No: 22-2252

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DEDRE VANIECE FEYIJIMNI,

Appellant,

v.

THE STATE OF MARYLAND CENTRAL COLLECTION UNIT,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
THE DISTRICT OF MARYLAND

OPENING BRIEF OF APPELLANT

Marie Lott Pharaoh
850 Lindbergh Dr., Q4
Jackson, MS 39209
(240) 606-3494
mariepharaoh@gmail.com

Counsel for Appellant

Table of Contents

TABLE OF AUTHORITIES

Cases

Statutes

Rules

STATEMENT OF JURISDICTION

The United States Fourth Circuit Court of Appeals has jurisdiction to review a final decision or order of the United District Court for the District of Maryland pursuant to 28 U.S.C. §1291 ("The courts of appeals … shall have jurisdiction of appeals from all final decisions of the district courts of the United States. . . ."). *E.g.*, *A.H. Robins Co. Inc. v. Piccinin,* 788 F.2d 994,1009 (4th Cir.1986).

STATEMENT OF THE ISSUES

1. Whether the United States District Court for the District of Maryland ("District Court") erred in holding that the United States Bankruptcy Court for the District of Maryland ("Bankruptcy Court") did not have to determine whether undue prejudice would accrue to the Appellant before using its 11 U.S.C. § 105(a) powers to amend the Appellee's amended proof of claim filed in the Chapter 13 case, changing the debt from "Court Ordered Fees, which are dischargeable under 11 U.S.C. §1328(a) to "criminal restitution," a nondischargeable debt under 11 U.S.C. §1328(a)(3).
2. Whether the District Court erred in finding that the Judgment of Restitution attached to the Appellee's amended proof of claim gave the Appellant sufficient notice that the debt was for "criminal restitution" when the

Bankruptcy Court itself, upon examining the document at the July 14, 2021 hearing on Appellee's Motion to Dismiss could not determine that that very document evidenced "criminal restitution" as argued by the Appellee at that hearing.

3. Whether the District Court erred in applying *In re Wilson*, 252 B.R. 739 (B.A.P. 8th Cir. 2000), clearly distinguishable on the facts, when that case clearly states that a conviction for purposes of a federal statute depends on whether the debtor in an underlying criminal case pleaded guilty, and more importantly, as the only case in any District or Circuit to have interpreted 11 U.S.C. §1328(a)(3), should the *Wilson* holding be applied the case *sub judice* when the Appellant has not had an opportunity to litigate the particular components of that statute.
4. Whether the District Court erred in holding that the Bankruptcy Court did not err when it determined that the Doctrine of Waiver was not applicable when the Appellee failed to amend its amended proof of claim to characterize the debt as "criminal restitution" during the Chapter 13 proceedings.
5. Whether the United States Congress' intent for an efficacious and expeditious proceeding with assured finality – and a "fresh start" for an

honest debtor --in enacting the United States Bankruptcy Code and Rules -- is undermined by the results in this case.

STATEMENT OF THE CASE

A. Factual Background

On October 21, 2014, Appellant sought relief under Chapter 13 of the United States Bankruptcy Code. JA1-JA10. Appellant scheduled Maryland Central Collection Unit ("CCU") as a secured creditor on her Schedule D. CCU was collecting the debt via wage garnishment on behalf of Maryland's Division of Parole and Probation ("Parole and Probation"), the original payor. *See* [JA14, JA17].

Mr. Ari Kodeck, an Assistant Attorney General with the Maryland's Office of the Attorney General ("OAG"), who represented CCU, filed the original proof of claim, Form B10, on April 13, 2015, and in box #2 on the proof of claim stated that the basis of the claim was for "Court Ordered fees." [JA11]. Attached to the proof of claim was a document on Parole and Probation's letterhead dated September 30, 2014, stating that the amount due and owing was $16,008.80 for "Court Ordered Fees." JA14. Appellant's attorney contacted Mr. Kodeck and presented him with evidence that the amount owed as stated was incorrect.

On May 5, 2015, Mr. Kodeck amended the proof of claim to correct the amount owed, again characterizing the nature of the debt as "Court Ordered Fees"

in box #2 of Form B10. [JA16]. Attached to the amended proof of claim was another document on Parole and Probation's letterhead, dated April 30, 2015 with the new balance of $7275.33. [JA17]. The basis of the debt was characterized as "Failure to Pay Court Ordered Fees." [JA17]. A Judgment of Restitution was also attached to this amended proof of claim, though not included in the original proof of claim. [JA18]. No objections were raised to either the original or amended proof of claim and both were allowed in evidence in the Chapter 13 case.

The Appellant's Chapter 13 plan was confirmed on August 28, 2015. [JA19]. The record reflects that the Appellee did not file an adversary proceeding to determine the dischargeability of the debt in the case. The Appellee never filed an amendment to its allowed amended proof of claim. Nor did the Appellee file an objection to Appellant's original, amended or confirmed Chapter 13 plans. Nor did it object to Appellant's Chapter 13 discharge.

The Appellant completed her Chapter 13 payments on December 5, 2019, [JA20-JA21], and filed her Affidavit for Chapter 13 discharge on February 6, 2020. [JA22- JA26]. The Appellant received a discharge on February 26, 2020. [JA27- JA28]. The Appellant's Chapter 13's case closed on June 23, 2020 and final decree issued. [JA29]. CCU received approximately $787.49 as an unsecured general creditor under the Chapter 13 plan. [JA30].

On or about October 21, 2020, Appellant received a letter from CCU stating that she owed an outstanding debt in the amount of $9652.77. [JA31]. On or about October 27, 2020, Appellant, pursuant to the contents of the letter requested an appeal of the decision and checked the CCU portal, downloaded the information, and determined that the alleged debt was associated with the debt she thought she had discharged in her Chapter 13 case. [JA32-JA33]. On or about February 11, 2021, the Appellant spoke to a CCU customer service representative who informed her that CCU was aware of the Chapter 13 but that the debt was not dischargeable and that CCU would continue with collection activities, which included garnishing her wages. Shortly, thereafter, Appellant notified counsel who represented her in her Chapter 13.

> The attorney contacted CCU via email and her email was forwarded to the Maryland Office of Attorney General ("OAG"). The OAG's office responded: "Good morning, Ms. Pharaoh. I have reviewed your email and the supporting documents. CCU continues to take the position that restitution debts are not discharged. For support, CCU relies on *Kelly v. Robinson,* 479 U.S. 36 (1986) and its progeny, such as *In re Wilson*, 252 B.R. 739 (B.A.P. 8th Cir. 2000). It is CCU's position that in a Ch 13 context, Ms. Rodriquez-Feyijinmi's guilty plea which resulted in the imposition of restitution as part of the criminal sentence are included in the broad class of debts that are not discharged."

[JA34].

Appellant's counsel replied, [JA35], but realized that nothing would be gained through any further colloquy with the State.

B. **Procedural Background**

Accordingly, the Appellant filed a Motion to Reopen her case to determine the dischargeability of the debt owed to CCU on February 23, 2021. [JA36-JA47]. The motion was granted by the Bankruptcy Court. [JA48]. On March 26, 21, Appellant filed her Complaint. [JA49-JA65]. The State responded on May 5, 2021 with its Motion to Dismiss. [JA66-JA74]. Appellant filed an amended complaint on May 27, 2021, [JA75-JA95]. A hearing was held, but the time for the State to respond to the Amended Complaint had not passed, so the Bankruptcy Court continued the hearing, until July 14, 2021 for the State to file its opposition to the Amended Complaint, which it did on July 8, 2021. [JA96-JA106].

At the hearing on the State's Motion to Dismiss, the Bankruptcy Court decided to shift the case to a Motion for Summary Judgment under Rule12 (d) to allow the State to provide additional evidence concerning the Judgment of Restitution, which was attached to the State's amended proof of claim. [JA107-JA136]. The State argued that the Judgment of Restitution placed the debtor on notice that the debt was for "criminal restitution"

The Bankruptcy Court found otherwise:

> But even getting -- giving him [Appellee's attorney] credit, he signed a proof of claim that twice stated this is a claim for court ordered fees. It says it in the claim form. It says it in the first attachment. ***Yes, the judgment is attached. But there is really nothing in the rest of the***

> ***proof of claim that speaks to the significance to this attachment, what it is, what it means, why it relates to this proof of claim at all.*** So I think that this is -- for those reasons, I think that the state needs to supplement with motion, with whatever additional materials it wants to provide to support the motion, as if it were a motion for summary judgment. The rule says -- and we're talking about Bankruptcy Rule7012, which incorporates parts of federal rule of civil procedure 12 and 12(d) says, if on a motion under Rule 12(d) are motions outside the pleadings that are presented to you and not excluded by the court, the motion must be treated as one summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent.

[JA133]

On November 10, 2021 the State submitted its Motion for Summary Judgment. [JA137-JA149].and the Appellant submitted hers on January 9, 2022. [JA150-JA170]. The Court held a hearing on March 24, 2022 [JA171-JA215]] and ruled in favor of the State, granting its Motion for Summary Judgment, and denying the Appellant's Motion for Summary Judgment.

The Bankruptcy Court held:

> The Appellant relies largely on her arguments related to the proof of claim filed by the state. The court rejects the waiver argument. The amended proof of claim was filed with the judgment of restitution attached. There is simply no basis for assertion of [waiver] by the state under such circumstances. Likewise, the Appellant's res judicata argument is without merit. While confirmation of a chapter 13 plan may have res judicata effects in certain circumstances, here determination of the nature of the state's unsecured claim was not required for

> confirmation. Therefore there is no res judicata effect by reason of the order confirming the Appellant's chapter 13 plan. There is not a dispute that the Appellant was charged with a crime. There is no dispute that the circuit court entered a judgment of restitution and that that judgment was the one attached to the state's proof of claim. I find that the 8th circuit bankruptcy appellate's decision in In Re: Wilson reported at 252 B.R. 739 in the year 2000 is persuasive authority here. Whether the Appellant was found guilty and sentenced to probation or granted probation before judgment is of no consequence to the outcome of this case. Under Wilson, under the Wilson rationale, a finding of guilt by the district court and an order of restitution would mean the state's claim is not dischargeable under 11 U.S.C. §1328(a)(3). If the Appellant was granted probation before judgment by either the district court or the circuit court, the same result would apply.

[JA213-JA214].

The Court issued its written Order on March 30, 2022. [JA216]. Appellant timely filed her Notice of Appeal on April 12, 2022. [JA218]. Appellant filed her Opening Brief on July 7, 2022 [JA220-JA242] and the State filed its Response on August 5, 2022 [JA243-JA260]. Appellant filed her Reply Brief on August 19, 2022. [JA261-JA274]. The District Court issued its Memorandum Opinion on November 1, 2022 without holding a hearing. [JA275 -JA284] Appellant filed her Notice of Appeal to the United States Fourth Circuit of Appeals on December 1, 2022. [JA285].

SUMMARY OF ARGUMENT

The problem with the District Court's opinion is that it failed to address the core issue of this matter raised by the Appellant in both its Appellant and Reply Briefs. That issue is the Bankruptcy Court's exercise of its 11 U.S.C. §105 (a) to amend the Appellee amended proof of claim filed in her Chapter 13 bankruptcy case. The Bankruptcy Court, while it has broad equitable powers under 11 U.S.C. §105(a), those powers are not unlimited. Those powers must be exercised within the confines of the provisions of United States Bankruptcy Code and Rules and the caselaw interpreting the same.

Perhaps, the District Court missed the fact that the Bankruptcy Court amended the Appellee's amended proof of claim? In both the original and amended proof of claim, Appellee characterized the debt as "Court Ordered Fees," which all parties agree are nondischargeable pursuant to 11 U.S.C. §1328(a). Although the Appellee argued at the hearing on its Motion to Dismiss that the attached Judgment of Restitution to the amended proof of claim clearly indicated that the debt was for "criminal restitution," the Bankruptcy Court did not agree, and moved the adversary case into a Rule 12(d) summary judgment action to give the Appellee an opportunity to submit affidavits to prove that the debt was in fact "criminal restitution."

The Bankruptcy Court failed to consider any undue prejudice accruing to the Appellant prior to amending the amended proof of claim. It did not do so and the District Court failed to recognize this requirement. Had the Bankruptcy Court done so, it would have realized that deeming the debt "criminal restitution" was unduly prejudicial to the Appellant. The Appellant reasonably relied on the Appellee's amended proof of claim and geared her actions accordingly in fashioning her Chapter 13 plan. She was unable to craft a 100% plan, negotiate with CCU or any of her creditors to ensure she had a "fresh start" post-discharge.

Nor did she have an opportunity to object to amending the amended proof of claim during the Chapter 13 proceeding, which would have been an adversary hearing rather than the submission of affidavits. It is not clear, moreover, that deeming the debt "criminal restitution" is sufficient for the debt to be nondischargeable.

Pursuant to 11 U.S.C. §1328(a)(3), debts owed for "restitution, or a criminal fine, included in a sentence on the debtor's conviction of a crime" are not dischargeable. More needs to be proved than the debt was for "criminal restitution" and the Appellant had no opportunity to fully make her arguments or present her evidence. She was prevented from doing so because her criminal case had been expunged and records/transcripts of the hearing were unavailable.

ARGUMENT

STANDARD OF REVIEW

The Court of Appeals for the Fourth Circuit reviews the Bankruptcy Court's factual findings for clear error, and its legal conclusions *de novo*. *In re Banks*, 299 F.3d 296, 300 (4th Circ. 2002).

I. THE DISTRICT COURT ERRED, AS A MATTER OF LAW, BY FAILING TO RECOGNIZE AND APPLY ESTABLISHED CASE LAW THAT A BANKRUPTCY COURT MUST DETERMINE THE PREJUDICIAL EFFECT TO THE OPPOSING PARTY BEFORE GRANTING ANY AMENDMENT TO A TIMELY FILED PROOF OF CLAIM

The filing of a proof of claim in a bankruptcy case is authorized by 11 U.S.C. § 501(a). "A creditor or an indenture trustee may file a proof of claim." The requirements of a proof of claim are provided in Fed. R. Bankr. P. 3001, which mandates, among other things, that a proof of claim be in writing and conform substantially to the appropriate Official Form 10 and be executed by the creditor or the creditor's authorized agent. If the claim is based on a writing, then the original or a duplicate of that writing must be filed with the proof of claim. Fed. R. Bankr. P. 3001(a)-(c). Once a claim is filed and not objected to, it is allowed. 11 U.S.C. § 502(a).

Under Rule 3001(f), "[a} proof of claim executed and filed in accordance with these rules shall constitute prima facie evidence of the validity and amount of the claim."

A. AN ALLOWED PROOF OF CLAIM IS BOTH A PLEADING AND TRIAL EVIDENCE IN A BANKRUPTCY CASE: THERE IS NO LANGUAGE IN THE CODE, RULES OR CASELAW CONCERNING "MISLABELING" A PROOF OF CLAIM

The Fourth Circuit citing to *Whitney v. Dresser,* 200 U.S. 532, 535-36, 26 S.Ct. 316, 50 L.Ed. 584 (1906) held: "'[A] sworn proof of claim is prima facie evidence of its correctness. The rule applied in *Whitney v. Dresser* is based upon an interpretation of section 57d of the Bankruptcy Act (Comp. St. § 9641), which provides that 'claims which have been duly proved shall be allowed, upon receipt by or upon presentation to the court, unless objection to their allowance shall be made by parties in interest.'"

An allowed proof of claim "serves as both a pleading and as trial evidence, even in the face of an objection to the claim." *In re Sydnor*, 571 B.R. 681,683 (Bankr. E.D. Pa. 2017).

"`[C]ourts routinely recognize that the filing of a proof of claim is analogous to the filing of a complaint and that, by doing so, a creditor submits itself to the jurisdiction of the court, at least with regard to the adjudication of its claim.'" *In re Simmons,* 765 F.2d 547, 552 (5th Cir. 1985) (citing *Nortex Trading Corp. v.*

Newfield, 311 F.2d 163 (2d Cir. 1962); *In re Brosio,* 505 B.R. 903, 912 (9th Cir. BAP 2014) ("The filing of a proof of claim is analogous to filing a complaint in the bankruptcy case."); *In re Cerrato,* 504 B.R. 23, 38 (Bankr.E.D.N.Y.2014) ("The filing of a proof of claim is equivalent to the filing of a complaint in a civil action, and an objection to a claim is analogous to an answer.").

To say that a creditor "mislabels" a proof of claim undermines the seriousness of the filing of the proof of claim and its evidentiary impact, once allowed, in a bankruptcy case. Had Congress wanted it to be mere perfunctory, it would not have obligated the filer to attest to the accuracy of the claim under the penalty of perjury.

"Congress has evidenced its intent that a proof of claim be treated as the equivalent of a complaint by referring to actions brought by the estate against a person filing a proof of claim as 'counterclaims.' 28 U.S.C. § 157(b)(2)(C) (stating that core proceedings include 'counterclaims' by the estate against persons filing claims against the estate.')" *Townsend v. Quantum3 Group, LLC*, 535 BR 415, 422 (M.D. Fla 2015).

Fed. R. Civ. Pro 11 is also instructive here. In finding whether an attorney violated Rule 11 in the filing of a subsequently dismissed complaint, this Court recognized in *In Re Kunstler*, 914 F.2d 505, 513 (4th Cir. 1990):

> The signature of an attorney or party constitutes a certificate by the signer that the signer has read the

> pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

The Court goes on to elucidate: "The signing attorney cannot leave it to some trusted subordinate, or to one of his partners, to satisfy himself that the filed paper is factually and legally responsible; by signing he represents not merely the fact that it is so, but also the fact that he personally has applied his own judgment." *Id*.

The Appellee's attorney filing of the original and amended proof of claim characterizing the nature of the debt as "Court Ordered Fees" should be given full faith and credit from the outset. There is nothing in the record that indicates that he was not knowledgeable of CCU's policies, the Bankruptcy Code or Rules. Nor is there anything in the record that the attorney in fact "mislabeled" the debt in the proof of claim. On the contrary, the record shows that the attorney in both the original proof of claim and the amended proof of claim deemed the nature of the debt "Court Ordered Fees."

B. THE CASE LAW IN THIS CIRCUIT AND OTHER COURTS REQUIRES THAT THE BANKRUPTCY COURT *MUST* WEIGH THE EQUITIES AND INTERESTS OF THE PARTIES BEFORE ALLOWING AN AMENDMENT TO A PROOF OF CLAIM

Whether by amendment of Bankruptcy Form B10 or via the use of the Bankruptcy Court's equitable power, the Bankruptcy Court must examine whether the allowance of the amendment would result in prejudice to the Appellant.

The Code and Rules are silent regarding amending a timely filed proof of claim. "It has long been the law that the bankruptcy court possesses the power to allow the amendment of a [timely] filed proof of claim, even after the expiration of the time designated by the statute for the filing of claims." *In re Gibraltor Amusements, LTD*, 315 F.2d 210, 213 (2d Cir. 1963); *see Cotton v. Bennett*, 59 F.2d. 373, 375 (4th Cir. 1932) ("Where there are enough facts appearing in the record to establish claim against the bankrupt, it may, in a proper case, be used as a basis for amendment.").

This is not to say that an amendment to a proof of claim is always permitted. The right of a creditor to amend a timely claim is not unlimited. For instance, an amendment is not allowed if the amended claim is actually a new claim filed under the guise of an amendment, *See Miller v. ChanneLinx, Inc. (In re ChanneLinx, Inc.),* 317 B.R. 694, 699 (Bankr. D.S.C.2004).

Neither should "an amendment should not be allowed if it would cause undue prejudice to an opposing party." *In re White Motor Corp.,* 59 B.R. 286 (Bankr.N.D.Ohio 1986); *accord In re Newcomb,* 60 B.R. 520, 523 (Bankr.W.D.Va.1986). ("Even if an amendment of a proof of claim sought by a party arises out of the same conduct or transaction set forth in the original claim, undue prejudice to an opposing party may nevertheless serve to bar the amendment."). Furthermore, "[u]ndue prejudice is any result that conflicts with a just and equitable result." *In re Vlavianos,* 71 B.R. 789, 793-94 ((Bankr.W.D.Va.1986)

"In determining prejudicial effect, the court considers such elements as bad faith or unreasonable delay in filing the amendment, impact on other claimants, reliance by the debtor or creditors …, and change of the debtor's position. *In re City of Capitals, Inc.,* 55 B.R. 634, 637 (Bankr.D.Md.1985).

The Appellant relied on the Appellee's allowed original and amended proofs of claim filed by its attorney. The Bankruptcy's Court amendment of the same, upheld by the District Court changed the debtor's position. The Appellant, an honest debtor, has been denied a "fresh start." She now owes more now than when she began her Chapter 13 case in 2014. She also faces having her wages garnished once more as the Appellee has filed a Request for Writ of Garnishment in the Circuit Court of Maryland for Baltimore County. [JA275].

Furthermore, the Appellant was never put on notice that "Court Ordered Fees" was nondischargeable, which would have given her the opportunity to negotiate with CCU to reduce the debt, abate the interest, enter into an agreement regarding a payment plan, post-discharge, if the debt was not paid in full, negotiate with her other creditor who filed claims, and/or fashion a 100% plan to pay all unsecured general claims in full. Had the Appellee amended the amended proof of claim to reflect that it was "criminal restitution" the Appellant would have had an opportunity to object to the amendment, and the Bankruptcy Court may have ruled that the debt was in fact dischargeable.

The District Court failed to understand Appellant's argument. It declared: "Feyijinmi argues that the CCU attorneys were at fault for mischaracterizing her debt, so somehow the "equities" lie in Appellant's favor, and she should be absolved from paying that debt. This argument is unconvincing and not sounded in law. Appellant does not cite to any law that dictates a Bankruptcy Court is to consider the "interests and equities" of a debtor when the debtor owes restitution as part of a criminal conviction. Instead, there is no discretionary power for a court to disrupt a state criminal finding and discharge Appellant's restitution." [JA282].

The Appellant's argument is that the debt was characterized as "Court Ordered Fees" in both the Appellee's original and amended proofs of claim. "Court Ordered Fees" are dischargeable under 11 U.S.C.§ 1328(a)(3). For the debt now to

be characterized as "criminal restitution" – nondischargeable under § 1328(a)(3) -- the Bankruptcy Court had to employ its equitable powers to declare it so. Accordingly, the Bankruptcy Court was obligated to determine whether any undue prejudice accrued to the Appellant.

II. THE DISTRICT COURT ERRED IN FINDING THAT THE JUDGMENT OF RESTITUTION UNAMBIGUOUSLY INDICATED THAT THE DEBT WAS FOR "CRIMINAL RESTITUTION" IN CONTRADISTINCTION TO THE BANKRUPTCY COURT'S FACTUAL FINDING THAT IT DID NOT

Surprisingly, the District Court found that the Judgment of Restitution attached to the amended proof of claim was sufficient to put the Appellant on notice that the debt was really for "criminal restitution." The District Court held: "The attached Order of Restitution precluded any confusion about the debt that CCU claimed, and further exhibits that CCU did not relinquish its right to collect on that debt. In other words, '[b]y attaching the judgment of restitution to its proof of claim, Appellee removed any ambiguity as to either the nature of the debt or its intent to collect after a possible discharge.'" [JA283}. It cites to *In re Avery*, 272 B.R. 718, 724 (Bankr. E.D. Cal. 2002) (finding 'attachments to the proof of claim made up for [] paucity of detail and dispelled any doubt' about which debt was to be collected)."

What does not make any sense with this ruling is that had the Judgment of Restitution been so clear regarding the nature of the debt, the Bankruptcy Court would have granted the Appellee's Motion to Dismiss with prejudice rather than moving the parties to file Summary Judgment motions pursuant to Fed. R. Civ. Pro. (12)(d). Here's what the Bankruptcy Court had to say about the Appellee's contention that the Judgment of Restitution was sufficient to put the Appellant on notice that the debt was really for "criminal restitution":

> It says it in the claim form. It says it in the first attachment. ***Yes, the judgment is attached. But there is really nothing in the rest of the proof of claim that speaks to the significance to this attachment, what it is, what it means, why it relates to this proof of claim at all.*** So I think that this is -- for those reasons, I think that the state needs to supplement with motion, with whatever additional materials it wants to provide to support the motion, as if it were a motion for summary judgment. The rule says -- and we're talking about Bankruptcy Rule7012, which incorporates parts of federal rule of civil procedure 12 and 12(d) says, if on a motion under Rule 12(d) are motions outside the pleadings that are presented to you and not excluded by the court, the motion must betreated as one summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent.

[JA133] (emphasis added)

Obviously, the Judgment of Restitution was deficient in putting the Appellant on notice that the debt was for "criminal restitution." The Bankruptcy Court closely examined the Judgment of Restitution and found it necessary for the

Appellee to submit affidavits to affirm its contention that the debt was "criminal restitution."

The District Court failed to state what words or sentences in the Judgment of Restitution lead it to find that the document was without any ambiguity as to the true nature of the debt. On its face the Judgment of Restitution is void of any indication of what crime was committed, whether the obligor had been convicted of a crime, and whether the restitution was part of some sentence.

The District Court also failed to explain why if the nature of the debt was revealed by the Judgment of Restitution, why the Appellee's attorney upon receiving it, reviewing it, and attaching it to the amended proof of claim still declared the nature of the debt "Court Ordered Fees"? Or why didn't Parole and Probation, the original payor, from whom the Appellee's attorney received the Judgment of Restitution and the revised payment information change the nature of the debt on the revised payment information? [*See* JA17].

In re Avery, *supra*, is distinguishable. In this case the creditor filed a proof of claim, which was defective on its face, having failed to state the amount and nature of the debt. The documents attached to the proof of claim, however, clearly showed a sum certain owed and that the debt was unsecured. The Chapter 13 Trustee for some reason did not pay the creditor anything, noting that the amount

of the claim was for $0.00, The *Avery* court reasoned that it is axiomatic for a creditor to file a claim and expect no payment.

The Appellee's amended proof of claim was complete, and the attached Judgment of Restitution, as proved by the Bankruptcy Court on its face did not provide any additional or contrary notice as to the nature of the debt.

III. THE DISTRICT COURT MISTAKENLY APPLIED *IN RE WILSON*, 252 B.R. 739 (B.A.P. 9th Cir. 2000)

In re Wilson, 252 B.R. 739 (B.A.P. 9th Cir 2000) is distinguishable on its facts. Wilson was not an honest debtor. The facts in that case show that she did not schedule the debt, so the creditor did not have an opportunity to participate in her Chapter 13 case. *Id*. at 740. Wilson sought to hide her perfidy and escape responsibility for paying the debt by invoking 11 U.S.C. §1328(a)(3). She argued that, even if she had scheduled the debt in her Chapter 13, it would have been discharged upon completion of her plan. While she agreed the debt was for restitution, she argued that she was never convicted of a crime. *Id*. at 741. The facts also show that Wilson disobeyed the state court's order to make payments on the debt after she was pleaded guilty to the theft and was granted a deferred adjudication, which was not a conviction under Texas law. *Id*.

Wilson did not argue anything more than her deferred adjudication was not a conviction for purposes of §1328(a)(3). *Id.* at 741. The Appellant here argued that the restitution she was ordered to pay could not have been part of any sentence,

even if her probation was a "sentence" under §1328(a)(3), as she was no longer on probation at the time she filed her Chapter 13, because had the restitution been part of her probation, she would never have been granted an expungement of her case, since she still owed part of the restitution. [JA123-JA124].

Furthermore, the interpretation of 11 U.S.C. §1328(a)(3) has yet to be interpreted fully and completely by any other court to include bankruptcy, district, appellate, or the United States Supreme Court. If we examine that statute, we find that there is more to be decided than simply what constitutes a conviction for purposes of interpreting the statute.

For example, what does part of a sentence entail? For purposes of this statute, is a probation before judgment or even a simple probation a sentence? What if, as in this case, the debtor is no longer on probation? If the probation before judgment is a sentence and the debt still remains unpaid, is the restitution still part of the sentence? How does a Judgment of Restitution fit into the entire rubric when a debtor is no longer on probation and her criminal record has been expunged, leaving what happened at the trial a mystery?

Appellant argues here that a much fairer and more equitable result would be for the interpretation §1328(a)(3) be had after a plenary hearing in which the parties can make these pertinent arguments undergirded by live witnesses and evidence.

IV. THE DISTRICT COURT, AS A MATTER OF LAW, MISSTATED THE APPLICABILITY OF THE WAIVER DOCTRINE

The District Court missed the mark on the doctrine of waiver's full equitable scope. The District Court states that the doctrine is inapplicable because the Appellee did not voluntarily waive its right "to collect Appellant's owed restitution." To support this proposition, it cites to *In re Varat Enterprises*, Inc., 81 F.3d 1310, 1317 (4th Cir. 1996): "'[T]raditional waiver principles come into play when a party voluntarily or intentionally relinquishes a known claim right.'" [JA282]. The Appellant's argument, however, was not that the Appellee had waived its right to collect the debt but waived its right to have its allowed amended proof of claim amended by the Bankruptcy Court to be able to collect the debt, post-Chapter 13 discharge. [JA270-JA271]. During her Chapter 13, the debt was characterized as "Court Ordered Fees," dischargeable under §1328(a).

As noted in Appellant's reply brief [JA270-Ja271], this equitable doctrine is not limited to the creditor's intent, but also includes the creditor's failure to act. "[A]cts inconsistent with the continued assertion of a right, such as a failure to insist upon the right, may constitute waiver." *In re Workman*, 373 B.R. 460, 465 (Bankr. D.S.C. 2007). The failure of Appellee to act to amend its amended proof of claim to declare the debt "criminal restitution" prior to Appellant's Chapter 13

discharge constitutes waiver of the right to have the amended proof of claim amended post-Chapter13 discharge.

As this Court notes in *Covert v. LVNV Funding LLC*, 779 F.3d 242, 250 (4th Cir. 2015): "We note that the Plaintiffs failed to raise a claim for equitable relief under 11 U.S.C. § 502(j), which states that "[a] claim that has been allowed . . . may be reconsidered for cause," until oral argument in this case. We thus consider this argument waived. Surely, the Plaintiffs did not intend to waive the claim, but their failure to raise that claim timely constituted waiver to have the court consider that claim. The Appellee in this case failed to amend its amended proof of claim to characterize the debt, as it now claims, as "criminal restitution."

Furthermore, like the Plaintiffs in *Covert, supra*, the creditor must assume responsibility for following the Bankruptcy Code. *See In re Taylor*, 280 B.R. 711, 716 (Bankr.S.D. Ala. 2001) ("The fault for the problem lies squarely with Empire [the creditor]. It is not the trustee's or debtors' responsibility to inform Empire or its counsel as to the proper manner in which to complete a claim form."); *In re Workman*, 373 B.R. at 466. ("The foregoing facts indicate that Harris Trust [the creditor] was aware of its claim against Debtor but nevertheless engaged in a pattern to knowingly and voluntarily relinquish its right to additional arrearage.")

The Bankruptcy Court should not have given the Appellee an opportunity to set forth extraneous evidence as to the nature of the debt when it was without any

doubt that the proof of claim did not any way support the Appellee's claims that the debt was for "criminal restitution."

CONCLUSION

Efficacy, efficiency, and finality are part of the bankruptcy process. Congress intended it to be so with the enactment of the Bankruptcy Code and it concomitant Rules. Debtors and other interested parties are meant to rely on a creditor's declarations in its proof of claim. Allowing a creditor to amend a proof of claim to change the nature of the debt post-Chapter 13 discharge undermines Congress intent for a speedy, just, and final result. Therefore, the Appellant respectfully requests that the Court reverse the District Court's and Bankruptcy Court's rulings and declare that the debt is "Court Ordered Fees" and thereby dischargeable.

REQUEST FOR ORAL ARGUMENT

Appellant respectfully requests the Court to hear oral argument.

February 28, 2023

Respectfully submitted,

/s/Marie Lott Pharaoh
Marie Lott Pharaoh
Bar #11080
850 Lindbergh Dr., Q4
Jackson, MS 39209
(240) 606-3494
mariepharaoh@gmail.com

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App.P.29 (c)(7) and 32 (a)(7)(c) because Appellant's Opening Brief contains 6083 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32 (a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in Times New Roman 14-point font.

3. In making this certification, I have relied on the word count feature of the word processing program used to prepare the brief.

CERTIFICATE OF SERVICE

I certify that on the 28th day of February 2023, I electronically filed the Appellant's Brief and Appellant's Joint Appendix using the Court's CM/ECF system, which will send notification of such filing to all counsel and parties of record.

/s/ Marie Lott Pharaoh
Marie Lott Pharaoh