

United States Bankruptcy Appellate Panel
For the Eighth Circuit

No. 15-6001

In re: Suzette Woodward

Debtor

Heritage Bank

Creditor - Appellant

v.

Suzette Woodward

Debtor - Appellee

National Association of Consumer Bankruptcy Attorneys

Amicus on Behalf of Appellee(s)

Appeal from United States Bankruptcy Court
for the District of Nebraska - Lincoln

Submitted: July 22, 2015

Filed: August 13, 2015

Before FEDERMAN, Chief Judge, SCHERMER, and SHODEEN, Bankruptcy Judges.

SCHERMER, Bankruptcy Judge

Heritage Bank (Heritage) appeals from a Bankruptcy Court order confirming Suzette Woodward's (Debtor) Fifth Amended Chapter 11 Plan. The confirmation order is a final order of the Bankruptcy Court over which we have jurisdiction on appeal. *See* 28 U.S.C. § 158(b). The Notice of Appeal and Statement of Election also references an April 29, 2014 order denying the Debtor's Third Amended Plan. We believe that the denial of confirmation of the Debtor's Third Amended Plan is not a final order and cannot be the subject of this appeal. *Bullard v. Blue Hills Bank*, 135 S.Ct. 1686 (2015). Therefore, the sole basis of this appeal is the order confirming the Debtor's Fifth Amended Chapter 11 Plan. For the following reasons, the confirmation order is reversed and the case is remanded for a new confirmation hearing.

ISSUES

1. Whether an impaired class of claims has accepted the Debtor's Fifth Amended Plan.
2. Whether 11 U.S.C. §§ 1129(b)(2)(B)(ii)'s absolute priority rule prevents individual debtors in Chapter 11 from retaining property acquired prior to the filing of the bankruptcy petition when not all creditors' claims will be paid in full.
3. Whether the value of the property to be distributed under the Fifth Amended Plan is less than the Debtor's disposable income.

BACKGROUND

The Debtor is a practicing pathologist in Grand Island, Nebraska. She is a member of Pathology Specialists, LLC. On April 4, 2011, the Debtor filed for relief under Chapter 7 of the Bankruptcy Code. Heritage holds an allowed, unsecured claim in the amount of \$270,566.00.

On May 15, 2012, the Debtor acquired property at 2604 Arrowhead Road in Grand Island, Nebraska as her principal residence from Leland and Marie Elliott (Elliotts). As part of the purchase price, the Debtor signed a promissory note in favor of the Elliotts in the amount of \$169,900, and granted the Elliotts a security interest in the property. The Elliotts perfected their lien in the Debtor's property. In addition to regular monthly payments, the terms of the note required the Debtor to make a balloon payment on June 1, 2013. The Elliotts subsequently agreed to extend the date on which the balloon payment was due by one year.

The case was converted to a proceeding under Chapter 11 on September 10, 2012. The Elliotts filed a proof of claim asserting secured status with respect to the principal residence. Heritage objected to the Elliotts' proof of claim, not because it arose postpetition, but based on the timeliness of its filing. The Bankruptcy Court overruled the objection and allowed the claim in the amount of \$158,724.54. Heritage did not appeal the order allowing the claim, but instead continued to object to the Elliotts' voting on the plan as an impaired class, on the ground that the claim was a postpetition claim. At plan confirmation, the Bankruptcy Court essentially held that the Elliotts had an allowed claim, that the plan altered the treatment of their claim, and, thus, that the Elliotts were an impaired class entitled to the vote on the plan.

The Bankruptcy Court entered an order confirming the Debtor's Fifth Amended Plan on December 23, 2014. The Elliotts, the sole members of their class, voted in favor of the plan. No other impaired classes voted to accept the plan. On appeal,

Heritage argues that the plan should not have been confirmed because: (1) an impaired class did not accept it; (2) it violated the absolute priority rule; and (3) it does not call for payment of all of the Debtor's disposable income.

STANDARD OF REVIEW

We review the bankruptcy court's findings of fact for clear error and its conclusions of law de novo. *In re Walker*, 528 B.R. 418, 427 (B.A.P. 8th Cir. 2015) (citing *Heide v. Juve (In re Juve)*, 761 F.3d 847, 851 (8th Cir.2014)). Determining whether the Elliotts may vote on the plan and whether the absolute priority rule applies in individual Chapter 11 cases involve purely legal questions of statutory interpretation. We exercise de novo review with respect to each issue. *In re Johnson*, 509 B.R. 213, 214-15 (B.A.P. 8th Cir. 2014) (citing *Graven v. Fink (In re Graven)*, 936 F.2d 378, 384-85 (8th Cir.1991)). We find it unnecessary to reach the third issue.

DISCUSSION

1. An Impaired Class of Claims has Accepted the Plan

Heritage asserts on appeal that since the Debtor's obligation to the Elliotts arose postpetition, the Elliotts were not "creditors," as that term is defined in § 101(10), and so the Elliotts were not entitled to vote on the plan. Thus, Heritage asserts, the Bankruptcy Court erred in treating them as a consenting class under § 1129(a)(10). We disagree and think that Heritage's argument misses the mark under the circumstances of this case.

The issue is not whether the Elliotts were "creditors" under § 101(10), as Heritage asserts, because the time to litigate the Elliotts' creditor status has long since passed. As a result, Heritage is now foreclosed from raising the argument on appeal. Although it is true that Heritage objected to the Elliotts' proof of claim, the objection

was based on the timeliness of its filing. Heritage never objected to the claim's foundation in postpetition debt. Heritage did not appeal the Bankruptcy Court's order allowing the Elliotts' claim, and review is now precluded by principles of *res judicata*. Heritage may not raise the issue now. We hold that the Elliotts have an allowed claim.

We do question, however, whether the Elliotts *should have been* holders of an allowed claim because we are not convinced that the Bankruptcy Code allows for a postpetition claim such as this. *See, e.g.*, Bankr. Law Manual § 6:24 (5th ed.) (although recognizing that the Code provides for specific, identified, exceptions to the rule, stating that “[i]n general, only those claims that exist as of the date of the filing of the bankruptcy petition, commonly referred to as prepetition claims, may be allowed as claims against the estate.”).

Nevertheless, because the Elliotts were the “holders of a[n] [allowed] claim,” they were entitled to vote on the plan under the plain language of § 1126(a). That section provides that “[t]he holder of a claim or interest allowed under section 502 of this title may accept or reject a plan” (emphasis added). Furthermore, § 1129(a)(10) provides that, in order to confirm a plan, “[if] a class of claims is impaired under the plan, at least one *class of claims* that is impaired under the plan has accepted the plan, determined without including any acceptance of the plan by any insider” (emphasis added). “[A] class of claims or interests is impaired under a plan, unless,” as relevant here, the plan “leaves unaltered the legal, equitable, and contractual rights to which such claim or interest entitles the holder of such claim or interest.” 11 U.S.C. § 1124. We believe that the Elliotts' claim is impaired. They agreed to alter their rights under the note when they extended the date on which the balloon payment was due. In so doing, the Elliotts also waived § 1123(b)(5)'s prohibition against the modification of security interests in a debtor's principal residence. The antimodification provision can be waived by the creditor holding such

a claim.¹ See, e.g., *In re Arns*, 372 B.R. 876, 882-83 (Bankr. N.D. Ill. 2007) (holding that a lender can waive the antimodification provision in § 1123 by agreeing to the plan and not pursuing an objection to confirmation); *In re Canovali*, 2011 WL 307374 at 6 (Bankr. E.D. N.C. Jan. 27, 2011) (same); *In re Mayberry*, 487 B.R. 44, 46 (Bankr. D. Mass. 2013) (“Absent the creditor’s agreement the debtor cannot obtain confirmation of a chapter 13 plan which proposes to modify a claim secured by the debtor’s principal residence. If the creditor opts to agree to different treatment, it is certainly free to do so.”) (quoting *In re Wofford*, 449 B.R. 362, 365 (Bankr. W.D. Wis. 2011) (emphasis added); *In re Smith*, 409 B.R. 1, 4 (Bankr. D. N.H. 2009) (“[N]othing prevents a secured creditor from consenting to the modification of its claim.”)).

Heritage cites *In re Kliegl Bros. Universal Electric Stage Lighting Co.*, which held that, since § 1126(a) provides that only the holder of a claim or interest allowed under § 502 may accept or reject a plan, and since postpetition secured lenders are not mentioned or implied in § 502, the class containing such a postpetition lender as its sole member was not entitled to vote on the plan. 149 B.R. 306, 307 (Bankr. E.D. N.Y. 1992) (citations omitted). However, in contrast to this case, *Kliegl Bros.* did not say whether the lender there actually had an allowed claim, as the Elliotts do here. Again, maybe the Elliotts should not have had an allowed claim, but the fact is, they do. To the extent *Kliegl Bros.* can be read to prohibit the Elliotts – as the holders of an allowed claim impaired by the plan – from voting on the plan, we believe such a reading is contrary to the language of the statutes discussed above.

Consequently, we do not believe that the Bankruptcy Court erred in permitting the Elliotts’ ratifying vote to serve as the sole basis for the satisfaction of §

¹ The modification of a residential mortgage such as this could, conceivably, raise good faith issues if the modification was done to create a favorable impaired class, but good faith is not an issue raised in this appeal.

1129(a)(10)'s requirement that an impaired class of claim holders vote in favor of the plan. As the holders of an allowed claim and sole members of their impaired class, the Elliotts' ratifying vote satisfied § 1129(a)(10).

2. The Absolute Priority Rule Applies in Individual Chapter 11 Cases

“[T]he absolute priority rule ‘provides that a dissenting class of unsecured creditors must be provided for in full before any junior class can receive or retain any property under a reorganization plan.’ *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 202 (1988) (quoting *Ahlers v. Northwest Bank (In re Ahlers)*, 794 F.2d 388, 401 (8th Cir. 1986)); 11 U.S.C. § 1129(b)(2)(B)(ii). However, Congress amended the bankruptcy code in 2005 to include a statutory exception permitting individual Chapter 11 debtors to retain property *included in the estate under section 1115...*” without first paying creditors (emphasis added). 11 U.S.C. § 1129(b)(2)(B)(ii). Although most courts agree that § 1115 defines "property of the estate" as property and income acquired after commencement of the case in addition to the prepetition property specified in § 541, defining what "property [is] included in the estate under section 1115" has divided courts. Whether prepetition property is "property included in the estate under section 1115" will ultimately determine whether the absolute priority rule has any continuing application in individual debtor Chapter 11 cases.

In order to determine whether clarity exists in the murky jurisprudence surrounding the absolute priority rule, we think an overview of Congress's thinking with respect to individual Chapter 11 cases would be illuminating. Congress grafted many aspects of Chapter 13 onto the individual Chapter 11 framework. For instance, § 1123(b)(5) generally mimics § 1322(b)(2)'s treatment of claims secured only by the Debtor's principal residence. In addition, § 1129(a)(15) imports § 1325(a)(5)'s concept of disposable income, and § 1141(d)(5) does the same with respect to § 1328(a)'s limitations on discharge. Finally, like § 1306, § 1115 brings into the estate postpetition earnings and property. Other similarities exist.

Although Congress was able to import many elements of Chapter 13 into the individual Chapter 11 arena, it was not a perfect fit. In fact, in certain respects, it did not fit at all. The absolute priority rule states, in full, that:

[T]he holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property, except that in a case in which the debtor is an individual, the debtor may retain property included in the estate under section 1115, subject to the requirements of subsection (a)(14) of this section [relating to payment of domestic support obligations].

§ 1129(b)(2)(B)(ii). We suggest that there is no “interest” holder in an individual Chapter 11 case. The concept plainly applies to equity holders in the corporate or partnership Chapter 11 context, for example, but we do not believe that there is an *individual* Chapter 11 analogue. *Ahlers* simply assumed, without discussion, that the Debtors were interest holders. *Northwest Bank Worthington v. Ahlers*, 485 U.S. at 966. But how can one hold an interest in oneself? We do not think this is possible. In any event, one cannot avoid the fact that this is a Chapter 11 case. If Congress intended for all Chapter 13 specific law to apply in individual Chapter 11 cases, it could have afforded higher income debtors the ability to seek reorganization under Chapter 13. It did not.

We hold that the absolute priority rule still applies in individual Chapter 11 cases to prevent debtors from retaining prepetition property. Our holding is supported by: (1) the language and context of § 1129(b)(2)(B)(ii) and 1115; (2) the absence of a clear indication by Congress of an intent to abrogate; and (3) the weight of existing authority.

A. The Relevant Statutory Language and Context Supports the Absolute Priority Rule's Continuing Application

"In determining the meaning of a statutory provision, 'we look first to its language, giving the words used their ordinary meaning.'" *Lawson v. FMR LLC*, 134 S. Ct. 1158, 1165 (2014) (quoting *Moskal v. United States*, 498 U.S. 103, 108 (1990)). "Whether a statutory term is unambiguous, however, does not turn solely on dictionary definitions of its component words. Rather, '[t]he plainness or ambiguity of statutory language is determined [not only] by reference to the language itself, [but as well by] the specific context in which that language is used, and the broader context of the statute as a whole.'" *Yates v. United States*, 135 S. Ct. 1074, 1081-82 (2015) (citing *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)).

The language of §§ 1129 and 1115 favors the absolute priority rule's continuing application. That postpetition property is the only "property included in the estate under section 1115" follows from § 1129's use of the word "included." "The action described by 'include' is either 'to take in as a part, an element, or a member ...[C]onverted into the active voice, § 1129(b)(2)(B)(ii) refers to property that § 1115 includes in the estate, which naturally reads as 'property that § 1115 takes into the estate...'" *Ice House America, LLC v. Cardin (In re Cardin)*, 751 F.3d 739 (6th Cir. 2014). Contextually, the only property that § 1115 can take into the estate is postpetition property and income because prepetition property is already part of the estate under § 541. "Section 1115 cannot take into the estate property that was already there [prepetition property under § 541] ... what § 1115 takes into the estate-is property 'that the debtor acquires after the commencement of the case.'" *Id.*

The text of § 1115(a) leads to the same conclusion. It states that "property of the estate includes, *in addition to the property specified in section 541*– all property of the kind specified in section 541 that the debtor acquires after the commencement of the case... ." (emphasis added). The inclusion of "in addition to" as a modification

of the "property specified in section 541" separates the "property specified in section 541" from all of the other property mentioned in § 1115, thereby channeling all of the other property into "property included in the estate under section 1115" while filtering from this definition "the property specified in section 541." In other words,

[T]he phrase, 'the property specified in section 541' cannot be viewed in isolation. The phrase is part of the prepositional phrase beginning with 'in addition to,' and is thus not the direct object of the transitive verb, 'includes,' so it does not relate to the subject of the sentence, 'property of the estate... .

In re Arnold, 471 B.R. 578, 602 (Bankr. C.D. Cal. 2012).

The broader statutory context provides further support. "Because § 541 independently includes all § 541 property in the estate, it would be a redundancy to 'reininclude' that property through the § 1115 language." *In re Maharaj*, 681 F.3d 569 (4th Cir. 2012). Consequently, we are left to conclude that the "property specified in section 541" – that is, prepetition property – is not "property included in the estate under section 1115" that is excluded from the absolute priority rule. Section 541 cannot operate as a "subset" of § 1115 as some "broad view" courts have suggested. *Id.* at 569 (discussing *Friedman v. P+P, LLC (In re Friedman)*, 466 B.R. 471 (B.A.P. 9th Cir. 2012)). Therefore, the statutory language and context suggests that Congress did not abrogate the absolute priority rule in individual Chapter 11 cases.

B. Congress has not Evinced a Clear Indication of an Intent to Abrogate the Absolute Priority Rule

The concept of the absolute priority rule was first articulated in 1913. *N. Pac. R. Co. V. Boyd*, 228 U.S. 482, 508 (1913). We believe that Congress would have employed clearer language to abrogate the absolute priority rule if it had so intended.

It could have "expressly exempted individual debtors at the beginning of § 1129(b)(2)(B)(ii)." *Dill Oil Company, LLC v. Stephens (In re Stephens)*, 704 F.3d 1286 (10th Cir. 2013). It could have omitted "in addition to the property specified in section 541" from the introductory clause of § 1115(a), while including the words "before and" directly preceding "after" in (a)(1) of the statute. The language of the statute, then, would read, "property of the estate includes [comma and text omitted] – all property of the kind specified in section 541 that the debtor acquires before and after the commencement of the case." Congress did not make these changes, however, and we see no reason to read them into §§ 1129 or 1115.

Furthermore, any mention of the absolute priority rule's abrogation is conspicuously absent in The Bankruptcy Abuse and Prevention Act of 2005's (BAPCPA) legislative history. PL 109-8, April 20, 2005, 119 Stat 23." BAPCPA's legislative history lists several debtor protections but makes no mention of eliminating the APR ... had Congress intended such a drastic change, it surely would have included the amendment in its list of debtor protections. Instead, the amendments are best understood as preserving the status quo." *Stephens*, 704 F.3d at 1286 (citing H.R. REP. NO. 109-31, pt. 1, at 2, 17-18 and *Maharaj*, 681 F.3d at 572). "[W]e will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure." *In re Lively*, 717 F.3d 406 (5th Cir. 2013) (quoting *Hamilton v. Lanning*, 560 U.S. 505, 517 (2010)).

C. The Overwhelming Weight of Authority has Upheld the Absolute Priority Rule

Finally, the majority of courts to address the issue, including the Fourth, Fifth, Sixth, and Tenth Circuits, follow the "narrow view." *See Ice House*, 751 F.3d at 734; *Lively*, 717 F.3d at 406; *Stephens*, 704 F.3d at 1279; *Maharaj*, 681 F.3d at 558. They have held, as we do today, that § 1115 merely augments existing estate property as set out in § 541 by drawing in postpetition property and income. In fact, no circuit

court has ruled otherwise. Therefore, we are comfortable in concluding that the absolute priority rule still has application in individual Chapter 11 cases.

3. Determining whether the Debtor is Contributing Less than Her Disposable Income to the Plan is Unnecessary

When the holder of an allowed unsecured claim objects to plan confirmation in a Chapter 11 case involving an individual debtor, § 1129(a)(15) requires that all unsecured claims be paid in full or that the debtor pay all of her disposable income into the plan for five years. “[D]isposable income” is defined in § 1325(b)(2) as “current monthly income received by the Debtor ... less than amounts reasonably necessary to be expended” The Bankruptcy Court determined the Debtor’s income and the reasonableness of her expenses.

Heritage, however, believes that the Debtor’s income tax return should be used to determine “current monthly income” rather than an average of her previous six monthly “draws” from Pathology Specialists, LLC. Heritage also disputes the reasonableness of the Debtor’s expenses. Because we have determined that the absolute priority rule applies to individuals in Chapter 11, it is unnecessary to address the Bankruptcy Court’s determination of the Debtor’s disposable income. The Debtor’s “disposable income” as defined in § 1325(b)(2) is “property included in the estate under section 1115” which the Debtor may retain. Heritage stated at oral argument that it will only accept full payment on its claim. Therefore, any determination of disposable income on appeal is unnecessary.

CONCLUSION

For the reasons stated above, we remand the case for a new confirmation hearing.

IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF MISSOURI

IN RE:)	
)	
WILLIAM STEVEN DUNAWAY and)	
CYNTHIA ANN DUNAWAY,)	Case No. 14-41073-13-drd
)	
Debtors.)	
)	
_____)	
)	
WILLIAM STEVEN DUNAWAY and)	
CYNTHIA ANN DUNAWAY,)	
)	
Plaintiffs,)	
)	
VS.)	Adversary No. 14-4132
)	
LVNV FUNDING, LLC and)	
RESURGENT CAPITAL SERVICES, L.P.,)	
)	
Defendants.)	

MEMORANDUM OPINION

Before this Court is the Motion for Summary Judgment (the “Motion”) filed by LVNV Funding, LLC (“LVNV”) and Resurgent Capital Services, L.P. (the “Defendants”) against William Steven Dunaway and Cynthia Ann Dunaway (the “Debtors”). Also before the Court is Debtors’ Motion for Summary Judgment. Both parties filed Suggestions in Support of their motions and Suggestions in Opposition to the opposing parties’ motions. The Plaintiff initiated the adversary proceeding seeking a right to recover actual and statutory damages, costs and attorney’s fees from Defendants for violation of the Fair Debt Collections Practices Act, 15 U.S.C. 1692 et seq. (the “FDCPA”). In accordance with Rule 7056 of the Federal Rules of

Bankruptcy Procedure and for the reasons set forth below, the Court grants the Defendants' Motion and denies Debtors' Motion.

I. FACTUAL BACKGROUND

The following facts are undisputed. Debtors filed for Chapter 13 bankruptcy on March 31, 2014. LVNV was listed on Debtors' Schedule F and creditor matrix. On July 25, 2014, Defendants filed a proof of claim on behalf of LVNV. The Claim lists an unsecured amount of \$6,206.92. The attachment to the Claim lists First USA Bank, N.A. as the creditor from whom LVNV purchased the account. The attachment also states that the account was charged off by the original creditor on 05/05/2000, the last payment date was 8/19/1999, and the last transaction date was 8/19/1999. On October 14, 2014, Debtors filed an objection to the Claim. On October 16, Debtors amended the objection and filed an adversary proceeding against Defendants. On November 19, 2014, the Court granted the amended objection to the Claim.

II. LEGAL ANALYSIS

A. Standard for Summary Judgment

Bankruptcy Rule 7056, applying Federal Rule of Civil Procedure 56(c), provides that summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." *See Celotex v. Catrett*, 477 U.S. 317, 322 (1986). Once the moving party has met this burden, the non-moving party must set forth specific facts sufficient to raise a genuine issue for trial, and may not rest on its pleadings or mere assertions of disputed facts to defeat the motion. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). When reviewing the record for

summary judgment, the court is required to draw all reasonable inferences in favor of the non-movant. *Bank Leumi Le-Israel, B.M. v. Lee*, 928 F.2d 232, 236 (7th Cir. 1991).

B. Allegation of Violation of the Fair Debt Collection Act

Debtors allege in their adversary complaint that filing a proof of claim on a time-barred debt is a violation of the FDCPA. Debtors urge the Court to adopt and apply the 11th Circuit's holding in *Crawford v. LVNV Funding, LLC*, 758 F.3d 1254 (11th Cir. 2014). In that case, the debtor filed for bankruptcy in 2008 and proposed to repay creditors over a five year period. LVNV filed a proof of claim in the bankruptcy case on a debt outside the statute of limitations. Neither the debtor nor the trustee objected to the claim and the debtor continued to pay on all debts including the LVNV claim. After four years, the debtor realized the LVNV claim was based on a stale debt and filed an objection to the claim and an adversary proceeding against LVNV for violation of the FDCPA. The *Crawford* court found that LVNV did violate the FDCPA by filing a time-barred proof of claim because absent an objection, the claim is automatically allowed against a debtor and was therefore "unfair, unconscionable, deceptive and misleading" within the broad scope of §1692e and §1692f.

Debtors argue that filing a time-barred proof of claim violates the FDCPA. First, Debtors assert that filing a proof of claim is akin to collecting a debt and analogous to the filing of a complaint in a civil action. Citing *In re Brimmage*, 523 B.R. 134 (Bankr. N.D. Ill. 2015) and *Smith v. Dowden*, 47 F.3d 940 (8th Cir. 1995). The FDCPA prohibits debt collectors from taking any action that cannot legally be taken in connection with the collection of a debt. See 15 U.S.C. §1692e(5). Numerous district and circuit courts have held that the FDCPA prohibits a defendant from filing a lawsuit to collect a time-barred debt, see, e.g., *Freyermuth v. Credit Bureau Services*, 248 F.3d 767, 771 (8th Cir. 2001). Debtors argue that action taken in bankruptcy courts

should not be exempt from this prohibition because if they are then debt collectors will have a blanket immunity to pursue claims in bankruptcy court that they could not pursue in a non-bankruptcy court context. Debtors argue that not only will this practice harm debtors but that it will also harm legitimate creditors because they will receive a lesser amount paid on their timely claims. Debtors also assert that the Bankruptcy Code and the FDCPA are not incompatible and thus can co-exist and courts can enforce both.

Defendants of course disagree. They contend that the FDCPA protections are inapplicable in the bankruptcy context because the Code has its own set of procedures and protections. Defendants assert that the FDCPA is not implicated by filing a proof of claim, even if invalid, because the Code gives an interested party the right to object to an invalid claim, which includes a claim that is barred by the statute of limitations. In fact, Debtors have in fact done just that in this case and objected to the claim filed by Defendants and the objection was granted and the claim disallowed.

Defendants further argue that filing a proof of claim does not constitute an attempt to collect a debt from a consumer as required by the FDCPA. Rather, they argue, a debtor's bankruptcy estate is not a consumer. Defendants contend that filing a proof of claim is not a collection activity but rather an attempt to be involved in the distribution of estate proceeds. They further assert that if filing a proof of claim was an attempt to collect a debt that it would be a violation of the automatic stay. Finally, Defendants contend that even if filing a proof of claim is a debt collection activity, it is not an abusive or deceptive practice as required by the FDCPA.

C. Analysis

1. *Whether the Bankruptcy Code precludes FDCPA actions.*

When two federal statutes have inconsistent provisions, a court may find that one of the statutes precludes application of the other. *See, e.g., Simon v. FIA Card Ser., N.A.*, 732 F.3d 259, 280 (3rd Cir. 2013). Several decisions have held that the Bankruptcy Code precludes actions under the FDCPA based on collection activity within a bankruptcy case. The leading decision is *B-Real, LLC v. Chaussee (In re Chaussee)*, 399 B.R. 225, 237 (9th Cir. BAP 2008) (“[T]he debt validation provisions required by FDCPA clearly conflict with the claims processing procedures contemplated by the [Bankruptcy] Code and Rules”). Similarly, the FDCPA has been held not to apply to a bankruptcy proof of claim allegedly filed in an excessive amount, because “[t]here is no need to protect debtors who are already under the protection of the bankruptcy court, and there is no need to supplement the remedies afforded by bankruptcy itself.” *Simmons v. Roundup Funding, LLC*, 622 F.3d 93, 96 (2nd Cir. 2010).

Determining whether the provisions of the Bankruptcy Code regarding the filing and allowance of claims preclude the application of the FDCPA requires consideration of both the appropriate standard for judging preclusion generally and the specific context in which the question is being asked. In *Randolph*, 368 F.3d 726 (7th Cir. 2004), the Seventh Circuit adopts a standard requiring either an irreconcilable conflict or a clearly expressed legislative intention that one statute replace the other. The Eighth Circuit has employed a similar, but not identical standard, stating that if the statutes are capable of coexistence, it is the duty of the court to regard each as effective absent a clearly expressed legislative intention to the contrary. *See Wood v. Fiedler*, 548 F.2d 216 (8th Cir.1977). Context is also important. Some of the cases finding no conflict and thus no preclusion are based upon actions alleged to have been in violation of the discharge injunction. *See, e.g., Randolph*, 368 F.3d 726; *Simon*, 732 F.3d 259. These actions were taken after the bankruptcy case was concluded. In other instances, the question has arisen

in the context of acts alleged to have been a violation of the automatic stay, acts which were taken by the creditor outside the context of the bankruptcy case. *Maloy v. Phillips*, 191 B.R. 721, 723 (M.D. Ga. 1996); *Divane v. A & C Elec. Co., Inc.*, 193 B.R. 856, 859 (N.D. Ill. 1996); *Hubbard v. Nat'l Bond & Collection Assoc., Inc.*, 126 B.R. 422, 428–29 (D. Del. 1991). The alleged violation in this case arises from the filing of a proof of claim in the bankruptcy court. As to this process, governed by the Bankruptcy Code and Rules and managed by the bankruptcy court within the context of a pending case, the possibility for inconsistency is heightened.

If the standard is one of irreconcilable conflict, the Court might find it difficult to determine that the application of the FDCPA is precluded even in this context. If there is any lower threshold, the Court would likely conclude the Bankruptcy Code precludes application of the FDCPA in the specific context of the filing and allowance of proofs of claim. The Court finds persuasive the extensive analysis by the court in *Chausee* regarding the inconsistencies between the process of filing claims and adjudicating objections and the principles of the FDCPA, specifically debt validation requirements. *Chausee*, 399 B.R. at 237. Because the Court has determined that the filing of a claim barred by the statute of limitations does not violate the FDCPA, it need not determine the preclusion question now and leaves it to another day if it arises again in another context.

2. Filing a proof of claim is an action to collect a debt.

The liability under the FDCPA asserted in Debtors' complaint can only arise from actions taken "in connection with the collection of any debt." 15 U.S.C. § 1692e. The Defendants' second point in their motion is that the action of filing a proof of claim was not taken in connection with debt collection. The Court disagrees.

A proof of claim, of course, is intended to result in some recovery for the creditor on the debt set out in the proof of claim, and so filing a proof of claim would be within the ordinary meaning of “debt collection.” See *In re LaGrone*, 525 B.R. 419 (Bankr. N.D. Ill. 2015); *Crawford*, 758 F.3d at 1262 (“Filing a proof of claim is the first step in collecting a debt in bankruptcy and is, at the very least, an ‘indirect’ means of collecting a debt.”). A number of decisions, however, hold that that filing of a proof of claim is not a debt collection activity. These decisions are collected in *Humes v. LVNV Funding, LLC (In re Humes)*, 496 B.R. 557, 581 (Bankr.E.D.Ark.2013), and rationalize that the filing of a proof of claim is a request to participate in the distribution of the bankruptcy estate under court control and is not an effort to collect a debt from the debtor, who enjoys the protections of the automatic stay. See e.g., *Jenkins v. Genesis Fin. Solutions (In re Jenkins)*, 456 B.R. 236, 240 (Bankr E.D.N.C. 2011) (emphasis in original); see also *McMillen v. Syndicated Office Sys., Inc. (In re McMillen)*, 440 B.R. 907, 912 (Bankr .N.D. Ga. 2010); *Simmons*, 622 F.3d at 95.

This analysis is not persuasive. There is no contradiction between a proof of claim being an action to collect a debt and the automatic stay. The automatic stay does indeed prohibit debt collection activity, and filing a proof of claim is an action to collect a debt, but it is well established that the automatic stay does not prohibit actions taken in the bankruptcy case itself. See *Eger v. Eger (In re Eger)*, 507 B.R. 1, 1 (Bankr. N.D. Ga. 2014) (collecting authorities). The argument is particularly unpersuasive in the Chapter 13 context where the payment of unsecured claims is made primarily or exclusively from the debtor’s wages. Further, in some, and perhaps many of these cases, the amount the debtor must commit to the payment of claims will depend upon the filed and allowed amount of such claims.

3. Filing a proof of claim subject to a limitations defense does not violate the FDCPA.

The first section of the FDCPA sets out a finding that “abusive, deceptive, and unfair debt collection practices” are employed by debt collectors against consumers, 15 U.S.C. § 1692, and the Act goes on to prohibit a number of specific practices. Section 1262k provides for an award of damages against any debt collector who fails to comply with the Act's provisions.

Debtors assert generally in their Complaint that the acts of Defendants in attempting to collect a time-barred debt are in violation of the FDCPA, 15 U.S.C. §1692, and that the filing of a proof of claim to collect a stale debt violates sections 1692d, 1692e and 1692f. Specifically, Debtors allege that the acts and omissions by Defendants constitute violations of the FDCPA, including, but not limited to, collecting or attempting to collect amounts not permitted by law and by otherwise using unfair and deceptive methods in direct violation of 1692f(1).

Defendants’ argue that filing a proof of claim on a debt subject to a limitation defense does not violate any of these provisions.

Section 1692d states: “A debt collector may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt.” The section goes on to provide specific conduct that is a violation that includes the use or threat of use of violence or other criminal means to harm the physical person, reputation, or property of any person; the use of obscene or profane language or language the natural consequence of which is to abuse the hearer or reader; among others that Debtors do not allege. Here, there is no “threat” in a proof of claim that accurately reflects information about an unsecured debt the debtor has listed on his own schedules. “It is neither a lawsuit nor a threat of a lawsuit; it’s a statement that a debt exists ... and there is no prohibition in the Bankruptcy Code against filing a proof of claim on an unsecured, stale debt.” *See, e.g., In re Donaldson*, Case No. 1:14-cv-01979 (S.D. Ind. 2015).

Section 1692e provides that “a debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt.” That section also provides specific examples of such conduct. As discussed above, the Court agrees that filing a proof of claim is an act to collect a debt. However, the Court does not agree that a proof of claim that accurately reflects information on the debt, including the date of last payment, date the account was charged off by the original creditor and the last transaction date is false, deceptive or misleading on its face. Further, Debtors listed the debt on their schedules as unsecured indicating an intent to include it in any discharge that resulted from the bankruptcy. The argument that filing a proof of claim on a time-barred debt mischaracterizes the legal status of the debt also fails because a debt that is legally unenforceable or uncollectible is not extinguished; the money is still owed and only the creditor’s remedies are regulated. *See Donaldson*, Case No. 1:14-cv-01979 (S.D. Ind. 2015). Similarly, “a factual, true statement about the existence of a debt and the amount, which is recognized in the debtor’s own bankruptcy schedules, is neither false nor deceptive.” *Id.*; *see also, In re McMillen*, 440 B.R. 907, 913 (Bankr. N.D. Ga. 2010).

Section 1692f of the FDCPA, which generally prohibits “unfair or unconscionable” debt collection activities, is an additional ground for relief asserted by Debtors. However, as with the other sections, there is nothing unconscionable or unfair about filing a proof of claim that contains truthful and accurate information on a debt that is known to debtors and their attorney. *See, e.g., In re Claudio*, 463 B.R. 190, 193-94 (Bankr. D. Mass. 2012). There can be no violation to these sections if the claimant complies with all of the rules for filing a proof of claim, including the requirement to supply various attachments with certain specific information, and unless any of that information is false, the filing can hardly be deceptive.

Numerous courts have held that an FDCPA claim “cannot be based on the filing of a proof of claim, regardless of the ultimate validity of the underlying claim.” *In re Simpson*, 2008 WL 4216317 at *3; *see, e.g., In re Pariseau*, 395 B.R. at 493–94; *In re Varona*, 388 B.R. at 717–21; *see also Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502, 510–11 (9th Cir. 2002) (debtor's claim under FDCPA for an alleged violation of the bankruptcy discharge must be dismissed); *Jones v. Wolpoff & Abramson, L.L.P.*, 2006 WL 266102 at *3 (E.D. Pa. 2006) (same). Although there are conflicting decisions on this issue, the Court finds that Defendants' position is the better one. Courts have interpreted these FDCPA provisions as prohibiting a debt collector from filing untimely lawsuits against consumer debtors, but these interpretations are grounded in the situation of the defendants facing such lawsuits. *See Phillips v. Asset Acceptance, LLC*, 736 F.3d 1076, 1079 (7th Cir. 2013). The question raised by Defendants' motion is whether this analysis applies to debt collectors filing bankruptcy proofs of claims. The Eleventh Circuit has held that it does apply in *Crawford*, 758 F.3d at 1261 and Debtors urge this Court to follow the *Crawford* reasoning.

In the Eighth Circuit case *Freyermuth*, a debtor alleged that a collection agency engaged in abusive practices in violation of the FDCPA by attempting to collect on a debt that was potentially time-barred. The court found that a creditor may attempt to collect on a claim barred by the statute of limitations and does not violate the FDCPA unless the creditor either threatens to or actually files a lawsuit on such a claim. *See* 248 F.3d at 771. The filing of a proof of claim does not constitute a threat of litigation. For the reasons discussed below, this Court does not believe that a debtor in bankruptcy is in the position of a consumer facing a collection lawsuit and would not extend *Freyermuth* to bankruptcy claims. Debtors also urge the Court to use the “least sophisticated consumer” standard for determining the existence of an FDCPA violation.

However, the *Freyermuth* court found that standard to be appropriate only if the representation is made directly to the debtor. Here, the representation is made to the Court, not directly to the Debtors. That fact and the fact that Debtors are represented by counsel make the application of the standard urged by Debtors inappropriate. This case is thus distinct from *Crawford* in which the 11th Circuit employed this stricter standard. *Id.*; *see also, Donaldson*, Case No. 1:14-cv-01979 (S.D. Ind. 2015). While the FDCPA's purpose is to protect unsophisticated consumers from unscrupulous debt collectors, that purpose is not implicated when a debtor is instead protected by the court system and its officers. *See Simmons*, 622 F.3d at 96. The Court agrees that there are differences between lawsuits filed against individuals and proofs of claim filed in bankruptcy cases, all indicating that the deception and unfairness of untimely lawsuits is not present in the bankruptcy claims process. *See LaGrone*, 525 B.R. at 426.

First, Debtors in bankruptcy cases have the benefit of a trustee with a fiduciary duty to all parties to "examine proofs of claims and object to the allowance of any claim that is improper." *In re Andreas*, 373 B.R. 864, 876 (Bankr. N.D. Ill. 2007) ("[T]he Trustee is a fiduciary owing duties to all parties in interest in a Chapter 13 case."); *In re Mid-States Express, Inc.*, 433 B.R. 688, 697 (Bankr. N.D. Ill. 2010) ("The trustee has a duty to object to improper claims."). Also, debtors in bankruptcy are likely to be represented by an attorney who can both advise them about the existence of a statute of limitations defense and file an objection if the trustee does not. The process of filing an objection to a proof of claim is much simpler and more streamlined than defending a civil lawsuit. All a debtor need do is file a simple objection, usually one page long, setting forth the factual or legal basis for the dispute. Then, after the filing of a response within a limited period of time, the matter is set for hearing before the bankruptcy court and promptly resolved. The Debtors here have been represented by counsel throughout the case. Further, in

the bankruptcy context, a debtor has the benefit of the U.S. Trustee acting as watchdog and the U.S. Trustee has indeed been active in this area recently.

Second, a debtor in bankruptcy often has much less at stake in the allowance of a proof of claim than a defendant facing the prospect of an adverse judgment in a collection lawsuit. A proof of claim does not always result in collection from the debtor personally but seeks only a share in the total payments available to all of the debtor's creditors. This is most obvious in a Chapter 7 case, where the debtor's nonexempt assets are the sole source of payments to creditors and where it is rare for the value of these assets to exceed the amount of the debt. Accordingly, in most Chapter 7 cases, the debtor has no standing to object to claims. *LaGrone*, 525 B.R. at 426-27; *see In re Curry*, 409 B.R. 831, 838 (Bankr. N.D. Tex. 2009) (noting that Chapter 7 debtors lack standing to file claim objections because they “have no pecuniary interest in doing so”). In Chapter 13, creditors are paid through a plan the debtor proposes, but in a case like the present one, where the debtor is proposing to pay the creditors less than the full amount of their claims, the effect is similar to Chapter 7 in that the debtor will pay the same total amount to creditors, regardless of whether particular proofs of claim are disallowed. In many instances in Chapter 13 cases, the amount to be paid to unsecured creditors is not determined by the amount of the debt, but rather either by the debtor’s projected disposable income or the hypothetical distribution to creditors in a Chapter 7 case. In either case, the amount is a lump sum which would be distributed to the unsecured creditors pro rata. The allowance of additional claims would not affect the total amount that the debtor would have to pay in order to confirm and consummate the Chapter 13 plan. While it is true that in cases dismissed before discharge the debtors would still owe whatever portion of their debts was not paid through their plans, and if payments made on a time-barred claim had been made to other creditors, the amounts remaining

to be paid on the other claims would be lower, this contingency still presents a much smaller effect on a debtor than would a civil judgment.

The Court recognizes that debtors, their counsel, bankruptcy trustees and the U.S. Trustee must be vigilant in reviewing proofs of claim, so that a distribution is not provided to those holding claims barred by the statute of limitations. Nonetheless, as other courts have observed, the present statute and procedural rules do not preclude such filings by creditors. Until the Bankruptcy Code is amended (for example, by adding a provision in § 501 requiring creditors to have a good faith belief in the allowability of their claims), or the procedural rules modified to render such claims invalid, *see Chaussee*, 399 B.R. at 240 n. 16; *In re Andrews*, 394 B.R. at 388, creditors such as these defendants are entitled to file proofs of claim even for stale debts.

III. CONCLUSION

After reviewing the entire record, the Court finds that the Defendants have met their burden of proving that there is no genuine issue of fact and that they are entitled to judgment as a matter of law. Accordingly, the Defendants' Motion for Summary Judgment is granted and Debtors' Motion for Summary Judgment is denied.

Dated: May 19, 2015

/s/Dennis R. Dow
THE HONORABLE DENNIS R. DOW
UNITED STATES BANKRUPTCY JUDGE

United States Bankruptcy Appellate Panel
For the Eighth Circuit

No. 15-6008

In re: Johnny Jr. Gatewood; Cheryl Gatewood

Debtors

Johnny Jr. Gatewood; Cheryl Gatewood

Plaintiffs - Appellants

v.

CP Medical, LLC

Defendant - Appellee

Appeal from United States Bankruptcy Court
for the Western District of Arkansas - Fayetteville

Submitted: June 2, 2015

Filed: July 10, 2015

Before KRESSEL, SALADINO and SHODEEN, Bankruptcy Judges.

SALADINO, Bankruptcy Judge.

Mr. and Mrs. Gatewood appeal from an order of the bankruptcy court¹ granting summary judgment to the defendant in an adversary proceeding concerning a proof of claim filed by the defendant on a time-barred debt. We have jurisdiction over this appeal from entry of the bankruptcy court's final order pursuant to 28 U.S.C. § 158(b). For the reasons set forth below, we affirm.

FACTUAL BACKGROUND

The operative facts are not in dispute. Mr. and Mrs. Gatewood filed a Chapter 13 bankruptcy petition on October 7, 2013. Many of the unsecured non-priority debts listed on their Schedule D are for medical services and include collection agents for some of the debts. CP Medical's agent timely filed a proof of claim on October 24, 2013. The Chapter 13 plan, proposing monthly payments of \$124.00 over 36 months and a pro rata distribution to unsecured creditors, was confirmed on December 5, 2013. However, Mr. and Mrs. Gatewood subsequently fell behind on their plan payments and converted the case to a Chapter 7 in May 2015.

After confirmation, but during the pendency of the Chapter 13 case, Mr. and Mrs. Gatewood filed an adversary proceeding against CP Medical, LLC for monetary damages caused by a violation of the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 *et seq.* The amended complaint indicated that CP Medical's proof of claim was for medical services provided on February 27, 2011. Mr. and Mrs. Gatewood assert that the bankruptcy and proof of claim filings were beyond Arkansas' two-year statute of limitations for the collection of a medical debt. They further assert that by filing a claim on a debt that is time-barred, CP Medical engaged

¹The Honorable Ben T. Barry, United States Bankruptcy Judge for the Western District of Arkansas.

in a “false, deceptive, misleading, unfair and unconscionable” debt collection practice in contravention of the FDCPA.²

The parties filed cross-motions for summary judgment, and on February 6, 2015, the bankruptcy court granted CP Medical’s motion and denied Mr. and Mrs. Gatewood’s motion. In doing so, the court relied on Eighth Circuit precedent holding that no FDCPA violation occurs when a debt collector attempts to collect a potentially time-barred debt that is otherwise valid unless there is actual litigation or the threat of litigation. Order of Feb. 6, 2015, at 8. The court characterized the filing of CP Medical’s proof of claim as a simple attempt to share in any distribution made to listed creditors in the bankruptcy case, an action that does not rise to the level of actual or threatened litigation. In denying Mr. and Mrs. Gatewood’s motion, the court pointed out that the FDCPA and the Bankruptcy Code overlap but serve different purposes, in that a bankruptcy debtor is protected from collection activities by the Code and has other avenues to challenge claims the debtor believes are unenforceable. The court ultimately held that the FDCPA is not the controlling statute after a debtor files a bankruptcy petition. Mr. and Mrs. Gatewood then appealed.

STANDARD OF REVIEW

We review de novo the bankruptcy court’s grant of summary judgment, and will affirm the grant of summary judgment if there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. *Shaffer v. Bird*

²While the adversary proceeding complaint fails to identify which specific sections of the FDCPA were violated, the operative language used in the complaint appears to be referencing 15 U.S.C. §§ 1692e (which prohibits a debt collector from using false, deceptive or misleading representations) and 1692f (which prohibits the use of unfair or unconscionable means to collect a debt). More specifically, 15 U.S.C. § 1692e(5) states that the threat to take any action that cannot legally be taken is a violation of that section.

(*In re Bird*), 513 B.R. 104, 106 (B.A.P. 8th Cir. 2014); *Ritchie Capital Mgmt., LLC v. Stoebner*, 779 F.3d 857, 860-61 (8th Cir. 2015). Here, there is no dispute as to the material facts. Accordingly, we must review de novo whether CP Medical is entitled to judgment as a matter of law.

DISCUSSION

Mr. and Mrs. Gatewood identify the issue on appeal as whether the filing of a proof of claim that is supported by a debt time-barred under applicable state law (a “stale” debt) constitutes a violation of the FDCPA, 15 U.S.C. §§ 1692e and 1692f, as a means of debt collection that is either false, misleading, deceptive, unfair, or unconscionable. To answer this question, we must determine whether, under the FDCPA, the filing of a proof of claim in a bankruptcy case constitutes an attempt to collect upon the debt and, if so, whether the filing of a proof of claim on a stale debt is a debt collection action that is false, misleading, deceptive, unfair, or unconscionable under the FDCPA.

Liability for violations of the sections of the FDCPA asserted in Mr. and Mrs. Gatewood’s complaint can only arise from actions taken “in connection with the collection of any debt.” 15 U.S.C. §§ 1692e and 1692f. Mr. and Mrs. Gatewood argue that the filing of a proof of claim in bankruptcy is an act in connection with the collection of a debt. We agree.

We believe it is abundantly clear that the filing of a proof of claim in a bankruptcy case is intended to result in some recovery for the creditor on the debt set out in the proof of claim. *See Dunaway v. LVNV Funding, LLC*, 531 B.R. 267, 271 (Bankr. W.D. Mo. 2015) (citing *LaGrone v. LVNV Funding, LLC (In re LaGrone)*, 525 B.R. 419 (Bankr. N.D. Ill. 2015), and *Crawford v. LVNV Funding, LLC*, 758 F.3d 1254, 1262 (11th Cir. 2014) (stating that “[f]iling a proof of claim is the first step in

collecting a debt in bankruptcy and is, at the very least, an ‘indirect’ means of collecting a debt.”)).

CP Medical argues that even if the filing of a proof of claim in bankruptcy could be considered an action to collect a debt, it is not “litigation” or the “threat of litigation” and, therefore, there is no violation of the FDCPA. For this proposition, CP Medical cites to the Eighth Circuit Court of Appeals decision in *Freyermuth v. Credit Bureau Servs., Inc.*, 248 F.3d 767 (8th Cir. 2001), which held that, “in the absence of a threat of litigation or actual litigation, no violation of the FDCPA has occurred when a debt collector attempts to collect on a potentially time-barred debt that is otherwise valid.” Thus, the question is whether the filing of a proof of claim in a bankruptcy case is “a threat of litigation or actual litigation.”

In bankruptcy, the filing of a proof of claim is triggered by an act of the debtor – the filing of the bankruptcy case. The debtor has a duty to file a list of creditors. 11 U.S.C. § 521(a)(1)(A). Those creditors are then given the opportunity to file a proof of claim. 11 U.S.C. § 501(a). A proof of claim is deemed allowed unless a party in interest objects. 11 U.S.C. § 502(a). If an objection is filed to a claim, the court will, “after notice and hearing,” determine the amount and allow the claim unless it falls under one of several exceptions to allowance. One of those exceptions is if the claim is unenforceable against the debtor and the property of the debtor under applicable law. 11 U.S.C. § 502(b)(1).

It is easy to see how the entire claims allowance process could be classified as “litigation,” particularly since “notice and hearing” are required once an objection is filed. Less clear, however, is whether the singular act of filing a proof of claim – an act done solely to protect the creditor’s rights after receiving notice to do so – is “litigation” for purposes of the FDCPA. In any event, the Eighth Circuit Court of Appeals seems to have answered this question in the affirmative when it said: “When a creditor files a proof of claim before the bankruptcy court, this amounts to a civil

action to collect the debt, which arguably invokes the litigation machinery.” *Lewallen v. Green Tree Servicing, L.L.C.*, 487 F.3d 1085, 1091 (8th Cir. 2007) (citation omitted). While the holding in *Lewallen* was not directly in the context of the FDCPA, we agree that the filing of a proof of claim “arguably invokes the litigation machinery.” Thus, *Freyermuth* does not stand in the way of an action under the FDCPA based on a stale debt.³

The foregoing discussion leads us to the ultimate question on appeal – whether the filing of a proof of claim on a stale debt is a debt collection action that is false, misleading, deceptive, unfair, or unconscionable under the FDCPA. Mr. and Mrs. Gatewood encourage us to follow the holding of the Eleventh Circuit Court of Appeals in *Crawford v. LVNV Funding, LLC*, 758 F.3d 1254 (11th Cir. 2014), which said debt-collector creditors who file a time-barred proof of claim in a Chapter 13 bankruptcy case engage in deceptive, misleading, unconscionable, or unfair conduct under the FDCPA. The *Crawford* court focused on the harm to the debtors and the bankruptcy estate caused by such a filing, in that the onus would be on either the trustee or the debtor to object to the claim, and if they did not, the claim would automatically be allowed and paid, at least in part, to the detriment of other creditors. This potential outcome was deemed unfair, unconscionable, deceptive, and misleading under the “least-sophisticated consumer” standard used by the Eleventh Circuit in FDCPA cases.

Subsequent to the ruling in *Crawford*, many courts outside of the Eleventh Circuit have considered the same question with an emphasis on the bankruptcy aspect and have reached a different conclusion. The basis for that conclusion, finding that

³Of course, *Freyermuth* does not stand for the proposition that a FDCPA violation has occurred if there is *any* sort of litigation associated with a stale debt. It only stands for the proposition that absent litigation or the threat of litigation, there cannot be a FDCPA violation for trying to collect a stale debt. If there is litigation, the decision still needs to be made as to whether the FDCPA has been violated.

filing a stale proof of claim is not grounds for an FDCPA action, focuses on the protections already provided to debtors by the Bankruptcy Code, rendering the *Crawford* court's apprehensions about debt collectors taking advantage of debtors unwarranted.

The United States District Court for the Eastern District of Pennsylvania recently addressed the question in an FDCPA action brought by a debtor against a creditor who filed a proof of claim on a time-barred debt. The court weighed the reasoning of *Crawford*, as well as that of a Second Circuit case in which the court had ruled that an inflated proof of claim does not give rise to an FDCPA violation because “[t]here is no need to protect debtors who are already under the protection of the bankruptcy court, and there is no need to supplement the remedies afforded by bankruptcy itself.” *Simmons v. Roundup Funding, LLC*, 622 F.3d 93, 96 (2d Cir. 2010). The Pennsylvania court adopted *Simmons*' rationale, noting that debtors are protected by the bankruptcy court and court officers from abusive collection practices, and the Bankruptcy Code provides adequate remedies for potential creditor misconduct. *Torres v. Asset Acceptance, LLC*, ___ F. Supp. 3d ___, 2015 WL 1529297 (E.D. Pa. Apr. 7, 2015) (appeal filed May 13, 2015). “Under these circumstances, the Court will not insert judicially created remedies into Congress’s carefully calibrated bankruptcy scheme, thus tilting the balance of rights and obligations between debtors and creditors.” *Id.* at *7.

In a recent case from within the Eighth Circuit, the bankruptcy court for the Western District of Missouri granted summary judgment to a debt collector creditor, ruling that while filing a proof of claim was an action to collect a debt for purposes of the FDCPA, filing a proof of claim on a time-barred debt does not violate the FDCPA. *Dunaway v. LVNV Funding, LLC (In re Dunaway)*, 531 B.R. 267 (Bankr. W.D. Mo. 2015). The Missouri bankruptcy court rejected the debtor's request to apply the Eleventh Circuit's “least sophisticated consumer” standard for determining the existence of a FDCPA violation. As that court aptly stated:

While the FDCPA's purpose is to protect unsophisticated consumers from unscrupulous debt collectors, that purpose is not implicated when a debtor is instead protected by the court system and its officers. *See Simmons*, 622 F.3d at 96. The Court agrees that there are differences between lawsuits filed against individuals and proofs of claim filed in bankruptcy cases, all indicating that the deception and unfairness of untimely lawsuits is not present in the bankruptcy claims process. *See LaGrone*, 525 B.R. at 426.

531 B.R. at 273.

In addressing the FDCPA's purpose of protecting unsophisticated consumers from unscrupulous debt collectors, the *Dunaway* court specifically noted the protections provided by the Bankruptcy Code that debtors outside of bankruptcy do not enjoy when faced with a potential debt collection action. For instance, debtors in bankruptcy often have their own attorneys, as well as trustees who owe fiduciary duties to all parties and have a statutory obligation to object to unenforceable claims, available to run interference for them and determine whether filed proofs of claim in fact represent valid debts. If there is an issue with a proof of claim, the Bankruptcy Code provides for a claims resolution process involving an objection and a hearing to assess the amount and validity of the claim. This is generally a more streamlined and less unnerving prospect for a debtor than facing a collection lawsuit. *Id.* In addition, the court pointed out, the debtors have less at stake in claims allowance than they would when facing enforcement of an adverse judgment in a collection action, in that a creditor holding an allowed unsecured claim is likely to merely share pro rata in the distribution of the pool of available funds and see the unpaid portion of its claim discharged. *Id.* at 273-74. For these reasons, the court held, the filing of a proof of claim on a stale debt does not constitute a unfair or deceptive debt collection practice.

Other cases finding no violation of the FDCPA based on filing a claim for a stale debt include *Broadrick v. LVNV Funding, LLC (In re Broadrick)*, ___ B.R. ___, 2015 WL 3855251 (Bankr. M.D. Tenn. June 19, 2015); *Donaldson v. LVNV Funding, LLC*, ___ F. Supp. 3d ___, 2015 WL 1539607 (S.D. Ind. Apr. 7, 2015); *Torres v. Cavalry SPVI, LLC*, 530 B.R. 268 (E.D. Pa. 2015); *Jenkins v. Genesis Fin. Solutions (In re Jenkins)*, 456 B.R. 236 (Bankr. E.D.N.C. 2011); *B-Real, LLC v. Rogers*, 405 B.R. 428 (M.D. La. 2009); and *Jacques v. U.S. Bank N.A. (In re Jacques)*, 416 B.R. 63 (Bankr. E.D.N.Y. 2009).

We find compelling the thoughtful analysis of Judge Mashburn from the United States Bankruptcy Court for the Middle District of Tennessee:

Using an unnecessarily sweeping interpretation of the FDCPA to find even an accurate proof of claim, albeit based on a stale debt, to be a violation of the FDCPA runs counter to the Supreme Court’s “cardinal principle of construction” to give effect to both laws. However, finding that the bankruptcy claims process is so contradictory to the FDCPA protections that the FDCPA must be essentially ignored in every bankruptcy situation likewise violates that important principle.

Thus, this Court rejects the holding in *Crawford* and finds that not every filing of a proof of claim on a stale claim is automatically a violation of the FDCPA. However, going to the other extreme and finding, as *Simmons* did, that the laws are so inconsistent that the FDCPA can never be applied in the bankruptcy claims setting would be just as contrary to the goal of making the two laws work together to the extent possible.

Broadrick, ___ B.R. ___, 2015 WL 3855251 at *11-12.

Here, the undisputed facts are that Mr. and Mrs. Gatewood listed in their bankruptcy schedules the very debt upon which CP Medical filed its proof of claim. Notice was given to CP Medical and its agents to file a proof of claim in order to participate in any distributions to unsecured creditors. Through its agent, CP Medical filed a claim that is on its face accurate and not misleading. There is nothing improper about attempting to collect on a time-barred debt since the debt remains. *Freyermuth*, 248 F.3d at 771 (stating “[a]s several cases have noted, a statute of limitations does not eliminate the debt; it merely limits the judicial remedies available.”). Mr. and Mrs. Gatewood are seeking a discharge of their indebtedness, including the debt owed to CP Medical. In fact, they did not object to CP Medical’s claim.⁴ To then sue CP Medical under the FDCPA for doing that which it was invited to do – file an accurate proof of claim – offends the senses.

CONCLUSION

The FDCPA does not prohibit *all* debt collection practices. Instead, it simply prohibits false, misleading, deceptive, unfair, or unconscionable debt collection practices. Filing in a bankruptcy case an accurate proof of claim containing all the required information, including the timing of the debt, standing alone, is not a prohibited debt collection practice. Accordingly, the judgment of the bankruptcy court is affirmed.⁵

⁴As the *Broadrick* court noted, a debtor may actually desire to have a stale claim paid in bankruptcy. For example, there may be a co-signer who would otherwise bear the burden of payment.

⁵In light of the decision here, it is not necessary to address the other arguments raised in the parties’ briefs.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF MISSOURI

IN RE:)
)
JAMES CHRISTOPHER COTTON, III) Case No. 11-42420-13-drd
and LAUREN PATRICE COTTON,)
)
Debtors.)

ORDER OVERRULING DEBTORS' OBJECTION TO CLAIM FILED BY
TOYOTA MOTOR CREDIT (Doc. No. 106); DENYING APPLICATION FOR
DISTRIBUTION OF INSURANCE PROCEEDS (Doc. No. 107); AND
DIRECTING CHAPTER 13 TRUSTEE TO RETAIN INSURANCE PROCEEDS

Debtors James and Lauren Cotton filed this Chapter 13 case on May 25, 2011. At the time of filing, they owned a 2008 Toyota Yaris, the purchase of which had been financed by Toyota Motor Credit Corporation. On July 1, 2011, Toyota filed a Proof of Claim in the case, asserting a claim secured by the Yaris in the amount of \$14,408.74. The contract rate of interest on the loan is 13.85%.

On August 5, 2013, the Debtors objected to the claim, asserting that the claim should be bifurcated into secured and unsecured portions based on value because the Yaris had not been purchased within 910 days prior to the bankruptcy filing.¹ Toyota did not respond to the objection, and so it was sustained, leaving Toyota with an allowed secured claim in the amount of \$11,925, and an unsecured claim of \$2,483.74. The Debtors' confirmed Plan had also proposed to bifurcate the claim in the same manner, paying Toyota \$11,925 on its secured claim at the Chapter 13 Trustee's rate of interest, then 4.64%. Unsecured claims, including the

¹ 11 U.S.C. §§ 1325(a) (hanging paragraph) and 506 permit debtors to bifurcate claims secured by vehicles purchased more than 910 days prior to filing and to thereby reduce the secured portion of the claim to the value of the vehicle.

unsecured portion of Toyota's claim, are expected to receive a *de minimis* distribution under the Plan.

Sometime this year, the Yaris was totaled in an accident. An insurance company thus tendered a check dated June 2, 2015, made payable jointly to Debtor Laura Cotton and Toyota, in the amount of \$6,684.55. The dispute here concerns who – the Debtor or Toyota – is entitled to those insurance proceeds.

As of June 22, 2015, the Chapter 13 Trustee had disbursed \$10,366.94 in principal and \$1,633.06 in interest on Toyota's secured claim. The amount remaining on Toyota's secured claim is \$1,558.06. Since no payments have been made to unsecured creditors in this case, its unsecured claim remains at \$2,483.74.

Toyota asserts the balance owed on the Debtor's account under the contract terms is \$9,136.06 as of June 8, 2015.

After the accident, the Debtors filed the pending Objection to Toyota's claim, as well as an application for distribution of the insurance proceeds. They assert that the insurance proceeds should be used to pay only the remaining portion of Toyota's allowed secured claim, \$1,558.06, plus \$18.03 on Toyota's unsecured claim, based on the Chapter 13 Trustee's estimated distribution to unsecured creditors of .726%. The Debtors assert they are entitled to keep the remaining \$5,108.56 and thus filed an application to have that amount distributed to them. Toyota objects.

Section 1325(a)(5)(B) provides, as relevant here, that the court shall confirm a plan if, with respect to each allowed secured claim provided for by the plan:

(B)(i) the plan provides that --

(I) the holder of such claim retain the lien securing such claim until the earlier of--

(aa) the payment of the underlying debt determined under nonbankruptcy law; or

(bb) discharge under section 1328; and

(II) if the case under this chapter is dismissed or converted without completion of the plan, such lien shall also be retained by such holder to the extent recognized by applicable nonbankruptcy law.²

Congress added this provision to the Bankruptcy Code as part of the 2005 BAPCPA amendments, and in doing so, Congress “stated unequivocally that the holder of an allowed secured claim will retain the lien securing its allowed secured claim until either (1) the debtor receives a discharge under § 1328 or (2) the *underlying debt under nonbankruptcy law* has been paid.”³ Section 1325(a)(5)(B)(i) is “an attempt to overrule the results of cases under the prior language of Section 1325(a)(5)(B)[ii] that required elimination of the creditor’s lien when the allowed secured claim had been paid.”⁴ In contrast to pre-BAPCPA law, “[t]he focus is no longer on the ‘lien securing such claim’, rather, the focus is on the underlying debt under state law.”⁵

² 11 U.S.C. § 1325(a)(5)(B). Consistent with this provision, the Debtors’ confirmed Plan provided:

The holder of a secured claim shall retain its lien, until the earlier of the payment of the underlying debt determined under non-bankruptcy law or the discharge under § 1328 and, if the case is dismissed or converted without completion of the plan, the lien also shall be retained by such holder to the extent recognized by applicable nonbankruptcy law. § 1325(a)(5)(B).

Doc. No. 3 at p. 8, ¶ F.

³ *In re Strzelecki*, 509 B.R. 671, 674 (Bankr. W.D. Ark. 2014).

⁴ 8 Collier on Bankruptcy ¶ 1325.06[3][a] (16th ed. rev. 2013) (quoted by *In re Strzelecki*, 509 B.R. at 674).

⁵ *In re Strzelecki*, 509 B.R. at 674.

Under the plain meaning of the statute, since the Debtors here have not yet received a discharge, Toyota must retain its lien until either (i) they do receive their discharge, or (ii) Toyota's underlying debt under nonbankruptcy law is paid. The Debtors concede this much.⁶ The question, then, is whether Toyota's lien covers the proceeds in excess of its allowed secured claim.

On this question, the Debtors do not appear to dispute that the loan and insurance documents gave Toyota a lien in all of the insurance proceeds. Rather, the Debtors rely on *In re Habtemichael*,⁷ a pre-BAPCPA case decided by the Honorable Frank W. Koger of this district. The facts of that case are very similar to the situation here. As the Debtors point out, Judge Koger relied on Missouri law, which provides that a loss payable clause in an automobile insurance policy "constitutes a separate and distinct contract between the mortgagee and the insured up to the amount of the debt secured."⁸ Judge Koger determined that, under the Bankruptcy Code as it existed at the time in 1996, the creditor's secured claim was limited to value under § 506. Thus, the debtor in that case was entitled to the insurance proceeds in excess of the lender's allowed secured claim.

Missouri law has not changed on this question since *Habtemichael* was decided, and I agree with Judge Koger's analysis that, under Missouri law, Toyota's lien on the insurance proceeds here is limited to "the amount of the debt secured." However, at the time *Habtemichael* was decided, it was reasonable to interpret the Bankruptcy Code as, in effect, reducing the "amount of the debt

⁶ See *Debtors' Brief in Support of Objection to Claim 13-1 of Toyota Motor Credit Corporation* (Doc. No. 139) at 3 ("The above language makes clear that the holder of an allowed secured claim retains the lien securing its allowed secured claim until (1) debtor receives a discharge under § 1328 or (2) the underlying debt has been paid under nonbankruptcy law.").

⁷ 190 B.R. 871 (Bankr. W.D. Mo. 1996).

⁸ *Id.* at 873 (quoting *Shelter Mut. Ins. Co. v. Flint*, 837 S.W.2d 524, 530 (Mo. App. 1992)) (emphasis added by Judge Koger).

secured” to the vehicle’s value at the time the claim was bifurcated for bankruptcy purposes, rather than when the discharge was entered. Thus, it made sense to hold that the amount of the debt secured was paid when the allowed secured claim was paid.

But § 1325(a)(5)(B) was subsequently modified to change that result. As stated, that provision now prohibits the release of Toyota’s lien until discharge or “payment of the underlying debt determined under nonbankruptcy law.” Bifurcation of claims into secured and unsecured portions based on value as of a particular date does not occur outside of bankruptcy cases. Thus, if the Debtors were not in a bankruptcy case, then Toyota’s underlying debt under nonbankruptcy law would be \$9,136.06, and Toyota would be entitled to the entire amount of the insurance proceeds as payment of its security interest. In sum, payment of Toyota’s “allowed secured claim” in this bankruptcy case does not pay the “underlying debt determined under nonbankruptcy law,” and Toyota’s lien in the proceeds cannot be released at this point.

Consequently, Toyota’s lien will remain in the insurance proceeds until such time that the Debtors receive their discharge under § 1328.⁹ The Debtor’s objection to Toyota’s Claim No. 13 must therefore be overruled.

Finally, the Chapter 13 Trustee objected to the Debtors’ request that any portion of the funds be used to pay Toyota’s unsecured claim because the Plan is what is known as a “Base-55” plan, and the exact dividend to unsecured creditors will not be known until the end of the case. That objection is sustained.

ACCORDINGLY, the Debtors’ Objection to Claim filed by Toyota Motor Credit (Doc. No. 106) is OVERRULED. The Debtors’ Application for Distribution of Insurance Proceeds (Doc. No. 107) is DENIED. The Chapter 13

⁹ *Accord, In re Norred*, 2011 WL 4433598 (Bankr. D. Or. Sept. 21, 2011)

Trustee is ORDERED to pay to Toyota the sum of \$1,558.06 as the remaining balance on its allowed secured claim. In order to protect Toyota's interest in the proceeds remaining after payment of the allowed secured claim, the Chapter 13 Trustee shall hold such proceeds until the Debtors receive a discharge. Upon discharge, the Trustee shall pay the remaining proceeds in accordance with the Plan. In the event that the Debtors do not obtain a discharge, the Trustee shall pay such funds over to Toyota Motor Credit.

IT IS SO ORDERED.

Dated: 9/22/15

/s/ Arthur B. Federman
Chief Bankruptcy Judge

bankruptcy court and will be reversed only for an abuse of discretion. 573 F.3d 237, 247 (6th Cir.2009). Further, “[t]he standard for choosing conversion or dismissal based on the best interest of creditors and the estate implies a balancing test to be applied through case-by-case analysis.” *In re Gateway Ethanol, L.L.C.*, No. 08-22579, 2011 WL 597059, at *2 (Bankr. D.Kan. Feb. 11, 2011) (internal quotation and citation omitted). Here, in light of the arguments proffered in the record, as well as the court’s careful review of the record and oral statements, the undersigned finds that the bankruptcy court did not abuse its discretion in finding that dismissal was in the best interest of the creditors and the estate.

Further, although Greene relies heavily on *In re Superior Siding & Window, Inc.*, the facts are not analogous. In that case, the bankruptcy court’s stated reason for dismissing instead of converting the case to Chapter 7 was a consensus of a majority of creditors favored dismissal. 14 F.3d at 242. Here, however, the bankruptcy court set forth properly supported reasons for choosing dismissal over conversion; namely, the failure of Franke to pay the examiner; the absence of an offer to pay for a Trustee; the inability of the estate to pay a Trustee; and the difficulty and expense in investigating and recovering foreign assets. This is particularly compelling in light of the fact that the alleged assets are in Vietnam, and neither the Examiner nor a Trustee would have the ability to compel evidence or documents. Although Greene finds the bankruptcy court’s analysis of and factual findings regarding the best interests of the creditors and estate to be lacking, the determination is adequate under the law. *In re Mazzone*, 183 B.R. at 417 (noting “considerable authority for the proposition that a bankruptcy court is not required to explain the reasons for dismissal or conversion in detail”); *see also*

Loop Corp. v. U.S. Trustee, 379 F.3d 511, 519 (8th Cir.2004) (finding oral explanation sufficient findings of fact to support conversion order); *In re Fossum*, 764 F.2d 520, 522 (8th Cir.1985) (stating that while the court’s findings could have been more detailed, in light of the evidence in record, bankruptcy court’s one line statement that reorganization was not feasible was a sufficient finding of fact supporting dismissal). The undersigned finds that the bankruptcy court’s decision to dismiss the case “did not result from a factual finding that was illogical, implausible, or without support in inferences that may be drawn from the record.” *In re YBA Nineteen, LLC*, 505 B.R. at 304. As such, the Court concludes that the bankruptcy court did not abuse its discretion in ordering dismissal of Debtor’s case, and the decision of the bankruptcy court is affirmed.

Accordingly,

IT IS HEREBY ORDERED that the Appeal filed by Robert P. Greene (ECF No. 1) is **DENIED**.

IT IS FURTHER ORDERED that the Order of the United States Bankruptcy Court for the Eastern District of Missouri, dated April 18, 2014 is **AFFIRMED**.



**IN RE: Randi Kathleen
HAINES, Debtor.**

Case No. 12-50882-can7

United States Bankruptcy Court,
W.D. Missouri,
at Kansas City.

Signed April 14, 2015

Background: Chapter 7 trustee objected to exemption claimed by debtor in broker-

age account that she alleged was owned as tenant by the entirety under Missouri law with non-debtor spouse.

Holdings: The Bankruptcy Court, Cynthia A. Norton, J., held that:

- (1) Missouri law applied in determining whether tenancy by the entirety presumption applied to brokerage account;
- (2) under Missouri law, tenancy by the entirety presumption applied to brokerage account;
- (3) trustee failed to rebut statutory presumption that brokerage account was tenancy by the entirety under Missouri law; and
- (4) trustee did not have right to invoke the parol evidence rule under Missouri law to bar testimony of debtor and her non-debtor spouse regarding their intent that brokerage account was to be marital property they held together.

Objection denied.

1. Bankruptcy ⇨2802

Burden of proof is on party objecting to exemption to provide evidence that the exemption is not proper, at which point the burden shifts to the debtor to show she is entitled to the exemption; ultimate burden of persuasion rests on the objecting party. Fed. R. Bankr. P. 4003(c).

2. Contracts ⇨93(5)

Under Missouri law, doctrine of mutual mistake requires the mistake to be mutual.

3. Bankruptcy ⇨2764

Missouri has opted out of the federal exemptions set forth in the Bankruptcy Code, thereby restricting Missouri residents to the exemptions available under Missouri law and under federal statutes other than the Code. 11 U.S.C.A. § 522.

4. Husband and Wife ⇨14.2(1)

Under Missouri law, tenancy by the entirety is a form of marital property ownership based upon the common law principle that, upon marriage, each spouse loses his or her individual identity, and the two people become one entity.

5. Husband and Wife ⇨14.2(2)

To create a tenancy by the entirety estate under Missouri law, the four unities of interest, title, time and possession must be present.

6. Husband and Wife ⇨14.2(1)

Under Missouri law, tenants by the entirety have but one estate, which they hold "per my et per tout," i.e., by the moiety or half and by the whole.

7. Husband and Wife ⇨14.2(5), 14.10

Under Missouri law governing tenancy by the entirety estates, since the estate is held both by the half and the whole, neither spouse may unilaterally convey or burden the property, although a tenancy by the entirety interest may be severed by agreement, actual or implied, or by any conduct or course of dealing sufficient to indicate that all parties have mutually treated their interests as belonging to them in common.

8. Husband and Wife ⇨14.2(5)

Under Missouri law, when a tenancy by the entirety estate is severed, the result is a tenancy in common.

9. Husband and Wife ⇨14.11

Under Missouri law, the effect of tenancy by the entirety property is that, during the lifetime of the joint tenants, only creditors of both joint tenants may execute on or garnish the tenancy by the entirety property.

10. Husband and Wife ⇨14.2(6)

Under Missouri law, once a tenant by the entirety dies, the other tenant has the right of survivorship.

11. Husband and Wife ⇨14.3, 14.11

Under Missouri law, property held by spouses in a joint tenancy is reachable by an individual spouse's creditor, but property held in tenancy by the entirety is only reachable by joint creditors of the couple.

12. Bankruptcy ⇨2773, 2793**Husband and Wife** ⇨14.11

Debtor may properly exempt tenancy by the entirety property under Missouri law, but Chapter 7 trustee may invade the tenancy by the entirety property to the extent necessary to pay unsecured joint debts.

13. Husband and Wife ⇨2

Missouri law applied in determining whether tenancy by the entirety presumption applied to brokerage account that Chapter 7 debtor owned with her non-debtor spouse, rather than Kansas law, even though the account was physically held at an office located in Kansas, given that debtor and her spouse were Missouri residents.

14. Property ⇨6

Missouri law provides that the situs of intangible personal property is governed by the domicile of the owners.

15. Husband and Wife ⇨14.2(4)

Under Missouri law, tenancy by the entirety presumption applied to brokerage account that Chapter 7 debtor owned with her non-debtor spouse, where the four unities of interest, title, time and possession were established as of the opening of the account.

16. Husband and Wife ⇨14.2(4)

Missouri law strongly presumes that all property owned by a husband and wife is tenancy by the entirety property if the four unities are established.

17. Husband and Wife ⇨14.2(4)

Statutory presumption that brokerage account belonging to Chapter 7 debtor and her non-debtor spouse was tenancy by the entirety was not rebutted by mere checking of box on account application marked "joint tenants with rights of survivorship" and not the "tenants by the entirety" box, given that debtor and her husband testified that they considered the account to be marital property they held together, and debtor's later loan application identified her property as entireties property.

18. Evidence ⇨397(1)

Under Missouri law, parol evidence rule prohibits the trier of fact from using evidence to contradict, vary or alter the terms of an integrated written contract.

19. Evidence ⇨397(2)

Under Missouri law, in the absence of fraud, duress, mistake or mental incapacity, an integrated unambiguous contract may not be varied, and a new and different contract substituted by parol evidence.

20. Evidence ⇨384, 448

Under Missouri law, the parol evidence rule is not a rule of evidence, but rather a substantive rule that limits the evidence from which inferences may be drawn.

21. Evidence ⇨384

Under Missouri law, purpose of the parol evidence rule is to preserve the sanctity of written contracts.

22. Evidence ⇨397(2)

Under Missouri law, regardless of whether a party objects, considering extrinsic evidence in spite of a final, com-

plete, and unambiguous contract violates the parol evidence rule.

23. Banks and Banking ⇨151

Under Missouri law, a bank account agreement is a contract.

24. Banks and Banking ⇨151

Under Missouri law, parties to bank account agreements acquire rights and the agreement governs the conduct between the parties and the bank.

25. Brokers ⇨7

Brokerage accounts under Missouri law are generally controlled by the language of the account documents.

26. Brokers ⇨7

Under Missouri law, brokerage account applications, like bank accounts, create rights and responsibilities, and are contracts.

27. Evidence ⇨448

Under Missouri law, when a writing is ambiguous, courts must go outside the four corners of the document and consider extrinsic evidence.

28. Bankruptcy ⇨2802

Chapter 7 trustee did not have right to invoke the parol evidence rule under Missouri law to bar testimony, in proceeding on exemption objection, of debtor and her non-debtor spouse regarding their intent that brokerage account was to be marital property they held together, given that trustee was a nonparty to the contract and therefore fell within the stranger exception to the parol evidence rule.

1. As will be discussed below, the general presumption does not apply to all accounts. *E.g.*, § 369.174 RSMo (the savings and loan joint account of a husband and wife presumed to be only joint tenancy, and not a TBE ac-

29. Evidence ⇨424

Courts generally recognize that there is an exception to the parol evidence rule when the dispute involves a third party rather than the two parties to the contract; this exception is referred to as the “stranger exception.”

30. Evidence ⇨424

The “stranger exception” to the parol evidence rule excludes those who are not parties to the document from objecting to the court considering extrinsic evidence that affects the interpretation of the document.

Donald E. Bucher, Kansas City, MO, for Debtor.

MEMORANDUM OPINION AND ORDER OVERRULING TRUSTEE’S OBJECTION TO EXEMPTIONS

Cynthia A. Norton, UNITED STATES BANKRUPTCY JUDGE

When a husband and wife open an account together, Missouri law generally¹ presumes they own the account as “tenants by the entirety,” or “TBE.” The presumption is rebuttable, but only by particularly strong evidence, such as “to leave no doubt in the judge’s mind.” If a couple has the choice of checking the “tenants by the entirety” box on an account application, but fails to do so, is that failure sufficiently strong evidence to overcome the presumption when a bankruptcy trustee objects to the debtor’s exemption of that account as TBE property? This

count); § 370.287 RSMo (credit union shares; same); *compare* § 362.470 RSMo (joint bank account of husband and wife presumed to be a TBE, and not a joint tenancy).

Court concludes not under the circumstances of this case.

I. Jurisdiction

There is no dispute and the Court finds that it has jurisdiction over this matter. 28 U.S.C. § 1334. This matter is also a core proceeding over which the court has authority to enter a final order. 28 U.S.C. § 157(b)(2)(B).

II. Facts

The Court makes the following findings of fact.

Debtor Randi Kathleen Haines is a married resident of Missouri. She filed a Chapter 7 bankruptcy after a business co-owned with her daughter failed. Her only unsecured creditor is a bank to whom she had personally guaranteed the business loan. Ms. Haines owes the bank approximately \$165,000; her husband was not obligated on the business loan or guaranty.

Bruce E. Strauss was duly appointed the Debtor's Chapter 7 Trustee. Nearly a year after her bankruptcy filing,² the Debtor amended her schedule B to include an interest in a UBS brokerage account, valued at almost \$200,000, described as being owned "jointly with her nonfiling spouse." She claimed this account as exempt TBE property under applicable Missouri law.

The Trustee timely objected to the exemption, arguing that Mr. and Mrs. Haines had failed to open the UBS account as a TBE account, and that since the box "joint tenants with right of survivorship" or "JTWROS" was checked, the account documents controlled. Mrs. Haines re-

sponded that the checking of the JTWROS box on the account application—and the concomitant failure to check the TBE box—was as a matter of law insufficient to defeat Missouri law's presumption of TBE ownership.

The Court conducted an evidentiary hearing on the Trustee's objection, at which both Mr. and Mrs. Haines testified; the Court finds their testimony generally to be credible, except where noted below.

Mrs. Haines testified that she and Mr. Haines had been married 22 years, and had not maintained separate finances during their marriage. Specifically, Mrs. Haines and her husband had two joint checking accounts, and a retirement account, in addition to the UBS account. She testified that she and her husband had always considered and treated their various accounts as being jointly owned. She testified that both contributed funds to their accounts and both made withdrawals or wrote checks from their various accounts.

With respect to the UBS account in particular, Mrs. Haines testified that she and Mr. Haines had had a brokerage account for a number of years, as recommended by their financial advisor, one Mike Hamilton, and had owned the UBS account for about ten years. The Haineses opened the UBS account when Mr. Hamilton switched brokerage firms and moved to UBS.

Mrs. Haines testified to a discussion that the brokerage account should be owned in the same form as the previous account (implying that the previous account was a

2. The Trustee has not argued that amendment should be denied for bad faith or other grounds. *In re Kaelin*, 308 F.3d 885 (8th Cir.2002) (bankruptcy court has discretion to deny amendment of exemptions for bad faith or prejudice to creditors). *But see Law v.*

Siegel, — U.S. —, 134 S.Ct. 1188, 188 L.Ed.2d 146 (2014) (bankruptcy court had no authority to surcharge debtor's otherwise validly claimed homestead exemption even though debtor acted in bad faith).

TBE account); the Court, however, finds that testimony to be self-serving, for several reasons. First, as the Trustee pointed out, there was no evidence that the previous brokerage account was a TBE account. More importantly, Mrs. Haines could not explain the differences between a TBE and JTWROS account in response to the Trustee's questions on cross-examination.

In light of her otherwise uncontroverted evidence that she signed the account application at her husband's office; that the application had already been completed when she arrived to sign it; and that she admitted on cross-examination that she likely only glanced at it; the Court believes that Mrs. Haines had no specific intent in creating the UBS account other than that it was some type of joint account that she and her husband both owned and could use. For the same reason, the Court places no weight on the hand-written note on Mrs. Haines' financial statement, submitted to the Bank in 2010 [Exhibit C], that "all assets are owned jointly with my husband in [TBE] and therefore not subject to enforcement by creditors, except creditors of both husband and wife."

Mr. Haines also testified, and his testimony largely mirrored that of his wife's. He agreed that all the household finances were held jointly and that he also had relied on the broker to fill out the paperwork correctly (again, implying without direct testimony that the UBS account was supposed to have been set up as a TBE account). He, too, did not know the difference between JTWROS and TBE accounts; the Court likewise believes that Mr. Haines had no specific intent to establish a TBE account but instead intended that the account be a joint marital account.

In addition to their testimony, Mrs. Haines admitted as an exhibit the UBS

brokerage account application she and her husband had signed when opening the account. The application provided joint account owners with five options for how their accounts could be held: community property, tenants by entirety, joint tenants with rights of survivorship, tenants in common, and joint community funds. The box next to "Joint Tenants with Rights of Survivorship" is checked, presumably by the financial advisor. The application did not contain any explanation of the various species of joint ownership, but instructed those completing the application to "Please read the joint account section of the New Account booklet carefully." The parties did not provide the court with the joint account section of the New Account booklet or any testimony about whether Mr. or Mrs. Haines consulted it. The application contains a paragraph entitled "Account Agreement"; however, the provisions in the agreement relate to client management, trading on margin, and disclosure issues, and do not address ownership of the account. Neither party called the UBS representative who prepared the paperwork to testify.

III. Summary of the Arguments

[1] Both parties agree that the Court should apply Missouri law to determine the nature of Mrs. Haines' ownership interest in the brokerage account. The parties also agree that the burden of proof is on the Trustee to provide evidence that the exemption is not proper, at which point the burden shifts to the debtor to show she is entitled to the exemption. Fed. R. Bankr.P. 4003(c); *Peoples' State Bank of Wells v. Stenzel (In re Stenzel)*, 301 F.3d 945, 947 (8th Cir.2002). The ultimate burden of persuasion rests on the Trustee. *Id.*

[2] Additionally, the parties agree that generally there is a presumption under

Missouri law that property held by husband and wife is held as tenancy by the entireties. The parties disagree as to whether the presumption arises here. The Trustee argues that the presumption does not arise because the plain and unambiguous language in the brokerage application, identifying the account as held in joint tenancy with right of survivorship, controls. The Trustee also contends that the parol evidence rule prevents Mr. and Mrs. Haines from testifying about their intent in contravention of the plain language of the application. Mrs. Haines in turn argues that the presumption does arise, and that the box checked joint tenancy with rights of survivorship is insufficient to rebut the presumption in light of the additional evidence provided to the Court.³

IV. Discussion

Nature of TBE Property Under Missouri Law

[3] Commencement of a bankruptcy case creates an estate, consisting of “all legal or equitable interests of the debtor in property as of the commencement of the case . . . [.]” 11 U.S.C. § 541(a). A debtor may exempt certain property from property of the estate under 11 U.S.C. § 522(b). Missouri has opted out of the federal exemption scheme in § 522, thus “restricting Missouri residents to the exemptions available under Missouri law and under federal statutes other than 11 U.S.C. § 522(d).” *In re Benn*, 491 F.3d 811, 813 (8th Cir. 2007). The parties do not dispute that § 522(b)(3)(B) authorizes the exemption of TBE property to the extent the interest is

exempt from process under applicable non-bankruptcy law, and that applicable Missouri law so provides.

[4] TBE is a form of marital property ownership originally created by common law, not by statute. *In re Bellingroehr*, 403 B.R. 818, 820 (Bankr.W.D.Mo.2009). TBE is based upon the “ancient common law principal that, upon marriage, each spouse loses his or her individual identity, and the two people become one entity.” *Bellingroehr*, 403 B.R. at 820. Its original purpose was to protect wives from irresponsible husbands who might lose a home or other valuable asset. *Id.*

[5–8] To create a TBE estate, the four unities—unities of interest, title, time and possession—must be present. Once created, TBE tenants have but one estate, which they hold “*per my et per tout*—by the moiety or half *and* by the whole.” *In re Gerling’s Estate*, 303 S.W.2d 915, 917 (Mo.1957). Since the estate is held both by the half and the whole, neither spouse may unilaterally convey or burden the property (*In re King’s Estate*, 572 S.W.2d 200, 211 (Mo.App.1978)), although a TBE interest may be severed by agreement, actual or implied, or by any conduct or course of dealing sufficient to indicate that all parties have mutually treated their interests as belonging to them in common. *In re Bellingroehr*, 403 B.R. 818 (Bankr. W.D.Mo.2009). When a TBE estate is severed, the result is a tenancy in common. *In re Stanke*, 234 B.R. 439, 442 n.6 (Bankr.

3. The Debtor argues, for the first time in her post-hearing brief, that the Court should amend the UBS account application based on the doctrine of mutual mistake. Setting aside whether the court can consider the Debtor’s new argument, the doctrine of mutual mistake requires the mistake to be mutual. *E.g.*, *In re Williams Recycling, Inc.*, Case No. 12–

50669; Adv. No. 13–5002; 2013 WL 6797486 (Bankr.W.D.Mo.2013). The Debtor provides the court with no evidence showing that the UBS representative believed there was a mistake. In light of this clear lack of evidence showing the mistake was mutual, the Court sees no need to further address this argument.

W.D.Mo.1999).⁴

The history of TBE as applied to accounts is quite interesting. Because of the uncertainty that could be engendered with joint accounts—whether adding a person to an account was an *intervivos* gift or a testamentary disposition—the Missouri legislature enacted statutes to allow the creation of a TBE account without the presence of all four unities. Known as a “statutory joint tenancy,” accounts created under § 362.470 RSMo (bank and trust company accounts) are statutorily “considered a tenancy by the entirety unless otherwise specified.” § 362.470.5 RSMo.⁵

The Missouri Supreme Court has explained that statutory joint tenancies should be given effect without consideration of the strict common law requirements of the four unities. *Estate of La-Garce*, 487 S.W.2d 493, 501 (Mo.banc 1972); *Burkholder v. Burkholder*, 48 S.W.3d 596, 598 n. 9 (Mo.banc 2001). Conversely, the Missouri legislature has also prescribed that certain joint accounts and interests, namely savings and loan accounts and credit union shares, “shall be considered a joint tenancy and not a tenancy by the entirety unless otherwise specified.” § 370.287.3 RSMo (credit union shares); § 369.174.4 RSMo (savings and loan accounts). The parties here have pointed the Court to no statutory tenancy in effect with respect to brokerage accounts, and the Court finds none. Therefore, the Missouri common law of TBE applies to the UBS account at issue in this case.

4. In a post-trial conference, the Court asked counsel about the fact that the UBS account appeared to have been pledged and queried why there had been no argument or testimony about it. Both counsel agreed that the pledge occurred after the bankruptcy filing, and that the existence of the pledge had no bearing on the issue before the Court.

[9, 10] Returning then to the common law: The effect of TBE property is that during the lifetime of the joint tenants, only creditors of both joint tenants may execute on or garnish the TBE property. *In re Garner*, 952 F.2d 232, 235 (8th Cir. 1991); *In re Van Der Heide*, 164 F.3d 1183, 1184 (8th Cir.1999). And, once a TBE tenant dies, the other tenant has the right of survivorship. Indeed, it has been noted that “[t]he leading and distinctive characteristic of an estate in joint tenancy is, of course, the right of survivorship.” *In re Gerling’s Estate*, 303 S.W.2d 915, 917 (Mo.1957).

[11] Thus, the most important characteristic of entireties property is that neither spouse may unilaterally convey or burden the property. *In re King’s Estate*, 572 S.W.2d at 200. The consequence of this distinction for creditors is crucial: property held by spouses in a joint tenancy is reachable by an individual spouse’s creditor, but property held in tenancy by the entirety is only reachable by joint creditors of the couple. *Garner*, 952 F.2d at 235.

[12] The distinction carries into bankruptcy in this way: in a bankruptcy case, a debtor may properly exempt TBE property but the Chapter 7 Trustee may invade the TBE property to the extent necessary to pay unsecured joint debts. See *Bellin-groehr*, 403 B.R. at 818 (TBE property could not be invaded where trustee failed to establish there were any joint unsecured debts to be paid from the TBE property). Since it is undisputed that Mr.

5. Section 362.470.5 RSMo states: “Any deposit made in the name of two persons or the survivor thereof who are husband and wife shall be considered a tenancy by the entirety unless otherwise specified.”

and Mrs. Haines have no joint, unsecured debts, if the UBS account is exempt, the Trustee will not have the ability to liquidate the account for the benefit of the estate.

Whether the TBE Presumption Applies In this Case

In many respects, this case boils down to a question of whether the TBE presumption applies to the UBS account; if it applies, then the burden under Missouri law (and bankruptcy law) would be on the Trustee to present the type of clear evidence needed to rebut the presumption that the UBS account is a TBE account. If the presumption does not apply, then the Trustee would have met his initial burden of coming forward with evidence in support of his objection—that the Debtor established a JTWROS and not a TBE account—and the burden of production would have shifted to the Debtor to show they had the requisite intent to create a TBE account notwithstanding the fact that they checked the JTWROS box. Whether the presumption applies is critical, because, in the Court's view, if the burden of production shifted to the Debtor, then the Debtor likely would not win, as the Debtor's evidence did not establish any express intent to create specifically a TBE account.

The Court concludes that the TBE presumption applies to the Debtor's UBS account as a matter of law, for the following reasons.

[13, 14] First, as explained above, there is no Missouri statute that governs the UBS brokerage account; Missouri

common law therefore applies. Missouri common law applies because, although the UBS account is physically held at an office located in Kansas, Missouri law provides that the situs of intangible personal property is governed by the domicile of the owners, and the Debtor and her husband are indisputably Missouri residents. *McDougal v. McDougal*, 279 S.W.2d 731, 739 (Mo.App.1955).

[15, 16] Second, also as explained above, Missouri common law indisputably and strongly presumes that all property owned by a husband and wife is TBE property if the four unities are established. E.g., *Capital Bank v. Barnes*, 277 S.W.3d 781, 782 (Mo.App.S.D.2009). The evidence was uncontroverted that the four unities of interest, title, time and possession were established as of the opening of the UBS account.

Third, whether the presumption that a husband and wife own property as TBE arises by statute or by common law, Missouri cases appear to require the same quality of evidence to overcome the presumption; that the evidence "must be so strong, clear, positive, unequivocal and definite as to leave no doubt in the trial judge's mind." *Brown v. Mercantile Bank of Poplar Bluff*, 820 S.W.2d 327, 336 (Mo. App.S.D.1991). See also *Nelson v. Hotchkiss*, 601 S.W.2d 14, 19 (Mo.banc1980) (once the presumption of tenancy by the entirety arises, a party challenging the presumption may only rebut it if the party can show a contrary intention by clear, cogent, and convincing evidence⁶).

6. The Trustee argues that the "heightened standard" of clear and convincing should not apply here because the account is not one that is expressly presumed by statute to be a tenancy by the entirety account. The Trustee cites *In re Wax*, 63 S.W.3d 668, 672 (Mo.App. E.D.2001), in support of his position. The Court agrees with the Trustee that *Wax* does

state that a brokerage account is not a bank account and thus the brokerage documents are controlling. *Wax*, 63 S.W.3d at 672. The issue in *Wax*, however, was whether the Missouri statutes regarding bank accounts should apply to the brokerage account. *Id.* *Wax* does not discuss burdens of proof and this Court finds nothing in *Wax*—or elsewhere in

Although there are no Missouri cases involving this fact pattern, several cases are instructive.

Scott v. Flynn, 946 S.W.2d 248 (Mo.App. E.D.1997) involved a statutory joint bank account created under R.S. Mo. 362.470.5. The account was titled “W.H. Scott or Abigail C. Scott, Joint Tenants with Right of Survivorship.” A bank, opposing the wife’s claim to an interest in the account, argued that by specifying the account as a JTWROS account, the account was “otherwise specified” such that the statutory TBE presumption did not arise. The Missouri Court of Appeals disagreed.

The Court explained that the bank’s reasoning was circular, “because a husband’s and wife’s joint tenancy with right of survivorship satisfies the statute’s definition of what is presumed to be a tenancy by the entirety—i.e., it is a deposit made in the name of two persons or the survivor thereof who are husband and wife.” *Scott v. Flynn*, 946 S.W.2d at 251. Therefore, the Court stated,

[D]esignation of a specific type of account that satisfies all of the statutory requirements triggering a presumption of the tenancy by the entirety cannot be construed as a specification that the account be held ‘otherwise’ than by the entirety. Rather, to achieve that result, it would be necessary to designate the account ‘Joint Tenants with Right of Survivorship and not as Tenants by the Entirety,’ or words to like effect.

Scott v. Flynn, 946 S.W.2d at 251 (emphasis in the original).

Scott v. Flynn thus held that, “absent a specific disclaimer that the account is not being held as tenants by the entirety, an account card signed by a husband and wife as joint tenants with right of survivorship

must be considered a tenancy by the entirety.” *Id.*

Scott v. Flynn relied on two other Missouri cases. In *Brown v. Mercantile Bank of Poplar Bluff*, 820 S.W.2d 327, 336 (Mo. App.S.D.1991), the court held the addition of a daughter to an account owned by a husband and wife as JTWROS did not rebut the presumption that the husband and wife’s undivided interest in the account was held as TBE and was not subject to garnishment. *Brown*, 820 S.W.2d at 337–338. Similarly, in *Edgar v. Ruma*, 823 S.W.2d 59 (Mo.App.E.D.1991), an account card signed by a husband and wife providing that any sums deposited “are and shall be owned by them jointly with a right of survivorship” created a TBE account. *Edgar*, 823 S.W.2d at 61.

[17] This trio of cases reinforces the Court’s conclusion that a Missouri court would require more evidence before finding that the presumption was rebutted in this case. The evidence was undisputed that the Haineses intended to create a joint, marital account when they set up the UBS account. The UBS account they created was a joint, marital account with rights of survivorship. Without a specific disclaimer of the kind noted in *Scott v. Flynn* (i.e., JTWROS and not TBE) or other strong evidence, the Court cannot conclude that merely checking the JTWROS box was sufficient to defeat the presumption.

The Trustee’s argument that the presumption did not arise does not address these Missouri cases but instead relies on *Beal Bank, SSB v. Almand and Associates*, 780 So.2d 45 (Fla.2001). *Beal Bank* states that under Florida law, the entireties presumption will not arise if there is an express disclaimer. *Beal Bank*, 780 So.2d at 60. The Court reads Missouri

Missouri law—that would lower the Trustee’s

burden here.

law differently, and has found no language in Missouri law to support an understanding of the entireties presumption similar to that in Florida. Instead, Missouri courts have first determined whether the presumption arose, and subsequently determined if other factors—such as a checked box or language in the documents—are sufficient to rebut the presumption. *E.g.*, *Scott v. Flynn*, 946 S.W.2d at 251.

The Parol Evidence Rule

As a final matter, the Trustee has asked the Court to reconsider its oral ruling at trial that Mr. and Mrs. Haines' testimony regarding their intent should be barred by the parol evidence rule. The Court believes its ruling at trial that the parol evidence rule does not apply is correct.

[18, 19] The parol evidence rule "prohibits the trier of fact from using . . . evidence to contradict, vary or alter the terms of an integrated written contract." *Central Stone Co. v. Warning*, 412 S.W.3d 908, 912 (Mo.App.E.D.2013).⁷ Stated another way, in the absence of fraud, duress, mistake or mental incapacity, an integrated unambiguous contract may not be varied, and a new and different contract substituted by parol evidence. *Commerce Trust Co. v. Watts*, 360 Mo. 971, 231 S.W.2d 817, 820 (1950).

[20-22] The parol evidence rule is not a rule of evidence, but rather a substantive rule that limits the evidence from which inferences may be drawn. *Poelker v. Jamison*, 4 S.W.3d 611, 613 (Mo.App.E.D.

1999). The purpose of the rule is to preserve the sanctity of written contracts. *Id.* Regardless of whether a party objects, considering extrinsic evidence in spite of a final, complete, and unambiguous contract violates the parol evidence rule. *Id.* In the *Commerce Trust Co.* case, for example, where there was a formal, unambiguous joint depository agreement establishing the account as a JTWR0S, the court refused to admit parol evidence that the parties' intent was not to establish a joint account, but only to add the other owner as an accommodation.

[23-26] The Debtor, by contrast, argues that the parol evidence rule should not apply for two reasons. First, the Debtor argues that the parol evidence rule is limited to contracts, and the writing before the Court is not a contract.⁸ The Court disagrees. Under Missouri law, a bank account agreement is a contract. *Commerce Trust Co. v. Watts*, 231 S.W.2d at 819. Parties to these agreements acquire rights and the agreement governs the conduct between the parties and the bank. *Id.* The Court sees no reason to treat a brokerage application differently. Indeed, as the Trustee notes, brokerage accounts under Missouri law are generally controlled by the language of the account documents. *Wax*, 63 S.W.3d at 672. Like bank accounts, these applications create rights and responsibilities. They are contracts.⁹

[27] The Debtor's second argument is similarly unpersuasive. The Debtor cites

her position. In *Kinser*, the court held that a consent form is not a contract.

9. The Court would also note it is a bit puzzling for the Debtor to argue that the account application is not a contract, but should be reformed using the contract doctrine of mutual mistake.

7. The parties assume, without discussing, that Missouri law is the relevant state law. Because the parol evidence rule is a substantive rule determining the parties' underlying state law rights, this appears to be correct. *Gibbons v. Graves Constr. Co., Inc.*, 727 F.2d 753, 755-56 (8th Cir.1984).

8. The Debtor cites *Kinser v. Elkadi*, 674 S.W.2d 226 (Mo.App.S.D.1984), in support of

Nelson v. Hotchkiss, 601 S.W.2d 14, for the proposition that courts consider parol evidence when determining whether property is entireties property. But the *Nelson* court also found that the wording “all joint tenants with right of survivorship in all four and not as tenants in common” was ambiguous in light of the Missouri’s tenancy by the entireties presumption. *Nelson*, 601 S.W.2d at 20–21. When a writing is ambiguous, courts must go outside the four corners of the document and consider extrinsic evidence. *Central Stone Co. v. Warning*, 412 S.W.3d at 912. The *Nelson* analysis is consistent with the parol evidence rule and does not create an exception for courts considering whether the entireties presumption is rebuttable.

[28, 29] Despite disagreeing with the Debtor’s arguments, the Court does agree that the parol evidence rule does not apply in this case. Although it has not been widely litigated in Missouri, courts generally recognize that there is an exception to the parol evidence rule when the dispute involves a third party rather than the two parties to the contract. *American Bank v. Wegener, et al.*, 776 S.W.2d 922, 925 (Mo. App.W.D.1989); see also *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 348, n.12, 91 S.Ct. 795, 28 L.Ed.2d 77 (1971) (“[T]he parole evidence rule is usually understood to be operative only as to parties to a document.”). This exception is referred to as the “stranger exception.” 6 Peter Linzer, *Corbin on Contracts* § 25.24 (Joseph M. Perillo ed., 2010); *Am.Jur.2d Evidence* § 1108 (Updated 2014); 11 Richard Lord and Samuel Williston, *A Treatise*

10. Even without the testimony of the Debtor and her husband, the Court questions whether the checked box, without some evidence of the accompanying explanation, would be a clear manifestation of intent. While the terms “tenancy by the entireties” and “joint tenancy with rights of survivorship” may be

on the Law of Contracts § 33:10 (4th Ed.2012).

[30] The “stranger exception” excludes those who are not parties to the document from objecting to the court considering extrinsic evidence that affects the interpretation of the document. *Slinkard v. Lamb Const. Co.*, 286 Mo. 623, 225 S.W. 352, 352 (1920). As a nonparty to the contract, the Trustee falls within the stranger exception and does not have the right to invoke the parol evidence rule. Even if, however, the Trustee would be deemed to be in privity with the Debtor, such that the rule might apply, it would not make a difference to the analysis. Considering only the documentary evidence, as the Trustee requests still leads to the same result: under Missouri law, the mere checking of the box JTWROS and not the TBE box, without more, is insufficient to rebut the presumption.

Conclusion

The burden on the Trustee is to provide the Court with evidence “so strong, clear, positive, unequivocal and definite as to leave no doubt in the trial judge’s mind,” *Scott*, 946 S.W.2d at 251, that the parties did not intend the property to be held in the entireties. The evidence before the Court is a brokerage account application with a box marked “joint tenants with rights of survivorship,” the testimony of the Debtor and her husband that they considered the account to be marital property they held together, and the Debtor’s later loan application identifying her property as entireties property.¹⁰ The parties

understood by many lawyers, they are not terms most lay people have encountered or could be reasonably expected to understand without explanation. The Court need not reach that question, however, because it can consider the testimony. The Court similarly rejects the Trustee’s argument that the Debtor

did not provide any evidence that the Debtor consulted the New Account booklet discussing the choice of ownership, and both the Debtor and her husband testified that they did not know what the terms meant. Under those circumstances, the Court is not convinced that the Debtor and her husband intended to form a different type of account than what is presumed under Missouri law. The Court therefore holds that under Missouri law, the presumption of tenancy by the entireties arose and the Trustee's evidence was in-

needed to prove she had the intent to create an entireties account. Not only does proving the specific intent to hold property in the entireties seem intuitively impossible unless

sufficient to rebut the presumption. Since the Trustee bore the burden of proof to defeat the claimed exemption under Rule 4003(c), the Trustee's Objection to the Debtor's Exemption is therefore DENIED.



the parties are sophisticated and well-versed in the nuances of joint property law, but the Court also has not found any case law supporting this position.

**UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF MISSOURI**

IN RE:)
)
CASEY D. O’SULLIVAN,) **Case No. 15-30173-can7**
Debtor.)
_____)

**MEMORANDUM OPINION REGARDING DEBTOR’S MOTION TO AVOID
JUDGMENT LIEN OF CRP HOLDINGS A-1, LLC UNDER §522(F)(1)**

Casey D. O’Sullivan, Chapter 7 Debtor, moves the Court for an Order pursuant to 11 U.S.C. § 522(f)(1)(A) avoiding the judgment lien of CRP Holdings A-1, LLC. CRP objected to the motion and requested that the Court rule the matter based on the motion, objection and CRP’s brief. Finding that the facts are undisputed, the Court is prepared to rule. The Court overrules CRP’s objection and grants the Debtor’s motion.

Jurisdiction

The Court has jurisdiction over this matter under 28 U.S.C. § 1334(b), and there is no dispute that this is a core proceeding under 28 U.S.C. § 157(b)(2)(K).

Findings of Fact

The Debtor filed a voluntary petition for Chapter 7 relief on April 3, 2015. At the time of filing, the Debtor, a Missouri resident, owned a home jointly with his non-filing spouse. The home at 304 W. 1st Terrace is located in Lamar, Barton County, Missouri. There is no dispute that the Debtor and his wife acquired the home as a married couple some twenty years before the bankruptcy filing, in November 1995. There is also no dispute that the home is encumbered by a properly recorded deed of trust in favor of Heritage State Bank. The deed of trust, executed by both the Debtor and his wife, was recorded with the Barton County Recorder of Deeds in August 2004. The current balance on the note secured by the deed of trust, according to the schedules, is

\$93,134.04. The value of the home as of the date of filing is also not in dispute; Debtor valued the home as worth \$105,000, making his half interest worth \$52,500.

On January 5, 2015,¹ in the Circuit Court of Platte County, Missouri, CRP obtained a default judgment, Case No. 13AE-CV02856, against Debtor and his business entities in the amount of \$765,151.18. Although not relevant to this dispute, the judgment was for rent owed under a commercial lease that the Debtor had personally guaranteed. It is undisputed that CRP neither has a judgment nor any claim against the Debtor's wife. CRP recorded the Platte County judgment as a foreign judgment in Barton County, Case No. 15B4-CV00019, where the Debtor and his spouse reside, shortly thereafter, on January 26, 2015. Debtor then filed this bankruptcy approximately three months later.

Debtor claimed \$15,000 of the home exempt on his Schedule C, pursuant to R.S.Mo. 513.475 and 11 U.S.C. 522(b)(3)(B) (tenancy by the entireties). No party has objected to the Debtor's claim of exemption. On April 3, 2015, Debtor filed a motion to avoid CRP's judgment lien (now in the amount of \$770,949.00) under 11 U.S.C. § 522(f)(1)(A), asserting that the lien impaired the exemption in his homestead. CRP filed a timely response. CRP asserted that since its judgment lien was unenforceable against the home (the home being protected by the tenancy by the entireties exemption and CRP having no judgment or claim against the Debtor's wife), its judgment lien did not "attach" to the home. Since the judgment lien did not attach, CRP argued, it could not as a matter of law impair the Debtor's exemption and thus could not be avoided.

The Debtor submitted witness and exhibit lists in accordance with the local rules before the hearing. CRP did not submit any witness or exhibit lists but appeared through counsel. The Court announced that it was prepared to rule based on the undisputed facts but offered CRP an opportunity to brief the matter. CRP's brief reiterates its legal argument – that there is no lien to

¹ The file stamp on the judgment incorrectly bears the date of January 5, 2014, not 2015.

avoid since the lien does not “attach” to the Debtor’s exempt tenancy-by-the-entirety homestead, and that if there is no attached lien there can be no impairment of the exemption. In addition, CRP argues that it will be harmed if the Court avoids the lien; if Debtor’s spouse pre-deceases him, CRP argues, the Debtor would own the home solely, unprotected by the tenancy-by-the-entirety exemption, and CRP would intend to enforce its judgment lien against the Debtor’s home.

Conclusions of Law

As always, the Court must start with the language of the statute. 11 U.S.C. § 522(f)(1)(A) provides that the debtor “may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is a judicial lien.” Section 522(f)(2)(A) determines when a lien impairs an exemption:

For purposes of this subsection, a lien shall be considered to impair an exemption to the extent that the sum of –

- (i) the lien;
- (ii) all other liens on the property; and
- (iii) the amount of the exemption that the debtor could claim if there were no liens on the property;

exceeds the value that the debtor’s interest in the property would have in the absence of any liens.

Much has been written about § 522(f), none of which was referred to in CRP’s brief. The Supreme Court addressed § 522(f)(1) in the context of liens arising under divorce judgment in 1991. *Farrey v. Sanderfoot*, 500 U.S. 291, 111 S.Ct. 1825, 114 L.Ed.2d 337 (1991). The Supreme Court explained that, before the enactment of § 522(f), judgment liens survived bankruptcy and could be enforced on exempt property, including otherwise exempt homestead property. *Id.* at 297. Congress instead enacted § 522(f) “with the broad purpose of protecting the debtor’s exempt property.” *Id.* According to the Supreme Court, § 522(f)(1), by its terms,

“extends this protection to cases involving the fixing of judicial liens onto exempt property.” *Id.* Notably, “[w]hat specific legislative history exists suggests that a principal reason Congress singled out judgment liens was because they are a device commonly used by creditors to defeat the protection bankruptcy law accords exempt property against debts.” *Id.*

In this case, CRP argues that the Court should equate the “fixing” of a lien with the “attachment” of a lien. CRP contends that if the lien did not “attach” under applicable Missouri law, that there was no “fixing.” The term “fixing” of a lien is not defined in the Code. The Supreme Court in *Farrey v. Sanderfoot* defines the “fixing” as a temporal event, or the event of “fastening of a liability” upon a debtor’s interest. *Id.* at 296. Congress certainly understood the difference between “attachment” and “fixing” and could have used the term “attached” in § 522(f). Rather, it is more likely that Congress was aware that in some states judgment liens did not “attach” to exempt homestead and yet unavoided judgment liens still could impair a debtor’s fresh start by interfering with a debtor’s attempt to refinance or sell the property. *See generally In re Cisneros*, 257 B.R. 332, 335-37 (Bankr. D. N. Mex. 2000) and cases cited therein.

More importantly, CRP’s argument that its judgment lien does not “attach” and therefore is not “fixed” is contrary to Missouri law. R.S. Mo. 511.350, governing judgment liens, expressly provides that judgments “shall be liens on the real estate of the person against whom they are entered, situate in the county for which or in which the court is held.” The Court concludes as a matter of law that CRP’s judgment lien – although perhaps not enforceable – certainly affixed upon the Debtor’s home upon CRP’s recording of its judgment in Barton County.² That is why, as CRP points out, it would be enforceable against the property if Debtor’s wife were to predecease him.

² CRP in its brief stated that the Court had suggested that the wording of §522(f) “might allow the Court to enter an Order that can be used to stop the possibility of the lien affixing in the future,” and states that “a careful

Having determined that CRP's judgment lien affixed, the Court then turns to whether the lien impairs the Debtor's exemption. CRP argues that the lien cannot impair the exemption because in essence there is not equity. For a determination of whether equity is relevant to impairment the Court need look no further than § 522(f)(2)(A). Congress has expressly provided a formula for when an exemption is impaired in § 522(f)(2)(A).

Applying the formula here, the Court adds the judgment lien (\$770,949.00) plus the other liens on the property (\$93,134.04), plus the exemption (\$15,000), for a total of \$879,083.04. That amount clearly exceeds the value of the Debtor's interest, whether such value is the value of the indivisible whole (\$105,000), or Debtor's half (\$52,500). Thus, as a matter of law, CRP's judgment lien is deemed to impair the Debtor's exemption and is thus avoidable.

The 8th Circuit, in an opinion not cited by CRP, examined anomalies resulting from the § 522(f)(2)(A) formula, particularly with second liens, and concluded it had no choice but to apply the formula. *In re Kolich*, 328 F.3d 406, 410 (8th Cir. 2003). Although noting that it was not "entirely comfortable" with the equities of the strict application of the § 522(f)(2)(A) formula, the *Kolich* Court reasoned,

[o]n the other hand, refusing to apply the statutory formula as written may result in denying deserving debtors the fresh-start advantage § 522(f) was enacted to provide -- for example, if a drop in market value has left exempt property over-encumbered by a judicial lien and a junior consensual lien, and the judicial lienholder insists upon foreclosure. With the competing equities both hard to weigh and finely balanced, our task is simply to apply § 522(f)(2)(A) as Congress wrote it.

reading" of § 522(f)" suggests that the section refers to actions which have already taken place. CRP misapprehends the Court's comments at the hearing and notes, in any event, that *Farrey v. Sanderfoot* has ruled that § 522(f)(1) does not apply to future events: "The gerund 'fixing' refers to a temporal event. That event – the fastening of a liability – presupposes an object onto which the liability can fasten. The statute defines this pre-existing object as 'an interest of the debtor in property.' Therefore, unless the debtor had the property interest to which the lien attached at some point *before* the lien attached to that interest, he or she cannot avoid the fixing of the lien under the terms of § 522(f)(1)." *Farrey v. Sanderfoot*, 500 U.S. at 296 (emphasis in original).

*Id.*³

The bottom line is that whether CRP's lien is enforceable or not, it is avoidable under the plain language of § 522(f)(1)(A). And, even if CRP is correct, that somehow its lien is not one Congress intended to avoid, such that avoiding an unenforceable lien would be superfluous,⁴ this Court may still determine that the lien should be avoided as impairing the exemption – particularly given CRP's express desire to enforce the lien post-discharge if Debtor's spouse dies. Such enforcement is exactly the sort of impairment of a debtor's fresh start that Congress intended to thwart in enacting § 522(f)(1).

A separate order will issue.

DATED: June 4, 2015

/s/ Cynthia A. Norton
United States Bankruptcy Judge

Parties to receive electronic notice.

³ See also *In re Moore*, 495 B.R. 1 (8th Cir. BAP 2013), rejecting an argument that because the debtor had no "equity" in the property, a judgment lien could not be avoided under § 522(f)(1). Equity is irrelevant to the determination of when a judicial lien can be avoided under the formula.

⁴ See *In re McRoy*, 204 B.R. 62 (Bankr. D. Kan. 1996) (judgment lien not avoidable since no judgment lien attached to the exempt Kansas homestead, and finding § 522(f)(1) "superfluous," but nonetheless avoiding the lien so as not to create a cloud on the debtor's title).

**UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF MISSOURI**

IN RE JEREMY MICHAEL COLLINS,)	
)	Case No. 14-42981-can7
Debtor.)	
<hr/>		
)	
JEREMY MICHAEL COLLINS,)	
Plaintiff,)	
v.)	Adv. Case No. 15-4062
NEBRASKA FURNITURE MART, INC.,)	
Defendant.)	
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ORDER DENYING DEFENDANT’S MOTION TO DISMISS

Debtor’s adversary complaint seeks damages against Nebraska Furniture Mart (“NFM”), for NFM’s request, in a post-discharge replevin action, to impose against the Debtor an *in personam* judgment for NFM’s attorney’s fees, costs, and other damages incurred in connection with the replevin. In lieu of answering the complaint, NFM has filed a Rule 12(b)(6) motion to dismiss for failure to state a claim, arguing that it has not violated the Debtor’s discharge injunction since its alleged damages are post-petition debts. For the reasons set forth below, the Court denies the Motion.

Standard

Federal Rule of Bankruptcy Procedure 7012 incorporates Fed. R. Civ. P. 12(b)(6), which provides defenses for claims for relief. *See* Fed. R. Bankr. P. 7012. When deciding a motion to dismiss, the Court “accept[s] as true all factual allegations in the complaint and draw[s] all reasonable inferences in favor of the nonmoving party.” *Freitas v. Wells Fargo Home Mortg., Inc.*, 703 F.3d 436, 438 (8th Cir. 2013). The complaint must “contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face.” *Id.* (quoting *Ashcroft v.*

Iqbal, 556 U.S. 662, 678 (2009)). “Plausible” requires less than “probable” but more than “possible.” *Iqbal*, 556 U.S. at 678. The Court will not accept as true wholly conclusory allegations. *Hanten v. Sch. Dist. Of Riverview Gardens*, 183 F.3d 799, 805 (8th Cir. 1999). While “detailed factual allegations” are not required in the complaint, the complaint must contain “enough facts to raise a right to relief above the speculative level.” *Iqbal*, 556 U.S. at 678; *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

Discussion

The facts in the light most favorable to the Debtor are not in dispute. NFM is a well-known regional furniture retailer, offering buyers enticing, no-money-down, 0% interest if paid-in-full-within-X-months credit terms for a dazzling array of household goods and furnishings. Under its standard revolving credit agreement, NFM retains a purchase money security interest in all items purchased until the buyer pays for the purchases in full.

In this case, the Debtor owed NFM approximately \$3,000 for items he purchased from NFM before he filed bankruptcy. NFM had in fact sued the Debtor to recover the items and for damages, but NFM dismissed its suit when it received notice of Debtor’s Chapter 7 bankruptcy filing. The Debtor, for his part, did not acknowledge NFM’s lien in his bankruptcy filings, instead scheduling NFM as an unsecured creditor. Likewise, the Debtor did not respond to NFM’s written request to surrender, reaffirm, or redeem the items he had purchased. The Debtor duly received a discharge, after which NFM filed its replevin action in state court.

Debtor does not dispute that NFM’s lien survived his discharge, or that NFM has the right to replevin items subject to NFM’s valid lien.¹ Rather, Debtor takes issue with the fact that NFM’s petition not only seeks the immediate right to possess the items, but “for payment of

¹ Debtor also alleges he no longer has the items. Whether or not Debtor has possession of the items is not material, however, to resolution of the motion to dismiss for failure to state a claim.

[NFM]'s costs and attorneys' fees incurred in enforcing the Revolving Credit Charge Agreement [and] for damages incurred by [Debtor]'s retention of the goods." NFM's creative argument for avoiding liability for its attempts to collect a prepetition debt is that its request for damages is instead a postpetition debt incurred on account of Debtor's "unlawful" retention of the items. In support of its argument, NFM points to the many changes BAPCPA added to the Bankruptcy Code,² which NFM argues eliminated a debtor's ability (known as "ride-through") to retain personal property encumbered by a lien without the benefit of redemption or a reaffirmation agreement. NFM's argument is not well-taken.

NFM does not dispute that it seeks attorney fees and other damages under the terms of its revolving credit agreement, and that Debtor executed that agreement prepetition. Under the Bankruptcy Code's broad definitions of "debt" (meaning, liability on a "claim"³) and "claim" (including a right to payment whether or not such right was reduced to judgment),⁴ NFM's right to seek attorney's fees and other damages arising under its agreement was unquestionably a prepetition debt. It follows, then, that Debtor's discharge order enjoined NFM from commencing an action, employing process, "or acting to collect, recover or offset any such debt as a personal liability of the debtor." 11 U.S.C. § 524(a)(2).

Nor is NFM's reliance on certain Code provisions evincing intent to eliminate ride-through availing. NFM is correct when it points out that 11 U.S.C. § 521(a)(2) together with § 521(a)(6) imposes upon an individual Chapter 7 debtor a duty to timely file a statement of intent

² Those changes include: 11 U.S.C. §§ 521(a)(2) (expanding the requirement of filing a statement of intent to all secured debts); § 521(a)(6) (imposing a duty on debtor's not to retain possession of property unless the debt was reaffirmed or the property redeemed under § 722); § 521(d) (certain ipso facto clauses validated); § 521(a)(2)(A) (shortening the time to file a statement of intention); § 521(a)(2)(B) (shortening the time to perform the statement of intention); § 521 undesignated paragraph (after § 521(a)(7) (lifting of the stay for certain noncompliance); § 362(h)(1) (lifting of the stay for failure to file the statement of intention or take timely action under the statement of intention; and § 524(k)(6)(A) (enhancing the debtor's attorney's duties, in the form of the Attorney Part C certification).

³ 11 U.S.C. § 101(12).

⁴ 11 U.S.C. § 101(5)(A).

specifying the debtor's intent to either surrender or retain the property, and if retaining, to either reaffirm or redeem, as well as a duty not to retain personal property collateral under certain circumstances.⁵ And NFM has tumbled to Judge Federman's *Riggs*⁶ case, which notes that the consequences of a debtor's failure to comply with his statutory duties means that the stay terminates, the property is no longer property of the estate, and that the creditor may proceed as permitted by state law. 11 U.S.C. § 362(h).

But NFM's reliance on a discussion of ride-through is largely irrelevant; the Debtor here is not relying on ride-through to keep the collateral since the Debtor, indisputably, is not maintaining current payments to NFM.⁷ More to the point, nothing in §§ 521 or 362 (or the Code, for that matter) renders a debtor's failure to comply with § 521(a)(2) or (a)(6) "unlawful"; nothing in the Code transmutes NFM's prepetition claim into a postpetition one; and nothing excepts the debtor's personal liability from being discharged by operation of the discharge order and § 524 save by the timely filing of a dischargeability complaint. See 11 U.S.C. § 727.

By contrast, Congress showed that it knew how to limit the discharge injunction in other BAPCPA amendments; § 524(j) expressly provides that § 524(a)(2) does not enjoin home mortgage creditors from seeking periodic payments from debtors in lieu of *in rem* relief under certain circumstances, and § 365(p)(2) protects personal property lessors from discharge injunction violations when negotiating a cure. Congress could have further penalized debtors

⁵ Section 521(a)(6) provides that the individual Chapter 7 debtor shall "not retain possession of personal property as to which a creditor has an *allowed claim for the purchase price* secured in whole or in part by an interest in such personal property" unless the debtor either reaffirms the debt or redeems the property within 45 days after the first meeting of creditors (emphasis added). But since only creditors who file a proof of claim are holders of *allowed claims* in Chapter 7 (11 U.S.C. § 502), NFM's failure to file a claim in this case may mean the Debtor owed no such duty to NFM. See generally *In re Rowe*, 342 B.R. 341, 350-51 (Bankr. D. Kan. 2006). This Court need not decide the issue since it is not relevant to whether the Debtor has stated a claim for violation of the discharge injunction.

⁶ No. 06-60346, 2006 WL 2990218, at *1 (Bankr. W.D. Mo. Oct. 12, 2006).

⁷ For the same reasons, the Court need not address NFM's attempts to denigrate the *McNeil* case, 128 B.R. 603 (Bankr. E.D. Pa. 1991). Although that court's discussion of ride-through has been abrogated by BAPCPA, the ultimate holding – that a creditor can't do an end-run around § 524(a)(2) by disguising its attempts to collect on a prepetition discharged debt as "special damages" -- is still good law.

who, like this Debtor, merely ignore §§ 521(a)(2) and (a)(6), but clearly Congress believed the automatic stay lift sufficient punishment. And, of course, Congress did not eliminate a creditor's ability to avail itself of other remedies under the Code (*e.g.*, dismissal for unreasonable delay under § 707(a)(1); determination of nondischargeability under § 523(c)), and certainly did not impinge on secured creditor's state law remedies (such as the right to replevin its collateral *in rem*), so long as undertaken within the purview of the discharge injunction.

The Court need not delve further into the myriad of other issues that the attempt to eliminate ride-through has spawned, nor decide any of those issues in the context of this case.⁸ “The discharge injunction of 11 U.S.C. § 524 is one of the most fundamental protections, or “benefits,” of bankruptcy. Without it, there would be no “fresh start.” *In re Poindexter*, 376 B.R. 732, 736 (Bankr. W.D. Mo. 2007). Willful violations of the discharge injunction are punishable by contempt. A creditor found in contempt for having willfully violated the discharge injunction is subject to an award of actual damages including attorney fees, as well as punitive damages in egregious circumstances. *Id.* at 739. The standard of willfulness, similar to that set forth in § 362(k), requires evidence the offending creditor knew of the existence of the discharge order and intentionally took actions which violated its provisions. Knowledge of the order and willful violation must be established by clear and convincing evidence. *Id.* at 738.

In the light most favorable to NFM, the Debtor has alleged that there is a valid court order (the discharge order) that discharged the Debtor's personal liability to NFM; that NFM had knowledge of the discharge order; and that NFM willfully violated the discharge order by suing

⁸ It is ironic that the attempt to eliminate the violent disagreement Courts expressed over ride-through (*e.g.*, *In re Price*, 370 F.3d 362, 370 (3rd Cir. 2004)) has spawned even more disagreement among courts because of the poor drafting, ambiguity, and internally inconsistent language used in the various Code sections. As one court has stated of the BAPCPA ride-through amendments, “[d]eciphering this puzzle is like trying to solve a Rubik's cube that arrived with a manufacturer's defect.” *In re Donald*, 343 B.R. 524, 529 (Bankr. E.D.N.C. 2006).

Debtor to obtain an *in personam* judgment of a discharged debt. The Debtor's complaint therefore states a plausible claim for relief.

Conclusion

NFM's Motion to dismiss is denied. NFM is granted 14 days from the date hereof to file an answer to Debtor's complaint.

IT IS SO ORDERED.

Dated: July 28, 2015

/s/ Cynthia A. Norton
United States Bankruptcy Judge

Parties to receive electronic notice