No. 21-1322

IN THE

Supreme Court of the United States

JAN M. SENSENICH, CHAPTER 13 TRUSTEE,
Petitioner,

v.

PHH MORTGAGE CORPORATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

Alexandra E. Edelman
Ryan M. Long
PRIMMER PIPER EGGLESTON & CRAMER, PC
30 Main Street, Suite 500
Burlington, VT 05402
(802) 864-0880
aedelman@primmer.com

Matthew J. Delude
Counsel of Record
PRIMMER PIPER EGGLESTON & CRAMER, PC
900 Elm St. 19th Floor
Manchester, NH 03105
(603) 626-3324
mdelude@primmer.com

Counsel for Respondent

QUESTIONS PRESENTED

The questions presented by Petitioner bear no actual relation to the facts and circumstances of these cases. When properly framed, the questions presented should read:

1. Is an appellate court required to affirm on an alternative ground for affirmance when the appellate court determines both that the decision below is wrong and that there are insufficient findings to support the alternative ground advanced?

2. Do sanctions based on inherent judicial power require a finding of bad faith where they are imposed on a party and not an attorney, the party violated no court order, and the conduct sought to be sanctioned did not take place before the court?

3. Does Bankruptcy Rule 3002.1 authorize punitive sanctions against a creditor for sending informational mortgage statements that cause no harm, seek no fees, and violate no court orders?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent PHH Mortgage Corporation ("PHH" or "Respondent") states the following information:

PHH is a wholly owned subsidiary of PHH Corporation, which is a wholly owned subsidiary of Ocwen Financial Corporation, a publicly traded company on the NYSE (OCN). No publicly held company owns 10% or more of Ocwen Financial Corporation's stock.

PHH Corporation was acquired by Ocwen Financial Corporation in 2018, after all of the events of relevance in this case.

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PRELIMINARY STATEMENT

This case began in 2016 when the bankruptcy court overreached its constitutional authority and issued a staggering $375,000 sanction against Respondent based upon its erroneous belief that Respondent had violated the bankruptcy court's orders. App.3; No. 20-1 (2d Cir.), Doc. 69 ("2d Cir. SA") at 42-43. That false belief infected every aspect of the bankruptcy court's order. (*Id.*) When that sanctions award was vacated on appeal and remanded by the district court, the bankruptcy court refused to re-consider its mistake despite specific remand briefing on the issue. *See* No. 20-1 (2d Cir.), Doc. 70 ("2d Cir. JA-I") at 153-55. The court simply re-imposed $300,000 in sanctions for the same false reasons. (*Id.*)

On a second appeal before the Second Circuit, the panel unanimously reversed and vacated $225,000 of the re-imposed sanctions because Respondent did not, in fact, violate any order of the bankruptcy court. App.3, 29. The Petition does not seek review of that unanimous decision. Pet.-*i.* The Petition only seeks review of the $75,000 in sanctions awarded under Rule 3002.1, which the majority also vacated. (*Id.*) Only Judge Bianco dissented. (*Id.*) While Judge Bianco was swayed by the inflammatory rhetoric of Petitioner and his *amici* to support affirmance of the $75,000 sanction, the rest of the panel recognized that the bankruptcy court's decision was both wrong and lacked sufficient findings to support invocation of any inherent power. (*Id.*) Petitioner now focuses on *dicta* from the

decision below and seeks to manufacture a circuit split to save the $75,000 sanction.

Petitioner's ultimate goal is to turn a simple compensatory bankruptcy rule (Rule 3002.1) into a tool that he can use now and in the future to fund the operations of his office with sanctions money. 2d Cir. JA-I-185. In an effort to create this new source of funding, the Petitioner has resorted to inflammatory rhetoric and has repeatedly and falsely accused Respondent of engaging in egregious behavior and serial violations in these cases when the *actual* record firmly and unequivocally shows the opposite. *See, e.g.,* App.25. Petitioner and his *amici* know this, which is why their briefs rely heavily on citations outside the record of alleged conduct of Respondent in entirely separate unrelated cases that were never part of the evidentiary record below and even on alleged conduct of entirely different mortgage servicers. *See, e.g.,* Pet.10-11.[1]

In truth, the Second Circuit correctly held that in *these* three cases actually on petition for certiorari to this Court, and the only ones where this Court would have jurisdiction to grant relief, "PHH never

[1] Petitioner's *amici* even devotes multiple pages of their brief to an attempt to paint Respondent PHH with alleged misconduct of Ocwen from 2009 to 2016 despite the fact that *amici's* own citation of ownership at footnote 9 shows PHH was not even acquired by Ocwen until 2018 after both the events alleged in *amici's* brief and the events of relevance to this appeal. *See Amici* Br. Cyganowski at 9-11&n.9. Those companies were completely unaffiliated at all relevant times and the conduct alleged is completely irrelevant to these cases. (*Id.*)

charged the debtors a dime, and never collected a dime." App.25. That is because "[t]he fees to which no notice was given ***were never due***." App.25 (emphasis added). Respondent's informational mortgage statements sought no fees, caused no harm, and violated no orders. (*Id.*)

The decision of the Second Circuit provides no occasion for certiorari review. The alleged circuit splits are manufactured to seek relief based on *dicta* below but are ultimately illusory. The real issue in these cases concerns Bankruptcy Rule 3002.1, which both the decision below and Petitioner's own *amici* recognize is "an issue of first impression" amongst the circuit courts. App.18. That issue needs time to percolate, particularly where this case would make a profoundly bad vehicle for this Court's resolution of the issue. Certiorari should be denied.

STATEMENT

A. Background and Procedural History.

1. The *In re Gravel* Bankruptcy.

Respondent is the servicer of a mortgage on the Gravels' residence. No. 20-1 (2d Cir.), Doc. 72 ("2d Cir. JA-III") at 651. On May 20, 2016, the bankruptcy court entered an order determining that the Gravels cured all pre-petition mortgage defaults and were current on all post-petition mortgage payments to Respondent (the "Gravel Debtors Current Order"). 2d Cir. SA-45; 2d Cir. JA-III-705.

On May 25, 2016, Respondent sent Petitioner and the Gravels an electronically generated monthly

mortgage statement (the "Gravel Statement"). 2d Cir. SA-45; 2d Cir. JA-III-612. The Gravel Statement indicated that Respondent was sending the statement solely to comply with Vt. LBR 3071-1, which requires mortgage creditors to provide monthly mortgage statements to Chapter 13 debtors, and that it was "not an attempt to collect a debt." 2d Cir. JA-III-612.

The Gravel Statement was broken down into sections. 2d Cir. JA-III-612. The "Loan Information" section of the Gravel Statement, for informational purposes only, included a line item for property inspection fees of $258.75 (the "Gravel Fees"). The Gravel Fees were listed to comply with Respondent's servicing tracking requirements. No. 20-1 (2d Cir.), Doc. 113 ("2d Doc. 113") at 5 n.2. 2d Cir. JA-III-612. The Gravel Statement also contained a separate section entitled "Breakdown of Contractual Monthly Payment" calculating the "Total Payment Due," comprised solely of "Principal and Interest" and "Escrow." 2d Cir. JA-III-612. As recognized by the Second Circuit, the Gravel Fees were never charged to the Gravels and were never due. App.25.

The May 25, 2016 informational mortgage statement was the first and only statement sent by Respondent following the issuance of the Gravel Debtors Current Order that listed the Gravel Fees. 2d Cir. JA-III-612, 705, 775. That statement was substantially similar to 24 prior monthly informational mortgage statements Respondent had sent to Petitioner for two years without objection or expression of concern and without payment of the Gravel

Fees by Petitioner or the Gravels because they were not charged or due. App.5, 25.

Less than a month later, on June 13, 2016, Petitioner filed a motion for contempt and sanctions against Respondent for including the Gravel Fees on the Gravel Statement, asserting Respondent sent the Gravel Statement in violation of the Gravel Debtors Current Order and Rule 3002.1(c) (the "Gravel Sanctions Motion"). 2d Cir. SA-45; 2d Cir. JA-III-651. Petitioner did not confer with Respondent prior to filing the Gravel Sanctions Motion, as required by local rule. 2d Cir. SA-46; 2d Cir. JA-III-603.

Less than 24 hours after Petitioner filed the Gravel Sanctions Motion, Respondent removed the Gravel Fees from the Gravels' statement completely. 2d Cir. SA-45; 2d Cir. JA-III-603. Neither Petitioner nor the Gravels paid any portion of the Gravel Fees. (*Id.*) As the Second Circuit specifically recognized, the fees were never paid because Respondent never sought them from the Debtors in the first place and they were never due. App.25. Petitioner conceded that neither Petitioner nor the Gravels suffered any harm due to Respondent's actions. 2d Cir. SA-45.

2. The *In re Beaulieu* Bankruptcy.

Respondent is the holder of a mortgage on the Beaulieu residence. 2d Cir. JA-III-669. On May 5, 2016, the bankruptcy court entered an order determining that Allen and Laurie Beaulieu (the "Beaulieus") had cured all pre-petition mortgage defaults and were current on all post-petition mortgage payments to Respondent (the "Beaulieu Debtors Current Order," together with the Gravel Debtors Current

Order, the "Debtors' Current Orders"). 2d Cir. SA-46; 2d Cir. JA-III-709.

On May 25, 2016, Respondent sent Petitioner and the Beaulieus an electronically generated monthly mortgage statement (the "Beaulieu Statement"). 2d Cir. SA-46-47; 2d Cir. JA-III-618, 628. The Beaulieu Statement indicated that Respondent was sending the statement solely to comply with Vt. LBR 3071-1 and made clear that it was "not an attempt to collect a debt." 2d Cir. JA-III-628.

The Beaulieu Statement was broken down into sections. 2d Cir. JA-III-628. The "Loan Information" section of the Beaulieu Statement, for informational purposes only, included a line item for property inspection fees of $56.25 and insufficient funds fees of $30.00 (the "Beaulieu Fees"). 2d Cir. JA-III-628. The Beaulieu Fees were also listed solely to comply with servicing tracking requirements. 2d Doc. 113 at 5 n.2. The Beaulieu Statement also contained a separate section entitled "Breakdown of Contractual Monthly Payment" calculating the "Total Payment Due," comprised solely of "Principal and Interest" and "Escrow." 2d Cir. JA-III-628. As recognized by the Second Circuit, the Beaulieu Fees were never charged to the Beaulieus and were never due. App.25.

The May 25, 2016 informational mortgage statement was the first and only statement sent by Respondent following the issuance of the Beaulieu Debtors Current Order that listed the Beaulieu Fees. 2d Cir. JA-III-709. That statement was substantially similar to 24 prior monthly informational mortgage statements Respondent had sent to Petitioner

for two years without objection or expression of concern and without payment of the Beaulieu Fees by Petitioner or the Beaulieus because they were not charged or due. App.6, 25.

Also less than a month later, and the day after the Gravel Sanctions Motion, on June 14, 2016, Petitioner filed a motion for contempt and sanctions articulating the same arguments and seeking the same relief as in the Gravel Sanctions Motion (the "Beaulieu Sanctions Motion"). 2d Cir. SA-47; 2d Cir. JA-III-669. Just as in *Gravel*, Petitioner did not confer with Respondent prior to filing the Beaulieu Sanctions Motion, as required by local rule. 2d Cir. SA-46; 2d Cir. JA-III-619.

On the same day, June 14, 2016, Respondent removed the Beaulieu Fees from the Beaulieu's statement completely. 2d Cir. JA-III-619. Neither Petitioner nor the Beaulieus paid any portion of the Beaulieu Fees because they were never actually sought by Respondent and they were never due. 2d Cir. JA-III-619; App.25. Petitioner conceded that neither he nor the Beaulieus suffered any harm due to Respondent's actions. 2d Cir. SA-45.

3. The *In re Knisley* Bankruptcy.

Respondent is the holder of a mortgage on the Knisleys' residence. 2d Cir. JA-III-687. The Court did not enter a Debtors Current Order in the Knisley case. 2d Cir. SA-47.

On May 25, 2016, Respondent sent Petitioner and the Knisleys an electronically generated monthly mortgage statement (the "Knisley Statement"). 2d

Cir. SA-47; 2d Cir. JA-III-645. The Knisley Statement indicated that Respondent was sending the statement solely to comply with Vt. LBR 3071-1 and made clear that it was "not an attempt to collect a debt." 2d Cir. JA-III-645.

The Knisley Statement was broken down into sections. 2d Cir. JA-III-645. The "Loan Information" section of the Knisley Statement, for informational purposes only, included a line item for property inspection fees of $246.50 and late charges of $124.50 (the "Knisley Fees"). 2d Cir. JA-III-645. The Knisley Fees were also listed solely to comply with servicing tracking requirements. 2d Doc. 113 at 5 n.2. The Knisley Statement also contained a separate section entitled "Breakdown of Contractual Monthly Payment" calculating the "Total Payment Due," comprised solely of "Principal and Interest" and "Escrow." 2d Cir. JA-III-645. As recognized by the Second Circuit, the Knisley Fees were never charged to the Beaulieus and were never due. App.25.

The May 25, 2016 informational mortgage statement was substantially similar to 24 prior monthly informational mortgage statements Respondent had sent to Petitioner for two years without objection or expression of concern and without payment of the Knisley Fees by Petitioner or the Knisleys because they were not charged or due. App.7, 25.

Also less than a month later, and the day he filed the Beaulieu Sanctions Motion, on June 14, 2016, Petitioner filed a motion for contempt and sanctions, focusing solely on Respondent's alleged failure to comply with Rule 3002.1 (the "Knisley

Sanctions Motion"). 2d Cir. JA-III-687. Petitioner did not confer with Respondent prior to filing the Knisley Sanctions Motion, as required by local rule. 2d Cir. SA-46; 2d Cir. JA-III-636.

On the same day, June 14, 2016, Respondent removed the Knisley Fees from the Knisleys' statement completely. 2d Cir. JA-III-636. Neither Petitioner nor the Knisleys paid any portion of the Knisley Fees because they were never actually sought by Respondent and they were never due. App.25; 2d Cir. JA-III-636. Petitioner conceded that neither he nor the Knisleys suffered any harm due to Respondent's actions. 2d Cir. SA-45.

Combined, the total fees listed on the informational mortgage statements were $716 that were never charged to the debtors because they were never due. 2d Cir. JA-III-612, 628, 645; App.18, 25.

B. The Orders Issued In These Cases.

1. <u>The Bankruptcy Court's First Sanctions Order</u>.

Following a July 27, 2016 consolidated motion hearing, which was not an evidentiary hearing, the bankruptcy court entered its First Sanctions Order on September 12, 2016 granting all three sanctions motions. 2d Cir. SA-42. The bankruptcy court held that Respondent failed to comply with Rule 3002.1 by sending the debtors mortgage statements that included charges more than 180 days old, without filing accompanying Rule 3002.1(c) notices. 2d Cir. SA-43. The Court further held that, in the *Gravel* and *Beaulieu* cases Respondent violated the Debtors'

Current Orders by sending the debtors mortgage statements that included charges for which it had not sent a Rule 3002.1(c) notice. 2d Cir. SA-43. Based on those determinations, the bankruptcy court sanctioned Respondent an astounding $375,000. (*Id.*) The bankruptcy court imposed those sanctions despite finding that neither the debtors nor Petitioner suffered any harm because of Respondent's informational statements listing the combined $716 in fees. (*Id.*)

The Order imposed the following sanctions on Respondent, with payment to Legal Services Law Line of Vermont, a non-profit entity not involved in any of the three cases:

(a) In *Gravel*: $25,000 based on violation of Rule 3002.1 and $200,000 based on violation of the Gravel Debtors Current Order;

(b) In *Beaulieu*: $25,000 based on violation of Rule 3002.1 and $100,000 based on violation of the Beaulieu Debtors Current Order; and

(c) In *Knisley*: $25,000 based on violation of Rule 3002.1(c).

(*Id.*)

2. The District Court's Vacating Order on Appeal.

Respondent appealed the bankruptcy court's First Sanctions Order to the district court. No. 20-1 (2d Cir.), Doc. 71 ("2d Cir. JA-II") at 427-496. The district court vacated the First Sanctions Order con-

cluding that "the statutory and inherent powers of the Bankruptcy Court [we]re not sufficient to support the Bankruptcy Court's imposition" of the punitive sanctions awarded against Respondent. 2d Cir. JA-II-319, 326.

The district court then directed that "[s]hould the Bankruptcy Court determine that the exercise of [the district court's] authority would be appropriate, it may refer the matter to the district court." 2d Cir. JA-II-327. The court further directed that if the bankruptcy court decided that the exercise of that authority would not be appropriate in these cases, it could "take steps to enforce its orders short of punitive sanctions of the scope and type imposed in these cases." 2d Cir. JA-II-327. The district court then vacated the First Sanctions Order. 2d Cir. JA-II-327. Petitioner appealed the district court's Vacating Order to the Second Circuit Court of Appeals, which dismissed the appeals for lack of finality on July 10, 2018. 2d Cir. JA-I-227-228.

3. The Bankruptcy Court's Second Sanctions Order.

On remand, the bankruptcy court set a hearing to discuss the issues to be addressed. 2d Cir. JA-I-224-226. Just before that hearing, Petitioner filed a motion requesting that the bankruptcy court reimpose the $375,000 in sanctions but award the $375,000 sanction to him instead of the non-profit Legal Services Law Line so that he could fully fund his office for four years. 2d Cir. JA-I-185.

Following briefing on Petitioner's motion and separate briefing on the remand issues, on June 27,

2019 the bankruptcy court issued its Second Sanctions Order. App.139. Notably, despite briefing on the issue and specific requests by Respondent, the bankruptcy court did not hold an evidentiary hearing or refer the matters to the district court for an evidentiary hearing or procedural protections appropriate to punitive sanctions. *See* App.59-141; *Goodyear Tire & Rubber Co. v. Haeger*, 137 S.Ct. 1178, 1186 (2017).

The bankruptcy court also refused to reconsider its firmly held belief that Respondent had violated its orders notwithstanding the clear erroneous nature of that belief and extensive briefing on the issue by Respondent on remand. App.88; 2d Cir. JA-I-153-55. The bankruptcy court instead simply re-imposed $300,000.00 in "punitive" contempt-based sanctions on Respondent, a $75,000 (20%) reduction from the bankruptcy court's First Sanctions Order with no change to the amount of the Rule 3002.1 sanctions vacated by the district court and now before this Court on petition for certiorari. App.59-141.

The Second Sanctions Order imposed the following sanctions on Respondent:

(a) In *Gravel*: re-imposition of the exact same Rule 3002.1 sanction of $25,000 previously vacated and an inherent power sanction of $150,000 for a total sanction of $175,000;

(b) In *Beaulieu*: re-imposition of the exact same Rule 3002.1 sanction of $25,000 previously vacated and an inherent power sanction of $75,000 for a total sanction of $100,000; and

(c) In *Knisley*: re-imposition of the exact same Rule 3002.1 sanction of $25,000 previously vacated.

App.140-141. The Second Sanctions Order further directed Respondent to pay the re-imposed $75,000 of Rule 3002.1 sanctions directly to Petitioner as he had requested and the $225,000 of Debtors' Current Orders sanctions to Legal Services Vermont. App.140-41.

4. The Second Circuit's Decision on Direct Appeal.

Respondent appealed the Second Sanctions Order to the district court. 2d Cir. JA-I-55-58. Petitioner did not appeal the Second Sanctions Order, or the separate order denying his request for re-imposition of the First Sanctions Order. Petitioner further did not cross-appeal the Second Sanctions Order.

At Petitioner's request, the bankruptcy court certified Respondent's appeal for direct appeal pursuant to 28 U.S.C. § 158(d)(2) instead of a customary appeal through the district court. 2d Cir. JA-I-33-34. Petitioner presented three questions for certification, all of which the Second Circuit ultimately determined were irrelevant to the three cases on appeal despite Petitioner's attempt to re-characterize the sanctions issued. App.9-12 ("The questions, which the Trustee formulated, concern the power of bankruptcy courts to impose 'punitive non-contempt sanctions'" however "[t]he bankruptcy court plainly based its sanction on contempt.").

On direct appeal the Second Circuit Court of Appeals vacated the bankruptcy court's Second Sanctions Order in its entirety. App.2. The decision below specifically and unanimously held that the $225,000 sanction issued by the bankruptcy court "was an abuse of discretion because PHH did not, as a matter of law, violate the Current Orders." App.11, 29. Concurring in part and dissenting in part, Judge Bianco agreed with the majority that Respondent did not violate the Current Orders. App.29. Petitioner has not petitioned for certiorari with respect to the vacatur of the $225,000 sanction, and has finally accepted that Respondent never violated any court order in this case. *See* Pet.

With respect to the $75,000 Rule 3002.1 sanction, the decision below noted that "[t]he bankruptcy court in this case is apparently the first and only one to impose punitive monetary sanctions under the rule." App.18. Explicitly noting that the issue was "an issue of first impression among the circuit courts" that "few bankruptcy courts have opined on," the Second Circuit correctly held that the "sanction went beyond the relief authorized by that rule." App.18, 23.

REASONS FOR DENYING THE PETITION

I. The Circuit Courts Are Not Divided.

These cases concern Bankruptcy Rule 3002.1. They do not concern ancillary questions concerning the nuances of how the circuit courts of appeals describe their appellate review process or how they address bad faith requirements in circumstances bearing no factual relation to these cases. On the Rule

3002.1 issue, the Petition does not present a circuit split because none exists. On the other two ancillary issues raised, the Petition reads too much into broad language when the reality shows that the circuits all follow precisely the same approach taken by the court below.

1. *The Rule 3002.1 Issue*: As explicitly noted by the Second Circuit in the decision below, the Bankruptcy Rule 3002.1 issue at the heart of these appeals "is an issue of first impression among the circuit courts." App.18. In fact, "[t]he bankruptcy court in this case is apparently the first and only one to impose punitive monetary sanctions under the rule." App.18.

The Second Circuit appropriately recognized that novelty does not equate with propriety, and the bankruptcy court's punitive sanctions award was improper. For this Court's purposes that novelty calls for percolation, not review. No other circuit court or even district court has addressed this issue. It has only been addressed by a handful of the more than 345 bankruptcy judges across 94 federal districts. *See* Pet.4. Such an undeveloped issue nationwide is not an appropriate candidate for certiorari. *See* Sup. Ct. R. 10(a).

2. *The Alternative Grounds Issue*: There is universal agreement among the federal courts of appeals that a decision below can only be affirmed on alternative grounds when the alternative ground is both correct and supported by sufficient findings in the record.

In this case, the Second Circuit reversed and vacated the bankruptcy court's punitive sanctions order because it was both wrong and it did not make the necessary findings to support affirmance on an alternative basis. *See, e.g.,* App.25 ("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."); App.16&n.1.

First Circuit–*In Re Hann*, 711 F.3d 235, 243 (1st Cir. 2013). In *Hann*, the First Circuit only "affirm[ed] the bankruptcy court's imposition of sanctions…on different grounds" because it determined that the decision below was both correct and "the record of the claim objection process and ECMC's conduct [wa]s sufficiently clear." *Id.*

By contrast, in *In re Indian Motocycle Co., Inc.*, 452 F.3d 25, 30–31 (1st Cir. 2006), the First Circuit vacated a sanctions order without remanding because it was "unsupported." As the First Circuit explained, "[t]he district court's frustration with this endless and entangled litigation is more than understandable; but we conclude that the findings of deliberate misconduct that underpin the sanctions order are unsupported and now disapprove the findings, vacate the sanctions order, *and bring the controversy to an end*." *Id.* (emphasis added). Precisely what the Second Circuit did correctly here.

Third Circuit–*Fellheimer, Eichen & Braverman, PC v. Charter Techs., Inc.*, 57 F.3d 1215, 1227-

28 (3d Cir. 1995). In *Fellheimer,* the Third Circuit specifically noted that "the bankruptcy court did find that FE & B had acted in bad faith in the course of its representation of the debtor." *Id.* The Third Circuit held that it "must affirm the bankruptcy court's findings, *which are sufficient to support its conclusion* that FE & B did act with bad faith in the proceedings below." *Id.* (emphasis added).

In *In re Miller*, 730 F.3d 198, 206 (3d Cir. 2013), the Third Circuit once again made clear that sanctions may only be upheld on alternative grounds when "they are 'clearly valid' under a different sanctioning mechanism." While the Third Circuit remanded in *Miller* for the bankruptcy court to explore other potential bases for sanctions, two of the three panel members made clear that remand should not always be granted. *See id.* at 207 (McKee, C.J., concurring) ("I do not suggest that a party should always be afforded the luxury of a 'second bite of the apple…"); *id.* at 207-08 (Nygaard, C.J., dissenting) ("despite a panoply of options available to him, the bankruptcy judge chose to limit his choice to Rule 9011. I would hold him to that decision.").

Seventh Circuit–*In re Volpert*, 110 F.3d 494, 500 (7th Cir. 1996). In *Volpert*, the Seventh Circuit explained that it could only "affirm the district court's judgment on a different basis *if that basis is supported by the record* and law." *Id.* (emphasis added). The Seventh Circuit specifically noted that "the bankruptcy court found independently that Mr. Ellis' 'conduct in the case at bar could only be described as an abuse of the judicial process.'" *Id.*

Eighth Circuit–*Isaacson v. Manty*, 721 F.3d 533, 539 (8th Cir. 2013). In *Isaacson*, the Eighth Circuit explained that it "*may* consider alternative grounds for the imposition of those sanctions, *so long as…the court's findings are adequate to meet the applicable standard.*" *Id.* (emphasis added). The Eighth Circuit chose to consider the alternative ground because "[t]he bankruptcy court determined that Isaacson caused the filing of papers that contained 'unbelievably and unmitigatingly outrageous' assertions" and the Eighth Circuit held that that conduct was "the sort of contumacious conduct that is sanctionable under the court's inherent power." *Id.*

Ninth Circuit–*In re DeVille*, 361 F.3d 539, 543 (9th Cir. 2013). In *DeVille*, the Ninth Circuit upheld an inherent power sanction specifically invoked by the bankruptcy court where "[t]he court found that Smith and Miller 'acted with subjective bad faith.'" *Id.*

Tenth Circuit–*In re Courtesy Inns., Ltd.*, 40 F.3d 1084, 1085 (10th Cir. 1994). In *Courtesy Inns.*, the Tenth Circuit affirmed a sanction award "for $6,953 attorney's fees for bad faith filing of a bankruptcy petition" where the evidence "nearly describe[d] the archetype of a bad faith filing." *Id.*

Eleventh Circuit–*In re Mroz*, 65 F.3d 1567, 1576 (11th Cir. 1995). In *Mroz*, the Eleventh Circuit specifically explained: "It is very clear that the bankruptcy court was outraged at the events that transpired before it, but we cannot glean from the record whether this outrage stemmed from a belief that H &

S and its attorneys acted in bad faith, or whether it was due to a belief that they acted negligently or without due diligence." *Id.*

The actual holding in the decision below was "that the sanction went beyond the relief authorized by [Rule 3002.1]." App.23. While the Second Circuit also discussed in *dicta* the potential alternative ground of inherent power, the decision below specifically discussed the absence of necessary findings by the bankruptcy court and noted that "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*." App.26 (emphasis added).

The decision below could not reach the alternative ground of inherent power because the bankruptcy court did not make sufficient findings to support it. (*Id.*) Furthermore, the majority found that the bankruptcy court erred in its conclusion that the debtors were billed for the charges at issue. App.16, 18, 25. While Judge Bianco disagreed, that disagreement is not the basis for a circuit split. Additionally, and as discussed further below, Judge Bianco's view as to the sufficiency of the record was also clearly mistaken. *See infra* Part IV.

3. *The Bad Faith Issue*: There is universal agreement among the federal courts of appeals that a finding of bad faith or a finding that is "tantamount to bad faith" would be required for issuance of inherent power sanctions on the facts of this case.

The circuit courts that Petitioner claims "*do not always require* bad faith" for the issuance of inherent-power sanctions in actual practice limit such instances to conduct and situations not applicable to this case. Pet.26. When "this Court decides questions of public importance, it decides them in the context of meaningful litigation." *The Monrosa v. Carbon Black Exp., Inc.*, 359 U.S. 180, 184 (1959). Whatever mild disagreement a few circuits might have as to the requirement of a bad faith finding in certain circumstances is irrelevant to the outcome of this case where all circuits would agree a bad faith finding is required. *See Sommerville v. United States*, 376 U.S. 909 (1964).

First Circuit: The *In re Charbono* decision involved the violation of a court order and the imposition of an incredibly minor $100 sanction for the violation of that order. 790 F.3d 80, 84 (1st Cir. 2015). The First Circuit's holding in *Charbono* was explicit: "We therefore hold…that bankruptcy courts possess the inherent power to impose punitive non-contempt sanctions *for failures to comply with their orders*." *Id.* at 87 (emphasis added). As the decision below correctly held, Respondent violated no court order in this case so *Charbono* is irrelevant. App.3.

Third Circuit: The citation to footnote 11 in *Republic of Philippines v. Westinghouse Elec. Corp.*, 43 F.3d 65, 74 n.11 (3d Cir. 1994) is classic *dicta* as the Third Circuit ultimately vacated the sanctions issued and bad faith played no part in its analysis of the vacatur. *Id.* at 81. Whatever position could have been ascribed to the Third Circuit based on that *dicta* was promptly clarified by the *Fellheimer* decision

issued by the Third Circuit the following year. *See Fellheimer*, 57 F.3d at 1225, 1227 (confirming without qualification that "a finding of bad faith is *required* to support a court's employment of its inherent sanction power.") (emphasis added).

Eighth Circuit: While the Eighth Circuit in *Stevenson* did use broad language and state that "a finding of bad faith is not always necessary to the court's exercise of its inherent power to impose sanctions," it cited to its own precedent in *Harlan*. *Stevenson v. Union Pac. R.R.*, 354 F.3d 739, 745-751 (8th Cir. 2004) (citing *Harlan v. Lewis*, 982 F.2d 1255 (8th Cir. 1993)). In *Harlan*, the two monetary sanctions were imposed on Attorney Hall specifically for his violations of ethical rules governing proper attorney conduct before the court. *Harlan*, 982 F.2d at 1257-58.

Some courts have held that they possess the inherent "power to discipline attorneys appearing before the court" without a finding of bad faith. *Id.* at 1259. The Second Circuit agrees, and explained in *Seltzer*: "Today, we hold that the inherent power of the district court also includes the power *to police the conduct of attorneys as officers of the court*, and to sanction attorneys for conduct not inherent to client representation, such as, violations of court orders or other conduct which interferes with the court's power to manage its calendar and the courtroom without a finding of bad faith." *United States v. Seltzer*, 227 F.3d 36, 42 (2d Cir. 2000) (emphasis added). Attorney misconduct is categorically different from alleged party misconduct because we are officers of the court

and held to a higher standard subject to the oversight of the court.

In *Stevenson* itself, despite the broad language cited the court nevertheless imposed a bad faith requirement with respect to all of the sanctions before it with the exception of Union Pacific's destruction of documents for which an adverse inference was the sanction. *Stevenson*, 354 F.3d at 745-751. The *Stevenson* decision specifically required a showing of bad faith with respect to the only monetary sanction issued in that case. *Id.* at 751. None of the situations in *Stevenson*, *Seltzer*, or *Harlan* were present in these cases.

Ninth Circuit: As Petitioner's own quotation of *Evon v. Law Offices of Sidney Mickell*, 688 F.3d 1015, 1035 (9th Cir. 2012) confirms, the Ninth Circuit requires a bad faith finding for the imposition of inherent power sanctions unless there is a "willful violation of a court order." As the decision below has confirmed and Petitioner has not appealed, Respondent did not violate any orders in this case so *Evon* would likewise prohibit the imposition of inherent power sanctions here. *See also America Unites for Kids v. Rousseau*, 985 F.3d 1075, 1090 (9th Cir. 2021) ("When acting under its inherent authority to impose a sanction…a district court *must find* either: (1) a willful violation of a court order; or (2) bad faith.") (emphasis added).

Whatever the nuance of limited circumstances where a finding of bad faith need not be shown, the Petition provides no decisions that would support the imposition of punitive inherent power sanctions lev-

ied upon a non-attorney creditor for the good faith mailing of informational mortgage statements that caused no harm, sought no fees, and violated no court orders.

II. The Questions Presented Are Not Important.

The decision below explicitly recognized that the Rule 3002.1 issue presented by these cases "is an issue of first impression among the circuit courts." App.18. Petitioner claims that bankruptcy courts would be powerless and the system would fall completely apart without the power to levy sanctions like those levied by the bankruptcy court below for Rule 3002.1 violations. But we know that is not true. Rule 3002.1 was promulgated in 2011 and in the approximately eleven years since then "[t]he bankruptcy court in this case is apparently the first and only one to impose punitive monetary sanctions under the rule." App.18, 26.

One bankruptcy judge amongst more than 345 bankruptcy judges across 94 federal districts overreached and imposed punitive monetary sanctions based on Rule 3002.1. *See* Pet.4. That overreach was promptly vacated on appeal to the district court. 2d Cir. JA-II-319, 326. When that same judge reimposed the exact same sanctions the district court had just vacated, the Second Circuit also vacated the overreach on a direct appeal certified by the same judge. App.2. There literally has not been a single judge that has successfully imposed punitive monetary sanctions under Rule 3002.1 and yet the Nation's bankruptcy system has hummed along unabat-

ed by the absence of this power. Bankruptcy courts do not need it, because the exclusion of fees and compensatory relief provided for by Rule 3002.1 are more than sufficient to address the actual harms sought to be targeted by Rule 3002.1. The decision below correctly recognized that Petitioner's "concern[s] [are] at best over-wrought." App.26.

Petitioner also offers no explanation for why the rule promulgation process is insufficient to address the alleged harms he fears will be present without punitive sanction authority under Rule 3002.1. If punitive sanctions are truly imperative under Rule 3002.1, as Petitioner claims, Petitioner can present his concerns to the Advisory Committee on Bankruptcy Rules where the issue can be studied and considered with all potential stakeholders partaking in the decision. This Court's limited docket is no place to attempt to create a power that has literally been attempted only once and to punitively sanction the mailing of informational mortgage statements that sought no fees, caused no harm, and did not violate any court orders.

With respect to the other two issues, all that is asked of the lower courts is that when "exercis[ing] caution in invoking [their] inherent power" they create a sufficient record to support such invocation including invoking the power and providing proper procedural protections and appropriate bad faith findings. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 50 (1991). As explained above and below, *see supra* Part I and *infra* Part IV, this is something that is already expected of the lower courts in all circuits and by this Court.

III. This Case Presents the Worst Vehicle Possible To Resolve Any Issues.

Petitioner claims that this case is the "right vehicle" for the Court to answer the questions he presents for three reasons. Not one of the proffered reasons is correct and numerous alternative bases for affirmance would render any determination of the issues presented useless *dicta*.

1. *Contested Issues*: This case does not present "pure issues," it is riddled with contested issues.

Respondent has consistently disputed that bankruptcy courts have the inherent power to sanction as the bankruptcy court has done in this case because they are not Article III courts. *See, e.g.,* 2d Cir. JA-II-427-496. In fact, that very issue was the basis for the district court's vacatur of the First Sanctions Order in this case. 2d Cir. JA-II-319, 326.

Respondent has also consistently disputed that it received notice and was properly heard on the $75,000 sanction, including the lack of an evidentiary hearing, the absence of an Article III judge at that hearing, and the absence of criminal procedural protections required for punitive sanctions. *See, e.g.,* No. 20-1 (2d Cir.), Doc. 68 ("2d Doc. 68") at 39-47 & n.3; *see also Goodyear Tire & Rubber Co.*, 137 S.Ct. at 1186. It comprised an entire section of Respondent's brief below. 2d Doc. 68 at 39-47.

Respondent has also consistently disputed that the $75,000 sanction was an appropriate amount for mailing mortgage statements that sought no fees, caused no harm, and violated no orders. 2d

Cir. JA-I-110; App.18, 25. The total fees listed but not sought were $716 in all three cases. App.17-18. The total $75,000 Rule 3002.1 punitive sanction was more than 100 times the fees at issue. (*Id.*) In the *Beaulieu* bankruptcy the $25,000 Rule 3002.1 sanction was more than twice the size of the *entire mortgage* held by Respondent. 2d Cir. JA-III-628.

2. *Disputed Facts*: This case does not provide "undisputed facts." While Respondent chose not to challenge factual determinations on its initial appeal to the district court, when the district court vacated the First Sanctions Order it reopened all factual considerations. *Animal Legal Defense Fund v. Veneman*, 490 F.3d 725, 730 (9th Cir. 2007). With respect to the alleged violation of Rule 3002.1, the decision below specifically recognized and held that the fees at issue in this case "were not even 'charges' in any sense: they were not reflected in the balance due." App.18.

3. *Completely New Issues*: There has certainly not been "full ventilation" of the issues presented by Petitioner. Two of the three issues have barely been litigated in this case and only the Rule 3002.1 issue (properly framed) has been extensively litigated. However, the Rule 3002.1 issue is the issue of "first impression" amongst the circuit courts.

4. *Numerous Alternative Bases for Affirmance:* Even if this Court were to disagree with the decision below on any of the questions presented, the disagreement would amount to *dicta* as there are numerous alternative bases for affirmance fully briefed and presented below. The following are just some of those bases.

4a. Insufficient Procedural Protections for Punitive Sanctions: This Court has made clear that inherent power sanctions issued pursuant to civil procedures "must be compensatory rather than punitive in nature." *Goodyear Tire & Rubber Co.*, 137 S.Ct. at 1186. It is undisputed that the Rule 3002.1 sanctions levied by the bankruptcy court were not compensatory and were instead punitive. "To level that kind of separate penalty, a court would need to provide procedural guarantees applicable in criminal cases, such as a 'beyond reasonable doubt' standard of proof." *Id.* Such procedural protections were not provided in these cases, despite specific briefing on the issue. 2d Cir. JA-I-160-65.

4b. Violation of the District Court's Mandate on Remand: In the first round of appeals following the bankruptcy court's First Sanctions Order, the district court vacated the $375,000 in combined sanctions issued including the $75,000 in Rule 3002.1 sanctions. 2d Doc. 68 at 26-33. On remand, the bankruptcy court quite literally "re-imposed" the exact same $75,000 Rule 3002.1 sanctions in direct violation of the district court's mandate. (*Id.*) That violation of the mandate further compelled the result below. *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895).

4c. Law of the Case: In the first round of appeals, the district court held that the bankruptcy court could not impose the sanctions issued due to its status as an Article I Court and not an Article III Court wielding the Judicial Power of the United States. 2d Cir. JA-II-319, 326. Petitioner's failure to cross-appeal the bankruptcy court's Second Sanc-

tions Order rendered the district court's legal determination on that issue the "law of the case" in these cases. 2d Doc. 68 at 26-33. That alone prevents the relief sought here.

4d. The Award of Fees To Petitioner: The $75,000 Rule 3002.1 sanctions were not simply imposed against Respondent, but were instead awarded to Petitioner. App.137. An award of those sanctions is separately reversible pursuant to 11 U.S.C. §§ 326(b) & 586(e) for the reasons discussed at length in briefing below. 2d Doc. 68 at 65-68.

It is difficult to imagine another case with more issues complicating clean resolution of questions presented than these ones.

IV. The Decision Below Is Correct.

The Second Circuit's decision correctly recognized that the bankruptcy court's imposition of punitive sanctions against Respondent for the mailing of informational mortgage statements that caused no harm, sought no fees, and violated no court orders, was improper and abused the bankruptcy court's discretion. App.1, 10-11. Consistent with this Court's precedents and every other circuit court of appeals, the Second Circuit reversed and vacated the improper sanctions.

1. This Court has made clear that appellate courts can only order alternative affirmance where "the decision below is correct." *Helvering v. Gowran*, 302 U.S. 238, 245 (1937). Additionally, the alternative ground for affirmance must be fully developed in the record below. *See MeadWestvaco Corp. ex rel.*

Mead Corp. v. Illinois Dep't of Revenue, 553 U.S. 16, 31 (2008) ("We typically will not address a question under these circumstances even if the answer would afford an alternative ground for affirmance."); *Smith v. Phillips*, 455 U.S. 209, 215 n.6 (1982) ("Respondent may, of course, defend the judgment below on any ground which the law *and the record* permit.") (emphasis added).

As the Second Circuit Court of Appeals made clear in its decision, the bankruptcy court's imposition of punitive sanctions in this case based upon the mailing of informational mortgage statements that caused no harm, sought no fees, and violated no court orders, was wrong. *See* App.16, 18, 25. The decision rendered its holding with respect to the $75,000 Rule 3002.1 sanctions based on Rule 3002.1, but it also made clear in *dicta* that it could not reach the alternative ground of inherent power because the record was insufficient to support it. App.25-26. Judge Bianco disagreed with respect to the sufficiency of the record, but his dissent reveals he was mistaken.

Judge Bianco cited at length from footnote ten in the bankruptcy court's First Sanctions Order. App.51-52. But Judge Bianco omitted a critical portion of that block quotation, which in full stated:

> While 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 the Debtors Current Order, violated it in at least the two instant cases by including postpetition fees that

> should never have appeared in the first place, 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).

Footnote ten in the First Sanctions Order was the closest the bankruptcy court ever came to rendering a finding that Respondent acted in bad faith or in a manner that was "tantamount" to bad faith. Judge Bianco's quotation of footnote ten replaced the underlined text above with "[its obligations]," however that changes the entire meaning of footnote ten in a way that Judge Bianco clearly did not appreciate but the majority did. *See* App.24 ("A concern, even a serious concern, is not a finding.").

In fact, the full language of footnote ten makes clear that the bankruptcy court's only analysis concerning bad faith was based on the erroneous belief that Respondent violated the Debtors Current Orders. *Gravel I*, 556 B.R. at 576 n.10. Importantly, Judge Bianco joined the majority's opinion, which specifically held that "PHH did not, as a matter of law, violate the Current Orders." App.11, 29 ("I therefore join in the opinion of the majority, except with respect to Part D."). It is unclear why Judge

Bianco would have found support for conduct "tantamount to bad faith" when the only bad faith analysis conducted by the bankruptcy court was based entirely on a determination that Judge Bianco rejected.

Furthermore, the bankruptcy court's footnote ten makes clear that the bankruptcy court actually *faulted* Respondent for having the temerity to "assert[] it did not violate a court order at all." App.52 ("and then asserted it did not violate a court order at all."). That bears repeating. The closest the bankruptcy court got to finding bad faith here was Respondent's argument that it did not violate the court's orders, which the Second Circuit *unanimously* concluded was correct. As a matter of law, a litigant defending itself based on a meritorious position vindicated on appeal is *per se* not bad faith conduct.

Judge Bianco nevertheless relied primarily on footnote ten to support his determination of record sufficiency. App.53. The majority correctly disagreed, and a review of the decision below reveals that the majority had a much stronger command of the record than Judge Bianco did. App.24-26.

Judge Bianco's dissent also states: "*after* orders were issued in the *Gravel* and *Beaulieu* actions…*PHH sent twenty-five mortgage statements showing late charges and property inspection fees in both actions*. PHH did the same in the *Knisley* action." App.31-32 (emphasis added). Judge Bianco was again mistaken.

Respondent sent only one informational mortgage statement in each of the three actions (all on

May 25, 2016) after the entry of Current Orders in *Gravel* and *Beaulieu*. 2d Cir. JA-III-645, 705, 709; App.5-6, 25. One statement in each case, all sent on the same day. (*Id.*) The 25 statement number comes from the fact that Respondent had previously sent 24 statements in each case before the Current Orders with identical or similar informational sections listing the fees without a word of objection or concern from the Petitioner. (*Id.*) But those 24 statements were all *prior to* the Debtors Current Orders. (*Id.*) The majority opinion clearly understood the actual factual chronology, which was materially significant given the Petitioner's claims of "egregious" "repeated" violations. *See* App.5-7 (discussing chronology of statements).

With respect to the question of whether remand was warranted, the record in this case reveals its futility here. *First*, as noted above the closest the bankruptcy court could come to a bad faith finding was based on violation of an order that Respondent never violated, so on remand the finding would have to be no bad faith. *Second*, these cases already were remanded and the bankruptcy court on remand flagrantly violated the mandate of the district court by explicitly re-imposing the $75,000 Rule 3002.1 sanction the district court had specifically vacated. 2d Cir. JA-II-319, 326. There is no reason to believe it would act differently on remand a second time or worse yet seek to impose even greater sanctions under Rule 3002.1 now that the $225,000 sanction award is gone. *Third*, on the last remand Respondent specifically argued that the absence of bad faith here meant no sanctions could issue. *See* 2d Cir. JA-I-157-59. In fact, despite the awkwardness of telling

the sanctioning judge of the judge's own error Respondent even specifically and carefully explained in footnote 14 of its remand brief that the bankruptcy court's footnote 10 was improperly predicated upon a violation of the Debtors Current Orders that Respondent did not violate as a matter of law. *See* 2d Cir. JA-I-158 n.14.

Despite all of that, with the issue squarely presented and fully briefed, the bankruptcy court simply re-imposed the sanctions on remand and quite literally ignored the bad faith issue. *See* App.59-141. Remand is not appropriate here. The bankruptcy court had its remand and affirmatively *chose* not to render a bad faith finding because it knew that it could not do so under the facts of this case. The decision below was correct and is precisely how any other circuit or this Court would handle this record.

2. The decision below never reached the bad faith issue beyond *dicta* because it did not have to, but if it had reached the issue it is clear that a bad faith finding is required to issue the sanctions levied in this case.

This Court has made clear that "[b]ecause of their very potency, inherent powers must be exercised with restraint and discretion." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991). Among other things, "invocation of the inherent power would require a finding of bad faith." *Id.* This Court has never departed from that requirement.

Petitioner cites to Justice Scalia's dissent in *Chambers* to argue that not all sanctions imposed under the courts' inherent authority should require a finding of bad faith. In support Petitioner cites to *Harlan* where Attorney Hall was sanctioned for his violations of ethical rules governing proper attorney conduct before the court. *Harlan*, 982 F.2d at 1257-58.

However, even if some limited circumstances could support relaxing the bad faith requirement in a future case before this Court, they are simply inapplicable in these cases. Respondent is not an attorney as was sanctioned in *Harlan*. "[T]he Court has held that a federal court has the power to control admission to its bar and to discipline attorneys who appear before it." *Chambers*, 501 U.S. at 43 (citing *Ex parte Burr*, 9 Wheat. 529, 531 (1824)). That supervisory power over attorneys as officers of the court is fundamentally different than the power courts exercise over litigants who have not sought or obtained admission to the court.

Here the $75,000 punitive sanctions issued pursuant to civil procedures were non-compensatory and were levied upon Respondent for mailing informational mortgage statements that sought no fees, caused no harm, and violated no court orders. App.25. There is simply no legal basis for such an untethered exercise of an inherent power that "must be exercised with restraint and discretion" where the sanctioning court can point to no bad faith conduct or even conduct tantamount to bad faith. *Chambers*, 501 U.S. at 44.

3. The Second Circuit correctly held that Bankruptcy Rule 3002.1 does not authorize punitive sanctions as a form of "appropriate relief." Engaging in careful analysis of the rule's text, the decision below concluded that the enforcement mechanism of Rule 3002.1 was compensatory in nature and "limited to non-punitive sanctions." App.19-20.

Ultimately, "[t]he rule's only other sanction reinforces that inference" because "[i]t prevents a creditor from collecting an unnoticed claim so that a surprise deficiency does not later frustrate the debtor's fresh start." App.20. In fact, "[t]he 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." (*Id.*) As the decision below explained, "[a] broad authorization of punitive sanctions is a poor fit with Rule 3002.1's tailored enforcement mechanism and limited purpose." (*Id.*); *see also* 2d Cir. Doc. 68 at 50-64.

Nothing in *Tanzin v. Tanvir*, 141 S.Ct. 486 (2020) directs otherwise. In *Tanzin* Respondents sought compensatory damages in the form of "airline tickets wasted and income from job opportunities lost." *Id.* at 489. An award of those damages is a compensatory non-punitive form of "appropriate relief."

V. Supreme Court Rule 14.4 Further Counsels for Denial of the Petition.

Pursuant to Supreme Court Rule 15.2, Respondent addresses the following, in addition to the

corrections noted above, which warrant denial pursuant to Supreme Court Rule 14.4:

1. *Alleged Systemic Violations*: Petitioner accuses Respondent of systemic violations of Rule 3002.1, but the actual conduct in this case was the mailing of informational mortgage statements that sought no fees, caused no harm, and violated no court orders. App.18, 25. Petitioner cites heavily to matters outside the record, including inflammatory allegations of misconduct that have nothing to do with Rule 3002.1 or Respondent's conduct in these cases.

Among other things, Petitioner accuses Respondent of a fee harvesting program. *See* Pet.8-9. As the Second Circuit specifically held below, "PHH never charged the debtors a dime, and never collected a dime. The fees to which no notice was given were never due." App.25. Allegations discussed on page 10 of the Petition relate to alleged conduct by PHH from 2009 to 2012, well before the events of relevance in these cases. *See* Pet.10 &n.7-9. Not one of the allegations related to an alleged violation of Rule 3002.1. (*Id.*) The allegations on page 11 of the Petition fare no better, alleging conduct that has nothing to do with Rule 3002.1.

These citations to non-record inflammatory allegations are a transparent effort to shore up the absence of bad faith in these cases, but they also cloud any clean and effective resolution of the issues presented if certiorari were granted. *See* Sup. Ct. R. 14.4, 24.1(g).

2. *PHH's Mortgage Statements In These Cases Never Sought Payment of Any Fees*: Petitioner claims that five days after the Debtors Current Order in *Gravel* "PHH sent a May 2016 mortgage statement to the Gravels that listed due '[p]roperty inspection fees' of $258.75." Pet.15. Review of the statement cited shows clearly that the property inspection fees were *not* due as they were not included in the "Total Payment Due." 2d Cir. JA-654. The decision below recognized and highlighted this fact and specifically held "[t]he fees to which no notice was given were never due." App.25. Petitioner makes the same misstatement with respect to the Beaulieu May 2016 mortgage statement. *See* Pet.16; App.25.

3. *Petitioner Sought and Obtained Contempt Sanctions, Not a "Fine"*: For the first time in these cases, Petitioner claims he sought to "fine" Respondent for alleged violations of Rule 3002.1 and that the bankruptcy court awarded only "fines." *See* Pet.16 ("The Trustee asked the bankruptcy court to fine PHH for these violations."); Pet.18 ("the bankruptcy court fined PHH."); Pet.20 ("the bankruptcy court…again fine[d] PHH $75,000"); Pet.-*i*.

However, the record is clear that Petitioner sought punitive contempt-based *sanctions* not a "fine" and sanctions are precisely what the bankruptcy court ordered. 2d Cir. SA-42; 2d Cir. JA-III-651, 669, 687. As discussed at length in the decision below, this is not the first time Petitioner has sought to re-characterize the punitive contempt-based sanctions issued in this case. *See* App.9-10; 12-13. In fact, Petitioner's prior re-characterization of the sanctions

issued led to direct review under 28 U.S.C. § 158(d)(2) based on certified questions the Second Circuit was forced to abandon because they were irrelevant to these cases. (*Id.*) Likewise, Question Number 3 asking "[w]hether Bankruptcy Rule 3002.1 authorizes punitive ["]fines["] as a form of 'appropriate relief'" is simply irrelevant to these cases where the bankruptcy court never issued any fine. *See* Pet.-*i*; Sup. Ct. R. 14.4.

CONCLUSION

For the foregoing reasons this Court should deny the Petition.

Respectfully submitted,

Matthew J. Delude
Counsel of Record
PRIMMER PIPER EGGLESTON
& CRAMER, PC
900 Elm St. 19th Floor
Manchester, NH 03105
(603) 626-3324
mdelude@primmer.com

Alexandra E. Edelman
Ryan M. Long
PRIMMER PIPER EGGLESTON
& CRAMER, PC
30 Main Street, Suite 500
Burlington, VT 05402
(802) 864-0880
aedelman@primmer.com

May 4, 2022

Counsel for Respondent