M B C NEWSLETTER

MISSISSIPPI BANKRUPTCY CONFERENCE

Editors: Robert Byrd and William P. Wessler **Fall 2021**

PRESIDENT'S MESSAGE

It has been a great honor to serve as President of the 2021 Mississippi Bankruptcy Conference. The past year has thrown us many curveballs as a conference but I am very proud of how our board has adapted in the best way possible to continue to provide our members with a high-quality virtual conference. It was our intent to provide an in-person conference again this year at the Beau Rivage but unfortunately, we were unable to do so. I do know that our board will do everything it can to have an in-person conference next year.

Many thanks to everyone who has agreed to speak at this year's virtual conference scheduled for November 18 & 19, 2021. Seminar Chair, Kim Bowling and Co-Chair, Jarrett Little have done an outstanding job putting together a great program this year. The program will include some very interesting topics and it will also include some of your favorite sessions, including the Case Law Update and Views from the Bench. Further details will be announced when they become available, so please watch your email for registration information.

In closing, I want to personally thank each of you for putting your trust in me to be President this year and I especially want to thank each of you for your flexibility during these unprecedented times in our world. We, as a board, are very grateful for your support. I also want to thank the Conference's Board of Directors, Rosamond Posey, Chris Maddux, Kim Bowling (upcoming MBC President), Jason Graeber, Jim Wilson, Christopher Meredith and Stephen Smith. I want to give a special thanks to Stephen Smith (our Executive Director) and Charlene Kennedy. These two put in so much time and effort every year and we could not do this conference without them!

Jordan Ash, President, Mississippi Bankruptcy Conference

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Opinion Summaries by JUDGE NEIL P. OLACK[1]

[1]These opinion summaries were prepared by Rachael H. Lenoir, Olivia O'Brien, and Natalie McCarty, judicial law clerks to U.S. Bankruptcy Judge Neil P. Olack. They include those opinions that have not been summarized previously in the materials provided at the Mississippi Bankruptcy Conference and all opinions rendered this year through June 30, 2021. Opinions pending on appeal, however, are not included in these summaries but are listed at the end. These materials are designed to provide general information and should not be considered as a substitute for the actual text of the opinions. Unless noted otherwise, all references to code sections are to the U.S. Bankruptcy Code, and all references to rules are to the Federal Rules of Bankruptcy Procedure.

The opinion summaries at numbered paragraphs (1) and (2) relate to the same bankruptcy case:

(1) Mansfield v. Capitala (In re On-Site Fuel Service, Inc.), Adv. Proc. 19-00059-NPO, consolidated with Shaffer v. Diesel Direct, Inc., Adv. Proc. 20-00007-NPO (Bankr. S.D. Miss. Nov. 10, 2020)

Chapter 7: The adversary proceeding filed by the chapter 7 trustee (the "Trustee") arises from the Asset Purchase Agreement ("APA") entered into by and among On-Site Fuel Service, Inc. ("On-Site") and Diesel Direct, Inc. Pursuant to the APA, after On-Site ceased its operations, it sold substantially all of its assets to Diesel Direct. The Trustee alleged that the Defendants, Diesel Direct, Capitala Finance Corp. ("Capitala"), CapitalSouth Partners Fund II, L.P., CapitalSouth Partners SBIC Fund III, L.P., and Harbert Mezzanine Partners III SBIC, L.P. ("Harbert"), and McGlinn, Capitala's primary board representative and chairman of On-Site's board structured the APA so that the consideration paid by Diesel Direct would be routed directly to the Defendants and bypass On-Site.

Diesel Direct retained Benny Taylor to provide an expert opinion on the valuation of assets sold by On-Site Fuel Service to Diesel Direct pursuant to the APA. The chapter 7 trustee filed a Motion in Limine to exclude the opinions and testimony of Taylor from evidence at the trial under Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). The Trustee conceded that Taylor was qualified to render an expert opinion in the field of personal property appraisal and that his testimony was relevant, but argued that his testimony, as reflected in his report was unreliable. The Trustee alleged that he did not follow the methodology required by the sales comparison approach even though he purportedly applied that approach in his report. The Trustee's contentions arose out of a dispute as to the extent of Taylor's reliance upon value information provided by third parties. The Court found that the Trustee's arguments challenging Taylor's methods would be handled best at trial through cross-examination. Keeping in mind the limited gatekeeper role necessary in a bench trial, the Court denied the Trustee's Motion in Limine.

Mansfield Oil Company of Gainesville, Inc. ("Mansfield") also filed a Motion to Exclude in its adversary proceeding against Defendants Capitala, Capital South Partners Fund II, LP, McGlinn, Harbert, and John C. Harrison. The Defendants jointly designated William O. Young ("Young") as an expert witness. Mansfield sought to preclude the Defendants from relying upon Young's opinions on the grounds that: (1) Young was unqualified to testify as an expert about "due diligence" or "credit underwriting"; (2) Young's opinions were irrelevant; and (3) Young's opinions were unreliable. Though Young had not performed due diligence or credit underwriting specifically in the tank wagon fuel supply industry or in this exact type of joint venture or strategic alliance agreement, his lack of specific or specialized expertise did not preclude him from analyzing and offering expert testimony as to Mansfield's conduct in relation to its dealings with On-Site. Young's level of expertise bore upon the weight of his testimony, not its admissibility. Huss v. Gayden, 571 F.3d 442, 452 (5th Cir. 2009). The Court reiterated its limited gatekeeper role in a bench trial and found that Mansfield's objections to the relevance of Young's proposed expert testimony would go to the weight of his testimony, not its admissibility, which Mansfield could attack at trial. Finally, while Mansfield alleged that Young's opinions were based on an incorrect industry standard, not based on objective criteria, and were nothing more than "ipse dixit," the Court found that Mansfield's concerns did not render Young's testimony unreliable and should be more properly explored at trial through "vigorous cross-examination [and] presentation of contrary evidence," as the Court, rather than a jury, was the ultimate finder of fact. Daubert, 509 U.S. at 596. Accordingly, the Court denied Mansfield's Motion to Exclude.

(2) In re On-Site Fuel Service, Inc., Case No. 18-04196-NPO (Bankr. S.D. Miss. Feb. 26, 2021)

Chapter 7: With the Court's approval, the chapter 7 trustee employed Liston & Deas, PLLC ("L&D") as special counsel under § 327 "to pursue generally all Causes of Action related to equitable and tort theories" in accordance with the Joint Venture Co-Counsel Agreement (the "JV Agreement") signed by L&D and Mitchell, McNutt & Sams ("MMS"). The JV Agreement set forth a hybrid or blended-fee structure. Compensation for legal fees would be paid at a reduced hourly rate of $150.00 and a contingent fee of 27.5% of all "sums recovered on behalf of the estate." L&D and MMS agreed to divide any contingent fees 60% to L&D and 40% to MMS.

L&D initiated an adversary proceeding on behalf of the chapter 7 trustee against two large creditors for equitable subordination pursuant to § 510(c). The trustee's equitable subordination claim against the creditors was settled and resolved, with the settlement approved by the Court. In the settlement, the creditors agreed to contractually subordinate their claims against the bankruptcy estate to the allowed claims of all other creditors with respect to the estate funds held by the trustee.

L&D filed a fee application seeking compensation for legal services performed related to the trustee's equitable subordination claim. The attached fee itemization showed that L&D incurred fees of $58,740.0 based on the reduced hourly rate of $150.00. L&D requested payment of those fees plus a contingent fee of $97,953.81 based upon application of a 27.5% contingent fee to $356,159.69, the amount of estate funds held by the trustee at the time of the hearing on the fee application. The blended-fee arrangement resulted in total fees of $156,693.81.

The United States Trustee (the "UST") objected to the request for $97,953.81 in contingency-based compensation. The UST maintained that "sums recovered" was not defined in the JV Agreement to include amounts saved the estate and, moreover, contingent fees are permissible only when based on new funds paid into the estate. Neither L&D nor the UST found any controlling authority that addressed reverse contingent fees for legal services that benefit a bankruptcy estate through the equitable subordination of claims. However, both pointed to *Adam v. Weinman (In re Adam Aircraft Industries, Inc.)*, 532 B.R. 814 (D. Colo. 2015).

The Court found that the phrase "sums recovered" in the JV Agreement included more than the influx of new money. Why else would L&D agree to a reduced fee and the potential of a reverse contingent fee in an equitable subordination case? Under these factual circumstances where the trustee fully supported the fee request and where the method used to calculate the amount of the savings was reasonable, the Court found that the blended-fee structure resulting in $156,693.81 in fees was reasonable.

The opinion summaries at numbered paragraphs (3), (4), (5), (6), and (7) relate to the following two bankruptcy cases:

In re Heritage Real Estate Investment, Inc., Case No. 14-03603-NPO (Bankr. S.D. Miss.)

Chapter 7: Heritage Real Estate Investment, Inc. ("Heritage") is one (1) of six (6) related

Opinion Summaries by JUDGE NEIL P. OLACK (continued)

entities operating under the umbrella of the Greater Christ Temple Apostolic Church (the "Church") in Eutaw, Alabama. The Church was established in 1961 by Bishop Luke Edwards ("Bishop Edwards"). Heritage was organized as a for-profit corporation in Mississippi in 1989 and served as a holding company for multiple businesses, including motels, a shopping center, and convenience stores. On November 6, 2014, Heritage commenced a bankruptcy case under chapter 11 (the "Heritage Bankruptcy Case"). In 2015, the Heritage Bankruptcy Case was converted to a chapter 7 case and a trustee was appointed to administer the bankruptcy estate (the "Trustee").

The Heritage Bankruptcy Case has a complicated and litigious history. The Trustee has filed four (4) adversary proceedings in the bankruptcy court and three (3) actions in Alabama and Mississippi state courts to recover personal and real property of the bankruptcy estate. The Trustee also has had to defend an adversary proceeding filed by creditors, and a "Whistleblower" complaint (the "Whistleblower Complaint") filed by Bishop Edwards individually and purportedly on behalf of Heritage and other Church-related entities in the U.S. District Court for the Northern District of Alabama (the "Alabama District Court").

In re Alabama-Mississippi Farm, Inc., Case No. 16-03603-NPO (Bankr. S.D. Miss.)

Chapter 7: Like Heritage, Alabama-Mississippi Farm, Inc. ("AL-MS Farm") operates under the umbrella of the Church. On March 31, 2016, AL-MS Farm filed a voluntary petition for relief under chapter 11 (the "AL-MS Farm Bankruptcy Case"). Months later, the Court converted the AL-MS Farm bankruptcy case to chapter 7, and the same trustee was appointed to administer the AL- MS Farm bankruptcy estate. The chapter 7 trustee is the same in the Heritage Bankruptcy Case and the AL-MS Farm Bankruptcy Case.

(3) (Nov. 18, 2020) On September 18, 2020, Dynasty Group, Inc. ("Dynasty"), another Church-related entity, filed the Motion to Stay (the "Motion to Stay") in the Heritage Bankruptcy Case asking the Court to stay the Trustee's execution of a final judgment entered in favor of the Trustee setting aside conveyances from Heritage to Dynasty of seventeen (17) parcels of property located in Sumter County Alabama (the "Alabama Final Judgment") on the ground that it had filed a petition for a writ of certiorari to the U.S. Supreme Court (the "Alleged Certiorari Petition") seeking review of the Alabama Final Judgment. The Trustee filed a response to the Motion to Stay questioning the filing of the Alleged Certiorari Petition since no copy was attached to the Motion to Stay. To expedite the resolution of the dispute, the Court ordered Dynasty to produce a copy of the Alleged Certiorari Petition, but Dynasty failed to do so.

On October 27, 2020, the Court held a hearing on the Motion to Stay. Dynasty argued that a stay preventing the Trustee from executing the Alabama Final Judgment was proper because the Alleged Certiorari Petition was pending before the Supreme Court. Counsel for Dynasty explained why he failed to produce a copy—another attorney was handling the Alleged Certiorari Petition and he himself had never seen it. Counsel stated that a "brief in support of the Petition," consisting of the brief filed with the Alabama Supreme Court during the appeal process, had been filed as a "stop gap" measure with the Supreme Court. The Court denied the Motion to Stay on the ground that Dynasty had not demonstrated that a timely petition for a writ of certiorari had been filed with the Supreme Court. Even if such a petition were pending before the Supreme Court, however, this Court was not the appropriate court to stay the execution of the Alabama Final Judgment. Doing so would have undermined the orderly process of the law. The Court also held that Dynasty had not taken the proper procedural steps to request injunctive relief against the Trustee or object to the sale of the property in question.

(4) (Dec. 18, 2020) Once the Alabama Supreme Court certified its decision affirming the Alabama Final Judgment, the Trustee initiated the process of selling the assets of the Heritage bankruptcy estate. During the pendency of the Motion to Stay, the Trustee filed the Motion for Approval of Auction Contract/Proposal, Sale of Property, Free and Clear of Liens and Auctioneer's Fees and Expenses (the "Motion to Sell") asking the Court to approve the sale of the properties awarded by the Alabama Final Judgment. Two objections to the Motion to Sell were filed by creditors. The Trustee and the objecting creditors reached an agreement, and the Court entered the Agreed Order Approving Motion for Approval of Auction Contract/ Proposal, Sale of Property, Free and Clear of Liens, and Auctioneer's Fees and Expenses (the "Sale Order").

On November 16, 2020, Dynasty filed the Motion to Reconsider (the "Motion to Reconsider") asking the Court to reconsider the Sale Order. In the Motion to Reconsider, Dynasty alleged that it "was not allowed to give input in the hearing, or raise its objection predicated on its prior Motion to Stay proceedings until Dynasty's Petition for writ of Certiorari to the United State Supreme Court is adjudicated." The Court found that Dynasty did not file a timely written objection to the Motion to Sell. The Court, therefore, denied the Motion to Reconsider from the bench and issued the Order Denying Motion to Reconsider finding that Dynasty: (1) did not have an interest in the property at issue; (2) failed to file a written objection to the Motion to Sell before the deadline to assert an interest in the disposition of the property; (3) misinterpreted the Court's bench ruling on the Motion to Stay; (4) did not reserve its opportunity to participate in the hearing on the Motion to Sell because it did not file an objection; (5) did not properly seek authority to participate via telephone; and (6) waived the right to participate in the settlement negotiations that produced the Sale Order.

(5) (Mar. 12, 2021) On January 5, 2021, the Trustee filed applications for approval to pay compensation and expenses of the Trustee's counsel in the AL-MS Farm Bankruptcy Case and the Heritage Bankruptcy Case. The Trustee requested that the Court approve the interim applications for fees and expenses incurred by Watkins & Eager, PLLC ("Watkins & Eager") as special counsel for the Trustee. In total, Watkins & Eager charged $49,176.47 in fees and expenses in the fee application in the Heritage Bankruptcy Case and $23,375.39 in fees and expenses in the fee application in the AL-MS Farm Bankruptcy Case. The Estate of Bruce L. Johnson, Michael L. King, and William Harrison (collectively, the "Harrison Parties") filed objections to the fee applications in both bankruptcy cases. The Harrison Parties argued that the attorneys' fees were unreasonable because they were disproportionate to the cash receipts.

The Court first utilized the established analysis for allowing interim compensation under § 331. The Court applied the lodestar method in concert with the twelve (12) factors articulated in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974) to determine that the hours expended and hourly rate charged were reasonable. The Court did adjust the interim compensation by $60.00 under the lodestar method because of a computation error. The Court found that any further adjustment based on the *Johnson* factors was not necessary. The Court emphasized that interim fee applications are not final determinations.

Smith v. Edwards (In re Heritage Real Estate Investment, Inc.), Case No. 20-00034-NPO (Bankr. S.D. Miss. Feb. 4, 2021) and Smith v. Edwards (In re Alabama-Mississippi Farm, Inc.), Case No. 16-03603-NPO (Bankr. S.D. Miss. Feb. 4, 2021)

Chapter 7: After Bishop Edwards filed the Whistleblower Complaint in the Alabama District Court but before the Court dismissed the Whistleblower Complaint, the Trustee initiated two adversary proceedings by filing the Trustee's Complaint for (I) Preliminary and Permanent Injunction and (II) for Contempt Sanctions against Bishop Luke Edwards for

Opinion Summaries by JUDGE NEIL P. OLACK (continued)

Violating the Automatic Stay and (III) for Other Relief (the "Adversary Complaint") on behalf of the AL-MS Farm bankruptcy estate and the Heritage bankruptcy estate. The Court consolidated the hearings in the adversary proceedings since the pleadings and dockets were identical.

In the adversary complaints, the Trustee sought a preliminary and permanent injunction pursuant to § 105 prohibiting Bishop Edwards from pursuing any claims in any other federal court or in any state court that belonged to the bankruptcy estates or that collaterally attacked any final orders of the Court. The Trustee also sought damages for civil contempt under § 105 against Bishop Edwards for violation of the automatic stay under § 362(a)(3).

(6) (Nov. 18, 2020) The relief sought by the Trustee in the adversary proceedings concerned the Whistleblower Complaint, which Bishop Edwards filed in the Alabama District Court without providing notice to the Trustee or the Court, and which began by invoking the procedures in 50 U.S.C. § 3033(k)(5)(A) to report an "urgent concern." As the Alabama District Court later held, it was unclear how 50 U.S.C. § 3033(k)(5)(A), which protects intelligence officials from retaliation, relates to the factual allegations in the Whistleblower Complaint. The Alabama District Court also noted that an "urgent concern" under 50 U.S.C. § 3033(k)(5)(A) should be reported as a "complaint to the Inspector General." The Whistleblower Complaint also alleged the existence of a criminal enterprise in violation of numerous criminal statutes: the Drug Abuse Prevention and Control Act with respect to continuing criminal enterprises (21 U.S.C. § 848); the RICO Act definitions of "racketeering activity" and "state" (18 U.S.C. § 1961) and for laundering monetary instruments (18 U.S.C. § 1956); the general provisions of the criminal code (18 U.S.C. § 2); the provisions of the criminal code regarding false entries and reports of moneys or securities (18 U.S.C. § 2073); for deprivation of rights under color of law (18 U.S.C. § 242); and for obstruction of justice by retaliating against a witness, victim, or an informant (18 U.S.C. § 1513). To the extent the allegations are construed as a private civil claim under the RICO Act, 18 U.S.C. § 1964, the factual basis appeared to arise from the entry of an Alabama default judgment against Heritage, AL-MS Farm, Bishop Edwards, and other Church-related entities and the pre-petition sale of property to AL-MS Farm in 2007.

In the adversary complaint, the Trustee asked the Court, pursuant to § 105, to enjoin Bishop Edwards from pursuing the allegations in the Whistleblower Complaint individually or on behalf of Heritage or AL-MS Farm in any foreign jurisdiction. On October 27, 2020, the Court held a hearing on the request for a preliminary injunction. The Court considered the four (4) elements for preliminary injunctive relief: (1) a substantial likelihood that the movant will prevail on the merits; (2) a substantial threat that the movant will suffer irreparable injury if the injunction is not granted; (3) that the threatened injury to the movant outweighs the threatened harm an injunction may cause the party opposing the injunction; and (4) that the granting of the injunction will not disserve the public interest. *See In re Zale Corp*., 62 F.3d at 765 (citing *In re Commonwealth Oil Ref. Co*., 805 F.2d at 1189). The Court found that there was a substantial likelihood that the Trustee would prevail on the merits because Bishop Edwards had no authority to assert claims belonging to the bankruptcy estates of Heritage and AL-MS Farm, and, if true, his actions violated the automatic stay. The Court found that Bishop Edwards's unauthorized exercise of authority over property of the bankruptcy estates of Heritage and AL-MS Farm were collateral attacks on various orders in the Heritage Bankruptcy Case and AL-MS Farm Bankruptcy Case. The Court, therefore, found that the threat of irreparable injury to the Trustee and the bankruptcy estates was evident. The Court also found that a preliminary injunction enjoining Bishop Edwards from pursuing claims on behalf of or belonging to Heritage and AL-MS Farm was simply a prohibition from doing that which he was not permitted to do in the first place and would not cause Bishop Edwards harm or disserve the public interest. While the Fifth Circuit has not directly addressed the issue of "unusual circumstances" necessary to warrant an injunction, the Court found that other courts' standard of unusual circumstances existed to warrant a preliminary injunction against Bishop Edwards.

(7) (Feb. 4, 2021) On November 9, 2020, the Trustee filed the Request to Clerk to Enter Default asking the Clerk of the Bankruptcy Court to enter a default against Bishop Edwards for his failure to plead, answer, or otherwise defend the adversary proceedings. The Trustee attached the Affidavit of Jim F. Spencer, Jr. in Support of Entry of Default (the "Affidavit"). The Affidavit provided that a copies of the adversary complaints had been personally served on Bishop Edwards who had failed to answer, plead, or otherwise defend the adversary proceedings. The Clerk entered the Entry of Default on November 10, 2020.

The Trustee filed the Motion for Default Judgment (the "Motion for Default") in the adversary proceedings asking the Court to enter a default judgment permanently enjoining Bishop Edwards in accordance with the adversary complaints and holding Bishop Edwards in civil contempt for violating the automatic stay under § 362(a)(3). The Court held a hearing on the Motion for Default. Bishop Edwards did not appear. At the hearing, the Trustee testified that Bishop Edwards, or individuals purportedly acting on his behalf, continue to interfere with the administration of the bankruptcy estate and pursue claims on behalf of Heritage and AL-MS Farm without his authorization. The Trustee also stated that recent filings in the Heritage Bankruptcy Case and in the Mississippi District Court appear to violate the preliminary injunction issued by the Court. The Court first determined that Bishop Edwards failed to plead or otherwise defend against the adversary complaints and that he did not file a response to the Motion for Default or appear at the hearing to offer evidence that a default judgment is not warranted. In the absence of evidence of a good faith mistake or excusable neglect, the Court found that a default judgment was warranted. The Court also found that the Trustee established that Bishop Edwards violated the automatic stay pursuant to § 362(a)(3) by filing the Whistleblower Complaint and continuing to pursue the claims in the Whistleblower Complaint in violation of the preliminary injunction. Similar to the elements for a preliminary injunction, the Court employed the elements provided by the Fifth Circuit to grant a permanent injunction against Bishop Edwards. The Court found that a permanent injunction was necessary to prevent Bishop Edwards and others acting on his behalf, from pursuing improper claims and litigation. The Court also awarded the Trustee damages in the form of attorneys' fees and expenses for Bishop Edwards' willful violation of the automatic stay.

(8) In re Hall, Case No. 11-03139-NPO (Bankr. S.D. Miss. Nov. 20, 2020)

Chapter 7: On September 8, 2011, the debtors filed a voluntary petition for relief under chapter 11. The debtors' schedules provided that the debtors owned real property located at 521 Holly Bush Road, Brandon, Mississippi (the "Property") with a current value of $400,000.00 and that the creditor held a claim secured by the Property of $245,995.00.

The creditor filed the Motion for Relief from automatic Stay and for Abandonment or Alternatively, for Adequate Protection (the "First Motion for Relief") asking the Court to lift the automatic stay with respect to the Property because the Debtors had defaulted on payments from October 2011 through April 2012 for a balance of $14,763.79. The debtors responded denying that the creditor was entitled to the requested relief. The creditor and debtors reached an agreement and the Court entered an Agreed Order (the "2012 Agreed Order") allowing the Debtors to pay the amounts due from August 2011 through August 2012, which totaled $27,059.87, through the chapter 11 plan.

Opinion Summaries by JUDGE NEIL P. OLACK (continued)

On April 1, 2014, the bankruptcy case was converted to a case under chapter 7 because the debtors were unable to obtain confirmation of a chapter 11 plan by the provided deadline.

After the Court converted the bankruptcy case, the creditor filed the Motion for Relief from Automatic Stay and for Abandonment, or Alternatively for Adequate Protection (the "Second Motion for Relief") alleging that the debtors were in default from April 2012 through April 2014 and that the debtors owed $45,047.37. The debtors filed a response to the Second Motion for Relief. The day before the scheduled hearing on the Second Motion for Relief, the Creditor withdrew the Second Motion for Relief.

Over nine (9) months after the Second Motion for Relief was filed, on January 27, 2015, the creditor filed another Motion for Relief from Automatic Stay and for Abandonment, or Alternatively for Adequate Protection (the "Third Motion for Relief") alleging that the debtors owed payments from May 2012 through January 2015 that totaled an arrearage of $62,318.65. The Trustee filed a response to the Third Motion for Relief requesting that the Court allow the Trustee to liquidate the Property because the equity in the Property belonged to the bankruptcy estate. The debtors also filed a response alleging that the creditor had "'lost' the application for restructuring on at least half a dozen occasions and has otherwise failed to adequately 'service' debtor's restructuring rights under applicable law." The parties reached an agreement on the Third Motion for Relief, and the Court entered the Agreed Order (the "Agreed Order") resolving the Third Motion for Relief. The Agreed Order stated that the debtors were in arrears on monthly post-petition payments from May 2012 through March 2015 in the amount of $61,098.16 and that the debtors agreed to "pay the sum of $275,000.00 amortized over 30 years at 4.5% interest to Creditor." The Agreed Order provided that the debtors would "resume the monthly mortgage payments in the amount of $1738.55 P&I plus $245.92 escrow direct to PHH beginning with the April 2015 payment." The Agreed Order required the creditor to send a notice of default if the Debtors became more than thirty (30) days delinquent in their payments beginning with the April 2015 payment. The debtors then would have fourteen (14) days to cure the default.

On June 27, 2016, the Court entered the Amended Agreed Order (the "Amended Agreed Order") modifying the principal and interest payments from $1,783.55 to $1,393.00. The debtors negotiated the terms of the Agreed Order with the former counsel for the creditor and the Amended Agreed Order was a correction to the originally agreed upon terms of the Agreed Order.

On June 10, 2020, the creditor filed the Notice of Default After Agreed Order (the "Default Notice") notifying the debtors that pursuant to the 2012 Agreed Order, they were in default in the amount of $15,519.87 for the period from August 2019 through May 2020 and that they had fifteen (15) days to cure the deficiency. The creditor attached a "breakdown" that detailed ten (10) payments of $1,598.42 due from August 2019 through May 2020. The debtors filed an objection to the Default Notice alleging that it was defective and that they were current on their payments under the Amended Agreed Order. At the hearing on the Default Notice (the "Hearing"), the creditor attempted to reconcile the Default Notice with its own documentation entered into evidence and the debtors' documentation entered into evidence. The Court found that the creditor's documentation alone was hopelessly inconsistent and that the creditor's representative did not have first-hand knowledge of the transaction to support the speculative explanations. The Court found that the errors in the Default Notice did not provide the debtors with effective notice. Recognizing that this finding did not substantively resolve the parties' dispute, the Court ordered the creditor to provide the debtors with an amount calculated pursuant to the Amended Agreed Order. The Court disallowed the creditor from issuing another notice until the creditor retained an accountant to reconcile the debtors' account. The Court also held that if the creditor failed to reconcile the debtors' account, the Court would order the account current as of a particular date.

(9) In re Jordan Landing, LP, Case No. 20-02176-NPO (Bankr. S.D. Miss. Dec. 2, 2020)

Chapter 11: Jordan Landing, L.P. filed a petition for relief under chapter 11. The basis for venue was by virtue of Jordan Landing's domicile in Canton, Mississippi. 28 U.S.C. § 1408(1). The Tennessee Housing Development Agency d/b/a Volunteer Mortgage Loan Servicing (the "THDA") filed a motion asking the Court to transfer the case to a bankruptcy court in Tennessee. The THDA's primary argument for transfer was that because Jordan Landing had a pending motion to determine its tax liability pursuant to 11 U.S.C. § 505(a)(1) (the "Tax Motion"), venue should be transferred to a Tennessee bankruptcy court. The THDA asserted that the Tax Motion would require analysis of Tennessee state law.

The Court found that because Jordan Landing was domiciled in Mississippi, Mississippi was a proper venue for Jordan Landing to commence its bankruptcy case under 28 U.S.C. § 1408(1). The Court also found that because Jordan Landing's principal assets were located in Tennessee, Tennessee was also a proper venue. The Court considered the factors promulgated by the Fifth Circuit Court of Appeals in *Puerto Rico v. Commonwealth Oil Refining Co. (In re Commonwealth Oil Refining Co.)*, 596 F.2d 1239 (5th Cir. 1979) ("CORCO"). The Court found that the THDA's primary argument for the transfer of venue failed for two reasons: (1) the Tax Motion was resolved and no longer pending; and (2) even if the Tax Motion had not been resolved, the Court is often called upon to apply state law to bankruptcy issues, so to the extent that Tennessee state law issues arose, judicial economy would not be affected by the routine application of state law to bankruptcy issues. The Court determined that neither CORCO prong—"the interest of justice" or "the convenience of the parties"—warranted the transfer of the case to a Tennessee bankruptcy court.

(10) The Jefferson Bank v. Hollins (In re Hollins), Adv. Proc. 19-00057-NPO (Bankr. S.D. Miss. Dec. 3, 2020)

Chapter 7: The debtor executed a promissory note in favor of Jefferson Bank in the amount of $389,000.00 secured by farm equipment. Attached to the security agreement were eight (8) bills of sale memorializing the purported sale of the farm equipment to the debtor. Jefferson Bank initiated an adversary proceeding seeking actual damages of $365,139.75 and attorneys' fees and costs and a declaratory judgment that the debt is nondischargeable under §§ 523(a)(2) and/or (a)(6). Jefferson Bank alleged that the debtor breached the promissory note by failing to make payments and committed fraud by providing false information about his financial condition and his ownership of the collateral. Jefferson Bank filed a summary judgment motion on its dischargeability claims under § 523(a)(2)(A) and (B).

Because the alleged debt to Jefferson Bank had not been reduced to judgment, its motion for summary judgment involved a two-step process: (1) the establishment of the debt owed Jefferson Bank and (2) a determination of the dischargeability of that debt under bankruptcy law. The Court denied the summary judgment motion on the ground that Jefferson bank alleged insufficient undisputed facts to support the first step, the establishment of a debt for breach of contract or fraud.

The opinion summaries at numbered paragraphs 10, 11, and 12 relate to the following bankruptcy case:

(11) In re McHenry, Case No. 20-00268-NPO (Bankr. S.D. Miss. Jan. 11, 2021)

Chapter 7: The debtor filed a voluntary petition for relief under chapter 7 of the U.S. Bankruptcy Code on January 24, 2020. On Schedule D: Creditors Who Have Claims Secured by Property, the Debtor disclosed a claim owed

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to the Creditor in the amount of $45,000.00 secured by a 2017 Ford F-250 (the "Vehicle"). The creditor filed a Motion for Abandonment and Relief From Automatic Stay (the "Motion") seeking relief from the automatic stay imposed by § 362 and the abandonment of the Vehicle form the bankruptcy estate pursuant to § 554. The creditor attached the Retail Installment Sale Contract-Simple Finance Charge to the Motion indicating that the Creditor financed the original amount of $62,141.63 for the purchase of the Vehicle and that the Debtor agreed to repay the loan in monthly installments of $976.35. The creditor alleged that the Debtor had missed four (4) payments of $976.35 for the months of August 2020 through November 2020 for a total delinquency of $3,889.65. The Bankruptcy Clerk issued the Notice of Hearing and Deadlines (the "Notice") setting January 4, 2021 as the date for a telephonic hearing on the Motion and December 21, 2020 as the deadline for filing an objection. The Notice provided that "[i]f no response is filed, the Court may consider the Motion and enter an order granting relief before the hearing date." The debtor did not file a response to the Motion, and the Court entered the Default Order Granting Relief from Automatic Stay (the "Order") granting the Motion on December 22, 2020. The next day, the debtor filed the Motion for Reconsideration (the "Motion to Reconsider") asking the Court to vacate the order granting the Motion.

In the Motion to Reconsider, the debtor explained that on December 11, 2020, counsel for the debtor discussed the Motion with counsel for the creditor. Counsel for the debtor informed counsel for the creditor that the debtor had furnished proof that he made his monthly payment to the creditor for each month in question and asked the creditor to withdraw the Motion as moot. Counsel for the creditor requested copies of the debtor's statements. On December 17, 2020, counsel for the debtor sent to counsel for the creditor via U.S. mail and email the Debtor's bank statements ostensibly showing that the disputed payments had been made and requesting that the creditor withdraw the Motion. On December 22, 2020, one day after the deadline to file an objection to the Motion, counsel for the debtor reached out to counsel for the creditor inquiring as the why the creditor had not withdrawn the Motion as moot. Counsel for the creditor explained that the Court had probably entered the Order because no response was filed and that the creditor still believed the debtor missed the August 2020 payment. At the hearing on the Motion to Reconsider, counsel for the debtor explained that he did not file a response to the Motion because of his conversation with counsel for the creditor on December 11, 2020 and that numerous persons in his law office had been absent due to the COVID-19 pandemic, which hampered his ability to file a response.

Based on the totality of the circumstances, the Court held that cause existed to reconsider the Order. Although the Federal Rules of Civil Procedure do not recognize a general motion for reconsideration, courts have considered such requests as either a motion to "alter or amend" under Rule 59(e) of the Federal Rules of Civil Procedure ("Rule 59"), as made applicable to bankruptcy proceedings by Rule 9023, or a motion for "relief from judgment" under Rule 60(b) of the Federal Rules of Civil Procedure ("Rule 60(b)"), as made applicable to bankruptcy proceedings by Rule 9024. The Court found that because the Motion to Reconsider, filed on day after the entry of the Order, satisfied the stringent time requirements of Rule 59(e) and because Rule 59(e) motions provide relief on grounds at least as broad as Rule 60(b) motions, it would consider the Motion to Reconsider under Rule 59(e). Under Rule 59(e), a final judgment may be amended if: (1) there is a manifest error of law or fact; (2) newly discovered evidence; or (3) an intervening change in controlling law. The Court found that the debtor proved that (1) it exercised due diligence in obtaining the newly discovered evidence and (2) the evidence was material and controlling and clearly would have produced a different result if presented before the Order. The Court held that it would not have signed and entered the Order if it had realized that the allegation in the Motion were incorrect. The Court noted that typically a failure to file a response when the ability to do so is within counsel's "reasonable control" does not justify relief under Rule 59(e), but because of the unique circumstances of the COVID-19 pandemic and the creditor's failure to produce evidence regarding the actual number of missed payments before the response deadline, relief was warranted.

(12) Bond, et al. v. McHenry (In re McHenry), Adv. No. 20-00024-NPO) (Bankr. S.D. Miss. Jan. 26, 2021)

Chapter 7: The adversary proceeding was an attempt by defrauded investors to recoup their losses from the debtor who they allege personally recruited them to invest in a Ponzi scheme. From 2011 until April 2018, Arthur Lamar Adams ("Adams"), through his wholly-owned company, Madison Timber Properties, LLC ("Madison Timber"), operated a Ponzi scheme. *United States v. Adams*, 3:18-cr-00088-CWR-LRA (S.D. Miss. May 1, 2018). Investors in Madison Timber were led to believe that their money was used to purchase timber from landowners; that Madison Timber sold the timber to lumber mills at a higher price; and that Madison Timber repaid investors from the profits. The investments appeared to be secured by timber deeds and cutting agreements, but the documents were fake. The Securities and Exchange Commission filed a complaint against Adams and Madison Timber in the U.S. District Court for the Southern District of Mississippi (the "District Court") alleging securities fraud. *Securities and Exchange Commission v. Arthur Lamar Adams and Madison Timber Properties, LLC*, No. 3:18-cv-00252-CWR-FKB. The District Court issued an order appointing Alysson Mills to serve as the Receiver (the "Receiver") for Adams's and Madison Timber's estates.

On October 1, 2018, the Receiver filed a lawsuit against the debtor and his wholly-owned company, First South Investments, LLC ("First South") in the District Court seeking the return of more than $16 million paid in commissions by Madison Timber. *Alysson Mills v. Michael D. Billings, et al.*, No. 3:18-cv-00679-CWR-FKB (S.D. Miss. Aug. 16, 2019). On August 16, 2019, the District Court entered an order granting the Receiver's motion for summary judgment on her fraudulent transfer claims against the Debtor and First South. The District Court entered summary judgment against the debtor and First South in the amount of $3,472,320.00.

On January 24, 2020, the debtor filed a voluntary petition for individuals under chapter 7 of the U.S. Bankruptcy Code. In his bankruptcy schedules, the debtor identified the Receiver as a creditor holding an unsecured claim of $3,472,320.00. On April 23, 2020, the Receiver filed an adversary proceeding to determine the dischargeability of debt pursuant to § 523 and § 727. No. 20-00022-NPO (Bankr. S.D. Miss. April 23, 2020). The Receiver alleged that the $3,473,320.00 debt is nondischargeable as a debt obtained by false pretenses, false presentations, and/or actual fraud under § 523(a)(2)(A); arising from the debtor's fraud or defalcation while acting in a fiduciary capacity under § 523(a)(4); and/or arising from the debtor's willful and malicious injury to another under § 523(a)(6). The Receiver also alleged that the discharge of the debtor's debt to all creditors is barred for concealing, falsifying, or failing to keep information from which his financial condition might be ascertained under § 727(a)(3); for knowingly and fraudulently making a false oath or account under § 727(a)(4); and for knowingly and fraudulently making a false account under § 727(a)(5).

On April 24, 2020, twenty-one (21) individually named plaintiffs (the "Plaintiffs") initiated the Adversary Proceeding by filing the Adversary Complaint Objecting to Discharge Pursuant to § 523 and § 727 (the "Complaint"). The facts alleged in the Complaint are similar to those alleged by the Receiver in the previously mentioned adversary proceeding. The Plaintiffs argued that the District Court judgment entered in favor of the Receiver does not include the satisfaction of damages suffered by the Plaintiffs for claims arising from the Debtor's

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conduct. The Plaintiffs subsequently filed the First Amended Adversary Complaint Objecting to Discharge Pursuant to 11 U.S.C. § 523 and 11 U.S.C. § 727 (the "Amended Complaint") that was substantially similar to the Complaint. Before the Debtor was served with a copy of either the Complaint or the Amended Complaint, he filed the Answer to Adversary Complaint to Determine Dischargeability of Debt Pursuant to: 11 U.S.C. 523 and 11 U.S.C. 727 (the "Answer") consisting of a general denial of all the allegations.

The Plaintiffs failed to perfect service of the Complaint within the ninety (90)-day time period required by Rule 4(m). When the deadline to perfect service of the Amended Complaint approached, the Plaintiffs filed a Motion to Deem Any Affirmative Defense to Service of Process Waived or in the Alternative for Enlargement of Time to Complete Service (the "Motion to Waive") asking the Court to declare that the Debtor had waived any defense to the service of process. The Motion to Waive was riddled with errors. No response to the Motion to Waive was filed. The Court held a hearing on the Motion to Waive and granted the Motion to Waive. Pursuant to Local Rule 5005-1(a)(2)(D)(i) of the Uniform Local Bankruptcy Rules for the Northern and Southern District of Mississippi, the Court signed the proposed Order (the "Order") prepared by counsel for the Plaintiffs. The Order stated that the Debtor "shall file an Answer to the [Complaint] within fourteen (14) days of the date of this Order." When the Debtor failed to file an answer pursuant to the Order, the Plaintiffs filed the Application to the Clerk for Entry of Default alleging that the Debtor failed to "plead, answer or otherwise defend" the Adversary Proceeding. That same day, the Plaintiffs filed the Plaintiffs' Request for Default Judgment Against William Byrd McHenry, Jr. (the "Motion") asking the Court to enter a default judgment against the Debtor and grant "the relief set forth in the Plaintiffs' Adversary Complaint." Three (3) days after the Bankruptcy Clerk's entry of default, the Debtor filed the Answer to First Amended Adversary Complaint Objecting to Discharge Pursuant to 11 U.S.C. : 523 [*sic*] and 11 U.S.C. : 727 [*sic*] (Previously Filed with Date Stamp Attached) (the "Answer to Amended Complaint") arguing that he already filed an answer in the Adversary Proceeding.

The Court held a hearing on the Motion. The debtor testified that he believed he had done everything he was required to do by the Court and the law by filing the Answer and adhering to the disclosure requirements. The Court found that good cause existed to set aside the Bankruptcy Clerk's entry of default and deny the Motion. The Court held that the imprecise references to pleadings by both parties created an ambiguity in the timeline and that the debtor's status as a *pro se* litigant deemed his misunderstanding excusable. The Court also found that the Plaintiffs did not provide any evidence of prejudice by being required to prove the claims and that the debtor should not be denied an opportunity to participate in the Adversary Proceeding.

(13) Mills v. McHenry (In re McHenry), Adv. Proc. 20-00022-NPO (Bankr. S.D. Miss. Mar. 26, 2021)

Chapter 7: The facts in the adversary arise from the $3,473,320.00 judgment (the "Judgment") the Receiver obtained against the Debtor in the U.S. District Court for the Southern District of Mississippi (the "District Court"). The Debtor filed a petition for relief under chapter 7, hoping to discharge the $3,473,320.00 debt owed to the Receiver. The bankruptcy filing automatically stayed the District Court Litigation, including an order requiring the Debtor to produce financial documents. In the bankruptcy case, the Receiver requested, and the Debtor agreed, for him to undergo an examination under Rule 2004. The scope of the document production was a point of contention between the Debtor and the Receiver, ultimately culminating in the Receiver filing a motion to compel and two motions for sanctions against the Debtor. The documents that the Debtor did produce to the Receiver showed that he used an account held by First South (the "First South Account") to pay the majority of his and his wife's personal expenses. At a deposition taken by the Receiver, the Debtor confirmed that he paid personal household expenses from the First South Account. When asked about deposits into the First South Account, he testified that he could not recall the source of the funds. The Debtor never produced specific information about funds deposited into the First South Account. While the Debtor eventually produced the requested documents to the Receiver, including the First South Account records, he did not amend his bankruptcy schedules to include the First South Account.

The Receiver asked the Court to find the Judgment nondischargeable pursuant to either 11 U.S.C. § 727(a) or § 523(a). During the course of the document production dispute in the bankruptcy case, the Receiver filed a motion for summary judgment in the adversary seeking summary judgment as to all claims asserted in the complaint. The Receiver contended that the Debtor should be denied a discharge under § 727(a)(4) because he did not disclose on his schedules all bank accounts used by him, specifically the First South Account, and those misstatements or omissions constituted the making of a false oath or statement. The Debtor never amended his bankruptcy schedules to include the First South Account, and his schedules also did not list the income received and deposited into the First South Account. The Court found that the Debtor's omissions in his bankruptcy schedules constituted a false oath. In addition, the Debtor's omissions were made knowingly because his testimony indicated that he at least knew that he owned an equitable interest in the First South Account. Finally, while a debtor should be granted a discharge in the event of an honest mistake, the Debtor failed to take advantage of multiple opportunities to correct his errors. *Gebhardt v. Gartner (In re Gartner)*, 326 B.R. 357, 371 (Bankr. S.D. Tex. 2005). Few, if any, assets are more material to a consumer debtor's financial affairs than a bank account. *Johnson v. Baldrige (In re Johnson),* 256 B.R. 284, 291-92 (Bankr. E.D. Ark. 2000). Accordingly, the undisputed facts established that the Receiver was entitled to a judgment as a matter of law that the Debtors debts are nondischargeable pursuant to § 727(a)(4)(A).

(14) In re Kevin Kemp, Case No. 20-00655 (Bankr. S.D. Miss. Feb. 5, 2021)

Chapter 12: The Debtor filed a petition for relief under chapter 12. After the Court denied confirmation of the Debtor's first chapter 12 plan, the Debtor filed a motion to convert the chapter 12 case to a case under chapter 11, subchapter V ("Subchapter V"). The Debtor contended that the compensation requested by the chapter 12 trustee (the "Trustee") caused the plan to lack feasibility and/or was excessive in comparison to the costs, expenses, and fees of a case filed under Subchapter V. The Trustee and a creditor objected to the conversion, arguing that there is no provision in chapter 12 that allows conversion to Subchapter V.

Chapter 12 of the U.S. Bankruptcy Code permits a debtor to convert from a chapter 12 to a chapter 7 but is silent as to whether a debtor may convert to a case under chapter 11. 11 U.S.C. § 1208(a). The Fifth Circuit Court of Appeals had not yet addressed the issue, and the Court identified a split of authority amongst the courts that had. The Debtor relied upon a line of cases that permitted conversion in certain circumstances because the omission in the statute was viewed as an intent by Congress to leave the decision to the discretion of the court. *In re Orr,* 71 B.R. 639, 641 (Bankr. E.D.N.C. 1987). The Trustee relied upon the opposite line of cases where courts denied conversion on the ground that the legislative history of 11 U.S.C. § 1208 indicates the omission of chapter 11 from the statute was intentional. *In re Colón,* No. 16-0060 (ESL), 2016 WL 3548821, *5 (Bankr. D.P.R. June 16, 2016); *In re Christy,* 80 B.R. 361, 364 (Bankr. E.D. Pa. 1987).

The Court found that the statute is clear and unambiguous and could not discern from the plain language of 11 U.S.C. § 1208(a) any intent by Congress to allow a debtor to convert

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a chapter 12 case to a case under any chapter other than chapter 7. In applying traditional canons of statutory interpretation, the Court looked to similar conversion provisions found in chapter 7 and chapter 13 that specifically mention conversion to chapter 11. 11 U.S.C. § 706(a); 11 U.S.C. § 1307(a), (d). The Court read the inclusion in § 1208 of language permitting conversion to chapter 7 as excluding conversion to any other chapter. Declining to violate canons of statutory interpretation and the plain-meaning principle by modifying § 1208(a) to include language allowing conversion from chapter 12 to chapter 11, the Court found that the Debtor was not permitted to convert his chapter 12 bankruptcy case to a case under Subchapter V.

(15) In re Mississippi Maternal-Fetal Medicine, P.A., Case No. 21-00091-NPO (Bankr. S.D. Miss. Feb. 18, 2021)

Chapter 11: The debtor is an obstetrics and gynecology practice that provides maternal and fetal medicine and specializes in the care of expectant mothers that are considered high-risk. On January 20, 2021, the debtor filed a voluntary petition for non-individuals under subchapter V of chapter 11 of the U.S. Bankruptcy Code (the "Petition") and classified its business as a health care business as defined in § 101(27A). The debtor filed the Motion for Determination that Appointment of a Patient Care Ombudsman is Unnecessary (the "Motion") arguing that the appointment of a patient care ombudsman ("PCO") pursuant to § 333 is unnecessary. Strategic Funding Source, Inc. ("Strategic") then filed the Motion to Prohibit Use of Cash Collateral (the "Motion on Cash Collateral") asking the Court to prohibit the use of its cash collateral pursuant to § 363(e) or in the alternative to provide for adequate protection as a condition to its use pursuant to § 361. The hearing on the Motion on Cash Collateral was set for March 9, 2021, after the hearing on the Motion.

At the hearing on the Motion, Dr. Naef, the president of the debtor and only doctor employed by the debtor, testified about the circumstances that caused the debtor to file the Petition. Specifically, Dr. Naef explained that the Debtor had fallen behind on its obligation to Strategic, and Strategic obtained a garnishment and seized all of the debtor's cash in its accounts. In order to continue operating, the debtor obtained funding from an alternative lender and was continuing to use the alternative funding to maintain its normal operations.

The Court considered the factors articulated in *In re Alternate Family Care,* 377 B.R. 754 (Bankr. S.D. Fla. 2007) to determine that the appointment of a PCO was not necessary at the time. The Court, however, reserved the right to reconsider the *Alternate Care* factors and the necessity of a PCO at any time during the Bankruptcy Case. Specifically, the Court would consider whether a PCO was necessary at the conclusion of the hearing on the Motion on Cash Collateral. At that hearing, the parties had reached an agreement on the issues in the Motion on Cash Collateral and that the parties would submit an agreement for the Court's approval. The Court, therefore, upheld its previous determination that the appointment of a PCO was not necessary at the time.

(16) Bridgewater Owners Ass'n, Inc. v. Robinson (In re Robinson), Adv. Proc. 20-00049 (Bankr. S.D. Miss. Mar. 8, 2021)

Chapter 7: The Plaintiff is the homeowners' association for Bridgewater Subdivision. The Plaintiff brought suit against the Debtors in state court seeking injunctive relief against the Debtors and New England Contractors, owned by the debtor Abby Robinson. The Plaintiff sought to enforce compliance with its covenants governing construction within the subdivision. The Plaintiff alleged that the Debtors deviated from the covenants in numerous ways. After a two-day trial, the state court entered a Judgment, ruling that the Debtors deviated from the covenants and that the Plaintiff was entitled to an injunction requiring the Debtors and New England Contractors to correct the deviations within ninety (90) days. The state court also granted the Plaintiff its attorneys' fees and expenses in the amount of $206,761.18.

The Plaintiff initiated an adversary proceeding (the "Adversary") by filing a Complaint requesting a determination that the attorneys' fees and expenses of $206,761.18 awarded by the state court and additional attorneys' fees and expenses of $181,961.34 incurred by the Plaintiff after the Judgment be deemed nondischargeable pursuant to § 523(a)(6). The Debtors in response filed a Motion to Dismiss the Complaint, contending that the doctrines of *res judicata* and "unclean hands" barred the relief sought in the Adversary and denying that their debt to the Plaintiff is nondischargeable pursuant to § 523(a)(6). In the same pleading, the Debtors asserted a counterclaim under Rule 9011(b), arguing that the Complaint was frivolous and seeking sanctions against the Plaintiff and its counsel on the ground that they allegedly knew that *res judicata* barred the Complaint.

The Debtors' *res judicata* argument hinged on their contention that the Plaintiff did not raise any new issue in the Complaint that was not previously addressed by the Judgment, and therefore, *res judicata* applied. In other words, they contended that the Plaintiff could have raised the issue as to whether their breach of the covenants involved a willful and malicious injury under § 523(a)(6) in the state court litigation. The Court compared this argument to the argument presented to the U.S. Supreme Court in *Brown v. Felsen,* 442 U.S. 127 (1979). The Court found that, as was the case in *Brown*, the Plaintiff had no incentive to raise the claim of willful and malicious injury in the state court and the nature of the debt to the Plaintiff did not become an issue until the Debtors commenced the bankruptcy case. Thus, while collateral estoppel principles applied to the factual findings actually and necessarily litigated by the state court, the Court retained exclusive jurisdiction to determine the § 523(a)(6) nondischargeability claim. The Debtors' argument that the Complaint was barred under the doctrine of "unclean hands" lacked merit for the same reason. While the Debtors argued that the Plaintiff had not shown any evidence that the debtors intentionally or deliberately caused harm to another entity, attorneys' fees awarded by a state court under an enforceable contract or state statute are nondischargeable if awarded in connection with a non-dischargeable debt. *Gober v. Terra+Corp. (In re Gober),* 100 F.3d 1195 (5th Cir. 1996). The dischargeability of the attorneys' fees awarded by the state court thus hinged upon whether the Debtors committed a knowing breach of a clear contractual obligation by failing to comply with the covenants. *Williams v. Int'l Bhd. of Elec. Workers Local 520 (In re Williams),* 337 F.3d 504, 510 (5th Cir. 2003). Accepting as true the Plaintiff's allegations in the Complaint regarding the Debtors' violation of the covenants, the Court found that the Plaintiff sufficiently stated a claim that the Debtors possibly caused willful and malicious injury to the Plaintiff within the meaning of § 523(a)(6). Accordingly, the Court did not dismiss the Complaint.

As to the counterclaim, the Fifth Circuit has held consistently that "strict compliance" with the procedural requirements contained in Rule 11 is mandatory. *The Cadle Co. v. Pratt (In re Pratt)*, 524 F.3d 580, 588 (5th Cir. 2008). Rule 9011(c)(1)(A) requires that a motion for sanctions under this rule shall be made separately from other motions or requests. The Debtors' request for sanctions was contained within the Motion to Dismiss and not filed as a separate pleading. In addition, the Debtors did not properly serve the counterclaim on the Plaintiff's counsel nor did they give notice of the alleged violation and an opportunity to withdraw the challenged pleading, as required by Rule 9011(c)(1)(A). Consequently, the Debtors' request did not strictly comply with Rule 9011 and was denied.

(17) Lentz v. Clark (In re JESCO Corp.), Adv. Proc. 20-06007-NPO (Bankr. S.D. Miss. Apr. 14, 2021)

Chapter 7: In this adversary proceeding initiated by the chapter 7 trustee, the parties

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disputed the validity and priority of competing liens on the same property. The debtor was engaged in the business of disaster cleanup and environmental remediation services. Before filing bankruptcy, the debtor sued BP America Production Company ("BP") alleging multiple claims arising out of disaster services the Debtor provided following the *Deepwater Horizon* oil spill (the "BP Litigation"). Meanwhile, the debtor settled litigation brought by Theodore Connor, III ("Connor") and Henry N. Clark ("Clark") based, in part, upon the success of the BP Litigation. Connor's agreed judgment was entered on September 23, 2014 in the amount of $2,376,888.44 (the "Connor Judgment") but was never enrolled. Indeed, the Connor Judgment contained a provision prohibiting Connor from enrolling it except in the event of a default. In that same action, an order was entered under seal granting Connor a "judicial and equitable lien" on $800,000.00 in any proceeds of the BP Litigation (the "Connor Lien Order"). Clark's agreed judgment was entered on May 4, 2016 but likewise was never enrolled (the "Clark Judgment"). The debtor, however, executed an "assignment" transferring to Clark and Clark's attorneys a security interest up to $600,000.00 in the BP Proceeds. On June 13, 2016, the IRS filed a Notice of Federal Tax Lien with the Mississippi Secretary of State.

The debtor commenced a chapter 7 bankruptcy case on November 5, 2018. The chapter 7 trustee thereafter settled the BP Litigation for $600,000.00 (the "BP Proceeds") and initiated this adversary proceeding against Clark, Clark's attorneys, and the IRS asking the Court to find that the IRS holds a first priority lien and security interest in the BP Proceeds. Connor intervened to assert a claim against the BP Proceeds. The chapter 7 trustee filed a summary judgment motion, which the Court granted.

The Court found that the Connor Judgment and Connor Lien Order constituted an agreement between Connor, the Debtor, and alleged alter egos of the Debtor, that the Debtor owed Connor $2,376,888.44 and the Debtor would pay Connor $800,000.00 of that amount from the BP Proceeds. Connor's claim, however, was unsecured since his only superior position to the BP Proceeds was against the defendants. Even assuming that Connor had properly enrolled the Connor Judgment, his lien would not attach to intangible personal property under Mississippi law.

For these same reasons, the Court found that the Clark Judgment did not create a lien on the BP Proceeds. As to the assignment, Clark failed to file a UCC financing statement to perfect his security interest. Even if he had, the assignment granted him a security interest only in the "net proceeds" of the BP Litigation and not in the BP Litigation itself. The BP Proceeds constituted after-acquired property not subject "to any lien resulting from any security agreement entered into by the debtor before the commencement of the case." 11 U.S.C. § 552.

The Court found that the IRS perfected the federal tax lien in all property held or subsequently acquired by the debtor as of June 13, 2016. To be superior to the federal tax lien, therefore, Connor's and Clark's judgment liens must have been perfected prior to this date. 26 U.S.C. § 6323(a). Because they failed to obtain and perfect their alleged liens in the manner required by applicable state law before June 13, 2016, the federal tax lien prevailed over their claims even though the Connor Judgment and Clark Judgment predated the Notice of Federal Tax Lien. The Court also noted that pursuant the U.S. Supreme Court's decision in *United States v. McDermott*, 507 U.S. 447 (1993), a competing state lien does not come into existence under the Federal Tax Lien Act until "the identity of the lienor, the property subject to the lien, and the amount of the lien are established." *Id*. at 449. The BP Proceeds, however, did not come into existence until the settlement was reached in 2020.

The opinion summaries at numbered paragraphs (18) and (19) relate to the same adversary proceeding:

(18) Demory v. Martin, Adv. Proc. 20-00008-NPO (Bankr. S.D. Miss. Apr. 27, 2021)

Chapter 7: The facts at issue in the adversary arose from a verbal agreement between the Plaintiff and the Debtor regarding the restoration of three (3) antique vehicles (the "Vehicles"). After paying the Debtor $104,400.00 total over seven years, the Plaintiff began to question the restoration progress on the Vehicles. Shortly thereafter, the Debtor told the Plaintiff that the Vehicles were full restored and were ready to be shipped to the Plaintiff. The Debtor admitted at trial that this statement was a lie. After the agreed-upon delivery date had passed and the Vehicles did not arrive, the Debtor told the Plaintiff a series of evolving lies to hide the truth, which was that the vehicles had never been shipped and the restoration work was nowhere near completion. The Debtor and the Plaintiff then entered a contract setting a deadline for the Debtor to complete certain tasks and to reach certain milestones in the restoration process. If the work was not completed by the deadline, the entire sum paid by the Plaintiff to the Debtor was to be immediately paid in full plus interest. The contract was not fulfilled by the deadline. At this time, the Plaintiff and the Debtor executed a promissory note (the "Note"), requiring the Debtor to pay the Plaintiff $100,000.00 in three monthly payments. The Note provided the Plaintiff with a contractual right to attorneys' fees and costs upon default. The Debtor did not make the payments. The Plaintiff then brought suit against the Debtor in the Circuit Court of Culpeper County, Virginia for nonpayment of the Note. The Plaintiff sought a judgment of $100,000.00 plus interest and attorney's fees. The Debtor did not defend the lawsuit, and the Circuit Court entered an order granting the Plaintiff a default judgment against the Debtor for a total of $125,239.00 plus interest (the "Default Judgment"). Included in the total amount awarded in the Default Judgment was an award of attorneys' fees of $25,000.00.

Following the enrollment of the Default Judgment in the Circuit Court of Hinds County Mississippi, the Debtor commenced the bankruptcy case. The Plaintiff then filed an adversary complaint contesting the dischargeability of the debt owed to him in the amount of $137,123.55 and seeking an award of attorneys' fees and costs incurred in the adversary. A trial was held over two days. The issue of attorneys' fees and costs was bifurcated for later determination.

The Default Judgment was a valid state-court judgment entitled to full faith and credit. 28 U.S.C. § 1738. The doctrines of *Rooker-Feldman* and collateral estoppel required the Court to apply whatever preclusive effect a Virginia court that rendered the judgment would afford that judgment. Under Virginia law, the Court must look to the actions of the parties prior to entry of that default judgment as well as the completeness of the record before it. *Reed v. Owens (In re Owens)*, 449 B.R. 239 (Bankr. E.D. Va. 2011). There was no proof that the issues in the state court proceedings were actually litigated, and, therefore, other than the existence and amount of the debt owed to the Plaintiff, no other facts arose from the state court proceeding as to the nature of the debt that was binding upon the parties. Accordingly, the Plaintiff had to establish the nondischargeability of the debt based on the evidence presented at trial.

The Plaintiff sought a finding of nondischargeability under either § 523(a)(2)(A) or § 523(a)(6). The Court found that the Note was an extension of credit, given in exchange for the Plaintiff's forbearance of collection on his claims against the Debtor, for the Debtor's failure to perform under the contract. *Allison v. Roberts (In re Allison)*, 960 F.2d 481, 483 (5th Cir. 1992). The Plaintiff justifiably relied upon the Debtor's representations to him that he had the financial ability to pay the Note. Accordingly, the Court found that the Default Judgment debt was nondischargeable under the false representations prong of § 523(a)(2)(A). The Court also found that the Debtor's misrepresentations fell into the category of "false pretenses" and "actual fraud" under §

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523(a)(2)(A). The Debtor admitted that he lied to the Plaintiff during the course of his business dealings. When considered collectively, the Debtor's actions created an overall false impression that the work for which the Plaintiff was paying the Debtor actually was being performed and induced the Plaintiff to continue making payments and to enter into the contract and the Note, forbearing his collection efforts and ultimately causing him harm. *Tomlinson v. Clem (In re Clem)*, 583 B.R. 329, 384 (Bankr. N.D. Tex. 2017). The Court found that the facts presented at trial rendered the Default Judgment debt nondischargeable under § 523(a)(2)(A).

(19) April 27, 2021 At the conclusion of the trial of the adversary, the Court instructed the Plaintiff to submit a motion in accordance with MISS. BANKR. L.R. 7054-1(b)(2) in support of his request for attorneys' fees and costs. Shortly thereafter, the Plaintiff filed a motion seeking reimbursement of his attorneys' fees and costs pursuant to a contractual provision in the Note in which the Debtor agreed to pay such fees and costs "for collection or suit." Attached to the motion was an itemization indicating that his attorneys had incurred $91,008.00 in attorneys' fees and $657.11 in expenses in pursuing and litigating the adversary from January 16, 2020 through March 16, 2021, the last day of the trial. The Debtor opposed the amount of the attorneys' fees as excessive.

A question arose as to the preclusive effect of the Default Judgment on the Plaintiff's request for attorneys' fees and costs. Applying Virginia law, the Court concluded that the Plaintiff's claim for attorneys' fees and costs was part of the same "cause of action" as his underlying claim for enforcement of the Note. Accordingly, the Court found that the Plaintiff's claim pursuant to the Note for additional attorneys' fees and costs incurred in the adversary was extinguished by the Default Judgment under Virginia law. *In re Chen,* 351 B.R. 355, 363 (Bankr. E.D. Va. 2006).

Opinions for which an appeal is no longer pending but which have not been summarized in any previous edition of the Mississippi Bankruptcy Conference Newsletter include the following:

(20) In re Community Home Financial Services, Inc., Case No. 12-01703-NPO, rev'd, Case No. 3:18-cv-00158-CWR-LRA (S.D. Miss. Aug. 7, 2020), rev'd, 990 F.3d 422 (5th Cir. 2021) (reinstating bankruptcy court's fee award)

Chapter 7: Community Home Financial Services, Inc. ("CHFS") commenced a chapter 11 bankruptcy case. Derek A. Henderson ("Henderson") and Wells Marble & Hurst, PLLC ("Wells Marble") represented CHFS. In that role, they initiated adversary proceedings against the two largest creditors, Edwards Family Partnership, Inc. ("Edwards Family") and Beher Holdings Trust ("Beher") challenging the priority of certain claims. Edwards Family and Beher objected to the proposed reorganization plan and moved to convert the bankruptcy case to a chapter 7 case. Henderson and Wells Marble responded to these motions.

Meanwhile, CHFS's president transferred over $9 million in cash to a Panamanian account, fled the country, and set up a "rogue" operation of CHFS's business out of new branch offices in Panama and Costa Rica. Within days, the Court converted the case to a chapter 7 case and appointed Kristina Johnson ("Johnson") as the trustee.

Henderson and Wells Marble sought fees for the services they performed before Johnson was appointed as the chapter 7 trustee. The Court awarded fees to both Henderson and Wells Marble. Edwards Family and Beher appealed the awards. The district court affirmed in part but remanded for further findings. The Court found that the adversary proceedings were necessary to create a clear path for an exit strategy and to reduce and reclassify certain claims and, therefore, again concluded that the services were necessary to the administration of the case and reasonably likely to benefit the bankruptcy estate. Edwards Family and Beher again appealed. In this second appeal, the district court vacated the fee award on the ground that Henderson and Wells Marble's decision to pursue adversary proceedings "was not a good gamble." Henderson, Wells Marble, and Johnson appealed the district court's decision. Henderson and Wells Marble then settled their fee dispute with Edwards Family and Beher and were dismissed from the appeal. Edwards Family and Beher moved to dismiss the appeal as moot. They argued that without Henderson and Wells Marble, no party with sufficient interest in the case remained to appeal the district court's decision. Johnson opposed the motion.

The Fifth Circuit decided as a preliminary matter that the appeal was not moot. Although phrased as a mootness question, the argument of Edwards Family and Beher challenged the standing of Johnson to pursue the appeal. The Fifth Circuit held that trustee standing does not depend on a pecuniary interest but comes from the trustee's duties to administer the bankruptcy estate. Johnson had standing to pursue the appeal because the payment of fees to Henderson and Well Marble directly affect the administration of the bankruptcy estate.

As to the merits of the appeal, the Fifth Circuit cited *Barron & Newburger, P.C. v. Texas Skyline, Ltd. (In re Woerner),* 783 F.3d 266, 276 (5th Cir. 2015), for the holding that "if a fee applicant establishes that its services were 'necessary to the administration' of a bankruptcy case or 'reasonably likely to benefit' the bankruptcy estate 'at the time at which [they were] rendered,' then the services are compensable." The Fifth Circuit held that the district court erred in vacating the bankruptcy court's fee award based on its own retrospective assessment of the propriety of the adversary proceedings. Viewed prospectively, the Fifth Circuit found that pursuit of the adversary proceedings was necessary to resolve otherwise unsettled disputes about the priority of claims. The Fifth Circuit, therefore, reversed the judgment of the district court and remanded for the district court to reinstate the bankruptcy court's fee award.

(21) In re Thompson, Case No. 10-01515-NPO (Bankr. S.D. Miss. Feb. 26, 2019), appeal dismissed, Case No. 3:19-cv-00179-DPJ-FKB (S.D. Miss. Apr. 1, 2020), affirmed, No. 20-60358 (5th Cir. Sept. 29, 2020)

Chapter 7: Anita White ("White") initiated a legal malpractice action against the debtor and obtained a clerk's entry of default against him in 2009. In 2010, the debtor filed a chapter 7 bankruptcy petition but failed to list White or her legal malpractice claim in his bankruptcy schedules. Thus, White did not receive formal notice of the bankruptcy case. Later in 2010, the Court granted the debtor a discharge of his prepetition debts and closed the case. In 2013, White obtained a default judgment against the debtor in the amount of $1,540,242.12. In 2018, Thompson filed a motion to reopen his closed bankruptcy case pursuant to § 350(b). White opposed the motion as did another creditor. After a hearing, the Court denied the motion to reopen. *See Stone v. Caplan (In re Stone),* 10 F.3d 285, 290-92 (5th Cir. 1994) (setting forth three factors for determining whether a debtor's failure to list a creditor prevents the discharge of unscheduled debt).

The debtor appealed the decision to the district court. After the appeal was docketed, the debtor's brief was due within thirty days. FED. R. BANKR. P. 8018(a)(1). The debtor failed to file a brief. The district court entered a show-cause order requiring the debtor to respond and explain why the appeal should not be dismissed for want of prosecution. The debtor did not respond, and the district court dismissed the appeal without prejudice on October 10, 2019. The debtor filed a Rule 60(b)(1) motion. The district court denied the Rule 60(b)(1) motion on the basis that the debtor's "gross carelessness" in failing to check the status of his case was an insufficient basis for relief. *See Edward H. Bohlin Co. v. Banning Co.*, 67 F.3d 350, 357 (5th Cir. 1993) (holding that "[g]ross carelessness, ignorance of the rules, or ignorance of the law

Opinion Summaries by JUDGE NEIL P. OLACK (continued)

are insufficient bases for 60(b)(1) relief"). The debtor appealed the district court's denial of the Rule 60(b)(1) motion.

In his appeal to the Fifth Circuit, the debtor argued that he did not receive the mailed notices to file his brief or respond to the show-cause order because one of his many post-office boxes "was not being checked" due to a "staffing change." The debtor characterized this failure as one of "mistake, inadvertence, and/or excusable neglect." The Fifth Circuit, however, agreed with the district court that the debtor failed to show *excusable* neglect. He failed to ensure that someone was checking the post-office box he provided, and he failed to check the status of the case. Indeed, the debtor admitted that he learned about the district court's dismissal of his appeal from his bankruptcy attorney, but by then, seven months had passed from when he first filed the appeal.

The opinion summaries at numbered paragraphs (22), (23), (24), and (25) relate to the following bankruptcy case and related adversary proceeding:

(22) In re McCoy, Case No. 18-01569-NPO (Bankr. S.D. Miss. Feb. 3, 2020), appeal dismissed, Case No. 3:20-cv-00082-DPJ-FKB (S.D. Miss. Mar. 23, 2021)

The debtor owes the Mississippi Department of Revenue ("MDOR") unpaid income taxes, penalties and interest. For over ten years, the debtor has unsuccessfully attempted to avoid these obligations by filing two chapter 7 bankruptcy petitions and two adversary proceedings in bankruptcy court, two appeals in the district court, and an appeal in the Fifth Circuit.

The debtor commenced the first bankruptcy case in 2007 (the "Prior Bankruptcy Case") (No. 07-02998-EE) and the first adversary proceeding in 2008 (the "Prior Adversary") (Adv. Proc. 08-00175-EE) seeking discharge of tax liabilities for years 1993 through 2000. She later voluntarily dismissed with prejudice her dischargeability claims for tax years 1993 through 1997 and 2000. The Court dismissed her remaining dischargeability for tax years 1998 and 1999 on the ground she failed to file timely returns as to those years. That ruling was based on the one-day-late filing rule applicable to § 523(a)(1)(B)(i). On appeal, both the district court and the Fifth Circuit affirmed the ruling. *See In re McCoy,* 666 F.3d 924 (5th Cir. 2012). Almost ten years later, the debtor filed a second chapter 7 bankruptcy petition (the "Current Bankruptcy Case") (No. 18-01569-NPO) and a second adversary proceeding (the "Current Adversary") (Adv. Proc. 19-00019-NPO) advancing the same arguments she raised in the Prior Adversary as to tax years 1994 through 2000.

The MDOR filed a motion to dismiss the Current Adversary on the ground that the claims were barred by res judicata or, in the alternative, that the Fifth Circuit had already ruled that the one-day-late rule applied to the disputed tax years. The debtor responded by filing: (1) two motions to amend the complaint in the Current Adversary; (2) two motions to show cause seeking sanctions against the MDOR; and (3) a motion to reopen the Prior Bankruptcy Case to pursue a claim for violation of the discharge injunction against MDOR. This Court issued an opinion addressing all five motions.

The Court agreed with the MDOR that the debtor's previously asserted dischargeability claims for 1994 through 2000 were barred by the doctrine of res judicata. As to the debtor's dischargeability claims for tax years 2009 and 2010, the Court found that the tax liabilities for those years were not dischargeable under § 523(a)(1)(A) pursuant to the 240-day rule. The Court granted the MDOR's motion to dismiss and denied the motions to amend, motions to show cause, and motion to reopen. The opinion and final judgment were docketed in the Prior Bankruptcy Case, the Current Bankruptcy Case, and the Current Adversary.

Aggrieved, the debtor filed an appeal in the Current Bankruptcy Case, which was assigned to District Judge Daniel P. Jordan III. She did not file an appeal in the Current Adversary or in the Prior Bankruptcy Case. Judge Jordan concluded that it lacked jurisdiction over issues raised in the Current Adversary because the debtor filed her notice of appeal in the Current Bankruptcy Case. *See In re Dorsey,* 870 F.3d 359 (5th Cir. 2017) (holding that a notice of appeal in the main bankruptcy case "could not serve as a notice of appeal in the adversary proceeding"). Judge Jordan nevertheless addressed the merits of the appeal and affirmed this Court's holdings.

(23) McCoy v. Mississippi Department of Revenue (In re McCoy), Adv. Proc. 19-00019-NPO (Bankr. S.D. Mar. 26, 2020), appeal dismissed, Case No. 3:20-cv-00308-TSL-RHW (S.D. Miss. July 15, 2020), appeal dismissed, No. 20-60679 (5th Cir. Oct. 1, 2020)

After she filed the notice of appeal in the Current Bankruptcy Case, the debtor filed in the Current Adversary an emergency motion for a preliminary injunction, essentially seeking a stay pending appeal. This Court denied the request on March 26, 2020, and the debtor filed a request to reconsider, which this Court denied on April 22, 2020. These motions were the first and second post-judgment motions filed by the debtor in the Current Adversary.

The debtor filed an appeal of the Court's denial of the motion. The appeal was assigned to District Judge Tom S. Lee in Civil Action No. 3:20-cv-00308-TSL-RHW. Judge Lee dismissed the appeal, advising the debtor that the proper approach was to file a motion requesting a stay pending appeal before Judge Jordan in Case No. 3:20-cv-00082-DPJ-FKB. The debtor appealed but failed to timely file the appellant's brief and record excerpts. The Fifth Circuit dismissed the appeal for want of prosecution.

(24) (May 15, 2020) The debtor filed two additional motions in the Current Adversary asking the Court to reduce the amount of unpaid state income taxes, interest, and penalties that she owed to the MDOR. These motions were the third and fourth post-judgment motions filed by the debtor in the Current Adversary. The debtor argued that the MDOR attempted to garnish $295,554.38 in unpaid state income taxes but the MDOR's on-line records showed that she owed only $286,966.40. She maintained that the MDOR failed to properly credit her account after intercepting her 2012, 2013, 2014, and 2016 tax refunds and also failed to account for contract wages for the tax years 1998 and 1999. She also asserted that the MDOR inexplicably increased the amount of unpaid state income taxes owed for the 2000 tax year.

The Court found that the debtor's arguments regarding the alleged inaccuracy of the MDOR's tax assessments already were considered and rejected in a final judgment appealed by the debtor. That appeal divested the Court of jurisdiction over those matters and conferred jurisdiction on the district court. The Court further found that the divestiture rule applied to the extent the debtor raised new arguments, because exercising jurisdiction over those matters likewise would interfere with the appeal before the district court. In the alternative, the Court held that the law-of-the-case doctrine prevented it from ruling on the motions. The Court, therefore, denied the motions.

(25) (June 9, 2020) The debtor filed a fifth post-judgment motion seeking reconsideration of the order denying her request that the Court reduce the amount of unpaid state income taxes, interest, and penalties that she owed to the MDOR. Because the motion was filed more than fourteen days after entry of the order, the Court treated it as a Rule 60 motion. (Rule 60 of the Federal Rules of Civil Procedure is made applicable to bankruptcy proceedings by Rule 9024.) The debtor cited § 505 for the proposition that the Court has jurisdiction to rule on issues "involving the validity of taxes and state laws which affects taxes which may or may not be discharged in bankruptcy." The Court rejected the debtor's argument because the basis for its ruling was not its lack of jurisdiction under § 505 but the law-of-the-case doctrine and the

Opinion Summaries by JUDGE NEIL P. OLACK (continued)

jurisdictional significance of her appeals to the district court. The Court denied the debtor's fifth post-judgment motion.

Opinions pending on appeal include the following:

(26) Johnson v. Edwards Family Partnership, LP (*In re* Community Home Financial Services, Inc.), Adv. Proc. 12-00091-NPO; Johnson v. Edwards (*In re* Community Home Financial Services, Inc.), Adv. Proc. 13-00104-NPO, Johnson v. Edwards Family Partnership, LP (*In re* Community Home Financial Services, Inc.) Adv. Proc. 15-00080-NPO (Bankr. S.D. Miss. Feb. 27, 2018), Memorandum Opinion and Order on Third Amended Complaint in Adversary Proceeding 12-00091-NPO; Consolidated Amended Complaint in Adversary Proceeding 13-00104-NPO; Amended Complaint for Turnover, Recovery of Property Transferred Post-Petition, Damages, Declaratory Relief, Equitable subordination, and Other Relief in Adversary Proceeding 15-00080-NPO; and Consolidated Contested Matters, ***rev'd*, Case No. 3:18-cv-00154-CWR-LRA (S.D. Miss. Oct. 2, 2020), appeal docketed, No. 20-61011 (5th Cir. Oct. 29, 2020)**

(27) Harrison v. Heritage Real Estate Investment, Inc. (*In re* Heritage Real Estate Investment, Inc.), Adv. Proc. 20-00029-NPO (Bankr. S.D. Miss. Oct. 23, 2020), Memorandum Opinion and Order: (1) Denying *Ore Tenus* Motion to Stay Adversary; (2) Granting J. Stephen Smith, Trustee of the Estate of Heritage Real Estate Investment, Inc.'s Motion to Dismiss Pursuant to Federal Rule of Bankruptcy Procedure 7012(b)(6); (3) Setting Aside Order Holding in Abeyance Motion for Summary Judgment and Memorandum Brief in Support of Motion for Summary Judgment; and (4) Denying Motion for Summary Judgment as Moot, ***appeal docketed,* Case No. 3:20-cv-00708-HTW-LGI (S.D. Miss. Nov. 2, 2020)**

Opinion Summaries by the HON. JASON D. WOODARD

These case summaries were prepared by Jack Schultz, Law Clerk to the Honorable Jason D. Woodard. These are simply case summaries and have no precedential effect. The published opinions speak for themselves.

In re Steven Keith Jenkins, Case No. 19-13234-JDW, Order Granting Trustee's Motion to Sell based on credibility deficiencies of objector, October 22, 2020 (aff'd No. 3:20-CV-300-SA).

The Trustee filed a Motion to Sell a 57-foot Miller Marine fishing vessel. The only opposition to the Motion came from Billy Joe Swick, Jr., who contended that he owned a 50% interest in the boat. The Trustee argued that Mr. Swick did not own any interest in the boat and that the debtor was the sole owner. The resolution of the case turned not on legal issues, but on a credibility determination. Most of the testimony at the hearing came from Mr. Swick and the court did not find his testimony nor his documentation as to the ownership of the boat credible. The court found that at best, Mr. Swick failed to properly document his interest in a boat worth several hundred thousand dollars and at worst, he fabricated documents. Either way, the court overruled Mr. Swick's objections and granted the Trustee's Motion to Sell.

In re 305 Petroleum, Inc., Case No. 20-11593-JDW, Memorandum Opinion and Order granting Motion to Strike small business designation due to excessive affiliate debt, October 27, 2020.

305 Petroleum, Pleasant Point Investment, LLC, Premier Petroleum Investment, LLC, and Pacific Pleasant Investment, LLC are jointly administered debtors under Chapter 11. Each debtor elected designation as a small business to utilize Subchapter V. Premier Capital Investment Company, LLC and Vikram Patel, who contends he owns some portion of some of the debtors, objected to the small business designation of the debtors. The parties stipulated that Premier Petroleum's primary activity is the business of owning single asset real estate, and, as such, it is ineligible to be a debtor under Subchapter V. The issue was whether the remaining debtors met the statutory definition of small business debtors.

To elect the small business designation under chapter 11, a debtor must meet the definition of a "small business debtor" under 11 U.S.C. § 101(51D). The statute excludes any debtor whose total debt, plus the debt of all its affiliates, exceeds the current small business threshold of $7,500,000.00. The debtors argued that because Premier is ineligible for subchapter V, its debt should not be aggregated with the other debtors in the maximum debt limit analysis. But the Court found that Congress could have expressly excluded single asset real estate debtors from the debt limit yet chose not to do so. Instead, the Court held that the statute's plain language required Premier's debt be included in the debt limit of the other debtors, regardless of its designation. Accordingly, the debt of all the affiliates exceeded the $7,500,000.00 threshold and the debtors were reclassified as standard chapter 11 debtors.

In re Kevin O' Connor Freeman, Case No. 20-12124-JDW, Memorandum Opinion and Order disallowing homestead exemption on California property, April 23, 2021.

The Debtor's voluntary petition provided that he lived in Water Valley, Mississippi, and had lived in the district longer than any other district during the 180 days prior to filing his petition. The debtor filed a Schedule A/B, which listed real estate located in Temecula, California with an estimated value of $375,000.00. The debtor later filed an Amended Schedule C, where he claimed a homestead exemption in the California property based on Miss. Code Ann. § 85-3-21. The Trustee objected to the claimed exemption. At a hearing on the objection, it was admitted that the debtor's estranged wife and adult children were living in the California home, while the debtor was living in Water Valley with no intention of returning to reside in California. In fact, the debtor had resided in Mississippi since January 2, 2018 and was living with his girlfriend and her two children.

Mississippi has opted out of the federal exemptions. The Mississippi exemption statute is silent as to whether a debtor may claim a homestead exemption on extraterritorial property and the Mississippi Supreme Court had not addressed the extraterritorial issue. But the Court did not reach the issue of extraterritorial exemption because occupancy by the debtor is required to create a homestead interest in the property. To be entitled to claim a homestead exemption to particular property, the individual must own and occupy the property as his residence. In this case, the debtor abandoned the property years before and did not intend to return, thereby abandoning his homestead rights under Mississippi law. The objection was sustained, and the claimed homestead exemption was disallowed.

In re Laura Doler, Case No. 20-12244-JDW, Order Approving Compromise to allow application of litigation proceeds to priority claims rather than general unsecured claims, May 7, 2021.

The debtor had a confirmed bankruptcy plan that provided for payment of her taxes but not payment to general unsecured creditors over a 60-month plan term. After confirmation, the debtor retained representation to pursue a civil claim for violation of the Family Medical Leave Act. The claim was settled, and the Debtor filed an application to compromise. The Trustee responded to the application arguing that the nonexempt portion of the settlement proceeds should be disbursed first to general unsecured claims. The debtor contended that the proceeds should be paid to the priority tax claims, which would allow her to pay off her case early.

The Court noted that Congress has explicitly given priority to tax claims over general unsecured claims. Because the debtor was below median income and had no projected disposable income, she was not required to pay general unsecured creditors and was entitled to a discharge after 36 months. Accordingly, the Court found the settlement proceeds should be disbursed to the priority tax claims and approved the application.

In re Steven Keith Jenkins, Case No. 19-13234-JDW, Order denying motion to convert due to debtor's bad faith, May 7, 2021.

The debtor originally filed this case on August 12, 2019 and more than 400 docket entries had been entered before the debtor filed this Motion to Convert. One of the more notable entries on the docket is the Court's opinion, in which it found that the debtor and his good friend, Bill Swick, evaded the chapter 7 trustee's attempts to locate and liquidate a 57-foot boat valued at $300,000.00 by back-dating documents and excluding information from the bankruptcy schedules. The debtor testified that he was unaware the boat needed to be disclosed and then testified that the boat was owned by a separate LLC at the time this case was filed. The Court found that the boat was, in fact, owned by the debtor. The debtor's initial petition indicated less than $50,000.00 in liabilities, but later admitted his liabilities were closer to $8,000,000.00. The Court found a litany of inconsistencies in the debtor's filings and testimony, repeated failure to disclose ownership interests, a failure of the debtor to comply with an order of the court and that the debtor continued to use assets of the bankruptcy estate without trustee or Court approval, all of which were detailed by the court in the opinion.

The Fifth Circuit has held that a debtor does not have an absolute right of conversion if a debtor has engaged in bad faith or abused the bankruptcy process. The Court found that permitting the debtor to convert to chapter 12, without trustee control, would be putting the fox in charge of the henhouse. The debtor's bad faith was sufficient reason to deny the debtor's Motion to Convert.

Opinion Summaries by the HON. JASON D. WOODARD (continued)

In re Michael Leon Brock, Case No. 19-10293-JDW, Order denying confirmation in chapter 11 case due to proposed extension of home loan maturity date, May 10, 2021.

The debtor's Schedule D listed a claim of SPS secured only by the debtor's principal residence. The plan of reorganization proposed to resume the normal monthly installment payments to SPS and provided that "[a]ny defaulted monthly installments or payments that have not been made to SPS during the pendency of this case will be added to the end of the loan," effectively extending the maturity date on the loan by the number of months the debtor was in arrears. U.S. Bank objected to confirmation of the plan because it proposed to modify the bank's rights by extending the loan term.

The Bankruptcy Code provides that a chapter 11 plan may "modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence. . . ." 11 U.S.C. 1123(b)(5). The Court found it determinative that chapter 13 offers a narrow exception to the anti-modification provision, while chapter 11 has no such counterpart. Because the plan proposed to modify the rights of the bank on a loan secured solely by the debtor's principal residence, it failed to comply with section 1123(b)(5) and the Court sustained the bank's objection.

In re Charles Dallas Hunsucker, Case No. 20-12226-JDW, Memorandum Opinion and Order sustaining in part objection to claim and establishing revised factors for differentiating between a domestic support obligation and a property settlement, August 3, 2021.

Prior to the debtor, Dallas Hunsucker, filing his bankruptcy petition, a consent agreement filed in the Chancery Court of Desoto County provided that the chancery court would "make an equitable division of marital assets and marital debts accumulated or acquired by the parties during the marriage" and determine "whether to award alimony to one or the other party. . . ." After hearing testimony and considering the evidence, Chancellor Lundy granted physical custody of the children to Amy Hunsucker and set Dallas's monthly child support payment at $1,000.00. The Chancellor extensively analyzed the *Ferguson* factors for property division and awarded the remaining funds in a Fidelity account to Amy and entered judgment in favor of Amy for her half of the equity in their marital home. The Chancellor's thirteen-page opinion did not provide any analysis of the *Armstrong* factors or mention alimony, except to say that the award "could be satisfied in the form of monthly alimony payments."

For reasons unknown to this Court, the children were removed from Amy's care and sent to live with Dallas in June of 2020. On July 27, 2020, Chancellor Vicki Daniels entered a temporary restraining order suspending Dallas's child support obligation and formally ordering that the daughters reside with Dallas. Meanwhile, the debtor's schedules listed $43,795.00 in unsecured debt for a "[d]ivision of property in divorce [judgment]." Amy eventually filed an amended claim for $50,975.00 in domestic support, comprised of the $43,795.00 for the home equity and Fidelity account plus $6,000.00 in prepetition child support arrears and $1,000.00 for postpetition child support arrears. Dallas objected.

First, the Court found that Dallas' child support obligation was either suspended or terminated (by the Chancery Court) during the entirety of his bankruptcy case and therefore he did not owe any postpetition child support. The Court then noted that the Fifth Circuit has not established a comprehensive list of factors for courts to consider when determining whether an award is domestic support or a property settlement. The Court considered the factors set out in *In re Sheffield*, which had been used in this district over the years, but also noted that the law has continued to evolve and the factors should keep pace. As there is no controlling authority, the Court decided an update of the factors was warranted. The court set out the following list of factors to be considered in differentiating between a domestic support obligation and a property settlement:

1. Will the obligation terminate on the remarriage or death of the other spouse?

2. What were the relative earning capacities of the parties at the time of the divorce?

3. Did the state court examine the *Ferguson* or *Armstrong* factors?

4. How do the parties treat the obligation for tax purposes, if the award or agreement was finalized prior to January 1, 2019?

5. What were the reasonable and necessary living expenses of the receiving spouse at the time of the award?

6. Is the obligation subject to modification if economic circumstances change?

7. What was the nature of the property awarded to the other spouse?

Applying those factors and deferring to the chancery court's thorough findings, the Court found that Dallas's obligation to Amy was not a domestic support obligation, but a property settlement, which was reclassified as a general unsecured claim. The child support arrearage, which was a nondischargeable domestic support obligation was classified as a priority debt to be paid through the confirmed plan.

In re Robert William Mullin, A.P. No. 20-01064-JDW, Memorandum Opinion and Order denying discharge of student loan debt, August 26, 2021.

The debtor filed this adversary proceeding seeking to discharge student loan debt owed to the University of Mississippi. The aggregate loan balance consisted of two $1,000.00 student loans made to the debtor in the mid-1990s, plus accrued interest. It was uncontroverted that the debtor made one payment of $40.00 on his Perkins loan in April 1999 but had made no other voluntary payments on either loan in the previous twenty-two years. As of May 14, 2021, the debtor owed a total of $5,526.61 for the two loans. The debtor contended that based on his income and expenses, he would be unable to maintain a minimal standard of living and repay the loan. The debtor's sole source of revenue is a monthly Social Security check in the amount of $750.00. The debtor admitted, however, that he and his wife have a combined annual gross income of $94,142.00, which was more than ten times their annual household expenses. The debtor and the University filed competing motions for summary judgment.

The Bankruptcy Code provides that student loans are nondischargeable, unless a debtor can show that the debt is an undue hardship on the debtor and his dependents. 11 U.S.C. § 523(a)(8). "Undue hardship" is not defined by the Bankruptcy Code, but the Court of Appeals for the Fifth Circuit has explained that "[t]he plain meaning of the words chosen by Congress is that student loans are not to be discharged unless requiring repayment would impose intolerable difficulties on the debtor." *Thomas v. Dept. of Educ. (In re Thomas)*, 931 F.3d 449, 454 (5th Cir. 2019). The Fifth Circuit has adopted the three-pronged *Brunner* test to determine whether a student loan falls within the exception. The Court found that the debtor's mere assertion that repayment would constitute an undue hardship was a conclusory fact and insufficient alone to meet the first prong of the *Brunner* test. The debtor failed to address either the second or third elements of *Brunner* in his motion.

Meanwhile, the University cited to evidence in the debtor's schedules and answers to interrogatories that the debtor's annual household income far exceeded their own expenses as well as the federal poverty guidelines. Because the debtor failed to prove any of the three *Brunner* elements and no genuine issue for trial existed, the Court denied the Debtor's Motion to Summary Judgment and granted the University's Motion for Summary Judgment.

Opinion Summaries by the HON. JASON D. WOODARD (continued)

In re John Ellis Johnson, A.P. No. 20-01029-JDW, Memorandum Opinion and Order applying City of Chicago v. Fulton, August 5, 2020.

The debtor co-owned a 2012 Peterbilt 587 truck with his brother, which was financed by FedEx. The debtor became delinquent on his loan payments and FedEx repossessed the truck through B&B/PAR on August 11, 2019. On August 21, the debtor filed the underlying bankruptcy case, and the defendants were aware of the bankruptcy by the next day. On August 26, FedEx filed motions for relief from the stay and the co-debtor stay as to the truck, which were eventually granted by agreed order on November 20. No lift stay motion was ever filed as to any other personal property. The defendants retained possession of the truck but did not take any other action to sell or dispose of the truck while the stay remained in effect. The debtor filed this adversary proceeding, seeking damages for violation of the stay, arguing that the defendants improperly retained possession of his truck after his bankruptcy filing and disposed of his personal property in the truck. The defendants filed a Motion for Summary Judgment.

In *City of Chicago v. Fulton*, the Supreme Court held that section 3362(a)(3) "halts any affirmative act that would alter the status quo as of the time of the filing of a bankruptcy petition." 141 S. Ct. 585, 592 (2021). In this case, the Court found that under *Fulton*, there was no stay violation as to the truck. The defendants were aware that the truck could not be sold until the bankruptcy stay was lifted, and merely retained possession of the truck. A dispute remained as to other personal property that may have been in the truck. Therefore, the Court granted the Motion for Summary Judgement as to the truck and denied the Motion as to the other personal property.

Opinion Summaries by HON. KATHARINE M. SAMSON

[1] These materials are designed to provide general information and should not be considered as a substitute for the actual text of the cases. All references to code sections are to the United States Bankruptcy Code. All references to rules are to the Federal Rules of Bankruptcy Procedure, unless otherwise stated.

Lentz v. Nat'l Debt Relief LLC (In re Ernst), Adv. Proc. No. 20-06018, ECF No. 33, 2021 WL 1550833 (Bankr. S.D. Miss. Mar. 29, 2021).

Ch. 7: On Defendant's motion to dismiss under Rule 12(b)(1) for lack of subject matter jurisdiction. Plaintiff Chapter 7 Trustee alleged that Defendant violated the Credit Repair Organizations Act (CROA) by misrepresenting to Debtors the benefits of what Trustee described as Defendant's "debt relief and credit repair program." Defendant argued that Trustee lacked standing to sue under CROA because (1) the injuries alleged were outside CROA's scope;

(2) Trustee alleged only bare procedural violations; and (3) Trustee sued the wrong party. Defendant did not consent to entry of final orders in non-core proceedings.

Held: Dismissal denied. Although litigation on the merits of the CROA claim would be non-core, whether Court had subject matter jurisdiction was core. As to Defendant's arguments, (1) whether injuries alleged were outside the statutory scope went to merits, not to standing;

(2) Trustee alleged concrete injury, not bare procedural violations; and (3) whether Trustee sued correct party went to merits, not to standing. Trustee adequately alleged all elements of standing: injury in fact, a causal connection between the alleged injury and the conduct, and that the requested relief would likely redress the alleged injury.

Lentz v. Nat'l Debt Relief LLC (In re Ernst), Adv. Proc. No. 20-06018, ECF No. 32, 2021 WL 1556756 (Bankr. S.D. Miss. Mar. 29, 2021).

On same complaint as in summary above, on Defendant's motion under Rule 12(c) for judgment on the pleadings as to fraudulent transfer, §§ 548, 540; turnover of records, § 542(e); and accounting, § 542(a). Plaintiff Chapter 7 Trustee alleged that Defendant received payments from Debtors for services that were not worth what Debtors paid for them.

Held: Judgement on the pleadings granted. It was undisputed that Debtors agreed to pay a different company, not Defendant.

Henderson v. Howse, Adv. Proc. No. 19-06034-KMS, 2021 WL 2932675 (Bankr. S.D. Miss. July 12, 2021).

Ch. 7: On cross-motions for summary judgment on complaint by Chapter 7 Trustee to set aside alleged fraudulent transfers. Count I, brought under Mississippi's Uniform Fraudulent Transfer Act (MUFTA) using avoidance powers under § 544(b) of the Bankruptcy Code, sought to set aside alleged transfer to Debtor's wife of Debtor's interest in proceeds of sale of their home, which Debtor and wife had held as tenants by the entirety. Count II, brought under § 548, sought to set aside alleged transfers made through checks that Debtor wrote to wife from their joint bank account. Count III sought either turnover of funds sought under Counts I and II or a monetary judgment under § 550.

Held as to Count I and to Count III as applicable to Count I: Summary judgment granted in favor of Defendant-wife. Under Mississippi law, real property held by a debtor and non-debtor spouse in a tenancy by the entirety is exempt from seizure or attachment for debts owed only by the debtor. Also exempt are proceeds from the sale of such property. Consequently, even if wife's receipt of check from closing attorney's escrow account constituted a transfer from Debtor, Trustee had no cause of action under MUFTA, which defines "asset" to exclude exempt property.

Held as to Count II and to Count III as applicable to Count II: Summary judgment denied both parties. Action for fraudulent transfer requires debtor to have interest in property transferred, and undisputed facts did not establish ownership of funds in joint account.

Opinion Summaries by HON. SELENE D. MADDOX

Case summaries prepared by Jace Ferraez and Erin McManus, Law Clerks to Judge Selene D. Maddox, and Alan Alexander, Former Law Clerk to Judge Selene D. Maddox.

In re: Tony and Melissa Easter, 19-12063-SDM Dkt. #343. Memorandum Opinion Addressing the Motion for Relief In Part and Finding the Above-Ground Swimming Pool to Be Personal Property. December 7, 2020.

The subchapter V Debtors, Tony and Melisa Easter, secured a loan from the Creditor, First Metropolitan, and used those loan proceeds to purchase a 30-foot "Round Blue" above-ground swimming pool, among other pool related items. First Metropolitan moved to terminate the automatic stay and take possession of its collateral. The Debtors admitted that First Metropolitan attempted to secure a purchase money security interest in an above ground pool but that the above ground pool had become a fixture and could now only be secured with a real estate deed of trust. The Debtors argued that the above-ground swimming pool had become a fixture because it had been installed at least two feet in the ground and was secured by stakes or posts.

HELD: The Court looked to Mississippi law and found that the above-ground swimming pool had not become a fixture and that First Metropolitan had a valid purchase money security interest in the swimming pool. Despite the general rule under Mississippi law that "whatever is affixed to land becomes a part of the realty", the Court noted that there are several exceptions, and adopted several factors articulated by other courts in determining what constitutes a fixture: (1) nature and mode of attachment; (2) purpose for which used; (3) the relation of the party making the annexation; and (4) other attending circumstances indicating the intention to make it a temporary, attachment or a permanent accession to the realty. After considering the above factors, the Court found that little evidence pointed to the permanent nature of the swimming pool. The swimming pool consisted of prefabricated pieces of aluminum and plastic, and the method of installation (a two-foot hole leveled off with sand and a few stakes or posts) did not constitute a true annexation to the real property. The Court also found that the Debtors' failure to build more anchored structures of support for the swimming pool signaled their lack of intention to make the swimming pool a permanent attachment.

In re: William Skelton, 20-10636-SDM Dkt. #47. Memorandum Opinion Addressing Debtor's Motion to Avoid Judgment Lien. December 16, 2020

The Debtor, Skelton, filed a *Motion to Avoid Judgment Lien* obtained against him in his individual capacity by the Creditor, Strategic Funding Source, Inc. ("SFSI"). The lien purported to attach to all current and future property owned by Skelton in Winston County. Skelton's motion sought to avoid the lien as it applied to the homestead property which he and his wife held in Winston County as tenants in the entirety with full right of survivorship. Skelton argued that because the homestead was not owned in any sense by him as an individual but rather was owned by the marriage itself, the lien was avoidable. SFSI argued that avoiding the lien was improper because the status of the Skeltons' property rights might change before discharge (assuming that Skelton obtained a discharge at all) and, alternatively, that if the property was a true tenancy by the entirety, the lien never attached, and so avoiding it is improper.

HELD: After a thorough review of tenancies by the entirety under Mississippi law, the Court held that the homestead was a true tenancy by the entirety and was therefore owned not by either of the Skeltons but rather by a fictitious corporate entity "consisting of the combined legal personals of the husband and wife" and that non-exempt equity in the estate may only be administered as to joint claims against both spouses. Skelton undoubtedly had some form of contingent future interest in the equity in the homestead (and possibly a present individual interest) which would be both subject to exemption and thus impaired if SFSI's lien were not avoided. Finally, the Court rejected SFSI's arguments that the tenancy by the entirety might be destroyed by the future actions of Skelton and/or his wife. Under the "snap-shot rule," the applicability of exemptions is determined at the filing of the petition and will not be altered by future events during the pendency of the bankruptcy case. However, while the Court granted the motion to avoid, it noted that avoidance was conditioned on Skelton actually obtaining a discharge. As such, the lien would remain recorded until Skelton's discharge was actually obtained.

Isham David Conner v. A. Rhett Wise et al, AP Case No. 20-1075-SDM, Dkt. #9 and 13. Order Denying Defendants' Motion to Dismiss; March 19, 2021

In 2013, the Debtor ("Conner") filed for Chapter 13 bankruptcy with a debt owed to Brightview Credit Union ("Brightview") and secured by a BMW as the only debt paid through the confirmed plan. Brightview's Proof of Claim ("POC") listed the BMW's value at $22,279.69 which was also the amount owed. The confirmed plan, however, set the value at $12,960, although Conner was required to pay the full amount owed as the BMW was a 910 vehicle. Subsequently, the BMW broke down and became inoperable in Georgia, where Conner left it with a mechanic. Conner converted his Chapter 13 case to one under Chapter 7, surrendered the BMW to Brightview, and obtained a discharge. Between the entry of an Order Lifting Stay obtained by Brightview and entry of the discharge, Brightview field a Complaint for Replevin Without Bond against Conner in the County Court of Lowndes County, Mississippi seeking possession of the BMW (which was still in Georgia), damages, costs, and attorney's fees. Later, after discharge, Brightview filed a second civil action against Conner in the same forum for civil conversion. Brightview obtained a default judgment in an amount equal to its original POC even though the confirmed plan set the value of the BMW as significantly less. The Final Judgment, which was drafted for the state court judge by counsel for Brightview, stated that "Defendant's actions in abandoning the secured collateral of the Plaintiff were in violation of the contractual agreement between the parties and amount to the wrongful civil conversion of the Plaintiff's collateral."

Brightview thereafter obtained a judicial lien against Conner's property, which he averred that he was unaware of until he tried to sell the property years later. At that time, he was forced to satisfy Brightview's lien before the sale could proceed. At some point, the BMW was towed from Georgia to Mississippi where it was left in Conner's possession. Conner subsequently filed a *Motion to Reopen Case*, followed by an adversary proceeding against Brightview, the attorney who filed the state court actions against him, and the law firm which employed said attorney. The adversary asserts that Brightview's pursuit of state court remedies violated the discharge order, that their attorney's filing of the suit on their behalf was actionable because he knew or should have known of the discharge order, and that the attorney's firm was vicariously liable for his actions. The latter two defendants jointly filed a *Motion to Dismiss*, arguing (1) that the Court's subject matter jurisdiction ended when the BMW was abandoned from the estate and the automatic stay was lifted, (2) that the Complaint failed to state a claim under which relief could be granted, and (3) that the order reopening the case only referenced an adversary proceeding against Brightview but did not authorize an adversary proceeding against the attorney or his firm.

HELD: (1) The defendants argued that the Court's jurisdiction ended when the BMW was surrendered from the bankruptcy estate, but the Complaint itself does not challenge the validity of the state court judgment itself. Rather, it alleges that the act of commencing

Opinion Summaries by the HON. SELENE D. MADDOX (continued)

the state court action violated the discharge injunction. Under clear Fifth Circuit precedent, a claim for violation of the discharge injunction under 11 U.S.C. § 524 is a core proceeding. Accordingly, the Court has jurisdiction over the proceedings. (2) After accepting the well-pleaded facts in the light most favorable to Conner and taking judicial notice of the elements of conversion under Mississippi law, the Court concluded that Conner had met his burden of establishing a plausible claim that the Defendants improperly made use of the state court conversion action to circumvent the discharge injunction. The Court expressly declined to address any issues of claim or issue preclusion implicating the state court judgment, as the adversary was premised on the mere act of bringing the state court action in the first place. Thus, Conner had met his burden under *Twombly and Iqbal*, and dismissal under 12(b)(6) was not warranted. (3) The language used in the Court's order reopening the case was not intended to limit Conner to just an adversary proceeding against Brightview, and the Court would likely have granted a motion to add the attorney and law firm as additional and necessary parties if such a motion had been made.

In re: Philly Finance Inc. v. Michael Jamarero Williams et al, AP Case No. 20-1033-SDM, Dkt. #48¬. Memorandum Opinion and Order Granting Creditor's Motion for Attorney's Fees and Expenses in Part and Denying in Part; April 23, 2021

By a previous order, the Court rejected a proposed agreed judgment due to unduly onerous terms that were deemed unfair to both Debtors and to unsecured creditors, and accordingly, the case proceeded to discovery. After Debtors' counsel failed to respond to Interrogatories and Request for Admissions, the Plaintiff, Philly Finance Inc. ("Philly"), filed a motion for summary judgment, which was granted, as the failure to respond meant that Philly's request that the Debtors admit the underlying debt was nondischargeable was deemed admitted. The Court entered a nondischargeable judgment against the Debtors for $4,228.77. Philly then filed a *Motion for Attorney's Fees* pursuant to a provision in the underlying contract that required Debtors to pay such fees. Said motion sought a total award of $27,548.56, an amount six-and-a-half times the amount of the judgment obtained against the Debtors. According to the itemization, a substantial portion of the time billed was spent preparing subpoenas for other loan companies to determine if the Debtors had taken out other loans which had not been disclosed when they signed the loan agreement with Philly. These subpoenas proved to be redundant in light of the judgment eventually granted based on the requests for admissions deemed admitted. After the Court noted during the hearing on the motion that the discounted rate to which the attorney had alluded had not been consistently applied to all entries, the attorney filed an amended itemization and reduced the requested attorneys' fees and costs to $26,032.50. The Debtors' counsel argued that the requested fee award was "unreasonable and unconscionable."

HELD: The Court considered the fee request pursuant to the "lodestar" method outlined in *Johnson v. Georgia Highway Express Inc.*, 488 F.2d 714 (5th Cir. 1974) and Mississippi Rule of Professional Conduct 1.5. The Court also cited favorably *In re Staten* B.R. 666 (Bankr. S.D. Miss. 2016) and *In re Peters,* 2007 WL 1173597 (Bankr. S.D. Miss. Mar. 28, 2017), both of which involved fee requests in cases similar to the one at bar. In particular, both cases noted that attorney's fees that were "almost double" the amount in dispute were excessive and that the fee customarily charged in nondischargeability actions was generally around one-third of the total debt. In *Peters*, the court also expressed dissatisfaction with the use of "block billing" in fee itemizations as it "impedes a court's ability to determine the reasonableness of the hours spent on individual tasks and has served as the basis for courts to issue a flat reduction of a specific percentage from an award of attorney's fees." The *Peters* court also specifically addressed the time spent by the attorney in that case on preparing subpoenas to be served on various other finance companies that were not necessary to the disposition of the case and reduced the fees billed for those entries by 50%.

In the instant case, the Court found that the billing rate proposed by Philly's attorney was reasonable but that a reduction in the lodestar was called for. The Court noted that all of the work described in the Revised Itemization was for work done after the Court's order denying the proposed agreed judgment, but despite billing 113.40 hours on this case, Philly's counsel never reached out to the Debtors' attorney to discuss a possible settlement that the Court would approve. Instead, Plaintiff's counsel expended over thirty hours on subpoenas for "potential undisclosed lenders." The Court found the fees requested for those hours to be unreasonable and reduced the lodestar from $26,032.50 to $16,889.50. Next, the Court applied the Rule 1.5/Johnson factors and found that the lodestar was still four times the damages sought and was an excessive ratio. Following the lead of *Staten and Peters*, the Court reduced the lodestar by 75% to $4,222.38. This decision was bolstered by other *Johnson* factors which also militated in favor of a fee reduction. While the final attorney's fee award was more than the "one-third of the total debt," which was the customary measure of fees in nondischargeability actions, the Court declined to adopt the "one-third of the total debt" measure as a firm rule. In any event, an award in excess of one-third was justified due to the various missteps by Debtors' counsel that made resolution of this case more difficult than it should have been.

In re: R.L. Brand and Deborah Brand, 20-12492-SDM Dkt. #226. Memorandum Opinion and Order Granting Motion to Reconsider. July 13, 2021

An Order was entered by the Court in this small business Chapter 11 case stating that failure by the Debtors ("the Brands") to timely file Monthly Operating Reports ("MORs") with the U.S. Trustee ("UST") within a 14-day grace period after notice would result in automatic dismissal of the case. Subsequently, the Brands were delinquent in filing their MORs and failed to correct the deficiency within fourteen days, and the case was dismissed. Fourteen days later, the Brands' attorney filed the delinquent MORs along with a motion to reconsider, to which the UST and several creditors objected.

HELD: The Court construed the Motion for Reconsideration as a motion under Rule 60(b) and, after analysis, found excusable neglect on the part of the Brands' attorney. The Court noted that the Brands' delay in filing the delinquent MORs was only fourteen days after dismissal. Their attorneys forthrightly claimed sole responsibility for the delinquency, as Mrs. Brand timely submitted all the documents to his office for filing, but at the time, his practice was undergoing a period of disruption owing to serious health issues suffered by his son during the relevant time frame. The Court considered the circumstances deemed relevant by the U.S. Supreme Court in *Pioneer Investment Servs. Co. v. Brunswick Associates Ltd. P'ship*, 507 U.S. 380 (1993) and concluded that they favored the Brands. The Court cautioned, however, that the Pioneer Investment factors might well have supported denial of the motion had there been a more significant delay before filing the motion, had there been more evidence of prejudice to non-moving parties, or had there been evidence of bad faith. Alternatively, the Court find that, even if the facts had not shown excusable neglect under Rule 60(b)(1), it would have nevertheless been appropriate to grant the motion under Rule 60(b)(6)("the catch-all provision") as it was an "exceptional circumstance" for an attorney or other entity replied upon by debtors who had otherwise complied to all requirements set by the Court to simply fail to timely file MORs for whatever reason. Consequently, the Court vacated the Order of Conversion, thereby returning the case to one under Chapter 11 subchapter V as if it had never been converted.

Opinion Summaries by the HON. SELENE D. MADDOX (continued)

In re: Cedric Wooten, 21-11375-SDM Dkt. #32. Memorandum Opinion and Order Denying Motion to Extend Automatic Stay. August 25, 2021

On July 16, 2021, the Debtor filed his sixth and most current Chapter 13 bankruptcy case. The five cases preceding were filed and dismissed for various reasons between November 20, 2018 and May 25, 2021, primarily for failure to make Chapter 13 plan payments and failure to file required schedules, statements, and other documents. The Debtor's next most previous case, filed on January 20, 2020, was dismissed for failure to make plan payments, but not before the Debtor entered into an agreed order providing for case dismissal if the Debtor became more than 60 days delinquent in plan payments and containing a provision barring him from refiling for a period of 180 from the date of entry of the final order of dismissal. Though the previous case was dismissed on May 25, 2021, the Debtor filed the instant case on July 16, 2021—only 52 days after the dismissal of the previous case. Three days later, the United States Trustee filed a *Motion to Dismiss with Prejudice*, arguing that the current bankruptcy case should be dismissed for bad faith due to the Debtor's previous bankruptcy filings. The Chapter 13 Trustee filed a *Joinder* to the United States Trustee's *Motion to Dismiss*.

On July 22, 2021, the Debtor filed a *Motion to Extend Automatic Stay* claiming that his current bankruptcy case and plan were filed in good faith, that he believed that the Chapter 13 Plan and case would be confirmed, and that he would be able to fully perform under the plan. At a hearing on the *Motion to Extend Automatic Stay and Response* filed by the United States Trustee, the Debtor gave contradicting testimony regarding his employment and income and, most notably, conceded that he was aware of and understood the 180-day bar at the time of his § 341 meeting of creditors in the most previous bankruptcy case.

HELD: The presumption of bad faith arose with respect to the Debtor's filing of the instant case under § 362(c)(3)(C). This presumption arose specifically under § 362(c)(3)(C)(i)(II)(cc)—where the individual was a Debtor in a Chapter 13 case pending within the previous 1-year period and failed to perform the terms of a plan confirmed by the Court. The Debtor's failure to make Chapter 13 plan payments after plan confirmation results in the presumption that the new case is not filed in good faith, and here, the facts were undisputed that the Debtor failed to perform under the confirmed plan of his previous bankruptcy case. Though a presumption of bad faith can be rebutted by clear and convincing evidence that the instant bankruptcy case was filed in good faith, the Debtor here failed to meet this burden. By reviewing decisions by other courts, the Court determined that "good faith" is determined by making a totality of the circumstances determination on a case-by-case basis. When considering the facts presented in the Debtor's case, including his serial filing status, his consistent failure to make plan payments in previous bankruptcies, his lack of steady employment and income, and, most crucially, his understanding and subsequent violation of the 180-day bar contained in the agreed order with the Chapter 13 Trustee, the Court ultimately concluded that the Debtor failed to rebut the presumption of bad faith by clear and convincing evidence to the contrary. Therefore, the Debtor's *Motion to Extend Automatic Stay* was denied.

Thank You

The Bankruptcy Court for the Northern District extends many thanks to the attorneys, trustees, and other members of the public for being adaptable to the changes that have been implemented to keep matters before the court moving forward during the pandemic. We realize that some of these changes have come with their share of challenges, and we appreciate your cooperation.

Most hearings and other proceedings will continue to be held by telephone or video. Please review notices from the court closely and monitor deadlines accordingly.

Our goal in the Clerk's Office is to continue to work effectively and efficiently as we assist with case management. While most of our staff continues to work remotely, we remain fully operational and available to assist you during our normal office hours.

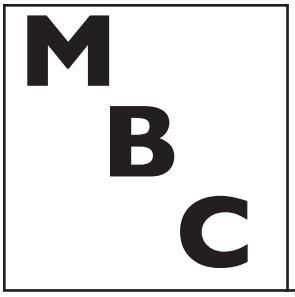
As a reminder, resources such as court calendar information, CM/ECF training material, and template forms are available on the court's website at www.msnb.uscourts.gov. Should you have any questions, concerns, or suggestions for improvement, please do not hesitate to contact us.

Shallanda "Che" Clay

News from the Southern District of Mississippi

On June 30, 2021, the United States Bankruptcy Court for the Southern District of Mississippi wished a happy retirement to the Honorable Neil P. Olack. On July 1, our court welcomed the Honorable Jamie A. Wilson to the bench in Jackson. Judge Wilson comes to us after most recently serving as an Assistant United States Attorney for the Southern District of Alabama.

Our court, like others around the United States, has experienced a significant impact on our daily operations in the wake of the COVID pandemic. Many, and quite often all, of our hearings have shifted to telephonic or video. Our staff employs a rotating telework schedule with about one-half of our staff in the office each day. We've incorporated video meetings, social distancing, and other protocols into our daily work lives. We are proud of the resilience of our staff as we have maintained maximum operational efficiency throughout the pandemic. We are also thankful to the bankruptcy bar for your support and cooperation during these uncertain and difficult times.



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