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In the MATTER OF: Randall Lee HALER Debtor
Randall Haler, Appellant

v.

Boyington Capital Group, L.L.C., Appellee

No. 17-40229

|

Filed December 29, 2017

Appeal from the United States District Court for the Eastern District of Texas, USDC No. 4:16-CV-185

Attorneys and Law Firms

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Jacob Michael Gold, Esq., Gold Law Firm, Plano, TX, Michael Krist Haines, Esq., Haines & Associates, P.C., Dallas, TX, for Appellee

Before KING, DENNIS, and COSTA, Circuit Judges.

Opinion

PER CURIAM: *

*1 Randall Lee Haler filed for Chapter 7 bankruptcy. Boyington Capital Group, L.L.C., then filed a complaint, requesting that a state court judgment debt be declared non-dischargeable pursuant to 11 U.S.C. § 523(a)(2), (4), and (6). Boyington then filed a motion for partial summary judgment. The bankruptcy court granted summary judgment in favor of Boyington. It found that the debt, which was obtained by Haler's false representations, was non-dischargeable under § 523(a)(2)(A). The district court affirmed the grant of

summary judgment. Haler now appeals. Because Haler's representations were statements respecting financial condition, his debt is outside the scope of the § 523(a)(2)(A) exception. We REVERSE.

I.

Randall Lee Haler was the Executive Vice President and a limited partner of McKinney Aerospace, L.P. ("McKinney"), a company that repaired and refurbished business jets. In March 2006, McKinney entered into four contracts with Boyington Capital Group, L.L.C. ("Boyington"), to repair and restore a Boyington jet. In April 2006, Boyington tendered a payment of \$337,275 to McKinney. Subsequently, the parties agreed on a change order. On June 6, 2006, Boyington tendered an additional \$60,000 for that change order. However, later on the same day, Boyington sent a letter to McKinney, asking McKinney to stop work on the jet and to refund any money paid but not yet spent. While McKinney acknowledged that it needed to return money to Boyington, it did not issue any refunds.

A month later in July 2006, Boyington sued Haler and other parties in Texas state court for, inter alia, fraud under state law theories of recovery. At the trial, Greg Morse of Boyington stated that Haler had expressed to Boyington that McKinney was in "very fine legally [sic] financial shape" and had "plenty of cash to operate [the] business during the term that [it was] working on" the jet. The jury found, inter alia, that Haler's representations were false and that Haler was therefore liable for fraud. The jury returned a verdict in favor of Boyington and awarded \$258,021.73 in damages. The state district court issued a final judgment on December 6, 2011. Haler appealed, but the Texas appeals court affirmed the final judgment with respect to all issues except for attorneys' fees. In June 2015, the state district court issued an amended judgment, which became final and non-appealable.

After the entry of the jury verdict but before the December 2011 final judgment, Haler filed a voluntary Chapter 7 bankruptcy petition in June 2010. Boyington then initiated this adversary proceeding in September 2010, seeking a declaration that the state court judgment debt is non-dischargeable pursuant to 11 U.S.C. § 523(a)(2), (4), and (6). After the state court issued the amended

judgment in June 2015, Boyington filed a motion for partial summary judgment. It argued that the debt is non-dischargeable pursuant to § 523(a)(2)(A) and (a)(4) as a matter of law because Haler is collaterally estopped from relitigating the determinations rendered in state court concerning his fraud. The bankruptcy court granted Boyington's motion. It decided that collateral estoppel applied and then declared the debt non-dischargeable under § 523(a)(2)(A). In doing so, it rejected Haler's argument that his oral statements were outside the scope of § 523(a)(2)(A) because they pertained to McKinney's financial condition. Haler appealed, but the district court affirmed the bankruptcy court's decision. Haler then timely appealed to this court. He now contends that his representations that (1) McKinney was in "very fine legally [sic] financial shape" and (2) it had "plenty of cash to operate [the] business" were "statement[s] respecting ... financial condition" under § 523(a)(2)(A) and thus dischargeable under this subsection.

II.

*2 We review a bankruptcy court's findings of fact for clear error and its conclusions of law de novo. See *Judgment Factors, L.L.C. v. Packer (In re Packer)*, 816 F.3d 87, 91 (5th Cir. 2016). The meaning of "statement respecting ... financial condition" in 11 U.S.C. § 523(a)(2) is a question of law, which we consider de novo. See *Bandi v. Becnel (In re Bandi)*, 683 F.3d 671, 674 (5th Cir. 2012). The bankruptcy court granted summary judgment in favor of Boyington, which is proper when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *In re Packer*, 816 F.3d at 91 (quoting Fed. R. Civ. P. 56(a)).

In a Chapter 7 bankruptcy proceeding, a court discharges many of the debtor's preexisting obligations. See 11 U.S.C. § 727. While the general purpose of the Bankruptcy Code is to provide debtors with a "fresh start," there are several statutory exceptions to discharge. *In re Bandi*, 683 F.3d at 674. Some debts incurred as a result of the debtor's fraud or other misconduct cannot be discharged. See 11 U.S.C. § 523. At issue here is whether the exception to discharge set forth in 11 U.S.C. § 523(a)(2)(A) applies to Haler's oral statements, thus rendering the state court judgment debt non-dischargeable. This issue turns on whether his oral statements qualify as "statement[s] respecting ... financial condition." *Id.* § 523(a)(2)(A). If his

statements indeed qualify, then they are outside the scope of § 523(a)(2)(A) and therefore subject to discharge. See *In re Bandi*, 683 F.3d at 674.

The phrase "statement respecting ... financial condition" appears in subsections (A) and (B) of 11 U.S.C. § 523(a)(2):

(a) A discharge under section 727 ... of this title does not discharge an individual debtor from any debt—

...

(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—

(A) false pretenses, a false representation, or actual fraud, other than a *statement respecting* the debtor's or an insider's¹ *financial condition*;

(B) 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;....

(emphasis added). Section 523(a)(2)(A) generally renders debt obtained by false pretenses, false representations, or actual fraud non-dischargeable. See *In re Bandi*, 683 F.3d at 674. But it contains an exception: if the debt is obtained by a false *oral* statement respecting financial condition, then it is dischargeable. See *id.* In contrast, a false *written* statement respecting financial condition is non-dischargeable under § 523(a)(2)(B), provided that the other conditions in this subsection are met. See *id.*

In *In re Bandi*, we held that statements respecting financial condition are "those that purport to present a picture of the debtor's overall financial health." *Id.* at 677 (quoting *Cadwell v. Joelson (In re Joelson)*, 427 F.3d 700, 714 (10th Cir. 2005)). We stated that "financial condition" meant "the general overall financial condition of an entity or individual, that is, the overall value of property

and income as compared to debt and liabilities.” *Id.* at 676. A representation regarding a specific asset “says nothing about the overall financial condition of the person making the representation or the ability to repay debt.”² *Id.* “Ownership of specific assets does not mean that the assets are unencumbered or that other debts or liabilities of the owner do not exceed the value of the assets.” *Id.* at 678–79. We also stated that “financial condition” connoted the “overall net worth of an entity or individual.” *Id.* at 676; *see id.* at 675 (noting that the Supreme Court had previously “seemed to equate a ‘statement’ about ‘financial condition’ with what is commonly understood as something akin to a balance sheet or bank balance” (citing *Field v. Mans*, 516 U.S. 59, 76–77, 116 S.Ct. 437, 133 L.Ed.2d 351 (1995))). Finally, we decided that the debtors’ representations in *In re Bandi* regarding the ownership of three properties (i.e., a commercial building, a condominium development, and a residence) were not statements respecting financial condition. *Id.* at 678. Their representations fell short of conveying the debtors’ net worth or “overall financial condition and consequent ability to pay.” *See id.*

*3 Haler’s representations were “statement[s] respecting ... financial condition” and therefore outside the scope of § 523(a)(2)(A). The statements at issue are (1) that McKinney was in “very fine legally [sic] financial shape” and (2) that McKinney had “plenty of cash to operate [the] business during the term that [it was] working on” the jet. These representations pertained to the overall financial strength and stability of McKinney. In its complaint filed in the bankruptcy court, Boyington stated that “Haler misrepresented the *financial strength* and capability of McKinney” (emphasis added). In its motion for partial summary judgment, Boyington again stated Haler had expressly represented “that McKinney Aerospace had the experience, competence and *financial stability* to perform the repair and restoration

work” (emphasis added). Whereas the misrepresentations concerned the debtors’ specific assets (i.e., the properties) in *In re Bandi*, *id.* at 674, Haler’s representations were general and intimated that the overall value of McKinney’s property and income was greater than its debt and liabilities. Thus, his statements “present [ed] a picture” of McKinney’s “overall financial health,” *id.* at 677 (quoting *In re Joelson*, 427 F.3d at 714).

Boyington argues that Haler’s statements were not akin to a balance sheet or income statement and therefore did not present a picture of overall financial health. This contention is unavailing. As we noted in *In re Bandi*, a statement respecting financial condition “need not carry the formality of a balance sheet, income statement, statement of changes in financial position, or income and debt statement.” *Id.* at 677 n.29 (quoting *In re Joelson*, 427 F.3d at 714). The information regarding “overall net worth or overall income flow” contained within such a statement—not the formality of the statement—is what is important. *Id.* (quoting *In re Joelson*, 427 F.3d at 714).

In sum, we conclude that Haler’s statements represented that McKinney was overall financially sound. These oral representations were “statement[s] respecting ... financial condition” and thus did not render the debt non-dischargeable under § 523(a)(2)(A).

III.

For the foregoing reasons, we REVERSE the grant of summary judgment in favor of Boyington.

All Citations

--- Fed.Appx. ----, 2017 WL 6729967

Footnotes

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

1 Haler’s statements pertained to McKinney. Boyington pleaded (and it is undisputed) that McKinney is an insider of Haler.

2 Currently, there is a circuit split regarding whether a representation about a specific asset can qualify as a statement respecting financial condition under 11 U.S.C. § 523(a)(2). We concluded in *In re Bandi* that such a representation cannot qualify. *See* 683 F.3d at 676. The Tenth and Eighth Circuits have held the same. *See In re Joelson*, 427 F.3d at 706–07; *Rose v. Lauer (In re Lauer)*, 371 F.3d 406, 413 (8th Cir. 2004). But the Eleventh and Fourth Circuits have reached the opposite conclusion. *See Applying v. Lamar, Archer & Cofrin, LLP (In re Applying)*, 848 F.3d 953, 961 (11th Cir. 2017),

petition for cert. filed, (Apr. 11, 2017) (No. 16-1215); *Engler v. Van Steinburg (In re Van Steinburg)*, 744 F.2d 1060, 1061 (4th Cir. 1984).

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United States Bankruptcy Court,
E.D. Tennessee.

IN RE Khalid Yahia IBRAHIM fdba
Advance Medical Transportation
fdba Dubai Hookah Lounge, Debtor
Azaam Almasudi, Plaintiff

v.

Khalid Yahia Ibrahim, Defendant

Case No. 3:16-bk-32406-SHB

|

Adv. Proc. No. 3:16-ap-3034-SHB

|

Signed December 15, 2017

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MEMORANDUM

[SUZANNE H. BAUKNIGHT](#), UNITED STATES
BANKRUPTCY JUDGE

*1 Plaintiff filed a Complaint to Determine Dischargeability of Debt and for Judgment for Damages for Fraud and/or Conversion (“Complaint”) [Doc. 1] on November 18, 2016, asking the Court to grant him a nondischargeable judgment against Defendant for actual damages of \$28,000.00, treble or punitive damages in a minimum amount of \$100,000.00, pre- and post-judgment interest, attorneys' fees, and expenses pursuant to [11 U.S.C. § 523\(a\)\(2\)\(A\)](#) and [\(a\)\(6\)](#). Defendant timely answered [Doc. 6], denying Plaintiff's allegations of fraud and Plaintiff's entitlement to a nondischargeable judgment against him. This is a core proceeding pursuant to [28 U.S.C. § 157\(b\)\(2\)\(I\)](#).

Trial was held on September 22, 2017. The record before the Court consists of forty-four exhibits entered into evidence; the deposition testimony of Ryan Grubb; and the trial testimony of Plaintiff, Defendant, and Ernest Wombles. The Court also takes judicial notice, pursuant to [Rule 201 of the Federal Rules of Evidence](#), of undisputed facts of record in Defendant's Chapter 7 bankruptcy case.

For the reasons set forth in this Memorandum, the Court finds that Plaintiff is entitled to a nondischargeable judgment under [11 U.S.C. § 523\(a\)\(2\)\(A\)](#) and [\(a\)\(6\)](#). Plaintiff will be awarded a judgment in the total amount of \$84,000.00, consisting of \$28,000.00 in actual damages and \$56,000.00 in punitive damages.

I. BACKGROUND FACTS

Plaintiff is a student at the University of Tennessee, majoring in chemical engineering. A citizen of Saudi Arabia, he came to Tennessee on a student visa in August 2014, with approximately \$55,000.00 in proceeds from the sale of his house in Saudi Arabia. Plaintiff met Defendant at the Dubai Hookah Lounge (the “Lounge”), which was located on Cumberland Avenue, in the midst of the University of Tennessee campus area. The two men became friends and eventually discussed Plaintiff making an investment in the Lounge.

On November 17, 2014, Plaintiff and Defendant met with Ryan Grubb, branch team leader with the Cumberland Avenue branch of Regions Bank. During this meeting, Plaintiff offered a cashier's check in the amount of \$28,000.00 [Trial Ex. 6] that was deposited into a checking account in the name of “Dubai Hookah and Lounge Corp Kitchen & Alcohol” (the “K & A Account”). [Trial Exs. 6, 7, 9.] Defendant identified himself on the K & A Account signature card as “President” of “Dubai Hookah and Lounge Corp,” which was identified as an LLC. [Trial Ex. 7.] Defendant was the only authorized signatory on the K & A Account. [Trial Ex. 7.]

Plaintiff was not repaid any funds by Defendant, notwithstanding requests made on numerous occasions over the next several months, culminating in a formal demand to Defendant for repayment of the \$28,000.00 by a letter dated September 23, 2015. [Ex. D to Trial Ex. 2.] Subsequent to this demand and his discovery through a

newspaper article that the Lounge was having safety and financial problems [see Trial Ex. 36], Plaintiff filed *Azaam Almasudi v. Khalid Y. Ibrahim, individually and/or d/b/a Dubai Hookah and Lounge Corp., aka Dubai Hookah Lounge and Dubai Hookah and Lounge Corporation*, No. 190624-3, in the Knox County Chancery Court on November 12, 2015 (“State Court Lawsuit”), seeking repayment of the \$28,000.00, punitive damages, and attorney's fees. [Trial Ex. 26.] Defendant filed an answer to the State Court Lawsuit four months later, denying any liability. [Trial Ex. 27.] Because attempts to take Defendant's deposition in the State Court Lawsuit were unsuccessful, Plaintiff sought discovery sanctions against Defendant, but those proceedings were stayed when Defendant filed his Chapter 7 bankruptcy petition on August 12, 2016.¹ [See Coll. Trial Ex. 28.]

*2 Plaintiff filed a proof of claim in the amount of \$28,000.00 on September 16, 2016 [Claim No. 2-1], and he timely initiated this adversary proceeding. Pursuant to the Joint Pretrial Statement filed on September 12, 2017 [Doc. 16], the primary issues are (1) whether Defendant obtained the \$28,000.00 by false pretenses, false representations, and/or actual fraud such that the debt is nondischargeable under § 523(a)(2)(A); (2) whether Defendant willfully and maliciously converted the \$28,000.00 such that the debt is nondischargeable under § 523(a)(6); and (3) whether Plaintiff is entitled to a judgment against Defendant in the amount of \$28,000.00 plus punitive damages and/or attorneys' fees and expenses.²

II. LAW AND ANALYSIS

In order to accomplish one of the Bankruptcy Code's primary goals—relieving “honest but unfortunate debtors” from their obligations to facilitate a “fresh start”—Chapter 7 debtors are entitled to a discharge of their pre-petition debts “[e]xcept as provided in section 523[.]” 11 U.S.C. § 727(b); *Buckeye Ret. Co., LLC v. Heil (In re Heil)*, 289 B.R. 897, 901 (Bankr. E.D. Tenn. 2003) (citations omitted). The Court construes § 523(a) liberally in favor of Defendant and strictly against Plaintiff, who bears the burden of proving all of the elements of each subsection by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 291, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991); *Rembert v. AT & T Universal Card Servs., Inc. (In re Rembert)*, 141 F.3d 277, 281 (6th Cir. 1998).

A. 11 U.S.C. § 523(a)(6)

Plaintiff argues that Defendant converted Plaintiff's \$28,000.00, thus entitling him to a nondischargeable judgment under § 523(a)(6). To prevail under this subsection, Plaintiff must prove (1) the existence of “a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury[.]” *Kawaauhau v. Geiger*, 523 U.S. 57, 61, 118 S.Ct. 974, 140 L.Ed.2d 90 (1998), and (2) that Defendant either desired to cause the consequences of his actions or believed with reasonable certainty that such consequences would occur. *Markowitz v. Campbell (In re Markowitz)*, 190 F.3d 455, 464 (6th Cir. 1999). In the Sixth Circuit, “unless the actor desires to cause consequences of his act, or ... believes that the consequences are substantially certain to result from it, he has not committed a ‘willful and malicious injury’ as defined under § 523(a)(6).” *Id.* at 464 (citations omitted); see also *Guthrie v. Kokenge (In re Kokenge)*, 279 B.R. 541, 543 (Bankr. E.D. Tenn. 2002). “That a reasonable debtor ‘should have known’ that his conduct risked injury to others is simply insufficient. Instead, the debtor must ‘will or desire harm, or believe injury is substantially certain to occur as a result of his behavior.’” *In re Kokenge*, 279 B.R. at 543 (quoting *In re Markowitz*, 190 F.3d at 465 n.10). Furthermore, “the injury must invade the creditor's legal rights.” *Steier v. Best (In re Best)*, 109 Fed.Appx. 1, 6 (6th Cir. June 30, 2004).³

*3 “[I]t is well settled that actions of conversion may serve [as] the basis for a determination of nondischargeability under § 523(a)(6)” *First Nat'l Bank v. Simerlein (In re Simerlein)*, 497 B.R. 525, 544 (Bankr. E.D. Tenn. 2013). Conversion, as defined under Tennessee law is “the appropriation of another's property to one's own use and benefit, by the exercise of dominion over the property, in defiance of the owner's right to the property.” *Ralston v. Hobbs*, 306 S.W.3d 213, 221 (Tenn. Ct. App. 2009). Proof that a conversion occurred, however, does not, without more, satisfy the requirements of § 523(a)(6). See *Jenkins v. Schmank (In re Schmank)*, 535 B.R. 243, 264 (Bankr. E.D. Tenn. 2015). “Whether an act of conversion constitutes a willful and malicious injury within the scope of § 523(a)(6) depends upon whether the party intended to cause the harm or was substantially certain that such harm would occur.” *In re Simerlein*, 497 B.R. at 544.

“While willfulness and malice may often exist concurrently in the same set of facts, each is a distinct element in the § 523(a)(6) analysis; both requirements must be met to warrant a determination of nondischargeability.” *Schafer v. Rapp (In re Rapp)*, 375 B.R. 421, 436 (Bankr. S.D. Ohio 2007). Concerning the willfulness element, the Supreme Court looked to Black's Law Dictionary to define “willful” as “voluntary,” “intentional,” and “deliberate” and compared proof of the willfulness requirement—that the actor intended not merely to act but to cause the consequences of the act—to proof of an intentional tort. *Geiger*, 523 U.S. at 61–62 & n.3, 118 S.Ct. 974. Accordingly, “[a]n act will be deemed ‘willful’ only if it was undertaken with the actual intent to cause injury,” *Cash Am. Fin. Servs., Inc. v. Fox (In re Fox)*, 370 B.R. 104, 119 (6th Cir. BAP 2007).

A court, thus, must “look into the debtor's mind, subjectively” to determine whether a defendant-debtor “intended to cause the consequences of his act or believed that the consequences were substantially certain to result from his act.” *Monsanto Co. v. Wood (In re Wood)*, 309 B.R. 745, 753 (Bankr. W.D. Tenn. 2004). “Proof of willful behavior must often be demonstrated through the use of circumstantial evidence ... [that] can ‘be indirectly established by the creditor demonstrating the existence of two facts: (1) the debtor knew of the creditor's ... rights; and (2) the debtor knew that his conduct would cause injury to those rights.’ ” *In re Schmank*, 535 B.R. at 264 (quoting *J & A Brelage, Inc. v. Jones (In re Jones)*, 276 B.R. 797, 802 (Bankr. N.D. Ohio 2001)).

As to the element of malice, “[a] person has acted ‘maliciously’ when that person acts ‘in conscious disregard of his duties or without just cause or excuse.’ ” *HER, Inc. v. Barlow (In re Barlow)*, 478 B.R. 320, 330 (Bankr. S.D. Ohio 2012) (citations omitted). “A party may establish malice for purposes of § 523(a)(6) by showing ‘that (1) the debtor has committed a wrongful act, (2) the debtor undertook the act intentionally, (3) the act necessarily causes injury, and (4) there is no just cause or excuse for the action.’ ” *Vicars v. Freeman (In re Freeman)*, No. 11-5028, 2013 WL 4447007, at *17 (Bankr. E.D. Tenn. Aug. 16, 2013) (quoting *JP Morgan Chase Bank, NA v. Algire (In re Algire)*, 430 B.R. 817, 823 (Bankr. S.D. Ohio 2010) (citations omitted)). “There is no requirement that the person act with ill will, spite, or animosity toward the injured party,” *In re Rapp*, 375 B.R. at 436, but “[m]ere

negligence is not sufficient to except a debt from discharge under § 523(a)(6).” *In re Fox*, 370 B.R. at 119.

Based on the record, the Court finds that Defendant's personal use of the \$28,000.00 received from Plaintiff, to the exclusion of Plaintiff and Plaintiff's expressed desired use for those funds, constituted conversion as defined under Tennessee law. The Court also finds that, even in light of the requirement to construe § 523(a) liberally in Defendant's favor and strictly against Plaintiff, Defendant's conversion of Plaintiff's \$28,000.00 was willful and done with malice and an intent to harm Plaintiff by Defendant's orchestration of an elaborate scheme to convince Plaintiff to “invest” money in the Lounge when Defendant knew that the business was struggling (in part due to his spending habits) and when Defendant intended to use the money to perpetuate his lavish lifestyle.

*4 As an initial matter, the Court found Plaintiff to be extremely credible; on the other hand, Defendant's testimony was not credible. Not only did Defendant's trial testimony contradict most of Plaintiff's testimony, but Defendant also contradicted his own deposition testimony, sworn discovery responses, and sworn bankruptcy schedules and statements.

Plaintiff testified that he was 24 years old when he came to Knoxville from Saudi Arabia. He began hanging out at the Lounge for the music, dancing, late hours, and fellowship with other students from various nationalities. He met Defendant soon after he arrived in Tennessee, and he quickly came to consider Defendant a close friend. Plaintiff testified that Defendant expressly represented that, and acted like, he owned the Lounge. Plaintiff also testified that Defendant appeared successful because he dressed well and drove a nice car and that Defendant regularly bragged to Plaintiff and on social media about his success and his wealth, as well as that his wife was Dolly Parton's niece. Plaintiff and others also accompanied Defendant on trips to Nashville, Cookeville, and Washington, D.C.

At some point, Plaintiff expressed an interest generally in making investments in order to grow his limited funds and better support himself in case he was not awarded a scholarship from the Saudi Arabian government to continue his studies. Defendant planted a seed with Plaintiff about how a friend of Defendant's regretted

having passed on an opportunity to invest in the Lounge before it opened. A few days after that particular discussion, Defendant asked Plaintiff for the first time if he wanted to invest his money in renovating the Lounge to put in a kitchen, which Defendant said would cost approximately \$30,000.00.⁴

During the initial conversation with Defendant about investing in the Lounge to add a kitchen, Plaintiff told Defendant that he did not think it would be a good idea to invest, expressing his concern that making such an investment might affect his immigration status and harm his student visa. Plaintiff then researched the issue more and discovered that it was complicated. When he again told Defendant that he did not want to invest because of his immigration concerns, Defendant told Plaintiff not to worry, that Defendant had a lawyer, and that making investments was not the same as working a job so that it would not affect Plaintiff's immigration status.

When Plaintiff expressed continued reluctance given the amount of money, Defendant offered to open a new bank account with both men having access so that Plaintiff could monitor the account. Defendant promised Plaintiff 30% of the profits realized from the Lounge after the kitchen was added. Based on Defendant's representations and assurances, Plaintiff agreed to invest \$28,000.00. Plaintiff acknowledged at trial that he never asked Defendant to produce any financial records for review before making any decisions about investing and that there was no written agreement nor any offer of stock in the corporation.

*5 Plaintiff testified that, approximately two weeks after they initially agreed that Plaintiff would invest in the Lounge, Defendant called Plaintiff to arrange for the funds transfer. Plaintiff testified that Defendant accompanied him to Bank of America on Cumberland Avenue, where Plaintiff had an account, to get a cashier's check for \$28,000.00, which Defendant directed Plaintiff to make payable to Dubai Hookah and Lounge Corp. Plaintiff then accompanied Defendant to Regions Bank, where Defendant already had a business account for the Lounge, in order to open the new K & A Account.

At Regions Bank, the two of them met with Mr. Grubb, who opened the K & A Account with Defendant as the only signatory to the account. Plaintiff testified that Defendant had assured him before opening the account

that it would be joint so that Plaintiff could monitor the funds and even have an access card, but because of Plaintiff's limited understanding of the English language at the time, he was unaware until later (when he did not receive an access card) that Defendant had opened the K & A Account without authorizing Plaintiff to have access.

For his part, when asked at trial about his promises concerning Plaintiff's access to the K & A Account, Defendant testified at trial that he "didn't mention stuff like that" and that he did not remember telling Plaintiff that he would have access to the account. In his deposition, however, Defendant testified that although there was some discussion about giving Plaintiff authority to access the account, he could not remember the details:

A. The discussion we—we had a lot of discussion. You know, he's going to access the account and—because, you know, whether he's going to do partnership, or was this going to be like a loan to the business. That's what it was. But I don't—I don't remember in details what it was because it's been a while now.

Q. Did you tell [Plaintiff] he was going to have access to the account?

A. Yeah.

Q. Or at least be able to ... monitor it?

A. Yeah. Yeah. I told him, yeah.

....

Q. But that didn't happen?

A. Yeah—because he change [*sic*] his mind. He doesn't want to be a partner.

Q. Well, but from the git-go he was not—you did not sign him up for access or anything?

A. I don't remember. I don't remember things.

[Trial Ex. 1, Def.'s Dep. at pp. 115–16.] Defendant testified at trial that the \$28,000.00 was supposed to have been used for renovations but that he only changed tiles in the Lounge, painted, and bought items from a neighboring business that was closing to be used to further renovate the Lounge. Yet, no further renovations were made to the Lounge.

Plaintiff testified that he trusted Defendant as his close friend and believed, based on Defendant's representations, that both Defendant and the Lounge were very successful. Although Defendant testified at trial that he and Plaintiff had not agreed to put anything in writing, he testified at deposition that they had discussed having a lawyer draw up paperwork but then Defendant decided not to involve a lawyer after the money was transferred "because there's a trust." [Trial Ex. 1, Def.'s Dep. at p. 70.]

Plaintiff testified that he first questioned Defendant about the investment the day after the K & A Account was opened because Defendant posted on social media that he was looking for a new car. Plaintiff immediately called Defendant to ask if he was using Plaintiff's money to buy a car, and Defendant told Plaintiff, "[N]o and just to relax." Plaintiff went to Regions Bank to ask about getting the access card and was informed that he could not get a card. When Plaintiff asked Defendant about getting the account access card, Defendant told him that if he had put Plaintiff's name on the account, it would be complicated and Plaintiff could get into trouble and that Defendant did not want to be involved in immigration troubles with Plaintiff.

*6 Thereafter, Plaintiff regularly tried to contact Defendant to ask about the kitchen renovation. Defendant replied that he was "working on it" and that Plaintiff was annoying. Finally, in response to repeated inquiries from Plaintiff, Defendant sent Plaintiff an estimate for \$10,866.00 received from Air Maintenance, LLC [see Trial Ex. 23; Trial Ex. 24] and told Plaintiff to stop bothering him about it. After receiving the estimate from Defendant, Plaintiff stopped calling Defendant to inquire, but he continued going to the Lounge to check on the kitchen. Although he saw where the floor had been repaired, Plaintiff never saw evidence of a kitchen renovation nor any evidence of kitchen equipment that Defendant said he had purchased.

Plaintiff eventually reinitiated efforts to reach Defendant, who reported that he had paid an attorney \$4,000.00 to write up their agreement as an investment and that the agreement was in Defendant's car but that he was too busy to come to Plaintiff and sign it. At the same time, Plaintiff continued to see social media posts by Defendant showing him to be partying, including a post while Defendant was in Washington, D.C., saying that he had \$6,000.00 in hand for a party night.

In early 2015, Plaintiff's brother in Saudi Arabia experienced some difficulty with which Plaintiff believed he could help if he could get his money back from Defendant. In May, Plaintiff contacted Defendant via text message, informing him how worried Plaintiff was about the situation and asking Defendant to repay the money. Defendant replied the next day, at 5:18 a.m., "Okay soon. I just woke up!" [Trial Ex. 37.] At some point, Defendant said that he would pay \$500.00 monthly; however, he put nothing in writing and made no payments, prompting Plaintiff to send a text in August, stating, "Khalid please start paying me back my money. I waited enough!!! This is Azaam by the way!" [Trial Ex. 37.]

Because Defendant continued to be non-responsive and never repaid any of the money, Plaintiff finally hired legal counsel, who sent a demand letter to Defendant for payment on September 23, 2015. [Ex. D to Trial Ex. 2.] Plaintiff testified that Defendant called him after receiving the demand letter and, claiming they were "brothers," asked him to drop any legal action. Defendant also asked Plaintiff to drop the State Court Lawsuit after it was filed on November 12, 2015. Plaintiff further testified that during conversations when they have seen each other at other establishments since late 2015, Defendant told Plaintiff that he "could" repay the \$28,000.00 but does not want to because of the lawsuits.

In the meantime, as discussed in a newspaper article on the front page of the Knoxville News-Sentinel, safety concerns arose after a fatal shooting occurred in the lot just behind the Lounge in November 2015. [See Trial Ex. 36.] At some point after the shooting, the City of Knoxville closed the Lounge as "unfit for human habitation." [See Trial Ex. 21.] Defendant, however, testified that the Lounge was closed because business waned as a result of the construction on Cumberland Avenue, cutting into revenues such that Defendant had failed to pay sales taxes to the State of Tennessee. [See Trial Ex. 25.] Defendant also testified that he owed money to the landlord, AMU Properties.

Defendant does not deny that he has repaid none of the \$28,000.00. In an effort to cast doubt on his personal liability to Plaintiff for the \$28,000.00, Defendant testified that he simply ran the Lounge for his brother, who actually owned the business because his money (not Defendant's) funded it. Defendant explained that his

brother could not obtain a visa to come to the United States and that Defendant started the business with funds that his brother transferred from his personal account to Defendant's personal account. Defendant also acknowledged that he personally set up the corporation, that he obtained the business license, that he opened the original bank account in 2012, and that he arranged the original lease prior to the company's incorporation. In fact, corporate records from the Tennessee Secretary of State reflect that Defendant was Registered Agent, President, and the sole Director of the Lounge [see Coll. Trial Ex. 44], which was administratively dissolved by the state on August 8, 2015 [see Coll. Trial Ex. 2 at pg. 00099]. Defendant also acknowledged at trial that he had held himself out as president and manager of the Lounge not only to Plaintiff but also to other patrons and members of the business community. [See, e.g. Trial Ex. 40.]

*7 The Court also finds telling the deposition testimony of Mr. Grubb, the Regions Bank employee who met with Defendant to open the K & A Account, who spoke of knowing Defendant in a business capacity “the entire time that he had had the Hookah Lounge[.]” [Trial Ex. 30 at pg. 7, lines 7–8.] More importantly, with respect to the \$28,000.00 payment, Defendant endorsed the back of the cashier's check personally and in his individual name, not as or on behalf of the Lounge. [Trial Ex. 9, p. 00175.]

Moreover, Defendant's bankruptcy schedules, signed under penalty of perjury, reflect the following facts:

- the Petition reflects “FDBA Dubai Hookah Lounge” as a business name Defendant used in the last eight years [Trial Ex. 28 (Case No. 3:16–bk–32406–SHB, Doc. 1, p. 2), p. 00308];
- the Petition reflects that he was the sole proprietor of “fdba Dubai Hookah Lounge” [Trial Ex. 28 (Case No. 3:16–bk–32406–SHB, Doc. 1, pp. 4, 8), pp. 00310, 00314];
- the Statement of Financial Affairs reflects that his source of income for 2014 through 2016 derived from operating a business [Trial Ex. 28 (Case No. 3:16–bk–32406–SHB, Doc. 1, p. 11), p. 00317];
- the Statement of Financial Affairs reflects that he operated as a sole proprietor of or was self-employed under the business “fdba Dubai Hookah Lounge” from October 2012 to March 2016 and also “Dubai

Hookah & Lounge Corp.” [Trial Ex. 28 (Case No. 3:16–bk–32406–SHB, Doc. 1, p. 16), p. 00322];

- Defendant identified on Schedule E/F a priority debt owed to the Tennessee Department of Revenue for “business taxes” from 2015 [Trial Ex. 28 (Case No. 3:16–bk–32406–SHB, Doc. 1, p. 29), p. 00335];
- Defendant identified on Schedule E/F the debt owed to Plaintiff, and he failed to mark it as contingent, unliquidated, or disputed [Trial Ex. 28 (Case No. 3:16–bk–32406–SHB, Doc. 1, p. 30), p. 00336]; and
- Defendant listed on Schedule E/F a general unsecured debt owing to A Z International Fine Rugs for “business debt—rent” [Trial Ex. 28 (Case No. 3:16–bk–32406–SHB, Doc. 1, p. 30), p. 00336].⁵

Thus, the overwhelming weight of the evidence shows that Defendant owned the Lounge as a sole proprietorship so that the debt he owes to Plaintiff is an individual liability.⁶

The fact of conversion is also clear from the evidence. Defendant appropriated Plaintiff's \$28,000.00 for his own use by exercising dominion over it in defiance of Plaintiff's stated purpose and while refusing to return it. See *Ralston*, 306 S.W.3d at 221.

As for whether Plaintiff adequately proved under § 523(a)(6) that he suffered a willful and malicious injury from Defendant's conversion of the \$28,000.00, the answer is yes. Defendant, after promising Plaintiff that he would have access to the K & A Account, opened the account with Defendant having sole signatory authority and the only debit card. Within forty-six days of account opening, the entire \$28,000.00 was depleted from the account as a result of Defendant transferring \$19,750.00 to his other Lounge bank account, withdrawing \$4,000.00 cash (the day after the account was opened), and writing three checks totaling \$4,750.00, of which \$3,800.00 was a rent check to the Lounge's landlord.⁷ [Trial Exs. 8, 9, 10.] Defendant testified that he transferred the funds from the K & A Account to the Dubai Hookah and Lounge Corp business account (the “Lounge Business Account”) because it was “complicated” and “confusing” for him to have more than one account. Notably, he asserted that he transferred funds to the Lounge Business Account because did not have checks for the K & A Account, but the bank records reflect that he not only ordered and paid for

checks, but he wrote three checks from that account in the first fifteen days after depositing Plaintiff's cashier's check.

*8 Defendant would have the Court believe that his personal use of the funds was merely his compensation as an employee of the Lounge. He testified during his deposition that “about 20 percent [of the expenditures from the Lounge Business Account] are personal because, you know, this is sort of pay for me as well.” [Trial Ex. 1 at pg. 142, lines 18–22.] At trial, Defendant acknowledged that he took money from his various accounts, with some spent on business expenses and tax write-offs, some spent for merchandise, and some spent on his personal expenses as his compensation.⁸ Indeed, Defendant solely controlled the Lounge Business Account and regularly used a debit card, which his wife also used. A review of the bank records for the Lounge Business Account into which Defendant transferred \$19,750.00 of Plaintiff's \$28,000.00 payment, reflects that significantly more than 20% of the expenditures were for personal household and entertainment expenses,⁹ and other significant debits were for “unknown” purposes, according to Defendant's trial testimony. [Trial Exs. 14–20.] Defendant testified that he might have used a portion of the K & A Account transfers to pay cash to his employees but that all of his financial books and records were in the building where the Lounge operated and he was not allowed to re-enter the building to retrieve the records. At bottom, Defendant admitted that although some of the funds in the Lounge Business Account went to business expenses, none of it was spent to renovate the Lounge to add a kitchen.

The Court finds utterly unbelievable Defendant's denial at trial that he ever told Plaintiff that the \$28,000.00 was solely to set up a kitchen. At his deposition, Defendant first testified that the money he was getting from Plaintiff was supposed to go toward buying kitchen and alcohol equipment “to do a restaurant” [Trial Ex. 1 at pg. 61, line 14—pg. 62, line 5], but then he contradicted that testimony by stating that the money was “[f]or the business ... [and] not necessary [sic] for the kitchen.” [Trial Ex. 1 at pg. 62, lines 6–15.] The fact that the account was called the “Kitchen & Alcohol” account speaks volumes. Were it simply intended as an investment account, there would have been no reason to call it the “Kitchen & Alcohol” account—in fact, there would have been no reason to create a wholly separate account. The Court also does not believe Defendant's assertions that when he opened the account, Regions “just want [sic] a name,” and that

“[it] just has to be something—I told [Grubb] the first thing pop out [sic] of my mind. It was for the kitchen, to increase—I don't know if—I could have said remodeling or anything. ... [H]e just wanted to say anything to open the account.” [Trial Ex. 1 at pg. 62, line 10—pg. 63, line 4.] Instead, the Court concludes from the evidence that the reason Defendant opened a separate account was to lead Plaintiff to believe that his \$28,000.00 would be segregated for use on a kitchen renovation in an account that he could monitor.

Telling also is the fact that after Plaintiff began questioning Defendant about the money and whether he was making any progress on the kitchen renovations, Defendant obtained a free estimate from Air Maintenance, LLC for \$10,866.00 for kitchen renovations and provided it to Plaintiff to appease him. Defendant, however, never took any action or contacted Air Maintenance, LLC or any other company to actually perform any renovations to install a kitchen in the Lounge. Although Defendant testified that he changed tiles in the Lounge, painted, and bought equipment from a neighboring business that was closing, he could not produce any records to prove that any such renovations or purchases were made. Nor do any of the bank records show that any of the money obtained from Plaintiff was used for any such purchases or renovations.¹⁰ Defendant's claim that all of his financial records are locked in the building where the Lounge operated and that he has been denied access to them is unconvincing, especially in light of his contradictory testimony that because it was a “family business,” he did not have to be detailed in his record-keeping.

*9 In sum, the bank statements reflect that Defendant spent a lot of money to maintain a very lavish lifestyle and that a large amount of the money that was supposed to be for renovations of the Lounge, including Plaintiff's \$28,000.00, was spent instead by Defendant solely for his personal and household use. The Court can easily deduce that Defendant took Plaintiff's \$28,000.00 with the intention of spending it on whatever *he* wanted to spend it on, that he never had any intention of using the money for the business or to renovate or install a kitchen, and that he never had any intention of paying anything back to Plaintiff. Such use was a conversion under Tennessee law, done willfully and maliciously, with the knowledge that Plaintiff would suffer harm.

Thus, based on the evidence, Plaintiff is entitled to a determination of nondischargeability under § 523(a)(6).

B. 11 U.S.C. § 523(a)(2)(A)

Plaintiff has also sought a determination of nondischargeability under § 523(a)(2)(A), by which an individual is not discharged from any debt “for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained, by [] false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor’s or an insider’s financial condition[.]” 11 U.S.C. § 523(a)(2)(A). To satisfy § 523(a)(2)(A)’s requirements, Plaintiff must prove that Defendant obtained money or property from or belonging to Plaintiff through false pretenses and/or material misrepresentations that Defendant knew were false or that he made with gross recklessness or through actual fraud; that Defendant intended to deceive Plaintiff when any such false pretenses, misrepresentations, and/or any such fraud occurred; that Plaintiff justifiably relied on Defendant’s false pretenses, representations, and/or fraudulent conduct; and that Plaintiff’s reliance was the proximate cause of his losses. See *McDonald v. Morgan (In re Morgan)*, 415 B.R. 644, 649 (Bankr. E.D. Tenn. 2009). Although there is no dispute that the \$28,000.00 deposited into the K & A Account originally belonged to Plaintiff, Defendant has challenged the remaining elements of § 523(a)(2).

Material misrepresentations under § 523(a) are “substantial inaccuracies of the type which would generally affect a lender’s or guarantor’s decision.” *Haney v. Copeland (In re Copeland)*, 291 B.R. 740, 761 (Bankr. E.D. Tenn. 2003) (citations omitted); see also *McCallum v. Pixley (In re Pixley)*, 456 B.R. 770, 782 (Bankr. E.D. Mich. 2011) (defining “material fact” to require that it “must be of enough importance in the matter that a reasonable person would be likely to rely on it” (citation omitted)). Additionally, “[s]ilence regarding a material fact can constitute a false representation actionable under § 523(a)(2)(A).” *Fee v. Eccles (In re Eccles)*, 407 B.R. 338, 342 (8th Cir. BAP 2009) (citation omitted).

In the context of § 523(a)(2)(A), “false representations and pretenses encompass statements that falsely purport to depict current or past facts.” *Peoples Sec. Fin. Co., Inc. v. Todd (In re Todd)*, 34 B.R. 633, 635 (Bankr. W.D. Ky.

1983). False pretense is an “implied misrepresentation or conduct intended to create and foster a false impression, as distinguished from a ‘false representation’ which is an express misrepresentation.” *In re Copeland*, 291 B.R. at 760 (citations omitted). Thus, “a broken promise to repay a debt, without more, will not sustain a cause of action under § 523(a)(2)(A). Instead, central to the concept of fraud is the existence of scienter which, for the purposes of § 523(a)(2)(A), requires that it be shown that at the time the debt was incurred, there existed no intent on the part of the debtor to repay the obligation.” *EDM Mach. Sales, Inc. v. Harrison (In re Harrison)*, 301 B.R. 849, 854 (Bankr. N.D. Ohio 2003) (citations omitted). Additionally, “[t]he term ‘actual fraud’ in § 523(a)(2)(A) encompasses forms of fraud, like fraudulent conveyance schemes, that can be effected without a false representation.” *Husky Int’l Elecs, Inc. v. Ritz*, — U.S. —, 136 S.Ct. 1581, 1586, 194 L.Ed.2d 655 (2016).

*10 Under Sixth Circuit authority, a subjective standard determines fraudulent intent, *In re Rembert*, 141 F.3d at 281, and may be “inferred as a matter of fact” based on the totality of the circumstances when a defendant has engaged in conduct that was “somewhat blameworthy[.]” although mere negligence or evidence of “[a] ‘dumb but honest’ [debtor] does not satisfy the test.” *Copeland*, 291 B.R. at 759, 765–66 (citations omitted).

A subjective approach, of course, requires that the trier-of-fact focus solely on the individual characteristics of the debtor. Yet, like an objective approach, a subjective approach still entails the utilization of circumstantial evidence given that a debtor will rarely, if ever, admit to acting in a fraudulent manner; helpful in this regard are many of the traditional indicia of fraud—e.g., a suspicious timing of events, insolvency, transfers to family members or other insiders. In utilizing such indicia, however, the Sixth Court cautioned against “factor-counting,” instead holding “[w]hat courts need to do is determine whether all the evidence leads to the conclusion that it is more probable than not that the debtor had the requisite fraudulent intent.”

In re Harrison, 301 B.R. at 854 (quoting *In re Rembert*, 141 F.3d at 282; other citations omitted). The determination of nondischargeability often comes down to a defendant’s conduct before, during, and after the representations at issue and witness credibility. See *In re Copeland*, 291 B.R. at 766; *Commercial Bank & Trust Co. v. McCoy (In re McCoy)*, 269 B.R. 193, 198 (Bankr. W.D. Tenn. 2001)).

Finally, the Court must also find justifiable reliance; i.e., that Plaintiff actually relied on representations made by Defendant, that the reliance was the proximate cause of Plaintiff's losses, and, based on the facts and circumstances known at the time, Plaintiff's reliance was justifiable. See *In re Morgan*, 415 B.R. at 649. Justifiable reliance is a subjective standard "which takes into account the knowledge and relationship of the parties themselves[.]" *Giebel v. Styron (In re Giebel)*, 2014 WL 4346611, at *5 (Bankr. W.D. Wash. Aug. 29, 2014), and "does not require an investigation, even if the failure to investigate would be considered negligent and the falsity of the representation would be readily discovered upon investigation." *In re Eccles*, 407 B.R. at 342 (citing *Field v. Mans*, 516 U.S. 59, 70–71, 116 S.Ct. 437, 133 L.Ed.2d 351 (1995)). In order to find justifiable reliance, the Court must find that Plaintiff's conduct was not "so utterly unreasonable, in light of the information apparent to him, that the law may properly say that his loss is his own responsibility." *Stewart Title Guar. Co. v. Roberts–Dude*, 497 B.R. 143, 151 (S.D. Fla. 2013) (citation omitted).

Based on the facts set out above, the Court finds that Defendant personally and individually obtained \$28,000.00 from Plaintiff. The Court also finds that Defendant's representations to Plaintiff that he wanted to use Plaintiff's money to install a kitchen and that Plaintiff would receive profits from the kitchen business were material misrepresentations made to Plaintiff on which Plaintiff justifiably relied given their friendship and Defendant's representations, both to Plaintiff personally and by social media, that both he and the Lounge were financially successful. The Court likewise finds that Defendant intended to deceive Plaintiff when he made the false representations and that all of this caused Plaintiff's loss of his \$28,000.00 at Defendant's hand. In short, the facts show that Defendant preyed on Plaintiff's naiveté and vulnerabilities as an international student new to the United States, the English language, and American immigration, banking, and business laws. Thus, Plaintiff is also entitled to a determination of nondischargeability pursuant to § 523(a)(2)(A).

C. TCPA

*11 Plaintiff claims that Defendant's conduct violated the TCPA. The threshold for a claim under the TCPA is

that the claimant be a "consumer" as defined by the Act. Section 47–18–103(1) defines a "consumer" as

any natural person who seeks or acquires by purchase, rent, lease, assignment, award by chance, or other disposition, any goods, services, or property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value wherever situated or any person who purchases or to whom is offered for sale a franchise or distributorship agreement or any similar type of business opportunity."

Even if Plaintiff qualified as a consumer under the circumstances, courts also look to the nature of the transaction. The Tennessee Supreme Court has noted that, "[r]elying in part on the Act's [express] purpose of 'maintaining ethical standards of dealing *between persons engaged in business* and the consuming public,' Tenn. Code Ann. § 47–18–102(4) (emphasis added), courts have limited the Act's application to 'transactions between businesses and consumers and not to casual, non-commercial transactions between two individuals.'" *Fayne v. Vincent*, 301 S.W.3d 162, 173 (Tenn. 2009) (quoting *White v. Eastland*, No. 01A01-9009-CV-00329, 1991 WL 149735, at *3 (Tenn. Ct. App. Aug. 9, 1991)). Thus, the Act does not apply to "sellers [who are] not in the business of selling property as owners or brokers" such that "persons making an isolated sale of their home are not covered." *Id.* (quoting *Ganzevoort v. Russell*, 949 S.W.2d 293, 298 (Tenn. 1997)). The Tennessee Supreme Court concluded that "a casual sale or transaction is an occasional and isolated sale or transaction by a person who does not hold himself or herself out as being regularly engaged in business of commerce involving the goods, property, or services involved in the sale or transaction." *Id.*

This same reasoning applies to the facts here. Defendant unquestionably was not in the business of offering investment opportunities to consumers. The transaction between Plaintiff and Defendant was an "isolated," "casual, non-commercial transaction[]" that was not the kind of matter that the TCPA was intended to address. Thus, Plaintiff is not entitled to damages under the TCPA.

III. DAMAGES

In the Sixth Circuit, bankruptcy courts possess the jurisdiction and authority to adjudicate the validity of a claim and award damages, including “compensatory and punitive damages, costs, interest, and attorney’s fees” in connection with an adversary proceeding to determine dischargeability. *R & L Pricecorp LLC v. Hall (In re Hall)*, Adv. No. 12-3026, 2013 WL 1739658, at *2 (Bankr. E.D. Tenn. Apr. 23, 2013); see also *In re Copeland*, 291 B.R. at 792 (citing *Longo v. McLaren (In re McLaren)*, 3 F.3d 958, 965 (6th Cir. 1993)).

A. Actual Damages

Plaintiff argues that he is entitled to a judgment for actual damages against Defendant in the amount of \$28,000.00, representing the funds he lost as a result of Defendant’s actions. The Court agrees. As relates to actual damages, the Court finds that Plaintiff loaned or invested \$28,000.00 for the sole purpose of installing a kitchen in the Lounge, that Defendant personally and individually took those funds and used them for his own purposes, and that Plaintiff was never repaid the \$28,000.00. Accordingly, Plaintiff is entitled to a judgment against Defendant for actual damages in the amount of \$28,000.00, and this judgment is nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A) and (a)(6).

B. Attorneys’ Fees and Expenses

*12 Plaintiff also seeks reimbursement of the attorneys’ fees and expenses he has incurred as a result of Defendant’s actions; however, under the facts of this case, he is not entitled to recover attorneys’ fees. Tennessee courts “follow the American rule, which provides that litigants must pay their own attorney’s fees unless there is a statute or contractual provision providing otherwise.” *In re Morgan*, 415 B.R. at 653 (quoting *Taylor v. Fezell*, 158 S.W.3d 352, 359 (Tenn. 2005)). Because there is no contractual or statutory basis for awarding attorneys’ fees (the Court having found that the TCPA is inapplicable), the Court will not enter a judgment against Defendant for the fees evidenced by Trial Exhibit 46.

C. Punitive Damages

In addition to actual damages and attorneys’ fees and expenses, Plaintiff asks the Court to award him punitive damages against Defendant.¹¹ Imposition of punitive damages is within the discretion of the bankruptcy court when there is “conduct that is particularly ‘egregious, vindictive or intentionally malicious,’ ‘when there is a strong showing that the defendant acted in bad faith or otherwise undertook [his] actions in reckless disregard of the law,’ or upon finding that the actions were ‘taken in arrogant defiance of [the] law.’ ” *In re Wilson*, No. 15-51532-MPP, 2016 WL 3303325, at *10 (Bankr. E.D. Tenn. June 7, 2016) (quoting *Tyson v. Hunt (In re Tyson)*, 450 B.R. 754, 767 (Bankr. W.D. Tenn. 2011)). Tennessee law, similarly, is clear that under the appropriate circumstances, a court may award punitive damages for particularly egregious conduct. See *Riad v. Erie Ins. Exch.*, 436 S.W.3d 256, 276 (Tenn. Ct. App. 2013).

Compensatory and punitive damage awards serve vastly different purposes. Compensatory damages are intended to compensate an injured plaintiff for personal injury or property damage and thereby make the plaintiff whole again. *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 902 (Tenn. 1992). In contrast, punitive damages are intended to “punish a defendant, to deter him from committing acts of a similar nature, and to make a public example of him.” *Huckeby v. Spangler*, 563 S.W.2d 555, 558–59 (Tenn. 1978). Punitive damages are thus appropriate only in the most egregious cases and, consequently, a verdict imposing such damages must be supported by clear and convincing evidence that the defendant acted intentionally, fraudulently, maliciously, or recklessly. *Hodges*, 833 S.W.2d at 901. Evidence is clear and convincing when it leaves “no serious or substantial doubt about the correctness of the conclusions drawn.” *Id.* at 901 n.3. In other words, the evidence must be such that the truth of the facts asserted be “highly probable.” *Teter v. Republic Parking Sys., Inc.*, 181 S.W.3d 330, 341 (Tenn. 2005).

Goff v. Elmo Greer & Sons Constr. Co., 297 S.W.3d 175, 187 (Tenn. 2009).

Based on the particularly egregious, callous, and intentional nature of Defendant’s actions in his dealings

with Plaintiff, the cavalier and patently contradictory manner in which he testified at the trial and in his deposition, and the Court's conclusion that Defendant acted intentionally, willfully, maliciously, and fraudulently, the Court finds that an award of punitive damages in the amount \$56,000.00—double the amount of Plaintiff's actual damages—is warranted and appropriate in this case.

*13 For these reasons, and pursuant to 11 U.S.C. § 523(a)(2)(A) and (a)(6), Plaintiff shall be awarded actual damages in the amount of \$28,000.00 and punitive damages in the amount of \$56,000.00 for a total nondischargeable judgment against Defendant in the amount of \$84,000.00. The Court shall enter judgment consistent with this Memorandum opinion.

All Citations

--- B.R. ----, 2017 WL 6498026

IV. CONCLUSION

Footnotes

- 1 Defendant received a discharge on November 29, 2016. [Doc. 19.]
- 2 Plaintiff also claims that Defendant's conduct constituted a violation of the Tennessee Consumer Protection Act, [Tenn. Code Ann. §§ 47-18-101](#)—131 ("TCPA"), such that Plaintiff is entitled to actual and treble damages as well as attorneys' fees and that, to the extent necessary, any corporate veil between Dubai Hookah and Lounge Corporation and Defendant should be pierced under Tennessee law. As explained below, the Court finds it unnecessary to pierce the corporate veil and finds the TCPA inapplicable to the transaction at issue.
- 3 "The Sixth Circuit has developed a non-exclusive list of 'types of misconduct [that] satisfy the willful and malicious injury standard: intentional infliction of emotional distress, malicious prosecution, conversion, assault, false arrest, intentional libel, and deliberately vandalizing the creditor's premises.' " [MD Acquisition, LLC v. Myers \(In re Myers\)](#), No. 11-6092, 2012 WL 6761356, at *8 (Bankr. N.D. Ohio Dec. 31, 2012) (quoting [In re Best](#), 109 Fed.Appx. at 5 & n.2).
- 4 Plaintiff testified that although he seeks only \$28,000.00 in actual damages, he also gave Defendant \$2,000.00 that was needed for "cash flow" to buy "supplies for the lounge" before the weekend. As a result, when Plaintiff later obtained the cashier's check, Defendant instructed Plaintiff to make it out for \$28,000.00 because of the \$2,000.00 that Plaintiff had already provided.
- 5 Defendant admitted at trial that this creditor is the same as AMU Properties, the landlord for the Lounge to which a \$3,800.00 check was written for "rent" on the K & A Account in November 2014.
- 6 For this reason, the Court finds it unnecessary to pierce any corporate veil.
- 7 Additional debits from the account included \$59.98 for a check order and \$100.00, shown on the statement as a garnishment. [Trial Ex. 8, 10.]
- 8 Defendant testified that although he considered use of the money compensation, he was unsure if he had ever paid taxes on or reported this as income on his personal tax returns. His 2015 tax return, filed jointly with his wife, shows combined household income of \$19,672.00, all of which was reported on his W-2 from Dubai Hookah and Lounge Corp. [See Trial Ex. 43.]
- 9 For example, as evidenced by the bank statement for the Lounge Business Account dated November 1 through November 28, 2014, charges for Crossfit (\$65.45); gas stations (at least \$191.26); restaurants (at least \$114.78); hotels (\$386.01); clothing and other retailers (at least \$495.61); undescribed PayPal transactions (totaling \$180.65); a car dealership (\$234.38); and other undescribed debits (totaling \$660.74) that do not appear to be business-related were debited from that account, which had a beginning balance of <\$235.37> and an ending balance (after transfers from the K & A Account totaling \$6,000.00) of \$2,922.11. [Trial Ex. 14.] Additionally, Defendant and his wife made cash withdrawals, inclusive of fees, totaling \$1,325.00 (\$1,025.00 by Defendant; \$300.00 by his wife) between November 20 and November 28. [Id.] Subsequent bank statements for the Lounge Business Account reflect similar personal expenses and cash withdrawals in even higher amounts. [Trial Exs. 16–20.]
- 10 The December bank statement for the Lounge Business Account shows a debit to Home Depot for \$865.04 on December 26, 2014, which could possibly have been to purchase tiles and/or paint supplies [see Trial Ex. 16]; however, Defendant pointed to no other entries in the bank records for either the K & A Account or the Lounge Business Account that appear to have been even remotely associated with any sort of renovations.

- 11 As noted, Plaintiff also asks for treble damages and attorney's fees under the TCPA, but because the Court finds the TCPA inapplicable to these facts, the request for treble damages will be denied.

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877 F.3d 246

United States Court of Appeals,
Sixth Circuit.

IN RE: MOUNTAIN GLACIER LLC, Debtor.
[Nestlé Waters North America, Inc.](#), Appellant,

v.

Mountain Glacier LLC, Appellee.

No. 17-5638

|
Argued: December 5, 2017

|
Decided and Filed: December 11, 2017

Synopsis

Background: Chapter 11 debtor brought adversary proceeding for declaratory judgment that its right to pursue counterclaim first asserted prepetition, in pending arbitration proceeding, was sufficiently reserved in its confirmed Chapter 11 plan. Debtor moved for summary judgment. The United States Bankruptcy Court for the Middle District of Tennessee, [Charles M. Walker, J.](#), 564 B.R. 314, granted motion, and other party to arbitration appealed. The District Court, [Aleta A. Trauger, J.](#), 572 B.R. 205, affirmed. Appeal was taken.

[Holding:] The Court of Appeals, [Thapar](#), Circuit Judge, held that language in Chapter 11 disclosure statement, describing counterclaim that debtor had asserted in pending arbitration proceeding and indicating that counterclaim was unliquidated and remained of uncertain value, coupled with transfer-of-assets provision in debtor's plan, indicating that this claim would be transferred to reorganized debtor for future prosecution upon entry of order confirming plan, was sufficient to reserve claim.

Affirmed.

*247 Appeal from the United States District Court for the Middle District of Tennessee at Nashville. No. 3:17-cv-00154—Aleta Arthur Trauger, District Judge. United States Bankruptcy Court for the Middle District of Tennessee at Nashville. No. 15-03817; Adv. Pro. No. 3:16-ap-90113—Charles M. Walker, Judge.

Attorneys and Law Firms

ARGUED: [Deborah T. Kovsky–Apap](#), PEPPER HAMILTON LLP, Southfield, Michigan, for Appellant. [William L. Norton III](#), BRADLEY ARANT BOULT CUMMINGS LLP, Nashville, Tennessee, for Appellee. ON BRIEF: [Deborah T. Kovsky–Apap](#), [Robert S. Hertzberg](#), PEPPER HAMILTON LLP, Southfield, Michigan, for Appellant. [William L. Norton III](#), BRADLEY ARANT BOULT CUMMINGS LLP, Nashville, Tennessee, for Appellee.

Before: [SILER](#), [KETHLEDGE](#), and [THAPAR](#), Circuit Judges.

OPINION

[THAPAR](#), Circuit Judge.

Sometimes bankrupt debtors want to hold on to legal claims that pre-date their bankruptcies. They are allowed to do so—but only if they reserve those claims in their reorganization plans. The question in this appeal is exactly what a debtor needs to say about a claim to preserve it for later.

I.

The facts are undisputed. Mountain Glacier and Nestlé Waters were in the middle of an arbitration when Mountain Glacier filed for bankruptcy. The bankruptcy automatically stayed the companies' arbitration. *See* 11 U.S.C. § 362(a)(1). And it remained stayed until the bankruptcy court confirmed Mountain Glacier's plan of reorganization and the bankruptcy proceedings ended.

[1] Shortly thereafter, Mountain Glacier attempted to resume arbitration. But Nestlé Waters objected, claiming that Mountain Glacier failed to properly reserve the arbitration claim in its reorganization plan. Mountain Glacier disagreed. *248 And so did the bankruptcy court and the district court. Nestlé Waters now appeals. We review the bankruptcy court's legal conclusions de novo. *McMillan v. LTV Steel, Inc.*, 555 F.3d 218, 225 (6th Cir. 2009).

II.

At least in broad strokes, the Chapter 11 bankruptcy process is quite simple. The idea is to provide a debtor on its last leg the means to reorganize. But to do so, the debtor must follow certain rules. For one, the debtor must file a disclosure statement. 11 U.S.C. § 1125(b)–(c). This is essentially an inventory of all the debtor's assets and liabilities, which the debtor files with the court and shares with creditors. *Id.* That inventory gives creditors the information they need to “make an informed judgment about the [reorganization] plan”—i.e., the debtor's ultimate plan to get back on track and pay off (at least some) of its debts. *Id.* § 1125(a). If a creditor believes that the debtor has not provided “adequate information,” that creditor can object to the disclosure statement. *See* 9C Am. Jur. 2d *Bankruptcy* § 2840 (2017).

Just like every other Chapter 11 debtor, Mountain Glacier had to follow this process. So it submitted a disclosure statement to the bankruptcy court detailing its assets and liabilities, as well as a plan of reorganization outlining how it intended to pay its creditors. One of its assets was its stayed claim against Nestlé Waters. The disclosure statement described the claim as “a counterclaim asserted by the Debtor against Nestlé Waters North American, Inc. in arbitration pending in Chicago, IL,” which “remain[ed] unliquidated and ha[d] unknown value.” B.R. 169, Pg. ID 3. And Mountain Glacier's plan indicated that this arbitration claim would be transferred to the “Reorganized Debtor”—i.e., Mountain Glacier—upon the plan's confirmation. B.R. 203, Pg. ID 8–9.

[2] [3] Nestlé Waters says that res judicata bars Mountain Glacier's attempt to restart the companies' arbitration. *See Browning v. Levy*, 283 F.3d 761, 772 (6th Cir. 2002) (holding that res judicata can bar later litigation of reorganized debtors' pre-existing legal claims). But, as all parties here recognize, res judicata does not apply if the debtor expressly retained an existing claim for post-bankruptcy litigation. *Id.* at 774. Section 1123(b)(3) of the Bankruptcy Code allows a debtor's plan to provide for “the retention and enforcement by the debtor” of “any ... claim or interest.” 11 U.S.C. § 1123(b)(3). And a “claim” is defined to include a “right to payment,” even when that payment is “disputed.” *Id.* § 101(5)(A). Thus, a debtor who wishes to retain an existing claim for future litigation need

only note the reservation of that claim in its plan. The statute requires nothing more. *See, e.g., P.A. Bergner & Co. v. Bank One, Milwaukee, N.A. (In re P.A. Bergner & Co.)*, 140 F.3d 1111, 1117 (7th Cir. 1998) (“While there might be some logic in requiring ‘specific and unequivocal’ language to preserve claims belonging to the estate ..., the statute itself contains no such requirement.”).

[4] Nestlé Waters argues that this court's opinion in *Browning* set out requirements more stringent than those in the Bankruptcy Code. Nestlé Waters is incorrect. As a preliminary matter, courts cannot add to statutes. *Cf. Henson v. Santander Consumer USA Inc.*, — U.S. —, 137 S.Ct. 1718, 1725, 198 L.Ed.2d 177 (2017) (“[W]hile it is of course our job to apply faithfully the law Congress has written, it is never our job to rewrite a constitutionally valid statutory text under the banner of speculation about what Congress might have done”). Legislating is for Congress, not the courts.

[5] *249 Moreover, *Browning* did not set out the stringent requirements that Nestlé Waters reads into it. In *Browning*, we stated that “a general reservation of rights” is not sufficient to preserve the debtor's claims. *Browning*, 283 F.3d at 774. But *Browning* does *not* require a debtor's reservation of claims to name each (potential) defendant and state the factual basis for each (potential) cause of action, as Nestlé Waters contends. Any such suggestion by *Browning* was not part of its holding, but a mere statement of reasons for why the debtor's blanket reservation in that case did not give sufficient notice to creditors. *See id.* at 775; *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399, 5 L.Ed. 257 (1821) (noting that reasoning that goes “beyond the case ... may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision”). Rather what *Browning* held is that a debtor's reservation is sufficient so long as it enables creditors to (1) identify the claims (or potential claims) at issue and (2) evaluate whether those claims might provide additional assets for distribution. *See Browning*, 283 F.3d at 774–75; *see also P.A. Bergner*, 140 F.3d at 1117 (holding that the reservation of a claim need not name a defendant, but only identify the type of claim the debtor seeks to retain); *Harstad v. First Am. Bank*, 39 F.3d 898, 903 (8th Cir. 1994) (describing Section 1123(b)(3) as “a notice provision” intended to ensure creditors know about claims that might enlarge the estate).

[6] So the question is whether Mountain Glacier's reservation enabled creditors to identify its claim and evaluate whether additional assets might be available for distribution. It did. There is no doubt that creditors could identify the claim: The reservation identified Mountain Glacier's counterparty—Nestlé Waters—and indicated the forum—Chicago, Illinois. Creditors thus knew that there was an ongoing claim and a potential recovery. If creditors wanted more information, they could have objected to the reservation (or plan) and asked the bankruptcy court to require a more fulsome description. See *D & K Props. Crystal Lake v. Mut. Life Ins. Co. of N.Y.*, 112 F.3d 257, 261 (7th Cir. 1997) (suggesting that a claim might be retained if a broad reservation was “explicit,” since creditors would have had the opportunity to “dicker over the language”). But no creditor did. And Nestlé Waters certainly had all the information it needed—after all, it was the other party in the arbitration. Ultimately, neither *Browning* nor the statute required Mountain Glacier to provide more information than it did. So neither will we.

Nestlé Waters raises one more argument as to why Mountain Glacier's reservation was not sufficient. The “Retention of Claims” section of Mountain Glacier's plan purported to retain every “cause of action” that the company had the power to assert immediately before confirmation. B.R. 203, Pg. ID 10. The “Transfer of Assets” section, by contrast, purported to transfer Mountain Glacier's “Causes of Action” to the reorganized debtor, which were explicitly defined in the disclosure statement to include the claim against Nestlé Waters. *Id.* at Pg. ID 8–9; B.R. 169, Pg. ID 3. Nestlé Waters says that the general “Retention of Claims” was insufficient,

since it was a “blanket reservation” of the sort we rejected in *Browning*, and that we should now refuse to look to the definition of “Causes of Action” to find the requisite specificity. Why? Because while “Causes of Action” was capitalized in the transfer-of-assets section, “causes of action” in the retention-of-claims section was not. Nestlé Waters thus argues that the two terms must have had different meanings.

[7] *250 This argument need not detain us for long, since it fails for two straightforward reasons. First, even had the plan not included the retention-of-claims provision, the transfer-of-assets provision was itself sufficient to preserve Mountain Glacier's claim. As discussed above, Section 1123(b)(3) does not require the debtor to intone any magic words. And the transfer-of-assets provision put creditors on notice of Mountain Glacier's claim. Second, even if the retention-of-claims provision was essential to Mountain Glacier's reservation, the lower-cased “causes of action” is most naturally read as encompassing the upper-cased “Causes of Action.” After all, Mountain Glacier's retention-of-claims provision purported to retain “each and every ... cause of action whatsoever.” B.R. 203, Pg. ID 10. It would be strange indeed if that broad language included every cause of action *except* the specific ones the plan identified just a few paragraphs before. Thus, on any reading, Mountain Glacier's plan was sufficient to retain its claim.

We **AFFIRM**.

All Citations

877 F.3d 246, 64 Bankr.Ct.Dec. 256

2017 WL 6550492

Only the Westlaw citation is currently available.

United States Bankruptcy Court,
E.D. Michigan, Southern Division.

IN RE: [SHEFA, LLC](#), Debtor.

Case No. 14-42812

|

Signed December 22, 2017

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Chapter 11

OPINION REGARDING THE CITY OF SOUTHFIELD'S "MOTION TO COMPEL CONSUMMATION OF CONFIRMED PLAN OF REORGANIZATION"

[Thomas J. Tucker](#), United States Bankruptcy Judge

I. Introduction and background

*1 The Debtor in this Chapter 11 case, Shefa, LLC, obtained confirmation of a plan on February 19, 2016, and the case was closed on February 6, 2017. This case was reopened on October 11, 2017, to resolve a dispute between the Debtor and the City of Southfield, Michigan (the "City").¹ The dispute requires the Court to interpret and apply certain terms of the confirmed Plan.

The dispute concerns real property owned by the Debtor, located at 16400 J.L. Hudson Drive, Southfield, Michigan (the "Property").² The Property is the site of a 14-story, 427 room hotel built in 1974 on nine acres, known at different times as the Plaza Hotel and the Michigan Inn. The Property has been vacant and shuttered since October 2010. The Debtor acquired the Property in 2009.

The Debtor filed this Chapter 11 case on February 25, 2014. At that time, no real estate taxes had been paid on the Property since 2005, and no payments for water

and sewerage charges had been made since July 2009. As of the petition date, the Debtor owed Oakland County a total of \$3.787 million, consisting of \$1.917 million in delinquent real estate taxes plus \$1.87 million for water and sewerage charges. Two years after filing this case, and after considerable litigation and two extensive mediation sessions, the Debtor was able to confirm a consensual Chapter 11 plan, on February 19, 2016. The confirmed Plan contemplated, among other things, that the Debtor would make a substantial payment to Oakland County, and obtain financing in order to renovate and reopen the Property as a hotel.

The case is now before the Court on a motion by the City of Southfield (the "City") entitled "City of Southfield's Motion to Compel Consummation of Confirmed Plan of Reorganization" (the "Motion").³ The Motion seeks an order requiring the Debtor to deed the Property to the City. According to the City, this relief is appropriate and permitted under the terms of the confirmed Plan, and is necessary for "consummation" of the Plan. The Debtor objected to the Motion.⁴ The Court held a hearing on December 13, 2017, and took the Motion under advisement.

For the reasons stated in this opinion, the Court will deny the Motion.

II. Jurisdiction

This Court has subject matter jurisdiction over this Chapter 11 bankruptcy case and this contested matter under 28 U.S.C. §§ 1334(b), 157(a) and 157(b)(1), and E.D. Mich. LR 83.50(a). This is a core proceeding under 28 U.S.C. § 157(b)(2)(O), because it is a proceeding "affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor ... relationship." This is a core proceeding also because it is a proceeding "arising in" a case under title 11, within the meaning of 28 U.S.C. § 1334(b). Matters falling within this category are deemed to be core proceedings. See *Allard v. Coenen (In re Trans-Indus., Inc.)*, 419 B.R. 21, 27 (Bankr. E.D. Mich. 2009) (citing *Mich. Emp. Sec. Comm'n v. Wolverine Radio Co., Inc.*, 930 F.2d 1132, 1144 (6th Cir. 1991)). As a proceeding that seeks to enforce a confirmed Chapter 11 plan, this is a proceeding "arising in" a case under title 11, because it is a proceeding that "by its very nature, could arise only in bankruptcy cases." See *Allard v. Coenen*, 419 B.R. at 27.

*2 This Court has the authority and jurisdiction to interpret provisions of a confirmed plan to determine whether a party violated that plan. See *Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 151, 129 S.Ct. 2195, 174 L.Ed.2d 99 (2009) (stating that “the Bankruptcy Court plainly had jurisdiction to interpret and enforce its own prior orders.”) (citing *Local Loan Co. v. Hunt*, 292 U.S. 234, 239, 54 S.Ct. 695, 78 L.Ed. 1230 (1934)).

And this dispute is a type over which this Court retained jurisdiction under the confirmed Plan. Paragraph 5(t) of the February 19, 2016 confirmation order states that “[t]he Court retains jurisdiction for the enforcement of the foregoing terms, the confirmed Plan and this Order[.]”⁵ In addition, the confirmed Plan's retention-of-jurisdiction provisions include the following:

This Court shall retain jurisdiction in this matter until the Plan has been fully consummated including, but not limited to, the following reasons and purposes:

B. The determination of all questions and disputes regarding title to the assets of the estate or Debtor, ...

E. The enforcement and interpretation of the terms and conditions of this Plan and the entry of orders in support of confirmation of this Plan.

F. The entry of any order, including injunctions, necessary to enforce the title, rights, and powers of Debtor, the Reorganized Debtor or any party-in-interest, ...⁶

III. Discussion

A. Relief sought by the City's Motion

The Motion seeks entry of an order compelling the Debtor “to execute a deed and bill of sale in favor of the City, transferring the real property commonly known as 16400 J.L. Hudson Drive, Southfield, Michigan (the ‘Property’).”⁷ And in the event the Debtor fails to obey such an order, the Motion seeks an order of this Court directly transferring the Property to the City. The Motion alleges that the relief requested is “consistent with the requirements set forth in the” February 19, 2016 Confirmation Order. This is so, the City alleges, because of events of default by the Debtor under the terms of the Confirmation Order.

The Debtor argues that there has been no event of default that permits any relief in favor of the City. And even if there were any such event of default, the Debtor contends, the City is not entitled to the relief it seeks.

B. Relevant terms of the confirmed Plan

The confirmed Plan contemplated that the Debtor would renovate the Property, and would spend at least \$2.1 million in doing so. But, importantly, the Plan did not set any deadline for the Debtor to spend this amount, or any deadline to complete the renovation. Nor did the Plan set any milestones for the Debtor to make progress in the renovation, with one exception—obtaining site plan approval—discussed below.

The Plan does contain a number of specific requirements that the Debtor had to meet by stated deadlines, of both a monetary nature and a non-monetary nature. For example, the Plan required the Debtor to make certain payments, by specified deadlines, to the Oakland County Treasurer. These totaled approximately \$1.95 million, and were for past-due real estate taxes and water and sewerage charges.⁸ The Debtor has made these payments. The Plan also required the Debtor to obtain site plan approval from the City for its renovation of the Property, no later than 180 days after the Plan's Effective Date.⁹ It is undisputed that the Debtor met this requirement.

*3 The Plan also contains complex, specific procedures and remedies in case of a default by the Debtor in the performance of its Plan obligations. These were negotiated and agreed upon by the City and the Debtor, and are found mainly in a lengthy paragraph in the Confirmation Order, Paragraph 5 with its subparts (a) through (v). The Court quotes this Paragraph 5 at length below, but first will summarize its relevant default and remedy provisions.

In summary, the confirmed Plan provides that if the Debtor defaults in certain ways, the City can serve a written notice of the default on the Debtor, after which notice the Debtor would have a specified period of time to cure the default. (There are different cure periods, depending on the nature of the default.) If the Debtor then failed to cure the default, that uncured default would constitute an “Event of Default.” Such an Event of Default—*i.e.*, a default by the Debtor that was not timely cured after the City gave the Debtor written notice

of it¹⁰—gives the City the right to use certain specific remedies. The remedies that are relevant to the present dispute were two specific, alternative actions by which the City hoped to obtain the transfer of the Property to itself.

The first of these actions, which the Court will refer to as the “Escrow Deed,” is that the City could record a deed to the Property that the Debtor had executed in the City's favor and placed in escrow with a “Title Company” (defined to mean “a title company mutually acceptable to the Debtor and the City”). The City would obtain the release of the deed from the Title Company, so the City then could record the deed, merely by giving “a written certification [to the Title Company] from the City's counsel, attesting to” an Event of Default by the Debtor.¹¹

The second, alternative remedy for an Event of Default, which the Court will refer to as the “Power of Attorney Deed,” was that the City could use a power of attorney that the Debtor had executed, “in favor of the City's Mayor and City Clerk, authorizing them to execute a deed to the Property in favor of the City.” Such power of attorney also was to be held in escrow by the Title Company.¹² This alternative remedy, of using a deed executed by City officials based on a power of attorney given by the Debtor, was a hedge against some risk that the City perceived, that it could not obtain title insurance based on a transfer of the Property to itself using the Escrow Deed remedy described above.¹³

The City says that it seeks the relief in the Motion because it is now informed by a title company that the title company will not issue title insurance if the City uses either the Escrow Deed remedy or the Power of Attorney Deed remedy.

*4 In hindsight, at least, it seems clear that there are simpler and more direct “Event of Default” remedies that the Debtor and the City could have agreed on and provided in their negotiated Confirmation Order, either instead of or in addition to the Escrow Deed and the Power of Attorney Deed remedies. These include saying that if there is an Event of Default—*i.e.*, a default not timely cured after the Debtor is given written notice of it—the Debtor then must execute and deliver to the City a deed to the Property, and that if the Debtor fails to do this, the City can obtain an order from this Court requiring

the Debtor to do it, or an order directly transferring the Property to the City. But these alternative remedies are *not* included in the negotiated Confirmation Order, or anywhere else in the confirmed Plan.

The Escrow Deed and the Power of Attorney Deed remedies that were chosen by the parties are in the nature of self-help, obviously designed by the City to avoid the need, after an Event of Default, of having to depend on the Debtor's cooperation or having to obtain an order from the Court. But the more direct alternative remedies described above could have been provided in the Plan *in addition to* the City's self-help type remedies that were put in the Plan. They were not.

The relevant portions of Paragraph 5 of the Confirmation Order, which include the provisions defining what an “Event of Default” is and what remedies are available for an Event of Default, are these:

- f. On the Effective Date of the Plan, (i) the Debtor shall execute a deed to the Property in favor of the City (the “Deed”), to be held in escrow by a title company mutually acceptable to the Debtor and the City (the “Title Company”), ...
- g. The City shall have the right, but not the obligation to release the Deed from escrow (or to have a deed to the Property, executed pursuant to the Power of Attorney process described below, recorded with the Oakland County Register of Deeds), and record same with the Oakland County Register of Deeds, upon the Title Company's receipt of a written certification from the City's counsel, attesting to (1) the default by the Reorganized Debtor in the payment of taxes, water and/or sewer charges, which has not been cured within ten (10) days of the date of issuance of written notice of same by the City or its counsel, sent to the address of the Debtor for notices, which is care of Steven Z. Cohen, Cohen, Lerner & Rabinovitz, P.C., 26862 Woodward, Suite 200, Royal Oak, MI 48067, and emailed to counsel at bbassel@gmail.com and to Sidney Elhadad at sidney2618@gmail.com (the “Default Notice”); or, (2) the default by the Debtor in one (1) or more of its non-monetary obligations pertaining to the Property for which a cure has been either (i) not been undertaken within thirty-five (35) days after the issuance of a Default Notice, or (ii) undertaken within thirty-five (35) days after the issuance of a Default Notice, but not completed, and substantial efforts to complete the

cure have not been taken for a period of seven (7) or more consecutive days to the extent that efforts need to be undertaken during that time period (together with the events set forth in Paragraph 5k below, each an “Event of Default,” and collectively, “Events of Default”);

h. In addition to the Deed, on the Effective Date, the Debtor shall execute a limited power of attorney (the “Power of Attorney”), in form satisfactory to the City, in favor of the City's Mayor and City Clerk, authorizing them to execute a deed to the Property in favor of the City, in the event title insurance cannot reasonably be obtained by the City for the transfer of the Property contemplated by the Deed. Any assignee of the Debtor shall be bound by the terms of the confirmed Plan, and this Order, and shall execute a document acknowledging such. No assignment shall be made without the assignee signing a substitute deed in lieu of foreclosure (“Substitute Deed”), limited power of attorney (“Substitute Power of Attorney,” and together with the Deed, the Power of Attorney and any Substitute Deed, the “Deed Documents”) and acknowledgement that they are bound by the terms of this Order and the Plan, all in form satisfactory to the City and the Oakland County Treasurer, provided the Deed has not yet been released from escrow. If however, if the Deed has been released from escrow and returned to the Debtor or its assignee, assignee shall not be required to sign a Substitute Deed or Substitute Power of Attorney. Subject to the terms hereof, the Debtor may transfer its assets to a third party without the consent of any other party. The Deed Documents shall be of no further force or effect, and shall be returned to the Debtor or any assignee upon fulfillment of the conditions pursuant to which they are to be returned to the Debtor, as set forth in this Order;

*5 i. On the Effective Date of the Plan, the Debtor shall execute and deliver a first priority mortgage in favor of the City, encumbering the Property (the “City Mortgage”), which the City agrees to discharge upon the fulfillment of the conditions pursuant to which the Deed is to be returned to the Debtor, or to any assignee, as applicable;

....

k. So long as the Deed Documents are being held in escrow, (i) the proceeds of any loan obtained by the Debtor or any assignee, secured by a Third

Party Mortgage, shall be disbursed through the Title Company, pursuant to a construction draw protocol which shall be approved in writing by the City; and, (ii) the recording of a mechanic's or construction lien encumbering the Property, which has not been discharged within fifteen (15) days of the date of recording, shall constitute monetary Event of Default. ;

l. The Deed Documents and any Discharges shall be released from escrow, and returned to the Debtor or its assignee, and the City Mortgage shall be discharged, upon receipt of written confirmation from the City to the Debtor that \$2,100,000.00 or more had been expended in physical improvements to the Property, which improvements have been approved by the City, which approval shall not unreasonably be withheld (the “Approved Expenses”), after the Effective Date. The Approved Expenses shall be confirmed by invoices in form, substance and detail reasonably acceptable to the City, of which no more than \$100,000.00 shall have been incurred for “soft costs,” including but not limited to architectural, environmental and/or engineering fees pertaining to the Property;¹⁴

C. The Court's ruling on the Motion

The Court concludes that it must deny the Motion, for two independent reasons. First, the City has not demonstrated that there has been an “Event of Default” by the Debtor under the terms of the Confirmation Order. Second, even if there had been such an “Event of Default,” the City is not entitled to the relief it requests.

1. There has been no “Event of Default” as defined by the confirmed Plan.

The first reason requiring the Court to deny the City's Motion is that the City has not alleged any set of facts that constitute an “Event of Default,” as that phrase is defined by the confirmed Plan.

The City complains that since the confirmation of the Plan, the Debtor has failed to make sufficient progress on renovating the Property, as contemplated by the Plan. The Debtor disputes that, and has presented evidence regarding all the work done and money spent by the Debtor on its renovation program. And the Debtor argues that in any event, the Debtor has not committed an “Event of Default” under the confirmed Plan.

The City points out that since confirmation, it has issued letters of default to the Debtor on five occasions, ranging in date from March 4, 2016 to September 5, 2017, for various failures by the Debtor to meet its obligations under the Plan. But the City also acknowledges that the Debtor cured all of these defaults.¹⁵ Because the Debtor cured these defaults, the City does not contend that any of these defaults constitutes an “Event of Default” as that term is defined in the Plan. And only an “Event of Default”—meaning a default that is not timely cured after the City gives the Debtor written notice of the default—can trigger the City's right to exercise the Escrow Deed remedy or the alternative Power of Attorney Deed remedy described above.¹⁶

*6 The City acknowledges that the Debtor obtained site plan approval for the Property renovation from the City by the deadline set by the Plan (180 days after the Plan's Effective Date). But that site plan approval was only effective for one year, and it expired on August 18, 2017 without being renewed or extended. And, the City says, the site plan approval expired “without the Debtor having obtained a single permit from the City for repairs or renovation.”¹⁷

The Debtor does not dispute these facts about the site plan approval, but argues, among other things, that (1) the Debtor made a written request to the City on September 6, 2017 for a one-year extension of the site plan approval, which the City has not granted (or formally denied) (this is undisputed); (2) the City's failure to grant the requested extension of the site plan approval is an attempt by the City to “manufacture” a default (the City disputes this), because the City wants the Debtor's renovation project to fail and wants to acquire ownership of the Property; and (3) in any event, the expiration and non-renewal of the site plan approval is not a default under the confirmed Plan, let alone an “Event of Default.”

It is not necessary for the Court to address the first two of these Debtor arguments, in order to decide the Motion. This is because the Court agrees with the third of these arguments. Nothing in the confirmed Plan requires the site plan approval to remain in effect, once it was timely obtained by the Debtor. The expiration and/or non-renewal of the site plan approval is not a default under the confirmed Plan. It therefore cannot become the basis for

there to be an “Event of Default” under the Plan. The Plan must be applied and enforced as written.

At the hearing on the Motion, the Court asked counsel for the City this question—exactly what are the “Event[s] of Default” that have occurred, within the meaning of the confirmed Plan, that permit the City to exercise the Escrow Deed remedy or the Power of Attorney Deed remedy under the Plan, and which the City says permits it to obtain ownership of the Property now by court order? The answer given was in two parts. First, the City argued, based on the Debtor's filed affidavits, that the Debtor has done demolition work on the Property without a permit, in violation of a City ordinance that requires such a permit. As required by the confirmed Plan, the Debtor executed a mortgage in favor of the City, which includes a provision requiring the Debtor to comply with all applicable law, so the Debtor's having done demolition without a permit breached this provision in the mortgage. The City says that this, in turn, was a default under the confirmed Plan, although the City failed to identify what specific provision of the confirmed Plan was violated.

The Debtor responded to this argument during the hearing, in part, by denying that any of the work done by the Debtor was demolition work, so no demolition permit was required by any law. But it is not necessary to decide that question, because, as the Debtor argues and the City admits, the City has never issued any written notice of default to the Debtor for this alleged default under the Plan. For that reason alone, the Court concludes that any such default cannot be considered an “Event of Default” under the Plan.

The City's second answer to the Court's question (what is the “Event of Default” here?) is that under the Debtor's view of the confirmed Plan, the Debtor could obtain the site plan approval for its renovations by the 180-day deadline, as it did, and then could do nothing more to renovate the Property. This, the City says, would be an absurd result.

*7 But this case clearly does not present such an extreme situation. It is clear that the Debtor is not guilty of “doing nothing,” even though the City is not satisfied with the Debtor's progress. Nor has the City demonstrated that it would be without any recourse outside the confirmed Plan, under applicable nonbankruptcy law, to address such an extreme situation of the Debtor doing nothing to

renovate the Property after obtaining site plan approval. To the contrary, during the hearing, for example, the City's counsel alluded to the possible actions of (1) foreclosing on the City's mortgage on the Property; and (2) declaring the building on the Property a nuisance and demolishing it.

And more importantly, the City cannot identify, and this Court cannot find, any language in the confirmed Plan that imposes any specific obligation on the Debtor that the Debtor has violated, other than provisions under which the Debtor defaulted but which defaults the Debtor timely cured. The City and the Debtor negotiated this very detailed Plan at length, including during an 11-hour mediation according to the City's attorney, and agreed to it. That Plan imposes no time limit, deadline, or milestones whatsoever related to the Debtor's renovation of the Property, other than the Debtor obtaining site plan approval within 180 days, which the Debtor did. There is no ambiguity in the Plan about this, and the confirmed Plan must be applied and enforced as written.

What the City really is seeking, in effect, is a *modification* of the confirmed Plan, to put in some unspecified deadlines, time limits, or milestones that are not there. But under [Bankruptcy Code § 1127\(b\)](#), only the Debtor may propose a post-confirmation plan modification. *See* [11 U.S.C. § 1127\(b\)](#) (“The proponent of a plan or the reorganized debtor may modify such plan at any time after confirmation of such plan and before substantial consummation of such plan, ...”); *In re Longardner & Assocs., Inc.*, 855 F.2d 455, 462 n.8 (7th Cir. 1988), *cert. denied*, 489 U.S. 1015, 109 S.Ct. 1130, 103 L.Ed.2d 191 (1989) (citation omitted) (holding, based on [§ 1127\(b\)](#), that “[o]nly the proponent ... of a Chapter 11 reorganization plan can seek to have it modified.”)¹⁸

For these reasons, the Court concludes that there has been no “Event of Default” under the confirmed Plan that would trigger the City's right to exercise either the Escrow Deed remedy or the Power of Attorney Deed remedy. As a result, the City certainly is not entitled to an order requiring the Debtor now to deed the Property to the City. So the Motion must be denied.

2. Even if there was an “Event of Default” under the confirmed Plan, the City would have no right to the relief sought.

The Court also concludes that even if there was an “Event of Default” by the Debtor, such that the City could exercise its Escrow Deed remedy or its Power of Attorney Deed remedy, the City would not be entitled to an order requiring the Debtor now to execute and deliver another deed to the City, transferring the Property to the City. Nor would the City be entitled to an order directly transferring the Property to the City. Such relief clearly is not provided in the confirmed Plan. Rather, the City's remedy under the Plan is limited to the self-help remedies expressly provided in the Plan—the Escrow Deed remedy and the Power of Attorney Deed remedy.

*8 The City argues that the Court can grant it the relief it seeks, even though it is not a remedy provided in the confirmed Plan, based on [11 U.S.C. § 1142](#). That section provides:

(a) Notwithstanding any otherwise applicable nonbankruptcy law, rule, or regulation relating to financial condition, **the debtor** and any entity organized or to be organized for the purpose of carrying out the plan **shall carry out the plan** and shall comply with any orders of the court.

(b) **The court may direct the debtor** and any other necessary party **to execute or deliver** or to join in the execution or delivery of **any instrument required to effect a transfer of property dealt with by a confirmed plan, and to perform any other act**, including the satisfaction of any lien, **that is necessary for the consummation of the plan.**

(Emphasis added).

With respect to [§ 1142\(a\)](#), the relief the City seeks cannot be deemed an order requiring the Debtor to “carry out the plan,” because such relief is not provided for in the confirmed Plan. Similarly, [§ 1142\(b\)](#) does not authorize the Court to add a material term—here a default remedy—that is not provided in the confirmed Plan. This is particularly so where, as here, the confirmed Plan contains very specific, detailed remedies for default. *See* [8 Collier on Bankruptcy ¶ 1142.03\[2\]](#), at 1142–6 (Alan N. Resnick & Henry J. Sommer eds., 16th ed.) (footnote omitted) (“While phrased broadly, [section 1142\(b\)](#) has its limitations and should not offer justification for a plan proponent to seek orders beyond the scope of ... what is called for by the particular chapter 11 plan.”).

Again, what the City really is seeking, in effect, is a *modification* of the confirmed Plan, to put in an additional specific remedy for default that is not there. But as noted above, under [Bankruptcy Code § 1127\(b\)](#), only the Debtor may propose a post-confirmation plan modification.

For these reasons, the City is not entitled to the relief it seeks in the Motion, regardless of whether or not the Debtor has defaulted under the confirmed Plan.

IV. Conclusion

For the reasons stated in this Opinion, the Court will enter an order denying the Motion.

All Citations

--- B.R. ----, 2017 WL 6550492, 65 Bankr.Ct.Dec. 14

Footnotes

- 1 Until recently, this case was assigned to Judge Phillip J. Shefferly. Judge Shefferly recused himself on November 20, 2017, and the case then was assigned to the undersigned judge, by blind draw.
- 2 The facts stated in this paragraph and the next paragraph are based mainly on findings made by Judge Shefferly, after holding an evidentiary hearing, in the opinion filed January 20, 2015 (Docket # 78), at pp. 3–7.
- 3 Docket # 215.
- 4 Docket # 218. And the City filed a Reply in support of the Motion (Docket # 229).
- 5 Stipulated Order Confirming Debtor's [Third Amended Plan] (Docket # 172, the "Confirmation Order") at 6, ¶ 5(t).
- 6 Third Amended Debtor's Combined Disclosure Statement and Plan of Reorganization (Docket # 146, the "Plan") at 15–16, Article VII.
- 7 Motion at 1.
- 8 Confirmation Order at 3, ¶¶ 5(a), 5(b), and 5(c).
- 9 Confirmation Order at 6, ¶ 5(o).
- 10 Although not relevant here, there is one type of default, not alleged by the City in its Motion, that arguably would constitute an "Event of Default" without first requiring the City to issue a written notice of default. Under ¶ 5(k) of the Confirmation Order, quoted below, a "monetary Event of Default" includes "the recording of a mechanic's or construction lien encumbering the Property, which has not been discharged within fifteen (15) days of the date of recording." (Confirmation Order at 5, ¶ 5(k)).
- 11 See Confirmation Order at 4, ¶¶ 5(f) and 5(g).
- 12 See *id.* at 4–5, ¶¶ 5(g), 5(h), 5(k), 5(l).
- 13 See *id.* at 4, ¶ 5(h) (referring to the power-of-attorney alternative as being "in the event title insurance cannot reasonably be obtained by the City for the transfer of the Property contemplated by the Deed."). Counsel for the City acknowledged this at the hearing on the Motion.
- 14 Confirmation Order at 4–6, ¶¶ 5(f), 5(g), 5(h), 5(l), 5(k), 5(l) (underlining in original).
- 15 See Motion at 4–5, ¶¶ 10–13.
- 16 As noted in footnote 10 of this opinion, above, there is one arguable exception to this in the confirmed Plan, but it is not relevant here.
- 17 *Id.* at 4, ¶¶ 14–16.
- 18 The rule is different in the case of a Chapter 11 debtor that is an "individual" (*i.e.*, a human being). In the case of an individual, a post-confirmation plan modification may be requested by "the debtor, the trustee, the United States trustee, or the holder of an allowed unsecured claim." See [11 U.S.C. § 1127\(e\)](#). The Debtor in this case, Shefa, LLC, is not an "individual."

2017 WL 5989170

Only the Westlaw citation is currently available.

United States Bankruptcy Court,
E.D. Michigan, Southern Division.

IN RE: Liza Vulaj WEBSTER, Debtor.

Case Number 17-43099

|
Signed 12/01/2017

Attorneys and Law Firms

[Ethan D. Dunn](#), Maxwell Dunn, PLC, Southfield, MI, for Debtor.

OPINION AND ORDER REGARDING VALUATION METHODOLOGY

[Mark A. Randon](#), United States Bankruptcy Judge

I. INTRODUCTION

*1 A debtor's Chapter 13 plan cannot be confirmed unless it proposes to pay creditors at least what they would receive in a Chapter 7. In most instances, a simple mathematical calculation of a debtor's non-exempt equity (from the values, liens, and exemptions listed on the schedules)-less administrative expenses and costs-suffices. This is an atypical scenario: the Court must determine the proper valuation methodology for Debtor's interest in a hair salon for purposes of her Chapter 13 liquidation analysis.

Debtor says the proper valuation methodology is the business's non-going concern liquidation value of \$29,086.98; Creditors urge the going concern fair market value of \$239,000.00.¹ The Court adopts a third methodology. After the scheduled evidentiary hearing, the Court will determine the business's going concern *forced sale value*, because: (1) Debtor's plan of reorganization is premised on the business's viability as a going concern and proposes to use at least a portion of its net revenue to fund the plan; (2) a hypothetical Chapter 7 trustee would likely obtain approval to operate the viable business for a limited period to obtain a quick sale, where the going concern value greatly exceeds its non-going concern liquidation value; and (3) a hypothetical Chapter 7 trustee would not have time to obtain a fair market value price.

II. BACKGROUND

Debtor owns C.D. Kessler Corporation, a Michigan business now operating as "Mane Connection" hair salon in Farmington Hills ("the Business"). Debtor also works as a hair stylist at the salon. Creditors are the former owners of the Business. Debtor filed Chapter 13 on March 6, 2017. Her Second Amended Schedule I indicates that her sole source of income derives from the Business.

Pre-petition, Creditors sued Debtor in state court over an alleged breach of the Business Purchase Agreement. Related to that litigation, Debtor obtained a detailed written valuation from Michigan Business Advisors ("MBA"). Using the income approach valuation methodology, MBA concluded that the fair market value of the Business as a going concern-discounted 6% for lack of marketability-is \$239,000.00. MBA also estimated the non-going concern liquidation value of the Business (i.e., its cash and equipment minus its liabilities)-discounted 11% for lack of marketability-is \$29,086.98.

Debtor and Creditors disagree as to the proper valuation methodology for the Business as it relates to section 1325(a)(4). Not surprisingly, Debtor requests the Court use the non-going concern liquidation value; Creditors ask for the going concern fair market value. The ultimate value of the Business is critical to the feasibility of Debtor's Chapter 13 plan of reorganization.

III. APPLICABLE LAW AND ANALYSIS

Under 11 U.S.C. § 1325(a)(4):

*2 the court shall confirm a plan if ... the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date[.]

In determining value, the Court must contemplate a hypothetical Chapter 7 liquidation conducted on the effective date of the plan. *In re Lason, Inc.*, 300 B.R. 227, 232 (Bankr. D. Del. 2003) (citing *In re Sierra-Cal*,

210 B.R. 168, 171–72 (Bankr. E.D. Cal. 1997)). “The hypothetical liquidation entails a considerable degree of speculation about a situation that will not occur unless the case is actually converted to a chapter 7.” *In re Lason, Inc.*, 300 B.R. at 233 (quoting *In re Sierra-Cal*, 210 B.R. at 171–72). Thus, a court “need only make a well-reasoned estimate of the liquidation value that is supported by the evidence on the record.” *In re W.R. Grace & Co.*, 475 B.R. 34, 142 (D. Del. 2012).

Although 11 U.S.C. § 704(a)(1) requires a Chapter 7 trustee to “collect and reduce to money ... property of the estate ... and close such estate as expeditiously as is compatible with the best interests of parties in interest [.]” section 721 allows the trustee to “operate the business of the debtor for a limited period, if such operation is in the best interest of the estate and consistent with the orderly liquidation of the estate.” 11 U.S.C. § 721. “The continued operation of a bankrupt’s business is a matter within the discretion of the court.” *In re Richter*, 40 F. Supp. 758, 759 (S.D.N.Y. 1941).

Read together, sections 704 and 721 recognize that, in the context of a business, the sale of the whole may well yield more than the sale of its constituent parts. The Code, therefore, allows a Chapter 7 trustee to at least attempt to sell a viable business as a going concern. Section 326 further provides an incentive for Chapter 7 trustees to maximize the assets of the estate by allowing compensation “upon all moneys disbursed or turned over in the case[.]” 11 U.S.C. § 326(a).

But a Chapter 7 trustee must also close cases as quickly as is practicable, and obtaining a less than fair market value price for a going concern liquidation is often a reasonable-if not expected-outcome. Chapter 7 trustees are advised to operate a business for the shortest practical period, and either “close the case, liquidate the business, or convert the case to chapter 11 within a reasonable time[.]”² This “need for speed” reduces the time for trustee marketing, prospective buyer due diligence, and often results in an

appreciably lower sale price. —particularly when the property is a business.

Here, the Court finds it unlikely that a hypothetical Chapter 7 trustee would engage in the piecemeal sale of the Business’s assets for \$29,086.98. According to MBA’s valuation report, the salon has been in operation for more than 30 years, and its five-year average gross income is \$663,387.00. The more likely trustee approach would be to obtain a quick sale of the Business-as a going concern-through a forced sale (e.g., an auction).

*3 The United States Supreme Court has recognized that forced sales do not enjoy the same market conditions as a sales to obtain “fair market value.” *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 538 (1994). “Everything else being equal, the only difference between a forced sale and an ordinary sale ... is the hurry-up nature of the former.” *In re Economy Lodging Sys. Inc.*, 205 B.R. 862, 865 (Bankr. N.D. Ohio 1997). Forced sale values are, therefore, “simply worth less.” *BFP*, 511 U.S. at 539 (emphasis in original).

Debtor has indicated that the Business is viable as a going concern; her proposed Chapter 13 plan is funded, in part, through net business revenue. In a Chapter 7 liquidation, a hypothetical trustee would likely operate the Business and sell it as a going concern through a forced sale.

IV. CONCLUSION

The Court will determine the forced sale value of the Business following the December 14, 2017, evidentiary hearing.

IT IS ORDERED.

All Citations

Slip Copy, 2017 WL 5989170

Footnotes

- 1 The valuation matters! Estimating a 20 percent reduction for administrative expenses and costs, at \$29,086.98, plan payments would be an additional \$387.83 for 60 months; at \$239,000.00, the additional amount would be \$3,186.67 per month.
- 2 U.S. Department of Justice Executive Office for United States Trustees, Handbook for Chapter 7 Trustees 4–30 (2012), available at https://www.justice.gov/ust/file/handbook_for_chapter_7_trustees.pdf.

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2017 WL 6372463

Only the Westlaw citation is currently available.

United States Bankruptcy Court,
D. New Mexico.

IN RE: The VAUGHAN
COMPANY, REALTORS, Debtor.
Judith A. Wagner, Chapter 11 Trustee
of the bankruptcy estate of The
Vaughan Company, Realtors, Plaintiff,

v.

David Lankford and Lee Ann Lankford, Defendants.

No. 10-10759-j11

Adversary Proceeding No. 12-1139-j

Signed December 12, 2017

Attorneys and Law Firms

James A. Askew, Edward Alexander Mazel, Daniel Andrew White, Askew & Mazel, LLC, Albuquerque, NM, for Plaintiff.

David Lankford, pro se.

Lee Ann Lankford, pro se.

MEMORANDUM OPINION AND ORDER **DENYING MOTION TO VACATE** **VOID JUDGMENTS PER RULE 60(b)(4)**

ROBERT H. JACOBVITZ, United States Bankruptcy Judge

*1 The matter is before the Court on the Motion to Vacate Void Judgments Per Rule 60(b)(4) (“Motion to Vacate”) filed by David and Lee Ann Lankford, *pro se*, on November 30, 2017. *See* Docket No. 155. Judith A. Wagner, Chapter 11 Trustee of the bankruptcy estate of The Vaughan Company, Realtors (the “Trustee”) opposes the Motion to Vacate. *See* Judgment Creditor's Response in Opposition to Motion to Vacate Void Judgments per Rule 60(b)(4)—Docket No. 156.

The Motion to Vacate is another in a series of efforts the Lankfords have undertaken to overturn a summary

judgment this Court entered against them in this adversary proceeding. The Lankfords continue to assert that 1) the chapter 11 trustee and her counsel acted improperly in The Vaughan Company, Realtors' Chapter 11 bankruptcy case by deliberately and fraudulently miscalculating the Trustee's claims against them; and 2) this Court acted improperly in connection with a discovery issue and by granting summary judgment.

The Lankfords previously filed a motion to reopen this adversary proceeding on April 24, 2017 so that they could file a motion to vacate the summary judgment. *See* Docket No. 149. On June 7, 2017, this Court entered a 17-page Memorandum Opinion and Order denying the Lankfords' request to reopen, concluding that the reasons the Lankfords gave in support of vacating the summary judgment were without merit. *See* Docket No. 153. Because the Lankfords' arguments had no merit, the Court concluded that reopening this adversary proceeding would be futile. *Id.* Even though this adversary proceeding remains closed, the Lankfords filed the Motion to Vacate anyway, raising largely the same arguments the Court found to be without merit in its June 7, 2017 Memorandum Opinion. Nevertheless, instead of striking the Motion to Vacate, the Court will consider the Motion to Vacate, and, for the reasons set forth below, denies the Motion to Vacate.

Procedural Background.

The Lankfords unwittingly invested in a Ponzi scheme perpetrated by Douglas Vaughan and his company, the Vaughan Company Realtors (“VCR”). Judith Wagner was appointed Chapter 11 trustee (“Trustee”) in the VCR bankruptcy case. The Trustee commenced adversary proceedings against a number of investors in the Ponzi scheme, including the Lankfords, seeking to clawback funds VCR paid them in connection with the Ponzi scheme. This Court issued a memorandum opinion and entered summary judgment in favor of the Trustee and against the Lankfords (“Summary Judgment”) on May 27, 2014 (Docket Nos. 99 and 100). The Lankfords did not appeal the Summary Judgment.

In addition to the current Motion to Vacate, the Lankfords have filed several motions with this Court. They commenced actions in the United States District Court for the District of New Mexico (“District Court”),

and prosecuted appeals. The Lankfords filed all of the motions, actions in District Court, and the appeals in an effort to overturn the Summary Judgment and/or assert claims against the Trustee and her counsel for fraudulently miscalculating the amount of the claim against the Lankfords and/or assert misconduct by this Court, including:

*2 1. Motion for leave to file counterclaim against the Trustee and her counsel for alleged misconduct, filed November 12, 2013. *See* Docket No. 75. This Court denied the motion in a memorandum opinion and order entered February 14, 2014. *See* Docket No. 81.

2. Motion for leave to file a claim against Judith Wagner, Chapter 11 Trustee for misconduct, filed June 30, 2014. *See* Docket No. 103. This Court denied the motion in a memorandum and opinion entered November 26, 2014. *See* Docket No. 110.

3. Motion to vacate final summary judgments filed December 1, 2014. *See* Docket No. 114. This Court denied the motion in a memorandum opinion and order entered December 11, 2014. *See* Docket No. 116. The Lankfords appealed that decision to the District Court. *See* District Court Case No. 1:14-cv-01153-RB/CG. On appeal, on June 4, 2015 the Magistrate Judge issued a 19-page Proposed Findings and Recommended Disposition (“PFRD”) determining that the appeal was without merit. *See* District Court Case No. 1:14-cv-01153-RB/CG—Docket No. 34. In a 26-page opinion, on August 25, 2015 the District Court adopted the Magistrate Judge's PFRD and dismissed the appeal after independently reviewing the issues in detail. *See* District Court Case No. 1:14-cv-01153-RB/CG—Docket No. 38.

4. Complaint commencing an action in the District Court against the Trustee and her counsel alleging they committed misconduct. *See* District Court Case No. 1:15-cv-1013-JCH/LF. The District Court dismissed the complaint, and the Lankfords appealed to the Tenth Circuit. In an opinion issued April 7, 2017, the Tenth Circuit affirmed the District Court. *See Lankford v. Wagner*, 853 F.3d 1119 (10th Cir. 2017).

5. Motion to reopen this adversary proceeding due to fraud on the court on April 24, 2017 so they could file a motion to overturn the Summary Judgment. *See* Docket No. 149. This Court denied the motion in a Memorandum

Opinion and Order entered June 7, 2017. *See* Docket No. 153.

6. Complaint commencing an action in the District Court against the United States Department of Justice on June 21, 2017, which remains pending. *See* District Court Case No. 1:17-cv-668 WJ/GBW. In an Order to Show Cause entered November 17, 2017, the District Court characterized the issues raised by the Complaint as centering on the Lankfords' “attempt to (1) overturn the bankruptcy court's summary judgment, or (2) assert claims against the Trustee for alleged misconduct in the adversary proceeding.” *See* District Court Case No. 1:17-cv-668 WJ/GBW, Docket No. 22. The Order to Show Cause imposes a deadline of December 7, 2017 for the Lankfords to file written objections to proposed filing restrictions that would enjoin them from filing new lawsuit in the District Court or filing pleadings with this Court without satisfying certain requirements specified in the order. *Id.*

The Lankfords filed their Motion to Vacate with this Court on November 30, 2017, a week in advance of their December 7 deadline in District Court Case No. 1:17-cv-668 WJ/GBW to object to the filing restrictions recited in the Order to Show Cause. They filed an objection to the Order to Show Cause in the District Court on the December 7 deadline. Since then, the District Court entered an order enjoining the Lankfords from filing pleadings or motions in the District Court or in this Court that relate to the subject of their existing or prior lawsuits in those courts. *See* 1:17-cv-668 WJ/GBW, Docket No. 24.

DISCUSSION

*3 The Lankfords filed the Motion to Vacate under Rule 60(b)(4) more than three years after the entry of the Court's Memorandum Opinion and Judgment granting summary judgment in favor of the Trustee. Rule 60(b)(4), however, is not subject to the one-year limitation applicable to subsections (1), (2), and (3) of Rule 60. *See* Fed. R. Civ. P. 60(c) (imposing a one year time limit for Rule 60(b) motions based on subsections (1), (2), and (3) and a “reasonable time” limit for other subsections); *Orner v. Shalala*, 30 F.3d 1307, 1310 (10th Cir. 1994) (“Unlike its counterparts, Rule 60(b)(4), which provides relief from void judgments, is not subject to any

time limitation.”) (internal quotation marks and citation omitted). A party may be relieved from a judgment under [Rule 60\(b\)\(4\)](#) if the judgment is void. *See Fed. R. Civ. P. 60(b)(4)* (“On motion and just terms, the court may relieve a party ... from a final judgment” if “the judgment is void.”).

“A judgment is not void merely because it is erroneous. It is void only if the court that rendered it lacked jurisdiction of the subject matter, or of the parties, or if it acted in a manner inconsistent with due process of law.” 11 Charles Alan Wright, Arthur R. Miller, and Mary Kay Kane, *Federal Practice and Procedure* § 2862 at 434–41 (2012). *See also, United States v. Buck*, 281 F.3d 1336, 1344 (10th Cir. 2002) (same). The Lankfords contend the Summary Judgment is void because the Court acted in a manner inconsistent with due process of law. They base their due process claim on the following: 1) what transpired at a hearing held August 6, 2013, and the alleged falsification of the minutes from that hearing; 2) alleged bias and corruption by the Court and by the Trustee and her counsel; 3) alleged willful and fraudulent errors by the Trustee in the calculation of the Lankfords' net winnings; and 4) alleged deprivation of their day in court as a result of the grant of summary judgment. These arguments are the same arguments the Lankfords have unsuccessfully asserted multiple times in multiple motions and appeals.

Specifically, this Court, and/or the United States District Court, have already addressed and rejected the following arguments:¹

1. The Trustee fraudulently calculated the net winnings;
2. Entry of the Summary Judgment based on the Trustee's calculations constituted a fraud on the Court;
3. Material facts should have prevented the Court from granting summary judgment;
4. The Court is corrupt, biased and abused its discretion;
5. The Lankfords were deprived of due process;
6. The Court's Order and minutes did not accurately reflect the outcome of the August 6, 2013 hearing;
7. The calculation of net winnings should have taken into account Ms. Lankford's IRA loss; and

8. The Trustee committed fraud on the Lankfords and the Court.

“Generally, once a court decides an issue, the same issue may not be relitigated in subsequent proceedings in the same case.” *Wessel v. City of Albuquerque*, 463 F.3d 1138, 1143 (10th Cir. 2006) (internal quotation marks and citation omitted). *See also, Entek GRB, LLC v. Stull Ranches, LLC*, 840 F.3d 1239, 1240 (10th Cir. 2016) (explaining that “[l]aw of the case doctrine permits a court to decline the invitation to reconsider issues already resolved earlier in the life of a litigation.”). The Court declines to revisit the same issues the Lankfords raised in the Motion to Vacate that this Court previously addressed in its Memorandum Opinion and Order entered June 7, 2017 (Docket No. 153) at pp. 6–16. In addition, for the reasons previously explained in the memorandum opinions and orders identified at footnote 1, *supra*, and in this Court's Memorandum Opinion and Order accompanying the grant of summary judgment entered May 27, 2014 (Docket No. 99), these issues are without merit.

*4 The Lankfords raise one factual issue in the Motion to Vacate that appears not to have been previously addressed. They complain about the Court having entered an order sealing certain documents from public view and ascribe a nefarious motive to that ruling. On October 4, 2013, the Trustee filed a Motion to File Under Seal a Notice of Errata and an exhibit to the Trustee's motion for summary judgment asking the Court to seal those documents because they contained confidential financial account information. *See* Docket No. 62. The Court entered an Order Granting Motion to File Under Seal (Docket No. 63) authorizing the Trustee to file those documents under seal because they contained confidential financial account numbers. The sealing order was entered to protect the holders of the accounts, including Mr. Lankford. The Lankfords did not complain about the sealing order at the time. The Court finds the Lankfords' argument based on the sealing order to be without merit.

Finally, the Lankfords assert that the Court lost jurisdiction based on its alleged bias and should have recused even before it entered summary judgment against them. Though couched in terms of [Rule 60\(b\)\(4\)](#) and jurisdiction, this argument is not new. The Court has already addressed the Lankfords' claims of bias. Adverse

rulings alone are insufficient to show improper bias. See *Green v. Branson*, 108 F.3d 1296, 1305 (10th Cir. 1997) (“adverse rulings cannot in themselves form the appropriate grounds for disqualification.”) (internal quotation marks and citation omitted). Further, as the Court previously determined, entry of summary judgment against the Lankfords without a trial comported with the requirements of due process. See Memorandum Opinion and Order Denying Motion to Reopen Adversary Proceeding—Docket No. 153, p. 13 (“Granting summary judgment without a trial satisfies a party’s right to be heard when the decision is made on the court’s review of the briefs and supporting affidavits and other evidence

submitted to the court Entry of the Judgment without a trial did not deprive the Lankfords’ due process rights.”) (citing *Carter v. Cybertech Intern.*, 21 Fed. Appx. 818, 821 (10th Cir. 2001)). The Lankfords’ argument that the Court’s alleged bias renders the summary judgment void is without merit.

WHEREFORE, IT IS HEREBY ORDERED, that the Motion to Vacate is DENIED.

All Citations

Slip Copy, 2017 WL 6372463

Footnotes

- 1 See Memorandum Opinion and Order entered February 14, 2014—Docket No. 81; Memorandum Opinion and Order entered November 26, 2014—Docket No. 110; Memorandum Opinion and Order entered December 11, 2014—Docket No. 116; Memorandum Opinion and Order entered June 7, 2017—Docket No. 153; Magistrate Judge’s PFRD entered June 4, 2015 in Case No. 1:14-cv-01153-RB/CG—Docket No. 34; District Court’s Order entered August 25, 2015 in Case No. 1:14-cv-01153-RB/CG—Docket No. 38; and District Court’s order entered September 14, 2016 in Case No 1:15-cv-01013-JCH/LF—Docket No.56.

876 F.3d 1076

United States Court of Appeals,
Eleventh Circuit.IN RE: Richard D. HORNE,
Patricia Nelson Horne, Debtors,
Mary Beth Mantiplly, Plaintiff-Appellant,

v.

Richard D. Horne, Defendant,
Patricia Nelson Horne, Defendant-Appellee.

No. 16-16789

|
(December 5, 2017)**Synopsis**

Background: Order was entered by the United States Bankruptcy Court for the Southern District of Alabama, No. 11-bkc-00096-WWS, denying attorney's motion to recuse bankruptcy judge from presiding over damages litigation arising out of attorney's willful violation of automatic stay, and attorney appealed. The District Court, No. 1:13-cv-00258-CB-B, [Charles R. Butler, Jr., J., 2014 WL 1370151](#), affirmed, but denied debtors' motion for award of appellate attorney fees, and both parties appealed. The Court of Appeals, [630 Fed.Appx. 908](#), affirmed in part and remanded in part. On remand, the District Court, Butler, J., [2016 WL 5661937](#), awarded appellate attorney fees as element of damages arising out of stay violation, and attorney appealed.

Holdings: The Court of Appeals, [May](#), District Judge, sitting by designation, held that:

[1] as matter of first impression, damages provision of bankruptcy statute governing automatic stay and liability for willful violations thereof, which provides that any individual injured by willful violation of stay “shall recover actual damages, including costs and attorneys' fees,” was broad provision that permitted recovery of attorney fees incurred, not just in stopping the stay violation, but in prosecuting a damages action and defending damages judgment on appeal;

[2] district court did not abuse its discretion when, as additional damages for attorney's willful violation of automatic stay, it awarded debtors reasonable attorney

fees for their successful defense on appeal of earlier damages award; and

[3] debtors were entitled to an additional \$30,559.98 for time and expenses of their attorney in connection with subsequent appeal to the Court of Appeals.

Affirmed.

***1078** Appeal from the United States District Court for the Southern District of Alabama, D.C. Docket No. 1:13-cv-00258-CB-B, BKCY No. 11-bkc-00096-WWS

Attorneys and Law Firms

[Thomas M. O'Hara](#), O'Hara Law Firm, LLC, DAPHNE, AL, [Thomas R. McAlpine](#), Whitfield & McAlpine, PC, MOBILE, AL, for Plaintiff-Appellant.

[Suzanne Paul](#), [Charles Michael Smith](#), Paul & Smith, PC, MOBILE, AL, [Marion Everett Wynne, Jr.](#), Wilkins Bankester Biles & Wynne, PA, FAIRHOPE, AL, for Defendant-Appellee.

Before [ED CARNES](#), Chief Judge and [BLACK](#), Circuit Judge, and [MAY](#), * District Judge.

Opinion

[MAY](#), District Judge:

Mary Mantiplly appeals the district court's order awarding Richard and Patricia Horne¹ the attorneys' fees and costs that they incurred because of her unsuccessful appeal of the damages award to the Hornes for her violation of the Bankruptcy Code's automatic stay provision. This case involves an issue of first impression in this Circuit: whether the Bankruptcy Code authorizes payment of attorneys' fees and costs incurred by debtors in successfully pursuing an action for damages resulting from the violation of the automatic stay and in defending the damages award on appeal. After careful consideration, and with the benefit of oral argument, we affirm the district court.

I. BACKGROUND

The Hornes filed for Chapter 7 bankruptcy on January 10, 2011. [In re Horne](#), 630 Fed.Appx. 908, 909 (11th Cir. 2015) (per curiam) (unpublished). They were discharged from bankruptcy on May 10, 2011. [Id.](#) The filing of the Hornes' bankruptcy triggered an automatic stay of any litigation against them under [11 U.S.C. § 362\(a\)\(1\)](#). [Id.](#) Despite the stay, however, *1079 Ms. Mantiplay—an attorney—filed a civil action on behalf of her clients against Mr. Horne in state court. [See id.](#) And even after being informed of the stay, Ms. Mantiplay repeatedly refused to voluntarily dismiss the action she had filed. [Id.](#) Eventually it was dismissed in November 2011. [Id.](#)

The Hornes filed a motion in the bankruptcy court seeking damages for Ms. Mantiplay's violation of the automatic stay under [Section 362\(k\)\(1\)](#). [Id.](#) The bankruptcy court awarded the Hornes \$81,714.31 in damages, including \$41,714.31 in attorneys' fees. [Id.](#) Ms. Mantiplay appealed that decision to the district court, which affirmed and also awarded the Hornes an additional \$34,551.28 in attorneys' fees incurred in the appeal of the damages award. [Id.](#)

Ms. Mantiplay then filed two identical motions in the bankruptcy court and the district court seeking the bankruptcy judge's recusal.² [Id.](#) at 910. The bankruptcy court denied Ms. Mantiplay's recusal motion. [Id.](#) Ms. Mantiplay appealed that decision to the district court, which affirmed but denied the Hornes' motion for attorneys' fees incurred in defending the appeal of the recusal order. [Id.](#)

Ms. Mantiplay appealed the district court's affirmance of her denied recusal motion, and the Hornes cross-appealed the district court's denial of their motion for attorneys' fees incurred defending the recusal order on appeal to the district court. [Id.](#) This Court affirmed in part and remanded. [Id.](#) at 913–14. First, we affirmed the district court's conclusion that the bankruptcy judge's recusal was not required in this case. [Id.](#) at 910–12. Second, we remanded for the district court to either award the Hornes attorneys' fees under the mandatory fees provision of [Section 362\(k\)](#), or explain why the recusal motion did not involve litigation over the stay violation and thus did not entitle the Hornes to attorneys' fees. [Id.](#) at 912–13. On remand, the district court found that the Hornes' requested attorneys' fees were indeed mandatory and awarded an additional \$14,918.60 to the Hornes.

Meanwhile, Ms. Mantiplay petitioned for a writ of certiorari with the Supreme Court to review this Court's decision affirming the denial of her recusal motion. The Hornes filed a brief in response. The Supreme Court denied Ms. Mantiplay's petition on June 27, 2016.

The Hornes then filed motions with this Court for attorneys' fees incurred in defending against Ms. Mantiplay's appeal to the Eleventh Circuit as well as her petition for certiorari (collectively, the “appellate fees”). We *sua sponte* transferred those motions to the district court to consider in the first instance whether the Hornes were legally entitled to their requested appellate fees and, if so, whether they were reasonable. The district court found that the Hornes were entitled to the appellate fees and that they were reasonable. In determining that the requested appellate fees were reasonable, the district court pointed out that the amount of fees and costs, while large, was reasonable given the time and labor required to defend Ms. Mantiplay's many appeals. The district court also found that the skill and experience required of counsel in defending the appeals, the favorable results obtained, and the undesirability of the case—which required undertaking legal action against a fellow lawyer—supported finding the requested attorneys' fees to be reasonable as well. Based on these findings, the district court awarded the Hornes appellate fees and costs of \$92,495.86. This appeal followed.

*1080 II. APPELLATE FEES

[1] [2] We first address Ms. Mantiplay's main argument that the Hornes were not entitled to appellate fees as a matter of law under [Section 362\(k\)\(1\)](#). She contends that the statute provides mandatory fees for damages and attorneys' fees incurred in ending a stay violation, but not attorneys' fees incurred in pursuing a damages award nor fees incurred in defending that award on appeal. We review *de novo* an interpretation of the Bankruptcy Code, which is a question of law. [Pollitzer v. Gebhardt](#), 860 F.3d 1334, 1338 (11th Cir. 2017).

As set out above, once the Hornes filed for Chapter 7 bankruptcy, an automatic stay took effect. [See 11 U.S.C. § 362\(a\)\(1\)](#). It is undisputed that Ms. Mantiplay willfully violated this automatic stay. When willful violations occur, [Section 362\(k\)\(1\)](#) provides that:

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

[Id.](#) § 362(k)(1) (emphasis added).

Ms. Mantiply relies primarily on the Supreme Court's recent decision in [Baker Botts L.L.P. v. ASARCO LLC](#), 576 U.S. —, 135 S.Ct. 2158, 192 L.Ed.2d 208 (2015), which warned that courts should not depart from the American Rule—“the rule that each side must pay its own attorney's fees”—absent explicit statutory authority. [Id.](#) at 2163–64. In [ASARCO](#), the Supreme Court held that Section 330(a)(1) of the Bankruptcy Code, which states that a bankruptcy court “may award ... reasonable compensation for actual, necessary services rendered by” certain types of professionals (one of which is attorneys), was not a fee-shifting statute. [Id.](#) (quoting 11 U.S.C. § 330(a)(1)). The Supreme Court reasoned that the statute's plain language indicated that an attorney could receive payment for fees incurred in service of a bankruptcy estate, but was not explicit enough to extend to time spent litigating a fee application against an administrator of a bankruptcy estate. [See id.](#) at 2164–65. The latter, the Supreme Court explained, could not fall within Section 330(a)(1)'s text, which required service rendered to the estate. [Id.](#) at 2165.

In stark contrast to Section 330(a)(1), Section 362(k)(1) of the Bankruptcy Code specifically and explicitly contemplates at least some departure from the American Rule by including “costs and attorneys' fees” in the damages due to an individual injured by a willful violation of an automatic bankruptcy stay. 11 U.S.C. § 362(k)(1); [see also Jove Eng'g, Inc. v. IRS](#), 92 F.3d 1539, 1559 (11th Cir. 1996) (describing the attorneys' fees imposed by Section 362(k)(1) as “mandatory”). Even Ms. Mantiply concedes that Section 362(k) authorizes a departure from the American Rule to the extent that it shifts fees incurred in ending a violation of an automatic stay. But we have never had occasion to examine the legal question Ms. Mantiply's appeal raises—that is, the precise scope of the fees. Relying on [ASARCO](#), Ms. Mantiply argues we must read Section 362(k) narrowly against the background

presumption of the American Rule and allow attorneys' fees to be shifted under this statute only when they are incurred in ending the stay violation, not in pursuing the damages remedy or defending the judgment on appeal.

[3] We start with the text. Section 362(k)(1) specifically provides for the recovery of “actual damages, including costs and attorneys' fees.” 11 U.S.C. § 362(k). This Court has recognized that “[u]nlike *1081 general, special, and compensatory damages, [] ‘actual damages’ has no consistent legal interpretation.” [Fitzpatrick v. IRS](#), 665 F.2d 327, 329 (11th Cir. 1982), [abrogated on other grounds by Doe v. Chao](#), 540 U.S. 614, 124 S.Ct. 1204, 157 L.Ed.2d 1122 (2004). However, our interpretive task with regard to Section 362(k)(1) is made easier by the fact that Congress added “including costs and attorneys' fees” to the term “actual damages.” The Supreme Court has instructed that “[i]t is our duty to give effect, if possible, to every clause and word of a statute.” [United States v. Menasche](#), 348 U.S. 528, 538–39, 75 S.Ct. 513, 99 L.Ed. 615 (1955) (quotation omitted). In keeping with this duty, we read the phrase “including costs and attorneys' fees” as broadening the notion of actual damages beyond the immediate injury incurred in ending the violation of a stay. Based on the text of Section 362(k)(1), it is clear that Congress intended that the word “including” serve as a word of enlargement. [See Include](#), [Black's Law Dictionary](#) 524 (“‘Including’ within statute is interpreted as a word of enlargement or of illustrative application....”).

This interpretation accords with our precedent. In [In re Rosenberg](#), 779 F.3d 1254 (11th Cir. 2015), we recently examined another fee-shifting provision of the Bankruptcy Code, Section 303(i)(1), which authorizes an award of “a reasonable attorney's fee” to any debtor who is forced into bankruptcy by someone who improperly files an involuntary petition. [Id.](#) at 1259–60. This Court held that based upon the text of Section 330(i)(1) “nothing ... precludes appellate fees or limits fees to only those incurred before the date of dismissal.” [Id.](#) at 1265.

Similarly, we hold that nothing in the text of Section 362(k)(1) limits the scope of attorneys' fees to solely ending the stay violation. Congress made sure to add that Section 362(k)(1)'s definition of “actual damages” includes costs and attorneys' fees. [See](#) 3 Alan N. Resnick & Henry J. Sommer, [Collier on Bankruptcy](#) ¶ 362.12[3] (16th ed. 2014) [hereinafter [Collier](#)] (“Attorneys' fees incurred in prosecuting an action to obtain full relief under the

statute, including any entitlement to actual and punitive damages, is as much a part of the debtor's 'actual damages' as those incurred in stopping the stay violation.”). Congress did not say those costs and attorneys' fees were limited to ending the stay violation, but rather spoke to a full recovery of damages including fees and costs incurred from violating a stay. This explicit, specific, and broad language permits the recovery of attorneys' fees incurred in stopping the stay violation, prosecuting a damages action, and defending those judgments on appeal.

[4] Further, the only other circuit to have examined this question in detail reached the same conclusion we do.³ See [In re Schwartz-Tallard](#), 803 F.3d 1095, 1101 (9th Cir. 2015) (en banc). The Ninth Circuit, sitting en banc, held in a 9-1 decision that “nothing in the statute [] suggests Congress intended to cleave litigation-related fees into two categories, one recoverable by the debtor, the other not.” [Id.](#) at 1099. Instead, the court pointed out that the phrase “including costs and attorneys' fees” contained “no limitation on the remedy for which the fees were incurred.” [Id.](#) In other words, the Ninth Circuit said, *1082 Ms. Mantiplay's interpretation “would have to read into the statute limiting language—something like, ‘including costs and attorneys' fees incurred to end the stay violation’—that is simply not present.” [Id.](#) As the Ninth Circuit pointed out, there is no such textual limitation on the scope of attorneys' fees. [Id.](#) And adding such a limitation would eliminate the effectiveness of [Section 362\(k\)\(1\)](#)'s remedy. See [Collier ¶ 362.12\[3\]](#) (“[The] ‘private attorney general’ purpose of [section 362\(k\)\(1\)](#) is undermined if debtors in bankruptcy, having significant constraints on their ability to pay for legal representation, are not able to recover attorneys' fees for their entire representation in a stay enforcement proceeding.”). Like other fee-shifting statutes, this one is aimed at “making it possible for persons without means to bring suit to vindicate their rights.” See [Perdue v. Kenny A. ex rel. Winn](#), 559 U.S. 542, 559, 130 S.Ct. 1662, 176 L.Ed.2d 494 (2010); see also Antonin Scalia & Bryan A. Garner, [Reading Law: The Interpretation of Legal Texts](#) § 4 (2012) (“A textually permissible interpretation that furthers rather than obstructs the document's purpose should be favored.”).

This result also makes sense in the context of bankruptcy litigation. The lion's share of damages from violations of automatic stays are typically attorneys' fees. Most debtors are not in the financial position to afford an action to

prosecute damages and, even if they could, limiting fees to those incurred in ending the stay violation would be too small to justify the expensive litigation that may follow. See [Schwartz-Tallard](#), 803 F.3d at 1100. Rather than draining the limited funds in the bankruptcy estate and jeopardizing creditors' recoveries, the party wrongfully violating the automatic stay and causing the resulting damage awards is the one required to shoulder these fees. See [id.](#) That is all too clear in a case like this, in which Ms. Mantiplay has appealed each and every adverse order to the district court and then to this Court time and again.

Having determined that [Section 362\(k\)\(1\)](#)'s award of attorneys' fees apply to prosecuting damages actions, we have no trouble concluding that defending that judgment on appeal is also within the statute's fee-shifting authorization. This Court has held many times that fee-shifting statutes—which [Section 362\(k\)](#) undoubtedly is—entitle parties not only to fees in the court of first instance, but also to appellate fees incurred in defending the judgment. See [In re Rosenberg](#), 779 F.3d at 1265; [Thompson v. Pharmacy Corp. of Am., Inc.](#), 334 F.3d 1242, 1245 (11th Cir. 2003) (holding that “an attorney may recover fees for time spent litigating the award of a [11 U.S.C. §] 1988 fee”); [Finch v. City of Vernon](#), 877 F.2d 1497, 1508 (11th Cir. 1989) (holding that a plaintiff who prevailed on a 42 U.S.C. § 1983 claim was “entitled to an award of attorney's fees incurred [on] appeal”); see also [Comm'r, INS v. Jean](#), 496 U.S. 154, 161–62, 110 S.Ct. 2316, 110 L.Ed.2d 134 (1990) (noting that fee-shifting statutes treat “a case as an inclusive whole, rather than as atomized line-items”).⁴

III. OTHER ISSUES

[5] [6] In the alternative, Ms. Mantiplay raises three other challenges to the district court's award of attorneys' fees. We review *1083 for an abuse of discretion the district court's attorneys' fee award. [Grant v. George Schumann Tire & Battery Co.](#), 908 F.2d 874, 878 (11th Cir. 1990). The district court abuses its discretion when it fails to apply proper legal standards, fails to follow proper procedures, or bases its award on findings of fact that are clearly erroneous. [Id.](#) Each of Ms. Mantiplay's arguments is addressed in turn.

A. APPELLATE RULES COMPLIANCE

[7] First, Ms. Mantiplay argues that the Hornes are not entitled to appellate fees because their motions to this Court—which we transferred to the district court—did not comply with [Federal Rule of Appellate Procedure 27](#) nor [Eleventh Circuit Rule 27-1\(a\)\(3\)](#). Both these rules require that a motion “state with particularity the ground for the motion, the relief sought, and the legal argument necessary to support it” and that “[a]ny affidavit or other paper necessary to support a motion ... be served and filed with the motion.” [Fed. R. App. P. 27\(a\)\(2\)](#); [see 11th Cir. R. 27-1\(a\)\(3\)](#) (“A motion shall be accompanied by ... supporting documentation required by [FRAP 27](#), including relevant materials from previous judicial or administrative proceedings in the case or appeal.”). Specifically, Ms. Mantiplay contends that the Hornes' motions did not comply with these rules because they incorporated relevant arguments and supporting documentation by reference. Ms. Mantiplay also points out that the Hornes filed an amended motion for appellate fees with this Court without first asking for leave to amend.

The district court recognized that both parties “assert[ed] various technical objections to the content and timing of the motions and responses,” but chose “to avoid becoming mired in that minutiae,” opting instead to address the motions' substantive issues. Our review of the Hornes' motions reveals that they included copies of the relevant documentation, and Ms. Mantiplay does not argue that she suffered any prejudice whatsoever from the alleged oversights. On this record, we cannot say the district court abused its discretion.

B. PROOF OF DAMAGES

[8] Next, Ms. Mantiplay argues that the Hornes failed to meet their burden of proof in establishing damages by a preponderance of the evidence. Primarily, Ms. Mantiplay points out that the Hornes did not file a copy of their retainer agreement nor any affidavit stating that the fee statements attached to their motions were actually owed to their counsel.

Bankruptcy courts in this circuit uniformly have held that the debtor has the burden of proving damages from an automatic stay violation by a preponderance of the evidence. [See, e.g., In re Campbell, 553 B.R. 448, 455 \(Bankr. M.D. Ala. 2016\)](#). Our review of the record shows that each of the Hornes' motions attached affidavits from their counsel attesting that they served as counsel for the Hornes and kept contemporaneous record of

their services rendered, including the time expended and expenses incurred in defending the Hornes. The billing statements attached to each affidavit provide an itemized list of these services, with the time spent on each, as well as expenses. Additionally, the Hornes' motions incorporate by reference earlier-filed affidavits from disinterested legal experts that attest the hourly rates charged by the Hornes' counsel were consistent with the prevailing market rates in their local legal community. On this record, the district court did not abuse its discretion.⁵

*1084 C. REASONABLENESS OF FEE AWARD

[9] [10] [11] Ms. Mantiplay last argues that the fee award was not reasonable. An award of attorneys' fees is governed by a reasonableness standard using the lodestar approach. [See Grant, 908 F.2d at 878](#) (applying the lodestar approach to an analogous provision of the Bankruptcy Code); [In re Parker, 419 B.R. 474, 477–78 \(Bankr. M.D. Ala. 2009\)](#) (applying the lodestar approach to [Section 362\(k\)\(1\)](#)). Under this approach, a court must “(1) determine the nature and extent of the services rendered; (2) determine the value of those services; and (3) consider the factors in [Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 \(5th Cir. 1974\)](#) [6] and explain how they affect the award.” [Grant, 908 F.2d at 877–78](#). Those factors are as follows:

- (1) the time and labor required,
- (2) the novelty and difficulty of the legal questions,
- (3) the skill required to perform the legal service properly,
- (4) the preclusion of other employment by the attorney due to acceptance of the case,
- (5) the customary fee for similar work in the community,
- (6) whether the fee is fixed or contingent,
- (7) time limitations imposed by the client or the circumstances,
- (8) the amount involved and the results obtained,
- (9) the experience, reputation, and ability of the attorney,
- (10) the undesirability of the case,
- (11) the nature and length of the professional relationship with the client, and
- (12) awards in similar cases.

[Id.](#) at 878 n.9.

[12] Ms. Mantiplay specifically argues that the district court failed to exercise proper “billing judgment” by not considering the proportionality of the requested appellate fees to the results obtained in bankruptcy court.⁷ Our review of the record shows otherwise.

In considering the Hornes' motions for appellate fees, the district court relied on the affidavits and billing statements attached to them to reach its fees figure. The district court applied the correct legal standard, and first used these documents to ascertain the nature and value of the services rendered. The court then employed the [Johnson](#) factors, and made findings *1085 as to each relevant factor. Specifically, the district court found that although the requested \$92,495.86 in appellate fees was a large figure, it was not unreasonable given the time and labor involved in the appeals, which it found were “unnecessarily complicated” by Ms. Mantiplay's many appeals. The district court also pointed to the skill and experience required of counsel in this case; the favorable results counsel achieved at each step of the litigation; and the undesirability of litigating against a fellow lawyer. The court found that the remaining [Johnson](#) factors were not relevant in this case. And importantly, the district court addressed Ms. Mantiplay's objections to the fee motions. See [Am. Civil Liberties Union of Ga. v. Barnes](#), 168 F.3d 423, 428 (11th Cir. 1999) (“[W]here specific objections are made a court's order should consist of more than conclusory statements.”). Based on these findings, the district court determined that the Hornes' requested appellate fees were reasonable.

[13] The Supreme Court has instructed that “[a] request for attorney's fees should not result in a second major litigation.” [Hensley v. Eckerhart](#), 461 U.S. 424, 437, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). Instead, parties will ideally “settle the amount of a fee.” [Id.](#) Of course, that is most certainly not what has occurred in this case. As to Ms. Mantiplay's proportionality argument, the district court found that Ms. Mantiplay had “unnecessarily complicated” this case, creating an unduly large record and repeatedly appealing. Specifically, the court recognized that Ms. Mantiplay's proportionality argument “ignore[d] the fact that the Hornes *necessarily* incurred [the appellate] fees because” of her own litigation decisions. Based on our review of the record, we cannot say the district court's findings were clearly erroneous, nor did the court employ an incorrect legal standard or fail

to follow proper procedures. [Grant](#), 908 F.2d at 878. The district court therefore did not abuse its discretion. [Id.](#)

IV. MOTION FOR ATTORNEYS' FEES

[14] On January 17, 2017, after the Hornes' counsel completed briefing for this appeal, they filed (yet another) motion for attorneys' fees to this Court incurred on the instant appeal. The Hornes subsequently amended that motion the next day, on January 18. In opposition, Ms. Mantiplay raises the same arguments that this Court has already addressed.

Although we transferred the appellate attorneys' fees motions from Ms. Mantiplay's previous appeal to the district court to consider in the first instance, we decline to do so here. As set out above, the Supreme Court has instructed that “[a] request for attorney's fees should not result in a second major litigation.” [Hensley](#), 461 U.S. at 437, 103 S.Ct. 1933. Where appellate courts can “resolve, instead of remand, fee determination issues,” doing so “is consistent with [that] directive.” [Barnes](#), 168 F.3d at 432. Indeed, “[b]y deciding such matters ourselves where possible, we dispose of issues that ought not be extensively litigated.” [Id.](#)

As a result, we will exercise our discretion and resolve the Hornes' motion now. See [id.](#) In short, it is granted. Our review of the Hornes' motion shows that it is properly supported by documentation indicating 121.4 hours were spent at an hourly rate of \$250, plus expenses of \$290.98, for a total requested \$30,559.98. For the same reasons as the district court, we hold that the requested fees and expenses, in this case, are reasonable. The Hornes' motion is accordingly granted.

*1086 V. CONCLUSION

In sum, we affirm the district court's award of attorneys' fees to the Hornes. We hold that [Section 362\(k\)\(1\) of the Bankruptcy Code](#) specifically departs from the American Rule and authorizes costs and attorneys' fees incurred by the debtor in ending a willful violation of an automatic stay, prosecuting a damages violation, and defending those judgments on appeal. We also hold that the district court did not abuse its discretion in awarding the Hornes

attorneys' fees. Additionally, the Hornes' motion for attorneys' fees incurred in this appeal is **GRANTED**.

AFFIRMED.

All Citations

876 F.3d 1076, 65 Bankr.Ct.Dec. 3, Bankr. L. Rep. P 83,183, 27 Fla. L. Weekly Fed. C 411

Footnotes

- * Honorable Leigh Martin May, United States District Judge for the Northern District of Georgia, sitting by designation.
- 1 Richard Horne passed away during the proceedings of this litigation. Ms. Horne was substituted as his personal representative. For the sake of clarity, we refer to Mr. and Ms. Horne collectively in this opinion as the Hornes.
- 2 Specifically, Ms. Mantiply argued the bankruptcy judge was biased because the judge's courtroom deputy was the sister of the Hornes' bankruptcy counsel's paralegal. [Id.](#)
- 3 The Fifth Circuit also reached the same holding, but without much explanation. See [In re Repine](#), 536 F.3d 512, 522 (5th Cir. 2008) ("The lower courts in our Circuit have concluded that it is proper to award attorney's fees that were incurred prosecuting a [section 362\(k\)](#) claim. We adopt the same reading of [section 362\(k\)](#) and therefore agree." (citations omitted)).
- 4 Because we affirm the district court based on the text of the statute itself, we need not address the Hornes' argument that this issue is foreclosed by the law-of-the-case doctrine. See [Mink v. Smith & Nephew, Inc.](#), 860 F.3d 1319, 1324 (11th Cir. 2017) ("We may affirm the District Court on any ground supported by the record, regardless of whether the District Court relied on it.").
- 5 Ms. Mantiply also briefly asserts that the Hornes failed to meet their obligation under [Section 362\(k\)\(1\)](#) to mitigate damages by communicating with her before seeking fees. However, this argument comes too late. The authority that Ms. Mantiply relies on, [In re Briskey](#), 258 B.R. 473 (Bankr. M.D. Ala. 2001), indicates that "debtors should not file motions with [bankruptcy courts] to enforce [an] automatic stay unless they have first made a reasonable attempt to communicate with the creditor to resolve the matter." [Id.](#) at 480. But the bankruptcy court in this case long ago established that the automatic stay was violated. Ms. Mantiply should have raised this issue of fact—which the Hornes hotly dispute—at that time. Cf. [Access Now, Inc. v. Sw. Airlines Co.](#), 385 F.3d 1324, 1331 (11th Cir. 2004) ("[A]s a court of appeals, we review claims of judicial error in the trial courts. If we were regularly to address questions—particularly fact-bound issues—that district[] court[s] never had a chance to examine, we would not only waste our resources, but also deviate from the essential nature, purpose, and competence of an appellate court.").
- 6 In [Bonner v. City of Prichard](#), 661 F.2d 1206 (11th Cir. 1981) (en banc), we adopted as binding precedent all decision of the former Fifth Circuit handed down before October 1, 1981. [Id.](#) at 1209.
- 7 As an initial matter, Ms. Mantiply argues that the Hornes abandoned any argument that their requested appellate fees were reasonable because they did not specifically cite the [Johnson](#) factors in their motions. Our review of the record, however, shows that although the factors were not specifically cited, the motions clearly contain arguments about the reasonableness of the requested fees. We therefore decline Ms. Mantiply's invitation to view their reasonableness argument as abandoned.

876 F.3d 1302
United States Court of Appeals,
Eleventh Circuit.

IN RE: Jonathan NORTHINGTON, Debtor.
Title Max, Plaintiff-Appellant,

v.

Jonathan Northington, Defendant- Appellee.

In re: Gustavius A. Wilber, Debtor.
Title Max, Plaintiff-Appellant,

v.

Gustavius A. Wilber, Defendant- Appellee.

No. 16-17467, No. 16-17468

|
(December 11, 2017)

Synopsis

Background: Pawnbroker moved for relief from automatic stay to exercise its rights in motor vehicle that Chapter 13 debtor had pawned prepetition. The United States Bankruptcy Court for the Middle District of Georgia, No. 4:15-bkc-40962-JTL, [John T. Laney, III, J.](#), 551 B.R. 542, denied motion, and pawnbroker appealed. The District Court, No. 4:16-cv-00174-CDL, [Clay D. Land](#), Chief Judge, 559 B.R. 542, affirmed. Appeal was taken.

Holdings: The Court of Appeals, Newsom, Circuit Judge, held that:

[1] res judicata effect of debtor's confirmed Chapter 13 plan, under which debtor sought to redeem motor vehicle that he had pawned prepetition by payments that he proposed to make under plan, did not bar pawnbroker from proceeding with its appeal from bankruptcy court order denying its motion for relief from stay;

[2] time provided under Georgia law for debtor to redeem motor vehicle that he had pawned prepetition, which had not yet expired as of commencement of debtor's bankruptcy case, was not tolled indefinitely while bankruptcy case was pending by operation of automatic stay; and

[3] upon expiration of state law deadline for Chapter 13 debtor to redeem motor vehicle that he pawned prepetition, as that deadline was extended for 60 days

based on debtor's bankruptcy filing, motor vehicle ceased to be property of the debtor and dropped out of bankruptcy estate.

Reversed and remanded.

[Wilson](#), Circuit Judge, filed dissenting opinion.

*1305 Appeals from the United States District Court for the Middle District of Georgia, D.C. Docket No. 4:16-cv-00172-CDL, Bkcy No. 4:15-bkc-40877-JTL, D.C. Docket No. 4:16-cv-00174-CDL, Bkcy No. 4:15-bkc-40962-JTL

Attorneys and Law Firms

[Stuart E. Walker](#), [Jenny Martin Stansfield](#), Martin Snow, LLP, MACON, GA, for Plaintiff.

[Brace W. Luquire](#), Pro Per.

Before [WILSON](#) and [NEWSOM](#), Circuit Judges and [MORENO](#),* District Judge.

Opinion

[NEWSOM](#), Circuit Judge:

This case requires us to assess the interplay between the United States Bankruptcy Code and a Georgia statute that defines state-law property rights. For its part, the Code describes a bankruptcy estate as including “all legal or equitable interests of the debtor in property as of the commencement of the case,” 11 U.S.C. § 541(a) (1), and goes on to provide, as relevant here, that a Chapter 13 plan can “modify the rights of holders of secured claims” on property in the estate, *id.* § 1322(b) (2). Meanwhile, Georgia’s “pawn” law states that any “pledged”—*i.e.*, pawned—item that is not “redeemed” within a statutorily prescribed grace period “shall be automatically forfeited to the pawnbroker by operation of [law], and any ownership interest of the pledgor ... shall be automatically extinguished in the pledged item.” [Ga. Code Ann. § 44-14-403\(b\)\(3\)](#).

So how do these provisions interact? Very briefly, here's the deal: The debtor in this case entered into a pawn transaction in which he pledged his car in exchange for a loan, defaulted on the loan by failing to repay it

on time, and then, shortly before the expiration of the redemption period—during which he could pay off his debt (with interest) and thereby regain title to his car—filed a Chapter 13 bankruptcy petition. Even though the Bankruptcy Code extended the debtor's state-law grace period an additional 60 days, he still failed to redeem the car. All agree that because the debtor filed for bankruptcy before the grace period lapsed, the car and the associated right of redemption initially became part of the bankruptcy estate pursuant to [Section 541\(a\)\(1\)](#). But this case presents the following interesting question: Did the filing of the bankruptcy petition necessarily freeze those assets in the estate just as they were, such that at confirmation the pawnbroker remained a mere “holder [] of [a] secured claim” whose “rights” the bankruptcy court could “modify” under Section 1322(b)(2)—here, by extending the repayment schedule? Or instead, even after the petition's filing, did Georgia's pawn statute continue to operate in the background, so to speak, such that upon the expiration of the redemption period, the car was “automatically forfeited to the pawnbroker by operation of [law]” and thus ceased to be property of the estate, leaving no bankruptcy-based “claim” or “right” to be “modif[ied]”?

Mindful of the deference owed to state-law definitions and regulations of property rights—even in this heavily “federal” area of law—we hold that the Bankruptcy Code ***1306** did not forestall the “automatic[]” operation of Georgia's pawn statute, that the car dropped out of the bankruptcy estate (and vested in the pawnbroker) when the prescribed redemption period lapsed, and, accordingly, that with respect to the car, Section 1322(b) (2) had no field of operation. Simply put, following the expiration of the grace period, the pawnbroker didn't have a mere “claim” on the debtor's car—it had the car itself.

I

[1] On September 2, 2015, Gustavius Wilber and TitleMax entered into a pawn transaction under Georgia law, *see* [Ga. Code Ann. § 44-14-403](#), in which Wilber exchanged the certificate of title on his 2006 Dodge Charger for a \$4,400 cash advance.¹ Because pawn transactions are nonrecourse loans, Wilber had no firm obligation to repay the advance or to redeem the Charger; rather, if Wilber failed to pay off the loan with interest, TitleMax simply took the car. *See* [Ga. Code Ann. §](#)

[44-14-403](#). Wilber's pawn transaction matured on October 2, 2015, by which point he had to repay his loan in order to regain title to his car.

Wilber failed to repay the loan by its maturity date. Georgia law, though, gives a defaulting debtor in a motor-vehicle pawn transaction a 30-day grace period during which he can redeem his car. *See id.* § 44-14-403(b) (1). Here, on October 30, just before his redemption period was set to expire on November 2, Wilber—still in possession of the Charger²—filed a petition for relief under Chapter 13 of the United States Bankruptcy Code. Wilber simultaneously filed his Chapter 13 plan, which listed TitleMax as a creditor holding a secured claim on the Charger. Pursuant to [11 U.S.C. § 108\(b\)](#), the Bankruptcy Code extended Wilber's state-law grace period an additional 60 days from the date of his petition, giving him until December 29 to redeem the car.

The extended expiration date came and went with no redemption. On January 8, 2016, before the bankruptcy court held a confirmation hearing on Wilber's proposed plan, TitleMax filed a motion for relief from the Code's automatic-stay provision, [11 U.S.C. § 362\(a\)](#), so that it could recover the Charger, which Wilber still had in his possession. In the motion, TitleMax contended that Wilber's bankruptcy estate no longer included the car because Wilber had failed to redeem it within the extended grace period.

The bankruptcy court conducted confirmation hearings on January 21 and February 2, and then on February 9—with TitleMax's motion for relief from the stay still pending—entered an order confirming Wilber's Chapter 13 plan. The confirmed plan treated TitleMax as a creditor on a \$5,036 debt secured by a claim on the Charger, and provided for repayment of the pawn loan at a 5% interest rate in installments of \$175 per month.

Following confirmation, the parties continued to litigate TitleMax's earlier-filed motion for relief from the automatic stay, ***1307** and on April 29, 2016, the bankruptcy court entered a final order denying that motion. Rejecting TitleMax's arguments, the court held (1) that the Charger and the redemption right were property of Wilber's bankruptcy estate, and remained so even after the expiration of the Code-extended grace period, and accordingly (2) that TitleMax didn't own the car itself, but rather continued to hold only a secured

“claim” on it, which gave rise to repayment “rights” that could be “modif[ied]” under Section 1322(b)(2). *In re Wilber*, 551 B.R. 542, 544–47 (Bankr. M.D. Ga. 2016). The bankruptcy court separately (and alternatively) concluded that under 11 U.S.C. § 1327(a) and “[t]he doctrine of res judicata,” the order confirming Wilber’s Chapter 13 plan precluded any relief for TitleMax, which the court said had “slept on its rights by not timely objecting” to confirmation. *Id.* at 547–48.

The district court affirmed the bankruptcy court’s decision on the merits, without addressing the “res judicata” issue. In particular, the district court “agree[d] with the bankruptcy court’s conclusion” that “because the vehicle [was] part of the debtor[s] estate[] when the debtor[] filed [his] Chapter 13 petition[], Title Max held [a] secured claim[] in the vehicle[] that could be modified under 11 U.S.C. § 1322(b)(2).” *Title Max v. Northington*, 559 B.R. 542, 545 (M.D. Ga. 2016).

[2] TitleMax timely appealed to this Court, challenging the district court’s affirmance of the order denying its motion for relief from the automatic stay. TitleMax’s appeal presents questions of law, which we review *de novo*. See *In re Paschen*, 296 F.3d 1203, 1205 (11th Cir. 2002) (internal citations omitted).

II

[3] Before jumping into the merits, we must first address the bankruptcy court’s alternative (but logically antecedent) holding that TitleMax’s challenge is procedurally barred on “res judicata” grounds.

The bankruptcy court held that TitleMax “slept on its rights” by “fail [ing] to timely object to confirmation” of Wilber’s proposed Chapter 13 plan. 551 B.R. at 548. Accordingly, the court held that its confirmation order was conclusive under 11 U.S.C. § 1327(a)—which generally binds a debtor and his creditors to the terms of a confirmed plan—and “[t]he doctrine of res judicata.” 551 B.R. at 548.

In the particular circumstances of this case, we cannot agree that TitleMax impermissibly “slept on its rights” and thus forfeited its ability to raise the argument that it presents on appeal. The decision that the bankruptcy court cited for support, *In re Young*, 281 B.R. 74 (Bankr.

S.D. Ala. 2001), provides a useful (and stark) contrast. As in this case, the debtors in *Young* failed to redeem property that they had pledged to a pawnbroker. And as in this case, the bankruptcy court held a hearing on the debtors’ proposed Chapter 13 plan—which listed the pawnbroker as the creditor on the pawn debt—and later entered an order confirming the plan. The pawnbroker in *Young*, however, did absolutely nothing to preserve its argument that it had rightful title to the pawned property. It didn’t “participate in the confirmation [hearing],” nor did it in any way contest the plan’s consummation; rather, following confirmation, the pawnbroker simply set out, unilaterally, to sell the pawned property, prompting the debtors to file a motion to enforce the automatic stay. See *id.* at 76, 80.

Here, by contrast, even before the bankruptcy court held a confirmation hearing, and thus by definition before it entered any confirmation order, TitleMax filed a written motion in which it contended—just *1308 as it does here—that at the moment Wilber failed to redeem the Charger pursuant to Georgia’s pawn statute, the car ceased to be property of the bankruptcy estate. TitleMax then appeared at the hearing, and later filed post-hearing briefs, to reiterate its position. When the bankruptcy court later denied its motion for relief from the automatic stay, thereby bringing the bankruptcy proceeding to a close, TitleMax appealed directly to the district court and then, following that court’s affirmance, directly to this Court.

Our dissenting colleague, who would affirm on res-judicata grounds, is of course quite right to say that TitleMax had “to take some action” in order to preserve its position that the car dropped out of the estate upon the expiration of the redemption period. Dissenting Op. at 1318 n.2. The question is precisely what form that “action” had to take. The dissent repeatedly protests that TitleMax didn’t formally “object” to the confirmation of Wilber’s Chapter 13 plan. See, e.g., Dissenting Op. at 1317, 1318, 1319, 1321, 1322. That’s true—no one denies it, and TitleMax freely admits it.³ We hold, though, that on the unique facts of this case, TitleMax was not required to file an “Objection”—styled as such—but rather adequately preserved its position through its pre-confirmation motion for relief from the automatic stay, which it briefed and argued to the bankruptcy court.

First, as a practical matter, there is no substantive difference between the styled-as-such “Objection” that the

dissent would seemingly require and the motion for relief that TitleMax actually filed. As Wilber's counsel candidly acknowledged at oral argument, “the body of [TitleMax's motion] was exactly what they needed for an objection to confirmation.” Oral Arg. Tr. at 20:38. “They could've changed the title” of the pleading, he said, “and not had to change anything else other than the request for the relief.” *Id.* The parties thus agree that TitleMax put the *substance* of its position—namely, that the Charger ceased to be estate property when the redemption period lapsed—squarely before the bankruptcy court.⁴

Second, as a legal matter, in the circumstances presented here, TitleMax didn't need to file a styled-as-such “Objection” in order to preserve its position that the Charger ceased to be estate property upon the expiration of the redemption period; rather, that argument was adequately teed up (just as TitleMax presented it) in a motion for relief from the stay. *Cf. In re Boyd*, 11 F.3d 59, 60 (5th Cir. 1994) (holding that even where a Chapter 13 plan was confirmed without a formal objection, a creditor's motion for relief from the stay adequately preserved its argument that disputed property was not properly part of the bankruptcy estate).⁵ TitleMax filed its *1309 motion pre-confirmation, making exactly the same argument and seeking exactly the same relief that it does here. When the bankruptcy court rejected its argument and denied its motion, TitleMax took an appeal directly to the district court and then, following that court's affirmance, came straight to this Court.⁶

We hold that in the particular (and peculiar) factual and procedural posture in which this case arises, TitleMax did enough to preserve its position. We turn, then, to an evaluation of the merits.

III

The district court explained its decision on the merits in two parts. Initially, the court observed, “when [Wilber] filed [his] Chapter 13 petition [], the vehicle[was] part of [his] bankruptcy estate[] and Title Max held [a] secured claim[]” in *it*. 559 B.R. at 546. Accordingly, the court concluded, because the Bankruptcy Code provides in 11 U.S.C. § 1322(b)(2) that “a Chapter 13 plan may ‘modify the rights of holders of secured claims’ ... the bankruptcy court was authorized to modify Title Max's claim [] as it

did...” *Id.* The district court skipped an important step—a mistake that our dissenting colleague largely repeats—and it is that step on which this appeal largely turns.

In order to hold (as the district court did) that Wilber's Chapter 13 plan could modify TitleMax's rights, it would be necessary not only to conclude (as the district court did) that the Charger initially became part of Wilber's bankruptcy estate with the filing of his petition, but also to find (as the district court did *not*) that it remained in the estate even after the expiration of the prescribed redemption period. We agree with the district court that the Charger entered Wilber's estate, but we hold that it dropped out—pursuant to the “automatic[]” operation of Georgia's pawn statute—when the grace period lapsed.

A

[4] We can make quick work of the first issue. Section 541 of the Bankruptcy Code specifies the property interests that constitute the bankruptcy estate. 11 U.S.C. § 541. In relevant part, Section 541 states that a debtor's estate comprises “all legal or equitable interests of the debtor in property as of the commencement of the case.” *Id.* at (a)(1). As used in Section 541(a)(1), the term “commencement” means the date on which the debtor filed his bankruptcy petition. *See 5 Collier on Bankruptcy* ¶ 541.02 (16th ed. 2017).

[5] TitleMax concedes, and the parties thus agree, that “on October 30, 2015—the date he filed his bankruptcy petition—Wilber retained property interests in the Charger that became ‘property of the estate’ under 11 U.S.C. § 541.” Br. of Appellant at 10. In particular, the parties agree that the car, which remained in Wilber's possession, as well as the associated right to redeem it—which at that time had not *1310 yet expired—entered the estate with the filing of his petition. *Id.* at 8 (referring to the “right to possess” and the “right to redeem” as “property interests related to the Charger that ... entered the bankruptcy estate”).

That all seems right to us. The Supreme Court has observed that “§ 541(a)(1)'s scope is broad,” *United States v. Whiting Pools*, 462 U.S. 198, 204, 103 S.Ct. 2309, 76 L.Ed.2d 515 (1983), and existing precedent supports the parties' shared view that both the Charger and the right of redemption became estate assets upon the filing

of Wilber's bankruptcy petition. See *In re Lewis*, 137 F.3d 1280, 1284 (11th Cir. 1998) (stating that a debtor's "statutory right of redemption in the automobile became 'property of the estate' under 11 U.S.C. § 541(a)(1) at the commencement of the case"); *In re Moore*, 448 B.R. 93, 100 (Bankr. N.D. Ga. 2011) (finding that debtors' vehicles entered the estate where, as here, the debtors "had possession of the pawned vehicles at the time of the bankruptcy filing and the grace periods for their redemptions had not yet expired").

But—and it's a big but—contrary to the district court's (implicit) determination, finding that the car and the redemption right were initially made part of Wilber's bankruptcy estate doesn't end the inquiry. The controlling question isn't whether Wilber's property interests in the Charger entered the bankruptcy estate in the first instance—they did—but rather whether, despite the expiration of the prescribed grace period, those assets *remained* in the estate at the time of confirmation, such that TitleMax's rights in them could be "modif[ied]" under Section 1322(b) (2). That is the issue to which we now turn.

B

The parties have clearly joined issue on the question whether an asset that is initially made part of a bankruptcy estate must necessarily remain there, irrespective of the underlying state law that defines it—or whether, instead, the ordinary operation of that state law can (for reasons wholly separate from the bankruptcy) cause the asset to drop out of the estate. For its part, TitleMax insists that "[n]o principle of bankruptcy law requires that a debtor's bankruptcy estate be frozen in time where a debtor's state-law interest in property is divested after the date of filing." Br. of Appellant at 10. Wilber rejoins, precisely to the contrary, that "it is clear that the estate is in fact 'frozen in time' as of the filing of the case." Br. of Appellee at 5. The battle lines thus clearly drawn, we must decide whether the filing of a bankruptcy petition necessarily freezes the debtor's estate and thereby forestalls the operation of the state-law rules that define and regulate the property interests that comprise that estate.

1

[6] [7] In assessing this question, we begin with an important stage-setting observation: Even in the uniquely "federal" bankruptcy context, "[p]roperty interests are created and defined by state law." *Butner v. United States*, 440 U.S. 48, 55, 99 S.Ct. 914, 59 L.Ed.2d 136 (1979); accord, e.g., *Barnhill v. Johnson*, 503 U.S. 393, 398, 112 S.Ct. 1386, 118 L.Ed.2d 39 (1992) (observing that, as a general matter, "'property' and 'interests in property' are creatures of state law"). Particularly significant for present purposes, this Court has emphasized that although "whether an interest of the debtor[] is property of the estate is a federal question," "the nature and existence of the debtor[s] right to property is determined by looking to state law." *In re Thomas*, 883 F.2d 991, 995 (11th Cir. 1989).

*1311 Accordingly, analyzing a bankruptcy estate requires two tiers of inquiry, first into the assets of the estate, and then into the underlying property rights and interests that constitute each asset—first, that is, into the estate's contents, and then into the contents of the contents. The second, more granular inquiry—into the nature of a debtor's property interest in a particular estate asset—turns on state law. See *Butner*, 440 U.S. at 54, 99 S.Ct. 914 ("Congress has generally left the determination of property rights in the assets of a bankrupt's estate to state law."); *In re Smith*, 85 F.3d 1555, 1557 (11th Cir. 1996) ("The property rights of a debtor in a bankruptcy estate are defined by state law."); *Norton Bankruptcy Law and Practice* § 61.3 (3d ed. 2016) ("State law determines the existence, nature, and extent of any property interests a debtor may have.").

With respect to the particular estate asset at issue here—Wilber's pawned Charger—the applicable state law is crystal clear: Under Georgia's pawn statute, "[p]ledged goods not redeemed within the grace period shall be *automatically* forfeited to the pawnbroker ... and any ownership interest of the pledgor or seller shall *automatically* be extinguished as regards the pledged item." Ga. Code Ann. § 44-14-403(b)(3) (emphasis added). All agree that under Section 44-14-403(b)(3)'s plain terms, the expiration of the redemption period is conclusive—the debtor loses title to his pawned property, which vests immediately and by operation of law in the pawnbroker. Indeed, at oral argument, Wilber's counsel acknowledged that but for the bankruptcy "stepp [ing] in," TitleMax "would have had th[e] car" and Wilber would have had "no recourse." Oral Arg. Tr. at 24:50. The question

presented here is whether federal bankruptcy law changes all that, prevents the ordinary and “automatic” operation of Georgia’s pawn statute, and prohibits title to the Charger from passing, as it otherwise would, from Wilber to TitleMax.⁷

[8] To be clear, we are not concerned here with congressional power; Congress has extensive authority in the bankruptcy arena—including the authority to supersede state property law. See U.S. Const. Art. I, § 8, cl. 4. Rather, the issue before us is whether Congress has in fact exercised that authority. In answering that question, we take our cue from the Supreme Court’s decision in *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 114 S.Ct. 1757, 128 L.Ed.2d 556 (1994). There, the Court considered the meaning of Section 548 of the Bankruptcy Code, which empowers a bankruptcy trustee to set aside “constructively fraudulent transfers,” including an insolvent debtor’s sale of property, within one year before filing *1312 bankruptcy, for less than “reasonably equivalent value.” 11 U.S.C. § 548(a)(2). The particular issue before the Court in *BFP* was whether the term “reasonably equivalent value” should be read to imply a “fair market value” benchmark—or whether, instead, the statutory term should be understood by reference to the underlying state law, such that the price fetched at a foreclosure sale conducted in accordance with applicable state procedures would conclusively establish the property’s “reasonably equivalent value.” In opting for the latter rule, the Court made several observations that guide our analysis here.

[9] First, the Supreme Court explained that “[a]bsent a clear statutory requirement to the contrary,” courts interpreting the Bankruptcy Code “must assume the validity of th[e] state-law regulatory background” at issue “and take due account of its effect.” 511 U.S. at 539, 114 S.Ct. 1757. In *BFP*, the underlying state law was one that permitted a mortgagee to unload property at a forced sale, and that law’s “effect” was that “property that *must* be sold within those strictures is simply *worth less*” than it would be on the open market. *Id.* (emphasis in original). Here, the Georgia pawn statute’s “effect” is that following expiration of the prescribed redemption period, a debtor’s rights in the pledged property are “automatically forfeited,” “extinguished,” and vested in the pawnbroker.

[10] Second, and relatedly, the *BFP* Court emphasized that before a federal statute—notably including the Bankruptcy Code—may be read to “displace traditional state regulation,” the “federal statutory purpose must be ‘clear and manifest.’” *Id.* at 544, 114 S.Ct. 1757 (quoting *English v. General Elec. Co.*, 496 U.S. 72, 79, 110 S.Ct. 2270, 110 L.Ed.2d 65 (1990)). Significantly for present purposes, just as the states have historically regulated the sorts of mortgage-foreclosure transactions at issue in *BFP*, see *id.* at 540-43, 114 S.Ct. 1757, they have long regulated pawn transactions, see, e.g., *Lockwood v. Muhlberg*, 124 Ga. 660, 53 S.E. 92 (Ga. 1906); cf. also *Asakura v. City of Seattle*, 265 U.S. 332, 343, 44 S.Ct. 515, 68 L.Ed. 1041 (1924) (“In this country, the practice of pledging personal property for loans dates back to early colonial times, and pawnshops have been regulated by state laws for more than a century.”).

[11] Finally, and again in a similar vein, the Court in *BFP* clarified that while it is not strictly necessary for Congress to “override historical state practice expressly or not at all,” and that the Bankruptcy Code can supersede state-law property rules “by implication,” it may do so only “when the implication is unambiguous.” *BFP*, 511 U.S. at 546, 114 S.Ct. 1757 (internal quotation marks omitted). “[W]here the intent to override is doubtful,” the Court stressed, “our federal system demands deference to long-established traditions of state regulation.” *Id.*

To be sure, *BFP* is not quite on all fours—it addressed a different section of the Code, and it dealt with mortgage foreclosures rather than pawn transactions. But its upshot for this case is clear. Given the acknowledged background principle at work here—namely, that property is created and defined by state law—we should hold that the Bankruptcy Code prevents and counteracts the ordinary operation of Georgia’s pawn statute only if we find some clear textual indication that Congress intended that result. As explained below, we don’t.

2

[12] At first blush, the likeliest candidate to accomplish the “freezing” that Wilber’s position entails might seem to be the *1313 Bankruptcy Code’s automatic-stay provision, 11 U.S.C. § 362(a). As it turns out, though, Section 362(a) has no application to the particular circumstances of this case.

[Section 362\(a\)](#) states that a bankruptcy petition “operates as a stay, applicable to all entities,” of assorted acts and occurrences, including (1) the “commencement or continuation” of certain “judicial, administrative, or other action[s] or proceeding[s],” (2) the “enforcement” of certain pre-petition “judgment[s],” (3) any “act to obtain possession of property of the estate,” (4) any “act to create, perfect, or enforce” pre-petition liens, and (5) any “act to collect, assess, or recover” a pre-petition claim against the debtor. *Id.* In so doing, we have said, the automatic stay “relieves the debtor from financial pressure during the pendency of bankruptcy proceedings” and “protects creditors by preventing the premature disbursement of the bankruptcy debtor’s estate.” *Carver v. Carver*, 954 F.2d 1573, 1576 (11th Cir. 1992).

[13] Although Wilber doesn’t particularly press the position, some courts considering cases like this one have held that following a bankruptcy petition’s filing, the automatic-stay provision applies to toll an as-yet-unexpired state-law redemption period indefinitely, thereby preventing the period from lapsing and (in effect) keeping pawned assets in the estate. *See, e.g., Cash Am. Pawn, L.P. v. Murph*, 209 B.R. 419, 423 (E.D. Tex. 1997) (describing the “minority position”). We reject that view for two reasons. First, it ignores [11 U.S.C. § 108\(b\)](#)’s specific tolling provision—which, as explained above, expressly extends a debtor’s state-law grace period, but only temporarily, for a finite term of 60 days. *See supra* at 1306. Reading the automatic-stay provision to effect an open-ended extension of a state-law redemption period not only would impermissibly allow the “general” [Section 362\(a\)](#) to control the more “specific” [Section 108\(b\)](#), *contra, e.g., Bloate v. United States*, 559 U.S. 196, 207, 130 S.Ct. 1345, 176 L.Ed.2d 54 (2010), but also (and worse) would render [Section 108\(b\)](#) entirely superfluous, *contra, e.g., Corley v. United States*, 556 U.S. 303, 314, 129 S.Ct. 1558, 173 L.Ed.2d 443 (2009). The far better understanding, we think, is that “[Section 108\(b\)](#) and [section 362\(a\)](#) are mutually exclusive; anything temporarily stayed under the specific language of [section 108\(b\)](#) is not indefinitely stayed by the more general language of [section 362\(a\)](#).” *In re Maanum*, 828 F.2d 459, 460 (8th Cir. 1987); *see generally* 3 *Collier, supra*, ¶ 362.03 (“[T]he majority view is that the automatic stay does not toll the running of redemption and reinstatement periods if the sale becomes effective without further action by any entity at the end of such period, and that relief for the

debtor is to be found in the automatic 60-day extension of [section 108\(b\)](#).”).

[14] Second, and separately, any “freezing” argument founded on the automatic stay misunderstands [Section 362\(a\)](#)’s particular language, which specifically targets the affirmative conduct of creditors. Again, the automatic-stay provision applies to prevent “entities” from (for instance) “commenc[ing]” actions, “issu[ing]” process, “enforc[ing]” judgments, and “perfect[ing]” liens. [11 U.S.C. § 362\(a\)](#). While [Section 362\(a\)](#)’s text undoubtedly prevents creditors from taking steps to actively pry assets out of a debtor’s estate, it does not separately prevent those assets from evaporating on their own—as here, “automatically”—pursuant to the ordinary operation of state law. *See, e.g., In re Canney*, 284 F.3d 362, 372–73 (2d Cir. 2002) (“The automatic stay prevents only certain affirmative acts taken by a creditor, and the running of time is not one of those acts.”); *[1314 Johnson v. First Nat’l Bank of Montevideo](#), 719 F.2d 270, 276 (8th Cir. 1983) (observing that [Section 362\(a\)](#)’s language demonstrates that “Congress intended ... to prohibit only certain types of *affirmative actions*” (emphasis in original)).⁸

[15] But enough of [Section 362\(a\)](#), which isn’t the focus of Wilber’s argument. Rather, as his “freezing” mechanism, Wilber points to [11 U.S.C. § 541](#), which he says—with emphasis—“states that the property of the estate is created as of the *commencement of the case*.” Br. of Appellee at 4. That’s certainly true as far as it goes; under [Section 541\(a\)](#), “[t]he commencement of a case”—*i.e.*, the filing of a petition—“creates an estate,” which includes, among other things, “all legal or equitable interests in property as of the commencement of the case.” [11 U.S.C. § 541\(a\)\(1\)](#). But [Section 541](#) neither clearly says nor unambiguously implies, *see BFP*, 511 U.S. at 544–45, 114 S.Ct. 1757, that a bankruptcy estate, once created, necessarily remains static. The textual indicators, in fact, point in the opposite direction, and suggest that an estate is not necessarily “frozen in time,” but rather can, in certain circumstances, expand or contract in accordance with the operation of underlying state-law property rules. *Cf., e.g., 11 U.S.C. §§ 541(a)(6)–(7), 541(b)(8)* (specifying instances in which property may be added to or excluded from the bankruptcy estate based on post-petition events).⁹

[16] Properly understood, the Bankruptcy Code takes an estate’s constituent property interests as it finds them. If

an asset is by its state-law nature static, then it remains so in the bankruptcy estate. If, by contrast—as is often the case—state law imbues an estate asset with a sort of internal dynamism, then that characteristic will follow the asset into the estate. Such dynamism will often (and perhaps typically) increase an estate asset's value—take, for example, the post-petition interest that accumulates on a debtor's deposit account, which, pursuant to the traditional state-law “interest follows principal” rule, presumably inures to the account's (and thus the estate's) bottom line. *Cf. Phillips v. Washington Legal Found.*, 524 U.S. 156, 165, 118 S.Ct. 1925, 141 L.Ed.2d 174 (1998) *1315 (“The rule that ‘interest follows principal’ has been established under English common law since at least the mid-1700's.”).

But increase will not always be the result—sometimes the dynamism will reduce (or even eliminate) an asset's value. Think, for instance, about a debtor whose bankruptcy estate includes an option contract. If the debtor fails to exercise the option in accordance with state law, then the right to buy disappears. This case reflects the same basic phenomenon. Under Georgia's pawn statute, following his loan's maturity date, Wilber had a conditional right to possess the Charger as well as a right to redeem it during the statutory period. But after the expiration of the prescribed period, Wilber had no rights in the car, possessory or otherwise. Rather, his rights had been “automatically ... extinguished” and “automatically forfeited to [TitleMax].” *Ga. Code Ann. § 44-14-403(b)(3)*.

Finding no clear indication that Congress intended to do so, *see BFP*, 511 U.S. at 544–45, 114 S.Ct. 1757, we must reject Wilber's contention that 11 U.S.C. § 541 “froze[]” his bankruptcy estate's assets at the time he filed his initial petition, and thereby thwarted the normal operation of the Georgia pawn statute's automatic-extinguishment provision. Accordingly, we hold that when Wilber's redemption period lapsed on December 29, 2015, his rights in the Charger were immediately forfeited, extinguished, and vested in TitleMax.¹⁰

C

[17] That's the end of the road for us. Because we hold that the car ceased to be property of the bankruptcy estate upon the expiration of the redemption period, it follows that 11 U.S.C. § 1322(b)(2)—on which the district

court founded its ultimate conclusion, and on which the dissent predicates its analysis, *see* Dissenting Op. at 1323–25 has no field of application to this case. Under that provision, a Chapter 13 plan can “modify the rights of holders of secured claims” on property in the estate. 11 U.S.C. § 1322(b)(2). It is axiomatic, though, that a plan can “modify ... rights” arising under a “claim” only if the claim exists at the time the plan would purport to modify the rights associated with it—namely, at confirmation. Here, by the time the bankruptcy court confirmed Wilber's Chapter 13 plan on February 9, 2016, TitleMax didn't have a mere “claim”—it had (by operation of Georgia law) a 2006 Dodge Charger.

* * *

A brief coda: Having endeavored along the way to meet our dissenting colleague's specific objections, we must respond briefly to his more sweeping charge that we have “disregard[ed]” or cavalierly “passe[d] by” settled procedural rules in a *1316 conscious effort to “move to the merits”—only, he says, to adopt a rule that “undermines long-established principles of bankruptcy law and the Code itself, and runs contrary to the purpose of Chapter 13 bankruptcy.” Dissenting Op. at 1317, 1325. With the utmost respect, none of that is true.

The former intimation—that we've somehow bent normal procedures in a headlong rush to parse the U.S. Bankruptcy Code—seems to us to refute itself. That's not how courts should operate, and it's not how we operate—and, let's just say, the temptation to cut corners is not particularly strong (which is to say nonexistent) when the reward for doing so is an exhaustive assessment of Chapter 13, Georgia's “pawn” statute, and those laws' combined import for the fate of a 2006 Dodge Charger. (If anything, the incentives would seem to run in the other direction, but we digress.) Here as always, we're just doing our best to call ‘em like we see ‘em. And needless to say, we find no particular joy in concluding that a pawnbroker now owns the car that Mr. Wilber once drove. For better or worse, that's simply the result that, on our reading, the law requires.

As for the dissent's suggestion that our interpretation of the Bankruptcy Code is in any way extraordinary, suffice it to say that the record demonstrates otherwise. Indeed, quite the contrary, the rule that we adopt has been embraced by a number—and seemingly a clear majority—

of bankruptcy courts deciding materially identical cases. See Hon. W. Homer Drake, Jr., Hon. Paul W. Bonapfel & Adam M. Goodman, *Chapter 13 Practice and Procedure* § 14.16 (2017) (cataloguing numerous decisions holding that “forfeiture occurs if the debtor does not redeem the vehicle within the redemption period, as extended by Code § 108(b),” and that “if the debtor does not timely redeem, the property is not property of the estate and a plan cannot modify the pawnbroker’s claim”).¹¹ So *1317 while this is admittedly a tough case, with respectable arguments on both sides—and while we appreciate and admire the vigor with which the dissent has pressed its position—today’s decision is in the heartland of mainstream bankruptcy law, practice, and precedent.

IV

For the foregoing reasons, we REVERSE the district court’s judgment and REMAND for proceedings consistent with this opinion.

WILSON, Circuit Judge, dissenting:

This should be an easy case. The Bankruptcy Code provides—and the Supreme Court and this Circuit agree—that a confirmed Chapter 13 bankruptcy plan enjoys a preclusive, binding effect. A creditor may only escape treatment under a plan if it objects to plan confirmation and then appeals the overruling of that objection. Title Max admitted to the bankruptcy judge, on the record, that it did not object, and the bankruptcy judge confirmed the plan. Title Max now says that it did object and that it therefore can elude the plan’s terms. But the law required an objection before plan confirmation, not a retroactive recasting of motions as objections. Therefore, Title Max remains bound by the confirmed plan.

The majority disregards these simple facts, choosing instead to move to the merits. In doing so, the majority rewards Title Max—by allowing it to sidestep the preclusive effects of a confirmed bankruptcy plan—for changing litigation positions on appeal. I am troubled that we would incentivize an attorney’s inconsistent representations before the courts of this Circuit, including before the judges of this panel, and I thus cannot join the majority’s opinion. Aside from these concerns, I am skeptical of the majority’s holding that state law may

operate to divest a federally-created bankruptcy estate of a piece of property that all parties, and the majority, admit entered that estate pursuant to the Bankruptcy Code. Such a holding undermines long-established principles of bankruptcy law and the Code itself, and runs contrary to the purpose of Chapter 13 bankruptcy. Therefore, I respectfully dissent.¹

I.

We review a bankruptcy court’s legal findings de novo and its factual findings for clear error. *In re JJJ Inc.*, 988 F.2d 1112, 1116 (11th Cir. 1993). Whether a party made an objection is a factual finding *1318 subject to clear error review.² *Smith v. Estelle*, 562 F.2d 1006, 1007 n.2 (5th Cir. 1977)³ (“The district court concluded that Smith had not objected ..., and this finding is not clearly erroneous.”); accord *In re AFY*, 734 F.3d 810, 819 (8th Cir. 2013) (noting that a finding that a party did not object is a finding of fact); *Ham v. Patterson*, 474 Fed.Appx. 386, 387 (4th Cir. 2012) (per curiam) (treating a district court’s finding that a party did not file objections as a finding of fact); *R.H. Cochran & Assocs., Inc. v. Sheet Metal Workers Int’l Ass’n Local Union No. 33*, 335 Fed.Appx. 516, 519–20 (6th Cir. 2009) (applying clear error review to whether an objection was raised); *Clark v. Foti*, 50 F.3d 1032, 1995 WL 136127, at *1 (5th Cir. 1995) (per curiam) (“The district court clearly erred in finding that Clark had failed to file any objections.”).

We refuse to find clear error unless we are left “with the *definite and firm conviction* that a mistake has been committed.” *Coggin v. Comm’r*, 71 F.3d 855, 860 (11th Cir. 1996) (emphasis added). We “may not substitute our own findings of fact for that of the district court, and may reverse only if the record lacks substantial evidence to support” the finding below. *Id.* (internal quotation mark omitted). When there are “two permissible views of the evidence, the factfinder’s choice between them cannot be clearly erroneous.” *Anderson v. City of Bessemer City*, 470 U.S. 564, 574, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985).

Here, the bankruptcy court specifically found that “Title Max failed to timely object to [plan] confirmation,” and that Title Max “slept on its rights by not timely objecting.”⁴ Title Max repeatedly confirmed this to

the bankruptcy judge, affirming that it indeed did not object.⁵

***1319** Despite whatever recharacterizations Title Max and the majority make—which I reject below—a clear error review of the bankruptcy judge's finding that Title Max did not object is insurmountable. Far from being left with a definite and firm conviction that the bankruptcy judge made a mistake in this finding, a review of the record reveals ample evidence to support the fact that Title Max *affirmatively declined* to object. This comes primarily in the form of Title Max's repeated admissions on the record that it did not object after repeated questioning from the bankruptcy judge. I can think of no stronger evidence to support the bankruptcy judge's finding in this matter.

Therefore, given the extremely deferential standard of review applicable to this case, I would affirm the bankruptcy court's decision and find that Title Max did not object to plan confirmation and is therefore bound by the confirmed plan. However, I write further here because the majority commits legal error in applying an incorrect standard of review, under which I would still affirm. Moving past the objection issue, the majority then endorses a rule that will impede the effectiveness of our bankruptcy system and will undermine its purpose.

II.

Judges should be able to rely upon representations made to them by attorneys. Indeed, a “lawyer's representations have long been accorded a particular expectation of honesty and trustworthiness.” *Fire Ins. Exch. v. Bell*, 643 N.E.2d 310, 312 (Ind. 1994); see also Model Rules of Prof'l Conduct r. 3.3 (Am. Bar Ass'n 2016) (explaining a lawyer's duty of candor toward a tribunal). Under any standard of review, the record indicates that Title Max expressly stated to the bankruptcy judge that it did not object to plan confirmation. I see no reason why the bankruptcy judge should have been required to doubt this attorney's representation. However, after today's ruling, bankruptcy judges in this Circuit will no longer be able to safely take an attorney at her word with respect to confirmation objections (or lack thereof). Rather, these judges will need to scour the docket prior to each confirmation hearing, looking for any filings that could possibly be construed as objections to confirmation, lest they be transformed into objections on appeal. This outcome nullifies the point

of giving the moment of plan confirmation any weight, and, simply put, imposes additional work on bankruptcy judges without justification.

This is not the normal case of an objection preserving a position for appeal, as the majority puts it. Rather, a confirmed Chapter 13 bankruptcy plan has a specially codified, broadly defined, binding and preclusive effect. 11 U.S.C. § 1327(a). When a party has notice of an impending plan confirmation, its failure to object to that confirmation precludes its post-confirmation challenge to the terms of the plan. *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 276, 130 S.Ct. 1367, 1380, 176 L.Ed.2d 158 (2010); see *Hope v. Acorn Fin., Inc.*, 731 F.3d 1189, 1193–95 (11th Cir. 2013) (“If a trustee, like a debtor or creditor, is obliged to make a timely objection to the confirmation of a plan, and foregoes an objection she is aware of, it is difficult to see why the trustee, like a debtor or creditor, would not also be bound by confirmation.”); Keith M. Lundin & William H. Brown, *Chapter 13 Bankruptcy* § 229.1 ¶ 3 (4th ed. 2010) [hereinafter Lundin] (“[T]he creditor that fails to ***1320** object to confirmation and then to appeal an adverse decision is bound by the confirmed plan.” (footnote omitted)).⁶

Plan confirmation even binds a creditor to an “illegal” plan provision unless the creditor has objected and appealed. Lundin § 229.1 ¶¶ 3, 77; see *Espinosa*, 559 U.S. at 275, 130 S.Ct. at 1380 (noting that even though the bankruptcy judge committed legal error in confirming a plan, the confirmation order remained “enforceable and binding” on the creditor because it “had notice of the error and filed to object or timely appeal”). In short, § 1327(a) prohibits rewarding litigants who “sleep on their rights” by failing to object to confirmation. *Espinosa*, 559 U.S. at 275, 130 S.Ct. at 1380; *In re Young*, 281 B.R. 74, 80 (Bankr. S.D. Ala. 2001). As was pointed out at oral argument,⁷ “a lot rides” on whether a creditor objected to plan confirmation due to the confirmation's conclusive and preclusive effect.⁸

Any party in interest may object to plan confirmation. 11 U.S.C. § 1324(a). Such an objection must be filed and served upon the relevant parties, *Fed. R. Bankr. P. 3015(f)*, and is to be made by motion, with “reasonable notice and opportunity for hearing” afforded to the party opposing the motion. *Fed. R. Bankr. P. 9014(a)*. Objections to confirmation “may not be combined with

other requests for relief.” M.D. Ga. Local [Bankr. R. 9004-1\(a\)\(2\)](#).

Here, Title Max filed no objections to plan confirmation styled as such. It filed a “Motion for Relief from the Automatic Stay.”⁹ Although Title Max concedes that under [Fed. R. Bankr. P. 3015\(f\)](#), it was required to “lodge an objection *before* the plan [was] confirmed,” it asserts “[t]hat is precisely what [it] did” by filing its motion. Appellant's Br. at 23 n.11. Title Max contends that its motion made the bankruptcy court “well aware that TitleMax objected to the plan before the confirmation order was entered.” *Id.* The majority agrees, and *1321 notes that Title Max “appeared at the hearing, and later filed post-hearing briefs, to reiterate its position.”

This is simply not true. Title Max *did not* object to the confirmation of the plan, and the bankruptcy court was certainly not aware of the company's objections prior to confirmation.¹⁰ Appearing before the bankruptcy court at the oral argument on its motion, Title Max *affirmatively stated*—repeatedly—that it *did not* object and *had not* objected to plan confirmation.¹¹ Now, however, the company has represented to this court that it “objected ... *before* the bankruptcy court entered the Chapter 13 confirmation order,” Appellant's Br. at 20, and that its motion for relief from stay “itself constituted an objection to the terms of the proposed plan.” 11th Cir. OA at 02:37.

Perhaps most incredibly, Title Max told this court that it had appeared before the bankruptcy court “arguing the merits of [its] objection before the confirmation order was entered,” *id.* at 06:03, and was “lodging and arguing a merits objection before there was a confirmation order.” *Id.* at 06:16. The purported objections to which Title Max refers occurred during the very hearing where Title Max specifically disclaimed any objection to plan confirmation, despite repeated promptings from the bankruptcy judge. Bankr. OA at 07:57, 17:44.

Such behavior constitutes more than mere stylistic oversight, as the majority would treat it. It is a fact—Title Max did not object. But it now wishes to recast its motion as an objection, adopting a favorable appellate litigation position contradicting the one it adopted below. Bankruptcy law does not allow this. It requires a proper objection to plan confirmation in order to mount a challenge to the terms of the plan.

The majority's holding allows companies such as Title Max to advance novel legal arguments with no litigation risk. Title Max takes part in the post-confirmation litigation with the safe backstop of the already-confirmed plan, in which it receives nearly the entire benefit of its bargain—payment in full, plus five percent interest. If Title Max wins, it gets a pro-title-lender rule to advance in other cases (and a 2006 Dodge Charger). If it “loses,” it gets the cash equivalent of a 2006 Dodge Charger, plus five percent interest. This is precisely the “two bites at the apple” problem that rules like the one in [§ 1327\(a\)](#) seek to prevent, and that this court has prohibited in the past. *See, e.g., Wagner v. Daewoo Heavy Indus. Am. Corp.*, 314 F.3d 541, 543 (11th Cir. 2002) (en banc) (creating new pleading rule to prevent a plaintiff from getting “two bites at the apple” and “reap[ing] several benefits without taking any risks”).

*1322 The majority notes that the pawnbroker in *In re Young* did not “in any way contest the plan's consummation,” and therefore *Young* “provides a useful (and stark) contrast” to the case at bar. Here, however, not only did Title Max do absolutely nothing to contest confirmation—it *actively asserted that it did not object* to confirmation. This behavior far surpasses that of the pawnbroker in *Young*. Title Max did not merely sleep on its rights; it woke up, entered an appearance, and then affirmatively renounced them.

The majority also correctly notes that the Fifth Circuit's brief ruling in *In re Boyd*, 11 F.3d 59 (5th Cir. 1994), “isn't quite on point.” In that case, a former debtor, in what appears to have been an attempt to reclaim his house, “filed his Chapter 13 petition thirty-three months after the foreclosure sale had been concluded,” which sale included his eviction and divested him of all rights in the property. *Id.* at 61. In essence, Boyd (likely fraudulently) listed property on his plan that was not his. The Fifth Circuit rejected his argument that his confirmed plan “magically revest[ed] Boyd with property that was never property of Boyd's bankruptcy estate.” *Id.* at 60.

All parties, and the majority, concede that the Dodge Charger entered the bankruptcy estate in this case, unlike in *Boyd*. The majority mistakenly focuses on “the pertinent moment of confirmation.” The pertinent moment is at the creation of the bankruptcy estate. If, as here, a confirmed bankruptcy plan provides for property

of the bankruptcy estate—which is created at the filing of a bankruptcy petition—the plan is binding as to that property. Boyd's attempt to illicitly take back his already-lost house has nothing in common with this case: Boyd's house never entered his bankruptcy estate.

We should not require bankruptcy judges to do litigants' jobs for them, worrying about construing every motion and filing as an objection to plan confirmation. “Such a level of clairvoyance is not required by the bankruptcy laws,” *Lamarche v. Miles*, 416 B.R. 53, 60 n.8 (E.D.N.Y. 2009), and will threaten the reliability and efficiency of our Circuit's Chapter 13 bankruptcy programs. See Lundin § 228.1 ¶¶ 5–6 (noting that before the Supreme Court's clarification in *Espinosa*, “[m]any courts almost paternalistically (mis)interpret[ed] § 1327 to protect creditors from failing to protect themselves from the effects of confirmation,” and so “debtors and creditors couldn't count on § 1327 to produce finality of rights and responsibilities in Chapter 13 cases with great enough certainty to ensure reliable and efficient Chapter 13 programs”).

I would reject Title Max's “brazen suggestion” that the bankruptcy judge “should have treated [its] yet to be heard motion in the stead of an actual objection [it] could have easily asserted but chose not to assert at the proper time.” *Lamarche*, 416 B.R. at 60 n.8. Instead, I would give heft to the text of § 1327(a) and incentivize creditors to properly object before confirmation. Only then will bankruptcy judges have a complete picture when deciding upon confirmation, and will creditors and debtors be able to “find finality and be assured of a settled and orderly resolution of the claims against the debtor.” *Id.* at 60. Whatever else, I certainly would not reward litigants for taking an opposite, more convenient position on appeal than the one taken below. Accordingly, I would affirm and find that Title Max's appeal is barred because it failed to object to plan confirmation.

III.

A bankruptcy court sits in equity. *1323 *In re Waldron*, 785 F.2d 936, 941 (11th Cir. 1986) (per curiam). Recognizing this, Congress gave bankruptcy judges great latitude to modify the rights of holders of claims against the bankruptcy estate. In their equitable role, bankruptcy judges must attempt to “accommodate competing goals

of financial rehabilitation for the debtor and preservation of the constitutionally protected, bargained-for rights of secured creditors.” *In re Johnson*, 165 B.R. 524, 528 (S.D. Ga. 1994). That is exactly what the bankruptcy judge did in this case. After the Dodge Charger entered the bankruptcy estate (an occurrence that nobody contests), the bankruptcy judge changed Title Max's secured claim to the vehicle into a right to loan repayment over the plan period in an effort to assist Wilber's financial rehabilitation. Preserving Title Max's rights, however, the bankruptcy judge provided for Title Max to receive the entire loan amount back, plus five percent interest. The bankruptcy judge had authority to do this under the Bankruptcy Code.

The majority, contending that Congress has not spoken on the issue, confuses these straightforward facts by characterizing this case as one of state law deference. To the contrary, Congress has conclusively defined the creation and scope of a bankruptcy estate and has given bankruptcy judges vast authority to alter the rights of those with claims against this estate. Federal bankruptcy law thus controls, and state law cannot operate to alter the bankruptcy estate after its creation—and it certainly cannot serve to dispossess the bankruptcy estate of property. That is not to say that state law plays no role in bankruptcy, however.

The filing of a Chapter 13 petition creates a bankruptcy estate comprised of “all legal or equitable interests of the debtor in property as of the commencement of the case.” 11 U.S.C. § 541(a)(1). All such property, “wherever located and by whomever held,” becomes a part of the bankruptcy estate on the filing date. *Id.* State law serves to define the property interest and rights that enter the bankruptcy estate on that date. *Butner v. United States*, 440 U.S. 48, 55, 99 S.Ct. 914, 918, 59 L.Ed.2d 136 (1979) (“Property interests are created and defined by state law.”).

Once a piece of property becomes part of the bankruptcy estate, creditors step forward with their claims against that property. In Georgia, if, as is relevant here, the bankruptcy estate is created during the statutory grace period of redemption, a vehicle title lender has a secured claim—a “lien on the [vehicle] pawned for the money advanced, interest, and pawnshop charge[s] owed.” O.C.G.A. § 44-14-403(a); see 11 U.S.C. § 101(5)

(A). The bankruptcy estate contains the vehicle itself. *See* 11 U.S.C. § 541(a)(1); O.C.G.A. § 44-14-403(b)(3).

The bankruptcy court has the “very significant power” to dispose of claims against this estate and to “modify the rights of holders of secured claims.” 11 U.S.C. § 1322(b)(2); *see* Lundin § 104.1 ¶ 1. Through this ability, the bankruptcy court can fulfill the purpose of Chapter 13 bankruptcy: “[T]o enable an individual, under court supervision and protection, to develop and perform under a plan for the repayment of his debts over an extended period.” H.R. Rep. No. 95-595, at 118 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6079. Because creditors “must receive payments only under the [bankruptcy] plan,” and may not “harass the debtor or seek to collect their debts,” Chapter 13 serves to “relieve[] the debtor from indirect and direct pressures from creditors,” and to enable the debtor “to support himself and his dependents while repaying his creditors at the same time.” *Id.* As such, Chapter 13 can only be effective when the *1324 bankruptcy judge has the authority to equitably modify the rights of *all of those* holding claims against the bankruptcy estate.

In this case, Wilber's bankruptcy estate was created on the date he filed his Chapter 13 petition. Because he filed the petition before his state law redemption period expired, Wilber, at that moment, had legal title to his car and a right to redeem it. The car and the attendant right to redeem became property of the bankruptcy estate on that date. Title Max retained a secured claim against the bankruptcy estate—a claim that the bankruptcy court modified under § 1322(b)(2), turning it into a structured repayment of the entire loan plus five percent interest.

This should end the inquiry. Congress provided no mechanism for property of the bankruptcy estate to evaporate. Congress set the date of bankruptcy estate creation as the date of commencement of the case. Congress then gave the bankruptcy court plenary control over the disposition of property of the bankruptcy estate and its attendant claims in order to allow debtors to restructure their debts.

However, the majority presses forward, asserting that the Bankruptcy Code's “textual indicators” indicate that property may vanish from the bankruptcy estate. Searching for statutes that “specif[y] instances in which property may be added to or excluded from the

bankruptcy estate based on post-petition events,” the majority first cites two provisions that permit the *adding* of property to the estate: 11 U.S.C. § 541(a)(6) (including “[p]roceeds, product, offspring, rents, or profits of or from property of the estate”) and 11 U.S.C. § 541(a)(7) (including any “interest in property that the estate acquires after the commencement of the case”). These provisions support the supplementing of the bankruptcy estate, not the disappearing of property from it.

The majority then cites 11 U.S.C. § 541(b)(8). Importantly, § 541(b)(8)—appearing in a list of enumerated exclusions from the bankruptcy estate—contemplates a situation quite similar to the one at hand:

Property of the estate does not include ... any interest of the debtor in property where the debtor pledged or sold tangible personal property (other than ... written or printed evidences of indebtedness or title) as collateral for a loan or advance of money given by a person licensed under law ... where —(A) the tangible personal property is in the possession of the pledgee or transferee; (B) the debtor has no obligation to repay the money, redeem the collateral, or buy back the property at a stipulated price; and (C) neither the debtor nor the trustee have exercised any right to redeem provided under the contract or State law, in a timely manner as provided under State law and section 108(b).

11 U.S.C. § 541(b)(8).

Under the interpretative canon of *expressio unius est exclusio alterius*, when “a legislature has enumerated a list or series of related items, the legislature intended to exclude similar items not specifically included in the list.” *Christian Coal. of Fla., Inc. v. United States*, 662 F.3d 1182, 1193 (11th Cir. 2011). Even assuming *arguendo* that property may leave the bankruptcy estate, Congress's authoring of this exclusionary provision evinces a congressional intent to permanently include Wilber's vehicle in his bankruptcy estate: The provision would apply to Wilber's title loan but for the fact that

he retained possession of the vehicle. If Congress wanted to exclude Wilber's vehicle from his bankruptcy estate, it would not have specifically required Title Max to retain possession of ***1325** the vehicle in order to qualify for the [§ 541\(b\)\(8\)](#) exclusion.

The majority's holding also creates a bizarre incentive for Chapter 13 litigants, and perhaps for bankruptcy courts as well. It appears as though under the majority's rule, if a plan is confirmed before the expiration of a debtor's vehicle redemption period, the plan may modify the rights of secured creditors with respect to that vehicle under [§ 1322\(b\)\(2\)](#). If the plan is confirmed after the redemption period expires, however, the vehicle evaporates from the bankruptcy estate, and the plan cannot apply [§ 1322\(b\)\(2\)](#) to the creditor's secured claim.¹² Therefore, after today's holding, Georgia debtors in a title pawn situation will be in a rush to confirm their Chapter 13 plans, while Georgia title pawn lenders will be incentivized to deliberately delay confirmation until after the redemption period expires. The random date of redemption period expiration will take on increasing importance in Chapter 13 bankruptcy, and bankruptcy courts will be forced to police the confirmation timetable even more closely.¹³

This awkward recasting of incentives shows the consequence of moving or unbundling the “watershed date” of bankruptcy—the date that “creditors' rights are fixed (as much as possible), the bankruptcy estate is created, and the value of the debtor's exemptions is determined.” See *Johnson*, 165 B.R. at 528. Congress set this date as the commencement of the case, 11 U.S.C. [§ 541\(a\)\(1\)](#), but the majority today contrarily moves it to the date of confirmation. This holding allows the scope of the “property of the bankruptcy estate” to remain in flux between commencement of the case and plan confirmation. It adds tremendously to the level of uncertainty encountered in Chapter 13 litigation, runs

afoul of the statute, and will only increase the level of gamesmanship before the courts in this Circuit.

The majority—while purporting to look to the implications of the “textual indicators” left to us by Congress—overlooks the actual text of the Bankruptcy Code, the written legislative history behind it, and the practical ramifications of its rule. Congress intended Chapter 13 bankruptcy to enable debtors to *repay* their debts, and to “retain the pride attendant on being able to meet one's obligations.” H.R. Rep. No. 95-595, at 118 (1977), as reprinted in 1978 U.S.C.C.A.N. 5963, 6079. It did not intend, and did not write the Bankruptcy Code to allow, for Georgia title pawn lenders to invent loopholes in order to evade the jurisdiction of the bankruptcy courts. Unfortunately, the majority's ruling enables just that.

IV.

Title Max did not object to plan confirmation—the record confirms this under either the appropriate clear error standard, or the incorrect de novo standard applied by the majority. This fact precludes the company from now challenging or escaping from the confirmed plan. The majority passes by this reality on its way ***1326** to the merits. Once there, the majority, by moving the statutorily-mandated operative date for Chapter 13 bankruptcy, allows state law to strip a federal bankruptcy estate of property. Today's holding is not supported by the Bankruptcy Code and is not justified in its encouraging of manipulation of our federal courts. Because I would not ignore the broad preclusive effect of plan confirmation, and because the Code must take precedence over state law, I respectfully dissent.

All Citations

876 F.3d 1302, 27 Fla. L. Weekly Fed. C 426

Footnotes

* Honorable Federico A. Moreno, United States District Court Judge for the Southern District of Florida, sitting by designation.

1 Wilber and Jonathan Northington were debtors in two virtually identical bankruptcy cases. The district court combined the cases on appeal from the bankruptcy court. Northington, though, failed to comply with his Chapter 13 plan, and the bankruptcy court therefore dismissed his proceeding. That dismissal moots TitleMax's appeal against Northington. See *Neidich v. Salas*, 783 F.3d 1215, 1216 (11th Cir. 2015) (“[T]he dismissal of a Chapter 13 case moots an appeal arising from the debtor's bankruptcy proceedings.”).

- 2 Although a pawnbroker has the right to take possession of pledged property during the redemption period, see *id.* § 44-12-131(a)(3), TitleMax didn't do so here.
- 3 That being the case, the entirety of Part I of the dissenting opinion—urging that “[w]hether a party made an objection is a factual finding subject to clear error review” and that the bankruptcy court here “specifically found” that TitleMax failed to formally “object” to confirmation—is beside the point. Dissenting Op. at 1317–19.
- 4 Accordingly, to the extent that TitleMax's lawyers have contended from time to time that, practically speaking, their motion for relief from the stay was tantamount to a more formal “Objection,” see Dissenting Op. at 1318 n.2, 1320–21, they have good company in Wilber's own counsel.
- 5 Although *Boyd* isn't quite on point—there, the debtor's state-law redemption period expired before he filed his Chapter 13 petition, and, accordingly, the disputed property “was never part of [the] bankruptcy estate,” 11 F.3d at 60—its logic nonetheless applies. As explained in detail below, TitleMax contends that by the time Wilber's plan was confirmed, the Charger had dropped out of the estate by the “automatic []” operation of Georgia's pawn statute. Accordingly, at the pertinent moment of confirmation—by which point TitleMax had clearly asserted its position in its motion for relief from the stay—the creditors in *Boyd* and this case were identically situated.
- 6 Far, then, from the collateral “post-confirmation challenge” that the dissent posits, see Dissenting Op. at 1319, 1321, TitleMax has prosecuted a garden-variety direct appeal from a final order denying its requested relief. The dissent's reliance on *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 130 S.Ct. 1367, 176 L.Ed.2d 158 (2010) (disallowing a years-after-the-fact collateral attack on a confirmed plan under Rule 60), and *Hope v. Acorn Financial, Inc.*, 731 F.3d 1189 (11th Cir. 2013) (disallowing a stand-alone “post-confirmation avoidance action”), is thus misplaced.
- 7 In this respect, Georgia's pawn statute seems to operate pretty much the same way that all state pawn laws operate—and, so far as we can tell, pretty much the same way that pawn laws have always been understood to operate. See, e.g., Ala. Code § 5-19A-6 (“Pledged goods not redeemed within 30 days following the originally fixed maturity date shall be forfeited to the pawnbroker and absolute right, title, and interest in and to the goods shall vest in the pawnbroker.”); Fla. Stat. Ann. § 539.001(10) (“Pledged goods not redeemed within the 30-day period following the maturity date of a pawn are automatically forfeited to the pawnbroker; absolute right, title, and interest in and to the goods shall vest in and shall be deemed conveyed to the pawnbroker by operation of law; and no further notice is necessary.”); 47 C.J.S. *Interest & Usury* § 577 (“[I]n a typical pawn, a debtor deposits goods with the pawnbroker and receives money in return, and if the customer does not ‘redeem’ the pawn within a specified time, the power to sell the goods deposited automatically passes to the pawnbroker....”); 2 W. Blackstone, *Commentaries* *396 (observing that “goods pledged or pawned,” like other property interests giving rise to “qualified” rights, “may be redeemed, or else forfeited”).
- 8 From the fact that Section 362(a) did not of its own force prevent Wilber's redemption period from expiring—and thereby lock the Charger into Wilber's estate—it does not necessarily follow that TitleMax erred in seeking relief from the automatic stay before taking steps to possess the car. The lesson of *In re Young*, already discussed, is that a pawnbroker in TitleMax's position is better off safe (asking for leave) than sorry (bulling ahead without court permission). See *supra* at 1307.
- 9 The dissent criticizes our citation to 11 U.S.C. §§ 541(a)(6)–(7) and 541(b)(8), but ultimately does not fundamentally dispute the limited (but key) proposition for which we cite them—namely, that bankruptcy estates are not necessarily set in stone, but rather can and do expand and contract based on post-petition events. See Dissenting Op. at 1324. As to the dissent's “*expressio unius*”—based suggestion, see *id.*, that Section 541(b)(8) implicitly (and “permanently”) includes in a debtor's estate unredeemed property in a title-pawn transaction like the one here—in which the debtor retains physical possession—by specifically excluding from the estate unredeemed property in an ordinary pawn transaction—in which the creditor takes possession—we can only say that we think that it stretches the negative-implication canon too far. Cf. Hon. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 107 (2012) (noting that “[v]irtually all the authorities who discuss the negative-implication canon emphasize that it must be applied with great caution, since its application depends so much on context”). That Congress decided *as a matter of federal law* to exclude several specific asset types from a debtor's estate in no way convincingly implies that Congress thereby meant to forestall the ordinary operation of *state-law* rules that define the constituent property rights that comprise the estate.
- 10 The dissent expresses a concern that our decision creates “a bizarre incentive for Chapter 13 litigants” in that, the dissent speculates, “Georgia debtors in a title pawn situation will be in a rush to confirm their Chapter 13 plans” before the statutory grace period lapses—thereby preventing automatic forfeiture under Georgia's pawn law—“while Georgia title pawn lenders will be incentivized to deliberately delay confirmation until after the redemption period expires.” Dissenting Op. at 1324–25. But of course there are plenty of policy-based arguments to go around. The dissent's view, for instance—in which physical possession of the vehicle makes all the difference, see *id.*, would incentivize pawnbrokers to repossess

vehicles immediately upon default, even during the pendency of the redemption period, which Georgia law clearly permits. See *Ga. Code Ann. § 44-12-131(a)(3)*. That, needless to say, would leave downtrodden debtors even worse off, and almost certainly less able to claw their way back to solvency. All of which, we think, confirms the imprudence of interpreting statutes by reference to the goodness or badness of particular consequences or outcomes.

11 See also, e.g., *In re Holt*, No. 16-12150, 2017 WL 892333, at *2 (Bankr. N.D. Ga. 2017) (Drake, J.) (holding that “as of the expiration of the redemption period, the [d]ebtor no longer had any interest in the [v]ehicle under Georgia law, and the [v]ehicle ceased to be property of the estate”); *In re Stanfield*, No. 15-50612, 2016 WL 669472, at *3 (Bankr. S.D. Ga. 2016) (holding that when the debtor failed to redeem in accordance with state law, “any legal or equitable interest that [he] possessed was extinguished, the [v]ehicle was no longer property of the estate, and the automatic stay ceased to apply”); *In re Jones*, 544 B.R. 692, 701 (Bankr. M.D. Ala. 2016) (holding that because the debtor failed to redeem in accordance with state law, “she cannot now redeem her collateral under applicable law, nor modify [the creditor’s] contract rights in her Chapter 13 plan”); *Cash Am. Pawn, L.P. v. Murph*, 209 B.R. 419, 423 (E.D. Tex. 1997) (holding that “when the [d]ebtors failed to exercise the right of redemption within the 60 day extension provided by § 108(b), they no longer had any legal or equitable interest in the collateral and it ceased to be part of the bankruptcy estate”); *In re Jackson*, 133 B.R. 541, 546–47 (Bankr. W.D. Okla. 1991) (holding that “[s]ince debtors failed to redeem the collateral within [the extended grace] period, they no longer have a property interest in the collateral, and the debt ... may not be administered or otherwise dealt with through debtors’ Chapter 13 plan”); *In re Hand*, 52 B.R. 65, 66 (Bankr. M.D. Fla. 1985) (holding that “due to the debtors’ failure to redeem within the 60 days, the right to redeem was terminated and the debtors’ interest in the property was permanently extinguished” and that “the right is no longer part of the estate”); cf. also, e.g., *In re Oglesby*, No. 01-4072, 2001 WL 34047880, at *4 (holding that “when [d]ebtors failed to exercise their right of redemption within the sixty-day extension provided by § 108(b), any legal or equitable interest they possessed in the vehicle ceased to be part of their bankruptcy estate”); *In re Dunlap*, 158 B.R. 724, 728 (M.D. Tenn. 1993) (holding that “[o]nce redemption is no longer possible, the debtor loses any legal or equitable interest in a pawned good, and thus this good cannot be considered part of the bankruptcy estate,” and the “debtor may not seek to cure or modify the pawn contract under § 1322, because this remedy applies only to goods in which the estate retains an interest”).

1 The majority seeks to limit the material parts of its decision to the facts of this case. See, e.g., Maj. Op. at 1307 (“In the particular circumstances of this case”); *id.* at 1308 (“on the unique facts of this case”); *id.* (“in the circumstances presented here”); *id.* at 1309 (“in the particular (and peculiar) factual and procedural posture in which this case arises”). However, a published opinion enjoys precedential status, binding future panels of this Circuit, the district courts, and the bankruptcy courts. See *Smith v. GTE Corp.*, 236 F.3d 1292, 1300 n.8 (11th Cir. 2001). An unpublished opinion would have limited this decision to the “particular” and “peculiar” facts of the case. See Eleventh Circuit I.O.P. 6 (“Opinions that the panel believes to have no precedential value are not published.”). Additionally, there is little reason to believe that this case is “peculiar,” as TitleMax found itself in the same procedural posture in these two consolidated appeals. It has also litigated from similar postures in other cases in the bankruptcy courts. See, e.g., *In re Thompson*, No. 13-11235, 2014 WL 1330110 (Bankr. S.D. Ga. Mar. 31, 2014).

2 The majority gives short shrift to the standard of review in this case. It merely states that this appeal “presents questions of law, which we review de novo.” It asserts that because Title Max “freely admits” that it “didn’t formally ‘object’ to [plan] confirmation,” this dissent’s Part I, explaining the appropriate clear error review, is “beside the point.” However, far from “freely admit[ting]” that it failed to object, Title Max here repeatedly asserts that it did object, and actively challenges the bankruptcy court’s factual finding that it did not object. See, e.g., Appellant’s Br. at 23 n.11 (“The [bankruptcy] court was ... well aware that TitleMax objected to the plan before the confirmation order was entered. This is why the bankruptcy court erred in finding that TitleMax failed to object to the proposed plan before it was confirmed....”).

Further, by recognizing that Title Max “did enough to preserve its position,” the majority necessarily implies that Title Max did need to take some action in order to do so. See Maj. Op. at 1308 (“We hold, though, that on the unique facts of this case, TitleMax ... adequately preserved its position....”); *id.* at 1308 (“[TitleMax’s] argument was adequately teed up” in order to “preserve its position.”); *id.* at 1309 (“TitleMax did enough to preserve its position.”). Whether Title Max took that action is a finding of fact, as noted above. The majority wholly ignores the bankruptcy court’s finding that Title Max did not take this action, and instead makes the finding itself under an apparent de novo standard. It therefore deprives the bankruptcy court of the deferential clear error standard of review to which it is entitled.

3 See *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc) (holding that all decisions of the “old Fifth” Circuit handed down prior to the close of business on September 30, 1981 are binding precedent in the Eleventh Circuit).

4 *In re Wilber*, 551 B.R. 542, 548 (Bankr. M.D. Ga. 2016) [hereinafter Bankr. Order].

- 5 Audio File for Doc. 16 at 07:57, *In re Northington*, 550 B.R. 644 (Bankr. M.D. Ga. 2016) [hereinafter *Bankr. OA*] (Title Max stating that “we did not ... object in this case” because once the redemption period expired the vehicle was forfeited); *id.* at 17:44 (bankruptcy judge: “I can take judicial notice ... that there was no objection [to confirmation].... You're not contending that ... your client objected to confirmation?” Title Max: “No. There's no contention in either case, Your Honor.”); see also Minute Entry for Doc. 15, *Wilber*, 551 B.R. 542 (incorporating into *Wilber's* docket Audio File from *Northington*).
- 6 See also *In re Harvey*, 213 F.3d 318, 321 (7th Cir. 2000) (“It is a well-established principle of bankruptcy law that a party with adequate notice of a bankruptcy proceeding cannot ordinarily attack a confirmed plan The reason for this is simple.... [A]fter the affected parties have an opportunity to present their arguments and claims, it is cumbersome and inefficient to allow those same parties to revisit or recharacterize the identical problems in a subsequent proceeding.”); *In re Simpson*, 240 B.R. 559, 562 (B.A.P. 8th Cir. 1999) (“The sum of the judicial decisions that have considered the statutorily binding effect of a confirmed plan ... is that if the confirmed plan treats the creditor, and if the creditor received proper notice of the plan and its proposed confirmation, the creditor's only potential remedy for a plan it doesn't like is to appeal the order of confirmation.... IMPAC cannot now raise issues it could have and should have raised by objecting to confirmation and in an appeal of the confirmation order.”).
- 7 See Oral Argument Recording for Case 16-17467, at 06:56 (Aug. 22, 2017) [hereinafter 11th Cir. OA], http://www.ca11.uscourts.gov/system/files_force/oral_argument_recordings/1617467.mp3?download=1.
- 8 The majority states that I would “affirm on res-judicata grounds.” However, I would affirm on the broader § 1327(a) grounds. See generally *Lundin* § 229.1 ¶¶ 4–7 (explaining that “the statutory formulation of binding effect in § 1327(a) is broader than the res judicata effect of an ordinary judgment in the federal courts”).
- 9 The relevant timeline in the bankruptcy court is as follows: Title Max filed its motion for relief from the automatic stay on January 8, 2016. A confirmation hearing was held and the plan was orally confirmed on January 21, 2016. The bankruptcy court heard oral argument on Title Max's motion on February 2, 2016, in which the parties requested and received additional time to brief the issues raised by the motion. On February 9, 2016, the court entered its written order formally confirming the plan. The court denied Title Max's motion on April 29, 2016.
- 10 See *Bankr. OA* at 00:45 (bankruptcy judge: “We've confirmed both plans and there are no objections.”); *id.* at 03:31 (bankruptcy judge: “For some reason, the creditor [Title Max] didn't object.... So, the question on my mind ... is what is the effect of confirmation of the plan that the creditor didn't object to it. The creditor knew about the case, because creditor filed ... a motion for a relief before the hearing on confirmation, but for some reason, the creditor didn't object....”); see also *Bankr. Order* at 548 (“Title Max failed to timely object to confirmation. Title Max slept on its rights by not timely objecting.”).
- 11 *Bankr. OA* at 07:57 (Title Max stating that “we did not ... object in this case” because once the redemption period expired the vehicle was forfeited); *id.* at 17:44 (bankruptcy judge: “I can take judicial notice ... that there was no objection [to confirmation].... You're not contending that ... your client objected to confirmation?” Title Max: “No. There's no contention in either case, Your Honor.”).
- 12 The majority holds that the Dodge Charger *did* originally enter the bankruptcy estate; it disappeared later. Therefore, going forward, debtors' bankruptcy estates could still include pawned vehicles, at least initially.
- 13 The majority takes issue with this incentives concern, asserting that “[t]he dissent's view, for instance—in which physical possession of the vehicle makes all the difference—would incentivize pawnbrokers to repossess vehicles immediately upon default.” (citation omitted). However, the fact that physical possession of a pawned item “makes all the difference” in a § 541(b)(8) analysis is not merely “[my] view,” it is the view of Congress, as codified in the Bankruptcy Code. See § 541(b)(8)(A).