

United States Bankruptcy Court  
Eastern District of North Carolina

A Thomas Small  
Judge  
919-856-4603

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October 1, 2008

08-BK-J

Mr. Peter G. McCabe, Secretary  
Committee on Rules of Practice and Procedure  
of the Judicial Conference of the United States  
Thurgood Marshall Federal Judiciary Building  
Washington, D.C. 20544

Re: Proposed Bankruptcy Rule regarding filing of claims by consumer debt buyers

Dear Mr. McCabe:

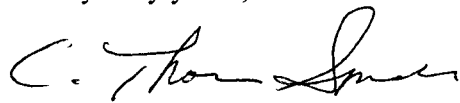
In recent years there has been a marked proliferation of the number of debts being purchased in bulk by consumer debt buyers. These charged-off debts then resurface as claims filed by the assignees. Increasingly, the proofs of claim are either for stale claims that are outside the applicable statute of limitations, or are filed without the documentation required by 11 U.S.C. § 501 and Rule 3001(c) of the Federal Rules of Bankruptcy Procedure, or both.

Debtors and trustees must file objections asserting affirmative defenses based on the statute of limitations, but in this context, because the assignees' proofs of claim are filed without adequate review on the part of the assignee, the incidence of stale claims is high and the burden of sifting through these claims without the documentation to assess them falls increasingly and unfairly upon debtors.

This practice would benefit from a review by the Advisory Committee on Bankruptcy Rules and from eventual implementation of a rule that takes into account the new landscape of debt trading. I have no firm proposal in mind but feel sure that the Committee could develop a rule appropriately tailored to address the problem. I entered an order discussing these issues earlier this week, and enclose a copy of the decision in In re Andrews, Case No. 08-00151-8-JRL (Bankr. E.D.N.C. September 30, 2008), for your consideration. The lawyers did a good job of illustrating the big picture of debt trading as well as both sides of the argument, and many of their points are set out in the order.

Along with the Andrews order, which will be submitted for publication, I also enclose the useful briefs of both the debtor and the creditors.

Very truly yours,

A handwritten signature in black ink, appearing to read "A. Thomas Small". The signature is written in a cursive style with a large initial "A" and a long, sweeping underline.

A. Thomas Small

Enclosures  
ATS:td

SO ORDERED.

SIGNED this 30 day of September, 2008.



A handwritten signature in black ink, appearing to read "A. Thomas Small". The signature is written in a cursive style and is positioned above a horizontal line.

A. Thomas Small  
United States Bankruptcy Judge

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UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF NORTH CAROLINA  
WILMINGTON DIVISION

IN RE:

CASE NO.

ROBIN GRAHAM ANDREWS

08-00151-8-JRL

DEBTOR

**ORDER REGARDING OBJECTIONS TO CLAIMS**

The matters before the court are the objections filed by the chapter 13 debtor, Robin Graham Andrews, to the claims of two unsecured creditors, B-Real, LLC (B-Real) and Roundup Funding, LLC (Roundup). The debtor maintains that both claims are barred by the statute of limitations. In addition, she contends that the writings upon which the claims were based, or statements explaining the circumstances of the loss or destruction of those writings, were not filed with the proofs of claim, and, therefore, the proofs of claim filed by B-Real and Roundup do not comply with Rule 3001(c) of the Federal Rules of Bankruptcy Procedure. B-Real and Roundup filed responses, but at the hearing held on July 24, 2008, in Wilmington, North Carolina, they announced that their claims had been withdrawn.

Notwithstanding the withdrawals, the debtor requests that the court enter show cause orders to examine the collection practices of B-Real and Roundup and to determine if these two creditors should be sanctioned pursuant to Rule 9011 of the Federal Rules of Bankruptcy Procedure. The

debtor also asked that she be awarded attorney's fees for having to file objections to the claims. Both parties filed post-hearing briefs, the last of which was filed on September 2, 2008.

### BACKGROUND

On January 9, 2008, the debtor filed for relief under chapter 13 of the Bankruptcy Code, and proposed a plan that provides for monthly payments of \$300 for 24 months and \$441 for 36 months, but which pays no dividend to holders of general unsecured claims. On February 29, 2008, B-Real filed a proof of claim (Claim No. 5) in the amount of \$3,287.92 for money loaned, stating that it is an assignee of a claim that was previously held by NCO Portfolio Management, Inc. and originally owed to DEBT ONE. B-Real did not attach any documentation establishing that it is the assignee or holder of a claim that the debtor may have owed to DEBT ONE, and did not, as required by Rule 3001(c) of the Federal Rules of Bankruptcy Procedure, attach the writing upon which the claim was based, or a statement explaining the circumstances of the loss or destruction of the writing.

An attachment to the proof of claim, however, did include "account information" in which B-Real states the name of the debtor, the last four digits of the debtor's social security number, the last four digits of the related account number, the name of NCO Portfolio Management, Inc. as "assignor," the name of DEBT ONE as the "original creditor," the "open date" of November 19, 1997, the "charge off date" of June 28, 1999, the "balance as of filing" of \$3,287.92, and "money loaned" as the "basis for claim." The proof of claim also includes this statement:

This claim is based on an unsecured account acquired from Assignor. Pursuant to Instruction 7, above is a redacted version of the information contained in the computer files documenting the account.

This information substantially conforms to 11 U.S.C. § 501, Federal Bankruptcy Rule 3001 and the Instructions to Form B10. See, e.g., In re Moreno, 341 B.R. 813 (Bankr. S.D. Fla. 2006); In re Cluff, 2006 WL 2820005 (Bankr. D. Utah 2006); In re Heath, 331 B.R. 424 (9th Cir. B.A.P. 2005); In re Dove-Nation, 318 B.R. 147 (8th Cir. B.A.P. 2004); In re Guidry, 321 B.R. 712 (Bankr. N.D. Ill. 2005); In re Burkett,

329 B.R. 820 (Bankr. S.D. Ohio 2005); In re Lapsansky, 2006 WL 3859243 (Bankr. E.D. Pa. 2006); In re Irons, 343 B.R. 32 (Bankr. N.D. N.Y. 2006).

On March 10, 2008, Roundup filed a proof of claim (Claim No. 7) in the amount of \$1,405.11, stating that it is the assignee of a claim it purchased from National Credit Adjusters and that was originally owned by HSBC. Roundup also did not attach any documentation establishing that it is an assignee or holder of a claim that the debtor may have owed to HSBC, and did not, as required by Rule 3001(c) of the Federal Rules of Bankruptcy Procedure, attach the writing upon which the claim was based, or a statement explaining the circumstances of the loss or destruction of the writing. It did, however, include an attachment in the same format as the attachment to the B-Real proof of claim, setting out “account information” in which Roundup states the name of the debtor, the last four digits of the debtor’s social security number, the last four digits of the related account number, the name of National Credit Adjusters as “assignor,” the name of HSBC as the “original creditor,” the “open date” of September 2, 2002, the “charge off date” of April 30, 2003, the “balance as of filing” of \$1,405.11, and “money loaned” as the “basis for claim.”

#### DISCUSSION

Counsel for the debtor begins her brief with a statement that succinctly explains why the issue before the court is so significant. The court agrees with her observation that “[w]ith such imaginative and innocuous names, it is easy to underestimate the negative impact large-scale consumer debt buyers like B-Real, LLC and Roundup Funding are having on the bankruptcy court system.” Debtor’s Brief at p. 1. The debtor contends that the high volume of inadequately reviewed and stale claims filed by bulk buyers of charged-off debts places an inordinate burden on individual debtors and the bankruptcy system. The debtor argues further that the claims filing practices of bulk

debt buyers undermines the Bankruptcy Code's and the Bankruptcy Rules' goal of promoting the efficient and economical administration of bankruptcy estates.<sup>1</sup>

In this case, of the twelve filed unsecured proofs of claim, five were filed by bulk claims purchasers. Although the plan will not pay a dividend to unsecured creditors, the debtor felt compelled to file objections to four of the five claims because "[i]f the debtor does not raise by objection the affirmative defense of the statute of limitations, that defense may be deemed waived [if the case is dismissed]." Debtor's Brief at p. 6. The four objections were identical and, after the objections were filed, the claims were withdrawn. The debtor maintains that this is a pattern that is becoming all too familiar in this and other districts through the country.

The phenomena of bulk debt purchasing has proliferated and the uncontrolled practice of filing claims with minimal or no review is a new development that presents a challenge for the bankruptcy system. The debtor contends that the remedies available under the Bankruptcy Code and the Bankruptcy Rules are inadequate to address the problem, and proposes as a solution that the court enter a show cause order for the purpose of examining the practices of Roundup and B-Real. It is the debtor's expectation that the court will find the creditors' claim filing procedures to be

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<sup>1</sup> The debtor contends that the number of debt buying claims is so high that they may, through cumulative effect, undermine the Bankruptcy Rules' important policy goals of efficient and economical administration of the bankruptcy system. In the Eastern District of North Carolina, during the first seven months of 2008 alone, B-Real filed 614 claims and Roundup filed 1,074 claims.

The debtor notes that Mr. Steven G. Kane is the authorized agent signing the claims at issue in this case, and his affidavit was filed in another case in this district earlier this year regarding the assignment of claims in In re Coates, Case No. 03-04673-8-JRL (Bankr. E.D. N.C.). In his affidavit in that case, Mr. Kane stated that B-Line purchased 61,017 chapter 7 bankruptcy receivables from Bank One, Delaware, NA and 77,408 chapter 7 bankruptcy receivables from Chase Manhattan Bank, USA, NA, among which were Ms. Coates' three accounts. B-Line then sold those 138,425 accounts to its wholly-owned subsidiary, Roundup. Those claims are in no way at issue in this case, but are noted here to illustrate the sheer volume of claims that are trading ownership and moving into the bankruptcy system.

unacceptable and will impose sanctions that will encourage Roundup, B-Real, and other bulk claims purchasers to change their ways.

The court agrees that the problem needs to be addressed, but disagrees that a show cause order is the best approach. First of all, the damages sustained by a debtor whose plan pays nothing to unsecured creditors are questionable. More importantly, it is not clear that the claim filing practices of Roundup or B-Real are sanctionable under Bankruptcy Rule 9011. Many courts have looked into this emerging issue and found that sanctions were not warranted for filing stale claims or for filing claims without the accompanying documentation required by Rule 3001(c) of the Federal Rules of Bankruptcy Procedure. In addition to the cases mentioned in their proofs of claim, Roundup and B-Real cite numerous decisions to support their procedure of filing stale claims and for filing summaries instead of the statements required by Rule 3001(c). See, e.g., In re Simms, 2007 WL 4468682 (Bankr. N.D. W. Va. 2007); In re Kincaid, 388 B.R. 610 (Bankr. E.D. Pa. 2008); In re Kemmer, 315 B.R. 706 (Bankr. E.D. Tenn. 2004); In re Mazzoni, 318 B.R. 576 (Bankr. D. Kan. 2004); but see In re Wingerter, 376 B.R. 221 (Bankr. N.D. Ohio 2007) (on appeal by B-Line to the Sixth Circuit Bankruptcy Appellate Panel).

Whether this court agrees or disagrees with those cases, there was a substantial body of existing case law upon which Roundup and B-Real reasonably relied, and because of their reasonable reliance, Rule 9011 sanctions are not justified. Accordingly, the debtor's request for a show cause order to examine the claims filing practices of Roundup and B-Real will be denied.

If the Federal Rules of Bankruptcy Procedure do not adequately deal with the problem, the issue should be submitted to the federal rulemaking process. The Judicial Conference of the United States' Advisory Committee on Bankruptcy Rules is well qualified to examine all aspects of the claims filing process and to determine if changes are needed.

The objective of the Federal Rules of Bankruptcy Procedure is “to secure the just, speedy, and inexpensive determination of every case and proceeding,” Fed. R. Bankr. P. 1001, and for the most part the claims process has met that goal. Section 101(5) of the Bankruptcy Code broadly defines “claim” to include rights to payment that are contingent, unmatured, and disputed, and § 501(a) provides that any creditor may file a proof of claim. Section 502(a) provides that if a proof of claim is filed, the claim is deemed allowed unless a party in interest objects based on one of the grounds specified in § 502(b). “A proof of claim executed and filed in accordance with [the Bankruptcy Rules] shall constitute prima facie evidence of the validity and amount of the claim.” Fed. R. Bankr. P. 3001(f).

Section 502(b)(1) provides that one of the grounds for disallowing a claim is that the claim is unenforceable under applicable law. A statute of limitations, such as North Carolina’s three-year statute of limitations, is the type of applicable law referred to in § 502(b)(1) that is grounds for disallowing a claim. See N.C. Gen Stat. § 1-52(1). In many states, including North Carolina, statutes of limitation are affirmative defenses that must be affirmatively pled. See Overton v. Overton, 259 N.C. 31, 129 S.E. 2d 593 (1963). Consequently, a proof of claim based on a stale claim will be deemed allowed under § 501(a) unless the affirmative defense is raised in a filed objection. In re Varona, 388 B.R. 705 (Bankr. E.D. Va. 2008).

Allowing claims based on unchallenged proofs of claim is efficient and economical in most cases. However, requiring debtors to file objections and to raise affirmative defenses to large numbers of stale claims filed by assignees based on a business model rather than after careful review and evaluation is both burdensome and expensive.

A possible solution is to have a rule that requires an assignee that files a proof of claim to disclose whether the claim violates a statute of limitations applicable in the district where the case



is pending. If the claim is outside the statute of limitations and the assignee does not provide a statement explaining why the statute of limitations is not a valid defense, the lack of a statement would constitute prima facie evidence that the defense is valid and the claim would not be allowed. A similar approach would be to require an assignee to state in the proof of claim that no statute of limitations defense is applicable. A failure to make the disclosure would constitute prima facie evidence that the defense is valid and the claim would be disallowed.

Bankruptcy Rule 3001(a) requires that a proof of claim must substantially conform to Official Form 10, which provides that limited information must be filed with each proof of claim, including the basis for the claim, the date the debt is incurred, the secured or unsecured status of the claim, and the amount of the claim. Rule 3001(c) provides that when a claim is based upon a writing, “the original or a duplicate [of that writing] shall be filed with the proof of claim,” and further that “[i]f the writing has been lost or destroyed, a statement of the circumstances of the loss or destruction shall be filed with the claim.” Most bulk purchasers of claims, such as Roundup and B-Real, do not file the required writings and do not file statements explaining the writings’ loss or destruction. The consequence of that failure, however, is not the disallowance of the claim, but rather a loss of the prima facie presumption of validity.

“Many courts have weighed in on the ramifications of a creditor’s failure to comply with Rule 3001(c) . . . [and the] majority view is that failure to attach documents required by Rule 3001 and Official Form 10 is not, by itself, a basis for disallowance . . . .” 9 Collier on Bankruptcy ¶ 3001.01 (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2007). Moreover, bankruptcy courts in the Fourth Circuit have held that a lack of documentation of the claim is not a basis for disallowance. See, e.g., In re Herron, 381 B.R. 184, 190 (Bankr. D. Md. 2008); In re Simms, 2007 WL 4468682 at \*2 (Bankr. N.D. W. Va. 2007). Rather, the appropriate remedy for failure to

properly document a claim or assignment of claim under Rule 3001 is that the claim loses its prima facie presumption of validity and amount. Simms, 2007 WL 4468682 at \*2. But, loss of the presumption of validity is of little consequence to the debtor, who must still file an objection to the claim to prevent the claim from being deemed allowed under 11 U.S.C. § 502(a). Perhaps that result cannot be changed without changing the Bankruptcy Code, but it may be possible for the Advisory Committee on Bankruptcy Rules to craft a Rule to relieve the debtor from this burden.

Based on the foregoing, the debtor's request for a show cause order to examine the claims filing practices of Roundup and B-Real and her request for attorney's fees are **DENIED**. The court will ask the Advisory Committee on Bankruptcy Rules to consider whether changes should be made to the Federal Rules of Bankruptcy Procedure and to the Official Bankruptcy Forms to alleviate the significant burden on individual debtors and on the bankruptcy system caused by the large number of undocumented, stale claims being filed by the bulk purchasers of charged-off debts. The briefs prepared by counsel for both the debtor and the creditors were thorough and comprehensive, and in light of their usefulness the court will make them available to the Advisory Committee. Finally, because the federal rule-making process typically takes no less than three years to produce a new rule, this issue will also be referred, with the consent of the two other judges of this district, to the Local Rules Committee of the Eastern District of North Carolina.

**SO ORDERED.**

**END OF DOCUMENT**

**UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF NORTH CAROLINA  
WILMINGTON DIVISION**

**IN RE:  
ROBIN GRAHAM ANDREWS**

**CASE NO.:  
08-00151-8-JRL**

**DEBTOR(S)**

**CHAPTER 13**

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**BRIEF IN SUPPORT OF DEBTOR'S OBJECTIONS TO CLAIMS  
OF  
B-REAL, LLC (CLAIM NO. 5) AND ROUNDUP FUNDING, LLC (CLAIM NO. 7)**

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**STATEMENT OF THE CASE**

With such imaginative and innocuous names, it is easy to underestimate the negative impact large-scale consumer debt buyers like B-Real, LLC and Roundup Funding, LLC are having on the bankruptcy court system. The sheer volume of claims filed by these entities is astounding. In the Eastern District of North Carolina alone, B-Real had filed 614 claims and Roundup had filed 1,074 claims in 2008 as of the date of hearing of these matters, according to the debtor's PACER search.<sup>1</sup> The debtor requests, pursuant to FRE 201, that the Court take judicial notice of the number of claims filed by B-Real and Roundup as proof that these entities regularly file claims in the District. The problem is that a significant portion of these claims are filed on purported debts which, on the face of the claims themselves, are time barred or otherwise filed without any documentation or information sufficient for the debtor to ascertain the claimant's connection to the original creditor or to an assignee of the original creditor. B-Real and Roundup are not entities the debtor has ever heard of or dealt with prior to the filing of her

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<sup>1</sup> These numbers were determined through a PACER search of claims filed by B-Real and Roundup in the Eastern District of North Carolina conducted by debtor's counsel on July 23, 2008 in advance of the hearing on July 24, 2008

bankruptcy case. In fact, the filing of the bankruptcy case is often the triggering event by which a defaulted debt is sold, through a “forward flow agreement,” to the buyer who then files the claim in order to seek payment in the bankruptcy case.

Debtor Robin Andrews’ case illustrates the prevalence with which such stale and deficient claims are filed by debt buyers in our District. Of the twelve total claims filed in her case, five were filed by debt buyers (Jefferson Capital-3; B-Real-1; and Roundup-1). Of those five, the debtor filed objections on identical grounds to four of those claims. Debtor settled her objections to two claims filed by Jefferson Capital.<sup>2</sup> Thus, 80% of the claims filed by debt buyers in Ms. Andrews’ case were time barred on their face and otherwise failed to show proof that the claimant was entitled to collect a debt from the debtor. Ms. Andrews’ case exemplifies the high rate at which stale and deficient claims are filed by debt buyers and the substantial number of such claims threatens the efficiency and integrity of the claims administration process.

The debtor recognizes that the bankruptcy rules provide less scrutiny of claims in order to promote efficient and economical administration. However, the proliferation of debt buyer claims undermines these very policy goals. For example, the authorized agent signing the claims of B-Real and Roundup in Ms. Andrews’ case, Steven G. Kane, appears to be listed as the signatory for all of the above-referenced 1,688 claims filed by B-Real and Roundup in the District so far this year from a review of the index of claims produced by debtor’s PACER search. The debtor believes that Mr. Kane signs proofs of claim filed in other districts as well. Mr. Kane must be a very busy man. In another case in this Court, the Chapter 7 trustee objected

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<sup>2</sup> Debtor resolved her objections to the claims of Jefferson Capital Systems, LLC (Claim Nos 4 and 12) pursuant to the Consent Orders entered on June 23, 2008. Ms. Andrews did not object to the other claim filed by Jefferson Capital (Claim No. 9) for the reason that the original creditor and debt disclosed on the proof of claim were known to her.

to three claims of Roundup on the grounds that “the documentation supplied by Roundup did not show that the claims against the female debtor were, in fact, assigned to Roundup.” *In re Coates* (03-04673-8-JRL) (June 9, 2008). The Court allowed Roundup to submit evidence to supplement its claims. Roundup provided an affidavit from Mr. Kane in which Mr. Kane stated that B-Line, LLC had purchased 61,017 Chapter 7 bankruptcy receivables from Bank One, Delaware NA and 77,408 Chapter 7 bankruptcy receivables from Chase Manhattan Bank, USA, N.A., and that Ms. Coates’ three accounts were among those thousands of receivables. Mr. Kane’s affidavit attested that he was custodian of records and operation manager for B-Line, LLC and that B-Line had sold these 138,425 accounts to Roundup, B-Line’s wholly-owned subsidiary. The Court found that Mr. Kane’s statements constituted sufficient proof of the sales of Ms. Coates’ accounts to Roundup. Of more importance to this case, Mr. Kane’s affidavit provides a glimpse into the enormous volume of bankruptcy receivables bought by debt buyers such as Roundup and B-Real and the number of claims signed personally by Mr. Kane in this District, let alone nationwide. Such practices reasonably call into question whether minimal or adequate review of claims is being undertaken by these debt buyers prior to filing.

### **PROCEDURAL HISTORY**

Debtor Robin Andrews filed her individual case on January 9, 2008 and her Chapter 13 plan, which pays no dividend to unsecured creditors, was confirmed on April 15, 2008. The proofs of claim filed by B-Real (Claim No. 5) and Roundup (Claim No. 7) were both signed on the same day, January 31, 2008. The proofs of claim consist entirely of the official claim form with the identical attachment page entitled “Account Information.” Both claims are signed by Steven G. Kane, as authorized agent for B-Real, LLC and Roundup Funding, LLC. Listed below

Mr. Kane's signature line is "EMAIL: BLINE.CHAPTER13@BLINELLC.COM". Both claims are for "money owed" and show charge off dates of more than three years before the filing date of the debtor's bankruptcy case.<sup>3</sup> A considerable period of time can lapse between default and charge off, thus, a charge off date can be a misleading time reference. Nonetheless, the claims show charge off dates of more than eight years (B-Real) and four years (Roundup) before the filing of Ms. Andrews's bankruptcy case.

The debtor filed her Objection to B-Real's claim (number 5) on May 16, 2008 and B-Real filed a Response In Opposition to Debtor's Objection on June 16, 2008 and an Amended Response on June 17, 2008. The debtor filed her Objection to Roundup's claim (number 7) on May 26, 2008. Roundup filed its Response on June 25, 2008. These matters were heard before Judge Thomas A. Small on July 24, 2008. The creditors do not dispute the debtor's assertion that both claims are time barred under the applicable statutes of limitation. The applicable statute of limitations for such a debt is three years from the date of default pursuant to N.C.G.S. § 1-52(1).

### ARGUMENT

Outside the bankruptcy claims process, most courts have found it is a violation of the Fair Debt Collection Practices Act (FDCPA) for a creditor to sue on a time barred debt without having first determined after reasonable inquiry that the limitations period had been or should have been tolled. *See Kimber v. Federal Financial Corp* , 668 F.Supp. 1480 (M.D.Ala.1987). The debtor acknowledges that some courts have distinguished the filing of a proof of claim from other collection action and have held that a debtor cannot maintain a FDCPA violation in

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<sup>3</sup> B-Real's claim is for \$3,287.92 and lists a charge off date of 06/28/1999 Roundup's claim is for \$1,405.11 and lists a charge off date of 04/30/2003.

response to a creditor's filing of a proof of claim. *See Adair v. Sherman*, 230 F.3d 890, 895-96 (7<sup>th</sup> Cir. 2000), *Kaiser v Braje & Nelson, LLP*, 2006 WL 1285143 at \*6,7 (Bankr. N.D.Ind. 2006), *In re Cooper* 253 B.R. 286, 291 (Bankr. N.D.Fla. 2000). When debtors have sought sanctions through a claims objection as opposed to raising an FDCPA claim in an adversary proceeding, some courts have held that that a creditor cannot be sanctioned under 11 U.S.C. § 105 for filing a time barred claim. *See infra In re Varona*, 388 B.R. 705, 2008 WL 2150109 (May 22, 2008). Such decisions provide the "loopholes" through which debt buyers are permitted to file an inordinate number of claims falling far short of the requirements of Rule 3001 without the threat of any penalty other than disallowance of the claim on an objection by objection basis.

B-Real and Roundup contend that Ms. Andrews lacks standing to object to these claims because her confirmed Chapter 13 plan provides for a zero percent distribution to unsecured claimants. It is important to note, however, that B-Real and Roundup are not claiming that their claims have been properly documented nor are they contesting Ms. Andrews' assertion that the debts are time barred. Rather, they contend that a debtor is not damaged or harmed by these deficient claims when the debtor has a 0% plan. Such a "no harm, no foul" defense is a misnomer as the debtor is damaged by these claims even if it turns out, after the claims are filed, that unsecured claimants will not receive payment through the plan.

A debtor must object to these claims that she has not scheduled (B-Real's claim no. 5) or that she has scheduled as disputed (Roundup's claim number 7), especially when the claims are time barred, whether or not unsecured claimants are to receive a dividend through the plan. The completion rate for Chapter 13 cases is far less than 100% and under BAPCPA, if the debtor's case is dismissed, she may not be able to re-file for relief under Title 11 for a substantial period

of time. If the debtor does not raise by objection the affirmative defense of the statute of limitations, that defense may be deemed waived in a subsequent collection action if the debtor fails to take action in the present case. While Local Rule 2016-1 allows debtor's counsel to seek compensation from the debtor of \$200 per objection, given the frequency with which these stale and deficient claims are often filed in a debtor's case, this could result in greatly increased administrative costs to the debtor. It is unfair and inequitable for the debtor to bear the cost of review and objection to these claims when a reasonable pre-filing review by the creditor would disclose these glaring deficiencies.

***In re Wingerter (Bkrptcy. N.D. Ohio)***

In addition to being time-barred, the claims filed by B-Real and Roundup provide no documentation of a chain of title. Such claims fail to comply with Rule 3001 and have been found in other cases to have no prima facie validity. *See eCast Settlement Corp. v. Tran*, 369 B.R. 312 (S.D. Tex. 2007). In a very thorough analysis of the pre-filing procedures of B-Line, LLC, the parent company of B-Real, LLC in connection with the court's show cause order, the Northern District of Ohio concluded in the *Wingerter* case:

. . . that, particularly where a debtor has not scheduled any claim resembling the purportedly assigned obligation that a claims purchaser wants to file in the debtors' case, the claim purchaser needs to discharge its obligations under Rule 3001 and Rule 9011 at the time it files a proof of claim. **The assignee should not be able to shift the expense of the initial examination of claims to other interest parties, e.g., chapter 7 trustees and chapter 13 debtors and trustees.** More specifically, the Court finds that when the debtors have not scheduled any claim listing the originating creditor or any direct or indirect assignee of the originating creditor, Rule 9011 requires a claim purchaser, before filing a proof of claim with a bankruptcy court, to obtain originating documents or, when such documents are not available, a clear understanding of the nature of the original dealings that support the assertion of a claim against the particular debtor. Having obtained those documents or that clear



understanding, the claim purchaser should then attach to the proof of claim form the originating documents or an affidavit explaining the non-availability of such “media” to the proof of claim form so the debtor and other interested parties are given fair notice of the source and particulars of the claim.

376 B.R. 221, 224 (Oct. 1, 2007) (emphasis added).

Judge Shea-Stonum found B-Line’s conduct to be worthy of sanctions in *Wingertter*, holding as follows:

This Court finds that B-Line did not fulfill its Rule 9011 obligations in filing the B-Line POC without having possession of the underlying transactional documents or any reliable proxy for such documents. As a prospective matter, B-Line and other purchasers in the claims trading industry should understand that this Court views the filing, without review of originating documents, of a proof of claim by an assignee/purchaser to fall short of reasonable inquiry under Rule 9011.

*Id.* at 239.

While Ms. Andrews is not seeking sanctions against B-Real and Roundup under Rule 9011, the *Wingertter* holding is instructive as it indicates that the court, after thorough review and analysis of the evidence submitted in connection with its show cause order to B-Line, found that the practices of a debt buyer in filing claims in bankruptcy are sanctionable. B-Line has appealed this decision to the Bankruptcy Appellate Panel of the Sixth Circuit.

It is premature to seek sanctions against B-Real and Roundup in the debtor’s case. However, the similarities between these claims and that in the *Wingertter* case support the debtor’s request for a show cause order to B-Real and Roundup, respectively, to determine if their policies and procedures are in compliance with the Bankruptcy Rules. Debtor believes that Roundup is the wholly-owned subsidiary of B-Line. Steven G. Kane, the authorized agent signing the claims at issue here, is also the “operations manager” whose affidavit B-Line

submitted in connection with the *Wingert* objection. Speaking to facts on point with the debtor's objections to the claims of B-Real and Roundup, Judge Shea-Stonum found:

The Court finds that reasonable inquiry on the part of an assignee of a consumer claim before filing a proof of claim requires consideration of whether the debtor has included a related claim in its schedules. This opinion does not deal with cases in which the debtor has admitted an original indebtedness by scheduling the originating creditor or one of its assignees in its bankruptcy filings. . . . Where, as here, the debtor does not include in its schedules a claim that bears any resemblance to the purportedly assigned claim, claim assignees need to note that red flag. The optimal response to such a red flag would be to obtain and review the originating documents prior to filing a proof of claim.

*Id.* at 231-232.

Similarly, in the debtor's case, Ms. Andrews did not schedule any original creditor or assignee related to or disclosed on B-Real's claim. As to Roundup's claim, however, the debtor listed on her schedules a disputed claim to "National Credit Adj./Interntl Fin SE" and further stated on Schedule F, "[c]reditor/debt unknown to debtor." While Roundup's claim lists National Credit Adjusters as its assignor, Roundup provides no further documentation and debtor believes such claim squarely falls under the types of claim signaled out for concern in *Wingert*

***Chaussee v. B-Real, et al. (Bkrptcy. W.D.Wa.)***

In a March 26, 2008 unreported memorandum decision (a copy of which is attached hereto) from the Western District of Washington denying B-Real's motion to dismiss the debtor's claims brought under the FDCPA and the Washington fair debt collection statute, Judge Karen A. Overstreet reasoned as follows:

Plaintiff is not without remedies under bankruptcy law for Defendant's filing of improper proofs of claim. Plaintiff had the right to, and did, object to the claims. Plaintiff could also file a Rule 9011

motion against the representative of Defendant who signed the proofs of claim. Plaintiff is not attempting to bypass remedies under the Bankruptcy Code. Further, although Plaintiff's bankruptcy case is not completed and the actions complained of occurred during the pendency of the case, the simultaneous assertion of Plaintiff's rights under the FDCPA and the Bankruptcy Code will not interfere with Plaintiff's bankruptcy proceedings. Because Defendant has no claims against Plaintiff, there will be no further proceedings regarding allowance of the claims and the claims will not in any way impact Plaintiff as the debtor or to other creditors in the bankruptcy case. Consequently, the Court finds that Plaintiff has sufficiently stated a claim under the FDCPA so as to avoid dismissal under Rule 12(b)(6), Fed.R.Civ.P.

*Chaussee v B-Real, et al (In re Chaussee)*, Adv. No. 07-01266, (W.D.Wa.) at pp.13-14.

According to the memorandum, the claims at issue in the *Chaussee* case, to which the debtor filed an objection after and in addition to her adversary proceeding, were alleged by the debtor to relate to debts that were not owed by the debtor, not listed on her schedules and, alternatively, which were barred by the applicable statute of limitations under Washington law. *Id.* at p. 12. The memorandum states that the proofs of claim listed a debtor as "Dawn Gonzales" and not in the name of the debtor, but that the proofs of claim contained an account summary statement which did list the last four digits of the debtor's social security number. *Id.* at p. 12-13. The memorandum indicates that B-Real has taken the same position as in this case, in that it apparently argued "that the Plaintiff's exclusive remedy was to object to the claims under Section 502." *Id.* at p. 13. B-Real is appealing the decision to the Bankruptcy Appellate Panel for the Ninth Circuit.

***Rogers v. B-Real, L.L.C. (Bkrptcy. M.D.La.)***

In a reported decision handed down a few days before the hearing of these objections, the Middle District of Louisiana denied B-Real's motion to dismiss the debtors' FDCPA claims

arising from B-Real's filing of three time barred proofs of claim on facts nearly identical to the facts of Ms. Andrews' case. *Rogers v. B-Real, L L C.*, \_\_\_ B.R. \_\_\_, 2008 WL 2810593 (July 21, 2008). The signatory to all three claims is Steven G. Kane. The attached "Account Information" page is the same except that the claims in *Rogers* purportedly arise from "services performed" as opposed to "money loaned" in Ms. Andrews' case. The *Rogers* Account Information pages list only an "open date" and not also a "charge off" date as in this case. Also as in the present case, B-Real did not dispute the Rogers' contention that all three claims were barred by the three year statute of limitations provided under Louisiana law.

The Rogers allege in the adversary proceeding that B-Real used false, deceptive, or misleading representation and unfair and unconscionable means to collect a debt in violation of the FDCPA by filing proofs of claim on time barred claims. The court soundly rejected a similar argument to that presented by B-Real and Roundup in this case, that the debtors lack standing to complain because their confirmed plan has not yet paid on the claims at issue. The court, citing *Adair v. Sherman*, 203 F.3d 890, 894 n.3 (7<sup>th</sup> Cir. 2000) stated "[t]he debtors undeniably have standing to object to B-Real's claims" under 11 U.S.C. § 502(a). *Id.* at \*3. The debtors' plan in *Rogers*, in contrast to Ms. Andrews' 0% plan, will pay 100% to allowed unsecured claims through installment payments beginning in month 37 and a final balloon payment at month 60.

On the question of whether a debtor can bring a FDCPA claim in response to a creditor's action in a bankruptcy case, the court cited a number of reported decisions that have held that a debtor cannot. *Id.* at \*7 (citations omitted). However, the court in *Rogers* found that most of the cited decisions holding that the Bankruptcy Code pre-empts the FDCPA pre-date the *Randolph v. IMBS, Inc.*, 368 F.3d 726 (7<sup>th</sup> Cir. 2004) decision or "are either factually distinguishable or based on limited reasoning." *Id.* The court found persuasive the thoughtful analysis of *Randolph* in

which the Seventh Circuit decided that “although the Bankruptcy Code and the FDCPA may overlap, the Bankruptcy Code did not repeal the FDCPA” and that the “operational differences” between the two schemes were not irreconcilable” such that neither statute repealed the other. *Id.* at \*7 citing *Randolph v. IMBS, Inc.*, 368 F.3d 726 at 730.

The court in *Rogers* refused to find that the debtors had a private right of action against B-Real for its filing of claims on time-bared debts under 11 U.S.C. § 105. *Id.* at \*4. However, the court stated that “Bankruptcy Rule 9011 can be used to sanction a creditor that files a proof of claim without proper prefiling investigation and support, or that otherwise violates Rule 9011.” *Id.* citing *In re Cassell*, 254 B.R. 687, 691 (B.A.P. 6<sup>th</sup> Cir. 2000); *In re Wingerter*, 376 B.R. 221, 224 (Bankr. N.D. Ohio 2007); *In re Dansereau*, 274 B.R. 686, 688-89 (Bankr. W.D. Tex. 2002); *In re Knox*, 237 B.R. 687 at 697; *In re McAllister*, 123 B. R. 393, 395 (Bankr. D. Or. 1991); *In re Hamilton*, 104 B.R. 525, 527 (Bankr. M.D. Ga. 1989). While the court dismissed the *Rogers*’ claim for damages under § 105, it did not dismiss the *Rogers*’ request for sanctions in the prayer for relief. *Id.*

***In re Varona* (Bkrptcy. E.D. Va.)**

B-Real and Roundup cite *In re Varona*, the recent case from the Eastern District of Virginia, for the proposition that the plain language of 11 U.S. C. § 502(a) allows a creditor to file a claim that is invalid on its face but believed to be valid unless objected to by a party in interest. 388 B.R. 705 (May 22, 2008). However, it is important to note that in *Varona*, the court discussed at length the precedent of *Tate v. NationsBanc Mortgage Corp. (In re Tate)*, 253 B.R. 653 (Bankr. W.D.N.C. 2000) and determined:

The filing of a false or fraudulent claim in a bankruptcy case would unquestionably constitute an abuse of the claims process as well as an attempted fraud upon the court. Filing a false or fraudulent claim in a bankruptcy proceeding is also undeniably violative of any number of specific Bankruptcy Code provisions, warranting the imposition of sanctions.

*In re Varona*, 388 B.R. 705, 717.

In *Varona*, the court refused to find that “arguably time-barred claims” were false and fraudulent and, in arriving at that result, the Court gave significant weight to the fine distinction that the statute of limitations bars the *collection* of the debt and does not *extinguish* the debt. *Id.* at 723. The Court found that under Virginia law, “the running of the statutes of limitations merely bars the creditor’s remedy but does not extinguish the debt.” *Id.* at 722. While the debtor acknowledges that North Carolina law likely has a similar distinction between enforcement and extinguishment, this Court does not have to stretch to such an extreme in order to find a remedy. As a distinction, however, it appears the creditor in *Varona* did not concede that the claims at issue were time-barred, as B-Real and Roundup have in this instance.

Without conceding that it is permissible for a creditor to file a claim that is invalid on its face, as the debtor does not read Rule 3001 to permit such a practice, *Varona* focused exclusively on the alleged time-barred nature of the claim filed in that case by Portfolio Recovery Associates, LLC, another prolific debt buyer. It did not raise the question the debtor asks in this case, whether such claims are entitled to prima facie validity under Rule 3001(f) where the creditors, as in this case, do not provide documentation of the debt itself or of proof of assignment or ownership to the debt buyer. In *Varona*, the Court started its analysis from the assumption that the claim had been properly executed and filed in accordance with Rule 3001 and that “[t]he claims facially indicate the circumstances under which they were incurred; there is no attempt to

obfuscate the time of their incurrence so as to mask the potential bar of time.” *Id.* at 723. Even though declining to find the allegedly time-barred claims of Portfolio Recovery false or fraudulent and, therefore, not warranting of sanctions, the court warned Portfolio Recovery that it “should not accept this ruling as a blessing of any of their policies or procedures or as an advisory opinion condoning the filing of allegedly time-barred claims in any other bankruptcy proceeding. *Id.* at 724, n. 13.

### CONCLUSION

Under the current framework, the only risk the debt buyer runs in filing a stale or deficient claim is disallowance of the claim. They have elected to take a “wait and see” approach to see if a claim is objected to instead of performing an appropriate review of a claim before it is filed. This shifts the expense of pre-filing review to the debtors and trustees who must object to such claims on a case by case basis. In the event no objection is filed and the stale and deficient claims are allowed, then legitimate creditors are harmed and the integrity of the claims administration process suffers. Due to the magnitude of debt buyer claims filings and the prevalence of stale and deficient claims as set forth in this case, the debtor respectfully requests the Court review the practices and procedures of B-Real and Roundup in connection with their filing of such claims in this District.

This the 11<sup>th</sup> day of August, 2008.

FINANCIAL PROTECTION LAW CENTER

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4

5 UNITED STATES BANKRUPTCY COURT  
6 WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

7	In re	)	
8	DAWN CHAUSSEE,	)	Chapter 13
9		)	
10	Debtor.	)	
11		)	Bankruptcy No. 07-11392
12	DAWN CHAUSSEE,	)	
13		)	Adversary No. 07-01266
14	Plaintiff.	)	
15	V.	)	MEMORANDUM DECISION
16	B-REAL, LLC, DOES 1-X,	)	ON MOTION TO DISMISS
17		)	
18	Defendants.	)	
19		)	

20 This matter came before the Court on the motion to dismiss  
21 under Rule 12(b)(6), Fed.R.Civ.P.,<sup>1</sup> filed by B-Real, LLC  
22 ("Defendant"). Defendant contends that the claims of Dawn  
23 Chaussee, the debtor in bankruptcy and plaintiff herein  
24 ("Plaintiff"), arising under the Washington State Consumer

25 <sup>1</sup> Absent contrary indication, all "Code," chapter, and section  
26 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 as  
27 amended by the Bankruptcy Abuse Prevention and Consumer Protection  
28 Act of 2005 ("BAPCPA"), Pub.L. 109-8, 119 Stat. 23. "Rule"  
references are to the Federal Rules of Bankruptcy Procedure, and  
"LBR" references are to the Local Bankruptcy Rules of this  
district.



1 Protection Act and the Fair Debt Collection Practices Act are  
2 barred under the doctrine of federal preemption. For the reasons  
3 that follow, this Court will deny Defendant's motion.

4 I. FACTUAL BACKGROUND

5 Plaintiff filed a chapter 13 petition on March 29, 2007. The  
6 complaint in this adversary proceeding was filed on September 17,  
7 2007. The complaint alleges that Defendant violated the Fair Debt  
8 Collection Practices Act, 15 U.S.C. § 1692, *et seq.* ("FDCPA"), and  
9 the Washington State Consumer Protection Act, RCW 19.86 *et seq.*  
10 ("WACPA"), by filing proofs of claim in the bankruptcy to collect  
11 debts that Plaintiff contends she does not owe. The complaint  
12 seeks actual damages under the FDCPA, statutory damages of up to  
13 \$1,000 per violation and reasonable costs and attorneys' fees.  
14 Under the WACPA, Plaintiff seeks treble damages and reasonable  
15 attorneys' fees and costs.

16 Defendant's answer disputed the applicability of the FDCPA and  
17 the WACPA and asserted that Plaintiff's sole remedy was to object  
18 to the claims filed by Defendant in the main bankruptcy case.  
19 Plaintiff responded on November 16, 2007, by filing objections to  
20 the two proofs of claim filed by Defendant in the main case: Claim  
21 no. 22 in the amount of \$5,269.05 (unsecured, nonpriority) and  
22 Claim no. 23 in the amount of \$843.74 (unsecured, nonpriority).  
23 The objections asserted that the debts were not owed by Plaintiff  
24 and therefore not listed on her schedules, or, alternatively, were  
25 barred by the statute of limitations for collection of debts under  
26 Washington state law. Each of the proofs of claim named the  
27 debtor/obligee as "Dawn Gonzales" and provided no documentation  
28 other than an account summary referring to the last four digits of

1 Plaintiff's social security number. Defendant did not respond to  
2 the objections and an order was entered by the Court on  
3 December 18, 2007 denying both claims in their entirety.

4 On October 8, 2007, Defendant filed a motion to dismiss  
5 Plaintiff's claim under Rule 12(b)(6), Fed.R.Civ.P., made  
6 applicable to bankruptcy proceedings under Rule 7012. Defendant  
7 contends in the motion that the provisions of the FDCPA are  
8 entirely superceded by the Bankruptcy Code and Rules regarding the  
9 claims process, and that Plaintiff's exclusive remedy was to object  
10 to the claims under Section 502 (which Plaintiff did, subsequent to  
11 the filing of this adversary proceeding). Defendant further  
12 contends that the Bankruptcy Code and Rules supersede the WACPA  
13 under the doctrine of federal preemption thereby depriving  
14 Plaintiff of the remedies under the state statute. Defendant has  
15 included a request for attorneys' fees and costs under Rule 11,  
16 Fed.R.Civ.P., applicable to bankruptcy proceedings under Rule 9011.

17 Plaintiff counters that there is no evidence the debts sought  
18 to be collected by Defendant are actually obligations of Plaintiff,  
19 and that Defendant's attempt through the bankruptcy claims process  
20 to collect debts not owed by Plaintiff violates the FDCPA and the  
21 WACPA, which are not preempted by the Bankruptcy Code, but rather  
22 coexist with the bankruptcy laws. Neither party filed a factual  
23 declaration in support of their position and it is undisputed that  
24 the claims sought to be collected by Defendant are not obligations  
25 of Plaintiff. The Court heard oral argument on March 5, 2008, and  
26 took the matter under advisement.

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II. JURISDICTION

The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding under 28 U.S.C. § 157(b)(2)(B).

III. ISSUE

In a bankruptcy case, can a debtor bring a separate adversary proceeding under the FDCPA and the WACPA against an entity that has filed a claim against the debtor for an obligation that is not owed by the debtor?

IV. DISCUSSION

A. Burden of Proof.

"On a motion to dismiss for failure to state a claim, the court must construe the complaint in the light most favorable to the plaintiff, taking all her allegations as true and drawing all reasonable inferences from the complaint in her favor." *Doe v. United States*, 419 F.3d 1058, 1062 (9th Cir. 2005). Under the recent decision in *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1964-65, 167 L.Ed.2d 929, 75 USLW 4337 (2007), the complaint must proffer "enough facts to state a claim for relief that is plausible on its face." *Id.* at 1986-87.<sup>2</sup>

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<sup>2</sup> *Bell Atlantic Corp.* disapproved the "no set of facts" language in *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). *Conley* had stated "the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." 355 U.S. at 45-46. *Bell Atlantic Corp.* decided that "this famous observation has earned its retirement. The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard." *Bell Atlantic Corp.*, 127 S.Ct. at 1969.

1 B. The Washington State Consumer Protection Act Claim.

2 Defendant argues that Plaintiff has no remedy under the WACPA  
3 based upon its filing of proofs of claim in Plaintiff's bankruptcy  
4 because the Bankruptcy Code preempts any state law claim under the  
5 WACPA. In *Bibbo v. Dean Witter Reynolds, Inc.*, 151 F.3d 559 (6th  
6 Cir. 1998), the Sixth Circuit Court of Appeals outlined the three  
7 different types of preemption of state law by federal law under the  
8 Supremacy Clause, U.S. Const. art. VI: (1) express preemption,  
9 which occurs when Congress expresses an intent to preempt state law  
10 in the language of the statute; (2) field preemption, where  
11 Congress intends fully to occupy a field of regulation; and  
12 (3) conflict preemption, "where it is impossible to comply with  
13 both federal and state law, or where state law stands as an  
14 obstacle to the accomplishment and execution of the full purposes  
15 and objectives of Congress." *Id.* at 562-63.

16 Without a doubt, there are strong factors that support the  
17 exclusive nature of federal bankruptcy proceedings. The  
18 Constitution grants Congress the authority to establish "uniform  
19 Laws on the subject of Bankruptcies." U.S. Const. art. I, § 8.  
20 Congress has created comprehensive regulations applicable in  
21 bankruptcy proceedings and vested exclusive jurisdiction over those  
22 proceedings in the federal district courts. 28 U.S.C. § 1334(a).  
23 The Ninth Circuit Court of Appeals has stated, in language often  
24 quoted by courts analyzing whether a state cause of action is  
25 preempted by the Bankruptcy Code:

26 [A] mere browse through the complex, detailed,  
27 and comprehensive provisions of the lengthy  
28 Bankruptcy Code, 11 U.S.C. §§ 101 et seq.,  
demonstrates Congress's intent to create a  
whole system under federal control which is

1 designed to bring together and adjust all of  
2 the rights and duties of creditors and  
3 embarrassed debtors alike. [Footnote omitted.]  
4 While it is true that bankruptcy law makes  
5 reference to state law at many points, the  
6 adjustment of rights and duties within the  
7 bankruptcy process itself is uniquely and  
8 exclusively federal. It is very unlikely that  
9 Congress intended to permit the superimposition  
10 of state remedies on the many activities that  
11 might be undertaken in the management of the  
12 bankruptcy process. (Emphasis added).

13 *MSR Exploration, Ltd. v. Meridian Oil, Inc.*, 74 F.3d 910, 914 (9th  
14 Cir. 1996).

15 Defendant places great reliance on *MSR Exploration*. In that  
16 case, a chapter 11 debtor brought an action against a creditor  
17 based upon the debtor's assertion that the creditor maliciously  
18 pursued claims against the debtor in the bankruptcy proceedings.  
19 The court held that the debtor's state malicious prosecution  
20 action, which was based upon events taking place in the bankruptcy,  
21 was completely preempted by federal bankruptcy law and that the  
22 remedies available to the debtor were exclusively under bankruptcy  
23 law, such as Rule 9011. The court in *MSR Exploration* noted that  
24 creditors may have less time to "ruminate" on the merits of the  
25 claim before filing it yet risk forfeiting their rights altogether  
26 if the claim is not filed on time. "The threat of later state  
27 litigation may well interfere with the filings of claims by  
28 creditors and with other necessary actions that they, and others,  
must or might take within the confines of the bankruptcy process."  
*Id.* at 916.

The concern of the court in *MSR Exploration* was that the  
regulation of the rights between debtors and creditors in  
bankruptcy not be disrupted by "even slight incursions and

1 disruptions brought about by state malicious prosecution actions."  
2 That concern is legitimate as it pertains to the relation of  
3 creditors and debtors. In the *MSR Exploration* case, the debtor and  
4 creditor were parties to a prebankruptcy contract under which  
5 disputes arose and were resolved by the bankruptcy court on a  
6 claims objection by the debtor. In this case, however, there is no  
7 evidence that Plaintiff and Defendant are debtor and creditor,  
8 respectively, nor evidence that they have ever been in a debtor-  
9 creditor relationship.<sup>3</sup> Defendant therefore has no right to invoke  
10 the regulations of the bankruptcy court to adjust the debts  
11 alleged, because Defendant has asserted them against the wrong  
12 debtor.

13 Applying the three types of preemption summarized in *Bibbo*,  
14 *supra*, it is hard to see how Plaintiff's WACPA claim under the  
15 unique facts of this case runs afoul of the bankruptcy laws. There  
16 is no expression by Congress in the Bankruptcy Code of an intent to  
17 preempt state law consumer protection statutes. While it can be  
18 argued that the Bankruptcy Code fully occupies the field of debtor-  
19 creditor relationships in the context of bankruptcy and insolvency,  
20 the bankruptcy laws do not generally apply to third parties who  
21 have no relationship to the debtor or the debtor's assets.  
22 Finally, the Court finds no evidence that Plaintiff's pursuit of a  
23 WACPA claim against Defendant presents an obstacle to the  
24 administration and objectives of Plaintiff's underlying bankruptcy  
25 proceeding. In the absence of her bankruptcy proceeding, Plaintiff

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27 <sup>3</sup> Because Defendant does not hold a "claim" against  
28 Plaintiff, Defendant is not a "creditor" entitled to participate in  
the claims adjustment process under 11 U.S.C. §§ 501, 502. See 11  
U.S.C. §§ 101(5), (10).

1 would have a right to assert a claim under the WACPA against  
2 Defendant to redress Defendant's attempts to collect a debt she  
3 does not owe. Under the unique facts of this case, the Court does  
4 not see why Plaintiff should be deprived of that right merely  
5 because she is in a bankruptcy proceeding.

6 Neither party has cited a case involving federal preemption of  
7 state law in the bankruptcy context where the parties involved had  
8 no debtor-creditor relationship. See, e.g., *Holloway v. Household*  
9 *Auto. Fin. Corp.*, 227 B.R. 501 (N.D. Ill. 1998) (claim under  
10 Illinois Consumer Fraud and Deceptive Practices Act preempted where  
11 creditor allegedly misvalued its collateral for a claim against  
12 debtor); *Koffman v. Osteoimplant Technology, Inc.*, 182 B.R. 115 (D.  
13 Md. 1995) (attempted malicious prosecution claim for the filing of  
14 an involuntary petition and violation of the stay by creditor  
15 preempted); *In re Shape, Inc.*, 135 B.R. 707 (Bankr. D. Me.  
16 1992) (claim under Massachusetts Consumer Protection Act preempted  
17 where debtor alleged willful violation of stay by creditor with  
18 whom debtor had prepetition contractual relationship); see also *In*  
19 *re Bassett*, 255 B.R. 747 (9th Cir. BAP 2000), *aff'd in part, rev'd*  
20 *in part*, 285 F.3d 882 (9th Cir. 2002) (court affirms dismissal of  
21 debtor's state law claims against creditor related to reaffirmation  
22 agreement). Even where a debtor-creditor relationship does exist,  
23 at least one court has held that the debtor may pursue a state  
24 unfair trade practices act claim if there is little risk that  
25 allowing the claim to go forward will "disrupt the uniform  
26 application of the federal bankruptcy laws or contravene  
27 congressional purpose." *Dougherty v. Wells Fargo Home Loans, Inc.*,  
28 425 F.Supp.2d 599, 609 (E.D. Pa. 2006) (claim based upon post-

1 petition, post-confirmation assessment of attorneys' fees by  
2 mortgagee).

3 Because the debtor-creditor relationship does not exist  
4 between Plaintiff and Defendant, the Court finds that *MSR*  
5 *Exploration* does not apply to preempt Plaintiff's claim under the  
6 WACPA. Whether a violation of that statute occurred in this case  
7 must await further proceedings.

8 C. The Fair Debt Collection Practices Act Claim.

9 The stated purpose of the FDCPA is to "eliminate abusive debt  
10 collection practices by debt collectors." 15 U.S.C. § 1692(e).  
11 For purposes of the motion at issue, the parties do not dispute  
12 that Defendant is a debt collector<sup>4</sup> and that the debts asserted are  
13 consumer debts.<sup>5</sup> Plaintiff contends that Defendant's attempt to  
14 collect debts that are not owed by her, by filing claims against  
15 her in bankruptcy, violates 15 U.S.C. § 1692f. Section 1692f  
16 prohibits a debt collector from using "unfair or unconscionable  
17 means to collect or attempt to collect any debt." The statute  
18 contains a nonexclusive list of actions that violate the section,  
19 of which the most apropos to this action is subsection (1), which  
20 prohibits the collection of "any amount...unless such amount is  
21 expressly authorized by the agreement creating the debt or  
22 permitted by law." The undisputed fact in this case is that

23 \_\_\_\_\_  
24 <sup>4</sup> A debt collector is defined as "any person who uses any  
25 instrumentality of interstate commerce or the mails in any business  
26 the principal purpose of which is the collection of any debts, or  
27 who regularly collects or attempts to collect, directly or  
28 indirectly, debts owed or due or asserted to be owed or due  
another." 15 U.S.C. § 1692a(6).

27 <sup>5</sup> The FDCPA defines a debt as "any obligation or alleged  
28 obligation of a consumer to pay money arising out of a  
transaction...." 15 U.S.C. § 1692a(5).



1 neither of the debts reflected in the proofs of claim filed by  
2 Defendant are debts of Plaintiff, not because those debts are  
3 subject to some defense, such as the statute of limitations<sup>6</sup>, but  
4 because Defendant has simply named the wrong debtor. The debts  
5 alleged are not and have never been debts of Plaintiff.

6 Defendant relies on *Walls v. Wells Fargo Bank, N.A.*, 276 F.3d  
7 502 (9th Cir. 2002), which held that the debtor's action under the  
8 FDCPA against a creditor for its attempts to collect a discharged  
9 debt in violation of Section 524(a) (the discharge injunction) was  
10 subject to dismissal because it "would circumvent the Bankruptcy  
11 Code's remedial scheme." *Id.* at 504. The court in *Walls*, however,  
12 did not consider the doctrine of preemption in resolving the case,  
13 because as correctly pointed out by the Seventh Circuit Court of  
14 Appeals in a case with nearly identical facts, one federal statute  
15 does not preempt another. See *Randolph v. IMBS, Inc.*, 368 F.3d  
16 726, 729 (7th Cir. 2004), citing *Baker v. IBP, Inc.*, 357 F.3d 685,  
17 688 (7th Cir. 2004). Instead, when two federal statutes address  
18 the same subject in a different way, the court must determine  
19 whether one statute implicitly repeals the other. *Id.* at 730;  
20 *Branch v. Smith*, 538 U.S. 254, 273, 123 S.Ct. 1429, 155 L.Ed.2d 407  
21 (2003).

22 In *Walls*, the Ninth Circuit Court of Appeals correctly  
23 concluded that because the discharge injunction of Section 524(a)  
24 is a creation of the Bankruptcy Code specifically enacted to  
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26 <sup>6</sup> Plaintiff has argued in the alternative, based upon the age  
27 of the debts as stated by Defendant in the proofs of claim, that  
28 the debts are barred by the statute of limitations. That defense,  
however, is not necessary given that the evidence demonstrates that  
neither debt was ever a debt of Plaintiff.

1 protect discharged debtors from post-discharge collection efforts  
2 by creditors whose claims have been discharged, the bankruptcy  
3 court and the Bankruptcy Code should dictate the remedy for a  
4 violation of that statutory injunction. The court repeated the  
5 district court's conclusion that a determination of the debtor's  
6 FDCPA claim "necessarily entails bankruptcy-laden determinations"  
7 such as whether the debtor's payments were voluntary under Section  
8 524(f), whether she was required to enter into a reaffirmation  
9 agreement under Section 524(c), etc. The court also noted that the  
10 Bankruptcy Code provides a civil contempt remedy under Section 105  
11 for violation of the discharge injunction and that the existence of  
12 this remedy justified dismissal of the debtor's simultaneous claim  
13 under the FDCPA.

14       There is considerable disagreement among courts as to whether  
15 the Bankruptcy Code and the FDCPA can peaceably coexist without one  
16 treading unfairly on the other's objectives. The Ninth Circuit  
17 Court of Appeals in *Walls* held that the FDCPA should give way to  
18 the Bankruptcy Code remedies in the context of a violation of the  
19 discharge injunction. The Seventh Circuit Court of Appeals in  
20 *Randolph* held just the opposite. In *Randolph*, the court took up  
21 three consolidated lower court cases, each holding that the  
22 Bankruptcy Code provides the sole remedy against post-bankruptcy  
23 debt-collection efforts. Disagreeing with *Walls*, however, the  
24 Seventh Circuit reversed the three lower court cases, concluding  
25 that there was no irreconcilable conflict between the FDCPA and the  
26 Bankruptcy Code and that "[I]t is easy to enforce both statutes,  
27 and any debt collector can comply with both simultaneously." 368

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1 F.3d at 730. There are plenty of cases adopting the *Walls*'  
2 reasoning and plenty of cases alined with *Randolph*.<sup>7</sup>

3 Where the facts of the case indicate that the debtor's pursuit  
4 of an FDCPA claim will not interfere with the administration of the  
5 bankruptcy case, courts have been more willing to permit the claims  
6 to go forward, rejecting the creditor's preemption argument. See,  
7 e.g., *Doughterty v. Wells Fargo Home Loans, Inc.*, *supra* (claim  
8 based upon post-petition, post-confirmation acts); *Wagner v. Ocwen*  
9 *Fed. Bank*, *supra* n. 8 (collection action complained of occurred  
10 after the bankruptcy proceedings were closed); *Peeples v. Blatt*,  
11 *supra* n. 8 (collection action complained of occurred after  
12 bankruptcy proceedings); *Molloy v. Primus Automotive Financial*  
13 *Services*, 247 B.R. 804, 821 (Bankr. C.D. Cal. 2000) (addressing  
14 creditor's "alleged debt collection activities outside of and in  
15 disregard of the bankruptcy proceeding.").

16 After *Walls*, confusion regarding the preemption doctrine  
17 continues in the Ninth Circuit. In the case of *Wan v. Discover*  
18 *Financial Services, Inc.*, 324 B.R. 124 (N.D. Cal. 2005), the court,  
19 following *Walls*, affirmed the bankruptcy court's dismissal of  
20 counterclaims brought by the debtor in the creditor's nondischarge  
21 action for alleged violations of the notice provisions of the  
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23 <sup>7</sup> See, e.g., *Baldwin v. McCalla*, 1999 WL 284788 (N.D. Ill.  
24 1999); *Kibler v. WFS Fin. Inc.*, 2000 WL 1470655 (C.D. Cal. 2000);  
25 *Degrosiellier v. Solomon & Solomon, P.C.*, 2001 WL 1217181 (N.D.  
N.Y. 2001); *Gray-Mapp v. Sherman*, 100 F.Supp.2d 810 (N.D. Ill.  
1999).

26 <sup>8</sup> See, e.g., *Peeples v. Blatt*, 2001 WL 921731 (N.D. Ill.  
27 2001); *Molloy v. Primus Auto Fin. Serv.*, 247 B.R. 804 (C.D. Cal.  
2000); *Wagner v. Ocwen Fed. Bank, FSB*, 2000 WL 1382222 (N.D. Ill.  
28 2000); *Forsberg v. Fid. Nat'l. Credit Serv., Ltd.*, 2004 WL 3510771,  
2004 U.S. Dist LEXIS 7622 (S.D. Cal. 2004).

1 FDCPA. Distinguishing *Walls*, the court in *Forsberg v. Fidelity*  
2 *Nat'l Credit Serv., Ltd.*, 2004 WL 3510771, 2004 U.S. Dist. LEXIS  
3 7622 (S.D. Cal. 2004), refused to dismiss a debtor's claim that the  
4 creditor's notices violated the provisions of the FDCPA. The court  
5 in *Forsberg* pointed out that the creditor in that case was not  
6 specifically enjoined by the bankruptcy court from collecting the  
7 debt and the debtor was pursuing simultaneously his remedies under  
8 the Bankruptcy Code and the FDCPA. See also *In re Lasky*, 364 B.R.  
9 385, 388 (Bankr. C.D. Cal. 2007) (court notes "serious question  
10 whether the standards of the FDCPA can be imported into the claims  
11 objection process.")<sup>9</sup>

12 Plaintiff is not without remedies under bankruptcy law for  
13 Defendant's filing of improper proofs of claim. Plaintiff had the  
14 right to, and did, object to the claims. Plaintiff could also file  
15 a Rule 9011 motion against the representative of Defendant who  
16 signed the proofs of claim. Plaintiff is not attempting to bypass  
17 remedies under the Bankruptcy Code. Further, although Plaintiff's  
18 bankruptcy case is not completed and the actions complained of  
19 occurred during the pendency of the case, the simultaneous  
20 assertion of Plaintiff's rights under the FDCPA and the Bankruptcy  
21 Code will not interfere with Plaintiff's bankruptcy proceedings.  
22 Because Defendant has no claims against Plaintiff, there will be no  
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24 <sup>9</sup> Courts are equally divided when looking at whether other  
25 federal statutes governing debtor-creditor relations are preempted  
26 by the Bankruptcy Code. See, e.g., *In re Figard*, 2008 WL 501356  
27 (Bankr. W.D. Pa. 2008) (court finds that Bankruptcy Code does not  
28 preempt provisions of Real Estate Settlement Procedures Act, 12  
U.S.C. § 2605(e)(2)); *In re Holland*, 374 B.R. 409 (Bankr. D. Mass.  
2007) (Bankruptcy Code does not preempt Real Estate Settlement  
Procedures Act); *In re Nosek*, 354 B.R. 331 (D. Mass. 2006) (court  
finds Bankruptcy Code preempts Real Estate Settlement Procedures  
Act and state statutory and common law).

1 further proceedings regarding allowance of the claims and the  
2 claims will not in any way impact Plaintiff as the debtor or other  
3 creditors in the bankruptcy case. Consequently, the Court finds  
4 that Plaintiff has sufficiently stated a claim under the FDCPA so  
5 as to avoid dismissal under Rule 12(b)(6), Fed.R.Civ.P.

6 **D. Other.**

7 Defendant included a request for fees under Rule 9011 with its  
8 motion to dismiss. Because the Court will deny the motion to  
9 dismiss, Defendant is not entitled to fees. In addition, the  
10 request for fees is not in compliance with Rule 9011(c)(1)(A),  
11 which requires a request for fees to be initiated by a separate  
12 motion.

13 Defendant's memorandum in support of its motion raises a legal  
14 argument about the statute of limitations applicable to the claims  
15 it asserted against Plaintiff. That argument is moot given the  
16 concession by Defendant that it has no claims against Plaintiff.

17 Finally, the Court declines to rule on Defendant's contention  
18 solely in oral argument that the filing of a proof of claim is not  
19 an action to collect a debt under the FDCPA because that claim was  
20 not raised in the motion to dismiss or Defendant's memorandum in  
21 support of that motion. Whether Defendant's filing of the proofs  
22 of claim at issue in this case violates the FDCPA must await  
23 further proceedings.

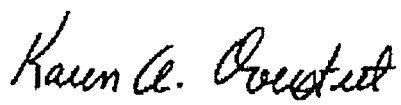
24 **CONCLUSION**

25 For the foregoing reasons, the Court finds that Plaintiff's  
26 claims under the WACPA and the FDCPA are not subject to dismissal  
27 under Rule 12(b)(6), Fed.R.Civ.P. The Court will therefore enter  
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an order, on presentation by Plaintiff, denying Defendant's motion to dismiss.

DATED this 25th day of March, 2008.



KAREN A. OVERSTREET  
UNITED STATES BANKRUPTCY JUDGE

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies under penalty of perjury that she is over eighteen (18) years of age, and that the foregoing

**BRIEF IN SUPPORT OF DEBTOR'S OBJECTIONS TO CLAIMS  
OF  
B-REAL, LLC (CLAIM NO. 5) AND ROUNDUP FUNDING, LLC (CLAIM NO. 7)**

in the above captioned case was this day served upon the below named persons by mailing, postage prepaid, first class mail, of a copy of such instrument to such persons, parties and/or counsel at the address shown below:

Mr. Robert R. Browning  
Chapter 13 Trustee  
Post Office Box 8249  
Greenville, NC 27835

Mr. Richard D. Sparkman  
Post Office Box 1687  
Angier, NC 27501  
*Attorney for B-Real, LLC & Roundup Funding, LLC*

Mr. John C. Bircher, III  
White & Allen, P.A.  
Post Office Box 1555  
New Bern, NC 28563  
*Attorney for B-Real, LLC & Roundup Funding, LLC*

Mr. Aaron J. Nash  
Hale, Dewey & Knight, PLLC  
88 Union Avenue, Suite 700  
Memphis, TN 38103

This the 11<sup>th</sup> day of August, 2008.

FINANCIAL PROTECTION LAW CENTER

By: /s/ Maria D. McIntyre  
Maria D. McIntyre  
P.O. Box 390, Wilmington, NC 28402  
Phone: (910) 442-1013  
*Attorneys for Debtor*

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF NORTH CAROLINA  
WILSON DIVISION

<p>IN RE: ROBIN GRAHAM ANDREWS 115 Munn Lane Riegelwood, NC 28456 SSN: xxx-xx-6323  Debtor(s).</p>	<p>Case No. 08-00151-8-JRL Chapter 13</p>
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**ROUNDUP FUNDING, LLC'S AND B-REAL, LLC'S SUPPLEMENTAL BRIEF IN  
SUPPORT OF OPPOSITION TO DEBTOR'S OBJECTION TO CLAIMS NUMBER  
FIVE (5) AND SEVEN (7)**

Comes now Roundup Funding, LLC (hereinafter "Roundup"), assignee to National Credit Adjusters (hereinafter "NCA") for a debt owed to HSBC and B-Real, LLC (hereinafter "B-Real"), assignee to NCO for a debt owed to Debt One, by and through its attorney of record, John C. Bircher III, opposes Debtor's Objection to Claims Number Five (5) and Seven (7) and submits the following in support of its opposition.

**INTRODUCTION**

The Debtor's Brief in Support of Debtor's Objections to Claims of B-Real, LLC and Roundup Funding, LLC (hereinafter "Debtor's Brief") is confusing. Your undersigned, while not in attendance at the hearing on this matter, has reviewed the recording, and Debtor's counsel seemed to suggest that she was no longer pursuing 9011 sanctions against B-Real, LLC or Roundup Funding, LLC. Out of an abundance of caution, and for the purpose of establishing a record, this brief will respond as if the sanctions issue was not withdrawn since the initial pleadings filed by the Debtor included said request of the Court. Furthermore, Debtor's counsel



is still seeking attorneys' fees despite withdrawing her motion for sanctions under Rule 9011, and therefore it is appropriate for this brief to address the issues surrounding Rule 9011 when discussing claims filing.

First, the Debtor's objection to claim requests sanctions under Rule 9011 based upon a filing of a proof of claim that is disputed or unenforceable under 11 U.S.C. § 502(b)(1) and based upon failure to attach documentation, i.e. violation of Bankruptcy Rule 3001(c). The Debtor did not comply with the strict procedural requirements for requesting sanctions under Bankruptcy Rule 9011. Debtor failed to provide the twenty-one (21) day safe harbor and tacked the request for sanctions to an objection to claim, which is not allowed under Bankruptcy Rule 9011.

The Debtor's Brief now states "while Ms. Andrews is not seeking sanctions against B-Real and Roundup under Rule 9011" and that "it is premature to seek sanctions against B-Real and Roundup in the debtor's case." *See* Debtor's Brief at page 8. However, Debtor's Brief continues to argue that the Court should sanction B-Real and Roundup under Bankruptcy Rule 9011.

The Debtor has no constitutional standing, as the plan has been confirmed at 0%. There is no discussion in the Debtor's Brief that she denying the objection to claim will result in any injury to the Debtor.

The Debtor now alleges for the first time, that the Fair Debt Collection Practices Act ("FDCPA") applies to proof of claims. Debtor is estopped from raising new legal argument not presented in the original objection to claim. The fact that various creditors sell its bankruptcy receivables in bulk to Roundup is not improper or illegal, as Debtor suggests. Since many Chapter 13 plans pay significantly less than 100%, accounts are sold in volume to maximize efficiency.

Debtor's counsel vaguely asserts that a "significant portion of the claims" filed by B-Real and Roundup are time barred. Debtor has not presented any evidence that it researched each case to determine if the debtors scheduled the debt as due and owing, which choice of law applied to the underlying debt, if the statute of limitations was tolled under applicable laws, or when the accrual period began under applicable law. Americans freely move from one state to another, which is why many states, including North Carolina toll the statute of limitations if the debtor leaves the state. Some states, such as North Carolina allow a debt to be revived upon written acknowledgement by the debtor. Debtor may omit creditors from their petition to avoid any admission. The issue of statute of limitations is fact intensive. Furthermore, although B-Real and Roundup offered to withdraw the claims in this matter, there is no concession by either entity that the applicable statute of limitation has run on these particular debts. Therefore, counsel at the hearing was mistaken in his belief that these creditors concede the claims are time-barred.

The Debtor's counsel has a duty to object to claims under 11 U.S.C. § 502(b)(1) if she believes that a valid affirmative defense applies to the claim. The burden of objecting to a claim based upon the statute of limitations is on the debtor per 11 U.S.C. § 502(b)(1). The Debtor admits that the Bankruptcy Code has created a claims process to provide less scrutiny to promote efficient and economical administration. However, the Debtor requests the Court legislate to change the Bankruptcy Code and Rules for debt buyers.

## **FACTS AND PROCEDURES**

On January 9, 2008, Debtor filed a voluntary petition with the Court but omitted the Schedules and Statement of Financial Affairs. The Debtor certified in her petition that "National

Credit Adjuster” at the address of “327 West Forth Avenue, Hutchinson, KS 67501” is a “creditor scheduled in the petition” to be included in the bankruptcy case. A true and correct copy of the voluntary petition is attached as Exhibit “A”.

Based upon the Debtor’s certification of creditors, on January 10, 2008, the Court served NCA notice of the bankruptcy case and proof of claim form with instructions on how to file the claim in the bankruptcy case. Nowhere in the proof of claim form or instructions is there notification that failure to attach documentation or assignment is grounds for sanctions. The instructions for the proof of claim form allow for attachment of a summary. A true and correct copy of the Court’s January 10, 2008 BNC is attached as Exhibit “B”.

Upon receipt of the Court’s bankruptcy notice and instructions on filing a proof of claim, NCA sold the HSBC account to Roundup on or about January 29, 2008 with the information that Robin Andrews with SSN XXX-XX-6323 (number redacted here for privacy reasons) opened a HSBC credit card account with the account number xxxxxxxxxxxx2062 (number redacted here for privacy reasons) on 09/02/2002 and charged off on 04/30/2003 with a prepetition balance due of \$1,405.11. Based upon NCA’s representations, Roundup filed a proof of claim with the account information from NCA.

Upon notice of the bankruptcy case and instructions on filing a proof of claim, NCO sold the Debt One account to B-Real on or about January 29, 2008 with the information that Robin Andrews with SSN XXX-XX-6323 (number redacted here for privacy reasons) opened the account with the account number xxxx2699 (number redacted her for privacy reasons) on 11/19/1997 and charged off on 6/28/1999 with a prepetition balance due of \$3,287.92. Based upon NCO’s representations, B-Real filed a proof of claim with the account information from NCO.

On January 30, 2008, Debtor filed her schedules and statement of financial affairs and amended those schedules and statement of financial affairs on February 13, 2008. Neither the Court nor the Debtor ever served creditors copy of the voluntary petition, schedules, or statement of financial affairs on any creditors. *See* bankruptcy docket. NCA simply received Court's BNC of the bankruptcy filing and claim for with instructions to file a claim in the bankruptcy case. NCA never received notice that the debt was disputed at any time. The Debtor represented that NCA is a creditor in the bankruptcy case per the creditor's matrix certification. The Court and NCA acted upon the Debtor's representation.

Almost a month after NCA received notice to file a proof of claim in the bankruptcy case from the Court, the Debtor filed her schedule F and listed a disputed debt to "National Credit Adj./Interntl Fin SE," in the unsecured amount of \$1,291.00 for "Creditor/debt unknown to debtor." Debtor omits the account number for this debt and many others while disputing nearly half of all debts listed on the Schedule F. A true and correct copy of the Schedule F is attached as Exhibit "C." The Debtor never served copies of the Schedule F upon any creditor. There was no notice sent to Roundup that the debt was ever disputed, but the Debtor insists that Roundup should be sanctioned. Granting such sanctions is a violation of Roundup's due process, since Bankruptcy Rule 9011 grants due process through notice and twenty-one (21) day safe harbor.

Under criminal and civil penalties of 18 U.S.C. §§152 and 3571, Roundup timely filed proof of claim number seven (7) on March 10, 2008 in the general unsecured amount of \$1,405.11 for an unsecured HSBC credit card debt under account number xxxxxxxxxxxx2062.

The Debtor objected to the two claims alleging that both debts are barred by the statute of limitations and both creditors should be sanctioned under Rule 9011 for failing to attach documentation and for filing claims that are unenforceable.

## LEGAL DISCUSSION

### I. The Sole Remedy for Failure to Attach Documentation Under Bankruptcy Rule 3001 is Loss of Prima Facie Validity and Not Sanctions.

Without waiving Roundup and B-Real's objections to Debtor raising new arguments not presented in the original objections to claims, the failure to attach documentation is not a basis for claim disallowance under 11 U.S.C. § 502(b) and cannot be a Bankruptcy Rule 9011 violation. Both claims filed in this case complied with Bankruptcy Rule 3001, as the forms set forth Roundup's and B-Real's claim in a clear written statement that substantially conforms with Official Form 10. The claim facially indicated the circumstance by which the claim was acquired. Even assuming that the claim does not comply with Bankruptcy Rule 3001, the claim simply lacks prima facie validity.

Specifically, the bankruptcy courts in the Fourth Circuit have held that lack of documentation and lack of assignments is not a basis for claim disallowance. *See In re Herron*, 381 B.R. 184, 190 (Bankr. Md. 2008) (holding the Bankruptcy Code governs the allowability of claims, the Bankruptcy Rules dictate the manner and timing of the filing of claims and objections thereto; *In re Simms*, 2007 WL 4468682 \* 2 (Bankr. N.D. Va. 2007), (holding under 11 U.S.C. § 501, a creditor may file a proof of claim in a bankruptcy case, and the debtor has the burden to object to the claim under 11 U.S.C. § 502(b)(1)-(9)); *See In re Harford Sands Inc.*, 372 F.3d 637, 640 (4<sup>th</sup> Cir. 2004) (holding only 11 U.S.C. § 502(b) provides the nine grounds on which to disallow a proof of claim). *In re Simms* also discuss that Bankruptcy Rule 3001(e)(1) does not require a claimant to attach a copy of the assignment if the transfer occurred prior to a proof of claim filing unlike Bankruptcy Rule 3001(e)(2), which requires such evidence when the transfer occurs after a claim filing. *See In re Simms* \*4 (Since Bankruptcy Rule 3001(e)(1) simply does

not require evidence of assignment, this court will “not impose any additional requirement on a claim transferee that does not appear in the Rules of Bankruptcy Procedure or the statute itself.”)

*Id.*

If a majority of courts agree that failure to attach documentation is not a basis for claim disallowance<sup>1</sup>, how can it be a basis to award sanctions under Bankruptcy Rule 9011? The

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<sup>1</sup> Second Circuit

The Northern District Bankruptcy Court of New York held that (1) proofs of claim filed by creditor to which debtors' credit card debts had been assigned were not prima facie valid, given that account summaries attached to proofs of claim did not include breakdown of interest and late fees; but (2) proofs were some evidence of creditor's claims and, in absence of any evidence to contradict amounts of claims, would not be disallowed based solely on this procedural deficiency in Bankruptcy Rule 3001. *In re Irons*, 343 B.R. 32, 39 (Bankr. N.D. NY 2006).

The Connecticut Bankruptcy Court held that a Bankruptcy Rule 3001(f) presumption is not the only way for a claimant to establish at least a prima facie claim against the estate. A proof of claim when considered together with the relevant admission in the Schedules establishes at prima facie case of the debtor's liability on the claim and shifts the burden of production upon the debtor. *In re Jorzak*, 314 B.R. 474, 477 (Bankr. D. Conn. 2004).

Third Circuit

The Eastern District Bankruptcy Court of Pennsylvania explicitly agreed with the analysis of the majority of courts overruling objections to claims that do not attack liability for the claim or the amount of the underlying debt, but instead are based solely on the argument that the claims should be disallowed because they do not attach the documentation required by Federal R. Bankr. P. 3001(c). *See In re Lapsansky*, 2006 WL 3859243 \*2 (Bankr. E.D. Pa. 2006); *see also In re Kincaid*, --- B.R. ---, 2008 WL 2278895 \*2 (Bkrty.E.D.Pa.) (holding “[t]he law is well settled that failure to attach supporting documentation as required by a rule of procedure is not grounds for disallowance of a claim as § 502(b) supplies the exclusive basis for claim disallowance.”)

Sixth Circuit

The Bankruptcy Court in the Southern District of Ohio agreed that Bankruptcy Rule 3001 cannot overrule the plain meaning of the 11 U.S.C. § 502. *See In re Burkett*, 329 B.R. 820, 824 (Bankr. S.D. Ohio 2005). Full conformance with Official Form 10 has never been required for allowance of a claim but failure to comply with the Rule 3001 only affects the presumption of validity. *Id.* at 824. Thus, the bankruptcy court overruled all of the trustee's objections to claims based solely on lack of documentation.

The Bankruptcy Court in the Western District of Michigan held that the trustee could not have the creditor's claim judicially invalidated by entry of order, based solely on trustee's belief that claimant had not filled out official claim form correctly. *In re Shaffner*, 320 B.R. 870 (Bankr. W.D. Mich. 2005). The

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court “agree[s] with those courts that have held that a claim may be disallowed only for one of the reasons set forth in 11 U.S.C. § 502(b).” *Id* at 876.

The Eastern District of Tennessee Bankruptcy Court overruled objections to claims that fail to dispute either the liability or the claim amount despite the fact that the claims were filed without sufficient documentation under Bankruptcy Rule 3001(c). *In re Kemmer*, 315 B.R. 706, 716 (Bankr. E.D. Tenn. 2004). The court held:

The failure to attach a monthly account statement or a similar computer-generated account summary, evidencing the required account information, will result in the loss of the creditor’s prima facie presumption of validity. This does not, however, automatically result in disallowance based upon a groundless objection.

*Id.* The court went on to declare that disallowing claims based solely on lack of documentation results in a windfall to debtors, requiring the court to find that Bankruptcy Rule 3001(c) interposes a non-statutory ground by which it may disallow claims. *Id* at 717.

#### Seventh Circuit

The Northern District Bankruptcy Court for Illinois agrees with the growing majority concerning the simple legal principal that Federal R. Bankr. P. 3001 does not supersede the Bankruptcy Code under 11 U.S.C. §502. *In re Guidry*, 321 B.R. 712, 719 (Bankr. N.D. Ill 2005) (since the debtors setting forth no grounds in their objections that would require the claims to be disallowed--indeed, with the debtors largely admitting in their schedules that the claims are valid--any amendment of the proofs of claim would be a meaningless and wasteful exercise). *Id.* The bankruptcy court also discussed the evidentiary impact of Bankruptcy Rule 3001(c):

The difficulty with this reasoning is that evidence of any kind – prima facie or otherwise – is a concern only a hearing to resolve factual disputes. *See* Fed.R.Evid. 401(defining “relevant evidence” as that tending to make more or less probably “the existence of any fact that is of consequence to the determination of the action”). The debtors’ claim objections raised no factual dispute requiring a hearing. If eCast’s proofs of claim are analogized to complaints – as commonly done – then the debtors’ objections are like motions to dismiss for failure to state a claim on which relief can be granted. The debtors do not deny any of the factual allegations of the proofs of claim.

*Id* at 714. All the objections that fail to raise any substantive dispute were overruled.

The Bankruptcy Court in the Eastern District of Wisconsin came to the same conclusion that even if a proof of claim is not granted prima facie status, objection to claim must present some evidence sufficient to overcome, or at least, equalize, the evidentiary weight of the proof of claim. *In re Habiballa*, 337 B.R. 911, 915 (Bankr. E.D. Wis. 2006).

The Bankruptcy Court for the Southern District of Indiana agreed with the early decisions of *In re Cluff* and *In re Kemmer* to the extent that noncompliance with Bankruptcy Rule 3001 does not necessarily mean that the claim must be amended to include the missing documentation to be allowed. *In re Relford*, 323 B.R. 669 (Bankr. S.D. Ind. 2004). A court should determine whether the preponderance of the evidence supports allowance of the claim as filed. *In re Relford* at 677. If the schedules are consistent with the amount set forth in the deficient claim and do not indicate that the debt is disputed, unliquidated,

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or contingent, the creditor may ask a court to take judicial notice of the schedules as additional evidence of the claim. *Id.*

### Eighth Circuit

The Eighth Circuit B.A.P. was one of the first courts to discuss in-length the relationship between 11 U.S.C. §§501-502 and Bankruptcy Rule 3001(c), in the case of *In re Dove Nation*, 318 B.R. 147 (Eighth Cir. B.A.P. 2004). The 8<sup>th</sup> Circuit B.A.P. concluded that:

Section 502 of the Bankruptcy Code governs the allowance and disallowance of claims filed against bankruptcy estates. Neither procedural rules nor instructional language on official forms overrides clear statutory language. Therefore, the court properly overruled the Debtor's objections to claims based solely on grounds not recognized by Section 502 of the Code. Accordingly, we AFFIRM the bankruptcy court order overruling the Debtor's objections to the Claimant's claims.

*In re Dove-Nation*, 318 B.R. 147, 153 (8<sup>th</sup> Cir. BAP 2004). The rules are designed to supplement the statute, not replace it. When the objecting party does not come forward with any evidence countering existence or amount of these debts but objects solely on basis of lack of supporting documentation, the claim cannot be disallowed solely on that basis. *Id.* at 152.

### Ninth Circuit

The Ninth Circuit B.A.P. also published a decision in the case of *In re Heath* 331 B.R. 424 (9<sup>th</sup> Circuit B.A.P. 2005), holding that courts are bound by the plain meaning of the Bankruptcy Code, and that noncompliance with Bankruptcy Rule 3001(c) is not one of the statutory grounds for disallowance. Thereafter, the Ninth Circuit B.A.P. published another opinion, *In re Campbell*, 336 B.R. 430 (9<sup>th</sup> Cir. B.A.P. 2005), holding that (a) a proof of claim filed without sufficient documentation does lack prima facie validity: the claim very likely will not survive a bona fide legal or factual objection absent an adequate response by the creditor; (b) a debtor's admission of liability on the bankruptcy schedules also has consequences: the debtor might be able to withdraw that admission, but the legal and evidentiary consequences will depend on the normal rules governing admissions and estoppel; and (c) a claim objection that does not actually contest the debtor's liability or the amount of the debt is not enough to disallow a proof of claim, even if the proof of claim lacks the documentation required by Rule 3001(c). *In re Campbell* at 435.

### Tenth Circuit

The Tenth Circuit B.A.P. In *re Kirkland*, 379 B.R. 341 (10<sup>th</sup> Cir. BAP 2007) held that a creditor's failure to attach supporting documentation to proof of claim that it filed for sum allegedly owing in connection with debtor's prepetition credit card purchases was not ground for disallowing claim on objection by trustee. See *Cluff v. eCast Settlement Corp. (In re Cluff)*, 313 B.R. 323, 331 (Bankr. D. Utah 2004), (*affirmed Cluff v. eCast Settlement*, 2006 WL 282005 at 2 (D. Utah 2006) (holding that 11 U.S.C. §502(b)(1) allows a bankruptcy trustee to use any defense to a claim that would have been available to a debtor under applicable non-bankruptcy law, including lack of consideration, statute of limitations, and others numerated.)); *In re Mazzoni*, 318 B.R. 576, 579 (Bankr. D. Kansas 2004) (creditor's failure to attach credit card documentation on which their claims were based merely deprived claims of their prima facie validity, but did not prevent these proofs of claim, which included creditor's name, account number by which creditor identified debtor and amount of claim on petition date, from satisfying creditors' initial burden of proving existence and amount of claims); *In re Joslin*, 344 B.R. 146, 151 (Bankr. Kans. 2006) (overruling a Chapter 7 Trustee's objection based solely on lack of documentation even though B-Line's



Debtor cites *In re Wingerter*, which is in the minority view that a creditor who fails to attach documentation to a proof of claim is subject to Bankruptcy Rule 9011 sanctions when the debtor does not schedule the debt or schedules the debt as disputed. *Wingerter* has allowed debtors' consels to use gamesmanship in completing the petition. In Ohio and many other states, debtors counsels have begun routinely omitting creditors or disputing debts in the petitions. To satisfy due process, if a court sanctions a creditor for not reviewing the debtor's schedule prior to filing a claim, then the court must send copies of the entire petition with notice

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claim does not have prima facie validity because the Chapter 7 Trustee took no position, nor offered any evidence disputing the information contained in the claim).

#### Eleventh Circuit

The Southern District of Florida Bankruptcy Court published two opinions concerning claim disallowance under 11 U.S.C. § 502 and Bankruptcy Rule 3001(c). *In re Moreno*, 2006 WL 1071889 (Bankr. S.D. Fla. 2006) and *In re Felipe*, 319 B.R. 730, 735 (Bankr. S.D. Florida 2005). In *Moreno*, Chief Judge Robert A. Mark from the Southern District of Florida held that a creditor's failure to attach the signed application or statements supporting the claim is not a basis for claim disallowance. The court provided further guidance:

First, if a claim is scheduled by a debtor as undisputed and in an amount equal to or greater than the amount in the proof of claim, little, if any, documentation is necessary. . . Moreover, this Court joins other courts which have criticized the tactic of filing an objection to an undisputed scheduled claim. . . . The Court's bar to raising objections to claims scheduled as undisputed should not be read as an invitation to schedule credit card debts as disputed in hopes of shifting the burden back to the creditor.

*In re Moreno*, 2006 WL 1071889 at \* 5- 6 (internal citations omitted). In the event that the scheduled amount is less than the proof of claim amount, an objection based solely on lack of documentation will be overruled without prejudice for the debtor to file a renewed objection to the claim amount in excess of scheduled amount. *Id.*

The Southern District of Florida Bankruptcy Court earlier held: "claims objections should address that portion of a claim actually in dispute" and "it is not appropriate, for example, to seek an Order striking a \$1,361.96 claim in its entirety . . . if the debtor has scheduled the claim as undisputed and liquidated in the amount of \$1,320.00. *In re Felipe*, 319 B.R. 730, 735 footnote 3 (Bankr. S.D. Florida 2005).

The Southern District of Florida Bankruptcy Court relied on *In re Shank*, 315 B.R. 799 (Bankr. N.D. Ga. 2004) in interpreting 11 U.S.C. § 502(b). *In re Shank* predicted that requiring creditors to attach documentation in response to an objection that identifies no grounds for disallowance or reduction of a claim will increase abuse and litigation. *Supra* at 813. If there is no substantive objection to the claim, the creditor should not be required to provide further documentation because it serves no purpose. *Id.*

that if a claim is disputed full documentation must be attached to the proof of claim. This will unduly burden the all bankruptcy courts.

Recent published opinions reflect the pattern of debtors attorneys who schedule every debt as disputed in their schedule F as a matter of course. *See in re Chalakee*, 385 B.R. 771, 776 (Bankr. N.D. Okla. 2008) (“The fact that Debtors designated every credit card debt as disputed raises a question about their motivation in filing these objections”); *In re Samson*, 2008 WL 2994328 (Bankr. N.D. Ohio 2008) (“To be sure, the Debtors listed their three obligations to Chase Bank as disputed, contingent and unliquidated. But the Debtors listed all their claims in this manner, with their attorney explaining that he does this simply as a matter of course for all debts.”).

**II. If the Bankruptcy Code Permits Filing Claims on Prescribed Debts and Created an Objections to Claims Process, There is No Basis to Award Sanctions or Fees Against Creditors.**

The Bankruptcy Code permits filing claims on disputed debts, and the Bankruptcy Code creates an objection to claim process to disallow such claims only upon a filing of an objection to claim. A “creditor” is defined broadly as any “entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor.” 11 U.S.C. § 101(10)(A).

The Bankruptcy Code, 11 U.S.C. § 101(5), broadly defines “claim” to mean:

- (A) A right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, *disputed*, undisputed, legal, equitable, secured, or *unsecured*; or
- (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, *disputed*, and undisputed, secured, or *unsecured*.

(Emphasis added ). The legislative history for 11 U.S.C. § 101(5) even states that “the bill contemplates all legal obligations of the debtor, no matter how remote or contingent, will be able

to be dealt with in the bankruptcy case. It permits the broadest possible relief in the bankruptcy court.” H. Rept. No. 95-595 to accompany H.R. 8200 95th Cong., 1<sup>st</sup> Sess. (1977) pp. 308-314.

Section 501(a) provides that any “creditor . . . may file a proof of claim.” Section 502(a) simply states that any claim filed under §501 is deemed allowed unless a party in interest objects under the grounds specified under Section 501 (b)(1)-(9). Therefore, the debtor has the responsibility of objecting to the claim under subsections (b)(1)-(9) if the debtor does not want the claim to be paid. Otherwise, the debtor is barred from opposing any distributions to the claim from the estate.

Section 502(b)(1)-(9) of the Bankruptcy Code provides the exclusive list of reasons for disallowance of a claim.<sup>2</sup> One of the enumerated reasons for a valid objection to claim is that the debt is “**unenforceable against the debtor** and property of the debtor, under any agreement or applicable law for a reason other than because the claim is contingent or unmatured.” 11 U.S.C. §502(b)(1)11 (emphasis added).

Here, the Bankruptcy Code specifically contemplates a process to allow all creditors to file claims in the bankruptcy case, including debts that are disputed or prescribed, i.e. unenforceable. The Bankruptcy Code then creates a process for the debtors and trustees to

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<sup>2</sup> See *In re Irons*, 343 B.R. 32, 39 (Bankr. N.D. NY 2006); *In re Jorczak*, 314 B.R. 474, 477 (Bankr. D. Conn. 2004); *In re Lapansky*, 2006 WL 3859243 (Bankr. E.D. Pa. 2006); *In re Burkett*, 329 B.R. 820 (Bankr. S.D. Ohio 2005); *In re Kemmer*, 315 B.R. 706, 716 (Bankr. E.D. Tenn. 2004); *In re Habiballa*, 337 B.R. 911 (Bankr. E.D. Wis. 2006); *In re Relford*, 323 B.R. 669 (Bankr. S.D. Ind. 2004); *In re Heath*, 331 B.R. 424 (9th Circuit B.A.P. 2005); *In re Campbell*, 336 B.R. 430 (9th Cir. B.A.P. 2005); *In re Mazzoni*, 318 B.R. 576, 579 (Bankr. D. Kansas 2004); *In re Joslin*, 344 B.R. 146, 151 (Bankr. Kans. 2006); *In re Moreno*, 2006 WL 1071889 (Bankr. S.D. Fla. 2006); *In re Felipe*, 319 B.R. 730, 735 (Bankr. S.D. Florida 2005); *In re Shank*, 315 B.R. 799 (Bankr. N.D. Ga. 2004); See *In re Shaffner*, 320 B.R. 870, 876 (Bankr. W.D. Mich. 2005); *In re Dove-Nation*, 318 B.R. 147 (Eighth Cir. B.A.P. 2004); *In re Guidry*, 321 B.R. 712, 719 (Bankr. N.D. Ill 2005); *Cluff v. eCast Settlement Corp.*, 313 B.R. 323, 331 (Bankr. D. Utah 2004); *In re Kirkland*, 379 B.R. 341 (10th Cir. BAP 2007).

decide whether or not to object to the claim based upon unenforceability of the debt or any type of dispute. The sole remedy in 11 U.S.C. §502 and Fed. R. Bankr. P. 3007 governing the objections to claims is *claim disallowance*. *In re Henry*, 311 B.R. 813, 822 (Bankr. W.D. Wash. 2004). The Debtor complied with the Bankruptcy Code and Rules by objecting to the claim; however there is no fee shifting provision in the Bankruptcy Code or Rules to allow a debtor sanctions.

Therefore, Roundup, which filed a claim against the Debtor, is a “creditor” in the bankruptcy case, even though the underlying debt is allegedly disputed. The term “creditor” is not dependent on how the debtor schedules the debt, as there maybe many reasons why a creditor is omitted from the schedules or why the debt is disputed. The term “creditor” includes claims that are disputed and unenforceable, as long as the claim is not fraudulent. Debtor’s sole remedy under the Bankruptcy Code is to object to the proof of claim under 11 U.S.C. § 502(b)(1) as unenforceable, i.e. disputed, and have the claim disallowed.

The bankruptcy court even sends notices to all creditors to file a claim in a chapter 13 bankruptcy case regardless of whether the debtor scheduled the debt as disputed or not. Moreover, neither the debtors nor the court ever mail a copy of the petition to the bankruptcy court, so a creditor receives no notice of any claim dispute until an objection is filed.

The Official Proof of Claim Form B10 instructs a creditor to file a claim to assert that a debt is owed by either the debtor or the debtor’s estate. Form B10 only prohibits a creditor from filing a fraudulent claim, as the fine for presenting a fraudulent claim is a “up to \$500.00 or imprisonment for up to 5 years, or both.” 18 U.S.C. §§152 and 3571. Official Proof of Claim Form B10.

The objection to claim requests the Court to turn the Bankruptcy Code claims process upside down by shifting the debtor's burden to review filed claims over to the creditor.<sup>3</sup> According to the Debtor's logic, the creditor must determine in advance whether any possible basis for claim disallowance under 11 U.S.C. § 502(b)(1)-(9) applies to prohibit the creditor from filing a proof of claim. As explained below, whether a debt is barred by the statute of limitations is fact intensive and not easily determined under applicable state law.

**III. The Debtor Has No Constitutional Standing to Objection to the Claims; Therefore, the Objections are Moot.**

On March 20, 2008, the Minutes of 341 Meeting and Motion for Confirmation of Plan was filed proposing to pay zero percent (0%) to unsecured claimants. The Order granting the Minutes of 341 Meeting and Motion for Confirmation of Plan was entered on April 15, 2008. Debtor admits she does not have standing to object to the claim because she does not qualify under the "Injury in Fact" standard set forth by *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) or the "Person Aggrieved" standard set forth by *Holmes v. Silver Wings Aviation, Inc.*, 881 F. 2d 939 (10th Cir. 1989). Debtor is not prejudiced as a result of the filing of Roundup's claim, as Debtor's confirmed Plan provides for a zero percent (0%) distribution to unsecured claims. The objection to claim is moot, but for the fact that Debtor's counsel requested sanctions against Roundup under Bankruptcy Rule 9011. Allowing such objections in 0% plan will open the litigation floodgate.

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<sup>3</sup> A similar situation arises in connection with a Chapter 13 Plan. It is the responsibility of the debtor to present a Chapter 13 plan for confirmation under 11 U.S.C. §1325, and it is the responsibility of the creditor to object to the plan confirmation if the creditor does not agree with the terms of the plan. However, applying Debtor's logic, the debtor would have an affirmative duty to make sure that the creditor would not object to the terms of the Chapter 13 plan and to make sure that the plan strictly complies with 11 U.S.C. §1325. Otherwise, under Debtor's reasoning, a debtor would be liable to the creditor for fees and costs.

For example, using the same form objection to claim, Debtor's counsel also filed two other objections to claims against Jefferson Capital in this 0% plan case. Since it will cost Jefferson Capital at least \$2,000.00 to defend its claims, Jefferson Capital decided to disallow its claims (which are under \$600.00) and pay \$1,500.00 to make the matter go away. Even if the creditor wins by providing documentation to show that the debtor is wrong, the claim will not be paid anything. Debtor's counsel seeks to double her bankruptcy compensation by objecting to claims in 0% plans.

All the cases the Debtor cites, *In re Chaussee*, *In re Wingerter*, *In re Varona*, and *Rogers v. B-Real, LLC* involve chapter 13 cases with payouts above 0%. At a minimum, those debtors had constitutional standing to file an objection to claim since the outcome of the objections affected the confirmed plan. Here, the Debtor admits that disallowing the claim does not affect her monetarily.

**IV. Under the American Rule and Case Law, Plaintiffs' and Their Counsel Are Not Entitled to Any Fees or Sanctions.**

Under the American Rule, litigants in bankruptcy proceedings may recover their fees and costs incurred pre-petition that are provided for under a valid contract. *See In re Simms*, 2007 WL 4468682 (Bankr. N.D. W. Va. 2007); *In re Henry*, 311 B.R. 813 (Bankr. W.D. Wash. 2004); *F.D. Rich Co. v. Industrial Lumber Co.*, 417 U.S. 116, 129 (1974) (explaining the basis for the American Rule). The exceptions to the American Rule exist, whereby the loser in civil litigation may be forced to pay the winner's attorney's fees. *In re Simms* at \*4. Common exceptions include contractual provisions allowing the shifting of fees, statutory provisions allowing for the shifting of fees (such as those in the FDCPA), and awarding of fees to compensate one party for the other's bad faith or vexatious conduct. *E.g.*, Fed.R.Civ.P. 11, Fed. R. Bankr.P. 9011

(sanctions for inappropriate representations to the court); *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43-51 (1991) (recognizing the bad faith exception to the American Rule). Under 11 U.S.C. §105(a), the Court may award fees through its equitable power necessary or appropriate to fulfill a specific Code provision. See *In re Henry* at 11 (citing *In re Saxman*, 325 F.3d 1168 and *Northwest Bank Worthington v. Ahlers*, 485 U.S. 197).

In this case, the Debtor has not presented any factual or legal basis in the Bankruptcy Code and Rules to depart from the American Rule. There is no evidence of a contract giving Debtor's counsel the right to legal fees or sanctions. Debtor's counsel has not alleged any contract as a basis for such a demand.

Furthermore, Debtor has failed to allege any provision in the Bankruptcy Code warranting the award of attorney's fees, has failed to file a separate motion requesting such relief pursuant to Bankruptcy Rule 9011, and did not even provide the twenty-one (21) day notice before requesting sanctions. Bankruptcy Rule 9011 requires:

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

Pursuant to Bankruptcy Rule 9011, a request for attorney's fees as a sanction must be made separately from other motions or requests and shall describe the specific conduct warranting sanctions. Rule 9011 also requires the motion for sanctions not be filed until after the twenty-one (21) day from the service of the motion for sanctions to give the party a safe harbor.

Plaintiffs' counsel never contacted Defendant or counsel prior to filing, and never served the prerequisite motion for sanctions concerning the claim. Roundup and B-Real are now forced to spend thousands of dollars defending itself against a frivolous adversary proceeding over claims that will be paid \$0.00. This form of harassment is a waste of judicial resources. The judicial system will spend more than \$0.00 in reviewing the pleadings when a simple letter from the Debtor's counsel could have quickly resolved the matter. Therefore, Creditor could argue that Debtor is in violation of Bankruptcy Rule 9011 itself and is subject to sanctions for continuing to litigate this matter.

V. **The Bankruptcy Code and Rules Preclude the FDCPA From the Bankruptcy Claims Process.**

Many courts have rejected the FDCPA and sanction remedies against creditors in a claim dispute, as the only remedy is claim disallowance under the Bankruptcy Code and Rules.

In the case of *In re Varona*, \_\_\_ B.R. \_\_\_, 2008 WL 2150109, \*15 (Bankr. E.D.Va. 2008), the court held:

Here, no issue exists as to the direct application of the FDCPA to provide a basis for recovery by the Varonas. This is because there is no assertion by them of a claim pursuant to the FDCPA. Rather, the Varonas argue the Court should analogize the instant matter to the interpretations of the FDCPA that have concluded an attempt to collect a time-barred debt is violative of the FDCPA. The divergent purpose of the FDCPA, however, convinces the Court that the application of decisions such as *Kimber* to the instant matter is inappropriate.

The Debtor cites *In re Rogers* to support the position that the FDCPA should apply to every creditor who files a proof of claim. Since the FDCPA provides for statutory damages and attorney's fees, debtors' attorneys nationwide have filed adversaries based upon the FDCPA for any type of claim dispute instead of a simple objection to claim requesting claim disallowance.



Recently, two bankruptcy decisions have rejected *In re Rogers* holding. In the case of *In re Williams*, unpublished 08-AP-00030 (Bankr. M.D. Fla. 2008), the Court held:

However, the facts of this case can be distinguished from cases involving the applicability of the FDCPA to violations of the automatic stay and dischargeability issues. In the cases of *Turner*, *Hyman*, *Randolph*, the collection agencies sent letters that violated both the Bankruptcy Code and the FDCPA. Here Asset did not engage in any wrongful conduct by filing a proof of claim. To hold otherwise would undermine the rights of creditors in the bankruptcy process. The creditor's right to file a claim is not impacted by whether the statute of limitations had run, as the debtor must raise the statute of limitations as an affirmative defense, and even then the court still must determine whether it had tolled and run. The debtor does not need the FDCPA to protect itself from improper claims, as the Bankruptcy Code allows the debtor to file an objection.

A true and correct copy of *In re Williams* is attached as Exhibit "D". *In re Pariseau*, unpublished 08-AP-00142 (Bankr. M.D. Fla. 2008) criticized *In re Rogers* for its poor analysis:

*In re Rogers* (citation omitted) relied upon the decision issued in *Randolph* in denying a motion to dismiss as to the FDCPA claims upon the basis that it was not possible to conclude that the debtors could not prove facts entitling them to relief under the FDCPA. As stated above, *Randolph* is distinguishable from the instant proceeding and accordingly the Court respectfully disagrees with the Rogers court's reliance upon *Randolph* in reaching its holding.

A true and correct copy of *In re Pariseau* is attached as Exhibit "E".

Other courts agree the FDCPA did not apply to a creditor who files a proof of claim in a bankruptcy case. *In re Middlebrook*, --- B.R. ----, 2008 WL 2705496 (D. Minn.) (holding once debtor in bankruptcy, challenges to proofs of claim limited to those provided in Bankruptcy Code and the FDCPA provides no remedy to Middlebrooks for ICC's allegedly wrongful proof of claim); *In re Lasky*, --- B.R. ----, 2007 WL 777763 (Bkrty.C.D.Cal.)(holding the reasoning of *Kokoszka v. Belford*, 417 U.S. 642 (1974) impel a finding that an FDCPA claim may not be premised on proofs of claim filed as part of a bankruptcy proceeding); *In re Henry*, 311 B.R. 813, 822 (Bankr. W.D. Wash. 2004); *In re Rice-Etherly*, 336 B.R. 308 (Bankr. E.D. Mich 2006);

*Gray-Mapp v. Sherman*, 100 F. Supp. 2d 810 (N.D. Ill. 1999); *In re Abramson*, 313 B.R. 195 (Bankr. W.D. Pa. 2004).

In the case of *In re Gilliland*, 386 B.R. 622 (Bankr. N.D. Miss. 2008), the court dismissed debtor's FDCPA action against a creditor who filed a proof of claim on a debt that was previously discharged:

The defendant's motion to dismiss for failure to state a claim was granted by the court. The court stated that "once the debtor is in bankruptcy court, the debtor's remedies are limited to those provided in the Bankruptcy Code." *Id.* at 814. "Nothing in either the Bankruptcy Code or the FDCPA suggests that the debtor should be permitted to bypass the procedural safeguards in the Code in favor of asserting \*624 potentially more lucrative claims under the FDCPA. And nothing in the FDCPA suggests that it is intended as an overlay to the protections already in place in the bankruptcy proceedings." *Id.* See also, *Shortsleeve v. Centurytel of Ala., LLC (In re Shortsleeve)*, 349 B.R. 297 (Bankr.M.D.Ala.2006); *Mogg v. Consumer Collection Mgmt., Inc. (In re Mogg)*, No. 05-34066, 2007 WL 2608501, \*3, 2007 Bankr. LEXIS 3085, at \*8 (Bankr.S.D.Ill. Sept.5, 2007); *Csonder v. Weinstein, Treiger & Riley, P.S. (In re Csonder)*, 309 B.R. 124, 129-30 (Bankr.E.D.Pa.2004); *Vogt v. Dynamic Recovery Servs. (In re Vogt)*, 257 B.R. 65, 68 (Bankr. D. Colo. 2000); *Mogg v. Midwest Collection Servs. (In re Mogg)*, No. 07-3076, 2007 WL 2608501, at \*3 (Bankr.S.D.Ill., Sept.5, 2007); *Buckingham v. Baptist Mem.'l Hospital-Golden Triangle*, 283 B.R. 691 (N.D.Miss.2002); and *In re Goldstein*, 201 B.R. 1, 4-5 (Bankr.D.Me.1996).

*Id.* at 624. If a creditor who files a proof of claim on a previously discharged debt is not subject to the FDCPA, a creditor who files a proof of claim on a debt that is allegedly barred by the statute of limitations cannot be subject to the FDCPA. The statute of limitations is fact intensive since the Debtor cannot presume that the state in which the Debtor filed bankruptcy is the governing law.

**VI. The Statute of Limitations is an Issue of Fact; the Sole Remedy Under North Carolina Law is Dismissal of the Claim Without Any Award of Fees.**

Pursuant to N.C.G.S. § 1-52(1), the running of the statute of limitations merely bars enforcement collection, it does not extinguish the debt. Since the debt was not extinguished, Roundup has in good faith complied with the claims filing system of 11 U.S.C. §§ 101(5), 501, 502 and Bankruptcy Rule 3001.

It is undisputed by both parties the statute of limitations defense is an affirmative defense with the Debtor having the burden to present such a defense. Objection that an action was not commenced within time limited can only be taken by answer, and unless statute of limitations is annexed to cause of action itself, bar of limitation must be affirmatively pleaded in order to be available as defense. *Overton v. Overton*, 1963, 129 S.E.2d 593, 259 N.C. 31.

The question of whether a cause of action is barred by the statute of limitations is a mixed question of law and fact. *Pharmaresearch Corp. v. Mash*, 2004, 163 N.C.App. 419, 594 S.E.2d 148, review denied 358 N.C. 733, 601 S.E.2d 858, review dismissed 358 N.C. 733, 601 S.E.2d 858. The Court needs to decide which governing law to apply, which statute of limitations to apply, when the period began to run, if the statute of limitations is tolled at any point, and if the debt is acknowledged. The Court cannot merely assume that North Carolina law applies to all debts when a Debtor files bankruptcy in North Carolina. The underlying agreement may have a choice of law provision; the Debtor may have moved from a different state, the debt may have incurred in another state.

From February 1993 until February 2004, Debtor either used the address or resided at “824 S. 19<sup>th</sup> Street, Newark, NJ 07108-1110”. A true and correct copy of Westlaw skip tracing

result for Debtor is attached as Exhibit "E". The skip tracing is an example of how difficult it is to determine which state's statute of limitation to apply for a debt since debtors move and the underlying contract may have a choice of law clause. Under N.C.G.S.A. § 1-21, the statute of limitations is tolled during the time the debtor is outside of the state of North Carolina. Also, the statute of limitations for New Jersey is six (6) years per New Jersey Statute § 2A:14-1, which means that the account opened in 09/02/2002 cannot be barred by the statute of limitations. The Debtor cannot assume that just because she is currently residing in North Carolina that North Carolina law applies to the debt.

Many states, such as North Carolina, allow a debt to be revived by written acknowledgement by the debtor. If a debtor schedules the debt as due and owing for a specific amount under penalty of perjury, NCGSA §1-27 removes the bar of the statute of limitations and the statute begins to run anew. Since a creditor is not served with a copy of the schedule F, the creditor doesn't know if the debt is acknowledged to exempt the debt from the statute of limitations.

Since North Carolina law puts the legal burden on the debtor to raise the statute of limitations as an affirmative defense and since the statute of limitations is an issue of fact and law for the Court to decide, the filing of a claim allegedly barred by the statute of limitations is not sanctionable. Even though B-Real and Roundup believe that North Carolina law may not apply, both creditors agree to have the claims disallowed to avoid protracted litigation over claims worth \$0,00.

WHEREFORE, the above premises considered, Roundup and B-Real respectfully requests that:

1. Roundup and B-Real be allowed to withdraw their claims or in the alternative enter an order disallowing the claims;

2. Debtor's request for attorney's fees and "show cause" order be denied;
3. Hold that the FDCPA does not apply to a proof of claim filing;
3. Other and further relief to which it may be entitled.

This the 22<sup>nd</sup> day of August, 2008

Respectfully submitted,

/s/John C. Bircher III  
John C. Bircher III  
607 Broad Street  
PO Box 1555  
New Bern NC 28560  
252.638.3882  
252.638.3326 fax

UNITED STATES BANKRUPTCY COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA  
WILSON DIVISION

IN RE:

**ROBIN GRAHAM ANDREWS**  
115 Mum Lane  
Riegelwood, NC 28456  
SSN: xxx-xx-6323

**CASE NO: 08-00151-8-JRL**

**Chapter 13**

Debtor(s).

**CERTIFICATE OF SERVICE**

**THIS IS TO CERTIFY** that on the below date, the undersigned served a copy of ROUNDUP FUNDING, LLC'S AND B-REAL, LLC'S SUPPLEMENTAL BRIEF IN SUPPORT OF OPPOSITION TO DEBTOR'S OBJECTION TO CLAIM NUMBERS FIVE (5) AND SEVEN (7) by depositing the same, enclosed in a postpaid wrapper, properly addressed to the following parties in interest, at their last known addresses as shown below, in a post office or official depository under the exclusive care and custody of the United States Postal Service:

Maria D. McIntyre, Esq.  
Debtor's Attorney  
P.O. Box 390  
Wilmington, NC 28408  
maria@financialprotectionlawcenter.org

Robert R. Browning  
Chapter 13 Trustee  
P.O. Box 8248  
Greenville, NC 27835

Robin Graham Andrews  
115 Munn Lane  
Riegelwood, NC 28456

**THIS** the 22 day of August, 2008.

/s/John C. Bircher III  
John C. Bircher III

<b>Voluntary Petition</b> <i>(This page must be completed and filed in every case)</i>	Name of Debtor(s): Andrews, Robin Graham
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**Prior Bankruptcy Case Filed Within Last 8 Years (If more than one, attach additional sheet)**

Location Where Filed: None	Case Number:	Date Filed:
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Location Where Filed:	Case Number:	Date Filed:
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**Pending Bankruptcy Case Filed by any Spouse, Partner or Affiliate of this Debtor (If more than one, attach additional sheet)**

Name of Debtor: None	Case Number:	Date Filed:
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District:	Relationship:	Judge:
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**Exhibit A**

(To be completed if debtor is required to file periodic reports (e.g., forms 10K and 10Q) with the Securities and Exchange Commission pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 and is requesting relief under chapter 11.)

Exhibit A is attached and made a part of this petition

**Exhibit B**

(To be completed if debtor is an individual whose debts are primarily consumer debts)

I, the attorney for the petitioner named in the foregoing petition, declare that I have informed the petitioner that [he or she] may proceed under chapter 7, 11, 12, or 13 of title 11, United States Code, and have explained the relief available under each such chapter. I further certify that I delivered to the debtor the notice required by § 342(b) of the Bankruptcy Code

X Maureen M. Hynes 1-9-08  
Signature of Attorney for Debtor(s) Date

**Exhibit C**

Does the debtor own or have possession of any property that poses or is alleged to pose a threat of imminent and identifiable harm to public health or safety?

- Yes, and Exhibit C is attached and made a part of this petition.
- No

**Exhibit D**

(To be completed by every individual debtor. If a joint petition is filed, each spouse must complete and attach a separate Exhibit D)

Exhibit D completed and signed by the debtor is attached and made a part of this petition

If this is a joint petition:

Exhibit D also completed and signed by the joint debtor is attached and made a part of this petition

**Information Regarding the Debtor - Venue**

(Check any applicable box.)

- Debtor has been domiciled or has had a residence, principal place of business, or principal assets in this District for 180 days immediately preceding the date of this petition or for a longer part of such 180 days than in any other District.
- There is a bankruptcy case concerning debtor's affiliate, general partner, or partnership pending in this District
- Debtor is a debtor in a foreign proceeding and has its principal place of business or principal assets in the United States in this District, or has no principal place of business or assets in the United States but is a defendant in an action or proceeding [in a federal or state court] in this District, or the interests of the parties will be served in regard to the relief sought in this District.

**Statement by a Debtor Who Resides as a Tenant of Residential Property**

(Check all applicable boxes)

Landlord has a judgment against the debtor for possession of debtor's residence. (If box checked, complete the following)

\_\_\_\_\_  
(Name of landlord or lessor that obtained judgment)

\_\_\_\_\_  
(Address of landlord or lessor)

- Debtor claims that under applicable nonbankruptcy law, there are circumstances under which the debtor would be permitted to cure the entire monetary default that gave rise to the judgment for possession, after the judgment for possession was entered, and
- Debtor has included in this petition the deposit with the court of any rent that would become due during the 30-day period after the filing of the petition
- Debtor certifies that he/she has served the Landlord with this certification. (11 U.S.C. § 362(l)).

**Voluntary Petition**

(This page must be completed and filed in every case)

Name of Debtor(s):  
Andrews, Robin Graham

**Prior Bankruptcy Case Filed Within Last 8 Years (If more than one, attach additional sheet)**

Location Where Filed: None

Case Number:

Date Filed:

Location Where Filed:

Case Number:

Date Filed:

**Pending Bankruptcy Case Filed by any Spouse, Partner or Affiliate of this Debtor (If more than one, attach additional sheet)**

Name of Debtor:  
None

Case Number:

Date Filed:

District:

Relationship:

Judge:

**Exhibit A**

(To be completed if debtor is required to file periodic reports (e.g., forms 10K and 10Q) with the Securities and Exchange Commission pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 and is requesting relief under chapter 11)

Exhibit A is attached and made a part of this petition

**Exhibit B**

(To be completed if debtor is an individual whose debts are primarily consumer debts)

I, the attorney for the petitioner named in the foregoing petition, declare that I have informed the petitioner that [he or she] may proceed under chapter 7, 11, 12, or 13 of title 11, United States Code, and have explained the relief available under each such chapter. I further certify that I delivered to the debtor the notice required by § 342(b) of the Bankruptcy Code.

*X Maria D. McHugh* 1-9-08  
Signature of Attorney for Debtor(s) Date

**Exhibit C**

Does the debtor own or have possession of any property that poses or is alleged to pose a threat of imminent and identifiable harm to public health or safety?

Yes, and Exhibit C is attached and made a part of this petition.  
 No

**Exhibit D**

(To be completed by every individual debtor. If a joint petition is filed, each spouse must complete and attach a separate Exhibit D)

Exhibit D completed and signed by the debtor is attached and made a part of this petition

If this is a joint petition:

Exhibit D also completed and signed by the joint debtor is attached and made a part of this petition

**Information Regarding the Debtor - Venue**

(Check any applicable box.)

- Debtor has been domiciled or has had a residence, principal place of business, or principal assets in this District for 180 days immediately preceding the date of this petition or for a longer part of such 180 days than in any other District.
- There is a bankruptcy case concerning debtor's affiliate, general partner, or partnership pending in this District.
- Debtor is a debtor in a foreign proceeding and has its principal place of business or principal assets in the United States in this District, or has no principal place of business or assets in the United States but is a defendant in an action or proceeding [in a federal or state court] in this District, or the interests of the parties will be served in regard to the relief sought in this District.

**Statement by a Debtor Who Resides as a Tenant of Residential Property**

(Check all applicable boxes)

Landlord has a judgment against the debtor for possession of debtor's residence. (If box checked, complete the following)

\_\_\_\_\_  
(Name of landlord or lessor that obtained judgment)

\_\_\_\_\_  
(Address of landlord or lessor)

- Debtor claims that under applicable nonbankruptcy law, there are circumstances under which the debtor would be permitted to cure the entire monetary default that gave rise to the judgment for possession, after the judgment for possession was entered, and
- Debtor has included in this petition the deposit with the court of any rent that would become due during the 30-day period after the filing of the petition
- Debtor certifies that he/she has served the Landlord with this certification. (11 U.S.C. § 362(l)).



**Voluntary Petition**  
*(This page must be completed and filed in every case)*

Name of Debtor(s):  
Andrews, Robin Graham

**Signatures**

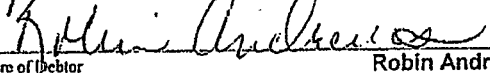
**Signature(s) of Debtor(s) (Individual/Joint)**

I declare under penalty of perjury that the information provided in this petition is true and correct.

[If petitioner is an individual whose debts are primarily consumer debts and has chosen to file under Chapter 7] I am aware that I may proceed under chapter 7, 11, 12 or 13 of title 11, United States Code, understand the relief available under each such chapter, and choose to proceed under chapter 7.

[If no attorney represents me and no bankruptcy petition preparer signs the petition] I have obtained and read the notice required by 11 U.S.C. § 342(b)

I request relief in accordance with the chapter of title 11, United States Code, specified in this petition.

X   
Signature of Debtor Robin Andrews

X \_\_\_\_\_  
Signature of Joint Debtor

Telephone Number (If not represented by attorney)

Date 01-09-08

Date

**Signature of a Foreign Representative**

I declare under penalty of perjury that the information provided in this petition is true and correct, that I am the foreign representative of a debtor in a foreign proceeding, and that I am authorized to file this petition

(Check only one box)

I request relief in accordance with chapter 15 of title 11, United States Code. Certified copies of the documents required by 11 U.S.C. § 1515 are attached.

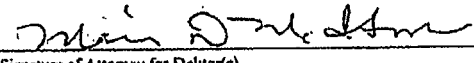
Pursuant to 11 U.S.C. § 1511, I request relief in accordance with the chapter of title 11 specified in this petition. A certified copy of the order granting recognition of the foreign main proceeding is attached

X \_\_\_\_\_  
Signature of Foreign Representative

X \_\_\_\_\_  
Printed Name of Foreign Representative

Date

**Signature of Attorney\***

X   
Signature of Attorney for Debtor(s)

**Maria D. McIntyre 24407**

Printed Name of Attorney for Debtor(s)

**Financial Protection Law Center**

Firm Name

**PO Box 390**

Address

**Wilmington, NC 28402**

910-442-1010, Ext. 2013  
Telephone Number

1-9-08  
Date

\*In a case in which § 707(b)(4)(D) applies, this signature also constitutes a certification that the attorney has no knowledge after an inquiry that the information in the schedules is incorrect

**Signature of Debtor (Corporation/Partnership)**

I declare under penalty of perjury that the information provided in this petition is true and correct, and that I have been authorized to file this petition on behalf of the debtor.

The debtor requests relief in accordance with the chapter of title 11, United States Code, specified in this petition.

X \_\_\_\_\_  
Signature of Authorized Individual

Printed Name of Authorized Individual

Title of Authorized Individual

Date

**Signature of Non-Attorney Petition Preparer**

I declare under penalty of perjury that: 1) I am a bankruptcy petition preparer as defined in 11 U.S.C. § 110; 2) I prepared this document for compensation and have provided the debtor with a copy of this document and the notices and information required under 11 U.S.C. §§ 110(b), 110(h) and 342(b); 3) If rules or guidelines have been promulgated pursuant to 11 U.S.C. § 110(h) setting a maximum fee for services chargeable by bankruptcy petition preparers, I have given the debtor notice of the maximum amount before preparing any document for filing for a debtor or accepting any fee from the debtor, as required in that section. Official Form 19 is attached.

Printed Name and title, if any, of Bankruptcy Petition Preparer

Social Security Number (If the bankruptcy petition preparer is not an individual, state the Social Security number of the officer, principal, responsible person or partner of the bankruptcy petition preparer) (Required by 11 U.S.C. § 110)

Address

X \_\_\_\_\_  
Signature of Bankruptcy Petition Preparer or officer, principal, responsible person, or partner whose social security number is provided above

Date

Names and Social Security numbers of all other individuals who prepared or assisted in preparing this document unless the bankruptcy petition preparer is not an individual:

If more than one person prepared this document, attach additional sheets conforming to the appropriate official form for each person.

*A bankruptcy petition preparer's failure to comply with the provisions of title 11 and the Federal Rules of Bankruptcy Procedure may result in fines or imprisonment or both 11 U.S.C. § 110; 18 U.S.C. § 156*

United States Bankruptcy Court  
Eastern District of North Carolina

IN RE:

Case No. \_\_\_\_\_

Andrews, Robin Graham

Chapter 13

Debtor(s)

EXHIBIT D - INDIVIDUAL DEBTOR'S STATEMENT OF COMPLIANCE  
WITH CREDIT COUNSELING REQUIREMENT

Warning: You must be able to check truthfully one of the five statements regarding credit counseling listed below. If you cannot do so, you are not eligible to file a bankruptcy case, and the court can dismiss any case you do file. If that happens, you will lose whatever filing fee you paid, and your creditors will be able to resume collection activities against you. If your case is dismissed and you file another bankruptcy case later, you may be required to pay a second filing fee and you may have to take extra steps to stop creditors collection activities.

Every individual debtor must file this Exhibit D. If a joint petition is filed, each spouse must complete and file a separate Exhibit D. Check one of the five statements below and attach any documents as directed.

1. Within the 180 days before the filing of my bankruptcy case, I received a briefing from a credit counseling agency approved by the United States trustee or bankruptcy administrator that outlined the opportunities for available credit counseling and assisted me in performing a related budget analysis, and I have a certificate from the agency describing the services provided to me. *Attach a copy of the certificate and a copy of any debt repayment plan developed through the agency.*

2. Within the 180 days before the filing of my bankruptcy case, I received a briefing from a credit counseling agency approved by the United States trustee or bankruptcy administrator that outlined the opportunities for available credit counseling and assisted me in performing a related budget analysis, but I do not have a certificate from the agency describing the services provided to me. *You must file a copy of a certificate from the agency describing the services provided to you and a copy of any debt repayment plan developed through the agency no later than 15 days after your bankruptcy case is filed.*

3. I certify that I requested credit counseling services from an approved agency but was unable to obtain the services during the five days from the time I made my request, and the following exigent circumstances merit a temporary waiver of the credit counseling requirement so I can file my bankruptcy case now. *[Must be accompanied by a motion for determination by the court.] [Summarize exigent circumstances here.]*

If the court is satisfied with the reasons stated in your motion, it will send you an order approving your request. You must still obtain the credit counseling briefing within the first 30 days after you file your bankruptcy case and promptly file a certificate from the agency that provided the briefing, together with a copy of any debt management plan developed through the agency. Any extension of the 30-day deadline can be granted only for cause and is limited to a maximum of 15 days. A motion for extension must be filed within the 30-day period. Failure to fulfill these requirements may result in dismissal of your case. If the court is not satisfied with your reasons for filing your bankruptcy case without first receiving a credit counseling briefing, your case may be dismissed.

4. I am not required to receive a credit counseling briefing because of: *[Check the applicable statement.] [Must be accompanied by a motion for determination by the court.]*

- Incapacity. (Defined in 11 U.S.C. § 109(h)(4) as impaired by reason of mental illness or mental deficiency so as to be incapable of realizing and making rational decisions with respect to financial responsibilities.);
- Disability. (Defined in 11 U.S.C. § 109(h)(4) as physically impaired to the extent of being unable, after reasonable effort, to participate in a credit counseling briefing in person, by telephone, or through the Internet.);
- Active military duty in a military combat zone.

5. The United States trustee or bankruptcy administrator has determined that the credit counseling requirement of 11 U.S.C. § 109(h) does not apply in this district.

I certify under penalty of perjury that the information provided above is true and correct.

Signature of Debtor: Robin Andrews

Date: 01-09-08

Hummingbird Credit Counseling and Education, Inc.  
CREDIT COUNSELING CERTIFICATION

Certificate Number: 82975-B92417L-06

**Robin Andrews**

I CERTIFY that on January 8, 2008, at 11:20 AM EST, Robin Andrews received from Hummingbird Credit Counseling and Education, Inc., an agency approved pursuant to 11 U.S.C. § 111 to provide credit counseling in North Carolina, Eastern District, an individual briefing (including a briefing conducted by telephone or on the Internet) that complied with the provisions of 11 U.S.C. §§ 109(h) and 111. A debt repayment plan was not prepared.

By: Victoria S. Wright, Esq. Date: January 8, 2008

Title: Executive Director of Education  


\*Individuals who wish to file a bankruptcy case under title 11 of the United States Bankruptcy Code are required to file with the United States Bankruptcy Court a completed certificate of counseling from the nonprofit budget and credit counseling agency that provided the individual the counseling services and a copy of the debt repayment plan, if any, developed through the credit counseling agency. See 11 U.S.C. §§ 109(h) and 521(b).

UNITED STATES BANKRUPTCY COURT

NOTICE TO INDIVIDUAL CONSUMER DEBTOR UNDER § 342(b)  
OF THE BANKRUPTCY CODE

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In accordance with § 342(b) of the Bankruptcy Code, this notice: (1) Describes briefly the services available from credit counseling services; (2) Describes briefly the purposes, benefits and costs of the four types of bankruptcy proceedings you may commence; and (3) Informs you about bankruptcy crimes and notifies you that the Attorney General may examine all information you supply in connection with a bankruptcy case. You are cautioned that bankruptcy law is complicated and not easily described. Thus, you may wish to seek the advice of an attorney to learn of your rights and responsibilities should you decide to file a petition. Court employees cannot give you legal advice.

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**1. Services Available from Credit Counseling Agencies**

With limited exceptions, § 109(h) of the Bankruptcy Code requires that all individual debtors who file for bankruptcy relief on or after October 17, 2005, receive a briefing that outlines the available opportunities for credit counseling and provides assistance in performing a budget analysis. The briefing must be given within 180 days before the bankruptcy filing. The briefing may be provided individually or in a group (including briefings conducted by telephone or on the Internet) and must be provided by a nonprofit budget and credit counseling agency approved by the United States trustee or bankruptcy administrator. The clerk of the bankruptcy court has a list that you may consult of the approved budget and credit counseling agencies.

In addition, after filing a bankruptcy case, an individual debtor generally must complete a financial management instructional course before he or she can receive a discharge. The clerk also has a list of approved financial management instructional courses.

**2. The Four Chapters of the Bankruptcy Code Available to Individual Consumer Debtors**

**Chapter 7: Liquidation (\$245 filing fee, \$39 administrative fee, \$15 trustee surcharge: Total fee \$299)**

1. Chapter 7 is designed for debtors in financial difficulty who do not have the ability to pay their existing debts. Debtors whose debts are primarily consumer debts are subject to a "means test" designed to determine whether the case should be permitted to proceed under chapter 7. If your income is greater than the median income for your state of residence and family size, in some cases, creditors have the right to file a motion requesting that the court dismiss your case under § 707(b) of the Code. It is up to the court to decide whether the case should be dismissed.

2. Under chapter 7, you may claim certain of your property as exempt under governing law. A trustee may have the right to take possession of and sell the remaining property that is not exempt and use the sale proceeds to pay your creditors.

3. The purpose of filing a chapter 7 case is to obtain a discharge of your existing debts. If, however, you are found to have committed certain kinds of improper conduct described in the Bankruptcy Code, the court may deny your discharge and, if it does, the purpose for which you filed the bankruptcy petition will be defeated.

4. Even if you receive a general discharge, some particular debts are not discharged under the law. Therefore, you may still be responsible for most taxes and student loans; debts incurred to pay nondischargeable taxes; domestic support and property settlement obligations; most fines, penalties, forfeitures, and criminal restitution obligations; certain debts which are not properly listed in your bankruptcy papers; and debts for death or personal injury caused by operating a motor vehicle, vessel, or aircraft while intoxicated from alcohol or drugs. Also, if a creditor can prove that a debt arose from fraud, breach of fiduciary duty, or theft, or from a willful and malicious injury, the bankruptcy court may determine that the debt is not discharged.

**Chapter 13: Repayment of All or Part of the Debts of an Individual with Regular Income (\$235 filing fee, \$39 administrative fee: Total fee \$274)**

1. Chapter 13 is designed for individuals with regular income who would like to pay all or part of their debts in instalments over a period of time. You are only eligible for chapter 13 if your debts do not exceed certain dollar amounts set forth in the Bankruptcy Code.

2. Under chapter 13, you must file with the court a plan to repay your creditors all or part of the money that you owe them,

using your future earnings. The period allowed by the court to repay your debts may be three years or five years, depending upon your income and other factors. The court must approve your plan before it can take effect.

3. After completing the payments under your plan, your debts are generally discharged except for domestic support obligations; most student loans; certain taxes; most criminal fines and restitution obligations; certain debts which are not properly listed in your bankruptcy papers; certain debts for acts that caused death or personal injury; and certain long term secured obligations.

**Chapter 11: Reorganization (\$1000 filing fee, \$39 administrative fee: Total fee \$1039)**

Chapter 11 is designed for the reorganization of a business but is also available to consumer debtors. Its provisions are quite complicated, and any decision by an individual to file a chapter 11 petition should be reviewed with an attorney.

**Chapter 12: Family Farmer or Fisherman (\$200 filing fee, \$39 administrative fee: Total fee \$239)**

Chapter 12 is designed to permit family farmers and fishermen to repay their debts over a period of time from future earnings and is similar to chapter 13. The eligibility requirements are restrictive, limiting its use to those whose income arises primarily from a family-owned farm or commercial fishing operation.

**3. Bankruptcy Crimes and Availability of Bankruptcy Papers to Law Enforcement Officials**

A person who knowingly and fraudulently conceals assets or makes a false oath or statement under penalty of perjury, either orally or in writing, in connection with a bankruptcy case is subject to a fine, imprisonment, or both. All information supplied by a debtor in connection with a bankruptcy case is subject to examination by the Attorney General acting through the Office of the United States Trustee, the Office of the United States Attorney, and other components and employees of the Department of Justice.

**WARNING:** Section 521(a)(1) of the Bankruptcy Code requires that you promptly file detailed information regarding your creditors, assets, liabilities, income, expenses and general financial condition. Your bankruptcy case may be dismissed if this information is not filed with the court within the time deadlines set by the Bankruptcy Code, the Bankruptcy Rules, and the local rules of the court.

**Certificate of [Non-Attorney] Bankruptcy Petition Preparer**

I, the [non-attorney] bankruptcy petition preparer signing the debtor's petition, hereby certify that I delivered to the debtor this notice required by § 342(b) of the Bankruptcy Code.

Printed Name and title, if any, of Bankruptcy Petition Preparer  
Address:

Social Security number (If the bankruptcy petition preparer is not an individual, state the Social Security number of the officer, principal, responsible person, or partner of the bankruptcy petition preparer.)  
(Required by 11 U.S.C. § 110.)

Signature of Bankruptcy Petition Preparer of officer, principal, responsible person, or partner whose Social Security number is provided above.

**Certificate of the Debtor**

I (We), the debtor(s), affirm that I (we) have received and read this notice.

Andrews, Robin Graham  
Printed Name(s) of Debtor(s)

*Robin Andrews* 01-09-08  
Signature of Debtor Date

Case No. (if known)

Signature of Joint Debtor (if any) Date

United States Bankruptcy Court  
Eastern District of North Carolina

IN RE:

Case No. \_\_\_\_\_

Andrews, Robin Graham

Chapter 13

Debtor(s)

**DISCLOSURE OF COMPENSATION OF ATTORNEY FOR DEBTOR**

1 Pursuant to 11 U.S.C. § 329(a) and Bankruptcy Rule 2016(b), I certify that I am the attorney for the above-named debtor(s) and that compensation paid to me within one year before the filing of the petition in bankruptcy, or agreed to be paid to me, for services rendered or to be rendered on behalf of the debtor(s) in contemplation of or in connection with the bankruptcy case is as follows:

For legal services, I have agreed to accept \$ 0

Prior to the filing of this statement I have received \$ 0

Balance Due \$ 0

2 The source of the compensation paid to me was:  Debtor  Other (specify): **No compensation paid to me**

3 The source of compensation to be paid to me is:  Debtor  Other (specify): **No compensation paid to me**

4  I have not agreed to share the above-disclosed compensation with any other person unless they are members and associates of my law firm

I have agreed to share the above-disclosed compensation with a person or persons who are not members or associates of my law firm. A copy of the agreement, together with a list of the names of the people sharing in the compensation, is attached

5 In return for the above-disclosed fee, I have agreed to render legal service for all aspects of the bankruptcy case, including:

- a. Analysis of the debtor's financial situation, and rendering advice to the debtor in determining whether to file a petition in bankruptcy;
- b. Preparation and filing of any petition, schedules, statement of affairs and plan which may be required;
- c. Representation of the debtor at the meeting of creditors and confirmation hearing, and any adjourned hearings thereof;
- d. ~~Representation of the debtor in adversary proceedings and other contested bankruptcy matters;~~
- e. [Other provisions as needed]

6 By agreement with the debtor(s), the above disclosed fee does not include the following services:  
**Representation of the debtor in any adversary proceeding and other contested bankruptcy matters**

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CERTIFICATION

I certify that the foregoing is a complete statement of any agreement or arrangement for payment to me for representation of the debtor(s) in this bankruptcy proceeding

1/9/08  
Date

*Maria D. McArthur*  
Signature of Attorney

Financial Protection Law Center  
Name of Law Firm

United States Bankruptcy Court  
Eastern District of North Carolina

IN RE:

Case No. \_\_\_\_\_

Andrews, Robin Graham

Debtor(s)

Chapter 13

**CERTIFICATION OF MAILING MATRIX REQUIRED BY E.D.N.C. LBR 1007-2**

I hereby certify under penalty of perjury that the attached list of creditors which has been prepared in the format required by the clerk is true and accurate to the best of my knowledge and includes all creditors scheduled in the petition.

Date: 1/9/08

Maria D. McHenry

Attorney for Debtor

Adam M. Gottsegen, Esq.  
SMITH DEBNAM  
Post Office Box 26268  
Raleigh, NC 27611-6268

Columbus County Tax Office  
ATTN: Managing Officer/Agent  
Post Office Box 1468  
Whiteville, NC 28472-1468

North Carolina Department of Revenue  
Office Services Division, Bankrupt. Unit  
Post Office Box 1168  
Raleigh, NC 27602-1168

Alltel  
ATTN: Managing Officer/Agent  
One Allied Drive, Bldg. 4, 5th Floor  
Little Rock, AR 72202-2099

First Premier Bank  
ATTN: Managing Officer/Agent  
Post Office Box 5519  
Sioux Falls, ND 57117-5519

North State Acceptance  
ATTN: Managing Officer/Agent  
3501 Market Street  
Wilmington, NC 28403

American Collection Systems  
ATTN: Managing Officer/Agent  
2500 Corporate Exchange Drive, Suite 150  
Columbus, OH 43231

FSNB  
ATTN: Managing Officer/Agent  
5226 Sigmon Road  
Wilmington, NC 28403

Paragon Way, Inc  
ATTN: Managing Officer/Agent  
Post Office Box 42829  
Austin, TX 78704-0048

Bank of America  
ATTN: FLI-300-02-07  
Post Office Box 25118  
Tampa, FL 33633-0900

FSNB Main Bank  
ATTN: Managing Officer/Agent  
Post Office Box 33009  
Ft Sill, OK 73503

Plains Commerce Bank  
ATTN: Managing Officer/Agent  
Post Office Box 88020  
Sioux Falls, SD 57109-8020

Bank of America  
ATTN: Managing Officer/Agent  
1929 Carolina Beach Road  
Wilmington, NC 28401

Internal Revenue Service  
ATTN: Insolvency Support Services  
320 Federal Place, Room 327  
Greensboro, NC 27401

Plaza Associates  
ATTN: Managing Officer/Agent  
370 Seventh Avenue, Suite 1500  
New York, NY 10001

Cardinal Finance Co.  
ATTN: Managing Officer/Agent  
608 South Madison Street  
Whiteville, NC 28472

Jeff Rogers, Esq.  
SMITH DEBNAM  
Post Office Box 26268  
Raleigh, NC 27611-6267

Powell Bail Bonding  
ATTN: Managing Officer/Agent  
244 Princess Street, Suite 17  
Wilmington, NC 28401

Cavalry Portfolio Services, LLC  
ATTN: Managing Officer/Agent  
7 Skyline Drive  
Hawthorne, NY 10532

Mid-Atlantic Finance  
ATTN: Managing Officer/Agent  
15500 Lightwave Drive, Suite 201  
Clearwater, FL 33760

State Employees Credit Union  
ATTN: Managing Officer/Agent  
3101 Wake Forest Road  
Raleigh, NC 27609-7845

Certegy  
ATTN: Managing Officer/Agent  
100 Second Ave. South, Suite 1100S  
St. Petersburg, FL 33701

Midland Credit Management  
ATTN: Managing Officer/Agent  
5775 Roscoe Court  
San Diego, CA 92123-1356

State of NC c/o Columbus County  
Clerkof Superior Court - Criminal Div.  
Post Office Box 1587  
Whiteville, NC 28472-1587

Certegy  
ATTN: Managing Officer/Agent  
Post Office Box 30046  
Tampa, FL 33630-3046

National Auto Instant Credit  
ATTN: Managing Officer/Agent  
5832 Market Street  
Wilmington, NC 28405

State of NC- Indigent Defense Services  
ATTN: Collections  
123 West Main Street, Suite 400  
Durham, NC 27701

Columbus County  
ATTN: Managing Officer/Agent  
111 Washington Street  
Whiteville, NC 28472

National Credit Adj. / Interntl Fin SE  
ATTN: Managing Officer/Agent  
327 West 4th Avenue  
Hutchinson, KS 67501

State of North Carolina  
Division of Community Corrections  
2020 Yonkers Road - MSC-4250  
Raleigh, NC 27699-4250



**Tribute MasterCard / First Bank of DE**  
**ATTN: Managing Officer/Agent**  
**1000 Rocky Run Parkway**  
**Wilmington, DE 19803**

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**Universal Underwriters ACC**  
**ATTN: Managing Officer/Agent**  
**7045 College Blvd., 4th Floor Recovery**  
**Overland Park, KS 66211**

**Vanderbilt Mortgage and Finance, Inc.**  
**ATTN: Managing Officer/Agent**  
**Post Office Box 9800**  
**Maryville, TN 37802**

**UNITED STATES BANKRUPTCY COURT Eastern District of North Carolina**

**Notice of  
Chapter 13 Bankruptcy Case, Meeting of Creditors, & Deadlines**

The debtor(s) listed below filed a chapter 13 bankruptcy case on 1/9/08.

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below. **NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.**

**See Reverse Side For Important Explanations**

Debtor(s) (name(s) used by the debtor(s) in the last 8 years, including married, maiden, trade, and address):

Robin Graham Andrews  
115 Munn Lane  
Riegelwood, NC 28456

Case Number:  
08-00151-8-JRL

Social Security/Taxpayer ID/Employer ID/Other Nos.:  
xxx-xx-6323

Attorney for Debtor(s) (name and address):

Maria D. McIntyre  
Financial Protection Law Center  
PO Box 390  
Wilmington, NC 28402  
Telephone number: 910 442-1010

Bankruptcy Trustee (name and address):

Robert R. Browning  
PO Box 8248  
Greenville, NC 27835  
Telephone number: 252-758-6530

**Meeting of Creditors**

Date: **February 15, 2008**

Time: **01:30 PM**

Location: **USBA Creditors Meeting Room, Alton Lennon Federal Bldg., Room 125, 2 Princess Street, Wilmington, NC 28401**

**Deadlines:**

Papers must be *received* by the bankruptcy clerk's office by the following deadlines:

**Deadline to File a Proof of Claim:**

For all creditors (except a governmental unit): **5/15/08**

For a governmental unit (except as otherwise provided in Fed. R. Bankr. P. 3002 (c)(1)): **7/7/08**

Claims (with attachments proving security interest and perfection) must be filed with the court at the address shown below. Otherwise, your claim will be classified as unsecured. Secured claims should be filed at least two days before the meeting of creditors. *The date the debt was incurred must be included for all secured claims.*

**Creditor with a Foreign Address:**

A creditor to whom this notice is sent at a foreign address should read the information under "Claims" on the reverse side.

**Deadline to File a Complaint to Determine Dischargeability of Certain Debts: 4/15/08**

**Deadline to Object to Exemptions:**

Thirty (30) days after the *conclusion* of the meeting of creditors.

**Filing of Plan**

A summary of the plan will be sent at a later date as part of the trustee's motion for confirmation. Creditors will be given a deadline to object to the motion. If an objection is filed, a hearing will be scheduled. The plan once confirmed by the court, determines the repayment of claims provided for in the plan. The value of the debtor's property securing each claim may be determined at the meeting of creditors.

**Creditors May Not Take Certain Actions:**

In most instances, the filing of the bankruptcy case automatically stays certain collection and other actions against the debtor, the debtor's property, and certain codebtors. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized. Consult a lawyer to determine your rights in this case.

**Address of the Bankruptcy Clerk's Office:**

1760-A Parkwood Blvd.  
Wilson, NC 27893 Telephone number: 252-237-0248

**For the Court:**

Clerk of the Bankruptcy Court:  
Peggy B. Deans

Hours Open: Monday - Friday 8:30 AM - 4:30 PM

Date: 1/9/08

## EXPLANATIONS

B91 (Official Form 91) (12/07)

Filing of Chapter 13 Bankruptcy Case	A bankruptcy case under Chapter 13 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by the debtor(s) listed on the front side, and an order for relief has been entered. Chapter 13 allows an individual with regular income and debts below a specified amount to adjust debts pursuant to a plan. A plan is not effective unless confirmed by the bankruptcy court. You may object to confirmation of the plan and appear at the confirmation hearing. A copy or summary of the plan, if not enclosed, will be sent to you later, and if the confirmation hearing is not indicated on the front of this notice, you will be sent notice of the confirmation hearing. The debtor will remain in possession of the debtor's property and may continue to operate the debtor's business, if any, unless the court orders otherwise.
Legal Advice	The staff of the bankruptcy clerk's office cannot give legal advice. Consult a lawyer to determine your rights in this case.
Creditors Generally May Not Take Certain Actions	Prohibited collection actions against the debtor and certain codebtors are listed in Bankruptcy Code § 362 and § 1301. Common examples of prohibited actions include contacting the debtor by telephone, mail or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; starting or continuing lawsuits or foreclosures; and garnishing or deducting from the debtor's wages. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay.
Meeting of Creditors	A meeting of creditors is scheduled for the date, time and location listed on the front side. <i>The debtor (both spouses in a joint case) must be present at the meeting to be questioned under oath by the trustee and by creditors.</i> Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date without further notice. Courtroom decorum: The dignity of the court is to be respected and maintained at all times. Attire for counsel, parties, and spectators should be restrained and appropriate to the dignity of a federal court of the United States. <b>SHORTS ARE NOT CONSIDERED APPROPRIATE COURT ATTIRE.</b>
Claims	A Proof of Claim is a signed statement describing a creditor's claim. If a Proof of Claim form is not included with this notice, you can obtain one at any bankruptcy clerk's office. A secured creditor retains rights in its collateral regardless of whether that creditor files a Proof of Claim. If you do not file a Proof of Claim by the "Deadline to File a Proof of Claim" listed on the front side, you might not be paid any money on your claim from other assets in the bankruptcy case. To be paid you must file a Proof of Claim even if your claim is listed in the schedules filed by the debtor. Filing a Proof of Claim submits the creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a Proof of Claim may surrender important nonmonetary rights, including the right to a jury trial. <b>Filing Deadline for a Creditor with a Foreign Address:</b> The deadlines for filing claims set forth on the front of this notice apply to all creditors. If this notice has been mailed to a creditor at a foreign address, the creditor may file a motion requesting the court to extend the deadline.
Discharge of Debts	The debtor is seeking a discharge of most debts, which may include your debt. A discharge means that you may never try to collect the debt from the debtor. If you believe that a debt owed to you is not dischargeable under Bankruptcy Code § 523 (a)(2) or (4), you must start a lawsuit by filing a complaint in the bankruptcy clerk's office by the "Deadline to File a Complaint to Determine Dischargeability of Certain Debts" listed on the front side. The bankruptcy clerk's office must receive the complaint and any required filing fee by that deadline.
Exempt Property	The debtor is permitted by law to keep certain property as exempt. Exempt property will not be sold and distributed to creditors, even if the debtor's case is converted to chapter 7. The debtor must file a list of all property claimed as exempt. You may inspect that list at the bankruptcy clerk's office. If you believe that an exemption claimed by the debtor is not authorized by law, you may file an objection to that exemption. The bankruptcy clerk's office must receive the objection by the "Deadline to Object to Exemptions" listed on the front side.
Bankruptcy Clerk's Office	Any paper that you file in this bankruptcy case should be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of property claimed as exempt, at the bankruptcy clerk's office.
Creditor with a Foreign Address	Consult a lawyer familiar with United States bankruptcy law if you have any questions regarding your rights in this case.
<b>Refer to Other Side for Important Deadlines and Notices</b>	
<p>RECORD SEARCH FEE - \$26.00/NAME OR ITEM. COPY FEE = \$.50 + SEARCH FEE.          Requests must be made in writing to the address listed on the front side, accompanied by a self-addressed, stamped envelope &amp; cashier's check/money order for the correct amount payable to CLERK, U.S. BANKRUPTCY COURT. No telephone inquiries.  <b>**VCIS Toll free-24 hour case information 1-888-513-9765 or 1-888-847-9138</b>  <b>**VCIS Local 24-hour case information 252-234-7655 (Wilson) or 919-856-4618 (Raleigh)</b>  <b>**Pacer Internet Address: <a href="http://pacer.nceb.uscourts.gov">http://pacer.nceb.uscourts.gov</a> **Internet Web Page: <a href="http://www.nceb.uscourts.gov">http://www.nceb.uscourts.gov</a></b></p> <p><b>YOU COULD HAVE RECEIVED THIS NOTICE AS AN INTERNET E-MAIL OR FAX. Visit <a href="http://www.EBNuscourts.com">www.EBNuscourts.com</a> or call toll-free 1-877-837-3424.</b></p>	

<b>UNITED STATES BANKRUPTCY COURT Eastern District of North Carolina</b>		<b>PROOF OF CLAIM</b>
Name of Debtor: Robin Graham Andrews		Case Number: 08-00151
NOTE: This form should not be used to make a claim for an administrative expense arising after the commencement of the case. A request for payment of an administrative expense may be filed pursuant to 11 U.S.C. § 503.		
Name of Creditor (the person or other entity to whom the debtor owes money or property):		<input type="checkbox"/> Check this box to indicate that this claim amends a previously filed claim.  Court Claim Number: _____ (If known)
Name and address where notices should be sent:		
Telephone number:		Filed on: _____
Name and address where payment should be sent (if different from above):		<input type="checkbox"/> Check this box if you are aware that anyone else has filed a proof of claim relating to your claim. Attach copy of statement giving particulars.  <input type="checkbox"/> Check this box if you are the debtor or trustee in this case.
Telephone number:		
1. Amount of Claim as of Date Case Filed: \$ _____  If all or part of your claim is secured, complete item 4 below; however, if all of your claim is unsecured, do not complete item 4.  If all or part of your claim is entitled to priority, complete item 5.  <input type="checkbox"/> Check this box if claim includes interest or other charges in addition to the principal amount of claim. Attach itemized statement of interest or charges.		5. Amount of Claim Entitled to Priority under 11 U.S.C. §507(a). If any portion of your claim falls in one of the following categories, check the box and state the amount.  Specify the priority of the claim.  <input type="checkbox"/> Domestic support obligations under 11 U.S.C. §507(a)(1)(A) or (a)(1)(B).  <input type="checkbox"/> Wages, salaries, or commissions (up to \$10,950*) earned within 180 days before filing of the bankruptcy petition or cessation of the debtor's business, whichever is earlier - 11 U.S.C. §507(a)(4).  <input type="checkbox"/> Contributions to an employee benefit plan - 11 U.S.C. §507(a)(5).  <input type="checkbox"/> Up to \$2,425* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use - 11 U.S.C. §507(a)(7).  <input type="checkbox"/> Taxes or penalties owed to governmental units - 11 U.S.C. §507(a)(8).  <input type="checkbox"/> Other - Specify applicable paragraph of 11 U.S.C. §507(a)( ).
2. Basis for Claim: _____ (See instruction #2 on reverse side.)		
3. Last four digits of any number by which creditor identifies debtor: _____  3a. Debtor may have scheduled account as: _____ (See instruction #3a on reverse side.)		
4. Secured Claim (See instruction #4 on reverse side.) Check the appropriate box if your claim is secured by a lien on property or a right of setoff and provide the requested information.  Nature of property or right of setoff: <input type="checkbox"/> Real Estate <input type="checkbox"/> Motor Vehicle <input type="checkbox"/> Other Describe:  Value of Property: \$ _____ Annual Interest Rate ___%  Amount of arrearage and other charges as of time case filed included in secured claim, if any: \$ _____ Basis for perfection: _____  Amount of Secured Claim: \$ _____ Amount Unsecured: \$ _____		Amount entitled to priority:  \$ _____
6. Credits: The amount of all payments on this claim has been credited for the purpose of making this proof of claim.  7. Documents: Attach redacted copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. You may also attach a summary. Attach redacted copies of documents providing evidence of perfection of a security interest. You may also attach a summary. (See definition of "redacted" on reverse side.)  DO NOT SEND ORIGINAL DOCUMENTS. ATTACHED DOCUMENTS MAY BE DESTROYED AFTER SCANNING.  If the documents are not available, please explain:		*Amounts are subject to adjustment on 4/1/10 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.
Date:	Signature: The person filing this claim must sign it. Sign and print name and title, if any, of the creditor or other person authorized to file this claim and state address and telephone number if different from the notice address above. Attach copy of power of attorney, if any.	<b>FOR COURT USE ONLY</b>

**INSTRUCTIONS FOR PROOF OF CLAIM FORM**

The instructions and definitions below are general explanations of the law. In certain circumstances, such as bankruptcy cases not filed voluntarily by the debtor, there may be exceptions to these general rules.

**Items to be completed in Proof of Claim form**

**Court, Name of Debtor, and Case Number:**

Fill in the federal judicial district where the bankruptcy case was filed (for example, Central District of California), the bankruptcy debtor's name, and the bankruptcy case number. If the creditor received a notice of the case from the bankruptcy court, all of this information is located at the top of the notice.

**Creditor's Name and Address:**

Fill in the name of the person or entity asserting a claim and the name and address of the person who should receive notices issued during the bankruptcy case. A separate space is provided for the payment address if it differs from the notice address. The creditor has a continuing obligation to keep the court informed of its current address. See Federal Rule of Bankruptcy Procedure (FRBP) 2002(g).

**1. Amount of Claim as of Date Case Filed:**

State the total amount owed to the creditor on the date of the Bankruptcy filing. Follow the instructions concerning whether to complete items 4 and 5. Check the box if interest or other charges are included in the claim

**2. Basis for Claim:**

State the type of debt or how it was incurred. Examples include goods sold, money loaned, services performed, personal injury/wrongful death, car loan, mortgage note, and credit card.

**3. Last Four Digits of Any Number by Which Creditor Identifies Debtor:**

State only the last four digits of the debtor's account or other number used by the creditor to identify the debtor.

**3a. Debtor May Have Scheduled Account As:**

Use this space to report a change in the creditor's name, a transferred claim, or any other information that clarifies a difference between this proof of claim and the claim as scheduled by the debtor.

**4. Secured Claim:**

Check the appropriate box and provide the requested information if the claim is fully or partially secured. Skip this section if the claim is entirely unsecured. (See DEFINITIONS, below.) State the type and the value of property that secures the claim, attach copies of lien

documentation, and state annual interest rate and the amount past due on the claim as of the date of the bankruptcy filing.

**5. Amount of Claim Entitled to Priority Under 11 U.S.C. §507(a).**

If any portion of your claim falls in one or more of the listed categories, check the appropriate box(es) and state the amount entitled to priority. (See DEFINITIONS, below.) A claim may be partly priority and partly non-priority. For example, in some of the categories, the law limits the amount entitled to priority.

**6. Credits:**

An authorized signature on this proof of claim serves as an acknowledgment that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

**7. Documents:**

Attach to this proof of claim form redacted copies documenting the existence of the debt and of any lien securing the debt. You may also attach a summary. You must also attach copies of documents that evidence perfection of any security interest. You may also attach a summary. FRBP 3001(c) and (d). Do not send original documents, as attachments may be destroyed after scanning.

**Date and Signature:**

The person filing this proof of claim must sign and date it. FRBP 9011. If the claim is filed electronically, FRBP 5005(a)(2), authorizes courts to establish local rules specifying what constitutes a signature. Print the name and title, if any, of the creditor or other person authorized to file this claim. State the filer's address and telephone number if it differs from the address given on the top of the form for purposes of receiving notices. Attach a complete copy of any power of attorney. Criminal penalties apply for making a false statement on a proof of claim.

**DEFINITIONS**

**INFORMATION**

**Debtor**

A debtor is the person, corporation, or other entity that has filed a bankruptcy case.

**Creditor**

A creditor is the person, corporation, or other entity owed a debt by the debtor on the date of the bankruptcy filing.

**Claim**

A claim is the creditor's right to receive payment on a debt that was owed by the debtor on the date of the bankruptcy filing. See 11 U.S.C. §101 (5). A claim may be secured or unsecured.

**Proof of Claim**

A proof of claim is a form used by the creditor to indicate the amount of the debt owed by the debtor on the date of the bankruptcy filing. The creditor must file the form with the clerk of the same bankruptcy court in which the bankruptcy case was filed.

**Secured Claim Under 11 U.S.C. §506(a)**

A secured claim is one backed by a lien on property of the debtor. The claim is secured so long as the creditor has the right to be paid from the property prior to other creditors. The amount of the secured claim cannot exceed the value of the property. Any amount owed to the creditor in excess of the value of the property is an unsecured claim. Examples of liens on property include a mortgage on real estate or a security interest in a car.

A lien may be voluntarily granted by a debtor or may be obtained through a court proceeding. In some states, a court judgment is a lien. A claim also may be secured if the creditor owes the debtor money (has a right to setoff).

**Unsecured Claim**

An unsecured claim is one that does not meet the requirements of a secured claim. A claim may be partly unsecured if the amount of the claim exceeds the value of the property on which the creditor has a lien.

**Claim Entitled to Priority Under 11 U.S.C. §507(a)**

Priority claims are certain categories of unsecured claims that are paid from the available money or property in a bankruptcy case before other unsecured claims.

**Redacted**

A document has been redacted when the person filing it has masked, edited out, or otherwise deleted, certain information. A creditor should redact and use only the last four digits of any social-security, individual's tax-identification, or financial-account number, all but the initials of a minor's name and only the year of any person's date of birth.

**Evidence of Perfection**

Evidence of perfection may include a mortgage, lien, certificate of title, financing statement, or other document showing that the lien has been filed or recorded.

**Acknowledgment of Filing of Claim**

To receive acknowledgment of your filing, you may either enclose a stamped self-addressed envelope and a copy of this proof of claim or you may access the court's PACER system ([www.pacer.psc.uscourts.gov](http://www.pacer.psc.uscourts.gov)) for a small fee to view your filed proof of claim.

**Offers to Purchase a Claim**

Certain entities are in the business of purchasing claims for an amount less than the face value of the claims. One or more of these entities may contact the creditor and offer to purchase the claim. Some of the written communications from these entities may easily be confused with official court documentation or communications from the debtor. These entities do not represent the bankruptcy court or the debtor. The creditor has no obligation to sell its claim. However, if the creditor decides to sell its claim, any transfer of such claim is subject to FRBP 3001(e), any applicable provisions of the Bankruptcy Code (11 U.S.C. § 101 *et seq.*), and any applicable orders of the bankruptcy court.

**BAE SYSTEMS**

Bankruptcy Noticing Center  
2525 Network Place, 3rd Floor  
Herndon, Virginia 20171-3514

**CERTIFICATE OF SERVICE**

District/off: 0417-8  
Case: 08-00151

User: admin  
Form ID: b9i

Page 1 of 2  
Total Served: 36

Date Rcvd: Jan 10, 2008

The following entities were served by first class mail on Jan 12, 2008.

db +Robin Graham Andrews, 115 Munn Lane, Riegelwood, NC 28456-8659  
aty +Maria D. McIntyre, Financial Protection Law Center, PO Box 390, Wilmington, NC 28402-0390  
2700361 Adam M. Gottsegen, Esq., SMITH DEBNAM, Post Office Box 26268, Raleigh, NC 27611-6268  
2700362 Alltel, ATTN: Managing Officer/Agent, One Allied Drive, Bldg. 4, 5th Floor,  
Little Rock, AR 72202-2099  
2700363 +American Collection Systems, ATTN: Managing Officer/Agent,  
2500 Corporate Exchange Drive, Suite 150, Columbus, OH 43231-7666  
2700364 +Bank of America, ATTN: FLI-300-02-07, Post Office Box 25118, Tampa, FL 33633-0001  
2700365 +Bank of America, ATTN: Managing Officer/Agent, 1929 Carolina Beach Road,  
Wilmington, NC 28401-6855  
2700366 +Cardinal Finance Co., ATTN: Managing Officer/Agent, 608 South Madison Street,  
Whiteville, NC 28472-4130  
2700367 +Cavalry Portfolio Services, LLC, ATTN: Managing Officer/Agent, 7 Skyline Drive,  
Hawthorne, NY 10532-2158  
2700368 +Certeqy, ATTN: Managing Officer/Agent, 100 Second Ave. South, Suite 1100S,  
St. Petersburg, FL 33701-4338  
2700369 Certeqy, ATTN: Managing Officer/Agent, Post Office Box 30046, Tampa, FL 33630-3046  
2700370 +Columbus County, ATTN: Managing Officer/Agent, 111 Washington Street,  
Whiteville, NC 28472-3324  
2700371 Columbus County Tax Office, ATTN: Managing Officer/Agent, Post Office Box 1468,  
Whiteville, NC 28472-1468  
2700373 ++FORT SILL NATIONAL BANK, P O BOX 33009, FORT SILL OK 73503-0009  
(address filed with court: FSNB, ATTN: Managing Officer/Agent, 5226 Sigmon Road,  
Wilmington, NC 28403)  
2700374 +FSNB Main Bank, ATTN: Managing Officer/Agent, Post Office Box 33009,  
Ft Sill, OK 73503-0009  
2700376 +Jeff Rogers, Esq., SMITH DEBNAM, Post Office Box 26268, Raleigh, NC 27611-6268  
2700377 +Mid-Atlantic Finance, ATTN: Managing Officer/Agent, 15500 Lightwave Drive, Suite 201,  
Clearwater, FL 33760-3505  
2700379 +National Auto Instant Credit, ATTN: Managing Officer/Agent, 5832 Market Street,  
Wilmington, NC 28405-3614  
2700380 +National Credit Adj. / Interntl Fin SE, ATTN: Managing Officer/Agent, 327 West 4th Avenue,  
Hutchinson, KS 67501-4842  
2700382 +North State Acceptance, ATTN: Managing Officer/Agent, 3501 Market Street,  
Wilmington, NC 28403-1323  
2700383 +Paragon Way, Inc, ATTN: Managing Officer/Agent, Post Office Box 42829,  
Austin, TX 78704-0044  
2700384 Plains Commerce Bank, ATTN: Managing Officer/Agent, Post Office Box 88020,  
Sioux Falls, SD 57109-8020  
2700386 +Powell Bail Bonding, ATTN: Managing Officer/Agent, 244 Princess Street, Suite 17,  
Wilmington, NC 28401-3964  
2700388 State of NC c/o Columbus County, Clerkof Superior Court - Criminal Div., Post Office Box 1587,  
Whiteville, NC 28472-1587  
2700389 +State of NC- Indigent Defense Services, ATTN: Collections, 123 West Main Street, Suite 400,  
Durham, NC 27701-3654  
2700391 +Tribute MasterCard / First Bank of DE, ATTN: Managing Officer/Agent, 1000 Rocky Run Parkway,  
Wilmington, DE 19803-1455  
2700392 +Universal Underwriters ACC, ATTN: Managing Officer/Agent,  
7045 College Blvd., 4th Floor Recovery, Overland Park, KS 66211-1523  
2700393 +Vanderbilt Mortgage and Finance, Inc., ATTN: Managing Officer/Agent, Post Office Box 9800,  
Maryville, TN 37802-9800

The following entities were served by electronic transmission on Jan 10, 2008.

tr +Fax: 252-758-2614 Jan 10 2008 19:51:52 Robert R. Browning, PO Box 8248,  
Greenville, NC 27835-8248  
2700372 EDI: AMINPOFP.COM Jan 10 2008 15:58:00 First Premier Bank, ATTN: Managing Officer/Agent,  
Post Office Box 5519, Sioux Falls, ND 57117-5519  
2700375 EDI: IRS.COM Jan 10 2008 15:58:00 Internal Revenue Service,  
ATTN: Insolvency Support Services, 320 Federal Place, Room 327, Greensboro, NC 27401  
2700378 EDI: MIDB.COM Jan 10 2008 15:58:00 Midland Credit Management, ATTN: Managing Officer/Agent,  
5775 Roscoe Court, San Diego, CA 92123-1356  
2700381 EDI: NCDEPREV.COM Jan 10 2008 15:58:00 North Carolina Department of Revenue,  
Office Services Division, Bankrupt. Unit, Post Office Box 1168, Raleigh, NC 27602-1168  
2700383 +EDI: CFSX.COM Jan 10 2008 15:58:00 Paragon Way, Inc, ATTN: Managing Officer/Agent,  
Post Office Box 42829, Austin, TX 78704-0044  
2700385 +EDI: PHINPLAZA.COM Jan 10 2008 15:58:00 Plaza Associates, ATTN: Managing Officer/Agent,  
370 Seventh Avenue, Suite 1500, New York, NY 10001-3912  
2700387 E-mail/Text: bankruptcydept@ncsecu.org State Employees Credit Union,  
ATTN: Managing Officer/Agent, 3101 Wake Forest Road, Raleigh, NC 27609-7845  
2700390 +EDI: NCDEPREV.COM Jan 10 2008 15:58:00 State of North Carolina,  
Division of Community Corrections, 2020 Yonkers Road - MSC-4250, Raleigh, NC 27699-0001  
TOTAL: 9

\*\*\*\*\* BYPASSED RECIPIENTS \*\*\*\*\*

NONE,

TOTAL: 0

Addresses marked '+' were corrected by inserting the ZIP or replacing an incorrect ZIP.  
USPS regulations require that automation-compatible mail display the correct ZIP.

Addresses marked '++' were redirected to the recipient's preferred mailing address  
pursuant to 11 U.S.C. 342(f)/Fed.R.Bank.PR.2002(g)(4).

District/off: 0417-8  
Case: 08-00151

User: admin  
Form ID: b9i

Page 2 of 2  
Total Served: 36

Date Rcvd: Jan 10, 2008

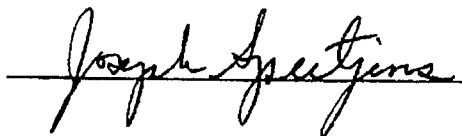
\*\*\*\*\* BYPASSED RECIPIENTS (continued) \*\*\*\*\*

I, Joseph Speetjens, declare under the penalty of perjury that I have served the attached document on the above listed entities in the manner shown, and prepared the Certificate of Service and that it is true and correct to the best of my information and belief.

Meeting of Creditor Notices only (Official Form 9): Pursuant to Fed. R. Bank. P. 2002(a)(1), a notice containing the complete Social Security Number (SSN) of the debtor(s) was furnished to all parties listed. This official court copy contains the redacted SSN as required by the bankruptcy rules and the Judiciary's privacy policies.

Date: Jan 12, 2008

Signature:

A handwritten signature in black ink, reading "Joseph Speetjens", is written over a horizontal line.

IN RE Andrews, Robin Graham

Case No. 08-00151-8-JRL

Debtor(s)

(If known)

**SCHEDULE F - CREDITORS HOLDING UNSECURED NONPRIORITY CLAIMS**

State the name, mailing address, including zip code, and last four digits of any account number, of all entities holding unsecured claims without priority against the debtor or the property of the debtor, as of the date of filing of the petition. The complete account number of any account the debtor has with the creditor is useful to the trustee and the creditor and may be provided if the debtor chooses to do so. If a minor child is a creditor, state the child's initials and the name and address of the child's parent or guardian, such as "A. B., a minor child, by John Doe, guardian." Do not disclose the child's name. See, 11 U.S.C. §112 and Fed. R. Bankr. P. 1007(m). Do not include claims listed in Schedules D and E. If all creditors will not fit on this page, use the continuation sheet provided.

If any entity other than a spouse in a joint case may be jointly liable on a claim, place an "X" in the column labeled "Code Debtor," include the entity on the appropriate schedule of creditors, and complete Schedule H - Code Debtors. If a joint petition is filed, state whether the husband, wife, both of them, or the marital community may be liable on each claim by placing an "H," "W," "J," or "C" in the column labeled "Husband, Wife, Joint, or Community."

If the claim is contingent, place an "X" in the column labeled "Contingent." If the claim is unliquidated, place an "X" in the column labeled "Unliquidated." If the claim is disputed, place an "X" in the column labeled "Disputed." (You may need to place an "X" in more than one of these three columns.)

Report the total of all claims listed on this schedule in the box labeled "Total" on the last sheet of the completed schedule. Report this total also on the Summary of Schedules and, if the debtor is an individual with primarily consumer debts, report this total also on the Statistical Summary of Certain Liabilities and Related Data.

Check this box if debtor has no creditors holding unsecured nonpriority claims to report on this Schedule F.

CREDITOR'S NAME, MAILING ADDRESS INCLUDING ZIP CODE, AND ACCOUNT NUMBER. <i>(See Instructions Above)</i>	CODEBTOR HUSBAND, WIFE, JOINT, OR COMMUNITY	DATE CLAIM WAS INCURRED AND CONSIDERATION FOR CLAIM, IF CLAIM IS SUBJECT TO SETOFF, SO STATE	CONTINGENT	UNLIQUIDATED	DISPUTED	AMOUNT OF CLAIM
ACCOUNT NO. Alltel ATTN: Managing Officer/Agent One Allied Drive, Bldg. 4, 5th Floor Little Rock, AR 72202-2099		Debt for cell phone service from approx. Oct. 2005				400.00
ACCOUNT NO. American Collection Systems ATTN: Managing Officer/Agent 2500 Corporate Exchange Drive, Suite 150 Columbus, OH 43231		Creditor/debt unknown to Debtor; could be collection agent for Satelink Communications		X		0.00
ACCOUNT NO. *****2035 Bank of America ATTN: FLI-300-02-07 Post Office Box 25118 Tampa, FL 33633-0900		Overdrafted checking account				395.90
ACCOUNT NO. Bank of America ATTN: Managing Officer/Agent 1929 Carolina Beach Road Wilmington, NC 28401		Assignee or other notification for: Bank of America				

3 continuation sheets attached

Subtotal  
(Total of this page) \$ **795.90**

Total  
(Use only on last page of the completed Schedule F Report also on the Summary of Schedules and, if applicable, on the Statistical Summary of Certain Liabilities and Related Data ) \$

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**SCHEDULE F - CREDITORS HOLDING UNSECURED NONPRIORITY CLAIMS**  
(Continuation Sheet)

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CREDITOR'S NAME, MAILING ADDRESS INCLUDING ZIP CODE, AND ACCOUNT NUMBER <i>(See Instructions Above.)</i>	CODEBTOR HUSBAND, WIFE, JOINT, OR COMMUNITY	DATE CLAIM WAS INCURRED AND CONSIDERATION FOR CLAIM, IF CLAIM IS SUBJECT TO SETOFF, SO STATE	CONTINGENT	UNLIQUIDATED	DISPUTED	AMOUNT OF CLAIM
ACCOUNT NO. Cavalry Portfolio Services, LLC ATTN: Managing Officer/Agent 7 Skyline Drive Hawthorne, NY 10532		Upon information and belief, Cavalry Portfolio is collect agent/assignee for Sprint				288.76
ACCOUNT NO. Certegy ATTN: Managing Officer/Agent 100 Second Ave. South, Suite 1100S St. Petersburg, FL 33701		Creditor/debt unknown to debtor; May be collection agent of Kmart		X		132.00
ACCOUNT NO. Certegy ATTN: Managing Officer/Agent Post Office Box 30046 Tampa, FL 33630-3046		Assignee or other notification for: Certegy				
ACCOUNT NO. ****-****-****-1814 First Premier Bank ATTN: Managing Officer/Agent Post Office Box 5519 Sioux Falls, ND 57117-5519	X	W Mastercard opened by son, Nicholas Hall in approx. May 2007; Debtor may be a co-debtor on the account				481.74
ACCOUNT NO. ****081 FSNB Main Bank ATTN: Managing Officer/Agent Post Office Box 33009 Ft Sill, OK 73503		Overdraft of closed checking account				302.55
ACCOUNT NO. FSNB ATTN: Managing Officer/Agent 5226 Sigmon Road Wilmington, NC 28403		Assignee or other notification for: FSNB Main Bank				
ACCOUNT NO. Mid-Atlantic Finance ATTN: Managing Officer/Agent 15500 Lightwave Drive, Suite 201 Clearwater, FL 33760	W	Purchase of used 1994 Saturn in approx. Feb. 2005; vehicle repossessed approx. Dec. 2005		X		2,952.00

Sheet no 1 of 3 continuation sheets attached to  
Schedule of Creditors Holding Unsecured Nonpriority Claims

Subtotal  
(Total of this page) \$ **4,157.05**

Total  
(Use only on last page of the completed Schedule F Report also on  
the Summary of Schedules, and if applicable, on the Statistical  
Summary of Certain Liabilities and Related Data ) \$

**SCHEDULE F - CREDITORS HOLDING UNSECURED NONPRIORITY CLAIMS**  
(Continuation Sheet)

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CREDITOR'S NAME, MAILING ADDRESS INCLUDING ZIP CODE, AND ACCOUNT NUMBER. <i>(See Instructions Above)</i>	CODEBTOR HUSBAND, WIFE, JOINT, OR COMMUNITY	DATE CLAIM WAS INCURRED AND CONSIDERATION FOR CLAIM. IF CLAIM IS SUBJECT TO SETOFF, SO STATE	CONTINGENT		AMOUNT OF CLAIM
			UNLIQUIDATED	DISPUTED	
ACCOUNT NO. Midland Credit Management ATTN: Managing Officer/Agent 5775 Roscoe Court San Diego, CA 92123-1356		Creditor/debt unknown to debtor		X	713.00
ACCOUNT NO. National Auto Instant Credit ATTN: Managing Officer/Agent 5832 Market Street Wilmington, NC 28405	W	Purchased used Chrysler Concord with then boyfriend (now husband) Antonio Collins in approx. October 2005; debtor returned the car to creditor in approx. October 2005		X	4,566.00
ACCOUNT NO. National Credit Adj. / Interntl Fin SE ATTN: Managing Officer/Agent 327 West 4th Avenue Hutchinson, KS 67501		Creditor/debt unknown to debtor		X	1,291.00
ACCOUNT NO. North State Acceptance ATTN: Managing Officer/Agent 3501 Market Street Wilmington, NC 28403	X	Co-debtor for son Jermia Hall's purchased of used Chevy Tahoe; repossessed in approx. July 2005		X	541.00
ACCOUNT NO. Paragon Way, Inc ATTN: Managing Officer/Agent Post Office Box 42829 Austin, TX 78704-0048		Debt/creditor/collection agent unknown to debtor; possible collection agent for QC Financial Services		X	0.00
ACCOUNT NO. ****-****-****-8148 Plains Commerce Bank ATTN: Managing Officer/Agent Post Office Box 88020 Sioux Falls, SD 57109-8020		In approx. May 2007, former creditor American General sought collection of purported deficiency balance against debtor; American General offered settlement of balance and, upon information and belief, arranged for Plains Commerce to issue a revolving credit line for such payment; Debtor accepted offer and used credit line to pay AG's compromised debt. Debtor never used card again.			5,000.00
ACCOUNT NO. Plaza Associates ATTN: Managing Officer/Agent 370 Seventh Avenue, Suite 1500 New York, NY 10001		Creditor/debt unknown to Debtor; possibly collecting for DirectTV		X	unknown

Sheet no 2 of 3 continuation sheets attached to  
Schedule of Creditors Holding Unsecured Nonpriority Claims

Subtotal  
(Total of this page) \$ 12,111.00

Total  
(Use only on last page of the completed Schedule F Report also on  
the Summary of Schedules, and if applicable, on the Statistical  
Summary of Certain Liabilities and Related Data) \$

**SCHEDULE F - CREDITORS HOLDING UNSECURED NONPRIORITY CLAIMS**  
(Continuation Sheet)

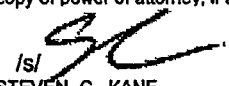
CREDITOR'S NAME, MAILING ADDRESS INCLUDING ZIP CODE, AND ACCOUNT NUMBER. <i>(See Instructions Above)</i>	CODEBTOR HUSBAND, WIFE, JOINT, OR COMMUNITY	DATE CLAIM WAS INCURRED AND CONSIDERATION FOR CLAIM. IF CLAIM IS SUBJECT TO SETOFF, SO STATE	CONTINGENT		AMOUNT OF CLAIM
			UNLIQUIDATED	DISPUTED	
ACCOUNT NO. State of NC c/o Columbus County Clerkof Superior Court - Criminal Div. Post Office Box 1587 Whiteville, NC 28472-1587		Restitution and costs for worthless check offense conviction 05 CR 50976 of 11-29-07, Columbus County District Court Debtor proposes paying restitution through Chapter 13 plan			286.83
ACCOUNT NO. State of North Carolina Division of Community Corrections 2020 Yonkers Road - MSC-4250 Raleigh, NC 27699-4250		Monetary Conditions of Probation Judgments for restitution and fines on worthless check offenses: 07 CR 64068, New Hanover County District Court: \$198.66 total due at rate of \$20 per month beginning 12-6-07  07 CR 52807, New Hanover County District Court; \$209.22 restitution due beginning 12-6-07 at \$55 per month until paid  Debtor proposes paying both judgments through her Chapter 13 plan			407.88
ACCOUNT NO. ****_****_****-6576 Tribute MasterCard / First Bank of DE ATTN: Managing Officer/Agent 1000 Rocky Run Parkway Wilmington, DE 19803		Mastercard account			unknown
ACCOUNT NO. Universal Underwriters ACC ATTN: Manging Officer/Agent 7045 College Blvd., 4th Floor Recovery Overland Park, KS 66211	X	Co-Debtor son, Jermia Hall's purchase of used 1994 Firebrld; car totalled and creditor claimed deficiency balance		X	1,962.00
ACCOUNT NO.					
ACCOUNT NO.					
ACCOUNT NO.					

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Sheet no 3 of 3 continuation sheets attached to  
Schedule of Creditors Holding Unsecured Nonpriority Claims

Subtotal  
(Total of this page) \$ **2,656.71**

Total  
(Use only on last page of the completed Schedule F Report also on  
the Summary of Schedules, and if applicable, on the Statistical  
Summary of Certain Liabilities and Related Data.) \$ **19,720.66**

<b>UNITED STATES BANKRUPTCY COURT EASTERN DISTRICT OF NORTH CAROLINA AT WILSON</b>		<b>PROOF OF CLAIM</b>								
Name of Debtor <b>ANDREWS, ROBIN</b>		Case Number. <b>08-00151</b> Ch <b>13</b>								
NOTE: This form should not be used to make a claim for an administrative expense arising after the commencement of the case. A "request" for payment of an administrative expense may be filed pursuant to 11 U.S.C. §503.										
Name of Creditor (The person or other entity to whom the debtor owes money or property): <b>Roundup Funding, LLC</b>		<input type="checkbox"/> Check box if you are aware that anyone else has filed a proof of claim relating to your claim. Attach copy of the statement giving particulars.  <input type="checkbox"/> Check box if you have never received any notices from the bankruptcy court in this case.  <input checked="" type="checkbox"/> Check box if the address differs from the address on the envelope sent to you by the court.								
Name and address where notices should be sent: <b>Roundup Funding, LLC</b> <b>MS 550</b> <b>PO Box 91121</b> <b>Seattle, WA 98111-9221</b>										
Telephone number: <b>(866) 670-2361</b>										
Last four digits of account or other number by which creditor identifies debtor: <b>XXX6012</b>		Check here if this claim: <input type="checkbox"/> replaces a previously filed claim, dated: _____ <input type="checkbox"/> amends								
<b>1. Basis for Claim</b> <input type="checkbox"/> Goods sold <input type="checkbox"/> Services performed <input checked="" type="checkbox"/> Money loaned <input type="checkbox"/> Personal injury/wrongful death <input type="checkbox"/> Taxes <input type="checkbox"/> Other: _____										
<input type="checkbox"/> Retiree benefits as defined in 11 U.S.C. § 1114(a) <input type="checkbox"/> Wages, salaries, and compensation (fill out below) Last four digits of your SS#: _____ Unpaid compensation for services performed from _____ to _____ (date) (date)										
<b>2. Date debt was incurred:</b> Charges made Prior to Filing.		<b>3. If court judgment, date obtained:</b>								
<b>4. Classification of Claim.</b> Check the appropriate box or boxes that best describe your claim and state the amount of the claim at the time case filed. See reverse side for important explanations.										
<b>Unsecured Nonpriority Claim \$1,405.11</b> <input checked="" type="checkbox"/> Check this box if: a) there is no collateral or lien securing your claim, or b) your claim exceeds the value of the property securing it, or if c) none or only part of your claim is entitled to priority.		<b>Secured Claim</b> <input type="checkbox"/> Check this box if your claim is secured by collateral (including a right of setoff). Brief Description of Collateral: <input type="checkbox"/> Real Estate <input type="checkbox"/> Motor Vehicle <input type="checkbox"/> Other _____ Value of Collateral: _____ Amount of arrearage and other charges at time case filed included in secured claim, if any: \$ _____								
<b>Unsecured Priority Claim</b> <input type="checkbox"/> Check this box if you have an unsecured claim, all or part of which is entitled to priority. Amount entitled to priority \$ _____  Specify the priority of the claim: <input type="checkbox"/> Domestic support obligations under 11 U.S.C. §507(a)(1)(A) or (a)(1)(B) <input type="checkbox"/> Wages, salaries, or commissions (up to \$10,950), * earned within 180 days before filing of the bankruptcy petition or cessation of the debtor's business, whichever is earlier - 11 U.S.C. § 507(a)(4). <input type="checkbox"/> Contributions to an employee benefit plan - 11 U.S.C. § 507 (a)(5).										
<b>5. Total Amount of Claim at Time Case Filed:</b> <table style="width:100%; border: none;"> <tr> <td style="text-align: center;"><b>\$ 1,405.11</b></td> <td style="text-align: center;"><b>\$0.00</b></td> <td style="text-align: center;"><b>\$0.00</b></td> <td style="text-align: center;"><b>\$1,405.11</b></td> </tr> <tr> <td style="text-align: center;">(unsecured)</td> <td style="text-align: center;">(secured)</td> <td style="text-align: center;">(priority)</td> <td style="text-align: center;">(Total)</td> </tr> </table> <input type="checkbox"/> Check this box if claim includes interest or other charges in addition to the principal amount of the claim. Attach itemized statement of all interest or additional charges.		<b>\$ 1,405.11</b>	<b>\$0.00</b>	<b>\$0.00</b>	<b>\$1,405.11</b>	(unsecured)	(secured)	(priority)	(Total)	THIS SPACE IS FOR COURT USE ONLY
<b>\$ 1,405.11</b>	<b>\$0.00</b>	<b>\$0.00</b>	<b>\$1,405.11</b>							
(unsecured)	(secured)	(priority)	(Total)							
<b>6. Credits:</b> The amount of all payments on this claim has been credited and deducted for the purpose of making this proof of claim.										
<b>7. Supporting Documents:</b> Attach copies of supporting documents, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, court judgments, mortgages, security agreements, and evidence of perfection of lien. DO NOT SEND ORIGINAL DOCUMENTS. If the documents are not available, explain. If the documents are voluminous, attach a summary.										
<b>8. Date-Stamped Copy:</b> To receive an acknowledgment of the filing of your claim, enclose a stamped, self-addressed envelope and copy of this proof of claim.										
Date <b>1/31/2008</b>	Sign and print the name and title, if any, of the creditor or other person authorized to file this claim (attach copy of power of attorney, if any):   /s/ <b>STEVEN G. KANE</b> Authorized Agent for Roundup Funding, LLC E-MAIL: BLINE.CHAPTER13@BLINELLC.COM									

Penalty for presenting fraudulent claim: Fine of up to \$500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.



**EXHIBIT** 

**ACCOUNT INFORMATION**

Debtor Name: ANDREWS, ROBIN  
Debtor SSN: XXX-XX-6323  
Account Number: XXX6012  
Creditor Name: Roundup Funding, LLC  
Related Account Number: XXXXXXXXXXXXX2062  
Assignor: National Credit Adjusters  
Original Creditor: HSBC  
Open Date: 09/02/2002  
Charge Off Date: 04/30/2003  
Balance as of Filing: \$1,405.11  
Basis for Claim: Money Loaned

**CASE INFORMATION**

Case Number: 08-00151  
Current Chapter: 13  
Court District: EASTERN DISTRICT OF NORTH CAROLINA  
Court City: WILSON  
Trustee: ROBERT R BROWNING  
Counsel for Debtor(s): MARIA D MCINTYRE  
Counsel Address: PO BOX 390  
WILMINGTON, NC 28402-0390

This claim is based on an unsecured account acquired from Assignor. Pursuant to Instruction 7, above is a redacted version of the information contained in the computer files documenting the account.

This information substantially conforms to 11 U.S.C. § 501, Federal Bankruptcy Rule 3001 and the Instructions to Form B10. See, e.g., *In re Moreno*, 34 B.R. 813 (Bankr. S.D. Fla. 2006); *In re Cluff*, 2006 WL 2820005 (Bankr. Utah 2006); *In re Heath*, 331 B.R. 424 (9th Cir. B.A.P. 2005); *In re Dove-Nation*, 318 B.R. 147 (8th Cir. B.A.P. 2004); *In re Guidry*, 321 B.R. 712 (Bankr. N.D. Ill. 2005); *In re Burkett*, 329 B.R. 820 (Bankr. N.D. Ohio 2005); *In re Lapsansky*, 2006 WL 3859243 (Bankr. E.D. Pa. 2006); *In re Irons*, 343 B.R. 32 (Bankr. N.D. NY 2006).



Westlaw

**PEOPLE FINDER HISTORIC TRACKER RECORD**

**Information Current Through:** 06-30-2008  
**Database Last Updated:** 07-08-2008  
**Update Frequency:** MONTHLY  
**Current Date:** 08/07/2008  
**Source:** TRANS UNION  
**INDIVIDUAL INFORMATION**

**Name:** ROBIN YVETTE ANDREWS  
**Also Known As:** ANDREWS, ROBIN  
**SSN:** ██████████  
**Estimated Date of Birth:** 1960  
**On File Since:** 05/01/1989  
**Phone Number 1:** 910-655-6042  
**Phone Number 2:** 910-655-6042

**CURRENT ADDRESS INFORMATION**

**Current Address:** 115 MUNN LN  
 RIEGELWOOD, NC 28456-8659  
**Address Last Reported:** 02/25/2004

**PREVIOUS OR ADDITIONAL ADDRESS INFORMATION**

**Previous Address:** 824 S 19TH ST  
 NEWARK, NJ 07108-1110  
**Address Last Reported:** 02/01/1993  
**Previous Address:** PO BOX 613  
 RIEGELWOOD, NC 28456-0613  
**Address Last Reported:** 10/01/1993

END OF DOCUMENT

**IN THE UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF FLORIDA  
JACKSONVILLE DIVISION**

IN RE:

KEITH ROLAND PARISEAU  
THERESA LYNNETTE PARISEAU,

Debtors.

Case No.: 08-1606

\_\_\_\_\_/

KEITH ROLAND PARISEAU  
THERESA LYNNETTE PARISEAU,

Plaintiffs,

Adversary No.: 08-ap-00142

v.

ASSET ACCEPTANCE, LLC,

Defendant.

\_\_\_\_\_/

**ORDER GRANTING DEFENDANT'S MOTION TO DISMISS**

This Proceeding is before the Court upon Defendant's Motion to Dismiss Plaintiffs' Amended Complaint, which is based upon alleged violations of the Federal Fair Debt Collection Practices Act, the Florida Consumer Collection Practices Act, and the Florida Deceptive and Unfair Trade Practices Act. In response to Defendant's Motion to Dismiss, Plaintiffs filed a response in opposition to the Motion, to which Defendant filed a reply. Based upon a review of the pleadings and applicable law, the Court finds it appropriate to grant Defendant's Motion to Dismiss.

**Background**

On March 25, 2008, Plaintiffs filed a petition for relief under Chapter 13 of the Bankruptcy Abuse Prevention and Consumer Protection Act. On April 15, 2008, Defendant filed three proofs of claim in Plaintiffs' Chapter 13 case. The proofs of claim

Exhibit F

were for unsecured debt in the amount of \$1,430.54. On May 21, 2008, Plaintiffs filed the instant adversary proceeding based upon alleged violations of the Federal Fair Debt Collection Practices Act (“FDCPA”), the Florida Consumer Collection Practices Act (“FCCPA”), and the Florida Deceptive and Unfair Trade Practices Act (“FDUTPA”). In response to the complaint, Defendant offered to withdraw the claims at issue. Plaintiffs choose not to accept Defendant’s offer to withdraw the claims, and instead filed an Amended Complaint, which is the subject of the instant Motion.

### Analysis

The Supreme Court has held that despite the protections afforded to consumers pursuant to consumer protection legislation a debtor’s remedy for protection remains under the Bankruptcy Code. Kokoszka v. Belford, 417 U.S. 642, 651 (1974)(in addressing the applicability of the Consumer Credit Protection Act, of which the FDCPA is a part, the Supreme Court stated, “the Consumer Credit Protection Act sought to prevent consumers from entering bankruptcy in the first place. However, if despite its protection, bankruptcy did occur, the debtor’s protection and remedy remained under the Bankruptcy Act”); see also In re Varona, 2008 WL 2150109 at \*10 (Bankr. E.D. Va. May 22, 2008) (stating that, “it appears that a majority of courts that have considered whether a proof of claim may be the subject of a FDCPA violation have concluded the FDCPA is not intended to provide a remedy for claims filed in a bankruptcy proceeding”); In re Walker, 336 B.R. 534 (Bankr. M.D. Fla. 2005)(stating that the Consumer Credit Protection Act is preempted by the Bankruptcy Code); In re Cooper, 253 B.R. 286, 291 (Bankr. N.D. Fla. 2000)(holding “the filing of the proof of claim in a bankruptcy proceeding does not trigger the FDCPA, and fails to state a cause of action under that



Act”); Baldwin v. McCalla, Raymer, Padrick, Cobb, Nichols & Clark, L.L.C., Case No. 98-C-4280, 1999 WL 284788, at \*4 (N.D. Ill. Apr. 26, 1999)( “a key function of the FDCPA provisions of the Consumer Credit Protection Act was to eliminate practices that “contribute to the number of personal bankruptcies.” Neither set of provisions demonstrates even the slightest intent on the part of Congress to interfere with the intricate workings of the bankruptcy system.”). In addition to stating that the bankruptcy system would be undermined by allowing debtors to proceed under the FDCPA, the court in Baldwin also stated that, “application of the FDCPA to bankruptcy proofs of claim would be inconsistent with prior bankruptcy practice and inappropriate pursuant to the clear statement rule.” Baldwin at \* 4.

The Court also notes that although other courts have applied the FDCPA in bankruptcy cases, they have done so only in the very *narrow* context of situations involving the automatic stay or dischargeability. For instance, the Seventh Circuit held that the FDCPA applied when a creditor sent a post-petition collection notice in an attempt to collect a debt that had been discharged by the former Chapter 13 debtor’s case. Hyman v. Tate, 362 F.3d 965 (7<sup>th</sup> Cir. 2004), see also Randolph v. IMBS, Inc., 368 F.3d 726 (7<sup>th</sup> Cir. 2004)(applying the FDCPA to a violation of the automatic stay). However, the instant proceeding does not deal with the applicability of the FDCPA to violations involving the automatic stay or dischargeability. Accordingly, the Court does not find the case law submitted by Plaintiffs to be persuasive, especially in light of the numerous decisions which hold that FDCPA claims that arise from the filing of a proof of claim

during the pendency of a bankruptcy proceeding are precluded by the available remedies Congress enumerated in Title 11 of the United States Code.<sup>1</sup>

In regards to Plaintiffs' ability to successfully bring claims pursuant to the FCCPA and FDUPTA, the case law is equally as clear. As the Supreme Court has stated, "[o]nce an area of state law has been completely pre-empted, any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law." Caterpillar, Inc. v. Williams, 482 U.S. 386, 393 (1987). The Supremacy Clause of the United States Constitution provides Congress with the ability to preempt state law. Preemption is established when (i) Congress explicitly states that state law is superceded, (ii) in the absence of explicit statutory language, or (iii) when a conflict arises between the state and federal law. English v. General Electric Co., 496 U.S. 72, 78-79 (1990). Defendant accurately asserts that the vast majority of courts have held that the Bankruptcy Code preempts state law claims allegedly arising from an abusive bankruptcy filing or other wrongful conduct

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<sup>1</sup> The Court does not find the non-binding authority cited to in Plaintiffs' "Notice of Supplemental Authority" to be persuasive. The court in Rogers v. B-Real, LLC, (*In re Rogers*), Ch. 13 Case No. 07-11293, Adv. No. 08-1011 (Bankr. M.D. La. July 21, 2008), relied upon the decision issued in Randolph in denying a motion to dismiss as to FDCPA claims upon the basis that it was not possible to conclude that the debtors could not prove facts entitling them to relief under the FDCPA. As stated above, Randolph is distinguishable from the instant proceeding and accordingly the Court respectfully disagrees with the Rogers court's reliance upon Randolph in reaching its holding. Additionally, the Court finds the remaining *non-binding* authority cited to by Plaintiff to be distinguishable from *specific* factual circumstances involved in the instant proceeding. For example, the case of Kimber v. Federal Financial Corporation, 668 F.Supp. 1480 (M.D. Ala. 1987), was not a bankruptcy case and dealt with a small claims court law suit, not a proof of claim. The unpublished opinion of Chaussee v. B-Real, LLC, 2008 Lexis 1026 (Bankr. W.D. Was. March 25, 2008) is also distinguishable as it involved a creditor who filed a proof of claim against the wrong debtor. In reaching its decision that the debtor's FDCPA claims would not be precluded by the Bankruptcy Code, the court in Chaussee specifically focused on the fact that a debtor-creditor relationship did not exist. The court reasoned that, "the bankruptcy laws do not generally apply to third parties who have no relationship to the debtor or the debtor's assets." Id. at \*10.

committed during the course of a bankruptcy case. MRS Exploration, Ltd. V. Meridian Oil, Inc., 74 F.3d 910 (9<sup>th</sup> Cir. 1996), Gonzalez v. Parks, 830 F.2d 1033 (9<sup>th</sup> Cir. 1987), Koffman v. Osteoimplant Tech, Inc.; 182 B.R. 115 (D. Md. 1995), Mason v. Smith, 140 N.H. 696, 672 A.2d 705 (N.H. 1996); Glannon v. Garrett & Assoc., Inc., 261 B.R. 259, 262 (Bankr. D. Kan. 2001). For example, in MSR Exploration, the court held that the Bankruptcy Code preempts malicious prosecution of a claim against creditors for pursuing claims in a Chapter 11 case. Id. at 914. In reaching its decision, the Ninth Circuit recognized that uniformity is essential in bankruptcy law and that Congress has provided remedies to preclude misuse, including Bankruptcy Code §§105 and 303 and Fed. R. Bankr. 9011.<sup>2</sup> Id. at 914-15. Based upon the doctrine of preemption, the Court finds that Plaintiffs' claims pursuant to the FCCPA and FDUPTA are subject to dismissal.

The Court also notes that this proceeding deals with a situation that should have been handled in the main case, the manner in which objections to claims have historically been dealt with. However, instead of being treated as the routine matter it is, a formal lawsuit was filed, which will likely cost the parties involved both resources and funds significantly above and beyond what was needed in order to reach a resolution. Although this Court would not expect a non-bankruptcy practitioner to understand the overwhelming significance of how the "floodgates of litigation" would be opened by allowing this type of suit to proceed, it does expect those who practice before this Court regularly to appreciate the significance. One of the core fundamentals in bankruptcy is a

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<sup>2</sup> Case law in Florida also holds that an action taken in a bankruptcy proceeding cannot be the basis for malicious prosecution or abuse of process claims. Mullin v. Orthwein, 772 So. 2d 30 (Fla. 4<sup>th</sup> Dist. Ct. App. 2000).

creditor's right to file a proof of claim, which is presumed to be prima facie valid until an objection is filed.<sup>3</sup> It is an efficient process that gives all sides an opportunity to assert their position. Typically, the majority of objections to claims are either worked out amongst the parties themselves, or if a hearing is necessary, the objection can usually be resolved within 5-10 minutes of the Court's time. Therefore, given the thousands of cases filed annually, coupled with the high volume of claims filed in each case, it is essential that practitioners appearing before this Court respect the claims process so that significant judicial resources are not squandered on matters that can be so very easily resolved.<sup>4</sup>

It is also worth noting that in a recent unpublished opinion, that dealt with facts virtually identical to those presented in the instant proceeding, Judge Paskay, echoed similar sentiments when he eloquently stated:

In conclusion ... for the guidance of the Bar in the future. This Court's view of the Amended Complaint filed by the Debtor is a paradigm or a so-called attempt of creative lawyering to make a mountain out of a molehill and to transform a simple claim resolution process into an extensive and expensive proceeding. It is this Court's opinion, even filing an invalid proof of claim would be insufficient to form the basis for the claims attempted to be asserted under the FDCPA or the Florida equivalents, the FCCPA and FDUPTA, in light of existing authority. To accept the proposition that the statutes created an alternative method to challenge a proof of claim in bankruptcy would open up the floodgate for unnecessary and expensive litigation, replacing the simple procedure for dealing with an objection to the allowance of a claim. This cause of action would be totally contrary to the entire scheme established by Congress to deal with creditor and debtor relationships. Williams v. Asset Acceptance (*In re Williams*), Ch. 13 Case No. 07-10393, Adv. No. 08-30 (M.D. Fla. May 20, 2008).

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<sup>3</sup> The Defendant did not do anything atypical or improper by merely *filing* its proof of claim and to find otherwise would chill creditor's rights in the bankruptcy process, as well as undermine the very mechanisms that are set forth by the Bankruptcy Code to deal with such issues.

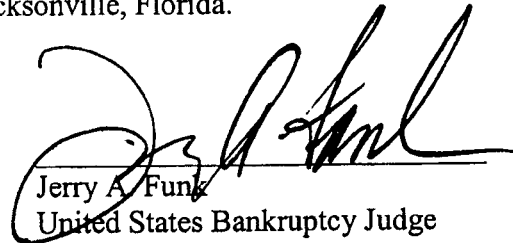
<sup>4</sup> In the instant proceeding, as Plaintiff offered to withdraw the claims in dispute, there was no need at all for court intervention.

Based upon the above, it is

ORDERED:

1. Defendant's Motion to Dismiss Plaintiffs' Amended Complaint is  
Granted.
2. The Adversary Proceeding is dismissed with prejudice.

Dated this 24 day of July, 2008 in Jacksonville, Florida.



Jerry A. Funk  
United States Bankruptcy Judge

Copies to:  
Plaintiffs  
Defendant

UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF FLORIDA  
FORT MYERS DIVISION

In re:

CONSTANCE G. WILLIAMS, Case No. 9:07-bk-10393-ALP  
Chapter 13 Case

Debtor. /  
CONSTANCE G. WILLIAMS,

Plaintiff,

v. Adv. Proc. No. 9:08-ap-00030-ALP

ASSET ACCEPTANCE, LLC,

Defendant. /

**ORDER GRANTING ASSET ACCEPTANCE, LLC'S MOTION TO  
DISMISS DEBTOR'S AMENDED COMPLAINT**  
(Doc. No. 6)

Consumer debtors' attempts to turn a simple claim resolution into a multiple-count adversary proceeding has been considered in the past by several courts and is precisely the issue currently being presented to this Court.

The matter under consideration in this Chapter 13 case of Constance G. Williams (the Debtor) is a Motion to Dismiss Debtor's Amended Complaint filed by Asset Acceptance, LLC (Asset) on March 24, 2008 (Doc. No. 6).

The facts relevant to the resolution of the issues raised by Asset in its Motion to Dismiss are a matter of record, are without dispute and can be summarized as follows:

The Debtor filed her Voluntary Petition for Relief under Chapter 13 of the Bankruptcy Code on October 31, 2007. On November 27, 2007, Asset filed its Proof of Claim for an unsecured claim in the amount of \$224.27. Rather than file an objection to Asset's claim, which is the proper way to challenge the allowance of a claim, the Debtor filed her Complaint in the above-captioned adversary proceeding on January 21, 2008, asserting that Asset's claim was time-barred under Florida law. The Debtor asserts that the statute of limitations for bringing such a claim for breach of a written instrument expires five years after the breach. The Debtor in her Complaint is seeking damages from Asset for a purportedly willful violation of the automatic stay. It should be noted at the outset that the claim in Count I is basically an objection to claim in the amount of \$224.27. Needless to say, the objection could have been resolved without the necessity of a formal law suit being filed, taking into consideration the very unimpressive size of the amount of the claim filed by Asset, coupled with the reduced judicial labor needed to resolve an objection to claim.

Upon receipt of the Complaint, Asset forwarded case law to the Debtor to show that the claims were without merit and requested that the Debtor dismiss the Complaint in compliance of Fed. R. Bankr. P. 9011. Furthermore, Asset offered to withdraw its Proof of Claim to prevent the Debtor from incurring further legal fees. The Debtor rejected Asset's offer and filed her Amended Complaint (Doc. No. 5) (Amended Complaint) on March 3, 2008. Based on the same, Asset filed its Motion to Dismiss contending that the Debtor is attempting to make a mountain out of a molehill while failing to state a claim upon which relief can be granted. Asset argues that the claims arising under the Fair Debt Collection Practices Act (FDCPA) are precluded by the Bankruptcy Code, and the state law claims are preempted by the Code.

As noted above, the Debtor in her original Complaint objected to Asset's Proof of Claim, alleging that the claim was time-barred and the filing of such claim violated Fed. R. Bankr. P. 3001 and is, therefore, a violation of the automatic stay. The Debtor has since abandoned these claims and raises four new counts in her Amended Complaint.

In Count I of the Amended Complaint, the Debtor charged a violation of the FDCPA. In support of her claim, the Debtor alleges that Asset's filing of the Claim constitutes an attempt to collect a debt not permitted by law in violation of 15 U.S.C. § 1692(f)(1). Based on the foregoing facts, the Debtor is seeking



an award of actual and/or statutory damages and legal fees pursuant to 11 U.S.C. § 1692(k).

The claim in Count II of the Amended Complaint asserts that the acts of Asset resulted in harassment, oppression, or abuse of the Debtor in connection with the collection of a debt in violation of 15 U.S.C. § 1692(d). The Debtor asserts that as a result of Asset's actions, the Debtor has suffered monetary loss, mental and emotional suffering, fright, anguish, shock, nervousness, anxiety, humiliation and depression. The Debtor claims that she continues to be fearful, anxious, nervous and depressed. Based on the foregoing, the Debtor seeks actual and statutory damages in the total sum of \$1,000.00. In addition to actual and statutory damages, the Debtor also claims that she is entitled to an award of legal fees.

The claim in Count III is based on the violation of the Florida Consumer Collection Practices Act (FCCPA). The Debtor contends that Asset has engaged in illegal debt collection practices pursuant to the obligation between the parties as defined in Fla. Stat. § 559.55(1). Furthermore, Asset has engaged in consumer collection conduct that violates Fla. Stat. § 559.72(9), and based on the same, the Debtor has sustained economic damages for which she is entitled to compensation pursuant to Fla. Stat. § 559.77. In addition to the above, the Debtor seeks an award of actual or statutory damages plus attorney fees.

The Debtor's claim in Count IV alleges Asset's violation of the Florida Deceptive and Unfair Trade Practices Act (FDUTPA) pursuant to Fla. Stat. §§ 501.201, et. seq. In this Count, the Debtor alleges that Asset violated the Act by engaging in deceptive and unfair trade practices. Based on this, the Debtor claims that the wrongful conduct by Asset she has suffered is identical to the damages outlined in Count II of the Amended Complaint.

The interaction between the Bankruptcy Code and consumer protection legislation is involved in several different attempts by debtors to by-pass the remedies available under the Bankruptcy Code and assert claims for damages under consumer protection legislation passed by Congress.

In the matter of *Kokoszka v. Belford*, 417 U.S. 642, 651, 94 S.Ct. 2431, 41 L. Ed. 2d 374 (1974), the Supreme Court held that despite the protection rendered to consumers under the FDCPA, the debtor's protection remedy remained under the Bankruptcy Code. Based on *Kokoszka*, several courts have held that claims brought pursuant to the FDCPA are precluded when such claims are based upon a post-petition violation that can be remedied under the Bankruptcy Code. See *Betty Jean McCarther-Morgan v. Asset Acceptance, LLC*, Adv. Case No. 07-90654-M13 (Bankr S.D. Ca. March 12, 2008); *Rice-Etherly v. Bank One (In re Rice-Etherly)*, 336 B.R. 308 (Bankr. E.D. Mich. 2006) (holding that the FDCPA did not apply to the proof of claim filed in the

bankruptcy case); *Degrosiellier v. Solomon & Solomon, P.C.*, No. 00-CV-1065, 2001 WL 1217181 at 4 (N.D. N.Y. Sept. 27, 2001) (holding that the Bankruptcy Code precludes a claim brought pursuant to the FDCPA where such violation by a defendant can be remedied by the Bankruptcy Code); *Kaiser v. Braje & Nelson, LLP*, No. 3:04-CV-405 RM, 2006 WL 1285143 (N.D. Ind. May 5, 2005) (Holding FDCPA claims are pre-empted by the Bankruptcy Code remedies such as the filing of an objection to the claim).

In the case of *Cooper v. Litton Loan Servicing (In re Cooper)*, 253 B.R. 286, 291 (Bankr. N.D. Fla. 2000), the court held that “the filing of a proof of claim in a bankruptcy proceeding does not trigger the FDCPA, and fails to state a cause of action under the Act. *See Baldwin v. McCalla, et al.*, 1999 WL 284788 (N.D. Ill. 1999). The debtor can only attack a proof of claim in the bankruptcy court, and only by using remedies provided in the Bankruptcy Code.”

This Court would not be candid in its analysis if it did not acknowledge other courts’ applications of the FDCPA in bankruptcy cases. Other courts have considered whether the FDCPA should be applied with respect to the automatic stay or dischargeability. However, applying the FDCPA to issues involving the automatic stay or dischargeability is different than the issues surrounding the creditor’s right to file a claim in a bankruptcy case. For example, in the case of

*Turner v. J.V.D.B. & Associates, Inc.*, 330 F.3d 991 (7th Cir. 2003), the Seventh Circuit applied the FDCPA when a debt collector sent a post-petition letter to collect a debt discharged in bankruptcy from a former Chapter 13 debtor. The Seventh Circuit again applied the FDCPA in the case of *Hyman v. Tate*, 362 F.3d 965 (7th Cir. 2004), which also involved a letter sent to a Chapter 13 debtor by a collection agency; however, the court ultimately held that the collection agency was protected by bona fide error defense under the FDCPA. In the case of *Randolph v. IMBS, Inc.*, 368 F.3d 726 (7th Cir. 2004), the court applied the FDCPA to a violation of the automatic stay, noting that Section 362 of the Bankruptcy Code merely overlapped with the FDCPA and did not pre-empt it.

However, the facts of this case can be distinguished from cases involving the applicability of the FDCPA to violations of the automatic stay and dischargeability issues. In the cases of *Turner*, *Hyman*, and *Randolph*, the collection agencies sent letters that violated both the Bankruptcy Code and the FDCPA. Here, Asset did not engage in any wrongful conduct by filing a proof of claim. To hold otherwise would undermine the rights of creditors in the bankruptcy process. The creditor's right to file a claim is not impacted by whether the statute of limitations had run, as the debtor must raise the statute of limitations issue as an affirmative defense, and even then the court still must determine whether it has tolled and run. The debtor does not need the FDCPA

to protect itself from improper claims, as the Bankruptcy Code allows the debtor to file an objection. If this Court was to apply the FDCPA in this instance, debtors would be encouraged to file adversary proceedings instead of simply an objection to the creditor's claim, which is incredibly inefficient and undermines the process provided by the Bankruptcy Code.

Based on the overwhelming authorities supporting Asset's contentions, that FDCPA claims are precluded by the Bankruptcy Code, this Court is satisfied that Asset's request for dismissal with respect to the claims asserted in Counts I and II of the Amended Complaint is well taken and, therefore, should be granted.

This leaves for consideration the Debtor's claim asserted in Count III of the Amended Complaint that is based on the violation of the FCCPA. Violations of the FCCPA have also been challenged and considered by several courts. These courts have concluded that under the Supremacy Clause of the United States Constitution, the FCCPA is pre-empted by bankruptcy law. Pursuant to Article VI, Clause 2, of the United States Constitution, the Supremacy Clause provides Congress with the power to pre-empt state law. Pre-emption is established when (i) Congress explicitly states that state law is superseded, (ii) in the absence of an explicit statutory language, or (iii) when the

state law conflicts with that federal law. *English v. General Electric Co.*, 496 U.S. 72, 78-79 (1990).

This Court is satisfied that the overwhelming majority of courts who have addressed the identical issue have held that the Bankruptcy Code pre-empts state law claims arising from an abusive bankruptcy filing or other wrongful conduct committed during the course of a bankruptcy case. *MSR Exploration, Ltd. v. Meridian Oil, Inc.*, 74 F.3d 910 (9th Cir. 1996). The Ninth Circuit in *MSR Exploration* held that the Bankruptcy Code pre-empts malicious prosecution of a claim against creditors for pursuing claims in a Chapter 11 case. The Ninth Circuit considered a number of factors which compelled the conclusion of the court's decision, such as, Congress placed bankruptcy jurisdiction exclusively in the United States District Court to be referred to as the Bankruptcy Court pursuant to 28 U.S.C. 157(a) and 1334(a). Next, the complex and detailed Bankruptcy Code demonstrated "the need to jealously guard the bankruptcy process from even slight incursions and disruptions brought about by state malicious prosecution actions." *Id.* at 914. Furthermore, the bankruptcy law requires uniformity, and Congress provides various remedies designed to preclude misuse, including Fed. R. Bankr. P. 9011 and Bankruptcy Code Sections 105 and 303. *Id.* at 914-15.

Various other courts that have considered the identical problem have uniformly held that if there is a state law that arose in a bankruptcy filing, the Bankruptcy Code pre-empts state law claims. *Gonzalez v. Parks*, 830 F.2d 1033 (9th Cir. 1987), *Koffman v. Osteoimplant Tech, Inc.*, 182 B.R. 115 (D. Md. 1995), *Glannon v. Garrett & Assoc., Inc.*, 261 B.R. 259, 262 (Bankr. D. Kan. 2001) (holding that the Bankruptcy Code pre-empted state law claims based on (i) violation of Sections 303 and 362 on the Bankruptcy Code (ii) malicious prosecution of the bankruptcy case and the adversary proceeding (iii) abuse of process for the prosecution of the involuntary bankruptcy case and the adversary proceeding).

Florida case law also holds that no action taken in a bankruptcy proceeding can be the basis of a claim for malicious prosecution or abuse of the process. *Mullin v. Orthwein*, 772 So. 2d 30 (Fla. 4th Dist. Ct. App. 2000). The Fourth Circuit in the case of *Mullin* quoted the decision of the Superior Court of Pennsylvania in the case of *Shiner v. Moriarty*, 706 A.2d 1228, 1238 (Pa. Super. Ct. 1998). The *Shiner* court noted that “the Bankruptcy Code permits no state law remedies for abuse of its provisions” and the plaintiffs’ claim “being based on the defendants’ conduct in the bankruptcy proceeding is pre-empted by the Bankruptcy Code.” *Mullin*, 772 So.2d at 33 (quoting *Shiner*, 706 A.2d at 1238). Based on the foregoing authorities, this Court is satisfied that Count III cannot

be sustained based on the reasons stated above and, therefore, the claim is equally subject to dismissal.

The claim in Count IV of the Amended Complaint seeks to recover damages based on Asset's Violation of the FDUTPA. This Count is being challenged by Asset on the basis that the Debtor failed to allege that Asset had actual knowledge or intent to enforce a debt that was time barred, which is an essential element of a claim under the Act and, therefore, fails to state a claim for which relief can be granted. To establish a claim pursuant to the FDUTPA, the claimant must allege that there was: (1) a deceptive act or unfair practice; (2) causation; and (3) actual damages. *Bookworld Trade, Inc. v. Daughters of St. Paul, Inc.*, 532 F. Supp. 2d. (M.D. Fla. 2007). Under Florida law, a deceptive practice is one that is "likely to mislead" consumers. *Davis v. Powertel, Inc.*, 776 So.2d 971, 974 (Fla. 1st Dist. Ct. App. 2000). The unfair practice is "one that 'offends established public policy' and one that is 'immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.'" *Samuels v. King Motor Co. of Fort Lauderdale*, 782 So.2d 489,499 (Fla. 4th Dist. Ct. App. 2001) (quoting *Spiegel, Inc. v. Fed. Trade Comm'n*, 540 F2d 287, 293 (7th Cir. 1976)).

The claim in Count IV of the Amended Complaint fails to allege a single deceptive act or unfair practice that caused the Debtor to incur actual damages.



In Paragraph 46 of the Amended Complaint, the Debtor contends she suffered damages based on Asset's wrongful acts, and based on the same, has suffered mentally and emotionally. Furthermore, the Debtor contends that based on Asset's unfair and deceptive actions, she continues to suffer from fright, anguish, shock, nervousness, anxiety, humiliation and depression; therefore, she is entitled to statutory and actual damages.

The most ironic pleading and obscured contention is that the Debtor continues to be fearful, anxious, nervous, and depressed in light of the fact that Asset from the beginning offered to withdraw its Proof of Claim, which is the center point of the entire controversy. The FDUTPA was designed to "protect the consuming public and legitimate enterprises from those who engage in unfair methods of competition, or unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce." *Rollins, Inc. v. Butland*, 951 So.2d 860, 869 (Fla. 2d. Dist. Ct. App. 2006). In the present instance, Asset filed its Proof of Claim in the above-captioned Chapter 13 case. Such a filing does not constitute trade or commerce and, therefore, would not constitute a violation of the FDUTPA. Based on the foregoing, this Court is satisfied that this claim is thereby subject to dismissal.

In conclusion, this Court cannot help but to make the following comments for the guidance of the Bar in the future. This Court's view of the Amended


Complaint filed by the Debtor is a paradigm or a so-called attempt of creative lawyering to make a mountain out of a molehill and to transform a simple claim resolution process into an extensive and expensive proceeding. It is this Court's opinion that such a proceeding is totally needless, specifically, when the litigation involves nothing more than an objection to the claim. In this Court's opinion, even filing an invalid proof of claim would be insufficient to form the basis for the claims attempted to be asserted under the FDCPA or the Florida equivalents, the FCCPA and FDUPTA, in light of existing authority. To accept the proposition that the statutes created an alternative method to challenge a proof of claim in bankruptcy would open the floodgate for unnecessary and expensive litigation, replacing the simple procedure for dealing with an objection to the allowance of a claim. This cause of action would be totally contrary to the entire scheme established by Congress to deal with creditor and debtor relationships. The Proof of Claim filed by Asset in the "gross" amount of \$224.27 is a claim that could not have had any meaningful impact on the outcome of any Chapter 13 case, much less, a momentous significance to the Chapter 13 Plan of the Debtor. Based on the foregoing, this Court is satisfied that Asset Acceptance, LLC's Motion to Dismiss Debtor's Amended Complaint should be granted.

Accordingly, it is

ORDERED, ADJUDGED AND DECREED that Asset Acceptance, LLC's Motion to Dismiss Debtor's Amended Complaint (Doc. No. 6) be, and the same is hereby granted. It is further

ORDERED, ADJUDGED AND DECREED that the above-captioned adversary proceeding be, and the same is hereby dismissed with prejudice.

DONE at Tampa, Florida, on MAY 20 2008.

  
ALEXANDER L. PASKAY  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF NORTH CAROLINA  
WILMINGTON DIVISION

IN RE:  
ROBIN GRAHAM ANDREWS

CASE NO.:  
08-00151-8-JRL

DEBTOR(S)

CHAPTER 13

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DEBTOR'S REPLY BRIEF  
IN SUPPORT OF DEBTOR'S OBJECTIONS TO CLAIMS OF  
B-REAL, LLC (CLAIM NO. 5)  
AND  
ROUNDUP FUNDING, LLC (CLAIM NO. 7)

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Debtor Robin Andrews respectfully submits this reply to *Roundup Funding, LLC's and B-Real, LLC's Supplemental Brief in Support of Opposition to Debtor's Objection to Claims Number Five (5) and Seven (7)* filed on August 22, 2008.

Show Cause

The creditors claim in their brief that they are confused about whether the debtor is seeking sanctions under Bankruptcy Rule 9011. *Creditors' Brief*, Introduction, ¶1. The debtor's Objections clearly set forth the relief sought:

Debtor respectfully requests this Court issue a "show cause" order to [B-Real/Roundup] to determine whether its policies and procedures are comporting with its obligations under the Federal Rules of Bankruptcy Procedure in that, if [B-Real/Roundup] is filing proofs of claims that debtors may not owe, such practice calls into question the entire integrity of the claims filing system.

That a "show cause" order be issued to determine whether [B-Real, LLC's/Roundup Funding, LLC's] procedures fulfill its obligations under Rule 3001 and Rule 9011 in filing proofs of claim in this district;

*Debtor's Objections* (B-Real: ¶15; prayer, ¶3); (Roundup: ¶11; prayer, ¶3).

In their responses and at the hearing, the creditors emphasized that the debtor had not served the “safe harbor” letter or the motion in accordance with Rule 9011. In the brief, debtor clarified that she was not seeking sanctions but that “. . . the similarities between these (sp) claims and that in the *Wingert* case support the debtor’s request for a show cause order to B-Real and Roundup, respectively, to determine if their policies and procedures are in compliance with the Bankruptcy Rules.” *Debtor’s Brief*, p. 7. While the debtor cited *Wingert* for the proposition that a court can sanction the practices of a debt buyer in filing claims in bankruptcy court, the debtor is asking this Court to undertake a review of the practices and procedures of B-Real and Roundup in filing claims in this District. It is premature for the debtor to move for sanctions against B-Real and Roundup before a thorough review of their pre-filing procedures has been undertaken.

#### Statute of Limitations

In their brief, B-Real and Roundup abruptly depart from the position they have long set forth in their filed responses<sup>1</sup> and in the statements of counsel at the hearing of this matter. They now contend in the brief that “there is no concession by either entity that the applicable statute of limitation has run on these particular debts.” *Brief*, Introduction, ¶6, lines 10-11.

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<sup>1</sup> Pursuant to N C G S § 1-52(1), the running of the statute of limitations merely bars enforcement collection, it does not extinguish the debt. Since the debt was not extinguished, [B-Real/Roundup] has in good faith complied with the claims filing system of 11 U.S.C §§ 101(5), 501, 502 and FRBP 3001.

The plain language of 11 U.S.C. 502(a) allows a creditor to file a claim that is invalid on its face, but believed valid unless objected to by a party in interest. *In re Varona*, \_\_\_ B R. \_\_\_, 2008 WL 2150109, 15 (Bkrcty. E.D Va. 2008).

The debtor argues that B-Real and Roundup are estopped from raising a new legal argument at this late juncture; however, the facts alleged by B-Real and Roundup for the first time in their brief actually undermine their new position. The creditors offer a Westlaw “People Finder Historic Tracker Record” (Exhibit E to their brief) in an effort to introduce confusion about where the debtor has lived in the last 15 years. B-Real and Roundup misstate the Westlaw record when they conclude that “[f]rom February 1993 until February 2004, Debtor either used the address or resided at “824 S. 19<sup>th</sup> Street, Newark, NJ 07108-1110.” *Creditors’ Brief*, Section VI, ¶4, lines 1-2. A proper reading of the record plainly discloses the debtor’s former address, “PO Box 613, Riegelwood, NC 28456-0613” and that such address was last reported “10/01/1993.” The purported debts at issue, as set forth by the creditors in their proofs of claim, were opened on 11/19/1997 (B-Real, Claim No. 5) and 09/02/2002 (Roundup, Claim No. 7), respectively.

The creditors’ argument that N C G S. § 1-21 tolls the statute of limitations for the period of time the debtor lived in New Jersey is inapplicable to these facts. Furthermore, there is no question that the North Carolina statute of limitation applies. North Carolina law is clear that the statute of limitation is a procedural device and the forum state’s procedural law is what applies. *See Sayer v. Henderson*, 225 N.C. 642, 35 S.E.2d 875 (1945); *Eagle Nation, Inc v Market Force, Inc* , 180 F.Supp.2d 752 (E.D.N.C. 2001).

#### Standing and Injury

The creditors state in their brief that the “[d]ebtor admits she does not have standing to object to the claim.” *Brief*, Section III, ¶1, lines 4-5. The debtor has made no such admission and, further, the creditors’ brief is replete with admonitions that it is the debtor’s burden to object

to the claim. B-Real and Roundup cannot put the debtor in the futile position of having the burden, but not the standing, to object to these stale claims.

#### Fair Debt Collection Practices Act

The debtor is not, as the creditors contend in their brief, alleging that the Fair Debt Collection Practices Act (“FDCPA”) applies to the objections to claim at issue in this case. Rather, the debtor sought to show in her brief that, with the proliferation of stale debt buyer claims in bankruptcy court, some courts in recent decisions have refused to dismiss the debtors’ FDCPA claims alleged in response to the filing of time barred claims by debt buyers. The debtor discussed these cases to show that some courts have begun to distinguish the particular deficiencies of debt buyer claims from the different fact situations contemplated in the previous line of cases that held the FDCPA did not apply to the claims administration process. *See Chaussee v. B-Real, et al (In re Chaussee)*, Adv. No. 07-01266, (W.D.Wa.) (March 26, 2008); *Rogers v B-Real, L L C*, \_\_\_ B.R. \_\_\_, 2008 WL 2810593 (Bkrpty. M.D.La.) (July 21, 2008). Given that the debtor is not alleging a FDCPA claim in these objection actions, it is beyond the scope of the proceeding for B-Real and Roundup to seek a ruling from the Court that that FDCPA does not apply to a proof of claim filing. *Creditors’ Brief*, Prayer, ¶3.

#### The Creditors’ Misplaced Focus

The creditors’ brief goes to great lengths to complain that they were not served with the debtor’s Schedule F, which showed that the debtor disputed the debt for which Roundup seeks collection. The creditors’ focus here is misplaced. Rather, the appropriate questions raised by the debtor’s claims objections are what, if any, pre-filing investigation procedures B-Real and Roundup undertake to verify: 1) that the debt claimed is not time barred; and 2) that the debt

buyer has a documentary chain of title from the original creditor to the debt buyer for the particular debt on which it files a claim.

To be clear, the debt for which B-Real seeks collection (Claim No. 5) was not scheduled by the debtor. This is precisely the type of claim contemplated by *In re Wingert*, 376 B.R. 221 (Bkrpty. N.D. Ohio) (Oct. 1, 2007). The debtor did schedule, as disputed, a debt in the amount of \$1,291.00 in the name of "National Credit Adj./Internatl Fin SE." Roundup, though to this date has not offered any supporting documentation, asserts that it is the assignee to National Credit Adjusters and that HSBC was the original creditor of this debt which was charged off on 04/30/2003, more than four years before the filing of the debtor's bankruptcy petition. Roundup claims that, because the debtor listed the debt as disputed on Schedule F, that such act somehow removes the bar of the statute of limitation or causes the statute to begin running anew under N.C.G.S. § 1-27. B-Real and Roundup simply conclude as follows:

If a debtor schedules the debt as due and owing for a specific amount under penalty of perjury, NCGSA § 1-27 removes the bar of the statute of limitations and the statute begins to run anew. Since a creditor is not served with a copy of the schedule F, the creditor doesn't know if the debt is acknowledged to exempt the debt from the statute of limitations.

*Creditors' Brief*, Section VI, ¶5.

The debtor knows of no authority, and the creditors fail to cite any authority, in support of their contention that the debtor's act of scheduling the disputed debt that Roundup now claims, operates as a renewal of the statute of limitation.

Further, the debtor concludes it is a red herring for the creditors to argue that they would not know if a debt is exempt from the statute of limitations unless they were served with a copy of the debtor's Schedule F. B-Real admits that it filed its claim based upon *NCO Portfolio Management*,



*Inc* 's notice of the debtor's bankruptcy case and upon *NCO*'s representations to B-Real as to the particulars of the claim. *Creditors' Brief, Facts and Procedures*, ¶4. The Court did not serve NCO or B-Real with notice of the debtor's Chapter 13 case as the debtor had not listed B-Real, NCO or the alleged original creditor, Debt One on the creditor matrix. These facts make it clear that B-Real did not review or rely upon the debtor's petition or creditor matrix before filing its claim, but rather that it filed a claim solely upon the information provided to it by NCO.

It defies reason, then, for the debt buyers to maintain that their duty to inquire into the validity of a claim arises only when the debtor or Court serves the creditor with a schedule disputing the debt. The creditors claim in their brief:

To satisfy due process, if a court sanctions a creditor for not reviewing the debtor's schedule prior to filing a claim, then the court must send copies of the entire petition with notice that if a claim is disputed full documentation must be attached to the proof of claim. This will unduly burden all bankruptcy courts.

*Creditors' Brief*, Section I, ¶4, lines 6-9.

To the contrary, debt buyers such as B-Real and Roundup are unduly burdening the Court by shifting the cost of pre-filing review from the debt buyer to debtors and trustees.

### Conclusion

The debtor respectfully asks the Court to issue a show cause order to review the practices and procedures of B-Real and Roundup to determine if they comply with the Bankruptcy Rules in their filing of claims in this District. The debtor does not, as the creditors claim in their brief, ask the Court to "legislate to change the Bankruptcy Code and Rules for debt buyers." *Brief*, Introduction, ¶7, lines 5-6. Rather, as the debt buying industry is a recent and evolving phenomenon, it is the debt buyers who are exploiting the rules by filing stale and deficient claims. The debtor submits that

under the existing framework in this District, where the only risk to the debt buyer is that its stale claim will be disallowed on an individual objection by objection basis, the debtors and trustees subsidize the debt buying industry and the claims administration process suffers.

This the 2nd day of September, 2008.

FINANCIAL PROTECTION LAW CENTER

By: /s/ Maria D. McIntyre  
Maria D. McIntyre  
P.O. Box 390, Wilmington, NC 28402  
Phone: (910) 442-1013 / Fax: (910) 442-1011  
*Attorneys for Debtor*

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies under penalty of perjury that she is over eighteen (18) years of age, and that the foregoing

**DEBTOR'S REPLY BRIEF  
IN SUPPORT OF DEBTOR'S OBJECTIONS TO CLAIMS OF  
B-REAL, LLC (CLAIM NO. 5)  
AND  
ROUNDUP FUNDING, LLC (CLAIM NO. 7)**

in the above captioned case was this day served upon the below named persons by mailing, postage prepaid, first class mail, of a copy of such instrument to such persons, parties and/or counsel at the address shown below:

Mr. Robert R. Browning  
Chapter 13 Trustee  
Post Office Box 8249  
Greenville, NC 27835

Mr. Richard D. Sparkman  
Post Office Box 1687  
Angier, NC 27501  
*Attorney for B-Real, LLC & Roundup  
Funding, LLC*

Mr. John C. Bircher, III  
White & Allen, P.A.  
Post Office Box 1555  
New Bern, NC 28563  
*Attorney for B-Real, LLC & Roundup  
Funding, LLC*

Mr. Aaron J. Nash  
Hale, Dewey & Knight, PLLC  
88 Union Avenue, Suite 700  
Memphis, TN 38103

This the 2nd day of September, 2008.

FINANCIAL PROTECTION LAW CENTER

By: /s/ Maria D. McIntyre  
Maria D. McIntyre  
P.O. Box 390, Wilmington, NC 28402  
Phone: (910) 442-1013  
*Attorneys for Debtor*

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF NORTH CAROLINA  
WILMINGTON DIVISION

IN RE:  
ROBIN GRAHAM ANDREWS

CASE NO.:  
08-00151-8-JRL

DEBTOR(S)

CHAPTER 13

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ADDENDUM TO DEBTOR'S REPLY BRIEF

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Debtor Robin Andrews respectfully submits this addendum to her *Reply Brief In Support of Debtor's Objections to Claims of B-Real, LLC (Claim No. 5) and Roundup Funding, LLC (Claim No. 7)* filed on September 2, 2008:

B- Real very recently submitted discovery responses (a copy is attached as Exhibit A<sup>1</sup>) in the *Rogers v. B-Real, LLC, et al.* \_\_\_ B.R. \_\_\_, 2008 WL 2810593 (Bkrcty.M.D.La.) case cited by the debtor in her initial brief. B-Real's response to Interrogatory No. 3 is relevant in that B-Real acknowledges a complete lack of review of stale claims as part of a deliberate business model that shifts the costs of such review to debtors and their counsel as follows:

**No. 3:** Describe in detail all procedures taken by you with respect to screening debts you receive to make sure the debt is not outside the statute of limitations/prescriptive period.

**Response:** None. Screening to see if an affirmative defense, i.e. statute of limitations, is applicable to a claim is the responsibility of debtors and their attorneys. Debtors attorneys are paid for reviewing claims with their clients and to object to the claim, if warranted under 11 U.S.C. § 502(b)(1)-(9).

The debtor submits that such a disclosure by B-Real, in another similarly situated case where time barred claims of B-Real are at issue, is a strong indication that no such review was undertaken by B-

Real prior to its filing of the claim in the debtor's case. Given that B-Real is a regular and prolific filer in this District, the debtor submits that inquiry into the pre-filing review procedures of B-Real is warranted by the Court

This the 8th day of September, 2008.

FINANCIAL PROTECTION LAW CENTER

By: /s/ Maria D. McIntyre  
Maria D. McIntyre  
P.O. Box 390, Wilmington, NC 28402  
Phone: (910) 442-1013 / Fax: (910) 442-1011  
*Attorneys for Debtor*

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<sup>1</sup> The copy attached contains only the written responses and not the documents produced by B-Real. Some of the documents contained personal identifying information of the Plaintiff and none of the documents was relevant to the interrogatory response to which the debtor refers.

UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF LOUISIANA

In re:

STEPHEN DOUGLAS ROGERS  
JULIE KELLY ROGERS,

Debtor(s).

Bankruptcy No. 07-11293

Chapter 13

STEPHEN DOUGLAS ROGERS and  
JULIE KELLY ROGERS,

Plaintiffs,

vs.

B-REAL, LLC aka B-LINE, LLC, aka  
ROUNDUP FUNDING, LLC, aka TRIUMPH  
PARTNERSHIPS, LLC

Defendant(s).

ADV. NO. 08-1011

DEFENDANT'S RESPONSE TO PLAINTIFFS' FIRST SET OF  
INTERROGATORIES AND REQUEST FOR PRODUCTION

NOW INTO COURT through undersigned counsel come defendant, B-Real, LLC, who respond to the Interrogatories and Requests for Production as follows:

GENERAL OBJECTIONS

1. Creditor objects to these requests to the extent that they seek information concerning matters other than those at issue in this bankruptcy matter. To the extent that the requests relate to other issues, they are overly broad, unduly burdensome, seek irrelevant information and they are not calculated to lead to the discovery of admissible evidence.

2. Creditor objects to these requests to the extent that they seek information privileged because of the attorney-client or work product privileges, including the qualified privileges accorded certain experts' opinions under the Federal Rules of Civil Procedure

3. Creditor objects to these requests to the extent that they seek trade secrets, proprietary information or other privileged or confidential information.

4. Creditor objects to all requests insofar as they call for information, which is neither admissible under the Federal Rules of Civil Procedures nor reasonably calculated to lead to the discovery of admissible evidence.

5. Creditor objects to any requests seeking information or documents available in the public literature and thus equally available to all parties.

7. The responses herein will be subject to and limited by the foregoing Preliminary Statement and General Objections. Additional specific objections may be made to specific requests.

8. Creditor further state that in preparing and making these answers, it has not accepted or acquiesced in the purported directions, conditions or definitions imposed at the time the document request were propounded by Debtor, except and to the extent that the same may have been consistent or in conformity with its understanding of the applicable discovery rules.

NOW, IN RESPONSE TO THE INTERROGATORIES AND REQUESTS FOR PRODUCTION:

**NO. 1:** Please identify by name, bankruptcy case number, date of bankruptcy case filing, date of filing proof of claim and date debt was incurred each proof of claim that you have filed in the U.S. Bankruptcy Court for the Middle District of Louisiana between the dates of January 1, 2007, and July 22, 2008.

**RESPONSE:** The request is overly broad, unduly burdensome, not relevant, designed to harass Creditor, and not calculated to lead to the discovery of admissible evidence.

**NO. 2:** As to each proof of claim identified in Interrogatory No. 1, please provide a copy of said proof of claim including any and all attachments filed with the proof of claim.

**RESPONSE:** The request is overly broad, unduly burdensome, not relevant, designed to harass Creditor, and not calculated to lead to the discovery of admissible evidence.

**NO. 3:** Describe in detail all procedures taken by you with respect to screening debts you receive to make sure the debt is not outside of the statute of limitations/prescriptive period.

**RESPONSE:** None. Screening to see if an affirmative defense, i.e. statute of limitations, is applicable to a claim is the responsibility of the debtors and their attorneys. Debtors attorneys are paid for reviewing claims with their clients and to object to the claim, if warranted under 11 U.S.C. § 502(b)(1)-(9).

**NO. 4:** Please provide all documents and logs concerning the debts that are the subject of this case created by you with a list and explanation of abbreviations used in any logs or documents.

**RESPONSE:** Documents provided herein.

**NO. 5:** Please provide a copy of any Plan of Merger and Acquisition or Asset Purchase Agreement between you and NCO Portfolio Management, Inc. or any entity regarding the debt referenced in the proof of claim which forms the basis for this adversary proceeding.

**RESPONSE:** The assignment between NCO Portfolio Management and Creditor is attached herein.

**NO. 6:** Please produce a documentary chain of title from Arkansas EM-I Gatewood ER Svs. to NCO Portfolio Management, Inc. and from NCO Portfolio Management, Inc. to B-Real, LLC for the debt on which you filed a claim at issue in this adversary proceeding.

**RESPONSE:** Documents provided herein

**NO. 7:** Please produce a documentary chain of title from Sterling ER Physicians to NCO Portfolio Management, Inc. and from NCO Portfolio Management, Inc. to B-Real, LLC for the debts on which you filed the claims at issue in this adversary proceeding.

**RESPONSE:** The assignment between NCO Portfolio Management, Inc. and Sterling ER Physicians is not in the possession of Creditor. The assignment from NCO Portfolio Management, Inc. and Creditor is produced herein.

**NO. 8:** Describe in detail how your collection system is organized with respect to the receipt, processing and reporting of bankruptcy accounts, including the written procedures and documents related to the said procedures.

**RESPONSE:** Creditor does not have a collection system and does not report any accounts to any credit reporting agencies.

**NO. 9:** State the name, title or position, address and telephone number of each and every witness that you plan to call to testify at the hearing in this case and state the substance of the testimony expected from each such witness.

**RESPONSE:** No witness is expected to testify at this point since the issue is a matter of law. There is no factual dispute requiring any testimony. However, Creditor reserves the right to present a witness.



**NO. 10:** Identify with particularity each and every exhibit that you will seek to introduce into evidence at the hearing in this matter.

**RESPONSE:** Creditor intends to provide the court with copies of the Plaintiffs' own petition, background for the medical treatments and statements to show that the underlying debt is valid against the debtors.

**NO. 11:** State the name, address and title of each and every party providing any information with respect to the answers to these interrogatories.

**RESPONSE:** Linh K. Tran  
Associate In-House General Counsel for B-Real, LLC  
2101 Fourth Avenue, Suite 900  
Seattle, WA 98121

**NO. 12:** How many proofs of claims did you file in 2007?

**RESPONSE:** The request is overly broad, unduly burdensome, not relevant, designed to harass Creditor, and not calculated to lead to the discovery of admissible evidence.

**NO. 13:** How many proofs of claims have you filed in 2008?

**RESPONSE:** The request is overly broad, unduly burdensome, not relevant, designed to harass Creditor, and not calculated to lead to the discovery of admissible evidence.

**NO. 14:** Of the number of proofs of claims filed in 2007, how many were signed by Steven G. Kane?

**RESPONSE:** The request is overly broad, unduly burdensome, not relevant, designed to harass Creditor, and not calculated to lead to the discovery of admissible evidence. Almost all claims are filed by Steve Kane. He supervises a team to review and file the claims manually. Similar to a paralegal who files pleadings using the attorney's login at the direction of the attorney.

**NO. 15:** Of the number of proofs of claims filed in 2008, how many were signed by Steven G. Kane?

**RESPONSE:** The request is overly broad, unduly burdensome, not relevant, designed to harass Creditor, and not calculated to lead to the discovery of admissible evidence.

**NO. 16:** Please describe in detail how you came into possession of the debts associated with the proofs of claims you filed in the underlying Chapter 13 case associated with this adversary proceeding.

**RESPONSE:** Creditor purchased the account from NCO Portfolio Management, Inc. who provided the account information, Plaintiff's personal identifiers, bankruptcy information, and the medical statements supporting the debt.

Generally, prior to purchasing a portfolio of bankrupt consumer debt, Creditor receives a computer file for each account contained in the portfolio (hereinafter, a "Computer File"). The Computer file is a list of account information that includes the debtor's name, account number, social security number, prepetition balance, address, original creditor name, and description of debt for basis of claim. This information is subsequently provided in the proof of claim. Upon receipt of the Computer Files from a potential seller, the data is loaded onto a database. Creditor then subjects each account to a due diligence process designed to confirm that (i) the Debtor for the account is the same individual as the Debtor for the referenced bankruptcy case and (ii) the status of the bankruptcy case permits Creditor to file either (A) a proof of claim for the account, or (B) a Rule 3001 notice evidencing the transfer of an existing proof of claim to Creditor.

When an account has been identified as eligible for a proof of claim to be filed, Creditor generates a draft proof of claim. These draft claims are then physically reviewed by a team of employees under Steven G. Kane's supervision to ensure that these are proper claims that can be filed. Creditor's personnel charged with filing proofs of claim in consumer bankruptcy cases receive substantial training, including careful review as well as "side-by-side" practice, in which a new employee walks through the claim filing process with an experienced manager. The claims filing team also has continuous access to Mr. Kane and managers supervised by Mr. Kane, to answer all questions the claim filers may have.

Among other things, the employee physically verifies the debtor's name and the case number, to make sure this data is consistent with the information provided by the originating creditor and seller. If that information is inconsistent, the proof of claim is not filed. Rather, the employee physically reviews the proof of claim with Mr. Kane or a manager supervised by Mr. Kane, to determine the nature of the inconsistency. If they are unable to resolve that issue, the matter is always brought to Mr. Kane's attention for his review. If, upon Mr. Kane's review, he determines that the information in the draft proof of claim is incorrect but can be corrected, the proof of claim is edited to reflect the proper information. If the proof of claim cannot be reconciled, no proof of claim is filed.

Once a proof of claim is determined to be correct and appropriate for filing, trained employees under Mr. Kane's supervision are authorized to file the proof of claim with his signature affixed. Such authorization is conditioned upon the employee in question having followed the company's claim processing procedures. When filed, a proof of claim contains information to allow the debtor to determine the basis of the claim. Each claim that is filed contains a summary sheet which provides: (i) the redacted account number; (ii) the debtor's redacted social security number; (iii) the prepetition account balance; (iv) the name of the original creditor; (v) basis for claim; and (vi) account open date.

**NO. 17:** Please provide a detailed job description for Steven G. Kane.


**RESPONSE:** Mr. Kane is the operations manager. He is responsible for filing claims and transfers of claims, training employees to properly file claims or transfers of claims, supervise his employees who file claims or transfers on his behalf, and handle the daily operations concerning such claims, i.e. reviewing correspondence from attorneys and trustees concerning the claims or transfers of claims filed.

**NO. 18:** Do you regularly collect or attempt to collect debts owed or due or asserted to be owed or due another?

**RESPONSE:** B-Real files proofs of claims. B-Real does not contact debtors directly. B-Real does not service any accounts for any third parties.

Monroe, Louisiana, this 25th day of August, 2008.

Respectfully Submitted:


/s/Ashley S. Burch   
Ashley S. Burch, La. Bar # 24984  
1904 Royal Ave.  
Monroe, Louisiana 71201  
Telephone: (318) 361-3140  
Facsimile: (318) 361-3141  
Attorney for the Defendants

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Defendant's Response to Plaintiffs' First Set of Requests for Admissions has been served upon the following via U. S. mail with postage prepaid and properly addressed as follows:

J. David Andress  
10537 Kentshire Court, Suite A  
Baton Rouge, Louisiana 70810

Monroe, Louisiana, this 25th day of August, 2008.

/s/Ashley S. Burch   
Ashley S. Burch, La. Bar # 24984

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies under penalty of perjury that she is over eighteen (18) years of age, and that the foregoing

**ADDENDUM TO  
DEBTOR'S REPLY BRIEF**

in the above captioned case was this day served upon the below named persons by mailing, postage prepaid, first class mail, of a copy of such instrument to such persons, parties and/or counsel at the address shown below:

Mr. Robert R. Browning  
Chapter 13 Trustee  
Post Office Box 8249  
Greenville, NC 27835

Mr. Richard D. Sparkman  
Post Office Box 1687  
Angier, NC 27501  
*Attorney for B-Real, LLC & Roundup  
Funding, LLC*

Mr. John C. Bircher, III  
White & Allen, P.A.  
Post Office Box 1555  
New Bern, NC 28563  
*Attorney for B-Real, LLC & Roundup  
Funding, LLC*

Mr. Aaron J. Nash  
Hale, Dewey & Knight, PLLC  
88 Union Avenue, Suite 700  
Memphis, TN 38103

This the 8th day of September, 2008.

FINANCIAL PROTECTION LAW CENTER

By: /s/ Maria D. McIntyre  
Maria D. McIntyre  
P.O. Box 390, Wilmington, NC 28402  
Phone: (910) 442-1013  
*Attorneys for Debtor*