SOUTH CAROLINA BANKRUPTCY ETHICS CASES 2012

BY JOHN B BUTLER III

In re Biddle, 12-05171-D, 2012 WL 6093926 (Bankr. D.S.C. 12/7/12)(DD)

United States Trustee objected to the Chapter 11 Debtors' Application to employ an Attorney. The United States Trustee alleged the Attorney had failed to comply with earlier disgorgement orders in other cases and had failed to disclose connections to the Debtors and other interested parties.

The Court held that the Attorney's failure to comply with earlier disgorgement orders in other cases did not warrant her disqualification, because to do so would be imposing sanctions beyond that set forth in the orders.

The Court held attorneys seeking employment must be meticulous in disclosing all connections with the debtor and other parties in interest, and the Attorney should have disclosed connections with the Debtors and other interested parties, and the failure to do so warranted the imposition of an appropriate remedy. The Court held the proper remedy is left to the Court's broad discretion.

The Court held the Attorney was disqualified from representing the Debtors stating: "After careful consideration, the Court concludes Ms. Cooper is disqualified under section 327(a) from representing Debtors for the following reasons: (1) under the May 23d Order in the Disgorgement Cases, Ms. Cooper is currently a debtor of an insider of the debtors in this case, the Jerry Cox Company; (2) Larry Biddle, who is president of Jerry Cox, has indicated an unwillingness or, at best, a hesitancy to negotiate the checks Ms. Cooper is required to send to Jerry Cox under the May 23d Order; (3) another insider of Debtors, their son, has represented Ms. Cooper in some recent legal matters; and (4) Ms. Cooper failed initially to disclose these connections even after what happened in the Disgorgement Cases. While none of these reasons appear to constitute actual conflicts at this point, they do give rise to potential conflicts and 'create the appearance of conflict of interest or impropriety .... ' It is the sum of these connections that disqualifies Ms. Cooper. For instance, the fact that Ms. Cooper is a debtor of Jerry Cox raises concerns over whether she may place the interests of this insider above those of the bankruptcy estate, and the fact that Debtors' son represented her in some recent legal matters raises questions as to whether he did so in exchange for her representing his parents in this case. Additionally, there is uncertainty about the fee arrangement in this case as there is no retainer, which raises concerns about whether Ms. Cooper is representing Debtors in exchange for Jerry Cox not negotiating the checks she is required to send under the May 23d Order." Citations omitted.

In re City Loft Hotel, LLC, 11-01270-D, 2012 WL 3263619 (Bankr. D.S.C. 8/8/12)(DD)

Earlier the Court had entered an Order requiring Chapter 11 Debtor's Attorney to disgorge a retainer paid from Secured Creditor's cash collateral; the Court specifically stated the holding was "expressly limited to the facts of this case."

The Debtor's Attorney filed a Motion to Alter or Amend the Judgment pursuant to Fed. R. Bankr. 9023. The Secured Creditor objected.

The Court denied the Motion stating: "No grounds exist for amending the judgment here. No change in law has occurred, there is no new evidence available that was not previously available, and no clear error of law or manifest injustice has occurred. In its objection to Bank's Motion for Disgorgement of Retainer, Debtor focused primarily on the argument that disgorgement was too harsh a remedy for the Court to employ in this case. Debtor's arguments are substantially similar here. Any arguments contained in Debtor's Motion that Debtor did not include in its objection to Bank's Motion for Disgorgement of Retainer could have previously been presented to the Court, prior to the issuance of its Order Granting Bank's Motion for Disgorgement ('Disgorgement Order'), but they were not. Debtor cannot now attempt to rely on arguments that it failed to raise when it had the chance. Further, as the Court noted in its Disgorgement Order, Debtor's counsel had the opportunity to avoid this result. Debtor never made a request to the Court to use cash collateral. The Court stated in the Disgorgement Order that the holding was expressly limited to the facts in this particular case and that '[i]n other cases, Debtor's counsel can be paid from cash collateral if the Court authorizes the use of cash collateral or if the creditor with a lien on cash collateral consents.' Neither occurred in this case."

In re Davis, 11-07525-D, 2012 WL 3782548 (Bankr. D.S.C. 8/30/12)(DD)

Pro Se Debtor filed Motion to Revoke *Pro Hac Vice* Admission of out of state Counsel for Plaintiffs who had commended dischargeability proceeding against Debtor.

The Court denied the Motion stating: "Revocation of an attorney's *pro hac vice* admission is a harsh sanction. As a result, it should be exercised sparingly and only in particularly egregious cases .... Mr. Cohan should have reported the previous denial of his application for *pro hac vice* admission to the Florida District Court. However, Mr. Cohan apologized to the Court for the error and explained that the denial was based on a technicality, which was quickly corrected, leading to the application being subsequently granted. Mr. Cohan explained that the failure to list the denial on his application to this Court was based on his belief that the denial was a technicality and not a sanction and therefore it did not occur to him to list it. While Mr. Cohan obviously did not follow the best practice in completing his *pro hac vice* application, his actions were not taken in bad faith and do not amount to egregious misconduct rising to the level necessary for revocation of *pro hac vice* admission. Debtor also makes allegations of numerous other instances of unprofessional conduct or bad faith on the part of Mr.

Cohan. Debtor cites no instance in which Mr. Cohan has been sanctioned or disciplined by another court and besides the misstatement described above, makes no allegations of other false representations on Mr. Cohan's application for *pro hac vice* admission. Debtor has not shown that Mr. Cohan engaged in egregious unethical conduct or acted in bad faith."

Dutt, LLC v. Huggins, C/A 3:12-2036-CMC-PJG, 2012 WL 5384943 (D.S.C. Sept. 14, 2012) report and recommendation adopted, Dutt, LLC v. Huggins, CA 3:12-2036-CMC-PJG, 2012 WL 5381675 (D.S.C. Nov. 1, 2012)

After dismissal of their cases, Chapter 11 Debtors filed a malpractice action against their former Bankruptcy Attorneys in Richland County. The Attorneys/Defendants removed the action to Federal District Court. The Plaintiffs filed a Motion to remand the action to state court pursuant to 28 U.S.C. §1452(b), and the Defendants objected.

The Court initially discussed the test for equitable removal stating: "Courts have recognized that the factors to consider in determining the appropriateness of permissive remand under 28 U.S.C. § 1334(c)(1) and equitable remand under § 1452(b) are essentially the same ..... Courts examining this question have considered: the effect on the administration of the bankruptcy estate; the extent to which issues of state law predominate; the difficulty or unsettled nature of the applicable state law; comity; the degree of relatedness or remoteness to the main bankruptcy case; the existence of the right to a jury trial; and prejudice to the involuntarily removed defendants.... Additionally, courts and commentators have identified other appropriate factors to consider such as whether remand would prevent duplication or uneconomical use of judicial resources; whether the case involves questions of state law better addressed by a state court; judicial economy; the effect of bifurcating the action, including whether remand will increase or decrease the possibility of inconsistent results; the predominance of state law issues and non-debtor parties; and the expertise of the court in which the action originated .... Put succinctly, all of the factors essentially consider issues of comity, efficiency, and the impact on the bankruptcy estate or parties." Citations omitted.

The District Court adopted the Magistrate's Recommendations and denied the Motion to Remand stating: "Applying these factors to this case, the court observes that the impact of this action on the administration of the bankruptcy estate weighs in favor of remand since the bankruptcy estate has been closed. Additionally, the legal malpractice cause of action is created by state law and raises issues of legal ethics generally governed by state law. Other considerations outweigh these factors, however. First, the filings in this case make clear that bankruptcy issues are at the heart of the dispute. For example, Richard R. Gleissner, the plaintiffs' expert whose affidavit was filed with the state court complaint in accordance with S.C.Code Ann. § 15–36–100(b), is a certified bankruptcy specialist and former professor of bankruptcy at the Charleston School of Law .... Although the instances of alleged malpractice that he identifies are categorized under the South Carolina Rules of Professional Conduct, the substance of his averments show that the issue of the defendants'

competence under Rule 1.1 in the area of bankruptcy is squarely presented by this matter .... Thus, the court cannot say that a state court, which routinely addresses issues of professional misconduct, is better suited than a bankruptcy court, which also routinely addresses issues of professional misconduct and does so in the very specialized area of bankruptcy law, to adjudicate this matter.... Further, in considering the degree of relatedness or remoteness to the main bankruptcy case, the court observes, based on controlling precedent, that the legal malpractice claim at issue is not merely 'related to' but rather 'arose in' the bankruptcy proceeding; it is therefore a 'core proceeding ....' The court further notes that the Local Rules of this district provide for bankruptcy judges to conduct a jury trial ... and no involuntarily removed defendants' rights are at stake. Finally, it appears that at least some of the instances of alleged malpractice at issue in this matter have already been addressed to some degree by the bankruptcy court ... so the factors considering judicial economy, the likelihood of inconsistent results, and the expertise of the court in which the action originated all weigh against remand. The court therefore concludes that consideration of the factors as a whole weighs against granting the plaintiffs' motion for a discretionary or equitable remand." Citations and footnotes omitted.

The District Court also held the core proceeding status of the malpractice action was important to a determination of whether to abstain from, or remand, the proceeding stating: "This distinction is important, as §1334(c)(2) provides that abstention is mandatory in certain circumstances when a matter is merely related to, but did not arise under or arise in, the bankruptcy proceeding."

In re Full, 09-05650-W (Bankr. D.S.C. 9/24/12)(JW).

After rejecting Chapter 13 Debtors' requests for Loan Modification, Mortgage Creditor filed Motion for Relief from Stay alleging Debtors were past due approximately $9,000 post-confirmation. The Debtors objected to the Motion for Relief from Stay, challenged the Mortgage Creditor's Standing, and served the Mortgage Creditor with extensive discovery requests. The Mortgage Creditor agreed to allow its Attorneys to switch from a flat fee basis to an hourly basis under the terms of their Retainer Agreement. The Debtors filed a Motion to Compel Discovery Responses, to prohibit the Mortgage Creditor from charging any fees against the estate, and to require the Mortgage Creditor to charge any fees incurred in responding to discovery requests under the flat fee portion of the Retainer Agreement.

The Court first rejected the Debtors' argument that the Mortgage Creditor failed to properly preserve its objections to Discovery Requests by failing to timely file a Motion for Protective Order. The Court stated: "In this case, unlike the plaintiff in Adams, Wells Fargo provided adequate answers and responses, which included its objections to the Discovery Requests .... [T]he Court can consider and rule on discovery objections in the absence of a protective order. Rules 33, 34, and 36 of the Federal Rules of Civil Procedure, which govern interrogatories, document production, and

requests for admission, all provide a mechanism for the responding party to object without filing a separate motion for a protective order .... Thus, under the circumstances of this case, the Court agrees with Wells Fargo's position that the plain language of the Local Rule does not require a party objecting to a discovery response to also file a request for a protective order. Therefore, the Court finds that the objections raised by Wells Fargo to the Discovery Requests were properly preserved without separate request for a protective order."

The Court then rejected the Debtors' other demands for relief in their Discovery Motion stating: "Having reviewed the pleadings and considered the arguments of the Parties at the Hearing, the Court finds that Wells Fargo's responses are adequate. Finding otherwise would elevate form over substance. Furthermore, at this point in the case and considering the Debtors' admitted failure to make postpetition payments in accordance with the confirmed Plan, the critical issue that should be considered is not whether Wells Fargo complied with the Discovery Requests in a perfect manner. Instead, the issue is whether more detailed responses to the Debtors' Discovery Requests will provide sufficient benefit to outweigh the associated costs .... The postpetition arrearage due from the Debtors to Wells Fargo was $6,675.20 as of May 1, 2012. Counsel for the Parties agreed at the Hearing that the arrearage would be approximately $10,000 as of September 1, 2012 if payments were not received before the next payment deadline. In addition to the arrearage, the attorneys' fees incurred by the Parties as a result of the Discovery Requests and the Discovery Motion now exceed $30,000 and are poised to increase as a result of the Parties' participation at the Hearing and the pendency of the 362 Motion. Unfortunately, for the Debtors, whatever equity in the Collateral remained at the time of the 362 Motion appears to have been consumed by the attorneys' fees associated with discovery. No further discovery is necessary because any potential benefit that discovery could provide has been surpassed by the expense incurred by the Parties in requesting and responding to such discovery. The mounting costs of such discovery are just too great to continue."

The Court then addressed the Debtors' Objection to the reasonableness of the fees of the Attorneys for the Mortgage Creditor. The Court found the approximately $21,615 in attorneys' fees incurred in responding to Debtors' Discovery Requests appeared to be reasonable stating: "Discovery is a double-edged sword because, just as it costs money to prepare discovery requests and motions to compel, responses to such also come at a price. Service of substantial or boilerplate discovery requests on secured creditors in a consumer case can exponentially increase the costs of a case, which are often ultimately borne by the debtor. Therefore, the costs of discovery should be weighed against the potential benefit. At the Hearing, Debtors' counsel argued that RTT's fees were unreasonable, in part because RTT went from representing Wells Fargo on a flat fee basis for the 362 Motion to billing on an hourly basis following the Discovery Requests and the Discovery Motion. The Court disagrees. The majority of the fees and expenses at issue, including all of the fees related to the Discovery Requests and the Discovery Motion, appear to directly result from the litigation approach of and the pleadings filed by the Debtors. The manner of charging for

representation, specifically switching from a flat fee to an hourly rate because of the serious allegations asserted by the Debtors, appears to have been properly executed between Wells Fargo and RTT based on the terms of the Retainer Agreement and also appears reasonable to the Court under the circumstances of this case. This Court notes that, in this District, a debtor's attorney typically charges an initial flat fee when representing a Chapter 13 debtor, which the Debtors' counsel appears to have done here. In the event that significant issues arise in connection with the defense of a motion for relief from stay or other matters, the attorney often subsequently switches his billing method from a flat fee basis to an hourly basis, which Mr. Cantrell also appears to have done in this case. To limit Wells Fargo to representation based on the initial flat fee is simply impractical and inequitable because it would eliminate its ability to adequately respond to the Discovery Requests and the Discovery Motion. Furthermore, such limitation would be contrary to the express terms of the Retainer Agreement. The attorney's fees and expenses in this matter for which the Debtors may be responsible currently stand at over $30,000 and continue to grow. However, based on the Court's review of the Fee Affidavit, the Retainer Agreement, and the Correspondence, the Court finds that Wells Fargo was within its rights under the Retainer Agreement to allow RTT to transition from a flat fee representation to an hourly representation, particularly in light of the extensive discovery requests submitted by the Debtors. Therefore, the Court finds, on a preliminary basis, that the fees and expenses incurred by RTT during its representation of Wells Fargo in these matters are reasonable and were a foreseeable consequence of the Discovery Requests and the Discovery Motion. Finally, the Court must note that this Order is limited to the facts and circumstances of this case and is not intended to put a chilling effect on the discovery efforts of debtors or creditors. Instead, it should serve to as a reminder to counsel for all parties that they should be mindful of the issues and amounts at issue in the particular case when engaging in substantial and potentially costly discovery requests, particularly a consumer bankruptcy case involving debtors with limited resources and assets." Footnotes omitted.

The Court then addressed some preliminary matters on the Motion for Relief From Stay scheduled for later. The Court held the Mortgage Creditor's Motion for Relief from the Stay sufficiently complied with the procedural requirements of the Local Rules including the Certification of Facts Form. The Court, however did deny the Mortgage Creditor's Request to be excused from further compliance with the filing requirement of Fed. R. Bankr. P. 3002.1.

The Court rejected the Debtors' argument the Mortgage Creditor lacked standing stating: "Despite efforts by Debtors' counsel to raise issues regarding Wells Fargo's standing at this time, in the end, the Debtors borrowed a sum of money from a third party to finance the Collateral and have yet to pay back that obligation in full. The Plan, the Debtors' Chapter 13 Income Statement, and the Debtors' Schedule D all recognized that obligation and identified Wells Fargo as the proper mortgage creditor. As evidenced by the payment history attached to the Discovery Objection, the Debtors continued to make payments to Wells Fargo through at least April 17, 2012. Furthermore,

at the time each of the previous motions for relief from stay was filed by Wells Fargo, the Debtors either made the necessary payments to Wells Fargo or requested a loan modification from Wells Fargo to resolve those motions.... The first instance of questioning the legitimacy of the amounts owed to Wells Fargo or the identity of Wells Fargo as the appropriate party to receive payment under the Plan comes via the 362 Objection. The Debtors' challenge to Wells Fargo's standing comes too late. Furthermore, even if the issue of standing is appropriate for consideration at this time in the case, the Court finds that Wells Fargo has standing. Although Wells Fargo indicated that it sold the Debtors' loan to Freddie Mac on July 15, 2012, it stated that it remained the servicer on the loan and also presented the original (endorsed) Note and the Mortgage at the Hearing. Therefore, the Court concludes that Wells Fargo is a 'person entitled to enforce' the Note pursuant to S.C. Code Ann. § 36-3-301 .... Based on the representations at the Hearing and both the Note and the Mortgage, which were presented at the Hearing and provided to the Court, the Court finds, as it did in Neals, that the Plan in this case is 'res judicata on the issue of a creditor's rights as a party in interest with standing to seek relief from the stay ....' Therefore, Wells Fargo has standing to prosecute the 362 Motion. However, in order to provide maximum protection to the Debtors, if the Court subsequently determines that Wells Fargo is not the proper recipient of the payments made by the Debtors, the Court hereby retains jurisdiction and authority to require Wells Fargo to disgorge the amounts received and return such funds to the proper party, and order sanctions or other remedies against Wells Fargo and its counsel as appropriate or necessary." Footnotes and citations omitted.

The Court then addressed the issue of whether the Debtors' failure to make the regular payments constituted cause for relief from the stay stating: "In this case, the Debtors have admitted that the failure to pay Wells Fargo pursuant to the Plan was a result, to a great extent, of the need for Mrs. Full to take two months of unpaid maternity leave. However, according to the payment history attached to the Discovery Objection, the Debtors' discontinued making full payments to Wells Fargo after May 2011 and discontinued making any payments to Wells Fargo after April 2012. Mrs. Full gave birth in June 2012. Furthermore, at the Hearing, counsel for the Parties agreed that while the Debtors may be able to catch up on their regular payments to Wells Fargo during the remaining term of the Plan, which is twenty-four (24) months, it was unlikely that the Debtors would be able to catch up on both the mortgage payments and the costs of litigation that have been incurred. Although it is unclear whether Mrs. Full's decision to take two months of unpaid maternity leave constitutes circumstances beyond the Debtors' control or whether there is any equity remaining in the Collateral as a result of the growing litigation costs in this case, the Debtors must be able to demonstrate that a reasonable cure period is possible in order to operate under the Plan and defeat the 362 Motion." Footnote omitted.

The Court then addressed the proof the Debtors would have to submit at the upcoming hearing on the Motion for Relief from Stay on the ability to cure the post-confirmation arrearage stating: "At the Hearing, counsel for Wells Fargo indicated that the Debtors would be required to

make payments of approximately $1,400 per month for the remaining term of the Plan merely to allow the Debtors to catch up on their delinquent postpetition payments to Wells Fargo and stay current. According to the Amended Schedules, the Debtors have budgeted $937.00 per month for their mortgage payment and indicate an available net income of $626.62 after deducting their monthly expenses. However, these figures do not include the monthly payments of $200.00 to the Chapter 13 Trustee or $141.00 to State Farm Financial Services, both of which are set forth in the Plan. Therefore, if the Debtors were to apply all available net income towards the mortgage payment and the arrearage less the payments to the Trustee and State Farm Financial Services, it appears that the Debtors would only be able to make monthly payments of $1,222.62, which would not be enough to cover the catch up on the postpetition mortgage arrearage payments without factoring any payment of legal fees. As counsel for the Parties noted at the Hearing, unless the monthly payments were lowered or a settlement agreement was reached to significantly reduce the attorneys' fees, it is likely that the Debtors would be unable to make the necessary payments to Wells Fargo under the remaining term of the Plan to keep the Collateral .... Therefore, at the hearing scheduled for October 4, 2012, the Debtors must demonstrate an ability to make the necessary payments to Wells Fargo either through the term of the Plan or pursuant to some other arrangement in order to prevail on the 362 Objection." Footnote omitted.

In re JK Harris and Co., LLC, 11-06254-W (Bankr. D.S.C. 7/17/12)(JW)

After Chapter 11 case was converted to Chapter 7, the Trustee sought a Supplemental Order requiring the Debtors to file Amended Schedules, to appear at the 341 Meeting, for sanctions and other relief. The Debtors objected to the Motion and their Counsel sought to be relieved of further duties.

The Court first addressed the issue of the Disclaimer which the Debtors' Officer signed with respect to the Amended Schedules and Statement of Affairs. The Court held the Disclaimer was inappropriate stating: "In light of the importance of these verifications, where the inclusion of a disclaimer is opposed by a party-in-interest, especially if that party-in-interest is a fiduciary acting for the benefit of all creditors, there should be a showing of compelling circumstances to justify the use of a disclaimer in connection with the filing of schedules and statements. A disclaimer is particularly problematic in a converted case when the trustee questions whether the debtor is cooperating or preserving estate assets. In addition, a court should not have to parse a lengthy disclaimer to determine whether it has the effect of reducing or qualifying the signer's assurances regarding the veracity of the schedules or statements. In these cases, the inclusion of the Disclaimer raises serious questions regarding the reliability of the information contained in the Amended Schedules and Statement of Financial Affairs, because it alters the meaning of the unsworn declaration to such an extent that it can no longer be certain that Harris, as Managing Member of Debtors, verified these documents under penalties of perjury. The Court also believes, in general,

that the inclusion of a disclaimer without compelling justification is contrary to the very purpose of requiring detailed and verified schedules and statements of financial affairs and the policy of complete and accurate disclosure underlying the Bankruptcy Code and Federal Rules of Bankruptcy Procedure. To some degree, the debtor or the signer of the schedules and statements has the protections sought through the use of a disclaimer by the very nature of the verification language. Pursuant to its terms, a verification of the schedules through an unsworn declaration is not a guarantee of perfection. Rather, it is a declaration that the schedules are true and correct 'to the best of [the signer's] knowledge, information, and belief.' See Official Form B6 Declaration Concerning Debtor's Schedules (12/07) (emphasis added). Therefore, for all of the foregoing reasons, the Court concludes that the Disclaimer should not be allowed as part of Debtors' schedules and statements of financial affairs and that they should be amended accordingly."

The Court also held the Debtors' Schedules and Statements should be amended stating: "In these cases, Debtors have repeatedly qualified their efforts by pointing out that the information source for their schedules and statements was controlled by the Trustee. After the unusual 'gotomeeting' conference was arranged to provide access, Debtors filed a large set of schedules and statements, but still disclaimed or qualified the information. Thereafter, Debtors' representative failed to appear and be examined on those schedules until expressly ordered by the Court. Since Debtors are required to amend the schedules and statements to remove the Disclaimer and they now have access to all the information available to allow them to do so, they should amend the schedules and statements once more to the extent necessary to fully comply with the Conversion Orders and put an end to this issue. While the Court recognizes that Harris's ability to prepare the financial reports necessary to amend the schedules may be limited by his lack of skills or resources and the fact that the former employees who formerly assisted him are no longer employed and willing to assist without being compensated for their efforts, the Court believes that Harris's best efforts should be made in light of the availability of all of the information. Again, the Court notes that perfection is not the standard. Rather, the information provided must be to the best of Harris's knowledge, information, and belief.... Therefore, in connection with filing amended schedules and amended statements of financial affairs to remove the Disclaimer as required above, Debtors shall amend their schedules and statements of financial affairs within 14 days of the entry of this Order to meet the requirements of the Conversion Orders and include previously omitted information and correct inaccuracies to the extent reasonably necessary to provide a full, candid, and complete disclosure of Debtors' financial affairs. As the designated representative of Debtors under Fed. R. Bankr. P. 9001(5), Harris is responsible for preparing and filing such amendments to the best of his ability. After the amended filings, the Trustee should administer the case with the information she has identified or developed since her appointment as trustee in these cases."

The Court addressed the Motion of Debtors' Counsel to Relieved stating: "At the May 15, 2012 hearing on the Motion and Supplement, Debtors' counsel made an oral motion to be relieved

from further duties as counsel since the cases have been converted. While it is reasonable to expect Debtors' counsel to assist Debtors in complying with the Court's Conversion Orders, the Court recognizes the limitation on the means of compensation for counsel's services after conversion of a case to a case under Chapter 7 set forth in the U.S. Supreme Court's decision, Lamie v. U.S. Trustee. 540 U.S. 526, 124 S.Ct. 1023 (2004) .... Therefore, at some reasonable point, the responsibilities of Debtors' counsel in a converted chapter 7 case should be viewed as complete. Unless an objection is filed by the Trustee or Debtors within 10 days of the entry of this Order, the Court will grant the motion and relieve Debtors' counsel from further responsibilities in these cases. In the event a timely objection is filed, the Court will conduct a hearing ...."

In re the Jerry Cox, Co., 10-06501-W (Bankr. D.S.C. 5/23/12)(JW)

After her suspension and reinstatement as a Bar Member, Attorney for Chapter 11 Debtors filed Applications for Compensation *Nunc Pro Tunc*. The United States Trustee objected to the Applications.

The Court held the Attorney improperly withdrew Retainer funds and used them without Court approval and without disclosing the withdrawals on an Amended Rule 2016(b) Statement. The Court stated: "She did not make this disclosure when she asked to be reinstated as the debtors' attorney in all three cases. The debtors' plans of reorganization in the Jerry Cox Company and Hughes cases were silent as to attorney fees paid or earned. When Ms. Cooper filed the motion for a final decree in the Jerry Cox Company case on February 16, 2012, she understood that the timing of the final decree was important because the case would have to be closed prior to April 1, 2012, for the debtor to avoid payment of another quarterly fee payment to the UST. Ms. Cooper also understood that for the Court to enter the final decree and close the case, other outstanding motions and applications would first have to be resolved. Ms. Cooper's failure to file her fee application until after the UST suggested that it be filed, and too late for her fee application to be resolved prior to April 1, 2012, does not support her claim that she intended all along to file the application. Ms. Cooper's postpetition withdrawal of the retainers without Court approval warrants denial of all compensation and disgorgement of the retainers in all three cases. Ms. Cooper's failure to timely disclose her postpetition withdrawal of the retainers also warrants denial of all compensation and disgorgement of the retainers in all three cases."

The Court also held the Attorney was not entitled to compensation, because she was not a disinterested person under §101(14)(A) and §101(14)(C) stating: "Ms. Cooper was not qualified for employment in the Jerry Cox Company and Hughes cases as debtor's attorney pursuant to § 327(a) because she was not a disinterested person. In a chapter 11 case, any creditor of a bankruptcy estate, or anyone with 'an interest materially adverse to the interest of the estate ... by reason of any direct or indirect relationship to, connection with, or interest in, the debtor,' is not a disinterested person. §§ 101(14)(A, C). A 'creditor' includes any 'entity that has a claim against the debtor that arose at

the time of or before the order for relief concerning the debtor,' § 101(10)(A), and a 'claim' includes any 'right to payment,' § 101(5)(A). Ms. Cooper's fee applications in the Jerry Cox Company and Hughes cases reflect fees owing for work performed prior to the filing of the cases. Ms. Cooper was a creditor of the debtors when those cases were filed. Ms. Cooper could have avoided this disqualifying circumstance by drawing down before the filing of the case from the retainer fees that she earned pre-petition, advise the Court in the documents related to their employment that they have done so, and disclose the amounts drawn and the amount remaining in the retainer. Ms. Cooper's failure to timely disclose her prepetition claims against the debtors in the Jerry Cox Company and Hughes cases also warrants denial of her fee applications in those cases. The disclosure requirements of §§ 327 and 329 and Fed. R. Bankr. P. 2014 and 2016 require that all relevant information be disclosed by an applicant seeking Court approval for employment. An applicant may not exercise any discretion to withhold information. 'This Court believes the policy of requiring timely disclosure of such matters under § 329 and Rule 2016(b) is central to the integrity of the bankruptcy process and are not to be taken lightly nor easily dismissed.'" Citation omitted.

The Court also ordered the Attorney to disgorge and repay the Retainers and ordered that Debtors "accept the disgorged fees paid pursuant to this order and shall not make future payments directly or indirectly to Ms. Cooper .... "

Kain v. Bank of New York Mellon (In re Kain), 08-08404-B, Adversary No. 10-80047-B (Bankr. D.S.C. 5/24/12)(HB).

In April 2010, Chapter 13 Debtors filed a Complaint alleging Defendants, as originator, servicers and assignees of residential mortgage, did not have a valid mortgage, had violated the Truth In Lending Act, and the Attorney for one of the Defendants had improperly filed a proof of claim. The Plaintiffs voluntarily dismissed the Truth In Lending Cause of Action and dismissed the Complaint as to one of the Defendants.

The remaining Parties filed Cross Motions for Summary Judgment. The Court granted Summary Judgment to the Defendants/Claimant and denied the Plaintiffs' Motion for Summary Judgment and denied all relied to the Plaintiffs. The Plaintiffs filed a Motion to Alter or Amend the Judgment pursuant to Fed. R. Civ. P. 59(e) and Fed. R. Bankr. P. 9023.

The Court first addressed the argument that it improperly admitted an Affidavit stating: "Any argument for reconsideration based on the Affidavit of Sharon Mason is immaterial because the Court did not substantially rely on the contents of that Affidavit when making its decision. Further, any reliance on the Affidavit would have been harmless since other exhibits presented by the Claimant supported entry of the judgment." Footnote omitted.

The Court then rejected the Plaintiffs' argument that Defendants' discovery responses were improperly admitted stating: "Likewise, the Court finds that Plaintiffs' argument that Claimant's

discovery responses are inadmissible as a whole because they are self-serving is without merit. Fed. R. Civ. P. 56(c)(1)(A) specifically states that a party may support its position by 'citing to particular parts of materials in the record, including . . . interrogatory answers, or other materials ...' The fact that the evidence supporting Claimant's motion was presented as part of discovery responses does not, in itself, preclude Claimant from relying on them. Furthermore, Plaintiffs previously requested verification of Claimant's discovery responses, which was done. See Fed. R. Civ. P. 33(b). Accordingly, Plaintiffs' argument that these documents and responses are self-serving does not persuade the Court to utilize the 'extraordinary remedy' of altering its prior decision." Citation and footnote omitted.

The Court then rejected the Plaintiffs' argument that it improperly refused to grant Declaratory Judgment to the Plaintiffs stating: "The Court previously considered and denied Plaintiffs' request for a declaratory judgment with regard to the Remaining Defendants because it did not deem such relief necessary. The Court's Order clearly reflects that these parties 'have no interest in or liability resulting from this adversary proceeding. [These] parties did not file claims in Plaintiffs' bankruptcy case and after due notice, did not assert any right to payment under the Note or Mortgage[.]'" Footnotes omitted.

The Court also held it did not err in finding Plaintiffs did not have standing to challenge the Pooling and Service Agreement between various of the Defendants or asset a cause of action under §544 stating: "The Court is not persuaded by the Plaintiffs' arguments that it wrongfully denied their Motion for Summary Judgment based on their lack of standing to challenge the PSA or bring a claim under § 544(a). Plaintiffs have presented no persuasive authority in their Motion or Brief to support the contention that they have standing to challenge the PSA, especially in light of the vast authority supporting the contrary. Plaintiffs rely on In re Sheeley, to establish derivative standing for them to bring a claim under § 544(a) .... However, Sheeley, which was issued by the Bankruptcy Court for the Southern District of Ohio, does not constitute an intervening change in controlling law and is distinguishable on its facts."

The Court also held it did not err in refusing to certify to the South Carolina Supreme Court the issue of whether an adjustable rate mortgage was a negotiable instrument. The Court stated: " This issue was squarely addressed in a recent opinion from this Court where Judge Duncan denied the same request because the necessity of a decision from the South Carolina Supreme Court was questionable since the question was based on an interpretation of statutes no longer in effect .... Judge Duncan also acknowledged the abundance of case law from other jurisdictions-as well as the analysis in this matter-regarding the statutory principles and purposes of the UCC, which rendered an interpretation from the Supreme Court unnecessary .... In addition, the Court recognizes that the bankruptcy courts are regularly required to interpret state law as a matter of first impression.... Therefore, no basis for reconsideration exists for the failure to certify this question to the state's highest court." Citations omitted.

The Court also addressed the relevance of the Plaintiffs' failure to present evidence at the hearings on the Motions for Summary Judgment stating: "As the Court recognized in its prior Order, it is important to note that Plaintiffs' Motion for Summary Judgment and Objection were not accompanied by significant references to the record that would support their case and did not highlight any genuine dispute of material fact for trial. Claimant's Motion, in contrast, was properly supported by sufficient evidence. The Court is not obligated to deny Claimant's Motion for Summary Judgment in order to allow Plaintiffs to conduct a fishing expedition at trial.... After a careful review of the prior record and decision, the Court cannot find that there has been any intervening change in controlling law or any new evidence for the Court to consider. Further, the Court is not persuaded that it made a clear error of law or that there is any manifest injustice to prevent with regard to its denial of Plaintiffs' Motion for Summary Judgment and award of Summary Judgment for Claimant."

In re Mc Fadden, 10-3899-D (Bankr. D.S.C. 5/9/12)(DD)

Chapter 7 Trustee hired Special Counsel who had served as Debtor's Counsel prior to conversion of the case from Chapter 13 to Chapter 7. The Special Counsel was hired to object to the claim of the Residential Mortgage Claim Holder. Trustee's Counsel alleged the Mortgage Creditor's Indenture Trustee and Servicer did not have standing to file the Proof of Claim or the Motion for Relief from the Stay which had been filed. After numerous hearings on contested discovery motions, the Court held hearings on the Objection to Claim, the validity of the Mortgage and the Motion for Relief from the Stay. The Court noted :"At the hearings, Trustee's counsel made evidentiary objections to almost every exhibit Saxon attempted to introduce." The Court then addressed the evidentiary rulings in a sixty page opinion.

The Court first addressed the filed Proof of Claim stating: "BONYM's proofs of claim were flawed. BONYM amended its proof of claim three times over a period of almost three months, but not once did it attach documentation sufficient to support its proof of claim. For example, the documentation attached to the proof of claim included copies of the note and mortgage made prior to the indorsements that were established at trial. BONYM's repeated failure to attach sufficient supporting documentation to its proof of claim evidences BONYM's poor document practices. Prior counsel for BONYM merely printed copies of electronic images of the note and mortgage that were maintained in its document retrieval system and not updated as indorsements were added. These practices opened the door for Trustee's objections. While, as discussed at length below, BONYM presented evidence at trial and established its claim, the long delays and squandered time resulting from these practices rest squarely with former counsel for BONYM."

The Court then addressed the Trustee's duties and the actions of his Special Counsel stating: "Trustee and his counsel are complicit in the delay, and their strategy and purpose have been lost on the Court. The Court first reviews a chapter 7 trustee's duties regarding claims and explores

Trustee's counsel's compliance with the scheduling orders entered by the Court in this case. 11 U.S.C. § 704(a) sets forth the duties of a trustee in a chapter 7 case and provides, in relevant part, 'The trustee shall - (5) *if a purpose would be served*, examine proofs of claims and object to the allowance of any claim that is improper.' 11 U.S.C. § 704(a)(5) (emphasis added). 'A trustee, while having the right to investigate claims without court authority, must exercise this right judiciously. The trustee cannot engage in fishing expeditions when no purpose would be served.'" Citation omitted, emphasis in original.

The Court then reviewed Special Counsel's failure to comply with the Pre-Trial Order by failing to file a Pre-Trial Brief. The Court stated: "Trustee's counsel argued that he did not know that the requirements to file a pre-trial brief and produce witness and exhibit lists were mandatory. He first claimed that he was not aware of the original May 18, 2011 deadline for filing a pre-trial brief containing exhibit and witness lists and that he did not remember there being a scheduling order in the case. Trustee's counsel informed the Court that its requirements were not clear because the original scheduling order contained language requiring the parties to file exhibit and witness lists, but the orders extending the deadlines in the original discovery schedule order did not refer to exhibit and witness lists. The original Order Setting Discovery Schedule provides, 'The parties are directed to jointly file one document containing a list of exhibits to be offered at trial, a list of witnesses to be called, and a stipulation of facts not in dispute. This filing shall be made on or before May 18, 2011.' The Orders extending the deadlines, both signed by Mr. Cantrell, both specifically extend the deadline for filing a pre-trial brief. Clearly, the original order provided that a joint pre-trial brief containing exhibit and witness lists must be filed. Thus, the provisions in the subsequent orders extending the deadlines to file pre-trial briefs also extended the deadlines for the exhibit and witness lists contained in those briefs as well. The orders were not ambiguous, and if Mr. Cantrell was unclear on the effect of the orders extending the discovery schedule, he should not have signed them. Even if Mr. Cantrell could reasonably claim confusion with respect to the Court's scheduling orders, the Court clearly ordered Trustee's counsel to produce those lists on the record at the October 6 hearing on the Motion to Compel. At that hearing, Trustee's counsel complained and argued that Saxon had not produced specific cases, authorities, and arguments that it intended to rely on and stated that he was trying to avoid 'trial by surprise,' yet he failed to provide the exact same information to Saxon. At the same hearing, Trustee's counsel stated that he assumed the Court would require him to file a pre-trial brief, and that such requirement didn't come as 'any real surprise.' Trustee's counsel did not comply with the Court's repeated orders to file a pre-trial brief and provide information regarding his case to the Court and opposing counsel and has no reasonable excuse for his failure to comply. He should not now be entitled to benefit from his noncompliance, when opposing counsel had no difficulty understanding or complying with the Court's orders." Footnote omitted.

The Court then addressed the fallaciousness of the legal theory underlying the Objection to

Claim stating: “Trustee employed Mr. Cantrell to pursue these matters against Saxon and BONYM based on his apparent belief that these creditors have no standing to file claims or pursue relief from stay. When asked what the purpose of this litigation was, Trustee's counsel referred to 11 U.S.C. § 506(d), which states, ‘To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void, unless - (1) such claim was disallowed only under section 502(b)(5) or 502(e) of this title; or (2) such claim is not an allowed secured claim due only to the failure of any entity to file a proof of such claim under section 501 of this title.’ Trustee's Objection to Claim and Objection to Saxon's Motion both only address the standing of Saxon and BONYM and do not address the validity of the underlying debt. The validity of the lien on the property was not attacked in the instant matters, and in fact could not be attacked absent an adversary proceeding. As a result, if Trustee is successful here, he still will not be able to sell the property, but will have to commence an adversary proceeding to attempt to extinguish the lien on the property. Trustee is attacking the standing of Saxon and BONYM to file a claim and seek relief from stay but has not advanced any basis for disallowance of the claim itself. The value of the property at issue is listed on Debtor's Schedule A as $145,000, and Schedule A states that the property needs about $10,000 in repairs. A Broker's Price Opinion, admitted at trial without objection, values the property between $115,000 and $135,000, depending on the marketing time for the property. Debtor took an exemption of $51,450 in the property .... Mr. Cantrell was employed by Trustee on a contingency basis; the Amended Order Authorizing Trustee to Employ Special Counsel entered on March 10, 2011 provides that after all reasonable costs of sale and payment of homestead exemptions, Mr. Cantrell is entitled to recover actual costs and expenses, plus 40 percent of the remaining proceeds. Based on all this, it appears, even if Trustee was able to sell the property for $145,000, which is unlikely given the repairs Debtor indicates are needed, the Broker's Price Opinion submitted at trial, and the current state of the housing market, that there would be little recovery for creditors. In spite of this, Trustee has pursued this litigation based on theories that were neither disclosed prior to trial nor developed at trial. There is no indication that Trustee has any evidence that the debt secured by the lien against Debtor's property is anything other than an allowable claim against the estate owed to BONYM, or, if some defect in assignment exists, to some predecessor in title. Apparently, Trustee's counsel hopes the Court will be careless in its ruling and will ‘disallow’ the claim rather than strike the proof of claim for a lack of standing, thus opening the door to a technical section 506(d) attack, despite the fact that there is no question that the debt is due to someone and that a lien encumbers the real estate.” Footnote omitted.

The Trustee file a Motion in Limine to exclude two Affidavits which the Mortgage Creditor intended to offer at trial alleging insufficient notice was given as to the Affidavits and that the Affidavits were not admissible under F.R.E. 902(11) and 803(6). The Court denied the Trustee’s Motion in Limine with respect to one Affidavit. The Court found sufficient notice had been given stating: “First, the Court finds that reasonable written notice of Saxon's intent to use the affidavits

at trial was provided. Saxon provided a number of exhibits to Trustee well in advance of the hearing on November 14, 2011 and also filed a pre-trial brief with a list of exhibits which included the two affidavits. A specific citation to the Federal Rules of Evidence is not necessary to give effect to the notice of intent to use the affidavit at trial. Trustee's counsel's Motion in Limine and his lengthy and detailed objections at the hearing clearly show that he had ample notice of Saxon's intent to use the affidavits. Providing affidavits that contain a notation which indicates that the source is a record custodian and including the affidavits in a list of exhibits which may be used at trial is sufficient notice under the Federal Rules of Evidence. The fact that the exhibit list contained exhibits that 'might' as opposed to 'would be,' used at trial is not the sort of equivocation that deprives a party of notice."

The Court also held F.R.E. 803(6) and F.R.E. 902(11) did not bar the use of one of the Affidavits but that the other Affidavit was not admissible stating: "Turning to the substance of the objection, Rule 902(11) requires that a declaration which seeks to certify the authenticity of a business record either be made by a record custodian or by a qualified witness. To be a qualified witness, the declarant must have knowledge of the company's policies with respect to creation and maintenance of the records. Here, Ms. Bodine specifically states in the US Bank affidavit that she is a record custodian for US Bank. Additionally, US Bank is the custodian for the Trust and therefore its regular course of business is to hold and be familiar with the content, creation, and maintenance of Trust records. As a result, the US Bank affidavit meets the requirements of Rule 902(11). However, in the Novastar affidavit, Mr. Holtmann does not claim to be a record custodian, nor does he make any representations with respect to his knowledge of the company's policies on record creation and maintenance. The US Bank affidavit is proper and authenticates those documents accompanying it, while the Novastar affidavit is defective and does not authenticate those documents accompanying it. The fact that the Novastar affidavit is captioned with a reference to 'record custodian' is not sufficient, as the caption is not a matter to which the affiant subscribed."

The Court then addressed Special Counsel's Objection to certain documents on the grounds of lack of foundation, lack of personal knowledge and hearsay. The Court overruled Special Counsel's objection to the introduction of several Exhibits but held that two Exhibits which were unsigned Agreements should not have been admitted into evidence.

The Court overruled Special Counsel's Objection to a summary of a redacted Mortgage Loan Schedule containing information about Debtor's Mortgage and approximately 8,000 other Mortgages; the Court held redaction of personal information of other parties did not make the document an inaccurate duplicate of an original business record and that since the original was voluminous but available for inspection, the summary was admissible.

The Court also admitted the original Note and Mortgage into evidence in response to Special Counsel's argument that the Court should have the originals in evidence so as to permit inspection of the staple holes in the originals.

The Court overruled Special Counsel's Objections to payments histories kept by the Servicers of the loan. The Court discussed and applied the Imwinkelreid eleven part test for authenticating electronic business records and admitted the records over the objection of Special Counsel.

The Court also overruled the objections to the admission of other Exhibits as business records stating: "Trustee's counsel's main arguments related to Mr. Goss's qualifications as a record custodian and his ability to authenticate the exhibits. Midfirst Bank makes clear that for documents to be admissible under the business records exception, they do not have to be actually created by the witness testifying to authenticate them, as Trustee's counsel appears to argue, nor do they even have to be created by the entity by which the witness is employed. This is evident from the language of Rule 803(6), as it provides that a document falls within the business records exception if it meets the other two requirements discussed above and is "made at or near the time by, or from information transmitted by, a person with knowledge." Fed. R. Evid. 803(6). Further, the witness does not have to have met the person who created the records or even know their existence or identity. Instead, Rule 803(6) merely requires, for records to be admissible as business records, the witness must be familiar with the company's record keeping system .... Mr. Goss, as a record custodian for Saxon, clearly meets that test. His testimony established that he has custody of Saxon's records and is familiar with how they are obtained, modified, and stored. Trustee's counsel's objections regarding the admissibility of Exhibits B, C, D, E, F, K, L, M, N, S, T, U, and V are overruled. Those exhibits are admitted as business records .... Two different standards exist for electronic business records. Records which are not created by a computer but are merely stored on one are not subject to the particular reliability concerns that arise with records generated by a computer. As a result, they are subject to the lesser standard set forth in Midfirst Bank, which states that computer records, with limited exceptions not applicable here, must merely meet the requirements of Rule 803(6) and do not require additional authentication.... Records that are generated by a computer using data compiled or created by the computer present questions regarding reliability and accuracy which require a higher standard for authentication. Thus, records created by this method are subject to the standard suggested by Imwinkelreid and must meet each of the factors. Despite the fact that Trustee's counsel maintained his objection to Exhibit U and V after Mr. Goss was questioned based on each of the Imwinkelreid factors, the Court finds that all of the factors were met and Exhibits U and V were properly authenticated. For the reasons discussed above, Exhibits U and V clearly meet the requirements of Rule 803(6). To the extent that Trustee's counsel's objections to any other exhibits are based on the fact that they were produced from Saxon's computer system, those objections are also without merit. The requirements of Rule 803(6) have been met and the exhibits are admissible." Citations omitted.

The Court also held the Chapter 7 Trustee did not have standing to object to the propriety of the transfers between Servicers and Trustees of the Mortgage and the documents which enforce

those transfers, because neither the Debtor nor the Trustee was a party or third party beneficiary to those agreements.

The Court also overruled Special Counsel's Objection to the existence of the Mortgage Trust stating: "With respect to Exhibit H and Exhibit J, the Court notes that they are indeed unsigned, and for this reason the Court, as previously discussed, determined that Exhibit H and Exhibit J were inadmissible. If Trustee's counsel had raised an issue regarding whether the Trust actually exists during the pendency of this litigation, these documents would likely be defective in that they do not contain signatures; the Court does not speculate on what the ultimate result or effect of that finding would be, as it is immaterial for purposes of this case, although the Court does note that in this case the existence of the Trust was established by Exhibit F, the Trustee Acknowledgement Agreement, and Exhibit I, the Delaware Certificate of Trust for NovaStar Mortgage Funding Trust, Series 2006-1. Trustee's counsel failed to raise any issues with respect to the existence of the Trust until his closing argument and even then did not expressly contend that the Trust did not exist but instead appeared to hint at this conclusion by merely pointing out technical deficiencies in Saxon's exhibits. He did not articulate this argument in his pleadings with the Court, and he did not present any evidence on the argument throughout the trial of these matters. Despite the Court's orders requiring him to do so, he did not file a pre-trial brief containing his contentions and failed to provide opposing counsel with any notice of his arguments except a list of case citations which he might rely on at trial. The Court will not permit Trustee's counsel to suddenly attack the existence of the Trust based on the appearance of two unsigned documents, when he failed to raise this issue at any time during the litigation on this matter. The Court takes note of the fact that the Amended and Restated Trust Agreement and the Indenture Trust Agreement are unsigned, but because the existence of the Trust has not been and cannot now be questioned, the fact that the copies of the documents produced in court are unsigned has no bearing on the ultimate issues in this case." Footnote omitted.

The Court rejected Special Counsel's argument the note was non-negotiable because it had a variable interest rate and did not contain a "sum certain" stating: "The Court finds that for a number of reasons, the legislature's amendments to South Carolina's Commercial Code were intended to clarify the law rather than modify it, and therefore no retroactive application is necessary.... The Court agrees with Judge Burris and those courts in other jurisdictions that have found that the realities of commercial practices and the needs of the business community require that variable rate notes be encompassed in that group of notes the Code defines as negotiable. Variable interest rates are extremely common in recent loan transactions, and finding such notes to be non-negotiable would significantly inhibit many commercial transactions. The purpose of the Commercial Code is to facilitate rather than frustrate commercial transactions, and the Court's holding is consistent with that crucial purpose. The fact that Debtor's note contains a variable interest rate does not render the note non-negotiable."

The Court also denied Special Counsel's request to certify the negotiability issue to the South

Carolina Supreme Court stating: “Trustee's counsel requests that the Court certify a question based on an interpretation of a Code section no longer in effect; thus, the necessity of a ruling from the South Carolina Supreme court is questionable. Further, there exists abundant case law from other jurisdictions and a recent decision from another Judge in this Court on this issue, and the statutory principles and stated purposes of the Commercial Code are clear. It is unnecessary to certify this question to the South Carolina Supreme Court, and the Court declines to do so.”

The Court also rejected Special Counsel’s argument that the “no space” test required a finding the separate allonges to the Note were not valid, because there was sufficient space on the Note itself for indorsements stating: “Trustee's counsel points to the multiple sets of staple holes in the note and allonges as evidence of alteration of the documents. Trustee's counsel speculates that the allonges were not attached to the note until much later, perhaps right before the litigation. There is no evidence of this, and Trustee's counsel's accusatory speculation that regarding Saxon altered the note by attaching allonges in anticipation of litigation is without evidentiary support. Saxon maintained that the allonges were attached at the time they were created, and the Court has no reason to believe otherwise. Further, the fact that there are more than one set of staple holes in the documents is not evidence of any wrongdoing. It is reasonable to expect staples to be removed from documents with multiple pages when they are photocopied or electronically imaged, as testimony indicated occurred here.... The Court carefully inspected the staple holes in the documents, as requested by Trustee's counsel, and surmises nothing other than that staples were affixed and removed for the purpose of making multiple copies or electronic images of the documents. The ‘no space’ rule does not apply in South Carolina, and the Court finds that the allonges attached to the note were ‘affixed’ to the note as required by the South Carolina Code. The indorsements on the allonges are proper.”

The Court overruled Special Counsel’s Objection to the standing of the Indenture Trustee and the Servicer of the Mortgage finding all the transfers of the Note were valid stating: “The first allonge to the original note, bearing the same date as the note, contains an indorsement from Loanleaders of America, the original lender, to NovaStar Mortgage, Inc. As the Court previously discussed, an indorsement on an allonge is valid even if there is sufficient space for the indorsement on the face of the note, as long as the allonge is affixed to the note. There has been no evidence that this allonge was not attached to the note and in fact the allonge was attached to the note at the time of admission of the exhibit at trial; therefore, the indorsement's location on the first allonge from Loanleaders to Novastar is proper. Former S.C. Code § 36-3-202(1) provided that negotiation occurs when an instrument payable to order is indorsed and delivered to the transferee; S.C. Code § 36-3-202(2) provided that the ‘indorsement must be written by or on behalf of the holder.’ Here, Loanleaders was clearly a holder of the note, as it was the original lender, and it signed the allonge. There was no evidence that the note was not delivered to Novastar. In fact, Novastar's later indorsement, discussed below, is evidence that the note was delivered to and held by Novastar at the

relevant time. All the requirements for negotiation are met. The indorsement from Loanleaders to Novastar was proper. The second indorsement in the chain of title is from NovaStar Mortgage, Inc. to JPMorgan Chase Bank, as Trustee. This indorsement is on the face of the note, so clearly there is no issue with its placement. This transfer also meets all the requirements for negotiation, as the indorsement is by a representative from Novastar and there is no evidence that the note was not delivered to US Bank as custodian for JPMorgan Chase. Trustee's counsel complains that the indorsement is undated, but his complaint is without merit. See former S.C. Code § 36-3-114(1) ('The negotiability of an instrument is not affected by the fact that it is undated, antedated or postdated.'). Trustee's counsel also points out that the indorsement contains a reference to "the Novastar Home Equity Loan Asset-Bank Certificates, Series 2006-1," which is not the Trust involved in this case and which Mr. Goss testified does not actually exist. The only testimony or other evidence was that this is a scrivener's error on the part of the indorser, and the Court finds that the error is immaterial. See former S.C. Code § 36-3-117 and Official Comment 3; Official Comment to S.C. Code § 36-3-110. The second indorsement was proper and the note was negotiated from Novastar to JPMorgan Chase. The final indorsement is on a second allonge attached to the note and is from JPMorgan Chase Bank, N.A. as Trustee for The Novastar Home Equity Loan Asset-Bank Certificates, Series 2006-1 to the Bank of New York Mellon, as Successor Indenture Trustee under NovaStar Mortgage Funding Trust, Series 2006-1, by Saxon Mortgage Services, Inc. as its attorney-in-fact. Mr. Goss testified at trial that this allonge was created by Natalie Flowers, a former Vice President of Saxon, on BONYM's behalf at some point subsequent to BONYM becoming the trustee. This allonge is actually unnecessary to the transfer of the note; although Mr. Goss was unsure when exactly it was created, it is clear that at the time of its execution the loans had already been transferred into the Trust and remained there despite a change in trustee."

The Court held the standing of the Indenture Trustee and the Servicer was valid stating: "BONYM had constructive possession of Debtor's note through its agent, US Bank, and could obtain the note at any time simply by requesting it from US Bank .... The instruments were transferred to the Trust with the clear intention to transfer title to the instruments to the Trust, and when BONYM became trustee, it assumed title to the instruments in the Trust. BONYM meets all the requirements of the South Carolina Code and is a holder entitled to enforce the note. Saxon is the current servicer for BONYM, pursuant to the Servicing Rights Transfer Agreement between Saxon and Novastar, Exhibit E, which transfers to Saxon 'full power and authority, acting alone, to do any and all things in connection with the servicing and administration of the Mortgage Loans that [Saxon] may deem necessary or desirable, consistent with the terms of [the Servicing Rights Transfer Agreement] and the Servicing Requirements ....' BONYM also executed powers of attorney, Exhibits P and Q, which provide Saxon with authority to take a wide variety of actions with respect to the instruments in the Trust. The mortgages in the Trust were incorporated into Saxon's records when it became servicer, and Saxon could also obtain Debtor's original note at any

time by simply requesting it from US Bank, which it in fact did for purposes of this trial. A servicer is a party in interest and has standing to move for relief from stay and to file proofs of claim on the owner's behalf.... BONYM is entitled to enforce the note and Saxon is entitled to do so on its behalf. BONYM has standing to file a proof of claim in Debtor's case, and Saxon has standing to pursue a Motion for Relief from Stay." Citations and footnotes omitted.

The Court then overruled the Objection to the Claim stating: "BONYM has standing to file a proof of claim, and its proof of claim is allowed. Trustee's counsel's trial strategy throughout this litigation was to attack Saxon and BONYM rather than attacking the proof of claim itself. Trustee's counsel did not raise any arguments about the underlying claim's validity. As the Court previously discussed, Trustee's motives and theory in pursuing this litigation are flawed. Trustee's counsel has made no effort to show that the claim should be disallowed under 11 U.S.C.§ 506. Trustee's Claim Objection is overruled and the claim is allowed as amended."

The Court also granted relief from the stay to the Mortgage Creditor pursuant to §362(d)(1) stating: "Cause clearly exists in this case. Uncontested testimony established that Debtor has not made a mortgage payment in over three years, and BONYM is owed for additional months beyond that time period. The payoff amount on the loan is significantly greater than the value of the property. The Court finds that Saxon has established cause for relief from stay under section 362(d)(1)."

The Court also granted relief from the stay to the Mortgage Creditor pursuant to §362(d)(2) stating: "Saxon is also entitled to relief from stay under section 362(d)(2). As noted above, there is no equity in the property, and in fact there is a substantial lack of equity. This is a chapter 7 case, and therefore the property is not necessary for reorganization. Both elements of section 362(d)(2) are satisfied."

In re Vetter, 11-03988-D, 2012 WL 1597378 (Bankr. D.S.C. 5/7/12)(DD)

During the course of her Chapter 13 case, the Debtor died. The representative of the Debtor's estate with the assistance of the Debtor's Bankruptcy Attorney, filed a Notice of Conversion which pursuant to Fed. R. Bankr. P. 1017(f)(3) was treated as effective without court order. The United States Trustee made inquiry about the Debtor's death and the status of the case but there was no response. The United States Trustee filed a Motion to Dismiss the case alleging the Debtor's Attorney had no authority to file the Notice of Conversion. No party objected or responded to the Motion to Dismiss.

The Court dismissed the case stating: "Fed. R. Bankr. P. 1016 provides that when a chapter 13 debtor dies, the 'case may be dismissed; or if further administration is possible and in the best interest of the parties, the case may proceed and be concluded in the same manner, so far as possible, as though the death or incompetency had not occurred.' Rule 1016 further provides that in a chapter 7 context, the death of a debtor 'shall not abate a liquidation case' and that the case, so far as

possible, should continue as if the death had not occurred. Although the debtor died during the chapter 13 portion of the case following confirmation of the debtor's plan, the debtor's counsel made no request to the Court for the debtor's personal probate estate representative to assume debtor's duties under the Bankruptcy Code. It further appears that creditors, the chapter 13 trustee, and other parties in interest were not provided notice of the debtor's death. The only suggestion that debtor died is the purported signature on the notice of conversion by an individual identified as the debtor's probate estate representative. Rules 1016 and 1017(f) do not permit the debtor's chapter 13 case to be converted to one under chapter 7 under the facts of this case. The Court, the case trustee, and other parties in interest should be promptly notified of the death of a debtor under bankruptcy protection, particularly where relief is sought under a reorganization chapter. Under chapter 13 the case is subject to dismissal under Rule 1016 following the death of a debtor if further administration is not possible and allowing the case to continue does not serve the best interests of creditors and the bankruptcy estate. The failure to provide such notification in the present case prevented a proper evaluation of this case. Further, the failure to obtain permission from the Court to permit the debtor's probate estate representative to act for the debtor casts serious doubt upon the authority of counsel to take instruction from the representative. The Court recognizes that a chapter 7 or chapter 13 case could be at the stage where notice of the debtor's death and recognition of the authority of a personal representative would be less important than in this case. However, in most cases pleadings, amended schedules, reports, or an amended plan may be required. Parties in interest may well have service of process questions. Counsel for a deceased debtor needs direction concerning the authority of another party to act for the debtor. Finally, creditors and parties in interest may need to reevaluate their positions in a case based upon a debtor's death such as deciding whether to prosecute a motion for stay relief or a discharge or dischargeability action or a motion to dismiss or to convert a case to another chapter. For these reasons, upon the death of a debtor, counsel for a deceased debtor should ordinarily promptly notify the Court of the debtor's death and file a motion for designation of an appropriate person to act on the debtor's behalf. The failure of the debtor's counsel to take these actions in this case and his failure to respond to the motion to dismiss constitute cause for dismissal of this case. § 707(a).” Footnote omitted.

In re Washington, 11-00625-D, 2012 WL 266159 (Bankr. D.S.C. 1/30/12)(DD)

Chapter 11 Debtors filed Objected to their Attorney’s Application for Compensation. The Debtors argued they thought the fees would not exceed $25,000.

The Court overruled the Objection in part but reduced the fees sought stating: “For his representation of Debtors in their chapter 11 case, Mr. Smith is requesting a total amount of $29,905 in fees and $1,094.71 in expenses. These amounts include the amounts requested in Mr. Smith's first Application for Compensation, which have been approved on an interim basis. This Order deals with all fees and costs through confirmation and is a final order. Debtors' chapter 11 case presented

complex and contested issues, requiring more time than many individual chapter 11 cases. Mr. Smith's hourly fee is $350.00 for himself, $250.00 for his law partner, and $100 for his paralegal. The Court finds these rates reasonable, and finds that the amount of time Mr. Smith states he spent on Debtors' case is reasonable. However, attorneys have a duty to fully and accurately disclose their fees to the Court.... Here, Mr. Smith's disclosure that he was receiving a set fee contrasted with the party's agreement for fees based on services performed at the rate of $350 an hour, resulted in confusion and discord between the parties, and required the Court to expend significant time and resources on resolving the dispute and determining the proper amount of fees which Mr. Smith should properly receive. For these reasons, though they are otherwise reasonable, a reduction in Mr. Smith's fees and expenses is proper. The Court finds that the total amount of fees Mr. Smith is requesting, excluding those already approved and paid, should be reduced by fifteen percent. This results in a total of $26,821.00 in fees. Fees of $9,345 were approved in Mr. Smith's first Application, and additional fees of $17,476 are now approved. Mr. Smith is entitled to receive the full amount of his costs, in the amount of $1,094.71. Thus, Mr. Smith is awarded fees and costs in the amount of $27,915.71 for this case." Citations and footnote omitted.