UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF LOUISIANA

In re:	
	CASE NO. 07-11862
RON WILSON, **LaRHONDA WILSON,**	**Section "A"**
	CHAPTER 13
Debtors.	

UNITED STATES TRUSTEE'S POST-TRIAL BRIEF IN LIEU OF CLOSING ARGUMENT

TO THE HONORABLE ELIZABETH W. MAGNER:

Henry G. Hobbs, Jr., the Acting United States Trustee for Region 5 ("United States Trustee"), files this brief in lieu of closing argument, per the Court's directive at the conclusion of evidence on December 1, 2010. This brief, and the December 1, 2010 trial, relate to the May 21, 2010 Motion for Sanctions filed by the United States Trustee ("Motion"). The Motion seeks sanctions against the respondent, Lender Processing Services, Inc., f/k/a Fidelity National Information Services, Inc. ("Fidelity"), pursuant to the Court's inherent power to sanction bad faith conduct and under 11 U.S.C. § 105(a) to prevent an abuse of process.

I. SUMMARY OF ARGUMENT

Fidelity permitted its officer, Dory Goebel, to give materially misleading testimony to the Court on August 21, 2008, and should be sanctioned. It is undisputed that important parts of Goebel's testimony were untrue; the crux of the matter now is determining Fidelity's level of culpability. The evidence proves that, at a minimum, Fidelity acted with indifference to the truth in permitting Goebel to give the misleading testimony. The United States Trustee has met his

burden of proof, which is a mere preponderance of the evidence. The sanctions available to this Court, through its inherent authority and 11 U.S.C. § 105 (a), range from financial sanctions to injunctive relief.

II. This Court Has Authority Pursuant to Section 105 And The Court's Inherent Authority To Issue Sanctions.

"The authority of bankruptcy courts to issue civil sanctions is well settled and springs from two sources: section 105 of the Bankruptcy Code and the Court's inherent authority." *Jones v. Wells Fargo Home Mortgage, Inc. (In re Jones)*, 418 B.R. 687, 694-95 (Bankr. E.D. La. 2009) (Magner, J.).[1]

A. The Bankruptcy Court's Authority Pursuant to Section 105(a).

Pursuant to section 105(a) of the Bankruptcy Code, a bankruptcy court "may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). A bankruptcy court may take actions and make determinations "necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process." *Id.; see also Campbell v. Countrywide Home Loans, Inc.*, 545 F.3d 348, 356 n.1 (5th Cir. 2008) (noting that section 105 is available to discipline parties who "attempt to abuse the procedural mechanisms within the bankruptcy court"). Section 105(a) expands upon the traditional equitable power of federal courts to protect their proceedings by enjoining abusive

[1] Although often analyzed in conjunction with a court's inherent power, a court's power pursuant to section 105 is an independent source of authority and not a codification of a court's inherent power. At least three circuit courts have recognized that a court's inherent authority and its authority pursuant to section 105 are distinct. *See Goldberg v. Evergreen Sec. Ltd. (In re Evergreen Sec., Ltd.)*, 570 F.3d 1257, 1273 (11th Cir. 2009); *Knupfer v. Lindblade (In re Dyer)*, 322 F.3d 1178, 1196 (9th Cir. 2003); *In re Rimsat, Ltd.*, 212 F.3d 1039, 1049 (7th Cir. 2000).

litigants. *See Balawajder v. Scott*, 160 F.3d 1066, 1067-68 (5th Cir. 1998) (recognizing inherent power of federal courts to enjoin party from filing vexatious pleadings); *Farguson v. MBank Houston, N.A.*, 808 F.2d 358, 360 (5th Cir. 1986) (holding that order enjoining abusive litigant from filing further suits against certain defendants "was well within the court's range of authority").

Section 105(a) permits a bankruptcy court to issue remedies for, *inter alia*, "wrongful conduct, such as bad faith or unreasonable, vexatious conduct, by any party or representative that has appeared before the court." *In re Cabrera-Mejia*, 402 B.R. 335, 346 (Bankr. C.D. Cal. 2008). Pursuant to section 105(a), a court may issue sanctions where a party or counsel has violated a court order or rule. *In re Evergreen Sec., Ltd.*, 570 F.3d 1257, 1273 (11th Cir. 2009); *Galloway v. EMC Mortgage Corp. (In re Galloway)*, 05-13504, 2010 WL 364336, at *5 (Bankr. N.D. Miss. Jan. 29, 2010) (imposing sanctions for violation of a confirmation order); *In re Stone*, 166 B.R. 269, 274 (Bankr. W.D. Pa. 1994).

A court may issue sanctions pursuant to section 105(a), among other reasons, if a party has made false statements or filings to the court. *See Goldman v. Morgan (In re Morgan)*, 573 F.3d 615, 628 (8th Cir. 2009) (affirming removal of chapter 13 trustee as sanction pursuant to section 105(a) for giving misleading testimony); *Watson v. Stonewall Jackson Mem'l Hosp. Co. (In re Watson)*, No. 10-1292, 2010 WL 4496837, at *3 (Bankr. N.D.W.Va. Nov. 1, 2010) ("When a creditor files a false or fraudulent proof of claim, which is deemed allowed by § 502(a), and entitled to prima facie presumption of validity and amount by Rule 3001(f), the creditor is abusing the bankruptcy process."); *In re Jacobsen*, No. 07-41092, 2009 WL 3245418, at *16 (Bankr. E.D. Tex. Sept. 30, 2009) (imposing sanctions pursuant to section 105(a) against

debtor for filing materially misleading schedules and falsifying other documents used in the bankruptcy proceeding); *In re Varona*, 388 B.R. 705, 717 (Bankr. E.D. Va. 2008) (after extended analysis, concluding that "the Court's power to remedy and punish for the filing of a false or fraudulent claim is within the strictures of its authority pursuant to 11 U.S.C. § 105").

The remedial use of section 105 is not limited by a requirement that bad faith be demonstrated for the court to act. *In re Dempsey*, 247 F. App'x 21, 25 (7th Cir. 2007) (holding court's use of section 105(a) to impose a one-year filing bar was justified despite absence of bad faith); *Knupfer v. Lindblade (In re Dyer)*, 322 F.3d 1178, 1190 (9th Cir. 2003) (holding that a court's use of its contempt power under section 105 does not require bad faith); *Bartock v. BAE Systems Survivability Sys., LLC (In re Bartock)*, 398 B.R. 135, 161 (Bankr. W.D. Pa. 2008); *Cochran v. Reatch (In re Reath)*, No. 06-1531, 2006 WL 3524458, at *6 (Bankr. D.N.J. Dec. 6, 2006); *see also In re Evergreen Sec., Ltd.*, 570 F.3d at 1273 (requiring bad faith for a court to sanction a litigant pursuant to its inherent authority but not mentioning bad faith as a requirement for sanctioning a litigant pursuant to section 105). The court's power to remedy an abuse of process or the violation of a court's order should not hinge on the intent (or lack thereof) of a litigant, but rather on the effect that a litigant's actions have on the court's proceedings regardless of whether the abuse or violation was in bad faith or otherwise.[2]

B. <u>The Bankruptcy Court's Inherent Authority</u>

Federal courts also possess the inherent authority to take measures in support of the lawful exercise of their judicial power. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991);

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[2] This is not to say that bad faith is irrelevant. A finding of bad faith or its absence would certainly be relevant to how a court tailors the appropriate remedy. Bad faith is not, however, a threshold finding for a court to exercise its section 105 authority.

Knight v. Luedtke (In re Yorkshire, LLC), 540 F.3d 328, 332 (5th Cir. 2008). "These powers are 'governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.'" *Chambers*, 501 U.S. at 43 (quoting *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630-31 (1962)). Bankruptcy courts generally enjoy the same inherent powers as other federal courts. *Cf. Marrama v. Citizens Bank of Massachusetts*, 549 U.S. 365, 375-76 (2007).

The power is independent of, and is not displaced or overridden by, statutes or rules that grant a court similar authority. *Chambers*, 501 U.S. at 49 ("The Court's prior cases have indicated that the inherent power of a court can be invoked *even if procedural rules exist which sanction the same conduct*.") (emphasis added). Rather, when the statutes or rules are not "up to the task, the court may safely rely on its inherent power." *Id.* at 50. Conversely, the fact that one or more textual sources of authority may be inapplicable does not mean the court lacks the inherent authority to take measures it deems appropriate. *Engel v. Bresset (In re Engel)*, 246 B.R. 784, 789 (Bankr. M.D. Pa. 2000).

Before exercising its inherent powers, a court must determine that "'there is an adequate factual predicate for flexing its substantial muscle . . . and must also ensure that the sanction is tailored to address the harm identified.'" *Goldstein v. Forbes (In re Cendant Corp.)*, 260 F.3d 183, 200 (3d Cir. 2001) (quoting *Chambers*, 501 U.S. at 44). Courts have used their inherent authority to sanction litigants for violating a court order. *See, e.g., Payne v. Mortgage Electronic Registration Systems, Inc. (In re Payne)*, 387 B.R. 614, 639 (Bankr. D. Kan. 2008) (imposing sanctions for the violation of a confirmation order pursuant to section 105(a) and inherent authority). Courts have used their inherent authority where counsel and parties have made untrue

statements to the court. *See, e.g., Caldwell v. Unified Capital Corp. (In re Rainbow Magazine, Inc.)*, 77 F.3d 278 (9th Cir. 1996) (affirming sanctions for filing a inaccurate statement of affairs in bankruptcy case); *Ocon v. Equinamics, Corp. (In re Ocon)*, No. 08-11226, 2009 WL 405370, at *1-*2 (11th Cir. 2009) (affirming sanctions against counsel in bankruptcy proceeding for statement to court in hearing).

To the extent bad faith is a necessary showing for a court to exercise its inherent powers, bad faith "includes a broad range of willful improper conduct." *Fink v. Gomez*, 239 F.3d 989, 992 (9th Cir. 2001). "A party also demonstrates bad faith by delaying or disrupting the litigation or hampering enforcement of a court order." *Gwynne v. Walker (In re Walker)*, 532 F.3d 1304, 1309 (11th Cir. 2008) (quoting *Byrne v. Nezhat*, 261 F.3d 1075, 1121 (11th Cir. 2001)); *see also In re Sealed Appellant*, 194 F.3d 666, 671 (5th Cir. 1999) ("When bad faith is patent from the record and specific findings are unnecessary to understand the misconduct giving rise to the sanction, the necessary finding of 'bad faith' may be inferred."). The question of whether a party acted in bad faith is a factual one. *In re Prudential Ins. Co. America Sales Practice Litig. Agent*, 278 F.3d 175, 181 (3d Cir. 2002).

Where bad faith is a necessary predicate for a court to use its inherent authority, an untrue statement is made in bad faith if the statement was made for a harassing or frivolous purpose. *Byrne v. Nezhat*, 261 F.3d 1075, 1125 (11th Cir. 2001). Bad faith can be inferred where an attorney knowingly and deliberately makes blatantly incorrect statements. *See Crowe v. Smith*, 151 F.3d 217, 239 (5th Cir. 1998) (finding adequate support in the record for the conclusion that an attorney acted in bad faith in providing "blatantly incorrect discovery response" counsel knew to be untrue at that the time it was offered).

III. THE APPROPRIATE BURDEN OF PROOF IS PREPONDERANCE OF THE EVIDENCE

The applicable burden of proof in this matter is mere preponderance of the evidence. The burden of proof in a bankruptcy proceeding is preponderance of the evidence, absent special circumstances. *See Grogan v. Garner*, 498 U.S. 280, 291 (1991) (requiring proof only by a preponderance to establish fraud under 11 U.S.C. § 523(a)(2)(B)). This Court should consider the allegations in the Motion pursuant to this burden of proof. First, the burden of proof in a civil action is generally preponderance of the evidence. *Addington v. Texas*, 441 U.S. 418, 423 (1979). This presumption does not change when a federal statute is involved. *Hermann & MacLean v. Huddleston*, 459 U.S. 375, 387-88 (1983) (preponderance in fraud action under Securities Act). The preponderance standard only comes into question when "particularly important individual interests or rights are at stake," such as termination of parental rights or involuntary commitment. *Id.* at 389 (citing cases). No such special interests exist here.

Second, a court must have an explicit basis to justify placing a heightened burden of proof on a civil plaintiff. *Grogan*, 498 U.S. at 286 (congressional silence insufficient). The Bankruptcy Code has no textual support for the theory that different standards of proof apply to its various provisions. *See Georges v. Solodky (In re Georges)*, 138 F. App'x 471, 473 (3d Cir. 2005) (applying preponderance standard to a motion to dismiss under 11 U.S.C. § 727); *First Nat'l Bank of Gordon (In re Serafini)*, 938 F.2d 1156, 1157 (10th Cir. 1991) (perceiving "no good reason" to apply different standards of proof to actions to determine dischargeability of particular debts or to object or revoke discharge under 11 U.S.C. §§ 523 and 727). There is no

reason to treat cases involving section 105(a) or a court's inherent authority differently from sections 523 or 727 and impose a higher burden of proof.

Third, the preponderance standard governs this case although some of the allegations relate to misconduct. *Grogan* itself involved an exception of debt from discharge under 11 U.S.C. § 523(a)(2)(A) on the basis of a debtor's pre-petition fraud. The state-law standard of proof for fraud, clear and convincing, was irrelevant to the Supreme Court's decision that the preponderance standard governs in bankruptcy cases. *Grogan*, 498 U.S. at 288. Therefore, the fact that the United States Trustee alleges misrepresentation does not alter the burden of proof analysis.[3]

IV. THERE IS NO DISPUTE THAT DORY GOEBEL GAVE MATERIALLY MISLEADING TESTIMONY ON AUGUST 21, 2008

Fidelity admits that "the Court was misled" by Goebel's August 21, 2008 testimony. December 1, 2010 Transcript. 52:9 ("December 1 Tr.").[4] Moreover, three pieces of evidence prove Fidelity's knowledge and communications regarding the Debtors' loan account, as well as Fidelity's role as an intermediary, or "go between" obtaining and forwarding information between Option One Mortgage Corporation ("Option") and the Boles Law Firm APC ("Boles").

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[3] The statute at issue in *Grogan*, 11 U.S.C. § 523(a)(2)(A), excepts from discharge debts "to the extent obtained by . . . false pretenses, a false representation, or actual fraud." Although that case concerned the "actual fraud" element of that provision, the Court's reasoning is equally applicable to the "false representation" prong.

[4] Among the disputed testimony in this case is Dory Goebel's statement that Fidelity did not act as a "go between" in this case between Option One and the Boles Law Firm. Fidelity maintains that the "go between" testimony was not misleading.

See Trial Ex.s 14, 15, and 16.[5] The identified exhibits document Fidelity's communications and, hence, Fidelity's knowledge, about three specific unposted payments (collectively, the "Unposted Payments").[6] Those three pages document Fidelity employees Bob Yang's and Gregory Biersack's intercom messages to Terrie Jones of January 3, 2008; February 1, 2008; and March 4, 2008. *Id.* Each Fidelity intercom confirms that Fidelity knew that Option had received a payment from the Debtors, and that Fidelity was requesting instructions from Boles as to whether the respective payments should be posted. As stated by Fidelity's counsel, "We don't dispute that [Fidelity employees Gregory Biersack, Johnnie Timm, and Bob Yang] . . . were aware of the unposted payments." December 1 Tr. 18:23-24.

Therefore, Ms. Goebel's testimony at the August 21, 2008 hearing that Fidelity would not have communicated with the law firm regarding payments received by Option from the Debtors

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[5] Those pages were created through Fidelity's own software called "Desktop."

Herein, the United States Trustee refers in some instances to specific pages within a Trial Exhibit and will, thus, use the sequential numbering system that the Court directed be used, i.e., every page of every Exhibit was to be stamped with a sequential number. The particular reference will be designated as follows: Trial Ex. __ at ____.

[6] The payments addressed by this Brief were made after December 20, 2007 (date of MFR referral) and before April 22, 2008 (date the Court determined to enter a rule to show cause). During that time frame, Option received four monthly payments from the debtors. Option, though, did not post or credit three of those payments to the debtors' account. The dates of those payments received but not posted by Option are: January 2, 2008; January 31, 2008; and March 3, 2008, hereinafter, the "Unposted Payments." Upon information and belief, Option received:

- on January 2, 2008, personal check # 1151, in the amount of $1,546.84;
- on January 31, 2008, cashier's check # 9427116 in the amount of $1,000.00 and simultaneously received personal check # 1180 in the amount of $546.84 (and personal check # 1181 in the amount of $312.00, apparently payment of late fees); and
- on March 3, 2008, cashier's check # 9322069 in the amount of $1,546.84 (and personal check # 1207 in the amount of $77.33, apparently payment of late fees).

substantially misled the Court with respect to Fidelity's knowledge and responsibility in submitting the affidavit of debt in support of Option's motion for relief from stay in this case. August 21, 2008 Transcript ("August 21 Tr."). Fidelity does not dispute this conclusion, instead contending that neither it nor Ms. Goebel fully understood the breadth of the subject matter about which the Court was requesting testimony. December 1 Tr. 15:13-16:10. As demonstrated below, this defense finds no support in the evidence adduced at trial.

V. THE EVIDENCE PROVES THAT FIDELITY ACTED WITH INDIFFERENCE TO THE TRUTH IN PERMITTING GOEBEL TO GIVE THE MISLEADING TESTIMONY

Three essential facts, established at trial, demonstrate that Fidelity should be held responsible for its conduct in connection with the materially misleading testimony that Ms. Goebel gave to this Court on August 21, 2008.

- In August, 2008, Dory Goebel knew that Fidelity purposefully obtained knowledge of the Unposted Payments received by Option. Goebel's materially untruthful testimony on August 21, 2008 cannot, therefore, be attributed to Goebel's rank ignorance of the subject matter.

- Fidelity knew or should have known that the Court would expect Fidelity to explain at the August 21, 2008 hearing what institutional knowledge Fidelity possessed as to the debtors' Unposted Payments.

- Fidelity possessed an indifference to whether its institutional knowledge of the Unposted Payments was accurately revealed to the Court at the August 21, 2008 hearing.

These three facts lead to one conclusion: Fidelity should be held responsible for its conduct in producing Ms. Goebel to give materially misleading testimony to this Court on August 21, 2008.

A. Dory Goebel Knew That Fidelity's Routine Procedures Included Obtaining Knowledge Regarding Unposted Payments Received By Option

Fidelity provided default services for the benefit of Option as a mortgage servicer pursuant to a contract identified as the Default Services Agreement (the "DSA"). Trial Ex. 6. These obligations included assisting Option in resolving issues relating to the prosecution of any motion for relief from stay filed by Option. Trial Ex. 6 at 439. Fidelity maintained a specific group of employees for that purpose, called the Bankruptcy Issue Resolution department (the "BIR department"). December 1 Tr. 214:23-215:2, 222:13-223:8, 223:21-24. At all relevant times, Fidelity staffed the BIR department with at least three employees: Gregory Biersack, Johnnie Timm, and Bob Yang. December 1 Tr. 223:21-24 (Biersack and Yang); *see also* September 21, 2010 Deposition Transcript of Johnnie Timm, Trial Ex. 11B, 8:25-9:13 and 11:12-19; September 21, 2010 Deposition Transcript of Bob Yang, Trial Ex. 14C, 7:5-6 and 9:4-10:17; and September 28, 2010 Deposition of Gregory Biersack, Trial Ex. 15D, 7:13-8:14.

Fidelity adopted detailed procedures for its BIR department to follow in assisting Option in what to do with payments made by a borrower/debtor after a loan had been referred for a motion for relief from stay. Trial Ex. 9. The procedures were set forth in a section of its employee manual governing the motion for relief from stay process entitled "Funds Received." These procedures are also set forth in greater detail in another section of Fidelity's employee manual in a section entitled "BK Posting Instructions." Trial Ex. 13.

The manual provided the following instructions: if a payment came in to Option after a motion for relief from stay had been referred, Fidelity was to act as an intermediary. Specifically, Option would alert Fidelity that it had received a payment from a borrower/debtor. Trial Ex. 9 at

557; Trial Ex. 13 at 711. Fidelity would then contact the network attorney assigned to the file and request instructions as to what Option should do with the funds. *Id.*

The attorney, in turn, could advise Fidelity to have Option post the payment, to return the funds to the borrower, or that the funds should not be posted for some reason. Trial Ex. 13 at 711-713. Testimony of Terrie Jones December 1 Tr. 71:21-73:3. Whatever the attorney instructed, Fidelity was to memorialize the instructions in the computer records and relay them to Option. Trial Ex. 13 at 712. Fidelity's acquisition of knowledge about unposted payments was not accidental or random or merely as a repository (such as a "library") of the information. Rather, Fidelity's acquisition of that knowledge was a necessary part of performing Fidelity's contractual obligations as required in the DSA.

In this case, Fidelity referred Option's motion for relief from stay task to Boles on December 21, 2007. Trial Ex. 5 at 391. Shortly thereafter, Option received the first of the three Unposted Payments from the debtors. *Id.* at 390. Fidelity had assigned two employees, Bob Yang and Gregory Biersack, with responsibility to address post-referral posting instructions received from Option. Tr. Ex.14C at 757:3-6 and 729:4-17; Tr. Ex. 15C at 783:13-784:14. Option sent a request for posting instructions with respect to all three of the Unposted Payments, as each came in. Tr. Ex. 13. Option received the first Unposted Payment on January 2, 2008, and Mr. Yang contacted Boles about it on January 3, 2008. Tr. Ex. 5 at 390. Option received the second Unposted Payment on January 31, 2008, and Mr. Biersack contacted Boles about it on February 1, 2008. Tr. Ex. 5 at 387-388. Option received the third Unposted Payment on March 3, 2008, and again, Mr. Biersack contacted Boles about it on March 4, 2008. Tr. Ex. 5 at 364.

Fidelity appointed managers over the BIR department. December 1 Tr. 299:4-6. Dory Goebel herself was at one time a BIR department manager. *Id.* In approximately mid-2007, Fidelity laterally transferred or moved Goebel from her position as Manager of the Document Execution Team to a group called Bankruptcy Support. *Id.* 298:11-299:2. Within Bankruptcy Support, she was assigned to be a Manager of the BIR department. *Id.*, 299:1-6; and 300:16 (Goebel referring to herself as "Manager of Issue Resolution"). Goebel worked in that role several months. *Id.*, 299:9-11; and 300:20-301:1 (tenure was potentially six months). Fidelity then promoted Goebel to be an Assistant Vice President of Bankruptcy Support. *Id.*, 299:12-15.

Regardless of her length of tenure as a manager in the BIR department, Goebel knew in August, 2008 that BIR department employees might learn of and inquire what should be done with unposted payments received by Option. December 1Tr. 366:23 - 367:3; 367:13-20; and 372:8-25. Goebel cannot be said to have been ignorant of the fact that Fidelity operated a department whose role, in part, involved systematically gaining knowledge of unposted payments. Goebel's misleading testimony, consequently, cannot be excused based on her lacking an appreciation of Fidelity's institutional knowledge of unposted payments.

B. Fidelity Knew or Should Have Known That the Court Would Expect Fidelity to Explain at the August 21, 2008 Hearing What Institutional Knowledge That Fidelity Possessed as to the Debtors' Unposted Payments

Through its orders, the Court formally notified Fidelity that it and its employee, Dory Goebel, would have to testify at a show-cause proceeding before the Court. In all, the Court issued three orders to show cause in this case (collectively, the "show cause orders"). The first was entered on May 9, 2008 and set a hearing for June 26, 2008. Owing to Fidelity's and Ms. Goebel's failure to appear at that hearing, the Court issued two additional show cause orders on

July 11, 2008.[7] See, Docket Entries 45 and 46. In its show cause orders, the Court plainly stated that an explanation would have to be given about "the amounts due on the mortgage loan" of the debtors. The "amounts due" was the precise matter that Ms. Goebel had averred her personal knowledge of in her affidavit. Trial Ex. 3A at 123-124. In ¶ 6 of the affidavit, Ms. Goebel averred that "The Debtors are delinquent on post-petition arrearages for the months of November 1, 2007, through and including February 1, 2008."

Fidelity's defense, in part, seems to be one of confusion or lack of clarity in the show cause orders. For example, in his opening statement, Fidelity's counsel contended that the show cause examination was conducted like a freewheeling deposition." December 1 Tr. 15:17-18; 15:23-24. And, "The examination strayed outside of what she was prepared to testify to." 20:9-18. While Fidelity's counsel conceded that Ms. Goebel's previous testimony had misled the Court, he argued that Fidelity should not be sanctioned because Fidelity did not intend to be misleading. Rather, Fidelity failed to prepare Ms. Goebel adequately because Fidelity did not fully understand the show cause orders. December 1 Tr. 52:9-12.[8]

Fidelity contends that it thought that Ms. Goebel's testimony at the August 21, 2008 hearing would be limited to explaining the balance due on the mortgage loan of the debtors.

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[7] The Court also ordered that Ms. Goebel be sanctioned $5,000 for her failure to appear.

[8] Specifically, Fidelity blamed its lack of understanding on its former counsel, Michael Cash, contending that it was Mr. Cash's particular failure to grasp the meaning of the show cause orders that led to the misleading testimony. December 1 Tr. 52:13-25; 58:14-12. Fidelity asserts that sanctions are therefore inappropriate, because there was no intention to mislead the Court. As Fidelity's counsel stated, Fidelity "did not come in here to give [the Court] a snow job." *Id.*, 58:19-21. The United States Trustee does not address this contention further because Fidelity introduced no evidence regarding its former counsel's understanding of the Court's show cause orders.

December 1 Tr. 20:22-24. Fidelity claims that it was, therefore, surprised at the August 21 hearing, that the Court expected Goebel to be prepared to be prepared to testify about Fidelity's institutional knowledge of payments. Fidelity contends that this disparity between its understanding of the show cause orders and what it was actually asked about at the August 21, 2008 hearing caused it to be unprepared to answer the Court's questions about Fidelity's knowledge of the Debtors' Unposted Payments. Ms. Goebel characterized her experience as being "ping pong[ed]" with questions at the August 21 hearing, causing her to be confused. December 1 Tr. 374:2-5. Fidelity contends that it should not be held responsible for coming unprepared for a matter when it simply misunderstood what it was being asked to provide.

A review of the language of the July 11, 2008 show cause Order belies Fidelity's explanation. That Order read, in pertinent part, as follows:

> The Court orders Dory Goebel, Assistant Secretary of Option One Mortgage Corporation, and a Representative of Option One Mortgage Corporation to appear and explain the amounts due on the mortgage loan for the above-captioned debtors.

Trial Ex. 4.

Additionally, the two July 11 show cause Orders specifically ordered both Ms. Goebel and a representative of Fidelity to appear to explain the amounts due on the Debtors' mortgage. Fidelity must have considered Ms. Goebel to be its representative, because Ms. Goebel is the only witness that Fidelity produced. It is, therefore, simply not credible for Fidelity now to claim that it did not understand that it should have expected to explain Fidelity's knowledge of all facts necessary to provide an accurate affidavit regarding the Debtors' mortgage account.

Moreover, the transcript of the June 26, 2008 hearing, and the order issuing sanctions against Ms. Goebel provided Fidelity with further clarification, if any were needed, as to the scope of the Court's inquiry. At that hearing the Court concluded that Ms. Goebel's Affidavit was "false because your client did not disclose that it had received payments even in November and December and January before it - - and February before it signed the Affidavit." June 26, 2008 Tr. 38:15-18.[9] The Court obviously did not need more information to determine whether the Affidavit was false. Similarly, the Court did not need more information to determine the "balance due" because it made that determination also at the June 26 hearing, going so far as to "declare [the debtors'] loan current as of June 30, 2008." Trial Ex. 4A, June 26, 2008 Tr. 46:12-13. In this context, it is obtuse for Fidelity to contend that it did not understand the July 11 show cause order to encompass Fidelity's institutional knowledge of the Debtors' mortgage account.

Finally, Fidelity offered in its Motion to Appear filed on July 9, 2008, to "clarify Fidelity's limited role and limited actions relating to the Debtors in this case." Trial Ex. 4C. Fidelity, thus, did not merely offer to explain the contents of the affidavit and Ms. Goebel's actions, rather the offer was to explain Fidelity's its actions as they related " to the Debtors in this case." *Id.* Thus, whatever confusion Fidelity might claim from reading the language of the show

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[9] It is beyond argument that Fidelity knew what had transpired at the June 26, 2008 hearing even though it was not present. On July 9, 2008, Fidelity filed its "Motion to Appear as Interested Entity and Clarify Record," which was an explicit response to the Court's June 26, 2008 rulings. Dkt. 43 at 1. In the motion, Fidelity stated that it wanted to "clarify its role in this matter and correct any misconceptions or misunderstandings which may have been left with the Court regarding that role." *Id.* The Court granted Fidelity's motion on July 9, 2008, and ordered Fidelity to appear with a representative at the August 21, 2008 hearing to show cause.

cause orders, is superseded by Fidelity's own voluntary offer to appear before this Court and explain Fidelity's actions with respect to the Debtors' mortgage account.

In summary, the evidence proves that Fidelity knew or should have known that it was ordered to bring to the August 21 hearing Ms. Goebel and whatever other witnesses were necessary to explain Fidelity's institutional knowledge of the debtors' Unposted Payments. For its part, Fidelity offered no evidence at trial to support a contrary reading of the show cause orders, nor any evidence that it ever sought clarification of those orders from the Court prior to the hearing.

C. Fidelity Possessed an Indifference to Whether its Institutional Knowledge of the Unposted Payments Was Accurately Revealed to the Court at the August 21, 2008 Hearing

1. Fidelity failed to select a representative prepared to explain Fidelity's institutional knowledge of the Unposted Payments.

Fidelity suggests that the United States Trustee has unfairly viewed Dory Goebel as Fidelity's corporate representative, something akin to a Fed. R. Civ. P. 30(b)(6) witness. *See* December 1 Tr. 16:11-14. However, as noted, Fidelity volunteered to appear at the August 21 hearing to explain and clarify its role. By sending only Goebel to testify, Fidelity effectively made her its representative with respect to all matters involving Fidelity that day. Moreover, during the hearing, Goebel confirmed in response to questioning by the Court that she was the representative of Fidelity. August 21, 2008 Tr. 81:6-9. The Court itself referred to its understanding that Goebel was Fidelity's representative. August 21, 2008 Tr. 265:6-11

In some respects, Goebel's operational experience and knowledge might indicate that she was capable of testifying broadly about Fidelity. Goebel had not only worked in the document

execution department executing affidavits, she was the Assistant Vice President of it. Also, Goebel had personally managed the Fidelity department that functioned as an intermediary in resolving questions from mortgage servicers about what to do with payments that came in after a motion for relief from stay was filed. Goebel had been promoted frequently in her tenure with Fidelity, bespeaking obedience to and a competent understanding of the company's procedures. Indeed, Goebel had been promoted to Assistant Vice President of the document execution department directly from her position as manager of the BIR department.

Yet, despite this extensive experience with Fidelity's policies and procedures, Fidelity conceded that Ms. Goebel gave materially inaccurate testimony at the August 21 hearing. Ms. Goebel testified at trial that she "was . . . to talk about the procedures in executing an affidavit. That's what I was instructed." December 1 Tr. 362:16-19. Thus, it is clear that Fidelity failed to prepare its only witness to respond fully and accurately to the Court's show cause orders, including testifying about Fidelity's institutional knowledge of the Unposted Payments.

Taking Goebel at her word, that she was confused at the show cause hearing owing to her limited preparation for the subject matters she was to testify about at the August 21, 2008 hearing, Fidelity should be faulted. Fidelity either selected a witness who had an insufficient comprehension of Fidelity's knowledge of the Unposted Payments, or Fidelity utterly failed to prepare Ms. Goebel as its representative to testify accurately about that knowledge. In either event, Fidelity demonstrated material indifference to whether this Court received accurate testimony on August 21, 2008.

2. Fidelity failed to advise the Court about the falsity of part of Goebel's August 21, 2008 testimony.

At the August 21, 2008 hearing, Dory Goebel testified about the procedures she would follow when she executed affidavits. Among other things, she was asked about her "typical process" for physically executing the affidavit. Trial Ex. 4G at 264-65, August 21, 2008 Tr. 109:7-110:2. She was asked if "these three people would come in, the two witnesses and a notary would come in," to join Goebel in her office for the purpose of executing the affidavit. *Id.*, 109:7-11. She answered that once she had "validated" and executed the affidavit, a notary public "would then take the document back to her desk and notarize it." *Id.*, 109:12-15. The United States Trustee's counsel accepted her answer. *Id.*, 109:16. Goebel, though, volunteered the following modification to her testimony: "After she [the notary] has seen me execute it." *Id.*, 109:17.

On December 1, 2010, Goebel testified in direct contrast to her August 21, 2008 testimony. She testified that, indeed, she would not have executed the affidavit in the notary's presence:

> Q. Was Ms. Jackson standing there while you wrote your signature?
> A. No.

December 1 Tr. 336:21-22.

Further, Goebel and Walter testified unequivocally that Fidelity's policy and procedure was that Fidelity affiants were not to sign in the presence of notaries. *Id.*, 336:23-24 (Goebel: that was the "usual practice"); and 246:6-13 (Walter: agreeing that affidavit execution outside the presence of a notary was "consistent with LPS policy and procedure").

Goebel, thus, knowingly testified falsely at the August 21, 2008 hearing with respect to whether she would have executed her affidavit in the presence of a notary.[10] Fidelity never acted to correct Goebel's false testimony. For example, Goebel finished her testimony on August 21, 2008 prior to the lunch break. All the parties returned after the lunch break, and the hearing continued for several more hours. At no time, though, did Fidelity notify the Court that Goebel's testimony was confused or in error or needed to be clarified.

Further, in the more than two years that spanned between the August 21, 2008 show cause hearing and the December 1, 2010 trial, Fidelity and the United States Trustee have been before this Court multiple times. Fidelity knew or should have known that its officer had given materially, intentionally, and knowingly false testimony about procedures for executing affidavits; yet Fidelity never advised this Court, during any of those proceedings, that Goebel's testimony needed to be corrected. It is a fair claim that Fidelity's failure to correct Goebel's testimony, with respect to a matter of material importance and the precise area that Goebel had been instructed to testify about, demonstrates Fidelity's indifference to whether this Court received accurate testimony on August 21, 2008.

3. A culture existed at Fidelity that was indifferent to whether truthful information was given to a bankruptcy judge through sworn statements of its employees.

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[10] Goebel undoubtedly understood the context of the question, being that co-employees were in her physical presence when she signed the affidavit. The very next question, following her answer about the notary "seeing" her execute it, probed whether "those witnesses" would be in the same room or office with Goebel. Trial Ex. 4G, August 21, 2008 Tr. 109:18-19. Goebel stated that they would be in the same building (*Id.*, 109:20), but the Court stressed to Goebel that the question probed whether "they [are] in your office." *Id.*, 109:21-22. Goebel testified that they would be "near me and around my cube." *Id.*, 109:23-24. Prodded further, Goebel conceded, "No," the witnesses were not in her cube watching her sign. *Id.*, 109:25-110:2.

Fidelity operated an affidavit-execution process that systematically caused the execution of false affidavits.[11] That Fidelity considered this a valuable service to its clients is made manifest in an article co-authored by Ms. Goebel appearing in Fidelity's corporate newsletter The Summit. In the article, published in September, 2006, Fidelity trumpeted the efficiency and benefits that its "document execution" process offered to servicer clients. Trial Ex. 17.

The Fidelity affidavits were false because, per Fidelity's procedures, its affiant-employees: 1) did not sign in the presence of notaries; 2) did not take any steps to obtain personal knowledge of the averments contained in the affidavits; and 3) falsely represented the contrary, within the affidavits themselves, as to possession of requisite personal knowledge.

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[11] Fidelity offered a surprisingly candid explanation of the extant logic at Fidelity. The logic essentially was that Goebel would have been justified in executing the Affidavit of Debt even if she had personal knowledge that it omitted payment information:

- "Even if Goebel had read the [process management] notes [memorializing Fidelity's institutional knowledge of the Unposted Payments] and had been aware of their content prior to executing the affidavit, *it would have been of no import*."

June 16, 2010 Response, p. 10 (emphasis added).

- "even if Goebel had reviewed the process management notes and been made aware of the existence of the checks in question, . . . before she signed the affidavit, . . . *the affidavit would have remained unchanged*."

Id. at 12 (emphasis added) (discussion of hypothetical in which Option's employee and Goebel herself had communicated about the Unposted Payments prior to Goebel's signing the Affidavit).

See also December 1 Tr. 22:7-12:

- "Her point and the way she testified was, I don't look at what's going on when I execute the affidavit. It's immaterial. I'm agnostic. I don't care because ultimately what I as the affiant rely on is the client's records, what's in Option One's system."

Fidelity officers Scott Walter and Ms. Goebel testified in complete agreement that Ms. Goebel would not have executed her affidavit in the presence of a notary, and that Ms. Goebel would have obeyed Fidelity's procedures in that respect. December 1 Tr. 246:6-12, 337:5-22, 332:3-4.

Mr. Walter and Ms. Goebel also testified in complete agreement that Goebel would not have gained personal knowledge about the averments in her affidavit and, again, that Goebel's execution of the affidavit without gaining personal knowledge would have been in compliance with Fidelity's procedures in that respect. December 1 Tr. 248:1-8, 342:21-343:3. Logically, thus, Fidelity expected its affiants to swear, falsely, that they had gained that personal knowledge. An example from this case highlights the seriousness of this misconduct.

In her Affidavit in this case, Ms. Goebel alleged that she had personal knowledge that "OPTION ONE MORTGAGE CORPORATION is the holder of a secured claim" in the debtors' bankruptcy case by virtue of a mortgage on their home. Trial Ex. 3A, at 122. In fact, however, both Mr. Walter and Ms. Goebel testified that Fidelity's procedure was that its affiants were not to gain personal knowledge as to whether the mortgage servicer had a secured claim against its borrower. At a minimum, Ms. Goebel falsely averred that she knew that Option held the mortgage against the debtors' home. More importantly, it may be that Option did not, in fact, hold the mortgage on the debtors' home. The undisputed evidence was that a completely distinct entity, the Option One Mortgage Loan Trust 2007-6 Asset-Based Certificates, Series 2007-6 (the "PSA Trust"), acquired ownership of the debtors' mortgage pursuant to the May 1, 2007 Pooling and Servicing Agreement filed with the Securities and Exchange Commission. The Pooling and Servicing Agreement indicated that the PSA Trust acquired that title on or about May 1, 2007,

being nine months before Goebel signed her Affidavit.[12] Moreover, just weeks before trial, on September 30, 2010, the PSA Trust asserted its position as the debtors' "creditor" on their home mortgage debt, pursuant to the amended Proof of Claim that it filed with this Court. Trial Ex. 1A at 37. Fidelity offered no evidence that refuted that the PSA Trust, and not Option, was the genuine "holder of the secured claim" on the debtors' home on February 28, 2008.[13] This evidence shows that Fidelity acted with utter indifference as to who held the secured claim on the debtors' home when it permitted Goebel to sign the Affidavit.

VI. THE EVIDENCE ESTABLISHES THAT FIDELITY ACTED TO ABUSE THE BANKRUPTCY PROCESS

The evidence admitted at trial establishes that Fidelity actions constituted abuse of the bankruptcy system. First, Fidelity was willing to permit its employees to systematically provide false testimony to courts, including this Court, through the execution and filing of false affidavits. As Ms. Goebel explained, she followed Fidelity's established procedure for executing affidavits which dictated as follows:

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[12] Whether a mortgage was transferred to a securitized trust is of utmost importance. *See*, *e.g. U.S. Bank N.A. v. Ibanez*, ___ N.E.2d ___, 2011 WL 38071 (Mass. Jan. 7, 2011) (foreclosing plaintiffs denied declaratory relief "that they held clear title" due to absence of timely assignment to pooling and servicing trust) (concurring opinion, Cordy, J., at * 12, underscoring "the utter carelessness" exhibited by the foreclosing plaintiffs, and that "Foreclosure is a powerful act with significant consequences . . ."); and *Kemp v. Countrywide Home Loans, Inc.*, ___ B.R. ___, 2010 WL 4777625 (Bankr. D.N.J. Nov. 16, 2010) (bankruptcy court disallowed claim of trustee for pooling and servicing trust because the mortgage was never delivered to the trustee).

[13] The February 28, 2008 assertion made by Fidelity, through its officer Goebel, that Option is the "holder of a secured claim" against the debtors' home stands in stark contrast to the September 30, 2010 Amended Proof of Claim filed by the PSA Trust, indicating that it, not Option, was the holder of the secured claim.

-- that she look only at three specific computer screens in Option One's database and that these screens did not reflect payments received but not posted. December 1 Tr. 319:16-320:4, 320:17-321:6, 322:21-323:6, 326:14:327:6, 329:13:22; Trial Ex. 9A.

-- that she not sign the document in the presence of a notary, nor be put under oath by a notary prior to signing, but rather that she would sign a number of affidavits all of which were then delivered to a notary who then notarized the stack of affidavits at a later time. December 1 Tr. 246:2-13, 337:10-22, 342:3-20.

-- that she not have personal knowledge of, nor take any steps to verify the existence of a mortgage, a note, any assignments of the mortgage, or any other documents that were referred to in the affidavit, rather she was to assume that the law firm was responsible for verifying that information. December 1 Tr. 341:3-24, 342:21-25.

Moreover, Ms. Goebel testified that she signed virtually all affidavits in the same business day as she received them, taking approximately 10 minutes for each one. December 1 Tr. 333:11-334:8. She further testified that she signed as many as 30 documents per day, although this total included other types of documents in addition to affidavits, and that she considered signing affidavits a "clerical" function. *Id.* 342:21-343:10; 345:6-22.

In short, Fidelity's established policies for signing affidavits guaranteed that its employees, such as Ms. Goebel, would not have personal knowledge of the facts contained therein. Indeed, Fidelity's policies served to prevent its employees from having personal knowledge based upon both the volume of documents they were to sign and the limited information they were allowed to consult prior to executing an affidavit. In this way, Fidelity's process for the execution of affidavits directly contravened this Court's Section A Procedures. Those procedures require that a motion for relief must be supported by an affidavit. An affidavit by an affiant without personal knowledge not only falls below the Court's requirement, it also

acts as a deception, leaving the impression that the creditor has complied with the affidavit requirement.

Second, Fidelity's policies also included acting as an intermediary between Option One and the Boles Law Firm with respect to payments received from debtor/borrowers. See, infra at 6-7. Yet, Ms. Goebel testified at the August 21, 2008 hearing that Fidelity "would not know of additional payments, Option One would." Trial Ex. 26, 111:1-5. This testimony was false, and was, at a minimum, contradicted by Fidelity's own written policies and procedures.[14] Trial Exs. 9, 13. Yet, Fidelity made no effort to correct this false testimony at any time following the hearing.

Finally, prior to the August 21, 2008 hearing, Fidelity knew that Ms. Goebel had been criticized by this Court for providing a false affidavit. This Court determined that the Affidavit of Debt that Goebel gave in this case was "false." Trial Ex. 4A, June 26, 2008 Tr. 35:16-36:5, Trial Ex. 4A at 165-166; and Trial Ex. 4E, July 11, 2008 Order, dkt #46, at 187. A few months prior to this Court's finding, in In re Fagan, Case No. 04-23460, the United States Bankruptcy Court for the Southern District of New York made a virtually identical finding. Specifically, in its September 24, 2007 Decision Granting Sanctions for Motion to Lift Stay Based on False Certification, that court considered an averment in an affidavit signed by "Mr." Dory Goebel on June 1, 2007.[15] There, as in her affidavit in this case, Goebel alleged that the debtor had failed to

[14] It was also contradicted by three other Fidelity employees whose excerpted deposition testimony was admitted into evidence. Trial Exs. 11B, 14C, 15D.

[15] Goebel did not dispute that she was one and same person as the Dory Goebel referred to in the New York court's opinion.

make four post-petition payments. The New York bankruptcy court decreed that "Goebel's sworn statement . . . was false." Trial Ex. 17A at 820 and 826.

Thus, the evidence established that on two occasions prior to the August 21, 2008 show cause hearing Fidelity had reason to question Ms. Goebel's truthfulness. Yet, when responding to the show cause orders, and in support of its own motion to clarify Fidelity's role with respect to the debtors' mortgage account, Fidelity provided only the testimony of Ms. Goebel, and made no effort to correct or retract it at any time.

This evidence establishes that the false testimony given by Ms. Goebel at the August 21, 2008 show cause hearing was not, as Fidelity would have it, the product of Fidelity's confusion or misunderstanding about the scope of the hearing. Rather, it was the inevitable result of Fidelity's "culture of efficiency" that prized speed and volume over truth and accuracy. The evidence is extensive and multi-faceted that Fidelity acted with indifference to whether this Court received accurate and truthful testimony on August 21, 2008. Fidelity's indifference rises to the level of an abuse of the bankruptcy process in seeking relief from stay, as well as bad faith, and demonstrates why Fidelity should be sanctioned.

VII. CONCLUSION

Fidelity permitted this Court to be misled through the sworn testimony of its officer, Dory Goebel, given on August 21, 2008. Through that testimony, this Court was misled about whether Fidelity would know and communicate about the Unposted Payments, as well as Fidelity's role as a go between in this case between Option and Boles. Fidelity knew or should have known that it would be asked about its knowledge of the Unposted Payments, yet failed to send a representative prepared to testify as to that critical subject matter. Fidelity has elected not to

blame Goebel, but has failed to refute the circumstantial evidence showing that Fidelity possessed an indifference to whether this Court received accurate and truthful testimony on August 21, 2008. Fidelity's conduct in this case rises to the level of an abuse of the bankruptcy process, and it acted in bad faith in impeding this Court's investigation. Therefore, this Court should sanction Fidelity.

WHEREFORE, the United States Trustee requests that the Court:

1. Grant the United States Trustee's Motion and enter an order imposing on Fidelity sanctions or other monetary or non-monetary relief as this Court deems appropriate; and

2. Grant the United States Trustee such additional general relief to which the United States Trustee may be entitled, including the award of attorney's fees and costs as may be allowed by law.

Respectfully submitted,

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