22-6173

ORIGINAL

STEVEN D'AGOSTINO Plaintiff-Appellant	BELOW: THIRD CIRCUIT COURT OF APPEALS, **DOCKET NO: 21-3178**
v.	BELOW NO: 20-6330-FLW BELOW NO: 10-24143-CMG
BUNCE ATKINSON Defendant – Appellee	PLAINTIFF'S PETITION FOR A WRIT OF CERTIORARI

On appeal from final order on Aug 23, 2022 by
The U.S. Court of Appeals for the Third Circuit

PLAINTIFF-APPELLANT'S PETITION FOR A WRIT OF CERTIORARI

Steven D'Agostino
25 Nautilus Dr.
Barnegat NJ 08005
(609) 622-8964

DATED: Nov 14, 2022

QUESTIONS PRESENTED

1) What is the significance and/or importance of the *United States Trustee Office's Handbook for Chapter 7 Trustees* (hereinafter "*the Handbook*") ?

A) Given the ample amount of recent authorities holding that several Chapter 7 trustees had acted reasonably by following *the Handbook*, is the reverse also true?

B) That is, if a Chapter 7 trustee chooses to completely flout / ignore the requirements that are set forth within *the Handbook*, does the trustee act unreasonably? (Or at a minimum, does the failure to follow *the Handbook* at least establish the prima facie prerequisite for a plaintiff to obtain *Barton* permission)? [1]

2) In the performance of the statutory obligations set forth in *11 U.S. Code § 704(a)*, can a reasonably-acting Chapter 7 trustee fail to check the debtor's schedules, AND also fail to detect the absence of required documents?

A) For example, can a reasonably-acting Chapter 7 trustee fail to detect the absence of the detailed explanation of purported business expenses, as required by line 16 of the bankruptcy petition's Schedule J?

3) Is circumstantial evidence alone sufficient to obtain *Barton* permission, when that circumstantial evidence strongly suggests that a conflict of interest (i.e. a professional and social relationship) had existed between the debtor and the Chapter 7 trustee? [1]

---

[1] "*Barton* permission" refers to a plaintiff's need to obtain permission from the Bankruptcy Court before being able to bring a private cause of action against a trustee, as initially established by this Court in *Barton v. Barbour*, 104 US 126 (1881). This requirement has recently been applied to Chapter 7 trustees. See *In re VistaCare Grp., LLC*, 678 F.3d 218, 224 (3d Cir. 2012) (holding that the Barton doctrine extends to lawsuits against a bankruptcy trustee for acts done in the trustee's official capacity); *In re J & S Props., LLC*, 872 F.3d 138, 143 (3d Cir. 2017).

LIST OF PARTIES

1) Laurence A. Hecker (the Chapter 7 debtor, now deceased); 2) Bunce Atkinson (the Chapter 7 trustee); and 3) Steven D'Agostino (a creditor who is owed ~$400,000 from the debtor, and who was listed as a creditor in the debtor's amended schedules, but who was never served with anything about the debtor's bankruptcy petition).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PUBLISHED OPINIONS **PAGE(s)**

UNPUBLISHED OPINION

UNITED STATES CONSTITUTION

UNITED STATES STATUTES

CODE OF FEDERAL REGULATIONS

RULES OF COURT

OTHER AUTHORITIES

CONCISE STATEMENT OF THE BASIS FOR JURISDICTION

The U.S. Bankruptcy Court of Trenton New Jersey had subject-matter jurisdiction to determine whether or not permission should be granted to allow Plaintiff-Appellant Steven D'Agostino, a judgment creditor of debtor Laurence A. Hecker whom obtained a Chapter 7 discharge from that court, to proceed with his state court claims against the Chapter 7 trustee, Defendant-Appellee Bunce Atkinson. (See e.g. *Barton v. Barbour*, 104 U.S. 126, 26 L. Ed. 672 (1881))

On May 6, 2020, the Bankruptcy Court entered a final order denying the aforementioned permission sought.

The U.S. District Court then had jurisdiction to hear an appeal of that order. (See e.g. *28 U.S.C. §158(a)* and *F.R.B.P. 8003*). Venue was proper in the Trenton N.J. district because the underlying Bankruptcy Court action occurred in this district. An appeal of the aforementioned May 6, 2020 order was timely filed on May 18, 2020, which was entered into the Bankruptcy Court docket (as ECF No. 59) on May 20, 2020. NOTE: *For reasons unknown, the District Court docket reflects an incorrect filing date of May 26, 2020.* On Nov 16, 2021 the U.S. District Court entered a final order affirming the Bankruptcy Court's denial of the aforementioned permission sought.

The U.S. Court of Appeals for the Third Circuit then had appellate jurisdiction over the Trenton NJ U.S. District Court. The Third Circuit appeal was timely filed on Nov 24, 2021, as the final order by the US District Court was entered on Nov 16, 2021.

On Jul 19, 2022, the Third Circuit affirmed the rulings of the lower courts, and a timely motion for rehearing / en banc rehearing was filed on Jul 31, 2022. On Aug 23, 2022, the Third Circuit denied rehearing, and affirmed its earlier decision.

This petition for a writ of certiorari is being timely file on Nov 14, 2022.

THE CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED IN THE CASE

- The 14th Amendment of the United States Constitution
- United States Statute 11 U.S.C. §105
- United States Statute 11 U.S.C. §341
- United States Statute 11 U.S.C. §521
- United States Statute 11 U.S.C. §704
- United States Statute 11 U.S.C. $707
- United States Statute 28 U.S.C. §158
- United States Statute 28 U.S.C. §581
- United States Statute 28 U.S.C. §586
- Code Of Federal Regulations 28 C.F.R. § 58.3(b)(4)

CONCISE STATEMENT OF THE CASE [2]

REFERENCES TO THE ORIGINAL RECORD WITHIN THIS PETITION

[2] This petition will primarily refer to documents that are in the original record of the Bankruptcy Court of N.J. docket, 10-24143-CMG. This includes both of the transcripts (i.e. ECF Nos. 77 and 78) of the only two oral hearings in this matter (i.e. Mar 24, 2020 and May 5, 2020, respectively). Please note that the District Court of N.J. appeal, 20-6330-FLW, was conducted entirely on paper only.

Unless otherwise specified, any ECF number indicated herein refers to the Bankruptcy Court of N.J. docket, 10-24143-CMG. To the extent that the District Court of N.J. docket will be referenced herein, all such references will indicate the District Court docket number as well as the corresponding ECF number (e.g. 20-6330-FLW, ECF No. 16).

The relevant facts are largely undisputed. For the sake of simplicity, Plaintiff-Petitioner Steven D'Agostino shall hereinafter refer to himself in the first person.

I was a former client of the Chapter 7 debtor, Laurence A. Hecker (hereinafter "Hecker"), who was an attorney whom had three (3) disciplinary suspensions from the bar, and whom had a history of hiding assets out of state to prevent his creditors from collecting upon their respective judgments against him. In 2006, I brought a legal malpractice suit against Hecker in New Jersey Superior Court, and in May of 2009, I obtained a $385,399.32 (including interest) judgment against him.

On May 7, 2010, while his New Jersey Superior Court appeal of my judgment was still pending, Hecker filed a pro se Chapter 7 bankruptcy petition. However I was not listed as a creditor.

Defendant-Appellee Bunce Atkinson (hereinafter "Atkinson") was then appointed as the Chapter 7 trustee on May 10, 2010. On June 4, 2010 Hecker filed amended schedules, which listed 19 total creditors, including my secured claim in the amount of $385,399.32. Hecker did not file an amended creditor matrix. Consequently, my name was not included on the creditor list for notices sent by the Bankruptcy Court Clerk's Office.

About a month later, I received secondhand notice of the filing, and I then contacted the court in July 2010 regarding the case. At that time I had spoken to Diane Lipcsey, whom was (and still is currently) the Bankruptcy Court's courtroom deputy. She informed me that the case was set to be dismissed due to various maladies. On July 20, 2010 Hecker's case was dismissed for failure to file missing documents. When I called

back a few days later, Ms. Lipcsey emailed me a copy of the order of dismissal. But I did not receive independent notice of the dismissal.

On September 1, 2010 Hecker, this time through bankruptcy counsel, filed a motion to reopen the case. However, I was not a party whom was served with (or notified of) Hecker's motion. Instead, as noted by the Bankruptcy Court, the motion was served only upon the United States Trustee, Atkinson, and counsel for an automotive creditor.

The motion was granted and the case was reinstated on September 20, 2010. Atkinson was reappointed as Trustee on September 21, 2010. However even at that stage, still I was never notified of the reinstatement. On October 25, 2010 Atkinson conducted a *341* meeting, which I was completely unaware of. On December 22, 2010 Atkinson filed a notice of abandonment for Hecker's real property, which I was completely unaware of as well. On January 7, 2011 Hecker received his Chapter 7 discharge, which I was also completely unaware of. On February 8, 2011 Atkinson issued a report of no distribution, which again I was completely unaware of. The bankruptcy case was closed on March 16, 2011, which yet again I was completely unaware of.

I had no knowledge whatsoever of the reinstatement of the bankruptcy, until Hecker had mentioned it to me during a September 2013 conversation. I then spoke with my collection attorney, who informed me that there may be issues with the discharge as to my judgment, and that my judgment was still active on the New Jersey Judiciary website.

However, because Hecker had threatened both me and my collection attorney with possible sanctions of thousands of dollars each, and given that more than a year had elapsed since the bankruptcy case had closed and there was nothing more that we could do to revoke the discharge, my collection attorney did not want to proceed any further.

But I had then informed my collection attorney that Hecker lived alone, had no heirs, and was in bad health. So he then said that because my judgment was still active, when Hecker dies then we can attempt to proceed on collecting against his real estate (and possibly other assets as well), as obviously a deceased person cannot be harassed.

Thus, as soon as I learned of Hecker's passing in May 2017, I then contacted my collection attorney again to collect from the real estate / assets. However there was a delay in the paperwork for a few months, and unfortunately for us the bank had foreclosed on the property in October 2017. But a couple months later, I then was able to obtain files belonging to Hecker which evidenced the fact that just before the time when he had sought his Chapter 7 discharge, Hecker had hidden (i.e. transferred to his accomplices) over $300,000 worth of his now-long-gone assets.

In September of 2019 I filed a lawsuit in the N.J. Superior Court against Atkinson and Ms. Karen Bezner, who was Hecker's personal bankruptcy attorney. As to Atkinson, the Lawsuit seeks damages for breach of fiduciary duty, professional negligence, tortious interference, as well as declaratory relief. My causes of action against Atkinson are that Atkinson failed his duties by: 1) failing to check the petition for accuracy; 2) failing to investigate Hecker's purported lack of assets; 3) failing to verify Hecker's purported business expenses.

In response to the Lawsuit, Atkinson filed a motion to dismiss for lack of subject matter jurisdiction, due to my failure to obtain approval of the Bankruptcy Court prior to the filing of the Lawsuit. Thus on Mar 3, 2020 I then filed a motion to reopen the bankruptcy matter so as to obtain that approval. (ECF No. 37).

On Mar 12, 2020 Atkinson opposed the motion. (ECF No. 40). On Mar 19, 2020 I served and filed my reply to Atkinson's opposition, which was entered the following day. (ECF No. 42). However on the same day that he was served with my reply, Atkinson filed an impermissible sur-reply. (ECF No. 41).

On Mar 24, 2020 the Bankruptcy Court heard oral argument (*transcript 1T* = ECF No. 77) and denied my motion for *Barton* permission to proceed with my state court claims against Atkinson. (ECF No. 43)

On Apr 3, 2020 the Bankruptcy Court then vacated its Mar 24, 2020 order sua sponte (ECF No. 47), and entered an amended order (ECF No. 48) on Apr 3, 2020.

On Apr 8, 2020 I filed a timely motion for reconsideration (ECF No. 53) of the Apr 3, 2020 order. On Apr 25, 2020 Atkinson opposed the motion. (ECF No. 54). On Apr 28, 2020 I filed my reply to Atkinson's opposition. (ECF No. 55). But on Apr 30, 2020 Atkinson yet again filed an impermissible sur-reply. (ECF No. 56)

On May 5, 2020 oral argument (*transcript 2T* = ECF No. 78) was heard on the motion for reconsideration, which on that date was orally denied. An order for the denied motion for reconsideration was entered the following day on May 6, 2020. (ECF No. 57) The District Court appeal was timely filed 12 days later on May 18, 2020. (ECF No. 59; 20-6330-FLW, ECF No. 1).

On July 31, 2020 I filed my Appellant brief and appendix with the District Court. (20-6330-FLW, ECF No. 7).

On Oct 16, 2020 Atkinson filed his Appellee brief. (20-6330-FLW, ECF No. 14). On Nov 3, 2020 I filed my reply brief. (20-6330-FLW, ECF No. 15).

On Mar 24, 2021 the District Court affirmed the Bankruptcy Court's denial of my motion for *Barton* permission. (20-6330-FLW, ECF No. 16).

On Apr 20, 2021 I filed a timely motion for reconsideration. (20-6330-FLW, ECF No. 17). On May 21, 2021 Atkinson opposed the motion. (20-6330-FLW, ECF No. 19). On May, 26, 2021 I filed my reply to Atkinson's opposition. (20-6330-FLW, ECF No. 20).

On Nov 16, 2021 the District Court denied my motion for reconsideration. (20-6330-FLW, ECF No. 21).

The Third Circuit appeal was timely filed on Nov 24, 2021 (and later docketed as 21-3178). (20-6330-FLW, ECF Nos. 22 and 23).

On Jul 19. 2022, the Third Circuit affirmed the rulings of the lower courts. On Jul 31, 2022, I filed a petition for rehearing / en banc rehearing with the Third Circuit.

On Aug 23, 2022, the petition for rehearing / en banc rehearing was denied, and the Third Circuit therein affirmed its earlier decision.

On Nov 14, 2022, I am filing a petition for a writ of certiorari with this United States Supreme Court.

ARGUMENTS

1) Chapter 7 trustees cannot choose to flout / ignore the Handbook

(RAISED BELOW: ECF Nos. 37, 40, 41, 42, 43, 47, 48, 53, 54, 55, 56, 57, 77 and 78; and on appeal, 20-6330-FLW, ECF Nos. 7, 14, 15, 16, 17, 19, 20, and 21). [1]

Atkinson failed to perform a multitude of duties listed within *the Handbook*, which sets forth the Chapter 7 trustee's duties and obligations. The attached addendum (A1 – A10) contains the most relevant excerpts from *the Handbook*. Amongst several other failures, consider just the following two failures by Atkinson.

First, although *the Handbook* clearly requires the trustee to check the accuracy of the notice matrix, **it is undisputed that Atkinson had failed to check the notice matrix at all** to observe that only one creditor was listed in the notice matrix, while schedules D through F had listed a total of 19 creditors.

Second, although *the Handbook* clearly requires the trustee to review all of the debtor's paperwork and check for accuracy and completeness, Atkinson clearly failed in this obligation as well. That is, although Hecker admitted to having a monthly income of $13,350, Hecker claimed to have $8,102 in regular monthly business expenses on line 16 of his Schedule J. However, Schedule J line 16 required Hecker to attach a detailed statement so as to explain his purported expenses, but no such statement was attached. (See ECF No. 10-1, page 9). Undeniably, Atkinson also completely failed to catch this blatant omission.

The Bankruptcy Court seemingly trivialized the obligations set forth within *the Handbook* as being merely "guidelines, not statutes". (2T16:5 – 16:10).

The District Court agreed with this finding. (20-6330-FLW, ECF No. 16, page 11, n.3; 20-6330-FLW, ECF No. 21, pages 6-7). The Third Circuit scantly even addressed the issue. (21-3178, ECF Nos. 25 – 29)

However I respectfully submit that these rulings were in error. In *Phoenician Mediterranean Villa, LLC v. Swope* (a.k.a. *In Re: J & S Properties, LLC*) 872 F.3d 138 (3rd. Cir. 2017) (hereinafter "*Swope*") the Third Circuit found that because Chapter 7 Trustee Swope had followed the rules and procedures that are set forth within *the Handbook*, that Trustee Swope had acted reasonably.

That is, the Third Circuit's rulings in *Swope* referred not only to Trustee Swope's statutory duties, but further had also repeatedly cited to *the Handbook* and the requirements specified therein. And the *Swope* court found that because Trustee Swope had followed the rules and procedures that are set forth in *the Handbook*, she had acted reasonably.

Thus it logically follows that the reverse must also be true – that is, if a trustee acts reasonably by following *the Handbook*, then a trustee who does not follow *the Handbook* acts unreasonably.

In the instant matter, both the Bankruptcy Court and the District Court seemed to limit the scope of their review of the trustee's actions (or lack thereof) only to duties that were specifically set forth via a statutory obligation. However I respectfully submit that this was error, as I only needed to show that Atkinson's conduct was unreasonable. It was not necessary for me to show that Atkinson violated a statutory duty in order to defeat his presumption of qualified immunity.

The importance for a Chapter 7 trustee to follow what is set forth in *the Handbook* cannot be trivialized. For example, over 10 years ago, even this U.S. Supreme Court cited to *the Handbook* when discussing its rulings upon "the trustee's statutory obligations" as a Chapter 7 trustee. (See e.g. *Schwab v. Reilly*, 560 U.S. 770 (2010).

A Chapter 7 trustee's compliance with *the Handbook* is mandatory, not optional. For example, almost 20 years ago in the matter of *In re Rambo*, 297 BR 418 (Bankr. ED Pa. 2003), the Bankruptcy Court noted: "the Chapter 7 trustee's **mandate** under the U.S. Trustee's Handbook." [*emphasis added*]

Moreover, as the Utah Bankruptcy Court held in the matter of *In re Christensen*, 561 BR 195, 203 (Bankruptcy Court, D. Utah. 2016):

> **A chapter 7 trustee's duties are created by Congress through statute, and** the Office of the United States Trustee has prepared **the Handbook for Chapter 7 Trustees** (Trustee Handbook),[29] which **directs trustees with respect to those duties. The two are complementary**, with the statutes generally making broader pronouncements and **the Trustee Handbook typically filling in much of the detail on the nuts-and-bolts of case administration**. [emphasis added]

Further, as the Utah Bankruptcy Court had noted, *the Handbook* itself sets forth the fact that a "trustee's primary **statutory duties** are set forth **in part** in section 704 of the Bankruptcy Code **and are detailed more thoroughly in other parts of this Handbook.**" *In re Christensen*, 561 B.R. at n.29 [*emphasis added*] (citing the *Office for U.S. Trustees Handbook for Chapter 7 Trustees, 1-2 (2012)*).

Even more recently, in the case of *In Re Bell*, 617 BR 364, 374-375 (D. Col. 2020), the Chapter 7 trustee filed a motion to dismiss the Chapter 7 petition, simply because the debtor failed to bring proper identification to the *§341* meeting. The Colorado

Bankruptcy Court found that to be "fairly draconian" and denied the trustee's motion to dismiss, in part **due to his failure to comply with** *the Handbook*, where the Bankruptcy Court denied the non-complying trustee's motion to dismiss, opining in detail therein:

> **The TRUSTEE HANDBOOK** is not a statute and is not binding on the Court; but it **directs Chapter 7 trustees how to perform their duties**. The TRUSTEE HANDBOOK generally complements the Bankruptcy Code and "typically fill[s] in much of the detail on the nuts-and-bolts of case administration." *In re Christensen*, 561 B.R. 195, 203 (Bankr. D. Utah 2016). The United States Supreme Court and appellate courts have cited the TRUSTEE HANDBOOK with approval in considering various bankruptcy issues. See e.g. *Schwab v. Reilly*, 560 U.S. 770, 785, 130 S.Ct. 2652, 177 L.Ed.2d 234 (2010) (citing TRUSTEE HANDBOOK with approval); *Phoenician Mediterranean Villa, LLC v. Swope (In re J & S Prop., LLC)*, 872 F.3d 138, 144 (3rd Cir. 2017) (same); *Wisdom v. Gugino*, 649 Fed. Appx. 583, 584 (9th Cir. 2016) (unpublished) (same); *In re Rowe*, 750 F.3d 392, 397 (4th Cir. 2014) (same); *Jubber v. Bird (In re Bird)*, 577 B.R. 365, 379 (10th Cir. BAP 2017) (same; "sale of the Homesteads undoubtedly violates the Trustee Handbook's directive...."). [emphasis added]
>
> By refusing to follow that course (endorsed in the TRUSTEE HANDBOOK), the Chapter 7 Trustee contributed to the current conundrum. Also, if the Chapter 7 Trustee had really doubted the Debtor's identification, the TRUSTEE HANDBOOK instructs that he "must refer the matter to the United States Trustee." There is no evidence that he did that. Ultimately, the Court concludes that the Chapter 7 Trustee has not met his burden to show cause sufficient for dismissal under *Section 707(a)(1)*.

The above matter may, in some respects, be the most on-point. That is, although it did not involve a creditor at all (let alone a creditor who is seeking *Barton* permission), it seems to be the only authority involving a scenario of a trustee's non-compliance with *the Handbook* (i.e. the only authority dealing with a trustee who **did not comply**).

And in that case, the Bankruptcy court denied the relief sought by the trustee, therein admonishing him for his failure to comply with *the Handbook*.

And even further still, less than 2 years ago in an unpublished opinion, the Georgia Bankruptcy Court held:

In re McConnell, 2021 WL 203331, *2 (Bankr. N.D. Ga. Jan. 4, 2021):

> **A. The Chapter 7 Trustee's Role and Duties**
> The United States Trustee, appointed by the Attorney General of the United States, *28 U.S.C. § 581(a)*, has **the statutory duty**, among others,[4] to establish and maintain a panel of private trustees to serve in chapter 7 cases and to supervise them. *28 U.S.C. § 586(a)(1)*. The Executive Office for United States Trustees maintains ***the Handbook*** *for Chapter 7 Trustees*[5] (hereinafter the "*Chapter 7 Handbook*") that **states** the views of the United States Trustee Program on **the duties owed by a chapter 7 trustee** to debtors, creditors, other parties in interest, and the United States Trustee. [*emphasis added*]

In re McConnell, 2021 WL 203331, *12 (Bankr. N.D. Ga. Jan. 4, 2021):

> One of **the statutory duties of a chapter 7 trustee** is "to investigate the financial affairs of the debtor." *§ 704(a)(4)*. As the ***Chapter 7 Handbook***, at 4-26, explains:
>
> > **The trustee must investigate the debtor's financial affairs by reviewing the debtor's schedules** of assets and liabilities, statement of financial affairs, and schedules of current income and expenditures which the debtor must file pursuant to section 521 and Fed. R. Bankr. P. 1007 and by examining the debtor at the meeting of creditors. The trustee must also conduct such other investigation as necessary, such as following up on credible tips about unscheduled assets. [*emphasis added*]

Thus, I respectfully submit that it was error for the Bankruptcy and District Courts (as well as the Third Circuit) to discount *the Handbook* in their review of the reasonableness of the trustee's actions (or lack thereof).[3]

---

3 The District Court incorrectly stated that neither party provided *the Handbook* version in effect during the relevant period. (20-6330-FLW, ECF No. 16, n.2) In my motion for reconsideration, I responded that I had provided excerpts from that version. Attached hereto as an addendum (A1 - A10) are the cover page, table of contents, and relevant portions (with emphasis added) of that 216-page 2002-2011 version, which is available in its entirety on the U.S Trustee's website via this link:
https://www.justice.gov/sites/default/files/ust/legacy/2011/07/13/ch7_handbook_pii_2010.pdf

2) Chapter 7 trustees cannot ignore their statutory duties

(RAISED BELOW: ECF Nos. 37, 40, 41, 42, 43, 47, 48, 53, 54, 55, 56, 57, 77 and 78; and on appeal, 20-6330-FLW ECF Nos. 7, 14, 15, 16, 17, 19, 20, and 21).[1]

Atkinson failed to comply with his statutory duties. The duties of a chapter 7 trustee are set forth, in part, within *11 U.S. Code §704*. This statute provides, in parts that are most relevant to this instant matter, that: "(a) The trustee shall - (4) investigate the financial affairs of the debtor;" and "(b)(1) With respect to a debtor who is an individual in a case under this chapter (A) the United States trustee (or the bankruptcy administrator, if any) shall review all materials filed by the debtor ... "

Starting with the duty specified in *§704(a)*, Atkinson undeniably had a statutory duty to investigate the financial affairs of the debtor. While the statute does not specify how the investigation should be conducted, it should be axiomatic that any proper investigation would include checking the schedules, and would have required Atkinson to observe that Hecker provided no detailed explanation of his purported business expenses, which according to the requirements in line 16 of Schedule J of the petition, was required to be attached. It should also be axiomatic that a proper investigation by Atkinson would have raised several red flags. First, when / if compared, the business expenses listed in his tax return were far less than what he alleged in his Schedule J (i.e. which was over 40% higher). Second, when Hecker claimed to: A) earn $10,000/month as an employee (i.e. an in-house attorney for APM Financial, whom provided Hecker with all necessary overhead, including an office and staff); while B) earn only $2,000/month from the operation of his own law practice, with over $8,000/month in expenses. That is, APM financial paid for all of the expenses involved

with Hecker being their in-house attorney, so the only business expenses that Hecker would have incurred would have been from the operation of his own law practice. Yet Hecker incredulously claimed to be running his own business at a loss of over $6,000 per month. Further, Atkinson failed to provide (and/or obtain from Hecker) any explanation as to why Hecker should not restructure his debts (i.e. under Chapters 11 or 13), rather than having those debts discharged under Chapter 7. That is, even taking Hecker at his own word, Hecker would have had more than $6,000/month extra simply by ceasing his own law practice (i.e. just via receiving his remaining $11,350/month income from the other listed sources, without incurring any of the purported business expenses). So there can be no doubt that Hecker easily had the ability to repay his debts, thus Atkinson had the statutory duty to object to Hecker's abuse of Chapter 7.

However Atkinson essentially contends that because of the express language of *11 U.S.C. §707(b)* (i.e. which is only applicable if the debts are primarily consumer debts), he had no duty to scrutinize Hecker's purported business debts, nor any duty to object to Hecker's abusive discharge of business debts. That is, Atkinson attempts to misconstrue *§707(b)* so as to suggest that whenever business debts are primarily involved, trustees do not need to investigate for any possible abuse.

That contention is flawed. As held by the Oklahoma Bankruptcy Court, *In re Stewart*, 204 BR 780, 781-782 (Bankr.NDOkla.1997):

> Congress never intended *§707(b)* to grant business debtors a "right" to abuse the Bankruptcy Code. "Section 707(b) was not enacted to narrow and discourage Court review of abusive cases, but to broaden and encourage such review", *In re Stewart*, 201 B.R. p. 1004. Bankruptcy courts have long had the power and duty to prevent abuse of their jurisdiction by debtors who choose relief under "the wrong chapter", *In re Higginbotham*, 111 B.R. 955, 961-964 (B.C., N.D.Okl.1990).

As later affirmed by the Bankruptcy Appellate Panel, "the dismissal power under *§707(b)* is not essentially different from the established power of a bankruptcy court to dismiss a petition under any chapter of the Bankruptcy Code that is filed with a lack of good faith or as an abuse of the process under *§§ 105(a)* and *707(a)* of the Code." *In re Stewart*, 215 B.R. 456, 463 (10th Cir. BAP 1997) (citing *In re Keniston*, 85 B.R. 202, 222-223 (Bankr.D.N.H. 1988)). The Bankruptcy Appellate Panel further explained that "*§707(b)* **neither requires nor prevents dismissal of business debtor's cases for abuse**, and bankruptcy courts have long had the power and duty to prevent abuse of their jurisdiction by debtors who choose relief under 'the wrong chapter.'" (citing *In re Stewart*, 204 BR at 782). [*emphasis added*]

As later affirmed again by the Tenth Circuit Court of Appeals, *In re Stewart*, 175 F.3d 796, 813 (10th Cir. 1999):

> As the bankruptcy court aptly noted, *§707(b)* was not enacted to narrow and discourage court review of abuse cases to those involving consumer debt, but to broaden and encourage such review in light of the fact many bankruptcy courts were not dismissing abusive consumer petitions. *Stewart II*, 204 B.R. at 781-82.

Moreover, most courts apply a "totality of the circumstances" approach, recognizing that the debtor's ability to repay his debts is a primary factor. *In re Stewart*, 175 F.3d at 809. Here in this case, Hecker easily could have repaid all of his business debts, simply by ceasing the operation of his own law practice.

As to the duties specified in *§704(b)*, the United States Trustee delegated to Atkinson the statutory duty to review "all materials filed by the debtor", which was clearly a statutory duty that Atkinson had failed to perform. For instance, Atkinson

failed to detect the absence of the required detailed statement for Hecker's purported business expenses. Also, the lower courts have both stated that there was only one creditor listed in the notice matrix, while Hecker's amended schedules had shown 19 total creditors. Thus, if Atkinson had taken even just a quick glance at Hecker's paperwork, these obvious defects would have been caught. The only logical conclusion is that Atkinson never even bothered to look at Hecker's paperwork at all. This was gross negligence, not just a simple oversight or mistake.

But when the Bankruptcy Court denied my motion for reconsideration, it referenced "Paragraph 6 through 16" of Atkinson's Mar 19, 2020 certification in opposition to my initial motion, and then stated an incorrect finding of fact that: "Clearly, Atkinson reviews the materials submitted by the debtor. He could not conduct a 341 hearing without doing so." (2T18:1 – 18:8). However this factual finding was irrefutably wrong, as Atkinson's Mar 19, 2020 certification undeniably speaks for itself. (ECF No. 41). That is, the Bankruptcy Court had essentially put words into Atkinson's mouth that were contrary to what Atkinson had actually said repeatedly.

In essence, Atkinson's actual statements (i.e. made within paragraphs 6 through 16 of his Mar 19, 2020 certification) is that all he does, as his standard practice, is to ask questions of the debtor. And he also stated, in paragraph 13, that the only document that he requests prior to the *§341* meeting is a copy of the debtor's tax return, and if they don't give him a copy beforehand, he'll ask for it at the meeting, and if they still don't have it at the meeting, he allows them an extra week to send it to him. He repeatedly stated that's the only document that he will review. (ECF No. 41, pages 4-5).

Thus, I had attempted to bring this blatant error to the Bankruptcy Court's attention, but my efforts proved to be futile. (2T18:9 – 18:17)

Moreover, Atkinson stated in paragraph 16: "D'Agostino claims on page 7 of his reply brief that there is no dispute that I failed to check the schedules for accuracy, or that I failed to investigate Hecker's 'purported lack of assets'. This mere statement is contrary to what I do in all Chapter 7 cases as my standard procedure." (ECF No. 41, page 5)

Here, Atkinson is expressly stating that checking a debtor's schedules for accuracy, and/or investigating a debtor's purported lack of assets, is contrary to what he does in all Chapter 7 cases as his standard procedure. And again during the Mar 24, 2020 oral argument, Atkinson stated that checking the debtor's materials for deficiencies was the job of the clerk's office (and/or the U.S. Trustee). For example, Atkinson had said: "... the procedure in New Jersey has always been that when the debtor files a petition, **it is reviewed by the clerk's office**, and if there are any deficiencies, the clerk gives them notice ... in most districts, the clerk of the Bankruptcy Court, the United States Trustee and Trustees have developed systems for monitoring submissions of all of the above-referenced documents in taking action in the event of noncompliance. Well, that's the system that was involved in New Jersey, certainly in 2010 when Mr. Hecker filed his bankruptcy petition. **The clerk is the one who** sent out notices of deficiency and **reviewed it.**" [*emphasis added*] (1T6:1-15)

Moreover, even in Aktinson's District Court Appellee brief, **noticeably absent** from his description about what he does as a Chapter 7 trustee, **is any mention about**

reviewing the debtor's schedules. (20-6330-FLW, ECF No. 14, pages 10 and 11). Only in his impermissible Apr 30, 2020 sur-reply brief for my Bankruptcy Court motion for reconsideration (which the Bankruptcy Court should not have even considered), only then did Atkinson attempt to completely change his story, therein stating that he does review all of the debtor's materials prior to the *§341a* meeting. (ECF No. 56) But this was exactly opposite to all of his other previous statements, as well as contrary to his subsequent statements in his District Court Appellee brief, wherein he states that all he does is ask the debtor some questions at the *§341* meeting, and the only document he reviews is a copy of the debtor's tax return.

There is no valid dispute that Atkinson needed to review Hecker's materials to see if they seemed subjectively reasonable and legitimate; and it would have been impossible to properly perform that task without noticing Hecker's blatant omissions. As recently opined by the Bankruptcy Court of the Eastern District of Michigan:

In re Barman, 252 B.R. 403, 416 (ED Michigan 2000):

> (a) The Interests of the Trustee and the Public
> Experience demonstrates that in carrying out the trustee's obligations under the Bankruptcy Code, the trustee may need to inspect a debtor's residence for property of the estate. This need may arise from the trustee's general statutory obligation to marshal and account for all property of the estate. *11 U.S.C. § 704*; *Midway Airlines, Inc. v. Northwest Airlines, Inc. (In re Midway Airlines Inc.)*, 154 B.R. 248, 256 (N.D.Ill.1993). More particularly, such a need may arise when, as here, the trustee has reason to believe that there are undisclosed assets to be administered for the benefit of the estate. See *In re Washington*, 232 B.R. 814, 815 (Bankr. S.D.Fla.1999). This need may also arise when the trustee seeks to meet his burden of proof in objecting to the debtor's discharge or the debtor's exemptions. *11 U.S.C. § 704(6)*. See, e.g., *In re Gaines*, 106 B.R. 1008, 1013 (Bankr.W.D.Mo.1989), rev'd on other grounds, 121 B.R. 1015 (W.D.Mo.1990). See also *Payne v. Wood*, 775 F.2d 202, 206 (7th Cir.1985) ("The requirement that the debtor list the property serves at least two functions. One is to settle claims of title, so that on the day of discharge everyone knows who owns what. The other is to allow the trustee to decide which claims to challenge."); *Andermahr v. Barrus (In re Andermahr)*, 30 B.R. 532, 533 (9th Cir. BAP 1983)

The *Barman* Court further held that: "it must be recognized that [d]ebtors are not perfectly trustworthy." (citing *Payne v. Wood*, 775 F.2d 202, 206 (7th Cir.1985)).

Also during the Mar 24, 2020 oral argument, Atkinson stated that it was not his job to look at the notice matrix (1T5:15 – 5:18). And then even further, in Atkinson's Apr 23, 2020 letter-brief opposing my motion for reconsideration, Atkinson therein reiterated what was stated within his Mar 19, 2020 certification. (ECF No. 54) He then further added that the task of ensuring notice to the creditors was the job of the debtor and/or debtor's attorney. (ECF No. 54, page 10)

Moreover, even assuming arguendo if had Atkinson had **consistently** stated that he did review all of Hecker's paperwork prior to the *341* meeting - which he certainly had not so stated – even in that hypothetical scenario, such statements would not be dispositive. Undoubtedly this was error, as otherwise every defendant in every case could immediately end the litigation, just by simply denying the allegations.

Further still, it was not necessary for me to prove Atkinson's liability to the Bankruptcy Court in order for it to grant permission to proceed with my state court claims against Atkinson. Instead, I only needed to make a prima facie showing that the State Court could find liability on Atkinson's part. I have more than sufficiently met the "rather minimal" burden of showing that my claims against Atkinson are "not without foundation". See *In re Brownsville Prop. Corp., Inc.*, 473 B.R. 89, 92 (Bankr.W.D.Pa.2012), where the Bankruptcy Court of the Western District of Pennsylvania had no trouble concluding that the Plaintiff had met that "rather minimal" *VistaCare* standard of making out a prima facie case against the Defendants by showing

that its claim is "not without foundation." (citing to *In re VistaCare Group, L.L.C.*, 678 F.3d 218, 232 (3d Cir.2012)).

Clearly Atkinson's statutory duties included those that are set forth in *11 U.S.C. § 704*, and undeniably Atkinson failed to perform these statutory duties. Thus, I respectfully submit that it was error for the Bankruptcy court and the District Court to find that Atkinson had not breached any of his statutory duties.[4]

3) There is sufficient circumstantial evidence of a conflict of interest to grant *Barton* permission.

(RAISED BELOW: ECF Nos. 37, 40, 41, 42, 43, 47, 48, 53, 54, 55, 56, 57, 77 and 78; and on appeal, 20-6330-FLW ECF Nos. 7, 14, 15, 16, 17, 19, 20, and 21).[1]

Circumstantial evidence of Atkinson's conflict of interest. In my Mar 19, 2020 reply brief to Atkinson's opposition, I alerted the Bankruptcy Court to circumstantial evidence of a conflict of interest with Atkinson having served as the Chapter 7 trustee for Hecker's bankruptcy (i.e. that Hecker and Atkinson were acquaintances from the MBA, where they had each participated in various social functions and events). (ECF No. 42). Atkinson then denied this within his impermissible sur-reply. (ECF No. 41). Curiously, the Bankruptcy Court did not address this issue one way or the other within its rulings.

[4] The Bankruptcy court also seemed to suggest that even a breach of a statutory duty may not necessarily allow for *Barton* permission. That is, the Bankruptcy court opined: "If he had been able to show that Atkinson failed to perform statutory duties, it would have gone a long way to proving that Atkinson acted unreasonably or irresponsibly." (2T16:1-4)

However the issue **was addressed** by the District Court in its rulings on my motion for reconsideration, wherein I had recently then found additional circumstantial evidence of Atkinson's conflict of interest. In denying my motion for reconsideration, the District Court held:

> ... the Court does not find that [the circumstantial evidence] would alter the outcome of Plaintiff's appeal. Indeed, Atkinson certifies that he never met Hecker, personally or professionally, prior to the Section 341(a) meeting, that he never socialized with Hecker at any MBA function or event, and that contrary to D'Agostino's assertion, he never served as an officer or President of the MBA. (Certification of Bunce Atkinson, Esq. in Opposition to Motion for Reconsideration, ¶¶ 7, 9, 10, 15.) Rather, Atkinson explains that in 2019, two years after Hecker's death, he was elected to a three-year term as a MBA Trustee; however, he resigned as a Trustee in April 2020. (Id. at ¶ 10.) Put simply, I find that the supposed "new evidence" merely demonstrates that Hecker and Atkinson were members of the same professional organization for a finite period of time. None of the evidence provided by D'Agostino, however, demonstrates a direct personal or professional connection between Hecker and Atkinson. But, more importantly, **even if Atkinson had a personal relationship with Hecker, D'Agostino has presented no evidence that Atkinson had a conflict of interest because of the relationship** or that Atkinson did in fact assist Hecker in carrying out any alleged fraudulent scheme. Rather, it is all based on D'Agostino's unsupported speculations. (20-6330-FLW, ECF No. 21, pages 9-10) [*emphasis added*]

As to this issue, I respectfully submit that the District Court erred in several ways.

First, it seems that the District Court had relied upon Atkinson's denials as being dispositive on the issue. As argued in a preceding point heading, this undoubtedly was error - as otherwise every defendant in every case could immediately end the litigation, just by simply denying the allegations.

Second, it seems that the District Court ruled that my circumstantial evidence of the relationship between Hecker and Atkinson was insufficient proof of a conflict of interest. This too was error because: A) proving the allegations is not a prerequisite to

obtaining *Barton* permission; and B) even assuming arguendo if it had been necessary to do so at that stage, "in any lawsuit, the plaintiff may prove his case by direct or circumstantial evidence". *Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, n.3 (1983) Thus it was error for the District Court to completely discount the circumstantial evidence of the relationship between Hecker and Atkinson.

Third, any relationship, in and of itself, created a clear violation of law. The District Court had ruled that: "even if Atkinson had a personal relationship with Hecker, D'Agostino has presented no evidence that Atkinson had a conflict of interest because of the relationship". However this ruling is at odds with *28 C.F.R. § 58.3(b)(4)*, which provides that a panel trustee must: "**Be free of prejudices** against any individual, entity, or group of individuals or entities **which would interfere with unbiased performance of a trustee's duties.**" [*emphasis added*]

4) Atkinson's failures caused deprivation of my constitutional and statutory rights, resulting in my loss of over $300,000

Atkinson had argued that his conduct did not result in the deprivation of my constitutional and/or statutory rights. The Bankruptcy Court held that Atkinson's failures were not the cause of my being deprived of these rights (i.e. instead attributing the cause to the debtor). (ECF No. 48, pages 7 and 8). The District Court did not make any rulings on this issue, and instead had only noted the Bankruptcy Court's finding.

However I respectfully submit that this was error. Based upon the foregoing arguments, fault did lie with Atkinson. This undisputedly resulted in my being deprived the aforementioned rights. I ask this Court to consider just two (2) examples.

For one, when Hecker filed his motion to reinstate his dismissed bankruptcy petition, I was not notified or served. Thus I was deprived my constitutional 14th Amendment due process right of having a "meaningful opportunity to be heard" in that judicial proceeding. *Boddie* v. *Connecticut*, 401 U.S. 371, 379 (1971) (holding that inadequate notice of judicial proceedings deprives litigants of this 14th Amendment due process right).

Secondly, without being given notice of the *§341* meeting, I was deprived my statutory right to participate in that hearing, where I not only had the right to ask Hecker questions, but further where I had the right to make sure that both Atkinson and the U.S. Trustee where aware of Hecker's disciplinary history of hiding his assets to thwart his judgment creditors. (See e.g. *Matter of Hecker, 109 N.J. 539, 542-548 (1988)*) And as I had set forth extensively in the original record of both of the lower courts, these failures resulted in Hecker being able to hide over $300,000 worth of his assets out of my reach, and those then-hidden assets are now long-since gone.

Thus, based upon the foregoing, I ask this Court to reverse the rulings of the lower courts and allow me the *Barton* permission I seek. Thank you.

Respectfully submitted,

Steven D'Agostino

Steven D'Agostino