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REPLY BRIEF OF
DEBTORS-APPELLANTS MARCUS AND AMANDA PURDY

1. The Motion to Dismiss was primarily based on a violation of E.D.N.C. LBR 4002-1(g)(5) and (g)(6) and not at all based on a forged letter.

On August 23, 2022, the Chapter 13 Trustee filed a Motion to Dismiss the Purdys' case with prejudice. Paragraph 26 of the Motion set forth the asserted reasons to dismiss the case. Paragraphs (a), (c) and (d) of the Motion are based entirely upon the violation of E.D.N.C. LBR 4002-1(g)(5) and (g)(6)¹ (hereafter referred to as "The Local Rules"). Paragraph 26(b) of the Motion to Dismiss is partially based on the violation of The Local Rules with the remainder an allegation that a generic sua sponte ORDER AND NOTICE TO DEBTOR with a hodge podge of E.D.N.C. chapter 13 miscellany was violated. The ORDER AND NOTICE TO DEBTOR was merely notice of the existence of the invalid Local Rules automatically generated in all chapter 13 cases in the E.D.N.C. and was not an order arising from a case or controversy or that resulted from pleadings or arguments of any party to the case. The Bankruptcy Court explicitly did not base its ruling on

¹ The Table of Contents in the Appellees' brief mistakenly states that The Local Rule at issue in this case is E.D.N.C. LBR 4002-1(g)(4) which relates to the disposing of non-exempt property with a fair market value of more than \$10,000.00. The Purdys violated E.D.N.C. LBR 4002-1(g)(5) and (6) which relate to the incurrence of debt and making purchases in excess of \$10,000.00. The Appellees' brief refers to E.D.N.C. LBR 4002-1(g)(5) as The Local Rule. The Purdys refer to The Local Rules in both the original brief and this reply brief as both E.D.N.C. LBR 4002-1(g)(5) and (g)(6).

contempt of court relative to the ORDER AND NOTICE TO DEBTOR. The Appellees' brief focuses on the forged letter which was never cited in the Motion to Dismiss. The forged letter should not have been admitted into evidence by the Bankruptcy Court and should not have been a basis for dismissing the case. The issue of the forged letter was not before the court as it was not pled in the Trustee's Motion to Dismiss. The interactions between the Purdys and their mortgage lender were irrelevant to the prosecution of the chapter 13 case.

2. The forged letter was not fraud.

The Appellees' brief incorrectly alleges that the Purdys incurred their mortgage loan through fraud because of the forged letter. Fraud must be pled with particularity pursuant to Bankruptcy Rule 7009 but was not pled in the Trustee's Motion to Dismiss. Furthermore, the Bankruptcy Court order contained no findings on the essential elements of reliance and injury. If the Purdys' home mortgage lender has an issue with the loan origination, its recourse is in a non-bankruptcy forum under non-bankruptcy law. There was no evidence offered, or finding, regarding reliance of the mortgage lender. There was no evidence offered, or finding, of any injury to any party to the case. Instead, the Bankruptcy Court order stated "... creditors of the Debtors may not have been harmed by the Debtors' actions to date..."

3. The Local Rules are substantive.

The Appellees' brief asserts that The Local Rules are a recognition of various Bankruptcy Code² provisions (11 U.S.C. §1306(a)(1)³, §1325(b)(1)(B) and §1329) and allow the bankruptcy court to fulfill its responsibility to ensure the purposes and intent of the Code are accomplished in cases filed in the E.D.N.C. The brief does not explain what procedure The Local Rules implement. If the Appellees' are correct, then The Local Rules are improperly substantive.

Federal Bankruptcy Rule 1001 establishes that the purpose of local rules of bankruptcy procedure is to secure the just, speedy, and inexpensive determination of every case and proceeding. The purpose of local rules of bankruptcy procedure is not to allow unelected Article I bankruptcy judges to survey bankruptcy jurisprudence, consider the intent of the Code, and then formulate substantive law to apply within a district. By way of contrast, the Local Civil Rules for the Eastern District of North Carolina do not attempt to implement the Congressional intent of patent law, admiralty law, ERISA law, etc.

If a chapter 13 debtor wants to use, sell or lease estate property outside the ordinary course, a notice can be filed under Federal Bankruptcy Rule 6004(a). If a party opposes the proposal, then that initiates a contested matter under Federal Bankruptcy Rule 6004(b). In this case the confirmed plan provided that the estate

² Henceforth, references to the Bankruptcy Code will be abbreviated to "Code".

³ Henceforth references to Title 11 of the United States Code will be abbreviated. For example, 11 U.S.C. §1306 will be §1306.

property would vest in the debtors at confirmation pursuant to §1327. Once the Purdys' plan was confirmed by the Bankruptcy Court, the bankruptcy estate ceased to exist. Even if the Purdys did plan to use estate property to make mortgage payments, it would certainly have been within the ordinary course and not required a notice. It is in the ordinary course to pay for a housing expense. In any event, the Purdys' housing decision was eminently normal and rational. If the goal of the Code was for a chapter 13 debtor's spending to be scrutinized for the totality of the case, it would not allow for vesting of all estate property to occur in the first few months and would provide for this oversight in a manner that was clear and manifest for the hundreds of thousands of chapter 13 cases that are filed each year throughout the country.

The role of the bankruptcy court is to adjudicate disputes that arise under the Bankruptcy Code. The Appellees' brief states that "Debtors seeking relief under chapter 13 of the Bankruptcy Code do so voluntarily, requesting the bankruptcy court's protection from creditors while reorganizing their debts in pursuit of a discharge after maximizing payments to their creditors over time." (Brief of Appellees, Doc. 19, page 23) The Code passed by the democratically elected Congress is what provides the protections that exist for debtors and that is balanced with numerous policy considerations that balance rights and privileges of debtors, creditors, taxpayers, etc. The Supreme Court has explained that the Code "creates

and maintains the ‘delicate balance’ of a debtor’s protections and obligations. *Midland Funding, LLC v. Johnson*, 581 U.S. 224, 233 (2017). There are minimum repayment amounts that are part of the chapter 13 plan confirmation process and that include the liquidation test of §1325(a)(4) and the disposable income test of §1325(b). The Purdys’ confirmed plan met both of those requirements as well as the good faith requirement of §1325(a)(3) and the feasibility requirement of §1325(a)(6). There is no ongoing requirement of good faith to remain in chapter 13 and there is no authority to back up the Appellees’ assertion that “[A] bankruptcy court should not, however, be limited to reviewing a debtor’s conduct only at the time of plan confirmation or modification.” (Brief of Appellees, Doc 19, page 11) The Appellees’ are overstating the power of the bankruptcy court regarding a “for cause” dismissal under §1307. The house purchase was unrelated to the chapter 13 case and for that reason the purchase could not possibly be an abuse of the provisions, purpose or spirit of the Code. The Purdys’ loan process and house purchase had nothing to do with the prosecution of the chapter 13 case. There is no ongoing requirement that a plan remains feasible. That chapter 13 is voluntary, is not a license for bankruptcy judges to create substantive law. All civil litigation is voluntary. Procedural rules must be confined to procedure. A local bankruptcy rule of procedure that purports to restrict something as fundamental and common as a housing decision, should be clear as to its basis in the Code and Federal Rules and

as to what is needed to prevail. In contrast, The Local Rules were formed *ex nihilo* and the application is left to the whims of the presiding judge.

4. Section 1305(c) and §1328(d) do not curtail a chapter 13 debtor’s ability to incur post-petition debt or make purchases.

The Code does not limit a chapter 13 debtor’s ability to incur debt to purchase a home. Section 1305 limits a post-petition claim to debt for property or services necessary for the debtor’s performance of the plan and if practicable, it requires prior approval of the trustee. The court and the trustee are two different entities. Purchasing a house was not necessary for the Purdys’ performance under the plan. The Local Rules are not implementing §1305 and §1328. See *In re Ripley*, 2018 Bankr. LEXIS 310 (Bankr. E.D.N.C. 2018) and *In re Butala*, 2018 Bankr. LEXIS 2606 (Bankr. E.D.N.C. 2018). Holdings to the contrary are incorrectly decided. See *Higgins v. Logan*, 635 B.R. 776 (E.D.N.C. 2021) and *In re Fanning*, 2023 Bankr. LEXIS 1405 (Bankr. E.D.N.C. 2023). Tellingly, the Appellees’ brief does not reference or attempt to justify the existence of E.D.N.C. LBR 4002-1(g)(6) which restricts the purchase of property.

5. The Local Rules abridge and modify substantive rights.

The Rules Enabling Act prohibits a rule of procedure from abridging, modifying or enlarging a substantive right. This limitation reflects the appropriate boundaries of the separation of powers set forth in the U.S. Constitution. Congress makes the laws. The definition of abridge is “to reduce or diminish.” Black’s Law

Dictionary 8 (11th ed. 2019). The definition of modify is “To make somewhat different; to make small changes to (something) by way of improvement, suitability, or effectiveness.” *Id.* at 1203. Modify “carries a ‘connotation of increment or limitation,’ and must be read to mean ‘to change moderately or in minor fashion.’” *Biden v. Nebraska*, 143 S.Ct. 2355 (2023). The Local Rules meet and well exceed that threshold as they improperly invent prohibitions on financial transactions that have nothing to do with bankruptcy law, the E.D.N.C. Bankruptcy Court, or the prosecution of a bankruptcy case. The Appellees wrongly contend because of the (supposed) soundness of The Local Rules and alignment with certain bankruptcy policies that it is acceptable to modify or abridge substantive rights with a local rule of bankruptcy procedure. The Appellees’ brief suggests that making a monthly mortgage is a use of estate property outside the ordinary course. (See Appellees’ brief, Doc 19, Page 22). In this case the bankruptcy estate terminated at confirmation and as such the Purdys were not using estate property to make mortgage payments. In any event, making a residential mortgage payment is not outside the ordinary course of business as most chapter 13 debtors pay monthly rent or mortgage payments. The use of estate property under §363(b) is governed by Federal Bankruptcy Rule 6004. Bankruptcy Rule 9029 requires that local bankruptcy rules of procedure be consistent with, and not duplicative, of the Federal Rules of Bankruptcy Procedure and the Code. A tension with the Code and a local bankruptcy

rule is sufficient to invalidate the local rule. *No. v. Gorman*, 891 F.3d 138, 141 (4th Cir. 2018). Federal Bankruptcy Rule 6004 does not require a court order but only a notice. The Local Rules require an order and make no reference to use of property of the bankruptcy estate. It is impossible to reconcile The Local Rules with Federal Bankruptcy Rule 6004.

CONCLUSION

Bankruptcy Rule 9030 prohibits a rule of procedure from expanding the jurisdiction of the bankruptcy court. In this case, the Bankruptcy Court erred in expanding its jurisdiction with an invalid rule of bankruptcy procedure that was substantive and abridged the Purdys' rights. The Bankruptcy Court compounded its err by dismissing the case based on a violation of this invalid rule along with particulars of how the invalid rule was violated even though these details were irrelevant to its proper role and function and were not properly before it. Finally, there was no finding regarding damages to any party in the bankruptcy case. The Bankruptcy Court holding should be reversed.

Respectfully submitted, this the 31st day of July 2023.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Appellants' Reply Brief complies with Federal Rule of Bankruptcy Procedure 8015(a)(7)(B)(ii), and it contains a total of 2,487 words.

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I certify that a copy of the foregoing REPLY BRIEF OF APPELLANTS was served on all parties or their counsel of record through the CM/ECF system:

Michael B. Burnett and Brian C. Behr
Served electronically via CM/ECF

This the 31st day of July 2023.

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