III. PETITIONER' S REPLY TO RESPONDENT'S OPPOSITION BRIEF

Petitioner files this Reply Brief to address certain legal arguments made in Respondent's Brief in Opposition to Petitioner's Petition for a Writ of Certiorari to this Court.

A. There is a 30 year unresolved conflict between the Circuit Courts regarding the limited jurisdiction of the Bankruptcy Court.

The Fourth Circuit in this case declined to limit the authority of the bankruptcy court to impose a sanction under its inherent authority and under § 105(a) of the Bankruptcy Code. The Fourth Circuit thus sided with the Eighth and Tenth Circuit Courts and advanced an existing conflict with the Fifth, Sixth, Ninth, and Eleventh Circuit Courts. This known conflict has gone unresolved for 30 years. *See, In re Ragar*, 3 F.3d 1174 (8th Cir. 1993) (describing the divided and comparing the Fifth and Ninth Circuits with the Fourth and Tenth Circuit Courts).

Not only have the Circuit Courts struggled with this question, so have the drafters of the Federal Rules of Bankruptcy Procedure. In 1987, the drafters noted that Rule 9020 might be inapplicable because "bankruptcy judges may not have the power to punish for contempt." When that rule was replaced in 2001, the drafters again stated that there were conflicting authorities. The advisory notes to Rule 9014 now state that "[i]ssues relating to the contempt power of bankruptcy judges are

substantive and are left to statutory and judicial development, rather than procedural rules."

The Circuit Courts have given various reasons for limiting the authority of the bankruptcy courts. Several Circuit Courts have reasoned that bankruptcy judges are not permitted under the U.S. Constitution to impose criminal sanctions because they are not Article III judges. *Adell v. John Richards Homes Bldg. Co, LLC*, 552 Fed. Appx 401, 416 (6th Cir 2013); *In re Hipp*, 895 F.2d 1503, 1521 (5th Cir. 1990). ("Bankruptcy courts have no inherent or statutory power -- and none granted them by 11 U.S.C. § 105 or by 28 U.S.C. § 157 or by [Bankruptcy] Rule 9020 -- to preside over section 401(3) criminal contempt trials for violation of bankruptcy court orders."). *Griffith v. Oles*, 895 F.2d 1503, 1515 (5th Cir. 1990) (§ 105 does not authorize bankruptcy courts to punish criminal contempt committed outside the court's presence).

The Second Circuit held that inherent sanctioning powers include the power to impose relatively minor, non-compensatory sanctions on attorneys appearing before the court in appropriate circumstances. *In re Sanchez*, 941 F.3d 625 (2nd Cir. 2019). In the Ninth Circuit, "relatively mild" fines are permitted. *In re Dyer*, 322 F.3d 1178, 1193 (9th Cir. 2003); *see also Hanshaw*, 244 F.3d 1128, 1140 n.10 (9th Cir. 2001) (declining to determine "the precise limit for a 'serious' sanction entitling an individual to a jury trial"). More recently, the Ninth Circuit held in *Price v. Lehtinen*, 564 F.3d 1052, 1059 (9th Cir. 2009) that bankruptcy courts lack authority to impose punitive sanctions, in part because they cannot provide the due process protections to which criminal defendants are entitled, such as jury trial.

The Seventh Circuit has thus far eluded the issue. *Cox v. Zale Delaware, Inc.*, 239 F.3d 910, 917 (7th Cir. 2001) (noting that the court could "save the issue of the bankruptcy judges' criminal-contempt powers for another day"). Prior to this case, the Fourth Circuit likewise mostly eluded the issue. *In re Walters*, 868 F.2d 665 (4th Cir. 1989) ("We caution that we do not address any question of criminal contempt; neither do we express any opinion thereupon"). The Eleventh Circuit has permitted sanctions that are not punitive. *Jove Engineering, Inc. v. I.R.S.*, 92 F.3d 1539 (11th Cir. 1996) (sovereign immunity prevented punitive sanction); *In re Hardy*, 97 F.3d 1384 (11th Cir. 1996) (The court may award sanctions for contempt only to the extent that they are coercive, and not punitive).

Other circuit courts have, however, ruled that bankruptcy courts can impose noncompensatory sanctions in the exercise of their general contempt power or their power under section 105(a) in furtherance of section 524(a) of the Bankruptcy Code. *In re Charbono*, 790 F.3d 80, 85 (1st Cir. 2015); *Isaacson v. Manty*, 721 F.3d 533, 538-39, 541 (8th Cir. 2013), although in each case the non-compensatory sanction was mild, $100 and $500 per incident, respectively. *See also In re Ragar*, 3 F.3d 1174, 1179 (8th Cir. 1993) (disagreeing with *Hipp*'s reading of section 105(a) as never permitting the imposition of non-compensatory sanctions -- "[W]e think this is simply wrong" -- and further noting "it is difficult for us to see a substantial constitutional question here"); *In re Skinner*, 917 F.2d 444 (10th Cir.1990) (" Therefore, we, like the Fourth Circuit, conclude that 'the delegation of civil contempt power to the bankruptcy courts by 11 U.S.C. Sec. 105(a) does not

offend the Constitution as in violation of the separation of powers'"); *Law v. Siegel*, 571 U.S. 415, 421 (2014) ("§ 105(a) 'does not allow the bankruptcy court to override explicit mandates of other sections of the Bankruptcy Code.' . . . We have long held that whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code"); *See generally, John A. Pottow and Jason S. Levin, "Symposium: Rethinking Criminal Contempt in Bankruptcy Courts,"* 91 Am. Bankr. L.J. 311, 313 (Spring 2017) (describing the conflict between the Circuit Courts).

In this case, the bankruptcy court chose to dismiss counts IV and V. Other than § 105, the remaining Bankruptcy code sections were §§ 329 and 526, which deal with voiding a fee agreement and do not grant authority to the bankruptcy court to impose a punitive sanction. *See e.g., In re Gravel*, 6 F.4th 503 (2nd Cir. 2021) cert. denied sub nom. Sensenich v. PHH Mortg. Corp., 142 S.Ct. 2829 (2022) (Punitive sanctions do not fall within the "appropriate relief" authorized by Rule 3002.1.).

B. <u>There is an irreconcilable conflict between the Fourth Circuit and its sister courts regarding the due process requirement of notice in advance.</u>

Respondent argues that there was sufficient due process because Petitioner was given the opportunity to testify at the hearing and file a post trial brief, but this just highlights the conflict between the Fourth Circuit and the Second, Third, Fifth, Sixth, and Tenth Circuit Courts. A lawyer's ability to argue against a previously unannounced request for sanctions at a hearing does not mean that

the lawyer received due process. *Ted Lapidus, S.A. v. Vann*, 112 F.3d 91, 97 (2d Cir. 1997) (explaining how the lack of particularized notice deprived the lawyer of the opportunity to defend himself against sanctions); *Sakon v. Andreo*, 119 F.3d 109, 114 (2d Cir. 1997) ("An attorney whom the court proposes to sanction must receive **specific** [emphasis added] notice of the conduct alleged to be sanctionable . . . and must be forewarned of the authority under which sanctions are being considered, and given a chance to defend himself against **specific** [emphasis added] charges"); *Wilson v. Citigroup, N.A.*, 702 F.3d 720, 725 (2d Cir. 2012) (quoting *Sakon*); *Am. Bd. of Surgery, Inc. v. Lasko*, 611 F. App'x 69, 72 (3d Cir. 2015) (A lawyer whose conduct may result in sanctions "is entitled to notice of the reasons for possible sanctions, the rule on which they might be based, and their potential form"); *1488, Inc. v. Philsec Inv. Corp.*, 939 F.2d 1281, 1292 (5th Cir. 1991) (Providing the defendant with an opportunity to mount a defense "on the spot" does not comport with due process); *Indah v. U.S. S.E.C.*, 661 F.3d 914, 928 (6th Cir. 2011) (It was error to impose a sanction for conduct **broader** [emphasis added] than that described in the motion); *Hutchinson v. Pfeil*, 208 F.3d 1180, 1185 (10th Cir. 2000) (The ability to respond at an open-ended hearing does not comport with due process).

Those Circuit Courts noted that an ambushed lawyer cannot be expected to sit idly by while the court threatens to impose sanctions. The ability to muster a hurried defense in challenging circumstances does not equate to adequate notice of possible sanctions. *Litigation Sanctions Against Lawyers and Due Process*, 48 Fla. St. U. L. Rev. 945.

The approach advocated by the respondent would require Delafield to defend his actions on the spot against every weapon the judicial arsenal has available for imposing sanctions on an attorney. The United States Trustee (UST) intended the ambush as evidenced by the trial court's statement that the UST's response to discovery was "not within the spirit of what the Court was trying to accomplish when getting ready for trial" and the trial court's statement that there was a "palpable feeling of hostility that is jumping off the page" in the pre-trial deposition transcript of the UST.

The respondent cites as authority the case of *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950) for the proposition that post-trial briefing satisfied due process, but *Mullane* is a case involving notice by publication of the pendency of an action and did not address the required information to be included in the notice such as the reasons why sanctions are under consideration. *Simmerman v. Corino*, 27 F.3d 58 (3rd Cir. 1994). *Mullane* likewise does not address notice of the form of sanction under consideration. A court may not convert a civil contempt hearing into a criminal trial without notice to the accused. *Epps v. Commonwealth*, 626 S.E.2d 912, 923 (2006).

The umbrella of abuse of discretion includes violating procedural due process and acting outside jurisdictional constraints. When the bankruptcy court has already elected to schedule an evidentiary hearing, entered a pre-trial order setting deadlines, and approved a discovery plan, procedural due process is violated when the court allows new allegations at trial contrary to that pre-trial order. In such a situation, an attorney is denied a meaningful

opportunity to be heard and the lack of notice in advance denies the attorney the opportunity to prepare a defense. There is no justification for such a procedure and the respondent cannot point to "other considerations" which prevented the trial court from following the mandated procedure set forth in its own pre-trial order. The respondent asks this court to approve notice to Delafield in the form of a digressive and tangled answer to an interrogatory which was tendered twelve (12) days prior to trial and after the pre- trial deadline to amend. Such a procedure would violate the terms of the pre-trial order and render its deadlines and petitioner's reliance upon the pre-trial order as meaningless. Furthermore, the answer to the interrogatory cites the entire Virginia Rules of Professional Responsibility as its legal authority. That is analogous to citing the entire criminal code in a warrant. Respondent cites, *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 654-655 (1985), but respondent ignores new factual allegations are prohibited.

Finally, the respondent argues there was sufficient due process because the original complaint cited a number of Bankruptcy Code sections. The Fourth Circuit Panel opinion admits new factual allegations were asserted and that the original complaint failed to cite any ethic rules, but then dismisses this deficiency because the complaint cited Bankruptcy Code sections and Delafield was given the opportunity to respond in post trial briefing. However, the respondent and the Fourth Circuit opinion fail to account for the fact that the referenced code sections were in counts IV and V, which were dismissed. The remaining Bankruptcy code sections

were §§ 329 and 526, which deal with voiding a fee agreement, and Delafield did not appeal the voiding of the fee agreement. The dismissed factual allegations in counts IV and V do not equate to particularized notice in advance of unpled factual allegations of additional conduct asserted to be sanctionable. Moreover, "The requirements of fairness are not exhausted in the taking or consideration of evidence, but extend to . . . the beginning and intermediate steps." *Morgan v. United States*, 304 U.S. 1 (1938).

Respondent falsely claims Petitioner failed to challenge the notice provided in his post trial briefing, but in fact, Delafield objected to unpled claims on pages 66 and 67 of his reply brief. (docket 230 of the bankruptcy docket, Jan. 4, 2018). Furthermore, Delafield never had the opportunity to challenge new factual allegations asserted in the UST's reply brief.

C. To avoid erroneous deprivations of the right to counsel and the right to remain silent, this Court should clarify an attorney's duty to assert the privilege on behalf of a client, clarify the privilege belongs to the client, affirm the wisdom of instructing a client to remain silent, and prohibit allegations of bad faith for advising a client to remain silent.

The respondent argues that attorney client privilege was asserted in bad faith. This allegation, supported by a published opinion, is exceptionally important and impacts the client's right to remain silent, the right to counsel, attorney client privilege,

inherent authority, and the limited jurisdiction of the bankruptcy court. This case presents to this Court for the first time a novel attack upon the right to remain silent. Furthermore, the position of the respondent is unconstitutional because: it prevents lawyers from advising clients to exercise their constitutional right to remain silent, take lawful actions, and it extends beyond abuse to prevent advice to take prudent actions, and therefore imposes limitations on speech beyond what is narrow and necessary. Respondent ignores the constitutional underpinnings of attorney-client privilege and falsely claims petitioner did not raise any such arguments before the court of appeals. In fact, petitioner asserted that the bankruptcy court had fundamentally undermined attorney-client privilege.

D. The opinion of the Fourth Circuit cannot be reconciled with Supreme Court precedent set out in *Bagwell.*

The respondent contends the sanction was a civil sanction, but the Fourth Circuit's refusal to vacate the fine after $5,000.00 was tendered to the debtors by a co-defendant is characteristic of a criminal, not civil, sanction. *See, Int'l Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821 (1994) (The Virginia courts' refusal to vacate the fines, despite the parties' settlement and joint motion, is characteristic of criminal, not civil proceedings). When sanctions have punitive characteristics, progressively greater procedural protections are required. This is true in part because the "fusion of legislative, executive, and judicial powers [in inherent powers proceedings] summons forth . . . the

prospect of the most tyrannical licentiousness" and is "uniquely [ ] liable to abuse." Id. at 831. In this case, the bankruptcy court took on the role of prosecutor and stated on remand regarding the District Court's reversal, "I guess I probably should've put more stuff in the record regarding [the defendant,]Mr. Scanlan . . ." Contrary to the court's statement, it was the UST's obligation to introduce evidence and meet the burden of proof.

The Fourth Circuit opinion imposing a sanction for "inconvenience" is also contrary to the Second Circuit opinion in *Hanshaw v. Emerald River Dev.*, 244 F.3d 1128 (9th Cir. 2001), ("[T]he sanction was intended 'partly to compensate for inconvenience and waste of time caused the Court,' but that is not the same as compensation to 'the complainant for losses sustained' contemplated by *Bagwell*").

E. The bankruptcy court applied the wrong standard and relied upon faulty factual conclusions.

The respondent argues the Ex Post Facto Clause is not implicated, but *Ruffalo* holds that disbarment is quasi-criminal. The respondent further argues that Delafield had full knowledge of how the NCCP worked and that Delafield ratified the unethical conduct of the managing partner, Kevin Chern. However, the respondent is unable to identify where the trial court identifies credible supporting evidence that renders its factual determination highly probable, and there is none. The bankruptcy court identifies the June 18 email as a source of knowledge, but the respondent concedes that Chern hid the true nature of the NCCP. The

June 18 email does not reveal the scam; rather, it does the opposite and hides the scam from the limited partners. The respondent offers no evidence Delafield had reason to know the motivations of Brian Fenner nor that the NCCP was not being operated as described in the June 18 email. There is no evidence Delafield should have known anything other than the fact that, pursuant to a program reviewed by ethics counsel, the attorney fees had been subsidized by a third party vendor which was reported to be charging reasonable and customary towing and storage fees on an automobile the lender, GCB, was refusing to repossesses and where the lender was harassing the debtors to the point that Mrs. Williams cried.

The respondent relies heavily upon a new allegation put forth at trial asserting that Delafield acted inappropriately when he allegedly told the debtors he would be looking out for himself. Delafield was asked about this:

> ·Q · · Did you in fact say that to Mrs. Williams?
>
> ·A · · No. The opposite. As I was trying to explain the waiver to Mr. Williams, and apparently she was listening in, he kept saying you're my attorney – I'm paraphrasing not quotes - you're my attorney, I trust you. And I kept saying, yeah, you're right, I'm your lawyer, I've got your back; I'm going to take a hit before you do, but if things go badly, if they don't turn out the way we want, a third person might look at it differently. They might say I sold you out, that I put my interests ahead of yours. And I

> think that, that must be what Mrs. Williams overheard.

The unpled factual allegations asserted by the respondent are false and violate the holding in *In re Ruffalo*, 390 U.S. 544 (1968), that "[t]he charge must be known before the proceedings commence" and "[The] absence of . . . the precise nature of the charges deprived petitioner of procedural due process."

IV. CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant the petition for a writ of certiorari.

Respectfully submitted,

Dated: October 19, 2023 /s/ Darren Delafield

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