UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

IN RE:	**Case No. 12-01703-JAW**
COMMUNITY HOME FINANCIAL SERVICES, INC.	**Chapter 11**
Debtor	

THIRD AMENDED DISCLOSURE STATEMENT FOR THE THIRD AMENDED JOINT CHAPTER 11 PLAN OF LIQUIDATION OF THE ESTATE OF COMMUNITY HOME FINANCIAL SERVICES, INC. PROPOSED BY THE TRUSTEE, KRISTINA M. JOHNSON AND CREDITORS, EDWARDS FAMILY PARTNERSHIP LP AND BEHER HOLDINGS TRUST AS OF MAY 15, 2023

Jeffrey R. Barber (MB #1982)
Kristina M. Johnson (MB #9382)
JONES WALKER LLP
190 East Capitol Street, Suite 800 (39201)
Post Office Box 427
Jackson, Mississippi 39205-0427
Telephone: (601) 949-4765
Facsimile: (601) 949-4804
jbarber@joneswalker.com
kjohnson@joneswalker.com

Jim F. Spencer, Jr. (MSB # 7736)
Stephanie M. Rippee (MSB #8998)
WATKINS & EAGER PLLC
P.O. Box 650
Jackson, MS 39205-0650
(601) 965-1900 (p)
jspencer@watkinseager.com
srippee@watkinseager.com

Admitted *Pro Hac Vice*:

Mark A. Mintz (LAB #31878)
JONES WALKER LLP
201 St. Charles Avenue, Suite 5100
New Orleans, Louisiana 70170-5100
Telephone: (504) 582-8368
Facsimile: (504) 589-8368
mmintz@joneswalker.com

TABLE OF CONTENTS

Page

1. INTRODUCTION 6

   (A) THE DISCLOSURE STATEMENT 6

   (B) EXHIBITS TO THE DISCLOSURE STATEMENT 6

   (C) CONFIRMATION HEARING 7

   (D) VOTING ON THE PLAN 7

2. OVERVIEW OF CLAIMS AND INTERESTS 8

   (A) SUMMARY OF CLAIMS AND INTERESTS TABLE 8

   (B) CLAIMS OBJECTION PROCESS 11

3. DESCRIPTION AND HISTORY OF DEBTOR'S BUSINESS AND THE EVENTS OF THE CHAPTER 11 CASE 12

   (A) PRE-CHAPTER 11 LITIGATION 12

   (B) OTHER PRE-CHAPTER 11 EVENTS 13

   (C) PRE-TRUSTEE CHAPTER 11 EVENTS 13

   (D) TRUSTEE'S APPOINTMENT 15

   (E) POST-TRUSTEE EVENTS 15

   (F) CASH COLLATERAL MATTERS 18

   (G) CONTINUATION OF INITIAL EDWARDS ADVERSARY PROCEEDINGS 18

   (H) THE EDWARDS TRIAL 19

   (I) BANKRUPTCY COURT'S MEMORANDUM OPINION AND ORDER ON THE EDWARDS TRIAL AND APPEALS 20

   (J) PRIOR TRUSTEE PLANS AND DISCLOSURE STATEMENTS 22

   (K) MISCELLANEOUS PROCEDURAL MATTERS 24

(L) INVENTORY, MONTHLY OPERATING REPORTS AND U.S. TRUSTEE'S QUARTERLY FEES 24

4. THE PLAN OF LIQUIDATION 24

(A) TREATMENT OF UNCLASSIFIED CLAIMS 24

(B) TREATMENT OF CLASSIFIED CLAIMS 26

5. MEANS OF IMPLEMENTING THE PLAN 28

(A) GENERALLY 28

(B) POWERS OF THE TRUSTEE POST EFFECTIVE DATE 30

(C) EFFECTUATING DOCUMENTS; FURTHER TRANSACTIONS; EXEMPTION FROM CERTAIN TRANSFER TAXES 30

(D) GENERAL SETTLEMENT OF CLAIMS 30

6. PROVISIONS GOVERNING DISTRIBUTIONS AND OBJECTIONS TO CLAIMS 31

(A) NO PAYMENT OF POSTPETITION INTEREST AND ATTORNEYS' FEES ON CLAIMS 31

(B) DISTRIBUTION RECORD DATE 31

7. TREATMENT OF EXECUTORY CONTRACTS AND UNEXPIRED LEASES 31

8. EFFECT OF CONFIRMATION OF THE PLAN 31

(A) BINDING EFFECT 31

(B) MISCELLANEOUS PROVISIONS OF THE PLAN 31

9. CONFIRMATION AND CONSUMMATION PROCEDURE 34

(A) THE CONFIRMATION HEARING 34

(B) CONFIRMATION 34

(C) CONSUMMATION ON THE EFFECTIVE DATE 34

10. CERTAIN FEDERAL INCOME TAX CONSEQUENCES OF THE PLAN 35

(A) FEDERAL INCOME TAX CONSEQUENCES TO HOLDERS OF CLAIMS 35

(B) RECEIPT OF CASH FOR ALLOWED CLAIMS 35

11. VOTING AND BALLOTS.....36

12. CONCLUSION AND RECOMMENDATION.....37

1. INTRODUCTION

Chapter 11 is the principal business reorganization chapter of the Bankruptcy Code.[1] The commencement of a chapter 11 case creates an estate comprised of all the legal and equitable interests of the debtor as of the date of Filing of the bankruptcy petition. On May 23, 2012 (the "**Petition Date**"), Community Home Financial Services, Inc. ("**CHFS**" or the "**Debtor**") Filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code, as discussed more fully below. The Bankruptcy Code provides that the chapter 11 debtor may continue to operate its business and remain in possession of its property as a "debtor-in-possession." In the chapter 11 case (the "**Bankruptcy Case**") of the Debtor, the appointment of a chapter 11 trustee, Kristina M. Johnson (the "**Trustee**") was approved on January 16, 2014, by Order entered January 21, 2014,[2] of this bankruptcy court (the "**Bankruptcy Court**") in lieu of a debtor-in-possession, pursuant to section 1104 of the Bankruptcy Code. The Trustee and creditors, Edwards Family Partnership LP ("**EFP**") and Beher Holdings Trust ("**BHT**") (together, the "Plan Sponsors") are proposing a Third Amended Joint Chapter 11 Plan of Liquidation of The Estate of Community Home Financial Services, Inc. Proposed by the Trustee, Kristina M. Johnson And Creditors, Edwards Family Partnership LP and Beher Holdings Trust as of May 15, 2023 (the "**Plan**") in the Bankruptcy Case. Capitalized terms used herein shall have the meanings ascribed to them in the Plan that is attached hereto as **Exhibit A**.

(a) **The Disclosure Statement** The Plan Sponsors submit this Disclosure Statement in compliance with section 1125 of the Bankruptcy Code. The Disclosure Statement is submitted in connection with the hearing to consider approval of the Plan and the Disclosure Statement (the "**Confirmation Hearing**") scheduled for July 11, 2023. The Disclosure Statement (as amended, modified or supplemented) describes certain aspects of the Plan, CHFS's business, operations and related matters.

(b) **Exhibits to the Disclosure Statement**Attached as exhibits to the Disclosure Statement are copies of the following documents:

- The Plan and the Plan Exhibits (Exhibit A)
- Chart Summarizing Cash and Claims (Exhibit B)[3]
- Dickson Criminal Complaint (Exhibit C)

---

[1] The "**Bankruptcy Code**" means title 11 section 101 *et seq.* of the United States Code, as amended from time to time. The "**Bankruptcy Rules**" means the Federal Rules of Bankruptcy Procedure as provided by the United States Supreme Court under section 2075 of title 28 of the United States Code, and any Local Rules of the Bankruptcy Court.

[2] **Dkt. #473.**

[3] To be supplied before noticing.

- Bankruptcy Court's Memorandum and Opinion Regarding the Edwards Trials (Exhibit D)

- District Court's Memorandum Opinion Reversing in Part and Affirming in Part Bankruptcy Court's Opinion Regarding Edwards Trials (Exhibit E)

- Fifth Circuit Court of Appeals Opinion Affirming in Part District Court and Reversing and Vacating in Part Bankruptcy Court Opinion in Edwards Trials (Exhibit F)

- Bankruptcy Court's Memorandum and Opinion Regarding the Trial on the Trustee's Dickson Proceeding (Exhibit G)

- Chapter 7 Liquidation Analysis (Exhibit H)[4]

- Fifth Circuit Court of Appeals Opinion Reversing and Remanding to the District Court to Reinstate the Bankruptcy Court's Fee Award (Exhibit I)

(c) **Confirmation Hearing** Pursuant to section 1128 of the Bankruptcy Code and the Bankruptcy Court's Order **[Dkt. #___]**, there will be a combined hearing on the Disclosure Statement and the Confirmation of the Plan on July 11, 2023, at 9:00 a.m, central standard time, before the Honorable Jamie A. Wilson, United States Bankruptcy Judge, at the United States Bankruptcy Court for the Southern District of Mississippi, 501 E. Court Street, Jackson, Mississippi, 39201. Objections, if any, to confirmation must be served and Filed[5] so that they are received no later than June 16, 2023, in the manner described in the Bankruptcy Court's Order. The Confirmation Hearing may be continued from time to time by the Bankruptcy Court without further notice except for announcement of the continuation date made at the Confirmation Hearing.

Pursuant to section 1123 of the Bankruptcy Code and Bankruptcy Rule 9019, and in consideration for the classification, Distributions, releases and other benefits provided in the Plan, the provisions of the Plan, upon the Effective Date, shall constitute a good faith compromise and settlement of all Claims, including but not limited to the disputed issues remanded to this Court between the Estate and EFP/BHT previously set for trial on March 28–31, and controversies resolved pursuant to the Plan to the extent not already adjudicated and determined by any Final Order of the Bankruptcy Court.

(d) **Voting for the Plan**

---

[4] To be supplied before noticing.

[5] "**Filed**" means File, Filed or Filing with the Bankruptcy Court.

This is a fully consensual Plan pursuant to section 1129 in which EFP/BHT are the only creditors Impaired by the Plan and therefore, the only creditors entitled to vote. EFP/BHT, as joint Plan Sponsors with the Trustee, are deemed to accept the Plan and therefore, no voting is required.

2. OVERVIEW OF CLAIMS AND INTERESTS

Summary of Claims and Interests Table The following table briefly summarizes the classification and treatment of Claims under the Plan. The Trustee believes that the following chart[6] contains a reasonable estimate of the Claims:

CLASS	CLAIM	TREATMENT
Unclassified	Administrative Claims	Unimpaired. Each Holder of an Allowed Administrative Claim will receive from the Trustee Cash equal to the Allowed Amount of such Administrative Claim. Professionals or other Entities asserting a Professional Fee Claim for services rendered before the Effective Date must File and serve on the Trustee and such other Entities who are designated by the Bankruptcy Rules, the Confirmation Order, or other Order of the Bankruptcy Court, an application for final allowance of such Professional Fee Claims within thirty (30) days after the Effective Date. Objections to any Professional Fee Claims, including any objections by the U.S. Trustee and EFP/BHT must be Filed and served on the Trustee and the requesting party by the later of (A) sixty (60) days after the Effective Date, and (B) thirty (30) days after the Filing of the applicable request for payment of the Professional Fee Claims. To the extent necessary and as allowed by law, the Confirmation Order will be deemed to amend and supersede any previously entered Order of the Bankruptcy Court regarding the procedure for payment of Professional Fee Claims. Any of the Trustee's Administrative Claims or those of her Professionals, incurred after the Effective Date will be paid on a monthly basis without the need for approval by the Bankruptcy Court. THE TRUSTEE SHALL BE COMPENSATED PURSUANT TO THE PROVISIONS OF THE BANKRUPTCY CODE AND THE PLAN. The Trustee must File and serve on such Entities who are designated by the Bankruptcy Rules, the Confirmation Order or other Order of the Bankruptcy Court, an application for final allowance of her fee within sixty (60) days after the Effective Date. Estimated, Allowed Amount of the unpaid Allowed Administrative Claims as of May 15, 2023: Unknown. Percentage recovery: 100% on Allowed Administrative Claims.
Class 1	Secured Claims (Non-EFP/BHT)	Unimpaired. Unless otherwise agreed in a written agreement by and among the Holder of an Allowed Secured Claim and the Trustee, on the Effective Date, in full satisfaction of the Holder's Secured Claim, each Holder of a Secured Claim will receive Cash in an amount equal to the Allowed amount of such Holder's Secured Claim, and will release all Liens on any Collateral in exchange for the receipt of such Cash. If the Holder's Secured Claim is not Allowed on or before the Effective Date, the Trustee will make the Distribution to such Holder within fifteen (15) days after the earlier of the date on which (a) an Order allowing the Secured Claim becomes a Final Order, or (b) a

[6] This is a summary and is not intended to address each class in detail. The Plan terms should be referenced as to each class and will control the treatment of each class.

CLASS	CLAIM	TREATMENT
		Stipulation Regarding the Amount and Nature of the Claim is executed. Estimated, Allowed Amount of Secured Claims as of May 15, 2023: Zero Percentage recovery: 100%
Class 2	Priority Unsecured Claims	Unimpaired. Unless otherwise agreed in a written agreement by and among the Holder of an Allowed Priority Unsecured Claim and the Trustee, on the Effective Date, in full satisfaction of the Holder's Priority Unsecured Claim, each Holder of a Priority Unsecured Claim will receive Cash in an amount equal to the Allowed amount of such Holder's Priority Unsecured Claim. If the Holder's Priority Unsecured Claim is Allowed on or before the Effective Date, the Trustee will make the Distribution to such Holder within fifteen (15) days of the Effective Date. If, however, the Holder's Priority Unsecured Claim is not Allowed on or before the Effective Date, the Trustee will make the Distribution to such Holder within fifteen (15) days after the earlier of the date on which an Order allowing the Priority Unsecured Claim becomes a Final Order, or a Stipulation Regarding the Amount and Nature of the Claim is executed. Estimated, Allowed Priority Unsecured Claims as of May 15, 2023: Zero Percentage recovery: 100%
Class 3	EFP/BHT Claim	Impaired. Unless otherwise agreed in a written agreement by and between the Holders of an Allowed EFP/BHT Claim and the Trustee, the following treatment is afforded the Holders of Class 3 Claims of the EFP/BHT Claim. (i) On or before the Effective Date, the Trustee will assign, without recourse or warranty of any kind or nature, to EFP/BHT or its designee, or assigns, any Loan held by or owned by the Debtor, regardless of whether any such Loans were purchased before or after the Petition Date. EFP/BHT, or their designee or assigns, will be responsible for issuing statements and all other forms of documents required by State or federal law related to the Loans for the calendar year in which the assignment occurs. (ii) On or before the Effective Date, the Trustee will transfer to EFP/BHT or their designee via quitclaim deed or comparable instrument, without recourse, any Loan which the Trustee has a right to recover due to any avoidable transfer of such Loan. (iii) On or before the Effective Date of the Plan, the Trustee shall assign to EFP/BHT, or their designees or assigns, her rights in the Edwards Adversary Proceedings as part of the Distribution on the EFP/BHT Claim. Within ten (10) days after the Effective Date, EFP/BHT shall dismiss with prejudice the EFP/BHT Adversary Proceedings. For the avoidance of doubt, the Trustee will assign the U.S. Forfeiture Order and the Final Judgment on Trustee's

CLASS	CLAIM	TREATMENT
		Dickson Trial to EFP/BHT. . (iv) The Trustee will assume and assign the Executory Contracts on Plan Exhibit 7.1, without recourse or warranty of any kind or nature, to EFP/BHT (or their designee). Furthermore, the Indemnification Agreement dated June 16, 2014, between EFP/BHT and the Servicer will be amended to delete the portion of said Agreement by which it expires upon the third anniversary of the termination of the Servicing Agreement. (v) On or before the Effective Date, the Trustee will convey, without recourse or warranty of any kind or nature, to EFP/BHT or their designee, any property of CHFS or the Estate, real or personal (except as otherwise provided by the Plan), as is/where is subject to all existing liens and encumbrances. EFP/BHT or their designee will be responsible for all obligations regarding the property conveyed under the Plan after the Effective Date. (vi) On the Effective Date, the Trustee will convey the remaining Cash in the Estate after Classes 1, 2, and 4 are paid in full, less $75,000, which will be held by the Trustee and not disbursed without further order of the Court. These funds will be available to pay Estate Professionals for the fees and expenses incurred in confirming this Plan, after notice and a hearing. To the extent these funds are not paid to Estate Professionals, the funds will be distributed to EFP/BHT, or their assigns. (vii) The UST, EFP and BHT will be entitled to object to the Final Fee Applications of any Estate Professionals and to the extent any funds that have been paid to an Estate Professional on an interim basis are ordered to be repaid, those funds will be paid to EFP and BHT, or their assigns or designees . Percentage of Recovery: Unknown.
Class 4	General Unsecured Claims	Unimpaired. Unless otherwise agreed in a written agreement by and among the Holder of an General Unsecured Claim and EFP/BHT, the Holder of an Allowed General Unsecured Claim will be paid in full by the Trustee, from the Estate's Cash before the Estate's Cash is distributed to EFP/BHT, or their assigns, or designees on the Effective Date. Estimated, approximate Allowed Amount of General Unsecured Claims as of May 15, 2023: Zero Percentage recovery: 100%

(For a more detailed discussion of the treatment of Claims and Interests under the Plan, *see* Article 4 of the Disclosure Statement and Article IV of the Plan.)

(b) **Claims Objection Process** The initial deadline for Filing Proofs of Claim was September 20, 2012, as established by the Notice of Chapter 11 Bankruptcy Case, Meeting of Creditors, & Deadlines.[7] The Debtor, before the Trustee was appointed, Filed a Motion to Establish Bar Date; this motion was withdrawn. The Trustee Filed a *Motion: (I) to Establish Amended Bar Date for Pre-Petition Claims and Bar Date for Post-Petition and Administrative Claims; and (II) to Approve Form, Manner, and Sufficiency of Notice for Same*.[8] This motion was also withdrawn pursuant to an Order entered by the Bankruptcy Court.[9]

On April 5, 2023, EFP objected to the following claims:

Claim No. 15 of Pitney Bowes Global Financial Services (Dkt. #3184)

Claim No. 17 of the Commissioner of Revenue of Tennessee (Dkt. #3185)

Claim No. 20 of Wayne Co. Michigan Treasurer (Dkt. #3187)

Claim No. 21 of Wayne Co. Michigan Treasurer (Dkt. #3188)

Claim No. 22 of Genesee Co. Michigan Treasurer (Dkt. #3189)

Claim No. 23 of Wayne Co. Michigan Treasurer (Dkt. #3190)

Claim No. 24 of Wayne Co. Michigan Treasurer (Dkt. #3191)

Claim No. 26 of Genesee Co. Michigan Treasurer (Dkt. #3192)

Claim No. 27 of Genesee Co. Michigan Treasurer (Dkt. #3193)

Claim No. 28 of Genesee Co. Michigan Treasurer (Dkt. #3194)

Claim No. 29 of Wells Fargo Bank, N.A. (as amended, Dkt. #s 3195 & 3204)

Claim No. 30 of Genesee Co. Michigan Treasurer (Dkt. #3196)

Claim No. 31 of Genesee Co. Michigan Treasurer (Dkt. #3197)

Claim No. 33 of Department of Treasury (Dkt. #3198)

---

[7] **Dkt. #15.**

[8] **Dkt. #1067**.

[9] **Dkt. #1710.**

Claim No. 34 of Tennessee of Revenue (Dkt. #3199)

Objection to Listed Claim of Decatur City of Illinois (Dkt. #3200)

Objection to Listed Claim of Information Tools, Inc. (Dkt. #3201)

Objection to Listed Claim of US Recordings (Dkt. #3202)

Objection to Listed Claim of Windstream (Dkt. #3203)

The response deadline to these Objections was May 5, 2023, and May 8, 2023, for Claim No. 29. As of May 15, 2023, the only response received was related to Claim No. 33, which, if Allowed, is classified as a Priority Unsecured Claim under Class 1 for $7,209.75. The hearing on EFP's Objection to Claim No. 33 is set for June 13, 2023, at 1:30 p.m. The remainder of the objected to claims listed above received no response, are therefore disallowed and orders have been entered by the Court accordingly. These claims will not be paid under the Plan.

3. DESCRIPTION AND HISTORY OF DEBTOR'S BUSINESS AND THE EVENTS OF THE CHAPTER 11 CASE **Pre-Chapter 11 Litigation** Prior to bankruptcy, CHFS is in the business of purchasing and servicing loan portfolios consisting of mostly Class B loans of 2nd to 3rd mortgages.[10] In approximately 2007, the Debtor entered into various arrangements with Edwards Family Partnership ("**EFP**"), Beher Holdings Trust ("**BHT**") (together with EFP, "**EFP/BHT**"), and/or affiliates or predecessors of EFP and BHT whose ultimate principal is believed to be Dr. Edwards. The nature of the exact relationship between the Debtor on the one hand and Dr. Edwards and EFP/BHT on the other was at issue in three separate adversary proceedings initiated by the Debtor.[11]

The relationship between the Debtor and EFP/BHT began to sour in late 2011 or early 2012 and litigation ensued. In February 2012, CHFS and Dickson (acting in his individual capacity as well as in his role as president and director of CHFS) Filed a complaint against, *inter alia*, EFP/BHT and Dr. Edwards concerning the obligations and rights under various agreements purporting to establish joint ventures between the parties as well as the liability of the respective parties for alleged breach of those agreements. EFP/BHT and Dr. Edwards counterclaimed against CHFS as well as Dickson, seeking to enforce certain guaranty agreements.[12] This litigation was stayed as to CHFS upon its chapter 11 Filing.

(b) **Other Pre-Chapter 11 Events**The Debtor was not primarily in the business of making loans to third parties pre-petition, although the Trustee's investigation has revealed at least one instance of an unsecured loan from the financing of wedding receptions at the Debtor's affiliate, Brookwood-Byram Country Club. Nevertheless, beginning four months prior to the

---

[10] **Dkt. #167.**

[11] *See infra* at 8.

[12] *Cmty. Home Fin. Servs., Inc. v. Edwards Family P'ship, LP*, No. 3:12-cv-252-CWR-LRA (S.D. Miss.).

Debtor Filing for chapter 11 relief (and after the dispute that occurred in 2011 between the Debtor and Dickson (on the one hand) and EFP/BHT (on the other hand)), the Debtor made substantial pre-petition transfers to affiliates/insiders in early 2012, including:

02/14/2012 Discount Mortgage, Inc. ("**DMI**")	$500,000.00
02/14/2012 Double S Construction, Inc. ("**Double S**")	$500,000.00
02/14/2012 William D. Dickson ("**Dickson**")	$250,000.00
02/15/2012 William D. Dickson Enterprises, Inc. ("**Dickson Enterprises**")	$350,000.00
03/14/2012 Double S	$400,000.00
04/12/2012 Crisco Investments, Inc. ("**Crisco**")	$500,000.00
05/14/2012 Crisco Investments	$450,000.00
05/14/2012 DMI	$250,000.00
TOTAL	**$3,200,000.00**

At least January 2014, DMI, Discount Home Mortgage, Inc. ("**DHMI**"), Victory, Crisco, Double S, and Dickson Enterprises were all located in the same building as the Debtor, namely, 234 East Capitol Street, Jackson, Mississippi. DMI, DHMI, Victory, Crisco, and Double S shared the same office space with the Debtor, prior to January 2014, but they also shared in whole or in part the Debtor's employees and used said employees to function on a day-to-day basis. Also, prior to the Trustee's appointment, DMI, DHMI, Crisco, Dickson Enterprises, Victory, and Double S had continuous access to the Debtor's bank accounts, books, records, computers, and other proprietary information.

(c) **Pre-Trustee Chapter 11 Events**On May 23, 2012 (the "**Petition Date**"), the Debtor Filed a voluntary petition for relief in the Bankruptcy Court under chapter 11 of the Bankruptcy Code. The Filing was precipitated by EFP/BHT's assertion of a counterclaim against the Debtor and Dickson in litigation referenced in footnote 12. The Debtor initially operated as a debtor-in-possession.

(i) *Initial Edwards Bankruptcy Litigation*

(ii) The Debtor and Dickson initiated three adversary proceedings against, *inter alia*, EFP, BHT and Dr. Edwards: *Dickson v. Edwards Family P'ship, LP*, AP No. 12-00091-EE (Bankr. S.D. Miss. Aug. 24, 2012); *Dickson v. Edwards Family P'ship, LP*, AP No. 00109-EE (Bankr. S.D. Miss. Oct. 2012); and *Dickson v. Edwards*, AP No. 13-00104-EE (Bankr. S.D. Miss. Nov. 26, 2013) (collectively, "**Initial Edwards Adversary Proceedings**").[13] On September 20, 2012, EFP/BHT Filed Proofs of Claim Nos. 4-1, 5-1, 6-1, 7-1, 8-1, and 9-1 (collectively, "**EFP/BHT Claims**") in the Bankruptcy Case to which the Debtor objected. On March 5, 2013, Claims Nos. 6, 7, 8, and 9 were

[13] The Trustee was substituted as the proper party-in-interest in the Initial Edwards Adversary Proceedings, which were then stayed by consent Orders pending the stabilization of the Estate after her appointment. Subsequent procedural history is discussed *supra* at 32-38.

consolidated with *Dickson v. Edwards Family P'ship, LP*, AP No. 12-00109.[14] That same day, Claims Nos. 4 and 5 were consolidated with *Dickson v. Edwards Family P'ship, LP*, AP No. 12-00091.[15] *Other Pre-Trustee Chapter 11 Events*

To facilitate the operation of the Debtor's business, the Bankruptcy Court entered certain Orders regarding the Debtor's cash flow and operations. *See* Orders found at Dkt. Nos. 60 and 231 ("**Cash Collateral Orders**"). In the litigation between them, EFP/BHT and the Trustee disagreed with each other as to the extent of the exact relief provided by the Cash Collateral Orders, but these issues have been resolved by their settlement evidenced herein. During the course of this chapter 11 case, the Debtor's operations generated substantial sums of money. For example, the Debtor showed cash receipts of $2,223,875.06 in October 2013.[16] The October 2013 Monthly Operating Report (the last report Filed by the Debtor) indicated an ending cash balance of $9,059,191.49.

On December 20, 2013, a Disclosure of Transfer of Funds and other Matters ("**Disclosure**") was Filed in the Bankruptcy Case indicating that: (1) the Debtor changed its principal place of business to Panama; (2) the Debtor had transferred funds from its DIP account(s) to the Debtor's bank accounts in Panama; and (3) the Debtor continued to service its business operations in Panama and Costa Rica. The transfer of funds was an express violation of the Cash Collateral Orders.

(d) **Trustee's Appointment**

In response to the Disclosure, the United States Trustee Filed an *Emergency Motion for Order for the Appointment of a Chapter 11 Trustee*.[17] On December 23, 2013, the Court entered an *Order Granting the United States Trustee's Emergency Motion for Order for the Appointment of a Chapter 11 Trustee* directing the appointment of a trustee in this case.[18] Upon entry of this Order, Debtor's management and employees lost all decision-making authority for the Debtor and power to bind the Estate.

On January 8, 2014, the United States Trustee's Office Filed its *Application for Approval of Chapter 11 Trustee*.[19] On January 16, 2014, the Court approved the United States Trustee's appointment of the Trustee (over the objections of the Debtor and Dickson and with the support of EFP/BHT) pursuant to a bench ruling that was confirmed in an Order dated January 21,

---

[14] AP 12-109 **Dkt. #13.**

[15] AP 12-91 **Dkt. #24.**

[16] **Dkt. #416.**

[17] **Dkt. #427.**

[18] **Dkt. #429.**

[19] **Dkt. #455.**

2014.[20] The Trustee is the duly acting and qualified trustee in this case. No committee of unsecured creditors has been appointed.

(e) **Post-Trustee Events**

After her appointment, the Trustee proceeded with (a) stabilizing the mortgage portfolio, the servicing of which constitutes the majority of the business operations of the Estate; (b) recovering funds and other assets improperly removed from the Estate and precluding additional diversion; and (c) investigating the Debtor's conduct and financial affairs.

On February 25, 2014, the Trustee Filed her *Motion to Approve Procedure for Compromise and Settlement of a Class of Claims* ("**Settlement Motion**") requesting an interim protocol for responding to borrower payoff and short sale requests.[21] An Order was entered on the Settlement Motion on April 9, 2014.

On March 5, 2014, filed a *Motion for Interim Authority* Nunc Pro Tunc *to January 8, 2014, to Service Loans in the Ordinary Course of Business* ("**Interim Servicing Motion**") pending the retention of a professional mortgage servicing company.[22] On April 11, 2014, the Bankruptcy Court granted the Interim Servicing Motion.[23]

On April 11, 2014, the same day the Court granted the Interim Servicing Motion, the Trustee Filed her *Application to Employ Loan Servicing Company and to Establish Settlement Authority* ("**Application**").[24] Through this Application, the Trustee sought to retain Vantium Capital, Inc., ("**Servicer**"). The Servicer went "live" with servicing on June 20, 2014.

Not all loans are currently being serviced by the Servicer. For example, there are loans for which there is inadequate information to board with the Servicer or for which the servers reflected a zero balance due.

The Trustee Filed a *Motion to Extend 11 U.S.C. § 546 Deadline* on October 27, 2014.[25] The Bankruptcy Court subsequently granted this motion on November 13, 2014, thereby extending the deadline under 11 U.S.C. § 546 through January 21, 2016.[26]

---

[20] **Dkt. #473.**

[21] **Dkt. #536.**

[22] **Dkt. #553.**

[23] **Dkt. #616**

[24] **Dkt. #618.**

[25] **Dkt. #848.**

[26] **Dkt. #877.**

(i) *Dickson's Criminal Conviction & Restitution Order*

On March 10, 2014, a criminal complaint was Filed against Dickson, who was detained in federal custody and deported from Panama while *en route* to Costa Rica ("**Dickson Criminal Case**"). An indictment was issued on April 9, 2014.[27] A true and correct copy of the Complaint which is of public record is attached hereto as Exhibit "D." On February 18, 2015, First Superseding Indictments were Filed by the United States of America against both Colby and Dickson. Colby was arrested April 2, 2015, but was subsequently released on bond.[28]

On May 5, 2015, Dickson pled guilty to two counts for which he was indicted, including the criminal concealment of assets and false oaths and claims, in violation of 18 U.S.C. §§ 152(5), (2).[29] Subsequent to pleading guilty, an Agreed Order of Restitution (the "**Restitution Order**") was entered on September 13, 2016. The total losses to the Estate for purposes of the Restitution Order amounted to $12,145,842.46. This total included: (a) $9,095,000 transferred from DIP accounts; (b) $1,345,462.46 diverted to Victory Consulting's Wells Fargo account; (c) CHFS checks totaling $196,973.24 deposited with OmniBank; and (d) proceeds from November 2013 to April 2014 "as the result of the diversion of proceeds from electronic deposits" totaling $1,508,406.66.[30] However, Dickson was given credit for amounts intercepted by the Trustee or voluntarily remitted to the Trustee by Dickson in the amount of $6,703,837.78. Consequently, Dickson was been ordered to pay restitution to the Trustee on behalf of the Estate in the amount of $5,422,004.58. Certain property became the subject of criminal forfeiture to be applied to restitution to the Estate as more specifically described in Dickson's criminal case, but includes a condominium in Costa Rica and $587,749.95 seized by the Costa Rican government.

(ii) *Asset Recovery*

The Trustee intercepted various payments that were deposited into the Estate bank account:

(1) $240,000.00 – cashier's check dated February 25, 2014;
(2) $300,000.00 – cashier's check dated January 29, 2014; and
(3) $263,418.67 – received by the Trustee on May 13, 2014

On July 10, 2014, the Trustee received a wire of $4,924,025.58 from a Panamanian bank.[31] On March 19, 2015, the Trustee received a wire transfer of $408,146.70 from a

---

[27] *See United States v. Dickson*, No. 3:14-cr-00078-TSL-FKB (S.D. Miss. Apr. 9, 2014), **Dkt. #3**.

[28] *See United States v. Dickson*, No. 3:14-cr-00078-TSL-FKB (S.D. Miss. Apr. 2, 2015), **Dkt. #37**.

[29] AP 14-30 **Dkt. #301, 24** (pleading guilty specifically to Counts 5 and 20 under the pertinent indictment).

[30] AP 14-30 **Dkt. #301, 27.**

[31] This amount was received through two transfers on July 10, 2014: (1) $3,099,154.09 and (2) $1,824,871.49. *See* AP 14-30 **Dkt. #301, 23.**

Panamanian bank. On April 3, 2015, the Trustee received another wire transfer from a Panamanian bank in the amount of $566,106.61, bringing the total in funds voluntarily remitted to the Estate over the course of approximately sixteen (16) months after the Trustee's appointment to $5,898,278.89.

The Trustee also has recovered funds from first mortgage lenders who foreclosed on properties in violation of the CHFS automatic stay.

Dickson and Dr. Edwards, along with certain of their related companies, were involved in litigation in Florida involving "Coastal Condos." Pursuant to a settlement in that litigation and a subsequent Order entered in the Trustee's Dickson Proceeding the sum of $144,000.00 was deposited in the registry of the Bankruptcy Court. This amount was included as a credit in the Restitution Order.

The Trustee located real properties not included in the Debtor's Schedules that were foreclosed on by the Debtor or otherwise placed in the Debtor's name. The Trustee obtained authority to abandon three (3) such properties from the Estate and conveyed the remainder to EFP/BHT by quitclaim deed.

(iii) *The Trustee's Dickson Proceeding*

On June 4, 2014, the Trustee filed a Verified Complaint to: (1) Recover Money, Damages or Property; (2) to Avoid Pre-Petition and Post-Petition Transfers; (3) for Turnover of Property; (4) for Injunctive Relief; and (5) for Equitable Subordination against DMI; DHMI; Double S; Crisco; Victory; Dickson Enterprises; Phalanx, Inc. ("**Phalanx**"); Dickson; BBCC; Colby; Cristen Dickson Nelson ("**Cristen**"); Beau Nelson ("**Beau**"); Reshonda Rhodes ("**Rhodes**"); Carol Runnels ("**Runnels**"); Warren Foundation; Nick Clark d/b/a Nick Clark Auctions ("**Clark**"); and William Head d/b/a Head Auctions ("**Head**"). The Verified Complaint was amended on June 25, 2014. Certain interim relief was provided by agreed Order to allow the auctions to proceed. The Verified Complaint, as amended, in addition to seeking recovery through avoidance actions, sought to compel the return of books and records and the liquidation of various tort claims.

The Trustee's Dickson Proceeding was tried the Bankruptcy Court on December 7, 2017.

On February 27, 2018, the Bankruptcy Court entered its *Memorandum Opinion and Order on First Amended Verified Complaint to: (1) Recover Money, Damages or Property; (2) to Avoid Pre-Petition and Post-Petition Transfers; (3) for Turnover of Property; (4) for Injunctive Relief; and (5) for Equitable Subordination* (the "**Opinion on Dickson Trial**") and *Final Judgment on First Amended Verified Complaint to: (1) Recover Money, Damages or Property; (2) to Avoid Pre-Petition and Post-Petition Transfers; (3) for Turnover of Property; (4) for Injunctive Relief; and (5) for Equitable Subordination* (the "**Final Judgment on Dickson Trial**").[32]

[32] AP 14-30 **Dkt. Nos. 301 & 302.**

On June 1, 2018, the Trustee Filed an objection to the proof of claim Filed by Dickson in the Bankruptcy Case, asking the Bankruptcy Court to reduce the Allowed amounts of such Dickson's Claim to $0.00, on several grounds including the fact that the Final Judgment on Dickson Trial created an offset in favor of the Estate as a matter of law.[33] The Objection was sustained,[34] and therefore Dickson Claim is disallowed and will not be paid under the Plan.

(f) **Cash Collateral Matters**

On December 3, 2014, EFP/BHT Filed a *Third Motion to Prohibit Use of Cash Collateral until the Court Rules in Adversary Proceeding 12-00091*.[35] EFP/BHT and the Trustee continued to File motions and responses regarding the use of cash collateral in the Bankruptcy Case. These matters were stayed pursuant to the Bankruptcy Court's *Order Holding in Abeyance Cash Collateral Pleadings*.[36] On February 17, 2017, the Bankruptcy Court entered its *Order Setting Aside Abeyance Order and Resetting Status Conference*.[37] These Cash Collateral Matters were consolidated with AP 12-00091-JAW.[38]

(g) **Continuation of Initial Edwards Adversary Proceedings**

(i) **RICO Complaint/Post Petition Conduct Adversary**

On April 7, 2014, a complaint (the "**RICO Complaint**")[39] and statement—seeking relief for, *inter alia*, violations of the Racketeer Influenced and Corrupt Organizations Act—against EFP/BHT, Dr. Edwards (individually, as managing partner of EFP, and as the "investment manager" of BHT), Martha Borg, and James Edwards. ("**RICO Case**"). The Trustee also filed motions to withdraw the reference of the Initial Edwards Adversary Proceedings, and a motion to consolidate the adversary proceedings with the RICO Case.

On July 15, 2015, the District Court denied, without prejudice, all relief requested by the Trustee, but granted leave to amend the complaint. The District Court also denied the Motion to Withdraw the Reference and the Bankruptcy Court, *sua sponte*, and terminated the stay of the Home Improvement Loans Adversary on July 28, 2015. On December 3, 2015, the Bankruptcy

---

[33] **Dkt. #2302.**

[34] **Dkt. #2387.**

[35] **Dkt. #901.**

[36] **Dkt. #1293.**

[37] **Dkt. #1671;** *see also* **Dkt. #1672.**

[38] AP 12-91 **Dkt. #285.**

[39] *See Johnson v. Edwards Family P'ship*, No. 3:15-cv-00260-CWR-LRA (S. D. Miss. Apr. 7, 2015), **Dkt. Nos. 1 & 3**.

Court granted the Trustee's motions to terminate the stays of the "**Mortgage Portfolios Adversary**" and Adversary Proceeding No. 12-00109-JAW (Bankr. S.D. Miss.).

The RICO Complaint was amended subsequently became *Kristina M. Johnson, Trustee of the Estate of Cmty. Home Fin. Servs., Inc. v. Edwards Family P'ship, LP, Beher Holdings Trust, Charles C. Edwards, Individually and as managing partner of Edwards Family P'ship, LP, Beher Holdings Trust*, Adv. Proc. No. 15-00080-JAW (Bankr. S.D. Miss.) (also referred to as the "**Post-Petition Conduct Adversary**").

(ii) **Home Improvement Loan Adversary**

The Trustee Filed a Third Amended Complaint in the Home Improvement Loan Adversary on January 15, 2016. This adversary proceeding continued to challenge EFP and BHT's secured claims on the Home Improvement Loan to CHFS.

(iii) **Mortgage Portfolios Adversary**

On March 6, 2017, the Trustee filed an amended complaint in the Mortgage Portfolio Adversary Proceeding against Dr. Edwards, James Edwards, The Atkinson Trust, EFP/BHT, and The Debt Exchange, Inc. The Trustee sought, *inter alia*, a declaratory judgment setting forth the rights and obligations of the parties with respect to Mortgage Portfolios #1 through #7, a declaratory judgment disallowing Edwards Claims 6-1 and 9-1, in whole or in part, as well as an accounting of the net proceeds owed to CHFS.

EFP/BHT and Dr. Edwards also sought a judgment declaring the rights of the parties under Mortgage Portfolios #1 through #7 through their Answer and Counterclaims. EFP/BHT also sought damages resulting from CHFS's alleged pre-petition and post-petition breaches of the "joint ventures," they claims gave rise to the relationships between EFP/BHT and CHFS relating to the Mortgage Portfolios, damages for CHFS's alleged breach of fiduciary duties under the purported joint ventures, and that, in addition to these damages, a declaratory judgment providing they are entitled to 65.7% of the funds records by the Trustee. Finally, EFP/BHT and Dr. Edwards sought an accounting from the Trustee of all funds collected from the Mortgage Portfolios and a return of any Mortgage Portfolio funds used to pay expenses of the Estate.

(h) **The Edwards Trial**

Trial on all three of the Adversary Proceedings took place contemporaneously from October 30, 2017, through November 2, 2017; the final day of trial was held November 27, 2017.

(i) **Bankruptcy Court's Memorandum Opinion & Order on the Edwards Trial and Appeals.**

(i) **Bankruptcy Court's Ruling:** On February 27, 2018, the Bankruptcy Court issued Its Memorandum Opinion and Order and its *Final Judgment on Third Amended Complaint in Adversary Proceeding 12-00091-NPO; Consolidated Amended Complaint in Adversary Proceeding 13-00104-NPO; Amended Complaint for Turnover, Recovery of Property*

Transferred Post-Petition, Damages, Declaratory Relief, Equitable Subordination, and Other Relief in Adversary Proceeding 15-00080-NPO; and Consolidated Contested Matters ("**Final Judgment**").

The Bankruptcy Court determined that, *inter alia*, as to the Home Improvement Loans Adversary: (1) EFP/BHT do not have a perfected security interest in the Home Improvement Loans, and as a result, are general unsecured creditors of the Estate of CHFS; and (2) EFP/BHT do not have security interest in any of the stolen funds recovered or intercepted by the Trustee.

The Bankruptcy Court determined that as to the Mortgage Portfolio Adversary Proceeding: (1) EFP has claim secured by the mortgages and notes that comprise Mortgage Portfolios #1 and #2; (2) the loans EFP provided to CHFS for the purchase of Mortgage Portfolios #3 through #6 are unenforceable; (3) CHFS entered into a servicing agreement with BHT regarding Mortgage Portfolio #7 for which CHFS is owed all servicing fees and the reimbursement of costs; and (4) BHT owns the original notes and mortgages that comprise Mortgage Portfolio #7. The Bankruptcy Court disallowed EFP and BHT's claims 6-1 and 9-1.

The Bankruptcy Court determined that as to the Cash Collateral Motions: (1) EFP/BHT were unsecured as to the collections on the Home Improvement Loan and therefore the collections were not cash collateral; (2) the Trustee may use traceable proceeds from Mortgage Portfolios #1 and #2 to pay ordinary expenses of the Estate, with the amount and extent to be determined at a later date; and (3) the proceeds from the Home Improvement Loans and Mortgage Portfolios #3–#6 are not cash collateral and therefore, no relief was necessary nor required.[40]

The Bankruptcy Court found with respect to the Post-Petition Conduct Adversary Proceeding that Dr. Edwards and EFP/BHT (jointly and severally) were liable for violations of the automatic stay and awarded damages in the amount of $10,000.00, "representing additional servicing costs and $61,458.25 in attorneys' fees and expenses incurred by the Trustee through July 31, 2017, plus attorneys' fees and expenses incurred from August 1, 2017, through the last day of the Edwards Trial". The Bankruptcy Court Ordered Dr. Edwards to turn over the two (2) original CDs he received from Meehan, and entered a judgment against Dr. Edwards and EFP/BHT jointly and severally, for the conversion of the CDs in the amount of $10,000.00, including post-judgment interest at the legal rate until satisfied. The Bankruptcy Court dismissed the remaining counts in the Post-Petition Adversary Proceeding.

(ii) **District Court's Ruling**

On March 13, 2017, EFP/BHT appealed the Final Judgment. After granting orders extending the temporary stay of the Final Judgment, the District Court issued a stay pending appeal on August 27, 2018.

On October 2, 2020, the District Court issued it Memorandum Opinion and Order and Final Judgment affirming in part and reversing and remanding in part the Final Judgment

[40] *See* **Dkt. #2183, at 6-7.**

("**District Court Judgment**"). The District Court Judgment also stayed execution pending appeal.

The District Court Judgment, *inter alia*, reversed the Final Judgment as to the Home Improvement Adversary and held that EFP/BHT had perfected secured claim as to the loans in the Home Improvement loan portfolio. The District Court Judgment stated that the cash collateral rulings were necessarily reversed. The District Court affirmed the Final Judgment as to the Mortgage Portfolio Adversary. The District Court reversed the Final Judgment in the Post-Petition Conduct Adversary Proceeding.[41]

(iii) **Fifth Circuit's Ruling**

In late October , 2020, EFP/BHT and the Trustee cross-appealed to the Fifth Circuit Court of Appeals on a variety of issues.

On April 27, 2022, the Fifth Circuit affirmed the District Court's decision in part, reversed in part, and remanded the consolidated appeals for reconsideration of the issues "of the valuations of Mortgage Portfolios #1 and #2 and "the collections of Mortgage Portfolio #7."[42]

(iv) **Settlement of Disputes on Remand**

After the Fifth Circuit's ruling, on January 20, 2023, the Bankruptcy Court issued its *Order Identifying Issues on Remand and Setting Date for Trial and Deadline for Pre-trial Order*,[43] with respect to the pending adversary proceedings and related contested matters. The evidentiary hearing on remand issues was consolidated with a trial on other pending contested matters and was set for March 28–31, 2023.

The Bankruptcy Court also issued an *Order Setting Hearing on All Pending Contested Matters*,[44] for March 28–31, 2023, which set the following contested matters for hearing:

(A) Trustee's Motion for Use of Cash Collateral [Dkt. #906]; Edwards Response [Dkt. #919]; Trustee's Reply [Dkt. #926]; and Trustee's Supplemental Reply [Dkt. #1023] (Trustee's Motion, Trustee's Reply and Trustee's Supplemental Reply are referred to collectively as the "**Trustee's Cash Motion**[45]").

---

[41] *See Edwards Family P'ship, LP v. Johnson, 2020 U.S. Dist. LEXIS 182973*, *39 (Bankr. S.D. Miss. Oct. 2, 2020).

[42] *See Edwards Fam. P'ship, L.P. v. Johnson (In re Cmty. Home Fin. Servs. Corp.)*, 32 F.4th 472, 488 (5th Cir. 2022).

[43] **Dkt. 3081, Dkt. 422, Dkt. 199 and Dkt. 180.**

[44] **Dkt.3082.**

[45] This Order uses the same defined terms as provided in this Court's opinion at **Dkt. #2182** for consistency in the record.

(B) (Amended) Edwards Family Partnership, LP and Beher Holdings Trust Renewed Motion to Prohibit Use of Cash Collateral and to Provide Adequate Protection for Unauthorized Use of Cash Collateral ("**EFP/BHT Renewed Cash Collateral Objection**")[Dkt. #3012]; and Trustee's Objection [Dkt. #3029] ("**Trustee's Response to Renewed Cash Collateral Objection**").

(C) Trustee's 18th Fee Application [Dkt. #3019]; and Edwards Limited Objection [Dkt. #3026].

(D) Trustee's 19th Fee Application [Dkt. #3067]; and Edwards Limited Objection [Dkt. #3075].

(E) Harper, Rains, Knight & Company, P.A. (Trustee's Accountant) 9th Fee Application [Dkt. #3020]; and Edwards Limited Objection [Dkt. #3027].

(F) Harper, Rains, Knight & Company, P.A. (Trustee's Accountant) 10th Fee Application [Dkt. #3068]; and Edwards Limited Objection [Dkt. #3076].

(G) Law Firm of Facio & Cañas (Costa Rican Counsel to Trustee) 10th Fee Application [Dkt. #3021]; and Edwards Limited Objection [Dkt. #3028].

(H) Jones Walker's 20th Fee Application [Dkt. #3045]; and Edwards Limited Objection [Dkt. #3056].

(I) Jones Walker's 21st Fee Application [Dkt. #3089]; and Edwards Limited Objection [Dkt. #3093].

(J) Law Offices of John D. Moore, P.A. 26th Fee Application [Dkt. #3078]; and Edwards Limited Objection [Dkt. #3080].

(K) Trustee's Motion to Abandon Selected Assets from the Estate [Dkt. #3047] ("**Trustee's Motion to Abandon HIL Loans**"); and Edwards Response [Dkt #3064].

(L) Trustee's Motion to Reject Executory Contract as to Portfolio No. 7 [Dkt. #3048]("**Trustee's Motion to Reject Portfolio 7**"); and Edwards Response in Opposition [Dkt #3065].

(K) Trustee's 20th Fee Application [Dkt. #3098] and Edwards Objection [Dkt. #3115]

(M) Harper, Rains, Knight & Company, P.A. (Trustee's Accountant) 11th Fee Application [Dkt. #3099] and an Edwards Objection [Dkt. #3115]

There were three additional contested matters pending before the Bankruptcy Court that were not yet set for hearing. Those matters were:

(A) Application to Employ Loan Sale Consultant [Dkt. #3102] and Edwards Objection [Dkt. #3124]

(B) Motion of Trustee for Entry of an Order (A)(I) Approving Bidding Procedures, (II) Approving Stalking Horse Bid Protections, (III) Approving an Auction, (IV) Scheduling a Hearing and Objection Deadline with Respect to the Sale, (V) Approving the Form and Manner of Notice Thereof, and (VI) Granting Related Relief; and (B) Authorizing the Sale of the Assets Free and Clear of All Liens, Claims, Interests, and Encumbrances; and (C) Granting Related Relief [Dkt. #3103] and Edwards Objection [Dkt. #3123]

(C) Edwards Entities' Application for Super Priority Administrative Expense Claim Pursuant to 11 U.S.C § 507(B) [Dkt. #3125.

On March 28, 2023, the Trustee and EFP/BHT reached a settlement of the issues set for trial on March 28–31, 2023 and the contested matters which had not yet been set for hearing.[46] The Plan incorporates the terms of that settlement, which was read into the record on March 28, 2023, before this Court.

(j) **Prior Trustee Plans and Disclosure Statements**

The Trustee has previously filed the following plans and disclosure statements:

(i) *Chapter 11 Plan of Liquidation of the Estate of Community Home Financial Services, Inc. Proposed by the Trustee, Kristina M. Johnson, Dated as of February 9, 2015 and Disclosure Statement for Chapter 11 Plan of Liquidation of the Estate of Community Home Financial Services, Inc. Proposed by the Trustee, Kristina M. Johnson, dated as of February 9, 2015*, This plan and disclosure statement were withdrawn.

(ii) *First Amended Chapter 11 Plan of Liquidation of the Estate of Community Home Financial Services, Inc. Proposed by the Trustee, Kristina M. Johnson Dated as of May 15, 2015* along with the *First Amended Disclosure Statement for the Chapter 11 Plan of Liquidation of the Estate of Community Home Financial Services, Inc. Proposed by the Trustee, Kristina M. Johnson Dated as of May 15, 2015*. On February 2, 2017, the Trustee filed a modified plan. The first amended disclosure statement was approved but confirmation of the first amended plan, as modified, was denied.

(iii) *Second Amended Chapter 11 Plan of Liquidation of the Estate of Community Home Financial Services, Inc. Proposed by the Trustee, Kristina M. Johnson Dated as of June 1, 2018,* along with the *Second Amended Disclosure Statement for the Chapter 11 Plan of Liquidation of the Estate of Community Home Financial Services, Inc. Proposed by the Trustee, Kristina M. Johnson Dated as of June 1, 2018*.

(k) **<u>Miscellaneous Procedural Matters</u>**

[46] *See* Notice of Settlement, **Dkt. #3158**.

The Trustee has retained the following Professionals:

(1) Jones Walker LLP, Lead Counsel;
(2) John D. Moore, P.A., Special Counsel;
(3) Stephen Smith, CPA (now Harper Rains Knight & Company) CPA;
(4) Horne LLP, Expert Witness;
(5) Facio & Canas, Costa Rican Counsel;
(6) Jeffery Kirk of Appleby BVI, Expert Witness; and
(7) Arias, Fabrega & Fabrega, Special Counsel.

Additionally, the Court appointed former Judge David Houston III of Mitchell McNutt & Sams, P.A. as mediator to be paid equally by the estate and the EFP/BHT.

(l) **Inventory, Monthly Operating Reports and U.S. Trustee Quarterly Fees**

The Trustee is current on filing Monthly Operating Reports and on quarterly fees owed to the U.S. Trustee.

The Trustee filed federal and State of Mississippi tax returns for 2013-2022. The Trustee has paid estimated taxes owed for the State of Mississippi and other states as applicable as required by 11 U.S.C. § 1106. The Trustee has also investigated issues relating to privilege taxes and income tax issues in multiple states.

4. THE PLAN OF LIQUIDATION

The Plan classifies Claims and Interests separately and provides different treatment for different Classes of Claims and Interests in accordance with the provisions of the Bankruptcy Code. As described more fully below, the Plan provides, separately for each Class, that Holders of certain Claims and Interests will receive various amounts and types of consideration, thereby giving effect to the different rights of Holders of Claims and Interests in each Class. The Plan provides that the Trustee shall act as the Disbursing Agent.

(a) <u>Treatment of Unclassified Claims</u>

The Plan proposes treatment for certain Claims that are not classified, including Administrative Claims and certain fees, as follows.

(i) *Administrative Claims*

Section 3.1 of the Plan provides for the treatment of Administrative Claims (Claims for costs or expenses of administration of the Bankruptcy Case that are Allowed under sections 503(b) or 507(a)(2) of the Bankruptcy Code). Such Claims include the actual and necessary costs and expenses of preserving the Debtor's Estate incurred after the Petition Date. Each Holder of an Allowed Administrative Claim will receive, in full satisfaction of its Administrative Claim, Cash equal to the Allowed amount of such Administrative Claim either (A) on the Effective Date or as soon as practicable thereafter, or (B) if the Administrative Claim is not Allowed on or

before the Effective Date, within thirty (30) days after the date on which (i) an Order that Allows such Administrative Claim becomes a Final Order, or (ii) a Stipulation of Amount and Nature of Claim is executed.

The Trustee estimates the total Administrative Claims (including Professional Fee Claims), from the date of her appointment through April 30, 2023, will be approximately $13,800,000. The Trustee estimates approximately $489,000.00 in Administrative Claims are unpaid at this time.

The Trustee is entitled to a statutory fee, calculated based on the percentages set forth in section 326 of the Bankruptcy Code, "payable after the trustee renders such services, not to exceed five percent upon all payments under the Plan." 11 U.S.C. § 326. The Trustee expects to apply for final compensation under section 326 of the Bankruptcy Code at a later date, and, after reviewing her time entries, will make a determination as to the reasonable compensation that she will seek as the Trustee under section 326 of the Bankruptcy Code.

Section 3.2(a) of the Plan provides a general bar date for Filing Administrative Claims.

Professionals or other Entities asserting a Professional Fee Claim for services rendered before the Effective Date must File and serve on the Trustee, EFP/BHT and such other Entities who are designated by the Bankruptcy Rules, the Confirmation Order, or other Order of the Bankruptcy Court, an application for final allowance of such Professional Fee Claims within thirty (30) days after the Effective Date. Professionals or other Entities asserting a Professional Fee Claim for services rendered before the Effective Date, and whose services will be required after the Effective Date, must File and serve on the Trustee, EFP/BHT and such other Entities who are designated by the Bankruptcy Rules, the Confirmation Order, or other Order of the Bankruptcy Court, an application for Final allowance of such Professional Fee Claims within thirty (30) days after the Effective Date. Objections to any Professional Fee Claims, including any objections by the U.S. Trustee, and EFP and/or BHT must be Filed and served on the Trustee and the requesting party by the later of (A) sixty (60) days after the Effective Date, and (B) thirty (30) days after the Filing of the applicable request for payment of the Professional Fee Claims.

On the Effective Date, except to the extent otherwise provided herein, all notes, stock, instruments, certificates and other documents evidencing Equity Interests shall be deemed automatically canceled, shall be of no further force, whether surrendered for cancellation or otherwise, and the obligations of the Debtors thereunder or in any way related thereto shall be discharged.

(b) **Treatment of Classified Claims** *Secured Claims*

Secured Claims are treated in Class 1, Section 4.1 of the Plan. Secured Claims are Unimpaired under the Plan, are not entitled permitted to vote to accept or reject the Plan, and are deemed to accept the Plan.

Unless otherwise agreed in a written agreement by and among the Holder of an Allowed Secured Claim and the Trustee, on the Effective Date, in full satisfaction of the Holder's Secured

Claim, each Holder of a Secured Claim will receive Cash in an amount equal to the Allowed amount of such Holder's Secured Claim, and will release all Liens on any Collateral in exchange for the receipt of such Cash. If the Holder's Secured Claim is not Allowed on or before the Effective Date, the Trustee will make the Distribution to such Holder within fifteen (15) days after the earlier of the date on which (a) an Order allowing the Secured Claim becomes a Final Order, or (b) a Stipulation Regarding the Amount and Nature of the Claim is executed. The Allowed amount of Secured Claims, other than the EFP/BHT Claim, is believed to be zero as of May 15, 2023.

(ii) *Priority Unsecured Claims*

Priority Unsecured Claims are treated in Class 2, Section 4.2 of the Plan. Priority Unsecured Claims include any Unsecured Claim that is entitled to priority under the Bankruptcy Code. The Priority Unsecured Claims are Unimpaired under the Plan, are not entitled permitted to vote to accept or reject the Plan, and are deemed to accept the Plan.

Unless otherwise agreed in a written agreement by and among the Holder of an Allowed Priority Unsecured Claim and the Trustee, on the Effective Date, in full satisfaction of the Holder's Priority Unsecured Claim, each Holder of a Priority Unsecured Claim will receive Cash in an amount equal to the Allowed amount of such Holder's Priority Unsecured Claim. If the Holder's Priority Unsecured Claim is Allowed on or before the Effective Date, the Trustee will make the Distribution to such Holder within fifteen (15) days of the Effective Date. If, however, the Holder's Priority Unsecured Claim is not Allowed on or before the Effective Date, the Trustee will make the Distribution to such Holder within fifteen (15) days after the earlier of the date on which an Order allowing the Priority Unsecured Claim becomes a Final Order, or a Stipulation Regarding the Amount and Nature of the Claim is executed.

The Trustee estimates the approximate Allowed amount of Priority Unsecured Claims is zero as of May 15, 2023.

(iii) *EFP/BHT Claim*

The EFP/BHT Claim is treated in Class 3, Section 4.3 of the Plan. The Holders of the Allowed EFP/BHT Claim are Impaired and are deemed to accept the Plan as Plan Sponsors.

(a) Unless otherwise agreed in a written agreement by and between the Holders of an Allowed EFP/BHT Claim and the Trustee, the following treatment is afforded the Holders of Class 3 Claims of the EFP/BHT Claim.

(i) On or before the Effective Date, the Trustee will assign, without recourse or warranty of any kind or nature, to EFP/BHT or its designee or assigns, any Loan held by or owned by the Estate, regardless of whether any such Loans were purchased before or after the Petition Date. EFP/BHT, or their designee or assigns, will be responsible for issuing statements and all other forms or documents required by State or federal law related to the Loans for the entire calendar year in which the assignment occurs.

(ii) On or before the Effective Date, the Trustee will transfer to EFP/BHT or their assignee or designee via quitclaim deed or comparable instrument, without recourse or warranty, any Loan which the Trustee has a right to recover due to any avoidable transfer of such Loan.

(iii) On or before the Effective Date of the Plan, the Trustee shall assign to EFP/BHT, or their designees or assigns, her rights in the Edwards Adversary Proceedings as part of the Distribution on the EFP/BHT Claim. Within ten (10) days after the Effective Date, EFP/BHT shall dismiss with prejudice the Edwards Adversary Proceedings. For the avoidance of doubt, the Trustee will assign the U.S. Forfeiture Order and the Final Judgment on Trustee's Dickson Trial to EFP/BHT.

(iv) The Trustee will assume and assign the Executory Contracts on **Plan Exhibit 7.1** without recourse or warranty of any kind or nature, to EFP/BHT (or their designee). Furthermore, the Indemnification Agreement dated June 16, 2014, between EFP/BHT and the Servicer will be amended to delete the portion of said Agreement by which it expires upon the third anniversary of the termination of the Servicing Agreement.

(v) On or before the Effective Date, the Trustee will convey, without recourse or warranty of any kind or nature, to EFP/BHT or their designee, any property of CHFS or the Estate, real or personal (except as otherwise provided by the Plan), as is/where is subject to all existing liens and encumbrances. EFP/BHT or their assignee or designee will be responsible for all obligations regarding the property conveyed under the Plan after the Effective Date.

(vi) On the Effective Date, the Trustee will convey the remaining Cash in the Estate after Classes 1, 2, and 4 are paid in full, less $75,000, which will be held by the Trustee and not disbursed without further order of the Court. These funds will be available to pay Estate Professionals for the fees and expenses incurred in confirming this Plan, after notice and a hearing. To the extent these funds are not paid to Estate Professionals, the funds will be distributed to the EFP/BHT, or their assigns or designees.

(b) The UST, EFP, and BHT will be entitled to object to the Final Fee Applications of any Estate Professionals and to the extent any funds that have been paid to an Estate Professional on an interim basis are ordered to be repaid, those funds will be paid to EFP and BHT, or their assigns or designees. The UST, EFP, BHT, and all Estate Professionals are reserved all rights, claims, and defenses in connection with Final Fee Applications.

(iv) *General Unsecured Claims*

General Unsecured Claims are treated in Class 4, Section 4.4 of the Plan. General Unsecured Claims are Unimpaired under the Plan are not entitled to vote to accept or reject the Plan, and are deemed to accept the Plan.

Unless otherwise agreed in a written agreement by and among the Holder of a General Unsecured Claim and the Trustee, on the Effective Date, in full satisfaction of the Holder's General Claim, each Holder of a General Unsecured Claim will receive Cash in an amount equal to the Allowed amount of such Holder's General Unsecured Claim, exclusive of any and all accrued interest.

If the Holder's General Unsecured Claim is Allowed on or before the Effective Date, the Trustee will make the Distribution to such Holder on the Effective Date. If, however, the Holder's General Unsecured Claim is not Allowed on or before the Effective Date, the Trustee will make the Distribution to such Holder within fifteen (15) days after the earlier of the date on which an Order allowing the General Unsecured Claim becomes a Final Order, or a Stipulation Regarding the Amount and Nature of the Claim is executed.

The Trustee estimates the approximate Allowed amount of General Unsecured Claims is zero, as of May 15, 2023.

5. MEANS OF IMPLEMENTING THE PLAN<u>Generally</u>. As provided in Article 5 of the Plan, the Plan will be implemented as follows:

a. Before the Effective Date, the Trustee shall reject and terminate the Pre-petition Executory Contracts on **<u>Plan Exhibit 7.1</u>**.

b. Before the Effective Date, the Trustee will assign the Servicing Agreement and all other post-petition agreements identified on **<u>Plan Exhibit 5.3</u>** to EFP/BHT or their designees or assigns.

c. On or before the Effective Date, the Trustee shall pay Claims in Class 1. If a Holder's Claim in Class 1 is not Allowed on or before the Effective Date, the Trustee will make the Distribution to such holder within fifteen (15) days after the earlier of the date on which (a) an Order allowing such Claim becomes a Final Order, or (b) a Stipulation Regarding the Amount and Nature of the Claim is executed.

d. On or before the Effective Date, the Trustee shall pay Claims in Class 2. If a Holder's Claim in Class 2 is not Allowed on or before the Effective Date, the Trustee will make the Distribution to such holder within fifteen (15) days after the earlier of the date on which (a) an Order allowing such Claim becomes a Final Order, or (b) a Stipulation Regarding the Amount and Nature of the Claim is executed.

e. On or before the Effective Date, the Trustee shall execute documents[47] sufficient to transfer to EFP/BHT or their designees, or assigns, attached hereto as **<u>Plan Exhibit 5.1</u>**, any Loan owned by or serviced by the Estate constituting, or included in, the Home Improvement Loans, the Mortgage Loan Portfolios, the Unclassified Loans, the U.S. Forfeiture Order, and any rights in the Foreign Loans or claims related to the Foreign Loans. At

her discretion, Trustee may execute said documents by power of attorney. All costs associated with the preparation and/or recordation of the documents shall be borne by EFP/BHT, their designees, or assigns. EFP/BHT, their designees, or assigns will be responsible for issuing statements and all other forms or documents required by State or federal law related to the Loans for the calendar year in which the assignment occurs.

f. On the Effective Date, the Trustee will transfer all remaining Cash in the Estate to EFP/BHT, or their assigns, or designees, less the $75,000 amount which will be available to pay the Estate Professionals pursuant to authorization from the Court.

g. On or before the Effective Date, the Trustee shall pay Claims in Class 4, exclusive of any and all accrued interest. If a Holder's Claim in Class 4 is not Allowed on or before the Effective Date, the Trustee will make the Distribution to such holder within fifteen (15) days after the earlier of the date on which (a) an Order allowing such Claim becomes a Final Order, or (b) a Stipulation Regarding the Amount and Nature of the Claim is executed.

h. On or before the Effective Date, the Trustee shall execute documents sufficient to transfer to EFP/BHT or their assignees or designees all rights to funds associated with the U.S. Forfeiture Order, all funds associated with the Forfeiture Order (including the Costa Rica Condo Sale Proceeds) and all funds and/or assets currently in or being held by the Costa Rican Government. All costs associated with the preparation and/or recordation of the documents shall be borne by EFP/BHT. EFP/BHT will be responsible for issuing statements and all other forms or documents required by State, federal, and/or foreign law related to the Loans for the calendar year in which the assignment occurs.

i. On or before the Effective Date, the Trustee shall pay all Estate Taxes and Tax Claims as advised by her Estate Professionals to be presently due and owing, pursuant to Section 5.4 of the Plan.

(b) **Powers of the Trustee Post Effective Date.** After the Effective Date, the Trustee shall have the following powers without need for approval by the Bankruptcy Court.File any documents required by the Bankruptcy Code including, but not limited to, Monthly Operating Reports.

2) Complete final Tax returns for the Estate.

3) Disburse payments on final fee applications as approved by the Court.

(c) **Effectuating Documents; Further Transactions; Exemption from Certain Transfer Taxes.** The Trustee will be authorized to execute, deliver, file or record such contracts, instruments, releases and other agreements and documents and take such actions as may be necessary, appropriate or desirable to effectuate and implement the provisions of the Plan. The Trustee will be authorized to certify or attest to any of the foregoing actions. Pursuant to section 1146(c) of the Bankruptcy Code, the following will not be subject to a stamp tax, real estate

transfer tax, sales or use tax or similar Tax: (a) the creation of any mortgage, deed of trust, lien or other security interest; (b) the making or assignment of any lease or sublease; and (c) the making or delivery of any deed, bill of sale or other instrument of transfer or assignment or any plan of merger, consolidation, liquidation or dissolution under, in furtherance of or in connection with the Plan. **Estate Taxes.** On or before the Effective Date, the Trustee shall pay all Estate Taxes and Tax Claims as advised by her Estate Professionals to be presently due and owing, to the extent not otherwise disputed and with the reasonable consent of EFP/BHT. Upon discharge of the Trustee pursuant to Section 5.6, all other Estate Taxes including but not limited to future obligations and filing requirements shall be the responsibility of EFP/BHT.

(e) **General Settlement of Claims.** Except as provided in the Plan, pursuant to section 1123 of the Bankruptcy Code and Bankruptcy Rule 9019, and in consideration for the classification, Distributions, releases and other benefits provided under this Plan, upon the Effective Date, the provisions of this Plan shall constitute a good faith compromise and settlement of all Claims and controversies resolved pursuant to this Plan in accordance with Bankruptcy Rule 9019 and within the exercise of the Trustee's business judgment and shall be approved as in the best interests of the Estate. However, a vote to accept the Plan ***will not*** be considered a settlement of all claims against the Estate. (f) **Discharge of Trustee.** Upon completion of all duties under the Plan and closure of the Bankruptcy Case, the Trustee shall be discharged as Trustee of this Bankruptcy Case.

6. PROVISIONS GOVERNING DISTRIBUTIONS AND OBJECTIONS TO CLAIMS

No Payment of Postpetition Interest and Attorneys' Fees on Claims

Unless otherwise provided by Order of the Bankruptcy Court, no Distributions shall be made pursuant to the Plan to any Holder of a Claim for or on account of any interest, penalty or late charge accruing on or after the Petition Date, or for any attorneys' fees with respect to such Claim.

(b) **Distribution Record Date** Pursuant to Section 6.3(a) of the Plan, the Trustee will have no obligation to recognize the transfer of, or the sale of any participation in, any Allowed Claim that occurs after the Distribution Record Date and will be entitled to recognize and make distributions only to those Holders of Allowed Claims that are Holders of such Claims, as of the Distribution Record Date as reflected by the Docket in this Bankruptcy Case.

7. TREATMENT OF EXECUTORY CONTRACTS AND UNEXPIRED LEASES

Section 7.1 Executory Contracts/Unexpired Leases Relevant to Loan Servicing. Except as otherwise provided in the Plan or Confirmation Order, the Trustee will assume and assign to EFP/BHT, their assignees, or designees the Executory Contracts or Unexpired Leases listed on **Plan Exhibit 7.1**

Section 7.2 All Other Executory Contracts and Unexpired Leases in Rejected. Any Executory Contracts or Unexpired Leases not listed provided in **Plan Exhibit 7.1** will be deemed rejected. The Confirmation Order of the Plan will constitute an Order of the Bankruptcy Court approving the rejection and termination as of the Effective Date, pursuant to section 365 of the

Bankruptcy Code of each Executory Contract and Unexpired Lease that is not assumed and assigned.

Section 7.3 Payments Related to the Assumption of Executory Contracts and Unexpired Leases. To the extent that such Claims constitute monetary defaults, the Cure Amount Claims associated with each Executory Contract or Unexpired Lease to be assumed pursuant to the Plan will be satisfied, pursuant to section 365(b)(1) of the Bankruptcy Code by EFP/BHT or the designees or assigns. If there is a dispute regarding the amount of any Cure Amount Claim, or any other matter pertaining to assumption of such contract or lease, the payment of any Cure Amount Claim by EFP/BHT required by section 365(b)(1) of the Bankruptcy Code will be made following the entry of a Final Order resolving the dispute and approving the assumption.

Section 7.4 Deemed Rejection. All Executory Contracts and Unexpired Leases not specified on **Plan Exhibits 5.3 or 7.1**, and not either (a) assumed or rejected pursuant to a Final Order entered on or before the Effective Date, or (b) the subject of a pending motion to assume or an Order that has not yet become a Final Order as of the Effective Date, shall be deemed rejected as of the Effective Date.

Section 7.5 Rejection Damages Claims. Pursuant to section 502(g) of the Bankruptcy Code, any Claims arising from the rejection of the Executory Contracts or Unexpired Leases shall File a Rejection Claim within the deadlines provided Bankruptcy Rule 3001. Any Rejection Claim Allowed under section 502(a)(b), or (c) will be treated as a General Unsecured Claim and will be treated in Class 4 of the Plan.

8. EFFECT OF CONFIRMATION OF THE PLAN

(a) **Binding Effect** Pursuant to Section 12.5 of the Plan, the Plan shall be binding upon and/or inure to the benefit of the Debtor, the Estate, the Trustee, the Holders of Claims, and Interests. Nothing contained in Article X of the Plan will limit the effect of Confirmation described in section 1141 of the Bankruptcy Code.

(b) **Miscellaneous Provisions of the Plan***Retention of Jurisdiction*

As provided in Article X of the Plan, until the entry of a final decree in accordance with Bankruptcy Rule 3022, the Bankruptcy Court shall have jurisdiction of all matters arising under, arising out of or relating to the Bankruptcy Case including, but not limited to, the following:

(1) to insure that the purpose and intent of the Plan are carried out;

(2) to consider any modification of the Plan under section 1127 of the Bankruptcy Code;

(3) to hear and determine all Claims, controversies, defaults, suits and disputes against the Debtor, including, but not limited to, any Disputed Administrative Claim or Disputed Claim;

(4) to hear, determine and enforce all Claims and Causes of Action of the Estate that arose, in whole or in part, prior to the Effective Date;

(5) to hear and determine all controversies, suits, defaults and disputes that may arise in connection with the interpretation, execution or enforcement of the Plan;

(6) to hear and determine all requests for compensation and/or reimbursement of expenses for services rendered or expenses incurred before the Effective Date which may be made after the Effective Date;

(7) to hear and determine all objections to Administrative Claims, Claims, controversies, suits, and disputes that may be pending at or initiated after the Effective Date, except as provided in the Confirmation Order;

(8) to consider and act on the compromise and settlement of any Administrative Claim, Claim or Bankruptcy Cause of Action on behalf of or against the Debtor or Trustee;

(9) to enforce and interpret by injunction or otherwise the terms and conditions of the Plan;

(10) to enter a Final Order concluding and terminating the Bankruptcy Case;

(11) to correct any defect, cure any omission, or reconcile any inconsistency in the Plan or Confirmation Order necessary or helpful to carry out the purposes and intent of the Plan;

(12) to determine all questions and disputes regarding titles to the assets of the Debtor or Trustee;

(13) to classify the Claims or Interests of any Holder and to re-examine Claims allowed for purposes of voting, and to determine objections to Administrative Claims, Claims, and Interests;

(14) to consider and act on such other matters consistent with the Plan as may be provided in the Confirmation Order;

(15) to enforce any injunction or stay whether arising under the Bankruptcy Code, Bankruptcy Rules or the Plan;

(16) to consider and rule upon any objection to all final applications for compensation of Estate Professionals; and/or

(17) to consider the rejection or assumption and assignment of Executory Contracts and/or Unexpired Leases that are not discovered before Confirmation.

(ii) *Governing Law*

As provided in Section 12.9 of the Plan, except to the extent that the Bankruptcy Code is applicable, the rights and obligations arising under the Plan shall be governed by, and construed and enforced as provided in the laws of the State of Mississippi; *provided, however*, that any documents executed in connection with the Plan, including, but not limited to the Plan Exhibits, shall be governed by the laws of the State chosen therein.

9. CONFIRMATION AND CONSUMMATION PROCEDURE

The Confirmation Hearing

The Bankruptcy Code requires the Bankruptcy Court, after notice, to hold a confirmation hearing with respect to the accompanying Plan. The Confirmation Hearing in respect of the Plan has been scheduled for July 11, 2023, at 9:00 a.m. Any objection to Confirmation must be made in writing and specify in detail the name and address of the objector, all grounds for the objection and the amount of the Claim or a description of the interest in the Debtor or the Estate held by the objector, and must be made in accordance with any pre-trial or scheduling Orders that the Bankruptcy Court may enter in the Case. Any such objection must be Filed with the Bankruptcy Court and served so that it is received by the Bankruptcy Court, and served upon the parties specified in the accompanying Notice on or before June 16, 2023.

(b) **Confirmation**

At the Confirmation Hearing, the Bankruptcy Court will confirm the Plan only if all of the requirements of section 1129 of the Bankruptcy Code are met. Among the requirements for confirmation of the consensual Plan are that (i) all classes must be Unimpaired or accept the Plan, , (ii) the Plan must be feasible and (iii) in the "best interests" of Holders of Claims and Interests that are Impaired under the Plan.

(c) **Consummation on the Effective Date** The Plan will be consummated on the Effective Date. The Effective Date shall not occur until each of the following conditions has been satisfied, pursuant to Article VIII of the Plan:

(i) The first Business Day after a Confirmation Order has been entered by the Bankruptcy Court in form and substance that is satisfactory to the Bankruptcy Court and the Trustee, so that such Confirmation Order shall be in full force and effect and shall be a Final Order;

(ii) no Material Adverse Change will have occurred from and after the Confirmation Date; and,

(iii) all consents, actions, documents, certificates and agreements necessary to implement the Plan shall have been effected or executed and delivered to the required parties and, to the extent required, Filed with the applicable governmental units in accordance with the applicable laws.

10. CERTAIN FEDERAL INCOME TAX CONSEQUENCES OF THE PLAN

The following discussion is a summary of certain federal income tax consequences expected to result from the consummation of the Plan. This discussion is based on current provisions of the Tax Code, applicable Treasury Regulations, judicial authority and current administrative rulings and pronouncements of the Internal Revenue Service (the "**IRS**"), any of which may be altered with retroactive effect, thereby changing the federal income tax consequences discussed below. There can be no assurance that the IRS will not take a contrary view, and no ruling from the IRS has been or will be sought.

The following summary is for general information only and discusses the federal tax consequences only to Holders of Allowed Unsecured Claims. The tax treatment of a Holder of an Allowed Unsecured Claim may vary depending upon such Holder's particular situation. EACH HOLDER OF AN ALLOWED CLAIM IS URGED TO CONSULT WITH HIS OR HER TAX ADVISOR REGARDING THE FEDERAL, STATE, LOCAL AND FOREIGN TAX CONSEQUENCES OF THE PLAN.

(a) Federal Income Tax Consequences to Holders of Claims

The consideration received under the Plan by Holders of Unsecured Claims is netted against the amount of the Claim which is discharged under the Plan. The net amount is the amount of the Holder's loss. In the event the Holder of the Claim previously took a loss for the full amount of his or her discharged Claim, then the Holder would have to realize income in the year that he or she receives payments under the Plan.

(b) Receipt of Cash for Allowed Claims

Each Holder of an Allowed Claim who receives Cash on the Effective Date in partial satisfaction of his or her Allowed Claim should recognize gain or loss on the Effective Date equal to the difference between (i) the amount of Cash received and (ii) the Holder's adjusted tax basis in the Allowed Unsecured Claim exchanged therefore.

The character of any gain or loss as capital or ordinary and, in the case of capital gain or loss, as short-term or long-term, will depend on a number of factors, including: (i) the Holder's adjusted tax basis in the Allowed Unsecured Claim exchanged therefore.

The character of any gain or loss as capital or ordinary and, in the case of capital gain or loss, as short-term or long-term, will depend on a number of factors, including: (i) the nature and origin of the Allowed Claim; (ii) the tax status of the Holder of the Allowed Claim; (iii) whether the Allowed Claim has been held for more than one year; and (iv) the extent to which the Holder previously claimed a loss, bad debt reduction or charge to a reserve for bad debts with respect to the Allowed Claim. Each Holder of an Allowed Claim is urged to consult his or her tax advisor as to the applicability of these other factors to such Holder.

A loss generally is treated as sustained in the taxable year for which there has been a closed and completed transaction, and no portion of a loss with respect to which there is a

reasonable prospect of reimbursement may be deducted until it can be ascertained with reasonable certainty whether or not such reimbursement will be recovered.

Holders of Claims should consult with their own tax advisors as to the matters discussed in this section concerning character and timing of recognition of gain or loss. Because a loss will be allowed as a deduction only for the taxable year in which the loss was sustained, a Holder of a Claim is entitled a loss in the wrong taxable year risks denial of such loss altogether. In the case of certain categories of Claims, consideration should be given to the possible availability of a bad debt deduction under section 166 of the Tax Code for a period prior to the Effective Date. In addition, a portion of any distributions received after the Effective Date may be taxed as ordinary income under the imputed interest rules.

ALL HOLDERS OF CLAIMS AND INTERESTS SHOULD CONSULT WITH THEIR OWN TAX ADVISORS AS TO THE TAX CONSEQUENCES OF IMPLEMENTATION OF THE PLAN TO THEM UNDER APPLICABLE FEDERAL, STATE AND LOCAL TAX LAWS.

THE FEDERAL INCOME TAX CONSEQUENCES OF THE PLAN ARE COMPLEX. THE SUMMARY DOES NOT DISCUSS ALL ASPECTS OF FEDERAL INCOME TAXATION THAT MAY BE RELEVANT TO THE DEBTOR AND THE ESTATE, THE TRUSTEE, OR HOLDER. THE TAX CONSEQUENCES TO EACH CLAIM OR INTEREST HOLDER WILL VARY BASED ON THE HOLDER'S CIRCUMSTANCES. ACCORDINGLY, EACH CLAIM OR INTEREST HOLDER SHOULD CONSULT WITH HIS OR HER TAX ADVISOR AS TO THE SPECIFIC TAX CONSEQUENCES TO SUCH HOLDER OF THE PLAN, INCLUDING THE APPLICATION AND EFFECT OF FEDERAL, STATE, LOCAL, FOREIGN AND OTHER TAX LAWS.

TO ENSURE COMPLIANCE WITH TREASURY DEPARTMENT CIRCULAR 230, EACH HOLDER IS HEREBY NOTIFIED THAT: (A) ANY DISCUSSION OF U.S. FEDERAL TAX ISSUES IN THE DISCLOSURE STATEMENT IS NOT INTENDED OR WRITTEN TO BE RELIED UPON, AND CANNOT BE RELIED UPON, BY THE ESTATE OR THE DEBTOR, THE TRUSTEE, OR ANY HOLDER FOR THE PURPOSE OF AVOIDING PENALTIES THAT MAY BE IMPOSED ON A HOLDER UNDER THE TAX CODE; (B) SUCH DISCUSSION IS NOT INCLUDED HEREIN BY THE DEBTOR, THE ESTATE OR THE TRUSTEE IN CONNECTION WITH THE PROMOTION OR MARKETING (WITHIN THE MEANING OF CIRCULAR 230) BY THE DEBTOR, THE ESTATE, OR THE TRUSTEE OF THE TRANSACTIONS OR MATTERS ADDRESSED HEREIN; AND (C) EACH HOLDER SHOULD SEEK ADVICE BASED ON SUCH HOLDER'S PARTICULAR CIRCUMSTANCES FROM AN INDEPENDENT TAX ADVISOR.

11. VOTING BY HOLDERS OF CLAIMS AND INTERESTS ENTITLED TO VOTE

The Plan is consensual and no voting is required for Confirmation of the Plan pursuant to section 1129(a)(8). The Claims in Class 3 are Impaired under the Plan; however, the Class 3 Claimants, as Plan Sponsors, are deemed to have accepted the Plan and are therefore, not entitled

to vote. The Claims in Classes 1, 2 and 4 are Unimpaired and the Holders of Claims in Class 1, 2, and Class 4 are not entitled to vote and deemed to have accepted the Plan.

12. CONCLUSION AND RECOMMENDATION The Disclosure Statement is intended to assist the Court and each Holder of Claims against the Estate and Interests in the Debtor to make an informed decision regarding the confirmation the Plan. This is fully consensual Plan, as the only Impaired Class, Class 3, is made up of Plan Sponsors EFP and BHT and the remainder of the Classes are Unimpaired and deemed to accept. If the Plan is confirmed, all Holders of Claims and Interests will be bound by its terms. The Plan Sponsors believe that Confirmation and implementation of the Plan are preferable to any of the alternatives described above and respectfully urges the Court and each Holder of a Claim against the Estate to review the Disclosure Statement carefully and the enclosed copy of the Plan and to allow confirmation of the Plan.

Dated: May 15, 2023.

Respectfully submitted,

By: *s/ Jeffrey R. Barber*

Jeffrey R. Barber (MB #1982)
Kristina M. Johnson (MB #9382)
JONES WALKER LLP
190 East Capitol Street, Suite 800 (39201)
Post Office Box 427
Jackson, Mississippi 39205-0427
Telephone: (601) 949-4765
Facsimile: (601) 949-4804
jbarber@joneswalker.com
kjohnson@joneswalker.com

Admitted *Pro Hac Vice*:

Mark A. Mintz (LAB #31878)
JONES WALKER LLP
201 St. Charles Avenue, Suite 5100
New Orleans, Louisiana 70170-5100
Telephone: (504) 582-8368
Facsimile: (504) 589-8368
mmintz@joneswalker.com

COUNSEL FOR THE TRUSTEE

By: */s Jim F. Spencer, Jr.*

Jim F. Spencer, Jr. (MSB # 7736)
Stephanie M. Rippee (MSB #8998)
WATKINS & EAGER PLLC
P.O. Box 650
Jackson, MS 39205-0650
(601) 965-1900 (p)
jspencer@watkinseager.com
srippee@watkinseager.com

COUNSEL FOR EDWARDS FAMILY PARTNERSHIP, LP AND BEHER HOLDINGS TRUST

CERTIFICATE OF SERVICE

I hereby certify that on May 15, 2023, I electronically filed the foregoing with the Clerk of the Court using the ECF system which sent notification of such filing to the parties set forth in the Electronic Mail Notice List as of the date hereof, including the following:

Christopher J. Steiskal
christopher.j.steiskal@usdoj.gov

DATED: May 15, 2023.

s/Jeffrey R. Barber

EXHIBIT A

UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

IN RE:

COMMUNITY HOME FINANCIAL SERVICES, INC.,
DEBTOR.

CASE NO. 12-01703-JAW

CHAPTER 11

JOINT THIRD AMENDED CHAPTER 11 PLAN OF LIQUIDATION OF THE ESTATE OF COMMUNITY HOME FINANCIAL SERVICES, INC. PROPOSED BY THE TRUSTEE, KRISTINA M. JOHNSON, AND CREDITORS, EDWARDS FAMILY PARTNERSHIP LP AND BEHER HOLDINGS TRUST DATED AS OF MAY 15, 2023

Jeffrey R. Barber (MB #1982)
Kristina M. Johnson (MB #9382)
JONES WALKER LLP
190 East Capitol Street, Suite 800 (39201)
Post Office Box 427
Jackson, Mississippi 39205-0427
Telephone: (601) 949-4765
Facsimile: (601) 949-4804
jbarber@joneswalker.com
kjohnson@joneswalker.com

Jim F. Spencer, Jr. (MSB # 7736)
Stephanie M. Rippee (MSB #8998)
WATKINS & EAGER PLLC
P.O. Box 650
Jackson, MS 39205-0650
(601) 965-1900 (p)
jspencer@watkinseager.com
srippee@watkinseager.com

Admitted *Pro Hac Vice*:

Mark A. Mintz (LAB #31878)
JONES WALKER LLP
201 St. Charles Avenue, Suite 5100
New Orleans, Louisiana 70170-5100
Telephone: (504) 582-8368
Facsimile: (504) 589-8368
mmintz@joneswalker.com

The Trustee, Kristina M. Johnson, and creditors, Edwards Family Partnership LP and Beher Holdings Trust, propose the following Joint Third Amended Chapter 11 Plan of Liquidation (the "**Plan**") for the resolution of the outstanding claims against the Estate of Community Home Financial Services, Inc. (the "**Debtor**" or "**CHFS**").

ARTICLE I
DEFINED TERMS AND RULES OF INTERPRETATION

In addition to such other terms as may be defined in other Sections of the Plan, the following capitalized terms will have the following meanings:

Section 1.1 "**Administrative Claim**" means a Claim for costs and expenses of administration allowed under sections 503(b), or 507(a)(2) of the Bankruptcy Code, including (a) the actual and necessary costs and expenses incurred after the Petition Date of preserving the Estate and operating the Debtor's business, including (but not limited to) the costs of Servicing the Loans (b) the Professional Fee Claims, (c) the U.S. Trustee Fees, and (d) the Trustee's Fees.

Section 1.2 "**Administrative Claim Bar Date**" means the date by which all requests for payment of Administrative Claims are required to be Filed with the Bankruptcy Court, which date is sixty (60) days after the Effective Date. For the avoidance of doubt, Administrative Claims for the Servicing of the Loans as provided by the order approving the Servicer shall not be required to be filed by the Servicer except to the extent incurred before the Effective Date but not paid by the most recent monthly remittance by the Trustee for said servicing before the Effective Date.

Section 1.3 "**Affiliate**" has the same meaning set forth in section 101(2) of the Bankruptcy Code.

Section 1.4 "**Allowed**" means, (a) when used with respect to an Administrative Claim, all or any portion of an Administrative Claim (i) that has been adjudicated in favor of the Holder by a Final Order, or (ii) that is specifically deemed allowed pursuant to the Plan, or (iii) for which a Proof of Claim in a liquidated amount has been timely Filed with the Bankruptcy Court pursuant to the Bankruptcy Code, any Final Order of the Bankruptcy Court, or other applicable bankruptcy law, and as to which no objection to its allowance has been Filed within the periods of limitation fixed by the Plan, the Bankruptcy Code, or any Order of the Bankruptcy Court; or (b) when used with respect to a Claim other than an Administrative Claim, such Claim or any portion thereof (i) that has been allowed, or adjudicated in favor of the Holder by a Final Order, or (ii) as to which (x) no Proof of Claim has been Filed (y) the liquidated and noncontingent amount of which is included in the Schedules, other than a Claim that is included in the Schedules as Disputed, and (z) no objection has been filed or (iii) for which a Proof of Claim in a liquidated amount has been timely Filed with the Bankruptcy Court pursuant to the Bankruptcy Code, any Final Order of the Bankruptcy Court, or other applicable bankruptcy law, and as to which no objection to its allowance has been Filed within the periods of limitation fixed by the Plan, the Bankruptcy Code, or any Order of the Bankruptcy Court, or (iv) that is

expressly deemed allowed pursuant to the Plan. For the avoidance of doubt, notwithstanding anything herein to the contrary, the EFP/BHT Claim is deemed Allowed.

Section 1.5 **"Bankruptcy Case"** means the bankruptcy case in the Bankruptcy Court under chapter 11 of the Bankruptcy Code, captioned *In re Community Home Financial Services, Inc.*, 12-01703-JAW (Bankr. S.D. Miss.).

Section 1.6 **"Bankruptcy Code"** means title 11 section 101 *et seq.* of the United States Code, as amended from time to time.

Section 1.7 **"Bankruptcy Court"** means the United States Bankruptcy Court for the Southern District of Mississippi, Jackson Division, having jurisdiction over the Bankruptcy Case.

Section 1.8 **"Bankruptcy Rules"** mean the Federal Rules of Bankruptcy Procedure as provided by the United States Supreme Court under section 2075 of title 28 of the United States Code, and any Local Rules of the Bankruptcy Court.

Section 1.9 **"BHT"** means Beher Holdings Trust, a Bermuda Trust, or its assigns or designees.

Section 1.10 **"Business Day"** means any day other than a Saturday, Sunday, or other day on which commercial banks in Jackson, Mississippi are required or authorized to close by law or executive order.

Section 1.11 **"Cash"** means legal tender of the United States of America and equivalents thereof.

Section 1.12 **"Claim"** has the same meaning as set forth in section 101(5) of the Bankruptcy Code.

Section 1.13 **"Class"** means a category of Holders of Claims, as more fully described in Article II of the Plan.

Section 1.14 **"Clerk"** means the Clerk of the Bankruptcy Court.

Section 1.15 "**Collateral**" means any property or interest in property of the Estate subject to an unavoidable Lien securing the payment or performance of a Claim.

Section 1.16 **"Confirmation"** means the entry of an Order by the Bankruptcy Court confirming the Plan.

Section 1.17 **"Confirmation Date"** means the date on which the Clerk enters the Confirmation Order on the Docket.

Section 1.18 **"Confirmation Order"** means the Order of the Bankruptcy Court confirming the Plan pursuant to section 1129 of the Bankruptcy Code.

Section 1.19 **"Cure Amount Claim"** means a Claim for all unpaid monetary obligations, or such lesser amount as may be agreed upon by the parties, under an Executory Contract or Unexpired Lease assumed pursuant to section 365 of the Bankruptcy Code or the Plan.

Section 1.20 **"Debtor"** has the meaning set forth in the introductory paragraph of the Plan.

Section 1.21 **"Dickson Claim"** means a Claim or Interest held by any Dickson Related Parties. The Dickson Claim and all Interests are disallowed.

Section 1.22 **"Dickson Related Parties"** means William D. "Butch" Dickson ("**Dickson**") and any of his Insiders, Affiliates, Insider of Affiliates, including, but not limited to, the Debtor, Discount Mortgage, Inc., Discount Home Mortgage, Inc., Double S Construction Inc., Crisco Investments, Inc., Victory Consulting Group, Inc., William D. Dickson Enterprises Inc., Phalanx, Inc., Phalanx, S.A., Philanfin, S.A., Bonami, S.A., Piranha, S.A., Reshonda Rhodes, Mary Madison Foundation, Brookwood-Byram Country Club, Inc., Colby Dickson, Cristen Dickson Nelson, Beau Nelson, Carol Runnels, W.W. Warren Foundation, any former employee of the Debtor (except as otherwise provided herein or by separate order of the Bankruptcy Court), or the predecessors, successors, assigns, designees, officers, directors, principals, shareholders, members, partners, employees, agents, representatives, trustees, direct beneficiaries, or indirect beneficiaries of the corporate entities referenced in this Section.

Section 1.23 **"Disbursing Agent"** means for all purposes under this Plan, the Trustee.

Section 1.24 **"Disclosure Statement"** means, as amended, the *Third Amended Disclosure Statement for the Joint Third Amended Chapter 11 Plan of Liquidation of the Estate of Community Home Financial Services, Inc. Proposed by the Trustee, Kristina M. Johnson and Creditors, Edwards Family Partnership and Beher Holdings Trust Dated as of May 15, 2023* **[Dkt. #___]**.

Section 1.25 **"Disputed"** means, as to any Administrative Claim or Claim against or Interest in the Estate, (a) any Claim, proof of which was required to be Filed by Order of the Bankruptcy Court, but as to which a Proof of Claim was not timely or properly Filed, (b) any Claim which was timely and properly Filed, but which has been or hereafter is listed on the Schedules as unliquidated, disputed, contingent, at zero, or in an unknown amount, (c) any Administrative Claim, Claim or Interest which is disputed under the Plan, (d) any Claim or Administrative Claim for which an objection is filed, or (e) any Administrative Claim, Claim or Interest, to which the Trustee or, if not prohibited by the Plan, any other party in interest has interposed a timely objection, which objection has not been withdrawn or determined by a Final Order. Any Claim that is deemed Allowed pursuant the Plan is not Disputed within the meaning of this definition.

Section 1.26 **"Distribution"** means a payment in Cash, or in kind, made by the Trustee to the Holder of an Allowed Claim on account of such Allowed Claim pursuant to the terms and conditions of the Plan.

Section 1.27 **"Distribution Record Date"** means the first Business Day after the Confirmation Date.

Section 1.28 **"Docket"** means the docket in the Bankruptcy Case maintained by the Clerk.

Section 1.29 **"Dr. Edwards"** means Dr. Charles C. Edwards in his individual capacity or, where applicable or otherwise indicated, in his capacity as general partner of EFP and/or as investment manager for BHT, or their assigns or designees.

Section 1.30 **"Edwards Adversary Proceedings"** means the adversary proceedings in this Bankruptcy Case, captioned *Cmty. Home Fin. Servs., Inc. & William D. Dickson v. Edwards Family P'ship, LP & Beher Holdings Trust*, Adv. Proc. 12-00091-JAW (Bankr. S.D. Miss.), *Cmty. Home Fin. Servs., Inc. v. Charles Edwards, M.D., Edwards Family P'ship, LP,* Adv. Proc. No. 13-00104-JAW (Bankr. S.D. Miss.); *Kristina M. Johnson, Trustee v. Edwards Family Partnership, LP, et al.,* Adv. Proc. 15-00080-JAW (Bankr. S.D. Miss.).

Section 1.31 **"Effective Date"** means the first Business Day after which the conditions specified in Section 8.1 of the Plan have been satisfied or waived in accordance with Section 8.2.

Section 1.32 **"EFP"** means Edwards Family Partnership, LP, a Delaware limited partnership, or its assigns or designees.

Section 1.33 **"EFP/BHT"** means Dr. Edwards, the Edwards Family Partnership LP and the Beher Holdings Trust, or their assigns or designees.

Section 1.34 **"EFP/BHT Claim"** means any Claim, whether a secured claim, an unsecured Claim, or interest in Loans held by the Edwards Family Partnership, Beher Holdings Trust, their assigns or designees, or Affiliates, Insiders, or Insiders of Affiliates, including but not limited to Proofs of Claim 4-1, 5-1, 6-1, 7-1, 8-1, and 9-1 filed by EFP/BHT. The EFP/BHT Claims are treated in Class 3 of the Plan and includes the EFP/BHT Secured Claims, the EFP Secured Claim, and the EFP Purchased Unsecured Claims

Section 1.35 **"EFP/BHT Secured Claims"** means the Claims of EFP and BHT determined by the Fifth Circuit Court of Appeals to be secured by the Home Improvement Loans. The EFP/BHT Secured Claims are treated in Class 3 of the Plan.

Section 1.36 **"EFP Secured Claim"** means the Claim determined by the Bankruptcy Court to be held by EFP and to be a Secured Claim for an amount the parties stipulated to be $1,728,804 as of the Petition Date. The EFP Secured Claim is treated in Class 3 of the Plan.

Section 1.37 **"EFP Purchased Unsecured Claims"** means the Claims purchased by EFP for which Transfer of Claims have been filed more specifically described as Transfer of Claim Joe Logan $100,000 **[Dkt. No. 1598]**, Transfer of Claim, Cadwell, Sandford, Delbert & Gary, $3,655.42 **[Dkt. No. 2468]**, Transfer of Claim, Fred Carpenter **[Dkt. No. 2469]**, and Transfer of Claim, Airespring, $4,308.00 **[Dkt. No. 3060]**. The EFP/BHT Purchased Unsecured Claims are treated in Class 3 of the Plan.

Section 1.38 **"Entity"** means any individual, corporation, partnership, limited liability company, joint venture, association, joint stock company, unincorporated organization, estate, trust, governmental unit or other entity (notwithstanding origin of incorporation or formation), including the Trustee and the Office of the United States Trustee, whether singular or plural.

Section 1.39 **"Estate"** means the estate of the Debtor as created upon the commencement of the Bankruptcy Case by section 541 of the Bankruptcy Code.

Section 1.40 **"Exculpated Parties"** means to the extent allowed by applicable law, the Trustee and her Professionals, each in their capacities as such and with respect to each as entities, such entities' predecessors, successors, assigns, designees, officers, directors, principals, shareholders, members, partners, employees, agents, or representatives, but specifically excluding Dickson Related Parties. For avoidance of doubt, the Servicer is an Exculpated Party.

Section 1.41 **"Executory Contract"** means a contract to which the Estate remains a party that is subject to assumption, assumption and assignment, or rejection under section 365 of the Bankruptcy Code, or any remaining post-petition contract.

Section 1.42 **"File," "Filed" or "Filing"** means file, filed or filing with the Bankruptcy Court or its authorized designee in the Bankruptcy Case.

Section 1.43 **"Final Fee Application"** means an application for final allowance of a Professional Fee Claim.

Section 1.44 **"Final Judgment on Edwards Trial"** means the *Final Judgment on the Third Amended Complaint in Adversary Proceeding 12-00091-JAW Consolidated Amended Complaint in Adversary Proceeding 13-00104-JAW; Amended Complaint for Turnover, Recovery of Property Transferred Post-Petition, Damages, Declaratory Relief, Equitable Subordination, and Other Relief in Adversary Proceeding 15-00080-JAW; and Consolidated Contested Matters*, entered by the Bankruptcy Court on February 27, 2018 **[Dkt. #2183]**, as reversed and vacated in part, *In the Matter of: Community Home Financial Services Corporation (Edwards Family Partnership, L. P. et al. v. Johnson*, No. 20-61011 (5th Circuit, April 27, 2022).

Section 1.45 **"Final Judgment on Trustee's Dickson Trial"** means the *Final Judgment on First Amended Verified Complaint to: (1) Recovery Money, Damages or Property; (2) To Avoid Pre-Petition and Post-Petition Transfers; (3) For Turnover of Property;*

(4) For Injunctive Relief; and (5) For Equitable Subordination, entered by the Bankruptcy Court on February 27, 2018 [**Dkt. #2188**].

Section 1.46 **"Final Order"** means an order or judgment of the Bankruptcy Court or other court of competent jurisdiction, as entered on the Docket in the Bankruptcy Case, or on the docket of any other court of competent jurisdiction, as applicable, the operation or effect of which has not been stayed, reversed, modified or amended, and as to which order or judgment (or any revision, modification, or amendment thereof) the time to appeal or seek review or rehearing or leave to appeal has expired and as to which no appeal or petition for review or rehearing or leave to appeal was Filed or, if Filed, no appeal or petition for review or rehearing remains pending; *provided, however*, that the possibility that a motion under Rule 59 or Rule 60 of the Federal Rules of Civil Procedure, or any analogous rule under the Bankruptcy Rules, may be Filed with respect to such order or judgment shall not cause such order or judgment not to be a Final Order.

Section 1.47 **"Foreign Loans"** means loans purchased or originated outside of the United States using funds believed to be traceable to the Debtor or Dickson, directly or indirectly.

Section 1.48 **"Holder"** means any Entity that holds a Claim or Interest.

Section 1.49 **"Home Improvement Loan Adversary"** means the adversary proceeding originally captioned *Cmty. Home Fin. Servs., Inc. & William D. Dickson v. Edwards Family P'ship, LP & Beher Holdings Trust*, Adv. Proc. No. 12-00091-JAW (Bankr. S.D. Miss.), and subsequently captioned *Kristina M. Johnson, Trustee of the Estate of Cmty. Home Fin. Servs., Inc. v. Edwards Family P'Ship; Beher Holdings Trust*, Adv. Proc. No. 12-00091-JAW (Bankr. S.D. Miss.).

Section 1.50 **"Home Improvement Loans"** means the consumer mortgage loans identified in the Final Judgment on Edwards Trial and litigated in the Home Improvement Loan Adversary purchased by CHFS from various unrelated entities with funds ultimately loaned from EFP/BHT, or their affiliates, in which EFP and BHT have a perfected first lien security interest as determined by the Fifth Circuit Court of Appeals in *In the Matter of: Community Home Financial Services Corporation (Edwards Family Partnership, L. P. et al. v. Johnson*, No. 20-61011 (5th Circuit, April 27, 2022).

Section 1.51 **"Impaired"** means, with respect to any Claim or Interest, that such Claim or Interest is impaired within the meaning of section 1124 of the Bankruptcy Code.

Section 1.52 **"Insider"** has the same meaning as set forth in section 101(31) of the Bankruptcy Code.

Section 1.53 **"Interest"** means any interest in the Debtor that is an "equity security" within the meaning of section 101(16) of the Bankruptcy Code, or any similar interest in an Entity that is recognized under applicable law. Interests are disallowed.

Section 1.54 **"Lien"** has the same meaning as set forth in section 101(37) of the Bankruptcy Code.

Section 1.55 **"Loan"** means any advance of money or other credit evidenced by a promissory note, contract, or similar instrument (whether secured or unsecured) and related documents executed by a borrower that: (a) was purchased by or serviced by the Debtor, (b) is owned or serviced by the Debtor's Estate as of the Effective Date, (c) has been identified by the Trustee, and (d) has not been satisfied by the obligor as of the Effective Date and released by the Debtor or the Estate. For avoidance of doubt, Loan includes, but is not limited to the Home Improvement Loans and the loans in the Mortgage Loan Portfolios, Unclassified Loans and Foreign Loans.

Section 1.56 **"Material Adverse Change"** means an event affecting the Estate which, if it were to occur on or after the Effective Date, would render implementation and fulfillment of the Plan impossible.

Section 1.57 **"Monthly Operating Reports"** means periodic reports and summaries, in accordance with 28 U.S.C. § 586(A)(3)(D) and 11 U.S.C. § 1106(a)(1), of the operation of the Debtor's business, including statements of receipts and disbursements, and such other information as required by the U.S. Trustee or the Bankruptcy Court.

Section 1.58 "**Mortgage Portfolio Adversary**" means the adversary proceeding originally captioned *Cmty. Home Fin. Servs., Inc. & William D. Dickson v. Charles Edwards, M.D., James Edwards, Edwards Family P'ship, LP, The Atkinson Trust, LLC, & The Debt Exchange, Inc.*, Adv. Proc. No. 12-00109-EE (Bankr. S.D. Miss.), and subsequently captioned *Kristina M. Johnson, Chapter 11 Trustee of the Estate of Cmty. Home Fin. Servs., Inc. v. Charles C. Edwards, Edwards Family P' Ship, and Beher Holdings Trust,* Adv. Pro. No. 13-00104-JAW (Bankr. S.D. Miss.).

Section 1.59 **"Mortgage Loan Portfolios"** means the consumer mortgage loans identified in the Final Judgment on Edwards Trial and litigated upon in the Mortgage Portfolio Adversary in which EFP has a perfected first lien security interest in Mortgage Loan Portfolios #1–2; EFP is unsecured as to Mortgage Loan Portfolios #3–6; and Portfolio #7 is a servicing agreement between BHT and CHFS in which BHT owns the original notes and mortgages as determined by the Fifth Circuit Court of Appeals in *In the Matter of: Community Home Financial Services Corporation (Edwards Family Partnership, L. P. et al. v. Johnson*, No. 20-61011 (5th Circuit, April 27, 2022).

Section 1.60 **"Order"** means an order or judgment of the Bankruptcy Court as entered on the Docket.

Section 1.61 **"Petition Date"** means May 23, 2012.

Section 1.62 **"Plan"** means, as applicable, the *Joint Third Amended Chapter 11 Plan of Liquidation of the Estate of Community Home Financial Services, Inc. Proposed by the Trustee, Kristina M. Johnson and Creditors, Edwards Family Partnership and Beher Holdings Trust Dated as of May 15, 2023* Filed jointly by the Plan Sponsors, as the same may be amended, modified, or supplemented from time to time, together with the Plan Exhibits.

Section 1.63 **"Plan Exhibits"** mean the exhibits that are attached to the Plan, or exhibits that will be Filed before the commencement of the Confirmation Hearing.

Section 1.64 **"Plan Sponsors"** means the Trustee and creditors EFP/BHT, the joint sponsors of this Plan.

Section 1.65 **"Priority Unsecured Claim"** means any Claim, other than an Administrative Claim entitled to priority in right of payment pursuant to section 507(a) of the Bankruptcy Code. Priority Unsecured Claims are treated in Class 2 of the Plan.

Section 1.66 **"Professional"** means any professional employed in the Bankruptcy Case pursuant to sections 327 or 1103 of the Bankruptcy Code or any professional or other Entity seeking compensation or reimbursement of expenses in connection with the Bankruptcy Case pursuant to section 503(b) of the Bankruptcy Code.

Section 1.67 **"Professional Fee Claim"** mean the Claim of (a) any Professional in the Bankruptcy Case pursuant to sections 330 or 1103 of the Bankruptcy Code, or (b) any Professional or other Entity seeking compensation or reimbursement of expenses in connection with the Bankruptcy Case pursuant to section 503(b)(2), 503(b)(3), 503(b)(4) or 503(b)(5) of the Bankruptcy Code. For the avoidance of doubt, the fees of the Servicer are not Professional Fee Claims.

Section 1.68 **"Proof of Claim"** means a proof of claim that was Filed in the Bankruptcy Case.

Section 1.69 **"Pro Rata"** means the proportion that an Allowed Claim in a particular Class bears to the aggregate amount of Allowed Claims or Interests in that Class.

Section 1.70 **"Released Parties"** means except as otherwise provided in this Plan or as limited by applicable law, the Estate, the Trustee, her Professionals, and the Servicer, each in their capacities as such and with respect to each as entities, such entities' predecessors, successors, assigns, designees, officers, directors, principals, shareholders, members, partners, employees, agents, or representatives, but specifically excluding Dickson Related Parties.

Section 1.71 **"Schedules"** collectively means the schedules of assets and liabilities and the statement of financial affairs Filed by the Debtor under section 521 of the Bankruptcy Code and Bankruptcy Rule 1007, and all amendments and modifications thereto through the Confirmation Date.

Section 1.72 "**Secured Claim**" means an Allowed Claim that is secured by a Lien on property of the Estate, as provided in section 506(a) of the Bankruptcy Code, which is valid, perfected, and enforceable, and not avoidable, to the extent of the value of such Lien, as determined by a Final Order of the Bankruptcy Court pursuant to section 506 of the Bankruptcy Code, or as otherwise agreed in writing by the Trustee and the Holder of such Claim. Secured Claims are treated in Class 1 of the Plan.

Section 1.73 "**Servicer**" means Insight One Recovery Solutions, Inc. (f/k/a Sortis Financial, Inc. f/k/a ClearSpring Loan Services, Inc., f/k/a Vantium Capital, Inc. d/b/a Acqura Loan Services).

Section 1.74 "**Servicing Agreement**" means the Residential Mortgage Special Servicing Agreement between the Trustee and the Servicer approved by Agreed Order **[Dkt. #702]** of the Bankruptcy Court, as supplemented by an Order **[Dkt. #931]** of the Bankruptcy Court.

Section 1.75 "**State**" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

Section 1.76 "**Stipulation of Amount and Nature of Claim**" means (a) before the Effective Date, a stipulation or other agreement between the Trustee and a Holder of a Claim that is approved by an Order of the Bankruptcy Court, or (b) from and after the Effective Date, a stipulation or other agreement between the Disbursing Agent and a Holder of a Claim.

Section 1.77 "**Tax**" means (a) any net income, alternative or add-on minimum, gross income, gross receipts, sales, use, ad valorem, value added, transfer, franchise, profits, license, property, environmental or other tax, assessment or charge of any kind whatsoever (together in each instance with any interest, penalty, addition to tax or additional amount) imposed by any federal, State, local or foreign taxing authority, or (b) any liability for payment of any amounts of the foregoing types as a result of being a member of an affiliated, consolidated, combined or unitary group, or being a party to any agreement or arrangement whereby liability for payment of any such amounts is determined by reference to the liability of any other Entity.

Section 1.78 "**Tax Claim**" means any Claim of a governmental unit, whether federal, State or local, for recovery of a tax of any kind whatsoever (including any interest, penalty, or addition thereto) incurred or arising before the Effective Date, including but not limited to Claims of the kind specified in sections 502(i) and 507(a)(8) of the Bankruptcy Code.

Section 1.79 "**Trustee**" means Kristina M. Johnson, the duly appointed and qualified Chapter 11 Trustee for the Estate of Community Home Financial Services, Inc.

Section 1.80 **"Trustee's Fees"** collectively means all fees and charges the Trustee is entitled to pursuant to 11 U.S.C. §§ 323, 326, 330, or 331.

Section 1.81 **"Unclassified Loans"** means all loans of the Estate not included in the Home Improvement Loans, the Mortgage Portfolio Loans, or the Foreign Loans.

Section 1.82 **"Unexpired Lease"** means a lease to which the Debtor is a party that is subject to assumption, assumption and assignment or rejection under section 365 of the Bankruptcy Code.

Section 1.83 **"Unimpaired"** means, with respect to any Claim or Interest, that such Claim or Interest is not impaired within the meaning of section 1124 of the Bankruptcy Code.

Section 1.84 **"Unsecured Claims"** means any Claim that arose before the Petition Date that is not an Administrative Claim, Cure Amount Claim, Priority Unsecured Claim, Secured Claim. Unsecured Claims are treated in Class 4 of the Plan.

Section 1.85 **"U.S. Trustee"** means the Office of the United States Trustee and/or the United States Trustee for Region 5.

Section 1.86 **"U.S. Trustee Fees"** collectively means all fees and charges assessed against the Estate under chapter 123 of title 28, United States Code, 28 U.S.C. §§ 1911–1930.

Section 1.87 **"U.S. Forfeiture Order"** means the Second Amended Final Order of Forfeiture signed on May 31, 2016, in the case captioned *United States of America v. William D. Dickson*, No. 3:14-CR-00078 TSL FKB.

Interpretation; Application of Definitions and Rules of Construction. Wherever from the context it appears appropriate, each term stated in either the singular or the plural shall include both the singular and the plural and pronouns stated in the masculine, feminine or neuter gender shall include the masculine, feminine and neuter. The rules of construction contained in section 102 of the Bankruptcy Code shall apply to the construction of the Plan. A term used herein that is not defined herein, but that is used in the Bankruptcy Code, shall have the meaning ascribed to that term in the Bankruptcy Code. The headings in the Plan are for convenience of reference only and shall not limit or otherwise affect the provisions of the Plan.

Any reference in the Plan to a document or instrument being in a particular form means that the document or instrument shall be in substantially such form. Any reference in the Plan to an existing document or instrument means such document or instrument as it may have been amended, modified or supplemented from time to time. Unless otherwise specified, all Section, Article, schedule or exhibit references in the Plan are to the respective Section in, Article of, schedule to, or exhibit to, the Plan. The words "herein," "hereof," "hereto," "hereunder" and other words of similar import refer to the Plan as a whole and not to any particular Section or clause contained in the Plan. All Plan Exhibits are incorporated into the

Plan, and shall be deemed to be included in the Plan, regardless of when such Plan Exhibits are Filed.

In computing any period of time prescribed or allowed by the Plan, the provisions of Bankruptcy Rule 9006(a) shall apply as though the Plan is an Order of the Bankruptcy Court.

ARTICLE II
CLASSIFICATION OF CLAIMS AND INTERESTS

Section 2.1 **Division of Claims.** For all purposes, including organization, voting, Confirmation and Distributions pursuant to the Plan, except as otherwise provided herein, all Claims (except for Administrative Claims) are classified as provided in Articles II through IV of the Plan.

Section 2.2 **No Interest After the Petition Date Unless Otherwise Provided.** Unless otherwise specifically provided for in the Plan or the Confirmation Order, no Holder of a Claim shall be entitled to interest after the Petition Date on any Claim or right. Additionally, and without limiting the foregoing, interest shall not accrue or be paid on any Disputed Claim, if and when such Disputed Claim becomes an Allowed Claim.

Section 2.3 **Allowed Claims and Interests.** A Claim is treated in a particular Class under the Plan only to the extent such Claim is Allowed. Any and all Interests in the Debtor will be extinguished as of the Effective Date.

Section 2.4 **Classification of Claims with Respect to the Plan.** Claims and Interests are classified in the Plan as follows:

(a) Class 1 consists of **Secured Claims**. This Class of Claims is Unimpaired, the Holders are deemed to accept the Plan and are not entitled to vote for or against the Plan with respect to such Claims.

(b) Class 2 consists of **Priority Unsecured Claims**. This Class of Claims is Unimpaired, the Holders are deemed to accept the Plan and are not entitled to vote for or against the Plan with respect to such Claims.

(c) Class 3 consists of the **EFP/BHT Claim.** This Class of Claims is Impaired, and are deemed to accept the Plan with respect to such Claims due to their role as Plan Sponsors.

(d) Class 4 consists of **General Unsecured Claims**. This Class of Claims is Unimpaired, the Holders are deemed to accept the Plan and the Holders are not entitled to vote for or against the Plan with respect to such Claims.

ARTICLE III
TREATMENT OF CERTAIN UNCLASSIFIED ADMINISTRATIVE CLAIMS, CERTAIN FEES AND TAXES

Section 3.1 Administrative Claims.

(a) **Generally.** Except as otherwise provided herein or unless otherwise agreed in a written agreement by and among the Holder of an Administrative Claim and the Trustee, each Holder of an Allowed Administrative Claim will receive, in full satisfaction of its Administrative Claim, Cash equal to the Allowed amount of such Administrative Claim either (A) on the Effective Date or as soon as practicable thereafter, or (B) if the Administrative Claim is not Allowed on or before the Effective Date, within thirty (30) days after the date on which (i) an Order that Allows such Administrative Claim becomes a Final Order, or (ii) a Stipulation of Amount and Nature of Claim is executed.

(b) **U.S. Trustee Fees.** On or before the Effective Date, fees payable pursuant to 28 U.S.C. § 1930(a)(6) will be paid by the Trustee in Cash. All fees payable pursuant to 28 U.S.C. § 1930(a)(6) will be paid in accordance therewith until the closing of the Bankruptcy Case pursuant to section 350(a) of the Bankruptcy Code.

(c) **Trustee Fees.** For the avoidance of doubt, any Distributions made pursuant to this Plan of any property of the Estate (whether in Cash or in kind) shall be counted as a Distribution made by the Trustee for Claims and must be Filed on or before the Administrative Claim Bar Date and served pursuant to the procedures specified in the Administrative Claim Bar Date Order.

Section 3.2 Bar Dates for Administrative Claims.

(a) **General Bar Date Provisions.** Except as otherwise provided in the Plan, requests for payment of Administrative Claims for goods or services rendered before the Effective Date must File and serve on the Trustee, EFP/BHT and such other Entities who are designated by the Bankruptcy Rules, the Confirmation Order, or other Order of the Bankruptcy Court, an application for final allowance of such payment within sixty (60) days after the Effective Date. Parties asserting an Administrative Claim for services or goods rendered before the Effective Date, and whose goods or services will be required after the Effective Date, must File and serve on the Trustee, EFP/BHT and such other Entities who are designated by the Bankruptcy Rules, the Confirmation Order, or other Order of the Bankruptcy Court, an application for Final allowance of such an Administrative Claim within thirty (30) days after the Effective Date. Objections to any Administrative Claims, including any objections by the U.S. Trustee, and EFP and/or BHT must be Filed and served on the Trustee and the requesting party by the later of (A) sixty (60) days after the Effective Date, and (B) thirty (30) days after the Filing of the applicable request for payment of the Administrative Claim.

(b) **Bar Dates for Certain Administrative Claims.**

(i) **Professional Fee Claims.** Professionals or other Entities asserting a Professional Fee Claim for services rendered before the Effective Date must File and serve on the Trustee, EFP/BHT and such other Entities who are designated by the Bankruptcy Rules, the Confirmation Order, or other Order of the Bankruptcy Court, an application for final allowance

of such Professional Fee Claims within sixty (60) days after the Effective Date. Professionals or other Entities asserting a Professional Fee Claim for services rendered before the Effective Date, and whose services will be required after the Effective Date, must File and serve on the Trustee, EFP/BHT and such other Entities who are designated by the Bankruptcy Rules, the Confirmation Order, or other Order of the Bankruptcy Court, an application for Final allowance of such Professional Fee Claims within thirty (30) days after the Effective Date. Objections to any Professional Fee Claims, including any objections by the U.S. Trustee, and EFP and/or BHT must be Filed and served on the Trustee and the requesting party by the later of (A) sixty (60) days after the Effective Date, and (B) thirty (30) days after the Filing of the applicable request for payment of the Professional Fee Claims.

(ii) **Ordinary Course Liabilities.** Holders of Administrative Claims based on liabilities incurred by the Estate in the ordinary course of its business that are paid by the Estate (as applicable) will not be required to File or serve any request for payment of such Administrative Claims.

(c) **Bar Dates for Trustee Compensation.**

(i) The Trustee shall be compensated pursuant to the provisions of the Bankruptcy Code. The Trustee must File and serve on such Entities who are designated by the Bankruptcy Rules, the Confirmation Order, or other Order of the Bankruptcy Court, an application for final allowance of her chapter 11 Trustee's fee under section 326 of the Bankruptcy Code within sixty (60) days after the Effective Date. Objections to the Trustee's application, including any objection by the U.S. Trustee, EFP and/or BHT, must be Filed and served on the Trustee by the later of (a) 90 days after the Effective Date, and (b) thirty (30) days after the Filing of the Trustee's final application.

ARTICLE IV
TREATMENT OF CLASSIFIED CLAIMS AND INTERESTS

Section 4.1 Class 1 Claims (Secured Claims).

(a) Classification: Class 1 consists of the Secured Claims.

(b) Treatment: Unless otherwise agreed in a written agreement by and among the Holder of an Allowed Secured Claim and the Trustee, on the Effective Date, in full satisfaction of the Holder's Secured Claim, each Holder of a Secured Claim will receive Cash in an amount equal to the Allowed amount of such Holder's Secured Claim, and will release all Liens on any Collateral in exchange for the receipt of such Cash. If the Holder's Secured Claim is not Allowed on or before the Effective Date, the Trustee will make the Distribution to such Holder within fifteen (15) days after the earlier of the date on which (a) an Order allowing the Secured Claim becomes a Final Order, or (b) a Stipulation Regarding the Amount and Nature of the Claim is executed.

(c) Voting: Class 1 is Unimpaired by the Plan. Holders of an Allowed Secured Claim are deemed to accept the Plan.

Section 4.2 Class 2 (Priority Unsecured Claims).

(a) Classification: Class 2 consists of the Priority Unsecured Claims.

(b) Treatment: Unless otherwise agreed in a written agreement by and among the Holder of an Allowed Priority Unsecured Claim and the Trustee, on the Effective Date, in full satisfaction of the Holder's Priority Unsecured Claim, each Holder of a Priority Unsecured Claim will receive Cash in an amount equal to the Allowed amount of such Holder's Priority Unsecured Claim. If the Holder's Priority Unsecured Claim is Allowed on or before the Effective Date, the Trustee will make the Distribution to such Holder within fifteen (15) days of the Effective Date. If, however, the Holder's Priority Unsecured Claim is not Allowed on or before the Effective Date, the Trustee will make the Distribution to such Holder within fifteen (15) days after the earlier of the date on which an Order allowing the Priority Unsecured Claim becomes a Final Order, or a Stipulation Regarding the Amount and Nature of the Claim is executed.

(c) Voting: Class 2 is Unimpaired by the Plan. Holders of an Allowed Priority Unsecured Claim are deemed to accept the Plan.

Section 4.3 Class 3 EFP/BHT Claim

(a) Classification: Class 3 consists of the EFP/BHT Claim.

(b) Treatment: Unless otherwise agreed in a written agreement by and between the Holders of an Allowed EFP/BHT Claim and the Trustee, the following treatment is afforded the Holders of Class 3 Claims of the EFP/BHT Claim.

(i) On or before the Effective Date, the Trustee will assign, without recourse or warranty of any kind or nature, to EFP/BHT or its designee or assigns, any Loan held by or owned by the Estate, regardless of whether any such Loans were purchased before or after the Petition Date. EFP/BHT, or their designee or assigns, will be responsible for issuing statements and all other forms or documents required by State or federal law related to the Loans for the entire calendar year in which the assignment occurs.

(ii) On or before the Effective Date, the Trustee will transfer to EFP/BHT or their assignee or designee via quitclaim deed or comparable instrument, without recourse or warranty, any Loan which the Trustee has a right to recover due to any avoidable transfer of such Loan.

(iii) On or before the Effective Date of the Plan, the Trustee shall assign to EFP/BHT, or their designees or assigns, her rights in the Edwards Adversary Proceedings as part of the Distribution on the EFP/BHT Claim. Within ten (10) days after the Effective Date, EFP/BHT shall dismiss with prejudice the Edwards Adversary Proceedings. For

the avoidance of doubt, the Trustee will assign the U.S. Forfeiture Order and the Final Judgment on Trustee's Dickson Trial to EFP/BHT.

(iv) The Trustee will assume and assign the Executory Contracts on **Plan Exhibit 7.1** without recourse or warranty of any kind or nature, to EFP/BHT (or their designee). Furthermore, the Indemnification Agreement dated June 16, 2014, between EFP/BHT and the Servicer will be amended to delete the portion of said Agreement by which it expires upon the third anniversary of the termination of the Servicing Agreement.

(v) On or before the Effective Date, the Trustee will convey, without recourse or warranty of any kind or nature, to EFP/BHT or their designee, any property of CHFS or the Estate, real or personal (except as otherwise provided by the Plan), as is/where is subject to all existing liens and encumbrances. EFP/BHT or their assignee or designee will be responsible for all obligations regarding the property conveyed under the Plan after the Effective Date.

(vi) On the Effective Date, the Trustee will convey the remaining Cash in the Estate after Classes 1, 2, and 4 are paid in full, less $75,000, which will be held by the Trustee and not disbursed without further order of the Court. These funds will be available to pay Estate Professionals for the fees and expenses incurred in confirming this Plan, after notice and a hearing. To the extent these funds are not paid to Estate Professionals, the funds will be distributed to the EFP/BHT, or their assigns or designees.

(c) The UST, EFP, and BHT will be entitled to object to the Final Fee Applications of any Estate Professionals and to the extent any funds that have been paid to an Estate Professional on an interim basis are ordered to be repaid, those funds will be paid to EFP and BHT, or their assigns or designees. The UST, EFP, BHT, and all Estate Professionals are reserved all rights, claims, and defenses in connection with Final Fee Applications.

(d) Voting: Class 3 is Impaired by the Plan. Holders of an Allowed EFP/BHT Claim are deemed to accept the Plan on account of such Holder's EFP/BHT Claim in Class 3 due to their role as Plan Sponsors.

Section 4.4 General Unsecured Claims.

(a) Classification: Class 4 consists of the General Unsecured Claims.

(b) Treatment: Unless otherwise agreed in a written agreement by and among the Holder of an Allowed General Unsecured Claim, and EFP/BHT upon notice to the Trustee, the Holder of an Allowed General Unsecured Claim will be paid in full by the Trustee from the Estate's Cash before the Estate's Cash is distributed to EFP/BHT, or their assigns, or designees on the Effective Date.

(c) Voting: Class 4 is Unimpaired by the Plan. Holders of an Allowed Unsecured Claim are deemed to accept the Plan.

ARTICLE V
MEANS FOR IMPLEMENTATION OF THE PLAN

Section 5.1 General Means of Implementation

(a) On or before the Effective Date, the Plan will be implemented and consummated through the means contemplated by section 1123 of the Bankruptcy Code, including by:

(A) Before the Effective Date, the Trustee shall reject and terminate the pre-petition Executory Contracts not listed on **Plan Exhibit 7.1**.

(B) Before the Effective Date, the Trustee will assign the Servicing Agreement and all other post-petition agreements identified on **Plan Exhibit 5.3** to EFP/BHT or their designees or assigns.

(C) On or before the Effective Date, the Trustee shall pay Claims in Class 1. If a Holder's Claim in Class 1 is not Allowed on or before the Effective Date, the Trustee will make the Distribution to such holder within fifteen (15) days after the earlier of the date on which (a) an Order allowing such Claim becomes a Final Order, or (b) a Stipulation Regarding the Amount and Nature of the Claim is executed.

(D) On or before the Effective Date, the Trustee shall pay Claims in Class 2. If a Holder's Claim in Class 2 is not Allowed on or before the Effective Date, the Trustee will make the Distribution to such holder within fifteen (15) days after the earlier of the date on which (a) an Order allowing such Claim becomes a Final Order, or (b) a Stipulation Regarding the Amount and Nature of the Claim is executed.

(E) On or before the Effective Date, the Trustee shall execute documents sufficient to transfer to EFP/BHT or their designees, or assigns, attached hereto as **Plan Exhibit 5.1**, any Loan owned by or serviced by the Estate constituting, or included in, the Home Improvement Loans, the Mortgage Loan Portfolios, the Unclassified Loans, the U.S. Forfeiture Order, and any rights in the Foreign Loans or claims related to the Foreign Loans. At her discretion, Trustee may execute said documents by power of attorney. All costs associated with the preparation and/or recordation of the documents shall be borne by EFP/BHT, their designees, or assigns. EFP/BHT, their designees, or assigns will be responsible for issuing statements and all other forms or documents required by State or federal law related to the Loans for the calendar year in which the assignment occurs.

(F) On the Effective Date, the Trustee will transfer all remaining Cash in the Estate to EFP/BHT, or their assigns, or designees, less the $75,000 amount which will be available to pay the Estate Professionals pursuant to authorization from the Court.

(G) On or before the Effective Date, the Trustee shall pay Claims in Class 4, exclusive of any and all accrued interest. If a Holder's Claim in Class 4 is not

Allowed on or before the Effective Date, the Trustee will make the Distribution to such holder within fifteen (15) days after the earlier of the date on which (a) an Order allowing such Claim becomes a Final Order, or (b) a Stipulation Regarding the Amount and Nature of the Claim is executed.

(H) On or before the Effective Date, the Trustee shall execute documents sufficient to transfer to EFP/BHT or their assignees or designees all rights to funds associated with the U.S. Forfeiture Order, all funds associated with the Forfeiture Order (including the Costa Rica Condo Sale Proceeds) and all funds and/or assets currently in or being held by the Costa Rican Government. All costs associated with the preparation and/or recordation of the documents shall be borne by EFP/BHT. EFP/BHT will be responsible for issuing statements and all other forms or documents required by State, federal, and/or foreign law related to the Loans for the calendar year in which the assignment occurs.

(I) On or before the Effective Date, the Trustee shall pay all Estate Taxes and Tax Claims as advised by her Estate Professionals to be presently due and owing, pursuant to Section 5.4.

Section 5.2 **Powers of the Trustee Post Effective Date.** After the Effective Date, the Trustee shall have the following powers without need for approval by the Bankruptcy Court.

1. File any documents required by the Bankruptcy Code including, but not limited to, Monthly Operating Reports.

2. Complete final Tax returns for the Estate.

Section 5.3 **Effectuating Documents; Further Transactions; Exemption from Certain Transfer Taxes.** Before the Effective Date, the Trustee shall assign to EFP/BHT the Servicing Agreement and all other post-petition agreements listed on **Plan Exhibit 5.3**. The Trustee will be authorized to execute, deliver, File or record such contracts, instruments, releases and other agreements and documents and take such actions as may be necessary, appropriate or desirable to effectuate and implement the provisions of the Plan. The Trustee will be authorized to certify or attest to any of the foregoing actions. Pursuant to section 1146(c) of the Bankruptcy Code, the following will not be subject to a stamp tax, real estate transfer tax, sales or use tax or similar Tax: (a) the creation of any mortgage, deed of trust, lien or other security interest; (b) the making or assignment of any lease or sublease; and (c) the making or delivery of any deed, bill of sale or other instrument of transfer or assignment or any plan of merger, consolidation, liquidation or dissolution under, in furtherance of or in connection with the Plan.

Section 5.4 **Estate Taxes.** On or before the Effective Date, the Trustee shall pay all Estate Taxes and Tax Claims as advised by her Estate Professionals to be presently due and owing, to the extent not otherwise disputed and with the reasonable consent of EFP/BHT. Upon discharge of the Trustee pursuant to Section 5.6, all other Estate Taxes

including but not limited to future obligations and filing requirements shall be the responsibility of EFP/BHT.

Section 5.5 **General Settlement of Claims.** Pursuant to section 1123 of the Bankruptcy Code and Bankruptcy Rule 9019, and in consideration for the classification, Distributions, releases and other benefits provided under this Plan, upon the Effective Date, the provisions of this Plan shall constitute a good faith compromise and settlement of all Claims and Interests and controversies resolved pursuant to this Plan in accordance with Bankruptcy Rule 9019 and within the exercise of the Trustee's business judgment and shall be approved as in the best interests of the Estate. A vote to accept the Plan ***will not*** be considered a settlement of all claims against the Estate.

Section 5.6 **Discharge of Trustee.** Upon completion of all duties under the Plan and closure of the Bankruptcy Case, the Trustee shall be discharged as Trustee of this Bankruptcy Case.

ARTICLE VI
PROVISIONS GOVERNING DISTRIBUTIONS AND OBJECTIONS TO CLAIMS

Section 6.1 **Distributions Generally.** Distributions to be made under the Plan to Holders of Claims that are Allowed on or before the Effective Date will be deemed made on the Effective Date if made on the Effective Date or as promptly thereafter as is practicable, but in any event within fifteen (15) days after the Effective Date unless such Distribution is returned to the Trustee as undeliverable. If a Claim is Allowed after the Effective Date, a Distribution will be made on account of the Allowed Claim within fifteen (15) days after the earlier of the date on which (a) an Order allowing the Claim becomes a Final Order, or (b) a Stipulation Regarding the Amount and Nature of the Claim is executed. Distributions under the Plan will be made to the Holder of each Allowed Claim at the address of such Holder as listed on the Schedules, unless the Trustee has been notified in writing of a change of address, including, without limitation, by the Filing of an amended Proof of Claim by such Holder that provides an address for such Holder different from the address reflected on the Schedules.

Section 6.2 **Delivery of Distributions to Holders of Allowed Claims.** The Trustee will make Distributions to the Holders of Allowed Claims. No Distribution will be made with respect to all or any portion of any Disputed, contingent or unliquidated Claim until the Claim becomes an Allowed Claim. For purposes of this Plan, any Claims held by any Entity for which the Bankruptcy Court has entered a Final Judgment, shall be deemed to be an Allowed Claim.

Section 6.3 **Distribution Record Date.**

(a) **Allowed Claim.** The Trustee will have no obligation to recognize the transfer of, or the sale of any participation in, any Allowed Claim that occurs after the Distribution Record Date and will be entitled for all purposes herein to recognize and make

Distributions only to those Holders of Allowed Claims that are Holders of such Claims, or participants therein, as of the Distribution Record Date.

(b) **Pending Transfers.** Except as otherwise provided in a Final Order, the transferees of Allowed Claims that are transferred pursuant to Bankruptcy Rule 3001 before the Distribution Record Date will be treated as Holders of such Claims for all purposes, notwithstanding that any period provided by Bankruptcy Rule 3001 for objection to such a transfer has not expired before the Distribution Record Date.

Section 6.4 **Distributions in Complete Satisfaction.** Except as otherwise provided herein, the payments, Distributions and other treatments provided in respect to each Allowed Claim under this Plan shall be in complete satisfaction, discharge and release of all such Allowed Claims.

Section 6.5 **Objections to Claims.** Objections to Claims may be Filed until the Effective Date, or such later date as the Bankruptcy Court may Order. The Trustee reserves the right for herself and any other party in interest, to File objections through the Effective Date.

ARTICLE VII
TREATMENT OF EXECUTORY CONTRACTS AND UNEXPIRED LEASES

Section 7.1 **Executory Contracts or Unexpired Leases to Be Rejected or Assumed.**

(a) **Executory Contracts/Unexpired Leases Relevant to Loan Servicing.** Except as otherwise provided in the Plan or Confirmation Order, the Trustee will assume and assign to EFP/BHT, their assignees, or designees the Executory Contracts or Unexpired Leases listed on **Plan Exhibit 7.1**.

Section 7.2 **All Other Executory Contracts or Unexpired Leases Rejected**. Any Executory Contracts or Unexpired Leases not listed provided in **Plan Exhibit 7.1** will be deemed rejected. The Confirmation Order of the Plan will constitute an Order of the Bankruptcy Court approving the rejection and termination as of the Effective Date, pursuant to section 365 of the Bankruptcy Code of each Executory Contract and Unexpired Lease that is not assumed and assigned.

Section 7.3 **Payments Related to the Assumption of Executory Contracts and Unexpired Leases.** To the extent that such Claims constitute monetary defaults, the Cure Amount Claims associated with each Executory Contract or Unexpired Lease to be assumed pursuant to the Plan will be satisfied, pursuant to section 365(b)(1) of the Bankruptcy Code by EFP/BHT or the designees or assigns. If there is a dispute regarding the amount of any Cure Amount Claim, or any other matter pertaining to assumption of such contract or lease, the payment of any Cure Amount Claim by EFP/BHT required by section 365(b)(1) of the

Bankruptcy Code will be made following the entry of a Final Order resolving the dispute and approving the assumption.

Section 7.4 **Deemed Rejection.** All Executory Contracts and Unexpired Leases not specified on **Plan Exhibits 5.3 or 7.1**, and not either (a) assumed or rejected pursuant to a Final Order entered on or before the Effective Date, or (b) the subject of a pending motion to assume or an Order that has not yet become a Final Order as of the Effective Date, shall be deemed rejected as of the Effective Date.

Section 7.5 **Rejection Damages Claims.** Pursuant to section 502(g) of the Bankruptcy Code, any Claims arising from the rejection of the Executory Contracts or Unexpired Leases shall File a Rejection Claim within the deadlines provided Bankruptcy Rule 3001. Any Rejection Claim Allowed under section 502(a), (b) or (c) of the Bankruptcy Code will be treated as a General Unsecured Claim and will be treated in Class 4 of the Plan.

ARTICLE VIII
CONDITIONS TO THE PLAN BECOMING EFFECTIVE AND IMPLEMENTATION OF THE PLAN

Section 8.1 **Conditions to the Plan Becoming Effective.** The Plan shall not be consummated, and the Effective Date shall not occur, until each of the following conditions has been satisfied or duly waived pursuant to Section 8.2 of the Plan:

(a) The first Business Day after a Confirmation Order has been entered by the Bankruptcy Court in form and substance that is satisfactory to the Bankruptcy Court and the Trustee, so that such Confirmation Order shall be in full force and effect and shall be a Final Order;

(b) no Material Adverse Change will have occurred from and after the Confirmation Date; and,

(c) all consents, actions, documents, certificates, and agreements necessary to implement the Plan shall have been effected or executed and delivered to the required parties and, to the extent required, Filed with the applicable governmental units in accordance with the applicable laws.

Section 8.2 **Waiver of Conditions to the Effective Date.** One or more of the foregoing conditions to the Effective Date may be waived, in whole or in part, by all Plan Sponsors in their discretion at any time and without any Order of the Bankruptcy Court.

Section 8.3 **Filing Notice of Occurrence of the Effective Date.** Any Plan Sponsor shall File a notice of occurrence of the Effective Date within three (3) Business Days of the Effective Date, and such Notice must state that all conditions to the Plan becoming effective have been satisfied.

Section 8.4 **Effect of Non-Occurrence of Conditions to Consummation.** If consummation of this Plan does not occur (including, without limitation, if the Confirmation Order is vacated pursuant to a Final Order), then except as provided in any Order of the Bankruptcy Court vacating the Confirmation Order, the Plan will be null and void in all respects, and nothing contained in the Plan or Disclosure Statement shall (a) constitute a waiver or release of any Claims, Interests, or Causes of Action, (b) prejudice in any manner the rights of any Entity, or (c) constitute an admission, acknowledgment, offer, or undertaking of any sort by any Entity. All assignments and releases granted in this event prior to failure to consummate will be deemed null and void without further need for approval by the Bankruptcy Court. In that event, the Trustee and EFP/BHT reserve all applicable rights, claims, and defenses, including but not limited to those under Federal Rule of Bankruptcy Procedure 9019.

ARTICLE IX
DISCHARGE, RELEASES AND INJUNCTION

Section 9.1 **Injunction.** Except as otherwise expressly provided in the Plan or the Confirmation Order, as of the Effective Date, any Entity that has held, currently holds or may hold a Claim or other debt, or liability, that is settled or deemed satisfied in accordance with the Plan will be permanently enjoined from taking any of the following actions on account of any such Claims, debts, liabilities or Interests: (a) commencing or continuing in any manner any action or Cause of Action or other proceeding against the Estate, the Trustee, the Estate's Professionals, including the Servicer, or the property of any of them, other than to enforce any right that does not comply with, or is inconsistent with, the provisions of the Plan; (b) enforcing, attaching, collecting or recovering in any manner any judgment, award, decree or order against the Estate, the Trustee, the Estate's Professionals, including the Servicer, or the property of any of them; (c) creating, perfecting or enforcing any Lien or encumbrance of any kind against the Estate, the Trustee, the Estate's Professionals, including the Servicer, or the property of any of them; (d) asserting a setoff, right of subrogation or recoupment of any kind against any debt, liability or obligation due to the Estate, Trustee or the property of any of them; and (e) commencing or continuing any action or Cause of Action, in any manner, in any place that does not comply with or is inconsistent with the Plan. Notwithstanding anything to the contrary contained herein, this Section shall not supersede any contractual rights between Servicer and EFP/BHT. For avoidance of doubt, pursuant to Section 4.3(c), the UST, EFP, and BHT will be entitled to object to the Final Fee Applications of any Estate Professionals and to the extent any funds that have been paid to an Estate Professional on an interim basis are ordered to be repaid, those funds will be paid to EFP and BHT, or their assigns or designees. The UST, EFP, BHT, and all Estate Professionals are reserved all rights, claims, and defenses in connection with Final Fee Applications.

Section 9.2 **Term of the Automatic Stay.** Unless otherwise provided in the Plan or the Confirmation Order, the automatic stay set forth in section 362 of the Bankruptcy Code shall remain in full force and effect until the Effective Date.

Section 9.3 **No Successor Liability.** The Trustee will have no responsibilities for any Claims against or liabilities or obligations of the Estate relating to or arising out of the operations of or assets of the Trustee, the Debtor, the Estate or the Estate's

Professionals, including the Servicer, whether arising prior to, or resulting from actions, events or circumstances occurring or existing at any time prior to the Confirmation Date; *provided, however*, that the Trustee shall have the obligations specifically and expressly provided in the Plan.

Section 9.4 Releases.

EXCEPT AS OTHERWISE SPECIFICALLY PROVIDED IN THE PLAN OR THE CONFIRMATION ORDER, ON AND AFTER THE EFFECTIVE DATE, EACH HOLDER OF A CLAIM WHO HAS VOTED TO ACCEPT THIS PLAN SHALL BE DEEMED TO HAVE UNCONDITIONALLY RELEASED THE RELEASED PARTIES FROM ANY AND ALL CLAIMS, OBLIGATIONS, RIGHTS, SUITS, DAMAGES, CAUSES OF ACTION, REMEDIES AND LIABILITIES, WHETHER KNOWN OR UNKNOWN, FORESEEN OR UNFORESEEN, EXISTING OR HEREAFTER ARISING, IN LAW, EQUITY, OR OTHERWISE, THAT SUCH ENTITY WOULD HAVE BEEN LEGALLY ENTITLED TO ASSERT (WHETHER INDIVIDUALLY OR COLLECTIVELY), BASED IN WHOLE OR IN PART UPON ANY ACT OR OMISSION, TRANSACTION, AGREEMENT, EVENT, OR OTHER OCCURRENCE TAKING PLACE ON OR BEFORE THE EFFECTIVE DATE THAT IS IN ANY WAY RELATED TO THE ESTATE, ITS PROPERTIES, THE BANKRUPTCY CASE, THE TRUSTEE, HER PROFESSIONALS, THE DISCLOSURE STATEMENT OR THE PLAN; *PROVIDED, HOWEVER*, THAT NOTHING HEREIN WILL BE CONSIDERED A WAIVER OR RELEASE NOR SHALL THIS PROVISION IN ANY WAY PRECLUDE THE UST, EFP AND BHT FROM PURSUING ANY OBJECTIONS TO ANY ESTATE PROFESSIONALS' FINAL FEE APPLICATIONS AND THAT NOTHING IN THIS SECTION 9.4 OF THE PLAN WILL OPERATE TO WAIVE OR RELEASE (A) THE RIGHTS OF ANY PARTY TO ENFORCE THIS PLAN AND THE CONTRACTS, INSTRUMENTS AND OTHER AGREEMENTS OR DOCUMENTS DELIVERED UNDER OR IN CONNECTION WITH THIS PLAN OR ASSUMED PURSUANT TO THIS PLAN, INCLUDING BUT NOT LIMITED THE RIGHT TO ENFORCE THE CONTRACT WITH THE SERVICER OR (B) ANY CLAIM OR RIGHT AGAINST A RELEASED PARTY THAT IS BASED ON THE GROSS NEGLIGENCE, FRAUD OR WILLFUL MISCONDUCT OF SUCH RELEASED PARTY AS DETERMINED BY A FINAL ORDER OF THE BANKRUPTCY COURT OR OTHER COURT OF COMPETENT JURISDICTION.

Section 9.5 Exculpation.

AS OF AND SUBJECT TO THE OCCURRENCE OF THE CONFIRMATION DATE, THE EXCULPATED PARTIES (A) SHALL BE DEEMED TO HAVE NEGOTIATED THE PLAN IN GOOD FAITH AND NOT BY ANY MEANS FORBIDDEN BY LAW, AND (B) SOLICITED ACCEPTANCES OF THE PLAN IN GOOD FAITH AND IN COMPLIANCE WITH THE APPLICABLE PROVISIONS OF THE BANKRUPTCY CODE, INCLUDING SECTION 1125(a) AND (e) OF THE BANKRUPTCY CODE AND ANY APPLICABLE NON-BANKRUPTCY LAW, RULE, OR REGULATION GOVERNING THE ADEQUACY OF DISCLOSURE IN CONNECTION WITH THE SOLICITATION. ADDITIONALLY, NONE OF THE EXCULPATED PARTIES SHALL BE LIABLE TO ANY ENTITY FOR ANY ACTION TAKEN OR OMITTED TO BE TAKEN IN CONNECTION WITH OR RELATED TO THE FORMULATION,

PREPARATION, DISSEMINATION, IMPLEMENTATION, CONFIRMATION, OR CONSUMMATION OF THE PLAN, THE DISCLOSURE STATEMENT, EARLIER VERSIONS OF THE SAME, OR ANY CONTRACT, INSTRUMENT, RELEASE, OTHER AGREEMENT OR DOCUMENT CREATED OR ENTERED INTO, OR ANY OTHER ACTION TAKEN OR OMITTED TO BE TAKEN, IN CONNECTION WITH THE PLAN OR THE BANKRUPTCY CASES; *PROVIDED, HOWEVER*, THAT NOTHING HEREIN WILL BE CONSIDERED A WAIVER OR RELEASE NOR SHALL THIS PROVISION IN ANY WAY PRECLUDE THE UST, EFP AND BHT FROM PURSUING ANY OBJECTIONS TO ANY ESTATE PROFESSIONALS' FINAL FEE APPLICATIONS AND THAT NOTHING IN THIS SECTION 9.5 OF THE PLAN WILL OPERATE TO WAIVE OR RELEASE (A) THE RIGHTS OF ANY PARTY TO ENFORCE THIS PLAN AND THE CONTRACTS, INSTRUMENTS AND OTHER AGREEMENTS OR DOCUMENTS DELIVERED UNDER OR IN CONNECTION WITH THIS PLAN OR ASSUMED PURSUANT TO THIS PLAN, INCLUDING THE RIGHT TO ENFORCE THE CONTRACT WITH THE SERVICER OR (B) ANY CLAIM OR RIGHT AGAINST AN EXCULPATED PARTY THAT IS BASED ON THE GROSS NEGLIGENCE, FRAUD OR WILLFUL MISCONDUCT OF SUCH EXCULPATED PARTY AS DETERMINED BY A FINAL ORDER OF THE BANKRUPTCY COURT OR OTHER COURT OF COMPETENT JURISDICTION.

ARTICLE X
RETENTION OF JURISDICTION

Section 10.1 After Confirmation, the Bankruptcy Court shall have exclusive jurisdiction of all matters arising under, arising out of or relating to the Bankruptcy Case including, but not limited to, the following:

(a) to insure that the purpose and intent of the Plan are carried out;

(b) to consider any modification of the Plan under section 1127 of the Bankruptcy Code;

(c) to hear and determine all Claims, controversies, defaults, suits, and disputes against the Estate, including, but not limited to, any Disputed Administrative Claim or Disputed Claim;

(d) to hear, determine and enforce all Claims, Causes of Action of the Estate that arose, in whole or in part, prior to the Effective Date;

(e) to hear and determine all controversies, suits, defaults and disputes that may arise in connection with the interpretation, execution or enforcement of the Plan;

(f) to hear and determine all requests for compensation and/or reimbursement of expenses for services rendered or expenses incurred before the Effective Date which may be made after the Effective Date;

(g) to hear and determine all objections to Administrative Claims, Claims, controversies, suits and disputes that may be pending at or initiated after the Effective Date, except as provided in the Confirmation Order;

(h) to consider and act on the compromise and settlement of any Administrative Claim, Claim or Cause of Action on behalf of or against the Estate;

(i) to enforce and interpret by injunction or otherwise the terms and conditions of the Plan;

(j) to enter a Final Order concluding and terminating the Bankruptcy Case;

(k) to correct any defect, cure any omission or reconcile any inconsistency in the Plan or Confirmation Order necessary or helpful to carry out the purposes and intent of the Plan;

(l) to determine all questions and disputes regarding titles to the assets of the Debtor;

(m) to classify the Claims or Interests of any Holder and to re-examine Claims allowed for purposes of voting, and to determine objections to Administrative Claims, Claims and Interests;

(n) to consider and act on such other matters consistent with the Plan as may be provided in the Confirmation Order;

(o) to enforce any injunction or stay whether arising under the Bankruptcy Code, Bankruptcy Rules, or the Plan; and/or

(p) to consider the rejection or assumption and assignment of Executory Contracts and/or Unexpired Leases that are not discovered before Confirmation.

ARTICLE XI
RESERVED

ARTICLE XII
MISCELLANEOUS

Section 12.1 **Modification of the Plan.** Subject to the restrictions on modification set forth in section 1127 of the Bankruptcy Code and Bankruptcy Rules 2002 and 3019, the Plan Sponsors reserve the right to alter, amend or modify the Plan before its substantial consummation.

Section 12.2 **Revocation or Withdrawal of the Plan.** The Plan Sponsors reserve the right to revoke or withdraw the Plan at any time before the Confirmation Date by Filing a notice of withdrawal or revocation. If the Plan is revoked or withdrawn, or if the Effective Date does not occur, then the Plan and all settlements and compromises set forth herein

and not otherwise approved by Final Order shall be deemed null and void and nothing contained herein shall be deemed to constitute a waiver or release of any Claims by or against the Estate or any other Entity.

Section 12.3 **Severability.** If, prior to confirmation of the Plan, any term or provision of the Plan is held by the Bankruptcy Court to be invalid, void or unenforceable, the Bankruptcy Court will have the power to alter and interpret such term or provision to make it valid or enforceable to the maximum extent practicable, consistent with the original purpose of the term or provision held to be invalid, void or unenforceable, and such term or provision then will be applicable as altered or interpreted; *provided, however*, that any such alteration or interpretation must be in form and substance acceptable to the Trustee. Notwithstanding any such holding, alteration or interpretation, the remainder of the terms and provisions of the Plan will remain in full force and effect and will in no way be affected, impaired or invalidated by such holding, alteration or interpretation. The Confirmation Order will constitute a judicial determination and will provide that each term and provision of the Plan, as it may have been altered or interpreted in accordance with the foregoing, is valid and enforceable pursuant to its terms.

Section 12.4 **Plan Exhibits.** All Plan Exhibits are incorporated by reference and are intended to be an integral part of this document as though fully set forth in the Plan.

Section 12.5 **Binding Effect.** The Plan shall be binding upon and/or inure to the benefit of the Debtor, the Estate, the Trustee, the Holders of Claims and Interests, together with their respective successors and assigns or designees.

Section 12.6 **Substantial Consummation.** The Plan will be deemed to be substantially consummated under sections 1101 and 1127(b) of the Bankruptcy Code upon the Effective Date.

Section 12.7 **Successors and Assigns.** The rights, benefits and obligations of any Entity named or referred to in the Plan shall be binding on, and shall inure to the benefit of, any heir, executor, administrator, successor or assign or designee of such Entity.

Section 12.8 **Headings.** Headings are used in the Plan for convenience and reference only, and shall not constitute a part of the Plan for any other purpose.

Section 12.9 **Governing Law.** Except to the extent that the Bankruptcy Code is applicable, the rights and obligations arising under the Plan shall be governed by and construed and enforced as provided in the laws of the State of Mississippi; *provided, however*, that any documents executed in connection with the Plan, including, but not limited to the Plan Exhibits, shall be governed by the laws of the State chosen therein.

Section 12.10 **No Admissions.** Notwithstanding anything herein to the contrary, nothing contained in the Plan shall be deemed an admission by any Entity prior to Confirmation with respect to any matter set forth herein.

ARTICLE XIII
CRAMDOWN

Section 13.1 The Trustee may request Confirmation under section 1129(b) of the Bankruptcy Code, if any Impaired Class does not accept the Plan pursuant to section 1126 of the Bankruptcy Code. The Trustee reserves the right to alter the treatment of any Class to effectuate a cramdown under section 1129(b) of the Bankruptcy Code.

Dated: May 15, 2023.

Respectfully submitted,

By: *s/ Jeffrey R. Barber*

Jeffrey R. Barber (MB #1982)
Kristina M. Johnson (MB #9382)
JONES WALKER LLP
190 East Capitol Street, Suite 800 (39201)
Post Office Box 427
Jackson, Mississippi 39205-0427
Telephone: (601) 949-4765
Facsimile: (601) 949-4804
jbarber@joneswalker.com
kjohnson@joneswalker.com

Admitted *Pro Hac Vice*:

Mark A. Mintz (LAB #31878)
JONES WALKER LLP
201 St. Charles Avenue, Suite 5100
New Orleans, Louisiana 70170-5100
Telephone: (504) 582-8368
Facsimile: (504) 589-8368
mmintz@joneswalker.com

COUNSEL FOR THE TRUSTEE

By: _

Jim F. Spencer, Jr. (MSB # 7736)
Stephanie M. Rippee (MSB #8998)
WATKINS & EAGER PLLC
P.O. Box 650
Jackson, MS 39205-0650
(601) 965-1900 (p)
jspencer@watkinseager.com
srippee@watkinseager.com

COUNSEL FOR EDWARDS FAMILY PARTNERSHIP, LP AND BEHER

CERTIFICATE OF SERVICE

I hereby certify that on May 15, 2023, I electronically filed the foregoing with the Clerk of the Court using the ECF system which sent notification of such filing to the parties set forth in the Electronic Mail Notice List as of the date hereof, including the following:

Christopher J. Steiskal
christopher.j.steiskal@usdoj.gov

DATED: May 15, 2023.

s/Jeffrey R. Barber

PLAN EXHIBITS

PLAN EXHIBIT 5.1	LOAN ASSIGNMENT DOCUMENTS
PLAN EXHIBIT 5.3	POST-PETITION AGREEMENTS TO BE ASSIGNED TO EFP/BHT
PLAN EXHIBIT 7.1	PRE-PETITION EXECUTORY CONTRACTS AND UNEXPIRED LEASES TO BE ASSUMED AND ASSIGNED

PLAN EXHIBIT 5.1

PLAN EXHIBIT 5.3

- Servicer Agreement
- Host Gator Agreement
- NLEX Website Agreement

PLAN EXHIBIT 7.1

- Membership Agreement with MERS®
- Portfolio 7 Agreement

EXHIBIT B

(To be supplied)

EXHIBIT C

AO 91 (Rev. 11/11) Criminal Complaint

UNITED STATES DISTRICT COURT

for the

Southern District of Mississippi

Filed

MAR 1 2014

U.S. Magistrate Judge

United States of America
v.
William D. Dickson a/k/a Butch Dickson

Case No. 3:14-mj-521-FKB

Defendant(s)

CRIMINAL COMPLAINT

I, the complainant in this case, state that the following is true to the best of my knowledge and belief.

On or about the date(s) of 11/5/2013 through 1/7/2014 in the county of Hinds in the Southern District of Mississippi, the defendant(s) violated:

Code Section	*Offense Description*
18 U.S.C. Section 1349	Conspiracy to Commit Bank Fraud

This criminal complaint is based on these facts:

See the affidavit of FBI Special Agent Bradley Hentschel, attached to this application and incorporated herein by reference.

☑ Continued on the attached sheet.

Complainant's signature

Bradley Hentschel, Special Agent, FBI

Printed name and title

Sworn to before me and signed in my presence.

Date: 3/10/2014

Judge's signature

City and state: Jackson, Mississippi

F. Keith Ball, United States Magistrate Judge

Printed name and title

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

COMPLAINT

I, Bradley Hentschel, affiant, having been duly sworn, hereby depose and state that:

I. Background Information of Lead Agent

1. I, Bradley Hentschel, have been a Special Agent of the Federal Bureau of Investigation ("FBI") since July 2010. I am assigned to FBI's Jackson, Mississippi Office, which has investigative responsibility for federal crimes committed in the State of Mississippi within the jurisdiction of the FBI. During my employment as an FBI Special Agent, I have received training on the investigation of white collar crimes, and I have conducted and, otherwise, participated in numerous white collar criminal investigations, including some which involve financial fraud and embezzlement.

2. The information contained in this Affidavit is based on my training and experience; on my personal knowledge and observations made during the course of this investigation; on information conveyed to me by other agents and witnesses; and on my review of records, documents, and other physical evidence. This Affidavit is intended only to show that there is sufficient probable cause for the requested arrest warrant and, thus, does not set forth all of my knowledge about this matter.

3. The matters detailed in this Affidavit concern the investigation of a number of companies and individuals, including, but not limited to WILLIAM D. DICKSON, also known as BUTCH DICKSON; COMMUNITY HOME FINANCIAL SERVICES ("CHFS"); THE W. W. WARREN FOUNDATION; VICTORY CONSULTING GROUP ("VCG"); and others known and unknown, for violations of Title 18 U.S.C. § 1349, which makes it a crime for any person to knowingly conspire with another person to commit bank fraud. There is probable

cause to believe that WILLIAM D. DICKSON, a/k/a Butch Dickson, and others have conspired to commit bank fraud. Bank fraud is criminalized by Title 18 U.S.C. § 1344, which makes it a crime for anyone to execute, or attempt to execute, a scheme or artifice to defraud a financial institution or to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises.

II. Facts and Circumstances

4. CHFS is a Jackson, Mississippi-based home mortgage lending company.

5. From at least in or about July 2008 through in or about February 2014, William D. Dickson was the President, Director and Secretary of CHFS. Prior to that time, he was President and Director.

6. On or about May 23, 2012, CHFS declared Chapter 11 bankruptcy in the United States Bankruptcy Court for the Southern District of Mississippi.

7. According to a Bankruptcy Court Order, CHFS was prohibited from making unauthorized transfers or expenditures of cash collateral subject to bankruptcy protection. Bankruptcy Court orders issued to CHFS required that CHFS continue collecting on existing mortgage loans in CHFS' management portfolio and secure these ongoing collections in accounts subject to bankruptcy protection.

8. There is probable cause to believe that WILLIAM D. DICKSON, a/k/a Butch Dickson, and others known and unknown, have conspired to knowingly and intentionally commit bank fraud and to violate the Bankruptcy Court's Orders by transferring without legal authority and without the Court's approval, cash collateral out of accounts subject to bankruptcy protection.

9. Between November 5, 2013, and January 7, 2014, WILLIAM D. DICKSON, a/k/a Butch Dickson, and others known and unknown, conspired to wire approximately $9,095,000.00 from accounts subject to bankruptcy protection to accounts owned and/or controlled by WILLIAM D. DICKSON, a/k/a Butch Dickson and/or in which WILLIAM D. DICKSON, a/k/a Butch Dickson has a financial interest.

10. On or about November 5, 2013, approximately $900,000.00 was wired from the DIP operating account via HSBC Bank USA to a Banco Panameno account held in the name of the W.W. Warren Foundation, a company in which WILLIAM D. DICKSON, a/k/a Butch Dickson, holds a financial interest.

11. On or about November 12, 2013, approximately $795,000.00 was wired from the DIP operating account to the same Banco Panameno account held in the name of the W.W. Warren Foundation.

12. On or about November 25, 2013, approximately $700,000.00 was wired from the DIP operating account to a Wells Fargo account in the name of VICTORY CONSULTING GROUP, INC. (VCG), a company operated and/or controlled by WILLIAM D. DICKSON, a/k/a Butch Dickson.

13. On or about January 7, 2014, VCG, approximately $450,000.00 was wired from a VCG Wells Fargo account to the same Banco Panameno account held in the name of the W.W. Warren Foundation.

14. On or about December 11, 2013, approximately $3,500,000.00 was wired from the EFP escrow account to the same Banco Panameno account held in the name of the W.W. Warren Foundation.

15. On or about December 11, 2013, approximately $2,000,000.00 was wired from the BHT escrow account to the same Banco Panameno account held in the name of the W.W. Warren Foundation.

16. On or about December 19, 2013, approximately $1,200,000.00 was wired from the DIP operating account to the same Banco Panameno account held in the name of the W.W. Warren Foundation.

17. Each of the wire transfers was made at a Wells Fargo Bank, a federally insured financial institution, by a person yet identified, who represented to bank personnel that he or she had the authority to authorize these wire transfers, when in truth, he or she had no such authority.

18. On or about December 23, 2013, in response to these above-described unauthorized and unlawful bank wire transfers, the Bankruptcy Court appointed an emergency trustee as the representative of CHFS' Chapter 11 estate.

19. According to immigration records, WILLIAM D. DICKSON, a/k/a Butch Dickson, last traveled from the United States to Costa Rica on January 6, 2014. On that date, WILLIAM D. DICKSON, a/k/a Butch Dickson, flew on American Airlines flight 2438 from Miami, Florida, to San Jose, Costa Rica. As of March 7, 2014, immigration records do not indicate that WILLIAM D. DICKSON, a/k/a Butch Dickson, has returned to the United States since that time.

20. The Bankruptcy Trustee has made numerous turnover demands regarding these funds, none of which have resulted in the recovery of the subject Bankruptcy assets.

21. Based on business records CHFS provided to the Bankruptcy Court, CHFS' monthly cash receipts are substantial. CHFS reported monthly cash receipts as $1,618,898.05 for the period between August1 to August 31, 2013. For the period beginning September 1 and

ending September 31, 2013, CHFS reported monthly cash receipts of $1,620,051.51. In the latest report furnished by CHFS to the Bankruptcy Court, CHFS had $2,223,875.06 in cash receipts between October 1 and October 30, 2013.

22. CHFS collected payments on its mortgage portfolios in three primary ways: in-person, mail, and online payments. As previously discussed, CHFS remains under its obligation to accept and retain all proceeds it receives from mortgages for the benefit of the Bankruptcy estate. Causing said funds to be routed to accounts and locations unknown to the Bankruptcy Court and Trustee conceals those funds from the Bankruptcy Court and Trustee.

23. On February 5, 2014, the Bankruptcy Trustee visited CHFS' known physical location and discovered that the physical office had been emptied and was no longer operational. As a result, CHFS could no longer make collections in person at that address, and, could only collect payments via mail or online, or at a physical location unknown to the Bankruptcy Court and Trustee.

24. Bank records and other credible evidence reveal that WILLIAM D. DICKSON, a/k/a Butch Dickson, has moved CHFS' principal place of business from Jackson, Mississippi, to Panama. The evidence further reveals that CHFS claims to have set up to continue running its business, two branch offices – one in Panama and another in Costa Rica. Since CHFS has left Mississippi, the Bankruptcy Trustee has exercised its right to receive all incoming mail sent to CHFS' Jackson, Mississippi address for the purpose of receiving and depositing the mortgage payments of CHFS customers.

25. Investigation has uncovered a conspiracy to reroute new loan collections from CHFS customers away from its mailing address in Jackson, Mississippi, to undisclosed mailboxes in order to prevent the Bankruptcy Trustee from securing said funds.

26. CHFS and other conspirators have steered mail away from the Trustee by directing its mortgagees to mail their mortgage payments to a Las Vegas address; payments received at the Las Vegas address are then re-shipped by an unknown person or persons to CHFS in Costa Rica. According to information provided to the Bankruptcy Trustee by a former CHFS employee, CHFS opened a "virtual office" in Las Vegas in approximately mid-2013. This office was established and connected to a commercial registered agent who serviced the post office box in Las Vegas. In late 2013, CHFS began sending its mortgagees their account statements that were accompanied by self-addressed envelopes bearing the Las Vegas post office box address. According to the former CHFS employee, CHFS mail that had been sent to the post office box was re-packaged and forwarded to Costa Rica.

27. Once the Bankruptcy Trustee discovered the Las Vegas address, CHFS made another attempt to divert income away from the Bankruptcy Trustee. On February 1, 2014, a change of address form was submitted to the U.S. Postal Service via the Postal Service website that directed mail addressed to the CHFS physical location at 234 East Capitol Street, Jackson, Mississippi, to be forwarded to 8610 NW 72nd Street, #725, Miami, Florida. The change of address was billed to a Visa credit card held in the name of "WILLIAM DICKSON." The Internet Protocol address assigned to the computer used to submit the change of address shows that the computer was located in Costa Rica at the time the change of address was submitted.

28. Open source searches identified several businesses located at address 8610 NW 72nd Street, Miami, Florida, including, but not limited to, Interworld Freight, Inc., and EParcel-Xpress, Inc.

29. The 72nd Street Address in Miami address has also appeared as the payment address on CHFS statements that were being sent to CHFS mortgagees as late as February 17,

2014. The Miami address has been printed on envelope labels which appear to be pasted over the Las Vegas post office box address. These envelopes bearing the Miami address labels were accompanied by statements directing borrowers to forward payment to the Miami address.

30. Investigation has uncovered evidence that CHFS is depositing payments subject to bankruptcy protection into an account outside the United States that is yet unknown to the Trustee. On December 26, 2013, WILLIAM D. DICKSON, a/k/a Butch Dickson, sent a letter to a CHFS customer confirming CHFS' acceptance of the customer's short sale and CHFS lien release. The customer then sent to CHFS' Jackson address a check in the amount satisfying the loan.

31. Later, the customer received a letter dated February 12, 2014, from Banvivienda, a Panama bank associated with Banco Panameno, acknowledging receipt of the check. The letter indicated the bank was "acting as agent for our client" and did not cash the check. Instead, the bank returned the check with instructions to wire the payoff amount via HSBC Bank USA to Banvivienda. The letter listed the payee as Community Home Financial Services, Inc. The returned check was endorsed for deposit to a Banvivienda account in the name of Community Home Financial Services.

32. In addition to having CHFS loan payments forwarded to new addresses, WILLIAM D. DICKSON, a/k/a Butch Dickson, and his co-conspirators have taken other actions to prevent the Trustee from receiving CHFS mail in Jackson. For example, one CHFS borrower reported being contacted by an individual named "David," who purported to be a CHFS employee. "David" advised that mortgagee via telephone to submit the mortgagee's loan payment to CHFS online. When the mortgagee told "David" that the mortgagee would send

his/her payment to the Bankruptcy Trustee, "David" advised that CHFS was not in bankruptcy and was "healthy and strong."

33. Investigation uncovered another example of the conspiracy to divert incoming payments away from the Bankruptcy Trustee. On or about February 17, 2014, a CHFS borrower received a demand letter from CHFS stating that CHFS would take various legal actions against the borrower if the borrower did not pay the full balance of the borrower's loan, a total of $12,977.70. This letter bore the typed name and title of "William Dickson, President – Community Home Financial Services, Inc.," and directed payment to the Miami address. (Affiant's Note: The borrower provided documentation that the balance of the loan, $12,409.82, was paid off in November of 2013.)

34. The investigation has also uncovered evidence that certain email accounts are being used by persons involved in the conspiracy to re-route CHFS mortgage payments away from the Bankruptcy Trustee. On or about February 20, 2014, an individual utilizing e-mail account briannichol13@gmail.com contacted a CHFS customer to provide the aforementioned Miami address as the current CHFS payment address. This customer also received a CHFS statement dated February 20, 2014, listing the Miami address as the current CHFS address.

35. The e-mail account briannichol13@gmail.com was used on another occasion to send account information to a CHFS customer. On or about February 22, 2014, a third-party mortgage lender contacted CHFS to request payoff information for a CHFS customer, who was attempting to refinance his CHFS loan. The third-party lender spoke with a CHFS employee via telephone who identified himself as "Brian". "Brian" directed the lender to request payoff information from CHFS by submitting the request via email to briannichol13@gmail.com. Per

"Brian's" instructions, the lender sent an e-mail confirming the payoff request to e-mail account briannichol13@gmail.com.

36. In response to the third-party lender's request, an individual utilizing account briannichol13@gmail.com provided a pay-off statement to another CHFS employee named Reshonda Rhodes at email address rrhodes@dminet.biz. This pay-off statement, which listed a total amount of $53,293.40, was dated February 22, 2014. (Affiant's Note: During the course of the investigation, I have learned that Reshonda Rhodes is an employee of CHFS and frequent traveler to Central America.)

37. On or about Monday, February 24, 2014, an individual utilizing e-mail address rrhodes@dminet.biz forwarded the pay-off statement for the loan referenced *supra* in paragraph 34 to the third-party lender. This pay-off statement did not direct the third-party lender to make payment to the Bankruptcy Trustee.

38. The investigation has determined that an individual utilizing the CHFS e-mail account attributed to WILLIAM D. DICKSON, a/k/a Butch Dickson, corresponded with CHFS customers regarding CHFS records as late as February, 2014. On February 10, 2014, a CHFS customer sent an e-mail to account butch@dminet.biz requesting tax information from the CHFS customer's account. An individual utilizing the e-mail account butch@dminet.biz responded on February 14, 2014, by providing the customer's payment history from 2013, and signed the e-mail as "wdd". The alias associated with this e-mail account is "BUTCH DICKSON".

39. Internet service provider searches for "dminet.biz" indicate this domain is hosted in the country of Panama.

40. On March 5, 2014, website hosting service US Next, which hosts the CHFS website, completed a recorded phone call with Colby Dickson regarding the status of payment on

their web hosting account with CHFS (Affiant's note: COLBY DICKSON is the son of WILLIAM D. DICKSON, a/k/a Butch Dickson, and was the top wage earner at CHFS in 2013). During the recorded call, Colby Dickson indicated that WILLIAM D. DICKSON, a/k/a Butch Dickson, still controls CHFS. When asked about payment for web hosting services, the status of the bankruptcy, and where US Next should direct mortgage payments collected online, Colby Dickson indicated any questions about normal business operations should be directed to WILLIAM D. DICKSON, a/k/a Butch Dickson. To that end, COLBY DICKSON provided a direct contact telephone number for WILLIAM D. DICKSON.

41. On March 7, 2014, the Bankruptcy Trustee received a FedEx bill for the CHFS account indicating that WILLIAM D. DICKSON, a/k/a Butch Dickson, and others conducted transactions between Central America and the United States on behalf of CHFS.

42. On January 28, 2014, CHFS employee Reshonda Rhodes sent a package from what appears to be a CHFS office in Costa Rica to "WILLIAM D. DICKSON," Discount Mortgage, Inc., 234 Capitol Street, Jackson, Mississippi (Affiant's Note: This Jackson address is the former physical location of CHFS).

43. On January 30, 2014, an individual identified as Xinia Avila sent a package from the same apparent CHFS office in Costa Rica to Carol Runnels (Affiant's Note: Investigation has identified Carol Runnels as the secretary for CHFS in Jackson). This package was sent to the same Jackson address as referenced in paragraph 40. On the same date, an individual identified as Brian Nichol sent a package from the same Costa Rica address to the aforementioned Jackson address.

44. On January 31, 2014, an individual noted only as "William D D" sent a package from the same Costa Rica address as referenced in paragraphs 40 and 41. This package was sent

to address 6830 Via Del Uro, Suite 105, San Jose, California. Investigation determined this address is occupied by a company called "My FBI Report". According to the company's website, My FBI Report is a division of National Credit Reporting authorized to expedite the process of obtaining a personal FBI criminal report. More specifically, this service assists individuals in sending personal fingerprints to the FBI's fingerprint database. The company's website lists several reasons for ordering a personal FBI criminal report, including personal review, foreign travel or work, work or student visas, adoption requirements, attorney requests, challenge errors and inaccurate information, and court related matters.

CONCLUSION

45. Based on the forgoing, I request that the Court issue the proposed complaint and arrest warrant for WILLIAM D. DICKSON, a/k/a Butch Dickson for a violation of Title 18 U.S.C. § 1349.

REQUEST FOR SEALING

46. I further request that the Court order that all papers in support of this application, including the affidavit, complaint, and arrest warrant, be sealed until further order of the Court. These documents discuss an ongoing criminal investigation that is neither public nor known to

all of the targets of the investigation. Accordingly, there is good cause to seal these documents because their premature disclosure may seriously jeopardize that investigation.

Respectfully submitted,

Bradley Hentschel
Special Agent
Federal Bureau of Investigation

Subscribed and sworn to before me on March 10, 2014

Hon. F. Keith Ball
UNITED STATES MAGISTRATE JUDGE

EXHIBIT D

SO ORDERED

Judge Neil P. Olack
United States Bankruptcy Judge
Date Signed: February 27, 2018

The Order of the Court is set forth below. The docket reflects the date entered.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI

IN RE:

COMMUNITY HOME FINANCIAL SERVICES, INC.,	**CASE NO. 12-01703-NPO**
DEBTOR.	**CHAPTER 11**

KRISTINA M. JOHNSON, AS TRUSTEE FOR THE ESTATE OF COMMUNITY HOME FINANCIAL SERVICES, INC.	**PLAINTIFF**
VS.	**ADV. PROC. NO. 12-00091-NPO**
EDWARDS FAMILY PARTNERSHIP, LP AND BEHER HOLDINGS TRUST	**DEFENDANTS**

KRISTINA M. JOHNSON, AS TRUSTEE FOR THE ESTATE OF COMMUNITY HOME FINANCIAL SERVICES, INC.	**PLAINTIFF**
VS.	**ADV. PROC. NO. 13-00104-NPO**
CHARLES EDWARDS, EDWARDS FAMILY PARTNERSHIP, LP, EDWARDS FAMILY PARTNERSHIP, LLP, AND BEHER HOLDINGS TRUST	**DEFENDANTS**

KRISTINA M. JOHNSON, CHAPTER 11 TRUSTEE OF THE ESTATE OF COMMUNITY HOME FINANCIAL SERVICES, INC. **PLAINTIFF**

VS. **ADV. PROC. NO. 15-00080-NPO**

EDWARDS FAMILY PARTNERSHIP, LP, BEHER HOLDINGS TRUST, AND CHARLES C. EDWARDS, INDIVIDUALLY AND AS MANAGING PARTNER OF EDWARDS FAMILY PARTNERSHIP, LP AND BEHER HOLDINGS TRUST **DEFENDANTS**

MEMORANDUM OPINION AND ORDER ON THIRD AMENDED COMPLAINT IN ADVERSARY PROCEEDING 12-00091-NPO; CONSOLIDATED AMENDED COMPLAINT IN ADVERSARY PROCEEDING 13-00104-NPO; AMENDED COMPLAINT FOR TURNOVER, RECOVERY OF PROPERTY TRANSFERRED POST-PETITION, DAMAGES, DECLARATORY RELIEF, EQUITABLE SUBORDINATION, AND OTHER RELIEF IN ADVERSARY PROCEEDING 15-00080-NPO; AND CONSOLIDATED CONTESTED MATTERS[1]

From October 30, 2017, through November 2, 2017, and on November 27, 2017, the Court conducted a consolidated trial (the "Trial") consisting of three (3) adversary proceedings and five (5) related contested matters.

A. Adversary Proceedings

At Trial, the Court heard evidence in: (1) adversary proceeding 12-00091-NPO (the "Home Improvement Loans Adversary"); (2) adversary proceeding 13-00104-NPO (the "Mortgage Portfolios Adversary"); and (3) adversary proceeding 15-00080-NPO (the "Post-Petition Conduct Adversary" or, collectively, the "Adversary Proceedings"). The

[1] The consolidated contested matters are defined and discussed at pages four (4) and five (5) of this Opinion.

following pleadings were before the Court: (1) in the Home Improvement Loans Adversary, the Third Amended Complaint (the "HIL Third Amended Complaint") (HIL Adv. Dkt. 237)[2] filed by Kristina M. Johnson ("Johnson"), chapter 11 trustee (the "Trustee") of the estate of Community Home Financial Services, Inc. ("CHFS"); the Answer, Defenses and Counterclaim of Edwards Family Partnership, LP and Beher Holdings Trust to Third Amended Complaint (Ct Dkt. #237) (the "HIL Answer & Counterclaim") (HIL Adv. Dkt. 289) filed by Edwards Family Partnership, LP ("EFP") and Beher Holdings Trust ("BHT" or, together with EFP, "EFP/BHT"); and the Reply and Affirmative Defenses to Counterclaim of Edwards Family Partnership, LP and Beher Holdings Trust (the "HIL Reply to Counterclaim") (HIL Adv. Dkt. 294) filed by the Trustee; (2) in the Mortgage Portfolios Adversary, the Consolidated Amended Complaint (the "MPF Complaint") (MPF Adv. Dkt. 61) filed by the Trustee; the Amended Joint Answer of Edwards Family Partnership, L.P., Edwards Family Partnership, LLP, Beher Holdings Trust, Charles C. Edwards, James R. Edwards, The Atkinson Trust, L.L.C. to the Consolidated Amended Complaint (Dkt. # 61) (the "MPF Answer & Counterclaim") (MPF Adv. Dkt. 70) filed by EFP, BHT, Charles C. Edwards, M.D. ("Dr. Edwards"), James Edwards, and the Atkinson Trust, L.L.C. (the "Atkinson Trust"); and the Reply and Affirmative Defenses to Counterclaim of Edwards Family Partnership, LP and Beher

[2] Citations to the record are as follows: (1) citations to docket entries in the Home Improvement Loans Adversary are cited as "(HIL Adv. Dkt. ___)"; (2) citations to docket entries in the Mortgage Portfolios Adversary are cited as "(MPF Adv. Dkt. ___)"; (3) citations to docket entries in the Post-Petition Conduct Adversary are cited as "(PPC Adv. Dkt. ____); (4) citations to docket entries in the above-referenced bankruptcy case (the "Bankruptcy Case") are cited as "(Bankr. Dkt. ___)"; and (5) citations to docket entries in other separate but related adversary proceedings are cited as "(Adv. Proc. ____, Dkt. ____)". Citations to docket entries in cases before the U.S. District Court for the Southern District of Mississippi (the "District Court") are cited as "(Case No. ____, Dkt. ____)".

Holdings Trust, Acting by and Through its Trustee, Church Bay Trust (the "MPF Reply to Counterclaim") (MPF Adv. Dkt. 72) filed by the Trustee; and (3) in the Post-Petition Conduct Adversary, the Amended Complaint for Turnover, Recovery of Property Transferred Post-Petition, Damages, Declaratory Relief, Equitable Subordination, and Other Relief (the "PPC Amended Complaint") (PPC Adv. Dkt. 48) filed by the Trustee; and the Joint Answer and Defenses of Edwards Family Partnership, LP, Beher Holdings Trust and Charles C. Edwards, Individually and as Managing Partner of Edwards Family Partnership, LP and Beher Holdings Trust (PPC Adv. Dkt. 76) filed by EFP/BHT and Dr. Edwards.

B. Contested Matters

Also before the Court at Trial were the following contested matters (collectively, the "Contested Matters") filed in the Bankruptcy Case, related to Proofs of Claim 4-1 through 9-1 and CHFS's use of alleged cash collateral:

Proofs of Claim 4-1 & 5-1

Objection to Claim of Beher Holdings Trust (Claim No. 4) and to Claim of Edwards Family Partnership (Claim No. 5) (the "Objection to POC 4 & 5") (Bankr. Dkt. 162) filed by CHFS

Edwards Family Partnership, LP and Beher Holdings Trust's Responses to Objection to Proof of Claim of Beher Holdings Trust No. 4 and to Proof of Claim of Edwards Family Partnership, LP No. 5 (DK #162) (the "Responses to Objection to POC 4 & 5") (Bankr. Dkt. 208) filed by EFP/BHT

Proofs of Claim 6-1 & 9-1

Objection to Claims of Edwards Family Partnership (Claim No. 6 and Claim No. 9) (the "Objection to POC 6 & 9") (Bankr. Dkt. 163) filed by CHFS

Edwards Family Partnership, LP's Responses to Objection to Proof of Claim of Edwards Family Partnership, LP No. 6 and to Proof of Claim of Edwards Family Partnership, LP No. 9 (DK #163) (the "Responses to Objection to POC 6 & 9") (Bankr. Dkt. 209) filed by EFP

Proofs of Claim 7-1 & 8-1

Objection to Claims of Beher Holdings Trust (Claim No. 7 and Claim No. 8) (the "Objection to POC 7 & 8") (Bankr. Dkt. 164) filed by CHFS

Beher Holding Trust's Response to Objection to Proof of Claim of Beher Holdings Trust No. 7 and to Proof of Claim of Beher Holdings Trust No. 8 (Dkt #164) (the "Response to Objection to POC 7 & 8") (Bankr. Dkt. 210) filed by BHT

Cash Collateral

Edwards Family Partnership, LP and Beher Holdings Trust's Third Motion to Prohibit Use of Cash Collateral Until the Court Rules in Adversary Proceeding 12-00091 (the "Cash Collateral Objection") (Bankr. Dkt. 901) filed by EFP/BHT

Trustee's Objection to Edwards Family Partnership, LP and Beher Holdings Trust's Third Motion to Prohibit Use of Cash Collateral Until the Court Rules in Adversary Proceeding 12-00091 (Dkt. No. 901) (the "Response to Cash Collateral Objection") (Bankr. Dkt. 927) filed by the Trustee

Trustee's Supplemental Objection to Edwards Family Partnership, LP and Beher Holdings Trust's Third Motion to Prohibit Use of Cash Collateral Until the Court Rules in Adversary Proceeding 12-00091 (Dkt. No. 901) (the "Supplemental Response to Cash Collateral Objection") (Bankr. Dkt. 1024) filed by the Trustee

Trustee's Motion for Use of Cash (to Extent Required) *Nunc Pro Tunc* (the "Trustee's Cash Motion") (Bankr. Dkt. 906) filed by the Trustee

Edwards Family Partnership, LP and Beher Holdings Trust's Response to Trustee's Motion for Use of Cash Collateral (to the Extent Required) *Nunc Pro Tunc* (DOC. No. 906) (the "Response to Trustee's Cash Motion") (Bankr. Dkt. 919) filed by EFP/BHT

Trustee's Reply to Edwards Family Partnership, LP and Beher Holdings Trust's Response to Trustee's Motion for Use of Cash Collateral (to the Extent Required) *Nunc Pro Tunc* (the "Reply to Response to Trustee's Cash Motion") (Bankr. Dkt. 926) filed by the Trustee

Trustee's Supplemental Reply to Edwards Family Partnership, LP and Beher Holdings Trust's Response to Trustee's Motion for Use of Cash Collateral (to the Extent Required) *Nunc Pro Tunc* (the "Supplemental Reply to Response to Trustee's Cash Motion") (Bankr. Dkt. 1023) filed by the Trustee

C. Pretrial Orders & Trial

The Court consolidated the Contested Matters in the Bankruptcy Case, the Home Improvement Loans Adversary, the Mortgage Portfolios Adversary, and the Post-Petition Conduct Adversary for purposes of the Trial, due to common questions of fact, law, witnesses, and exhibits. (HIL Adv. Dkt. 285; MPF Adv. Dkt. 57). On September 5, 2017, the Joint Pretrial Order was entered in the Home Improvement Loans Adversary (HIL Adv. Dkt. 322) and in the Mortgage Portfolios Adversary (MPF Adv. Dkt. 118). As agreed upon by the parties, the Addendum to Joint Pretrial Order was entered in the Home Improvement Loans Adversary (HIL Adv. Dkt. 324) and in the Mortgage Portfolios Adversary (MPF Adv. Dkt. 120) on September 18, 2017. On October 17, 2017, the Joint Pretrial Order (PPC Adv. Dkt. 108) was entered in the Post-Petition Conduct Adversary.

On October 24, 2017, the Court entered an order granting the parties permission to correct certain errors that appeared in the document lists and to incorporate the Addendum to Joint Pretrial Order into a single amended joint pretrial order in the Home Improvement Loans Adversary and the Mortgage Portfolios Adversary. (HIL Adv. Dkt. 330; MPF Adv. Dkt. 125). That same day, the Amended Joint Pretrial Order was entered in the Home Improvement Loans Adversary (the "HIL Amended Pretrial Order") (HIL Adv. Dkt. 331) and in the Mortgage Portfolios Adversary (the "MPF Amended Pretrial Order") (MPF Adv. Dkt. 126). On October 30, 2017, the Court entered an order in the Post-Petition Conduct Adversary likewise granting the parties permission to correct certain errors that appeared in the documents lists into a single amended joint pretrial order in the Post-Petition Conduct Adversary (PPC Adv. Dkt. 114), and on that say day, the Amended Joint Pretrial Order

was entered in the Post-Petition Conduct Adversary (the "PPC Amended Pretrial Order") (PPC Adv. Dkt. 118).

At Trial,[3] Jeffrey R. Barber ("Barber"), Kristina M. Johnson, Mark A. Mintz, and Stephanie B. McLarty represented the Trustee, and Jim R. Spencer, Jr. and Stephanie M. Rippee represented EFP/BHT and Dr. Edwards. During the Trial, the following witnesses testified on behalf of the Trustee: Jeffrey N. Aucoin, the Trustee, Alan Sercy, Jeffrey Albert Kirk, and Harold B. McCarley, Jr. The following witnesses testified on behalf of EFP/BHT and Dr. Edwards: Dr. Edwards, William Richard Hare, and Martha Edwards Borg.

At the beginning of Trial, the Court took judicial notice of the pleadings filed in the following cases before the U.S. District Court for the Southern District of Mississippi: *United States v. Dickson*, Case No. 3:14-cr-00078-TSL-FKB; *Edwards Family Partnership, LP v. William D. Dickson Enterprises, Inc.*, Case No. 3:14-cv-00436-CWR-LRA; *Edwards Family Partnership, LP v. Dickson*, Case No. 3:13-cv-00587-CWR-LRA; and *Johnson v. Edwards Family Partnership, LP*, Case No. 3:15-cv-00260-CWR-LRA. At Trial, the parties stipulated to the admissibility of 114 exhibits. The Trustee introduced into evidence seven (7) additional exhibits; Dr. Edwards and EFP/BHT introduced into evidence thirteen (13) additional exhibits. Sixteen (16) exhibits were admitted only for

[3] A transcript of each day of the Trial is docketed in the Home Improvement Loans Adversary at the following docket numbers: #340 (October 30, 2017); #341 (October 31, 2017); #342 (November 1, 2017); #343 (November 2, 2017); and #352 (November 27, 2017).

demonstrative or identification purposes.[4] Having considered the pleadings as well as the testimony, exhibits, and the arguments of counsel, the Court makes the following findings of fact and conclusions of law.[5]

TABLE OF CONTENTS

JURISDICTION 15

INTRODUCTION.....15

FACTS 20

A. CHFS.....20

B. Credit Facility—Home Improvement Loans 21

1. Rainbow Loan Term Sheet—Initial $10 Million Loan.....22

2. Execution of Rainbow Loan Agreement.....23

3. Rainbow Group. 24

4. Terms & Conditions of the Rainbow Loan Agreement 24

5. 2006 Note.....26

6. Custodial Agreement 27

7. 2007 Assignment 29

---

[4] The exhibits introduced into evidence at Trial in the Home Improvement Loans Adversary by the Trustee are cited as "(HIL Ex. P-#)" and by EFP/BHT are cited as "(HIL Ex. D-#)". The exhibits introduced into evidence at Trial in the Mortgage Portfolios Adversary by the Trustee are cited as "(MPF Ex. P-#)" and by Dr. Edwards and EFP/BHT are cited as "(MPF Ex. D-#)". The exhibits introduced into evidence at Trial in the Post-Petition Conduct Adversary by the Trustee are cited as "(PPC Ex. P-#)" and by Dr. Edwards and EFP/BHT are cited as "(PPC Ex. D-#)". For each exhibit, the page number or the Bates stamp is provided when available.

[5] These findings of fact and conclusions of law are made pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure. To the extent that any finding of fact is construed as a conclusion of law, it is adopted as such. Moreover, to the extent any conclusion of law is construed as a finding of fact, it is adopted as such.

8. 2007 Note 29

9. BVI Company Register 30

10. 2010 Assignment 31

11. Amended Loan Agreements 32

12. BHT Note & EFP Note 34

13. Guaranties 34

C. Mortgage Portfolios 35

1. Portfolio #1 38

2. Portfolio #2 40

3. Portfolio #3 41

4. Portfolio #4 42

5. Portfolio #5 42

6. Portfolio #6 42

7. Portfolio #7 43

D. Original State Lawsuit & Receivership Action 45

E. Pre-petition Transfers 46

F. Bankruptcy Case 47

1. Proofs of Claim Filed by EFP/BHT 48

2. Proof of Claim Filed by Dickson 52

3. Claims Register 52

4. Cash Collateral Orders 52

G. Initiation of Home Improvement Loans Adversary 54

H. Initiation of Adversary Proceeding 12-00109-NPO 55

I. Dickson Guaranty Suit 55

J. Initiation of Mortgage Portfolios Adversary 56

K. Post-petition Transfers & Rogue Operation 57

L. Appointment of Trustee 59

M. Trustee's Investigation of Funds Stolen & Diverted 61

N. Stay of Adversary Proceedings 63

O. Criminal Proceedings Against Dickson 63

P. Trustee's Efforts to Locate Loan Documents 64

Q. ClearSpring 65

R. Turnover Order 66

S. Edwards TRO Case 67

T. Dickson Adversary Proceeding 68

U. Recovery of Funds 68

V. Partial Summary Judgment in Dickson Guaranty Suit 69

W. Rejection of Servicing Contract 71

X. Dr. Edwards & Meehan 71

Y. Extension of 11 U.S.C. § 546 Deadline 73

Z. Dr. Edwards' Plans to Travel to Costa Rica 73

AA. Cash Collateral Objection & Trustee's Cash Motion 74

BB. Dr. Edwards' Trip to Costa Rica 76

CC. Trustee & Meehan 78

DD. Trustee's Initiation of RICO Case 79

EE. Trustee's Withdrawal Motions 80

FF. RICO Case 81

GG. Terminating the Stays 82

HH. Restitution Order 83

II. HIL Third Amended Complaint 85

JJ. Post-Petition Conduct Adversary 87

KK. Bankruptcy Court's Consolidation Orders 88

LL. MPF Complaint 89

MM. HIL Answer & Counterclaim 91

NN. Panamanian Counsel 92

OO. Adversary Proceeding 12-00109-NPO 92

PP. Settlement & Dismissals in Mortgage Portfolios Adversary 93

QQ. Restoration Order 93

RR. Motion to Continue 94

SS. Motion to Prohibit Amendment 95

TT. Trial 96

DISCUSSION 97

A. Home Improvement Loans Adversary 97

1. Choice of Law—Generally 98

2. Doctrines of Waiver and/or Estoppel 101

3. Statute of Limitations 103

4. Count I (Legal Capacity of the Rainbow Group) 108

a. Choice of Law 108

b. Are the Rainbow Loan Agreement, the 2006 Note, and the Custodial Agreement void *ab initio*? 109

(1.) British Virgin Islands Law 111

(2.) BCA 111

(3.) Kirk 112

(4.) Hare 113

c. Analysis 115

5. Count II (Legal Capacity of Beher Limited) 119

a. Choice of Law 119

b. Does the Trustee have standing to complain about the legal authority of Beher Limited to execute the 2010 Assignment or to object to the validity of the 2010 Assignment? 120

c. Under British Virgin Islands law, does the striking of Beher Limited from the BVI Company Register in 2008 void the 2010 Assignment (of the 2006 Note to BHT?) 122

(1.) Kirk 124

(2.) Hare 125

d. Analysis 127

6. Count IV (Perfection of Security Interest) 130

a. Choice of Law 130

b. Do EFP/BHT have a perfected security interest in the Home Improvement Loans? 132

(1.) Are EFP/BHT assignees of the Custodial Agreement? ... 135

(2.) Are EFP/BHT required by the UCC to "re-perfect" their security interest? 138

c. Analysis 140

7. Count V (Tracing of Funds) 140

8. Count VI (POC 4-1 & POC 5-1) 141

a. Calculation of Claims 141

b. Analysis.....146

B. Mortgage Portfolios Adversary.....147

1. MPF Complaint.....147

2. MPF Counterclaim Counts 148

3. Misjoinder of Parties.....148

4. Choice of Law.....150

5. Counts I & IV/MPF Counterclaim Counts I-III (Mortgage Portfolios)...150

a. Are Portfolios #1-#7 assets of true joint ventures, collateral for loans, or the subject of servicing contracts 152

(1.) Portfolios #1 & #2 (EFP & CHFS).....154

(a.) Intent 157

(b.) Control 159

(c.) Profit Sharing.....159

(d.) Who owns Portfolios #1 & #2 161

(e.) Does EFP have a perfected a perfected security interest? 161

(2.) Portfolios #3-#6 (EFP & CHFS).....162

(a.) Who owns Portfolios #3-#6? 163

(b.) Are the loans enforceable?.....163

(3.) Portfolio #7 (BHT & CHFS) 164

6. Counts II & III/MPF Counterclaim Count VIII (POC 6-1 to POC 9-1)..166

a. Calculation of Claims 166

b. Analysis.....170

7. MPF Counterclaim Count IV (Breach of MPF Agreements) 171

8. MPF Counterclaim Count V (Breach of Fiduciary Duty) 172

9. MPF Counterclaim Count VI (Servicing Fees) 173

10. MPF Counterclaim Count VII (Tracing of Funds) 175

C. Tracing of Funds 175

1. Choice of Law 176

2. Does EFP have a security interest in the $5,490,132.19 wired to the Trustee from accounts at Banco Panameño or the $540,000 in loan payments intercepted by the Trustee? 176

a. Tracing of Funds-General 177

b. Tracing of Pre-petition Funds 178

c. Tracing of Post-petition Funds.....179

d. Tracing of Funds Recovered or Intercepted.....181

3. Analysis.....183

D. Cash Collateral Contested Matters.....184

E. Post-Petition Conduct Adversary.....187

1. Count I (Violation of Automatic Stay) 187

a. Did Dr. Edwards know about the existence of the automatic stay? 189

b. Did Dr. Edwards intend his actions?.....190

c. Did Dr. Edwards violate the automatic stay?.....190

d. May the Trustee recover damages under 11 U.S.C. § 362(k)? 194

2. Count II (Turnover of Property) 196

3. Count III (Post-petition Transfer) 197

4. Count IV (Civil Conspiracy).....198

a. Choice of Law 198

b. Did EFP/BHT and Dr. Edwards act in concert to hinder, delay, and otherwise defraud the estate and its creditors by withholding information pertinent to the operation of its ongoing business and assets stolen from the estate? 199

5. Count V (Conversion) 203

a. Choice of Law 203

b. Did EFP/BHT and Dr. Edwards convert estate property for their own use without permission or lawful justification and willfully interfere with the Trustee's duty to protect and acquire the estate's property thereby depriving the Trustee of rightful possession of that property? 203

6. Count VI (Equitable Subordination) 204

F. Plan Confirmation Proceedings in the Bankruptcy Case 208

CONCLUSION 209

JURISDICTION

This Court has jurisdiction over the subject matter of and the parties to these adversary proceedings and contested matters pursuant to 28 U.S.C. § 1334. This matter is a core proceeding as defined in 28 U.S.C. § 157(b)(2)(A), (B), (E), (K), (M), and (O). Notice of the Trial was proper under the circumstances.

INTRODUCTION

By way of explanation and apology for the considerable length of this Opinion, this effort resolves three (3) adversary proceedings and five (5) Contested Matters. The consolidation of these proceedings and matters into a single Opinion was deemed by the Court to be the most efficient means of resolving years of disputes previously unresolved in state court, federal district court, and numerous mediations. The objective of the Court is to create a clear path for an exit strategy in the Bankruptcy Case. The journey began on

February 15, 2012, with litigation filed in state court that was removed to federal district court and then stayed by CHFS's chapter 11 bankruptcy filing on May 23, 2012.[6] During the two (2) years it operated as a debtor-in-possession, CHFS initiated two of the three adversary proceedings addressed in this Opinion. All of these matters were derailed by the criminal conduct of CHFS's president, resulting in the appointment of the Trustee in 2014. During several failed attempts at mediation, litigation stalled. Because of the length of this Opinion, the Court provides a short summary of the facts to assist the reader in understanding the myriad of legal issues raised by the parties.

This Opinion describes only a portion of the long, tedious relationship between Dr. Edwards, an orthopedic surgeon from Baltimore, Maryland, and William D. "Butch" Dickson ("Dickson"), a business owner from Jackson, Mississippi. Both Dr. Edwards and Dickson owned and operated multiple family businesses. This unlikely pair were introduced by a broker from New York hired by Dickson to locate a lender to replace the current lender for CHFS, a mortgage servicing company managed by Dickson. Edwards and Dickson entered into their first business deal, a credit facility of $10 million to fund the purchase of home improvement loans. To save time and money, John Allen ("Allen"), a disbarred attorney and employee of CHFS, drafted the loan documents using as forms the documents prepared by CHFS's prior lender, cutting and pasting different names and addresses where appropriate. In this early transaction and in all subsequent transactions regarding the home improvement loans, Dr. Edwards, entities owned by Dr. Edwards, or an offshore trust funded the loans. Dr. Edwards relied on his daughter, Martha Edwards

[6] On May 23, 2012, the Bankruptcy Case was assigned originally to Bankruptcy Judge Edward Ellington. On February 1, 2017, the Bankruptcy Case and all related adversary proceedings were transferred to the above-signed Bankruptcy Judge. (Bankr. Dkt. 1609).

Borg, who is not a certified public accountant and does not hold a degree in accounting, to review CHFS's financial reports, calculate the principal balance and interest due on the promissory notes each month, and determine "eligible receivables" based on a "Borrowing Base Certificate." To provide some understanding as to the magnitude of their initial business deal, the flow of funds from CHFS to entities of Dr. Edwards averaged between $600,000 and $700,000 per month.

During their business relationship, Dr. Edwards and Dickson ignored or changed the terms of their agreement. For example, they increased the line of credit from $10 million to $16 million, assigned promissory notes to different entities owned or advised by Dr. Edwards, and changed the number and frequency of wire transfers. These changes were not always documented in writing; some of the written changes were implemented solely as the result of an exchange of emails. When changes were formally documented, mistakes were made. Dr. Edwards, who is not an attorney, prepared and drafted many of these documents himself. He did not always use the correct name of the alleged lender.

In 2008, Dr. Edwards and Dickson entered into an entirely new business relationship, a series of seven (7) so-called "joint ventures," in which Dr. Edwards, through entities he controlled or advised, including an offshore trust, expended approximately $20 million either as investments, loans, or purchases of portfolios of mortgages. Dr. Edwards drafted three of the purported "joint venture" agreements himself; he did not bother to memorialize in writing the remaining purported "joint venture" agreements.[7]

In the beginning, Dr. Edwards and Dickson were content with their informal business relationship. Then, in 2010, Dr. Edwards became suspicious that CHFS had

[7] The Court finds none of these business relationships was a "joint venture." *See infra* at 165.

exceeded the limit of the credit facility regarding the home improvement loans, and Dickson believed that Dr. Edwards was overcharging CHFS by, for example, posting payments late. Dickson also believed that Dr. Edwards was not remitting CHFS's share of the net profits from the purported joint ventures. Litigation ensued. In 2012, Dickson diverted or transferred approximately $3.7 million from CHFS's operating accounts to an account in a Panamanian bank. He then commenced the Bankruptcy Case on behalf of CHFS.

In the Bankruptcy Case, Dr. Edwards filed proofs of claim on behalf of EFP/BHT totaling approximately $30 million. As the largest creditor of CHFS, EFP/BHT challenged almost every action taken by CHFS in the Bankruptcy Case. In the fall of 2013, Dickson surreptitiously began moving CHFS's business operations to Costa Rica. Then, in early 2014, Dickson fled to Costa Rica but not before withdrawing over $9 million from CHFS's operating and escrow accounts. For his bankruptcy crimes, Dickson was sentenced to fifty-seven (57) months in a federal correctional facility.

The discovery of the unauthorized transfers led to the swift appointment of the Trustee. With limited cooperation from Dickson, the Trustee eventually recovered and/or intercepted some of the stolen funds. Needless to say, her efforts to administer the bankruptcy estate were hampered by the lack of bank records.

Without informing the Trustee, Dr. Edwards paid Dickson's business associate in Costa Rica, Mike James Meehan ("Meehan"), for information about CHFS's rogue operation and, in December of 2014, met with him in Costa Rica. Dr. Edwards and Meehan corresponded for five (5) months, and during that time, Dr. Edwards did not inform the Trustee. When Meehan himself later contacted the Trustee, she learned for the first time

that Meehan had sent Dr. Edwards two (2) compact discs ("CDs") and a dropbox.[8] The Trustee sued Dr. Edwards and two offshore lenders.

In these consolidated Adversary Proceedings, the Trustee asks the Court to determine the respective rights and obligations of CHFS, EFP, Edwards Family Partnership, LLP ("EFP LLP"), [9] and BHT based, among other testimony and evidence, on: (1) documents prepared in haste using documents from another transaction as forms or documents drafted by Dr. Edwards (regardless of which the parties acted inconsistently with respect to their alleged contractual rights); (2) an interpretation and application of the law of the British Virgin Islands as explained by lawyers practicing in that jurisdiction; (3) the testimony of Dr. Edwards who admits he did not pay much attention to Dickson and CHFS until the monthly payments stopped; (4) the testimony of Borg, who held the title of bookkeeper but who had limited knowledge of general accounting principles; and (5) the testimony of an accountant, Aucoin, whose analysis was limited because of the unavailability of bank records from Panama and Costa Rica. The Trustee also asks the Court to determine the source of the funds returned to her after Dickson's arrest as well as

---

[8] Dropbox "is a cloud storage product that allows a user to create an account to save and store digital content, including images and videos, in folders, and to share that content by providing others with the email address and password used to log in to the account." *United States v. Wilson*, 217 F. Supp. 3d 165, 169 (D.D.C. 2016).

[9] Dr. Edwards claims that no entity by the name of "Edwards Family Partnership, LLP" or "EFP LLP" entered into any business relationship with CHFS and that "Edwards Family Partnership LP" or "EFP" is the properly named entity for all of these transactions. (HIL Adv. Dkt. 341 at 129). Because the Trustee alleges that EFP LLP has filed pleadings in this Court and in other federal courts and has had checks printed, the Court distinguishes between EFP and EFP LLP in this Opinion. (HIL Adv. Dkt. 341 at 173).

the funds she intercepted. Finally, the Trustee challenges Dr. Edwards' post-petition conduct as a stay violation and conversion.[10]

EFP/BHT assert counterclaims in these adversary proceedings, in which they ask the Court to declare, *inter alia*, that they have a secured interest in the home improvement loans, they own the notes underlying other mortgage portfolios, and they are entitled to the money recovered by the Trustee. They also seek damages against the estate for losses they incurred as a result of Dickson's criminal conduct.

FACTS

The majority of facts elicited at Trial are undisputed. Indeed, the parties stipulated to the admissibility of 114 documents at Trial. The parties' primary disputes rest on an application of law to the facts.

A. CHFS

CHFS, a Delaware company, is a mortgage servicing entity that for the most part purchased mortgage loan portfolios at a discount from various third parties and serviced those loans, as well as loans owned by two (2) affiliated companies, Discount Home Mortgage, Inc. and Discount Mortgage, Inc. (Bankr. Dkt. 167; HIL Adv. Dkt. 341 at 10-11). Additionally, CHFS serviced consumer loans owned by SNGC, LLC, not involved in this litigation. (HIL Adv. Dkt. 341 at 11; MPF Ex. P-15).

The majority of CHFS's shares of stock are owned by Victory Consulting Group, Inc. ("Victory Consulting") (HIL Adv. Dkt. 340 at 86). Until early 2014, Dickson was CHFS's chief executive officer and its owner through his ownership of Victory Consulting.

[10] The Trustee's claims against Dickson, his affiliated companies, and a former employee of CHFS are the subject of the Dickson Adversary Proceeding and are not addressed in this Opinion.

Before the fall of 2013, CHFS's principal place of business was located at 234 East Capitol Street, in Jackson, Mississippi, where employees, including Dickson's family members, serviced mortgage loan portfolios, each one consisting of hundreds of individual notes secured by mostly subordinate residential mortgages on property located in over thirty (30) states in the United States. (HIL Adv. Dkt. 341 at 11). For each mortgage loan there was an underlying retail installment contract signed by the consumer. All of the loans were for a period longer than five (5) years. (HIL Adv. Dkt. 341 at 11).

B. Credit Facility—Home Improvement Loans

In 2006, near the end of CHFS's relationship with its current lender, Roy Al Finance and Loan Company, Dickson began searching for replacement financing. (HIL Adv. Dkt. 341 at 113-14). That same year, Joe Logan ("Logan"), a business broker hired by CHFS, brought a loan proposal to Dr. Edwards, whom Logan knew from previous business deals, whereby Dr. Edwards would replace Roy Al Finance and Loan Company.[11] (HIL Adv. Dkt. 341 at 112-14). In July of 2006, Dr. Edwards met with Dickson in his home in Baltimore. (HIL Adv. Dkt. 341 at 114). At Dr. Edwards' request, his daughter Borg traveled to Jackson, Mississippi, to meet with Dickson and CHFS employees for the purpose of learning CHFS's business operations. (HIL Adv. Dkt. 342 at 117-18). Borg was unfamiliar with second mortgages but apparently her report to her father about CHFS was favorable. (HIL Adv. Dkt. 342 at 182).

---

[11] In 2007, CHFS sued Logan and J.A.S. Commercial Corp. ("J.A.S.") for breach of contract in state court, and Logan and J.A.S. removed the suit to the U.S. District Court for the Southern District of Mississippi. *See Cmty. Home Fin. Servs., Inc. v. J.A.S. Commercial Corp*, Case No. 3:07-cv-00619-HTW-LRA. CHFS voluntarily dismissed J.A.S. as a defendant. (*Id.* Dkt. 16). After her appointment, the Trustee successfully moved the District Court to refer the action to this Court (*Id.* Dkt. 22), where it became adversary proceeding 14-00029-NPO. On February 22, 2017, the Trustee voluntarily dismissed Logan. *See* Adv. Proc. 14-00029-NPO, Dkt. 23.

From September 25, 2006, to August 10, 2010, Dr. Edwards, acting through four (4) entities owned and/or purportedly controlled by him—The Rainbow Group, Ltd., a British Virgin Islands company; Beher Holdings, Ltd. ("Beher Limited"), a British Virgin Islands company; EFP, a Delaware limited partnership; and BHT, a trust organized under the laws of Bermuda—loaned approximately $16 million to CHFS. (Bankr. Dkt. 167 at 9). Borg, who has a bachelor's degree in political science but does not hold a degree in accounting and is not a certified public accountant, acted as the bookkeeper for The Rainbow Group, Ltd., Beher Limited, and EFP/BHT in all of these transactions. (HIL Adv. Dkt. 342 at 115-18, 121-22).

The parties have stipulated that the consumer mortgage loans that are at issue in the Home Improvement Loans Adversary, which CHFS purchased from various unrelated entities, are the 1,809 loans listed in schedules 2 and 3 attached to the expert report of Jeffrey N. Aucoin ("Aucoin"). (HIL Ex. P-7, Schedules 2 & 3; HIL Adv. Dkt. 331 at 40). These loans are referred to as the "Home Improvement Loans" because the consumers obtained the loans to replace windows, coat basements, and the like. (HIL Adv. Dkt. 341 at 11). As to these transactions, it is undisputed that the relationship between CHFS and EFP/BHT can be characterized as borrower-lender.

1. Rainbow Loan Term Sheet—Initial $10 Million Loan

On July 17, 2006, Dr. Edwards sent a letter (the "Rainbow Loan Term Sheet") (HIL Ex. P-3) to Dickson outlining the terms and conditions under which The Rainbow Group, Ltd. would offer CHFS a revolving line of credit up to $10 million to replace CHFS's existing credit facility and provide capital for the purchase of additional Home

Improvement Loans. (HIL Adv. Dkt. 331 at 40). The Rainbow Loan Term Sheet appears on the letterhead of:

The Rainbow Group, Ltd.
Intercontinental Investment
P.O. Box 627, Zone 1
Panama, Republic of Panama

(HIL Ex. P-3). The letterhead identifies Patsy Cambra de Brackett as "President" of "The Rainbow Group, Ltd." and Dr. Edwards as "U.S. Investment Advisor." Pursuant to the Rainbow Loan Term Sheet, Dr. Edwards proposed that the form of the loan documents follow those already in existence between CHFS and its then lender, Roy Al Finance and Loan Company.

2. Execution of Rainbow Loan Agreement

Allen prepared the Loan and Security Agreement (the "Rainbow Loan Agreement") (HIL Exs. P-1, P-2, D-17 & D-18), using as forms the documents in place between CHFS and Roy Al Finance and Loan Company and conforming the terms to the Rainbow Loan Term Sheet. (HIL Adv. Dkt. 341 at 115). On September 25, 2006, CHFS and "The Rainbow Group, Ltd." signed the Rainbow Loan Agreement, in which "The Rainbow Group, Ltd., a British Virgin Island [*sic*] corporation . . . or assigns" agreed to advance to CHFS a line of credit up to $10 million to pay-off in full Roy Al Finance and Loan Company and to acquire new consumer mortgage loans. (HIL Adv. Dkt. 331 at 41). Patsy Cambra de Brackett[12] purportedly signed the Rainbow Loan Agreement on behalf of "The Rainbow Group, Ltd." as "President," and Dr. Edwards signed the Rainbow Loan

[12] Patsy Cambra de Brackett, a Florida resident, did not testify at Trial. (HIL Adv. Dkt. 341 at 13-14). The Trustee did not produce any evidence indicating that Patsy Cambra de Brackett did not sign the Rainbow Loan Agreement, as alleged in the HIL Third Amended Complaint. (HIL Adv. Dkt. 237 at 24-28).

Agreement on behalf of "The Rainbow Group, Ltd." as "U.S. Investment Manager." Dickson signed the Rainbow Loan Agreement on behalf of CHFS and as a personal guarantor.

3. Rainbow Group

The Rainbow Loan Agreement identifies "The Rainbow Group, Ltd." as a British Virgin Islands corporation. The British Virgin Islands is a British overseas territory located in the northeastern Caribbean. (HIL Adv. Dkt. 342 at 12-13). There is no entry in the British Virgin Island Register of Companies (the "BVI Company Register") for an entity named "The Rainbow Group, Ltd." (HIL Adv. Dkt. 342 at 15). According to Dr. Edwards, the use of "The" in the name is a drafting error, and there is no entity known as "The Rainbow Group, Ltd." (HIL Adv. Dkt. 341 at 119-20). There is an entry in the BVI Company Register for an entity called "Rainbow Group, Ltd." (HIL Adv. Dkt. 342 at 36). For ease of reference, the Court refers to the Rainbow entity as the "Rainbow Group," without regard to whether its proper name is "The Rainbow Group, Ltd." or "Rainbow Group, Ltd."

4. Terms & Conditions of the Rainbow Loan Agreement

The parties did not always conform their conduct to the terms and conditions of the Rainbow Loan Agreement. *See, e.g.*, (HIL Ex. D-24). The Rainbow Loan Agreement required CHFS to deposit all payments received on the underlying retail installment contracts into a blocked account at BancorpSouth Bank ("BancorpSouth") in Tupelo, Mississippi. CHFS and Rainbow Group would own the blocked account jointly, but only

the Rainbow Group would have the right to withdraw funds from the blocked account.[13] As security, CHFS was required to assign the retail installment contracts to the Rainbow Group.

After the initial disbursement in an amount sufficient to pay off Roy Al Finance and Loan Company and pay all loan fees owed the Rainbow Group, plus an initial advance of $500,000,[14] CHFS could request additional advances up to 80% of "eligible receivables," consisting of the aggregate outstanding principal balance owed to CHFS by consumers, less the balance on any accounts more than sixty-one (61) days delinquent. For that calculation, CHFS was required to send the Rainbow Group a monthly "Borrowing Base Certificate," showing the total principal balance of eligible consumer loans, the current balance for the line of credit (as calculated by Borg), and the remaining availability. (HIL Ex. D-14); *see, e.g.*, (HIL Ex. D-24). As the bookkeeper for the Rainbow Group, Borg was responsible for maintaining a list of the Home Improvement Loans, determining whether new consumer loans met the eligibility requirements, and calculating the balance due for the line of credit. (HIL Adv. Dkt. 342 at 118-19). In that role, she was responsible

---

[13] In 2014, EFP/ BHT sued BancorpSouth in the District Court in Civil Action No. 3:14-cv-0964-DPJ-FKB, alleging that BancorpSouth breached the blocked account agreement by allowing CHFS to transfer approximately $2 million from the blocked account to accounts other than the "concentration account," identified in the Rainbow Loan Agreement as the account owned by the Rainbow Group at First Bank Puerto Rico. On February 21, 2017, the District Court awarded summary judgment to BancorpSouth on the ground that EFP/BHT had abandoned its contractual rights by acquiescing to CHFS's transfers to a number of different bank accounts, including accounts in the name of EFP/BHT. EFP/BHT appealed the summary judgment order on March 15, 2017. (*Id.* Dkt. 116). The Fifth Circuit Court of Appeals affirmed the District Court on October 16, 2017. *Edwards Family P'ship, L.P. v. BancorpSouth Bank*, 699 F. App'x 312 (5th Cir. Oct. 16, 2017).

[14] A review of bank records, however, shows a deposit into CHFS's account of only $300,000. (HIL Ex. P-7 at 7).

for providing CHFS the figures for the current balance due that appeared each month in the Borrowing Base Certificate. According to Dr. Edwards, CHFS routinely requested and received advances under the line of credit up to the maximum availability, as shown in the Borrowing Base Certificate. (HIL Adv. Dkt. 341 at 124). If the Rainbow Group did not have sufficient funds, Dr. Edwards would arrange for payment by a different entity owned or purportedly controlled by him. (HIL Adv. Dkt. 341 at 125).

Paragraph 9.6 of the Rainbow Loan Agreement grants the Rainbow Group the right to divide and reissue the promissory note and to assign its rights, as follows:

> 9.6 ASSIGNMENT BY LENDER. LENDER MAY AT ANY TIME (A) DIVIDE AND REISSUE (WITHOUT SUBSTANTIVE CHANGES OTHER THAN RESULTING FROM SUCH DIVISION) THE NOTE, AND/OR (B) SELL, ASSIGN, GRANT PARTICIPATION IN, DELEGATE OR OTHERWISE TRANSFER TO ANY OTHER PERSON (AN "ASSIGNEE") ALL OR PART OF RIGHTS AND DUTIES OF LENDER UNDER THIS AGREEMENT AND THE OTHER LOAN DOCUMENTS. TO THE EXTENT INDICATED IN ANY DOCUMENT, INSTRUMENT OR AGREEMENT SO SELLING, ASSIGNING, GRANTING PARTICIPATION IN, OR OTHERWISE TRANSFERRING TO AN ASSIGNEE SUCH RIGHTS AND/OR DUTIES, (I) THE ASSIGNEE SHALL ACQUIRE ALL THE LENDER'S RIGHTS UNDER THE AGREEMENT AND THE OTHER LOAN DOCUMENTS AND (II) THE ASSIGNEE SHALL BE DEEMED TO BE THE "LENDER" UNDER THIS AGREEMENT AND THE OTHER LOAN DOCUMENTS WITH THE AUTHORITY TO EXERCISE SUCH RIGHTS IN THE CAPACITY OF LENDER.

(HIL Exs. P-1, P-2, D-17 & D-18). Paragraph 9.19 contains a similar provision. Under ¶ 2.3(iii), the maturity date of the loan was March 7, 2009, but CHFS was granted an additional six (6) months to obtain alternate financing or liquidate the credit line.

5. 2006 Note

Consistent with the Rainbow Loan Agreement, Dickson, as president of CHFS, signed a Note (the "2006 Note") (HIL Exs. P-1, P-2, D-2, D-17 & D-18), dated September

25, 2006, obligating CHFS to pay the Rainbow Group the unpaid balance of all advances made under the $10 million line of credit. (HIL Adv. Dkt. 331 at 41). The maturity date of the 2006 Note was March 25, 2009. The 2006 Note required CHFS to pay interest only, at the initial annual rate of 13% or 5% plus prime rate, whichever is greater, and after one year, at an annual rate of 12%, on the outstanding principal amount advanced to CHFS until February 25, 2009, and, thereafter, CHFS agreed to pay principal and interest until the maturity date of March 25, 2009.

6. Custodial Agreement

CHFS entered into the Custodial Agreement (the "Custodial Agreement") (HIL Ex. D-22) to provide for the custody of the original loan documents and assignments for the benefit of the Rainbow Group. (HIL Adv. Dkt. 331 at 41). The Custodial Agreement designated Harold B. McCarley, Jr. PLLC (the "McCarley Firm"), a law firm located in Ridgeland, Mississippi, as the custodian. (HIL Adv. Dkt. 343 at 10). Dickson, as president of CHFS, and Harold B. McCarley, Jr. ("McCarley"), on behalf of the McCarley Firm, signed the Custodial Agreement. No designated individual for the Rainbow Group signed the Custodial Agreement. In the signature block, there are blanks for the signatures of Patsy Cambra de Brackett, as president of the Rainbow Group, and Dr. Edwards, as its United States investment manager.

Before any newly acquired retail installment contract could become an "eligible receivable" under the Rainbow Loan Agreement, the Custodial Agreement required CHFS to deliver to the McCarley Firm the retail installment contract, the consumer mortgage, and the assignment transferring the mortgage to the Rainbow Group. Pursuant to the Custodial Agreement, the McCarley Firm agreed to certify and confirm each new retail installment

contract and related documents delivered by CHFS, in return for payment of a $20 fee. At Trial, McCarley testified that he currently holds these documents and releases them only when he receives a written request signed by both CHFS and the Rainbow Group or other entity identified by Dr. Edwards. (HIL Adv. Dkt. 343 at 9-10). The release of documents was not uncommon and took place whenever a borrower paid off a mortgage. (HIL Adv. Dkt. 341 at 125). There is no provision in the Custodial Agreement for the McCarley Firm to release the documents to the Rainbow Group or other lender in the event of a default of the Rainbow Loan Agreement by CHFS. Sections 5.1 and 5.7 of the Custodial Agreement prohibited any amendment or assignment without the prior written consent of the McCarley Firm, the Rainbow Group, and CHFS, as follows:

> Section 5.1. Amendment. This Agreement may be amended from time to time by Custodian, Lender and Borrower by written agreement signed by such parties.
>
> Section 5.7 Assignment. No party hereto shall sell, pledge, assign or otherwise transfer this Agreement without the prior written consent of the other parties hereto.

(HIL Ex. D-22).

The advances from the Rainbow Loan Agreement resulted in a flow of money to and from the Rainbow Group. In theory, CHFS profited from this arrangement in two ways, on the spread (the difference between the principal balance of the consumer mortgage loans and the price CHFS paid for them) and on the unearned discount. The Rainbow Group profited from CHFS's payment of interest at annual rates varying from 12.5% to 14%. (HIL Ex. P-7 at 9).

7. 2007 Assignment

At some point, Dr. Edwards transferred the assets of the Rainbow Group to Beher Limited, a British Virgin Islands company that he purchased from a subsidiary of VP Bank (BVI) Limited ("VP Bank") on or about April 25, 2007, for that purpose. (HIL Exs. D-20 & P-26). (HIL Adv. Dkt. 341 at 126-27). On April 28, 2007, Dr. Edwards sent an email to Dickson, informing him that Beher Limited had purchased the "Rainbow Group Loans" and that all future wires from CHFS should be sent to Beher Limited's account at JP Morgan Chase Bank. (HIL Ex. P-20). Shortly thereafter, on May 1, 2007, "The Rainbow Group, Ltd." purportedly assigned the 2006 Note (the "2007 Assignment") (HIL Exs. P-1, P-2, D-2, D-17 & D-18) to Beher Limited. Dr. Edwards' handwritten endorsement appears on the last page of the 2006 Note and provides: "Pay to the Order of: Beher Holdings, Ltd. without recourse" and is signed by Dr. Edwards in his capacity as the investment manager for the Rainbow Group. (HIL Adv. Dkt. 331 at 41). There were no changes or amendments to the Rainbow Loan Agreement or the Custodial Agreement. To be clear, there is no document that amends the Custodial Agreement to change the name of the lender from the Rainbow Group to Beher Limited or that assigns the Custodial Agreement from the Rainbow Group to Beher Limited. (HIL Adv. Dkt. 341 at 14-15).

8. 2007 Note

In an email dated August 6, 2007, Dr. Edwards informed Dickson that his recent request for an advance exceeded the borrowing limit. (HIL Ex. D-21). Thereafter, CHFS executed a $3 million Supplemental Promissory Note and Credit Facility (the "2007 Note") (HIL Ex. D-17) payable to Beher Limited. The 2007 Note purportedly increased the

amount of available credit under the Rainbow Loan Agreement to $12 million.[15] (HIL Adv. Dkt. 331 at 41). The 2007 Note required CHFS to pay interest only, at the annual rate of fourteen percent (14%) on the outstanding principal amount of the credit facility until the maturity date of March 25, 2009.

9. BVI Company Register

On October 31, 2008, the Registrar struck both Beher Limited and "Rainbow Group, Ltd." from the BVI Company Register because of their failure to pay annual registration fees pursuant to the BVI Business Companies Act ("BCA"). (HIL Ex. P-12; HIL Adv. Dkt. 341 at 128). Unlike Beher Limited, it does not appear that Rainbow Group, Ltd. engaged in any business after the strike off.

An email to Dr. Edwards from Robert Hirst ("Hirst"), head of banking at VP Bank, shows that Dr. Edwards was aware by November 2, 2009, that Beher Limited was "not in goodstanding [*sic*] with the companies [*sic*] registry" and, as a result, was legally restricted from executing any transactions until it was returned to good standing. (HIL Ex. P-26; HIL Adv. Dkt. 341 at 221). In an email to Hirst dated November 5, 2009, Dr. Edwards complained that he received "no warning about striking the company." (HIL Ex. P-26). Dr. Edwards then became involved in a dispute with VP Bank and Beher Limited's registered agent, ATU General Trust (BVI) Limited, purportedly a subsidiary of VP Bank, regarding the payment of Beher Limited's registration fees. (HIL Adv. Dkt. 341 at 128). Apparently, they disagreed about whether the price Dr. Edwards paid VP Bank to purchase Beher Limited should have included payment of the initial registration fee. (HIL Adv. Dkt. 341 at 128). It is unknown whether the fee dispute was ever resolved. Regardless, Dr.

[15] The figure of $3 million appears on the top left-hand corner of the 2007 Note, but the body of the 2007 Note indicates a loan of only $2 million. (HIL Ex. D-17).

Edwards did not take any action to restore Beher Limited to the BVI Company Register until July 17, 2017, when he commenced a proceeding in the Eastern Caribbean Supreme Court in the High Court of Justice (Commercial Division) Virgin Islands, to have Beher Limited restored to the BVI Company Register. (HIL Ex. P-27; HIL Adv. Dkt. 341 at 129, 172).

On May 1, 2010, before the restoration of Beher Limited to the BVI Company Register, Dr. Edwards transferred the assets of Beher Limited to BHT, a trust that he created under Bermuda law for the benefit of his children. (HIL Ex. P-26; HIL Adv. Dkt. 341 at 127). The trustee of BHT is Church Bay Trust Co. ("Church Bay Trust"), a licensed Bermuda trust company. No attorney has appeared in these proceedings on behalf of Church Bay Trust. Dr. Edwards testified that he is the "settlor" or "grantor" of BHT as well as its investment advisor and "controls" BHT in the context of this litigation. (HIL Adv. Dkt. 341 at 127, 164 & 172). There is no document indicating that Church Bay Trust delegated to Dr. Edwards its responsibilities for managing BHT's assets. Dr. Edwards testified that he controls BHT.

10. 2010 Assignment

On May 10, 2010, before Beher Limited was restored to the BVI Company Register, Beher Limited assigned the 2006 Note to BHT (the "2010 Assignment") (HIL Adv. Dkt. 237-1 at 39) (HIL Ex. D-2) by Dr. Edwards' handwritten endorsement on the last page of the 2006 Note. (HIL Adv. Dkt. 331 at 41). The endorsement provides: "Pay to the order of Beher Holdings Trust without recourse" and is signed by Dr. Edwards as the "Investment Manager" for Beher Limited. Again, there were no changes or

amendments to the Rainbow Loan Agreement or the Custodial Agreement. Unlike the 2006 Note, the 2007 Note was never assigned to BHT.

11. Amended Loan Agreements

On August 6, 2010, Dr. Edwards sent an email to Dickson, "I just realized the Beher-CHFS loan has matured." (HIL Ex. P-4). Dr. Edwards attached a letter to the email proposing a new loan wherein BHT would renew a portion of the indebtedness owed by CHFS, and EFP would become CHFS's new lender for the remaining portion of the loan. (HIL Exs. P-4 & D-5). EFP was formed by Dr. Edwards as a family limited partnership under Delaware law, and Dr. Edwards is its general partner (HIL Adv. Dkt. 341 at 129) and Borg is a limited partner (HIL Adv. Dkt. 342 at 115). In the same email to Dickson, Dr. Edwards informed him that the renewal "gives us the opportunity to clean up several items." (HIL Ex. P-4 & D-5).

On August 10, 2010, CHFS executed two nearly identical amendments (the "Amended Loan Agreements") (HIL Exs. D-9 & D-10), prepared by Dr. Edwards, which amended the Rainbow Loan Agreement to increase the line of credit from $12 million to $16 million and divide the loan between two lenders, EFP ($4 million) and BHT ($12 million). (HIL Adv. Dkt. 331 at 42). This division represents a 75/25 percentage split of the loan between BHT and EFP, respectively. The Amended Loan Agreements, each consisting of a single page, were signed by Dickson on behalf of CHFS.

Dr. Edwards signed the Amended Loan Agreement on behalf of BHT (the "BHT Amended Loan Agreement") (HIL Ex. D-10) as its "US Investment Manager." Church Bay Trust did not sign the BHT Amended Loan Agreement, and there is no document authorizing Dr. Edwards to sign it on BHT's behalf. The amount of the credit line provided

by BHT is listed inconsistently as "Sixteen [*sic*] Million Dollars ($12,000,000)." The following statement appears at the bottom of the page: "The outstanding principal balance due Lender, subject to alteration upon documentation of any mistake in calculations, was $11,201,233 as of July 31, 2010."

Dr. Edwards signed the Amended Loan Agreement on behalf of EFP (the "EFP Amended Loan Agreement") (HIL Ex. D-9) as its "General Partner." (HIL Adv. Dk. 341 at 129). Notably, the EFP Amended Loan Agreement purportedly amends the Rainbow Loan Agreement although EFP was not a party to, or assignee of, the Rainbow Loan Agreement. The amount of the credit line provided by EFP is listed as "Four Million Dollars ($4,000,000)." A statement similar to the one in the BHT Amended Loan Agreement appears at the bottom of the page of the EFP Amended Loan Agreement: "The outstanding principal balance due Lender, subject to alteration upon documentation of any mistake in calculations, was $3,733,744 as of July 31, 2010."

Many changes were made to the Rainbow Loan Agreement other than the increase in the credit facility and EFP/BHT's replacement of Beher Limited as lenders. Among these changes, payments were no longer required to be made to a blocked account but were required to be wired "to the address provided from time to time in writing." The availability of eligible receivables was increased to 92% of total loans from January 1, 2011, until June 1, 2011, when it was reduced to 90%. Unlike the EFP Amended Loan Agreement, the BHT Amended Loan Agreement increased this percentage to 94% from October 1, 2010, until January 1, 2011. Additionally, the interest rate per annum was set at 12.5% effective August 1, 2010.

12. BHT Note & EFP Note

Pursuant to the Amended Loan Agreements, CHFS executed a $12 million Commercial Loan Note and Line of Credit in favor of BHT (the "BHT Note") (HIL Ex. D-7) and a $4 million Commercial Loan Note and Line of Credit in favor of EFP (the "EFP Note") (HIL Ex. D-6), both of which were drafted by Dr. Edwards (HIL Adv. Dkt. 341 at 184). Of the total amount of the credit facility of $16 million, BHT undertook seventy-five percent (75%) of the obligation, and EFP undertook twenty-five percent (25%) of the obligation. (HIL Adv. Dkt. 342 at 122). The maturity date of the BHT Note and EFP Note was August 1, 2013. (HIL Adv. Dkt. 331 at 42). Both the BHT Note and EFP Note were signed by Dickson on behalf of CHFS and individually as a guarantor.

Both the BHT Note and EFP Note provided for the payment of interest only at 12.5% until maturity. Security for repayment of the loans (as evidenced by the BHT Note and EFP Note) was the assignment of the consumer mortgage loans and Dickson's written guaranties. There is no document that amends the Custodial Agreement to change the name of the lender from the Rainbow Group to EFP/BHT or that assigns the Custodial Agreement to EFP/BHT. After execution of the EFP and the BHT Notes, CHFS made three payments totaling $667,500 from September 1, 2010 to November 30, 2010. (HIL Ex. P-7, Schedule 7; HIL Adv. Dkt. 340 at 123-24; HIL Adv. Dkt. 342 at 124).

13. Guaranties

In addition to signing the EFP Note and BHT Note as a personal guarantor, Dickson signed two nearly identical guaranties in favor of EFP and BHT. (Case No. 3:13-cv-00587-CWR-LRA, Dkt. 14 Exs. H & I). By each guaranty, signed on August 10, 2010, Dickson "unconditionally and absolutely guarantee[d] . . . the due and punctual payment and

performance when due of the principal of the Note and the interest thereon. . . . " He accepted liability that was not conditioned on EFP/BHT first demanding payment from CHFS or pursuing any remedies against their collateral. Moreover, Dickson agreed that his obligation under the guaranty agreements was independent of CHFS's obligation. In addition, Dickson agreed to pay all costs and expenses incurred by EFP/BHT in enforcing the guarantees.

C. Mortgage Portfolios

In 2008, before the parties entered into the Amended Loan Agreements in 2010, Dickson approached Dr. Edwards about expanding the nature and scope of their business relationship to include a series of transactions where entities owned and/or purportedly controlled by Dr. Edwards would provide approximately $9 million for CHFS to purchase seven (7) mortgage portfolios of subprime loans (the "Mortgage Portfolios"). (HIL Adv. Dkt. 341 at 19 & 135). Because of the financial crisis in the mortgage industry at that time, Dickson believed that CHFS could purchase loan portfolios at favorable prices. (HIL Adv. Dkt. 341 at 19 & 135). Dr. Edwards testified that he did not consider these transactions to be loans."[16] (HIL Adv. Dkt. 341 at 137).

For ease of reference, the Mortgage Portfolios are referred to individually as Portfolios one through seven ("Portfolios #1-#7"), in the order in which they were purchased by CHFS.[17] The parties to Portfolios #1-#6 are CHFS and EFP LLP; the parties to Portfolio #7 are CHFS and BHT. Of the seven (7) transactions, only three are

---

[16] Whether the transactions are true joint ventures, loans, or something else is an issue raised in the Mortgage Portfolios Adversary and discussed in this Opinion. (MPF Adv. Dkt. 126).

[17] In some of the exhibits, Portfolio #3 is referred to as the "Mountainview Portfolio." *See, e.g.*, (MPF Ex. D-35; HIL Ex. D-30).

memorialized in writing. Dr. Edwards prepared all three (3) written agreements without the assistance of an attorney and admitted at Trial that they were poorly drafted. (HIL Adv. Dkt. 341 at 187-88). "I should have had attorneys write these. I'm very sorry I didn't." (HIL Adv. Dkt. 341 at 211). Of the three (3) written agreements, EFP LLP (not EFP) is the counterparty to two, and BHT is the counterparty to one. The Portfolios are shown below:

Mortgage Portfolio	Counter-party	Documentation	Portfolio Seller
#1	EFP LLP	Written	DLJ Mortgage Capital, Inc.
#2	EFP LLP	Written	DLJ Mortgage Capital, Inc.
#3	Unknown	Undocumented	DLJ Mortgage Capital, Inc.
#4	Unknown	Undocumented	Promor Investments, LLC
#5	Unknown	Undocumented	Blue World Pools, Inc.
#6	Unknown	Undocumented	Blue World Pools, Inc.
#7	BHT	Written	Blue World Pools, Inc.

(MPF Exs. P-5 to P-14 & D-3 to D-5; MPF Ex. P-2, Schedule 8; PPC Exs. D-22 & D-23). The loans in the Portfolios were serviced by CHFS. The consumer borrower would make payment to CHFS either by check, automatic draft, or money order, and CHFS would remit collections to EFP/BHT, which then would return to CHFS its servicing fees. (HIL Adv. Dkt. 341 at 21). The parties have stipulated that the loans at issue in the Mortgage Portfolios Adversary are the 2,080 loans listed in schedules 2.1 to 2.7 attached to Aucoin's expert report (the "Mortgage Portfolios"). (MPF Adv. Dkt. 126 at 37). As with the Home Improvement Loans, Borg was responsible for reviewing and maintaining the records related to the Mortgage Portfolios as EFP/BHT's bookkeeper. (HIL Adv. Dkt. 342 at 125

& 136). Borg testified that CHFS did not categorize the Mortgage Portfolios by portfolio until 2011 at her request. (HIL Adv. Dkt. 341 at 132-33).

Although the purchases of the seven portfolios was funded directly by entities owned or purportedly controlled by Dr. Edwards (not necessarily EFP/BHT), all of the portfolio purchase agreements were between CHFS and the portfolio seller. (HIL Adv. Dkt. 341 at 16-17, 19; MPF Exs. P-5 to P-14; HIL Adv. Dkt. 342 at 131). Moreover, for Portfolios #1-#6, the portfolio sellers assigned the loans to CHFS. (HIL Adv. Dkt. 341 at 17). The original notes and assignments comprising the consumer loans in Portfolios #1-#6 are currently in EFP's possession as "collateral." (HIL Adv. Dkt. 342 at 198-99).

As to Portfolio #7, the original notes and assignments were supposed to be held by Patrick Frascogna ("Frascogna"), a Mississippi attorney whose law office was in the same building as CHFS. (MPF Ex. P-4 & D-28). Frascogna, however, either released the original loan documents to Dickson at some point or never took possession of them. According to Dickson, the original loan documents are in a warehouse somewhere in Panama, the location of which he has not divulged. (HIL Adv. Dkt. 341 at 6). The original notes and loan documents, however, remain missing.[18] According to the Custodial File Delivery Form MPF Reply to Counterclaim D-28 at 1) signed by Dickson and the Custodial Certifications (MPF Ex. D-28 at 2-5) signed by Frascogna, CHFS assigned the notes that comprise Portfolio #7 to BHT. Each Mortgage Portfolio is discussed separately below.

[18] BHT sued Frascogna for his alleged breach of contract and breach of the fiduciary duty to hold the original notes. *See Beher Holdings Tr. v. Frascogna*, Case No. 3:15-cv-00007-HTW-LRA (S.D. Miss. Jan. 5, 2015). The case was administratively closed on February 15, 2018 (*Id.* Dkt. 42), pending resolution of Frascogna's motion to reopen his bankruptcy case.

1. Portfolio #1

In late 2007, CHFS entered into negotiations with DLJ Mortgage Capital, Inc. ("DLJ") for the purchase of Portfolio #1. (MPF Ex. P-5). Portfolio #1 consists of 225 second mortgages with a collective unpaid principal balance of $9,573,866.86. (MPF Ex. P-7). On January 7, 2008, Dr. Edwards emailed Dickson agreeing to provide CHFS with the funds to purchase Portfolio #1. "If I put up all $ and you manage the portfolio, the upside split will be something like 3:1 after repayment of principal, reimbursement of your costs (based upon CHFS financial statements) and interest on my funds." (MPF Ex. D-1). On January 9, 2008, CHFS executed a letter agreement committing to purchase Portfolio #1 from DLJ (MPF Ex. P-28) for 27% of the aggregate unpaid balance of the loans. CHFS and DLJ then entered into a Mortgage Loan Purchase Agreement (the "DLJ Purchase Agreement") (MPF Ex. P-6). An entity purportedly controlled by Dr. Edwards funded $2,584,944 and $143,608, on January 31, 2008, and February 8, 2008, respectively, to purchase Portfolio #1. (MPF Exs. P-2 at 2 & D-8).[19]

The formal terms of the arrangement between CHFS and EFP regarding the purchase of Portfolio #1 were reduced to writing in the Mortgage Portfolio Joint Venture *Between Edwards Family Partnership & Community Home Financial Services, Inc.* (the "MPF Agreement *I*") (MPF Exs. P-6 & D-20; MPF Adv. Dkt. 126 at 36) dated January 28, 2008, and drafted by Dr. Edwards, which he later admitted in a letter to Dickson had been "poorly written." (HIL Ex. D-30; MPF Ex. D-35). EFP LLP agreed to commit approximately $3 million to purchase Portfolio #1, and "[i]n exchange for its capital

[19] This exhibit (MPF Ex. D-8) and six other similar exhibits (MPF Exs. D-9 to D-14) were prepared by Borg and were admitted into evidence only for the purpose of establishing the amounts funded by EFP/BHT for the purchase of the portfolios. (HIL Adv. Dkt. 342 at 128-31).

investment, EFP [LLP] will receive interest on the outstanding balance to be paid monthly at the rate of 12% and receive 75% of net proceeds from the portfolio. CHFS will receive a servicing fee of $20 per month for each loan payment collected and 25% of net proceeds from the portfolio." Later, on page two, MPF Agreement *I* sets forth in detail these distribution rights:

> Distributions
>
> 1. CHFS will send a monthly statement along with the financial summary. The statement will note the number of collections X $20 each and any out of pocket major collection expenses.
>
> 2. EFP [LLP] will pay the CHFS invoice within 15 days of receipt.
>
> 3. Anytime total loan interest and principal pay-offs exceed cumulative CHFS servicing invoices + interest on the EFP [LLP] investment by $10,000, EFP [LLP] will distribute 25% of the cumulative net proceeds to CHFS and retain 75%.
>
> 4. EFP [LLP] will either provide or confirm a CHFS monthly statement of all income and expenses of joint venture.

(MPF Exs. P-6 & D-20). Accordingly, under MPF Agreement *I*, CHFS was entitled to receive: (1) a $20 fee for each loan payment collected each month; (2) 100% reimbursement for "any out of pocket major collection expenses"; and (3) 25% of the net proceeds "anytime total loan interest and principal pay-offs exceed cumulative CHFS servicing invoices + interest on the EFP investment by $10,000." MPF Agreement *I* further provides, "CHFS will vigorously pursue collections for accounts 3 months or more behind. This may include personal visits to renegotiate loans, court judgments, wage garnishments and/or mortgage foreclosures. CHFS will front collection expenses which will be reimbursed." (MPF Exs. P-6 & D-20).

MPF Agreement *I* did not require CHFS to assign EFP LLP any rights, interests, or claims in the mortgage instruments that CHFS received as the purchaser of Portfolio #1 from DLJ under the DLJ Purchase Agreement. However, MPF Agreement *I* did require EFP LLP to hold title to the individual notes and mortgages as "collateral." Specifically, MPF Agreement *I* provides:

> Security for $3 million investment
>
> 1. EFP [LLP] will hold title to all notes and mortgages as collateral and will be entitled to physically retain the original notes until they are paid.
>
> 2. EFP [LLP] will be able to assign this collateral to a national lending institution.
>
> 3. All portfolio mortgage payments will be made to a lockbox. A bank agreement will provide that funds from the lockbox may be released to only EFP [LLP].
>
> 4. CHFS represents that all statements in this Agreement are correct and that it will perform in accordance with its terms. Misrepresentation or failure to perform in accordance [with] this Agreement shall constitute a default under the Amended Note and Credit Agreement between CHFS and [Beher Limited], an affiliate of EFP [LLP].

(MPF Ex. D-3; PPC Ex. D-22). Dr. Edwards testified that the original notes and mortgages that comprise Portfolio #1 are currently at his home in Baltimore. (HIL Adv. Dkt. 341 at 140).

2. Portfolio #2

On March 25, 2008, CHFS signed a letter committing to purchase Portfolio #2 from DLJ for approximately $1.37 million. (MPF Ex. P-8; MPF Adv. Dkt. 126 at 36). Portfolio #2 consists of 151 first and second mortgages with an original principal balance of $6,880,143.58. (MPF Ex. P-9). The formal terms governing the rights and obligations of

EFP LLP and CHFS concerning Portfolio #2 were reduced to writing on April 20, 2008, in the Mortgage Portfolio Joint Venture II *Between Edwards Family Partnership & Community Home Financial Services, Inc.* ("MPF Agreement *II*") (MPF Ex. D-4; MPF Adv. Dkt. 126 at 36; PPC Ex. D-23). An entity purportedly controlled by Dr. Edwards funded $1,379,557, on April 22, 2008, to purchase Portfolio #2. (MPF Exs. P-2 at 2 & D-9). MPF Agreement *I* and MPF Agreement *II* contain the same or similar provisions concerning the respective ownership rights of CHFS and EFP LLP but differ as to due diligence and the treatment of costs. (MPF Ex. D-6).

Unlike MPF Agreement *I*, MPF Agreement *II* provides that "[t]he cost of loan due diligence will be equally divided between EFP [LLP] and CHFS. CHFS will pay all costs relating to loan servicing and collections prior to engaging outside counsel to collect on defaulted loans. Costs of collection by outside attorneys or other third parties will be paid two thirds by EFP [LLP] and one third by CHFS." (MPF Ex. D-4; PPC Ex. D-23). Thus, under MPF Agreement *II*, CHFS was entitled to receive from EFP LLP: (1) a $20 fee for each loan payment collected each month; (2) 50% reimbursement for all due diligence expenditures incurred by CHFS; (3) 100% reimbursement for out of pocket major collection expenses every month; (4) 67% reimbursement for all costs of collection by outside attorneys or other third parties; and (5) 25% distribution of proceeds "anytime total loan interest and principal pay-offs exceed cumulative CHFS servicing invoices + interest on the EFP [LLP] investment by $10,000" for servicing Portfolio #2.

3. Portfolio #3

On July 14, 2008, CHFS agreed to purchase Portfolio #3 from DLJ for $1,592,285.48. (MPF Ex. P-10). Portfolio #3 consists of 173 mortgages with an original

principal balance of $7,591,887.60. (MPF Ex. P-10). An entity purportedly controlled by Dr. Edwards funded $1,584,008, on July 26, 2008, to purchase Portfolio #3. (MPF Exs. P-2 at 2 & D-10). There is no writing that memorializes the respective distribution rights for Portfolio #3.

4. Portfolio #4

On October 28, 2009, CHFS entered into an agreement with Promor Investments, LLC to purchase Portfolio #4 for approximately $1.05 million. (MPF Ex. P-11). An entity purportedly controlled by Dr. Edwards funded $1,054,550, on October 28, 2009, to purchase Portfolio #4. (MPF Exs. P-2 at 2 & D-11). There is no writing that memorializes the respective distribution rights for Portfolio #4.

5. Portfolio #5

On March 22, 2010, CHFS entered into an agreement with Blue World Pools, Inc. ("BWP") to purchase Portfolio #5 for approximately $4 million. (MPF Ex. P-12; MPF Adv. Dkt. 126 at 36). An entity purportedly controlled by Dr. Edwards funded $4,027,272, on April 22, 2010, to purchase Portfolio #5. (MPF Exs. P-2 at 3 & D-13). BWP is engaged in the business of originating residential swimming pool loans secured by home mortgages. (HIL Adv. Dkt. 342 at 205). There is no writing that memorializes the respective distribution rights for Portfolio #5.

6. Portfolio #6

On November 15, 2010, CHFS entered into an agreement with BWP to purchase Portfolio #6 for $3,397,875.33. (MPF Ex. P-13). Portfolio #6 consists of 431 loans. (MPF Ex. P-13). An entity purportedly controlled by Dr. Edwards funded $3,397,875, on

November 19, 2010, to purchase Portfolio #6. (MPF Exs. P-2 at 3 & D-12). There is no writing that memorializes the respective distribution rights for Portfolio #6.

7. Portfolio #7

On February 16, 2011, CHFS entered into an agreement with BWP to purchase Portfolio #7 for approximately $6.5 million (MPF Ex. P-14; MPF Adv. Dkt. 126 at 36). Portfolio #7 consists of second mortgages with an original principal balance of approximately $10.6 million. (MPF Ex. P-14). Portfolio #7 is the largest mortgage portfolio purchased by CHFS.

On March 1, 2011, CHFS signed the Mortgage Portfolio Joint Venture *Between Beher Holdings Trust & Community Home Financial Services, Inc.* ("MPF Agreement *III*") (MPF Ex. D-5 & PPC Ex. D-20). MPF Agreement *III* was signed on behalf of BHT by Church Bay Trust. MPF Agreement *III* contains terms that are materially different from those in MPF Agreement *I* and MPF Agreement *II*. For example, MPF Agreement *III* provides that "[t]he benefits and obligations of the Purchase Agreement have been assigned from CHFS to [BHT]. [BHT] will be the beneficial owner of the loans, subject to the terms of this Joint Venture." (MPF Exs. D-5 & D-26; PPC Exs. D-20 & D-21). Moreover, MPF Agreement *III* provides that "[t]he custodian selected by [BHT] will hold the original Notes and Assignments to [BHT] for all loans in the portfolio and will be entitled to physically retain the original notes until they are paid." (MPF Ex. D-5; PPC Ex. D-20). The parties agreed that the original notes and assignments in Portfolio #7 would not be held by BHT, Dr. Edwards, or CHFS but by a third-party custodian. BHT selected Frascogna as the custodian. The custodial certifications signed by Frascogna indicate that he received corporate assignments of the original notes and mortgages from CHFS to BHT. (MPF Ex.

D-28). As noted previously, Frascogna either allowed Dickson to take possession of the original loan documents or later released them to Dickson. Either way, the documents remain missing.

MPF Agreement *III* contains materially different distribution terms. "CHFS will pay all costs of loan due diligence, loan servicing and collections prior to engaging outside counsel to collect on defaulted loans. Costs of collection by outside attorneys or other third parties will be paid two thirds by [BHT] and one third by [CHFS]." (MPF Ex. D-5; PPC Ex. D-20). With respect to payment, "CHFS will receive a servicing fee of $15 per month for each loan payment collected and 25% of net proceeds from the portfolio after repayment of [BHT]." MPF Agreement *III* also includes the following provision: "[W]hen [BHT] principal, interest and CHFS servicing fees are paid, [BHT] will distribute 25% of additional proceeds to CHFS and retain 75%." Thus, unlike MPF Agreement *I* and MPF Agreement *II*, CHFS was required to pay all of its due diligence expenses, CHFS received a reduced monthly servicing fee of only $15 per month, and CHFS was not entitled to receive any distribution of its 25% share of the net proceeds until BHT recovered its entire cash contribution. Moreover, a purported default under MPF Agreement *III* would also be considered a default under the Home Improvement Loans: "CHFS represents that all statements in this Agreement are correct and that it will perform in accordance with its terms. Misrepresentation or failure to perform in accordance [with] this Agreement shall constitute a default under the Commercial Loan Note and Line of Credit dated August 10, 2010." On March 6, 2011, CHFS assigned the purchase agreement with BWP to Church Bay Trust. (PPC Ex. D-21). Between March of 2011 and June of 2011, an entity

purportedly controlled by Dr. Edwards funded $5,777,754 to purchase Portfolio #7. (MPF Exs. P-2 at 3 & D-14).

D. Original State Lawsuit & Receivership Action

In 2010, the business relationship between Dickson and Dr. Edwards soured. CHFS made payments under the terms of the Amended Loan Agreements, the BHT Note, and the EFP Note until December of 2010, when he became convinced that Dr. Edwards was overcharging the credit line by charging interest before draws occurred. (HIL Adv. Dkt. 342 at 139). In a letter dated January 4, 2012, Dr. Edwards responded to Dickson's challenge regarding the calculation of net proceeds in MPF Agreement *I*. (MPF Ex. D-35; HIL Ex. D-30). Then, on January 20, 2012, Dr. Edwards sent identical letters to CHFS demanding that CHFS cure certain defaults on the EFP Note and BHT Note by January 31, 2012, or face acceleration of the maturity date. (HIL Exs. D-11 & D-12). Dr. Edwards signed the letter regarding the BHT Note as BHT's "agent." CHFS made its last payment on the Mortgage Portfolios in February of 2012. (HIL Adv. Dkt. 341 at 149-50). For the last collections period paid by CHFS pre-petition, Borg received the monthly report from CHFS for Portfolio #7 dated February 14, 2012 (MPF Ex. D-16) and for Portfolios #1-#6 dated February 23, 2012 (MPF Ex. D-15).

On February 15, 2012, CHFS and Dickson sued Dr. Edwards and EFP/BHT in state court, seeking a declaration of the parties' rights (the "Original State Lawsuit") (Case No. 3:12-cv-00252-CWR-LRA, Dkt. 1-2 at 7-29). CHFS and Dickson challenged the alleged secured status of the loans that financed the Home Improvement Loans and also asserted an interest in the net profits of the alleged Joint Ventures. On April 11, 2012, Dr. Edwards and EFP/BHT removed the Original State Lawsuit to the District Court (the "Receivership

Action") (Case No. 3:12-cv-00252-CWR-LRA, Dkt. 1) and asserted counterclaims seeking a judgment against CHFS for amounts due on the EFP Note and BHT Note, a judgment against Dickson for his guarantees of the EFP Note and BHT Note, judicial foreclosure on their collateral, and a judgment against CHFS for its breach of the purported joint venture agreements. (HIL Adv. Dkt. 341 at 151). On May 1, 2012, EFP/BHT filed an emergency motion for the immediate appointment of a receiver for CHFS. (Case No. 3:12-cv-00252-CWR-LRA, Dkt. 6). In May of 2012, the District Court conducted a trial of the Receivership Action, which was interrupted by the filing of the Bankruptcy Case, as discussed later in this Opinion.

E. Pre-petition Transfers

Although CHFS was not primarily involved in the business of loaning funds, CHFS disclosed in its bankruptcy schedules that from February 14, 2012 to May 14, 2012, it loaned $3.2 million, in amounts varying from $250,000 to $500,000, to Dickson and four affiliated companies, including W.D. Dickson Enterprises, Inc., Crisco Investments, Inc., Double S Construction, Inc., and Discount Mortgage, Inc., as shown below:

02/14/2012	Discount Mortgage, Inc.	$500,000
02/14/2012	Double S Construction, Inc.	$500,000
02/14/2012	William D. Dickson	$250,000
02/15/2012	W. D. Dickson Enterprises, Inc.	$350,000
03/14/2012	Double S Construction, Inc.	$400,000
04/12/2012	Crisco Investments, Inc.	$500,000
05/14/2012	Discount Mortgage, Inc.	$250,000
05/14/2012	Crisco Investments, Inc.	$450,000
TOTAL		$3,200,000

(Bankr. Dkt. 115 at 6, Attach. B; MPF Ex. D-41; HIL Ex. D-36). The promissory notes provided for payment of interest at the initial rate of four percent (4%) per annum. (MPF

Ex. D-41; HIL Ex. D-36). These four affiliated companies shared the same office space with CHFS and some of the same employees.

On March 1, 2012, Dickson formed the W W Warren Foundation in Panama.[20] An analysis of available bank records shows that CHFS transferred approximately $3.7 million (including the above sums), directly or indirectly, from CHFS's operating account at BancorpSouth ending in 6711 to the account of the W W Warren Foundation at Banco Panameño de la Vivenda S.A. ("Banco Panameño") (later known as Banvivienda) in Panama as well as other accounts, as shown below:

Discount Mortgage, Inc.	$55,000*
Double S Construction, Inc.	$15,000*
Crisco Investments, Inc.	$50,000*
W.D. Dickson Enterprises, Inc.	$225,849*
William D. Dickson	$50,000*
Victory Consulting	$640,000*
W W Warren Foundation	$2,300,000
E.S. Berry Jr.	$240,000
Unknown	$124,151
Total	$3,700,000

(HIL Ex. P-7, Schedule 8).[21]

F. Bankruptcy Case

On May 23, 2012, during the trial of the Receivership Action, CHFS filed a voluntary chapter 11 petition for relief (the "Petition") (Bankr. Dkt. 1). The commencement of the Bankruptcy Case stayed all proceedings against CHFS, including

[20] The record suggests that Dickson owns W W Warren Foundation, which he named after his father W.W. Warren. (MPF Ex. D-42; HIL Ex. D-37).

[21] In the last column of the chart, the amounts followed by an asterisk are net amounts to avoid overstating the total amount transferred from CHFS. (HIL Adv. Dkt. 340 at 88). There are no bank records from Banco Panameño. Some of the transfers to Banco Panameño are reflected in the bank records of HSBC in Florida where the W W Warren Foundation holds an account. (HIL Ex. D-39; MPF Ex. 44; PPC Ex. D-15).

the trial of the Receivership Action. 11 U.S.C. § 362(a). CHFS proceeded as the debtor-in-possession (the "DIP") in the Bankruptcy Case pursuant to 11 U.S.C. § 1101, with Dickson acting as its designated representative until December 23, 2013, when the Court entered an order approving the appointment of a chapter 11 trustee. (Bankr. Dkt. 429). The parties have stipulated that as of the date of the Petition, the total amount due on the loans made to CHFS to fund the purchases of the Home Improvement Loans was $17,832,496. (HIL Adv. Dkt. 331 at 43). The parties have also stipulated that as of the date of the Petition, the amount at issue for each Portfolio was, as follows:

Portfolio #1	$1,115,304
Portfolio #2	$564,778
Portfolio #3	$61,685
Portfolio #4	$160,103
Portfolio #5	$2,616,209
Portfolio #6	$2,395,383
Portfolio #7	$4,866,989

(MPF Adv. Dkt. 126 at 36-37).

1. Proofs of Claim Filed by EFP/BHT

The bar date to file non-governmental proofs of claim in the Bankruptcy Case was September 20, 2012. (Bankr. Dkt. 15). On that date, EFP/BHT filed six (6) proofs of claim arising from the two distinct business relationships with CHFS regarding the Home Improvement Loans and the purported "joint ventures." (Claims 4-1 to 9-1; HIL Exs. P-1, P-2, D-17 & D-18; MPF Exs. D-20 to D-23; PPC Exs. P-1 to P-6). Proofs of claim 4-1 and 5-1 relate to the Home Improvement Loans; proofs of claim 6-1 through 9-1 relate to the Mortgage Portfolios.

EFP/BHT filed proofs of claim four ("POC 4-1") and five ("POC 5-1"), each in the amount of $18,390,660.32 for "Money Loaned" to CHFS. (HIL Exs. P-1, P-2, D-17 & D-

18; PPC Exs. P-1 & P-2). POC 4-1 is noted in the claims register as belonging to BHT whereas POC 5-1 is noted in the claims register as belonging to EFP. Nevertheless, both POC 4-1 and POC 5-1 name EFP/BHT jointly as the creditor, and the amounts listed are the same. EFP/BHT jointly assert a perfected security interest, based on "Possession." (HIL Adv. Dkt. 331 at 40). Dr. Edwards signed both POC 4-1 and POC 5-1 as BHT's "Agent" and as EFP's "Managing Partner." Attached to both POC 4-1 and POC 5-1 are the Rainbow Loan Agreement, the Custodial Agreement, the 2006 Note, the 2007 Note, the EFP Note, the BHT Note, and the Amended Loan Agreements. The Custodial Agreement is the only document attached to either POC 4-1 or POC 5-1 that is signed by McCarley. (HIL Adv. Dkt. 331 at 40).

POC 4-1 and POC 5-1 are duplicate filings in which the total amount that EFP/BHT claim is $18,390,660.32 and not twice that amount, as suggested by the duplicate filings. The portion of the total amount of $18,390,660.32 that is allegedly owed to BHT and EFP, separately, is not disclosed in POC 4-1 and POC 5-1.

CHFS filed the Objection to POC 4 & 5, challenging EFP/BHT's secured status. CHFS maintained that the 2007 Assignment and 2010 Assignment are invalid because the Rainbow Group was never lawfully incorporated to transact business. They also point out that all collateral was assigned to Beher Limited, not to EFP or BHT. Thus, according to CHFS, even if a security interest exists in favor of EFP/BHT, it remains unperfected because of EFP/BHT's failure to establish perfection by possession through a custodian. MISS. CODE ANN. § 75-9-313(c). EFP/BHT filed the Responses to Objection to POC 4 & 5 in which they incorporated the pleadings they filed in the Home Improvement Loans Adversary.

EFP filed nearly identical proofs of claim six ("POC 6-1") and nine ("POC 9-1") in the estimated amount of $7,101,094.35 and $7,101,094.55, respectively. (MPF Exs. D-20 & D-23; PPC Exs. P-3 & P-6). In POC 6-1, the basis for EFP's unsecured claim was a "series of six (6) Joint Venture Agreements." EFP claims damages arising out of CHFS's alleged breach of its fiduciary duty. EFP attached MPF Agreement *I* and MPF Agreement *II* as exhibits to both POC 6-1 and POC 9-1, but the counterparty in both MPF Agreement *I* and MPF Agreement *II* is EFP LLP.

EFP filed POC 9-1 "solely to protect its right to assert a secured claim against [CHFS]" in the event it was determined that EFP did not own the Mortgage Portfolios. According to Exhibit A to POC 9-1, EFP's total investment, plus interest, in the joint ventures was $7,101,094.55, as follows:

Mortgage Portfolio	Outstanding Investment	Interest
Portfolio #1	$1,249,694.32	$34,922.62
Portfolio #2	$554,754.44	$15,502.73
Portfolio #4	$89,202.22	$2,492.77
Mt View	$47,606.97	$1,330.39
BWP #1	$2,598,513.87	$71,777.63
BWP #2	$2,369,091.99	$66,204.76

(POC 9-1 Ex. A).[22]

CHFS filed the Objection to POC 6 & 9. CHFS maintains that neither MPF Agreement *I* nor MPF Agreement *II* required CHFS to repay EFP in full before CHFS was entitled to 25% share of net proceeds and that EFP had improperly withheld its share of the net proceeds. Moreover, CHFS points out that it never signed a promissory note. CHFS denies that EFP/BHT owned the notes in the Mortgage Portfolios. In the absence of written

[22] The total reflected in POC 9-1 is not a result of the Court's own calculations.

agreements as to Portfolios #3-#6, CHFS alleges that there is no debt. EFP filed the Responses to Objection to POC 6 & 9 in which it incorporated by reference its pleadings filed in the Mortgage Portfolios Adversary.

BHT filed nearly identical proofs of claim seven ("POC 7-1") and eight ("POC 8-1") in the estimated amount of $4,917,547.35 and $4,917,547.34, respectively. (MPF Exs. D-21 & D-22; PPC Exs. P-4 & P-5). In POC 7-1, the basis for its unsecured claim is also a "series of six (6) Joint Venture Agreements." BHT claims damages arising out of CHFS's alleged breach of its fiduciary duty. BHT estimates its loss of the investment, plus interest, at $4,917,547.35. (POC 7-1 Ex. A). BHT attached MPF Agreement *III* as an exhibit to POC 7-1.

BHT filed POC 8-1 "solely to protect its right to assert a secured claim against [CHFS]" in the event it was determined that BHT did not own the Mortgage Portfolios. (POC 8-1). In POC 8-1, BHT's investment in the joint venture was allegedly $4,917,547.34, as follows:

Portfolio	Outstanding Investment	Interest
Portfolio	$4,783,861.55	$133,685.99

(POC 8-1 Ex. A).[23] CHFS filed the Objection to POC 7 & 8, setting forth the same allegations contained in its Objection to POC 6 & 9. Likewise, BHT filed the Responses to Objection to POC 7 & 8, which mirrors EFP's allegations in the Responses to Objection to POC 6 & 9.

[23] The total reflected in POC 8-1 is not a result of the Court's own calculations.

2. Proof of Claim Filed by Dickson

Dickson filed a proof of claim ("POC 10-1") (Claim 10-1) on September 20, 2012, for an unknown amount. In the attachment to POC 10-1, Dickson explains that his "unliquidated claim . . . is the result of an indemnity which may arise regarding his personal guaranty on the Home Improvement Line from BHT and EFP."[24] (POC 10-1 Pt. 2).

3. Claims Register

In the claims register of the Bankruptcy Case, thirty-two (32) proofs of claim were filed; six (6) of which were filed by EFP/BHT (Claims 4-9), four (4) of which have been withdrawn (Claims 1, 11, 16 & 32), two (2) of which have been satisfied (Claims 19 & 25), and one of which was filed by Dickson (Claim 10). The total amount of the remaining nineteen (19) proofs of claim is $207,405.62.

4. Cash Collateral Orders

In order to facilitate the operation of CHFS's business, interim orders were entered in the Bankruptcy Case on July 10, 2012, and May 3, 2013, regarding its cash flow (the "Cash Collateral Orders") (Bankr. Dkt. 60 & 231; HIL Exs. D-46 & D-47; MPF Exs. D-51 & D-52). EFP/BHT alleged that payments on the Home Improvement Loans constituted their cash collateral, which CHFS may not use without permission of the Court. (Bankr. Dkt. 23 at 2). Under the Cash Collateral Orders, CHFS was required to deposit all funds collected in the Home Improvement Loans into the DIP operating account (the "DIP

[24] In the Memorandum Opinion and Order on First Amended Verified Complaint to: (1) Recover Money, Damages, or Property; (2) to Avoid Pre-Petition and Post-Petition Transfers; (3) for Turnover of Property; (4) for Injunctive Relief; and (5) for Equitable Subordination entered in *Johnson v. Cmty. Home Fin. Servs., Inc.*, Adv. Proc. 14-00030-NPO (the "Dickson Adversary Opinion"), entered in the Dickson Adversary Proceeding contemporaneously with this Opinion, the Court equitably subordinated POC 10-1 to all other creditors and claims pursuant to 11 U.S.C. § 510.

Operating Account") at Wells Fargo Bank ("Wells Fargo"). CHFS also was required to make adequate protection payments to EFP/BHT each month beginning July 10, 2012, and continuing until October 10, 2012, in an amount equal to all payments collected on the Home Improvement Loans during the previous month plus interest calculated at the rate of seven percent (7%) per annum. For purposes of the Cash Collateral Orders, the principal balance as of June 1, 2012, was deemed to be $18,300,000. According to Borg, CHFS made four adequate protection payments. (HIL Adv. Dkt. 342 at 124-25).

As to the Mortgage Portfolios, EFP/BHT claimed that the notes do not constitute property of the estate but belonged to them. (Bankr Dkt. 23 at 2). Under the Cash Collateral Orders, CHFS was required to segregate collections on the Mortgage Portfolios into separate escrow accounts at Wells Fargo: (1) the EFP Mortgage Portfolios Escrow Account ending in -9335 and (2) the BHT Mortgage Portfolios Escrow Account ending in -9343. CHFS was required to deposit all of the collections from any EFP Mortgage Portfolio (Portfolios #1-#6) into its DIP Operating Account and transfer funds, less a $20 servicing fee, to the EFP Mortgage Portfolios Escrow Account. Similarly, CHFS was required to deposit all of the collections from any BHT Mortgage Portfolio Loan (Portfolio #7) into its DIP Operating Account and transfer funds, less a $15 servicing fee, to the BHT Mortgage Portfolios Escrow Account.

Other than carve outs for operating and other expenses, the Cash Collateral Orders prohibited CHFS from disbursing the funds in the DIP Operating Account without further order of the Court. CHFS segregated the collections on the Home Improvement Loans and Mortgage Portfolios from that point forward until October of 2013. As of October 31, 2013, the EFP Mortgage Portfolios Escrow Account held a balance of $3,871,020.06 (MPF

Ex. D-50 at 30), and the BHT Mortgage Portfolios Escrow Account held a balance of $2,072,893.31 (MPF Ex. D-50 at 21).

G. Initiation of Home Improvement Loans Adversary

Before the Trustee's appointment on January 21, 2014, CHFS and Dickson initiated the Home Improvement Loans Adversary on August 24, 2012, by filing the Complaint to Determine the Validity and Extent of Claims (the "HIL Original Complaint") (HIL Adv. Dkt. 1) against EFP/BHT. (HIL Adv. Dkt. 331 at 40). In the HIL Original Complaint, CHFS and Dickson sought to determine "the validity and extent of the respective claim(s) of EFP and BHT against CHFS and Dickson, respectively, some or all of which derive solely from the knowingly unlawful actions by The Rainbow Group, Ltd. and/or some or all of its representatives." (HIL Adv. Dkt. 1 at 2-3). As relief, CHFS and Dickson sought to obtain a judgment against EFP and BHT declaring that the underlying loan documents are void *ab initio*. (HIL Adv. Dkt. 1, Counts I-IX).

CHFS and Dickson amended the HIL Original Complaint twice. They filed the Amended Complaint to Determine the Validity and Extent of Claims (HIL Adv. Dkt. 6), as of right, on September 13, 2012. CHFS and Dickson then filed the Objection to POC 4 & 5, which mirrored the allegations in the Amended Complaint. (HIL Adv. Dkt. 6). On March 5, 2013, the Court entered the Order to Consolidate for Administration and Discovery (HIL Adv. Dkt. 24), consolidating the Home Improvement Loans Adversary and the Objection to POC 4 & 5 for all purposes. CHFS and Dickson filed the Second Amended Complaint (the "HIL Second Amended Complaint") (HIL Adv. Dkt. 48) with leave of Court (HIL Adv. Dkt. 47) on June 6, 2013.

H. Initiation of Adversary Proceeding 12-00109-NPO

CHFS and Dickson initiated adversary proceeding 12-00109-NPO on October 24, 2012, against EFP/BHT and EFP LLP. (Adv. Proc. 12-00091-NPO, Dkt. 1). CHFS and Dickson sought a declaration that EFP/BHT and EFP LLP failed to pay CHFS its share of the net profits under the seven (7) agreements governing the Mortgage Portfolios entered into between January 2008 and March 2011. CHFS's objections to POCs 6-1, 7-1, 8-1, and 9-1 mirrored these allegations. CHFS also sought declaratory relief regarding an eighth unwritten joint venture involving the purchase through The Debt Exchange, Inc. ("DebtX") of a pool of residential real estate lots in Atlanta, Georgia (the "Atlanta Property"). CHFS and Dickson filed the Amended Complaint (Adv. Proc. 12-00109-NPO, Dkt. 7) on January 15, 2013. The Court entered an order on March 5, 2013, consolidating for administrative purposes and discovery adversary proceeding 12-00109-NPO, the Objection to POC 6 & 9, and the Objection to POC 7 & 8. (Adv. Proc. 12-00109-NPO, Dkt. 13). EFP/BHT and EFP LLP filed an answer and counterclaim on March 8, 2013. (Adv. Proc. 12-00109-NPO, Dkt. 14). In their answer, EFP/BHT and EFP LLP denied that EFP LLP (as opposed to EFP) had ever engaged in business with CHFS. In the counterclaim, EFP/BHT sought, *inter alia*, a declaratory judgment that CHFS's only interest in the Mortgage Portfolios was a right to servicing fees of $20 or $15 and a 25% split of the net proceeds after repayment of EFP/BHT's investment. CHFS filed an answer to the counterclaim on March 29, 2013. (Adv. Proc. 12-00109-NPO, Dkt. 16).

I. Dickson Guaranty Suit

In the Receivership Action, the District Court found that the automatic stay imposed by operation of law by CHFS's commencement of the Bankruptcy Case did not apply to

the counterclaims asserted by EFP/BHT against Dickson seeking to hold Dickson personally liable on the EFP Note and BHT Note based on two guaranty agreements. (Case No. 3:12-cv-00252-CWR-LRA, Dkt. 109 & 110). The District Court reasoned that Dickson was not in bankruptcy and thus was not protected by the stay.[25] Accordingly, on March 29, 2013, the District Court severed those counterclaims from the claim asserted against CHFS, realigned the parties (with EFP/BHT as the plaintiffs and Dickson as the defendant), and assigned it a new case number, 3:13-cv-00587-CWR-LRA (the "Dickson Guaranty Suit").

J. Initiation of Mortgage Portfolios Adversary

CHFS and Dickson initiated the Mortgage Portfolios Adversary against EFP/BHT, Dr. Edwards, James Edwards, Edwards Family Partnership, LLP, the Atkinson Trust, and DebtX by filing the Complaint (the "MPF Original Complaint") (MPF Adv. Dkt. 1) on November 26, 2013. Many of the allegations in the MPF Original Complaint are similar to those alleged in adversary proceeding 12-00109-NPO, with the notable exception that the MPF Original Complaint names two additional defendants, the Atkinson Trust and DebtX.

CHFS and Dickson alleged in the MPF Original Complaint that CHFS was approved as a registered user of DebtX's online loan sale platform in 2008 and that the defendants, Dr. Edwards, James Edwards, EFP, and Atkinson Trust, used CHFS's username and password in 2010 to purchase (through DebtX) the Atlanta Property, and in doing so misappropriated for themselves a business opportunity that belonged to CHFS

[25] The bankruptcy court denied Dickson's request to extend the automatic stay to enjoin EFP/BHT from proceeding with their counterclaims against him was denied as to their claims against him based on his guaranties of the EFP Note and the BHT Note. (HIL Adv. Dkt. 92).

and Dr. Edwards. After acquiring the Atlanta Property in CHFS's name, Dr. Edwards then transferred the property to the Atkinson Trust. CHFS and Dickson alleged that DebtX negligently failed to follow its procedures by allowing Dr. Edwards, James Edwards, EFP, and Atkinson Trust to bid on and acquire the Atlanta Property using CHFS's and Dickson's status as a registered user of its online loan sale platform.

K. Post-petition Transfers & Rogue Operation

During the course of the Bankruptcy Case, CHFS generated substantial sums of money. For example, the October 2013 monthly operating report, the last one filed by CHFS as a DIP, showed an ending cash balance of $9,059,191.49. (Bankr. Dkt. 416; HIL Ex. D-45; MPF Ex. D-50). Beginning in the fall of 2013, Dickson began transferring most of CHFS's cash to accounts in his name or in the name of affiliated companies in violation of the Cash Collateral Orders. From November 5, 2013, to January 7, 2014, Dickson transferred approximately $9,095,000 from CHFS's account. (HIL Ex. P-7, Schedules 8 & 8.1). There were four wire transfers totaling $8,395,000 to the account of W W Warren Foundation at Banco Panameño in Panama, and one wire transfer totaling $700,000 to the account of Victory Consulting (HIL Ex. D-41; MPF Ex. D-46; PPC Ex. D-16), another entity owned or controlled by Dickson. The parties have stipulated that W W Warren Foundation and Victory Consulting are insiders and affiliates of Dickson and/or CHFS. (HIL Adv. Dkt. 331 at 42).

Date	Approximate Amount	Outbound Transfers	Inbound Transfers
11/05/2013	$900,000	DIP Operating Account	W W Warren Foundation at Banco Panameño
11/12/2013	$795,000	DIP Operating Account	W W Warren Foundation at Banco Panameño
11/25/2013	$700,000	DIP Operating Account	Victory Consulting at Wells Fargo
12/11/2013	$3,500,000	EFP Mortgage Portfolios Escrow Account	W W Warren Foundation at Banco Panameño
12/11/2013	$2,000,000	BHT Mortgage Portfolios Escrow Account	W W Warren Foundation at Banco Panameño
12/19/2013	$1,200,000	DIP Operating Account	W W Warren Foundation at Banco Panameño
Total	$9,095,000		

(HIL Adv. Dkt. 331 at 42; HIL Ex. P-7, Schedules 8 & 8.1). There were additional wire transfers from Victory Consulting's account at Wells Fargo to RE&B Investment Trust's account at Scotia Bank in Costa Rica totaling $1,325,000 and to W W Warren Foundation's account totaling $450,000. Dickson and others continued to divert funds totaling at least $1.3 million from the estate until approximately April of 2014. (HIL Adv. Dkt. 341 at 37).

In the fall of 2013, Dickson moved from Jackson, Mississippi to Costa Rica and set up a "rogue" operation of CHFS's business there and in Panama. (Bankr. Dkt. 918). This rogue operation had several facets, including:

- written and oral communications with borrowers to send payments to alternate addresses;
- electronic deposits into non-CHFS accounts;
- transmission of checks between the United States and Costa Rica;
- diversion of payoff checks through foreign accounts; and
- purchase of foreign assets.

(HIL Adv. Dkt. 341 at 37-40; HIL Ex. P-7). The rogue operation ceased sometime between mid- to late-April 2014. (HIL Adv. Dkt. 341 at 37).

In March of 2014, Dickson arranged for the shipment of several computer servers, other office equipment, and almost all of CHFS's current loan records to Costa Rica. (HIL Adv. Dkt. 341 at 6 & 9-10). Dickson entered into an agreement with Meehan, the owner of Advanced Communications S.A., a call center in Costa Rica, to provide debt collection services for CHFS beginning in December 2013. (HIL Adv. Dkt. 341 at 37). A former CHFS employee, Reshonda Rhodes, traveled to Cosa Rica on two separate occasions to assist Dickson in setting up the rogue operation. (HIL Adv. Dkt. 341 at 40). As part of the scheme, Dickson changed CHFS's physical mailing address from Jackson, Mississippi, to that of its corporate agent in Las Vegas, Nevada, where payments from borrowers were received and forwarded to Dickson in Costa Rica. (HIL Adv. Dkt. 341 at 54).

L. Appointment of Trustee

On August 15, 2012, EFP/BHT filed the Edwards Family Partnership, LP and Beher Holdings Trust's Motion to Appoint Chapter 11 Trustee for Community Home Financial Services, Inc. (the "EFP/BHT Motion to Appoint Trustee") (Bankr. Dkt. 96) based on allegations of pre-petition and post-petition misconduct of CHFS. CHFS opposed the appointment of a chapter 11 trustee (Bankr. Dkt. 120) and, on the same day, filed the Motion for Examiner (the "CHFS Motion to Appoint Examiner") (Bankr. Dkt. 121). In response, the U.S. Trustee asked the Court to grant the CHFS Motion to Appoint Examiner and hold the EFP/BHT Motion to Appoint Trustee in abeyance pending the examiner's report. (Bankr. Dkt. 122). In an order entered on September 25, 2012, the Court held both

the EFP/BHT Motion to Appoint Trustee and the CHFS Motion to Appoint Examiner in abeyance.[26] (Bankr. Dkt. 133).

On December 20, 2013, counsel for CHFS, who was unaware of Dickson's activities at the time they occurred, filed the Disclosure of Transfer of Funds and Other Matters (the "Disclosure") (Bankr. Dkt. 426), notifying the Court of the following:

> 1) CHFS has changed its principal place of business from Jackson, Mississippi to Panama.
>
> 2) CHFS has transferred funds from the DIP [Operating Account] at Wells Fargo Bank to other CHFS bank accounts located in Panama.
>
> 3) CHFS has set up two (2) branch offices-one in Panama and one in Costa Rica. The business operations of CHFS are continuing to be conducted at these two branch locations.

(Bankr. Dkt. 426 at 1). Contrary to the Disclosure, the funds were not transferred "to other CHFS bank accounts" but to accounts owned by Dickson or affiliated companies. (HIL Ex. P-7 at 11).

In response to the Disclosure, the U.S. Trustee filed the United States Trustee's Emergency Motion for Order for the Appointment of a Chapter 11 Trustee (Bankr. Dkt. 427) on December 20, 2013. On December 23, 2013, the Court entered the Order Granting United States Trustee's Emergency Motion for Order for the Appointment of a Chapter 11 Trustee (Bankr. Dkt. 429).

On January 8, 2014, the U.S. Trustee filed the United States Trustee's Application for Approval of Chapter 11 Trustee (Bankr. Dkt. 455), seeking approval of the appointment of Johnson as the chapter 11 trustee. EFP/BHT filed the Objection to Application for

[26] On March 4, 2014, the Court dismissed as moot the EFP/BHT Motion to Appoint Trustee and the CHFS Motion to Appoint Examiner because of the later appointment of the Trustee. (Bankr. Dkt. 551).

Approval of Chapter 11 Trustee (Bankr. Dkt. 458), alleging the existence of a conflict or "adverse interest" arising out of the representation by Johnson's law firm of the accountant firm retained by CHFS as an expert witness in the Bankruptcy Case. After finding that Johnson had no conflict and was a "disinterested person" as defined under 11 U.S.C. § 101(14), the Court entered the Order (Bankr. Dkt. 473), approving Johnson's appointment as the chapter 11 trustee on January 21, 2014.

Upon entry of the order granting the emergency motion for appointment of a chapter 11 trustee and approving the appointment of Johnson as the Trustee, Dickson no longer had any decision-making authority for CHFS. 11 U.S.C. § 704, § 1106. Nevertheless, Dickson's efforts to transfer CHFS's business and assets within the United States, between the United States and Latin America, and within Latin America continued after the Trustee's appointment. (HIL Adv. Dkt. 341 at 37).

M. Trustee's Investigation of Funds Stolen & Diverted

The Trustee's investigation of Dickson's conduct revealed that the $9,095,000 million transferred by him and the $1.3 million later diverted from the estate were laundered, commingled, and otherwise dissipated by the purchase of Costa Rican loans and a condominium in Los Sueños, Costa Rica, in the names of other entities including Philanfin, S.A. and Phalanx, S.A. The Trustee eventually discovered a document that appeared to transfer shares of stock in CHFS to Dickson and Phalanx, S.A., a Costa Rican company. (HIL Ex. P-13; MPF Ex. P-17; HIL Adv. Dkt. 341 at 22). The Trustee also found mortgages held in the name of Philanfin, S.A. with a value of over $2 million. (HIL Adv. Dkt. 341 at 25). The parties have stipulated that Phalanx, S.A. and Philanfin, S.A. are insiders and affiliates of CHFS and/or Dickson. (HIL Adv. Dkt. 331 at 42).

At the time of the Trustee's appointment, CHFS was essentially no longer an on-going business in the United States. CHFS had only approximately $7,500 cash on-hand, collectively, in numerous bank accounts. (HIL Adv. Dkt. 341 at 5). The Trustee sent letters to all individuals and entities having any connection with the Bankruptcy Case, demanding that they turn over any assets, information, or documents belonging to the estate. (HIL Adv. Dkt. 341 at 5). The Trustee conducted an examination of Dickson under Rule 2004 of the Federal Rules of Bankruptcy Procedure during which she asked him about the whereabouts of loan records, but Dickson refused to answer almost every question, invoking his Fifth Amendment right against self-incrimination. (HIL Adv. Dkt. 341 at 6).

On February 7, 2014, Dr. Edwards sent the Trustee by email a copy of a report he prepared at the request of the Federal Bureau of Investigation ("FBI"), as well as other documents. (MPF Ex. D-42; HIL Ex. D-37; PPC Ex. D-12; HIL Adv. Dkt. 341 at 50). The report included information obtained by Dr. Edwards as a result of subpoenas that Dr. Edwards' attorneys issued to all known banks where Dickson and/or his affiliated companies held accounts and also as a result of the investigation undertaken by Dr. Edwards' attorneys in Costa Rica. (HIL Adv. Dkt. 341 at 153-54). On February 9, 2014, Dr. Edwards sent the Trustee another email to which he attached a chart prepared by his lawyers in Costa Rica regarding bank accounts held by Dickson. (PPC Ex. D-1). In the email, he offered "to initiate legal proceedings in Costa Rica to freeze these assets for the bankruptcy estate." (PPC Ex. D-1).

Based on mostly outdated records obtained from Dr. Edwards and information gleaned from CHFS's mail, the Trustee sent letters to consumers instructing them to remit their loan payments to her, to provide her with copies of the loan documents (since the

borrowers initially were the Trustee's primary source of information), and to ignore payment instructions from anyone else. (HIL Adv. Dkt. 341 at 54 & 99). When the Trustee discovered that Dickson had informed borrowers that CHFS had changed its Mississippi address to the Nevada address, someone notified borrowers to send their payments to a new address in Miami, Florida, where payments again were being forwarded to Dickson in Costa Rica.

N. Stay of Adversary Proceedings

In each of the Adversary Proceedings initiated by CHFS and Dickson, an order was entered on March 6, 2014, substituting the Trustee for CHFS as the proper party-in-interest. (HIL Adv. Dkt. 121; MPF Adv. Dkt. 21; Adv. Proc. 12-00109-NPO, Dkt. 71); 11 U.S.C. § 323; FED. R. BANKR. P. 6009. In the same orders, the Court stayed the Adversary Proceedings. (HIL Adv. Dkt. 121, MPF Adv. Dkt. 21; Adv. Proc. 12-00109-NPO, Dkt. 71).

O. Criminal Proceedings Against Dickson

On March 10, 2014, a criminal complaint was filed against Dickson, alleging that Dickson "conspired to wire approximately $9,095,000.00 from accounts subject to bankruptcy protection to accounts [he] owned and/or controlled." (Case No. 3:14-cr-00078-TSL-FKB, Dkt. 1 at 4). Dickson was detained in Panama in federal custody and deported to the United States while *en route* to Costa Rica. Upon his return to the United States, Dickson was arrested for bank fraud and held without bond. An indictment was issued on April 9, 2014.

P. Trustee's Efforts to Locate Loan Documents

Although the Trustee initially gained access to CHFS's computer servers in Panama with Allen's login information, Dickson reached out from his jail cell to Reshonda Rhodes to contact the computer server company in Panama to deactivate Allen's password. (HIL Adv. Dkt. 341 at 7). The Trustee appeared at Dickson's arraignment in April of 2014, and demanded that he execute consents to allow her access to CHFS's four (4) computer servers in Panama. (HIL Adv. Dkt. 341 at 7). The Trustee eventually obtained access to three of the four computer servers in Panama. Of these, one of the servers had been wiped clean. (HIL Adv. Dkt. 341 at 7-8). Some information on the other two servers was encrypted. The Trustee retained a forensic computer technician to break the codes, but he was unsuccessful. The Trustee found inconsistencies in the data between the two servers. (HIL Adv. Dkt. 341 at 30). A borrower's name may be on one or both servers, and when a borrower's name was found on both servers, the borrower's information was sometimes different with no server being more accurate than the other.

After leaving a meeting with counsel for Dickson and his affiliates where she obtained permission to enter CHFS's place of business in Jackson, Mississippi, and remove whatever records were there, the Trustee went to 234 East Capitol Street but was denied access past the reception area by Dickson's family members and employees. (HIL Adv. Dkt. 341 at 9). When the Trustee returned the next Monday, all furniture and furnishings, including all certificates and pictures hanging on the walls, had been removed. The Trustee found only a handful of documents, but they related to old loans. (HIL Adv. Dkt. 341 at 9).

Despite demands from the Trustee, not all books and records of CHFS, electronic or otherwise, were surrendered to her. (HIL Adv. Dkt. 341 at 5). The original documents assigning mortgages to CHFS and purportedly from CHFS to BHT have never been recovered by the Trustee. Although Dickson testified that certain documents and access codes are in a warehouse in Panama, he has not disclosed the location of the warehouse. (HIL Adv. Dkt. 341 at 6).

Q. ClearSpring

An order was entered on April 11, 2014, allowing the Trustee to service loans with the assistance of counsel, *nunc pro tunc* to January 8, 2014, until a professional mortgage servicing company could be approved by the Court. (Bankr. Dkt. 616). That same day, the Trustee filed an application seeking permission to hire Vantium Capital, Inc., later known as ClearSpring Loan Services, Inc. ("ClearSpring"),[27] to service the vast majority of the consumer loans. (Bankr. Dkt. 618; HIL Adv. Dkt. 341 at 18, 92). EFP/BHT objected to the proposed servicing contract, alleging that the fees the Trustee proposed to pay ClearSpring were unreasonably high. (Bankr. Dkt. 630). The parties resolved their dispute, and the application was approved on June 3, 2014. (Bankr. Dkt. 702; PPC Ex. P-16). In the Agreed Order Granting Trustee's Application to Employ Loan Servicing Company and to Establish Settlement Authority (Bankr. Dkt. 702; PPC Ex. P-16), the Trustee proposed to pay ClearSpring, in general, an electronic boarding fee of $25 per loan (including dormant loans); a one-time administrative accounting work fee of $35 per loan, a deboarding/transfer fee of $25 per loan; a performing loan fee of 10% of payments collected, up to $50 per loan with a minimum $20 fee; fifty percent (50%) of late fees; and

[27] ClearSpring changed its name to Sortis Financial Inc., effective January 1, 2018. (HIL Adv. Dkt. 353).

base fees of $7.50 per month per dormant loan. EFP/BHT agreed to cooperate with ClearSpring in order to smooth the transition and reduce costs by releasing original loan documents, when requested, and providing information to ClearSpring. In return, ClearSpring agreed to allow EFP/BHT to track its servicing activities by granting them "view only" access to its proprietary web-based software. In addition, the Trustee agreed to provide EFP/BHT with monthly reports of collections received from ClearSpring. Finally, the parties agreed that ClearSpring's fees and expenses would be a surcharge under 11 U.S.C. § 506(c) that would not be subject to "claw back" for any cause other than a violation of the terms of the servicing agreement with ClearSpring.

The electronic information on CHFS's computer servers along with physical records and files created by the Trustee when borrowers contacted her, were transferred to ClearSpring, and ClearSpring went "live" in June of 2014. (HIL Ex. P-24). Alan Sercy ("Sercy"), president and chief executive officer of ClearSpring, testified at Trial that the information from CHFS's servers designated loans as either EFP, BHT, CHFS, or Discount Home Mortgage, Inc., and ClearSpring continued those same designations. (HIL Adv. Dkt. 341 at 96-97; HIL Ex. P-24 at 3). The Trustee did not ask ClearSpring to verify that a loan belonged to any particular portfolio. (HIL Adv. Dkt. 341 at 29). Initially, 3,828 loans were "boarded" with ClearSpring. (HIL Ex. P-24 at 3).

R. Turnover Order

On April 25, 2014, the Court entered the Order Granting Edwards Family Partnership, LP and Beher Holding Trust's Emergency Motion for Order Directing William D. Dickson to Show Cause and Directing Him to Return the Funds Transferred from the Bankruptcy Estate (the "Turnover Order") (Bankr. Dkt. 631; PPC Ex. P-27) in

the Bankruptcy Case. The Turnover Order required Dickson to provide information and documents to the Trustee pursuant to 11 U.S.C. § 521(a)(3)-(4) within ten (10) business days. Dickson failed to comply with the Turnover Order. (HIL Adv. Dkt. 341 at 5).

S. Edwards TRO Case

In District Court, EFP/BHT sued W.D. Dickson Enterprises, Inc., Crisco Investments, Inc., Phalanx, S.A., Victory Consulting, and Dickson (the "Edwards TRO Case") (Case No. 3:14-cv-00436-CWR-LRA) on June 3, 2014. Dr. Edwards became concerned that Dickson, from his jail cell, was attempting to auction real property held for him by shell corporations. EFP/BHT asked the District Court to issue an injunction restraining the named defendants from selling the real property. On June 11, 2014, EFP/BHT filed the First Amended Complaint (the "Amended Edwards TRO Complaint") (Case No. 3:14-cv-00436-CWR-LRA, Dkt. 10), adding as defendants W W Warren Foundation, Discount Mortgage, Inc., Discount Home Mortgage, Inc., and Double S Construction, Inc., all of whom are affiliates and/or insiders of CHFS. The Amended Edwards TRO Complaint asserted claims to avoid the fraudulent conveyance of the stock of Victory Consulting (present owner of CHFS stock) to W W Warren Foundation, avoidance of fraudulent liens related to certain items of real property owned by affiliates of CHFS, injunctive relief and the appointment of a receiver, imposition of a constructive trust, and piercing of the corporate veil of certain affiliates/insiders of CHFS. According to EFP/BHT, the Amended Edwards TRO Complaint was filed "against these non-debtor persons and companies to try to un-do and/or stop certain pre- and post-bankruptcy fraudulent transfers by the debtor." (Case No. 3:14-cv-00436-CWR-LRA, Dkt. 35). After no substantive activity in the Edwards TRO Case for nearly two (2) years, the District Court

entered an order on January 12, 2017, closing the Edwards TRO Case without prejudice. (Case No. 3:14-cv-00436-CWR-LRA, Dkt. 42).

T. Dickson Adversary Proceeding

On June 4, 2014, the Trustee initiated an action similar to the Edwards TRO Case, adversary proceeding 14-00030-NPO (the "Dickson Adversary Proceeding"), against Dickson, certain related companies, and insiders, seeking to recover pre-petition and post-petition transfers under the avoidance powers granted her by 11 U.S.C. § 544. In the Dickson Adversary Proceeding, the Trustee alleged certain defendants related to Dickson continued to withhold funds and proprietary information belonging to the estate. The Trustee also alleged "[u]pon information and belief, some of [CHFS's] money transferred pre-petition and/or post-petition to bank accounts in Latin America has been transferred to one or more of the Defendants or has funded purchases by one or more of the Defendants, including real property in Latin America and mortgage loans in Latin America, the proceeds of which are generating income received from additional borrowers." (Adv. Proc. 14-00030-NPO, Dkt. 33 n.23). The Trustee also sought to equitably subordinate Dickson's claims, including his claim for indemnity, and to enjoin the sale at auction of the properties owned by insiders and/or affiliates of CHFS.[28]

U. Recovery of Funds

Beginning in July of 2014, the Trustee recovered and/or intercepted funds totaling $6,693,838.38. (HIL Ex. P-7 at 12-13). On July 10, 2014, $3,099,154.09 was wired to the Trustee from a CHFS account at Banco Panameño. (HIL Adv. Dkt. 331 at 43). (Banco Panameño later became Banvivienda Bank. (HIL Adv. Dkt. 341 at 28)). On July 10, 2014,

[28] The trial of the Dickson Adversary Proceeding took place on December 7, 2017, and is the subject of the Dickson Adversary Opinion.

$1,824,871.49 was wired to the Trustee from a "Dickson William D" account at Banco Panameño. On March 19, 2015, $408,146.70 was wired to the Trustee from a CHFS account at Banco Panameño. Finally, on April 3, 2015, $566,106.61 was wired to the Trustee from a CHFS account at Banco Panameño.

07/10/2014	$3,099,154.09	CHFS Account at Banco Panameño
07/10/2014	$1,824,871.49	"Dickson William D" Account at Banco Panameño
03/19/2015	$408,146.70	CHFS Account at Banco Panameño
04/03/2015	$566,106.61	CHFS Account at Banco Panameño
Total	$5,898,278.89	

(HIL Ex. P-7 at 12-13). The Trustee also intercepted two cashier's checks totaling $540,000 made payable to CHFS. The Trustee intercepted the first cashier's check in the amount of $300,000 from BancorpSouth dated January 29, 2014, and the second $240,000 cashier's check from a W.D. Dickson account at OmniBank, dated February 25, 2014. (HIL Adv. Dkt. 341 at 26).

Date	Amount	Account
01/29/2014	$300,000	BancorpSouth
02/25/2014	$240,000	W.D. Dickson Account at OmniBank
Total	$540,000	

The Trustee also received $144,191.90 from a settlement related to Coastal Condos and $111,367.59 from the sale of Willow Court. (HIL Ex. P-7 at 13; HIL Adv. Dkt. 340 at 94). The Trustee testified that she was unable to credit these funds against any particular CHFS borrower loans. (HIL Adv. Dkt. 341 at 28).

V. Partial Summary Judgment in Dickson Guaranty Suit

In the Dickson Guaranty Suit, EFP/BHT moved for partial summary judgment as to Dickson's liability as guarantor since the EFP Note and BHT Note matured on August 1, 2013, and remain unpaid. (Case No. 3:13-cv-00587-CWR-LRA, Dkt. 14). The District Court entered an order granting partial summary judgment in favor of EFP/BHT on

September 10, 2014 (the "September 10 Order") (PPC Ex. P-25); *Edwards Family P'ship, LP v. Dickson*, Case No. 3:13-cv-00587-CWR-LRA, 2014 WL 4494283 (S.D. Miss. Sept. 10, 2014). The District Court found that CHFS had defaulted on the EFP Note and BHT Note and that Dickson was personally liable by virtue of the guaranties he signed. (*Id.*, at *3). "Dickson signed these agreements [with EFP/BHT] and testified to its validity . . . . According to Dickson, CHFS made payments under the terms of the original loan agreements, the amended agreements, and the BHT and EFP notes until October 2011." (*Id.*, at *1-2). Applying Mississippi contract law, the District Court ruled that the clear and unambiguous language of the guaranty agreements rendered Dickson personally liable for the debt owed by CHFS. The District Court ordered the parties to file affidavits establishing the extent of Dickson's liability. On August 26, 2015, the District Court concluded that Dickson owed, as of September 20, 2014, on the EFP Note $3,775,995 (principal), $2,651,983 (interest), and $2,946 (per diem) and on the BHT Note $11,327,984 (principal), $8,021,207 (interest), and $8,868 (per diem) (Case No. 3:13-cv-00587-CWR-LRA, Dkt. 67). The District Court entered a final judgment in favor of EFP/BHT on September 1, 2015. (PPC Ex. P-30).

Dickson appealed the decision to the Fifth Circuit Court of Appeals, arguing that the summary judgment was premature because of the pending Home Improvement Loans Adversary in which he and CHFS were challenging the extent and validity of the EFP Note and BHT Note. Dickson posited that if CHFS's obligation fell away, then his should too. On May 23, 2016, the Fifth Circuit affirmed the District Court. *Edwards Family P'ship L.P. v. Dickson*, 821 F.3d 614 (5th Cir. 2016). Based on the unambiguous language of the guaranty agreements, the Fifth Circuit ruled that Dickson waived any defenses to the

enforcement of the EFP Note and BHT Note, and, therefore, was required to satisfy the obligations "no matter what." *Id.* at 614.

W. Rejection of Servicing Contract

On June 4, 2014, the Trustee obtained authority from the Court pursuant to 11 U.S.C. § 365(a) to reject the servicing agreement entered into between CHFS and SNGC, LLC on August 26, 2005. (MPF P-15; Bankr. Dkt. 705; HIL Adv. Dkt. 341 at 12). Under the contract, CHFS had agreed to service certain loans that SNGC, LLC had purchased prior to the Petition date for a servicing fee. The Trustee determined it was not economically feasible to continue to service these loans and that it was in the best interest of the estate to allow SNGC, LLC to service its own loans.

X. Dr. Edwards & Meehan

Dr. Edwards testified that Meehan[29] first contacted him by telephone on September 11, 2014. (HIL Adv. Dkt. 341 at 200). The next day, Dr. Edwards emailed Meehan a copy of the September 10 Order "granting Edwards Family Partnership its Judgment against Dickson under his Guaranty. (PPC Ex. P-32).[30] Only two days before, on September 10, 2014, the District Court had entered the September 10 Order, but at this juncture the District Court had not yet determined the amount of damages that Dickson owed EFP/BHT and had not yet entered a final judgment in the Guaranty Suit. (PPC Ex. P-25).

---

[29] Meehan is a U.S. citizen who resides in Costa Rica. (HIL Adv. Dkt. 341 at 31). Meehan did not testify at Trial and was not deposed by either party. The Trustee testified that she subpoenaed Meehan to attend the Trial, but he was unable to comply with the subpoena because leaving Costa Rica would have jeopardized a pending custody dispute with his estranged spouse. (HIL Adv. Dkt. 341 at 31-32).

[30] In the chain of emails between Dr. Edwards and Meehan, the Court admitted into evidence only those written by Dr. Edwards. (HIL Adv. Dkt. 341 at 203).

In other emails on September 12, 2014, Dr. Edwards informed Meehan that he was "trying to arrange a trip to San Jose" and would like to meet with him "to review the CHFS computers and Dickson's property," and talk to Dickson's former attorney. (PPC Ex. P-32). There were other email exchanges between Dr. Edwards and Meehan from September 25, 2014, through February of 2015. (PPC Ex. P-32).

On October 11, 2014, at 9:32 a.m.,[31] Dr. Edwards wrote in an email to Barber, counsel for the Trustee, "Martha [Borg] forwarded your question on the Sanford mortgage release . . . Jeff [Barber], please exit the loan servicing business as we cannot abide by your firm's charges. Let Vantium deal with CHFS loose ends; Martha [Borg] and I will deal with EFP and BHT loose ends." (PPC Ex. P-12). Dr. Edwards did not reveal to Barber his ongoing communications with Meehan. Later that same day at 11:00 a.m., Dr. Edwards emailed Meehan, "Did you receive the first wire? Was your IT guy able to open the loan files?" (PPC Ex. P-32 at 59).

On October 14, 2014, Meehan emailed Dr. Edwards the link to a dropbox account containing CHFS data pulled from a CHFS computer. (PPC Ex. P-32 at 61). Dr. Edwards was unable to access the dropbox and asked Meehan to mail him the information on CDs. (HIL Adv. Dkt. 341 at 206). Sometime later, Meehan mailed Dr. Edwards two CDs containing the hard drive of the computer used by Reshonda Rhodes. (HIL Adv. Dkt. 341 at 157 & 203; PPC Ex. P-34). On October 15, 2014, Dr. Edwards informed Meehan in an email that he had opened the two CDs but that they did not contain all of the loan servicing data he needed. He instructed Meehan to use Dickson's former employees to obtain access to CHFS information from another off-site server. Dr. Edwards also inquired whether

[31] The times shown on the emails from Dr. Edwards are assumed to reflect Eastern Standard Time.

Meehan had received the first wire transfer payment, noting that he had "agreed to send the second thousand if I was able to find any useful information. Certainly some of the information on the CDs will find a use." (PPC Ex. P-32 at 66).

At Trial, Edwards testified that he believed the CDs to be duplicates of each other and that they contained no new or relevant information. (HIL Adv. Dkt. 341 at 157). Nevertheless, he admitted that he wired Meehan money but only "out of just appreciation." (HIL Adv. Dkt. 341 at 207). Dr. Edwards gave one of the CDs to the FBI and kept the other. (HIL Adv. Dkt. 341 at 208-09; PPC Ex. P-34).

Y. Extension of 11 U.S.C. § 546 Deadline

On October 27, 2014, the Trustee filed in the Bankruptcy Case the Trustee's Motion to Extend 11 U.S.C. § 546 Deadline (the "Motion to Extend") (Bankr. Dkt. 848). On November 13, 2014, the Court entered the Order Granting Trustee's Motion to Extend 11 U.S.C. § 546 Deadline [Dkt. #848] (Bankr. Dkt. 877), enlarging the one-year limitations period in 11 U.S.C. § 546 to January 21, 2016.

Z. Dr. Edwards' Plans to Travel to Costa Rica

Between November 12 and 19, 2014, Dr. Edwards and Meehan began discussing, through emails, Dr. Edwards' plans to visit Costa Rica from December 3 to December 9, 2014. (PPC Ex. P-32). He also planned a telephone interview with Daniel Romero ("Romero"), Meehan's attorney. On November 28, 2014, Dr. Edwards asked Meehan to arrange a meeting with Martinez, Dickson's former attorney, to "enlist his help in reclaiming stolen assets." (PPC Ex. P-32 at 51-52). Dr. Edwards also asked Meehan, "Can you get a list of the mortgages and other investments that attorney Jose Martinez prepared for Dickson? Is he still willing to help us reclaim stolen funds or is he backing off?" Dr.

Edwards then stated, "If he is still on our side I would like to set up a meeting with him between December 6 evening to Dec 8 AM." (PPC Ex. P-32 at 42).

AA. Cash Collateral Objection & Trustee's Cash Motion

On December 3, 2014, EFP/BHT filed the Cash Collateral Objection, objecting to the Trustee's use of their alleged cash collateral and asserting that the collections by the Trustee and ClearSpring on the Home Improvement Loans and the Mortgage Portfolios belonged to them. They expressed concerns over the demands for payment of administrative expenses and sought an order prohibiting the Trustee from using any of the cash generated by collections on either the Home Improvement Loans or the Mortgage Portfolios.

On December 22, 2014, the Trustee filed the Response to Cash Collateral Objection, stating that the relief requested by EFP/BHT exceeded the relief afforded under 11 U.S.C. § 363 and that EFP/BHT's interest in the cash was adequately protected. The Trustee incorporated by reference the authorities and arguments presented in the Trustee's Cash Motion filed on December 5, 2014, shortly after the filing of the Cash Collateral Objection.

In the Trustee's Cash Motion, the Trustee sought permission from the Court, to the extent required, to use cash to maintain the operations of CHFS in the ordinary course of business until the confirmation of a plan of liquidation. The Trustee explained that until the filing of the Cash Collateral Objection, EFP/BHT had agreed to the use of cash to operate the business, first by CHFS and then by the Trustee.

The Trustee asserted that the interests of EFP/BHT were adequately protected by: (a) repatriation of approximately $4.9 million wrongfully removed from the estate and the

Trustee's ongoing efforts to repatriate additional funds; (b) the monthly accumulation of cash through the servicing of loans by ClearSpring; (c) numerous orders preserving the rights, claims, and defenses of EFP/BHT regarding estate assets; (d) estate funds being safeguarded in the Trustee's accounts subject to her sole access; and (e) the monthly operating reports, which are current and accessible, pursuant to an agreed order, to ClearSpring's reports. The Trustee expressed her willingness to remit monthly payments to EFP/BHT, provided that sufficient funds remained in the estate to meet its obligations.

The Trustee disputed EFP/BHT's assertion that the cash generated from the Home Improvement Loans belonged to them. Also, she pointed out that 11 U.S.C. § 363 permits the Court to order the use of cash irrespective of a putative secured creditor's lack of consent. The Trustee also disputed EFP/BHT's assertion that they own the Mortgage Portfolios because no adjudication had been made to that point. Certain of the transactions were not governed by a written agreement, and complicated issues existed as to which law applied to fill in the gaps, according to the Trustee. Moreover, some of the alleged Mortgage Portfolios are titled in the name of CHFS.

The Trustee characterized EFP/BHT's request for relief as an attempt to "strangle" the estate and prevent her from exercising her statutory duties. (Bankr. Dkt. 906 at 8). For example, without the use of cash, the Trustee could not: (1) maintain corporate good standing in states that require payment of franchise fees and annual fees as a condition precedent to foreclosing loans or suing to collect indebtedness; (2) pay the monthly charge for remote access to CHFS's computer servers in Panama necessary to service loans that have not been boarded with ClearSpring; (3) refund amounts to borrowers improperly assessed by CHFS in violation of federal statutes; (4) pay recording fees to cancel

mortgages that have been paid in full; (5) pay U.S. Trustee fees; and (6) pay appropriate state and federal taxes. (Bankr. Dkt. 906 at 9). To the extent required, the Trustee requested permission to use cash for ordinary expenses of the estate *nunc pro tunc* to January 16, 2014, the date the Court approved her appointment.

In the Response to Trustee's Cash Motion, EFP/BHT alleged that the overwhelming majority of the cash collected was either their cash collateral or cash in which the estate held no interest. In support of their position, they pointed to the criminal conduct of Dickson in taking the post-petition collections and diverting them to accounts in Latin America. If the cash collected belonged to CHFS, they reasoned, "Dickson would not have needed to resort to self-help." (Bankr. Dkt. 919 at 1). They claimed that the Home Improvement Loans Adversary placed a "choke hold" on their ability to obtain relief from the automatic stay and realize on their collateral. They asked the Court to prohibit any use of their cash collateral until resolution of the Home Improvement Loans Adversary. In the Reply to Response to Trustee's Cash Motion, the Trustee claimed that EFP/BHT did not oppose the order holding in abeyance the Home Improvement Loans Adversary and did not request that the Court lift the hold. The Trustee interposed a procedural objection in that "EFP/BHT should not be permitted to obtain factual findings on the Joint Venture Loans in a contested matter that could arguably have preclusive effect in the Adversary Proceeding relating to the Joint Venture Loans." (Bankr. Dkt. 926 at 4 n.7).

BB. Dr. Edwards' Trip to Costa Rica

Dr. Edwards traveled to Costa Rica on December 3, 2014. (HIL Adv. Dkt. 341 at 157). While there, he met with Meehan as they had planned. On December 10, 2014, Dr. Edwards notified Meehan by email that he had wired $1,000 to his account so that Meehan

"will be able to accomplish 3 things ASAP." (PPC Ex. P-32 at 64). Among them, Dr. Edwards asked Meehan to "[d]ownload to CD information in hard drive of one container computer and one call center computers." (PPC Ex. P-32 at 64). In an email from Dr. Edwards dated December 27, 2014, he asked Meehan, "I have not received the downloads from the two computers we found in your office. Do you have them?" (PPC Ex. P-32 at 62).

In a letter dated February 4, 2015, the Trustee informed Borg and McCarley that ClearSpring "ha[d] been trying to locate documents on certain loan files in order to pursue collections, respond to borrower Qualified Written Requests under RESPA,[32] analyze modification requests, and respond to inquiries by borrowers or governmental agencies." (PPC Ex. P-15). The Trustee reminded Borg and McCarley that their compliance with this request was required pursuant to the order that approved ClearSpring as the loan servicer (Bankr. Dkt. 702; PPC Ex. 16). Neither Dr. Edwards nor Borg notified the Trustee of the CHFS information they had obtained from Meehan. (HIL Adv. Dkt. 341 at 41).

In emails between February 6 and 9, 2015, Dr. Edwards asked about the assets seized by the Costa Rican government from Dickson. In an email to Meehan's attorney on February 13, 2015, Dr. Edwards asked whether any seized assets would be "paid over to the victims (my companies), the FBI or to whom?" (PPC Ex. P-32 at 68).

According to Dr. Edwards, the only information he ultimately received from Meehan were some computer records of the Home Improvement Loans and the other EFP/BHT portfolios that Meehan copied onto CDs. Dr. Edwards testified that he believed the information on the CDs were duplicative of records already in the Trustee's possession.

[32] Real Estate Settlement Procedures Act of 1974, 12 U.S.C. § 2601 *et seq*.

Thus, Dr. Edwards supposedly believed he had no useful information to turn over to the Trustee. (HIL Adv. Dkt. 341 at 157-58). Dr. Edwards testified that despite his efforts, he was unable to collect any money from any source in Costa Rica or Panama. (HIL Adv. Dkt. 341 at 158).

According to the Trustee, as a result of Dr. Edwards' contact with Meehan from September of 2014 to February of 2015, Dr. Edwards had knowledge of approximately 2,000 loans, at least two bank accounts in CHFS's name (one with Banco de Costa Rica and the other with Banco Panameño), over $1.5 million in loans purchased in Costa Rica with funds stolen from the estate, and the names of two CHFS affiliates (Pirrana SA and Mary Madison Foundation), all of which she was previously unaware.

CC. Trustee & Meehan

Meehan attempted to contact the Trustee for the first time on February 17, 2015. (HIL Adv. Dkt. 341 at 30-31). But for Meehan contacting the Trustee directly, she would not have known the location of CHFS's computers in Costa Rica or other information regarding the financial affairs as well as books and records of CHFS's operations there, all of which Dr. Edwards knew five months earlier. In February or March of 2015, Meehan gave the Trustee a CD, which was another copy of the hard drive of Reshonda Rhodes' computer. (HIL Adv. Dkt. 341 at 40; PPC Ex. P-34).[33] The CD contained borrower information, information about Costa Rican loans, and forms that changed automatic draft deposits into Victory Consulting's account at Wells Fargo. (HIL Ex. D-38). There was also information about the Mary Madison Foundation, a foreign company formed by Dickson after the Trustee's appointment. The CD also contained information about Costa

[33] After Trial, the Court became aware that the CD admitted as "PPC Ex. P-34" contained a computer virus.

Rican and Panamanian bank accounts. (HIL Adv. Dkt. 341 at 42). The Trustee learned that from September of 2014 to March of 2015, the Costa Rican government seized from those accounts and affiliated accounts of Dickson $587,749.95 as part of its criminal investigation. (HIL Adv. Dkt. 341 at 42). The Trustee testified at Trial that she incurred increased attorney's fees of $61,000 and increased servicing costs as a result of not having this information earlier. (HIL Adv. Dkt. 341 at 43-44).

In the Trustee's Supplemental Response to Cash Collateral Objection filed on April 7, 2015, the Trustee alleged that EFP/BHT, by and through Dr. Edwards, had violated the automatic stay by exercising possession and control over property of the estate located in Costa Rica. The Trustee indicated that she would shortly file pleadings seeking an adjudication as to whether EFP/BHT should be stripped of its rights to the cash as the result of Dr. Edwards' conduct. Likewise, in the Supplemental Reply to Response to Trustee's Cash Motion filed on April 7, 2015, the Trustee reiterated that EFP/BHT, by and through Dr. Edwards, had violated the automatic stay by exercising possession and control over property of the estate located in Costa Rica. The Trustee again indicated that she would shortly file pleadings seeking an adjudication as to whether EFP/BHT should be stripped of its rights to the cash as the result of Dr. Edwards' conduct. (HIL Adv. Dkt. 341 at 42).

DD. Trustee's Initiation of RICO Case

On April 7, 2015, the Trustee initiated a civil action in District Court against EFP, BHT, Dr. Edwards, Borg, and James R. Edwards in *Johnson v. Edwards Family P'ship, LP*, Case No. 3:15-cv-00260-CWR-LRA (S.D. Miss. 2015) (the "RICO Case"). The Trustee alleged nine (9) counts in the complaint (the "RICO Complaint"), including: damages under the Racketeer Influenced and Corrupt Organization Act ("RICO"), 18

U.S.C. § 1962(c) (the "RICO Claim"), declaratory judgment and damages for violations of the automatic stay under 11 U.S.C. § 362(a), (k); equitable subordination of the claims of EFP/BHT to the rights of all of CHFS's creditors except Dickson, pursuant to 11 U.S.C. § 510(c); turnover of property pursuant to 11 U.S.C. § 542(a); unauthorized post-petition transactions under 11 U.S.C. § 549; re-characterization of EFP/BHT's claims as equity; tortious interference with contract; civil conspiracy; and conversion. (Case No. 3:15-cv-00260-CWR-LRH, Dkt. 1).

EE. Trustee's Withdrawal Motions

In early April, 2015, the Trustee filed five (5) motions in the Bankruptcy Case and related adversary proceedings, asking the District Court to withdraw the reference to the Bankruptcy Court of the entire Bankruptcy Case or, alternatively, to withdraw certain adversary proceedings and contested matters, pursuant to 28 U.S.C. § 157(d) and to consolidate them with other pending District Court cases, pursuant to FED. R. CIV. P. 42(a), into two (2) new parallel District Court cases (the "Withdrawal Motions") (Bankr. Dkt. 1026; HIL Adv. Dkt. 156; Adv. Proc. 12-00109-NPO, Dkt. 77; MPF Adv. Dkt. 26; Dickson Adv. Dkt. 90; PPC Adv. Dkt. 6). The filing of the Withdrawal Motions initiated five (5) new District Court actions: Case No. 3:15-cv-00312-CWR-LRA; Case No. 3:15-cv-00313-CWR-LRA; Case No. 3:15-cv-00314-CWR-LRA; Case No. 3:15-cv-00315-CWR-LRA; and Case No. 3:15-cv-00316-CWR-LRA. Specifically, the Trustee asked the District Court either to withdraw the reference of the entire Bankruptcy Case or alternatively to withdraw the reference of the following adversary proceedings and contested matters:

a. Home Improvement Loans Adversary;
b. Mortgage Portfolios Adversary;
c. Adversary Proceeding 12-00109-NPO;
d. Dickson Adversary Proceeding;
e. Cash Collateral Objection & related contested matters;
f. POC 4-1 through 9-1; and
g. POC 10-1.

The Trustee then asked the District Court to consolidate all of these matters into two (2) federal court actions, one of which would include:

a. Dickson Guaranty Suit;
b. RICO Case;
c. Home Improvement Loans Adversary
d. Mortgage Portfolios Adversary;
e. Adversary Proceeding 12-00109-NPO;
f. Cash Collateral Objection & related contested matters; and
g. POC 4-1 through 9-1.

The second federal court action would include:

a. Edwards TRO Case and
b. Dickson Adversary Proceeding.

FF. RICO Case

On April 14, 2015, the Trustee filed a motion to consolidate the RICO Case with the Dickson Guaranty Suit. (Case No. 3:15-cv-00260-CWR-LRA, Dkt. 5). On May 22, 2015, EFP/BHT, Dr. Edwards, Borg, and James Edwards filed a motion challenging the legal sufficiency of the allegations of the RICO Complaint. (*Id.*, Dkt. 19). On July 15, 2015, the District Court entered an order denying, without prejudice, all relief requested by the parties. (*Id.*, Dkt. 27). In the order, the District Court questioned whether the RICO Claim was properly supported and suggested that the remaining counts of the RICO Complaint would best be heard in the Bankruptcy Court. The District Court, "[a]ssuming without deciding that the current complaint is defective," granted the Trustee leave to amend the RICO Complaint on the basis that "an amended complaint would likely have a

better chance of surviving the motion to dismiss standard." The District Court, however, stayed the filing of an amended complaint until the parties had an opportunity to meet with the Magistrate Judge to arrive at a timeline for litigation.

After a status conference with the Magistrate Judge, the Trustee agreed to dismiss the RICO count without prejudice to facilitate mediation. (*Id.*, Dkt. 28). Mediation proved to be unsuccessful, and by an agreed order entered on December 10, 2015, the District Court referred the action to this Court pursuant to 28 U.S.C. § 157(a), where the RICO Case became the Post-Petition Conduct Adversary. (Case No. 3:15-cv-00260-CWR-LRA, Dkt. 30). In the same agreed order referring the action to this Court, the District Court instructed the Trustee to amend the RICO Complaint by February 15, 2016.

In early May of 2015, the Trustee, prompted by the information provided by Meehan, met with Dickson's criminal counsel in Costa Rica to investigate the affairs of Dickson and his affiliated companies, to talk to witnesses, and to search for documents. (HIL Adv. Dkt. 341 at 10 & 22). The Trustee found some documents in garbage bags thrown in the back room of an abandoned bar. (HIL Adv. Dkt. 341 at 10). The Trustee arranged for the shipment of those documents, in twenty (20) boxes, to her office in Jackson, Mississippi.

GG. Terminating the Stays

The District Court denied the Withdrawal Motions. (HIL Adv. Dkt. 176; MPF Adv. Dkt. 35). Thereafter, the Court *sua sponte* terminated the stay of the Home Improvement Loans Adversary on July 28, 2015 (HIL Adv. Dkt. 187) and on December 3, 2015, granted the Trustee's motions to terminate the stays of the Mortgage Portfolios Adversary (MPF

Adv. Dkt. 41) and adversary proceeding 12-00109-NPO (Adv. Proc. 12-00109-NPO, Dkt. 92).

HH. Restitution Order

On September 10, 2015, Dickson pled guilty to two counts of bankruptcy fraud in violation of 18 U.S.C. § 152(2), (5). *See United States v. Dickson*, Case No. 3:14-cr-00078-TSL-FKB, Dkt. 44. As part of the plea agreement, Dickson was informed that the District Court could order forfeiture and/or restitution.

On May 31, 2016, the District Court entered a Second Amended Final Order of Forfeiture (the "Forfeiture Order") (Case No. 3:14-cr-00078-TSL-FKB, Dkt. 79; PPC Ex. P-36), ordering Dickson to forfeit the $587,749.95 seized by the Costa Rican government from Dickson, the condominium in Costa Rica, and the $9,095,000 money judgment, less the liquidation of the condominium, the $587,749.95, the value of all loans purchased in Costa Rica and/or Panama with the corpus of the $9,095,000, and the total amount of money repatriated to the custody of the Trustee. The Trustee attempted to negotiate an amount of restitution with Dickson's criminal counsel but had little success. (Adv. Dkt. 341 at 56).

On September 13, 2016, Dickson reached an agreement with the government in which Dickson agreed to pay the bankruptcy estate restitution in the amount of $5,442,004.58 (the "Restitution Order"). (Case No. 3:14-cr-00078-TSL-FKB, Dkt. 83; HIL Ex. D-48; MPF Ex. D-53; PPC Ex. P-37). Exhibits introduced into evidence at the restitution hearing indicate how the government calculated the restitution amount. (HIL Ex. D-43; MPF Ex. D-48). The chart below reflects the losses to the bankruptcy estate, as presented by the government at the restitution hearing:

Losses to the Bankruptcy Estate	
Wire Transfers	$9,095,000.00
Funds Diverted to Victory Consulting's Wells Fargo Account	$1,345,462.46
CHFS Checks Deposited to OmniBank Account	$196,973.24
Uncollected Loan Payments from Nov. 2013 to Apr. 2014	$1,508,406.66
Total	$12,145,842.36

(HIL Ex. D-43; MPF Ex. D-48). The Trustee explained that the $9,095,000 loss attributed to the wire transfers referred to the post-petition transfers that occurred from November 5, 2013, to January 7, 2014. (HIL Adv. Dkt. 341 at 57). The $1,345,462.46 loss consisted of automatic draft or electronic deposits diverted into the Victory Consulting's Wells Fargo account. (HIL Adv. Dkt. 341 at 57-58). The $196,973.24 loss represented checks made payable to CHFS that Dickson endorsed and deposited into an OmniBank account. (HIL Adv. Dkt. 341 at 59). Finally, the Trustee calculated $1,508,406.66 in "lost" loan payments from November of 2013 to April of 2014, based on a two-year average of electronic deposits into CHFS's accounts. (HIL Adv. Dkt. 341 at 59-60).

The Trustee disagreed with the total loss as calculated by the government. (HIL Adv. Dkt. 341 at 61-63), largely because it did not include losses sustained by the bankruptcy estate but for Dickson's criminal conduct, such as "Penalties Associated with Application of Time Deposits Prior to Maturity" or "Trustee's Fees, Legal Fees and Expenses of Estate Professionals and ClearSpring Loan Service Charges in Excess of CHFS Servicing Charges." (HIL Ex. D-43; MPF Ex. D-48). According to the Trustee, the government removed those items from the categories of losses because counsel for Dickson indicated that the amounts were being disputed in this Court. (HIL Adv. Dkt. 341 at 63).

Against the total losses to the bankruptcy estate, the government credited the following amounts recovered and/or intercepted by the Trustee:

Credits to the Bankruptcy Estate	
BancorpSouth Check	$300,000.00
OmniBank Check	$250,000.00
Funds from Panama	$5,898,278.29
Costal Condos Sale	$144,191.90
Willow Court Sale	$111,367.59
Total	$6,703,837.78

(HIL Ex. D-43; MPF Ex. D-48). The first two credits represent the checks intercepted by the Trustee from BancorpSouth in the amount of $300,000 and from OmniBank in the amount of $240,000. (HIL Adv. Dkt. 341 at 61). The Trustee testified that the $250,000 amount shown in the chart for the OmniBank check is incorrect and should be $240,000. (HIL Adv. Dkt. 341 at 61). The $5,898,278.29 credit represents the total funds sent the Trustee from different accounts at Banco Panameño belonging to CHFS and Dickson. (HIL Adv. Dkt. 341 at 61). The two remaining credits represent proceeds from the sale of condominiums and Willow Court, which Dickson asked to be included in the restitution calculation. (HIL Adv. Dkt. 341 at 62). The difference between the total losses and total credits, as calculated by the government, is $5,442,004.58.[34] Later, Dickson was sentenced to serve fifty-seven (57)-months in a federal correctional facility. (HIL Ex. D-49; MPF Ex. D-54; PPC Ex. P-38). Dickson is currently serving the remainder of his sentence in a halfway house in Maryland.

II. HIL Third Amended Complaint

On December 9, 2015, the Court dismissed the HIL Second Amended Complaint filed by CHFS and Dickson without prejudice, subject to the Trustee filing an amended complaint by January 21, 2016, as to claims asserted solely by the estate. (HIL Adv. Dkt.

[34] $12,145,842.36 (Total Losses) - $6,703,837.78 (Total Credits) = $5,442,004.58. (HIL Ex. D-43; MPF Ex. D-48).

227). In the same order, all personal claims asserted by Dickson were dismissed without prejudice. (*Id.*). The Trustee filed the HIL Third Amended Complaint on January 15, 2016.

The Trustee pleads causes of action under six (6) counts in the HIL Third Amended Complaint. In general, the Trustee asks the Court to: (1) avoid any interest EFP/BHT assert in the Home Improvement Loans because of the alleged defects in the underlying loan documents; (2) disallow POC 4-1 and POC 5-1 because of the alleged defects in the underlying documents purporting to grant EFP/BHT an interest in the Home Improvement Loans; and (3) if POC 4-1 and POC 5-1 are allowed, determine the amount of the claims following an accounting. More specifically, as to each count in the HIL Third Amended Complaint, the Trustee seeks a declaratory judgment that:

> Count I: The Rainbow Loan Agreement, the 2006 Note, and/or the Custodial Agreement are void *ab initio*.
>
> Count II: The 2010 Assignment by Beher Limited is invalid, and, therefore, any claims by EFP/BHT are similarly invalid.
>
> Count III: The EFP Note and the BHT Note are fraudulent, and, therefore, any claims by EFP/BHT are invalid.
>
> Count IV: The Custodial Agreement was never validly assigned to Beher Limited, or validly assigned later to BHT, and as a result, EFP/BHT do not have a perfected security interest.
>
> Count V: EFP/BHT do not have any security interest in the nearly $6 million turned over to the Trustee or in any other monies from sources other than CHFS borrowers.
>
> Count VI: POC 4-1 and POC 5-1 are duplicative and declare the respective amounts owed to EFP/BHT under POC 4-1 and POC 5-1, pursuant to a complete and itemized accounting.

(HIL Adv. Dkt. 237 at 30-38).

JJ. Post-Petition Conduct Adversary

On February 12, 2016, the Trustee filed the PPC Amended Complaint against EFP/BHT and Dr. Edwards, alleging: violations of the automatic stay under 11 U.S.C. §§ 105(a), 362(a), (k); turnover of all estate property to the Trustee under 11 U.S.C. § 542(a); reverting all improper post-petition transfers to the Trustee under 11 U.S.C. § 549; civil conspiracy; conversion of estate property; and equitable subordination. (PPC Adv. Dkt. 48). The PPC Amended Complaint did not name Dr. Edwards' adult children, James Edwards and Borg, as defendants and did not include a RICO claim.

In the Post-Petition Conduct Adversary, the Trustee seeks a declaratory judgment that the actions of Dr. Edwards, imputed to EFP/BHT, including the receipt, concealment, and withholding of loans and/or recorded information belonging to the estate, constituted a willful violation of the stay for which the Trustee seeks appropriate damages and/or sanctions against Dr. Edwards, EFP/BHT, jointly and severally, including all costs and attorneys' fees associated with this matter. The Trustee estimates that the estate has been damaged in additional servicing costs in excess of $10,000 that could have been avoided had Dr. Edwards promptly notified her of his contact with Meehan or turned over the information in his possession. (PPC Adv. Dkt. 115 at 27). Moreover, the Trustee contends that Dr. Edwards' conduct deprived her of the opportunity to obtain $587,749.95 subsequently seized by the Costa Rican government in connection with its investigation of Dickson's affairs in that country. The Trustee claims she lost a window of opportunity to obtain CHFS funds prior to the freezing of the assets by the Costa Rican government and has incurred and will incur legal fees and expenses in attempting to retrieve those assets from a foreign government. Additionally, the Trustee alleges that Dr. Edwards instructed

Meehan not to pay a promissory note, and, as a result, the estate was damaged in the amount of $50,000. According to the Trustee, the estate has incurred legal fees and expenses attributable to Dr. Edwards' conduct in excess of $61,458.25[35] through July 31, 2017, and will incur additional legal fees and expenses from August 1, 2017, through trial.

KK. Bankruptcy Court's Consolidation Orders

On February 1, 2017, the Bankruptcy Case and all related adversary proceedings were reassigned to the above-signed bankruptcy judge. (Bankr. Dkt. 1609). On February 15, 2017, a status conference was held on all pending matters in the Bankruptcy Case and all related adversary proceedings. (Bankr. Dkt. 1612). As a result of the status conference, the Court issued the Order: (1) Severing and Consolidating Claims and (2) Scheduling Discovery and Other Pretrial Matters (the "MPF Consolidation Order") (MPF Adv. Dkt. 55; Adv. Proc. 12-00109-NPO, Dkt. 111), severing and consolidating the claims asserted by the Trustee in Adversary Proceeding 12-00109-NPO with those claims alleged by the Trustee in the Mortgage Portfolios Adversary and similarly severing and consolidating the claims asserted by Dickson in the Mortgage Portfolios Adversary with those claims alleged by Dickson in adversary proceeding 12-00109-NPO. As a result of the MPF Consolidation Order, all claims asserted by Dickson were severed and consolidated into Adversary Proceeding 12-00109-NPO. To effectuate the severance and consolidation of the claims, the Court ordered Dickson to amend the complaint filed in adversary proceeding 12-00109-NPO by March 6, 2017.

[35] This amount does not include the fees and expenses related to the RICO Case, which the Court disallowed on an interim basis, and those related to the Trustee's attempt to withdraw the reference to this Court, which the Court reduced by half on an interim basis. (Bankr. Dkt. 1787).

On March 2, 2017, the Court consolidated, for discovery, pretrial, and trial purposes, all claims asserted by the Trustee in the Home Improvement Loans Adversary and the Mortgage Portfolios Adversary against EFP/BHT, Dr. Edwards, James Edwards, and the Atkinson Trust, as well as the Contested Matters filed in the Bankruptcy Case (the "HIL & MPF Consolidation Order") (HIL Adv. Dkt. 285; MPF Adv. 57). The HIL & MPF Consolidation Order did not consolidate the claims asserted by the Trustee in the Mortgage Portfolios Adversary against DebtX.

To effectuate the consolidation of the claims, the Court found it necessary to advance the Home Improvement Loans Adversary and the Mortgage Portfolios Adversary to the same stage of preparedness for trial. To that end, the Court instructed the Trustee to file an amended complaint in the Mortgage Portfolios Adversary by March 6, 2017 and EFP/BHT to answer the HIL Third Amended Complaint by March 20, 2017.

LL. MPF Complaint

On March 6, 2017, the Trustee, consistent with the HIL & MPF Consolidation Order, filed the MPF Complaint, consolidating the claims and parties from adversary proceeding 12-00109-NPO and the Mortgage Portfolios Adversary. The relief sought by the Trustee in the Mortgage Portfolios Adversary relates to Portfolios #1-#7 and an eighth unwritten transaction involving the purchase through DebtX of the Atlanta Property (the "DebtX Matters").

The Trustee pleads causes of action under nine (9) counts in the MPF Complaint. As to Portfolios #1, #2, and #7 the Trustee contends that CHFS did not receive all distributions and reimbursements to which it was entitled to receive under MPF Agreement *I*, MPF Agreement *II*, MPF Agreement *III*, and Mississippi's version of the Uniform

Partnership Act, MISS. CODE ANN. § 79-13-1201 *et seq*. As to Portfolios #3, #4, #5, and #6, for which there are no written agreements, the Trustee contends that CHFS did not receive all distributions and reimbursements to which it was owed under the Uniform Partnership Act, MISS. CODE ANN. § 79-13-1201 *et seq*. Finally, as to the eighth transaction, the Trustee alleges that a joint venture or partnership exists between CHFS and the Atkinson Trust (the current owner) with CHFS owning a fifty percent (50%) share of the assets and obligations of the joint venture or partnership. The Trustee also alleges that DebtX was negligent by allowing one or more entities owned or purportedly controlled by Dr. Edwards to use CHFS's authority to submit a bid on the Atlanta Property. The Trustee seeks a declaratory judgment regarding the rights and obligations of the parties as to all of the transactions.

On March 20, 2017, EFP/BHT, Dr. Edwards, and James Edwards filed the MPF Answer & Counterclaim. They denied the relief requested by the Trustee and asserted numerous affirmative defenses, including statute of limitations and the doctrine of waiver or estoppel. (MPF Adv. Dkt. 70 at 2-3). In their counterclaim, EFP/BHT allege eight (8) counts. (MPF Adv. Dkt. 70 at 20-25). In general, EFP/BHT seek a judgment declaring that they are the owners of the notes and mortgages that comprise the Mortgage Portfolios, the Mortgage Portfolios are not property of the estate, and CHFS's only interest in the Mortgage Services are servicing fees of $20 or $15 and 25% of the net proceeds after the repayment of EFP/BHT's investment. EFP/BHT ask the Court to find that Portfolios #1-#6 are governed by MPF Agreement *I* and MPF Agreement *II*. EFP/BHT seek damages against the estate for CHFS's alleged breach of the Mortgage Portfolio agreements and its fiduciary duties. EFP/BHT seek damages to the extent the fees charged by ClearSpring

exceed the amount they agreed to pay CHFS. They seek a declaratory judgment that EFP/BHT are entitled to 65.7% of the $5,918,279 or $3,888,309.30 in stolen funds recovered by the Trustee. EFP/BHT arrive at 65.7% because they contend that the total amount of the Mortgage Portfolios, according to the monthly operating report of October 2013 (Bankr. Dkt. 416 at 6; HIL Ex. D-45; MPF Ex. D-50), was $5,943,913.37, and the total funds in all of CHFS's accounts were $9,059,191.49.[36] Finally, EFP/BHT seek a judgment requiring the Trustee to return any proceeds from the Mortgage Portfolios used to pay expenses of the estate.

DebtX filed its answer and counterclaim on March 20, 2017. (MPF Adv. Dkt. 66). DebtX denied all claims and allegations and sought damages against the Trustee for all expenses it incurred in connection with the Mortgage Portfolios Adversary based on an indemnification provision in the Investor Representation and the Purchaser Qualification Agreement signed by CHFS. On April 10, 2017, the Trustee filed the MPF Reply to Counterclaim, denying the relief sought by EFP/BHT.

MM. HIL Answer & Counterclaim

On March 20, 2017, EFP and BHT, "acting by and through its Trustee, Church Bay Trust Company, Ltd.," filed the HIL Answer & Counterclaim denying that the Trustee was entitled to any relief and asserted numerous affirmative defenses, including statute of limitations, waiver and/or estoppel, and lack of standing. (HIL Adv. Dkt. 289 at 2 & 17). In Count I of their counterclaim, EFP/BHT seek a declaratory judgment that their claims are secured with a first lien on all loans held by the McCarley Firm as custodian for the lender under the Rainbow Loan Agreement, as amended. (HIL Adv. Dkt. 289 at 21-22).

[36] The Court's calculation results in a percentage rate of 65.6%. ($5,943,913 ÷ $9,059,191.49 = 0.6561196.)

In Count II of their counterclaim, EFP/BHT seek a declaratory judgment that they are entitled to 34.3% of the funds recovered by the Trustee ($5,918,279) or $2,029,969.60 (34.3% of $5,918,279), representing the collections on the Home Improvement Loans. (HIL Adv. Dkt. 289 at 22-23). EFP/BHT arrive at 34.3% because they claim that the total amount of collections generated by the Home Improvement Loans, according to the monthly operating report of October 2013 (Bankr. Dkt. 416; HIL Ex. D-45; MPF Ex. D-50), were $3,115,278.12, and the total funds in all of CHFS's accounts were $9,059,191.49.[37] On April 10, 2017, the Trustee filed the HIL Reply to Counterclaim, denying the relief sought by EFP/BHT.

NN. Panamanian Counsel

The Trustee obtained permission to employ the law firm of Arias, Fabrega & Fabrega, *nunc pro tunc* to March 27, 2017, to represent her as special counsel in Panama. (Bankr. Dkt. 1847). Since then, the Trustee has initiated judicial proceedings in Panama to obtain bank records from Banco Panameño. (HIL Adv. Dkt. 341 at 27-28). Those proceedings remain pending.

OO. Adversary Proceeding 12-00109-NPO

Notwithstanding the MPF Consolidation Order, Dickson failed to file an amended complaint in Adversary Proceeding 12-00109-NPO by March 6, 2017. On May 5, 2017, DebtX filed the Motion to Dismiss All Claims Against the Debt Exchange, Inc. with Prejudice (Adv. Proc. 12-00109-NPO, Dkt. 118). The Court issued the Amended Order to Show Cause (Adv. Proc. 12-00109-NPO, Dkt. 125) (the "Show Cause Order") on June 9, 2017, requiring Dickson to show cause why adversary proceeding 12-00109-NPO should

[37] $3,115,278.12 ÷ $9,059,191.49 = .3438804.

not be dismissed because of his failure to comply with the MPF Consolidation Order. On June 12, 2017, the Court entered an order granting DebtX's motion, thereby dismissing with prejudice all claims alleged by Dickson against DebtX. (Adv. Proc. 12-00109-NPO, Dkt. 126). Dickson did not respond to the Show Cause Order or appear at the hearing. On July 19, 2017, the Court entered the Order Dismissing Adversary (Adv. Proc. 12-00109-NPO, Dkt. 129).

PP. Settlement & Dismissals in Mortgage Portfolios Adversary

On June 6, 2017, the Trustee filed a motion for authority to settle with DebtX. (MPF Adv. Dkt. 83). The next day, the Trustee filed a motion to dismiss James Edwards and the Atkinson Trust as defendants in the Mortgage Portfolios Adversary as well as certain claims against Dr. Edwards as they relate to the DebtX Matters. (MPF Adv. Dkt. 86). The Court granted both motions on July 5, 2017. (MPF Adv. Dkt. 96 & 97). As a result of these orders, the only remaining defendants in the Mortgage Portfolios Adversary are Dr. Edwards, EFP, EFP LLP, and BHT, the only counter-plaintiffs are EFP/BHT, and the only surviving counts in the MPF Complaint are counts I-VI.

QQ. Restoration Order

Pursuant to the HIL & MPF Consolidation Order, the trial of the Home Improvement Loans Adversary and the Mortgage Portfolios Adversary was set to begin on August 21, 2017. Without notifying the Trustee, Dr. Edwards initiated a proceeding in the Eastern Caribbean Supreme Court in the High Court of Justice (Commercial Division) Virgin Islands (the "BVI Court") on July 14, 2017, to have Beher Limited restored to the BVI Company Register under BCA § 218. (HIL Ex. P-27). Because Beher Limited was struck off the BVI Company Register on October 31, 2008, and remained struck off

continuously for a period longer than seven (7) years, it was dissolved by operation of BCA § 216 as of October 31, 2015. For that reason, a BVI court proceeding was necessary to restore Beher Limited. BCA § 218.

In support of the restoration, Dr. Edwards filed: (1) the Fixed Date Claim Form; (2) his affidavit and the affidavit of La Fleece Prince, a paralegal; (3) a certificate of urgency; and (4) numerous exhibits related to the incorporation of Beher Limited. (HIL Ex. P-27). In the Fixed Date Claim Form, Dr. Edwards alleged that he was unaware of the effect of the strike off in 2010. In his affidavit, Dr. Edwards alleged as grounds for the restoration the Trustee's claim in the Home Improvement Loans Adversary that the 2010 Assignment was invalid because of Beher Limited's dissolution. (HIL Ex. P-27). He maintained that the restoration order was necessary to moot this argument and informed the BVI Court that the proceeding was an urgent matter, given the fast approaching trial date of August 21, 2017.

On July 20, 2017, the BVI Court signed an order restoring Beher Limited to the BVI Company Register (the "Restoration Order") (HIL Ex. D-23). Consistent with the Restoration Order, the Registrar issued a Certificate of Restoration to the Register (HIL Ex. D-58) on August 4, 2017.

RR. Motion to Continue

On August 11, 2017, EFP/BHT filed the Motion to Continue Trial (the "Motion to Continue") (HIL Adv. Dkt. 314; MPF Adv. Dkt. 106), seeking a continuance of the trial date on the ground that Dr. Edwards had become ill and was not expected to recover from his illness until after the scheduled trial date. The Court granted the Motion to Continue

and reset the Trial to begin on October 30, 2017. (HIL Adv. Dkt. 318; MPF Adv. Dkt. 112).

SS. Motion to Prohibit Amendment

Before the Trial was continued, the parties submitted on August 9, 2017, a proposed Joint Pretrial Order for entry in the Mortgage Portfolios Adversary (the "MPF Proposed Pretrial Order") (MPF Adv. Dkt. 103-2) and in the Home Improvement Loans Adversary, in anticipation of the August 21, 2017 trial date. In connection with the Motion to Continue, the parties asked the Court not to enter the proposed pretrial orders, and the Court set a new deadline of September 1, 2017, for resubmitting a joint pretrial order. (HIL Adv. Dkt. 318; MPF Adv. Dkt. 112). After reviewing the Trustee's portion of the MPF Proposed Pretrial Order and the Supplemental Expert Witness Report of Jeffrey N. Aucoin, CPA/CFF, CFE, CIA (the "Supplemental Report") (MPF Adv. Dkt. 103-1) produced by the Trustee on August 1, 2017, EFP/BHT filed the Motion to Prohibit Untimely Amendment of Complaint and to Strike Supplemental Expert Report of Jeffrey Aucoin (the "Motion to Prohibit Amendment") (MPF Adv. Dkt. 103), on August 9, 2017. In the MPF Proposed Pretrial Order, the Trustee contended that "[o]ne or more of the Joint Ventures are loans rather than true joint ventures." (MPF Adv. Dkt. 103-2 at 13). Under the heading, "Accounting and Tax Treatment of J[oint] V[enture] Loans," which was not part of the original expert report produced by the Trustee on July 5, 2017, Aucoin opined that CHFS's accounting for, and tax treatment of, the Mortgage Portfolios was consistent with its accounting for, and tax treatment of, the Home Improvement Loans. (MPF Adv. Dkt. 103-1 at 7). EFP/BHT alleged that the Trustee was attempting to amend the MPF Complaint

through the MPF Proposed Pretrial Order to interject a new legal theory at Trial that some or all of the transactions are traditional loans.

Although any issue arising out of the MPF Proposed Pretrial Order ordinarily would be rendered moot by the submission of a new order, the Court ruled on the merits of the Motion to Prohibit Amendment because EFP/BHT indicated their intent to raise this issue again. After a hearing, the Court denied the Motion to Prohibit Amendment, ruling that the Trustee's legal theory in the MPF Proposed Pretrial Order (that one or more of the transactions were loans) did not constitute a "back door" amendment of the MPF Complaint and further found that the Supplemental Report was not untimely produced. (MPF Adv. Dkt. 116). In addition, the Court found that the continuance of the trial date, at EFP/BHT's request, would ameliorate any alleged prejudice.

TT. Trial

The Trial took place on four consecutive days, October 30, October 31, November 1, November 2, and thereafter on November 27, 2017. On the third day of Trial, November 1, 2017, EFP/BHT and Dr. Edwards offered the testimony of William Richard Hare ("Hare") to show that Beher Limited was restored to the BVI Company Register on August 4, 2017. The Trustee objected to Hare's testimony because the restoration was not disclosed in Hare's expert report and, additionally, the Restoration Order was not produced to the Trustee until August 4, 2017, well after the discovery deadline and expert designation deadline had expired. (HIL Adv. Dkt. 341 at 15). EFP/BHT and Dr. Edwards argued that they did not receive a copy of the Restoration Order until August 1, 2017, and, therefore, the disclosure of the Restoration Order to the Trustee three days later, on August 4, 2017, was timely.

The Court found that Dr. Edwards controlled the timing of Beher Limited's restoration, and that his decision to wait until the eve of Trial on July 14, 2017, to initiate the proceedings unfairly prejudiced the Trustee. As the Court made clear during the Trial, the issue of timeliness was not when the Restoration Order was produced to the Trustee relative to when it was obtained by counsel for Dr. Edwards (a gap of three days) but when Dr. Edwards began the court proceedings in the British Virgin Islands that led to the entry of the Restoration Order. Compared to the date of these court proceedings, Dr. Edwards first became aware that Beher Limited was struck off the BVI Company Register eight years earlier. Further, Dr. Edwards knew that the validity of the transfers by BVI was an issue in the Home Improvement Loans Adversary four years earlier.[38] To cure the prejudice to the Trustee, the Court ordered Dr. Edwards to produce all documents related to the restoration and allowed the Trustee to reopen Dr. Edwards' deposition and supplement the report of the Trustee's expert in British Virgin Islands law, Kirk. The Court also continued and reset the Trial to November 27, 2017, so that the Trustee could present additional evidence regarding the restoration issue. Closing arguments were likewise delayed until November 27, 2017.

DISCUSSION

A. Home Improvement Loans Adversary

The gravamen of the Trustee's allegations in the HIL Third Amended Complaint are that the Rainbow Group, the entity that originated the loan and that is listed as the

[38] The Court noted that Dr. Edwards' decision to delay restoring Beher Limited to the BVI Company Register despite his belief that restoration would moot a substantial issue in the Home Improvement Loans Adversary was inconsistent with Dr. Edwards' repeated complaints about the amount of expenses incurred by the Trustee in litigating that issue. For example, the Trustee incurred the expense of retaining Jeffrey Albert Kirk ("Kirk") to opine on the effect of the strike off. (Bankr. Dkt. 1785).

secured beneficiary in the Custodial Agreement, is not a valid corporate entity with the capacity to contract under the law of the British Virgin Islands; the 2006 Note was assigned by Beher Limited in 2010 in violation of the law of the British Virgin Islands; the Rainbow Loan Agreement, the 2006 Note, and the Custodial Agreement are void *ab initio*; the EFP Note and BHT Note are fraudulent; and EFP/BHT are not the secured beneficiaries of the Custodial Agreement. At Trial, counsel for the Trustee announced that she had abandoned her allegation in the HIL Amended Complaint that the EFP Note and BHT Note are fraudulent.

In the HIL Answer & Counterclaim, EFP/BHT contend that the Trustee is barred by the doctrines of waiver and/or estoppel from challenging the validity of the Rainbow Loan Agreement, the 2006 Note, and the Custodial Agreement. EFP/BHT also assert that the Trustee's claims are barred by Mississippi's general three (3)-year statute of limitations. Finally, EFP/BHT seek a judgment declaring that their claims are secured by the Home Improvement Loans and that they are entitled to 34.3% of the funds recovered by the Trustee.

1. Choice of Law—Generally

In determining which law governs the issues in the Home Improvement Loans Adversary, the Court must decide first which choice-of-law rules control. It is well settled that a federal court sitting in diversity jurisdiction must apply the choice-of-law rules of the forum state in which it sits—here, Mississippi. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941). This Court, however, sits in federal question jurisdiction arising out of CHFS's filing of the Bankruptcy Case. The Fifth Circuit Court of Appeals has not ruled on whether bankruptcy courts should apply federal or state choice-of-law rules. *Tow*

12-01703-NPO Dkt 2182 Filed 02/27/13 Entered 02/27/13 16:37:37 Page 99 of 214

v. Rafizadeh (In re Cyrus II P'ship), 413 B.R. 609, 613 (Bankr. S.D. Tex. 2008). In the absence of compelling federal policy, bankruptcy courts generally apply state choice-of-law rules. *Id.* Because the Trustee seeks to avoid EFP/BHT's interest in the Home Improvement Loans under § 544, a cause of action rooted in federal bankruptcy law and policy, the Court applies federal choice-of-law rules.

Dr. Edwards lives in Maryland; Dickson is currently serving the remainder of his sentence at a halfway house in Maryland but before his arrest, resided in Mississippi; CHFS is a Delaware corporation with its principal place of business in Mississippi; the Rainbow Group and Beher Limited are purportedly British Virgin Islands companies; the McCarley Firm is a Mississippi law firm, EFP is a Delaware company; and BHT is a Bermuda trust. The Home Improvement Loans are secured by real property located in thirty (30) states in the United States. The original notes and mortgages underlying the Home Improvement Loans are located in Mississippi. Many of the relevant documents contain a contractual choice-of-law provision. These documents provide that the law of either Maryland, California, or Mississippi applies. Specifically, the Rainbow Loan Agreement is governed by the substantive laws of Maryland but requires the application of Mississippi and Maryland laws in determining the rights and remedies of a secured party under the Uniform Commercial Code (the "UCC"). The 2006 Note is governed by the substantive laws of Maryland. The Custodial Agreement is to be construed in accordance with the laws of California, but the parties agree to submit to personal jurisdiction in Mississippi in any court action or proceeding. The 2007 Note is governed by the substantive laws of Maryland. Both the BHT Note and the EFP Note apply the substantive laws of Maryland. Because the Trustee, as a hypothetical lien creditor, was not a signatory to any of the

12-01703-NPO Dkt 2182 Filed 02/27/18 Entered 02/27/18 16:51:37 Page 100 of 214

agreements or notes, these contractual choice-of-law provisions are not necessarily controlling. Instead, the Court must conduct a general choice-of-law inquiry.

The choice-of-law analysis is issue-based, so that the laws of different jurisdictions may govern different issues in the same proceeding. *See, e.g.*, *Cates v. Creamer*, 431 F.3d 456, 463 (5th Cir. 2005). In the Home Improvement Loans Adversary, the parties raise issues of corporate formation/dissolution and the secured status of EFP/BHT. The Court finds that the corporate formation/transfer issue as to the Rainbow Group and Beher Limited is governed by the law of the British Virgin Islands, whereas the perfection issue is governed by the version of the UCC enacted by Mississippi. The Court's application of Mississippi law is consistent with the choice of law made by the Fifth Circuit and the District Court in the Dickson Guaranty Suit. *Dickson*, 821 F.3d at 617 n.2; *Dickson*, 2014 WL 4494283, at *3. The differences in the laws of Mississippi and Maryland, the two states with the most significant relationship to the transactions and the parties, are minimal. *Schneider Nat'l Transp. v. Ford Motor Co.*, 280 F.3d 532, 536 (5th Cir. 2002) (recognizing that no choice-of-law analysis is necessary when the laws of the jurisdictions do not conflict).

Before separately addressing the five counts in the HIL Third Amended Complaint, the Court considers the affirmative defenses alleged by EFP/BHT that some or all of the Trustee's claims are barred by the doctrines of waiver and estoppel or by the statute of limitations. (HIL Adv. Dkt. 331 at 46-48). Because the Court rejects these arguments under provisions of the Bankruptcy Code, it is unnecessary for the Court to consider choice-of-law issues as to these preliminary matters.

2. Doctrines of Waiver and/or Estoppel

Dr. Edwards and EFP/BHT contend that because CHFS executed the BHT Note and EFP Note on August 10, 2010, and made payments on the BHT Note and EFP Note, the doctrines of waiver and/or estoppel bar the Trustee from asserting any claim: (1) that the Rainbow Loan Agreement, the 2006 Note, and the Custodial Agreement are invalid; or (2) that Beher Limited lacked legal authority to execute the 2010 Assignment to BHT. (HIL Adv. Dkt. 331 at 30-31). In effect, EFP/BHT contend that CHFS's execution in 2010 of the Amended Loan Agreements, the BHT Note, and the EFP Note cured any alleged deficiencies in the Rainbow Loan Agreement, the 2006 Note, and the Custodial Agreement. EFP/BHT rely on case authority holding that a party who has full knowledge of all defenses to a note waives those claims by renewing that note. (HIL Adv. Dkt. 331 at 30); *see Austin Dev. Co. v. Bank of Meridian*, 569 So. 2d 1209, 1212 (Miss. 1990); *Brickell v. First Nat'l Bank*, 373 So. 2d 1013, 1025 (Miss. 1979). EFP/BHT also cite case law holding that a creditor who has recognized the corporate existence of an association, by, for example, transacting business with the association as if it were a properly-formed corporation, is estopped from denying the corporate existence of the association with respect to any claim arising out of the creditor's dealings with that association. (HIL Adv. Dkt. 331 at 30); *see Cranson v. Int'l Bus. Machs. Corp.*, 200 A.2d 33, 39 (Md. Ct. App. 1964).

EFP/BHT base their defenses of waiver and estoppel on the assumption that the Trustee, in challenging the validity of the agreements with the Rainbow Group, has stepped into the shoes of CHFS. The Trustee, however, seeks to avoid the Home Improvement Loans under 11 U.S.C. § 544,[39] known as the "strong arm" clause. *See Gandy v. Gandy*

[39] All references are to the Bankruptcy Code found in title 11 of the United States Code, unless noted otherwise.

(In re Gandy), 299 F.3d 489, 495 (5th Cir. 2002). Under § 544(a), a trustee occupies the status of a hypothetical judicial lien creditor "without regard to any knowledge of the trustee or of any creditor." 11 U.S.C. § 544(a). Section 544(a) provides:

> (a) The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by—
>
> > (1) a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists[.]

11 U.S.C. § 544(a)(1). Section 544(a)(1) gives a trustee the status of a hypothetical judicial lien creditor who "extends credit to the debtor at the time of filing and, at that moment, obtains a judicial lien on all property in which the debtor has any interest that could be reached by a creditor." *Musso v. Ostashko*, 468 F.3d 99, 104 (2d Cir. 2006).

The term "knowledge" in § 544 refers to actual knowledge. *Wilson v. Parson (In re Jones)*, 77 B.R. 541, 545 (Bankr. N.D. Tex. 1987). Although the strong-arm rights and powers are conferred on a trustee by federal bankruptcy law, the extent of the trustee's rights and powers as a judicial lien creditor is governed by the substantive law of the state governing the property in question. *Gaudet v. Babin (In re Zedda)*, 103 F.3d 1195, 1201-02 (5th Cir. 1997); 5 COLLIER ON BANKRUPTCY ¶ 544.02[1] (16th ed. 2017). Thus, although actual knowledge is irrelevant under § 544, a trustee is still bound by other state-law limitations upon judgment lien status, including the effect of constructive notice. *Realty Portfolio, Inc. v. Hamilton (In re Hamilton)*, 125 F.3d 292, 299 (5th Cir. 1997).

Here, EFP/BHT rely on CHFS's actual knowledge to establish defenses of waiver and estoppel against the Trustee. The Trustee, however, became a "hypothetical judgment

lien creditor" after CHFS signed the EFP Note and BHT Note in 2010 and, under § 544, has the right to dispute a creditor's claim as such. Simply put, CHFS's knowledge cannot be imputed to the Trustee.

In *Boudreaux v. Dolphin Press Inc. (In re Dolphin Press Inc.)*, No. 99-60253, 1999 WL 800170 (5th Cir. Sept. 17, 1999), for example, the Fifth Circuit Court of Appeals affirmed the bankruptcy court's avoidance of a creditor's lien under § 544(a) where the creditor failed to file a financing statement in accordance with Mississippi law. The creditor argued that "actual knowledge of the contents of the financial statement" precluded any challenge to his secured status under § 544(a). *In re Dolphin Press*, 1999 WL 800170, at *1. The Fifth Circuit disagreed because a debtor's "actual knowledge" is irrelevant to the strong-arm avoidance powers. *Id.* As in *In re Dolphin Press*, EFP/BHT's claim that CHFS's actual knowledge bars the Trustee's claims under the doctrines of estoppel and waiver is misplaced.

3. Statute of Limitations

EFP/BHT and Dr. Edwards contend that the statute of limitations bars the Trustee from asserting claims: (1) that Beher Limited was struck from the BVI Company Register in 2008 and, therefore, Beher Limited lacked legal authority to execute the 2010 Assignment; or (2) that there was no valid assignment of the Custodial Agreement to EFP/BHT. (HIL Adv. Dkt. 331 at 31 & 33). According to EFP/BHT, these claims assert different conduct than those alleged in the HIL Original Complaint filed on August 24, 2012, and the Trustee first raised these claims in the HIL Third Amended Complaint filed on January 15, 2016. EFP/BHT maintain that because these new claims had not expired upon the filing of the Petition, the Trustee had the longer of the remaining statute of

limitations, MISS. CODE ANN. § 15-1-49, or two (2) years from the date of the Petition (May 23, 2014) to assert the claims. 11 U.S.C. § 108(a). More than two (2) years, however, had passed before the Trustee asserted these claims in the HIL Third Amended Complaint. *Robinson v. Gen. Motors Corp.*, 150 F. Supp. 2d 930, 932 (S.D. Miss. 2001); *Dawson v. Donahoe*, Case No. 3:14-cv-627-DPJ-FKB, 2015 WL 1636864, at *3, n.3 (S.D. Miss. Apr. 13, 2015).

In the HIL Third Amended Complaint, the Trustee seeks to avoid EFP/BHT's alleged security interest in the Home Improvement Loans. Pursuant to § 546, the Trustee is empowered to bring an avoidance action under § 544:

> (1) the later of—
>
> (A) 2 years after the entry of the order for relief; or
>
> (B) 1 year after the appointment or election of the first trustee under section 702, 1104, 1163, 120-2, or 1302 of this title if such appointment or such election occurs before the expiration of the period specified in subparagraph (A); or
>
> (2) the time the case is closed or dismissed.

11 U.S.C. § 546. The Trustee was appointed on January 21, 2014. (Bankr. Dkt. 473). On November 13, 2014, the Trustee filed the Motion to Extend, which the Court granted, enlarging "the one-year limitations period in 11 U.S.C. § 546 . . . to January 21, 2016." (Bankr. Dkt. 877); *see McFarland v. Leyh (In re Tex. Gen. Petroleum Corp.)*, 52 F.3d 1330, 1337-38 (5th Cir. 1995) (adopting majority view that § 546 is a statute of limitations as opposed to a jurisdictional bar). The HIL Third Amended Complaint was filed on January 15, 2016, before the extended deadline to bring an avoidance action under § 546. Thus, the Court finds that the Trustee's avoidance action is timely.

12-01703-NPO Dkt 2182 Filed 02/27/18 Entered 02/27/18 16:51:37 Page 105 of 214

Even if § 546 were inapplicable, the Court finds that the Trustee's claims against EFP/BHT are timely because the HIL Third Amended Complaint relates back to the HIL Second Amended Complaint filed on June 6, 2013, before EFP/BHT contend that the statute of limitations expired. The relation back of an amendment to a pleading is governed by Rule 15(c) of the Federal Rules of Civil Procedure ("Rule 15(c)"), as made applicable in adversary proceedings by Federal Rule of Bankruptcy Procedure 7015. Under Rule 15(c)(1)(B), "an amendment to a pleading relates back to the date of the original pleading when . . . the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading." FED. R. CIV. P. 15(c)(2). Under the doctrine of relation back, a complaint amended to add a new claim that arises out of the conduct, occurrence, or transaction alleged in a timely original complaint may be treated, for purposes of statute of limitations, as having been filed on the date of the original complaint. 6A CHARLES A. WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1497 (3d ed. 2010). The Court finds that the allegations in the HIL Third Amended Complaint arise out of the same conduct, transaction, and occurrence alleged in the HIL Second Amended Complaint. *See FDIC v. Bennett*, 898 F.2d 477, 480 (5th Cir. 1990) (holding that a complaint properly relates back, even when the theory of recovery is wholly different, when the factual situation upon which the action depends remains the same and has been brought to the defendant's attention by the original pleading).

Counts II and IV are not new allegations unrelated to the conduct described in the HIL Second Amended Complaint. Count II of the HIL Third Amended Complaint seeks to invalidate the 2010 Assignment because Beher Limited was struck from the BVI

12-01703-NPO Dkt 2182 Filed 02/27/18 Entered 02/27/18 16:51:37 Page 106 of 214

Company Register in 2008 and "did not have the authority to assign its alleged rights." (HIL Adv. Dkt. 237 at 31-32). Similarly, Count V of the HIL Second Amended Complaint sought to invalidate the 2010 Assignment as "void *ab initio* and/or that the 2010 Assignment is invalid as a matter of law for failure of consideration and/or is unenforceable because it arises out of an invalid contract." (HIL Adv. Dkt. 48 at 20). The HIL Second Amended Complaint also alleged that Beher Limited is a former lender "believed to be non-existent and/or defunct . . . ." (HIL Adv. Dkt. 48 at 9).

Count IV of the HIL Third Amended Complaint seeks a declaratory judgment that the Custodial Agreement was never validly assigned to Beher Limited or assigned later to BHT thereby avoiding any lien on the Home Improvement Loans. (HIL Adv. Dkt. 237 at 32-35). Similarly, paragraphs 31 through 43 of the HIL Second Amended Complaint include allegations which, if proven, would establish that EFP/BHT failed to obtain a perfected security interest in any collateral owned by CHFS. (HIL Adv. Dkt. 48 at 9-12).

The Court's findings that Counts II and IV of the HIL Third Amended Complaint relate back to the HIL Second Amended Complaint is consistent with the Fifth Circuit's holding that a plaintiff has the right "to correct a technical difficulty, state a new legal theory of relief, or amplify the facts alleged in the prior complaint" to relate back to the prior complaint. *FDIC v. Conner*, 20 F.3d 1376, 1386 (5th Cir. 1994).

In *Conner*, the FDIC filed suit against the former directors of a bank, alleging that they had engaged in various "unsafe, unsound, imprudent or unlawful acts and omissions . . . with respect to the management of the [b]ank." *Id.* at 1378. The FDIC filed a motion for leave to file an amended complaint. *Id.* The FDIC sought to include allegations that the defendants' wrongful conduct had caused the bank to suffer losses from

several loans that were not identified in the original complaint. The defendants opposed the amendment, arguing that allowing the amendment would be futile because the FDIC's claims, based on the newly challenged loans, would not relate back to the date of the original complaint and would be barred by the applicable statute of limitations. The Fifth Circuit disagreed, finding that the amended complaint would relate back to the date of the original complaint because the damage caused by the newly identified loans arose out of the same conduct as the damage caused by the twenty-one loans listed in the original complaint and because the additional sources of damages "were caused by the same pattern of conduct identified in the original complaint." *Id*. at 1386. "[O]nce litigation involving particular conduct or a given transaction or occurrence has been instituted, the parties are not entitled to the protection of the statute of limitations against the later assertion by amendment of defenses or claims that arise out of the same conduct, transaction, or occurrence as set forth in the original pleading." *Id.* at 1385 (citing 6A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1496, at 64 (1990)).

As in *Conner*, EFP/BHT cannot reasonably be surprised by the allegations in the HIL Third Amended Complaint. *See Flores v. Cameron Cty*., 92 F.3d 258, 273 (5th Cir. 1996) ("Notice is the critical element involved in Rule 15(c) determinations.") (quotation omitted). The Trustee's claims (that the 2010 Assignment is invalid and the Custodial Agreement was never validly assigned to Beher Limited or BHT) relate back to the HIL Second Amended Complaint, are deemed filed on June 6, 2013, and, therefore, are timely. *See* 6A CHARLES A. WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1497 (when complaint is dismissed without prejudice, amended

12-01703-NPO Dkt 2182 Filed 02/27/18 Entered 02/27/18 16:31:37 Page 108 of 214

pleading which amplifies factual allegations of new pleading or asserts new claims based on earlier factual allegations generally relates back to original pleading).

4. Count I (Legal Capacity of the Rainbow Group)

In Count I of the HIL Third Amended Complaint, the Trustee seeks a declaration that the Rainbow Loan Agreement, the 2006 Note, and the Custodial Agreement are void *ab initio* because: (1) the Rainbow Group lacked the requisite legal capacity to make any contract on September 25, 2006; (2) the agreements lacked the requisite number of competent parties to make a valid contract; (3) failure of mutual consent between two competent parties; and (4) Patsy Stecco ("Stecco"),[40] whose signature appears on the documents as president of "The Rainbow Group, Ltd.," but who has testified that she had never heard of that entity, was not its president and did not sign the documents. (HIL Adv. Dkt. 237 ¶¶ 6, 13, 52-61 & at 7 n.9). In the HIL Amended Pretrial Order, EFP/BHT contend that the use of "The" is a misnomer that does not affect the validity of the Rainbow Loan Agreement under Maryland law. *Curtis G. Testerman Co. v. Buck*, 667 A.2d 649, 652 (Md. Ct. App. 1995) (holding that use of "Inc." instead of "Company" was a misnomer that did not release corporation from contractual liability); (HIL Adv. Dkt. 331 at 30).

a. Choice of Law

It is a longstanding rule that the internal affairs of a corporation are governed by the law of the jurisdiction in which it was organized. *Atherton v. FDIC*, 519 U.S. 213, 224 (1997); *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 621 (1983). The internal affairs doctrine is a choice-of-law rule that recognizes that only one jurisdiction should have authority to regulate a corporation's internal affairs—matters

[40] Patsy Stecco is also known as Patsy Cambra de Brackett.

peculiar to the relationships between the corporation and its shareholders, directors, and officers—because otherwise a corporation could be faced with inconsistent rules regarding its internal governance procedures. Courts normally look to the jurisdiction of a business's incorporation for the law that provides the relevant corporate government general standard of care.

The issues arising out of the corporate existence of the Rainbow Group and its capacity to contract are governed by the jurisdiction of its incorporation, which is purportedly the British Virgin Islands. Thus, the Court concludes that the law of the British Virgin Islands applies to Count I. Despite EFP/BHT's citation of Maryland law in the HIL Amended Pretrial Order, all counsel and their experts at Trial relied solely on British Virgin Islands law with respect to Count I.

b. Are the Rainbow Loan Agreement, the 2006 Note, and the Custodial Agreement void *ab initio*?

In the HIL Third Amended Complaint, the Trustee challenges the corporate status of the Rainbow Group because of the absence of "The Rainbow Group, Ltd." from the BVI Company Register; the Rainbow Loan Term Sheet prepared by Dr. Edwards on the purportedly official letterhead of "The Rainbow Group, Ltd."; the numerous entities owned by Dr. Edwards and/or related parties that use some variation of "Rainbow Group" in their names; the deposition testimony of Stecco (the purported president of "The Rainbow Group, Ltd."), that she has never heard of that entity and was unaware of her alleged role in the alleged transaction; and Dr. Edwards' use of Stecco's uncle's post office box as the mailing address for "The Rainbow Group, Ltd." (HIL Adv. Dkt. 237 ¶¶ 6, 13, 52-61 & at 7 n.9). The Trustee does not deny that money was loaned to CHFS from some entity; only that the Rainbow Group, Beher Limited, BHT, and EFP are not that entity.

Stecco did not testify at Trial, her deposition testimony was not introduced into evidence (HIL Adv. Dkt. 341 at 13-14), and the Trustee's factual statement in the HIL Amended Pretrial Order does not mention Stecco (HIL Adv. Dkt. 331 at 9-12). With the Trustee's apparent abandonment of her allegations regarding Stecco's role in The Rainbow Group, Ltd., the Trustee's contention in the HIL Third Amended Complaint that the Rainbow Loan Agreement, the 2006 Note, and the Custodial Agreement are invalid was supported at Trial only by the undisputed fact that The Rainbow Group, Ltd. is not registered as a British Virgin Islands company. Although the Trustee did not identify this contention as a legal issue in the HIL Amended Pretrial Order (HIL Adv. Dkt. 331 at 46), EFP/BHT addressed it at length at Trial as if she had.

The principle governing statute on company law in the British Virgin Islands is the BVI Business Companies Act 2004 (the "BCA"). In interpreting foreign law, such as the BCA, this Court is bound by Federal Rule of Civil Procedure 44.1 ("Rule 44.1"), as made applicable by Federal Rule of Bankruptcy Procedure 9017. Rule 44.1 provides, in pertinent part:

> In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence.

FED. R. CIVIL P. 44.1. The advisory committee's note to Rule 44.1 explains:

> In further recognition of the peculiar nature of the issue of foreign law, the new rule provides that in determining this law the court is not limited by material presented by the parties; it may engage in its own research and consider any relevant material thus found.

FED. R. CIVIL P. 44.1 advisory committee's note. "Although expert testimony is the most common way to determine foreign law, it is no longer 'an invariable necessity in establishing foreign law, and indeed, federal judges may reject even the uncontradicted

conclusions of an expert witness and reach their own decisions on the basis of independent examination of foreign legal authorities.'" *Trans Chem. Ltd. v. China Nat'l Mach. Imp. & Exp. Corp.*, 978 F. Supp. 266, 275 (S.D. Tex. 1997) (quoting *Curtis v. Beatrice Foods Co.*, 481 F. Supp. 1274, 1285 (S.D.N.Y.), *aff'd mem.*, 633 F.2d 203 (2d Cir. 1980)). "In making its determination of foreign law the court may rely on foreign case law decisions, treatises, and learned articles, even if they are not generally admissible under the Federal Rules of Evidence." *Id.* at 275-76 (citation omitted).

(1.) British Virgin Islands Law

The British Virgin Islands is a dependent overseas territory of the United Kingdom. (HIL Adv. Dkt. 342 at 12-13 & 62). The local legislature and courts of the British Virgin Islands are independent from the United Kingdom, but the British government is responsible for its defense and security and for its international relations. Under The Common Law (Declaration of Application) Act (Cap 13), enacted in the 1700s, where there is no British Virgin Islands law, English law applies. (HIL Adv. Dkt. 342 at 62). As a result, English common law, although not binding, is highly persuasive and routinely relied upon by the BVI Court. (HIL Adv. Dkt. 342 at 13). The British Virgin Islands has developed an international financial center and comprehensive corporate laws, apart from the laws of the United Kingdom. As to certain financial and corporate matters, therefore, British Virgin Islands law would govern rather than English common law.

(2.) BCA

The BCA, which became effective on January 1, 2005, is the principal statute of the British Virgin Islands relating to British Virgin Islands company law, regulating both offshore companies and local companies. For a small fee, a licensed registered agent in

the British Virgin Islands may apply to the Registrar to incorporate a company under the BCA. BCA § 6(2). In determining whether to incorporate the company, the Registrar considers whether the name of the company complies with the BCA, which sets forth rules governing what expressions or designations a company name may include. BCA §§ 17-19. Section 26(1) of the BCA also requires that:

> [A] company . . . ensure that its full name . . . is clearly stated in
>
> (a) every written communication sent by, or on behalf of, the company; and
>
> (b) every document issued or signed by, or on behalf of, the company that evidences or creates a legal obligation of the company.

BCA § 26(1). Section 26(2) of the BCA provides that "[a] company that contravenes subsection (1) commits an offence and is liable on summary conviction to a fine of $1,000." BCA § 26(2). At Trial, the parties presented the testimony of Kirk and Hare, both of whom qualified as experts in British Virgin Islands law, to assist the Court in interpreting and applying the provisions of the BCA.

(3.) Kirk

The Trustee's expert, Kirk, is the managing partner of the Appleby law firm in the British Virgin Islands. (HIL Adv. Dkt. 342 at 6). Kirk attended the University of the Witwatersrand in Johannesburg, South Africa, where he obtained a baccalaureus procurationis degree, a four-year undergraduate law degree. (HIL Adv. Dkt. 32 at 5). Kirk was admitted to practice law in South Africa in 1998. He was admitted as a solicitor in Wales in 2003, as a solicitor and barrister in Bermuda in 2008, and as a solicitor in the British Virgin Islands in 2010. Since July of 2014, Kirk has been the managing partner at the British Virgin Islands office of the Appleby law firm where he practices primarily

British Virgin Islands law and Bermuda law. (HIL Adv. Dkt. 342 at 6-7). The Court accepted Kirk as an expert to testify about the corporate laws of the British Virgin Islands and Bermuda. Kirk was not offered as an expert in British Virgin Islands bankruptcy or insolvency law. (HIL Adv. Dkt. 342 at 9).

Kirk testified that he performed a search of the BVI Company Register for the name "The Rainbow Group, Ltd.," which is the name reflected on the Rainbow Loan Term Sheet, the Rainbow Loan Agreement, the 2006 Note, and the Custodial Agreement.[41] Kirk's search showed that no entity by that name had ever been registered in the British Virgin Islands. (HIL Adv. Dkt. 342 at 14-15). His search, however, did reveal that an entity by the nearly identical name "Rainbow Group, Ltd." had been registered. Kirk opined that if "Rainbow Group, Ltd." were the correct name of the company, then its use of the name, "The Rainbow Group, Ltd." violated BCA § 26(2), which requires British Virgin Islands companies to use the full name of the company on all correspondence and legal documents. (HIL Adv. Dkt. 342 at 15-16).

(4.) Hare

EFP/BHT's expert, Hare, is the managing partner of Forbes Hare, a law firm established in the British Virgin Islands in 2005. (HIL Adv. Dkt. 342 at 55). Hare holds an undergraduate degree in politics and economics from Newcastle University in England. (HIL Adv. Dkt. 342 at 54). Hare underwent the common law professional examination for non-law graduates and the bar vocational course at the Inns of Court School of Law in London. He holds a master's degree in law from University College London with a

[41] Kirk prepared a report dated July 3, 2017, and a supplemental report dated November 19, 2017, that were admitted at Trial as demonstrative exhibits. (HIL Exs. P-6 & P-28).

concentration in commercial law. Hare has practiced law since 1994. In 1999, he relocated to the Caribbean, and that same year, was admitted to the Bar of the Eastern Caribbean in the British Virgin Islands. He also has been admitted to practice law in Anguilla, St. Kitts and Nevis, and Grenada. Hare worked as a litigation barrister at the law firm of Harney Westwood & Riegels, before establishing Forbes Hare in 2005. His practice at Forbes Hare is primarily in the field of commercial litigation. Hare is familiar with the BCA, having contributed to its drafting. The Court accepted Hare as an expert to testify about the laws of the British Virgin Islands generally and the BCA specifically.[42] (HIL Adv. Dkt. 342 at 57). Hare was not offered as an expert in British Virgin Islands bankruptcy or insolvency law.

Hare testified that if confronted with the issue, the BVI Court would reject the Trustee's contention that the Rainbow Loan Agreement, the 2006 Note, and the Custodial Agreement are invalid and would construe the reference to "The Rainbow Group, Ltd." as a reference to "Rainbow Group, Ltd."[43] The BVI Court would consider whether there was any confusion about the true identity of the contracting party, and if not, the BVI Court would treat the mistake as a misnomer.

Hare opined, in the alternative, that the BVI Court would follow the precedent of courts in English common-law jurisdictions, and rectify the mistake. (HIL Adv. Dkt. 342 at 76). Hare did not believe rectification would be necessary under these facts where the only mistake in the company name was the addition of the article "The"; rather, the BVI

---

[42] The Court previously accepted Hare as an expert in the laws of Nevis in *Fogerty v. Condor Guar., Inc. (In re Condor Ins. Ltd.)*, Adv. Proc. 07-05049-NPO (Bankr. S.D. Miss. May 10, 2012). (HIL Adv. Dkt. 342 at 57).

[43] Hare prepared a report dated July 5, 2017, that was admitted at Trial as a demonstrative exhibit. (HIL Ex. D-28).

12-01703-NPO Dkt 2182 Filed 02/27/18 Entered 02/27/18 16:31:37 Page 115 of 214

Court would construe the documents using its correct name. If, however, the name "The Rainbow Group International Ltd." appeared in the documents and if that company did in fact exist, the BVI Court would rectify the documents to refer to the intended party. He did not view the mistaken inclusion of "The" in the name of the company as a violation of BCA § 26.

c. Analysis

At Trial, counsel for Dr. Edwards and EFP/BHT cited four cases in support of Hare's expert testimony: *Chartbrook Ltd v. Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101; *Derek Hodd Limited v. Climate Change Capital Limited* [2013] EWHC 1665 (Ch); *Liberty Mercian Limited v. Cuddy Civil Engineering Limited* [2013] EWHD 2688 (TCC); and *Staray Capital Limited v. Yang*, BVIHCMAP2013/0009. (HIL Adv. Dkt. 342 at 39-41. Of these four (4) cases, the Court finds that *Climate Change Capital* is the most analogous.

In *Climate Change Capital*, Derek Hodd Limited sued Climate Change Capital Limited ("CCC") to recover a contingency fee payable for consultancy services provided pursuant to a written agreement dated November 13, 2006 (the "2006 Agreement"). *Climate Change Capital*, [2013] EWHC 1665 at 3. Derek Hodd Limited, a company owned by Derek Hodd ("Hodd"), was not a party to the 2006 Agreement but sued CCC as the assignee of the 2006 Agreement from Zukra Limited, a company owned by Dominic Hollywood ("Hollywood").

CCC is the main subsidiary of Climate Change Holdings Limited and one of eighteen (18) such subsidiary companies. During the litigation, a question arose as to which of the CCC companies was a signatory to the 2006 Agreement. CCC denied having

entered into the 2006 Agreement. Hollywood, who prepared the letter of engagement (the "Letter of Engagement"), identified the client as "Climate Change Group Limited" rather than CCC, but Climate Change Group Limited was a dormant company. Hollywood explained that he chose Climate Change Group Limited after finding the name on the website of the CCC group of companies. The High Court of Justice, Chancery Division, described Hollywood's choice as "little more than a shot in the dark," *id.* at 34-35, and agreed with Hodd that the references in the Letter of Engagement to Climate Change Group Limited were obvious misnomers.

The High Court explained that there is a misnomer whenever a party knows to whom he wishes to refer but by mistake uses the wrong name. Because Hollywood never decided which company in the CCC group of companies was his client, his mistake was not one about the identity of a particular counterparty. Still, the High Court found that the parties intended that the chief operating company of the CCC group of companies, namely CCC, be the company contracting for consultancy services. "[O]nce the court has decided, as a matter of construction, that the parties intended the contracting party to be CCC, I can see no good reason why the error should not be corrected as a matter of construction." *Id.* at 50. The High Court found its conclusion supported by the failure of the CCC group to raise any issue about the identity of the contracting party until Hollywood first sought to enforce the 2006 Agreement. *Id.* at 46.

In the alternative, the High Court held that the 2006 Agreement should be rectified so as to replace the references to Climate Change Group Limited with references to CCC. *Id.* at 51. The High Court cited the basic requirements for rectification set forth by Lord

Hoffman in *Chartbrook Limited v. Persimmon Homes Limited* [2009] UKHL 38, [2009] 1 AC 1101, at [48], as follows:

> The party seeking rectification must show that: (1) the parties had a common continuing intention, whether or not amounting to an agreement, in respect of a particular matter in the instrument to be rectified; (2) there was an outward expression of accord; (3) the intention continued at the time of the execution of the instrument sought to be rectified; (4) by mistake, the instrument did not reflect that common intention.

Chartbrook at 48. The High Court also cited Lord Hoffman regarding the admissibility and relevancy of prior negotiations in considering a rectification claim:

> The party seeking rectification must show that he indeed made the relevant mistake when he entered into the contract. Rectification is an equitable remedy. In order to get rectification, it is necessary to show that the parties were in complete agreement on the terms of their contract, but by an error wrote them down wrongly. . . . You look at their outward acts, that is, at what they said or wrote to one another in coming to their agreement, and then compare it with the document which they have signed.

Chartbrook at 60 (citation omitted). Again, the High Court concluded that the common intention of the parties was that CCC was the contracting party and by mistake, the Letter of Engagement failed to reflect the parties' common intention.

The holding in the *Climate Change Capital* case is consistent with Hare's testimony. Kirk testified on cross-examination that he was unaware of *Climate Change Capital* but admitted that under the principles of construction in British Virgin Islands law, if the parties know whom they are dealing with, then the BVI Court would construe a legal document as if it contained the correct name. (HIL Adv. Dkt. 342 at 39-40).

In applying the test set out in *Chartbrook* and discussed in *Climate Change Capital*, the Court considers first whether there is a clear mistake in the Rainbow Loan Agreement, the 2006 Note, and the Custodial Agreement when the documents are read with regard to their background and context. Second, the Court considers whether it is clear what

correction ought to be made to cure the mistake. The Rainbow Loan Agreement, the 2006 Note, and the Custodial Agreement all named "The Rainbow Group, Ltd." as the lender.[44] These documents were prepared by Allen, who used as forms the documents that governed the relationship between CHFS and Roy Al Finance and Loan Company. Dr. Edwards testified that the use of "The" was his mistake. Kirk testified that his search of the BVI Company Register showed there is no British Virgin Islands company known as "The Rainbow Group, Ltd.," but there is a company named "Rainbow Group, Ltd."

The Court finds that under *Chartbrook* and the law of the British Virgin Islands, Dr. Edwards' mistake in inserting "The" before the name "Rainbow Group, Ltd." would be remedied under British Virgin Islands law by applying the principle of misnomer. In the alternative, the Court finds that these documents would be rectified to correct the mistake. As Hare explained at Trial, the purpose of BCA § 26 is to ensure that counterparties know who they are dealing with, and no evidence was presented at Trial that CHFS was confused about the identity of the Rainbow Group. The Court, therefore, rejects the Trustee's argument, to the extent raised at Trial, that the Rainbow Loan Agreement, the 2006 Note, and the Custodial Agreement are invalid because of the absence of "The Rainbow Group, Ltd." from the BVI Company Register. Indeed, in closing argument, counsel for the Trustee maintained that the corporate status of the Rainbow Group was raised as an issue only to show, in support of other allegations, that Dr. Edwards routinely ignored or neglected corporate formalities in business transactions. It thus appears that the Trustee abandoned Count I at Trial. Regardless, the Court finds in favor of EFP/BHT on Count I.

---

[44] Even as recently as July, 2017, Dr. Edwards submitted an affidavit to the BVI Court referring to the lender as "The Rainbow Group Limited." (HIL Ex. P-27 at 7).

5. Count II (Legal Capacity of Beher Limited)

In Count II, the Trustee seeks a declaratory judgment that the 2010 Assignment by Beher Limited to BHT is void because, at the time of the 2010 Assignment, Beher Limited had been struck by the Registrar from the BVI Company Register. EFP/BHT contend that the restoration of Beher Limited to the BVI Company Register on August 4, 2017, moots the Trustee's claim. BCA § 217(6). In the alternative, EFP/BHT contend that the striking of Beher Limited from the BVI Company Register did not affect the validity of the 2010 Assignment. BCA § 29(1).

a. Choice of Law

For the reasons discussed with respect to Count I, the Court finds that the law of the British Virgin Islands governs the effect of Beher Limited being stricken in Count II. Before addressing the merits of the Trustee's claim, the Court discusses the affirmative defense raised by EFP/BHT that the Trustee lacks standing to challenge the validity of the 2010 Assignment. As to the issue of standing, EFP/BHT rely on cases applying the laws of Maryland, Delaware, Pennsylvania, and Florida (HIL Adv. Dkt. 331 at 31-32) with no regard to which state law applies.

The 2010 Assignment has no choice-of-law provision. The 2006 Note (the subject of the 2010 Assignment) contains a provision requiring the application of Maryland law, but the Trustee was not a signatory to the 2006 Note. CHFS collected payments on the Home Improvement Loans at its office in Mississippi and sent payments owed to the Rainbow Group to an account at a bank in Puerto Rico and, thereafter, to various accounts as instructed by Dr. Edwards. The underlying mortgages and notes are in Mississippi. Dr. Edwards resides in Maryland. The Court finds no discernible relationship with Delaware,

Pennsylvania, or Florida. Applying the RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188, the Court finds that Mississippi has the most significant relationship to the 2010 Assignment and the parties.

b. Does the Trustee have standing to complain about the legal authority of Beher Limited to execute the 2010 Assignment or to object to the validity of the 2010 Assignment?

EFP/BHT argue that the Trustee lacks standing as a hypothetical lien creditor under § 544 to challenge the legal authority of Beher Limited to execute the 2010 Assignment to BHT or to object to the validity of the 2010 Assignment of the 2006 Note to BHT because, unlike CHFS, she is not a party to the 2010 Assignment. (HIL Adv. Dkt. 331 at 31-32, 34-36). EFP/BHT cite two (2) Maryland cases, *Henry v. Aurora Loan Services, LLC*, Case No. CV TDC-14-1344, 2016 WL 1248672 (D. Md. Mar. 25, 2016) and *Danso v. Ocwen Loan Servicing, LLC*, Case No. CV PX 16-1396, 2016 WL 4437653 (D. Md. Aug. 23, 2016). In those cases, the Maryland court held that the plaintiff lacked standing to challenge the propriety of an assignment because the plaintiff was not a party to the assignment or an intended beneficiary. *Danso*, 2016 WL 4437653, at *2; *Henry*, 2016 WL 1248672, at *3. In both cases, however, the Maryland court emphasized that the plaintiff lacked standing because the defect alleged by the plaintiff rendered the assignment voidable at the option of the "innocent" contracting party, rather than void. Applying Mississippi law, the district court reached the same conclusion in *Neel v. Fannie Mae*, Case No. 1:12-cv-00311-HSO-RHW, 2014 WL 896754 (S.D. Miss. Mar. 6, 2014).

Courts addressing the issue of standing have recognized, however, that a non-party, non-third-party beneficiary to a contract may challenge an assignment when the alleged defect renders it void. *See, e.g.*, *Yvanova v. New Century Mortg. Corp.*, 365 P.3d 845, 853

(Cal. 2016); *Reinagel v. Deutsche Bank Nat'l Tr. Co.*, 735 F.3d 220, 228 (5th Cir. 2013) (applying Texas law). In *Yvanova*, the California Supreme Court explained, "[b]orrowers who challenge the foreclosing party's authority on the grounds of a void assignment 'are not attempting to enforce the terms of the instruments of assignment; to the contrary, they urge that the assignments are void ab initio.'" *Yvanova*, 365 P.3d at 856 (quoting Reinagel, 735 F.3d at 225). A void contract is without legal effect; "It binds no one and is a mere nullity." *Id*. (citation omitted). "Such a contract has no existence whatever. It has no legal entity for any purpose and neither action nor inaction of a party to it can validate it…." *Id.* (citation omitted). Unlike a voidable transaction, a void transaction cannot be ratified or validated by the parties to it even if they so desire. *Id.* Consequently, even a non-party and non-third-party beneficiary to a contract has standing to challenge a transaction that is void. *Id.*

The Trustee asserts in the HIL Third Amended Complaint that "The Rainbow Group, Ltd." was never a valid existing BVI company and, "[t]herefore, any agreements entered into by 'The Rainbow Group, Ltd.' are null and void." (HIL Adv. Dkt. 237 at 30-31). The Trustee also maintains that because Beher Limited was struck from the BVI Company Register in 2008, it did not have the requisite legal capacity in 2010 to assign the 2006 Note to EFP/BHT. (HIL Adv. Dkt. 237 at 31-32). Because the Trustee's claims would render the 2010 Assignment void, not voidable, the Court finds that the Trustee has standing to challenge Beher Limited's corporate status.

Counsel for EFP/BHT supposed in his closing argument at Trial that British Virgin Islands law would treat the 2010 Assignment as voidable, not void, because the actions of a dissolved company are deemed retroactively valid upon that company's restoration to the

BVI Company Register. (HIL Adv. Dkt. 352 at 45). Under § 215(1) of the BCA, however, transactions by a dissolved company are deemed void by operation of law without regard to the interests of the contracting parties and without the need for any further action. The Court, therefore, rejects EFP/BHT's attempt to recharacterize the Trustee's claim, which, would render the 2010 Assignment void, to a claim which would render the 2010 Assignment only voidable.

c. Under British Virgin Islands law, does the striking of Beher Limited from the BVI Company Register in 2008 void the 2010 Assignment (of the 2006 Note to BHT)?

As to the effect of the strike off of Beher Limited, the Trial testimony of Kirk and Hare was mostly consistent and, from the Court's own reading of the BCA, their testimony provided a reasonable interpretation of British Virgin Islands law. Both agreed that all companies formed in the British Virgin Islands must be registered under the BCA. (HIL Adv. Dkt. 342 at 14). Under the BCA, the Registrar may strike off the name of a company from the BVI Company Register for many reasons, including the company's failure to appoint a registered agent, to file documents required by the BCA, or "to pay its annual fee or any late payment penalty by the due date." BCA § 213(1); (HIL Ex. P-12). Before striking off a company from the BVI Company Register, the Registrar must send that company thirty (30)-days' notice and publish notice of his intention to do so. BCA § 213(3).

Under § 215(1) of the BCA, the effect of being struck off the BVI Company Register is that the company and its directors, members, and any liquidator or receiver may not: "(a) commence legal proceedings, carry on any business or in any way deal with the assets of the company; (b) defend any legal proceedings, make any claim or claim any right

for, or in the name of, the company; or (c) act in any way with respect to the affairs of the company." BCA § 215(1). There are a few statutory exceptions. For example, a company that has been struck off may continue to defend or carry on legal proceedings that were instituted prior to the date of striking off. BCA § 215(2). When a company remains struck off the BVI Company Register continuously for seven (7) years, it is dissolved effective from the last day of that period. BCA § 216.

Notwithstanding BCA § 215, a transfer of assets from a struck-off company to a third party may be deemed valid under BCA § 29, which provides:

> (1) No act of a company and no transfer of an asset by or to a company is invalid by reason only of the fact that the company did not have the capacity, right or power to perform the act or to transfer or receive the asset.

BCA § 29(1). The protections afforded by BCA § 29(1) do not apply, however, when the third party is aware of the strike off by either actual or constructive notice. As to the issue of constructive notice, BCA § 32(1) further provides:

> (1) A person is not deemed to have notice or knowledge of any document relating to a company, including the memorandum and articles, or of the provisions or contents of any such documents, by reason only of the fact that a document
>
> (a) is available to the public from the Registrar

BCA § 32(1).

A company that has been struck off the BVI Company Register but has not yet been dissolved, that is, a company that has not remained struck off continuously for seven (7) years, may be restored by filing an application with the Registrar and paying any outstanding fees and penalties. BCA § 217(1). A company that has been dissolved by having been struck off for more than seven (7) years, however, must have the dissolution declared void before the company may be restored to the BVI Company Register. BCA

§ 218. Doing so requires the company to file an application with the BVI Court within ten (10) years of the dissolution. BCA § 218. Regardless, once a company is restored, "the company is deemed never to have been dissolved or struck off the [BVI Company] Register." BCA § 218(3).

(1.) Kirk

Kirk opined that because Beher Limited was struck off the BVI Company Register on October 31, 2008, and remained struck off the BVI Company Register continuously for the next seven (7) years, Beher Limited did not have any legal capacity to take any corporate action, conduct any business, or transfer any interest since that time. (HIL Adv. Dkt. 342 at 18). He further opined that because Beher Limited attempted to assign the 2006 Note to BHT on May 10, 2010, when it was prohibited from conducting any business, the 2010 Assignment would not be considered legal, valid, or binding under British Virgin Islands law. For that reason, the Amended Loan Agreements, having been entered on August 10, 2010, when Beher Limited was prohibited from transacting any business, would also not be considered legal, valid, or binding. Moreover, Kirk testified that BHT would not qualify for protection as an innocent third party under BCA § 29 because of Dr. Edwards' role in both Beher Limited and BHT. Dr. Edwards is the sole member of Beher Limited, signed POC 4-1 as BHT's agent, appeared at Trial as BHT's representative (HIL Adv. Dkt. 342 at 20 & 28), and admitted at Trial that he acted as the agent of BHT (HIL Adv. Dkt. 341 at 165).

According to Kirk, BCA § 29(1) is an expansion of the common-law "indoor management rule," the effect of which is to relieve innocent third parties from having to inquire into and satisfy themselves that the requisite internal formalities of a company

formed under British Virgin Islands law have been met. (HIL Ex. P-28). An innocent third party is entitled to assume that a company has acted in accordance with its memorandum and articles of association. Accordingly, internal management failures, such as the failure of a company to duly appoint or authorize a director to enter into the subject transaction, cannot be asserted by that company against an innocent third party. When the third party is aware of the internal management failure, however, the protections afforded by BCA § 29(1) and the indoor management rule do not apply.

As to the issue of constructive notice, Kirk opined that the strike off of a company from the BVI Company Register is a fact that can be determined by means of a public search. The BVI Company Register operates as an online platform, enabling law firms and other service providers to search the names of companies. Because strike off and dissolution do not result by virtue of documents filed with the Registrar but result automatically by operation of the BCA, Kirk testified that BCA § 32(1)(a) does not apply.

On cross examination, Kirk admitted that his opinion that the transfers in 2010 were invalid was based on the assumption that Beher Limited had never been restored to the BVI Company Register. Yet, at Dr. Edwards' request, Beher Limited was restored on August 1, 2017, by Hare and his law firm.

(2.) Hare

Hare opined that the transfers in question are not invalid by virtue of BCA § 215 for two reasons. First, the effect of BCA § 215 may be avoided simply by restoring a struck-off company to the BVI Company Register. (HIL Adv. Dkt. 342 at 68). At Dr. Edwards' request, Hare and his law firm initiated the court proceedings that led to the restoration of Beher Limited to the BVI Company Register on August 1, 2017. If a struck-

off company or a struck-off and dissolved company is restored, it "is deemed never to have been dissolved or struck off the Register." BCA § 218(3). "If you unstitch that process, once it's back on the register, it retrospectively validates all the actions." (HIL Adv. Dkt. 342 at 74). Pursuant to this "deeming" provision, the restoration of Beher Limited had a curative effect on all questions of corporate capacity at the time of the 2010 transfers, according to Hare. Hare further opined that there is no subjective element to the restoration process. "[I]t's a binary question; the company is either restored or it's not." (HIL Adv. Dkt. 342 at 74).

The second reason why the transfers in question are not invalid, according to Hare, is that even if Beher Limited had not been restored, BCA § 29(1) and § 32 validated the transfers of assets. (HIL Adv. Dkt. 342 at 75). Hare acknowledged that there are exceptions to BCA § 29(1). For example, a transferee may not, as a matter of law, enjoy the benefit of BCA § 29(1) if it had actual notice that the transferor was unable to transact business because it had been struck off the BVI Company Register.

Unlike Kirk, Hare questioned whether BHT would have had constructive notice that Beher Limited had been struck off the BVI Company Register, given that the BVI Company Register is not always properly updated. Even if the information were discoverable by a search of the public record, Hare testified that it would not constitute notice to BHT because of BCA § 32. According to Hare, BCA § 29(1) and § 32 mitigate the effect of BCA § 215 so that the transfers in question are valid unless it can be shown that BHT had actual knowledge of Beher Limited being struck off and unable to transact business at the time of those transfers in 2010. Hare testified he was not aware of any facts indicating that BHT had actual knowledge of the strike off.

d. Analysis

The Court finds that under BCA §218(3), the restoration of Beher Limited in 2017 retroactively rendered the transactions in 2010 valid under British Virgin Islands law for the reasons given by Hare. Notwithstanding the retroactive effect of the Restoration Order under British Virgin Islands law, an issue remains as to whether it should be disregarded as conflicting with federal bankruptcy law. (HIL Adv. Dkt. 352 at 16-17). When Dr. Edwards filed POC 4-1 and POC 5-1 on September 20, 2012 (the bar date for filing nongovernmental proofs of claim in the Bankruptcy Case), Beher Limited was struck off the BVI Company Register, and the transactions in 2010 were invalid under BCA § 215. Should the status of POC 4-1 and POC 5-1 remain unchanged by events occurring after the bar date?[45]

In his closing argument, counsel for the Trustee cited *In re W.R. Grace & Co.*, 366 B.R. 302 (Bankr. D. Del. 2007). (HIL Adv. Dkt. 352 at 17). There, the Delaware bankruptcy court held that claimants could not ratify, after expiration of the claims bar date, a law firm's act of submitting unauthorized proofs of claim on their behalf. *Id.* at 307. After filing a chapter 11 bankruptcy case, the debtors received 4,200 asbestos property damage claims, 2,938 of which were filed by the same law firm. None of the 2,938 proofs of claim were personally signed by the actual claimants. The debtors filed an objection on the ground that Rule 3001(b) of the Federal Rules of Bankruptcy Procedure requires the creditor or the creditor's authorized agent to execute the proof of claim. The

[45] EFP/BHT complained at Trial that the Trustee failed to raise the ratification issue in the HIL Amended Pretrial Order. (HIL Adv. Dkt. 352 at 44). Because EFP/BHT raised as an issue in the HIL Amended Pretrial Order (HIL Adv. Dkt. 331 at 47) the effect of the Restoration Order on the Trustee's claim, and because EFP/BHT disclosed the Restoration Order to the Trustee in an untimely manner, the Court finds that the ratification issue was not waived by its omission.

bankruptcy court entered an order requiring the law firm to provide the debtors with copies of express written authorizations establishing the law firm's authority to represent the claimants in the bankruptcy case. For seventy-one (71) of the proofs of claims, the written authorizations were either undated or dated after expiration of the claims bar date.

The bankruptcy court noted that under the doctrine of ratification, acts performed outside the scope of an agent's authority or performed by one who is not an agent, may be ratified by the principal and, moreover, that the doctrine of ratification has been deemed applicable in bankruptcy cases. *W.R. Grace & Co.*, 366 B.R. at 305. The bankruptcy court, however, held that ratification is not effective when it takes place after a deadline. *Id.* at 306. For its holding, the bankruptcy court cited *Federal Election Commission v. NRA Political Victory Fund*, 513 U.S. 88 (1994), in which the Supreme Court discussed the limitations on ratification: "[I]t is essential that the party ratifying should be able not merely to do the act ratified at the time the act was done, but also at the time the ratification was made." *Federal Election*, 513 U.S. at 98 (citing *Cook v. Tullis*, 85 U.S. 332, 338 (1873)). Because allowing ratification after the bar date for filing proofs of claim would grant the seventy-one (71) claimants the unilateral power to extend the deadline, the bankruptcy court found that it would be unfair to the other creditors who properly and timely filed their claims and would disrupt the reorganization process to apply ratification. For those reasons, the bankruptcy court disallowed the seventy-one (71) proofs of claims.

Similarly, the Court finds that to render the 2010 Assignment by Beher Limited retroactively valid, based on an act that took place on August 1, 2017, would be unfair. EFP/BHT's claims should be allowed or disallowed based on the status of the claimants at

the time POC 4-1 and POC 5-1 were filed or no later than the bar date.[46] The Court, therefore, disregards the effect of the Restoration Order. The Court notes that to avoid a discovery dispute, EFP/BHT offered at Trial to stipulate that Beher Limited was never restored to the BVI Company Register, but the Court refused to accept the stipulation in light of Hare's conflicting testimony. Apparently, EFP/BHT were willing to enter into the stipulation because of their alternative argument that British Virgin Islands law would uphold the transfers under BCA § 29 and § 32 notwithstanding BCA § 215.

Both Kirk and Hare interpreted BCA § 29 as protecting a third-party transferee (BHT) only if it had no actual or constructive knowledge of the strike off of the transferor (Beher Limited). The emails exchanged between Dr. Edwards and Hirst, head of banking at VP Bank, show that Dr. Edwards was aware by at least November 2, 2009, that Beher Limited had been struck off the BVI Company Register. Dr. Edwards suggests that because he is not an attorney, he did not understand the significance of the strike off. The effect of the strike off, however, was explained by Hirst in the same email to Dr. Edwards, "Legally, the company is restricted from executing any transactions until it is returned to goodstanding [*sic*]." (HIL Ex. P-26). Dr. Edwards' terse response—"I received no reminder from you . . . and no warning about striking the company!"—indicates that he was somewhat concerned about the consequences resulting from the strike off. (HIL Ex. P-26). If not from the November 2, 2009, email, then Dr. Edwards certainly was made aware of the legal consequences of the strike off in another email from Hirst on November 19, 2009, informing Dr. Edwards: "We are in receipt of your instructions for a payment of $212,000, however as [Beher Limited] is not in goodstanding [*sic*] it is not possible [to]

[46] EFP/BHT filed POC 4-1 and POC 5-1 on the same day as the bar date, September 20, 2012.

process the payment until [Beher Limited] is returned to goodstanding [*sic*] status." (HIL Ex. P-26). Yet for his own reasons, he chose to ignore the effect of the strike off under British Virgin Islands law while disputing the payment of registration fees with Beher Limited's registered agent. The Court finds that BHT was not an innocent third party transferee entitled to the protections afforded by BCA § 29. As a result, the Court finds that the 2010 Assignment of the 2006 Note is void.

6. Count IV (Perfection of Security Interest)

In Count IV, the Trustee seeks a declaratory judgment that the Custodial Agreement was never validly assigned to EFP/BHT. Because the Custodial Agreement was never validly assigned, the Trustee contends that the McCarley Firm does not hold the Home Improvement Loans for the benefit of EFP/BHT. As a result, the Trustee asserts that EFP/BHT's alleged security interest is unperfected.

a. Choice of Law

The Custodial Agreement provides that it is to be construed according to the laws of California but in the same paragraph requires the parties to submit to personal jurisdiction in Mississippi in any ensuing litigation. (HIL Ex. D-22). There is no discernible relationship, however, between California and the parties or the transaction. It appears that the choice of California law was arbitrary and may have been the result of the parties' use of the documents in place between CHFS and its prior lender as forms. Moreover, the Trustee was not a signatory to the Custodial Agreement.

The Court finds that whether EFP/BHT have a perfected security interest in the Home Improvement Loans is governed by the UCC. *Mills Morris Co. of Miss., Inc. v. Scanlon* (*In re King-Porter Co.*), 446 F.2d 722, 732 (5th Cir. 1971) ("The Uniform

Commercial Code has been adopted in all but one state. It should generally be considered as the federal law of commerce—including secured transactions."). Under the UCC, the determination of whether a creditor has properly perfected its security interest is governed by the law of the place where the collateral is located:

> (1) Except as otherwise provided in this section, while a debtor is located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in collateral.
>
> (2) While collateral is located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a possessory security interest in that collateral.

UCC § 9-301. The UCC provides the following relevant definitions:

> (a) In this section, "place of business" means a place where a debtor conducts its affairs.
>
> (b) Except as otherwise provided in this section, the following rules determine a debtor's location: . . .
>
> * * *
>
> (2) A debtor that is an organization and has only one place of business is located at its place of business.

UCC § 9-307. CHFS's principal place of business before the rogue operation was at 234 East Capitol Street in Jackson, Mississippi. The McCarley Firm's place of business is at 357 Towne Center Boulevard in Ridgeland, Mississippi, which is also the location of EFP/BHT's purported collateral, the Home Improvement Loans. Because CHFS, the McCarley Firm, and the collateral at issue are in Mississippi, the Court finds that Mississippi law applies to the issue of perfection.

b. Do EFP/BHT have a perfected security interest in the Home Improvement Loans?

EFP/BHT allege that they have a perfected security interest in the Home Improvement Loans pursuant to the Rainbow Loan Agreement and the Custodial Agreement. The Trustee seeks to avoid any interest of EFP/BHT in the Home Improvement Loans as an unperfected security interest avoidable by a hypothetical lien creditor under § 544. From the position of a hypothetical judicial lien creditor, the Trustee takes priority over any unperfected security interests attached to the Home Improvement Loans. MISS. CODE ANN. § 75-9-317(a)(2). Accordingly, if EFP/BHT's alleged security interest was unperfected at the time of the filing of the Petition, EFP/BHT's claims are unsecured.

Article 9 of the UCC, as adopted by Mississippi, governs when and how a security interest in personal property or fixtures is perfected. MISS. CODE ANN. § 75-9-102. The method of perfection permitted under Article 9 depends on the type of "property subject to a security interest or agricultural lien." MISS. CODE ANN. § 75-9-102(12) (defining "collateral"). The Rainbow Loan Agreement describes the collateral, as follows:

> COLLATERAL. The term "Collateral" shall mean all Retail Installment Contracts and Receivables owned by CHFS.

(HIL Exs. P-1 & P-2, Part 2 at 3). The terms "Retail Installment Contract" and "Receivables" are defined as follows:

> RETAIL INSTALLMENT CONTRACT. The term "Retail Installment Contract" shall mean the retail installment contract, promissory note or other similar instrument originally payable to an Originator and executed by an Account Debtor to evidence a Consumer Mortgage Loan, such contract being sold and assigned by such Originator to Borrower and assigned by Borrower to Lender.

> RECEIVABLES. The term "Receivables" shall mean any and all indebtedness or obligations evidenced by Consumer Mortgage Loan now or hereinafter owned by Borrower and in which Lender has been granted a first priority security interest therein.

(HIL Exs. P-1 & P-2, Part 2 at 6). The Rainbow Loan Agreement defines "Consumer Mortgage Loan" and a "Consumer Mortgage," as follows:

> CONSUMER MORTGAGE LOAN. The term "Consumer Mortgage Loan" shall mean any loan made by an Originator to an Account Debtor (a) evidenced by a Retail Installment Contract, (b) secured by a Consumer Mortgage, and (c) the proceeds of which were used by the Account Debtor to remodel or renovate such Account Debtor's residence.
>
> CONSUMER MORTGAGE. The term "Consumer Mortgage" shall mean a mortgage, deed of trust or other security deed in land and interests in real property (including, without limitation, Consumer Fixture Filings), structures, improvements, fixtures and buildings located on or used in connection with real property or rights and interest in real property which secures a Retail Installment Contract.

(HIL Exs. P-1 & P-2, Part 2 at 4-5). From these definitions in the Rainbow Loan Agreement, the collateral in which EFP/BHT assert a security interest falls within the definition of an "instrument" under Mississippi's version of the UCC:

> (47) "Instrument" means a negotiable instrument or any other writing that evidences a right to the payment of a monetary obligation, is not itself a security agreement or lease, and is of a type that in ordinary course of business is transferred by delivery with any necessary endorsement or assignment. The term does not include (i) investment property, (ii) letters of credit, or (iii) writings that evidence a right to payment arising out of the use of a credit or charge card or information contained on or for use with the card.

MISS. CODE ANN. § 75-9-102(47).

According to POC 4-1 and POC 5-1, the sole basis for perfection of EFP/BHT's alleged security interest in the Home Improvement Loans is "possession." (HIL Exs. P-1 & P-2 at 1). The relevant statutory provisions regarding perfection of a security interest in an instrument by possession are as follows:

> (a) Except as otherwise provided in subsection (b) and Section 75-9-312(b), a financing statement must be filed to perfect all security interests and agricultural liens.
>
> (b) The filing of a financing statement is not necessary to perfect a security interest:
>
> * * *
>
> (6) In collateral in the secured party's possession under Section 75-9-313;

MISS. CODE ANN. § 75-9-310(a), (b)(6). Specifically, EFP/BHT themselves do not possess the Home Improvement Loans; rather, they contend they have constructive possession of the Home Improvement Loans under MISS. CODE ANN. § 75-9-313(c), which provides:

> (c) With respect to collateral other than certificated securities and goods covered by a document, a secured party takes possession of collateral in the possession of a person other than the debtor, the secured party, or a lessee of the collateral from the debtor in the ordinary course of the debtor's business, when:
>
> (1) The person in possession authenticates a record acknowledging that it holds possession of the collateral for the secured party's benefit; or
>
> (2) The person takes possession of the collateral after having authenticated a record acknowledging that it will hold possession of collateral for the secured party's benefit.

MISS. CODE ANN. § 75-9-313(c)(1)-(2). EFP/BHT claim that they have a perfected security interest in all the Home Improvement Loans because the McCarley Firm, acting either as their agent or as a bailee, holds possession of the Home Improvement Loans for the benefit of the "Edwards companies."[47] EFP/BHT rely on their status as "assignees" of the

[47] Counsel for EFP/BHT repeatedly referred to both EFP and BHT as "Edwards-controlled entities" or the "Edwards companies" at Trial. *See, e.g.*, (HIL Adv. Dkt. 340 at 106-09). That description may properly refer to EFP but not BHT. Under Bermuda trust law, Dr. Edwards as the settlor of BHT has only limited powers. *See* The Trusts (Special Provisions Act) 1989 § 2A(2)(3); (HIL Adv. Dkt. 342 at 24-25). Thus, the Court uses the adverb "purportedly" regarding the statement of control by Dr. Edwards.

Rainbow Loan Agreement and point out that the UCC does not require "re-perfection" of a security interest. (HIL Adv. Dkt. 331 at 33).

(1.) Are EFP/BHT assignees of the Custodial Agreement?

Under the Custodial Agreement, the McCarley Firm acts as the custodian of the Home Improvement Loans "for the exclusive use and benefit of the Lender":

> Section 4.2. Custodian of Documents. Custodian, either directly or by acting through an agent, shall hold all documents relating to any Receivable that comes into its possession for the exclusive use and benefit of Lender.

(HIL Exs. P-1 & P-2, Part 3 at 7). "Lender" is defined in the first paragraph of the Custodial Agreement:

> This Custodial Agreement ("Agreement"), dated as of September 25, 2006, is by and among THE RAINBOW GROUP, LTD., a British Virgin Island[s] corporation ("Lender"), COMMUNITY HOME FINANCIAL SERVICES, INC., a Delaware Corporation ("Borrower") and HAROLD B. MCCARLEY, JR, PLLC a Mississippi professional limited liability company ("Custodian").

(HIL Exs. P-1 & P-2, Part 3 at 2). This definition of "Lender" does not include BHT or EFP by name or by reference as an assignee of the Rainbow Group. Indeed, the Custodial Agreement expressly provides that it may only be assigned pursuant to a writing signed by the parties.

> Section 5.7. Assignment. No party hereto shall sell, pledge, assign or otherwise transfer this Agreement without the prior written consent of the other parties hereto.

(HIL Exs. P-1 & P-2, Part 3 at 12). McCarley testified at Trial that he has never executed an assignment or amendment of the Custodial Agreement. (HIL Adv. Dkt. 343 at 5-6). Additionally, the Custodial Agreement expressly provides that the McCarley Firm is not an agent of either the Lender or Borrower.

> Section 5.5. No Partnership. Nothing herein contained shall be deemed or construed to create a co-partnership or joint venture between the parties hereto and the services of Custodian shall be rendered as an independent contractor and not as agent for Lender or Borrower.

(HIL Exs. P-1 & P-2 at 12).

The contractual designation of the McCarley Firm as an "independent contractor" in the Custodial Agreement forecloses EFP/BHT's argument that the McCarley Firm possesses the collateral as their agent. As to the alternative argument that the McCarley Firm holds the collateral as their non-agent bailee, Mississippi law requires some writing where the bailee acknowledges "that it holds possession of the collateral for the secured party's benefit" or "that it will hold possession of the collateral for the secured party's benefit." MISS. CODE ANN. § 75-9-313(c)(1)-(2). Yet the only evidence of such a written acknowledgment by the McCarley Firm is the Custodial Agreement, which does not name EFP/BHT as the secured parties and which has never been assigned to them.

EFP/BHT, nevertheless, maintain that the McCarley Firm acted as their bailee under the contractual right of assignment found in ¶ 9.6 of the Rainbow Loan Agreement, which provides:

> 9.6 ASSIGNMENT BY LENDER. LENDER MAY AT ANY TIME (A) DIVIDE AND REISSUE (WITHOUT SUBSTANTIVE CHANGES OTHER THAN RESULTING FROM SUCH DIVISION) THE NOTE, AND/OR (B) SELL, ASSIGN, GRANT PARTICIPATION IN, DELEGATE OR OTHERWISE TRANSFER TO ANY OTHER PERSON (AN "ASSIGNEE") ALL OR PART OF THE RIGHTS AND DUTIES OF LENDER UNDER THIS AGREEMENT AND THE OTHER LOAN DOCUMENTS. TO THE EXTENT INDICATED IN ANY DOCUMENT, INSTRUMENT OR AGREEMENT SO SELLING, ASSIGNING, GRANTING PARTICIPATION IN, OR OTHERWISE TRANSFERRING TO AN ASSIGNEE SUCH RIGHTS AND/OR DUTIES, (I) THE ASSIGNEE SHALL ACQUIRE ALL THE LENDER'S RIGHTS UNDER THE AGREEMENT AND THE OTHER LOAN DOCUMENTS AND (II) THE ASSIGNEE SHALL BE DEEMED TO BE THE "LENDER" UNDER THIS AGREEMENT AND THE OTHER LOAN DOCUMENTS WITH

THE AUTHORITY TO EXERCISE SUCH RIGHTS IN THE CAPACITY OF THE LENDER.

(HIL Exs. P-1, P-2, D-17 & D-18). McCarley's testimony at Trial supports EFP/BHT's contention. McCarley testified that he understood that he was the bailee of the Home Improvement Loans for the "lender" under the Custodial Agreement and that at some point, the "lender" changed from Rainbow Group, Ltd. to Beher Limited. (HIL Adv. Dkt. 343 at 14-15). After that initial change, McCarley apparently took instruction from Dr. Edwards as to the identity of the lender.

To reach this result, EFP/BHT attempt to incorporate ¶ 9.6 of the Rainbow Loan Agreement into the Custodial Agreement, but ¶ 9.6 of the Rainbow Loan Agreement contradicts § 5.7 of the Custodial Agreement. *See Alford v. Kuhlman Elec. Corp.*, 716 F.3d 909, 913 (5th Cir. 2013) ("[A] reference in subcontract to the provisions, plans and specifications of a general contract imports them into the subcontract where not inconsistent with its terms . . ." (quoting *Perry v. United States*, 146 F.2d 398, 400 (5th Cir. 1945)). To remove the conflict between these provisions, EFP/BHT suggest a narrow interpretation of § 5.7 of the Custodial Agreement—that it prohibits an assignment only by the McCarley Firm without the written consent of the parties. (HIL Adv. Dkt. 341 at 179). The plain language of § 5.7 of the Custodial Agreement, however, prohibits any party from assigning the Custodial Agreement "without the prior written consent of the other parties." To allow EFP/BHT to inject § 9.6 of the Rainbow Loan Agreement to the Custodial Agreement would be contrary to the principle of contractual construction that the express terms of a valid contract should not be altered or amended. *Epperson v. SOUTHBank*, 93

So. 3d 10, 17 (Miss. 2012). The Court, therefore, finds that EFP/BHT are not assignees of the Custodial Agreement.[48]

(2.) Are EFP/BHT required by the UCC to "re-perfect" their security interest?

EFP/BHT contend, in the alternative, that the UCC does not require the Rainbow Group or Beher Limited to assign the Custodial Agreement to them. They rely on MISS. CODE ANN. § 75-9-310(c), which provides: "If a secured party assigns a perfected security interest or agricultural lien, a filing under this article is not required to continue the perfected status of the security interest against creditors of and transferees from the original debtor." *Id.* Under MISS. CODE ANN. § 75-1-302, however, parties may agree to vary the effect of provisions of the UCC:

> (a) Except as otherwise provided in subsection (b) or elsewhere in the Uniform Commercial Code, the effect of provisions of the Uniform Commercial Code may be varied by agreement.
>
> * * *
>
> (c) The presence in certain provisions of the Uniform Commercial Code of the phrase "unless otherwise agreed," or words of similar import, does not imply that the effect of other provisions may not be varied by agreement under this section.

MISS. CODE ANN. § 75-1-302(a),(c). The Court finds that the parties "varied by agreement" the terms of MISS. CODE ANN. § 75-9-310(c) by providing in ¶ 5.7 certain conditions that must occur before any assignment of the Custodial Agreement.

Notwithstanding EFP/BHT's contention at Trial that "re-perfection" is unnecessary under the UCC, Dr. Edwards apparently thought otherwise at the time CHFS signed the

[48] To the extent EFP/BHT rely on the 2010 Assignment of the 2006 Note to BHT as evidence of an assignment of the Custodial Agreement, the Court has found that the 2010 Assignment is void.

EFP Note and BHT Note. In an email Dr. Edwards sent to Dickson on August 6, 2010, Dr. Edwards explained, "The new loan should be divided into two loans, one from Beher and one from EFP. I hope to work out the % from each entity by Saturday." (HIL Ex. P-4 & D-5). Dr. Edwards then sets out eight (8) points related to this new loan. In the second point, he states, "The name on the lockbox, custodial agreement, and all other documents should be amended." (HIL Ex. P-4 & D-5). Dr. Edwards did not follow through with the amendment of the Custodial Agreement.

A pattern has developed. In a separate but related suit against BancorpSouth Bank, EFP/BHT alleged that "because of the way certain interests were shared and transferred from Rainbow [Group, Ltd.] to the other Edwards Entities, EFP and BHT may enforce the [blocked account agreement] against BancorpSouth" even though they were not an original party to that agreement. *Edwards Family P'ship, LP v. BancorpSouth Bank*, 236 F. Supp. 3d 964, 967 (S.D. Miss. 2017), *aff'd*, 699 F. App'x 312 (5th Cir. 2017). The District Court assumed the truth of this allegation in considering BancorpSouth Bank's summary judgment motion and in the end held that EFP/BHT had abandoned their right to enforce the agreement by acquiescing "to a sustained deviation from their contractual rights." *Id.* at 966-67. Here, EFP/BHT again seek to succeed to the rights of an agreement to which they were not the original parties and which they were never assigned. As noted by another Mississippi bankruptcy court, "Although strict adherence to the Code requirements may at times lead to harsh results, efforts by courts to fashion equitable solutions for mitigation of hardships experienced by creditors in the literal application of statutory filing requirements may have the undesirable effect of reducing the degree of reliance the market should be able to place on the Code provisions. The inevitable harm doubtless would be more serious

to commerce than the occasional harshness from strict obedience." *United States v. Williams* (*In re Williams)*, 82 B.R. 430, 435 (Bankr. N.D. Miss. 1988) (citing *Sec. Nat'l Bank & Tr. Co. v. Dentsply Prof'l Plan*, 617 P.2d 1340, 1343 (Okla. 1980)); *Pongetti v. Nat'l Bank of Commerce* (*In re Frady)*, 276 B.R. 456, 460 (Bankr. N.D. Miss. 2000) ("While the results in this proceeding might initially appear harsh, [the creditor] could certainly have better protected itself.")

c. Analysis

The Court finds that EFP/BHT failed to perfect their alleged security interest in the Home Improvement Loans before the date of the Petition. The Custodial Agreement is ineffectual to grant EFP/BHT a perfected security interest in the Home Improvement Loans. Neither EFP nor BHT is in possession of the Home Improvement Loans and the McCarley Firm does not hold the Home Improvement Loans as an agent or bailee for EFP/BHT. Because their interest in the Home Improvement Loans is unperfected, EFP/BHT are general unsecured creditors. Accordingly, the Court finds that the Objection to POC 4 & 5 should be sustained to the extent that EFP/BHT are not secured creditors of CHFS.

7. Count V (Tracing of Funds)

In Count V, the Trustee seeks a declaratory judgment that, to the extent that EFP/BHT have a perfected security interest in the Home Improvement Loans, their security interest does not attach to any of the funds recovered by the Trustee because EFP/BHT have failed to trace those funds. The Court already has found that EFP/BHT failed to perfect their security interest. Assuming EFP/BHT have a perfected security interest in the Home Improvement Loans, the Court finds that they do not have a security interest in the

$5,490,132.19 wired to the Trustee from accounts at Banco Panameño or in the $540,000 in loan payments intercepted by the Trustee. Because the issue of tracing concerns proceeds of both the Home Improvement Loans and the Mortgage Portfolios, the Court delays addressing this issue in full until after discussing the Trustee's claims and EFP/BHT's counterclaim in the Mortgage Portfolios Adversary.

8. Count VI (POC 4-1 & POC 5-1)

In Count VI, the Trustee seeks a declaratory judgment that POC 4-1 ($18,390,660.32) and POC 5-1 ($18,390,660.32), both of which were filed by EFP/BHT, are duplicative and that the claims are calculated incorrectly. (HIL Adv. Dkt. 342 at 179-83).

a. Calculation of Claims

According to the claims register, POC 4-1 belongs to BHT, and POC 5-1 belongs to EFP. For convenience, the Court will maintain these separate designations.

The Trustee retained Aucoin to identify and categorize the Home Improvement Loans, evaluate the transactions between CHFS and EFP/BHT, and analyze and recalculate the amount owed to each under the EFP Note and the BHT Note. (HIL Ex. P-7). Since 2010, Aucoin has been a partner in the fraud, forensic, and litigation services group of Horne LLP, a regional accounting and consulting firm. Aucoin graduated from Louisiana State University with a bachelor of science degree in accounting and a master of science degree in accounting and internal auditing. He is a certified public accountant, certified internal auditor, and a certified fraud examiner. Aucoin is also certified in financial forensics. Before he was a partner at Horne LLP, Aucoin was employed as a forensic accountant at Ernest & Young, LLP and Postlethwaite & Netterville, APAC. The Court

accepted Aucoin as an expert in the fields of public accounting, fraud examination, financial forensics, and internal audits. (HIL Adv. Dkt. 340 at 73-75).

According to Aucoin, from September 26, 2006, to August 11, 2010, CHFS received funds totaling $18,771,500 (not including $6,572,949.45 that were paid to Roy Al Finance and Company) from Beher Limited, EFP, Florida Mutual Assurance Trust, LLC, Rainbow Group, Ltd., and an unknown JP Morgan Chase account. (HIL Ex. P-7, Schedule 6). During that same period of time, Aucoin identified payments totaling $17,421,250 from CHFS to BHT, Beher Limited, EFP, a Merrill Lynch account, the Rainbow Group, and VP Bank BVI, Ltd. (HIL Ex. P-7, Schedules 6 & 9). Aucoin calculated a loan balance of $17,832,496, due on the EFP Note and the BHT Note, combined, from September 26, 2006, to May 23, 2012, the date of the Petition. (HIL Ex. P-7 at 10). This amount consists of principal of $14,919,181 and interest of $2,913,315. (HIL Adv. P-7, Schedules 7 & 10). It does not appear that any attempt was ever made to separate the Home Improvement Loans funded by the EFP Note from those funded by the BHT Note. For that reason, there were no records available from which Aucoin could calculate the amount owed EFP and BHT separately.

In reaching his calculation of the loan balance, Aucoin disagreed with the amounts set forth in the Amended Loan Agreements as the "outstanding principal balance" due as of July 31, 2010, and in the affidavit of Borg submitted in the Dickson Guaranty Suit. Aucoin found three (3) variances which he attributed to Borg's overstatement of the initial draw by $200,000 and her failure to credit $126,246 in payments made by CHFS. Aucoin also found two other issues. First, Borg applied compound interest rather than simple interest. In other words, she included outstanding interest in the interest calculation and

continued to add any unpaid interest to the principal balance. Aucoin found that the EFP Note and the BHT Note made no provision for compound interest. (HIL Adv. Dkt. 340 at 149). Second, there were delays in posting CHFS's payments. Before Trial, EFP/BHT agreed to stipulate to Aucoin's calculation of principal and interest of $17,832,496 due on the EFP Note and BHT Note, combined, as of May 23, 2012. (HIL Adv. Dkt. 331 at 43). Based on this stipulation and the percentage amount of the $16 million credit facility divided between EFP/BHT, as reflected in the EFP Note (25%) and the BHT Note (75%), the Court finds that as of May 12, 2012, CHFS owed BHT $13,374,372, consisting of $11,189,385.80 in principal and $2,184,986.25 in interest, and CHFS owed EFP $4,458,124, consisting of $3,729,795.25 in principal and $728,328.75 in interest. Accordingly, the Court finds that POC 4-1 should be allowed as an unsecured claim in the principal amount of $11,189,385.80 and interest of $2,184,986.25, and POC 5-1 should be allowed as an unsecured claim in the principal amount of $3,729,795.25 and $728,328.75 in interest

The parties disagree as to the amount that is owed on the Home Improvement Loans after the Petition date because they cannot agree on the post-petition interest rate or the amount of post-petition payments traceable to the Home Improvement Loans. For the post-petition period June 1, 2012, through September 30, 2012, Aucoin calculated the interest due based on a seven percent (7%) per annum rate (as set forth in the Cash Collateral Orders). After applying post-petition adequate protection payments of $958,839 made by CHFS during that period, Aucoin calculated a loan balance due of $17,223,688 as of September 30, 2012, consisting of principal of $14,310,373 and interest of $2,913,315.[49]

[49] Aucoin applied $608,808 to the principal balance and $350,031 to interest.

(HIL Ex. P-7, Schedule 10). Aucoin then applied to the outstanding principal due a total of $4,389,241 collected by ClearSpring from June 30, 2014, through May 31, 2017, which he could trace to the Home Improvement Loans.[50] (HIL Adv. Dkt. 340 at 94; HIL Ex. P-7, Schedule 9).

Aucoin explained how he traced ClearSpring's collections to the Home Improvement Loans, as opposed to the Mortgage Portfolios or other sources. Aucoin first identified the loans classified as Home Improvement Loans by CHFS and found that from February of 2006 to October of 2011, CHFS categorized 2,888 loans as Home Improvement Loans. (HIL Ex. P-7, Schedule 1). Aucoin then reconciled the 2,888 loans with ClearSpring's boarding data. Within the boarding data, 1,796 loans had the designation of "COMMUNITY HOME FINANCIAL SERVICES – 1." (HIL Ex. P-7, Schedule 2). Of these 1,796 loans, 128 loans did not appear anywhere in the information provided by CHFS. (HIL Ex. P-7, Schedule 5). There were thirteen (13) additional loans that sometime after October of 2011 were moved from the category of Home Improvement Loans to Discount Home Mortgage, Inc. loans. (HIL Ex. P-7, Schedule 3). Aucoin reclassified these thirteen (13) loans as Home Improvement Loans, which increased the total number of Home Improvement Loans from 1,796 to 1,809. (HIL Ex. P-7, Schedules 2 & 3). The parties stipulated that there are 1,809 Home Improvement Loans, as determined by Aucoin. (HIL Adv. Dkt. 331 at 40).

From June 30, 2014, to May 31, 2017, ClearSpring collected approximately $11 million related to Home Improvement Loans, Mortgage Portfolios, Discount Home Mortgage, Inc. loans, and other unknown loans. These funds were remitted to the Trustee,

[50] $4,389,241 = $4,348,082 + $41,159 (HIL Ex. P-7, Schedule 9).

less servicing fees of $2,426,826 for collections of Home Improvement Loans, Mortgage Portfolios, and all other loans. (HIL Ex. P-7, Schedule 9). As to the 1,809 Home Improvement Loans, ClearSpring collected $4,348,082 and $41,159 related to the loans identified by ClearSpring as Home Improvement Loans that were not identified as such in CHFS's records. Applying these collections on the Home Improvement Loans to the outstanding principal due, Aucoin calculated the loan balance as of May 31, 2017, to be $12,834,447, which includes principal of $9,921,132 and interest of $2,913,315. (HIL Adv. Dkt. 340 at 132; HIL Ex. P-7 at 14).

EFP/BHT disagree with Aucoin's post-petition calculations. Because the Cash Collateral Orders required payment of interest at the rate of seven percent (7%) per annum only until September 30, 2012, Aucoin did not include interest payments after that date. (HIL Adv. Dkt. 340 at 139). EFP/BHT contend that Aucoin should have applied the contract rate of interest of 12.5% during the entire post-petition period. EFP/BHT also contend that Aucoin should have applied compound interest, rather than simple interest, but do not point to any specific language in the EFP Note or BHT Note. On cross-examination, Aucoin agreed that the calculations provided by Borg to CHFS for the Borrowing Base Certificates included compound interest. Aucoin, however, testified that he did not find any indication that CHFS was aware that Borg was doing so. Finally, EFP/BHT question why Aucoin reduced the principal amount by the amount of ClearSpring's collections without first deducting ClearSpring's servicing fees. (HIL Adv. Dkt. 340 at 149).

b. Analysis

The Court finds that EFP/BHT, who are general, unsecured creditors as to the Home Improvement Loans, are not entitled to post-petition interest.[51] 11 U.S.C. § 506(b) ("[t]o the extent that an allowed secured claim is secured by property the value of which . . . is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim. . . ."). Moreover, the Court finds that EFP/BHT failed to meet their burden of proving the portion of ClearSpring's servicing fees attributable to the Home Improvement Loans, which they contend should not have been included by Aucoin in his calculation of the principal amount. EFP/BHT did not present any evidence as to this issue and did not identify any report from which the information might be gleaned. On cross-examination, Aucoin could not recall whether he reviewed any report prepared by ClearSpring that showed the portion of its total servicing fees attributable to Home Improvement Loans, as opposed to the Mortgage Portfolios or some other loan.

Under the burden-shifting framework of § 502(a), POC 4-1 and POC 5-1 constitute *prima facie* proof of the amount of EFP and BHT's claims. Aucoin's testimony, however, shifted the burden to EFP/BHT to prove the amount of their claims by a preponderance of the evidence. *In re 804 Congress, L.L.C.*, 529 B.R. 213, 219 (Bankr. W.D. Tex. 2015). In the absence of any evidence by EFP/BHT showing the amount of ClearSpring's servicing fees attributable to the Home Improvement Loans, the Court adopts Aucoin's calculation of the loan balance as of May 31, 2017, of $12,834,447, which includes principal of $9,921,132 and interest of $2,913,315. Consistent with the percentages set forth in the EFP

[51] The Court also finds that the EFP Note and BHT Note clearly provide for payment of simple interest, not compound interest. "The Borrower promises to pay interest only on the outstanding principal amount of the credit facility. . . ." (HIL Exs. P-1 & P-2, Part 4 at 1).

Note and BHT Note, the Court finds that as of May 31, 2017, assuming the collections identified by Aucoin are paid EFP/BHT, $9,625,835.25 is owed BHT (consisting of principal of $7,440,849 and interest of $2,184,986.25) and $3,208,611.75 is owed EFP (consisting of $2,480,283 in principal and $728,328.75 in interest) as unsecured creditors.

B. Mortgage Portfolios Adversary

1. MPF Complaint

In Count I of the MPF Complaint, the Trustee seeks a broad declaratory judgment that determines the rights and obligations of the parties with respect to the Mortgage Portfolios and Portfolios #1-#7. In Count II, the Trustee seeks a declaratory judgment disallowing POCs 6-1 to 9-1, in whole or in part. In Count III, she seeks an accounting of the net proceeds owed CHFS. Because both Counts II and III relate to POCs 6-1 to 9-1 and the amounts owed in connection with the Mortgage Portfolios, the Court addresses Counts II and III in the same discussion. In Count IV, the Trustee seeks specific performance of MPF Agreement *I*, MPF Agreement *II*, and MPF Agreement *III*. For convenience, Counts I and IV are combined in the discussion below. In Count V, the Trustee seeks the imposition of a constructive trust on all proceeds of the Mortgage Portfolios, and in Count VI, she seeks damages in excess of $1 million for conversion of property of the estate. Because the Trustee did not seek relief based on her claims in Count V and Count VI in the MPF Amended Pretrial Order (MPF Adv. Dkt. 126 at 12-13), the Court considers Counts V and VI to have been abandoned and will not discuss them further until the conclusion of this Opinion.

2. MPF Counterclaim Counts

EFP/BHT and Dr. Edwards filed the MPF Answer & Counterclaim, alleging eight (8) counts (the "MPF Counterclaim Counts"). In MPF Counterclaim Counts I-III of the MPF Answer & Counterclaim, EFP/BHT and Dr. Edwards seek a declaratory judgment that sets forth the rights and obligations of the parties with respect to Portfolios #1-#7. Because MPF Counterclaim Counts I-III seek a declaration of the same rights that are the subject of the Trustee's Counts I and IV in the MPF Complaint, MPF Counterclaim Counts I-III and Counts I and IV are included in the same discussion. In MPF Counterclaim Count IV, EFP/BHT and Dr. Edwards seek damages because of CHFS's alleged pre-petition and post-petition breaches of the purported "joint ventures." In MPF Counterclaim Count V, they seek damages for CHFS's alleged breach of its fiduciary duties. In MPF Counterclaim Count VI, they seek damages in the amount of the difference in servicing fees charged by ClearSpring and CHFS. In MPF Counterclaim Count VII, they seek a declaratory judgment that they are entitled to $3,888,309.30 or 65.7% of the $5,918,279 recovered by the Trustee. Finally, in MPF Counterclaim Count VIII, EFP/BHT and Dr. Edwards seek an accounting from the Trustee of all funds collected from the Mortgage Portfolios and a return of any funds used by the Trustee to pay expenses of the estate. MPF Counterclaim Count VIII is combined with the discussion of Counts II and III, given that they all relate to POCs 6-1 to 9-1.

3. Misjoinder of Parties

As a procedural matter, the Trustee alleged as an affirmative defense in the MPF Reply to Counterclaim that EFP/BHT improperly joined Church Bay Trust and CHFS as parties in the Mortgage Portfolios Adversary. (MPF Adv. Dkt. 72 at 3). The MPF

Counterclaim Counts in the MPF Answer & Counterclaim are asserted on behalf of EFP and BHT "acting by and through its trustee, Church Bay Trust" and identify the parties as EFP, BHT, Church Bay Trust, CHFS, and the Trustee. (MPF Adv. Dkt. 70 at 15).

No attorney appeared at Trial on behalf of Church Bay Trust or CHFS. When questioned on cross-examination, Dr. Edwards testified that he was acting in a representative capacity for BHT but was unaware of any separate claim brought by Church Bay Trust in the Mortgage Portfolios Adversary. (HIL Adv. Dkt. 341 at 164-71). Moreover, it does not appear that EFP/BHT seek any relief against CHFS, as opposed to the Trustee, in her representative capacity. *See Nicholas v. United States*, 384 U.S. 678, 692-93 & n.27 (1966); 11 U.S.C. § 323(b) (as representative of the estate, the trustee has exclusive capacity to sue and be sued on behalf of the estate).

Pursuant to Rule 21 of the Federal Rules of Civil Procedure ("Rule 21"), as made applicable to adversary proceedings by Rule 7021 of the Federal Rules of Bankruptcy Procedure, "[o]n motion or on its own, the court may at any time, on just terms, add or drop a party." FED. R. CIV. P. 21. Because Rule 21 does not provide any standards for determining if parties are misjoined, courts look to Rule 20 of the Federal Rules of Civil Procedure ("Rule 20") for guidance. *Acevedo v. Allsup's Convenience Stores, Inc.*, 600 F.3d 516, 521 (5th Cir. 2010). Rule 20 provides, in pertinent part, that "[p]ersons may join in one action as plaintiffs if . . . they assert any right to relief jointly." FED. R. CIV. P. 20. Because no relief is sought by Church Bay Trust or against CHFS, the Court agrees with the Trustee that Church Bay Trust and CHFS are misjoined parties and should be dismissed from the Mortgage Portfolios Adversary.

4. Choice of Law

As in the Home Improvement Loans Adversary, the Court finds that the rights and obligations of the parties with respect to Portfolios #1-#7 is governed by Mississippi law. As noted previously, Dr. Edwards lives in Maryland; Dickson is currently serving the remainder of his sentence at a halfway house in Maryland but before his arrest, resided in Mississippi; CHFS is a Delaware corporation with its principal place of business in Mississippi; EFP is a Delaware company; and BHT is a Bermuda trust; and Frascogna is a Mississippi attorney. The Mortgage Portfolios are secured by real property located in thirty (30) states in the United States. The original notes and mortgages that comprise Portfolios #1-#6 are located in Maryland. The original notes and mortgages that comprise Portfolio #7 are missing but presumed to be in Costa Rica. MPF Agreement *I*, MPF Agreement *II*, and MPF Agreement *III* do not contain a choice-of-law provision. The differences in the laws of Mississippi and Maryland, the two states with the most significant relationship to the transactions and the parties, are minimal. *Schneider Nat'l Transp. v. Ford Motor Co.*, 280 F.3d 532, 536 (5th Cir. 2002) (recognizing that no choice-of-law analysis is necessary when the laws of the jurisdictions do not conflict). The Court's application of Mississippi law is consistent with the choice of law made by the Fifth Circuit and the District Court in the Dickson Guaranty Suit. *Dickson*, 821 F.3d at 617 & n.2; *Dickson*, 2014 WL 4494283, at *3.

5. Counts I & IV/MPF Counterclaim Counts I-III (Mortgage Portfolios)

In Counts I & IV and MPF Counterclaim Counts I-III, the parties dispute the ownership of the Mortgage Portfolios and almost every other aspect of their business relationship. The Trustee maintains that CHFS owns the loans that comprise Portfolios #1-

#7 and that they constitute property of the bankruptcy estate (MPF Adv. Dkt. 126 at 12); EFP/BHT contend that EFP owns the loans that comprise Portfolios #1-#6 and BHT owns the loans that comprise Portfolio #7 (MPF Adv. Dkt. 126 at 31).

The Trustee questions whether the transactions are true joint ventures, loans, or something else. The Trustee asks the Court to decide this issue and alleges various claims depending on whether the Court finds that the transactions are true joint ventures, loans, or something else.

If any of the transactions are true joint ventures, according to the Trustee, then the funds used to purchase the Mortgage Portfolios are a capital contribution of EFP/BHT and are not obligations of CHFS. Moreover, the Trustee contends that with respect to Portfolios #1, #2, and #7, the estate is entitled to a distribution according to the terms of MPF Agreement *I*, MPF Agreement *II*, and MPF Agreement *III*, once EFP/BHT has been repaid its "investment" plus interest. With respect to Portfolios #3-#6 (for which there are no documents), the Trustee maintains that the estate has an equal ownership interest in the loan proceeds of Portfolios 1#-#6 pursuant to the default rules under the Mississippi Uniform Partnership Act, MISS. CODE ANN. § 79-13-101 *et seq*.

If any of the transactions are loans and not true joint ventures, however, the Trustee asserts that the loans are void or unenforceable against the estate under Mississippi's Statute of Frauds, MISS. CODE ANN. § 15-3-1(d), due to the lack of a written instrument. Even if the loans are enforceable, the Trustee contends the loans are unsecured or, if secured, are unperfected and do not accrue post-petition interest. As to the issue of perfection, the Trustee asserts that BHT's security interest in Portfolio #7 is unperfected for an additional reason—Frascogna released the underlying consumer loans to Dickson.

According to EFP/BHT, the transactions are true "joint ventures" with respect to all of the Mortgage Portfolios, and they have paid all sums due CHFS under the terms of their agreements. EFP/BHT contend that MPF Agreement *I* and MPF Agreement *II*, by their express terms, govern Portfolios #1 and #2 and by the parties' course of performance also govern Portfolios #3-#6. Moreover, EFP/BHT maintain that Portfolio #7 is governed by MPF Agreement *III*. They conclude that because the Mortgage Portfolios are not property of the estate, the payments on the Mortgage Portfolios are not property of the estate and cannot be used by the Trustee to pay any expenses of the estate.[52]

According to Dr. Edwards, the arrangement between CHFS and EFP/BHT was that CHFS serviced the loans in Portfolios #1-#7 for a flat "per collected payment" fee. Additionally, once EFP or BHT recovered their capital investment and twelve percent (12%) interest per annum as to any of the Portfolios, CHFS was entitled to a twenty-five percent (25%) share of the profits. Dr. Edwards insisted that EFP/BHT have not yet recovered their capital investment plus interest as to any of the Portfolios, and, therefore, CHFS is not entitled to receive any percentage share of the profits.

a. Are Portfolios #1-#7 assets of true joint ventures, collateral for loans, or the subject of servicing contracts?

A joint venture is "an association of two or more persons to carry out a single business enterprise for profit." *Boxwell v. Champagne*, 91 So. 2d 256, 261 (Miss. 1956). "Most courts agree that it is easier to define a joint venture than to recognize one." *In re York Furniture Co.*, 32 B.R. 211, 214 (Bankr. S.D.N.Y. 1983). As described by the Mississippi Supreme Court, a joint venture exists when two or more persons "combine

[52] EFP/BHT also raised this argument in the Cash Collateral Objection. *See supra* at 74-76.

their property, money, effects, skill and knowledge and agree to share jointly or in proportion to the capital contributed in the profits and losses. One may provide the necessary funds and another may put up only his labor, skill or experience." *Boxwell*, 91 So. 2d at 261 (citations omitted).

A partnership and a joint venture are identical "except the latter has limited and circumscribed boundaries." *Hults v. Tillman*, 480 So. 2d 1134, 1141 (Miss. 1985). Indeed, the Mississippi Supreme Court has described a joint venture as a "single shot partnership." *Id.* at 1143; *Sample v. Romine*, 8 So. 2d 257, 261 (Miss. 1942) (noting that a joint venture is usually of shorter duration than a partnership). Notwithstanding the differences, "[t]he legal principles for determining the existence of each are identical." *Hults*, 480 So. 2d at 1141. In that regard, the Mississippi Uniform Partnership Act defines a partnership as "the association of two or more persons to carry on as co-owners of a business for profit[.]" MISS. CODE ANN. § 79-13-202(a); *Allied Steel Corp. v. Cooper*, 607 So. 2d 113, 116 (Miss. 1992) (holding that statutory provisions of Mississippi Uniform Partnership Law, then in effect, applied to joint ventures). "The three main questions that are considered in partnership determination are (1) the intent of the parties, (2) the control question, and (3) profit sharing." *Carlson v. Brabham,* 199 So. 3d 735, 740 (Miss. Ct. App. 2016) (quoting *Smith v. Redd*, 593 So. 2d 989, 994 (Miss. 1991)).

In the discussion below, the Court divides the Portfolios into three categories. The first group consists of Portfolios #1 and #2, for which there are written agreements between EFP and CHFS; the second group consists of Portfolios #3-#6, for which there are no written agreements but which involve the same parties as Portfolios #1 and #2 (EFP and

CHFS); and the third group consists of Portfolio #7 for which there is a written agreement between BHT and CHFS.

(1.) Portfolios #1 & #2 (EFP & CHFS)

As a preliminary matter, the Court considers whether the counterparty to MPF Agreement *I* and MPF Agreement *II* is EFP or EFP LLP. The name that appears in MPF Agreement *I* and MPF Agreement *II* is EFP LLP, but POC 6-1 and POC 9-1 were filed by EFP. No proof of claim was filed by EFP LLP, and no representative of EFP LLP made an appearance in the Mortgage Portfolios Adversary. Dr. Edwards testified that EFP LLP does not exist, and the use of that name in MPF Agreement *I* and MPF Agreement *II* was his mistake. (HIL Adv. Dkt. 341 at 141). The evidence at Trial showed that he repeated this mistake by opening a bank account and having checks printed in the name of EFP LLP. This issue resembles the issue discussed in the Home Improvement Loans Adversary regarding the corporate status of the Rainbow Group. In applying the law of the British Virgin Islands, the Court concluded that Dr. Edwards' mistake in identifying the Rainbow Group as the "Rainbow Group, Ltd." rather than "The Rainbow Group, Ltd." did not render the Rainbow Loan Agreement, the 2006 Note, or the Custodial Agreement invalid. Likewise, the Court finds that the mistaken use of "LLP" did not render MPF Agreement *I* and MPF Agreement *II* invalid under Mississippi law. *See, e.g.*, *Journeay v. Berry*, 953 So. 2d 1145, 1153-54 (Miss. Ct. App. 2007). These mistakes show, however, that Dr. Edwards was careless in his drafting of legal documents. There are consequences when an orthopedic surgeon attempts to prepare documents dictating the terms of a complicated business relationship involving thousands of mortgages and millions of dollars, just as there would be consequences if a lawyer attempted to perform spinal surgery.

Here, the existence of joint ventures, loans, or servicing contracts depends on the provisions of MPF Agreement *I* and MPF Agreement *II* and an application of the Mississippi Partnership Act and Mississippi contract law. "A joint venture is a form of contract, and [is] governed by contract law." *Hults*, 480 So. 2d at 1143. Mississippi courts embrace "a three-tiered process" to contract interpretation. *Pursue Energy Corp. v. Perkins*, 558 So. 2d 349, 351-53 (Miss. 1990). "First, the 'four corners' test is applied, wherein the reviewing court looks to the language that the parties used in expressing their agreement." *Tupelo Redevelopment Agency v. Abernathy*, 913 So. 2d 278, 284 (Miss. 2005). Second, if the parties' intent remains unclear, a court should look to "the discretionary canons of contract construction." *Austin v. Carpenter*, 3 So. 3d 147, 150 (Miss. Ct. App. 2009). Third, "if the contract continues to evade clarity as to the parties' intent, the court should consider extrinsic or parol evidence." *Royer Homes of Miss., Inc. v. Chandeleur Homes, Inc.*, 857 So. 2d 748, 753 (Miss. 2003).

The Court finds that the business arrangements set forth in MPF Agreement *I* and MPF Agreement *II* possess characteristics of both true joint ventures and loans. The business arrangements are like joint ventures in that they are labeled as a "Mortgage Portfolio Joint Venture" in MPF Agreement *I* and MPF Agreement *II*, respectively. Both CHFS and EFP contributed something to the enterprise. EFP (through Dr. Edwards) contributed the funds to purchase Portfolios #1 and #2. CHFS contributed its loan servicing experience and fronted "collection expenses." There is no obligation of CHFS to repay EFP except from collections on Portfolios #1 and #2. Moreover, CHFS was entitled to receive twenty-five percent (25%) of the "cumulative net proceeds."

The business arrangements also contain many features that are unlike true joint ventures. There was no sharing of control. CHFS serviced Portfolios #1 and #2, sent collections to EFP, and was reimbursed a servicing fee "in the amount of $20 per month for each loan payment collected." EFP's role in the enterprise was limited to its initial contribution of funds. Also, there was no sharing of losses. *See Sample*, 8 So. 2d at 261 (discussing that the absence of any agreement to share losses supports the conclusion that no joint venture existed). Finally, CHFS's ability to share in any profits did not occur until after EFP had recouped both its investment and a return on its investment in the form of interest payments.

The business arrangements possess characteristics of loans. Pursuant to MPF Agreement *I* and MPF Agreement *II*, EFP agreed, in return for funding the purchases of Portfolios #1 and #2, to "receive interest on the outstanding balance to be paid monthly at the rate of 12%." (MPF Ex. D-20). EFP would hold title to the notes and mortgages that comprise Portfolios #1 and #2 as "collateral" and "would be entitled to physically retain the original notes until they are paid." Also, EFP would "be able to assign this collateral to a national lending institution." CHFS was required to make all payments to a "lockbox." The terms "interest," "collateral," "assign," and "lockbox" are terms generally found in loan documents.

After "read[ing] the contract[s] as a whole, so as to give effect to all of its clauses," the Court finds that MPF Agreement *I* and MPF Agreement *II* contain conflicting provisions and, therefore, are ambiguous. *Royer*, 857 So. 2d at 752. "[C]ontractual provisions are ambiguous where they are susceptible of two or more reasonable interpretations, or where one provision is in direct conflict with another provision, or where

terms are unclear or of doubtful meaning." *Reece v. State Farm Fire & Cas. Co.*, 684 F. Supp. 140, 143 (N.D. Miss. 1987) (citation omitted). The Court, therefore, considers rules of contract construction and parol evidence in determining whether the intent of the parties, the exercise of control over the enterprise, and the sharing of profits shows that the transactions are true joint ventures, loans, or servicing contracts. In that regard, the Court notes that the rules of contract construction require that ambiguous contract terms be construed most strongly against the party responsible for drafting them. *Wallace v. United Miss. Bank*, 726 So. 2d 578, 588 (Miss. 1998). The Court, therefore, construes MPF Agreement *I* and MPF Agreement *II*, both of which were drafted by Dr. Edwards, against EFP. Also, EFP, as the proponent of a finding of joint ventures has the burden of proving their existence by a preponderance of the evidence. *Davis v. Noblitt & Caper Elec. Co.*, 594 So. 2d 610, 613 (Miss. 1992).

(a.) Intent

The first question in determining the existence of a joint venture is whether the parties intended to form a joint venture. *Hults*, 480 So. 2d at 1143 ("[A]ctual intent to form a joint venture is essential."). The title "Mortgage Portfolio Joint Venture" appears in both MPF Agreement *I* and MPF Agreement *II*. The Court is convinced, however, that the title was chosen by Dr. Edwards, who drafted the documents. He used the phrase as a casual description of the parties' relationship, and did not intend to attach any legal meaning to its use. Dr. Edwards should not be allowed to point to the title as evidence of the parties' intent to enter into a joint venture but also ask the Court to ignore the legal meaning of other terms that appear in MPF Agreement *I* and MPF Agreement *II*, such as "collateral" and "security," as drafting mistakes made by a non-lawyer. With respect to MPF

Agreement *I* and MPF Agreement *II*, Dr. Edwards testified, "I will be first to say it is a poorly constructed document." (HIL Adv. Dkt. 341 at 187). Thus, the Court finds that the appearance of "Mortgage Portfolio Joint Venture" in the title does not necessarily imply the parties' intent to enter into a partnership relationship.

Aucoin's testimony at Trial showed that CHFS treated the arrangements as business loans for tax purposes. Aucoin evaluated the available tax returns and financial statements of CHFS. (MPF Ex. P-2 at 7). From 2008 to 2012, he found that CHFS recorded the Mortgage Portfolios as assets and recorded EFP/BHT's investments as a reduction of those assets. Because the Mortgage Portfolios were purchased at a discount, there was a difference between the purchase price for each portfolio and the principal balances of the loans at the respective purchase dates. These differences were recorded by CHFS as a liability, which he referred to as unearned discounts. In 2008, CHFS recorded the income associated with the Mortgage Portfolios on its tax returns and the interest paid to EFP/BHT as expenses. This is the same treatment CHFS provided the Home Improvement Loans. From 2009 to 2012, CHFS recorded income associated with the Mortgage Portfolios. In conclusion, Aucoin testified that CHFS treated these transactions as if EFP/BHT had loaned money to CHFS, rather than as joint ventures. (MPF Ex. P-2 at 7 & Schedule 14).

Aucoin was unable to evaluate EFP/BHT's accounting and tax treatment of the Mortgage Portfolios because EFP/BHT objected to producing their tax returns in response to the Trustee's discovery requests. (HIL Adv. Dkt. 342 at 201). Moreover, the Trustee did not file a motion to compel production of EFP/BHT's tax returns. The only evidence regarding EFP's tax treatment was Borg's testimony that she understood that EFP listed the Mortgage Portfolios on its books as assets. Borg's testimony was unsupported by any

documents, and Borg admitted that she did not prepare tax returns for EFP. (HIL Adv. Dkt. 342 at 199-200). The Court thus gives little weight to Borg's unsubstantiated testimony about EFP's internal treatment of the Mortgage Portfolios. In light of all of the evidence presented at Trial, the Court concludes that EFP failed to prove by a preponderance of the evidence that the parties intended to enter into a joint venture for the purpose of servicing the loans that comprise Portfolios #1 and #2.

(b.) Control

It is undisputed that EFP made no actual work contribution to the enterprise. There was no evidence at Trial that EFP controlled in any measure the day-to-day operations of the servicing loan business.

> We [have] broadly defined a joint venture as an association of persons to carry out a single business enterprise for profit, for which purpose they combine their property, money, efforts, skill, and knowledge. We said it exists when two or more persons combine in a joint business enterprise for their mutual benefit with an understanding that they are to share in profits or losses and . . . have a voice in its management. We noted a condition precedent for its existence was a joint proprietary interest in the enterprise and right of mutual control.

Pittman v. Weber Energy Corp., 790 So. 2d 823, 826 (Miss. 2001) (quotation omitted). The Court thus finds that EFP failed to prove by a preponderance of the evidence that the parties exercised mutual control over the enterprise.

(c.) Profit Sharing

The Mississippi Uniform Partnership Act imposes a presumption that a partnership exists if profit sharing is proven "unless the profits were received in payment . . . of wages or other compensation." MISS. CODE ANN. § 79-13-202(c)(3)(iii). Under MPF Agreement *I* and MPF Agreement *II*, CHFS was entitled to a twenty-five percent (25%) share of the net proceeds upon the achievement of certain milestones related to EFP's recoupment of

its investment, plus interest at the rate of twelve percent (12%) per annum. This provision suggests a creditor/borrower relationship. "If money, loaned to another for use in the enterprise, is to be repaid by the borrower, whether the venture succeeds or fails, the contract is ordinarily construed as one of lending and borrowing and not of [a] joint adventure." *Boxwell*, 91 So. 2d at 261. Moreover, that the arrangement did not contemplate profit-sharing is supported by Dr. Edwards' testimony. When asked at Trial about the parties' business relationship with respect to the Mortgage Portfolios, Dr. Edwards testified, "It is a servicing agreement with a bonus feature, an inventive bonus I would call it." (HIL Adv. Dkt. 341 at 210). The Court, therefore, finds that MPF Agreement *I* and MPF Agreement *II* gave CHFS the opportunity to share in the net proceeds as a loan servicer paid a bonus for its services and not as a joint venturer sharing in the profits of the business enterprise.

Because of the pervasive borrower/lender language in MPF Agreement *I* and MPF Agreement *II*, CHFS's treatment of Portfolios #1 and #2 as assets, the lack of mutual control over the enterprise, and the manner in which CHFS was paid for its services, the Court finds from a preponderance of the evidence that the transactions set forth in MPF Agreement *I* and MPF Agreement *II* are loans rather than true joint ventures. The Court arrives at this conclusion even though Dr. Edwards testified that EFP did not intend to loan money to CHFS, and that he knew how to draft a loan agreement if he had intended to do so, as evidenced by the Rainbow Loan Agreement. Although the Court does not doubt that Dr. Edwards thinks he knows how to draft a loan agreement, the evidence presented at Trial demonstrated that Dr. Edwards did not know how to draft a joint venture agreement. Moreover, EFP recognized the possibility that the business arrangements could be viewed

as loans by filing POC 8-1 and POC 9-1, in which EFP seeks treatment as a secured creditor. Having found that the business arrangements are loans and not true joint ventures, the Court next considers whether EFP or CHFS owns Portfolios #1 and #2, and if CHFS owns Portfolios #1 and #2, whether EFP has a perfected security interest in Portfolios #1 and #2.

(d.) Who owns Portfolios #1 & #2?

Three undisputed facts support a finding that CHFS owns Portfolios #1 and #2. First, CHFS purchased both Portfolios #1 and #2 from DLJ, as evidenced by the DLJ Purchase Agreement and the letter dated March 25, 2008. (MPF Ex. P-8). Second, the notes and mortgages that comprise Portfolios #1 and #2 were assigned to CHFS. Third, CHFS treated Portfolios #1 and #2 as assets in its tax returns.

Despite EFP's contention that it owns Portfolios #1 and #2 (at least until it received its seventy-five percent (75%) of the profits) because it paid DLJ directly for Portfolios #1 and #2, it is undisputed that EFP provided only a portion of the funds that financed the purchases. Although EFP committed to provide the funds for the purchases, the source of the funds was not only EFP but also Dr. Edwards and other entities purportedly controlled by him. The Court finds that the evidence at Trial shows that CHFS owns Portfolios #1 and #2.

(e.) Does EFP have a perfected security interest?

The basis for perfection of EFP's alleged security interest in the Mortgage Portfolios (including Portfolios #1 and #2) is possession. (MPF Ex. D-23). The relevant statutory provisions regarding perfection of a security interest in an instrument by possession are as follows:

> (a) Except as otherwise provided in subsection (b) and Section 75-9-312(b), a financing statement must be filed to perfect all security interests and agricultural liens.
>
> (b) The filing of a financing statement is not necessary to perfect a security interest:
>
> * * *
>
> (6) In collateral in the secured party's possession under Section 75-9-313;

MISS. CODE ANN. § 75-9-310(a), (b)(6). The Court finds that as of the Petition date, EFP had a perfected security interest in Portfolios #1 and #2, less CHFS's servicing fees (including twenty-five percent (25%) of the net proceeds if certain milestones were achieved) pursuant to MISS. CODE ANN. § 75-9-313(a), which provides:

> (a) Except as otherwise provided in subsection (b), a secured party may perfect a security interest in tangible negotiable documents, goods, instruments, money, or tangible chattel paper by taking possession of the collateral. . . .

MISS. CODE ANN. § 75-9-313(a). Here, the original notes and mortgages that comprise Portfolios #1 and #2 are in Baltimore in EFP's possession.

(2.) Portfolios #3-#6 (EFP & CHFS)

There is no written agreement between EFP and CHFS regarding Portfolios #3-#6. Nevertheless, "[t]he existence of a joint venture may be inferred from the facts, circumstances, and conduct of the parties." *Pennebaker v. Gray*, 924 So. 2d 611, 618 (Miss. Ct. App. 2006). The evidence at Trial demonstrated that the parties treated Portfolios #3-#6 the same way as Portfolios #1 and #2. For the reasons discussed at length with respect to Portfolios #1 and #2, the Court finds that the transactions regarding Portfolios #3-#6 are also loans and not true joint ventures.

(a.) Who owns Portfolios #3-#6?

The same undisputed facts that support a finding that CHFS owns Portfolios #1 and #2, also support a finding that CHFS owns Portfolios #3-#6. CHFS purchased Portfolio #3 from DLJ (MPF Ex. P-10); Portfolio #4 from Promor Investments, LLC (MPF Ex. P-11); and Portfolios #5-#6 from BWP (MPF Exs. P-12 & P-13). The notes and mortgages that comprise Portfolios #3-#6 were assigned by the portfolio sellers to CHFS. Finally, CHFS treated Portfolios #3-#6 as assets in its tax returns.

(b.) Are the loans enforceable?

The Trustee contends that the loans related to the purchase of Portfolios #3-#6, for which there is no written agreement, violate the general Statute of Frauds in Mississippi, which provides, in pertinent part:

> An action shall not be brought whereby to charge a defendant or other party:
>
> * * *
>
> (d) upon any agreement which is not to be performed within the space of fifteen months from the making thereof . . .
>
> * * *
>
> unless, in each of said cases, the promise or agreement upon which such action may be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith or signed by some person by him or her thereunto lawfully authorized in writing.

MISS. CODE ANN. § 15-3-1. Because the loans that comprise Portfolios #3-#6 are all for terms longer than five (5) years, the Court agrees with the Trustee that the loans to CHFS to purchase Portfolios #3-#6 could not be performed within the space of fifteen (15) months and, therefore, are unenforceable against the estate.

(3.) Portfolio #7 (BHT & CHFS)

As with Portfolios #1 and #2, the Court finds that the existence of a joint venture, loan, or servicing contract with regard to Portfolio #7 depends on the provisions of MPF Agreement *III* and an application of the Mississippi Uniform Partnership Act. *Hults,* 480 So. 2d at 1142. The Court's analysis of Portfolio #7, however, is not the same as its analysis of Portfolios #1 and #2 because the arrangement between CHFS and BHT regarding Portfolio #7 is different due to the influence of Church Bay Trust in the negotiations.

MPF Agreement *III* provides, "[t]he custodian selected by [BHT] will hold the original Notes and Assignments to [BHT] for all loans in the portfolio and will be entitled to physically retain the original notes until they are paid." (MPF Ex. D-5). Thus, the notes and mortgages would not be held by Dr. Edwards (as they are with respect to Portfolios #1-#6) but by an independent party. Also, CHFS assigned the agreement to purchase Portfolio #7 from BWP to Church Bay Trust. (PPC Ex. D-21). Although the notes and mortgages that comprise Portfolio #7 are missing, the custodial certifications signed by Frascogna indicate that at some point, the notes and mortgages were assigned by CHFS to BHT. (MPF Ex. D-28). Finally, unlike MPF Agreement *I* and MPF Agreement *II*, CHFS was required to pay all of its due diligence expenses, and the monthly servicing fee was reduced from $20 to only $15.

There are conflicting terms in MPF Agreement *III* that render it ambiguous as to whether the parties intended to enter into a joint venture, a loan, or something else. Although "Mortgage Portfolio Joint Venture" appears in the title, MPF Agreement *III* also contains such terms as "security" "collateral," "assign," and "lockbox." It thus suffers many of the same internal inconsistencies as do MPF Agreement *I* and MPF Agreement *II*.

12-01703-NPO Dkt 2182 Filed 02/27/18 Entered 02/27/18 16:51:37 Page 165 of 214

Without repeating the Court's discussion of Portfolio #1 and #2 but for the same reasons set forth in that discussion, the Court finds that the parties did not enter into a joint venture with respect to Portfolio #7. The Court also finds, however, that the parties did not enter into a loan agreement. CHFS owns the notes and mortgages that comprise Portfolios #1-#6 but not those that comprise Portfolio #7. Under these facts, where CHFS has no rights in Portfolio #7 (other than its contractual right to service the loans), no security interest can attach to Portfolio #7 as collateral for a loan. MISS. CODE ANN. § 75-9-203; *Germany v. Farmers Home Admin. (In re Germany)*, 73 B.R. 19, 21-22 (Bankr. S.D. Miss. 1986). The Court, therefore, concludes that the arrangement between the parties with respect to Portfolio #7 constitutes a servicing contract rather than a loan.

The Court finds that the business arrangements between CHFS and EFP with respect to Portfolios #1-#6 are loans and not true joint ventures. The Court further finds that the business arrangement between CHFS and BHT with respect to Portfolio #7 was a loan-servicing agreement. CHFS owns Portfolios #1-#6; BHT owns Portfolio #7. EFP had a perfected security interest in the loan proceeds of Portfolios #1 and #2 as of the Petition date, less CHFS's servicing fees of $20 for each loan payment collected each month (including twenty-five percent (25%) of the net proceeds once certain milestones were achieved) and reimbursement of certain costs.[53] The undocumented loans between CHFS and EFP for the purchase of Portfolios #3-#6 are unenforceable under the Statute of Frauds.

---

[53] MPF Agreement *I* and MPF Agreement *II* contain similar, but not identical terms for the reimbursement of costs incurred by CHFS in servicing the loans that comprise Portfolios #1 and #2. *See supra* at 41. No evidence was presented at the Trial regarding CHFS's "out of pocket major collections expenses" or its due diligence expenses. If necessary, the parties may request a hearing for a determination of these amounts.

6. Counts II & III/MPF Counterclaim Count VIII (POC 6-1 to POC 9-1)

In Counts II and III, the Trustee seeks a declaratory judgment disallowing POCs 6-1 to 9-1, in whole or in part, and also requests an accounting of the net proceeds owed CHFS. In MPF Counterclaim Count VIII, EFP/BHT likewise seek an accounting of all funds collected from the Mortgage Portfolios. Additionally, EFP/BHT ask the Court to require the Trustee to return any such funds used by her to pay expenses of the estate.

a. Calculation of Claims

The Court finds that POC 6-1 ($7,101,094.35) and POC 9-1 ($7,101,094.55), filed by EFP, are duplicative filings as are POC 7-1 ($4,917,547.35) and POC 8-1 ($4,917,547.34), filed by BHT. It is undisputed that they are for the same amount (except for a difference of a few pennies). EFP/BHT explain that the claims are based on distinct legal theories. (MPF Adv. Dkt. 126 at 31). One set (POC 6-1 and POC 7-1) relate to CHFS's alleged breach of its fiduciary duties to EFP/BHT, and the other set (POC 8-1 and POC 9-1) relate to their alleged secured claims. For the reasons discussed below, the Court finds that MPF Counterclaim Count V, based on CHFS's alleged breach of its fiduciary duties, should be dismissed. The Court, therefore, finds that POC 6-1 and POC 7-1 should be disallowed. The Court limits its calculation of claims to POC 8-1 filed by BHT and POC 9-1 filed by EFP.

The Trustee retained Aucoin to identify and categorize the Mortgage Portfolios, analyze payments made to EFP/BHT, and recalculate amounts due EFP/BHT. (MPF Ex. P-2 at 7). Aucoin calculated the total loan balance due on the Mortgage Portfolios, as of May 23, 2012, the Petition date, of $7,113,951 to EFP and $5,024,355 to BHT. Aucoin separated the loan balance by portfolio, as follows:

Portfolio	Balance Due May 23, 2012
Portfolio #1	$1,147,647
Portfolio #2	$581,157
Portfolio #3	$63,473
Portfolio #4	$164,746
Portfolio #5	$2,692,079
Portfolio #6	$2,464,849
Portfolio #7	$5,024,355

(MPF Ex. P-2, Schedule 13). As to Portfolio #7, the Court finds that POC 8-1 should be disallowed in whole. 11 U.S.C. § 502(b). BHT is not a creditor of the estate, as alleged in POC 7-1 and 8-1. As to Portfolios #1-#6, the Court finds that POC 9-1 should be allowed to the extent that EFP is a secured creditor in the amount of $1,728,804 (Portfolios #1 and #2) and an unsecured creditor in the amount of $5,385,147 (Portfolios #3-6) as of May 23, 2012. 11 U.S.C. § 502(b).

The parties disagree as to the amount that is owed on the Mortgage Portfolios after the Petition date because they cannot agree on the payment of post-petition interest or the amount of post-petition payments. Aucoin identified 2,103 loans classified as Mortgage Portfolios by CHFS. Aucoin then compared the 2,103 loans to lists provided by Dr. Edwards and identified a total of 2,080 Mortgage Portfolios. (MPF Ex. P-2, Schedules 2.1 to 2.7). Next, he reconciled the 2,080 Mortgage Portfolios with ClearSpring's boarding data. Aucoin found that some of the 2,080 loans were not identified as such in the boarding date, some of the loans were missing, and some were classified as possible Mortgage Portfolios. Before Trial, the parties stipulated that there are 2,080 Mortgage Portfolios, as determined by Aucoin. (MPF Adv. Dkt. 126 at 36).

Post-petition, Aucoin was unable to find any source of information to identify collections by portfolio until July of 2012. (HIL Adv. Dkt. 340 at 174; MPF Ex. P-2,

Schedules 9 & 10). Likewise, for the period of November of 2013 to May of 2014, he was unable to find information supporting the amount of collections by portfolio. For the period from June of 2014 to May of 2017, however, ClearSpring captured the collection data by portfolio. (MPF Ex. P-2, Schedule 12). From the information available to him, Aucoin traced a total of $6,096,800 in collections to the Mortgage Portfolios, of which he attributed the following amount to each portfolio:[54]

Portfolio #1	$481,936
Portfolio #2	$306,675
Portfolio #3	$593,062
Portfolio #4	$841,240
Portfolio #5	$1,097,525
Portfolio #6	$967,486
Portfolio #7	$1,808,876
TOTAL	$6,096,800

(MPF Ex. P-2, Schedule 13). These amounts do not include any of the funds stolen by Dickson. (HIL Adv. Dkt. 340 at 185).

Aucoin compared ClearSpring's collections by portfolio to the balance and interest due as of May 23, 2012, to determine if any portfolio collections exceeded EFP/BHT's original investment, less any payments and interest that accumulated before the Petition date. (MPF Ex. P-2, Schedule 13). Assuming that the parties had entered into a true joint venture as to all of the Mortgage Portfolios, Aucoin performed this calculation to determine whether CHFS was entitled to share in the collections. Similarly, under MPF Agreement *I* (Portfolio #1) and MPF Agreement *II* (Portfolio #2), once total interest and principal pay-offs exceeded CHFS's servicing fees and EFP's investment and interest by $10,000, CHFS was entitled to 25% of the collections. Under MPF Agreement *III* (Portfolio #7), once

[54] $6,096,800 = $5,992,418 + $95,525 + $8,857. (MPF Ex. P-2, Schedule 12; HIL Adv. Dkt. 340 at 183).

BHT's principal and interest and CHFS's servicing fees were paid, CHFS was entitled to 25% of the collections. Because there were no written agreements for Portfolios #3-#6, the Trustee asked Aucoin to assume, pursuant to the Mississippi Uniform Partnership Act, that once the total interest and principal payoffs exceeded CHFS's servicing fees and EFP's interest, CHFS would be entitled to 50% of the collections.

Aucoin determined that the collections for Portfolio #3 and Portfolio #4 exceeded the balance due EFP by at least May 23, 2012, as shown in the shaded rows of the chart below:

Portfolio	Balance Due May 23, 2012	ClearSpring's Collections	Collections Over/(Under)
Portfolio #1	$1,147,647	$481,936	$(665,711)
Portfolio #2	$581,157	$306,675	$(274,482)
Portfolio #3	$63,473	$593,062	$529,588
Portfolio #4	$164,746	$841,240	$676,494
Portfolio #5	$2,692,079	$1,097,525	$(1,594,555)
Portfolio #6	$2,464,849	$967,486	$(1,497,362)
Portfolio #7	$5,024,355	$1,808,876	$(3,215,479)

(MPF Ex. P-2, Schedule 13).[55] Aucoin did not determine the precise date when Portfolio #3 and/or Portfolio #4 exceeded the balance due. (HIL Adv. Dkt. 340 at 175).

EFP/BHT disagree with Aucoin's post-petition analysis. They contend that Aucoin should have applied the contract rate of interest of 12% during the entire post-petition period. EFP/BHT also question why Aucoin reduced the principal amount due as of May 23, 2012, by the gross amount of ClearSpring's collections without accounting for ClearSpring's servicing fees. (HIL Adv. Dkt. 340 at 184).

[55] Applying both ClearSpring's collections and CHFS's collections to the balance due results in Portfolio #3 and Portfolio #4 exceeding the balance due EFP, as of May 23, 2012, by $822,989 and $1,071,526, respectively. (MPF Ex. P-2 at 10, Schedule 10).

The Court finds that EFP/BHT failed to meet their burden of proving the portion of ClearSpring's servicing fees attributable to the Mortgage Portfolios, which they contend should not have been included in the calculation of the principal amount. EFP/BHT did not present any expert testimony by an accountant[56] or other qualified professional as to this issue and did not identify any report from which the information may be gleaned. On cross-examination, Aucoin could not recall whether he reviewed any report prepared by ClearSpring that showed the portion of its total servicing fees attributable to the Mortgage Portfolios, as opposed to the Home Improvement Loans or some other loan.

Under the burden-shifting framework of § 502(a), POC 4-1 and POC 5-1 constitute *prima facie* proof of the amount of EFP's and BHT's claims. Aucoin's testimony, however, shifted the burden to EFP/BHT to prove the amount of their claims by a preponderance of the evidence. *In re 804 Congress, L.L.C.*, 529 B.R. 213, 219 (Bankr. W.D. Tex. 2015). In the absence of any evidence by EFP/BHT showing the amount of ClearSpring's servicing fees attributable to the Portfolios, the Court adopts Aucoin's calculation of the loan balances as of May 31, 2017.

b. Analysis

As stipulated by the parties, the Court finds that there are a total of 2,080 Mortgage Portfolios. Moreover, the loan balance due on the Mortgage Portfolios, as of May 23, 2012, without regard to the enforceability of the loans, is $7,113,951 to EFP and $5,024,355 to BHT. The Court also finds, as to EFP/BHT's request for an accounting, that the post-petition collections of all the Mortgage Portfolios is $6,096,800. The Court finds that EFP is a secured creditor in the amount of $1,728,804 with respect to Portfolios #1

[56] Borg is not a certified public accountant and has no education in general accounting principles.

and #2 as of May 23, 2012. EFP's loans to CHFS as to Portfolios #3-#6 are unenforceable in the total amount of $5,385,147. As to the Trustee's request for an accounting of the net proceeds, the Court finds that Portfolios #3 and #4 exceeded EFP/BHT's original investment by $529,588 and $676,494, respectively. Because the Court already has determined that none of the business arrangements constituted true joint ventures, the Mississippi Uniform Partnership Act does not apply. No loan balance is owed BHT as to Portfolio #7, but BHT owns the post-petition collections of $1,808,876, less CHFS's servicing fees of $15 for each loan payment collected each month (including twenty-five percent (25%) of the net proceeds once certain milestones were achieved). Finally, the Court denies EFP/BHT's request to require the Trustee to return funds used to pay expenses of the estate.[57]

7. MPF Counterclaim Count IV (Breach of MPF Agreements)

EFP/BHT claim that CHFS breached the terms of the MPF Agreements pre-petition "by failing to pay all of the collections into lock box accounts" and post-petition "by transferring funds that were in the EFP Escrow Account and the BHT Escrow Account to Panama so that the funds could be stolen by [Dickson]." (MPF Adv. Dkt. 70 at 23). MPF Agreement *I* and MPF Agreement *II* contain the following relevant provision: "All portfolio mortgage payments will be made to a lockbox. A bank agreement will provide that funds from the lockbox may be released only to EFP." (MPF Exs. D-20 & D-23). MPF Agreement *III* contains the same provision except that "funds from the lockbox may be released only to [BHT]." (MPF Exs. D-21 & D-22).

[57] See *infra* at 184-87 for a discussion of the Cash Collateral Objection.

EFP/BHT did not mention any facts regarding the lockbox in the MPF Amended Pretrial Order, did not produce the bank agreements as exhibits at Trial, and offered no testimony related to the lockbox requirement. The Court, therefore, finds that EFP/BHT have abandoned their breach of contract claim regarding CHFS's purported failure to comply with the lockbox agreements.[58]

8. MPF Counterclaim Count V (Breach of Fiduciary Duty)

EFP/BHT claim that they are entitled to damages from the estate for CHFS's breach of its fiduciary duty arising out of its failure to honor the terms of the MPF Agreements. EFP/BHT allege that CHFS owed them a fiduciary duty as a joint venturer. The Court, having previously found that none of the business arrangements between EFP/BHT and CHFS constituted true joint ventures, finds that CHFS was not in a fiduciary relationship with EFP/BHT. In the absence of a fiduciary relationship, no fiduciary duty exists and no claim for a breach of that duty can arise. *Merchs. & Planters Bank of Raymond v. Williamson*, 691 So. 2d 398, 403 (Miss. 1997). The Court, therefore, finds that EFP/BHT have failed to meet their burden of proof and concludes that MPF Counterclaim Count V should be dismissed with prejudice. Accordingly, the Court also finds that POC 6-1 and POC 7-1, which are based on CHFS's alleged breach of its fiduciary duties, should be disallowed.

---

[58] As mentioned previously, EFP/BHT sued BancorpSouth in District Court in Case No. 3:14-cv-00964-DPJ-FKB, alleging that BancorpSouth breached a lockbox agreement related to the Home Improvement Loans. On February 21, 2017, the District Court found that EFP/BHT had abandoned its contractual rights by acquiescing to CHFS's transfers to a number of different bank accounts, including accounts in the name of EFP/BHT. EFP/BHT lost its appeal to the Fifth Circuit. *BancorpSouth*, 699 F. App'x 312.

9. MPF Counterclaim Count VI (Servicing Fees)

EFP/BHT seek damages against the estate for the difference between the servicing costs of ClearSpring and CHFS under the MPF Agreements. Given the Court's previous findings that there are no enforceable loans between CHFS and EFP as to Portfolios #3-#6, EFP's damages claim is limited to the servicing costs incurred with respect to Portfolios #1 and #2. BHT's damages claim arises out of the servicing costs incurred with respect to Portfolio #7.

EFP contends that it agreed to pay CHFS a servicing fee of $20 per month for each loan payment collected on the loans that comprise Portfolios #1 and #2; BHT asserts that it agreed to pay CHFS a servicing fee of $15 per month for each loan payment collected on the loans that comprise Portfolio #7. In comparison, ClearSpring's servicing fees, pursuant to the Agreed Order Granting Trustee's Application to Employ Loan Servicing Company and to Establish Settlement Authority [Dkt. #618][59] (Bankr. Dkt. 702; PPC Ex. P-16), include: an electronic boarding fee of $25 per loan; a one-time administrative accounting work fee of $35 per loan; a deboarding/transfer fee of $25 per loan; a performing loan fee of ten percent (10%) of payments collected, up to $50 per loan with a minimum $20 fee; fifty percent (50%) of late fees; and base fees of $7.50 per month per dormant loan.

To establish the difference between the servicing fees EFP/BHT agreed to pay CHFS and those charged by ClearSpring, EFP/BHT rely on the testimony of Borg and a summary prepared by her. (HIL Adv. Dkt. 342 at 161). Borg calculated that through June

[59] Neither EFP nor BHT appealed the Agreed Order Granting Trustee's Application to Employ Loan Servicing Company and to Establish Settlement Authority [Dkt. #618] (Bankr. Dkt. 702; PPC Ex. P-16), but they reserved their rights, claims, and defenses asserted in any of the adversary proceedings pending before this Court.

of 2017, ClearSpring charged the Trustee $725,363.21 that CHFS would not have charged EFP to service the loans in Portfolios #1-#6. (HIL Adv. Dkt. 342 at 175; MPF Ex. D-30). Similarly, Borg calculated that through June of 2017, ClearSpring charged the Trustee $312,978.54 more than what CHFS would have charged BHT to service the loans in Portfolio #7. (*Id.*). To simplify her calculations as to what CHFS would have charged EFP/BHT, Borg used a blanket servicing fee of $20 for all Mortgage Portfolios, including those that comprise Portfolio #7, although MPF Agreement *III* provided for payment of only $15. (HIL Adv. Dkt. 342 at 206; MPF Ex. D-30).

The Court finds Borg's conclusion drawn from her comparison of the servicing fees to be without merit. First, Borg failed to consider all of the compensation EFP/BHT agreed to provide CHFS. The $20 or $15 flat servicing fee was only one component of the compensation package contained in MPF Agreement *I*, MPF Agreement *II*, and MPF Agreement *III*. Another component of CHFS's compensation package was a bonus payment of twenty-five percent (25%) of the cumulative net proceeds, depending on the amount of cash collections for each Mortgage Portfolio. Borg erred in her assumption that calculating the difference in servicing fees was as simple as subtracting X dollars per loan payment from Y dollars per loan payment.

The second reason why Borg's comparison is meritless is Sercy's testimony. Sercy explained how the services provided by ClearSpring vastly differed from those provided by CHFS. After ClearSpring obtained access to CHFS's computer servers in June of 2014, Sercy described the situation as "quite bizarre." (HIL Adv. Dkt. 341 at 95). Data and images were missing due to the refusal of representatives of CHFS to surrender books and record to the Trustee, so it was like "putting a puzzle back together." (*Id.*). ClearSpring

also faced the task of "ingesting" into its system the information posted by the Trustee on "call logs," recording her direct contacts with individual borrowers. Moreover, ClearSpring's servicing of the loans was complicated by Dickson's contacts with borrowers just months beforehand. (HIL Adv. Dkt. 341 at 99). Understandably, some borrowers were mistrustful when told to send their payments to ClearSpring after Dickson had given them conflicting instructions. Given the largely destabilized condition of the Mortgage Portfolios and the uncertain condition of information obtained by the Trustee, the Court concludes that the services rendered by ClearSpring (for which there were significant front-end costs and other necessary expenses) differed from those provided by CHFS, and EFP/BHT have not met their burden of proving damages. Accordingly, the Court finds that MPF Counterclaim Count VI should be dismissed with prejudice.

10. MPF Counterclaim Count VII (Tracing of Funds)

In MPF Counterclaim Count VII, EFP/BHT seek a declaratory judgment that they are entitled to $3,888,309.30 or 65.7% of the $5,918,279 recovered by the Trustee. The Court has found that EFP is a secured creditor only with respect to Portfolios #1 and #2, and that BHT is not a secured creditor but holds a servicing contract with respect to Portfolio #7. Thus, the tracing issue is relevant only with respect to EFP and Portfolios #1 and #2. Because the issue of tracing was raised in both the Home Improvement Loans Adversary and the Mortgage Portfolios Adversary, the Court addresses this issue separately in the immediately following section.

C. Tracing of Funds

The Court previously has found that EFP/BHT are general unsecured creditors with respect to the Home Improvement Loans, that EFP is a general unsecured creditor with

respect to Portfolios #3-#6; and BHT is not a creditor of CHFS but the owner of Portfolio #7. The tracing of funds, therefore, is an issue only as to EFP's security interest in the loan proceeds of Portfolios #1 and #2.

1. Choice of Law

The issue as to whether EFP's security interest in Portfolios #1 and #2 attached to the funds recovered or intercepted by the Trustee is an issue under the UCC. The statutes of Maryland and Mississippi are materially identical as to a secured creditor's burden to trace funds.

2. Does EFP have a security interest in the $5,490,132.19 wired to the Trustee from accounts at Banco Panameño or the $540,000 in loan payments intercepted by the Trustee?

The loan payments collected on Portfolios #1 and #2 are proceeds from EFP's collateral. As defined under Mississippi's version of the UCC, "[p]roceeds" include: "(A) Whatever is acquired upon the sale, lease, license, exchange or other disposition of collateral; [or] (B) Whatever is collected on, or distributed on account of, collateral." MISS. CODE ANN. § 75-9-102(64). Under MISS. CODE ANN. § 75-9-315(a)(2), "[a] security interest attaches to any identifiable proceeds of collateral." Moreover, "[p]roceeds that are commingled with other property are identifiable proceeds . . . [i]f the proceeds are not goods, to the extent that the secured party identifies the proceeds by a method of tracing, including application of equitable principles, that is permitted under law." MISS. CODE ANN. § 75-9-315(b)(2). Simply put, a secured creditor, upon any disposition of collateral, has a continuing security interest in proceeds that can be identified by some method of tracing conducted and proved by that secured party.

According to EFP, Dickson stole funds from the bankruptcy estate that were subject to EFP's security interest. In calculating the amount of restitution Dickson was required to pay in connection with the criminal proceedings against him for bankruptcy fraud, the government credited all payments recovered or intercepted by the Trustee. EFP maintains that these payments constitute the proceeds of the property stolen from the estate that were subject to EFP's security interest.

According to the Trustee, Dickson's multiple transfers of funds from the DIP Operating Accounts to accounts in Latin America, the rogue operation of CHFS in Costa Rica and Panama prior and subsequent to the Disclosure filed on December 20, 2013, the unauthorized post-petition purchases of assets through affiliates in foreign countries, the difficulties presented by Panamanian bank secrecy laws, and the laundering of money have made it impossible to identify and trace collections on Home Improvement Loans, collections on Mortgage Portfolios, and funds from other sources (including Dickson's own personal funds and/or collections from loans purchased post-petition).

a. Tracing of Funds-General

The Trustee retained Aucoin to trace the funds that left the estate and the funds were delivered to the Trustee or collected on her behalf. In summary, Aucoin testified that approximately $13.2 million left accounts belonging to CHFS and the estate, both pre-petition and post-petition, and over $6.5 million was recovered or intercepted by the Trustee. (HIL Adv. Dkt. 340 at 96). Almost $12.3 million was deposited into offshore accounts held by W W Warren Foundation at Banco Panameño in Panama and RE&B Investment at Scotia Bank in Costa Rica. Aucoin was unable to trace the source of over $1.2 million deposited into Victory Consulting's account at Wells Fargo, which he believed

were payments from borrowers of either CHFS, Discount Home Mortgage, Inc., SNGC, LLC, or other lender. Aucoin was unable to determine the source of $6.5 million turned over to the estate or the property seized/identified in Costa Rica because of the pre-petition and post-petition commingling of funds and gaps in the data. (HIL Ex. P-7; HIL Adv. Dkt. 340 at 96).

b. Tracing of Pre-petition Funds

Aucoin testified that usually, if not always, the lenders purportedly controlled by Dr. Edwards wired funds to CHFS's account ending in 6711 at BancorpSouth. CHFS deposited payments from borrowers to a different account at BancorpSouth ending in 3644, referred to as the "lock box account." Borrowers whose funds were deposited into the -3644 account included those with loans in both the Home Improvement Loans and the Mortgage Portfolios as well as other loans. In other words, CHFS commingled collections from all loans into the BancorpSouth -3644 account. Moreover, collections from consumer loans were not the only deposits made into the -3644 account. (HIL Adv. Dkt. 340 at 204). Each month, CHFS wired payments from the -3644 account directly to an entity purportedly controlled by Dr. Edwards for payments related to the Home Improvement Loans. For payments related to the Mortgage Portfolios, however, CHFS transferred funds from the -3644 account to BancorpSouth accounts ending in 7901 and 7677, and then CHFS wired money from the BancorpSouth -7901 and -7677 accounts to EFP and BHT, respectively. These wires were consistent in timing and frequency. (HIL P-7 at 10).

In early 2012, the wires to the entities purportedly controlled by Dr. Edwards and the consistency of the transfers between CHFS accounts stopped. Pre-petition, approximately $3.7 million was moved to the W W Warren Foundation account in Panama

and other accounts through multiple transactions. Aucoin was unable to determine the portion of the $3.7 million that related to the Home Improvement Loans, the Mortgage Portfolios, or other sources. Moreover, Aucoin was unable to trace the source of $2.3 million, the largest deposit into the W W Warren Foundation account in Panama in May of 2012.

c. Tracing of Post-petition Funds

Post-petition, but before the Trustee's appointment, CHFS continued to use the BancorpSouth account ending in 3644 to receive most of the payments from its borrowers related to both the Home Improvement Loans and the Mortgage Portfolios. In addition, interest payments on the loans to Dickson and his affiliated companies were deposited into the -3644 account. (HIL Adv. Dkt. 342 at 149-51). For a brief period, CHFS's prior practice of moving funds to other accounts based on collections from Mortgage Portfolios continued on a monthly basis. The funds were moved from -3644 to the DIP Operating Account at Wells Fargo, and two transfers were made from the DIP Operating Account to the EFP Mortgage Portfolios Escrow Account and the BHT Mortgage Portfolios Escrow Account, also at Wells Fargo. This flow of funds changed in late 2013 when most payments from borrowers were diverted to Victory Consulting's Wells Fargo account ending in 2196. From November of 2013 to January of 2014, more than $300,000 per month in electronic deposits were made into Victory Consulting's Wells Fargo account. Because of the lack of detail associated with these electronic deposits, Aucoin was unable to determine whether the payments were for the Home Improvement Loans or the Mortgage Portfolios. A small number of borrowers continued to submit funds to the BancorpSouth account ending in 3644, and any checks were deposited into the W.D.

Dickson Enterprise, Inc. account at OmniBank. Aucoin was unable to trace directly to CHFS some large deposits into Victory Consulting's Wells Fargo account made during this period.

In late 2013, approximately $9,095,000 were transferred from CHFS accounts. Aucoin provided an analysis of these transactions. (HIL Ex. P-7, Schedules 8 & 8.1). Aucoin was not able to determine where $8,395,000 went once they were wired to the W W Warren Foundation account at Banco Panameño because of the absence of bank records. As to the remaining $700,000 that were wired to Victory Consulting, Aucoin identified funds totaling $1,445,000 that were transferred from accounts owned by Victory Consulting and Discount Mortgage, Inc. to the RE&B Investment Trust account, as shown below:

01/25/2013	$150,000	Victory Consulting
02/07/2013	$175,000	Victory Consulting
03/15/2013	$100,000	Victory Consulting
08/08/2013	$120,000	Discount Mortgage, Inc.
11/26/2013	$900,000	Victory Consulting
TOTAL	$1,445,000	

(HIL Ex. P-7, Schedule 8). A document provided by the Costa Rican government, however, reflected deposits totaling almost $5.2 million into the RE&B Investment Trust account. These other funds apparently came from accounts belonging to W W Warren Foundation, Phalanx, S.A., and Viene De Phalant S.A. With no records from these accounts, Aucoin was unable to trace the source of funds in excess of $1,445,000.

Aucoin opined that the original funds totaling $1,445,000 were converted into different types of investments. Based on documents provided by the Costa Rican government, Aucoin further opined that all of the RE&B Investment Trust account funds were connected in some way to most, if not all, of the following transactions:

- Eight (8) loans totaling $492,500 secured by real property in the name of Phalanfin;

- Fifteen (15) loans totaling $2,557,700 secured by real property in the name of Phalanx, S.A.;

- $180,840.72 as of November 14, 2014, held in Phalanx S.A.'s bank account in Costa Rica, which may have been seized by the Costa Rican government;

- $587,749.95 seized by the Costa Rican government from unknown sources;

- A residential condominium located at Marina Los Sueños in Costa Rica, seized by the Costa Rican government, which was purchased with unknown sources; and

- Other real property or rights to real property that were collateral for the loans mentioned above or other loans not yet identified.

(HIL Ex. P-7 at 12).

d. Tracing of Funds Recovered or Intercepted

Aucoin was unable to trace any of the funds recovered or intercepted by the Trustee in the amount of $6,693,838.38 to the Home Improvement Loans or the Mortgage Portfolios. He traced $5,898,278.29 to accounts at Banco Panameño belonging to CHFS and Dickson. Aucoin attempted to trace two (2) cashier's checks in the total amount of $540.000. The immediate source of the $300,000 cashier's check from BancorpSouth dated January 29, 2014, was the Discount Mortgage, Inc. account. These funds appeared to have come from the Victory Consulting account. Although these funds could be further traced to the BancorpSouth account ending in 3644, they could not be tied to either the Home Improvement Loans or the Mortgage Portfolios exclusively.

The second cashier's check in the amount of $240,000 from OmniBank dated February 25, 2014, and made payable to CHFS was traced to Dickson's account. These

funds, in turn, appeared to have come from Costal Condos, but Aucoin could not determine the source of the funds from Costal Condos. Aucoin researched the Willow Court Sale, for which the Trustee received $111,367.59 in restitution, and concluded that W.D. Dickson Enterprises, Inc. held the interest in the real estate. Aucoin was unable to tie Costal Condos to CHFS, for which the Trustee also received $144,191.90 in restitution. (HIL Adv. Dkt. 340 at 94).

For its tracing analysis, EFP did not present any expert testimony at Trial. Instead, EFP relied on Borg's testimony. She testified that at least $5,898,278.29 of the funds recovered by the Trustee can be traced to the funds stolen in late 2013 because these funds were withdrawn from the same bank (Banco Panameño) where approximately $8,395,000 of the stolen funds were deposited, although not from the same accounts.

In the alternative, EFP relies on the government's calculation of $5,442,004.58 in the Restitution Order. In his criminal case, the federal government determined that Dickson's criminal conduct resulted in losses to the estate of $12,145,842.36. From this amount, the government subtracted the funds recovered or intercepted by the Trustee ($6,448,278.29)[60] and proceeds from the sale of real property ($255,559.49) to arrive at a restitution amount of $5,442,004.58. Because the federal government gave Dickson credit for all amounts recovered or intercepted by the Trustee, regardless of the source of those funds, in its restitution calculation and because restitution, by definition, is the return of stolen property or payment to the victim for the harm caused, EFP claims it is entitled to a pro rata share of the restitution payments. For this proposition, EFP cites *Cameron v. Orix*

[60] The government's calculation overstates this amount by $10,000. *See supra* at 85.

12-01703-NPO Dkt 2182 Filed 02/27/18 Entered 02/27/18 16:51:37 Page 183 of 214

Credit Alliance, Inc. (In re Larson), Adv. Proc. 93-7049, 1993 WL 367106, at *5-6 (Bankr. N.D. July 1, 1993).

In *Larson*, the Internal Revenue Service ("IRS") held perfected federal tax liens on all property and rights to property belonging to the debtor pursuant to Internal Revenue Code ("IRC") §§ 6321, 6322 before the commencement of the debtor's bankruptcy case. The post-petition theft of estate funds resulted in a restitution order requiring the thief to pay restitution to the estate of $17,500. The chapter 7 trustee objected to the IRS's assertion of tax liens on the restitution order. The bankruptcy court ruled in favor of the IRS, holding that the IRS's tax liens continued to attach to the restitution order, "which constitute[d] the proceeds from the recovery of the stolen property which property the IRS had perfected liens pre-petition." *Larson*, 1993 WL 3671016, at *6.

3. Analysis

The Court finds that EFP has failed to meet its burden of tracing the collections stolen from Portfolios #1 and #2 to any of the funds recovered by the Trustee. Aucoin's testimony amply demonstrates the many obstacles that he faced in attempting to trace the stolen funds and the reasons for his failed efforts to do so. Moreover, the Court finds EFP's attempt to rebut Aucoin's testimony flawed for two reasons. First, the accounts from which the funds were withdrawn from Banco Panameño are not the same accounts that held the stolen funds. Without records from Banco Panameño, Borg's tracing analysis is speculative.

Second, EFP's reliance on the Restitution Order is misplaced. The Trustee did not agree with the government's restitution calculations. Although she provided information to the government about losses to the estate and her recovery of some funds, the Trustee

did not negotiate or agree to the restitution amount. Moreover, the government made no attempt to trace the source of the funds that Dickson agreed to pay the Trustee. In that regard, the Court finds EFP's reliance on *Larson* misplaced. In refusing to avoid the government's tax liens after a post-petition theft of estate funds, the bankruptcy court in *Larson* cited statutory provisions of the IRC. Here, EFP's security interest in Portfolios #1 and #2 arose from statutory provisions of the UCC, not the IRC, and, therefore, the UCC determines the reach of EFP's lien. *See* MISS. CODE ANN. § 75-9-315(b)(2) (upon disposition of collateral, secured creditor has continuing security interest only in proceeds that can be identified by some method of tracing).

D. Cash Collateral Contested Matters

In the Trustee's Cash Motion, the Trustee sought permission from the Court, to the extent required, to use cash collections to operate CHFS in the ordinary course of business until confirmation of a chapter 11 plan of liquidation. In the Cash Collateral Objection, EFP/BHT alleged that all cash collections from the Home Improvement Loans and the Mortgage Portfolios belonged to them and sought an order prohibiting the Trustee from using any of its cash collateral. These contested matters were filed prior to the Court's resolution of the issues raised in the Home Improvement Loans Adversary and the Mortgage Portfolios Adversary. Given the findings of the Court, the only cash collateral in question are the proceeds from Portfolios #1 and #2, which belong to EFP.

Section 363(c)(2) provides that a trustee may not use cash collateral without the consent of the creditor holding the security interest or leave of court. 11 U.S.C. § 363(c)(2). If a trustee uses cash collateral with court approval, § 363(e) requires that

> at any time, on request of an entity that has an interest in the property used, sold, or leased, or proposed to be used, sold, or leased, by the trustee, the

> court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest.

11 U.S.C. § 363(e). Section 361 provides the following examples of adequate protection: (1) periodic cash payments; (2) additional or replacement liens; and (3) such other relief as will provide the "indubitable equivalent" of the secured creditor's interest. 11 U.S.C. § 361. "The term 'adequate protection' is intended to be a flexible one." 3 COLLIER ON BANKRUPTCY ¶ 363.05 (16th ed. 2017). On the issue of adequate protection, the burden of proof falls on the Trustee. 11 U.S.C. § 363(p).

The Court finds that the Trustee met her burden proving that EFP is being adequately protected by the following: (1) the Trustee's repatriation of approximately $6.5 million stolen or diverted from the bankruptcy estate and the Trustee's on-going efforts to repatriate additional funds, including $587,749.95 seized by the Costa Rican government; (2) the monthly accumulation of cash through ClearSpring's servicing of Portfolios #1 and #2; and (3) EFP's access to ClearSpring's reports. The Court, therefore, concludes that the Trustee should be able to use EFP's traceable cash collateral.

In the alternative, the Court finds EFP's post-petition security interest in traceable proceeds from Portfolios #1 and #2 is limited by § 552, which provides, in relevant part:

> (a) Except as provided in subsection (b) of this section, property acquired by the estate or by the debtor after the commencement of the case is not subject to any lien resulting from any security agreement entered into by the debtor before the commencement of the case.
>
> (b)(1) Except as provided in sections 363, 506(c), 522, 544, 545, 547, and 548 of this title, if the debtor and an entity entered into a security agreement before the commencement of the case and if the security interest created by such security agreement extends to property of the debtor acquired before the commencement of the case and to proceeds, product, offspring, or profits of such property, then such security interest extends to such proceeds, products, offspring, or profits acquired by the estate after the commencement of the case to the extent provided by such security

> agreement and by applicable nonbankruptcy law, except to any extent that the court, after notice and a hearing and *based on the equities of the case*, orders otherwise.

11 U.S.C. § 552(a), (b)(1) (emphasis added). Under § 552(b), the Court has broad equitable powers in determining the extent that EFP may maintain its security interest in Portfolios #1 and #2 post-petition. "This 'equities of the case' provision is intended to prevent secured creditors from receiving windfalls." *In re Patio & Porch Sys., Inc.*, 194 B.R. 569, 575 (Bankr. D. Md. 1996). The Court finds that the equities of this Bankruptcy Case warrant a finding that EFP's security interest does not flow to all traceable proceeds generated by Portfolios #1 and #2, since they represent, in large part, the yeoman's work of the Trustee and numerous professionals of the estate. *Id.* At this juncture, however, the Court is unable to determine the extent to which the Trustee may use these proceeds.

In the Trustee's Cash Motion, the Trustee seeks authority to use EFP's cash collateral for ordinary expenses of the estate for six (6) months in order to afford her an opportunity to file a disclosure statement and plan of liquidation. The Trustee lists six (6) categories of ordinary expenses, but she does not provide the amount she seeks to use or a budget for the six-month period during which she seeks to use the cash collateral. Even if the Trustee had provided this information, it would have been irrelevant at this point, the Trustee's Cash Motion having been filed more than three years ago on December 5, 2014. It appears then that the only issue before the Court regarding the use of cash collateral at Trial was whether the Trustee should be able to use it and not the extent to which she may use it. The extent to which the Trustee may use the traceable proceeds of Portfolios #1 and #2 cannot be made by the Court at this time but should be addressed at a future hearing in

the Bankruptcy Case, perhaps in connection with hearings on the confirmation of a plan of liquidation.

Accordingly, the Court finds that the Cash Collateral Objection should be overruled, and the Trustee's Cash Motion should be granted in part and denied in part. The Trustee's Cash Motion should be granted to the extent that the Trustee may use proceeds from Portfolios #1 and #2 to pay certain ordinary expenses, with the amount and extent of such use to be determined at a later hearing. The Trustee's Cash Motion should be denied to the extent that proceeds from the Home Improvement Loans and from Portfolios #3 and #6 are not cash collateral of EFP/BHT and, therefore, no relief is necessary or required. Similarly, the Trustee's Cash Motion should be denied as to Portfolio #7, given the Court's finding that the arrangement between the parties with respect to Portfolio #7 constitutes a servicing contract rather than a loan.

E. Post-Petition Conduct Adversary

In four of the six counts alleged in the PPC Amended Complaint, the Trustee seeks relief under the Bankruptcy Code: Count I (§ 362(a)(k)), Count II (§ 542(a)), Count III (§ 549), and Count VI (§ 510). In the remaining two counts, Counts IV and V, she asserts state law claims for civil conspiracy and conversion.

1. Count I (Violation of Automatic Stay)

The Trustee contends that the post-petition conduct of Dr. Edwards and EFP/BHT (acting through Dr. Edwards), including his communications with Meehan and his trip to Costa Rica in the aftermath of Dickson's theft of funds, violated the automatic stay and damaged the estate. Dr. Edwards, in contrast, contends that his post-petition efforts to locate assets of Dickson, the missing loan files that comprise Portfolio #7, and information about the loans on which EFP/BHT assert a secured lien did not violate the automatic stay.

Once a bankruptcy petition is filed an automatic stay arises by operation of law. *Campbell v. Countrywide Home Loans, Inc.*, 545 F.3d 348, 354-55 (5th Cir. 2008). The automatic stay is "one of the fundamental debtor protections provided by the bankruptcy laws." *Midlantic Nat'l Bank v. N.J. Dep't of Envtl. Prot.*, 474 U.S. 494, 503 (1986) (quoting S. REP. NO. 95-989, at 54-55 (1978)); *see* H. REP. NO. 95-595, at 12-13 (1977). Further, "[t]he automatic stay also provides creditor protection. Without it, certain creditors would be able to pursue their own remedies against the debtor's property . . . . Bankruptcy is designed to provide an orderly liquidation procedure under which all creditors are treated equally. A race of diligence by creditors for the debtor's assets prevents that." S. REP. NO. 95-989, at 49 (1978). Included among the actions prohibited by the automatic stay is "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate." 11 U.S.C. § 362(a)(3). The violation of the automatic stay is viewed as tantamount to the violation of a court order. *Campbell*, 545 F.3d at 354-55 (noting that the automatic stay "operates as a self-executing injunction"). For this reason, a bankruptcy court may address a violation of the stay by exercising its civil contempt powers under 11 U.S.C. § 105(a). *See In re RX Pro of Miss., Inc.,* Adv. Proc. 16-00288-NPO (Bankr. S.D. Miss. Mar. 4, 2016), Dkt. 120 (granting corporate debtor relief under § 105 for violation of the automatic stay). A party violating the automatic stay has a duty to rectify the stay violation to the extent possible. *Leverette v. Cmty. Bank (In re Leverette)*, No. 12-05005-KMS, 2013 WL 5350902, at *3 (Bankr. S.D. Miss. Sept. 25, 2013); *Frankel v. Strayer (In re Frankel)*, 391 B.R. 266, 275 (Bankr. M.D. Pa. 2008).

The Fifth Circuit has established three (3) elements of a claim under § 362(k): (1) the party must have known of the existence of the stay; (2) the party's acts must have been

12-01703-NPO Dkt 2182 Filed 02/27/18 Entered 02/27/18 16:51:37 Page 189 of 214

intentional; and (3) the acts must have violated the automatic stay. *Young v. Repine (In re Repine)*, 536 F.3d 512, 519-20 (5th Cir. 2008). If all three (3) elements are proven, the party seeking to recover under § 362(k) is entitled to actual damages, including attorney's fees, and may recover punitive damages for egregious conduct. *Id.* at 521.

In a civil contempt proceeding, the movant must show by clear and convincing evidence that: (1) a court order was in effect; (2) the order required certain conduct; and (3) the respondent failed to comply with the order. *Petroleos Mexicanos v. Crawford Enters., Inc.*, 826 F.2d 392, 401 (5th Cir. 1987). The Fifth Circuit has observed that "[j]udicial sanctions in civil contempt proceedings, may in a proper case, be employed for either or both of two purposes: to coerce the defendant into compliance with the court's order, and to compensate the complainant for losses sustained." *Am. Airlines Inc. v. Allied Pilots Ass'n*, 228 F.3d 574, 585 (5th Cir. 2000) (quoting *United States v. United Mine Workers of Am.*, 330 U.S. 258, 303-04 (1947)).

a. Did Dr. Edwards know about the existence of the automatic stay?

The Court finds that Dr. Edwards knew about the automatic stay by virtue of his knowledge of the pending Bankruptcy Case. *Johnson v. Magee Rentals, Inc. (In re Johnson)*, 478 B.R. 235, 246 (Bankr. S.D. Miss. 2012) (holding that knowledge of a pending bankruptcy case is deemed to be the legal equivalent of knowledge of the automatic stay); *Leverette,* 2013 WL 5350902, at *2 n.17 (noting that the burden is on the creditor to determine the scope of the automatic stay and to ensure against automatic stay violations). EFP/BHT has actively participated in the Bankruptcy Case almost from the date of its commencement, filing their first of many motions on May 30, 2012. (Bankr. Dkt. 23). Moreover, Dr. Edwards is no stranger to automatic stay issues. *See* Motion to

Recover Damages for Violation of § 362 Automatic Stay, *In re Coastal Condos, LLC*, No. 12-01746-EE (Bankr. S.D. Miss. July 5, 2012), Dkt. 53.

b. Did Dr. Edwards intend his actions?

Dr. Edwards testified at Trial that he did not believe that his conduct violated the automatic stay. Dr. Edwards believed that he was entitled to enforce the September 10 Order because the assets he was pursuing in Costa Rica belonged to Dickson, not CHFS. He also believed that he was entitled to locate the missing loan files comprising Portfolio #7 because they were owned by BHT, not CHFS. Dr. Edwards was aware, however, that the September 10 Order did not award him any damages, and that Portfolio #7 was the subject of adversary proceeding 12-00109-NPO, in which CHFS, even before the Trustee's appointment, asserted an interest in Portfolio #7. Regardless, Dr. Edwards' argument that he did not intend to violate the automatic stay is misplaced. An act is deemed to be a willful violation of the automatic stay if the violator knew of the automatic stay and intentionally committed the act regardless of whether the violator specifically intended to violate the stay. *Campbell*, 545 F.3d at 355; *Brown v. Chesnut (In re Chesnut)*, 422 F.3d 298, 302 (5th Cir. 2005).

c. Did Dr. Edwards violate the automatic stay?

The Court finds that Dr. Edwards undertook acts to exercise control over property of the bankruptcy estate, thereby violating § 362(a)(3). Section 541(a)(1) defines "property of the estate" to include "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). The bankruptcy estate also includes "[p]roceeds, product, offspring, rents, or profits of or from property of the estate." 11 U.S.C. § 541(a)(6). "This generous provision sweeps into the bankruptcy estate *all*

interests held by the debtor—even future, nonpossessory, contingent, speculative, and derivative interests." *In re Dibiase*, 270 B.R. 673, 676 (Bankr. W.D. Tex. 2001). The bankruptcy estate also includes "[a]ny interest in property that the estate acquires after the commencement of the case." 11 U.S.C. § 541(a)(7). "Congress enacted § 541(a)(7) to clarify its intention that § 541 be an all-embracing definition and to ensure that property interests created with or by property of the estate are themselves property of the estate." *In re Hanley*, 305 B.R. 84, 87 (Bankr. M.D. Fla. 2003) (quotation omitted).

The prohibition in § 362(a)(3) against acts to "obtain possession of" or "exercise control over" property of the estate applies both to tangible and intangible property. *See Am. Nat'l Bank of Austin v. MortgageAmerica Corp. (In re MortgageAmerica Corp.)*, 714 F.2d 1266, 1275 (5th Cir. 1983)*; West v. Hsu (In re Advanced Modular Power Sys., Inc.)*, 413 B.R. 643, 670 (Bankr. S.D. Tex. 2009) (determining that intangible assets associated with operation of debtor's business are included in property of estate). Section 362(a)(3) "reaches farther [than other provisions in § 362], encompassing every effort to 'exercise control over property of the estate.'" *Nat'l Tax Credit Partners, L.P. v. Havlik*, 20 F.3d 705, 708 (7th Cir. 1994). Section 362(a)(3) is generally viewed as a provision designed to prevent the "dismemberment" of the bankruptcy estate until the bankruptcy process permits either a reorganization of the debtor or an orderly liquidation of the assets of the bankruptcy estate. *In re HSM Kennewick, L.P.*, 347 B.R. 569, 572 (Bankr. N.D. Tex. 2006).

Here, Dr. Edwards paid Meehan at least $1,000 and, in return, received two CDs of data from CHFS's computers in Costa Rica. Dr. Edwards insists there was no violation of the stay because he was unsuccessful in recovering any monetary assets of the estate, the CDs are duplicative and contain only useless information about existing loans and paid off

loans, and a copy of one of the CDs eventually was provided to the Trustee (albeit not by Dr. Edwards). In effect, Dr. Edwards argues that there is no violation of the stay since the estate suffered no negative impact as a result of his actions.

Although Dr. Edwards may not have succeeded in collecting any estate funds, the Court finds that his concerted efforts to do so, while keeping the Trustee unaware of his communications with Meehan from September of 2014, to February of 2015, his trip to Costa Rica, and his receipt and retention of the original CDs, constitute violations of the automatic stay and an attempt to circumvent the bankruptcy process. There is no question that Dr. Edwards' intent in paying Meehan and traveling to Costa Rica was to exercise control over property of the estate located there to the exclusion of the Trustee. Why else would Dr. Edwards conceal his activities from the Trustee for nearly five months? From the beginning of the Bankruptcy Case, Dr. Edwards has been vocal about his status as the largest creditor of the bankruptcy estate (by virtue of his purported control of EFP/BHT), and his actions in Costa Rica reflect a mistaken belief that his status entitled him to decide unilaterally what constitutes property of the estate and what information to share with the Trustee. "The purpose of the automatic stay is not to . . . ultimately prevent the exercise of the available rights of any party . . . [but instead is] to prevent any creditor from becoming a *self-determined arbiter* of what constitutes property of the estate and what actions are permitted or prohibited by the stay." *Clark v. United States (In re Clark)*, 207 B.R. 559, 564-65 (Bankr. S.D. Ohio 1997) (emphasis added). Questions such as "what constitutes property of the estate" and "what actions are permitted or prohibited by the stay" fall under the exclusive jurisdiction of the bankruptcy court. This point was made clear in *Chesnut*, where the Fifth Circuit ruled that a creditor violates the automatic stay

even when the debtor's interest in the property is "arguable." *Chesnut*, 422 F.3d at 303. Dr. Edwards' actions in Costa Rica took place while EFP/BHT's rights to the loans were disputed by CHFS and with full knowledge of the Trustee's need and search for them.

Just as Dr. Edwards does not have the unilateral right to determine what constitutes property of the estate, he does not have the unilateral right to determine the value of the information contained in the CDs. Dr. Edwards' characterization of the information on the CDs as useless at Trial was disputed by the Trustee, who testified that the CD she obtained from Meehan included the following helpful information that was previously unknown to her:

> Two (2) bank accounts in CHFS's name at Banco de Costa Rica in Costa Rica and Banco Panameño in Panama;
>
> Two (2) affiliates of CHFS, Pirrana SA and Mary Madison Foundation; and
>
> $1.5 million in Costa Rican loans purchased with stolen CHFS funds.

Moreover, only Dr. Edwards and Meehan (and perhaps Borg) have had the opportunity to compare the original CDs to determine whether they are in fact duplicative and whether the CD obtained by the Trustee is duplicative of one or both of the original CDs. Despite Dr. Edwards' testimony at Trial to the contrary, in an email to Meehan on October 15, 2014, he wrote, "I opened almost all the files on the 2 discs. *Most* of the *second* disc repeats sections of the first disc. . . . Certainly some of the information on the CDs will find a use." (PPC Ex. P-32) (emphasis added). Dr. Edwards, nevertheless, insists that this issue has been laid to rest by the following exchange of emails between Barber (Trustee's counsel) and Meehan on August 21, 2015. Barber asked Meehan, "Mike, did Edwards get two different CDs? One of his emails to you implies that there were two CDs with similar but not identical data. Just trying to make sure we have accounted for everything." (PPC Adv.

Dkt. 115 at 42). In response, Meehan wrote, "1 cd to him and 1 for his lawyer in cr all the same data." (PPC Adv. Dkt. 115 at 42). This exchange of emails on August 21, 2015, however, demonstrates only the existence of a dispute. To definitively resolve this issue, Dr. Edwards should have produced the original CDs to the Trustee during discovery for a side-by-side comparison, but he chose not to do so.

The purpose of the automatic stay is to preserve the estate to promote the orderly and effective reorganization or liquidation of the debtor. Based upon the evidence, the Court finds that Dr. Edwards' conduct constituted a willful violation of the automatic stay and a disruption of the bankruptcy process. The Court further finds that Dr. Edwards continues to violate the automatic stay by refusing to surrender both original CDs referenced in his email of October 15, 2014, to the Trustee.[61]

d. May the Trustee recover damages under 11 U.S.C. § 362(k)?

Because Dr. Edwards willfully violated the automatic stay, the Court next evaluates the appropriate remedies under § 362(k). "[A]n 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." 11 U.S.C. § 362(k)(1).

As a preliminary matter, Dr. Edwards contends that even if his actions constitute a technical violation of the stay, the Trustee cannot recover damages under § 362(k) because the remedy is available only to individuals. 11 U.S.C. § 362(k); *see Jove Eng'g, Inc. v. IRS*, 92 F.3d 1539, 1550-53 (11th Cir. 1996) (holding that a corporation is not an "individual" under § 362(h)); *Maritime Asbestosis Legal Clinic v. LTV Steel Co. (In re*

[61] The original CDs are the subject of the Trustee's turnover claim.

Chateaugay Corp.), 920 F.2d 183, 184-86 (2d Cir. 1990) (holding that an "individual" means a "natural person," not a corporation under § 362(h)); *Garner v. Knoll, Inc. (In re Tusa-Expo Holdings, Inc.)*, Case No. 10-04271-DML, 2014 WL 172276, at *4 (Bankr. N.D. Tex. Jan. 15, 2014) (holding that the "trustee, acting on behalf of the estate of a debtor corporation lacks standing to seek damages under section 362(k)"); 3 COLLIER ON BANKRUPTCY ¶ 362.12[3] (16th ed. 2017) ("Although the automatic stay is of critical importance in bankruptcy cases, the better approach is to recognize that section 362(k) provides a remedy only for natural persons."). Dr. Edwards alleges that the Trustee, in her capacity as a trustee for a corporate debtor, is not an "individual" as required by the statute. It is unnecessary for the Court to address this issue. *See St. Paul Fire & Marine Ins. Co. v. Labuzan*, 579 F.3d 533, 541 (5th Cir. 2009) (holding that individuals other than the debtor have standing to pursue a claim under § 362(k) and noting in its examination of the scope of the term "individual" that a district court within the Fifth Circuit has held that a corporate creditor fell within that definition). Even assuming that only natural persons in their individual capacities have standing under § 362(k), this Court and others have awarded damages to trustees and corporate debtors for stay violations under § 105(a). *See In re RX Pro of Miss., Inc.,* Adv. Proc. 16-00288-NPO (granting corporate debtor relief under § 105 for violation of the automatic stay); *see also Cuffee v. Atlantic Bus. & Cmty. Dev. Corp. (In re Atlantic Bus. & Cmty. Dev. Corp.*), 901 F.2d 325, 329 (3d Cir. 1990); *Leverette*, 2013 WL 5350902, at *11 & n.18; *In re Am. Med. Utilization Mgmt. Corp.*, 494 B.R. 626, 635 (Bankr. E.D.N.Y. 2013) (awarding chapter 11 trustee legal fees and costs due to respondent's failure to reverse actions taken in violation of the stay).

The Trustee testified at Trial that the conduct of Dr. Edwards resulted in monetary damages of more than $10,000 in additional servicing costs, as well as attorneys' fees and expenses of $61,458.25 through July 31, 2017. The Court finds that the Trustee met her burden of proof as to these damages and that she is entitled to a judgment against Dr. Edwards and EFP/BHT in the total amount of $71,458.25 pursuant to § 362(k). In addition, the Trustee is entitled to attorneys' fees and expenses incurred from August 1, 2017, through the last day of Trial, November 27, 2017, in connection with the prosecution of the Post-Petition Conduct Adversary. Because these fees and expenses already have been included, or will be included, in a fee application filed, or to be filed, by Trustee's counsel in the Bankruptcy Case, the Court will determine the amount of these additional fees and expenses in connection with counsel's final fee application.

The Trustee also testified that Dr. Edwards' conduct deprived her of the opportunity to obtain $587,749.95 seized by the Costa Rican government from an account at Scotia Bank sometime before February 1, 2015. (HIL Adv. Dkt. 341 at 81). The Court finds that the Trustee failed to prove that Dr. Edwards' conduct precluded her from collecting these funds. *See Magee Rentals, Inc.*, 478 B.R. at 248 (explaining that damages must be proven with "reasonable certainty"). These funds are the subject of the Forfeiture Order, and there have been recent discussions between the U.S. Government and the Costa Rican Government regarding the release of those funds to the Trustee. Accordingly, the Court does not award any damages to the Trustee arising out of the Costa Rican government's seizure of $587,749.95.

2. Count II (Turnover of Property)

The Trustee alleges a cause of action under § 542, which provides:

> [A]n entity . . . in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section 363 of this title, or that the debtor may exempt under section 522 of this title, shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate."

11 U.S.C. § 542(a). Dr. Edwards alleges that there is no estate property to be turned over to the Trustee. It is undisputed, however, that Dr. Edwards received two CDs from Meehan containing CHFS information dating from 2009 through March of 2014. It is also undisputed that Dr. Edwards has never turned the original CDs over to the Trustee. The Court already has found in its discussion of Dr. Edwards' violation of the automatic stay that the information and data on the original CDs constitute intangible assets of the bankruptcy estate under the broad definition set forth in § 541. The Court further finds that the Trustee is entitled to a judgment requiring Dr. Edwards to turn over the original CDs to the Trustee.

3. Count III (Post-petition Transfer)

As an additional cause of action in the PPC Amended Complaint, the Trustee seeks a judgment revesting certain post-petition transfers in the estate pursuant to § 549. To avoid a post-petition transfer, the Trustee must show: (1) a transfer of property occurred; (2) the transfer occurred after the commencement of the Bankruptcy Case; (3) the transfer was made without authority from this Court; and (4) the property transferred was property of the estate. *In re Advanced Modular Power Sys.*, 413 B.R. at 672 (holding that a transfer of records is actionable under § 549). Under these facts, there is considerable overlap between the Trustee's post-petition claim (Count III) under § 549 and her turnover claim (Count II) under § 542. The main difference between these claims is the remedy. Once a transfer is classified as a post-petition transfer under § 549, the Trustee has the option of

12-01703-NPO Dkt 2182 Filed 02/27/18 Entered 02/27/18 16:51:37 Page 198 of 214

recovering the property transferred or obtaining a judgment for its value under § 550. In the PPC Amended Pretrial Order, however, the Trustee does not mention her § 549 claim and does not seek a judgment for the value of the original CDs or of any other estate property. Accordingly, the Court finds that the Trustee has not met her burden of proving her claim under § 549.

4. Count IV (Civil Conspiracy)

a. Choice of Law

Paragraph 11 of the EFP Note and BHT Note provides: "This Note shall be governed by and construed in accordance with the laws of the State of Maryland without giving effect to its choice of law provisions." (HIL Exs. P-1, P-2, D-17 & D-18). The Court finds that this choice-of-law provision, which speaks only of "[t]his Note," does not encompass tort claims. *See Benchmark Elecs., Inc. v. J.M. Huber Corp.*, 343 F.3d 719, 726-27 (5th Cir. 2003) (applying Texas law to conclude that the choice-of-law provision, "the Agreement shall be governed by, and construed in accordance with the internal laws of the State of New York," did not encompass tort claims).

The RESTATEMENT (SECOND) OF CONFLICT OF LAWS applies the "law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6." RESTATEMENT (SECOND) OF CONFLICT OF LAWS §145; *In re Cyrus II P'ship*, 413 B.R. at 614-16 (discussing federal choice of law rules). Section 145 lists several factors relevant in applying the principles of § 6:

(a) the place where the injury occurred,
(b) the place where the conduct causing the injury occurred,
(c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and
(d) the place where the relationship, if any, between the parties is centered.

12-01703-NPO Dkt 2182 Filed 02/27/18 Entered 02/27/18 16:51:37 Page 199 of 214

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145. Section 6, in turn, provides the factors relevant to the choice-of-law analysis:

(a) the needs of the interstate and international systems,
(b) the relevant policies of the forum,
(c) the relevant polices of other interested states and the relative interests of those states in the determination of the particular issue,
(d) the protection of justified expectations,
(e) the basic policies underlying the particular field of law,
(f) certainty, predictability and uniformity of result, and
(g) ease in the determination and application of the law to be applied.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6.

A summary of the facts here shows that Mississippi has the most significant contacts to the occurrence and the parties. Dickson maintained the principal place of business of CHFS in Mississippi. Although payments were made on the consumer loans from thirty (30) states, they were deposited into the DIP Operating Account located in Mississippi. *See Houston Cas. Co. v. Certain Underwriters at Lloyd's London,* 51 F. Supp. 2d 789, 797 (S.D. Tex. 1999) (finding that the insured's obligation under the parties' agreement was to pay a premium and the insurer's obligation was to indemnify certain losses but w*here* the losses occurred did not affect either obligation). The conduct resulting in the losses occurred in Mississippi. Therefore, the Court concludes that Mississippi substantive law applies to the dispute between the parties. The parties do not dispute that Mississippi law applies to the Trustee's civil conspiracy claim.

b. Did EFP/BHT and Dr. Edwards act in concert to hinder, delay, and otherwise defraud the estate and its creditors by withholding information pertinent to the operation of its ongoing business and assets stolen from the estate?

In Mississippi, the elements of civil conspiracy are "(1) two or more persons or corporations; (2) an object to be accomplished; (3) a meeting of the minds on the object or

course of action; (4) one or more unlawful overt acts; and (5) damages as the proximate result." *Palmisano v. Miss. Dep't of Wildlife, Fisheries & Parks*, No. 5:14-cv-00094-KS-MTP, 2015 WL 1925466, at *1 (S.D. Miss. Apr. 28, 2015) (quoting *Gallaher Bassett Servs., Inc. v. Jeffcoat*, 887 So. 2d 777, 786 (Miss. 2004)). The Trustee bases her civil conspiracy claim on conversion. *See Ward v. Life Inv'rs Co. of Am.*, 383 F. Supp. 2d 882, 890 (S.D. Miss. 2005) (former insurance agents brought an action against the insurers alleging, among other things, that the insurers conspired to deprive them of commissions under a theory of breach of contract, tortious interference with a contract, and civil conspiracy).

The Court agrees with Dr. Edwards that the Trustee's claim fails to satisfy the first element of a civil conspiracy claim, known as the plurality requirement. Under Mississippi law, "[a] conspiracy is a combination of persons for the purpose of accomplishing an unlawful purpose or a lawful purpose unlawfully." *Levens v. Campbell*, 733 So. 2d 753, 761 (Miss. 1999) (quotation omitted). Further, the intra-corporate conspiracy doctrine provides that "[a] corporation cannot conspire with itself any more than a private individual can, and it is the general rule that the acts of agents are the acts of the corporation." *Frye v. Am. Gen. Fin. Inc.*, 307 F. Supp. 2d 836, 843-44 (S.D. Miss. 2004) (quotation omitted); *see Cooper v. Drexel Chem. Co.*, 949 F. Supp. 1275, 1285 (N.D. Miss. 1996) (holding that individual defendants are incapable of conspiring with their corporate employer unless they acted outside their employment capacities).

The facts here implicate the intra-corporate conspiracy doctrine but raise a slightly different issue. May two entities conspire through a single agent? Dr. Edwards did not

raise this precise issue but challenged the Trustee's claim on the ground that one person cannot conspire with himself.

In the PPC Amended Complaint, the Trustee named as defendants EFP/BHT and Dr. Edwards. Dr. Edwards is the only natural person named as a defendant in the Post-Petition Conduct Adversary.[62] The evidence at Trial did not show that any partner or agent of EFP or BHT other than Dr. Edwards was involved in the alleged conspiracy. The Trustee's testimony focused on Dr. Edwards' communications with Meehan and his trip to Costa Rica where he met with Meehan, Meehan's attorney (Romero), and Dickson's attorney (Martinez). The Trustee, however, did not allege that Meehan, Romero, or Martinez participated in the conspiracy. In effect, the Trustee's civil conspiracy claim rests solely on the conduct of Dr. Edwards, a single agent purportedly acting on behalf of two entities (EFP/BHT). No reported Mississippi case has discussed or applied the intra-corporate conspiracy doctrine under these facts. Courts in other jurisdictions have concluded that the tort of conspiracy does not exist apart from the underlying wrongful act on which the conspiracy is based in the absence of two human conspirators. *United States v. Panhandle Trading, Inc.*, Case No. 05:05-cr-00044-RS-ALL, 2006 WL 1883436, at *3-4 (N.D. Fla. July 7, 2006).

In a factually analogous case widely cited for its treatment of the "single agent problem," *Lockwood Grader Corp. v. Bockhaus*, 270 P.2d 193 (Colo. 1954), the Supreme Court of Colorado ruled that "a conspiracy cannot be shown by acts of one person, no matter how many corporations he represents." *Id.* at 196; *see, e.g.*, *Panhandle Trading,*

[62] In the PPC Amended Complaint, the Trustee did not include any allegations against Borg or Dr. Edwards' son, James Edwards, who she initially named as defendants in the RICO Case.

12-01703-NPO Dkt 2182 Filed 02/27/18 Entered 02/27/18 16:51:37 Page 202 of 214

Inc., 2006 WL 1883436, at *1-2; Kathleen F. Brickey, *Conspiracy, Group Danger and the Corporate Defendant*, 52 U. CIN. L. REV. 431, 434-35 (1983). In *Lockwood Grader Corp.*, Ralph L. Bockhaus ("Bockhaus") alleged that Lockwood Grader Corporation, Lockwood Graders of Colorado, and T.J. Lockwood ("Lockwood") unlawfully conspired to force him out of business. Lockwood was the majority stockholder, director, and president of both Lockwood Grader Corporation and Lockwood Graders of Colorado. The jury returned a verdict in favor of Bockhaus. On appeal, the state court reversed, holding that Bockhaus failed to prove the existence of a conspiracy because the evidence at trial showed that Lockwood was the only person who could possibly have acted for either of the corporations. *Lockwood Grader Corp.*, 270 P.2d at 196-97.

The Court finds that Dr. Edwards, acting alone, lacked the ability to form a conspiracy with himself. The policy underlying a conspiracy claim—holding combinations of individuals responsible—does not apply when one person uses two entities to carry out his tortious conduct. Although a conspiracy might be formed by two entities acting through two agents, more than one person must be involved in the conspiracy. Thus, if some partner or agent of EFP/BHT other than Dr. Edwards had participated in the alleged conspiracy, then the Trustee would have satisfied the plurality requirement for a civil conspiracy. Because the evidence did not show that anyone other than Dr. Edwards was involved in the alleged conspiracy, however, the Court finds that the Trustee has failed to meet her burden of proof.

5. Count V (Conversion)

a. Choice of Law

For the reasons given with respect to the Trustee's civil conspiracy claim, the Court also finds that Mississippi substantive law applies to the Trustee's conversion claim.

b. Did EFP/BHT and Dr. Edwards convert estate property for their own use without permission or lawful justification and willfully interfere with the Trustee's duty to protect and acquire the estate's property thereby depriving the Trustee of rightful possession of that property?

Under Mississippi law, a conversion claim exists where "a plaintiff owns or has the right to possess property, and the defendant exercises dominion or control over that property in a manner that is inconsistent with the plaintiff's rights." *Songcharoen v. Plastic & Hand Surgery Assocs., PLLC*, Case No. 3:11-cv-00308-WHB-LRA, 2012 WL 4480746, at *6 (S.D. Miss. Sept. 26, 2012), *aff'd in part, rev'd in part on other grounds*, 561 F. App'x 327 (5th Cir. 2014). "The intent required [for conversion] is not necessarily a matter of conscious wrongdoing. It is rather an intent to exercise a dominion or control over the goods which is in fact inconsistent with the plaintiff's rights." *Morris Schneider Wittstadt, LLC v. Beau Rivage Resorts, Inc.*, Case No. 1:15-cv-00403-LG-RHW, 2016 WL 1254387, at *3 (S.D. Miss. Mar. 29, 2016) (quotation omitted).

An action for conversion in Mississippi is available only for wrongful interference with tangible items of property and those "intangible rights that are customarily merged in, or identified with some document." 5 JEFFREY JACKSON & MARY MILLER, ENCYCLOPEDIA OF MISS. LAW § 41:89 (2001) (citation omitted). The Court agrees with Dr. Edwards that Mississippi law does not recognize the tort of conversion for strictly intangible property, such as computer data. *DirecTV, Inc. v. Hubbard*, Case No. 2:03-cv-00261, 2005 WL

1994489, at *4 (N.D. Miss. Aug. 17, 2005) (ruling that interception of satellite transmission did not give rise to tort of conversion under Mississippi law); *Holbert v. Wal-Mart Assocs.*, Case No. 3:09-cv-00509-TSL-MTP, 2011 WL 3652202, at *3-4 (S.D. Miss. Aug. 18, 2011) (holding that allegations of identity theft failed to state a claim for conversion under Mississippi law); *Morris Schneider Wittstadt, LLC*, 2016 WL 1254387, at *3 ("Mississippi federal courts have stated that money and other intangible assets cannot be converted under Mississippi law unless the funds or other property can be specifically identified."). The Court finds, however, that the two original CDs possessed by Dr. Edwards constitute either tangible assets or the information and data on the original CDs constitute intangible assets "merged in" the CDs and, therefore, may be subject to conversion. 6 JEFFREY JACKSON & MARY MILLER, ENCYCLOPEDIA OF MISS. LAW § 55:2 (unlike tangible property, intangible property cannot be physically touched).

The Court finds that the Trustee has met her burden of proving her conversion claim as to the original CDs. Dr. Edwards has exercised and continues to exercise control over the original CDs in a manner inconsistent with the Trustee's rights. The Trustee testified at Trial that Dr. Edwards' conduct resulted in monetary damages of more than $10,000 in additional servicing costs. The Court finds that the Trustee is entitled to a judgment in the amount of $10,000 against Dr. Edwards and EFP/BHT, jointly and severally, for the conversion of the original CDs.

6. Count VI (Equitable Subordination)

The Trustee seeks to equitably subordinate EFP/BHT's claims (POC 4-1 to POC 9-1) below the claims of all other creditors with the exception of Dickson. (PPC Adv. Dkt. 115 at 27). Under § 510(c)(1), a bankruptcy court may "subordinate for purposes of

12-01703-NPO Dkt 2182 Filed 02/27/18 Entered 02/27/18 16:51:37 Page 205 of 214

distribution all or part of an allowed claim to all or part of another allowed claim or all or part of an allowed interest to all or part of another allowed interest." 11 U.S.C. § 510(c)(1). The Bankruptcy Code, however, does not otherwise specify when equitable subordination is appropriate. In the seminal case on equitable subordination, the Fifth Circuit articulated the following three-prong test for determining when such action is permitted: (1) the claimant must have engaged in some type of inequitable conduct; (2) the misconduct must have resulted in injury to the creditors or conferred an unfair advantage on the claimant; and (3) equitable subordination must not be inconsistent with the provisions of the Bankruptcy Code. *Benjamin v. Diamond (In re Mobile Steel Co.)*, 563 F.2d 692, 699-700 (5th Cir. 1977); *see Fabricators, Inc. v. Tech. Fabricators, Inc. (In re Fabricators, Inc.)*, 926 F.2d 1458, 1464 (5th Cir. 1991) (recognizing that equitable subordination is to be invoked according to case law in existence at the time of § 510's enactment). A category of misconduct that traditionally has been held to constitute inequitable conduct includes fraud, illegality, and breach of fiduciary duties. *See In re Fabricators, Inc.*, 926 F.2d at 1467-69 (finding that interference with the completion of a contract to gain preferential payments and a release from liability amounted to inequitable conduct). The inequitable conduct need not be related to the challenged claim. *In re Mobile Steel Co.*, 563 F.2d at 700-01. Notwithstanding the broad three-part test set forth in *In re Mobile Steel Co.*, the Fifth Circuit has "largely confined equitable subordination to three general paradigms: (1) when a fiduciary of the debtor misuses his position to the disadvantage of other creditors; (2) when a third party controls the debtor to the disadvantage of other creditors; and (3) when a third party actually defrauds other creditors." *U.S. Abatement Corp. v. Mobil Expl. & Producing U.S., Inc. (In re U.S. Abatement Corp.)*, 39 F.3d 556, 561 (5th Cir. 1994).

The Fifth Circuit emphasized that when the remedy is invoked, a claim "should be subordinated only to the extent necessary to offset the harm which the [debtor] and its creditors suffered on account of the inequitable conduct." *In re Mobile Steel Co.*, 563 F.2d at 701. Dr. Edwards argues that none of the three general paradigms exists for the following reasons: (1) Dr. Edwards and EFP/BHT are not fiduciaries of CHFS, *Harrison v. Commercial Credit Corp.*, Case No. 4:01-cv-00151-LN, 2002 WL 548281, at *4-5 (S.D. Miss. Mar. 29, 2002) (holding that lenders and debtors typically are not in a fiduciary relationship under Mississippi law); (2) CHFS is not controlled by Dr. Edwards or EFP/BHT; and (3) Dr. Edwards did not defraud any other creditor. (PPC Adv. Dkt. 115 at 35).

As a preliminary matter, the Court finds it disingenuous of Dr. Edwards and EFP/BHT to dispute their status as fiduciaries in the Post-Petition Conduct Adversary, while seeking damages against CHFS in the Mortgage Portfolios Adversary based on the allegation that "CHFS owed a fiduciary duty to BHT and EFP, as a joint venturer." (MPF Adv. Dkt. 70 at 23); *see Braddock Law Firm, PLLC v. Becnel*, 949 So. 2d 38, 50 (Miss. Ct. App. 2006) (holding that fiduciary duties are owed to fellow joint venturers under Mississippi law). Dr. Edwards and EFP/BHT either intended to contradict themselves or believe that fiduciary duties among joint venturers are not mutual. Regardless, the Court already has ruled that the transactions are not true joint ventures. At best, EFP/BHT are in a contractual relationship with CHFS, which does not give rise to fiduciary obligations.

As to the second paradigm, the Court finds that there was no evidence at Trial that would support a finding that Dr. Edwards controlled or dominated CHFS, at least with respect to his post-petition conduct. The Court thus finds that the Trustee's equitable

12-01703-NPO Dkt 2182 Filed 02/27/18 Entered 02/27/18 16:51:37 Page 207 of 214

subordination claim rests solely on the third general paradigm. The issue before the Court, therefore, is whether Dr. Edwards, acting on behalf of EFP/BHT, "defraud[ed] other creditors." *In re U.S. Abatement Corp.*, 39 F.3d at 561. EFP/BHT and Dr. Edwards deny that they committed fraud, but "[i]t is well established that actual fraud need not be shown for equitable subordination." *Mach. Rental, Inc. v. Herpel (In re Multiponics, Inc.)*, 622 F.2d 709, 720 (5th Cir. 1980).

Dr. Edwards' alleged inequitable conduct began in September of 2014, when he obtained information from Meehan regarding the location of CHFS's stolen assets in Costa Rica. Rather than turn this information over to the Trustee, Dr. Edwards paid Meehan to perform certain services aimed at collecting assets of the bankruptcy estate. Meehan mailed Dr. Edwards two CDs, one of which contained the hard drive of a computer removed by Dickson from CHFS's office in Jackson, Mississippi, and was used in the rogue operation in Latin America after the Trustee's appointment. As shown in the exchange of emails, Dr. Edwards told Meehan that all information and assets relating to CHFS ultimately belonged to him and/or EFP/BHT as the largest creditor of the estate. Why didn't Dr. Edwards tell Meehan about the Trustee? Why didn't Dr. Edwards tell the Trustee about Meehan?

The Court finds that Dr. Edwards' post-petition conduct violated "rules of fair play and good conscience" and increased the administrative expenses of the estate. *Pepper v. Litton*, 308 U.S. 295, 310 (1939). Mindful that equitable subordination is only rarely granted, the Court, however, declines to invoke equitable subordination as a remedial measure for the harm caused by Dr. Edwards. *In re U.S. Abatement Corp.*, 39 F.3d at 561.

F. Plan Confirmation Proceedings in the Bankruptcy Case

Given the breadth of this Opinion and the impact it will have on the liquidation of assets of the estate, the Court will enter an order in the Bankruptcy Case rescinding the Order Approving First Amended Disclosure Statement and Fixing Time for Filing Acceptances or Rejections of the First Amended Plan of Reorganization Combined with a Notice of Hearing (the "Order Approving Disclosure Statement") (Bankr. Dkt. 1556) and disapproving the First Amended Disclosure Statement for the Chapter 11 Plan of Liquidation of the Estate of Community Home Financial Services, Inc. Proposed by the Trustee, Kristina M. Johnson Dated as of May 15, 2015 ("First Amended Disclosure Statement") (Bankr. Dkt. 1080) filed by the Trustee. As a result, the Court will not schedule a confirmation hearing on the First Amended Chapter 11 Plan of Liquidation of the Estate of Community Home Financial Services, Inc. Proposed by the Trustee, Kristina M. Johnson Dated as of February 1, 2017 (the "First Amended Plan") (Bankr. Dkt. 1607). The Court will set a status conference for the purpose of scheduling dates for the filing of an amended disclosure statement and an amended chapter 11 plan of liquidation.

The Court's rescission of the Order Approving Disclosure Statement and the disapproval of the First Amended Disclosure Statement renders the following related contested matters moot:

> Notice of Filing Immaterial Modifications to First Amended Chapter 11 Plan of Liquidation of the Estate of Community Home Financial Services, Inc. Proposed by the Trustee, Kristina M. Johnson Dated as of February 1, 2017 (the "Notice of Filing Immaterial Modifications") (Bankr. Dkt. 1606) filed by the Trustee;
>
> First Amended Plan;
>
> Edwards Family Partnership, LP and Beher Holdings Trust's Objection to Tabulation and Summary of Ballots Accepting or Rejecting Debtor's [*sic*]

> First Amended Plan of Reorganization (Dkt. #1626) (the "Objection to Tabulation and Summary of Ballots") (Bankr. Dkt. 1741) filed by EFP/BHT;
>
> Trustee's Response to Edwards Family Partnership, LP and Beher Holdings Trust's Objection to Tabulation and Summary of Ballots Accepting or Rejecting Debtor's First Amended Plan of Reorganization [Dkt. #1741] (the "Response to the Objection to Tabulation and Summary of Ballots") (Bankr. Dkt. 1753) filed by the Trustee; and
>
> Chapter 11 Trustee's Motion *in Limine* to Limit the Testimony of Dr. Charles C. Edwards in Connection with Matters Scheduled for Hearing on March 23, 2017 (the "Motion *in Limine*") (Bankr. Dkt. 1747) filed by the Trustee.

In the same order that rescinds the Order Approving Disclosure Statement and disapproves the First Amended Disclosure Statement, the Court will deny as moot the above contested matters without prejudice.

CONCLUSION

For the reasons discussed above, the Court declares and/or finds as follows:

A. In the Home Improvement Loans Adversary and related consolidated Contested Matter,

1. Count I (Legal Capacity of the Rainbow Group): The Trustee is not entitled to a judgment that the Rainbow Loan Agreement, the 2006 Note, and the Custodial Agreement are void *ab initio*. In the alternative, the Trustee has abandoned this claim.

2. Count II (Legal Capacity of Beher Limited): The Trustee is entitled to a judgment that the 2010 Assignment is void.

3. Count III (Fraudulent EFP Note & BHT Note): The Trustee has abandoned her claim that the EFP Note and BHT Note are fraudulent.

4. Count IV (Perfection of Security Interest): The Trustee is entitled to a judgment declaring that EFP/BHT do not have a perfected security interest in the Home

Improvement Loans, and EFP/BHT are general unsecured creditors of the bankruptcy estate of CHFS.

5. Count V (Tracing of Funds): EFP/BHT are not entitled to a judgment declaring that they have a security interest in any of the stolen funds recovered or intercepted by the Trustee.

6. Count VI (POC 4-1 & POC 5-1): The Objection to POC 4 & 5 is overruled in part and sustained in part. The Objection to POC 4 & 5 is overruled, and POC 4-1 is allowed to the extent that BHT has an unsecured claim of $13,374,372, consisting of $11,189,385.80 in principal and $2,184,986.25 in interest, as of May 23, 2012. The Objection to POC 4 & 5 is overruled, and POC 5-1 is allowed to the extent that EFP has an unsecured claim of $4,458,124, consisting of principal of $3,729,795.25 and interest of $728,328.75, as of May 23, 2012. The Objection to POC 4 & 5 is sustained in all other respects. Once all traceable collections from the Home Improvement Loans are applied, including the collections by ClearSpring, CHFS owed BHT $7,440,849 in principal and $2,184,986.25 in interest, and CHFS owed EFP $2,480,283 in principal and $728,328.75 in interest, as of May 31, 2017.

B. In the Mortgage Portfolios Adversary and related consolidated Contested Matter,

1. Misjoinder of Parties: Church Bay Trust and CHFS are misjoined parties and are dismissed with prejudice from the Mortgage Portfolios Adversary.

2. Counts I & IV/MPF Counterclaim Counts I-III (Mortgage Portfolios): The Trustee is entitled to a judgment declaring that:

(a.) CHFS and EFP entered into loans with respect to Portfolios #1-#6;

(b.) The loans EFP provided CHFS for the purchase of Portfolios #1 and #2 are enforceable and are secured by the mortgages and notes that comprise Portfolios #1 and #2 and also by the proceeds of the mortgages and notes that comprise Portfolios #1 and #2, but only to the extent the proceeds can be traced to funds of the estate;

(c.) EFP's security interest in Portfolios #1 and #2 is subject to the Court's ruling on the Cash Collateral Objection and Trustee's Cash Motion;

(d.) The loans EFP provided CHFS for the purchase of Portfolios #3-#6 are unenforceable;

(e.) CHFS owns the original notes and mortgages that comprise Portfolios #1-#6;

(f.) Dr. Edwards and EFP are ordered to turn over to the Trustee the original notes and mortgages that comprise Portfolios #1-#6;

(g.) BHT is not a creditor of the bankruptcy estate, as alleged in POC 7-1 and POC 8-1;

(h.) BHT owns the original notes and mortgages that comprise Portfolio #7; and

(i.) CHFS entered into a servicing agreement with BHT with respect to Portfolio #7, and CHFS is entitled to the servicing fees and reimbursement of costs set forth in MPF Agreement *III*.

3. Counts II & III/MPF Counterclaim Count VIII (POC 6-1 to POC 9-1): The Objection to POC 6 & 9 is sustained in part and overruled in part. The Objection to POC 6 & 9 is sustained to the extent that POC 6-1 is disallowed in whole. The Objection to

POC 6 & 9 is overruled to the extent that, as of May 23, 2012, EFP has a secured claim of $1,728,804 with respect to Portfolios #1 and #2. The Objection to POC 6 & 9 is sustained in all other respects. Once all traceable collections from Portfolios #1 and #2 are applied, including the collections by ClearSpring, CHFS owed EFP $665,711 as to Portfolio #1 and $274,482 as to Portfolio #2, as of May 31, 2017. The Objection to POC 7 & 8 is sustained. POC 7-1 and POC 8-1 are disallowed in whole.

4. Count V (Constructive Trust): The Trustee has abandoned her claim for the imposition of a constructive trust on all proceeds of the Mortgage Portfolios.

5. Count VI (Conversion): The Trustee has abandoned her claim for damages for conversion of property of the estate.

6. MPF Counterclaim Count IV (Breach of MPF Agreements): EFP/BHT's counterclaim for CHFS's alleged breach of the "joint venture" agreements is dismissed with prejudice.

7. MPF Counterclaim Count V (Breach of Fiduciary Duty): EFP/BHT's counterclaim for CHFS's alleged breach of its fiduciary duty is dismissed with prejudice.

8. MPF Counterclaim Count VI (Servicing Fees): EFP/BHT's counterclaim against the Trustee for servicing costs is dismissed with prejudice.

9. MPF Counterclaim Count VII (Tracing of Funds): EFP/BHT are not entitled to a judgment declaring that they have a security interest in any of the stolen funds recovered or intercepted by the Trustee.

C. In the Home Improvement Loans Adversary and the Mortgage Portfolios Adversary,

1. The Cash Collateral Objection is overruled.

2. The Trustee's Cash Motion is granted in part and denied in part. The Trustee should be able to use the traceable proceeds from Portfolios #1 and #2 to pay ordinary expenses of the bankruptcy estate, with the amount and extent of such use to be determined at a later hearing. The proceeds from the Home Improvement Loans and from Portfolios #3-#6 are not cash collateral and, therefore, no relief is necessary or required.

D. In the Post-Petition Conduct Adversary,

1. Count I (Violation of Automatic Stay): The Trustee is entitled to damages against Dr. Edwards and EFP/BHT, jointly and severally, in the amount of $10,000 representing additional servicing costs and $61,458.25 in attorneys' fees and expenses incurred by the Trustee through July 31, 2017, pursuant to 11 U.S.C. § 362(k). The Trustee also is entitled to an award of attorneys' fees and expenses incurred from August 1, 2017, through the last day of Trial, in connection with the prosecution of the Post-Petition Conduct Adversary. Because these fees and expenses already have been included, or will be included, in a fee application filed, or to be filed, by Trustee's counsel in the Bankruptcy Case, the Court will determine the amount of these additional fees and expenses in connection with the final fee application. In addition, the Trustee is entitled to post-judgment interest at the legal rate until satisfied on these amounts.

2. Count II (Turnover of Property): The Trustee is entitled to a judgment requiring Dr. Edwards to turn over the two (2) original CDs to the Trustee.

3. Count III (Post-petition Transfer): The Trustee's claim for post-petition transfers is dismissed with prejudice.

4. Count IV (Civil Conspiracy): The Trustee's claim for civil conspiracy is dismissed with prejudice.

5. Count V (Conversion): The Trustee is entitled to a judgment against Dr. Edwards and EFP/BHT, jointly and severally, for the conversion of the original CDs in the amount of $10,000, together with post-judgment interest at the legal rate until satisfied.

6. Count VI (Equitable Subordination): The Trustee's claim for equitable subordination is dismissed with prejudice.

E. In the Bankruptcy Case,

1. An order should be entered rescinding the Order Approving Disclosure Statement, disapproving the First Amended Disclosure Statement, and denying as moot the following contested matters, without prejudice: (a.) the Notice of Filing Immaterial Modifications; (b.) the First Amended Plan; (c.) the Objection to Tabulation and Summary of Ballots; (d.) the Response to the Objection to Tabulation and Summary of Ballots; and (e.) the Motion *in Limine*.

2. A status conference should be set for the purpose of scheduling dates for the filing of an amended disclosure statement and an amended chapter 11 plan of liquidation.

The costs of these Adversary Proceedings and Contested Matters are taxed against Dr. Edwards and EFP/BHT under 28 U.S.C. § 1920. The Trustee is entitled only to a single recovery where the same damages are granted under different legal theories. To the extent the Court has not addressed any of the parties' other arguments or positions, it has considered them and determined they would not alter the result. A separate final judgment consistent with this Opinion will be entered in accordance with Rules 7054, 9014, and 9021 of the Federal Rules of Bankruptcy Procedure.

###END OF OPINION###

EXHIBIT E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

EDWARDS FAMILY PARTNERSHIP, LP; BEHER HOLDINGS TRUST; & CHARLES C. EDWARDS — **APPELLANTS**

V. — **CAUSE NO. 3:18-CV-154-CWR-LRA** *consolidated with* **3:18-CV-155, 3:18-CV-156, & 3:18-CV-157**

KRISTINA M. JOHNSON, Trustee for Community Home Financial Services Corporation — **APPELLEE**

MEMORANDUM OPINION AND ORDER

Edwards Family Partnership, LP, Beher Holdings Trust, and Charles C. Edwards appeal the Bankruptcy Court's memorandum opinion and judgment. For the reasons that follow, the judgment is affirmed in part, reversed in part, and rendered in part.

I. Factual and Procedural History

This case is complex and the proceedings have been lengthy. What follows will discuss only those facts and proceedings necessary to the decision. Readers can find more detail in the Bankruptcy Court's 214-page opinion. That opinion will be cited as "Op. at [page number]."

Charles C. Edwards is a doctor and investor in Baltimore, Maryland. He owns Edwards Family Partnership, LP and Beher Holdings Trust, among other companies. Between 2006 and 2012, Dr. Edwards' entities invested tens of millions of dollars in Community Home Financial Services (CHFS), a mortgage servicing company in Jackson, Mississippi run by Butch Dickson.

The relationship fell apart. State-court litigation commenced in 2012 and was removed here. In an attempt to recoup as much of his investment as possible, Dr. Edwards asked this Court to appoint a receiver to manage CHFS's affairs. The undersigned heard evidence at a

multi-day hearing until CHFS filed for bankruptcy and brought the action to a halt. Thus began a six-year saga in the U.S. Bankruptcy Court for the Southern District of Mississippi that has come at enormous cost to all involved. The litigation has lasted longer than the underlying business relationship.

Dr. Edwards filed proofs of claim totaling nearly $30 million. The numbers were not inflated. In the receivership proceeding, Dr. Edwards had sought $30.8 million. *See* Docket No. 16 in No. 3:12-CV-252. In a later proceeding to enforce Dickson's personal guarantee, Dr. Edwards received a judgment against Dickson in excess of $28 million. *See Amended Rule 54(b) Final Judgment* in *Edwards Family P'ship v. Dickson*, No. 3:13-CV-587-CWR-LRA, Docket No. 83 (S.D. Miss. July 25, 2016).

The curious feature of this bankruptcy, given its worth, was in how few claims there were to resolve. Aside from the Edwards entities' claims for roughly $30 million, the Estate of CHFS owed a handful of creditors several thousand dollars each—about $200,000 in aggregate. Op. at 52. It would have been a rational, efficient decision to settle with all of the minor creditors and give Dr. Edwards whatever was left. *See Edwards Family P'ship, LP v. Johnson*, No. 3:18-CV-158-CWR-LRA, 2020 WL 4506788, at *1 (S.D. Miss. Aug. 5, 2020). After all, $200,000 represents less than 1% of the estate.[1]

That did not happen. Instead, Dickson directed CHFS to commence adversary proceedings challenging whether Dr. Edwards' investments were secured or unsecured. *Id.* at *2 (finding this strategic decision "neither necessary nor 'reasonably likely' to benefit the CHFS estate"). It turns out Dickson was a crook. He fled to Central America with millions of dollars.[2]

---

[1] Dr. Edwards' explanation of the status of those claims can be found at Docket No. 32 at 3 & nn.2-4. He says he has now purchased the claims of every owner who can be located. He owns all but $36,500 of the total claims. Docket No. 41 at 4 n.7. If $200,000 represents a handful, then this $36,500 is less than a thumbnail.

[2] On his return, Dickson was convicted of bankruptcy fraud and went to federal prison.

Upon his flight, the first Bankruptcy Judge to preside over this case appointed a Jackson attorney named Kristina Johnson as Trustee to manage CHFS's affairs. The Trustee hired the law firm at which she is a partner, Jones Walker, to be her counsel. She resumed the proceedings challenging the priority of Dr. Edwards' claims and then filed new claims, including RICO claims, against him. Every effort the first Bankruptcy Judge and the undersigned made to encourage settlement failed.[3] Private mediation before Judge Houston, the retired Bankruptcy Judge from Northern Mississippi, was also unsuccessful.

When this Court wrote in earlier proceedings that it had a lot to say about this case, it was about the litigation this dispute has spawned, and how over the last five years that litigation has gotten out of hand.

Trustees and their attorneys are "not private persons" acting out of self-interest, but "officers of the court" with special duties to the judiciary and the creditors. *Matter of Evangeline Ref. Co.*, 890 F.2d 1312, 1323 (5th Cir. 1989) (quotation marks and citations omitted). "The powers and duties of a bankruptcy trustee are extensive." *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 352 (1985). "The trustee is accountable for all property received, and has the duty to maximize the value of the estate." *Id.* at 352 (quotation marks and citations omitted). A Trustee is, in fact, "duty bound to assert" a cause of action "if doing so would maximize the value of the estate." *Louisiana World Exposition v. Fed. Ins. Co.*, 858 F.2d 233, 246 (5th Cir. 1988). *If* doing so would maximize the value of the estate.

The Trustee was appointed to bring stability to a bad situation—CHFS's failure and Dickson's fraud—so that remaining funds could be returned to CHFS's creditors. "Creditors"

[3] During hearings and trials, this Court routinely encourages parties to resolve their differences at any time before the Court or jury renders judgment. There is no doubt that the Court did so during the multi-day hearing that birthed this case.

here essentially means Dr. Edwards. But something went wrong. The parties dispute who started it and when it happened. Those are complex questions that must be resolved later. At some point, though, the Trustee's priorities shifted from recovering money for the benefit of Dr. Edwards, to pursuing Dr. Edwards.

The structural incentives are obvious and common enough. When a Trustee sues anyone or challenges anything in court, she can bill the estate for services rendered. She is authorized to bill her own hourly fees, the hourly fees of those who represent her (which in this case includes the partners, associates, and paralegals of her law firm), and every other professional she hires. Those fees become the responsibility of the estate. In large cases, a Trustee and her counsel stand to make millions of dollars.

Because of the potential for abuse, and mindful that "every dollar received by the [Trustee] results in one dollar less for creditors." the judiciary requires Trustees and other professionals to justify their work on behalf of an estate. *Evangeline*, 890 F.2d at 1326.[4] The Fifth Circuit instructs that "[t]he job of the bankruptcy courts is to oversee trustees' marshalling of a debtor's assets for appropriate distribution among the creditors." *Kipp Flores Architects, L.L.C. v. Mid-Continent Cas. Co.*, 852 F.3d 405, 410 (5th Cir. 2017) (citation omitted). Professional fees are thus subject to the Bankruptcy Court's discretion and reviewed on appeal by this Court and the Court of Appeals. *See In re Woerner*, 783 F.3d 266, 272 (5th Cir. 2015) (en banc). The courts "should only award fees *to the level* that has been proven to be actual, necessary and reasonable." *Evangeline*, 890 F.2d at 1327.

[4] In a separate context, this Court has discussed the particular care the judiciary must take when appointing officers of the court. *See S.E.C. v. Adams*, No. 3:18-CV-252-CWR-FKB, 2018 WL 2465763, at *1-2 (S.D. Miss. June 1, 2018).

This case was always at risk of a supercharged conflict. First, there's real money on the table. Relative to the Mississippi legal economy, there's an enormous estate to bill here. Second, the minority creditors have so little at stake, in real terms and relatively, that they have no incentive to step in. A fight between the Trustee and Dr. Edwards won't meaningfully impair their collective 0.1% recovery. The final, and maybe critical psychological realization here, is that when a Trustee lodges colorable accusations of impropriety against the super-majority creditor,[5] she renders less persuasive that creditor's objection that the Trustee is wasting estate assets.

Adding dollar signs might help make the hypothetical less abstract. Say the Estate of CHFS is ultimately worth $20 million. (Dr. Edwards claims he's owed $30 million, but this is bankruptcy; he won't walk away with 100% of his claim.) Then the professionals need to be paid—*someone* had to step in and take care of CHFS when its owner fled to Central America and then went to federal prison—and maybe their bills reach $2 million. We are left with $18 million for creditors. Less than 0.1% goes to the minority creditors, while Dr. Edwards exits from Bankruptcy Court with about $17,982,000. (Keep in mind he also has to pay his team of attorneys, so he goes home with meaningfully less than that.)

To be clear, that is a hypothetical about how it should have worked. Protect the assets, subtract necessary professional fees, and distribute the corpus to the creditors.

In real life, however, the Trustee, her counsel, and the professionals they retained have defined "necessary" work so broadly that they have billed the Estate more than $5 million. Docket No. 41 at 8 & n.15. More than 30 attorneys at Jones Walker have billed the file. *Id.* at 5 & n.8. The firm even billed for law student intern work. *Id.*

[5] Having ownership of more than 99% of the estate, Dr. Edwards is actually a "super-duper" creditor. It's a legal term of art. *See* Orin S. Kerr, *A Theory of Law*, 16 Green Bag 2d 111 (2012).

Aspects of the firm's work verge on the untenable. The Trustee hired an expert in the commercial law of the British Virgin Islands and Bermuda to testify live at trial that the inclusion of the word "The"[6] in some of the parties' documents invalidated millions of dollars of secured transactions over many years. This in turn forced Dr. Edwards to hire his own, competing expert about the meaning of the word "The" in those jurisdictions. The Bankruptcy Court's opinion dedicated 11 pages to the evidence and foreign law on this issue before concluding that it was immaterial because Dr. Edwards and CHFS knew who they were dealing with and weren't confused. Op. at 108-18. Charles Dickens would be impressed. *See* Bleak House (1852-1853).[7]

In law, the billable hours can keep going as long as there is a target to fight. There's a great target here: a stubborn and wealthy doctor-playing-businessman from out-of-state.[8] And in this situation the Trustee has no financial incentive to stop billing hours, as she is essentially using Dr. Edwards' own money to sue him. Her fees and those of her law firm are being siphoned from the creditors' eventual recovery.[9] One cannot overlook or lose sight of that fact. Unfortunately, the present Bankruptcy Judge has not placed any meaningful checks on the Trustee's billing.

---

[6] That pesky three-letter word is probably the most commonly used word in English. "The" is "omnipresent; we can't imagine English without it. But it's not much to look at. It isn't descriptive, evocative or inspiring. Technically, it's meaningless. . . . [But it] could be one of the most potent [words] in the English language." Hélène Schumacher, *Is this the most powerful word in the English language?*, BBC, June 26, 2020, https://www.bbc.com/culture/article/20200109-is-this-the-most-powerful-word-in-the-english-language, Here, the colossal waste of resources expended to have the Bankruptcy Court reach this commonsense conclusion defy logic.

[7] If John Grisham wants to write *The Trustee*, this case would provide great research material.

[8] In retrospect, it may have been better for this case to have proceeded in Maryland. A forum selection clause in the parties' original contract requires all disputes to be litigated there. *See* Docket No. 2-7 at 18-19 in No. 3:13-CV-587; *see also In re Spillman Dev. Grp., Ltd.*, 710 F.3d 299, 306 (5th Cir. 2013). Although CHFS was based in Mississippi and Mississippi-based companies generally go through bankruptcy in the U.S. Bankruptcy Court for the Northern or Southern District of Mississippi, the parties' dispute kicked off in state court months before CHFS declared bankruptcy. The parties each overlooked or agreed to avoid this provision of the contract. Had it been brought to the attention of the Court, though, the undersigned likely would have dispatched this case to Maryland. *See BK Tax Serv. v. Jackson Hewitt, Inc.*, No. 3:12-CV-676-CWR-FKB, 2013 WL 3821758, at *4 (S.D. Miss. July 23, 2013).

[9] Dr. Edwards is in fact paying twice, as he is financing both his antagonists at Jones Walker and his own defense lawyers at Watkins & Eager.

Dr. Edwards has objected to the Trustee's fees. It was in October 2014 that he emailed the Trustee's counsel saying, "please exit the loan servicing business as we cannot abide by your firm's [Jones Walker's] charges." Op. at 72. The email is worth quoting in full. It said:

> Jeff,
>
> Martha forwarded your question on the Sanford mortgage release. Please refer any person looking for a mortgage release from a loan owned by EFP or BHT directly to me. I will research it and try to resolve their issues as I have done for many mortgages in the past.
>
> Jeff, please exit the loan servicing business as we cannot abide by your firm's charges. Let Vantium deal with CHFS loose ends; Martha and I will deal with EFP and BHT loan loose ends.
>
> I was astounded by the magnitude of Jones-Walker fees so far in this case. They were out of proportion to anything I have seen before. As you know, 99.9% of your fees will be eventually taken from me and my family.
>
> Please turn your attention to resolving the merit-less adversary proceedings. They were just thrown up as road blocks to our recovery. If you require any more documentation to establish the validity of our claims or ownership of our loans, let me know and I will provide it. We need to bring this to an end and not drag it out. Please help.
>
> Charles

PX-44 in No. 3:18-CV-156. Dr. Edwards has made this plea for six years now.

The Trustee has attempted to neutralize his objections by making counter-accusations of his own impropriety. Her allegations make Dr. Edwards look like he's trying to evade the scrutiny of an independent officer of the court. His grievances become 'sour grapes,' so skepticism becomes understandable. But what if he just wants his money back?

This Court has raised these concerns with the parties numerous times. The most recent expression of worry came in the Court's order directing supplemental briefing. The Trustee's response persuasively showed that overbilling concerns are presently not before the Court. Dr. Edwards' request for the undersigned to take them up today by withdrawing the reference is not

well-taken and will be denied. It is not appropriate to try and find that point where reasonable management became unreasonable litigiousness.

Some plain talk is nevertheless warranted. Dr. Edwards should know that the Trustee and Jones Walker will be paid a substantial, seven-figure sum of money for their efforts on this case. They did necessary, complicated, and valuable work to recover assets, unwind fraud, manage CHFS, and bring stability to the consumers who relied upon CHFS for mortgage servicing. Meanwhile, the Trustee and Jones Walker should know that, from this vantage point, $5 million is excessive. The Fifth Circuit has discouraged bankruptcy proceedings where "courts' workload would increase substantially without yielding any benefit whatsoever to the debtor or the debtor's estate." *Kipp Flores*, 852 F.3d at 413. Yet that is our situation. The record raises red flags about whether the Trustee and her firm are acting "as prudent fiduciaries, seeking to preserve property of the estate for the benefit *of their creditors*." *In re MD Promenade, Inc.*, No. 08-34113-SGJ-7, 2009 WL 80203, at *13 (Bankr. N.D. Tex. Jan. 8, 2009) (emphasis added).

The parties do not wish to compromise. That is their right. The judiciary will do what is required. The second and present Bankruptcy Judge on this case moved with impressive speed to wrap this matter up within 13 months of receiving the case. This Court, while not nearly as fast, has endeavored to come to the outcome required by the evidence and the law. The Fifth Circuit will do the same.

Once again, though, the Court pleads with the parties to resolve this situation lest this case go down in history as the Southern District of Mississippi's modern-day *Jarndyce v Jarndyce*.

II. Standard of Review

The legal standard in a bankruptcy appeal is well-established.

> A district court, in reviewing the findings of a bankruptcy court, acts in an appellate capacity. . . . Conclusions of law are reviewed *de novo.* A finding of fact, however, may be disregarded only if it is clearly erroneous. The bankruptcy judge's opportunity to make first-hand credibility determinations entitles its assessment of the evidence to deference by both the district court and this court alike. Neither may weigh the evidence anew. Rather, we must determine whether the evidence supports the bankruptcy court's findings and set them aside only if we are left with the definite and firm conviction that a mistake has been committed.

In re Perry, 345 F.3d 303, 308–09 (5th Cir. 2003) (quotation marks and citations omitted). "Issues of statutory interpretation are reviewed *de novo*." *Matter of Glenn*, 900 F.3d 187, 189 (5th Cir. 2018) (citation omitted).

The Supreme Court has explained that "an abuse-of-discretion standard does not mean a mistake of law is beyond appellate correction. A [trial] court by definition abuses its discretion when it makes an error of law." *Koon v. United States*, 518 U.S. 81, 100 (1996) (citations omitted). "The abuse-of-discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions." *Id.*

III. Is Dr. Edwards a Secured Creditor as to the Home Improvement Line Loans?

Dr. Edwards' first deal with CHFS, the "Home Improvement Line" loans, commenced in 2006. Here's how it worked:

In two contracts, a Dr. Edwards company named (The) Rainbow Group agreed to make $10 million available to CHFS. CHFS drew down the funds to buy consumer mortgages that people had taken out to improve their homes—thus the name, "Home Improvement Line." CHFS serviced the mortgages and sent Rainbow the interest it owed. Rainbow took a security interest in CHFS's receivables. CHFS, meanwhile, delivered the original consumer mortgages to

Mississippi attorney Hal McCarley, who served as Custodian. A separate Custodial Agreement provided that McCarley held the originals as collateral for Rainbow's benefit.

More than 1,800 home improvement loans were handled through this arrangement. Between $600,000 and $700,000 flowed through this deal each month. Op. at 17.

Dr. Edwards later assigned Rainbow's rights and duties as Lender to Beher Holdings Limited. He could do that under § 9.6 of the parties' first contract, the 2006 "Loan and Security Agreement," which states that Rainbow could divide the loan and assign its rights and duties "AT ANY TIME." Docket No. 4-4 at 38 in No. 3:18-CV-154. When he did so the business relationship was fundamentally unchanged. Dr. Edwards kept the taps open; CHFS bought and serviced mortgages; and McCarley held the original documents as collateral.

Then Dr. Edwards re-assigned and split his investment between two entities: Edwards Family Partnership and Beher Holdings Trust, the present appellants. This was again explicitly permitted by the contract. Once again each aspect of the relationship operated as before.

The end result was a $4 million note between CHFS and EFP, and a $12 million note between CHFS and BHT. It is undisputed that when CHFS declared bankruptcy, it owed Dr. Edwards' entities $17.8 million on these notes.

A. Were the "Intra-Edwards" Assignments Valid?

In Count II of this Adversary Proceeding, the Trustee argued that Dr. Edwards' internal assignment of the note(s), from Rainbow to BHL to EFP/BHT, was invalid. The Bankruptcy Court found that she was proceeding on this theory under 11 U.S.C. § 544. Op. at 101. State substantive law therefore governs whether she has standing to complain about these assignments. *In re Moore*, 608 F.3d 253, 260 (5th Cir. 2010). Standing is reviewed *de novo*. *Moore v. Bryant*, 853 F.3d 245, 248 (5th Cir. 2017).

Under Mississippi law, "a borrower not a party to the assignment of one's security interest has no standing to challenge the assignment of that interest." *Crater v. Bank of N.Y. Mellon*, 203 So. 3d 16, 19 (Miss. Ct. App. 2016) (citation omitted). The Trustee is not a party to Dr. Edwards' assignments of his security interest. It follows that she lacks standing to challenge the validity of any assignment of that interest. *Accord In re Cook*, 457 F.3d 561, 567 (6th Cir. 2006) (finding that bankruptcy trustee proceeding under § 544 did not have standing under Kentucky law to challenge the assignment of a perfected security interest). Whether the Trustee may have standing under other authorities is not before the Court.

The Bankruptcy Court nevertheless found that the Trustee had standing because her claim "would render the 2010 Assignment void." Op. at 121. Its best authority for that proposition came from the Fifth Circuit's interpretation of Texas law, rather than Mississippi law. *See id.* (citing *Reinagel v. Deutsche Bank Nat. Tr. Co.*, 735 F.3d 220, 225 (5th Cir. 2013)). The *Reinagel* court held that while "an obligor cannot defend against an assignee's efforts to enforce the obligation on a ground that merely renders the assignment voidable at the election of the assignor, Texas courts follow the majority rule that the obligor *may* defend on any ground which renders the assignment void." 735 F.3d at 225 (quotation marks and citations omitted).

There are good reasons to adopt this conclusion. First, simple odds make it more likely than not that Mississippi would follow the majority rule. Second, Mississippi has "liberal standing requirements." *SASS Muni-V, LLC v. DeSoto Cty.*, 170 So. 3d 441, 449 (Miss. 2015). The Mississippi Supreme Court once found, for example, that a tax-sale purchaser had standing to argue that the Chancery Clerk's improper procedure rendered the sale void. *Id.* (applying Miss. Code Ann. § 27-43-3). Third, an investigation into the few local decisions to have considered and rejected this conclusion reveals that they discuss standing alongside the merits of

assignments in the context of securitization. *E.g.*, *Anderson v. Wells Fargo Bank, NA*, No. 2:15-CV-88-KS-MTP, 2016 WL 1562940, at *1 (S.D. Miss. Apr. 18, 2016). We are not in the securitization world.

When a state's highest court has not ruled on an issue, a federal court must "defer to intermediate state appellate court decisions unless convinced by other persuasive data that the highest court of the state would decide otherwise." *Herrmann Holdings Ltd. v. Lucent Techs. Inc.*, 302 F.3d 552, 558 (5th Cir. 2002) (quotation marks and citation omitted). This Court is not so persuaded as to reject the Mississippi Court of Appeals' decision, and therefore defers to its holding in *Crater v. Bank of New York Mellon.*

Crater was quoted above, but will now be explained in more detail.

Brenda Crater filed suit in state court alleging that Bank of New York Mellon was wrongfully foreclosing on her home. 203 So. 3d at 18. Mellon wasn't the original lender. It had come to hold the deed of trust by assignment. *Id.* Crater sought to halt the foreclosure by proving that "the assignment of the deed of trust to Mellon without the assignment of the associated promissory note was null and *void*." *Id.* (emphasis added); *see also id.* at 19.

The Mississippi Court of Appeals didn't review the authorities regarding standing to pursue claims that are void as opposed to voidable. Its entire analysis was the following:

> Crater asserts (1) that she has standing to challenge the assignment from MERS to Mellon as void, and (2) that assigning the deed of trust to Mellon, without also assigning the promissory note, makes the assignment void. With regard to Crater's standing to challenge the assignment, we find she has no standing because she was not a party to that transaction, as a borrower not a party to the assignment of one's security interest has no standing to challenge the assignment of that interest. *Neel v. Fannie Mae*, No. 1:12cv311–HSO–RHW, 2014 WL 977328, at *3 (S.D. Miss. Mar. 12, 2014).

203 So. 3d at 19; *see also Neel v. Fannie Mae*, No. 1:12-CV-311-HSO-RHW, 2014 WL 896754, at *4 (S.D. Miss. Mar. 6, 2014). In other words, in Mississippi, plaintiffs lack standing to

challenge an assignment exclusively between other parties, regardless of whether the assignment is void or merely voidable.

Per *Crater*, the Trustee lacks standing to proceed on this count.

Should the Fifth Circuit disagree, though, what follows will explain the undersigned's concerns about the Bankruptcy Court's next steps.

After finding standing, the Bankruptcy Court conducted a lengthy analysis into the merits of whether the law of the British Virgin Islands rendered Dr. Edwards' assignment void. That analysis failed to support the Trustee's claim; the restoration of Dr. Edwards' entities under BVI law rendered the assignment retroactively *valid*. But the Bankruptcy Court did not stop there. Instead, it pivoted and asked a novel question: whether the law of the British Virgin Islands "should be disregarded as conflicting with federal bankruptcy law." Op. at 127.

The Bankruptcy Court then concluded that it would be unfair to honor Dr. Edwards' assignment as retroactively valid because, during the years of his entities' nonconformity with BVI law, his entities had filed proofs of claim in this Bankruptcy Court matter. The Bankruptcy Court found that the proofs of claim were invalid and could not be ratified—could not be cured—by Dr. Edwards' present corporate compliance. It would be *unfair to the other creditors*, the Bankruptcy Court reasoned. *Id.* at 128-29.

Unfair to the other creditors? No way. The other creditors have waited *years* for meager payments while the Trustee spends *estate* money to prioritize *her* administrative fees above their and every other creditor's recovery. No, that justification is simply incredible.

But set that aside for a moment. It was an abuse of discretion to even consider ratification.

"It is a well-settled rule that a joint pretrial order signed by both parties supersedes all pleadings and governs the issues and evidence to be presented at trial." *McGehee v. Certainteed Corp.*, 101 F.3d 1078, 1080 (5th Cir. 1996) (quotation marks and citation omitted); *see also Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 474 (2007). The Trustee's ratification theory was never raised in the pleadings or the Pretrial Order. *See* Docket No. 4-2 at 50-51 in No. 3:18-CV-154. It follows that it was waived.

The Bankruptcy Court's memorandum opinion asserted, without authority, that it could consider the Trustee's ratification theory at the eleventh hour because Dr. Edwards had given late notice of the BVI restoration. Op. at 127 n.45. That's a kind of "two wrongs make a right" reasoning unsupported by the timeline or the law.

Dr. Edwards' evidence of restoration came at the tail end of the litigation, true enough, but it was timely enough to be included in the Pretrial Order. Dr. Edwards notified the Trustee of the BVI restoration on August 4, five days *before* the parties submitted their proposed Joint Pretrial Order. *Id.* at 95. The Pretrial Order wasn't entered until September 5. *Id.* at 6. It was amended once on September 18 and again on October 24. *Id.* Dr. Edwards' update was in.

In contrast, the Trustee's ratification theory was not included in any of the Pretrial Orders. She knew about Dr. Edwards' restoration before she submitted the proposed Joint Pretrial Order on August 9. She then had more than seven weeks to get her claim in the second amended Pretrial Order. She also could have filed a motion seeking its untimely inclusion. She did none of those things.

The ratification theory's absence from the last Pretrial Order means it was too late to advance it from the well of the courtroom at trial. *See* Docket No. 4-2 at 830 in No. 3:18-CV-154. Dr. Edwards had no reasonable notice of or opportunity to defend against it.

To all this, the Trustee would likely contend that the Bankruptcy Court's late consideration is within the standard of review. Courts review "decisions regarding amendment of pretrial orders for abuse of discretion." *Meaux Surface Prot., Inc. v. Fogleman*, 607 F.3d 161, 167 (5th Cir. 2010) (citation omitted).

She would probably be correct if the Bankruptcy Court had considered the elements of the proper legal standard—the four-factor test courts must apply in this Circuit when considering untimely additions to Pretrial Orders. *See, e.g.*, *id.* The Bankruptcy Court did not do that. *Compare id. with* Op. at 127 n.45.

"Because . . . a court by definition abuses its discretion when it applies an incorrect legal standard, we review such errors de novo." *Benavides v. Chicago Title Ins. Co.*, 636 F.3d 699, 701 (5th Cir. 2011) (citation omitted); *see also Koon*, 518 U.S. at 100 (1996) ("A [trial] court by definition abuses its discretion when it makes an error of law.").

Reviewing the timeline of this issue *de novo*, the undersigned finds that the Trustee's delay in raising ratification waived that claim, consistent with the usual standard in this Circuit. *See McGehee*, 101 F.3d at 1080.

The Trustee's challenge to Dr. Edwards' internal assignment is reversed and rendered.

B. Did the Custodial Agreement Need to be Assigned?

The parties agree that the 2006 contracts resulted in a security interest. In Count IV of this Adversary Proceeding, the Trustee argued that Dr. Edwards lost his security interest in the HIL loans when he failed to assign the Custodial Agreement to his new lender, BHL. The Bankruptcy Court agreed. The Trustee has standing to pursue this line of attack because CHFS was a party to the Custodial Agreement.

Under Mississippi law, "[t]he primary purpose of all contract construction principles and methods is to determine and record the intent of the contracting parties." *Royer Homes of Miss., Inc. v. Chandeleur Homes, Inc.*, 857 So. 2d 748, 752 (Miss. 2003) (citation omitted). "A cardinal rule of construction of a contract is to ascertain the mutual intentions of the parties." *Union Planters Bank, Nat'l Ass'n v. Rogers*, 912 So. 2d 116, 120 (Miss. 2005) (citation omitted).

The analysis begins and often ends with the plain language of the contract, since the words the parties selected "are by far the best resource for ascertaining the intent and assigning meaning with fairness and accuracy." *Royer Homes*, 857 So. 2d at 752 (citation omitted). The contract is read "as a whole, so as to give effect to all of its clauses." *Id.* (citation omitted).

"[I]f the contract is unclear or ambiguous, the court should attempt to harmonize the provisions in accord with the parties' apparent intent." *Id.* (quotation marks and citation omitted).

Section 9.6 of the 2006 Loan and Security Agreement says Rainbow could divide the loan and assign its rights and duties "AT ANY TIME." Docket No. 4-4 at 38 in No. 3:18-CV-154. This gave Dr. Edwards unilateral power of assignment. He invoked this clause when he assigned the rights and responsibilities of Lender from Rainbow to his other entities.

Section 5.7 of the Custodial Agreement, meanwhile, prohibits assignment or transfer of the Custodial Agreement without written consent of the parties. *See* Docket No. 4-4 at 202 in No. 3:18-CV-154. This is not inconsistent with § 9.6 of the Loan and Security Agreement. Read together, as Mississippi law requires, § 5.7 of the Custodial Agreement simply means that everyone would have to agree in writing before they could change *the custodian* of the mortgages. The lender can change at any time. The custodian can't.

In any event, it was clear error to hold Dr. Edwards responsible for a failure to assign the Custodial Agreement. As the Trustee's own brief observes, neither Dr. Edwards nor any of his

entities actually signed the Custodial Agreement. Docket No. 25 at 19. To the extent assignment was required (it wasn't), it wasn't required to be done by Dr. Edwards.

The structure of this deal is reasonable enough. The Loan and Security Agreement reflects an agreement between lender and borrower. The lender agreed to make money available to the borrower in exchange for a rate of return. The Custodial Agreement reflects an agreement between borrower and custodian. The custodian agreed to hold the consumer mortgages for the lender's benefit in exchange for a fee.

The evidence introduced at trial confirmed that the arrangement worked. It worked in 2006 and kept working through every change in Lender.[10] And the Custodian confirmed that he was never confused about who the lender was. He "took instruction from Dr. Edwards as to the identity of the lender." Op. at 137.

Now for the law. Mississippi Code § 75-9-313(c)(1)-(2) says that a person possessing collateral for a lender's benefit gives the lender a perfected security interest. McCarley's possession of consumer mortgages for Rainbow gave Rainbow a perfected security interest. Everyone agrees on this part.

Mississippi Code § 75-9-310(c), in turn, says "[i]f a secured party assigns a perfected security interest or agricultural lien, a filing under this article is not required to continue the perfected status of the security interest against creditors of and transferees from the original debtor." That means Dr. Edwards didn't have to "re-perfect" the security interest upon assignment.

[10] For what it's worth, the record confirms that CHFS knew and consented to Dr. Edwards' still-perfected security interest upon assignment. On August 10, 2010, Dickson and Dr. Edwards signed an "Amendment" to the "CHFS Loan and *Security Agreement*" (emphasis added) updating the terms of the loan to reflect that the new lenders would be Beher Holdings Trust and Edwards Family Partnership.

The Bankruptcy Court disagreed with this last conclusion. It found that the parties "varied by agreement" the continuous-perfection provision of § 75-9-310(c), in that the parties had affirmatively required Dr. Edwards to re-perfect his security interest every time he assigned the note to a new entity. Op. at 138. The Bankruptcy Court based this conclusion off of § 5.7 of the Custodial Agreement. But the plain language of § 5.7 doesn't say that the parties were waiving § 75-9-310(c) or that re-perfection was required upon assignment. And even if it did say that, it would be irrelevant since Dr. Edwards didn't sign the Custodial Agreement.

The Trustee embarked upon a long, tortured journey to try and convert Dr. Edwards to an unsecured creditor. The simplest path through the law and the evidence does not support such a conclusion. This Court sees a secured interest in 2006 and the assignment of that secured interest. Dr. Edwards is a secured creditor on the HIL loans. The Bankruptcy Court's findings to the contrary disregard the contract and the law. They are vacated and remanded. The cash collateral issues are necessarily remanded as well.

IV. Were the Mortgage Portfolios Joint Ventures?

The next set of issues concerns the mortgage portfolios between CHFS and the Edwards entities. The Bankruptcy Court evaluated the evidence and declared the mortgage portfolios to be loans. The Edwards entities seek to have them declared joint ventures.

The standard of review says trial court factual findings are owed substantial deference. Pursuant to that standard, and notwithstanding how parts of today's opinion might look, in prior cases this Court has usually affirmed the Bankruptcy Court's findings and decisions.

In other sections of today's ruling, this Court has found certain factual findings clearly erroneous only because the evidence in Dr. Edwards' favor was so overwhelming that the finding could not be sustained. The Bankruptcy Court's decisions on the mortgage portfolios are

different. Although this Court might have evaluated them differently as the trier of fact, that is not the standard on appeal. The Bankruptcy Court's rulings on the mortgage portfolios are within the standard of review and affirmed.

V. Post-Petition Conduct

A. Did Dr. Edwards Violate the Automatic Stay?

Dr. Edwards contests the Bankruptcy Court's finding that he violated the automatic stay pursuant to 11 U.S.C. § 362(k). He argues that he was searching for Dickson's Costa Rican assets rather than CHFS's assets, that he was held responsible for mere possession of CDs, and that the CDs were duplicative of existing information.

The Bankruptcy Court's discussion was not as limited as Dr. Edwards' brief claims. The Bankruptcy Court emphasized Dr. Edwards' global actions and attempts to secure information rather than the ultimate (f)utility of the information he gleaned. Op. at 187-96.

This broad scope of review makes sense. That Dr. Edwards may have been reacting to the breakdown in trust between himself and the Trustee does not automatically mean a reviewing court should give him a pass and decline to look at whether he violated a court order. Just as we should not condone a Trustee perceived to be taking advantage of an estate, we should not condone a creditor perceived to be circumventing a court order or a Trustee.

Nor should we yield to Dr. Edwards' current arguments about the relevance of the information. "If a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls the 'judicial power of the United States' would be a mere mockery." *In re Bradley*, 588 F.3d 254, 265 (5th Cir. 2009) (citation omitted). So this Court

agrees with the breadth of the Bankruptcy Court's review and the Trustee's arguments on appeal supporting that broad analysis.

That said, there were other, discrete legal and factual errors in this part of the Bankruptcy Court's memorandum opinion and judgment.[11]

We begin with standing. The Bankruptcy Court sidestepped the question of the Trustee's standing under § 362(k) to pursue damages for an automatic stay violation. It quoted Collier's and other authorities for the proposition that "section 362(k) provides a remedy only for natural persons," Op. at 195, which if true would end this claim in Dr. Edwards' favor. The Bankruptcy Court, however, then found such an analysis "unnecessary" because the court could sanction Dr. Edwards under its contempt power. *See* 11 U.S.C. § 105.

The Edwards entities argue that was error because "the standard for awarding damages for contempt is <u>much</u> different – and much higher than – the standard for awarding damages under § 362(k)." Docket No. 23 at 81. They claim support from an Eastern District of New York case allegedly imposing a "maliciousness" standard. *Id.*

The evidentiary standards are indeed different. "In order to prove a violation of § 362(k), a plaintiff must establish by a preponderance of the evidence that: (1) the defendant knew of the existence of the stay; (2) the defendant's actions were taken intentionally; and (3) those actions constituted stay violations." *St. Paul Fire & Marine Ins. Co. v. Labuzan*, No. CIVA H-05-3811, 2010 WL 1065958, at *2 (S.D. Tex. Mar. 22, 2010) (quotation marks, citations, and brackets omitted). In contrast, the civil contempt standard requires "clear and convincing evidence that:

[11] The justification for investigating a violation of the automatic stay is fairly weak in this case. The automatic stay exists "to protect the debtor's assets, provide temporary relief from creditors, and further equity of distribution among the creditors by forestalling a race to the courthouse." *GATX Aircraft Corp. v. M/V Courtney Leigh*, 768 F.2d 711, 716 (5th Cir. 1985). Here, though, Dr. Edwards owns 99.9% of the estate's assets. There's no race to the courthouse because no one else has a real interest in this case. Nevertheless the automatic stay obviously exists and had to be honored.

(1) a court order was in effect; (2) the order required certain conduct by the respondent; and (3) that the respondent failed to comply with the order."[12] *MD Promenade*, 2009 WL 80203, at *14 (citations omitted).

The standards for assessing damages, while overlapping, also have different characters. "Section 362(k) provides in relevant part that an individual injured by any willful violation of the automatic stay shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages." *In re Terry*, No. 18-44642-ELM-13, 2019 WL 7169095, at *12 (Bankr. N.D. Tex. Dec. 23, 2019) (quotation marks, citation, and brackets omitted). Civil contempt damages are designed to achieve ends beyond actual damages, though, and therefore require a different approach.

> Judicial sanctions in civil contempt proceedings may, in a proper case, be employed for either or both of two purposes; to coerce the defendant into compliance with the court's order, and to compensate the complainant for losses sustained. Where compensation is intended, a fine is imposed, payable to the complainant. Such fine must of course be based upon evidence of complainant's actual loss, and his right, as a civil litigant, to the compensatory fine is dependent upon the outcome of the basic controversy.
>
> But where the purpose is to make the defendant comply, the court's discretion is otherwise exercised. It must then consider the character and magnitude of the harm threatened by continued contumacy, and the probable effectiveness of any suggested sanction in bringing about the result desired.

United States v. United Mine Workers of Am., 330 U.S. 258, 303–04 (1947) (citations omitted). The Fifth Circuit's leading case on contempt emphasizes that the trial court "has broad discretion in the assessment of damages in a civil contempt proceeding. The purpose is to compensate for the damages sustained. The public rights that the said court orders sought to protect are important measures of the remedy." *Am. Airlines, Inc. v. Allied Pilots Ass'n*, 228 F.3d 574, 585 (5th Cir. 2000) (quotation marks and citations omitted); *see also Bradley*, 588 F.3d at 263.

[12] This standard contains no malice requirement.

"A bankruptcy court's assessment of monetary sanctions for contempt is reviewed for abuse of discretion. A court abuses its discretion if it awards sanctions based on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *In re Lothian Oil, Inc.*, 531 F. App'x 428, 445 (5th Cir. 2013) (quotation marks and citations omitted).

Several bankruptcy courts have considered § 362(k) and § 105 arguments in the same order. *E.g.*, *In re Reed*, 616 B.R. 77, 82 (Bankr. N.D. Miss. 2020). This very Bankruptcy Court has done that before, too. *See In re Adams*, 516 B.R. 361, 368-69 (Bankr. S.D. Miss. 2014). That unfortunately did not happen here.

The Bankruptcy Court's memorandum opinion uses the word "contempt" on two of its 214 pages, but otherwise exclusively applies the § 362(k) standard. Pages 189 to 194 invoke and apply the elements of a § 362(k) violation. Pages 194 to 196 invoke and apply the standard for imposing damages under § 362(k). The section concludes with a finding that the Trustee "is entitled to a judgment against Dr. Edwards and EFP/BHT in the total amount of $71,458.25 pursuant to § 362(k)." Op. at 196. The entire opinion concludes with the same recitation. *Id.* at 213. And page six of the final judgment explicitly rests the findings on "11 U.S.C. § 362(k)," rather than 11 U.S.C. § 105.

If the Bankruptcy Court's decision concluded with a mistaken citation to § 362(k) we might have a harmless clerical error. Yet a review of the entire record leaves this Court with the definite and firm conviction that the Bankruptcy Court applied § 362(k), a statute which might not provide a remedy, in lieu of applying § 105. The issue must therefore be remanded for either an explanation of why the Trustee has standing to pursue damages under § 362(k) *or* an analysis explicitly grounding liability and damages in § 105's contempt authority.

In case the Fifth Circuit disagrees with this conclusion and finds the existing discussion a legally-sufficient contempt finding pursuant to § 105, however, this Court will move on to the factual errors in this part of the Bankruptcy Court's findings.

The record does not bear out the Bankruptcy Court's finding that the information Dr. Edwards obtained was "from CHFS's computers." Op. at 191. Testimony revealed that the information was "from the personal computer of Reshonda Rhodes." Docket No. 4-2 at 370 in No. 3:18-CV-156.

The record then does not bear out the Bankruptcy Court's specific award of $10,000 in damages for "additional servicing costs." Op. at 196.

Damages must be established "with reasonable certainty," rather than evidence that is "speculative or based on conjecture." *Adams*, 516 B.R. at 370. When asked to prove her damages at trial, though, the Trustee said "[i]t's almost like proving a negative in some situations." Docket No. 4-2 at 255 in No. 3:18-CV-156. That is plainly not enough. The Trustee then tried to make a causal connection between her claim that (a) new information was contained on the CDs, and (b) higher servicing costs she says the Estate incurred. Yet there are evidentiary hurdles with each of those elements.

Regarding (a), an email exchange with the Trustee's attorney "laid to rest" whether there was new information contained on the CDs. Op. at 193. The Bankruptcy Court proceeded to ascribe error to Dr. Edwards for not turning over the original CDs, but that was flipping the burden of proof. The email with Trustee's counsel already established the lack of a genuine factual dispute.[13]

[13] Given the email exchange, the Bankruptcy Court erred in piling on with its finding that Dr. Edwards "continues to violate the automatic stay by refusing to surrender both original CDs referenced in his email of October 15, 2014, to the Trustee." Op. at 194.

Regarding (b), higher servicing costs, the Trustee attempted to prove damages by testifying that she suffered "increased servicing frustrations and walk-arounds and how to put penny to paper on all of that. And it's hard to do that." Docket No. 4-2 at 256 in No. 3:18-CV-156. The Trustee's brief here says this testimony is enough to sustain the award because she "was referring" to her "estimate[]" in the Pretrial Order. Docket No. 25 at 82 & n.114. But the Pretrial Order isn't evidence. And parties don't get a pass on proving damages just because they think it is "hard to do."

The Trustee has spared no expense on experts and professional assistance to advance her claims. Trial was the time for her to generate evidence assigning a dollar figure to any increased "frustrations" she says she incurred. She did not.

Courts are "wholly unable to make an assessment of the propriety of a fee award based on a number alone, devoid of any explanation of the method for its derivation." *Evangeline*, 890 F.2d at 1328. Accordingly, the $10,000 award for additional servicing costs cannot be affirmed.

For these reasons, the Bankruptcy Court's findings under § 362(k) are vacated and remanded. "If it is determined [on remand] that fees should be awarded, the court should clearly explain how it arrived at the level of compensation awarded." *Id.*

B. Did Dr. Edwards Convert Estate Property?

The Bankruptcy Court found that Dr. Edwards converted "estate property" in the form of two CDs he recovered from Costa Rica. Op. at 203-04. The Bankruptcy Court awarded $10,000 in damages on this claim, again for the "additional servicing costs" allegedly incurred by the Trustee. *Id.* at 204.

"The reported cases in Mississippi reflect the view that an action for conversion is available for wrongful interference with tangible items of personal property and those 'intangible

rights that are customarily merged in, or identified with some document.'" Jackson & Miller, 5 Encyclopedia MS Law § 41:89 (2d ed. Oct. 2019 update) (citation omitted); *see also LaBarre v. Gold*, 520 So. 2d 1327, 1330 (Miss. 1987). In contrast, there is no cause of action for conversion of intangible items. *See Directv, Inc. v. Hubbard*, No. 2:03-CV-261-P-D, 2005 WL 1994489, at *4 (N.D. Miss. Aug. 17, 2005) (concluding that allegations of stolen satellite transmissions did not state a conversion claim because digital transmissions "are not 'tangible' in the sense that they can be perceived by the touch of the skin").

The Bankruptcy Court acknowledged this law, then determined that Dr. Edwards converted two CDs. That was clear error. The tangible CDs themselves were never the property of CHFS or the Trustee, and the information contained on them is intangible, subject to unlimited reproduction and access. The Bankruptcy Court cited no authority for the proposition that digital files on a CD are "intangible rights that are customarily merged in, or identified with some document," Jackson & Miller, *supra*, and Mississippi Supreme Court case law discredits the notion.

In *Mossler Acceptance Co. v. Moore*, the State's highest court held that "[c]onversion lies only for personal property which is tangible." 67 So. 2d 868, 873 (Miss. 1953). Although that holding is not recent, Chief Judge Jordan's research found that "[t]he Mississippi Supreme Court has never reversed *Mossler*," *Swift Fin. Corp. v. Bath Planet of Miss., LLC*, No. 3:15-CV-846-DPJ-FKB, 2016 WL 3180291, at *6 (S.D. Miss. June 6, 2016), and the Fifth Circuit has used *Mossler* to emphasize that conversion in this State "is an act of dominion wrongfully exerted over another person's tangible personal property . . . ." *ABS Servs., Inc. v. New York Marine &*

Gen. Ins. Co., 524 F. App'x 946, 951 (5th Cir. 2013) (citing *Mossler*).[14] If "there is no obligation to return identical money," *Mossler*, 67 So. 2d at 873, it follows that there is no obligation to return identical digital files.

In addition, for the reasons discussed above, the $10,000 damages award was not established by any non-speculative evidence. *See Evangeline*, 890 F.2d at 1328.

For these reasons, the Trustee's conversion claim is reversed and rendered.

VI. The Trustee's Motion to Lift Stay

Lastly, earlier this year, the Trustee moved to lift this Court's stay. She said she had a deal on the table to sell 3,067 mortgages to an investor. Dr. Edwards opposed the motion, arguing that the purported deal would constitute irreparable harm if he were to prevail on the merits and be declared a secured creditor. He also said that when pressed about the details of the investor's proposal, "the Trustee does not even know which loan portfolios the offer encompasses." Docket No. 32 at 7.

The motion was and is due to be denied as moot. The only evidence attached to the Trustee's motion showed that the offer expired 16 days *before* she moved to lift the stay. *See* Docket No. 30-1. No evidence was presented of the offer's extension. In any event, the Trustee continues to be unharmed by the stay—and in fact profits from the stay—as Dr. Edwards continues to bear 99.9% of the cost of her work during the pendency of this case. Given the merits ruling, unless something significant changes, the undersigned will keep the stay in place.

[14] The Chief Judge's review indicated that conversion of an intangible states a claim in Mississippi only when the plaintiff alleges "conversion of a particular, identifiable fund, or funds from a specific-purpose account." *Swift Fin. Corp.*, 2016 WL 3180291, at *6.

VII. Conclusion

The judgment is affirmed in part, reversed in part, rendered in part, and remanded for further proceedings consistent with this opinion. A separate Final Judgment shall issue.

This ruling is stayed pending the parties' anticipated appeal and cross-appeal.

SO ORDERED, this the 2nd day of October, 2020.

s/ Carlton W. Reeves
UNITED STATES DISTRICT JUDGE

EXHIBIT F

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
April 27, 2022
Lyle W. Cayce
Clerk

No. 20-61011

IN THE MATTER OF: COMMUNITY HOME FINANCIAL SERVICES CORPORATION,

Debtor,

EDWARDS FAMILY PARTNERSHIP, L.P.; BEHER HOLDINGS TRUST,

Appellants—Cross-Appellees,

versus

KRISTINA M. JOHNSON, TRUSTEE FOR COMMUNITY HOME FINANCIAL SERVICES CORPORATION,

Appellee—Cross-Appellant.

Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. 3:18-CV-154
USDC No. 3:18-CV-155
USDC No. 3:18-CV-156
USDC No. 3:18-CV-157

Before DENNIS, HIGGINSON, and COSTA, *Circuit Judges*.

STEPHEN A. HIGGINSON, *Circuit Judge*:

This is a second review appeal and cross-appeal from consolidated matters in the Bankruptcy Court for the Southern District of Mississippi. The dispute centers around a business relationship between companies owned by Dr. Charles C. Edwards and William D. Dickson. Appellants are the Edwards Family Partnership ("EFP") and Beher Holdings Trust ("BHT"), two companies owned by Edwards and collectively referred to as the "Edwards entities." Appellee/Cross-Appellant is Trustee Kristina M. Johnson, who presently manages Dickson's former company, Community Home Financial Services Corporation ("CHFS"). The parties each raise four issues on appeal relating to the business relationship between EFP, BHT, and CHFS. We AFFIRM the district court's decision in part, REVERSE in part, and REMAND.

I.

A.

i.

The lengthy relationship between Edwards, an orthopedic surgeon from Maryland, and Dickson, a business owner from Jackson, Mississippi, began sixteen years ago. Both Edwards and Dickson owned and operated multiple family businesses. The two men were introduced by a broker hired by Dickson to find a replacement lender for CHFS. CHFS is a mortgage servicing entity, managed by Dickson, that purchased discounted mortgage loan portfolios from third parties and serviced those loans, as well as servicing loans from several affiliated companies.

In July 2006, Edwards and Dickson met for the first time. Edwards's daughter then traveled to Jackson, Mississippi, where CHFS was

headquartered, to survey the company's business operations. Although Edwards's daughter had no expertise in the realm of mortgage servicing, she reported favorably to her father about CHFS. Sometime thereafter, Edwards and Dickson commenced their first business deal, a credit facility of $10 million to fund the purchase of home improvement loans.

To conserve financial resources and to expedite the arrangements, an employee of CHFS, who happened to be a disbarred attorney, drafted the loan documents, using as forms the documents prepared by CHFS's prior lender, cutting and pasting different names and addresses where appropriate. Meanwhile, Edwards relied on his daughter, who is not an accountant, to review CHFS's financial reports, to calculate the principal balance and interest due on the promissory notes each month, and to determine "eligible receivables" based on a "Borrowing Base Certificate."

Although the financial entanglements of Edwards and Dickson contained many elements, the present dispute centers around two business transactions: (1) the initial home improvement loans from Edwards to CHFS and (2) a subsequent arrangement of seven mortgage portfolios of subprime loans (the "Mortgage Portfolios") purchased as "joint ventures" between Edwards and CHFS. In total, Edwards's proofs of claim with respect to his financial arrangements with Dickson and CHFS amount to roughly $30 million.

ii.

The first deal between Edwards and CHFS, which began in 2006, pertained to "Home Improvement Line" loans (otherwise known as the "home improvement loans" or the "Home Improvement Line"). Edwards agreed to loan $10 million to CHFS through his company Rainbow Group. CHFS used the funds from Rainbow Group/Edwards to purchase consumer

mortgages taken out by individuals seeking to improve their homes.[1] CHFS then serviced the purchased mortgages and sent Rainbow Group the interest it owed.[2] Nearly 2,000 home improvement loans were handled through this arrangement, with roughly $600,000 to $700,000 flowing through the deal each month.

CHFS established a custodial agreement with Harold B. McCarley, Jr., PLLC, a Mississippi law firm, designating attorney Harold McCarley, Jr., as the custodian of the original loan documents and assignments for Rainbow Group's benefit. McCarley testified in the bankruptcy trial that he holds these documents and releases them only upon receipt of a written request signed by CHFS and Rainbow Group (or other entity identified by Edwards).

The Home Improvement Loan Agreement gives Rainbow Group the authority to assign its rights and duties as Lender, pursuant to Paragraph 9.6 of the agreement, which reads:

> 9.6 ASSIGNMENT BY LENDER. LENDER MAY AT ANY TIME (A) DIVIDE AND REISSUE (WITHOUT SUBSTANTIVE CHANGES OTHER THAN RESULTING FROM SUCH DIVISION) THE NOTE, AND/OR (B) SELL, ASSIGN, GRANT PARTICIPATION IN, DELEGATE OR OTHERWISE TRANSFER TO ANY OTHER PERSON (AN "ASSIGNEE") ALL OR PART OF RIGHTS AND DUTIES OF LENDER UNDER THIS AGREEMENT AND THE OTHER LOAN DOCUMENTS. TO THE EXTENT INDICATED IN ANY DOCUMENT, INSTRUMENT OR AGREEMENT SO SELLING,

---

[1] The nature of the mortgages in question is the origin for the name "Home Improvement Line."

[2] More specific details regarding the financial terms of the initial Home Improvement Line agreement between Rainbow Group and CHFS can be found in the bankruptcy court opinion.

> ASSIGNING, GRANTING PARTICIPATION IN, OR OTHERWISE TRANSFERRING TO AN ASSIGNEE SUCH RIGHTS AND/OR DUTIES, (I) THE ASSIGNEE SHALL ACQUIRE ALL THE LENDER'S RIGHTS UNDER THE AGREEMENT AND THE OTHER LOAN DOCUMENTS AND (II) THE ASSIGNEE SHALL BE DEEMED TO BE THE "LENDER" UNDER THIS AGREEMENT AND THE OTHER LOAN DOCUMENTS WITH THE AUTHORITY TO EXERCISE SUCH RIGHTS IN THE CAPACITY OF LENDER.

Edwards exercised this authority twice on behalf of Rainbow Group. In 2007, Edwards assigned Rainbow Group's rights and duties to Beher Holdings Limited ("BHL").[3] Then in 2010, Edwards re-assigned and split rights to the Home Improvement Line loans between the present appellants: EFP and BHT. In each instance, when Edwards exercised his reassignment powers, the business relationship between Edwards and CHFS remained fundamentally unchanged. Several years after the initial 2006 loan agreement, Edwards and CHFS entered into amended loan agreements with respect to the Home Improvement Line. The amended agreements resulted in a $4 million commercial note and line of credit between CHFS and EFP, as well as a $12 million commercial note and line of credit between CHFS and BHT. The parties do not dispute that by the time CHFS declared bankruptcy in 2012, it owed the Edwards entities $17.8 million on these notes.

---

[3] Beher Holdings Limited is a British Virgin Islands company, acquired by Dr. Edwards for the purpose of the assignment orchestrated between BHL and the Rainbow Group.

iii.

In 2008, Edwards began to pursue a second type of investment with Dickson and CHFS. Because of the nationwide financial crisis at the time, Dickson believed that CHFS could purchase subprime loan portfolios at a favorable price. Accordingly, Dickson approached Edwards about providing roughly $9 million through various entities to CHFS to purchase seven mortgage portfolios (the "Mortgage Portfolios") of subprime loans. The Edwards entities maintain that Edwards did not intend for these transactions to be considered loans but rather "joint ventures" between the Edwards entities and CHFS.

Edwards (acting on behalf of EFP and BHT) finalized agreements with CHFS to purchase the Mortgage Portfolios between January 2008 and March 2011. The parties to Mortgage Portfolios #1-6 are CHFS and Appellant EFP. The parties to Mortgage Portfolio #7 are CHFS and Appellant BHT. Only three of the Mortgage Portfolio transactions between the Edwards entities and CHFS are documented in writing (Mortgage Portfolios #1, 2, and 7).

The parties do not dispute that the Edwards entities funded the purchase of the Mortgage Portfolios. Although the purchases of the seven portfolios were funded directly by entities purportedly controlled by Edwards (not necessarily EFP/BHT), all portfolio purchase agreements were between CHFS and the portfolio seller. Moreover, for Portfolios #1-6, the portfolio sellers assigned the loans to CHFS. The original notes and assignments comprising the consumer loans in Portfolios #1-6 are in EFP's possession as "collateral."

The agreement between CHFS and BHT regarding Portfolio #7 "contains terms that are materially different" from the agreements for

Mortgage Portfolios #1-6.[4] The parties to the agreement decided the original notes and assignments in Portfolio #7 would not be held by CHFS, Dickson, Edwards, or BHT, but rather by a third party. Currently, these custodial documents for Portfolio #7 are missing.[5]

It is undisputed that when CHFS declared bankruptcy, the investment in the portfolios that had not yet been recouped by the Edwards entities was $11,780,451.

B.

i.

In 2010, the business relationship between Edwards and Dickson started to deteriorate. The deterioration culminated in a lawsuit filed in February 2012 by CHFS and Dickson against Edwards in Mississippi state court. On April 11, 2012, Edwards and EFP/BHT removed the original state court lawsuit to the United States District Court for the Southern District of Mississippi. Shortly thereafter, EFP/BHT filed an emergency motion for immediate appointment of a receiver for CHFS. Just as the district court was

---

[4] Unlike the other agreements, Portfolio #7's agreement required CHFS to pay all of its due diligence expenses, and CHFS received a reduced monthly servicing fee of only $15 per month. Under the terms of this agreement, CHFS was not entitled to receive any distribution of its 25 percent share of the net proceeds until BHT recovered its entire cash contribution. In addition, the agreement states that "benefits and obligations of the Purchase Agreement have been assigned from CHFS to [BHT]. [BHT] will be the beneficial owner of the loans, subject to the terms of this Joint Venture."

[5] Patrick Frascogna, a Mississippi attorney whose law office was in the same building as the CHFS headquarters, was supposed to keep the notes and assignments for Portfolio #7 in his custody. However, Frascogna either released the loan documents to Dickson or never received them. Dickson claims that the documents are in a Panamanian warehouse but has not divulged the location of the warehouse.

about to conclude its trial in the matter of the receivership,[6] CHFS voluntarily filed a Chapter 11 petition for relief, which stayed all proceedings against CHFS in the receivership action.

Amid the bankruptcy proceedings (sometime in 2013), Dickson absconded to Costa Rica to establish "rogue" operations of the CHFS business outside of the United States. The parties do not dispute that Dickson stole nearly $10 million from CHFS bank accounts while in South America. Dickson also shipped various pieces of office equipment, several computer servers, and many of CHFS's loan records to Costa Rica. Ultimately, Dickson was returned to the United States in federal custody, arrested for bank fraud, and indicted on April 9, 2014.

In 2012, EFP/BHT filed a Motion to Appoint Chapter 11 Trustee for CHFS based on the alleged misconduct of CHFS and Dickson.[7] Then in December 2013, the bankruptcy court entered an Order Granting United States Trustee's Emergency Motion for Order for the Appointment of a Chapter 11 Trustee. Over the objection of the Edwards entities,[8] the bankruptcy court appointed Appellee Kristina Johnson ("Johnson" or

---

[6] The Edwards entities allege that after hearing testimony in the receivership matter, the district court judge "indicated that a receivership would likely be imposed."

[7] A bankruptcy trustee is entrusted with specific, legally binding responsibilities, which are "extensive." *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 352 (1985). "A trustee shall . . . investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of such business." 11 U.S.C. § 1106(a)(3). The trustee, as well as the trustee's attorneys, "are held to high fiduciary standards of conduct." *Matter of Evangeline Ref. Co.*, 890 F.2d 1312, 1323 (5th Cir. 1989).

[8] The Edwards entities objected to Johnson's appointment as Chapter 11 trustee on the grounds that Johnson's law firm was representing the accounting firm retained by CHFS as an expert witness in the bankruptcy case. The bankruptcy court found Johnson had no conflict.

"Trustee") as the Chapter 11 trustee for CHFS on January 21, 2014. Johnson subsequently hired the law firm at which she is a partner, to represent her[9] in the matter. Once the order granting the emergency motion for the appointment of a Chapter 11 trustee – in this case Johnson – was entered, Dickson no longer had any decision-making authority for CHFS. *See* 11 U.S.C. § 704, § 1106. Nevertheless, Dickson's illicit activities with respect to CHFS continued until he was taken into federal custody.

ii.

In September 2014, Edwards was contacted by a business associate of Dickson's in Costa Rica, Mike James Meehan ("Meehan"). Edwards and Meehan began to communicate sporadically over email regarding the affairs of CHFS in Costa Rica. Edwards and Meehan's correspondence lasted for roughly five months.

Emails between Edwards and Meehan reveal that Edwards sent Meehan wire transfers in exchange for information about CHFS's South American operations on multiple occasions.[10] Sometime during the email correspondence period, Meehan emailed Edwards a link to a Dropbox folder that contained data on CHFS pulled from a CHFS computer. After Edwards informed Meehan that he was unable to access the Dropbox folder, Meehan mailed Edwards two compact discs ("CDs") with the information in question. Edwards testified at trial "that he believed the CDs to be duplicates of each other," with no relevant or new information.

---

[9] The district court order opined on the troubling incentives associated with the arrangement between Johnson and her law firm in this case. Thus far, more than thirty lawyers have billed the estate for work on this matter, amounting to over $5 million in legal fees for which the estate is now responsible.

[10] Specifically, Edwards testified at trial that he wired Meehan money "out of just appreciation."

In addition to corresponding over email, Edwards traveled to Costa Rica to meet with Meehan in person in December 2014. After this visit, Edwards, once again, reached out to Meehan over email seeking information from the hard drives of computers in the CHFS Costa Rica office, as well as information about assets seized by the Costa Rican government from Dickson. Edwards claims that the only information he received from Meehan were "some computer records of the Home Improvement Loans and the other EFP/BHT portfolios that Meehan copied onto CDs."

Meehan did not attempt to contact Johnson until February 2015 (roughly five months after contacting Edwards). Before Meehan reached out to Johnson, she was unaware of the location of CHFS's computers, books, and records in Costa Rica and had no knowledge of the financial affairs of CHFS in South America. Johnson alleges that, because of Edwards's communications with Meehan, Edwards had extensive knowledge of various matters related to CHFS's business affairs for several months,[11] while she remained in the dark as to the same information.

In response, Johnson filed the PPC Amended Complaint against Edwards and the Edwards entities alleging violations of the automatic stay under 11 U.S.C. §§ 105(a), 362(a), (k). In the Amended Complaint, Trustee Johnson estimated that the estate was forced to incur additional servicing costs of more than $10,000, which could have been avoided if Edwards had notified Johnson of his communications with Meehan or turned over the information he possessed. Additionally, Johnson alleged that Edwards's

---

[11] According to Johnson, as referenced in the bankruptcy court opinion, Edwards "had knowledge of approximately 2,000 loans, at least two bank accounts in CHFS's name (one with Banco de Costa Rica and the other with Banco Panameño), over $1.5 million in loans purchased in Costa Rica with funds stolen from the estate, and the names of two CHFS affiliates (Pirrana SA and Mary Madison Foundation)[.]"

actions with respect to Meehan cost her an opportunity to obtain CHFS assets that were either seized or frozen by the Costa Rican government, thereby incurring greater legal fees and expenses to retrieve the repossessed assets. At the time of the bankruptcy trial, Johnson estimated the estate had "incurred legal fees and expenses attributable to Edwards's conduct in excess of $61,458.2535" and would continue to incur additional expenses. The bankruptcy court consolidated the PPC Amended Complaint with the other related proceedings in an order on February 15, 2017.

iii.

From October 30, 2017, through November 2, 2017, and on November 27, 2017, the bankruptcy court conducted a consolidated trial consisting of three adversary proceedings and five related contested matters. Judge Olack issued a far-reaching opinion in February 2018. With respect to the issues presently before this court on appeal, the bankruptcy court concluded:

> A. Mortgage Portfolios
>
> 1) The Loans to CHFS to purchase Mortgage Portfolios #3-6 were barred by the statute of frauds and, therefore, were unenforceable against the estate.
>
> 2) The Edwards entities were entitled (in 2018) to $788,611 for their secured claim on the loans for Mortgage Portfolio #1-2.
>
> 3) Johnson was not required to return collections from Mortgage Portfolio #7 to the Edwards entities.
>
> B. Home Improvement Line Loans
>
> 1) Trustee Johnson was entitled to a judgment that the 2010 Assignment is void.

C. Tracing

1) EFP/BHT were not entitled to a judgment declaring that they have a security interest in any of the stolen funds recovered or intercepted by the Trustee.

D. Post-Petition Adversary Conduct

1) Trustee Johnson was entitled to a judgment against Edwards and EFP/BHT, jointly and severally, for the conversion of the original CD.

2) Trustee Johnson was entitled to damages against Edwards and EFP/BHT, jointly and severally, for violations of the automatic stay.

iv.

On October 2, 2020, the district court issued a memorandum opinion and judgment affirming in part, reversing in part, and rendering in part the bankruptcy court's opinion. With respect to the issues presently on appeal, the district court concluded:

A. Mortgage Portfolios

1) The bankruptcy court's rulings on the mortgage portfolios were within the standard of review and affirmed.

B. Home Improvement Line Loans

1) Trustee Johnson's challenge to Dr. Edwards's internal 2010 Assignment was reversed and rendered.

C. Post-Petition Adversary Conduct

1) The Trustee's conversion claim was reversed and rendered.

2) The bankruptcy court's findings under § 362(k) were vacated and remanded. The district court held that "[i]f it is determined [on remand] that fees should be awarded, the court should clearly explain how it arrived at the level of compensation awarded."

II.

A district court reviewing the final judgement of a bankruptcy court uses the clearly erroneous standard of review for questions of fact and a de novo standard of review for conclusions of law. *In re Gerhardt,* 348 F.3d 89, 91 (5th Cir. 2003). When we review the decision of a district court, sitting in its bankruptcy appellate capacity, we apply the same standards of review. *In re SI Restructuring, Inc.*, 542 F.3d 131, 134 (5th Cir. 2008). *See also Barron & Newburger, P.C. v. Tex. Skyline, Ltd.* (*In re Woerner*), 783 F.3d 266, 270 (5th Cir. 2015) (en banc). We also apply these standards when reviewing a bankruptcy court's final judgements directly. *In re ASARCO, L.L.C.*, 702 F.3d 250, 257 (5th Cir. 2012).

III.

A.

The Edwards entities first ask this court to overturn the bankruptcy court's conclusion that the entities' right to repayment for the funding of Mortgage Portfolios #3-6 is barred by the statute of frauds. The Edwards entities argue the "statute of frauds does not apply to agreements already fully performed by one party; or to agreements capable of being fully performed within 15 months, even if performance is not expected."

Mississippi law provides that "[a]n action shall not be brought . . . upon any agreement which is not to be performed within the space of fifteen months from the making thereof" unless the agreement is "in writing, and signed by the party to be charged therewith or signed by some person by him or her thereunto lawfully authorized in writing." MISS. CODE ANN. § 15-3-1. The Mississippi Supreme Court and our court have both previously struck down loan agreements with durations that fell beyond the fifteen-month period. *See, e.g.*, *Fireman's Fund Ins. Co. v. Williams*, 154 So. 545, 547 (Miss. 1934) *Williams v. Evans*, 547 So. 2d 54, 56 (Miss. 1989); *Stahlman v.*

Nat'l Lead Co., 318 F.2d 388, 395 (5th Cir. 1963). However, the Mississippi Supreme Court has also considered the indefinite duration of an agreement to be a determinative factor in removing the agreement from the statute of frauds consideration. *See, e.g.*, *Beane v. Bowden*, 399 So. 2d 1358, 1361 (Miss. 1981) ("[T]he oral contract was of an indefinite duration and susceptible of performance within 15 months, thus removing it from the statute of frauds."). *See also Morgan v. Jackson Ready-Mix Concrete*, 157 So. 2d 772, 779 (Miss. 1963) ("The possibility of performance within fifteen months takes the contract out of the operation of the statute [of frauds].").

Accordingly, the salient question is whether the agreement between the Edwards entities and CHFS pertaining to the repayment of Mortgage Portfolios #3-6 had an indefinite duration for repayment and was susceptible of performance within fifteen months.[12] To answer this question, the bankruptcy court looked to the terms of the underlying subprime loans that comprise the larger Mortgage Portfolios. The bankruptcy court reasoned that "[b]ecause the loans that comprise Portfolios #3-#6 are all for terms longer than five (5) years, . . . the loans to CHFS to purchase Portfolios #3-#6 could not be performed within the space of fifteen (15) months and, therefore, are unenforceable against the estate."

We will affirm the bankruptcy court's findings if its "'account of the evidence is plausible in light of the record,' even if we 'would have weighed the evidence differently.'" *Matter of Trendsetter HR L.L.C.*, 949 F.3d 905, 910 (5th Cir. 2020) (quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985)). The bankruptcy court's determination that CHFS could not repay the Edwards entities until it had collected on the underlying loans in

[12] The record belies any cursory suggestion that the Edwards entities fully performed under Mortgage Portfolios #3-6, inasmuch as the Edwards entities had continuing service and fee obligations.

the Portfolios—which would take more than five years, based on the terms of the loan agreements—is "plausible in light of the record." *Id.* We agree that the agreement between the Edwards entities and CHFS was not performable within a fifteen-month period. As such, we affirm the district and bankruptcy courts' conclusion that the Edwards entities' right to repayment for their funding of Mortgage Portfolios #3-6 was barred by the statute of frauds

B.

The Edwards entities further contend that while the bankruptcy court correctly identified the unrecouped, combined value of Mortgage Portfolios #1-2 and rightly deemed that amount to be a secured loan to CHFS of $1,778,804, the bankruptcy court "reached [an] unreasonable result by arbitrarily adopting a valuation model put forward by the Trustee through her expert" for the two portfolios. The Edwards entities argue that the bankruptcy court itself found the underlying notes at issue were owned by the estate and, as such, that "[t]he valuation model that the bankruptcy court accepted was based on assumptions that the bankruptcy court's findings had expressly rejected."

This court has previously held that "[v]aluation is a mixed question of law and fact, the factual premises being subject to review on a clearly erroneous standard, and the legal conclusion being subject to *de novo* review." *In re Stembridge*, 394 F.3d 383, 385 (5th Cir. 2004) (citation omitted). As we have observed, the Bankruptcy Code "leaves valuation questions to judges" to resolve "on a case-by-case basis." *Matter of Clark Pipe & Supply Co., Inc.*, 893 F.2d 693, 697 (5th Cir. 1990).

Here, the bankruptcy court opinion does not elaborate on the reasoning behind its valuation method. The bankruptcy court simply adopted valuations for Mortgage Portfolio #1-2 proposed by the Trustee's expert,

accountant Jeffrey N. Aucoin that is $788,611.[13] In one prior case, we concluded that a bankruptcy court's proposed valuation was unreviewable because the bankruptcy court had not given specific reasons for its choice of valuation method. *See Matter of Missionary Baptist Found. of Am., Inc.*, 796 F.2d 752, 760-61 (5th Cir. 1986). Although they did not provide an alternative valuation, the Edwards entities did point out a problem underlying the bankruptcy court's valuation: The bankruptcy court found that Mortgage Portfolios #1 and #2 were loans to CHFS, but then assumed they were joint ventures for purposes of the valuation. This classification leads to a big difference in the money that EFP is owed. Our court's analysis of the issue indicates that if the portfolio agreements are loans, EFP is entitled to the entire loan payment from CHFS (which is the secured interest of $1,728,804); if they are joint ventures, EFP is only entitled to the money from the mortgage collection.

Upon review, we conclude this uncertainty is sufficient to merit further consideration by the bankruptcy court, in order for the court to determine how much money EFP is owed for Mortgage Portfolios #1 and #2 and to explain why the court's valuation of these portfolios is correct. Accordingly, we remand solely this issue of the valuations of Mortgage Portfolios #1-2 to the bankruptcy court.

---

[13] We note that factual findings made by the bankruptcy court that are drawn from assessments of witness credibility are granted additional deference because "only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said." *In re Renaissance Hosp. Grand Prairie Inc.*, 713 F.3d 285, 293 (5th Cir. 2013) (quoting *Anderson v. Bessemer City, N.C.*, 470 U.S. 564, 575 (1985)).

C.

According to the Edwards entities, while the bankruptcy court correctly identified Mortgage Portfolio #7 as a joint venture, the bankruptcy court's decision to disallow this claim "should be vacated and remanded for reasonable reevaluation of the amounts owed to the Edwards Entities for Mortgage Portfolio 7." The Edwards entities correctly assert that the bankruptcy court did not offer any analysis or consideration of this issue beyond its disallowance of the claim in the concluding section of its opinion. Due to the absence of any analysis, EFP and BHT ask this court to remand this issue for "reasonable reevaluation of the amounts owed to the Edwards entities for Mortgage Portfolio 7."

"The court to which [a bankruptcy] claim or cause of action is removed may remand such claim or cause of action on any equitable ground." 28 U.S.C. § 1452(b). We have previously recognized that fact and subject matter determinations, when presented to the court of appeals in the first instance, are best resolved by the bankruptcy court. *See In re Baron*, 593 F. App'x 356, 361-62 (5th Cir. 2014) (finding the determination of whether a creditor's right to seek relief in a bankruptcy matter may be enjoined by a district court is "best left to the bankruptcy court on remand" when the issue was raised before the bankruptcy court, but the court did not address the issue). *See also Matter of T-H New Orleans Ltd. P'ship,* 10 F.3d 1099, 1103 (5th Cir. 1993) (same). Given the summary disallowance of this issue, as well as both parties' acknowledgement that the issue remains unresolved, we remand this issue to the bankruptcy court.

IV.

A.

Trustee Johnson argues that the 2010 Assignment of the Home Improvement Line loans is void and cannot be cured post-petition "for the

reasons . . . determined by the bankruptcy court." Johnson argues that she has standing to challenge the 2010 Assignment of the HIL loans—despite not being a party to the Assignment—pursuant to statutorily granted authority under several sections of the federal Bankruptcy Code. While the bankruptcy court determined that the 2010 Assignment was valid, the bankruptcy court also concluded that it would be unfair to treat Edwards's 2010 Assignment as lawful because of intervening periods of non-compliance with local laws by the assignee entities. ***See*** On these grounds, the bankruptcy court voided the 2010 Assignment. In response, the district court stated that "it was an abuse of discretion [for the bankruptcy court] to even consider" such arguments and deemed the 2010 Assignment to be valid.

We examine the question of whether Johnson has standing to challenge the 2010 Assignment de novo. *See Friends of St. Frances Xavier Cabrini Church v. Fed. Emergency Mgmt. Agency,* 658 F.3d 460, 466 (5th Cir. 2011) ("Standing is a question of law reviewed de novo by this court."). We recently held in a related dispute that bankruptcy trustees generally have standing, as a party of interest, to challenge any matters concerning the bankruptcy estate. *See Matter of Cmty. Home Fin. Servs.*, Inc., 990 F.3d 422, 427 (5th Cir. 2021). In that case, we explained that a bankruptcy trustee "is distinct from all other bankruptcy parties because the trustee is responsible for the administration of the bankruptcy estate." *Id.* at 426. Accordingly, the "trustee's standing comes from the trustee's duties to administer the bankruptcy estate, not from any pecuniary interest in the bankruptcy." *Id.* at 427. Similarly, in an earlier case, we held that "the bankruptcy trustee is the real party in interest with respect to claims falling within the bankruptcy estate." *United States ex rel. Spicer v. Westbrook*, 751 F.3d 354, 362 (5th Cir. 2014). Because a challenge to the validity of the 2010 Assignment is directly linked to the bankruptcy estate, Trustee Johnson has standing to raise questions about the legitimacy of the Assignment.

Nevertheless, Johnson offers no substantive legal or factual reason why this panel should reverse the district court's conclusion that the 2010 Assignment is valid. On appeal, "the burden is on the appellants to show error." *Murphy v. St. Paul Fire & Marine Ins. Co.*, 314 F.2d 30, 31 (5th Cir. 1963). Because Johnson has not met her burden of demonstrating that the district court erred, we affirm the district court's conclusion that the 2010 Assignment is valid.

B.

Trustee Johnson also asks this court to overturn the district court's determination that the Edwards entities have a perfected security interest in the HIL loans. In response, the Edwards entities maintain they hold a perfected security interest in the HIL loans pursuant to the Rainbow Loan Agreement and the Custodial Agreement, emphasizing "the dispositive significance under the UCC of the custodian's continuing possession of the tangible instruments at issue."

We look to state law to determine if a security interest is perfected. *Matter of Locklin*, 101 F.3d 435, 438 (5th Cir. 1996). Under the Mississippi U.C.C., a party has a perfected secured interest in a tangible instrument when another party has taken possession of the instrument "after having authenticated a record acknowledging that it will hold possession for the secured party's benefit." MISS. CODE ANN. § 75-9-313(c)(2). Here, it is undisputed that Rainbow Group held a perfected security interest in the HIL loans, pursuant to this statutory provision, based on the Custodial Agreement and Rainbow Loan Agreement between the McCarley Firm, Rainbow Group, and CHFS. However, the critical question is whether Appellants EFP and BHT also possess a perfected security interest in the HIL loans under the same theory, given that the Custodial Agreement does not name these entities as beneficiary parties or lenders.

Mississippi law states that "[i]f a secured party assigns a perfected security interest . . . , a filing . . . is not required to continue the perfected status of the security interest against creditors of and transferees from the original debtor." MISS. CODE ANN. § 75-9-310(c); *see also id.* cmt. 4 ("Subsection (c) . . . . provides that no filing is necessary in connection with an assignment by a secured party to an assignee in order to maintain perfection as against creditors of and transferees from the original debtor."). The statute confirms that Edwards did not have to amend or re-perfect the Custodial Agreement or security interest upon its assignment from Rainbow Group to the Edwards entities. As such, the Edwards entities would hold a perfected security interest in the HIL loans under a continuous possession theory.

Nevertheless, the bankruptcy court determined that the analysis could not end there because the parties had "varied by agreement" the continuous-perfection provision of § 75-9-310(c), affirmatively requiring Edwards to re-perfect his security interest every time he assigned the note to a new entity under the terms of the Custodial Agreement. *See* MISS. CODE ANN. § 75-1-302 ("Except as otherwise provided . . . , the effect of provisions of the Uniform Commercial Code may be varied by agreement."). The bankruptcy court based this conclusion on Section 5.7 of the Custodial Agreement.[14]

"Generally, courts look to the 'four corners' of the contract to ascertain its meaning." *Harrison Cty. Com. Lot, LLC v. H. Gordon Myrick, Inc.*, 107 So. 3d 943, 959 (Miss. 2013). However, "separate agreements executed contemporaneously by the *same parties*, for the same purposes, and

[14] Section 5.7 of the Custodial Agreement states: "No party hereto shall sell, pledge, assign or otherwise transfer this Agreement without the prior written consent of the other parties hereto."

as part of the same transaction, are to be construed together." *Sullivan v. Mounger*, 882 So. 2d 129, 135 (Miss. 2004). Accordingly, we must review the Custodial Agreement and the Rainbow Loan Agreement for the HIL loans in conjunction with one another. Section 5.7 of the Custodial Agreement mandates that parties to the agreement may not "transfer *this Agreement* without the prior written consent of the other parties" Section 9.6 of the Rainbow Loan Agreement states that the original lender may at any time assign or transfer the rights and duties of lender to another party and that party would be "DEEMED TO BE THE 'LENDER' UNDER THIS AGREEMENT AND THE OTHER LOAN DOCUMENTS WITH THE AUTHORITY TO EXERCISE SUCH RIGHTS IN THE CAPACITY OF THE LENDER." The agreement does not require the lender to seek approval or sign-off or to even notify the other parties prior to re-assignment.

Read in conjunction with one another, these contract provisions support the district court's determination that "everyone would have to agree in writing before they could change *the custodian* of the mortgages. The lender can change at any time. The custodian can't." This reading of the contractual provisions is further supported by the trial testimony of Harold McCarley, Jr., the custodian of the loan documents. McCarley stated that "he understood he was the bailee of the Home Improvement Loans for the 'lender' under the Custodial Agreement and that at some point, the 'lender' changed from Rainbow Group, Ltd. to Beher Limited." McCarley also testified that he "took instruction from Edwards as to the identity of the lender." For these reasons, we affirm the district court's conclusion that the Edwards entities have a perfected security interest in the Home Improvement Line notes.

V.

The Edwards entities argue that the bankruptcy court erred in concluding that, because the Edwards entities could not trace the assets stolen by Dickson to the funds recovered by the Trustee, EFP and BHT do not hold a security interest in those funds. The Edwards entities also contend that they should maintain their security interest in the stolen funds, despite those funds having been co-mingled, based on the application of "equitable principles" under the terms of the Mississippi U.C.C.

The district court opinion did not reach the tracing issue, so we review the bankruptcy court's decision on this matter directly. Under Mississippi's governing rules for security interests in commingled goods, when goods become commingled—that is, when identity of the collateral has become lost—the security interest no longer exists in the commingled goods. *See* MISS. CODE ANN. § 75-9-336(b) ("A security interest does not exist in commingled goods..."). Since the original goods can no longer be identified, the rules pertaining to security interests in those goods (including particularly transfer or creation of a security interest in those original goods) are inapplicable, even though the goods still exist in some form. *See id.* cmt. 3 ("[T]he security interest in the specific original collateral alone is lost once the collateral becomes commingled goods, and no security interest in the original collateral can be created thereafter..."). However, a security interest remains attached to "[p]roceeds that are commingled with other property . . . to the extent that the secured party identifies the proceeds by a method of tracing, including application of equitable principles, that is permitted under law." *Id.* § 75-9-315(b)(2).

Pursuant to the express language of Mississippi's statute, the burden lies with the secured party—the Edwards entities—to identify the proceeds in question "by a method of tracing." However, EFP and BHT do not

provide this court with "a method of tracing" to identify the proceeds in question. Instead, they ask this court to apply "equitable principles" to retain their secured interest in the comingled funds. Yet, the Edwards entities offer no explanation or pertinent caselaw on how the application of equitable principles might serve as a method of tracing the funds, other than simply to state that such principles would mandate the security interest remain intact.

We have previously explained that "adherence to specific equitable principles, including rules concerning tracing analysis are 'subject to the equitable discretion of the court.'" *United States v. Durham*, 86 F.3d 70, 72 (5th Cir. 1996) (quoting *In re Intermountain Porta Storage*, Inc., 74 B.R. 1011, 1016 (D.C. Colo. 1987)). However, "when performing a judicial function by interpreting a state statute—which limits his discretion and is not merely a standardless grant of authority—a judge acts to *implement* state policy rather than *create* policy." *Boston v. Lafayette Cty., Miss.*, 743 F. Supp. 462, 470 (N.D. Miss. 1990). Creating new policy about the application of equitable principles in this matter is not the appropriate role of this court. For this reason, we affirm the bankruptcy court's holding that the Edwards entities failed to meet their burden of tracing the recovered funds.

VI.

A.

Trustee Johnson challenges the district court's decision to vacate and remand the bankruptcy court's ruling that Edwards's post-petition conduct was violative of federal law. Specifically, Johnson argues that the bankruptcy court was correct in determining that Edwards's attempts to acquire information about Dickson and CHFS's operations in South America, after the bankruptcy proceedings began, amounted to a violation of the automatic stay imposed pursuant to 11 U.S.C. § 362(a)(3). Accordingly, Trustee

Johnson urges this court to reinstate the award of damages granted by the bankruptcy court pursuant to 11 U.S.C. §§ 362(k) and 105(a). In response, EFP and BHT contend the bankruptcy court applied erroneous standards when considering Johnson's claims and, moreover, that the court's damages award was based on speculation or conjecture.

A bankruptcy petition automatically stays numerous proceedings against the debtor and the estate. *See* 11 U.S.C. § 362(a). "[A]n 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). Though we have previously held that both debtors and creditors have prudential standing to sue under § 362(k), we have expressly declined to consider the question of whether bankruptcy trustees have prudential standing to assert an automatic-stay violation claim. *See St. Paul Fire & Marine Ins. Co. v. Labuzan*, 579 F.3d 533, 543, 545 (5th Cir. 2009).

As the district court explained, the bankruptcy court "sidestepped the question of the Johnson's standing under § 362(k) to pursue damages for an automatic stay violation," instead determining that it "could sanction Dr. Edwards under its contempt power." *See* 11 U.S.C. § 105(a). Although the bankruptcy court cited its § 105 contempt power as the source of its authority to make this ruling, it analyzed the issue under § 362(k). To establish civil contempt under § 105, however, Edwards's conduct must have been shown, "by clear and convincing evidence," to be in violation of "a definite and specific order of the court requiring him to perform or refrain from performing a particular act or acts with knowledge of the court's order." *Piggly Wiggly*, 177 F.3d at 382. Here, there is no finding by "clear and convincing evidence" that Edwards's post-petition conduct met this threshold. Accordingly, we affirm *only* the district court's decision to vacate the bankruptcy court's ruling on this matter.

B.

Trustee Johnson further suggests that Edwards's failure to provide to the bankruptcy court, as well as Johnson's, the information and/or physical materials he acquired as a result of his independent inquiries "constituted a . . . disruption of the bankruptcy process" that amounted to an improper conversion of estate property. Under Mississippi law, "[c]onversion requires the intent to exercise dominion or control over goods inconsistent with the true owner's rights and is a result of conduct intended to affect property." *Greenlee v. Mitchell*, 607 So. 2d 97, 111 (Miss. 1992). Conversion is deemed to have occurred once an individual has taken possession of an item from its owner. *Walker v. Brown,* 501 So. 2d 358, 361 (Miss. 1987). "It is elementary that ownership is an essential element of conversion." *Cmty. Bank, Ellisville, Mississippi v. Courtney*, 884 So. 2d 767, 772 (Miss. 2004).

The district court determined that the bankruptcy court had committed a "clear error" in determining that Edwards's receipt of the CDs constituted a conversion of estate property. The district court reasoned that because the CDs did not come from CHFS or the Trustee, but rather from Meehan, a non-party in this matter who willfully provided the discs to Edwards, the physical CDs themselves were not the tangible property of the estate.[15] We agree. Because Edwards could not have converted estate property if the property in question did not belong to the estate, we affirm the district court's reversal of the bankruptcy court on this issue.

---

[15] Trustee Johnson also alleges that an action for conversion is appropriate in this case due to Edwards's possession of intangible information that was stored on the CDs he received from Meehan. However, Mississippi law is clear that this type of intangible property cannot constitute the basis for a conversion claim. *See Holbert v. Wal-Mart Assocs.*, 2011 WL 3652202, at *3–4 (S.D. Miss. Aug. 18, 2011); *Directv, Inc. v. Hubbard*, 2005 WL 1994489, at *4 (N.D. Miss. Aug. 17, 2005).

VII.

For the foregoing reasons, we AFFIRM the district court's decision in part, REVERSE in part, and REMAND the case for reconsideration of the issue of the collections of Mortgage Portfolio #7.

EXHIBIT G

SO ORDERED,

Judge Neil P. Olack
United States Bankruptcy Judge
Date Signed: February 27, 2018

The Order of the Court is set forth below. The docket reflects the date entered.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI

IN RE:

COMMUNITY HOME FINANCIAL SERVICES, INC.,	**CASE NO. 12-01703-NPO**
DEBTOR.	**CHAPTER 11**
KRISTINA M. JOHNSON, TRUSTEE OF THE ESTATE OF COMMUNITY HOME FINANCIAL SERVICES, INC.	**PLAINTIFF**
VS.	**ADV. PROC. NO. 14-00030-NPO**
COMMUNITY HOME FINANCIAL SERVICES, INC., DISCOUNT MORTGAGE, INC., DISCOUNT HOME MORTGAGE, INC., DOUBLE S CONSTRUCTION, INC., CRISCO INVESTMENTS, INC., VICTORY CONSULTING GROUP, INC., WILLIAM D. ENTERPRISES, INC., WILLIAM D. DICKSON, W. W. WARREN FOUNDATION, PHALANX, INC., BROOKWOOD-BYRAM COUNTRY CLUB, INC., AND RESHONDA RHODES	**DEFENDANTS**

MEMORANDUM OPINION
AND ORDER ON FIRST AMENDED
VERIFIED COMPLAINT TO: (1) RECOVER MONEY, DAMAGES OR PROPERTY; (2) TO AVOID PRE-PETITION AND POST-PETITION TRANSFERS; (3) FOR TURNOVER OF PROPERTY; (4) FOR INJUNCTIVE RELIEF; AND (5) FOR EQUITABLE SUBORDINATION

This matter came before the Court[1] for trial on December 7, 2017 (the "Trial"), on the First Amended Verified Complaint To: (1) Recover Money, Damages or Property; (2) To Avoid Pre-Petition and Post-Petition Transfers; (3) For Turnover of Property; (4) For Injunctive Relief; and (5) For Equitable Subordination (the "Amended Complaint") (D. Adv. Dkt. 33)[2] filed by Kristina M. Johnson, trustee of the estate of Community Home Financial Services, Inc. (the "Trustee"); the Defendant Reshonda Rhodes' Answer to First Amended Verified Complaint To: (1) Recover Money, Damages or Property; (2) To Avoid Pre-Petition and Post Petition Transfers; (3) For Turnover of Property; (4) For Injunctive Relief; and (5) For Equitable Subordination ("Rhodes Answer") (D. Adv. Dkt. 60) filed by Reshonda Rhodes ("Rhodes"); and the Answer and Defenses of Defendants, Discount Mortgage, Inc., Discount Home Mortgage, Inc.[,] Double S Construction, Inc., Crisco Investments, Inc., Victory Consulting Group, Inc., William D. Dickson Enterprises, Inc., William D. Dickson, W.W. Warren Foundation, Phalanx, Inc., Community Home Financial Services, Inc. and Brookwood-Byram Country Club, Inc. to First Amended Verified Complaint

[1] On May 23, 2012, the Bankruptcy Case was assigned originally to Bankruptcy Judge Edward Ellington. On February 1, 2017, the Bankruptcy Case and all related adversary proceedings were transferred to the above-signed Bankruptcy Judge. (Bankr. Dkt. 1609).

[2] Citations to the record are as follows: (1) citations to docket entries in the above-styled adversary proceeding (the "Dickson Adversary Proceeding") are cited as "(D. Adv. Dkt. __)"; (2) citations to docket entries in the above-styled bankruptcy case (the "Bankruptcy Case") are cited as "(Bankr. Dkt. __)"; and (3) citations to the Memorandum Opinion and Order on Third Amended Complaint in Adversary Proceeding 12-00091-NPO; Consolidated Amended Complaint in Adversary Proceeding 13-00104-NPO; Amended Complaint for Turnover, Recovery or Property Transferred Post-Petition, Damages, Declaratory Relief, Equitable Subordination, and Other Relief in Adversary Proceeding 15-00080-NPO; and Consolidated Contested Matters (the "Global Opinion") (Bankr. Dkt. 2182) are cited as "(Global Op. at __)". *See also* Final Judgment on Third Amended Complaint in Adversary Proceeding 12-00091-NPO; Consolidated Amended Complaint in Adversary Proceeding 13-00104-NPO; Amended Complaint for Turnover, Recovery or Property Transferred Post-Petition, Damages, Declaratory Relief, Equitable Subordination, and Other Relief in Adversary Proceeding 15-00080-NPO; and Consolidated Contested Matters (Bankr. Dkt. 2183).

("Dickson and Corporate Defendants Answer") (D. Adv. Dkt. 75) filed by Discount Mortgage, Inc. ("DMI"), Discount Home Mortgage, Inc. ("DHMI"), Double S Construction, Inc. ("Double S"), Crisco Investments, Inc. ("Crisco"), Victory Consulting Group, Inc. ("Victory Consulting"), William D. Dickson Enterprises, Inc. ("Dickson Enterprises"), W.W. Warren Foundation ("Warren Foundation"), Phalanx, Inc. ("Phalanx"), Community Home Financial Services, Inc. ("CHFS"), and the Brookwood-Byram Country Club, Inc. ("BBCC") (collectively, the "Corporate Defendants") and William D. "Butch" Dickson ("Dickson") in the Dickson Adversary Proceeding.[3] Together, Dickson and Rhodes are referred to as the "Individual Defendants." The Pretrial Order[4] (the "PTO") (D. Adv. Dkt. 284) was entered on December 5, 2017. At Trial,[5]

---

[3] In the Amended Complaint, the Trustee also named as defendants Colby Dickson, Cristen Dickson Nelson, Beau Nelson, Carol Runnels ("Runnels"), Nick Clark d/b/a Nick Clark Auctions ("Clark"), and William Head d/b/a Head Auctions ("Head"). The defendants Clark and Head were dismissed on March 13, 2017, pursuant to the Order Dismissing Defendants Nick Clark d/b/a Nick Clark Auctions and William Head d/b/a Head Auctions (D. Adv. Dkt. 177). Runnels was dismissed on May 24, 2017, pursuant to the Order Granting Dismissal of Defendant Carol Runnels *[Dkt. # 211]* (D. Adv. Dkt. 213). The Trustee resolved all claims against Dickson's children, Colby Dickson and Cristen Dickson Nelson, and Dickson's son-in-law, Beau Nelson, pursuant to the Order Granting Motion for Authority, Pursuant to Bankruptcy Rule 9019, To Enter into Settlement Agreement with Certain Defendants in Adversary Proceeding 14-00030-NPO and Execute Certain Documents Regarding the Same *[Dkt. #268]* (D. Adv. Dkt. 280), entered on December 1, 2017.

[4] Rule 16 of the Federal Rules of Civil Procedure applies in adversary proceedings pursuant to Rule 7016 of the Federal Rules of Bankruptcy Procedure. Rule 16(d) provides that the pretrial order "controls the course of the action unless the court modifies it." FED. R. CIV. P. 16(d). "It is a well-settled rule that a joint pretrial order signed by both parties supercedes all pleadings and governs the issues and evidence to be presented at trial." *Quick Techs., Inc. v. Sage Group PLC*, 313 F.3d 338, 350 n.5 (5th Cir. 2002) (quoting *Kona Tech. Corp. v. S. Pac. Transp. Co.*, 225 F.3d 595, 604 (5th Cir. 2000)). While Rhodes contributed to the PTO, neither Dickson nor the Corporate Defendants contributed to the PTO, despite receiving a draft from the Trustee's counsel with instructions on how to contribute to the PTO. Rhodes did not object to the final form of the PTO. (PTO at 1, n.1 & 53).

[5] A transcript of the Trial is docketed in the Dickson Adversary Proceeding at D. Adv. Dkt. 296.

Jeffrey R. Barber and Stephanie B. McLarty represented the Trustee, and Rhodes appeared without the assistance of counsel. Neither Dickson nor an attorney acting on behalf of Dickson or any of the Corporate Defendants appeared at Trial.

During the Trial, the Trustee introduced into evidence forty-six (46) stipulated exhibits and six (6) additional exhibits.[6] The issues in the Dickson Adversary Proceeding that remained for Trial are: (1) whether the Individual Defendants violated the Federal Racketeer Influenced and Corrupt Organizations Act; (2) whether the Individual Defendants violated the Mississippi Racketeering Act; (3) whether the Individual Defendants and the Corporate Defendants tortiously interfered with a contract; (4) whether the Trustee may avoid the Individual Defendants' and the Corporate Defendants' pre-petition transfers under Mississippi law; (5) whether the Trustee may avoid the Individual Defendants' and the Corporate Defendants' pre-petition transfers under 11 U.S.C. § 548(a)(1)(A)[7]; (6) whether the Trustee may avoid the Individual Defendants' and the Corporate Defendants' post-petition transfers under § 549; (7) whether the Trustee is entitled to a judgment directing the Individual Defendants and the Corporate Defendants to turn over the property of CHFS; (8) whether the Individual Defendants and the Corporate Defendants violated the automatic stay; (9) whether the Individual Defendants and the Corporate Defendants converted property of CHFS's estate (the "Estate"); (10) whether Dickson's Proof of Claim 10-1 should be equitably subordinated below all other unsecured creditors; and (11) whether the Individual Defendants and the Corporate Defendants conspired to defraud the Estate and its creditors. (PTO

[6] The exhibits introduced into evidence at Trial by the Trustee are cited as "(D. Ex. P-#)". Certain exhibits introduced into evidence contain personal identifies and, therefore, were redacted to comply with Rule 9037 of the Federal Rules of Bankruptcy Procedure.

[7] Hereinafter, all code sections refer to the United States Bankruptcy Code found at Title 11 of the United States Code, unless otherwise noted.

at 31-33). The Court, having considered the pleadings, evidence, and arguments of counsel, finds as follows:[8]

Jurisdiction

This Court has jurisdiction over the subject matter of and the parties to this Dickson Adversary Proceeding pursuant to 28 U.S.C. § 1334. This matter is a core proceeding pursuant to 28 U.S.C. § 157(A), (B), E), (F), and (O). Notice of the Trial was proper under the circumstances.

Parties

A. Corporate Defendants

1. CHFS, a Delaware company, is a mortgage servicing entity that for the most part purchased mortgage loan portfolios at a discount from various third parties and serviced those loans, as well as loans owned by DMI and DHMI (Bankr. Dkt. 167). Until early 2014, Dickson was CHFS's chief executive officer. Through at least January of 2014, CHFS's principal place of business was located at 234 East Capitol Street, in Jackson, Mississippi (the "Jackson Office"), where employees, including Dickson's family members, serviced mortgage loan portfolios, each one consisting of hundreds of individual notes secured by mostly subordinate residential mortgages on property located in over thirty (30) states in the United States. (D. Adv. Dkt. 273 at 3). Dickson Enterprises owned the building that housed the Jackson Office and leased the space to CHFS. Dickson lived in an apartment on the third floor of the same building. (D. Adv. Dkt. 296 at 48).

[8] These findings of fact and conclusions of law are made pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure. To the extent that any finding of fact is construed as a conclusion of law, it is adopted as such. Moreover, to the extent any conclusion of law is construed as a finding of fact, it is adopted as such.

2. The Corporate Defendants are insiders and/or affiliates of CHFS as defined in § 101 (31).

3. Victory Consulting, a Delaware corporation, wholly owns DMI and DHMI and is the majority shareholder of CHFS (D. Adv. Dkt. 273 at 1-2 & 277-1 at 43).

4. DMI is a Mississippi corporation.

5. DHMI is a Mississippi corporation.

6. Double S is a Mississippi corporation.

7. Crisco is a Mississippi corporation.

8. Dickson Enterprises is a Delaware corporation registered to do business in Mississippi.

9. Phalanx is a corporation organized and existing under the laws of Costa Rica and is listed on the real property tax rolls of Hinds County, Mississippi with the Jackson Office address (D. Adv. Dkt. 277-1 at 32-33).

10. BBCC is a Mississippi corporation.

11. The Warren Foundation is a Panamanian foundation named by Dickson. Dickson's adult children, Colby Dickson and Cristen Dickson Nelson, are the primary beneficiaries. (D. Adv. Dkt. 277-1 at 28-29; D. Ex. P-33).

12. DMI, DHMI, Victory Consulting, Crisco, Double S, and Dickson Enterprises shared space in the Jackson Office with CHFS. (D. Adv. Dkt. 273 at 3). Additionally, CHFS, DMI, DHMI, Victory Consulting, Crisco, Double S, and Dickson Enterprises shared some employees. (PTO at 29). Only three of the Corporate Defendants were not located at the Jackson Office, including the Warren Foundation, Phalanx, and BBCC.

B. Individual Defendants

13. Dickson was at all relevant times an officer, director, and/or person in control of the Corporate Defendants. (D. Adv. Dkt. 273 at 2). Dickson was sentenced to serve fifty-seven (57)-months in a federal correctional facility for bankruptcy fraud. (D. Ex. P-3). He is currently serving the remainder of his sentence at a halfway house in Maryland.

14. Rhodes is a former employee of CHFS and DMI. (PTO at 29; D. Adv. Dkt. 296 at 111-15 & 273 at 3).

Summary of Facts[9]

1. CHFS was not primarily in the business of loaning money to third parties. In early 2012, however, CHFS transferred $3.7 million, in multiple transactions, to Dickson and some of the Corporate Defendants. (Bankr. Dkt. 115 at 6; D. Ex. P-36 at 10, Schedule 8). This sum includes the following purported loans:

a. On February 14, 2012, CHFS advanced $250,000 to Dickson ("Dickson Note") (D. Ex. P-8), $500,000 to Double S ("Double S Note 1") (D. Ex. P-9), and $500,000 to DMI ("DMI Note 1") (D. Ex. P-10) on an unsecured basis pursuant to promissory notes (PTO at 29).

b. On February 15, 2012, CHFS loaned $350,000 to Dickson Enterprises ("Dickson Enterprises Note") (D. Ex. P-11) on an unsecured basis pursuant to a promissory note (PTO at 30).

[9] For additional facts and a more complete understanding of the context of the matters discussed below, see the Global Op. at 20-94. This discussion includes only a general summary of the Global Opinion, and any inconsistency between the Global Opinion and this Opinion should be resolved in favor of the Global Opinion.

c. On March 14, 2012, CHFS loaned $400,000 to Double S ("Double S Note 2") (D. Ex. P-12) on an unsecured basis pursuant to a promissory note (PTO at 30).

e. On April 12, 2012, CHFS loaned $500,000 to Crisco ("Crisco Note 1") (D. Ex. P-13) on an unsecured basis pursuant to a promissory note (PTO at 30).

f. On May 14, 2012, CHFS loaned $450,000 to Crisco ("Crisco Note 2") (D. Ex. P-14) and $250,000 to DMI ("DMI Note 2") (D. Ex. P-15) on an unsecured basis pursuant to promissory notes (PTO at 30).

2. On May 23, 2012, CHFS filed a petition for relief under chapter 11 of the U.S. Bankruptcy Code (Bankr. Dkt. 1).

3. On October 29, 2013, Dickson changed the ACH deposit arrangement with Advantage ACH from CHFS's account at BancorpSouth Bank ("BancorpSouth") to a Victory Consulting account at Wells Fargo Bank ("Wells Fargo") (PTO at 30; D. Ex. P-20; D. Adv. Dkt. 273 at 6).

4. On December 20, 2013, CHFS's bankruptcy attorney, Derek A. Henderson ("Henderson"), filed the Disclosure of Transfer of Funds and Other Matters (the "Disclosure") (Bankr. Dkt. 426; D. Ex. P-19), notifying the Court of the following:

> 1) CHFS has changed its principal place of business from Jackson, Mississippi to Panama.
>
> 2) CHFS has transferred funds from the DIP [Operating Account] at Wells Fargo Bank to other CHFS bank accounts located in Panama.
>
> 3) CHFS has set up two (2) branch offices-one in Panama and one in Costa Rica. The business operations of CHFS are continuing to be conducted at these two branch locations.

(*Id.*). Contrary to the Disclosure, the funds were not transferred "to other CHFS bank accounts" but to accounts held by some of the Corporate Defendants.

5. In December of 2013, CHFS, or those acting on its behalf, filed notices in at least five chapter 13 bankruptcy cases pending in other jurisdictions requesting that payments owed to CHFS be sent to "Community Home Financial Services, Inc., P.O. Box 27740, Las Vegas, NV 89126-7740." (PTO at 30; D. Ex. P-30 at 3).

6. Borrowers of CHFS also were sent letters directing payments to "Community Home Financial Services, Inc., Global World Link, 8610 NW 72nd Street, PTY, Miami, FL 33166" (the "Las Vegas P.O. Box") (PTO at 30; D. Ex. P-23 at 3, 10, 12 & 14).

7. On February 11, 2014, Dickson sent an e-mail to CHFS's registered agent for service of process in Las Vegas, Nevada, directing the registered agent to use DMI's UPS account number to ship CHFS's mail to "William D. Dickson c/o Xinia Avila Esquivel, Oficentro La Sabana Edif., 7 Planta Baja, San Jose, Costa Rica." (PTO at 31; D. Ex. P-25).

8. Banco Panameño de la Vivienda, S.A. ("Banco Panameño")[10] returned a check to BancorpSouth made payable to CHFS from an account at BancorpSouth in Tupelo, Mississippi, pursuant to an International Collection Letter dated March 6, 2014 (PTO at 31; D. Exs. P-26 & 27).

9. On February 3, 2014, the Trustee sent a letter to DMI, DHMI, Victory Consulting, Dickson Enterprises, Double S, and Dickson demanding the return of CHFS's property (PTO at 31).

10. The Trustee demanded turnover from BBCC in a letter dated February 4, 2014 (PTO at 31).

11. On June 4, 2014, the Trustee initiated the Dickson Adversary Proceeding by filing the Verified Complaint To: (1) Recover Money, Damages or Property; (2) To Avoid Pre-Petition

[10] Banco Panameño later became known as Banvivienda.

and Post-Petition Transfers; (3) For Turnover of Property; (4) For Injunctive Relief; and (5) For Equitable Subordination (D. Adv. Dkt. 1). On June 25, 2014, the Trustee filed the Amended Complaint, alleging seventeen (17) Counts for affirmative relief.

12. On August 8, 2014, Rhodes filed the Rhodes Answer.

13. On September 8, 2014, Dickson and the Corporate Defendants filed the Dickson and Corporate Defendants Answer.

14. At Trial, counsel for the Trustee announced that the Trustee had abandoned Counts 5, 6, 8, 10, 14, and 17 of the Amended Complaint. (D. Adv. Dkt. 296 at 16). Additionally, counsel for the Trustee stated that the Trustee no longer challenged the transfer of Victory Consulting's stock to the Warren Foundation. (D. Adv. Dkt. 296 at 39-40).

Absence of Representation of Dickson and the Corporate Defendants at Trial

The Court pauses here to address the absence from Trial of Dickson, any attorney representing Dickson, and any attorney representing the Corporate Defendants. Dickson, DMI, DHMI, Double S, Crisco, Victory Consulting, Dickson Enterprises, Warren Foundation, Phalanx, BBCC, Cristen Dickson Nelson, Beau Nelson, and Colby Dickson originally were represented by Luke Dove ("Dove"), a Mississippi attorney who represented Dickson in his criminal proceedings and who also filed the Dickson and Corporate Defendants Answer in the Dickson Adversary Proceeding.

On May 15, 2017, Dove filed the Motion to Withdraw as Counsel (the "Motion to Withdraw") (D. Adv. Dkt. 203) for Dickson, DMI, DHMI, Double S, Crisco, Victory Consulting, Dickson Enterprises, Warren Foundation, Phalanx, BBCC, Cristen Dickson Nelson, Beau Nelson, and Colby Dickson. On June 1, 2017, Dove filed the Supplemental Motion to Withdraw as Counsel (the "Supplemental Motion to Withdraw") (D. Adv. Dkt. 216), alleging that a conflict of

interest had arisen that prevented his continued representation of his clients and that the conflict "may be disclosed to the Court only *in camera*." (*Id.*) Dickson filed the Objection to Motion to Withdraw as Counsel (the "Objection") (D. Adv. Dkt. 217) on June 1, 2017. To remove the potential that any party would be prejudiced by the Court's *in camera* review of the evidence offered by Dove, the Court referred the Motion to Withdraw, the Supplemental Motion to Withdraw, and the Objection to Chief Bankruptcy Judge Katharine M. Samson for resolution. (D. Adv. Dkt. 219). On August 4, 2017, Judge Samson issued the Orders Allowing Withdrawal as Counsel (the "Withdrawal Orders"), which permitted Dove to withdraw as counsel. (D. Adv. Dkt. 238 & 239). Pursuant to the Withdrawal Orders, Dickson, DMI, DHMI, Double S, Crisco, Victory Consulting, Dickson Enterprises, Warren Foundation, Phalanx, BBCC, Cristen Dickson Nelson, Beau Nelson, and Colby Dickson had thirty (30) days to retain counsel.[11]

After the discovery period in the Dickson Adversary Proceeding expired on July 17, 2017 (D. Adv. Dkt. 221), and after the thirty (30)-day period to retain new counsel had elapsed on September 3, 2017, the Court held a status conference on September 18, 2017, for the purpose of setting a trial date. (D. Adv. Dkt. 245). Dickson's adult children, Colby Dickson and Cristen Dickson Nelson, and Dickson's son-in-law, Beau Nelson, appeared at the status conference without the assistance of counsel. Neither Dickson nor any attorney acting on his behalf or on behalf of the Corporate Defendants appeared at the status conference. Likewise, neither Rhodes nor any attorney acting on her behalf appeared at the status conference. The Trustee appeared at the status conference and was represented by Jeffrey R. Barber. Based on the preferences stated

[11] Dickson is no stranger to obtaining counsel to represent his individual and corporate interests. Dickson retained a personal attorney and multiple attorneys to represent CHFS in the Bankruptcy Case. Two attorneys represented Dickson in the criminal proceedings, and a Costa Rican attorney represented Dickson during his rogue operations.

by the parties and counsel in attendance, the Clerk of the Bankruptcy Court issued a notice (D. Adv. Dkt. 250), setting December 7-8, 2017, as the date of the Trial.

On October 10, 2017, Dickson filed the Motion to Extend Discovery Time and Allow Defendants Additional Time to Retain New Counsel ("Motion to Extend") (D. Adv. Dkt. 256). On October 12, 2017, the Court entered the Order Denying Motion to Extend Discovery Time and Allow Defendants [*sic*] Additional Time to Retain New Counsel ("Order Denying Motion") (D. Adv. Dkt. 257). In the Order Denying Motion, the Court noted that while Dickson has been incarcerated in a federal correctional facility, Dove represented Dickson in the Dickson Adversary Proceeding for almost three (3) years. The Court gave Dickson sufficient time to conduct discovery or retain new counsel before he filed the Motion to Extend. Moreover, Dickson could have filed the Motion to Extend before the Court set the Trial date.

On December 4, 2017, Dickson filed the Defendant and Defendants Representative Notice to Court Unable to Attend Trail [*sic*] (the "First Notice") (D. Adv. Dkt. 282). In the First Notice, Dickson alleged that he asked the "Hope Village Halfway House Case Manager" for permission to attend the Trial but had not yet received a response; his past furlough requests had been denied. (*Id.*) Additionally, Dickson contended that he is the corporate representative for the Corporate Defendants. In short, Dickson asked the Court to "consider the extreme hardship defendant has been placed in for past 45 months." (*Id.*) On December 5, 2017, the Court issued the Order Denying Defendant and Defendants Representative Notice to Court Unable to Attend Trail [SIC] (the "Order Denying First Notice") (D. Adv. Dkt. 283). In the Order Denying First Notice, the Court noted that Dickson had sufficient notice of the date of the Trial. Additionally, the Withdrawal Orders gave Dickson, DMI, DHMI, Double S, Crisco, Victory Consulting, Dickson Enterprises, Warren Foundation, Phalanx, BBCC, Cristen Dickson Nelson, Beau Nelson, and

Colby Dickson thirty (30) days to retain new counsel and to notify the Court of the same, but they failed to do so. Thus, the Court found that the First Notice appeared to be nothing more than Dickson's notification to the Court that he likely would not be present for the Trial.

On December 6, 2017, Dickson mailed the Defendant and Defendants Representative Unable to Attend Trial (the "Second Notice") to the Clerk of the Bankruptcy Court, and it was received and docketed in the Dickson Adversary Proceeding on December 11, 2017 (D. Adv. Dkt. 290). Dickson also sent a facsimile of the Second Notice to the Trustee on December 6, 2017. At the beginning of the Trial, counsel for the Trustee presented to the Court the faxed version of the Second Notice, which the Court marked as "Defendant's Exhibit D-1" for identification purposes only. In the Second Notice, Dickson alleged that his "furlough request" to appear at Trial was denied, he is the only officer and representative of the Corporate Defendants, his "release date" is May 3, 2018, and his case manager verbally relayed to the Court that she denied his furlough request. (*Id.*) Dickson asked the Court for an "opportunity to defend itself in these civil matters before this court at later date." (*Id.*) On December 12, 2017, the Court issued the Order Denying Defendant and Defendants Representative Unable to Attend Trial (the "Order Denying Second Notice") (D. Adv. Dkt. 292). In the Order Denying Second Notice, the Court found that, like the First Notice, the Second Notice appeared to be nothing more than Dickson's notification to the Court that he would not be present at Trial.

Indeed, Dickson and the Corporate Defendants did not retain counsel for the Trial. As a result, the Corporate Defendants were not permitted to appear at Trial without the assistance of counsel. *See Rowland v. Calif. Men's Colony*, 506 U.S. 194, 201-02 (1993); *Memon v. Allied Domecq QSR*, 385 F.3d 871, 873 (5th Cir. 2004) ("[A] corporation cannot appear in federal court unless represented by a licensed attorney."); MISS. BANKR. L.R. 9010-1(b)(2)(C). While Dickson

has maintained repeatedly in his pleadings that he is the representative of the Corporate Defendants, Dickson would not have been able to represent the Corporate Defendants at Trial, as he is not a licensed attorney. Dickson, in his individual capacity, however, could have appeared at Trial without counsel. He did not do so. Even if Dickson was unable to attend the Trial, the Court permitted him ample time to retain an attorney to represent his and the Corporate Defendants' interests at Trial. Again, he did not do so.[12]

It has not gone unnoticed that despite Dickson's recent requests for relief from this Court, Dickson, to this day, has not cooperated fully with authorities, has not turned over all necessary documents to the Trustee, has refrained from sharing computer passwords that safeguard relevant information to the Estate, and has not accounted for millions of dollars missing from the Estate. The "extreme hardship" that Dickson claims he "has been placed in for past 45 months" is a direct result of his international criminal conduct, voluntary guilty plea, and resulting federal incarceration. (D. Adv. Dkt. 282). In the interest of justice, the Dickson Adversary Proceeding, which had been pending for 42 months, needed to be tried after providing the parties with the required notice and an opportunity to be heard.

---

[12] In a separate federal civil action, Dickson requested and similarly was denied an extension of the discovery deadline by the U.S. District Court for the Southern District of Mississippi in *Edwards Family Partnership, LP v. Dickson*, Case No. 3:13-cv-00587-CWR-LRA, Dkt. 50. Dickson filed a motion to extend discovery in that case within weeks of the discovery deadline and almost seven (7) months after entry of a scheduling order. Among other reasons, Dickson claimed he was unable to develop critical expert witness testimony or deposition testimony before expiration of the discovery deadline. His request was denied as was his alternative request to continue the trial until after resolution of the criminal proceedings against him. "It is not within the Court's interest to reward Dickson additional discovery time at the expense of the resolution of this matter, without any showing on the part of the Defendant that he has not had a reasonable opportunity to conduct discovery." (*Id.* at 4-5). Likewise, this Court did not reward Dickson with additional time to obtain counsel and conduct discovery or grant a continuance of the Trial since Dickson was unable to show that he was not given a reasonable opportunity to obtain counsel, conduct discovery, and prepare for the Trial.

Discussion

A. Counts 1 & 2: Federal and State RICO Violations

1. Federal Racketeer Influenced and Corrupt Organizations Act

The Racketeer Influenced and Corrupt Organizations Act ("Federal RICO Act") prohibits the following activities:

> (a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. . . .
>
> (b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.
>
> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.
>
> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

18 U.S.C. § 1962. In its Amended Complaint, the Trustee alleged that the Individual Defendants violated the Federal RICO Act "as persons employed by or associated with an enterprise that (a) attempted to fraudulently divert money from [CHFS's] bankruptcy estate through a pattern of racketeering activity; and (b) also conducted the affairs of [CHFS] through a pattern of racketeering activity." (Amended Complaint at 20). Additionally, the Trustee alleged that the Individual Defendants conspired to commit the prohibited activities outlined in the Federal RICO Act. (*Id.*). At Trial, the Trustee presented evidence in support of a pattern of racketeering activity

that violated 18 U.S.C. §§ 152, 1341, 1342, 1343, and 1344, which comprise predicate acts under the Federal RICO Act. The evidence is recounted below under headings that clarify the timing of these events.

a. Post-Petition, Pre-Trustee Events

On May 23, 2012, CHFS filed a petition for relief under chapter 11 of the U.S. Bankruptcy Code and thereafter operated as a CHFS in possession. (Bankr. Dkt. 1). CHFS was a Delaware corporation registered to do business in Mississippi and engaged in interstate commerce by purchasing and servicing loan portfolios located in several states. (Bankr. Dkt. 167). Dickson directed and controlled CHFS's business affairs. (*Id.*). Other than limited carve-outs for operating and other expenses, the funds in CHFS's debtor-in-possession bank accounts at Wells Fargo (the "DIP Accounts") were not to be disbursed except upon further order of the Court (the "Cash Collateral Orders") (Bankr. Dkt. 60 & 231; D. Exs. P-16 & P-17). CHFS's October 2013 monthly operating report (D. Ex. P-5; Bankr. Dkt. 416), the last one filed by CHFS as a debtor in possession, showed an ending cash balance of $9,059,191.49 in the various accounts established by the Cash Collateral Orders. Beginning in the fall of 2013, Dickson began his scheme to empty the Estate of substantially all of its assets. The following facts were established at Trial:

1. On October 29, 2013, without Court approval, Dickson executed a request to change CHFS's ACH deposit arrangement with Advantage. The deposit arrangement was changed from CHFS's account at BancorpSouth to Victory Consulting's account at Wells Fargo. (D. Ex. P-20).

2. In November of 2013, Dickson arranged for James Mike Meehan ("Meehan"), a United States citizen residing in Costa Rica, to utilize Meehan's call center in Costa Rica, Advanced Communications, S.A. ("ADCOM"), to service CHFS's loans from Costa Rica. (D.

Ex. P-21). To facilitate that arrangement, Dickson purchased Voice over Internet Protocol telephones in November of 2013 with Iowa area codes and had them shipped initially to BBCC's location in Mississippi. (D. Ex. P-18). The Trustee testified that the telephones were then shipped from Mississippi to Costa Rica and used in the ADCOM operation. The Trustee later recovered those telephones from Meehan. Thus, CHFS's borrowers would receive telephone calls from CHFS in Costa Rica but an Iowa area code would appear on their caller ID.

3. Dickson moved furniture and equipment from the Jackson Office to Costa Rica. For example, an international Federal Express ("FedEx") waybill from December of 2013, signed by Rhodes, described the shipping of "office equipment" to Bernal Chavarria ("Chavarria"), Dickson's attorney in Costa Rica. (D. Ex. P-24).

4. In violation of the Cash Collateral Orders, Dickson caused the sums in the DIP Accounts to be removed and transferred to some of the Corporate Defendants and other insiders and/or affiliates of CHFS. There were four wire transfers totaling $8,395,000 to the account of the Warren Foundation at Banco Panameño in Panama, and one wire transfer totaling $700,000 to the account of Victory Consulting. Additionally, there were wire transfers from Victory Consulting's account at Wells Fargo to the RE&B Investment Trust account at Scotia Bank in Costa Rica totaling $1,325,000 and to the Warren Foundation account totaling $450,000. (D. Ex. P-36 at 11-12).

5. In mid-December of 2013, Dickson caused employees of CHFS to file notices in at least five (5) chapter 13 cases in other jurisdictions requesting that chapter 13 payments owed to CHFS be sent to the Las Vegas P.O. Box, which was controlled by Dickson and not previously disclosed to this Court. (D. Ex. P-30).

The Trustee testified that CHFS's chapter 11 bankruptcy counsel, Henderson, was unaware of the aforementioned activities at the times they occurred. On December 20, 2013, after learning of these activities, and based on information provided to him, Henderson filed the Disclosure in the Bankruptcy Case indicating that: (1) CHFS changed its principal place of business to Panama; (2) CHFS had transferred funds from the DIP Accounts to CHFS's bank accounts in Panama; and (3) CHFS continued to service its business operations in Panama and Costa Rica. Contrary to the Disclosure and unbeknownst to Henderson, however, the funds were not transferred to CHFS's accounts. Instead, the funds were transferred from the DIP Accounts directly (or indirectly through Victory Consulting) to the account of the Warren Foundation at Banco Panameño in Panama. (D. Ex. P-36 at 11-12).

Because of the Disclosure, the U.S. Trustee filed the United States Trustee's Emergency Motion for Order for the Appointment of a Chapter 11 Trustee (Bankr. Dkt. 427). Pursuant to the Order Granting United States Trustee's Emergency Motion for Order for the Appointment of a Chapter 11 Trustee (Bankr. Dkt. 429) entered on December 23, 2013, the Court directed the U.S. Trustee to appoint a trustee, subject to Court approval. Thereafter, the U.S. Trustee filed the United States Trustee's Application for Approval of Chapter 11 Trustee (Bankr. Dkt. 455), which the Court granted on January 21, 2014, approving the U.S. Trustee's appointment of the Trustee for the Estate (Bankr. Dkt. 473).

b. Post-Petition, Post-Trustee Events

At Trial, the Trustee testified that only approximately $7,500 remained in CHFS's bank accounts at the time of her appointment. (D. Adv. Dkt. 296 at 52). After the Court ordered the appointment of the Trustee, Dickson continued to transfer CHFS's business and assets within the

United States, between the United States and Latin America, and within Latin America, as evidenced by the following facts:

1. A DHL Express invoice dated January 17, 2014, reflects the shipment of "dox" (presumably, an abbreviation for "documents") from Vanessa Escobar ("Escobar") in Panama City, Panama to "Community Home Financial Services Inc." at a Costa Rica address. (D. Ex. P-52). Escobar was "Foundation Counsel" to the Warren Foundation. (D. Ex. P-33 at 1).

2. The Trustee testified that, on January 31, 2014, Runnels, operating under Dickson's instructions, denied the Trustee access to the Jackson Office, claiming that CHFS's lease terminated three weeks beforehand. (D. Adv. Dkt. 296 at 67-68). When the Trustee returned to the premises on February 3, 2014, the offices previously occupied by CHFS and its affiliates were dark, files and other items had been removed, and items that could be seen hanging on the walls the prior week had been removed.

3. In March of 2014, Dickson caused additional equipment and office furniture from the Jackson Office to be delivered to Costa Rica. (D. Ex. P-34).

4. Dickson caused letters to be sent to borrowers of CHFS with pre-addressed envelopes advising borrowers to send their payments to the Las Vegas P.O. Box. After the Trustee obtained control of the Las Vegas P.O. Box, borrowers were advised to send their payments to Community Home Financial Services, Inc., Global World Link, 8610 NW 72 Street, Pty. #725, Miami, Florida 33166. (D. Ex. P-23). Once checks were remitted to either location, they were shipped to Costa Rica or Panama. (D. Ex. P-43 at 4-5, ¶¶16-17; at 10-11, ¶ 17).

5. Rhodes notarized a subordination agreement purportedly on behalf of CHFS on January 31, 2014 (D. Ex. P-49) and a loan modification agreement on February 25, 2014 (D. Ex. P-23 at 11).

6. Dickson caused "dunning" letters to be sent to borrowers alleged to be behind in their payments after automatic draft payments were stalled through no fault of the borrowers. (D. Ex. P-23).

7. As demonstrated by the ADCOM call logs (D. Ex. P-31), telephone calls were made to borrowers asking them for electronic payment information or otherwise defrauding borrowers by alleging that CHFS's computer servers were "down" and that payments had to be made by a method other than electronic transfer. In at least one such call, the borrower was told that CHFS was not in bankruptcy but, "healthy and strong." (D. Ex. P-22). Borrowers also were advised to make payments through CHFS's website. (D. Ex. P-43 at 4-5, ¶16).

8. One borrower provided the Trustee a copy of his bank statement showing a March 7, 2014, debit for his payment to CHFS by "Brookwood Byram Co., Byram, MS" (D. Ex. P-32), indicating that BBCC was part of the scheme.

9. FedEx packages were exchanged between the Jackson Office and CHFS's Costa Rica location, or to Chavarria, through at least February of 2014. (D. Ex. P-24). Moreover, Dickson sent an e-mail to CHFS's registered agent for service of process on February 10, 2014, directing the registered agent to use DMI's United Postal Service (UPS) account number to ship CHFS's mail to "William D. Dickson c/o Xinia Avila Esquivel, Oficentro La Sabana Edif., 7 Planta Baja, San Jose, Costa Rica." (D. Ex. P-25).

10. In March of 2014, checks were delivered to the Trustee's office by Colby Dickson, Dickson's son, made payable to CHFS but endorsed by Dickson, allegedly on behalf of CHFS, and noted for deposit into a Dickson Enterprises account at OmniBank. (D. Adv. Dkt. 296 at 83-85). The envelopes for these checks already had been opened and removed, and the checks had been processed for deposit. At the time, Dickson was in Panama or Costa Rica. Checks collected

after the Trustee's appointment were sent to Dickson using CHFS's FedEx account, endorsed, and then returned to the United States by FedEx for deposit.

11. As late as April of 2014, funds that should have been directed to the Trustee continued to be deposited in Victory Consulting's account at Wells Fargo pursuant to, among other things, the change of the Advantage ACH deposit agreement from CHFS's accounts with BancorpSouth to the Victory Consulting accounts at Wells Fargo. (D. Ex. P-20). Further, borrowers continued to make payments on loans being serviced by CHFS through Western Union that should have been remitted to the Trustee. (D. Ex. P-31 at 67, 72, 362, 365 & 430).

12. The Trustee testified that Dickson caused title companies to make payoff checks payable to Banco Panameño in Panama. Banco Panameño would then return the check, contact the title company or its bank, and request that the funds be wire transferred. In the same vein, Runnells, employed at the time by CHFS and/or DMI, went to a BancorpSouth branch, with funds from a DMI account, and purchased a BancorpSouth Official Check Number 2203001 dated January 29, 2014, payable to CHFS, in the amount of $300,000. (D. Ex. P-26). The check was later returned by Banco Panameño to BancorpSouth pursuant to an International Collection Letter dated March 6, 2014, enclosing Check Number 2203001 for $300,000 drawn on BancorpSouth and made payable to CHFS with the request that the proceeds reflected by the check be wire transferred to HSBC for credit to an account with Banco Panameño. Banco Panameño purported to be acting as the "agent for our client," which would have been CHFS as the payee of the check. (D. Ex. P-27). Additionally, the ADCOM call logs reflect that borrowers were encouraged or directed to send payments by means of Western Union and various ACH vendors. (D. Ex. P-31 at 67, 362, 365 & 430).

13. Dickson caused bank accounts to be opened in CHFS's name in Panama and Costa Rica. (D. Ex. P-50).

14. At Trial, the Trustee testified that she began contacting borrowers shortly after her appointment and sent letters to as many borrowers as she could identify with the limited information available to her, advising that future payments be remitted to her. The activities of the Individual Defendants and the Corporate Defendants, according to the Trustee, caused confusion and mistrust among many borrowers as to the correct party to pay. Many borrowers stopped making payments altogether.

c. Combined Pre-Petition and Post-Petition Events

Through at least January of 2014, DMI, DHMI, Victory Consulting, Crisco, Double S, and Dickson Enterprises were all located in the same office space and in the same building as CHFS at the Jackson Office. (D. Adv. Dkt. 273). In fact, not only did DMI, DHMI, Victory Consulting, Crisco, and Double S share the same office space with CHFS, but they also shared in whole or in part the same employees as CHFS and used such employees to function on a regular basis. (*Id.*) These companies had continuous access to CHFS's bank accounts, books, records, computers, and other proprietary information through Dickson.

Both pre-petition and post-petition, Dickson caused to be transferred to insiders and/or affiliates of CHFS, including DMI and DHMI, loans that previously may have been owned by CHFS (the "Loan Transfers"). CHFS's servers show evidence of such transfers, including documents with handwritten notations to move certain loans from one server to another. (D. Ex. P-28). Other documents on the server allegedly intended to record DHMI loans show the "investor" to be CHFS or loans serviced in connection with entities other than DHMI. (D. Ex. P-28).

Additionally, Dickson, through Phalanx and/or Philanfin, used an undetermined amount of CHFS funds to purchase loans in Costa Rica. (D. Ex. P-29). Dickson also used funds commingled with CHFS funds to purchase a condominium in Los Sueños, Costa Rica. (D. Ex. P-51). The undetermined amount of Costa Rica loans, the condominium, and $587,749.45 seized by the Costa Rican government are the subject of a Second Amended Final Order of Forfeiture (D. Ex. P-1) in Dickson's criminal proceeding.

d. Dickson's Arrest and Subsequent Conviction

On March 10, 2014, a criminal complaint (D. Ex. P-42) was filed against Dickson (the "Criminal Proceeding").[13] At Trial, the Trustee testified that in early March of 2014, Dickson traveled to Panama to deposit mortgage-payment checks into Panamanian bank accounts. While *en route* to Costa Rica, Dickson was detained and deported to the United States. Upon his return to the United States, Dickson was arrested for bank fraud and held without bond. An indictment was issued against Dickson on April 9, 2014. (D. Ex. P-43).

On July 10, 2014, $3,099,154.09 were wire transferred to the Trustee from a CHFS account at Banco Panameño. (D. Ex. P-36 at 12). On that same day, $1,824,871.49 were wire transferred to the Trustee from a "Dickson William D" account at Banco Panameño. On April 3, 2015, $566,106.61 were wire transferred to the Trustee from a CHFS account at Banco Panameño. The Trustee also intercepted a $300,000 cashier's check from BancorpSouth made payable to CHFS and dated January 29, 2014. The Trustee intercepted a $240,000 cashier's check from a W.D. Dickson account at OmniBank, made payable to CHFS and dated February 25, 2014. (D. Exs. P-36 at 12-13, P-44 at 3).

[13] *United States v. Dickson*, No. 3:14-cr-00078-TSL-FKB (S.D. Miss. 2014).

In the Criminal Proceeding, Dickson pled guilty on May 5, 2015, to Counts 5 and 20 of an indictment (D. Exs. P-3 & P-43) charging Dickson with criminal concealment of assets and false oaths and claims, in violation of 18 U.S.C. §§ 152(5), (2). (D. Ex. P-3). The facts set forth or incorporated by reference in those two counts of the indictment are:

> 1. Community Home Financial Services, Inc. (CHFS) was a privately owned company engaged in the business of mortgage lending and servicing. CHFS principal place of business was in the Southern District of Mississippi, located at 234 E. Capitol Street, Jackson, Mississippi, until on or about December 20, 2013.
>
> 2. The defendant, WILLIAM DAVID DICKSON, a/k/a Butch Dickson, was the President and Director of CHFS.
>
> 3. On or about May 23, 2012, CHFS filed for Bankruptcy in the United States Bankruptcy Court for the Southern District of Mississippi, in Chapter 11, Case No. 12-01703-EE. Defendant WILLIAM DAVID DICKSON, a/k/a Butch Dickson signed the Statement and Schedules for CHFS, swearing the information to be true.
>
> 4. The Bankruptcy Court had exercised its authority over the assets of CHFS, including cash collateral and accounts receivables, and had expressly forbidden the use, expenditure or dissipation of any of the assets of CHFS without prior approval of the Bankruptcy Court.
>
> 5. Wells Fargo bank was a financial institution, the accounts and deposits of which were insured by the Federal Deposit Insurance Corporation. Wells Fargo Bank was an organization whose normal activities took place in interstate and foreign commerce and which had an effect on interstate and foreign commerce.
>
> 6. Pursuant to Bankruptcy Court orders, several escrow accounts were held at Wells Fargo for the purpose of collecting and retaining the cash collateral of CHFS, for the benefit of its creditors. The relevant escrow accounts were:

ACCOUNT NAME	FOR THE PURPOSE OF:
CHFS Debtor In Possession operating account (DIP) ending in #9425	Paying court approved expenses of CHFS
EFP funds account ending in #9335	Funds subject to a dispute between CHFS and the Edward Family Partnership
BHT funds account ending in #9343	Funds subject to a dispute between CHFS and the Beher Holdings Trust

> 7. Banco Panameno was a financial institution located in the country of Panama.

8. The defendant, WILLIAM DAVID DICKSON, a/k/a Butch Dickson, controlled an account at Banco Panameno held in the name of the W.W. Warren Foundation.

9. The defendant, WILLIAM DAVID DICKSON, a/k/a Butch Dickson, operated and controlled a company named Victory Consulting Group, Inc. (VCG).

* * *

[COUNT 5]

22. On or about the dates listed below, in Hinds County in the Northern Division of the Southern District of Mississippi, the defendant, WILLIAM DAVID DICKSON, a/k/a Butch Dickson, knowingly and fraudulently received from CHFS, Debtor, in the case filed May 23, 2012, under Title 11 of the United States Code and styled "In the matter of Community Home Financial Services, Inc., Debtor," Bankruptcy Docket No. 12-01703-EE, a material amount of property, that is approximately $9,095,000 held in various bankruptcy escrow accounts, with intent to defeat the provisions of Title 11.

COUNT	DATE	APPROXIMATE AMOUNT	FROM	TO ACCOUNT

[Counts 2-4 and 6-7 omitted]

5	12/11/2013	$3,500,000.00	EFP Escrow	W.W. Warren at Banco Panemeno

* * *

All in violation of Sections 152(5) and 2, Title 18, United States Code.

* * *

[COUNT 20]

35. On or about the dates listed below, in Hinds County in the Northern Division of the Southern District of Mississippi and elsewhere, the defendants, WILLIAM DAVID DICKSON, a/k/a Butch Dickson and COLBY DICKSON, aided and abetted by others known and unknown to the grand jury, knowingly and fraudulently conceal property belonging to CHFS, Docket No. 12-01703-EE, from the trustee charged with control of the Debtor's property and from the creditors and the United States Trustee.

COUNT	CHECK DATE	DATE POSTED	PAYEE	ACCOUNT DEPOSITED INTO
20	2/6/2014	3/7/2014	Community Home Financial Service, Inc.	OmniBank Account #22484, held in the name of W.D. Dickson Enterprises Inc.

[Counts 21-25 omitted.]

All in violation of Sections 152(1) and 2, Title 18 United States Code.

(D. Ex. P-43); *see* First Superseding Indictment, *United States v. Dickson*, No. 3:14-cr-00078 (S.D. Miss. Feb. 18, 2015). The portions of 18 U.S.C. § 152 that Dickson pled guilty to violating provide:

> A person who—
>
> (1) knowingly or fraudulently conceals from a custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or, in connection with a case under title 11, from creditors or the United States Trustee, any property belonging to the estate of a debtor;
>
> (2) knowingly and fraudulently makes a false oath or account in or in relation to any case under title 11;
>
> * * *
>
> (5) knowingly and fraudulently receives any material amount of property from a debtor after the filing of a case under title 11, with intent to defeat the provisions of title 11;
>
> * * *
>
> shall be fined under this title, imposed not more than 5 years, or both.

See 18 U.S.C. § 152. The Court gives collateral estoppel effect to the above-referenced facts to which Dickson pleaded guilty. *See Breeland v. Security Ins. Co. of New Haven*, 421 F.2d 918, 922 (5th Cir. 1969) (noting the "number of jurisdictions holding that a criminal conviction precludes litigation of the same issue in a civil suit is ever increasing"); *United States v. Shaw*, 725 F. Supp. 896 (S.D. Miss. 1989); *State Farm & Cas. Co. v. Dunn (In re Dunn)*, 95 B.R. 414, 417 (Bankr.

N.D. Miss. 1988) (applying collateral estoppel effect to arson conviction in criminal proceeding on debtor's willful and malicious injury to another's property).

An Agreed Order on Restitution (the "Restitution Order") (D. Exs. P-2 & P-44) was entered on September 13, 2016, ordering Dickson to pay restitution in the amount of $5,422,004.58. The restitution calculations provided that losses to the Estate for criminal purposes amounted to $12,145,842.36. This amount included: (a) $9,095,000 transferred from DIP Accounts; (b) $1,345,462.46 diverted to Victory Consulting's Wells Fargo account; (c) CHFS checks deposited with OmniBank; and (d) proceeds from November of 2013 to April of 2014 "as the result of the diversion of proceeds from electronic deposits." Dickson was then given credit for the following amounts intercepted by the Trustee or voluntarily remitted by Dickson: (a) $300,000 from a BancorpSouth check; (b) $250,000 from an OmniBank check; (c) $5,898,278.29 wire transferred from Panama; (d) $144,191.90 from the Coastal Condos sale; and (e) $111,367.59 from the Willow Court sale. Consequently, Dickson was ordered to pay restitution of $5,442,004.58. The restitution award did not, however, address the pre-petition transfers or the additional amounts that the Trustee contends Dickson owes to the Estate. The Trustee submitted a Victim Impact Statement in the Criminal Proceeding in which she alleged that the total losses to the Estate exceeded $16,454,339. (D. Ex. P-4).

e. Testimony of Rhodes

Rhodes appeared at Trial without the assistance of counsel. She testified that she worked for the Dickson family for about sixteen (16) years. (D. Adv. Dkt. 296 at 128). Colby Dickson hired her as a loan processor in 1999 for DMI. (D. Adv. Dkt. 296 at 129). Then she started working in the collections department of CHFS in 2000 or 2001, shortly after Dickson and Frank Jackson purchased CHFS. (D. Adv. Dkt. 296 at 130). Rhodes' income tax returns indicated that

CHFS employed her during the years of 2001 through 2014. (D. Adv. Dkt. 272-4, Ex. D). Rhodes stated that "[b]y working under a dictatorship, I've only gone to work, to work for me an[d] my sons. It was nothing extra given to me." (D. Adv. Dkt. 296 at 128-29). In short, Rhodes argued that she became involved with the Dickson family not knowing their true intentions and, as a result, "got trapped." (D. Adv. Dkt. 296 at 129).

When questioned as a hostile witness by the Trustee about an e-mail she allegedly sent on behalf of CHFS showing, in the signature block, that CHFS's office was located in and/or operating out of Miami, Florida, Rhodes told the Court that "[t]his is also the e-mail address that Butch [Dickson] and the guys were using when they were over in Costa Rica. So I can't say for certain that this was an e-mail that I was actively using at that time." (D. Adv. Dkt. 296 at 115-16). Rhodes testified that she flew to Costa Rica on February 26, 2014 and did not send any e-mails while outside of the United States. The Trustee then inquired whether Rhodes knew that other people were using her e-mail address, and Rhodes replied, "No, ma'am, because after—I didn't—when I took that hard drive over there to Costa Rica, I did not know what was on it. When I took that hard drive, I didn't know that everything was coming up with my information. But the guy Brian Nichols did tell me that he was using all of my information to send literature to the customers." (D. Adv. Dkt. 296 at 116). Rhodes testified that she did not object to Brian Nichols using her e-mail address because she was no longer using that account. (D. Adv. Dkt. 296 at 117). Additionally, Brett Harrison, a computer consultant hired by CHFS, was supposed to remove Rhodes' personal information from her e-mail account. (D. Adv. Dkt. 296 at 126).

Later, the Trustee asked Rhodes when she learned about CHFS's bankruptcy filing. Rhodes testified that she learned about CHFS's bankruptcy filing on her second trip to Costa Rica in early March 2014 after speaking to Kathleen Payne, a manager of the loans over Blue World

Pools in Atlanta, Georgia. (D. Adv. Dkt. 296 at 121). In response, the Trustee asked Rhodes to clarify her deposition testimony as to whether she learned about CHFS's bankruptcy filing on her first or second trip to Costa Rica. Rhodes testified, "I'm saying it was my second trip because after I was notified that Dickson had filed, that he was actually in a bankruptcy that is when I did not go back to Costa Rica." (D. Adv. Dkt. 296 at 120). Rhodes further testified that she asked Dickson in Costa Rica if CHFS was in bankruptcy, and he denied it. (D. Adv. Dkt. 296 at 121). "I never had an opportunity to open a piece of mail to know that [CHFS] was in a bankruptcy." (D. Adv. Dkt. 296 at 129).

With respect to Rhodes' activities in Costa Rica, the Trustee instructed Rhodes to examine an invoice dated February 27, 2014, from FedEx. (D. Ex. P-24 at 23; D. Adv. Dkt. 296 at 122). The invoice indicated that Rhodes was the sender of a shipment from CHFS's address in Costa Rica, the recipient of the shipment was Dickson at the Jackson Office, and the shipping date was January 28, 2014. (D. Ex. P-24 at 25). Rhodes testified that she was not physically present in Costa Rica on January 28, 2014, when the package was shipped and did not know that FedEx packages were being sent under her name. (D. Adv. Dkt. 296 at 122). Additionally, at the direction of Colby Dickson, Rhodes brought a hard drive from Mississippi to Costa Rica. (D. Adv. Dkt. 296 at 126-27). Rhodes testified that she did not know what information was on the hard drive; she was simply told to "[t]ake it to dad." (D. Adv. Dkt. 296 at 126-27). Rhodes also testified that she never was told the passwords to gain full access to the data on CHFS's computer servers. (D. Adv. Dkt. 296 at 127).

On her first trip to Costa Rica, Rhodes testified that she was surprised to find a fully operational call center collecting payments on behalf of CHFS. (D. Adv. Dkt. 296 at 124). When Rhodes arrived in Costa Rica, Xinia Maria Esquivel, known as "Nina," picked her up from the

airport and took her to the call center office where "different people [were] doing marketing with security systems and Butch [Dickson] had a certain small section with these guys that's on the phones, mail outs [to borrowers], and doing everything in the location." (D. Adv. Dkt. 296 at 125). Rhodes testified that she did not know how CHFS processed postage from its location in Costa Rica for the "mail outs" to borrowers, but she "would see them printing statements" with the Las Vegas P.O. Box on the return envelopes. (D. Adv. Dkt. 296 at 125). On her second trip to Costa Rica, Rhodes was asked specifically to work with Rick Felton ("Felton"). Rhodes testified that Dickson hired Felton to oversee the loan collectors. At Dickson's direction, Rhodes traveled to Costa Rica to assist Felton with collection protocols because Dickson believed Felton was using incorrect terminology when communicating with customers.

f. Liability of the Individual Defendants under the Federal RICO Act

Because neither Dickson nor anyone on Dickson's behalf appeared at Trial, the Trustee's testimony and evidence introduced at Trial remains uncontradicted. As a result, the Court finds that Dickson, while employed by or associated with CHFS, fraudulently diverted money from the Estate and conducted the affairs of CHFS through a pattern of racketeering activity. The Trustee is entitled to all appropriate relief against Dickson under the Federal RICO Act. The Trustee's Victim Impact Statement (D. Ex. P-4) submitted in the Criminal Proceeding on December 8, 2015, reflected approximate damages to the Estate as of that date in the amount of $16,454,339. After subtracting credits to Dickson per the Restitution Order in the amount of $6,703,837.78 and adding Trustee's fees, ClearSpring Loan Services, Inc.[14] ("ClearSpring")'s servicing fees, and other Estate professional fees and expenses (D. Ex. P-45), the Estate has been damaged in the amount of

[14] ClearSpring changed its name to Sortis Financial Inc., effective January 1, 2018. *See* Global Op. at 65 n.27.

$13,485,492 as of the date of Trial.[15] Accordingly, the Trustee is entitled to a judgment against Dickson for the amount of $13,485,492, trebled,[16] together with post-judgment interest at the legal rate until satisfied.

Regarding the allegation against Rhodes, counsel for the Trustee explained to the Court during closing argument,

> [W]e appreciate all that Ms. Rhodes has said. Perhaps she was caught between a rock and a hard place, but as the documents speak, the trustee felt she had no choice but to keep Ms. Rhodes in the case, particularly since she physically, you know, went to Costa Rica, was physically involved in the process, notarized documents, et cetera. So this is not an attempt to take advantage of her or anything else. This is simply the trustee trying to pursue her fiduciary duties to the estate.

(D. Adv. Dkt. 296 at 131). After fully considering the matter, the Court finds that the Trustee did not meet her burden of proof with respect to Rhodes, under the Federal RICO Act.

2. Mississippi Racketeering Act

The Mississippi Racketeering Act prohibits the following activities:

> (1) It is unlawful for any person who has with criminal intent received any proceeds derived, directly or indirectly, from a pattern of racketeering activity or through the collection of an unlawful debt to use or invest, whether directly or indirectly, any part of such proceeds or the proceeds derived from the investment or use thereof, in the acquisition of any title to,

---

[15] In the PTO, the Trustee requested a different amount in damages. (PTO at 26). At the beginning of Trial, counsel for the Trustee informed the Court, "[t]his morning we discovered that our damage calculations are actually in error. We accidentally added some numbers together that didn't need to be." (D. Adv. Dkt. 296 at 15). Counsel for the Trustee requested, and the Court granted him permission to revise the Plaintiff's Proposed Findings of Fact and Conclusions of Law (D. Adv. Dkt. 299 at 24) to correct the calculation of damages. The award of $13,485,492 reflects the revised damage calculations included in the Plaintiff's Proposed Findings of Fact and Conclusions of Law.

[16] *See* 18 U.S.C. § 1964(c) ("Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee . . . .").

> or any right, interest, or equity in, real property or in the establishment or operation of any enterprise.
>
> (2) It is unlawful for any person, through a pattern of racketeering activity or through the collection of an unlawful debt, to acquire or maintain, directly or indirectly, any interest in or control of any enterprise or real property.
>
> (3) It is unlawful for any person employed by, or associated with, any enterprise to conduct or participate, directly or indirectly, in such enterprise through a pattern of racketeering activity or the collection of an unlawful debt.
>
> (4) It is unlawful for any person to conspire to violate any of the provisions of subsections (1), (2), or (3) of this section.

MISS. CODE ANN. § 97-43-5. In its Amended Complaint, the Trustee asserted that the Individual Defendants violated the Mississippi Racketeering Act by "conduct[ing] the affairs of [CHFS] through a pattern of racketeering activity . . . and . . . conspir[ing] to violate these provisions . . . by seeking through their scheme to obtain control of assets of the bankruptcy estate." (D. Adv. Dkt. 33 at 27). At Trial, the Trustee presented to the Court the evidence detailed in Count 1, *supra*, in support of a pattern of racketeering activity that violated Mississippi Code §§ 97-21-3, 97-21-51, 97-9-69, and 97-9-71, which comprise predicate acts under the Mississippi Racketeering Act.

After fully considering the matter, the Court finds that the Trustee met her burden of proof with respect to Dickson but not with respect to Rhodes. The Trustee is entitled to all appropriate relief against Dickson under the Mississippi Racketeering Act. As previously stated, the Trustee's Victim Impact Statement (D. Ex. P-4) submitted in the Criminal Proceeding on December 8, 2015, reflected approximate damages to the Estate as of that date in the amount of $16,454,339. After subtracting credits to Dickson per the Restitution Order (D. Ex. P-2, P-44) in the amount of $6,703,837.78 and after adding Trustee's fees, ClearSpring's servicing fees, and other Estate professional fees and expenses (D. Ex. P-45), the Estate has been damaged in the amount of

$13,485,492 as of the date of Trial.[17] Accordingly, the Trustee is entitled to a judgment against Dickson for the amount of $13,485,492, trebled,[18] together with post-judgment interest at the legal rate until satisfied.

B. Count 3: Tortious Interference with Contract

Under Mississippi law, "[w]hen a person causes another to breach a contract with some third person, the tort is one of interference with performance of a contract." *Par Indus., Inc. v. Target Container Co.*, 708 So. 2d 44, 48 (Miss. 1998). The elements for the tortious interference with performance of a contract are:

> 1. that the acts were intentional and willful;
>
> 2. that they were calculated to cause damage to the plaintiffs in their lawful business;
>
> 3. that they were done with the unlawful purpose of causing damage and loss, without right or justifiable cause on the part of the defendant (which constitutes malice); and
>
> 4. that actual damage and loss resulted.

Cenac v. Murry, 609 So. 2d 1257, 1268-69 (Miss. 1992) (citing *Liston v. Home Ins. Co.*, 659 F. Supp. 276, 281 (S.D. Miss. 1986)). With respect to the first element, a showing of specific intent is not required. Instead, "the requisite intent is inferred when defendant knows of the existence of a contract and does a wrongful act without legal or social justification that he is certain or substantially certain will result in interference with the contract." *Liston*, 659 F. Supp. at 281.

---

[17] *See supra* note 15.

[18] *See* MISS. CODE ANN. § 97-43-9(6) ("Any person who is injured by reason of any violation of the provisions of this chapter shall have a cause of action against any person or enterprise convicted of engaging in activity in violation of this chapter for threefold the actual damages sustained and, when appropriate, punitive damages. Such person shall also recover attorney's fees in the trial and appellate courts and costs of investigation and litigation, reasonably incurred.").

Additionally, the plaintiff must prove the following: (1) "that an enforceable obligation existed between the plaintiff and another party," and (2) "that the contract would have been performed but for the alleged interference." *Par Indus., Inc.*, 708 So. 2d at 48.

At Trial, the Trustee testified that CHFS serviced loans for borrowers pursuant to various agreements. Because Dickson is the officer, director, and/or person in control of the Corporate Defendants, Dickson and the Corporate Defendants knew of the contracts between CHFS and the borrowers. Nevertheless, as described in the Post-Petition, Pre-Trustee Events; Post-Petition, Post-Trustee Events; and the Combined Pre-Petition and Post-Petition Events, *supra*, Dickson and the Corporate Defendants contacted borrowers to divert money away from CHFS and to Dickson and/or the Corporate Defendants. The Court finds that Dickson's and the Corporate Defendants' actions were intentional and done for the purpose of harming the Estate by depriving it of income. The Court further finds that the Trustee is entitled to a judgment against Dickson and the Corporate Defendants for tortiously interfering with CHFS's contracts with its borrowers. As previously stated, the Trustee's Victim Impact Statement (D. Ex. P-4) submitted in the Criminal Proceeding on December 8, 2015, reflected approximate damages to the Estate as of that date in the amount of $16,454,339. After subtracting credits to Dickson per the Restitution Order in the amount of $6,703,837.78 and after adding additional Trustee's fees, ClearSpring's servicing fees, and additional Estate professional fees and expenses, the Estate has been damaged in the amount of $13,485,492 as of the date of Trial.[19] Accordingly, the Trustee is entitled to a judgment against Dickson and the Corporate Defendants, jointly and severally, in the amount of $13,485,492, together with post-judgment interest at the legal rate until satisfied.

[19] *See supra* note 15.

C. Counts 4 & 7: Actual Fraudulent Transfers under State and Federal Law

1. Avoidance of Pre-Petition Transfers under Mississippi Law

Under § 544(a), the Trustee may avoid pre-petition transfers that could have been avoided by a hypothetical lien creditor that: (a) advanced credit to CHFS as of the petition date and obtained, at exactly the same time, and with respect to such credit, a judgment lien on all property of CHFS that could have been obtained by a creditor on a simple contract; or (b) advanced credit to CHFS as of the petition date and obtained, at exactly the same time, and with respect to such credit, an execution against CHFS that is returned unsatisfied. Alternatively, the Trustee may avoid pre-petition transfers that could have been avoided by a hypothetical bona fide purchaser of real property (other than fixtures) from CHFS against whom Mississippi law permits such transfer to be perfected and that has, as of the petition date, perfected such transfer. Under § 544(b), the Trustee has the powers of an actual creditor with an allowable unsecured claim that could have avoided a transfer of CHFS's property or any obligation of CHFS under Mississippi law.

Pursuant to the Mississippi Fraudulent Transfer Act:

> (1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation with actual intent to hinder, delay or defraud any creditor of the debtor.

MISS. CODE ANN. § 15-3-107(1). In determining fraudulent intent, the Court may consider the following "badges of fraud":

> (a) The transfer or obligation was to an insider;
>
> (b) The debtor retained possession or control of the property transferred after the transfer;
>
> (c) The transfer or obligation was disclosed or concealed;

(d) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;

(e) The transfer was of substantially all the debtor's assets;

(f) The debtor absconded;

(g) The debtor removed or concealed assets;

(h) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;

(i) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;

(j) The transfer occurred shortly before or shortly after a substantial debt was incurred;

(k) The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor;

(l) The debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

> (i) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
>
> (ii) Intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due;

(m) A transfer made or obligation incurred by a debtor may be fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation; and

(n) A transfer made by a debtor may be fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent.

MISS. CODE ANN. § 15-3-107(2); *see Soza v. Hill (In re Soza)*, 542 F.3d 1060, 1066-67 (5th Cir. 2008). Finally, "[i]f there exists a combination of facts such as described in subsection (2)(*1*), (m) or (n) only, then there will be a strong presumption of fraud which can be rebutted only by clear and convincing evidence." MISS. CODE ANN. § 15-3-107(3).

According to the Disclosure Statement of CHFS (Bankr. Dkt. 167 at 9), "CHFS is in the business of purchasing and servicing loan portfolios consisting of mostly Class B loans of 2nd to 3rd mortgages." In 2011, a dispute arose between CHFS and its president, Dickson, on the one hand, and Dr. Charles C. Edwards ("Dr. Edwards"), Edwards Family Partnership, LP ("EFP"), and Beher Holdings Trust ("BHT"), on the other hand. On February 15, 2012, CHFS and Dickson initiated state court litigation against Dr. Edwards, EFP, and BHT that was removed to the U.S. District Court for the Southern District of Mississippi on April 11, 2012. *See Cmty. Home Fin. Servs., Inc. v. Edwards Family P'ship, LP*, No. 3:12-cv-00252-CWR-LRA (S.D. Miss.) (the "Receivership Action"). Dr. Edwards, EFP, and BHT asserted counterclaims against CHFS and Dickson in the Receivership Action. (D. Ex. P-38).[20]

At Trial, the Trustee testified that CHFS was not primarily in the business of making loans to third parties pre-petition. Nevertheless, CHFS made substantial pre-petition transfers. Over the course of three months, CHFS transferred $3,200,000 through a series of promissory notes—Dickson Note, Double S Note 1, DMI Note 1, Dickson Enterprises Note, Double S Note 2, Crisco Note 1, Crisco Note 2, and DMI Note 2. After the Warren Foundation was established in Panama on March 1, 2012 (D. Ex. P-33 at 1), substantially all of the $3,200,000 were transferred to the

[20] *See* Global Op. at 45-46.

Warren Foundation.[21] The funds either were transferred to Warren Foundation directly, or were first transferred to Victory Consulting, which then transferred substantially all of the funds to the Warren Foundation. In total, CHFS transferred approximately $3,700,000, including the $3,200,000 referenced above, to accounts of Victory Consulting and Warren Foundation (the "Pre-Petition Transfers"). (D. Exs. P-36 at 10-11 & P-39).

The Corporate Defendants admitted that Dickson was an officer, director, and/or person in control of the Corporate Defendants at all relevant times. (D. Adv. Dkt. 273). As a result, Dickson's intent may be imputed to the Corporate Defendants. *See* 5 COLLIER ON BANKRUPTCY ¶ 548.04[1][b][iv] (16th ed. 2016) ("[T]he fraud of an officer of a corporation is imputed to the corporation when the officer's fraudulent conduct was (1) in the course of his employment, and (2) for the benefit of the corporation. This is true even if the officer's conduct was unauthorized, effected for his own benefit but clothed with apparent authority of the corporation, or contrary to instructions. The underlying reason is that a corporation can speak and act only through its agents and so must be accountable for any acts committed by one of its agents within his actual or apparent scope of authority and while transacting corporate business.").

Because "a transferor's actual intent is rarely susceptible to direct proof," courts look "to the circumstances of the transfer to infer intent." *Wiggains v. Reed (In re Wiggains)*, 848 F.3d 655, 661 (5th Cir. 2017). After fully considering the matter, the Court, pursuant to § 544, applying the Mississippi Fraudulent Transfer Act, finds that CHFS actually intended to hinder, delay, or defraud its creditors by making the Pre-Petition Transfers to insiders and/or affiliates of CHFS. While CHFS contended that the transfers were loans, the Court finds that they were fraudulent

[21] Presumably, the Warren Foundation was established by Dickson since his children, Colby Dickson and Cristen Dickson Nelson, were the primary beneficiaries. (D. Ex. P-33 at 2). Dickson admitted he named the Warren Foundation. (D. Adv. Dkt. 277-1 at 23).

transfers. First, CHFS received little, if any, consideration for the Pre-Petition Transfers. *See* MISS. CODE ANN. § 15-3-107(2)(h). Second, the transferees were insiders and/or affiliates of CHFS. *See* MISS. CODE ANN. § 15-3-107(2)(a). Third, Dickson controlled the transferees, the Corporate Defendants, and, thus, effectively retained the possession, benefit, and use of the property transferred. *See* MISS. CODE ANN. § 15-3-107(2)(b). Fourth, the transfers were made in direct proximity of a legal dispute and litigation between CHFS and its most significant putative creditors in the Receivership Action, EFP and BHT, and Dr. Edwards. *See* MISS. CODE ANN. § 15-3-107(2)(d). Fifth, Dickson's post-petition criminal conduct provides a general chronology of events and transactions from which the Court may infer actual fraudulent intent.[22] Indeed, Dickson's eventual use of the Warren Foundation to funnel money post-petition, *supra*, found its predicate in his establishment and use of that entity in connection with the Pre-Petition Transfers. Accordingly, the Trustee is entitled to a judgment against Dickson, Double S, DMI, Dickson Enterprises, Crisco, Victory Consulting, and Warren Foundation for the avoidance of the Pre-Petition Transfers.[23] Similarly, to the extent that the Loan Transfers, *supra*, were made pre-petition, the Trustee is entitled to avoid those transfers and to a judgment vesting title in the Estate of all loans ostensibly in the name of DMI or DHMI.

2. Avoidance of Pre-Petition Transfers under § 548(a)(1)(A)

Section 548 provides:

> (a)(1) The trustee may avoid any transfer . . . of an interest of the debtor in property . . . that was made or incurred on or within 2 years before the date of the filing of the petition, if the debtor voluntarily or involuntarily—

[22] *See supra* at 23-27.

[23] *See* MISS. CODE ANN. § 15-3-111(1)(a) ("In an action for relief against a transfer or obligation under this article, a creditor . . . may obtain . . . [a]voidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim.").

> (A) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted . . .

11 U.S.C. § 548(a)(1)(A). After fully considering the matter, the Court finds, consistent with its findings above, that the Trustee is entitled avoid the Pre-Petition Transfers, which occurred less than 2 years before the commencement of the Bankruptcy Case. Under § 550(d), the Trustee is entitled to only a single satisfaction under . . . this section." 11 U.S.C. § 550(d); *see Whitlock v. Lowe*, 569 B.R. 94, 101 (Bankr. W.D. Tex. 2017). Accordingly, under §§ 548 and 550,[24] the Trustee is entitled to a judgment against Dickson, Double S, DMI, Dickson Enterprises, and Crisco as initial transferees and against Victory Consulting and Warren Foundation, jointly and severally, as mediate or immediate transferees in the amounts specified below, together with post-petition judgment interest at the legal rate until satisfied:

1. Dickson: $250,000 pursuant to Dickson Note;
2. Double S: $900,000 pursuant to Double S Notes 1 and 2;
3. DMI: $750,000 pursuant to DMI Note 1 and 2;
4. Dickson Enterprises: $350,000 pursuant to Dickson Enterprises Note;
5. Crisco: $950,000 pursuant to Crisco Notes 1 and 2; and
6. Victory Consulting and Warren Foundation: $3,700,000, jointly and severally. *See* 11 U.S.C. § 550(d). Further, to the extent the Loan Transfers, *supra*, occurred within two (2) years before the commencement of the Bankruptcy Case, the Trustee is entitled to avoid those transfers

[24] Section 550 provides that "to the extent that a transfer is avoided under section . . . 548 . . . the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from . . . the initial transferee of such transfer or the entity for whose benefit such transfer was made; or . . . any immediate or mediate transferee of such initial transferee." 11 U.S.C. § 550(a)(1)-(2).

and to a judgment vesting the title in the Estate of all loans ostensibly in the name of DMI or DHMI.

D. Count 9: Post-Petition Transfers

Section 549 permits the trustee to avoid post-petition transfers of property made without authorization by the Court. *See* 11 U.S.C. § 549(a). The elements of a § 549 claim are as follows: "(1) a transfer of property occurred; (2) the property was property of the estate; (3) the transfer occurred after the commencement of the case; and (4) the transfer was not authorized by the Court or the Bankruptcy Code." *Litzler v. Am. Elk Conservatory, Inc. (In re Kelso)*, 196 B.R. 363, 368 (Bankr. N.D. Tex. 1996). Construed broadly, "[t]he term 'transfer' means . . . each mode, direct or indirect, absolute or unconditional, voluntary or involuntary, of disposing of or parting with . . . property or . . . an interest in property." 11 U.S.C. § 101(54)(D)(i)-(ii). Property of the estate consists of "all legal or equitable interests of the debtor in property as of the commencement of the case." *Id.* § 541(a)(1).

As described in the Post-Petition, Pre-Trustee Events; Post-Petition, Post-Trustee Events; and the Combined Pre-Petition and Post-Petition Events, *supra*, Dickson and the Corporate Defendants transferred funds from DIP Accounts and diverted funds away from the Estate. The Court finds that funds, indeed, were transferred; the funds were property of the Estate; the transfers were made after CHFS filed its petition for bankruptcy relief; and the transfers were made without the Court's permission and contrary to the Cash Collateral Orders. Accordingly, after giving the same credits given in the Restitution Order, the Trustee is entitled to a judgment under §§ 549 and 550 against Dickson and the Corporate Defendants, jointly and severally, as mediate or immediate transferees in the amount of $5,442,004.58, together with post-judgment interest at the legal rate until satisfied. Similarly, to the extent transfers were made after the commencement of the

Bankruptcy Case, the Trustee is entitled to avoid the Loan Transfers and to a judgment vesting title in the Estate of all loans ostensibly in the name of DMI or DHMI.

E. Count 11: Turnover of Estate Property

Once a bankruptcy case begins, § 362 automatically imposes a statutory stay against "any act to . . . exercise control over property of the estate." 11 U.S.C. § 362(a)(3). Property of the estate consists of "all legal or equitable interests of the debtor in property as of the commencement of the case." *Id.* § 541(a)(1). Construed broadly, "property of the estate includes the intangible and tangible property held by the [d]ebtor as of the [p]etition [d]ate." *West v. Hsu (In re Advanced Modular Power Sys., Inc.)*, 413 B.R. 643, 670 (Bankr. S.D. Tex. 2009). Accordingly, "an[y] entity, other than a custodian, in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease . . . shall deliver to the trustee, and account for, such property or the value of such property." 11 U.S.C. § 542(a).

At Trial, the Trustee testified that, following her appointment, she made demand on the Corporate Defendants, Dickson, and Rhodes for turnover of the Estate's property, including books and records. While Rhodes provided some documentation to the Trustee, neither Dickson nor the Corporate Defendants have complied fully with the demand. Specifically, the Trustee testified that Dickson refused to comply fully with the Court's Order Granting Edwards Family Partnership, LP and Beher Holdings Trust's Emergency Motion for Order Directing William D. Dickson to Show Cause and Directing Him to Return the Funds Transferred from the Bankruptcy Estate. (D. Ex. P-41). Additionally, the Trustee's efforts to administer the Estate were hindered by the absence of many operational documents and loan documents. Through John Allen, a former employee of CHFS, the Trustee gained remote access in April 2014 to two of CHFS's cloud-based servers, Mist and Koren, located in Panama. The two servers to which the Trustee gained access in April 2014

contained a significant amount of borrower documents and data. The server access, however, temporarily was disrupted shortly afterward when Dickson, despite being incarcerated, instructed Rhodes to contact the cloud-host and terminate access. Dickson, in late April 2014, executed consent to the cloud-host, and the Trustee's access to the servers was reestablished. The Trustee obtained access to a third server, Bacco, in April of 2015 that purportedly contained loans owned by DMI and DHMI. The Trustee, however, testified that those loans actually belonged to CHFS and were unlawfully assigned to the affiliates of DMI and DHMI. As a result, the Trustee boarded the loans with Vantium Capital, Inc. (later known as ClearSpring), a professional servicing company, in April of 2015. (Bankr. Dkt. 702).

Although the servers provided the Trustee with a significant amount of borrower data and documents, the Trustee testified that the servers were incomplete, containing little by way of operational documents and data. Further, the Trustee learned that in many instances, to save recording fees, CHFS did not record mortgage assignments until a borrower paid off a loan. As a result, the loans of public record were often in the name of an entity for which the Trustee has no authority to cancel the mortgage when the loan was paid off. The Trustee was contacted by numerous borrowers who provided proof that their loans had been paid off, sometimes pre-petition, but that the mortgage had never been cancelled. In many instances, the Trustee was unable to locate the original mortgage assignments to record them, and then release the mortgage. The Trustee's counsel was able to prepare lost instrument affidavits or utilize powers of attorney in mortgage portfolio purchase agreements to effectuate, in many cases, the cancellation of mortgages, but this approach caused the Estate to incur additional administrative expenses. Further, the Trustee learned that portions of the servers were password protected and, thus, could not be accessed. Dickson initially pleaded the Fifth Amendment in response to the Trustee's Rule

2004 examination questions, but following his plea, Dickson testified that certain loan documents and codes to password-protected portions of CHFS's computer servicers are in a location in Panama that he has not disclosed. (D. Adv. Dkt. 277-1 at 30, 46-47, 53, 57-58; D. Adv. Dkt. 277-2 at 10-11, 70-71). The cyber-security division of the Trustee's forensic tracing expert, Horne LLP, confirmed the encryption and attempted without success to crack the password-protected portions of CHFS's servers. (D. Ex. P-6). As a result, the Trustee does not have all of CHFS books and records and cannot access the password protected portions of the servers. Administration of the Estate, therefore, has been hampered, necessarily increasing servicing expenses and fees by ClearSpring and by the Trustee and her counsel.

Since the Trustee's testimony remains undisputed, the Court finds that Dickson and the Corporate Defendants are in possession, custody, or control of books, records, operational documents, and codes for the password protected portions of CHFS's computer servers that would be of use to the Trustee. Accordingly, the Trustee is entitled to a judgment directing Dickson and the Corporate Defendants to turn over all relevant documents, records, passcodes, and computer servers to the Trustee.

F. Count 12: Violation of Automatic Stay

When a debtor files a petition for bankruptcy relief, § 362 automatically imposes a statutory stay against "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate." 11 U.S.C. § 362(a)(3). Property of the estate consists of "all legal or equitable interests of the debtor in property as of the commencement of the case." *Id.* § 541(a)(1). As described in the Post-Petition, Pre-Trustee Events; the Post-Petition, Post-Trustee Events; and the Combined Pre-Petition and Post-Petition Events, *supra*, Dickson and his affiliated companies, DMI, DHMI, Double S, Crisco, Victory Consulting, Dickson Enterprises,

Warren Foundation, Phalanx, and BBCC, exercised control over property of the Estate when they took and accepted money and documents from CHFS, despite knowing that CHFS had filed for bankruptcy relief. Indeed, Dickson signed the petition for chapter 11 bankruptcy relief as CHFS's president. (Bankr. Dkt. 1). Pursuant to § 105(a) and § 362(k),[25] the Court finds that the Trustee is entitled to a judgment against Dickson, DMI, DHMI, Double S, Crisco, Victory Consulting, Dickson Enterprises, Warren Foundation, Phalanx, and BBCC for willful violation of the automatic stay. As previously stated, the Trustee's Victim Impact Statement (D. Ex. P-4) submitted in the Criminal Proceeding on December 8, 2015, reflected approximate damages to the Estate as of that date in the amount of $16,454,339. After subtracting credits to Dickson per the Restitution Order in the amount of $6,703,837.78 and after adding additional Trustee's fees, ClearSpring's servicing fees, and additional Estate professional fees and expenses (D. Ex. P-45), the Estate has been damaged in the amount of $13,485,492 as of the date of Trial.[26] Accordingly, the Court finds that the Trustee is entitled to a judgment against Dickson, DMI, DHMI, Double S, Crisco, Victory Consulting, Dickson Enterprises, Warren Foundation, Phalanx, and BBCC, jointly and severally, in the amount of $13,485,492, together with post-judgment interest at the legal rate until satisfied.

---

[25] Section 362 provides that "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." 11 U.S.C. § 362(k)(1). Because the violation of the automatic stay is viewed as tantamount to the violation of a court order, a bankruptcy court may address a violation of the stay by exercising its civil contempt powers under § 105(a). *See In re RX Pro of Miss., Inc.,* Adv. Proc. 16-00288-NPO (Bankr. S.D. Miss. Mar. 4, 2016), Dkt. 120 (granting corporate debtor relief under § 105 for violation of the automatic stay).

[26] *See supra* note 15.

G. Count 13: Conversion

Under Mississippi law, "acts alleged to constitute a conversion must be positive and tortious." *Cmty. Bank, Ellisville, Miss. v. Courtney*, 884 So. 2d 767, 773 (Miss. 2004). The tort of conversion requires "proof of a wrongful possession, or the exercise of a dominion in exclusion or defiance of the owner's right, or of an unauthorized and injurious use, or of a wrongful detention after demand." *Cmty. Bank, Ellisville, Miss.*, 884 So. 2d at 773-74 (quoting *McJunkin v. Hancock*, 176 P. 740, 742 (Okla. 1918)). In other words, conversion requires an "intent to exercise dominion or control over goods which is inconsistent with the true owner's right." *First Inv'rs Corp. v. Rayner*, 738 So. 2d 228, 234 (Miss. 1999). While intent is essential, "the intent required is not the intent to be a wrongdoer." *Walker v. Brown*, 501 So. 2d 358, 361 (Miss. 1987). The Court assesses damages based upon "the value of the property at the time and place of the conversion." *Cmty. Bank, Ellisville, Miss.*, 884 So. 2d at 775. Lost profits are recoverable "where the loss is a proximate result of the defendant's act, and where the loss can be shown with reasonable certainty." *Cmty. Bank, Ellisville, Miss.*, 884 So. 2d at 775 (quoting *Pride Oil Co. v. Tommy Brooks Oil Co.*, 761 So. 2d 187, 192 (Miss. 2000)).

As described in the Post-Petition, Pre-Trustee Events; the Post-Petition, Post-Trustee Events; and the Combined Pre-Petition and Post-Petition Events, *supra*, the Court finds that Dickson and the Corporate Defendants converted property of the Estate for their own use, without receiving permission, by obtaining exclusive control over the funds in DIP Accounts and, in turn, diverting those funds from the Estate, and by repeatedly hindering, blocking, and denying the Trustee access to that property. Further, Dickson and the Corporate Defendants willfully interfered with the Trustee's duty to protect and acquire CHFS's property without lawful justification and

deprived the Estate of possession of the funds. Additionally, as described in Turnover of Estate Property, *supra*, Dickson has refused to cooperate with the Trustee as required by § 521(a)(3)-(4).

As previously stated, the Trustee's Victim Impact Statement (D. Ex. P-4) submitted in the Criminal Proceeding on December 8, 2015, reflected approximate damages to the Estate as of that date in the amount of $16,454,339. After subtracting credits to Dickson per the Restitution Order in the amount of $6,703,837.78 and after adding additional Trustee's fees, ClearSpring's servicing fees, and additional Estate professional fees and expenses (D. Ex. P-45), the Estate has been damaged in the amount of $13,485,492 as of the date of Trial.[27] Accordingly, the Trustee is entitled to a judgment against Dickson and the Corporate Defendants, jointly and severally, in the amount of $13,485,492, together with post-judgment interest at the legal rate until satisfied.

H. Count 15: Equitable Subordination of Claims

Section 510 provides that the Court may "under principles of equitable subordination, subordinate for purposes of distribution all or part of an allowed claim to all or part of another allowed claim." 11 U.S.C. § 510(c)(1). In other words, "a proof of claim can be subordinated to a single claim, or all or a class of claims. The former remedy is a personal remedy based on personal injuries while the latter is a general remedy based on general injuries shared by all or a class of creditors." *Cadleway Props., Inc. v. Andrews (In re Andrews)*, No. 02-0001, 2009 WL 1076831, at *4 (Bankr. S.D. Tex. Apr. 2, 2009). In *Benjamin v. Diamond (In re Mobile Steel Co.)*, 563 F.2d 692 (5th Cir. 1977), the Fifth Circuit analyzed equitable subordination under the premise that bankruptcy courts are courts of equity. *Id.* at 698-99. Indeed, bankruptcy courts have exercised their equitable powers "to the end that fraud will not prevail, that substance will not give way to form, that technical considerations will not prevent substantial justice from being done."

[27] *See supra* note 15.

Pepper v. Litton, 308 U.S. 295, 304-05 (1939). With this premise in mind, the Fifth Circuit found that three conditions must be satisfied before a bankruptcy court exercises its power of equitable subordination: (1) "[t]he claimant must have engaged in some type of inequitable conduct," (2) "[t]he misconduct must have resulted in injury to the creditors of the bankrupt or conferred an unfair advantage on the claimant," and (3) "[e]quitable subordination of the claim must not be inconsistent with the provisions of the Bankruptcy Act." *In re Mobile Steel Co.*, 563 F.2d at 699-700.

In the Bankruptcy Case, Dickson filed Proof of Claim 10-1 (Bankr. Cl. 10-1) on September 20, 2012, for an unknown amount. As described in the Post-Petition, Pre-Trustee Events; the Post-Petition, Post-Trustee Events; and the Combined Pre-Petition and Post-Petition Events, *supra*, the Court finds that Dickson's removal of funds in the DIP Accounts and Dickson's efforts to cause CHFS and the Corporate Defendants to divert money away from the Estate was fraudulent, illegal, and a breach of his fiduciary duty as an officer of CHFS. As a result, the Court further finds that Dickson used CHFS to engage in inequitable conduct that injured the Estate. Accordingly, pursuant to § 510, Dickson's Proof of Claim is equitably subordinated to all other creditors and claims.[28]

I. Count 16: Civil Conspiracy

Under Mississippi law, civil conspiracy consists of the following elements: "(1) two or more persons or corporations; (2) an object to be accomplished; (3) a meeting of the minds on the object or course of action; (4) one or more unlawful overt acts; and (5) damages as the proximate result." *Gallagher Bassett Servs., Inc. v. Jeffcoat*, 887 So. 2d 777, 786 (Miss. 2004). The Trustee bases her civil conspiracy claim on conversion and tortious interference with a contract.

[28] The Trustee has not objected to Proof of Claim 10-1.

After fully reviewing the matter, the Court finds that the Trustee's claim fails to satisfy the first element of a civil conspiracy claim, known as the plurality requirement. In Mississippi, "[a] conspiracy is a combination of persons for the purpose of accomplishing an unlawful purpose or a lawful purpose unlawfully." *Shaw v. Burchfield*, 481 So. 2d 247, 255 (Miss. 1985). Under the intra-corporate conspiracy doctrine, "[a] corporation cannot conspire with itself any more than a private individual can, and it is the general rule that the acts of agents are the acts of the corporation." *Frye v. Am. Gen. Fin. Inc.*, 307 F. Supp. 2d 836, 843-44 (S.D. Miss. 2004); *see Cooper v. Drexel Chem. Co.*, 949 F. Supp. 1275, 1285 (N.D. Miss. 1996) (holding that individual defendants are incapable of conspiring with their corporate employer unless they acted outside their employment capacities).

The facts here implicate the intra-corporate conspiracy doctrine but raise a slightly different issue. May two entities conspire through a single agent?[29] In the Amended Complaint, the Trustee named as defendants CHFS, DMI, DHMI, Double S, Crisco, Victory Consulting, Dickson Enterprises, Dickson, Warren Foundation, Phalanx, BBCC, Colby Dickson, Cristen Dickson Nelson, Beau Nelson, Runnels, Rhodes, Clark, and Head. Dickson, Colby Dickson, Cristen Dickson Nelson, Beau Nelson, Runnels, and Rhodes are the natural persons named as defendants in the Amended Complaint. With the exception of Dickson and Rhodes, however, the remaining natural persons named as defendants were either dismissed from the Dickson Adversary Proceeding or the claims against them were resolved. (D. Adv. Dkt. 177, 213 & 280).

The evidence at Trial did not show that any partner or agent of the Corporate Defendants, other than Dickson, was involved in the alleged conspiracy. Indeed, after Rhodes testified at Trial, counsel for the Trustee conceded that Rhodes, perhaps, "was caught between a rock and a hard

[29] *See* Global Op. at 199-202.

place" with respect to her employment under Dickson. (D. Adv. Dkt. 296 at 131). In effect, the Trustee's civil conspiracy claim rests sole on the conduct of Dickson, a single agent purportedly acting on behalf of the Corporate Defendants. No reported Mississippi case has discussed or applied the intra-corporate conspiracy doctrine under these facts. Courts in other jurisdictions have concluded that the tort of conspiracy does not exist apart from the underlying wrongful act on which the conspiracy is based in the absence of two human conspirators. *United States v. Panhandle Trading, Inc.*, No. 05:05-cr-00044-RS-ALL, 2006 WL 1883436, at *3-4 (N.D. Fla. 2006).

In a factually analogous case widely cited for its treatment of the "single agent problem," *Lockwood Grader Corp. v. Bockhaus*, 270 P.2d 193 (Colo. 1954), the Supreme Court of Colorado ruled that a "conspiracy cannot be shown by acts of one person, no matter how many corporations he represents." *Id.* at 196; *see, e.g.*, *Panhandle Trading, Inc.*, 2006 WL 1883436, at *1-2; *Conspiracy, Group Danger and the Corporate Defendant*, 52 U. CIN. L. REV. 431, 434-35 (1983). In *Lockwood Grader Corp.*, Ralph L. Bockhaus ("Bockhaus") alleged that Lockwood Grader Corporation, Lockwood Graders of Colorado, and T.J. Lockwood ("Lockwood") unlawfully conspired to force him out of business. Lockwood was the majority stockholder, director, and president of both Lockwood Grader Corporation and Lockwood Graders of Colorado. The jury returned a verdict in favor of Bockhaus. On appeal, the state court reversed, holding that Bockhaus failed to prove the existence of a conspiracy because the evidence at trial showed that Lockwood was the only person who could possibly have acted for either of the corporations. *Lockwood Grader Corp.*, 270 P.2d at 196-97.

The Court finds that Dickson, acting alone, lacked the ability to form a conspiracy with himself. The policy underlying a conspiracy claim—holding combinations of individuals

responsible—does not apply when one person uses several entities to carry out his tortious conduct. Although a conspiracy might be formed by several entities acting through several agents, more than one person must be involved in the conspiracy. Thus, if some partner or agent of the Corporate Defendants, other than Dickson, had participated in the alleged conspiracy, then the Trustee would have satisfied the plurality requirement for a civil conspiracy. Because the evidence did not show that anyone other than Dickson was involved in the alleged conspiracy, however, the Court finds that the Trustee has failed to meet her burden of proof.

Conclusion

For the above and foregoing reasons, the Court declares and/or finds as follows:

1. Count 1 (Federal RICO): Dickson, but not Rhodes, violated the Federal RICO Act. The Trustee's Victim Impact Statement (D. Ex. P-4) submitted in the Criminal Proceeding on December 8, 2015, reflected approximate damages to the Estate as of that date in the amount of $16,454,339. After subtracting credits to Dickson per the Restitution Order in the amount of $6,703,837.78 and after adding Trustee's fees, ClearSpring's servicing fees, and other Estate professional fees and expenses (D. Ex. P-45), the Estate has been damaged in the amount of $13,485,492 as of the date of Trial. Accordingly, the Trustee is entitled to a judgment against Dickson for the amount of $13,485,492, trebled, together with post-judgment interest at the legal rate until satisfied.

2. Count 2 (Mississippi Racketeering Act): Dickson, but not Rhodes, violated the Mississippi Racketeering Act. As previously stated, the Trustee's Victim Impact Statement (D. Ex. P-4) submitted in the Criminal Proceeding on December 8, 2015, reflected approximate damages to the Estate as of that date in the amount of $16,454,339. After subtracting credits to Dickson per the Restitution Order in the amount of $6,703,837.78 and after adding Trustee's fees,

ClearSpring's servicing fees, and other Estate professional fees and expenses (D. Ex. P-45), the Estate has been damaged in the amount of $13,485,492 as of the date of the Trial. Accordingly, the Trustee is entitled to a judgment against Dickson for the amount of $13,485,492, trebled, together with post-judgment interest at the legal rate until satisfied.

3. Count 3 (Tortious Interference with Contract): Dickson and the Corporate Defendants tortiously interfered with CHFS's contracts with its borrowers. As previously stated, the Trustee's Victim Impact Statement (D. Ex. P-4) submitted in the Criminal Proceeding on December 8, 2015, reflected approximate damages to the Estate as of that date in the amount of $16,454,339. After subtracting credits to Dickson per the Restitution Order in the amount of $6,703,837.78 and after adding additional Trustee's fees, ClearSpring's servicing fees, and additional Estate professional fees and expenses (D. Ex. P-45), the Estate has been damaged in the amount of $13,485,492 as of the date of the Trial. Accordingly, the Trustee is entitled to a judgment against Dickson and the Corporate Defendants, jointly and severally, in the amount of $13,485,492, together with post-judgment interest at the legal rate until satisfied.

4. Count 4 (Mississippi Fraudulent Transfer Act): Dickson and the Corporate Defendants fraudulently transferred CHFS's assets. Accordingly, the Trustee is entitled to a judgment against Dickson and the Corporate Defendants for the avoidance of the Pre-Petition Transfers. Similarly, to the extent that the Loan Transfers were made pre-petition, the Trustee is entitled to avoid those transfers and to a judgment vesting title in the Estate of all loans ostensibly in the name of DMI or DHMI.

5. Count 5 (Avoidance of Transfers by Dickson Enterprises): The Trustee has abandoned Count 5, and, therefore, Count 5 is dismissed with prejudice.

6. Count 6 (Avoidance of Preferential Transfers): The Trustee has abandoned Count 6, and, therefore, Count 6 is dismissed with prejudice.

7. Count 7 (Avoidance of Pre-Petition Transfers under § 548(a)(1)(A)): Dickson and the Corporate Defendants fraudulently transferred CHFS's assets. Accordingly, under §§ 548 and 550, the Trustee is entitled to a judgment against Dickson, Double S, DMI, Dickson Enterprises, and Crisco as initial transferees and against Victory Consulting and Warren Foundation, jointly and severally, as mediate or immediate transferees, in the amounts specified below, together with post-petition judgment interest at the legal rate until satisfied:

a. Dickson: $250,000 pursuant to Dickson Note;

b. Double S: $900,000 pursuant to Double S Notes 1 and 2;

c. DMI: $750,000 pursuant to DMI Note 1 and 2;

d. Dickson Enterprises: $350,000 pursuant to Dickson Enterprises Note;

e. Crisco: $950,000 pursuant to Crisco Notes 1 and 2; and

f. Victory Consulting and Warren Foundation: $3,700,000, jointly and severally. *See* 11 U.S.C. § 550(d). Further, to the extent the Loan Transfers, *supra*, occurred within two (2) years before the commencement of the Bankruptcy Case, the Trustee is entitled to avoid those transfers and to a judgment vesting the title in the Estate of all loans ostensibly in the name of DMI or DHMI.

8. Count 8 (Avoidance of Pre-Petition Transfers under § 548(a)(1)(B)): The Trustee has abandoned Count 8, and, therefore, Count 8 is dismissed with prejudice.

9. Count 9 (Post-Petition Transfers): Dickson and the Corporate Defendants transferred CHFS's assets post-petition. Accordingly, after giving the same credits given in the Restitution Order, the Trustee is entitled to a judgment under §§ 549 and 550 against Dickson and

the Corporate Defendants, jointly and severally, as mediate or immediate transferees in the amount of $5,442,004.58, together with post-judgment interest at the legal rate until satisfied. Similarly, to the extent transfers were made after the commencement of the Bankruptcy Case, the Trustee is entitled to avoid the Loan Transfers and to a judgment vesting the title in the Estate of all loans ostensibly in the name of DMI or DHMI.

10. Count 10 (Temporary Restraining Order & Prohibitory Injunctions): The Trustee has abandoned Count 10, and, therefore, Count 10 is dismissed with prejudice.

11. Count 11 (Turnover of Estate Property): Dickson and the Corporate Defendants are in possession, custody, or control of books, records, operational documents, and codes for the password protected portions of CHFS's computer servers that would be of use to the Trustee. Accordingly, the Trustee is entitled to a judgment directing Dickson and the Corporate Defendants to turn over all relevant documents, records, passcodes, and computer servers to the Trustee.

12. Count 12 (Violation of the Automatic Stay): Dickson, DMI, DHMI, Double S, Crisco, Victory Consulting, Dickson Enterprises, Warren Foundation, Phalanx, and BBCC violated the automatic stay. As previously stated, the Trustee's Victim Impact Statement (D. Ex. P-4) submitted in the Criminal Proceeding on December 8, 2015, reflected approximate damages to the Estate as of that date in the amount of $16,454,339. After subtracting credits to Dickson per the Restitution Order in the amount of $6,703,837.78 and after adding Trustee's fees, ClearSpring's servicing fees, and other Estate professional fees and expenses (D. Ex. P-45), the Estate has been damaged in the amount of $13,485,492 as of the date of the Trial. Accordingly, the Court finds that the Trustee is entitled to a judgment against Dickson, DMI, DHMI, Double S, Crisco, Victory Consulting, Dickson Enterprises, Warren Foundation, Phalanx, and BBCC, jointly

and severally, in the amount of $13,485,492, together with post-judgment interest at the legal rate until satisfied.

13. Count 13 (Conversion): Dickson and the Corporate Defendants converted property of the Estate. As previously stated, the Trustee's Victim Impact Statement (D. Ex. P-4) submitted in the Criminal Proceeding on December 8, 2015, reflected approximate damages to the Estate as of that date in the amount of $16,454,339. After subtracting credits to Dickson per the Restitution Order in the amount of $6,703,837.78 and after adding additional Trustee's fees, ClearSpring's servicing fees, and additional Estate professional fees and expenses (D. Ex. P-45), the Estate has been damaged in the amount of $13,485,492 as of the date of Trial. Accordingly, the Trustee is entitled to a judgment against Dickson and the Corporate Defendants, jointly and severally, in the amount of $13,485,492, together with post-judgment interest at the legal rate until satisfied.

14. Count 14 (Usurpation of Corporate Opportunity): The Trustee has abandoned Count 14, and, therefore, Count 14 is dismissed with prejudice.

15. Count 15 (Equitable Subordination of Claims): Pursuant to § 510, Dickson's Proof of Claim is equitably subordinated to all other creditors and claims.

16. Count 16 (Civil Conspiracy): The Trustee failed to meet her burden of proof with respect to her civil conspiracy claim, and, therefore, Count 16 is dismissed with prejudice.

17. Count 17 (Veil Piercing/Alter Ego): The Trustee has abandoned Count 17, and, therefore, Count 17 is dismissed with prejudice.

18. The Trustee's claims against Rhodes are dismissed with prejudice.

19. The Trustee is entitled only to a single recovery where the same damages are granted under different legal theories.

20. The costs of the Dickson Adversary Proceeding are taxed against Dickson and the Corporate Defendants under 28 U.S.C. § 1920.

To the extent the Court has not addressed any of the parties' other arguments or positions, it has considered them and determined they would not alter the result. A separate final judgment consistent with this Opinion will be entered in accordance with Rules 7054 and 9021 of the Federal Rules of Bankruptcy Procedure.

##END OF OPINION##

EXHIBIT H

(To be supplied)

EXHIBIT I

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
March 5, 2021
Lyle W. Cayce
Clerk

No. 20-60718

IN THE MATTER OF: COMMUNITY HOME FINANCIAL SERVICES, INCORPORATED,

Debtor,

EDWARDS FAMILY PARTNERSHIP, L.P.; BEHER HOLDINGS TRUST,

Appellees,

versus

KRISTINA M. JOHNSON, *Trustee for Community Home Financial Services, Incorporated*,

Appellants.

Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. 3:18-CV-158

Before ELROD, WILLETT, and ENGELHARDT, *Circuit Judges*.

JENNIFER WALKER ELROD, *Circuit Judge*:

The bankruptcy court awarded fees to the bankruptcy debtor's counsel for work performed prior to the appointment of a trustee. Creditors

appealed the fee award to the district court. After a two-and-a-half-year delay, the district court vacated the fee award. Because the district court improperly assessed the benefit of counsel's services to the estate from hindsight, rather than assessing the reasonableness and likely benefit from the time the services were rendered, we REVERSE the district court's judgment and REMAND.

I.

This dispute arises from the bankruptcy proceedings for Community Home Financial Services, Inc. (CHFS), which is not a party to this appeal. Heavily indebted to the appellants—Edwards Family Partnership, Inc. and Beher Holdings Trust—and others, CHFS entered Chapter 11 bankruptcy to restructure its debts in May of 2012. *In re Cmty. Home Fin. Servs.*, No. 12-1703, 2015 WL 8113699, at *2–3 (Bankr. S.D. Miss. Dec. 7, 2015).[1]

Throughout the bankruptcy, the two largest creditors were the appellants, Edwards Family and Beher.[2] CHFS remained the debtor in possession, and CHFS's president acted as its designated representative. *Id.* at *2. With the approval of the bankruptcy court, Derek A. Henderson and Wells Marble & Hurst, PLLC represented CHFS. *Id.*; *see* 11 U.S.C. § 327.

---

[1] The parties have made it difficult to construct an accurate factual and procedural history by omitting record citations, including incorrect record citations, and making slightly incorrect factual assertions. We remind counsel of their duty to support "[e]very assertion in briefs regarding matter in the record . . . by a reference to the page number of the original record." 5th Cir. R. 28.2.2; *see also* Fed. R. App. P. 28(a)(6), (b).

[2] The bankruptcy court's opinion notes that the two entities tried to characterize themselves as a single entity called the "Edwards Entities." "The advantage of this tactic is the suggestion that there is only a single creditor in the Bankruptcy Case." But Edwards Family and Beher are, in fact, distinct, with the former being "a limited partnership formed under the laws of Delaware" and the latter being a "trust formed under Bermuda law."

As counsel for CHFS, Henderson and Wells Marble initiated a series of adversary proceedings against Edwards Family and Beher between August 2012 and November 2013 challenging the priority of certain claims. Meanwhile, Henderson and Wells Marble proposed a reorganization plan on January 29, 2013. 2015 WL 8113699, at *9.

Both Edwards Family and Beher objected to the plan and moved to appoint a trustee and to convert the bankruptcy to a Chapter 7 case. *Id.* The bankruptcy court held confirmation of the proposed reorganization plan in abeyance. *Id.* As a result, Henderson and Wells Marble responded to these motions as they continued to pursue the adversary proceedings. *Id.* Wells Marble withdrew as counsel for CHFS on November 13, 2013.

As the bankruptcy case proceeded, CHFS's president transferred "all but approximately $7,500.00 from" CHFS's account—over $9 million in cash—to a Panamanian account. *In re Cmty. Home Fin. Servs.*, 571 B.R. 714, 718 (Bankr. S.D. Miss. 2017). CHFS's president then fled the country and "set up a 'rogue' operation of CHFS's business" out of new branch offices in Panama and Costa Rica. *Id.*

On December 20, 2013, Henderson filed a disclosure informing the bankruptcy court that CHFS's president had transferred those funds and moved CHFS's principal place of business from Jackson, Mississippi to Panama. *Id.* Three days after the disclosure, the bankruptcy court appointed an emergency trustee, and then it appointed Kristina Johnson as Trustee on January 21, 2014. *Id.* at 719. Henderson withdrew as counsel on March 6, 2014.

Both Henderson and Wells Marble sought fees for the services they performed in connection with the adversary proceedings before Johnson was appointed as Trustee. Wells Marble sought fees for its services from May 1, 2013 through October 31, 2013, approximately two weeks before Wells

Marble withdrew as counsel. Henderson sought fees for his services from September 2, 2013 through December 28, 2013, approximately three weeks before Johnson was appointed as Trustee.

The bankruptcy court awarded fees to both Henderson and Wells Marble in December 2015 and January 2016. Edwards Family and Beher timely appealed the awards. In September of 2017, the district court affirmed in part but remanded for further findings of fact regarding the fees awarded for "commencing and then litigating certain Adversary Proceedings in the bankruptcy matter."

On February 27, 2018, the bankruptcy court once again awarded fees to Henderson and Wells Marble in connection with the adversary proceedings. The bankruptcy court concluded that those services "were necessary to the administration of the bankruptcy case and reasonably likely to benefit the bankruptcy estate." The bankruptcy court emphasized that the adversary proceedings were necessary "to create a clear path for an exit strategy in the Bankruptcy Case" and to "reduc[e] and reclassif[y]" certain claims."

Edwards Family and Beher filed a notice of appeal to the district court on March 13, 2018.[3] On August 5, 2020, the district court vacated the fee award. In the district court's view, Henderson and Wells Marble's decision to pursue adversary proceedings "was not a good gamble."

---

[3] Consolidated appeals of the bankruptcy court's rulings on the merits of the adversary proceedings were also pending in the district court. In response to a petition for writ of mandamus, we advised the district court to rule on those consolidated appeals within 60 days. *In re Johnson, Trustee for Cmty. Home Fin. Servs. Corp.*, 814 F. App'x 881 (5th Cir. 2020). The district court's ruling on the fee award at issue in this case came two days after our order on the petition for writ of mandamus.

Henderson, Wells Marble, and the Trustee appealed, arguing that the district court improperly evaluated the benefit of the adversary proceedings retrospectively. Edwards Family and Beher moved to dismiss the Trustee for lack of standing. We carried that motion with the case.

Henderson and Wells Marble then settled their fee dispute with Edwards Family and Beher, and those parties jointly moved to dismiss Henderson and Wells Marble from the appeal on October 13, 2020. We granted that motion on October 14, 2020. The only remaining appellant is the Trustee.

With the Henderson and Wells Marble fee disputes settled, Edwards Family and Beher moved to dismiss the appeal as moot. The Trustee opposed the motion. In the Trustee's view, the case remains live because the Trustee has an ongoing duty throughout the pendency of a bankruptcy proceeding to represent the interests of the bankruptcy estate in the award of fees. In the alternative, the Trustee moved to vacate the district court's judgment if we should dismiss this appeal as moot. We carried those motions with the case.

II.

In reviewing a district court's ruling on a bankruptcy court's fee award, we review the bankruptcy court's decision using the same standard of review as the district court. *Okla. State Treasurer v. Linn Operating, Inc. (In re Linn Energy, L.L.C.)*, 927 F.3d 862, 866 (5th Cir. 2019). "We therefore review the bankruptcy court's award of attorneys' fees for abuse of discretion." *In re Cahill*, 428 F.3d 536, 539 (5th Cir. 2005). "[A]s a second review court," we review "the bankruptcy court's conclusions of law de novo and its findings of fact for clear error." 927 F.3d at 866 (quoting *Viegelahn v. Lopez (In re Lopez)*, 897 F.3d 663, 668 (5th Cir. 2018)).

III.

Edwards Family and Beher contend that their settlement with Henderson and Wells Marble mooted this appeal. The Trustee, however, asserts that the case remains live notwithstanding the settlement. For the reasons stated herein, we agree with the Trustee.

"Article III's 'case or controversy' requirement permits federal courts to adjudicate only live disputes—a party must retain a 'legally cognizable interest in the outcome' of an issue, or its resolution is moot." *Hinkley v. Envoy Air*, Inc., 968 F.3d 544, 548 (5th Cir. 2020) (quoting *Campanioni v. Barr*, 962 F.2d 461, 464 (5th Cir. 1992)). "A controversy becomes moot where, as a result of intervening circumstances, there are no longer adverse parties with sufficient legal interest to maintain the litigation." *Scruggs v. Lowman (In re Scruggs)*, 392 F.3d 124, 128 (5th Cir. 2004) (quoting *Chevron U.S.A., Inc. v. Traillour Oil Co.*, 987 F.2d 1138, 1153 (5th Cir. 1993)).

In the view of Edwards Family and Beher, there is no longer any party with sufficient legal interest in this case because the Trustee did not have a legal interest to begin with:

> The dispute regarding the fee awards has now been fully resolved by compromise between the only parties with a legally cognizable interest in the dispute: Henderson and Wells Marble on one side (the parties who applied for fees), and the Edwards Entities on the other (the creditors who objected to the fees). . . . The Trustee has filed a principal brief on the merits, but the Trustee always lacked a direct interest in the judgment, and the underlying dispute is now moot.

Thus, Edwards Family and Beher effectively collapse the mootness question with the question of the Trustee's standing. Edwards Family and Beher, however, have an incorrect understanding of trustee standing.

Edwards Family and Beher point to the test for standing for interested parties in a bankruptcy: "a bankruptcy appellant must . . . show that he was 'directly and adversely affected pecuniarily by the order of the bankruptcy court.'" *Furlough v. Cage (In re Technicool Sys., Inc.)*, 896 F.3d 382, 385 (5th Cir. 2018) (quoting *Fortune Nat. Res. Corp. v. U.S. Dep't of Interior*, 806 F.3d 363, 365 (5th Cir. 2015)). A bankruptcy trustee, however, is distinct from all other bankruptcy parties because the trustee is responsible for the administration of the bankruptcy estate.

The Fourth Circuit has noted that trustees can never establish that they were pecuniarily affected by a bankruptcy order because trustees "never have pecuniary interests in cases." *U.S. Trustee for the W. Dist. of Va. (In re Clark)*, 927 F.2d 793, 795 (4th Cir. 1991) (involving a United States trustee); *see also Richman v. First Woman's Bank (In re Richman)*, 104 F.3d 654, 657 (4th Cir. 1997) (determining that the bankruptcy trustee had standing as "the representative of the bankrupt's estate"). Trustee standing does not arise from the trustee's pecuniary interest, but rather from the trustee's "official duty to enforce the bankruptcy law in the public interest." *In re Clark*, 927 F.2d at 796 (citing *Sec. & Exch. Comm'n v. U.S. Realty & Improvement Co.*, 310 U.S. 434, 460 (1940)).

The First, Sixth, and Ninth Circuits have also recognized the inadequacy of a pecuniary-interest test for trustee standing. *See In re Plaza de Diego Shopping Ctr., Inc.*, 911 F.2d 820, 824 (1st Cir. 1990) (citing *Morgenstern v. Revco D.S., Inc. (In re Revco)*, 898 F.2d 498, 499 (6th Cir. 1990)) (determining that the United States trustee had standing without a pecuniary interest); *Moneymaker v. CoBen (In re Eisen)*, 31 F.3d 1447, 1451 n.2 (9th Cir. 1994) (quoting *Hancock Bank v. Jefferson*, 73 B.R. 183, 185 (Bankr. S.D. Miss. 1986)) ("Once appointed a trustee, the debtor's assets and claims pass to the trustee, making the trustee 'the proper party in interest . . . .'").

Our own cases have implicitly recognized that trustee standing does not depend on a pecuniary interest. For example, we have previously held, in a Chapter 7 case, that "[i]n the bankruptcy context, the bankruptcy trustee is the real party in interest with respect to claims falling within the bankruptcy estate." *United States ex rel. Spicer v. Westbrook*, 751 F.3d 354, 362 (5th Cir. 2014). A trustee's standing comes from the trustee's duties to administer the bankruptcy estate, not from any pecuniary interest in the bankruptcy. *See id.*

In light of the explicit statements from our sister circuits and the implicit guidance from our own caselaw, we hold that the Trustee in this case has standing and this case is not moot because the payment of fees to Henderson and Wells Marble directly affects the administration of the bankruptcy estate. Even though Henderson and Wells Marble have settled their fee dispute with Edwards Family and Beher, the Trustee remains tasked with ensuring that only proper payments are made from the bankruptcy estate. It is immaterial whether the Trustee or Edwards Family and Beher will ultimately prevail on this appeal. *See Texas v. United States*, 945 F.3d 355, 383 (5th Cir. 2019) ("[C]ourts cannot fuse the standing inquiry into the merits."). Rather, the district court order presents an issue of the administration of the estate, meaning the Trustee has a "sufficient legal interest to maintain the litigation," such that this appeal is not moot. *In re Scruggs*, 392 F.3d at 12.

IV.

In *In re Woerner*, we held that "if a fee applicant establishes that its services were 'necessary to the administration' of a bankruptcy case or 'reasonably likely to benefit' the bankruptcy estate 'at the time at which [they were] rendered,' then the services are compensable." *Barron & Newburger, P.C. v. Texas Skyline, Ltd. (In re Woerner)*, 783 F.3d 266, 276 (5th Cir. 2015)

(internal citation omitted) (quoting 11 U.S.C. § 330(a)(3)(C), (4)(A)). In awarding fees, hindsight is irrelevant; retrospect is irrelevant; "material benefit to the bankruptcy estate" is irrelevant. *Id.* at 273–74. "What matters is that, prospectively, the choice to pursue a course of action was reasonable." *Id.* at 274.

Despite clear Fifth Circuit law that the services must be reasonable at the time they were rendered, the district court vacated the fee awards to Henderson and Wells Marble for their services related to the adversary proceedings. The district court determined that the decision to pursue adversary proceedings "was an expensive course of action from the outset. . . . [I]t would have been more cost-effective, faster, and better for the estate to pay off the few unsecured creditors rather than hire professionals to litigate Adversary Proceedings quibbling about their priority." "This was not a good gamble."

The district court was wrong to vacate the bankruptcy court award based on its own retrospective assessment of the propriety of the adversary proceedings without giving the "the deference that is the hallmark of abuse-of-discretion review." *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 143 (1997). The district court should have looked at the reasonableness of pursuing the adversary proceedings from the time Henderson and Wells Marble provided their services. *See, e.g.*, *In re Raygoza*, 556 B.R. 813, 824 (Bankr. S.D. Tex. 2016); 1 Bankruptcy Law Manual § 4:38 n.10 (5th ed. 2020). Viewed prospectively, pursuit of the adversary proceedings was "necessary to the administration of the case" to resolve otherwise unsettled disputes about the priority of claims. *See* 11 U.S.C. § 330(a)(1)(A), (a)(3), (a)(4)(A)(ii).

* * *

We REVERSE the judgment of the district court and REMAND for the district court to reinstate the bankruptcy court's fee award. Accordingly,

the appellees' motion to dismiss the Trustee from the appeal for lack of standing is DENIED, and the appellees' motion to dismiss the appeal as moot is DENIED. The appellant's alternative motion to vacate the judgment of the district court is DENIED AS MOOT.

Subject: FW: Activity in Case 3:18-cv-00158-CWR-LRA Edwards Family Partnership, LP et al v. Johnson, Trustee for Community Home Financial Services Corporation et al Copy of Opinion - USCA

Date: Monday, March 29, 2021 at 9:59:25 AM Central Daylight Time

From: MSSBdb_Appeals <MSSB_Appeals@mssb.uscourts.gov>

To: Collette Derouen <Collette_Derouen@mssb.uscourts.gov>, Dawn Sanderson <Dawn_Sanderson@mssb.uscourts.gov>, Candice Ramage <Candice_Ramage@mssb.uscourts.gov>, Cynthia Loftin <Cynthia_Loftin@mssb.uscourts.gov>, Margaret Farrell <Margaret_Farrell@mssb.uscourts.gov>

From: cmecfhelpdesk@mssd.uscourts.gov <cmecfhelpdesk@mssd.uscourts.gov>
Sent: Monday, March 29, 2021 2:58:20 PM (UTC+00:00) Monrovia, Reykjavik
To: MSSDdb_Courtmail <courtmail@mssd.uscourts.gov>
Subject: Activity in Case 3:18-cv-00158-CWR-LRA Edwards Family Partnership, LP et al v. Johnson, Trustee for Community Home Financial Services Corporation et al Copy of Opinion - USCA

This is an automatic e-mail message generated by the CM/ECF system. Please DO NOT RESPOND to this e-mail because the mail box is unattended.
*****NOTE TO PUBLIC ACCESS USERS*** Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing. However, if the referenced document is a transcript, the free copy and 30 page limit do not apply.**

U.S. District Court

Southern District of Mississippi

Notice of Electronic Filing

The following transaction was entered on 3/29/2021 at 9:58 AM CDT and filed on 3/29/2021

Case Name: Edwards Family Partnership, LP et al v. Johnson, Trustee for Community Home Financial Services Corporation et al

Case Number: 3:18-cv-00158-CWR-LRA

Filer:

WARNING: CASE CLOSED on 08/05/2020

Document Number: 30

Docket Text:
Copy of Opinion - USCA re [20] Notice of Appeal. We REVERSE the judgment of the district court and REMAND for the district court to reinstate the bankruptcy courts fee award. Accordingly, the appellees motion to dismiss the Trustee from the appeal for lack of standing is DENIED, and the appellees motion to dismiss the appeal as moot is DENIED. The appellants alternative motion to vacate the judgment of the district court is DENIED AS MOOT. (Attachments: # (1) Cover Letter)(PG)

3:18-cv-00158-CWR-LRA Notice has been electronically mailed to:

Derek A. Henderson derek@derekhendersonlaw.com, melissa@derekhendersonlaw.com

Jeffrey R. Barber jbarber@joneswalker.com, dthomas@joneswalker.com, jeff-barber-3516@ecf.pacerpro.com,

kbrabston@joneswalker.com, mgreen@joneswalker.com

Jimmy Fred Spencer , Jr jspencer@watkinseager.com, mryan@watkinseager.com

Kristina Crosswell Johnson kjohnson@joneswalker.com, kbrabston@joneswalker.com, kristi-johnson-0038@ecf.pacerpro.com

Mark A. Mintz - PHV mmintz@joneswalker.com

Roy H. Liddell royliddell@wellsmar.com, jwilson@wellsmar.com

Stephanie J. Bentley sbentley@mcguirewoods.com, vbryant@mcguirewoods.com

Stephanie M. Rippee srippee@watkinseager.com, bprince@watkinseager.com

3:18-cv-00158-CWR-LRA Notice has been delivered by other means to:

The following document(s) are associated with this transaction:

Document description: Main Document
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1081288797 [Date=3/29/2021] [FileNumber=5872573-0
] [b2d80fdb2b1028e1f4f289468390b0e0668b41c9745ff12062dd75722f08248a028
3dfe3106ce1f9a3f1a3b57c35cdbb205c456612bada2ea8d5f86013c4f95d]]
Document description: Cover Letter
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1081288797 [Date=3/29/2021] [FileNumber=5872573-1
] [97e153eb8071c3058d493b4b3c7223a6d7717f22f34758b7dc8437e166e7a943bf3
d9f33581e300e330c904c6fc9028256ff8df49a9c10a314eb3aa622d8dc64]]