

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA  
Augusta Division

IN RE:	)	Chapter 13 Case
	)	Number <u>98-13017</u>
MEMIE L. LAYNE	)	
	)	
Debtor	)	
_____	)	
	)	FILED
MEMIE L. LAYNE	)	at 8 O'clock & 30 min. a.m.
BARNEE C. BAXTER, Trustee	)	Date 9-22-00
	)	
Plaintiffs	)	
v.	)	
	)	
FIRSTAR BANK, N.A.	)	
fka STAR BANK, N.A.	)	
fka GREAT FINANCIAL BANK,	)	
	)	
First Defendant	)	
	)	
STAR BANK MORTGAGE,	)	Adversary Proceeding
	)	Number <u>99-01078A</u>
	)	
Second Defendant	)	
	)	
BARRETT, BURKE, WILSON, CASTLE,	)	
DAFFIN & FRAPPIER, L.L.P.	)	
	)	
Third Defendant	)	
_____	)	

**ORDER**

By motion, two of the defendants, Firststar Bank, N.A.,

f/k/a Star Bank, N.A., f/k/a Great Financial Bank, and Star Bank Mortgage (together "Firststar"), seek to have the Second Recast Complaint of Memie L. Layne, chapter 13 debtor, and Barnee C. Baxter, chapter 13 trustee (together "Plaintiffs", individually "Debtor" and "Trustee"), dismissed. By separate motion, the third defendant Barrett, Burke, Wilson, Castle, Daffin & Frappier, L.L.P. ("Barrett"), also moves for dismissal. All Defendants seek dismissal of all counts, on grounds that Plaintiffs fail to state claims for which relief may be granted and that the bankruptcy court lacks jurisdiction over the asserted class actions.

Defendants' motion to dismiss for failure to state a claim for which relief may be granted is brought under Federal Rule of Civil Procedure (FRCP) 12(b)(6), which applies to bankruptcy cases under Federal Rule of Bankruptcy Procedure (FRBP) 7012(b). The standard for determination of a FRCP 12(b)(6) motion is that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 78 S.Ct. 99, 102 2 L.Ed.2d 80 (1957). "The issue is not whether a plaintiff will ultimately prevail but whether a claimant is entitled to offer evidence to support the claims." Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686,

40 L.Ed.2d 90 (1974). The court may consider facts alleged in the complaint as well as official public records such as a debtor's bankruptcy case file. Pension Benefit Guar. Corp. v. White Consol. Indus., Inc., 998 F.2d 1192, 1196 (3<sup>rd</sup> Cir. 1993) (citations omitted); Watterson v. Page, 987 F.2d 1, 3 (1<sup>st</sup> Cir. 1993) (citations omitted). For purposes of a motion to dismiss, the factual allegations of the complaint are taken as true and are construed favorably to the pleader. Id.; Solis-Ramirez v. U.S. Dept. of Justice, 758 F.2d 1426, 1429 (11<sup>th</sup> Cir. 1985). However, conclusions of law asserted need not be accepted as true. The court makes its own determination of legal issues. Solis-Ramirez, 758 F.2d at 1429. Finally, ". . . a Rule 12(b)(6) motion to dismiss need not be granted nor denied in toto but may be granted as to part of a complaint and denied as to the remainder." Decker v. Massey-Ferguson, Ltd., 681 F.2d 111, 115 (2<sup>nd</sup> Cir. 1982) (citations omitted).

Defendants make two general arguments for dismissing the adversary proceeding as a whole, as well as specific arguments for dismissal of each count.

The facts taken from the pleadings and the Debtor's bankruptcy case file and construed favorably for the Plaintiffs are as follows. On April 22, 1988, Debtor obtained a loan from Mortgage First Corporation in the original principal amount of \$50,197.00.

As security for the loan, Debtor conveyed by security deed real property at 2111 Boykin Road, Augusta, Georgia, 30906. Mortgage First Corporation subsequently assigned the loan to Firststar.

Debtor filed her bankruptcy case on November 2, 1998, and listed Firststar as a creditor. On February 23, 1999, Firststar filed a proof of claim seeking all payment arrearages on the loan plus fees totaling \$350.66: attorney fees of \$125.00, inspection fees of \$118.95, accrued late charges of \$100.10, and uncollected late charges of \$6.61. Debtor's chapter 13 plan was confirmed on March 29, 1999. At confirmation Plaintiffs retained the right to file an objection to Firststar's claim, as noted on "Trustee's Motion to Confirm Plan, As Amended."

Debtor filed an objection to Firststar's claim on April 8, 1999, alleging that all fees were unauthorized and that the claim lacked proof of assignment. Plaintiffs also sought to have the claim reduced by the amount of the fees (\$350.66) and that the proper party in interest be required to file the proof of claim. At a hearing on May 17, the parties agreed to a continuance to July 8. Firststar filed an amended proof of claim in June, eliminating the attorney fees of \$125.00 but continuing to include the other fees. At the July 8 hearing, the objection to claim was voluntarily dismissed without prejudice.

On July 26, 1999, Plaintiffs filed this adversary proceeding. The Second Recast Complaint lists six counts. Count I alleges that all listed fees are unauthorized and seeks return of collected amounts and an injunction preventing collection of the fees. Count II alleges that Firststar's proof of claim violated the automatic stay of 11 U.S.C. §362(a) and seeks damages. Count III seeks certification of a class of debtors in whose bankruptcies Firststar filed claims that included such fees, and then seeks declaratory judgment, injunctive relief, turnover of amounts collected, and damages on behalf of that class. Count IV asks that Defendants be found in contempt of court for alleged violation of Local Bankruptcy Rule 3001-2, which requires that all claims be filed for the net principal balance only as of the date of the bankruptcy filing. Count V seeks certification of a class of debtors in the Southern District of Georgia and requests damages pursuant to Local Bankruptcy Rule 3001-2 on behalf of that class. Last, Count VI alleges that violation of the local bankruptcy rule in turn violated FRCP 9011, and asks that sanctions be imposed under that rule.

#### Res Judicata

Defendants first argue that the doctrine of res judicata

requires dismissal of the Second Recast Complaint. They contend that the confirmed plan binds the Debtor and has res judicata effect on all issues which were or could have been adjudicated at the confirmation hearing. 11 U.S.C. § 1327(a); In re Varat Enterprises, Inc., 81 F.3d 1310 (4<sup>th</sup> Cir. 1996); In re Coleman, 231 B.R. 397 (Bankr.S.D.Ga. 1999); In re Stevens, 187 B.R. 48 (Bankr.S.D.Ga. 1995); In re Clark, 172 B.R. 701 (Bankr.S.D.Ga. 1994); see also In re Bernard, 189 B.R. 1017 (Bankr.N.D.Ga. 1996) (holding that debtor's request for reconsideration did not come within exception to res judicata bar). They further note that an objection to claim was filed, the claim was amended, and the objection was withdrawn. Based on the confirmed plan and acceptance of the amended claim, res judicata is argued to bar Plaintiffs' claims.

Barrett notes authority for allowing post-confirmation objections which are motions for reconsideration. Clark, 172 B.R. at 701; In re Fryer, 172 B.R. 1020 (Bankr.S.D.Ga. 1994). However, Barrett contends that the cases do not apply because reconsideration is not the purpose of the complaint. Barrett is wrong. Claim reconsideration is precisely one of the purposes of this complaint. Plaintiffs want the allowed claim reconsidered as to the claimed fees. They also seek affirmative relief, the return of monies paid towards those fees, which requires that the request for

reconsideration be brought as an adversary proceeding.

In the underlying bankruptcy case, "Trustee's Motion to Confirm Plan, As Amended," was filed according to the bankruptcy case record at the confirmation hearing March 29, 1999 which amended Debtor's plan and retained the right to file an objection to Firststar's claim within thirty days of confirmation. An objection was filed within this time limit. The claim was amended, and Debtor filed a "Withdrawal Without Prejudice of Objection to Claim Filed by Star Bank, NA."

COMES NOW your debtor, by counsel, and hereby withdraws without prejudice the objection to the claim filed on behalf of Star Bank, NA. After filing of the objection, Firststar Bank, NA filed an amended claim to delete the bankruptcy attorney fees. The debtor withdraws without prejudice the objection to the original claim.

The objection was withdrawn "without prejudice."

"The words 'without prejudice,' as used in judgment, ordinarily import the contemplation of further proceedings, and, when they appear in an order or decree, it shows that the judicial act is not intended to be res judicata of the merits of the controversy. [citation omitted].

Black's Law Dictionary 1437 (5th ed. 1979). Debtor's voluntary dismissal of the objection made clear that further legal action was contemplated.

The amended claim did not include the attorney fees

charge. Therefore, Plaintiffs cannot now complain about a charge which no longer exists. Claims asserted in the Second Recast Complaint regarding the attorney fees charge are dismissed. Arguments relating to the inspection fees of \$118.95, accrued late charges of \$100.10, and uncollected late charges of \$6.61. (together "Fees") are discussed below.

This adversary proceeding was not commenced within thirty days of confirmation, which is the time limit retained by the Trustee's motion. However, 11 U.S.C. §502(j)<sup>1</sup> and FRBP 3008<sup>2</sup> provide

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<sup>1</sup>11 U.S.C. §502(j) provides:

(j) A claim that has been allowed or disallowed may be reconsidered for cause. A reconsidered claim may be allowed or disallowed according to the equities of the case. Reconsideration of a claim under this subsection does not affect the validity of any payment or transfer from the estate made to a holder of an allowed claim on account of such allowed claim that is not reconsidered, but if a reconsidered claim is allowed and is of the same class as such holder's claim, such holder may not receive any additional payment or transfer from the estate on account of such holder's allowed claim until the holder of such reconsidered and allowed claim receives payment on account of such claim proportionate in value to that already received by such other holder. This subsection does not alter or modify the trustee's right to recover from a creditor any excess payment or transfer made to such creditor.

<sup>2</sup>FRBP 3008 provides:

A party in interest may move for

the authority and procedure for post-confirmation claim reconsideration at the discretion of the court. In re Gomez, 250 B.R. 397, 400 (Bankr. M.D.Fla. 1999); In re Coleman, 200 B.R. 403, 407 (Bankr.S.D.Ala. 1996); In re Bernard, 189 B.R. 1017, 1021 (Bankr.N.D.Ga. 1996) (“... the Court finds section 502(j) to pose a narrow exception to the otherwise unwavering bar which section 1327(a) places upon re-litigation of claim allowance after confirmation.”); In re Lee, 189 B.R. 692, 695 (Bankr.M.D.Tenn. 1995); Fryer, 172 B.R. at 1024;<sup>3</sup> 5 Norton Bankruptcy Law and Practice 2d, § 122:12, p. 122-117 & 122-118 (citations omitted) (“Res judicata does not apply to the postconfirmation reconsideration of the allowance of a claim, or to determination of the precise amount of each creditor’s claim. ... A confirmed plan ... does not stop a trustee from filing a motion to reconsider a

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reconsideration of an order allowing or disallowing a claim against the estate. The court after a hearing on notice shall enter an appropriate order.

<sup>3</sup> Firststar comments that Fryer may be of doubtful validity, citing later proceedings in the Fryer case as well as outside litigation. In re Fryer, 183 B.R. 322 (Bankr.S.D.Ga. 1995) and 183 B.R. 654 (Bankr. S.D. 1995); Glinton v. And R, Inc., 173 F.3d 1352 (11<sup>th</sup> Cir. 1999); Glinton v. And R, Inc., 524 S.E.2d 481 (Ga. 1999). These cases concern Georgia usury and pawnshop law, which bear no relation to this adversary proceeding. Fryer’s holding as to 11 U.S.C. §502(j) and FRBP 3008 stands unaffected by these subsequent rulings.

previously allowed or disallowed claim under §502(j).”).

A claim may be reconsidered “for cause.” 11 U.S.C. §502(j).

Section 502(j) does not permit the reckless reconsideration of a claim nor does § 502(j) disregard the provision of §502(a) and §1327(a). Instead, §502(j) allows reconsideration of allowed or disallowed claims, but only for cause.

Gomez, 250 B.R. at 400 (citations omitted). Whether there is cause to reconsider a claim turns on the facts of the individual case.<sup>4</sup> Gomez, 250 B.R. at 401; Bernard, 189 B.R. at 1022; Lee, 189 B.R. at 696; Fryer, 172 B.R. at 1024.

Reconsideration of both allowed and disallowed claims may occur at any time before a case is closed, but in such reconsideration the court must weigh the extent and reasonableness of any delay, or prejudice to any party in interest, the effect on efficient court administration and the moving party’s good faith.

Fryer, 172 B.R. at 1024 (citations omitted).

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<sup>4</sup>Precedent in this district requires “cause” for reconsideration to be determined according to FRCP 60(b), incorporated in FRBP 9024. In re Clark, 172 B.R. 701, 705 (Bankr.S.D.Ga. 1994) (citing Colley v. National Bank of Texas (In re Colley), 814 F.2d 1008, 1010 (5<sup>th</sup> Cir. 1987)). However, the cases holding to this standard dealt with proofs of claims that had been actually litigated, and in Colley the Fifth Circuit Court of Appeals held that FRCP 60(b) standards only apply when the parties have actually litigated an objection on the proof of claim. Gomez, 250 B.R. at 401, citing Colley, 814 F.2d at 1010.

Plaintiffs have alleged facts sufficient to support reconsideration. In a motion to dismiss, factual allegations are taken as true and construed in favor of the pleader. Scheuer v. Rhodes, 416 U.S. at 236; Solis-Ramirez, 758 F.2d at 1429. Motion to dismiss based on the doctrine of res judicata is denied because the alleged facts, construed in favor of Plaintiffs, may support reconsideration of the amount of the allowed claim.

Furthermore, no case cited by Defendants holds that this Court cannot reconsider the amount of Firststar's allowed claim. Two of the cited cases state that §502(j) authorizes a bankruptcy court to reconsider claims at its discretion. In both cases, reconsideration was denied due to the length of time elapsed since confirmation. Clark, 172 B.R. at 701; Bernard, 189 B.R. at 1017. Another case, Varat Enterprises, 81 F.3d 1310 (4<sup>th</sup> Cir. 1996), did not address §502(j). Defendants' remaining citations do not address res judicata in the context of reconsidering the amount of an allowed claim. See In re Coleman, 231 B.R. 397 (Bankr.S.D.Ga. 1999) (secured claim could not be reclassified upon surrender of collateral); In re Stevens, 187 B.R. 48 (Bankr.S.D.Ga. 1995) (creditor was bound by terms of confirmed plan and could not retain overpayment when payments from trustee plus insurance proceeds exceeded allowed claim).

### Procedural Flaws

Firststar's second general ground contends that Plaintiffs were required by the Bankruptcy Code to bring this action as a contested matter under FRBP 9014.

FRBP 3008 permits motion for reconsideration of claims. A motion for reconsideration of the allowance of a claim is an objection to some aspect of the claim. Objections to claims are governed by FRBP 3007, which concludes, "If an objection to a claim is joined with a demand for relief of the kind specified in Rule 7001, it becomes an adversary proceeding." FRBP 7001(7) & (9) mandates that proceedings for injunctions or for declaratory judgments be brought as adversary proceedings. The Second Recast Complaint seeks such relief.

Firststar further contends that Plaintiffs failed to respond to this issue (and others) in their reply memorandum, and that such failure to respond is deemed a concession. Failure to respond is only deemed a concession when a responsive pleading is required. "Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided." FRCP 8(d) & 12(b), FRBP 7008 & 7012. No response to Defendants' motion was required. Nothing was conceded. Firststar's contention is without

merit. It will not be readdressed as to the remainder of Firststar's arguments to which Plaintiffs did not respond.

The action is properly brought. Motion to dismiss on procedural grounds is denied.

I now address the motions to dismiss as to each count of the complaint separately.

### Count I

In Count I of the Second Recast Complaint, Plaintiffs allege that the Fees<sup>5</sup> were not authorized by the loan documents and that Defendants were required to, but did not, obtain approval for the Fees pursuant to 11 U.S.C. §506.<sup>6</sup> Plaintiffs seek return of the

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<sup>5</sup> As stated above, the bankruptcy attorney fees of \$125.00 complained of in Count I are not considered because they were deleted from the amended proof of claim. The remaining contested amounts are uncollected late charges of \$6.61, inspection fees of \$118.95, and accrued late charges of \$100.10, totaling \$225.66.

<sup>6</sup>11 U.S.C. §506 provides:

(a) An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of

collected amounts and an injunction preventing Firststar from further collection of the fees, and cite 11 U.S.C. §105<sup>7</sup> as

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such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

(b) To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.

(c) The trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim.

(d) To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void, unless--

(1) such claim was disallowed only under section 502(b)(5) or 502(e) of this title; or  
(2) such claim is not an allowed secured claim due only to the failure of any entity to file a proof of such claim under section 501 of this title.

<sup>7</sup>11 U.S.C. §105 provides:

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to

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enforce or implement court orders or rules, or to prevent an abuse of process.

(b) Notwithstanding subsection (a) of this section, a court may not appoint a receiver in a case under this title.

(c) The ability of any district judge or other officer or employee of a district court to exercise any of the authority or responsibilities conferred upon the court under this title shall be determined by reference to the provisions relating to such judge, officer, or employee set forth in title 28. This subsection shall not be interpreted to exclude bankruptcy judges and other officers or employees appointed pursuant to chapter 6 of title 28 from its operation.

(d) The court, on its own motion or on the request of a party in interest, may--

(1) hold a status conference regarding any case or proceeding under this title after notice to the parties in interest; and

(2) unless inconsistent with another provision of this title or with applicable Federal Rules of Bankruptcy Procedure, issue an order at any such conference prescribing such limitations and conditions as the court deems appropriate to ensure that the case is handled expeditiously and economically, including an order that--

(A) sets the date by which the trustee must assume or reject an executory contract or unexpired lease; or

(B) in a case under chapter 11 of this title--

(i) sets a date by which the debtor, or trustee if one has been appointed, shall file a disclosure statement and plan;

(ii) sets a date by which the debtor, or trustee if one has been appointed, shall solicit acceptances of a plan;

(iii) sets the date by which a party in interest other than a debtor may file a plan;

(iv) sets a date by which a proponent of a plan, other than the debtor, shall solicit acceptances of such plan;

providing authority for such relief. Although the language is at times ambiguous, Count I does not seek relief on behalf of a class and is considered to pertain to Debtor's bankruptcy case alone.

Defendants claim that Count I should be dismissed because the Bankruptcy Code does not create a private cause of action under either §506 or §105.

Count I requests reconsideration of an allowed claim. This is permitted under §502(j) and FRCP 3008. Section 502(j) also provides a remedy for any change in the allowed amount of a claim by adjusting the amounts due or recovering excess already paid. See supra footnote 1. Section 502(j) confers upon the court power to reconsider and to remedy previously allowed incorrect claims. The basis for such reconsideration may be found in other sections of the Bankruptcy Code. Here, Plaintiffs allege grounds for reconsideration exist under §506.

Plaintiffs invoke §105 as conferring power on the court to fashion a remedy. However, §502(j) provides authority to grant the

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(v) fixes the scope and format of the notice to be provided regarding the hearing on approval of the disclosure statement; or  
(vi) provides that the hearing on approval of the disclosure statement may be combined with the hearing on confirmation of the plan.

relief that Plaintiffs request: reconsideration of Firststar's claim, recovery of any excess paid out under the plan, and prevention of further collection of unauthorized amounts by allowing the claim in the correct amount. An injunction preventing collection is not needed, and invoking the authority of §105 is unnecessary to Count I. Whether §105 has been properly invoked requires no further discussion on this Count.

Defendants cite three cases in support of their argument that no private cause of action exists under § 506. Knox v. Sunstar Acceptance Corp. (In re Knox), 237 B.R. 687 (Bankr.N.D.Ill. 1999); Lenior v. GE Capital Corp. (In re Lenior), 231 B.R. 662 (Bankr.N.D.Ill. 1999); Holloway v. Household Automotive Finance Corp., 227 B.R. 501 (N.D.Ill. 1998). Defendants' reliance is misplaced.

In Knox and Lenoir, §506 is cited as conferring jurisdiction to the bankruptcy court for claim valuation as well as providing a remedy to a debtor. Knox, 237 B.R. at 694 ("jurisdiction lies .. to "strip down" the car valuation to its actual value, a remedy that can be sought either by motion or by adversary proceeding"); Lenoir 231 B.R. at 671 ("two specific and adequate procedural remedies are available to Plaintiff to obtain the monetary redress sought for asserted violation of §506: (1)

'lien stripping' pursuant to 11 U.S.C. §506 itself, and (2) imposition of sanctions under Fed. R. Bankr. P. 9011"). Both cases support reconsideration of whether Firststar's claim complies with the provisions of §506, as well as any appropriate adjustment of the claim under the plan and recovery of any excess paid.

Holloway held "no private remedy exists under §§105 or 502." 227 B.R. at 504. However, the Holloway court's discussion of §502 was limited, the court noted that the plaintiff had made no claim pursuant to §502. The court then stated that no private right of action is provided either on the face of §502 or by implication. 227 B.R. at 507. No mention of §502(j) was made and I respectfully disagree with the Holloway analysis. The plain language of §502(j) expressly creates the very right that Plaintiffs seek to exercise. United States v. Ron Pair Enterprises, Inc., 109 S.Ct. 1026, 1030, 489 U.S. 235, 240-41, 103 L.Ed.2d 290 (1989) ("there generally is no need for a court to inquire beyond the plain language of the statute ... where, as here, the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'") (citations omitted). Under §502(j), Plaintiffs are authorized to seek reconsideration of Firststar's claim alleging non-compliance with the provisions of §506, and to seek an appropriate adjustment of the claim and payments on the claim.

Motion to dismiss Count I is denied. Count I consists of requests for reconsideration of Firststar's claim in Debtor's bankruptcy case to require compliance with the provisions of §506, adjustment of future payments under the chapter 13 plan to accord with the allowed amount of Firststar's claim, and to recover any disallowed amounts already paid. As pled the Second Recast Complaint is sufficient to overcome the 12(b)(6) motion to dismiss Count I.

Count II

Plaintiffs allege in Count II that Defendants have filed an inaccurate proof of claim, and that such filing is an attempt to collect a debt in violation of the automatic stay. Plaintiffs' briefs in opposition to motion to dismiss characterize the Fees as attempts to possess or control property of the estate, in violation of 11 U.S.C. §362(a)(3), and as attempts to enforce a lien, in violation of 11 U.S.C. §362(a)(4).<sup>8</sup> They seek actual, statutory and

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<sup>8</sup>11 U.S.C. §362 provides in pertinent part

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, . . . operates as a stay, applicable to all entities, of--

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

punitive damages, as well as attorney's fees and costs.

Count II is dismissed. Requests for damages pursuant to §362 which appear in other Counts are also dismissed. I recently held that the filing of a proof of claim cannot violate the automatic stay. Bradley v. Rich's (In re Bradley), Ch. 13 Case No. 95-10084, Adv. No. 97-01035 (Bankr. S.D.Ga. Aug. 8, 2000).

Filing a false proof of claim does not violate bankruptcy's automatic stay. "We agree that the stay does not apply to proceedings commenced against the debtor in the bankruptcy court where the debtor's bankruptcy is pending." Prewitt v. North Coast Village, Ltd. (In re North Coast Village, Ltd.), 135 B.R. 641, 643 (9<sup>th</sup> Cir. BAP 1992) (automatic stay does not bar adversary proceedings against debtor in bankruptcy court; construing stay to apply to all bankruptcy proceedings would lead to "absurd results" such as needing relief from the stay to file proof of claim); accord Civic Center Square, Inc. v. Ford (In re Roxford Foods, Inc.), 12 F.3d 875 (9<sup>th</sup> Cir. 1993); Armco Inc. v. North Atlantic Ins. Co. Ltd. (In re Bird), 229 B.R. 90, 94-95 (Bankr. S.D.N.Y. 1999) (citing North Coast Village and adding "[s]uch suits against the debtor can be considered the functional equivalent of filing a proof of claim against the bankruptcy estate"); see also Brown v. Sayyah (In re

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

I.C.H.Corp.), 219 B.R. 176, 190 (Bankr. N.D.Tex. 1998) (discussing right of setoff in bankruptcy, citing North Coast Village for “[t]he automatic stay is not applicable to assertion of a claim in a proof of claim filed in a Bankruptcy Court.”) (reversed on other grounds, 230 B.R. 88 (N.D.Tex. 1999)).

The purposes of the automatic stay are (1) to give the debtor a breathing spell from creditors’ collection efforts, (2) to protect creditors from each other by preserving assets for the benefit of all, and (3) to provide for an orderly liquidation or administration of the estate. North Coast Village, 135 B.R. at 643 (citing House Report No. 95-595, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess. at 340-41 (1977)); Bird, 229 B.R. at 94. The stay, and provisions for relief from the stay, vest in the bankruptcy court control over all claims against the debtor. North Coast Village, 135 B.R. at 643; Bird, 229 B.R. at 95. By centralizing all actions in the bankruptcy court, order is imposed and the objectives of the automatic stay are met. North Coast Village, 135 B.R. at 643; Bird, 229 B.R. at 95. Id. Therefore, the automatic stay does not apply to actions or claims brought before the bankruptcy court with jurisdiction over the debtor’s bankruptcy case. North Coast Village, 135 B.R. at 643; Bird, 229 B.R. at 95. Id.

[Allegation] that the Bank violated the protective provisions of the automatic stay

provided by Section 362(a) by filing the complaint to determine dischargeability. . . is absurd. . . .

In In re Hodges, 83 B.R. 25 (Bankr. N.D.Cal.1988), the Bankruptcy Court held that a nondischargeability action can never violate the automatic stay as a matter of law. The Bankruptcy Code expressly provides that all claims asserting nondischargeability based on 11 U.S.C. §§ 523(a)(2), (4), (6) and (15) must be filed in the bankruptcy court, the only court which has exclusive jurisdiction to determine the nondischargeability of a debt based on those exceptions. The contention that the exercise of a mandated statutory right under the Bankruptcy Code is a violation of the automatic stay is almost as absurd as a contention that any creditor who files a proof of claim in bankruptcy violated the automatic stay.

Nelson v. Providian Nat'l Bank (In re Nelson), 234 B.R. 528, 534 (Bankr. M.D.Fla. 1999).

The Bankruptcy Code provides for proofs of claim to be filed, for objections to claims to be filed, and for disputed claims or claim amounts to be determined by the bankruptcy court. 11 U.S.C. §501 & 502. As stated in Bradley, Defendants have filed proofs of claim to which Plaintiffs may object. However, objections to proofs of claims cannot be sustained on §362 grounds.

### Count III

\_\_\_\_\_ Plaintiffs seek certification of a class of individuals

who are debtors in bankruptcy and in whose bankruptcies Firststar filed claims including objectionable fees. On behalf of this class, Plaintiffs request declaratory judgment, injunctive relief, turnover of amounts collected, and damages and costs.

\_\_\_\_\_The first issue addressed under Count III is whether a class of debtors similar to this Debtor can be certified. After briefs were submitted in this case, the Honorable Anthony A. Alaimo Judge of the United States District Court for the Southern District of Georgia, issued a decision in Williams v. Sears, Roebuck and Co. 244 B.R. 858 (S.D.Ga. 2000) limiting the available class size on jurisdictional grounds in a case involving a Chapter 7 bankruptcy issue.

In Williams, the plaintiff, a chapter 7 debtor, sought to recover on behalf of a nationwide class of debtors allegedly subjected to routine violations of §§ 362 and 524 by the defendant creditor by the creditor's unilaterally cancelling reaffirmation agreements. The court characterized the claims raised by the plaintiff on behalf of the putative class as property of each individual debtor's bankruptcy estate. Williams, 244 B.R. at 866, (citations omitted). Under 28 U.S.C. §1334(e),<sup>9</sup> jurisdiction over

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<sup>9</sup>§1334. Bankruptcy cases and proceedings . . .  
(e) ) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of

the property of the debtor's estate is exclusively reserved to the district court wherein the bankruptcy case is commenced. Williams, 244 B.R. at 866. Judge Alaimo read §1334(e) to preclude the district court from exercising jurisdiction over the class claims beyond the bankruptcy cases commenced in this district. Id. Therefore, the defendant's motion to dismiss the class action components of the plaintiff's claims was granted with respect to the claims of the putative class members who commenced their bankruptcy cases outside the Southern District of Georgia, but denied with respect to the claims of those debtors who commenced their bankruptcy cases within the District. Williams, 244 B.R. at 866-67.

Jurisdiction over bankruptcy cases is granted to the district courts by 28 U.S.C. §1334(a).<sup>10</sup> A district court, in turn, may refer all bankruptcy matters to its bankruptcy judges. 28 U.S.C. §157(a);<sup>11</sup> see also 28 U.S.C. §151. Because a bankruptcy court's jurisdiction is derived from that of the district court, a

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such case, and of property of the estate.

<sup>10</sup> §1334. Bankruptcy cases and proceedings  
(a) Except as provided in subsection (b) of this section, the district court shall have original and exclusive jurisdiction of all cases under title 11.

<sup>11</sup> §157. Procedures  
(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

bankruptcy court's jurisdiction can be no greater than that of the district court. 28 U.S.C. §§ 1334(a) & 157(a). If the district court from which this bankruptcy court derives jurisdiction holds that its jurisdiction is limited to class members who filed their bankruptcy cases in this District, then the jurisdiction of this bankruptcy court is equally limited. Conversely, this bankruptcy court does have jurisdiction to entertain a class action if the class is not limited by the restrictions of §1334(e) and fulfills the requirements of FRBP 7023. FRBP 7023, incorporating FRCP 23; Williams, 244 B.R. at 866. But see, Noletto v. Nationsbank Mortgage, et al. (In re Noletto) 244 B.R. 845 (Bankr. S.D. Ala. 2000). Regardless of whether I concur with Judge Mahoney's analysis in Noletto, Williams is binding precedent on this court. In re Wright 144 B.R. 943, 949 (Bankr. S.D. Ga. 1992) (stating the bankruptcy court, a unit of the district court, 28 U.S.C. §151, is bound by the decisions of the district court [citations omitted]). However, Williams is binding precedent on this court only to the extent that the Williams analysis applies here.

In Williams, Judge Alaimo rested his determination of limited subject matter jurisdiction upon the requirements of §1334(e), that the cause of action constituted "property of the estate". To the extent that the cause of action was not "property

. . . of the debtor as of the commencement of [the] case," or . . . "property of the estate" the jurisdictional limitation of §1334(e) is inapplicable. Obviously, the issues raised in this adversary proceeding surrounding the filing of a proof of claim could not have existed prior to the filing of the debtor's bankruptcy case and therefore could not have been property of the debtor as of the commencement of the bankruptcy case.

Remaining for resolution is whether the cause of action constitutes property of the estate. In addition to debtors having filed Chapter 7 cases for which Williams controls, this debtor, proceeding in a Chapter 13 case, seeks to represent a class of debtors in not only Chapter 7 but also in Chapters 11, 12 and 13. In Chapter 11, 12, 13 cases, upon confirmation, property of the estate vests in the debtor. 11 U.S.C. §1141(b), §1227(b) and §1327(b). The controlling language is the same in all three chapters.

Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.

11 U.S.C. §1141(b), 1227(b) and §1327(b).

In confirmed Chapter 11, 12 and 13 cases, all property, including any cause of action not otherwise provided for in the order confirming the plan and not necessary to fulfillment of the plan,

re-vested in the debtor and no longer constitutes property of the estate. Telfair v. First Union Mortgage Corp. (In re: Telfair) 224 B.R. 243 (Bankr. S.D.Ga. 1999) affirmed 216 F.3d 1333 (11<sup>th</sup> Cir. July 7, 2000); In re McKnight 136 B.R. 891 (Bankr. S.D. Ga. 1989). There is no similar re-vesting provision under Chapter 7. Therefore, Williams provides no binding precedent as to Chapter 11, 12 or 13 debtors.

Defendants' motion to dismiss the class action component of Count III is granted as to debtors who commenced their Chapter 7 cases in bankruptcy courts other than the Southern District of Georgia but denied as to all Chapter 11, 12 and 13 debtors in confirmed cases regardless as to district and Chapter 7 debtors who commenced their bankruptcy cases within this district.

The second question under Count III is should a class be certified, can the relief requested on behalf of that class be granted. Plaintiffs may only represent a class to the extent that they have standing to bring individual claims. FRBP 7023, incorporating FRCP 23; Jones v. Firestone Tire and Rubber Co., Inc., 977 F.2d 527, 531 (11<sup>th</sup> Cir. 1992). Plaintiffs do not have standing as to proofs of claims including attorney fees nor as to damages pursuant to §362. It appears from the text of Count III that punitive damages are sought pursuant to §362. Therefore, punitive

damages are not applicable. Thus, Count III is reduced to a request for declaratory judgment that Firststar cannot collect inspection charges or late charges, an injunction on such basis, return of improperly collected monies, and an award of actual damages and costs for each alleged improper charge included in proofs of claim filed by Firststar in the potentially certified class.

In Williams Judge Alaimo considered whether the remedies of declaratory relief and injunction could be granted on behalf of a class. Williams, 244 B.R. at 867-68. He held that a declaratory judgment would be, in effect, a finding that discharge injunctions entered by bankruptcy courts inside and outside the Southern District of Georgia had been violated. Id. at 867. Because relief for violation of an injunction may be sought only in the court that entered the injunction, the district court's jurisdiction to grant declaratory relief was limited to class members whose discharge had been received from this district. Id. In this case, declaratory relief is sought as to proofs of claim filed by Firststar not a declaration that an injunction has been violated. As pled the Second Recast Complaint is sufficient to overcome a motion to dismiss Plaintiff's request for declaratory judgment under Count III.

Judge Alaimo also held that if the district court

eventually concluded that the Bankruptcy Code had been violated, then §105(a) gave the court power to enjoin against future violations. 11 U.S.C. §105(a); Williams, 244 B.R. at 867-68. "Such a prospective injunction would not constitute property of any bankruptcy estate. Section 1334(e), therefore, poses no obstacle to granting relief." Williams, 244 B.R. at 867-68. Defendants' motion to dismiss the injunctive component of Count III is also denied.

Motion to dismiss as to return of alleged overpayment and award of actual damages and costs is denied. Such relief will depend on facts to be determined by reconsideration of the allowed claims of the class members should a class meet the certification criteria of FRBP 7023.

#### Count IV

\_\_\_\_\_Count IV alleges that Firststar habitually violates Local Bankruptcy Rule 3001-2, which provides:

Without in any way limiting or amending any provision of the Code or Rules that govern the filing of proofs of claim, all claims filed in this Court shall be filed for the net principal balance only as of the date of the debtor's filing of his or her case.

Plaintiffs argue that Firststar's claim exceeded the net principal balance as of the date of the filing of the case. They ask that

Defendants be held in contempt of court for violation of Local Bankruptcy Rule 3001-2 and that damages for contempt be imposed.

If Firststar was entitled to a certain amount as of the date that the bankruptcy case was filed, then that amount is part of the net principal balance. Whether Firststar was entitled to the contested charges as of the date of filing is an issue of fact that has yet to be determined. The motions to dismiss fail to establish "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41., 45, 78 S.Ct. 99, 102, 2 L.E.2d 80 (1957). Motion to dismiss Count IV is denied.

Firststar notes that FRBP 9020 must be followed in contempt proceedings. Nelson v. Providian National Bank (In re Nelson), 234 B.R. 528, 534 (Bankr.M.D.Fla. 1999). Subsection (b) of FRBP 9020 would apply here, which states that contempt may be determined by the bankruptcy judge only after a hearing on notice and sets out the notice requirements. FRBP 9020(b).<sup>12</sup> FRBP 9020(b) requires that

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<sup>12</sup>FRBP 9020(b) provides:

(b) Other contempt

Contempt committed in a case or proceeding pending before a bankruptcy judge, except when determined as provided in subdivision (a) of this rule, may be determined by the bankruptcy

notice issue from the bankruptcy court, but does not address how the bankruptcy court is to be made aware of the alleged contempt. Id. Should the issue of contempt be scheduled for a hearing, the bankruptcy court will comply with the notice requirements of FRBP 9020(b). The motion to dismiss this aspect of Count IV is denied.

#### Count V

In Count V, Plaintiffs seek to bring a class action on behalf of debtors in the Southern District of Georgia, as an alternative to its nationwide class of debtors. Having determined the jurisdictional limits as to class size, no further determination is required as to this alternative class.

Additionally, Count V incorporates Count IV's claim for

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judge only after a hearing on notice. The notice shall be in writing, shall state the essential facts constituting the contempt charged and describe the contempt as criminal or civil and shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense. The notice may be given on the court's own initiative or on application of the United States attorney or by an attorney appointed by the court for that purpose. If the contempt charged involves disrespect to or criticism of a bankruptcy judge, that judge is disqualified from presiding at the hearing except with the consent of the person charged.

damages for violation of Local Bankruptcy Rule 3001-2. Whether Plaintiffs have standing to bring such a charge will depend on the resolution of Count IV. Whether a subclass may be certified for prosecution of such a charge will be addressed by subsequent hearings on class certification. Again, the motions to dismiss fail to establish "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson 355 U.S. at 45. Motion to dismiss count V is denied.

#### Count VI

Plaintiffs claim that the alleged violation of Local Bankruptcy Rule 3001-2 in turn violated FRBP 9011, and seek sanctions as provided therein.

Rule 9011(c) (1) (A) states how a motion for sanctions under the rule must be brought. Although an alternative procedure applies if sanctions are imposed on the court's initiative, such is not the case here. Rule 9011(c) (1) (A) provides:

Rule 9011. Signing of Papers; Representations to the Court; Sanctions; Verification and Copies of Papers

- (c) Sanctions.
- (1) How initiated

(A) By motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 7004. The motion for sanctions may not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected, except that this limitation shall not apply if the conduct alleged is the filing of a petition in violation of subdivision (b). If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

Plaintiffs have sought sanctions within the framework of the Second Recast Complaint. Under FRBP 9011, Plaintiffs were required to seek sanctions by separate motion, and file that motion with the court only after 21 days from service of the motion. Motion to dismiss Count VI is granted. See Hedges v. Yonkers Racing Corp., 48 F.3d 1320, 1328 (2<sup>nd</sup> Cir. 1995) (sanctions could not be imposed where movant did not meet service requirements of FRCP 11(c)(1)(A), which corresponds to and includes the same 21-day "safe harbor" period as FRBP 9011(c)(1)(A)); In re Smith, 230 B.R. 437, 441 (Bankr.N.D.Fla. 1999) (Debtors' request for sanctions failed procedurally where

requirements of FRBP 9011 were not met; creditors must be given 21-day safe harbor to correct their proof of claim before possible imposition of sanctions, and motion for sanctions must be filed separately from other motions or requests.).

I also note that in the prayers for relief concluding the Second Recast Complaint, Plaintiffs pray for an order declaring a violation of 11 U.S.C. §524. Section 524 of the Bankruptcy Code is titled "Effect of discharge." Debtor's bankruptcy case is pending. Plaintiffs have no standing to bring any claims pursuant to §524 on their own or others behalf.

It is, therefore, ORDERED that the motions to dismiss brought by Firststar Bank, N.A., Star Bank Mortgage, and Barrett, Burke, Wilson, Castle, Daffin & Frappier, L.L.P. are granted as to all claims made in the Second Recast Complaint to proofs of claim including attorney's fees, granted as to Count II and any other references to violations of the automatic stay, granted in part as to class composition excluding only debtors whose chapter 7 bankruptcy cases were commenced outside the Southern District of Georgia, and granted as to Count VI seeking imposition of sanctions under FRBP 9011 and any §524 discharge violation. The motions to dismiss are ORDERED denied as to all other Counts and claims brought in the Second Recast Complaint.

JOHN S. DALIS  
CHIEF UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia

this 21st Day of September, 2000.