No. 22-1231

In The

Supreme Court of the United States

LAIRD J. HEAL,

Petitioner,

v.

WELLS FARGO, N.A., as Trustee for WaMu Mortgage Pass-Through Certificates Services 2006-PR2 Trust; JPMORGAN CHASE BANK, N.A.; and MORTGAGE CONTRACTING SERVICES, LLC, d/b/a Mortgage Contracting Services,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR A WRIT OF CERTIORARI

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Petitioner, pro se

ORIGINAL

QUESTIONS PRESENTED

Whether the motions to strike under Fed.R.Civ.P. 56(c)(2) were decided correctly or if the First Circuit should apply a different legal standard as courts in different circuits do.

Whether the District Court should have allowed the motions to amend complaint under Rule 15(a), where other circuits follow a different rule.

Whether the First Circuit's determinations under diversity jurisdiction were so inconsistent with Massachusetts law as to fail to follow Erie R.R. v. Tompkins, and hence unconstitutional.

Whether the summary judgment motions should have been denied, where the Defendants/Respondents were outside any possible construction of their claimed license given by the mortgage, rendering them trespassers as construed in courts in other circuits, and there was no evidence that the mortgagee had delegated any right to act at the Property.

Whether the application of judicial estoppel was proper, when the Bankruptcy Code mandates a different procedure and other circuits come to a different result.

PARTIES TO THE PROCEEDING

Petitioner Laird James Heal is an individual, citizen of the United States and domiciled at 8 Linden Street, Winchendon Massachusetts.

Respondent WELLS FARGO, N.A., as Trustee for WaMu Mortgage Pass-Through Certificates Services 2006-PR2 Trust, now or formerly at 700 Kansas Lane, MC 8000, Monroe, LA 71203.

Respondent JPMORGAN CHASE BANK, N.A., now or formerly at 1111 Polaris Parkway, Columbus, OH 43240.

Respondent MORTGAGE CONTRACTING SERVICES, LLC, d/b/a Mortgage Contracting Services, now or formerly at 6504 International Parkway, Suite 1500, Plano, TX 75093.

CORPORATE DISCLOSURE STATEMENT

The Petitioner is an individual and thus the corporate disclosure statement is inapplicable.

STATEMENT OF RELATED PROCEEDINGS

A motion for contempt was filed in the District of New Hampshire, docketed as 21-mc-00004-PB on January 21, 2021 and dismissed on January 4, 2022 "without prejudice to the plaintiff's right to seek further subpoena if the Massachusetts case should be revived".

STATEMENT OF RELATED PROCEEDINGS –
Continued

Paoluccio et al v. Wells Fargo, N.A., et al, No. 17-cv-11918, U.S. District Court for the District of Massachusetts, Judgment entered September 1, 2021.

Heal v. Murgo, No. 21-mc-00004, U.S. District Court for the District of New Hampshire, Judgment entered January 4, 2022.

Heal v. Wells Fargo, N.A. et al, No. 21-1817, U.S. Court of Appeals for the First Circuit, Judgment entered January 17, 2023.

Heal v. Wells Fargo, N.A. et al, No. 22-1346, U.S. Court of Appeals for the First Circuit, Judgment entered January 17, 2023.

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INTRODUCTION

The fact pattern underlying this dispute is not uncommon, or not uncommon enough. The mortgagee breaks into the mortgaged property with no foreclosure in sight and then claims it is not liable because the damage is done by its contractor.

The First Circuit left Massachusetts law in the dust in Galvin v. U.S. Bank, N.A., 852 F.3d 146 (1st Cir. 2017) when it declared that as a matter of law breaking into an unoccupied house while the owner is absent was allowed, as long it was only once a month. *Id.* at 163. An inspection of the power of attorney from the mortgagee in that case does not include a power for so-called property preservation pre-foreclosure. The power of attorney in this case was not even given until January, 2015, after the putative agents had done all the damage, and this time, the property is occupied. The decision of the First Circuit sweeps all of this under the carpet.

The First Circuit also immunized the Defendants, stating any liability rests with their contractors. Massachusetts has a line of cases where actions of sexual harassment committed by employees were not imputed to the employer because it was not among the type of activities the employees were normally asked to do. Nevertheless, in cases involving the Catholic Church, that church has been found liable for its employees.

Wells Fargo had not authorized Chase, which did authorize MCS, which states it does not know who its field agents are and finally, three years after the case

was filed, gives a list of its 'vendors', but none of the vendors could be served at those addresses, and the two vendors which were served, simply ignored the subpoenas. The vendors are not left holding the bag because there is no bottom in MCS's bag. Only one vendor agreed to appear for a deposition and contradicts the MCS' interrogatory answer that MCS did not know what individuals were the field agents at any particular time, but only a few days before the District Court closed discovery. Another vendor was served in New Hampshire and my motion for contempt (No. 21-mc-00004-PB) for not appearing for his deposition was pending but closed after the Massachusetts case was adjudged and appealed.

After the first set of breaking in and theft was committed, I suffered a stroke, leaving me with aphasia and my language skills are still impaired. My attempts to work since have uniformly been disastrous, even nine years later.

I asked the Superior Court for an extension to serve the unknown defendants, but the order was to amend the Complaint as new defendants are discovered. However, the district court has denied all of my motions to amend the Complaint, each without explanation except the judge said, "It's way late" in a hearing (68a) held in December, 2018, despite no schedule order issued and over a year before the district court formally opened discovery.

The district court was considering the summary judgment motion filed by Wells Fargo and Chase. The

movants never mentioned judicial estoppel in their motion or in the hearing. Neither did the movants suggest that the valuable coin should have appreciated to "the inflation-adjusted $500 valuation from his 2001 bankruptcy proceedings" (App. 48a). The district court thus fashioned its partial summary judgment out of whole cloth, with hardly a reference to the motion before it.

Similarly, the September 1, 2021 opinion contained arguments which was never brought up before the Court, some of which are brought up here.

It has already been noted that the state court record contained an order to amend the Complaint as the unnamed defendant could be served. MCS did not divulge its contracting entities until August, 2020 and only one of them was confirmed by January 2021. After the summary judgment hearing, I was able to send mail to the entities that may be liable as Defendants. The District of New Hampshire finally held a hearing on Joseph Murgo in June, 2021 and while ready to arrest Mr. Murgo to enforce a deposition that judge did not agree to enforce the subpoena for the needed documents. Instead the New Hampshire judge suggested I try to amend the complaint.

Consumer protection Massachusetts law[1] requires a prospective defendant be served with a demand letter at least 30 days prior to instituting court action, and anticipating the New Hampshire outcome, I had

[1] Mass. General Law 93A, Section 9.

already sent such demand letters. While the return receipt cards for the other came back, the United States Postal Service could not find a record of the letter sent to Mr. Murgo. Although the companion copy sent first class was never returned, I was put to send another copy to him and after an inordinate period, that was returned unclaimed on September 6, 2021. By then summary judgment on the main case had been issued.

I filed a motion to amend or alter the judgment on bases ranging from probable typographical errors which could nevertheless mislead an appellate court to other errors which would be better cleared up before appeal. Before midnight on the same day, I filed a notice of appeal despite the motion under 59 was still pending, showing I was having trouble parsing the applicable civil rules and the respective periods. After further floundering, I filed a post-judgment motion to amend the complaint, more than 28 days after the judgment was first issued.

The First Circuit filed its decision on all pending matters on January 17, 2023. The panel's discussion states that they used a deferential standard when considering the district court's orders regarding discovery (App. 3a-4a). This is perplexing because summary judgment, which after all is on a stated record and motions to strike under Rule 56(c)(2) should not be reviewed on a discretionary basis.

Even so there was evidence on the record which a jury could base upon verdict upon, namely the statement contained in the June 26, 2014 police report (App.

72a-75a), which was introduced by Defendants without reservation and not otherwise objected to. That police report records my statement that there was a theft and the police sergeant assigned a value of more than $251.00, denoting that it is a felony.

DECISIONS BELOW

The Judgment of the First Circuit on docket number 21-1817 and 22-1346 was not published but can be found at 2023 WL 1872583, Heal v. Wells Fargo, N.A. as Trustee for WaMu Mortgage Pass-Through Certificates Services 2006-PR2 Trust et al. This is reprinted at App. 1a-5a.

The District of Massachusetts decision on summary judgment is reported at 560 F.Supp.3d 347 (D.Mass. 2021), Heal v. Wells Fargo, N.A. as Trustee for WaMu Mortgage Pass-Through Certificates Services 2006-PR2 Trust et al. This is reprinted at App. 6a-41a.

The District of Massachusetts decision on partial summary judgment was not published and can be found at 2019 WL 181288, Paoluccio v. Wells Fargo, N.A. as Trustee for WaMu Mortgage Pass-Through Certificates Services 2006-PR2 Trust et al. This is reprinted at App. 42a-49a.

The electronic orders without further discussion are replicated in the Appendix at 50a-58a.

STATEMENT OF JURISDICTION

On January 17, 2023, the First Circuit decision (App. 1a-5a) on docket number 21-1817 and 22-1346, affirmed the District of Massachusetts decisions on case number 17-cv-11918.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL PROVISIONS

Article I, Section 8 (pertaining to Bankruptcy jurisdiction) is reprinted at App. 62a-64a.

Article IV, Section 1 (requiring full faith and credit) is reprinted at App. 64a.

STATEMENT OF THE CASE

A. Factual Background

At all dates relevant, I (the Petitioner) have been the tenant, Mark Paoluccio the lessor and mortgagor and Wells Fargo as Trustee the mortgagee.

The Defendants produced records showing inspections of the Property from June, 2012. Those records show that by September, 2013 their work orders including changing the locks on the Property and interior inspections. In October, 2013 the work orders including removing personal property from the

Property. The District Court recognized these explicitly (App. 12a).

After Defendants had broken into my home multiple times, including taking the dry groceries there, I suffered a stroke (on January 29, 2014). I was in the hospital for a week, another two weeks in a rehabilitation hospital and I was recommended to recuperate with friends, if only they could observe any reoccurrence, so I was away from the Property until March, 2014.

On April 20, 2014, as I was bathing, two of these so-called field agents broke into my home, requiring me to hurriedly dress and confront them. They did not take any pictures while inside the Property but they had already emptied a wallet of my daughter and were in the room with the strongbox which was opened the next time the same vendor was sent to the Property (June 26, 2014), when the locks were again changed. The skeleton key to the porch door was craftily placed under the door and partly exposed and I was able to enter the lower level.

On July 2, 2014 the locks were again changed and this time I had to engage a locksmith to obtain access. On July 23, 2014 the locks were changed again[2] and

[2] The District Court list (App. 11a-12a) omits July 23, 2014. It also includes August 2, 2012 as completing a work order to change the locks, where the full report states only "OCCUPIED PER CONTACT AND VISUAL". The District Court opinion (App. 6a) appears to rely on the exhibits and over rely on the text in those Work Order Detail Reports, which are after all out-of-court statements from unnamed sources, and if the reports satisfy

the locksmith declined to help me change them back again. I eventually got the lock box code from a Defendant's attorney, but then the key inside it did not work. I was consequently locked out of the top floor for about 18 months, until a friend in the construction industry was able to break back in without causing damage.

In the meantime, while I was locked out the Defendants sent field agents which broke in again, without any known notice.

B. Procedural Background

The case was filed by Mark Paoluccio (the landlord) and Laird J. Heal (the tenant) in the Worcester Superior Court for the Commonwealth of Massachusetts and first served on Wells Fargo and Chase, together with the first sets of interrogatories and requests for production. As the 90 day state court limit for service approached, with no answers from those defendants, I moved to extend the time in which to serve the John Doe defendants, but the Superior Court judge stated that they could be added by amending the complaint and serving them then. MCS was served in Sept. 2017 and on October 5, 2017 removed the case to the

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3(6)(A), it is only a compendium of individual hearsay. The opinion also shows the limitations of rooting for truffles in the exhibits rather than focusing on the points the litigants have chosen as important and brought them to the attention of the court. In this case, see App. 68a-69a and App. 70a-71a, showing more incursions not mentioned in the opinion.

District of Massachusetts. On October 6, 2017 the case was transferred to the Central Division at Worcester.

Mark Paoluccio sent a letter date February 25, 2018 to the Court interpreted by the District Court as a voluntary dismissal (DE 16).

On August 9, 2018, Chase and Wells Fargo filed a motion for summary judgment (DE 27), allowed August 31, 2018 (DE 32). I filed a motion (DE 39) to reconsider because it was decided before I was due to respond. The motion for summary judgment was heard on December 21, 2018 (DE 45). The Memorandum and Order (DE 46, App. 42a-49a) was issued on January 11, 2019.

On March 14, 2019 I filed a Motion to Amend Complaint (DE 54). On April 10, 2019, I filed a motion to compel Wells Fargo and Chase Answers to Interrogatories and Production (DE 58). On April 11, 2019, I filed a second Motion to Amend Complaint (DE 60). These were all denied on June 26, 2019 (DE 72, App. 57a).

MCS filed its Motion for Partial Summary Judgment on June 28, 2019 (DE 75), allowed August 13, 2019 (DE 89, App. 55a).

On July 26, 2019 I filed a third Motion to Amend Complaint (DE 82), denied August 13, 2019 (DE 89, App. 55a).

On June 24, 2020, MCS filed a Motion for Protective Order (DE 102), allowed in part on June 25, 2020 (DE 104). On June 25, 2020, Wells Fargo and Chase filed a Motion for Protective Order (DE 105), allowed

in part on June 26, 2020 (DE 107). On July 13, 2020, I filed a Motion for Sanctions under Fed.R.Civ.P. 37(d) and 37(b) (DE 112), denied on July 24, 2020 (DE 119).

On February 15, 2021, motions for summary judgment were filed by the Defendants/Respondents (DE 143; DE 148), allowed on September 1, 2021 (App. 6a). I filed a motion to revoke/alter the judgment on September 29, 2021 (DE 181), denied on October 7, 2021 (DE 184, App. 51a).

On September 29, 2021, I filed a notice of appeal (DE 183). On November 4, 2021 I filed a subsequent notice of appeal (DE 189). On November 15, 2021 I filed a fourth motion to amend complaint (DE 194), denied on April 5, 2022 (DE 211). On May 3, 2022, I filed a second amended notice of appeal for this denial (DE 212).

On January 17, 2023, the First Circuit issued its decision affirming the district court, reprinted at App. 1a-5a.

REASONS FOR GRANTING THE WRIT

I. The Supreme Court should remand with instructions to reexamine the motions to amend the Complaint.

In, 371 U.S. 178, 182 (1962), the Supreme Court reversed a refusal to allow a motion to amend under, where no reason was stated for the denial. The dicta gave assorted possible reasons for denying a motion to

amend pleadings, which otherwise is to be allowed "freely when justice requires". Among these is "undue delay" and the First Circuit will allow delay alone suffice as a reason not to allow a litigants to amend their complaints. Other circuits require their judges to express more than mere delay if deciding not to allow such an amendment.

A. Whether the record supports finding the proposed amended complaints being time-barred.

The First Circuit decision under review in this case merely said that no abuse of discretion was not discerned (App. 3a-4a), citing only Windross v. Barton Protective Servs., Inc., 586 F.3d 98, 104 (1st Cir. 2009), which went on to state that the panel "defer to the district court if any adequate reason for the denial is apparent from the record." *Id.* There, they found amendment time-barred. In the present case, at least the amendment of civil RICO has a statute of limitations of ten years, Massachusetts law allows damages for prior trespass when the incursions continued, and there is no discussion of the normal rule that amended complaints run to the date of initial filing of the case. A Defendant's defense of the statutes of limitations must also be pleaded, lest they be waived. When the Complaint was filed and served, and until the Defendant/Respondents finally gave responses to the discovery requests, I had no solid evidence that I had sued the right defendants. There was no futility in the proposed amended complaints as being time-barred.

B. Whether denying a motion to amend the Complaint solely because of a perceived delay is consistent with Fed.R.Civ.P. Rule 15(a).

In Foman v. Davis, supra, we read: "Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion." The First Circuit, and the district court, did not express sufficient reasons for denying the motions to amend the complaint. See App. 4a, 50a, 55a, 57a. The record only shows the district court saying, "It's way late." See App. 67a.

The First Circuit interprets Foman v. Davis to allow denying leave to amend pleadings for simple delay, let alone the "undue delay" mentioned there. See 371 U.S. at 182. As shown later, this is in conflict with other circuits. Wells Fargo and Chase, see Appellees' Brief at 33, citing Kay v. N.H. Dem. Party, 821 F.2d 31, 34 (1st Cir. 1987) (per curiam) for the principle that "delay alone, without justification, is sufficient grounds to justify denying a motion for leave to amend."[3] However, in that case the First Circuit first found the proposed amended complaint futile, then commented, "In the circumstances of this case, three months constitutes the

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[3] They quoted from Correa-Martinez v. Arrillaga-Belendez, 903 F.2d 49, 59 (1st Cir. 1990) ("Where an amendment would be futile or would serve no legitimate purpose, the district court should not needlessly prolong matters.") but did not further analyze.

"undue delay" noted as a justifiable basis for denial in *Foman* [emphasis in original]" and concluded with "Although a district court should state explicitly its reasons for denial, the omission in this case, at best, amounts to harmless error." *Id.* at 34-35.

United States ex rel Nargol v. Depuy Orthopedics, Inc., 159 F.Supp.3d 226 (D.Mass 2016), *rev'd on other grounds*, United States ex rel Nargol v. Depuy Orthopedics, Inc., 865 F.3d 29 (1st Cir. 2017) collects case and summarizes First Circuit law on denying leave to amend complaints after a perceived delay. *Id.* at 261-62.

In the case before the Court, the District Court ordered the parties to confer about the overdue discovery responses and promptly sought to amend the Complaint as new information was disclosed. Even under a standard cited in Nargol, 159 F.Supp.3d 226 at 262 ("in assessing whether delay is undue, a court will take account of what the movant 'knew or should have known and what he did or should have done.'") I should have been allowed to amend the Complaint. Also see Invest Almaz v. Temple-Inland Forest Products Corporation, 243 F.3d 57, 72 (1st Cir. 2001) and Leonard v. Parry, 219 F.3d 25, 32 (1st Cir. 2000).

C. The conflict the First Circuit has created with other circuits require more than undue delay before denying a plaintiff's motion to amend a complaint.

In the Third Circuit, "'delay alone is an insufficient ground to deny leave to amend," and only delays

that are either "undue" or "prejudicial" warrant denial of leave to amend. Cureton v. Nat'l Collegiate Athletic Ass'n, 252 F.3d 267, 273 (3d Cir. 2001); Geness v. Cox, 902 F.3d 344, 364 (3d Cir. 2018).

In the Fourth Circuit, "Delay alone is not enough to deny leave to amend, though it is often evidence that goes to prove bad faith and prejudice. See Johnson, 785 F.2d at 509-10." United States ex rel. Nicholson v. Medcom Carolinas, Inc., 42 F.4th 185, 197 (4th Cir. 2022), citing Johnson v. Oroweat Foods Co., 785 F.2d 503, 509 (4th Cir. 1986)

In the Seventh Circuit, "Delay by itself is normally an insufficient reason to deny a motion for leave to amend. Delay must be coupled with some other reason." White v. Woods, 48 F.4th 853 (7th Cir. 2022), citing Liebhart v. SPX Corp., 917 F.3d 952, 965 (7th Cir. 2019).

This is not an exhaustive list. The Second Circuit may have endorsed denying leave to amend complaints due to undue delay but there were enough cases finding other reasons in addition to undue delay to make one question if that undue delay, by itself, will be affirmed under appeal.

D. On Remand, the Complaint Should Be Amended

Under the rule set down in Foman v. Davis, the Supreme Court should reverse the judgment and return the matter to the First Circuit, and due to the conflict among the circuits, clarify their confusion.

II. How the First Circuit has created discord and conflicts with the laws of the forum state.

In Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78, 58 S.Ct. 817, 82 L.Ed 1188 (1938), the Supreme Court required federal courts to apply the law of the forum state when diversity jurisdiction is invoked. The decision appealed from palpably diverges from Massachusetts law. It is possibly significant that if the complaint was amended and the parties were no longer diverse, the case would be required to returned to state court.

A. The state law decision.

The District Court Opinion states, "Where [. . .] MCS agents appeared to believe that Plaintiff was a squatter with no right to occupy the Property, it was reasonable for them to conduct more frequent inspections, winterize the building, and secure it." (App. 35a-36a) This plainly is against Massachusetts law. The opinion had already listed the text of Mass. G. L. c. 184, § 18 (App. 29a-30a). The opinion would have the subjective intent of the "MCS agents" make a difference. Those MCS agents were never identified, never made available for interview or deposition, and MCS answered an interrogatory that MCS did not know who the field agents were.

"Any possession is a legal possession against a wrongdoer." Prosser & Keaton on The Law of Torts, 5th Edition, p. 77. "One who is in the actual occupation of land may maintain trespass against any person except the real owner, or the person having a right of possession." Nickerson v. Thacher, 146 Mass. 609 (1888). That

is, the subjective thoughts of the MCS agents were not relevant and the conclusion of the district court was incorrect, if not prejudicial to me. What would be relevant would be the scope of any license given to the MCS agents. In Hardie, removing the personal property of the occupants was deemed to exceed the scope of any license, citing Nieporte v. CitiMortgage, Inc., No. 11-10940, 2011 WL 3032331, at *5 (E.D. Mich. July 25, 2011).

Even if one door is locked will prevent the occupant to reenter if that is the only key he or she has at the time, effectively effecting an eviction. The District Court stated Massachusetts law (App. 29a-30a) by quoting Mass. G. L. c. 184 § 18, which forbids any "self-help evictions" (App. 29a). The District Court's conclusion that "to [. . .] change locks, shut off the utilities, and nail windows shut were reasonable and appropriate acts authorized by the mortgage to prevent a reduction in value" (App. 39a) cannot be reconciled with the Hardie and Nieporte decisions. Even the District Court opinion is self-contradictory when it approves of nailing windows shut, causing thousands of dollars of damage when the District Court writes it was done in order to prevent a reduction in value. *Id.* In other circuits, once the field agents go outside the ambit of their license, they are no longer licensees, they are trespassers. *Id.*

In the briefing in the appeal 22-1346 (regarding the denial to amend the complaint, post-judgment) I recounted the historical development in Massachusetts law. It is appropriate to reprise it here:

At common law, mortgage was recognized as conveying the fee in the property with the possibility of defeasance. The mortgagor retained possession only with the agreement of the mortgagee. Newall v. Wright, 3 Mass. 138, 155-56 (1806). Wales v. Mellin, 67 Mass. 512 (1854) reiterated the principle and allows evidence outside the mortgage itself to counter the common law ("But an agreement by the mortgagee, that the mortgagor may remain in possession until condition broken, need not be expressly set forth in the mortgage, nor in any other writing." *Id.* at 513). Recognizing that a mortgagee would likely not wish to take possession of the property and the consequent ping-pong of possession of the mortgaged property was inconvenient for the parties, the legislature changed the common law so a mortgagor will retain possession of the mortgaged property "[u]ntil default". Mass. G. L. c. 183 § 26. Chamberlain v. James, 294 Mass. 1, 8 (1936).[4]

By 1989, when an owner punctuated a dispute with tenants by changing the locks, the Massachusetts Appeals Court emphasized that such self-help eviction is actionable. Serezze v. YWCA of Western Massachusetts,

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[4] A mortgagor [. . .] "unless otherwise stated in the mortgage" until "default in the performance or observance of the condition of a mortgage" is entitled to "hold and enjoy the mortgaged premises and receive the rents and profits thereof." G. L. (Ter. Ed.) c. 183, § 26. The mortgagee upon such default is entitled to immediate possession merely in the sense that upon breach of condition he is entitled to recover possession of the mortgaged premises by an open and peaceable entry on such premises or by action, or, if the mortgage contains a power of sale, to foreclose by sale. G. L. (Ter. Ed.) c. 244, §§ 1-17.Harlow Realty Co. v. Cotter, 284 Mass. 68, 69-70 (1933). Chamberlain v. James, 294 Mass. at 8.

Inc., 30 Mass.App.Ct. 639, 642-43 (1991). The Supreme Judicial adopted this reasoning immediately in Attorney General v. Dime Savings Bank of New York, FSB, 413 Mass. 284, 291 (1992). In Sarvis v. Boston Safe Deposit and Trust Company, 47 Mass.App.Ct. 86 (1999), after foreclosure, the mortgagee changed the locks without first obtaining an execution on a Summary Process judgment pursuant to Mass. G. L. c. 290, and the violations of Mass. G. L. c. 184 § 18 resulted in $45,000 verdicts to each plaintiff.

B. In conclusion, the First Circuit decision, and Galvin v. U.S. Bank, N.A., 852 F.3d 146 (1st Cir. 2017), which the District Court cites as precedential (App. 34a-35a), fail to follow Massachusetts, creating an irrevocable conflict.

According to this Summary Judgment, a mortgagee's rights before foreclosure allows them to forcibly evict tenants when after foreclosure, the violations will give a plaintiff both injunctive relief and money damages. This is both paradoxical and plain wrong.

C. Permissible actions by a mortgagee.

Massachusetts jurisprudence allows two types of non-judicial foreclosures. A mortgagee can follow specific steps and sell its property at auction, where if the mortgage is in first place, the foreclosure deed conveys the res. Instead, a mortgagee may record a Certificate of Peaceable Entry, which can be opposed for three years. In those three years, the mortgagee is known as

a mortgagee in possession. The case law has denied relief to mortgagees offering self-help repairs, unless those mortgagees have become mortgagees in possession. Thus, in Krikorian v. Grafton Co-operative Bank, 312 Mass. 272, 279 (1942), after a hurricane the mortgagee sought to augment its loan balance for purported expenses without foreclosing, but the SJC would only allow expenses after a peaceable entry when the mortgagee had become a mortgagee in possession.

None of the Defendants became a mortgagee in possession, and the District Court remarked, "It is true that Bank Defendants have not provided sufficient evidence that the inspections did not begin until Paoluccio's mortgage loan became delinquent." (App. 31a) In the other circuits, at least the mortgagee has had declare a default. Once the First Circuit affirmed this judgment, any mortgagee can intrude, willy-nilly, and escape liability if it can only remove the ensuing state court case into the embrace of the federal courts. This Supreme Court must intervene.

D. Other errors in the District Court opinion.

1. The lack of authority for Chase or MCS to act at the Property.

The District Court opinion is replete with gaps in its logic, and here the conjectured subjective belief of the "MCS agents" are used as a basis for a further faulty ruling. These MCS agents were never identified in discovery and the business records presented are

nothing but a collection of unverified hearsay treated as self-authenticating. Earlier, when discussing the merits of the Ortiz affidavit, the opinion states,

> the key issue here is not if MCS field agents entered the Property (the record is replete with dated reports and pictures documenting the occasions when agents entered the Property, and what they did), but whether they were legally authorized to do so, and what, if anything, they removed from the Property."

(App. 28a).

One fallacy here is that none of the Defendants/Respondents ever state that the mortgagee (Wells Fargo) gave Chase or MCS the right to act at the Property. In their responding brief Wells Fargo and Chase bring up a recorded Limited Power of Attorney (which was never produced during discovery), which still limits any property preservation until after foreclosure. That should have stopped the discussion with respect to Chase and MCS.

2. Even if the Mortgage gave MCS or its agents any right to act at the Property, once they overstepped the limits inherent in the Mortgage, they were trespassing.

Without waiving any argument that Massachusetts requires the mortgagee to record its Certificate of Peaceful Entry before it has any right to conduct property preservation, once the MCS agents overstepped

any limits of the license which the Defendants argue the mortgage gives them, then the Defendants' agents were trespassers.

"As against the fact of possession in the plaintiff, no defendant in a trespass action may set up the right of a third person, unless the defendant is able to connect himself with that right." Prosser & Keaton on The Law of Torts, 5th Edition, p. 77. Chase and MCS claimed that the Mortgage itself gave them the right to enter the Property and violate an occupied property, but the Mortgagee at all times pertinent was Wells Fargo, as Trustee. There is a contract between MCS and Chase in the record, but nothing between Chase and Wells Fargo.

Massachusetts applies a title theory to home loans, where a mortgage and the note evidencing the loan secured by the mortgage are separate instruments. The endorsee of a loan has the right to have the associated mortgage assigned to it, *id.* at 652, but the mortgagee holds legal title to the property in question. *Id.* There is nothing in the record to suggest that after the Mortgage was assigned to Wells Fargo, it delegated any right to act at the Property, pursuant to the Mortgage. The combined brief submitted by Wells Fargo and Chase pointed to an inserted reference (found at Book 58640, Page 157 of the Worcester District Registry of Deeds for the Commonwealth of Massachusetts), claiming that this made Chase a power of attorney for Wells Fargo. The Limited Power of Attorney (App. 82a) had not been produced prior to that point. It was recorded on July 30, 2015 and I incorporated it into my reply brief's addendum. It is dated on

January 21, 2015 and by its terms are effective on that date. Even after that date, it does not allow Chase to conduct property preservation activities prior to foreclosure. There should be no doubt that Chase and its contractor MCS were trespassers every time they stepped onto the Property, pre-foreclosure.

3. Massachusetts law on vicarious liability does not support the First Circuit decision.

This does not implicate Wells Fargo without bringing in another legal theory. The First Circuit agreed that each entity could escape liability by pointing at the terms of its orders to its contractor, despite the record showed that the contractor does exactly the same actions for its employer at different times.

"Whether an employer has sufficient control over part of the work of an independent contractor to render him liable . . . is a question of fact for the jury." Chow v. Merrimack Mutual Fire Insurance, 83 Mass.App.Ct. 622, 628 (2013), quoting Corsetti v. Stone Co., 396 Mass. 1, 11 (1985). "Separately, if a principal has actual knowledge of the unsuitability of an agent, the principal may be held liable for his own negligence in the selection of an unsuitable agent to take action on his behalf." *Id.*

The District Court opinion recognized that a normal task the MCS agents do routinely is to remove the personal property found there, and the Defendants exert control over the place and time. It should be left to the jury to determine if the Defendants were liable.

As well as accepting a misapplication of a Massachusetts case, Worcester Ins. Co. v. Fells Acres Day School, Inc., 408 Mass. 393, 404-05 (1990) where an employer was found not liable for the sexual battery of employees, the First Circuit has presented with the Supreme Court yet another conflict with other circuits. See, e.g., Hardie v. Deutsche Bank Trust Company America, 544 F.Supp.3d 547 (D.Maryland, 2021), where Deutsche argued it was not responsible for Altisource's misdeeds, or Altisource's contractors, so Deutsche Bank asked to be dismissed, but applying Maryland vicarious liability law, the judge disagreed. *Id.* at 561-62.

E. The First Circuit did not follow Fed.R.Civ.P. 56(c)(2) when overruling my objections to the Defendants' evidence on Summary Judgment.

1. The District Court should have sustained my objection to the use of an undisclosed witness.

Fed.R.Civ.P. Rule 56(c)(2) states, "A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence." A corollary is Fed.R.Civ.P. Rule 37(c)(1), which precludes any undisclosed witness from giving evidence, whether "on a motion, a hearing or at trial." The district court posits that witnesses could be identified more than 30 days before trial, citing Fed.R.Civ.P.

Rule 26(a)(3)(B)[5] although the Defendants had not argued they could cure their omissions. The District Court also improperly put the burden of proof, if not just production, on me.

This question, whether an affidavit from a fact witness which was not designated as a witness during discovery should be allowed to be considered for Summary Judgment, is again an incipient conflict among the circuits.

In People Source Staffing Professionals LLC v. Robertson, No. 19-CV-00430, 2021 WL 2292801 at *4-*5 (W.D. Louisiana, June 3, 2021), an undisclosed witness was disregarded. The affiant (Reeves) was not mentioned during discovery, and despite he was disclosed two months after discovery ended, his affidavit and its attachment were struck out. In the same case, an objection to another document was sustained because it was appended to an affidavit but the affiant could not authenticate it. The motion judge left the possibility of authentication at trial but noted that the

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[5] See App. 23a: "[does not require parties to disclose trial witnesses until 30 days before trial, and we have not reached that point in time." However, this is again a different standard. 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." See, e.g., Kumar v. Frisco Ind. School Dist., 476 F.Supp.3d 439, 467-468 (E.D.Tex. 2020). The district court in Massachusetts did not determine that the Defendants' failure to identify any fact witnesses was either justified or harmless. (App. 8a-40a).

plaintiff had not listed any witness which could authenticate it then.

The Fifth Circuit upheld these rulings. People Source Staffing Professionals LLC v. Robertson, No. 21-30368, 2022 WL 3657186 (5th Cir. August 25, 2022). The panel held, first,

> Although appellant was not obliged to authenticate its summary-judgment evidence, the summary-judgment rules permit a party to "object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible evidence." Fed.R.Civ.P. Rule 56(c)(2). Upon objection, "[t]he burden is on the proponent to show that the material is admissible as presented or to explain the admissible form that is anticipated." advisory committee's note to 2010 amendment. And here, although it was possible the Agreement could be "authenticated in other ways at trial," the district court noted People Source "listed no witnesses who could authenticate" the document.

Id. at *2.

The Fifth Circuit also affirmed the district court's decision to exclude "the Reeves Affidavit" from its consideration. The First Circuit states, "People Source produced it after the applicable discovery deadline, and the district court excluded it for that reason" but the district court opinion makes it clear that "Reeves was not identified as a witness in People Source's Rule 26 disclosures, preliminary witness list, answers to interrogatories, or supplemental discovery responses."

People Source Staffing Professionals LLC v. Robertson, No. 19-CV-00430, 2021 WL 2292801 at *4 (W.D. Louisiana, June 3, 2021). The attachment to the Reeves Affidavit was not produced during the discovery period and likewise was excluded. *Id.* at *5.

This decision stands in clear conflict with the First Circuit now laid before the Supreme Court. As the Fifth Circuit explained, it is the burden of the proponent, that is, the party presenting the evidence, that it could be admitted in trial over objection. Where, as in the case before this Court, no witnesses were identified for the Defendants/Respondents, there is no possibility that they maintain a defense, or authenticate these documents.

2. The District Court improperly ruled I and not the Defendants had the burden of persuasion on whether the evidence could be used at trial.

In Brown v. Yaring's of Texas, Inc., No. 21-cv-00355 (S.D. Alabama, December 1, 2022) the district court, like that in the People Source court, looked at the committee notes, construed a motion to strike as an objection, assigned the burden as the notes state, and overruled the objection.

The First Circuit practice is to file motions to strike summary judgment affidavits, as done by the parties litigating the summary judgment motions. I also detailed my objections to each and every statement of fact and the underlying factual allegations,

despite the lack of expectation that the District of Massachusetts would rule upon them there, piecewise.

Despite the Defendants failure to explain how their evidence could be authenticated at trial, and their serial failure to designate any witness even after the lack was pointed out in court, the District Court allowed the Benavidez affidavit to stand. If it had been struck out, there would be no evidence whatsoever.

As written in Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548 (1986): "Of course, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact." Thus, if the Defendants' motions fail in the first instance, my requirement to produce countervailing evidence palls. That should have been the result, but even with Defendants' evidence intact, there was still a factual dispute sufficient to defeat the summary judgment motions.

a. The Defendants' responses did not show the evidence could be admitted at trial.

The Wells Fargo and Chase response referred to Fed.R.Civ.P. 56(c), writing "Plaintiff argues that the affidavit of Gary Benavidez must struck because he has not been identified as a witness" and "the Bank

Defendants have not made a determination as to trial witnesses[.]" DE 174 at 2. It is not until their answering brief before the First Circuit that, as cued if the district court's opinion, they mention identifying their witnesses later. However, there was no attempt to supplement their empty witness list. By Fed.R.Civ.P. Rule 37(c)(1), any witness not already disclosed "as required by Rule 26(a) or (e)" should have been excluded from offering factual evidence, here at the motions (DE 143).

MCS likewise argues, "Mr. Heal provides no valid grounds to exclude the Benavidez Affidavit or any of the exhibits appended to the pleading. Mr. Heal's complaints about the particular witness and particular documents submitted are irrelevant to admissibility, and his concerns over the testimony and documents, if at all valid, go to weight and not to admissibility. For the reasons stated above, Mortgage Contractor Services respectfully requests that this Court deny Plaintiff's Motion to Strike." DE 175 at 4.

b. The District Court decided on an erroneous standard.

The District Court incorrectly stated I, as the objecting party, should demonstrate that it would be impossible for the Defendants/Respondents to transmute their affidavits and documents into a form that would be admissible at trial. At App. 18a, we read, "First, Plaintiff has not provided any legal precedent that a defendant's failure to disclose potential trial witnesses with its initial disclosures warrants striking its entire

statement of material facts." At App. 21a, that is echoed with, "Again, Plaintiff has not provided any legal precedent that a defendant's failure to disclose potential trial witnesses with its initial disclosures warrants striking its entire statement of material facts."

c. The result is a conflict among the circuits.

The Fifth Circuit endorsed striking an affidavit where the affiant was identified after discovery ended, and struck out a document which the proponent could not offer anyone to authenticate it at trial, but the First Circuit came to the opposite result. Why Fed.R.Civ.P. 37(c)(1) should have been dispositive is still an open question.

d. There is still a factual dispute to bring to a jury and the Summary Judgment motions should not have been allowed.

After having struck all of the affidavits I submitted to oppose summary judgment, the District Court declared that there was no evidence of wrongdoing by the Defendants, but that was incorrect, as the police reports, filed by the Defendants, report that they had fomented a felony and the value of the items stolen were at least $251. App. 73a-74a. There are my statement, not objected to, that Defendants had taken my property, and the police sergeant tending to doubt my

statement. That should have been sufficient to resist summary judgment all by itself.

Whether or not there is a vicarious liability is normally a question to be determined at trial as well.

F. The District Court mistakenly limited recovery on the premise that a value listed 15 years earlier warranted applying judicial estoppel, despite the Bankruptcy Code mandates a different result.

Now we come to the most interesting issue. In order to satisfy standings, there should be an active dispute among the parties, which appears to require the judgment be vacated, but in this case, the District of Massachusetts shaded a potential recovery with statements made 15 years earlier, despite the contrary results in other circuits, and unsurprisingly other courts in other circuits have continued to decide with their own results, the opposite of the First Circuit's.

1. The District Court's version of Judicial Estoppel.

This decision would prospectively limit any possible remedy for the theft of the gold coin my grandmother gave me to $500 adjusted by inflation. I explained that I was unaware of the value of that $20 Double Eagle until Mr. Paoluccio told me.

2. Whether the Joe Presti affidavit was irrelevant and correctly excluded.

This was corroborated by Joe Presti, an expert and incidentally a lawyer admitted in New Hampshire. He stated the values in 2001 and 2014. Nothing else would gauge the appreciation over the period, but the district court struck out that affidavit as irrelevant. There was nothing else to show that the coin was worth more than zero. The district court's reasoning was that it had "capped" the value of the gold coin and this decision, as with too much other facets of this case, flies in the face of reason.

3. Discussion of Bankruptcy procedures.

When the Bankruptcy case is opened, the legal title to all of the debtor's assets is transferred to the Bankruptcy estate. The Bankruptcy Code states that if an asset is listed in the schedules, it is automatically revested in the debtor when the debtor's Bankruptcy case is closed, but while the case is opened it must be maintained in the name of the trustee, if any, but when the case is closed, if the debtor had not scheduled a possible recovery from a defendant, that possibility remains within the Bankruptcy estate and neither the debtor nor anyone else can prosecute it, until and when the case is reopened, a trustee is appointed and/or the chose in action is scheduled, at which point the trustee can administer the asset or abandon it to the debtor.

4. Application of Judicial Estoppel in a Bankruptcy context is inconsistent with the Constitution.

Section 8 of Article I of the Constitution assigns Congress the power to "establish [. . .] uniform Laws on the subject of Bankruptcies throughout the United States;" but these decisions in the name of judicial estoppel are creating a hodge-podge.

5. There is a conflict among the circuits about limiting recovery based on assumed valuation listed in Bankruptcy schedules.

In the case at bar, courts in other circuits have come to the opposite result when asked directly to apply judicial estoppel.

See Levitz v. Alicia's Mexican Grille, Inc., 2020 WL 710013, No. H-19-3929 (S.D.Tex., Feb. 11, 2020) in which exempting a potential court case in the amount of $10,500 did not merit imposing judicial estoppel. *Id.* at *4.

In Hardie v. Deutsche Bank Trust Company America, 544 F.Supp.3d 547 (D.Maryland, 2021) decisions mirroring those in the First Circuit case reached the opposite results, point by point. Altisource allegedly removed all personal property despite the mortgagee had not foreclosed. The defendants claimed that the plaintiffs were judicially estopped from claiming the value of the property taken was worth more than $1.5 million in September 2017 to the $8,350 in personal

property on April 2016 bankruptcy schedules, but the District of Maryland found that was not "clearly inconsistent," applying the test set down in New Hampshire v. Maine, 532 U.S. 742, 750-51, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001). *Id.* at 557-58.

6. This is the type of judicial activism which the Supreme Court will tamp down as its role as bellwether.

It is not proper to apply an equitable doctrine when that will contravene the statutory language of the Bankruptcy Code. Another way to put that is, it is judicial activism. The Supreme Court should remind the inferior courts to enforce congressional intent and not find an analogue in the common law. See, e.g., Jesinoski v. Countrywide Home Loans, Inc., 572 U.S. 259, 264, 135 S.Ct. 790, 793 (2015).

7. Relief under the Bankruptcy Code should not be subject to collateral attack.

Once the Chapter 7 Trustee abandons an asset and the bankruptcy case is closed, the Bankruptcy Court loses jurisdiction. In DeVore v. Marshack (In re DeVore), 223 B.R. 193 (9th Cir. BAP 1998), the Chapter 7 Trustee pursued a court case but after judgment mistakenly issued a no-asset notice and no assets to administer. The case was thereupon closed and the Chapter 7 Trustee's attempt to claw back the judgment into the bankruptcy estate was rebuffed, as the

statutory language did not support his attempt. In re Puntas Associates LLC, No. 18-bk-03123, 2021 WL 4558294 (D. Puerto Rico, October 5, 2021) at *5 elaborated: "[A]bandonment of property divests the trustee of title, and that an abandonment is irrevocable regardless of subsequent unforeseen enhancement in the value of the property [. . .] abandonment constitutes a divestiture of all of the estate's interests in the property. Property abandoned under section 554 reverts to the debtor, and the debtor's rights to the property are treated as if no bankruptcy petition was filed."

Equitable reasons should not disturb the legal decision, i.e. after a Bankruptcy Case is closed pursuant to, its assets are abandoned to the debtor. A one year limitations period is provided within which a trustee or creditor may object to a discharge of debts. 11 U.S.C. § 727(e). A look-back period further than that would impermissibly interfere with the legislature's authority. After one year, it is res judicata and not estoppel which applies. Puntas, *id.*, continues "In Cusano v. Klein, 264 F.3d 936, 946 (9th Cir. 2001) the court explained that: 'Generally, "mistakes in valuation will not enable a trustee to recover an abandoned asset," Hutchins[v. Internal Revenue Service], 67 F.3d 40, 44 (3d Cir. 1995) not even upon "subsequent discovery that the property has a greater value than previously believed.'" Cusano v. Klein, 264 F.3d at 946.

The District Court relied on Guay v. Burack, 677 F.3d 10, 19 (1st Cir. 2012) and Schomaker v. United States, 334 Fed.Appx. 336, 340 (1st Cir. 2009). If Guay v. Burack used "judicial estoppel" for as its basis, it could as

well as found no standing, as those plaintiffs (the Guays) did not disclose a claim on their bankruptcy schedules, and hence the claim remained within the bankruptcy estate. Either way, the First Circuit drew a bright line. Schomaker v. United States is murkier. The opinion's dicta about the value of the property Schomaker sued for return from the United States is not supported by the cases it cites, 334 Fed.Appx. at 340, as in both Payless Wholesale Distributors, Inc. v. Alberto Culver (P.R.) Inc., 989 F.2d 570, 571 (1st Cir. 1993) and Estel v. Bigelow Management, Inc., 323 B.R. 918 (E.D.Tex. 2005), each plaintiff had omitted the chose in action from the respective bankruptcy schedules entirely.

8. The District Court decision is not consistent with the Supreme Court's guidance.

The Supreme Court outlined judicial estoppel for federal law in New Hampshire v. Maine, 532 U.S. 742, 750-51, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001): "First, a party's later position must be 'clearly inconsistent' with its earlier position [. . .] Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create 'the perception that either the first or the second court was misled,' [. . .] A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." The Supreme Court winds

up with "judicial estoppel forbids use of intentional self-contradiction as a means of obtaining unfair advantage" [internally quotation subsumed], thus limiting the use of the principle. *Id.*

The District Court did not apply these principles in its decision [DE 46 at 5] but instead quoted from Guay v. Burack, supra '("[T]he integrity of the bankruptcy process is sufficiently important that we should not hesitate to apply judicial estoppel even where it creates a windfall for an undeserving defendant."),' which itself stands in stark contradiction to the Supreme Court's third consideration above and there is no consideration of whether the supposed contradiction is intentional and whether I am thus obtaining an unfair advantage.

9. This also is in conflict with other circuits.

Ashmore v. CGI Group, Inc., 923 F.3d 260 (2d Cir. 2019) reversed a Southern District of New York imposition of judicial estoppel. The recital of the New Jersey bankruptcy proceedings demonstrate how a pro se litigant can flounder, but with the assistance of counsel, things were still hit and miss. In 2013, the plaintiff (and debtor) initially detailed his case on the Statement of Financial Affairs but omitted it from the Schedule B (of personal property). At first, the Chapter 7 Trustee did not substitute herself as the plaintiff in interest. The bankruptcy case was closed, only to be reopened, twice, and only in 2017 was Schedule B amended.

The substitution of the Chapter 7 Trustee and the amendment to the Schedule B should have been enough, but the district court found the plaintiff was estopped by failing to initially place the case on his Schedule B. Such a decision would frustrate Congress' intent in enacting the Bankruptcy Code. Nonplussed, the Second Circuit analyzed the district court's decision after first quoting Clark v. AII Acquisition, LLC, 886 F.3d 261, 265 (2d Cir. 2018), "A district court may not do inequity in the name of equity." In the AII Acquisition case we find, '[W]e will overturn a district court's decision to invoke judicial estoppel that, "though not necessarily the product of a legal error or a clearly erroneous factual finding[,] cannot be located within the range of permissible decisions." Zervos v. Verizon N.Y., Inc., 252 F.3d 163, 169 (2d Cir. 2001).'

Third Circuit law was applied because the Bankruptcy Case was extant in New Jersey, so the Second Circuit examined four factors: (1) Advanced of Inconsistent Factual Positions; (2) A Court has Adopted the Former Position; (3) A Party Seeking Estoppel Must Have Suffered Prejudice; and (4) the Impact on Judicial Integrity. In conclusion, the Second Circuit wrote, "For estoppel to apply, there must be greater indicia than presented here of an intent to deceive the court for the debtor's benefit." Ashmore v. CGI Group, Inc., 923 F.3d at 281. In a footnote, the Second Circuit mentioned the "good faith" exception.

Since there is a requirement of specific intent, it is already unfair if the decision is made without an evidentiary hearing. Imposing a hard and fast rule is all and good if an asset is not listed in the schedules, but

there is a statutory basis that is even clearly. Once a court begin to delve into the Bankruptcy schedules more deeply, it begins to second-guessing the Bankruptcy Court, and that kind of collateral attack should not be allowed.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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