RECENT CASE AND RULE DEVELOPMENTS IN CONSUMER BANKRUPTCY CASES

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1.§ 101(5); § 502(b)(1); ACM, Bus. Reg. §§ 7-301(a), 7-401(a). Unlicensed debt collector allowed to file a proof of claim; Plan confirmation did not bar Objection to claims, and State consumer protection laws are preempted by the Bankruptcy Code. *Chorba v. Quantum3 Group LLC, et al., (In re Chorba),* _____B.R.

(Bankr. D.Md. March 8, 2018)(Harner, J.)(Case No. 17-16032-MMH; Adv. No. 17-00380-MMH). A creditor holding a right to payment under applicable nonbankruptcy law generally may file a proof claim in a debtor's bankruptcy case under § 501 as the U.S. Supreme Court explained in *Midland Funding, LLC v. Johnson*, U.S. ___, 137 S. Ct. 1407, 197 L. Ed. 2d 790, 85 U.S.L.W. 4239 (May 15, 2017) even if the claim underlying the right to payment is time barred under applicable nonbankruptcy law as the Bankruptcy Code does not limit the definition of claim in § 101(5) to an enforceable claim and specifically recognizes that an unenforceable claim may be disallowed in accordance with § 502 underscoring the stark distinction in the Code between the filing of a proof of claim and the ultimate allowance of that claim in the debtor's bankruptcy case.

Facts: Chapter 13 debtor brought adversary proceeding against unlicensed debt collectors under the Maryland Collection Agency Licensing Act that had filed proofs of claim. Defendants asserted that the Plaintiff's complaint is barred by her confirmed chapter 13 plan and the doctrine of *res judicata* or, alternatively, their proofs of claim are permissible under *Midland Funding* and that the Plaintiff's state law claims are preempted by the Code. Under either argument, Defendants posit that Plaintiff's complaint fail s to state a claim upon which relief can be granted and should be dismissed under F.R.C.P. Rule 12(b)(6) and F,R.B.P. 7012.

Held: Plan confirmation process and claims allowance process serve two different functions and one does not necessarily foreclose the other. *LVNV Funding, LLC v. Harling*, 852 F.3d 367, 371 (4th Cir. 2017) (citing *Covert v. LVNV Funding, LLC*, 779 F.3d 242, 246 (4th Cir. 2015)(rejecting creditor's argument the Chapter 13 plan confirmation process precluded claim objection, "There is no 'prior judgment,' final or otherwise, 'on the merits' as to any individual unsecured creditor's claims in the Confirmation Orders." *Id*. at 374). The Court found no basis to bar the Plaintiff's claims under *res judicata*. Under *Midland Funding* – the Supreme Court determining that the creditor's time-barred claim fell within the Code's definition of claim because, among other things, the applicable state law "provides that a creditor has the right to payment of a debt even after the limitations period has expired." 137 S.Ct. at 1411.

Licensing Act, MD. CODE ANN., BUS. REG. §§ 7-301(a), 7-401(a) , do not address the validity or effect of contracts or assignment agreements between a debt collector and a debt seller or assignor, whether for the purchase of defaulted debt or otherwise, nor do they speak to the validity of the debt itself, or the debtor's liability on the debt, which gives rise to a right to payment. Defendants' proofs of claim, based on their right to payment on the purchased debt, can stand, subject to the claims allowance process in which the Plaintiff/debtor may challenge the claims in Count III of the complaint. To the extent the claims are unenforceable under Maryland law, they are subject to disallowance under § 502(b), nevertheless the claims asserted in Counts I and II of the complaint alleging that the Defendants violated Maryland law by filing their proofs of claim are preempted by the Bankruptcy Code and accordingly the Court dismissed those two Counts.

N.B. If the holding is recognized nationwide, a debt collector need not be licensed in states where it files proofs of claim in Bankruptcy Court. Were the rule otherwise, debt collectors would incur greater costs in filing claims.

2. § 101(18)(A), § 109(f). <u>Calculation of "aggregate debt" of $4,153,150 for limit under Chapter 12 based on Claims filed rather than Debts scheduled</u>. *SummitBridge National Investments V LLC v. Perkins (In re Perkins)*, _____F.3d _____ (B.A.P. 6th Cir. March 13, 2018)(Nos. 17-8001/8008). SummitBridge National Investments V LLC, assignee of Branch Banking & Trust Co. appealed from the Orders of the U.S. Bankruptcy Court for the Western District of Kentucky at Bowling Green which overruled its objection to the confirmation of Tony Dian Perkins' Chapter 12 plan, and the subsequent order confirming that plan.

<u>Issues</u>: 1. How is "aggregate debt" calculated in determining a farmer's eligibility for Chapter 12 relief? 2. In determining a farmer's eligibility for Chapter 12 relief, can partnership income received by the individual debtor from the liquidation of separate farming partnerships and from an S corporation constitute income from

"such farming operation" when the partnerships and S corporation are not being reorganized in the Chapter 12 case?

Facts: Perkins operates a farm on 200 acres in southern Kentucky purchased by her grand-parents in 1948 continuing to operate the farm with her husband until his illness and in partnerships with her son, which partnerships filed Chapter 11 and were dismissed after liquidating assets which paid BB&T about $4 million. Perkins filed Chapter 12 when low farm prices combined with high input prices and as of the date of the confirmation hearing, proofs of claim filed by creditors totaled $4,012,908.79 for debts owed on the petition date. In the preceding tax year, Perkins received $279,000 of gross income from her own farm, $764,472 from her farm partnerships with her son, $161,571 of capital gains from the sale of farm equipment, and $132,360 from wages, a pension, and social security. The liquidation analysis accompanying the plan projected that a Chapter 7 liquidation would produce no payments to general unsecured creditors. The amended plan proposed to pay BB&T's claim in annual instalments over 20 years at 4.5% interest, with the first installment due January 2017.

§ 101(18)(A) provides three elements which must be met for a particular time period in order for an individual to be considered a family farmer: first, the individual's "aggregate debts" (the "aggregate debt limit") may not exceed $4,153,150; second, more than 50% of the individual's aggregate noncontingent, liquidated debts (excluding a debt for the principal residence unless such debt arises out of a farming operation), must be farm debt; and third, more than 50% of the individual's income must be farm income. SummitBridge contends that the bankruptcy court erred in finding that Perkins met the first and third requirements.

Bankruptcy Court: found Perkins filed the schedules in good faith, and rejected BB&T's argument that the court should consider both the scheduled claims, even if such creditors did not file proofs of claim, and the additional claims for which proofs of claim were filed and rejected the consideration of the debtor's substantial tax liability arising from the liquidation of her other partnerships. If the Court were to use BB&T's analysis of including the amounts of the Proofs of Claim, as well as the $640,408 of unsecured debts for which no Proofs of Claim were filed, Debtor is over the limit.

Held: It would be inequitable to use the amounts on the Proofs of Claim, as well as the scheduled amounts on which no Proofs of Claim were filed. In Chapter 12 cases, an unsecured creditor must file a timely proof of claim in order to participate in the distributions. The Sixth Circuit determined it has the discretion to use the Petition date to determine aggregate debt limit eligibility and concluded that the debt limit aggregates the debtor's non-farm and farm debts. Without this reading, the aggregate debt limit of § 101(18) is ambiguous as to whether it applies to the individual or just the farming operation in which the individual engages.

Held: More than 50% of her total income for the particular time period must be from "such farming operation." Her 2015 tax return showed $279,000 in farm income and $132,360 in non-farm income from wages, pension, and social security. In addition, she earned $764,472 from her farm partnerships and S corporation and $161,571 of capital gains from the sale of farm equipment.

3. § 101(31)(B)(i)–(iii). <u>The standard of review for a mixed question depends on whether answering it entails primarily legal or factual work; a clear-error standard, rather than a *de novo*, review applies in determining whether a person is a "non-statutory" insider, focusing, in whole or in part, on whether a person's transactions with the debtor were at arm's length</u>. *U.S. Bank, N.A., Trustee, v. Village at Lakeridge, LLC.*, 583 U. S. ____ (2018)(No. 15–1509)(March 5, 2018). Respondent Lakeridge is a corporate entity with a single owner, MBP Equity Partners. When Lakeridge filed for Chapter 11 bankruptcy, it had a pair of substantial debts: It owed petitioner U. S. Bank over $10 million and MBP another $2.76 million. Lakeridge submitted a reorganization plan, proposing to impair the interests of both U. S. Bank and MBP. U. S. Bank refused the offer, thus blocking Lakeridge's option for reorganization through a fully consensual plan. See 11 U. S. C. §1129(a)(8). Lakeridge then turned to the so-called "cramdown" plan option for imposing a plan impairing the interests of a non-

consenting class of creditors. See §1129(b). Among the prerequisites for judicial approval of such a plan is that another impaired class of creditors has consented to it. See §1129(a)(10). But crucially here, the consent of a creditor who is also an "insider" of the debtor does not count for that purpose. *Ibid.* The Bankruptcy Code's definition of an insider "includes" any director, officer, or "person in control" of the entity. §101(31)(B)(i)–(iii). Courts have devised tests for identifying other, so-called "non-statutory" insiders, focusing, in whole or in part, on whether a person's transactions with the debtor were at arm's length. Here, MBP (an insider of Lakeridge) could not provide the partial agreement needed for a cramdown plan, and Lakeridge's reorganization was thus impeded. MBP sought to transfer its claim against Lakeridge to a non-insider who could agree to the cramdown plan. Kathleen Bartlett, an MBP board member and Lakeridge officer, offered MBP's claim to Robert Rabkin, a retired surgeon, for $5,000. Rabkin purchased the claim and consented to Lakeridge's proposed reorganization. U. S. Bank objected, arguing that Rabkin was a non-statutory insider because he had a "romantic" relationship with Bartlett and the purchase was not an arm's-length transaction.

The Bankruptcy Court rejected U. S. Bank's argument finding instead that Rabkin purchased the MBP claim as a "speculative investment" for which he did adequate due diligence.

The Ninth Circuit affirmed, viewing the Bankruptcy Court's decision as one based on a finding that the relevant transaction was conducted at arm's length, *In re U. S. Medical, Inc.*, 531 F. 3d 1272, 1280 (10th Cir. 2008), the Ninth Circuit held that that finding was entitled to clear-error review, and could not be reversed under that deferential standard. According to the court, a creditor qualifies as a non-statutory insider if two conditions are met: "(1) the closeness of its relationship with the debtor is comparable to that of the enumerated insider classifications in [the Code], and (2) the relevant transaction is negotiated at less than arm's length." *In re Village at Lakeridge, LLC*, 814 F. 3d 993, 1001 (2016).

Rationale: Given all the basic facts found, was Rabkin's purchase of MBP's claim conducted as if the two were strangers to each other? That is about as factual sounding as any mixed question gets. Indeed, application of the Ninth Circuit's arm's length legal standard really requires what we have previously described as a "factual inference[ ] from undisputed basic facts." *Commissioner* v. *Duberstein*, 363 U. S. 278, 291 (1960) (holding that clear-error review applied to a decision that a particular transfer was a statutory "gift").

Held: The Ninth Circuit was right to review the Bankruptcy Court's determination for clear error (rather than *de novo*). At the heart of this case is a so-called "mixed question" of law and fact—whether the Bankruptcy Court's findings of fact satisfy the legal test chosen for conferring non-statutory insider status. U. S. Bank contends that the Bankruptcy Court's resolution of this mixed question must be reviewed *de novo*, while Lakeridge (joined by the Federal Government) argues for a clear-error standard. For all their differences, both parties rightly point to the same query: What is the nature of the mixed question here and which kind of court (bankruptcy or appellate) is better suited to resolve it? Mixed questions are not all alike. Some require courts to expound on the law, and should typically be reviewed *de novo*. Others immerse courts in case-specific factual issues, and should usually be reviewed with deference. In short, the standard of review for a mixed question depends on whether answering it entails primarily legal or factual work. *Pullman-Standard* v. *Swint*, 456 U. S. 273, 289, n. 19 (1982) (A mixed question asks whether "the historical facts . . . satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated"). Here, the Bankruptcy Court confronted the question whether the basic facts it had discovered (concerning Rabkin's relationships, motivations, etc.) were sufficient to make Rabkin a non-statutory insider. Using the transactional prong of the Ninth Circuit's legal test for identifying such insiders (whether the transaction was conducted at arm's length, *i.e.*, as though the two parties were strangers) the mixed question became: Given all the basic facts found, was Rabkin's purchase of MBP's claim conducted as if the two were strangers to each other? That is about as factual sounding as any mixed question gets. Such an inquiry primarily belongs in the court that has presided over the presentation of evidence, that has heard all the witnesses, and that has both the closest and deepest understanding of the record—*i.e.*, the bankruptcy court. One can arrive at the same point by asking how much legal work applying the arm's-length test requires. It is precious little—as shown by judicial opinions applying the familiar legal term without further elaboration. Appellate review of the arm's-length issue—even if conducted *de novo*—will not much clarify legal principles or provide guidance to other courts resolving other disputes. The issue is therefore one that primarily rests with a bankruptcy court, subject only to review for clear error. Affirmed. KAGAN, J., delivered the opinion for a unanimous Court. KENNEDY, J., filed a concurring opinion. SOTOMAYOR, J., filed a concurring opinion, in which KENNEDY, THOMAS, and GORSUCH, JJ., joined.

N.B. The Supreme Court did not grant review and there for did not address the question of whether statutory insider status is conveyed to the purchaser on the theory that an entity which acquires a claim steps into the shoes of that claimant.

Further, Justice Kennedy in his concurring Opinion observed "See *In re Village at Lakeridge, LLC*, 814 F. 3d 993, 1006 (CA9 2016) (Clifton, J., concurring in part and dissenting in part) ("[E]ven if the clear error standard applies, the finding that Rabkin was not a non-statutory insider cannot survive scrutiny"). MBP's failure to offer its claim more widely could be a strong indication that the transaction was not conducted at arm's length. As the Court is careful and correct to note, however, certiorari was not granted on this question. See *ante*, at 11, n. 7" adding "The Court's holding should not be read as indicating that the non-statutory insider test as formulated by the Court of Appeals is the proper or complete standard to use in determining insider status. Today's opinion for the Court properly limits its decision to the question whether the Court of Appeals applied the correct standard of review, and its opinion should not be read as indicating that a transaction is arm's length if the transaction was negotiated simply with a close friend, without broader solicitation of other possible buyers."

Moreover, Justice Sotomayor in her concurring Opinion observed "The Court's discussion of the standard of review thus begs the question of what the appropriate test for determining non-statutory insider status is. I do not seek to answer that question, as the Court expressly declined to grant certiorari on it. I have some concerns with the Ninth Circuit's test, however, that would benefit from additional consideration by the lower courts. As the Ninth Circuit interpreted the Code, `[a] creditor is not a non-statutory insider unless: (1) the closeness of its relationship with the debtor is comparable to that of the enumerated insider classifications in [11 U. S. C.]§101(31), *and* (2) the relevant transaction is negotiated at less than arm's length.' Under this test, because prongs one and two are conjunctive, a court's conclusion that the relevant transaction was conducted at arm's length necessarily defeats a finding of non-statutory insider status, regardless of how close a person's relationship with the debtor is or whether he is otherwise comparable to a statutorily enumerated insider."

Justice Sotomayor questions "That is, an enumerated "insider" does not cease being an insider just because a court finds that a relevant transaction was conducted at arm's length. Then why should a finding that a transaction was conducted at arm's length, without more, conclusively foreclose a finding that a person or entity is a "nonstatutory insider"?"

4. § 105(a); F.R.B.P. 9023, Fed. R. Civ. P. 59. <u>A court is not precluded to act *sua sponte* taking "any action" to prevent an abuse of discretion under 11 U.S.C. § 105(a) including dismissing the bankruptcy case if it is in the best interest of the estate; A judgment may be altered or amended under certain factors; "to .accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial and; 3) to correct a clear error of law or prevent manifest injustice;</u> *Mustafa v. Branigan*, 2017 WL 2634153 (D. Md. 2017)(Messitte, J.).

A Chapter 13 debtor appeals the denial of her motion to reinstate and the order of dismissal of her bankruptcy case. A Bankruptcy Court on request by a party of interest after notice and a hearing may convert a case or dismiss the case if it serves the best interest of the estate, moreover the Court is not precluded to act *sua* *sponte* by "any action" to prevent an abuse of discretion. 11. U.S.C. § 105(a). '"Any action' includes dismissal." *See In re Kestell,* 99 F.3d 146, 149 (4th Cir. 1996).

The Court affirmed the Bankruptcy Court's decision to dismiss the case *sua sponte* without notice and a hearing because the dismissal occurred only after the Court had warned the debtor the case was going to be dismissed. The Court found that the debtor's behavior abused the bankruptcy process and dismissal *sua sponte* was justified. Specifically, the debtor had a long history of missed deadlines and insufficient filings, missed two scheduled meetings of the creditors, admitted she waited more than a year to file required documents; and filed four deficient plans that were not able to be confirmed.

F.R.B.P. 9023, Fed. R. Civ. P. 59 governs to alter to amend judgment. A court may amend a judgment "(1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; (3) to correct a clear error of law or prevent manifest injustice. *U.S. ex rel. Becker v Westinghouse Savannah River Co.,* 305 F.3d 284, 290 (4th Cir. 2002) (quoting *Pac. Ins. Co. v Am. Nat'l Fire Ins. Co.,* 148 F.3d 396, 403 (4th Cir 1998)). The Court affirms the lower court's decision to deny the debtor's motion to reinstate as the debtor did not argue any of the aforementioned factors. Instead, the debtor argues that she was compliant with the Bankruptcy Court's orders, that she had made required payments, she cooperated with the creditors, amended her plan, and submitted required documentation.

5. §§ 105(a), 1307(c). A Court may act *sua sponte* taking "any action" under 11. U.S.C. § 105 to prevent an abuse of the bankruptcy process. " 'Any action' includes dismissal" *Mustafa v. Branigan*, 2017 WL 2634153, at *2. *Kaur v. Grigsby*, 2017 WL 4050229 (D. Md. 2017)(Grimm, J.). The Court dismissed a Chapter 13 Debtor's case without notice and a hearing citing 11 U.S.C. §§ 105(a) and 1307(c). Under 11 U.S.C. § 105 a court may act *sua sponte* taking any action to prevent an abuse of the process. "'Any action' includes dismissal." *Mustafa v. Branigan*, 2017 WL 2634153 at *2 (D. Md. June 16, 2017) (citing *In re Kestell*, 99 F.3d 146, 149 (4th Cir. 1996)). The Court held that the debtor's case should be dismissed because the debtor acted with a complete disregard for her case and the Bankruptcy Court's orders. Under the facts, the debtor had requested an extension for filing, which the Court granted. In granting this extension, the Court warned the debtor that failure to meet the filing deadline could result in case dismissal without a hearing. The debtor was warned twice in writing that her case could be dismissed if she did not make the required filings. Additionally, the debtor acknowledged she failed to make the required filings. She also failed provide an explanation of why the filings were not made or request an additional extension. Accordingly, dismissal was proper.

6. §§ 106(a)(1), 522. Debtor's exemption of tax refund trumps government's offset of refund against non-dischargeable tax and sovereign immunity claim of government has been abrogated by Congress *In re Copley*, 572 B.R. 808, 2017 WL 4082354 (Bankr. E.D.Va. 2017). Chapter 7 debtors brought adversary proceeding for determination that their right to exempt prepetition income tax refund trumped government's ability to set off its obligation for payment of this refund against debtors' liability to government on dischargeable, nonpriority tax debt. The Bankruptcy Court determined that it did, and government appealed. The District Court remanded for consideration of government's sovereign immunity claim.

Held: Congress abrogated whatever sovereign immunity the federal government might otherwise have had in adversary proceeding brought by Chapter 7 debtors for determination that their right to exempt prepetition income tax refund trumped government's ability to set off its obligation for payment of this refund.

7. §§ 109(e); 1307(c). Student loans and Chapter 13 debt limits held NOT jurisdictional – case permitted to proceed to confirmation. *In re Fishel*,___ B.R.__, (Bankr. W.D. Wis. March 30, 2018)(Case No.: 17-14180-13). Above median-income debtor filed Chapter 13 listing unsecured debt of $147,891.30, including student loan debt of $16,184.78. The Trustee objected to confirmation of the Plan based on an issue of eligibility, pointing

to scheduled student loan debt in the amount of $132,000. The servicer for the U.S. Department of Education on the other hand, filed a claim for $341,136 attaching itemizations of amounts and a statement that the servicer had no copies of any promissory notes because it did not receive them from "the originating lender or prior servicer."

Issue: Is the debt limit in § 109(e) jurisdictional? There is a split of authority among the courts that have considered this question. The minority view holds that Chapter 13 eligibility requirements under section 109(e) are jurisdictional. The majority view holds that eligibility is not jurisdictional. Instead, "the eligibility requirements of § 109(e) create a gateway into the bankruptcy process, not an ongoing limitation on the jurisdiction of the bankruptcy courts." *Glance v. Carroll (In re Glance)*, 487 F.3d 317, 321 (6th Cir. 2007).

Held: The Northern District of Illinois considered eligibility under section 109(h) and ruled that "eligibility to be a debtor under a particular chapter of the Bankruptcy Code is not the equivalent of a jurisdictional question." *In re Arkuszewski*, 550 B.R. 374, 377–78 (N.D. Ill. 2015) (citing *In re Lane*, No. 12-10718-M, 2012 WL 1865448, at *5 (Bankr. N.D. Okla. May 22, 2012)). Rather, the filing of a petition "sets in motion a series of events" and the "court *may* properly dismiss a petition at a later date if it is determined that the debtor is ineligible under § 109." *Id*. (emphasis supplied). Jurisdiction is determined by good-faith allegations rather than by what the evidence eventually might show. *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 288-90 (1938). Eligibility is not expressly listed as "cause" for conversion or dismissal under § 1307(c) but the list is non-exhaustive. *In re Love*, 957 F.2d 1350, 1354 (7th Cir. 1992), *see also In re Smith*, 848 F.2d 813, 816 n.3 (7th Cir. 1988). The Court agreed with the majority view that it had jurisdiction and it has discretion and is not compelled to either convert or dismiss. The Court considered absurd the other two alternatives – conversion to Chapter 7 where the § 707(b) "means test" could lead to dismissal of the case, or, conversion to Chapter 11 where administrative expenses and U.S. Trustee quarterly fees in addition to the disclosure statement and balloting process would vitiate the funds available for distribution to unsecured creditors – concluding that neither was in the best interests of the debtor, creditors, or her estate. Debt limit held not jurisdictional and motion to dismiss was denied.

8. § 109(g)(1). <u>A debtor can be barred from refiling under § 109(g)(1) for 180 days if the debtor demonstrates willfulness and blatant disregard for the Bankruptcy Code,</u> *In re Contrell*, 2017 WL 2544135 (S.D.W.Va. 2017)(Volk, J.). The Bankruptcy Court dismissed the debtor's Chapter 13 case. The Court indicated that it was considering a bar to refiling and allowed any interested party to file a motion in support thereof. The Chapter 13 Trustee and secured creditor filed a motion to support the bar to refiling.

§ 109(g)(1) allows a court to bar a debtor from refiling for a period of 180 days, if the case was dismissed for willful failure of the debtor to follow the court's orders or failure to properly prosecute the case. This sanction is reserved for extraordinary abuses of the Bankruptcy Code. *Houck v. Substitute Trustee Servs.*, 791 F.3d 473 (4th Cir. 2015) (quoting *Frieouf v United States (In re Frieouf)*, 938 F.2d 1099, 1104 (10th Cir. 1991). While willful is not defined by the Bankruptcy Code it means "deliberate or intentional." *Desinar v. Payne*, No. 5:12cv00090, 2013 U.S. Dist LEXIS 10047, at *9 (W.D. Va. Jan. 25, 2013) (quoting *Walker v. Stanley*, 231 B.R. 343, 347 (N.D. Cal. 1999) (citing *In re Herrera*, 194 B.R. 178, 188 (Bankr. N.D. Ill. 1996)). The Court found that the debtor's behavior rose to the point of willful and a blatant disregard for the Bankruptcy Code and satisfied the requirements of 109(g)(1). The Court came to this conclusion because the debtor filed four cases in five years, filed his cases on the day of the foreclosure sales, failed to attend three 341 meetings of the creditors, did not file the Statement of Affairs, did not attend the hearing for the case dismissal, and did not properly prosecute his case. In particular, the Court found the debtor's flagrant disregard for the bankruptcy process because of repeated skeletal filings at the last moment to stop the foreclosure sale, the filings failed to include any schedules, no payments were ever made to the Trustee, and no filing fees were paid in the last four cases.

9. §109(h). *In re Tillman*, 2017 WL 933025 (Bankr. W.D.N.C 2017) (Laura T Beyer, Judge). The plain language of 11 U.S.C. 109(h) as amended in 2010, requires that Debtors complete their credit counseling classes during the 180 day period **ending on the date** of the filing of the petition. This unambiguously allows the Debtors to satisfy the credit counseling requirement on the same day that the case commences even if the Debtors do not take a class until after the case is filed.

The bankruptcy administrator in this case sought to have the Debtor's case dismissed on the grounds that the debtor had completed her credit counseling course later the same day she filed her petition in bankruptcy. The administrator argued that the Debtor did not obtain her credit counseling prior to filing her case and relied on cases decided prior to the 2010 amendment.

The Court held that the words of a statute must have their normal meaning and that neither the Code nor Section 109 of the Code contains a definition for "date" and "date" means the day when an event happened or will happen. Since the date of filing in Section 109 (h) refers to an entire day and not a particular point in time during the day, Debtors can obtain credit counseling at any point during the same day that they file their petitions, and the motion is denied.

10. § 303(b). LLC's forfeiture of right to do business in Maryland and use its name did not disqualify it, to take action to place debtor into involuntary bankruptcy in order to protect the undisputed obligation owed to it, *Yan v. Zhang (In re Yan),* **_____**F.Supp.3d. **_____** (D.Md. March 14, 2018)(Case Nos.: PWG-17-742 PWG-17-870)(Grimm, J.). Zhengang Zhang, KZDJ, Inc., and Paxi, LLC filed an involuntary bankruptcy proceeding against Peide Yan under Chapter 7.

Section 303(b) provides: An involuntary case against a person is commenced by the filing with the bankruptcy court of a petition under chapter 7 or 11 of this title -- **(1)** by three or more entities, each of which is either a holder of a claim against such person that is not contingent as to liability or the subject of a bona fide dispute as to liability or amount, . . . if such noncontingent, undisputed claims aggregate at least $15,775 more than the value of any lien on property of the debtor securing such claims held by the holders of such claims; **(2)** if there are fewer than 12 such holders, excluding any employee or insider of such person and any transferee of a transfer that is voidable under section 544, 545, 547, 548, 549, or 724(a) of this title, by one or more of such holders that hold in the aggregate at least $15,775 of such claims; creditors, one or more of the six Petitioning Creditors had to hold non-contingent, undisputed, unsecured/ undersecured claims that totaled at least $15,775.

Appellees concede that "Zhang, Che, and KZDJ did not hold eligible claims against Yan because each was an insider of Yan and their claims were still the subject of a litigation pending in the Circuit Court for Montgomery County, MD,

Issue: Whether Paxi had authority, despite the forfeiture of its rights to do business in Maryland and use its name, to take action to place Yan into involuntary bankruptcy in order to protect the undisputed obligation owed to it. Because it did have this authority, such that it was a qualified petitioning creditor, the Petitioning Creditors met the statutory requirements of § 303(b)(2) based on Paxi's claim, regardless of whether Chen and Shi's claim was disputed.

Bankruptcy Court: relied on ACM, Corp. and Ass'ns §§ 4A-911 and 4A-920 to disqualify Paxi. Section 4A-911 provides that, when a Maryland limited liability company, such as Paxi, "has not paid a tax due before October 1 of the year after the tax became due," as Paxi failed to do, "its right to do business in Maryland and the right to the use of its name will be forfeited unless all taxes, interest, and penalties due by it are paid." § 4A-911(a)(1)–(2). The forfeiture is subject to § 4A-920, which provides: The forfeiture of the right to do business in Maryland and the right to the use of the name of the limited liability company under this title does not impair the validity of a contract or act of the limited liability company entered into or done either before or after the forfeiture, or prevent the limited liability company from defending any action, suit, or proceeding in a court of this State. Corps. & Ass'ns § 4A-920. Construing this language, the Court of Special Appeals of Maryland held that a forfeited LLC cannot file a lawsuit in a Maryland court. *See Price v. Upper Chesapeake Health Ventures, Inc.*, 995 A.2d 1054, 1061–62 (Md. Ct. Spec. App. 2010), affirming the dismissal of the LLC's lawsuit on the basis that neither the LLC, nor the members on its behalf, could file suit, despite the continued existence of the LLC. *Id*. at 1063. In *Willow Grove Citizens Association v. County Council of Prince George's County* the Court of Special Appeals held that the forfeiture of an LLC does "not impair the validity" of an application filed with a county agency, because an application is not a lawsuit, and an agency is not a Maryland court. 175 A.3d 852, 855, 857 (Md. Ct. Spec. App. 2017). In *Willow Grove*, a forfeited LLC "applied for a special exception with the Prince George's County Office of Zoning," seeking to "operate a 15–person adult day care facility and a 63–unit assisted living facility" on property zoned Rural Residential. *Id.* at 854–55. The Maryland National Capital Park and Planning Commission accepted the application; the zoning hearing examiner recommended approval; the Prince George's County Council approved the special exception, reasoning that the forfeited LLC still was "legally authorized to engage in the *activity* of filing an application for a special exception concerning real or personal property.

Held: Yan's challenge to the Order Entering Relief, based on his belief that Chen and Shi's claim did not qualify, consequently becomes moot. The District Court concluded that Maryland state law does not render Paxi ineligible to file an involuntary bankruptcy petition under the circumstances.

11. §§ 330(a)(3), 331. <u>Chapter 13 attorney fee of $9,300.00 approved in non-cookie-cutter case</u>. *Chung &* Press*, LLC v. Branigan. Trustee (In re Starner),* ___ F.Supp. 3d. ___, 2017 WL 4675739 (D. Md. 2017)(Hazel, J.). Chung & Press, LLC, Chapter 13 debtor's counsel, filed an interim application for compensation seeking $13,513.50 for services from May 5, 2014 to January 12, 2016, and $1,089.00 for the time expended in preparing the application, totaling $14,602.50, and reimbursement of expenses of $211.50. Because it was anticipated that there would be litigation over separation and divorce matters related to property and agreements, counsel was retained on an hourly basis rather than a flat fee under Appendix F. Counsel successfully resolved a Motion for Relief from the Automatic Stay, an Objection to Confirmation, and a Motion to Convert Case from Chapter 13 to Chapter 7 or to Dismiss, as well as an Adversary Proceeding, all filed by the debtor's ex-spouse. Plan was confirmed after which counsel filed an emergency motion to borrow so that the debtor could purchase a car. Brett Weiss' hourly rate during the course of representation was $495.00. The application categorized five major task: (a) Initial Services (including pre-petition work, the preparation of the Schedules, Statement of Financial Affairs, and Chapter 13 Plan, the filing of a Suggestion of Bankruptcy, Meeting of Creditors, obtaining and providing documentation requested by the Chapter 13 Trustee) billed at $4,653.00; (b) Addressing the various matters involving the Debtor's ex-spouse billed at $2,574.00; (c) Preparing and filing three Amended Chapter 13 Plans billed at $3,415.50; (d) General Representation/Advisement (including dealing with Seterus and its Motion for Relief from the Automatic Stay and the Emergency Motion to Borrow) billed at $2,871.00; and (e) Preparation of this Fee Application billed at $1,049.00.

Issue: Did the Bankruptcy Court err in its application of the *Johnson v. Georgia Highway Express, Inc*., 488 F.2d 714 (5th Cir. 1974) factors as adopted by the Fourth Circuit in *Barber v. Kimbrell's Inc*., 577 F.2d 216 (4th Cir. 1978) because the Bankruptcy Court, when considering a reasonable hourly rate, only compared Appellant's rate to other Chapter 13 practitioners rather than "comparably skilled practitioners in cases other than cases under this title" as required by § 330(a)(3)(F).

Bankruptcy Court: Compared Appellant's proposed hourly rate of $495 to reported rates of other Chapter 13 counsel, concluding that the average rate charged was $336.25 and Appellant's rate "is substantially higher than that of most Chapter 13 attorneys."

District Court: Appellant did not present the Bankruptcy Court with any argument or evidence regarding the rates of non-bankruptcy attorneys until its Motion to Alter or Amend, at which point the Bankruptcy Court considered the reasonableness of the application as a whole and also considered the rates charged by paralegals in light of this Court's conclusion that some of the services billed by Counsel could have been performed by a paralegal.

Held: The Bankruptcy Court carefully reviewed specific charges in the fee application and applied the *Johnson* factors in making its determination to reduce the requested compensation.

12. § 350(a) and Rule 5010 Motion to Reopen a bankruptcy case is inappropriate under § 350(a) and Rule 5010 when a case has been "dismissed"; A Motion to Reopen/Vacate under Rule 60(b) if it is not timely brought must provide a valid reason for the delay, *In re Douglas Myers*, 2017 WL 2833255 (D. Md. 2017)(Hollander, J.). More than five years after the bankruptcy court enters two orders, the self-represented Chapter 13 debtor appeals two motions: an Order Denying Motion to Reconsider and Order Denying Motion to Vacate Order Dismissing Case after his case was dismissed. No hearings were held by the Court as to these two motions. The Court held that under § 350(b) and Rule 5010 that a case cannot be reopened unless the case was closed, and that a dismissed case is not closed under the rule. The Court found there was no error for not providing notice and a hearing as to the dismissal. Further, the Court held that under Fed. R. Bankr. P. 9014 does not apply to Motions to Reopen and applies to contested matters that are not otherwise covered by the Rules. As to the Motion to Vacate, the Court upheld the lower court's dismissal because the debtor's Motion was filed more than five years after the dismissal and no excuse for the substantial delay was provided. The Court's analysis under Rule 60(b) is that if a motion is untimely brought after the original judgment a valid reason must be provided for the delay.

13. § 362; § 363(b) and § 363(f); § 1325(a)(5)(C); § 1322(b)(9). "Surrender" in Plan does NOT transfer title. Motion for relief from stay for Condominium to foreclose *in rem* lien on condo denied as moot where confirmed Chapter 13 plan lifted the stay but granted to the limited extent necessary to permit the Condominium to reduce its post-petition claims for *in personam* liability dischargeable upon completion of plan against the Debtor to judgment and enforce them against the Debtor, but premature to permit enforcement of any such judgment against property of the Debtor's bankruptcy estate; Court denied debtor's request for appointment of a person to sell the condo without prejudice to the right of the debtor to propose a sale of the property himself pursuant to§ 363(b) and § 363(f); proposed surrender in plan did not transfer title to condo. *In re Christopher D. Wiley,* 2018 WL 604401 (Slip Copy)(Bankr. D.Md. 2018)(Rice, J.).

The Council of Unit Owners of Waterford Landing Condominium filed a motion for relief from automatic stay to permit it to (i) foreclose its *in rem* lien rights against the Chapter 13 debtor's condominium unit, and (ii) pursue an *in personam* collection action against the debtor for unpaid condominium assessments and other charges that accrued after commencement of this case. The debtor opposed the motion requesting that the court (i) appoint a person to sell his condominium unit under the procedure adopted in *Pigg v. BAC Home Loans Servicing, LP (In re Pigg),* 453 B.R. 728 (Bankr. M.D. Tenn. 2011), and (ii) if the stay is terminated with respect to *in personam* actions against him, to limit the action that may be taken by the Condominium in accordance with *Carrollan Gardens Condominium Association v. Khan (In re Khan)*, 504 B.R. 409 (Bankr. D. Md. 2014). The Chapter 13 Trustee opposed termination of the automatic stay to permit *in personam* action against the debtor with respect to post-petition assessments—especially execution against property of the estate (including garnishment of the Debtor's post-petition wages).

Facts: Debtor still owns but does not live in, use or lease the condo since prior to the Petition Date, nor does he plan to do so in the future, but he is obligated to make monthly payments to cover common expenses which, if not paid, plus late fees, interest, and attorney's fees, will constitute a lien on the unit and may be collected by foreclosure. The Condominium as a secured creditor was owed $3,087.16. The Property is subject to a purchase money deed of trust held by Wilmington Savings Fund Society, FSB ("WSFS"), which filed a motion seeking relief from automatic stay to permit foreclosure of its deed of trust against the Property, which motion was granted, but which after more than a year had not as yet foreclosed.

Debtor's Plan had proposed the condo unit would vest back to the Condominium Association upon confirmation to which the Condominium Association filed an objection, but the confirmed Plan proposed only that the property would be *surrendered* pursuant to § 1325(a)(5)(C) of the Bankruptcy Code (Local Bankruptcy Form M which provided, "Title to the Debtor's property shall revest in the Debtor when the Debtor is granted a discharge pursuant to 11 U.S.C. § 1328, or upon dismissal of the case, or upon closing of the case."). The confirmed Plan and the Confirmation Order were duly served upon WSFS and upon the Condominium Association. The confirmed Plan also provided that secured claims would be satisfied through surrender of the collateral securing the claims. Neither WSFS nor the Condominium appealed the order confirming the Debtor's Chapter 13 Plan, which was a final order and also provided (consistent with the terms of the Chapter 13 Plan) that "the property of the estate shall not vest in the Debtor until the Debtor is granted a discharge or this case is dismissed."

Judge Rice concluded that:

(i) The Condominium's request for relief from stay with respect to enforcement of *in rem* lien rights against the Property was moot as the confirmed plan under § 1327(a) was binding as a final judgment that has *res judicata* effect, *United Student Aid Funds v. Espinoza*, 130 S. Ct. 1367, 1376 (2010); *Covert v. LVNV Funding*, 779 F.3d 242, 246 (4th Cir. 2015); *In re Linkous*, 990 F.2d 160, 162 (4th Cir. 1993) and provided in Paragraph 2(e)(iv) that confirmation lifted the automatic stay under § 362(a) and permitted the Condominium to enforce its *in rem* rights.

(ii) The plain meaning of 11 U.S.C. § 523(a)(16) under the Fourth Circuit's Opinion in *River Place East Housing Corp. v. Rosenfeld (In re Rosenfeld)*, 23 F.3d 833 (4th Cir. 1994) is that a discharge granted under § 1328(a) upon completion of payments under a confirmed Chapter 13 plan extinguishes *in personam* liability because § 523(a)(16) exceptions to discharge is excluded from exceptions to a § 1328(a) discharge.

(iii) *Rosenfeld* does not control the outcome as it was a Chapter 7 case and Congress later amended the Bankruptcy Code to add and then further revised § 523(a)(16).

(iv) A Chapter 13 debtor's obligation to pay post-petition condominium assessments continues up to the time of entry of a discharge under § 1328(a) of the Bankruptcy Code, at which time the condominium's *in rem* remedies survive, but the *in personam* obligations of the debtor are discharged, under *Khan*, 504 B.R. at 412 ("Because 11 U.S.C. § 523(a)(16) is not specifically listed among the exceptions to a Chapter 13 discharge entered after completion of all of a debtor's payments under a Chapter 13 plan, the *in personam* obligation to pay condominium fees does not survive as an exception to discharge. But, this obligation survives discharge as an *in rem* obligation because it is a covenant running with the land."). The effect of *Khan* is:

-- should Debtor be able to consummate his plan, then the pre-filing claim of the condominium would be discharged; its lien remains of record, not having been avoided, and after discharge, 11 U.S.C. § 523(a)(16) will not impose personal liability upon the Debtor to continue the payment of condominium assessments, but the charges of the condominium will continue as an *in rem* obligation. *Id*. at 414.

-- no Supreme Court or Fourth Circuit case addresses either (i) the effect of a § 1328(a) discharge on a debtor's *in personam* liability for post-petition condominium fees, or (ii) the extent to which a condominium should be permitted to enforce a debtor's liability for such fees while Chapter 13 plan payments are ongoing. Related questions have been considered by the lower courts within the Fourth Circuit. *See, e.g. In re Guillebreaux*, 361 B.R. 87 (Bankr. M.D.N.C. 2007) (homeowners association entitled to administrative expense claim for post-petition assessments when property sold by a Chapter 7 trustee); *Montclair Prop. Owners Ass'n v. Reynard* (*In re Reynard)*, 250 B.R. 241 (Bankr. E.D. Va. 2000) (applying *Rosenfeld* in a Chapter 13 case to conclude that homeowners association does not need relief from stay to demand payment or file suit to collect post-petition assessments and denying relief from stay to execute on property of the estate as premature); *Old Bridge Estates Community Ass'n v. Lozada (In re Lozada)*, 214 B.R. 558 (Bankr. E.D. Va. 1997) (in a Chapter 7 case filed after the initial version of § 523(a)(16) was adopted, homeowners association claim for post-petition assessments not discharged by reason of *Rosenfeld*), *aff'd* 176 F.3d 475 (4th Cir. 1999) (unpublished *per curiam* opinion stating that while "*Rosenfeld* was superseded as it applied to condominium and cooperative housing association fees, § 523(a)(16) did not affect *Rosenfeld's* treatment of other homeowner's association fees"); *In re Schechter*, 2012 W.L. 3555414 (Bankr. E.D. Va. Aug. 16, 2012)(applying *Reynard* in a Chapter 13 case with respect to post-petition condominium assessments). Judge Rice considered these cases but concluded that *Khan* represents the better reasoned and more persuasive authority.

-- Judge Rice also considered *In re Rose*, 512 B.R. 790 (Bankr. W.D.N.C. 2014) which cites *Khan* with approval but does so for the limited proposition that a Chapter 13 debtor cannot force a secured creditor to accept property surrendered by the debtor in a Chapter 13 plan pursuant to § 1325(a)(5) (C) of the Bankruptcy Code. 512 B.R. at 794. *See, Khan*, 504 B.R. at 410 ("none of the secured creditors has gone forward with foreclosure, and [the] Debtor cannot compel them to accept his surrender pursuant to 11 U.S.C. § 1325(a)(5)(C)"). Nothing in *Rose*, addressed the question of enforcement of post-petition condominium fees as an *in personam* obligation of a Chapter 13 debtor.

(v) The surrender provision of the Chapter 13 Plan was not dispositive of the issues as the *Rose* court explained surrender pursuant to § 1325(a)(5)(C) does not transfer ownership to a lender and does not require the lender to enforce its *in rem* lien rights against the collateral. 512 B.R. at 793-94. Vesting of title pursuant to § 1322(b)(9) may be a different matter, but the Chapter 13 Plan did not contain a vesting provision. The Condominium relied on the unreported decision by U.S. District Court Judge Messitte in *Heffner v. Elmore, Throop & Young, P.C.*, 2012 W.L. 2138097 (D. Md. June 12, 2012) with which Judge Rice respectfully disagreed for the reasons stated in *Khan*, 504 B.R. at 414, n.7.

-- Judge Rice concluded that *Khan* and *Ramirez* are the better reasoned line of authority. *In re Ramirez*, 547 B.R. 449 (Bankr. S.D. Fla. 2016) followed *Khan* and held that "the *in personam* obligation with respect to condominium fees does not survive as an exception to discharge. Instead, the obligation survives as an *in rem* obligation because it runs with the land." *Id*. at 452. In *Ramirez*, the court denied a request for sanctions against a condominium that sued the debtors after completion of their plan payments, but only because it concluded that at the time the condominium acted the law in its circuit was "unsettled." *Id*. at 454.

The Condominium suggested that the court disregard *Ramirez* because it "was not followed by subsequent decisions from its sister courts." To support that contention, the Condominium cites *In re Montalvo*, 546 B.R. 880 (Bankr. M.D. Fla. 2016), which it characterizes as disagreeing with *Ramirez* and acknowledging that there are three views on treatment of post-petition condominium assessments. The *Montalvo* court did rely on the Fourth Circuit's decision in *Rosenfeld* and (unlike *Ramirez*) held that a Chapter 13 debtor's *in personam* liability for post-petition condominium assessments is not discharged under § 1328(a). *Montalvo*, however, was not decided subsequent to *Ramirez*, did not refer to *Ramirez*, and relied entirely on reported decisions issued before *Ramirez* was decided. More importantly perhaps, when the *Montalvo* court refers to *Khan* it does so only for the proposition that *in rem* rights are preserved because they run with the land and does not recognize that *Khan* represents a fourth line of authority distinct from the three lines it identifies earlier in its opinion. The *Ramirez* opinion was issued on March 7, 2016, ten days after the *Montalvo* opinion was issued on February 25, 2016. Neither opinion makes any reference to the other.

-- The court also considered *In re Coonfield*, 517 B.R. 239 (Bankr. E.D. Wash. 2014) which overruled the condominium's argument that a Chapter 13 plan must provide for payment of ongoing assessments against a unit that was abandoned by the owner prior to bankruptcy; it did so because it held (like *Khan*) that the effect of the adoption by Congress of § 523(a)(16) was to make a debtor's obligation to pay post-petition condominium assessment subject to the broad discharge granted under § 1328(a). *Id*. at 244-45 ("If Congress intended to categorically except debts for ongoing association assessments from discharge it would have said so."). *Coonfield* was subsequently criticized in *In re Batali*, 2015 W.L. 7758330 (B.A.P. 9th Cir. Dec. 1, 2015), as contrary to *In re Foster*, 435 B.R. 650 (B.A.P. 9th Cir. 2010), both of which relied upon the Fourth Circuit's decision in *Rosenfeld*. Nevertheless, Judge Rice held that *Khan*, *Ramirez*, and *Coonfield* express the better reasoned conclusion with respect to the effect on *Rosenfeld* of the adoption by Congress of § 523(a)(16).

(vi) The reasoning of the *Pigg* court does not support appointment of a person to sell the Property in this case and Judge Rice declined to exercise powers under § 105(a) to appoint a person to sell the Property. In *Pigg*, the debtor (like the Debtor in this case) owned a condominium unit that was worth less than its market value and the holder of the debt secured by the unit had not foreclosed its lien despite being granted relief from the automatic stay to do so. *Pigg*, however, was filed under Chapter 7 and the court set aside temporarily the debtor's discharge, set aside the Chapter 7 trustee's report of no distribution, set aside its order granting relief from stay, directed the Chapter 7 trustee to be reappointed, and ordered the Chapter 7 trustee to sell the condominium unit pursuant to § 363 of the Bankruptcy Code. *Pigg*, 453 B.R. at 735. Unlike *Pigg*, this case is one under Chapter 13 of the Bankruptcy Code, no "person" need be appointed to sell the Property pursuant to § 363(b) and § 363(f) because the Debtor himself is authorized to take such action under sections 363(b), 363(d), 363(e), 363(f), and 363(l)." Thus, the Debtor's request for appointment of a person to sell the Property was denied.

In reaching this conclusion, the court stated that it did not mean to suggest that other aspects of *Pigg* might not be persuasive if the Debtor were to elect to sell the Property himself pursuant to § 363(b) and § 363(f). For example, the *Pigg* court held that the lender and the homeowners association had "consented to sale by their inaction," and that "[w]hile in most cases there would be no such inference, in this case, equity demands that the court fashion a remedy that balances the rights of the lienholders and the right of a debtor to a fresh start." *Id*. at 736. Although the instant case may present different facts and equitable considerations, it is a case in which a first priority secured creditor has apparently deferred action to foreclose against the Property despite having been granted relief from stay to do so more than 15 months ago—delay that has exposed the Debtor to the Condominium's claims of continuing liability for post-petition assessments and has undoubtedly necessitated the time and expense of defending the Condominium's motion. Under such circumstances, a court might well conclude that a secured creditor has consented to a short sale of the Property pursuant to § 363(f)(2).

Judge Rice observed that the Debtor's confirmed plan provides for payments to creditors over 60 months from April 20, 2016, with roughly 40 months remaining before a discharge under § 1328(a), and thus eligible to discharge his *in personam* liability on the post-petition condominium assessments. As discussed above, should the Debtor fail to obtain a discharge under § 1328(a), but rather obtain a hardship discharge under § 1328(b), the § 523(a)(16) exception would apply and his liability for post-petition condominium assessments would not be discharged. Accordingly, the Opinion is without prejudice to the rights of the Debtor or the Condominium in the event the Debtor fails to obtain a discharge under § 1328(a).

(vi) The court addressed the remedy (if any) available to the Condominium with respect to collection of post-petition assessments by *in personam* action against the Debtor given that such claims have not been, and may never be, discharged under § 1328(a). The debtor's future earnings are property of the estate under 11 U.S.C. § 1306. Although the Plan has been confirmed, the property of the estate did not vest in the Debtor pursuant to § 1327(b) because the order confirming the plan provides that such property does not vest in the Debtor until the debtor is granted a discharge or the case is dismissed. Thus, any action by the Condominium to enforce its post-petition assessments claim against the Debtor *in personam* is currently stayed under § 362(a)(3) and § 362(a)(4) to the extent the Condominium seeks to obtain possession of, or to create, perfect, or enforce a lien against, property of the estate.

These very same considerations were grappled with by the courts in *Reynard* and *Schechter*—courts that held post-petition condominium or homeowners fees were not dischargeable in a Chapter 13 case by reason of *Rosenfeld*. In both of those cases, the court concluded that it was premature to lift the stay to permit enforcement against property of the estate until the creditor had reduced its claim to judgment, and the amount of the judgment and its potential effect on the success of the Chapter 13 plan could be determined. *Reynard*, 250 B.R. at 250; *Schechter*, 2012 W.L. 3555414, at *8. The opinion in *Khan* does not make clear the extent to which the court believed *in personam* collection action should be permitted. The order entered in accordance with the *Khan* opinion, however, stated that the condominium "may proceed against the Debtor for post-petition debts and foreclose its lien against the real property." *In re Khan*, Case No. 11-33248-PM, United States Bankruptcy Court for the District of Maryland [Docket No. 67]. The language of that order indicates that the relief granted did not include enforcement of any judgment against property of the debtor's estate; indeed, nothing in the *Khan* opinion suggests that such relief was to be granted. Moreover, Judge Mannes cites *Schechter* as holding that "[c]ollection activities must be limited to property of the debtors, not property of the estate, but all post-confirmation earnings are property of the estate under 11 U.S.C. § 1306(a)(2)." *Khan*, 504 B.R. at 414. Judge Rice concluded that there was cause to grant relief under § 362(d) to terminate to the automatic stay to the limited extent necessary to permit the Condominium to reduce its post-petition claims against the Debtor to judgment and enforce them against the Debtor, but that it is premature to permit enforcement of any such judgment against property of the Debtor's bankruptcy estate.

N.B. Surrender of collateral to secured creditor is governed by Section 4.6.4 of the current Chapter 13 Plan which continues to provide that "[a]ny allowed claim for an unsecured deficiency will be paid pro rata with general unsecured creditors".

14. § 362, § 1322(b)(9). <u>Paragraph 8 in Ch 13 Plan vesting title of condo upon confirmation satisfies secured claim but does NOT extinguish or release *in personam* claims of the Condominium Association; Confirmation Order vesting title in lender was not recorded in Land Records but federal interest preempts state law and lender is owner; Condominium granted relief from stay but only to pursue collection from debtor of post-petition assessments that accrued prior to confirmation of Chapter 13 plan with remedy against lender/owner</u>. *In re Peterson*, ___ B.R. ___, 2018 WL 793685 (Bankr. D. Md. Feb. 7, 2018)(Case No. 16-13521-DER)(Rice, J.). Condominium sought relief from the automatic stay to pursue collection of post-petition assessments from a debtor who surrendered an over-encumbered condominium unit under a previously confirmed Chapter 13 plan for title to be vested in the lender upon confirmation pursuant to 11 U.S.C. § 1322(b)(9) not just for the unit to be surrendered as did the plan in *In re Wiley*, 2018 W.L. 604401, ___ B.R. ___ (Bankr. D. Md. Jan. 26, 2018). Neither the lender nor the condominium objected to confirmation of that plan.

The Newport Condominium Association filed a Motion for Relief from Automatic Stay to (i) foreclose its *in rem* lien rights against the condo – located in Chicago, IL in which the Debtor has not lived, used, or leased at any time after the Petition Date, which relief the debtor did not oppose, and (ii) to pursue an *in personam* collection action against the Debtor for unpaid assessments that accrued after commencement of this case which the debtor did oppose taking the position that she has no ongoing *in personam* liability for the post-petition assessments because under the terms of her confirmed Chapter 13 plan (i) the unit was surrendered to lienholders, (ii) the surrender was in full satisfaction of the underlying claims secured by the unit, and (iii) title to the unit was vested in the first priority mortgage lender, RCS.

The condo is subject to two mortgages, $99,137.14 secured by RCS' first mortgage and $28,062.71 secured by SLS' second mortgage, and condo asserted at least $12,420.08 for assessments, late fees and other charges although no secured claim had been filed. The amount due on the condo after the Petition Date at confirmation of the Debtor's plan was only $4,096.05.

With respect to the condo and the secured claims of RCS, SLS, and the Condominium, the Chapter 13

Plan provides in pertinent part as follows:

The following secured claims will be satisfied through surrender of the collateral securing the claims (describe the collateral); any allowed claims for deficiencies will be paid pro rata with general unsecured creditors; upon confirmation of the plan, the automatic stay is lifted, if not modified earlier, as to the collateral of the listed creditors: [Thereafter, the Debtor lists RCS, SLS, and the Condominium as claimants, states an amount for each of their claims, and describes the collateral of each of them as the condo.]

The confirmed Plan in ¶ 8 also contained the following relevant nonstandard provision:

All collateral listed in ¶ 2(e)(iv) claims is surrendered in full satisfaction of the underlying claims secured by the collateral. Pursuant to §§ 1322(b)(8) and (9), title to the condo shall vest in RCS upon confirmation, and the Confirmation Order shall constitute a deed of conveyance of the condo when recorded at the applicable Land Records office.

The Confirmation Order provides (consistent with the terms of the Chapter 13 Plan) that "the property of the estate shall not vest in the Debtor until the Debtor is granted a discharge or the case is dismissed or otherwise terminated."

Held: (i) Because a confirmed plan is binding on the parties, the condominium should be granted relief from the stay, but only to pursue collection from the debtor and reduce to judgment at least some portion of its claim for assessments due after the Petition Date for the post-petition assessments that accrued prior to confirmation of the Chapter 13 plan.

(ii) Resolution of this case, however, requires consideration of an issue not addressed in *Wiley*— that is, the impact of the Chapter 13 Plan provision specifying that upon confirmation title to the condo vested in RCS pursuant to § 1322(b)(9). The debtor argued that the surrender provisions of her Chapter 13 Plan bar the Condominium from collecting any post-petition assessments from her individually because such claims were satisfied by surrender upon confirmation. That argument, however, fails for two reasons. First, a surrender under § 1325(a)(5)(C) merely means that the debtor will make the collateral available to the secured creditor and not oppose the creditor's exercise of its *in rem* rights. A debtor cannot compel a secured creditor to accept surrender or to foreclose. *In re Khan,* 504 B.R. 409, 410 (Bankr. D. Md. 2014). Second, the standard form language of Paragraph 2(e)(iv) of the Chapter 13 Plan makes clear that the surrender is in satisfaction of the "secured claims" of the Condominium and that "any allowed claims for deficiencies will be paid pro rata with general unsecured claims." Such language is inconsistent with the assertion that the *in personam* claims of the Condominium have been extinguished by the surrender.

(iii) First sentence of Paragraph 8 of the Chapter 13 Plan is mere surplusage that reiterates the meaning and effect of surrender under Paragraph 2(e)(iv); it would be inappropriate to give the language of Paragraph 8 an interpretation so as to negate the meaning of Paragraph 2(e)(iv). **Such an extraordinary application of surrender—effectively converting surrender into a release of liability—would be appropriate (if at all) only if separately set forth solely as a standalone nonstandard provision in Paragraph 8.** Court declined to read the, at best confusing, language of the Chapter 13 Plan to have such an extraordinary meaning and effect.

Neither the Supreme Court nor the Fourth Circuit has spoken on the issue of the validity and effect of a vesting provision coupled in a Chapter 13 plan with one for surrender of collateral pursuant to § 1325(a)(5)(C). In *In re Rosa*, 495 B.R. 522 (Bankr. D. Hawaii 2013) a plan containing such a provision was confirmed over the standing trustee's objection. A lower court in the Fourth Circuit rejected *Rosa* and held that a mortgage holder could not be compelled to accept title to its collateral. *In re Rose*, 512 B.R. 790 (Bankr. W.D.N.C. 2014).

Thereafter, a number of bankruptcy courts rejected *Rose* and followed *Rosa*. See, e.g., *In re Stewart*, 536 B.R. 273 (Bankr. D. Minn. 2015); *In re Zair,* 535 B.R. 15 (Bankr. E.D.N.Y. 2015); *In re Watt,* 520 B.R. 834 (Bankr. D. Or. 2014); *In re Sagendorph*, 2015 W.L. 3867955 (Bankr. D. Mass. June 22, 2015). Other courts, however, followed *Rose* and held that a forced vesting plan cannot be confirmed over the objection of the secured creditor. *See, e.g., In re Brown*, 563 B.R. 451 (D. Mass. 2017) (reversing on appeal a bankruptcy court order confirming plan vesting title in an unwilling secured creditor); *Wells Fargo Bank v. Sagendorph (In re Sagendorph*), 562 B.R. 545 (D. Mass. 2017) (reversing *Sagendorph* on appeal); *HSBC Bank USA v. Zair (In re Zair)*, 550 B.R. 188 (E.D.N.Y. 2016) (reversing *Zair* on appeal); *Bank of New York Mellon v. Watt (in re Watt)*, 2015 W.L. 1879680 (D. Ore. April 22, 2015) (reversing *Watt*); *In re Williams*, 542 B.R. 514 (Bankr. D. Kan. 2015). The majority view and more recent trend—particularly in light of the outcome on appeal in district courts—seems to follow *Rose* and favor interpretation of § 1325(a)(5)(C) to preclude confirmation over a secured creditor's objection of a Chapter 13 plan that vests title to collateral in the creditor.

Peterson does not resolve that question because the Condominium is not before the court objecting to confirmation. The Plan was confirmed long ago without objection and "bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan." 11 U.S.C. § 1327(a). Confirmation of a Chapter 13 plan has *res judicata* effect not only as to any issue actually litigated, but also as to any issue necessarily determined by an order of confirmation. *Bullard v. Blue Hills Bank*, 135 S.Ct. 1686 (2015); *United Student Aid Funds v. Espinoza*, 130 S.Ct. 1367, 1376 (2010); *Covert v. LVNV Funding*, 779 F.3d 242, 246 (4th Cir. 2015); *In re Linkous*, 990 F.2d 160, 162 (4th Cir. 1993). As the Supreme Court said in *Ballard*, confirmation of a Chapter 13 plan "alters the status quo and fixes the rights and obligations of the parties. When the bankruptcy court confirms a plan, its terms become binding on debtor and creditor alike." 135 S.Ct. at 1692 (citing 11 U.S.C. § 1327(a)).

Issue: The only question is the extent to which the now binding provisions of the confirmed plan surrendering the condo and vesting title in RCS impact the Condominium's request for relief from the automatic stay.

The Condominium asserts that the answer lies in the Land Records of Cook County, Illinois where the Debtor is reflected as the current owner of record; RCS had not recorded the Confirmation Order which "shall constitute a deed of conveyance of the Property when recorded at the applicable Land Records office." "Property interests are created and defined by state law." *Butner v. United States*, 99 S.Ct. 914, 918 (1979). But, as the Supreme Court immediately went on to explain there is no reason to deviate from the state law result unless "some federal interest requires a different result." *Id*. In this instance, Congress adopted § 1329(b)(9) which expressly permits title to property to be vested upon confirmation of a Chapter 13 plan "in the debtor or in any other entity." This language is clear: title vests on confirmation. Court must look to the terms of the plan, not to Illinois law.

The Condominium is bound by the terms of the Chapter 13 Plan which vested title to the condo in RCS upon entry of the Confirmation Order. It is of no consequence as amongst the Debtor, RCS, and the Condominium that RCS has chosen to hold its title to the Property off record by not recording the Confirmation Order in the Land Records. The second sentence of Paragraph 8 of the Chapter 13 Plan does not give RCS the option to accept or reject vesting of title to the Property. As a result, the court must treat RCS as the owner of the Property as of November 29, 2016, the date on which the Confirmation Order was entered.

In its memorandum the Condominium directs the court to two unpublished opinions that it contends support a different conclusion, *In re Schechter*, 2012 W.L. 3555414 (Bankr. E.D. Va. Aug. 16, 2012) and *In re Langenderfer*, 2012 W.L. 1414301 (Bankr. N.D. Ohio April 23, 2012). In both cases, courts considered issues related to condominium ownership and liabilities of debtors for post-petition assessments. In doing so, the courts rejected the contention that surrender of a condominium extinguished a debtor's liability for post-petition assessments and made clear that such surrender does not result in transfer of ownership. Neither of those cases, however, considered the effect of vesting of title pursuant to § 1322(b)(9). In this case, title to the Property vested in RCS when the Confirmation Order was entered. RCS, not the Debtor, is the owner of the Property, so the Condominium may have remedies for assessments and charges arising from and after November 30, 2016, but such remedies do not lie against the Debtor. Condominium granted relief consistent with Wiley, but only with respect to assessments and other charges related to the Property for the time period from March 13, 2016 to November 29, 2016 – from Petition Date to Confirmation Date.

N.B. Revesting of property of the bankruptcy estate is governed by Section 8 of the current Chapter 13 Plan and any non-standard provision is governed by Section 9 of the current Chapter 13 Plan and is void if not stated Section 9.

15. § 362(a)(1). <u>A member's bankruptcy does not automatically stay proceedings against an LLC, the unusual circumstances exception allows the protection of the automatic stay to extend to third parties</u>. *National Electrical Benefit Fund v. 3W Electrical Annuity Plan*, 2017 WL 1079954 (D. Md. 2017)(Grimm, J.). A member of an LLC files bankruptcy and sought to have the stay apply to the LLC he was a member. The Court found that a member's ownership interest in an LLC does not give that member an ownership interest in the assets of that LLC. An owner could have had direct ownership of the assets, but by creating an LLC no longer does. The Court held that the assets of the LLC are its own and are not protected by the Member's bankruptcy stay.

The unusual circumstances exception allows the automatic stay to extend to third parties where the identify between the debtor and the third party is almost the same that a judgment against the third party is in effect a judgment against the debtor. An example of such a circumstance is a suit against a third party who has absolute indemnity by the debtor. Courts have not recognized membership in an LLC to be an "unusual circumstance." The Court found that the unusual circumstance exception did not apply to the LLC.

16. § 362(d); 1322(c)(1); Md. Code Ann. Real Prop. § 7-105.1(p)(1). <u>Relief from stay granted to allow ratification of foreclosure sale where Chapter 7 filed one half hour after sale was conducted</u>. *Schweiger v, MidFirst Bank*, ___F.Supp.2d ___ (Civil No. JKB-17-3255)(D.Md. March 26, 2018)(Bredar, J.). Facts: At 11:38 a.m. approximately one half hour after the foreclosure sale at 11:04 a.m. on July 20, 2017, Mr. Schweiger filed his Chapter 7 petition which case was subsequently converted to Chapter 13. Midfirst Bank filed a motion for relief from the automatic stay to conclude the ratification of the sale and secure possession of the real property, which motion was granted, and the debtor appealed.

Issue: Did the Bankruptcy Court err in granting relief from stay where the debtor has a right of redemption under § 1322(c)(1) to cure a default with respect to a lien on the debtor's principal residence until such residence is sold at a foreclosure sale conducted in accordance with applicable nonbankruptcy law notwithstanding § 1322(b)(2) allowing modification of the rights of a holder of a secured claim other than a claim secured only by a security interest in real property that is the debtor's principal residence.

Held: Stay was properly lifted. Maryland statutory law restricts a debtor's right to cure a default with respect to residential property: "The mortgagor or grantor of residential property has the right to cure the default by paying all pas t due payments, penalties, and fees and reinstate the loan up to 1 business day before the foreclosure sale occurs. Md. Code Ann. Real Prop. § 7-105.1(p)(1) (West 2017). Even if Section 1322(c)(1) extends the time up to the moment of the foreclosure sale, the debtor did not possess that right from that point forward.

"Through the right of possession until default under the mortgage, and the equity of redemption, the mortgagor is … regarded as the real and beneficial owner of the mortgaged premises to all persons except the mortgagee and those claiming under him." *Williams v. Safe Deposit & Trust Co*., 175 A. 331, 333 (Md. 1934) *quoted in Bethesda Air Rights Ltd. P'ship*, 117 B.R. 202, 208-09 (Bankr. D.Md. 1990). However, after default, the mortgagee can exercise the right of foreclosure. Long-standing Maryland law provides that "the sale of the mortgaged premises under the power of sale in the mortgage deed virtually foreclose[s] the mortgage and divest[s] all rights of redemption which had remained in the mortgagor until the sale." *Union Trust Co. v. Biggs*, 137 A. 509, 512 (Md. 1927); *Butler v. Daum*, 226 A2d 261, 264 (Md. 1967)(right of redemption is divested by valid foreclosure sale).

Citing and distinguishing Judge Messitte's affirming opinion in *Ocwen Loan Servicing, LLC v. Kameni*, Civ. No. PJM 14-877, 2014 WL 3563658 (D. Md. July 16, 2014), *aff'd*, 590 F.App'x 145 (4th Cir. 2015)(unreported), Judge Bredar noted that the *Kameni* Court found it inequitable that the debtor would not receive the benefit of the automatic stay where the bankruptcy case was filed before the foreclosure auction sale but that due to a misstep by the Bankruptcy Court in untimely not setting a hearing prior to the auction sale on the debtor's motion to extend – actually to impose – the automatic stay.

17. § 362(a). Bank has standing to file Motion to Lift Stay based on "Evidence of a Colorable Claim to Bring State Court Foreclosure Claim".*Mustafa v Pennymac*, ____F.Supp. ____ (D. Md. 2017). U.S. District Judge Affirmed Judge Caliota. The term "party in interest" is not defined by the Bankruptcy Code, and must be determined by a court "on a case-by-case basis with reference to the interest asserted and how said interest is affected by the automatic stay." A party must prove that it has standing to bring the motion – i.e., that "the plaintiff's personal stake in the lawsuit is sufficient to have a case or controversy to which the federal judicial power may extend under Article III." However, a party "need only present evidence sufficient to present a colorable claim—not every piece of evidence that would be required to prove a right to foreclose under a state law judicial foreclosure proceeding is necessary."

Pennymac is the holder in due course of a promissory note secured by a deed of trust on the Bubbling Spring property, which is indorsed in blank, meaning that the instrument "becomes payable to bearer and may be negotiated by transfer of possession alone until specially indorsed." Md. Code Ann., Com. Law § 3-205. Furthermore, Pennymac apparently has possession of the secured note on the property, clearly conveying standing and making Pennymac a "party in interest."

18. § 365(g)(1). Pre-petition settlement agreement of litigation is an executory contract that can be rejected. *In re Byung Mook Cho*, Case No. 17-22057-MMH and *In re The New Belvedere Cleaners, Inc.*, Case No. 17-22058-MMH, ___B.R. ___ (Bankr. D.Md. March 13, 2018)(Harner, J.). Chong Ok Lim and Young Jun Jun, plaintiffs, filed a lawsuit against Byung Mook Cho and The New Belvedere Cleaners, Inc., debtors, in the Circuit Court for Howard County, Maryland involving allegations of fraud and fraudulent conveyance relating to the business of New Belvedere. The parties entered into an oral settlement agreement placed on the record in the Circuit Court, which Mr. Cho later refused to sign, which the plaintiffs sought to enforce and the State Court determining to enforce the Settlement Agreement, which Mr. Cho continued to refuse to sign, and rather than defend against the plaintiffs' Show Cause Order for contempt, instead M. Cho and New Belvedere filed jointly administered Chapter 11 cases and filed a motion to reject the Settlement Agreement as an executory contract, to which motion the plaintiffs objected.

Issue: The core purpose of a Settlement Agreement was to resolve the pending legal disputes between the parties, providing certainty and finality to each affected party. In exchange for the transfer of a certain business and a cash payment, the parties agreed to dismiss the litigation between them; the non-debtor parties agreed to dismiss, and to take certain other action in, related litigation involving a third party; and the parties agreed to refrain from disparaging each other and their respective businesses.

No Res Judicata: The Circuit Court's oral ruling was not, however, incorporated into a final judgment or otherwise noted as a judgment, final or otherwise, on the docket. Pl. Ex. 9. *See also, e.g.*, Md. Rule 2-601; *Scarborough v. Altstatt*, 140 A.3d 497, 501 (Md. Ct. Spec. App. 2016) (explaining requirements for final judgment under Maryland law). Thus, Judge Sweeney's oral ruling does not technically satisfy all of the required elements of claim or issue preclusion under Maryland law. *See, e.g., Snavely v. Miller (In re Miller)*, 397 F.3d 726, 729 (9th Cir. 2005).

Rationale: The Court first determined whether a settlement agreement existed and based on the entirety of the record and the Court's observation of Mr. Cho's testimony during the November Hearing, the Court found that the Plaintiffs and Mr. Cho did in fact reach an agreement, satisfying the required elements of mutual assent, for purposes on forming an enforceable contract under Maryland law and recognized it as a valid and enforceable contract.. *See, e.g., Cochran v. Norkunas*, 919 A.2d 700, 708 (Md. 2007)("It is universally accepted that a manifestation of mutual assent is an essential prerequisite to the creation or formation of a contract.")

"A debtor may reject an executory contract if it is advantageous to the debtor to do so." *In re Auto Showcase of Laurel, LLC*, 2011 WL 4054839, at *5 (Bankr. D. Md. Sept. 12, 2011) (citing *Lubrizol Enters., Inc. v. Richmond Metal Finishers, Inc.*, 756 F.2d 1043, 1046 (4th Cir. 1985)). The critical question is whether assumption or rejection benefits the estate and the debtor's reorganization efforts rather than the potential benefits and burdens of the subject contract.

The Fourth Circuit has adopted the Countryman test. "By that test, a contract is executory if the 'obligations of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete the performance would constitute a material breach excusing the performance of the other.'" *Lubrizol*, 756 F.2d at 1045. Debtors have unperformed, material obligations under the Settlement Agreement to transfer the dry-cleaning business, make a cash payment, and not interfere in the Plaintiffs' operation of the business. The parties do not agree on the nature of the Plaintiffs' unperformed obligations that include: (i) authorizing their counsel "to file a Stipulation of Dismissal with the Circuit Court for Howard County, dismissing the Lawsuit"; and (ii) dismissing "their action pending against [Ms. Paik] in the United States Bankruptcy Court for the District of Maryland, Case No. 16-10260-DER, Adversary No. 16-00362, and note the judgment held against [Ms. Paik] in the Circuit Court for Baltimore City, Case No. 24-C-14-004134, as satisfied." Both of the foregoing obligations are triggered once the Debtors have, among other things, transferred the business and made the cash payment, neither of which has been done. The question then becomes whether these obligations—particularly the Plaintiffs' unperformed obligations—are material under Maryland law which turns, in part, on the primary purpose of the contract. The Court found that the circumstances of case law it cited and considering the purpose of a litigation settlement agreement, that the non-disparagement provision is material and serves the core purpose of the Settlement Agreement. In the bankruptcy context, several courts have held that negative obligations and obligations to refrain from taking certain actions are material and sufficient to render a contract executory when those obligations serve the underlying purpose of the contract at issue. Notably, some of these obligations to refrain are similar to not only the non-disparagement provision in the Settlement Agreement, but also to the Plaintiffs' affirmative obligation to act on certain pending litigation. For example, the court in *In re WorldCom, Inc.* found an obligation to refrain from challenging a state court consent judgment in the context of a settlement agreement material under section 365 of the Code. 343 B.R. 486, 496 (Bankr. S.D.N.Y. 2006). As that court explained, "'[e]ach performance goes to the essence of what the other party sought and expected when he entered into the … Agreement, and without it, the party will lose the benefit of the bargain that he thought he struck.'" *Id.* at 496–497 (quoting *In re Teligent, Inc.*, 268 B.R. 723, 730–731 (Bankr. S.D.N.Y. 2001)). Likewise, in *Alpha Natural Resources*, the court determined that the agreement was executory because "the Debtors have a material obligation to tender the Payment Obligations" and "[b]oth parties also have a material obligation to refrain from bringing the underlying claims that the Agreement purported to resolve.'" 555 B.R. at 525 n.8. *See also, e.g., Lubrizol*, 756 F.2d at 1045 ("The unperformed, continuing core obligations of notice and forbearance in licensing made the contract executory as to RMF."); *RCI Tech. Corp. v. Sunterra Corp. (In re Sunterra Corp.)*, 361 F.3d 257, 264 (4th Cir. 2004) (finding contract executory where each party "possessed an ongoing obligation to maintain the confidentiality of the source code of the software developed by the other"); *Roomstore*, 473 B.R. at 114 (explaining that "continuing duties of the parties" to a contract can make the contract executory); *In re Spoverlook, LLC*, 551 B.R. 481, 486–487 (Bankr. D.N.M. 2016)(finding contingent obligation to release claims to be material). Debtors asserted that the Settlement Agreement is onerous and counterproductive to the reorganization efforts and Court found that the record supports the Debtors' business judgment and their request to reject the Settlement Agreement.

Held: Considering the totality of the circumstances and the core purpose of the settlement agreement, the Court determines that the settlement agreement is an executory contract and subject to rejection in the Debtors' chapter 11 cases. Notably, because the Debtors are seeking rejection, which simply constitutes a prepetition breach of the settlement agreement under section 365(g) of the Code, the parties' respective rights may not differ significantly from those available if the Court had found the prepetition settlement agreement to be non-executory and the Debtors refused to perform – a question not before the Court.

19. § 502)(a). <u>Confirmed Chapter 13 plan was not *res judicata* as to allowability of unsecured claims filed prior to confirmation</u>. *LVNV Funding, LLC v. Harling*, 852 F.3d 367 2017 WL 1190965 (4th Cir. 2017). Chapter 13 debtors objected, postconfirmation, to admittedly stale proof of claim filed by creditor, LVNV Funding, LLC, prior to the confirmation of the debtors' plan and creditor responded by asserting that debtors' objection was barred by *res judicata* effect of their confirmed plan. The United States Bankruptcy Court for the District of South Carolina, entered an order disallowing the claim, despite confirmed Chapter 13 plan's allegedly preclusive effects, and creditor appealed directly to the Court of Appeals.

Issue: What issues were determined by the Confirmation Orders, and, specifically, did the bankruptcy court adjudicate the merits of any individual unsecured creditor's claim?

Held: Chapter 13 plans must comply with the plan content requirements set forth in § 1322, meaning the plan: (1) must be proposed in good faith; (2) must not "discriminate unfairly" between different classes of unsecured creditors; and (3) must be in the best interest of the debtor's creditors. *See, e.g., id.* §§ 1322, 1325(a)(3), (4), (7). These requirements are statutory mandates, and the bankruptcy court lacks the authority to impose additional requirements. An unsecured creditor's claim, if filed before plan confirmation, has already been "deemed allowed" under § 502(a) without any action of the bankruptcy court.

The question to resolve is whether the objections to LVNV's claims by the Debtors raise the same cause of action as before the bankruptcy court in plan confirmation. The plain language of the Bankruptcy Code and clear structure of the bankruptcy process set out by Congress confirm that they do not. There is no "prior judgment," final or otherwise, "on the merits" as to any individual unsecured creditor's claims in the Confirmation Orders. Prior orders confirming debtors' proposed Chapter 13 plans were not *res judicata* on allowability of proofs of unsecured claim filed prior to confirmation of plans.

20. § 502(a). <u>Under 11 U.S.C. § 502(a) a creditor cannot object to a proof of claim unless the trustee fails to do</u> so, In *re Goss*, 568 B.R. 525 (D. S.C. 2017)(Duncan, J .). A first priority creditor and its assignee seek approval of a settlement agreement with the Chapter 7 Trustee and the other creditors object. Prior to the settlement agreement, the Chapter 7 Trustee objected to the claims by the two creditors and filed an adversary proceeding (which were consolidated) because the claims were nearly identical. The Court ruled against the Trustee and denied the basis for the claims objection.

The Court found that the creditors' objections to the claims were unfounded because the trustee had already objected to the claim, the creditor is entitled to reasonable interest and attorneys fees, that no proof of claim is required to be filed as the lien survives the bankruptcy, and the Trustee had used business judgment. A majority of the Courts hold under 11 U.S.C. § 502(a) that "as a general rule…the chapter 7 trustee alone may interpose objections to proofs of claim" usually a creditor is not allowed to object unless the trustee fails to do so, and the court allows the creditor to stand in the trustee's place. *In re Thompson*, 965 F.2d 1136, 1147 (1st Cir. 1992); *see also In re Dominelli*, 820 F. 2d 313, 317 (9th Cir. 1987). In this case, the court held that because the trustee had objected to the claims on behalf of the estate and litigated the claims for a number of years that the creditors could not now object.

The Court also held that under 11 U.S.C. §506(b) secured creditors [are entitled] to accrue post-petition and interest and reasonable attorney's fees as provided for in the note up to the value of the collateral." *See United Sav. Ass'n of Tx. v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 372, 108, S. Ct. 626, 98 L.ed.2d 740 (1988). The Court further held that the Trustee acted with business judgment as to the settlement agreement, as the proceeds of the estate were insufficient to satisfy all the creditors' claims, but the agreement at least satisfied the creditor and the assignee's claims.

21. §§ 502, 558. <u>Filing of a proof of claim that is obviously time barred is not a false, deceptive, misleading, unfair, or unconscionable debt collection practice within the meaning of the Fair Debt Collection Practices Act</u>. *Midland Funding, LLC v. Johnson*, ___ U.S.__, 137 S. Ct. 1407, 197 L. Ed.2d 790, 85 U.S.L.W. 4239 (May 15, 2017). Petitioner Midland Funding filed a proof of claim in respondent Johnson's Chapter 13 bankruptcy case, asserting that Johnson owed Midland credit-card debt and noting that the last time any charge appeared on Johnson's account was more than 10 years ago. The relevant statute of limitations under Alabama law is six years. Johnson objected to the claim, and the Bankruptcy Court disallowed it. Johnson then sued Midland, claiming that its filing a proof of claim on an obviously time-barred debt was "false," "deceptive," "misleading," "unconscionable," and "unfair" within the meaning of the Fair Debt Collection Practices Act, 15 U. S. C. §§ 1692e, 1692f. The District Court held that the Act did not apply and dismissed the suit. The Eleventh Circuit reversed. *Held*: The filing of a proof of claim that is obviously time barred is not a false, deceptive, misleading, unfair, or unconscionable debt collection practice within the meaning of the Fair Debt Collection Practices Act.

(a) Midland's proof of claim was not "false, deceptive, or misleading." The Bankruptcy Code defines the term "claim" as a "right to payment," 11 U. S. C. §101(5)(A), and state law usually determines whether a person has such a right, see *Travelers Casualty & Surety Co. of America* v. *Pacific Gas & Elec. Co.*, 549 U. S. 443, 450–451. The relevant Alabama law provides that a creditor has the right to payment of a debt even after the limitations period has expired. Johnson argues that the word "claim" means "enforceable claim." But the word "enforceable" does not appear in the Code's definition, and Johnson's interpretation is difficult to square with Congress's intent "to adopt the broadest available definition of 'claim,' " *Johnson* v. *Home State Bank*, 501 U. S. 78, 83. Other Code provisions are still more difficult to square with Johnson's interpretation. For example, §502(b)(1) says that if a "claim" is "unenforceable" it will be disallowed, not that it is not a "claim." Other provisions make clear that the running of a limitations period constitutes an affirmative defense that a debtor is to assert after the creditor makes a "claim." §§ 502, 558. The law has long treated unenforceability of a claim (due to the expiration of the limitations period) as an affirmative defense, and there is nothing misleading or deceptive in the filing of a proof of claim that follows the Code's similar system. Indeed, to determine whether a statement is misleading normally "requires consideration of the legal sophistication of its audience," *Bates* v. *State Bar of Ariz.*, 433 U. S. 350, 383, n. 37, which in a Chapter 13 bankruptcy includes a trustee who is likely to understand that a proof of claim is a statement by the creditor that he or she has a right to payment that is subject to disallowance, including disallowance based on untimeliness.

(b) Several circumstances, taken together, lead to the conclusion that Midland's proof of claim was not "unfair" or "unconscionable" within the terms of the Fair Debt Collection Practices Act. Johnson points out that several lower courts have found or indicated that, in the context of an ordinary civil action to collect a debt, a debt collector's assertion of a claim known to be time barred is "unfair." But those courts rested their conclusions upon their concern that a consumer might unwittingly repay a time-barred debt. Such considerations have significantly diminished force in a Chapter 13 bankruptcy, where the consumer initiates the proceeding, see §§ 301, 303(a); where a knowledgeable trustee is available, see §1302(a); where procedural rules more directly guide the evaluation of claims, see Fed. Rule Bkrtcy. Proc. 3001(c)(3)(A); and where the claims resolution process is "generally a more streamlined and less unnerving prospect for a debtor than facing a collection lawsuit," *In re Gatewood*, 533 B. R. 905, 909. Also unpersuasive is Johnson's argument that there is no legitimate reason for allowing a practice like this one that risks harm to the debtor. The bankruptcy system treats untimeliness as an affirmative defense and normally gives the trustee the burden of investigating claims to see if one is stale. And, at least on occasion, the assertion of even a stale claim can benefit the debtor. More importantly, a change in the simple affirmative-defense approach, carving out an exception, would require defining the exception's boundaries. Does it apply only where a claim's staleness appears on the face of the proof of claim? Does it apply to other affirmative defenses or only to the running of the limitations period? Neither the Fair Debt Collection Practices Act nor the Bankruptcy Cite as: 581 U. S. ____ (2017),

Code indicates that Congress intended an ordinary civil court applying the Act to determine answers to such bankruptcy-related questions. The Act and the Code have different purposes and structural features. The Act seeks to help consumers by preventing consumer
bankruptcies in the first place, while the Code creates and maintains the "delicate balance of a debtor's protections and obligations," *Kokoszka* v. *Belford*, 417 U. S. 642, 651. Applying the Act in this context would upset that "delicate balance." Contrary to the argument of the United States, the promulgation of Bankruptcy Rule 9011 did not resolve this issue. 823 F. 3d 1334, reversed. BREYER, J., delivered the opinion of the Court.

22. §§ 502(b), 506(a), 1322(b)(2), and 1322(c)(2). Secured mortgage loan against residence on which final payment came due prior to final payment on five-year Chapter 13 Plan could be modified to be paid over the five-year plan but could not be bifurcated into secured and unsecured portions. *Hurlburt v. Black (In re Hurlburt)*, 572 B.R. 160, 2017 WL 2483724 (Bankr. E.D.N.C. 2017). Seller, Juliet Black, who had provided financing for Chapter 13 debtor's prepetition purchase of home, and who held mortgage for payment of remaining balance on which final payment was due prior to debtor's final payment under plan, objected to confirmation of proposed plan, which purported to cram seller's claim down to value of real property securing it. Parties cross-moved for summary judgment. Held: Bankruptcy Code allows Chapter 13 plan to provide for payment of residential mortgagee's claim as modified in any case in which last payment will become due on mortgage loan prior to debtor's final payment under plan enabled debtor to modify his "payments" to seller, by stretching them out over life of plan, but did not permit debtor to modify seller's "claim" itself, by bifurcating it into secured and unsecured claim, but debtor was barred from plan that proposed to pay nothing on remaining balance of mortgage note that exceeded the value of the collateral and was prohibited from modifying seller's rights to that extent. Seller's motion granted; debtor's cross-motion denied.

23. §§ 506(a)(2), 722. Carmax Appraisal Offer is Not "Replacement Value" of Car under 11 U.S.C. § 506 for Redemption. *In re Aiken*, ___B.R. ___, 2017 WL 1628866 (Bankr. D. DC 2017). The exhibit upon which the debtor relies to determine the amount of the allowed secured claim is an Appraisal Offer by CarMax that lists the *trade-in value* of the car, appearing to state what CarMax is willing to pay for the car, which the Court declined to accept as the "replacement value" necessary for redemption under § 722.

24. § 506(b). *In re Stelma Properties LLC*, 2017 WL 2983876 (E.D.N.C. 2017)(Joseph N Callaway, United States District Judge). Court disallowed claim filed by BB&T to recover post petition interest, fees and costs pursuant to 11 U.S.C. 506(b) under terms of a settlement agreement incorporated in a confirmed Chapter 11 plan. The debtor filed a Chapter 11 case on 01/22/16. The debtor owned and operated two (2) fitness centers and BB&T was their largest creditor. A mediation was set to resolve BB&T's claim. The parties participated in the mediated conference and reached a settlement agreement which was incorporated in the confirmed

Chapter 11 plan. Modified notes were executed reflecting the new terms and BB&T's entire claim was allowed in the plan and deemed secured.

Following confirmation, BB&T filed an application for asserting a right to recover post-petition attorneys' fees and costs directly from the Debtor, pursuant to 11 U.S.C. § 506(b), on the basis that its claims were oversecured as of the petition date and throughout the case. They also asserted that recovery of post-petition fees and expenses is a right that cannot be waived under Section 506(b).

The Court held that a confirmed Chapter 11 plan operates as a binding contract between the debtor and its creditors regardless of whether the creditors vote for the plan or reject it. In this case BB&T's rights were modified by the settlement agreement incorporated in the confirmed plan. Even though the confirmed plan contains no provisions for the requested fees and expenses, the Court will enforce it. BB&T cannot unilaterally add terms to the agreement or seek to alter its treatment under the confirmed plan. The fact that BB&T's status is oversecured is immaterial.

25. § 506(d); 1322(b)(2). Proof of Claim is not required for avoidance of wholly unsecured lien. *Burkhart v. Grigsby, Trustee, and Community Bank of Tri-County,* ___F.3d ___ (4th Cir. March 29, 2018). Facts: Chapter 13 debtors' residence valued at $435,000 was encumbered by mortgage and judgment liens in the following priority: (i) $609,500 by Chase Bank; (ii) $49.411.80 by Community Bank of Tri-County; (iii) $78,289.11 by Community Bank of Tri-County; and (iv) $105,995.75 and by PNC Bank. Chase and PNC filed proofs of claim, but Community Bank of Tri-County did not. Debtors filed an adversary proceeding to avoid Community Bank of Tri-County's two judgment liens. Bankruptcy Court denied the relief under section 506(d)(2) which prohibits lien avoidance where no proof of claim has been filed, and he District Court affirmed concluding that in Chapter 12 a lien stripoff could not occur without first applying section 506(d)(2) disagreeing with the debtors' contention that lien avoidance could be achieved under section 1322(b)(2)alone, concluding that it could not turn to section 1322(b)(2) until after the claim had been valued under section 506(a). The Fourth Circuit reversed, concluding that the filing of a proof of claim was not required for a determination under section 1322(b)(2) that the claim was without value.

Held: Addressing first the role of section 506(d) in a Chapter 13 lien stripoff and then whether Tri-County held an unsecured claim under section 1322(b)(2). Under *Bank of America v. Caulkett*, 135 S.Ct. at 1999, 506(d)'s function is voiding a lien whenever the claim secured by the lien itself has not been allowed. The Fourth Circuit observed that section 1322(b)(2) modifies the *rights of the holders* of secured clams and not the claims themselves. The Court further observed that the bankruptcy code routinely modifies the rights of non-participating creditors. Debtors look to section 506(a)for a judicial valuation of the collateral to determine the status of the banks' claim as secured. The Court also noted that amendments to the bankruptcy rules now permit a Chapter 13 debtor to request a valuation of a secured claim directly in a Plan. The Court concluded that he debtor's ability to stripoff an underwater lien stems from section 1322(b)(2) and not from section 506(d). A proof of claim is not required for a determination of the status of the lien under section 1322(b)(2).

26. § 507(a)(8)(C). IRS permitted to collect interest post-confirmation Chapter 13 discharge on federal withholding taxes. *In re Thaxton*, 2017 WL 2371121 (Slip Copy)(Bankr. S.D.W.Va. 2017).Pending is Debtors' Request to Determine if the Internal Revenue Service May Collect any Interest on the Responsible Officer Assessment of 941 Taxes Post–Discharge.. On June 17, 2009, Gregory Ward Thaxton and Pamela Gay Thaxton petitioned for relief under Chapter 13 of the Bankruptcy. Mr. Thaxton owned and operated two construction remodeling businesses and the IRS filed a proof of clam for withholding taxes in his Chapter 13 case. The Confirmation Order provides for payment in full of the Service's $34,797.75 allowed priority tax claim. Trustee filed Final Report advising that IRS' claim was paid in full. IRS threatened to levy their assets and the

Thaxtons moved for a determination of whether the Service may collect interest on the responsible officer assessment of 941 taxes post-discharge.

Held: Postpetition interest accrues outside the Chapter 13 plan and the debtor remains personally liable therefor post discharge. *See* 11 U.S.C.A. § 1328(a)(2) (West 2005); *see, e.g., Bruning v. United States*, 376 U.S. 358, 361 (1964); *In re Kirkland*, 600 F.3d 310, 316 (4th Cir. 2010). Court found that unlike in *In re Espinosa*, 599 U.S. 260, 264 (2007), the debtors' Plan did not propose any alternative treatment of the IRS' Claim No. 8. The debtors' plan made no mention of their intent to pay only the principal of the claim. They also did not tender a clear, open and explicit statement that interest accrued post-petition would be discharged. Further, the predecessor judicial officer's stray observation that the Chapter 13 plan treats the Service's claim as "fully paid" does not approach the type of an express statement of discharge that would suffice under *In re Espinosa*.

27. § 523. The Court is to follow the principles of statutory construction in determining whether the Bankruptcy Code and another conflicting federal law can coexist. *In re Kyle*, 566 B.R. 151 (E.D. N.C. 2017). A Chapter 7 debtor seeks to discharge a debt to repay an Army reenlistment bonus. 11 U.S.C. §523 lists the debts that are not dischargeable in a Chapter 7 Bankruptcy. A separate federal statute addressed how to address obligations owed to the United States. The Court followed the principles of statutory construction to see if the seemingly conflicting Bankruptcy Code and federal law could coexist, "while giving effect to each statute, the later statute should be construed as 'as implicitly amending an earlier, more general statute.'" *In re Fagan*, 559 B.R. 718 (Bankr. E.D. Cal 2016). The Court held that the debt was not dischargeable as the federal statute was effective in excepting obligations to repay a military debt. The Court found that the Bankruptcy Code and the federal statute were not irreconcilable, and both statutes were effective. The Court reasoned if 11 U.S.C. § 523 was an exhaustive list of nondischargeable debts, it would render the federal statute meaningless.

28. § 523(a)(2)(A). Sole owner of corporate creditor has standing to bring adversary proceeding to except from discharge claim that arose from loans extended by corporate creditor that were instigated by debtor's intentional misrepresentations. *Fridman v. Rixham (In re Rixham)*, 578 B.R. 287, 2017 WL 5943378 (D. Md. 2017)(Gordon, J.).

Issue: May Plaintiff/Judgment Creditor, Mr. Fridman, the individual 100% owner of the corporate creditor, Golden Gate Enterprises, Inc. (Golden Gate), may personally prosecute an 11 U.S.C. § 523(a) exception to discharge claim that arises from debts that were instigated by the Debtor's intentional misrepresentations but were technically extended by Golden Gate.

Facts: In 2006, Mr. Fridman was the sole shareholder and President of Golden Gate. Ms. Rixham was the President and a shareholder of Houston's Custom Home Design, Inc. (Houston's). Houston's purported to be a home improvement contractor, capable of performing professional and expert services of that nature. Mr. Fridman wanted a backyard deck constructed for his primary residence. He contacted Houston's and thereafter met with Michael Ledwith and Steven Becker, Houston's main contractors, and subsequently met Ms. Rixham at Houston's showroom. At some point in 2007, at a meeting at Mr. Fridman's home, the question was raised by Mr. Ledwith and Ms. Rixham as to whether Mr. Fridman might be willing to invest, and/or become a partner, in Houston's.

According to Mr. Fridman, Ms. Rixham gave him a sales pitch that promoted and extolled Houston's financial growth and well-being, stressing the fact that the company was still licensed and bonded – a fact important to Mr. Fridman who "flipped" houses because it enabled him to recover money from the Home Improvement Commission if a contractor he hired did to complete its renovation work properly. Ms. Rixham explained that Houston's rapid growth and the attendant influx of business mandated a cash investment to keep up with its projected customer demands. Nevertheless, Mr. Fridman ultimately declined the investment opportunity and instead offered to make a loan to Houston's which Houston's accepted. To make the loan, Mr.

Fridman drew from his personal home equity line of credit secured by his residence and transferred the proceeds to Golden Gate's bank account. He then drew a $75,000 check from Golden Gate's account and that was the check made payable to Houston's (Golden Gate Loan). The Golden Gate Loan check was dated August 14, 2007. On the same date, a Front Yard Project agreement (FYP Agreement) was drawn-up and signed on behalf of Houston's and Golden Gate issued an additional deposit check for $20,000. Ms. Rixham used these funds to repay a loan which was secured by an Indemnity Deed of Trust against her home, and Houston's never completed the Front Yard Project and the Golden Gate Loan was never repaid.

The Golden Gate Loan was not immediately memorialized with either a promissory note or other loan documentation. Mr. Fridman testified at trial in the Bankruptcy Court that he thought he should have some document supporting the fact that he did loan $75,000 to whoever—Lisa Rixham, Houston's, Michael Ledwith, all of them. He further testified that it was his money – the he drew on his home equity line of credit to obtain the funds the he deposited into Golden Gate that were loaned but that he did not recall why he did not include Ms. Rixham personally on the promissory note which was signed by Ms. Rixham as President of Houston's but not in her personal capacity.

On January 4, 2010, the Circuit Court of Maryland for Baltimore County entered a final judgment against Houston's, Mr. Ledwith, and Ms. Rixham by default on Mr. Fridman's complaint in which two counts alleged Ms. Rixham committed fraud by inducing the $75,000 loan. None of the three Defendants answered or otherwise pled to the Amended Complaint. The State Court defendants immediately moved to revise the State Court Judgment, but the motion was denied on March 11, 2010. The State Court Judgment regarding Counts I and II against Ms. Rixham was revised upwards to a total of $96,094.68. The State Court Judgment on Counts III and IV was in the amount of $28,148. Where a defendant has purposefully participated in a case—as in *Reed v. Reed (In re Reed)*, 2013 WL 6497926 (Bankr. D. Md. Dec. 11, 2013), *aff'd*, 2014 WL 4926187 (D. Md. Sept. 30, 2014), *Ramsey v. Bernstein (In re Bernstein)*, 197 B.R. 475 (Bankr. D. Md. 1996), and *Nestorio v. Assocs. Commer. Corp. (In re Nestorio*), 250 B.R. 50 (D. Md. 2000), *aff'd*, 5 Fed.Appx. 283 (4th Cir. 2001)—but then abandons the litigation, it may be proper to conclude that she had a full and fair opportunity to litigate on the merits and hence is precluded by adverse findings. But Ms. Rixham did not participate at all in the liability phase of the State Court Case. Accordingly, this Court held that the State Court Judgment did not have preclusive effect as to liability issues, especially issues of fraud.

At trial in the Bankruptcy Court Mr. Fridman testified that four misrepresentations were made to him by Ms. Rixham: the company was not licensed and I was lied about it (sic); the company was not in good financial standing and I was lied about it (sic); the company couldn't complete the project and I was lied about it (sic); and they had no intention to repay my personal loan and I was lied about it (sic). And I was lied about all these facts (sic) by Lisa Rixham.

The Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. § 1334(b) and U.S. District Court Local Rule 402 and is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I). The parties have consented to the entry of a final judgment on the merits which will not offend the strictures of *Stern v. Marshall*, 564 U.S. 462, 131 S.Ct. 2594, 180 L.Ed.2d 475 (2011) and is in compliance with *Wellness Int'l Network, Ltd. v. Sharif*, ____U.S. ____, 135 S.Ct. 1932, 191 L.Ed.2d 911 (2015) (holding that parties may knowingly and voluntarily consent to adjudication of claim by Bankruptcy Court). Venue is proper under 28 U.S.C. § 1409(a).

Generally speaking, the exceptions to discharge enumerated in Section 523 are construed narrowly in order to "protect the purpose of [the Bankruptcy Code of] providing debtors a fresh start." *Fleming v. Gordon (In re Gordon)*, 491 B.R. 691, 697 (Bankr. D. Md. 2013). In order to prevail in a nondischargeability action under § 523(a)(2)(A), the plaintiff must satisfy five elements, *Nunnery v. Rountree (In re Rountree)*, 478 F.3d 215, 218 (4th Cir. 2007); *Dubois v. Lindsley (In re Lindsley)*, 388 B.R. 661, 668 (Bankr. D. Md. 2008): (1) that the defendant made a representation, (2) that the defendant knew at the time the representation was made that it was false, (3) that the defendant made the representation with the intent and purpose of deceiving the plaintiff,

(4) that the plaintiff justifiably relied upon the false representation, and (5) that the plaintiff suffered damages as a proximate result of the representation. *Lindsley*, 388 B.R. at 668. The burden of proof is on the creditor to establish by a preponderance of the evidence that a debt is not dischargeable. *Kubota Tractor Corp. v. Strack (In re Strack)*, 524 F.3d 493, 497 (4th Cir. 2008)(citing *Grogan v. Garner*, 498 U.S. 279, 291, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991)); *Colombo Bank v. Sharp*, 477 B.R. 613, 619 (D. Md. 2008).

A misrepresentation constitutes any words or conduct, which produce a false or misleading impression of fact in the mind of another. *Kendrick v. Pleasants (In re Pleasants*), 231 B.R. 893, 897 (Bankr. E.D. Va. 1999), *aff'd*, 219 F.3d 372, 375 (4th Cir. 2000)(rejecting the argument that Section 523(a)(2)(A)'s "obtained by" language requires that some portion of a creditor's claim must have been directly transferred from the creditor to the debtor). Further, "[a]n omission may constitute a misrepresentation where the circumstances are such that the omission creates a false impression." *Ortman v. Reinheimer (In re Reinheimer)*, 509 B.R. 12, 19 (Bankr. D. Md. 2014); *Gordon*, 491 B.R. at 701. The debtor's intent shall be determined subjectively with the totality of the relevant circumstances taken into account. *Rembert v. AT & T Universal Card Servs. (In re Rembert)*, 141 F.3d 277, 281 (6th Cir. 1998); *Pleasants*, 231 B.R. at 898. The standard of reliance under Section 523(a)(2)(A) is the lesser one of justifiable (as opposed to reasonable) and that element is also to be assessed in accordance with the overall circumstances of the case. *Field v. Mans*, 516 U.S. 59, 73, 116 S.Ct. 437, 445, 133 L.Ed.2d 351 (1995); *Colombo Bank v. Sharp (In re Sharp)*, 340 Fed.Appx. 899, 906, 2009 WL 2480841, at *5 (4th Cir. 2009). *See also*, *Husky v. Ritz*, ___U.S. ___, 136 S.Ct. 1581, 194 L.Ed.2d 655 (2016), where the Supreme Court enhanced its expansive view of the fraud exception, wherein the Court made it clear that Section 523(a)(2)(A)'s use of the term "actual fraud" is broad enough to include fraudulent conveyances whether the actual "debt" sued upon was obtained by the transfer or not.

The Court concluded that Mr. Fridman can enforce the exception to discharge claim notwithstanding his use of Golden Gate to make the loan. Given the transactional history, his only significant roadblock is the fact that he purposefully and voluntarily chose to funnel the payments through his wholly-owned corporation, Golden Gate. Hence the question becomes whether the word "debt" in Section 523(c) should be interpreted expansively enough in this context to include the injury inflicted by Ms. Rixham's participation in the underlying scheme. The Court has wrestled with the pros and cons but in the end concludes that (a) Mr. Fridman was personally defrauded, (b) Ms. Rixham took his money to be used for her own personal benefit, and (c) the debt therefore must be excepted from her discharge as Mr. Fridman bore the real injury. The general rule is that a corporation is an entity, separate and distinct from its shareholders. *U.S. v. Brager Bldg. & Land Corp.*, 124 F.2d 349, 350 (4th Cir. 1941)(citing *Dalton v. Bowers*, 287 U.S. 404, 53 S.Ct. 205, 77 L.Ed. 389 (1932)); *Superior Outdoor Signs, Inc. v. Eller Media Co.*, 150 Md.App. 479, 822 A.2d 478, 490 (Md. Ct. Spec. App. 2003). Thus, the rights and claims of a corporation belong to the corporation and not to its shareholders. *Shenker v. Laureate Educ., Inc.*, 411 Md. 317, 343, 983 A.2d 408 (Md. 2009); *see also Marchman v. NCNB Texas Nat. Bank*, 120 N.M. 74, 898 P.2d 709, 716 (1995). Although corporate shareholders may suffer indirect harm, the right of recovery belongs exclusively to the corporation. *Shenker*, 411 Md. at 343, 983 A.2d 408 (citing *Waller v. Waller*, 187 Md. 185, 49 A.2d 449, 452 (1946)); *NCNB Nat. Bank of N. Carolina v. Tiller*, 814 F.2d 931, 937 (4th Cir. 1987), *overruled on other grounds by Busby v. Crown Supply, Inc.*, 896 F.2d 833 (4th Cir. 1990) (holding that "only the corporation may vindicate its rights"). Yet, notwithstanding that settled hornbook law, the Court would have to reject reality to conclude that Mr. Fridman was not personally and directly injured by Ms. Rixham's fraudulent conduct. Stated differently, it's not as if the evidence showed that Golden Gate had its own separate assets and that those assets were used to make the subject payments. Therefore, the corporate separateness should not be permitted to shield Defendant from individual liability. *See e.g., Wilcoxon Construction, Inc. v. Woodall (In re Woodall)*, 177 B.R. 517, 522 (Bankr. D. Md. 1995). While *Woodall* holds that a debtor may not hide her fraud behind her own defensive, corporate shield, the Court concluded that the same logic should apply here in the reverse to negate Ms. Rixham's offensive deployment of the technical transactional framework to the same improper end.

The Court found that two essential affirmative misrepresentations attributed to Ms. Rixham were in fact made by her: (1) that the purpose of the $75,000 loan was to help Houston's manage the large influx of business, and (2) that Houston's was bonded, licensed and able to handle the projects proposed by Mr. Fridman. *See Gem Ravioli, Inc. v. Creta (In re Creta)*, 271 B.R. 214, 220 (1st Cir. BAP 2002)(holding that misrepresentations regarding a professional license go to very essence of an agreement, *i.e.*, “the reliance by the contracting party that the debtor has the requisite knowledge”); *Pleasants*, 231 B.R. 893 (holding that misrepresentation regarding professional license is sufficient under § 523(a)(2)(A) because professional licenses carry with them degree of presumed competence). The most important misrepresentation should be added to these, *i.e.*, Ms. Rixham's silence as to the existence of the Caplan Loan, the IDOT that secured it and her intention to use the proceeds of the Golden Gate Loan to pay the Caplan Loan off and secure the IDOT's release. There were three key misrepresentations in this case—two overt and one silent—and the Court finds that Ms. Rixham to be the responsible party for each one. The Court further found that Ms. Rixham knew at the time the representations were made that they were false, that she made the misrepresentations with the intent and purpose of deceiving Mr. Fridman, and that Mr. Fridman's reliance justifiable.

Held: The word “debt” should be interpreted expansively enough in this context to include this entire transaction such that the Plaintiff, Mr. Fridman, has sufficient standing to enforce the prescribed remedy for the fraudulent conduct. Accordingly the debt was excepted from the Debtor's discharge.

29. § 523(a)(2),523(a)(4). Debt arising from real estate transaction did not fall within dischargeability exception for fraud. *Conestoga Title Insurance Company v. Rebecca Patchell and Lowell McCoy (In re Patchell),* 569 B.R. 635, 2017WL 2743236 (Bankr. D.Md. 2017)(Gordon, J.). Title insurance company brought adversary proceeding against Chapter 7 debtor and non-debtor guarantor, alleging debtor committed fraud with respect to settlement of the sale of her personal real estate such that her potential liability to company should be excepted from her discharge, and non-debtor could be held liable on the basis of his guaranty. Defendants moved for judgment of dismissal.

Facts: On August 31, 2005, Conestoga Elkton entered into an Agency Agreement with Conestoga Lancaster which appointed Conestoga Elkton as Conestoga Lancaster's agent, and granted Conestoga Elkton the authority to write title insurance for real estate transactions, subject to the Agreement's terms. Ms. Patchell signed the Agreement on behalf of Conestoga Elkton and Mr. McCoy witnessed her signature. The same day, Ms. Patchell and Mr. McCoy both signed the Guaranty in favor of Conestoga Lancaster.

Ms. Patchell was selling realty she owned; the first lien to NBRS would be paid off and the second lien to Cecil Bank would be released from that realty and an IDOT recorded against different real estate collateral. Ultimately, Cecil Bank neither provided the promised release nor accepted Cherokee as substitute collateral. Ms. Patchell filed her Chapter 7 Petition on April 9, 2015 and Conestoga Title filed its Adversary Proceeding on May 13, 2015.

Under *Bullock v BankChampaign, N.A.,* 569 U.S. 267, 133 S.Ct. 1754, 1759–60, 185 L.Ed.2d 922 (2013) proof of an intentional wrong is required for nondischargeability under Section 523(a)(4). In Maryland the general statute of limitations for a civil action, including an action on a simple contract, is three years from the date the action accrues. Md. Cts. & Jud. Proc. Code Ann. § 5–101; *McMahan v. Dorchester Fertilizer Co.*, 184 Md. 155, 157–158, 40 A.2d 313 (1944). However, relying upon the sealed Agreement (and not the Guaranty) as the primary document that governs Mr. McCoy's rights, Conestoga Lancaster looks to Md. Cts. Jud. Proc. Code Ann. § 5–102(a)(5),

Held: (i) debt arising from real estate transaction did not fall within dischargeability exception for fraud; (ii) debt arising from real estate transaction did not fall within dischargeability exception for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny; (iii) under Maryland law, limitations period on company's claim against non-debtor guarantor of payment and performance for real estate transaction began to run on day of settlement; and (iv) under Maryland law, general three year limitations period applied, rather than extended 12 year limitations period, to company's claim against non-debtor guarantor of payment and performance for real estate transaction.

30. § 523(a)(2)(A). <u>Partnership not proven regarding sole proprietorship business</u>. *Chesapeake Employers Insurance Company v. Flores (In re Flores)*, 576 B.R. 505, 2017 WL 4127779 (Bankr. D.Md. 2017)(Rice, J.). Claimant, a government entity that had issued a workers' compensation insurance policy to Chapter 7 debtor's wife for her roofing and home improvement business and subsequently obtained a state-court judgment against her and the company for unpaid premiums in the amount of $338,776, filed adversary complaint against debtor, asserting that debtor was a partner in the business, that debtor was liable for the amount of the judgment plus punitive damages of $500,000, and that the debt was excepted from discharge. Following trial, in denying the requested relief the Court held that (i) claimant failed to establish that, under Maryland law, the business was a partnership in fact between debtor and his wife; (ii) there was no partnership by estoppel; (iii) debtor was not liable to claimant on grounds of misrepresentation or concealment under the discharge exception for debts obtained by false pretenses, a false representation, or actual fraud; (iv) claimant's claim did not fall within the discharge exception for debts obtained by false financial statements; and (v) debtor was not a participant in a civil conspiracy to defraud claimant, even assuming that claimant sustained actual injury by reason of wife's overt tortious actions and that her conduct was such that its claims against her would be nondischargeable on grounds of misrepresentation, concealment, fraud, and use of false written statements of financial condition.

In August of 2014, Chesapeake Employers Insurance Company ("CEIC") filed a complaint against Flores, Jennifer L. Bishoff, and others in the Circuit Court for Baltimore County, Maryland. On March 21, 2016, the Circuit Court granted CEIC's motion for summary judgment against Bishoff. As a result, the Circuit Court entered judgment in favor of CEIC and against Bishoff and Citywide in the amount of $338,776.

CEIC filed a seven count complaint in the Bankruptcy Court against Flores in which CEIC asserts that Flores is liable to CEIC for the amount of that judgment plus punitive damages of $500,000 and also that his liability to CEIC is excepted from discharge under 11 U.S.C. § 523(a)(2). Count I of the complaint seeks a declaratory judgment that Flores and Bishoff agreed to operate a roofing and home improvement business as a partnership and that Flores is thus liable for the debts of that business. Counts II and III seek a determination under 11 U.S.C. § 523(a)(2)(A) that the alleged partnership's liabilities to CEIC are not dischargeable by reason of misrepresentation or fraudulent concealment, either by imputation of Bishoff's wrongful actions to Flores as a matter of partnership law, or by reason of the direct individual actions of Flores. Similarly, Count IV seeks a determination under 11 U.S.C. § 523(a)(2)(B) that such liabilities are not dischargeable by reason of use of a false written statement by imputation or by the direct individual actions of Flores. Counts V, VI, and VII seek a determination of nondischargeability on grounds parallel to Counts II, III, and IV, but based upon the assertion that the liability of Flores to CEIC stems from his participation with Bishoff in a civil conspiracy to defraud CEIC. Judge Rice concluded that (i) the business in question was not a partnership (either in fact or by estoppel), but was a sole proprietorship owned by Bishoff, (ii) Flores is not liable to CEIC by reason of any of his individual actions, and (iii) Flores was not a participant in a civil conspiracy. Thus, the relief sought by the plaintiff must be denied.

Facts: Bishoff formed a roofing and home improvement business in 2008 that traded as Citywide Construction, Citywide Home Improvement, and/or other similar names (collectively, "Citywide"). On or about September 4, 2008, Bishoff submitted to CEIC an application signed solely by Bishoff for workers' compensation insurance through an insurance agent known as Rick Gerety & Associates, Inc., and CEIC's policy and Bishoff's application both referred to Bishoff as a "sole proprietor." In July, 2009, July, 2010, and thereafter, CEIC sent Gerety renewal papers for the policy that indicated that Bishoff was the insured and that she was the "owner" again indicating that Bishoff was a "sole proprietor." No evidence was presented that indicates CEIC issued or renewed insurance for Citywide in reliance on the assertion now made that Citywide was a partnership rather than a sole proprietorship, and that Flores was one of the partners in such a partnership. No written partnership agreement was introduced into evidence. Nothing in the evidence presented suggests that Bishoff and Flores entered into a written partnership agreement with respect to the Citywide business. Likewise, no direct evidence was presented of any such oral partnership agreement. Thus, CEIC relies upon the totality of the facts and circumstances as a basis upon which the court could infer the existence of an oral partnership agreement or of a partnership by estoppel. Flores was and is married to Bishoff. According to both Bishoff and Flores, their marriage relationship deteriorated as the financial problems of Citywide worsened. As a result they separated in November of 2014. Prior to formation of Citywide in 2008, Bishoff had no experience in the roofing or home repair business, and had never owned or operated a business.

CEIC called three witnesses, Brian T. Grant, Timothy G. Taylor, and Christopher Toleman, in an effort to provide independent corroboration for its assertion that Flores held himself out, and was understood in the industry, to be the owner of or a partner in Citywide. The Court found that that effort was not particularly convincing and tended to support a conclusion opposite to the one intended by CEIC establishing only that Flores was an active manager of the field operations for Citywide who interacted on a daily basis with general contractors dealing with Citywide.

Held: The question of whether Citywide was a partnership is a matter of Maryland law. The existence of a written agreement is not a prerequisite under Maryland law for the creation of a partnership. As the Court of Appeals of Maryland has said "Although [the plaintiff] relies upon an oral agreement to establish the partnership, a written agreement is not necessary where the acts and circumstances of the parties indicate an intention to create a partnership. Similarly, where there is no express agreement, whether or not a partnership exists is to be gathered from the intention of the parties revealed by their conduct and the circumstances surrounding their relationship and the transactions between them." *Presutti v. Presutti*, 270 Md. 193, 197–98, 310 A.2d 791 (1973) (citations omitted). See also, *Gosman v. Gosman*, 271 Md. 514, 519, 318 A.2d 821 (1974)("There was, of course no written agreement, and none is required 'where the circumstances and acts of the parties indicate an intention to create a partnership.'") (quoting *M. Lit., Inc. v. Berger*, 225 Md. 241, 248, 170 A.2d 303 (1961)). In *Berger*, the court reiterated the longstanding Maryland rule that the "burden of proving a partnership is on the one who alleges its existence." 225 Md. at 247, 170 A.2d 303 (citing *Collier v. Collier*, 182 Md. 82, 32 A.2d 469 (1943)). These well-settled propositions were summarized and explained at length as follows in an earlier Court of Appeals of Maryland decision cited in *Presutti*:

> The applicable law is clear and well established. The existence of a partnership will not be presumed, but must be proved ... with the burden of proving such existence resting upon the party having the affirmative of that issue. Between the parties, the existence of a partnership, *vel non*, is a matter of the parties' intention proved by their expressed agreement, or inferred from their acts and conduct. And this intention is to be determined as it is disclosed by all of the transactions between the parties. The receipt by a person of a share of the profits of a partnership business (with certain exceptions noted [in what is now Md. Code Ann., Corps. & Ass'ns § 9A–202(d)]) is prima facie evidence that he is a partner in the business. The probative force of the sharing of profits is not conclusive on the question of the existence of a partnership, but may be rebutted by a showing of fact to the contrary.

Miller v. Salabes, 225 Md. 53, 55–56, 169 A.2d 671 (1961) (citations omitted). Applying these principles of partnership law to the evidence presented at trial, Judge Rice concluded that CEIC did not meet its burden to establish by a preponderance of the evidence that the Citywide business was in fact a partnership between Flores and Bishoff. The fact that Bishoff may have used her Citywide bank account to pay business and household expenses that benefited Flores does not dictate a different conclusion.

The determination that Citywide was not a partnership in fact does not dispose entirely of the question of the liability, if any, of Flores to CEIC under partnership law. It has long been the law in Maryland that liability to third parties may arise by reason of partnership by estoppel. As the Court of Appeals of Maryland has observed,

> That there may be a partnership by estoppel as to third persons, even though the parties are not partners *inter se*, is well recognized by our cases.... Under these cases, the ground of liability of a person as a partner, who is not so in fact, is that he has held himself out to the world as such, or has permitted others to do so and, by reason thereof, is estopped from denying that he is a partner as against those who have, in good faith, dealt with the firm or with him as a member of it.

Klein v. Weiss, 284 Md. 36, 67, 395 A.2d 126 (1978). Maryland Revised Uniform Partnership Act, Md. Code Ann., Corps. & Ass'ns § 9A–308(a), provides in pertinent part as follows:

> If a person, by words or conduct, purports to be a partner, or consents to being represented by another as a partner, in a partnership or with one or more persons not partners, *the purported partner is liable to a person to whom the representation is made, if that person, relying on the representation, enters into a transaction with the actual or purported partnership.* If the representation, either by the purported partner or by a person with the purported partner's consent, is made in a public manner, the purported partner is liable to a person who relies upon the purported partnership even if the purported partner is not aware of being held out as a partner to the claimant. If partnership liability results, the purported partner is liable with respect to that liability as if the purported partner were a partner. If no partnership liability results, the purported partner is liable with respect to that liability jointly and severally with any other person consenting to the representation.

(emphasis added).

Under these authorities, the essence of CEIC's assertion of liability against Flores would be that (i) a representation was made to CEIC that Flores was a partner in Citywide, and (ii) CEIC relied upon that representation at the time that it issued or renewed the insurance policy for Citywide. The Court found that the evidence presented did not establish that a representation was ever made to CEIC that Flores was a partner in Citywide.

A discharge granted in a Chapter 7 case "does not discharge an individual debtor from any debt ... for money, property, or services, or an extension, renewal, or refinancing of credit, to the extent obtained, by ... false pretenses, a false representation, or actual fraud ...." 11 U.S.C. § 523(a)(2)(A). As the Fourth Circuit has explained, a creditor asserting a claim under § 523(a)(2)(A) must prove five elements by a preponderance of the evidence—namely, "(1) false representation, (2) knowledge that the representation was false, (3) intent to deceive, (4) justifiable reliance on the representation, and (5) proximate cause of damages." *Nunnery v. Rountree*, 478 F.3d at 218. These five elements are essentially the same as those required under Maryland law to establish the tort of intentional misrepresentation (also known as fraud or deceit). *Phillip v. Reecher (In re Reecher)*, 514 B.R. 136, 155 (Bankr. D. Md. 2014). Although the Fourth Circuit has yet to address the question, a debtor's silence with respect to a material fact may give rise to a tort claim under Maryland law for concealment and nondisclosure that is not dischargeable under § 523(a)(2)(A). *Phillip v. Reecher*, 514 B.R. at 157. As indicated by the Fourth Circuit in *Nunnery v. Rountree*, "Congress intended § 523(a)(2) to protect creditors who were tricked by debtors into loaning them money or giving them property, services, or credit through fraudulent means." 478 F.3d at 219–20. The Court found that there was no evidence of any representation to—let alone one relied on by—CEIC that Flores was a partner.

A discharge granted in a Chapter 7 case also "does not discharge an individual debtor from any debt ... for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained, by ... use of a statement in writing (i) that is materially false; (ii) respecting the debtor's or an insider's financial condition; (iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and (iv) that the debtor caused to be made or published with intent to deceive." 11 U.S.C. § 523(a)(2)(B). In order to sustain an action under Section 523(a)(2)(B) of the Bankruptcy Code, a plaintiff must show that: (1) the defendant made a written statement; (2) the written statement was about her financial condition; (3) the statement was materially false; and (4) the defendant published the statement with the intent to deceive the plaintiff; and (5) the plaintiff reasonably relied on the false statement. The intent to deceive may be inferred by the totality of the circumstances, including a debtor's knowing or reckless disregard for the accuracy of financial statements. A written statement is materially false if it paints a substantially untruthful picture of the defendant's financial condition by misrepresenting information of the type that would normally affect a plaintiff's decision to grant credit. Mere inaccuracy is not sufficient, rather, material falsity requires a significant understatement of liabilities or exaggeration of assets. *Guaranty Residential Lending v. Koep (In re Koep)*, 334 B.R. 364, 372–73 (Bankr. D.Md. 2005) Because § 523(a)(2)(B) is written in the conjunctive, a plaintiff must prove each element in order to prevail and failure to prove any one of them means that a court must find that the debt in question is subject to discharge.

The Court has also previously pointed out, "with respect to the first element, the statement must have been either written by the debtor, signed by the debtor, or written by someone else and then adopted and used by the debtor." *Jones v. Owens (In re Owens)*, 549 B.R. 337, 349 (Bankr. D.Md. 2016). *See also, Hudson Valley Water Res. Inc. v. Boice (In re Boice)*, 149 B.R. 40, 45 (Bankr. S.D.N.Y. 1992) ("It is sufficient that Debtors either wrote, signed, or adopted such statement to find that documents were 'written' by them."). CEIC has not proved by a preponderance of the evidence that Flores used a written statement and thus its claim under § 523(a)(2)(B) must be denied because the written statements relied upon by CEIC were prepared and signed by Bishoff and/or Barkhorn.

Under Maryland law, liability for civil conspiracy requires a finding of "a combination of two or more persons by an agreement or understanding to accomplish an unlawful act or to use unlawful means to accomplish an act not in itself illegal, with the further requirement that the act or the means employed must result in damages to the plaintiff." *Rosen v. Kore Holdings, Inc. (In re Rood)*, 459 B.R. 581, 603 (Bankr. D. Md. 2011) (citing *Hoffman v. Stamper*, 385 Md. 1, 24, 867 A.2d 276 (2005)). Numerous courts have found debts arising on account of a civil conspiracy to be nondischargeable where the underlying unlawful act was nondischargeable. *See, e.g., Cowin v. Countrywide Home Loans, Inc. (In re Cowin)*, 864 F.3d 344, 350 (5th Cir. 2017) ("the intent and actions of [the debtor's] co-conspirators is sufficient to support non-dischargeability under § 523(a)(4)"); *Aetna Casualty and Surety Co. v. Markarian (In re Markarian)*, 228 B.R. 34 (1st Cir. BAP 1998)(affirming bankruptcy court's decision that all debts related to jury finding against the debtor for common-law fraud, statutory fraud and conspiracy were nondischargeable pursuant to § 523(a)); *FDIC v. Smith (In re Smith)*, 160 B.R. 549 (N.D. Tex. 1993)(holding debt for conspiracy nondischargeable under § 523(a)(6) even though his conduct was not an independent, recognized tort but his actions were willful and malicious); *MacDonald v. Buck (In re Buck)*, 75 B.R. 417, 420–421 (Bankr. N.D. Cal. 1987) ("a debtor who has made no false representation may nevertheless be bound by the fraud of another if a debtor is a knowing and active participant in the scheme to defraud").

Civil conspiracy is not a tort that under Maryland law can support an award of damages absent other tortious injury to the plaintiff, which injury must result from the commission of an overt act in furtherance of the conspiracy. *Hoffman v. Stamper*, 385 Md. at 25, 867 A.2d 276. For purposes of this decision the court assumes (without deciding) that CEIC sustained actual injury by reason of the overt tortious actions of Bishoff and that her conduct was such that CEIC's claims against Bishoff would be nondischargeable under § 523(a)(2)(A) and/or § 523(a)(2)(B) for misrepresentation, concealment, fraud, and use of false written statements of financial condition.

Issue: The question before this court is thus whether Flores was a knowing and active participant in Bishoff's alleged scheme to defraud CEIC; that is, was Flores a party to an agreement (express or implied) with

Bishoff to defraud CEIC. The evidence shows he was not. Flores was the manager of Citywide's day to day field operations. Bishoff was the owner of Citywide and was the person responsible for management of the business. In that role, Bishoff (with assistance from Barkhorn) handled all matters involving obtaining and maintaining the workers' compensation insurance policy issued by CEIC to Citywide. No evidence was presented of any actual written or oral agreement between Bishoff and Flores to defraud CEIC by presenting false information; nor did the Court infer the existence of such an agreement from the evidence.

Held: Consequently, the Court denied with prejudice all relief sought in CEIC's complaint.

31. § 523(a)(4), § 523(a)(6). Although no fiduciary relationship found, 50% stockholder's receipt, deposit, and use of secured proceeds of sale found to be a nondischargeable willful and malicious injury to creditor's property. *NextGear Capital, Inc. v. Nozary (In re Nozary),* 2017 WL 4411250 (Bankr. D.Md. 2017)(Slip Copy)(Alquist, C.J.). The Plaintiff NextGear Capital, Inc., filed a Complaint to Determine Nondischargeability of Debt against Shahla Nozary, debtor, who owned 50% of Beltway Auto Brokers, Inc., a used car dealer. The debtor's husband, Khazeyer Molavi, owned the remaining 50%. NextGear provided floorplan financing for Beltway's vehicle inventory and discovered that Beltway had sold vehicles from its inventory, and failed to turn over the proceeds to NextGear, in violation of the trust language of the parties' contractual agreement – sales of vehicles "out of trust." NextGear then discovered that the remaining vehicles had been removed from the lot, which vehicles remained missing, and proved that Beltway was liable to it for $1,189,818.25.

Ms. Nozary guaranteed Beltway's obligation to NextGear. NextGear sought to bar Ms. Nozary's discharge of the guaranty debt pursuant to § 523(a)(4) which excepts from discharge any debt for fraud or defalcation in a fiduciary capacity, embezzlement or larceny and pursuant to § 523(a)(6) which excepts any debt for willful and malicious injury by the debtor. Ms. Nozary claimed that she had no fiduciary obligation and no knowledge that vehicles were being sold out of trust or unlawfully removed. She maintained that her husband ran the business, that she was an owner of Beltway in name only, and that she was not involved in the day-to-day operations of Beltway.

The Bankruptcy Court found that Ms. Nozary did not have felonious intent; she may have been a knowing bystander to bad acts, but she was not an active participant in hiding cars or selling them out of trust and concluded that NextGear had neither properly pleaded nor demonstrated at trial that the debt was nondischargeable under § 523(a)(4) as a debt for fraud or embezzlement, but a corporation of which she is an owner may have engaged in fraudulent conduct, but corporate boundaries are to be respected. *Hemel v. Pontier*, 165 B.R. 797, 799 (Bankr. D.Md. 1994)(A corporate officer is not personally liable for a tort unless that officer specifically committed, participated or cooperated in the tort). *See also, In re Rigoroso*, 453 B.R. 612 (Bankr. D.S.C. 2011)(In a floor plan financing case, commenting that, "[o]ther courts have routinely found that a debtor who is an officer or director of a corporation can be held personally liable for the tortious acts of the corporation when he actively participated in those acts.").

Although Ms. Nozary did not sell or move the vehicles, she did however, personally take control of their cash proceeds at a time when she had knowledge that NextGear had the superior ownership interest. Yet she used funds from her bank account which she must have known had no possible source other than NextGear, and were subject to injunction. Ms. Nozary, by virtue of the state court lawsuit and injunction, knew that the dealership owed money to NextGear and, as of the time of issuance of the state court injunction, she also knew that all of the funds of the dealership were impressed with a lien. She had the checks issued anyway and even tried to negotiate with NextGear using its own money.

NextGear established the debt it was owed by its proof of claim. A proof of claim *prima facie* demonstrates the validity and amount of the claim unless put in dispute. *In re Harford Sands Inc.*, 372 F.3d 637 (4th Cir. 2004). The Fourth Circuit's decision in *In re Strack*, 524 F.3d 493 (4th Cir. 2008) provides guidance as to whether, and in what circumstances, an individual owner of a corporation like Ms. Nozary can be held to account for a fiduciary breach by a corporation. In *Strack*, as in this case, a dealership entered into a floor-plan financing agreement that created a trust and the owner of the dealership had personally guaranteed the indebtedness. *Id*. at 495. The *Strack* Court determined that there was a fiduciary duty owing from the corporation to the floor-plan financer because, just as in this case, the financing agreement required that the proceeds of sale be segregated and placed into trust for the benefit of the floor-plan financer. The language of the loan agreement was held sufficient to create a trust and a fiduciary relationship between the *dealership and the financer* with respect to the proceeds of sale. *Id*. at 498–99. (emphasis added). Here too, the language in the note creates a fiduciary relationship between NextGear and Beltway. *See infra.* The more complicated part of this analysis is determining whether the *owner* of the dealership— Ms. Nozary—should be impressed with the fiduciary obligations the dealership owes to its lender such that the obligations should be rendered non-dischargeable as to the individual owner.

The factors in *In re Ellison*, 296 F.3d 266 (4th Cir. 2002) adopted in *Strack* to determine whether Ms. Nozary's obligation to NextGear is non-dischargeable under § 523(a)(4) are (1) whether the debtor personally guaranteed the indebtedness; (2) whether the indebtedness arose due to defalcation or "the breach of a fiduciary relationship between the two corporations"; (3) whether the debtor was "personally responsible for the conduct that gave rise" to the corporate breach or defalcation; and (4) whether the debtor's "conduct amounted to a breach of their fiduciary duty" to the corporation. Regarding the third factor, Chief Judge Alquist found that there was no evidence that Ms. Nozary was involved in the sale of vehicles out of trust or in the obfuscation of NextGear's collateral; the record did not support the conclusion that Ms. Nozary's conduct and decisions were responsible for the dealership breaching its duties to NextGear. Although the Court concluded that her first, second and fourth factors had been established – Ms. Nozary's conduct in using the $111,108.18 was a breach of her duty to the dealership – the Court concluded that her conduct in violation of a duty to Beltway was not, however, sufficient to establish § 523(a)(4) nondischargeability as *Ellison* required that *all* four factors be satisfied.

In § 523(a)(6) "willful" modifies "injury" and to prevail, the creditor must prove that the debtor intended to injure—not simply that the debtor intended to perform the act that ultimately caused injury. *See Kawaauhau v. Geiger*, 523 U.S. 57, 61 (1998). "Malice" means "wrongfully and without cause" and can be shown by "exercise of dominion and control over funds that [the debtor] knew belonged to another." *In re Stanley*, 66 F.3d 664 (4th Cir. 1995). Ms. Nozary took $111,108.18 of proceeds, converted the funds to cashier's checks and ultimately spent the funds. Her actions and the context in which she acted are very similar to the scenario addressed by the court in *In re Stelluti*, 94 F.3d 84 (2d Cir. 1996).

Held: Ms. Nozary, by virtue of the state court lawsuit and injunction, knew that the dealership owed money to NextGear and, as of the time of issuance of the state court injunction, she also knew that all of the funds of the dealership were impressed with a lien. She had the checks issued anyway and even tried to negotiate with NextGear using its own money. When that didn't work, she simply deposited the proceeds of the checks into her account and spent them for household purposes. This meets the criteria for both willful and malicious and is grounds for holding that Ms. Nozary's personal guaranty liability is non-dischargeable under § 523(a)(6) to the extent of (only) the amount of the cashier's checks ($111,108.18).

32. § 523(a)(8)(A) or (B). <u>Loan could not be excepted from discharge as "obligation to repay funds received as an educational benefit, scholarship or stipend.</u>" *Essangui v. SLF V–2015 Trust, et al., (In re Essangui*), 573 B.R. 614, 2017 WL 4358755 (Bankr D.Md. 2017)(Harner, J.). Chapter 7 debtor brought adversary proceeding seeking to determine dischargeability of loan obtained to participate in Medical Education Readiness Program (MERP), a preparatory course that, upon completion, allowed students to enroll in medical school. Parties cross-moved for summary judgment.

Rationale: As explained by the Bankruptcy Appellate Panel for the Ninth Circuit, "those bankruptcy cases [in the majority], perhaps inadvertently, imprecisely quote the provisions of the discharge exception statute as applying to 'loans received,' as opposed to the 'obligation to repay funds received.'" *Inst. of Imaginal Studies v. Christoff (In re Christoff)*, 527 B.R. 624, 635 (9th Cir. BAP 2015). First, the subject of subsection (A)(ii) is "an obligation to repay funds." That subject is different than "an educational benefit overpayment or loan," which is the subject of subsection (A)(i), and "educational loan," which is the subject of subsection (B). Some courts have recognized this difference and held that "an obligation to repay funds" is not the equivalent of a loan for purposes of section 523(a)(8). 573 B.R. at 622. Second, subsection (A)(ii) is not focused on just any "obligation to repay funds." Rather, Congress defined the kinds of funds at issue, specifically funds "received as an educational benefit, scholarship, or stipend." *Kashikar v. Turnstile Capital Mgmt., LLC (In re Kashikar)*, 567 B.R. 160, 167 (9th Cir. BAP 2017)(holding that "a 'loan' is not an 'educational benefit'"). The phrase "as an educational benefit" is relevant and identifies the kinds of funds protected by the subsection. Importantly, in describing the kinds of funds within subsection (A)(ii), Congress used the word "as" rather than "for."

Held: Debtor's obligation to repay loan could not be excepted from discharge as "obligation to repay funds received as an educational benefit, scholarship or stipend." To hold otherwise would ignore the plain language of the statute and render subsections (A)(i) and (B) largely meaningless. Indeed, if subsection (A)(ii) covers any loan for educational purposes, much of the language in the remainder of the section is superfluous. Debtor's motion for summary judgment granted; creditor's motion for summary judgment denied.

Issue: The Court's initial inquiry was whether the student loan obligations at issue fall within §§ 523(a)(8)(A) or (B) of the Code – was the loan made to a student for educational purposes. Parties agreed §§ 523(a)(8)(A)(i) and 523(a)(8)(B) were inapplicable. Defendant asserted that its debt is covered by.§ 523(a)(8)(A)(ii), as "an obligation to repay funds received as an educational benefit, scholarship, or stipend." Court concluded that the loan is not an educational benefit under § 523(a)(8)(A)(ii) and, therefore, is dischargeable in Chapter 7.

Procedural Background: Yolande E. Essangui, debtor filed a Chapter 7 case on March 8, 2016 and on April 21, 2017, initiated an adversary proceeding to determine the dischargeability of a loan used, in part, for educational purposes. The Debtor's Complaint names numerous entities as defendants because the subject loan has changed hands several times since the execution of the original documents. GS2 Grantor Trust 2016–A, assignee of SLF V–2015 Trust ("defendant"), was the only defendant to file an Answer to the debtor's Complaint and after discovery filed its Motion for Summary Judgment. Debtor responded and filed her own Motion for Summary Judgment to which the Defendant responded.

Facts: In March 2008, debtor enrolled in a Medical Education Readiness Program ("MERP") a preparatory course of instruction that, upon completion, allows students to enroll at Ross University School of Medicine. MERP is not qualified as a Title IV institution under the Higher Education Act of 1965 (as amended) and federal aid, grants, or loans are not available to students attending MERP. Debtor completed MERP, enrolled at Ross University for the fall 2008 semester but did not complete her coursework or graduate from Ross University, as she was dismissed from Ross University in December 2008.

Debtor financed her participation in MERP by applying for and receiving a CitiAssist Health Professions Loans Online Loan from Citibank N.A. of approximately $23,670.00 on March 20, 2008, using the proceed to pay for MERP fees and her books for the program, as well as rent and living expenses incurred while attending the program. Citibank sold its interest in the Loan to SLF V–2015 Trust, which then assigned its interest in the Loan to GS2 Depositor 2016–A SPV, LLC. Through a Trust Agreement, GS2 Depositor 2016–A SPV, LLC, deposited the Loan with the Defendant, which is the current holder of the Loan. The Defendant asserts that the current balance is approximately $37,175.25, plus interest.

Rationale: *Rumer v. Am. Educ. Servs. (In re Rumer)*, 469 B.R. 553, 562 (Bankr. M.D. Pa. 2012)(noting that "[m]ost courts ... have analyzed whether a loan is a qualified educational expense by focusing on the stated purpose for the loan when it was obtained, rather than how the proceeds were actually used ..."). In *U.S. Dep't of Health & Hum. Servs. v. Smith*, 807 F.2d 122 (8th Cir. 1986), the lower courts in *Smith* held that the conditional scholarship at issue was not a loan under the statute and, as such, was dischargeable, *id.* at 123, and the Eighth Circuit reversed, finding that because the debtor had received money and signed an agreement to repay that money under certain conditions, the conditional scholarship was an educational loan. *Id.* at 125.

1990 amendments to § 523(a)(8), *see, e.g., Dufrane v. Navient Sols., Inc. (In re Dufrane)*, 566 B.R. 28, 35–39 (Bankr. C.D. Cal. 2017)(explaining history of 1990 amendments); *Campbell v. Citibank, N.A. (In re Campbell)*, 547 B.R. 49, 55–57 (Bankr. E.D.N.Y. 2016)(same) added the language "or for an obligation to repay funds received as an educational benefit, scholarship or stipend" to § 523(a)(8). Courts generally interpreted this language to create a new category of nondischargeable debt that excluded for-profit loans. *See, e.g. Jones v. H & W Recruiting Enter., LLC (In re Jones)*, 242 B.R. 441, 443–444 (Bankr. W.D. Tenn. 1999)(holding debt owed to for-profit trucking company dischargeable in bankruptcy and noting that broad application of new language would subsume the old language); *United Res. Sys., Inc. v. Meinhart (In re Meinhart)*, 211 B.R. 750, 752–754 (Bankr. D. Colo. 1997) (discussing term "educational benefit" in the context of holding for-profit lender not protected by § 523(a)(8)). These courts based their holdings, in part, on the language of the statute and that "[a]n example of such an obligation would be for funds provided as grants that must be repaid only under certain conditions." *Scott v. Midwestern Training Ctr., Inc. (In re Scott)*, 287 B.R. 470, 474 (Bankr. E.D. Mo. 2002). Notably, in 2005, when Congress again amended § 523(a)(8), it did not change the substance of the existing statutory language. *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), Pub. L. 109–8, 119 Stat. 23, enacted April 20, 2005. The version of § 523(a)(8) resulting from BAPCPA is the version in effect today.

BAPCPA made two changes to § 523(a)(8) that are relevant to this adversary proceeding. First, the amendments separated the existing language of the section into two subsections, providing that the following kinds of debt are not dischargeable:

> (A)(i) an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution; or
>
> (ii) an obligation to repay funds received as an educational benefit, scholarship, or stipend; ....

Second, the amendments added a completely new section 523(a)(8)(B). That new subsection described an additional kind of nondischargeable debt as:

> (B) any other educational loan that is a qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986, incurred by a debtor who is an individual ....

Debtor states that she used the proceeds of the Loan to pay fees associated with the MERP program and also admits that she "used the funds received from the Note for an educational benefit." But denies that the Loan constitutes "funds received as an educational benefit". Defendant argues that the term "funds" under that subsection includes loans and that because the Debtor used the Loan for educational purposes, the Loan falls directly within the subsection

Cases interpreting § 523(a)(8)(A)(ii): *Micko v. Student Loan Finance Corp. (In re Micko)*, the bankruptcy court relied on the BAPCPA changes to support including a private nonprofit student loan within the pre-BAPCPA version of section 523(a)(8). 356 B.R. 210, 216–217 (Bankr. D. Ariz. 2006). Likewise, in *Brown v. CitiBank, N.A. (In re Brown)*, the bankruptcy court determined that a loan used by the debtor to support herself while she studied and then sat for the California bar examination was a nondischargeable student loan obligation. 539 B.R. 853 (Bankr. S.D. Cal. 2015)(adopting the reasoning of *Skipworth v. Citibank Student Loan Corp. (In re Skipworth)*, 2010 WL 1417964 (Bankr. N.D. Ala. Apr. 1, 2010), and concluding "that § 523(a)(8)(A)(ii) should be interpreted broadly to include a bar examination loan under the definition of ‘educational benefit’”). This line of cases includes any loan used at least in part for educational purposes—whether a public or a private loan—within the purview of § 523(a)(8).

More recent decisions have questioned this result. These courts tend to focus more on the precise language and structure of the statute and, through that prism, express several concerns with the majority's approach. Those concerns include: (1) Congress's use of the word “funds” rather than “loan” in § 523(a)(8)(A)(ii), particularly given that “loan” is used elsewhere in the section; and (2) that an “educational benefit” is a term different from “educational benefit overpayment or loan” or “educational loan” used elsewhere in the section. As explained by the Bankruptcy Appellate Panel for the Ninth Circuit, “those bankruptcy cases [in the majority], perhaps inadvertently, imprecisely quote the provisions of the discharge exception statute as applying to ‘loans received,’ as opposed to the ‘obligation to repay funds received.’” *Inst. of Imaginal Studies v. Christoff (In re Christoff)*, 527 B.R. 624, 635 (9th Cir. BAP 2015).*See also Campbell*, 547 B.R. at 54 (noting that “[s]ome courts have decided without explanation, or assumed, that ‘educational benefit,’ as used in § 523(a)(8)(A)(ii), encompasses any loan which relates in some way to education”). Many of the cases in the minority stand for the general proposition that “we must presume that, in organizing the provisions of § 523(a)(8) as it did in BAPCPA, Congress intended each subsection to have a distinct function and to target different kinds of debts.” *Christoff*, 527 B.R. at 634.

Although both the majority and minority decisions on this issue are thoughtfully written and strive to implement Congress's intent, the Court finds the minority's position more faithful to the actual language of the statute enacted by Congress. “We begin, as always, with the language of the statute.” *Duncan v. Walker*, 533 U.S. 167, 172, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001) (citations omitted). *See also Ransom v. FIA Card Servs., N.A.*, 562 U.S. 61, 69, 131 S.Ct. 716, 178 L.Ed.2d 603 (2011). As explained by the Fourth Circuit, “we must try to discover the plain meaning of th[e] statute using both the text and structure since ‘statutory construction ... is a holistic endeavor.’” *Healthkeepers, Inc. v. Richmond Ambulance Auth.*, 642 F.3d 466, 471 (4th Cir. 2011).

Basic principles of statutory construction require that each word, clause, and section of a statute be given independent meaning whenever possible. *See, e.g., Corley v. United States*, 556 U.S. 303, 314, 129 S.Ct. 1558, 173 L.Ed.2d 443 (2009) (explaining that “one of the most basic interpretative canons” is that “ ‘[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant’”)(quoting *Hibbs v. Winn*, 542 U.S. 88, 101, 124 S.Ct. 2276, 159 L.Ed.2d 172 (2004)). Those principles also state that when Congress chooses to use different words in different places within a statute, that choice is intentional and conveys meaning. *See, e.g., Duncan*, 533 U.S. at 173, 121 S.Ct. 2120 (observing that “ ‘[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion’”) (citations omitted); *Healthkeepers*, 642 F.3d at 472 (same). Applying these, and other canons of construction, to § 523(a)(8) yields the following observations:

First, the subject of subsection (A)(ii) is “an obligation to repay funds.” That subject is different than “an educational benefit overpayment or loan,” which is the subject of subsection (A)(i), and “educational loan,” which is the subject of subsection (B). Some courts have recognized this difference and held that “an obligation to repay funds” is not the equivalent of a loan for purposes of § 523(a)(8). *See, e.g., Christoff*, 527 B.R. at 634 (rejecting the notion that the words “loans received” could be substituted for “funds received” and “arguments conflating ‘loan’ as used in § 523(a)(8)(A)(i) and (a)(8)(B) ... with ‘an obligation to repay funds received’”); *Kashikar v. Turnstile Capital Mgmt., LLC (In re Kashikar)*, 567 B.R. 160, 167 (9th Cir. BAP 2017). Although common usage of the word “funds” could (as argued by the Defendant) include the proceeds of a loan, the structure of § 523(a)(8) suggests a more limited and tailored definition. As explained below, both the remaining language of subsection (A)(ii) and consideration of the purpose of each clause within § 523(a)(8), read as a whole, support this conclusion. *See, e.g., Dada v. Mukasey*, 554 U.S. 1, 16, 128 S.Ct. 2307, 171 L.Ed.2d 178

(2008) (explaining that "[i]n reading a statute we must not 'look merely to a particular clause,' but consider 'in connection with it the whole statute'").

Second, subsection (A)(ii) is not focused on just any "obligation to repay funds." Rather, Congress defined the kinds of funds at issue. Specifically, subsection (A)(ii) applies to funds "received as an educational benefit, scholarship, or stipend." *See, e.g., Kashikar*, 567 B.R. at 167 (holding that "a 'loan' is not an 'educational benefit'"). The prepositional phrase "as an educational benefit" is relevant and identifies the kinds of funds protected by the subsection. Importantly, in describing the kinds of funds within subsection (A)(ii), Congress used the word "as" rather than "for." The word "as" commonly refers to the role or character of something (or someone) when used in a prepositional phrase. *See, e.g.,* Merriam–Webster Dictionary (2005) (defining "as" to mean "in the capacity or character of"). In contrast, the word "for" commonly signals the object or purpose of something when used in this grammatical structure. *See*, *e.g.*, *id.* (defining "for" to mean "toward the purpose or goal of"). Examples of these two different words having two different meanings are found within section 523 itself. For example, section 523(a)(17) references the "debtor's status *as* a prisoner." 11 U.S.C. § 523(a)(17) (emphasis added). Section 523(a)(2)(C)(i)(I) references "consumer debts owed to a single creditor and aggregating more than $675 *for* luxury goods or services ...." 11 U.S.C. § 523(a)(2)(C)(i)(I) (emphasis added). This latter example is particularly apt because it is describing the use of the funds underlying the consumer debt, much like the Defendant's argument concerning the use of the Loan. *See Healthkeepers*, 642 F.3d at 471 (explaining that statutory analysis "includes employing various grammatical and structural canons of statutory interpretation which are helpful in guiding our reading of the text").

In addition, as explained exceptionally well by the courts in *Campbell* and *Dufrane*, Congress delineated three specific kinds of funds within § 523(a)(8)(A)(ii), and that list of categories must be read in a coherent manner. "The canon of statutory construction known as *noscitur a sociis* instructs that when a statute contains a list, each word in that list presumptively has a 'similar' meaning."*Campbell*, 547 B.R. at 55 (citing *Yates v. United States*,__U.S.__, 135 S.Ct. 1074, 1089, 191 L.Ed.2d 64 (2015) (Alito, J., concurring in judgment)). *See also*, *Dufrane*, 566 B.R. at 39 (quoting *Campbell*). The definition or scope of educational benefit thus should align with that of scholarship and stipend—both terms representing funds extended for educational purposes that generally do not need to be repaid unless the recipient fails to graduate or meet other specified requirements. A for-profit student loan does not meet these criteria. For-profit lenders like the Defendant do not forgive loans upon graduation or require repayment only if the borrower fails to graduate or meet other academic milestones. The Court agrees with the courts in *Campbell* and *Dufrane* that "[s]ection 523(a)(8)(A)(ii) excepts from discharge educational debts, other than loans, such as conditional grants and stipends that generally are not required to be repaid." *Dufrane*, 566 B.R. at 40.

Third, interpreting subsection (A)(ii) to mean loans used for educational purposes renders subsections (A)(i) and (B) largely meaningless. *See Campbell*, 547 B.R. at 59–60. *See also Corley*, 556 U.S. at 316, 129 S.Ct. 1558 (rejecting position that rendered subsection of a statute superfluous and explaining, "we cannot accept the Government's attempt to confuse the critically distinct terms 'involuntary' and 'inadmissible' by rewriting (c) into a bright-line rule doing nothing more than applying (a)"); *Healthkeepers*, 642 F.3d at 472 (adopting a limited definition in statute because "[o]therwise, the directive '[i]n subparagraph 2(A)(i)' would be surplus language in the statute without any effect"); *Burkhart v. Community Bank of Tri–County*, 2016 WL 4013917, at *7 (D. Md. July 27, 2016), *appeal docketed*, No. 16–1971 (4th Cir. Aug. 24, 2016) (applying statutory canons and reaching holding because "[u]nless § 506(d) is relevant to lien avoidance, the Court would be constrained to conclude that the provision is mere surplusage").1 That broad reading, which would be necessary to sustain the Defendant's position, would capture any public or private loan that is used at least in part by the Debtor to obtain an educational benefit. It would not matter if the loan was a government loan,

[1] See Summary Number 25 on Page 25 of *Burkhart v, Grigsby, Trustee, and Community Bank of Tri-County,* __F.3d___ (4th Cir. March 29, 2018) regarding Section 506(d) of the Bankruptcy Code.

incurred in connection with a government or nonprofit program, or a qualified education loan; regardless, subsection (A)(ii) would cover it. Indeed, if that was Congress's intent, it did not need to add subsection (B), which was added at the same time subsection (A)(ii) was designated a separate subsection. One needs only to read the first few words of subsection (B) to understand this point. Subsection (B) begins, “any other educational loan that is a qualified education loan.” If any loan extended for educational purposes is already covered by subsection (A)(ii), what could Congress have meant by these additional words in subsection (B)?

Notably, an interpretation of section 523(a)(8)(A)(ii) that focuses on “funds received as an educational benefit, scholarship, or stipend” not only gives meaning to the other subsections of the statute, but it also comports with the well-established principle of construing exceptions to discharge narrowly. As the Fourth Circuit has explained, “[w]hen considering the applicability of an exception to discharge, we construe the exception narrowly ‘to protect the purpose of providing debtors a fresh start.’” *Nunnery v. Rountree (In re Rountree)*, 478 F.3d 215, 219 (4th Cir. 2007)(quoting *Foley & Lardner v. Biondo (In re Biondo)*, 180 F.3d 126, 130 (4th Cir. 1999)). *See also Bullock v. BankChampaign*, 569 U.S. 267, 275, 133 S.Ct. 1754, 185 L.Ed.2d 922 (2013) (noting that “‘exceptions to discharge “should be confined to those plainly expressed”’”) (quoting *Kawaauhau v. Geiger*, 523 U.S. 57, 62, 118 S.Ct. 974, 140 L.Ed.2d 90 (1998)).

Based on the foregoing analysis, the Court found the phrase “received as an educational benefit, scholarship, or stipend” in § 523(a)(8)(A)(ii) unambiguous and inapplicable to the facts of this adversary proceeding. The language of that subsection covers funds received by a debtor as an educational benefit, a scholarship, or a stipend. The Defendant does not argue that the Loan qualifies as an actual educational benefit, scholarship, or stipend. The facts do not suggest that the Loan was an actual educational benefit, scholarship, or stipend. Rather, the Defendant asserts, and the record supports, only that the Loan was used by the Debtor for educational purposes. That is not enough to bring the Loan within the subsection. In addition, the Court is not persuaded by the Defendant's argument that an “obligation to repay funds” is equivalent to a loan, or that its proposed, expansive reading of subsection (A)(ii) leaves a meaningful role for the remainder of section 523(a)(8). As such, the Court concludes that, as a matter of law, the Defendant's debt is not protected by section 523(a)(8)(A)(ii).

Judge Harner than examined policy considerations. An interpretation of section 523(a)(8)(A)(ii) that includes only “funds received as an educational benefit, scholarship, or stipend” comports with Congress's reported objective “to protect the student loan system and maintain the ability of future students to obtain funding to advance their education.” *Kidd v. Student Loan Xpress, Inc. (In re Kidd)*, 458 B.R. 612, 621 (Bankr. N.D. Ga. 2011). By separating the language in subsection (A)(ii) from the government-related loans and programs identified in subsection (A)(i), Congress confirmed that subsection (A)(ii) is a separate category. In addition, Congress added subsection (B), which pulled in private loans that constitute “qualified education loans” under section 221(d)(1) of the Internal Revenue Code of 1986. This category of private loans was not previously covered by the language of section 523(a)(8), and the linkage to section 221(d)(1) of the Internal Revenue Code ensured that the credit extended was for purposes of attending an institution that is eligible to offer programs under Title IV of the Higher Education Act of 1965. This amendment provided somewhat parallel treatment for both public and private educational loans. Notably, the addition of subsection (B) is the only amendment to section 523(a)(8) mentioned in the legislative history to BAPCPA. *Nunez*, 527 B.R. at 413.

The foregoing interpretation of section 523(a)(8) is consistent with the legislative history of both the original enactment of section 523(a)(8) and BAPCPA generally. It does not provide lenders with blanket protection for any loan used at least in part by a debtor for educational purposes. Rather, the language of the statute suggests that Congress worked to strike a delicate balance between the fresh start policy for debtors and the protection of certain educational programs and lenders offering loans for such programs. It is not for this Court to say whether Congress has struck an appropriate balance. Moreover, if any policy change needs to be made, that is a matter for Congress, and not one for this Court.

The Court concluded that the Loan is not an educational benefit under section 523(a)(8)(A)(ii) and, therefore, is dischargeable in the Debtor's chapter 7 case. Debtor's Motion for Summary Judgment granted and Defendant's Motion for Summary Judgment denied.

33. § 523(a)(8) It is the debtor's burden to overcome the presumption that student loan debt/interest is nondischargeable under § 523(a)(8) of the Bankruptcy Code by demonstrating an undue hardship under the *Brunner* Test, *In re McDade v. Direct Subsidized Consolidation Loan*, 2017 WL 3208353 (N.D.W.Va. 2017)(Flatley, J.). A Chapter 13 debtor seeks to discharge her student loan debt.

Under Section 523(a)(8) of the Bankruptcy Code student loan is nondischargeable, however, if the debtor is able to overcome the presumption by a preponderance of the evidence and demonstrate that repayment causes an undue hardship the debt may be dischargeable. *Educ. Credit Mgmt. Corp v Mosko*, 515 F.3d 319, 323 (4th Cir. 2008).

The *Brunner* test shows repayment is an undue hardship if the following are present: 1) the debtor cannot maintain a minimal standard of living, based on current income and expenses if required to pay the student loan debt; 2) that the current state of affairs is likely to persist through the repayment period; and 3) the debtor has made a good faith effort to repay the loans. *Educ. Credit. Mgmt. Corp. v. Frushour*, 433 F.3d 393, 401 (4th Cir. 2005) (citing *Brunner v. N.Y. State Higher Educ. Servs. Corp.*, 831 F.2d 395, 396 (2nd Cir. 1987)). However, if even one of the requirements is not met the Bankruptcy Court should not proceed to the further requirements. In particular, if the first prong of the *Brunner* test is not met, maintain a minimal standard of living, the other prongs should not be examined. In order for the debtor to demonstrate that the debtor cannot maintain a minimal standard of living based on current income and expenses, the Court will look closely at the reasonableness of expenses. Expenses related to adult children, cable, and religious expenses exceed minimally necessary to live. The Court found that the debtor was able to at least maintain a minimal standard of living by analyzing her expenses, specifically, the debtor supported an adult daughter, had a sizeable car payment, and made a significant charitable contribution. Further, the debtor had an increase in monthly expenses demonstrated the debtor maintained a minimal standard of living. As the debtor was not able to demonstrate the first prong of the *Brunner* test, the Court did proceed to the other prongs, and found the debt nondischargeable. The Court also found that the student loan interest was nondischargeable absent finding of an undue hardship.

34. § 524(a). Debtors were entitled to damages of $2,500 and attorney fees of $4,600 for loan servicer's violation of the discharge injunction by payment demands on loan paid in full through confirmed Chapter 13 Plan. *In re Lewis,* 570 B. R. 195, 2017 WL 1628871 (Slip Copy)(Bankr. E.D.N.C. 2017). Chapter 13 debtors filed motion for sanctions and damages, alleging that creditor, Rushmore Loan Management Services, LLC ("Rushmore") and U.S. Bank, N.A., as Trustee for the RMAC Trust, Series 2012–3T ("U.S. Bank"), whose claim was secured by deed of trust on their residence and its loan servicer violated the discharge injunction when servicer sent various correspondence to them that asserted incorrectly that balance remained due on note. There were no pre-petition arrears on the note owed to Bank of the West and no cure of any arrearage was provided for under the confirmed plan to Bank of the West with the debtors completed and on which they obtained a discharge. Bank of the West sold its debt to U.S. Bank and its services Rushmore. On September 30, 2014, the court entered a Consent Order ("Consent Order") between the Debtors and U.S. Bank which acknowledged that the Motion for Confirmation did not reference the Bank of the West claim, but stated that "To date, the Trustee has treated the Claim as a total debt claim *with the balance due as of the Petition Date paid in full within the life of the Chapter 13 Plan.*" (emphasis added).

After the entry of a Discharge Order and a Final Decree, U.S. Bank forgot to mark the Deed of Trust as paid and satisfied, and Rushmore continued to send to the Debtors correspondences showing a balance due to Rushmore.

Held: "A violation of the discharge injunction is punishable by civil sanctions pursuant to [11 U.S.C.] § 105," as the violation is treated as contempt of the discharge order. *Americorp Fin., L.L.C. v. Schwarz (In re Schwarz)*, 2016 WL 7413478, 2016 Bankr. LEXIS 4432 (Bankr. E.D.N.C. Dec. 22, 2016) (citing *Cherry v. Arendall (In re Cherry)*, 247 B.R. 176, 187 (Bankr. E.D. Va. 2000)). The Fourth Circuit has adopted a two-part test to determine whether contempt sanctions are appropriate: "(1) whether the creditor violated the injunction, and (2) whether [it] did so willfully." *Bradley v. Fina (In re Fina)*, 550 Fed.Appx. 150, 154 (4th Cir. 2014). "Congress enacted § 524(a) to insure debtors are not pressured *in any way* to pay discharged debts." *In re Arnold*, 206 B.R. 560, 564 n.3 (Bankr. N.D. Ala. 1997) (emphasis added). The sending of each Correspondence was a willful act, even if the Correspondence was computer-generated. *See In re Ennis*, 2015 Bankr. LEXIS 3657 (Bankr. E.D.N.C. Oct. 28, 2015). Rushmore willfully violated the discharge injunction when it sent the Correspondence and is in contempt of the Discharge Order.

35. § 526(a)(4). Attorney violates BAPCPA if he instructs debtor to pay bankruptcy-related legal fees by using credit card -- no invalid purpose is required. *Cadwell v. Kaufman, Englett & Lynd, PLLC*, F.3d (11th Cir. March 30, 2018)(No. 17-10810). Facts: Loyd Cadwell consulted with law firm of Kaufman, Englett & Lynd about filing a Chapter 7 case and he signed a retainer agreement obligating him to pay $1,700.00 in attorneys' fees for representation with a fee payment schedule of an immediate $250 retainer, a second $250 installment soon thereafter and then four (4) installments each in the amount of $300 and was instructed to pay all of these by credit card. He paid the initial installment and the next three payments using two different credit cards. Cadwell sued the law firm in U.S. District Court for an alleged violation of Section 526(a)(4); the law firm moved to dismiss contending that the complaint failed to state a claim upon which relief could be granted and that Section 526(a)(4) was unconstitutional because it improperly restricted attorney-client communication.

Section 526(a)(4) states:

> A debt relief agency shall not … advise an assisted person or prospective assisted Person to incur more debt in contemplation of such person filing a case under this title or to pay an attorney or bankruptcy petition preparer a fee or charge for services performed as part of preparing for or representing a debtor in a case under this title.

District Court: Granted the law firm's motion to dismiss concluding that without more, the mere advice to use credit cards to pay for legal fees did not violate Section 526(a)(4) because advice to incur debt had to be for an invalid purpose and that the complaint did not allege facts that would permit an inference that the law firm acted with an improper purpose or with an intent to manipulate the bankruptcy system. Having dismissed the complaint for failure to state a claim, the District Court did not reach the First Amendment issue.

The parties agree that Section 526(a)(4) contains two separate prohibitions, one about incurring debt in contemplation of bankruptcy filing generally, and a second regarding incurring debt for bankruptcy-related services.

Issue: Does giving advice to incur debt to pay for a lawyer's bankruptcy-related representation require proof that the advice was given for an invalid purpose designed to manipulate the bankruptcy process? Three different interpretations – one suggested by the Supreme Court, one proposed by the law firm and adopted by the District Court, and a third advocated by the debtor:

> A debt relief agency shall not … advise an assisted person or prospective assisted person EITHER [1] to incur more debt in contemplation of such person filing a case under this title or [2] to pay an attorney or bankruptcy petition preparer a fee or charge for services performed as part of preparing for or representing a debtor in a case under this title.

Not an unnatural reading but it would prohibit all advice to pay an attorney and the Code in Section 329 appears to contemplate such payment. This interpretation was rejected.

> A debt relief agency shall not … advise an assisted person or prospective assisted

> person to incur more debt in contemplation of [1] such person filing a case under this title or [2] to pay an attorney or bankruptcy petition preparer a fee or charge for services performed as part of preparing for or representing a debtor in a case under this title.

This reading was proposed by the law firm and adopted by the District Court. The Eleventh Circuit held that *Milavetz* only addressed the first prohibition – incurring debt, i.e., "loading up" prior to filing, and did not address the second prohibition. Under this reading, advice to incur additional debt would violate Section 526(a)(4) if *either*(1) the impelling reason for the advice is the expectation of bankruptcy discharge, *i.e.*, an invalid purpose, *or* (2) the impelling reason for the advice is exactly the same and is invalid for the same reason *and* the debt happens to be incurred to pay an attorney. This interpretation was rejected as the second prohibition would become a mere subset of the first.

> A debt relief agency shall not … advise an assisted person or prospective assisted person to incur more debt[1] in contemplation of such person filing a case under this title or [2] to pay an attorney or bankruptcy petition preparer a fee or charge for services performed as part of preparing for or representing a debtor in a case under this title.

Rationale: This third way of interpreting Section 526(a)(4) forbids lawyers from advising their clients "to incur more debt … to pay an attorney… a fee or charge for services performed as part of preparing for or representing a debtor in a case under Title 11. Importantly, this prohibition is modified by "in contemplation of" and does NOT entail any invalid-purpose requirement.

Held: Section 526(a)(4) prohibits a debt relief agency, which includes a law firm that provides bankruptcy-related services from advising a debtor to incur more debt in contemplation of the filing of a case or to pay an attorney or bankruptcy petition preparer a fee or charge for services or for representation in a Title 11 case. In *Milavetz, Gallop & Milavetz, P.A., v. United States*, 559 U.S. 229 (2010) the Supreme Court unanimously concluded that the first prohibition – advice to incur additional debt in contemplation of the filing of a bankruptcy case – requires proof that the advice was given for an invalid purpose designed to manipulate the bankruptcy process. This case involves the second prohibition: advice to incur debt to pay for a lawyer's bankruptcy-related representation. Eleventh Circuit held: No. Invalid purpose is not required; a violation of BAPCPA occurs when advice is given by attorney to client to use credit card to incur debt to pay for bankruptcy-related services.

The Eleventh Circuit also rejected the law firm's First Amendment argument concluding that Section 526(a)(4) does not prevent law firms from discussing with debtors potential options and their legal consequences, it merely prohibits them from giving their clients affirmative advice to incur more debt in order to pay for bankruptcy-related representation.

36. § 541(a)(1). <u>Client lacked standing to assert malpractice claim that accrued when attorney filed his bankruptcy petition and thus became part of the bankruptcy estate, and where claim was not scheduled as an asset, it remained in the estate when the case was closed subject to the Trustee's control</u>. *Labgold v. Regenhardt*, 573 B.R. 645, 2017 WL 1395495 (D. E.D.Va. 2017). Facts: Debtor/Plaintiff/patent attorney was sued by former employees of bioscience company, thereafter got married, and transferred his home to the entireties. He then engaged the legal services of Mr. Regenhardt to file Chapter 11 but she recommended an immediate Chapter 7 case less than one year after the recordation of the deed to the entireties. Chapter 7 Trustee sued to recover alleged fraudulent conveyance, which debtor settled for $180,000. Then U.S. Trustee sued to deny discharge for transfer less than one year prior to filing allegedly made with the intent to hinder, delay or defraud creditors and Bankruptcy Court denied discharge under Section 727(a)(2)(A) and case was closed.

Debtor/client then brought state court action against bankruptcy attorney alleging legal malpractice arising out of the denial of discharge. Following removal for federal court, the attorney moved to dismiss for lack of subject matter jurisdiction. When a bankruptcy case closes, property that was disclosed to the trustee and not administered is abandoned back to the debtor. 11 U.S.C. § 554(c). On the other hand, property that was not disclosed remains the property of the estate even after the case is closed. *See id.* § 554(d). A legal malpractice claim is a breach of contract claim. *Shipman v. K ruck*, 267 Va. 495, 593 S.E.2d 319, 322 (2004) ("The statute of limitations for legal malpractice actions is the same as those for breach of contract because although legal malpractice actions sound in tort, it is the contract that gives rise to the duty.").

Held: the Court concludes that Plaintiff's legal malpractice claim, as alleged in the Complaint, was property of the bankruptcy estate under 11 U.S.C. § 541(a)(1). Because Dr. Labgold did not disclose that cause of action in the bankruptcy case, it was not abandoned back to him upon the closing of the bankruptcy case under 11 U.S.C. § 554. The bankruptcy trustee is therefore the only party who can currently decide whether to bring this claim against Defendants. Accordingly, Plaintiff lacks standing to bring this claim, and the Court lacks subject matter jurisdiction over it. *See Nat'l Am. Ins. Co. v. Ruppert Landscaping Co.*, 187 F.3d 439, 441 (4th Cir. 1999)("If a cause of action is part of the estate of the bankrupt then the trustee alone has standing to bring that claim."). Because cause of action accrued at filing of the bankruptcy petition, the cause of action belonged to the bankruptcy estate so that client lacked standing to bring the claim and District Court lacked subject matter jurisdiction over it. Motion granted and complaint dismissed.

37. § 541(a). <u>Debtor's Malpractice Claim against Bankruptcy Attorney Denied where Client did Not have Expert Witness</u>. *Short v. Ramsey*,__Md.App.__ (No. 002742, Sept. Term 2014 March 15, 2017). The appellant in this case, Deborah Short, acting *pro se,* filed a complaint in the Circuit Court for Baltimore City against Michael O. Ramsey, appellee, who is an attorney who had previously provided legal representation to Ms. Short in a Bankruptcy matter. She alleged that she had suffered damages because he had violated his duty to provide adequate legal representation. After the discovery deadline, counsel for Mr. Ramsey moved for summary judgment, and asserted that Ms. Short would be unable to establish liability without an expert witness. The circuit court agreed, and entered judgment in favor of Mr. Ramsey as to each count stated in Ms. Short's amended complaint.

The circuit court correctly granted the motion as to the counts alleging legal malpractice because of the lack of an expert witness to support Ms. Short's claims against Mr. Ramsey. As the circuit court observed, Maryland courts have made it clear that, with narrow exceptions, a plaintiff in a legal malpractice case must support the claim with expert testimony.

Finally, a claim asserting intentional infliction of emotional distress requires the plaintiff to prove that the defendant engaged in extreme and outrageous intentional (or reckless) conduct that caused the plaintiff to suffer severe emotional distress. *Lassater v. Guttman,* 194 Md. App. 431, 448 (2010)(the tort requires proof of "extreme and outrageous conduct" which is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."). Ms. Short's claims of misconduct do not rise to that level, even when considered in a light most favorable to her. Her amended complaint alleged that Mr. Ramsey made false or negligent statements in the course of providing legal representation. But she failed to identify any expert witness who will support her allegations that Mr. Ramsey's legal advice was negligent or false, let alone constituted extreme or outrageous behavior that inflicted severe emotional distress. The circuit court correctly concluded that Ms. Short's allegations, if proved at trial, would not be sufficient to submit to the jury her claim of intentional infliction of emotional distress.

38. § 541(a)(1). <u>Discretionary bonus not yet awarded on petition date was not estate asset</u>. *In re Bronkowski*, 569 B.R. 48, 2017 WL 2623792 (Bankr. W.D.N.C. 2017). Chapter 7 Trustee objected to exemption claimed by debtor of a bonus she anticipated receiving from her employer. Congress intended the scope of a debtor's estate to be "all embracing," *Vogel v. Palmer (In re Palmer)*, 57 B.R. 332, 333 (Bankr. W.D. Va. 1986) (citing *In re*

Ryan, 15 B.R. 414 (Bankr. D.Md. 1981). Overruling the objection, the Bankruptcy Court held that the mere expectation or hope on the date of the filing of the bankruptcy petition did not create an asset of the bankruptcy estate where the payment of the anticipated bonus was totally discretionary with employer, and which debtor was eligible for only if she maintained her employment postpetition and performed satisfactorily, such that bonus was not included in "property of the estate."

39. §§ 544(b), 550 and Md. Code Ann., Com. Law §§ 15–203, 15–205, 15–206, 15–207, and 15–208. No recovery for conspiring to commit fraudulent transfer by nontransferees and nonbeneficiaries. *Schlossberg, Trustee, v. Madeoy, et. al. (In re Madeoy),* 576 B.R. 484, 2017 WL 3661208 (Bankr. D.Md. 2017)()()(Catliota, J.). Chapter 7 trustee brought adversary proceeding to set aside alleged fraudulent transfers that debtor made in furtherance of scheme to conceal assets from his creditors, as well as to recover assets on alter ego theory, and to recover for fraudulent statements allegedly made by participants in scheme. Defendants moved to dismiss for failure to state claim. Judge Catliota held that (i) trustee could not recover from one not a transferee or the person for whose benefit allegedly fraudulent transfer was made for conspiring to commit fraudulent transfer; (ii) allegations in trustee's complaint that, in addition to relatively modest transfers to debtor's wife and friend that were specifically identified in complaint, other fraudulent transfers were made to multiple defendants in furtherance of scheme by debtor to fraudulent divert assets of his business entities, did not state plausible fraudulent transfer avoidance claim except as to wife and friend; (iii) trustee did not plead each defendant's fraud with requisite particularity; (iv) trustee stated alter ego claim that was plausible on its face; (v) while debtor had duty to accurately disclose information in his bankruptcy schedules or to bankruptcy trustee, and while his failure to do so might support cause of action to deny him a discharge based on his "false oaths," it would not support recovery by trustee on fraudulent concealment or failure to disclose theory; and (vi) trustee stated plausible claim for accounting; but (vii) turnover claim was premature. Motion granted in part and denied in part.

Procedural Posture: Roger Schlossberg, the Chapter 7 Trustee filed an Amended Complaint alleging that Steven F. Madeoy, the Chapter 7 debtor, his wife Melanie Madeoy, and business partners and associates conspired to defraud creditors and investors by transferring assets outside the reach of the Debtor's creditors and the bankruptcy estate. The Trustee alleges that the Debtor, with the assistance of his conspirators, planned the bankruptcy years in advance so that he could shield at least $4.5 million from creditors' claims, leaving little money in the bankruptcy estate to pay creditors. This is the Trustee's second attempt to state claims against various defendants. On December 20, 2014, the Trustee commenced this adversary proceeding by filing a 104–page complaint asserting 22 counts against 53 defendants. The Defendants, along with other defendants named in the initial complaint, filed several motions to dismiss the initial complaint, which the court resolved in a Memorandum of Decision, *Roger Schlossberg, Chapter 7 Trustee v. Madeoy, et al. (Madeoy I),* 2015 WL 4879960 (Bankr. D. Md. July 30, 2015).

In the Amended Complaint, the Trustee brings 13 counts against 10 defendants: the Debtor, Melanie Madeoy, George Christopher, as Trustee for the Melanie Cook Madeoy Living Trust (the "Trust"), David Scott Posey ("Posey"), Paul Kurtz ("Kurtz"), Amalgamated Holdings, Inc. ("AHI"), Girard LLC ("Girard") JTRS, Incorporated ("JTRS"), LWBR, LLC ("LWBR"), and MRC Investors, LLC ("MRC") (collectively, the "Defendants"). The Defendants filed a motion to dismiss the Amended Complaint contending that it fails to state a claim and lacks the requisite particularity for pleading fraud by failing to allege fraud at a particular time or place, and that the summary of 65 emails attached to the Amended Complaint is conclusory, contains unsupported factual statements, and does not support the claims in the Amended Complaint.

The Court (1) granted the motion to dismiss Counts 1, 4, 7, 12 and 13; (2) denied the motion to dismiss Counts 2 and 3 as to Melanie Madeoy and Posey, to the extent of $67,567.34, and grant the motion as to all other defendants; (3) denied the motion to dismiss Counts 5 and 11 as to the Debtor, Melanie Madeoy, Posey, MRC, AHI, Girard, JTRS, and LWBR and grant the motion as to all other defendants; and (4) denied the motion to dismiss Count 6 as to Melanie Madeoy, Posey, and the Trust and grant the motion as to all other defendants.

Facts: The Debtor was involved in many businesses that acquired real estate for the purpose of leasing or reselling them for a profit. Through the creation of many business entities, the Debtor led a fraudulent conspiracy to evade his creditors, reaping the profits of his business to the creditors and investors' detriment. Even though the Debtor was not a named owner of the business entities, the Debtor was the de facto managing member. He secretly caused broker or real estate commissions or profits from transactions to be paid to Melanie Madeoy, the Trust, Posey, MRC, AHI, and Girard, without any consideration. Those people and entities have been unjustly enriched.

The Debtor was assisted by the Defendants. A primary conspirator in his scheme is the Debtor's wife, Melanie Madeoy, who by being the putative owner of holding companies that served the purpose of transferring assets out of the reach of creditors and the Trustee. A second defendant, Posey, assisted in the conspiracy by holding ownership of various entities, in name only, for the purpose of hiding the Debtor's assets from creditors. Posey is co-owner with the Debtor and Melanie Madeoy in 11 entities. The Trust is also another entity that received transferred assets that belonged to the Debtor. Kurtz, who is a long-time friend of the Debtor, provided advice to the Debtor before and after his bankruptcy filing. The defendant entities, AHI, Girard, JTRS, LWBR, and MRC, are fraudulently conceived entities that acted as a shield to hold assets and to hinder, delay and defraud the Debtor's creditors and estate.

The Debtor dissipated and diverted funds for his own personal benefit and for the benefit of his co-conspirators and to the detriment of creditors. The fraudulent scheme included using $100,000 from the sale of real property to pay his accountant, non-legitimate business expenses, and a management fee of $41,025.64 in the name of an entity called Crosstown Properties. The Debtor "rolled" or "jumped" debts of TMS and Crosstown entities: when a piece of real property sold, the Debtor would not repay the loan or the investment, which was secured by the real property and instead caused that debt to be recorded as a debt owned by another entity; thus, it created a false debt for another entity.

The Debtor scheduled JTRS as having a value of $0 on the petition date, December 21, 2012. However, between February 10, 2011, and December 18, 2012, there were payments made to JTRS from MRC totaling $13,741.79. Additionally, between December 28, 2012, and September 26, 2014, there were payments made to JTRS totaling $166,512.22. The Debtor made this transfer with the assistance of George Christopher, Posey, Kurtz, and Melanie Madeoy. None of these payments were disclosed to the Trustee or turned over to the estate.

The Debtor eliminated his ownership interest, on paper, around the time of the bankruptcy. He transferred ownership interests to Melanie Madeoy and Posey. However, the Debtor directed the deals while Posey continued to work on "flipping" properties. Email communication show that Melanie was not directly involved, and that only her name and her entities names were being used to create a façade that she owned the business enterprise. Posey, Kurtz, and George Christopher acted as agents for Melanie.

Conclusions of Law: "[T]he purpose of Rule 12(b)(6) is to test the sufficiency of a complaint and not to resolve contests surrounding the facts, the merits of the claim, or the applicability of defenses." *Presley v. City of Charlottesville*, 464 F.3d 480, 483 (4th Cir. 2006) (quoting *Edwards v. City of Goldsboro*, 178 F.3d 231, 243 (4th Cir. 1999). The court must "accept the well-pled allegations of the complaint as true," and "construe the facts and reasonable inferences derived therefrom in the light most favorable to the plaintiff." *Ibarra v. United States*, 120 F.3d 472, 474 (4th Cir. 1997). To survive a motion to dismiss, a complaint must "contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face." *Ashcroft v. Iqbal,* 556 U.S. 662, 667, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). "The mere recital of elements of a cause of action, supported only by conclusory statements, is not sufficient to survive a motion made pursuant to Rule 12(b)(6)." *Walters v.*

McMahen, 684 F.3d 435, 439 (4th Cir. 2012) (citing *Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937). The complaint must also state a "plausible claim for relief" and that determination by the court is a "context-specific task." *Walters*, 684 F.3d at 439 (citing *Iqbal*, 556 U.S. at 680–681, 129 S.Ct. 1937 (plaintiffs bear the burden of establishing that a claim is not only conceivable, but also plausible)). "Ultimately, factual allegations must ... raise a right to relief above the speculative level, and the complaint must offer enough fact to raise a reasonable expectation that discovery will reveal evidence of the alleged activity." *US Airline Pilots Ass'n v. Awappa, LLC*, 615 F.3d 312, 317 (4th Cir. 2010)(quoting *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955).

Fed. R. Civ. P. 9(b): Claims based on fraud are subject to a heightened pleading standard. Fed. R. Civ. P. 9(b) provides: "In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice intent, knowledge, and other conditions of a person's mind may be alleged generally."

In the Fourth Circuit, a complaint must identify with particularity "the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby." *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 784 (4th Cir. 1999). "Mere allegations of 'fraud by hindsight' will not satisfy the requirements of Rule 9(b)." *Hillson Partners Ltd. Partnership v. Adage, Inc.*, 42 F.3d 204, 209 (4th Cir. 1994). A court, however, "should hesitate to dismiss a complaint under Rule 9(b) if the court is satisfied (1) that the defendant has been made aware of the particular circumstances for which she will have to prepare a defense at trial, and (2) that plaintiff has substantial pre-discovery evidence of those facts." *Harrison*, 176 F.3d at 784.

As pertinent here, when the complaint alleges claims against many defendants, Rule 9(b) requires that all claims must be pled with particularity to each defendant. *Dealers Supply Co., Inc. v. Cheil Industries, Inc.*, 348 F.Supp.2d 579, 589–90 (M.D.N.C. 2004)(citing *Adams v. NVR Homes, Inc.*, 193 F.R.D. 243, 251 (D. Md. 2000). "The identity of the person making the misrepresentation is particularly important where there are multiple defendants." *Id.* at 590. Courts have rejected claims in which multiple defendants are "lumped together" and in which "no defendant can determine from the complaint which of the alleged representations it is specifically charged with having made, nor the identity of the individual by whom and whom the statements were given." *Id.* (quoting *McKee v. Pope Ballard Shepard & Fowle, Ltd.*, 604 F.Supp. 927, 931 (N.D. Ill. 1985)).

Count 1 (Civil Conspiracy to Commit Fraud), the Trustee asserts a claim for conspiracy against all Defendants alleging they agreed or understood that they would act in confederation to commit a fraud upon the creditors of the bankruptcy estate of Steven Madeoy by unlawfully funneling monies out of accounts and entities that should have become property of the estate, by unlawfully hiding and concealing assets of the estate, and by unlawfully using assets of the estate of their own benefit.

Under Maryland law, civil conspiracy is the "combination of two or more persons by an agreement or understanding to accomplish an unlawful act or to use unlawful means to accomplish an act not in itself illegal, with the further requirement that the act or the means employed must result in damages to the plaintiff." *Marshall v. James B. Nutter & Co.*, 758 F.3d 537, 541 (4th Cir. 2014)(quoting *Hoffman v. Stamper*, 385 Md. 1, 867 A.2d 276, 290 (2005)). Beyond proving an agreement exists, "the plaintiff must also prove the commission of an overt act, in furtherance of the agreement that caused the plaintiff to suffer actual injury." *Id.* "[C]onspiracy is not a separate tort capable of independently sustaining an award of damages in the absence of other tortious injury to the plaintiff." *Marshall*, 758 F.3d at 541 (quoting *Alleco Inc. v. Harry & Jeanette Weinberg Found., Inc.*, 340 Md. 176, 665 A.2d 1038, 1045 (1995)).

The court must first determine what is the underlying tort alleged by the Trustee that supports the conspiracy claim. The Trustee asserts that the Defendants engaged in a conspiracy to commit fraudulent transfers: The Defendants "assist[ed] or caus[ed] the improper transfer of money, property, entities, and membership interests that are property of the estate." It also alleges that the Defendants "unlawfully funnel[led] monies out of accounts and entities that should have become property of the estate, by unlawfully hiding and concealing assets of the estate." Numerous courts have held that a plaintiff may not recover damages for a conspiracy to commit a fraudulent transfer. *Indus. Enters. of Am., Inc. v. Mazzuto (In re Pitt Penn Holding Co.)*, 484 B.R. 25, 48 (Bankr. D. Del. 2012)("Bankruptcy courts do not recognize claims for damages for conspiracy to commit a fraudulent transfer."); *Hyundai Translead, Inc. ex rel. Estate of Trailer Source, Inc. v. Jackson Truck & Trailer Repair Inc.*, 419 B.R. 749, 761 (M.D. Tenn. 2009)("[T]he authorities are [ ] clear that there is no such thing as liability for aiding and abetting a fraudulent conveyance or conspiracy to commit a fraudulent transfer as a matter of federal law under the Code.")(quoting *Official Comm. of Unsecured Creditors of Fedders N. Am., Inc. v. Goldman Sachs Credit Partners L.P. (In re Fedders N. Am., Inc.)*, 405 B.R. 527, 549 (Bankr. D. Del. 2009)). A trustee's recourse for a fraudulent transfer is limited to remedies provided in 11 U.S.C. § 550, "and that provision only allows the trustee to recover up to the amount of the transfer from a transferee, or a party for whose benefit the transfer was made." *In re Fedders N. Am., Inc.*, 405 B.R. at 548 (citing *Sherman v. FSC Realty LLC (In re Brentwood Lexford Partners, LLC)*, 292 B.R. 255, 275 (Bankr. N.D. Tex. 2003)); *see also Schlossberg v. Abell (In re Abell)*, 549 B.R. 631, 667 (Bankr. D. Md. 2016)("Numerous courts have held that the bankruptcy court cannot invoke state law remedies to circumvent or undermine the remedy legislated by Congress for the avoidance of a fraudulent transfer .... [T]he trustee's remedy for an avoided transfer [is] provided for in § 550, and that provision only allows a trustee to recover up to the amount of the transfer."). Allowing a trustee to recover more than the amount of the transfer would "lead to a result that expands the remedies [for a fraudulent transfer] beyond § 550." *In re Brentwood Lexford Partners, LLC*, 292 B.R. at 275.

The conclusion that a trustee may not bring a claim for conspiracy to commit a fraudulent transfer is also supported by Maryland conspiracy law, at least where the alleged conspirators are not in the chain of title. "[A] defendant may not be adjudged liable for civil conspiracy unless that defendant was legally capable of committing the underlying tort alleged." *Marshall*, 758 F.3d at 541 (quoting *Shenker v. Laureate Educ., Inc.*, 411 Md. 317, 983 A.2d 408, 428 (2009)). "Thus, civil conspiracy requires an agreement, and an overt act in furtherance of the agreed-to unlawful conduct that causes injury, as well as the legal capacity of the conspirators to complete the unlawful conduct." *Marshall*, 758 F.3d at 541. If the participant cannot be held liable for the underlying tort, then the participant cannot be held liable for the conspiracy to commit the underlying tort. *BEP, Inc. v. Atkinson*, 174 F.Supp.2d 400, 409 (D. Md. 2001). Thus, a conspirator could only be capable of committing a fraudulent transfer if he or she were a transferor or transferee. To hold otherwise would be to impose liability on parties not "legally capable of committing the underlying tort." *Marshall*, 758 F.3d at 541–42. For this reason, Maryland law would not recognize a conspiracy claim against any defendant for whom a claim of fraudulent transfer could not be made.

<u>Held</u>: Accordingly, the Trustee can recover under § 550 from those defendants against whom he has stated a fraudulent transfer claim and no other defendant is legally capable of committing a fraudulent transfer. The court will dismiss Count 1 to the extent it seeks to bring a claim for conspiracy to commit a fraudulent transfer.

The second underlying tort asserted by the Trustee in support of a conspiracy claim is fraudulent misrepresentation brought against all Defendants in Count 4. The finding of a civil conspiracy presupposes the underlying tort was committed. *See Marshall*, 758 F.3d at 541; *see also Alexander & Alexander Inc. v. B. Dixon Evander & Assocs., Inc.*, 336 Md. 635, 650 A.2d 260, 265 (1994) ("[I]t is a general rule, that a conspiracy cannot be made the subject of a civil action, unless something is done which, without the conspiracy, would give a right of action.") (quoting *Robertson v. Parks*, 76 Md. 118, 24 A. 411, 413 (1892)). Therefore, Count 4 cannot support a claim of conspiracy and the Court dismissed Count 1.

Count 2 seeks to avoid pre-petition transfers made to the Defendants under §§ 548 and 550. Trustee asserts that within two years of the petition date, the Debtor's assets and membership interests were transferred to various defendants with an actual intent to hinder, delay, or defraud creditors under § 548(a)(1)(B) if the debtor received less than reasonably equivalent value and, among other things, was insolvent or rendered insolvent by the transfer or was left with unreasonably small capital to conduct its business. § 548(a)(1)(A). A claim under § 548(a)(1)(A) must satisfy the pleading requirement of Rule 9(b), but a claim under § 548(a)(1)(B) "is based on the transferor's financial condition and the sufficiency of the consideration provided by the transferee, rather than fraud ...." *In re Derivium Capital, LLC,* 380 B.R. 429, 439 (Bankr. D.S.C. 2006). Thus, a § 548(a)(1)(B) claim only needs to satisfy general pleading rules to survive a motion to dismiss. A trustee may recover the value of that which was transferred for the benefit of the estate. § 550.

The Trustee alleges that $58,974.26 was transferred as a fee upon the closing of 301 Delafield Place, N.W. The Amended Complaint alleges this amount was taken by the Debtor as a fee for Crosstown and the funds were then transferred to Melanie Madeoy. This allegation does not state a claim for fraudulent transfer against any defendant other than Melanie.

The Trustee alleges that $13,741.79 was transferred to JTRS prepetition from MRC but it does not say from whom the transfers were made or why a transfer to an entity owned by the Debtor and Melanie is a fraudulent transfer against any defendant, other than perhaps Melanie.

Accordingly, the Court dismissed Count 2 against all defendants except for Melanie Madeoy and the claim against Posey for up to $67,567.34.

Count 3 (Fraudulent Conveyance) seeks to avoid transfers under the Maryland Uniform Fraudulent Conveyance Act ("MUFCA") § 15–201, *et seq.*, against the Defendants. Under MUFCA, the Trustee may avoid transfers that occurred up to three years before the date of the petition, unlike § 548 which limits recovery to those transfers that occurred within the two-year look back period. The allegations in this count are identical to those in Count 2 and therefore the same rationale applies. The Court dismissed Count 3 against all defendants except for Melanie Madeoy and the claim against Posey for up to $67,567.34.

Count 4 (Fraud) asserts a claim for fraudulent misrepresentation against all the Defendants alleging knowingly false representations the basis for, timing of, and participants in and to transfers of money and property, and by knowingly and intentionally misrepresenting the legitimacy of encumbrances on properties allegedly securing loans. The Court found that Count 4 did not meet the specificity and particularity requirement of Rule 9(b).

Count 5 (Alter Ego) asserts that all the individual defendants should be held personally liable and that corporate defendants should be held jointly and severally liable for the liabilities of the Debtor. The Trustee contends that the separate corporate existence of the Trust, MRC, AHI, Girard, JTRS, and LWBR is a fiction. In Maryland, corporate "shareholders generally are not held individually liable for debts or obligations of a corporation except where it is necessary to prevent fraud or enforce a paramount equity." *Bart Arconti & Sons, Inc. v. Ames–Ennis, Inc.,* 275 Md. 295, 340 A.2d 225, 234 (1975)(citing *Damazo v. Wahby,* 259 Md. 627, 270 A.2d 814 (1970)). However, in the appropriate circumstances, courts will "disregard the corporate entity and deal with substance rather than form, as though a corporation did not exist." *Id.* There are three circumstances by which a corporate entity may be disregarded:

First. Where the corporation is used *as a mere shield for the perpetration of a fraud*, the courts will disregard the fiction of separate corporate entity.

Second. The courts may consider a corporation as unencumbered by the fiction of corporate entity and deal with substance rather than form as though the corporation did not exist, *in order to prevent evasion of legal obligations.*

Third. Where the stockholders themselves, or a parent corporation owning the stock of a subsidiary corporation, *fail to observe the corporate entity, operating the business or dealing with the corporation's property as if it were their own*, the courts will also disregard the corporate entity for the protection of third persons. *Hildreth v. Tidewater Equip. Co.,* 378 Md. 724, 838 A.2d 1204, 1210 (2003) (quoting Herbert M. Brune, Jr., Maryland Corporation Law and Practice, § 371 at 384 (revised ed. 1953)). The third of these circumstances is commonly referred to as the "alter ego" doctrine. *Rosen v. Kore Holdings, Inc. (In re Rood)*, 448 B.R. 149, 159 (D. Md. 2011) (citing *Hildreth*, 838 A.2d at 1210. This doctrine is applied " 'with great caution and reluctance' and only in 'exceptional circumstances.' " *Id.* Application of the alter ego doctrine is appropriate where there is a showing of:

(1) complete domination, not only of the finances, but of policy and business practice in respect to the transaction so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own[;]

(2) that such control [was] used by the defendant to commit fraud or wrong, to perpetrate the violation of the statutory or other positive legal duty, or dishonest and unjust act in contravention of the plaintiff's legal rights [;] and

(3) that such control and breach of duty proximately caused the injury or unjust loss.

Id. (internal quotations omitted). Although there is "no universal rule as to the specific criteria that courts will consider in determining whether to apply the doctrine, ... some of the factors commonly considered" are:

(1) whether the corporation is inadequately capitalized, fails to observe corporate formalities, fails to issue stock or pay dividends, or operates without a profit[;]

(2) whether there is commingling of corporate and personal assets[;]

(3) whether there are non-functioning officers or directors[;]

(4) whether the corporation is insolvent at the time of the transaction [;] and

(5) the absence of corporate records.

The evaluation of alter ego liability is a fact-specific inquiry generally left to summary judgment. *RaceRedi Motorsports, LLC v. Dart Mach., Ltd.*, 640 F.Supp.2d 660, 670 (D. Md. 2009)(citing *In re American Honda Motor Co., Inc. Dealerships Relations Litigation*, 941 F.Supp. 528, 551 (D. Md. 1996)). Maryland courts, "nonetheless, have dismissed alter ego claims under Rule 12(b)(6)." *Id.* The Defendants argue that dismissal of the alter ego claim is warranted because, in Maryland, courts will not disregard the corporate entity absent a finding of fraud or to enforce a paramount equity. The Defendants also argue that the Trustee has failed to allege that the Defendants exercised complete domination over the entities so that the corporate defendants had no separate mind, will, or existence of their own.

Held: Complaint asserts that Melanie's and Posey's involvement in these entities was fabricated, making it appear that the Debtor no longer had ownership of the assets, when in actuality he continued to orchestrate all of the dealings of the companies and retained beneficial ownership. These allegations are sufficient to state a claim against Melanie and Posey and against the corporate defendants of MRC, AHI, Girard, JTRS, and LWBR but the Complaint does not contain sufficient allegations to state an alter ego claim against the Trust. Count 5 was not be dismissed as to the Debtor, Melanie Madeoy, Posey, MRC, AHI, Girard, JTRS, and LWBR, but was dismissed against Kurtz and the Trust.

Count 6 (Recovery of Fraudulent Transfers under § 550) asserts that the Defendants received transfers as described in previous counts and that those transfers should be avoided and the value of those assets should be returned to the Trustee. The Court determined that the Trustee has stated a claim for fraudulent transfer against Madeoy and Posey and the Complaint alleges assets were transferred to the Trust. Therefore, the Court denied the motion to dismiss Count 6 as to Melanie Madeoy, Posey and the Trust, and grant the motion as to all other defendants.

Count 7 (Concealment and/or Failure to Disclose) alleges that the Debtor "concealed a significant amount of information concerning assets of the Estate, and the Trustee and the Debtor's bankruptcy estate have suffered significant damages as a result of these concealments."

The Trustee cites no authority for the position that he can seek monetary relief for a debtor's failure to accurately disclose information in his bankruptcy schedules or to a bankruptcy trustee. Of course, a debtor's failure to disclose can provide a basis for denying the discharge under § 727. But there is no general cause of action by a Chapter 7 trustee against a debtor for failing to accurately disclose financial information during the bankruptcy case. Accordingly, Count 7 will be dismissed.

Count 11 (Accounting) The common law claim of accounting is available only when remedies at law are inadequate. *Goldhammer v. Hayes,* 2009 WL 1609044, *5 (D. Md. 2009). It is an equitable action. *Shah v. HealthPlus, Inc.*, 116 Md.App. 327, 696 A.2d 473, 476 (Md. Ct. Spec. App. 1997). "An accounting may be had where one party is under an obligation to pay money to another based upon facts and records which are known and kept exclusively by the party to whom the obligation is owed, or where there is a confidential or fiduciary relation between the parties, and a duty rests upon the defendant to render an account." *P.V. Props. Inc. v. Rock Creek Village Assocs. Ltd. P'ship*, 77 Md.App. 77, 549 A.2d 403, 409 (Md. Ct. Spec. App. 1988), *quoted in Polek v. J.P. Morgan Chase Bank, N.A.*, 424 Md. 333, 36 A.3d 399, 418 (2012)). *P.V. Props*. provides an example under Maryland law of when a freestanding claim for accounting is appropriate. In that case, a commercial tenant in a shopping center sought an itemized listing of common area maintenance expenses where the lease [was] silent in that respect and the landlord [was] unwilling to provide the desired information. The Maryland Court of Special Appeals explained the "general rule" that a suit in equity for an accounting may be maintained when the remedies at law are inadequate, and said: An accounting may be had ... where there is a confidential or fiduciary relation between the parties, and a duty rests upon the defendant to render an account.

As discussed above, the court determined the Complaint asserts a plausible claim for alter ego liability against Melanie Madeoy, Posey, MRC, AHI, Girard, JTRS, and LWBR. Due to the nature of the alleged scheme, it may well be that the remedies available to the Trustee are inadequate to determine the scope and extent of any losses, should he prove his case. The court also takes into account the long and tortuous dispute between the parties over the Trustee's Bankruptcy Rule 2004 investigations and requests. *See Madeoy I*, 2015 WL 4879960 at *6–8. Lastly, because these entities may be considered alter egos of the Debtor, a "confidential or fiduciary relation between the parties" may exist and thus "a duty rests upon the defendant to render an account." *P.V. Props. Inc.*, 549 A.2d at 409. For this reason, the court will deny the motion to dismiss Count 11 as to the parties against whom the Trustee has stated a claim for alter ego, and will dismiss Count 11 as to Kurtz and the Trust.

Count 12 (Injunction) asserts a claim for an injunction against the Defendants. The Trustee has not filed a motion seeking temporary or permanent relief. The relief the Trustee seeks is a permanent injunction, which would only be available, if at all, after adjudication of liability and a showing of likelihood or continuing dissipation of assets. The court will dismiss Count 12 without prejudice upon a proper showing at the applicable time.

Count 13 (Turnover) asserts a claim for turnover under § 542(a), which requires that the trustee must prove that "(1) the property is in the possession, custody or control of another entity; (2) the property can be used in accordance with the provisions of section 363; and (3) the property has more than inconsequential value to the debtor's estate." *Zazzali v. Minert* (*In re DBSI, Inc.),* 468 B.R. 663, 669 (Bankr. D. Del. 2011) "[C]ourts generally agree that the turnover provision 'is not intended as a remedy to determine disputed rights of parties [,] [but] ... to obtain what is acknowledged to be property of the estate.'" *Rosen v. Dahan (In re Minh Vu Hoang),* 469 B.R. 606, 617 (D. Md. 2012) (quoting *In re Suncoast Towers South Assoc.*, Nos. 98–10537–BKC–AJC, 98–1451–BKC–AJC–A, 1999 WL 549678, at *10 (Bankr. S.D. Fla. June 17, 1999)). Therefore, to survive a motion to dismiss the Trustee needs to plausibly allege the three elements. The Court found the turnover count is premature as the Amended Complaint does not identify any undisputed assets of the estate. *Pry v. Maxim Glob. Inc. (In re Maxim Truck Co.), Inc.*, 415 B.R. 346, 357 n.4 (Bankr. S.D. Ind. 2009)("[T]he Trustee's remedy under § 542 for turnover ... only ripens upon a determination by the Court that the property in dispute is, in fact, property of the estate."). The Court dismissed Count 13 without prejudice to reasserting a claim for turnover as it becomes necessary.

The Defendants seek sanctions against the Trustee's counsel under 28 U.S.C. § 1927, contending that he has created a "quagmire of interrelated pleadings as to purposefully harass and intimidate the Defendants .... [and] to churn fees and create an excessive billing scheme designed to bleed substantial assets from the Debtor's estate ...." Indeed, the original complaint, which named 53 defendants in a 104–page pleading, seemed unnecessarily convoluted to assert the claims that the Trustee ultimately brought against the current 10 defendants in the Amended Complaint. But the Trustee brought the initial complaint on the heels of a long ongoing skirmish with the many of the defendants over their production of information in response to his Bankruptcy Rule 2004 requests. *See Madeoy I*, 2015 WL 4879960 at *6–8. The Court found that the Amended Complaint does not run afoul of 28 U.S.C. § 1927.

Conclusion: The court (1) granted the motion to dismiss Counts 1, 4, 7, 12 and 13; (2) denied the motion to dismiss Counts 2 and 3 as to Melanie Madeoy and Posey, to the extent of $67,567.34, and grant the motion as to all other defendants; (3) denied the motion to dismiss Counts 5 and 11 as to the Debtor, Melanie Madeoy, Posey, MRC, AHI, Girard, JTRS, and LWBR and grant the motion as to all other defendants; and (4) denied the motion to dismiss Count 6 as to Melanie Madeoy, Posey, and the Trust and grant the motion as to all other defendants. All dismissals are with prejudice except for Counts 12 and 13.

40. § 546(a)(1), 548(a). <u>A complaint to recover alleged fraudulent conveyances in a case filed as Chapter 7, converted to Chapter 11 and then reconverted to Chapter 7 must be commenced within two (2) years from the date of the entry of the Order reconverting the case to a Chapter 7 case</u>. *Wolff v. Katz*, 2017 WL 2590757 (D. Md. 2017)(Not Reported in F.Supp.3d). The U.S. District Court affirmed the dismissal of the Chapter 7 Trustee's complaint against Garrett Katz, Gabrielle Katz, and Gregory Katz ("Appellees"). On January 8, 2014, the Doug Monsein Family Trust, the Sheldon Monsein Living Trust, and Sol Oidick filed a Chapter 7 involuntary petition against Debtor Geary B. Katz, debtor. On January 23, 2014, on the debtor's motion, the Bankruptcy Court entered an order converting the Chapter 7 case to a Chapter 11 case, and subsequently on February 21, 2014, the Bankruptcy Court issued a Notice of Chapter 11 Bankruptcy Case, which stated that a Chapter 11 bankruptcy case "has been filed ... and an order for relief has been entered", however, on April 14, 2014, by consent order the case was reconverted to Chapter 7.

On April 16, 2014, Michael G. Wolff was appointed Chapter 7 Trustee and on June 30, 2014, the Trustee filed a line requesting the entry of an order for relief. At the Trustee's request, on July 8, 2014, the Bankruptcy Court entered an order for relief *nunc pro tunc*. On June 30, 2016, less than two years after the *nunc pro tunc* order, the Trustee filed a Complaint for Avoidance and Recovery of Fraudulent Conveyances against Appellees, the Debtor's children alleging that the debtor made fraudulent transfers to Appellees for their benefit in violation of § 548(a). The Appellees filed a Motion to Dismiss the Trustee's complaint which the Bankruptcy Court granted on December 7, 2016, as untimely filed under the statute of limitations set forth in § 546(a)(1). The Trustee appealed the dismissal of his complaint.

The U.S. District Court reviews under a bankruptcy court's "findings of fact for clear error and questions of law *de novo.*" *Duncan v. Duncan (In re Duncan)*, 448 F.3d 725, 728 (4th Cir. 2006) an abuse-of-discretion standard applies in reviewing the application of law to the facts. *Matusda Capital, Inc., v. Nelfax Dev. LLC (In re Netfax, Inc.)*, 335 B.R. 85, 91 (D. Md. 2005). A district court may find an abuse of discretion " 'where the [bankruptcy court's] decision rests upon a clearly erroneous finding of fact, an errant conclusion of law, or an improper application of law to fact.'" *Id.*, at 92.

Trustee argues that the Bankruptcy Court erred by dismissing his complaint as untimely under Section 546(a)(1) contending that the *nunc pro tunc* order entered on July 8, 2014, constitutes the appropriate order for relief for purposes of Section 546. The Appellees contend that the 11 Conversion Order, entered on January 23, 2014, constitutes the order for relief for purposes of Section 546(a)(1). The Bankruptcy Court agreed with Appellees. District Court affirmed.

Section 546(a)(1) provides, in relevant part, that an avoidance "action under§ 548 may not be commenced after ... 2 years after the entry of the order for relief." *Id.* In a voluntary bankruptcy case, the filing of the bankruptcy petition constitutes the order for relief. § 301(b). In an involuntary case, the Court is required to enter an order for relief "under the chapter under which the petition was filed." § 303(h). If the petition is controverted, the Bankruptcy Court must enter an order for relief after a trial and "only if the debtor is generally not paying such debtor's debts as such debts become due unless such debts are the subject of a bona fide dispute as to liability or amount; or within 120 days before the date of the filing of the petition, a custodian ... was appointed or took possession." *Id.* In addition, an order for relief is entered automatically by operation of law when a case is converted from "one chapter of [Title 11] to a case under another chapter of [Title 11]." § 348(a) (stating that "[c]onversion of a case from a case under one chapter of this title to a case under another chapter of this title constitutes an order for relief under the chapter to which the case is converted[.]"). However, conversion under Section 348(a) "does not effect a change in the date of ... the order for relief" unless specified in an enumerated exception under Sections 348(b) and (c). *Id.*

In this case, the Bankruptcy Court dismissed the Trustee's complaint because it was "barred by the two-year limitations period set forth in § 546(a)(1)." The Bankruptcy Court found that "the order converting the debtor's case to one under Chapter 11 entered on January 23, 2014 constituted an order for relief by operation of § 348(a)." However, the Trustee argues that the *nunc pro tunc* order constitutes the proper order for relief for purposes of § 546(a)(1). Specifically, the Trustee contends that a conversion order under § 348(a) does not effect a change in the date of the order for relief; and that §§ 348(b) and 348(c), which provide the exceptions to § 348(a), do not include § 546(a). ("If the 'order for relief' addressed in § 348(a) does not effect a change in the date of the 'order for relief' it cannot, itself, be the 'order for relief' addressed in §§ 303 and 546(a)"; ("The plain language of § 348 states that the conversion does not effect a change in the date of the order for relief. The [*nunc pro tunc* order] being an Order for Relief that was entered by the Bankruptcy Court, by the plain language of § 348(a), the conversion order cannot have changed that date.").

Held: Contrary to the Trustee's argument, the conversion order constitutes the proper order for relief for purposes of § 546(a)'s statute of limitations. Although the Trustee correctly notes that conversion of a case under § 348(a) "does not effect a change in the date of ... the order for relief," *see In re Borgus*, 544 B.R. 315,322 (Bankr. E.D.N.C. 2016)(noting that the "general rule is that conversion does not reset the order for relief[.]"), " 'the purpose of that provision is to preserve actions already taken in the case *before* conversion.' " *In re Campbell*, 313 B.R. 320 (B.A.P. 10th Cir. 2004). Indeed, "[S]ection 348 is designed to avoid [ ] the *resetting* of deadlines and the *reopening* of limitations periods" by an order for relief entered pursuant to a conversion order. *In re Bell*, 225 F.3d 203, 213 (2nd Cir. 2000).
Here, however, the *nunc pro tunc* order was entered after the 11 Conversion Order and the 7 Reconversion Order. Case law indicates that the *initial* order for relief, whether entered pursuant to Section 303(h) or Section 348(a), is not altered by a subsequent order for relief entered pursuant to conversion. *See, e.g., In re Quality Pontiac Buick GMC Truck, Inc.,* 222 B.R. 865, 868 (Bankr. D.Minn. 1998)(noting that § 348)(a) "does not *restart,* anew and generally, the various periods for administrative action that governed the case at its inception, under its *original* order for relief.").

A conversion order constitutes a controlling order for relief in a case where, as here, it precedes the entry of an order for relief under Section 303(h). As such, the exceptions listed in Sections 348(b) and (c) do not apply to the instant case. Indeed, courts recognize that Sections 348(b) and (c) are intended to apply to conversion orders entered after the entry of an initial order for relief. *In re State Airlines, Inc.,* 873 F.2d 264, 268 (11th Cir. 1989).

41. § 546(e); § 548(a). Safe harbor for avoidance of recovery of alleged fraudulent transfer protects only the transfers that the trustee seeks to avoid and not financial institutions acting only as an intermediary. *Merit*

Management Group, LP v. FTI Consulting, Inc., 583 U. S. ____ (No. 16–784) (February 27, 2018), The Bankruptcy Code allows trustees to set aside and recover certain transfers for the benefit of the bankruptcy estate, including, as relevant here, certain fraudulent transfers "of an interest of the debtor in property." 11 U.S.C. § 548(a). It also sets out a number of limits on the exercise of these avoiding powers. Central here is the securities safe harbor, which, *inter alia*, provides that "the trustee may not avoid a transfer that is a . . . settlement payment . . . made by or to(or for the benefit of) a . . . financial institution . . . or that is a transfer made by or to (or for the benefit of) a . . . financial institution . . . in connection with a securities contract." §546(e).Valley View Downs, LP, and Bedford Downs Management Corp. entered into an agreement under which Valley View, if it got the last harness-racing license in Pennsylvania, would purchase all of Bedford Downs' stock for $55 million. Valley View was granted the license and arranged for the Cayman Islands branch of Credit Suisse to wire $55 million to third-party escrow agent Citizens Bank of Pennsylvania. The Bedford Downs shareholders, including petitioner Merit Management Group, LP, deposited their stock certificates into escrow. Citizens Bank disbursed the $55 million over two installments according to the agreement, of which petitioner Merit received $16.5 million. Although Valley View secured the harness-racing license, it was unable to achieve its goal of opening a racetrack casino. Valley View and its parent company, Centaur, LLC, filed for Chapter 11 bankruptcy. Respondent FTI Consulting, Inc., was appointed to serve as trustee of the Centaur litigation trust. FTI then sought to avoid the transfer from Valley View to Merit for the sale of Bedford Downs' stock, arguing that it was constructively fraudulent under § 548(a)(1)(B). Merit contended that the § 546(e) safe harbor barred FTI from avoiding the transfer because it was a "settlement payment . . . made by or to (or for the benefit of)" two "financial institutions," Credit Suisse and Citizens Bank. The District Court agreed with Merit, but the Seventh Circuit reversed, holding that § 546(e) did not protect transfers in which financial institutions served as mere conduits.

Issue: a transfer from A → D that was executed via B and C as intermediaries, such that the component parts of the transfer includeA → B → C → D. If a trustee seeks to avoid the A → D transfer, and the §546(e) safe harbor is invoked as a defense, the question becomes: When determining whether the §546(e) securities safe harbor saves the transfer from avoidance, should courts look to the transfer that the trustee seeks to avoid (*i.e.*, A → D) to determine whether that transfer meets the safe-harbor criteria, or should courts look also to any component parts of the overarching transfer (*i.e.*, A → B → C → D)? The Court concludes that the plain meaning of §546(e) dictates that the only relevant transfer for purposes of the safe harbor is the transfer that the trustee seeks to avoid.

Held: The only relevant transfer for purposes of the § 546(e) safe harbor is the transfer that the trustee seeks to avoid. (a) Before a court can determine whether a transfer was "made by or to (or for the benefit of)" a covered entity, it must first identify the relevant transfer to test in that inquiry. Merit posits that the relevant transfer should include not only the Valley-View-to-Merit end-to-end transfer, but also all of its component parts, *i.e.*, the CreditSuisse-to-Citizens-Bank and the Citizens-Bank-to-Merit transfers. FTI maintains that the only relevant transfer is the transfer that it sought to avoid, specifically, the overarching transfer between Valley View and Merit. (1) The language of § 546(e) and the specific context in which that language is used support the conclusion that the relevant transfer for purposes of the safe-harbor inquiry is the transfer the trustee seeks to avoid. The first clause of the provision—"Notwithstanding sections 544, 545, 547, 548(a)(1)(B), and 548(b) of this title"—indicates that § 546(e) operates as an exception to trustees' avoiding powers granted elsewhere in the Code. The text makes clear that the starting point for the § 546(e) inquiry is the expressly listed avoiding powers and, consequently, the transfer that the trustee seeks to avoid in exercising those powers. The last clause—"except under section 548(a)(1)(A) of this title"—also focuses on the transfer that the trustee seeks to avoid. Creating an exception to the exception for § 548(a)(1)(A) transfers, the text refers back to a specific type of transfer that falls within the avoiding powers, signaling that the exception applies to the overarching transfer that the trustee seeks to avoid, not any component part of that transfer. This reading is reinforced by the § 546 section heading, "Limitations on avoiding powers," and is confirmed by the rest of the statutory text: The provision provides that "the trustee may not avoid" certain transfers, which naturally invites scrutiny of the transfers that "the trustee . . . may avoid," the parallel language used in the avoiding powers provisions. The text further provides that the transfer that is saved from avoidance is one "that *is*" (not one that involves) a securities transaction covered under § 546(e). In other words, to qualify for protection under the securities safe harbor, § 546(e) provides that the otherwise avoidable transfer itself be a transfer that meets the safe-harbor criteria. (2) The statutory structure also supports this reading of § 546(e). The Code establishes a system for avoiding transfers as well as a safe harbor from avoidance. It is thus only logical to view the pertinent transfer under § 546(e) as the same transfer that the trustee seeks to avoid pursuant to one of its avoiding powers. In an avoidance action, the trustee must establish that the transfer it seeks to set aside meets the carefully set out criteria under the substantive avoidance provisions of the Code. The defendant in that avoidance action is free to argue that the trustee failed to properly identify an avoidable transfer under the Code, including any available arguments concerning the role of component parts of the transfer. If a trustee properly identifies an avoidable transfer, however, the court has no reason to examine the relevance of component parts when considering a limit to the avoiding power, where that limit is defined by reference to an otherwise avoidable transfer, as is the case with § 546(e).

(b) The primary argument Merit advances that is moored in the statutory text—concerning Congress' 2006 addition of the parenthetical "(or for the benefit of)" to § 546(e)—is unavailing. Merit contends that Congress meant to abrogate the Eleventh Circuit decision in *In re Munford, Inc.,* 98 F.3d 604, which held that § 546(e) was inapplicable to transfers in which a financial institution acted only as an intermediary. However, Merit points to nothing in the text or legislative history to corroborate its argument. A simpler explanation rooted in the text of the statute and consistent with the interpretation of § 546(e) adopted here is that Congress added the "or for the benefit of" language that is common in other substantive avoidance provisions to the § 546(e) safe harbor to ensure that the scope of the safe harbor and scope of the avoiding powers matched.

That reading would not, contrary to what Merit contends, render other provisions ineffectual or superfluous. Rather, it gives full effect to the text of § 546(e). If the transfer the trustee seeks to avoid was made "by" or "to" a covered entity, then §546(e) will bar avoidance without regard to whether the entity acted only as an intermediary. It will also bar avoidance if the transfer was made "for the benefit of" that entity, even if it was not made "by" or "to" that entity.

Finally, Merit argues that reading the safe harbor so that its application depends on the identity of the investor and the manner in which its investment is held rather than on the general nature of the transaction is incongruous with Congress' purportedly "prophylactic" approach to § 546(e). But this argument is nothing more than an attack on the text of the statute, which protects only certain transactions "made by or to (or for the benefit of)" certain covered entities.

(c) Applying this reading of the § 546(e) safe harbor to this case yields a straightforward result. FTI sought to avoid the Valley-Viewto-Merit transfer. When determining whether the § 546(e) safe harbor saves that transfer from avoidance liability, the Court must look to that overarching transfer to evaluate whether it meets the safe-harbor criteria. Because the parties do not contend that either ValleyView or Merit is a covered entity, the transfer falls outside of the§ 546(e) safe harbor. The Supreme Court affirmed the Seventh Circuit's opinion at 830 F. 3d 690 and remanded.

42. § 549, § 550. <u>Chapter 11 debtor can avoid unauthorized post-petition transfer to law firm alleged secured by settlement proceeds from which transfer was made, however, there can be no recovery on unauthorized postpetition transfer from transferee that was fully secured</u>. *Forest Capital, LLC v. Fischer Porter & Thomas, P.C. (In re Forest Capital, LLC),* _B.R.__, 2017 WL 6558603 (Bankr. D.Md. December 15, 2017)(Harner, J.). The Fourth Circuit explained in *In re Merry-Go-Round*, 400 F.3d 219, 224 (4th Cir. 2005) "the recovery by a

Trustee of post-petition transfers from the bankruptcy estate requires, under the Statute, the satisfaction of four elements: (1) a transfer, (2) of property of the estate, (3) made after commencement of the case, and (4) that is not authorized under the Bankruptcy Code or by the bankruptcy court." Chapter 11 debtor-in-possession brought adversary proceeding to set aside allegedly unauthorized postpetition transfer and to recover from law firm as initial transferee thereon. Debtor moved for grant of partial summary judgment on avoidance claim, and law firm cross-moved for partial summary judgment on theory that its statutory lien rights under New Jersey law insulated it from any liability under Section 550 governing the liability of transferees on avoided transfers. Judge Harner held that the debtor could avoid, as unauthorized postpetition transfer, a transaction whereby law firm withdrew $25,000.00 from a trust account into which it had deposited settlement proceeds in which the Chapter 11 debtor had interest, either as owner or as assignee, but genuine issues of material fact, including the issue as to whether law firm had taken all of the steps required under New Jersey law to perfect its statutory lien in the settlement funds, precluded entry of summary judgment for firm on the claim asserted by debtor-in-possession seeking to hold firm liable under Section 550 governing the liability of transferees on avoided transfers. The Bankruptcy Court's rationale in granting the debtor's motion and denying the law firm's cross-motion was that a trustee in bankruptcy generally may avoid any postpetition transfer of property belonging to the bankruptcy estate that is not authorized by the Bankruptcy Code or the court under 11 U.S.C. § 549. Some courts have determined that the trustee's ability to recover an avoidable postpetition transfer is limited if the transferee has a secured claim against the estate. *See* 11 U.S.C. § 550; *In re C.W. Min. Co.*, 477 B.R. 176 (10th Cir. B.A.P. 2012). The logic of this approach rests on the fact that the transfer to the secured creditor actually reduces the secured creditor's claim against the estate, which reduction will be reinstated and repaid from the estate if the transfer is avoided. *In re C.W. Min. Co,*, 477 B.R. at 185. Under this approach, the analysis focuses on whether avoidance of the postpetition transfer provides a benefit to the estate.

In this adversary proceeding the Court evaluated both the avoidance of an alleged postpetition transfer and the transferee's liability for the same if the transferee asserts a valid and perfected lien in the transferred property. Specifically, Fischer Porter & Thomas, P.C. made a postpetition transfer of property in the amount of $25,000.00 to itself in payment of certain prepetition legal fees. Forest Capital, LLC, the debtor in possession and plaintiff in the adversary proceeding asserted that the postpetition transfer constituted an avoidable transfer under § 549 and moved for partial summary judgment on that basis. The law firm's opposition turned largely on § 550 and the reasoning of *In re C.W. Mining Company* and grounded its request for partial summary judgment on its secured creditor status and the legal services it provided to a nondebtor party.

43. § 549, § 550. <u>A trustee in bankruptcy generally may avoid any postpetition transfer of property belonging to the bankruptcy estate that is not authorized by the U.S. Bankruptcy Code or the court</u>. *Forest Capital, LLC v. Fischer Porter & Thomas, P.C. (In re Forest Capital, LLC),*__B.R. , 2018 WL 540988 (Bankr. D.Md. January 24, 2018)(Harner, J.). This adversary proceeding requires the Court to evaluate both the avoidance of an alleged postpetition transfer and the transferee's liability for the same if the transferee asserts a valid and perfected lien in the transferred property.

44. § 704; 28 U.S.C. §§ 1332, 1334 (c)(2). <u>Abstention warranted from Chapter 7 Trustee's suit under state law for debtor's claim for personal injuries</u>. *Payne, Trustee v. Doe (In re Leonard),* 2017 WL 1227932 (D. E.D. Va. 2017). Earl C. Leonard filed a personal injury action against John Doe in Fairfax County Circuit Court in 2015 which was dismissed after the state judge found that the two year statute of limitations had expired. Leonard then filed a Chapter 7 bankruptcy case and his trustee, pursuant to his authority under 11 U.S.C. § 704 to recover damages claimed by a debtor who was injured as a result of a hit-and-run accident allegedly caused by the negligence of an unidentified motorist, filed a suit in U.S. District Court seeking $1,000,000 in damages, which claim was defended by State Farm, the issuer of Leonard's uninsured motorist policy. Plaintiff, acting as

trustee of Leonard's bankruptcy estate, then filed this case in federal court against John Doe, seeking to recover on behalf of the bankruptcy estate asserting diversity jurisdiction pursuant to 28 U.S.C. § 1332 as the only basis for federal jurisdiction contending (i) he is the federal bankruptcy trustee and resides in Tennessee, (ii) John Doe is represented by a Virginia insurance company, and (iii) Leonard's medical bills are approximately $1,000,000. On February 10, 2017, the defendant moved to dismiss plaintiff's complaint for lack of subject matter jurisdiction, arguing that diversity of citizenship was not sufficiently alleged in the original complaint. Specifically, defendant argued that because the citizenship of John Doe is unknown, true diversity of citizenship cannot be affirmatively alleged. Moreover, defendant asserted that Leonard's uninsured motorist policy issued by State Farm expressly limits liability to $50,000, and therefore, § 1332's amount in controversy requirement was not satisfied.

Trustee amended his complaint alleging a separate ground for federal jurisdiction—28 U.S.C. § 1334(c)(2) and also filed a state court complaint against defendant John Doe. State Farm filed a second motion to dismiss, asserting (i) that plaintiff's state law claim is barred by res judicata and must be dismissed pursuant to Rule 12(b)(6), Fed. R. Civ. P.; (ii) that § 1334(c)(2) mandates abstention in this case because: (a) a timely motion for abstention was filed, (b) the case is based on a state law cause of action, (c) the case is related to a title 11 bankruptcy proceeding but is not a "core" proceeding, (d) the action lacks a federal jurisdictional basis absent § 1334, and (e) a parallel state court action exists and can be timely adjudicated; and (iii) that even if mandatory abstention is not required, permissive abstention is appropriate under § 1334(c)(1).

Issues: (i) whether mandatory abstention is required; (ii) whether, if mandatory abstention is not required, permissive abstention is appropriate; and (iii) whether, if abstention is inappropriate, plaintiff's claims are barred by *res judicata*. The mandatory abstention argument is addressed first because in the event mandatory abstention is warranted, it is unnecessary to reach or decide the remaining issues.

Held: Although plaintiff's personal injury claim does not "arise in" a bankruptcy proceeding, it is clearly "related to" a bankruptcy proceeding under Title 11. In this respect, courts in this circuit and elsewhere have broadly construed the term "related to" as used in § 1334(b). An action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate. *A.H. Robins Co., Inc. v. Piccinin,* 788 F.2d 994, 1 016 n. 11 (4th Cir. 1986) (quoting *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3rd Cir. 1984)). This case falls squarely within this definition. The bankruptcy trustee, standing in the shoes of Leonard, is asserting a right to recovery that could positively impact the bankruptcy estate, and thus it follows that § 1334(b) confers federal jurisdiction. This does not mean, however, that the exercise of federal jurisdiction is appropriate, inasmuch as § 1334(c)(2) mandates abstention. Mandatory abstention is required when (i) any party timely files a motion for abstention, (ii) the claim is based on a state law, (iii) the case is related to a title 11 bankruptcy proceeding but is not a "core" proceeding, (iv) the action lacks any other basis for federal jurisdictional other than § 1334, and (v) a parallel state court action exists and can be timely adjudicated. If any one of these requirements is not satisfied, then abstention is not compulsory. *See, e.g., In re Bay Vista of Virginia, Inc.*, 394 B.R. 820, 833 (Bankr. E.D. Va. 2008). It is readily apparent that all five requirements for mandatory abstention are met in this case.

45. § 707(a). <u>Decision to file bankruptcy after multi-million dollar judgment arising from multi-billion dollar Ponzi scheme is not bad faith and does not warrant dismissal of Chapter 7 case</u>. *Janvey v. Romero,* F.3d (No. 17-1197) (4th Cir. February 21, 2018). Appellee Peter Romero filed a Chapter 7 bankruptcy petition after he was found liable for $1.275 million to the victims of a multibillion-dollar Ponzi scheme. Appellant Ralph Janvey, the receiver in the Ponzi scheme litigation, moved to dismiss Romero's bankruptcy petition for cause under 11 U.S.C. § 707(a). The bankruptcy court denied the motion, and the district court affirmed the

bankruptcy court's order. The Fourth Circuit affirmed holding that Romero's decision to file for bankruptcy did not rise to the level of bad faith and did not constitute cause for dismissal.

Bankruptcy Court: More than six months after Romero filed for bankruptcy, Janvey moved to dismiss his petition under 11 U.S.C. § 707(a) on the ground that Romero had abused the bankruptcy process to avoid Janvey's judgment. The Bankruptcy Court denied the motion. *See In re Romero*, 557 B.R. 875 (Bankr. D. Md. 2016) acknowledging that bad faith can constitute cause for dismissal under § 707(a), but finding that Romero had not acted in bad faith. In doing so, it applied the eleven bad-faith factors set forth in *McDow v. Smith*, 295 B.R. 69 (Bankr. E.D. Va. 2003). The bankruptcy court acknowledged that Romero's "primary motivation in filing the petition was to address [Janvey]'s judgment" but that he also "faced the inability to earn a living, his wife's illness and care needs, the pending termination of two disability policies, and aggressive and costly litigation tactics by [Janvey]," *Romero*, 557 B.R. at 883-84, noting also that Romero had twice tried and failed to settle the matter in the course of the litigation, and denied the motion to dismiss and granted Romero a discharge. Janvey appealed, the District Court affirmed, and the Fourth Circuit reviewed the Bankruptcy Court's denial of a motion to dismiss for abuse of discretion, its factual findings for clear error, and its legal conclusions de novo. *See In re Jenkins*, 784 F.3d 230, 234 (4th Cir. 2015); *In re Piazza*, 719 F.3d 1253, 1271 (11th Cir. 2013). Janvey claims that Romero abused the bankruptcy process and should be ineligible for its protections. The Court of Appeals disagreed.

A debtor's bad faith in filing may constitute cause for dismissal under § 707(a). *See In re Krueger*, 812 F.3d 365, 370 (5th Cir. 2016) ("[A] debtor's bad faith in the bankruptcy process can serve as the basis of a dismissal 'for cause' . . . ."); *In re Schwartz*, 799 F.3d 760, 764 (7th Cir. 2015) ("[A]n unjustified refusal to pay one's debts is a valid ground under 11 U.S.C. § 707(a) to deny a discharge of a bankrupt's debts."); *Piazza*, 719 F.3d at 1260-61 ("[T]he power to dismiss 'for cause' in § 707(a) includes the power to involuntarily dismiss a Chapter 7 case based on prepetition bad faith."); *In re Tamecki*, 229 F.3d 205, 207 (3d Cir. 2000) ("Section 707(a) allows a bankruptcy court to dismiss a petition for cause if the petitioner fails to demonstrate his good faith in filing."); *In re Zick*, 931 F.2d 1124, 1127 (6th Cir. 1991) ("[L]ack of good faith is a valid basis of decision in a 'for cause' dismissal by a 10 bankruptcy court."). But acknowledging that bad faith may constitute "cause" under § 707(a) also requires that the remedy of dismissal be reserved for cases of real misconduct.

The bankruptcy court employed the eleven-factor bad-faith test set forth in *McDow*, 295 B.R. at 79 n.22: "[t]he debtor's lack of candor and completeness in his statements and schedules"; "[t]he debtor has sufficient resources to repay his debts, and leads a lavish lifestyle"; "[t]he debtor's motivation in filing is to avoid a large single debt incurred. It predicted that the subsequent termination of these policies would result in an increase in the couple's out-of-pocket medical expenses, which were already steep at $55,000 in the year before Romero filed. In light of these circumstances, the bankruptcy court concluded that no "cause" for dismissal existed in this case.

Janvey's objections: (i) bankruptcy was filed solely to avoid a single debt, Janvey's judgment – which the Court found was not the case; (ii) efforts to settle litigation betrayed his bad-faith motive – the Court found that the law encourages voluntary settlement of disputes; and (iii) Romero had substantial assets and attendant ability to pay the judgment – the Court found that a debtor's ability to repay debts does not alone amount to cause for dismissal and is not a *per se* bar to bankruptcy relief.

46. § 707(a). <u>To determine bad faith and whether a dismissal for cause is appropriate under 11 U.S.C. 707(a), the Court should weigh the totality of facts and circumstances</u>, *In re Edwards*, 2017 WL 3616582 (E.D.N.C. 2017)(Humrickhouse, J.). To determine bad faith and whether a dismissal for cause is appropriate under 11 U.S.C. 707(a), the Court should weigh the totality of facts and circumstances and apply the following factors: whether the debtor "reduces creditors to a single creditor in the months prior to the filing of the petition;" fails

to adjust or lives an extravagant lifestyle; files a case in response to a pending judgment; fails to repay debts; uses Chapter 7 unfairly; has ability to pay debts; pays debts to an insider; exaggerates expenses to mask ability to pay; "transfers assets;" overuses the Code's protections to the creditors' detriment; acts deliberately in avoiding a single major creditor; "fail[s] to make candid and full disclosure"; debts are minor in relation to ability to pay; and files bankruptcy repeatedly *In Re Marino*, 388 B.R. 679, 682 (Bankr. E.D.N.C. 2008) (citing *In re O' Brien,* 328 B.R. 669, 675 (Bankr. W.D.N.Y. 2005)).

The Court held that the dismissal was proper as bad faith was demonstrated by the following: the debtors had the ability to pay a certain amount per month towards their debts; the debtors could sell or surrender a second home, which would provide for an additional amount to pay toward debts. Instead, the debtors wanted to retain the second home. The debtors failed to make lifestyle adjustments in order to repay debts; they purchased two new cars. The debtors increased their contributions to their church. The debtor's supported a parent. The debtors did not make an effort to resolve debts prior to filing bankruptcy. The filing appeared to be discharging two large business debts, in which the creditors sought full payment. Accordingly, bad faith was found.

47. § 707(b)(1). <u>Applying "conduct test" personal liability arises at time of corporate charge on account with personal guarantee which, when occurring after the filing of Chapter 7, is not discharged; *In re Stecklow* inapplicable to post-petiton debt</u>. *Brand v. Graybar Electric Company, Inc.*, 578 B.R. 729 (D. Md. 2017)(Chuang, J.), reversing summary judgment granted in favor of debtor and remanding to Bankruptcy Court for further proceedings. Corporate supplier, Graybar Electric Company, Inc., brought adversary proceeding for declaratory judgment that Chapter 7 debtor's obligation to it on guarantee did not arise until after discharge order was entered, when corporation ordered additional supplies, and thus was not affected by debtor's bankruptcy discharge. The Bankruptcy Court granted debtor's motion for summary judgment, and supplier appealed. The U.S. District Court held that conduct giving rise to Chapter 7 debtor's liability on her guarantee of corporate debt to supplier was not her execution of guarantee, which occurred prepetition, but corporation's ordering of additional products from supplier, which occurred after the grant of debtor's discharge in her no-asset case.

Facts: On August 28, 2012, Electric Power Services, Inc. ("EPS"), an electrical contractor, submitted a commercial credit application to Graybar, a supplier of electrical material and equipment. Brand, in what she identified as her capacity as President of EPS, signed that agreement as a guarantor. The guaranty obligated Brand to absolutely, unconditionally and personally guarantee to Graybar ... the performance of all obligations of [EPS] arising under this credit agreement, including without limitations, the payment of all indebtedness as the same are due or come to be due or accelerated whether such indebtedness and obligations exist on the date of this instrument or are incurred after such date. As a result of that application, Graybar extended a line of credit to EPS to allow EPS to make purchases from Graybar.

On March 4, 2014, Brand filed a petition under Chapter 7. Graybar was not listed as a creditor on any of Brand's schedules, so it did not receive any notice of those proceedings. Brand received a discharge on June 11, 2014, and the case was closed as a "no asset" case on June 16, 2014.

On December 30, 2014, Brand placed an email order with Graybar, on behalf of EPS, for $123,405.58 worth of supplies from Graybar. On December 9, 2015, Graybar initiated an adversary proceeding with the bankruptcy court seeking a declaratory judgment stating that Brand's bankruptcy did not discharge the debts owed by Brand to Graybar, pursuant to the guaranty, for materials ordered by EPS after March 4, 2014, the date on which Brand filed for bankruptcy. The parties filed cross-motions for summary judgment; Graybar argued that Brand did not revoke the guaranty and any debt arising from orders placed after the filing of Brand's bankruptcy petition on March 4, 2014 was a post-petition debt not discharged by the bankruptcy. Brand framed the case differently, asserting that because her bankruptcy was a "no asset" case, any obligation she had to

Graybar was discharged. *See In re Stecklow,* 144 B.R. 314, 318 (Bankr. D.Md. 1992)(noting that in a "no asset" case, the claim of an unscheduled, unsecured creditor is discharged unless the debt falls into certain enumerated exceptions). Brand did not address whether the money owed to Graybar pursuant to the guaranty was the result of pre-petition or post-petition conduct.

Bankruptcy Court: On cross motions for summary judgment, the bankruptcy court granted Brand's motion concluding that the debt to Graybar arising from the orders placed after the bankruptcy discharge was a pre-petition debt applying the "conduct test," adopted by the Fourth Circuit in *River Place East Housing Corp. v. Rosenfeld (In re Rosenfeld),* 23 F.3d 833 (4th Cir. 1994) to an action sounding in contract. In that case, the debtor, was obligated by a covenant to pay housing cooperative association dues for a residential unit that he had purchased prior to filing for bankruptcy. *Id.*, at 835. At the time that he filed his bankruptcy petition, the debtor had various unpaid association dues, all of which were disposed of as part of his bankruptcy proceeding. *Id*. After his discharge from bankruptcy, however, the housing cooperative association filed suit seeking unpaid dues assessed post-petition. *Id,* Debtor asserted that because he had entered into the covenant prior to his bankruptcy, even post-petition assessments made pursuant to the covenant were pre-petition debts discharged in his bankruptcy. *Id.*, at 835-36.

The Fourth Circuit sided with the housing association, concluding that the claimed post-petition dues were not pre-petition debts because the debtor's obligation to pay the assessments arose from his continued post-petition ownership of the property, not from the pre-petition contract that he signed, such that the obligation did not arise until the dues were assessed. *Id.*, at 837. In making this determination, the Court noted that the debtor's obligations under the covenant could be terminated at any time by transferring title to the property. *Id.*, at 838.. Thus, the relevant conduct giving rise to the right to payment was not the entering into the covenant, but rather the post-petition assessment of dues and the debtor's breach of the covenant by failing to pay those dues. *See id*.

The Bankruptcy Court in granting the debtor's motion for summary judgment relied upon *In re Lipa*, 433 B.R. 668 (Bankr. E.D. Mich. 2010) which concluded that a debtor's personal guaranty signed pre-petition was a contingent right to payment that was discharged in his bankruptcy, *id.* at 671, determining that the conduct giving rise to Graybar's right to payment was Brand's execution of the guaranty, which could be construed as a contingent right to payment, and that this conduct occurred before Brand filed for bankruptcy. As a result, the bankruptcy court concluded that although the debt to Graybar arose from orders placed after Brand filed for bankruptcy, the debt was nevertheless a pre-petition claim that had been discharged at the conclusion of the bankruptcy proceedings. The bankruptcy court noted, however, that such a result was "uncomfortable," but appeared to be mandated by the Fourth Circuit's broad application of the conduct test.

District Court: Arguments: Graybar asserts that the bankruptcy court erred in deciding that Brand's new obligations to Graybar under the guaranty were pre-petition debts discharged by her bankruptcy because the conduct giving rise to the debts, the submission of purchase orders to Graybar and the failure to pay for the acquired items, occurred after both the filing of Brand's bankruptcy petition and the discharge of her bankruptcy. Brand counters that any debt she owed to Graybar was discharged through her bankruptcy because, as the bankruptcy court held, the operative conduct was Brand's pre-petition conduct of signing the guaranty. In the alternative, Graybar argues that discharge of the debts incurred through post-petition purchase orders would be unconstitutional as a matter of due process, because Graybar received no notice of Brand's bankruptcy.

Analysis: Chapter 7 bankruptcy discharges the debtor from "all debts that arose before the date of the order for relief." 11 U.S.C. § 727(b). "Debt" is defined as a "liability on a claim," with "claim" in turn defined as a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, mature, unmatured, disputed, undisputed, legal, equitable, secured or secured" broadly construed under *Grady v. A.H. Robins Co., Inc.,* 839 F.2d 198, 202 (4th Cir. 1988). Although the statutory scheme includes contingent obligations as debts, it does not define when a contingent right to payment arises. This case hinges on the question of when Graybar's right to payment for the Cultural Vistas materials ordered by Brand and EPS arose. If that right to payment arose before March 4, 2014, the date that Brand filed her bankruptcy petition, the claim was discharged in Brand's bankruptcy. If the right to payment did not arise until after that date, the outstanding balance remains one for which Brand is obligated.

"The plain meaning of a 'right to payment' is nothing more or less than an enforceable obligation." *Pa. Dep't of Pub. Welfare v. Dayenport,* 495 U.S 552, 559 (1990). In the Fourth Circuit, the point at which the right to payment arises is established by application of the conduct test. *See Grady,* 839 F.2d at 203. In *Grady,* the tort claim of plaintiff, a woman injured by a defective intrauterine contraceptive device the device, against the manufacturer who discovered her injuries only after the bankruptcy filing, the court held that "when the acts constituting the tort or breach of warranty have occurred prior to the filing of the [bankruptcy] petition," a contingent right to payment has been established, even if there was still "no right to the immediate payment of money on account of a claim" and the existence of such a right of payment depended "upon a future uncertain event," specifically, the manifestation of injuries from the use of the product. *Id.*, 839 F.2d at 203. The Court thus held that the plaintiff's right to payment had accrued at the time of the device implantation, such that her tort claim was subject to the automatic stay. *Id.* In *Brand*, the bankruptcy court noted that *Grady* was not applicable as it arises in the context of tort, where the conduct causing the injury usually consists of a discrete act by the defendant. However, in *Rosenfeld*, the Fourth Circuit applied the conduct test to an action sounding in contract, where the debtor asserted that because he had entered into the covenant prior to his bankruptcy, even post-petition assessments made pursuant to the covenant were pre-petition debts discharged in his bankruptcy. The Fourth Circuit sided with the housing association, concluding that the claimed post-petition dues were not pre-petition debts because the debtor's obligation to pay the assessments arose from his continued post-petition ownership of the property, not from the pre-petition contract that he signed, such that the obligation did not arise until the dues were assessed. *Id*., 23 F.3d 837.

The Bankruptcy Court had distinguished *Grady* on that grounds that there, the conduct giving rise to the claim for payment was a tortious act occurring pre-petition, rather than a breach of a post-petition obligation. The District Court found no meaningful distinction between the present case and *Rosenfeld;* the only pre-petition conduct by Brand was her signing of the guaranty. Although that act created a contingent right to payment for any preexisting charges incurred by EPS, even if EPS had not yet defaulted on those debts, it did not bind her to pay all future charges not yet incurred by EPS. As with the pre-petition covenant signed in *Rosenfeld,* which the court held did not create a right to payment for association dues that had yet to accrue, Brand's pre-petition act of signing the guaranty did not create a right to payment, even a contingent right to payment, for purchase orders that had not yet been made because Brand could have terminated the guaranty at any time prior to EPS' purchases. *See Phelps Dodge Corp. v. Schumacher Elec. Corp.,* 415 F.3d 665, 668 (2005) ("A continuing guaranty ... is revocable at any time by the guarantor upon notice to the obligee."). Here, as in *Rosenfeld*, all of the acts establishing liability occurred post-petition. The District Court therefore concluded that, under the conduct test, Brand's obligation to pay the post-petition debts incurred by EPS was not discharged through Brand's bankruptcy. The analysis and conclusion of *In re Lipa* are contrary to the Fourth Circuit's approach in *Rosenfeld* and provided no basis to alter this conclusion.

At least one bankruptcy court has applied the District Court's reasoning under similar facts to reject the conclusion "that the discharge of a debtor's guaranty obligations extends so far as to include even yet to be incurred debts of the principal obligor." *Weeks v. Isabella Bank Corp.,* 400 B.R, 117, 124 (Bankr. W.D. Mich. 2009)(concluding that no dischargeable claim "can arise on account of a debtor's guaranty of future indebtedness until a new advance has in fact been made," but found that where a debtor doctor had not revoked a pre-petition guaranty to pay future debts of his medical practice owed to a bank, his debts incurred post-petition were not discharged).

N.B. Where a debtor has engaged in business – sole proprietorship, partnership, limited partnership, corporation, or limited liability corporation (1) schedule ALL business debts in an individual bankruptcy case to give notice of the debtor's intention to discharge any contingent obligation; (2) revoke in writing all personal guaranty agreements, and (3) consider terminating the operation of any business in which the debtor is a guarantor and forming an new business entity.

48. § 707(b)(1). Chapter 7 case dismissed for abuse where realtor/debtor had $735.00 monthly disposable income. *In re Hector,* 2017 WL 4286138 (Bankr. E.D.N.C. 2017)(Slip Copy). Bankruptcy Administrator moved to dismiss debtor's Chapter 7 case for abuse under § 707(b)(1) where debtor's schedules and claims filed indicated assets valued at $18,376.89, secured debts in the amount of $28,592.00, unsecured priority debts in the amount of $33,482.00, and unsecured nonpriority claims in the amount of $89,361.56. On Schedule I, Ms. Hector listed that she earned $3,191.06 in net income per month as a realtor and she listed monthly expenses totaling $2,456.00 on Schedule J. On Official Form 122A–2, Ms. Hector listed a household size of one and claimed deductions for the following expense categories: (1) food, clothing, and other items; (2) out-of-pocket health care allowance; (3) housing and utilities—insurance and operating expenses; (4) housing and utilities—mortgage or rent expenses; (5) vehicle operation expense; (6) vehicle ownership or lease expense; (7) taxes; (8) life insurance; and (9) health insurance. In total, Ms. Hector claimed IRS expense deductions in the aggregate amount of $3,908.41 and additional expense deductions in the amount of $257.62 for health and disability insurance.

Held: The purpose of the means test, as enacted in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, is to "ensure that debtors who can pay creditors do pay them." *Ransom v. FIA Card Services, N.A.*, 562 U.S. 61, 64, 131 S.Ct. 716 (2011). The Bankruptcy Court disallowed the debtors' claimed expense deduction for "housing and utilities—mortgage or rent expenses" in the amount of $1,061 pursuant to the IRS Local Standard where the debtor did not incur any formal monthly rent or mortgage expense as she did not remit any funds directly to her partner in exchange for the right to reside at his property and is not a party to a lease agreement of any sort. Case dismissed.

49. § 707(b). Abuse Test under § 707(b) Applies where Debtor Initially filed under Chapter 13 but later Converted to Chapter 7. *Pollitzer v. Gebhardt,* 860 F.3d 1334 2017 WL 2766088 (11th Cir. 2017). Section 707(b) of the Bankruptcy Code allows a Bankruptcy Court to dismiss a petition filed under Chapter 7 if it determines that relief would be an "abuse" within the meaning of that section. 11 U.S.C. § 707(b). In this appeal from a judgment of the U.S. District Court for the Southern District of Florida the Eleventh Circuit Court of Appeals considered whether § 707(b) applies to a petition that was initially filed under Chapter 13 but later converted to a petition under Chapter 7.In March 2011, the Debtor filed for bankruptcy relief under Chapter 13 of the Code. Under Chapter 13, a debtor such as this Debtor who aims to restructure his debts may retain his assets but must submit a plan to repay his debts over a three- to five-year period. The payments are generally made from the debtor's future earnings or income. See *Harris v. Viegelahn*, 135 S. Ct. 1829, 1835 (2015). The Debtor submitted a Chapter 13 repayment plan and made the required payments for more than two years but then exercised his right under § 1307 of the Code to convert his case to Chapter 7. 11 U.S.C. § 1307. After the Debtor converted his petition, the U.S. Trustee moved to dismiss it as abusive under § 707(b). The Trustee contended that the Debtor's disposable income, which far exceeded the means-test, would allow for a significant dividend to unsecured creditors. The Debtor opposed the motion on the sole ground that § 707(b) does not apply to petitions initially filed under Chapter 13 and later converted to Chapter 7. He concedes that his petition fails to satisfy the means-test and that his petition would be subject to dismissal as an abusive petition if § 707(b) applied. The bankruptcy court concluded that § 707(b) applied to converted cases and dismissed the petition. The district court affirmed and this appeal followed. Interpretations of the Code are

questions of law that we review de novo. The Debtor's argument is textual. He points to the language of § 707(b) limiting it to "a case filed by an individual debtor under this chapter" and reads the phrase "under this chapter" as modifying the phrase "a case filed." Because, he argues, his was not a "case filed . . . under this chapter [Chapter 7]," but rather was filed under Chapter 13, § 707(b) does not apply. The U.S. Trustee also makes a textual argument. He contends that "under this chapter" modifies the phrase to which it is immediately adjacent, "an individual debtor." And, the argument goes, because the Debtor is an "individual debtor under [Chapter 7]," § 707(b) applies

50.§§ 707(b)(1), (2) and (3) <u>In Determining Whether Debts are Primarily Consumer or Business Debts for Means Test Purpose, the Terms "Debt" and "Claim" are Synonymous</u>. *In re Reed,* __B.R.___ (Bankr. D.Colo. 2017). The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") draws a critical distinction between whether the debts of a particular debtor are primarily consumer debts or primarily business debts in a Chapter 7 case. If the debts are primarily consumer debts in a Chapter 7 case, the court may dismiss such a case if the granting of Chapter 7 relief would be an "abuse" of the Bankruptcy Code. If the debts are primarily business debts, the abuse analysis is not applicable.

The threshold issue presented in this case is whether a mortgage encumbering a debtor's 50% interest in a home, for which the debtor is not personally liable, is still a "debt" for the purpose of calculating whether the debtor has primarily consumer debts. The Bankruptcy Code defines "debt" and "claim." Generally, the debtor owes a debt to the creditor and the creditor holds a claim against the debtor. Are the words "debt" and "claim" as used in the Bankruptcy Code synonymous? The Debtor argues the mortgage is a "claim" but not a "debt," because in § 101(12), the Bankruptcy Code defines a "debt" as "liability on a claim," and the Debtor was not personally liable for the mortgage. The Debtor acknowledges the mortgage is a "claim" against the estate, but contends that because he is not personally liable for the mortgage, the mortgage is not a "debt" within the plain language of the Bankruptcy Code. The Debtor reasons: "Under the plain language of the statute, § 707(b) looks to the nature and amount of debts for which the debtor is liable, not to claims against the debtor's estate. Accordingly, because the debtor is not personally liable for the mortgage on his residence, and his business debt therefore outweighs his consumer debt, the debtor is a business debtor, and the 'abuse' provisions of §707(b) are not applicable."

The Debtor, a medical doctor, filed for relief under Chapter 7 on September 9, 2016. On Schedule A, he identified a fifty percent interest in certain real property (the "Property") valued at $1,774,000, with the value of the fifty percent portion he owned as $887,000. On Schedule D, the Debtor identified the amount of the mortgage on the Property as $1,858.681.

The United States Trustee ("UST") moved to dismiss the Debtor's case as an abusive case under §§ 707(b)(1), (2) and (3), asserting the mortgage on the Property, a secured claim in the case, was also a "debt" for purposes of determining whether the Debtor had primarily consumer debts, citing numerous cases and legislative history in support of that position discussed below. The UST further argues under the specific facts of this case, the Debtor's case should be dismissed as abusive. If the Debtor has primarily consumer debts, the analysis of whether his case is an "abuse" must be undertaken. In response, the Debtor argues the mortgage is a "claim" but not a "debt," because in § 101(12), the Bankruptcy Code defines a "debt" as "liability on a claim," and the Debtor was not personally liable for the mortgage. The Debtor acknowledges the mortgage is a "claim" against the estate, but contends that because he is not personally liable for the mortgage, the mortgage is not a "debt" within the plain language of the Bankruptcy Code. The Debtor reasons: "Under the plain language of the statute, § 707(b) looks to the nature and amount of debts for which the debtor is liable, not to claims against the debtor's estate. Accordingly, because the debtor is not personally liable for the mortgage on his residence, and his business debt therefore outweighs his consumer debt, the debtor is a business debtor, and the 'abuse' provisions of §707(b) are not applicable."3 The Debtor further contends other sections of the Bankruptcy Code support the argument that a ‘debt’ is intended to refer to *in personam* liability on a claim, citing to § 727(b) as referring to the discharge of “debts” and any “liability on a claim that is determined under section 502.” Because a discharge, under § 727(a), discharges only *in personam* liability, Debtor asserts “it is evident that ‘debt’ is intended to refer to personal liability, not a claim against property.” The Debtor also argues the absence of the word “debt” in 11 U.S.C. § 506 is indicative that “debt” and “claim” are not interchangeable terms. The Court began its analysis by noting that the UST has the burden to prove that more than half of the Debtor’s debts are consumer debts. The court “may dismiss a case filed by an individual debtor under this chapter [7] whose debts are primarily consumer debts, or, with the debtor’s consent, convert such a case to a case under chapter 11 or 13 of this title, if it finds that the granting of relief would be an abuse of the provisions of this chapter. The Bankruptcy Code defines the words in question. The term “primarily consumer debts” means a “debt incurred by an individual primarily for a personal, family, or household purpose.” The term “debt” is a “liability on a claim.” The term “creditor” is “an entity that has a claim against the debtor.” The term “claim” is a “right to payment” or a “right to an equitable remedy,” and the term “claim against the debtor” includes a claim against property of the debtor. Next the Court found that a home mortgage is a “consumer debt,” and that the Debtor did not assert that the mortgage encumbering the Property is not a consumer debt.

The Court then reviewed the Supreme Court’s decision of *Johnson v. Home State Bank*, 501 U.S. 78 (1991). In that case, the Supreme Court held that Congress intended the broadest definition of the word claim available. It ruled that since § 101(5) defines claim as a “right to payment” and a “right to an equitable remedy” the word means, “nothing more than an enforceable obligation.” *Id*. at 83. The Court recognized the concepts of *in personam* liability and in rem liability and stated that even after *in personam* liability has been extinguished by a bankruptcy discharge, the creditor still retains a “right to payment” from the proceeds of the sale of the debtor’s property. *Johnson* stands for the principle that a nonrecourse debt secured by the debtor’s property is a claim if it is enforceable against either the debtor or the debtor’s property. Since a debt is a liability on a claim, a non-recourse loan secured by the debtor’s property is a debt to the extent of the creditors’ interest in the encumbered property.

This view is shared in other jurisdictions. The Fifth Circuit Court of Appeals held that a nonrecourse obligation was a “debt” under the Bankruptcy Code to determine the debtor’s eligibility for Chapter 12 in the case of In re Lindsey, 995 F.2d 626 (5th Cir. 1993). The court followed Johnson and stated the creditor’s right to act against collateral is a “right to an equitable remedy” for the debtor’s breach of obligation. Lindsey also cited the legislative history that the words debt and claim are coextensive and also found support in § 102(2), holding that the Bankruptcy Code explicitly incorporates nonrecourse loans as claims in that section.

The bankruptcy court for the District of Kansas ruled that a nonrecourse mortgage was a consumer debt in the case of *In re Bryson*, 2007 WL 2219114 (Bankr. D. Kan. 2007). In Bryson, the Kansas bankruptcy court was faced with the same issue presented here; i.e., “the narrow issue . . . [of] whether, even though Debtor has no personal liability on a note secured by her residence, the lien against the Debtor’s residence is included in calculating the Debtor’s aggregate ‘consumer debt’ for purposes of the United States Trustee’s Motion to Dismiss pursuant to § 707(b).”

In this case, therefore, the Court finds that the mortgage on the Property is a “debt” for the purposes of determining whether the Debtor has primarily consumer debts under 11 U.S.C. § 707(b). The Court concluded the case was subject to the dismissal provisions of §707(b).

51. § 727(a)(6). Denial of discharge based on refusal to obey court orders. *Smith-Scott v. U.S. Trustee*, __ F.3d ___, 2018 WL 572866 (D. Md. 2018)(Hollander, J.). Self-represented attorney and debtor, Arlene Smith-Scott appealed from three orders issued by the Bankruptcy Court entering summary judgment denying discharge under § 727(a)(6), the Judgment Denying Debtor’s Discharge; and the Order Certifying Judgment as Final against her in an adversary proceeding filed by the U.S. Trustee.

Facts: Debtor commenced a Chapter 11 case in September 2014 at which time she owned three investment real properties. In early 2015, a creditor, Patapsco Bank, filed a motion under § 1112(b) to convert the case to Chapter 7. The Bankruptcy Court granted this motion and the debtor appealed the conversion order, which was affirmed by the District Court. Debtor's motion to reconsider was denied by the Bankruptcy Court and her appeal of the denial was also affirmed by the District Court. Ms. Smith-Scott's appeal to the Fourth Circuit was also affirmed. Under § 541(a), the debtor was required to turn over the investment properties to the Chapter 7 trustee who filed two motions to compel the turnover of the properties; both motions were granted. Debtor moved for reconsideration of the Second Turnover Order, which required her to give possession of two of the investment properties to the Chapter 7 trustee. The Bankruptcy Court denied that motion. It appears that the debtor did not comply with the Second Turnover Order. As a result, the Chapter 7 trustee filed a motion for civil contempt. The Bankruptcy Court found the debtor in contempt, and ordered her to turn over the property and pay related fines and costs until she did. She appealed the contempt order which was affirmed by the District Court.

Ms. Smith-Scott did not comply with the Second Turnover Order, and the Bankruptcy Court ordered the U.S. Marshal to assist the Chapter 7 trustee in taking possession of the properties finding that she was "willfully disregarding court orders and refusing to allow the Trustee to undertake his statutory function to administer the assets of the estate." Debtor appealed the U.S. Marshal Order, but the appeal was dismissed for failure to prosecute. Thereafter, Ms. Smith-Scott filed a motion under § 324(a) to remove the Chapter 7 trustee, as well as a motion asking Bankruptcy Judge Schneider to recuse himself. Both motions were denied and the District Court affirmed in August 2017.

Bankruptcy Court: On June 20, 2016, the U.S. Trustee filed a Complaint to Deny or Revoke Discharge under § 727(a) alleging five independent bases to support the denial of a bankruptcy discharge including Counts I, III, and V under § 727(a)(6) alleging refusal to comply with a court order and Counts II and V alleging the transfer or concealment of property of the bankruptcy estate with the intent to hinder, delay, or defraud a creditor or the trustee, under § 727(a)(2) ("Discharge Action"). On October 26, 2016, the U.S. Trustee filed a motion for summary judgment, to which the debtor filed a response in opposition on the morning of the hearing held on January 19, 2017, during which the District Court stated that Ms. Smith-Scott argued with Judge Schneider and left the courtroom before the close of the Bankruptcy Court's oral ruling that she had not obeyed court orders, had disobeyed willfully, and granted summary judgment to the U.S. Trustee denying her a discharge. She appealed from that decision.

District Court: Reviewing the bankruptcy court's findings of fact under the "clear error" standard, *In re Taneja,* 743 F.3d 423, 429 (4th Cir. 2014) where a finding of fact is clearly erroneous when the record demonstrates convincingly to the reviewing court that "a mistake has been committed." *United States v. U.S. Gypsum Co.,* 333 U.S. 364, 395 (1948) with the bankruptcy court's conclusions of law subject to *de novo* review, *Taneja,*743 F.3d at 429, the District Court found under *In re Jordan,* 521 F.3d 430, 433-34 (4th Cir. 2008) that "[t]he term used in § 727(a)(6)(A) is 'refused' not 'failed.' Accordingly, the Court must find that the Debtors' lack of compliance with the relevant court order was willful and intentional.... The party objecting to discharge satisfies this burden by demonstrating the debtor received the order in question and failed to comply with its terms.... Such a showing then imposes upon the debtor an obligation to explain his non-compliance."

Ms. Smith-Scott challenged the grant of summary judgment to the U.S. Trustee on several grounds: (i) the Bankruptcy Court's jurisdiction because she had moved to withdraw the reference as to her bankruptcy under 28 U.S.C. § 157(d) but it had not been withdrawn at the time of the hearing on the Discharge Action and was ultimately denied nor is the issue of whether a debtor is entitled to a discharge one for which she was entitled to a jury. *See In re Varney,* 81 F.3d 152 (Table) at *2 (4th Cir. 1996);

(ii) lack of evidence to support the allegations which contention the District Court found did not address the question of whether she refused to obey a court order but rather her "evidence" impugned the motives of the

Chapter 7 trustee and the decisions of the Bankruptcy Court in prior proceedings and held that courts have recognized that adversary proceedings are "discrete judicial units," and that an appeal in one proceeding cannot change the rulings of another. *See In re Dorsey,* 870 F.3d 3359, 362 (5th Cir. 2017);

(iii) abuse of discretion by granting summary judgment after "allegations of misconduct and/or abuse of process by the Chapter 7 Trustee which contention appeared to challenge the billing rates of the Chapter 7 trustee and his attorney as excessive which was not at issue in the Discharge Action and not appropriate to consider on appeal;

(iv) Fourteenth Amendment equal protection grounds, possibly concerning race or gender which contention the District Court found to be unclear as to whether "the discriminatory nature of the proceedings" caused Ms. Smith-Scott to be unable to invoke various statutes, or whether the "cooling effect," caused by the alleged discrimination, prevented her from asserting her legal defenses, and the District Court found that it was not evident how any of the statutes Ms. Smith-Scott cited might have aided her in the Discharge Action which only concerned whether she had refused to obey a court order; and

(v) alleged discrimination by the Bankruptcy Court. The U.S. Trustee contended that no evidence of discrimination was offered beyond the Bankruptcy Court's adverse rulings, and no evidence at all that any of those rulings were based on Ms. Smith-Scott's membership in any protected class. The District Court held that to the extent that Ms. Smith-Scott based her discrimination claim on Judge Schneider's prior rulings, it must fail, because she had not established that the Judge's rulings were incorrect, much less that they were based on her race, gender, or *pro se* status. Lastly, Ms. Smith-Scott contended that the summary judgment ruling was based on personal bias allegedly implied by Judge Schneider's statements. The District Court set forth at length the exchange between Ms. Smith-Scott however the District Court concluded that mere "expressions of impatience, dissatisfaction, annoyance, and even anger" do *not* establish bias or partiality.

None of the grounds for the appeal suggested that such relief was warranted, and, therefore, the disputed orders of the Bankruptcy Court were affirmed.

52. § 1301(b); § 1326(a)(1)(A). <u>Ch 13 Plan Not Confirmable where Debtor had $3,564 in monthly Disposable Income, but Proposed Payment of $0/month</u>. *Ekweani v. Thomas*, 574 B.R. 561, 2017 WL 2733928 (D. Me. 2017)(Bredar, J.). Appellant/debtor's projected disposable income was $3,564.62 per month. The Trustee objected to confirmation because, among other reasons, all of Appellant's projected disposable income was not to be paid to the Plan. Appellant proposed paying $0 per month before confirmation and only $1,388.72 per month after confirmation, for a total term of 60 months. Section 1326(a)(1)(A) states, "Unless the court orders otherwise, the debtor shall commence making payments not later than 30 days after the date of the filing of the plan or the order for relief, whichever is earlier, in the amount proposed by the plan to the trustee." Under 11 U.S.C. § 301(b), "The commencement of a voluntary case under a chapter of this title constitutes an order for relief under such chapter." Appellant commenced his Chapter 13 case on June 8, 2016. Appellant filed his amended plan on August 26, 2016. Thus, the earlier date referenced in Section 1326(a)(1)(A), as applied to Appellant's case, was June 8, 2016. Consequently, his first payment of $3,564.62 was due July 8, 2016. It is obvious that Appellant's Chapter 13 Plan was not confirmable because it did not meet the requirements of sections 1325 and 1326.

53. § 1307(c), § 1325, § 1326. <u>Cause for Dismissal Exists When Debtor Continually Remains in Default on Required Plan Payments</u>. *Dailey v. Thomas, II, Trustee,* ___F.Supp. ___ (D. Md. March 23, 2017)(Hollander, J.). Mitzi Elaine Dailey, a *pro se* debtor, attorney and a member of the Maryland Bar, appealed from Judge Schneider's Orders dismissing her Chapter 13 case number 15-25464-JFS and denying her emergency motion in which the debtor alleged that her employer, the IRS, violated the automatic stay pursuant to 11 U.S.C. § 362 by imposing a five-day suspension on her, without pay, from April 25, 2016 through April 29, 2016, as

discipline for the charge of being AWOL ("Emergency Motion"). Debtor's related two adversary proceedings and employment discrimination case were dismissed and those dismissals were affirmed on appeal, the District Court Judge Motz having ruled that the employment discrimination actions were non-core proceedings reserved for exclusive jurisdiction by the District Courts ….The Bankruptcy Court lacked jurisdiction over the employment discrimination claim ...." In the interim, the debtor's Chapter 13 plans were denied confirmation as not having met the requirements under § 1325, proposing $760 per month for 60 months but the debtor having failed to tender two of five payments that had come due totaling $1,520, and subsequently the Chapter 13 Trustee, Robert S. Thomas, II, Esquire, filed a motion under § 1326 claiming that the debtor had defaulted on four required payments due under the proposed Plan totaling $3,040, and as of the August 22, 2016, hearing had defaulted on three payments totaling $2,280. Judge Schneider dismissed the Chapter 13 case due to continued material default in plan payments.

A bankruptcy court's decision to dismiss a bankruptcy case under 11 U.S.C. § 1307(c) is discretionary. *See In re Jackson v. United States,* 131 F.3d 134 (Table), 1997 WL 746763 at *4 (4th Cir. December 4, 1997)(*per curiam*) ("When determining whether cause exists to warrant a dismissal or conversion, a bankruptcy court retains „broad discretion.‟"). Accordingly, a district court generally reviews a decision to dismiss a bankruptcy case under 11 U.S.C. § 1307(c) for abuse of discretion. *Jacobsen v. Moser* (*In re Jacobsen*), 609 F.3d 647, 652 (5th Cir. 2010); *In re Hall*, 304 F.3d 743, 746 (7th Cir. 2002); *In re Roberts*, 279 F.3d 91, 92 (1st Cir. 2002); *Leavitt v. Soto (In re Leavitt),* 171 F.3d 1219, 1223 (9th Cir. 1999); *Bulmer v. Bulmer*, No. CIV. WDQ-13-1578, 2014 WL 823659, at *7 (D. Md. Feb. 28, 2014)(citing *In re Jackson,* 131 F.3d at *4). The Fourth Circuit has said: "A district court abuses its discretion when it (1) acts arbitrarily, as if neither by rule nor discretion,‟ (2) fails to adequately . . . take into account judicially recognized factors constraining its exercise‟ of discretion, or (3) rests its decision on erroneous factual or legal premises.‟" *United States v. Alvarado*, 840 F.3d 184, 188-89 (4th Cir. 2016)(quoting *James v. Jacobson*, 6 F.3d 233, 239 (4th Cir. 1993)). The same standard applies to the Bankruptcy Court. *See* 28 U.S.C. § 158(c)(2).

Reasons constituting cause for dismissal also include "judicially construed ones such as bad faith[.]" *Kestell v. Kestell* (*In re Kestell*), 99 F.3d 146, 148 (4th Cir. 1996). A "bankruptcy court is accorded considerable discretion in evaluating whether „cause‟ exists and whether dismissal is the appropriate remedy." *In re Orawsky*, 387 B.R. 128, 137 (Bankr. E.D. Pa. 2008). *See, e.g., In re Demeza*, No. 1:16-BK-02789-MDF, 2017 WL 696677, at *3 (Bankr. M.D. Pa. Feb. 21, 2017) (same); *In re Kane,* No. 94-16181DWS, 1998 WL 259945, at *3 (Bankr. E.D. Pa. May 18, 1998) ("the decision of whether to dismiss a case under § 1307(c) is within the discretion of the Court").

"[F]ailure to commence making timely payments under section 1326" is a cause for dismissal of a debtor's bankruptcy petition. 11 U.S.C. § 1307(c)(4). "Courts considering situations in which a debtor commenced making payments but then either stopped or paid less than the plan required have considered the text of section 1307(c)(4) and concluded that a failure to *continue* making payments as required by the plan is cause for dismissal under section 1307(c)." *In re Mallory*, 444 B.R. 553, 558 (S.D. Tex. 2011)(emphasis in original), *aff'd*, 476 F. App'x 766 (5th Cir. 2012)(*per curiam*). The District Court affirmed the Bankruptcy Court's dismissal of the Chapter 13 case.

54. § 1326(a)(2). <u>Estate funds go to debtor upon dismissal of Chapter 13 case prior to confirmation even if Chapter 13 Trustee has been served with writ of garnishment</u>. *Virginia, Department of Social Services, Division of Child Support Enforcement v. Beskin (In re Beskin)*, 581 B.R. 162 (D. Va. 2017)(appeal pending). Chapter 13 trustee, unsure of party to whom he should disburse surplus plan payments in his possession following dismissal of bankruptcy case, moved for entry of order directing him to disburse payments. The Bankruptcy Court entered order directing payment, and creditor appealed.

The District Court observed that the Supreme Court emphasized that the "wholly voluntary" process of Chapter 13 bankruptcy is meant to "benefit debtors and creditors alike." *Harris v. Viegelahn,* __U.S. __,_135 S.Ct. 1829, 1835, 191 L.Ed.2d 783 (2015). Section 1326(a)(2) furthers these overarching purposes by returning the funds to the debtor and refusing to penalize the debtor for entering this voluntary proceeding. Last term, the Supreme Court emphasized that dismissal of a bankruptcy case "aims to return to the prepetition financial status quo." *Czyzewski v. Jevic Holding Corp., __U.S.__*, 137 S.Ct. 973, 979, 197 L.Ed.2d 398 (2017). Affirming, the District Court held that trustee, upon debtor's inability to obtain confirmation of plan and entry of order dismissing his Chapter 13 case, had to return surplus plan payments in his possession to debtor, despite writ of garnishment served on trustee by creditor.

55. Former Fed. R. Bankr. P 219(c). <u>Compensation and Fee Enhancement to a Trustee performing legal services or an attorney serving as counsel for the Trustee must be "reasonable" under the Fed. R. Bankr. P. 219(c); reasonableness is measured by the balancing of the factors in *Johnson v. Georgia Highway Express, Inc.*488 F.2d 714 (5th Cir. 1974)</u> *Weyerhaeuser Company v. Yellow Poplar Lumber Company, Inc.*, 2017 WL 2799316 (W.D.Va. 2017)(Jones, J.).

Trustee who also performed legal services for the estate sought compensation/lodestar, and fee enhancements associated with his legal services rendered. Compensation for the Trustee performing legal services or an attorney serving for the Trustee must be reasonable under the Fed. R. Bankr. P 219(c); compensation and fee enhancement must be balanced under the factors of *Johnson v. Georgia Highway Express, Inc.* 488 F.2d 714 (5th Cir. 1974). The twelve *Johnson* factors the Court looks to are: "(1) [T]he time and labor expended; (2) the novelty and difficulty of the questions raised; (3) the skill required to properly perform the legal services rendered; (4) the attorney's opportunity costs in pressing the instant litigation; (5) the customary fee for like work; (6) the attorney's expectations at the outset of the litigation; (7) the time limitation imposed by the client or circumstances; (8) the amount in controversy and the results obtained; (9) the experience, reputation, and ability of the attorney; (10) the undesirability of the case within the legal community in which the suit arose; (11) the nature and length of the professional relationship between attorney and client; and (12) attorney's fees awards in similar cases. *Id.* In calculating the lodestar/compensation, the District Court needs to obtain a statement of the number of hours worked and explanation of the work performed. The number of hours are to be multiplied by the customary hourly rate. The Court after weighing the other factors, should adjust the fee as necessary.

In this case, the Court approved the lodestar for the Trustee's work for the estate and found the compensation reasonable as the work performed involved legal services pertaining to the case and was approved by the Court. The Court also granted the fee enhancement as it was deemed reasonable under the *Johnson* factors.

56. Fed R. Bankr. P. 8018(a)(4). <u>The District Court in reviewing whether to dismiss a bankruptcy appeal for an untimely brief filed must exercise its discretion under Bankruptcy Rule 8001(a) and look to the four steps/test outlined in *In Re Serra Builders, Inc.* 970 F.2d 1309 (4th Cir. 1992)).</u> *Brandeen v. Liebmann,* 2017 WL 1398266 (D. Md. 2017)(Bennett, J.). A debtor filed a Chapter 7 bankruptcy where the largest creditor was his former wife who had made a sizable domestic relations claim. Overruling the debtor's objection, the Bankruptcy Court granted the Trustee's Motion to Approve Settlement and Compromise. The Debtor sought an appeal pursuant to 28 U.S.C § 158 and Rule 8001 of the Federal Rules of Bankruptcy Procedure. More than five months past the deadline the debtor had not filed his brief. The court issued an Order to Show Cause with a 30 day deadline requesting why the appeal should not be dismissed.

Under Rule 8018(a)(4) of the Federal Rules of Bankruptcy Procedure states "if an appellant fails to file a brief on time … an appellee may move to dismiss the appeal—or the district court…after notice may dismiss the appeal on its own Motion. Fed R. Bankr. P. 8018(a). The District Court in applying Rule 8001(a) the District Court looks to the four steps in *Serra Builders, Inc.* where the court must "(1) make a finding of bad faith or negligence; (2) give the appellant notice an opportunity to explain (3) consider whether the delay had possible prejudicial effect on the other parties (4) indicate that it considered the impact of the sanction and available alternatives." *In re SPR Corp., 45 F.3d 70, 74* (4th Cir. 1945) citing *In re Serra Builders, Inc.* 970, F.2d 1309 (4th Cir. 1992)).

The Court affirmed the Bankruptcy Court's dismissal and found that bad faith was inferred from the debtor's behavior. Specifically, the debtor failed to provide an explanation for failure to file a brief after the Court gave additional time to do so. Furthermore, the debtor failed to respond to the Court's Show Cause order and was given numerous notifications from his former counsel and the Court as to the brief filing deadline. The Court found the Bankruptcy Trustee and the former spouse were both prejudiced due to the debtor's delay. The Trustee was unable to administer the estate assets and the former spouse had the final resolution to her claim delayed. Accordingly, bad faith was found and the dismissal upheld.

57. Fed. R. Civ. P. 8(a)(2). *Piper v. Meade & Associates, Inc., ___ F.3d ____*, 2017 WL 4516698 (D. Md. 2017)(Titus, J.). Consumer brought action against debt collector, alleging violation of Fair Debt Collection Practices Act (FDCPA). Debt collector moved to dismiss. District Court, held that the consumer failed to allege injury in fact and, thus, did not have standing, and even if consumer had standing, she did not state claim for violation of FDCPA. Complaint was dismissed under the FDCPA where the pleadings were insufficient to overcome because (1) Plaintiff failed to allege sufficient actual damages, risk of damages or statutory damages; and (2) the conclusory claims that the debt was "consumer" were not supported by sufficient factual allegations. This case is a good reminder to allege sufficient facts and not just conclusions from what *seem* like obvious details. A plaintiff must meet the *Twombly–Iqbal* pleading standard for all elements of a cause of action, including jurisdiction and standing. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) and *Ashcroft v. Iqbal,* 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). In this case, for example, Plaintiff stated, without factual support, that a debt to Harris Teeter was "common sense" a consumer debt, however, the Court noted that people use personal credit cards for business expenses all the time.

58. Fed. R. Civ. P. 12(b)(6). <u>Statements by lender that no payment was due after lender issued 1099-C to IRS constitute genuine issue of material facts on which to deny motion to dismiss</u>. *Newton, et al. v. Beneficial Financial I, Inc.,* 2017 WL 1293579 (D. W.D.Va. 2017).On January 26, 2005, the late Judith F. Woodson, mother of the plaintiffs Woodson Newton, Michael Early Woodson, and Donald Lewis Woodson, Jr., plaintiffs, obtained a home mortgage loan from Beneficial Mortgage Company of Virginia which was evidenced by a loan repayment and security agreement and secured by a deed of trust on 1967 Red Hill Road in Gordonsville, Virginia. On March 30, 2006, Ms. Woodson obtained a home equity line of credit from Beneficial Discount Company of Virginia secured by second deed of trust on the Property.

Defendant Beneficial succeeded to the interests of Beneficial Mortgage Company of Virginia and Beneficial Discount Company. Several years later, according to the plaintiffs, Beneficial cancelled or discharged the Line of Credit debt and for tax year 2012 filed with the IRS a Form 1099-C titled "Cancellation of Debt," listing Beneficial as the creditor and Ms. Woodson as the debtor.

Ms. Woodson died intestate on March 20, 2015. Prior to her death, a representative of Beneficial advised Ms. Woodson that she did not need to make any additional payments on the Line of Credit, and following her death, a lender representative advised Tonia Newton that no payments were required on the Line of Credit. Beneficial denied the plaintiffs' request for approval of a short sale which plaintiffs maintain was consistent with their understanding that the Line of Credit debt had been discharged by Beneficial, Plaintiffs fell into arrears on the first mortgage, and Beneficial filed foreclosure' plaintiffs filed a complaint in State court, obtained an injunction of the foreclosure sale, and the case was removed to the U.S. District Court, where defendants filed motions to dismiss relying on the Fourth Circuit's decision in *FDIC v. Cashion*, 720 F.3d 169 (4th Cir. 2013) in which the Court considered whether the introduction into evidence of a 1099-C Form created a genuine issue of material fact as to whether an underlying note had been cancelled or assigned, 720 F.3d at 177,"because a creditor can be required to file a Form 1099-C even where a debt has not been cancelled, the mere fact that a Form 1099-C is filed does not constitute sufficient evidence, standing alone, that a debt has been cancelled." *Id.*, at 180. Since Cashion's claim of cancellation was "based solely on the 1099-C Form," the Fourth Circuit held, as a matter of law, that a jury could not have rendered a verdict in Cashion's favor. Id. Accordingly, the Fourth Circuit affirmed the grant of summary judgment to the FDIC. *Id.*

Held: Here, however, both Ms. Woodson and her daughter were told, after the 1099-C Form was issued, that no additional payments were required on the Line of Credit. The additional allegations when considered in conjunction with the 1099-C Form, support the plausible inference that the Line of Credit debt was cancelled by Beneficial. Accordingly, the defendants' motions to dismiss were denied.

59. Fed. R. Civ. P. 12(b)(6). Motion to Dismiss Plaintiff's Amended Claim pursuant to Rule 12(b)6 for failure to state a claim granted where Plaintiff fails to state with precision a plausible claim for relief to survive the Motion to Dismiss. *Eggiman v Ventures Trust, 2013 I H-R by MCM Capital Partners LLC*, 2017 WL 4003025 (E.D. VA. 2017) (Claude M Hilton, US District Court Judge). The Court will not accept as true any "unwarranted inferences, unreasonable conclusions or arguments". Plaintiff alleged five (5) causes of actions which the Court found not to state a plausible claim for relief. Of particular interest were two (2) purported violations of the FDCPA and standing to foreclose. On the latter point, the Court held that a Plaintiff lacks standing to challenge an assignment because the Plaintiff is not an intended beneficiary of said assignment.

60. § Fed. R. Civ. P. 12(b)(6). Complaint for breach of contract dismissed as barred by *res judicata*. *Davenport, et al. v. Djourabchi,* ____F.Supp.2d____ (D. D.C. November 1, 2017)(Civil Action No. 16-2445-ABJ)(Jackson, J.). Creditors, Djourabchi, made $80,000 interest-only business loan to, debtor, Davenport, secured by his residence, on which principal could only be paid in its entirety. Debtor made monthly overpayments and believed principal was being reduced, but actually he was paying interest ahead of schedule. Creditors' proof of claim in first bankruptcy case was $80,000 with no arrearage, so none were paid. Creditors demanded additional payments and debtor filed Application in Bankruptcy Court requesting finding that creditors' demands violated Bankruptcy Court orders; Bankruptcy Court denied relief and made no finding on amount of debt which creditors alleged was $114,568.07. Second Chapter 13 case was filed on October 14, 2015, to stop foreclosure action filed when debtor was not in default, and debtor objected – a contested matter not an adversary proceeding -- to creditor's $121,313.88 proof of claim contending debt was $54,435.00, and Bankruptcy Court found debtor was not in default and debt was $53,557.10. Debtor and his company sued creditor in U.S. District Court for District of Columbia on common law and statutory bases due to creditor's enforcement of the secured Note, alleging Counts for wrongful foreclosure, breach of contract, false representations, unlawful trade practices and tortious interference; creditors moved to dismiss on *res judicata* contending that the causes of action in the complaint could have been raised in the claim objection.

Rationale: *Res judicata* bars relitigation of claims that were or could have been raised. A claim is the same if it shares the same nucleus of facts that were litigated. Debtor contended that the complaint involved expansive time, space, origin, and motive than the limited facts in the Bankruptcy Court objection. Dispositive issue was whether the claims arose out of the same set of facts and whether debtor could have raised them. District Court found that the proper course for the debtor's *Stern* claims – a claim designated for final adjudication in the bankruptcy court as a statutory matter but prohibited from proceeding that way as a constitutional matter – is to issue findings of fact and conclusions of law just like the bankruptcy court would do with non-core proceedings. *Executive Benefits Insurance Agency v. Arkinson*, 134 S.Ct. 2165 (2014), and in *Wellness International Netowrk, Ltd., v. Sharif,* held that parties could consent to jurisdiction.

Held: *Res judicata* applies to non-core claims that could have been brought in prior bankruptcy proceedings; complaint dismissed.

N.B.: A motion for reconsideration has been filed, and, if not granted, Jeffrey Orenstein, Esquire, has advised that the matter is to be appealed to the DC Circuit Court of Appeals.

Implications of this decision: If parties are separated and involved in a custody dispute but have not yet filed the divorce action when a bankruptcy case is fled, or, if a non-debtor spouse files a proof of claim and debtor needs to object, the action should be brought as an adversary and the complaint should include Counts for divorce and everything else that goes with it or he plaintiff could be barred from doing so in the Superior Court. What if a personal injury claim was filed and an objection did not include a non-compulsory counterclaim under State law – could that be barred later?

61. F.R.B.P. Rule 8007. Stay pending appeal denied from Order lifting stay in Chapter 13 case filed after foreclosure sale hammer sold realty. *MidFirst Bank v Schweiger*, 578 B.R. 734, 2017 WL 6994033 (Bankr. D.Md. 2017)(Rice, J.). Order was entered by the Bankruptcy Court, lifting automatic stay to allow deed of trust lender to exercise its rights as high bidder at deed of trust foreclosure sale on which the auctioneer's hammer had fallen prior to commencement of debtor's bankruptcy case. Chapter 13 debtor appealed and moved for issuance of stay pending appeal. Under Rule 8007 the burden is on the movant to establish grounds for entry of a stay pending appeal. *Culver v. Boozer,* 285 B.R. 163 (D. Md. 2002)(stay pending appeal denied because the movant did not carry his burden). As stated by Judge Blake in *Culver*, the party moving for a stay pending appeal "must show: (1) that he will likely prevail on the merits of the appeal; (2) that he will suffer irreparable injury if the stay is denied; (3) that other parties will not be substantially harmed by the stay; and (4) that the public interest will be served by granting the stay." *Id*., at 166. (citing *Long v. Robinson,* 432 F.2d 977, 979 (4th Cir. 1970); *In re Sy;mington,* 211 B.R. 520, 522 (Bankr. D.Md. 1977)(a stay pending appeal is extraordinary relief). After the Supreme Court's decision in *Winter v. Natural Resources Defense Council, Inc.,* 555 U.S. 7, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008), the Fourth Circuit held that a movant seeking a preliminary injunction "must establish 'that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.'" *The Real Truth About Obama, Inc. v. EEC.* 575 F.3d, 342, 346 (4th Cir. 2008), *vacated on other grounds*, 559 U.S. 1089, 130 S.Ct. 2371, 176 L.Ed.2d 764 (2010). Judge Rice relied upon *In re May,* 546 B.R. 639 (Bankr. D.Md. 2016) holding that in this district it has long been the law that (i) the bankruptcy court lacks authority to invalidate a prepetition foreclosure sale, and (ii) once the gavel falls a debtor's rights are limited to contesting ratification in state court. *Id*., at 641 (relying on *In re Denny,* 242 B.R. 593 (Bankr. D.Md. 1999), and *In re De Souza*, 135 B.R. 793 (Bankr. D.Md. 1992). Held that debtor was not entitled to stay pending his appeal from bankruptcy court order lifting automatic stay in order to allow deed of trust foreclosure to be completed. Court disagreed that *Kameni* was a defense to a lift stay where the bankruptcy case was filed after the sale, and therefore could not be cured or reinstated thru the plan. Appeal to the District Court and briefs have been filed.

62. F.R.B.P. Rule 8009(a)(1). The District Court must take steps (outlined in *In re SPR Corp.* 45 F.3d 70, 72 (4th Cir. 1995)) in determining whether to dismiss an appeal for failure to properly designate the record on appeal as required by Rule 8009(a)(1) of the Federal Rules of Bankruptcy Procedure, *Bird v. Specialized Loan Serving, LLC*, 2017 WL 1001257 (D. Md. 2017) (Bennet, J.). An appellant failed to properly designate the record on appeal as required by Rule 8009(a)(1) of the Federal Rules of Bankruptcy. The appellee sought to have the appeal dismissed for non-compliance with the Rule.

A Court may dismiss an appeal for non-compliance with Bankruptcy Rule 8009 after giving the appellant an opportunity to explain the non-compliance and whether the non-compliance had a prejudicial effect on the other parties. The Fourth Circuit has held that before a Court dismisses an appeal the District Court must take one of the following steps: (1) make a finding of bad faith or negligence; (2) give the appellant notice or an opportunity to explain the delay; (3) consider whether the delay had any possible effect on the other parties; or (4) indicate that it considered the impact of the sanction and available alternatives." *In re SPR Corp.*, 45 F3d 70, 72 (4th Cir. 1995).

Under the facts, the Court did not dismiss the appeal because the appellant was proceeding *pro se*, able to timely designate the record, and it was unclear whether the procedural failure unduly prejudiced the appellee.

63. F.R.B.P. 9037. <u>No duty of privacy to protect debtor's personal information established by creditor's website</u>. *Branch v. Wakemed f/k/a Wake County Hospital (In re Branch)*, 569 B.R. 657 2017 WL 1066560 (Bankr. E.D.N.C. 2017). Chapter 7 debtor brought adversary proceeding against creditor, asserting creditor negligently included debtor's personal and medical information in proof of claim. Creditor moved to dismiss. In granting the motion to dismiss, the Bankruptcy Court held that (i) collateral estoppel did not preclude debtor from seeking attorney fees related to prior motion to restrict access and sanctions motion, in connection with creditor's proof of claim that included debtor's personal information, as mitigation costs in adversary proceeding; (ii) attorney fees associated with motion to restrict access and sanctions motion and cost of identity theft protection that debtor sought to recover as mitigation costs in adversary proceeding were insufficient to establish an injury-in-fact, as required to establish standing; (iii) debtor's claim for attorney fees incurred in filing adversary proceeding did not constitute an injury-in-fact, as required to establish standing; (iv) creditor's inclusion of dates of admission and discharge, medical record numbers, and other medical information in proof of claim did not violate any duty that might be established by bankruptcy rule governing privacy protection for court filings; (v) joint notice of privacy practices published on creditor's website did not establish a duty to protect debtor's personal information; and (vi) information that creditor disclosed in proof of claim was reasonably limited within meaning of Health Insurance Portability and Accountability Act (HIPAA); and (vii) debtor's conclusory allegations that he was subjected to an increased likelihood that his personal information would be stolen were insufficient to establish that he suffered damages as a proximate result of creditor's conduct.

64. ACM, Com. Law, §§ 1-201(b)(5), 1-201(b)(21), 3-301, 3-309. <u>The holder of a Note endorsed in blank is entitled to enforce it</u>. *Brown v. Tysons Financial, LLC, et al. (In re Brown)*, 2017 WL 3298471 (Bankr. D.Md. 2017)(Catliota, J.).On December 14, 2015, Mr. Brown filed for Chapter 13 bankruptcy relief; he owns real property at 17705 Queen Anne Road, Upper Marlboro, MD which he purchased on January 10, 2006, for $690,000 by Deed recorded in the land records for Prince George's County, MD, on January 19, 2006, but the legal description was incorrect, and on July 7, 2006, the deed was re-recorded to correct the legal description. To finance the purchase, Mr. Brown borrowed $500,000 from Saxon Mortgage, Inc., and on January 10, 2006, he signed an adjustable rate note and a purchase money deed of trust that secured the Note, and the deed of trust was recorded on January 19, 2006, with an incorrect property description, which was corrected by re-recorded deed of trust on July 7, 2006.

On January 10, 2006, Mr. Brown also executed a purchase money deed of trust in favor of Saxon for $155,500, and it secured a note in that amount, again with an incorrect legal description recorded on January 19, 2006 and corrected by re-recorded deed of trust on July 7, 2006, In April 2012, Tysons purchased the Note and all the instruments securing the Note. Ocwen Loan Servicing recorded the Tysons assignment on May 2, 2012. On July 15, 2015, Saxon assigned the $155,500 deed of trust to Ocwen Loan Servicing. Both assignments were recorded in the land records.

If the movant is able to establish a prima facie basis for summary judgment, the burden of production shifts to the party opposing summary judgment. A party opposing summary judgment "may not rest upon the mere allegations or denials of [their] pleading, but must set forth specific facts showing that there is a genuine issue for trial. Those specific facts must be supported by "citing to particular parts of materials in the record." Fed. R. Civ. P. 56(c)(1)(A); *See Emmett v. Johnson*, 532 F.3d 291, 297 (4th Cir. 2008) ("The party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials of his pleadings, but must come forward with specific facts showing that there is a genuine issue for trial." Oral argument is deemed unnecessary because the facts and legal arguments are adequately presented in the parties' briefs and the exhibits submitted in support.

<u>Fact</u>: The dispute between the parties centers on the indorsement. Tysons contends it should be read to mean the Note is indorsed in blank by Saxon. Mr. Brown contends the indorsement should be read to mean "Without Recourse Pay to the Order of Saxon Mortgage, Inc. by Amy Shook, Assistant Vice–President." Thus, Mr. Brown contends that the Note is specially indorsed to Saxon and therefore Tysons in not a holder, but merely a transferee in possession.

<u>Issue</u>: Is Tysons the holder of the Note or merely a transferee in possession who took by assignment? If, as Tysons contends, it is the holder of the Note, it has the right to enforce the Note and the deed of trust as corrected. Mr. Brown does not dispute this. If, as Mr. Brown contends, Tysons is merely a transferee who obtained the Note and deed of trust by an assignment agreement, then whether Tysons can enforce the Note and corrected deed of trust may depend on a number of disputed issues, including whether it can prove an unbroken chain of title and whether the assignment agreement allows it enforce the corrected deed of trust. But there is no dispute that if Tysons is the "holder" of the Note, it is entitled to summary judgment. Section 3–301 defines "Person Entitled to Enforce an Instrument":

<u>Rationale</u>: Person entitled to enforce" an instrument means (i) the *holder* of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder, or (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to Section 3–309 or 3–418(d). A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument. Md. Code Ann., Com. Law § 3–301. A "holder" is: (i) The person in possession of a negotiable instrument that is payable either *to bearer* or to an identified person that is the person in possession; or (ii) The person in possession of a document of title if the goods are deliverable either to bearer or to the order of the person in possession. Md. Code Ann., Com. Law § 1–201(b)(21). "Bearer" is "a person in possession of a negotiable instrument, document of title, or certificated security that is payable to bearer or indorsed in blank." Md. Code Ann., Com. Law § 1–201(b)(5). "A promise or order is payable to bearer if it: (1) States that it is payable to bearer or to the order of bearer or otherwise indicates that the person in possession of the promise or order is entitled to payment; (2) Does not state a payee; or (3) States that it is payable to or to the order of cash or otherwise indicates that it is not payable to an identified person."

65. ACM, RP § 11-101 *et seq*, Maryland Condominium Act. <u>Condominium cannot restrict use of pool or parking to exact payment of fees</u>. *Elvaton Towne Condominium Regime II, Inc. v. Rose,* 453 Md. 684 (2017). The Maryland Condominium Act allows access to communally-held property to be restricted as a means to enforce payment of condominium fees, but such restrictions must first be authorized by the unit owners through agreement in the condominium's declaration. In this case, a condominium association and its management firm (collectively, Elvaton) claimed that unit owners William and Dawn Rose were delinquent in paying their condominium fees. The association thus prohibited the Roses from parking in the parking lot overnight or using the pool until they paid their allegedly delinquent fees. The circuit court ruled that Elvaton did not have the authority to restrict the Roses' use of the parking lots and the pool as a means of collecting on the debt. The Court of Appeals affirmed. The Supreme Court affirmed, holding that because Elvaton did not include a

restriction to the general common elements of the condominium as a means to enforce payment of condominium fees in the condominium's declaration, the restriction was invalid.

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66. ACM, <u>Est. & Trusts §§ 14.5-404</u>, 14.5-405; F.R.C.P. 12(b)(6). <u>Complaint states causes of action for fraud, breach of contract and unjust enrichment where Trust created for unlawful purpose</u>. *Chevy Chase Funding, LLC v. Walsh*, 2017 WL 908184 (D. Md. 2017) (Slip Copy)(Hazel, J.).Compliant filed by Chevy Chase Funding, LLC, seeks to set aside a Deed and declare a nullity the transfer of real property by Walsh to himself as Trustee of the Berwyn Road Historic Preservation and Conservation Trust "for the sole purpose of avoiding creditors and defrauding the CCF Trust" prior to the recordation of his grant of a mortgage to Chevy Chase Funding, which transfer reduced the collateral subject to its mortgage, and declare the DOT to Chevy Chase Funding, LLC as the first-priority lien against the entire Property, or, in the alternative to reform its deed of trust, which complaint Walsh sought to dismiss for failure to state a claim.

Facts: The Berwyn Road Trust, by the face of its Deed, is "revocable" and does not provide any specific methods of revocation. "[a] trust may be created only to the extent that the purposes of the trust are lawful, not contrary to public policy, and possible to achieve." Md. Code, Est. & Trusts § 14.5-404. A trust created for a fraudulent purpose is void. § 14.5-405. Here, the Walshes allegedly conveyed the Property to the Berwyn Road Trust only a few months after the Welshes purchased the Property, and only several months before they borrowed the Subject Loan from CCF. to state a claim for fraudulent conveyance, "the plaintiff needs to allege that a creditor-debtor relationship exists and that the debtor has fraudulently transferred assets." *Trikeriotis*, 201 F. Supp. 2d at 502 (D. Md. 2002) (citing *Dixon v. Bennett*, 72 Md.App. 620, 623 n. 2 (1987)). A conveyance is fraudulent to both present and future creditors when such a conveyance is made "without fair consideration when the person who makes the conveyance or who enters into the obligation intends or believes that he [or she] will incur debts beyond his [or her] ability to pay as they mature" or when it is made with "actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud present or future creditors." Md. Code, Com. Law §§ 15-206-07.

Plaintiff claims that the defects in its lien interest were caused by Defendants' fraudulent conduct, entitling it to equitable relief. The law is clear that "if an individual obtains real property by fraud and executes a mortgage on that property, the mortgage is valid in the absence of proof that the mortgagee had notice of the fraud." *Holliday v. Holliday*, No. 8:09-CV-01449-AW, 2011 WL 3565566, at *6 (D. Md. Aug. 11, 2011) (citing *Wicklein v. Kidd*, 149 Md. 412, 131 A. 780, 783 (Md. 1926).

<u>Held</u>: The Subject DOT between Plaintiff and the Walshes bears the hallmarks of a mortgage. Maryland law also recognizes the doctrine of equitable subrogation. *Holliday*, 2011 WL 3565566, at *6 (citing *G.E. Capital v. Levenson*, 338 Md. 227, 657 A.2d 1170, 1175 (Md. 1995)). Equitable subrogation "provides that [a lender] who pays the mortgage of another and takes a new mortgage as security will be subrogated to the rights of the first mortgagee." *Id.; see also CitiMortgage, Inc. v. Holmes*, No. CIV.A. DKC 13-1641, 2014 WL 3055563, at *3 (D. Md. July 1, 2014) ("Where a lender has advanced money for the purpose of discharging a

prior encumbrance in reliance upon obtaining security equivalent to the discharged lien, and [its] money is so used ... if [it] did so in ignorance of junior liens or other interests[,] [it] will be subrogated to the prior lien."). The District Court denied the motion to dismiss Counts III and V.

To state a claim for unjust enrichment, plaintiff must show "that the defendant retained a benefit conferred by the plaintiff 'under such circumstances as to make it inequitable for the defendant to retain the benefit without the payment of its value.' " *Bowers v. Bank of Am., N.A.,* 905 F. Supp. 2d 697, 703 (D. Md. 2012) (citing *Hill v. Cross Country Settlements, LLC,* 402 Md. 281, 295 (2007)). District Court held that the complaint stated causes of action for both breach of contract and unjust enrichment.

67. 12 U.S.C. § 2601, Real Estate Settlement Procedures Act ("RESPA"); the Fair Debt Collection Practice Act ("FDCPA"), 15 U.S.C. § 1692a. <u>Claims for alleged violations of these statutes failed</u>. *Lindsay, et al., v. Rushmore Loan Management Services, LLC,* 2017 WL 1230822 (D. Md. 2017)(Grimm, J.). After Plaintiffs Sterling Lindsay and Rachel Lindsay stopped making payments on their mortgage loan, Defendant Rushmore Loan Management Services, LLC tried, without success, to collect on the debt. Rushmore ultimately initiated proceedings in state court to foreclose on the Lindsays' real property purchased with the proceeds of the loan. In this action, the Lindsays allege that, in its debt collection efforts, Rushmore violated the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2601 *et seq.*; the Fair Debt Collection Practice Act ("FDCPA"), 15 U.S.C. § 1692a; and the Maryland Consumer Debt Collection Act ("MCDCA"), Md. Code § 14-201 *et seq.* ECF No. 10.[2] Rushmore moved to dismiss for failure to state a claim and based on the *Younger* abstention doctrine, *see Younger v. Harris*, 401 U.S. 37 (1971), but both motions were denied. Rushmore then filed its Motion for Summary Judgment.

<u>Held</u>: There is no genuine dispute that the Lindsays submitted a complete loan modification application by May 2014. Therefore, Rushmore did not violate RESPA with regard to the Lindsays' later loss mitigation applications, because it was not required to comply with the loss mitigation procedures for any of Plaintiffs' loss mitigation applications submitted after the May, 2014 complete application. Additionally, a statute of limitations bars Plaintiffs' FDCPA claims. Also, the Lindsays cannot succeed on their MCDCA claim because, in part, they challenge the validity of the debt, which is not permissible under the statute, and to the extent that they challenge the amount rather than the validity, they cannot show that the amount in excess of what they believed they owed was an unauthorized type of charge, as a MCDCA claim requires. Finally, the Lindsays cannot succeed on their RESPA claim regarding Rushmore's allegedly delayed response to their inquiry about their debt because Plaintiffs have not provided any evidence that Rushmore's failure to provide a timely response caused damages. Accordingly, the District Court granted Rushmore's Motion as to all counts.

68. 12 U.S.C. §§ 5481 *et. seq*., §§ 5531(a), (b), and (d) Md. Cts. & Jud. Proc. §§ 5–1102(b)(3) (2000). <u>Consumer Protection Attorney who advised consumers who made structured settlement transfers was subject to practice of law exclusion of Consumer Financial Protection Act.</u>. C*onsumer Financial Protection Bureau v. Access Funding, LLC,* ___ F.Supp. 3d ____, 2017 WL 4063737 (D. Md. 2017)(Motz, J.). Plaintiff Consumer Financial Protection Bureau ("CFPB") filed suit against defendants Access Funding, LLC, Access Holding, LLC, Reliance Funding, LLC, Lee Jundanian, Raffi Boghosian, and Michael Borkowski ("Access Funding Defendants") and attorney Charles Smith ("Smith"), seeking a permanent injunction, damages, disgorgement, and payment of redress, civil penalties, and costs for violation of various provisions of the Consumer Financial Protection Act of 2010 ("CFPA"), 12 U.S.C. §§ 5481 *et. seq.*, relating to the transfers of structured settlements. Access Funding Defendants filed motions for *Burford* abstention and a stay, or in the alternative, to dismiss.

This dispute involves the sale of structured settlements which are "established by legal judgments or settlements of tort claims to provide recipients with an arrangement for periodic payment of damages for personal injuries" and are "often used to ensure the financial well-being of victims who have suffered long-term physical or cognitive harm." Access Funding's principal business was structured-settlement-factoring which is the offering to "recipients of structured settlements the opportunity to transfer a portion of their future payment streams in exchange for a discounted immediate lump sum."

Maryland enacted Structured Settlement Protection Act ("SSPAs"), Md. Cts. & Jud. Proc. §§ 5–1102(b)(3) (2000), in order to protect individuals who have suffered long-term physical or cognitive harm from entering into transactions that are not in their best interest. Maryland's SSPA requires structured settlement factoring companies to obtain court approval before purchasing a payment stream, requiring that the court "find that the consumer has consulted with an independent professional advisor before it can approve a structured-settlement transfer."

The complaint alleges that Access Funding aggressively pursued structured settlement holders in the hopes of purchasing their settlements. Their aggressive business practices included searching court records to identify consumers who had previously transferred a portion of their structured settlements, then contacting those consumers and enticing them to transfer the remainder of their settlements to Access Funding. However, the complaint is based instead on two of Access Funding's specific business practices. First, the complaint alleges that Access Funding violated the CFPA by abusing consumers with respect to the payment of advances. It alleges that after contacting consumers and offering to purchase their settlements. Access Funding entered into advance agreements with many of them, pursuant to which it advanced their lump sum payments while they waited to complete their paperwork and finalize their transfers. These advances often consisted of $500 for signing a contract, $1,000 when a court date was set, and another $1,000 when a judge approved the sale. The advance agreements notified the consumers that they would be liable to repay the advances if they did not ultimately go through with the transaction, and that in order to keep the advances they would have to cooperate fully with the company in obtaining court approval for the transaction.

The second basis for the complaint is Smith's conduct as an independent professional advisor ("IPA") alleging that Access Funding used Smith as the IPA for "almost all of its Maryland transactions. Contending that Smith in fact had both personal and professional ties to Access Funding, paying him $200 for each IPA letter he provided.

On November 21, 2016, CFPB filed its complaint alleging Smith engaged in unfair (Count I), deceptive (Count II), and abusive (Count III) acts and practices, in violation of 12 U.S.C. §§ 5531(a), (b), and (d) and that the Access Funding Defendants substantially assisted Smith's unfair, deceptive, and abusive acts (Count IV), in violation of 12 U.S.C. § 5536(a)(3). The fifth claim arises out of the Access Funding Defendants' conduct with respect to the advances alleging that the Access Funding Defendants engaged in abusive acts and practices

Defendants argue that there are both prudential bars and a jurisdictional bar to the court hearing this case. First, defendants argue that the abstention doctrine set forth in *Burford v. Sun Oil,* 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943), mandates that the court dismiss the CFPB's claims for equitable remedies and stay its claims for damages. Second, defendants argue that the doctrine of issue preclusion bars the CFPB from re-litigating the issues at the heart of its complaint—namely, whether Smith gave independent professional advice and whether the Access Funding transfers were fair and reasonable. Third, defendants argue that the collateral attack doctrine bars the CFPB from challenging final judgments of the Maryland state courts. The District Court found none of these three arguments persuasive as there were no difficult questions of state law before the court nor would its review disrupt Maryland's efforts to establish a coherent policy with respect to a matter of substantial public concern.

Defendants next asked the court to find that the CFPB was barred by the doctrine of issue preclusion from relitigating two issues that were decided in Maryland state court: whether Smith provided independent professional advice and whether the structured settlement transfers were fair to the consumers. The Full Faith and Credit Act, 28 U.S.C. § 1738, dictates that a federal court must give a state court judgment the same preclusive effect it would be given in the courts of the state that rendered the judgment.

Defendants argued that Counts I–IV of the complaint should be dismissed because Smith is not a "covered person" under the CFPA and therefore the statute does not apply to his conduct. The CFPB argues that Smith is a "covered person" under the plain meaning of the statute. Ultimately, the plain meaning of the statute is sufficient to resolve the question of whether Smith is a "covered person." Pursuant to § 5481(15)(A)(viii), one who "provides financial advisory services ... to consumers on individual financial matters" is a "covered person," regardless of the specific nature of that financial advice, The District Court agreed with the CFPB.

Defendants argue that even if Smith is a "covered person," Counts I–IV of the complaint should be dismissed because he was an attorney who provided legal advice and whose conduct is therefore subject to the "practice of law" exclusion to the CFPA. The CFPB argues that Smith's perfunctory conversations with consumers did not constitute the practice of law and therefore are not excluded from CFPA coverage. This was the closest of the issues before the Court which found that Smith was engaged in the practice of law, and that his conduct does not fall within either of the exceptions to the "practice of law" exclusion set forth in § 5517(e)(2). Thus, Counts I–IV of the complaint, each of which is premised upon Smith's conduct, must be dismissed.

Defendants argued that the complaint is deficient because the CFPB failed to demonstrate "(1) how the [allegedly abusive] act causes substantial injury to consumers, or (2) how any purported substantial injury is not outweighed by the benefits to consumers." The court found that argument unavailing. Although § 5531(c) requires that a plaintiff prove these elements in order to make out a claim for "unfair" acts or practices, § 5531(d)—the provision at issue in Count V—does not require the CFPB to prove these elements in order to make out its claim for "abusive" acts or practices.

Held: Court would not abstain under *Burford*; neither issue preclusion nor collateral attack doctrine barred the action; attorney was a "covered person," within the meaning of the Consumer Financial Protection Act; attorney was subject to the practice of law exclusion of the Consumer Financial Protection Act; and complaint stated plausible claim against purchaser. Defendants' motions to dismiss Counts I–IV are granted. Defendants' motions to dismiss Count V are denied.

69. 15 U.S.C. §§ 1692-1692p (2012). Fourth Circuit Vacates District Court's Decision that FDCPA/MCPA Plaintiff Lacked Standing; Plaintiff Established Injury in Fact. *Ben-Davies v. Blibaum & Assoc. P.A.*, ___F.3d (4th Cir. June 6, 2017). Amber Ben-Davies appeals the district court's order granting Defendant Blibaum & Associates, P.A. (Blibaum)'s Fed. R. Civ. P. 12(b)(1) motion and dismissing her civil action for lack of subject matter jurisdiction. Ben-Davies' complaint alleged violations of the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §§ 1692-1692p (2012), the Maryland Consumer Debt Collection Act (MCDCA), Md. Code Ann., Com. Law, §§ 14-201 to 14-204 (LexisNexis 2013 & Supp. 2016), and the Maryland Consumer Protection Act (MCPA), Md. Code Ann., Com. Law, §§ 13-101 to 13-501 (LexisNexis 2013 & Supp. 2016). The district court dismissed the FDCPA count for lack of standing under Article III of the Constitution, concluding that Ben-Davies had not established an injury in fact. The court also dismissed the MCDCA and MCPA claims for lack of supplemental jurisdiction. Ben-Davies appeals and challenges the district court's ruling on Article III standing. We vacate and remand for further proceedings. This appeal concerns injury in fact, "the first and foremost of standing's three elements."

The FDCPA prohibits a debt collector from using "any false, deceptive, or misleading representation or means in connection with the collection of any debt." *Id.* § 1692e. In this regard, the FDCPA prohibits "[t]he false representation of . . . the character, amount, or legal status of any debt." *Id.* § 1692e(2)(A). An erroneous statement of the amount of a debt owed qualifies as misleading or deceptive under the FDCPA.

This was not a case where the plaintiff simply alleged "a bare procedural violation [of the FDCPA], divorced from any concrete harm." *Spokeo, Inc.*, 136 S. Ct. at 1549. Indeed, Ben-Davies' complaint alleged that, as a "direct consequence" of Blibaum's alleged violations of the FDCPA's proscribed practices, she "suffered and continues to suffer" actually existing intangible harms that affect her personally: "emotional distress, anger, and frustration." Ben-Davies thus sufficiently established the existence of an injury in fact, and Blibaum has not asserted that such an injury is anything other than traceable to its alleged violations of the FDCPA and could not be redressed by a favorable judicial decision.

Accordingly, we vacate the district court's judgment and remand for further proceedings consistent with this opinion.

70. 15 U.S.C. § 1692a(6)(F)(iii). *Henson v. Santander Consumer Inc.*, ,___ U.S.,___ , 137 S.Ct. 1718, 2017 WL 2507342 (2017). No. 16–349 Decided June 12, 2017. Consumers commenced action alleging that consumer finance company and its agents violated Fair Debt Collection Practices Act (FDCPA) by engaging in prohibited collection practices when collecting on their automobile loans, which had been originated by third party and then, after default, sold to company. The United States District Court for the District of Maryland, Richard D. Bennett, J., 2014 WL 1806915, dismissed the action, and denied reconsideration, 2015 WL 433475. Consumers appealed. The Court of Appeals for the Fourth Circuit, Niemeyer, Circuit Judge, 817 F.3d 131, affirmed. Certiorari was granted.

The Supreme Court on June 12, 2017, in an Opinion by Justice Gorsuch, ruled that a debt collector that purchases a debt for its own account is not a debt collector covered by the FDCPA because Santander was not collecting a debt owed to another, abrogating *McKinney v. Cadleway Properties, Inc.*, 548 F.3d 496 (7th Cir. 2008) and *FTC v. Check Investors, Inc.*, 502 F.3d 159 (3rd Cir. 2007).

The potential effects that the decision will have on both debt collectors and consumers needs to be examined.

71. 15 U.S.C. § 1962g(a)(2). <u>Consumer pled facts that could plausibly give rise to inference that debt collector's letter failed to clearly specify name of creditor to whom debt was owed</u>. *Smith v. Cohn, Goldberg & Deutsch, LLC*, ___*F.3d* ___, 2017 WL 4921695 (D. Md. 2017)(Bennett, J.). James A. Smith, plaintiff/consumer, brought class action against debt collector, Cohn, Goldberg & Deutsch, LLC alleging that it failed to properly name in its initial written communications the creditor to whom debt was owed, as required by the Fair Debt Collection Practices Act. The law firm, debt collector, moved to dismiss. The law firm, debt collector, sent the plaintiff a letter stating:

On November 18, 2005, you executed a Deed of Trust and Note secured by the above referenced property, and borrowed money in connection with a loan made by Mortgage Lenders Network USA, Inc.. [*sic*] The current owner of the note is U.S. Bank National Association, as Trustee, for Residential Asset Securities Corporation, Home Equity Mortgage Asset–Backed Pass–Through Certificates, Series 2006–EMX1, and the current servicer of the above-referenced loan is Wells Fargo Bank, N.A..[*sic*] The loan has been referred to this office for legal action based upon a default under the terms of the loan agreement....

Upon your written request within the thirty (30) day period, this office will provide the name and address of the original creditor if different from the current creditor.

IF YOU ARE A DEBTOR, OR AN ATTORNEY REPRESENTING A DEBTOR, THIS COMMUNICATION IS AN ATTEMPT TO COLLECT A DEBT, AND ANY INFORMATION OBTAINED HEREBY WILL BE USED FOR THAT PURPOSE.

Plaintiff asserts that the Letter violated the Fair Debt Collection Practices Act (“FDCPA”), 15 U.S.C. § 1962g(a)(2), because it “fail[ed] to clearly specify, in a manner in which the least sophisticated consumer could understand, the name of the creditor to whom the Debt was owed.”

The Letter includes the following entities that are related to the debt in question: Mortgage Lenders Network USA, Inc.; U.S. Bank National Association; Residential Asset Securities Corporation, Home Equity

Mortgage Asset–Backed Pass–Through Certificates, Series 2006–EMX1; Wells Fargo Bank, N.A.; and "this office" (Cohn). The parties disagreed as to whether the Letter identified four or five entities.

The Fair Debt Collection Practices Act ("FDCPA") "protects consumers from abusive and deceptive practices by debt collectors, and protects non-abusive debt collectors from competitive disadvantage." The relevant question here is whether Smith's claim plausibly alleges that Cohn "faile[ed] to clearly specify, in a manner in which the least sophisticated consumer could understand, the name of the creditor to whom the Debt is owed".

Courts interpret the FDCPA using the least sophisticated consumer standard, requiring a determination applying a less demanding standard than that of a "reasonable" consumer, *Ramsay v. Sawyer Prop. Mgmt. of Maryland LLC,* 593 Fed.Appx. 204, 207 (4th Cir. 2014), which test is intended to ensure that "the gullible as well as the shrewd" are not deceived by communications from a debt collector. Although the FDCPA protects uninformed consumers, the standard employed nevertheless protects creditors from "liability for bizarre or idiosyncratic interpretations of collection notices by preserving a quotient of reasonableness and presuming a basic level of understanding and willingness to read with care." *Id.* Accordingly, courts must remain mindful not to "conflate lack of sophistication with unreasonableness." *Ellis v. Solomon & Solomon, P.C.*, 591 F.3d 130, 135 (2nd Cir. 2010).

Issue: Though the FDCPA does not necessarily require specific language to communicate the identity of the creditor to whom the debt is owed, such information "must be conveyed effectively to the debtor." *Miller v. Payco–Gen. Am. Credits, Inc.*, 943 F.2d 482, 484 (4th Cir. 1991). In other words, the provisions of § 1692g must be communicated "clearly enough that the recipient would likely understand it." *See Janetos v. Fulton Friedman & Gullace, LLP*, 825 F.3d 317, 321 (7th Cir. 2016). Further, if there is more than one plausible way to read a debt collection letter, such that the identity of the creditor to whom the debt is owed is unclear to the least sophisticated consumer, a violation to the FDCPA may result. "A debt collection letter is deceptive where it can be reasonably read to have two or more different meanings, one of which is inaccurate." *Gonzales v. Arrow Fin. Servs., LLC,* 660 F.3d 1055, 1062 (9th Cir. 2011). Additionally, "[u]nsophisticated readers may require more explanation than do federal judges; what seems pellucid to a judge, a legally sophisticated reader, may be opaque to someone whose formal education ended after sixth grade." *McMahon v. LVNV Funding, LLC*, 744 F.3d 1010, 1020 (7th Cir. 2014). Fundamentally, the parties here dispute whether the above text lists four entities or five. Cohn asserts that "U.S. Bank National Association, as Trustee, for Residential Asset Securities Corporation, Home Equity Mortgage Asset–Backed Pass–Through Certificates, Series 2006–EMX1," is one entity, not two. Cohn also argues that because the information in the Letter was accurate, the identity of the creditor to whom the debt is owed was effectively communicated to Smith.

Held: If the parties here dispute the number of actual entities within the Letter, what hope does the least sophisticated consumer have to accurately determine which entity is the creditor? The FDCPA requires that the identity of the creditor to whom the debt is owed be communicated effectively to the least sophisticated consumer, and here, there is at least a facially plausible claim that Cohn's Letter did not meet such a standard. Further, the memo line of Cohn's Letter only includes vague references to file numbers, "Loan # 1115040410" and "Our File # 449614," that do not link the account numbers to a particular entity that could be identified as the creditor to whom the debt is owed. As a result, the content of the Letter supports a plausible claim that the identity of the creditor to whom the debt is owed was not effectively communicated, thus, Smith has set out a plausible claim for relief under the FDCPA.

72. § 26 U.S.C. §§ 6331(a)-(b), 6337(b)(1). Redemption of property sold by IRS at tax sale must be completed within 180 days after the sale excluding the date the sale occurred and parties cannot extend the deadline. *5050 Tuxedo, LLC v. Neal,* 2017 WL 935877 (D.Md. 2017)(Slip Copy)(Hazel, J.). Plaintiff, 5050 Tuxedo, LLC brought an action against Defendant Stephen W. Neal, seeking to enforce a statutory right to redeem real

property seized by the Internal Revenue Service and subsequently sold to Defendant at a public tax sale. Defendant moved to dismiss, or in the Alternative, for summary judgment, which the Court granted. The IRS provided notice of its intent to seize and sell the Property to collect sufficient funds to re-coup the unpaid federal taxes.

Prior to the tax sale, on October 2, 2015. Wamo and Winston Marshall executed a "Commercial Contract of Sale" with Plaintiff, to provide Plaintiff with an assignment and interest in the Property sufficient to redeem the Property pursuant to federal law. On October 24, 2015, a few days after the public auction. Plaintiff entered into an agreement to lease the Property to Mr. Marshall. According to the Complaint, the IRS identified April 18, 2016 as the final date to redeem the Property, but "the parties" agreed to extend the time for redemption beyond this deadline to allow Plaintiff to "close the transaction." Plaintiff initiated this case on June 3, 2016, claiming that Defendant's refusal to accept its redemption breached their agreement to extend the statutory redemption period, and thus, violated its right to redeem the property pursuant to 26 U.S.C. § 6337.The Property was sold at tax sale on October 21, 2015. Thus, any right to redeem the Property needed to be exercised within 180 days of that date, 26 U.S.C. § 6337(b)(1). Both the plain language of the statute and Federal Rule of Civil Procedure 6(a), which governs the computation of time, support the interpretation that the day of the sale is not included when calculating the 180-day redemption window. *See* 26 U.S.C. § 6337(b)(1).

<u>Held</u>: 26 U.S.C. 6337(b)(1). There is nothing in the language of the statute to suggest that the owner of the property and the individual who purchased it at the tax sale could agree to extend the statutory redemption period. As has been stated by the Fourth Circuit, "[i]t is not within the power of the parties to a contract, subject to valid governmental regulation, to frustrate the will of Congress and to ignore *pro tanto* its legislative fiat." *United States v. Murlaugh*, 190 F.2d 407. 409 (4th Cir. 1951).

73. 28 U.S.C. 157(d). <u>A District Court looks to six factors in determining whether permissive withdrawal of an adversary proceeding under 28 U.S.C. 157(d) is appropriate.</u> *Farmer v. Macy's Inc.*, 2017 WL 3493129 (D. Md. 2017)(Hazel, J.). Plaintiff filed an adversary proceeding in her Chapter 13 bankruptcy case. Her Adversary Complaint alleged employment discrimination based on age, disability, and race against her former employer. Plaintiff filed a Motion to Withdraw Reference to the Bankruptcy Court and Transfer to the District Court of Maryland.

28 U.S.C. 157(d) governs mandatory and permissive withdrawal of an adversary proceeding. The first clause of § 157(d) triggers permissive withdrawal (which analyzes six factors to determine whether withdrawal is appropriate), while the second clause triggers mandatory withdrawal upon a timely filed motion. In the case of mandatory withdrawal, "it should only be made where substantial and material consideration of non-bankruptcy statutes is necessary in the case." *In re Merryweather Importers, Inc.* 179 B.R. 61, 62 (D. Md. 1995). Mandatory withdrawal is required with cases of complex federal questions or cases of first impression, while straightforward application of federal law does not warrant mandatory withdrawal. *Id.*

The Court will look to six factors in determining the use of permissive withdrawal: is it "core" issue under 157(b)(2) of the Bankruptcy Code (integral to the bankruptcy) ; 2) "uniformity of bankruptcy administration; 3) forum shopping; 4) conservation of creditor or debtor resources; 5) expediency of the bankruptcy proceeding; 6) the likelihood of a jury trial. *Albert v. Site Mgmt. Inc.* 506 B.R. 453. 455 (D. Md. 2014): *see also In re Merryweather Importers, Inc.* 179 B.R. at 63. It is the movant's burden to show cause that permissive withdrawal is appropriate.

The Court held that permissive withdrawal was appropriate under the six factors. Specifically, the Adversary Proceeding, only asserted employment discrimination claims under federal statues which were not core under the Code, that the bankruptcy administration was not going to be negatively impacted, and it was faster to have the case transferred to the District Court as the subject matter was not typically handled by the

Bankruptcy Court. The likelihood of forum shopping was low as the Bankruptcy Court suggested the movant file the motion, and a jury trial was requested.

74. 28 U.S.C. § 157 (b). A Bankruptcy Court has jurisdiction over adversary claims that arise under, arise in, or relate to the Bankruptcy Code; a core proceeding under § 157 (b) is one that could only arise from a bankruptcy . *Okoro v. Wells Fargo Bank, N.A.,* 567 B.R. 267 (2017) (Xinis, J.). Chapter 7 debtors brought an adversary action against the mortgage servicer asserting among other claims that the servicer lacked a valid lien on the property. The Trustee filed a no distribution report, and the bankruptcy case was discharged, and dismissed. The Court dismissed the adversary proceeding. The debtors appealed.

A Bankruptcy Court may review claims limited to arising under, arising in, or relating to the Bankruptcy Code. *In re Kirkland* 600 F.3d at 316; *In re Colleen*, Inc., 406 B.R. 674, 678 (Bankr. D. Md. 2009).The debtors asserted that the mortgage loan debt was dischargeable and thereby the adversary proceeding arose *under* the Bankruptcy Code. Exceptions to discharge, fall under 11 U.S.C. § 523(a).The Court held that the adversary proceeding did not arise *under* the Bankruptcy Code because the debtors were not seeking to discharge a debt under *any* subsection of 11 U.S. C. § 523(a) or assert that the mortgage debt was listed *under* 11 U.S. C. § 523(a).

Once the bankruptcy is dismissed, generally "related to" adversary proceedings should be dismissed because there is no longer a connection between the adversary claims and the bankruptcy. The adversary proceeding would no longer have an effect on the bankruptcy estate. Here, the Trustee had filed a no distribution report, which effectively abandoned the real property of the estate. The debtor's discharge was entered and the case dismissed. The estate was thereby fully administered, thereby the adversary proceeding no longer effected the bankruptcy estate. Thus, dismissal of the adversary proceeding was proper.

The Court also held that the debtors' adversary claim was not a core proceeding under the Code. Core proceedings are those that would only arise out of a bankruptcy case. Here, the debtors' adversary claims did not arise *under* or *in*, but were only *related to* the bankruptcy.

75. 28 U.S.C. §§ 3201(a), 3201(c). Judgment lien held by U.S. Government valid for 20 years and renewable for an additional 20 years. *United States v LaRosa*, 2017 WL 4418418 (D. Md. 2017)(Slip Copy)(Chasanow, J.). Federal Government obtained a judgment which was a lien against the defendants' real property. Pursuant to Section 3201(a), 28 U.S.C., it filed a motion to renew the judgment lien. Section 3201(1) provides that the judgment in this case, when appropriately filed, "create[d] a lien on all real property of" Defendants. The lien is effective for 20 years and can be renewed for "one additional period of 20 years" if the "the notice of renewal is filed before the expiration of the 20–year period" and "the court approves the renewal of such lien[.]" Defendants' argument of laches failed as against statutory authorization.

76. 37 U.S.C. § 303a(e)(4). Bankruptcy Code is not exclusive statute determining nondischarge-ability of debts. *Ryan v. Defense Finance and Accounting Service (In re Ryan),* 566 B.R. 151 (Bankr. E.D.N.C. 2017). Chapter 7 debtor brought adversary proceeding seeking determination that military debt was discharged and objecting to allowance of Defense Finance and Accounting Service's claim for that debt. An obligation to repay the United States under this subsection [an unearned bonus] is, for all purposes, a debt owed the United States. A discharge in bankruptcy under title 11 does not discharge a person from such debt if the discharge order is entered less than five years after — (A) the date of the termination of the agreement or contract upon which the debt is based; or (B) in the absence of such an agreement or contract, the date of the termination of the service on which the service is based.

The court must determine whether the list of non-dischargeable debts set forth in 11 U.S.C. § 523(a) is exclusive, as argued by the Plaintiff, or whether if it can be supplemented by nonbankruptcy law such as 37

U.S.C. § 303a(e)(4) upon which the Defendant relies. On January 6, 2006, Congress enacted 37 U.S.C. § 303a(e) as part of the National Defense Act for Fiscal Year 2006. The legislative history for this act provides that its amendments to 37 U.S.C. § 303a "shall apply to any case commenced under title 11, United States Code, after March 30, 2006." National Defense Authorization Act for Fiscal Year 2006, Pub.L. No. 109–163, § 687, 119 Stat. 3136. Significantly, Congress passed this act after the most recent major amendment to the Bankruptcy Code, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. The court is aware of three opinions addressing 37 U.S.C. § 303a(e), and in each case, the issuing bankruptcy court found that the statute was indeed effective to except obligations to repay a military bonus from a debtor's Chapter 7 discharge. This court agrees.

Held: (i) Debtor, who received involuntary discharge from active duty with the Army, was in breach of reenlistment bonus contract, and therefore obligated to repay unearned part of bonus; (ii) army's decision to not waive collection of reenlistment bonus from debtor was not an abuse of discretion; (iii) amount of unearned part of reenlistment bonus that debtor was obligated to repay would be based on gross amount paid to debtor, rather than net amount; (iv) amount of unearned part of reenlistment bonus that debtor was obligated to repay would be computed based upon a per month rather than a per diem rate; (v) in computing amount of unearned part of reenlistment bonus that debtor was obligated to repay, debtor was not entitled to a credit for unused leave; and (vi) military debt to repay unearned part of reenlistment bonus was not debt which could be discharged. Debt nondischargeable.

77. Constitutional or Equitable Mootness. A bankruptcy appeal can be dismissed if the case has become either constitutionally or equitably moot. *Khan v. Citibank*, 2017 WL 2311185 (D. Md. 2017)(Xinis, J.). Citibank foreclosed on the debtors' property. Subsequently, Citibank executed a deed conveying the property to another entity. The debtors filed bankruptcy the next day. Citibank sought relief from the automatic stay to move forward with the eviction. The deed conveying the property to the other entity was recorded. The Court granted the relief from the stay to Citibank, even though the deed transferring the property to the other entity had been recorded. The co-debtor filed a motion to deny relief from stay, a hearing was held, but the co-debtor failed to appear. The debtor moved to dismiss the relief from stay due to that Citibank lacked standing, which was struck for failure to follow filing procedures. Subsequently, the court issued an order denying the co-debtor's request and lifting the stay. The debtor appealed that order requesting reversal of lifting the stay, but did not request that the Bankruptcy Court stay its order, pending appeal. At the time of the appeal the debtors no longer had possession of the property.

Constitutional mootness is when there is no longer a "live" interest in the outcome. Equitable mootness is with the passage of time after a judgment in equity and the judgment being implemented, relief from an appeal is not possible. For equitable mootness, the Court looks to several factors: did the appellant seek a stay; has the equitable relief ordered been substantially consummated; the extent that the relief requested affects the equitable relief granted; and the effect on third parties. To overcome mootness, the party must show that his injury would be redressed by a favorable decision. Under the facts, even if the Court were to reverse the lifting of the stay, there would be no practical effect because the property had already been transferred to the new entity and the debtors had already been evicted. The debtor only requested the reversal of the lifting of the stay as recourse. The court dismissed the debtors' appeal as moot (constitutionally and equitably) because the property had been transferred to the new entity, neither Citibank nor the debtors owned the property, the debtors were no longer in possession of the property, and reversing the lifting of the stay had no practical effect.

78. Judicial Estoppel. Judicial estoppel was not applied in defendant's motion for summary judgment in attempt to thwart debtor plaintiff's sexual harassment suit where plaintiff was not inconsistent in family court

financial disclosure forms which did not specifically require disclosure of causes of action. *Nightingale v. Caliber Holdings Corp.*, 2017 WL 4585650 (D. SC 2017).

Facts: Plaintiff worked full-time for Defendant from October 2014 until May 2015. During her employment, she began an extra-marital affair with her supervisor, Cory Caldwell. Plaintiff alleges that when she refused to continue the affair, she was terminated. On February 8, 2016, Plaintiff filed a claim with the Equal Employment Opportunity Commission. On August 31, 2016, the EEOC issued Plaintiff a Right to Sue Letter. Plaintiff then filed this action in state court on November 29, 2016. On August 30, 2016, Plaintiff's husband filed for a divorce in the Family Court and, on that same date, Plaintiff and her husband entered into a marital settlement agreement. In the divorce action, as part of the settlement agreement, Plaintiff filled in a financial declaration disclosing her income, expenses, assets, and liabilities. Plaintiff did not list as an asset her claims against Defendant. The divorce became final on January 6, 2017.

"[J]udicial estoppel is an equitable doctrine invoked by a court at its discretion." *New Hampshire v. Maine*, 532 U.S. 742, 750, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001). Judicial estoppel is "exists to prevent litigants from playing 'fast and loose' with the courts—to deter improper manipulation of the judiciary." *Folio v. City of Clarksburg, W. Va.*, 134 F.3d 1211, 1217 (4th Cir. 1998) (*quoting John S. Clark Co. v. Faggert & Frieden, P.C.*, 65 F.3d 26, 28-29 (4th Cir. 1995)). "[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position...." *New Hampshire,* 532 U.S. at 749, 121 S.Ct. 1808.

Judicial estoppel is an "extraordinary remed[y] to be invoked when a party's inconsistent behavior will otherwise result in a miscarriage of justice." ... It is not meant to be a technical defense for litigants seeking to derail potentially meritorious claims, especially when the alleged inconsistency is insignificant at best and there is no evidence of intent to manipulate or mislead the courts. Judicial estoppel is not a sword to be wielded by adversaries unless such tactics are necessary to "secure substantial equity."

Ryan Operations G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355, 365 (3rd Cir. 1996) (internal citation omitted). The Fourth Circuit Court of Appeals has identified four elements that must be met before a court may apply judicial estoppel: (1) "the party sought to be estopped must be seeking to adopt a position that is inconsistent with a stance taken in prior litigation;" (2) "the position sought to be estopped must be one of fact rather than law or legal theory;" (3) "the prior inconsistent position must have been accepted by the court;" and (4) "the party sought to be estopped must have intentionally misled the court to gain unfair advantage." *Lowery v. Stovall*, 92 F.3d 219, 223-24 (4th Cir. 1996)(internal quotation marks omitted). The court has characterized the final element as determinative. *Id.* at 224 (internal quotation marks omitted). Moreover, "[w]ithout bad faith, there can be no judicial estoppel." *Zinkand v. Brown,* 478 F.3d 634, 639 (4th Cir. 2000). Defendant relies mostly on cases involving bankruptcy petitions. Along with many other circuits, the Fourth Circuit Court of Appeals has recognized judicial estoppel when a party has failed to claim a pending lawsuit in a bankruptcy petition. *See Whitten v. Fred's, Inc.*, 601 F.3d 231, 241- 42 (4th Cir. 2010), abrogated in part on other grounds by *Vance v. Ball State Univ.*, ––– U.S. ––––, 133 S.Ct. 2434, 2443, 186 L.Ed.2d 565 (2013). However, in a bankruptcy petition, a debtor is required to list a schedule of assets, including "all personal property of the debtor of whatever kind," and property of a bankruptcy estate is broadly defined to include "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. §§ 521(1), 541(a)(1). This definition includes "all causes of action that could be brought by a debtor." *Calafiore v. Werner Enters., Inc.,* 418 F.Supp.2d 795, 797 (D. Md. 2006). Defendant did not cite, and the court was unable to find, a non-bankruptcy case where judicial estoppel has been applied by any federal court in the Fourth Circuit.

Defendant, relying on one case from the Southern District of Florida, *Stabielli v. Eagle Roofing Products Florida, LLC,* No. 12-80766, 2013 WL 12101139 (S.D. Fla. Aug. 19, 2013), argues that the court should extend judicial estoppel to cases where a party has failed to include a pending or potential lawsuit on a financial declaration filed in a family court action. As the Magistrate Judge noted, however, the forms in the family court in Florida are different from South Carolina's forms.

Held: Having failed to establish the necessary elements of judicial estoppel, the court denies Defendant's summary judgment motion. First, arguably the position taken by Plaintiff is not inconsistent with a stance previously taken in the family court. There is nothing in South Carolina's financial declaration form which specifically requires a party to include a potential lawsuit as an asset. Second, whether the potential lawsuit was considered an asset on the family court's financial declaration is arguably a question of law, rather than fact. *See Minnieland Private Day School, Inc., v. Applied Underwriters Captive Risk Assurance Co., Inc.*, 867 F.3d 449, 458 (4th Cir. 2017). However, even if the court were to assume the first two elements were met, as the Magistrate Judge determined, Defendant cannot satisfy the third element as there is nothing in the record that suggests Plaintiff, who was proceeding pro se in the family court action and did not have the experience that the plaintiff had in *Stabielli*, intentionally mislead the family court to gain an unfair advantage. *See Berkowitz v. Berkowitz*, No. 11-10483-DJC, 2015 WL 1442987 (D. Mass. Mar. 30, 2015) (holding judicial estoppel inappropriate where counsel did not list securities on financial disclosure form because he did not believe he was obligated to include it). Additionally, here, Plaintiff's husband was aware Plaintiff had been terminated from her employment after she ended the affair.

79. Refusal to Enforce Arbitration Agreement in Terms of Online Payday Loan. *Dillon v. BMO Harris Bank*, ___F.3d___ (4th Cir. 2017). In this appeal, we consider the enforceability of an arbitration agreement included in the terms of a "payday loan" obtained over the internet. Plaintiff James Dillon brought this civil action against defendant BMO Harris Bank, N.A. (BMO Harris), alleging that BMO Harris violated the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 et seq., when BMO Harris used its role within a network of financial institutions "to conduct and participate in the collection of unlawful payday loans."

Relying on the Federal Arbitration Act (FAA), BMO Harris sought to enforce an arbitration agreement for the loan at issue, which was entered into by Dillon and the lender, Great Plains Lending, LLC (Great Plains). The district court held that the arbitration agreement was unenforceable under this Court's opinion in Hayes v. Delbert Services Corp., 811 F.3d 666 (4th Cir. 2016), and denied BMO Harris' motion to compel arbitration. BMO Harris appeals from the district court's order. Upon our review, we hold that the arbitration agreement between Dillon and Great Plains is unenforceable, and we affirm the district court's order denying BMO Harris' motion.

80. *Res Judicata*. Prior Agreement in Litigation Determining Chase to be Lienholder Barred Relitigation in Subsequent Bankruptcy Case. *Bird, Sr., v. Soecialized Loan Servicing, LLC, et al.,* ___F.Supp.2d____ (D.Md. March 15, 2017) (Civil Action No. RDB-16-3743; Bankruptcy Case No. 13-28238)(Bennett, J.). On June 8, 1990, the *pro se* Appellant Paul Charles Bird, Sr. and Brenda Lee Armstrong executed a promissory note secured by a deed of trust in favor of Union Federal Savings Bank in the amount of $111,481.00 to finance the purchase of real property located at 3416 Hopkins Avenue, Baltimore County, Maryland 21227. The Deed was recorded among the Land Records of Baltimore County in Liber 8504, folio 533. On August 26, 1996, Union Federal assigned the Note to HUD, and the assignment was recorded among the Land Records of Baltimore County. Subsequently, on October 27, 1997, an *allonge* to the Note was executed by HUD to Ocwen Federal Bank, FSP. HUD assigned the Deed to Ocwen that same day, and the assignment was recorded. On November 15, 2000, Ocwen assigned the Deed to JP Morgan Chase Manhattan Bank as trustee c/o Residential Funding, and that assignment was recorded among the Land Records of Baltimore County. On that same day, Ocwen executed an *allonge* that contained an open indorsement. Subsequently, on December 20, 2000, Ocwen executed a "lost note affidavit" to Homecomings Financial Network. Subsequently, Fairbanks filed a secured

claim in the amount of $41,504.15, representing past due arrearage on the Deed. Bird filed an objection to the secured claim, arguing that "the secured Proof of Claim [was] incorrect as the records and payment history [in his possession] dispute[d] the arrearage amount filed in the Claimant's Proof of Claim." Via Order dated September 29, 2003, the Bankruptcy Court sustained Bird's objection, but subsequently granted Homecomings' motion for reconsideration of that Order and scheduled a hearing on Bird's objection filed in the Chapter 13 case that he had filed. In a written opinion issued after the hearing, Judge James F. Schneider of the United States Bankruptcy Court for the District of Maryland held that Claim 1 had been improperly filed, but that Bird's objection to Claim 1 was moot because "the parties [ ] agreed that JP Morgan [Chase] [was] the proper party asserting the secured claim." *Id*. at 4. Accordingly, Judge Schneider allowed the secured claim of JP Morgan Chase in the full amount of $138,796.80, plus accrued amounts that had come due postpetition since the claim was filed. *Id*. Additionally, Judge Schneider held that "a valid assignment occurred from Ocwen to JP Morgan [Chase]." *Id*. Judge Schneider explained that "[t]he Assignment of Deed of Trust expressly assigning the note to JP Morgan [Chase], coupled with JP Morgan [Chase's] possession of the *allonge* with the blank indorsement confirm[ed] that a transfer of the deed of trust and the note took place in November 2000." *Id*. "The lost note affidavit sworn under oath was sufficient to prove the existence and validity of the note, regardless of its recipient" and "[t]he fact that it was given to Homecomings rather than to JP Morgan [Chase] [was] of no moment." *Id*. at 5. Judge Schneider further concluded that "[t]he later production of documents that evidenced the chain of title [was] *prima facie* evidence of a properly-filed proof of claim." *Id*. "The Court note[d], however, that on August 13, 2007, the Chapter 13 trustee filed a line of completion of case which indicated that the debtor [Bird] ha[d] been discharged." *Id*. at 5. Bird filed a Chapter 7 case on October 28, 2013, adversary complaint and subsequently amended that complaint, again claiming, *inter alia*, that several of his creditors lacked standing to pursue their claims as to his real property. *Id.* at pp. 88-112. Subsequently, Chief Judge Nancy V. Alquist granted the secured creditors and Substitute Trustees' Motion to Dismiss the Amended Complaint, holding that the issues raised "pertain to rights of [Bird's] lenders to execute on their security interests," and that these issues "were fully and finally adjudicated in [Bird's] 2003 Bankruptcy Case." Bird subsequently appealed Chief Judge Alquist's Order to this Court. On May 20, 2015, the Honorable George L. Russell, III of this Court, in Case No. GLR-15-1326, adopted the Bankruptcy Court's findings and conclusions, and dismissed Bird's adversary action with prejudice. Appellee's App. at p. 131, ECF No. 7-1. Bird subsequently appealed Judge Russell's Order to the United States Court of Appeals for the Fourth Circuit. The Fourth Circuit affirmed the Judgment of this Court in a one-page *per curiam* opinion dated October 22, 2015. *Id.* at pp. 132-138. Following entry of the Fourth Circuit's Judgment, The Bank of New York Mellon filed a Motion for Relief from the Automatic Stay in the pending Bankruptcy Action so that it could continue foreclosure proceedings in state court. By this time, two foreclosure actions had been filed against Bird in the Circuit Court for Baltimore County, Maryland. The first case, Civil Action No. 03-C02-000527, was dismissed without prejudice due to changes in Maryland state law on potential loss mitigation. *Id*. at 77-80. Subsequently, a second foreclosure action was filed, Civil Action No. 03-C-13001774), and that case was automatically stayed upon Bird's filing his Chapter 7 bankruptcy petition in the instant case. After a hearing on the Motion, Chief Judge Alquist granted Appellee's Motion for Relief from the Automatic Stay via Order dated November 17, 2016 (ECF No. 2-1). On that same day, Bird filed the instant appeal of that Order. Debtor appealed Judge Alquist's decision granting SLS' Motion for Relief from Stay. Debtor argued that SLS did not have the right to proceed in this action since JP Morgan Chase was the real party in interest. After a hearing on the Motion, Chief Judge Alquist granted Appellee's Motion for Relief from the Automatic Stay via Order dated November 17, 2016. On that same day, Bird filed the instant appeal of that Order. The *pro se* Appellant Paul Charles Bird, Sr. appeals the November 17, 2016 Order of United States Bankruptcy Chief Judge Nancy V. Alquist granting the Motion for Relief from Automatic Stay of Appellee Specialized Loan Servicing, LLC, as servicing agent for The Bank of New York Mellon Trust Company, N.A. Bird previously challenged the chain of title established by JP Morgan Chase in his 2003 Chapter 13 Bankruptcy proceedings before Judge Schneider, who found that the record of the Note assignments showed a proper chain of title and established that JP Morgan Chase was a valid claimant. *Id.* at pp. 65-67. The issue was again addressed by Bankruptcy Chief Judge Alquist, who again confirmed lender JP Morgan Chase's right to execute on its security interest, stating that the issues "were fully and finally adjudicated in the Debtor's 2003 Bankruptcy Case." *Id.* at p. 129. Judge Russell of this Court adopted Chief Judge Alquist's Findings and Conclusions, and dismissed Appellant's Amended Complaint with prejudice. *Id.* at p. 131. The United States Court of Appeals for the Fourth Circuit subsequently affirmed Judge Russell's Order. *Id.* at 132-138. Appellant's present claim is based on the same arguments presented and adjudicated in these previous actions. For this reason, Appellant is barred from re-litigating this claim.

81. Standing Requires Concrete Injury. *Dreher v. Experian Information Solutions*,__F.3d__ (4th Cir. 2017). Where an individual fails to allege a concrete injury stemming from allegedly incomplete or incorrect information listed on a credit report, he or she cannot satisfy the threshold requirements of constitutional standing. At issue in this case was whether the decision of Experian to list a defunct credit card company, rather than the name of its servicer, as a source of information on an individual's credit report -- without more -- created sufficient injury in fact.

82. D.C. Code § 42–1903.13. Foreclosure sale under super-priority condominium lien, even sale "subject to", under DC law extinguishes purchase money mortgage/deed of trust lien. *Liu v. U. S. Bank National Association*, _____A.3d ____,2018 WL 1095503 (D.C. March 1, 2018). After condominium unit was sold at condominium association's foreclosure sale, holder of note, which was secured by deed of trust on condominium unit, filed claim for judicial foreclosure against borrower in default under the note and foreclosure-sale purchaser. The Superior Court, No. CAR–6539–14, granted note holder's summary judgment motion and denied purchaser's summary judgment motion. Purchaser appealed.

Issue: Whether, prior to the 2017 amendment to D.C. Code § 42–1903.13, a condominium association could choose to sell the condominium unit "subject to the first mortgage or first deed of trust" on the property, while at the same time enforcing its super-priority lien. The Court concluded that a condominium association could not foreclose on its super-priority lien while leaving the property subject to the unsatisfied balance of the first mortgage or first deed of trust—to find otherwise would contravene our holding in *Chase Plaza*. Accordingly, the Court reversed the decision of the trial court's order granting summary judgment to U.S. Bank, which concluded that a condominium could foreclose on its super-priority lien while leaving the underlying mortgage lien intact, and remand for further proceedings consistent with this opinion.

Held: In reversing and remanding, the Court of Appeals held that (i) anti-waiver provision of Condominium Act precluded condominium association from enforcing its six-month super-priority lien for unpaid condominium assessments at foreclosure sale while also preserving full amount of unpaid mortgage lien; (ii) condominium association enforced its super-priority lien for unpaid condominium assessments when it sold condominium at foreclosure sale; (iii) equitable estoppel doctrine did not preclude purchaser from maintaining that her purchase of condominium at foreclosure sale was not subject to note holder's deed of trust; (iv) condominium association was not precluded from pursuing non-judicial enforcement of its six-month super-priority lien; and (v) condominium association was not barred from filling successive foreclosure action.

In the District of Columbia, condominium associations are granted a "super-priority lien" over first mortgage lienholders, which permits an association to collect up to six months of unpaid assessments upon foreclosure on a condominium unit. In *Chase Plaza Condominium Ass'n v. JPMorgan Chase Bank, N.A.*, 98 A.3d 166, 172 (D.C. 2014), this court was asked to determine whether a condominium association's foreclosure on its super-priority lien could extinguish an otherwise first-priority deed of trust or mortgage when the proceeds of the foreclosure sale were insufficient to satisfy the deed of trust or mortgage. We held in the affirmative—that “a condominium association is permitted to foreclose on [its] six-month [super-priority] lien and [to] distribute the proceeds from the foreclosure sale first to satisfy [its super-priority] lien and then to satisfy any remaining liens in order of lien priority.” *Id.* We clarified that in such circumstances “[a]ny liens [including a first mortgage or first deed of trust] that are unsatisfied by the foreclosure-sale proceeds are extinguished, and the foreclosure-sale purchaser acquires free and clear title.” *Id.*