REAFFIRMATIONS, TAX RETURNS AND AUTOMATIC DISMISSAL: § 521 AFTER BAPCPA

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Section 521 Debtor's duties

(a) The debtor shall—

(1) file—

(A) a list of creditors; and

(B) unless the court orders otherwise—

(i) a schedule of assets and liabilities;

(ii) a schedule of current income and current expenditures;

(iii) a statement of the debtor's financial affairs and, if section 342(b) applies, a certificate—

(I) of an attorney whose name is indicated on the petition as the attorney for the debtor, or a bankruptcy petition preparer signing the petition under section 110(b)(1), indicating that such attorney or the bankruptcy petition preparer delivered to the debtor the notice required by section 342(b); or

(II) if no attorney is so indicated, and no bankruptcy petition preparer signed the petition, of the debtor that such notice was received and read by the debtor;

(iv) copies of all payment advices or other evidence of payment received within 60 days before the date of the filing of the petition, by the debtor from any employer of the debtor;

(v) a statement of the amount of monthly net income, itemized to show how the amount is calculated; and

(vi) a statement disclosing any reasonably anticipated increase in income or expenditures over the 12-month period following the date of the filing of the petition;

(2) if an individual debtor's schedule of assets and liabilities includes debts which are secured by property of the estate—

(A) within thirty days after the date of the filing of a petition under chapter 7 of this title or on or before the date of the meeting of creditors, whichever is earlier, or within such additional time as the court, for cause, within such period fixes, file with the clerk a statement of his intention with respect to the retention or surrender of such property and, if applicable, specifying that such property is claimed as exempt, that the debtor intends to redeem such property, or that the debtor intends to reaffirm debts secured by such property; and

(B) within 30 days after the first date set for the meeting of creditors under section 341(a), or within such additional time as the court, for cause, within such 30-day period fixes, perform his intention with respect to such property, as specified by subparagraph (A) of this paragraph;

except that nothing in subparagraphs (A) and (B) of this paragraph shall alter the debtor's or the trustee's rights with regard to such property under this title, except as provided in section 362(h);

(3) if a trustee is serving in the case or an auditor is serving under section 586(f) of title 28, cooperate with the trustee as necessary to enable the trustee to perform the trustee's duties under this title;

(4) if a trustee is serving in the case or an auditor is serving under section 586(f) of title 28, surrender to the trustee all property of the estate and any recorded information, including books, documents, records,

and papers, relating to property of the estate, whether or not immunity is granted under section 344 of this title;

(5) appear at the hearing required under section 524(d) of this title;

(6) in a case under chapter 7 of this title in which the debtor is an individual, 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, not later than 45 days after the first meeting of creditors under section 341(a), either—

(A) enters into an agreement with the creditor pursuant to section 524(c) with respect to the claim secured by such property; or

(B) redeems such property from the security interest pursuant to section 722; and

(7) unless a trustee is serving in the case, continue to perform the obligations required of the administrator (as defined in section 3 of the Employee Retirement Income Security Act of 1974) of an employee benefit plan if at the time of the commencement of the case the debtor (or any entity designated by the debtor) served as such administrator.

If the debtor fails to so act within the 45-day period referred to in paragraph (6), the stay under section 362(a) is terminated with respect to the personal property of the estate or of the debtor which is affected, such property shall no longer be property of the estate, and the creditor may take whatever action as to such property as is permitted by applicable nonbankruptcy law, unless the court determines on the motion of the trustee filed before the expiration of such 45-day period, and after notice and a hearing, that such property is of consequential value or benefit to the estate, orders appropriate adequate protection of the creditor's interest, and orders the debtor to deliver any collateral in the debtor's possession to the trustee.

(b) In addition to the requirements under subsection (a), a debtor who is an individual shall file with the court—

(1) a certificate from the approved nonprofit budget and credit counseling agency that provided the debtor services under section 109(h) describing the services provided to the debtor; and

(2) a copy of the debt repayment plan, if any, developed under section 109(h) through the approved nonprofit budget and credit counseling agency referred to in paragraph (1).

(c) In addition to meeting the requirements under subsection (a), a debtor shall file with the court a record of any interest that a debtor has in an education individual retirement account (as defined in section 530(b)(1) of the Internal Revenue Code of 1986) or under a qualified State tuition program (as defined in section 529(b)(1) of such Code).

(d) If the debtor fails timely to take the action specified in subsection (a)(6) of this section, or in paragraphs (1) and (2) of section 362(h), with respect to property which a lessor or bailor owns and has leased, rented, or bailed to the debtor or as to which a creditor holds a security interest not otherwise voidable under section 522(f), 544, 545, 547, 548, or 549, nothing in this title shall prevent or limit the operation of a provision in the underlying lease or agreement that has the effect of placing the debtor in default under such lease or agreement by reason of the occurrence, pendency, or existence of a proceeding under this title or the insolvency of the debtor. Nothing in this subsection shall be deemed to justify limiting such a provision in any other circumstance.

(e)(1) If the debtor in a case under chapter 7 or 13 is an individual and if a creditor files with the court at any time a request to receive a copy of the petition, schedules, and statement of financial affairs filed by

the debtor, then the court shall make such petition, such schedules, and such statement available to such creditor.

(2)(A) The debtor shall provide—

(i) not later than 7 days before the date first set for the first meeting of creditors, to the trustee a copy of the Federal income tax return required under applicable law (or at the election of the debtor, a transcript of such return) for the most recent tax year ending immediately before the commencement of the case and for which a Federal income tax return was filed; and

(ii) at the same time the debtor complies with clause (i), a copy of such return (or if elected under clause (i), such transcript) to any creditor that timely requests such copy.

(B) If the debtor fails to comply with clause (i) or (ii) of subparagraph (A), the court shall dismiss the case unless the debtor demonstrates that the failure to so comply is due to circumstances beyond the control of the debtor.

(C) If a creditor requests a copy of such tax return or such transcript and if the debtor fails to provide a copy of such tax return or such transcript to such creditor at the time the debtor provides such tax return or such transcript to the trustee, then the court shall dismiss the case unless the debtor demonstrates that the failure to provide a copy of such tax return or such transcript is due to circumstances beyond the control of the debtor.

(3) If a creditor in a case under chapter 13 files with the court at any time a request to receive a copy of the plan filed by the debtor, then the court shall make available to such creditor a copy of the plan—

(A) at a reasonable cost; and

(B) not later than 7 days after such request is filed.

(f) At the request of the court, the United States trustee, or any party in interest in a case under chapter 7, 11, or 13, a debtor who is an individual shall file with the court—

(1) at the same time filed with the taxing authority, a copy of each Federal income tax return required under applicable law (or at the election of the debtor, a transcript of such tax return) with respect to each tax year of the debtor ending while the case is pending under such chapter;

(2) at the same time filed with the taxing authority, each Federal income tax return required under applicable law (or at the election of the debtor, a transcript of such tax return) that had not been filed with such authority as of the date of the commencement of the case and that was subsequently filed for any tax year of the debtor ending in the 3-year period ending on the date of the commencement of the case;

(3) a copy of each amendment to any Federal income tax return or transcript filed with the court under paragraph (1) or (2); and

(4) in a case under chapter 13—

(A) on the date that is either 90 days after the end of such tax year or 1 year after the date of the commencement of the case, whichever is later, if a plan is not confirmed before such later date; and

(B) annually after the plan is confirmed and until the case is closed, not later than the date that is 45 days before the anniversary of the confirmation of the plan;

Section 362 Automatic stay

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of—

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning a tax liability of a debtor that is a corporation for a taxable period the bankruptcy court may determine or concerning the tax liability of a debtor who is an individual for a taxable period ending before the date of the order for relief under this title.

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay—

(1) under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor;

(2) under subsection (a)—

(A) of the commencement or continuation of a civil action or proceeding—

(i) for the establishment of paternity;

(ii) for the establishment or modification of an order for domestic support obligations;

(iii) concerning child custody or visitation;

(iv) for the dissolution of a marriage, except to the extent that such proceeding seeks to determine the division of property that is property of the estate; or

(v) regarding domestic violence;

(B) of the collection of a domestic support obligation from property that is not property of the estate;

(C) with respect to the withholding of income that is property of the estate or property of the debtor for payment of a domestic support obligation under a judicial or administrative order or a statute;

(D) of the withholding, suspension, or restriction of a driver's license, a professional or occupational license, or a recreational license, under State law, as specified in section 466(a)(16) of the Social Security Act;

(E) of the reporting of overdue support owed by a parent to any consumer reporting agency as specified in section 466(a)(7) of the Social Security Act;

(F) of the interception of a tax refund, as specified in sections 464 and 466(a)(3) of the Social Security Act or under an analogous State law; or

(G) of the enforcement of a medical obligation, as specified under title IV of the Social Security Act;

(3) under subsection (a) of this section, of any act to perfect, or to maintain or continue the perfection of, an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title or to the extent that such act is accomplished within the period provided under section 547(e)(2)(A) of this title;

(4) under paragraph (1), (2), (3), or (6) of subsection (a) of this section, of the commencement or continuation of an action or proceeding by a governmental unit or any organization exercising authority under the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, opened for signature on January 13, 1993, to enforce such governmental unit's or organization's police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power;

[(5) Repealed. Pub. L. 105–277, div. I, title VI, §603(1), Oct. 21, 1998, 112 Stat. 2681–866;]

(6) under subsection (a) of this section, of the exercise by a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency of any contractual right (as defined in section 555 or 556) under any security agreement or arrangement or other credit enhancement forming a part of or related to any commodity contract, forward contract or securities contract, or of any contractual right (as defined in section 555 or 556) to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more such contracts, including any master agreement for such contracts;

(7) under subsection (a) of this section, of the exercise by a repo participant or financial participant of any contractual right (as defined in section 559) under any security agreement or arrangement or other credit enhancement forming a part of or related to any repurchase agreement, or of any contractual right (as defined in section 559) to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more such agreements, including any master agreement for such agreements;

(8) under subsection (a) of this section, of the commencement of any action by the Secretary of Housing and Urban Development to foreclose a mortgage or deed of trust in any case in which the mortgage or deed of trust held by the Secretary is insured or was formerly insured under the National Housing Act and covers property, or combinations of property, consisting of five or more living units;

(9) under subsection (a), of—

(A) an audit by a governmental unit to determine tax liability;

(B) the issuance to the debtor by a governmental unit of a notice of tax deficiency;

(C) a demand for tax returns; or

(D) the making of an assessment for any tax and issuance of a notice and demand for payment of such an assessment (but any tax lien that would otherwise attach to property of the estate by reason of such an assessment shall not take effect unless such tax is a debt of the debtor that will not be discharged in the case and such property or its proceeds are transferred out of the estate to, or otherwise revested in, the debtor).

(10) under subsection (a) of this section, of any act by a lessor to the debtor under a lease of nonresidential real property that has terminated by the expiration of the stated term of the lease before the commencement of or during a case under this title to obtain possession of such property;

(11) under subsection (a) of this section, of the presentment of a negotiable instrument and the giving of notice of and protesting dishonor of such an instrument;

(12) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Transportation under section 31325 of title 46 (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage, or a security interest in or relating to a vessel or vessel under construction, held by the Secretary of Transportation under chapter 537 of title 46 or section 109(h) of title 49, or under applicable State law;

(13) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Commerce under section 31325 of title 46 (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage in a vessel or a mortgage, deed of trust, or other security interest in a fishing facility held by the Secretary of Commerce under chapter 537 of title 46;

(14) under subsection (a) of this section, of any action by an accrediting agency regarding the accreditation status of the debtor as an educational institution;

(15) under subsection (a) of this section, of any action by a State licensing body regarding the licensure of the debtor as an educational institution;

(16) under subsection (a) of this section, of any action by a guaranty agency, as defined in section 435(j) of the Higher Education Act of 1965 or the Secretary of Education regarding the eligibility of the debtor to participate in programs authorized under such Act;

(17) under subsection (a) of this section, of the exercise by a swap participant or financial participant of any contractual right (as defined in section 560) under any security agreement or arrangement or other credit enhancement forming a part of or related to any swap agreement, or of any contractual right (as defined in section 560) to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more such agreements, including any master agreement for such agreements;

(18) under subsection (a) of the creation or perfection of a statutory lien for an ad valorem property tax, or a special tax or special assessment on real property whether or not ad valorem, imposed by a governmental unit, if such tax or assessment comes due after the date of the filing of the petition;

(19) under subsection (a), of withholding of income from a debtor's wages and collection of amounts withheld, under the debtor's agreement authorizing that withholding and collection for the benefit of a pension, profit-sharing, stock bonus, or other plan established under section 401, 403, 408, 408A, 414, 457, or 501(c) of the Internal Revenue Code of 1986, that is sponsored by the employer of the debtor, or an affiliate, successor, or predecessor of such employer—

(A) to the extent that the amounts withheld and collected are used solely for payments relating to a loan from a plan under section 408(b)(1) of the Employee Retirement Income Security Act of 1974 or is subject to section 72(p) of the Internal Revenue Code of 1986; or

(B) a loan from a thrift savings plan permitted under subchapter III of chapter 84 of title 5, that satisfies the requirements of section 8433(g) of such title;

but nothing in this paragraph may be construed to provide that any loan made under a governmental plan under section 414(d), or a contract or account under section 403(b), of the Internal Revenue Code of 1986 constitutes a claim or a debt under this title;

(20) under subsection (a), of any act to enforce any lien against or security interest in real property following entry of the order under subsection (d)(4) as to such real property in any prior case under this title, for a period of 2 years after the date of the entry of such an order, except that the debtor, in a subsequent case under this title, may move for relief from such order based upon changed circumstances or for other good cause shown, after notice and a hearing;

(21) under subsection (a), of any act to enforce any lien against or security interest in real property—

(A) if the debtor is ineligible under section 109(g) to be a debtor in a case under this title; or

(B) if the case under this title was filed in violation of a bankruptcy court order in a prior case under this title prohibiting the debtor from being a debtor in another case under this title;

(22) subject to subsection (*l*), under subsection (a)(3), of the continuation of any eviction, unlawful detainer action, or similar proceeding by a lessor against a debtor involving residential property in which the debtor resides as a tenant under a lease or rental agreement and with respect to which the lessor has obtained before the date of the filing of the bankruptcy petition, a judgment for possession of such property against the debtor;

(23) subject to subsection (m), under subsection (a)(3), of an eviction action that seeks possession of the residential property in which the debtor resides as a tenant under a lease or rental agreement based on endangerment of such property or the illegal use of controlled substances on such property, but only if the lessor files with the court, and serves upon the debtor, a certification under penalty of perjury that such an eviction action has been filed, or that the debtor, during the 30-day period preceding the date of the filing of the certification, has endangered property or illegally used or allowed to be used a controlled substance on the property;

(24) under subsection (a), of any transfer that is not avoidable under section 544 and that is not avoidable under section 549;

(25) under subsection (a), of—

(A) the commencement or continuation of an investigation or action by a securities self regulatory organization to enforce such organization's regulatory power;

(B) the enforcement of an order or decision, other than for monetary sanctions, obtained in an action by such securities self regulatory organization to enforce such organization's regulatory power; or

(C) any act taken by such securities self regulatory organization to delist, delete, or refuse to permit quotation of any stock that does not meet applicable regulatory requirements;

(26) under subsection (a), of the setoff under applicable nonbankruptcy law of an income tax refund, by a governmental unit, with respect to a taxable period that ended before the date of the order for relief against an income tax liability for a taxable period that also ended before the date of the order for relief, except that in any case in which the setoff of an income tax refund is not permitted under applicable nonbankruptcy law because of a pending action to determine the amount or legality of a tax liability, the governmental unit may hold the refund pending the resolution of the action, unless the court, on the motion of the trustee and after notice and a hearing, grants the taxing authority adequate protection (within the meaning of section 361) for the secured claim of such authority in the setoff under section 506(a);

(27) under subsection (a) of this section, of the exercise by a master netting agreement participant of any contractual right (as defined in section 555, 556, 559, or 560) under any security agreement or arrangement or other credit enhancement forming a part of or related to any master netting agreement, or of any contractual right (as defined in section 555, 556, 559, or 560) to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more such master netting agreements to the extent that such participant is eligible to exercise such rights under paragraph (6), (7), or (17) for each individual contract covered by the master netting agreement in issue; and

(28) under subsection (a), of the exclusion by the Secretary of Health and Human Services of the debtor from participation in the medicare program or any other Federal health care program (as defined in section 1128B(f) of the Social Security Act pursuant to title XI or XVIII of such Act).

The provisions of paragraphs (12) and (13) of this subsection shall apply with respect to any such petition filed on or before December 31, 1989.

(c) Except as provided in subsections (d), (e), (f), and (h) of this section—

(1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate;

(2) the stay of any other act under subsection (a) of this section continues until the earliest of—

(A) the time the case is closed;

(B) the time the case is dismissed; or

(C) if the case is a case under chapter 7 of this title concerning an individual or a case under chapter 9, 11, 12, or 13 of this title, the time a discharge is granted or denied;

(3) if a single or joint case is filed by or against a debtor who is an individual in a case under chapter 7, 11, or 13, and if a single or joint case of the debtor was pending within the preceding 1-year period but was dismissed, other than a case refiled under a chapter other than chapter 7 after dismissal under section 707(b)—

(A) the stay under subsection (a) with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease shall terminate with respect to the debtor on the 30th day after the filing of the later case;

(B) on the motion of a party in interest for continuation of the automatic stay and upon notice and a hearing, the court may extend the stay in particular cases as to any or all creditors (subject to such conditions or limitations as the court may then impose) after notice and a hearing completed before the expiration of the 30-day period only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed; and

(C) for purposes of subparagraph (B), a case is presumptively filed not in good faith (but such presumption may be rebutted by clear and convincing evidence to the contrary)—

(i) as to all creditors, if—

(I) more than 1 previous case under any of chapters 7, 11, and 13 in which the individual was a debtor was pending within the preceding 1-year period;

(II) a previous case under any of chapters 7, 11, and 13 in which the individual was a debtor was dismissed within such 1-year period, after the debtor failed to—

(aa) file or amend the petition or other documents as required by this title or the court without substantial excuse (but mere inadvertence or negligence shall not be a substantial excuse unless the dismissal was caused by the negligence of the debtor's attorney);

(bb) provide adequate protection as ordered by the court; or

(cc) perform the terms of a plan confirmed by the court; or

(III) there has not been a substantial change in the financial or personal affairs of the debtor since the dismissal of the next most previous case under chapter 7, 11, or 13 or any other reason to conclude that the later case will be concluded—

(aa) if a case under chapter 7, with a discharge; or

(bb) if a case under chapter 11 or 13, with a confirmed plan that will be fully performed; and

(ii) as to any creditor that commenced an action under subsection (d) in a previous case in which the individual was a debtor if, as of the date of dismissal of such case, that action was still pending or had been resolved by terminating, conditioning, or limiting the stay as to actions of such creditor; and

(4)(A)(i) if a single or joint case is filed by or against a debtor who is an individual under this title, and if 2 or more single or joint cases of the debtor were pending within the previous year but were dismissed, other than a case refiled under a chapter other than chapter 7 after dismissal under section 707(b), the stay under subsection (a) shall not go into effect upon the filing of the later case; and

(ii) on request of a party in interest, the court shall promptly enter an order confirming that no stay is in effect;

(B) if, within 30 days after the filing of the later case, a party in interest requests the court may order the stay to take effect in the case as to any or all creditors (subject to such conditions or limitations as the court may impose), after notice and a hearing, only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed;

(C) a stay imposed under subparagraph (B) shall be effective on the date of the entry of the order allowing the stay to go into effect; and

(D) for purposes of subparagraph (B), a case is presumptively filed not in good faith (but such presumption may be rebutted by clear and convincing evidence to the contrary)—

(i) as to all creditors if—

(I) 2 or more previous cases under this title in which the individual was a debtor were pending within the 1-year period;

(II) a previous case under this title in which the individual was a debtor was dismissed within the time period stated in this paragraph after the debtor failed to file or amend the petition or other documents as required by this title or the court without substantial excuse (but mere inadvertence or negligence shall not be substantial excuse unless the dismissal was caused by the negligence of the debtor's attorney), failed to provide adequate protection as ordered by the court, or failed to perform the terms of a plan confirmed by the court; or

(III) there has not been a substantial change in the financial or personal affairs of the debtor since the dismissal of the next most previous case under this title, or any other reason to conclude that the later case will not be concluded, if a case under chapter 7, with a discharge, and if a case under chapter 11 or 13, with a confirmed plan that will be fully performed; or

(ii) as to any creditor that commenced an action under subsection (d) in a previous case in which the individual was a debtor if, as of the date of dismissal of such case, such action was still pending or had been resolved by terminating, conditioning, or limiting the stay as to such action of such creditor.

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest;

(2) with respect to a stay of an act against property under subsection (a) of this section, if—

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization;

(3) with respect to a stay of an act against single asset real estate under subsection (a), by a creditor whose claim is secured by an interest in such real estate, unless, not later than the date that is 90 days after the entry of the order for relief (or such later date as the court may determine for cause by order entered within that 90-day period) or 30 days after the court determines that the debtor is subject to this paragraph, whichever is later—

(A) the debtor has filed a plan of reorganization that has a reasonable possibility of being confirmed within a reasonable time; or

(B) the debtor has commenced monthly payments that—

(i) may, in the debtor's sole discretion, notwithstanding section 363(c)(2), be made from rents or other income generated before, on, or after the date of the commencement of the case by or from the property to each creditor whose claim is secured by such real estate (other than a claim secured by a judgment lien or by an unmatured statutory lien); and

(ii) are in an amount equal to interest at the then applicable nondefault contract rate of interest on the value of the creditor's interest in the real estate; or

(4) with respect to a stay of an act against real property under subsection (a), by a creditor whose claim is secured by an interest in such real property, if the court finds that the filing of the petition was part of a scheme to delay, hinder, or defraud creditors that involved either—

(A) transfer of all or part ownership of, or other interest in, such real property without the consent of the secured creditor or court approval; or

(B) multiple bankruptcy filings affecting such real property.

If recorded in compliance with applicable State laws governing notices of interests or liens in real property, an order entered under paragraph (4) shall be binding in any other case under this title purporting to affect such real property filed not later than 2 years after the date of the entry of such order by the court, except that a debtor in a subsequent case under this title may move for relief from such order based upon changed circumstances or for good cause shown, after notice and a hearing. Any Federal, State, or local governmental unit that accepts notices of interests or liens in real property shall accept any certified copy of an order described in this subsection for indexing and recording.

(e)(1) Thirty days after a request under subsection (d) of this section for relief from the stay of any act against property of the estate under subsection (a) of this section, such stay is terminated with respect to the party in interest making such request, unless the court, after notice and a hearing, orders such stay continued in effect pending the conclusion of, or as a result of, a final hearing and determination under subsection (d) of this section. A hearing under this subsection may be a preliminary hearing, or may be consolidated with the final hearing under subsection (d) of this section. The court shall order such stay continued in effect pending the conclusion of the final hearing under subsection (d) of this section if there is a reasonable likelihood that the party opposing relief from such stay will prevail at the conclusion of such final hearing. If the hearing under this subsection is a preliminary hearing, then such final hearing shall be concluded not later than thirty days after the conclusion of such preliminary hearing, unless the 30-day period is extended with the consent of the parties in interest or for a specific time which the court finds is required by compelling circumstances.

(2) Notwithstanding paragraph (1), in a case under chapter 7, 11, or 13 in which the debtor is an individual, the stay under subsection (a) shall terminate on the date that is 60 days after a request is made by a party in interest under subsection (d), unless—

(A) a final decision is rendered by the court during the 60-day period beginning on the date of the request; or

(B) such 60-day period is extended—

(i) by agreement of all parties in interest; or

(ii) by the court for such specific period of time as the court finds is required for good cause, as described in findings made by the court.

(f) Upon request of a party in interest, the court, with or without a hearing, shall grant such relief from the stay provided under subsection (a) of this section as is necessary to prevent irreparable damage to the interest of an entity in property, if such interest will suffer such damage before there is an opportunity for notice and a hearing under subsection (d) or (e) of this section.

(g) In any hearing under subsection (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section—

(1) the party requesting such relief has the burden of proof on the issue of the debtor's equity in property; and

(2) the party opposing such relief has the burden of proof on all other issues.

(h)(1) In a case in which the debtor is an individual, the stay provided by subsection (a) is terminated with respect to personal property of the estate or of the debtor securing in whole or in part a claim, or subject to an unexpired lease, and such personal property shall no longer be property of the estate if the debtor fails within the applicable time set by section 521(a)(2)—

(A) to file timely any statement of intention required under section 521(a)(2) with respect to such personal property or to indicate in such statement that the debtor will either surrender such personal property or retain it and, if retaining such personal property, either redeem such personal property pursuant to section 722, enter into an agreement of the kind specified in section 524(c) applicable to the debt secured by such personal property, or assume such unexpired lease pursuant to section 365(p) if the trustee does not do so, as applicable; and

(B) to take timely the action specified in such statement, as it may be amended before expiration of the period for taking action, unless such statement specifies the debtor's intention to reaffirm such debt on the original contract terms and the creditor refuses to agree to the reaffirmation on such terms.

(2) Paragraph (1) does not apply if the court determines, on the motion of the trustee filed before the expiration of the applicable time set by section 521(a)(2), after notice and a hearing, that such personal property is of consequential value or benefit to the estate, and orders appropriate adequate protection of the creditor's interest, and orders the debtor to deliver any collateral in the debtor's possession to the trustee. If the court does not so determine, the stay provided by subsection (a) shall terminate upon the conclusion of the hearing on the motion.

(i) If a case commenced under chapter 7, 11, or 13 is dismissed due to the creation of a debt repayment plan, for purposes of subsection (c)(3), any subsequent case commenced by the debtor under any such chapter shall not be presumed to be filed not in good faith.

(j) On request of a party in interest, the court shall issue an order under subsection (c) confirming that the automatic stay has been terminated.

(k)(1) Except as provided in paragraph (2), an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

(2) If such violation is based on an action taken by an entity in the good faith belief that subsection (h) applies to the debtor, the recovery under paragraph (1) of this subsection against such entity shall be limited to actual damages.

(*l*)(1) Except as otherwise provided in this subsection, subsection (b)(22) shall apply on the date that is 30 days after the date on which the bankruptcy petition is filed, if the debtor files with the petition and serves upon the lessor a certification under penalty of perjury that—

(A) under nonbankruptcy law applicable in the jurisdiction, there are circumstances under which the debtor would be permitted to cure the entire monetary default that gave rise to the judgment for possession, after that judgment for possession was entered; and

(B) the debtor (or an adult dependent of the debtor) has deposited with the clerk of the court, any rent that would become due during the 30-day period after the filing of the bankruptcy petition.

(2) If, within the 30-day period after the filing of the bankruptcy petition, the debtor (or an adult dependent of the debtor) complies with paragraph (1) and files with the court and serves upon the lessor a further certification under penalty of perjury that the debtor (or an adult dependent of the debtor) has cured, under nonbankruptcy law applicable in the jurisdiction, the entire monetary default that gave rise to the judgment under which possession is sought by the lessor, subsection (b)(22) shall not apply, unless ordered to apply by the court under paragraph (3).

(3)(A) If the lessor files an objection to any certification filed by the debtor under paragraph (1) or (2), and serves such objection upon the debtor, the court shall hold a hearing within 10 days after the filing and service of such objection to determine if the certification filed by the debtor under paragraph (1) or (2) is true.

(B) If the court upholds the objection of the lessor filed under subparagraph (A)—

(i) subsection (b)(22) shall apply immediately and relief from the stay provided under subsection (a)(3) shall not be required to enable the lessor to complete the process to recover full possession of the property; and

(ii) the clerk of the court shall immediately serve upon the lessor and the debtor a certified copy of the court's order upholding the lessor's objection.

(4) If a debtor, in accordance with paragraph (5), indicates on the petition that there was a judgment for possession of the residential rental property in which the debtor resides and does not file a certification under paragraph (1) or (2)—

(A) subsection (b)(22) shall apply immediately upon failure to file such certification, and relief from the stay provided under subsection (a)(3) shall not be required to enable the lessor to complete the process to recover full possession of the property; and

(B) the clerk of the court shall immediately serve upon the lessor and the debtor a certified copy of the docket indicating the absence of a filed certification and the applicability of the exception to the stay under subsection (b)(22).

(5)(A) Where a judgment for possession of residential property in which the debtor resides as a tenant under a lease or rental agreement has been obtained by the lessor, the debtor shall so indicate on the bankruptcy petition and shall provide the name and address of the lessor that obtained that pre-petition judgment on the petition and on any certification filed under this subsection.

(B) The form of certification filed with the petition, as specified in this subsection, shall provide for the debtor to certify, and the debtor shall certify—

(i) whether a judgment for possession of residential rental housing in which the debtor resides has been obtained against the debtor before the date of the filing of the petition; and

(ii) whether the debtor is claiming under paragraph (1) that under nonbankruptcy law applicable in the jurisdiction, there are circumstances under which the debtor would be permitted to cure the entire monetary default that gave rise to the judgment for possession, after that judgment of possession was entered, and has made the appropriate deposit with the court.

(C) The standard forms (electronic and otherwise) used in a bankruptcy proceeding shall be amended to reflect the requirements of this subsection.

(D) The clerk of the court shall arrange for the prompt transmittal of the rent deposited in accordance with paragraph (1)(B) to the lessor.

(m)(1) Except as otherwise provided in this subsection, subsection (b)(23) shall apply on the date that is 15 days after the date on which the lessor files and serves a certification described in subsection (b)(23).

(2)(A) If the debtor files with the court an objection to the truth or legal sufficiency of the certification described in subsection (b)(23) and serves such objection upon the lessor, subsection (b)(23) shall not apply, unless ordered to apply by the court under this subsection.

(B) If the debtor files and serves the objection under subparagraph (A), the court shall hold a hearing within 10 days after the filing and service of such objection to determine if the situation giving rise to the lessor's certification under paragraph (1) existed or has been remedied.

(C) If the debtor can demonstrate to the satisfaction of the court that the situation giving rise to the lessor's certification under paragraph (1) did not exist or has been remedied, the stay provided under subsection (a)(3) shall remain in effect until the termination of the stay under this section.

(D) If the debtor cannot demonstrate to the satisfaction of the court that the situation giving rise to the lessor's certification under paragraph (1) did not exist or has been remedied—

(i) relief from the stay provided under subsection (a)(3) shall not be required to enable the lessor to proceed with the eviction; and

(ii) the clerk of the court shall immediately serve upon the lessor and the debtor a certified copy of the court's order upholding the lessor's certification.

(3) If the debtor fails to file, within 15 days, an objection under paragraph (2)(A)—

(A) subsection (b)(23) shall apply immediately upon such failure and relief from the stay provided under subsection (a)(3) shall not be required to enable the lessor to complete the process to recover full possession of the property; and

(B) the clerk of the court shall immediately serve upon the lessor and the debtor a certified copy of the docket indicating such failure.

(n)(1) Except as provided in paragraph (2), subsection (a) does not apply in a case in which the debtor—

(A) is a debtor in a small business case pending at the time the petition is filed;

(B) was a debtor in a small business case that was dismissed for any reason by an order that became final in the 2-year period ending on the date of the order for relief entered with respect to the petition;

(C) was a debtor in a small business case in which a plan was confirmed in the 2-year period ending on the date of the order for relief entered with respect to the petition; or

(D) is an entity that has acquired substantially all of the assets or business of a small business debtor described in subparagraph (A), (B), or (C), unless such entity establishes by a preponderance of the evidence that such entity acquired substantially all of the assets or business of such small business debtor in good faith and not for the purpose of evading this paragraph.

(2) Paragraph (1) does not apply—

(A) to an involuntary case involving no collusion by the debtor with creditors; or

(B) to the filing of a petition if—

(i) the debtor proves by a preponderance of the evidence that the filing of the petition resulted from circumstances beyond the control of the debtor not foreseeable at the time the case then pending was filed; and

(ii) it is more likely than not that the court will confirm a feasible plan, but not a liquidating plan, within a reasonable period of time.

(*o*) The exercise of rights not subject to the stay arising under subsection (a) pursuant to paragraph (6), (7), (17), or (27) of subsection (b) shall not be stayed by any order of a court or administrative agency in any proceeding under this title.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2570; Pub. L. 97–222, §3, July 27, 1982, 96 Stat. 235; Pub. L. 98–353, title III, §§304, 363(b), 392, 441, July 10, 1984, 98 Stat. 352, 363, 365, 371; Pub. L. 99–509, title V, §5001(a), Oct. 21, 1986, 100 Stat. 1911; Pub. L. 99–554, title II, §§257(j), 283(d), Oct. 27, 1986, 100 Stat. 3115, 3116; Pub. L. 101–311, title I, §102, title II, §202, June 25, 1990, 104 Stat. 267, 269; Pub. L. 101–508, title III, §3007(a)(1), Nov. 5, 1990, 104 Stat. 1388–28; Pub. L. 103–394, title I, §§101, 116, title II, §§204(a), 218(b), title III, §304(b), title IV, §401, title V, §501(b)(2), (d)(7), Oct. 22, 1994, 108 Stat. 4107, 4119, 4122, 4128, 4132, 4141, 4142, 4144; Pub. L. 105–277, div. I, title VI, §603, Oct. 21, 1998, 112 Stat. 2681–886; Pub. L. 109–8, title I, §106(f), title II, §§214, 224(b), title III, §§302, 303, 305(1), 311, 320, title IV, §§401(b), 441, 444, title VII, §§709, 718, title IX, §907(d), (*o*)(1), (2), title XI, §1106, title XII, §1225, Apr. 20, 2005, 119 Stat. 41, 54, 64, 75, 77, 79, 84, 94, 104, 114, 117, 127, 131, 176, 181, 182, 192, 199; Pub. L. 109–304, §17(b)(1), Oct. 6, 2006, 120 Stat. 1706; Pub. L. 109–390, §5(a)(2), Dec. 12, 2006, 120 Stat. 2696; Pub. L. 111–327, §2(a)(12), Dec. 22, 2010, 124 Stat. 3558.)

Historical and Revision Notes

legislative statements

Section 362(a)(1) of the House amendment adopts the provision contained in the Senate amendment enjoining the commencement or continuation of a judicial, administrative, or other proceeding to recover a claim against the debtor that arose before the commencement of the case. The provision is beneficial and interacts with section 362(a)(6), which also covers assessment, to prevent harassment of the debtor with respect to pre-petition claims.

Section 362(a)(7) contains a provision contained in H.R. 8200 as passed by the House. The differing provision in the Senate amendment was rejected. It is not possible that a debt owing to the debtor may be offset against an interest in the debtor.

Section 362(a)(8) is new. The provision stays the commencement or continuation of any proceeding concerning the debtor before the U.S. Tax Court.

Section 362(b)(4) indicates that the stay under section 362(a)(1) does not apply to affect the commencement or continuation of an action or proceeding by a governmental unit to enforce the governmental unit's police or regulatory power. This section is intended to be given a narrow construction in order to permit governmental units to pursue actions to protect the public health and safety and not to apply to actions by a governmental unit to protect a pecuniary interest in property of the debtor or property of the estate.

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF SOUTH CAROLINA

IN RE:

James J. Anderson and Ann Roslyn Anderson,

Debtor(s).

C/A No. 09-01531-JW

Chapter 7

ORDER

This matter comes before the Court for a hearing on a reaffirmation agreement entered into by James J. Anderson ("Debtor") and Citizens Automobile Finance Inc. ("Citizens"). Debtor seeks to reaffirm the debt owed to Citizens in the amount of $6,586.51, which appears secured by a lien on a 2004 Mazda pick-up truck ("Vehicle"). The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334. After considering the testimony of Debtor, arguments of counsel and the record in this case, the Court makes the following findings of fact and conclusions of law.[1]

FINDINGS OF FACT

1. On February 28, 2009, Debtor and his wife, Ann Roslyn Anderson, (collectively, "Debtors") filed a joint petition for relief under chapter 7 of the Bankruptcy Code. Simultaneously with the petition, Debtors filed their statement of intention, which indicated that they intended to retain the Vehicle and reaffirm the debt with Citizens.

2. The first meeting of creditors ("Meeting of Creditors") was held on March 27, 2009.

3. Thereafter, Debtor took steps to reaffirm his debt to Citizens by communicating with Citizens to negotiate the terms of an agreement and ultimately

[1] To the extent any of the following findings of fact constitute conclusions of law, they are adopted as such; and to the extent any of the conclusions of law constitute findings of fact, they are so adopted.

signing an agreement ("Reaffirmation Agreement"), which reaffirmed the debt owed to Citizens on the original contract terms. Debtors' counsel, Herman F. Richardson, Jr. ("Counsel"), did not sign the Reaffirmation Agreement. At the hearing, Counsel stated he did not feel it was appropriate to sign the agreement because Debtor's future employment was uncertain; therefore, he believed he had inadequate information to determine whether Debtor would be able to make the payments.

4. On June 3, 2009, sixty-nine (69) days after the Meeting of Creditors, Citizens filed the Reaffirmation Agreement.

5. The Court scheduled a hearing to consider whether the Reaffirmation Agreement should be approved because Part C of the Reaffirmation Agreement was not signed by Counsel, its filing was untimely, and there appeared to be a presumption of undue hardship in that Debtor's Schedule J indicates a budget shortfall of $824.00. Debtor's counsel advised the Court that the delay in the signing and filing of the Reaffirmation Agreement was caused by Citizens.[2] Debtor stated in Part D that he can afford the payments because he plans on working part time and has a tentative position at Midlands Technical College, instructing on weekends, starting July 25, 2009. This position, if obtained, would only provide Debtor with employment through December. At the hearing, Debtor testified that he needs the Vehicle for work and that he is current on the monthly payments. After the Court observed that the Reaffirmation Agreement was filed late, Counsel made an oral motion to extend the time to file the Reaffirmation Agreement.

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[2] Apparently, Citizens delayed in sending the proposed agreement to Debtor for his signature and the agreement received by Debtor did not include the signature of a representative of Citizens. Accordingly, Debtor was unable to immediately file the Reaffirmation Agreement after signing because he had to return the document to Citizens for its signature.

CONCLUSIONS OF LAW

The determination of whether Debtor's Reaffirmation Agreement can be approved requires an analysis of 11 U.S.C. § 524(c),[3] which sets forth the following checklist of requirements for an enforceable reaffirmation agreement:

(1) the reaffirmation agreement must be made before the granting of the discharge under section 727, 1141, 1228, or 1328;

(2) the debtor must have received the disclosures described in § 524(k) at or before the time at which the debtor signed the agreement;

(3) the reaffirmation agreement must be filed with the court and, if applicable, must be accompanied by a declaration or an affidavit of the attorney that represented the debtor during the course of negotiating an agreement under this subsection, which states that—
   (A) the reaffirmation agreement represents a fully informed and voluntary agreement by the debtor;
   (B) such agreement does not impose an undue hardship on the debtor or a dependant of the debtor; and
   (C) the attorney fully advised the debtor of the legal effect and consequences of a reaffirmation agreement and any default under such an agreement;

(4) the debtor must not have rescinded the reaffirmation agreement at any time prior to discharge or within sixty days after such agreement is filed with the court, whichever occurs later;

(5) the provisions of § 524(d) of this section must be complied with; and

(6) if the debtor was not represented by an attorney during the course of negotiating the reaffirmation agreement, the Court must determine that the reaffirmation agreement does not impose an undue hardship on the debtor or a dependent of the debtor and is in the best interest of the debtor.

The order granting Debtor his discharge has not yet been entered, therefore §524(c)(1) appears to be satisfied. Since the disclosures described in § 524(k) are

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[3] Further references to the Bankruptcy Code (11 U.S.C. § 101 *et seq.*) shall be by section number only.

incorporated into the Reaffirmation Agreement signed by Debtor, it appears that § 524(c)(2) is also satisfied.

The Reaffirmation Agreement has been filed with the Court, but it was not filed in accordance with Fed. R. Bankr. P. 4008, which requires a debtor to file a reaffirmation agreement within the sixty (60) days after the first date set for the meeting of creditors under § 341. However, Fed. R. Bankr. P. 4008 permits the Court, *at any time and in its discretion*, to enlarge the time to file a reaffirmation agreement. At the hearing, Debtor made an oral motion to enlarge the time to file the Reaffirmation Agreement. Debtor's counsel advised the Court that the delay in filing was caused by Citizens, who delayed in sending the Reaffirmation Agreement to Debtor and did not sign the agreement prior to sending it to Debtor, which necessitated the return of the agreement to Citizens for its signature prior to filing. The Court finds that an enlargement of the time for filing the Reaffirmation Agreement is appropriate and thus hereby grants Debtor's motion.

Nevertheless, it appears that § 524(c)(3) is not satisfied because Counsel was unwilling to sign Part C, which declares that the Reaffirmation Agreement represents a fully informed and voluntary agreement by Debtor, does not impose an undue hardship on Debtor, and Debtor was fully advised by Counsel of the legal effect of the Reaffirmation Agreement and any default under such agreement. Counsel advised the Court that he was unwilling to sign Part C because Debtor's employment was not certain, and consequently, he was unsure that Debtor would be able to make the payments required under the Reaffirmation Agreement.

Absent a declaration of Counsel, the Court can only approve the Reaffirmation Agreement if it concludes that (1) the Reaffirmation Agreement does not impose an

undue hardship on Debtor and (2) the Reaffirmation Agreement is in the best interest of Debtor. See § 524(c)(6)(A)(i) & (ii). Under § 524(m)(1), it appears that a rebuttable presumption of undue hardship arises in this case. Section 523(m)(1) provides in relevant part:

> [I]t shall be presumed that such agreement is an undue hardship on the debtor if the debtor's monthly income less the debtor's monthly expenses as shown on the debtor's completed and signed statement in support of such agreement required under subsection (k)(6)(A) is less than the scheduled payments on the reaffirmed debt.

According to Part D of the Reaffirmation Agreement, Debtor's monthly expenses exceed his monthly income by $824.00, leaving no funds available to make the payments on the reaffirmed debt. To approve the Reaffirmation Agreement, § 523(m) requires the Court to review this presumption and determine whether Debtor has sufficiently rebutted the presumption by providing an explanation that identifies additional sources of funds to make the payments as agreed upon under the terms of such agreement. § 524(m). Debtor stated in Part D, "I plan on working part time. I have a tentative position at Midlands Technical College, instructing on weekends starting July 25th." At the hearing, Debtor testified that he has a verbal commitment for a temporary teaching position from August through December, but he could not state for sure that he would have the position. He further testified that he needs the Vehicle in order to be able to work. The Court is unable to conclude from Debtor's testimony and statement on Part D that Debtor will have sufficient funds to meet his obligations under the Reaffirmation Agreement, and therefore finds that Defendant failed to rebut the presumption of undue hardship. Due to the uncertainty of Debtor's future income, the Court further finds that the agreement does

not appear to be in Debtor's best interest. For the foregoing reasons, the Court will not approve the Reaffirmation Agreement.

The Court observes that an issue remains whether Debtor can retain possession of the Vehicle even though the Reaffirmation Agreement has been disapproved by the Court. Several courts have held that where the court has disapproved a reaffirmation agreement, a debtor could continue to possess personal property and make payments on such property if the debtor complied with the requirements of § 521(a) and § 362(h) by timely filing a statement of intention indicating that he or she would reaffirm the debt and timely attempting to enter into a reaffirmation agreement. Coastal Federal Credit Union v. Hardiman, 398 B.R. 161 (E.D.N.C. 2008)(finding that there are limited circumstances where a debtor, who has timely complied with all the requirements under §§ 521 and 362(h), can "ride through" a bankruptcy and retain possession of secured personal property); In re Chim, 381 B.R. 191, 198 (Bankr. D. Md. 2008)(concluding that because the debtor fully complied with § 362(h) and § 521, the automatic stay remained in place with respect to the vehicle, the vehicle remained property of the estate, debtor could retain possession of the vehicle and the lender could not exercise remedies pursuant to *ipso facto* clause, despite the Court's disapproval of the reaffirmation agreement); In re Husain, 364 B.R. 211 (Bankr. E.D.Va. 2007)(stating that the consequences of § 362(h)(1) and § 521(d)—lifting the automatic stay and making *ipso facto* default clauses enforceable—are only caused by a debtor's failure to timely file a statement of intent and/or to timely enter into a reaffirmation agreement, not by the court's disapproval of the agreement or by its determination that the agreement is unenforceable). The debtor's

compliance with § 521(a)(2) appears to be essential to be able to retain possession of personal property under these circumstances.

Section 521(a)(2)(A) of the Bankruptcy Code requires debtors to file a statement of intention as to debts that are secured by property of the estate, which indicates whether the debtor intends to retain or surrender the property and, if he intends to retain the property, whether debtor intends to redeem the property, reaffirm the debt secured by such property, or claims that the property is exempt. In this case, Debtor timely filed his statement of intention indicating that he intended to reaffirm the debt with Citizens.

Section 521(a)(2)(B) provides that "within 30 days after the first date set for the meeting of creditors under § 341(a), or within such additional time as the court, for cause, within such 30-day period fixes, the debtor shall perform his intention with respect to such property, as specified by subparagraph (A) of this paragraph." Under the circumstances of this case, the Court finds that Debtor's efforts to obtain and enter into the Reaffirmation Agreement were sufficient to satisfy the performance requirement of § 521(a)(2)(B). See In re Peterson, 2009 WL 1730915, slip op. (Bankr. M.D.N.C. Jun. 17, 2009); In re Hill, 2009 WL 1651241, slip op. (Bankr. M.D. N.C. Jun. 9, 2009).

As the Court finds that Debtor has satisfied the requirements of § 521(a)(2), it appears that § 362(h) would not apply to terminate the automatic stay with respect to the Vehicle in this case. See 11 U.S.C. § 362(h).

Based on the foregoing, it is hereby

ORDERED that the Reaffirmation Agreement between Debtor and Citizens is not approved based on Debtor's failure to rebut the presumption of undue hardship in this case. Further, since Debtor complied with the requirements of § 521(a)(2) and agreed to

reaffirm the debt on the original terms of the contract, and was not responsible for the untimely entry and filing of the reaffirmation agreement, the Court finds that (1) the automatic stay remains in effect with respect to the Vehicle; (2) the Vehicle remains property of the estate; (3) any *ipso facto* clause contained in Debtor's original contract with Citizens or other document signed by Debtor remains ineffective;[4] and (4) Citizens shall continue to accept payments from Debtor. See Coastal Fed. Credit Union v. Hardiman, 398 B.R. 161, 189 (E.D.N.C. 2008); In re Husain, 364 B.R. 211, 219 (Bankr. E.D. Va. 2007); In re Stevens, 365 B.R. 610, 612 (Bankr. E.D. Va. 2007); In re Blakeley, 363 B.R. 225, 231 (Bankr. D. Utah 2007); In re Hinson, 352 B.R. 48, 53 (Bankr. E.D.N.C. 2006); In re Peterson, 2009 WL 1730915, slip op. (Bankr. M.D.N.C. Jun. 17, 2009); In re Hill, 2009 WL 1651241, slip op. (Bankr. M.D. N.C. Jun. 9, 2009).

AND IT IS SO ORDERED.

UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina
July 1, 2009

[4] The *ipso facto* clause would be ineffective because the provisions of § 521(d) that would give effect to such a clause have not been triggered by § 362(h).

372 B.R. 816
In re Jean H. WILSON, Debtor.
C/A No. 07-00668-DD.
United States Bankruptcy Court, D. South Carolina.
May 30, 2007.

Joseph H. Wachter, Myrtle Beach, SC for, Debtor.

ORDER

JOHN E. WAITES, Bankruptcy Judge.

This matter comes before the Court upon a Motion to Compel (the "Motion") filed by First Federal Savings & Loan Association of Charleston ("First Federal"). The Motion seeks an order directing Debtor to surrender certain collateral, redeem the collateral, or reaffirm the debts owed to First Federal pursuant to 11 U.S.C. § 521(a)(2).[1] Debtor timely filed an Objection to the Motion to Compel. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157(b) and 1334(a) and (b). Pursuant to Fed.R.Civ.P.

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52, made applicable to this proceeding by Fed. R. Bankr.P. 7052, the Court makes the following Findings of Fact and Conclusions of Law:[2]

FINDINGS OF FACT

1. On February 7, 2007, Debtor filed a voluntary petition under Chapter 7 of the United States Bankruptcy Code.

2. In her Schedules, Debtor indicated that she owns a condominium in Surfside Beach, SC, having a value of $80,000.00. She also indicated that the condominium is encumbered by a first mortgage lien held by First Federal in the amount of $19,732.00 and a second mortgage lien held by First Federal in the amount of $15,077.00.

3. In her original Statement of Intention, Debtor stated that she intended to reaffirm the two mortgage debts owed to First Federal.

4. By letter dated March 6, 2007, Debtor's counsel notified First Federal that, upon further consideration, Debtor had decided not to reaffirm the two mortgage debts.

5. On March 30, 2007, First Federal filed the Motion to Compel.

6. On April 4, 2007, Debtor filed an Amended Statement of Intention, which provides that she intends to retain possession of the condominium and continue making payments and remain current on the two mortgage debts owed to First Federal.

CONCLUSIONS OF LAW

First Federal seeks the entry of an order directing or compelling Debtor to reaffirm the debts owed to First Federal.[3] It argues that under § 521(a)(2)(A), Debtor must choose to either redeem or reaffirm the debt if she wishes to retain the property securing that debt. Section 521(a)(2) provides:

[I]f an individual debtor's schedule of assets and liabilities includes debts which are secured by property of the estate —

(A) within thirty days after the date of the filing of a petition under chapter 7 of this title or on or before the date of the meeting of creditors, whichever is earlier, or within such additional time as the court, for cause, within such period fixes, the debtor shall file with the clerk a statement of his intention with respect to the retention or surrender of such property and, *if applicable,* specifying that such property is claimed as exempt, that the debtor intends to redeem such property, or that the debtor intends to reaffirm debts secured by such property.

Debtor asserts that she may retain possession of her real property and continue making payments as scheduled under the "ride

through" option provided by *Home Owners Funding Corp. v. Belanger (In re Belanger),* 962 F.2d 345 (4th Cir.1992). First Federal argues that *Belanger* only addressed a "ride through" for personal property and was superseded by the enactment of the Bankruptcy Abuse Prevention

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and Consumer Protection Act of 2005 ("BAPCPA").

In *Belanger,* the Fourth Circuit Court of Appeals analyzed § 521(2)(A) and found that the options of reaffirming, redeeming or surrendering property were not exclusive.[4] In that case, the debtors had indicated on their statement of intention that they intended to retain their mobile home and keep the payments current. *Id.* at 346. The secured creditor moved to compel the debtors to reaffirm the debt, redeem the collateral, or surrender it, arguing that § 521(2)(A), the previous version of § 521(a)(2), restricted the debtors to these options.[5] The court noted that § 521(2) "merely requires a statement of whether the debtor intends to choose any of those options, *if applicable."* The court construed "if applicable" to mean that the options stated in the statute are not exclusive. *Id.* at 347. The Fourth Circuit held that a debtor who is not in default may elect to retain the property and make the payments specified in the contract with the creditor. *Id.* at 347.

The enactment of BAPCPA brought several amendments to the Bankruptcy Code with the potential to affect the "ride through" option. Section 521(2)(A) was redesignated § 521(a)(2)(A) and the requirement to file a statement of intention was made applicable to all secured debts, not just secured consumer debts. 11 U.S.C. § 521(a)(2)(A); *see In re Donald,* 343 B.R. 524 (Bankr.E.D.N.C.2006). Section 521(2)(B) was redesignated § 521(a)(2)(B) and the deadline for a debtor to perform his intention was changed to 30 days after the first date set for the meeting of creditors. The changes to § 521(a)(2)(A) and (B) do not appear to independently affect the "ride through" option.

Three sections amended or added by BAPCPA appear to have been designed to limit a debtor's right to elect the ride-through option as to personal property. Section 521(a)(6) provides that a debtor shall not retain possession of personal property as to which a creditor has an allowed secured claim unless the debtor reaffirms or redeems. 11 U.S.C. § 521(a)(6). Former § 521(2)(C), now § 521(a)(2)(C), was amended to provide that "nothing in subparagraphs (A) and (B) of this paragraph shall alter the debtor's or the trustee's rights with regard to such property under this title, *except as provided in section 362(h)."* 11 U.S.C. § 521(a)(2)(C). Section 362(h) was added by BAPCPA and provides that the automatic stay terminates with respect to personal property when the debtor does not state an intention to reaffirm or redeem, or does not perform such intention within a specified period of time. 11 U.S.C. § 362(h). The plain language of these statutes limits their application to a debtor's rights with regard to personal property. A debtor's rights as to real property

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appear to be unaffected by the BAPCPA amendments. *See In re Bennet,* No. 06-80241, slip op. at 1, 2006 WL 1540842 (Bankr.M.D.N.C. May 26, 2006).

First Federal argues that *Belanger* did not address ma: property, therefore a "ride through" option was never established as to real property. The Court is not convinced that the *Belanger* opinion limits its application to personal property. In *Belanger,* the Fourth Circuit analyzed the previous version of § 521(a)(2)(A), which refers to property of the estate and contains no language limiting its application to personal property.

The reasoning underlying *Belanger* further supports its application to both real property and personal property. The Fourth Circuit discussed the creditor's complaint that allowing the "ride through" and a discharge permits the debtors to retain the collateral without exposing them to personal liability for any deficiency in the event of default and the sale of the collateral for lest;

than the balance due.[6] The court stated: "When a nondefaulting debtor is discharged while retaining the collateral, the principal disadvantage to the creditor is the possibility that the value of the collateral will be less than the balance due on the secured debt. But this is a risk in all installment loans, and presumably the creditor has structured repayment to accommodate it." *Belanger,* 962 F.2d at 349. The risk of being undersecured is particularly a problem for lienholders with liens secured by personal property, which often rapidly depreciates. This risk would appear to be less pronounced for lienholders with liens secured by real property, as real property does not typically rapidly depreciate. In the instant case, First Federal is substantially oversecured, so there is little, if any, risk that it would not recover the full value of its lien if Debtor were to default in the future by failing to make a payment.

Limiting a debtor to the three choices of surrender, redeem or reaffirm for real property would impair the debtor's ability to obtain a fresh start, which is one of the primary purposes of bankruptcy law. *See Local Loan Co. v. Hunt,* 292 U.S. 234, 244, 54 S.Ct. 695, 699, 78 L.Ed. 1230 (1934). As a practical matter, it is highly unlikely that a person who has filed bankruptcy would be able to redeem real property in one lump sum payment.[7] Thus, under First Federal's proposed interpretation, the only alternative for a debtor who wishes to keep his home would be to reaffirm the debt. The creditor would have to consent to the terms of the reaffirmation agreement, thus the creditor could have an improved bargaining position. Congress intended the reaffirmation agreement to be a voluntary, consensual action. *In re Crouch,* 104 B.R. 770, 774 (Bankr.S.D.W.Va.1989)(citing *In re Whatley,* 16 B.R. 394 (Bankr.N.D.Ohio 1982)). First Federal argues that the overall intent of Congress was to eliminate the "ride through" altogether. The facts of this case demonstrate that eliminating the "ride through" for real property would have overly burdensome consequences for certain debtors. Moreover, the continued existence of the "ride through" option for

real property is supported by the plain language of the statute. Surely if Congress intended to force a debtor, who otherwise is current under the contract, to choose between giving up her home or agreeing to the creditor's terms, it would have included specific language in the statute dictating this result. Such an onerous requirement should not arise by implication.

First Federal argues that even if a "ride through" option remains for real property, it could hold debtor in default under a nonmonetary default provision such as an *ipso facto* clause (a clause making bankruptcy an event of default). While the Fourth Circuit held in *Riggs National Bank v. Perry,* 729 F.2d 982 (4th Cir.1984) that an *ipso facto* clause was unenforceable as a matter of law, § 521(d) was added by BAPCPA to preserve the enforceability of these types of clauses. However, the language in § 521(d) refers to such provisions in agreements covered by § 521(a)(6) and § 362(h), which address only personal property liens.[8] Thus, it appears that § 521(d) only preserves the enforceability of *ipso facto* clauses in personal property loans.

For the foregoing reasons, the Court finds that the *Belanger* case is controlling precedent in the Fourth Circuit and provides for a "ride through" option for real property that was unaffected by the BAPCPA amendments. Thus, Debtor has the right to retain her real property without being required to reaffirm or redeem, so long as she remains current in her payments and complies with any other contractual obligations, such as maintaining insurance on the property. Stay relief otherwise appears improper due the existence of equity as adequate protection. Therefore, it is hereby

ORDERED that First Federal's Motion to Compel is denied.[9]

AND IT IS SO ORDERED.

JUDGMENT

Based on the Findings of Fact and Conclusions of Law as recited in the attached Order of the Court, the Motion to Compel filed by First Federal Savings & Loan Association of Charleston is denied.

Notes:

1. Further references to the United States Bankruptcy Code shall be by section number only.

2. The Court notes that to the extent any of the following Findings of Fact constitute Conclusions of Law, they are adopted as such, and to the extent any Conclusions of Law constitute Findings of Fact, they are so adopted.

3. First Federal's motion was originally filed to compel Debtor to reaffirm the debts in accordance with her Statement of Intent. First Federal does not dispute that Debtor timely amended her Statement of Intention pursuant to Interim Bankruptcy Rule 1009 and Rule 1009(b) to provide that she intends to retain the property and continue making payments; therefore, the Motion to Compel is moot with respect to the issue of whether Debtor failed to comply with her original Statement of Intention.

4. The position asserted by the Fourth Circuit in *Belanger* is shared by four other circuits, and is the majority position. *See In re Price,* 370 F.3d 362, 379 (3d Cir.2004); *McClellan Federal Credit Union v. Parker (In re Parker),* 139 F.3d 668, 673 (9th Cir.1998); *Capital Comm. Fed. Credit Union v. Boodrow (In re Boodrow),* 126 F.3d 43, 51 (2d Cir.1997); *Lowry Fed. Credit Union v. West,* 882 F.2d 1543, 1547 (10th Cir.1989). All five circuits took the position that the previous version of the statute, § 521(2)(A), was procedural, requiring notice, and thus the debtor could "ride through" on secured debts with court protection if debtor remained current on repayment and other obligations, such as insuring the collateral.

5. The previous version of the statute, § 521(2)(A), was virtually identical to the current version, § 521(a)(2), with the exception that the statute now provides that a debtor must file a statement of intention regarding property of the estate encumbered by any debt, not just consumer debt.

6. A secured creditor's lien against the collateral usually will survive the bankruptcy discharge. *See Farrey v. Sanderfoot* 500 U.S. 291, 297, 111 S.Ct. 1825, 114 L.Ed.2d 337 (1991); *Johnson v. Home State Bank,* 501 U.S. 78, 84, 111 S.Ct. 2150, 115 L.Ed.2d 66 (1991); *In re Hamlett,* 322 F.3d 342, 348 (4th Cir.2003). Thus, the creditor would maintain the right to repossess the collateral and sell it, if the debtor failed to make timely payments.

7. Section 722 governs redemption and requires that debtor pay the holder of the lien the amount of the allowed secured claim that is secured by such lien in full at the time of redemption. However, the application of § 722 is limited to tangible personal property.

8. Section 521(d) also states that "[n]othing in this subsection shall be deemed to justify limiting such a provision in any other circumstance."

9. Due to the importance of consistency in rendering significant decisions under BAPCPA, all bankruptcy judges in this District have reviewed and concur with this opinion.

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383 B.R. 369
In re Charles Frederick HOISINGTON and Ellen Jean Hoisington, Debtor(s).
No. 07-06296-DD.
United States Bankruptcy Court, D. South Carolina.
January 31, 2008.
Page 370

Rolf M. Baghdady, Chapin, SC, for Debtors.

ORDER ON MOTION FOR RELIEF FROM STAY AND DETERMINATION OF THE STATUS OF THE AUTOMATIC STAY UNDER 11 U.S.C. § 521

DAVID R. DUNCAN, Bankruptcy Judge.

THIS MATTER is before the Court on Nuvell Credit Company LLC's ("Creditor") Motion for Relief from Stay ("Motion"). Charles Frederick Hoisington and Ellen Jean Hoisington ("Debtors") filed an objection to the Motion and a hearing was held in this matter on January 23, 2008. Both Debtors and Creditor appeared, by and through counsel, to present their positions. Creditor moves for relief from stay for cause pursuant to 11 U.S.C. § 362(d)(1).[1]

Creditor seeks relief from stay based on three alternative theories: First, Creditor asserts that the lack of equity in the 2004 Chevrolet Aveo VIN# KL1TJ52644B172302 ("Collateral") coupled with its inconsequential value to the chapter 7 estate creates cause to grant the Motion. Second, Creditor claims to have no proof that insurance is being kept by the Debtors on the Collateral and as such they are not adequately protected, which constitutes cause. Third, Creditor argues that the Debtors cannot retain the Collateral because they have failed to meet the requirements of § 521(a)(6). There is no allegation by Creditor that Debtors are delinquent in their payments to Creditor. In fact Creditor admitted at the hearing that the Debtors were current. Debtors' objection states that there is insurance currently on the Collateral and Debtors provided the policy number of same. At the hearing Debtors' counsel indicated that he had provided proof of insurance to Creditor, and it is the Court's understanding that this is no longer an issue. Thus, the remaining issues before the Court are (1) the effects of § 521(a)(6) on the collateral and (2) whether the lack of equity coupled with the Collateral having inconsequential value to the estate constitutes cause for relief from stay under § 362(d)(1). Based on the facts of this

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particular case the Court need not reach either one of these issues.

Section 521(a)(2) states in relevant part,

(a) The debtor shall —

(2) if an individual debtor's schedule of assets and liabilities includes debts which are secured by property of the estate —

(A) within thirty days after the date of the filing of a petition under chapter 7 of this title or on or before the date of the meeting of creditors, whichever is earlier, or within such additional time as the court, for cause, within such period fixes, the debtor shall file with the clerk a statement of his intention with respect to the retention or surrender of such property and, if applicable, specifying that such property is claimed as exempt, that the debtor intends to redeem such property, or that the debtor intends to reaffirm debts secured by such property;

(B) within 30 days after the first date set for the meeting of creditors under section 341(a), or within such additional time as the court, for cause, within such 30-day period fixes, the debtor shall perform his intention with respect to such property, as specified by subparagraph (A) of this paragraph; and

(C) nothing in subparagraphs (A) and (B) of this paragraph shall alter the debtor's or the trustee's rights with regard to such property

under this title, except as provided in section 362(h);

11 U.S.C. § 521(a)(2).

Section 362(h) states in relevant part,

(h) (1) In a case in which the debtor is an individual, the stay provided by subsection (a) is terminated with respect to personal property of the estate or of the debtor securing in whole or in part a claim, or subject to an unexpired lease, and such personal property shall no longer be property of the estate if the debtor fails within the applicable time set by section. 521(a)(2) —

(A) to file timely any statement of intention required under section 521(a)(2) with respect to such personal property or to indicate in such statement that the debtor will either surrender such personal property or retain it and, if retaining such personal property, either redeem such personal property pursuant to section 722, enter into an agreement of the kind specified in section 524(c) applicable to the debt secured by such personal property, or assume such unexpired lease pursuant, to section 365(p) if the trustee does not, do so, as applicable; and

(B) to take timely, the action specified in such statement, as it may be amended before expiration of the period for taking action, unless such statement specifies the debtor's intention to reaffirm such debt on the original contract terms and the creditor refuses to agree to the reaffirmation on such terms.

11 U.S.C. § 362(h)" This Court has previously discussed the interaction between these two code sections in *In re Ivey,* C/A No. 07-05659-DD, slip op. (Bankr.D.S.C. November 29, 2007), explaining,

[A] debtor has thirty (30) days to file a statement of intention indicating whether debtor intends to surrender or retain property secured by lien. § 521(a)(2)(A). If the debtor intends to retain the property the debtor has two choices, either reaffirm the debt or redeem the property. *Id.* Alone § 521 has no effect, but when read in conjunction with § 362 the effect can be the termination of the automatic stay with respect to personal property. *See In re Wilson,* 372 B.R. 816 (Bankr.D.S.C.2007) (General discussion on the interaction between

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§ 521(a)(2), § 521(a)(6) and § 362(h)). In the present case the relevant statutes are § 521(a)(2)(A) and 362(h)(1)(A). Debtor did file her statement of intention within thirty days, but indicated that she would retain the property and continue to make payments. Since the property at issue here is personal property this is not an option. The property must be surrendered, redeemed, or the debt reaffirmed. Section 362(h)(1)(A) specifically states that the automatic stay is terminated as to the personal property if the debtor fails to indicate, timely (i.e., 30 days from time of petition), on the statement of intention "that the debtor will either surrender such Personal property or retain it and, if retaining such personal property, either redeem . . . [or reaffirm]."

Ivey, C/A No. 07-05659-DD, slip op. (Bankr.D.S.C. November 29, 2007)([Brackets in Original]). The relevant facts of the current case are all but identical to the facts in Ivey. Debtors filed their statement of intention with their petition, thus they filed it in a timely manner. However, as in *Ivey,* Debtors indicated on their statement of intention that they would retain the collateral and continue to make payments to Creditor. As stated in *Ivey,* this is not an option in regards to personal property, even when a debtor is current in his or her payments. Debtors failed to indicate on their statement of intention that they would surrender the collateral, redeem the collateral, or reaffirm the debt. The Debtors' failure to comply with the requirements of § 362(h)(1)(A) resulted in termination of the stay as to the collateral at issue on December 13, 2007. Thus, there is currently no stay in place that prevents the Creditor from exercising its non-bankruptcy remedies against its collateral.

Debtors argue that § 362(h)(1)(B) contains an exception to the termination of the stay if the creditor refuses to accept a reaffirmation

agreement on the original contract terms. Section 362(h)(1)(B) states that the stay shall terminate as to personal property if a debtor fails "to take timely the action specified in such statement [of intention] as it may be amended before expiration of the period for taking action, *unless such statement specifies the debtor's intention to reaffirm such debt on the original contract terms and the creditor refuses to agree to the reafirmation on such terms." § 362(h)(1)(B) (Emphasis added).*

It is true (evidenced by Creditor's Motion and by Creditor's counsel's proffer at the hearing) that Creditor refuses to enter into a reaffirmation agreement with the Debtors. However, based on the conjunctive language of § 362(h)(1) the Court finds that the exception does not apply in this instance. For the exception to apply a debtor must (1) timely file a statement of intention indicating that he or she intends to reaffirm the debt (§ 362(h)(1)(A)), *and* (2) he or she must timely take that action and attempt to reaffirm the debt (§ 362(h)(1)(B)). If a debtor meets both of the above conditions but the reaffirmation agreement is refused by the creditor, then the exception applies. Support for this interpretation lies within the language of the exception itself. The stay terminates "unless . . . [the] statement [of intention] *specifies the debtor's intention to reaffirm* . . . and the creditor refuses to agree to the reaffirmation. . . ." *§ 362(h)(1)(B) (Emphasis added).* The exception requires that the statement of intention specify the debtor's intention to reaffirm, or in other words, a debtor must first comply with § 362(h)(1)(A). Here the Debtors indicated on their statement of intention that they would retain the collateral and continue to make payments.

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Debtors have not met the requirement of the exception.

Conclusion

The automatic stay terminated by Operation of law on December 13, 2067. The Court need not address the remaining issues nor need it consider Creditor's Motion as it is moot.

AND IT IS SO ORDERED.

Notes:

1. Further references to the Bankruptcy Code shall be by section number only.

U.S. BANKRUPTCY COURT
District of South Carolina

Case Number: 07-05659

ORDER DENYING MOTION TO EXPEDITE HEARING

The relief set forth on the following pages, for a total of 6 pages including this page, is hereby ORDERED.

FILED BY THE COURT
11/29/2007

US Bankruptcy Court Judge
District of South Carolina

Entered: 11/29/2007

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA

IN RE:	C/A No. 07-05659-DD
Mary Ivey,	Chapter 7
Debtor(s).	**ORDER DENYING MOTION TO EXPEDITE HEARING**

THIS MATTER is before the Court on Mary Ivey's ("Debtor") Motion to Expedite Hearing ("Motion") filed *pro se* on November 27, 2007. The Debtor asks this Court to expedite the hearing on her Motion to Reconsider Dismissal of Case, filed November 14, 2007. A hearing is set on December 11, 2007 at 9:00 a.m. Debtor's Motion indicates that her truck has been repossessed and will be sold on December 1, 2007 unless she can either (1) pay the creditor $2,000 or (2) have her case reinstated.[1]

Debtor filed her chapter 7 voluntary petition on October 17, 2007 along with the majority of the required schedules and statements. She was informed[2] by the Court on that same day that remaining to be filed were (1) the copies of her pay advices, (2) a Statement of Increase of income/expenses, and (3) a Statement of Assistance. She was informed that these were due on or before November 1, 2007. On October 29, 2007 Debtor filed the necessary pay advices and her Statement of Assistance but failed to file the Statement of Increase of Income/Expenses.[3] On November 2, 2007 the Clerk of Court left a telephonic message with Debtor informing her that the statement should be filed by the end of day. The Debtor did not file the required schedule and her case was dismissed by order dated November 8, 2007.

[1] The Debtor actually requests issuance of an "emergency case number."
[2] The deficiency notice provided that if the documents were not filed on or before November 1, 2007 that the case would be dismissed without further notice.
[3] This schedule is a new requirement of the 2005 Reform Act. *See 11 U.S.C. § 521(a)(1)(B)(vi).*

The Court next received a letter requesting that the Court reopen Debtor's case. The Court treated the letter as a Motion to Reconsider Dismissal of Case and set it for hearing on December 11, 2007. The letter explained Debtor's circumstances to the Court. While the Court is sympathetic to Debtor's situation, the Court's consideration of the Motion to Reconsider is for another day. The issue before the Court is whether the hearing should be held on an expedited basis. A motion to expedite a hearing must conform to the Court's Local Rule, which states,

> A motion for an emergency hearing or a hearing to be held on less than fifteen (15) days' notice should be filed as a separate document from the motion upon which relief is sought and should contain a complete and detailed explanation of the urgency of the request, including the proposed time for scheduling of a hearing, the potential for irreparable harm if relief is not granted, and the efforts made to communicate with other parties in interest to the motion in a good faith attempt to resolve the matter. The movant must contact the courtroom deputy or chambers upon the filing of a motion for an emergency hearing in accordance with Operating Order 04-11, Guidelines for the Filing of Documents. Failure to comply may result in denial of an emergency hearing or other adverse ruling.

SC LBR 9014-1(d).

The letter does appear to contain all the information required by the Local Rule. However, based on the facts set forth in Debtor's Motion and application of the law to those facts, the Court must deny Debtor's Motion to Expedite. Debtor's letter states that the purpose of her request for an expedited hearing is to avoid the sale of her truck, which was repossessed by the lien holder and will be sold on December 1, 2007. The Debtor expresses numerous reasons the truck is needed by her and her family, and if the Court could offer Debtor any relief it may have considered expediting the hearing. Unfortunately, the Court is unable to offer Debtor any relief. The statement of intention filed in this case states, with respect to the truck, that "Debtor will retain collateral and

continue to make regular payments" to Drive Financial Services, the lien holder.

11 U.S.C. § 521(a)(2)[4] states,

> [I]f an individual debtor's schedule of assets and liabilities includes debts which are secured by property of the estate--
>
> (A)within thirty days after the date of the filing of a petition under chapter 7 of this title or on or before the date of the meeting of creditors, whichever is earlier, or within such additional time as the court, for cause, within such period fixes, the debtor shall file with the clerk a statement of his intention with respect to the retention or surrender of such property and, if applicable, specifying that such property is claimed as exempt, that the debtor intends to redeem such property, or that the debtor intends to reaffirm debts secured by such property;
>
> (B) within 30 days after the first date set for the meeting of creditors under section 341(a), or within such additional time as the court, for cause, within such 30-day period fixes, the debtor shall perform his intention with respect to such property, as specified by subparagraph (A) of this paragraph; and
>
> (C) nothing in subparagraphs (A) and (B) of this paragraph shall alter the debtor's or the trustee's rights with regard to such property under this title, except as provided in section 362(h)

§ 521(a)(2).

> Section 362(h)(1) states,
>
> (h) (1) In a case in which the debtor is an individual, the stay provided by subsection (a) is terminated with respect to personal property of the estate or of the debtor securing in whole or in part a claim, or subject to an unexpired lease, and such personal property shall no longer be property of the estate if the debtor fails within the applicable time set by section 521(a)(2)--
>
> (A) to file timely any statement of intention required under section 521(a)(2) with respect to such personal property or to indicate in such statement that the debtor will either surrender such personal property or retain it and, if retaining such personal property, either redeem such personal property pursuant to section 722 , enter into an agreement of the kind specified in section 524(c) applicable to the debt secured by such personal property, or assume such unexpired lease pursuant to section 365(p)if the trustee does not do so, as applicable; and
>
> (B) to take timely the action specified in such statement, as it may be amended before expiration of the period for taking action, unless such statement specifies the debtor's intention to reaffirm such debt on the

[4] Further references to the Bankruptcy Code shall be made by section number only.

> original contract terms and the creditor refuses to agree to the reaffirmation on such terms.

§ 362(h)(1).

In simpler terms, a debtor has thirty (30) days to file a statement of intention indicating whether debtor intends to surrender or retain property secured by lien. § 521(a)(2)(A). If the debtor intends to retain the property the debtor has two choices, either reaffirm the debt or redeem the property. *Id.* Alone § 521 has no effect, but when read in conjunction with § 362 the effect can be the termination of the automatic stay with respect to personal property. *See In re Wilson*, 372 B.R. 816 (Bankr. D.S.C. 2007) (General discussion on the interaction between § 521(a)(2), § 521(a)(6) and § 362(h)).

In the present case the relevant statutes are § 521(a)(2)(A) and § 362(h)(1)(A). Debtor did file her statement of intention within thirty days, but indicated that she would retain the property and continue to make payments. Since the property at issue here is personal property this is not an option. The property must be surrendered, redeemed, or the debt reaffirmed. Section 362(h)(1)(A) specifically states that the automatic stay is terminated as to the personal property if the debtor fails to indicate, timely (i.e., 30 days from time of petition), on the statement of intention "that the debtor will either surrender such personal property or retain it and, if retaining such personal property, either redeem…[or reaffirm]."[5]

Debtor did not comply with § 521(a)(2)(A), therefore § 362(h)(1)(A) would have terminated the stay as to Debtor's 2003 Dodge Ram on November 16, 2007, thirty (30) days after the petition date had the case not been dismissed. The sole reason stated by Debtor for expedited relief is to prevent the sale of her truck on December 1, 2007. If the

[5] There are other situations that terminate the automatic stay as to personal property but this is the only one applicable in the present case.

case were reinstated there would be no stay as to the truck and no bar to action by the lien holder to proceed with the sale. Since hearing this matter on an expedited basis would not aid the Debtor in staying the sale of her truck, the Motion to Expedite is denied. The Motion to Reconsider Dismissal remains on the calendar for December 11, 2007 at 9:00 a.m.

AND IT IS SO ORDERED.
Columbia, South Carolina
November 29, 2007

591 F.3d 308
In re David Douglas JONES, Debtor.
DaimlerChrysler Financial Services Americas, LLC, Plaintiff-Appellee,
v.
David Douglas Jones; Kirsten M. Jones, Defendants-Appellants.
No. 08-2177.
United States Court of Appeals, Fourth Circuit.
Argued: September 23, 2009.
Decided: January 11, 2010.
[591 F.3d 309]
ARGUED: Andrew Steven Nason, Pepper & Nason, Charleston, West Virginia, for Appellants. Stephen P. Hale, Hale, Dewey & Knight, PLLC, Memphis, Tennessee, for Appellee. ON BRIEF: Jacob C. Zweig, Hale, Dewey & Knight, PLLC, Memphis, Tennessee, for Appellee.
Before NIEMEYER and SHEDD, Circuit Judges, and Mark S. DAVIS, United States District Judge for the Eastern District of Virginia, sitting by designation.
Affirmed by published opinion. Judge SHEDD wrote the opinion, in which Judge NIEMEYER and Judge DAVIS joined.
OPINION
SHEDD, Circuit Judge:

David Douglas Jones and Kirsten M. Jones appeal an order of the district court which held that DaimlerChrysler Financial Services Americas, LLC, had the right to repossess their vehicle pursuant to 11 U.S.C. §§ 362(h) and 521(a)(2), and West Virginia Code § 46A-2-106. For the following reasons, we affirm.

I.

The Joneses purchased a vehicle under a Retail Installment Contract with DaimlerChrysler that granted DaimlerChrysler a security interest in the vehicle to secure payment; the security interest was later perfected. The contract contains a clause which provides that the Joneses will be in default if they file a bankruptcy petition or if one is filed against them. Subsequently, David Jones filed a petition for relief under Chapter 7 of the Bankruptcy Code. Kirsten M. Jones did not file for bankruptcy but brought this adversary proceeding as the co-owner of the vehicle.

In filing for bankruptcy, Mr. Jones filed a statement of intention with respect to the contract for purchase of the Joneses' vehicle that indicated that he would "Continue Payments" on the vehicle but did not state whether he intended to redeem the vehicle or reaffirm the debt as required by 11 U.S.C. §§ 362(h) and 521(a)(2).[1] He

[591 F.3d 310]

also failed to redeem the vehicle or enter into a reaffirmation agreement with DaimlerChrysler within 45 days of the first meeting of creditors held on June 16, 2006. See 11 U.S.C. § 521(a)(6). Mr. Jones made a payment on August 28, 2006, through DaimlerChrysler's automated telephone payment system. This was the only payment made after the § 521(a)(6) 45-day period to either redeem or reaffirm expired on July 31, 2006.

DaimlerChrysler thereafter moved to confirm termination of the automatic stay[2] so that it could enforce its security interest by repossessing the vehicle pursuant to the default-upon-bankruptcy clause, also called an "ipso facto" clause. See In re Husain, 364 B.R. 211, 217 n. 7 (Bankr. E.D.Va.2007). After a hearing, the bankruptcy court entered an agreed order confirming that the automatic stay was terminated. Thereafter, without providing written notice of default and right to cure, DaimlerChrysler repossessed the vehicle pursuant to the ipso facto clause. The Joneses then commenced this adversary proceeding.

As part of the adversary proceeding, the bankruptcy court enjoined the sale of the vehicle and required its return. The bankruptcy court held that DaimlerChrysler did not have the right under the Bankruptcy Code to repossess the Joneses' vehicle even though Mr. Jones failed to indicate either his intent to redeem the vehicle or reaffirm the debt on his statement of intention. The bankruptcy court relied on the "ride-through" option recognized in Home Owners Funding Corp. of Am. v. Belanger (In Re Belanger), 962 F.2d 345, 347-49 (4th Cir.1992). The ride-through option permitted Chapter 7 debtors who were current on their installment payments to continue making payments and retain collateral after discharge without redeeming the collateral or reaffirming the debt. Id. at 347. The bankruptcy court also held that West Virginia Code § 46A-2-106 required DaimlerChrysler to first give the Joneses notice of the right to cure default before repossessing the vehicle.

On appeal, the district court reversed both rulings and held that DaimlerChrysler had the right to repossess the vehicle. In re Jones, 397 B.R. 775 (S.D.W.Va.2008). Specifically, the court held that the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), Pub.L. No. 109-8, 119 Stat. 23, eliminated the ride-through option recognized in In Re Belanger. In re Jones, 397 B.R. at 787. The district court also held that § 46A-2-106 is inapplicable here. Id. at 794-95. The Joneses now appeal the order of the district court, challenging both of these rulings. For the following reasons, we reject their contentions and affirm.

II.

When reviewing a decision by a district court in its capacity as a bankruptcy appellate court, we examine factual findings of the bankruptcy court for clear error and review legal conclusions de novo. See IRS v. White (In re White), 487 F.3d 199, 204 (4th Cir.2007). Because the facts here are not in dispute, we review the district court's decision de novo.

A.

We initially consider whether the district court erred in holding that BAPCPA eliminated the ride-through option recognized

[591 F.3d 311]

in In Re Belanger, 962 F.2d at 347-49. In re Belanger analyzed the language of former § 521(2)(A), which required a debtor to file a statement of intention which, "if applicable," indicated the debtor's intent to either redeem the collateral or reaffirm the debt secured by the collateral. We interpreted the language "if applicable" to mean that the options of redeeming or reaffirming were not exclusive and, therefore, the property could ride through the bankruptcy unaffected if the debtor chose to retain the property and continue making payments. 962 F.2d at 347.

Although the text of the former § 521(2)(A) remains largely the same under BAPCPA, former § 521(2)(C) has been amended as follows: "nothing in subparagraphs (A) and (B) of this paragraph shall alter the debtor's or the trustee's rights with regard to such property under this title, except as provided in section 362(h)." 11 U.S.C. § 521(a)(2)(C)(emphasis added). Section 362(h), which was added to Title 11 by BAPCPA, provides in relevant part,

> [T]he stay provided by subsection (a) is terminated with respect to personal property of the estate ... and such personal property shall no longer be property of the estate if the debtor fails within the applicable time set by section 521(a)(2)—
>
> (A) to file timely any statement of intention required under section 521(a)(2) with respect to such personal property or to indicate in such statement that the debtor will either surrender such personal property or retain it and, if retaining such personal property, either redeem such personal property pursuant to

> section 722, enter into an agreement of the kind specified in section 524(c) applicable to the debt secured by such personal property, or assume such unexpired lease pursuant to section 365(p) if the trustee does not do so, as applicable; and
>
> (B) to take timely the action specified in such statement....

11 U.S.C. § 362(h)(1) (emphasis added). Sections 521(a)(2)(C) and 362(h) significantly alter the pre-BAPCPA analysis by explicitly requiring a debtor to indicate on the statement of intention an intent to either (1) redeem the property or (2) reaffirm the debt, in order to retain the property. If the debtor fails to so indicate, the stay terminates with respect to the property, and the property will no longer be part of the estate. See, e.g., In re Craker, 337 B.R. 549, 550-51 (Bankr.M.D.N.C.2006).

Section 521(a)(6), added by BAPCPA, also evidences that the ride-through option has been eliminated. That section provides that a debtor may not retain possession of personal property which is subject to a secured claim unless the debtor either reaffirms the debt or redeems the property, according to the debtor's statement of intention required by §§ 521(a)(2) and 362(h), within 45 days of the first meeting of creditors. This section further provides that if the debtor fails to so act within the 45-day period, the stay is terminated, the property is no longer considered part of the estate, and "the creditor may take whatever action as to such property as is permitted by applicable nonbankruptcy law." § 521(a).

Therefore, BAPCPA amended Title 11 to eliminate the ride-through option that we recognized in In re Belanger, at least as applied to these facts.[3] Although our

[591 F.3d 312]

holding is at odds with In re Belanger, that decision has been superseded by BAPCPA. See Santos v. United States, 461 F.3d 886, 891 (7th Cir.2006) (holding that supervening developments, such as a statutory overruling, justify deviation from prior decisions of the same court).

When Mr. Jones failed to timely redeem the vehicle or reaffirm the contract, the automatic stay was terminated and the vehicle was no longer part of the bankruptcy estate. The Joneses were not entitled to retain the vehicle pursuant to the Bankruptcy Code, and DaimlerChrysler was free to take whatever action was permitted under West Virginia law and its contract.

B.

We next turn to the question of whether DaimlerChrysler had authority to repossess the vehicle pursuant to the contract's ipso facto clause without giving the Joneses prior notice of a right to cure the default under state law. The general rule is that an ipso facto clause in an installment loan contract is unenforceable as a matter of law. See Riggs Nat. Bank of Washington, D.C. v. Perry, 729 F.2d 982, 984-85 (4th Cir.1984) (explaining that these clauses deprive a debtor of the advantages of bankruptcy proceedings by causing him to default immediately upon his filing a bankruptcy petition). However, BAPCPA created an exception to this general prohibition by adding § 521(d), which permits creditors to enforce ipso facto clauses in consumer loan agreements secured by personal property if the debtor fails to comply with the provisions of §§ 521(a)(6) or 362(h). See In re Donald, 343 B.R. 524, 538-39 (Bankr.E.D.N.C. 2006). Specifically, § 521(d) provides that upon the debtor's failure to comply with these provisions,

> nothing in this title shall prevent or limit the operation of a provision in the underlying lease or agreement that has the effect of placing the debtor in default under such lease or agreement by reason of the occurrence, pendency, or existence of a proceeding under this title or the insolvency of the debtor. Nothing in this

> subsection shall be deemed to justify limiting such a provision in any other circumstance.

Therefore, the filing of the bankruptcy petition constituted default, and Mr. Jones's failure to redeem the vehicle or reaffirm the debt permitted DaimlerChrysler to take action under its contract and § 521(d) as permitted by West Virginia law. § 521(a)(6).

The Joneses argue that DaimlerChrysler waived any default under the ipso facto clause based on the single payment made through DaimlerChrysler's automated telephone payment system after the § 521(a)(6) 45-day period expired. However, at the time that this payment was made, the bankruptcy court had not yet issued its order confirming the termination of the automatic stay. We find that the acceptance of a single automated payment made prior to the bankruptcy court's order did not clearly waive default and did not estop DaimlerChrysler from repossessing the vehicle. Potesta v. U.S. Fidelity & Guar. Co., 202 W.Va. 308, 504 S.E.2d 135, 142 (1998) ("[W]here the alleged waiver is implied, there must be clear and convincing evidence of the party's intent to relinquish the known right.").

C.

Finally, the Joneses challenge DaimlerChrysler's right to repossess the vehicle

[591 F.3d 313]

under state law based on DaimlerChrysler's failure to give notice pursuant to West Virginia Code § 46A-102-106. That section is entitled "Notice of Consumer's Right to Cure Default; Cure; Acceleration." (Emphasis added). As the title of that section indicates, the section directs when a creditor must give a debtor notice of the right to cure default. The section's operative language states:

> [A] creditor may not ... commence any action or demand or take possession of collateral on account of default until ten days after notice has been given to the consumer of his or her right to cure such default.

§ 46A-102-106. That section also specifies that the notice must clearly state the debtor's "right to cure such default" and requires certification by the creditor that this notice of right to cure was provided in a specified manner. § 46A-2-106.

The requirement under § 46A-2-106 to inform a debtor of his right to cure default is necessarily based on the premise that the default can be cured.[4] Here, however, both parties agree that the event that triggered default, the filing of a bankruptcy petition, cannot be cured. Therefore, we affirm the district court's holding that DaimlerChrysler was not required to give the Joneses notice of default and right to cure before repossessing the vehicle.

III.

Accordingly, the judgment of the district court is affirmed.

AFFIRMED.

Notes:

1. These sections require a debtor intending to retain the collateral to file a statement of intention which states the intent to either reaffirm the debt in a reaffirmation agreement or redeem the property. Then, a creditor and a debtor enter into a reaffirmation agreement prior to discharge, and the consideration for the agreement is the debt which is dischargeable under the Bankruptcy Code; the agreement must be filed with the court. 11 U.S.C. § 524(c). Alternatively, a debtor may redeem property from a secured lien by paying the lienholder the full amount of the lien. 11 U.S.C. § 722. An individual debtor has 45 days after the first meeting of creditors to either reaffirm or redeem. § 521(a)(6).

2. When a bankruptcy petition is filed, it operates as an automatic stay of "any act to obtain possession of property of the estate." 11 U.S.C. § 362(a)(3).

3. Because Mr. Jones did not take any action to reaffirm or redeem, we have no occasion to address the "back door ride-through" option that some courts have recognized where the debtor has substantially complied with §§ 521(a)(2) and 362(h) but has been frustrated in his effort to fully comply. See, e.g., In re Chim, 381 B.R. 191, 198 (Bankr.D.Md.2008); In re Husain, 364 B.R. 211, 218-19 (Bankr. E.D.Va.2007).

4. We are not required to apply statutory language when such an application "`results in an outcome that can truly be characterized as absurd'". See Hillman v. IRS, 250 F.3d 228, 233 (4th Cir.2001) (quoting Sigmon Coal Co. v. Apfel, 226 F.3d 291, 304 (4th Cir.2000)). To require notice of right to cure when there is no ability to cure would be an absurd result.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

FRED W. ALLNUT Appellant	*	
	*	Case No. RDB-10-01739
v.		
	*	Bankruptcy No.: 08-26485NVA
MICHAEL G. RINN, Appellee	*	

* * * * * * * * * * * * *

MEMORANDUM ORDER

Now pending before this Court is Fred W. Allnut's Appeal of the dismissal of his bankruptcy petition for failure to comply with the filing requirements of 11 U.S.C. §521(e)(2)(A). This dismissal was clearly a ministerial act of the United States Bankruptcy Court for the District of Maryland, and did not arise in the context of an adversary proceeding, nor any contested matter. Initially, this Court would note that the named Appellee, Michael G. Rinn, the Chapter 7 Trustee, is not a proper party to this appeal.

The record of this case indicates that the Clerk of the Bankruptcy Court provided notice to Allnut that his bankruptcy case could be dismissed for non-compliance with the filing requirements of 11 U.S.C. §521(e)(2)(A), which requires that the debtor provide to the Trustee a copy of his federal tax return for the most recent year, and no later than seven days before the meeting of creditors. As a result of Allnut's failure to file this document as required, Bankruptcy Judge Nancy V. Alquist dismissed this case pursuant to Section 521(e)(2)(B). Allnut then filed multiple subsequent motions, all of which were denied and he has now appealed Judge Alquist's Dismissal Order to this Court. Furthermore, Allnut has now filed a new bankruptcy case,

captioned *In Re: Fred Waters Allnut, No. 1024504NVA* which remains pending in the Bankruptcy Court.

The dismissal of the first bankruptcy action was mandated by 11 U.S.C. §521(e)(2). Furthermore, there is now a pending case remaining in the Bankruptcy Court.

Accordingly, for the above reasons, IT IS HEREBY ORDERED This 5th day of October, 2011, that this appeal is DISMISSED as MOOT.

/s/
Richard D. Bennett
United States District Judge

456 B.R. 241
In re Daniel Peter BLIEK, Debtor.
No. 10–07801–jw.
United States Bankruptcy Court, D. South Carolina.
March 8, 2011.

[456 B.R. 242]

Daniel Peter Bliek, pro se.**ORDER DENYING DEBTORS' MOTION TO DISMISSJOHN E. WAITES, Bankruptcy Judge.**

This matter is before the Court on the Debtor's Motion to Dismiss Chapter 7 Case (the "Motion to Dismiss"). Based on the evidence in the record and the arguments presented at the hearing on March 3, 2011, the Court denies the Motion to Dismiss. In support of the Court's determination, the Court makes the following Findings of Fact and Conclusions of Law: [1]

FINDINGS OF FACT

1. On October 29, 2010 ("Petition Date"), the Debtor filed his voluntary petition for relief under Chapter 7 of the United States Bankruptcy Code ("Bankruptcy Code").

2. Among other assets, the Debtor owns an interest in certain real property ("Real Property") located at 2112–2114 Devine Street, Columbia, South Carolina and 618–620 Harden Street, Columbia, South Carolina. Prior to the Petition Date, TD Bank, N.A., successor in interest to Carolina First Bank ("Carolina First Bank"), initiated an action in state court to foreclose on certain mortgages on the Real Property and, on October 21, 2010, the state court entered its Order and Judgment of Foreclosure and Sale as to the Real Property. The foreclosure sale had been set for Monday, November 1, 2010, three days after the Petition Date. As of the Petition Date, the amount of Carolina First's claim which is secured by the Real Property was $747,143.37.

3. On November 16, 2010, the Chapter 7 Trustee filed an application for an examination under Bankruptcy Rule 2004, which the Court granted and ordered the Debtor to appear on November 29, 2010. On November 23, 2010, the Court held a status conference and the Debtor indicated he

[456 B.R. 243]

understood he would be required to provide information and attend an examination under Bankruptcy Rule 2004. Although the Debtor was pro se when he filed the petition and appeared at the status conference, he had engaged counsel by December 16, 2010.

4. Despite being served with the Order Granting Motion for 2004 Examination, the Debtor failed to attend the examination. Further, on December 3, 2010, the Debtor failed to appear at his originally scheduled meeting of creditors. On December 10, 2010, the Chapter 7 Trustee moved to compel the Debtor's attendance at the examination and for contempt. On December 17, 2010, the Court granted the Trustee's motion to compel attendance and ordered the Debtor to appear at a Rule 2004 examination on December 22, 2010.

5. On December 22, 2010, the Debtor appeared and was examined under Bankruptcy Rule 2004. The Debtor was represented by counsel at the examination. In his examination, the Debtor testified that he was preparing the schedules and statements, with the assistance of counsel.

6. On December 1, 2010, the Chapter 7 Trustee filed separate applications to sell the Real Property. The proposed sales reflected an agreement by Carolina First to a 10% "carve-out" of the gross sale proceeds in order to fund certain administrative costs and a distribution to unsecured creditors. The Debtor filed objections to the noticed sales. At the hearing on the applications to sell on January 6, 2011, however, the Debtor, who was represented by counsel at the hearing, consented to the sales. The Court thereafter conducted an auction of the Real

Property at the hearing. On January 14, 2011, the Court entered its Order for Sale of Assets in which it approved the sale of the Harden Street property and the Estate's membership interest in 618 Harden, L.L.C. to Martin J. Dreesen for $310,000. On January 18, 2011, the Court entered its Order for Sale of Assets in which it approved the sale of the Devine Street real property to Night Industries 2000, Inc. ("Night Industries") for $540,000 and the personalty located on the property for $16,000 and approved a back-up sale of the Devine Street real property and personalty to H.M. Lees, LLC.[2]

7. On January 20, 2011, the Debtor filed the Motion to Dismiss in which he seeks dismissal of his case, effective December 14, 2010, on the basis that he failed to file all of the information required under 11 U.S.C. § 521(a)(1).[3]

8. The filing of the Motion to Dismiss has had the effect of delaying the closings and jeopardizing the Real Property sales. Importantly, as stated at the January 6, 2011 hearing on the sale of the Real Property and again at the March 3rd hearing, the Devine Street property was vacant for a period of time prior to the Petition Date and the parties have represented to the Court that if the instant case is dismissed and the property is not sold as previously ordered, there is a substantial risk that the property's nonconforming uses could expire for zoning purposes due to the vacancy, which would substantially decrease the value of the property.

9. The Chapter 7 Trustee, Night Industries,[4] and Carolina First filed objections

[456 B.R. 244]

to the Motion to Dismiss. In addition, counsel for Mr. Dreesen appeared at the hearing on the Motion and supported the objections filed these parties.

CONCLUSIONS OF LAW

The Debtor brings this Motion pursuant to Section 521(i)(1) for the reason that he has failed to file all of the information required under that Section within 45 days of the Petition Date. Section 521 is among the provisions amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), Pub.L. No. 109–8, 119 Stat. 23 (2005). Pursuant to Section 521(a), a debtor is required to file a list of creditors and, "unless the court orders otherwise," a schedule of assets and liabilities and certain other financial information. Section 521(i) provides, subject to certain exceptions not applicable here,[5] if the debtor fails to file the required information within 45 days after the petition date, "the case shall be automatically dismissed effective on the 46th day after the date of the filing of the petition." 11 U.S.C. § 521(i)(1).

The issue before the Court is whether, given the "automatic" language used in Section 521(i), the Court has the discretion to deny dismissal after the expiration of the 45–day period. Although courts are split on this issue, this Court agrees with the two circuit courts to reach the issue, which have held that the bankruptcy court has discretion to deny dismissal under Section 521(i)(1), particularly when necessary to avoid abuse by the debtor. See Wirum v. Warren (In re Warren), 568 F.3d 1113 (9th Cir.2009); Segarra–Miranda v. Acosta–Rivera (In re Acosta–Rivera), 557 F.3d 8, (1st Cir.2009).

In Warren, the debtor filed a petition under Chapter 7 after a state court issued an order requiring the debtor's bank to turn over $93,330.46 in the debtor's bank account for overdue child support and then, five months after the petition, the debtor sought dismissal under Section 521(i)(1) while the chapter 7 trustee was in the process of investigating his estate. The Ninth Circuit reasoned that, since Section 521(a)(1) granted the power to "order otherwise" and does not include a deadline within which the court must enter such an order, while the 45–day deadline is Section 521(i)(1) was directed to debtors, not the court, and did not address the court's ability to order otherwise, Section 521 was ambiguous. Warren, 568 F.3d at 1117. The court then declined to import into

the "order otherwise" provision a limitation that such order must be entered before the 45–day filing deadline, which was consistent with BAPCPA's core purpose to prevent abusive filings. Id. at 1118. To rule otherwise would allow "abusive and manipulative debtors to gain automatic dismissal and thereby encourage bankruptcy abuse." Id. at 1119.

Likewise, in Acosta–Rivera, where the debtor sought dismissal only after the trustee sought to settle a previously-unscheduled lawsuit, the First Circuit held bankruptcy courts have discretion to deny a motion to dismiss under Section 521(i)(1). The First Circuit reasoned that, in light of the fact that the amendments to

[456 B.R. 245]

Section 521 were a part of anti-abuse legislation, the court declined to read the "automatic dismissal" language of Section 521(i)(1) to add a new restriction into the bankruptcy court's discretion to forgive compliance with disclosure requirements which would encourage rather than discourage bankruptcy abuse. Acosta–Rivera, 557 F.3d at 13–14; see also Simon v. Amir (In re Amir), 436 B.R. 1, 25 (6th Cir. BAP 2010) (holding debtor waived right to move for dismissal under Section 521(i) where he moved only after he discovered his undisclosed assets were going to be liquidated by the trustee); In re Parker, 351 B.R. 790 (Bankr.N.D.Ga.2006) (interpreting Section 521 and "automatic dismissal" language and denying debtor's motion to dismiss based on court's authority to "order otherwise").

This Court agrees with the reasoning of the First and Ninth Circuits that, given the anti-abuse purpose of BAPCPA, the Court has discretion to deny a debtor's motion Section 521(i)(1) where necessary to avoid abuse by the debtor. Adopting the Debtor's position that dismissal is automatic would have the unintended result of allowing debtors to use Section 521(i)(1) as an escape hatch to purposefully avoid the requirements of the Bankruptcy Code at the expense of creditors. Here, the Debtor's largest secured creditor, Carolina First, and the Debtor's other creditors are prejudiced if the previously approved sales are not allowed to close. Therefore, the Court denies the Debtor's Motion to Dismiss.

As an additional and alternative ground for the Court's holding, the Court finds the Debtor has waived and is judicially estopped from seeking to dismiss this case under Section 521. Debtor's counsel has acknowledged that she and counsel for the other parties discussed Section 521 during a recess of the hearing on the Real Property sales and prior to the Debtor consenting to the sales. As such, the Debtor was aware of the Section 521 requirements and, in consenting to the sales going forward, apparently decided not to raise them. Having done so, the Court and the other parties are entitled to rely on the Debtor's position at the sale hearing and the Debtor cannot subsequently change his position in order to gain an advantage over his creditors. See 1000 Friends of Maryland v. Browner, 265 F.3d 216, 226 (4th Cir.2001) (setting forth requirements of judicial estoppel). Accordingly,

IT IS HEREBY ORDERED THAT the Debtor's Motion to Dismiss is DENIED.

AND IT IS SO ORDERED.

Notes:

[1.] To the extent any of the following Findings of Fact constitute Conclusions of Law, they are adopted as such, and to the extent any Conclusions of Law constitute findings of Fact, they are adopted as such.

[2.] The parties thereafter decided not to proceed with the purchase/sale of the personalty as a question has been raised as whether the Debtor's estranged wife or a non-debtor entity owns an interest in such personal property.

[3.] All references to the Bankruptcy Code, 11 U.S.C. § 101 et seq., are hereinafter by section number only.

[4.] Night Industries withdrew its Objection when the sale did not close, but a representative

of Night Industries was present at the hearing and, according to counsel for Carolina First, remains interested in completing the proposed sale.

[5.] One of the exceptions is set forth in Section 521(i)(4), which provides the court may decline to dismiss the case under certain circumstances upon the motion of the trustee before the expiration of the applicable time period. The Chapter 7 Trustee in the instant case filed a motion to waive the Section 521 requirements, but subsequently acknowledged the motion was not timely under Section 521(i)(4) and withdrew the motion.

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA

IN RE:	
	C/A No. 11-01164-DD
Leroy C. Tincher,	Chapter 7
Debtor.	**ORDER**

This matter is before the Court on two Reaffirmation Agreements between Leroy C. Tincher ("Debtor") and two of his creditors. A Reaffirmation Agreement between Debtor and Wells Fargo Financial South Carolina, Inc. ("Wells Fargo") was filed on May 23, 2011, and a Reaffirmation Agreement between Debtor and PNC Mortgage ("PNC") was filed June 6, 2011. Hearings were held on both Reaffirmation Agreements on June 27, 2011. Following the hearings, the Court took the matters under advisement for further consideration. The Court now makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

Debtor filed for chapter 7 relief on February 24, 2011. Debtor's Schedule I reflects monthly net income of $1,522.00 per month from retirement income and Social Security. Debtor has monthly Schedule J expenses of $1,593.00, leaving Debtor with a deficiency of $71.00 per month. Debtor's Schedule D shows two secured debts: a mortgage on a mobile home and land and a lien on a 2006 Pontiac G6. Debtor's Schedule F estimates unsecured debt of $42,323.92, which appears to be comprised nearly exclusively of credit card debt.

Debtor's Reaffirmation Agreement with Wells Fargo was filed on May 23, 2011. Wells Fargo's debt is secured by a lien on Debtor's automobile, a 2006 Pontiac G6. The agreement requires Debtor to repay a total of $9,200 in 31 monthly installments of $330.00. The annual percentage rate of interest under the terms of the Reaffirmation Agreement is 8 percent, while the

contractual interest rate was 13.24 percent. The Reaffirmation Agreement indicates the terms of the agreement have reduced Debtor's monthly payment by $55.00 per month, decreasing Debtor's monthly shortfall to $16.00. Debtor indicated at the hearing that he is current on payments to Wells Fargo.

Debtor's Reaffirmation Agreement with PNC was filed June 6, 2011. The agreement relates to Debtor's primary residence, which is a mobile home and the land on which it sits in Gaston, South Carolina. Under the agreement, Debtor is required to pay PNC a total of $62,241.14. Debtor's Schedule A lists the value of his residence at $51,790.00. Debtor's monthly payments are $567.72, which Debtor must make for 258 months. The fixed interest rate under the agreement is the same as the contractual interest rate of 8.5 percent. Debtor stated at the hearing on the Reaffirmation Agreement that he had applied for the Home Affordable Modification Program ("HAMP") and was advised that his modification could not be processed until he received his chapter 7 discharge. PNC, according to Debtor, required him to sign the Reaffirmation Agreement in order to proceed with HAMP after the conclusion of his bankruptcy. Debtor testified that he is current on his mortgage payments.

CONCLUSIONS OF LAW

I. Reaffirmation Agreement with Wells Fargo

11 U.S.C. § 524(c) allows a debtor to reaffirm a debt in a chapter 7 case and sets forth numerous requirements for doing so. If a debtor chooses to reaffirm a debt, and the reaffirmation agreement meets all requirements set forth in section 524(c), the debtor will remain personally liable for a debt on which his personal liability would otherwise have been discharged in his chapter 7 case. *See In re Watson*, No. 10-04254-dd, 2010 WL 5169078, at *1 (Bankr. D.S.C. Aug. 10, 2010). The Court will set a hearing on a reaffirmation agreement when a presumption

of undue hardship exists. Testimony of a debtor and changes to a loan agreement can often rebut the presumption.

Debtor has chosen to reaffirm a debt on his vehicle, a 2006 Pontiac G6. Under the Reaffirmation Agreement, Wells Fargo has agreed to reduce Debtor's interest rate from the contractual rate of 13.24 percent to 8 percent and has reduced Debtor's monthly payments from $385.84 to $330.00 per month. This reduction in monthly payments reduces Debtor's monthly deficit to only $17.00 per month. Debtor testified that he could make up this difference by reducing Schedule J expenses like food and transportation. Based on the facts that the Reaffirmation Agreement provides Debtor with more favorable terms for repaying his debt with Wells Fargo, that Debtor's monthly deficit is reduced by the Reaffirmation Agreement and is insignificant enough that Debtor can reduce monthly expenses to meet his monthly obligations, and that Debtor is current on his payments to Wells Fargo, the Court finds that the Reaffirmation Agreement complies with the requirements of section 524(c) and is in Debtor's best interest. As a result, the Reaffirmation Agreement with Wells Fargo is approved.

II. Reaffirmation Agreement with PNC

Ordinarily, the Court scrutinizes reaffirmation agreements concerning real property closely. The agreement must be in the debtor's best interest and should not impose an undue hardship on the debtor. After considering Debtor's Reaffirmation Agreement with PNC, the Court declines to approve the agreement.

Debtor testified at the hearing that he is current on his mortgage, but wished to take advantage of HAMP in order to reduce his monthly payments. This Court has previously ruled that chapter 7 debtors current on real property debts have a "ride-through" option in addition to their options of surrender, reaffirmation, and redemption. *In re Watson*, No. 10-04254-dd, 2010

WL 5169078, at *1, *2 (Bankr. D.S.C. Aug. 10, 2010); *In re Waller*, 394 B.R. 111, 113 (Bankr. D.S.C. 2008); *In re Wilson*, 372 B.R. 816, 820 (Bankr. D.S.C. 2007). This option allows a debtor to continue regular payments and retain possession of the property. *Watson*, 2010 WL 5169078, at *1. This Court denied approval of reaffirmation agreements in *Watson* and *Waller*, finding that because the debtors could retain their real property without entering into the reaffirmation agreements, the agreements were not in the debtors' best interest. *Watson*, 2010 WL 5169078, at *2; *Waller*, 394 B.R. at 114. Here, Debtor is current on his mortgage payments to PNC and as a result, the reaffirmation agreement would not ordinarily be in Debtor's best interest. Because the ride-through option is available to Debtor, approval of the Reaffirmation Agreement with PNC should be denied.

The Court recognizes that the ride-through option may be undesirable to Debtor, as he wishes to use HAMP to reduce his monthly mortgage obligation. Denial of the reaffirmation agreement will not prevent him from doing so. Debtor stated at the hearing on the Reaffirmation Agreement that PNC informed him he was required to sign a reaffirmation agreement in order to take advantage of HAMP after his bankruptcy. Another bankruptcy court considered a similar circumstance in which a creditor required a debtor to enter into a reaffirmation agreement in order to be considered for a loan modification. In that case, the court stated:

> The debtor . . . stated that [the creditor] would not entertain a loan modification until he had reaffirmed the debt. If accurate, the requirement is improper. There is no assurance – or even indication – that a loan modification consistent with the debtor's financial circumstances will be forthcoming. The court will not approve reaffirmation agreements when the approval of the reaffirmation agreement is a condition precedent to a mortgage company entertaining a loan modification. The court may approve reaffirmation agreements for mortgages when there is a loan modification, but only as a part of the loan modification process. After the parties have come to an agreement on the loan modification, the modified loan may be approved by the court through a reaffirmation agreement. When the terms as modified and are within the debtor's budget, the concessions given by the lender are

> valuable consideration and may justify reaffirming a debt that may not otherwise be required to be reaffirmed.

In re Pope, No. 10-19688-RGM, 2011 WL 671972, at *1 (Bankr. E.D. Va. Feb. 17, 2011). This Court agrees with the Virginia court. PNC cannot require Debtor to agree to reaffirm its debt in order to consider Debtor for a loan modification after his bankruptcy. Debtor testified that PNC threw away the paperwork he completed and submitted to apply for HAMP because it claimed it could not consider his application until after he received his discharge. This means that there has not yet been a determination whether Debtor is eligible for HAMP or whether Debtor's loan modification will be approved. Even if Debtor is later determined to be ineligible for HAMP, or if PNC decides not to otherwise proceed with a loan modification, Debtor will still remain personally liable for PNC's debt if Debtor's Reaffirmation Agreement is approved. Without assurance that Debtor will be allowed to take advantage of a modification through HAMP, the Reaffirmation Agreement is not part of Debtor's loan modification process and must be denied.

Further support for the Court's conclusion lies in a document issued by the Treasury Department in connection with HAMP, which states:

> Borrowers who have received a Chapter 7 bankruptcy discharge in a case involving the first lien mortgage who did not reaffirm the mortgage debt under applicable law are eligible for HAMP. The following language must be inserted in Section 1 of the Home Affordable Modification Agreement: "I was discharged in a Chapter 7 bankruptcy proceeding subsequent to the execution of the Loan Documents. Based on this representation, Lender agrees that I will not have personal liability on the debt pursuant to this Agreement."

Supplemental Directive 10-02, Home Affordable Modification Program-Borrower Outreach and Communication, at 8, *available at* https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/sd1002.pdf (March 24, 2010). This directive makes clear that debtors who file bankruptcy were intended to be eligible for HAMP post-bankruptcy, without being required to reaffirm their mortgage debt. Debtor does

not have to sign a reaffirmation agreement with PNC to be eligible for a HAMP modification after his bankruptcy, and PNC cannot force him to do so. Debtor can attempt to take advantage of HAMP post-bankruptcy, without signing a reaffirmation agreement during his chapter 7 case. Based on the various other options available to Debtor, as well as the fact that his expenses exceed his income, the reaffirmation agreement is not in Debtor's best interest and cannot be approved.

CONCLUSION

For the reasons set forth above, Debtor's Reaffirmation Agreement with Wells Fargo is approved. Debtor's Reaffirmation Agreement with PNC is not in Debtor's best interest and therefore, approval of that Reaffirmation Agreement is denied. Debtor may pursue modification through HAMP following his chapter 7 discharge.

AND IT IS SO ORDERED.

FILED BY THE COURT
07/05/2011

Entered: 07/06/2011

David R. Duncan
US Bankruptcy Judge
District of South Carolina

In re, Rhett H. Tison, Debtor.
Rhett H. Tison, Plaintiff,
v.
Household Finance Corporation, II, HSBC, Defendants.
C/A No. 10-06825-DD
Adv. Pro. No. 11-80019-DD
UNITED STATES BANKRUPTCY COURT DISTRICT OF SOUTH CAROLINA
Date: February 20, 2011
Date: February 23, 2011

Chapter 7
ORDER GRANTING MOTION FORSUMMARY JUDGMENT

This matter is before the Court on a Motion for Summary Judgment ("Motion") filed by Household Finance Corporation, II, HSBC ("Defendants") on November 28, 2011 and a Motion for Summary Judgment ("Motion") filed by Rhett H. Tison ("Plaintiff") on November 28, 2011. This adversary was filed on March 1, 2011, seeking sanctions against Defendants for violation of the discharge injunction as well as an injunction against further collection efforts by Defendants of amounts allegedly not contained in the parties' Reaffirmation Agreement. Both parties filed timely Objections to the opposing party's Motion. A hearing was held on December 20, 2011. At the conclusion of the hearing, the Court took the matter under advisement, subject to further submissions from the parties. Plaintiff submitted an affidavit executed by him, along with numerous exhibits on January 17, 2012, and submitted an amendment to one of the exhibits on February 6, 2012. Defendants filed a response on February 9, 2012. The Court now issues this Order.

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FINDINGS OF FACT

Plaintiff filed his chapter 7 case on September 22, 2010. On October 19, 2010, former counsel for Defendants filed with the Court a Reaffirmation Agreement entered into by the parties. Under the terms of the Reaffirmation Agreement, Plaintiff proposed to reaffirm a debt with Defendants secured by his residence in Pawleys Island, South Carolina. The Reaffirmation Agreement indicates that the total amount reaffirmed is $617,892.92, to be paid in 328 monthly payments of $2,268.64. The interest rate under the Reaffirmation Agreement is 5.25 percent. The principal balance owed on the loan at the time of the Reaffirmation Agreement was $394,685.17. Various other fees and charges, including late fees, costs, and interest, had also accumulated. The Reaffirmation Agreement indicates that the current market value of the property is $450,000.

A calculation of the amortization of the debt repayment set forth in the Reaffirmation Agreement reveals that the agreement is mathematically impossible to perform. Repayment of $617,892.92 over 328 months at 5.25 percent interest requires payments of $3,551.63. Thus, 328 payments of $2,268.64, as provided for in the Reaffirmation Agreement, will not result in payment of the entire debt but requires a large balloon payment.

The Reaffirmation Agreement and Plaintiff's chapter 7 Schedules indicated that Plaintiff's living expenses exceeded his income by $2,505.00. Debtor filed his case pro se and was not represented by an attorney in negotiating the Reaffirmation Agreement; therefore, the Court conducted a hearing on the Reaffirmation Agreement on November 16, 2010. At the hearing, Plaintiff indicated that a family member was now making the monthly payments for one of his automobiles and that he was receiving additional family financial assistance in order to enable him to meet his expenses. He also stated that the Reaffirmation Agreement was in his

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best interest because it allowed him to reduce his monthly mortgage payment by almost $600 per month. He explained to the Court that keeping the home was very important to him and his family, as he is a single parent with five young children, and the home is across the street from his parents' home. Plaintiff presented an amended Schedule J at the hearing to show the Court his efforts to reduce his expenses. The amended Schedule J showed Plaintiff had negative monthly disposable income of only $218 and had therefore reduced his monthly expenditures by over $2,000. Plaintiff also presented an amended Reaffirmation Agreement, which differed from the original Agreement only in that it reflected the figures set forth in the amended Schedule J. The financial help Plaintiff was receiving from his relatives rebutted the presumption of undue hardship. As a result, the Court found that the Reaffirmation Agreement was in Plaintiff's best interest and entered an Order approving the October 19 Reaffirmation Agreement on November 16, 2010. Plaintiff received his discharge and his case was closed.

Plaintiff commenced this adversary proceeding on March 1, 2011, alleging that subsequent to the Court's approval of the Reaffirmation Agreement, Defendants attempted to collect additional amounts over and above the payment provided for in the Reaffirmation Agreement. In Household Finance Corporation, II's ("HFC") counterclaims,[1] HFC argues breach of contract due to Plaintiff's failure to make any payments under the Reaffirmation Agreement, rescission of the Agreement due to substantial breach by Plaintiff, and rescission of the Reaffirmation Agreement based on either a unilateral or mutual mistake. Defendants' Motion argues that there was no meeting of the minds with respect to the Reaffirmation Agreement and therefore it should be rescinded.

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A dispute arose during the parties' discovery period, and Motions for Protective Orders were filed by both parties. A hearing was held on those motions on December 6, 2011. At the conclusion of that hearing, the Court entered two orders granting in part both Motions. The Order granting Defendants' Motion for Protective Order required Defendants to produce, within thirty days from the date of entry of the order, "the case names and numbers for any litigation concerning a reaffirmation agreement entered into between a debtor and Defendant in a Fourth Circuit bankruptcy proceeding during calendar years 2009 through 2011, in which the debtor claimed that Defendant was attempting to collect more than the total debt provided for in the reaffirmation agreement." Order Granting Motion for Protective Order, docket #40.

At the conclusion of the December 20 hearing on the parties' Motions for Summary Judgment, the Court took the matters under advisement pending the conclusion of the discovery period provided for in the Orders Granting Motion for Protective Order entered December 7. The Court instructed the parties to complete their discovery and, if information was produced which Plaintiff felt necessitated a further hearing, Plaintiff should contact the Court by January 17, 2012. The Court told the parties that if it did not hear from Plaintiff by January 17, 2012, the Court would rule on the Motions for Summary Judgment.

On January 17, 2012, Plaintiff submitted numerous additional documents to the Court. These documents consisted of an affidavit executed by Plaintiff and copies of multiple reaffirmation agreements from other jurisdictions, all involving Defendants. Plaintiff's affidavit states that Defendants told Plaintiff in response to the Order Granting Motion for Protective Order that they were unable to find any instances of litigation relating to a reaffirmation agreement entered into by Defendants in the Fourth Circuit. However, Plaintiff's affidavit indicates that he searched PACER to find fifteen reaffirmation agreements which he alleges

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confirm that Defendants had a pattern of "presenting lesser payments for reaffirmation approval then expecting to collect additional

money . . . ." Plaintiff's Supplemental Affidavit, docket #48. None of these reaffirmation agreements appear to be the subject of a dispute between a debtor and Defendants.

Plaintiff did attach one affidavit from a debtor in Maryland, Mr. Jerry Collier, who had entered into a reaffirmation agreement with Defendants in September 2011. The affidavit was signed by Mr. Collier in Maryland on January 11, 2012, and was signed by a South Carolina notary on January 13, 2012. This affidavit was amended on February 6, 2012. The only change in the amended affidavit is that the South Carolina notary stamp and signature dated January 13, 2012 is replaced by a Maryland notary stamp and signature dated January 11, 2012. Apparently, Mr. Collier did not sign the affidavit in the presence of either of the notaries, and as a result, the affidavit is not proper.

Following the submission of the additional documents by Plaintiff, Defendants filed a memorandum in response on February 9, 2012. Defendants' memorandum attacks the affidavit of Mr. Collier as defective, argues that Plaintiff's filing is not permitted under the Court's previous orders in this adversary proceeding, and contends that the additional filings, if not stricken by the Court, are not relevant and do not create any material issues of fact necessitating additional inquiry by the Court.

Plaintiff argues that the documents he submitted to the Court on January 17, 2012 show a pattern of wrongdoing by Defendants and that based on this wrongdoing, it would not be improper to enforce the Reaffirmation Agreement against the Defendants. However, the Court finds that for a number of reasons, the additional documents submitted by Plaintiff should not be considered and do not have an effect on the result here. First, the Court notes that Plaintiff was

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not authorized by the Court to submit any additional evidence in this matter. The Court instructed Plaintiff at the summary judgment hearing on December 20 that once he received production from Defendants, if any, of the additional documents required by the Court's December 7 Order Granting Motion for Protective Order, Plaintiff was to contact the Court if he felt those documents necessitated a further hearing. No such documents were produced by Defendants. Plaintiff, on his own initiative, sought additional reaffirmation agreements involving Defendants and submitted them to the Court well after the conclusion of the parties' discovery period. The December 7 Order requiring Defendants to produce additional documents to Plaintiff was narrow and limited, and ordered production of only those reaffirmation agreements which were the subject of litigation in the Fourth Circuit. See Order Granting Motion for Protective Order, docket #40. The Court has reviewed the reaffirmation agreements presented by Plaintiff and notes that the payment calculations, like the calculation in the reaffirmation agreement at issue here, are impossible to perform. None of the reaffirmation agreements submitted by Plaintiff were the subject of a dispute, with the possible exception of Mr. Collier's, discussed above.[2] Further, the agreements came from jurisdictions across the country, including Texas, Kentucky, and Ohio. These agreements were not timely supplied and are simply not relevant to the matter presently before the Court. As a result, they will not be considered.

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CONCLUSIONS OF LAW

I. Summary Judgment Standard

Pursuant to Rule 7056 of the Federal Rules of Bankruptcy Procedure, Rule 56 of the Federal Rules of Civil Procedure governs summary judgment in adversary proceedings. In re Rigoroso, 453 B.R. 612, 614 (Bankr. D.S.C. 2011). Fed. R. Civ. P. 56 states, "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary

judgment; the requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) (emphasis original). Only factual disputes which could potentially affect the end result of the suit should cause a motion for summary judgment to be denied; "irrelevant or unnecessary" factual disputes will not preclude the entry of summary judgment. Id. at 248. A dispute relating to a material fact is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id.

A court determining whether summary judgment should be granted should look to multiple sources, including the pleadings, discovery responses, depositions, and affidavits, if any. Rigoroso, 453 B.R. at 614 (quoting In re Proveaux, No. 07-05384-JW, slip op., at 5 (Bankr. D.S.C. Mar. 31, 2008)). The court should view the facts and any reasonable inferences "'in the light most favorable to the nonmoving party.'" Rigoroso, 453 B.R. at 614 (quoting United Rentals, Inc. v. Angell, 592 F.3d 525, 530 (4th Cir. 2010)). Once the movant has presented sufficient evidence to support its summary judgment motion, the burden shifts to the nonmoving party to show that there are genuine issues of material fact. Emmett v. Johnson, 532 F.3d 291, 297 (4th Cir. 2008). The nonmovant cannot "rest upon mere allegations or denials of his

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pleading, but 'must come forward with specific facts showing that there is a genuine issue for trial.'" Id. at 297 (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-88 (1986)).

II. Reaffirmation Agreement

11 U.S.C. § 524(c) provides that a chapter 7 debtor may reaffirm a debt and sets forth several requirements the debtor must meet to do so. 11 U.S.C. § 524(c); In re Tincher, No. 11-01164-dd, 2011 WL 2650569, at *1 (Bankr. D.S.C. July 5, 2011). Upon reaffirming a debt, the debtor will remain personally liable for the debt, when such debt would otherwise have been discharged in his chapter 7 case. Tincher, 2011 WL 2650569, at *1. Reaffirmation agreements concerning real property are closely scrutinized and will only be approved if they are in the debtor's best interest and will not impose an undue hardship on the debtor. Id. at *2.

The Court found after a hearing that the Reaffirmation Agreement entered into by the parties was in Plaintiff's best interest for a number of reasons. At the time, the Court was not aware of the mathematical impossibility of the agreement. The principal balance on the loan at the time the parties entered into the Reaffirmation Agreement was $394,685.38. An amortization using this principal amount and the terms provided for in the Reaffirmation Agreement yields a total amount of $744,113.92, paid in monthly installments of $2,268.64 over the life of the Reaffirmation Agreement. Payment of $617,892.92 requires monthly payments of $3,551.63 for the life of the Reaffirmation Agreement. Whatever the parties' intention, the Reaffirmation Agreement is mathematically impossible to perform and should not be enforced. The agreement is rescinded. There are no material issues of fact as to HFC's counterclaim, and HFC is entitled to judgment as a matter of law. Because there is no Reaffirmation Agreement to enforce, all other relief is denied and the adversary proceeding is dismissed.

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CONCLUSION

For the reasons set forth above, Defendants' Motion for Summary Judgment is granted. Plaintiff's Motion for Summary Judgment is denied. The parties' Reaffirmation Agreement, filed on October 19, 2010 and approved by the Court on November 16, 2010, is not enforceable and is rescinded.

AND IT IS SO ORDERED.

_____

David R. Duncan

US Bankruptcy Judge
District of South Carolina

Notes:

[1] Household Finance Corporation, II is the only defendant who asserted counterclaims. HSBC filed an Answer with Household Finance Corporation, II, but did not assert counterclaims.

[2] The only reaffirmation agreement submitted by Plaintiff which appears to be the subject of a dispute is the reaffirmation agreement between Defendants and Mr. Collier. Plaintiff submitted an affidavit allegedly executed by Mr. Collier in an attempt to explain the misunderstanding between Defendants and Mr. Collier. However, the affidavit suffers from a fatal deficiency, as it was improperly notarized. See S.C. Code § 26-1-80; In re Ulmer, 363 B.R. 777, 782 (Bankr. D.S.C. 2007) (stating that a notarization is invalid and illegal if the notary does not witness the affiant signing the affidavit). Plaintiff submitted an amended affidavit in an attempt to cure the original affidavit's defect; however, that affidavit indicates that the Maryland notary notarized the affidavit on January 11, 2012, the same date that Mr. Collier signed the original affidavit. Clearly, this is not possible, rendering the amended affidavit also invalid and calling into question the credibility of the entirety of the documents submitted by Plaintiff. The affidavit of Mr. Collier is invalid and is not entitled to any consideration by the Court.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

THERESA MORRIS, WIFE OF BOB MORRIS,
Plaintiff,

-vs-

Case Nos. A-11-MC-712-SS
A-11-MC-713-SS
A-11-MC-714-SS
A-11-MC-715-SS

JOHN COKER, ALLIS-CHALMERS CORPORATION AND/OR STRATE DIRECTIONAL DRILLING, INC.,
Defendants.

ORDER

BE IT REMEMBERED on this day the Court reviewed the files in the above-styled causes, and now enters the following opinion and orders.

Non-parties Lance Langford, Erik Hoover, and Brigham Oil & Gas, L.P. invite the Court to quash subpoenas issued to them on behalf of Jonathan L. Woods, in relation to a matter currently pending in the United States District Court for the Western District of Louisiana, Lafayette-Opelousas Division, because the subpoenas were not properly served, are overly broad and unduly burdensome, and seek privileged information. In response, the Court issues the following invitation of its own:

Greetings and Salutations!

You are invited to a kindergarten party on **THURSDAY, SEPTEMBER 1, 2011, at 10:00 a.m.** in Courtroom 2 of the United States Courthouse, 200 W. Eighth Street, Austin, Texas.

The party will feature many exciting and informative lessons, including:

- How to telephone and communicate with a lawyer
- How to enter into reasonable agreements about deposition dates
- How to limit depositions to reasonable subject matter
- Why it is neither cute nor clever to attempt to quash a subpoena for technical failures of service when notice is reasonably given; and
- An advanced seminar on not wasting the time of a busy federal judge and his staff because you are unable to practice law at the level of a first year law student.

Invitation to this exclusive event is not RSVP. Please remember to bring a sack lunch! The United States Marshals have beds available if necessary, so you may wish to bring a toothbrush in case the party runs late.

Accordingly,

IT IS ORDERED that defense counsel Jonathan L. Woods, and movants' attorney Travis Barton, shall appear in Courtroom 2 of the United States Courthouse, 200 W. Eighth Street, Austin, Texas, on **THURSDAY, SEPTEMBER 1, 2011, at 10:00 a.m.**, for a memorable and exciting event;

IT IS FINALLY ORDERED that Mr. Barton is responsible for notifying Mr. Woods of this order by providing him with a copy by mail or fax on this date.

SIGNED this the 26th day of August 2011.

Sam Sparks

SAM SPARKS
UNITED STATES DISTRICT JUDGE