a. Errors in the Original Proof of Claim that caused McCalla Raymer to file the First Amended Proof of Claim on behalf of Countrywide

On January 4, 2006, pursuant to Countrywide's authorization, McCalla Raymer filed a proof of claim in the Debtor's Chapter 13 case (the Original Proof of Claim).[21] [Aug. 7, 2007 Hr'g Tr. 251-52; Proof of Claim 5-1.] During Thomas' 2004 examination, the U.S. Trustee questioned the basis of a $65.00 charge in the Original Proof of Claim included under "Pre-Petition Attorney Fees and Costs." [Aug. 7, 2007 Hr'g Tr. 124:14-125:4.] Thomas testified that McCalla Raymer was never able to "reconcile" this additional $65.00. [Aug. 7, 2007 Hr'g Tr. 124:25-125:4.] Smith testified that this $65.00 charge in the Original Proof of Claim appeared to be a duplication of another charge. [Aug. 8, 2007 Hr'g Tr. 229:14-230:11.]

Thomas also testified that a different $65.00 charge itemized as "Obtaining Loan Documents" was for work done in connection with the Debtor's prior bankruptcy. However, McCalla Raymer did not actually perform the work until after the Debtor had filed his current bankruptcy. Therefore, McCalla Raymer decided to remove this $65.00 charge from its claim out of "an abundance of caution."[22] [Aug. 7, 2007 Hr'g Tr. 7:7-24, 205:5-14.] As a result of the UST effectively challenging the basis for these two $65.00 charges, McCalla Raymer filed an amended proof of claim on July 19, 2007, which reduced the pre-petition attorney fees and costs by $130.00 (the First Amended Proof of Claim). [Aug. 7, 2007 Hr'g Tr. 124:14-125:4.] Countrywide

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[21] Although Countrywide authorizes the filing of proofs of claim, it does not review or sign any of the proofs of claim filed on its behalf by outside counsel such as McCalla Raymer. [Aug. 8, 2007 Hr'g Tr. 155:25-156:2; Aug. 9, 2007 Hr'g Tr. 278:21-279:3.]

[22] There was another $200.00 charge for closing costs related to the Debtor's prior bankruptcy that occurred post-petition. Thomas was unable to explain why McCalla Raymer removed the $65.00 charge because it occurred post-petition, but failed to remove this $200.00 charge which also occurred post-petition. [Aug. 7, 2007 Hr'g Tr. 130:21-131:17]

authorized McCalla Raymer to file the First Amended Proof of Claim and again did not review it before being filed. [Aug. 9, 2007 Hr'g Tr. 268:13-269:1.]

b. Additional errors and inconsistencies not corrected in the First Amended Proof of Claim

Aside from the removed $130.00, there were additional mistakes and inconsistencies in the Original Proof of Claim that neither McCalla Raymer nor Countrywide corrected in the First Amended Proof of Claim. [Aug. 8, 2007 Hr'g Tr. 254:14-16.]

i. Overcharging of late fees

The original Proof of Claim and the First Amended Proof of Claim both list $243.36 for late charges. [Proof of Claim 5-1; Proof of Claim 5-2.] Countrywide's bankruptcy ledger also indicates that the Debtor owed Countrywide $243.36 in late charges. [Gov't Ex. 25.] By contrast, Countrywide's Master Servicing Loan History indicates that the Debtor owed only $101.40 in late charges as of the filing date of his petition in this case.[23] [Gov't Ex. 24.] McCalla Raymer's Proof of Claim worksheet lists the late charges as both $101.40 and $243.36. [Gov't Ex. 3D.] Smith, the First Vice-President of Foreclosure and Bankruptcy at Countrywide, could not explain the discrepancy between the two amounts, nor could he state which amount was accurate. [Aug. 8, 2007 Hr'g Tr. 229:2-231:12.]

ii. Charging for non-recoverable fees

Thomas testified that McCalla Raymer makes recommendations to Countrywide as to the recoverability of McCalla Raymer's fees and costs in the invoices McCalla Raymer submits. [Aug.

[23] The documents comprising the Master Servicing Loan History evidence the Debtor's loan in a certain format. This format differs from the format set forth in what Countrywide calls the "bankruptcy ledger." Although the formats are different, both relate to the Debtor's loan history. As noted above, Smith was unable to explain why these two documents would have differing amounts.

7, 2007 Hr'g Tr. 129:11-130:5.] In the case at bar, on November 15, 2005, McCalla Raymer sent Countrywide an invoice for $321.00 which included the recommendation that the following charges were non-recoverable: $21.00 for "obtaining court dockets;" $65.00 for "obtaining loan documents;" and $35.00 for "court record costs." The remaining $200.00 of attorney's fees was listed as recoverable. [Gov't Ex. 48.]

The next day Countrywide created its own version of the McCalla Raymer invoice. The Countrywide version of the invoice indicated that, contrary to the McCalla Raymer invoice, the $200.00 in attorney's fees were non-recoverable. Smith testified that he did not how or why the $200.00 charge for attorney fees came to have a parenthetical notation as "non-recoverable," when it had no such notation on McCalla Raymer's invoice. [Aug. 9, 2007 Hr'g Tr. 208:6-11.] Countrywide then charged the entire $321.00 to the Debtor's account despite McCalla Raymer's invoice listing $121.00 in fees as non-recoverable and Countrywide's own invoice listing all the fees as non-recoverable. [Gov't Ex. 725.4; Aug. 9, 2007 Hr'g Tr. 209:17-25.] Thus, when McCalla Raymer filed the original Proof of Claim, it included all $321.00 of the fees even though the firm had already advised Countrywide through its invoice that $121.00 of that amount was non-recoverable and Countrywide's own invoice listed none of these fees as recoverable. [Proof of Claim 5-1.]

Thomas justified this inconsistency by shifting the blame from McCalla Raymer to Countrywide. She testified that McCalla Raymer's invoice is just a recommendation as to recoverability which Countrywide is free to reject. [Aug. 7, 2007 Hr'g Tr. 129:11-130:5.] Conversely, Smith shifted the blame from Countrywide back to McCalla Raymer. He testified that McCalla Raymer, when inputting its invoice, had failed to code its fees properly, which resulted in

the fees being listed on the Original and Amended Proofs of Claim. [Aug. 9, 2007 Hr'g Tr. 230:2-22.] Smith added that in the wake of the show cause hearings, Countrywide intended to conduct audits to ensure that the coding is correct and that Countrywide and its counsel agree on how to input information properly. [Aug. 9, 2007 Hr'g Tr. 231:13-25.]

iii. Countrywide's internal reclassification of fees as non-recoverable

Ortiz testified that after looking at the hard copy of McCalla Raymer's invoices, she learned that the attorney's fees and costs listed on the Original Proof of Claim had been incorrectly classified as recoverable. [Aug. 10, 2007 Hr'g Tr. (morning session) 25:15-26:6.] On June 20, 2007, Ortiz reclassified the attorney's fees and costs on Countrywide's system so that all $321.00 would be designated as non-recoverable. [*Id.*; Gov't Ex. 725.4.] Ortiz did not inform anyone at Countrywide or McCalla Raymer of her actions, however, and was unaware of any proposal or intention to file the First Amended Proof of Claim. [Aug. 10, 2007 Hr'g Tr. (morning session) 26:7-12.] Thus, McCalla Raymer included the non-recoverable fees and costs in First Amended Proof of Claim. Because Countrywide does not review its own proofs of claim, Ortiz did not see the First Amended Proof of Claim before it was filed. She testified that if she had seen the attorney's fees and costs still listed on the First Amended Proof of Claim, she would have informed McCalla Raymer and her own supervisor at Countrywide that those fees were unrecoverable. [Aug. 10, 2007 Hr'g Tr. Vol. 1 25-26.]

The following exchange between counsel for the UST and Smith underscores the potential for mistakes when Countrywide (the client) fails to communicate with McCalla Raymer (its counsel):

UST: You just testified that Countrywide reclassified this $321 in fees because it doesn't believe them to be recoverable from the borrower, correct?

Smith: I believe that Ms. Ortiz reclassified these fees and costs, again, in an abundance of caution on behalf of Countrywide based on these proceedings.

UST: Sir, my question was not what Ms. Ortiz did, my question is: Countrywide does not believe these fees to be recoverable and that's why they were reclassified, correct?

Smith: I would say this. What we believe is that, again, we're going to act upon the advice of counsel. If these were deemed to be fees and costs that should not be recovered by the borrower, we certainly are going to stand behind that and would reclassify as a result.

UST: And, in fact, according to Government Exhibit 725.4, we see the reclassification of these fees on June 20th, 2007, correct?

Smith: That's correct.

UST: And so that's an acceptance by Countrywide that they're not going to charge Mr. Parsley for these fees, correct?

Smith: That's correct.

UST: So can you tell me, sir, why a month later in the Amended Proof of Claim you included $256 in prepetition fees?

Smith: I cannot.

UST: That's wrong isn't it?

Smith: I would say so.

UST: Because Countrywide has reclassified those as not recoverable.

Smith: That's correct.

UST: So this Amended Proof of Claim filed by Mr. Schlotter is itself incorrect, is that right?

Smith: That would be correct.

[Aug. 8, 2007 Hr'g Tr. 253:8-254:16.]

iv. Improperly including post-petition, pre-confirmation attorney fees and disclosing a lesser amount than was actually charged to Countrywide and the Debtor

The Original Proof of Claim and the First Amended Proof of Claim included $350.00 in post-petition, pre-confirmation fees for filing the Original Proof of Claim. The official proof of claim form B-10 states that any arrearages to be included in the claim shall be those incurred "at time case filed." [Proof of Claim 5-1; Proof of Claim 5-2] (emphasis in original). The plain meaning of this language is that arrearages incurred after the case was filed should not be included in a proof of claim.

Thomas testified that she believed it was acceptable for oversecured creditors to list post-petition, pre-confirmation fees on a proof of claim, and thereby avoid complying with §506(b) or Rule 2016. [Aug. 7, 2007 Hr'g Tr. 240-41.] Thomas added that McCalla Raymer did not need to comply with the UST's disclosure guidelines for fee applications because a proof of claim is not a fee application. [Aug. 7, 2007 Hr'g Tr. 241-43.]

Thomas—and McCalla Raymer—are sorely misinformed. This Court has previously held that a creditor holding a lien solely on the debtor's principal residence, such as Countrywide in the case at bar, may assess post-petition, pre-confirmation charges pursuant to § 506(b), but only by filing a Rule 2016 application. *In re Sanchez*, 372 B.R. 289, 303-05 (Bankr. S.D. Tex. 2007) (holding that "the entity seeking reimbursement for expenses from the estate has the burden to file Rule 2016 disclosures and show that its charges are reasonable as required by § 506(b)"). Thus, the $350.00 in post-petition, pre-confirmation fees do not belong on a proof of claim. They belong in a Rule 2016 application, with all of the concomitant disclosure.

The testimony in this proceeding reveals the benefit of requiring creditors to file a Rule 2016 application to recover post-petition, pre-confirmation fees. Thomas testified that although the Original and Amended Proofs of Claim listed the amount of post-petition, pre-confirmation fees as $350.00, McCalla Raymer in fact charged Countrywide $450.00. [Aug. 7, 2007 Hr'g Tr. 132:10-22.] Thomas stated that McCalla Raymer listed the post-petition fees as being only $350.00 because "It is our experience that in jurisdictions where there are not specific either prohibitions of—about obtaining—of collecting post-petition fees without specific Court order, or where they're not allowed at all, that $350 is generally viewed as a reasonable fee for post-petition services as we itemize and make known to the Debtor, Debtor's attorney, and the Court." [Aug. 7, 2007 Hr'g Tr. 133:1-6.]

Smith confirmed that Countrywide passed on the charges for the full $450.00 to the Debtor's account. [Aug. 9, 2007 Hr'g Tr. 19:6-10.] Smith could provide no justification as to why only $350.00 was listed in the Original Proof of Claim and the First Amended Proof of Claim when the actual amount charged to the Debtor was $450.00. [Aug. 9, 2007 Hr'g Tr. 19:15-19.] Thus, the Debtor, through his confirmed plan, has been paying off the $350.00 set forth in the Proof of Claim. This unknowing underpayment will eventually leave the Debtor in the lurch: once his plan payments are completed, contrary to his belief that he has paid off this assessment, he will still owe $100.00 (plus any interest that Countrywide has charged on this $100.00) before he will be able to convince Countrywide to execute a release of lien.

c. The Second Amended Proof of Claim

On October 1, 2007, nearly two months after four days of testimony laying bare the extensive problems with the original Proof of Claim and First Amended Proof of Claim, Countrywide filed a Second Amended Proof of Claim. This Second Amended Proof of Claim was signed by John Smith

and not by an attorney at McCalla Raymer. [Proof of Claim 8-1.] The Second Amended Proof of Claim did not include any of the late charges, pre-petition attorneys' fees and costs, or post-petition fees discussed above. [*Id.*] However, Countrywide included the following notice: "By filing this Second Amended Proof of Claim, Countrywide Home Loans, Inc. does not concede that amounts listed in the Amended Proof of Claim are not recoverable from the Debtor's estate, but rather waives its right to collect such amounts." This statement is cavalier in light of the fact that Countrywide's own representative admitted that, at a minimum, the pre-petition attorneys' fees and costs were not recoverable. Given the testimony presented above, it is disconcerting that Countrywide continued this awkward posturing. Despite all of the errors made by Countrywide and its attorneys in the case at bar, Countrywide continues to leave the door open for collecting these fees.

5. The Motion was filed in violation of Fannie Mae guidelines

Schlotter testified that under Fannie Mae guidelines for loans serviced by Countrywide, a motion to lift stay should not be filed unless the debtor is 60 days delinquent. [Aug. 8, 2007 Hr'g Tr. 11:1-18.] Smith confirmed that Fannie Mae guidelines dictate that the Motion should not have been filed because the Debtor was not 60 days in default. [Aug. 8, 2007 Hr'g Tr. 149:10-16; Aug. 9, 2007 Hr'g Tr. 36:21-24.] Ortiz also testified that it was a mistake for Countrywide to refer the Debtor's file to McCalla Raymer because the Debtor was not 60 days delinquent. [Aug. 10, 2007 Hr'g Tr. 19:19-20:7; 85:4-14.]

From time to time during the hearing, Barrett Burke argued that even though the Motion should not have been filed under Fannie Mae guidelines, the Debtor was nevertheless one post-petition payment in arrears and that this fact was a sufficient legal basis for filing the Motion. [Dec.

12, 2007 Hr'g Tr. 22:18-19.] Indeed, in an attempt to justify his stating that the Motion was a "good motion," Thurmond had the following exchange with counsel for Barrett Burke:

> Counsel: Did the existence of one payment default have any impact on your assessment of the motion to the Court?
>
> Thurmond: Right. Yes, it did because if there was zero default, then it would have been a completely bad motion. If there's a default or multiple defaults, it's a different situation.

[July 27, 2007 Hr'g Tr. 354:5-9.]

The Court is skeptical of Barrett Burke and Thurmond's attempt to disregard the Fannie Mae guidelines in order to justify filing the Motion with only one delinquent post-petition payment. Given that Barrett Burke—and, for that matter, McCalla Raymer—adhere to all other Fannie Mae guidelines, the justification articulated by Barrett Burke and Thurmond is less than compelling. The fact remains that the Debtor was only one payment in default, not three as alleged in the Motion, and Thurmond should have responded with a simple "yes" when the Court asked if the Motion contained inaccurate factual allegations. Additionally, Thurmond's later justification of his "good motion" answer is inconsistent with Fannie Mae policy. Thus, if all of the facts had been correctly stated in the Motion, it should not have been filed and was not a "good motion" under the very Fannie Mae guidelines followed by Barrett Burke.

6. The inaccurate factual allegations in the Motion

However, all the facts were not correctly stated in the Motion. Reilly conceded that the Motion contained inaccurate factual allegations because the payment history attached to the Motion failed to account for the Debtor's November 9, 2005 payment, May 6, 2006 payment, and December 13, 2006 payment. [July 27, 2007 Tr. 108:7-19; *see also* 112:20-113:17.] Likewise, Sanov testified that the payment history attached to the Motion was neither accurate nor current despite the

representation in the Motion that "the attached payment history is a current payment history reflecting all payments, advances, charges, and credits from the beginning of the loan." [July 27, 2007 Hr'g Tr. 212:17-19.] As stated previously, a simple call to McCalla Raymer or Countrywide asking for an updated payment history would have revealed the existence of the Debtor's December 13, 2006 payment.

At the March 5, 2007 hearing, Ortiz testified that Countrywide did not receive notice of the Debtor's bankruptcy filing until November 15, 2005, thereby leading this Court to believe that Countrywide made an innocent mistake when it reported the Debtor's November 9, 2005 payment as a prepetition payment instead of a post-petition payment. [March 5, 2007 Hr'g Tr. 58:4-12.] At the August 10, 2007 hearing, however, Ortiz conceded, under cross examination by the UST, that her testimony at the March 5, 2007 hearing was false. [Aug. 10, 2007 Hr'g Tr. 80:17-81:5.] Indeed, she admitted that her own involvement in the Debtor's file began on November 3, 2005, and that Countrywide's own records revealed that the Debtor had called Countrywide on November 2, 2005 to report that he had filed a bankruptcy petition on October 13, 2005. [Aug. 10, 2007 Hr'g Tr. 81:6-16.] Ortiz also conceded she did not avail herself of the opportunity to correct her inaccurate testimony between March 5, 2007—when she first took the stand—and August 10, 2007—when she took the stand a second time.[24] [Aug. 10, 2007 Hr'g Tr. 105:2-9.] This is further evidence of the sloppy practices and training at Countrywide. Moreover, Ortiz's failure to correct her prior incorrect testimony reflects poorly on her credibility with this Court.

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[24] The transcript from the March 5, 2007 hearing became available on March 7, 2007 so Ortiz had at least five months to review the transcript and inform this Court of her inaccurate testimony. There is no question that Ortiz reviewed the transcript of the March 5, 2007 hearing before she took the stand on August 10, 2007. [Aug. 10, 2007 Hr'g Tr. 105:16-18.]

Regarding the Debtor's November 9, 2005 payment and its erroneous application in the payment history attached to the Motion, Smith conceded that it was Countrywide's fault that this payment was not reflected as a post-petition payment. [Aug. 8, 2007 Hr'g Tr. 142:18-21.] However, Smith blamed Barrett Burke and McCalla Raymer for the absence in the loan payment history of the December 13, 2006 payment made by the Debtor. [Aug. 8, 2007 Hr'g Tr. 144:21-145:3.] Smith also testified that "Countrywide's expectation would be that upon referral to counsel, that counsel would take all appropriate actions necessary to ensure the accuracy/validity of the documentation provided to the Court for a Motion for Relief." [Aug. 9, 2007 Hr'g Tr. 45:3-7.]

The Court finds Countrywide's attitude to be less than commendable. Countrywide is the client, and Countrywide has the records and documents necessary to substantiate and update the accuracy of any motion for relief from stay or proof of claim prepared by outside counsel. Smith's testimony leaves no doubt that Countrywide does not want to devote any employee time to reviewing the pleadings drafted by its own counsel.[25] This approach may well work in many cases, but it surely did not work in the case at bar. Countrywide's policy of not checking its counsels' work may well save money; no employee time need be allocated to reviewing outside counsels' work. However, the substantial attorneys' fees and expenses incurred by Countrywide in the case at bar, plus the amount of employee time spent preparing for and attending the show cause hearings, underscores the risks of taking this approach.

[25] Smith also conceded that Countrywide does not review its proofs of claim before its counsel files them. [Aug. 9, 2007 Hr'g Tr. 278:21-24.]

7. Policy changes made by the parties as a result of the show cause hearing

More than nine months passed between the issuance of the First Show Cause Order and the closing arguments in this matter. During this time, each of the parties attempted to respond to the issues raised by the Court and the UST. Although a multitude of issues remain unresolved, the Court is pleased that some steps have been taken in the right direction. After the parties read this Memorandum Opinion, the Court hopes they will continue these improvements.

a. Changes made by Barrett Burke

Daffin testified that in the wake of this Court's issuance of the First Show Cause Order and the Second Show Cause Order, Barrett Burke no longer accepts referrals from other firms where Barrett Burke is not allowed to communicate directly with the client (i.e., the lender or the servicer). [July 27, 2007 Hr'g Tr. 252:4-253:12.] Daffin further testified that Barrett Burke will no longer file a motion to lift stay without attaching an affidavit from the servicer or lender attesting to the accuracy and current status of the loan that is the subject of the motion. [July 27, 2007 Hr'g Tr. 253:13-255:14.] She noted that Barrett Burke will insist upon an affidavit from the servicer or lender despite the difficulty in obtaining a loan history from inception. [July 27, 2007 Hr'g Tr. 258:14-21.]

b. Changes made by McCalla Raymer

Thomas testified that, in order to assuage this Court's concerns about inaccurate loan histories in motions to lift stay and proofs of claim, McCalla Raymer now requires the servicer or lender to sign an affidavit swearing that the figures are correct before referring the file to local counsel. [Aug. 7, 2007 Hr'g Tr. 47:6-24.] Additionally, McCalla Raymer has altered the language in its engagement letters so that local counsel is no longer prohibited from directly contacting the client so long as local counsel notifies McCalla Raymer about the direct communication. [Aug. 7,

2007 Hr'g Tr. 40:8-16.] Finally, Thomas testified that McCalla Raymer has instituted is that it will no longer make referrals to Barrett Burke, but rather to a different firm in Texas.[26] [Aug. 7, 2007 Hr'g Tr. 48:6-13.]

c. Changes made by Countrywide

Countrywide has made two changes as a result of the Show Cause Orders.[27] First, Countrywide no longer refers Fannie Mae loans to a single national counsel. [Aug. 8, 2007 Hr'g Tr. 157:10-21.] Insofar as this change means that Countrywide will be directly communicating with attorneys who file pleadings on behalf of Countrywide, the Court believes that this is a positive change. Second, Countrywide will require that internal affidavits be executed prior to the filing of a motion to lift stay, and will be diligent about communicating with outside counsel to ensure that Countrywide provides accurate information. [Aug. 8, 2007 Hr'g Tr. 158:25-159:7.]

F. Closing arguments raised at the December 12, 2007 hearing

1. *Sua sponte* action is permissible.

The parties, led by counsel for Barrett Burke, took the position during closing arguments that the Court lacked the power to issue the Show Cause Orders because it acted on its own volition rather than on a pleading from the Debtor. In fact, the Debtor has never been involved in this matter as a complainant. In its post-trial brief, Barrett Burke described this proceeding as "nothing more than an expensive and exhaustive 'fact finding mission.'" [Docket No. 232, ¶ 45.]

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[26] It should be noted that Barrett Burke expressly informed McCalla Raymer that Barrett Burke no longer wished to received referrals from McCalla Raymer. [Aug. 7, 2007 Hr'g Tr. 48:15-23.]

[27] Another change that Countrywide claimed to have made as a result of the Show Cause Orders was committing to writing a policy stating that it would not charge borrowers for fees associated with a motion to lift stay that is withdrawn due to Countrywide's errors. The Court has already discussed its skepticism about this alleged written policy *supra* in section IV.D.

Section 105(a) plainly states that the Court may act *sua sponte*:

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

11 U.S.C. § 105(a) (emphasis added).

The language from § 105(a) leaves no doubt that regardless of whether any party, including a debtor, complains about the actions of another, a bankruptcy court, on its own, may raise any issue and take any action to protect the integrity of the bankruptcy process. In the case at bar, this Court issued the First Show Cause Order only after providing counsel for Countrywide ample opportunity to explain why Countrywide wanted to withdraw the Motion. The Court could not reconcile the contradiction between the Debtor's written response with Thurmond's statement that the Motion was "a good motion;" and Thurmond never filed any pleading reporting back to the Court with any information that would help this Court reconcile the contradiction. The Court therefore issued the First Show Cause Order to ensure that Countrywide and Barrett Burke were not abusing the bankruptcy process. The absence of any challenge by the Debtor or any other party-in-interest does not absolve this Court from its duty to ensure the integrity of the process.

In the case at bar, a major reason the Motion was riddled with errors was due to McCalla Raymer's "simplification" of Countrywide's payment history. While the Court would prefer not to have to invoke § 105(a) and instead have debtors' attorneys lodge objections to ill-founded proofs of claim and motions to lift stay, in actual practice serious and thorough challenges are rarely mounted. The absence of such challenges argues in favor of this Court and the UST becoming more—not less —involved in scrutinizing payment histories and conduct of mortgagees to avoid

abuse of the bankruptcy system becoming accepted practice.[28] Indeed, in the case at bar, once this Court probed, and the UST became involved, it was established that Countrywide's Proof of Claim had to be amended not only once, but twice, which prevented the Debtor from being overcharged by $1,025.36.[29] This is a substantial sum to any debtor. Although $1,025.36 may be insubstantial to Countrywide, when that amount is multiplied by the tens of thousands of bankruptcy cases in which it has filed proofs of claim, the aggregate sum might total several million dollars of improperly obtained funds.

2. The Show Cause Orders are not moot.

Barrett Burke argues that the Show Cause Orders are moot because it has reimbursed the Debtor for the $250 of attorney's fees that he incurred in responding to the Motion. The Fifth Circuit has described the doctrine of mootness as applying when (1) there is no reasonable expectation that the alleged violation will recur; and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Tex. Office of Pub. Util. Counsel v. F.C.C.*, 183 F.3d 393, 413-14 (5th Cir. 1999) (citing *Count of Los Angeles v. Davis*, 440 U.S. 626, 631 (1979)).

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[28] In addition to the UST, the bankruptcy process would be well served if Chapter 13 Trustees could devote the necessary time to review and, where applicable, lodge objections to improper or incomplete proofs of claim. As a practical matter, however, given the vast number of cases and limited resources of the Chapter 13 Trustees in the Southern District of Texas, it would be very difficult for the two Chapter 13 Trustees in Houston to undertake these tasks.

[29] Countrywide's initial Proof of Claim set forth that total arrearages were $4,714.85. [Proof of Claim No. 5-1.] As discussed herein, Countrywide, through McCalla Raymer, then filed a First Amended Proof of Claim setting forth that the total arrearages were $4,584.85—in other words, $130 less than the amount set forth in the Original Proof of Claim. [Proof of Claim No. 5-2.] Then, as further discussed herein, Countrywide filed a Second Amended Proof of Claim setting forth that the total arrearages are $3,689.49—in other words $895.36 less than the amount set forth in the First Amended Proof of Claim and $1,025.36 less than the amount set forth in the Original Proof of Claim. [Proof of Claim No. 8.] In this Second Amended Proof of Claim, Countrywide did not claim the pre-petition attorney's fees and costs of $256.00, the post-petition fees and costs of $350.00, inspection fees of $46.00, and late charges of $243.36. But for the UST's thorough probing in the discovery associated with the show cause hearings, the erroneous, overstated arrearage amount in the Original Proof of Claim and the First Amended Proof of Claim would never have been uncovered.

That the Debtor is not a complainant has no bearing on this Court's jurisdiction or authority to issue show cause orders under 11 U.S.C. § 105. The Court's initial concern was about whether the Motion contained factual inaccuracies, but, after the March 5, 2007 hearing, new concerns developed about the defective system by which Countrywide, McCalla Raymer, and Barrett Burke file motions to lift stay and proofs of claim. Based on the testimony and exhibits described herein, the Court has reason to believe that the parties, in the future, might repeat the errors and misrepresentations that occurred in the case at bar. Accordingly, the Show Cause Orders are not moot.

3. The Frequency of Mistakes in Contested Matters in the Consumer Bankruptcy Practice

Barrett Burke's counsel also argued that this Court should not impose sanctions because the conduct called into question by this Court's Show Cause Orders an isolated incident of human error that is not commonplace. "Your Honor, the other observation that I would make is that if, in fact, the system is so egregious and so inadequate and so imperfect and so, fraught with errors, wouldn't we see it everywhere? Wouldn't we see the mistakes in every case, in every court, in every jurisdiction? And yet, we don't." [Dec. 12, 2007 Hr'g Tr. 149:13-17.] This Court begs to differ, both as to the consumer practice in general and Barrett Burke in particular.

Less than a year ago, the Honorable Wesley W. Steen, Chief Bankruptcy Judge for the Southern District of Texas, imposed sanctions of $150,000.00 against Barrett Burke as a result of its committing numerous mistakes related to a motion to lift in a Chapter 13 case. *In re Allen*, 2007 Bankr. LEXIS 2063 (Bankr. S.D. Tex. June 18, 2007).[30] Applying the factors set forth by the Fifth

[30] This amount was remitted in half "because Barrett Burke recognizes the gravity of its actions and takes responsibility for those actions" and Barrett Burke had taken actions to correct its deficiencies. *Allen*, 2007 Bankr. LEXIS 2063, at *43. Such actions included implementing extra levels of document review and hiring former Bankruptcy

Circuit in *Topalian v. Ehrman*, 3 F.3d 931 (5th Cir. 1993), Judge Steen noted that the conduct of Barrett Burke sought to be deterred by the sanction was, among other things, "the filing of pleadings with the court that are clearly wrong (even contrary to the information in Barrett Burke's own files) or that otherwise are not thoughtful, considered, and intelligible." *Id* at *6.

Thereafter, Judge Steen reviewed another factor from *Topalian*: what is the least severe sanction adequate to achieve the purpose of the rule under which it was imposed? He noted that answering this question requires review of several factors, including whether the improper conduct was part of a pattern of activity or an isolated event. *Id.* at *7. He then spent several pages discussing eight consumer cases in which Barrett Burke's conduct was woefully deficient. *Id.* at *9-25. In five of these instances, Barrett Burke filed motions to lift stay that contained inaccurate allegations about the debtors' payment defaults and/or failed to attach basic documentation such as the promissory note. *In re Thompson*, Case No. 01-10399, 2003 Bankr. LEXIS 2197 (Bankr. N.D. Tex. 2003); *In re Smith*, Case No. 04-41212 (Bankr. S.D. Tex. 2004); *In re Gaytan,* Case No. 04-50242 (Bankr. S.D. Tex. 2005); *In re Clansy,* Case No. 04-40504 (Bankr. S.D. Tex. 2005); *In re Cordova*, Case No. 04-50312 (Bankr. S.D. Tex. 2005). A sixth case involved Barrett Burke filing an agreed order which was materially contrary to the terms negotiated by counsel for the debtor and the Barrett Burke attorney. *In re Davis*, Case No. 02-10389, 2003 Bankr. LEXIS 1583 (Bankr. N.D. Tex. 2003). A seventh case involved Barrett Burke filing a proof of claim with no supporting documents. *In re Anderson,* 330 B.R. 180 (Bankr. S.D. Tex. 2005).[31] The eighth case involved

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Judge Bill Brister as an independent auditor. *Id.* at *28.

[31] Thurmond was the Barrett Burke attorney involved in *Anderson*. The Court, in denying the mortgagee's motion to vacate an order sustaining the debtor's objection to proof of claim, noted that Thurmond was not as diligent as he should have been in representing the mortgagee. *Anderson,* 330 B.R. at 187.

Barrett Burke submitting fee statements to the Court that, contrary to the testimony of the Barrett Burke attorney who sought to prove them up as business records, were actually non-contemporaneously-kept timesheets prepared in anticipation of litigation. *In re Porcheddu*, Case No. 05-40177, 338 B.R. 729 (Bankr. S.D. Tex. 2006). After reviewing all of these error-laden examples, Judge Steen quite reasonably concluded that "the improper conduct [in *Allen*] was part of a pattern of activity and that Barrett Burke has been warned numerous times to correct its deficiencies." *Id* at *9.

This Court is at a loss to understand how Barrett Burke's counsel—who, it should be noted, was also Barrett Burke's counsel in *Allen*—could suggest that the mistakes made in the case at bar are an isolated incident. As shown in *Allen*, Barrett Burke has repeatedly made the same kind of mistakes as those in the case at bar within the Southern District of Texas.

To the extent that the remarks of Barrett Burke's counsel were intended to suggest that the conduct in the case at bar has not been called into question in jurisdictions *outside* of the Southern District of Texas, the Court also disagrees. In addition to the two Northern District of Texas cases cited above, the Court would cite the following published opinions as examples of mistakes by firms other than Barrett Burke in jurisdictions outside of Texas that are similar to the errors in the case at bar:

(1) *In re Rivera*, 342 B.R. 435 (Bankr. D. N.J. 2006).

The bankruptcy court issued a show cause order to the law firm of Shapiro and Diaz, LLP (S&D), a firm owned by two Illinois attorneys which represents mortgagees in consumer bankruptcies throughout the country. *Id.* at 439. The Court sanctioned S&D $125,000.00 for filing 250 motions to lift stay that contained pre-signed certifications of default executed by an individual

who had not been an employee at S&D for over a year. *Id.* at 464. Characterizing S&D's use of pre-signed forms as "the blithe implementation of a renegade practice," the court noted that "S&D had become a paper-pushing factory" and that the firm's principals "seem to have lost sight of their professional responsibility. This loss was facilitated because [the principals] did not care to establish quality controls to assure that profession standards were being maintained." *Id.* at 464, 459, 466.

(2) *In re Ulmer*, 363 B.R. 777 (Bankr. D.S.C. 2007).

The bankruptcy court issued a show cause order to the law firm of Butler and Hosch P.A. (B&H), a firm with offices in several states, including South Carolina and Florida, which represents mortgagees in consumer cases. *Id.* at 779. The court sanctioned B&H $33,500.00 for filing 67 motions to lift stay that: (1) contained defective affidavits and/or (2) were not reviewed and signed by the attorney whose name was on the motion. *Id.* at 785. The court noted that B&H's managing attorneys were not properly supervising the firm's associate attorneys. *Id.*

(3) *In re Osborne*, 375 B.R. 216 (Bankr. M.D. La. 2007).

The bankruptcy court sanctioned Homeside Lending, its law firm, Shapiro and Mentz (S&M), and one associate attorney at S&M, Stacy Wheat (Wheat), jointly and severally, in the amount of $46,976.72, representing $41,976.72 in attorneys' fees and costs and $5,000.00 for the debtor's emotional distress. *Id.* at 229. The Court imposed the sanctions because Wheat, without any personal knowledge, signed an affidavit in support of relief from the stay declaring that the debtor had defaulted on her home loan to Homeside when, in fact, the debtor was not in default. *Id.* at 225. The bankruptcy court granted relief from the stay in reliance upon Wheat's submission of the affidavit, and foreclosure actions thereafter ensued, thereby causing the debtor emotional distress and substantial attorney's fees incurred to halt the foreclosure.

In his memorandum opinion, Bankruptcy Judge Douglas D. Dodd noted how S&M, which has a substantial practice representing mortgagees in real estate foreclosures and bankruptcies, allowed Wheat to handle its bankruptcy files:

> Stacy Wheat handled Shapiro and Mentz's litigation and bankruptcy matters, including mortgage foreclosures. Wheat testified that an average of between 30 and 50 files crossed her desk every day. She relied on two or three employees to prepare the motions for relief from the automatic stay, select a hearing date, then file and serve the motions she had signed. Wheat testified that she had handled thousands of motions for Homeside between 1991 and 1999, but Homeside never asked to review draft pleadings or stay relief motions before she filed them. Instead, the evidence demonstrated that Wheat, as Homeside's lawyer, assumed that the information Homeside furnished her office was correct, and therefore that the statements in documents that she filed on Homeside's behalf were accurate.

Id. at 220.

The conduct in the case at bar is similar to certain conduct in *Rivera*, *Ulmer*, and *Osborne*. Here, for example, the testimony was clear that Countrywide never reviewed the motions to lift stay which Barrett Burke or McCalla Raymer filed on its behalf. No attorney at McCalla Raymer reviewed the work of the legal assistants who constructed the so-called simplified payment history which was then forwarded to Barrett Burke. There was also a lack of candor to the Court: Thurmond's statement that "it was a good motion" was as deceptive as S&D's filing of certifications signed by an individual who was no longer employed by that law firm. Here, as in the three cases cited above, the partners at Barrett Burke and McCalla Raymer have not sufficiently supervised their associates and established sufficient controls to assure that professional standards are maintained.

In sum, there are published opinions from New Jersey, South Carolina, and Louisiana evidencing substantial and material errors in motions to lift stay filed by law firms representing mortgagees in consumer bankruptcies in several states. Contrary to the suggestion of Barrett Burke's

counsel, there are mistakes similar to the ones in the case at bar occurring in jurisdictions throughout the country.

V. Actions to be taken by this Court as a result of the hearings on the Show Cause Orders

A. The Show Cause Orders were issued pursuant to 11 U.S.C. § 105(a) and the Court's inherent power and were not in the nature of either civil or criminal contempt

The Court issued the First Show Cause Order under its inherent power "pursuant to *Chambers v. NASCO*, 501 U.S. 32, 111 S. Ct. 2123, 115 L Ed. 2d 27 (1991), and 11 U.S.C. § 105(a)." Section 105(a) states:

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

In *Chambers*, the Supreme Court recognized that courts have an inherent power to issue sanctions against litigants for their bad-faith conduct. *Chambers*, 501 U.S. 43-46. Although *Chambers* involved a district court, the inherent powers described by the Supreme Court "are equally applicable to the bankruptcy court." *In re Case*, 937 F.2d 1014, 1023 (5th Cir. 1991). The limits on a bankruptcy court's power to sanction under its inherent powers and § 105(a) are essentially coterminous. *Caldwell v. Unified Capital Corp. (In re Rainbow Magazine, Inc.)*, 77 F.3d 278, 284 (9th Cir. 1996) ("By providing that bankruptcy courts could issue orders necessary 'to prevent an abuse of process,' Congress impliedly recognized that bankruptcy courts have the inherent power to sanction that *Chambers* recognized exists within Article III courts."); *In re Courtesy Inns, Ltd., Inc.*, 40 F.3d 1084, 1089 (10th Cir. 1994) ("We believe, and hold, that § 105 intended to imbue the bankruptcy courts with the inherent power recognized by the Supreme Court in *Chambers*.").

It is undisputed that, within the Fifth Circuit, a bankruptcy court lacks criminal contempt power. *Placid Ref. Co. v. Terrebonne Fuel & Lube* (*In re Terrebonne Fuel & Lube*), 108 F.3d 609, 613 n.3 (5th Cir. 1997). Barrett Burke mistakenly argues that these proceedings have been in the nature of criminal contempt. Therefore, Barrett Burke argues that this Court lacked jurisdiction throughout the entire duration of these proceedings. This argument is based upon the incorrect assumption that the Show Cause Orders relied upon the Court's contempt power. Neither of the two Show Cause Orders ever mentions contempt nor do they seek to enforce any order of the Court. The power to issue the Show Cause Orders and conduct the hearings in this matter were solely derived from § 105(a) and the inherent power of the Court to regulate the parties before it. *See Chambers*, 501 U.S. at 46 (noting that inherent powers can be used without resorting "to the more drastic sanctions available for contempt of court."). Thus, Barrett Burke's argument that the Court lacks jurisdiction is without merit.

In its post-hearing brief, Countrywide argued that: "The issues regarding Countrywide in this Show Cause Proceeding are governed by Rule 9011. Because the Motion was withdrawn before the Show Cause Order was entered, Countrywide cannot be monetarily sanctioned for filing the Motion." [Docket No. 231, p. 2.] Barrett Burke made a similar argument. [Docket No. 232, pp.26-35.] This argument is apparently derived from the following language in *Chambers*: "when there is bad-faith conduct in the course of litigation that could be adequately sanctioned under the Rules, the court ordinarily should rely on the Rules rather than the inherent power. But if in the informed discretion of the court, neither the statute nor the Rules are up to the task, the court may safely rely on its inherent power." *Chambers*, 501 U.S. at 50.

The parties overlook the word "ordinarily" and extract a rule from these two sentences that the Court may not exercise its inherent power when a Rule exists that may arguably regulate the same conduct. This argument contradicts the ultimate holding in *Chambers*. Despite encouraging courts to utilize the Rules whenever possible, the Supreme Court held that "the inherent power of a court can be invoked even if procedural rules exist which sanction the same conduct." *Chambers*, 501 U.S. at 49. "There is, therefore, nothing in the other sanctioning mechanisms or prior cases interpreting them that warrants a conclusion that a federal court may not, as a matter of law, resort to its inherent power to impose attorney's fees as a sanction for bad-faith conduct. This is plainly the case where the conduct at issue is not covered by one of the other sanctioning provisions. But neither is a federal court forbidden to sanction bad-faith conduct by means of the inherent power simply because that conduct could also be sanctioned under the statute or the Rules." *Chambers*, U.S. 501 at 50; *see also Link v. Wabash R. Co.*, 370 U.S. 626, 630-32 (1962). This Court may exercise its inherent power when the conduct sought to be regulated is "intertwined" with conduct that is sanctionable under the Rules. *Chambers*, 501 U.S. at 51; *see also First Bank of Marrietta v. Hartford Underwriters Ins. Co.*, 307 F.3d 501 (6th Cir. 2002).

In the case at bar, the Court's impetus to issue the First Show Cause Order was its suspicion that Thurmond had lied at the February 6, 2007 hearing. Such an oral misrepresentation would be outside the scope of Rule 9011, but would be within the Court's inherent power. Many of the other issues raised by the Court are not directly covered by Rule 9011 or any other Rule: the prohibition against direct communication with the client; Countrywide improperly charging borrowers fees for withdrawn motions; and the process by which these parties prepare and deliver payment histories

to the Court. Thus, the Court appropriately resorted to its inherent power to address the full range of conduct in the case at bar because this conduct exceeded the scope of Rule 9011.

B. In order to impose sanctions under its inherent power, the Court must find clear and convincing evidence of conduct that is in bad faith, vexatious, wanton, or undertaken for oppressive reasons.

In order for the Court to impose sanctions pursuant to its inherent power or § 105(a), it must make "a specific finding of bad faith." *Goldin v. Bartholow*, 166 F.3d 710, 722 (5th Cir. 1999); *Crowe v. Smith*, 261 F.3d 558, 563 (5th Cir. 2001); *Bynum v. Am. Airlines, Inc.*, 166 Fed. Appx. 730, 735 (5th Cir. 2006) (citing *Chambers*, 501 U.S. at 44-46) ("One aspect of this inherent power is the power to impose sanctions, including attorney's fees, on litigants for conduct that is in bad faith, vexatious, wanton or undertaken for oppressive reasons."); *Matta v. May*, 118 F.3d 410, 416 (5th Cir. 1997); *Matter of Volpert*, 110 F.3d 494, 500 (7th Cir. 1997). "Bad faith, for the purposes of section 105 is characterized as an attempt to abuse the judicial process." *In re Gorshtein*, 285 B.R. 118, 124 (Bankr. S.D.N.Y. 2002) (citing *In re Spectee Group, Inc.*, 185 B.R. 146, 155 (Bankr. S.D.N.Y. 1995)). Moreover, the threshold for imposing sanctions using the court's inherent powers is extremely high. The court should invoke its inherent powers if it finds "that fraud has been practiced upon it, or that the very temple of justice has been defiled." *Chambers,* 501 U.S. at 46.

The Fifth Circuit has applied a clear and convincing evidence standard when the sanction imposed is attorney suspension or disbarment, but the Fifth Circuit has never directly stated the appropriate standard for less severe sanctions. *In re Cochener*, 360 B.R. 542, 572-73 (Bankr. S.D. Tex. 2007) (citing *Crowe v. Smith*, 261 F.3d 559 (5th Cir. 2001)). However, in the appeal of *Cochener*, District Judge Sim Lake ruled that the Fifth Circuit would apply a clear and convincing standard when the sanction is penal in nature.[32] In making this ruling, Judge Lake pointed to

[32] Judge Lake's opinion was not issued until December 28, 2007, which was two weeks after the last hearing in the case at bar. Given this ruling, this Court will apply the clear and convincing standard in the case at bar.

Shepherd v. Am. Broadcasting Companies, Inc., 62 F.3d 1469 (D.C. Cir. 1995) because the Fifth Circuit positively cited *Shepherd* in *Crowe*. *Barry v. Sommers* (*In re Cochener*), No. 07-0629, slip op. at 31 (S.D. Tex. Dec. 28, 2007) (appeal taken but not yet docketed). *Shepherd* held that a preponderance of the evidence standard is applied when the sanction is issue-related, such as the exclusion of evidence, but the court must apply the clear and convincing standard if the sanction is penal in nature, such as the imposition of a fine or an award of attorney's fees. *Shepherd*, 62 F.3d 1478. Any sanction that this Court may order as a result of the Show Cause Order would be punitive in nature and, therefore, the appropriate standard of proof in the case at bar is clear and convincing. In order to meet the clear and convincing standard, the evidence presented must be "so clear, direct and weighty and convincing as to enable the fact finder to come to a clear conviction, without hesitancy, of the truth of the precise facts." *In re Medrano*, 956 F.2d 101, 102 (5th Cir. 1992) (citing *Cruzan v. Director Mo. Dept. of Health*, 497 U.S. 261, 285 n.11 (1990)).

C. Thurmond's knowing misrepresentation to this Court constitutes bad faith.

At the February 6, 2007 hearing, this Court asked Thurmond if the Motion contained allegations about the payment history that were "just flat-out wrong." [Feb. 6, 2007 Hr'g Tr. 4:2-7.] He responded that "it was a good motion." [Feb. 6, 2007 Hr'g Tr. 4:10.] There was an abundance of testimony during the show cause hearings to establish by clear and convincing evidence that Thurmond had actual knowledge of the inaccurate factual allegations in the Motion before appearing at the February 6, 2007 hearing. Thus, the Court concludes that Thurmond made an intentional and knowing misrepresentation to the Court.[33] This finding alone constitutes bad faith for purposes of imposing sanctions under the Court's inherent power.[34] *Hamm v. Hiler* (*In re Smyth*), 242 B.R. 352,

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[33] As noted previously, Thurmond also misled the Court by informing it that he would go back to his office to investigate the allegations about the payment history. Thurmond had no intention to conduct an actual investigation and report back to the Court. Instead, he believed that this statement would satisfy the Court's interest in the Motion and the issue would simply go away.

[34] It should be noted that Thurmond is an attorney and, as such, this Court may impose a heightened standard of conduct on him when considering sanctions. *Carroll v. Jaques Admiralty Law Firm, P.C.* 110 F.3d 290, 293-94 (5th Cir. 1997). Additionally, Thurmond testified that he has four degrees: a bachelor's degree from Baylor University, a master's degree in accounting from the University of Houston, a Juris Doctor from South Texas College of Law, and an

361 (Bankr. W.D. Tex. 1999) (holding that an attorney's "unflinching lie to the bankruptcy court regarding when the property was transferred qualifies as a 'defiling of the very temple of justice.'").

The Court concludes that there is clear and convincing evidence that Thurmond had actual knowledge of the inaccurate factual allegations in the Motion for the following reasons: (1) Thurmond admitted that he knew before attending court on February 6, 2007 that the November 9, 2005 and May 5, 2006 payments had been misapplied and the December 13, 2006 payment was not recorded. [Aug. 10, 2007 Hr'g Tr. (afternoon session) 46:16-47:21]; (2) Schlotter convincingly testified that Thurmond called him the day before the February 6, 2007 hearing seeking permission to withdraw the Motion because of its erroneous allegations about the Debtor's defaults. [Aug. 8, 2007 Hr'g Tr. 70:2-71:11]; (3) Thurmond read the Barrett Burke attorney worksheet prior to attending the February 6, 2007 hearing. The attorney worksheet stated that "These payments have now been applied correctly and we have found that the loan was post petition due for 12/01/2006 with money in suspense when we filed the [Motion] on 12/29/2006 and this is why we are withdrawing the [Motion]." [Barrett Burke Ex. No. 31.]; and (4) Thurmond spoke with Knesek just prior to the February 6, 2007 hearing about the need to withdraw the Motion, and the bankruptcy case comments of Barrett Burke reflect that Knesek knew that the Motion contained factually inaccurate allegations. [Barrett Burke Exhibit No. 3, pg.2; Aug. 10 Hr'g Tr. (afternoon session) 34:2-35:13.] Because Thurmond had actual knowledge of the inaccurate allegations in the Motion, the Court concludes that his statement that the Motion was "a good motion" was a knowing misrepresentation made in bad faith.

D. The Court will issue no sanctions against Thurmond despite its specific finding of bad faith and his past misbehavior.

The case at bar is not the first time Thurmond has engaged in bad faith conduct in the Southern District of Texas. *See In re Porcheddu*, 338 B.R. 729 (Bankr. S.D. Tex. 2006). In

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LLM in taxation from Southern Methodist University. [July 27, 2007 Hr'g Tr. 342:17-24.] Thus, Thurmond had more degrees than any other individual in the courtroom. He can hardly claim to be unsophisticated or, for that matter, given his 24 years of practicing law, inexperienced.

Porcheddu, Bankruptcy Judge Marvin Isgur, after issuing a show cause order, imposed sanctions against Barrett Burke and one of its attorneys, R.J. Bryant, for intentionally and dishonestly submitting fee statements that were not kept contemporaneously as required by applicable Fifth Circuit case law. Indeed, part of the dishonest conduct involved misleading or downright false testimony and representations made by Thurmond. Set forth below is how Judge Isgur characterized Thurmond's statements:

> In closing arguments, Barrett Burke took solace in Mr. Thurmond's carefully chosen words on October 7, 2004. His statement was only that the task records were contemporaneous, not that the corresponding time entries were contemporaneous. Notably, he did not affirmatively advise the Court that the fee statement's time entries were made after-the-fact. Thurmond described the fee statement as a "summary" of Barrett Burke's records; it was not a summary. The fee statement included the task entries (which were contemporaneous and were summarized from the firm's records) but also included time entries that had not previously existed at all. It is not possible to create a summary from non-existent records. The inclusion of new information--not captured in Barrett Burke's records--makes the document something other than a summary. Instead, it is a document prepared for the purposes of litigation. In this case, it was a document prepared for litigation for the purpose of avoiding the hearsay rule. *Far from meeting a duty of candor to the Court, Thurmond's October 7, 2004 statement appears to have been intended to misdirect the Court. That sleight of hand was carried forward for a year and culminated in Bryant's false testimony on October 21, 2005.*
>
> *Porcheddu*, 338 B.R. at 733 (emphasis added).

Judge Isgur's description of Thurmond's conduct is identical to his conduct in the case at bar. Just as he deliberately failed to make complete disclosures of the facts regarding Barrett Burke's timesheets to Judge Isgur, Thurmond intentionally refused to make full disclosure concerning the accuracy of the Motion's allegations to the undersigned judge. Thurmond attempted to misdirect Judge Isgur by not affirmatively advising him that Barrett Burke's time entries were created after-

the-fact.[35] Similarly, Thurmond attempted to mislead the undersigned judge by advising him that the Motion was "good," which did not answer the actual question posed by the Court.

However, "[b]ecause of their very potency, inherent powers must be exercised with restraint and discretion." *Chambers*, 501 U.S. at 50. "The court must impose the least onerous sanction that addresses the situation." *In re Hughes*, 360 B.R. 202, 209 (Bankr. N.D Tex. 2007). Thurmond testified that Barrett Burke fired him with prejudice in March 2007.[36] [Aug. 10, 2007 Hr'g Tr. (afternoon session) 66:4-22.] Being fired with prejudice can have serious repercussions on an individual's professional career. Indeed, at the time he gave testimony in this Court, Thurmond was still seeking permanent employment elsewhere. Given these circumstances, the Court believes that no sanctions should be imposed against Thurmond.

E. Thurmond's bad faith conduct is imputed to Barrett Burke.

On February 6, 2007, Thurmond was employed as an associate attorney at Barrett Burke. Accordingly, Thurmond's bad faith conduct is imputed to Barrett Burke. *See Religious Tech. Ctr. v. Liebreich*, 98 Fed. Appx. 979, 988 n.30 (5th Cir. 2004) (imposing sanctions under 28 U.S.C. § 1927 jointly and severally against attorneys and their law firm); *Worrell v. GreatSchools, Inc.*, 2007 U.S. Dist. LEXIS 87344 at *10 (S.D. Tex. November 28, 2007) (imposing sanctions under Rule 11 jointly and severally against attorney and his firm); *see also Jordaan v. Hall*, 275 F.Supp.2d 778, 790-91 (N.D. Tex. 2003). That Thurmond's conduct is imputed to Barrett Burke is not only correct

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[35] The Court notes that Judge Isgur did not impose sanctions against Thurmond, but only against Bryant and Barrett Burke. The reason that he did not do so is that when he issued his show cause order, he named only Bryant and Barrett Burke as the subjects of the order—no doubt due to his belief at the time of the issuance of the order that Bryant was the only attorney whose conduct needed to be scrutinized. The language in Judge Isgur's written opinion about Thurmond's conduct leaves little doubt that if Thurmond's name had been set forth in the show cause order, Judge Isgur would have imposed sanctions against him. Indeed, Judge Isgur wrote that "Although the Court's analysis of the sanctions identifies other persons employed by Barrett Burke, only Bryant and Barrett Burke were the subjects of this Court's show cause order. Accordingly, the Court has not considered sanctions against any other person." *Porcheddu*, 338 B.R. at 732. In short, Judge Isgur was properly concerned about lack of due process to Thurmond and therefore did not impose sanctions against him. In the case at bar, this Court has no such due process concerns, as both the First Show Cause Order and the Second Show Cause Order put Thurmond on notice that it was scrutinizing his conduct. Moreover, Thurmond was represented by competent counsel in the case at bar.

[36] Unlike Sanov, who was fired because of her conduct in *Allen*, Thurmond did not state what the preceiptating event was that led to his firing.

as a matter of law, but it also entirely appropriate as a matter of imposing responsibility on Barrett Burke's partners for hiring Thurmond and then keeping him on the payroll. The partners at Barrett Burke are charged with knowing about Thurmond's inappropriate conduct as articulated by Judge Isgur in *Porcheddu*. Moreover, the partners are charged with knowing about Thurmond's ill-preparedness as articulated by the undersigned judge in *Anderson*, 330 B.R. at 187. The Court hopes that the partners are Barrett Burke stay more abreast of their associates' actions in the future.

F. This Court will issue no sanctions against Barrett Burke despite Thurmond's bad faith conduct being imputed to it.

Although Thurmond's bad faith misrepresentations can, as a matter of law, be imputed to Barrett Burke, the Court will impose no sanctions on the firm in light of certain corrective actions that the firm has taken, including: (1) changing the firm's policy to accept referrals only if Barrett Burke attorneys may communicate directly with the client; (2) requiring an affidavit from the servicer or lender to be attached to any motion to lift stay that the firm files; and (3) taking appropriate action against employees—in this case, Thurmond—whose conduct falls short of meeting the appropriate standards in the legal profession.

G. The Court cannot find by clear and convincing evidence that the conduct of Barrett Burke (except for the imputation of Thurmond's conduct), McCalla Raymer, or Countrywide reached the level of bad faith and, therefore, the Court will not issue sanctions again these parties.

While the Court is very disheartened by the conduct of Barrett Burke, McCalla Raymer, and Countrywide in this case, and also the manner in which they have structured their attorney-client relationship, it is unable to say that their conduct transcended from merely negligent bungling to full-blown bad faith. A decision not to sanction Barrett Burke, McCalla Raymer, or Countrywide, however, does not imply that their conduct was appropriate. The Court cannot emphasize enough that it does not condone the conduct of Barrett Burke, McCalla Raymer, and Countrywide described in this Memorandum Opinion.

VI. Conclusion

Over the past several years, attorney's fees and costs have risen steadily—some clients would doubtless say astronomically. Corporations in particular have reacted by demanding concessions such as flat fee pricing for each file. In the consumer bankruptcy field, many financial institutions—for example, Fannie Mae in the case at bar—have negotiated flat fee engagements with certain law firms to avoid large fees that can accrue under an hourly rate system. In theory, this arrangement seems appropriate: fixed fees minimize costs that are primarily passed on to consumer debtors. In practice, this arrangement has fostered a corrosive "assembly line" culture of practicing law.

As the case at bar shows, attorneys and legal assistants at Barrett Burke and McCalla Raymer are filing motions to lift stay without questioning the accuracy of the debt figures and other allegations in these pleadings and appearing in court without properly preparing for the hearings. These lawyers appear in court with little or no knowledge because they have been poorly trained. Indeed, the case at bar shows that the attorneys from Barrett Burke and McCalla Raymer often appear in court ill-prepared to think or effectively communicate.

This fixed-fee business model appears to have been an overwhelming financial success. In *Allen*, Bankruptcy Judge Steen noted that Barrett Burke's revenues totaled between approximately $9.7 million and $11.6 million per annum. *Allen*, 2007 Bankr. LEXIS 2063 at *42. Based upon the testimony at the show cause hearings, this Court estimates that McCalla Raymer has generated revenues of approximately $28 million over the past decade from representing solely Fannie Mae.[37] Meanwhile, the profession has suffered from the ever decreasing standards that firms like Barrett Burke and McCalla Raymer have heretofore promoted.

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[37] Thomas testified that McCalla Raymer made approximately 140,000 referrals under the Fannie Mae program (which included Countrywide, among other servicers) over the past ten years. [Aug. 7, 2007 Hr'g Tr. 43:5-11.] When one multiplies 140,000 times $200 (i.e. the net amount received by McCalla Raymer), the result is $28 million—substantial revenues, particularly for a firm with relatively few partners. Aside from Thomas' testimony, Smith testified that McCalla Raymer's revenues from all Countrywide referrals (as opposed to just Fannie Mae files) on an annual basis total approximately $10,440,000.00. [Aug. 9, 2007 Hr'g Tr. 261:19-24.]

This demise must stop. The problems at Barrett Burke and McCalla Raymer are not limited to training lawyers; there are other aspects of these firms' culture that is disconcerting. What kind of culture condones a firm signing an engagement letter which prevents its attorneys from communicating with its client? What kind of culture condones its lawyers preparing, signing, and filing motions to lift stay without having the client review the final version for accuracy? What kind of culture condones its attorneys signing proofs of claims without even contacting the client to review and confirm the debt figures? What kind of culture condones attorneys testifying to basic facts and then, at the next hearing, recanting the testimony on the grounds that the attorney had not sufficiently prepared to testify? And above all else, what kind of culture condones its lawyers lying to the court and then retreating to the office hoping that the Court will forget about the whole matter?

Countrywide's corporate culture is no better. What kind of culture condones blockading personnel from communicating with outside counsel? What kind of culture discourages the checking of outside counsel's work? What kind of culture promotes payment histories that are so confusing to the vast majority of persons, including attorneys and judges—not to mention borrowers—that it becomes necessary for legal assistants to "simplify" them—leading to more errors and confusion?

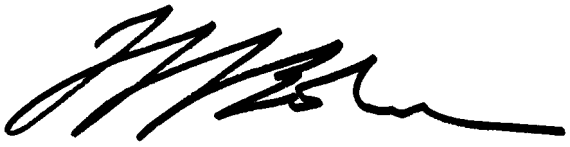
Barrett Burke and McCalla Raymer complain that this Court expects perfection from the attorneys who appear in this Court. While perfection is too much to demand, preparedness and candor are not. The vast majority of attorneys who appear in this Court easily meet these standards. There is no reason why the attorneys from Barrett Burke and McCalla Raymer cannot do the same.

With respect to Countrywide, this Court would hope that this entity would reevaluate its policies and procedures in order to improve upon the accuracy of payment histories and to ensure that its actions do not undermine the integrity of the bankruptcy system. Countrywide's business is directly tied to a quintessentially American aspiration—homeownership. If Countrywide does not properly maintain payment histories and effectively communicate with its counsel, the consequences can be very harmful. As Professor Porter has noted: "Mortgage servicing abuse weakens families' efforts to manage their mortgages successfully and can result in families being wrongfully deprived

of their homes through foreclosure or unsuccessful outcomes in bankruptcy. Mortgagees' failure to honor the terms of their loans and applicable law weakens America's homeownership policies and threatens families' financial well-being." Katherine Porter, *Misbehavior and Mistake in Bankruptcy Mortgage Claims*, U. of Iowa Legal Studies Research Paper No. 07-29, Nov. 6, 2007, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1027961.

This Court trusts that Barrett Burke, McCalla Raymer, and Countrywide will mend their broken practices. The Court will continue to verify that its trust is well-placed.

Signed on this 5th day of March, 2008.



Jeff Bohm
U.S. Bankruptcy Judge

ADDENDUM

Name[1]	Description	Dates testified
Mary Daffin	Barrett Burke partner in charge of the bankruptcy department. Described her job as primarily "client maintenance" and stated that she had very little involvement in the drafting, filing, and prosecuting of motions to lift stay. Testified as Barrett Burke's corporate representative.	July 27; Aug. 10
Yvonne Knesek	Barrett Burke associate who appeared at the January 23, 2007 preliminary hearing on the Motion.	Did not testify
Lois Ortiz	Countrywide employee who manages the bankruptcy department.	Mar. 5; Aug. 10
LaToya President	Paralegal at M.R. Default Services, formerly employed by McCalla Raymer prior to the spinning off of M.R. Default Services. Processed the Countrywide payment history into the "simplified" and mistake-ridden version which was sent to Barrett Burke.	Aug. 8
Christopher Reilly	Former Barrett Burke associate who received the referral of the Debtor's file from McCalla Raymer and was responsible for all files referred from McCalla Raymer.	July 27
Felicia Sanov	Former Barrett Burke associate who signed and submitted the Motion.	Mar. 5; July 27; Aug. 10
John Schlotter	McCalla Raymer associate who referred the Debtor's file to Barrett Burke.	Mar. 5; Aug. 8; Aug. 9
John Smith	Countrywide's first vice-president of foreclosure and bankruptcy. Appeared as Countrywide's corporate representative.	Aug. 8; Aug. 9
Regina Thomas	McCalla Raymer associate who manages ten attorneys in the firm's bankruptcy department. Previously, Thomas spent 12 years as the Chapter 13 Trustee for the Northern District of Georgia.	Aug. 7; Aug. 9
Walter Thurmond	Former Barrett Burke associate who appeared at the final hearing on February 6, 2007 to withdraw the Motion.	July 27; Aug. 10

[1] Set forth above are the names of the witnesses to whom this Court refers in its Memorandum Opinion. Several other witnesses also testified, but their names are not referenced in the Memorandum Opinion and therefore they are not identified in this addendum.