisions of the completed plan, whether or not the claim of such creditor is provided for by the Plan, and whether or not such creditor has objected to, has accepted or had rejected the Plan. All mortgage and other secured debts provided for by the Plan are hereby found to be cured of any and all monetary defaults as of the date of the Trustee's last distribution, and no additional interest, late fees or penalties may be assessed for the time periods or payments due prior to that date.

On March 16, 2007, the Court entered a *Discharge of Debtor after Completion of Chapter 13 Plan* (the "Discharge Order") granting the Debtor a discharge pursuant to *11 U.S.C. § 1328(a)*. Countrywide received actual notice of both the *Cure Order* and the *Discharge Order* on March 19, 2007. Countrywide did not seek reconsideration of or appeal of either the *Cure Order* or the *Discharge Order*. On March 29, 2007, those *Orders* became final and binding. On May 18, 2007, the *Final Decree* was entered and the case was closed.

After the Chapter 13 Trustee finished making mortgage payments under the *Amended Plan*, the Debtor contacted Countrywide service representatives to determine the correct payment amount she should be making. She was not provided with the requested information but was instead told she should "speak to her attorney." The Debtor called Mr. Steidl who told her she should pay the amount she had been paying prior to the bankruptcy. On February 11, 2007, the Debtor made her January and February, 2007, monthly mortgage payments directly to Countrywide with two checks, # 8410 and # 8411, both in the amount of $490.00. The checks were accepted by Countrywide and cashed. On March 7, 2007, the Debtor sent her March 2007, monthly mortgage payment directly to Countrywide, check # 8441, in the amount $490.00. That check was also accepted and cashed by Countrywide.

At some time around March 20, 2007, Countrywide performed a discharge audit on the Debtor's loan. The stated purpose of the discharge audit is to perform a full review of the account while it has been in Countrywide's Bankruptcy Department so as to identify and ensure that all procedures have been followed and that the status of the loan is correct prior to releasing it from the Bankruptcy Department. One part of the audit is apparently designed to compare the Chapter 13 Trustee's disbursements with Countrywide's postings in order to identify and reconcile any discrepancies. In the Debtor's case, the discharge audit failed to reconcile the discrepancies between the Trustee's records and Countrywide's records as noted above and incorrectly concluded that the Debtor did not make payments for June 2005, August 2005, April 2006, November 2006, and January 2007. The audit also failed to correct Countrywide's loan records to reflect a "paid-through" date of March 2007, rather than the October 2006

paid through date, reflected on its loan history.

On March 26, 2007, Countrywide re-instituted the foreclosure process on the Debtor's home that had been interrupted several years earlier by her bankruptcy filing. The "AS–400" [4] for her loan contained an entry dated March 26, 2007, stating that team leaders and managers were advised that the Debtor's bankruptcy was terminated and the appropriate office was to continue with the foreclosure process. Shortly thereafter, the Debtor was contacted by Countrywide and told that she owed money. The Debtor again informed Countrywide personnel that her loan was not in default and that she had successfully completed her bankruptcy and was current in her payments. Despite receiving this information, Countrywide failed to stop the foreclosure process and correct its records. On March 29, 2007, an escrow analysis was performed on the Debtor's loan and the regular monthly mortgage payment amount of $639.98, as calculated by the 2004 escrow analysis, was reduced to $523.82, due to an "escrow overage."

On April 9, 2007, Countrywide sent a *Notice of Intention to Foreclose* to the Debtor which stated that she owed $4,166.16 for missed payments from November 2006 to April 2007. On April 12, 2007, the Debtor once again told Countrywide personnel by telephone that she owed nothing and had received a bankruptcy discharge. On or about April 13, 2007, the Debtor sent her April 2007 monthly mortgage payment, in the amount of $500, to Countrywide, which returned the payment on April 16, 2007, stating it was being returned, "due to less than 1 of 6 p[ayments]/no commitment to cure."

As a result of Countrywide's failure to cease the foreclosure process, the Debtor contacted Mr. Steidl and asked for his help. On April 23, 2007, Mr. Steidl sent a letter to Countrywide at the appropriate address in which he expressed the view that the mortgage should actually be in a current status because of the effect of the *Cure Order* and the uninterrupted payments the Debtor had been making since the completion of the *Amended Plan*. The letter also enclosed several relevant documents from the bankruptcy case, asked Countrywide to adjust its records to show the mortgage was current, and asserted that, if necessary, he would file a motion to enforce discharge. Mr. Steidl never received a reply to this letter.

On May 10, 2007, the Debtor made her May 2007, monthly mortgage payment, in the amount of $523.82, and re-sent her April monthly payment in the amount of $523.81. Countrywide returned the May and April payments on May 16, 2007, stating that $1047.63 was returned, "due to 2 of 7 p[ayments]/no commitment to cure." The Debtor continued to send monthly payments to Countrywide every month, from June through October 2007.

On May 20, 2007, Landsafe Title issued a title report for Countrywide on the Debtor's property and stated, among other things, that bankruptcies "had not been searched" and that Countrywide would provide bankruptcy information. On May 25, 2007, Countrywide made a referral to GMM for purposes of filing a foreclosure action on the Debtor's mortgage [5]. A

4. "AS–400" is the name given by Countrywide to its electronic loan servicing program. All loan servicing information and events are supposed to be entered into the AS–400 system without exception. All Bankruptcy Department employees have access to the AS–400 system.

5. GMM represents secured creditors in New Jersey and Pennsylvania and it has represent-

paralegal at GMM prepared a foreclosure complaint against the Debtor pursuant to the firm's policy. The paralegal used a foreclosure complaint checklist to prepare the complaint, mistakenly answering "No" to the question, "Does the Title Search show any bankruptcy filings." GMM itself did no research on PACER or elsewhere to determine whether the Debtor had filed for bankruptcy. Per GMM firm practice, no attorney was involved in the preparation or review of the foreclosure complaint against the Debtor before it was filed and it was not signed by an attorney, although a signature appearing to be that of attorney Joseph Goldbeck was placed on the signature line.[6]

On June 15, 2007, Countrywide, through GMM, filed the complaint in mortgage foreclosure against the Debtor in the Court of Common Pleas of Allegheny County, Pennsylvania. The foreclosure complaint incorrectly alleged that the mortgage was in default because monthly payments of principal and interest were due and unpaid for November 1, 2006, forward. The complaint demanded payment for unpaid principal, interest, late charges and other fees totaling $37,880.69.

The Debtor took a couple of actions in response to the filing of the foreclosure complaint by Countrywide. One was to file a complaint with the Pennsylvania Attorney General. Her complaint set forth the pertinent facts and questioned how Countrywide could file a foreclosure action when they had been paid. She stated that her attorney had done his best to resolve the matter but "Countrywide just ignores everything." Upon receipt of that complaint, the Attorney General sent a letter to Countrywide advising it that a complaint had been filed and enclosing a copy. Countrywide was requested to respond in writing within 15 days. Countrywide misidentified the Debtor's complaint to the Attorney General and routed it to a technician. It did not conduct an investigation or take any other action to respond to the Attorney General.

The Debtor, acting through Mr. Steidl, also moved to reopen the bankruptcy case and filed the *Motion to Enforce* on June 25, 2007. The *Motion to Enforce* recited the key facts concerning the completion of the *Amended Plan*, the entry of the *Cure Order*, and the Debtor's own payments made after completion of the *Amended Plan* in support of the contention that the mortgage was current. The *Motion to Enforce* asked the Court to enter an order requiring Countrywide to cease its collection efforts and to amend its records to reflect that the loan was current.

On August 1, 2007, Countrywide, through GMM, filed a *Response* to the *Motion to Enforce* at Document No. 73. The *Response* was prepared by Ann Swartz, an attorney at GMM who was not admitted to practice in the Western District of Pennsylvania. Swartz placed the "e-signature" of Puida (who is admitted to practice in this Court) on the signature line of the *Response*. Although it purported to be signed by her, Puida did not assist in the preparation of the *Response* nor did she review it prior to its filing. The *Response* admitted a number of the allegations in the *Motion to Enforce*, but stated that Countrywide lacked sufficient information as to other allegations which were thus deemed denied. A number of "affirmative defenses" were also set forth.

ed Countrywide since 1995. In 2007 it earned roughly $1.8 million in legal fees from Countrywide, approximately 10% of its total revenues.

6. See the further discussion of this point, *infra*. at p. 71–72.

A first hearing on the *Motion to Enforce* was held on August 8, 2007 before the Honorable Jeffery A. Deller after he reopened the case and permitted the *Motion to Enforce* to proceed. Countrywide was represented at this hearing by local Pittsburgh counsel, whose services had been retained by GMM. Judge Deller was advised by local counsel that Countrywide needed some additional time to conduct an investigation into the allegations contained in the *Motion to Enforce.* Judge Deller continued the matter to September 19, 2007, along with giving some cautionary instructions to counsel:

> I read your client's answer and compared it to what the motion recites, which is a simple motion. They talk about the payments [that] were tendered and when we get here your client doesn't have any information. You should know whether payments have been tendered or not. You should know whether payments have been returned or not. These type of institutions keep records to that effect. And to file an answer which says well, we really don't know anything, candidly, is ridiculous....
>
> I'll continue this for a period of 30 days .... you might want to read *In Re Szalinski,* one of my opinions that are online and *in Re Miller.*

See Transcript of Hearing on Motion to Enforce, Aug. 8, 2007, at 4–5, Document No. 123.[7]

At the continued hearing, Countrywide's local counsel again appeared, while Mrs. Steidl appeared for the Debtor. Prior to the hearing, Puida instructed local counsel to raise the issue of post-petition tax payments by Countrywide. Countrywide's theory of recovery based on post-petition payment of taxes is that it was owed for the difference between what it advanced in escrow payments during the postpetition period beginning in July 2003 and what was collected from the Debtor to pay these escrow advances during this same period. Judge Deller questioned the viability of that theory in light of the language in the *Cure Order,* again pointing out that his decisions in *Szalinski* and *Miller* did not allow mortgagees to come in after the fact and seek to collect escrow shortfalls when they failed to follow the proper procedures for doing so during the case. Judge Deller encouraged local counsel to make his client aware of those cases and allowed a further continuance of the matter to October 31, 2007, which he stressed would be the "final hearing" on the matter. *See* Tr. of 9/19/07 hearing at 3–4, Document No. 124.

A number of relevant communications transpired between Countrywide and GMM at around this time concerning the Debtor's loan account. On September 18, 2007, a day before the hearing referred to above, a Countrywide bankruptcy specialist, Kimberly Hill, sent an e-mail to GMM paralegal Christopher Amann. The e-mail included payment change information and with regard to the Debtor's loan, stated:

> The debtor is due 11/1/06–present. Payment amount from 1/2006–4/1/2007 is 639.98. Effective 5/1/07–present the payment is 523.82 per escrow analysis that was done. Thank you.

See UST Exhibit CA; 12/10 tr. at 282.[8] On September 20, 2007, a day after the hearing, Amann sent an e-mail to Kimberly Hill stating in part:

7. For the cases to which Judge Deller made reference, *see In re Miller,* 2007 WL 81052 (Bankr.W.D.Pa.2007) and *In re Szalinski,* 360 B.R. 104 (Bankr.W.D.Pa.2007).

8. Trial was held on December 7–10, 2009. References to testimony at trial are given by date and transcript page.

> Hi Kim, the hearing on debtor's Motion to Enforce Discharge has been continued to 10/31/07. We will need the following information in order to be fully prepared for this hearing.
>
> • Payment amount when your office acquired the loan and each payment change thereafter.
>
> • A payment history from 2003 that shows which monthly contractual and/or postpetition payments were credited with each payment. Please be advised that this information must be received by **October 4, 2007.** Thank you in advance.
>
> Chris

See GMM Exhibit G.

In response to that e-mail, Kimberly Hill accessed the "Impound/Escrow Account Review" screens for the Debtor's loan on Countrywide's AS–400 computer loan servicing system. She then used a letter template to create three documents that reflected the date of each analysis of the Debtor's escrow account, as shown on Countrywide's computer system and the change thereby calculated to the Debtor's monthly mortgage payment, including escrow ("Payment Change Letters"). On their face, the Payment Change Letters appeared to be copies of Letters actually sent from Countrywide, under Kimberly Hill's signature, to the Debtor on the dates of September 22, 2003, October 25, 2004, and March 29, 2007 notifying her of payment changes.[9] *See GMM Ex. G.*

The Payment Change Letters also showed Mr. Steidl and the Chapter 13 Trustee as recipients of copies ostensibly sent on the dates reflected on them. There was no disclaimer or other indication on any of them to show that they were not, in fact, actual copies of authentic letters that were created and sent on the dates shown. In other words, as all Parties concede, in the absence of knowledge to the contrary, it would be reasonable for anyone to believe the Payment Change Letters were copies of actual Letters sent in the mail on the dates shown to the indicated parties.

Kimberly Hill transmitted the three Payment Change Letters along with some other materials to Amann at GMM via e-mail dated September 20, 2007 that stated:

> Chris,
>
> Attached are the payment change letters and the payment ledger for payments received under the bankruptcy. These are the only escrow analysis that have been done on this loan. I've requested the regular loan history to be faxed to you also. Please email me if any additional information is needed. Thank you.

See GMM Ex. G. Kimberly Hill did not include in this e-mail any explanation or disclosure that the Payment Change Letters were actually created on September 20, 2007, or that they had never been sent to the Debtor, her counsel, or the Chapter 13 Trustee. Despite the implication in Amann's email to Kimberly Hill that the materials had to be received by October 4, 2007, for the October 31, 2007 hearing, there is nothing in the record to indicate that any of the materials sent by Kimberly Hill were then forwarded by GMM to Mr. Steidl at this time. Instead, the case appears to have been essentially dormant for the next several weeks.

9. Countrywide admitted that its policies required an escrow analysis to be performed by it each year for loans in bankruptcy. However, despite this policy, none was done for this Debtor's loan in either 2005 or 2006. 12/8 Trial Transcript at 232. Countrywide could provide no explanation for its deviation from its policy with respect to the Hill loan. 12/9 Trial Tr. at 32.

Coincidentally, on October 10, 2010, the Chapter 13 Trustee for this district, Ronda Winnecour, filed *Motions to Compel* against Countrywide in 293 separate Chapter 13 cases, including this Sharon Hill case. Countrywide was served with these motions on October 15, 2010. On October 18, 2010 the UST then filed *Notices of Rule 2004 Exams* in 10 of those 293 cases, including the Hill case, and served them on GMM. Michael McKeever promptly forwarded the *Notices* to his contact at Countrywide, John Smith, the Vice President of Foreclosure, Bankruptcy Real Estate Management.

The combination of these actions by the Chapter 13 Trustee and the UST dramatically elevated the visibility and importance of the Hill case to Countrywide. While it appears to have been previously treated as a relatively low-level matter by Countrywide, it suddenly became a matter of concern to high-ranking individuals at the company such as Smith, his boss Mark Acosta, and Assistant General Counsel Charles Townsend. Outside litigation counsel also became involved by no later than October 24, 2010. At GMM, whereas the matter had formerly been solely the responsibility of Puida, named partners McKeever and McCafferty now became directly involved in the case.

The new-found significance of the Hill case for Countrywide and its attorneys originally seems to have been largely related to the fact that, in regard to the unresolved *Motion to Enforce*, it was an open, pending case, something of potential relevance on the issue of whether the UST had standing and authority to pursue *Rule 2004* exams against Countrywide.[10]

Events occurring between October 24–26, 2007, are key to the Court's decision and must be examined in some detail. As a first step in the case following its new prominence, Puida was apparently asked to prepare a status report on the case because she e-mailed such a report to McKeever and McCafferty on October 24th at 1:07 P.M.[11] This report summarized the status of the case and made reference to the Payment Change Letters,

10. The matter involving the UST's attempt to conduct *Rule 2004* exams was heard at Misc. No. 07-204. The Court conducted a status conference in that matter on November 15, 2007, and the fact that the Hill case was the one ongoing case among the ten in which exams were being sought was prominently featured. In response to a question from the Court as to the limitation on the UST's asserted power to engage in *Rule 2004* exams pursuant to *11 U.S.C. § 307*, counsel for Countrywide stated that the UST could only act in an "active case or proceeding that is not disposed of by res judicata." *Tr. of 11/15/2007 hearing at 30, Doc. No. 29 in Misc. No. 07-204.* After some further discussion about the ten cases in which the UST sought to take *Rule 2004* exams during which the Court expressed some doubt as to whether the UST Could act in old, closed cases, the following exchange occurred between the Court and Countrywide's attorney:

> Court: Let's take the current case that Judge Deller's investigating [i.e., Hill]. No res judicata, still in play. Why can't the U.S. Trustee come in and take a 2004 exam based on what's going on there?
>
> Counsel: Because the debtor and Countrywide are about to present an agreed order to Judge Deller on December 12th.

Id. at 38. Counsel obviously proved to be mistaken in this assertion that an agreed order was about to be presented but the point is clear that Countrywide thought that by settling Hill it could thwart the UST's efforts regarding the *Rule 2004* exams.

11. There is some confusion in the case involving the timing of e-mail communications between GMM and Countrywide because they are in different time zones—GMM in the Eastern and Countrywide in the Central. The same e-mail may thus show two different "sent" times depending on where it was received. For purposes of this Opinion the Court has attempted to "convert" all times to Eastern time.

including them as attachments to the email. Puida's report notes the failure to implement the payment changes as set forth in the Payment Change Letters as the reason for the Debtor purportedly owing an arrearage. McKeever forwarded this report and the attachments to several people at Countrywide, one of whom in turn forwarded it to Melissa "Lisa" Middleton, the head of the Countrywide Bankruptcy Department. Middleton in turn forwarded the report and attachments to Bobbi Hook, Assistant Vice President of Bankruptcy and asked her to review them.

In reviewing the attachments, Hook realized that something was amiss because two of the Payment Change Letters predated Kimberly Hill's employment at Countrywide, so it would have been impossible for her to have sent them. Hook also checked the Countrywide AS400 computer system and imaging system only to discover that no such Letters had ever been sent. Hook reported the news of her discovery to Middleton on October 25th and was instructed by Middleton to speak to Kimberly Hill about the matter and also to advise Countrywide's outside counsel of her findings in regard to the Payment Change Letters.

At about the same time as this was happening, on October 25th at 3:09 P.M., in an effort to begin negotiations toward a resolution of the *Motion to Enforce* which appears to have been spurred on by the heightened status of the case, and following a telephone discussion, Puida sent a facsimile to Mr. Steidl that included the three Payment Change Letters, a payment history for the Debtor's loan from 2003 to date, and the Chapter 13 Trustee's ledger relating to the Debtor's loan. This facsimile stated:

> Attached please find payment change letters, a payment history from 2003 to the present and the trustee's ledger. My review of this information leads me to think that the discrepancy in this case stems from the failure of the trustee to disburse the increased monthly payment amount throughout the case.
>
> Please review and advise if you agree. If so, please advise if the debtor would be interested in amicably resolving the matter.

See UST Exhibit BZ.

The high level of interest in trying to settle the Hill case is further indicated by the fact that Puida advised McKeever that same date by e-mail at 7:49 P.M. of her efforts to contact Mr. Steidl and concluding that she would try sending a fax to him at home. At 8:00 P.M. Puida did send Mr. Steidl a fax at his home stating that she wanted to resolve the matter and it would need to be done the next day (October 26th) because her "client" would be out of town the next week.

Efforts at settlement of the *Motion to Enforce* continued the next day, October 26th. At 10:54 A.M. Puida sent an e-mail to Townsend, McKeever, McCafferty and Smith summarizing her activities the previous day and stating that she had already tried to reach Mr. Steidl three times that day. Puida's e-mail says that Mr. Steidl had not yet looked into the matter and not reviewed the documentation that was sent to him on September 24, 2007 so she "resent" the information to him. Despite that assertion, no documentary evidence exists supporting the notion that the materials had ever been sent to Mr. Steidl on September 24th and nothing in the October 25th fax from Puida to Mr. Steidl indicates that this was a "resend" of materials previously provided.

Apparently sometime within an hour or so of sending that e-mail to Townsend and others, Puida did then speak with Mr. Steidl because at 1:03 P.M. she sent an e-

mail to McKeever reporting on her conversation with him, including Mr. Steidl's statement that he did not have any copies of the Payment Change Letters in his file. At 2:05 P.M. Puida sent an e-mail to Townsend, McKeever, McCafferty and Smith that was largely the same as the one she had previously sent to McKeever at 1:03 P.M., with the notable omission of Mr. Steidl's statement about not having copies of the Payment Change Letters in his file. Puida also asked for settlement parameters that would be acceptable to Countrywide, stating that she would do her best to have the matter resolved prior to the October 31st hearing.

Shortly after Puida's 2:05 P.M. e-mail was sent, Hook and Puida had a discussion during which Hook provided Puida with settlement parameters. Puida reported this conversation to Smith, McCafferty and McKeever in an e-mail sent at 3:00 P.M. and said she would do all she could to have the matter settled by "Tuesday," *i.e.*, by October 30th. Hook reported on this same conversation to Smith and Middleton in an e-mail sent at 4:24 P.M.

Hook testified at trial that it was during this conversation on October 26th with Puida that she advised Puida about the true nature of the Payment Change Letters. (12/9 Tr. at 75). Puida acknowledged that she was told about the Payment Change Letters by Hook, but she thought it had occurred during a conversation on a later date, sometime after October 30th, though she could not point to an exact date or time. (12/9 Tr. at 398). The Court found Hook to be credible on this point and accepts her testimony that the conversation about the Payment Change Letters occurred on October 26th.[12] Also on October 26th, Mr. Steidl forwarded the Payment Change Letters and other materials to the Debtor, along with a cover letter that noted he had reviewed his files and could not find the Letters and wondered whether she had them.

Despite all these efforts, the Hill case did not get settled on October 26th, which was a Friday. On October 29th Hook spoke with Kimberly Hill about the Letters and reported to Middleton about that meeting and her conversation with Puida. On October 30th GMM faxed a proposed consent order to Mr. Steidl showing an arrearage of $4,306. The next scheduled hearing on the *Motion to Enforce* went forward on October 31st, and based upon representations by counsel for both Parties that settlement discussions were ongoing, it was again continued by Judge Deller to December 12, 2007, even though he had previously cautioned there would be "no further continuances."

On November 5, 2010, the *Rule 2004 Notices* filed by the UST were consolidated under a new Miscellaneous No. 07–204 and assigned to this member of the Court. Countrywide filed a *Motion to Quash* in that matter on November 9, 2007 which included the statement that it believed the Debtor had received proper notice of increases in post-petition mortgage payments in this case. Document No. 13 at 11. A hearing on the *Motion to Quash* was held on November 15, 2007 and a few days later the Court issued a briefing schedule and set final argument for January 7, 2008. The Hill case, and the fact that it was an open, pending matter featured prominently in the November 15, 2007 argument. *See, generally,* Document No. 29 in No. 07–204 (Transcript of November 15th hearing).

12. The issue of whether Puida in turn ever informed Mr. Steidl about the Letters was sharply in dispute and is one of the specified points in the *Rule*. Given that, the Court addresses that point in more detail in the *Legal Discussion* portion of this Opinion.

On November 19, 2007, the pending *Motion to Enforce* in Hill was transferred from Judge Deller to the undersigned and a status conference was set for December 20th with the December 12th hearing cancelled. The Parties continued settlement efforts during this period. On December 6, 2007 Puida faxed another proposed consent order to Mr. Steidl, this one lowering the arrearage amount to $3,309. She explained that the amount had been reduced because Countrywide became aware that it had previously failed to account for the $973 payment that had been made to the prior servicer. On December 17th Puida again sent a letter to Mr. Steidl with a proposed consent order showing a $3,309 arrearage.

This set the stage for the events of December 20th. Ms. Steidl was to appear for the Debtor at the hearing. While she was reviewing the Hill file in preparation around 8:20–8:25 A.M. that morning she happened to notice the curious issue related to the office address set forth above and asked her husband when their firm had moved to its present location because she was not sure of the date. He told her that the firm had not moved until October 2003 and had not received mail at the current address before then. Ms. Steidl informed him that one of the Letters predated that move but showed the current address and the two agreed that she would attempt to get an explanation from Countrywide at the hearing later that day.

That same day a meeting involving Puida, McKeever, Townsend, Smith, and outside Countrywide attorneys Thomas Connop and Dorothy Davis, was held at the office of Davis in Pittsburgh to prepare for the same hearing. Puida and McKeever traveled from Philadelphia to attend the meeting and Townsend, Smith and Connop came from Dallas. During that meeting Puida informed the participants about the Payment Change Letters, which came as "news" to everyone but Smith and McKeever.[13]

Ms. Steidl happened to see Puida in the hall outside the courtroom prior to the hearing and asked her about the Letters. Puida said the Letters had never been sent. A short time later, during the hearing itself, Ms. Steidl raised the question about the Payment Change Letters, making the Court aware of them for the first time. The Court questioned Puida about the Letters, a subject discussed in further detail below. The end result of the hearing on December 20th was that the Court entered a pretrial scheduling order and directed that copies of the Letters be filed with the Court.

On March 3, 2008, the Debtor filed an *Amended Motion to Enforce Discharge* ("Amended Motion to Enforce") against Countrywide. By this time, Countrywide, through GMM, had dismissed the state foreclosure action against the Debtor, occurring on or about February 8, 2008.

In the *Amended Motion to Enforce* the Debtor sought damages for injury to her credit and the loss of the opportunity to obtain future credit, for physical damage to her health and emotional distress, for punitive damages and sanctions, and for attorneys' fees, and requested that she be allowed to file an adversary proceeding for statutory damages under the *Fair Debt Collections Practices Act, 15 U.S.C. §§ 1601–1616* and the Pennsylvania *Unfair Trade and Business Practices Act, 73 P.S. §§ 201–1—201–9.3.*

13. McKeever had been told about the Letters by Puida sometime after her conversation with Hook, and Smith found out about the Letters a week or so prior to the December 20th meeting in a conversation with Middleton.

Thereafter, Countrywide and the Debtor reached a written Settlement Agreement which resolved all claims, specifically including, but not limited to, the *Motion to Enforce* and the *Amended Motion to Enforce*. The Settlement Agreement provided, *inter alia*, Countrywide making payment of $100,000 to the Debtor, in the form of satisfaction of the note and release of the mortgage securing the note, with the balance to be delivered in cash, payable to the Debtor and the Debtor's attorneys for distribution to them in accordance with instructions from this Court, correction of the Debtor's credit records, sealing of the Foreclosure Action, the Debtor's dismissal of the *Motion to Enforce* and the *Amended Motion to Enforce*, the Debtor's return of documents produced to her by Countrywide, and mutual releases, all as more specifically provided therein.

Countrywide and the Debtor filed a *Joint Motion to Approve Settlement and Compromise* on May 2, 2008, which the Court denied without prejudice on May 6, 2008, pending receipt of additional information. The Debtor and Countrywide filed an *Amended Joint Motion to Approve Settlement and Compromise* on June 19, 2008, to comply with the Court's directive. On August 8, 2008, the UST filed a response to the *Joint Motion to Approve Settlement and Compromise* which did not object to the proposed settlement, but did ask that any order approving the settlement be without prejudice to her pursuit of a *Motion for Rule to Show Cause*. After hearing on the *Joint Motion to Approve Settlement and Compromise* on August 11, 2008, the Court entered an order approving the settlement.

On June 23, 2008, the UST filed her original *Motion for Rule to Show Cause*. On June 30, 2009, the UST's *Amended Motion for Rule to Show Cause* was filed.[14] Thereafter, the UST and the Respondents engaged in extensive discovery which ultimately resulted in the Court entering the *Rule* currently at issue. In December 2009, a four-day trial on the matter was held. On January 12, 2010, closing arguments were heard. The Parties have since filed Proposed Findings of Fact and Post–Trial Briefs.[15]

14. The *Amended Motion for Rule to Show Cause* became much more focused than its predecessor. Rather than alleging systemic and company-wide problems with the manner in which Countrywide, as a whole, serviced its vast mortgage portfolio as was done in her original motion, the UST in her *Amended Motion* merely sought a remedy for Countrywide's mishandling of the Sharon Hill bankruptcy, specifically.

15. With these materials in hand, the Court was finalizing its work on this *Opinion* when, on May 20, 2010, the UST filed a brief and rather cryptic *Status Report* indicating that she had reached a "conditional resolution" of the matters in dispute with Countrywide, asking the Court to defer its decision on the *Rule* as against Countrywide, only, pending the satisfaction of certain, undisclosed conditions precedent to that resolution. On July 11, 2010, the Court convened a Status Conference in an effort to acquire additional information concerning this conditional resolution. At that time, the UST and Countrywide advised the Court that they were requesting a "stay" of the Court's decision because a nationwide "global settlement" had been reached in a pending Federal Trade Commission matter involving Countrywide in the Central District of California. The Parties were vague as to the terms of the resolution but the implication was that a conclusion of that settlement would satisfy the UST and obviate the need for further proceedings under the *Rule* as against Countrywide. The Parties also represented that a part of the settlement would result in Countrywide filing a motion, supported by the UST, seeking a dismissal of this matter as to Countrywide. Based on these representations, the Court advised the Parties that it did not believe any settlement between Countrywide and the UST would be binding on it and require a dismissal because the *Rule* was issued by the Court, not the UST. The Court stated it would not stay this proceeding,

DISCUSSION

(A) The Court's Rule to Show Cause

The *Rule* is directed against Countrywide, GMM, and Puida and was very deliberately limited to seven well-defined Items of potentially sanctionable conduct related to this whole matter, four directed to Countrywide and three to GMM and Puida. The Court's approach to resolving the specified matters before it is to set forth each of the Items as stated in the *Rule*, followed by a discussion of whether the evidence supports the imposition of any kind of sanction against the respective party involved. The seven Items of inquiry identified by the Court in the *Rule* involve the following, allegedly inappropriate instances of conduct:

(1) Countrywide failing to properly account for chapter 13 payments made by the Debtor during the pendency of her case.

(2) Countrywide knowingly and willfully violating the discharge injunction granted to the Debtor through numerous and sustained attempts to collect on questionable debt which, by appropriate review of applicable records, was current as of the time of entry of the discharge order.

(3) Countrywide intentionally, or with reckless disregard and/or indifference to the applicable facts, misleading the debtor's attorneys into believing change notices had been timely sent via the use of three "created" Payment Change Letters, when in fact they had not, and during such time attempting to resolve a dispute pending before this Court.

(4) Countrywide intentionally, or with reckless disregard and/or indifference to the applicable facts, making misrepresentations to this Court in a pleading regarding the cause of its claimed escrow arrearages account regarding the Debtor.

(5) Goldbeck McCafferty and McKeever and Leslie Puida knowingly and willfully, or with reckless disregard and/or indifference to the applicable facts, violating the discharge injunction granted to the debtor by making numerous and sustained attempts to collect on debt they knew to be discharged or should have known was discharged.

(6) Goldbeck McCafferty and McKeever and Leslie Puida intentionally, or with reckless disregard and/or indifference to the applicable facts, failed to disclose to the debtor's attorney that three Payment Change Letters had never actually been

per se, but would consider any motion to dismiss once it was filed. Thereafter, the Court continued working on the within *Opinion* but with a "watchful eye" for the filing of a motion to dismiss which it anticipated would be done fairly soon. However, nothing along those lines occurred until August 16, 2010, when Countrywide filed its *Motion to Dismiss with Prejudice to the Court's July 29, 2009 Amended Rule to Show Cause* as to it, Document No. 541 ("Motion to Dismiss"). (The *Motion to Dismiss* is something of a misnomer because the Court issued only one *Rule*, there was no "Amended Rule." The predicate for the *Rule* was the *Amended Motion for Rule to Show Cause* filed by the UST, so perhaps that is from where Countrywide's confusion stems). On August 26, 2010, the UST filed a *Statement* indicating her support for the *Motion to Dismiss*. *See Document No. 547.*

Now that it has finally had an opportunity to fully review the settlement reached between Countrywide and the UST, the Court continues to be of the view that it is not bound by its terms and that to dismiss this matter on the basis of that settlement, even with the UST's support, is not relevant to matters pending before the Court in this instance. The Court provided the Parties with an opportunity to argue the *Motion to Dismiss* on October 4, 2010, which opportunity the Parties decided to waive. By separate *Order* entered this date, the Court denied the *Motion to Dismiss.*

sent, all in an improper attempt to collect on questionable debt while attempting to resolve a matter that was pending before this Court.

(7) Goldbeck McCafferty and McKeever and Leslie Puida intentionally, or with reckless disregard and/or indifference to the applicable facts, made inaccurate oral statements in response to the Court's inquiry regarding when Leslie Puida told the Debtor's attorney that the three Payment Change Letters were not what they purported to be, but instead were memoranda created years after the event.

Matters involving questionable conduct requiring further review by the Court also arose during the course of the trial on the *Rule*. Those matters will be separately addressed at the end of this *Opinion*.

[1] Before turning to an individualized review of the foregoing Items, it is necessary to set forth the Court's view regarding the basis for its authority to act in this matter, as well as the standard which it will apply in evaluating the conduct of the Respondents. The Court issued the *Rule* and conducted the trial in this matter principally pursuant to its inherent power as a federal court so as to achieve the orderly and expeditious disposition of cases by controlling the conduct of those who appear before it. As held in *Chambers v. NASCO, Inc.*, 501 U.S. 32, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991), such a power must be implied because it is necessary to the exercise of all other judicial powers by a court. 501 U.S. at 43, 111 S.Ct. 2123.

In *Fellheimer, Eichen & Braverman, P.C. v. Charter Techs., Inc.*, 57 F.3d 1215 (3d Cir.1995) the Court of Appeals of the Third Circuit discussed this inherent power as recognized in *Chambers* and found it to be properly exercisable by bankruptcy courts. The *Fellheimer* court noted that among the sanctionable conduct a court's power in this regard reaches are those cases in which a party "has acted in bad faith, vexatiously, wantonly, or for oppressive reasons." 57 F.3d at 1224 (quoting *Chambers*, 501 U.S. at 45–46, 111 S.Ct. 2123). Four other circuit courts which have also recognized that bankruptcy courts possess such inherent power, *see In re Downs*, 103 F.3d 472 (6th Cir.1996), *In re Jove Eng'g, Inc.*, 92 F.3d 1539 (11th Cir.1996), *In re Rainbow Magazine, Inc.*, 77 F.3d 278 (9th Cir.1996), and *In re Mroz*, 65 F.3d 1567 (11th Cir.1995).

[2–4] The *Fellheimer* court referenced *Chambers* to the effect that the imposition of sanctions pursuant to this inherent power serves the purpose of vindicating judicial authority without resort to the more drastic sanctions available for contempt of court. 57 F.3d at 1224. It is thus apparent that the inherent power to sanction is distinct from the contempt power.[16] It is further apparent that the level of miscon-

16. Respondents argue that the only basis for the Court to impose sanctions is through the contempt power. They further argue that civil contempt is not appropriate here because the Debtor has already been fully compensated as a result of the Settlement Agreement between her and Countrywide. Thus, they argue, any sanction imposed here by the Court would be purely punitive in nature, and necessarily a criminal contempt matter—something they say is beyond the power of a bankruptcy court. Respondents couch this as a lack of "jurisdiction" for the Court to act. The Court disagrees with that argument because it confuses the meaning of jurisdiction and it ignores the inherent power to sanction as discussed above. The Court is nonetheless acutely aware of the command to exercise "restraint and discretion" in exercising its inherent power, *Fellheimer*, 57 F.3d at 1224, and intends to do so here. Of course, to the extent the Court finds that Respondents' conduct does not rise to the sanctionable level under the inherent power, the argument presented by Respondents is essentially moot anyway.

duct that must be found to justify the imposition of a sanction pursuant to the inherent power exceeds that which is merely inadvertent or even negligent. In *Martin v. Brown*, 63 F.3d 1252 (3d Cir. 1995) the court noted that there was some discrepancy in Third Circuit precedent as to whether a specific finding of "bad faith" is required to impose a sanction under the inherent authority. *Id.* at 1265 (contrasting *Landon v. Hunt*, 938 F.2d 450 (3d Cir.1991) (finding of bad faith required), with *Republic of Philippines v. Westinghouse Electric Corp.*, 43 F.3d 65 (3d Cir. 1994) (bad faith not always required)). Without explicitly attempting to reconcile these two views, the *Martin* court stated that generally, the inherent power "should be reserved for those cases in which the conduct of a party or an attorney is egregious and no other basis for sanctions exists." *Id.* The American Heritage Dictionary defines "egregious" as "conspicuously bad or offensive." That is the touchstone the Court will apply in deciding whether to impose sanctions in this matter.

In addition to the inherent power, another basis for imposing sanctions for at least part of the alleged conduct involved in this matter may be found in *Fed.R.Bankr.P. 7037,* incorporating *Fed.R.Civ.P. 37(c)(1)(C),* which authorizes the Court to impose "appropriate sanctions" for certain discovery-related offenses, including a failure to correct a discovery disclosure that is later learned to be false. Thus, insofar as the *Rule* includes conduct related to the production of the Payment Change Letters as part of the discovery done in connection with the *Motion to Enforce, Rule 7037* provides another source of authority for the Court to act if the circumstances of this case so warrant.

Finally, since Item 4 of the *Rule* as directed against Countrywide concerns an alleged factual misrepresentation contained in a pleading filed with the Court, the sanctioning authority provided by *Fed. R.Bankr.P. 9011(c)* is implicated with respect to that part of the *Rule.*

The Court now turns to its individualized review of the Items in the *Rule.*

(1) Countrywide failing to properly account for chapter 13 payments made by the Debtor during the pendency of her case.

[5] There is no doubt that Countrywide failed to properly account for the Debtor's payments to it and its predecessors. At trial, Countrywide acknowledged in its opening statement that mistakes were made in the handling of the Debtor's account. There was a dispute between Countrywide and the UST as to the exact number and pervasiveness of these "mistakes" but even by Countrywide's reckoning, they were substantial.

At the outset, Countrywide admits it failed to properly account for the June 25, 2003 payment of $971.74 made by the Chapter 13 Trustee to the prior loan servicer when it took over responsibility for the loan. Countrywide acknowledged that this failure had a "cascading effect" that was largely responsible for the post-discharge miseries experienced by the Debtor.

Countrywide also admits that during the course of the Chapter 13 case it failed to comply with the requirement in the *Confirmation Order* and Chapter 13 Procedure *# 9* of this Court that required a notice of payment change be sent to the Debtor, her attorney, and the Chapter 13 Trustee before any payment change could take effect. This failure means the Debtor was not properly apprised of changes to her monthly mortgage payment being made by Countrywide due to escrow needs during the course of her bankruptcy. Countrywide also concedes that the discharge audit of the Debtor's loan done in

March 2007 was improperly conducted. A loan coming out of a Chapter 13 discharge and showing a delinquency should have been referred to higher level management at Countrywide, not to foreclosure.

By the UST's reckoning there were even more mistakes made by Countrywide with respect to the Debtor's account. But that is really gilding the lily at this point since by Countrywide's own admission it can properly be found at fault for failing to properly maintain the Debtor's loan account during the bankruptcy. Even so, the Court does not find that these mistakes rise to the level of sanctionable conduct.

While the actions of Countrywide personnel with respect to payments on the Debtor's account were sloppy and derelict, the Court finds no evidence of the sort of bad faith or intentional misconduct that would support the entry of a sanction under the Court's inherent power. The UST failed to show that these types of errors both were routinely made by Countrywide in bankruptcy cases pending throughout the country and were detrimental to the entire bankruptcy system. The Court also finds no evidence was presented to show that the type of mistake involved in the handling of the Debtor's account was a routine feature of the Countrywide accounting process for loans in bankruptcy. *See, e.g., In re Nosek,* 609 F.3d 6 (1st Cir.2010) (misrepresentation that was not a deliberate falsehood and not intended to mislead the court would warrant at most a modest sanction). Finally, the conclusion that Countrywide should not be sanctioned under this element of the *Rule* is further bolstered by the fact that the party most directly affected by these inexcusable instances of neglect—the Debtor—has been fully compensated pursuant to the Settlement Agreement.

(2) Countrywide knowingly and willfully violating the discharge injunction granted to the Debtor through numerous and sustained attempts to collect on questionable debt which, by appropriate review of applicable records, was current as of the time of entry of the discharge order.

[6] Going in to the trial, the Court did not anticipate that there would be a significant dispute as to whether Countrywide's post-discharge pursuit of an arrearage claim against the Debtor was legally permissible. The Trustee reported the *Amended Plan* as completed and all agree that as soon as the Trustee made the final payment to Countrywide under the *Amended Plan,* the Debtor immediately stepped in and began making the normal monthly payments (or at least attempted to do so). The March 9, 2007 *Cure Order,* a standard form order used in this District, clearly provides in part that

> "[a]ll mortgage and other secured debts provided for by the Plan are hereby found to be cured of any and all monetary defaults as of the date of the Trustee's last distribution, and no additional interest late fees or penalties may be assessed for time periods or payments due prior to that date."

See Document No. 46 at ¶ 3. The *Discharge Order,* Document No. 49, was entered one week later. Additionally, the *Confirmation Order* and this Court's Chapter 13 Procedure # 9 require that all notices of post-petition monthly changes must be served on the debtor, debtor's counsel and the Chapter 13 Trustee so that an amended plan can be filed if necessary. Once Countrywide admitted that the Payment Change Letters were not real and no such payment change notices had ever been delivered in this case, that conclusively resulted in a finding that any

attempt to collect the alleged arrearage debt from the Debtor was improper.

At trial, however, both Puida and McKeever (who were of course acting as attorneys for Countrywide during most of the time that the collection efforts were ongoing) testified that they believed that even though the Payment Change Letters had not been sent there remained a legal basis to attempt to collect the debt pursuant to *11 U.S.C. § 1322(b)(5)*. *See*, 12/9 Tr. at 360–64 and 12/10 Tr. at 39, 72–73 (Puida); 12/8 Tr. at 127–28, 145, 152, 199 (McKeever). The legal theory as they expressed it at trial was that the unpaid escrow amounts that formed the arrearage Countrywide was seeking to collect had become part of Countrywide's lien on the Debtor's property and "passed through" the bankruptcy, unaffected by the discharge. Puida and McKeever both also expressed that they held this view contemporaneously with the collection efforts in 2007. In other words, they testified that this theory was not something that was thought up after the fact to try to justify the attempted collection.

The Court has some lingering doubts as to whether this legal theory was in fact within the contemplation of counsel back in 2007. There was no mention whatsoever of *Section 1322(b)(5)* in the Response to the *Motion to Enforce* filed by Puida on August 1, 2007, on behalf of Countrywide at Document No. 73. As best the Court can tell, the first reference to *Section 1322(b)* as a possible defense for Countrywide appears as the "Eighth Defense" in Countrywide's Response to the *Amended Motion to Enforce* filed on March 13, 2008 at Document No. 168. Interestingly, that Response was filed by new counsel for Countrywide, not GMM. Additionally, that Response was filed after the questions about the Payment Change Letters had come to light. At this point it was apparent that Countrywide could not rely on the Payment Change Letters to support its collection attempts against the Debtor and it therefore needed some other basis for doing so.

Having said that, the Court will nevertheless accept the testimony of Puida and McKeever to the extent that, at the relevant time, they believed Countrywide had the benefit of a potentially viable legal theory to support their collection efforts even in the absence of actual, payment change notices having been sent. At the very least, nothing presented at trial indicated that Countrywide's continued collection efforts against the Debtor were made over the objections or warnings of GMM. One might cynically draw the conclusion that GMM was not about to say "no" to one of its largest clients, but the Court will adopt the view that GMM was motivated by its professional responsibility and saw nothing wrong with what Countrywide was asking it to do. Given such an "imprimatur" by outside counsel, the Court does not believe it would be appropriate to sanction Countrywide for a knowing and willful violation of the discharge injunction.[17]

That still leaves open for question the *bona fides* of Countrywide's collection efforts pre-dating the referral to GMM on May 25, 2007. In many ways Countrywide's treatment of the Debtor during that period of time was unconscionable. There is no doubt it clearly caused her significant anxiety and distress. However, the Debtor has presumably been made whole as a result of the Settlement Agreement with

17. This result should in no way be considered a ruling or even a comment on the legal merits of the *Section 1322(b)(5)* theory. That theory has not been argued or briefed and in light of the Settlement Agreement does not represent a pending case or controversy before the Court.

Countrywide that was approved on August 12, 2008. In order to further sanction Countrywide for this same conduct, it is imperative that the UST demonstrate that such conduct was pervasive or systemic in Countrywide's treatment of its mortgagors. No such pattern of widespread misconduct was shown. At most, the UST showed that in several of the thousands of closed or pending Countrywide matters in this District, questionable actions were taken. Such isolated instances do not a pattern make and are best addressed on a case-by-case basis as they arise.

For the above reasons, the Court declines to find that Countywide engaged in sanctionable conduct as described in this element of the *Rule*.

(3) Countrywide intentionally, or with reckless disregard and/or indifference to the applicable facts, misleading the debtor's attorneys into believing change notices had been timely sent via the use of three "created" Payment Change Letters, when in fact they had not, and during such time attempting to resolve a dispute pending before this Court.

[7] Everyone now agrees that the three Payment Change Letters "created" after the fact were misleading and should not have been provided to the Debtor's attorney, at least not without a clear explanatory disclaimer so they could not be mistaken for copies of Letters actually sent. The Parties have offered competing versions of how the Letters came about. Countrywide argues that the Letters were mistakenly, but in good faith, created by a lower-level employee who thought they were the best way to convey information that had been requested by Countrywide's foreclosure attorneys, GMM. Countrywide asserts that there was no intent to deceive and that Countrywide management took reasonable steps to correct the mistake as soon as it was discovered. The UST paints a more sinister picture, arguing that perhaps the Payment Change Letters were deliberately created to mislead, or that at the very least, Countrywide and GMM took advantage of the situation by doing nothing to apprise the Debtor's counsel of the true nature of the Letters after they discovered "why" and "when" they were created.

Although the UST has raised some valid points concerning the Letters, after hearing and considering the evidence presented at trial the Court finds no evidence to support the contention that the Payment Change Letters were deliberately created by Countrywide with an intent to deceive the Debtor or her attorney.

Countrywide presented the testimony of Kimberly Hill by videotape deposition. The Court found her to be a credible witness. She testified that she was first hired by Countrywide in May 2005 as a customer service representative and at some point was transferred to the Bankruptcy Department where she worked on cases from Pennsylvania. In that capacity she dealt with Christopher Amann, the GMM paralegal, via e-mail exchanges.

On September 20, 2007, when Amann requested that she provide him with information about the Debtor's account, Ms. Hill thought the easiest way to do that would be by reviewing the escrow analysis pages for the loan in the Countrywide computer system and putting the information it revealed into a letter template she had been given for creating payment change notices.[18] She explained that the

18. Kimberly Hill testified that the Debtor had a fixed-rate loan, so the only reason there would ever be for a payment change notice to

dates shown on each of the resulting Payment Change Letters were the dates of the corresponding escrow analysis and said she had to insert the other information that made the Letters look so real (e.g., the Debtor's name and address and "copied to" information) because otherwise the unrelated existing material from her letter template would appear in those areas instead. Kimberly Hill testified that she did not discuss the request from Amann, or her planned method of response, with anyone else at Countrywide. She said she did not check the AS400 system to see whether payment change notices had actually been sent to the Debtor in connection with the escrow analyses because she did not think it was relevant to Amann's request.

There was no direct evidence presented to refute the testimony provided by Kimberly Hill concerning the creation of the Payment Change Letters. The UST pointed out that there were easier ways to provide the requested information to Amann, thereby implying that the choice of the Letters as the vehicle for doing so must have been accompanied by an intent to deceive. The Court agrees that the creation of the Letters was ill-advised, but in the absence of any evidence showing that Kimberly Hill was directed to do so by someone else, it will ascribe that decision to poor judgment on the part of a relatively junior employee. It is also telling that Kimberly Hill's "signature" appeared on all three Letters, even though the first two were dated well before she had started to work for Countrywide. The Court finds this to be a further indication that there was no intent to deceive.

The UST also pointed out that information obtained during discovery from another case in this Court (*Karleski*, Case No. 04–31355–MBM) clearly showed that in 1999 Countrywide personnel discussed the need to "recreate" an "Act 91" letter, a statutorily required intent to foreclose notice that must be given before a foreclosure action can be pursued in Pennsylvania. Countrywide computer records from the *Karleski* loan revealed that a copy of an Act 91 letter needed to be sent to outside Countrywide attorneys so they could proceed with a foreclosure action, but the person from Countrywide who was working on the file could not find what she needed. She then suggested that the necessary document could be "recreated" and that approach was approved.

Countrywide witness John Smith testified that he was not with the company back in 1999, but that his understanding was that the policy at the time was to send outside counsel a copy of the original Act 91 letter along with the "green card" (i.e., certified mail return receipt). However, if an original Act 91 letter that had actually been sent could not be found, a copy of the "screen shot" from the computer showing the information that was put into the letter and the date it was sent, together with a "recreated" letter and the green card, would be sent to the foreclosure attorney. (12/10 Tr. at 167 *et seq.*). Smith testified that it was his understanding that it was made clear that any such recreated letter was not a copy of an original document although he didn't know if that was done by telling the attorney or by a notation to that effect placed on the recreated document. To counter Smith's testimony, the UST introduced Exhibit "EV," the state court foreclosure complaint from the *Karleski* case. It had the recreated letter attached with nothing on it to indicate that it was actually a recreated letter. Smith also testified that sometime after 1999 Countrywide began imaging and storing all Act 91 letters that are sent out so there

issue would be as a result of an escrow analysis.

is no need any longer to recreate letters as was done in *Karleski.*

The Court certainly cannot condone what Countrywide did in the *Karleski* matter, and based on Smith's testimony, perhaps in other Pennsylvania foreclosure actions as well. It would seem that at the very least Countrywide should have disclosed that the letter was a recreation of what it believed had been sent rather than leave the impression that it was a copy of the actual letter. That having been said, the Court fails to see how that evidence provides anything but the most tenuous support for the view that the creation of the Letters by Kimberly Hill in the present case was done with the intent to deceive. The recreated Act 91 letter in the *Karleski* matter was remote in time and context from what happened here. The system notes from *Karleski* reveal that even if there was a policy at that time permitting the recreation of documents, it was not a mere matter of routine since the request to do so went up the chain of command for approval. The lack of any evidence to show that Kimberly Hill sought the approval of anyone else before creating the Payment Change Letters at issue here, supports the view that she acted on her own and not pursuant to any "routine" or policy approved by Countrywide.

The UST further argues that even if the Payment Change Letters were not originally created with the intent to deceive, Countrywide nevertheless took advantage of their existence once it discovered what had happened. Apparently, the UST's contention is that Countrywide knowingly allowed the Debtor and her attorney to labor under the misapprehension that the Payment Change Letters were copies of documents that had actually been sent. The Court is not persuaded by that argument.

The evidence shows that once Kimberly Hill's supervisors found out what had happened they promptly took steps to address the matter. Middleton directed Hook to speak to Kimberly Hill and to inform Puida about the Letters. Hook carried out these instructions. She spoke to Kimberly Hill on October 29, 2007 and she (Hill) was "written up" over the matter. Hook also informed Puida about the Letters. There was some disagreement as to the exact date when that occurred (discussed further, *infra*), but Puida herself admitted that she had been informed about the Letters. Once that was done, Countrywide had taken reasonable action to correct its error. In the absence of some evidence it had to the contrary, Countrywide was thereafter entitled to assume that its attorneys would act to correct any misunderstanding caused by the Letters, including if necessary to inform the Debtor's attorney that the Letters were not what they appeared to be.

The UST did not present any direct evidence to show that Countrywide had some knowledge that its attorneys had not so informed the Debtor's attorney. There are circumstantial facts that might support a conclusion that at least some Countrywide personnel should have suspected that information about the true nature of the Payment Change Letters had not been conveyed to the Debtor's attorney. There does not seem to have been any noticeable change in the Debtor's settlement posture after Puida was told about the Payment Change Letters, which might strike a thoughtful observer as curious. Nevertheless, that is not something that would necessarily lead one to conclude that no communication to the Debtor's attorney had therefore occurred. There are other possible, reasonable explanations for these occurrences, making the circumstantial evidence far from clear. The Court does not

believe it appropriate to make a finding of egregious conduct and impose sanctions against Countrywide on the basis of ambiguous, circumstantial evidence and inferences.

(4) Countrywide intentionally, or with reckless disregard and/or indifference to the applicable facts, making misrepresentations to this Court in a pleading regarding the cause of its claimed escrow arrearages account regarding the Debtor.

This aspect of the *Rule* relates to the *Motion to Quash Notices of Examination Under Fed.R.Bankr.P. 2004 and Subpoenas,* Misc. No. 07–204, Document No. 13, filed on November 9, 2007 by Countrywide ("Motion to Quash") in response to the UST's request for 2004 Examinations in this and nine other cases.[19] In regard to the Hill case, the *Motion to Quash* states:

> Countrywide *believes* that the issues relating to the post-petition default are related to the chapter 13 trustee's and the debtor's failure to adjust payments post-petition despite having received proper notices of increases in post-petition mortgage payment from Countrywide.

Id. at ¶ 18 (emphasis added). All Parties now agree that the statement by Countrywide to the effect that the Debtor received proper notice of post-petition mortgage payment changes, is false. By the same token, the Parties strongly disagree as to whether by making such a representation, it rises to the level of sanctionable conduct against Countrywide.

The UST points out that the *Motion to Quash* was filed two weeks after the discovery by Middleton and Hook of Kimberly Hill's "creation" of the Payment Change Letters and urges that their knowledge be imputed to Countrywide. Countrywide argues that its personnel, who were involved with the preparation of the *Motion to Quash,* did not know about the true nature of the Payment Change Letters at the time the *Motion to Quash* was submitted. Countrywide also points out that the statement at issue in the *Motion to Quash* was qualified by the word "believes," signifying that it was making something less than a flat-out, factual allegation. Finally, Countrywide asks that, in mitigation, the Court take into consideration that it was being "battered" simultaneously on several fronts at the time the *Motion to Quash* was submitted, with the Chapter 13 Trustee having filed, only a short time earlier, motions in 293 cases in this District seeking loan histories from and sanctions against Countrywide accompanied by notices of examination and subpoenas also filed by the UST in a number of those cases.

The evidence presented at trial as to how this false allegation got into the *Motion to Quash* was somewhat murky. Smith testified that he "believed" there were "communications" between his staff and the outside counsel who prepared the *Motion to Quash* to the effect that payment changes had occurred and notice had been provided to the Debtor and her counsel. 12/9 Tr. at 213–214. When asked by the Court to name the people at Countrywide who would potentially have communicated information to outside counsel regarding factual allegations in support of the *Motion to Quash,* Smith testified that it likely would have been limited to himself, Middleton, and Hook. *Id.* at 215–216. Smith's testimony in this regard was not consistent.

At one point in his testimony, Smith stated that he himself was not personally involved in communications to counsel re-

19. *See In re Countrywide Home Loans, Inc.,* 384 B.R. 373 (Bankr.W.D.Pa.2009).

garding the Payment Change Letters, while later he stated that "counsel probably would have conferred with me as to my knowledge." *Compare, id.* at 214, 216. Unfortunately, for some reason at trial neither Hook nor Middleton was asked any questions related to this area so the Court is left with Smith's rather vague and uncertain recollection. Smith did testify that, although he now knows the allegation concerning notice of payment change to be false, at the time the *Motion to Quash* was filed the allegation was an accurate reflection of what he "believed." *Id.* at 216.

Additional evidence concerning the genesis of the false allegation in the *Motion to Quash* was provided by Townsend. He testified that although he did not draft the *Motion to Quash,* he did approve it. *Id.* at 254. Townsend stated that he relied upon Smith to provide the necessary information for the *Motion to Quash* and that the two exchanged comments about the subject in the days leading up to its filing. *Id.* at 254–56. He referred to a conference call between himself, Smith and Countrywide outside Counsel, Attorney Connop (and possibly Attorney Davis), prior to the filing of the *Motion to Quash* during which time it was reviewed. *Id.* at 256, 259–61. When further pressed as to the source of the allegation concerning the Hill case, Townsend testified that he thought the October 24, 2007 e-mail from Puida to McKeever (UST Exhibit CA) which McKeever forwarded to Attorney Connop, was another basis for the allegation, along with whatever Smith and his group may have provided. *Id.* at 256–57, 261.[20] With this evidentiary background in mind, the Court turns to a consideration of whether it is appropriate to impose sanctions against Countrywide for the false allegation contained in the *Motion to Quash.*

[8] *Fed.R.Bankr.P. 9011,* a close analogue of *Fed.R.Civ.P. 11,* is intended to deter the filing of pleadings or other documents with frivolous legal arguments or questionable factual assertions. This *Rule* provides, *inter alia,* that by filing a pleading with the court 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 factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support, after a reasonable opportunity for further investigation or discovery. *Fed.R.Bankr.P. 9011(b)(3).*

[9] Sanctions under the *Rule* are based on an objective standard of reasonableness under the circumstances, and a showing of bad faith is not required. *Martin v. Brown,* 63 F.3d 1252, 1264 (3d Cir.1995). The sanction process under the *Rule* can be initiated either by motion of the opposing party under *Rule 9011(c)(1)(A),* or on the Court's initiative under *Rule 9011(c)(1)(B)* by the issuance of a show cause order. This portion of the present case is best viewed as a court-initiated sanction inquiry, with the *Rule to Show Cause* functioning as the order required pursuant to *Rule 9011(c)(1)(B).*[21]

20. As indicated previously, p. 19 *infra,* Puida's e-mail appears to be a status report on the Hill case that was prepared in response to the actions of the Chapter 13 Trustee and the UST. In relevant part that e-mail states:

> It appears that the discrepancy between Countrywide's figures and the trustee/debtor's figures are payment changes that were sent to counsel for the debtor and the trustee. However, it does not appear that counsel for the debtor or the trustee made the necessary adjustments to the payments being sent to Countrywide.

21. As to this Item of the *Rule to Show Cause,* the Court declines to consider sanctions against Countrywide pursuant to its inherent power or under *Section 105(a)* of the Bank-

[10] Based on the evidence of record, the Court finds that sanctions are appropriate here. It is undisputed that both Middleton and Hook knew the truth about the Payment Change Letters by October 26, 2007, two weeks before the *Motion to Quash* was filed by Countrywide. Furthermore, they were two of the four individuals at Countrywide who were identified as having had a "designated role" in gathering information to assist outside counsel in the preparation of the *Motion to Quash.* The fact that the material false allegation appeared in the *Motion to Quash* despite the knowledge of Middleton and Hook forces the Court to conclude that either (a) the misstatement was knowingly and intentionally included in the *Motion to Quash* with the intent to deceive the Court, or (b) the misstatement was included through reckless disregard or indifference to the facts because Middleton and Hook were not adequately consulted before the allegation was included and the *Motion to Quash* submitted.

An intentional deception, as under conclusion (a) above, would be so obviously a sufficient basis to support an imposition of sanctions as to require no further discussion. However, even conclusion (b) provides a sufficient basis to impose sanctions under the objective standard to be applied. It is simply inconceivable that any remotely reasonable inquiry into the facts could have failed to discover the falsity of the allegation in question. As indicated above, two of the four Countrywide personnel assigned to gather information for the *Motion to Quash* knew about the Letters and would therefore have known the allegation being made was false. Even if the other two people involved, Smith and Townsend, believed in good faith that the allegation was true, it would at the very least be reckless not to seek the input of Middleton and Hook, who were the members of the group most closely involved with the Letters. Indeed, even if Middleton and Hook had not known the truth about the Letters, it would seem that any minimally reasonable inquiry in connection with the *Motion to Quash* would have included a review of the AS–400 file on the Hill loan, or an interview with Kimberly Hill whose signature appeared on the Letters, either of which would quickly have shown that no notices of payment change were ever sent. The Court thus has no difficulty concluding that sanctions are appropriate.[22]

[11] The Court has considered the defenses, or justifications, advanced by Countrywide but does not find them persuasive. First, the inclusion of the word "believes" as a preface to the false allegation can in no way act as a shield for Countrywide. As noted previously, *Rule 9011* incorporates a standard of reasonable inquiry under the circumstances. The use of the word "believes" would thus necessarily imply a belief, after reasonable inquiry, which the Court has already found Countrywide failed to make.[23] *Rule 9011(b)(3)*

ruptcy Code when *Rule 9011* is available for that very purpose.

22. In the alternative, given the managerial positions of Middleton and Hook and their role in gathering information for the *Motion to Quash,* it would be permissible for the Court simply to impute their knowledge about the Letters to Countrywide. *See, e.g., Turner Constr. Co. v. Brian Trematore Plumbing & Heating,* 2009 WL 3334823 *4 (D.N.J.2009).

23. *Black's Law Dictionary* (9th ed. 2009) defines the word "believe" as "[t]o feel certain about the truth of; to accept as true." This is contrasted with the word "suspect," which is defined as to consider something probable or possible. *Id.* Similarly, the online *Oxford Dictionary* defines believe as to "feel sure of the truth of." *http://english.oxforddictionaries.com.* It is thus clear even under the customary usage of the term that to say one "believes" something, especially in the context of

does recognize that it may sometimes be necessary for a party to make an allegation without yet having all the facts. To do that the party must specifically identify the allegation as something likely to have evidentiary support after a reasonable opportunity for further investigation or discovery. Countrywide's use of the word "believes" was not sufficient to avail itself of this option under *Rule 9011(b)(3)*—and in any event—it is highly questionable that Countrywide could have done so in good faith given that it possessed the underlying information regarding the allegation about notice, readily at hand the entire time, and the means to obtain it upon appropriate, yet minimal inquiry.

[12] Second, the fact that Countrywide was facing a number of actions simultaneously does not excuse the submission of the false allegation. Countrywide is a large entity with extensive resources at its disposal. No credible evidence was presented to show that it would have been impossible, or even unduly burdensome, for Countrywide to have complied with its *Rule 9011* obligations because those resources were being stretched beyond their capacity. In fact, to the contrary, the evidence showed that Countrywide had the requisite information available at least two weeks earlier but nevertheless made the false allegation either deliberately or through reckless disregard or indifference.

[13, 14] One last point needs to be addressed before moving on. Although typically a sanction under *Rule 9011* is imposed on the attorney who has signed the offending pleading, in this case the Court will impose a sanction against the client.[24] As stated in a leading treatise with regard to the analogous *Fed.R. Civ.P. 11:*

> ... the district court's discretion under Federal Rule 11 includes the power to impose sanctions on the client alone, solely on the counsel for one of the parties, or on both of them because there are circumstances in which one of the courses of action is more appropriate than the other two.... Conversely, sanctions should fall on the client rather than on counsel when the attorney has relied reasonably on the client's misrepresentations or the client's failure to disclose relevant facts—but the reliance by the attorney must be reasonable under the circumstances.

5A, Wright & Miller, *Federal Practice and Procedure* at § 1336.2 (2010) (footnotes omitted). *See also,* 10 *Collier on Bankruptcy* at ¶ 9011.08[3][a] (2009) (represented party may be sanctioned under *Fed. R.Bankr.P. 9011,* depending on the client's involvement in the management of the litigation and the decisions that resulted in violation of the rule); *Fed.R.Bankr.P. 9011(c)(2)* (nature of sanctions).

The evidence showed extensive involvement by Countrywide in the preparation of the *Motion to Quash.* The fact that two of the Countrywide personnel who were most closely involved are attorneys themselves, Smith and Townsend, further bolsters the Court's conclusion in this regard. *See,*

a court pleading, connotes near certainty as opposed to a mere probability or possibility.

24. The Court does not make any finding at this time as to whether *Rule 9011* sanctions should also be imposed against the Countrywide attorneys who signed and submitted the *Motion to Quash.* Since the *Rule to Show Cause* does not name those attorneys, no procedure for sanctions under *Rule 9011(c)(1)(B)* has been properly initiated by the Court or the UST against them. Rather, in its *Amended Motion for Rule to Show Cause,* the UST chose only to seek relief against Countrywide and not its counsel. Based on the current record, the Court will follow the UST's lead and focus on Countrywide, generally, in fashioning an appropriate remedy upon finding the existence of sanctionable conduct.

e.g., Continental Ins. Co. v. Construction Indus. Servs. Corp., 149 F.R.D. 451 (E.D.N.Y.1993) (*Rule 11* imposes affirmative duty of reasonable inquiry on represented corporation employing members of bar). Having found the existence of sanctionable conduct, the Court is next faced with the question of what is an appropriate sanction.

[15, 16] The touchstone of the Court's consideration is found in *Fed.R.Bankr.P. 9011(c)(2)*, which provides that a sanction imposed for violation of the *Rule* shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Under the specific facts of this case the Court does not believe a monetary sanction is necessary to achieve that goal. Any monetary sanction the Court might reasonably impose would have minimal further effect on Countrywide, given the costs in attorney fees and settlement payments it has already incurred. The Court is inclined to believe that inclusion of the false statement here was the result of reckless disregard rather than an intentional deception. While that does not shield Countrywide from sanctions, it does factor into the calculus of an appropriate sanction. The Court thus intends that the findings made and published regarding this aspect of the case be viewed as a public censure of Countrywide and concludes that is a sufficient sanction against it for violation of *Rule 9011*. Countrywide is on notice that further instances of this type of misconduct coming before the Court will not so leniently be dealt with.

(5) Goldbeck McCafferty and McKeever and Leslie Puida knowingly and willfully, or with reckless disregard and/or indifference to the applicable facts, violating the discharge injunction granted to the debtor by making numerous and sustained attempts to collect on debt they knew to be discharged or should have known was discharged.

[17] Many of the points addressed in the discussion of Item 2 of the *Rule* are equally applicable here and will not be repeated. The Court does note that on two occasions Judge Deller did inform local counsel for Countrywide that he had addressed the issue involving the effect of the *Cure Order* on mortgagees in previous cases. He rather strongly suggested that Countrywide and its attorneys review those cases because, based on the information being presented to him, he perceived that those decisions undermined Countrywide's position in defending the Debtor's *Motion to Enforce*. Nothing was offered at trial to show that Countrywide's local counsel ever passed Judge Deller's comments on to Puida or to anyone else at GMM. If he had done so, it would be appropriate to expect Puida and GMM to have reviewed those cases and require them to account for any decision to continue to maintain the same legal position in the face of the cases.[25] Since, according to her testimony, the Court must find that local counsel did not relay Judge Deller's comments, Puida and GMM will not be held to that standard.

25. It was disconcerting to hear at trial that even as of that late date, after being made aware of Judge Deller's comments, Puida still had not read the cases to which Judge Deller referred, i.e., *Szalinski* and *Miller*. *See 12/9 Tr. at 337*. The Court would have thought that after she finally learned that Judge Deller specifically mentioned the relevancy of these cases not just once, but twice, she would want to read them for her own professional edification, if for nothing else. Although disappointing to the Court, this failure is not a factor that has been considered in the decision whether to impose sanctions under the *Rule*.

[18] Furthermore, although Puida and McKeever both testified at trial that the revelation about the Payment Change Letters did not affect their evaluation as to whether it was still appropriate to continue their collection efforts (because of the alternative *Section 1322(b)(5)* theory), their testimony in this regard was not entirely consistent. In particular, McKeever acknowledged that as of October 26, 2007, the Payment Change Letters were the key to their theory of delinquency in the Hill case (not the *Section 1322(b)(5)* theory), and that it was "startling" when he learned the news about the Letters from Puida. *See* 12/8 Tr. at 122, 135.

The following exchange then took place between McKeever and Counsel for the UST at which time McKeever never mentioned the *Section 1322(b)(5)* theory even though one would naturally have expected him to do so at this point in the proceeding:

> Counsel. I am referring to, as you sat there in November 2007, when you learned these payment change letters had—were not sent out, there was no notice, that it was required under the rules, correct?
>
> McKeever. Yes.
>
> Counsel. So you understood without notice you couldn't ask for those increases anymore? At that time, you understood that?
>
> McKeever. Yes.
>
> Counsel. So you understood at that time, you could no longer collect this debt, this delinquency from Ms. Hill?
>
> McKeever. Well, I understood at that time that we were having negotiations with Mr. Steidl. He didn't raise the issue that it would not be collectable, and he was negotiating a number.

12/8 Tr. at 143–44. Subsequently, McKeever did seem to soften this testimony somewhat by again pointing to *Section 1322(b)(5)* as an alternative theory (*Id.* at 145). Nevertheless, it is difficult to draw any other conclusion from the quoted testimony but that GMM continued the collection efforts even after the original basis for doing so had collapsed primarily because of Mr. Steidl's non-reaction to the news about the Payment Change Letters. Of course, that presumes that Mr. Steidl was in fact told about the Letters, something that is addressed in the next section of this *Opinion* and resolved unfavorably to the position of GMM and Puida in that the Court concludes Mr. Steidl was not told about the Payment Change Letters.

It should be apparent from the discussion above that the Court does harbor some doubts as to whether GMM and Puida actually thought they possessed a solid, legal basis to continue to pursue collection efforts against Hill once they learned the Payment Change Letters had not been sent. Nevertheless, these doubts do not rise to the level where the Court is prepared to find that the UST has met her burden of proof as to Item 5 of the *Rule*.

(6) Goldbeck McCafferty and McKeever and Leslie Puida intentionally, or with reckless disregard and/or indifference to the applicable facts, failed to disclose to the debtor's attorney that three Payment Change Letters had never actually been sent, all in an improper attempt to collect on questionable debt while attempting to resolve a matter that was pending before this Court.

[19] It is admitted by Puida that Countrywide personnel informed her that the Letters had never actually been sent, although there is some dispute about exactly when that discussion happened. (*See* 12/9 Tr. at 77–84; 390, 393). The relevant issue underlying this element of the *Rule* is

whether Puida, in turn, then informed the Debtor's attorney about the Letters. There is absolutely no documentary evidence memorializing such an event so the Court is forced to reach a finding of fact based primarily on the testimony of Puida and Mr. Steidl—the only two people who know for sure whether Puida ever said anything, as well as whatever circumstantial evidence may be available.

There was a stark and seemingly irreconcilable disagreement at the trial in the testimony on this point. Puida testified that after she learned about the Payment Change Letters from Hook she spoke with McKeever, who told her to immediately call Mr. Steidl. (12/9 Tr. at 395). She said at first she was unable to reach him but she finally contacted him by telephone at which time she told him the Payment Change Letters were recent creations. She was unable to give the date when this occurred, other than to say she thought it was after October 30th, shortly after her conversation with Hook. (*Id.* at 398). She could not say what time of day the call took place and made no memorandum of any type to document it. (*Id.*)[26] Puida claimed the call in question was made "proactively" for the specific purpose of telling Mr. Steidl about the Payment Change Letters. (*Id.* at 402–03). She testified that in a previous conversation with Mr. Steidl he had indicated to her that he could not find the Letters in his files. When she made this proactive call she referred to that prior conversation and then explained to him why the Letters were not in his file. Puida summarized the content of the discussion as follows:

> I had told him that the letters hadn't been sent, that they were merely meant to show payment changes that had occurred on those dates. And he said okay. He wasn't giving me an argument or anything about them. And that was all there was to that conversation. Then we continued to try and resolve the motion.

(12/9 Tr. at 412).

Mr. Steidl's testimony was that he received a fax from Puida's office on October 25, 2007, which included the Payment Change Letters as attachments, coinciding with the opening of settlement discussions in the case. (12/7 Tr. at 158). He believed the Letters were real and checked his file carefully but could not find them. He forwarded copies of the Letters to the Debtor on October 26th, informing her that Countrywide had just provided them to him but he did not have them in his file, and asking whether she had them. The Debtor said she did not have the Letters in her documents, nor did the Chapter 13 Trustee possess them after he checked with her office. Mr. Steidl testified he believed the Letters to be real and never informed Puida that he did not have them in his file.

Mr. Steidl was adamant that Puida never told him that the Letters were not what they purported to be. He was able to pinpoint to within 5 minutes of when he first became aware that there might be a question about the legitimacy of the Payment Change Letters. He testified that happened between 8:20 a.m. and 8:25 a.m. on December 20, 2007 while his wife and law partner, Julie Steidl, was in a separate room at the firm's offices reviewing the

26. At trial the Court inquired whether there were any telephone records to show that such a telephone call from Puida to Steidl occurred during the week from October 30–November 6 and was told by Puida's counsel that "[w]e didn't pull any phone records. That wasn't part of the discovery." Puida testified that the call was made from her office. (12/9 at 401).

Debtor's file in preparation for a hearing later that day on the *Motion to Enforce.*

At that time Ms. Steidl happened to notice that the earliest of the three Payment Change Letters might predate the firm's move to its current address, which piqued her interest because it showed the current address on the letter. She called out to her husband asking what date they had moved to the new address. Mr. Steidl testified that his exact words in response were "[w]hat the hell difference does that make?" After Ms. Steidl said "just tell me," Mr. Steidl informed her that the firm had not moved to the current address until October 24, 2003 and it had not received any mail at that address prior to that date. Ms. Steidl then pointed out to him that the first letter was dated September 22, 2003, yet showed that it had been sent to the firm at the current address. Mr. Steidl responded that this discrepancy was "really interesting" and asked Ms. Steidl to inquire about it at the hearing.

There was general agreement that Ms. Steidl did make an inquiry to Puida about the Payment Change Letters when they met each other just prior to the hearing, although there was some conflict in the testimony as to exactly what was said. It is, of course, a matter of record that Ms. Steidl raised the question about the Letters at the December 20th hearing and it was clear to the Court at that time that she was truly perplexed about them.

The Court is left to determine what really happened regarding the communications between Puida and the Debtor's attorneys. Based on its evaluation of the evidence presented, the Court concludes GMM and Puida did not inform the Debtor's attorney about the true nature of the three Payment Change Letters prior to December 20, 2007. Because of the obvious gravity of this finding as to those parties, the Court will provide some detail to explain how it arrived at this conclusion.

[20] As a starting point, the Court finds that Puida and GMM bear the burden of proof on the issue of whether the Debtor's counsel was informed about the true status of the Payment Change Letters. They acknowledge that they originally provided the false and misleading Letters to the Debtor's counsel during the course of the bankruptcy court litigation even though they did not realize the true nature of the Letters at the time. They further fully acknowledge that at some point thereafter they were made aware of the true nature of the Letters. As a means of ameliorating what had been done, they contend that the Debtor's counsel was informed about the Letters. This position is in the nature of an affirmative defense, and in accordance with the well-recognized general rule, the party asserting such a defense bears the burden of proof on it. *See, Taylor v. Sturgell,* 553 U.S. 880, 907, 128 S.Ct. 2161, 171 L.Ed.2d 155 (2008), *Martinelli v. Bridgeport Roman Catholic Diocesan Corp.,* 196 F.3d 409, 428 (2d Cir.1999) (law places the burden of proof on the party that asserts a contention and seeks to benefit from it). Furthermore, evidence as to whether Puida informed Mr. Steidl about the Letters, if in fact it exists, is something that would be within the control of Puida and GMM rather than the UST, which provides another reason to place the burden of proof as to this issue on them. *United States v. Santee Sioux,* 254 F.3d 728, 733 (8th Cir. 2001) (when the true facts relating to a disputed issue lie peculiarly within the knowledge of one party it is fair to assign the burden of proof to that party). With that conclusion as to the burden of proof in mind, the Court turns to a closer review of the evidence.

On the most basic level, the Court simply found Mr. Steidl to be a more credible witness than Puida regarding this point. He was very clear that he had never been told about the Letters and he gave a detailed and believable explanation as to how he became aware for the first time on the morning of December 20th that there might be a question as to their authenticity. He testified to a previous, good-working relationship with Puida. No apparent motive has been demonstrated for him to be untruthful on the question of whether he was ever informed by her about the Letters.

On the other hand, although consistently maintaining that she did in fact inform Mr. Steidl about the Payment Change Letters, Puida's testimony was vague on when the supposed conversation took place and the circumstances surrounding it. She has long been on notice as to the importance of the conversation she supposedly had with Mr. Steidl wherein the nature of the Letters was disclosed to him. But at trial, she still could not provide the date or even a time of day, on which the conversation took place beyond a very rough approximation.

Puida's general credibility as a witness was damaged by other, more peripheral areas of her testimony as well. For instance, the Court did not find her testimony to be credible on the topic of why, in another case in this Court in which it represented Countrywide, GMM made a business decision to fully assume responsibility to pay a sanction itself without informing Countrywide of that or of any other circumstances surrounding the issue. *See* 12/09 Tr. at 284–315.

The Court also found Puida's credibility lacking in regards to her response to questions going to the "heightened importance," in late October through December of 2007, of the Hill case to both Countrywide and GMM once the Chapter 13 Trustee and UST proceedings were started. It is obvious to the Court, based on all the evidence presented, that the Hill case became an extremely important matter to all associated with Countrywide. At that point, under the circumstances, there was nothing wrong with such a realization. However, rather than freely concede the point, Puida only grudgingly acknowledged the obvious after continued prodding. *See* 12/9 Tr. at 353–354.

The Court is also troubled by the representation Puida made to Countrywide on October 26th that she had "resent" materials, including the Letter, to Mr. Steidl. There was no evidence that the materials had ever previously been sent to Mr. Steidl and in fact the facsimile from Puida to Mr. Steidl which accompanied the materials said nothing about being a "resend." The Court is then left to conclude that Puida was not being candid about this, further damaging her credibility with the Court.

Finding a lack of credibility as to the foregoing matters, the Court assesses Puida's overall credibility in light thereof. *See Bennun v. Rutgers State Univ.*, 941 F.2d 154, 179 (3d Cir.1991) (when court is the finder of fact it may apply the principle of *falsus in uno, falsus in omnibus*). Further undermining her credibility, Puida's trial testimony concerning the purported conversation with Mr. Steidl conflicted with statements she made to the Court at the December 20th hearing. At that earlier hearing she stated as follows in response to a question from the Court as to when she had told Mr. Steidl that the Payment Change Letters, on their face, were not what they appeared to be:

> Your Honor, I wouldn't be able to give you an exact date. I had a conversation with Mr Steidl where he indicated that he had never received the letter. He

had checked his file, and I told him, well, you wouldn't have, because this was—these were not sent out.

Tr. of 12/20/07 Hrg. at 11–12, Ex. DU. The Court understood this to be a reference to the contents of a single conversation wherein Mr. Steidl commented about not having received the Letters and Puida responded to explain why. However, at trial Puida testified to two separate conversations. She stated that Mr. Steidl had told her during a prior conversation that he did not have the Letters, and then, when at some later time after she learned from Hook that the Letters were not real, she called Mr. Steidl for the specific purpose of telling him about them. 12/9 Tr. at 402–03.

When confronted with this apparent discrepancy at trial, Puida testified that she should have been "more precise" at the December 20th hearing, but she had really meant that there had been two conversations separated in time. The Court does not find this explanation to be credible. There was absolutely nothing in the statement by Puida at the December 20th hearing that would indicate that the crucial event of her learning the truth about the Letters from Hook intervened between Mr. Steidl's comment that he did not have the Letters in the file and her telling him that they had never been sent.[27]

[21] There are other factors that lead the Court to reach the conclusion that Puida did not inform Mr. Steidl that the Letters were other than what they appeared to be. One is the complete lack of documentation to provide any evidence of the purported conversation. An attorney, who by her own admission held out false letters to opposing counsel as being real (12/9 Tr. at 374), even if innocently so, and then subsequently becomes aware of their falsity, is in an ethically tenuous position. In such circumstances the attorney has an obligation to correct matters by informing opposing counsel. *See Fed.R.Bankr.P. 7026,* incorporating *Fed.R.Civ.P. 26(e)(1)(A)* (requirement to correct a response to a discovery request later learned to be incorrect); *Fed.R.Bankr.P. 7037,* incorporating *Fed. R.Civ.P. 37(c)(1)* (sanctions for failure to provide corrective information); *Pa. Rules of Professional Conduct 4.1* (lawyer may not knowingly make false statement of material fact to a third person).

Given the level of seriousness involved, the Court believes that most attorneys facing a similar situation would make the correction to opposing counsel in writing, or confirm it in a writing following a phone call if speed was of the essence. Or, at the very least, place a note or memo in the file to provide some evidence that the correction had been made. Similarly, there is no documentary evidence of any kind to memorialize the purported meeting between Puida and McKeever during which she allegedly informed him about the Letters. The evidence does show that the Hill case was a high-priority matter by the end of October 2007 and that Puida and McKeever were extensively communicating with each other about it by e-mail. Despite that, there is no reference in any of these communications about Puida learning the truth about the Letters or telling McKeever that she had told Mr. Steidl about them. The inability of Puida or GMM to produce any documentary evidence in this regard is

27. Lest it be thought that Puida was not on notice at the December 20th hearing that her statements to the Court on this issue were very important and therefore needed to be "precise," the Court notes that its question to her, which elicited the quoted response, included the following: "I want you to be totally candid with me, because I'm going to ask these questions of Mr. Steidl as well at some point."

another negative factor in weighing their credibility.[28]

In weighing Puida's credibility, it is also instructive to compare the lack of documentary evidence to support the GMM/Puida position with the available documentary evidence from Mr. Steidl. The evidence clearly established that it was his regular practice to communicate with the Debtor via letter. When he received the Payment Change Letters from Puida on October 25th he promptly forwarded them to the Debtor the next day and specifically noted in his accompanying letter to the Debtor that he did not have copies of them in his file. He asked the Debtor to look to see if she had copies of the Letters. According to Puida's testimony, Mr. Steidl would have been told by her about the true nature of the Letters fairly soon thereafter but there is nothing in any of his subsequent Letters to the Debtor to that effect. It would seem natural that an attorney who had bothered to inform his client in the first instance about not having the Letters in his possession would likewise inform that client if and when he discovered the reason why they were not in his possession (and thus, would not be in hers either). The lack of any such communication from Mr. Steidl to the Debtor further confirms the Court's conclusion that prior to December 20th, Mr. Steidl was not told the truth about the Letters.

Not only is there a lack of documentary evidence to support the contention that Puida informed Mr. Steidl, there was no supporting oral testimony from anyone else other than McKeever. He testified that Puida told him she had spoken with Mr. Steidl about the Payment Change Letters, but he was very vague as to when this conversation took place. (12/8 Tr. at 157–58). On the other hand, Hook testified that Puida never told her that she had communicated with Mr. Steidl and informed him of the true nature of the Letters (12/9 Tr. at 129). McKeever acknowledged that he does not know if anyone at Countrywide was ever told that Puida had spoken with Mr. Steidl about the Letters. (12/8 Tr. at 160). Ms. Steidl testified that when she asked Puida about the Letters prior to the December 20th hearing, Puida did not tell her that she had told Mr. Steidl about them. (*Id.* at 19).

Another factor that contributed to the Court's conclusion is the lack of any evidence showing a change in attitude or approach on the part of the Debtor and her attorney after the disclosure was supposedly made. Countrywide, acting through Puida and GMM, continued to pursue a settlement on the basis that the Debtor had been given notice of the changes in her mortgage payments and Mr. Steidl continued to respond in a manner which seemed to acknowledge that notice had been given, only questioning the amount of the changes. Even though at trial both the Respondents and Mr. Steidl expressed the view that there still might have been a basis for Countrywide's claim even in the absence of proper notice of payment changes having been given, it was clear that the appearance that notice had been given was a significant factor in how the Parties viewed the case. *See* 12/7 Tr. at 204, 231 (Mr. Steidl testimony as to importance of the Letters in his negotia-

28. Countrywide's case also featured a lack of documentation demonstrating that Hook had in fact called Puida to tell her the Letters were false. Hook herself acknowledged this was a significant event which should have been documented in the Countrywide AS400 system. Had Puida denied ever being told about the Letters by Hook, the Court would have likely weighed that lack of documentation by Countrywide in the credibility balance. However, since Puida admitted that Hook did tell her, the lack of documentation by Countrywide is of little moment.

tions); 12/8 Tr. at 135 (McKeever testimony as to significance of Letters). A bombshell going off during settlement negotiations to the effect that the Letters were actually "phonies" would be expected to leave some evidence behind—an expression of outrage from Debtor's counsel at having been misled, a sudden change in settlement posture—but the Court sees none in this record. The most logical explanation for the absence of any such evidence is that the bombshell never went off.

In reaching its decision on this Item of the *Rule*, the Court is also mindful of the possible motives of the Parties. There is no obvious reason for Mr. Steidl to be untruthful in his testimony that Puida never informed him about the Letters. Both he and Ms. Steidl testified to a good, prior working relationship with Puida, so personal animus is ruled out. Mr. Steidl candidly testified that one of his major concerns upon being presented with the Letters by Puida was that he had somehow erred by not amending the Debtor's Chapter 13 plan to increase the monthly payments to reflect the changes noted in the Letters. He thought that this perceived error on his part would make him responsible for the shortfall that Countrywide was seeking. A revelation that the Letters were false would thus, in a sense, have been welcome news for him. Certainly there would be no reason for him to hide such news from the Debtor or to provide false testimony denying he had been told about the Letters.

On the other hand, there are a number of possible motives for Puida and GMM to fail to make the disclosure. Perhaps they thought that making the disclosure would diminish the prospects of settling the case—at a time when they were under intense pressure from one of their largest clients to settle in order to bolster the lack of standing argument being made in the Chapter 13 Trustee and UST matter.[29] Possibly, because matters had progressed so far, and due to their "good, working relationship" with Mr. Steidl they believed the matter would be settled and were just uncomfortable with the prospect of having to explain and apologize to Debtor's counsel, finding it easier to avoid that unpleasant task altogether by not mentioning the Letters. Conceivably, once the matter heated up in late October, Puida realized that copies of the Letters and the payment history had never been previously forwarded to Mr. Steidl in September when GMM received them from Countrywide. Or perhaps, to avoid the embarrassment of admitting that failure to GMM's client, Puida instead misrepresented to Countrywide that she had to "resend" the materials—with the deception escalating from there.[30]

To make a finding under Item 6 of the *Rule*, proof of a motive is not specifically

29. In his closing argument, Counsel for the UST also commented on possible "incentives" that Puida and GMM would have had not to tell Mr. Steidl about the Letters. In addition to the potential motives mentioned in this *Opinion* by the Court, Counsel pointed out that a disclosure to Mr. Steidl would have introduced an unwanted element of uncertainty into the settlement discussions because Puida/GMM could not have known how Mr. Steidl might react to such news—for example, he might inform the Court. Counsel also pointed out that the timing of the revelation about the Letter could not have been worse for Countrywide, given the nearly contemporaneous filings by the Chapter 13 Trustee and the UST concerning Countrywide and suggested that as another possible reason why Puida/GMM would choose not to inform Mr. Steidl. The Court certainly views these as other plausible motives underlying the failure to disclose.

30. This last scenario would explain the curious omission from Puida's October 26th 2:05 P.M. e-mail to Countrywide of the report in the 1:03 P.M. email to McKeever that Steidl stated he did not have the Letters in his file.

required. Therefore, the Court need not consider the actual motive(s) of GMM and Puida in failing to address the issue with Mr. Steidl. Nevertheless, possible motives clearly exist.

For all of the above reasons, the Court must reluctantly conclude that GMM and Puida failed to disclose the true nature of the Payment Change Letters to Mr. Steidl. The Court must further conclude that they did so intentionally, or with reckless disregard, because an alternative explanation of failure based on mere negligence or inadvertence is simply not plausible.

(7) Goldbeck McCafferty and McKeever and Leslie Puida intentionally, or with reckless disregard and/or indifference to the applicable facts, made inaccurate oral statements in response to the Court's inquiry regarding when Leslie Puida told the Debtor's attorney that the three Payment Change Letters were not what they purported to be, but instead were memoranda created years after the event.

The underlying issue involved in deciding this aspect of the *Rule* concerns Puida's statements to the Court at the December 20, 2007 hearing when questions regarding the Payment Change Letters were raised by Ms. Steidl. It is beyond dispute even by GMM and Puida, that a number of statements made by Puida at that hearing were factually untrue:

- "Your Honor, regarding the letters, they were never held out to be letters that were sent notifying anyone of payment changes." (12/20/2007 Tr. at 9: 24–10:1).
- "The letters again were never offered as being something that was sent out to debtor's counsel or to the Trustee." (*Id.* at 19:16–18).
- "Throughout my discussions with Mr. Steidl when we were trying to resolve this matter." (*Id.* at 10: 24–25 (stated in response to a question from the Court as to when she had disclosed that the Letters were not what they appeared to be)).

The first and second of these statements are demonstrably false based on Puida's own trial testimony. She testified at trial that the Letters were initially held out as having been sent as indicated, something she herself believed to be true at the time. (*See* 12/9 Tr. at 374–75). Further confirmation of the falsity of these two statements comes from the cover sheet which Puida sent to Mr. Steidl accompanying the Payment Change Letters which clearly implies they were "real" and meant to be viewed in that way. (*See,* UST Ex. BZ)

The third statement in the above list is false because Puida testified at trial that there was but a single conversation during which she supposedly told Mr. Steidl about the Letters, whereas the statement made on December 20th clearly indicates repeated representations of this type were made "throughout" the extended settlement negotiations with Mr. Steidl. (*See* 12/10 Tr. at 12–13). Additionally, based on the Court's finding above to the effect that Mr. Steidl was not informed of the true nature of the Letters until December 20th, at least one other statement made by Puida at the December 20, 2007 hearing was not true. This misrepresentation occurred when Puida stated:

> "I had a conversation with Mr. Steidl where he indicated that he had never received the letter. He had checked his file and I had told him, well, you wouldn't have, because this was—these were not sent out."

(*See* 12/20/2007 Tr. at 12:1–4)

Taking the falsity of Puida's statements as given, the question for the Court here

under the *Rule* is whether those statements were made deliberately or with reckless disregard. At trial, Puida would only acknowledge that she "should have been more precise" in her statements at the December 20th hearing. (12/10 Tr. at 407). She further said she only came to that realization after she saw a copy of the transcript from the hearing. (*Id.* at 409). In other words, it appears that Puida seeks a conclusion that she may have acted carelessly, but innocently, in responding to the Court, with no intent to deceive. After careful consideration the Court rejects such a conclusion.

As pointed out above, at the December 20th hearing the Court was very direct with Puida and instructed her that she should answer carefully and candidly because it was clear even then that the subject of the Payment Change Letters was significant and the Court would inevitably at some point be asking the same questions of Mr. Steidl. Moreover, the subject of the Letters had come up twice previously on the same date of the hearing—once by Puida herself at a meeting at the office of Countrywide's counsel and once when Puida and Ms. Steidl spoke in the hallway. This was not, then, a situation where Puida was somehow caught off guard with a totally unanticipated line of questions, or where she was in any way misled by the Court as to the significance that would be placed on her answers to its questions. Furthermore, since the alleged conversation(s) occurred relatively close in time to the December 20th hearing, it is fair to conclude that Puida's memory of the events would be more clear and distinct then her memory months or even years later at trial.

Puida's contention that she only realized the inaccuracy of her statements after she saw the transcript from the hearing also rings hollow. The transcript from the hearing was requested by the UST the very next day and the completed transcript was docketed on January 7, 2008. *See* Document No. 107. The filing receipt for the transcript shows that electronic notice of the filing was sent to Puida. Once Puida read the transcript and realized she had made false statements to the Court, she was under a duty to take remedial action by informing the Court as to any misstatements. *See Pa. Rules of Professional Conduct 3.3(a)(1)* (lawyer shall not knowingly make a false statement of material fact to a tribunal or fail to correct a false statement of material fact previously made by the lawyer). Had Puida been acting in good faith the Court would have expected a prompt correction once she reviewed the transcript, but that was not forthcoming.

When this point was raised at trial, Puida responded that she did not read the transcript until she was being represented by counsel in this matter and acted on advice of counsel in not advising the Court about the misrepresentations at the December 20th hearing. (12/9 Tr. at 409–10). The Court rejects this excuse for several reasons.

First, no attorney even sought to enter an appearance on behalf of Puida and GMM until July 14, 2008 (shortly after the UST filed its *Motion for Rule to Show Cause* on June 23, 2008), which was more than six months after the transcript was filed. The Court finds it difficult to believe that Puida did not read the transcript of the December 20th hearing until after she was being represented by counsel in this matter. The hearing was a dramatic event that received considerable notoriety and Puida was at the center of the firestorm. The Court believes she must have read the transcript as soon as it became available. Second, even assuming she did not read the transcript until after she was

being represented by counsel who advised her not to take remedial action, the Court does not believe that can excuse her obligation to do so as an officer of the Court under the *PA Rules of Professional Conduct.*

For the above reasons, the Court concludes that Puida intentionally, or at least with reckless disregard, made inaccurate statements at the December 20th hearing.

(B) Beyond the Rule to Show Cause: Attorney Misconduct Arising During the Trial

In addition to the particular points raised in the *Rule,* several other areas of potential misconduct came to the Court's attention during the trial that now require comment. One involved the deposition testimony of Charles Townsend, Assistant General Counsel of Countrywide, that was read into the record by the UST during her case.

In this testimony Counsel for the UST questioned Townsend closely about his role, if any, in attempting to settle the Hill matter, particularly during the period of late October 2007, when there was a flurry of activity in that regard following the filings by the Chapter 13 Trustee and the UST. Townsend testified that he "did not have a role in that litigation" (meaning the current matter) and "had no role in the motion to enforce discharge litigation." 12/9 Tr. at 230–31. When asked specifically about any involvement in settlement negotiations in Hill during the October 24–26th period, Townsend responded that he "had no participation in negotiations or parameters." He further testified that despite his position with Countrywide, he did not need to be informed of, or approve, any settlement in the Hill matter. *Id.* at 252–53.

At the conclusion of Townsend's testimony, the Court was thus left with the clear impression that Townsend was not involved in any way with the Hill case and the focused efforts to get it settled. There was no documentary or other evidence to the contrary, so the Court did not even consider the extent of Townsend's involvement in the Hill settlement effort to be at issue. However, in the evening, at the very end of the third day of trial, Countrywide's attorney asked questions of Puida that resulted in the Court ruling Countrywide had "opened the door" for admitting into evidence certain e-mails that, up to that point, had been the subject of a privilege claim by Countrywide and thus not available to the UST or the Court.[31]

These formerly-privileged e-mails paint a far different picture of Townsend's involvement in Hill than did his testimony. For instance, Court Exhibit 6 is a series of e-mails between McKeever and Townsend from the afternoon of October 25th. In the first one, Townsend asks McKeever to try to get the October 31st hearing on the motion in Hill continued for a few weeks so "we can try to do a workout". He further asks McKeever to let him know about the possible continuance by the next day because if the hearing is not continued "we need to formulate a strategy for the hear-

31. Pursuant to a Pretrial Order, Countrywide had previously been directed to set aside the emails in a "privilege file" so that at the time of Trial, in case their privileged status became an issue, they would be immediately available. Based on the line of questioning by Countrywide's attorney, the Court directed the entirety of the emails to be turned over. Thereafter, a member of the Court's staff reviewed them prior to the start of the fourth day of trial and provided a summary to the Court of those possibly relevant to the Townsend issue. The Court ultimately ruled that eight of these e-mails should be disclosed to the UST and made available for use at trial. These e-mails were marked as Court Exhibits 1–8.

ing." In his reply, McKeever assures Townsend that "[w]e won't settle any of it without your input."

Court Exhibit 8 is another series of e-mails, this one from the afternoon of October 30th. The first is an e-mail from Townsend to Puida, with copies going to several other people, including McKeever, with the simple message: "Any updates?" McKeever responded to that e-mail by reporting (erroneously) to Townsend that the matter had been resolved and Hook had received the details. McKeever concluded by asking whether "you or Lord Locke [Countrywide's outside counsel in the UST *Rule 2004* Notice matter at the time] want to review the stip?" Townsend replies "Both of us."

Based on these e-mails, and the assumption that Townsend reviewed them and other relevant materials prior to the deposition so that his memory was well-refreshed,[32] the only conclusion the Court can draw is that he was being deliberately misleading in his testimony as to the nature of his involvement in the Hill matter and the attempt to settle the *Motion*. But for the happenstance of the admission of the formerly privileged e-mails the Court may never have become aware of the deception. In addition to the obvious impropriety of Townsend providing misleading testimony, this is troubling because clearly counsel for some of the parties were aware of the content of the e-mails and had to know that Townsend was misleading the Court, but did nothing to bring it to the Court's attention.

First, as to Townsend himself, the Court concludes that something must be done in response to his misleading testimony. Townsend was not just another witness in the case. He is an attorney, an officer of the Court, who actually entered an appearance on behalf of Countrywide in this case.[33] As such, the Court is not inclined to take the easy path and look the other way concerning, at best, the lack of candor of his testimony. Townsend will be required to appear before this Court to personally explain his conduct so a determination can be made as to whether sanctions should be imposed against him or this matter should be referred to the proper disciplinary authorities.

32. Countrywide vigorously opposed the effort by the UST to depose Townsend on attorney-client privilege grounds, filing a motion to quash a subpoena that the UST had served. *See* Document No. 308. The matter was heavily litigated, being the subject of several arguments and orders by the Court and a supplemental filing by Countrywide. *See* Document Nos. 368, 379, 430. The Court ultimately denied Countrywide's motion and allowed the deposition to go forward with certain safeguards. For present purposes, given the obvious sensitivity of Countrywide to Townsend being deposed, the Court has no doubt that he was well prepared for the deposition.

33. The Court considers Townsend to have appeared for Countrywide in this case even though he did not sign any pleadings or enter a formal appearance. The *Amended Motion to Quash*, Document No. 308, which Countrywide filed in an effort to keep Townsend from being deposed by the UST states that Townsend "had specific responsibility for representing Countrywide in connection with the Hill case." *Id.* at ¶ 22. At hearings on this *Motion to Quash* Townsend appeared and sat at counsel table with the other Countrywide attorneys, and when the Court asked for the entry of appearances of attorneys at these hearings Townsend's name was given. *See* Tr. of 11/26/2008 Hrg. at 6, Document No. 399, Tr. of 1/26/2009 Hrg. at 6, Document No. 439. The Court made clear at both of these hearings that it viewed Townsend as having entered an appearance as an attorney for Countrywide in the case, at one point explicitly stating that it had jurisdiction over him as a result. *See* Tr. of 11/26/2008 Hrg. at 10, 18, Tr. of 1/26/2009 Hrg. At 36–37. There was never any response or objection from Townsend or anyone else disputing the Court's view in that regard.

[22, 23] The apparent falsity of the Townsend testimony, and the failure to make any effort to correct it, implicates the professional responsibilities of other attorneys in the case as well—those who had knowledge of the previously privileged but as yet undisclosed e-mails evidencing Townsend's participation in the October 2007 events. At the very least when the deposition testimony was offered, counsel should have alerted the Court as to its inaccuracies. An attorney's "loyalty to the Court, as an officer thereof, demands integrity and honest dealing with the Court. And when he departs from that standard in the conduct of a case he perpetrates a fraud upon the Court." *In re Ocon,* 2007 WL 781223 *3 (Bankr.S.D.Fla.2007) quoting *Kupferman v. Consol. Research & Mfg. Corp.,* 459 F.2d 1072, 1078 (2d Cir. 1972). Fraud on the court "is a wrong ... which .... cannot complacently be tolerated consistently with the good order of society ... involv[ing] two victims: the individual litigant ... and the court itself, whose integrity is compromised by the fraudulent behavior of its officers." *Hazel–Atlas Glass Co. v. Hartford–Empire Co.,* 322 U.S. 238, 246, 64 S.Ct. 997, 88 L.Ed. 1250 (1944). "The very temple of justice [is] defiled." *Universal Oil Prods. v. Root Ref. Co.,* 328 U.S. 575, 580, 66 S.Ct. 1176, 90 L.Ed. 1447 (1946). "If our adversary system is to function according to design, we must assume that an attorney will observe his responsibilities to the legal system as well as to [the] client." *Geders v. United States,* 425 U.S. 80, 93, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976).

The Pennsylvania *Rules of Professional Conduct, Rule 3.3* provides that:

> A lawyer shall not knowingly:
>
> ...
>
> (3) Offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence before a tribunal or in an ancillary proceeding conducted pursuant to a tribunal's adjudicative authority, such as a deposition, and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal....

Pa.R.P. C. 3.3.

Rule 3.3, cmt. 2 provides in part, that "[t]his Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process..... [T]he lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false."

Rule 3.3, cmt. 10 discusses remedial measures. It provides in part, "if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation ...". *See also Pa. R.P.C. 1.6*

[24] It appears to the Court that counsel, with knowledge of the misleading Townsend testimony, had a duty to take some remedial action respecting it, even though that could potentially require divulging attorney-client privileged material.

For instance, in a somewhat similar circumstance, the Honorable R. Stanton Wettick, a highly-regarded judge of the Allegheny County, PA, Court of Common Pleas, stated:

> An attorney who claims the [attorney/client] privilege on behalf of a client cannot do so without first reviewing the communications for which the privilege is sought. This attorney has a duty to prevent a client from offering false evidence. See Rule 3.3 of the Rules of Professional Conduct. This means, for example, that in an environmental coverage case counsel for the insured cannot permit a representative of the insured to testify that the insured first learned that certain underground water was polluted in January 1993 if this testimony is inconsistent with a communication between the insured and its counsel in 1991 which referred to a pollution problem involving this same underground water.

Mueller v. Nationwide Mut. Ins. Co., 1996 WL 910155 * 10, 31 Pa. D & C 4th 23, 39–40 (Pa.Com.Pl.1996). *See also, e.g., Montgomery v. Etreppid Techs., LLC*, 2009 WL 435195 (D.Nev.2009) (discussing counsel's obligation under Rule 3.3 and stating that lawyer must not allow the tribunal to be misled by evidence the lawyer knows to be false.)

During the trial the Court also became aware of some apparently routine practices at GMM that raise issues that cannot be ignored. McKeever testified to a procedure at his firm whereby foreclosure complaints are prepared and filed by non-attorneys and never reviewed by an attorney, even though the "signature" of an attorney appears on the document. 12/8 Tr. at 83–84. This would seem to be a violation of the *Pennsylvania Rules of Civil Procedure*, which provide that the signature of an attorney on a document filed with a Pennsylvania court is a certification that the document has been read by the attorney. *See Pa.R. Civ.P. 1023.1(c).* Even though these foreclosure actions are not being filed in this Court and thus do not expose GMM to sanctions, concern for our sister courts in this Commonwealth compel the Court to at least make publicly known what it learned during the trial. Furthermore, often these fundamentally flawed foreclosure actions, form the basis for related relief in this Court should the state court defendant subsequently file a bankruptcy petition. Therefore, the Court is concerned about the continuation of this practice by GMM.

[25] More germane to matters directly affecting this Court was testimony that Puida permitted an attorney named Ann Swartz to "sign" a document on behalf of Puida even though she (Puida) had not reviewed the document in question, and even though Swartz is not a member of the Bar of this Court and was not admitted *pro hac vice* in this matter. The Court believes this sort of conduct to be deceptive and a violation of the spirit, if not the letter, of *Fed.R.Bankr.P. 9010(a)* and *(b), 9011(a),* and, *Local Rule 9010–1.* Due to the other more serious matters addressed herein, and Puida's testimony that this practice is no longer being followed, the Court will not impose separate sanctions for this conduct. Counsel are on notice, however, that sanctions may be appropriate in the future should the Court become aware of any further instances of this type of conduct.

CONCLUSION

For the reasons given, the Court finds that no sanctions will be imposed against Countrywide pursuant to the *Rule* except with respect to Item 4 of the *Rule* concerning the false representation made in the *Motion to Quash.* Countrywide clear-

ly acted improperly in many respects in connection with its post-discharge pursuit of the Debtor, all as detailed above. However, the Court finds that the combination of the very favorable settlement which has made the Debtor whole, the negative publicity already experienced by Countrywide over this matter and the absence of any evidence to show a systemic problem existing at Countrywide respecting the points raised in the *Rule*,[34] are sufficient reasons not to impose any additional sanction at this time.

As to Puida and GMM, the Court finds that no sanctions will be imposed with respect to Item 5 of the *Rule* directed to them but that consideration of sanctions is appropriate as to Items 6 and 7.

During Trial, the Court advised the Parties that if it found sanctionable conduct to exist it would bifurcate the matter and hold a separate hearing to consider the type and extent of sanction that should be imposed. In keeping with that approach, the Court will schedule such a hearing as to GMM and Puida.

Finally, with respect to the "other instances" of misconduct that came to light during the trial, an *Order and Rule to Show Cause* will be issued against Atty. Charles Townsend directing him to personally appear and show cause as to why he should not be appropriately sanctioned for providing what appears to be false, or at the least misleading, testimony while under oath. Depending on the outcome of that hearing, the Court will determine whether any other counsel involved in this matter should be required to explain their failure to take appropriate, remedial action to prevent the Court from being misled by such false or misleading testimony.

Before concluding, a few observations about lessons to be learned from this case are appropriate. The real estate "meltdown" of the past several years has brought the whole subject of mortgages and foreclosures to the forefront of public awareness. In the Court's own experience, the prospect of dealing with a mortgage lender or mortgage servicer over a delinquency, or anything else other than the ordinary payment plan, clearly inspires feelings of dread, mystery and frustration in the average borrower. If the present case is at all representative, those feelings are substantially justified.

Here, the Debtor did everything right. Despite that, she was put through a grinding process by Countrywide even though along the way it repeatedly failed to take appropriate action to reconcile the Debtor's account. This was not a case where a single error led to a bad result. There were multiple points in the process—both during and after the bankruptcy concluded—when Countrywide and its agents missed successive opportunities for prevention or correction, which include:

- failing to properly account for payment to the prior servicer,
- failing to properly account for loan payments received by it,
- failing to timely conduct audit and escrow analyses required by RESPA and its own internal policies,
- failing to send appropriate and timely notices of payment change,
- failing to abide by bankruptcy court orders and rules,

34. Although there was a lack of evidence in this case as to any systemic problems at Countrywide, that is not tantamount to a finding that there are no such systemic problems. As indicated throughout this *Opinion*, the focus in this case has been on the specific facts attending the Hill case. The recent "global" settlement between Countrywide and the FTC might well be indicative of the existence of systemic issues.

- failing to properly respond to inquiries of the Debtor and her attorney,
- failing to respond to inquiries by the Pennsylvania Attorney General,
- failing to timely advise of false notices of payment change
- failing recognize the effect of the bankruptcy discharge order when filing a foreclosure action,
- failing to abide by admonitions of the bankruptcy judge regarding applicable law by continuing settlement negotiations based upon letters it knew appeared authentic but in reality were not.

Throughout this matter, Sharon Hill did everything she was supposed to do. She dutifully met her obligations under the Chapter 13 Plan during its five year duration. Upon receiving her discharge, she immediately assumed responsibility for her post-bankruptcy obligations and resumed—or at least attempted to resume—making her mortgage payments. When that failed, she tried to work things out with Countrywide but her entreaties were repeatedly ignored. She was "pushed back" at every opportunity for Countrywide to do the right thing and correct the wrong being done to her. Yet, Countrywide didn't discriminate, maintaining its cavalier approach throughout. It remained consistent in it's *modus operandi.* Not only did it ignore the Debtor's inquiries, but it ignored the inquiries from the PA Attorney General and warnings from the Debtor's personal attorney, as well.

But for Atty. Julie Steidl noticing the address change while preparing for work that morning on December 20, 2007, quite possibly she, the Debtor, and this Court, may never have known about the "after the fact" creation of the payment change letters or any of the other insensitive and inexcusable conduct Countrywide displayed in handling this account, from start to finish.

Most likely Countrywide would have continued to exercise its might and demand "tribute" to settle the case, despite prior admonitions from the bankruptcy court that it had no basis for its position, in amounts with no real relationship to what was owed—in this case—nothing. At some point the Debtor would have had to seriously consider, and most likely accept because of the mounting expenses her fight against Goliath was causing her to incur, capitulation. Soon, a practical, business decision most likely would require her to forego "principle" and settle the matter in an amount she could afford so as to make the obligation current, post bankruptcy, and make the problem go away. Fortunately for her, that bridge never had to be crossed. But how many other, similarly situated debtors will be so fortunate?

Although originally alleged, the Court was not presented with any evidence to support a finding for the existence of a systemic problem with loan servicing at Countrywide. Perhaps, this case was just an inexplicable aberration—where what could go wrong, did go wrong—although the Court highly doubts it. If only Countrywide, in particular, and the mortgage lender/servicer industry, in general, would take to heart just how devastating these kinds of mistakes can be to borrowers who are trying to do the right thing and honor their obligations. If such were to occur, and the lessons learned from this case lead to a correction in the way in which lenders and servicers currently do business when dealing with borrowers, then maybe everything Sharon Hill had to endure will not have been in vain and some good will come from it.

ORDER AND RULE TO SHOW CAUSE

AND NOW, this *5th* day of ***October, 2010,*** for the reasons set forth in the accompanying *Memorandum Opinion,* it is

ORDERED, ADJUDGED and DECREED that,

(1) Items 1, 2 and 3 of the ***Rule to Show Cause*** ("Rule"), Document No. 435, as directed against Countrywide Home Loans, Inc ("Countrywide"), and Item 5 of the *Rule*, as directed against Goldbeck, McCafferty and McKeever ("GMM") and Attorney Leslie Puida ("Puida") are ***VACATED.***

(2) With respect to Item 4 of the *Rule*, as directed against Countrywide, the Court finds sufficient cause exists to sanction Countrywide pursuant to *Fed. R.Bankr.P. 9011*, and that a sufficient sanction so as to deter repetition of such conduct in the future or comparable conduct by others similarly situated, is a "public censure" of Countrywide and a reminder of its obligations under *Fed.R.Bankr.P. 9011(b)(3)* to make reasonable investigation before making factual allegations in documents filed with the Bankruptcy Court, or any other court for that matter. The Court's comments in the *Memorandum Opinion* and in this *Order* constitute that censure and reminder. Therefore, no further hearing or action is required in regard to Paragraph (4) of the *Rule*.

(3) With respect to Items 6 and 7 of the *Rule* as directed against GMM and Puida, the Court finds that sufficient cause exists to impose sanctions pursuant to the Court's inherent power its power pursuant to *11 U.S.C. § 105(a)* and *Fed.R.Bankr.P. 7037*, incorporating *Fed.R.Civ.P. 37(c)(1)(C)*. Therefore, a hearing is scheduled for ***November 22, 2010 at 2:00 P.M.,*** in the Erie Bankruptcy Courtroom, U.S. Courthouse, 17 South Park Row, Erie, PA, for the purpose of considering and determining appropriate sanctions, at which time ***Leslie M. Puida*** and ***Michael T. McKeever,*** in his capacity as a representative of GMM, with authority to speak for the firm, are directed to ***personally*** appear.

(4) With respect to the apparent misconduct of ***Attorney Charles Townsend*** ("Townsend") as described in the *Memorandum Opinion*, a *Rule to Show Cause* is hereby issued directing him to ***personally*** appear on the ***November 22, 2010 at 2:00 P.M.,*** in the Erie Bankruptcy Courtroom, U.S. Courthouse, 17 South Park Row, Erie, PA, to show cause why sanctions should not be imposed against him for providing false or misleading testimony under oath during his deposition in this matter, which testimony was then used at the time of trial due to Townsend's unavailability. The Court further understands that Townsend may no longer be affiliated with Countrywide. If that is correct, Countrywide and its Counsel of Record, Thomas P Connop, are directed to effect personal service of a copy of this *Order* and *Rule to Show Cause*, together with the *Memorandum Opinion*, on Townsend immediately after receipt of this *Order* and file a ***Certificate of Service*** to that effect ***on or before October 12, 2010.***

In re Joseph Francis SWAIN and Edith Mae Swain, Debtors.

Edith Mae Swain, Plaintiff,

v.

United States Department of Treasury, Internal Revenue Service, Defendant.

Bankruptcy No. 09–55942.
Adversary No. 09–4996.

United States Bankruptcy Court,
E.D. Michigan,
Southern Division.

Sept. 27, 2010.

Background: Discharged Chapter 7 debtor in no-asset case filed adversary pro-

3. Nothing in this Order or the Franchise Agreement should be deemed or construed to prevent a competing plan proponent from seeking the rejection and/or termination of the Wyndham Franchise Agreement at or before confirmation of a plan in this case.
4. To the extent any provisions of the Wyndham Franchise Agreement or related documents conflict with the terms of this Order, this Order shall control in all respects.

In re Sharon Diane HILL, Debtor,

Roberta A. DeAngelis, Acting United States Trustee for Region 3, Movant,

v.

Countrywide Home Loans, Inc., Goldbeck, McCafferty and McKeever, and Attorney Leslie Puida, Respondents.

No. 01–22574 JAD.

United States Bankruptcy Court, W.D. Pennsylvania.

Nov. 24, 2010.

Background: Order to show cause was issued against residential mortgage lender and its attorneys as to why sanctions should not be imposed for their alleged misconduct in failing to properly credit payments received under Chapter 13 debtor's cure-and-maintenance plan, in attempting to collect what they should have realized was a highly doubtful deficiency, and in engaging in allegedly deceptive conduct in settlement negotiations with debtor's attorney and in their representations to the bankruptcy court. After the court determined that sufficient cause existed to sanction law firm and attorney, 437 B.R. 503, hearing was held regarding what sanctions would be appropriate.

Holdings: The Bankruptcy Court, Thomas P. Agresti, Chief Judge, held that:

(1) public reprimand was an appropriate sanction for firm, and

(2) public reprimand also was an appropriate sanction for attorney who lied to the court.

So ordered.

1. Attorney and Client ⇐59.8(1)

Bankruptcy ⇐2187

Public reprimand was appropriate sanction for law firm that represented residential mortgage lender, where firm was found to have made a false statement in a motion to quash notices of Rule 2004 examinations and to have failed to promptly notify Chapter 13 debtor's attorney of the fact that change-in-payment letters were never sent, while engaging in settlement negotiations with that attorney, and to have deliberately or at least recklessly misrepresented to the bankruptcy court that the firm had apprised debtor's attorney of the fact that the letters were never mailed; monetary sanction was not warranted, given magnitude of financial loss which the firm already had experienced in the form of attorneys fees and lost client revenue and the fact that a further monetary sanction was unlikely to have any significant deterrent effect, and honesty and truthfulness were matters of character that could not be taught through mandatory continuing legal education (CLE) or ethical training. Fed.Rules Bankr.Proc. Rule 9011, 11 U.S.C.A.

2. Attorney and Client ⇐59.8(1)
Bankruptcy ⇐2187

Public reprimand was appropriate sanction for attorney for law firm that represented residential mortgage lender, where bankruptcy court found that attorney had lied to the court and had not subsequently accepted responsibility for doing so; attorney had already, in a sense, been suspended from practice in the bankruptcy court, as firm had taken her off assignment to any cases filed in the district and it seemed highly unlikely that that would change anytime soon, monetary sanction was inappropriate as attorney already had suffered a significant financial detriment as a result of the matter, and mandatory continuing legal education (CLE) training, mediation, and the like were of no use, given that honesty and truthfulness were matters of character that could not be taught. Fed.Rules Bankr.Proc.Rule 9011, 11 U.S.C.A.

Donald R. Calaiaro, Calaiaro & Corbett, P.C., Kenneth Steidl, Steidl & Steinberg, Robert O. Lampl, Pittsburgh, PA, for Debtor.

MEMORANDUM ORDER

THOMAS P. AGRESTI, Chief Judge.

On October 5, 2010, the Court entered a *Memorandum Opinion and Order,* Document No. 562 [1], which found that sufficient cause existed to sanction Respondents Goldbeck, McCafferty and McKeever ("GMM") and Attorney Leslie A. Puida ("Puida") as to Items 6 and 7 of the *Rule to Show Cause* ("Rule"), Document No. 465, issued on July 29, 2009. Those two Items provided:

(6) Goldbeck McCafferty and McKeever and Leslie Puida intentionally, or with reckless disregard and/or indifference to the applicable facts, failed to disclose to the debtor's attorney that three Payment Change Letters had never actually been sent, all in an improper attempt to collect on questionable debt while attempting to resolve a matter that was pending before this Court.

(7) Goldbeck McCafferty and McKeever and Leslie Puida intentionally, or with reckless disregard and/or indifference to the applicable facts, made inaccurate oral statements in response to the Court's inquiry regarding when Leslie Puida told the Debtor's attorney that the three Payment Change Letters were not what they purported to be, but instead were memoranda created years after the event.

The Court did not actually decide what sanctions would be imposed in the *Memorandum Opinion and Order,* instead deferring that decision until after a hearing scheduled for November 22, 2010 to allow GMM and Puida an opportunity to present evidence of mitigation or other pertinent evidence going to an appropriate sanction. Prior to the hearing, at the request of counsel for GMM and Puida, the Court also convened a telephonic status conference, and entered a related order, to provide further guidance as to expectations for the hearing.

The hearing went forward as scheduled and GMM and Puida called three witnesses and submitted a number of exhibits. Attorney Robert Bernstein was called as an expert and opined on the practices and procedures currently being followed at GMM, some of them implemented as a direct result of the *Hill* matter. The Court found Atty. Bernstein to be a credi-

1. Reported at *In re Hill,* 437 B.R. 503 (Bankr. W.D.Pa., October 5, 2010).

ble witness and was gratified to hear that GMM does seem to have taken a number of steps that should result in improved operations and responsiveness to legitimate debtor concerns in cases being handled by the firm. Of course, Atty. Bernstein's testimony went only to "after-the-fact" matters. He had no personal knowledge or other insights as to the events underlying the *Rule*.

Attorney Michael McKeever, one of the principal shareholders of GMM also testified. McKeever confirmed much of the testimony of Mr. Bernstein concerning changes which have been implemented by GMM in response to the *Hill* matter, including an increased reliance on the presence of its own attorneys in the Western District as opposed to the use of local counsel. He apologized to the Court and the other interested parties and testified that GMM has been damaged by this whole matter in a number of ways. On a strictly monetary level, the firm has incurred out-of-pocket attorney and expert fees approaching $400,000 which will not be reimbursed by insurance coverage. McKeever also testified that two large clients have suspended referrals to the firm as a result of this matter, although the extent of that "loss" is somewhat unclear because it does not apply to cases already in the pipeline, and no information was provided as to how long the suspension will last.[2]

McKeever also described the damage to GMM's professional reputation, which he said has been significant. He stated that the firm has "self-reported" to the Pennsylvania Disciplinary Board, although the extent of that reporting was left somewhat unclear. The firm has also notified its clients as to "what happened" in this matter although the specific content and description of the notice being communicated was not identified. While still commendable, the mitigatory value of this action was somewhat tempered by the fact that it was only undertaken after a client made inquiries with the firm indicating that it was aware of this matter.[3] McKeever testified that the firm is committed to efforts to restore its reputation and improve its internal processes.

The final witness presented was Puida who testified emotionally as to the effect this matter has had on her individually. From an economic standpoint, GMM has reduced her compensation significantly as a result of the findings in the *Memorandum Opinion and Order*. This has hit her especially hard since she is the breadwinner for her family. She is now under an "action plan" at the firm designed to improve her professional and case management skills, including the documentation of all "substantive" communications in the cases she is handling. Puida testified that she is committed to being more aware of what is going on in her cases and better prepared to respond to any issues which might arise in the hearings she attends.

Although the evidence presented by GMM and Puida at the hearing was helpful as far as it went, it really did not go the core of the *Rule, i.e.*, a finding that Puida, and by extension GMM, had not been honest with this Court. In closing remarks at the sanction hearing counsel for the United States Trustee noted that the evidence had been focused on competence rather than character. The Court largely agrees

2. It is perhaps worth noting that Respondent Countrywide Home Loans, Inc., now under the umbrella of Bank of America, is *not* one of the clients that has suspended referrals to GMM.

3. McKeever testified that the issue of "client notification" was under discussion at the time this inquiry came into the office.

with that sentiment. No matter how extensive the procedures and checklists and forms that a high volume law firm like GMM may implement, they are not a substitute for the character of the individual persons who are supposed to be abiding by them. The Court was disappointed by the lack of any evidence to show a recognition by GMM, generally, of the need for its attorneys to employ a policy of absolute candor in dealing with this and other courts.

The Court was also disappointed by the apparent lack of recognition of this need by Puida. When asked what was the most important lesson she had learned from this entire matter, she replied that she needed to do a better job of documenting her communications. When asked point blank by counsel for the UST whether she wanted to now "change her story" about what had really happened between her and Attorney Ken Steidl, and despite being given assurances by the Court that she could invoke her Fifth Amendment protections if she wished without any consequence in this proceeding or as to the sanction ultimately imposed, Puida again insisted that she had informed Mr. Steidl about the letters and simply failed to document it.

The Court finds this lack of acceptance of responsibility, troubling. Its prior finding that Puida lied was not made lightly, nor in the end was it a close call—the Court would have made the same finding even if the applicable evidentiary standard had been clear and convincing rather than merely a preponderance. Furthermore, this was not a "shades of gray" type situation—either Mr. Steidl or Puida was lying and the Court found it to be Puida. The evidence that Puida lied was considerable. For Puida to thus continue to fall back on a "lack of documentation" as her only "sin" does give the Court some pause as to whether she truly appreciates the gravity of the situation.[4]

Having said all of the above, the Court is left with deciding appropriate sanctions to be imposed against GMM and Puida. The UST filed a helpful *Preliminary Recommendation Regarding Sanctions,* Document No. 575, and her counsel further expounded on those recommendations at the close of the hearing. The UST suggests that Puida should be suspended from practicing before this Court for a period of a year and that GMM should be required to pay a monetary sanction of $50,000.[5] The UST also raised a number of other possible sanctions for the Court's consideration, including the imposition of a CLE requirement, public reprimand or censure, or the requirement to perform *pro bono* client representation or mediation services.

4. The Court made clear in a prior order that the hearing on sanctions was not intended to be a retrial of the findings previously made. However, knowing that she was going to continue to refuse to acknowledge that she lied about what she had told Mr. Steidl, Puida should have been prepared to offer something in support thereof more than just her bare assertions, which have already been heard and rejected by the Court. In that regard, it is worth noting that the Court commented both at trial and in the *Memorandum Opinion and Order* about its surprise that no telephone billing records had been introduced to bolster Puida's contentions about her conversations with Mr. Steidl. See 437 B.R. at 535 n. 7. Assuming such billing records actually tend to support Puida, yet had been overlooked as evidence for trial, it seemed natural to attempt their introduction at this stage, if they in fact existed, as mitigation evidence in support of her obviously hollow contention that she did not lie to the Court, but no effort was made in that regard.

5. Counsel for the UST candidly admitted that his suggestion of $50,000 as a monetary sanction was in effect an arbitrary number, not based on any sort of calculation or formula.

[1] Turning first to GMM, the Court will not impose a monetary sanction as suggested by the UST. Given the magnitude of the financial loss which GMM has already experienced in the form of attorney fees and lost client revenue as a result of this matter, a further monetary sanction near the amount suggested by the UST is unlikely to have any significant further deterrent effect on GMM. If the Court were to impose a sanction in a much higher amount, it could jeopardize the continued operation of GMM, possibly threatening the livelihoods of innocent employees who had nothing to do with the violations addressed in the *Rule*. The Court also rules out any requirement for mandatory CLE or ethical training. As indicated at the hearing, the essence of the *Rule* is a lack of honesty. The Court does not believe it is necessary to undertake training in order to know that dishonesty is wrong despite the potential consequences of telling the truth. Honesty and truthfulness are matters of character that cannot be taught, if at all, in a few hours of CLE training. As for a *pro bono* requirement for client representation, that is something the attorneys in the firm should already be doing voluntarily, *Pa. R.P.C. 6.1*, so the Court does not find it to be an appropriate sanction for this matter. Finally, the firm will need to restore its professional reputation before it can effectively function as a mediator, ruling out any sanction requiring that it act as a *pro bono* mediator.

The Court therefore finds that the purpose behind the *Rule* will be best served by having the *Memorandum Opinion and Order*, together with this *Order*, serve as a public reprimand of GMM. In addition, GMM will be required to serve a copy of the *Memorandum Opinion and Order*, and this *Order*, on the Disciplinary Board of the Supreme Court of Pennsylvania.

[2] As for Puida, the UST's primary suggestion of a suspension is rejected. Puida has already, in a sense, been suspended from practice in this Court. The firm has taken her off assignment to any cases filed in this District, and it seems highly unlikely that is going to change anytime soon. Were the Court to order a suspension of Puida, it would thus add very little to the current reality, at the expense of burdening the District Court with a request for a suspension, and possibly jeopardizing other GMM personnel in unintended ways. The other suggestions related to CLE training, mediation and the like are rejected for reasons similar to those stated above in the discussion as to GMM. The Court did consider a monetary sanction against Puida, however that is rejected as well. She has already suffered a significant financial detriment as a result of this matter, and the Court is concerned that any further monetary sanction would be unnecessarily punitive and could harm her family.

The Court therefore concludes that, as with GMM, the purposes behind the *Rule* will best be served as to Puida by having the *Memorandum Opinion and Order*, together with this *Order*, serve as a public reprimand of her. Puida will be required to serve a copy of the *Memorandum Opinion and Order*, and this *Order*, on the Disciplinary Board of the Supreme Court of Pennsylvania, as well as on the American Bankruptcy Institute in connection with her effort to be certified as a bankruptcy specialist by that organization.

AND NOW, this ***24th*** day of ***November, 2010,*** for the reasons stated above and on the record at the time of the hearing, it is ***ORDERED, ADJUDGED and DECREED*** that:

(1) The *Memorandum Opinion and Order* of October 5, 2010, together with this *Order*, are intended to serve as a public reprimand of Respondents Goldbeck, McCafferty and McKeever ("GMM") and Attorney Leslie A. Puida ("Puida") for the

misconduct as described in Items 6 and 7 of the *Rule to Show Cause,* Document No. 465, issued on July 29, 2009.

(2) ***On or before December 3, 2010,*** GMM shall serve a copy of this *Order,* together with the *Memorandum Opinion and Order* of October 5, 2010, on the Disciplinary Board of the Supreme Court of Pennsylvania, and shall file a certificate of service to that effect with the Court within three days of doing so.

(3) ***On or before December 3, 2010,*** Puida shall serve a copy of this *Order,* together with the *Memorandum Opinion and Order* of October 5, 2010, on the Disciplinary Board of the Supreme Court of Pennsylvania and the American Bankruptcy Institute, and shall file a certificate of service to that effect with the Court within three days of doing so.

(4) ***On or before December 3, 2010,*** Counsel for Respondents GMM and Puida shall electronically file copies of the exhibits that were introduced at the hearing, those being Exhibits 1 through 18 and 22 though 35.

In re CIRCUIT CITY STORES, INC., et al., Debtors.

Robert Gentry, et al., Appellants,

v.

Circuit City Stores, Inc., et al., Appellees.

Case No. 08–35653.
Civil No. 3:10CV567–HEH.

United States District Court, E.D. Virginia, Richmond Division.

Oct. 29, 2010.

Background: Claimants, who had brought state labor-law class actions against Chapter 11 debtors in state court, moved for application of class certification rule to their class proofs of claim. The United States Bankruptcy Court for the Eastern District of Virginia, 2010 WL 2208014, denied motion, disallowing proofs of claim as to all unnamed claimants. Claimants appealed.

Holdings: The District Court, Henry E. Hudson, J., held that:

(1) denial of motion was not abuse of discretion, and

(2) publication notice provided to unnamed claimants under class proofs of claim was adequate under due process principles.

Affirmed.

1. Bankruptcy ⇐2895.1, 3784

Granting or denying a motion to apply class certification rule to proofs of claim is within the discretion of the bankruptcy court, and district court reviews that decision only for an abuse of discretion. Fed. Rules Bankr.Proc.Rules 7023, 9014(c), 11 U.S.C.A.

2. Bankruptcy ⇐2895.1

Bankruptcy court's findings that proposed class litigation of claims against Chapter 11 debtors for alleged violations of state labor laws would be inferior to individual bankruptcy claims resolution process and would unduly complicate administration of other claims before court against debtors were not clearly erroneous, and therefore denial of motion to apply class certification rule to class proofs of claim was not abuse of discretion. Fed. Rules Bankr.Proc.Rules 7023, 9014(c), 11 U.S.C.A.

3. Bankruptcy ⇐2895.1

Filing of a class proof of claim is not a matter of right, but a matter solely within

[9] Here, in contrast, the equities weigh heavily in favor of reopening the case. First, the refusal to reopen would be unjust to the creditors, as the Accounts Receivable Action is potentially a significant asset to the three estates. Second, the Trustee purposely closed the bankruptcy cases, but he did not intend thereby to abandon the Accounts Receivable Action. In closing the cases, he apparently (and mistakenly) believed that he could administer the assets of ACEI, CCT, and ATSCO via the lead ARI bankruptcy case. His continued pursuit of the Accounts Receivable Action demonstrates that he did not intend to abandon this adversary proceeding. Likewise, the Defendants' continued participation in discovery after the cases were closed demonstrates that they did not believe the Trustee had abandoned the Accounts Receivable Action. Unlike in *Arboleda*, the Accounts Receivable Action was commenced prior to closing the ACEI, CCT, and ATSCO cases. The Trustee filed the original complaint more than a year before the cases were closed.

Under Rule 15(c)(1)(B) an amendment relates back to the date of the original complaint if "the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading." Clearly, the amended complaint asserts a claim that arose out of the same conduct, transactions, or occurrences set forth in the original complaint.

Accordingly, this Court will *sua sponte* reopen the bankruptcy cases of ACEI, CCT, and ATSCO to permit the Trustee to continue pursuit of the Accounts Receivable Action.[1]

Conclusion

For the reasons discussed above, I will order that the bankruptcy cases for ACEI, CCT, and ATSCO be reopened and I will deny the Defendants' motion to dismiss. Furthermore, the three orders that closed the cases will be vacated.

ORDER

For the reasons set forth in the Court's memorandum opinion of this date, the Defendants' motion to dismiss is denied and the orders that closed the Chapter 7 cases of Automotive Caliper Exchange Incorporated (Case No. 05–20026, D.I. 8), Car Component Technologies, Inc. (Case No. 05–20027, D.I. 8) and ATSCO Products, Inc. (Case No. 05–20025, D.I. 8) are hereby vacated.

In re SHUBH HOTELS PITTSBURGH, LLC, Debtor.

No. 10–26337JAD.

United States Bankruptcy Court, W.D. Pennsylvania.

Nov. 23, 2010.

Background: Chapter 11 debtor-hotel owner moved for authority to execute 15–year franchise agreement with operator of large hotel franchise, so as to re-flag hotel following termination of debtor's previous franchise. Secured lender objected.

1. The Court will also deny the Defendants' motion to dismiss as to the "turnover claims," "*quantum meruit* claims," and "unjust enrichment claims," as all of these are the same with respect to the amounts of accounts receivable. As such, these additional counts will not likely result in any additional evidence being presented at trial, and so this Court will refrain from ruling on these counts until the conclusion of trial.

Holdings: The Bankruptcy Court, Jeffery A. Deller, J., held that:

(1) proposed agreement was appropriate exercise of debtor's business judgment;

(2) approval of franchise agreement would not amount to prohibited sub rosa or de facto plan of reorganization; and

(3) assuming that transaction violated loan documents, lender was entitled only to adequate protection for transaction.

Motion granted.

1. Bankruptcy ⚿3061, 3070, 3085

When debtor seeking to use, sell, or lease estate property outside ordinary course of business establishes a prima facie case supporting contemplated transaction, an objector to the proposed transaction is required to produce some evidence supporting its objection; mere argument or conclusory allegation is not enough. 11 U.S.C.A. § 363(b)(1).

2. Bankruptcy ⚿3061, 3069, 3085

In reviewing debtor's exercise of its business judgment, in deciding motion for authorization to use, sell, or lease estate property outside ordinary course of business, court looks at whether the proposed transaction (1) represents a business decision, (2) is made with disinterestedness, (3) is made with due care, (4) is made in good faith, and (5) does not constitute an abuse of discretion or waste of corporate assets. 11 U.S.C.A. § 363(b)(1).

3. Bankruptcy ⚿3061

Chapter 11 debtor-hotel owner's proposed 15-year franchise agreement with large hotel franchisor, which would result in re-flagging of debtor's hotel following termination of its previous franchise, was appropriate exercise of debtor's business judgment; transaction did not involve self-dealing with any insider of debtor, transaction was closely scrutinized by debtor's management, creditors committee, United States Trustee (UST), and court, transaction represented good-faith effort to re-flag debtor's hotel, and transaction was not abuse of discretion or waste of corporate assets, but would benefit estate and reorganization efforts. 11 U.S.C.A. § 363(b)(1).

4. Bankruptcy ⚿3061

Court's approval of transaction in which Chapter 11 debtor-hotel owner sought to enter into 15-year franchise agreement with operator of large hotel franchise would not amount to prohibited sub rosa or de facto plan of reorganization, inasmuch as agreement did not articulate terms for plan of reorganization, agreement did not require secured lender or other creditor to vote in favor of any reorganization plan, terms of agreement did not dictate priority scheme or timing and amount of money to be paid to creditors, and adoption of franchise would not require lender or other entities to release their claims against debtor or its officers or directors. 11 U.S.C.A. § 363(b)(1).

5. Bankruptcy ⚿3061

Where a transaction has the effect of dictating the terms of a prospective Chapter 11 plan, it will constitute a prohibited sub rosa plan.

6. Bankruptcy ⚿3061

Transaction amounts to prohibited sub rosa Chapter 11 plan of reorganization if it (1) specifies the terms of any future reorganization plan, (2) restructures creditors' rights, and (3) requires that all parties release claims against the debtor, its officers and directors, and its secured creditors.

7. Bankruptcy ⚿3061

That a transaction affects Chapter 11 debtor's reorganization does not automati-

cally convert the contemplated transaction into prohibited sub rosa plan.

8. Bankruptcy ⇨3062

Assuming that Chapter 11 debtor-hotel owner's entry into proposed franchise agreement with large hotel franchisor violated secured lender's loan documents, lender was entitled only to adequate protection for transaction. 11 U.S.C.A. § 363(b)(1), (e).

9. Bankruptcy ⇨3062

Secured lender was adequately protected with respect to Chapter 11 debtor's proposed franchise agreement with operator of large hotel franchise by equity cushion that existed in value of debtor's hotel and by debtor's willingness to make periodic interest payments to lender. 11 U.S.C.A. § 363(b)(1), (e).

David K. Rudov, Rudov & Stein, Scott M. Hare, Pittsburgh, PA, for Debtor.

Joseph M. Fornari Jr., Norma Hildenbrand, Pittsburgh, PA, for U.S. Trustee.

Christopher A. Boyer, David W. Lampl, John M. Steiner, Leech Tishman Fuscaldo & Lampl, LLC, Pittsburgh, PA, for Creditor Committee.

MEMORANDUM OPINION [1]

JEFFERY A. DELLER, Bankruptcy Judge.

The matter before the Court is Shubh Hotels Pittsburgh, LLC's motion to execute a Franchise Agreement with Wyndham Hotels and Resorts, LLC. This matter is a core proceeding over which this Court has jurisdiction pursuant to 28 U.S.C. §§ 157(b)(2)(M), 157(b)(2)(O), and 1334(b).

Shubh Hotels Pittsburgh, LLC (the "Debtor") is the current owner of a 713 room hotel located at or near Pittsburgh's Point State Park. The Debtor acquired the hotel, which is Pittsburgh's largest and arguably most recognizable given its location, in 2006. The hotel had operated as Hilton Hotel since the time of its construction in 1959 until September of 2010 when the Hilton company terminated the Debtor's franchise. Since the termination of the Hilton flag, the Debtor has operated its hotel as an independent hotel with no prominent flag.

By the motion, the Debtor wants to enter into a fifteen year franchise agreement with Wyndham Hotels and Resorts, LLC. By this non-ordinary course transaction, the Debtor will re-flag the hotel as a "Wyndham Grand," which is a quality full service hotel brand sponsored by Wyndham.

[1] Section 363(b)(1) of the United States Bankruptcy Code provides that a debtor "may use, sell, or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. § 363(b)(1). Courts have held that in determining whether to authorize a debtor's use, sale or lease of property of the estate under Section 363(b)(1), the debtor-in-possession is required to show that a sound business purpose justifies the debtor's contemplated actions. *In re Montgomery Ward Holding Corp.,* 242 B.R. 142, 147 (D.Del. 1999); *see also In re Lionel Corp.,* 722 F.2d 1063, 1071 (2d Cir.1983); *In re Continental Air Lines, Inc.,* 780 F.2d 1223, 1226 (5th Cir.1986); and *In re Titusville Country Club,* 128 B.R. 396, 399 (Bankr.

1. This Memorandum Opinion constitutes the Court's findings of fact and conclusions of law pursuant to Fed.R.Bankr.P. 7052.

W.D.Pa.1991). Courts have also held that a court should accept a debtor's business judgment, unless there is evidence of bad faith. *In re: Grand Prix Associates, Inc.*, No. 09–16545DHS, 2009 WL 1850966, *5 (Bankr.D.N.J. June 26, 2009) (citing *In re Sycom Enterprises, L.P.*, 310 B.R. 669, 675 (Bankr.D.N.J.2004), *In re Aerovox, Inc.*, 269 B.R. 74, 80 (Bankr.D.Mass.2001) and *In re Logical Software, Inc.*, 66 B.R. 683, 686 (Bankr.D.Mass.1986)). Of course, when the debtor establishes a prima facie case supporting its contemplated transaction, an objector to the proposed transaction is also required to produce some evidence supporting its objection as mere argument or conclusory allegation is not enough. *See Lionel, supra*, at 1071.

The Wyndham transaction proposed by the Debtor is supported by the Official Committee of Unsecured Creditors. The Debtor's secured lender, Carbon Capital Real Estate II CDO–2005–1 Ltd. through its servicer Black Rock Financial Management, Inc. (collectively, the "Lender") has objected to the proposed franchise transaction. A fair reading of the Lender's objection is that the secured creditor contends that the Wyndham transaction has been proposed by the Debtor in bad faith and as a litigation tactic to stall the Lender's foreclosure efforts. The Lender also complains that the Wyndham franchise should not be approved because the Lender (pursuant to its loan documents with the Debtor) has some sort of veto power over the re-flagging of the hotel. The Lender also contends that the hotel is better off as a Hilton franchise, as opposed to being re-flagged as a Wyndham Grand.

The record reflects that Dr. Kiran Patel directly or indirectly owns and controls the Debtor. While the documentation formally turning over control of the Debtor to Dr. Patel provides that he acquired his interest after the filing of this bankruptcy for little or no consideration, the record reflects that Dr. Patel had a fair amount of involvement with the Debtor in the year or so leading up to the Debtor's bankruptcy filing. In terms of bad faith, the Lender contends that the franchise motion is part of a scheme by Dr. Patel and his associates (including Mr. Jai Lalwani and Mr. Lalwani's companies known as Black Diamond Hospitality, Black Diamond Super Group and Fuel Group) to "kill" the Lender's interests.

The Court has previously noted that the Debtor's transactions with Dr. Patel and his affiliates "raise some eyebrows." The evidence introduced throughout these proceedings reflects that Dr. Patel and his associates appeared to control hotel operations prior to the Debtor's bankruptcy filing and thereafter as "one team." From time to time, Dr. Patel and his associates diverted hotel revenues away from the hotel (and the Lender's security interest) for their own benefit all the while trade vendors of the hotel remained unpaid. The diversion of funds also occurred all the while major construction and renovation projects remained uncompleted and protracted at the hotel (which, in turn, was one of the reasons why Hilton terminated the Debtor's flag). The record also includes evidence of the fact that hotel revenues were improperly diverted to other Patel/Lalwani projects in other parts of the country.

Dr. Patel, however, defended these transactions by claiming that he has been duped by Mr. Lalwani. But, the record reflects that Dr. Patel has not immediately disassociated himself from Mr. Lalwani. In fact, the record reflects that Mr. Lalwani was permitted to continue to interject himself into the Debtor's affairs post-petition as the hotel sought out a new flag. In addition, the record reflects that immediately after the bankruptcy filing, the Debt-

or remitted unauthorized post-petition payments to or for the benefit of Mr. Lalwani or his companies. The Debtor also remitted funds to Mr. Lalwani's "legal quarterback," Jonathan Kamin, Esq.[2]

All of the questionable transactions provided the Court with ample cause pursuant to 11 U.S.C. § 1104 to both appoint an examiner in this case to monitor the Debtor's receipts and disbursements and to terminate the Debtor's exclusive period to propose a plan of reorganization pursuant to 11 U.S.C. § 1121. Indeed, this Court did so by way of bench order on November 4, 2010, which was later memorialized by way of written Order dated November 8, 2010. But for the fact that this case has a very active Official Committee of Unsecured Creditors that is represented by competent legal counsel,[3] the Court may have appointed a trustee. Instead, the Court elected to exercise its discretion and defer inserting a trustee at this time. Notwithstanding the short shrift given in the pleadings filed by the Debtor and Dr. Patel with respect to the questionable transactions, the Court cautions such parties that if any more shenanigans occur, the Court will appoint a trustee.

Now, does all of this background mean that the Wyndham transaction is a bad faith litigation tactic? The Court concludes that it is not.

The fact is Hilton terminated the Debtor's flag, which in-turn resulted in this bankruptcy case. By summarizing the events this way, the Court is not suggesting that Hilton's termination of the Debtor's franchise was wrong. That decision (either positively or negatively) is potentially left for another day. The record nonetheless, reflects that the Debtor, its officers and its agents have a significant amount of responsibility for the Debtor's state of affairs. No matter what has occurred, the undisputed record is that this hotel needs a new flag.

In determining whether the Debtor has exercised its sound business judgment in proposing the Wyndham franchise, the question is not whether the Court would rather have the hotel be a Hilton (or some other hotel franchise for that matter) or a Wyndham Grand. The question also is not whether the Court or any individual creditor (such as the Lender) would make a better business decision. Rather, the question is whether the Debtor, when it chose to enter into the Wyndham transaction, appropriately exercised *its* business judgment.

[2, 3] In reviewing the Debtor's exercise of its business judgment, the Court looks at whether the proposed transaction (1) represents a business decision, (2) is made with disinterestedness, (3) is made with due care, (4) is made in good faith, and (5) does not constitute an abuse of discretion or waste of corporate assets. *See e.g. In re Adelphia Communications Corp.*, No. 02–41729REG, 2004 WL 1634538, *2 (Bankr.S.D.N.Y. June 22, 2004).[4]

2. Attorney Kamin had entered his appearance in this bankruptcy case as ''special counsel'' for the Debtor. But, no formal application has ever been filed pursuant to 11 U.S.C. § 327. Nor has any affidavit of disinterestedness or disclosure of compensation been filed as required by 11 U.S.C. § 329 and Fed. R.Bankr.P. 2014, 2016 and 2017. The Court notes that the Office of the U.S. Trustee has been present at various hearings on this matter. The Court assumes that the Office of the U.S. Trustee, whose duties include monitoring a debtor's transactions with attorneys, is undertaking whatever investigation it deems appropriate with respect to the transactions that have come to light in these proceedings.

3. *See* 11 U.S.C. § 1103(c).

4. In the sale context, some courts examine (1) whether there is a sound business purpose for the sale; (2) whether the proposed sale price

It is undisputed that the transaction proposed with Wyndham is a business decision—so the first factor is met. As to the second factor—disinterestedness—this element is met because there is no evidence that the Wyndham transaction constitutes any self-dealing with any insider of the Debtor. The third criterion—due care—appears to be challenged by the Lender. In this regard, the Lender complains that the Wyndham transaction is moving along with "light speed." The Lender also complains regarding: (a) the due diligence, or lack thereof, conducted by Wyndham, and (b) the fact the Dr. Patel never met face-to-face with Wyndham executives.

With respect to the speed of the transaction, it has not been at light speed. The Motion was filed on September 20th—more than a month ago. In fact, the delay occasioned by the intervening litigation has caused this transaction to be closely scrutinized not only by the Debtor's management, but also by the Official Committee of Unsecured Creditors, the U.S. Trustee, and all of the professionals involved in this case. Of course, the Court has scrutinized the transaction closely as well. It therefore appears that this transaction has had more than a sufficient amount of, and time for, deliberation.

With respect to due diligence, Wyndham's due diligence is irrelevant as there is no dispute that the transaction is an arm's length transaction in which Wyndham has proceeded in good faith. To the extent Wyndham's due diligence is relevant, the Court would note that Jeff Wagoner—the President of Wyndham Hotels and Resorts—was present at much of the trial of this matter and counsel of Wyndham was present throughout. If Wyndham's eyes were not open at the outset of these proceedings, they surely are now.[5]

As to the Debtor's deliberations, it also is not material that Dr. Patel never met Mr. Wagoner personally. The record reflects the Dr. Patel's surrogates undertook due diligence on his behalf, and both Dr. Patel and the Debtor are represented by sophisticated counsel. In addition, the Court is not convinced that Dr. Patel never met with Wyndham executives, as both Mr. Wagoner and Dr. Patel spent several days together in this Court's courtroom.

With respect to the fourth criterion—good faith—this Court has already determined above that the Wyndham transaction has not been proposed for an improper purpose. The transaction represents a good faith effort to re-flag the hotel.

As to the fifth criterion, this Court finds that the contemplated Wyndham transaction does not constitute an abuse of discretion or waste of corporate assets. Throughout the evidentiary hearing on this matter, the Debtor has highlighted the importance of re-flagging the hotel; that is, re-flagging is key to the Debtor recapturing of lost revenue and mitigating the concerns of existing reservation holders and employees regarding the long-term viability of the hotel. Specifically, the evidence shows that re-flagging the hotel as a Wyndham Grand will eliminate the con-

is fair; (3) whether the debtor has provided adequate and reasonable notice of the transaction; and (4) whether the buyer has acted in good faith. *See Lionel,* 722 F.2d at 1071. There is no dispute that notice of the proposed Wyndham transaction has been adequate. As to the remaining factors set forth in *Lionel,* they are subsumed in the five-part examination set forth above in the body of this Memorandum Opinion.

5. Mr. Wagoner also testified that Wyndham representatives visited the hotel, and as part of its due diligence inspected it, met with the hotel's manager, and obtained various financial information.

tinuing harm to the Debtor and this bankruptcy estate resulting from continued operation of the hotel as an "independent" unbranded guest lodging facility. In this regard, the evidence of record indicates:

(i) The Debtor has been without a national reservation system and has been deprived of 21% to 25% of its historic revenue for almost three months. That circumstance has significantly harmed the Debtor. A representative of Wyndham testified that it is prepared to immediately provide the hotel with access to its national reservation system once the Wyndham Franchise Agreement is authorized. The Debtor's witnesses testified that participation in the Wyndham national reservation system will enhance revenue and profitability.

(ii) A significant percentage of hotel revenue is derived from conference/convention business; and brand affiliation and resources play a large role in attracting that business. The absence of a national flag and the present uncertainty surrounding the Debtor's desire to a become a Wyndham Grand places the Debtor at a disadvantage to compete for the 2011 conference/convention business. Wyndham's representative testified at trial about Wyndham's extensive contacts with some of the largest corporations and organizations in both this market and nationally and further testified that it would immediately provide the Debtor with assistance from Wyndham's group sales team with respect to conference/convention business.

(iii) Since the termination of its former franchise agreement, the Debtor has gone without significant marketing campaigns. The absence of marketing traditionally provided by its franchisor has harmed the Debtor's business. Wyndham's representative has testified as to Wyndham's commitment to implement a marketing campaign for the hotel once the Wyndham Franchise Agreement is authorized.

(iv) Additional improvements to the hotel are needed. The Wyndham Franchise Agreement contains a list of property improvements and provides for a loan of up to $1,000,000 by Wyndham to the Debtor which would fund the agreed upon improvements to the hotel. Wyndham's representatives have also represented that Wyndham is prepared to make the improvement loan immediately available to the hotel, pursuant to the terms of the Franchise Agreement and related agreements, once same are approved and effectuated.

(v) Since the termination by its former franchisor, the Debtor has operated without: (i) the support of famous trademarks or copyrights, (ii) access to customer loyalty or referral programs, or (iii) centralized franchisor support functions such as a proprietary property management system, promotional programs, management and personnel training and/or operational standards, procedures and techniques. The lack of these privileges, which have been traditionally enjoyed by the hotel through Hilton, have been and remain harmful to the Debtor's business. Wyndham has represented that it will provide all of these benefits to the hotel, as set forth in the Franchise Agreement, once the Wyndham Franchise Agreement is authorized.

(vi) The hotel is more valuable as a Wyndham Grand. The only appraisal and expert value testimony presented to the Court valued the hotel at $54 million as of September 7, 2010 and this appraisal further valued the hotel at $58 million as of December 31, 2010 ***if*** the property is franchised as a Wyndham Grand.

(vii) The absence of a national flag and present uncertainty surrounding approval of the Debtor's business judgment to become a Wyndham Grand is jeopardizing existing business and causing instability in the marketplace. The Debtor contends that concern about the viability of events already planned (or to be planned) and the drop off in group sales which has occurred while the hotel has operated as an independent hotel, is largely attributable to the lack of affiliation with a quality national brand. The evidence submitted by the Debtor supports the conclusion that approval of the Wyndham Franchise Agreement would restore confidence, stabilize and improve this situation.

(viii) Many of the Debtor's employees have expressed concern over the lack of a quality flag for the hotel. Association with one of the largest franchisors in the world would provide a level of comfort for over 300 employees of the Debtor and would help the Debtor retain key employees due to flag stability.

Based on the record before the Court, the preponderance of the evidence is that the Debtor's reorganization efforts and the estate are benefitted by the Debtor's election to enter into the Wyndham Franchise Agreement. The evidence and testimony presented throughout the evidentiary hearing on this matter demonstrates that Wyndham is "a reputable and experienced franchisor." Specifically, the Lender's expert admitted that Wyndham is not only "a reputable franchisor," but also that Wyndham has experience in flagging hotel properties in similar "size, scope, use and value" as the hotel property in question.[6] Based on this admission and the testimony presented by Wyndham and various experts before the Court, the Debtor's selection of Wyndham as a franchisor appears to be neither a waste of corporate assets nor an abuse of discretion.[7]

[4] This Court must also reject the Lender's allegation that approval of the Wyndham Franchise Agreement would amount to a *sub rosa* or *de facto* plan of reorganization.

[5, 6] Where a transaction has the effect of dictating the terms of a prospective chapter 11 plan, it will constitute a prohibited *sub rosa* plan. *See In re Capmark Fin. Group Inc.,* 438 B.R. 471, 513 (Bankr. D.Del.2010) (citing *Official Comm. of Unsecured Creditors of Tower Auto. v. Debtors & Debtors in Possession (In re Tower Auto. Inc.),* 241 F.R.D. 162, 168 (S.D.N.Y.2006)). As articulated by the United States Court of Appeals for the Fifth Circuit, a transaction would amount to such a *sub rosa* plan of reorganization if it: 1) specifies the terms of any future reorganization plan; 2) restructures creditors' rights; and 3) requires that all parties release claims against the Debtor, its officers and directors, and its secured creditors. *Official Comm. of Unsecured Creditors v. Cajun Elec. Power Coop. by & through Mabey (In re Cajun Elec. Power Coop.),* 119 F.3d 349, 354 (5th Cir.1997) (citing *Pension Benefit Guar. Corp. v. Braniff Airways, Inc. (In re Braniff Air-*

6. The evidence presented also included testimony to the effect that Wyndham has agreed to provide the Debtor with favorable pricing terms under its Franchise Agreement.

7. The Court is not suggesting or holding that the Lender has acted unreasonably, arbitrarily or capriciously in not approving Wyndham as a qualified franchisor. At trial, the Lender articulated a number of justifications as to why it preferred Hilton over Wyndham as the franchisor of the Debtor's hotel. Notwithstanding these justifications, the fact remains it is the Debtor's business judgment, and not the Lender's business judgment, that is at issue.

ways, Inc.), 700 F.2d 935, 940 (5th Cir. 1983)).

The contemplated Wyndham transaction does not appear to be a *sub rosa* plan. The Court reaches this conclusion because the Wyndham Franchise Agreement does not articulate terms for a plan of reorganization; nor does it require the Lender (or any other creditor) to vote in favor of any reorganization plan. Further, the terms of the Franchise Agreement do not dictate the priority scheme or dictate the timing and amount of money to be paid to creditors. Finally, adoption of the franchise would not require the Lender or other entities to release their claims against the Debtor, or the Debtor's officers or directors.

[7] All that will be accomplished through the Wyndham transaction is the adoption of a franchise flag for the hotel. While it is true that this transaction affects the Debtor's reorganization, it is also true that many transactions are done in bankruptcy that affect a debtor's ability to reorganize. For example, as the Debtor correctly points out in its legal memoranda, prior to plan confirmation a debtor may change a marketing strategy, close unprofitable locations, open more desirable locations, reduce inventory, or enter into agreements with different vendors, franchisors or suppliers. The fact that a transaction affects a debtor's reorganization does not automatically convert the contemplated transaction into a *sub rosa* plan.[8] To hold otherwise would impede a debtor's ability to successfully reorganize, keep a bankrupt debtor in a constant state of limbo, and possibly negatively impact the going concern value of the bankruptcy estate. All of these consequences are exactly what the Bankruptcy Code is designed to avoid.

[8, 9] Lastly, the Lender complains that the Wyndham transaction violates the Lender's loan documents. This allegation may be true; however, bankruptcy causes certain provisions of a loan document to be suspended. This is one of those instances. All that Lender is entitled to here is adequate protection for the contemplated transaction. *See* 11 U.S.C. § 363(e). The evidence and testimony presented to date indicate that the Wyndham transaction does not harm the Lender's collateralized position. The record reflects that the Lender is owed approximately $50 million

8. The record reflects that the Debtor has a plan of reorganization on file. However, exclusivity has been terminated thus enabling competing plans to be filed by the Debtor's creditors. To the extent there is a concern that competing plans would be prejudiced by having the Wyndham Franchise Agreement approved (because a competing plan proponent may desire to subsequently reject the Franchise Agreement thereby giving rise to a large termination claim), the Debtor and Committee have successfully negotiated with Wyndham for the subordination of any termination claim that may be asserted by Wyndham in this bankruptcy case. Specifically, while the language of the Wyndham documents may differ to a degree, Counsel to the Debtor and Counsel to the Committee have represented to the Court that any termination claim that could be asserted by Wyndham shall be subordinate to any and all allowed unsecured claims in this case (including any allowed unsecured claim that may be asserted by the Lender). The Court understands this representation to mean that in essence any termination charges or debt asserted by Wyndham is subordinate to any and all priority claims and administrative expenses, and that the termination charges or debt of Wyndham (if any) would only be senior to both the interests of equity and creditor claims, if any, that are (under principles of equitable subordination) adjudicated to be subordinate. Thus, a competing plan proponent who seeks to place another flag on the hotel will not be faced with an additional multi-million dollar administrative expense claim which could impede reorganization of the hotel assets and business.

on its pre-petition claim,[9] and the collateral is presently worth $54 million.[10] Furthermore, there is no evidence indicating that the collateral is declining in value and the evidence of record suggests that re-branding the hotel as a Wyndham Grand would result in an increase in the value of the hotel to $58 million. Under these circumstances, the Court finds that the Lender is more than adequately protected by the equity cushion and by the fact that the Debtor has been agreeable to making periodic interest payments to the Lender.[11] *See* Doc. # 13 *(Cash Collateral Motion)* para. 21(c).

WHEREFORE, for the reasons stated above, the Court shall approve the Debtor's request for authority to execute the proposed Franchise Agreement with Wyndham Hotels and Resorts, LLC.

ORDER OF COURT

AND NOW, this ***23rd*** day of ***November, 2010,*** for the reasons expressed in the accompanying *Memorandum Opinion,* the court hereby **ORDERS, ADJUDGES** and **DECREES** as follows:

1. The Debtor's request for authority to execute the proposed Franchise Agreement with Wyndham Hotels and Resorts, LLC is **GRANTED.**
2. To the extent there is a concern that competing plans could be prejudiced by having the Wyndham Franchise Agreement approved (because a competing plan proponent may desire to subsequently reject the Franchise Agreement thereby giving rise to a large termination claim), it is hereby **ORDERED** that any debt or obligation due Wyndham arising out of, or relating to termination or rejection of the Franchise Agreement is subordinated. Specifically, any termination claim, debt or other obligation that could be asserted by Wyndham arising out of or relating to termination at or before plan confirmation in this bankruptcy case shall be subordinate to any and all allowed unsecured claims in this case (including any allowed unsecured claim that may be asserted by the "Lender" as such term is defined in the Memorandum Opinion). Any such termination charges, debts or other obligations that could be asserted by Wyndham as a result of such termination is also subordinate to any and all allowed priority claims and allowed administrative expenses, and that the termination charges or termination related debts or obligations that may become due to Wyndham (if any) will only be senior to both the interests of equity and creditor claims, if any, that are (under principles of equitable subordination) adjudicated to be subordinate by the Court.

9. The Lender is also a post-petition lender. The record does not contain the exact amount of post-petition advances made by the Lender, if any. However, it is believed that such sums, if there are any that are due, are less than $2 million.

10. The Lender's own internal documents suggest that the hotel is worth $56 million.

11. The Court recognizes that the Lender contends that the Debtor's proposed plan of reorganization does not provide the Lender with the ''indubitable equivalent'' of its legal and equitable interests under its loan documents. The Court further recognizes that the Debtor's proposed plan seeks to re-write many of the other terms and conditions of the Debtor's loan documents. The Court does not address today whether the provisions of the Debtor's plan of reorganization provides, or fails to provide, the Lender with the indubitable equivalent of the Lender's interests. Rather, all that the Court is deciding today is that the Lender is adequately protected by the equity cushion that exists in the value of the hotel.

3. Nothing in this Order or the Franchise Agreement should be deemed or construed to prevent a competing plan proponent from seeking the rejection and/or termination of the Wyndham Franchise Agreement at or before confirmation of a plan in this case.
4. To the extent any provisions of the Wyndham Franchise Agreement or related documents conflict with the terms of this Order, this Order shall control in all respects.

In re Sharon Diane HILL, Debtor,

Roberta A. DeAngelis, Acting United States Trustee for Region 3, Movant,

v.

Countrywide Home Loans, Inc., Goldbeck, McCafferty and McKeever, and Attorney Leslie Puida, Respondents.

No. 01–22574 JAD.

United States Bankruptcy Court, W.D. Pennsylvania.

Nov. 24, 2010.

Background: Order to show cause was issued against residential mortgage lender and its attorneys as to why sanctions should not be imposed for their alleged misconduct in failing to properly credit payments received under Chapter 13 debtor's cure-and-maintenance plan, in attempting to collect what they should have realized was a highly doubtful deficiency, and in engaging in allegedly deceptive conduct in settlement negotiations with debtor's attorney and in their representations to the bankruptcy court. After the court determined that sufficient cause existed to sanction law firm and attorney, 437 B.R. 503, hearing was held regarding what sanctions would be appropriate.

Holdings: The Bankruptcy Court, Thomas P. Agresti, Chief Judge, held that:

(1) public reprimand was an appropriate sanction for firm, and

(2) public reprimand also was an appropriate sanction for attorney who lied to the court.

So ordered.

1. Attorney and Client ⚿59.8(1)

Bankruptcy ⚿2187

Public reprimand was appropriate sanction for law firm that represented residential mortgage lender, where firm was found to have made a false statement in a motion to quash notices of Rule 2004 examinations and to have failed to promptly notify Chapter 13 debtor's attorney of the fact that change-in-payment letters were never sent, while engaging in settlement negotiations with that attorney, and to have deliberately or at least recklessly misrepresented to the bankruptcy court that the firm had apprised debtor's attorney of the fact that the letters were never mailed; monetary sanction was not warranted, given magnitude of financial loss which the firm already had experienced in the form of attorneys fees and lost client revenue and the fact that a further monetary sanction was unlikely to have any significant deterrent effect, and honesty and truthfulness were matters of character that could not be taught through mandatory continuing legal education (CLE) or ethical training. Fed.Rules Bankr.Proc. Rule 9011, 11 U.S.C.A.

2011 WL 7145601
Only the Westlaw citation is currently available.
NOT FOR PUBLICATION
United States Bankruptcy Court,
W.D. Pennsylvania.

In re: SHUBH HOTELS PITTSBURGH, LLC, Debtor.
Carbon Capital II Real Estate CDO 2005–1 Ltd., and Blackrock Financial Management, Inc., as subspecial servicer to Carbon Capital II Real Estate CDO 2005–1 Ltd's special servicer, Midland Loan Services, Inc., Movants,
v.
Shubh Hotels Pittsburgh, LLC, Respondent.

No. BR 10–26337 JAD, 312.
|
Feb. 1, 2011.

ORDER DIRECTING THE APPOINTMENT OF A CHAPTER 11 TRUSTEE

JEFFERY A. DELLER, U.S. Bankruptcy Judge.

Chapter 11

***1** AND NOW, this 1st day of February, 2011 and for the reasons set forth in the accompanying *Memorandum Opinion,* the Court hereby directs that a Chapter 11 Trustee be appointed for this bankruptcy estate.

SO ORDERED.

MEMORANDUM OPINION

On October 25, 2010, Carbon Capital II Real Estate CDO 2005–1 Ltd ., and BlackRock Financial Management, Inc., as subspecial servicer to Carbon Capital II Real Estate CDO 2005–1 Ltd's special servicer, Midland Loan Services, Inc., ("Carbon Capital") filed an *Emergency Motion for an Order Appointing a Chapter 11 Trustee* and for related relief (the "Trustee Motion").

After due consideration of the evidence presented over many days of trial, this Court exercised its discretion and (a) appointed an examiner, (b) held the request for the appointment of trustee in abeyance, and (c) stayed certain litigation that had been both consuming this Court's docket and draining the bankruptcy estate's financial resources (collectively, the "Examiner Appointment"). The findings and conclusions of the Court with respect to the Examiner Appointment are incorporated herein by reference (*see* Doc.399, 419, 420 at pp. 138–145).

As this Court previously noted, the Debtor's transactions with Dr. Kiran Patel and his affiliates are cause for concern. The evidence introduced throughout these proceedings showed that hotel operations appeared to be controlled by Dr. Kiran Patel and his affiliates as "one team" well before the commencement of this bankruptcy case and thereafter. The evidence also showed that hotel revenues were diverted from time to time by Dr. Patel and his associates for their own benefit despite the fact that trade vendors of the hotel remained unpaid. The diversion of funds also took place while major hotel construction and renovation projects were incomplete. Hotel revenues were also diverted to other projects owned or managed by Dr. Patel and his associate, Mr. Jai Lalwani, elsewhere in the country.

Dr. Patel attempted to counter these transactions by alleging to be duped by Mr. Lalwani. Yet, the record reflected that Mr. Lalwani continued to be a part of the postpetition affairs of the Debtor as the hotel searched for a new "flag" (i.e., a national or international hotel franchiser for which the Debtor may partner). Indeed, Mr. Lalwani continued to be active in the Debtor's affairs even though the Debtor represented to the Court that Mr. Lalwani had no involvement with the hotel subsequent to the commencement of this bankruptcy case. Interestingly, despite this clear and convincing evidence with respect to Mr. Lalwani's involvement with the Debtor, the Debtor and Dr. Patel continue to this day maintain that Mr. Lalwani occupied no role in the hotel's management. (*See* Dkt. # 674, p. 10). Such a statement is simply inaccurate and is refuted by e-mail communications in evidence, which reflect that Mr. Lalwani was intimately involved in both the Debtor's re-flagging of the hotel and in the litigation strategy employed by the Debtor and Dr. Patel with respect to motions filed by the Lender in this case.

***2** When the Court appointed an Examiner, the Court did not take the step of appointing a Chapter 11 Trustee at that time because the Court was hopeful that an examiner would (a) operate as a monitor of the Debtor's finances given the blatant financial irregularities of the Debtor, and (b) reduce the continuous conflict that has consumed the estate.

The Examiner appointed in this case has performed her job admirably and competently with respect to monitoring the Debtor's finances. However, because the powers and duties of an examiner in bankruptcy are limited, it appears to the Court that a powerless examiner lacks sufficient Court (and/or Bankruptcy Code) authority to rein-in or curb the litigation that continues to mount between the Debtor and the Lender. In this regard, and due to no fault of the Examiner, it is obvious that the Examiner Appointment has not had the salutary effect intended by the Court.

The distracting nature of the litigation that permeates this case can be illustrated by the matters heard on the Court's calender of January 31, 2011. One motion concerned a settlement of certain union claims in the case. The background of the union claim need not be addressed in length, except to note that the claim related to the diversion of funds from an account created by the Debtor in which employer withheld union dues were placed. The funds were previously diverted [1] and not remitted to the union. The settlement motion, filed by the union and not the Debtor, sought to authorize the Debtor to remit new funds to the union in satisfaction of certain sums due the union. The Lender had no opposition to the proposed payment to the union, but instead made the reasonable request that any claim or cause of action that the union or employees might have as a result of the diversion of the funds be assigned to the bankruptcy estate. In this regard, the Lender even drafted a proposed order to this effect, and the union agreed to it. Now, did the debtor-in-possession agree to it or request such relief? No it did not. The Court inquired the reason why, and the Debtor unconvincingly suggested that the proposed order somehow granted the Lender rights it did not have. The Court found the Debtor's argument to be unavailing as the proposed order made no final determination as to the rights of the Lender in any funds.

Now, why would the Debtor oppose the order proposed by the union and Lender when the estate clearly benefitted by it? Is it because the order assigned to the estate and reserved claims against the persons or entities which caused the diversion of funds in the first place? The Court appreciates that this is a delicate question to ask. However, there have been other instances in this case where the Court has inquired whether a Dr. Patel controlled Debtor is advocating the interests of the estate generally as opposed to advocating Dr. Patel's own special interests.

By way of example, there were many hearings in this case regarding debtor-in-possession financing. Dr. Patel desired to lend the estate funds, but was adamant on obtaining a lien that primed the Lender's equity. Given the Lender's willingness to provide alternative financing, [2] and the relatively small equity cushion in this case compared to the size of the Lender's claim, [3] the Court made it clear that it would not approve financing by Dr. Patel on a priming basis. Here, did the Debtor ask Dr. Patel to provide financing on a basis that did not prime the Lender? No it did not, much to the surprise of the Court. Instead, the Court held numerous hearings on this matter before an ultimate resolution could be had.

***3** Similarly, the Court had some concerns with respect to the manner in which the debtor-in-possession adhered to its duties relating to the funding available from the Debtor's franchisorWyndhamunder the franchise agreement approved by the Court. As reflected in this Court's prior *Memorandum Opinion and Order,* Wyndham had committed to fund $1 million toward the Debtor's property improvement plan. *See In re Shubh Hotels Pittsburgh, LLC,* 439 B.R. 637 (Bankr.W.D.Pa.2010). Apparently such obligations are guaranteed by Dr. Patel. However, as reported by the Examiner, Dr. Patel failed to cause the Debtor to draw upon such funds even though the Debtor's property improvement plan remains incomplete. According to the Examiner, "When asked about this loan, Dr. Patel's attorney ... explained that since Dr. Patel is guaranteeing the Franchise Agreement, the Debtor has chosen not to use these funds at this time ." *See First Status Report of Examiner Margaret M. Good* at p. 10 (Dkt. # 487). [4]

The Court's calender of January 31, 2011 also included the competing objections to disclosure statements filed by the Lender and the Debtor. The objections filed by each party reflect that these two parties cannot even agree as to the

basic background facts behind the Debtor's bankruptcy case. [5] Instead, each party desires to use the disclosure statement dissemination process to wage a public relations campaign to advocate the litigation interests of Dr. Patel and the Lender, respectively.

Indicative of this course of action, the disclosure statement proposed by Dr. Patel and the Debtor declined to identify material information to creditors in the form of the identity of which financial institutions would issue letters of credit securing, in part, payment obligations of the plan proposed by the Debtor and Dr. Patel. This material information was withheld purportedly out of a fear of prospective interference by the Lender with such letters of credit. When pressed as to why such a non-disclosure (and averment of an expectation of interference) was appropriate in a disclosure statement, the Debtor/Dr. Patel team could offer no explanation that was convincing. Instead, when pressed on the issue, they agreed that the footnote should be deleted in its entirety. Of course, this little tussle over a footnote in a proposed disclosure statement is indicia of the level of animosity that exists between these parties. [6]

The Court is not confident that the animosity and acrimony between the Lender and a Dr. Patel controlled Debtor will cease anytime soon. The Court reaches this conclusion because there is no level of trust between a Dr. Patel controlled Debtor and the Lender.

As this *Memorandum Opinion* is being written, the Court has received the latest status report filed by the Examiner, which outlines a few of the instances which illuminate the level of distrust between the parties. In her report dated February 1, 2011, the Examiner notes that the Lender has strong opposition to the management of the Debtor's construction projects being handled by Mr. Frank Amedia, [7] an alleged insider of the Debtor, and his company MAC Construction. [8] Based on the record made in the hearings on the Trustee Motion, the Court understands that the Lender's heartburn in this regard stems not only from the fact that Mr. Amedia is an insider, but also from other factors. The Examiner reports that the Debtor's construction project has since been stalled because each side is firmly entrenched in their positions. [9]

***4** The level of animosity and acrimony in this case must stop. [10] Otherwise, the costs of the estate will continue to skyrocket and the chances of reorganization will go down. This reorganization has already taken its toll on the morale of the Debtor's employees. In fact, almost twenty employees appeared in court at the hearings held on January 31, 2011, with representatives expressing their concern over the direction of this case (including the direction of present management and ownership). [11]

In light of all of the circumstances of this case, the record is clear and convincing that a Chapter 11 Trustee should be appointed pursuant to 11 U.S.C. § 1104(a)(1) and (2). *See also In re Marvel Entertainment Group, Inc.,* 140 F.3d 463 (3d Cir.1998)(appointment of trustee appropriate given high level of acrimony in complicated case). In rendering its decision to direct the appointment of a Chapter 11 Trustee, the Court is nonetheless mindful of the costs associated with the appointment of a trustee. However, without the interjection of a neutral third party, it is clear to the Court that litigation costs will bury this case in the absence of a change of direction.

For all of the reasons stated above, the Court shall direct that the Office of the U.S. Trustee appoint a Chapter 11 Trustee in this case. An appropriate order shall be issued.

All Citations

Slip Copy, 2011 WL 7145601

Footnotes

1 The Debtor remitted the funds to the Debtor's “special counsel” who was also described in e-mails as being Mr. Lalwani's “legal quarterback.” Such funds which were paid post-petition to “special counsel” have purportedly been repaid to the Debtor after these matters came to light.

2 In order to obtain financing, secured by a priming lien pursuant to 11 U.S.C. § 364(d), the debtor must demonstrate that no suitable alternative financing is available from other sources, and that the proposed post-petition arrangement adequately protects the existing lienholders's interests. *See e.g., Suntrust Bank v. Den–Mark Construction, Inc.,* 406 B.R. 683, 689 (E.D.N.C.2009).

3 Courts have held that an equity cushion alone does not per se result in a finding of adequate protection. *Suntrust Bank,* 406 B .R. at fn. 24. In the matter *sub judice,* the Court would note that while a small equity cushion exists using a going concern value for the Debtor's hotel, statements by counsel in this case suggest that if the case were to be converted to a liquidation, there would be no equity in the Lender's collateral. *Cf. In re Phoenix Steel Corp.,* 39 B.R. 218, 226–27 (D.Del.1984)(adopting an intermediate value when there is some probability that the debtor will avoid a forced liquidation).

4 The Court still does not know whether the $1 million property improvement loan was drawn upon.

5 The record also reflects that the parties could not even agree as to whether disputes in this case should be mediated. It was only after the Court overruled the Lender's objection to mediation that mediation became a possibility. Nothing contained herein should be deemed or construed to preclude the parties from mediating their disputes. In fact, the Court encourages the parties to try and work out an economic solution to their differences.

6 The Court, of course, recognizes that it takes “two to tango.” As such, it does not place the blame of the state of affairs entirely on the Debtor or Dr. Patel. Rather, the Lender bears some responsibility too.

7 The record reflects that Mr. Lalwani introduced Mr. Amedia to Dr. Patel.

8 The Examiner also noted that the Lender has strong opposition to the hotel employing Mr. Amedia's two daughters.

9 The Examiner recommends that bids for construction manager be sought from qualified firms.

10 The Examiner's latest report states that the competing plan process appears to be working. The Court agrees that a competing plan process works in that it gives competing plan proponents the incentive to increase consideration to be paid to creditors. However, that process has not diminished the level of acrimony between the respective parties, and that acrimony and animosity does come with a cost to the detriment of unsecured creditors and the employees of the Debtor.

11 The employees addressed the Court with no objection by the Debtor or any other parties in interest in attendance. At least one of the employees raised concerns regarding the Debtor's franchisorWyndham. The Court would note that it previously approved the Debtor's entry into the Wyndham franchise agreement, and nothing contained in this *Memorandum Opinion* should be deemed or construed to be a finding or conclusion that Wyndham is not performing its end of the bargain approved by the Court.

End of Document

Memorandum, it is hereby **ORDERED** that:

1. The Debtor's Motion is **DENIED.**
2. NWI's Motion is **DENIED.**

In re SHUBH HOTELS PITTSBURGH, LLC, Debtor.

Dr. Kiran C. Patel, Pittsburgh Grand, LLC and Meridian Financial Advisors, Ltd., Trustee of the Shubh Hotel Creditor Trust, Objectors,

v.

Shubh Hotels, LLC, Claimant.

No. 10–26337JAD.

United States Bankruptcy Court, W.D. Pennsylvania.

July 24, 2012.

Background: Objections were filed to proof of claim filed in Chapter 11 case of bankrupt limited liability company (LLC) on ground, inter alia, that advances underlying proof of claim were not in nature of loans, but equity contributions. Objectors moved for summary judgment.

Holding: The Bankruptcy Court, Jeffery A. Deller, J., held that alleged loans to bankrupt limited liability company (LLC) underlying proof of claim had to be recharacterized as equity contributions, and proof of claim had to be disallowed.

Motions granted; claim disallowed.

1. Bankruptcy ⚿2926

Burden of proof in objecting to proof of claim is shifting one. 11 U.S.C.A. § 502.

2. Bankruptcy ⚿2926, 2927, 2928

When objection to proof of claim is filed, objecting party bears initial burden of producing sufficient evidence to overcome the presumptive validity of properly filed claim. Fed.Rules Bankr.Proc.Rule 3001(f), 11 U.S.C.A.

3. Corporations and Business Organizations ⚿1285

Expectation of repayment of advance only when entity to which advance is made has cash flow available is the very essence of investment transaction or equity infusion.

4. Corporations and Business Organizations ⚿1285

Determination as to whether alleged loan should be recharacterized as equity contribution is appropriately based on intent of parties, not on labels ascribed to certain transactions.

5. Corporations and Business Organizations ⚿1285

Whether party intended a transfer of funds to constitute a loan or equity contribution may be inferred from party's actions, text of its contracts, and economic reality of surrounding circumstances.

6. Corporations and Business Organizations ⚿1285

Among factors that courts consider to decide whether alleged loan to corporation should be recharacterized as equity contribution are: (1) names given to instruments, if any, evidencing the indebtedness; (2) presence or absence of fixed maturity date and schedule of payments; (3) presence or absence of fixed rate of interest and interest payments; (4) source of repayment; (5) adequacy or inadequacy of capitalization; (6) identity of interest between creditor and stockholder; (7) the security, if any, for advances; (8) corporation's ability to

obtain financing from outside lending institutions; (9) extent to which advances were subordinated to claims of outside creditors; (10) extent to which advances were used to acquire capital assets; and (11) presence or absence of sinking fund to provide repayment.

7. Bankruptcy ⚿2827

Alleged loans to bankrupt limited liability company (LLC) underlying proof of claim filed in its Chapter 11 case had to be recharacterized as equity contributions, and proof of claim had to be disallowed, where claimant's principal admitted that there was no interest rate connected to advances, no definitive repayment schedule, and no writing documenting the nature of transactions, as well as that the LLC's obligation to repay advances depended on profitability of its hotel property or whether property could be sold at profit, and where advances were also listed as equity contributions on the LLC's own books and records, and only evidence that loans were intended was conclusory testimony of claimant's principal, characterizing advances as loans in hindsight. 11 U.S.C.A. § 502(b).

8. Corporations and Business Organizations ⚿1285

What is most determinative in distinguishing between "equity" and "debt" is intent of parties as it existed at time of transaction.

9. Bankruptcy ⚿2164.1

While summary judgment is generally inappropriate when intent is issue, it may be granted when all reasonable inferences defeat claims of party, or when party has rested merely on unsupported speculation.

David K. Rudov, Rudov & Stein, Pittsburgh, PA, James R. Walsh, Spence Custer Saylor Wolfe & Rose, Johnstown, PA, Scott M. Hare, Pittsburgh, PA, for Debtor.

MEMORANDUM OPINION

JEFFERY A. DELLER, Bankruptcy Judge.

The matter before the Court consists of two motions for summary judgment on the *Objection of Dr. Kiran C. Patel and Pittsburgh Grand, LLC to Claim of Shubh Hotels, LLC.* The matter is a core proceeding over which this Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 157(b)(2)(B) and 1334(b). For the reasons set forth below, the Court finds that no genuine issue of material fact exists to move the issue to trial. Consequently, summary judgment shall be granted and the claim disallowed.

I.

This Court shall grant a motion for summary judgment only if the moving party shows that there are no genuine disputes as to material facts and that it is entitled to judgment as a matter of law. *See* Fed. R.Civ.P. 56 (applicable in bankruptcy proceedings through Fed. R. Bankr.P. 7056); *see also Celotex Corp. v. Catrett,* 477 U.S. 317, 322–23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). A factual dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). When deciding a motion for summary judgment courts may consider all materials of record including depositions, documents, affidavits or declarations, stipulations, admissions and interrogatory answers. Fed.R.Civ.P. 56(c). All inferences drawn from underlying facts are to be viewed in the light most favorable to the nonmoving party. *Rosen v. Bezner,* 996 F.2d 1527, 1530 (3d Cir.1993)

(citing *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986)). In the instant matter, the following facts are undisputed.[1]

II.

Shubh Hotels, LLC ("Shubh Hotels") is a limited liability company that at the direction of its sole managing member, Atul Bisaria ("Bisaria"), transferred funds between various hotel entities in which Bisaria maintained an interest. (*See* Doc. # 2148, ¶ 28; *see also* Doc. # 2193, ¶¶ 3, 10).[2] At all times relevant to the instant litigation, Bisaria had full authority to act on behalf of Shubh Hotels and was the decision maker for Shubh Hotels Pittsburgh, LLC (the "Debtor"). (*See* Doc. # 2193, ¶¶ 3, 17–18). The Debtor is a limited liability company consisting of two members: Shubh Hotels Pittsburgh Investments, LLC and Shubh Hotels Pittsburgh Acquisitions, LLC that formerly operated the Pittsburgh Hilton Hotel at 600 Commonwealth Place, Pittsburgh, Pennsylvania. (*See id.* ¶¶ 3, 14–15).

On September 7, 2010, the Debtor filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. (*See id.* ¶ 1). Shubh Hotels filed a proof of claim against the Debtor (the "Claim") on January 18, 2011, asserting a general unsecured claim in the amount of $15,227,670.09 for "Loans to corporation." (*See* Doc. # 2148, ¶ 4). In support of the Claim, Shubh Hotels attached a list of funds transferred in and out of the Debtor's accounts between January 7, 2007 and July 29, 2009 (the "Advances"). (*See id.* ¶ 7). No loan agreements, promissory notes, term sheets, payment schedules, bank records, canceled checks, or other documents are attached to the list. (*See id.*).

On April 6, 2011, Dr. Kiran C. Patel and Pittsburgh Grand, LLC (the "Plan Proponents") filed a *Modified Second Amended Chapter 11 Plan* [Doc. # 927] and a *Modified Second Amended Disclosure Statement in Connection with Modified Second Amended Plan of Reorganization Dated April 6, 2011* [Doc. # 929]. (*See id.* ¶ 8). On April 22, 2011, the Plan Proponents objected to the Claim. (Doc. # 991). The objection asserted that, to the extent the funds were transferred from Shubh Hotels to the Debtor, they constituted equity contributions and not loans. (*See* Doc. # 991 ¶ 15). The objection also asserted a right of setoff in the Debtor. (*See id.* ¶ 17). The Official Committee of Unsecured

1. The facts listed represent an amalgam of facts admitted by Shubh Hotels, LLC and alleged in the *Statement of Undisputed Facts in Support of Motion for Partial Summary Judgment on Objection to Claim No 68 of Shubh Hotels, LLC* (Doc. # 2148) and the *Objectors' Amended Statement of Undisputed Facts in Support of Motion for Summary Judgment on Objection to Claim # 68 of Shubh Hotels, LLC* (Doc. # 2193). (See Doc. ## 2182, 2183, 2212).

2. Dr. Kiran C. Patel and Pittsburgh Grand, LLC originally filed a statement of material facts at Doc. # 2152. However, through the *Claimants' Motion to Strike, or Alternative Response to Objectors' Statement of Undisputed Facts in Support of Motion for Summary Judgment on Objection to Claim # 68 of Shubh Hotels, LLC,* Shubh Hotels requested that the statement of material facts be stricken for failure to cite the record in violation of this Court's Amended Scheduling Order entered at Doc. # 2068. (*See* Doc. # 2183). Pursuant to an oral directive of the Court at the hearing held March 27, 2012, Dr. Kiran C. Patel and Pittsburgh Grand, LLC filed the *Objectors' Amended Statement of Undisputed Facts in Support of Motion for Summary Judgment on Objection to Claim # 68 of Shubh Hotels, LLC* (Doc. # 2193), correcting the technical deficiencies present in its previously filed statement of material facts. As a housekeeping matter, this Court shall deny as moot Shubh Hotels' motion to strike as part of the Order attached to this *Memorandum Opinion.*

Creditors of Shubh Hotels Pittsburgh, LLC joined in the Plan Proponents' objection to the Claim for the limited purpose of preventing Shubh Hotels from voting on the proposed plan. (*See* Doc. # 1070, ¶ 11).

On May 4, 2011, Shubh Hotels filed a motion seeking temporary allowance of its Claim for voting purposes only. (*See* Doc. # 1083). Following a hearing held May 12, 2011, this Court denied said motion. (*See* Doc. # 1340). This Court entered an order confirming the plan on May 20, 2011. (Doc. # 1390).

Through its response to the Plan Proponents' objection to the Claim, Shubh Hotels conceded that the amount of its original claim should be reduced to $13,314,084.42. (*See* Doc. # 1447, unnumbered p. 1, n. 1). Shubh Hotels also asserted that the transfers to the Debtor's accounts were not investments because Shubh Hotels was not an equity holder of the Debtor and denied any right to setoff. (*See* Doc. # 1447).

Subsequent to the effective date of the plan (June 9, 2011), a Creditor Trust was created that appointed Meridian Financial Advisors, Ltd. as trustee. The Creditor Trust filed a supplemental objection to the Claim asserting that as the possible recipient of fraudulent transfers or recoverable property, Shubh Hotels' claim should be denied pursuant to 11 U.S.C. § 502(d). (*See* Doc. # 1954).

In February of 2012, both the Plan Proponents and the Creditor Trust (collectively, the "Objectors") filed motions for summary judgment. The *Motion for Partial Summary Judgment on Objection to Claim No. 68 of Shubh Hotels, LLC* filed by the Creditor Trust requests this Court limit the allowed amount of Claim to $337,216.11, representing the total amount of Advances sent directly from Shubh Hotels to the Debtor, and reserves the right to assert an objection for complete disallowance of the Claim at trial. (*See* Doc. # 2146, p. 6). The *Objectors' Motion for Summary Judgment on Objection to Claim # 68 of Shubh Hotels, LLC ("Summary Judgment Motion"),* primarily alleges that no issue of material fact exists as to whether the Shubh Hotels' fund transfers were equity contributions as opposed to "loans" to the Debtor. (*See* Doc. # 2153, pp. 15–23). The *Summary Judgment Motion* also asserts that there is no genuine issue of material fact that the Debtor has a complete setoff defense against the Claim. (*Id.* at pp. 23–24). In the alternative, the Plan Proponents joined in the Creditor Trust's request to limit the Claim to $337,216.11. (*Id.* at p. 24).

Shubh Hotels objects to both motions for summary judgment. Shubh Hotels argues that genuine issues of material fact exists as to all three grounds for summary judgment asserted through the Objectors' motions. (*See* Doc. ## 2181, 2184). Primarily, Shubh Hotels argues that it is inappropriate for this Court to grant the *Summary Judgment Motion* as a genuine issue of material fact exists as to whether this Court should consider the Advances loans or equity contributions. (*See* Doc. # 2184, pp. 2–4; *see generally* Audio Recording of Hearing Held in Courtroom D, March 27, 2012).

III.

The primary question before this Court is whether the funds transferred to the Debtor that form the basis for the Claim (the Advances) are properly characterized as either "loans" or "equity contributions." If the Advances are characterized as "loans" giving rise to a debt, Shubh Hotels would have a right to repayment of debt, thereby supporting its Claim. *See* 11 U.S.C. § 101(5) and (12). Conversely, if the Advances are characterized as capital

contributions, or equity interest obligations, they will not be considered debt obligations sufficient to support the Claim. *Citicorp Real Estate, Inc. v. PWA, Inc. (In re Georgetown Bldg. Associates, Ltd. P'shp),* 240 B.R. 124, 139 (Bankr.D.D.C. 1999).

[1, 2] The burden of proof in objecting to a claim is a shifting one. *In re Allegheny Int'l, Inc.,* 954 F.2d 167, 173–74 (3d Cir.1992). Once a claimant has alleged facts sufficient to support its claim, the claim is *prima facie* valid. *See id.; see also* Fed. R. Bankr.P. 3001(f). When an objection to a proof of claim is filed, the objecting party bears the burden of producing sufficient evidence to overcome the presumed validity of the filed claim. *In re Benninger,* 357 B.R. 337, 347 (Bankr. W.D.Pa.2006) (citing *Allegheny Int'l, Inc.,* at 173–74). To lodge a successful motion for summary judgment at this stage, the Objectors have the burden of proving that no genuine issues of material fact exist regarding the allowance of the Claim. *In re Planet Hollywood Int'l,* 274 B.R. 391, 394 (Bankr.D.Del.2001) (citing *Matsushita,* 475 U.S. at 586 n. 10, 106 S.Ct. 1348).

In support of the *Summary Judgment Motion,* the Objectors argue that the Claim is not supported by any debt owed by the Debtor because the Advances should be "recharacterized" as equity contributions. In combination with other authority, the Objectors cite the United States Court of Appeals for the Third Circuit opinion, *In re SubMicron Sys. Corp.,* 432 F.3d 448 (3d Cir.2006), insisting that "recharacterization" is appropriate based on the intent of the parties at the time the Advances were made.[3]

To support recharacterization under the instant circumstances, the Objectors proffer testimony from the Chief Operating Officer of Shubh Hotels, Harris Mathis ("Mathis"), that the Advances were recorded on the Debtor's books as equity. The Objectors also cite documentary evidence including: (1) the Debtor's balance sheet prepared just seven days prior to the Debtor's petition date that does not show any money owed to Shubh Hotels; and (2) the Debtor's bankruptcy schedules signed under penalty of perjury by Bisaria that do not show any money owed to Shubh Hotels. Finally, the Objectors offer an expert report, which concludes "to a reasonable degree of accounting and professional certainty, that the transactions between Shubh Hotels, LLC and the Debtor were appropriately accounted for as equity transactions." (Doc. # 2152, Exhibit 3, p. 9). Citing this evidence in combination with the alleged lack of any record evidence to the contrary, the Objectors insist that summary judgment is appropriate.

A.

Since the Objectors have carried their initial burden, Shubh Hotels must cite to particular materials in the record to show the existence of a genuine factual dispute over the nature of the funds it transferred to the Debtor. Fed.R.Civ.P. 56(c)(1)(A-B). To successfully object to the *Summary Judgment Motion,* Shubh Hotels must do more than merely demonstrate that there is some "metaphysical doubt as to the material facts" and must present "specific facts showing that there is a genuine issue for trial." *Matsushita,* 475 U.S. at 586–87, 106 S.Ct. 1348 (citations omitted). If Shubh Hotels fails to properly address the Objectors' assertion that the Advances

3. The term "recharacterization" is actually somewhat of a misnomer as the inquiry really focuses on "the proper characterization in the first instance of an investment." *SubMicron,* 432 F.3d at 454.

were equity contributions, this Court may consider this alleged fact undisputed and grant summary judgment if the motion and supporting materials show that the Objectors are entitled to it. Fed.R.Civ.P. 56(e).

While Shubh Hotels has consistently argued that the advances were loans (*see* Doc. ## 1447, 2181–2184), it has failed to cite any specific facts or materials in support of this argument. Rather, Shubh Hotels offers only the self-serving statements of Bisaria, its managing member, in support of its position.[4] (*See* Doc. # 2184, pp. 3–4). Specifically, Bisaria alleged throughout his deposition that Shubh Hotels would "borrow" funds from income producing hotel properties and other sources and in turn "loan" money to the Debtor. (*See, e.g.,* Doc. # 2152, Exhibit # 1, *Deposition of Atul Bisaria* (hereinafter "*Bisaria Deposition*"), p. 22:12–19, pp. 40:3–42:17, pp. 120:9–121:18). Bisaria also testified at his deposition that Shubh Hotels often "lent" money to the Debtor indirectly through Bisaria's personal bank account. (*Bisaria Deposition,* p. 144:10–25).

Much of Bisaria's deposition testimony with regard to the Advances is controverted by the deposition testimony of Mathis, the only other corporate designee for Shubh Hotels. Mathis testified that he is the Chief Operating Officer of Shubh Hotels, and from 2004 to 2010, was the Chief Operating Officer of the Debtor. (*See Mathis Deposition,* pp. 8:20–9:2, p. 11:12–14, pp. 13:21–14:6, p. 14:15–24, pp. 22:10–23:4). Mathis admits that the Debtor booked all of the Advances as equity, regardless of whether they were transferred directly from Shubh Hotels, Bisaria's personal bank account, or other sources. (*See id.* at p. 32:1–13, p. 91:8–25). Mathis also admits that he was not aware of any document indicating that the Advances were to be treated as a loan, and he was not aware of any interest rate or maturity date associated with the funds Advanced to the Debtor. (*See id.* at pp. 94:25–96:5).

[3] Bisaria's attempt to characterize the Advances as loans is also controverted by the bankruptcy schedules containing the list of creditors signed by Bisaria under penalty of perjury. Those schedules (at Schedules D, E and F) reflect no outstanding loans of Shubh Hotels to the Debtor. Furthermore, Bisaria's position in this case is undermined by his very own testimony. For example Bisaria testified at his deposition that the possibility of repayment was directly tied to the financial stability of the Debtor's hotel property, or the possible intervention of a third party to purchase the Debtor's hotel property. (*Bisaria Deposition,* pp. 92:20–93:21). This expectation of repayment from the Debtor only "[w]henever it had the cash flow available" (*id.* at p. 91:13) is the very essence of an investment transaction or equity infusion. *See, e.g., In re First NLC Fin. Services, LLC,* 415 B.R. 874, 881 (Bankr.S.D.Fla.2009) ("to be considered a debt rather than equity, court have stressed that a reasonable expectation of repayment must exist which does not depend solely on the success of the

4. Shubh Hotels also argues that the list of fund transfers attached to its Claim supports its position that the Advances were loans. (*See* Doc. # 2211, unnumbered pp. 1–2). The transaction list attached to the Claim offers no support to Shubh Hotels' allegation that the Advances were ''loans'' because it simply denotes when and in what amount transfers occurred with no indication of the intent behind the transfers. Indeed, the list actually undercuts Shubh Hotels' position as Mathis explained that he formed the list by examining the Debtor's general ledger and listing *only* the transactions involving the Debtor's *equity accounts.* (Doc. # 2152, Exhibit # 2, *Deposition of Harris Mathis* (hereinafter *''Mathis Deposition''*), p. 27:1–9, p. 29:2–21).

borrowers business.") (quoting *In re Lane,* 742 F.2d 1311, 1314 (11th Cir.1984)); *Official Comm. of Unsecured Creditors v. Fairchild Dornier GmbH (In re Dornier Aviation (N. Am.), Inc.),* Bankr.No. 02–82003SSM, Adv. No. 02–8199SSM, 2005 WL 4781236, *19 (Bankr.E.D.Va. Feb. 8, 2005) *aff'd* 453 F.3d 225 (4th Cir.2006) ("Indeed, the hope of payment out of future profits is exactly what characterizes an equity investor."). Therefore, Bisaria's own admission as to his intent at the time the advances were made belies any assertion that the advances were intended as "loans." [5]

B.

[4] In its opposition to the *Summary Judgment Motion,* Shubh Hotels insists that this Court must focus on the intent of Shubh Hotels in characterizing the Advances. (*See* Doc. # 2184, p. 3). It is true that recharacterization analysis is appropriately based on the intent of the parties, not the labels ascribed to certain transactions (*see SubMicron,* 432 F.3d at 457); however, Shubh Hotels has not put forth even a scintilla of evidence to suggest that the Advances may be properly "recharacterized" as loans to the Debtor.

[5, 6] Whether a party intended a transfer of funds to constitute a loan or equity contribution may be inferred from the party's actions, the text of its contracts, and "the economic reality of the surrounding circumstances." *Id.* at 456. Courts have generated a number of different factors to determine whether debt should be recharacterized as equity. *See Fairchild Dornier GmbH v. Official Comm. of Unsecured Creditors (In re Official Committee Of Unsecured Creditors For Dornier Aviation (N. Am.)),* 453 F.3d 225, 233–34 (4th Cir.2006). Among these factors are:

> (1) the names given to the instruments, if any, evidencing the indebtedness; (2) the presence or absence of a fixed maturity date and schedule of payments; (3) the presence or absence of a fixed rate of interest and interest payments; (4) the source of repayments; (5) the adequacy or inadequacy of capitalization; (6) the identity of interest between the creditor and the stockholder; (7) the security, if any, for the advances; (8) the corporation's ability to obtain financing from outside lending institutions; (9) the extent to which the advances were subordinated to the claims of outside creditors; (10) the extent to which the advances were used to acquire capital assets; and (11) the presence or absence of a sinking fund to provide repayments.

Id. (quoting *In re AutoStyle Plastics, Inc.,* 269 F.3d 726, 749–50 (6th Cir.2001)).

[7] While the Third Circuit Court of Appeals has rejected mechanical application of these factors (*see SubMicron,* 432 F.3d at 456), courts within the Third Circuit have utilized the eleven factors listed above to determine whether recharacterization is appropriate under a given set of circumstances. *See, e.g., Neilson v. Agnew (In re Harris Agency, LLC),* 465 B.R. 410, 421 (Bankr.E.D.Pa.2011); *Official Comm. of Unsecured Creditors v. Highland Capital Mgmt., L.P. (In re Moll Indus., Inc.),* 454 B.R. 574, 581 (Bankr.D.Del.2011).

5. Bisaria's admission regarding a lack of formal repayment terms is further supported by Shubh Hotels' admission in its response to the interrogatories that the books and records of the Debtor do not reflect that the Advances "constituted obligations of the Debtor repayable to [Shubh Hotels]." (Doc. # 2152, Exhibit 1–1, *Request for Admission* # 8). This characterization is also supported by statements from Mathis who explained that in his role of monitoring and reviewing the Advances he did not consider the Debtor to be "borrowing" the funds. (*See Mathis Deposition,* p. 24:9–21).

When using these factors as a framework for evaluating the instant matter, it is clear that the Advances are properly characterized as equity contributions and not loans.

The items supporting characterization of the Advances as equity contributions span the majority of the factors listed. For example, Shubh Hotels has not produced any documents supporting its characterization of the Advances as loans, and counsel for Shubh Hotels admitted that there was no documentation evidencing a loan obligation. (*See Bisaria Deposition*, pp. 35:20–36:7, p. 90:14–23; see also Audio Recording of Hearing Held in Courtroom D, March 27, 2012 (11:17–11:18 AM)). Additionally, Bisaria admitted that the Advances were provided interest free (*see Bisaria Deposition*, p. 91:7–9), and there was never any allegation by Shubh Hotels that the Advances were secured by an interest in the Debtor's property.

A review of the Debtor's balance sheet dated January 31, 2010 shows that the Debtor was not adequately capitalized because if the Advances were considered "debt", the Debtor would have had a substantial amount of negative capital. (*See* Doc. # 2152, Exhibit 1–10). Moreover, there was never any allegation by Shubh Hotels that the Debtor obtained or even attempted to obtain funds from an outside lending source as an alternative to obtaining the Advances from Shubh Hotels. Finally, Bisaria testified that repayment of the Advances was subordinate in priority to repayment of the loan obligation to the secured third-party lender. (*Bisaria Deposition*, pp. 98:14–99:25).

C.

Shubh Hotels also argues that because it did not maintain, and did not receive a membership or equity interest in the Debtor as a result of the Advances, this Court cannot recharacterize the Advances as equity contributions. (*See* Doc. # 2184, p. 3). Aside from its failure to cite any authority in support of this position, Shubh Hotels' argument is belied by the sixth factor as Bisaria admits that he was in control of both the transferor of the Advances (Shubh Hotels) and the recipient transferee (the Debtor).[6] Bisaria also testified that he is the majority owner of the two entities that are the members of the Debtor. (*Bisaria Deposition*, pp. 49:8–50:25). Thus, "consideration" or an expansion of control of the Debtor entity would be of little practical effect under the circumstances. In addition, the undisputed fact that Bisaria maintained in interest in both the transferor and transferee entities supports a characterization of the Advances as equity. *See, e.g., In re Newfound Lake Marina, Inc.*, Bankr.Nos. 04–12192MWV, 04–13727MWV, 2007 WL 2712960, *6 (Bankr.D.N.H. Sep. 14, 2007) (unpublished opinion) (holding that debt was properly recharacterized as equity based in part on the fact that the alleged creditor was also the sole principal, officer, and director of the debtor) (citing *In re Hyperion Enters., Inc.*, 158 B.R. 555, 561 (Bankr.D.R.I. 1993)); *In re Hog Farm, Inc.*, Bankr No. 09–17778, 2012 Bankr.LEXIS 1415, *9–10 (Bankr.S.D.Ohio Apr. 2, 2012) (holding that debt was properly recharacterized as equity based in part on the fact that the claimants were also the equity owners of the debtor).

[8] Aside from the many factors supporting characterization of the Advances as equity contributions, Shubh Hotels ad-

6. Bisaria refused to disclose the identity of Shubh Hotel's equity holders. (*See* Doc. # 2152, Exhibit 1–1, Answers to Interrogatories ## 3–4). However, Bisaria admitted during his deposition that he was in "control" of both Shubh Hotels and the Debtor at the time the Advances were made. (*Bisaria Deposition,* pp. 58:6–59:15).

mits that the Advances transferred indirectly through Bisaria's bank account to the Debtor were not intended to qualify as loans. Bisaria explained during his deposition, that the purpose of funneling some of the Advances through his personal bank account was to avoid violating certain covenants in a preexisting loan agreement between the Debtor and a third-party lender, which allegedly capped the amount of loans it could receive directly from Shubh Hotels. (*See Bisaria Deposition,* pp. 45:3–47:21). This description was confirmed by counsel for Shubh Hotels at the hearing on the *Summary Judgment Motion,* where counsel admitted that Bisaria intended to structure the Advances so that they would not be classified as loans by the secured lender. (*See* Audio Recording of Hearing held in Courtroom D, March 27, 2012 (11:18–11:20 AM)). Yet, Shubh Hotels now asks this Court to characterize the Advances as loans for the purpose of its Claim. The Third Circuit Court of Appeals holds that what is most determinative in distinguishing between "equity" and "debt" is the intent of the parties, "as it existed *at the time of the transaction.*" *Machne Menachem, Inc. v. Spritzer,* 456 Fed.Appx. 163, 165 (3d Cir.2012) (unpublished decision) (emphasis added) (quoting *SubMicron,* 432 F.3d at 457). Allowing the Shubh Hotels' hindsight characterization of the Advances to prevail over its confessed intent at the time the Advances were made, would run contrary to this well established precedent.

D.

[9] Finally, Shubh Hotels argues that summary judgment is not appropriate because the intent of Shubh Hotels regarding the Advances is at issue. (*See* Audio Recording of Hearing Held in Courtroom D, March 27, 2012 (11:19–11:20)). Though summary judgment is generally inappropriate when intent is an issue, it may be granted when all reasonable inferences defeat the claims of a party, or that party has rested merely on unsupported speculation. *See, e.g., Medina–Munoz v. R.J. Reynolds Tobacco Co.,* 896 F.2d 5, 8 (1st Cir.1990) ("Even in cases where elusive concepts such as motive or intent are at issue, summary judgment may be appropriate if the nonmoving party rests merely upon conclusory allegations, improbable inferences, and unsupported speculation.") (citations omitted); *Gertsch v. Johnson & Johnson, Fin. Corp. (In re Gertsch),* 237 B.R. 160, 165 (9th Cir. BAP 1999) ("Where intent is at issue, summary judgment is seldom granted (citation omitted); however, 'summary judgment is appropriate if all reasonable inferences defeat the claims of one side, even when intent is at issue.' ") (citing *Newman v. Checkrite California, Inc.,* 912 F.Supp. 1354, 1380 (E.D.Cal. 1995)); *Hines v. Marchetti,* 436 B.R. 159, 169 (M.D.Ala.2010) ("[I]n the bankruptcy context a summary judgment denying a debtor's discharge is sometimes appropriate even when intent is at issue.") (citations omitted).

In the instant case, Shubh Hotels relies on bald assertions of fact made by Bisaria in professing that the Advances were loans. Bisaria has admitted that there was no interest rate connected to the fund transfers, no definitive repayment schedule, and that he does not recollect any writing documenting the nature of the funds. Additionally, Bisaria's description of repayment of the Advances as dependent on profitability of the Debtor's hotel property or its profitable sale, is a blatant admission that the Advances were intended as equity contributions. The fact that such Advances were intended equity contributions is further corroborated by the Debtor's own books and records, as Mathis testified that he formed the transaction list at issue by examining the Debtor's general

ledger and listed only the transactions involving the Debtor's equity accounts. (*See Mathis Deposition*, p. 27:1–9, p. 29:2–21).

This Court recognizes that whether the Advances should be characterized as debt or equity is an issue of fact. *SubMicron*, 432 F.3d at 457. Nevertheless, because the Objectors' *Summary Judgment Motion* was properly made and supported, the burden to come forward with specific facts showing that there exists a genuine issue for trial rested with Shubh Hotels. *Anderson*, 477 U.S. at 248, 106 S.Ct. 2505. As this Court has previously held, this stage of the case is the "put up or shut up" time for the party opposing a properly supported motion for summary judgment. *In re Figard*, 382 B.R. 695, 706 (Bankr. W.D.Pa.2008) (citing *Berckeley Inv. Group, Ltd. v. Colkitt*, 455 F.3d 195, 201 (3d Cir.2006)).

The time for Shubh Hotels to produce something beyond the self-serving and hollow characterization of the Advances by Bisaria has passed. Bisaria's unsupported and oft contradicted testimony concerning his alleged intent at the time of the Advances is not sufficient to demonstrate that any genuine issue for trial exists in the instant matter. *See Jersey Cent. Power & Light Co. v. Lacey Twp.*, 772 F.2d 1103, 1109 (3d Cir.1985) (To show the existence of a genuine issue, "the evidence must create a fair doubt, and wholly speculative assertions will not suffice.") (citing *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 364 (4th Cir.1985)). Without citing sufficient evidence on the record to support its assertion, Shubh Hotels has not met its burden and summary judgment may be appropriately entered in favor of the Objectors. See Fed.R.Civ.P. 56(e).

E.

As this Court has found a grant of summary judgment based on the lack of a genuine issue of material fact regarding the characterization of the Advances supporting the Claim as equity contributions, the Court need not reach the other grounds for summary judgment alleged by the Plan Proponents. Similarly, because this Court will disallow the Claim in its entirety, this Court need not address the alternative relief requested by the Objectors reducing the amount of the Claim to $337,216.11 based on the exclusion of funds transferred to the Debtor directly from Bisaria or third parties that did not file a proof of claim.

IV.

Having failed to cite any specific materials on the record to convince this Court that the Advances were intended as "loans" to the Debtor, Shubh Hotels has failed to establish that a genuine issue of material fact exists to move the matter to trial. With no genuine issues of material fact for trial, this Court grants the *Summary Judgment Motion* filed by the Objectors, and shall enter an Order disallowing the Claim of Shubh Hotels in its entirety. An appropriate Order shall be entered. An Order shall also be entered which denies the Creditor Trust's *Motion for Partial Summary Judgment on Objection to Claim No. 68 of Shubh Hotels, LLC* as the relief requested therein is moot because it is subsumed by the Objector's motion (which, in turn, is being granted by the Court).

The Court stated that if Ocwen still claimed a defense to the action, the information was still relevant. Counsel agreed to provide anything that it had not yet produced. Ocwen has since provided answers to the interrogatories. (*See* Doc. # 56, Ex. A).

Ocwen also indicated that they are correcting all the things that need to be corrected. Among those things to be corrected, in accordance with Ocwen's own argument that it is not seeking to collect outstanding fees and expenses, are the billing statements sent to the Debtor. If Ocwen is not attempting to collect the fees or expenses as argued, there is no reason for those fees and expenses to be included in any fashion on the monthly billing statements. Such inclusion only creates confusion and requires the recipient to interpret the intentions of Ocwen.

[9] Accordingly, as a sanction for failure to comply with this Court's orders related to discovery, Ocwen will be required to revise the monthly billing statements sent to the Debtors commensurate with its own arguments. That is, all future billing statements commencing forthwith shall not include any reference to fees and expenses that Ocwen is not attempting to collect. Those sections of the billing statement reflecting prepetition or unauthorized postpetition outstanding fees and expenses shall reflect zero balances to avoid future confusion. In addition, Ocwen shall immediately take whatever steps are required internally to remove all reference to these costs as outstanding.

An appropriate order shall issue.

In re SHUBH HOTELS PITTSBURGH, LLC, Debtor.

Meridian Financial Advisors, Ltd, Trustee of the Shubh Hotel Creditor Trust, Plaintiff,

v.

Contract Purchase & Design, Inc. and C & M Installations, Inc., Defendants.

Bankruptcy No. 10–26337–JAD. Adversary No. 12–02353–JAD.

United States Bankruptcy Court, W.D. Pennsylvania.

July 9, 2013.

Background: President and sole shareholder of corporations named as defendants in strong-arm fraudulent transfer avoidance proceeding moved to intervene, for purposes of seeking indefinite stay of proceedings while criminal prosecution against him was pending.

Holdings: The Bankruptcy Court, Jeffery A. Deller, J., held that:

(1) motion to intervene in strong-arm fraudulent transfer avoidance proceeding was procedurally deficient;

(2) president could not intervene either as of right or permissively; and

(3) even assuming that president were allowed to intervene, bankruptcy court would not grant his motion for indefinite stay of proceedings.

So ordered.

1. Bankruptcy ⚿2160

Motion to intervene in strong-arm fraudulent transfer avoidance proceeding by sole shareholder, director, and president of corporate defendants was procedurally deficient based on movant's failure to attach copy of pleading to his motion or

to set out any claim or defense for which intervention was sought. 11 U.S.C.A. § 544; Fed.Rules Civ.Proc.Rule 24(c), 28 U.S.C.A.

2. Bankruptcy ⚿2160

Failure to comply with procedural requirements of Federal Rule of Civil Procedure governing motions to intervene will generally result in denial of motion.

3. Bankruptcy ⚿2160

It was inappropriate to relieve president and sole shareholder of corporations named as defendants in strong-arm fraudulent transfer avoidance proceeding of procedural requirements for motion to intervene and to excuse his failure to attach copy of pleading to his motion or to identify claim or defense for which intervention was sought, where president and sole shareholder had sought to intervene solely for purpose of seeking indefinite stay of proceeding, a stay that would be prejudicial to creditor trust pursuing these strong-arm claims, while criminal prosecution against him was pending. 11 U.S.C.A. § 544; Fed.Rules Civ.Proc.Rule 24(c), 28 U.S.C.A.

4. Bankruptcy ⚿2160

Federal Rule of Civil Procedure governing motions to intervene is meant to prevent multiplicity of suits. Fed.Rules Civ.Proc.Rule 24, 28 U.S.C.A.

5. Bankruptcy ⚿2160, 2205

Parties in interest have absolute right to intervene in adversary proceedings in Chapter 11 case, pursuant to bankruptcy statute granting such parties the right to appear and be heard on any issue. 11 U.S.C.A. § 1109(b).

6. Bankruptcy ⚿2205

Courts must determine on case-by-case basis whether prospective party in interest has a sufficient stake in proceeding to qualify as "party in interest" with right to appear and be heard on any issue in Chapter 11 case. 11 U.S.C.A. § 1109(b).

7. Bankruptcy ⚿2205

"Party in interest," with right to appear and be heard on any issue in Chapter 11 case, is anyone who has legally protected interest that could be affected by bankruptcy proceeding. 11 U.S.C.A. § 1109(b).

See publication Words and Phrases for other judicial constructions and definitions.

8. Bankruptcy ⚿2205

Mere economic interest in outcome of litigation is generally insufficient to qualify individual as "party in interest," with right to appear and be heard on any issue in Chapter 11 case. 11 U.S.C.A. § 1109(b).

9. Bankruptcy ⚿2160, 2205

President and sole shareholder of corporations named as defendants in strong-arm fraudulent transfer avoidance proceeding, whose only interest in proceeding was economic one, based on his ownership interest in companies, did not qualify as "party in interest," with statutory right to intervene as one authorized to appear and be heard on any issue in Chapter 11 case. 11 U.S.C.A. §§ 544, 1109(b).

10. Bankruptcy ⚿2160

President and sole shareholder of corporations named as defendants in strong-arm fraudulent transfer avoidance proceeding could not intervene as of right, for purpose of seeking indefinite stay thereof while criminal prosecution against him was pending, where his interests were closely aligned with those of corporate defendants, and he failed to demonstrate any adversity of interest, collusion, or nonfeasance. 11 U.S.C.A. § 544; Fed.Rules Civ.Proc.Rule 24(a)(2), 28 U.S.C.A.

11. Bankruptcy ⚿2160

Applicant is entitled to intervene as of right under Federal Rule of Civil Procedure when: (1) application for intervention is timely; (2) applicant has sufficient interest in litigation; (3) that interest may, as practical matter, be affected or impaired by disposition of litigation; and (4) interest is not adequately represented by existing party to litigation. Fed.Rules Civ.Proc. Rule 24(a)(2), 28 U.S.C.A.

12. Bankruptcy ⚿2160

Applicant bears burden of demonstrating that it has met all four requirements for intervention as of right pursuant to Federal Rule of Civil Procedure. Fed. Rules Civ.Proc.Rule 24(a)(2), 28 U.S.C.A.

13. Bankruptcy ⚿2160

Interest in litigation, of kind required to support intervention as of right, must be a legal interest, as opposed to interest of a general and indefinite character, and applicant must demonstrate that there is tangible threat to that legally cognizable interest. Fed.Rules Civ.Proc.Rule 24(a)(2), 28 U.S.C.A.

14. Bankruptcy ⚿2160

In deciding whether to grant motion for intervention as of right upon ground that movant's interest may be affected or impaired by litigation, court must assess the practical consequences of litigation, and may consider any significant legal effect on applicant's interest. Fed.Rules Civ.Proc.Rule 24(a)(2), 28 U.S.C.A.

15. Bankruptcy ⚿2160

To support intervention as of right, it is not sufficient that an interest be incidentally affected; rather, there must be tangible threat to applicant's legal interest. Fed.Rules Civ.Proc.Rule 24(a)(2), 28 U.S.C.A.

16. Bankruptcy ⚿2160

Burden is on the one seeking to intervene as of right to show that his interests are not adequately represented by existing parties. Fed.Rules Civ.Proc.Rule 24(a)(2), 28 U.S.C.A.

17. Bankruptcy ⚿2160

When party seeking to intervene as of right has same ultimate objective as party to suit, presumption arises that its interests are adequately represented, and in order to overcome this presumption of adequate representation, would-be intervenor must ordinarily demonstrate adversity of interest, collusion, or nonfeasance on part of party to suit. Fed.Rules Civ.Proc.Rule 24(a)(2), 28 U.S.C.A.

18. Bankruptcy ⚿2160

President and sole shareholder of corporations named as defendants in strong-arm fraudulent transfer avoidance proceeding would not be allowed to intervene permissively pursuant to Federal Rule of Civil Procedure, where intervention was not sought to enable president to assert any claim or defense, but merely to seek stay of proceeding while criminal proceedings against him were pending, and indefinite stay would prejudice other parties. 11 U.S.C.A. § 544; Fed.Rules Civ.Proc. Rule 24(b), 28 U.S.C.A.

19. Bankruptcy ⚿2160

In exercising its discretion whether to allow permissive intervention, court must consider whether intervention will unduly delay or prejudice adjudication of original parties' rights. Fed.Rules Civ.Proc.Rule 24(b), 28 U.S.C.A.

20. Action ⚿68

Stay of civil case is extraordinary remedy.

21. Action ⚿69(5)

Stay of civil proceeding during pendency of criminal proceedings against potential witness in civil suit is not required on Fifth Amendment grounds. U.S.C.A. Const.Amend. 5.

22. Action ⚿68

Stay of civil proceeding may be granted as incident to power inherent in every court to control disposition of causes on its docket with economy of time and effort for itself, for counsel, and for litigants.

23. Action ⚿68

Decision by court whether to exercise inherent power that it has to control disposition of causes on its docket in order to stay civil proceeding calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.

24. Action ⚿69(5)

In deciding whether to stay civil case pending resolution of criminal proceeding, courts often consider the following factors: (1) extent to which issues in civil and criminal cases overlap; (2) status of criminal proceedings, including whether any defendants have been indicted; (3) plaintiff's interest in expeditious civil proceeding weighed against prejudice to plaintiff caused by delay; (4) burden on defendants; (5) interests of court; and (6) the public interest.

25. Action ⚿69(5)

Even assuming that president and sole shareholder of corporations named as defendants in strong-arm fraudulent transfer avoidance proceeding were allowed to intervene, bankruptcy court would not grant his motion for indefinite stay of proceeding while criminal proceedings against him was pending, though lack of stay forced him to choose between testifying in avoidance proceeding or exercising his Fifth Amendment rights, where indefinite stay would prejudice other parties, and there was no showing the president's testimony was crucial to defense of avoidance claims, and that there were not other witnesses who could testify to relevant events. U.S.C.A. Const.Amend. 5; 11 U.S.C.A. § 544.

Crystal H. Thornton–Illar, Leech Tishman Fuscaldo & Lampl, LLC, Pittsburgh, PA, for Plaintiff.

Ronald B. Roteman, The Stonechipher Law Firm, Pittsburgh, PA, for Defendants.

MEMORANDUM OPINION

Jeffery A. Deller, Bankruptcy Judge.

The matters before the Court are a *Motion to Intervene for the Limited Purpose of Filing a Motion for Stay* and a *Motion to Stay* filed by proposed intervenor, Mr. Steve Lewis ("Mr. Lewis"). These matters are core proceedings over which the Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 157(b)(2)(A) and 1334.

These motions concern a criminal defendant's assertion of his Fifth Amendment privilege against self-incrimination and the court's interest in "secur[ing] the just, speedy, and inexpensive determination of every action and proceeding." *See* Fed. R.Civ.P. 1.

It has been asserted that Mr. Lewis' role as the sole shareholder and president of the defendants, Contract Purchase & Design, Inc. and C & M Installations, Inc. (together, the "Defendants"), makes him a possible witness in this adversary proceeding (the "Adversary Proceeding"). Meanwhile, it has also been asserted that his indictment in a pending criminal action in

the Northern District of Illinois implicates his privilege against self-incrimination under the Fifth Amendment. In essence, Mr. Lewis would like to use his privilege against self-incrimination as a shield preventing the prosecution of this civil adversary proceeding against his companies all the while he is under criminal indictment in the Northern District of Illinois. For the reasons set forth more fully below, the Court denies the motions filed by Mr. Lewis. As such, his intervention request will be denied, and the related motion to stay shall also be denied.

I.

The debtor, Shubh Hotels Pittsburgh, LLC (the "Debtor"), filed a voluntary petition under chapter 11 of the Bankruptcy Code on September 7, 2010 in case number 10–26337–JAD (the "Lead Bankruptcy Case"). The Debtor's amended chapter 11 plan filed April 6, 2011 (the "Plan") was confirmed on May 20, 2011. (*See* Case No. 10–26337–JAD, Doc. # 1390). Under the Plan, a creditor trust was to be formed pursuant to a separate trust agreement for the purpose of, among other things, prosecuting and settling avoidance actions. (*See* Case No. 10–26337–JAD, Doc. # 927, § 1.1, p. 12). Pursuant to these provisions of the confirmed Plan, a creditor trust was created on or about June 9, 2011, to which plaintiff Meridian Financial Advisors, Ltd. was appointed as trustee (the "Creditor Trust"). (*See* Case No. 12–02353–JAD, Doc. # 1, ¶¶ 9–10).[1]

On September 6, 2012, the Creditor Trust initiated the Adversary Proceeding by filing a complaint (the "Complaint"), claiming that the Debtor fraudulently transferred estate property to the Defendants in connection with proposed renovations to the Pittsburgh Hilton Hotel (the "Hotel"), which the Debtor operated prior to filing for bankruptcy. (*See* Doc. # 1). In the Complaint, the Creditor Trust specifically avers that on or about May 19, 2006, the Debtor obtained a $42,700,000 loan from Column Financial, Inc. to fund renovations to and the purchase of the Hotel from Hilton Hotels Corporation. (*See id.* at ¶ 18). The Creditor Trust further asserts that on or about May 2006, the Debtor contracted with the Defendants to provide goods and/or services related to the Hotel renovations (*see id.* at ¶ 21), and between June 2006 and November 2007, Contract Purchase & Design, Inc. and/or C & M Installations, Inc. received either directly or indirectly over $13,000,000 for goods and services allegedly provided to the Debtor for renovations to the Hotel (*see id.* at ¶ 22).

Subsequently, on or about August 17, 2007, the Debtor refinanced its loan with Column Financial, Inc., increasing the loan balance to $49,600,000, of which $4,800,000 was earmarked to fund a physical expansion of the Hotel (the "Expansion Reserve"). (*See id.* at ¶¶ 23–24). On or about October 12, 2007, $2,464,109 from the Expansion Reserve was wire transferred directly to Contract Purchase 8b Design, Inc. and/or C & M Installations, Inc. (the "Transfer"). (*See id.* at ¶ 26). The gravamen of the Creditor Trust's Complaint is that the Debtor received no goods or services of value from Contract Purchase & Design, Inc. and/or C & M Installations, Inc. in exchange for the Transfer. (*See id.* at ¶ 28). The Creditor Trust alleges that the Defendants have been unjustly enriched, and seeks to avoid and recover the value of the Transfer pursuant to the Pennsylvania Uniform Fraud-

1. All subsequent docket references refer to Case No. 10–02353–JAD unless otherwise specifically noted.

ulent Transfer Act, 12 Pa.C.S.A. §§ 5104(a)(1), 5104(a)(2), and 5105.

After the filing of the Complaint, the parties filed a *Stipulation to Extend Time for Defendants to File an Answer to the Complaint* on October 9, 2012, and a second stipulation to further extend the time on November 7, 2012. (*See* Doc. ## 6, 8). The Defendants then filed a *Motion to Extend Time for Filing a Response to the Complaint* on November 29, 2012. (*See* Doc. # 9). On the same day, Mr. Lewis filed a *Motion to Intervene and Motion to Stay Adversary Proceedings* (*see* Doc. # 10), which he re-filed at the Court's request to correctly file as a two-part motion on December 6, 2012 (*see* Doc. # 13). The Court granted the Defendant's *Motion to Extend Time for Filing a Complaint* on December 4, 2012, extending the deadline to file a response for a period of thirty days following the determination on the *Motion to Intervene* and the *Motion to Stay the Adversary.* (*See* Doc. # 12).

In Mr. Lewis' *Motion to Intervene* and *Motion to Stay the Adversary* filed on December 6, 2012, Mr. Lewis asserts that his indictment in a pending criminal matter necessitates his intervention in the Adversary Proceeding. Mr. Lewis' request to intervene is made pursuant to 11 U.S.C. § 1109(a) and Fed.R.Civ.P. 24 (made applicable to the Adversary Proceeding by Fed. R. Bankr.P. 7024), and his stay request is made pursuant to the Fifth Amendment of the United States Constitution and Fed. R.Civ.P. 26 (made applicable to the Adversary Proceeding through Fed. R. Bankr.P. 7026). (*See* Doc. # 13, ¶ 4).

On or about October 9, 2012, Mr. Lewis and Mr. Atul Bisaria ("Mr. Bisaria") [2] were indicted in the United States District Court for the Northern District of Illinois at Case No. 12–CR–791 (the "Criminal Proceeding"). (*See* Doc. # 13, Exhibit C, hereinafter the "Indictment"). The Indictment includes ten counts against Mr. Lewis and Mr. Bisaria and a forfeiture allegation for wire fraud and bank fraud in violation of 18 U.S.C. §§ 1343, 1014, and 2. Specifically, the indictment alleges that Mr. Lewis and Mr. Bisaria participated in a scheme to defraud Broadway Bank of Chicago, Illinois and Mutual Bank of Harvey, Illinois by falsely representing that loan proceeds from those banks were to be used to pay for renovations at the Ramada Plaza Hotel in Cincinnati, Ohio and the Doubletree Guest Suites in Boca Raton, Florida, when in fact the funds were diverted for other purposes. (*See* Indictment, ¶ 3, 11, 15, 17, 22, 26, and 33–35). Mr. Lewis asserts that his intervening in and staying of the Adversary Proceeding is necessary because the Criminal Proceeding involves issues "substantiality related to the claims and defenses in this [A]dversary [P]roceeding," and as such, "will each require Lewis' presence and participation, and involve many of the same documents, issues, claims and defenses." (*See* Doc. # 13, ¶ 1).

The Creditor Trust filed an *Objection* to the motions on January 22, 2013. (*See* Doc. # 20). The Defendants filed a *Supplemental Response and Joinder to Mr. Lewis' Motion to Intervene* on the same day. (*See* Doc. # 21). A hearing was held January 29, 2013. Parties filed Post–Trial Briefs on February 12, 2013, and Replies on February 19, 2013. (*See* Doc. ## 24, 25, 27, 28).[3] The matter is now ripe for decision.

2. The Creditor Trust also filed a separate adversary proceeding within the Lead Bankruptcy Case against Mr. Bisaria at Case No. 12–02357–JAD, alleging in its complaint therein that Mr. Bisaria, the sole officer and member of the Debtor, caused the Debtor to fraudulently transfer funds to Bisaria himself and to Shubh Hotels, LLC.

3. The Defendants and Mr. Lewis jointly filed their Post–Trial Brief and Reply. (*See* Doc. ## 24, 28).

II.

[1] As a preliminary matter, the Court will address the Creditor Trust's argument that Mr. Lewis failed to attach a pleading and assert a claim or defense, thereby failing to comply with the requirements of Fed.R.Civ.P. 24(c). Pursuant to Rule 24(c), "[a] motion to intervene ... must state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought." It is undisputed that Mr. Lewis did not attach a pleading to his motion. Because Mr. Lewis did not attach pleading, and also because he has not articulated any claim or defense that relates to the underlying substance of the Complaint, the Court denies Mr. Lewis' *Motion to Intervene* as procedurally deficient.

[2] Failure to comply with the requirements of Rule 24(c) will generally result in the denial of a motion to intervene. *See Township of S. Fayette v. Allegheny County Housing Authority,* 183 F.R.D. 451 (W.D.Pa.1998), affirmed 185 F.3d 863 (3d Cir.1999) (motion to intervene dismissed when movants did not submit the requisite proposed pleading); *School Dist. Of Philadelphia v. Pennsylvania Milk Marketing Bd.,* 160 F.R.D. 66 (E.D.Pa.1995) (motion to intervene denied for failure to attach a pleading setting forth the claim or defense for which intervention was sought). However, courts have not required strict compliance with Rule 24(c) in certain circumstances. *See, e.g., William v. Taylor,* 465 F.Supp.2d 1267, 1273 n. 3 (N.D.Ga.2000) (motion to intervene granted despite failure to attach complaint where intervenor's claims were identical to plaintiffs', intervention would not unduly delay or prejudice rights of original parties, and the intervenor attached proposed complaint with explanation of the claims to a reply brief); *McCausland v. Shareholders Management Co.,* 52 F.R.D. 521 (S.D.N.Y.1971) (failure to attach a pleading to motion to intervene not fatal when affidavit in support stated that proposed intervenors would adopt the present complaint).

[3] For example, the Defendants and Mr. Lewis directed the Court's attention to *U.S. ex rel. Frank M. Sheesley Co. v. St. Paul Fire & Marine Ins. Co.,* 239 F.R.D. 404, 413 (W.D.Pa.2006), where the court granted a motion to intervene despite the intervenor's failure to attach a pleading. The Defendants and Mr. Lewis assert that the instant case is similar to that of *Sheesley,* where there was a "sufficient commonality of law or facts underl[ying] the applicant's claim and the main action." (*See* Doc. # 24, p. 8, citing *Sheesley,* 239 F.R.D. at 414). However, the Creditor Trust argues that this case is easily distinguishable from *Sheesley,* where "there was no real prejudice to the [original parties] in waiving the procedural requirements of Rule 24(c)," since "the underlying dispute moved forward in another forum, [specifically] arbitration." (*See* Doc. # 25, p. 5). The Creditor Trust asserts that "in this matter, Mr. Lewis seeks to intervene and stay the underlying dispute for an indefinite period of time potentially resulting in great prejudice to the Creditor Trust." (*See id.*). The Court finds *Sheesley* distinguishable from the instant case, because there is not a sufficient commonality of law or facts underlying the Adversary Proceeding and the Criminal Proceeding, and because the Creditor Trust would be prejudiced.

[4] Unlike in *Sheesley,* here there is no threat of multiple suits because there is no unity of interest between the two proceedings. "Rule 24 is meant to prevent the ... multiplicity of suits." 239 F.R.D. at 415, citing *Wash. Elec. Coop., Inc. v. Mass. Mun. Wholesale Elec. Co.,* 922 F.2d 92, 97 (2d Cir.1990) ("The purpose of the rule allowing intervention is to prevent a multi-

plicity of suits where common questions of law or fact are involved."). "Rather than have different tribunals examine these issues at different times, notions of judicial economy suggest aggregating them in a single proceeding." 239 F.R.D. at 415. Here, the Court has not been persuaded that there are common questions of law or fact among the two proceedings.

The movant in *Sheesley* was asking "for a stay in [the] litigation and for an order compelling [the original plaintiff] to arbitrate its grievances." 239 F.R.D. at 408. Because "a plethora of questions to be raised in a potential arbitration proceeding [were] common with the issues in the main ... action," and the claims presented in the complaint in the main action "share[d] the same factual history" with any cross-claim that could be raised in arbitration, the *Sheesley* court found that "[i]dentical questions [would] ground the defenses available in [the court] and the claims that the [a]pplicant may bring before an arbitrator." 239 F.R.D. at 414.

Here, the Criminal Proceeding and the Adversary Proceeding do not share common questions of law or fact, and there is no overlap of issues or parties. The Criminal Proceeding involves allegations that Mr. Lewis defrauded two banks located in Illinois by falsely representing that loan proceeds from those banks were to be used to pay for renovations at the Ramada Plaza Hotel in Cincinnati, Ohio and the Doubletree Guest Suites in Boca Raton, Florida, when in fact the funds were diverted for other purposes. (*See* Indictment, ¶ 3, 11, 15, 17, 22, 26, and 33–35). The Adversary Proceeding, meanwhile, involves different defendants, a loan from a different bank, and renovations to a different hotel than those in the Criminal Proceeding. Specifically, the Creditor Trust's Complaint alleges that the Defendants were unjustly enriched by an alleged fraudulent transfer of estate property from the Debtor in connection with proposed renovations to the Pittsburgh Hilton Hotel. Mr. Lewis' actions regarding the Transfer in the Adversary Proceeding are not at issue in the Criminal Proceeding, nor are his actions regarding the fraud allegations within the Criminal Proceeding at issue in the Adversary Proceeding. There is no threat here of multiplicity of suits, as there was in *Sheesley.* The instant case does not present the situation that Rule 24 is meant to prevent.

Furthermore, the *Sheesley* court acknowledged that when courts waive procedural defects under Rule 24, such waiver "is often prompted by the merits of the motion itself, the lack of prejudice to the parties, and the principle that Rule 24 is intended simply to notice the parties as to the applicant's position and arguments." 239 F.R.D. at 411. Waiving Mr. Lewis' failure to attach a pleading is not appropriate here, where the Court agrees with the Creditor Trust that they would be prejudiced by an indefinite delay.

Mr. Lewis is asking for a stay of the litigation for an indefinite period, during which time the Creditor Trust would not be able to pursue its claims against the Defendants in another forum. Not only would a stay delay the Adversary Proceeding, but also the Lead Bankruptcy Case, which the Creditor Trust avers is "moving toward conclusion," as "most of [the other] adversary proceedings associated with the bankruptcy case have been resolved to date," and "the [P]lan has been confirmed." (*See* Doc. # 20, pp. 12–13, ¶ 57; *see also* Case No. 10–26337–JAD, Doc. # 1390). The Court also notes that during a stay of the Adversary Proceeding and Bankruptcy Case, the Debtor's estate would be required to continue paying quarterly fees to the United States trustee for each quarter until the case is converted

or dismissed. *See* 28 U.S.C. § 1930(a)(6). The longer the case is stayed, the greater the statutory fees that must be paid under this provision by the estate, thus reducing the amount of estate funds available for the Creditor Trust to enforce and prosecute the Debtor's obligations. Because the Creditor Trust is prejudiced by an indefinite delay of the Adversary Proceeding, waiver of Mr. Lewis' procedural defect is not appropriate in the instant case.[4]

Mr. Lewis' *Motion to Intervene* is also procedurally deficient because it does not set out a claim or defense related to the existing case, as required by Rule 24(c). "The words 'claim or defense' manifestly refer to the kinds of claims or defenses that can be raised in courts of law as part of an actual or impending law suit." *Diamond v. Charles*, 476 U.S. 54, 76–77, 106 S.Ct. 1697, 1711, 90 L.Ed.2d 48 (1986) (internal citations omitted). Here, Mr. Lewis has simply not raised any claim or defense; he has only asserted that he seeks to intervene for the limited purpose of staying the proceeding.

Thus, the Court finds that Mr. Lewis' *Motion to Intervene* is procedurally deficient in that if fails to conform with Fed. R.Civ.P. 24(c).

III.

Even if Mr. Lewis' *Motion to Intervene* were proper, it is deficient in substance. Mr. Lewis seeks to intervene under Fed. R.Civ.P. 24(a), which provides:

> On timely motion, the court must permit anyone to intervene who: (1) is given an unconditional right to intervene by federal statute; or (2) claims an interest relating to the property or transaction that is the subject of the action and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

For the reasons set forth below, the Court denies Mr. Lewis' request to intervene under both Rule 24(a)(1) and 24(a)(2).

A.

[5] Pursuant to Rule 24(a)(1), courts must allow parties to intervene that hold an unconditional right to intervene pursuant to federal statute. The Third Circuit has determined that parties in interest have an absolute right to intervene in adversary proceedings pursuant to Rule 24(a)(1) and 11 U.S.C. § 1109(b). *Phar–Mor, Inc. v. Coopers & Lybrand*, 22 F.3d 1228 (3d Cir.1994); *Official Unsecured Creditors Comm. v. Michaels* (*In re Marin Motor Oil, Inc.*), 689 F.2d 445 (3d Cir. 1982). Mr. Lewis asserts that he has an unconditional right to intervene pursuant to 11 U.S.C. § 1109(b), and thus must be permitted to intervene under Rule 24(a)(1). Section 1109(b) asserts:

> A party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter.

Because the Court finds that Mr. Lewis is not a "party in interest" under section 1109(b), the Court denies his request to intervene under Rule 24(a)(1).

[6] While the term "party in interest" is not statutorily defined, section 1109(b) lists several examples of parties that are

4. The Court further notes that the Criminal Proceeding was continued on May 7, 2013, when the Honorable John Z. Lee in the United States District Court for the Northern District of Illinois granted Mr. Lewis' oral motion "for additional time to review extensive discovery due to the complexity of the case." (*See* Case No. 12–CR–791, Doc. # 37).

considered "parties in interest," including "the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee." 11 U.S.C. § 1109(b). It is clear that this is not an exhaustive list of parties that may be "parties in interest." *In re Combustion Eng'g, Inc.,* 391 F.3d 190, 214 n. 21 (3d Cir.2004). "Consequently, courts must determine on a case by case basis whether the prospective party in interest has a sufficient stake in the proceeding so as to require representation." *In re Amatex Corp.,* 755 F.2d 1034, 1042 (3d Cir.1985).

In the instant case, the Defendants and Mr. Lewis assert that Mr. Lewis has a sufficient stake in the Adversary Proceeding which requires representation for the following reasons:

> (i) without [Mr.] Lewis' participation in the defense of the [Adversary Proceeding], [the Defendants] "are effectively and completely defenseless; (ii) in the event this Court should make any ... adverse inferences against [the Defendants] as a result of [Mr.] Lewis' temporary inability to assist in the defense of the [Adversary Proceeding], a judgment will likely be entered against [the Defendants]; and (iii) any such judgment will likely be in an amount that would cripple the businesses, resulting in their dissolution and destruction, as well as Lewis' inability to continue to earn a living.

(*See* Doc. # 24, p. 6).

The Creditor Trust, however, argues that Mr. Lewis does not have a sufficient stake in the outcome of the Adversary Proceeding because his interest is "contingent" and solely regards impairment of "his personal rights." (*See* Doc. # 20, p. 6, ¶ 25).[5] The Court agrees with the Creditor Trust that Mr. Lewis does not have a sufficient stake as required under section 1109(b), because Mr. Lewis has not persuaded this Court that his reasons for intervening constitute "legally protected interests" that could be affected by the Adversary Proceeding.

[7] In *In re Global Industrial Technologies, Inc.,* the Third Circuit adopted a test set forth by the Seventh Circuit to define a party in interest as "anyone who has a legally protected interest that could be affected by a bankruptcy proceeding." 645 F.3d 201, 210 (3d Cir.2011), citing *In re James Wilson Associates,* 965 F.2d 160, 169 (7th Cir.1992). Using that definition of "party in interest," the *Global Industrial Technologies* court held that the debtor's insurers, whose policies were to be transferred to a settlement trust under the debtor's chapter 11 plan, had standing to challenge the plan as parties in interest because they had legally protected interests which were affected by the debtor's plan. *See also In re Combustion Eng'g, Inc.,* 391 F.3d 190 (3d Cir.2004) (debtor's insurers did not have standing to object to confirmation of debtor's chapter 11 plan where a confirmation plan did not materially alter the insurers liability). Mr. Lewis fails to be a party in interest under this test.

[8, 9] None of the three arguments presented by the Defendants and Mr. Lewis assert a legally protected interest

5. The Creditor Trust also argues that Mr. Lewis fails to prove that he has a sufficient stake which requires representation because "any interest Mr. Lewis might have in the Adversary Proceeding is being adequately represented by the Defendants and would not require that he be separately represented." (*See* Doc. # 20, p. 6, ¶ 25). The Court reaches the issue of adequate representation in its analysis of Mr. Lewis' request to intervene pursuant to Rule 24(a)(2), and finds that any interest Mr. Lewis has in the Adversary Proceeding is adequately represented by the Defendants.

that could be affected by this proceeding. The first two relate to the Defendants' interest in having Mr. Lewis testify, rather than an interest of Mr. Lewis himself. In as much as the first two arguments could relate to Mr. Lewis' own interest in the Adversary Proceeding, they concern only Mr. Lewis' economic interests in his companies. "A mere economic interest in the outcome of the litigation is [generally] insufficient to support a motion to intervene." *Mountain Top Condominium Association v. Dave Stabbert Master Builder, Inc.,* 72 F.3d 361, 366 (3d Cir.1995), citing *U.S. v. Alcan Aluminum Inc.,* 25 F.3d 1174, 1185 (3d Cir.1994). Because Mr. Lewis' interest in the financial viability of his companies is merely economic, it is not a "sufficient stake" in the Adversary Proceeding to warrant intervening.

Similarly, the third argument, although phrased as a personal interest of Mr. Lewis, also fails to support the *Motion to Intervene.* Mr. Lewis' personal interest in continuing to operate his businesses is an economic concern, and does not present a legally protected interest which could be affected by this proceeding. The Court therefore finds that Mr. Lewis is not a party in interest under section 1109(b).

Moreover, Mr. Lewis and the Defendants have not presented this Court with any case where a shareholder of a defendant was found to have standing to intervene in a chapter 11 bankruptcy proceeding. The Court finds persuasive the case of *In re WHET, Inc.,* 33 B.R. 438, where the court found that the chief executive officer and president of the debtor did not have standing to be heard in a chapter 11 case. 33 B.R. 438, 442 (Bankr.D.Mass. 1983). The *In re WHET, Inc.* court looked to *In re O.P.M. Leasing Services, Inc.,* 21 B.R. 983, for guidance in determining whether officers of a corporation have standing. The *In re O.P.M. Leasing Services, Inc.* court held that a former president of a chapter 11 debtor and 50% owner of the company which was the sole shareholder of the debtor was not a party in interest under section 1109(b); the movant's former position as an officer of the debtor did not create any inherent rights in the bankruptcy case. 33 B.R. 438, 442, citing *In re O.P.M. Leasing Services, Inc.,* 21 B.R. 983 (D.N.Y.1981). The *In re WHET, Inc.* court extended this reasoning to current officers, finding that the debtor's president and chief executive officer did not have standing in that debtor's bankruptcy case. *Id.* Similarly, Mr. Lewis' role as a shareholder of the debtor does not create any basis for standing in the debtor's chapter 11 Bankruptcy Case or the Adversary Proceeding.[6]

Thus, the Court denies Mr. Lewis' request to intervene pursuant to Rule 24(a)(1) and section 1109(b).

B.

[10] The Court also denies Mr. Lewis' request to intervene under Rule 24(a)(2), as he fails to satisfy the four part test applied by courts in the Third Circuit to determine whether an applicant may intervene in an action as of right.

[11, 12] An applicant is entitled to intervene under Rule 24(a)(2) when: (1) the application for intervention is timely; (2)

6. The Court also notes the similarity of this case to *In re Refco, Inc.,* where the Second Circuit Court of Appeals found that a debtor's investors were not a party in interest under section 1109(b). 505 F.3d 109, 117 (2nd Cir. 2007). The Refco court held that although debtor's investors ''maintain a financial 'interest' in [the debtor entity], they are not a party in interest within the meaning of the Bankruptcy Code''; rather, ''[t]he party in interest in the bankruptcy sense, representing the investors' financial interest, is [the debtor entity]''. *Id.*

the applicant has a sufficient interest in the litigation; (3) the interest may be affected or impaired, as a practical matter by the disposition of the action; and (4) the interest is not adequately represented by an existing party in the litigation. *Harris v. Pernsley,* 820 F.2d 592, 596 (3d Cir.1987), cert. denied, 484 U.S. 947, 108 S.Ct. 336, 98 L.Ed.2d 363 (1987) (citation omitted). Although these requirements are intertwined, each must be met to intervene as of right. *Id.* The applicant bears the burden of demonstrating that it has met all four prongs. *Development Finance Corp. v. Alpha Housing & Health,* 54 F.3d 156, 162 (3d Cir.1995), *United States v. Alcan Aluminum, Inc.,* 25 F.3d 1174, 1181 n. 9 (3d Cir.1994). As the first factor, timeliness, is not in dispute, the Court will analyze factors two through four below.

[13] Regarding the second factor, a "sufficient interest in the litigation," the Supreme Court has determined that an intervenor's interest must be one that is "significantly protectable." *Donaldson v. United States,* 400 U.S. 517, 531, 91 S.Ct. 534, 542, 27 L.Ed.2d 580 (1971). In defining a "significantly protectable" legal interest under Rule 24(a)(2), Third Circuit courts have held that "the interest must be a legal interest as distinguished from interests of a general and indefinite character," and "[t]he applicant must demonstrate that there is a tangible threat to a legally cognizable interest to have the right to intervene." *Mountain Top Condominium Association v. Dave Stabbert Master Builder, Inc.,* 72 F.3d 361, 366 (3d Cir.1995), citing *Harris v. Pernsley,* 820 F.2d at 601 (citations omitted). "This interest is recognized as one belonging to or being owned by the proposed intervenor." *Mountain Top,* 72 F.3d at 366, citing *United States v. Alcan Aluminum, Inc.,* 25 F.3d 1174, 1185 (3d Cir.1994). The issue is whether Mr. Lewis is a real party in interest. *Harris v. Pernsley,* 820 F.2d at 596–598. *See also United States v. Alcan Aluminum, Inc.,* 25 F.3d 1174, 1185 (3d Cir. 1994) ("a party has more than an economic interest where it is the real party in interest and where the applicant would have standing to raise the claim."); *Mt. Hawley Ins. Co. v. Sandy Lake Properties,* 425 F.3d 1308, 1311 (11th Cir.2005) ("a legally protectable interest is something more than an economic interest ... [; t]hus, a legally protectable interest is an interest that derives from a legal right.").

The Court notes the similarity of the second *Harris v. Pernsley* factor to the requirements for intervening under section 1109(b) and Rule 24(a)(1) discussed above. Just as Mr. Lewis failed to prove to the Court that he was not a party in interest under section 1109(b), he again fails to persuade the Court that he is a real party in interest under Rule 24(a)(2).

Here, the original Defendants are the real parties in interest, not Mr. Lewis. Because Mr. Lewis has not met his burden in proving to the Court that his interest in the outcome of the litigation is not merely economic or that there is a tangible threat to a legally cognizable interest, he fails to satisfy the second *Harris v. Pernsley* factor.

Because Mr. Lewis does not have a legally protectable interest giving rise to a right to intervene, he also fails to satisfy the third factor, which requires that such interest will be impaired by the disposition of the action. The only non-economic interest Mr. Lewis has asserted which is arguably derived from a legal right is that he must choose between exercising his Fifth Amendment right to avoid self-incrimination and testifying on behalf of his

companies.[7] But even if the Court were to consider this choice to invoke the Fifth Amendment privilege an "interest" sufficient to satisfy the second *Harris v. Pernsley* factor, because Mr. Lewis maintains the ability to invoke the privilege, the Court finds that such interest is not impaired for purposes of 24(a)(2).

[14, 15] In determining whether an interest may be affected or impaired within the meaning of Rule 24(a)(2), the court must assess "the practical consequences of the litigation," and "may consider any significant legal effect on the applicant's interest." *Brody By and Through Sugzdinis v. Spang,* 957 F.2d 1108, 1123 (3d Cir.1992) (citations and internal quotations omitted). It is not sufficient that the claim be incidentally affected; rather, there must be "a tangible threat" to the applicant's legal interest. *Id.; see also Development Finance Corp. v. Alpha Housing and Health Care, Inc.,* 54 F.3d at 162. Since Mr. Lewis is still able to assert his Fifth Amendment right, his interest in asserting his right to avoid self-incrimination is not affected or impaired as a practical matter by the disposition of the action for purposes of Rule 24(a)(2). Thus, even if the Court were to determine that Mr. Lewis' decision between two choices constitutes an interest derived by a legal right, Mr. Lewis still could not satisfy the third *Harris v. Pernsley* factor.

[16, 17] Lastly, the Court finds that Mr. Lewis' interests are adequately represented by the original Defendants, because their interests are presumed to be one and the same. The "burden ... is on the applicant for intervention to show that his interests are not adequately represented by the existing parties." *In re Sheesley,* 239 F.R.D. at 409, citing *Brody,* 957 F.2d at 1123. Though often minimal, the burden can rise when the interests of an existing party are presumed coincident with those of the potential intervenor. "[W]hen the party seeking intervention has the same ultimate objective as a party to the suit, a presumption arises that its interests are adequately represented." *In re Cmty. Bank of N. Va. & Guar. Nat'l Bank of Tallahassee Second Mortgage Loan Litig.,* 418 F.3d 277, 315 (3d Cir. 2005). In order to overcome the presumption of adequate representation, "the proposed intervenor must ordinarily demonstrate adversity of interest, collusion, or nonfeasance on the part of a party to the suit." *Id. See also Gen. Star Indem. Co. v. V.I. Port Auth.,* 224 F.R.D. 372, 376 (D.Vi. 2004) ("Because any interest [p]roposed [i]ntervenors have or may have is identical to [the defendant's], there must be a concrete showing of circumstances in the particular case that make the representation inadequate." (internal citations omitted)). Here, Mr. Lewis has not asserted any adversity of interest, collusion, or nonfeasance which would overcome the presumption of adequate representation, and the Court therefore finds that any interest Mr. Lewis has in the Adversary Proceeding is adequately represented by the existing Defendants.

Lastly, Mr. Lewis asserts that without his "direct involvement in the litigation in his capacity as [the Defendant's] sole shareholder and director, president, and the person most familiar with the day to day operations of the corporate entities, ... [the Defendants] ... cannot adequately protect [Mr.] Lewis without his direct and intimate involvement in the [Adversary Proceeding]." (*See* Doc. # 24, p. 7).

7. The Court considers this issue as a potential argument for a legal interest for purposes of intervention under Rule 24(a)(2), although Mr. Lewis does not argue this point directly in support of his *Motion to Intervene,* but rather in support of his *Motion to Stay.*

While the Court appreciates the Defendants' interest in Mr. Lewis' ability to testify freely to bolster their case, the Court does not find persuasive the argument that the Defendants cannot defend the Adversary Proceeding without Mr. Lewis' testimony. A transfer of funds in exchange for a service generally requires both a transferor and a transferee. It is logical to conclude that persons other than solely Mr. Lewis must have been involved in the Hotel's expansion project, such as employees of the Hotel, employees of the Defendants, and employees of the Debtor. As such, the Court is not convinced that Mr. Lewis is the only person capable of being called as a witness to testify to the circumstances surrounding the Transfer at issue in the Adversary Proceeding.

For these reasons, the Court finds that Mr. Lewis' interests are adequately represented without allowing him to intervene in the Adversary Proceeding. The Court denies Mr. Lewis' request to intervene pursuant to Rule 24(a)(2).

IV.

[18] Mr. Lewis also seeks to intervene under Rule 24(b), under which courts may permit anyone to intervene who "(A) is given a conditional right to intervene by a federal statute; or (B) has a claim or defense that shares with the main action a common question of law or fact." Fed. R.Civ.P. 24(b)(1).[8] The Court finds intervening pursuant to Rule 24(b) is inappropriate in the instant case.

Mr. Lewis asserts section 1109 provides him with a conditional right to intervene under Rule 24(b)(1)(A). The Court first finds Rule 24(b)(1)(A) inapplicable, as the Court determined in its analysis under Rule 24(a)(1) that Mr. Lewis is not a party in interest under section 1109; thus, such statute does not provide Mr. Lewis a right, either conditionally or unconditionally, to intervene.

Mr. Lewis' intervening is also inappropriate under Rule 24(b)(1)(B), under which "the movant must have a 'claim or defense' against the defendants with questions of fact or law in common with the main action-not just a general interest in its subject matter or outcome." *Abney v. I.T.T. Diversified Credit Corp.* (*In re Environmental Electronics Systems, Inc.*), 11 B.R. 962, 964 (Bankr.N.D.Ga.1981), citing 3B Moores Federal Practice P 24.10(2) at p. 24–352 (1977). As discussed within the Court's analysis of Mr. Lewis' failure to comply with Rule 24(c)'s pleading requirements, Mr. Lewis has not presented any claim or defense, but merely seeks to intervene for the limited purpose of staying the Adversary Proceeding. As such, Mr. Lewis has not asserted a claim or defense against the Creditor Trust which has questions of law or fact in common with the main action for purposes of intervening under Rule 24(b)(1)(B). (*See* Doc. # 27, p. 5).

[19] Furthermore, pursuant to Rule 24(b)(3), in exercising the discretion afforded to the courts under Rule 24(b), "a court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." The Court has determined that allowing Mr. Lewis to intervene for the sole purpose of

8. The Creditor Trust points out that the Defendants' and Mr. Lewis' jointly-filed post-trial brief "was the first time [they] asserted that Mr. Lewis should be permitted to intervene pursuant to Rule 24(b) as no mention of intervention pursuant to Rule 24(b) was set forth in the [m]otion" and "[t]hat, alone, is enough to deny this request for intervention pursuant to Rule 24(b)." (*See* Doc. # 27, p. 4). The Court will address the request to intervene pursuant to Rule 24(b) notwithstanding the failure to include such request in the *Motion to Intervene*.

pursuing a stay of the proceeding would unduly delay both the Adversary Proceeding and the Lead Bankruptcy Case, resulting in prejudice to the Creditor Trust. In the interest of encouraging judicial efficiency and in light of Rule 24(c), the Court denies Mr. Lewis' request to intervene pursuant to Rule 24(b).

V.

Finally, Mr. Lewis requests a stay of the Adversary Proceeding under Fed.R.Civ.P. 26(c),[9] which provides:

> A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending—or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken.

Even if the Court were to find that Mr. Lewis has the right to and is permitted to intervene, it would deny Mr. Lewis' request to stay the Adversary Proceeding.

[20–23] "A stay of a civil case is an extraordinary remedy." *Walsh Sec., Inc. v. Cristo Prop. Mgmt., Ltd.,* 7 F.Supp.2d 523, 526 (D.N.J.1998) (internal citations omitted). Furthermore "[a] stay of a civil proceeding during the pendency of a criminal proceeding is not constitutionally required." *DeVita v. Sills,* 422 F.2d 1172, 1181 (3d Cir.1970). Rather, a stay may be granted as "incidental to the power inherent in every court to control the disposition of the causes on its docket with the economy of time and effort for itself, for counsel and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance." *Landis v. North American Co.,* 299 U.S. 248, 254–55, 57 S.Ct. 163, 166, 81 L.Ed. 153 (1936).

Mr. Lewis asserts that "[a] stay of the Adversary Proceeding is necessary (A) to protect [his] right against self-incrimination under the Fifth Amendment of the United States Constitution, and (B) to avoid confusion and the consumption of judicial resources associated with resolving logistical and legal questions arising from the simultaneous progression of these cases and the consequences associated with the invocation of the Fifth Amendment." (*See* Doc. # 13, ¶ 2). The Court disagrees with Mr. Lewis that a stay of the Adversary Proceeding is necessary in this instance.

First, Mr. Lewis' Fifth Amendment right against self-incrimination is not impaired, as he is able to assert it in the Adversary Proceeding. *See Paul Harrigan & Sons, Inc. v. Enterprise Animal Oil Co.,* 14 F.R.D. 333, 334 (E.D.Pa.1953) (while corporations do not have Fifth Amendment privileges, a witness called to testify regarding the conduct of a corporation or on its behalf may be entitled to invoke the Fifth Amendment privilege for himself).

[24, 25] Further, application of the factors commonly used by courts to decide whether to grant a stay in similar circumstances mitigates against granting the requested relief. Both parties direct the Court to *In re Adelphia,* which held:

> In deciding whether to stay a civil case pending the resolution of a criminal case, courts often consider the following factors: (1) the extent to which the issues in the civil and criminal cases overlap; (2) the status of the criminal

9. The Creditor Trust asserts that Rule 26 is not yet applicable to the instant case, since "this matter has not reached the discovery phase because the Defendants have not yet filed a response to the Complaint." The Court agrees, but nonetheless includes its analysis of Mr. Lewis' request to stay the proceedings.

> proceedings, including whether any defendants have been indicted; (3) the plaintiffs interest in the expeditious civil proceedings weighed against the prejudice to the plaintiff caused by delay; (4) the burden on the defendants; (5) the interests of the court; and (6) the public interest.

In re Adelphia Communs. Sec. Litig., 2003 WL 22358819, at *3, 2003 U.S. Dist. LEXIS 9736, *7 (E.D.P.a May 14, 2003), citing *Walsh Securities Inc. v. Cristo Prop. Mgmt., Ltd.*, 7 F.Supp.2d 523 (D.N.J.1998). *See also Golden Quality Ice Cream Co., Inc. v. Deerfield Specialty Papers, Inc.*, 87 F.R.D. 53, 56 (E.D.Pa.1980) (presenting similar factors). Mr. Lewis has failed to satisfy these factors to sufficiently compel the Court to stay the Adversary Proceeding pending the outcome of the Criminal Proceeding.

Most significantly, the Court finds that the extent to which the issues in the civil and criminal cases overlap is minimal. *See In re Adelphia*, 2003 WL 22358819, at *3, 2003 U.S. Dist. LEXIS 9736 at *8, citing *Walsh Securities*, 7 F.Supp.2d at 527 ("The similarity of issues underlying the civil and criminal actions is considered the most important threshold issue in determining whether or not to grant a stay."). Mr. Lewis and the Defendants assert that "[s]imilar to the allegations against [the Defendants] in the [Adversary Proceeding], the basis for liability against Lewis in the [C]riminal [P]roceeding involves the alleged transfer of bank loan proceeds to entities controlled by Atul Bisaria." (*See* Doc. # 24, p. 2). The Court, however, agrees with the Creditor Trust, who "submits that the issues in the Adversary Proceeding are distinguishable from those in the Criminal Proceeding in that the Transfer at issue is a different transaction than that in the Criminal Proceeding and involved different parties." (*See* Doc. # 20, p. 12, ¶ 52).

As discussed above, the Criminal Proceeding and the Adversary Proceeding involve different defendants, different banks, and different hotels. Mr. Lewis' actions regarding the Transfer in the Adversary Proceeding are not at issue in the Criminal Proceeding, nor are his actions regarding the fraud allegations within the Criminal Proceeding at issue in the Adversary Proceeding. Therefore, the Court finds the first *Adelphia* factor is not satisfied, as the overlap of issues among the proceedings is insufficient to warrant a stay.

Mr. Lewis also cannot satisfy the second factor, under which courts are to consider the status of the criminal proceedings, including whether any defendants have been indicted. Generally, stays are issued in civil proceedings against defendants also facing criminal charges. "If criminal indictments are returned against the civil defendants, then a court should strongly consider staying the civil proceedings until the related criminal proceedings are resolved." *In re Adelphia*, 2003 WL 22358819, at *3, 2003 U.S. Dist. LEXIS 9736 at *9, citing *Parallel Civil and Criminal Proceedings*, 129 F.R.D. 201, 203 (1989). This scenario does not apply to this instant case, where a criminal indictment was brought against Mr. Lewis, who is not a defendant in the Adversary Proceeding. Therefore, the Court agrees with the Creditor Trust that "this factor weighs against instituting a stay in the Adversary Proceeding." (*See* Doc. # 20, p. 13, ¶ 55).

In evaluating the third factor, the plaintiffs burden resulting from the stay, "courts may insist that the plaintiff establish more prejudice than simply a delay in his right to expeditiously pursue his claim . . . Instead, the plaintiff should demonstrate a particular unique injury, such as the dissipation of assets or an attempt to gain an unfair advantage from the stay."

In re Adelphia, 2003 WL 22358819, a *4, 2003 U.S. Dist. LEXIS 9736 at *10–11 (internal citations omitted).

The Creditor Trust argues that there exists a potential for dissipation of assets in this case (*see* Doc. # 20, p. 14, ¶ 58), although Mr. Lewis and the Defendants assert a willingness to stipulate to an order "mandating that there be no such dissipation of assets, expenditures or encumbrances outside the ordinary course of business going forward" (*see* Doc. # 28, p. 2). While the Court realizes that such a stipulation is not a strict guarantee against the dissipation of assets, it does mitigate against weighing this factor towards denying the stay.

The Creditor Trust also argues that they would be further prejudiced by a stay, as they could potentially "have to get in line behind any judgment and/or forfeiture obtained against [Contract Purchase 8b Design, Inc.] in the [C]riminal [Proceeding]." (*See* Doc. # 20, ¶ 58). However, the Indictment is against Mr. Lewis, not the Defendants, and does not include any claim against the Defendants nor any grounds to pursue a judgment therefrom. Further, the forfeiture allegation is based on 18 U.S.C. § 982(a)(2)(A) and 21 U.S.C. § 853(p), which provide, in part, for forfeiture of "substitute property" of the named defendant, but not from a third-party recipient of such property. Thus, the Court finds this argument unsupportive of the third *Adelphia* factor in this case.

However, as discussed above, the Creditor Trust convincingly argues that a stay will not simply delay its right to expeditiously pursue its claim in the Adversary Proceeding, but will also delay the Lead Bankruptcy Case itself, resulting in increased trustee and administrative fees. Thus, the Court finds this third factor does weigh in the Creditor Trust's favor, based on the Creditor Trust's interest in seeing both the Adversary Proceeding and the Lead Bankruptcy Case to timely resolutions.

Mr. Lewis also fails to satisfy fourth *Adelphia* factor, which considers the burden on the defendants. The *Adelphia* court found this factor satisfied since the defendants in the civil case were "already under criminal indictment in a case concerning identical allegations and issues," and so "they face[d] substantial risks of self-incrimination." *In re Adelphia,* 2003 WL 22358819, at *5, 2003 U.S. Dist. LEXIS 9736 at *14. Here, as the Court has stressed throughout this *Memorandum Opinion,* Mr. Lewis is only a defendant in the Criminal Proceeding, which does not concern allegations and issues identical to those in the Adversary Proceeding.

Mr. Lewis and the Defendants also assert that "[t]he request for a stay is needed not just to protect Lewis' interests," but also "in order to preserve [the Defendant's] ability to competently defend the [Adversary Proceeding] and ensure the absence of any substantial prejudice of their rights." (*See* Doc. # 24, p. 12). However, the fact remains that the Criminal Proceeding and the Adversary Proceeding do not involve the same defendants, and therefore the Court is not presented with the usual concern courts consider when analyzing the burden on defendants in denying a stay. *See also Chorches v. Ogden (In re Bolin & Co., LLC),* 2012 WL 3730410, at *3, 2012 U.S. Dist. LEXIS 128446, *7–8 (D.Conn. June 27, 2012) ("In the usual case, the concern is that a defendant in a civil action who is also the subject of criminal charges will face the 'Hobson's choice' of making potentially incriminating admissions during discovery or asserting his Fifth Amendment rights and losing his case," but a witness choosing between testifying and asserting his Fifth Amendment privilege

present a different concern, no more "dire of unfair than that of any other party who cannot find witnesses to testify on his behalf.").

Additionally, as discussed above, the Defendants and Mr. Lewis have not convinced this Court that the Defendants could not call any other witness to testify on their behalf regarding whether the Debtor received value in exchange the Transfer at issue in the Adversary Proceeding. Furthermore, as noted at the hearing, other options exist to protect Mr. Lewis outside of the extraordinary remedy of staying the proceedings. For example, the Court can place Mr. Lewis' testimony under seal, or order a bond to protect the plaintiffs. (*See* Hearing Held in Courtroom D, January 29, 2013 (11:31 AM)). For the foregoing reasons, the Court finds this factor weighs against the granting of a stay.

The Court also finds that consideration of both the fifth and sixth *Adelphia* factors, the interests of the Court and the public, weigh against the Court's granting a stay. As expressed in *Adelphia*, "[t]he Court has an interest in efficiently managing its caseload." *Adelphia*, 2003 WL 22358819, at *5, 2003 U.S. Dist. LEXIS 9736 at *5, citing *State Farm Mutual Automobile Ins. Co. v. Beckham–Easley*, 2002 U.S. Dist. LEXIS 17896, 2002 WL 31111766 at *3. The Court agrees with the Creditor Trust that "[g]enerally allowing a case to proceed in the normal course of that docket will promote the interests of the court." (*See* Doc. # 20, p. 15, ¶ 63).

This is not to say that the "public interest involved in Creditor Trust's pursuit of claims on behalf of the Debtor in the Adversary Proceeding" is any greater than the "public interest advanced in the Criminal Proceeding." (*See* Doc. # 13, p. 14). The proceedings involve different defendants, and "[t]here are few overlapping parties, documents, issues, claims, and defenses among the two proceedings." (*See* Doc. # 20, p. 15, ¶¶ 63–64). There is a public interest in advancing both proceedings, and no public harm in allowing both cases to proceed simultaneously.

Thus, after careful consideration of the above factors, the Court finds Mr. Lewis' argument for a stay of the Adversary Proceedings without merit.

VI.

In conclusion, Mr. Lewis' *Motion to Intervene* is both procedurally and substantively deficient, and as such is denied. Further, even if the Court granted Mr. Lewis' *Motion to Intervene*, it would deny his *Motion to Stay the Adversary Proceeding*. If, after discovery begins, some other action may be appropriate to further protect Mr. Lewis' Fifth Amendment right against self-incrimination, the Court will consider any timely requests for such. An appropriate order will be entered herewith.

In re Michael R. SMITH, Sr., Debtor.

Estate of Maggie Mae Smith, Plaintiff

v.

Michael R. Smith, Sr., Defendant.

Bankruptcy No. 08–10080–JDW.
Adversary No. 08–01181–JDW.

United States Bankruptcy Court,
N.D. Mississippi.

July 9, 2013.

Background: Estate of debtor's deceased mother, through debtor's brother as execu-

mation agreement under § 524(d) after the filing of an attorney certification under § 524(c)(3) (i.e., regardless of the resolution of the legal issue described in Paragraphs J–L above), the court concludes that it has the authority to hold a hearing to determine the bona fides of a § 524(c)(3) certification.[4]

N. In light of the information available to the court regarding this reaffirmation, see Paragraphs D–F, supra, and assuming arguendo that an appropriate § 524(c)(3) certification removes the bankruptcy court from the reaffirmation process, the court finds it appropriate to schedule a hearing to consider the § 524(c)(3) certification filed in this case and whether it is necessary to hold to a further hearing to make the determination required by § 524(d)(2).

It is therefore **ORDERED** that:

1. A hearing to consider the issue described in Paragraph N above is **SCHEDULED** on **November 8, 2017, in Bankruptcy Courtroom No. 1, 2d floor, U.S. Courthouse, 900 Market Street, Philadelphia, PA.**
2. The Debtor's counsel **SHALL ATTEND** the hearing.[5]

IN RE: RUE21, INC., et al.,[1] Debtors.

rue21, inc., et al., Movants,

v.

Official Committee of Unsecured Creditors, et al.[2], Respondents.

Case No. 17–22045 (GLT)

United States Bankruptcy Court, W.D. Pennsylvania.

Signed 9/8/2017

Background: Chapter 11 debtors sought confirmation of first amended joint plan of

4. This is a further application of In re Laynas, 345 B.R. 505, (Bankr. E.D. Pa. 2006). In Laynas, I held that, in determining whether a presumption of undue hardship exists under § 522(m)(1), (a determination which depends on consideration of the amount of the debtor's monthly income and monthly expenses, information which has been disclosed in court filings), the court need not accept the accuracy of the debtor's financial disclosures, but rather, may critically evaluate them in determining whether a presumption of abuse has arisen under § 524(m)(1).

Here, the attorney has filed a certification under § 524(c)(3) that, arguably, removes all judicial review of a debtor's reaffirmation agreement. It is consistent with the protective purposes of § 524(c) and (d) for the court to retain the authority to confirm the legitimacy of the attorney certification before it abdicates its role in the reaffirmation process.

5. Given the nature of the inquiry at this hearing, I am not requiring the Debtor to attend. Of course, the Debtor may attend the hearing. That decision is left to the Debtor and his counsel.

1. The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: rue21, inc. (1645); Rhodes Holdco, Inc. (6922); r services llc (9425); and rue services corporation (0396). The location of the Debtors' service address is: 800 Commonwealth Drive, Warrendale, PA 15086.

2. The other respondents are: PREIT Services, LLC, The State of Michigan, Department of Treasury, Aronov Realty Management, Brixmor Property Group, Inc., ShopOne Centers REIT, Inc., UBS Realty Management, and Weitzman Management Corporation, Los Lunas Investors, LLC CBL & Associates Management, Inc., Bloomfield Holdings, LLC, IREIT Louisville Dixie Valley, L.L.C., IREIT West Valley City Lake Park, L.L.C., Yuma Palms LeaseCo, L.L.C., Honey Creek DST,

reorganization. Confirmation hearing was held.

Holdings: The Bankruptcy Court, Gregory L. Taddonio, J., held that:

(1) the debtor release provision of the plan was appropriate;

(2) the third-party-release provision of the plan was appropriate; and

(3) the plan was proposed in good faith.

Ordered accordingly.

1. Bankruptcy ⇐3566.1

Debtors, as proponents of proposed Chapter 11 plan, had burden of proving the elements of the section of the Bankruptcy Code governing confirmation of Chapter 11 plans by a preponderance of the evidence. 11 U.S.C.A. § 1129.

2. Bankruptcy ⇐3555

Debtor-release provision of debtors' proposed Chapter 11 plan was appropriate, for plan-confirmation purposes, where costs of debtors' or reorganized debtors' pursuit of any claims against released parties, which had low probability of success, would likely outweigh any potential benefit from pursuing the claims, such that pursuit of the claims was not in the best interest of the estate's various constituencies, release was component of comprehensive settlement implemented under the plan and, thus, was integral part of plan, release was result of arm's-length negotiation process, release properly offered protection to parties that, in participating in debtors' restructuring process, made significant concessions and contributions to debtors' cases, including debtors' directors and officers, who shared identity of interest with debtors, and scope of release was properly tailored under facts and circumstances of cases. 11 U.S.C.A. § 1129.

3. Bankruptcy ⇐3555

Third-party-release provision of debtors' proposed Chapter 11 plan was appropriate, for plan-confirmation purposes, where release, by incentivizing the parties to support the plan and preventing potentially significant and time-consuming litigation, facilitated participation in both debtors' plan and the Chapter 11 process generally, release properly offered certain protections to parties that constructively participated in debtors' restructuring process, including DIP term loan parties and

IRC Bradley Commons, L.L.C., IRC Goldenrod Marketplace II, L.L.C., IRC Stone Creek, L.L.C., IRC Timmerman Plaza, L.L.C., KRG Aiken Hitchock, LLC, KRG Plaza Green, Leeds Retail Center, LLC, Duluth (Gwinnett) SSR, LLC, 3503 RP Jackson Columns, L.L.C., 3503 RP Summerville Azalea Square, L.L.C., 3503 RP Waco Central Limited Partnership, Inland Western Spartanburg, L.L.C., RPAI Lakewood, L.L.C., RPAI Mansfield Limited Partnership, RPAI McDonough Henry Town, L.L.C. and WHLR–Village of Martinsville, LLC, Bloomfield Holdings, LLC, 3503 RP Jackson Columns, L.L.C., 3503 RP Waco Central Limited Partnership, RPAI Lakewood, L.LC., and RPAI McDonough Henry Town, L.L.C., ARC NPHUBOH001, LLC, Centennial Real Estate Company, LLC, C.E. John Company, Inc., Deutsche Asset & Wealth Management, Foursquare Properties, Inc., Gem Realty Capital, Inc., KRE Colonie Owner, LLC, The Macerich Company, PGIM Real Estate, Southgate Mall Associates, LLP, Starwood Retail Partners LLC, and Vintage Real Estate, LLC, Coventry III/Satterfield Helm Valley Fair, LLC, Mt. Pleasant Shopping Center, LLC, Adrian Acquisition, LLC, Merle Hay Investors, LLC, and Capital Mall JC 1, LLC, Surprise Marketplace Holdings, Weingarten Realty Investors, Weingarten 1–4 Clermont Landing, LLC, WRI Alliance Riley Joint Venture, and WRI Mueller, LLC, Experian Marketing Solutions, Inc., Landlords DDR Corp., DLC Management Corp., GGP Limited Partnership, Gregory Greenfield & Associates Ltd., Jones Lang LaSalle Americas, Inc., Northwest Capital Investment Group, LLC, Regency Centers Corp., Rouse Properties, LLC, ShopCare Properties, LP, and Woodmont Companies, Winthrop Resources Corporation, Spinoso Real Estate Group, Washington Prime Group Inc.

certain other lenders and equity holders, release was consensual and otherwise proper under controlling law, scope of release was properly tailored under facts and circumstances of these Chapter 11 cases, and debtors provided sufficient disclosure and notice with respect to release. 11 U.S.C.A. § 1129.

4. Bankruptcy ⚭3558

Under the totality of the circumstances, debtors proposed their Chapter 11 plan in good faith, warranting confirmation of plan, where plan was proposed with legitimate and honest purpose of maximizing the value of each of the debtors' estates for the benefit of their stakeholders and to effectuate a successful restructuring of debtors, plan was product of extensive negotiations conducted at arm's length among debtors and certain of their key stakeholders, and plan's classification, indemnification, settlement, discharge, exculpation, release, and injunction provisions were negotiated in good faith and at arm's length, were consistent with applicable sections of the Bankruptcy Code, and were each necessary for debtors to consummate a value-maximizing transaction. 11 U.S.C.A. § 1129(a)(3).

Shireen A. Barday, Robert A. Britton, Jonathan S. Henes, George Klidonas, Kirkland & Ellis LLP, New York, NY, A. Katrine Jakola, Kirkland & Ellis LLP, Chicago, IL, Jared S. Roach, Eric A. Schaffer, Reed Smith LLP, Theodore A. Schroeder, Littler Mendelson, P.C., Pittsburgh, PA, for Debtor.

Heather A. Sprague on Behalf of the United States Trustee by Office of the United States Trustee, Pittsburgh, PA, for U.S. Trustee.

John R. Gotaskie, Jr., Fox Rothschild LLP, Pittsburgh, PA, Cathy Hershcopf, Jay Indyke, Michael Klein, Lauren Reichardt, Max Schlan, Ian Shapiro, Seth Van Aalten, Cooley LLP, New York, NY, Jeffrey M. Schlerf, Fox Rothschild LLP, Wilmington, DE, for Creditor Committee.

Related to Docket Nos. 695 and

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER CONFIRMING DEBTORS' FIRST AMENDED JOINT PLAN OF REORGANIZATION PURSUANT TO CHAPTER 11 OF THE BANKRUPTCY CODE

THE HONORABLE GREGORY L. TADDONIO, UNITED STATES BANKRUPTCY JUDGE

The above-captioned debtors and debtors in possession (collectively, the "Debtors"), having:

a. commenced the above-captioned chapter 11 cases (the "Chapter 11 Cases") by filing voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") on May 15, 2017 (the "Petition Date");

b. continued to operate their businesses and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code;

c. filed, on June 1, 2017, (i) the *Debtors' Joint Plan of Reorganization Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 316], which plan and related documents were subsequently amended, (ii) the *Disclosure Statement for the Debtors' Joint Plan of Reorganization Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 315], which disclosure statement and related documents were subsequently amended, and (iii) the *Debtors' Mo-*

tion for Entry of an Order (I) Approving the Disclosure Statement for the Debtors' Joint Plan of Reorganization Pursuant to Chapter 11 of the Bankruptcy Code, (II) Approving Certain Dates Related to Plan Confirmation, (III) Approving Procedures for Soliciting, Voting, and Tabulating Votes On, and for Filing Objections to, the Plan and Approving the Forms of Ballots and Notices, and (IV) Granting Related Relief [Docket No. 314];

d. filed, on July 12, 2017, (i) the *Debtors' First Amended Joint Plan of Reorganization Pursuant to Chapter 11 of the Bankruptcy Code* (the "Plan") [Docket No. 695]; and (ii) the *First Amended Debtors' Disclosure Statement for the Debtors' First Amended Joint Plan of Reorganization Pursuant to Chapter 11 of the Bankruptcy Code* (the "Disclosure Statement") [Docket No. 697];[3]

e. caused solicitation materials and notice of the deadline for objecting to confirmation of the Plan to be distributed by July 21, 2017, and continuing thereafter, consistent with the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), and the Disclosure Statement Order (as defined herein), which Disclosure Statement Order also approved, among other things, solicitation procedures (the "Solicitation Procedures") and related notices, forms, Ballots, and Master Ballots (collectively, the "Solicitation Packages"), as evidenced by, among other things, the *Amended Certificate of Service of P. Joseph Morrow IV for Solicitation Materials in Connection with the Amended Chapter 11 Plan* [Docket No. 844];

f. included in the Solicitation Packages a letter supporting the Debtors' Plan from the Official Committee of Unsecured Creditors (the "Committee Letter of Support");

g. caused notice of the Confirmation Hearing (the "Confirmation Hearing Notice") to be published on August 3, 2017 in *USA Today* (National Edition); the *Pittsburgh Post–Gazette* as evidenced by the *Affidavits of Publication of the Notice of (I) the Solicitation and Voting Procedures, (II) the Confirmation Hearing, and (III) the Plan Objection Deadline to All Holders of Claims and Interests and Parties in Interest* filed on August 10, 2017 [Docket Nos. 852, 853];

h. filed, on August 7, 2017, the *Notice of Filing of Assumed Executory Contract and Unexpired Lease Schedule* [Docket No. 836];

i. filed, on August 11, 2017, the *Notice of Filing of Plan Supplement* [Docket No. 871], which included the following documents: (i) New Organizational Documents; (ii) Schedule of Retained Causes of Action; (iii) the identity of the New Board for the Reorganized Debtors; (iv) that certain Commitment Letter dated August 5, 2017, among the Debtors, Bank of America, N.A. ("Bank of America"), and Merrill Lynch, Pierce, Fenner & Smith Incorporated ("MLPFS") (as amended and re-

3. Unless otherwise noted, capitalized terms not defined in this *Findings of Fact, Conclusions of Law, and Order Confirming Debtors' First Amended Joint Plan of Reorganization Pursuant to Chapter 11 of the Bankruptcy Code* (this "Confirmation Order") shall have the meanings ascribed to them in the Plan (as defined herein). The rules of interpretation set forth in **Article I.B** of the Plan shall apply to this Confirmation Order.

stated pursuant to that certain Amended and Restated Commitment Letter dated August [24], 2017, among the Debtors, Bank of America and MLPFS, and as otherwise amended, restated, amended and restated, supplemented or otherwise modified prior to the date hereof, the "Exit ABL Commitment Letter"), including a term sheet reflecting the the Exit ABL Credit Agreement; (v) the term sheet reflecting the Exit Term Loan Credit Agreement; and (vi) the Description of Transaction Steps (the "Plan Supplement");

j. filed, on August 14, 2017, the *Notice of Filing of First Amended Assumed Executory Contract and Unexpired Lease Schedule* [Docket No. 877];

k. filed, on August 21, 2017, the *Analysis of Potential Estate Claims Prepared for the Independent Committee of the Board of Directors of rue21, inc.* [Docket No. 914];

l. filed, on August 23, 2017, the *Notice of Filing of First Supplemental Assumed Unexpired Lease Schedule* [Docket No. 944];

m. filed, on August 24, 2017, the *Notice of Filing of Second Supplemental Assumed Unexpired Lease Schedule* [Docket No. 947];

n. filed, on August 24, 2017, the *Declaration of Adam Gorman on Behalf of Kurtzman Carson Consultants Regarding Voting and Tabulation of Ballots Accepting and Rejecting Debtors' First Amended Joint Plan of Reorganization Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 957] (as may be amended, modified, or supplemented, the "Voting Certification");

o. filed, on August 24, 2017, the *Debtors' (I) Memorandum of Law In Support of Confirmation of the Debtors' First Amended Joint Plan of Reorganization of Pursuant to Chapter 11 of the Bankruptcy Code and (II) Omnibus Reply to Objections Thereto* [Docket No. 956] (the "Confirmation Brief");

p. filed, on August 24, 2017, the *Notice of Filing of Proposed Findings of Fact, Conclusions of Law, and Order Confirming the Debtors' First Amended Joint Plan of Reorganization Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 953];

q. filed, on August 24, 2017, the *Declaration of Stephen L. Coulombe in Support of Confirmation of the Debtors' First Amended Joint Plan of Reorganization Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 954] (the "Coulombe Confirmation Declaration");

r. filed, on August 24, 2017, the *Declaration of Jonathan Brownstein in Support of Confirmation of the Debtors' First Amended Joint Plan of Reorganization Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 955] (the "Brownstein Confirmation Declaration");

s. filed, on August 25, 2017, the *Notice of Filing of Third Supplemental Assumed Unexpired Lease Schedule* [Docket No. 978];

t. filed, on August 28, 2017, the *Notice of Filing of Second Amended Assumed Unexpired Lease Schedule* [Docket No. 984];

u. filed, on August 28, 2017 the *Notice of Filing of Third Amended Assumed Unexpired Lease Schedule* [Docket No. 996]

v. filed, on August 28, 2017, the *Declaration of Neal Goldman in Support of Confirmation of the Debtors' First Amended Joint Plan of Reorganization Pursuant to Chapter 11*

of the Bankruptcy Code [Docket No. 987] (the "Goldman Confirmation Declaration");

w. filed, on August 28, 2017, the *Supplemental Declaration or Stephen L. Coulombe in Support of Debtors' (I) Memorandum in Support of Confirmation of the debtors' First Amended Joint Plan of Reorganization Pursuant to Chapter 11 of the Bankruptcy Code and (II) Omnibus Response to Objections Thereto* (the "Supplemental Coulombe Declaration);

x. filed, on August 29, 2017 the *Notice of Filing Second Amended Assumed Executory Contract Schedule* [Docket No. 1008]; and

This Court having:

a. entered the *Order (I) Approving the Disclosure Statement for the Debtors' First Joint Plan of Reorganization Pursuant to Chapter 11 of the Bankruptcy Code; (II) Approving Certain Dates Related to Plan Confirmation; (III) Approving Procedures for Soliciting, Voting, and Tabulating Votes On, and for Filing Objections to, the Plan and Approving the Forms of Ballots and Notices; and (IV) Granting Related Relief* [Docket No. 719] (the "Disclosure Statement Order");

b. set August 21, 2017 at 5:00 p.m. prevailing Eastern Time, as the deadline for filing objections to the Plan (the "Plan Objection Deadline");

c. set August 21, 2017, at 5:00 p.m. prevailing Eastern Time, as the deadline for voting on the Plan;

d. set August 29, 2017, at 2:00 p.m. prevailing Eastern Time, as the date and time for the confirmation hearing (the "Confirmation Hearing") pursuant to Bankruptcy Rules 3017 and 3018 and sections 1126, 1128, and 1129 of the Bankruptcy Code; and rescheduling the Confirmation hearing to August 30, 2017, at 11:00 a.m. prevailing Eastern Time;

e. reviewed the Plan, the Disclosure Statement, the Confirmation Brief, the Confirmation Declaration, the Voting Certification, the Committee Support Letter, and all pleadings, exhibits, statements, responses, and comments regarding Confirmation, including all objections, statements, and reservations of rights filed by parties in interest on the docket of the Chapter 11 Cases;

f. held the Confirmation Hearing;

g. heard the statements, arguments, and objections made by counsel in respect of Confirmation;

h. considered all testimony, documents, filings, and other evidence admitted at Confirmation; and

i. overruled any and all objections to the Plan and to Confirmation and all statements and reservations of rights not consensually resolved or withdrawn unless otherwise indicated herein.

NOW, THEREFORE, this Court having found that notice of the Confirmation Hearing and the opportunity for any party in interest to object to Confirmation has been adequate and appropriate as to all parties affected or to be affected by the Plan and the transactions contemplated thereby, and the legal and factual bases set forth in the documents filed in support of Confirmation and all evidence proffered or adduced by counsel at the Confirmation Hearing establish just cause for the relief granted herein; and after due deliberation thereon and good cause appearing therefor, this Court hereby makes and issues

the following Findings of Fact and Conclusions of Law:

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

IT IS HEREBY DETERMINED FOUND, ADJUDGED, DECREED, AND ORDERED THAT:

A. Findings and Conclusions.

1. The findings and conclusions of law set forth herein and on the record of the Confirmation Hearing constitute this Court's findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052, made applicable to this proceeding by Bankruptcy Rule 9014. To the extent any of the following findings of fact constitute conclusions of law, they are adopted as such. To the extent any of the following conclusions of law constitute findings of fact, they are adopted as such.

B. Jurisdiction, Venue, Core Proceeding (28 U.S.C. §§ 157(b)(2) and 1334(a)).

2. This Court has jurisdiction over the Chapter 11 Cases pursuant to 28 U.S.C. § 1334. Confirmation of the Plan is a core proceeding pursuant to 28 U.S.C. § 157(b), and this Court has jurisdiction to enter a Final Order determining that the Plan complies with the applicable provisions of the Bankruptcy Code and should be confirmed. Venue is proper before this Court pursuant to 28 U.S.C. § 1408.

C. Eligibility for Relief.

3. The Debtors are entities eligible for relief under section 109 of the Bankruptcy Code.

D. Notice and Transmittal of Solicitation Materials; Adequacy of Solicitation Notices.

4. The Plan, the Disclosure Statement, the Disclosure Statement Order, the ballots for voting on the Plan (the "Ballots"), the Confirmation Hearing Notice, the Plan Supplement, and the other materials distributed by the Debtors in connection with Confirmation of the Plan (collectively, the "Confirmation Materials") were transmitted and served in compliance with (i) Bankruptcy Rules, including Bankruptcy Rules 3017 and 3018, (ii) Local Bankruptcy Rules of the United States Bankruptcy Court for the Western District of Pennsylvania ("W.PA.LBR"), and (iii) procedures set forth in the Disclosure Statement Order. Notice of the Confirmation Hearing was appropriate and satisfactory based upon the circumstances of the Debtors' Chapter 11 Cases. The transmittal and service of the Confirmation Materials complied with the approved Solicitation Procedures, was appropriate and satisfactory based upon the circumstances of the Chapter 11 Cases, was conducted in good faith, and was in compliance with the provisions of the Bankruptcy Code, the Bankruptcy Rules, the W.PA.LBR, and any other applicable rules, laws, and regulations. Because such transmittal and service were adequate and sufficient, no other or further notice is necessary or shall be required.

E. Voting.

5. On August 24, 2017, the Debtors' filed the Voting Certification with this Court. As evidenced by the Voting Certification, votes to accept or reject the Plan have been solicited and tabulated fairly, in good faith, and in a manner consistent with the Bankruptcy Code, the Bankruptcy Rules, the Solicitation Procedures, and the W.PA. LBR.

F. Good–Faith Solicitation (11 U.S.C. § 1125(e)).

6. Based on the record before this Court in the Chapter 11 Cases, the Debtors, each

of the Restructuring Support Parties and their respective members, directors, managers, officers, employees, representatives, attorneys, financial advisors, investment bankers, agents, restructuring advisors, and other professionals have acted in "good faith" within the meaning of section 1125(e) of the Bankruptcy Code and in compliance with the applicable provisions of the Solicitation Procedures, the Bankruptcy Code, the Bankruptcy Rules, and the W.PA.LBR in connection with all of their respective activities relating to the solicitation of acceptances of the Plan, their participation in the Chapter 11 Cases, and the activities described in section 1125 of the Bankruptcy Code, and therefore are entitled to the protections afforded by section 1125(e) of the Bankruptcy Code.

G. Plan Supplement.

7. The filing and notice of the Plan Supplement were proper and in accordance with the Plan, the Bankruptcy Code, the Bankruptcy Rules, and the Disclosure Statement Order, and no other or further notice is or shall be required. The documents contained in the Plan Supplement are integral to, part of, and incorporated by reference into the Plan.

H. Modifications to the Plan.

8. Pursuant to section 1127 of the Bankruptcy Code, any modifications to the Plan since the commencement of solicitation described or set forth herein constitute technical changes or changes with respect to particular Claims made pursuant to the agreement of the holders of such Claims and do not materially or adversely affect or change the treatment of any other Claims or Interests. Pursuant to Bankruptcy Rule 3019, these modifications do not require additional disclosure under section 1125 of the Bankruptcy Code or the resolicitation of votes under section 1126 of the Bankruptcy Code, nor do they require that the holders of Claims or Interests be afforded an opportunity to change previously cast acceptances or rejections of the Plan.

9. This Confirmation Order contains modifications to the Plan that were made to address objections and informal comments received from various parties-in-interest. Modifications to the Plan since the entry of the Disclosure Statement Order, if any, are consistent with the provisions of the Bankruptcy Code. The disclosure of any Plan modifications prior to or on the record at the Confirmation Hearing constitutes due and sufficient notice of any and all Plan modifications. The Plan as modified by this Confirmation Order shall constitute the Plan submitted for Confirmation.

I. Objections.

10. To the extent that any objections, reservations of rights, statements, or joinders to Confirmation have not been resolved, withdrawn, waived, or settled prior to entry of this Confirmation Order or otherwise resolved herein or as stated on the record of the Confirmation Hearing, they are hereby overruled on the merits based on the record before this Court.

J. Burden of Proof.

[1] 11. The Debtors, as the proponents of the Plan, have met their burden of proving the elements of sections 1129(a) and (b) of the Bankruptcy Code by a preponderance of the evidence.

K. Bankruptcy Rule 3016.

12. The Plan is dated and identifies the Debtors as the Plan proponents, thereby satisfying Bankruptcy Rule 3016(a). The filing of the Disclosure Statement satisfied Bankruptcy Rule 3016(b).

L. Plan Compliance with the Bankruptcy Code (11 U.S.C. § 1129(a)(1)).

13. The Plan complies with the applicable provisions of the Bankruptcy Code, thereby satisfying section 1129(a)(1) of the Bankruptcy Code.

a. Proper Classification (11 U.S.C. §§ 1122, 1123(a)(1)). As required by section 1123(a)(1), in addition to Administrative Claims, Professional Fee Claims, Priority Tax Claims, DIP ABL Claims, DIP New Money Term Loan Claims, DIP Roll-Up Term Loan Claims, and United States Trustee Statutory Fees, which need not be classified, **Article III** of the Plan designates nine Classes of Claims and Interests. As required by section 1122(a) of the Bankruptcy Code, the Claims and Interests placed in each Class are substantially similar to other Claims and Interests, as the case may be, in each such Class. Valid business, factual, and legal reasons exist for separately classifying the various Classes of Claims and Interests created under the Plan, and such Classes do not unfairly discriminate among holders of Claims and Interests. Thus, the Plan satisfies sections 1122 and 1123(a)(1) of the Bankruptcy Code.

b. Specified Unimpaired Classes (11 U.S.C. § 1123(a)(2)). **Article III** of the Plan specifies that Classes 1, 2, 3, 6 (to the extent reinstated), and 7 (to the extent reinstated) are Unimpaired under the Plan, thereby satisfying section 1123(a)(2) of the Bankruptcy Code.

c. Specified Treatment of Impaired Classes (11 U.S.C. § 1123(a)(3)). **Article III** of the Plan sets forth the treatment of Classes 4, 5, 6 (to the extent cancelled), 7 (to the extent cancelled), 8, and 9, which are the Impaired Classes, thereby satisfying section 1123(a)(3) of the Bankruptcy Code.

d. No Discrimination (11 U.S.C. § 1123(a)(4)). **Article III** of the Plan provides for the same treatment by the Debtors for each Claim or Interest in each respective Class except to the extent that a holder of a particular Claim or Interest has agreed to a less favorable treatment of such Claim or Interest, thereby satisfying section 1123(a)(4) of the Bankruptcy Code.

e. Implementation of the Plan (11 U.S.C. § 1123(a)(5)). The Plan and the various documents included in the Plan Supplement provide adequate and proper means for implementation of the Plan, including, without limitation: (i) the execution, filing, and delivery of appropriate agreements or other documents of merger, sale disposition, transfer, consolidation, reorganization, restructuring, liquidation, dissolution, or equity issuance, certificates of incorporation, certificates of conversion, certificates of formation, operating agreements, bylaws, or other documents containing terms that are consistent with or reasonably necessary to implement the terms of the Plan and that satisfy the requirements of applicable law; (ii) the execution and delivery of appropriate instruments of sale, equity issuance, transfer, assignment, assumption, or delegation of any property, right, liability, duty, or obligation on terms consistent with the terms of the Plan; (iii) the issuance of the New Equity; (iv) the execution of the New Organizational Documents; (v) the vesting of the Debtors' assets in

the Reorganized Debtors, in each case in accordance with the Plan; (vi) the execution of the Exit Credit Facilities Documents; (vii) such other transactions that are necessary or appropriate to implement the Plan in the most tax efficient manner, including any mergers, sales, dispositions, transfers, consolidations, restructurings, conversions, formations, organizations, dissolutions, or liquidations (including without limitation any of the Restructuring Transactions); and (viii) all other transactions or actions that either (x) the Debtors or (y) the Reorganized Debtors, as applicable, determine are necessary or appropriate to implement the Plan, thereby satisfying section 1123(a)(5) of the Bankruptcy Code.

f. Non–Voting Equity Securities (11 U.S.C. § 1123(a)(6)). The Plan prohibits the issuance of non-voting securities to the extent that the issuance of non-voting securities is prohibited under section 1123(a)(6) of the Bankruptcy Code. The Plan thereby satisfies section 1123(a)(6) of the Bankruptcy Code.

g. Designation of Directors and Officers (11 U.S.C. § 1123(a)(7)). The Plan satisfies the requirements of section 1123(a)(7) of the Bankruptcy Code. The identity and affiliations of the initial New Board to the extent known and determined have been disclosed prior to the Confirmation Hearing. The selection of the initial directors and officers of the Reorganized Debtors was, is, and will be consistent with the interests of Holders of Claims and Interests and public policy. Accordingly, the requirements of section 1123(a)(7) of the Bankruptcy Code have been satisfied.

h. Additional Plan Provisions (11 U.S.C. § 1123(b)). The additional provisions of the Plan are appropriate and consistent with the applicable provisions of the Bankruptcy Code and, therefore, are consistent with section 1123(b) of the Bankruptcy Code.

(i) Impairment/Unimpairment of Any Class of Claims or Interests (11 U.S.C. § 1123(b)(1)). Pursuant to the Plan, Classes 1, 2, 3, 6 (to the extent reinstated), and 7 (to the extent reinstated) are Unimpaired, and Classes 4, 5, 6 (to the extent cancelled), 7 (to the extent cancelled), 8, and 9 are Impaired, as contemplated by section 1123(b)(1) of the Bankruptcy Code.

(ii) Assumption, Rejection and Assignment of Executory Contracts and Unexpired Leases (11 U.S.C. § 1123(b)(2)). **Article V** of the Plan provides that on the Effective Date, except as otherwise provided therein, all Executory Contracts or Unexpired Leases will be deemed rejected as of the Effective Date, in accordance with the provisions and requirements of sections 365 and 1123 of the Bankruptcy Code, other than those Executory Contracts or Unexpired Leases that: (1) previously were assumed or rejected by the Debtors; (2) are identified on the Assumed Executory Contract and Unexpired Lease Schedule, or (3) are the subject of a notice of assumption or motion to assume such Executory Contracts or Unexpired Leases, as applicable, that is pending on the Effective Date, regardless of whether the requested effective

date of such assumption is on or after the Effective Date; *provided, however*, that no notices of assumption or motions to assume Unexpired Leases of non-residential real property shall be pending on the Effective Date, absent counterparty consent. Any assignments of Executory Contracts or Unexpired Leases as of the Effective Date pursuant to the Restructuring Transactions or otherwise shall comply with the provisions and requirements of sections 365 and 1123 of the Bankruptcy Code.

(iii) Preservation of Causes of Action (11 U.S.C. § 1123(b)(3)). In accordance with section 1123(b)(3) of the Bankruptcy Code, **Article IV.W** of the Plan provides that, the Debtors and the Reorganized Debtors, as applicable, shall retain and may enforce all rights to commence and pursue, as appropriate, any and all Causes of Action, other than Released Causes of Action, whether arising before or after the Petition Date, including any actions specifically enumerated in the Plan Supplement, and the Debtors' or the Reorganized Debtors' rights to commence, prosecute, or settle such Causes of Action shall be preserved notwithstanding the occurrence of the Effective Date.

(iv) Compromise and Settlement (11 U.S.C. § 1123(b)(3)). In accordance with section 1123(b)(3)(A) of the Bankruptcy Code and Bankruptcy Rule 9019, and in consideration for the distributions and other benefits provided under the Plan, the provisions of the Plan constitute a good-faith compromise of all Claims, Interests, and controversies relating to the contractual, legal, and subordination rights that all holders of Claims or Interests may have with respect to any Allowed Claim or Interest or any distribution to be made on account of such Allowed Claim or Interest. Such compromise and settlement is fair, equitable, and reasonable and in the best interests of the Debtors and their Estates.

(v) Other Appropriate Provisions (11 U.S.C. § 1123(b)(6)). The Plan's other provisions are appropriate and consistent with the applicable provisions of the Bankruptcy Code, including, without limitation, provisions for (1) distributions to holders of Claims and Interests, (2) resolution of Disputed Claims, (3) allowance of certain Claims, (4) releases by the Debtors of certain parties, (5) releases by certain third parties, (6) exculpation of certain parties, and (7) retention of Court jurisdiction, thereby satisfying the requirements of section 1123(b)(6).

i. Cure of Defaults (11 U.S.C. § 1123(d)). **Article V.C** of the Plan provides that any monetary defaults under each Executory Contract and Unexpired Lease to be assumed pursuant to the Plan shall be satisfied, pursuant to section 365(b)(1) of the Bankruptcy Code, by payment of the default amount in cash on the Effective Date, subject to the limitations described therein.

M. The Debtors' Compliance with the Bankruptcy Code (11 U.S.C. § 1129(a)(2)).

14. The Debtors have complied with the applicable provisions of the Bankruptcy

Code, as required by section 1129(a)(2) of the Bankruptcy Code. Specifically:

a. the Debtors are eligible debtors under section 109 of the Bankruptcy Code and are proper proponents of the Plan under section 1121(a) of the Bankruptcy Code;

b. the Debtors have complied with applicable provisions of the Bankruptcy Code, except as otherwise provided or permitted by orders of the Bankruptcy Court; and

c. the Debtors have complied with the applicable provisions of the Bankruptcy Code, the Bankruptcy Rules, and the W.PA.LBR in transmitting the Confirmation Materials and related notices and in soliciting and tabulating the votes on the Plan.

N. Payment for Services or Costs and Expenses (11 U.S.C. § 1129(a)(4)).

15. Payments made or to be made by the Debtors for services or for costs and expenses in or in connection with the Chapter 11 Cases, or in connection with the Plan and incident to the Chapter 11 Cases, have been approved by, or are subject to the approval of, this Court as reasonable, thereby satisfying section 1129(a)(4) of the Bankruptcy Code.

O. Directors, Officers, and Insiders (11 U.S.C. § 1129(a)(5)).

16. The Debtors have complied with section 1129(a)(5) of the Bankruptcy Code. The identity and affiliation of the persons proposed to serve as members of the New Board (to the extent known and determined) have been disclosed prior to the Confirmation Hearing, and the appointment to, or continuance in, such positions of such persons is consistent with the interests of Holders of Claims against and Interests in the Debtors and public policy.

P. No Rate Changes (11 U.S.C. § 1129(a)(6)).

17. Section 1129(a)(6) of the Bankruptcy Code is satisfied because the Plan does not provide for any rate changes over which a governmental regulatory commission has jurisdiction.

Q. Best Interests of Creditors (11 U.S.C. § 1129(a)(7)).

18. Each holder of an Impaired Claim or Interest either has accepted the Plan or will receive or retain under the Plan, on account of such Claim or Interest, property of a value, as of the Effective Date, that is not less than the amount that such holder would receive or retain if the Debtors were liquidated under chapter 7 of the Bankruptcy Code on such date.

19. The liquidation analysis attached as **Exhibit C** to the Disclosure Statement (the "Liquidation Analysis") and the other evidence related thereto in support of the Plan that was proffered or adduced at or prior to the Confirmation Hearing or in the Confirmation Declaration: (i) are reasonable, persuasive, credible, and accurate as of the dates such analyses or evidence was prepared, presented, or proffered; (ii) utilize reasonable and appropriate methodologies and assumptions; (iii) have not been controverted by other evidence; and (iv) establish that holders of Allowed Claims in every Class will recover as much or more under the Plan on account of such Claim or Interest, as of the Effective Date, than the amount such holder would receive if the Debtors were liquidated under chapter 7 of the Bankruptcy Code. Accordingly, the Plan satisfies the "best interest of creditors" test under section 1129(a)(7) of the Bankruptcy Code.

R. Acceptance by Certain Classes (11 U.S.C. § 1129(a)(8)).

20. Classes 1, 2, 3, 6 (to the extent reinstated), and 7 (to the extent reinstated)

are Unimpaired by the Plan pursuant to section 1124 of the Bankruptcy Code and, accordingly, holders of Claims or Interests in such Classes are conclusively deemed to have accepted the Plan pursuant to section 1126(f) of the Bankruptcy Code. Classes 4 and 5 are Impaired by the Plan. Classes 4 and 5 at each Debtor have voted to accept the Plan and no Classes have voted to reject the Plan, as established by the Voting Certification. Holders of Claims or Interests in Classes 8 and 9 will not receive or retain any property on account of their Claims or Interests and, accordingly, such Claims and Interests are Impaired and such holders are deemed to have rejected the Plan pursuant to section 1126(g) of the Bankruptcy Code.

S. **Treatment of Administrative Claims, Professional Fee Claims, Priority Tax Claims, DIP ABL Claims, DIP New Money Term Loan Claims, DIP Roll-Up Term Loan Claims and United States Trustee Statutory Fees (11 U.S.C. § 1129(a)(9)).**

21. The treatment of Administrative Claims, Professional Fee Claims, Priority Tax Claims, DIP ABL Claims, DIP New Money Term Loan Claims, DIP Roll-Up Term Loan Claims, and United States Trustee Statutory Fees pursuant to **Article II** and **Article III** of the Plan satisfies the requirements of section 1129(a)(9) of the Bankruptcy Code. Accordingly, the Debtors have satisfied the requirements of section 1129(a)(9) of the Bankruptcy Code.

T. **Acceptance By at Least One Impaired Class of Claims (11 U.S.C. § 1129(a)(10)).**

22. Claims in Classes 4 and 5 are entitled to vote under the Plan. Classes 4 and 5 of each Debtor have voted to accept the Plan, as established by the Voting Certification. Accordingly, the Plan satisfies section 1129(a)(10) of the Bankruptcy Code.

U. **Feasibility (11 U.S.C. § 1129(a)(11)).**

23. The Plan satisfies the requirements of section 1129(a)(11) of the Bankruptcy Code. The evidence supporting the Plan proffered or adduced by the Debtors at or before the Confirmation Hearing, including the Confirmation Declaration: (i) is reasonable, persuasive, credible, and accurate as of the dates such evidence was prepared, presented, and/or proffered; (ii) utilizes reasonable and appropriate methodologies and assumptions; (iii) has not been controverted by other evidence; (iv) establishes that the Plan is feasible and Confirmation of the Plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the Debtors or the Reorganized Debtors, except as provided for in the Plan; and (v) establishes that the Debtors or the Reorganized Debtors will have sufficient funds available to meet their obligations under the Plan.

V. **Payment of Fees (11 U.S.C. § 1129(a)(12)).**

24. As set forth in **Article XII.C** of the Plan, all fees payable pursuant to section 1930(a) of the Judicial Code shall be paid by each of the Reorganized Debtors (or the Disbursing Agent on behalf of each of the Reorganized Debtors) until the Chapter 11 Cases are converted, dismissed, or closed, whichever occurs first. Accordingly, the Plan satisfies the requirements of section 1129(a)(12) of the Bankruptcy Code.

W. **Retiree Benefits (11 U.S.C. § 1129(a)(13)).**

25. Section 1129(a)(13) of the Bankruptcy Code requires a plan to provide for "retiree benefits" (as defined in section 1114 of the Bankruptcy Code) at levels

established pursuant to section 1114 of the Bankruptcy Code. On and after the Effective Date, all "retiree benefits" (as defined in section 1114 of the Bankruptcy Code) shall continue to be paid in accordance with applicable law. Accordingly, the requirements of section 1129(a)(13) of the Bankruptcy Code have been satisfied.

X. No Domestic Support Obligations (11 U.S.C. § 1129(a)(14)).

26. The Debtors are not required by a judicial or administrative order, or by statute, to pay a domestic support obligation. Accordingly, section 1129(a)(14) of the Bankruptcy Code is inapplicable in the Chapter 11 Cases.

Y. None of the Debtors is an Individual (11 U.S.C. § 1129(a)(15)).

27. None of the Debtors is an individual. Accordingly, section 1129(a)(15) of the Bankruptcy Code is inapplicable in the Chapter 11 Cases.

Z. No Applicable Nonbankruptcy Law Regarding Transfers (11 U.S.C. § 1129(a)(16)).

28. The Debtors are moneyed, business, or commercial entities. Accordingly, section 1129(a)(16) of the Bankruptcy Code is inapplicable in the Chapter 11 Cases.

AA. Confirmation of Plan Over Non-Acceptance of Impaired Classes (11 U.S.C. § 1129(b)).

29. The Plan may be confirmed pursuant to section 1129(b) of the Bankruptcy Code, notwithstanding that the requirements of section 1129(a)(8) have not been met, because the Debtors have demonstrated by a preponderance of the evidence that the Plan (i) satisfies all of the other requirements of section 1129(a) of the Bankruptcy Code and (ii) does not "discriminate unfairly" and is "fair and equitable" with respect to the Rejecting Classes (as defined below).

30. The Plan does not "discriminate unfairly" against any holders of Claims and Interests in Classes that are deemed to reject the Plan (the "Rejecting Classes"). The treatment of such holders is proper because all similarly situated holders of Claims and Interests will receive substantially similar treatment, and the Debtors have a valid rationale, including for the rationales articulated in the Confirmation Brief, for the Plan's classification scheme and the disparate treatment, if any, provided for different Classes.

31. The Plan is also "fair and equitable" with respect to each Rejecting Class. No holder of Claims or Interests junior to any Rejecting Class is receiving a distribution under the Plan.

32. The Plan, therefore, satisfies the requirements of section 1129(b) of the Bankruptcy Code and may be confirmed despite the fact that not all Impaired Classes have voted to accept the Plan.

BB. Only One Plan (11 U.S.C. § 1129(c)).

33. The Plan is the only plan filed in the Chapter 11 Cases, and, accordingly, section 1129(c) of the Bankruptcy Code is inapplicable in the Chapter 11 Cases.

CC. Principal Purpose of the Plan (11 U.S.C. § 1129(d)).

34. The principal purpose of the Plan is not the avoidance of taxes or the avoidance of the application of section 5 of the Securities Act of 1933, thereby satisfying section 1129(d) of the Bankruptcy Code.

DD. Not Small Business Cases (11 U.S.C. § 1129(e)).

35. None of the Chapter 11 Cases are small business cases, as that term is de-

fined in the Bankruptcy Code, and accordingly, section 1129(e) of the Bankruptcy Code is inapplicable in the Chapter 11 Cases.

EE. Plan Implementation.

36. The terms of the Plan, including, without limitation, the Plan Supplement and all exhibits and schedules thereto, and all other documents filed in connection with the Plan, or executed or to be executed in connection with the transactions contemplated by the Plan (including without limitation the Restructuring Transactions) and all amendments and modifications of any of the foregoing made pursuant to the provisions of the Plan governing such amendments and modifications (collectively, the "Plan Documents") are incorporated by reference, are approved in all respects, and constitute an integral part of this Confirmation Order. The Plan Documents are essential elements of the Plan and entry into and consummation of the transactions contemplated by each Plan Document is in the best interests of the Debtors, the estates, and the holders of Claims and Interests. The Debtors have exercised reasonable business judgment in determining which Plan Documents to enter into and have provided sufficient and adequate notice of such documents.

FF. Binding and Enforceable.

37. The Plan and the Plan Documents have been negotiated in good faith and at arm's length, are fair and reasonable, and, subject to the occurrence of the Effective Date, shall bind any holder of a Claim or Interest and such holder's respective successors and assigns, whether or not (i) the Claim or Interest is Impaired under the Plan, (ii) such holder has accepted the Plan, and (iii) such holder is entitled to a distribution under the Plan. The Plan and the Plan Documents constitute legal, valid, binding, and authorized obligations of the respective parties thereto and shall be enforceable in accordance with their terms. Pursuant to section 1142(a) of the Bankruptcy Code, the Plan and the Plan Documents shall apply and be enforceable notwithstanding any otherwise applicable nonbankruptcy law.

GG. Executory Contracts and Unexpired Leases.

38. The Debtors have exercised sound business judgment in determining whether to reject, assume, or assume and assign each of their Executory Contracts and Unexpired Leases pursuant to sections 365 and 1123(b)(2) of the Bankruptcy Code, **Article V** of the Plan, and as set forth in the Plan Supplement (including without limitation pursuant to the Restructuring Transactions). Except as set forth herein and/or in separate orders entered by this Court relating to assumption of Executory Contracts or Unexpired Leases, the Debtors have cured or provided adequate assurances that the Debtors will cure defaults (if any) under or relating to each Executory Contract or Unexpired Lease assumed under the Plan and, for each Executory Contract or Unexpired Lease being assigned under the Plan (if any) (including pursuant to the Restructuring Transactions), such assignee has provided adequate assurance of future performance as required under section 365(f)(2)(B).

39. Nothing in the Plan or the Confirmation Order shall prevent a party to an Executory Contract or Unexpired Lease rejected pursuant to the Plan from filing a Proof of Claim based on such rejection within thirty (30) days of the later of (i) the date of entry of this Confirmation Order, (ii) the effective date of such rejection, or (iii) the Effective Date. Nothing in the Plan or this Confirmation Order shall prevent a party to an Executory Contract or

Unexpired Lease assumed pursuant to the Plan, or otherwise, from continuing to prosecute an objection to the cure cost related to such assumed Executory Contract if such objection was or is timely filed, but not resolved before the Effective Date.

HH. Discharge, Compromise, Settlement, Release, Exculpation, and Injunction Provisions.

40. This Court has jurisdiction under sections 1334(a) and (b) of title 28 of the United States Code to approve the discharge, compromise, settlement, release, exculpation, and injunction provisions set forth in **Article VIII** of the Plan. Sections 105(a) and 1123(b) of the Bankruptcy Code permit issuance of the injunctions and approval of the releases, exculpations, and injunctions set forth in **Article VIII** of the Plan. Based upon the record of the Chapter 11 Cases and the evidence proffered or adduced at the Confirmation Hearing, this Court finds that the discharge, compromise, settlement, releases, exculpations, and injunctions set forth in **Article VIII** of the Plan are consistent with the Bankruptcy Code and applicable law. Further, the discharge, compromises, settlements, release, exculpation, and injunction provisions contained in **Article VIII** of the Plan are integral components of the Plan. The discharge, compromise, settlement, release, exculpation, and injunction provisions set forth in **Article VIII** of the Plan are hereby approved and authorized in their entirety.

II. Debtor Release.

[2] 41. The releases of claims and Causes of Action by the Debtors described in **Article VIII.C** of the Plan (the "Debtor Release") are approved for the reasons set forth in the MemoraQGXP VN 0QJO Opinion of the same date. The Debtors' or the Reorganized Debtors' pursuit of any such claims against the Released Parties is not in the best interest of the Estates' various constituencies because the costs involved would likely outweigh any potential benefit from pursuing such Claims. The Debtor Release is fair and equitable and complies with the absolute priority rule.

42. The Debtor Release is furthermore an integral part of the Plan and is in the best interests of the Debtors' Estates as a component of the comprehensive settlement implemented under the Plan. The low probability of success in litigation with respect to the released Causes of Action supports the Debtor Release. The Plan, including the Debtor Releases, was negotiated before and after the Petition Date by sophisticated parties represented by able counsel and financial advisors. The Debtor Release is therefore the result of an arm's-length negotiation process.

43. The Debtor Release appropriately offers protection to parties that participated in the Debtors' restructuring process. Specifically, the Released Parties under the Plan made significant concessions and contributions to the Debtors' Chapter 11 Cases, including, as applicable, actively supporting the Plan and these Chapter 11 Cases, and waiving substantial rights and Claims against the Debtors under the Plan. The Debtor Release for the Debtors' directors and officers is appropriate because the Debtors' directors and officers share an identity of interest with the Debtors, supported the Plan and these Chapter 11 Cases, and actively participated in meetings, negotiations, and implementation during these Chapter 11 Cases, and have provided other valuable consideration to the Debtors to facilitate the Debtors' reorganization.

44. The scope of the Debtor Release is appropriately tailored under the facts and

circumstances of these Chapter 11 Cases. In light of, among other things, the value provided by the Released Parties to the Debtors' Estates and the critical nature of the Debtor Release to the Plan, the Debtor Release is appropriate.

JJ. Third Party Release.

[3] 45. The release by the Releasing Parties (the "Third Party Release"), set forth in **Article VIII.D** of the Plan, is an essential provision of the Plan. The Third Party Release is: (i) in exchange for the good and valuable consideration provided by the Released Parties; (ii) a good-faith settlement and compromise of the claims and Causes of Action released by the Third Party Release; (iii) materially beneficial to, and in the best interests of, the Debtors, their Estates, and their stakeholders, and is important to the overall objectives of the Plan to finally resolve certain Claims among or against certain parties in interest in these Chapter 11 Cases; (iv) fair, equitable, and reasonable; (v) given and made after due notice and opportunity for hearing; (vi) a bar to any of the Releasing Parties asserting any claim or Cause of Action released by the Third Party Release against any of the Released Parties; and (vii) consistent with sections 105, 524, 1123, 1129, and 1141 and other applicable provisions of the Bankruptcy Code.

46. The Third Party Release is an integral part of the Plan. Like the Debtor Release, the Third Party Release facilitated participation in both the Debtors' Plan and the chapter 11 process generally. The Third Party Release is instrumental to the Plan and was critical in incentivizing the parties to support the Plan and preventing potentially significant and time-consuming litigation regarding the parties' respective rights and interests. The Third Party Release was instrumental in developing a Plan that maximized value for all of the Debtors' stakeholders. As such, the Third Party Release appropriately offers certain protections to parties that constructively participated in the Debtors' restructuring process. Among other things, (a) the DIP Term Loan Parties [4] agreed to (i) support the Plan, (ii) commit to backstop the $150 million DIP Term Loan Facility that was required to support the Debtors' estates during these Chapter 11 Cases, including by providing $50 million in DIP New Money Term Loans, (iii) fund the Exit Term Loan Facility by agreeing to convert the DIP New Money Term Loan Claims into Exit Term Loans, (iv) a Plan that provides a recovery of 2–4% to Holders of General Unsecured Claims, even though such claims are out-of-the-money, and (iv) waive the Prepetition Term Loan Deficiency Claim, thereby increasing the recovery available to General Unsecured Creditors; (b) the DIP ABL Lenders, the DIP ABL Agent, the Prepetition ABL Lenders and the Prepetition ABL Agent agreed to (i) support the Plan, (ii) provide a $125 million postpetition DIP ABL Credit Facility, and (iii) provide a $125 million Exit ABL Credit Facility; and (c) the Sponsor entities, in their roles as lenders and equity holders, agreed to (i) support the Plan, including by promptly facilitating and participating in prepetition Plan discussions that culminated in the Restructuring Support Agreement and the Plan, notwithstanding that their equity position would likely be eliminated thereunder; and (ii) participate in the financing of the DIP Term Loan Credit Facility. Furthermore, the Third Party Release is consensual or is otherwise appropriate under controlling law.

4. "DIP Term Loan Parties" means, collectively, the DIP Term Loan Agent, the DIP Term Loan Lenders, the Prepetition Term Loan Agent and the Term Loan Lender Group.

47. The scope of the Third Party Release is appropriately tailored under the facts and circumstances of these Chapter 11 Cases, and parties in interest received due and adequate notice of the Third Party Release. Among other things, the Plan provides appropriate and specific disclosure with respect to the claims and Causes of Action that are subject to the Third Party Release, and no other disclosure is necessary. The Debtors provided sufficient notice of the Third Party Release, and no further or other notice is necessary. The Third Party Release is specific in language, integral to the Plan, and given for adequate consideration. In light of, among other things, the value provided by the Released Parties to the Debtors' Estates and the critical nature of the Third Party Release to the Plan, the Third Party Release is appropriate.

KK. Exculpation.

48. The exculpation provisions set forth in **Article VIII.E** of the Plan were proposed in good faith and are essential to the Plan. The record in the Chapter 11 Cases fully supports the exculpation provisions, and the exculpation provisions set forth in **Article VIII.E** of the Plan are appropriately tailored to protect the Exculpated Parties from inappropriate litigation and to exclude actions determined by Final Order to have constituted actual fraud or gross negligence.

LL. Injunction.

49. The injunction provisions set forth in **Article VIII.F** of the Plan are essential to the Plan; are necessary to preserve and enforce the releases set forth in **Articles VIII.B**, **VIII.C**, and **VIII.D** of the Plan, the exculpation provisions in **Article VIII.E** of the Plan, and the compromises and settlements implemented under the Plan; and are narrowly tailored to achieve that purpose.

50. The injunction provisions set forth in **Article VIII.F** of the Plan: (i) are within the jurisdiction of this Court under 28 U.S.C. §§ 1334(a), 1334(b), and 1334(d); (ii) are an essential means of implementing the Plan pursuant to section 1123(a)(5) of the Bankruptcy Code; (iii) are an integral element of the transactions incorporated into the Plan; (iv) confer material benefits on, and are in the best interests of, the Debtors, the Estates, and their creditors; (v) are important to the overall objectives of the Plan to finally resolve all Claims or Causes of Action among or against the parties in interest in the Chapter 11 Cases with respect to the Debtors; and (vi) are consistent with sections 105, 1123, and 1129 of the Bankruptcy Code, other provisions of the Bankruptcy Code, and other applicable law. The record of the Confirmation Hearing and the Chapter 11 Cases is sufficient to support the injunction provisions set forth in **Article VIII.F** of the Plan.

MM. Retention of Jurisdiction.

51. Except as otherwise provided in any of the Plan Documents, this Court shall retain jurisdiction over the Chapter 11 Cases and all matters arising out of, or related to, the Chapter 11 Cases and the Plan, including the matters set forth in **Article XI** of the Plan.

NN. Good Faith.

[4] 52. The Debtors have proposed the Plan (including the Plan Documents and all other documents necessary to effectuate the Plan) in good faith and not by any means forbidden by law, thereby satisfying section 1129(a)(3) of the Bankruptcy Code. In determining that the Plan has been proposed in good faith, this Court has examined the totality of the circumstances

surrounding the filing of the Chapter 11 Cases and the formulation of the Plan. The Debtors' good faith is evident from the facts and record of the Chapter 11 Cases, the Disclosure Statement, and the record of the Confirmation Hearing. The Plan was proposed with the legitimate and honest purpose of implementing the Plan through the Restructuring Transactions and other transactions contemplated by the Plan and Plan Documents, thereby maximizing the value of the Debtors' Estates and to effectuate a successful restructuring of the Debtors. The Plan was the product of extensive negotiations conducted at arm's length among the Debtors and certain of their key stakeholders. Further, the Plan's classification, indemnification, settlement, discharge, exculpation, release, and injunction provisions have been negotiated in good faith and at arm's length, are consistent with sections 105, 1122, 1123(b)(6), 1129, and 1142 of the Bankruptcy Code, and are each necessary for the Debtors to consummate a value-maximizing transaction. Accordingly, the requirements of section 1129(a)(3) of the Bankruptcy Code are satisfied.

53. The Debtors have proposed the Plan with the legitimate and honest purpose of maximizing the value of each of the Debtors' Estates for the benefit of their stakeholders. The Plan gives effect to many of the Debtors' restructuring initiatives, including implementing a value maximizing restructuring transaction (including without limitation pursuant to the Restructuring Transactions). Accordingly, the Debtors (and all of their respective officers, managers, directors, agents, financial advisers, attorneys, employees, partners, Affiliates, and representatives) have been active, are acting, and will continue to act in good faith if they proceed to: (i) consummate the Plan and the Restructuring Transactions and the agreements, settlements, transactions, and transfers contemplated thereby; and (ii) take the actions authorized and directed or contemplated by this Confirmation Order. Therefore, the Plan has been proposed in good faith to achieve a result consistent with the objectives and purposes of the Bankruptcy Code and the aforementioned parties have acted in good faith within the meaning of sections 1125(e) and 1126(e) the Bankruptcy Code.

PP. The Exit Credit Facilities.

54. The Exit Credit Facilities are an essential element of the Plan, and entry into the Exit Credit Facilities, the Exit Credit Facilities Documents, the Exit ABL Commitment Letter and that certain Amended and Restated Fee Letter dated August 25, 2017, among the Debtors and Bank of America (as amended, restated, amended and restated, supplemented or otherwise modified prior to the date hereof, the "Exit ABL Fee Letter"), is in the best interests of the Debtors, the Estates and all holders of Claims and Interests, and is necessary for confirmation and consummation of the Plan. The Debtors have exercised reasonable business judgment in determining to enter into the Exit Credit Facilities, the Exit Credit Facilities Documents, the Exit ABL Commitment Letter and the Exit ABL Fee Letter, and have provided sufficient and adequate notice of the material terms of the Exit Credit Facilities. The terms and conditions of the Exit Credit Facilities, the Exit ABL Commitment Letter and the Exit ABL Fee Letter are fair and reasonable, and the Exit Credit Facilities, the Exit ABL Commitment Letter and the Exit ABL Fee Letter have been negotiated in good faith and at arms's length. The Debtors and the Reorganized Debtors are authorized, without further approval of the Court, to execute and deliver and incur and perform their obligations under the Exit ABL

Commitment Letter and the Exit ABL Fee Letter. The Debtors and the Reorganized Debtors are authorized, without further approval of the Court, to execute and deliver the Exit Credit Facilities Documents, including, without limitation, all agreements, documents, instruments and certificates relating to the Exit Credit Facilities and incur and perform their obligations under the Exit Credit Facilities. BASED ON THE FOREGOING, IT IS HEREBY ORDERED THAT:

A. Confirmation of the Plan.

55. The Plan and the other Plan Documents shall be, and hereby are, confirmed under section 1129 of the Bankruptcy Code. The terms of the Plan Documents (including without limitation the Restructuring Transactions) are incorporated by reference into, and are an integral part of, the Plan and this Confirmation Order and are authorized and approved, and the Debtors are authorized to implement their provisions and consummate the Plan without any further authorization except as expressly required by the Plan or this Confirmation Order.

B. Objections.

56. All objections, responses, reservations, statements, and comments in opposition to the Plan, other than those resolved, or withdrawn with prejudice prior to, or on the record at, the Confirmation Hearing are overruled on the merits in all respects. All withdrawn objections, if any, are deemed withdrawn with prejudice.

C. Omission of Reference to Particular Plan Provisions.

57. The failure to specifically describe or include any particular provision of the Plan or the Plan Documents in this Confirmation Order shall not diminish or impair the effectiveness of such provision, and such provision shall have the same validity, binding effects and enforceability as every other provision of the Plan and the Plan Documents.

D. Deemed Acceptance of the Plan as Modified.

58. In accordance with section 1127 of the Bankruptcy Code and Bankruptcy Rule 3019, all holders of Claims that voted to accept the Plan or that are conclusively presumed to have accepted the Plan are deemed to accept the Plan, subject to modifications (subject to the Restructuring Support Agreement), if any. No holder of a Claim shall be permitted to change its vote as a consequence of the Plan modifications. All modifications to the Plan made after the Solicitation Date (including any modifications contained in this Confirmation Order) are hereby approved, pursuant to section 1127 of the Bankruptcy Code and Bankruptcy Rule 3019.

E. Plan Implementation.

59. General Authorization. The transactions described in the Plan (including without limitation pursuant to the Restructuring Transactions), the other Plan Documents, and this Confirmation Order are hereby approved. On or before the Effective Date, and after the Effective Date, as necessary, and without any further order of this Court or other authority, the Debtors, or the Reorganized Debtors, as applicable, and their respective directors, managers, officers, members, agents, attorneys, financial advisors, and investment bankers are authorized and empowered pursuant to section 1142(b) of the Bankruptcy Code and other applicable laws (including without limitation section 303 of the General Corporate Law of the State of Delaware and the comparable provisions of the Delaware Limited Liability Company Act) to

and shall (i) grant, issue, execute, deliver, file, or record any agreement, document, or security, and the documents contained in the Plan or the Plan Documents (including without limitation pursuant to the Restructuring Transactions) (as modified, amended, and supplemented pursuant to the provisions of the Plan governing such modifications, amendments, and supplements), in substantially the form included therein, or any other documents related thereto and (ii) take any action necessary or appropriate to implement, effectuate, and consummate the Plan, the Plan Documents, the Restructuring Transactions or this Confirmation Order, in accordance with their terms. All such actions taken or caused to be taken shall be deemed to have been authorized and approved by this Court without further approval, act, or action under any applicable law, order, rule, or regulation, including, among other things, (i) all transfers of assets that are to occur pursuant to the Plan, the Plan Documents, the Restructuring Transactions, the New Organizational Documents, the Exit Credit Facilities Documents, the Exit ABL Commitment Letter, or this Confirmation Order; (ii) the incurrence of all obligations contemplated by the Plan, the Plan Documents, the New Organizational Documents, the Exit Credit Facilities Documents, the Exit ABL Commitment Letter, or this Confirmation Order and the making of all distributions under the Plan, the Plan Documents, the New Organizational Documents, the Exit Credit Facilities Documents, the Exit ABL Commitment Letter, or this Confirmation Order; and (iii) entering into any and all transactions, contracts, leases, instruments, releases, and other documents and arrangements permitted by applicable law, order, rule, or regulation pursuant to the Plan, the Plan Documents, the Restructuring Transactions, the New Organizational Documents, the Exit Credit Facilities Documents, the Exit ABL Commitment Letter, or this Confirmation Order. The approvals and authorizations specifically set forth in this Confirmation Order are nonexclusive and are not intended to limit the authority of the Debtors, the Reorganized Debtors, or any officer, director, or manager thereof to take any and all actions necessary or appropriate to implement, effectuate, and consummate any and all documents or transactions contemplated by the Plan, the Plan Documents or this Confirmation Order pursuant to section 1142(b) of the Bankruptcy Code. Pursuant to section 1142 of the Bankruptcy Code, to the extent that, under applicable nonbankruptcy law (including without limitation section 303 of the General Corporate Law of the State of Delaware and the comparable provisions of the Delaware Limited Liability Company Act), any of the foregoing actions that would otherwise require approval of the equity holders, directors, or managers (or any equivalent body) of the Debtors or the Reorganized Debtors, such approval shall be deemed to have occurred and shall be in effect from and after the Effective Date without any further action by the equity holders, directors, or managers (or any equivalent body) of the Debtors or the Reorganized Debtors. On the Effective Date, or as soon thereafter as is practicable, the Debtors or the Reorganized Debtors, as applicable, shall, if required, file any documents required to be filed in such jurisdictions so as to effectuate the provisions of the Plan. Any or all documents contemplated herein shall be accepted by each of the respective filing offices and recorded, if required, in accordance with applicable law. All counterparties to any documents described in this paragraph are hereby directed to execute such documents as may be required or provided by such docu-

ments, without any further order of this Court.

60. No Action. Pursuant to the appropriate provisions of the General Corporation Law of the State of Delaware (including section 303 thereof and the comparable provisions of the Delaware Limited Liability Company Act), section 1142(b) of the Bankruptcy Code, or other applicable law, this Confirmation Order shall constitute authorization for the Debtors or the Reorganized Debtors, as applicable, to enter into, execute, deliver, file, adopt, amend, restate, consummate, or effectuate, as the case may be, the Plan, the Plan Documents (including without limitation the New Organizational Documents), the Exit Credit Facilities Documents, the Exit ABL Commitment Letter, the Exit ABL Fee Letter, this Confirmation Order, and any contract, instrument, or other document to be executed, delivered, adopted, or amended in connection with the implementation of the Plan, and the respective directors, managers, stockholders, managers, or members of the Debtors or the Reorganized Debtors shall not be required to take any actions in connection with the implementation of the Plan, the Plan Documents, the Exit Credit Facilities Documents, the Restructuring Transactions, or this Confirmation Order. The Plan Documents are hereby approved, adopted, and effective upon the Effective Date.

F. Binding Effect.

61. On the date of and after entry of this Confirmation Order and subject to the occurrence of the Effective Date, the Plan, the Plan Documents, and this Confirmation Order shall bind any holder of a Claim or Interest and such holder's respective successors and assigns, whether or not: (i) the Claim or Interest is Impaired under the Plan; (ii) such holder has accepted the Plan; (iii) such holder has failed to vote to accept or reject the Plan or voted to reject the Plan; (iv) such holder is entitled to a distribution under the Plan; (v) such holder will receive or retain any property or interests in property under the Plan; and (vi) such holder has filed a Proof of Claim in the Chapter 11 Cases. The Plan, the Plan Documents, and this Confirmation Order constitute legal, valid, binding, and authorized obligations of the respective parties thereto and shall be enforceable in accordance with their terms. Pursuant to section 1142(a) of the Bankruptcy Code, the Plan, the Plan Documents, and this Confirmation Order shall apply and be enforceable notwithstanding any otherwise applicable nonbankruptcy law. The Plan, the Plan Documents and this Confirmation Order, and all prior orders of the Court in the Chapter 11 Cases shall be binding against and binding upon and shall not be subject to rejection or avoidance by any Chapter 7 or Chapter 11 trustee appointed in any of the Chapter 11 Cases, or any Successor Cases (as defined in the Final DIP Order).

G. Plan Classification Controlling.

62. The terms of the Plan shall solely govern the classification of Claims and Interests for purposes of the distributions to be made thereunder. The classifications set forth on the Ballots tendered to or returned by the holders of Claims or Interests in connection with voting on the Plan: (i) were set forth on the Ballots solely for purposes of voting to accept or reject the Plan; (ii) do not necessarily represent, and in no event shall be deemed to modify or otherwise affect, the actual classification of such Claims and Interests under the Plan for distribution purposes; (iii) may not be relied upon by any holder of a Claim or Interest as representing the actual classification of such Claim or Interest under the Plan for distribution purposes; and (iv) shall not be binding on the

Debtors except for voting purposes. All rights of the Debtors and the Reorganized Debtors to challenge, object to, or seek to reclassify Claims are expressly reserved.

H. Operation as of the Effective Date.

63. Upon the occurrence of the Effective Date, the terms of the Plan, the Plan Documents, and this Confirmation Order shall be immediately effective and enforceable and deemed binding upon the Debtors, the Reorganized Debtors, and any and all holders of Claims against or Interests in the Debtors (irrespective of whether their Claims or Interests are deemed to have accepted the Plan), all Entities that are parties to or are subject to the settlements, compromises, releases, discharges, and injunctions described in the Plan, and any and all non-Debtor parties to Executory Contracts and Unexpired Leases with the Debtors.

I. Vesting of Assets.

64. Except as otherwise provided in the Plan or any agreement, instrument, or other document incorporated therein, on the Effective Date, all property in each Debtors' estate, all Causes of Action, and any property acquired by any of the Debtors pursuant to the Plan shall vest in each respective Reorganized Debtor, free and clear of all Liens, Claims, charges, Causes of Action, or other encumbrances. On and after the Effective Date, except as otherwise provided in the Plan, each Reorganized Debtor may operate its business and may use, acquire, or dispose of property and compromise or settle any Claims, Interests, or Causes of Action without supervision or approval by the Bankruptcy Court and free of any restrictions of the Bankruptcy Code or Bankruptcy Rules.

J. Restructuring Transactions.

65. The Debtors and the Reorganized Debtors, with the consent of the Backstop DIP Term Lenders, are authorized to implement and consummate the Restructuring Transactions pursuant to the Plan, the Plan Documents (as may be amended), the Exit ABL Commitment Letter, the Exit ABL Fee Letter, and this Confirmation Order and are authorized to execute and deliver all necessary documents or agreements required to perform their obligations thereunder. The Restructuring Transactions (including any assignments of Executory Contracts or Unexpired Leases effectuated thereunder that are effective on or before the Effective Date) pursuant to the Plan are approved and authorized in all respects. The Debtors and the Reorganized Debtors, with the consent of the Backstop DIP Term Lenders, are authorized and directed to take all actions, necessary, appropriate, or desirable to enter into, implement, and consummate the contracts, instruments, releases, agreements, or other documents created or executed in connection with the Plan. In accordance with section 1142 of the Bankruptcy Code and applicable nonbankruptcy law, such actions may be taken without further action by stockholders, managers, or directors.

K. Exit Credit Facilities.

66. The Debtors and the Reorganized Debtors are authorized to enter into the Exit Credit Facilities, the terms of which will be set forth in the Exit Credit Facilities Documents, as applicable, and the Exit ABL Commitment Letter and the Exit ABL Fee Letter. This Confirmation Order shall be deemed approval of the Exit ABL Commitment Letter, the Exit ABL Fee Letter, the Exit Credit Facilities and the Exit Credit Facilities Documents (including, without limitation, all agreements, documents, instruments, and certificates relating to the Exit Credit Facilities), as

applicable, and all transactions contemplated thereby, and all actions to be taken, undertakings to be made, and obligations to be incurred by the Debtors and the Reorganized Debtors in connection therewith, including the payment of all fees, indemnities, and expenses provided for therein, and authorization of the Debtors and the Reorganized Debtors to enter into and execute, without further approval of the Court, the Exit ABL Commitment Letter, the Exit ABL Fee Letter, the Exit Credit Facilities Documents and such other agreements, securities, instruments, and documents as may be required to effectuate the treatment afforded to the lenders by the Exit Credit Facilities, including execution of any payoff letter with respect to the DIP Facilities. The Reorganized Debtors are authorized to: (i) immediately pay as and when required all fees, expenses and indemnities required to be paid under the Exit Credit Facilities, (ii) immediately pay each Allowed DIP ABL Claim indefeasibly in full in cash from the proceeds of the Exit Credit Facilities; and (iii) immediately pay as and when required all amounts owing under any payoff letter with respect to the DIP Facilities.

67. The agreements, documents, securities, and instruments entered into in connection with the Exit Credit Facilities constitute legal, valid, and binding obligations of the Debtors and the Reorganized Debtors and shall be enforceable in accordance with their terms. Subject to (i) the indefeasible payment in full in cash of each Allowed DIP ABL Claim and (ii) receipt by the DIP ABL Agent (as defined in the Final DIP Order) of a payoff letter in form and substance satisfactory to the DIP ABL Agent, on the Effective Date, all of the Liens and security interests to be granted in accordance with the Exit Credit Facilities and the Exit Credit Facilities Documents (i) shall be deemed to be granted, (ii) shall be valid, legal, binding, and enforceable Liens on, and security interests in, the collateral granted thereunder in accordance with the terms of the Exit Credit Facilities Documents, (iii) shall be deemed automatically perfected on the Effective Date, and (iv) shall be subject only to such Liens and security interests, if any, as may be expressly permitted under the Exit Credit Facilities Documents, The guarantees, mortgages, pledges, Liens, and other security interests granted pursuant to or in connection with the Exit Credit Facilities are granted in good faith, for a legitimate business purpose, for reasonably equivalent value, and as an inducement to the lenders to extend credit thereunder and shall be, and hereby are, deemed reasonable and not to constitute a fraudulent conveyance or fraudulent transfer under the Bankruptcy Code or any applicable non-bankruptcy law, shall not be subject to recharacterization or equitable subordination for any purposes whatsoever and shall not otherwise be subject to avoidance. The priorities of the liens and security interests granted pursuant to or in connection with the Exit Credit Facilities shall be as set forth in the intercreditor agreement and other definitive documentation executed in connection with the Exit Credit Facilities. The Reorganized Debtors and the persons and entities granted such Liens and security interests shall be authorized to make all filings and recordings, and to obtain all governmental approvals and consents necessary to establish and perfect such Liens and security interests under the provisions of the applicable state, federal, or other law that would be applicable in the absence of the Plan and this Confirmation Order (it being understood that perfection shall occur automatically by virtue of the entry of this Confirmation Order and any such filings, recordings, approvals, and consents shall not be required), and will thereafter coop-

erate to make all other filings and recordings that otherwise would be necessary under applicable law to give notice of such Liens and security interests to third parties.

L. New Organizational Documents

68. The terms of the New Organizational Documents, each attached to the Plan Supplement, are approved in all respects. The obligations of the applicable Reorganized Debtors related thereto, will, upon execution, constitute legal, valid, binding, and authorized obligations of each of the Debtors or Reorganized Debtors, as applicable, enforceable in accordance with their terms and not in contravention of any state or federal law. On the Effective Date, without any further action by the Court or the directors, officers, or equity holders of any of the Reorganized Debtors, each Reorganized Debtor, as applicable, will be and is authorized to enter into the New Organizational Documents to which such Reorganized Debtor is contemplated to be a party on the Effective Date. In addition, on the Effective Date, without any further action by the Court or the directors, officers or equity holders of any of the Reorganized Debtors, each applicable Reorganized Debtor will be and is authorized to: (a) execute, deliver, file, and record any other contracts, assignments, certificates, instruments, agreements, guaranties, or other documents executed or delivered in connection with the New Organizational Documents; (b) perform all of its obligations under the New Organizational Documents; and (c) take all such other actions as any of the responsible officers of such Reorganized Debtor may determine are necessary, appropriate or desirable in connection with the consummation of the transactions contemplated by the New Organizational Documents or pursuant to the Restructuring Transactions. The Shareholder Agreement (substantially in the form attached as Exhibit A–4 to the Plan Supplement) shall be effective as of the Effective Date and, as of such date, shall be deemed to be valid, binding, and enforceable in accordance with its terms, and each holder of New Equity from and after the Effective Date shall be bound thereby.

69. After the Effective Date, the Reorganized Debtors may, in accordance with the provisions of the Exit Credit Facilities Documents, amend and restate their respective New Organizational Documents and other constituent documents as permitted by the laws of their respective state of incorporation and their respective New Organizational Documents. Notwithstanding anything to the contrary in this Confirmation Order or Article XI of the Plan, after the Effective Date, any disputes arising under the Exit Credit Facilities Documents and the New Organizational Documents will be governed by the jurisdictional provisions therein.

M. Distributions.

70. All distributions pursuant to the Plan shall be made in accordance with **Article VI** of the Plan, and such methods of distribution are approved. The Reorganized Debtors shall have no duty or obligation to make distributions to any holder of an Allowed Claim unless and until such holder executes and delivers, in a form acceptable to the Reorganized Debtors, all Plan Documents applicable to such distributions.

N. Claims Register

71. On and after the Effective Date, any Claim that has been paid or satisfied, or any Claim that has been amended or superseded, may be adjusted or expunged on the Claims Register by the Debtors or the Reorganized Debtors to the maximum extent provided by applicable law without a

Claims objection having to be Filed and without any further notice to or action, order, or approval of the Bankruptcy Court.

O. Retained Assets.

72. To the extent that the retention by the Debtors of assets held immediately prior to emergence in accordance with the Plan is deemed, in any instance, to constitute a "transfer" of property, such transfer of property to the Debtors (i) is or shall be a legal, valid, and effective transfer of property; (ii) vests or shall vest the Debtors with good title to such property, free and clear of all liens, charges, Claims, encumbrances, or interests, except as expressly provided in the Plan or this Confirmation Order; (iii) does not and shall not constitute an avoidable transfer under the Bankruptcy Code or under applicable nonbankruptcy law; and (iv) does not and shall not subject the Debtors to any liability by reason of such transfer under the Bankruptcy Code or under applicable nonbankruptcy law, including by laws affecting successor or transferee liability.

P. Treatment of Executory Contracts and Unexpired Leases.

73. The treatment of Executory Contracts and Unexpired Leases as set forth in Article V.A of the Plan is hereby authorized. On the Effective Date, except as otherwise provided in the Plan, all Executory Contracts or Unexpired Leases will be deemed rejected as of the Effective Date, in accordance with the provisions and requirements of sections 365 and 1123 of the Bankruptcy Code, other than those Executory Contracts or Unexpired Leases that: (i) previously were assumed or rejected by the Debtors; (ii) are identified on the Assumed Executory Contract and Unexpired Lease Schedule; or (iii) are the subject of a notice of assumption or motion to assume such Executory Contracts or Unexpired Leases, as applicable, that is pending on the Effective Date, regardless of whether the requested effective date of such assumption is on or after the Effective Date; *provided, however*, that no notices of assumption or motions to assume Unexpired Leases of non-residential real property shall be pending on the Effective Date absent counterparty consent. Entry of this Confirmation Order by this Court shall constitute approval of such rejections and the assumption of the Executory Contracts or Unexpired Leases listed on the Assumed Executory Contract and Unexpired Lease Schedule pursuant to sections 365(a) and 1123 of the Bankruptcy Code. Any motions or notices to assume Executory Contracts or Unexpired Leases pending on the Effective Date shall be subject to approval by this Court on or after the Effective Date by a Final Order; *provided, however*, that no notices of assumption or motions to assume Unexpired Leases of non-residential real property shall be pending on the Effective Date absent counterparty consent. Each Executory Contract and Unexpired Lease assumed pursuant to Article V.A. of the Plan, or by any order of this Court, which has not been assigned to a third party prior to the Effective Date, shall revest in and be fully enforceable by the Debtors in accordance with such Executory Contract and/or Unexpired Lease's terms, except as such terms are modified by agreement of the counterparty to the Executory Contract or Unexpired Lease or any order of this Court authorizing and providing for its assumption under applicable federal law. To the maximum extent permitted by law, to the extent any provision in any Executory Contract or Unexpired Lease assumed or assumed and assigned pursuant to the Plan (including without limitation pursuant to the Restructuring Transactions) restricts or prevents, or purports to

restrict or prevent, or is breached or deemed breached by, the assumption or the assumption and assignment of such Executory Contract or Unexpired Lease (including, without limitation, any "change of control" provision), then such provision shall be deemed modified such that the transactions contemplated by the Plan shall not entitle the non-Debtor party thereto to terminate such Executory Contract or Unexpired Lease or to exercise any other default-related rights with respect thereto. Notwithstanding anything to the contrary in the Plan, the Debtors or the Reorganized Debtors, as applicable, reserve the right to alter, amend, modify, or supplement the Assumed Executory Contract and Unexpired Lease Schedule at any time through and including forty-five (45) days after the Effective Date, *provided, however*, that the Debtors shall not amend, modify, or supplement the Assumed Executory Contract and Unexpired Lease Schedule to add or remove any unexpired leases of non-residential real property from such schedule absent counterparty consent.

74. The Disclosure Statement, including the exhibits thereto, contains information providing counterparties to assumed and assumed and assigned to a Reorganized Debtor (including without limitation pursuant to the Restructuring Transactions) contracts and unexpired leases with adequate assurance of future performance in accordance with section 365 of the Bankruptcy Code. Notwithstanding anything in the Plan to the contrary, to the extent the Debtors propose the post-Effective Date assignment of leases as part of the Restructuring Transactions, such transactions are not subject to Bankruptcy Code section 365 and any proposed assignment of leases would be governed by applicable state law and the terms of the respective leases (including any notice and consent requirements).

75. Any monetary defaults under each Executory Contract and Unexpired Lease to be assumed or assumed and assigned pursuant to the Plan shall be satisfied, pursuant to section 365(b)(1) of the Bankruptcy Code, by payment of the default amount in cash on the Effective Date, subject to the limitations described in **Article V** of the Plan, or on such other terms as the parties to such Executory Contracts or Unexpired Leases may otherwise agree. In the event of a dispute regarding: (i) the amount of any payments to cure such a default; (ii) the ability of the Debtors or any assignee to provide "adequate assurance of future performance" under the Executory Contract or Unexpired Lease to be assumed or assumed and assigned; or (iii) any other matter pertaining to assumption, the cure amount required by section 365(b)(1) of the Bankruptcy Code shall be made following the entry of a Final Order or orders resolving the dispute and approving the assumption; *provided that* the Reorganized Debtors may settle any dispute regarding the amount of any such cure amount without any further notice to any other party or any action, order, or approval of this Court; *provided, further, that*, notwithstanding anything to the contrary in the Plan, prior to the entry of a Final Order resolving any dispute and approving the assumption or assumption and assignment of such Executory Contract or Unexpired Lease, the Debtors or the Reorganized Debtors, as applicable, reserve the right to reject any Executory Contract or Unexpired Lease Schedule in accordance with **Article V.A** of the Plan or otherwise. Except as otherwise agreed upon by an applicable counterparty, the Debtors shall make all cure payments substantially contemporaneously with assumption of the Executory Contracts and Unexpired Leases on the Effective Date.

76. Pursuant to **Article V.B**. of the Plan, unless otherwise provided by a Final Order of this Court approving rejection of Executory Contracts or Unexpired Leases, all Proofs of Claims with respect to Claims arising from the rejection of Executory Contracts or Unexpired Leases, pursuant to the Plan or the Confirmation Order, if any, must be Filed with the Notice and Claims Agent on or before the later of the date that is thirty (30) days after (i) notice of the Effective Date; or (ii) the date on which the Reorganized Debtors remove an Executory Contract or Unexpired Lease from the Assumed Executory Contract and Unexpired Lease Schedule on or after the Effective Date pursuant to **Article V.A** of the Plan, as applicable (the "Rejection Date"); *provided, however*, that the Rejection Date with respect to any Unexpired Lease of non-residential real property shall not occur until the date the Debtors relinquish control of the premises by notifying the affected landlord in writing of the Debtors' surrender of the premises and (x) turning over keys, key codes, and security codes, if any, to the affected landlord, or (y) notifying the affected landlord in writing that the keys, key codes, and security codes, if any, are not available, but the landlord may rekey the leased premises.

Q. Directors' and Officers' Liability Insurance.

77. As set forth in the Plan, the D&O Liability Insurance Policies, in effect on the Effective Date, shall be continued, subject to such D&O Liability Insurance Policies being reasonably satisfactory to the Backstop DIP Term Lenders. To the extent that the D&O Liability Insurance Policies are deemed to be Executory Contracts, then, notwithstanding anything in the Plan to the contrary, the Debtors shall be deemed to have assumed all of the Debtors' unexpired D&O Liability Insurance Policies pursuant to sections 365(a) and 1123 of the Bankruptcy Code effective as of the Effective Date. Entry of this Confirmation Order shall constitute the Bankruptcy Court's approval of the Debtors' foregoing assumption of each of the unexpired D&O Liability Insurance Policies. Notwithstanding anything to the contrary contained in the Plan, Confirmation shall not discharge, impair, or otherwise modify any indemnity or other obligations of the insurers under any of the D&O Liability Insurance Policies.

78. After the Effective Date, none of the Debtors or the Reorganized Debtors shall terminate or otherwise modify the terms of any D&O Liability Insurance Policies (including any "tail policy") in effect on the Petition Date, and all directors and officers of the Debtors who served in such capacity at any time prior to the Effective Date shall be entitled to the full benefits of any such policy for the full term of such policy regardless of whether such directors and officers remain in such positions after the Effective Date.

R. Exemption from Transfer Taxes.

79. Pursuant to section 1146(a) of the Bankruptcy Code, any transfers of property pursuant hereto shall not be subject to any stamp tax or similar tax, and upon entry of the Confirmation Order, the appropriate state or local governmental officials or agents shall forgo the collection of any such tax or governmental assessment and accept for filing and recordation any of the foregoing instruments or other documents pursuant to such transfers of property without the payment of any such tax, recordation fee, or governmental assessment.

S. Governmental Approvals Not Required.

80. This Confirmation Order shall constitute all approvals and consents required, if

any, by the laws, rules, or regulations of any state or any other governmental authority with respect to the implementation or consummation of the Plan and the Plan Documents.

T. Filing and Recording.

81. This Confirmation Order is and shall be binding upon and shall govern the acts of all persons or entities including, without limitation, all filing agents, filing officers, title agents, title companies, recorders of mortgages, recorders of deeds, registrars of deeds, administrative agencies, governmental departments, secretaries of state, federal, state, and local officials, and all other persons and entities that may be required, by operation of law, the duties of their office, or contract, to accept, file, register, or otherwise record or release any document or instrument. Each and every federal, state, and local government agency is hereby directed to accept any and all documents and instruments necessary, useful, or appropriate (including financing statements under the applicable uniform commercial code) to effectuate, implement, and consummate the transactions contemplated by the Plan and this Confirmation Order without payment of any stamp tax or similar tax imposed by state or local law.

U. Tax Withholding.

82. In accordance with the provisions of the Plan and subject to **Article VI.G** of the Plan, to the extent applicable, the Disbursing Agent shall comply with all tax withholding and reporting requirements imposed on it by any Governmental Unit, and all distributions pursuant to the Plan shall be subject to such withholding and reporting requirements. Notwithstanding any provision in the Plan to the contrary, the Disbursing Agent shall be authorized to take all actions necessary or appropriate to comply with such withholding and reporting requirements, including liquidating a portion of the distribution to be made under the Plan to generate sufficient funds to pay applicable withholding taxes, withholding distributions pending receipt of information necessary to facilitate such distributions or establishing any other mechanisms they believe are reasonable and appropriate.

V. Discharge of Claims and Termination of Interests; Compromise and Settlement of Claims, Interests, and Controversies.

83. Pursuant to section 1141(d) of the Bankruptcy Code, and except as otherwise specifically provided in the Plan, this Confirmation Order, or in any contract, instrument, or other agreement or document created pursuant to the Plan, including the Plan Documents, the distributions, rights, and treatment that are provided in the Plan shall be in complete satisfaction, discharge, and release, effective as of the Effective Date, of Claims (including any Intercompany Claims resolved or compromised after the Effective Date by the Reorganized Debtors), Interests, and Causes of Action of any nature whatsoever, including any interest accrued on Claims or Interests from and after the Petition Date, whether known or unknown, against, liabilities of, liens on, obligations of, rights against, and interests in, the Debtors or any of their assets or properties, regardless of whether any property shall have been distributed or retained pursuant to the Plan on account of such Claims and Interests, including demands, liabilities, and Causes of Action that arose before the Effective Date, any contingent or non-contingent liability on account of representations or warranties issued on or before the Effective Date, and all debts of the kind specified in sections 502(g), 502(h), or 502(i) of the Bankruptcy Code, in each

case whether or not: (i) a Proof of Claim based upon such debt, right, or Interest is Filed or deemed Filed pursuant to section 501 of the Bankruptcy Code; (ii) a Claim or Interest based upon such debt, right, or Interest is Allowed pursuant to section 502 of the Bankruptcy Code; or (iii) the holder of such a Claim or Interest has accepted the Plan. Any default or "event of default" by the Debtors or Affiliates with respect to any Claim or Interest that existed immediately before or on account of the Filing of the Chapter 11 Cases shall be deemed cured (and no longer continuing) as of the Effective Date. The Confirmation Order shall be a judicial determination of the discharge of all Claims and Interests, subject to the Effective Date occurring.

84. Pursuant to Bankruptcy Rule 9019 and section 1123(b)(3) of the Bankruptcy Code and in consideration for the classification, distributions, releases, and other benefits provided pursuant to the Plan, on the Effective Date, the provisions of the Plan shall constitute a good faith compromise and settlement of all Claims, Causes of Action, Interests, controversies, or issues relating to the contractual, legal, and subordination rights that a Holder of a Claim or Interest may have with respect to any Allowed Claim or Interest, or any distribution to be made on account of such Allowed Claim or Interest.

W. The Releases, Injunction, Exculpation, and Related Provisions Under the Plan.

85. The releases, injunctions, exculpations, and related provisions set forth in Article VIII of the Plan are incorporated herein in their entirety, are hereby approved and authorized in all respects, are so ordered, and shall be immediately effective on the Effective Date without further order or action on the part of this Court or any other party.

86. Pursuant to Bankruptcy Rule 3020(c)(1), the following provisions of the Plan will be immediately effective on the Effective Date:

> **Article VIII.F: Except as otherwise expressly provided in the Plan or for obligations issued or required to be paid pursuant to the Plan (including the New Equity, and documents and instruments related thereto), or the Confirmation Order, all Entities that have held, hold, or may hold Claims, Interests, or Liens that have been discharged pursuant to Article VIII.A, released pursuant to Article VIII.B, Article VIII.C, or Article VIII.D, or are subject to exculpation pursuant to Article VIII.E are permanently enjoined, from and after the Effective Date, from taking any of the following actions against, as applicable, the Debtors, the Reorganized Debtors, or the Released Parties: (1) commencing or continuing in any manner any action or other proceeding of any kind on account of or in connection with or with respect to any such Claims or Interests; (2) enforcing, attaching, collecting, or recovering by any manner or means any judgment, award, decree, or order against such Entities on account of or in connection with or with respect to any such Claims or Interests; (3) creating, perfecting, or enforcing any encumbrance of any kind against such Entities or the property or the Estates of such Entities on account of or in connection with or with respect to any such Claims or Interests; (4) asserting any right of setoff, subrogation, or recoupment of any kind against any obligation due from such Entities or against the property of such Entities on account of or in connection with or with respect to any such Claims or Interests unless such Entity has time-**

ly asserted such setoff right prior to the Effective Date in a document filed with the Bankruptcy Court explicitly preserving such setoff, and notwithstanding an indication of a Claim or Interest or otherwise that such Entity asserts, has, or intends to preserve any right of setoff pursuant to applicable law or otherwise; and (5) commencing or continuing in any manner any action or other proceeding of any kind on account of or in connection with or with respect to any such Claims or Interests released or settled pursuant to the Plan.

X. Setoff Rights of Counterparties to Unexpired Leases of Non–Residential Real Property.

87. Notwithstanding anything to the contrary in the Plan or this Confirmation Order, counterparties to rejected Unexpired Leases of non-residential real property shall be entitled to assert rights to setoff, subrogation, or recoupment in connection with damages arising from the rejection of such Unexpired Leases of nonresidential real property, *provided* that following all such setoffs, recoupments, or subrogations, such counterparty shall return to the Debtors or Reorganized Debtors any excess security deposits or other similar deposits held in connection with such rejected Unexpired Leases of nonresidential real property.

Y. Post–Confirmation Notices, Professional Compensation, and Bar Dates.

88. In accordance with Bankruptcy Rules 2002 and 3020(c), no later than seven days after the Effective Date, the Reorganized Debtors must cause notice of Confirmation and occurrence of the Effective Date, substantially in the form attached to this Confirmation Order as Exhibit 2 (the "Notice of Confirmation") to be served by United States mail, first-class postage prepaid, by hand, or by overnight courier service to all parties served with the Confirmation Hearing Notice. Notwithstanding the above, no notice of Confirmation or occurrence of the Effective Date or service of any kind shall be required to be mailed or made upon any Entity to whom the Debtors mailed notice of the Confirmation Hearing, but received such notice returned marked "undeliverable as addressed," "moved, left no forwarding address" or "forwarding order expired," or similar reason, unless the Debtors have been informed in writing by such Entity, or are otherwise aware, of that Entity's new address. To supplement the notice procedures described in the preceding sentence, no later than fourteen days after the Effective Date, the Reorganized Debtors must cause the Notice of Confirmation, modified for publication in the Debtors' discretion, to be published on one occasion in each of the *USA Today* (National Edition) and the *Pittsburgh–Post Gazette*. As soon as practicable after entry of this Confirmation Order, the Debtors shall make copies of this Confirmation Order available on their reorganization website at http://www.kccllc.net/rue21. Mailing and publication of the Notice of Confirmation in the time and manner set forth in this paragraph will be good, adequate, and sufficient notice under the particular circumstances and in accordance with the requirements of Bankruptcy Rules 2002 and 3020(c). No further notice is necessary.

89. The Notice of Confirmation will have the effect of an order of this Court, will constitute sufficient notice of the entry of this Confirmation Order to filing and recording officers, and will be a recordable instrument notwithstanding any contrary provision of applicable non-bankruptcy law.

90. Professionals or other Entities asserting a Professional Fee Claim for services rendered before the Confirmation Date must File an application for final allowance of such Professional Fee Claim no later than 30 days after the Effective Date. The Reorganized Debtors shall pay Professional Fee Claims in Cash in the amount this Court allows, including from the Professional Fee Escrow Account, which the Reorganized Debtors will establish in trust for the Professionals and fund with Cash equal to the Professional Fee Amount on the Effective Date and otherwise in accordance with the Plan.

91. Except as otherwise provided in the Plan, requests for payment of Administrative Claims, other than Administrative Claims arising under section 503(b)(9) of the Bankruptcy Code which were required to be Filed by the Bar Date, must be Filed no later than the Administrative Claim Bar Date. Holders of Administrative Claims that are required to File and serve a request for such payment of such Administrative Claims that do not file and serve such a request by the Administrative Claim Bar Date shall be forever barred, estopped, and enjoined from asserting such Administrative Claims against the Debtors, the Reorganized Debtors or their property, and such Administrative Claims shall be deemed discharged as of the Effective Date without the need for any objection from the Reorganized Debtors or any action by this Court. Notwithstanding any provision of the Plan or this Confirmation Order to the contrary no Holder of an Administrative Claim for a cure amount shall be required to file a request for the payment of an expense described in 11 U.S.C. § 503(b)(1)(A) so long as such Holder (a) filed an objection to the Debtors' proposed cure amount pursuant to the Disclosure Statement Order or (b) agreed with the cure amount listed by the Debtors in the Schedule of Assumed Executory Contracts and Unexpired Leases (as amended, supplemented, or modified from time to time).

Z. Post–Effective Date Notices.

92. Except as otherwise may be provided in the Plan or in this Confirmation Order, the only parties entitled to notice of any pleadings Filed in the Chapter 11 Cases of the Debtors after the Effective Date shall be: (a) the Reorganized Debtors and their counsel, (b) the United States Trustee, (c) counsel to the Backstop DIP Term Lenders, the DIP Term Loan Agent, the Prepetition Term Loan Agent and the Term Loan Lender Group, (d) counsel to the DIP ABL Agent and the Prepetition ABL Agent, and (e) any party known to be directly affected by the relief sought in a given pleading.

AA. Preservation of Rights of Action.

93. In accordance with section 1123(b) of the Bankruptcy Code, and except where such Causes of Action have been expressly released (including pursuant to the Debtor Release and the Third–Party Release and including Causes of Action against Excluded Parties), the Debtors and the Reorganized Debtors shall retain and may enforce all rights to commence and pursue, as appropriate, any and all Causes of Action, whether arising before or after the Petition Date, including any actions specifically enumerated in the Plan Supplement, and the Debtors' and the Reorganized Debtors' rights to commence, prosecute, or settle such Causes of Action shall be preserved notwithstanding the occurrence of the Effective Date.

BB. Release of Liens.

94. Except as otherwise provided in the Plan or in any contract, instrument, release, or other agreement or document

created pursuant to the Plan, including the Exit Credit Facilities Documents, or any other document executed in connection therewith, on the Effective Date and concurrently with the applicable distributions made pursuant to the Plan and, in the case of a Secured Claim, satisfaction in full of the portion of the Secured Claim that is Allowed as of the Effective Date, except for any Secured Claims that the Debtors elect to Reinstate in accordance with Article III.B of the Plan, all mortgages, deeds of trust, Liens, pledges, or other security interests against any property of the Estates shall be fully released and discharged, and all of the right, title, and interest of any Holder of such mortgages, deeds of trust, Liens, pledges, or other security interests shall revert to the applicable Debtor and its successors and assigns. The release of the Liens securing the DIP ABL Claims shall be subject to (i) the indefeasible payment in full in cash of each Allowed DIP ABL Claim and (ii) receipt by the DIP ABL Agent of a payoff letter in form and substance satisfactory to the DIP ABL Agent.

CC. Liabilities to the United States.

95. As to the United States of America, its agencies, departments, or agents (collectively, the "United States"), nothing in the Plan or Confirmation Order shall limit or expand the scope of discharge, release or injunction to which the Debtors or the Reorganized Debtors are entitled to under the Bankruptcy Code, if any. The discharge, release and injunction provisions contained in the Plan and Confirmation Order are not intended and shall not be construed to bar the United States from, subsequent to the Confirmation Order, pursuing any police or regulatory action.

96. Accordingly, notwithstanding anything contained in the Plan or Confirmation Order to the contrary, nothing in the Plan or Confirmation Order shall discharge, release, impair or otherwise preclude: (i) any liability to the United States that is not a "claim" within the meaning of section 101(5) of the Bankruptcy Code; (ii) any Claim of the United States arising on or after the Confirmation Date; (iii) any valid right of setoff or recoupment of the United States against any of the Debtors or the Reorganized Debtors; or (iv) any liability of the Debtors or Reorganized Debtors under police or regulatory statutes or regulations to any Governmental Unit (as defined by section 101(27) of the Bankruptcy Code) as the owner, lessor, lessee or operator of property that such entity owns, operates, or leases after the Confirmation Date. Nor shall anything in this Confirmation Order or the Plan: (i) enjoin or otherwise bar the United States or any Governmental Unit from asserting or enforcing, outside the Bankruptcy Court, any liability described in the preceding sentence; or (ii) divest any court, commission, or tribunal of jurisdiction to determine whether any liabilities asserted by the United States or any Governmental Unit are discharged or otherwise barred by this Confirmation Order, the Plan, or the Bankruptcy Code.

97. Moreover, nothing in the Confirmation Order or the Plan shall release or exculpate any non-debtor, including any Released Parties or Exculpated Parties, from any liability to the United States, including but not limited to any liabilities arising under the Internal Revenue Code, the environmental laws, or the criminal laws, nor shall anything in this Confirmation Order or the Plan enjoin the United States from bringing any claim, suit, action or other proceeding against the Released Parties or Exculpated Parties for any liability whatsoever; *provided, however*, that the foregoing sentence shall not limit the scope of discharge granted to the Debtors

under sections 524 and 1141 of the Bankruptcy Code.

98. Nothing contained in the Plan or Confirmation Order shall be deemed to determine the tax liability of any person or entity, including but not limited to the Debtors and the Reorganized Debtors, nor shall the Plan or Confirmation Order be deemed to have determined the federal tax treatment of any item, distribution, or entity, including the federal tax consequences of this Plan, nor shall anything in this Plan or Confirmation Order be deemed to have conferred jurisdiction upon the Bankruptcy Court to make determinations as to federal tax liability and federal tax treatment except as provided under 11 U.S.C. § 505.

DD. Cancellation of Existing Securities and Agreements.

99. On the later of (i) the Effective Date or (ii) the indefeasible payment in full in cash of the Prepetition ABL Obligations and DIP ABL Obligations, except to the extent otherwise provided in the Plan, the DIP ABL Documents, the DIP Term Loan Documents, the Prepetition ABL Documents, the Prepetition Term Loan Documents, the Unsecured Notes Indenture and all notes, instruments, certificates, agreements, indentures, and other documents evidencing Claims or Interests related to any of the foregoing shall be deemed cancelled, surrendered, and discharged without any need for further action or approval of the Bankruptcy Court or any Holder or other person and the obligations of the Debtors thereunder or in any way related thereto shall be deemed satisfied in full and discharged, and the DIP Term Loan Agent, the DIP ABL Agent, the Prepetition Agents and the Unsecured Notes Indenture Trustee shall have no further obligations or duties thereunder; *provided, however*, that notwithstanding Confirmation or Consummation, any such indenture or agreement that governs the rights of the Holder of a Claim shall continue in effect solely for purposes of (i) allowing Holders to receive distributions under the Plan; (ii) allowing Holders of Claims to retain their respective rights and obligations vis-à-vis other Holders of Claims pursuant to any applicable loan or other documents; (iii) allowing the Servicers to enforce their rights, claims, and interests vis-à-vis any party other than the Debtors; (iv) allowing the Prepetition Agents, DIP Agents and the Unsecured Notes Indenture Trustee to make the distributions in accordance with the Plan (if any), as applicable; (v) preserving any rights of the Servicers to payment of fees, expenses, and indemnification obligations as against any money or property distributable to the Holders under the Unsecured Notes Indenture, the Prepetition Term Loan Documents, the Prepetition ABL Loan Documents and the DIP Documents, including any rights to priority of payment and/or to exercise charging liens; (vi) allowing the Servicers to enforce any obligations owed to them under the Plan; (vii) allowing the Servicers to exercise rights and obligations relating to the interests of the Holders under the Prepetition Loan Documents, the DIP Documents and the Unsecured Notes Indenture, as applicable; (viii) allowing the Servicers to appear in the Chapter 11 Cases or in any proceeding in the Bankruptcy Court or any other court; and (ix) permitting the Servicers to perform any functions that are necessary to effectuate the foregoing; *provided, further, however*, that except as provided below, the preceding proviso shall not affect the discharge of Claims pursuant to the Bankruptcy Code, the Confirmation Order, or the Plan or affect any of the release, third-party release, Exculpation or injunction provisions contained in **Article VIII** of the Plan, or result in any expense or liabil-

ity to the Reorganized Debtors, as applicable; *provided, further*, that the foregoing shall not affect the issuance of New Equity issued pursuant to the Restructuring Transactions nor the treatment of Intercompany Interests pursuant to **Article III** of the Plan.

EE. Registration Exemptions

100. Pursuant to section 1145 of the Bankruptcy Code, the offering, issuance, and distribution of the New Equity, as contemplated by the Plan, shall be exempt from, among other things, the registration requirements of Section 5 of the Securities Act, and any other applicable United States, state, or local law requiring registration prior to the offering, issuance, distribution, or sale of securities. Such Section 1145 Securities will not be "restricted securities" (as defined in Rule 144(a)(3) under the Securities Act) and will be freely tradable and transferable by any initial recipient thereof that (x) is not an "affiliate" of the Reorganized Debtors (as defined in Rule 144(a)(1) under the Securities Act), (y) has not been such an "affiliate" within 90 days of such transfer, and (z) is not an entity that is an "underwriter" as defined in section 1145(b) of the Bankruptcy Code.

101. Notwithstanding the Plan, the New Equity distributed under the Plan will not be eligible upon the Effective Date for listing through the facilities of DTC. To the extent the New Equity distributed under the Plan will be reflected through the facilities of DTC, the Reorganized Debtors need not provide any further evidence other than the Plan or the Confirmation Order with respect to the treatment of such New Equity under applicable securities laws. If applicable, DTC shall be required to accept and conclusively rely upon the Plan and Confirmation Order in lieu of a legal opinion regarding whether such New Equity is exempt from registration and/or eligible for DTC's book-entry delivery, settlement, and depository services. Notwithstanding anything to the contrary in the Plan, no Entity (including, for the avoidance of doubt, DTC) may require a legal opinion regarding the validity of any transaction contemplated by the Plan, including, for the avoidance of doubt, whether such New Equity is exempt from registration and/or eligible for DTC's book-entry delivery, settlement, and depository services.

FF. Return of Deposits.

102. All utilities, including any Person that received a deposit or other form of "adequate assurance" of performance pursuant to section 366 of the Bankruptcy Code during the Chapter 11 Cases (collectively, the "Deposits"), whether pursuant to the *Order (I) Prohibiting Utility Providers from Altering, Refusing, or Discontinuing Utility Services, (II) Determining Adequate Assurance of Payment for Future Utility Services, (III) Establishing Procedures for Determining Adequate Assurance of Payment, and (IV) Granting Related Relief* [Docket No. 508] or otherwise, including, gas, electric, telephone, data, cable, trash, and sewer services, are directed to return such Deposits to the Reorganized Debtors, either by setoff against postpetition indebtedness or by Cash refund, within thirty (30) days following the Effective Date.

GG. The Mississippi Department of Revenue.

103. Notwithstanding anything in the Plan or this Confirmation Order to the contrary: (i) the Mississippi Department of Revenue's (the "MDOR") setoff rights under section 553 of the Bankruptcy Code and recoupment rights are preserved; (ii) the MDOR shall not be required to file any proofs of claim or requests for payment in

the Chapter 11 Cases for any Administrative Claims for the liabilities described in section 503(b)(1)(B) and (C) of the Bankruptcy Code (collectively, the "MDOR 503(b) Liabilities"), the Debtors or Reorganized Debtors, as applicable, shall timely submit returns for and remit payment of any MDOR 503(b) Liabilities, and, should the Debtors or Reorganized Debtors fail to so timely file returns for and remit payment of any MDOR 503(b)(9) Liabilities, MDOR may proceed with Mississippi state law remedies for collection of any MDOR 503(b)(9) Liabilities due and/or seek such relief as may be available from this Court (subject to the Debtors' and Reorganized Debtors' (as applicable) rights and defenses under Mississippi state law and the Bankruptcy Code; (iii) to the extent the MDOR's Priority Tax Claims, if any, are not paid in full in cash on the Effective Date, such Priority Tax Claims shall, at a minimum, be paid by regular, quarterly installment payments in Cash over a period not to exceed five years after the date of the order for relief under section 301 of the Bankruptcy Code, all as required section 1129(a)(9)(C) of the Bankruptcy Code, along with interest in accordance with sections 511 and 1129(a)(9)(C) of the Bankruptcy Code; (iv) the MDOR may timely amend any Proof of Claim against any Debtor after the governmental Claims Bar Date, or the Effective Date, whichever is later, with respect to (i) a pending audit, or (ii) an audit that may be performed, with respect to any pre- or post-petition tax return; and (iii) in the event of a default in payment of Priority Tax Claims of the MDOR as provided for herein, the MDOR shall send written notice of default to the Debtors or Reorganized Debtors, as applicable, to the address in MDOR's records, and to their counsel, *provided* that if such default is not cured within 15 business days after such notice of default is mailed, the MDOR may (i) enforce the entire amount of its claim; (ii) proceed with Mississippi state law remedies for collection of any amounts due and/or (iii) seek such relief as may be available from this Court.

HH. Local Texas Tax Authorities

104. Notwithstanding any other provisions in the Plan or the Exit Financing, the Class 1 Other Secured Claims of the Certain Texas Tax Authorities (as defined in the DIP Order) that are secured by Prior Permitted Liens (as defined in the DIP Order) shall retain their liens on the funds reserved from the Store Closing Sales (as defined in the DIP ABL Agreement) with the same validity, extent and priority as existed prior to the entry of the Confirmation Order. To the extent these claims are Allowed Claims, they shall be paid timely pursuant to applicable non-bankruptcy law, and if not timely paid they shall be entitled to interest from the Petition Date through the Effective Date and from the Effective Date through the date of payment at the applicable statutory rate as permitted by Bankruptcy Code sections 506(b), 511 and 1129.

II. Michigan Department of Treasury

105. Notwithstanding any other provisions in the Plan or this Confirmation Order, to the extent that any Allowed Priority Tax Claim of the Michigan Department of Treasury (the "MDOT") is not paid on the Effective Date or when Allowed in lump sum in accordance with section 1129(a)(9)(C)(i) of the Bankruptcy Code, the MDOT shall notify the Debtors, after which the Debtors and the MDOT may agree that such Allowed Priority Tax Claim shall be paid in regular installments over no more than 5 years from the Petition Date in accordance with section 1129(a)(9)(C)(ii) of the Bankruptcy Code, with interest accruing at the appropriate statutory rate.

106. Upon the failure of the Debtor(s) to make timely payment on any Allowed Claim of the Michigan Department of Treasury in accordance with the Plan and this Confirmation Order, which is not cured within 15 days of the mailing of a written notice of default by the MDOT, the MDOT may exercise all rights and remedies available under non-bankruptcy law for the collection of the relevant Allowed Claim. Notwithstanding any provision to the contrary in this Confirmation Order, the Disclosure Statement, the Plan or any Plan document, nothing shall (a) affect the ability of the State of Michigan to pursue to the extent allowed by nonbankruptcy law any nondebtors for any liabilities that may be related to any tax liabilities owed by the Debtors to the State of Michigan; or (b) affect the rights of the State of Michigan to assert setoff and recoupment rights under applicable law. The Debtors agree that they will timely file or cause to be filed all required state tax returns and shall otherwise comply with the provisions of the State of Michigan Tax Code.

JJ. Effect of Confirmation Order on Other Orders.

107. Unless expressly provided for herein, nothing in the Plan or this Confirmation Order shall affect any orders entered in the Chapter 11 Cases pursuant to section 365 of the Bankruptcy Code or Bankruptcy Rule 9019.

KK. Inconsistency.

108. In the event of any inconsistency between the Plan (including the Plan Supplement) and this Confirmation Order, this Confirmation Order shall govern. To the extent any provision of any final Plan Supplement document may conflict or is inconsistent with any provision in the Plan, the terms of the final Plan Supplement document shall govern and be binding and exclusive.

LL. Injunctions and Automatic Stay.

109. Unless otherwise provided in the Plan or in this Confirmation Order, all injunctions or stays in effect in the Chapter 11 Cases pursuant to sections 105 or 362 of the Bankruptcy Code or any order of this Court, and extant on this Confirmation Date (excluding any injunctions or stays contained in the Plan or the Confirmation Order) shall remain in full force and effect through and including the Effective Date. All injunctions or stays contained in the Plan or this Confirmation Order shall remain in full force and effect in accordance with their terms.

MM. Authorization to Consummate.

110. The Debtors are authorized to consummate the Plan and the Restructuring Transactions at any time after the entry of this Confirmation Order subject to satisfaction or waiver (by the required parties) of the conditions precedent to consummation set forth in **Article IX** of the Plan.

NN. Substantial Consummation.

111. On the Effective Date, the Plan shall be deemed to be substantially consummated under sections 1101 and 1127(b) of the Bankruptcy Code.

OO. No Waiver.

112. The failure to specifically include any particular Plan Document or provision of the Plan or Plan Document in this Confirmation Order will not diminish the effectiveness of such document or provision nor constitute a waiver thereof, it being the intent of this Court that the Plan is confirmed in its entirety, the Plan Documents (including, but not limited to, the Plan Supplement, the Disclosure Statement, the Disclosure Statement Order, the Interim

DIP Order, the Final DIP Order, the DIP ABL Documents, the DIP Term Loan Documents, the Exit ABL Credit Facility Documents, the Exit Term Loan Credit Facility Documents, the New Organizational Documents, and the documents that are Definitive Documentation (as defined in the Restructuring Support Agreement)) are approved in their entirety, and all the documents are incorporated herein by this reference.

PP. Severability.

113. Each term and provision of the Plan, as it may have been altered or interpreted in accordance with the foregoing, is (i) valid and enforceable in accordance with its terms; (ii) integral to the Plan and may not be deleted or modified except in accordance with **Article X.A** of the Plan; and (iii) nonseverable and mutually dependent.

QQ. Effect of Non–Occurrence of Effective Date.

114. If the Effective Date does not occur, then: (i) the Plan shall be null and void in all respects; (ii) any settlement, compromise, release, waiver, discharge, or exculpation embodied in the Plan (including the fixing or limiting to an amount certain of any Claim or Interest or Class of Claims or Interests), assumption or rejection of Executory Contracts or Unexpired Leases effected by the Plan, and any document or agreement executed pursuant to the Plan, shall be deemed null and void and without legal effect; and (iii) nothing contained in the Plan or the Disclosure Statement shall: (x) constitute a waiver or release of any Claims or Interests; (y) prejudice in any manner the rights of the Debtors or any other Person or Entity; or (z) constitute an admission, acknowledgement, offer, or undertaking of any sort by the Debtors or any other Person or Entity.

RR. Debtors' Actions Post–Confirmation Through the Effective Date.

115. During the period from entry of this Confirmation Order through and until the Effective Date, each of the Debtors shall continue to operate its business as a debtor in possession, subject to the oversight of this Court as provided under the Bankruptcy Code, the Bankruptcy Rules, and this Confirmation Order and any order of this Court that is in full force and effect.

SS. Dissolution of the Creditors' Committee.

116. On the Effective Date, the Creditors' Committee shall dissolve, and the members of the Creditors' Committee and their respective officers, employees, counsel, advisors and agents shall be released and discharged from further authority, duties, responsibilities and obligations related to and arising from and in connection with these Chapter 11 Cases; *provided*, that following the Effective Date the Creditors' Committee shall continue in existence and have standing and a right to be heard solely to pursue Professional Fee Claims in accordance with **Article II.B** of the Plan. Following the completion of the remaining duties of the Creditors' Committee set forth above, the retention or employment of the Creditors' Committee's respective attorneys, accountants, and other agents shall terminate. The Reorganized Debtors shall no longer be responsible for paying any fees or expenses incurred by the members of or advisors to the Creditors' Committee after the Effective Date.

TT. Conditions to Effective Date.

117. The Plan shall not become effective unless and until the conditions set forth in **Article IX** of the Plan have been satisfied

or waived pursuant to Article IX.C of the Plan.

UU. Waiver of 14-Day Stay.

118. Notwithstanding Bankruptcy Rule 3020(e), this Confirmation Order is effective immediately and not subject to any stay.

VV. Post-Confirmation Modification of the Plan.

119. Without the need for further order or authorization of the Court, the Debtors or the Reorganized Debtors, as applicable, are authorized and empowered to make any and all modifications to any and all documents that are necessary to effectuate the Plan that do not materially modify the terms of such documents and are consistent with the Plan (subject to any applicable consents or consultation rights set forth therein) and the Restructuring Support Agreement (subject to any applicable consents or consultation rights set forth therein). Subject to certain restrictions and requirements set forth in section 1127 of the Bankruptcy Code and Bankruptcy Rule 3019, and those restrictions on modifications set forth in the Plan and the Restructuring Support Agreement, the Debtors and the Reorganized Debtors expressly reserve their respective rights to revoke or withdraw, or to alter, amend, or modify materially the Plan with respect to such Debtor, one or more times after Confirmation and, to the extent necessary, may initiate proceedings in the Court to so alter, amend, or modify the Plan, or remedy any defect or omission, or reconcile any inconsistencies in the Plan, the Disclosure Statement, or this Confirmation Order, in such manner as may be necessary to carry out the purposes and intent of the Plan. Any such modification or supplement shall be considered a modification of the Plan and shall be made in accordance with Article X.A of the Plan and subject to the terms of the Restructuring Support Agreement.

WW. Miscellaneous.

120. Nothing in this Confirmation Order shall be deemed to (a) grant or authorize liens on the Debtors' leasehold interests in real property or (b) grant or authorize rights in Debtors' leasehold interests in real property to any party in a manner inconsistent with applicable law.

XX. Final Order.

121. This Confirmation Order is a Final Order and the period in which an appeal must be filed will commence upon entry of this Confirmation Order.

YY. Retention of Jurisdiction.

122. The Court may properly, and upon the Effective Date shall, to the full extent set forth in the Plan, retain jurisdiction over all matters arising out of, and related to, the Chapter 11 Cases, including the matters set forth in Article XI of the Plan and section 1142 of the Bankruptcy Code. To the extent it is not legally permissible for the Court to have exclusive jurisdiction over any of the foregoing matters, the Court shall have non-exclusive jurisdiction over such matters to the fullest extent legally permissible. Notwithstanding anything to the contrary in this Confirmation Order or the Plan, the Court's retention of jurisdiction shall not govern the enforcement of the Exit Credit Facilities or the documents executed in connection therewith or any liens, rights, or remedies related thereto, the New Organizational Documents except to the extent that this Confirmation Order has been vacated or reversed, but instead, such enforcement shall be governed as set forth in the applicable Exit Credit Facilities Documents

and the New Organizational Documents, as applicable.

Prepared by: Kirkland & Ellis LLP (counsel to the Debtors and Debtors in Possession)

Pittsburgh, Pennsylvania

Exhibit 1

Plan of Reorganization

Please refer to Document No. 695

Exhibit 2

Confirmation and Effective Date Notice

Attachment

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

In re: rue21, inc., *et al.*,[5] Debtors.

rue21, inc., *et al.*, Movants,

v.

Official Committee of Unsecured Creditors, *et al.*[6], Respondent.

Case No. 17–22045 (GLT)

Chapter 11

(Jointly Administered)

Related to Docket No. 315, 316, 695, 697, 844

5. The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: rue21, inc. (1645); Rhodes Holdco, Inc. (6922); r services llc (9425); and rue services corporation (0396). The location of the Debtors' service address is: 800 Commonwealth Drive, Warrendale, PA 15086.

6. The other respondents are: PREIT Services, LLC, The State of Michigan, Department of Treasury, Aronov Realty Management, Brixmor Property Group, Inc., ShopOne Centers REIT, Inc., UBS Realty Management, and Weitzman Management Corporation, Los Lunas Investors, LLC CBL & Associates Management, Inc., Bloomfield Holdings, LLC, IR-EIT Louisville Dixie Valley, L.L.C., IREIT West Valley City Lake Park, L.L.C., Yuma Palms LeaseCo, L.L.C., Honey Creek DST, IRC Bradley Commons, L.L.C., IRC Goldenrod Marketplace II, L.L.C., IRC Stone Creek, L.L.C., IRC Timmerman Plaza, L.L.C., KRG Aiken Hitchock, LLC, KRG Plaza Green, Leeds Retail Center, LLC, Duluth (Gwinnett) SSR, LLC, 3503 RP Jackson Columns, L.L.C., 3503 RP Summerville Azalea Square, L.L.C., 3503 RP Waco Central Limited Partnership, Inland Western Spartanburg, L.L.C., RPAI Lakewood, L.L.C., RPAI Mansfield Limited Partnership, RPAI McDonough Henry Town, L.L.C. and WHLR–Village of Martinsville, LLC, Bloomfield Holdings, LLC, 3503 RP Jackson Columns, L.L.C., 3503 RP Waco Central Limited Partnership, RPAI Lakewood, L.L.C., and RPAI McDonough Henry Town, L.L.C., ARC NPHUBOH001, LLC, Centennial Real Estate Company, LLC, C.E. John Company, Inc., Deutsche Asset & Wealth Management, Foursquare Properties, Inc., Gem Realty Capital, Inc., KRE Colonie Owner, LLC, The Macerich Company, PGIM Real Estate, Southgate Mall Associates, LLP, Starwood Retail Partners LLC, and Vintage Real Estate, LLC, Coventry III/Satterfield Helm Valley Fair, LLC, Mt. Pleasant Shopping Center, LLC, Adrian Acquisition, LLC, Merle Hay Investors, LLC, and Capital Mall JC 1, LLC, Surprise Marketplace Holdings, Weingarten Realty Investors, Weingarten 1–4 Clermont Landing, LLC, WRI Alliance Riley Joint Venture, and WRI Mueller, LLC, Experian Marketing Solutions, Inc., Landlords DDR Corp., DLC Management Corp., GGP Limited Partnership, Gregory Greenfield & Associates Ltd., Jones Lang LaSalle Americas, Inc., Northwest Capital Investment Group, LLC, Regency Centers Corp., Rouse Properties, LLC, ShopCare Properties, LP, and Woodmont Companies, Winthrop Resources Corporation, Spinoso Real Estate Group, Washington Prime Group Inc.

Attachment—Continued

NOTICE OF (I) ENTRY OF ORDER CONFIRMING THE DEBTORS' FIRST AMENDED JOINT PLAN OF REORGANIZATION PURSUANT TO CHAPTER 11 OF THE BANKRUPTCY CODE AND (II) OCCURRENCE OF EFFECTIVE DATE

TO ALL CREDITORS, INTEREST HOLDERS, AND OTHER PARTIES IN INTEREST:

PLEASE TAKE NOTICE that an order [Docket No. [●]] (the "Confirmation Order") confirming the *Debtors' First Amended Joint Plan of Reorganization Pursuant to Chapter 11 of the Bankruptcy Code* (as may be modified, the "Plan"), was entered by the Honorable Gregory L. Taddonio, United States Bankruptcy Judge, and docketed by the Clerk of the United States Bankruptcy Court for the Western District of Pennsylvania (the "Court") on [●], 2017. Unless otherwise defined in this notice, capitalized terms used in this notice shall have the meanings ascribed to them in the Plan and the Confirmation Order.

PLEASE TAKE FURTHER NOTICE that copies of the Confirmation Order, the Plan, and the related documents, are available on this Court's website at http://www.pawb.uscourts.gov and free of charge on www.kccllc.net/rue21. To access this Court's website, you will need a PACER password and login, which can be obtained at http://www.pacer.psc.uscourts.gov.

PLEASE TAKE FURTHER NOTICE that the Effective Date occurred on September [7], 2017.

PLEASE TAKE FURTHER NOTICE that, unless otherwise provided by the Plan, the Confirmation Order, any other applicable order of the Bankruptcy Court, or agreed to by the holder of an Allowed Administrative Claim and the Debtors, all

Attachment—Continued

requests for Payment of Administrative Claims, other than Administrative Claims arising under section 503(b)(9) of the Bankruptcy Code which were required to be Filed by the Bar Date, must be Filed and served on the Debtors **no later than October [7], 2017** (the "Administrative Claims Bar Date"). Holders of Administrative Claims that are required to File and serve a request for payment of such Administrative Claims that do not File and serve such a request by the Administrative Claims Bar Date shall be forever barred, estopped, and enjoined from asserting such Administrative Claims against the Debtors, or their property and such Administrative Claims shall be deemed discharged as of the Effective Date.

PLEASE TAKE FURTHER NOTICE that, unless otherwise provided by an order of the Bankruptcy Court, any Proofs of Claim based upon the rejection of the Debtors' Executory Contracts or Unexpired Leases pursuant to the Plan or otherwise, must be Filed with the Notice and Claims Agent **on or before the later of the date that is thirty (30) days after (i) notice of the Effective Date; or (ii) the date on which the Reorganized Debtors remove an Executory Contract or Unexpired Lease from the Assumed Executory Contract and Unexpired Lease Schedule on or after the Effective Date pursuant to Article V.A of the Plan, as applicable (the "Rejection Date"); *provided, however*, that the Rejection Date with respect to any Unexpired Lease of non-residential real property shall not occur until the date the Debtors relinquish control of the premises by notifying the affected landlord in writing of the Debtors' surrender of the premises and (x) turning over key, key codes, and security codes, if any, to the affected landlord, or (y) notifying the affected landlord in writing that the keys, key**

Attachment—Continued

codes, and security codes, if any, are not available, but the landlord may rekey the leased premises.

PLEASE TAKE FURTHER NOTICE that the Plan and its provisions are binding on the Debtors, the Reorganized Debtors, any holder of a Claim against, or Interest in, the Debtors and such holder's respective successors and assigns, whether or not the Claim or Interest of such holder is Impaired under the Plan and whether or not such holder or Entity voted to accept the Plan.

Dated: [●], 2017

/s/ Draft

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Robert A. Britton (admitted pro hac vice)
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Local Counsel to the Debtors and Debtors in Possession

IN RE: TAM OF ALLEGHENY LLC d/b/a Stonefront Witch Way Inn, Debtor.

Rosemary C. Crawford, Trustee, Movant,

v.

2827 California Inc. and Mary Lou Filsinger, Individually and as President of 2827 California Inc., Respondents.

Case No. 13–23143–GLT

United States Bankruptcy Court, W.D. Pennsylvania.

Signed September 29, 2017

Background: Creditor that had not received any distribution of estate assets objected to final report of Chapter 7 trustee.

Holdings: The Bankruptcy Court, Gregory L. Taddonio, J., held that:

(1) while creditor that had financed purchase of tavern by debtor's principal, and that asserted security interest in liquor license that debtor used to operate tavern, appeared to have satisfied each of requirements for attachment of its security interest under Pennsylvania law, its failure to file financing statement with the Secretary of the Commonwealth of Pennsylvania, instead making only a fixture filing, meant that its security interest was unenforceable against trustee;

(2) mere fact that creditor may not have received notice of debtor's Chapter 7 filing in time to file a proof of claim did not enable it to receive distribution, not even after payment in full of all timely filed claims, given its failure to take any action to protect its interests after learning of debtor's bankruptcy filing; and

Request for Counsel Fees

[30–32] Lastly, Defendant's Complaint requests an award of counsel fees and cost of suit. (Docket No. 1, at 5, ¶ 2). PACA allows parties to recover attorney's fees and costs if provided for in the contract. *Spectrum Produce Distrib., Inc. v. Fresh Mktg., Inc.*, No. CIV. 11-06368 JBS, 2012 WL 2369367, at *2 (D.N.J. June 20, 2012) (citing *Pacific Intern. Mktg., Inc. v. A & B Produce, Inc.*, 462 F.3d 279, 286 (3d Cir. 2006); *Country Best v. Christopher Ranch, LLC*, 361 F.3d 629, 632–33 (11th Cir. 2004)). Language contained in a supplier's invoices can be sufficient to create a contractual obligation for fees and costs. *Spectrum Produce Distrib., Inc.*, 2012 WL 2369367, at *2. Here, Krisp–Pak's invoices state that "attorney's fees necessary to collect any balance owed hereunder shall be considered sums owing in connection with this transaction under the PACA trust." (Invoices, Trial Ex. P–4). GFP agreed to this term by accepting the produce from Krisp–Pak. Since the contract between Krisp–Pak and GFP permits attorney's fees, Alliance is entitled to an award of attorney's fees and costs of suit.

CONCLUSION

For the forgoing reasons, judgment is entered in favor of Alliance and against Defendant in the amount of $292,444.20. That amount is and shall be deemed non-dischargeable pursuant to Section 523(a)(4) of the Bankruptcy Code. Additionally, judgment is entered in favor of Alliance and against Defendant for reasonable costs and attorney's fees. Those costs and fees, as further set by the Court, are and shall be non-dischargeable under Section 523(a)(4) of the Code. This Court will issue an appropriate Order entering judgment in the amount of $292,444.20 as non-dischargeable and rendering judgment that attorney's fees and costs, in an amount to be established, are also non-dischargeable. The only open issue will be the amount of those attorney's fees and costs. Alliance shall file, within thirty days of the date of the Order memorializing this Opinion, an affidavit of services rendered with the amount sought for attorney's fees and costs along with a proposed form of order on notice to Defendant and Defendant's counsel. This Court will enter a subsequent Order establishing the amount of attorney's fees and costs that are non-dischargeable consistent with this decision. To the extent Alliance fails to file the affidavit of services rendered and amount sought for attorney's fees and costs within thirty days of the date of the Order memorializing this Opinion, then Alliance shall be deemed to have waived any attorney's fees and costs derived from this decision.

IN RE: RUE21, INC., et al.,[1] Debtors.

Case No. 17–22045–GLT

United States Bankruptcy Court, W.D. Pennsylvania.

Signed 09/08/2017

Background: Objection was filed to debtors' proposed Chapter 11 plan, based on nondebtor release incorporated in plan.

Holdings: The Bankruptcy Court, Gregory L. Taddonio, J., held that:

1. The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax-identification number, include: rue21, inc. (1645); Rhodes Holdco, Inc. (6922); r services llc (9425); and rue services corporation (0396). The location of the Debtors' service address is: 800 Commonwealth Drive, Warrendale, Pennsylvania 15086.