UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

ANGELIQUE DOW

Chapter 7
Case No. 06-13460

Debtor

UNITED STATES TRUSTEE'S RESPONSE TO MOTION PURSUANT TO 11 U.S.C. §105 FINDING THAT DEBTOR'S ATTORNEY IS NOT A DEBT RELIEF AGENCY AS THAT TERM IS DEFINED IN 11 U.S.C. §101(12A) FOR SERVICES RENDERED IN CONNECTION WITH THIS PRO BONO BANKRUPTCY CASE

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 added provisions to the Bankruptcy Code ("Code") imposing certain requirements and restrictions on "debt relief agencies." See 11 U.S.C. §§ 526-528. Section 101(12A) of the Code defines the term "debt relief agency" as "any person who provides any bankruptcy assistance to an assisted person in return for the payment of money or other valuable consideration, or who is a bankruptcy petition preparer under section 110." 11 U.S.C. § 101(12A).

In this case, debtor's counsel – Michael J. O'Connor – has filed a motion requesting this Court to issue an advisory opinion finding that he is not a debt relief agency as that term is defined in 11 U.S.C. § 101(12A) for services rendered in connection with this *pro bono* bankruptcy case.[1] While the United States Trustee agrees with debtor's counsel that he is not a

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[1] See Motion Pursuant to 11 U.S.C. § 105 Finding That Debtor's Attorney is not a Debt Relief Agency as That Term is Defined in 11 U.S.C. § 101(12A) for Services Rendered in Connection with this Pro Bono Bankruptcy Case ("Motion").

debt relief agency when, as here, he is providing bankruptcy assistance on a *pro bono* basis, see infra at 9-12, his motion is not properly before the Court for at least two reasons.

First, this Court has no jurisdiction to issue such an advisory opinion. Article III of the Constitution limits courts to the resolution of actual "cases and controversies." In this case there is no disagreement between the debtor's counsel and the United States Trustee with respect to the legal question presented by the motion. Moreover, even if there were a disagreement, debtor's counsel would lack standing to raise the issue because he has not alleged any injury to himself or his client. Instead, debtor's counsel seeks such an order because he alleges that other attorneys may be reluctant to provide *pro bono* services to other debtors. Debtor's counsel has no standing to raise the rights of other attorneys or other debtors.

Second, the motion should be denied because it seeks equitable relief, which Fed. R. Bankr. P. 7001 requires be sought by complaint in an adversary proceeding. This point was specifically recognized by other courts, which have dismissed similar motions seeking declarations that the debt relief agency provisions are invalid as applied to licensed attorneys. See In re Jackson, Case No. 05-44941-B (Bankr. D.S.C. Nov. 21, 2005) (Exhibit A); In re Application for General Order Determining That Certain Provisions of the Bankruptcy Abuse Prevention and Consumer Act of 2005 Are Inapplicable to Attorneys, Misc. No. 9 (W.D. Okla. Dec. 1, 2005) (Exhibit B).

Accordingly, this Court should deny the Motion for lack of jurisdiction or, in the alternative, for failure to file as an adversary proceeding.

I. THIS COURT LACKS JURISDICTION TO CONSIDER THE MOTION BECAUSE THERE IS NO CASE OR CONTROVERSY.

"Even though bankruptcy courts are not Article III courts, they are nevertheless courts of limited jurisdiction bound by Article III, section 2 of the United States Constitution" because they derive their jurisdiction from Article III courts. In re Nunez, Nos. 98-CV-7077 and 98-CV-7078, 2000 WL 655983 (E.D.N.Y. March 17, 2000). Article III of the Constitution limits the federal courts to the resolution of live "cases and controversies." Lujan v. Defenders of Wildlife, 504 U.S. 555, 559-60 (1992); Diamond v. Charles, 476 U.S. 54, 61-62 (1986); Allen v. Wright, 468 U.S. 737, 750 (1984). This limitation encompasses several related principles. It prohibits a court from issuing an advisory opinion on a legal issue upon which there is no actual dispute. Preiser v. Newkirk, 442 U.S. 395, 400 (1975). (1911). It also prohibits a court from considering an issue that a party has no standing to raise. Allen v. Wright, 468 U.S. at 750. In this case, the Motion filed by debtor's counsel falls within both of these prohibitions.

A. Debtor's Counsel Cannot Seek An Advisory Opinion On An Issue Upon Which There Is No Dispute

The Supreme Court has held that the term "controversies" in Article III "implies the existence of present or possible adverse parties." Muskat v. United States, 219 U.S. 346, 357 (1911). Thus, judicial power under Article III is limited "to determin[ing] actual controversies arising between adverse litigants." Id. It does not include the power to issue "advisory opinions not founded upon the facts of a controversy between truly adverse parties." Scott v. Pasadena Unified School District, 306 F.3d 646, 654 (9th Cir. 2002). Accord Preiser v. Newkirk, 442 U.S. 395, 400 (1975) (noting a federal court "has neither the power to render 'advisory opinions' nor 'to decide questions that cannot affect the rights of the litigants in the case before them."

United States v. Johnson, 319 U.S. 302, 305 (1943) (dismissing as non-justiciable a suit brought at the request of the defendant because "it [was] not in any real sense adversary."); In re Nunez, 2000 WL 655983, * 6 (stating federal courts "cannot opine on any issues except those posed by adverse litigants"). This principle dates from the Supreme Court's refusal to answer the hypothetical questions directed to it by the Secretary of State Thomas Jefferson. Glidden Co. v. Zdanok, 370 U.S. 530, 587 (1962) (Clark, J., concurring) (citing The Correspondence and Public Papers of John Jay).

In this case, there is no allegation that the United States Trustee, who has authority to file motions for violations of the debt relief provisions, 11 U.S.C. § 526(c)(5), has interpreted the definition of "debt relief agency" to include attorneys who provide services *pro bono*. In fact, the United States Trustee agrees with debtor counsel that he is not a debt relief agency, when, as here, he is providing bankruptcy assistance on a *pro bono* basis. See infra at 9. See also Exhibit B to Motion (article citing a Minneapolis attorney as noting that several Assistant United States Trustees have advised him that an attorney providing *pro bono* services is not a debt relief agency). Thus, the Motion does not raise an issue upon which there is an actual dispute or disagreement regarding the proper interpretation of the term "debt relief agency." Because there is no such disagreement, the Motion fails to present an actual case or controversy as required by Article III and should be denied for lack of jurisdiction.[2]

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[2] Debtor's counsel cannot rely on 11 U.S.C. § 105 to avoid this jurisdictional defect. Section 105 addresses the court's authority to grant relief; it does not serve as a basis for the Court's jurisdiction. In re Matter of Zales Corp., 62 F.3d 746, 751 (5th Cir. 1995); United States Dep't of Air Force v. Carolina Parachute Corp., 907 F.2d 1469, 1475 (4th Cir. 1990); American Hardwood, Inc. v. Deutchse Credit Corp., 885 F.2d 621, 624 (9th Cir. 1989); In re Nunez, 2000 WL 655983, at *8. In any case, Congress cannot override Article III limitations with a statute.

B. Debtor's Counsel Lacks Standing.

Even if there were an actual disagreement between debtor's counsel and the United States Trustee with regard to the issue of whether an attorney providing *pro bono* services fits within the definition of "debt relief agency," 11 U.S.C. § 101(12A), this Court would lack jurisdiction because debtor's counsel has no standing to raise the issue. As the Supreme Court has stressed, "the presence of a disagreement, however, sharp and acrimonious it may be, is insufficient by itself to meet Article III's requirements." Diamond v. Charles, 476 U.S. at 62. Instead, Article III's standing doctrine requires a plaintiff

> to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," . . . and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision. . . ."

Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982) (citations omitted). see also Baron & Budd, P.C. v. Unsecured Asbestos Claimants Comm., 321 B.R. 147, 160-61(D.N.J. 2005) (using the Lujan standard to determine whether standing exists in a bankruptcy case); In re Park South Securities, LLC, 326 B.R. 505, 511 (Bankr. S.D.N.Y. 2005) (using same criteria to determine whether standing exists in a bankruptcy case).

Based on these criteria, courts have dismissed motions by debtors or their attorneys seeking declarations that attorneys who practice before a bankruptcy court are not debt relief agencies, ruling that the debtor has no real, actual or direct harm or injury and thus, cannot establish standing. In re David Cantor on Behalf of Himself and Members of the Bar Practicing Before the U.S. Bankruptcy Courts for the Western District of Kentucky, Case No. 05-2005

(Bankr. W.D.Ky. May 23, 2006) (Exhibit C); In re Ella Srymanske, Case No. 05-60519 (Bankr. D. N.J. April 7, 2006) (Exhibit D); In re Michelle Moore, No. 05-24651 (Bankr. W.D. Wash. Feb. 23, 2006) (Exhibit E); In re McCartney, 336 B.R 588 (Bkrtcy.M.D.Ga. 2006); In re Harvey Beaver, No. 05-04080 (Bankr. W.D.N.C. Nov. 15, 2005) (Exhibit F).

The Motion here suffers from the same defect because debtor's counsel does not allege that he has suffered any injury as a result of the purported confusion over whether a *pro bono* attorney fits within the definition of debt relief agency. Debtor's counsel does not allege that any enforcement action has been brought against him for violation of the debt relief provisions. In fact, he states that he "routinely complies with the [debt relief provisions], even in the pro bono cases." Motion, ¶ 7. Nor is there any reason to believe that he would face the threat of any such enforcement since the United States Trustee agrees that an attorney providing bankruptcy assistance on a *pro bono* basis does not fit within the definition of a debt relief agency. See infra at 9. Accordingly, debtor's counsel has not alleged (and cannot allege) that he has suffered any injury.[3]

Instead, debtor's counsel seeks a declaratory order because he alleges that other attorneys are reluctant to provide *pro bono* services because they fear potential exposure as debt relief agencies and that as a result other debtors may have difficulty obtaining an attorney. Motion, ¶ 3. But the debtor's counsel has no standing to seek relief on the behalf of other attorneys or individuals who seek such pro bono services. As courts have stressed, the usual rule is that an individual must "'assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." Kowalski v. Tesmer, 543 U.S. 125, 129 (2004)

[3] The debtor also cannot show any injury because she has counsel.

(quoting Warth v. Seldin, 422 U.S. 490, 499 (1975)). Courts have recognized exceptions to this rule only where the individual can show that (1) he or she has a "close" relationship with the person who possesses the right, and (2) there is a "hinderance" to that person's ability to protect his own interest. Id. Accord Singleton v. Wulff, 428 U.S. 106, 116 (1976); Corey v. Dallas, 492 F.2d 496, 497 (5th Cir. 1974).

Applying these standards, courts have rejected similar attempts by attorneys to adjudicate the rights of others where there is no obstacle to the individual's ability to protect his or her own rights. Kowalski v. Tesmer, 543 U.S. at 131-34 (attorney lacked standing to assert the rights of indigent defendants denied appellate counsel); Conn v. Gabbett, 526 U.S. 286, 292-93 (1999) (rejecting an attorney's attempt to adjudicate the rights of a client); Juvenile Matters Trial Lawyers v. Judicial Department, 363 F. Supp. 2d 239, 249 (D. Conn. 2005) (plaintiffs lacked standing to assert that low rates paid to attorneys representing indigent children violated their right to effective representation).

In this case, debtor's counsel has not alleged that he has a close relationship with the attorneys who are reluctant to accept *pro bono* cases or their potential clients. Nor has he alleged that there is any barrier preventing them from protecting their own rights.

Accordingly, because the debtor's counsel cannot show any injury to himself, the Motion should be denied for lack of standing.

II. THE MOTION SHOULD BE DENIED BECAUSE SUCH RELIEF MUST BE SOUGHT BY ADVERSARY PROCEEDING.

The Federal Rules of Bankruptcy Procedure distinguish between "contested matters" and "adversary proceedings." Under Rule 9014(a), a contested matter not otherwise governed by the

Rules is initiated by the filing of a motion. Fed. R. Bankr. P. 9014(a). Rule 7001 describes a series of proceedings denominated as "adversary proceedings" that are governed by Part VII of the Rules.[4] Rule 7001 provides that an adversary proceeding includes "a proceeding to obtain an injunction or other equitable relief . . ." or "a proceeding to obtain a declaratory judgment relating to any of the foregoing . . . ." Fed. R. Bankr. P. 7001(7) and (9).

That the relief sought in the Motion falls within the scope of Rule 7001 is not seriously subject to question. The Motion seeks declaratory relief that would effectively enjoin the enforcement of the debt relief agency provisions of the BAPCPA against attorneys who provide *pro bono* service in this Court. Because the relief sought is both declaratory and equitable, it may be sought only through the filing of a complaint and the service of the complaint and a summons on all necessary parties defendant to the action. Indeed, other bankruptcy courts have recognized this very point and dismissed motions challenging the application of debt relief agency provisions for failure to file as an adversary proceeding. See In re Jackson, Case No. 05-44941-B (Bankr. D.S.C. Nov. 21, 2005) (Exhibit A); In re Application for General Order Determining That Certain Provisions of the Bankruptcy Abuse Prevention and Consumer Act of

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[4] Part VII of the Bankruptcy Rules makes applicable to adversary proceedings, with some modifications, all of the Federal Rules of Civil Procedure that apply to civil actions in district courts. Rule 7003 directly applies Fed. R. Civ. P. 3 to adversary proceedings; an adversary proceeding is commenced by filing a complaint with the court. Fed. R. Bankr. P. 7003; Fed. R. Civ. P. 3. Rule 7004 incorporates, with some modifications not germane to the issues in this case, the requirements of Fed. R. Civ. P. 4 that the complaint filed pursuant to Rule 7003 be served upon the defendants with a summons issued by the clerk of the court. Fed. R. Bankr. P. 7004; Fed. R. Civ. P. 4. If, therefore, the relief sought by the debtor's counsel in the Motion was properly the subject of an adversary proceeding, he should have filed a complaint with the clerk of the Bankruptcy Court, had the clerk issue a summons, and served the summons and complaint in compliance with the requirements of the Federal Rules of Civil Procedure.

2005 Are Inapplicable to Attorneys, Misc. No. 9 (W.D. Okla. Dec. 1, 2005) (Exhibit B).

Accordingly, the Motion by debtor's counsel should be denied because it was not brought as an adversary proceeding

III. THE DEBT RELIEF AGENCY PROVISIONS OF THE BANKRUPTCY CODE ARE NOT APPLICABLE TO PRO BONO ATTORNEYS

While the Motion is not properly before this Court, the United States Trustee agrees with the debtor's counsel that where, as here, an attorney provides bankruptcy assistance to a debtor on a *pro bono* basis, the attorney does not fall within the term debt relief agency.

The interpretation of the Bankruptcy Code begins with the language itself. Lamie v. United States Trustee, 540 U.S. 526, 534 (2004). Section 101(12A) defines the term "debt relief agency" as follows:

> The term "debt relief agency" means any person who provides any bankruptcy assistance to an assisted person in return for the payment of money or other valuable consideration, or who is a bankruptcy petition preparer under section 110, but does not include --
>
> > (A) any person who is an officer, director, or agent of a person who provides such assistance or of the bankruptcy petition preparer;
> >
> > (B) a nonprofit organization that is exempt from taxation under section 501(c)(3) of the Internal Revenue Code of 1986;
> >
> > (C) a creditor of such assisted person, to the extent that the creditor is assisting such assisted person to restructure any debt owed by such assisted person to the creditor;
> >
> > (D) a depository institution (as defined in section 3 of the Federal Deposit Insurance Act) or any Federal credit union or State credit union (as those terms are defined in section 101of the Federal Credit Union Act), or any affiliate or

> subsidiary of such depository, institution or credit union; or
>
> (E) an author, publisher, distributor, or seller of works subject to copyright protection under title 17, when acting in that capacity.

Based on the plain language of this provision, an attorney who provides bankruptcy assistance to an assisted person "for the payment of money or other valuable consideration" is included in the definition of "debt relief agency." Hersh v. United States, 347 B.R. 19, 22-23 (N.D. Tex. 2006); Olsen v. Gonzales, 350 B.R. 906, 911-12 (D. Ore. 2006).[5] However, the language of this provision also makes clear that an attorney is not a debt relief agency when he or she provides such services on a *pro bono* basis. In re Gloria Reyes, No. 06-15957 BKC-AJC, 2007 WL 13693, * 4 (Bankr. S.D. Fla. Jan. 17, 2007) (attorneys who provide bankruptcy assistance on a *pro bono* basis are not debt relief agencies).[6]

Looking at the plain language of section 101(12A), the operative clause is "in return for the payment of money or other valuable consideration." By definition, *pro bono* attorneys do not receive, and do not expect to receive, payment of money from their clients.[7] In the same vein,

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[5] Contra Milavetz, Gallop & Milavetz v. United States, No.05-CV-2626 (D. Minn. Dec. 7, 2005). The decision in Milavetz was issued in the context of denying the government's motion to dismiss and no final judgment has been issued. Plaintiffs have filed a motion for summary judgment based on the court's findings and the government has opposed on the grounds that plaintiffs are not entitled to judgment as a matter of law.

[6] Although the *pro bono* issue was the only issue before the court and the only issue which had been briefed, the court issued an opinion in which it *sua sponte* questioned the constitutionality of the debt relief provisions and whether they applied to attorneys. While the United States Trustee agrees with the court's conclusion as to the inapplicability of the provision to attorneys who provide services *pro bono*, the United States Trustee has filed a notice of appeal on the other findings.

[7] *Pro bono* is a short version of the Latin term *"pro bono publico,"* which is commonly defined as "[b]eing or involving uncompensated legal services performed esp. for public good."

pro bono attorneys do not receive valuable consideration for their services. Although not specifically defined under the Bankruptcy Code, "valuable consideration" commonly involves "pecuniarily measurable benefit." Black's Law Dictionary 326 (8th ed. 2004).[8] There is no indication in the legislative history that Congress intended "valuable consideration" to mean anything different, or that it encompasses the non-pecuniary beneficial feeling or credit an attorney experiences when providing *pro bono* services.

In response to the Motion, the Capital Region Bankruptcy Bar Association has submitted a letter supporting the request for guidance on this issue. In its letter, the Capital Region Bankruptcy Bar Association noted that the New York State CLE Board Regulations provide that attorneys may receive one CLE credit hour for every six 50-minute hours (300 minutes) of eligible *pro bono* legal services provided. Letter to Hon. Robert E. Littlefield, Jr., from Francis J. Brennan, dated January 18, 2007.[9] The letter expresses concern that this nominal credit could be viewed as "valuable consideration" under the definition of "debt relief agency."

"Consideration" is defined as "something (such as an act, a forbearance, or a return

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Black's Law Dictionary 1248-49 (8th ed. 2004).

[8] Another canon of statutory construction involves looking not only at the particular language, but to the language and design of the statute as a whole. See K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988); Crandon v. United States, 494 U.S. 152, 158 (1990). As such, this Court should note that the concept of valuable consideration is similar to the concept of "value" under section 548. See In re Churchill Mortgage Investment Corp., 256 B.R. 664, 677-78 (S.D.N.Y. 2000); In re Independent Clearing House Co., 77 B.R. 843, 867 (D. Utah 1987).

[9] Under the New York CLE Board Regulations, credit may only be earned for *pro bono* services provided pursuant to an assignment by a court or participation in a *pro bono* program sponsored by an Approved Pro Bono CLE Provider. New York State CLE Board Regulation and Guidelines, Section 3(D)(11). A maximum of six (6) credit hours may be earned during any one reporting cycle. Id.

promise) bargained for and received by a promisor from a promisee." Black's Law Dictionary 324 (8th ed. 2004). While payments made by a related third party can sometimes be part of the bargained for agreement (i.e. an attorney can agree to accept fees from a family member or friend of the debtor), the credit given by the New York State CLE Board is not part of any agreement made between the attorney and debtor for providing legal services. The debtor has no relationship to the New York State CLE Board. Nor does the debtor have any control over whether the credit is received. In fact, the debtor probably does not know that such credit is offered. The CLE credit given by New York State CLE Board is not, therefore, analogous to a case in which an attorney receives a payment of money or other pecuniary benefit from a family or friend of the debtor. Moreover, there is no contention that the amount of credit received by the attorney is equivalent to the value of the services provided. As the Capital Region Bankruptcy Bar Association itself acknowledges, this credit is nominal. Thus, the CLE credit received by an attorney for providing assistance on a *pro bono* basis is not "valuable consideration" under the definition of "debt relief agency."

Accordingly, the definition of a "debt relief agency" does not encompass *pro bono* attorneys.

CONCLUSION

While the United States Trustee agrees that debtor's counsel is not a debt relief agency when, as here, he provides representation on a *pro bono* basis, the United States Trustee requests that this Motion be denied for lack of jurisdiction. The Court does not have Article III jurisdiction because (1) there is no actual controversy or disagreement between the debtor's counsel and the United States Trustee regarding the issue of whether an attorney who provides

representation on a *pro bono* basis is a "debt relief agency," and (2) even if there were a dispute, debtor's counsel had no standing to raise the issue. In the alternative, the United States Trustee request that the case be dismissed for failure to file as an adversary proceeding.

Respectfully submitted,

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