20-1-bk (L)
In re: Gravel

United States Court of Appeals
for the Second Circuit

AUGUST TERM 2020
Nos. 20-1-bk(L), 20-2-bk, 20-3-bk

IN RE: NICHOLAS GRAVEL, AMANDA GRAVEL,
Debtors.

PHH MORTGAGE CORPORATION,
Creditor-Appellant,

v.

JAN M. SENSENICH,
Trustee-Appellee.

ARGUED: FEBRUARY 4, 2021
DECIDED: AUGUST 2, 2021

Before: JACOBS, BIANCO, PARK, Circuit Judges.

PHH Mortgage Corp. appeals from the order of the United States Bankruptcy Court for the District of Vermont (Brown, J.) imposing sanctions in three chapter 13 cases. PHH was sanctioned $75,000 for violation of Bankruptcy Rule of Procedure 3002.1 and $225,000 for violation of bankruptcy court orders. PHH argues that Rule 3002.1 does not authorize punitive monetary sanctions, and that PHH did not violate the court orders as a matter of law. We agree.

We VACATE the sanctions order and REVERSE.

JUDGE BIANCO concurs in part and dissents in part in a separate opinion.

MATTHEW J. DELUDE, Primmer Piper Eggleston & Cramer PC, Manchester, NH (Alexandra E. Edelman, Douglas J. Wolinsky, on the brief) for Creditor-Appellant PHH Mortgage Corp.

MAHESHA P. SUBBARAMAN, Subbaraman PLLC, Minneapolis, MN, for Trustee-Appellee Jan M. Sensenich.

Henry E. Hildbrand, III, Nashville, TN, for Amicus Curiae National Association of Chapter 13 Trustees.

Tara Twomey, National Consumer Bankruptcy Rights Center, San Jose, CA, for Amici Curiae National Consumer Bankruptcy Rights Center, National Association of Consumer Bankruptcy Attorneys, National Consumer Law Center, Legal Services Vermont, Inc., and Housing Clinic of Jerome N. Frank Legal Services Organization at Yale Law School.

DENNIS JACOBS, Circuit Judge:

This appeal involves punitive sanctions imposed in three chapter 13 cases in Vermont. The debtor households are the Gravels, the Beaulieus, and the Knisleys. The sanctioned party is the creditor-appellant PHH

Mortgage Corp., which holds or services the mortgage on the principal residence of each debtor household. The appellee, Jan Sensenich, is the chapter 13 standing Trustee for the District of Vermont. The Trustee shepherds the debtors through the chapter 13 process and oversees their payments to PHH under their respective chapter 13 plans.

PHH sent monthly mortgage statements listing fees totaling $716 that had not been properly disclosed in the three cases. The United States Bankruptcy Court for the District of Vermont (Brown, J.) sanctioned PHH $225,000 for violation of court orders issued in the Gravel and Beaulieu cases, which declared that the debtors were current on their mortgages and enjoined PHH from challenging that fact in any other proceeding.

The bankruptcy court also sanctioned PHH $75,000 for violation of Bankruptcy Rule of Procedure 3002.1 in all three cases. Rule 3002.1(c) requires that a creditor give formal notice to the debtor and trustee of new post-petition fees and charges, and it gives the bankruptcy court power to impose sanctions for non-compliance.

The bankruptcy court's sanctions order was certified for direct appeal. We hold that Rule 3002.1 does not authorize punitive monetary sanctions, and that PHH did not, as a matter of law, violate the court orders.

The sanctions order is VACATED and REVERSED.

BACKGROUND

Frustration with PHH began early in the Gravel case, which was filed in February 2011. The Gravels' plan provided for them to remain in their home while making "conduit" monthly mortgage payments for 60 months. Under the District of Vermont's bankruptcy procedures, the Gravels paid the Trustee who then disbursed the payment to PHH.

Pursuant to a (since superseded) standing order, the Trustee accounted for the payments in March and April as an "administrative arrearage" rather than as a regular post-petition monthly mortgage payment. In effect, those payments were treated as a pre-petition arrearage paid as a special claim, so that regular post-petition payments did not begin until the third month. Monthly payments were thus forwarded to PHH as regular mortgage payments beginning with May. Because of this accounting, PHH incorrectly termed the loan delinquent and began to add late penalties on mortgage payments for March and April. PHH sent monthly mortgage statements reflecting this delinquency, and the Trustee responded with three letters in 2012 and 2013 explaining PHH's error, to which PHH failed to respond.

When PHH threatened foreclosure, the Trustee in February 2014 moved to compel PHH to apply the mortgage payments as provided by the chapter 13 plan. The Trustee also requested an award of sanctions to the debtors. PHH corrected the mortgage statements to reflect that the Gravels were current on post-petition payment obligations. PHH promised to prevent future errors. The parties stipulated to a $9,000 sanction, which the bankruptcy court so-ordered in March 2014. (The $9,000 sanction is not the subject of this appeal.)

* * *

Two years later, the Gravels reached the end of their chapter 13 plan. An order on May 20, 2016, confirmed that the Gravels were "current." J. App'x 705. That is, the Gravels had cured all pre-petition arrearages or defaults existing when the case was filed, and made all post-petition payments. (An identical order was issued in the Beaulieu case; they are referenced as "Current Orders.")

When PHH sent another monthly mortgage statement five days later, the Trustee noticed that an old charge for "property inspection fees" was listed under the "loan information" section. Id. at 654. The statement specified that the recorded fee and other account information was provided to comply with local bankruptcy rules and was "not an attempt to collect a debt." Id. Further, the fee—which had grown to $258.75 over at least 25 monthly statements—was not reflected in the "total payment due." Id. The only payment due was the principal/interest and escrow.

Nevertheless, the Trustee moved for a finding of contempt and sanctions on the ground that the charge violated the Current Order, and that each of the 25 charges violated Bankruptcy Rule 3002.1. Rule 3002.1 governs installment payments on a home mortgage in a plan under chapter 13. Fed. R. Bankr. P. 3002.1(a).

Under the rule, a mortgage creditor "shall file and serve on . . . the trustee a notice itemizing all fees, expenses, or charges" that the creditor "asserts are recoverable against the debtor" and serve this notice "within 180 days after the date on which the fees, expenses, or charges are incurred." Fed. R. Bankr. P. 3002.1(c). If a creditor fails to comply, a bankruptcy court may preclude the creditor from presenting the claim as evidence in the case, or award the debtor other relief including expenses and attorney's fees. Fed. R. Bankr. P. 3002.1(i).

In response to the Trustee's motion, PHH admitted that the fee had not been properly noticed within 180 days under Rule 3002.1, removed the fee from the Gravels' mortgage statement, and opposed the motion for sanctions.

*   *   *

Late-noticed fees also appeared on the Beaulieus' monthly mortgage statements. They filed their chapter 13 case in March 2011. The statements began reflecting a fee for insufficient funds 18 months later and a charge for property inspection two years later; and those fees were still being listed when the bankruptcy court issued the Current Order on May 5, 2016. Twenty days later, PHH sent the Beaulieus a monthly statement, on which the fees were still listed. The insufficient funds fee was $30, and the property inspection fee was $56.25.

Around the time the Trustee filed its motion in the Gravel case, the Trustee moved for a finding of contempt and sanctions in the Beaulieu case on the same basis. PHH removed the charges from the Beaulieus' mortgage statement and opposed the motion.

* * *

Post-filing of the Knisley case, 25 monthly mortgage statements showed a late charge and property inspection fee that had not been properly disclosed within 180 days. The late charge was $124.50, and the property inspection was $246.50. The Trustee moved for sanctions under Rule 3002.1(i), and PHH removed the charge and fee and opposed the motion. PHH was not alleged to be in contempt of a current order because no current order had issued; the Knisleys had not reached the end of their plan.

* * *

After a consolidated hearing, the bankruptcy court granted the Trustee's motions in September 2016. It found that PHH had violated Rule 3002.1(c) 25 times in each case, as well as the two Current Orders. It sanctioned PHH $75,000 pursuant to Rule 3002.1(i). And it sanctioned PHH for the Current Orders violation pursuant to its inherent power and § 105 of the Bankruptcy Code: $200,000 in the Gravel case and $100,000 in the Beaulieu case.

The bankruptcy court noted that it "levies this substantial penalty on PHH to convey a clear message to PHH, and other mortgage creditors, that they may not violate court orders with impunity and will suffer significant monetary sanctions if they conduct their mortgage accounting operations in a manner that fails to fully comply with Rule 3002.1, violates court orders, or threatens the fresh start of Chapter 13 debtors." In re Gravel ("Gravel I"), 556 B.R. 561, 580 (Bankr. D. Vt. 2016), vacated and remanded sub nom. PHH Mortg. Corp. v. Sensenich, No. 5:16-CV-00256, 2017 WL 6999820 (D. Vt. Dec. 18, 2017). PHH was ordered to pay the $375,000 to "Legal Services Law Line of Vermont." Id.

The United States District Court for the District of Vermont (Crawford, J.) vacated both sanctions. It held that the $75,000 and $300,000 sanctions exceeded the bankruptcy court's "statutory and inherent powers" because it lacks power to impose "serious punitive sanctions." PHH Mortg. Corp., 2017 WL 6999820, at *7-8. The district court reasoned that bankruptcy courts are ill-equipped to provide the procedural protections that due process requires, and that bankruptcy judges lack the tenure and compensation protections that ensure the judicial independence of Article III judges. The district court observed that the sanctions here were far greater than a punitive sanction of $50,000 that the Ninth Circuit vacated for the same reasons in In re Dyer, 322 F.3d 1178, 1194 (9th Cir. 2003). Remanding the matter, the district court noted that the bankruptcy court may refer a matter for criminal contempt proceedings and sanctions, or may "take steps to enforce its orders short of punitive sanctions of the scope and type imposed in these cases." PHH Mortg. Corp., 2017 WL 6999820, at *9.

The bankruptcy court issued a second sanctions order (the one now before us). See In re Gravel ("Gravel II"), 601 B.R. 873, 903 (Bankr. D. Vt. 2019). It adopted the factual findings of the first order and imposed the same sanctions for the Rule 3002.1 violation. However, the sanctions for violation of the Current Orders were reduced 25%: from $200,000 to $150,000 in the Gravel case and from $100,000 to $75,000 in the Beaulieu case. The reduced Current Orders sanctions were still to be paid to Legal Services; but the Trustee was made the recipient of the Rule 3002.1 sanction.

PHH appealed the second sanctions order to the district court, but the Trustee requested the bankruptcy court to certify the order for direct review by this Court, which the bankruptcy court granted. The Trustee petitioned this Court for direct review, which we granted.

DISCUSSION

A. Jurisdiction

This case is before us on direct appeal from the bankruptcy court's second sanctions order. Under 28 U.S.C. § 158(d)(2), a court of appeals has jurisdiction when the bankruptcy court has certified that an order involves an unresolved question of law and the court of appeals authorizes a direct appeal of that order. There is no doubt that we have jurisdiction to review the second sanctions order; but we must first clarify the scope of our jurisdiction over this appeal.

The bankruptcy court certified three questions of law. The questions, which the Trustee formulated, concern the power of bankruptcy courts to impose "punitive non-contempt sanctions" under Rule 3002.1, to impose such sanctions under § 105(a), and to impose them "commensurate (in amount) to the violation at hand." In re Gravel, No. 11-10112, 2019 WL 3783317, at *2 (Bankr. D. Vt. Aug. 12, 2019). We authorized direct review.

The Trustee contends that we can (or should) answer all three questions because they were certified. The statute, however, authorizes appeals of "orders," not "questions," and the second sanctions order is the only order on review. See 28 U.S.C. § 158(d)(2)(A). Unless that order poses a question of law, we lack jurisdiction to answer it notwithstanding what questions are certified. See N.Y.C. Health & Hosps. Corp. v. Blum, 678 F.2d 392, 396-97 (2d Cir. 1982) (observing the same with respect to 28 U.S.C. § 1292). Otherwise, we would be rendering an advisory opinion. See Preiser v. Newkirk, 422 U.S. 395, 401 (1975).

We may answer the certified questions only insofar as they help resolve the questions of law raised in the issues on appeal: whether the bankruptcy court properly sanctioned PHH for violating the Current Orders, and whether the bankruptcy court properly sanctioned PHH for violating Rule 3002.1.

B. Standard of Review

A bankruptcy court's award of sanctions, including findings of contempt, are reviewed for abuse of discretion. In re Kalikow, 602 F.3d 82, 91 (2d Cir. 2010). A bankruptcy court "necessarily abuses its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." Id. (quoting In re Highgate Equities, Ltd., 279 F.3d 148, 152 (2d Cir. 2002)) (brackets omitted).

The bankruptcy court's factual determinations are reviewed for clear error. U.S. Polo Ass'n, Inc. v. PRL USA Holdings, Inc., 789 F.3d 29, 33 (2d Cir. 2015). Questions of law and interpretation of an order underlying a contempt finding are reviewed de novo. Id.

C. The $225,000 Sanction

PHH argues that the $225,000 sanction was an abuse of discretion because PHH did not, as a matter of law, violate the Current Orders. We agree. Though the orders declared that the debtors were current, they did not enjoin the recording of expired fees on the statements. Without an express injunction, there is fair ground of doubt as to whether the listed fees can form the basis for contempt.

A bankruptcy court's contempt power, like that of a district court, is "narrowly circumscribed." Perez v. Danbury Hosp., 347 F.3d 419, 423 (2d Cir. 2003); see Taggart v. Lorenzen, 139 S. Ct. 1795, 1801 (2019) ("[T]he bankruptcy statutes incorporate the traditional standards in equity practice for determining when a party may be held in civil contempt for violating an injunction."). Accordingly, "our review of a contempt order is more exacting than under the ordinary abuse-of-discretion standard." Perez, 347 F.3d at 423; see United States v. Local 1804-1, Int'l Longshoremen's

Ass'n, 44 F.3d 1091, 1095 (2d Cir. 1995) ("The contempt power is different.").

Given the restricted scope of the contempt power, a prior question is whether the sanction here was actually based on contempt. The bankruptcy court invoked its "authority . . . to impose punitive sanctions on parties who violate court orders," observing that it "may hold a creditor in contempt for that party's violation of an injunction order." Gravel II, 601 B.R. at 903. Then, applying the Supreme Court's recently-articulated standard for contempt in Taggart, the bankruptcy court "impos[ed] punitive sanctions on PHH for its violation of the Debtor Current Orders." Id. at 903; see also id. at 888-89. Moreover, the Trustee's motion was one "for contempt and sanctions." J. App'x 651. The bankruptcy court plainly based its sanction on contempt.

The Trustee argues that we should affirm because a bankruptcy court, in any event, has power to issue "non-contempt-based sanctions." Appellee's Br. at 41. This argument is misplaced. A bankruptcy court's "discretion to award sanctions may be exercised only on the basis of the specific authority invoked by that court." Kalikow, 602 F.3d at 96. We therefore "confine our review to the question of whether the court properly exercised that power" and "do not consider potential alternative sources of authority." In re Sanchez, 941 F.3d 625, 626-27 (2d Cir. 2019). Because the bankruptcy court here relied on its contempt power, our review is limited to whether it abused its discretion in exercising that power.

* * *

A bankruptcy court's contempt power derives from a court injunction and 11 U.S.C. § 105(a). An injunction is an equitable remedy, and § 105(a) authorizes issuance of any "order" that is "necessary or appropriate to carry out the provisions of [the Bankruptcy Code]." Together, they "bring with them the 'old soil' that has long governed how courts enforce injunctions." Taggart, 139 S. Ct. at 1801. That includes the " 'potent weapon' of civil contempt." Id. (quoting Int'l Longshoremen's Ass'n, Local 1291 v. Phila. Marine Trade Ass'n, 389 U.S. 64, 76 (1967)).

Under Taggart, a bankruptcy court may hold a creditor in contempt for violating the court's injunction only "if there is *no fair ground of doubt* as to whether the order barred the creditor's conduct." Id. at 1799. The "fair ground of doubt" standard has long been used in this Circuit to determine when a party may be held in contempt in the district court. See King v. Allied Vision, Ltd., 65 F.3d 1051, 1058 (2d Cir. 1995) (quoting Cal. Artificial Stone Paving Co. v. Molitor, 113 U.S. 609, 618 (1885)). The standard derives from two principles that are reemphasized in Taggart: "civil contempt is a severe remedy" and "basic fairness requires that those enjoined receive explicit notice of what conduct is outlawed." 139 S. Ct. at 1802 (cleaned up). In particular, a contempt order is warranted only where the party has notice of the order, the order is clear and unambiguous, and the proof of noncompliance is clear and convincing. King, 65 F.3d at 1058; see U.S. Polo, 789 F.3d at 33.

The Current Orders had two components relevant to the contempt finding. The orders declared that the Gravels and Beaulieus are current on their mortgage payments to PHH, including all charges:

> the debtors, by their payments through the Office of the Chapter 13 Trustee, have made all payments due during the pendency of this case . . . including all monthly payments and any other charges or amounts due under their mortgage with PHH Mortgage Corporation.

The orders also prohibited PHH from contesting that fact in any other proceeding:

> the mortgagee [PHH] shall be precluded from disputing that the debtors are current (as set forth herein) in any other proceeding.

J. App'x 705-06, 709. These paragraphs, the bankruptcy court held, gave PHH "notice it was enjoined from seeking to collect any fees or expenses allegedly incurred during the period encompassed by each Order, if not specified in the Order." Gravel II, 601 B.R. at 890. We disagree.

The Current Orders were not a clear and unambiguous prohibition on PHH's sanctioned conduct. To form the basis for contempt, an order must leave "no doubt in the minds of those to whom it was addressed . . . precisely what acts are forbidden." Drywall Tapers & Pointers of Greater N.Y., Local 1974 v. Local 530 of

Operative Plasterers & Cement Masons Int'l Ass'n, 889 F.2d 389, 395 (2d Cir. 1989).

The declaration that a debtor is current does not in itself clearly forbid any conduct. Standing alone, it is an inadequate basis for contempt. The very purpose of the civil contempt power is to induce compliance with a court's injunction. Taggart, 139 S. Ct. at 1801. Aside from enjoining acts in other proceedings, there is no injunction here (or similar command or equitable remedy) to enforce—i.e., the orders fail to describe an "act or acts restrained or required." Fed. R. Civ. P. 65(d)(1)(C); Fed. R. Bankr. P. 7065; see Steffel v. Thompson, 415 U.S. 452, 471 (1974) ("[N]oncompliance with [a declaratory judgment] may be inappropriate, but is not contempt."). And to imply a restraint where none is stated would violate the principle that a party must have "explicit notice" of what is forbidden or required. Taggart, 139 S. Ct. at 1802.

The Current Orders imposed a single injunction: PHH may not dispute the current status of the debtors "in any other proceeding." J. App'x 706, 709. However broad "other proceeding" may be in this context, there is fair ground of doubt as to whether it would reach PHH's out-of-court conduct in these proceedings.

The Trustee argues that, unless PHH is held in contempt, mortgage creditors will be able to assess improper fees with impunity. These concerns are overwrought. The bankruptcy court could have crafted an order that would have forbidden the conduct troubling the Trustee. The orders in Taggart, for example, relieved the debtor "from all debts that arose before the date of the order for relief" *and* operated " 'as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset' a discharged debt." 139 S. Ct. at 1799, 1801 (quoting 11 U.S.C. §§ 727, 524(a)(2)).

Although a bankruptcy court has "unique expertise in interpreting its own injunctions and determining when they have been violated," In re Anderson, 884 F.3d 382, 390-91 (2d Cir. 2018), this insight does not command deference. Anderson—in recognizing the expertise—holds that a bankruptcy court is not required to compel arbitration of claims alleging violation of its discharge injunction. Id.; see also MBNA Am. Bank, N.A. v. Hill, 436 F.3d 104, 110 (2d Cir. 2006). But this Court still has a duty to conduct its own "exacting" review of contempt orders. Perez, 347 F.3d at 423. Expertise does not excuse a bankruptcy court from the fundamental limit on its power; a bankruptcy court cannot hold a party in contempt for violating an order that is subject to varying interpretations.

Moreover, the questionable proof of PHH's noncompliance could provide a second ground for vacatur, though we need not rely on it.[1] Because "ambiguities

[1] The mortgage statements excluded the fees at issue from the total payment due. The following, for example, is from the Beaulieus' statement:

Dear Mr. and/or Ms.

Below is the monthly Bankruptcy statement for the above loan. This statement is provided with the intent of complying with the and omissions in orders redound to the benefit of the person charged with contempt," Gucci Am., Inc. v. Weixing Li, 768 F.3d 122, 143 (2d Cir. 2014), the Current Orders already lack the requisite clarity to hold PHH in contempt.

D. The $75,000 Sanction

The bankruptcy court imposed sanctions on PHH for violation of Bankruptcy Rule 3002.1 amounting to $25,000 in each case for the improperly-noticed fees listed on the mortgage statements. The sanction was calibrated to "the number of incorrect statements PHH sent" as opposed "to the amount of the charges on each

---

United States Bankruptcy Court Vermont District Permanent Rule (3071-1). *This is not an attempt to collect a debt.*

Loan Information:

Unpaid Principal balance:	$ 11,851.98
Escrow Balance:	$ 3,962.45
Maturity Date:	07-18
Interest Rate:	5.37500%
Contractual Due Date:	03-01-16
Post-Petition due date:	03-01-16
Late Charge Balance to date:	$ .00
NSF fees:	*$ 30.00*
Property Inspection fees:	*$ 56.25*
Interest Paid Year to Date:	$ 485.79
Property Taxes Paid Year to Date:	$ .00

Breakdown of Contractual Monthly Payment:

Principal and Interest:	$ 437.66
Escrow:	$ 306.74
Total Payment Due:	*$ 744.40*

J. App'x 675 (emphasis added).

incorrect statement," which in total across the three cases did not exceed $716 (and in fact were not even "charges" in any sense: they were not reflected in the balance due). Gravel II, 601 B.R. at 903. Thus, the bankruptcy court imposed a punitive sanction on PHH of $1,000 per statement to deter PHH from further non-compliance.

To impose the sanction, the bankruptcy court invoked Rule 3002.1's authorization to "award other appropriate relief" for violation of the rule. PHH argues that the bankruptcy court erred because "other appropriate relief" does not authorize punitive sanctions.

This is an issue of first impression among the circuit courts. And few bankruptcy courts have opined on it. Although one court declined to dismiss a plaintiff's claim for Rule 3002.1 sanctions in an adversary proceeding, In re Bivens, 625 B.R. 843, 850-51 (Bankr. M.D.N.C. 2021), it did not address the issue here. The bankruptcy court in this case is apparently the first and only one to impose punitive monetary sanctions under the rule. The only other court to have weighed in reached the opposite conclusion: that Rule 3002.1 "does not permit [the court] to impose punitive monetary sanctions." In re Tollstrup, No. 15-33924, 2018 WL 1384378, at *5 (Bankr. D. Or. Mar. 16, 2018); see also In re Reynolds, 470 B.R. 138, 144 (Bankr. D. Colo. 2012) (reaching similar conclusion that Rule 3001(c) does not authorize claim disallowance as a sanction). We agree.

*   *   *

Before Rule 3002.1 was adopted in 2011, mortgage holders would forbear asserting new obligations in the bankruptcy proceedings for fear of violating the automatic stay. The result was that debtors who had completed their chapter 13 plans were discovering that they had incurred new obligations and defaults. See 9 Collier on Bankruptcy ¶ 3002.1.RH (16th 2020); Fed. R. Bank. P. 3002.1 Advisory Committee Notes to 2011 Adoption.

As a solution, Rule 3002.1 ensures that debtors are informed of new post-petition obligations (such as fees). The rule requires formal notice to debtors and trustees, and it assures creditors that they will not violate the automatic stay. Debtors then have a chance to pay or contest the new obligations, which prevents lingering deficits from surfacing after the case ends.

The last subdivision of the rule provides an enforcement mechanism. If a creditor fails to give the requisite notice, the bankruptcy court may preclude the creditor from presenting evidence of its claim in the case—unless the failure was substantially justified or harmless. Fed. R. Bankr. P. 3002.1(i)(1). The court may also (or instead) "award other appropriate relief, including reasonable expenses and attorney's fees caused by the failure." Fed. R. Bankr. P. 3002.1(i)(2).

Because "other appropriate relief" is a general phrase amid specific examples, it is best "construed in a fashion that limits the general language to the same class of matters as the things illustrated." Canada Life Assurance Co. v. Converium Ruckversicherung

(Deutschland) AG, 335 F.3d 52, 58 (2d Cir. 2003). Reasonable expenses and attorney's fees are compensatory forms of relief. They expressly remedy harms to the debtor "caused by the [creditor's] failure" to give proper notice of a claim. Fed. R. Bankr. P. 3002.1(i)(2). This suggests that "other appropriate relief" is limited to non-punitive sanctions, as that would cabin it to the most general attribute shared with an award of expenses and fees.

The rule's only other sanction reinforces that inference. It prevents a creditor from collecting an unnoticed claim so that a surprise deficiency does not later frustrate the debtor's fresh start. The rule makes an exception for harmless non-compliance, demonstrating that this evidence-preclusion sanction is tied to prejudice that a failure to notice causes the debtor. The sanction thus prospectively serves the remedial goal of shielding the debtor from unforeseen charges, and thus is also not a punishment.

Moreover, other sections of the Bankruptcy Code explicitly authorize punitive damages, whereas Rule 3002.1 is silent. See, e.g., 11 U.S.C. § 362(k)(1) ("[A]n individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.").

A broad authorization of punitive sanctions is a poor fit with Rule 3002.1's tailored enforcement mechanism and limited purpose. Punitive sanctions do not fall within the "appropriate relief" authorized by Rule 3002.1.

The bankruptcy court reasoned that Rule 3002.1 authorizes punitive sanctions because merely precluding evidence and awarding attorneys' fees might insufficiently deter misconduct, drawing an analogy to discovery sanctions under Federal Rule of Civil Procedure 37. The dissent likewise argues that Federal Rule 37 and Bankruptcy Rule 3002.1 have an "identical purpose." Dissent at 17. The analogy is unpersuasive.

Discovery sanctions under Federal Rule 37 are deterrents (specific and general) meant to punish a recalcitrant or evasive party. Nat'l Hockey League v. Metro. Hockey Club, Inc., 427 U.S. 639, 643 (1976); see Update Art, Inc. v. Modiin Publ'g, Ltd., 843 F.2d 67, 71 (2d Cir. 1988). A party might otherwise abuse or delay discovery, "embroil[ing] trial judges in day-to-day supervision." Cine Forty-Second St. Theatre Corp. v. Allied Artists Pictures Corp., 602 F.2d 1062, 1066 (2d Cir. 1979). "Without adequate sanctions the procedure for discovery would often be ineffectual," and the administration of justice would grind to a halt. C. Wright & A. Miller, 8B Fed. Prac. & Proc. Civ. § 2281 (3d ed.). Federal Rule 37 protects more than the interest of a party in remedying or avoiding certain costs; it protects the interests of the parties, the court, and the public in a speedy and just resolution of the case.

To that end, Federal Rule 37 authorizes a range of sanctions, from mild to severe. In addition to precluding evidence, a district court may:

(A) order payment of reasonable expenses, including attorney's fees, caused by the failure;

(B) inform the jury of the party's failure; and

(C) impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)-(vi).

Fed. R. Civ. P. 37(c)(1). Federal Rule 37(b)(2)(A) authorizes "further just orders" against a party that disobeys a discovery order, such as dismissal of the action, default judgment, and contempt of court.

The bankruptcy court cites district court decisions imposing punitive monetary sanctions on counsel under that "just orders" clause. See, e.g., J. M. Cleminshaw Co. v. City of Norwich, 93 F.R.D. 338, 355 (D. Conn. 1981); see also Dissent at 15 (collecting cases). This Court has not decided whether such sanctions are proper. In any event, Bankruptcy Rule 3002.1 lacks the authorization of "just orders." More importantly, the rule does not share the aims and functions of Federal Rule 37. Bankruptcy Rule 3002.1 protects a debtor's interest in fully resolving the debtor's current status as to particular financial obligations; Federal Rule 37 protects "the integrity of our judicial process" with an array of far harsher sanctions. Update Art, 843 F.2d at 73.

In the alternative, the Trustee argues that the $75,000 sanction is authorized under the bankruptcy court's inherent power. True, "bankruptcy courts, like Article III courts, possess inherent sanctioning powers," which "include[s] the power to impose relatively minor non-compensatory sanctions on attorneys appearing before the court in appropriate circumstances." Sanchez, 941 F.3d at 628. But while the bankruptcy court alluded to its inherent power, it did not assess whether the sanction was authorized under it; we cannot reach this question. See Kalikow, 602 F.3d at 96 ("[It is] imperative that the court explain its sanctions order with care, specificity, and attention to the sources of its power." (quoting Sakon v. Andreo, 119 F.3d 109, 113 (2d Cir.1997)). In any event, there is no finding of bad faith; so it is dubious that the bankruptcy court could exercise its inherent power to do that which is unavailable under powers expressly defined. See Schlaifer Nance & Co. v. Estate of Warhol, 194 F.3d 323, 338 (2d Cir. 1999); see also Chambers v. NASCO, Inc., 501 U.S. 32, 47 (1991). The sanction was imposed under Rule 3002.1(i), and our holding is that the sanction went beyond the relief authorized by that rule.[2]

* * *

[2] The dissent argues that the bankruptcy court should be "afforded the opportunity to provide additional reasoning" on remand based on the dissent's assumption that the bankruptcy court imposed sanctions under its inherent power and just neglected to give reasons. Dissent at 31. Remand is appropriate when there is an error to fix, a new standard to apply, or, as the dissent emphasizes, further explanation needed of the decision that the court made. Here, the bankruptcy court simply did not exercise its inherent power to sanction PHH. The problem is not that the bankruptcy court's reasoning is too sparse for review. Our role is to review what the bankruptcy court did, not to survey options.

The dissent challenges our ruling on Rule 3002.1 and inherent power. If inherent power is alone sufficient to affirm the $75,000 sanction, there would be no reason to consider Rule 3002.1; so I begin there.

The dissent concedes that sanctions may only be imposed based on "specific authority invoked." Dissent at 26 (quoting Kalikow, 602 F.3d at 96). But the invocation identified by the dissent is no more than a perfunctory mention. That does not do. A court must justify the sanction in view of the specific source of its authority—especially when the source is inherent power. Inherent power is constrained: it requires "caution" and notice before use; and it is a last resort for when an express authority is not "up to the task." Chambers, 501 U.S. at 50. Although, as the dissent observes, the bankruptcy court analyzed cases on inherent power, it did so to decide what amount it should sanction *under Rule 3002.1*.

In any event, there is still the matter of bad faith. The dissent posits that the bankruptcy court found bad faith, at least more or less. Dissent at 31. When it came to the issue, the bankruptcy court said that PHH's actions "cannot realistically be attributed to an innocent mistake" and raised "serious concerns about whether PHH is making a good faith effort to comply with Rule 3002.1." Dissent at 30 (quoting Gravel I, 556 B.R. at 576 n.10). A concern, even a serious concern, is not a finding. So the dissent characterizes this concern, and associated "findings by the bankruptcy court of PHH's repeated violations," as constituting a finding that PHH's conduct was "tantamount to bad faith." Dissent at 29-31. But tantamount means of the same weight; it does not mean lesser, and it is not a consolation prize. The dissent transmutes concern into a finding, and would thereby uphold sanctions on a basis that the bankruptcy court did not venture to make.

No wonder the dissent leans heavily on a non-finding to support the $75,000 sanction—PHH never charged the debtors a dime, and never collected a dime. The fees to which no notice was given were never due. The dissent fastidiously avoids acknowledging this little thing: the mortgage statements are said to have been "incorrect"; and they were "showing" fees. Dissent at 5, 7. On the final statements, the fees were $86.25 in the Beaulieu case, $371 in the Knisley case, and $258.75 in the Gravel case. Iterations of the same fees were re-listed on monthly statements in each case, none of them reflected in the amount due, and none of them paid. The rest is hyperventilation. It is surely of some matter there was no damage or harm here.

As for Rule 3002.1, the dissent's challenge proves too little. The dissent argues that the rule's sanction provisions have a deterrence function. Dissent at 17-20. True, but all sanctions deter, including compensatory ones; an award of attorneys' fees, which compensates, simultaneously inflicts pain that is an incentive for compliance. In short, all sanctions "punish." Dissent at 2. The issue is whether the sanction must be calibrated to the prejudice. See Goodyear Tire & Rubber Co. v. Haeger, 137 S. Ct. 1178, 1186 (2017) (distinguishing compensatory from punitive sanctions). With respect to Rule 3002.1(i), the answer is yes.

The dissent is concerned that our interpretation of Rule 3002.1 "will undoubtedly hamper the ability of bankruptcy courts" to deter violations and protect debtors. Dissent at 2. But this concern is at best overwrought. The punitive sanction here is the first and only of its kind that a bankruptcy court has imposed in the over nine years since Rule 3002.1 was adopted. In any event, the majority opinion does not limit a bankruptcy court's inherent power to sanction offenders who act in bad faith. That is just not what the bankruptcy court did here; others might be free to do so if they were to make sufficient findings.

CONCLUSION

For the foregoing reasons, the order of the bankruptcy court is **VACATED** and **REVERSED**.

JOSEPH F. BIANCO, *Circuit Judge*, concurring in part and dissenting in part:

I agree with the majority opinion that the Current Orders did not clearly and unambiguously prohibit PHH's conduct for which the bankruptcy court imposed the $225,000 sanction, and that the $225,000 should therefore be vacated. However, I respectfully part company with the majority opinion when it concludes that the bankruptcy court did not have the authority to impose $75,000 in sanctions under Federal Rule of Bankruptcy Procedure 3002.1 (the "Rule"), and that the bankruptcy court did not sufficiently invoke its inherent powers so as to allow this Court to separately review the $75,000 sanction under such powers.

As set forth below, the "other appropriate relief" language in the sanctions authority conferred upon bankruptcy courts under Rule 3002.1(i) provided a proper basis to impose the $75,000 punitive sanction against PHH based upon its flagrant and repeated violations of the Rule (as found by the bankruptcy court). Such an interpretation of the Rule is not only consistent with the plain text of the Rule itself but is further supported by the purpose of the Rule and the fact that the Rule was modeled after Rule 37 of the Federal Rules of Civil Procedure, which allows for similar punitive sanctions. In holding otherwise in the face of the broad language and purpose of the sanctions provision, the majority renders a bankruptcy court powerless to levy *any sanction* under the Rule against a serial violator of the Rule's provisions over a substantial period of time where those violations (due to the diligence of the Trustee in identifying and rectifying the violations) did not result in any actual economic harm to the multiple debtors who were the victims of the Rule violations. In other words, in this case the majority concludes that the sanctions provision of the Rule does not allow the bankruptcy court to punish the misconduct of one of the largest subservicers of residential mortgages in the United States, even where a prior sanction was ineffective at achieving compliance. This interpretation will undoubtedly hamper the ability of bankruptcy courts, through their enforcement of this Rule, to provide deterrence and to protect debtors from predatory practices that interfere with the "fresh start" for debtors that is a fundamental purpose of bankruptcy protection under Chapter 13.

I also separately conclude that, even assuming *arguendo* such authority does not exist under the Rule itself, the bankruptcy court possessed the independent authority under its inherent powers to impose this $75,000 sanction against PHH for its egregious conduct in violation of the Rule. The majority holds that the bankruptcy court, in imposing sanctions for this misconduct, only "alluded" to its inherent powers and did not provide sufficient reasoning to allow this Court to analyze the potential application of that power to the facts here. I respectfully disagree.

The bankruptcy court's explicit invocation of its inherent powers in both its order and its separate opinion, as well as its detailed reasoning regarding PHH's violations of the Rule and its thorough analysis of the "inherent powers" case authority relating to the sanction amount, together provided a more than sufficient record for us to hold that the imposition of the $75,000 sanction under such inherent powers was not an abuse of discretion. Moreover, although the majority suggests that it is "dubious" that a bankruptcy court can invoke its inherent powers in the absence of an explicit finding of bad faith, the Supreme Court and this Court have made clear that conduct that is "tantamount to bad faith" can provide the requisite factual predicate for imposing sanctions under a court's inherent powers, and I conclude that the bankruptcy court's findings satisfied that standard. This precedent regarding a district court's inherent powers to sanction in such situations applies with equal force to a bankruptcy court, which likewise has a correspondingly clear and compelling need to use such powers to vindicate its authority and ensure basic compliance with its rules and procedures.

In sum, I conclude that the bankruptcy court had the authority under Rule 3002.1(i), as well as its inherent powers, to sanction PHH for its repeated violations of the Rule, and did not abuse its discretion in setting the amount at $75,000 given the nature and scope of the violations by this multi-billion dollar company and the bankruptcy court's prior warning and sanction, as well as PHH's violation of its own commitment to rectify whatever lack of internal controls were causing these repeated violations.

I therefore join in the opinion of the majority, except with respect to Part D.

DISCUSSION

A. The Bankruptcy Court's Finding Regarding PHH's Pattern of Sanctionable Misconduct

Before reviewing the bankruptcy court's authority to impose sanctions for violations of Rule 3002.1 and the framework for exercising its discretion in determining the amount of such sanctions, it is necessary to briefly summarize the nature of PHH's repeated violations of the Rule, as found by the bankruptcy court (whose findings as to these violations are not disputed on appeal). This summary of the factual findings highlights that PHH's pattern of violations is precisely the type of conduct that the rule-makers sought to prevent, through the enactment of the Rule and the accompanying sanctions provision that gives a bankruptcy court the ability to enforce the Rule and deter such conduct.

In this action, PHH sent the Gravels incorrect mortgage statements for two-and-one-half years from 2011 until 2014. In order to attempt to correct the misapplication of payments, the Trustee mailed multiple letters attaching detailed spreadsheets directly to PHH, in addition to filing the letters with the bankruptcy court so they would be sent to PHH's counsel via ECF. Receiving no response from PHH, the Trustee filed a motion for sanctions in the amount of a little over $12,000. Only in response to that motion did PHH acknowledge its error and indicate that it had implemented new remedial processes to prevent future accounting errors. At oral argument on that motion, PHH's counsel acknowledged to the bankruptcy court that it "obviously has the authority to offer sanctions." Joint App'x at 734. However, PHH's counsel averred that the sanctions motion had successfully brought this accounting problem to PHH's attention, and asked that the amount of any monetary sanctions be modest in light of PHH's response. In particular, PHH's counsel told the bankruptcy court that PHH had "taken remedial steps" and had "corrected the underlying problem." *Id.* at 724. PHH's counsel further explained, "[i]f [PHH has] problems again, they are not going to have—they are not going to have that excuse. They are not going to have that defense." *Id.* Although the bankruptcy court expressed concerns about whether using progressive sanctions would curb the misconduct in a timely fashion, the bankruptcy court ultimately agreed to the amount of $9,000, which had been negotiated by PHH's counsel and the Trustee.

At least one other bankruptcy court had similarly warned PHH about its violation of Rule 3002.1. Specifically, in *In re Owens*, No. 12-40716, 2014 WL 184781 (Bankr. W.D.N.C. Jan. 15, 2014), a bankruptcy court found that PHH violated Rule 3002.1(c) when it sent debtors statements including post-petition fees that were more than 180 days old, without filing or serving the required Rule 3002.1(c) notice. The bankruptcy court specifically held that PHH must comply with Rule 3002.1(c), regardless of whether it actually intended to recover the fees. *Id.* at *4. The *Owens* court declined to sanction PHH under 3002.1(i) because the decision was rendered so soon after the Rule's effective date. *Id.* However, in that decision, the bankruptcy court unequivocally cautioned PHH that it "[might] consider awarding relief as against PHH under Rule 3002.1(i) should [the issue] come up in the future." *Id.*

Notwithstanding the prior sanction and warnings by bankruptcy courts about these violations, PHH's violations continued. More specifically, after orders were issued in the *Gravel* and *Beaulieu* actions, each of which attested that "the debtors have cured any mortgage arrearage or default" and were "current," Joint App'x at 705-06, 709, PHH sent twenty-five mortgage statements showing late charges and property inspection fees in both actions. PHH did the same in the *Knisley* action. Again, the Trustee filed motions for contempt and sanctions (this time in each action), and again, PHH waived the fees and removed them from the debtors' accounts. Only this time, in the exact reverse of its prior stance, PHH argued that motion practice was unnecessary, and that it would have happily removed the fees if the Trustee had only contacted PHH advising PHH of its error.

Among other sanctions, the bankruptcy court assessed a $1,000 sanction per violation of Rule 3002.1, for a total of $75,000 across all three actions, against PHH under Rule 3002.1(i) and its inherent powers.

B. Sanctions Under Federal Rule of Bankruptcy Procedure 3002.1(i)

I respectfully dissent from the majority's conclusion that Rule 3002.1 does not provide a bankruptcy court with the authority to impose sanctions. The plain meaning of the Rule, as bolstered by its purpose and a review of analogous rules, supports the bankruptcy court's conclusion that Rule 3002.1(i)'s enforcement measures for violations of Rule 3002.1(c) include punitive monetary sanctions.

At the start, in support of its conclusion, the majority cites to a bankruptcy case, in which the bankruptcy court determined that it lacked the power to impose punitive sanctions under Rule 3002.1. *See In re Tollstrup*, No. 15-33924, 2018 WL 1384378, at *5

(Bankr. D. Or. Mar. 16, 2018). However, it also should be noted that other bankruptcy courts have reached a contrary conclusion. For example, a bankruptcy court recently allowed a claim for punitive sanctions under Rule 3002.1(i) to survive a motion to dismiss. *See In re Bivens*, 625 B.R. 843, 850-51 (Bankr. M.D.N.C. 2021); *see also In re Owens*, 2014 WL 184781, at *4 (warning PHH that the bankruptcy court would consider imposing sanctions under Rule 3002.1(i) if there were future violations). Thus, not only has no circuit court addressed this issue, but bankruptcy courts themselves are not in agreement.

"[T]he starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof." *Ret. Bd. of the Policemen's Annuity and Benefit Fund of the City of Chi. v. Bank of N.Y. Mellon*, 775 F.3d 154, 165 (2d Cir. 2014) (alteration in original) (internal quotation marks omitted). As set forth by the majority, Rule 3002.1(i) provides that:

> the court may, after notice and hearing, take either or both of the following actions: (1) preclude the holder from presenting the omitted information, in any form, as evidence in any contested matter or adversary proceeding in the case, unless the court determines that the failure was substantially justified or is harmless; or (2) award *other appropriate relief*, *including* reasonable expenses and attorney's fees caused by the failure.

Fed. R. Bankr. P. 3002.1(i) (emphasis added).

The Bankruptcy Code instructs that " 'includes' and 'including' are not limiting[.]" 11 U.S.C. § 102(3). In essence, the Rule should be interpreted to mean "including, but not limited to," when enunciating the list of possible other relief that is available to the bankruptcy court. Therefore, the text is intended to be expansive: "[R]easonable expenses and attorney's fees" are but two possible types of "appropriate relief" within this sanctions provision. Fed. R. Bankr. P. 3002.1(i).

Notwithstanding this expansive language, the majority limits the Rule to allowing only non-punitive sanctions because, in its view, "reasonable expenses and attorney's fees" are both forms of compensatory relief and, when a statute provides specific examples, it is best to limit the general language to the same type of matters as those illustrated. Maj. Op. at 24-25 (quoting *Canada Life Assurance Co. v. Converium Ruckversicherung (Deutschland) AG*, 335 F.3d 52, 58 (2d Cir. 2003)). The use of that canon of construction, however, does not withstand closer scrutiny when the phrase "other appropriate relief" is analyzed in the context of this particular sanctions provision.

As a threshold matter, one should not overlook the fact that Rule 3002.1(i) does not purport to be a subsection that focuses on compensatory relief. It is, at its core, a sanctions provision. In fact, as one bankruptcy court has articulated, "[i]n case the importance of complying with Rule 3002.1(c) is for some reason lost on a lender, Rule 3002.1(i) serves as a sobering reminder. It authorizes the court to punish the offending lender." *In re Lescinskas*, 628 B.R. 377, 382 (Bankr. D. Mass. 2021) (noting that the advisory committee notes to the 2011 adoption of the Rule described "subdivision (i) penalties as 'sanctions' "). Thus, this is not a situation where a bankruptcy court chose to impose punitive monetary sanctions under a provision that had nothing to do with sanctions.

The majority nevertheless seeks to cabin the bankruptcy court's authority to impose punitive sanctions under the broad phrase "other appropriate relief," *within this sanctions provision*, by asserting that the other enumerated sanctions under both Rule 3002.1(i)(1) and (2) are non-punitive (or compensatory) forms of sanctions. I respectfully disagree with that analysis. In particular, I do not accept the majority's classification of Rule 3002.1(i)(1)—namely, the evidence-preclusion provision—as a non-punitive sanction. Although it does allow the violator to avoid the sanction if the failure to provide the requisite notice was harmless, it also allows for the imposition of the drastic sanction of exclusion regardless of the precise nature or amount of such harm. In other words, the sanction is not required to be proportionate to the harm—*i.e.*, compensatory in nature—but rather seeks to punish with the broad brush of evidence-preclusion to deter such violations in the future. Indeed, we have noted that in other contexts the preclusion of evidence can be a *more extreme* sanction than monetary sanctions. *See Cine Forty-Second St. Theatre Corp. v. Allied Artists Pictures Corp.*, 602 F.2d 1062, 1066 (2d Cir. 1979) (Rule 37 "provides a spectrum of sanctions. The mildest is an order to reimburse the opposing party for expenses caused by the failure to cooperate. More stringent are orders . . . prohibiting the introduction of evidence. . . . Preclusionary orders ensure that a party will not be able to profit from its own failure to comply. . . . [C]ourts are free to consider the general deterrent effect their orders may have on the instant case and on other litigation, provided that the party on whom they are imposed is, in some sense, at fault." (footnote and citations omitted)).

In fact, in the context of the evidence-exclusion sanction under Rule 37, we have explained the importance of the punitive nature of such a sanction as a deterrent to future violations. *See Daval Steel Prods. v. M/V Fakredine*, 951 F.2d 1357, 1365-67 (2d Cir. 1991) (discussing the district court's discretion to preclude evidence under Rule 37 and explaining that "[a]lthough an order granting a claim and precluding a party from presenting evidence in opposition to it is strong medicine, such orders are necessary on appropriate occasion to enforce compliance with the discovery rules and maintain a credible deterrent to potential violators"); *see also Nat'l Hockey League v. Metro. Hockey Club*, 427 U.S. 639, 643 (1976) (explaining Rule 37 sanctions must be applied diligently both "to penalize those whose conduct may be deemed to warrant such a sanction, [and] to deter those who might be tempted to such conduct in the absence of such a deterrent").

Once the evidence-preclusion penalty in Rule 3002.1(i)(1) is properly classified as a potentially punitive sanction that also operates as a deterrent, then the "other appropriate relief" language in Rule 3002.1(i)(2) naturally includes, from a textual standpoint, punitive monetary sanctions because they are part of "the same class of matters" contained within the related penalty provision. *Canada Life Assurance Co.*, 335 F.3d at 58.

This interpretation of the plain text of Rule 3002.1 to allow for punitive, non-compensatory sanctions is consistent with the Rule's purpose, as well as its origin and its amendment. As noted above, Rule 3002.1 was based on Federal Rule of Civil Procedure 37(c)(1).[3] This is also true of Federal Rule of Bankruptcy Procedure 3001(c)(2)(D), which is a companion rule to Rule 3002.1 and likewise addresses the failure of a holder of a claim to provide required information as part of a proof of claim and contains an identically-worded sanctions

---

[3] Rule 37(c)(1) states:

> If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:
>
> > (A) may order payment of the *reasonable expenses*, *including attorney's fees*, caused by the failure;
> >
> > (B) may inform the jury of the party's failure; and
> >
> > (C) may impose *other appropriate sanctions*, *including* any of the orders listed in Rule 37(b)(2)(A)(i)-(vi).

Fed. R. Civ. P. 37(c)(1) (emphases added).

provision.[4] *See* Advisory Comm. on Bankr. Rules, Subcomm. on Consumer Issues, Memorandum on Comments on Proposed Amendments to Rule 3001(c) and Proposed New Rule 3002.1, 12 (PDF page 63) (Apr. 7, 2010) ("The proposed sanctions [in Rule 3001(c)(2)(D)] most closely resemble the sanction available under Civil Rule 37(c)(1) for the failure to provide information required under the disclosure provisions of Rule 26(a)."), https://www.uscourts.gov/sites/default/files/fr_import/BK2010-04.pdf.

As the bankruptcy court noted below, district courts have concluded that the similar language of Rule 37 allows for the imposition of punitive, non-compensatory sanctions for violation of the discovery rules. *In re Gravel* ("*Gravel II*"), 601 B.R. 873, 886 (Bankr. D. Vt. 2019) (collecting cases). Although we have never decided this issue, I agree with the overwhelming majority of courts that have concluded such authority exists under Rule 37. *See*, *e.g.*, *Olivarez v. GEO Grp., Inc.*,

[4] Rule 3001(c) states:

> If the holder of a claim fails to provide any information required by this subdivision (c), the court may, after notice and hearing, take either or both of the following actions:
>
> > (i) preclude the holder from presenting the omitted information, in any form, as evidence in any contested matter or adversary proceeding in the case, unless the court determines that the failure was substantially justified or is harmless; or
> >
> > (ii) *award other appropriate relief, including reasonable expenses and attorney's fees* caused by the failure.

Fed. R. Bankr. P. 3001(c)(2)(D) (emphasis added).

844 F.3d 200, 203 (5th Cir. 2016) ("Pursuant to Rule 37[(c)(1)] and the court's inherent authority, the district court imposed sanctions requiring each Appellant to pay a $1,000 fine."); *see also Nycomed U.S. Inc. v. Glenmark Generics Ltd.*, No. 08-CV-5023 (CBA)(RLM), 2010 WL 3173785, at *3, 11 (E.D.N.Y. Aug. 11, 2010) (imposing a non-compensatory fine of $25,000 and stating "[a] court may . . . levy monetary sanctions against a violating party in lieu of or *in addition to* the sanctions outlined in Rule 37(b)(2)(A)." (emphasis added)); *Danis v. USN Commc'ns, Inc.*, No. 98 C 7482, 2000 WL 1694325, at *51 (N.D. Ill. Oct. 23, 2000) (ordering the defendant to pay $10,000 fine under Rule 37(b)(2) and noting that, "[w]hile the imposition of a fine is not one of the sanctions specifically enumerated in Rule 37(b)(2), the language of Rule 37(b)(2) makes it clear that the enumerated sanctions are 'among others' that a Court may enter, and that they are therefore not intended to be exclusive"); *Winters v. Textron, Inc.*, 187 F.R.D. 518, 521-22 (M.D. Pa. 1999) (defendant ordered to pay $10,000 fine); *Miltope Corp. v. Hartford Cas. Ins. Co.*, 163 F.R.D. 191, 195 (S.D.N.Y. 1995) (plaintiff fined $1,000); *see generally* 8B Charles Alan Wright et al., Federal Practice and Procedure § 2284 (3d ed. 2021) (sanctions enumerated in Rule 37 are not intended to be exclusive).

The majority nevertheless concludes that Rule 37 (and a lower court's use of that Rule to impose non-compensatory punitive sanctions) does not provide helpful guidance as to the intended scope of Bankruptcy Rule 3002.1 and, by extension, Rule 3001(c). In particular, in distinguishing these non-compensatory sanctions under Rule 37, the majority notes that "Rule 3002.1 lacks the authorization of 'just' orders" like that contained in Rule 37. Maj. Op. at 28 (quoting Fed. R. Civ. P. 37 (b)(2)(A)). However, the "just orders" clause, similar to the "other appropriate relief" catch-all provision at issue here, does not enumerate punitive monetary sanctions among its list of illustrative sanctions. In order to ensure compliance, both provisions use similar language to cloak the court with the flexibility and discretion to impose unenumerated punitive sanctions, regardless of whether such additional sanctions are characterized as "just orders" under Rule 37 or "other appropriate relief" under Rule 3002.1.

The majority also seeks to cast aside the analogous Rule 37 language and framework because unlike the "tailored enforcement mechanism" of Rule 3002.1, "[d]iscovery sanctions under Federal Rule 37 are deterrents (specific and general) meant to punish a recalcitrant or evasive party" and "Federal Rule 37 protects more than the interest of a party in remedying or avoiding certain costs; it protects the interests of the parties, the court, and the public in a speedy and just resolution of the case." Maj. Op. at 26-27.

However, I find no daylight between the deterrent purpose of the sanctions provisions in Bankruptcy Rules 3002.1 and 3001(c) and the identical purpose of Rule 37, upon whose language they were modeled. Prior to the adoption of Rule 3002.1, "mortgage companies applied fees and costs to a debtor's mortgage while the debtor was in bankruptcy without giving notice to the debtor and then, based on these post-petition defaults, sought to foreclose upon the debtor's property after the debtor completed the plan." *In re Tollios*, 491 B.R. 886, 888 (Bankr. N.D. Ill. 2013). In response to that problematic practice, and after the financial crisis, Rule 3002.1 was adopted in December 2011 to ensure that both debtor and trustee were informed of the exact amount needed to cure any pre-petition arrearage and were furnished with notice of any changes in post-petition obligations. *See* Fed. R. Bankr. P. 3002.1 advisory committee notes to the 2011 adoption.

Importantly, the evidentiary exclusion was already in Rule 3001 before the adoption of Rules 3001(c) and 3002.1, which now provide additional sanctions, including "other appropriate relief." As the bankruptcy court explained, this broadening of the available sanctions was a recognition that, in practice, "[t]here are many instances in which the evidentiary exclusion remedy provides little, if any, relief in the context of Rule 3001(c) and Rule 3002.1 sanctions motions." *Gravel II*, 601 B.R. at 885-86 (collecting cases). Additionally, another court has explained that "there can be no proceeding in which the evidentiary penalty of Rule 3001(c)(2)(D) could come into play" because "the chapter 13 plan has been fully administered." *In re Davenport*, 544 B.R. 245, 250 (Bankr. D.D.C. 2015); *see also In re Reynolds*, No. 11-30984, 2012 WL 3133489, at *3 (Bankr. D. Colo. July 31, 2012) ("At a hearing where the merits of a claim are not at issue, the penalty set out in Rule 3001(c)(2)(D) is meaningless because it only comes [into] play at a hearing on the merits of a claim where a court would otherwise entertain the type of evidence required by Rule 3001(c)(1).").

Thus, there is no doubt that the expansion of the sanctions, to include "other appropriate relief," was an effort to bring greater compliance under this Rule in the industry through the deterrence that such additional punitive sanctions would bring. *Cf.* Advisory Comm. on Bankr. Rules, Subcomm. on Consumer Issues, Memorandum on Comments on Proposed Amendments to Rule 3001(c) and Proposed New Rule 3002.1, 12 (PDF page 63) (Apr. 7, 2010) ("The proposed addition of Rule 3001(c)(2)(D) was based on the Advisory Committee's belief that stronger sanctions are required to ensure greater compliance with the rule's requirements."), https://www.uscourts.gov/sites/default/files/fr_import/BK2010-04.pdf.

Bankruptcy courts have highlighted the importance of using these sanctions to achieve greater deterrence and, therefore, greater compliance under Rule 3002.1. *See In re Lescinskas*, 628 B.R. at 382, n.8 ("The gravity of Rule 3002.1 compliance was recently underscored by a series of multimillion dollar penalties negotiated by the Department of Justice's U.S. Trustee Program with certain national banks which the USTP had accused of, among other things, repeatedly violating Rule 3002.1."). For instance, in *Lescinskas*, the bankruptcy court disallowed *the bank's* contractual claim for attorney's fees and costs under Rule 3002.1(i)(2) even though such a sanction was punitive rather than compensatory and would result in a windfall for the debtor. *See id*. at 384 ("A legitimate purpose of a sanction is to punish. It is not uncommon for the beneficiary of that punishment to be the opposing party who thereby receives a windfall.").

Given the broad language utilized and the clear intent to strengthen these sanctions to allow for additional deterrence, there is no basis to conclude that there was any intent to limit "other appropriate relief" to compensatory sanctions such as "reasonable expenses and attorney's fees," and to exclude non-compensatory punitive sanctions. For the same reason that the evidence exclusion sanction was insufficient to foster deterrence, such a restriction on the "other appropriate relief" would frustrate the provision's deterrent purpose especially because, as the bankruptcy court also emphasized, "[t]here are also many instances in which awarding attorney's fees and costs may prove insufficient 'to deter those who might be tempted to such conduct in the absence of such a deterrent.'" *Gravel II*, 601 B.R. at 886 (quoting *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980)).

In addition to the shared purpose of deterrence, the scope of the intended sanctions under Rule 3002.1 cannot be distinguished from those under Rule 37 based upon the other interests that each rule is designed to protect. Thus, I respectfully disagree with the majority's view that Rule 3002.1 only protects the debtor in "remedying or avoiding certain costs," while Federal Rule 37 "protects the interests of the parties, the court, and the public in a speedy and just resolution of the case." Maj. Op. at 27. To be sure, as noted above, Rule 3002.1 seeks to ensure that the debtor avoids certain undisclosed costs. However, more fundamentally, its objective is to broadly protect Chapter 13 debtors' opportunity for a "fresh start," which is one of the "twin pillars of the bankruptcy system." *In re Sanchez*, 372 B.R. 289, 321 (Bankr. S.D. Tex. 2007); *see also In re Rivera*, 599 B.R. 335, 342 (Bankr. D. Ariz. 2019) ("[Rule 3002.1] is a procedural mechanism designed to effectuate the Chapter 13 policy of providing debtors with a fresh start." (internal quotation marks omitted)). The reimbursement of costs to a debtor for a Rule violation (where such costs are incurred) does little to prevent future violations and therefore falls far short of safeguarding the Chapter 13 "fresh start" process for all such debtors. *See generally In re Lescinskas*, 628 B.R. at 384 ("Contrary to the bank's suggestion, putting a debtor in the difficult position of having to seek to amend his plan to amortize post-petition fees and charges (something a debtor cannot even force a lender to accept) is not an acceptable alternative to the lender's complying with Rule 3002.1(c) in the first instance.").

One of the primary reasons that the award of costs and attorney's fees may provide woefully insufficient deterrence is that debtors may often pay the fees and charges that violate the Rule, either because they go unnoticed to the debtor or because it is easier to pay the small fees/charges rather than to litigate them, and such decisions by the debtor expose the offending party to no sanction whatsoever. The *amicus* brief from the National Association of Chapter 13 Trustees explained this economic incentive for non-compliance with the Rule by mortgage servicers:

> [PHH] waves off its errors, in part, by emphasizing the relatively small dollar amount at issue in these cases. But that misses the systemic point. These types of undisclosed fees are at the heart of the problem that Rule 3002.1 attempts to address. When fees and charges creep into accounts without proper notice, debtors may pay them, even if invalid. That may be because the fees and charges are not designated as immediately collectible and simply inflate the amounts debtors must pay to satisfy the loans. Or it may be because debtors conclude that the burden of challenging the amounts exceeds the likely benefit—especially if they learn of the exaggerated payoff only when they are attempting to close a refinancing of the loan or a sale of the mortgaged property. If the only cost to a claimholder for improperly assessing fees is to occasionally forego the (relatively small) fees when caught, it encourages servicers to just treat those forfeitures as a cost of doing business and never take the systemic measures required to service loans properly in Chapter 13.

Nat'l Assoc. of Chapter 13 Trs. Amicus Br. at 5-6 (citation omitted); *see also id*. at 15 ("[A]s bad as the headline-grabbing cases are, the real story is in the systemic errors that impose relatively small costs on a wide range of consumers. These errors are at least as pernicious because of the ease with which they can escape notice and because of the practical obstacles to obtaining individual relief."). The majority nevertheless asserts that, when the improper fees are contained on the monthly statements but not part of the amount due and ultimately did not get paid (as is the case here), "[t]he rest is hyperventilation." Maj. Op. at 31. I do not view these serious concerns about systemic non-compliance by some mortgage servicers with the Rule and the Rule's inability to adequately address serial violations through compensatory sanctions, which were articulated by the *amicus* and recognized by a bankruptcy court with real-world expertise in the enforcement of this Rule, as "hyperventilation."

In short, beyond any interest that a particular debtor may have in the enforcement of the Rule, the bankruptcy courts and the public have an equally important and independent interest in ensuring that the "fresh start" objective of Chapter 13 proceedings is not undermined, and that a speedy and just resolution of those proceedings takes place. *See In re Sutherland*, 161 B.R. 657, 661 (Bankr. E.D. Ark. 1993) ("The longer the process to confirmation [under Chapter 13], the greater the harm to the creditors and the increase in adequate protection issues and problems for the creditors, the debtor, and the Court."); *see also In re Carr*, 468 B.R. 806, 808 (Bankr. E.D. Va. 2012) ("The purpose of Rule 3002.1 was to provide a prompt, efficient, and cost-effective means to determine whether there is a question as to the status of a debtor's home loan at the conclusion of the [C]hapter 13 case."); *Lucoski v. I.R.S.*, 126 B.R. 332, 342 (S.D. Ind. 1991) (noting that "speedy resolution of Chapter 13 proceedings are favored").

Thus, the judicial branch and the public have a compelling interest in ensuring that the bankruptcy process is not abused by Rule violations or other misconduct. In fact, it is the role of the Trustee to represent the public interest with regard to the enforcement of the bankruptcy rules, including Rule 3002.1. *See generally In re Zarnel*, 619 F.3d 156, 162 (2d Cir. 2010) (quoting other cases for the proposition that "the U.S. trustees are responsible for protecting the public interest and ensuring that bankruptcy cases are conducted according to law" and "avoiding substantial abuse of the bankruptcy process" (internal quotation marks omitted)).

In sum, I conclude that the plain meaning of "other appropriate relief" under Rule 3002.1, as confirmed by its modeling after both Rule 37 and that Rule's purpose, authorizes a bankruptcy court to use its discretion to impose punitive monetary sanctions in appropriate circumstances for violations of Rule 3002.1.

C. Sanctions Under a Bankruptcy Court's Inherent Power

Even assuming, *arguendo*, that the bankruptcy court did not have the authority to impose punitive monetary sanctions against PHH under Rule 3002.1, the bankruptcy court certainly possessed the authority and discretion to impose the $75,000 in sanctions for PHH's Rule violations under its inherent powers.

As the majority correctly explains, it is well settled that " '[b]ankruptcy courts, like Article III courts, possess inherent sanctioning powers,' which 'include[s] the power to impose relatively minor non-compensatory sanctions on attorneys appearing before the court in appropriate circumstances.' " Maj. Op. at 28 (second alteration in original) (quoting *In re Sanchez*, 941 F.3d 625, 628 (2d Cir. 2019)). That inherent power can be exercised to address violations of rules, even where rules contain a sanctions provision. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 50 (1991) (explaining that if "neither the statute nor the Rules are up to the task, the court may safely rely on its inherent power"); *see also DLC Mgmt. Corp. v. Town of Hyde Park*, 163 F.3d 124, 136 (2d Cir. 1998) ("[T]he fact that there may be a statute or rule which provides a mechanism for imposing sanctions of a particular variety for a specific type of abuse does not limit a court's inherent power to fashion sanctions, even in situations similar or identical to those contemplated by the statute or rule.").

Notwithstanding its recognition of this inherent power possessed by the bankruptcy court, the majority concludes that the bankruptcy court here only "alluded to its inherent powers" and that "[t]he sanction was imposed under Rule 3002.1(i)." Maj. Op. at 28-29. To be sure, an award of sanctions "may be exercised only on the basis of the specific authority invoked by that court." *In re Kalikow*, 602 F.3d 82, 96 (2d Cir. 2010). However, the bankruptcy court did more than "allude[ ] to its inherent powers"—it explicitly invoked such powers. More specifically, in both its opinion and its separate order, the bankruptcy court stated that it "finds, first, it has the authority pursuant to Rule 3002.1, pertinent caselaw, and *its inherent powers*, to impose punitive sanctions on PHH for its violations of Rule 3002.1." *Gravel II*, 601 B.R. at 878 (emphasis added); *see also id.* at 912. Thus, it is abundantly clear from the record that the bankruptcy court's inherent powers were invoked and that the sanctions were imposed pursuant to such powers (in addition to under the Rule). In fact, counsel for PHH even corrected the Court at oral argument to make clear that the bankruptcy court imposed the sanctions under its Rule 3002.1 and its inherent powers in its second order. *See* Oral Arg. at 8:15-28.

I also respectfully disagree with the majority's conclusion that the bankruptcy court did not sufficiently assess whether the sanction was authorized so as to allow this Court to reach the question. Although the bankruptcy court did not include a section in the opinion separately discussing its basis for invoking its inherent authority to impose the $75,000 in sanctions for PHH's violations of Rule 3002.1, no such separate analysis was necessary because its factual basis for invoking its inherent powers was exactly the same as its basis for imposing such sanctions under Rule 3002.1, as to which there already was a lengthy and thorough analysis.

Moreover, the bankruptcy court spent several pages of its decision analyzing multiple inherent powers cases in great detail in discussing and determining the potential amount of the sanctions to be imposed under the court's inherent powers. *See Gravel II*, 601 B.R. at 905-07. Thus, this is not a case where the bankruptcy court failed to show "care, specificity, and attention to the sources of its power," *In re Kalikow*, 602 F.3d at 96 (quoting *Sakon v. Andreo*, 119 F.3d 109, 113 (2d Cir. 1997)); *cf. Sakon*, 119 F.3d at 113 ("[A]n award [of sanctions] either without reference to any statute, rule, decision, or other authority, or with reference only to a source that is inapplicable will rarely be upheld.").

Indeed, it is hard to imagine (and the majority fails to articulate) what additional factual or legal reasoning would be needed to aid our review of this determination under the bankruptcy court's inherent powers. Interestingly, PHH has not even argued that the bankruptcy court's reasoning with respect to its inherent powers was deficient. Instead, when asked at oral argument about the imposition of the $75,000 in sanctions under its inherent authority, PHH's counsel simply stated, "with respect to the $75,000 part of the case, . . . [the Trustee] has a stronger argument there." Oral Arg. at 5:17-33. In short, I conclude that the bankruptcy court's decision—including its explicit invocation of its inherent powers, its detailed findings with respect to PHH's violations of Rule 3002.1, and its thorough explanation as to how it arrived at the particular amount of the sanctions under the applicable case authority for making such a determination under its inherent powers—provided a more than sufficient record for this Court to analyze and conclude that the bankruptcy court did not abuse its discretion in imposing such sanctions.

As to the requirements for the exercise of that authority and discretion under a bankruptcy court's inherent powers, although the majority suggests that it is "dubious" that a bankruptcy court can impose monetary sanctions without an explicit finding of bad faith, the Supreme Court has made clear that monetary sanctions imposed under a court's inherent powers require a finding that the misconduct "constituted or was *tantamount to bad faith*." *Roadway Express, Inc.*, 447 U.S. at 767 (emphasis added). As to the nature of conduct that can be "tantamount to bad faith," we have explained that "a federal court—any federal court—may exercise its inherent power to sanction a party . . . who has acted in bad faith, *vexatiously, wantonly, or for oppressive reasons*." *Ransmeier v. Mariani*, 718 F.3d 64, 68 (2d Cir. 2013) (emphasis added) (internal quotation marks omitted).

Therefore, although courts often make an explicit finding of bad faith on behalf of a party before imposing sanctions, *see Int'l Techs. Mktg., Inc. v. Verint Sys., Ltd.*, 991 F.3d 361, 368 (2d Cir. 2021), a court may impose a monetary sanction on a party (or an attorney) under its inherent power if the factual findings supporting the sanctions are tantamount to bad faith, *see*, *e.g.*, *First Bank of Marietta v. Hartford Underwriters Ins. Co.*, 307 F.3d 501, 520-21 (6th Cir. 2002) (concluding that, although the district court's finding that the plaintiff's conduct was "laced with bad faith" was an explicit finding of bad faith, "the district court's other findings [that] Plaintiff's litigation conduct [was] 'tantamount' to bad faith provid[ed] more than ample grounds to justify the exercise of its inherent authority and to impose the sanction of attorney fees and costs").

Here, the bankruptcy court observed, in its initial opinion imposing the sanctions, that:

> [w]hile there is no requirement to make a bad faith finding, *PHH's conduct cannot realistically be attributed to an innocent mistake*. PHH *had knowledge* of [its obligations] . . . , only corrected the statements after the Trustee filed a motion for sanctions, and then asserted it did not violate a court order at all. Taken together, particularly in the context of prior court warnings, these actions raise serious concerns about *whether PHH is making a good faith effort to comply with Rule 3002.1* and heed the directives of court orders declaring debtors current.

In re Gravel ("*Gravel I*"), 556 B.R. 561, 576 n.10 (Bankr. D. Vt. 2016) (emphases added), *vacated and remanded by PHH Mortg. Corp. v. Sensenich*, Case No. 5:16-cv-00256-gwc, 2017 WL 6999820 (D. Vt. Dec. 18, 2017). In addition to this finding in the initial opinion that PHH's conduct was not "an innocent mistake," the bankruptcy court reiterated in its second opinion (reimposing the sanctions) that it had found that "PHH had engaged in a pattern of the offending conduct" and "PHH had previously been admonished twice and sanctioned once (in this Court) for sending incorrect statements." *Gravel II*, 601 B.R. at 882; *see also id.* at

896, 903 (emphasizing "PHH's status as a repeat offender" and "the gravity of [PHH's] misconduct").

Simply put, the record is replete with findings by the bankruptcy court of PHH's repeated violations of the Rule despite having the wherewithal to know better and its assurances to the bankruptcy court that it would amend its processes to comply with its obligations. In my view, that record is more than sufficient to constitute the finding, which was necessary to support monetary sanctions under the bankruptcy court's inherent powers, that PHH's conduct was "tantamount to bad faith." *Roadway Express, Inc.*, 447 U.S. at 767; *see also Matter of Betts*, Nos. 94-2018, 94-2668, 1995 WL 108940, at *2 (7th Cir. 1995) (imposing sanction on an attorney pursuant to a bankruptcy court's inherent powers based on "egregious misconduct"); *In re AOV Indus., Inc.*, 798 F.2d 491, 498 (D.C. Cir. 1986) (noting the litigant "was on clear notice of what action was expected of him in the district court: the Bankruptcy Rules, the district judge, and the motion for fees made it crystal clear" what action the litigant must take, and sanctions were appropriate because he did not do so).

In any event, even if the bankruptcy court's reasoning for the imposition of sanctions under its inherent powers (including on the issue of bad faith) was not sufficiently developed to allow review by this Court (as the majority finds), we should remand the matter, and the bankruptcy court should be afforded the opportunity to provide additional reasoning for its determination. *See*, *e.g.*, *Hollon v. Merck & Co.*, 589 F. App'x 570, 572 (2d Cir. 2014) (remanding where the district court did not provide sufficient reasoning to allow appellate review on the issue of bad faith for the imposition of sanctions under the court's inherent powers); *Weaver v. Chrysler Corp.*, 14 F. App'x 136, 137 (2d Cir. 2001) (holding that findings for imposition of sanctions were insufficient and "retain[ing] jurisdiction over th[e] appeal while vacating the order and remanding to the district court for additional findings and reasoning as appropriate"), *order rescinded*, 99 F. App'x 330, 333 (2d Cir. 2004) (affirming district court's imposition of sanctions after it issued a supplemental order "in light of [its] additional findings and articulated reasoning"). Here, the bankruptcy court is not being afforded such an opportunity to supplement the record on remand.

In short, I conclude that the record is sufficient to allow this Court to determine that the bankruptcy court did not abuse its discretion in imposing sanctions under its inherent powers for PHH's flagrant misconduct in repeatedly violating Rule 3002.1 even after prior sanctions, warnings from bankruptcy courts, and a representation by PHH that it would rectify any internal controls that were contributing to such violations.

D. The Amount of the Sanctions

Although the majority did not need to analyze the amount of the sanctions in light of its holdings, I briefly write to explain why there would have been no basis to disturb the bankruptcy court's determination that $75,000 was the appropriate amount.

As a threshold matter, given that PHH is a multi-billion-dollar company, $75,000 was a modest, non-serious sanction that did not present the type of financial impact on PHH that would warrant heightened due process requirements. *See*, *e.g.*, *United States v. Twentieth Century Fox Film Corp.*, 882 F.2d 656, 665 (2d Cir. 1989) ("We conclude that the jury right is available for a criminal contempt whenever the fine imposed on an organization exceeds $100,000. For fines below the $100,000 threshold, it will remain appropriate to consider whether the fine has such a significant financial impact upon a particular organization as to indicate that the punishment is for a serious offense, requiring a jury trial."); *CBS Broad. Inc. v. FilmOn.com, Inc.*, 814 F.3d 91, 103-04 (2d Cir. 2016) (finding that a $90,000 sanction against an internet company was "relatively minor"); *cf. Mackler Prods., Inc. v. Cohen*, 146 F.3d 126, 130 (2d Cir. 1998) (concluding "the imposition of a $10,000 punitive sanction on an individual (*as opposed to a corporation or collective entity*) requires" certain heightened due process protections (emphasis added)); *see also Sizzler Family Steak Houses v. Western Sizzlin Steak House, Inc.*, 793 F.2d 1529, 1535 (11th Cir. 1986) (characterizing a $25,000 contempt sanction imposed against corporate restaurant chain as "a modest sanction").

With respect to the determination as to the amount of the sanction, the bankruptcy court properly considered the amount that would be necessary to provide deterrence in light of PHH's ability to pay and its sophistication. *See Oliveri v. Thompson*, 803 F.2d 1265, 1281 (2d Cir. 1986) ("[I]t lies well within the district court's discretion to temper the amount to be awarded against an offending [person or entity] by a balancing consideration of his [or its] ability to pay."); *see also Farmer v. Banco Popular of N. Am.*, 791 F.3d 1246, 1259 (10th Cir. 2015) ("[B]ecause the principal purpose of punitive sanctions is deterrence, the offender's ability to pay must be considered."); *Johansen v. Combustion Eng'g, Inc.*, 170 F.3d 1320, 1338 (11th Cir. 1999) ("A bigger award is needed to attract the attention of a large corporation." (alteration and internal quotation marks omitted)). In particular, in its initial opinion, the bankruptcy court explained:

> [T]he Court must take into account that PHH is a sophisticated commercial lender and an entity of substantial financial means. According to the public statements on its website, PHH is a top-ten originator and servicer of residential mortgages in the United States, boasting approximately $41 billion in mortgage financing and maintained an average servicing portfolio of approximately 1.1 million loans in 2015 alone. PHH has the expertise and experience to be charged with knowledge of the Bankruptcy Rules, of its duty to comply with court orders, and of its obligation to fulfill the commitments it makes to courts and debtors.

Gravel I, 556 B.R. at 578 (footnote and internal quotation marks omitted). The bankruptcy court also addressed that factor in its second opinion. *See*, *e.g.*, *Gravel II*, 601 B.R. at 901 ("PHH administers millions of dollars in mortgages every day, and therefore it is all too easy for it to pay a $10,000 sanction as a cost of doing business, and there is no way of selecting a specific amount that will *necessarily deter*." (internal quotation marks omitted)).

Similarly, it was well within the bankruptcy court's discretion to link the amount of the sanctions to the number of violations. *See Int'l Techs. Mktg.*, 991 F.3d at 369 (holding that the "number of misrepresentations that a party makes are perfectly acceptable data points for a court to consider in determining whether—and, perhaps more importantly, *what*—sanctions are warranted"). Here, the bankruptcy court determined that a sanction of $1,000 per violation should be imposed in light of PHH's repeated violations. Because PHH violated Rule 3002.1 on twenty-five separate occasions in each of the three cases, the bankruptcy court's formula resulted in a total of $75,000 in sanctions. That determination, especially in light of the prior sanction against PHH for the same misconduct and its sophistication, was not an abuse of discretion.

* * *

In sum, I conclude that the bankruptcy court did not exceed its authority or abuse its discretion in imposing $75,000 in sanctions against PHH under either Rule 3002.1 or its inherent powers for the reasons set forth above, and therefore, I respectfully dissent from the portion of the majority's opinion which vacated the imposition of those sanctions.

UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT

In re: Nicholas and Amanda Gravel, Debtors.	**Chapter 13 Case # 11-10112**
In re: Allen and Laurie Beaulieu, Debtors.	**Chapter 13 Case # 11-10281**
In re: Matthew and Emilie Knisley, Debtors.	**Chapter 13 Case # 12-10512**
Appearances: Mahesha Subbaraman, Esq., Subbaraman PLLC, Minneapolis, Minnesota, For the Trustee	*Alexandra Edelman, Esq., Primmer Piper Eggleston & Cramer, PC, Burlington, Vermont, For the Creditor*

MEMORANDUM OF DECISION

(Filed Jun. 27, 2019)

ON REMAND FROM U.S. DISTRICT COURT, IMPOSING SANCTIONS ON PHH MORTGAGE CORPORATION

The U.S. District Court remanded this matter for this Court to redetermine the amount of sanctions to be imposed on PHH Corporation ("PHH") for its violations of Bankruptcy Rule 3002.1 and Debtor Current Orders, with a focus on the scope of this Court's statutory and inherent authority to impose punitive sanctions. This Court has fulfilled that remand, based on the caselaw to which the District Court pointed, and a recent Supreme Court decision that affirmed the authority of bankruptcy courts to impose sanctions. See Taggart v. Lorenzen, No. 18-489 (U.S. June 3, 2019).

For the reasons set forth below, the Court finds, first, it has the authority pursuant to Rule 3002.1, pertinent caselaw, and its inherent powers, to impose punitive sanctions on PHH for its violations of Rule 3002.1; second, it has the authority, pursuant to § 105(a) and its inherent powers, to sanction PHH for its breach of the Debtor Current Orders in the Gravel and Beaulieu cases; third, there are specific dollar amount caps which set the outer limits of "modest," or "less than serious," sanctions; fourth, those caps may be adjusted to correlate to the present value of those dollar amounts; fifth, this Court has the authority to impose punitive sanctions on PHH for its Rule and Court Order violations, provided the amount of the sanction imposed in each case does not exceed the caselaw-defined cap for a non-serious sanction; and sixth, based on the facts and circumstances of these cases, it is appropriate for PHH to pay the sanctions for its Rule 3002.1 violations to the chapter 13 trustee (the "Trustee") and pay the sanctions attributable to its Court Order violations to Legal Services Vermont.

Based on these findings, the Court (1) is reducing the combined sanction from $225,000 to $175,000 in the Gravel case, reducing the combined sanction from $125,000 to $100,000 in the Beaulieu case, and leaving intact the sanction of $25,000 in the Knisley case; and (2) directing PHH to pay the portion of the sanctions allocable to PHH's violation of the Rule 3002.1 in each of the three cases, i.e., $25,000 per case, to the Trustee, and directing PHH to pay the portion of the sanctions allocable to PHH's violation of the Debtor Current Orders, i.e., $150,000 in the Gravel case and $75,000 in the Beaulieu case, to Legal Services Vermont (f/k/a Legal Services Law Line of Vermont).

I. JURISDICTION

The Court has jurisdiction over these contested matters pursuant to 28 U.S.C. §§ 157 and 1334, and the Amended Order of Reference entered on June 22, 2012. The Court declares the issues raised in the contested matter in each of these cases, and on remand, to be core proceedings, pursuant to 28 U.S.C. § 157(b)(2)(A), (B) and (O), over which this Court has constitutional authority to enter a final judgment.

II. PROCEDURAL HISTORY AND DIRECTION FROM THE DISTRICT COURT

On September 12, 2016, this Court entered an Order granting the Trustee's motions to sanction PHH, disallowing PHH's post-petition charges, and directing PHH to pay sanctions of $275,000, $175,000 and $25,000, respectively, in the Gravel, Beaulieu, and Knisley cases, to Legal Services Law Line of Vermont (Gravel, docs. ## 82, 83; Beaulieu, docs. ## 99, 100;

Knisley, docs. ## 55, 56) (the "Sanctions Decision").[1] On September 21, 2016, PHH filed a notice of appeal (doc. # 87). On December 18, 2017, the U.S. District Court (Crawford, J.) issued its decision vacating this Court's decision and remanding the matter to this Court (doc. # 104, the "Remand Decision"). Thereafter, the Debtors and Trustee filed an appeal of the District Court's Remand Decision, in the Second Circuit Court of Appeals. That Court dismissed the appeal, finding the Remand Decision was not a final order (doc. # 109). Thus, this matter was once again before this Court.

In the Remand Decision, the District Court observes that "[t]he basis for the sanctions was the admitted violation of Bankruptcy Rule 3002.1" (doc. # 104, p. 1), and PHH's violation of Debtor Current Orders in two of the three cases (doc. # 104, pp. 4, 5). The District Court described the scope of the appeal as limited: PHH's challenge to this Court's imposition of sanctions (in the amount of $225,000 in the Gravel case, $125,000 in the Beaulieu case, and $25,000 in the Knisley case[2]). The District Court remanded the matter with instructions that this Court reconsider the amount of sanctions, focusing on this Court's authority to only impose sanctions that are "short of punitive

[1] In the interest of simplicity, all docket references in this decision cite to the Gravel case docket only; all documents, however, can be found in all three chapter 13 bankruptcy cases.

[2] As will be discussed in detail below, the District Court focused on the total sanctions awarded in all 3 cases: $300,000 for violation of Court Orders, and $75,000 for violations of Rule 3002.1, rather than on the sanctions awarded in each case. See discussion at Part D.

sanctions of the scope and type [this Court previously] imposed in these cases" (doc. # 104, p. 17).

III. LEGAL ISSUES ON REMAND

The District Court remanded this matter to this Court to make a single determination: In light of PHH's violations of Rule 3002.1 and the Debtor Current Orders in these three cases, and consistent with the caselaw it highlighted, what sanctions are less than serious and, as such, within this Court's authority to impose?[3]

To fulfill that remand, and determine the appropriate amount of sanctions to impose on PHH for its misconduct in these cases, the Court analyzes six component legal issues: First, does this Court have the authority to impose punitive sanctions on PHH for its violations of Bankruptcy Rule 3002.1 and, if so, what is the source of that authority? Second, does this Court have the authority to impose sanctions on PHH for its violations of Debtor Current Orders and, if so, what is

---

[3] The final paragraphs of the Remand Decision stated:

> . . . [t]his court concludes that the statutory and inherent powers of the Bankruptcy Court are not sufficient to support the Bankruptcy Court's imposition upon PHH of $300,000 in punitive sanctions. The court notes that this conclusion does not leave Bankruptcy litigants free to engage in contemptuous conduct with impunity. . . . [The Bankruptcy Court] may take steps to enforce its orders <u>short of punitive sanctions of the scope and type imposed in these cases</u>.

(doc. # 104, pp. 16-17) (emphasis added).

the source of that authority? Third, what guidance can be drawn from the decisions favorably cited by the District Court in its Remand Decision, as well as any pertinent Second Circuit or Supreme Court caselaw, as to the scope and size of punitive sanctions this Court is authorized to impose? Fourth, what weight should this Court assign to factors such as PHH's corporate status, its substantial financial resources, and its prior violations of the same duties, in deciding what punitive sanctions are warranted here? Fifth, is there authority to adjust the caselaw-established caps defining what is a serious sanction, and what is less than a serious sanction, to reflect the passage of time and the present value of those dollar amount caps? Sixth, in the context of the particular facts presented in these cases, and the interest of justice, to whom should PHH pay the sanctions this Court imposes in each of these cases?

IV. FINDINGS OF FACT ESSENTIAL TO REMAND

Since, as the District Court observed, "[t]he facts giving rise to [the instant] appeal were not in dispute before the Bankruptcy Court and are not challenged on appeal" (doc. # 104, p. 2), the Court recites only those findings of fact that are essential to fulfilling the remand.

In the Gravel case, this Court had entered an order on May 20, 2016, determining Mr. and Mrs. Gravel had cured all prepetition mortgage defaults and were current on all postpetition mortgage payments to PHH (a "Debtor Current Order"). That order declared

> the debtors, by their payments through the Office of the Chapter 13 Trustee, have made all payments due during the pendency of this case through April 1, 2016, <u>including all monthly payments and any other charges or amounts due under their mortgage with PHH Mortgage Corporation</u>.

(doc. # 74) (emphasis added). On May 25, 2016, five days after entry of the Debtor Current Order, PHH sent the Debtors a mortgage statement for the month of May 2016 which, contrary to the recently entered Debtor Current Order, asserted the Debtors owed PHH property inspection fees of $258.75. The Trustee filed a motion seeking an order finding PHH to be in contempt and imposing sanctions on PHH (doc. # 75). PHH opposed that relief, arguing, <u>inter alia</u>, that this was a one-time error (doc. # 77). The Trustee vigorously disputed that assertion, pointing out that (i) PHH had sent out at least fifteen other mortgage statements that included postpetition fees and expenses without filing a single Rule 3002.1(c) notice, (ii) PHH had been chastised by another bankruptcy court for violating Rule 3002.1(c), <u>see</u> <u>In re Owens</u>, 2014 Bankr. LEXIS 163 (Bankr. W.D.N.C. 2014), (iii) PHH had assessed improper charges in other cases in this District, and (iv) this Court had previously imposed a consensual sanction of $9,000 on PHH, in this case, based on PHH's repeated misapplication of mortgage payments and issuance of dozens of erroneous monthly mortgage statements to Mr. and Mrs. Gravel for over two years (see doc. # 49). The Trustee claimed sanctions were warranted and necessary based on PHH's flagrant violation of both Rule 3002.1 and the Debtor Current Order in this case.

The factual and procedural posture of the Beaulieu case is substantially similar to that of the Gravel case: On May 5, 2016, the Court entered a Debtor Current Order, determining Mr. and Mrs. Beaulieu had cured all prepetition mortgage defaults and were current on all postpetition mortgage payments due to PHH (case # 11-10281, doc. # 82). Notwithstanding entry of that Order, less than three weeks later, on May 25, 2016, PHH sent out a monthly statement that included old charges (an NSF fee of $30 and a property inspection fee of $56.25) – charges for which it had never sent a Rule 3002.1(c) notice. On June 14, 2016, the Trustee filed a motion for contempt and sanctions (doc. # 90, the "Beaulieu Sanctions Motion"), essentially articulating the same arguments and seeking the same relief as in the Gravel Sanctions Motion, with regard to both PHH's failure to comply with Rule 3002.1 and PHH's violation of the Debtor Current Order. PHH filed opposition to the Beaulieu Sanctions Motion (doc. # 95), and the Trustee filed a response to that opposition (doc. # 96), both of which contained the same arguments they had made in the Gravel case. The facts of the Beaulieu case differ materially from the Gravel case in only three respects: (i) PHH charged postpetition fees to the Beaulieus' account on dates, and in amounts, that differed from the Gravels; (ii)

PHH did not respond to the Trustee's motion for final determination before the Debtor Current Order was entered in Beaulieu; and (iii) PHH was not previously sanctioned in the Beaulieu case.

PHH issued incorrect mortgage statements in the Knisley case, as well, but there was no Debtor Current Order yet in this case. Therefore, the Trustee's motion for contempt and sanctions in Knisley was limited to PHH's failure to comply with Rule 3002.1 (doc. # 50, the "Knisley Sanctions Motion"). The Trustee alleged in this case that PHH issued a monthly mortgage statement on May 25, 2016 that included charges more than 180 days old ($246.50 in property inspection fees and $124.50 in late charges), without having filed the required and corresponding Rule 3002.1(c) notices. PHH opposed the Knisley Sanctions Motion (doc. # 51), and the Trustee responded to that opposition (doc. # 52), both of which set forth the same arguments made in the other two cases, with respect to PHH's Rule 3002.1 violation.

This Court found below, and the District Court left undisturbed, that PHH was in consistent violation of Rule 3002.1 for 25 months in each of the three cases, and sent 25 incorrect statements to each of the Debtors.[4] That is to say, on 75 separate occasions, PHH

[4] Although the Trustee provided evidence that PHH sent incorrect mortgage statements to the Debtors over a period of years, in the interest of simplicity and to provide PHH the benefit of the doubt that it would fulfill its pledge to alter its procedures after the first sanction was imposed against it in the Gravel case (doc. # 49, entered Mar. 31, 2014), this Court arrived at the number of

failed to detect that its borrower was current, or erroneously determined its borrower was in default, and issued a notice that contradicted the information its representative had filed with this Court, under penalty of perjury, and upon which the Court relied in issuing the two Debtor Current Orders in the borrowers' bankruptcy cases. As a direct result of PHH's inaccurate filings, on 25 occasions, each of the three Debtors received a notice that erroneously stated the Debtors were behind on their mortgage payments and likely caused those Debtors to worry that, notwithstanding their belief that they had made all required payments, their mortgage loan was in default and they were at risk of losing their home.[5]

The District Court also left undisturbed this Court's finding that PHH's conduct, in sending notices that incorrectly stated the Debtors were in default, violated the Debtor Current Orders that had been entered in the Gravel and Beaulieu cases.

---

sanctionable Rule 3002.1 violations, for purposes of the Sanctions Decision, by computing the number of months from the date of its previous sanction against PHH to the monthly statements sent in May 2016. The 25 months yielded by this calculation was the basis for the Rule 3002.1 sanctions imposed against PHH in each of the three cases (doc. # 82, p. 10).

[5] These fears are not without rational basis. It is well-documented that mortgage lenders have admitted to foreclosing on mortgage loans based on erroneous records, See, e.g., Ranae Merle, Wells Fargo Admits it Incorrectly Foreclosed on 545 Homeowners It Should have Helped, The Washington Post, (Nov. 6, 2018), https://www.washingtonpost.com/business/2018/11/06/wells-fargo-admits-it-incorrectly-foreclosed-homeowners-it-should-have-helped/?utm_term=.ca5d432cd9a5.

Likewise, the District Court left undisturbed this Court's determination of the factors to be considered when determining the amount of the sanctions, and this Court's findings with respect to each factor (doc. # 82, p. 14-16). In that regard, this Court had found (1) PHH had adequate notice of the Debtor Current Orders, (2) PHH had engaged in a pattern of the offending conduct, (3) PHH had previously been admonished twice and sanctioned once (in this Court) for sending incorrect statements, and (4) PHH's level of sophistication and available financial resources mandated a higher sanction than might be imposed on another party.[6] As this Court indicated in its prior ruling, it is "mindful of the need to limit the magnitude of the sanction to the amount necessary to deter future misconduct," and to fix the sanctions in amounts that is "warranted, reasonable, and necessary to communicate to PHH the gravity of its violation of this Court's Debtor Current Order in this case, to punish the violation, and to deter PHH from violating court orders in the future" (doc. # 82, p. 16). On remand, the task of this Court is to reformulate the sanctions, articulate the source of the Court's authority for the sanctions, and explain the basis for characterizing them as "less than serious."

---

[6] Though not disturbed, the District Court did not discuss the factor considering a sanctioned party's financial resources and ability to pay, so this Court addresses it below. <u>See</u> discussion at Part C(3).

V. DISCUSSION

A. <u>This Court's Authority to Impose Sanctions for Violations of Rule 3002.1 and Violations of the Debtor Current Orders</u>

In the Remand Decision, the District Court examined the three sources of authority upon which this Court had relied in imposing sanctions on PHH, namely, Bankruptcy Rule 3002.1, this Court's inherent powers, and 11 U.S.C. § 105.[7] Therefore, this Court will begin with an analysis of those sources of authority, to ensure a determination that is congruent with the Remand Decision.

1. <u>*Authority to Impose Punitive Sanctions for Violations of Rule 3002.1*</u>

With respect to Rule 3002.1, the District Court pointed out there is no precedent for the imposition of punitive sanctions under this Rule and held "[t]he authority conferred by Rule 3002.1(i) cannot exceed the scope of the substantive powers of the Bankruptcy Court" and "the Bankruptcy Court's order imposing sanctions pursuant to Rule 3002.1(i) exceeded the scope of the Bankruptcy Court's powers as delineated by statute and precedent" (doc. # 104, p. 9). Based on these premises, it concluded the imposition of the $25,000 sanction in each case, for violating the Bankruptcy Rule requirements, "exceeded the scope of [the

---

[7] All citations to statutory sections refer to Title 11, United States Code (the "Bankruptcy Code"), unless otherwise indicated.

Court's authority under] Rule 3002.1(i)" (doc. # 104, p. 9).

While the District Court observed that "[t]he question of whether Rule 3002.1(i) authorizes the imposition of punitive sanctions appears to be a question of first impression, not just in the Second Circuit, but across the nation" (doc. # 104, p. 8), it did not rule that Rule 3002.1(i) precludes the awarding of a punitive sanction as a form of "other appropriate relief." This Court must determine the outer limits of bankruptcy courts' substantive, statutory, and precedential authority to ensure that the sanctions it imposes under Rule 3002.1(i) do not exceed those limits.

Bankruptcy Rule 3002.1 went into effect in 2011, in order to protect the fresh starts of chapter 13 debtors by requiring the holders of claims secured by a debtor's principal residence to timely file a detailed notice setting forth all postpetition fees, expenses, and charges it seeks to recover from the debtor. <u>See</u> KP. 3002.1(c). As noted by the Advisory Committee on Bankruptcy Rules, "Rule 3002.1 . . . assists in the implementation of § 1322(b)(5) of the Bankruptcy Code."[8] The requirements of Rule 3002.1, in combination with the requirements imposed by Rule 3001(c), "are designed to allow bankruptcy court determination of any questions regarding the status of a debtor's home mortgage during a Chapter 13 case, eliminating the

[8] Report of the Advisory Committee on Rules of Bankruptcy Procedure, Bankruptcy Rules Committee Report, p. 6 (May 2009), https://www.uscourts.gov/rules-policies/archives/committee-reports/advisory-committee-rules-civil-procedure-may-2009.

possibility of unexpected deficiencies at the time the case closes." Eugene R. Wedoff, Proposed New Bankruptcy Rules on Creditor Disclosure and Court Enforcement of the Disclosures – Open for Comment, 83 AM. BANKR. L.J. 579, 584 (2009).

Subparagraph (i) of Rule 3002.1 was added as an enforcement mechanism and may be invoked when a creditor fails to comply with the requirements of the rule, in language modeled after Federal Rule of Civil Procedure 37. This subparagraph identifies the penalty for failure to comply as follows:

> (i) FAILURE TO NOTIFY. If the holder of a claim fails to provide any information as required by subdivision (b), (c), or (g) of this rule, the court may, after notice and hearing, take either or both of the following actions:
>
> (1) preclude the holder from presenting the omitted information, in any form, as evidence in any contested matter or adversary proceeding in the case, unless the court determines that the failure was substantially justified or is harmless; or
>
> (2) award other appropriate relief, including reasonable expenses and attorney's fees caused by the failure.

FED. R. BANKR. P. 3002.1(i) (emphasis added). Rules 3001(c) and 3002.1 were introduced, developed, and enacted concurrently; "they employ the same enforcement mechanism for required disclosure," and "are modeled after those for failure to make ordered discovery" under the Federal Rules of Civil Procedure. Wedoff, supra, at 584. Indeed, "the proposed sanctions most closely resemble the sanction available under Civil Rule 37(c)(1) for the failure to provide information required under the disclosure provisions of Rule 26(a)(3)."[9]

PHH alleges that "[n]one of the Committee reports or minutes contained any discussion concerning broad monetary sanctions intended to penalize creditors or act as a warning of the importance of complying with disclosure provisions" (doc. # 127, p. 15). Citing this, and pointing to the modeling of Rule 3002.1 on the language of Federal Civil Rule 37, PHH argues that any sanctions under Rule 3002.1(i) are limited to evidentiary exclusion of any improperly noticed fees or charges in any proceeding before the court, and attorney's fees incurred to enforce that exclusion (doc. # 127, p. 15). The same "legislative history"[10] upon which

---

[9] Advisory Committee on Rules of Bankruptcy Procedure, Subcommittee on Consumer Issues, Memorandum on Comments to Proposed Rules 3001(c) and Rule 3002.1, p. 12 (Apr. 7, 2010), https://www.uscourts.gov/sites/default/files/fr_import/BK2010-04.pdf [hereinafter 2010 Committee Memo].

[10] In its Memorandum on Remand, PHH characterizes the Advisory Committee's reports and minutes as "legislative history." See, e.g., doc. # 127, p. 18. While the Federal Bankruptcy Rules "are a legislative enactment" and should be interpreted using the "traditional tools of statutory construction," any pertinent legislative history is still confined to the reports, hearing transcripts, and statements generated by Congress and its various committees. See Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 163-65 (1988) (interpreting the Federal Rules of Evidence).

PHH relies, however, indicates first, the evidentiary exclusion to which PHH refers was already in Rule 3001 before the adoption of Rules 3001(c) and 3002.1 and, second, the addition of specifically enumerated sanctions in Rule 3001(c)(2)(D) and Rule 3002.1(i) were added with the intention of bolstering that preexisting exclusion remedy. See 2010 Committee Memo, supra note 9, at 12 ("Currently, loss of the evidentiary effect of prima facie validity is the only sanction included in Rule 3001 for the failure to execute and file a [proof of claim] in accordance with the rules. The proposed addition of Rule 3001(c)(2)(D) was based on the Advisory Committee's belief that stronger sanctions are required to ensure greater compliance with the rule's requirements.") (emphasis added).

PHH also misconstrues the significance of the discretion afforded to courts pursuant to their authority to impose "other appropriate relief." See FED. R. BANKR. P. 3002.1(i)(2). The Committee's notes indicate the members of the Advisory Committee supported a broad reading of "other appropriate relief." See 2010 Committee Memo, supra note 9, at 13 ("[The court] may impose a sanction other than the preclusion of the introduction of evidence."). Judge Wedoff, an influential member of the Advisory Committee on Bankruptcy Rules at the time Rule 3002.1 was drafted and future

---

Nevertheless, while not constituting legislative history per se, the Advisory Committee materials are "particularly relevant in determining the meaning of the document Congress enacted," especially where Congress does not address or amend the Advisory Committee's draft in any meaningful way on the question at hand. Id. at 165 n. 9.

chair of that Committee, described the import of a bankruptcy court's ability to award "other appropriate relief" as an additional measure beyond the specifically enumerated relief of evidentiary preclusion and attorney's fees and costs:

> [Rule 3001(c)(2)(D) and 3002.1(i)] employ the same enforcement mechanism for required disclosure – generally, the potential for a creditor being barred from introducing at a later hearing the information that was not timely provided, as well as reimbursing the debtor for reasonable expenses and attorneys' fees, <u>with other relief in the court's discretion</u>.

Wedoff, <u>supra</u>, at 584 (emphasis added). Moreover, the caselaw construing former Bankruptcy § 304(b), which employed the same language as Rule 3002.1(i), also supports a broader reading of "other appropriate relief."[11] <u>See, e.g.</u>, <u>In re Gee</u>, 53 B.R. 891, 896-97 (Bankr. S.D.N.Y. 1985).

---

[11] In the context of international bankruptcy cases, until the passage of BAPCPA in 2005, 11 U.S.C. § 304(b) granted a bankruptcy court the power to:

> (1) enjoin the commencement of –
>
> > (A) any action against –
> >
> > > (i) a debtor with respect to property involved in such foreign proceeding; or
> > >
> > > (ii) such property; or
> >
> > (B) the enforcement of any judgment against the debtor with respect to such property, or any act or the commencement or continuation of any judicial proceeding to create or enforce a lien against the property of such estate;
>
> (2) order other appropriate relief.

In the Remand Decision, the District Court referred to the absence of caselaw concerning Rule 3002.1 sanctions, remarking, "[t]he parties have not cited and the court has not found any case from any American jurisdiction in which a bankruptcy court has imposed sanctions on this basis and in this manner" (doc. # 104, p. 8-9). The scarcity of decisions discussing the subject of Rule 3002.1 sanctions is not surprising in light of the fairly recent implementation of that Rule. Despite the lack of controlling precedent, however, and based on the District Court's observation, this Court may be guided by caselaw that is pertinent to the scope of Rule 3002.1(i) sanctions, and properly classified as persuasive authority for a determination of the issue at bar. See Detroit Edison Co. v. Michigan Dep't of Envtl. Quality, 29 F. Supp. 2d 786, 791 (E.D. Mich. 1998) ("This is the very definition of a question of first impression: no precedent compels an answer by stare decisis. Thus I find that I have at hand only the suggestions of persuasive authority . . .); see also In re Pilgrim's Pride Corp., 690 F.3d 650, 665 n. 18 (5th Cir. 2012) (finding fee-shifting caselaw can provide persuasive authority when resolving fee disputes in bankruptcy proceedings that are matters of first impression).

On this issue, persuasive authority can be found in caselaw interpreting the rules on which the language of Rule 3002.1 was modeled: Bankruptcy Rule 3002(c) and Federal Rule of Civil Procedure 37.[12] See,

[12] PHH also recognized the value of considering decisions analyzing Rule 37 sanctions to resolve the Rule 3002.1 issue. See

e.g., Smith v. City of Jackson, Miss., 544 U.S. 228, 233 (2005) ("[W]hen Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes."); Wasser v. N.Y. State Office of Vocational & Educ. Servs. For Individuals with Disabilities, 602 F.3d 476, 479 (2d Cir. 2010) (holding nearly identical language in two statutes designed to "assist individuals with disabilities" should be interpreted identically); Hyland v. New Haven Radiology Assoc., P.C., 794 F.2d 793, 796 (2d Cir. 1986) (finding that, because three statutes have a similar purpose, cases construing the definitional provisions of one are persuasive authority when interpreting the others); Omega Overseas, Ltd. v. Griffith, 2014 U.S. Dist. LEXIS 109781, at *14 (S.D.N.Y. 2014) ("Given the identical language in § 215(b) and § 29(b) and the close relationship between the IAA and the Exchange Act – both in terms of their dates of passage and their purposes . . . that case law is highly persuasive here.").

There are many instances in which the evidentiary exclusion remedy provides little, if any, relief in the context of Rule 3001(c) and Rule 3002.1 sanctions motions. See In re Davenport, 544 B.R. 245, 250 (Bankr. D.D.C. 2015) (finding "there can be no proceeding in which the evidentiary penalty of Rule

doc. # 127, p. 20 ("Accordingly, case law germane to Rule 37(c)(1) is of particular and dispositive relevance to the analysis here, particularly given the interpretation of substantively identical language.").

3001(c)(2)(D) could come into play" because "the chapter 13 plan has been fully administered"); In re Reynolds, 2012 Bankr. LEXIS 3517 (Bankr. D. Colo. 2012) ("At a hearing where the merits of a claim are not at issue, the penalty set out in Rule 3001(c)(2)(D) is meaningless because it only comes into play at a hearing on the merits of a claim where a court would otherwise entertain the type of evidence required by Rule 3001(c)(1).").

There are also many instances in which awarding attorney's fees and costs may prove insufficient "to deter those who might be tempted to such conduct in the absence of such a deterrent." Roadway Express, Inc v. Piper, 447 U.S. 752, 764 (1980). This predicament is described in a number of decisions that have interpreted Rule 37(c) and determined punitive sanctions were warranted, in addition to compensatory awards of fees and costs. For example, in Bradley v. Sunbeam Corp., 2003 U.S. Dist. LEXIS 14451 (N.D. W. Va. 2003) the district court commented upon the remedies available under Federal Rule 37(c):

> Those remedies specifically allow for the exclusion of the evidence at trial. The rule also provides that the Court 'may impose other appropriate sanctions,' and that in addition to awarding attorney's fees and costs, the Court may also issue sanctions authorized under Rule 37(b)(2)(A), (B), and (C).

Id. at *46. The Sunbeam court went on to find that, "since this case is settled, the sanctions authorized in Rule 37(b)(2) are of no use here. Accordingly, other appropriate sanctions must be issued." Id. at *47. That court imposed a $200,000 sanction on Sunbeam, finding "[t]he only sanction that is appropriate in this case is for Sunbeam and its national counsel to pay a significant fine." Id. at **47, 60. The Eastern District of New York reached a similar conclusion on the available sanctions under Rule 37 in Nycomed U.S., Inc. v. Glenmark Generics Ltd., 2010 U.S. Dist. LEXIS 82014 (E.D.N.Y. 2010). There, the court concluded an appropriate remedy for Glenmark's Rule 37 violations was "the imposition on Glenmark of a compensatory fine of $100,000 payable to Nycomed to cover a portion of its costs, and an additional monetary fine of $25,000 payable to the Clerk of the Court." Id. at *38. See also Capellupo v. FMC Corp., 126 F.R.D. 545, 551, 553 (D. Minn. 1989) (looking to Rule 37 for guidance and multiplying the plaintiff's fees and costs by a factor of two, because it was not convinced that attorney's fees and costs "alone will fully compensate plaintiffs for the harm done to them" or "adequately punish defendant and deter future transgressions"); Nat'l Ass'n of Radiation Survivors v. Turnage, 115 F.R.D. 543, 559 (N.D. Cal. 1987) (requiring the defendant to pay plaintiff's fees and costs and "pay an additional sum of $15,000" to the clerk of court for its Rule 11 violations and Rule 37 discovery abuses).

This flexibility-infused interpretation of the phrase, "other appropriate relief," allows a court to tailor the punitive sanction to be imposed when a party violates a particular rule according to the specific circumstances of the party's conduct. This approach has also been followed with respect to Federal Rules 16(f) and 37(b), which contain a similarly broad provision that allows the court to "issue any just orders" or "issue further just orders."[13] In J.M. Cleminshaw Co. v. Norwich, 93 F.R.D. 338 (D. Conn. 1981), the court considered the dilemma of awarding only attorney's fees and costs under Rule 37 when "the defendant has engaged in a prolonged and unjustified failure to provide discovery," and when the "plaintiff has claimed a very small sum in fees and expenses [$150]." Id. at 343-44. That court cited the language of Rule 37(b), which allows a court to issue further "just orders," and "to fashion a sanction which more adequately achieves both the goals of compensation and of punishment," as authority for it to impose punitive sanctions. Id. at 344. Looking to the broad language in Rule 37(b), the court found,

> There is no indication in Rule 37 that this list of sanctions was intended to be exhaustive. Indeed, the fact that Rule 37 also provides for the entry of such orders "as are just" suggests that, under that rule, a court possesses the authority to fashion any of a range of appropriate orders to enforce compliance with the requirements of pre-trial discovery.

Id. at 355 (citing Flaks v. Koegel, 504 F.2d 702, 707 (2d Cir. 1974)). In addition to awarding the plaintiff the

[13] Rule 37(b)(2)(A) provides, in the event a party does not obey a discovery order, "the court where the action is pending may issue further just orders," including those specifically enumerated in (i)-(vii) such as striking pleadings, dismissing the action, or entering a default judgment.

fees and costs totaling $150, the court required the offending party to pay a punitive fine of $150 to the clerk of the court. Cleminshaw, 93 F.R.D. at 360.

In In re Prudential Ins. Co. of Am. Sales Practices Litig., 169 F.R.D. 598 (D.N.J. 1997), the court considered sanctions under Rule 16(f) for Prudential's failure to preserve documents and, most significantly, its "consistent pattern of failing to prevent unauthorized document destruction[.]" Id. at 616. In determining it would "impose Federal Rule of Civil Procedure 16(f) sanctions," and after considering "the financial worth of Prudential," the district court not only awarded plaintiff's counsel all fees and costs the plaintiff had incurred, but also imposed a punitive sanction of $1,000,000 against Prudential for "the unnecessary consumption of the Court's time and resources" and to "inform[] Prudential and the public of the gravity of repeated incidents of document destruction and the need of the Court to preserve and protect its jurisdiction and the integrity of the proceedings before it." Id. at 616-17. The District of Massachusetts adopted a similar interpretation of the meaning of "just orders" in Pereira v. Narragansett Fishing Corp., 135 F.R.D. 24 (D. Mass. 1991). The court there found awarding the $550 in fees and costs which resulted from the plaintiff's discovery violations was "too small an amount to qualify as an appropriate sanction considering the egregious nature of the violations" in that case. Id. at 26. The court further found that "the phrase 'may make such orders as are just' as used in both Rules 16(f) and 37(b)(2) permit the imposition of a sanction in the form of a monetary fine which is paid to the court and not to an opposing party as reimbursement for costs and attorney's fees" and "without proceeding to a finding of contempt[.]" Id. at 27. On that basis, the district court directed the offending party to pay the $550 in fees and costs and a $2,500 punitive sanction.

These cases, interpreting language that is analogous, similar, or identical to that of Rule 3002.1(i) are persuasive authority and create a solid basis for this court to interpret Rule 3002.1(i) as authorizing a broad panoply of "other appropriate relief" that includes punitive sanctions. In the absence of caselaw construing punitive sanctions under Rule 3002.1, this Court relies on the persuasive authority described above, to determine the parameters of its authority to impose "other appropriate relief" as a sanction against PHH, for its Rule 3002.1 violations.

2. *Authority to Impose Punitive Sanctions for Violations of the Debtor Current Orders*

This Court imposed punitive sanctions on PHH for its violations of Debtor Current Orders pursuant to its statutory and inherent authority, and the District Court remanded on this point, based on the lack of Second Circuit caselaw on point and its endorsement of the appellate decisions which espoused a more limited view of bankruptcy courts' authority to impose punitive sanctions. The District Court concluded, "the statutory and inherent powers of the Bankruptcy Court are not sufficient to support the Bankruptcy Court's imposition upon PHH of $300,000 in punitive sanctions [for violation of court orders]" (doc. # 104, p. 16).

With regard to a bankruptcy court's statutory authority to impose punitive sanctions for violations of court orders pursuant to § 105(a), the District Court stated its preference for the approach of the Sixth and Ninth Circuits. See In re John Richards Homes Bldg. Co., 552 F. App'x 401 (6th Cir. 2013); Knupfer v. Lindblade (In re Dyer), 322 F.3d 1178 (9th Cir. 2003). These circuit courts have found "the language of § 105(a) simply does not allow for . . . serious punitive penalties[,]" and also acknowledged the possibility that "'relatively mild' non-compensatory fines may be necessary under some circumstances." Dyer, 322 F.3d at 1193; see also Richards, 552 F. App'x at 415 ("[W]hile § 105(a) grants bankruptcy courts the authority to award mild noncompensatory punitive damages, it does not provide a basis for awarding serious non-compensatory punitive damages."). Those circuits made a similar determination as to a bankruptcy court's ability to impose serious punitive sanctions under its inherent sanction authority. Dyer, 322 F.3d at 1197; Richards, 552 F. App'x at 415. Before addressing the pertinent caselaw addressing a bankruptcy court's ability to impose punitive sanctions, and the guidance the Second Circuit has offered on the question of what constitutes a "serious sanction,"[14] the Court reviews PHH's violations of specific court orders, and the grounds those violations establish for imposing

[14] See discussion at Part B.

punitive sanctions, in light of the Supreme Court's recent decision in Taggart v. Lorenzen, No. 18-489 (U.S. June 3, 2019).

In the opening paragraph of Taggart, the Supreme Court describes the purpose of a discharge order in a bankruptcy case and the restrictions a discharge order imposes on creditors, to introduce the issue of whether a bankruptcy court has the authority to punish creditors who violate these orders:

> At the conclusion of a bankruptcy proceeding, a bankruptcy court typically enters an order releasing the debtor from liability for most prebankruptcy debts. This order, known as a discharge order, bars creditors from attempting to collect any debt covered by the order. See 11 U.S.C. § 524(a)(2). The question presented here concerns the criteria for determining when a court may hold a creditor in civil contempt for attempting to collect a debt that a discharge order has immunized from collection.

Taggart, slip op. at 1. Echoing the language of the Bankruptcy Code, the Court held "[a] discharge order 'operates as an injunction' that bars creditors from collecting any debt that has been discharged." Id. at 1800. This is important because the orders PHH violated in these cases were also entered as injunctions, to enjoin certain described conduct, by a particular class of creditors.[15]

A Debtor Current Order, entered by the court "on motion of the debtor or trustee[,]" after notice and hearing, determines whether a debtor has (i) made all payments necessary to cure any default on a claim secured by the debtor's principal residence, and (ii) paid all required postpetition amounts. See FED. R. BANKR. P. 3002.1(h). Once entered by a bankruptcy court, a Debtor Current Order is a limited injunction in that it prohibits the mortgage creditor from attempting to collect (i) any prepetition mortgage arrearage that the Order declared to be cured, (ii) any postpetition amounts that the Order declared to be paid, or any (iii) fees or expenses that were not properly noticed pursuant to Rule 3002.1(b) and (c). See, e.g., In re Ferrell, 580 B.R. 181, 185 (Bankr. D.S.C. 2017) (finding if a mortgage creditor fails to appear at a hearing on a Rule 3002.1(h) motion, or appears but fails to submit evidence establishing its entitlement to any postpetition amounts claimed due, "the Court may find that the alleged postpetition arrearage did not exist, or find that the mortgage creditor has waived the opportunity to claim and collect these amounts."); In re Kreidler, 494 B.R. 201, 206 (Bankr. M.D. Pa. 2013) (holding that, because it failed to appear at a hearing on a Rule 3002.1(h)

---

[15] An injunction is "[a] court order commanding or preventing an action." Black's Law Dictionary (11th ed. 2019). See also Edgar v. MITE Corp., 457 U.S. 624, 649 (1982) (Stevens, J., concurring) ("An injunction restrains conduct. Its effect is normally limited to the parties named in the instrument.").

motion to establish its postpetition arrearage, the mortgage creditor's postpetition arrearage was satisfied as of the date of its last statement supplementing its proof of claim); In re Rodriguez, 2013 Bankr. LEXIS 2738, at **11-12 (Bankr. S.D. Tex. 2013) (holding that, because the mortgage creditor failed to appear at the Rule 3002.1(h) hearing to support the sums claimed in its supplement, the debtors had paid all required postpetition amounts); Hollingsworth v. Option One Mortg. Corp. (In re Hollingsworth), 2012 Bankr. LEXIS 4430, at **40-42 (Bankr. N.D. Ala. 2012) (denying plaintiffs' attempted class action to enjoin mortgage servicers from "[a]ssessing and/or collecting postpetition fees from chapter 13 plaintiffs without disclosure and approval by the court" because, inter alia, "[a]n injunction would overlap and conflict with, and is therefore preempted by, new Bankruptcy Rule 3002.1").

In Taggart, the Supreme Court held that a bankruptcy court may hold a creditor in contempt for violating a discharge order "if there is no fair ground of doubt as to whether the order barred the creditor's conduct." Taggart v. Lorenzen, No. 18-489, slip op. at 2 (U.S. June 3, 2019) (emphasis original). Debtor Current Orders, such as those entered in the Gravel and Beaulieu cases, place mortgage creditors on notice they may only collect postpetition arrears, fees, and expenses if they give proper notice of the amounts they claim due, pursuant to Rule 3002.1. See, e.g., In re Hockenberger, 2018 Bankr. LEXIS 1120, at **19-20 (Bankr. N.D. Ohio 2018) (holding the mortgage servicer "is prohibited from collecting or attempting to collect from Debtor or her property" those amounts which had "been waived and/or cured by Debtor's completion of her confirmed chapter 13 plan" as well as any other fees, charges, or expenses the creditor might assert were incurred in connection with the case); In re Ferrell, 580 B.R. 181, 188-89 (Bankr. D.S.C. 2017) (finding "[a]ny attempt by [the mortgage servicer] to collected [sic] the Disputed Amounts or any other postpetition amounts for fees, charges, and or expenses, is and shall be a willful violation of this Order and the discharge injunction of § 524 and punishable by the contempt powers of this Court."); In re Abbiehl, 2012 Bankr. LEXIS 5551, at **25-26 (Bankr. N.D. Ind. 2012) (granting Rule 3002.1(h) motion and finding "the debtors have paid in full the amount required to cure the prepetition default" and "have paid all postpetition mortgage amounts due and owing" to the creditor).

The Debtor Current Orders in these cases declared the respective Debtors "cured any mortgage arrearage or default existing on the date that this bankruptcy case was filed[,] . . . made all payments due during the pendency of this case . . . including all monthly payments and any other charges or amounts due under the mortgage with PHH Mortgage Corporation[,]" and "precluded [PHH] from disputing that the Debtors are current . . . in any other proceeding." See Gravel, no. 11-10112, doc. # 74; Beaulieu, no. 11-10281, doc. # 82. The Debtor Current Orders in each of these cases put PHH on notice it was enjoined from seeking to collect any fees or expenses allegedly incurred during the period encompassed by each Order, if not specified in the Order. Moreover, any inquiry into whether PHH was aware of its obligations under the Debtor Current Orders, and what fees and expenses it was enjoined from collecting, must take into account the fact that PHH had been sanctioned once before, in the same Gravel case, for an identical violation of Rule 3002.1 (doc. # 49). See Taggart v. Lorenzen, No. 18-489, slip op. at 7 (U.S. June 3, 2019) ("[A] party's record of continuing and persistent violations and persistent contumacy justified placing the burden of any uncertainty in the decree . . . on [the] shoulders' of the party who violated the court order.") (quoting McComb v. Jacksonville Paper Co., 336 U.S. 187, 192-93 (1949)). Neither the record in this case, nor the Remand Decision, indicate there was any "fair ground of doubt" that the Debtor Current Orders barred PHH from sending the incorrect notices it sent in these cases. See Taggart, slip op at 2.

Based on the findings and conclusions in the Remand Decision, as well as the Supreme Court's recent holding in Taggart, this Court finds it has authority, under its inherent powers and § 105(a), to impose punitive sanctions on PHH for its breach of the Debtor Current Orders and reviews these sanctions anew to ensure the sanction in each case is less than serious and does not exceed the limits of this Court's inherent and statutory authority.

B. THE SCOPE OF NON-"SERIOUS" PUNITIVE SANCTIONS

The Court addresses next the lack of Second Circuit caselaw directly on point, and the Sixth and Ninth Circuits' position that bankruptcy courts may only impose mild or modest punitive sanctions (doc. # 104, p. 11).

A central issue in the rationale of the Remand Decision is the circuit split with respect to bankruptcy courts' power to impose punitive sanctions. The District Court rejected the First and Eighth Circuits' conclusion that bankruptcy courts possess the broad authority to impose punitive sanctions for violation of a court order. See In re Charbono, 790 F.3d 80, 87 (1st Cir. 2015) (finding bankruptcy courts have the same authority as other federal courts to issue punitive non-contempt sanctions for failures to comply with their orders); Isaacson v. Manty, 721 F.3d 533, 538-39 (8th Cir. 2013) (finding the bankruptcy court had inherent power, like other federal courts, to issue a punitive, non-compensatory, penalty for a party's factually unsupported and harassing statements). The District Court found these interpretations of bankruptcy court authority to be too expansive and without adequate jurisprudential support. Instead, it endorsed the conclusions the Ninth, Fifth, and Sixth Circuits have reached, which "favor the narrower construction of the Bankruptcy Court's statutory and inherent punitive sanctions power" (doc. # 104, p. 16) (citing In re John Richards Homes Bldg. Co., 552 F. App'x 401, 415-16 (6th Cir. 2013); Knupfer v. Lindblade (In re Dyer), 322

F.3d 1178, 1193 (9th Cir. 2003); In re Hipp, Inc., 895 F.2d 1503, 1510 (5th Cir. 1990)). Relying on this narrower construction, the District Court held that while "the statutory and inherent powers of the Bankruptcy Court are not sufficient to support [the] imposition upon PHH of $300,000 in punitive sanctions[,] . . . [the Bankruptcy Court] may refer the matter to the district court" or "take steps to enforce its orders short of punitive sanctions of the scope and type imposed in these cases" (doc. # 104, p. 16-17) (emphasis added).

In effect, the District Court remanded to this Court the question of whether there are punitive sanctions that are (a) an appropriate punishment for PHH's violations, (b) within this Court's authority to impose, and (c) "short of [the] punitive sanctions of the scope and type [it previously] imposed in these cases" (doc. # 104, p. 17). Since the District Court pointed to the lack of Second Circuit authority directly on point, and signaled its support for the conclusions reached in Dyer and Richards, this Court looks to the Dyer and Richards decisions, their progeny, and the most applicable Second Circuit decisions construing the meaning of "serious sanctions," for guidance in reformulating the sanctions to be imposed on PHH.[16]

---

[16] In favoring the "narrower construction" adopted by the Fifth, Sixth, and Ninth Circuits, and rejecting the more expansive view of the First and Eighth Circuits, the District Court found that "[t]his narrower construction is also consistent with the direction of Second Circuit precedent addressing the scope of the Bankruptcy Court's contempt authority in other contexts" (doc. # 104, p. 16). It grounds this finding in the Second Circuit case of Kalikow (In re Kalikow), 602 F.3d 82 (2d Cir. 2010). The District

The Dyer and Richards holdings, which the District Court endorsed, do not categorically prohibit bankruptcy courts from imposing punitive sanctions under § 105(a), but rather bar them from imposing "serious" punitive sanctions (doc. # 104, p. 13-14) (citing In re Dyer, 322 F.3d at 1178; John Richards, 552 F. App'x at 415-16).[17] Similarly, the Remand Decision does not define "serious" punitive sanctions nor specify whether the amount of serious sanctions is determined

Court states that while this case "is not directly controlling," it "suggests that a more limited view of the scope of the Bankruptcy Court's power to impose punitive sanctions would prevail in the Second Circuit" (doc. # 104, p. 16). With all due respect to the District Court, this Court perceives the Kalikow case to be of marginal value in predicting a Second Circuit determination of the issue at bar. In that case, the Second Circuit holds only that § 105 cannot serve as a sole or independent basis for a bankruptcy court's imposition of sanctions, instructing that § 105 authority may be invoked only if the offending party violated another provision of the Code. Id. at 97. Here, PHH violated Rule 3002.1, which implements § 1322(b)(5) of the Bankruptcy Code.

[17] The only circuit case, of the three cited by the District Court, that can be read to categorically prohibit bankruptcy courts from imposing any amount of punitive sanctions is the Fifth Circuit's decision in In re Hipp, Inc., 895 F.2d 1503 (5th Cir. 1990). Support of this reading from within the circuit can be found in In re Rodriguez, 2007 U.S. Dist. LEXIS 11858 (W.D. Tex. 2007), where the district court vacated a bankruptcy court's $15,000 punitive fine imposed on an individual. In doing so, the court pointed to the Fifth Circuit's "rather expansive view of sanctions classifiable as criminal contempt," specifically circuit cases "holding that a fine of as little as $500 for failure to appear constitutes criminal contempt." Id. at *14-15, 2007 U.S. Dist. LEXIS 11858 at **43-45. But see Kamatani v. BenQ Corp., 2005 U.S. Dist. LEXIS 42762, at *46 (E.D. Tex. 2005) (imposing a "modest" $500,000 contempt sanction under its inherent powers without characterizing it as criminal contempt).

by application of an absolute cap or on a case-by-case basis.

The Richards and Dyer decisions describe the limits of a bankruptcy court's authority to impose punitive, non-compensatory sanctions by reference to "serious" versus "mild" punitive sanctions, essentially setting the two end points of a sanctions continuum.[18] Both decisions conclude that bankruptcy courts lack the general statutory authority to impose "serious non-compensatory punitive damages," In re John Richards Homes Bldg. Co., 552 F. App'x 401, 415 (6th Cir. 2013) (emphasis added), while conceding that bankruptcy courts do have the authority to award "mild non-compensatory sanctions." Id. (emphasis added). See also In re Dyer, 322 F.3d 1178, 1193 (9th Cir. 2003) ("Although 'relatively mild' non-compensatory fines may be necessary under some circumstances, the language of § 105(a) simply does not allow for the serious punitive penalties here assessed."). These decisions, however, do not articulate any criteria for how to recognize a mild versus serious sanction, or how to distinguish between them. In fact, they explicitly defer that question: In Dyer, the Ninth Circuit stated, "we leave for another day the development of a precise definition of the term

---

[18] The Richards court writes that, in addition to the Ninth Circuit, the Fifth Circuit "allow[s] bankruptcy courts to award relatively minor noncompensatory fines." In re John Richards Homes Bldg. Co., 552 F. App'x 401, 415 (6th Cir. 2013) (citing In re Hipp, Inc., 895 F.2d 1503, 1509-21 (5th Cir. 1990)). By contrast, the Hipp decision does not include language allowing for that possibility or recognizing the inherent power of bankruptcy courts to impose even non-serious punitive sanctions.

'serious' punitive (criminal) sanctions," In re Dyer, 322 F.3d at 1193, and in Richards, the Sixth Circuit affirmatively declined to decide "what defines a 'serious' non-compensatory award of punitive damages because the $2.8 million awarded below is serious under any definition." In re John Richards, 552 F. App'x at 416.

Similarly, the Second Circuit has recognized but not answered the question of the extent of a bankruptcy court's authority to impose punitive sanctions under either its inherent power or § 105(a) of the Bankruptcy Code. In the Guariglia case, for example, the Second Circuit identified, and then deferred addressing that crucial subject: "We note also that there is a serious question as to whether the bankruptcy court would have had the authority to punish Guariglia for criminal contempt of its Order had the government first sought a determination by the bankruptcy court. We need not resolve this issue . . . " United States v. Guariglia, 962 F.2d 160, 163 (2d Cir. 1992) (internal citations omitted). There are, however, other Second Circuit cases, albeit unrelated to bankruptcy disputes, which provide meaningful insight into how the Second Circuit might circumscribe the scope of "serious sanctions."

To begin with, the Second Circuit has decided several cases focused on the notice requirements and enunciated the due process prerequisite for imposing punitive sanctions. It held the same notice is required whether the sanction to be imposed arises from a rule violation or a finding of contempt. See Satcorp Int'l Group v. China Nat'l Silk Import & Export Corp., 101

F.3d 3, 5 (2d Cir. 1996) ("Regardless of whether a sanction is premised on a finding of contempt, or is deemed justified under Rule 37 generally, the same amount of due process is due . . . A district court cannot circumvent this mandate by choosing to characterize the sanction as something other than 'contempt.' ").[19]

Building on those notice requirements, the Second Circuit has held that while punitive damages are not inextricably linked to criminal contempt, a party facing substantial punitive sanctions is entitled to the same protections as a party threatened with criminal contempt:

> . . . the consequences of an adjudication of criminal contempt are different from those flowing from the imposition of sanctions. The person found guilty of criminal contempt, unlike a person on whom sanctions have been imposed, now carries a criminal conviction on his record. Furthermore, possible punishments for contempt, unlike sanctions, include imprisonment.
>
> Nevertheless, sanctions and contempt raise certain similar concerns. Whether or not a finding of contempt is involved, unfairness

[19] The Second Circuit has also recognized, however, "that the requirements of due process cannot be cabined within an inflexible regime, and must vary with each case." Reilly v. Natwest Markets Group Inc., 181 F.3d 253, 270 (2d Cir. 1999). Specifically, "in the Rule 37 context," which served as a model for Bankruptcy Rule 3002.1, the Reilly court "declined to impose rigid requirements on either the timing or the form of the notice afforded to a sanctioned party." Id.

> and abuse are possible, especially if courts were to operate without any framework of rules or cap on their power to punish. In either case, the individual bears the risk of substantial punishment by reason of obstructive or disobedient conduct, as well as of vindictive pursuit by an offended judge. We conclude, notwithstanding the differences mentioned above, that the imposition of a sufficiently substantial punitive sanction requires that the person sanctioned receive the procedural protections appropriate to a criminal case.
>
> We conclude that the imposition of a $10,000 punitive sanction on an individual (as opposed to a corporation or collective entity) requires such protections.

Mackler Prods., Inc. v. Cohen, 146 F.3d 126, 129-30 (2d Cir. 1998) [hereinafter Mackler I] (emphasis added). Interestingly, in a footnote to this section of the decision, the Second Circuit points out it "[did] not address a court's ability to levy a modest punitive sanction without the protections of criminal procedure." Id. at 130 n. 2 (emphasis added). This sanctions analysis in Mackler is important to the issues at bar because the Second Circuit distinguishes there between "a sufficiently substantial punitive sanction" and something less than that, as well as between a sanction imposed on an individual and a sanction imposed on "a corporation or collective entity." This suggests that a sanction it might classify as "serious" if imposed on an individual, could well fall into the category of "modest" if imposed on a corporation. Mackler I, 146 F.3d at 130.

The gap, for purposes of the instant cases, is that the Second Circuit did not articulate what sanction amount would have triggered the need for these protections (or been "serious") if the target of the sanction had been a corporation.[20]

Taken together, the Satcorp and Mackler cases erect guideposts one could reasonably expect the Second Circuit to follow when determining whether a particular punitive sanction on a corporation is serious or modest. This Court will follow these guideposts in reformulating the sanctions against PHH, to ensure the sanctions do not fall into the "serious" category. Mackler I, 146 F.3d at 130; Mackler Prods. v. Cohen, 225 F.3d 136, 142 (2d Cir. 2000) [hereinafter Mackler II]. To better ascertain the parameters of that category, the Court turns to the caselaw describing the sanctions that have been categorized as less than serious.

---

[20] The $10,000 sanction, which was imposed on an individual and triggered the need for procedural protections in June of 1998, would correspond to $15,711.17 in 2019 dollars. See United States Bureau of Labor Statistics, CPI Inflation Calculator, available at https://www.bls.gov/data/inflation_calculator.htm (last visited June 24, 2019) (hereinafter CPI Inflation Calculator). In adjusting a given sanction amount to its 2019 equivalent value, this Court relies upon the Bureau of Labor Statistics' Consumer Price Index (CPI) Inflation Calculator, the same tool utilized by the Supreme Court and the Second Circuit Court of Appeals. See, e.g., Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2483 (2018); Falzon v. JPMorgan Chase & Co., 501 Fed. Appx. 92, 94 n. 1 (2d Cir. 2012).

C. The Scope of "Non-Serious" or "Modest" Sanctions on a Corporation

In 1993, the Supreme Court considered and declined to answer "the difficult question where the line between petty and serious contempt fines should be drawn." Int'l Union v. Bagwell, 512 U.S. 821, 837 n. 5 (1994). It discussed a previous decision finding a fine of $10,000 imposed on a union "was insufficient to trigger the Sixth Amendment right to jury trial." Id. (citing Muniz v. Hoffman, 422 U.S. 454, 477 (1975)). The Bagwell Court did not find it necessary to create a bright-line rule "since the $52 million fine [imposed in the case] unquestionably is a serious contempt sanction." Id.[21]

While the Mackler cases, described above, are quite helpful in describing the contours of a "substantial punitive sanction" against an individual, Mackler II, 225 F.3d at 142, the Second Circuit Court of Appeals has not specified – there or elsewhere – where the line is between a substantial and a modest punitive sanction, against a corporation. Therefore, this Court attempts to discern the contours of a "modest sanction" by examining (1) Second Circuit decisions that discuss "modest" and "serious" sanctions, and (2) the caselaw that has emerged from the Richards and Dyer decisions, upon which the District Court relied in the

[21] The apparently modest $10,000 sanction, in the Muniz case to which the Supreme Court referred, was imposed in 1975 and would correspond to $27,611.94 in 1994 dollars – far shy of $52 million; it would amount to $47,778.36 in 2019 dollars. See CPI Inflation Calculator, supra note 20.

Remand Decision (doc. # 104, p. 13-14). The Court will also examine whether a sanctioned party's wealth and ability to pay should be considered in the determination of whether a given sanction is "serious" or "modest."

1. *Second Circuit Guidance re the Scope of "Modest" and "Serious" Sanctions on a Corporation*

a) *Second Circuit Guidance on "Modest" Sanctions*

While not controlling, the Mackler decisions offer valuable insight into the Second Circuit's approach to discerning the scope and definition of "modest" punitive sanctions. Following the remand in Mackler I, the district court lowered the punitive component of the sanction from $10,000 to $2,000.[22] The sanctioned individual appealed and, in Mackler II, the Second Circuit determined that, "when viewed in light of the other relevant factors, the $2,000 'punitive' sanction at issue in this case could not be imposed without [the protections of criminal procedure]" and therefore was not a "modest" punitive sanction.[23] Mackler Prods. v. Cohen, 225 F.3d 136, 143 n. 3 (2d Cir. 2000). The "other relevant factors" alluded to in Mackler II, beyond the size of the sanction, include:

---

[22] It left all other components of the sanction unchanged for reasons inapplicable to this analysis.

[23] A sanction of $2,000.00 in 2000 dollars is the equivalent of $2,964.03 in 2019 dollars. See CPI Inflation Calculator, supra note 20.

> whether the sanction is intended to be compensatory or punitive; whether it is payable to the court or to the injured party; whether it is based on past wrongful conduct or is intended to coerce future compliance; and whether any opportunity to purge the sanction is provided.

Id. at 142. While the Mackler II decision provides vital insight into the Second Circuit's view of punitive sanctions, there are some crucial factual distinctions in the case at bar that persuade this Court that its $2,000 cap does not control.

Of most significance, the party being sanctioned in Mackler was "a 78-year-old lawyer with an apparently unblemished record" until the sanctionable conduct at issue. Id. at 143. PHH, by contrast, is an active multi-billion dollar corporate entity, touting itself as "one of the largest subservicers of residential mortgages in the United States,"[24] with a total servicing portfolio, as of its most recent public earnings release, comprised of nearly 586,609 loans representing $129 billion of unpaid principal balance.[25] At least one court within the Second Circuit has differentiated between the heightened procedural requirements described as necessary in Mackler, where the sanctioned party was an individual, on the one hand, and instances in which the

---

[24] Company Overview, PHH Corporation, http://corporate.phh.com/phoenix.zhtml?c=187859&p=irol-media (last visited June 24, 2019, 9:35 a.m.).

[25] Press Release, PHH Corporation, PHH Corporation Announces Second Quarter 2018 Results, (Aug. 3, 2018), http://corporate.phh.com/Phoenix.zhtml?c=187859&p=irol-news.

sanctioned party is a corporation, on the other. See New Pac. Overseas Group (USA) Inc. v. Excal Int'l Dev. Corp. 2000 U.S. Dist. LEXIS 4695, at **14, 17 (S.D.N.Y. 2000) (distinguishing Mackler court's heightened procedural protections for "proceedings where punitive sanctions were being considered against an individual" from the $10,000 additional sanction "imposed on a corporation, and not on an individual.").

In contrast to the attorney sanctioned in the Mackler cases, who had no history of misconduct in the courts, PHH has been sanctioned for the same conduct at least once before and continued to transgress the rules and orders in question. This Court imposed a punitive sanction of $9,000 on PHH in 2014, in the Gravel case (doc. # 49).[26] Additionally, PHH was admonished by another bankruptcy court for identical violations, see In re Owens, 2014 Bankr. LEXIS 163 (Bankr. W.D.N.C. 2014), prior to its documented transgressions in this Court. Hence, sanctions in an amount larger than $9,000 are necessary to "coerce future compliance" with this Court's Debtor Current Orders and federal and local bankruptcy rules. Mackler Prods. v. Cohen, 225 F.3d 136, 142 (2d Cir. 2000). See Jones v.

[26] At the hearing on approval of that stipulated sanction, PHH asked the Court to authorize a "small sanction" to provide the Court additional room to impose a higher sanction if PHH failed to correct its procedures and comply with Rule 3002.1 and Court Orders going forward. The Court advised PHH that it imposed sanctions with the intent the sanction would be sufficient to deter misconduct – without need for subsequent, harsher penalties. See doc. ## 47, 48 for audio of the hearing held on March 21, 2014.

Wells Fargo Home Mortg., Inc. (In re Jones), 2012 Bankr. LEXIS 1450 (Bankr. E.D. La. 2012) (citing previous sanctions assessed against corporate bank, which "have not deterred Wells Fargo[,]" in awarding a larger punitive damage award of $3,171,154 "to deter Wells Fargo from similar conduct in the future"); Nowlin v. RNR, LLC, 2009 Bankr. LEXIS 2586, at **18-19 (Bankr. M.D. Tenn. 2009) (acknowledging its prior sanction, the third imposed against the corporate creditor, "had absolutely no deterrent effect[,]" chastising that creditor's "recidivism," and imposing a $25,000 punitive sanction to "ensure [the creditor's] compliance with the bankruptcy rules, code and this court's order"); Kamatani v. BenQ Corp., 2005 U.S. Dist. LEXIS 42762 (E.D. Tex. 2005) (imposing $500,000 punitive sanction on corporation where lesser sanctions it previously imposed on two separate occasions "failed to correct [the party's] behavior . . . ").[27]

---

[27] The Southern District of New York's decision in the New Pacific case illustrates this point well. There, the district court applied the Mackler factors and then explicitly imposed punitive sanctions intended to both punish past conduct and coerce future compliance. New Pac. Overseas Group (USA) Inc. v. Excal Int'l Dev. Corp., 2000 U.S. Dist. LEXIS 4695 (S.D.N.Y. 2000). After considering New Pacific's intransigence during the discovery process, particularly its blocking of any inspection of critical equipment, which persisted despite clear court instructions to make the equipment available, it imposed a $10,000 sanction on the corporate plaintiff and stated that the sanction was both "for [that plaintiff's] failure to comply with a Court Order to permit the defendants to inspect [the manufacturing equipment]" and "to ensure [that plaintiff's] future compliance with court orders and cooperation in discovery." Id. at **1, 15.

Based on this analysis of Mackler, and taking into account the different nature of the sanctioned party (multi-billion dollar corporation rather than individual attorney), and PHH's status as a repeat offender (having already been sanctioned by this Court in the amount of $9,000), this Court imposes herein sanctions it anticipates the Second Circuit would label as "modest," and the District Court would find to be "less than serious."

b) Second Circuit Guidance on "Serious" Sanctions

At the other end of the spectrum, the Second Circuit has drawn a bright-line rule for an "absolute dollar amount of fines above which, it holds, the Sixth Amendment entitles a corporation to a jury trial for criminal contempts, regardless of the contemnor's financial resources," thus demarcating what constitutes a serious sanction. United States v. Twentieth Century Fox Film Corp., 882 F.2d 656, 663 (2d Cir. 1989). In the Twentieth Century Fox case, the Second Circuit pronounced the triggering amount for Sixth Amendment protections: "We conclude that the jury right is available for a criminal contempt whenever the fine imposed on an organization exceeds $100,000." Id. at 665. It reiterated the existence and significance of this defined cap in 2000, when it stated, "On occasion, this Court has also adopted a bright-line standard. Considering the amount of a fine that could be imposed on an organization for criminal contempt without a jury trial, we set the amount at $100,000." Colon v. Howard, 215 F.3d 227, 233 (2d Cir. 2000).[28]

The establishment of a triggering amount of a sanction or fine in Twentieth Century Fox, when imposed on a corporation and upon which a jury trial is required, is a critical factor in determining what constitutes a "serious" punitive sanction in the Second Circuit. The Ninth Circuit employs a similar analytical approach by analogizing the amount at which a fine or sanction triggers an individual's right to a jury trial to the amount at which a punitive sanction is "serious." Knupfer v. Lindblade (In re Dyer), 322 F.3d 1178, 1193 (9th Cir. 2003). In considering what constitutes a "serious" punitive sanction, the Dyer court cited a prior Ninth Circuit decision, which implied that "any fine above $5,000, 'at least in 1998 dollars,' would be serious[.]" Id. (citing F.J. Hanshaw Enters. v. Emerald River Dev., Inc., 244 F.3d 1128, 1139 n. 10 (9th Cir. 2001)). The $5,000 figure to which Hanshaw refers has its genesis in a 1989 Supreme Court case,[29] which

---

[28] This sum of $100,000, in 1989 dollars, equals $205,531.30 in 2019 dollars. See CPI Inflation Calculator, supra note 20.

[29] The Dyer court quoted the Ninth Circuit's decision in F.J. Hanshaw Enters. v. Emerald River Dev., Inc., 244 F.3d 1128 (9th Cir. 2001) as favorably citing cases implying that "any fine above $5,000, 'at least in 1998 dollars,' would be serious, but declining to answer the question." Knupfer v. Lindblade (In re Dyer), 322 F.3d 1178, 1193 (9th Cir. 2003). However, the Hanshaw decision cites cases implying that any fine above $5,000, "at least in 1989 dollars," would be the cutoff for a serious fine warranting a jury trial. 244 F.3d at 1139 n. 10 (citing Blanton v. N. Las Vegas, 489 U.S. 538 (1989)) (emphasis added). To avoid confusion, incorrect citations to Hanshaw will be noted as such in this Memorandum

involved a potential "cutoff for a serious fine warranting a jury trial," in the case of two individuals convicted of driving under the influence. See Hanshaw, 244 F.3d at 1139 n. 10 (citing Blanton v. City of N. Las Vegas, 489 U.S. 538 (1989)).

With the pronouncement from the Second Circuit in the Twentieth Century Fox case, that $100,000 (in 1989 dollars) is the cap where criminal protections are required for a sanctioned corporation, combined with its explanation in Mackler that the definition of a serious sanction for an individual is different from that applicable to a corporation, this Court concludes the cap that would justify characterizing a civil punitive sanction as "serious" would likewise apply to set the line above which criminal protections are required. That persuades this Court that a sanction of less than $205,531.30 i.e., the same sanction imposed in Twentieth Century Fox, in 1989, translated into 2019 dollars, would be less than a "serious" punitive sanction, against a corporation, in the Second Circuit.

2. ***Richards & Dyer*** *Guidance re the Scope of "Modest" and "Serious" Sanctions on a Corporation*

Since the District Court cited favorably the rationale set forth in the Richards and Dyer cases in explaining its views on the bankruptcy court's authority to impose punitive sanctions (doc. # 104, p. 16, citing In re John Richards Homes Bldg. Co., 552 F. App'x 401,

---

of Decision, to emphasize that the year cited by Hanshaw was 1989, not 1998 as stated in Dyer.

415-16 (6th Cir. 2013), In re Dyer, 322 F.3d 1178, 1193 (9th Cir. 2003)), this Court will also scrutinize how the Richards and Dyer courts defined "serious" or "mild" punitive sanctions, and whether any further refinement of those terms has emerged from within those circuits since those two decisions were issued.

a) Guidance from Richards and its Progeny

The Sixth Circuit issued Richards in late 2013, as an unpublished decision, to review a bankruptcy court's imposition of a $2.8 million sanction on an individual. In re John Richards Homes Bldg. Co., L.L.C., 552 F. App'x 401 (6th Cir. 2013). The Sixth Circuit held that "bankruptcy courts lack the statutory authority to impose serious noncompensatory punitive damages" but refrained from defining what damages would be considered serious because "the $2.8 million awarded below [against an individual] is serious under any definition." Id. at 416. It also held bankruptcy courts have "the authority to award mild noncompensatory punitive damages," but did not define the limits of a "mild noncompensatory sanction." Id. at 415.

Since Richards, only one decision has been issued in the Sixth Circuit that attempts to define categories of sanctions. See In Cook v. Franklin Credit Mgmt. Corp. (In re Cook), 2015 Bankr. LEXIS 1258 (Bankr. M.D. Tenn. 2015), aff'd sub nom. Franklin Credit Mgmt. Corp. v. Cook, 551 B.R. 613 (M.D. Tenn. 2016). In the Cook case, the bankruptcy court had imposed a $5,000 sanction on a corporate defendant that it labeled as a "mild sanction," under § 105(a), based on the offending party's failure to comply with an order to correct erroneous entries on the debtors' credit reports and its violation both the Discharge Order and Debtor Current Order in the case. In re Cook, 2015 Bankr. LEXIS 1258, at **2, 6. The bankruptcy court had also (a) extinguished the $4,624 debt the debtors owed to the offending creditor, and (b) required the creditor to pay compensatory damages of over $31,000 to reimburse each of the joint-debtors for lost wages, and pay all court costs and attorney's fees. The bankruptcy court appears to have based its categorization of the sanction as "mild" by reference to the statement in Richards, that "[a] $5,000 sanction is not considered a serious punitive sanction." Id. at *3 n. 1 (quoting In re John Richards Homes Bldg. Co., L.L.C., 552 F. App'x 401, 415 (6th Cir. 2013)), and the district court affirmed that rationale. Franklin Credit Mgmt. Corp. v. Cook, 551 B.R. 613, 625 (M.D. Tenn. 2016). Hence, the only guidance from the Sixth Circuit to date appears to be that a sanction against a corporation in the amount of $5,000 is "mild" and a sanction against an individual in the amount of $2.8 million is "serious."

b) Guidance from Dyer and its Progeny

The Ninth Circuit's decision in Dyer considered the appropriateness of the bankruptcy court's imposition of punitive sanctions, under § 105(a) and, as in Richards, reviewed the propriety of that sanction against an individual. Knupfer v. Lindblade (In re Dyer), 322 F.3d 1178 (9th Cir. 2003). The Dyer court found § 105(a) "simply does not allow for the serious punitive penalties here assessed (a minimum of $50,000 and, under the trustee's theory, over $200,000)," but "[left] for another day the development of a precise definition of the term 'serious' punitive (criminal) sanctions." Id. at 1193 (emphasis added). The Dyer court held that "relatively mild" noncompensatory fines may be necessary under some circumstances, but the only indication of how large a "relatively mild sanction" might be, in the assessment of the Ninth Circuit, is the Dyer court's reference to a 2001 Ninth Circuit case which, while not reaching the question directly, pointed to cases "implying any fine above $5,000, 'at least in 1989 dollars,'[30] would be serious[.]" Id. (citing F.J. Hanshaw Enters., Inc. v. Emerald River Dev., Inc., 244 F.3d 1128, 1140 n. 10 (9th Cir. 2001), which in turn cited other cases that shared that perspective).[31]

Since the Ninth Circuit issued Dyer in 2003, courts within the Ninth Circuit appear to have applied its definition of "mild" noncompensatory sanctions with some trepidation. See, e.g., In re Vanamann, 561 B.R. 106, 131 (Bankr. D. Nev. 2016) ("Nationstar's

[30] The sum of $5,000 in 1989 dollars equals $10,469.83 in 2019 dollars. See CPI Inflation Calculator, supra note 20.

[31] For example, the Hanshaw court pointed to the Fifth Circuit's 1998 conclusion that "$75,000 is manifestly non-petty in the case of an individual, just as $5 million is non-petty in the case of a corporation" and remarking that, in 1994, the Supreme Court in the Bagwell case had "strongly suggested, without deciding, that $5,000 was an appropriate limit for individuals, and $10,000 for corporations." Crowe v. Smith, 151 F.3d 217, 228 n. 13 (5th Cir. 1998).

business decision resulted in actual damage to the Debtor and warrants, at a minimum, a mildly, non-compensatory fine of $5,000 that must be paid to the Debtor."). Some courts have ruled that the Dyer $5,000 cap may be adjusted to account for inflation. See Ocwen Loan Servicing, LLC v. Marino (In re Marino), 577 B.R. 772, 789 n. 12 (9th Cir. BAP 2017) ("The Ninth Circuit left open the question of what is a 'serious' punitive sanction but implied that any fine above $5,000 (presumably in 1989 dollars) would be considered serious."); Rosales v. Wallace (In re Wallace), 2012 Bankr. LEXIS 2934, at *24 (9th Cir. BAP 2012) (finding the Dyer court "implied that any fine above $5,000 (presumably in 1989 dollars) would be considered serious."). At least one district court has held that in determining whether a sanction imposed by a bankruptcy court exceeds the Dyer $5,000 cap, the amount of that cap must first be adjusted for inflation. In that decision, the Hawaii District Court affirmed "that a $9,000 fine in today's dollars would be less than the $5,000 fine in 1998 [sic][32] dollars" and that "the $9,000 fine does not appear to be a 'serious' punitive penalty

[32] In stating that prior Ninth Circuit decisions implied any fine over $5,000, "at least in 1998 dollars," could be considered serious, the Dyer court inaccurately cited the case relied upon for that proposition. See supra note 29. In Himmelfarb, this inaccuracy went uncorrected by the district court, but did not affect its decision. In re Himmelfarb, 2014 U.S. Dist. LEXIS 164462, at **28-29 (D. Haw. 2014). The bankruptcy court, which originally issued the sanction, had already detected and corrected the error from Dyer, and based its inflation-adjusted sanction on the correct year of 1989, In re Himmelfarb, 2014 Bankr. LEXIS 2916 (Bankr. D. Haw. 2014), which the district court then upheld.

that the bankruptcy court lacked the power to impose, under the guidance given in Dyer." In re Himmelfarb, 2014 U.S. Dist. LEXIS 164462, at **28-29 (D. Haw. 2014).

In 2015, the Ninth Circuit Bankruptcy Appellate Panel ("BAP") applied the Dyer and Hanshaw criteria to determine whether a particular sanction was "serious" by analyzing the amount of the sanction in light of the financial condition of the sanctioned party. Faden v. Segal (In re Segal), 2015 Bankr. LEXIS 286, at *30 (9th Cir. BAP 2015). In the Segal case, the BAP reviewed the sanction a bankruptcy court had imposed on an individual and, referring back to Dyer, observed that bankruptcy courts may impose "'relatively mild' non-compensatory fines . . . when there is no other practicable means of addressing the contumacious conduct." Id. at *22. With respect to the amount of such sanctions, it held that "under no circumstances should the relatively mild non-compensatory fine exceed several thousand dollars." Id. The BAP remanded the case to the bankruptcy court, in part, because the bankruptcy court had not made any findings with respect to the offending person's financial condition. It reiterated the Hanshaw determination, "the seriousness of the sanction award depends in part on whether the sanctioned party is a multinational corporation, an impoverished debtor, or something in between." Id. at *30 (citing F.J. Hanshaw Enters., Inc. v. Emerald River Dev., Inc., 244 F.3d 1128, 1140 n. 10 (9th Cir. 2001)). This was consistent with the way in which bankruptcy courts within the Ninth Circuit had been applying the

Dyer criteria. For example, in In re Grihalva, 2013 Bankr. LEXIS 4057 (Bankr. D. Nev. 2013), the bankruptcy court acknowledged it was limited to applying "relatively mild non-compensatory fines rather than serious punitive penalties[,]" acknowledged the $5,000 cap set by Dyer, and then sanctioned a mortgage servicer $10,000 – twice the amount the Dyer court had set for a mild sanction on an individual. Id. at **21-23.

These interpretations of, and extrapolations from, the Dyer and Richards cases persuade this Court that while these Ninth and Sixth Circuit cases do limit the sanctioning authority of bankruptcy courts to "mild" sanctions, they, first, allow bankruptcy courts to exercise discretion and consider the financial resources of the offending party in computing what would be a mild sanction against a corporation and, second, permit the bankruptcy court imposing the sanction to convert the applicable dollar amount cap to its present value.

3. The Offending Party's Wealth and Ability to Pay as a Factor in Determining if a Sanction on a Corporation is "Serious"

Deterrence is a key purpose sanctions are intended to serve. See Roadway Express Inc., v. Piper, 447 U.S. 752, 764 (1980) (noting that sanctions must be applied "to deter those who might be tempted to such conduct in the absence of such a deterrent"). In order to effectively deter inappropriate conduct across the full range of potential violators, courts must have the flexibility to tailor the amount of sanctions to account for factors such as the nature of the rule that was breached, the degree of the breach, whether there have been multiple breaches of the same rule and, importantly, the financial resources of the sanctioned party. See Thomas Koenig & Michael Rustad, Crimtorts as Corporate Just Deserts, 31 U. MICH. J.L. REFORM 289, 328 (1998) ("Nearly every American jurisdiction that recognizes punitive damages permits evidence of financial standing to be considered in order to ensure that the award is large enough to deter the wrongdoer.").

Many courts have recognized that sanctioning a large corporation may require a more substantial sanction than one imposed on an individual, to achieve a meaningful degree of deterrence. "It is not uncommon for large corporations with vast resources to impede the discovery process . . . Courts must be vigilant to prevent that type of conduct when it occurs and must impose meaningful sanctions to protect the integrity of the proceedings before it." In re Prudential Ins. Co. of Am. Sales Practices Litig., 169 F.R.D. 598, 617 n. 15 (D. N.J. 1997). For example, in Nycomed, the district court in the Eastern District of New York considered a sanction against a corporation in an amount that Mackler had deemed to be "sufficiently substantial" to require heightened criminal procedure protections, if it were imposed on an individual. See Mackler Prods., Inc. v. Cohen, 146 F.3d 126, 130 (2d Cir. 1998). However, the Nycomed court found being limited by the Mackler cap of $10,000 would result in a sanction insufficient to accomplish even a modicum of deterrence: "Glenmark is a substantial multinational corporation, and a more modest fine of $10,000 or $20,000 would amount to a proverbial slap on the wrist." Nycomed U.S. Inc. v. Glenmark Generics Ltd., 2010 U.S. Dist. LEXIS 82014, at **39-40 (E.D.N.Y. 2010). Similarly, in In re Brown, 319 B.R. 876 (Bankr. N.D. Ill. 2005), the bankruptcy court considered what amount would deter the offending mortgage servicer, and others, from careless mistakes leading to false pleadings, astutely inquiring, "At what dollar sanction will the company executives take a hand and order more careful procedures?" Id. at 882. It imposed a $10,000 sanction, observed that EMC Mortgage Corporation "is a major financial company, and is clearly able to pay a $10,000 sanction," id., and cautioned that this amount may still not provide sufficient deterrence. The order the bankruptcy court entered addressed that potential eventuality by retaining jurisdiction "to impose an additional sanction for disobedience of the Court order" if EMC did not pay the sanction within 21 days. Id. The court noted that, "[w]hen a company like EMC administers millions of dollars in mortgages every day, it is all too easy to pay a $10,000 sanction as a cost of doing business, and there is no way of selecting a specific amount that will necessarily deter." Id. This is precisely the conundrum this Court faces in trying to fashion a sufficient sanction against PHH. Like EMC, PHH administers millions of dollars in mortgages every day, and therefore "it is all too easy for it to pay a $10,000 sanction as a cost of doing business, and there is no way of selecting a specific amount that will necessarily deter." Id. (emphasis added). Here, the sanctions must be sufficient to deter PHH from continuing to issue statements to debtors which violate Rule 3002.1. Since the record demonstrates a $9,000 sanction was ineffective to deter PHH from continuing to engage in that misconduct, it appears unlikely that sanctions of $10,000 will be adequate to deter PHH from continuing that misconduct going forward.

Some courts have imposed a sanction in excess of $10,000 against a corporation and characterized the sanction as "modest." For example, in Kamatani, after two prior sanctions against the offending corporation did not end the punished conduct, the district court imposed an inherent power monetary sanction of $500,000, in addition to the attorney's fees and costs it imposed for Rule 37 violations. Kamatani v. BenQ Corp., 2005 U.S. Dist. LEXIS 42762, at *46 (E.D. Tex. 2005). In consideration of the "hundreds of millions of dollars" generated by the company through its alleged patent infringement, the Court classified the $500,000 sanction as a "modest" sanction. Id.[33] See also Sizzler Family Steak Houses v. Western Sizzlin Steak House, Inc., 793 F.2d 1529, 1535 (11th Cir. 1986) (characterizing a $25,000 contempt sanction imposed against corporate restaurant chain as "a modest sanction."[34]).

There are indications the Second Circuit shares the Ninth Circuit's perspective that a sanctioned party's wealth and ability to pay should play some role

[33] A sanction of $500,000 in 2005 dollars is the equivalent of $642,801.20 in 2019 dollars. See CPI Inflation Calculator, supra note 20.

[34] This sum of $25,000, in 1986 dollars, equals $58,468.49 in 2019 dollars. See CPI Inflation Calculator, supra note 20.

in a court's determination of an appropriate sanction. In Shangold v. Walt Disney Co., 275 Fed. Appx. 72 (2d Cir. 2008), the Second Circuit "noted . . . that fee awards are at bottom an equitable matter, and courts should not hesitate to take the relative wealth of the parties into account." Id. at 74 (internal quotation omitted). Citing that passage from Disney, the Nycomed court flatly stated, "[i]n determining the amount of an appropriate sanction, the Court is permitted to consider . . . the resources of the sanctioned party." Nycomed U.S. Inc. v. Glenmark Generics Ltd., 2010 U.S. Dist. LEXIS 82014, at *39 (E.D.N.Y. 2010). See also Oliveri v. Thompson, 803 F.2d 1265, 1281 (2d Cir. 1986) ("[G]iven the underlying purpose of sanctions – to punish deviations from proper standards of conduct with a view toward encouraging future compliance and deterring future violations – it lies well within the district court's discretion to temper the amount to be awarded against an offending party by a balancing consideration of his ability to pay.")

In the Mackler cases, the Second Circuit implicitly endorsed the same principle by limiting its finding on the seriousness of the punitive sanction at issue there (first a $10,000 sanction and then a $2,000 sanction) to cases in which the sanctioned party was an individual, and not a corporation. Mackler Prods., Inc. v. Cohen, 146 F.3d 126, 130 (2d Cir. 1998) (finding $10,000 punitive sanction imposed "on an individual (as opposed to a corporation or collective entity)" is a "sufficiently substantial punitive sanction" requiring criminal procedural protections) (emphasis added). In sanctioning a corporation, the Second Circuit has explicitly stated a corporation's financial resources must be considered in determining whether the punishment is "serious." In Twentieth Century Fox, which established the $100,000 amount that triggers a corporation's right to a jury trial, the Second Circuit held that "[f]or fines below the $100,000 threshold, it will remain appropriate to consider whether the fine has such a significant financial impact upon a particular organization as to indicate that the punishment is for a serious offense, requiring a jury trial." United States v. Twentieth Century Fox Film Corp., 882 F.2d 656, 665 (2d Cir. 1989).

More recently, the Second Circuit has adjusted the size of a sanction based on the financial resources of a sanctioned corporation. See, e.g., CBS Broad. Inc. v. FilmOn.com, Inc., 814 F.3d 91, 103-104 (2d Cir. 2016) (finding a $90,000 sanction imposed against internet company to be "a relatively minor amount which is not large enough to warrant concern with the adjudication process.") (internal citation omitted); see also Musidor B.V. v. Great American Screen, 658 F.2d 60, 66 (2d Cir. 1981) (finding that imposition of a $10,000 fine against T-shirt printer, which had "gross revenues of $60,000 to $75,000" from the sale of the shirts at a single venue, did not deprive the company of a constitutional right, at least where it never made any request for a jury trial); Passlogix, Inc. v. 2FA Tech., LLC, 708 F. Supp. 2d 378 (S.D.N.Y. 2010) (imposing a $10,000 sanction against company, payable to the court, based on the party's "litigation conduct" and "its status as a small corporation"); In re Haemmerle, 529 B.R. 17, 31 (Bankr.

E.D.N.Y. 2015) (finding a $69,500 sanction imposed against a large mortgage creditor was "proper and reasonable" after that creditor attempted to collect a debt that had been discharged in an individual's chapter 7 case.)

Based on this body of fairly well-developed, sanctions-focused jurisprudence from the Second Circuit, this Court finds it is appropriate and fair to consider PHH's financial resources in revisiting the question of what sanctions to impose on PHH.

D. THE NEW SANCTION ON PHH IN EACH OF THESE CASES

As directed in the Remand Decision, this Court issues this decision to impose sanctions on PHH that "are short of punitive sanctions of the scope and type [it] imposed [in its original Sanctions Decision] in these cases" (doc. # 104, p. 17).

The first step is confirmation of the authority of a bankruptcy court to impose punitive sanctions on parties who violate court orders, under either its inherent powers or § 105 of the Bankruptcy Code. This authority is confirmed in the Supreme Court's recent decision on that point. Taggart v. Lorenzen, No. 18-489 (U.S. June 3, 2019) In Taggart, the high court ruled a bankruptcy court may hold a creditor in contempt for that party's violation of an injunction order, and impose sanctions, including punitive sanctions,[35] if, using an objective standard, the court finds "there is not a 'fair ground of doubt' as to whether the creditor's conduct might be lawful under the order." Taggart, slip op. at 10. This Court has already found, and the District Court has not set aside the finding, that PHH acted in violation of the Debtor Current Orders in the Gravel and Beaulieu cases. Thus, there is no fair ground of doubt here that PHH's conduct violated the Debtor Current Orders and, in the absence of any Second Circuit decisions to the contrary, this Court concludes it possesses the authority, under its inherent powers and § 105, to impose punitive sanctions on PHH for its violation of the Debtor Current Orders.

Next, the Court looks to the financial markers associated with PHH's violations to assess the gravity of its misconduct and discern the proper amount of sanctions. The District Court concluded the original sanctions were "serious" punitive sanctions based, in part, on two financial markers: the total amount of the sanctions imposed on PHH for its misconduct in all three cases ($375,000), and the small amount of the fees and charges PHH erroneously claimed due from the each of the Debtor-borrowers on the inaccurate statements PHH sent in violation of the Debtor Current Orders and Rule 3002.1 (ranging from $30.00 to $258.75) (doc.

---

[35] In Taggart, the Supreme Court affirmed the bankruptcy court's basis for imposing a sanction that included $105,000 for attorney's fees and costs, $5,000 for emotional distress, and $2,000 in punitive damages. Taggart v. Lorenzen, No. 18-489, slip op. at 4 (U.S. June 3, 2019).

104, p. 2). The Remand Decision did not, however, limit this Court's discretion in reassessing the sanctions, and reformulating new, non-serious sanctions, to amounts that correlated directly to the amount of the charges on each incorrect statement. Based on the pertinent caselaw, this Court concludes the appropriate measure of the gravity of PHH's misconduct is not the sum of the amounts PHH claimed due on each statement, but rather the number of incorrect statements PHH sent, in violation of both Rule 3002.1 and the Debtor Current Orders.

In further response to the financial markers identified in the Remand Decision, the Court must determine whether to focus on the sum of the sanctions imposed in all three cases, or the sanctions imposed in each case individually, when assessing whether the sanctions it is now imposing are less than "serious." None of the cases this Court has found addressing either the maximum amount of a non-serious sanction, or the appropriate sanction warranted for an analogous violation of Rule 37, indicate any basis for gauging the seriousness of a sanction by reference to sanctions imposed across multiple cases. To limit the sanction imposed on PHH in any one of the three cases, based on the fact that the sum of the sanctions imposed in the three cases crosses over into the zone of a "serious sanction," would constitute a windfall for PHH. The three cases are before the Court in a consolidated fashion solely as a result of the Court's decision to address the Trustee's motions in these cases simultaneously, in the interest of judicial economy, and for no reason that bears on the nature or gravity of PHH's malfeasance in each of these three distinct cases.[36] Therefore, the Court evaluates the seriousness of each sanction it imposes in this decision on a case-by-case basis, independent of the size of any other sanction it imposes in this decision.

Against that backdrop, the Court is charged with detecting where the line is that distinguishes a serious sanction from a non-serious sanction. It fulfills this charge, in accord with the Remand Decision, by following the guidance of the Sixth, Ninth, and Second Circuits.

The Sixth Circuit, as expressed in the Richards case to which the Remand Decision points, makes clear that bankruptcy courts may impose "mild" punitive sanctions under § 105, and may not impose serious punitive sanctions, but makes this pronouncement without articulating the criteria that characterize a sanction as either "mild" or "serious." In re John Richards Homes Bldg. Co., 552 F. App'x 401, 415-16 (6th Cir.

---

[36] The Trustee filed his motions for contempt in all three cases within a two-day period. See Gravel, no. 11-10112, doc. # 75; Beaulieu, no. 11-10281, doc. # 90; Knisley, no. 12-10512, doc. # 50. The Court combined the hearings, and issued a single decision addressing all the Trustee's motions, due to the common identity of the offending party in all three cases, the similarity of PHH's actions and alleged violations in the three cases, and a desire to promote judicial economy and cost-efficiency. This Court made no finding that the amount of the sanction imposed on PHH in any one case was contingent upon, or related to, the violations in the other cases, or that the Court intended the sanctions to be treated as a single sanction.

2013). The only hint the Sixth Circuit gives as to how one can identify a serious sanction is its conclusion that a $2.8 million sanction against an individual is "serious." Since the Sixth Circuit issued the Richards decision, a district court in that circuit affirmed a bankruptcy court's imposition of a punitive sanction in the amount of $5,000 against a corporation. Franklin Credit Mgmt. Corp. v. Cook, 551 B.R. 613, 625 (M.D. Tenn. 2016). In the context of the facts of that case, and the other sums the creditor was ordered to pay, the district court found the $5,000 punitive sanction the bankruptcy court had imposed was "mild." Id. To comply with the Richards admonition not to impose a serious sanction on PHH, this Court is left to discern where the boundary between a mild and serious sanction lies in this case, which, based upon the Sixth Circuit continuum, is somewhere between $5,000 and $2.8 million.

The Ninth Circuit caselaw also limits bankruptcy courts' authority to impose sanctions, holding they may impose only modest punitive sanctions. It, however, is rather vague about how to parse what distinguishes a modest sanction from a serious sanction. See Knupfer v. Lindblade (In re Dyer), 322 F.3d 1178 (9th Cir. 2003). In applying Ninth Circuit precedent, lower courts have both taken into account the financial circumstances of the offending party, and converted the applicable dollar cap to its present value, when assessing a punitive sanction they intend to be less than "serious."[37] The delineation of serious sanctions that have emerged from the Ninth Circuit jurisprudence are, first, a fine above $5,000 in 1989 dollars, on an individual, is serious, id. at 1193, and, second, a $10,000 punitive sanction imposed on a corporate mortgage servicer is "less than a serious punitive penalty." In re Grihalva, 2013 Bankr. LEXIS 4057, at **21-23 (Bankr. D. Nev. 2013).

Finally, and most importantly, this Court draws on the guidance of the Second Circuit to ascertain what it identifies as the dollar amount floor of a "serious sanction," how that floor may fluctuate depending on whether the party to be sanctioned is a corporation or an individual, and whether this Court may adjust the dollar limit on the floor that Court has set to reflect the dollar amount's present value. Although the Second Circuit has not enunciated the scope of a bankruptcy court's authority to impose punitive sanctions,[38] as this Court described above,[39] the Second Circuit has, in the context of other areas of the law, established solid guideposts as to what constitutes a "serious sanction" both with regard to individuals and corporations. See Mackler II, 225 F.3d 136 (2d Cir. 2000). In 1989, the Second Circuit set the cap for a non-serious sanction, on a corporation, at $100,000 (or $205,531.30 in 2019 dollars). United States v. Twentieth Century Fox Film

[37] See discussion of Dyer and its progeny at Part C(2).

[38] See Remand Decision, doc. # 104, p. 11.

[39] See discussion at Part C(1).

Corp., 882 F.2d 656, 665 (2d Cir. 1989).[40] More recently, the Second Circuit has emphasized the equitable nature of punitive sanctions, and the appropriateness of factoring in the wealth of the party to be sanctioned. See CBS Broad. Inc. v. FilmOn.com, Inc., 814 F.3d 91, 103-104 (2d Cir. 2016); Shangold v. Walt Disney Co., 275 Fed. Appx. 72 (2d Cir. 2008). Applying the detailed rationale of these cases, and the Second Circuit's determination that a party's financial circumstances should factor into the computation of what amount of damages is sufficient to deter, this Court concludes a sanction of less than $205,531.30 would be less than a serious punitive sanction on PHH, and appropriate if, given PHH's financial resources, the Court determines a sanction of less than that magnitude would not be effective in deterring future misconduct.

Starting with the premise that the District Court did not disturb any of this Court's factual findings it made with respect to PHH's violations of Rule 3002.1 and the Debtor Current Orders, and relying on the

---

[40] As explained in Part C(1)(b), while Twentieth Century Fox considered the amount at which a fine or sanction triggers a corporation's right to a jury trial, this amount can be soundly analogized to the amount at which a sanction can be considered serious. This is precisely the analytical approach utilized by the Ninth Circuit in its Dyer decision, which the District Court cited favorably. See Knupfer v. Lindblade (In re Dyer), 322 F.3d 1178, 1193 (9th Cir. 2003) (basing its finding that the imposition of any fine above $5,000 could be considered serious, as against an individual, on the 1989 Supreme Court case Blanton v. N. Las Vegas, 489 U.S. 538 (1989), which involved a potential cutoff for a serious fine warranting a jury trial in the case of two individuals convicted of driving under the influence.)

pertinent case law from the Sixth, Ninth and Second Circuits with respect to the scope of bankruptcy courts' authority to impose punitive sanctions, and the decisions from within this Circuit that broadly construe the arsenal of sanctions courts may impose for Rule 37-type violations, as well as the general guidance from the Supreme Court granting bankruptcy courts the authority to impose sanctions for injunction violations, this Court concludes that, based on the circumstances of, and violations by, this multi-billion dollar financial institution, the following sanctions each fall within the scope of a non-serious sanction and, therefore, are within this Court's authority to impose.

In the Gravel case, the Court previously imposed a sanction of $200,000, based, in large measure on the fact that it was PHH's second violation of an Order of this Court. The previous Order, entered in March of 2014 (doc. # 49), not only sanctioned PHH for sending the Debtors inaccurate mortgage statements, but also unambiguously declared the debtors were current as of that date:

> [The Trustee] having filed a Motion to Compel [PHH Mortgage] to correct misapplied mortgage payments disbursed to it by the trustee in this case and for sanctions arising from its failure during this case to correctly apply such payments, the trustee and PHH, by filing their consent to this order, have stipulated and agreed to the following:
>
> (1) Subsequent to the filing of the motion, PHH has taken steps to re-apply the

> misapplied mortgage payments, paid to it by the trustee, and is now showing the debtor's mortgage payments, post-petition, as current[.]

Sanctions Decision, doc. # 82, pp. 14-15 (quoting doc. # 49). PHH violated that Order and violated the Debtor Current Order entered thereafter (doc. # 74). Taking into account PHH's repeated contemptuous conduct, its substantial financial resources, and the limitations on this Court's sanctioning authority, it imposes a sanction of $150,000 on PHH for PHH's violations of this Court's Orders in the Gravel case. See Shangold v. Walt Disney Co., 275 Fed. Appx. 72 (2d Cir. 2008); Oliveri v. Thompson, 803 F.2d 1265, 1281 (2d Cir. 1986). The Court also gives significant weight to the fact that PHH gave the Court emphatic assurances that the corrective measures PHH implemented as a result of the negotiations leading to its payment of a $9,000 sanction in 2014 would prevent precisely the sloppy or inattentive record keeping that underlies the instant violations. Moreover, although the Court is not entirely confident a $150,000 sanction will be sufficient to deter PHH from continuing to violate the Debtor Current Order in this case, it seems plausible that it will and nothing less would. With respect to the 25 incorrect notices, the Court reimposes the $25,000 sanction, finding it is the appropriate sanction for the repeated violations of Rule 3002.1(c). The sum of these two sanctions ($175,000) is consistent with the District's Court mandate to impose a less than serious sanction based on the Second Circuit's declaration that a serious sanction is one that exceeds $100,000 in 1989 dollars, i.e.,

$205,531.30 in 2019 dollars. See United States v. Twentieth Century Fox Film Corp., 882 F.2d 656, 665 (2d Cir. 1989).

In the Beaulieu case, the previously imposed $100,000 sanction for PHH's violation of the Debtor Current Order is reduced to $75,000. This sanction amount reflects the fact that this was PHH's first violation of an Order in this case and is one-half of the corresponding sanction for violation of the Debtor Current Order in the Gravel case. The Court reimposes the $25,000 sanction, as the appropriate sanction for the 25 incorrect notices PHH issued in violation of Rule 3002.1. This total sanction of $125,000 is not "serious" or beyond this Court's authority to impose because it is below the Second Circuit's $100,000 cap (in 1989 dollars), adjusted for present value. See Twentieth Century Fox, 882 F.2d at 665.

In the Knisley case, this Court imposes the same $25,000 sanction it previously imposed for PHH's 25 incorrect notices issued in violation of Rule 3002.1(c). There is nothing in the Remand Decision or the caselaw that convinces this Court that this sanction, in and of itself, is "serious" or beyond the authority of this Court to impose. Rather, it reflects the Court's broad authority under Rule 3002.1, as shown in the caselaw sanctioning violations of Rule 37 (upon which Rule 3002.1 was modeled), to impose such other appropriate relief as is warranted under the circumstances. See, e.g., Nycomed US, Inc. v. Glenmark Generics Ltd., 2010 U.S. Dist. LEXIS 82014 (E.D.N.Y. 2010); Bradley v. Sunbeam Corp., 2003 U.S. Dist. LEXIS 14451 (N.D. W.

Va. 2003); Pereira v. Narragansett Fishing Corp., 135 F.R.D. 24 (D. Mass. 1991); M. Cleminshaw Co. v. Norwich, 93 F.R.D. 338 (D. Conn. 1981).

E. To Whom PHH Must Pay the Sanctions

The District Court did not disturb this Court's decision that PHH pay all of the sanctions imposed in the Sanctions Decision to the non-profit organization now known as Legal Services Vermont[41] (doc. # 82, p. 17). This Court designated that payee in recognition of the crucial need for vigilant advocacy on behalf of individuals who seek bankruptcy relief in this District.

> The Debtors in these cases might well have found themselves confronted with unexpected charges and possible suit by PHH, after their bankruptcy cases were concluded, if the Trustee had not been zealous in his efforts to compel PHH to remove the incorrect charges from the Debtors' monthly mortgage statements. Without the Trustee's vigilance and his filing of the Sanctions Motions, the Debtors' fresh start might have been jeopardized – just as the drafters of Rule 3002.1 had warned.

Doc. # 82, p. 17. Because the Debtors did not present any evidence showing they suffered financial harm,

[41] At the time of this Court's Order it was known as Legal Services Law Line of Vermont; as of January 25, 2019, its legal name is Legal Services Vermont. See Press Release, Legal Services Vermont, 'Law Line' is Now 'Legal Services Vermont,' (Jan. 25, 2019), https://legalservicesvt.org/law-line-now-legal-services-vermont.

and to avoid unjustly enriching the Trustee or the Debtors, the Court awarded the sanctions to "Vermont's lead provider of pro bono legal services in bankruptcy cases" (doc. # 82, p. 17).

In the Trustee's Motion, the Trustee asks this Court, inter alia, to order payment of the full amount of the original sanctions to him, in four annual installments (doc. # 119, p. 1). While the Court has denied the Trustee's Motion, in most respects, see doc. # 133, the Court finds the Trustee's request to "conduct a new windfall analysis," in light of the entire record in these cases, and direct PHH to pay a portion of the sanctions to his office, rather than to pay it entirely to Legal Services Vermont (doc. # 119, p. 9), is within the Court's discretion on remand. The Trustee's arguments are compelling and, in light of the efforts the Trustee has made since entry of the Court's Sanctions Decision, justify a modification to the Court's original designation of payee.

1. PHH to Pay the Sanctions for Its Violations of Rule 3002.1 to the Trustee

The Court finds it appropriate and just to direct PHH to pay the Rule 3002.1 sanctions, of $25,000 in each of the three cases, to the Trustee, for several reasons. Although the caselaw on the question of awarding a chapter 13 trustee sanctions under Rule 3002.1(i) is undeveloped, at least one court considered the question. See In re Gutierrez, 2012 Bankr. LEXIS 5110 (Bankr. D.N.M. 2012). In Gutierrez, the court declined the trustee's request for an award of reasonable expenses and attorney's fees under 3002.1(i)(2), but that was because it granted the creditor additional time to comply with its Rule 3002.1 obligations and ultimately declined to impose sanctions. Id. at **10-12. While acknowledging the dearth of caselaw awarding 3002.1 sanctions to a trustee, the Court is guided by other sources of authority for this relief.

First, the language of Rule 3002.1(i), and its contemporaneously enacted counterpart Rule 3001(c)(2)(D), do not contain the restrictive language found in § 362(k) that allows the award to be paid only to the injured individual debtor. See § 362(k)(1) (" . . . an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorney's fees, and, in appropriate circumstances, may recover punitive damages."). Several courts, including this Court, have found that a trustee "is not eligible to sue for damages pursuant to § 362(k)(1)." Sensenich v. Ledyard Nat'l Bank (In re Campbell), 398 B.R. 799, 815 (Bankr. D. Vt. 2008); see also In re Dyer, 322 F.3d 1178, 1189 (9th Cir. 2003); In re Chateaugay Corp., 920 F.2d 183 (2d Cir. 1990). Rule 3002.1, by contrast, does not include this limitation, thus opening the door for courts to treat a trustee as an eligible recipient of Rule 3002.1 sanctions.

Second, there is an established body of caselaw demonstrating a court's authority to award sanctions to a chapter 13 trustee under Rule 3001(c)(2)(D), the companion sanction provision to Rule 3002.1(i). See Advisory Committee Minutes from Spring 2010

Meeting (in which the Reporter noted the sanctions provision under Rule 3002.1 "was intended to parallel the sanctions provisions the Committee just reviewed and modified in Rule 3001(c)(2)(D), and said the changes to both provisions should be the same").[42] In two instances, the Bankruptcy Court for the Eastern District of Michigan has awarded the chapter 13 trustee sanctions under Rule 3001(c)(2)(D) for the costs and expenses incurred when creditors failed to submit the supporting information to a proof of claim, as required by Rule 3001(c). <u>See</u> <u>In re Ball</u>, 2019 Bankr. LEXIS 179 (Bankr. E.D. Mich. 2019); <u>In re Simerson</u>, 2018 Bankr. LEXIS 3711 (Bankr. E.D. Mich. 2018). The bankruptcy court found that "unexplained deficiencies and delays in filing a full and complete proof of claim did cause the Trustee to devote more attention than was usual to solve a rather straightforward issue of payment of real estate taxes." <u>Simerson</u>, 2018 Bankr. LEXIS 3711, at *8. The court awarded sanctions based on the fees that were incurred, and could have been avoided, had the creditors complied with their Rule 3001(c) requirements. <u>Id.</u> at **8-9 (awarding $400 to the chapter 13 trustee); <u>Ball</u>, 2019 Bankr. LEXIS 179, at **6-7 (awarding $200 to the chapter 13 trustee). While these cases involved relatively minor, one-time infractions by creditors that were quickly resolved and thus did not merit large sanctions awards, the

---

[42] Advisory Committee on Rules of Bankruptcy Procedure, Minutes, p. 10 (Apr. 29-30, 2010), https://www.uscourts.gov/rules-policies/archives/meeting-minutes/advisory-committee-rules-bankruptcy-procedure-april-2010 [hereinafter April 2010 Advisory Committee Minutes].

decisions establish a well-reasoned basis for awarding sanctions to a chapter 13 trustee for work performed in addressing Rule 3001(c) and Rule 3002.1 violations. This is in addition to those cases in which courts have awarded sanctions to trustees under Rule 37, on which 3002.1 was modeled, and under § 105 and their inherent powers. See, e.g., In re Haynes, 577 B.R. 711, 757-58 (Bankr. E.D. Tenn. 2017) (awarding Rule 37 sanctions, totaling $15,000, to the chapter 13 trustee for work necessary to compel UpRight Law to provide discovery responses); Sensenich v. Ledyard Nat'l Bank (In re Campbell), 398 B.R. 799, 815 (Bankr. D. Vt. 2008) (finding the chapter 13 trustee may seek sanctions under the Court's contempt powers pursuant to § 105(a)); In re Ambotiene, 316 B.R. 25, 30, 40 (Bankr. E.D.N.Y. 2004) (awarding chapter 7 trustee $7,253 under § 105(a) for creditor's role in "interfering and obstructing [the trustee's] efforts to carry out his statutory and fiduciary duties" under the Bankruptcy Code), aff'd sub nom Grand St. Realty, LLC v. McCord, 2005 U.S. Dist. LEXIS 45314 (E.D.N.Y. 2005) (affirming the sanction under both § 105(a) and the bankruptcy court's inherent powers).

Third, some courts, while not characterizing such measures as punitive in nature, have awarded sanctions to trustees in a flat amount, without reference to specific fees or expenses. In In re Nettles, 2008 Bankr. LEXIS 1293 (Bankr. D.S.C. 2008), the bankruptcy court awarded the chapter 7 trustee $8,976.40 for attorney's fees and costs. Id. at *14. The Nettles court, however, went further and awarded an additional

$2,500 under its inherent powers "in reimbursement of the expenses incurred for Trustee's law firm[,]" without tying that amount to timesheets or other evidence to certify the fees or costs earned. Id. at *22. In In re Parker, 2014 U.S. Dist. LEXIS 136355 (E.D. Va. 2014), the district court upheld the bankruptcy court's awarding of a $1,000 sanction in each of four cases "as reimbursement for expenses incurred by the trustee attending to [the sanctioned party's] transgressions." Id. at *20. The appellant argued these sanctions amounted to unauthorized criminal contempt fines, but the district court held the $4,000 in sanctions, which were not linked to specific fees or expenses documented by the trustee, constituted "a reimbursement sanction meant to make the other parties to the proceeding whole and not a criminal contempt order meant to punish." Id. at *21. The court went on to find the sanctioned party's "actions and failures to act resulted in wasted time and effort by the Chapter 13 Trustee in each of the four cases in which the reimbursement sanction was imposed." Id. at *22. See also In re September 11th Liab. Ins. Coverage Cases, 243 F.R.D. 114, 132 (S.D.N.Y. 2007) (awarding attorney's fees in a "flat and sizeable amount" where the court found "precision in determining the amounts of time the parties devoted to this issue, separate from all other issues, is not possible."). This Court awards the sanctions to the Trustee, as the courts did in the Nettles and Parker cases, based on the circumstances presented rather than timesheets or billing records. It finds the Trustee deserves the Rule 3002.1 sanctions to compensate him for the expenses he and his office incurred, as well as the substantial attention, time and effort he devoted to detecting, describing, and acting on PHH's failures to comply with its Rule 3002.1 obligations.

Finally, awarding the sanctions which are attributable to PHH's Rule 3002.1 violations to the Trustee accords with and advances the underlying deterrent purpose of these sanctions (doc. # 82, p. 17).[43]

The Trustee "wear[s] many hats and perform[s] several functions," In re Harwood, 519 B.R. 535, 542 (Bankr. N.D. Cal. 2014), including many prominent duties associated with Rule 3002.1. Among those duties is the filing of a notice of final cure payment once a debtor completes all payments under the plan and, within this district, the filing of a motion to determine final cure and payment. See FED. R. BANKR. P. 3002.1(f),(h). The chapter 13 trustee's role is critical in protecting Vermont debtors from the harm Rule 3002.1 is "designed to address[; i.e.] the accumulation of unpaid fees and charges over the course of the case, resulting in a large deficiency when the debtor emerges from bankruptcy court with the expectation of a fresh start." April 2010 Advisory Committee Minutes, supra note 42, at 7. That role is evident in these cases where,

[43] The "Rule 37 sanctions," on which the Rule 3002.1 sanctions were modeled, "must be applied diligently both 'to penalize those whose conduct may be deemed to warrant such a sanction, [and] to deter those who might be tempted to such conduct in the absence of such a deterrent." Roadway Express Inc., v. Piper, 447 U.S. 752, 763-64 (1980) (quoting National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639, 643 (1976)).

as the Court previously observed, "[w]ithout the Trustee's vigilance and his filing of the Sanctions Motions, the Debtors' fresh start might have been jeopardized – just as the drafters of Rule 3002.1 had warned" (doc. # 82, p. 17). Thus, in addition to serving the underlying deterrent purposes of the sanctions, awarding a portion of the sanctions to the Trustee both compensates the Trustee for his efforts in preventing PHH's misconduct from causing real economic harm to debtors in this district, and strengthens the Trustee's "enforcement capacity" and ability to monitor creditors' compliance with Rule 3002.1 going forward (doc. # 119, p. 10).

2. PHH to Pay the Sanctions for Its Violation of Debtor Current Orders to Legal Services Vermont

As with the federal discovery rules on which it was modeled, one purpose of Rule 3002.1 "is to provide a level playing field, to the extent possible, in confronting the opposing party's evidence." Kuhlman v. Louisville Ladder, Inc., 2014 U.S. Dist. LEXIS 199433, at *10 (M.D. Fla. 2014). This sentiment is especially true within the context of Rule 3002.1, where a creditor possesses the records that would establish (or disprove) any outstanding postpetition obligations it claims the borrower owes. See In re Hockenbeger, 2018 Bankr. LEXIS 1120, at *9 (Bankr. N.D. Ohio 2018) (finding the burden is on the mortgage holder to establish outstanding postpetition obligations on a mortgage in a 3002.1(h) motion); In re Ferrell, 580 B.R. 181, 185

(Bankr. D.S.C. 2017) (same); In re Kreidler, 494 B.R. 201, 2014 (Bankr. M.D. Pa. 2013) (same).

In a broader sense, Rule 3002.1 was designed to protect debtors' fresh starts after emerging successfully from a chapter 13 bankruptcy. See Wedoff, supra at 584. The provisions of Rule 3002.1 allow for either the chapter 13 trustee, or the debtors themselves, to file the notice of final cure payment or a motion to determine final cure and payment, and thereby obtain the assurance of a Debtor Current Order. See FED. R. BANKR. P. 3002.1(f), (h). Subparagraph (i) provides the mechanism to protect debtors' fresh starts in the face of creditor violations of Rule 3002.1 and Debtor Current Orders, after a case has concluded:

> If, after the chapter 13 debtor has completed payments under the plan and the case has been closed, the holder of a claim secured by the debtor's principal residence seeks to recover amounts that should have been but were not disclosed under this rule, the debtor may move to have the case reopened in order to seek sanctions against the holder of the claim under subdivision (i).

FED. R. BANKR. P. 3002.1 Advisory Committee's 2011 note.

This places enormous pressure on debtors to monitor the statements issued by creditors following their discharges, and to take measures to protect themselves from efforts to collect unauthorized fees and expenses, and to protect their homes from possible foreclosure.

This underscores the critical debtor-protector role debtors' attorneys must play. Many homeowners facing foreclosure are in financial crisis and lack effective legal representation. See Melanca Clark & Maggie Barron, Foreclosures: A Crisis in Legal Representation, Brennan Center for Justice, p. 12 (2009) (finding many homeowners possess legal defenses that could bar foreclosure, but cannot effectively raise them absent the assistance of counsel). Access to a competent attorney, who will recognize creditor violations and advocate zealously on a debtor's behalf, is one of the most essential tools for protecting debtors' fresh starts and accomplishing the goals of Rule 3002.1 and Debtor Current Orders. See In re Miller, 2015 Bankr. LEXIS 4530 (Bankr. D. Vt. 2015). As the Brennan Center concluded,

> The loan servicers and lenders invariably have counsel whenever they take action against a homeowner for alleged default of the mortgage terms. Providing lawyers for low- and moderate-income homeowners would level the playing field, and help to ensure that banks and other institutions that operate in economically distressed communities do so according to the rule of law.

Clark & Barron, supra, at 16-17.

Mindful of the distress many homeowners experience in trying to defend against actions commenced by mortgage creditors with experienced counsel, this Court reiterates its belief, as originally stated in the Sanctions Decision, that "the best way to protect consumer debtors who cannot afford to dispute and litigate the assessment of improper post-petition charges – and thus are at risk of having their fresh starts diluted[,]" is to direct PHH to pay sanctions to a pro bono legal service provider (doc. # 82, p. 17). The Court remains convinced it is equitable, and serves the interests of justice, to direct PHH to pay the sanctions flowing from PHH's violations of the Debtor Current Orders, i.e., the $150,000 sanction in the Gravel case and the $75,000 sanction in the Beaulieu case, to Legal Services Vermont.

VI. CONCLUSION

For the reasons set forth above, the Court reaches the following conclusions with respect to the six interlocking legal issues presented. First, this Court has the authority to issue punitive sanctions against PHH for its violations of Bankruptcy Rule 3002.1, in all three of these cases, based on the detailed explanations of the Rule's purpose and the intent of its drafters, as set out in the records of the Advisory Committee that formulated the Rule, and the court decisions which constitute persuasive authority regarding this question, in their analysis of analogous or similar language in Bankruptcy Rule 3001(c) and Federal Civil Rule 37. Second, this Court has authority to sanction PHH for its breach of the Debtor Current Orders in the Gravel and Beaulieu cases, pursuant to § 105(a) and its inherent powers. Third, the sanctions this Court imposes on PHH herein fall within the caselaw definitions of "modest" and "less than serious" sanctions, from the Second, Sixth and Ninth Circuits, i.e., the Circuits to which the

Remand Decision directed this Court's attention. Fourth, that same caselaw provides a sound basis for this Court to take into account PHH's corporate status, the repetitive nature of its violations, and its relative wealth and ability to pay in setting the amount of the sanctions. Fifth, based on the well-established jurisprudence that assigns upper monetary limits to the various categories of sanctions germane to this decision, as well as the more recent trial and appellate level decisions that adjust those dollar amounts to reflect present dollar value, this Court concludes it is proper to apply the monetary caps, adjusted to reflect their value in 2019 dollars. Sixth, the Court finds that although the chapter 13 Trustee has not documented the number of hours he or his pro bono attorney have spent in addressing the myriad issues raised in these cases, it is clear that (a) their efforts shielded the Debtors from having to pay improper charges and from incurring the cost of legal actions that might have flowed from a failure to pay them, and (b) it was – and will continue to be – within the scope of the Trustee's duties to vigilantly monitor mortgage creditors' compliance with Rule 3002.1, and as such, it is fair to direct that portion of the sanctions allocable to PHH's violation of Rule 3002.1 ($75,000) to the chapter 13 Trustee. Analogously, the fact that the Debtors did not suffer financial harm when PHH violated the Debtor Current Orders in the Gravel and Beaulieu cases does not diminish the need to impose sanctions on PHH for punitive and deterrent purposes. It is most appropriate that PHH pay these sanctions ($225,000) to Legal Services Vermont, the premier provider of pro bono legal services to the individuals who are most vulnerable to harm when a creditor fails to adhere to the injunctions in Debtor Current Orders, and most in need of protection from mortgagors who do not play by the rules.

Accordingly, and pursuant to its mandate on remand, the Court (1) reduces the combined sanction from $225,000 to $175,000 in the Gravel case, reduces the combined sanction from $125,000 to $100,000 in the Beaulieu case, and leaves intact the $25,000 sanction in the Knisley case; (2) directs PHH to pay the sanctions for violations of court orders, i.e., $150,000 in the Gravel case and $75,000 in the Beaulieu case, to Legal Services Vermont; and (3) directs PHH to pay the sanctions for violations of Rule 3002.1, i.e., $25,000 in each of the three cases, to the chapter 13 Trustee, as more fully described in the accompanying Order.

This memorandum of decision constitutes the Court's findings of fact and conclusions of law, and implementation of the Remand Decision.

/s/ Colleen A. Brown

Burlington, Vermont
June 27, 2019

Colleen A. Brown
United States
Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT

In re: Nicholas and Amanda Gravel, Debtors.	**Chapter 13 Case # 11-10112**
In re: Allen and Laurie Beaulieu, Debtors.	**Chapter 13 Case # 11-10281**
In re: Matthew and Emilie Knisley, Debtors.	**Chapter 13 Case # 12-10512**

Appearances:
Mahesha Subbaraman, Esq., Subbaraman PLLC, Minneapolis, Minnesota, For the Trustee

Alexandra Edelman, Esq., Primmer Piper Eggleston & Cramer, PC, Burlington, Vermont, For the Creditor

ORDER

(Filed Jun. 27, 2019)

ON REMAND FROM U.S. DISTRICT COURT, IMPOSING SANCTIONS ON PHH MORTGAGE CORPORATION

For the reasons set forth in the memorandum of decision of even date, the Court finds, first, it has the authority pursuant to the Rule 3002.1, pertinent case-law, and its inherent powers, to impose punitive sanctions on PHH for its violations of Rule 3002.1; second, it has the authority, pursuant to § 105(a) and its inherent powers, to sanction PHH for its breach of the Debtor Current Orders in the Gravel and Beaulieu cases; third, there are specific dollar amount caps which set the outer limits of "modest," or "less than serious," sanctions; fourth, those caps may be adjusted to correlate to the present value of those dollar amounts; fifth, this Court has the authority to impose punitive sanctions on PHH for its Rule 3002.1 and Court Order violations, provided the amount of the sanction imposed in each case does not exceed the caselaw-defined cap for a non-serious sanction; and sixth, based on the facts and circumstances of these cases, it serves the interests of justice for PHH to pay the sanctions for its Rule 3002.1 violations to the chapter 13 Trustee and to pay the sanctions attributable to its violations of Debtor Current Orders to Legal Services Vermont.

Accordingly, IT IS HEREBY ORDERED that:

(1) The following sanctions are imposed on PHH:
(a) in the Gravel case, a sanction of one hundred seventy-five thousand dollars ($175,000),
(b) in the Beaulieu case, a sanction of one hundred thousand dollars ($100,000), and
(c) in the Knisley case, a sanction of twenty-five thousand dollars ($25,000).

(2) (a) PHH shall pay to the chapter 13 Trustee the portion of each sanction imposed for PHH's violation of Bankruptcy Rule 3002.1:
(i) in the Gravel case, twenty-five thousand dollars ($25,000),

(ii) in the Beaulieu case, twenty-five thousand dollars ($25,000), and

(iii) in the Knisley case, twenty-five thousand dollars ($25,000), within fourteen (14) days of entry of this Order.

(b) PHH shall pay to Legal Services Vermont the portion of each sanction imposed for PHH's violation of Debtor Current Orders:

(i) in the Gravel case, one-hundred fifty thousand dollars ($150,000), and

(ii) in the Beaulieu case, seventy-five thousand dollars ($75,000)

within fourteen (14) days of entry of this Order.

SO ORDERED.

/s/ Colleen A. Brown

Burlington, Vermont
June 27, 2019

Colleen A. Brown
United States
Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT

In re:	)	Case No.: 11-10112
NICHOLAS GRAVEL and	)	Chapter 13
AMANDA GRAVEL	)	
	)	
Debtors	)	

ORDER DETERMINING THAT THE DEBTORS HAVE CURED ALL PREPETITION MORTGAGE DEFAULTS AND IS CURRENT POST-PETITION ON MORTGAGE PAYMENTS TO *PHH MORTGAGE CORPORATION*

(Filed May 20, 2016)

Upon motion of the Chapter 13 Trustee pursuant to VT LBR 3015-2(j)(8) and notice under Fed. R. Bankr. P. 3002.1(f) for an order determining that the debtor(s) in this case are current on their mortgage payments to *PHH Mortgage Corporation*. Service of the motion and notice having been given to the mortgagee, Debtors, and Debtors' attorney, and the Creditor, PHH Mortgage, having filed a Response agreeing that the Debtors are current (doc. #72), and it appearing to the Court based on the representations of PHH's Response, along with the Trustee's Motion and exhibits, that in fact the debtors are current on their mortgage payments, NOW THEREFORE,

IT IS ORDERED AND DETERMINED AS FOLLOWS:

(1) the debtors have cured any mortgage arrearage or default existing on the date that this bankruptcy case was filed;

(2) the debtors, by their payments through the Office of the Chapter 13 Trustee, have made all payments due during the pendency of this case through April 1, 2016, including all monthly payments and any other charges or amounts due under their mortgage with *PHH Mortgage Corporation.*

(3) the Debtors' first post-bankruptcy mortgage payment is to be made directly by the debtors to the mortgagee beginning with the payment due on May 1, 2016.

(4) the mortgagee shall be precluded from disputing that the debtors are current (as set forth herein) in any other proceeding.

Dated: May 20, 2016
Burlington, Vermont /s/ Colleen A. Brown
Hon. Colleen A. Brown
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT

In re:	)	Case No.: 11-10281
ALLEN BEAULIEU and	)	Chapter 13
LAURIE BEAULIEU	)	
	)	
Debtors	)	

ORDER DETERMINING THAT THE DEBTORS HAVE CURED ALL PREPETITION MORTGAGE DEFAULTS AND ARE CURRENT ON POST-PETITION MORTGAGE PAYMENTS TO *PHH MORTGAGE CORPORATION*

(Filed May 5, 2016)

Upon motion of the Chapter 13 Trustee pursuant to VT LBR 3015-2(j)(8) and notice under Fed. R. Bankr. P. 3002.1(f) for an order determining that the debtors in this case are current on their mortgage payments to *PHH Mortgage Corporatio*n, service of the motion and notice having been given to the mortgagee, Debtors, and Debtors' attorney, and no objection or adverse interest appearing and it appearing to the Court based on the representations of the Trustee's Motion and exhibits, that in fact the debtors are current on their mortgage payments, NOW THEREFORE,

IT IS ORDERED AND DETERMINED AS FOLLOWS:

(1) the debtors have cured any mortgage arrearage or default existing on the date that this bankruptcy case was filed;

(2) the debtors, by their payments through the Office of the Chapter 13 Trustee, have made all payments due during the pendency of this case through May 1, 2016, including all monthly payments and any other charges or amounts due under their mortgage with *PHH Mortgage Corporation.*

(3) the debtors' first post-bankruptcy mortgage payment is to be made directly by the debtors to the mortgagee beginning with the payment due on June 1, 2016.

(4) the mortgagee shall be precluded from disputing that the debtors are current (as set forth herein) in any other proceeding.

Dated: May 5, 2016
Burlington, Vermont /s/ Colleen A. Brown

Hon. Colleen A. Brown
United States
Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT

IN RE: **NICHOLAS GRAVEL**	)	Case No. **11-10112**
and AMANDA GRAVEL	)	
Debtor(s)	)	(Chapter 13)

ORDER ON TRUSTEE'S MOTION TO COMPEL AND FOR SANCTIONS

(Filed Mar. 31, 2014)

The Chapter 13 Trustee, Jan M. Sensenich, having filed a Motion to Compel PHH Mortgage Corporation (PHH) to correct misapplied mortgage payments disbursed to it by the trustee in this case and for sanctions arising from its failure during this case to correctly apply such payments, the trustee and PHH, by filing their consent to this order, have stipulated and agreed to the following:

(1) subsequent to the filing of the trustee's motion, PHH has taken steps to re-apply the misapplied mortgage payments, paid to it by the trustee, and is now showing the debtor's mortgage payments, post-petition, as current;

(2) PHH and the trustee agree that the Court shall award sanctions against PHH for its misapplication of payments during this case so far, and for directing erroneous communications to the debtor with respect to the status of their post-petition mortgage payments; and

(3) the award of sanctions shall be in the amount of $9,000.00, payable by PHH to the debtors in this case, and shall be payable to the debtors within 30 days from the date of this order.

So Ordered.

Dated: March 31, 2014

/s/ Colleen A. Brown
HON. COLLEEN A. BROWN
U.S. BANKRUPTCY JUDGE

**UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT**

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 1st day of November, two thousand twenty-one.

In re: Nicholas Gravel,
Amanda Gravel,
Debtors.
****
PHH Mortgage Corporation,

Creditor - Appellant,

v.

Jan M. Sensenich,

Trustee - Appellee.

ORDER
Docket Nos: 20- 1 (Lead)
20-2 (Con)
20-3 (Con)

Appellee, Jan M. Sensenich, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc.*

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

[SEAL]

/s/ Catherine O'Hagan Wolfe