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OPINION, U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT (JANUARY 3, 2024)

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 24a0003p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE: MEGAN MARIE TETER,

Debtor,

MEGAN MARIE TETER,

Appellant,

v.

RICHARD A. BAUMGART, Chapter 7 Trustee, UNITED STATES TRUSTEE,

Appellee.

No. 22-3778

Appeal from the United States District Court for the Northern District of Ohio at Cleveland; No. 1:21-cv-00334—Bridget Meehan Brennan, District Judge.

United States Bankruptcy Court for the Northern District of Ohio at Cleveland;

No. 1:19-bk-11224—Arthur I. Harris, Bankruptcy Judge.

Argued: June 13, 2023

Decided and Filed: January 3, 2024

Before: GILMAN, BUSH, and READLER, Circuit Judges.

COUNSEL

ARGUED: Susan M. Gray, SUSAN M. GRAY LAW, Rocky River, Ohio, for Appellant. Jeffrey E. Sandberg, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee. ON BRIEF: Susan M. Gray, SUSAN M. GRAY LAW, Rocky River, Ohio, for Appellant. Jeffrey E. Sandberg, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee.

OPINION

CHAD A. READLER, Circuit Judge. Megan Teter was nearly $100,000 in debt when she declared bankruptcy. Believing that Teter was abusing the bankruptcy system, the United States Trustee intervened and filed a motion to dismiss the case. The Trustee later withdrew his motion, and the bankruptcy court discharged Teter's debt without objection. Teter then sought attorneys' fees from the Trustee through the Equal Access to Justice Act. The bankruptcy court denied her request. On appeal, the district court agreed and affirmed the bankruptcy court. We now do the same.

I

Staring down $96,538.05 in debt, Megan Teter filed for Chapter 7 bankruptcy. Over half of her total debt reflected unpaid student loans. The Bankruptcy Abuse Prevention and Consumer Protection Act, passed in 2005, restricts an individual's ability to discharge consumer debts if the debtor's income exceeds certain thresholds. *See* 11 U.S.C. § 707; *Schultz v. United States*, 529 F.3d 343, 346–47 (6th Cir. 2008). In her Chapter 7 filing, Teter described her unpaid loans as "business debts," meaning they were "not primarily consumer debts." The United States Trustee disagreed. Reviewing Teter's petition in accordance with statutory requirements, the Trustee concluded that Teter's loans were better characterized as "consumer debt." *See* 11 U.S.C. § 704(b) (explaining the duties of a trustee). And after evaluating Teter's monthly income, the Trustee came to the view that Teter was abusing the system and thus filed a motion to dismiss her bankruptcy petition. *See id.* § 707(b) (allowing a bankruptcy court to dismiss, on the Trustee's motion, a case "filed by an individual debtor . . . whose debts are primarily consumer debts" if granting relief under Chapter 7 would be an abuse of the chapter).

Teter contested the Trustee's position through a motion for summary judgment. The bankruptcy court initially declined to grant Teter's motion, believing that more record development was warranted. Teter reiterated her request, citing a desire to have her case resolved quickly in light of family circumstances. Before the bankruptcy court took any further action, the Trustee withdrew his motion, explaining that he had "become aware of certain facts and circumstances which render the Motion unwarranted."

Claiming victory, Teter sought attorneys' fees from the Trustee under the Equal Access to Justice Act, or EAJA. *See* 94 Stat. 2321, 2325 (1980); 28 U.S.C. § 2412. The bankruptcy court, however, declined to award them. Teter appealed that decision to the district court, which, following its review, affirmed the bankruptcy court. The case is now before us following Teter's timely notice of appeal.

II

Today's case involves a request for attorneys' fees under the EAJA during a bankruptcy proceeding. The EAJA empowers "a court" to award prevailing parties fees and costs incurred "in any civil action" that is "brought by or against the United States in any court having jurisdiction of that action." 28 U.S.C. § 2412(d)(1)(A). By way of background, in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (plurality op.), the Supreme Court struck down parts of the then-existing bankruptcy system. Congress responded by erecting the system that remains in place today. *See Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 669–71 (2015) (discussing historical amendments to the bankruptcy system). In this modern regime, bankruptcy courts are officers of the district courts, meaning the former can adjudicate certain cases that are referred to those courts. *Id.* at 670. When that happens, the bankruptcy court's "statutory authority depends on whether Congress has classified the matter as a 'core proceeding' or a 'non-core proceeding.'" *Id.* (alterations adopted) (quoting 28 U.S.C. §§ 157(b)(2), (b)(4)). A core proceeding is "one that either invokes a substantive right created by federal bankruptcy law or one which could not exist out-

side of the bankruptcy." *In re Bavelis*, 773 F.3d 148, 156 (6th Cir. 2014) (cleaned up). Congress has provided a non-exhaustive list of examples. *See* 28 U.S.C. § 157(b)(2). Non-core proceedings, conversely, include causes of action that (1) are not identified in § 157(b)(2), (2) existed before the filing of the bankruptcy case, (3) would exist independent of the Bankruptcy Code, or (4) are not significantly affected by the filing of the bankruptcy petition. *Bavelis*, 773 F.3d at 156. For core proceedings, "Congress gave bankruptcy courts the power to 'hear and determine' core proceedings and to 'enter appropriate orders and judgments,' subject to appellate review by the district court." *Wellness Int'l*, 575 U.S. at 670 (citing 28 U.S.C. § 157(b)). For non-core proceedings, on the other hand, a bankruptcy court enjoys authority over the matter only to the extent that the parties consent to the court's jurisdiction. *Id.* at 671 (citing 28 U.S.C. § 157(c)(2)).

How do attorneys' fees requests under the EAJA fare in this dichotomy? The federal courts are not of one mind. Some describe EAJA fees requests as core proceedings, while others treat them as non-core proceedings. *Compare* Dist. Ct. Op., R.12, PageID#315 ("Other courts have held that a fee motion related to and arising from a core proceeding is itself considered a core proceeding." (citing *In re Mendez*, No. 7-07-11092 SA, 2008 WL 5157922, at *5 n.1 (Bankr. D.N.M. Sept. 26, 2008), and *In re Chambers*, 140 B.R. 233, 238 (N.D. Ill. 1992))), *with In re Davis*, 899 F.2d 1136, 1140 (11th Cir. 1990) ("While the Trustee's underlying action in this case was a core proceeding, his application for EAJA fees clearly is not." (internal citation omitted)). Were we to agree with those courts that

treat the issue as a core proceeding, the bankruptcy court fairly asserted jurisdiction. *Wellness Int'l*, 575 U.S. at 670; 28 U.S.C. § 157(b). But we would say the same in this instance even if we were to treat the matter as a non-core proceeding.

That is because no party objected to the bankruptcy court's jurisdiction. Teter consented to the bankruptcy court's adjudication of her fees request by filing her motion with that court. In response, the Trustee has never argued that the bankruptcy court lacked jurisdiction to assess such fees. True, parties ordinarily cannot waive federal jurisdictional defects. *See Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006). But things work slightly differently in bankruptcy court. *See Wellness Int'l*, 575 U.S. at 683–84. For non-core proceedings, again, bankruptcy courts have jurisdiction only where the parties have so consented. But "[n]othing in the Constitution requires that consent to adjudication by a bankruptcy court be express." *Id.* at 683. And by continuing to litigate Teter's EAJA request without objection, the Trustee in effect consented to the bankruptcy court's handling of the matter, making it a valid exercise of that court's jurisdiction.

With the bankruptcy court's jurisdiction being sound, so too was the district court's. The district court had appellate jurisdiction over "final judgments, orders, and decrees" of the bankruptcy court under 28 U.S.C. § 158(a). That includes all orders that "finally dispose of discrete disputes within the larger case." *Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co.*, 547 U.S. 651, 657 n.3 (2006) (emphasis omitted). Denying a party's request for fees does just that. We, in turn, have appellate jurisdiction over the district court's appellate judgments under 28 U.S.C. § 158(d).

III

A. That takes us to the merits of Teter's claim for attorneys' fees. As a background principle, we note that a "hallmark of the American judicial system is the practice of parties to a lawsuit bearing their own attorney's fees and costs." *Betancourt v. Indian Hills Plaza LLC*, 87 F.4th 828, 830 (6th Cir. 2023) (citation omitted). Congress, however, may alter "that traditional practice by statute." *Id.* It did so in the EAJA. There, Congress authorized federal courts to award prevailing parties fees and costs incurred "in any civil action" that is "brought by or against the United States in any court having jurisdiction of that action." 28 U.S.C. § 2412(d)(1)(A).

Among other things, then, as a threshold to recovering fees, Teter must demonstrate that the Trustee's motion to dismiss in the bankruptcy court unambiguously constituted a "civil action" under the EAJA. The bankruptcy court held that it did not, as did the district court. Noting that harmony, it nonetheless remains the case that in bankruptcy appeals, we "directly review the bankruptcy court's decision." *In re Purdy*, 870 F.3d 436, 442 (6th Cir. 2017) (citation omitted). We do so by examining its factual findings under the clear error standard and its legal conclusions de novo. *Id.*

Our inquiry here is limited. At Teter's direction, we examine whether the EAJA's "civil action" requirement has been satisfied in a very specific context: a motion to dismiss a bankruptcy case filed by the United States Trustee in accordance with 11 U.S.C. § 707(b). Whether, for example, a bankruptcy case itself constitutes a civil action for purposes of the

EAJA is not a point pressed by Teter. *Cf. In re Sisk*, 973 F.3d 945, 947 (9th Cir. 2020) ("[U]ncontested bankruptcy cases do not clearly constitute civil action[s] brought by or against the United States within the meaning of the EAJA." (citation and quotation marks omitted)).

Our analysis is informed by principles of sovereign immunity. In "render[ing] the United States liable for attorney's fees for which it would not otherwise be liable," the EAJA "amounts to a partial waiver of sovereign immunity." *Ardestani v. INS*, 502 U.S. 129, 137 (1991). Although the EAJA waives sovereign immunity in some respects, such waivers "must be strictly construed in favor of the United States." *Id.* To honor that understanding, we read any textual ambiguity in favor of immunity, because "the Government's consent to be sued is never enlarged beyond what a fair reading of the text requires." *FAA v. Cooper*, 566 U.S. 284, 290 (2012). And, in the end, we agree with the bankruptcy court that the EAJA could be read to exclude § 707(b) motions to dismiss, leaving fees unavailable to a party like Teter.

One such reading turns on a straightforward understanding of the Federal Rules of Civil Procedure. Since their promulgation in 1937, there has been "one form of action—the civil action." Fed. R. Civ. P. 2. In the realm of federal civil litigation, enactment of Federal Rule of Civil Procedure 2 was a watershed event. It marked an "abolition of forms of action and procedural distinctions" in favor of "a single action and mode of procedure." Fed. R. Civ. P. 2 advisory committee's note 3 to 1937 adoption. Today, "[a] civil action is commenced by filing a complaint with the court." Fed. R. Civ. P. 3. And once commenced, the

case proceeds according to the guiding hand of the Federal Rules of Civil Procedure. *See, e.g.*, Fed. R. Civ. P. 8 (general pleading rules); Fed. R. Civ. P. 26 (discovery proceedings); Fed. R. Civ. P. 38 (procedures for demanding a jury trial).

The edition of Black's Law Dictionary in print when the EAJA was enacted is in accord with this contemporary understanding of a civil action. *Civil Action*, Black's Law Dictionary (5th ed. 1979) (noting that civil actions encompass the old categories of actions at law and suits in equity). By and large, it defines a "civil action" as an "[a]ction brought to enforce, redress, or protect private rights," which generally includes "all types of actions other than criminal proceedings." *Id.* This definition is perhaps capacious. But "action" is a generous term; its "usual legal sense means a suit brought in a court; a formal complaint within the jurisdiction of a court of law." *Action*, Black's Law Dictionary (5th ed. 1979). And with respect to a federal civil action in particular, the manner of "action" at issue here, Black's understanding parrots that of Federal Rule of Civil Procedure 3: "a civil action is commenced by filing a complaint with the court." *Bring Suit*, Black's Law Dictionary (5th ed. 1979); *see also* Fed. R. Civ. P. 3. Other entries of this nature are to the same effect. *See, e.g.*, *Controversy*, Black's Law Dictionary (5th ed. 1979) ("adversary proceeding in a court of law; a civil action or suit"); *Plaintiff*, Black's Law Dictionary (5th ed. 1979) ("the party who complains or sues in a personal action and is so named on the record"). All share the understanding that the invocation of a civil action turns on the filing of a complaint. As neither Teeter nor the

Trustee filed a complaint, it is difficult to believe that this proceeding is the kind to which the EAJA applies.

Seeing things otherwise, Teter contends that a motion to dismiss should be treated as a civil action. For Teter to overcome the shield of sovereign immunity, however, she must show that Congress unambiguously intended to allow bankruptcy petitioners to recover attorneys' fees under the EAJA after successfully defending against the Trustee's motion to dismiss. *See Cooper*, 566 U.S. at 290. She has not done so, in light of the above.

And truth be told, Teter's interpretation of the EAJA is the less convincing one. After all, if she is correct that a motion to dismiss amounts to a separate civil action, a party in the district court could claim entitlement to EAJA fees for doing no more than simply defeating a Rule 12(b)(6) motion. That understanding is not only at odds with Rules 2 and 3, but is also in tension with the understanding that the "EAJA—like other fee-shifting statutes—favors treating a case as an inclusive whole rather than as atomized line-items." *See Comm'r v. Jean*, 496 U.S. 154, 161–62 (1990) ("Any given civil action can have numerous phases."). To that end, Teter has not offered any examples of a federal court explicitly stating that a motion to dismiss (of any kind) is its own civil action. Nor would we anticipate as much. Motions to dismiss are widely perceived as tools to resolve, in whole or in part, the civil actions of which they are a part. *See, e.g.*, *Banister v. Davis*, 140 S. Ct. 1698, 1715 (2020) (Alito, J., dissenting) (describing motions to dismiss as part of the "civil action procedural sequencing"). Think of its filing as tantamount to an act in a play,

be it a one-act production, should the motion succeed, or a longer running performance, should it not.

We see no reason why motions to dismiss in bankruptcy proceedings buck this general understanding. Teter notes two cases that seem to assume the EAJA applies in bankruptcy court when a debtor prevails over a trustee's motion to dismiss. *See In re Terrill*, No. 05-87180-BJH-7, 2006 WL 2385236 (Bankr. N.D. Tex. July 27, 2006) (assuming, without explaining, that EAJA fees are available in a bankruptcy case after defeating a § 707(b) motion and receiving a discharge); *In re Mendez*, No. 7-07-11092, 2008 WL 5157922 (Bankr. D.N.M. Sept. 26, 2008) (same). But those cases offer no analysis on the point. Attempting to fill in the gaps, Teter directs us to Bankruptcy Rule 9002. It instructs bankruptcy courts to use the Federal Rules of Civil Procedure in any "adversary proceeding, or when appropriate, a contested petition, or proceedings to vacate an order for relief or to determine any other contested matter" within the bankruptcy rules. Teter describes Rule 9002 as defining the term "civil action" to include contested matters like a § 707(b) motion. But Rule 9002, remember, provides a definition for the bankruptcy rules, not the EAJA. And the bankruptcy rules cannot implicitly expand the scope of a congressionally enacted statute. *Cf.* 9 *Collier on Bankruptcy* ¶ 1001.01 (2023) (noting that the bankruptcy rules "may not abridge, enlarge, or modify any substantive right"). At day's end, if there is something special about bankruptcy motions to dismiss that makes them civil actions, Congress did not make that sufficiently clear.

Further complicating Teter's position is the fact that the EAJA requires fee applications to be filed

"within thirty days of final judgment in the action." 28 U.S.C. § 2412(d)(1)(B). Denials of motions to dismiss bankruptcy petitions, however, are not considered final judgments. *In re Amir*, 436 B.R. 1, 8 (6th Cir. B.A.P. 2010). Teter's reading of the law thus leaves the EAJA's deadlines unmoored from the action that entitles one to attorneys' fees. Again, we doubt this is what Congress had in mind in enacting the EAJA.

All things considered, it is at the very least plausible to conclude that a § 707(b) motion to dismiss does not initiate its own civil action. The absence of an express waiver by Congress of sovereign immunity therefore bars us from lifting the veil of immunity protecting the United States Trustee. Accordingly, Teter is unable to avail herself of the EAJA. *See Ardestani*, 502 U.S. at 137.

B. We note another potential hurdle for Teter in seeking fees under the EAJA. The statute allows courts to award fees only when not "expressly prohibited by statute" and "[e]xcept as otherwise specifically provided by statute." 28 U.S.C. § 2412(b) & (d); *cf. EEOC v. Consol. Serv. Sys.*, 30 F.3d 58, 59 (7th Cir. 1994) ("[T]he [EAJA] provides . . . that nothing in it alters any other provision of Federal law that authorizes an award of attorney's fees to a prevailing party in a suit by or against the United States." (cleaned up)). This might mean that the EAJA takes a back seat when fees are sought for § 707(b) motions. Recall that § 707(b)(5)(A) allows the bankruptcy court, "on its own initiative or on the motion of a party in interest, in accordance with the procedures described in rule 9011 of the [Federal Rules of Bankruptcy Procedure]," to "award a debtor all reasonable costs (including reasonable attorneys' fees) in contesting a

motion filed by a party in interest (other than a trustee or United States trustee)." Read together, these statutes might suggest that the Bankruptcy Code is the arbiter of when parties are entitled to attorneys' fees in bankruptcy proceedings, leaving the EAJA no seat at the bankruptcy table. If so, § 707(b)(5)(A)'s prohibition against fee awards related to contesting a motion by the trustee would seem to foreclose Teter's request here. But this argument is relatively underdeveloped by the parties, and Teter's request otherwise fails. Accordingly, we flag the issue for future cases, but we do not reach it today.

IV

Finally, Teter argues that the district court violated Bankruptcy Rule 8019 when it denied her the opportunity to present an oral argument without making the threshold "necessary findings that oral argument was unnecessary." The Rule in question instructs that "[o]ral argument must be allowed in every case unless the district judge . . . examine[s] the briefs and record and determine[s] that oral argument is unnecessary because . . . the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument." Fed. R. Bankr. P. 8019(b). Teter's reading of the Rule has many flaws.

One, Rule 8019 does not explicitly require an express finding of why oral argument will not take place, nor does Teter identify binding authority to that effect. Two, Teter identifies no substantive aspect of her case that would have taken on new life during oral argument, instead relying on general platitudes that "the facts and law relied upon in the Appellate brief

were not clear to the District Court." And three, it bears reminding that we are reviewing the bankruptcy court's decision, not that of the district court. Oral argument or not, what happened in the district court typically does not affect our review of the bankruptcy court's order and judgment. *See In re Kelley*, 703 F. App'x 668, 672 (10th Cir. 2017) ("Mr. Kelley first contends the [bankruptcy appellate panel] violated his due process rights by holding oral argument without him. Given our independent review of the bankruptcy court's decisions, we need not address this argument because the [panel]'s procedural ruling has no impact on the outcome of this case."). In short, Teter is not entitled to relief on this ground either.

* * * * *

We affirm the judgment of the bankruptcy court.

JUDGMENT, U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT (JANUARY 3, 2024)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE: MEGAN MARIE TETER,

Debtor,

MEGAN MARIE TETER,

Appellant,

v.

RICHARD A. BAUMGART, Chapter 7 Trustee, UNITED STATES TRUSTEE,

Appellee.

No. 22-3778

On Appeal from the United States District Court for the Northern District of Ohio at Cleveland.

Before: GILMAN, BUSH, and READLER, Circuit Judges.

JUDGMENT

THIS CAUSE was heard on the records from the district court and the bankruptcy court and was argued by counsel.

IN CONSIDERATION THEREOF, it is ORDERED that the judgment of the bankruptcy court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/ Kelly L. Stephens
Clerk

FINAL JUDGMENT ENTRY, U.S. DISTRICT COURT NORTHERN DISTRICT OF OHIO (AUGUST 15, 2022)

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF OHIO EASTERN DIVISION

IN RE: MEGAN MARIE TETER,

Debtor,

MEGAN MARIE TETER,

Appellant,

v.

UNITED STATES TRUSTEE,

Appellee.

Case No. 1:21-cv-00334

Appeal from No. 19-11224
U.S. Bankruptcy Court
Northern District of Ohio, Eastern Div.
Hon. Arthur I. Harris, presiding

Before: Bridget M. Brennan
United States District Judge.

FINAL JUDGMENT ENTRY

For the reasons set forth in the contemporaneously filed Memorandum of Opinion and Order, the

decision of the United States Bankruptcy Court for the Northern District of Ohio, No. 19-11224, entered on January 27, 2021 [Docket No. 85] is AFFIRMED.

This case is hereby dismissed and closed.

IT IS SO ORDERED.

/s/ Bridget M. Brennan
United States District Judge

Date: August 15, 2022

MEMORANDUM OPINION, U.S DISTRICT COURT NORTHERN DISTRICT OF OHIO (AUGUST 15, 2022)

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF OHIO EASTERN DIVISION

IN RE: MEGAN MARIE TETER,

Debtor,

MEGAN MARIE TETER,

Appellant,

v.

UNITED STATES TRUSTEE,

Appellee.

Case No. 1:21-cv-00334

Appeal from No. 19-11224
U.S. Bankruptcy Court
Northern District of Ohio, Eastern Div.
Hon. Arthur I. Harris, presiding

Before: Bridget M. Brennan
United States District Judge.

MEMORANDUM OF OPINION AND ORDER

The Equal Access to Justice Act, 28 U.S.C. § 2412 ("EAJA") permits a prevailing party in a civil action

either brought by or brought against the United States (or agency or official thereof) to file a motion for costs and attorneys' fees under specified circumstances. Debtor-Appellant is a chapter 7 bankruptcy debtor. The U.S. Trustee filed — and later withdrew upon receiving new information and before any court ruling — a motion to dismiss the bankruptcy case pursuant to 11 U.S.C. § 707(b). Debtor-Appellant then filed a motion for attorneys' fees under the EAJA.

The Bankruptcy Court granted the Debtor-Appellant a discharge order pursuant to 11 U.S.C. § 727. But the Bankruptcy Court denied the EAJA fee motion on legal grounds, noting the dearth of case law on the specific issues involved:

> Unfortunately, despite the passage of forty years, there appear to be no published cases from the Sixth Circuit or other courts of appeals that have analyzed whether bankruptcy cases or disputes within bankruptcy cases other than adversary proceedings fall within the scope of the term 'civil action' under the EAJA, let alone do so under the Supreme Court's framework for delineating the scope of waivers of sovereign immunity.

In re Teter, No. 19-11224, 2021 WL 371750, at *7 (Bankr. N.D. Ohio Jan. 25, 2021).

> And, if a reviewing court were to find that the debtor is in fact a 'prevailing party' in a 'civil action' for purposes of the EAJA, this Court would certainly benefit from any guidance (1) delineating the applicable 'civil action,' and (2) explaining what is necessary

> to be a 'prevailing party' in the context of bankruptcy cases or contested matters.

Id. at *22.

Debtor-Appellant filed an appeal from the denial of her EAJA fee motion to this Court, and both sides seek similar clarification. This Court AFFIRMS the decision below and answers the questions of law raised by the parties.

Issues on Appeal

1. Does the EAJA apply to this chapter 7 bankruptcy case with a § 707(b) motion to dismiss filed by the U.S. Trustee?

   a. Was this a 'civil action brought by or against the United States' or its officers acting in their official capacity?

   b. Does the attorneys' fees recovery clause in § 707(b)(5) preclude the debtor's reliance upon the more general EAJA?

2. Was the debtor a prevailing party for purposes of the EAJA?

Jurisdiction & Standard of Review

This Court has jurisdiction over appeals from final orders of the Bankruptcy Court in core proceedings. 28 U.S.C. §§ 157(b)(1) and 158(a)(1); *In re H.J. Scheirich Co.*, 982 F.2d 945, 949 (6th Cir. 1993).

> Under 28 U.S.C. § 157(b)(1), bankruptcy judges may hear and determine core proceedings arising under the bankruptcy code and may enter orders and judgments in those proceedings. Core proceedings are

> defined in a non-exclusive list at section 157 (b)(2). The significance of whether a proceeding is core or non-core is that the bankruptcy judge may hear non-core proceedings related to bankruptcy cases but cannot enter judgments and orders without consent of all parties to the proceeding. *See* § 157(c).

In re G.A.D., Inc., 340 F.3d 331, 336 (6th Cir. 2003) (citations and quotations omitted).

The matter under review was a core proceeding for one or more of the following reasons. *See generally Sanders Confectionery Prod., Inc. v. Heller Fin., Inc.*, 973 F.2d 474, 483 (6th Cir. 1992) (noting that a court "looks at both the form and the substance of the proceeding in making its determination" of core or non-core). First, the matter below concerned the administration of the estate. 28 U.S.C.A. § 157(b)(2)(A). The § 707(b) motion to dismiss related to whether the Debtor accurately described property of the estate, income, and financial obligations. Second, the matter affected the liquidation of the assets of the estate. *Id.* § 157(b)(2)(O). If the § 707(b) motion was granted, then the bankruptcy case would cease to exist, property would return to the debtor, and no discharge of debts against that property would be discharged. Third, the EAJA fee motion matter arose from and is based upon a § 707(b) motion to dismiss that was filed and withdrawn. The contested matter raised by the § 707(b) motion was a core proceeding. *See* 28 U.S.C.A. § 157(b)(2)(A, I, J, O). Other courts have held that a fee motion related to and arising from a core proceeding is itself considered a core proceeding. *See generally In re Mendez*, No. 7-07-11092 SA, 2008 WL 5157922, at *5 n.1 (Bankr. D. N.M. Sept. 26, 2008) ("A request

for fees arising out of a core proceeding is also a core proceeding."); *In re Chambers*, 140 B.R. 233, 238 (N.D. Ill. 1992).

A district court reviewing a bankruptcy court's decision in a core proceeding functions as an appellate court, applying the standards of review normally applied by federal appellate courts. *H.J. Scheirich*, 982 F.2d at 949; *In re Dow Corning Corp.*, 255 B.R. 445, 463 (E.D. Mich. 2000), *aff'd and remanded*, 280 F.3d 648 (6th Cir. 2002).

"The district court reviews the bankruptcy court's legal conclusions *de novo*." *In re Batie*, 995 F.2d 85, 88 (6th Cir. 1993); *see also In re Dudley*, 614 B.R. 277, 280 (S.D. Ohio 2020) ("Questions of statutory construction are reviewed de novo."). This Court "may affirm for any reason presented in the record, even if the reason was not raised below." *Loftis v. United Parcel Serv., Inc.*, 342 F.3d 509, 514 (6th Cir. 2003); *see also Stein v. Regions Morgan Keegan Select High Income Fund, Inc.*, 821 F.3d 780, 786 (6th Cir. 2016)*; U.S. Postal Serv. v. Nat'l Ass'n of Letter Carrier, AFL–CIO*, 330 F.3d 747, 750 (6th Cir. 2003). It may be appropriate to consider a new issue on appeal when the issue is one of law, and further development of the record is unnecessary. *See generally Lockhart v. Napolitano*, 573 F.3d 251, 261 (6th Cir. 2009) (citing cases).

Facts

Debtor-Appellant Megan M. Teter ("Debtor") filed a voluntary chapter 7 bankruptcy petition on March 7, 2019. In the schedules filed with her petition, Debtor listed student loans among her debts. Debtor claimed that her debts were primarily business debts

and filled out a statement of exemption from presumption of abuse under 11 U.S.C. § 707(b)(2). (Doc. No. 1.)

The U.S. Trustee must review all materials filed by chapter 7 debtors who are individuals and file with the court a statement as to whether a debtor's case would be presumed to be an abuse. *See* 11 U.S.C. § 704 (b)(1). The U.S. Trustee must then, within thirty days, either file a motion to dismiss or convert or file a statement setting forth the reasons the U.S. Trustee does not consider such a motion to be appropriate. *See* 11 U.S.C. § 704(b)(2). The U.S. Trustee performs these duties even for cases in which debtors assert that their debts are not primarily consumer debts.

On April 25, 2019, the U.S. Trustee timely filed a statement of presumed abuse. (Doc. Nos. 12-14.) On May 28, 2019, the U.S. Trustee timely filed a motion to dismiss Debtor's case for abuse under § 707(b) of the Bankruptcy Code. (Doc. No. 15.) In the § 707(b) motion, the U.S. Trustee argued that most of Debtor's total debt, including debt from student loans, was "incurred primarily for personal, family, or household purposes." (Doc. No. 15.) *See* 11 U.S.C. § 101(8). The U.S. Trustee also claimed that, based on the U.S Trustee's own calculations, there was a presumption of abuse under § 707(b)(2). (*Id.*) The U.S. Trustee argued that if the contested expenses were adjusted, then Debtor's net monthly income was sufficient to repay her creditors, justifying a dismissal under § 707 (b)(2). (*Id.*) The U.S. Trustee also argued, in the alternative, that the totality of Debtor's circumstances necessitated a dismissal under § 707(b)(3). (*Id.*)

On June 5, 2019, Debtor filed an amended petition and schedules in which she claimed her debts were neither primarily consumer debts nor primarily

business debts. (Doc. No. 18.) On the same day, Debtor also responded to the U.S. Trustee's motion to dismiss. (Doc. No. 19.) The debtor argued that, under the profit motive test, her student loan debt was not "consumer debt" and, taking into account all of her debt, she was not a debtor "whose debts are primarily consumer debts" within the meaning of §§ 101(8) and 707(b) of the Bankruptcy Code. Debtor also claimed that she provided all information necessary to confirm the expenses contested in the U.S. Trustee's motion to dismiss. (*Id.*)

The Bankruptcy Court held an initial hearing on June 18, 2019, and scheduled an evidentiary hearing for November 14, 2019. (Doc. No. 23.)

On October 14, 2019, Debtor moved for summary judgment on the U.S. Trustee's motion to dismiss. (Doc. No. 29.) Debtor argued that her student loan debts were not consumer debts, and so she was not a debtor "whose debts are primarily consumer debts" under § 707(b). According to the debtor, she incurred student loan debt "in the furtherance of her undergraduate education," and "[h]er purpose in undertaking those obligations was to pay for an education and earn a degree that would maximize her opportunity for employment in business." (Doc. No. 29 at 3.)

The Bankruptcy Court denied the summary judgment motion on December 11, 2019 – leaving the issues open until after an evidentiary hearing. (Doc. Nos. 35 & 36.) On December 19, 2019, the Bankruptcy Court denied Debtor's motion for reconsideration and set a new evidentiary hearing date of April 23, 2020. (Doc. Nos. 41 & 42.) On the same day, the chapter 7 trustee reported that "there is no property available

for distribution from the estate over and above that exempted by law." (Doc. No. 40.) On January 15, 2020, the Bankruptcy Court issued a second amended scheduling order moving the evidentiary hearing date to May 11, 2020. (Doc. No. 45.)

On March 2, 2020, Debtor again moved for summary judgment. She argued that, even using all the U.S. Trustee's other figures for calculating the means test, there would be no presumption of abuse if the Bankruptcy Court were to find that the "imputed income" reported on Debtor's payment advice for health insurance for her domestic partner was not "income received" under 11 U.S.C. § 101(10A). (Doc. No. 48.)

On March 24, 2020, the U.S. Trustee withdrew the § 707(b) motion to dismiss after becoming aware of facts and circumstances related to Debtor's medical condition. (Doc. No. 49.) Although the U.S. Trustee's notice of withdrawal provided no further details, Debtor's March 2, 2020, motion for summary judgment revealed that she was currently facing the challenge of a high-risk pregnancy and other serious health issues. (Doc. No. 48 at 3.)

On April 23, 2020, Debtor moved for attorneys' fees under the EAJA, 28 U.S.C. § 2412, claiming that she was a "prevailing party" and that the U.S Trustee's motion to dismiss was not substantially justified. (Doc. No. 50.)

On May 20, 2020, Debtor received an order of discharge. (Doc. No. 59.)

Briefing and hearings on the EAJA fee motion ensued over the following months. (Doc. Nos. 56 - 58, 60, 63 - 81.) On January 25, 2021, the Bankruptcy Court entered an order and opinion denying the

Debtor's motion for fees. (Doc. Nos. 82 - 85.) The Debtor timely appealed to this Court. (Doc. Nos. 86 - 88.)

Parties' Arguments on Appeal

While the Court has reviewed all of the arguments, below is a summary of the major points raised on appeal.

Debtor contends that the EAJA applies and entitles her to an award of attorneys' fees because, *inter alia*: A motion to dismiss under § 707(b) of the Bankruptcy Code is a contested matter and also a 'civil action' under the EAJA. (Doc. No. 7, Appellant Br. PageID# 167 - 68, 170, 176, 180, 187 - 88, 198 - 99; Doc. No. 11, Reply PageID# 291 - 99.) Bankruptcy cases themselves are civil actions. (Doc. No. 7, Appellant Br. PageID# 192 - 97.) The term "civil action" under the EAJA has a broad scope. (*Id.* PageID# 176-77, 178, 185 - 202.) Federal Rule of Bankruptcy Procedure 9002(1) defines a 'civil action' to include, *inter alia*, proceedings to determine any contested matter. (*Id.* PageID# 179 - 81, 188.) Some litigation that qualifies as a 'civil action' is not only commenced by a complaint but also by other types of initiating documents such as a motion. (*Id.* PageID# 167, 180 - 81.) The history and purpose of the EAJA is to promote equity in litigation between a citizen without resources and the U.S. government. (*Id.* PageID# 168, 173 - 75.) The Bankruptcy Court's statutory construction improperly searched for an ambiguity and narrowed the construction of the EAJA. (*Id.* PageID# 176.) The Bankruptcy Court misapplied case law and other federal statutes. (*Id.* PageID# 182 - 84, 199 - 202.) Debtor should be deemed a prevailing party under the EAJA. The purposes of a § 707(b) motion is to preclude the

debtor from receiving a discharge. Here the U.S. Trustee withdrew its § 707(b) motion, and Debtor got the discharge order that was the object of her chapter 7 case. (*Id.* PageID# 175 - 076, 178, 183 - 85; Doc. No. 11, Reply PageID# 288 - 90, 294 - 97, 301 - 03.) The plain language and purpose of the EAJA allow for the conclusion that sovereign immunity was waived. (Doc. No. 7, Appellant Br. PageID# 203 - 06; Doc. No. 11, Reply PageID# 298, 304.)

The U.S. Trustee contends that the EAJA does not apply and that sovereign immunity was not waived for the circumstances of this case because, *inter alia*: waivers of sovereign immunity are strictly construed and ambiguities are resolved in the government's favor. (Doc. No. 9, Appellee Br. PageID# 242, 244 - 47.) The terms 'civil action' does not include an 'umbrella' bankruptcy case, which is not a two-sided lawsuit but rather a centralized proceeding to administer the debtor's property. (*Id.* PageID# 242, 247 - 249.) A bankruptcy case is not brought against the United States. (*Id.* PageID# 255.) Contested matters such as motions under § 707(b) of the Bankruptcy Code are not civil actions under the EAJA. (*Id.* PageID# 249 - 259.) Federal Rule of Bankruptcy Procedure 9002(1) does not define or illuminate the meaning of civil action under the EAJA. (*Id.* PageID# 243, 259 - 261.) Debtor is not a prevailing party for purposes of the EAJA. (*Id.* PageID# 243, 264 - 268.) Congress did not intend to waive sovereign immunity for motions under § 707(b) of the Bankruptcy Code, as evidenced by the waiver provision in § 106(a)(1) and the attorney fee

award provision in § 707(b)(5). (*Id.* PageID# 251; *see also id.* PageID# 238.)[1]

Discussion

I. Sovereign Immunity

Because this appeal requires the interpretation of federal statutes and involves a request for monies from the federal treasury, the Court begins by recounting interpretative canons we are bound to observe.

"The EAJA renders the United States liable for attorney's fees for which it would not otherwise be liable, and thus amounts to a partial waiver of sovereign immunity. Any such waiver must be strictly construed in favor of the United States." *Ardestani v. INS*, 502 U.S. 129, 137 (1991). "A waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text, and will not be implied." *Lane v. Pena*, 518 U.S. 187, 192 (1996) (citations omitted); *see also United States v. Nordic Vill. Inc.*, 503 U.S. 30, 33 - 34 (1992).

> Legislative history cannot supply a waiver that is not clearly evident from the language of the statute. Any ambiguities in the statutory language are to be construed in favor of immunity, so that the Government's consent to be sued is never enlarged beyond what a fair reading of the text requires . . . . .

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[1] The parties disagree in their briefs over Debtor's compliance with required forms and disclosures related to means-testing and computations related to the statutory presumption of abuse. The Court does not discuss those factual disputes because the decision below and this opinion both turn on dispositive issues of law.

> The question that confronts us here is not whether Congress has consented to be sued . . . . Rather, the question at issue concerns the *scope* of that waiver. For the same reason that we refuse to enforce a waiver that is not unambiguously expressed in the statute, we also construe any ambiguities in the scope of a waiver in favor of the sovereign.
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> . . . What we thus require is that the scope of Congress' waiver be clearly discernable from the statutory text in light of traditional interpretive tools. If it is not, then we take the interpretation most favorable to the Government.

F.A.A. v. Cooper, 566 U.S. 284, 290–91 (2012) (emphasis in original; citations omitted).

While Debtor urges that this Court reify the legislative history, purpose, or perceived 'spirit' of the EAJA, we must resist those endeavors if they would contravene unambiguous statutory text.

> When we . . . are called upon to review and interpret Congress's legislation, '[i]t is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the lawmaking body which passed it, the sole function of the courts is to enforce it according to its terms.'

Thompson v. N. Am. Stainless, LP, 567 F.3d 804, 807 (6th Cir. 2009) (*en banc*) (quoting *Caminetti v. United States*, 242 U.S. 470 (1917)), *rev'd on other grounds*,

562 U.S. 170 (2011). "If the words are plain, they give meaning to the act, and it is neither the duty nor the privilege of the courts to enter speculative fields in search of a different meaning." *Caminetti*, 242 U.S. at 490. The "function of the courts - at least where the disposition required by the text is not absurd - is to enforce it according to its terms." *Lamie v. United States Tr.*, 540 U.S. 526, 534 (2004). *See also Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997) ("[The court's] inquiry must cease if the statutory language is unambiguous and the statutory scheme is coherent and consistent.") (internal citation and quotation marks omitted); *Rubin v. United States*, 449 U.S. 424, 430 (1981) ("When we find the terms of a statute unambiguous, judicial inquiry is complete, except in rare and exceptional circumstances.").

With these precepts in mind, the Court turns first to matters of statutory construction.

`II. Bankruptcy Litigation and the EAJA

The Bankruptcy Court aptly observed that while one "cannot deny the clarity of the waiver of sovereign immunity as to lawsuits that are obviously 'civil actions,' the debtor's motion in this bankruptcy case fairly presents a question as to the *scope* of that waiver." *Teter*, No. 19-11224, 2021 WL 371750, at *6 (citation omitted; emphasis in original).

"The Equal Access to Justice Act (EAJA) directs a court to award 'fees and other expenses' to private parties who prevail in *litigation against the United States* if, among other conditions, the position of the United States was not 'substantially justified.'" *Commissioner, I.N.S. v. Jean*, 496 U.S. 154, 155 (1990) (emphasis added). "The EAJA, enacted in 1980, pro-

vides for an award of attorney fees to a party *prevailing against the United States* in a civil action when the position taken by the Government is not substantially justified and no special circumstances exist warranting a denial of fees." *Bryant v. Comm'r of Soc. Sec.*, 578 F.3d 443, 445 (6th Cir. 2009) (emphasis added).

The emphasized phrases above draw attention to a recurring theme in the analysis below. Only a 'civil action' brought by, or one brought against, the U.S. government is a viable candidate in which to award fees under the EAJA. While the matter below was not a civil action, it also was not one brought by, or one brought against, the United States. That is why under these facts and circumstances the Bankruptcy Court could not award Debtor the fees sought under the EAJA. Moreover, the Bankruptcy Code contains its own specific section delineating when attorney fees may be awarded following an unsuccessful § 707(b) motion. *See* 11 U.S.C. § 707(b)(5). The Code shows that no such award is permitted if the § 707(b) movant was the United States Trustee.

A. Bankruptcy Courts May Hear and Rule on an EAJA Fee Motion

Although this Court ultimately concludes that the EAJA fee motion below was foreclosed by statute and properly denied, we begin by affirming the Bankruptcy Court's jurisdiction to hear such a motion.

"Congress has [ ] authorized the appointment of bankruptcy and magistrate judges, who do not enjoy the protections of Article III, to assist Article III courts in their work." *Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 668 (2015); *see also* 28 U.S.C. § 151.

In 28 U.S.C. § 2412(a)(1), "the plain and unambiguous statutory language gives 'any court,' including the bankruptcy court, the power to make a fee award under the EAJA." *O'Connor v. U.S. Dep't of Energy*, 942 F.2d 771, 774 (10th Cir. 1991). Most courts reach this legal conclusion explicitly or implicitly, which this Court likewise adopts.[2]

Although a bankruptcy court may have jurisdiction to hear a motion for fees brought under the EAJA, caution is prudent because much of the litigation that occurs in bankruptcy courts often will not fall within the EAJA's bounds, as discussed below.

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[2] Most courts expressly hold (or presume without expounding) that a bankruptcy court has jurisdiction to hear a motion for fees under the EAJA. *E.g., In re Terrill*, 2006 WL 2385236 (Bankr. N.D. Tex. July 27, 2006); *In re Transcon Lines*, 178 B.R. 228, 232–33 (Bankr. C.D. Cal. 1995)*; In re Shafer*, 146 B.R. 477, 481 (D. Kan. 1992), *modified* 148 B.R. 617 (D. Kan. 1992); *In re Tom Carter Enterprises, Inc.*, 159 B.R. 557, 561 (Bankr. C.D. Cal. 1993); *In re Esmond*, 752 F.2d 1106 (5th Cir. 1985); *In re Newlin*, 29 B.R. 781 (E.D. Pa. 1983); *In re Hagan*, 44 B.R. 59 (Bankr. D. R.I. 1984); *cf. In re Yochum*, 89 F.3d 661, 667–69 (9th Cir. 1996) ("Because bankruptcy courts are units of the district court, they are by analogy 'courts of the United States' . . . and therefore possess the power to award attorneys' fees"). In listing these decisions for the proposition that a bankruptcy court *may* hear an EAJA motion, this Court does *not* endorse or adopt any of the merits analysis regarding the applicability (or not) of the EAJA to the bankruptcy-related litigation at issue in these cases.

B. Attorneys' Fees Under 28 U.S.C. §§ 2412(b) and/or (d) May Be Awarded Only in a Civil Action Brought By the United States or in a Civil Action Brought Against the United States

Debtor's fee motion was filed pursuant to the following two sections of the EAJA, which contain similar language:

> (b) Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in *any civil action brought by or against the United States* or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.
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> * * *
>
> (d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in *any civil action* (other than cases sounding in tort), including proceedings for judicial review of agency action, *brought by or against the United*

> *States* in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. § 2412 (emphasis added).

1. The Matter Below Was Not a 'Civil Action'

The Bankruptcy Court below explored whether a chapter 7 case and/or a contested matter constitutes 'a civil action.' *See In re Teter*, No. 19-11224, 2021 WL 371750, at *7 and * 22. This Court understands why the Bankruptcy Court found the existing body of case law wanting.[3]

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[3] *See Teter*, 2021 WL 371750 at *14 ("Although the debtor cites to case law that simply assumes the scope of the EAJA extends to bankruptcy cases or contested matters within a bankruptcy case, none of these case analyzed whether bankruptcy cases or contested matters fall within the scope of the term 'civil action' under the EAJA. . . . Nor has the Court been able to uncover any case law directly on point."); *cf. In re S. Indus. Banking Corp.*, 189 B.R. 697, 702 (E.D. Tenn. 1992) (reasoning that "'case' is a term of art in bankruptcy practice. A case in bankruptcy is the proceeding involving the liquidation or reorganization of a debtor or the adjustment of the debtor's debts. . . . The case is to be distinguished from the adversary proceeding, Bankr. R. 7001, and from the contested matter, Bankr. R. 9014, both of which arise in the case under the Bankruptcy Code."); *see also In re Garnett*, 303 B.R. 274, 277 (E.D.N.Y. 2003).

> It is the difference in meaning of the word "case" as applied in the more general Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure on the one hand, and in the more specialized Federal Rules of Bankruptcy Procedure on the other, which gives rise to at least part of the problem. A non-

Whether a bankruptcy case or a contested matter is a 'civil action' turns out to be fairly esoteric.[4] There

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> bankruptcy civil "case" is commenced by a complaint and usually ends, if pursued, in a judgment. Fed.R.Civ.P. 3, 54. A bankruptcy "case" commences with the filing of a petition - 11 U.S.C. §§ 301, 302(a), 303(b), Fed.R.Bankr.P. 1002(a), 1003(a), 1004, 1005 - and may include a number of adversary proceedings (commenced by complaint under Fed.R.Bankr.P. 7003) and "contested matters" (begun by motion under Rule 9014).

Matter of Berge, 37 B.R. 705, 706 (Bankr. W.D. Wis. 1983).

[4] To the extent the 'civil action' label does little more than to distinguish a legal proceeding from a *criminal* legal proceeding, then bankruptcy cases, adversary proceedings, and contested matters all fall within the civil rubric. *Cf. Sec. & Exch. Comm'n v. Manor*, No. CV 20-597 (SRC), 2020 WL 3446306, at *1 (D.N.J. June 24, 2020) (discussing a civil action brought by the S.E.C. and a federal criminal action both arising from the same scheme); *Harrison v. Coker*, No. CV 08-4307, 2013 WL 12084734, at *3 (E.D. Pa. Mar. 21, 2013), *aff'd*, 587 F. App'x 736 (3d Cir. 2014) (criticizing a party's position for failure to account for "the difference between criminal and civil actions or briefing regarding the preclusive effects of bankruptcy or state criminal proceedings on federal civil actions").

In some circumstances, 'civil action' is used to connote the distinction between two distinct litigation proceedings. *Cf. United States ex rel. Yelverton v. Fed. Ins. Co.*, 831 F.3d 585, 588 (D.C. Cir. 2016) ("Although the district court's categorization of bankruptcy appeals as civil (rather than criminal) cases implies that bankruptcy appeals may be considered 'civil actions' in some sense, there are important distinctions between the treatment of bankruptcy appeals and that of civil actions filed originally in district court. . . . Thus, when Yelverton appealed each of these cases from the bankruptcy court to the district court, he filed nothing in the district court. In that light, we find it insufficiently clear that bringing a bankruptcy appeal to the district court

are a litany of distinctions between a prototypical *civil action* (*i.e.*, a lawsuit initiated by complaint, comprised of distinct causes of action, directed at particular adverse parties over whom the forum has personal jurisdiction, seeking specified forms of relief from those parties) *versus* a *bankruptcy case* (which is initiated with an *ex parte* petition predicated on *in rem* jurisdiction over property of the estate and functioning as an order for relief – rather than a list of allegations and demands – resulting in an immediate automatic stay on outside adverse actions against a debtor occurring in other jurisdictions involving third parties not summoned to appear in the bankruptcy court) *versus* a *contested matter* (which is initiated, *inter alia*, by motion or objection to a claim filed in a bankruptcy case by any party with an interest in the debtor's property or in the outcome of a liquidation or reorganization, which is then resolved with abbreviated, expedited procedures). *Cf. In re Salem Mortg. Co.*, 783 F.2d 626, 634 n.18 (6th Cir. 1986) ("[E]verything that occurs in a bankruptcy case is a proceeding.

Thus, proceeding here is used in its broadest sense, and would encompass what are now called contested matters, adversary proceedings, and plenary actions under current bankruptcy law.") (quoting S. Rep. No. 989, 95th Cong., 2d Sess. 153-54, reprinted in 1978 U.S. Code Cong. & Ad. News 5787, 5939-40).

Whether a chapter 7 case or a contested matter has or does not have enough traits in common with a typical lawsuit framework to earn the moniker 'civil action' is not the final consideration on appeal given

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constitutes 'filing a new civil action' in the district court within the meaning of the pre-filing injunction.").

what the parties have raised in their briefs. This Court agrees with the Bankruptcy Court's conclusion that here we do not have a 'civil action' under the EAJA. And this Court goes further. Because even if it was a 'civil action,' it would still be necessary that the United States or an agency or officer thereof (in an official capacity) either be the party who brought that civil action or be the party against whom that action was brought.

Debtor stresses that the Federal Rules of Bankruptcy Procedure treats a contested matter and a civil action as essentially the same.

> "Action" or "civil action" means an adversary proceeding or, when appropriate, a contested petition, or proceedings to vacate an order for relief or to determine any other contested matter.

Fed. R. Bankr. P. 9002(1). Her argument is understandable but insufficient for a few reasons. First, whether or not the contested matter for the U.S. Trustee's § 707(b) motion to dismiss and/or the Debtor's chapter 7 case are treated as civil actions, that does not inform whether or not those civil actions were brought by or brought against the U.S. government.

Second, a bankruptcy definitional rule, adopted by the U.S. Supreme Court, is not an indicator of the meaning of a non-bankruptcy federal statute passed by Congress. *See* 28 U.S.C. §§ 2071, 2075 (prescribing the authority of the judiciary to adopt rules of bankruptcy procedure).

Third, FRBP 9002(1) treats all adversary proceedings as 'civil actions'; however, a contested matter is only treated as a civil action "when appropriate."

Congress hedged on the latter – likely because it was impossible to predict the innumerable taxonomy of contested matters that might (and do) arise in bankruptcy. *See Bullard v. Blue Hills Bank*, 575 U.S. 496, 505 (2015) (noting that "the list of contested matters is 'endless' and covers all sorts of minor disagreements"). In any event, for reasons discussed throughout this opinion, this Court concludes that it is not appropriate to treat the contested matter here (*i.e.*, the § 707(b) motion filed and voluntarily withdrawn by the U.S. Trustee) as a civil action for purposes of the EAJA. *See* 11 U.S.C. 707(b)(4, 5) (discussed *infra*.).

2. An EAJA Movant Must Have Prevailed in a Civil Action That Was Brought By or Against the U.S. Government

Only when the civil action in question was brought by or was brought against the United States will such action be one in which an EAJA fee motion may be granted. The EAJA's text reinforces this reading. *See* 28 U.S.C.A. § 2412(d)(2)(E) (treating "civil action brought by or against the United States" as the operative term and expressly including certain contractual appeals within the scope of that defined phrase). As another court observed, "Congress drafted 28 U.S.C. § 2412(b) to limit liability payable thereunder in a civil action brought 'by or against the United States or any agency or any official of the United States acting in his or her official capacity . . . . '" *In re Sann*, 546 B.R. 850, 858 (Bankr. D. Mont. 2016).

Thus, a critical inquiry for an EAJA fee motion is whether it is filed in a civil action brought by the

United States or in a civil action brought against the United States. For these purposes, 'United States' includes federal agencies and federal officers acting in an official capacity. *See* 28 U.S.C. § 2412, subsections (a)(1) and (b).

In this appeal, the parties discuss two proceedings: the Debtor's chapter 7 case and the U.S. Trustee's § 707(b) motion. Neither is a permissible locus in which to award fees pursuant to the EAJA, as explained below.

C. A Voluntary Chapter 7 Bankruptcy Case Is Neither Brought By Nor Brought Against the United States

"Unlike a typical lawsuit, where one party brings an action against another, a bankruptcy proceeding provides a forum for multiple parties—debtors, creditors, bidders, etc.—to sort out how to allocate, among other things, a debtor's assets." *United States v. Schafer and Weiner, PLLC*, No. 21-1203, slip op. at 6 n.1 (6th Cir. Aug. 8, 2022) (quoting *Brown Media Corp. v. K&L Gates, LLP*, 854 F.3d 150, 158 (2d Cir. 2017)). "Critical features of every bankruptcy proceeding are the exercise of exclusive jurisdiction over all of the debtor's property, the equitable distribution of that property among the debtor's creditors, and the ultimate discharge that gives the debtor a 'fresh start' by releasing him, her, or it from further liability for old debts." *Cent. Virginia Cmty. Coll. v. Katz*, 546 U.S. 356, 363–64 (2006).[5]

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[5] "Bankruptcy jurisdiction, at its core, is *in rem*. . . . [T]the jurisdiction of courts adjudicating rights in the bankrupt estate included the power to issue compulsory orders to facilitate the

Debtor's voluntary chapter 7 case was not a civil action brought against the United States. Indeed, it was not an action brought *against* anyone.

> A bankruptcy proceeding in itself *is not a proceeding or action against anyone* and the law does not support generalizing all bankruptcy proceedings as arising out of a . . . dispute . . . between the debtor and a creditor, even where that dispute is the precipitating factor for the bankruptcy. The administration of a bankruptcy case is different than 'an action or proceeding' because of the variety of the parties involved, their differing objectives, and the various administrative requirements . . . .

In re Hawkeye Ent., LLC, 625 B.R. 745, 755 (Bankr. C.D. Cal. 2021) (emphasis added); *see also In re Sisk*, 973 F.3d 945, 947 (9th Cir. 2020). As the Bankruptcy Court here observed: "Bankruptcy cases do not have plaintiffs or defendants. . . . The commencement of a voluntary case . . . constitutes an order for relief . . . 11 U.S.C. § 301. In contrast, under the Federal Rules of Civil Procedure, an order of relief is by no means automatic. Rather, 'relief' is something that you ask for in a complaint or other pleading and hope the court will include in its judgment." *Teter*, 2021 WL 371750 at *10.

Because a voluntary chapter 7 case is brought by a debtor, obviously it is not brought by the United

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administration and distribution of the *res*." *Katz*, 546 U.S. at 362 (2006). "The whole process of proof, allowance, and distribution is, shortly speaking, an adjudication of interests claimed in a *res*." *Gardner v. New Jersey*, 329 U.S. 565, 574, (1947).

States. Further, a voluntary chapter 7 case is not brought against the United States or against any creditor in particular. A voluntary chapter 7 case – even if labeled a 'civil action' – therefore does not come within the EAJA's plain language.[6]

D. A § 707(b) Motion to Dismiss or Convert a Chapter 7 Petition Is Not a Civil Action Brought By or Against the United States

Congress designed the U.S. Trustee to perform administrative functions previously tackled directly by bankruptcy judges.[7] For a discussion of the historical development of bankruptcy courts and trustees, *see generally In re Castillo*, 297 F.3d 940, 949–51 (9th Cir. 2002), *as amended* (Sept. 6, 2002). U.S. Trustees "serve as bankruptcy watch-dogs to prevent fraud, dishonesty, and overreaching." They are "charged

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[6] This holding is limited to voluntary cases for a basic reason: If the United States in its capacity as a creditor initiated an involuntary bankruptcy case, 11 U.S.C. § 303, it is conceivable that a court might deem such to be an action 'brought by' the United States. Because that is not the situation here, this Court takes no position on that question.

[7] *See* H.R. Rep. No. 95-595 at 4, 88 (1977) *reprinted in* 1978 U.S.C.C.A.N. 5963, 5966 ("The proposed United States Trustees will be the repository of many of the administrative functions now performed by bankruptcy judges, and will serve as bankruptcy watch-dogs to prevent fraud, dishonesty, and overreaching in the bankruptcy arena . . . . When a liquidation case is commenced under Chapter 7, the United States Trustee will immediately designate a member of the panel to serve as interim trustee in the case . . . . If a panel member serves in the case, the United States Trustee will be available to give advice in the administration of the case and to supervise the private trustee's performance.").

with preventing fraud and abuse and with 'fill[ing] the vacuum' caused by possible creditor inactivity." *Castillo*, 297 F.3d at 950 (quoting H.R.Rep. No. 95–595, at 100 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6061). "The statutory duties of a bankruptcy trustee operating under the aegis of the U.S. Trustee are enumerated in 11 U.S.C. §§ 704, 1302, 1304." *Id.*

The strongest formulation of Debtor's argument for purposes of coming within the ambit of the EAJA is as follows: The U.S. Trustee is an official of the United States acting in an official capacity. The U.S. Trustee 'brought' a § 707(b) motion, which is a civil matter, *i.e.*, inasmuch as it is not criminal. Therefore, the § 707(b) motion was brought by the United States. Even assuming *arguendo* the correctness of this characterization, it is not enough to carry the day.

1. A § 707(b) Motion to Dismiss or Convert Is Not Itself a New or Distinct Civil Action; Rather It Is a Phase or Component of the Chapter 7 Case

For several reasons, a motion pursuant to § 707(b) is plainly part of the chapter 7 case itself. First, the motion may be brought by the bankruptcy court *sua sponte, i.e.*, the same court that is administering the chapter 7 case. *See* 11 U.S.C. § 707(b)(1); *cf. id.* § 707 (a) (authorizing a bankruptcy court to dismiss a chapter 7 if a debtor fails to do what the Code requires).

Second, once a § 707(b) motion is filed, then notice is given and a hearing is held. That notice comes in the chapter 7 case. The hearing is conducted

by the same bankruptcy court and in the same chapter 7 case targeted by the motion.

Third, a possible outcome of the motion is for the chapter 7 case to be converted to chapter 11 or 13, *i.e.*, from a liquidation to a reorganization or payment plan. Such a motion must be part of the bankruptcy case given that the motion might revise the fundamental character and resolution of such bankruptcy case.

Fourth, in civil litigation generally, a motion to dismiss is not ordinarily conceived of, described, or understood to be a distinct proceeding from the action in which it is filed, which is itself targeted for dismissal. A motion to dismiss is filed in and as part of a civil action precisely to challenge or test whether that same action brought by a plaintiff or petitioner is viable, within the court's jurisdiction, permissible, or legally sufficient to be considered.

Fifth, § 707(b) allows a challenge to or testing of a chapter 7 petition and its supporting documents and schedules to determine whether those are accurate, sufficient, and permissible under the Bankruptcy Code. The motion does not start its own distinct action; rather, it questions whether the chapter 7 debtor has or has not put forward information that qualifies her for the relief she seeks.

Finally, this Court aims to be consistent with the approach taken by the Supreme Court in *Bullard v. Blue Hills Bank*:

> The present dispute is about how to define the immediately appealable "proceeding" in the context of the consideration of Chapter 13 plans. Bullard argues for a plan-by-plan

> approach. Each time the bankruptcy court reviews a proposed plan, he says, it conducts a separate proceeding. On this view, an order denying confirmation and an order granting confirmation both terminate that proceeding, and both are therefore final and appealable.
>
> In the Bank's view Bullard is slicing the case too thin. The relevant "proceeding," it argues, is the entire process of considering plans, which terminates only when a plan is confirmed or - if the debtor fails to offer any confirmable plan - when the case is dismissed. An order denying confirmation is not final, so long as it leaves the debtor free to propose another plan.
>
> We agree with the Bank: The relevant proceeding is the process of attempting to arrive at an approved plan that would allow the bankruptcy to move forward.

Bullard, 575 U.S. at 502 (2015). Note that multiple creditors – along with the U.S. Trustee – could file § 707(b) motions in one chapter 7 case. *See* 11 U.S.C. § 707(b)(1). So these motions are akin to the chapter 13 plans addressed in *Bullard*: *i.e.*, a bankruptcy court might sift through several, with each filed by a different party-in-interest. *Bullard* teaches that each contested hearing on each individual motion is not its own separate civil action. *Cf. id.*

In short, motions to dismiss generally, and a § 707(b) motion in particular, are part of the action initiated originally by the complainant/petitioner or, here, by the voluntary bankruptcy debtor's petition. The filing of a subsequent motion in that case does not

create or commence a distinct civil action; rather it requires a decision by the court administering the chapter 7 case – a decision taken in and as part of the chapter 7 case itself. *Cf. In re Brown*, 248 F.3d 484, 486 (6th Cir. 2001) ("Because bankruptcy courts operate as adjuncts to district courts, we view all proceedings in this action, whether in the Bankruptcy Court or the District Court, as one proceeding in bankruptcy.") (citations and quotation omitted).

2. Debtor Admits that Her Chapter 7 Case Is the 'Action' in Which She Claims to Have 'Prevailed'

In portions of her briefing, Debtor acknowledges that the civil action in which she claims to have 'prevailed' is the chapter 7 case. Debtor contends that she "prevailed against the substantially unjustified position of the [U.S. Trustee] to receive the Chapter 7 Discharge for which she qualified. She prevailed in receiving the Order and Final Judgment of Discharge . . . . " (Doc. No. 11, Reply PageID# 280.) Debtor received her discharge in and as a result of her chapter 7 case. (*See* Doc. No. 7, Appellant Br. PageID# 184 – 85; Doc. No. 11, Reply PageID# 295, 302, 303.)

As previously discussed, a voluntary chapter 7 case does not come within the plain language of the EAJA. The chapter 7 case was not an action brought by the United States, and it was not an action against the United States.

At most, in one of the phases or components of that bankruptcy case, Debtor and a United States official (*i.e.*, the U.S. Trustee) squared off on a motion to dismiss. But that motion was never denied or resolved by the Bankruptcy Court in Debtor's favor.

The U.S. Trustee withdrew it before a ruling was made. Further, the discharge order Debtor received was not a judgment resolving the § 707(b) motion contested matter. A discharge order is not filed in, nor does it follow invariably from resolution of, a § 707(b) contested motion. Rather, a discharge comes in and from resolution of the entire chapter 7 case.

3. This Court Declines to Follow a Decision Awarding EAJA Fees to a Debtor Who Withstands a § 707(b) Motion

Although Debtor did not raise it, *In re Terrill*, No. 05-87180-BJH7, 2006 WL 2385236 (Bankr. N.D. Tex. July 27, 2006) is a short memorandum decision that awarded fees under the EAJA to a Chapter 7 debtor whose petition survived a U.S. Trustee's § 707(b) motion to dismiss. *Id.* at *1. This Court declines to follow *Terrill* for three reasons.

First, in *Terrill*, the EAJA motion was decided akin to a default judgment. The U.S. Trustee filed no objection to the debtor's EAJA fee motion. *Id.* at *1 ¶ 8. "The United States Trustee failed to present any evidence to meet its burden of proof that its position with respect to the Motion was 'substantially justified' or that special circumstances make an award unjust in this case." *Id.* at *2 ¶ 13. Had the United States briefed or robustly opposed the fee motion in *Terrill*, it is possible there may not have been an award at all.

Second, the written order in *Terrill* does not mention § 707(b)(5) of the Code. *Terrill* apparently did not consider whether the specific attorneys' fee provision within § 707(b) itself precluded a debtor from turning to the EAJA to recover fees.

Finally, the written order in *Terrill* does not mention or appear to analyze whether a Chapter 7 case or a contested matter on a § 707(b) motion to dismiss is properly characterized as a civil action brought by or against the United States.

E. Section 707(b)(5) of the Bankruptcy Code Precludes or Counsels Against an Award Under the AJEA Based on the U.S. Trustee's Withdrawn § 707(b) Motion

Even if one doubted this Court's analysis, *supra.*, based on the nature of bankruptcy cases, matters and proceedings, there is another fundamental reason why an EAJA fee motion is not available to the Debtor.

The principal gripe in her EAJA fee motion and now on appeal is that the U.S. Trustee filed a statement of presumed abuse followed by a motion to dismiss the Chapter 7 case – both pursuant to § 707 (b) of the Code. Debtor argued that these § 707(b) filings were ill-advised and obstructionist – tantamount to *de facto* motions to extend time. Even assuming *arguendo* that such characterizations were fair (and they do not seem to be), Debtor faces a roadblock.

Section 707(b) of the Code contains *its own* provision devoted specifically to awarding costs and attorneys' fees to debtors who beat back a § 707(b) motion to dismiss.

> Except as provided in subparagraph (B) and subject to paragraph (6), the court, on its own initiative or on the motion of a party in interest, in accordance with the procedures described in rule 9011 of the Federal Rules

> of Bankruptcy Procedure, may award a debtor all reasonable costs (including reasonable attorneys' fees) in contesting a motion filed by a party in interest *(other than a* trustee or *United States trustee* (or bankruptcy administrator, if any)) under this subsection if—
>
> (i) the court does not grant the motion; and
>
> (ii) the court finds that—
>
> (iii) the position of the party that filed the motion violated rule 9011 of the Federal Rules of Bankruptcy Procedure; or
>
> (iv) the attorney (if any) who filed the motion did not comply with the requirements of clauses (i) and (ii) of paragraph (4)(C), and the motion was made solely for the purpose of coercing a debtor into waiving a right guaranteed to the debtor under this title.

11 U.S.C.A. § 707(b)(5)(A) (emphasis added). This provision makes plain that a motion for attorneys' fees based on an unsuccessful § 707(b) motion is not available if the § 707(b) movant was the U.S. Trustee.

Debtor ignores this clause in her appeal briefs. The U.S. Trustee mentions this clause, but does not make it a centerpiece of argument. (*See* Doc. No. 9, Appellee Br. PageID# 238, 251.)[8] This Court concludes that § 707(b)(5) is significant for several reasons.

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[8] On May 19, 2020, the Bankruptcy Court held an initial hearing on the EAJA fee motion. At the hearing, the Court outlined its initial analysis of the debtor's motion. The Court noted that the EAJA might not apply because § 707(b) of the Bankruptcy Code contains its own fee shifting provisions in § 707(b)(4) and (b)(5),

First, the EAJA does not authorize a fee award where another statute rules out a fee award. Returning to the two clauses of the EAJA on which Debtor relies, the emphasized language below makes this point plain:

> (b) *Unless expressly prohibited by statute*, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. *The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award*.
>
> * * *
>
> (d)(1)(A) *Except as otherwise specifically provided by statute*, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United

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which appear to preclude a fee award if a § 707(b) motion was filed by a United States trustee. *See Teter*, No. 19-11224, 2021 WL 371750, at *3.

> States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. § 2412(d)(1)(A) (emphasis added). As previously noted, § 707(b)(5) of the Bankruptcy Code specifically rules out a fee award if the party who brought an unsuccessful § 707(b) motion was the U.S. Trustee. The EAJA clauses in subsection (b) and (d) decline to permit a fee award where another statute provides that such fees not be awarded. That is what § 707(b)(5) does. And because the latter section of the Code is specifically applicable to § 707(b) motions, it controls the question of whether a fee award is permissible.

Second, § 707(b)(5) conveys Congressional intent. Sovereign immunity is not waived for a motion seeking attorneys' fees based on a § 707(b) motion that was filed by the U.S. Trustee. Had a private citizen creditor filed a specious § 707(b) motion, for example, then a debtor who successfully defends such a motion may have a chance to be awarded fees under § 707 (b)(5) . . . but *not* if the movant was the U.S. Trustee. *See id.* Moreover, the Bankruptcy Code expressly abrogates sovereign immunity with respect to multiple Code provisions. Section 707 is not one of those. *See* 11 U.S.C. § 106(a)(1).

Third, Debtor's position chafes with some foundational precepts of bankruptcy. A bankruptcy court whose aid is sought is not bound to assume the correctness or legitimacy of the assertions made by the person who seeks judicial aid. The process of hearing challenges to that person's claims or requests for relief "is, indeed, of basic importance in the administration

of a bankruptcy estate whether the objective be liquidation or reorganization." *Gardner*, 329 U.S. at 573. "It is traditional bankruptcy law that he who invokes the aid of the bankruptcy court . . . must abide the consequences of that procedure." *Id.* One such consequence is that attorney fee motions can be available to a debtor who repels certain § 707(b) motions, but not for such motions filed by a U.S. Trustee. 11 U.S.C. § 707 (b)(5).

Read in tandem, the opening qualifier phrases in subsections (b) and (d) of the EAJA, along with § 707 (b)(5) of the Bankruptcy Code, render it impossible as a matter of law to grant the fee motion filed by the Debtor.

F. Because the Plain Language of the EAJA and Bankruptcy Code Resolve this Appeal, the Court Need Not Weigh Into Legislative History and Policy Objectives

Debtor argues, correctly, that the general aim of the EAJA was to prevent the cost and complexity of litigation versus the federal government from deterring a citizen litigant who lacks resources. (Doc. No. 7, Appellant Br. PageID# 168, 173 - 75, 185 - 90.) *See Sullivan v. Hudson*, 490 U.S. 877, 883 - 84 (1989). However, for the reasons previously discussed, this Court finds the statutory text of the EAJA and Bankruptcy Code clear and unambiguous. Thus, there is no occasion here to review legislative history, statutory purpose, or public policy considerations.

Debtor's overall position is reminiscent of an approach rejected in *Astrue v. Ratliff*, 560 U.S. 586 (2010), where the Supreme Court rejected "an effort to avoid EAJA's plain meaning" by cobbling together

other federal statutory clauses and functional descriptions of past government practice. *See id.* at 593 - 98. *Ardestani*, where legislative purpose and public policy rationales were sensible but insufficient to overcome one statutory textual barrier, also is instructive:

> Finally, we consider [the] argument that a functional interpretation of the EAJA is necessary in order to further the legislative goals underlying the statute. The clearly stated objective of the EAJA is to eliminate financial disincentives for those who would defend against unjustified governmental action and thereby to deter the unreasonable exercise of Government authority.
>
> We have no doubt that the broad purposes of the EAJA would be served by making the statute applicable to deportation proceedings. We are mindful that the complexity of immigration procedures, and the enormity of the interests at stake, make legal representation in deportation proceedings especially important. We acknowledge that [petitioner] has been forced to shoulder the financial and emotional burdens of a deportation hearing in which the position of the INS was determined not to be substantially justified. *But we cannot extend the EAJA* to administrative deportation proceedings *when the plain language of the statute, coupled with the strict construction of waivers of sovereign immunity, constrain us to do otherwise*.

Ardestani, 502 U.S. at 137 (emphasis added).

The Court has not ignored Debtor's fairness and policy arguments. All of this is to say that these arguments are for Congress to consider – not this Court.

III. Debtor Was Not a Prevailing Party

In addition to this Court's statutory interpretation of (i) a civil action by or against the United States under the EAJA and (ii) the non-waiver of sovereign immunity under § 707(b)(5), there is another distinct reason why this Court affirms the decision below. Debtor was not a 'prevailing party' under the EAJA.

Both Debtor and the U.S. Trustee ask this Court to determine whether Debtor was a prevailing party. "In designating those parties eligible for an award of litigation costs, Congress employed the term 'prevailing party,' a legal term of art." *Buckhannon Bd. & Care Home, Inc. v. W. Virginia Dep't of Health & Hum. Res.*, 532 U.S. 598, 603 (2001). Although Debtor received a discharge order, this Court cannot conclude that she is a prevailing party for purposes of an award under the EAJA.

A. Debtor Did Not Prevail on the Issues She Presented for Summary Adjudication

Debtor filed two motions for summary judgment on matters related to her chapter 7 petition, the presumption of abuse, and eligibility for a discharge. In those, Debtor staked out her positions regarding the proper characterization of student loan debt and its resulting effect on Debtor chapter 7 case and entitlement to a discharge. (*See* Doc. Nos. 29 & 48.) The Bankruptcy Court did not resolve those in favor of the Debtor. (*See* Doc. Nos. 35 - 36, 41 - 42.) The Bankruptcy Court did not agree with Debtor's positions, and there is no

order or opinion siding with the Debtor on her legal theories. That detracts from her suggestion that she was a prevailing party.

B. Surviving a Withdrawn Motion to Dismiss Under § 707(b) of the Bankruptcy Code Is Not Sufficient to Render a Litigant a Prevailing Party

Although the U.S. Trustee filed a § 707(b) motion to dismiss, the Bankruptcy Court never ruled on that motion. The motion was voluntarily withdrawn by the U.S. Trustee once the Debtor disclosed and documented her high-risk pregnancy. *See* 11 U.S.C. § 707 (b)(2)(B)(i) (providing that a presumption of abuse may be rebutted by a serious medical condition). This Court draws guidance from the Supreme Court:

> Numerous federal statutes allow courts to award attorney's fees and costs to the "prevailing party." The question presented here is whether this term includes a party that has failed to secure a judgment on the merits or a court-ordered consent decree, but has nonetheless achieved the desired result because the lawsuit brought about a voluntary change in the defendant's conduct. We hold that it does not.

Buckhannon, 532 U.S. at 600.

The Debtor did not prevail on the issues raised in the U.S. Trustee's § 707(b) motion. The Bankruptcy Court neither resolved the motion nor sided with Debtor's views on the disputes raised. There was no order denying the § 707(b) motion, so there was no victor here.

Debtor therefore looks instead to her receipt of a discharge order pursuant to § 727 of the Bankruptcy Code at the conclusion of her chapter 7 case. It is true that the discharge order is akin to a final order or judgment. But basic problems persist. As explained previously, 'prevailing' in a chapter 7 case is not prevailing in an action brought by or against the United States.

Moreover, the apparent pivotal development that prompted the withdrawal of the § 707(b) motion was *not* some legal or factual submission by Debtor that bested the U.S. Trustee. Instead, it was the revelation of a medical issue, *i.e.*, Debtor's high-risk pregnancy. Under § 707(b)(2)(B), this new circumstance might overcome the statutory presumption of abuse. Here, the U.S. Trustee did the commendable thing in voluntarily withdrawing the motion to dismiss in light of this news. This Court declines to hold that a newly discovered serious medical condition of a debtor renders said debtor a prevailing party eligible for fees under the EAJA, even if the revelation does indeed rebut or overcome the presumption of abuse under § 707.

C. Receiving a Chapter 7 Discharge Order Is Not Sufficient to Render a Litigant a Prevailing Party

A related problem with Debtor's argument is that it would work a potential sea change in the number of instances where the federal government may be liable for fees. Any time a debtor receives a discharge order, the debtor could move for fees if at some point the U.S. Trustee resisted the discharge or pushed back against the accuracy or completeness of schedules, assertions or submissions made by a debtor.

Such an approach could open Pandora's box given that a "United States trustee may raise and may appear and be heard on any issue in any case or proceeding under" the Bankruptcy Code. 11 U.S.C. § 307. In any event, Congress left a textual clue to resolve the question: The Bankruptcy Code expressly abrogates sovereign immunity with respect to multiple Code provisions. 11 U.S.C. § 106(a)(1). Section 727 – the Code provision that covers discharge orders – is *not* one of the instances where sovereign immunity was waived. *See id.* This Court will not infer Congressional intent to allow every debtor with a discharge order to sue the U.S. Trustee for an attorneys' fee award based on the latter's performance of watch-dog duties required by the Bankruptcy Code during the administration of the bankruptcy case.[9]

D. The Court Does Not Opine on Substantial Justification or Special Circumstances

Even if a litigant prevails in an action covered by the EAJA, that statute includes exceptions if "the

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[9] A bankruptcy case "is a collective proceeding that involves a multiplicity of parties with both cooperative and competing interests rife with strategic behavior that may include pretextual or meritless assertion of claims and objections. . . . Given the number of parties, the immense range of activity regulated by the bankruptcy court, and the ease of access to the bankruptcy court, strategic litigation by bullies, hold-outs, and squeaky wheels are endemic concerns in bankruptcy." Daniel J. Bussel, *Fee-Shifting in Bankruptcy*, 95 Am. Bankr. L.J. 613, 632 (2021). Allowing EAJA fee awards merely for receiving a discharge seems inconsistent with the admonition that "[a] request for attorney's fees should not result in a second major litigation," *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983), or "spawn a second litigation of significant dimension," *Texas State Teachers Assn. v. Garland Ind. School Dist.*, 489 U.S. 782, 791 (1989).

court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A).

Though the record sheds light on these subjects, this Court declines to reach those questions. The Bankruptcy Court did not make findings in this regard. Because this Court holds that the EAJA fee motion is not available as a matter of law, the Court need not delve into these fact-dependent exceptions within the EAJA.

Finally, although the EAJA does not apply in the present circumstances, this Court's holding should not be misconstrued to mean that the EAJA will never come into play in bankruptcy litigation. *E.g., In re Wood Locker, Inc*., 868 F.2d 139, 142 (5th Cir. 1989) ("Adversary proceedings have been correctly described as 'full blown federal lawsuits within the larger bankruptcy case,' and are thereby distinguishable from other disputes in bankruptcy cases which are denominated 'contested matters' . . . . ").

Conclusion

For the reasons discussed above, this Court AFFIRMS the denial of the Debtor's motion for an award of fees and costs under the EAJA.

IT IS SO ORDERED.

/s/ Bridget M. Brennan
United States District Judge

Date: August 15, 2022

ORDER, U.S. BANKRUPTCY COURT NORTHERN DISTRICT OF OHIO (JANUARY 25, 2021)

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE: MEGAN MARIE TETER,

Debtor.

Case No. 19-11224

Chapter 7

Before: Arthur I. Harris,
United States Bankruptcy Judge.

ORDER

For the reasons stated in the separate memorandum of opinion, the debtor's motion for an award of attorney's fees and costs under the Equal Access to Justice Act, 28 U.S.C. § 2412, is denied.

IT IS SO ORDERED.

/s/ Arthur I. Harris
United States Bankruptcy Judge

Dated: January 25, 2021

MEMORANDUM OF OPINION, U.S. BANKRUPTCY COURT NORTHERN DISTRICT OF OHIO (JANUARY 25, 2021)

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE: MEGAN MARIE TETER,

Debtor.

Case No. 19-11224

Chapter 7

Judge Arthur I. Harris

MEMORANDUM OF OPINION[1]

This case is currently before the Court on the motion of the debtor, Megan Marie Teter, for an award of attorney's fees under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412. The debtor seeks an award of attorney's fees based on the U.S. Trustee's filing of a motion to dismiss the debtor's bankruptcy case for abuse under 11 U.S.C. § 707(b), a position the debtor maintains was not substantially justified. As explained more fully below, the debtor's motion for attorney's fees must be denied because a debtor who successfully defends a contested matter within a

[1] This Opinion is not intended for official publication.

bankruptcy case is not a "prevailing party" in a "civil action" under 28 U.S.C. § 2412 and therefore falls outside the scope of the waiver of sovereign immunity provided under the EAJA.

JURISDICTION

This is a core proceeding under 28 U.S.C. § 157(b)(2)(A) and (0). The Court has jurisdiction over core proceedings under 28 U.S.C. §§ 1334 and 157(a) and Local General Order 2012-7 of the United States District Court for the Northern District of Ohio.

BACKGROUND

The debtor filed for relief under chapter 7 of the Bankruptcy Code on March 7, 2019. In the schedules filed with her petition, the debtor listed nonpriority general unsecured debt totaling $96,538.05, which included $56,321.31 in student loan debt. The debtor claimed that her debts were primarily business debts and filled out a statement of exemption from presumption of abuse under 11 U.S.C. § 707(b)(2) (Docket No. I).

Under § 704(b) of the Bankruptcy Code, the U.S. Trustee must review all materials filed by chapter 7 debtors who are individuals and, not later than ten days after the date of the first meeting of creditors, file with the court a statement as to whether the debtor's case would be presumed to be an abuse under § 707(b). The U.S. Trustee must then, within thirty days, either file a motion to dismiss or convert under § 707(b) or file a statement setting forth the reasons the U.S. Trustee does not consider such a motion to be appropriate. *See* 11 U.S.C. § 704(b)(2). The U.S. Trustee must perform these duties even for cases in which

debtors assert that their debts are not primarily consumer debts, such as the current case.

On April 25, 2019, the U.S. Trustee timely filed a statement of presumed abuse *(see* docket entry dated April 25, 2019). On May 28, 2019, the U.S. Trustee timely filed a motion to dismiss the debtor's case for abuse under § 707(b) (Docket No. 15). In the § 707(b) motion, the U.S. Trustee argued that, notwithstanding the debtor's assertions to the contrary, the debtor's debts were primarily consumer debts because a majority of the debtor's total debt, including debt from student loans, was "incurred primarily for personal, family, or household purposes." *See* 11 U.S.C. § 101(8). The U.S. Trustee also claimed that, based on the U.S Trustee's own calculations, there was a presumption of abuse under § 707(b)(2), despite the debtor's Schedule J which listed a net monthly income of negative $84.91. The U.S. Trustee claimed that several expenses listed on the debtor's Schedule J were without substantiation or explanation. The U.S. Trustee argued that if the contested expenses were adjusted, the debtor's net monthly income would increase and the debtor would have the ability to repay her creditors, justifying a dismissal under § 707(b)(2). The U.S. Trustee also argued, in the alternative, that the totality of the debtor's circumstances necessitated a dismissal under § 707(b)(3),

On June 5, 2019, the debtor filed an amended petition and schedules in which she claimed her debts were neither primarily consumer debts nor primarily business debts (Docket No. 18). On the same day, the debtor also responded to the U.S. Trustee's motion to dismiss (Docket No 19). The debtor argued that, under the profit motive test, her student loan debt was not

"consumer debt" and, taking into account all of her debt, she was not a debtor "whose debts are primarily consumer debts" within the meaning of §§ 101(8) and 707(b) of the Bankruptcy Code. The debtor also claimed that she provided all information necessary to confirm the expenses contested in the U.S. Trustee's motion to dismiss. The debtor asserted that the U.S. Trustee's motion was in reality a disguised motion for extension of time because the U.S. Trustee's calculations were based on what the U.S. Trustee merely believed a properly calculated means test would show.

The Court held an initial hearing on June 18, 2019, and scheduled an evidentiary hearing for November 14, 2019 (Docket No. 23).

On October 14, 2019, the debtor moved for summary judgment on the U.S. Trustee's motion to dismiss (Docket No. 29). The debtor argued that, because her student loan debts were not consumer debts, she was not a debtor "whose debts are primarily consumer debts" under § 707(b). According to the debtor, she incurred her student loan debt "in the furtherance of her undergraduate education," and "[h]er purpose in undertaking those obligations was to pay for an education and earn a degree that would maximize her opportunity for employment in business" (Docket No. 29, pg. 3).

The Court denied the motion on December 11, 2019 (Docket Nos. 35 & 36). In denying the motion, the Court noted that there is conflicting case law and no binding precedent as to whether student loans constitute "consumer debt" within the meaning of 11 U.S.C. § 101(8). Without adopting any particular line of case law, the Court indicated that the test in the treasury regulation governing deductibility of expen-

ses for education may perhaps serve as a useful framework.

> Under Section 262 of the Internal Revenue Code, a taxpayer may not deduct "personal, living, or family expenses." This language is close to the definition of "consumer debt" contained in the 1978 Bankruptcy Act—"debt incurred by an individual primarily for a personal, family, or household purpose." The treasury regulation governing deductibility of expenses for education, 26 C.F.R. 1.162-5, is apparently unchanged since 1967. It provides that educational expenditures in order to meet the minimum educational requirements for employment are generally personal expenditures and are not deductible as ordinary and necessary business expenses.

(Docket No. 35, pgs. 6-7) (internal citations omitted). This framework has the advantage of not relying on a debtor's subjective intent for obtaining a college degree. *Id.* In denying summary judgment, the Court noted:

> At this stage, the Court is uncertain as to what is the best line of case law for analyzing whether the debtor's student loan debt constitutes "consumer debt." If the better approach is to find that the debtor incurred the debt to attend college and attempt to obtain a college degree, full stop. Then the debt will most likely qualify as a "consumer debt" because there are few things more personal than obtaining an education. Nor would there be any need to inquire as to a

> debtor's many reasons for obtaining that education. Under this approach, the debtor in the current case would not be entitled to summary judgment. Nor has the U.S. Trustee filed his own motion for summary judgment on this issue.
>
> On the other hand, if the better approach is to inquire further as to why the debtor wanted to attend college and obtain a college degree, then the issue of summary judgment is a closer one. The record contains some evidence that the debtor wanted to obtain a college degree in order to qualify for a job with the best salary she could obtain. But at the summary judgment phase, the Court must construe the evidence in a light most favorable to the nonmoving party, and questions of intent may not be best suited for summary judgment. Rather, the Court has reason to believe, in the language of *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986), "that the better course would be to proceed to a full trial." For example, it may turn out that the U.S. Trustee's 707(b) motion must be denied even if the debtor's debts are "primarily consumer debts." In short, the Court believes that the better course is developing a complete record on all 707(b) issues, including whether the debtor's debts are "primarily consumer debts," especially if one or more of these issues is to be heard by a reviewing court.

Id. at 8-9.

On December 19, 2019, the Court denied the debtor's motion for reconsideration in a brief marginal order and set a new evidentiary hearing date of April 23, 2020 (Docket Nos. 41 & 42). On the same day, the chapter 7 trustee reported that there were no assets to administer for the benefit of creditors (Docket No. 40).

On January 15, 2020, the Court issued a second amended scheduling order moving the evidentiary hearing date to May 11, 2020 (Docket No. 45).

On March 2, 2020, the debtor again moved for summary judgment. The debtor argued that, even using all the U.S. Trustee's other figures for calculating the means test. there would be no presumption of abuse if the Court were to find that the "imputed income" reported on the debtor's payment advices for health insurance for the debtor's domestic partner was not "income received" under 11 U.S.C. § 101(10A) (Docket No. 48).

On March 11, 2020, the Court held a telephonic status conference at which it set briefing deadlines regarding the debtor's most recent motion for summary judgment and directed the parties to continue exchanging information in hopes of reaching a consensual resolution.

On March 24, 2020, the U.S. Trustee withdrew the § 707(b) motion to dismiss, stating that the U.S. Trustee had become aware of facts and circumstances which made the motion unwarranted at that time (Docket No. 49). Although the U.S. Trustee's notice of withdrawal provided no further details, the debtor's March 2, 2020, motion for summary judgment mentioned that the debtor was currently facing the chal-

lenge of a high-risk pregnancy and other serious health issues (Docket No. 48. pg. 3).

On April 23, 2020. the debtor moved for attorney's fees under the portion of the EAJA codified at 28 U.S.C. § 2412, claiming that she was a "prevailing party" and that the U.S Trustee's motion to dismiss was not substantially justified (Docket No. 50). On May 13, 2020, the U.S. Trustee objected to the debtor's motion for attorney's fees (Docket No. 56). The U.S. Trustee argued that the debtor was not a prevailing party on the motion to dismiss; that the U.S. Trustee's position was justified because the debtor's debts were primarily consumer debts and a presumption of abuse arose based on the U.S. Trustee's calculation of the means test; and that special circumstances would make an award of attorney's fees unjust. The debtor filed a reply to the U.S. Trustee's objection on May 18, 2020 (Docket No. 58).

On May 19, 2020, the Court held an initial hearing on the motion for attorney's fees. At the hearing, the Court outlined its initial analysis of the debtor's motion. The Court noted that the EAJA might not apply because § 707(b) of the Bankruptcy Code contains its own fee shifting provisions in § 707(b)(4) and (b)(5) that appear to preclude a fee award if the § 707(b) motion is filed "by the trustee or United States trustee." 11 U.S.C. § 707(b)(5). The Court also noted that, with respect to bankruptcy cases, the EAJA would likely be limited to adversary proceedings, which are essentially full civil lawsuits within bankruptcy cases (Docket No. 63, pg. 8). Because the attorneys for the debtor and the U.S. Trustee had not addressed these specific arguments, the Court invited

the parties to submit additional briefing on the issues raised by the Court.

On May 20, 2020, the debtor received an order of discharge (Docket No. 59).

On July 20, 2020, the debtor filed a supplemental brief (Docket No. 68), and on September 3, 2020, the U.S. Trustee filed a supplemental brief (Docket No. 75).

On September 22, 2020, the Court heard further argument on the debtor's motion for an award of attorney's fees. The Court noted that while the supplemental briefs did analyze the interplay between the EAJA and the fee shifting provisions specific to § 707 (b) of the Bankruptcy Code, the Court was still looking for analysis addressing whether the term "civil action" as used in the EAJA encompasses disputes in bankruptcy cases other than adversary proceedings. The Court therefore invited the parties to submit additional briefing. *See U.S. Nat'l. Bank of Oregon v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 446-47 (1993) (court retains the independent power to identify and apply the proper construction of governing law and does not stray beyond its constitutional or prudential boundaries in doing so); *see also* Fed. R Civ. P. 56(f) (court must give notice and reasonable time to respond before granting summary judgment on ground not raised by a party); Fed. R. Bankr. P. 7056 (applying Fed. R. Civ. P. 56 in adversary proceedings); Fed, R. Bankr. P. 9014(c) (including Bankruptcy Rule 7056 among Part VII rules generally applicable to contested matters).

On November 25, 2020, the U.S. Trustee filed a brief arguing that a bankruptcy case is not a "civil

action" within the meaning of the EAJA (Docket No. 80). On December 1, 2020, the debtor filed a brief arguing that a bankruptcy case and/or a contested matter within a bankruptcy case is a "civil action" within the meaning of the EAJA (Docket No. 81). The Court then took the matter under advisement.

DISCUSSION

While the debtor's motion for attorney's fees raises many potential issues, a threshold question may be dispositive:

> Does the debtor's motion fall within the scope of the waiver of sovereign immunity provided under the EAJA?

If the answer to this question is "no," and the debtor is not a prevailing party in a "civil action" within the meaning of 28 U.S.C. § 2412, then all the other potential issues are moot.

Waivers Of Sovereign Immunity, Including The Scope Of The Waiver, Must Be Strictly Construed

Under well-established case law, waivers of sovereign immunity such as those contained in the EAJA must be strictly construed. *See F.A.A. v. Cooper*•, 566 U.S. 284 (2012); *Ardestani v. I.N.S.*, 502 U.S. 129 (1991); *Buchwald Capital Advisors, LLC v. Sault Ste. Marie Tribe of Chippewa Indians (In re Greektown Holdings LLC)*, 917 F.3d 451 (6th Cir. 2019). "Any ambiguities in the statutory language are to be construed in favor of immunity . . . so that the Government's consent to be sued is never enlarged beyond what a fair reading of the text requires." *F.A.A. v. Cooper*, 566 U.S. at 290 (internal citations omitted). Ambiguity exists if there is a plausible interpretation

of the statute that would not authorize an award of attorney's fees in favor of the debtor. *Id.* at 290-91.

The Supreme Court has had a number of opportunities to opine on the scope of the waiver of sovereign immunity under the EAJA and other statutes awarding attorney's fees, costs, and money damages against the United States. The Supreme Court's decisions in *Ardestani v. I.N.S.* and *F.A.A. v. Cooper* are particularly apt. In *Ardestani*, the Supreme Court was asked to decide whether the EAJA applied to administrative deportation proceedings. The Supreme Court looked to the definition of what constituted an adversary adjudication under the EAJA and concluded that administrative deportation proceedings are not adversary adjudications "under section 554" and thus do not fall within the category of proceedings for which the EAJA has waived sovereign immunity and authorized an award of attorney's fees and costs. *Ardestani v. I.N.S*, 502 U.S. at 139. Relying on prior precedent, the Court noted that Congress intended for the Immigration and Naturalization Act of 1952 to supplant the Administrative Procedures Act in immigration proceedings. The Court held that the meaning of "an adjudication under 554" was plain and unambiguous. More importantly. the Court added that its conclusion was reinforced by the limited nature of waivers of sovereign immunity.

> The EAJA renders the United States liable for attorney's fees for which it would not otherwise be liable, and thus amounts to a partial waiver of sovereign immunity. Any such waiver must be strictly construed in favor of the United States . . . .

> Because we conclude that administrative immigration proceedings do not fall "under section 554" and therefore are wholly outside the scope of the EAJA, this case is distinguishable from those cases in which we have recognized that, once Congress has waived sovereign immunity over certain subject matter, the Court should be careful not to "assume the authority to narrow the waiver that Congress intended." *United States v. Kubrick*, 444 U.S. 111, 118, 100 S.Ct. 352, 357, 62 L.Ed.2d 259 (1979); see, *e.g., Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95, 111 S.Ct. 453, 457, 112 L.Ed.2d 435 (1990) ("Once Congress has made such a waiver, we think that making the rule of equitable tolling applicable to suits against the Government, in the same way that it is applicable to private suits, amounts to little, if any, broadening of the congressional waiver"); *Sullivan v. Hudson*, 490 U.S. 877, 892, 109 S.Ct. 2248, 2258, 104 L.Ed.2d 941 (1989) (holding that Social Security administrative proceedings held on remand from a district court order "are an integral part of the 'civil action' for judicial review," and thus that attorney's fees for representation on remand are available under the civil action provisions of the EAJA, 28 U.S.C. § 2412).

Id. at 137.

In *FAA v. Cooper*, the plaintiff alleged that the unlawful disclosure of confidential medical information by several federal agencies had caused him mental and emotional distress. *FAA v. Cooper*, 566

U.S. at 289. He filed a civil action seeking an award of "actual damages" under the Privacy Act of 1974. The Supreme Court held that the Privacy Act does not unequivocally authorize damages for mental or emotional distress and therefore does not waive the government's sovereign immunity from liability for such harms.

> We have said on many occasions that a waiver of sovereign immunity must be "unequivocally expressed" in statutory text. See, *e.g., Lane v. Pena*, 518 U.S. 187, 192, 116 S.Ct. 2092, 135 L.Ed.2d 486 (1996); *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33, 112 S.Ct. 1011, 117 L.Ed.2d 181 (1992); *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95, 111 S.Ct. 453, 112 L.Ed.2d 435 (1990). Legislative history cannot supply a waiver that is not clearly evident from the language of the statute. *Lane, supra, at* 192, 116 S.Ct. 2092. Any ambiguities in the statutory language are to be construed in favor of immunity, *United States v. Williams*, 514 U.S. 527, 531, 115 S.Ct. 1611, 131 L.Ed.2d 608 (1995), so that the Government's consent to be sued is never enlarged beyond what a fair reading of the text requires, *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685-686, 103 S.Ct. 3274, 77 L.Ed.2d 938 (1983) (citing *Eastern Transp. Co. v. United States*, 272 U.S. 675, 686, 47 S.Ct. 289, 71 L.Ed. 472 (1927)). Ambiguity exists if there is a plausible interpretation of the statute that would not authorize money damages against

> the Government. *Nordic Village, supra*, at 34, 37, 112 S.Ct. 1011.
>
> The question that confronts us here is not whether Congress has consented to be sued for damages under the Privacy Act. That much is clear from the statute, which expressly authorizes recovery from the Government for "actual damages." Rather, the question at issue concerns the *scope* of that waiver. For the same reason that we refuse to enforce a waiver that is not unambiguously expressed in the statute, we also construe any ambiguities in the scope of a waiver in favor of the sovereign. *Lane, supra*, at 192, 116 S.Ct. 2092.

Id. at 290-91 (emphasis in original).

Courts have "never required that Congress use magic words," but instead require that "the scope of Congress'[s] waiver be clearly discernable from the statutory text . . . [i]f it is not, then we take the interpretation most favorable to the Government." *Id.* at 291.

> We do not claim that the contrary reading of the statute accepted by the Court of Appeals and advanced now by respondent is inconceivable. But because the Privacy Act waives the Federal Government's sovereign immunity, the question we must answer is whether it is plausible to read the statute, as the Government does, to authorize only damages for economic loss. *Nordic Village*, 503 U.S., at 34, 37, 112 S.Ct. 1011. When waiving the Government's sovereign immunity, Con-

> gress must speak unequivocally. *Lane*, 518 U.S., at 192, 116 S.Ct. 2092. Here, we conclude that it did not. As a consequence, we adopt an interpretation of "actual damages" limited to proven pecuniary or economic harm. To do otherwise would expand the scope of Congress' sovereign immunity waiver beyond what the statutory text clearly requires.

Id. at 299.

And while this Court does not and cannot deny the clarity of the waiver of sovereign immunity as to lawsuits that are obviously "civil actions," *see Baker Botts L.L.P. v. ASARCO LLC*, 576 U.S. 121, 126-27 (2015), the debtor's motion in this bankruptcy case fairly presents a question as to the *scope* of that waiver.

The Equal Access to Justice Act

The debtor seeks an award of attorney's fees under 28 U.S.C. § 2412(b) and (d). Section 2412 of the Judicial Code provides in pertinent part:

> (b) Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute

which specifically provides for such an award.

. . . .

(d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

(B) A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the United States was not substantially justified. Whether or not the position of the United States was substantially justified shall be determined on the basis of the record

> (including the record with respect to the action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought.

28 U.S.C. § 2412.

Congress enacted the EAJA in 1980. Pub. L. 96-481, 94 Stat. 2321. In enacting the EAJA, Congress provided for an award of attorney's fees to a prevailing party "in any civil action" as well as in certain administrative adjudications. The provision permitting an award of attorney's fees in civil actions is codified in § 2412 of Title 28 (the Judicial Code). The provision permitting an award of attorney's fees in certain administrative adjudications is codified primarily in §§ 504, 551, and 554 of Title 5 of the United States Code. The debtor's motion in this bankruptcy case only seeks an award of attorney's fees under 28 U.S.C. § 2412.

Is There A Plausible Interpretation Of The Phrase "Civil Action" In 28 US. C. 2412 That Would Not Extend The Waiver Of Sovereign Immunity To The Debtor's Bankruptcy Case Or The US. Trustee's § 707(B) Motion Filed Within The Bankruptcy Case?

Congress did not define "civil action" when it enacted the EAJA in 1980. At the time the EAJA was enacted, the entry for "civil action" in Black's Law Dictionary was as follows:

> Civil action. Action brought to enforce, redress, or protect private rights. In general, all types of actions other than criminal proceedings. *Gilliken v. Gilliken*, 248 N.C. 710, 104 S.E.2d 861, 863.

> The term includes all actions, both those formerly known as equitable actions and those known as legal actions, or, in other phraseology, both suits in equity and actions at law. *Thomason v. Thomason* 107 U.S. App. D.C. 27, 274 F.2d 89, 90.
>
> In the great majority of states which have adopted rules or codes of civil procedure as patterned on the Federal Rules of Civil Procedure, there is only one form of action known as a "civil action." The former distinctions between actions at law and suits in equity, and the separate forms of those actions and suits, have been abolished. Rule of Civil Proc. 2; New York CPLR § 103(a).

Black's Law Dictionary 222 (5th ed. 1979). "[The] term [action] in its usual legal sense means a suit brought in a court; a formal complaint within the jurisdiction of a court of law." *Id.* at 26; *see also Sullivan v. Hudson*, 490 U.S. 877 (1989).

Unfortunately, despite the passage of forty years, there appear to be no published cases from the Sixth Circuit or other courts of appeals that have analyzed whether bankruptcy cases or disputes within bankruptcy cases other than adversary proceedings fall within the scope of the term "civil action" under the EAJA, let alone do so under the Supreme Court's framework for delineating the scope of waivers of sovereign immunity.

Certainly, the phrase "civil action" could be read as simply distinguishing between actions that are not criminal. *Di Bella v. United States*, 369 U.S. 121 (1962) (distinguishing order denying motion to suppress in criminal case from established exceptions to final

judgment rule in "civil actions"). Under this broad interpretation, "civil actions" would encompass all formal court proceedings that are not criminal proceedings. But the phrase "civil action" could also be defined more narrowly as synonymous with the identical term used by the Federal Rules of Civil Procedure since at least 1937 and appearing elsewhere in the Judicial Code since it was recodified in 1948. In other words, "civil actions" would constitute all formal lawsuits subject to the Federal Rules of Civil Procedure initiated by the filing of a complaint. This narrower definition of "civil action" would presumably not include bankruptcy cases, which, in 1980 as well as today, are not subject to the Federal Rules of Civil Procedure, are not initiated by the filing of a complaint, and have no plaintiff or defendant.

Rather than being part of a dichotomy that recognizes court proceedings as either civil or criminal, this narrower definition of "civil action" would treat "civil actions" and "bankruptcy cases" as separate subsets within the universe of all formal court proceedings.

In order to determine whether this narrower definition of "civil action" is a plausible interpretation of the term as used in the EAJA, some historical analysis is instructive.

Rules 2 and 3 of the Federal Rules of Civil Procedure have essentially remained unchanged since their enactment in 1937. Rule 2 states that "[t]here is one form of action—the civil action." Rule 3 states that "[a] civil action is commenced by filing a complaint with the court."

> The prescription in Federal Rule of Civil Procedure 2 that there shall be one form of action has been characterized as the most fundamental rule of all. A number of important consequences follow from Rule 2: the forms of action are abolished, the separate equity practice of the federal courts is eliminated, the old equity rules are superseded, the Conformity Act no longer superimposes state laws or rules upon the procedure in federal courts, and the significance of the term "cause of action," which formerly was a matter of serious dispute, has been eliminated. Today, there is a single procedural framework for all federal civil proceedings, regardless of the substantive claim at issue, including those in admiralty.

4 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1042 (4th ed. 2008) (hereinafter "Wright & Miller") (internal citations omitted).

Congress's use of the term "civil action" goes back at least to the recodification of the Judicial Code (Title 28 of the United States Code) in 1948. Pub. L. 80-773, 62 Stat. 869 (1948), It appears that all of the instances in which Congress used the term "civil action" in the 1948 recodification of the Judicial Code are consistent with the term "civil action" as used in Rules 2 and 3 of the Federal Rules of Civil Procedure, which remain essentially unchanged since 1937—namely, a formal lawsuit commenced by filing a complaint with the court. Examples where Congress used the term "civil action" in the 1948 recodification of the Judicial Code include the following:

§ 1331. Federal question; amount in controversy

The district courts shall have original jurisdiction of all *civil actions* wherein the matter controversy exceeds [$3,000], and arises under the Constitution, laws or treaties of the United States.

§ 1332. Diversity of citizenship; amount in controversy

The district courts shall have original jurisdiction of all *civil actions* where the matter controversy exceeds [$1000], and is between:

(1) Citizens of different States;

(2) Citizens of a State, and foreign states or citizens or subjects thereof; . . .

§ 1346. United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

(1) Any *civil action* against the United States for the recovery of any [tax];

(2) Any other *civil action* or claim against the United States, not exceeding [$10,000], founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

(b) [T]he district courts . . . shall have exclusive jurisdiction of *civil actions* on claims against the United States . . . under circumstances where the

United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

. . . .

(d) The district courts shall not have jurisdiction under this section of:

(1) Any *civil action* or claim for a pension;

(2) Any *civil action* to recover fees, salary, or compensation for official services of officers of the United States.

§ 2401. Time for commencing action against United States

Every *civil action* commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues . . . .

Pub. L. 80-773 , 62 Stat. 869 (emphasis added).

The 1948 recodification of the Judicial Code also contains at least two instances where Congress chose to use different language in referring to certain judicial proceedings: (1) bankruptcy matters and proceedings, and (2) intervention by the United States in any "action, suit, or proceeding" where the constitutionality of an act of Congress is called into question.

§ 1334. Bankruptcy matters and proceedings

The district courts shall have original jurisdiction, exclusive of the courts of the States, *of all matters and proceedings in bankruptcy.*

§ 2403. Intervention by United States; constitutional question

(a) In *any action, suit or proceeding* in a court of the United States . . . wherein the constitutionality of any Act of Congress affecting the public interest is drawn into question, the court shall certify such fact to the Attorney General and shall permit the United States to intervene . . .

Pub. L. 80-773 , 62 Stat. 869 (emphasis added).

"[I]t is a normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning." *Taniguchi v. Kan Pacific Saipan, Ltd.*, 566 U.S. 560, 571 (2012) (internal citations omitted). On the other hand, " '[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.' " *Russello v. United States*, 464 U.S. 16, 23 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)). These canons suggest that when Congress recodified the Judicial Code in 1948 the term "civil action" meant something different from "matters and proceedings in bankruptcy" as used in § 1334. Similarly, the term "civil action" also meant something different from (and was presumably as subset of) "any action, suit or proceeding" as used in § 2403.

In 1948, § 2412 of the Judicial Code generally provided that the United States would be liable for fees and costs "only when such liability is expressly

provided for by Act of Congress." Pub. L. 80-773, 62 Stat. 869.

Subsection 2412(b) did allow costs to the prevailing party for certain actions under §§ 1346(a) and 1491. Pub. L. 80-773, 62 Stat. 869.

When Congress next amended § 2412 in 1966, it generally gave courts the authority to award costs (but not attorney's fees) against the United States to a "prevailing party in any civil action":

> Except as otherwise specifically provided by statute, a judgment for costs . . . but not including the fees and expenses of attorneys may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or official of the United States acting in his official capacity, in any court having jurisdiction of such action . . . .

Pub. L. 89-507, 80 Stat. 308 (1966).

When Congress enacted the EAJA in 1980, it amended § 2412 to include, for the first time, a right to attorney's fees under certain circumstances. In doing so, it continued to use the terms "prevailing party" and "civil action" already present in previous versions of § 2412.

From this history, it is certainly plausible to interpret "any civil action" in the EAJA as the term has been historically used in Rules 2 and 3 of the Federal Rules of Civil Procedure and as the term was used in earlier versions of the Judicial Code, including earlier versions of § 2412. As Justice Breyer wrote for a unanimous Supreme Court:

> When a statutory term is " 'obviously transplanted from another legal source,' " it " 'brings the old soil with it.' *"Hall v. Hall*, 584 U.S.___,___, 138 S.Ct. 1118, 1128 (2018) (quoting Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 537 (1947)) . . .

Taggart v. Lorenzen, 139 S. Ct. 1795, 1801 (2019).

If this historical interpretation of "civil action" is a plausible interpretation of the same term that Congress chose when it amended § 2412 in 1980, did Congress unambiguously intend to include bankruptcy cases as "civil actions" when it waived sovereign immunity in enacting the EAJA?

In the words of Judge Thapar in another context: "Bankruptcy is different." *Ritzen Grp., Inc. v. Jackson Masonry, LLC (In re Jackson Masonry, LLC)*, 906 F.3d 494, 498 (6th Cir. 2018), *aff'd sub nom. Ritzen Grp., Inc. v. Jackson Masonry, LLC*, 140 S. Ct. 582 (2020). Unlike ordinary civil litigation, "[a] bankruptcy case is an aggregation of individual disputes, many of which could be entire cases on their own. *Id.* A bankruptcy case has a debtor and creditors and often a trustee. But there is no "v." in bankruptcy cases, except for adversary proceedings, which are "essentially full civil lawsuits carried out under the umbrella of bankruptcy cases." *Id.* at 500 (quoting *Bullard v. Blue Hills Bank*, 135 S. Ct. 1686, 1694 (2015)). Bankruptcy cases do not have plaintiffs or defendants. A bankruptcy case is not begun by filing a complaint. Rather, the Bankruptcy Reform Act of 1978, like its predecessor, provides for the filing of a voluntary or involuntary petition. 11 U.S.C. §§ 301-303; Pub. L. 95-598, 92 Stat. 2549. Furthermore,

under the language of the Bankruptcy Code: "The commencement of a voluntary case under a chapter of [the Bankruptcy Code] constitutes an order for relief under such chapter." 11 U.S.C. § 301. In contrast, under the Federal Rules of Civil Procedure, an order of relief is by no means automatic. Rather, "relief" is something that you ask for in a complaint or other pleading and hope the court will include in its judgment. *See, e.g.*, Fed. R. Civ. P. 8(a) ("A pleading that states a claim for relief must contain . . . a demand for the relief sought."); Fed. R. Civ. P. 54(b) ("final judgment should grant the relief to which each party is entitled").

In addition, the grant of bankruptcy jurisdiction contained in the Judicial Code in effect in 1980 gave the district courts "original jurisdiction, exclusive of the courts of the States, *of all matters and proceedings in bankruptcy*" (emphasis added). Thus, unlike the federal question and diversity jurisdiction statutes, which have both used the phrase "civil actions" since at least 1948, the statute for bankruptcy jurisdiction instead used the phrase "matters and proceedings in bankruptcy." When Congress next amended § 1334 under the Bankruptcy Amendments and Federal Judgeship Act of 1984, § 1334 provided for "exclusive jurisdiction of all cases under title 11" and "original but not exclusive jurisdiction of all civil proceedings arising under title 11." Pub. L. 98-353, 98 Stat. 333. In other words, the bankruptcy jurisdictional statute has continued to use language different from the federal question and diversity jurisdiction statutes. *See also Cent. Virginia Cmty. Coll. v. Katz*, 546 U.S. 356, 369 (2006) ("Bankruptcy jurisdiction, as understood

today and at the time of the framing, is principally *in rem* jurisdiction.") (internal citations omitted).

Furthermore, the Federal Rules of Civil Procedure have historically not applied to bankruptcy cases except to the extent provided by other rules adopted by the Supreme Court. In 1980, Rule 81 of the Federal Rules of Civil Procedure provided in part: "These rules . . . do not apply to proceedings in bankruptcy . . . except in so far as they may be made applicable thereto by rules promulgated by Supreme Court of the United States." Similarly, in 1980, Rule 1 of the Federal Rules of Civil Procedure provided in pertinent part:

> These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81.

The first set of comprehensive, codified bankruptcy rules was issued in 1973. Wright & Miller at § 1016. This version of bankruptcy rules, using a three-digit numbering system, was in place when the EAJA was enacted in 1980. A copy of the April 24, 1973, Supreme Court order adopting bankruptcy rules and official bankruptcy forms effective October 1, 1973, as well as the official rules and forms are reprinted in 37 L. Ed. 2d at xxxi — cxxxviii. A new set of bankruptcy rules using the current four-digit numbering system did not become effective until August 1, 1983. *See* Wright & Miller at § 1016.

In addition, in 1964, Congress enacted 28 U.S.C. § 2075, giving the Supreme Court the power to establish rules and forms governing cases under Title 11.

See Pub L. No. 88-623, 78 Stat. 1001. This rulemaking authority is separate and apart from the rulemaking authority under 28 U.S.C. § 2072, governing the Federal Rules of Civil Procedure.

The Federal Rules of Bankruptcy Procedure apply to matters and proceedings in bankruptcy cases, regardless whether such matters or proceedings are heard by a district judge or a bankruptcy judge. *See* Fed. R. Bankr. P. 1001; Fed. R. Civ. P. 81(a)(2); *Diamond Mortg. Corp. of Ill. v. Sugar*, 913 F.2d 1233, 1240-41 (7th Cir. 1990); *see also* 1987 Advisory Committee Note to Fed. R. Bankr. P. 9001(4) ("Since a case or proceeding may be before a bankruptcy judge or a judge of the district court, 'court or judge' is defined to mean the judicial officer before whom the case or proceeding is pending,").

Nor is it clear how one would translate "prevailing party" in a bankruptcy case when there is no plaintiff or defendant. Is every debtor who receives a discharge a prevailing party? What about a trustee who recovers assets for the benefit of creditors? How about creditors who receive some distribution from property of the debtor's estate? If the debtor gets a discharge and the trustee recovers sufficient assets to pay creditors a substantial dividend on their claims, are the debtor, trustee, and creditors all prevailing parties? If the U.S. Trustee moves unsuccessfully under Bankruptcy Rules 1017(e)(1) and 4004(b)(1) for an extension of time to file a § 707(b) motion or an adversary complaint objecting to the debtor's discharge and the debtor later receives a discharge under chapter 7, is the debtor a "prevailing party" for purposes of the EAJA?

The Supreme Court addressed the definition of "prevailing party" in *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 603 (2001):

> In designating those parties eligible for an award of litigation costs, Congress employed the term "prevailing party," a legal term of art. Black's Law Dictionary 1145 (7th ed.1999) defines "prevailing party" as "[a] party in whose favor a judgment is rendered, regardless of the amount of damages awarded <in certain cases, the court will award attorney's fees to the prevailing party>.___ Also termed *successful party.*" This view that a "prevailing party" is one who has been awarded some relief by the court can be distilled from our prior cases.
>
> . . . .
>
> . . . These decisions, taken together, establish that enforceable judgments on the merits and court-ordered consent decrees create the "material alteration of the legal relationship of the parties" necessary to permit an award of attorney's fees . . . .
>
> . . . Our precedents thus counsel against holding that the term "prevailing party" authorizes an award of attorney's fees *without* a corresponding alteration in the legal relationship of the parties.

532 U.S. at 603-05 (citations and footnotes omitted).

It is unclear how this definition works in a bankruptcy case that consists of various matters and pro-

ceedings, and no plaintiffs or defendants, aside from adversary proceedings, which the Supreme Court has noted are essentially full civil lawsuits carried out under the umbrella of bankruptcy cases. *See Bullard v. Blue Hills Bank*, 135 S. Ct at 1694. Nor is the language defining parties eligible for fee awards in 28 U.S.C. § 2412 a good fit for bankruptcy trustees, who are often the most likely parties to pursue avoidance actions against the United States. *See Gower v. Farmers Home Admin. (In re Davis)*, 899 F.2d 1136, 1142-45 (11th Cir. 1990) (trustee who prevailed in adversary proceeding against federal agency did not qualify as "party" eligible to apply for fees under the EAJA).

Presumably, Congress could have used broader language in delineating the scope of the EAJA. For example, when Congress enacted the Bankruptcy Reform Act of 1978, it used broader language in describing both the scope of the automatic stay under § 362(a) and the scope of the criminal exception to the automatic stay in § 362(b)(1). Section 362, as written in the Bankruptcy Reform Act of 1978 provided in pertinent part:

> (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title operates as a stay, applicable to all entities, of—
>
> (1) the commencement or continuation, including the issuance or employment of process, *of a judicial, administrative, or other proceeding* against the debtor that was or could have been commenced before the commencement of the case under this title . . . .

. . . .

> (b) The filing of a petition under section 301, 302, or 303 of this title does not operate as a stay—
>
> (1) under subsection (a) of this section, of the commencement or continuation of a *criminal action or proceeding* against the debtor;

Pub. L. 95-598, 92 Stat. 2549 § 3 (emphasis added).

At the time the EAJA was enacted, Black's Law Dictionary defined "proceeding," in part, as:

> In a general sense, the form and manner of conducting juridical business before a court or judicial officer. Regular and orderly progress in form of law, including all possible steps in an action from its commencement to the execution of judgment.

Black's Law Dictionary 1083 (5th ed. 1979).

In *Bloate v. United States*, 559 U.S. 196 (2010), the Supreme Court defined the term proceeding as follows:

> A court proceeding is defined as "[a]n act or step that is part of a larger action" and "an act done by the authority or direction of the court." Black's Law Dictionary 1324 (9th ed.2009) (hereinafter Black's Law) (internal quotation marks omitted). The granting of a defense request for an extension of time to prepare pretrial motions constitutes both "[a]n act or step that is part of [the] larger [criminal case]" and "an act done by the authority or direction of the court."

559 U.S. at 218-19.

In *Ball v. Memphis Bar-B-Q Co.*, 34 F.Supp.2d 342 (E.D. Va. 1999), *aff'd*, 228 F.3d 360 (4th Cir. 2000), the district court provided a somewhat similar definition:

> A "proceeding", at base, is an action of some form before a tribunal. *See [Black's Law Dictionary (5th ed.1979)]* at 1083 ("proceeding" is defined as, "[On a general sense, the form and manner of conducting juridical business before a court or judicial officer. Regular and orderly progress in form of law, including all possible steps in an action from its commencement to the execution of judgment").

Ball v. Memphis Bar-B-Q, 34 F.Supp.2d at 345.

> "Proceeding" has a more general meaning [than "action"]; it may refer to any step taken by a court in the course of an "action." . . . Its technical and older meaning is an original matter, independent of an "action" or not qualifying as an "action" in the traditional sense. Id. at 1083-84.

R. E. Linder Steel Erection Co. v. Alumisteel Sys., Inc., 88 F.R.D. 629, 633 (D. Md. 1980),

The term proceeding would therefore cover all "act[s] done by the authority or direction of the court," *see Bloate v. United States*, 559 U.S. *at* 219, including the items listed in the debtor's most recent brief (Docket No. 81, pgs. 12-13), and all matters and proceedings in bankruptcy cases. It would also cover miscellaneous matters in court such as civil commitment proceedings under 18 U.S.C. § 4248. *Cf. United States v. Searcy*, 880 F.3d 116, 124 (4th Cir, 2018) (civil com-

mitment proceeding is not the type of "civil action" Congress had in mind when it enacted the catchall statute of limitation codified at 28 U.S.C. § 1658(a)). In other words, one plausible reading of "civil action" as used in 28 U.S.C. § 2412 would be to treat "civil actions" and "bankruptcy cases" as separate subsets within the universe of all formal court proceedings.

To recap, a number of factors suggest that, aside from adversary proceedings, the scope of Congress's waiver of sovereign immunity in the EAJA in 1980 does not extend to "prevailing parties," however they might be defined, in bankruptcy cases:

- the historical use of "civil action" throughout the Judicial Code as synonymous with "civil action" as used in Rules 2 and 3 of the Federal Rules of Civil Procedure since 1937;
- the use of different language in the same Judicial Code when referring to bankruptcy cases and proceedings;
- the use of broader language in the same Judicial Code when referring to intervention by the United States under § 2403 when the constitutionality of an act of Congress is brought into question — *"any action, suit or proceeding* in a court of the United States";
- the inapplicability of the Federal Rules of Civil Procedure to bankruptcy cases unless incorporated by the Bankruptcy Rules or other rules of the Supreme Court;
- the absence of a "v." in bankruptcy cases (other than in adversary proceedings that are essentially full civil lawsuits carried out under the

> umbrella of bankruptcy cases); no plaintiffs or defendants, just a debtor, creditors, and usually a trustee; which does not readily translate into the traditional "prevailing party" requirement that was present in 28 U.S.C. § 2412 even before Congress enacted the Equal Access to Justice Act in 1980.

Is it plausible for bankruptcy cases to fall within a broad interpretation of the term "civil action?" Perhaps. But Supreme Court precedent requires that waivers of sovereign immunity be strictly construed. Ambiguity exists if there is a plausible interpretation of the statute that would not encompass an award of attorney's fees in bankruptcy cases aside from adversary proceedings. *See F A.A. v. Cooper*, 566 U.S. at 291 (citing *United States v. Nordic Village, Inc.*, 503 U.S. 33, 34, 37 (1992)) ("Ambiguity exists if there is a plausible interpretation of the statute that would not authorize money damages against the Government."); *In re Greektown Holdings LLC*, 917 F.3d at 457 (in the context of tribal sovereign immunity, "any doubt is to be resolved in favor of Indian tribes.").

For purposes of the debtor's current motion for attorney's fees, it is enough to note that a plausible interpretation of the EAJA exists under which Congress did not intend "civil actions" to encompass bankruptcy cases. And if the scope of Congress's waiver is not clearly discernable from the statutory text in light of traditional interpretive tools, then we take the interpretation most favorable to the United States. *See F.A.A. v. Cooper*, 566 U.S. at 291; *United States v. Nordic Village, Inc.*, 503 U.S. at 34, 37.

The Case Law Cited By The Debtor Fails To Address This Issue Or Support An Unambiguous Waiver

Although the debtor cites to case law that simply assumes the scope of the EAJA extends to bankruptcy cases or contested matters within a bankruptcy case, none of these case analyzed whether bankruptcy cases or contested matters fall within the scope of the term "civil action" under the EAJA. *See, e.g., O'Connor v. U.S. Dep't of Energy*, 942 F.2d 771 (10th Cir. 1991) (after seeking attorney's fees under the EAJA related to contested matter, Tenth Circuit noted that sole issue presented on appeal is whether a bankruptcy court is "a court" under 28 U.S.C. § 2412(d)(1)(A)); *In re Mendez*, No. 7-07-11092 SA, 2008 WL 5157922, at *3 (Bankr. D. N.M. Sept. 26, 2008) (debtor was prevailing party for purposes of the EAJA after U.S. Trustee withdrew § 707(b) motion); *In re Collins*, No. 3:18-BK-0630-JAF, 2019 WL 3948383, (Bankr. M.D. Fla. June 13, 2019) (holding that the EAJA does not extend to actions taken in contested matters by panel trustees, but acknowledging "that the Office of the U.S. Trustee is, in general, subject to the EAJA" and citing *In re Terrill*, No. 05-87180-BJH-7, 2006 WL 2385236 (Bankr. N.D. Tex. July 27, 2006)); *In re Terrill*, (after denying U.S. Trustee's § 707(b) motion, court issued short memorandum and order finding debtor to be prevailing party under the EAJA and finding that U.S. Trustee's position was not substantially justified). Nor has the Court been able to uncover any case law directly on point,

Also, a number of the cases cited by the debtor involved adversary proceedings, which are "essentially full civil lawsuits carried out under the umbrella of the bankruptcy case," *Bullard v. Blue Hills Bank*, 135 S. Ct. at 1694, as opposed to an award of fees either for prevailing in the bankruptcy case overall or

for prevailing in a particular contested matter within a bankruptcy case. *See, e.g.*, *United States Small Bus. Admin. v. Esmond (In re Esmond)*, 752 F.2d 1106 (5th Cir.1985), In *Esmond*, the SBA filed an adversary complaint objection to the debtors' discharge. The debtors then moved for attorney's fees under the EAJA, After the district court upheld the bankruptcy court's denial of attorney's fees, the Fifth Circuit reversed. The Fifth Circuit's opinion simply assumed that the EAJA applied to the SBA's adversary complaint and held that the agency failed to meet its burden of proving that its position was "substantial justified." *Accord Gumport v. Interstate Commerce Conan 'n (In re Transcon Lines)*, 178 B.R. 228, 232 (Bankr. C.D. Cal. 1995) (granting trustee's motion for attorney's fees under the EAJA for trustee's successful adversary proceeding against ICC, without analyzing applicability of the EAJA to trustee's adversary proceeding).

The debtor also discusses case law involving the authority of the bankruptcy court to award fees under the EAJA as a "court of the United States" (Docket No. 81, pgs. 21-26). This dispute in the case law apparently arises from the exclusion of bankruptcy courts from the definition of courts of the United States in § 451 of the Judicial Code (28 U.S.C. § 451). This case law involves the authority of the bankruptcy judge to issue an award of attorney's fees under 28 U.S.C. § 2412. Similar conflicts have arisen over a bankruptcy judge's authority to impose sanctions under 28 U.S.C. § 1927, which imposes attorney's fees and costs upon any attorney "who so multiplies the proceedings in any case unreasonably and vexatiously." *See Grossman v. Wehrle (In re Royal*

Manor Mgmt., Inc), 652 F. App'x 330, 341-42 (6th Cir. 2016) (acknowledging circuit split but holding that bankruptcy courts have authority to impose sanctions under § 1927).

While the undersigned judge believes that whether a bankruptcy court is a court of the United States should be irrelevant because bankruptcy judges are, by definition "a unit of the district court," 28 U.S.C. § 151; *accord In re Schaefer Salt Recovery, Inc.*, 542 F.3d 90, 105 (3d Cir. 2008), this dispute is of no moment to the present case in light of the Supreme Court's decision in *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932 (2015). In *Wellness*, the Supreme Court adopted the implied consent standard articulated in *RoeII v. Withrow*, 538 U.S. 580 (2003), and held that "Article HI is not violated when the parties knowingly and voluntarily consent to adjudication by a bankruptcy judge." *Wellness Intl Network, Ltd. v. Sharif*, 135 S. Ct. at 1939, 1948.

In the present case, the debtor maintains that this Court has the authority to enter an award of attorney's fees under the EAJA and has asked this Court to do just that. Such action, if not express consent, appears to meet the implied consent standard in *Wellness*. And, presumably, the U.S. Trustee has no objection to this Court entering an order holding that a debtor who successfully defends a contested matter within a bankruptcy case is not a "prevailing party" in a "civil action" under 28 U.S.C. § 2412.

In support of her argument that a bankruptcy case is a civil action, the debtor cites to *Allfirst Bank v. Lewis (In re Lewis)*, 257 B.R. 431 (Bankr. D. Md. 2001). However, *Lewis* did not determine that a bank-

ruptcy case is a civil action. In *Lewis*, the court determined that "a bankruptcy case is a civil *proceeding*" for the purposes of the Soldiers' and Sailors' Civil Relief Act. *Id.* at 435 (emphasis added). The Soldiers' and Sailors' Civil Relief Act "applies to *any judicial or administrative proceeding* commenced in any court or agency in any jurisdiction subject to this chapter." 50 U.S.C. § 3912(b) (emphasis added). The language of the EAJA is not so broad; fees "may be awarded to the prevailing party in *any civil action* brought by or against the United States." 28 U.S.C. § 2412(a)(1). Furthermore, the bankruptcy proceeding at issue in Lewis was a creditor's adversary proceeding seeking the nondischargeability of certain debts. *In re Lewis*, 257 B.R. at 433.

The debtor also cites to *In re Perry*, No. 02-13366, 2002 WL 31160132 (Bankr. W.D. Tenn. Sept. 26, 2002), in which a bankruptcy judge transferred a bankruptcy case within the Western District of Tennessee from the Western Division to the Eastern Division pursuant to 28 U.S.C. § 1404(a). Because there was no local bankruptcy rule on point, and because the bankruptcy change of venue statute, 28 U.S.C. § 1412 and Bankruptcy Rule 1014, are both silent with respect to intra-district transfers, the bankruptcy court followed the change in venue provision applicable to "civil actions" in 28 U.S.C. § 1404(a) and approved the intra-district transfer. Presumably, the bankruptcy change of venue statute and Bankruptcy Rule 1014 are silent with respect to intra-district transfers because such transfers can be handled at the discretion of the judges within the district, at least in the absence of any applicable local bankruptcy rules. *Cf.* N.D. Ohio Local Bankruptcy Rule 1073-1(d):

"Nothing in the Local Bankruptcy Rules shall preclude the reassignment of cases, proceedings, or matters from one Judge to another Judge with the consent of both Judges."). In any event, this broad reading of "civil action" with respect to an intra-district transfer of a bankruptcy case offers little guidance for how the same term in 28 U.S.C. § 2412 must be interpreted under the Supreme Court's framework for delineating the scope of waivers of sovereign immunity.

Perhaps the closest case on point in terms of analyzing whether bankruptcy cases are "civil actions" for purposes of the EAJA is *In re Sisk*, 973 F.3d 945 (9th Cir. 2020), *as amended* (Sept. 24, 2020). In *Sisk*, the bankruptcy court declined to confirm the debtors' chapter 13 plans, despite the absence of any objections by parties in interest. After the Bankruptcy Appellate Panel affirmed, the Ninth Circuit reversed. The debtors then moved for attorney's fees under the EAJA, arguing that they were prevailing parties against the bankruptcy court and the BAP. In a short order, the Ninth Circuit denied the fee applications, holding that chapter 13 bankruptcy cases are not civil actions brought by or against the United States for the purposes of the EAJA. Instead, they are brought by debtors seeking relief from their creditors. *Id.*

The debtor also cites to several cases and other sources for the proposition that the merger of law and equity means that a bankruptcy case is a civil action. However, the Supreme Court has long recognized a difference between proceedings in bankruptcy and suits at law and equity. *See Schumacher v. Beeler*, 293 U.S. 367 (1934) (noting that "by virtue of its Art. I authority over bankruptcies the Congress could confer on the regular district courts jurisdiction of 'all contro-

versies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants' "); *accord Nat'l Mut. Ins. Co. of Dist. of Col. v. Tidewater Transfer Co*., 337 U.S. 582, 594 (1949) (discussing *Schumacher v. Beeler).*

The absence of a significant amount of cases applying the EAJA in bankruptcy cases, other than adversary proceedings, may be instructive in and of itself. Aside from *Sisk*, the few reported cases do not analyze whether a bankruptcy case is a "civil action," let alone do so under the Supreme Court's framework for delineating the scope of waivers of sovereign immunity.

The debtor correctly notes that another fee-shifting statute may present similar questions as to whether disputes within bankruptcy cases other than adversary proceedings fall within the scope of the term "civil action." As part of the Tax Equity and Fiscal Responsibility Act of 1982, Congress amended § 7430 of the Tax Code (Title 26 of the United States Code). Pub. L. 97-248, 96 Stat. 324 § 292. Under § 7430, if certain circumstances are met, a prevailing party may be awarded costs and fees "[On any administrative or court proceeding which is brought by or against the United States." Although "any administrative or court proceeding" seems broader in scope than "any civil action," another subsection of the statute defines "court proceeding" as "any civil action brought in a court of the United States (including the Tax Court and the United States Court of Federal Claims)." 26 U.S.C. § 7430(c)(6). As with the EAJA, the Court has been unable to find any case law analyzing whether a bankruptcy case or a bankruptcy matter other than an adversary proceeding constitutes a "civil action"

within the meaning of 26 U.S.C. § 7430(c)(6). *Cf. Grewe v. I.R.S. (In re Grewe)*, 4 F.3d 299 (4th Cir. 1993) (§ 7430 applied to debtors' adversary complaint alleging that IRS violated discharge injunction because bankruptcy courts constitute courts of the United States). The Court need not decide the scope of this separate fee shifting provision.

Does `The Waiver Of Sovereign Immunity Under The Equal Access to Justice Act Unambiguously Extend To "Prevailing Parties," In Individual "Contested Matters" Within A Bankruptcy Case?

In her most recent supplemental brief, the debtor argues that even if the scope of the waiver of sovereign immunity does not extend to prevailing parties in bankruptcy cases, the waiver of sovereign immunity nevertheless does extend to the U.S. Trustee's § 707(b) motion as a "contested matter" (Docket No. 81). In support of this argument the debtor cites Bankruptcy Rule 9002.

Rule 9002 provides in pertinent part:

> **Rule 9002. Meanings of Words in the Federal Rules of Civil Procedure When Applicable to Cases Under the Code**
>
> (1) "Action" or "civil action" means an adversary proceeding or, when appropriate, a contested petition, or proceedings to vacate an order for relief or to determine any other contested matter.

Although Rule 9002 of the Federal Rules of Bankruptcy was not adopted until 1983, *see* Wright & Miller at § 1016, the Bankruptcy Rules in effect in 1980 were promulgated by the Supreme Court pursuant to 28

U.S.C. § 2075, effective October 1, 1973. *See* April 24, 1973, Supreme Court order adopting bankruptcy rules and official bankruptcy forms effective October 1, 1973 (reprinted at 37 L. Ed. 2d at xxxi).

> Rule 902, the predecessor to Rule 9002 provided, in part:
>
> **Rule 902. Meanings of Words in the Federal Rules of Civil Procedure When Applicable in Bankruptcy Cases**
>
> The following words and phrases used in the Federal Rules of Civil Procedure made applicable in bankruptcy cases by these rules have the meanings herein indicated unless they are inconsistent with the context:
>
> (1) "Action" or "civil action" means an adversary proceeding, or, when appropriate, a proceeding on a contested petition, to vacate an adjudication, or to determine another contested matter.

37 L. Ed. 2d at lxxvi.

Although the debtor asserts that Bankruptcy Rule 9002 (or its predecessor Rule 902) makes the contested matter of the U.S, Trustee's § 707(b) motion an "action" or "civil action" within the meaning of the EAJA, the debtor simply reads too much into this Bankruptcy Rule. As the Advisory Committee Note to Rule 902 indicates:

> In particular, the Federal Rules of Civil Procedure largely govern an adversary proceeding, which is to be read for "action" or "civil action" whenever either of these terms appears in any of the Civil Rules made

> applicable by the Bankruptcy Rules in Part VII. Rule 121 [now Rule 1018] also makes many of the Civil Rules applicable to a proceeding on a contested petition or to vacate an order for relief, and for this purpose "[a]ction" or "civil action" is to be read as referring to such a proceeding. When the Civil Rules are made applicable to a contested matter by or pursuant to Rule 914 [now rule 9014], "action" or "civil action" refers to the contested matter in this context.

10 Collier on Bankruptcy ¶ 9002.01 (16th ed. 2020).

This portion of Bankruptcy Rule 9002 means nothing more than to substitute "adversary proceeding" for "action" or "civil action" whenever a bankruptcy rule makes a civil rule applicable to an adversary proceeding, and to substitute "contested matter" for "action" or "civil action" whenever a bankruptcy rule makes a civil rule applicable to a contested matter.

Here are three examples to illustrate the application of Bankruptcy Rule 9002 and its predecessor Bankruptcy Rule 902.

If Civil Rule 17 is made applicable to a contested matter under Bankruptcy Rules 7017 and 9014, then Civil Rule 17 should be read in part as follows:

> (a) *Real Party in Interest*.
>
> (1) *Designation in General.* ~~An action~~ [A contested matter] must be prosecuted in the name of the real party in interest . . . .

Similarly, if Civil Rule 36 is made applicable to a contested matter under Bankruptcy Rules 7036 and

9014, then Civil Rule 36 should be read in part as follows:

> (a) *Scope and Procedure.*
>
> (1) *Scope.* A party may serve on any other party a written request to admit, for purposes of the pending action. [contested matter] only, the truth of any matters within the scope of Rule 26(b)(1) . . .
>
> . . . .
>
> *(b) Effect Of An Admission; Withdrawing Or Amending It* . . . . Subject to Rule 16(e), the court may permit withdrawal or amendment if it would promote the presentation of the merits of the ~~action~~ [contested matter] and if the court is not persuaded that it would prejudice the requesting party in maintaining or defending the action [contested matter] on the merits . . . .

Similarly, if Civil Rule 42 is made applicable to a contested matter under Bankruptcy Rules 7042 and 9014, then Civil Rule 42 should be read in part as follows:

> (a) *Consolidation*. If ~~actions~~ [contested matters] before the court involve a common question of law or fact, the court may:
>
> (1) join for hearing or trial any or all matters at issue in the ~~actions~~ [contested matters];
>
> (2) consolidate the ~~actions~~ [contested matters]; or
>
> (3) issue any other orders to avoid unnecessary cost or delay,

This portion of Rule 9002 (and its predecessor Rule 902) does nothing more than explain how to interpret the terms "action" or "civil action" when civil rules containing those terms are made applicable to contested matters by bankruptcy rules.

There are additional problems with the debtor's Rule 9002 argument. First, a bankruptcy rule cannot expand the scope of the waiver of sovereign immunity in a statute. *See* 28 U.S.C. § 2075 ("Such rules shall not abridge, enlarge, or modify any substantive right."); Pub. L. 88-623, 78 Stat. 1001; *cf. F.A.A. v. Cooper*, 566 U.S. at 290 ("Legislative history cannot supply a waiver that is not clearly evident from the language of the statute.") (internal citations omitted); *Ardestani v. I.N.S.*, 502 U.S. at 136 (same).

Second, there is no indication that Congress ever intended to award attorney's fees under the EAJA to a prevailing party in something smaller than a "civil action" such as a discovery dispute, a motion for leave to file an amended complaint, or a motion *in limine*. *See Hanrahan v. Hampton*, 446 U.S. 754 (1980) ("[The respondents] may [not] fairly be said to have "prevailed" by reason of the Court of Appeals' other interlocutory dispositions, which affected only the extent of discovery. As is true of other procedural or evidentiary rulings, these determinations may affect the disposition on the merits, but were themselves not matters on which a party could "prevail" for purposes of shifting his counsel fees to the opposing party under § 1988."); *accord Comm'r, INS. v. Jean*, 496 U.S. 154, (1990) ("Any given civil action can have numerous phases. While the parties' postures on individual matters may be more or less justified, the EAJA—like other fee-shifting statutes—favors treating a case as an inclusive

whole, rather than as atomized line-items."); *Kitchen Fresh, Inc. v. N.L.R.B.*, 729 F.2d 1513 (6th Cir. 1984) ("[T]he procedural victory itself is insufficient to establish that the petitioner has prevailed for the purposes of an award of attorneys' fees pursuant to the Equal Access to Justice Act.").

A "contested matter" in a bankruptcy case is any dispute other than an adversary proceeding.

> Whenever there is an actual dispute, other than an adversary proceeding, before the bankruptcy court, the litigation to resolve that dispute is a contested matter. For example, the filing of an objection to a proof of claim, to a claim of exemption, or to a disclosure statement creates a dispute which is a contested matter. Even when an objection is not formally required, there may be a dispute. If a party in interest opposes the amount of compensation sought by a professional, there is a dispute which is a contested matter.

Advisory Committee Note to Fed. R. Bankr. P. 9014.

Unlike adversary proceedings, which are "essentially full civil lawsuits carried out under the umbrella of the bankruptcy case," a contested matter is "an undefined catchall for other issues the parties dispute." *Bullard v. Blue Hills Bank*, 135 S. Ct. at 1694. "As a leading treatise notes, the list of contested matters is `endless' and covers all sorts of minor disagreements." *Id.* (quoting 10 Collier ¶9014.01, at 9014-3).

In the present bankruptcy case, the U.S. Trustee's § 707(b) motion was a contested matter. Similarly, the

debtor's motion for an award of attorney's fees is a contested matter.

Although the debtor at times describes the U.S Trustee's efforts in this case as seeking to deny the debtor a discharge, a § 707(b) motion is not an objection to the debtor's discharge under § 727 of the Bankruptcy Code and Bankruptcy Rule 4004. In contrast with motions under § 707(b), which are governed by Bankruptcy Rule 1017(e), objections to discharge generally require the filing of an adversary complaint. *See* Fed. R. Bankr. P. 7001(4).

In 1980, all objections to discharge required the filing of an adversary complaint, *see* Fed. R. Bankr. P. 701(4); however, in 2010, Bankruptcy Rule 7001 was amended to create an exception for objections to discharge under §§ 727(a)(8), (a)(9), and 1328(f). These exceptions, which essentially involve calculating the time since the filing of previous cases resulting in discharges, are "more easily resolved" and do not require "the more formal procedures applicable to adversary proceedings, such as commencement by a complaint." *See* 2010 Advisory Committee Note to Fed. R. Bankr. P. 7001.

Moreover, the standard under § 707(b) is whether "the granting of relief would be an abuse of this chapter" *i.e.*, chapter 7. That a debtor may legitimately benefit from or even need relief under chapter 11 or chapter 13 has nothing to do with whether "the granting of relief would be an abuse of [chapter 7]" under § 707(b). Section 707(b) expressly provides for the conversion of a case to chapter 11 or chapter 13 in response to the filing of a § 707(b) motion, with the debtor's consent. It is this Court's experience that

debtors facing § 707(b) motions will often opt to convert their cases to chapter 13.

It seems doubtful that Congress intended for all such disputes *(i.e.*, "contested matters"), whether large or small, to constitute discrete "civil actions" under 28 U.S.C. § 2412 and therefore provide for potential fee shifting whenever any such disputes involve the United States or an agency or officer of the United States. *Cf. Bullard v. Blue Hills Bank*, 135 S. Ct. 1686 (declining to hold that a every order resolving a contested matter is final and appealable). The concept of finality cannot stretch to cover, for example, an order resolving a disputed request for an extension of time," *Id.* at 1694.

Nor does the language in Bankruptcy Rule 9002 (or its predecessor Rule 902) support the debtor's initial argument that she is the prevailing party in a bankruptcy case, as opposed to a contested matter. There is nothing in the Bankruptcy Rules to indicate that, when certain civil rules are made applicable to a bankruptcy case, any reference to "action" or "civil action" in the civil rules should be read as "bankruptcy case." Nor is there anything in the Bankruptcy Rules to indicate that, when certain civil rules are made applicable to a bankruptcy case, any reference to "complaint" in the civil rules should be read as a "bankruptcy petition." In contrast, Rule 3 of the Federal Rules of Civil Procedure, which applies in adversary proceedings under Bankruptcy Rule 7003, reads as follows (as translated by Bankruptcy Rule 9002): "A[n] ~~civil action~~ [adversary proceeding] is commenced by filing a complaint with the court."

Debtor's Other Arguments Are Unavailing

The debtor asserts that excluding bankruptcy cases and. or contested matters in bankruptcy cases from "civil actions" for which fee shifting is available under 28 U.S.C. § 2412 would contravene the policy of protecting debtors from unjustified positions taken by the United States and its agencies and officers in such cases and matters. This policy argument, however, is best addressed to Congress. *See Ardestani v. I.N.S.*, 502 U.S. at 138 (while acknowledging that Ardestani had been forced to shoulder the financial and emotional burdens of a deportation hearing in which the agency's position was determined not to be substantially justified, the Court indicated "[I]t is the province of Congress, not this Court, to decide whether to bring administrative deportation proceedings within the scope of the statute."). Indeed, not long after the Supreme Court ruled in *Nordic Village* that § 106 of the Bankruptcy Code did not unequivocally waive sovereign immunity with respect to the bankruptcy trustee's action against the United States, Congress amended the sovereign immunity waiver provisions of § 106. *See* Pub. L. 103-394, 108 Stat. 4117.

Moreover, even if the EAJA does not apply to bankruptcy cases or contested matters in bankruptcy cases, a number of other fee shifting provisions in the Bankruptcy Code presumably do apply to the United States. For example, § 106 of the Bankruptcy Code waives sovereign immunity for governmental units, including the United States and its agencies, with respect to numerous sections of the Bankruptcy Code, including actions to recover damages and attorney's fees for willful violations of the automatic stay under § 362(1) and actions to recover damages and attor-

ney's fees against creditors who file an involuntary petition in bad faith under § 303(i).

Section 106 does not, however, waive sovereign immunity with respect to § 707. *See* 11 U.S.C.§§ 106 (waiver of sovereign immunity) & 101(27) (defining "governmental unit"). Moreover, when Congress amended the Bankruptcy Code in 2005, it included fee-shifting provisions specifically for motions filed under § 707(b). *See 11* U.S.C. § 707(b)(4) and (b)(5); Pub. L. 109-8, 119 Stat. 27.

Under § 707(b)(4), "The court . . . may order the attorney for the debtor to reimburse the trustee for all reasonable costs in prosecuting a motion filed under section 707(b), including reasonable attorneys' fees," if the court finds that the debtor's attorney violated Bankruptcy Rule 9011 in filing the case under chapter 7. 11 U.S.C. § 707(b)(4).

Under § 707(b)(5):

> [Subject to certain exceptions,] the court . . . may award a debtor all reasonable costs (including reasonable attorneys' fees) in contesting a motion filed by a party in interest (other than a trustee or United States trustee (or bankruptcy administrator, if any)) under this subsection if —
>
> (i) the court does not grant the motion; and
>
> (ii) the court finds that
>
> (I) the position of the party that filed the motion violated [Rule 9011]; or
>
> (II) the attorney (if any) who filed the motion did not comply with the [reasonable investiga-

> tion and other] requirements of clauses (i) and (ii) of paragraph (4)(C), and the motion was made solely for the purpose of coercing a debtor into waiving a right guaranteed to the debtor under this title.

11 U.S.C. § 707(b)(5). Thus, § 707(b)(5) appears to preclude an award of fees in the debtor's favor when the motion is filed "by the trustee or United States trustee," at least with respect to this fee-shifting provision intended specifically for motions filed under § 707(b). Although these specific fee-shifting provisions bring to mind Justice Scalia's description of the "mind-numbingly detailed" exemption language in 11 U.S.C. § 522, *see Law v. Siegel*, 571 U.S. 415, 424 (2014), they appear to codify a Rule 9011 standard, subject to a host of exceptions.

Section 106 also waives sovereign immunity with respect to orders and judgments, including monetary awards, fees, and costs, but not punitive damages, under the Federal Rules of Bankruptcy Procedure. Thus, the United States is subject to sanctions under Bankruptcy Rule 9011. Presumably, if the debtor believed that the U.S. Trustee's § 707(b) motion violated Bankruptcy Rule 9011(b), nothing in the Bankruptcy Code, including § 707(b)(5), would have prevented the debtor from serving a motion for sanctions, consistent with the safe-harbor provisions of Rule 9011, asking that the § 707(b) motion be withdrawn, and if it were not withdrawn, seeking an award of sanctions, including attorney's fees. *See also Baker Botts v. ASARCO*, 576 U.S. at 134 n.4 (noting that Rule 9011 is available to address concerns about the possibility of frivolous or other filings that violate Rule 9011, and that court may direct payment of some or all of the reasonable

attorneys' fees and other expenses incurred as a direct result of the violation).

Although the debtor notes the differences between potential remedies available under Rule 9011 and an award of attorney's fees under the EAJA, Rule 9011 does seem to protect against just the type of action that the debtor alleges the U.S. Trustee took in this case. Specifically, the debtor alleges that the U.S. Trustee filed the § 707(b) motion without first making a reasonable inquiry into what a properly calculated means test would show. If these allegations are true, such conduct would presumably be a violation of Rule 9011(b).

The Court's Ruling Makes It Unnecessary To Address Other Issues

This ruling makes it unnecessary to address other potentially difficult issues, such *as:*

(1) whether the more general fee shifting provisions of the EAJA can be harmonized with the detailed fee-shifting provisions specific to § 707(b) motions that Congress enacted in 2005, which expressly exclude fee awards for motions brought by a chapter 7 trustee or a U.S. Trustee; c*f. United States v. Khan*, 497 F.3d 204, 211 (2d Cir. 2007) (holding that the specific fee-shifting provisions of the Civil Asset Forfeiture Reform Act of 2000 (CAFRA) "are irreconcilably at odds" with the EAJA);

(2) whether the debtor can qualify as a "prevailing party" given that the U.S. Trustee voluntarily withdrew the § 707(b) motion before any ruling from the Court. *See Buckhannon*, 532 U.S. at 604 ("These decisions, taken together, establish that enforceable judgments on the merits and court-ordered consent decrees create

the 'material alteration of the legal relationship of the parties' necessary to permit an award of attorney's fees."); *cf.* 11 U.S.C. § 707(b)(5)(A)(i) (statute permits fee shifting when "the court does not grant the [§ 707 (b) motion]," which presumably includes situations where the § 707(b) movant voluntarily withdraws the motion without a court ruling);

(3) whether the position of the U.S. Trustee in filing the motion was substantially justified;

(4) whether "special circumstances make an award [of attorney's fees under the EAJA] unjust," 28 U.S.C. § 2412(d)(1)(A), including Congress's enactment of detailed fee shifting provisions specific to § 707(b) motions in 2005; *cf. Bush v. Lucas*, 462 U.S. 367, 378 (1983) (existence of alternative remedy structure constitutes "special factor[] counselling hesitation" in establishing *&yens* action); and

(5) the reasonableness of the fees requested.

* * *

The Court does not wish to encourage further litigation of the issues in this case. Nevertheless, should the debtor be inclined to appeal this Court's decision, the Court believes that certification of a direct appeal to the Sixth Circuit under 28 U.S.C. § 158(d) and Bankruptcy Rule 8006 may well be appropriate given the absence of a controlling decision from the Sixth Circuit or the Supreme Court. And, if a reviewing court were to find that the debtor is in fact a "prevailing party" in a "civil action" for purposes of the EAJA, this Court would certainly benefit from any guidance (1) delineating the applicable "civil action," and (2) explaining what is necessary to be a "prevailing

party" in the context of bankruptcy cases or contested matters.

Finally, the Court notes that, for purposes of this decision, it need not decide and does not decide whether adversary proceedings are "civil actions" within the meaning of 28 U.S.C. § 2412.

CONCLUSION

The debtor's motion for an award of attorney's fees and costs under the EAJA is denied.

IT IS SO ORDERED.

SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION FOR FEES AND COSTS UNDER THE PROVISIONS OF 28 U.S.C. 2412 (DOCKET 50)

IN THE UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE: MEGAN MARIE TETER,

Debtor.

Case No. 19-11224

Chapter 13 Proceeding

Judge Arthur I. Harris

Ms. Megan Teter respectfully offers this supplemental brief in support of her Motion for Fees and Costs.

Ms. Teter respectfully incorporates herein by this reference her original Motion with Brief in support at Docket 50, with all Exhibits thereto, her Reply Brief at Docket 58, and her Post Hearing Brief at Docket 68.

This Brief is narrowly tailored to address the question whether the expression "civil action" in 28 USC 2412(d) encompasses the United States Trustee's Motion under 707(b) to deny Ms. Teter's Discharge. This brief will address that question, as well as the "question within the question" whether the Bankruptcy Court has jurisdiction to hear and decide motions under 28 U.S. C. 2412.

Ms. Teter respectfully contends that under Bankruptcy Rule 9002(a), a contested matter is, by definition, a civil action as contemplated by 28 U.S.C. Section 2412. She further respectfully contends that this Bankruptcy Court has jurisdiction to hear and decide the question based on the provisions of the Section 2412 itself, as well as under 28 U.S.C. Sec. 157 (a) and (c), and General Order 2012-7.

Issues:

ISSUE 1: Is the United States Trustee's Objection Under 11 U.S.C. 707(b) to Ms. Teter's Discharge a Civil Action with the plain language of 28 U.S.C. Sec. 2412(b) and (d)?

ANSWER: YES. Federal Rules of Bankruptcy Procedure 9002 specifically defines Civil Action to include contested matters in the Bankruptcy Court.

ISSUE 2: Does the Bankruptcy Court have Jurisdiction to hear and decide Ms. Teter's Motion for Fees and Costs Under 28 U.S.C. Sec. 2412(b) and (d)?

ANSWER: YES. 28 U.S.C. Sec. 157(a) authorizes the District Court to refer any and all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 to bankruptcy judges. The District Court Order of Reference in General Order 2012-7 has done so. In the alternative, as set forth in the Order, if entry of a final order or judgment would not be consistent with Article III of the United States Constitution, the Judge may enter findings of fact and conclusions of law with the final determination to be made by the District Court.

Legal Analysis:

1. History and Purpose of the Equal Access to Justice Act

The Equal Access to Justice Act was enacted in Public Law 96-481-Oct. 21, 1980.

The purpose is stated in the congressional Findings and Purpose:

Sec. 202. (a) The Congress finds that certain individuals, partnerships, corporations, and labor and other organizations may be deterred from seeking review of, or defending against, unreasonable governmental action because of the expense involved in securing the vindication of their rights in civil actions and in administrative proceedings.

(b) The Congress further finds that because of the greater resources and expertise of the United States the standard for an award of fees against the United States should be different from the standard governing an award against a private litigant, in certain situations.

(c) It is the purpose of this title—

(1) to diminish the deterrent effect of seeking review of, or defending against, governmental action by providing in specified situations an award of attorney fees, expert witness fees, and other costs against the United States; and

(2) to insure the applicability in actions by or against the United states of the common law and statutory exceptions to the "American rule" respecting the award of attorney fees."

Thus, the broad remedial purpose in this waiver of statutory immunity is clearly stated.

There follows section 203(a), an amendment of Subchapter 1 of chapter 5 of Title 5, to add an entire new section, Section 504, awarding costs and fees of parties in an "adversary adjudication" in agency proceedings under the Administrative Procedures Act. 504(a) and 504(b)(1)(c). (Exhibit 2)

Also, at section 204(a), Congress greatly expanded the exposure of the United States for fees and costs, creating in Sec. 2412(d) a new substantive right to fees against the United States in addition to 2412(b) which had not created a substantive right but had the United States liable as would be any other party to fees under any other common law or statutory theory. (Compare Exhibit 2 [1980 Act] with Exhibit 3 [1948 Act].

It is significant that in enacting this expansive waiver of sovereign immunity, that Congress used broad terms such as 'any civil action' and 'any court' rather than the more restrictive "court of the United States" language of 28 U.S.C. Sec. 1920.

The expansive nature of the legislation is further emphasized by Sec. 206: "Nothing in section 2412(d) of Title 28, United States Code, as added by section 204(a) of tis title, alters, modifies, repeals, invalidates, or supersedes any other provision of federal law which authorizes an award of such fees and other expenses to any party other than the United States that prevails in any civil action brought by or against the United States."

The express expansive application is further emphasized in section 208: "This title and the amend-

ments made by this title shall take effect of October 1, 1981, and shall apply to any adversary adjudication, as defined in section 504(b)(1)(C) of title 5, United States Code, and any civil action or adversary adjudication described in section 2412 of title 28, United States Code, which is pending on or commenced on or after such date." *Id.* Exhibit 2

2. The United States Trustee's Objection to Discharge is a Civil Action Within the Plain language of 28 U.S.C. 2412(a), (b) and (d)

This analysis will track the discussion of the issues at the hearing on September 22, 2020.

A. The US Trustee Challenge to Discharge in this Case is a Civil Action

The question raised by the Court at the hearing on September 22, 2020 was the scope of the Equal Access to Justice Act. (Trans. P. 2, 3), specifically the meaning of the term 'civil action' as a term of art. More specifically, the question is how the meaning of that term may be illuminated by reference to a previous version of Section 2412, and Rules 2 and 3 of the Federal Rules of Civil Procedure. The purpose of that inquiry will be to ascertain whether the term 'civil action' is limited to formal lawsuits initiated by filing a Complaint. It seems that the short and most specific question set forth in the transcript, at p. 3, is what did 'civil action' mean when the 28 U.S.C. 2412 was enacted.

This analysis will endeavor, by reference to historical documents, to answer that question, and then will discuss whether that term, in light of definitions provided by Bankruptcy Rule 9002, under the authority

of Federal Rule 81 includes bankruptcy cases even in the absence of the filing of a formal complaint.

The Motion to Dismiss under 707(b) is a Civil Action Because it is a Contested Matter. Rule 9002.

Federal Rule of Civil Procedure Rule 81(a)(2) provides that "These rules apply to bankruptcy proceedings to the extent provided by the Federal Rules of Bankruptcy Procedure." *Id.*

Federal rule of Bankruptcy procedure 9002 provides that (1)" Action" or "civil action" means an adversary proceeding or, when appropriate, a contested petition, or proceedings to vacate an order for relief *or to determine any other contested matter*." The rule further provides: (5) "Judgment' includes any order appealable to an appellate court. *Id.* (Emphasis added)

"Federal Rule of Bankruptcy Procedure 9002 is basically a translation section. Its intention is best found in the Advisory Committee Note to its predecessor, Bankruptcy rule 902. According to the Note: 'These rules make many of the Federal Rules of Civil Procedure applicable in bankruptcy cases or in proceedings therein, and this rule indicates the substitution or translation of certain terms that is necessary for this purpose. In particular, the Federal Rules of Civil Procedure largely govern an adversary proceeding, which is to be read for 'action' or 'civil action' whenever either of these terms appears in any of the Civil Rules made applicable by the Bankruptcy Rules in Part VII. Rule 121 [now rule 1018] also makes many of the Civil Rules applicable to a proceeding on a contested petition or to vacate an order for relief, and for this purpose, 'action' or 'civil action' is to be read as referring to such proceeding. When the Civil Rules are made applicable

to a contested matter by or pursuant to rule 914 [now Rule 9014], 'action' or 'civil action' refers to the contested matter in this context. Bankruptcy Rule 9002 cautions that its translations apply 'unless they are inconsistent with the context'". 10 Collier on Bankruptcy P 9002.01. "In particular, many of the Civil Rules are made applicable in contested matters by Bankruptcy Rule 9014(c)." Id. P 9002.02.

"[A] contested matter in bankruptcy court is a civil action in federal court, and therefore within the ambit of the [Rules of Decision] Act." *In re Gonzales*, 578 B.R. 627 (Bankr. W.D. Mich. 2017).

FRCP Rule 3 establishes that a civil action in Federal Court is commenced by the filing of a complaint. The rule "establishes one uniform and certain way to commence civil actions in federal court, that is, by filing a complaint with the court. It specifically rejects the 'hip pocket' method of commencing an action. Under the 'hip pocket method, an action was commenced by service of process; court filing was not required unless and until court intervention was necessary." 1 Moore's Federal Practice-Civil Sec. 3.02.

However, the rule that a civil action is commenced by filing a complaint is a default rule that may be displaced by contrary statutory provisions authorizing a different method of commencement. Section 707(b), permitting a challenge to discharge by motion to dismiss is such a provision. That does not mean such a motion is not a civil action. FRBP 9002 makes clear that this contested matter is a civil action. Even in federal district court, where a statute so provides, a civil action may be commenced by the filing of a motion. "For example, the Federal Arbitration Act provides simplified procedure for a party to seek to

confirm or challenge an arbitration award . . . . under these procedures, FAA actions are conducted under the motions practice of federal courts, so an FAA action is commenced by motion, not by the filing of a complaint. This rule applies, however, only when judicial review of an arbitration award is governed by the FAA. If judicial review is governed by another statute, commencement occurs on the filing of the complaint, not by motion, unless the alternative statutory authorization expressly so provides."

So, the question whether a matter before the court is a 'civil action' does not turn on whether a party has initiated the matter by filing a complaint. It turns on whether the action is brought before the court in a manner authorized by statute, and is a matter that is governed by the Federal Rules of Civil Procedure. Thus, a bankruptcy case is a civil action because it is commenced by filing by a mechanism other than a complaint, as set forth by statute, and the proceedings therein are governed by the Federal Rules of Civil Procedure as applied to Bankruptcy Cases.

The affirmative statement, "These rules apply to bankruptcy proceedings to the extent provided by the Federal rules of Bankruptcy Procedure" is an affirmative statement, in contrast to an earlier version of Rule 81 which stated that the Civil Rules "do not apply in proceedings in bankruptcy . . . except insofar as they may be made applicable thereto by rules promulgated by the Supreme Court." Christopher Klein, Bankruptcy rules Made Easy (2001): A Guide to the Federal Rules of Civil Procedure that Apply in Bankruptcy, 75 Am. Bankr. L.J. 35 (Winter 2001). As of 2001, twenty-two of the Federal Rules of Civil Pro-

cedure applied to every bankruptcy case even in the absence of a contested matter. *Id.* p. 37; Table 4.

The 9th Circuit case of In re *Sisk*, http://cdn.ca9.uscourts.gov/datastore/opinions/2020/06/22/18-17445.pdf, is not instructive. First of all, the posture of the case is not at all a good match to the language of the statute. The statute refers to any civil action brought by or against the United States in any court. The EAJA Applicants in Sisk sought to shoehorn the bankruptcy judge into two places, the "United States" and the "any court". It is true that the court decision caused the attorneys to do a lot of uncompensated work, and that their clients benefitted from attorneys' efforts, but there was no action brought by the United States and no action brought against the United States. The expansive interpretation sought by the applicants in Sisk would make the judge in any reversed decision liable for fees on reversal. The Sisk opinion could and should have stood on that analysis. Its comments that a bankruptcy case is not a civil action, and that 2412k(d)(2)(e) limits the definition of civil action are patently ill-considered. It is doubtful that either matter was fully briefed, as they have been and will be in this brief.

28 U.S.C. Sec. 2412 is Meant to Have Broad Application

In addition to the legislative purpose, cited above, the broad application of the statute is expressed in the precise language of 2412(b) and 2412(d) "any civil action" and "any court having jurisdiction of such action."

This is supported by the historical progress of the statute.[1]

It is also supported by the stated purpose of the rules of civil procedure. The purpose of establishing a single form of action was to obviate the injustice of technical pleading requirements, so that cases would be resolved on the merits, rather than on technical pleading skills. "The basic purpose of the Federal Rules is to administer justice through fair trials, not through summary dismissals as necessary as they may be on occasion. These rules were designed in large part to get away from some of the old procedural booby traps which common-law pleaders could set to prevent unsophisticated litigants from ever having their day in court. If rules of procedure work as they should in an honest and fair judicial system, they not only permit, but should as nearly as possible guarantee that bona fide complaints be carried to an adjudication on the merits. *Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 373 (1966). "By requiring a single form of action, Rule 2 eliminates most procedural distinctions based on whether a plaintiff's claims are legal or equitable or both. An action is not an equitable action or a legal action, but simply a civil action governed by the same procedural rules. *City of Morgantown v. Royal Ins. Col*, 337 U.S. 254, 257 (1949). Also, "the use of a single form of action precludes in almost all circumstances a federal court's use of any form of action other than a civil action to resolve disputes within the scope of the rules . . . This prevents the adjudication of disputes without the full procedural protections of

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[1] To the extent prior enactments have been located, they are all attached for reference.

the rules . . . " 1 Moore's Federal Practice-Civil Sec. 2.02. *See also* 1 Am. Jur. 2d Actions Secs. 5, 8, 9. (technical forms of action that existed at common law have generally been abolished in favor of the 'civil action,' under which any recognized cause of action may be enforced)

Bringing all disputes into the realm of the 'civil action' makes it possible to bring all claims, legal and equitable into the same suit, and also makes it possible to raise equitable defenses to legal claims. 1 Moore's Federal Practice-Civil Sec. 2.05[2]. "The merger of law and equity allows federal courts to adjudicate shareholder derivative actions and to preserve the right to trial by jury for legal issues arising in those actions." Id. Sec. 2.04[2] "By allowing the efficient resolution of all issues in a single action, and by effectuating the Seventh Amendment right to a jury trial, Rule 2 greatly simplifies and rationalizes procedure governing shareholder's derivative claims. Prior to promulgation of the rules, a shareholder's derivative action was simply impossible in some contexts." *Id.* In other words, the concept of 'civil action' is a term of expansion, not exclusion. It is meant to bring, and does bring, into its embrace all litigation before a court which takes place under the protection of the civil rules.

Thus, in contrast to practice in some states, summary proceedings, which are defined as proceedings that may be conducted, for example, without formal pleadings, on short notice, or without trial procedures, are prohibited in federal court. Because state-court summary proceedings do not constitute a 'civil action' under Rule 2, they likewise cannot be removed to federal court." 1 Moore's Federal Practice-Civil Sec. 2.02.

A contested matter in the bankruptcy court, is defined as a civil action and governed by the Federal Rules of Civil Procedure, as made applicable to cases in Bankruptcy Courts. Essentially, if the rules of procedure apply, the action is a civil action. *Buccina v. Grimsby*, 889 F. 3d 256 259-260 (6th Cir. 2018) (Admiralty case discussing earlier merger of law and equity). "An action is not an equitable action or a legal action, but simply a civil action governed by the same procedural rules." *City of Morgantown v. Royal Ins. Co.*, 337 U.S. 254, 257 (1949).

28 U.S.C. Sec. 2412 includes within its broad statement of waiver 'any civil action', not 'any action commenced by the filing of a complaint under FRCP Rule 3'.

These expressions are not synonymous, and 'civil action' is a broader, more inclusive, term. The expression 'civil action,' as seen from the foregoing analysis, includes contested matters in the bankruptcy court and other matters where the governing statute authorizes proceeding by motion. Under both of those analyses, the US Trustee Motion to Dismiss is a civil action.

B. The Language to be Construed in this Case is 28 U.S.C. Sec. 2412. Construction of that Language is not Impacted by Congress' Choice in 26 U.S.C. 7430 to Use Different Language in Different Circumstances in the Tax Collection Context

The plain language of the 28 U.S.C. 2412 is outcome determinative to this case. The fact that another statute, 26 U.S.C. 7430, uses different language does not determine the meaning of the lan-

guage at issue. However, the purpose of the use of the different language in 26 U.S.C. Sec. 7430 is readily apparent from the first section: (a) In General: In any administrative or court proceeding which is brought by or against . . . . " Id. The purpose of the different language is apparent from the fact that at section (a)(1) it provides for reasonable administrative costs. And at (a)(2) it provides for reasonable litigation costs. Thus, 26 U.S.C. Sec. 7430 provides for an award of fees over the range of administrative and legal proceedings between the Internal Revenue Service and the taxpayer, and the language reflects that statutes broader application to steps in the process prior to litigation steps.

What is more, it is not likely that 'court proceeding' in 26 U.S.C. Sec. 7430 is intended to have a different meaning than 'civil action'. This is seen in Sec. 7430(c)(6) "Court Proceedings: The term 'court proceeding' means any civil action brought in a court of the United States (including the Tax Court and the United States Court of Federal claims)." This is opposed to "(c)(5) Administrative Proceedings: The term 'administrative proceeding' means any procedure or other action before the Internal Revenue Service." Thus 'court proceeding' and 'civil action' are used interchangeably and the distinction is without a difference.

However, speculation, even reasoned speculation, about what may have been the purpose for word choice in the statute does not bear on the interpretation of the statute at issue.

The precise language of 28 U.S.C. Sec 2412 is 'any civil action.' In the context of distinguishing between whether an action is a 'criminal action' or a 'civil

action' multiple types of proceedings have been determined to be 'civil actions.' "The term 'civil action' as distinguished from 'criminal action' has been held to include:

- Attorney disciplinary proceedings
- Proceedings for the forfeiture of bail and proceedings by sureties therein to be discharged from liability
- A driver's license suspension proceeding
- A hearing on a petition to rescind a summary suspension of driving privileges
- Judicial review of the administrative suspension of a driver's license pursuant to the implied consent law
- Proceedings under an implied consent law for the suspension or revocation of a license to operate a motor vehicle.
- Proceedings for court-ordered mental health treatment
- A hearing to determine whether a contemnor has purged himself of civil contempt
- Election contests
- Actions for the annulment of corporate franchises for violations of the law
- Actions to expunge criminal records
- Habeas corpus and other collateral proceedings for post-conviction relief
- Quo warranto proceedings

Although actions for the enforcement of a penalty imposed for a violation of law have in many cases been deemed civil in nature, particular circumstances, such as the terms of the statute imposing the penalty, can lead to their characterization as criminal proceedings. Moreover, operating a motor vehicle while intoxicated gives rise to two separate and independent proceedings; one is civil and one is criminal, and the outcome of one proceeding has no effect or consequence on the other." 1 Am. Jur. 2d Actions Sec. 33. *See* multiple cases cited therein. The thirty cases cited are from multiple states across the nation in federal and state courts ranging from 1906 through 2017. *See e.g., Lampshire v. State*, 73 N.H. 463, 62 A. 786 (1906); *In re Lafleur*, 129 So. 3d 540 (La. Ct. App. 3d Cir.2013); *Liming v. Damos*, 133 Ohio St. 3d 509, 2012-Ohio-4783, cert. denied, 133 S.Ct. 2389 (2013); *McGough v. Director of Revenue*, 462 S.W. 3d 459 (Mo. Ct. App. E.D. 2015. Thus, the term civil action is a very expansive term applicable to many kinds of legal actions in many types of courts. Thus, the 'any court having jurisdiction of that action' language of 28 U.S.C. 2412 is very expansive, not necessarily limited to federal court and not necessarily limited to cases subject to the Federal Rules of Civil Procedure. Nothing in the statute requires such limitation, and the statute should be interpreted as written.

Indeed, no less an authority than Colliers refers to a bankruptcy case as a civil action. "A bankruptcy 'case' is that civil action brought under Title 11 which concerns a particular debtor. Within that case are matters which are usually decided on relatively short notice, called 'contested matters," and matters that require something akin to a full civil lawsuit, called

'adversary proceedings.'" 1 Collier on Bankruptcy, Para 1.01[2][b]. 16th Ed. *Accord*, *in re Council of Unit Owners of the 100 Harborview Drive Condominium*, 552 B.R. 84 (D.Md. 2016) citing Colliers (applying federal 'relation back' principles to a jurisdiction issue in a bankruptcy case). The court in *In re Lewis*, 257 B.R. 431 (Bankr D. Md. 2001) held "It is proper to apply the [Soldiers and Sailors Relief] Act to bankruptcy because a bankruptcy case is a civil proceeding conducted under the supervision of the district court and it includes as bankruptcy proceedings any events that occur in the bankruptcy case." Id. p. 435.

The entire bankruptcy case, in some respect, is governed by the Federal Rules. See, for example, Fed. R.Bankr. P 9017 which provides that "The Federal Rules of Evidence and Rules 43, 44, and 44.1 FRCiv.P apply in cases under the Code." *Id.* "The rules are often as important as the statutory provisions. For example, sections 501 and 502 of the Code provide that a proof of claim must be filed and allowed for the creditor to obtain any distribution. Neither section specifies the time within which a proof of claim must be filed. Role 3002 provides the deadline in Chapter 7, 12, and 13 cases for timely filing of a proof of claim." 1 Collier P. 1.01[2] [b].

In the context of applying Federal Rules of Civil Procedure, Bankruptcy Courts have treated bankruptcy cases as civil actions even in the absence of a contested matter. For example, The court in *In re Perry*, 49 Collier Bankr. Cas. 2d 945 2002 WL 31160132 (WD Tenn. ED) ordered an intra-district transfer of a bankruptcy case on the authority of 28 U.S.C. Sec. 1404(a) which provides: "For the convenience of the parties and witnesses, in the interest of justice, a district

court may transfer any civil action to any other district or division where it might have been brought." *Id.* (Exhibit 4). Similarly, the Bankruptcy Court held that the holdings of cases under Fed.R.Civ.P. 3, deciding timing for commencing a civil action, could be relied upon to determine the precise time that a bankruptcy petition was filed under 11 U.S.C. sec. 301. *In re Brown*, 311 B.R. 721 (Bankr. W.D. Pa 2004); *In re Sands*, 328 B.R. 614 (Bankr. N.D. NY 2005). The Court in *In re Astri Inv., Management & Securities Corp*, 88 B.R. 730 (U.S.C.C. D. Md. 1988) reasoned by analogy to civil trials in federal court to hold that meetings of creditors under 11 U.S.C. Sec. 341 should be open to the press. *Id.* The court in *In re Brimmage*, 523 B.R. 134 (Bankr. N.D. Il, 2015) found that the similarity of language between Fed.R.Civ.P. 3 and 11 U.S.C. Sec. 301 "Provides a strong indication that Congress intended for a bankruptcy petition to commence a civil form of action. Compare F.R.C.P. 3 ('A civil action *is commenced by filing* a complaint . . . ') with 11 U.S.C. Sec. 310 ('A voluntary case under a chapter of this title *is commenced by the filing* with the bankruptcy court a petition . . .)'" (Emphasis in original) *Id.* p. 141. (Case under Fair Debt Collection Practices Act, finding a proof of claim in a chapter 13 case "was a legal pleading filed either in a civil action or beginning one.") *Id.* p.141.[2]

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[2] The holding of this case, that a Claim under the Fair Debt Collection Practices Act based on filing a claim known to be stale can state a claim and proceed as an adversary proceeding in the Bankruptcy court. Its holding has been essentially overruled or undermined by the Supreme Court in *Midland Funding, LLC v. Johnson*, 581 U.S. ____ (2017), but the analysis in *Midland* did not turn on whether a bankruptcy case is a civil action. The question in *Midland* was whether filing a claim known to be stale

This understanding that the entire bankruptcy case is a civil action is supported by the Notes of Advisory Committee on Rules—1946 Amendment to Rule 81: "Rules 1 and 81 provide that the rules shall apply to all suits of a civil nature, whether cognizable as cases at law or in equity, except those specifically excepted . . . ". *Id.*

It is not necessary to decide this case based on the historically expansive definition of civil-action-as-opposed-to-criminal-action analysis. However, that is also a fair interpretation of FRCP Rule 3 in the context of FRCP Rule 2, given that the purpose of Rule 2 was to bring together in one place, under one procedure, all the multiple types of suits previously scattered among chancery, law courts and maritime courts. Rule 2 did not gather together a mix of criminal actions and civil actions, it gathered under one name multiple civil actions. Thus, 'civil action' in Rule 2 and Rule 3 could very well be interpreted to mean civil-as-opposed-to-criminal. That this is the use intended in 28 U.S.C. Sec. 2412 is illustrated by the further limitation "other than cases sounding in tort" and by the

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in a chapter 13 case violated the Fair Debt Collection Practices Act. The decision in *Midland* turned on the fact that in bankruptcy, staleness is an affirmative defense and to rule in favor of the plaintiff in that case would undermine the 'delicate balance' between debtors and creditors in the bankruptcy case, and the perceived vigilance of Chapter 13 Trustees to ferret out stale claims *Id.* pp.5 and 8. See also *In re Murff*, Bankr N.D. Ill, June 15, 2015 https://www.ilnb.uscourts.gov/sites/default/files/opinions/MurffRulingOnMotionToDismiss.pdf These rulings on the applicability of the Fair Debt Collection Practices Act to the claims process in Chapter 13 cases do not undercut or even discuss the determination that the bankruptcy case is a civil action.

use interchangeably in the same section of the terms 'cases' and 'proceedings." 28 U.S.C. Sec. 2412(d). By definition 28 U.S.C. 2412 is limited to litigation in court, and thus uses the terms 'any court' and any 'civil action,' excepting only tort actions, but not applicable to criminal actions and not applicable to 'agency action" except for judicial review of agency action. *Id.* By its very terms, it is saying 'civil except tort.'

This construction is in keeping with the legislative history of the statute. Reference to legislative history, if it is to be referred to at all, is only appropriate when some word or term in the statute is ambiguous. *Bostock v. Clayton County*, 590 U.S. ____, p. 24. Ms. Teter respectfully asserts that the statute is not ambiguous and should be applied according to its terms. However, should legislative thinking be helpful, Ms. Teter respectfully refers to the House Report for the 1985 reauthorization of the EAJA, wherein Congress criticized the judiciary for its restrictive interpretation of the EAJA and instructed courts to take the "expansive view" and apply the "broader meaning." *See* H.R. Rep. No. 120, 99th cong., 1st Sess. 9 (1985), reprinted in 1985 U.S. Code Cong. And Admin. News 137. (Exhibit 5) For example, in discussing the 30-day time limit to file a motion for EAJA fees, the report states that courts should be flexible about the time for the start date. ""If a settlement is reached and the fee award is not part of the settlement, then the thirty-day period would commence on the date when the proceeding is dismissed . . . . . When the government dismisses an appeal, the date of dismissal commences the thirty-day period." After multiple additional examples, the paragraph

concludes: "The overly technical approach in *Auke Bay Concerned Citizens' Advisory Council v. Marsh*, 755 F.3d 717 (9th Cir. 1985) should be avoided. It should also be noted that in some cases a 'settlement' does not necessarily produce an 'order' but rather a dismissal with consent. The court should avoid an overly technical construction of these terms. This section should not be used as a trap for the unwary resulting in unwarranted denial of fees." *Id.* Also, consider the report regarding prevailing party which was given a specific definition with respect to condemnation proceedings: "Nothing in the definition of 'prevailing party' for purposes of condemnation proceedings is meant to limit the definition of 'prevailing party' under other circumstances. The Act, as originally enacted, has an expansive view of the term 'prevailing party'" Id. (Exhibit 5). Similarly, with respect to "position of the United States": "Part of the problem in implementing the Act has been that agencies and courts are misconstruing the Act. Some courts have construed the 'position of the United States which must be 'substantially justified' in a narrow fashion which has helped the Federal Government escape liability awards. H.R. 2378 clarifies both of these points. When the except clause was originally written, it was understood that 'position of the United States' was not limited to the government's litigation position, but included the action-including agency action-which led to the litigation. However, courts have been divided on the meaning of 'position of the United States.' H.R. 2378 clarifies that the broader meaning applies." *Id.* As to the scope of judicial review of agency and administrative decision on fees: "The committee intends that the court have a broader scope of review of the agency determination than the abuse of discretion standard, and believes

that the new language is consistent with the normal scope of judicial review of agency actions. In addition, the committee notes that fees incurred by a party when a fee award or denial is appealed are recoverable as part of the final fee award." Id.

The statute should be applied according to its plain meaning. The fact that it is a waiver of sovereign immunity does not change that.

Though a Waiver of Sovereign Immunity, the Plain Language of 28 U.S.C. Sec. 2412 Should be Construed to Effect its Purposes Rather than Limit its Mandate. The Meaning of Words Do Not Change by Virtue of Appearance in a Waiver of Sovereign Immunity

In the context of another waiver of sovereign immunity, specifically 39 U.S.C. Sec. 401(1), which provides that the US Postal Service could "sue and be sued in its official name" the United States Supreme Court rejected the argument of the Postal Service that it was not required to honor a taxing authority's non-judicial administrative garnishment order for delinquent taxes. The Postal Service argued that since it had been served by an administrative agency rather than a court, it had not been 'sued.' In ruling against the Postal Service, Justice Stephens, writing for a unanimous court, rejected what he termed "a crabbed construction of the statute that overlooks our admonition that a waiver of sovereign immunity is accomplished not by 'a ritualistic formula;' rather intent to waive immunity and the scope of such a waiver can only be ascertained by reference to underlying congressional policy. *Franchise Tax Board of California* v. USPS,

467 U.S. 512, 521 (1983) (citing *Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U.S. 301, 389 (1939).

The Supreme Court reasoned that "'[t]hat there is no reason to believe that Congress intended to impose a meaningless procedural requirement that an order to withhold be issued by a court. To distinguish between administrative and judicial process would be to take an approach to sovereign immunity that this Court rejected more than 40 years ago—'to impute to Congress a desire for incoherence in a body of affiliated enactments and for drastic legal differentiation where policy justifies none.' *Keifer & Keifer* 306 U.S., at 394" *Franchise*, 467 U.S. at p. 524.

This analysis could not be more potent in the case at bar.

The Supreme Court Construction of the Statute in *Ardestani*, based on the Plain Language of the Statute Relevant to that Case, is a Model for the Construction of the Statute at Issue in this Case

This analysis will endeavor to present a construction of the referenced rules and statute in keeping with United States Supreme Court instructions regarding the interpretation of language in statutes, specifically from *Bostock v. Clayton County*, 590 U.S. _____ (2020) and *Ardestani v I.N.S.*, 502 U.S. 129, 112 S. Ct. 515.

It can be seen from the earlier discussion that contested matters in the Bankruptcy Court are within the definition of a civil action, and have been through multiple reenactments of the EAJA. The Supreme

Court has emphasized that the inquiry as to what Congress was thinking when it enacted 28 U.S.C. 2412, using the term 'any civil action' is not the appropriate inquiry in this case. The appropriate inquiry is what did Congress actually say in the statute itself. *Bostock v. Clayton County*, 590 U.S. ____, p. 24.

Ardestani v. INS, 502 U.S. 129 (1991) is readily distinguished from this case, and a model for statutory interpretation in this case, because the outcome in that case turned on what Congress actually said in the statute. The portion of the statute at issue in Ardestani was 5 U.S.C. Sec 504(a)(1) which permits a prevailing party in an 'adversary adjudication" before an administrative agency to recover fees from the United States. However, immigration proceedings were 'defined out" of the statute in that 5 U.S.C. Sec. 504(a)(1) defined 'adversary adjudication' as "an adjudication under section 554 of Title 5", which is part of the Administrative Procedure Act. (APA). 5 U.S.C. Sec. 504(b)(1)(C)(i). The hearing in *Ardestani* was an immigration case which the Supreme court had previously held not to be a case under the administrative procedure act. *Marcello v. Bonds*, 349 U.S. 302. *Marcello* had based its holding on the statutory language of the Immigration and Nationality Act, 8 U.S.C. Sec. 1252(b) that the INA's prescriptions "shall be the sole and exclusive procedure for determining deportability." The individual in *Ardestani* argued for application of the EAJA to immigration cases because the rules under the INA were similar, or 'functionally equivalent to' those under the APA. In that case, the Supreme Court did not track through the legislative history to find out what Congress was thinking, it

relied on what Congress said. Ms. Teter urges the Court to do the same in this case.

Even so, *Ardestani* was not an easy case for the Court and the decision was a divided one. The justices were divided because the dissent was concerned that majority opinion contradicted the Court's previous statement that the EAJA must be interpreted in light of its undenied purpose 'to diminish the deterrent effect of seeking review of, or defending against governmental action." *Id Dissent* at 142, quoting *Sullivan v. Hudson*, 490 U.S 877, 890 (1989). The majority, however ruled that it was bound by the precise language: "Applying our precedent in *Marcello*, it is clear that Ardestani's deportation proceeding was not subject to the APA and thus not governed by the APA . . . . We hold that the meaning of 'an adjudication under section 554' is unambiguous in the context of the EAJA." *Id.* p.p. 134-135. The majority in that case, as in *Bostock,* reasoned that legislative history may be referenced to resolve an ambiguity, but not to create an ambiguity. The words of the statute had to control in the absence of an ambiguity. In this case, as in *Ardestani*, there is no such ambiguity and the statute in this case should be applied as written.

3. The Bankruptcy Court has Jurisdiction to hear and decide Ms. Teter's Motion for Fees and Costs under 28 U.S.C. Sec. 2412

Much of the dispute over the power of the bankruptcy courts to shift fees under 28 U.S.C. Sec. 2412 stems from the fact that bankruptcy courts are Article 1 courts. Bankruptcy courts are considered Article 1 courts based on the article of the Constitution that gives Congress the authority to establish them. Article

III courts are the Supreme Court and those 'inferior Courts as the Congress may from time ordain and establish." US const, Art III, Sec. 1. Article 1 courts, by contrast, are those established by Congress under its power "[t]o constitute Tribunals inferior to the supreme Court." US Const. Art I, Sec. 8. Article III and Article I courts are defined by the prerogatives of their judges. Bankruptcy courts are considered Article 1 courts because their judges do not meet the Article III requirements of life tenure and guaranteed salary. So, the question is whether that distinction as to constitutional source of authority bears on the authority of bankruptcy courts to shift fees under the Equal Access to Justice Act.

It does not appear that the Supreme Court has addressed this question, but two circuit courts are said to have reached different conclusions. Commentators on this question frequently juxtapose the Eleventh Circuit case of *In re Davis*, 899 F. 2d 1136 (11th Cir. 1990) with the Tenth Circuit case of *O'Connor v. United States Department of Energy*, 942 F. 2d 771 ((10 Cir. 1991), stating that *Davis* rejected the authority of the Bankruptcy Court to decide cases under the EAJA and that *O'Connor* ruled otherwise. See for example, Charles R. Haywood, Comment: The Power of Bankruptcy Courts to Shift Fees under the Equal Access to Justice Act; 61 U. Chi. L. Ref. 985 (Summer 1994) p. 995 ff. Ms. Teter respectfully suggests that this juxtaposition of opposites is more a literary device than a true distinction. This is because each case gives a path for bankruptcy courts to hear and decide motions for fees under 28 U.S.C. Sec. 2412. It is just that the paths are different.

O'Connor is the most direct path. The Tenth Circuit in *O'Connor* relied on the plain language of the statute rather than the legislative history. "Citing Supreme Court Authority, it held that its 'judicial inquiry is complete' when the language of a statute is clear.' . . . The court found complete clarity in the EAJA's phrases 'court' and 'any court having jurisdiction of that action' Using a standard dictionary, the *O'Connor* court reasoned that the 'plain ordinary and every day' meaning of 'court' encompassed both Article 1 and Article III courts. Nor did Congress restrict the use of 'court' to article III courts, despite its ability to do so by simply using the well-known phrase 'court of the United States." *O'Connor* at 773-74. The *O'Connor* court held that judges should not read into the statute an intent to restrict its applicability. *O'Conner*, 942 F.2d at pp. 772-774. The *O'Connor* court was aware of the *Davis* analysis and rejected it as tortured. It also pointed out several cases that already had assumed the ability of bankruptcy courts to make EAJA fee awards. Id. at 774, citing *In re Esmond*, 752 F. 2d 11106 (5th Cir. 1985); *In re Amstead*, 106 B.R. 405 (Bankr. E.D. Pa, 1989); *In re Hagan*, 44 B.R. 59 (Bankr. D RI 1984).

Davis, by contrast, is said to have rejected the power of the bankruptcy courts to award fees under the EAJA. However, a close analysis of that case reveals otherwise. *Davis* held that 'any court' means only Article III courts, based on its reference to 28 U.S.C. Sec. 451.[3] However, that did not end the dis-

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[3] In that respect it was bound by circuit precedent in *Bowen v. Commissioner of Internal Revenue*, 706 F.2d 1087 (11th Cir. 1983) that only courts of the United States, as defined in 28 U.S.C. Sec. 451 had jurisdiction to award fees under EAJA.

cussion. The court stated that "The jurisdictional provisions of the Bankruptcy Code nevertheless suggest two possible methods by which a bankruptcy court might validly entertain an EAJA application. The court referred to the 1984 amendments to the Bankruptcy Code which were enacted to respond to the constitutional problems created by the bankruptcy court's non-Article III status, referencing 28 U.S.C. Sec. 157. The Davis court discoursed at length about the fact the initial action before the bankruptcy court was a core proceeding under Sec. 157(b)(2)(F), (O), the following EAJA claim "under section 157(c)(1) it is an 'otherwise related' or noncore proceeding." A motion for fees under EAJA can be heard under 157(c)(1) as long as those procedures are followed. Specifically, Section 157(c)(1) provides that

> "A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district court after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matter to which any party has timely and specifically objected."

Davis, pp 1138, 1139. The court noted significant changes to the EAJA since *Bowen*, and significant contrary authority in other circuits, but was bound by the holding *Bowen* "until and unless it is modified by the Supreme Court or by this Court sitting *en banc." Id.* p. 1140.

11 U.S.C. Sec. 157(c)(1).[4]

Consideration of an EAJA application by a bankruptcy court under this procedure would not raise any Article III problems because the decision to award fees would be made by an article III court. *Davis*. p. 1141.

The second potential method by which a bankruptcy court may consider an EAJA application without raising Article III issues is under Sec. 157(c)(2). If both parties consent to judgment by the bankruptcy court, then the bankruptcy court may issue a final order subject, as always, to judicial review under Sec. 158. "Because the very purpose of section 157(c)(2) is to authorize adjudication by the bankruptcy courts of proceedings otherwise reserved for Article III tribunals, it would appeal that EAJA applications may property be adjudicated by bankruptcy courts pursuant to that section.' Davis. p. 1142. *See also* cases cited therein at footnote 12.

Thus, even courts that have been perceived to have held that Bankruptcy Courts do not have authority to rule on 28 U.S.C. 2412 have in fact seen paths to legitimate rulings on the question by Bankruptcy Courts. And almost all courts that have considered the question have assumed authority to rule or, like *O'Connor* have discussed the matter and found clear congruence with the statute.

To complete the analysis, it us useful, though perhaps tedious, to present informed legal criticisms of the basis of the Davis', (really Bowen's) rulings. An extensive analytical criticism of the Davis decision to

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[4] The law is unchanged since the Davis decision. See 11 U.S.C Sec. 157(c)(1)

exclude bankruptcy courts from the 'any court' expression in the EAJA may be found at Matthew J. Fischer, The Equal Access to Justice Act—Are the Bankruptcy Courts Less Equal than Others? 92 Mich.L.Rev. 2248 (June, 1994). That law review is attached as Exhibit 6. The criticisms in summary are that (1) it is a mistake to incorporate through reference to 1920 a jurisdictional limitation when really is only a reference to the enumeration of costs covered by the statute; (2) it is incongruous to read the statute as including agencies but withhold authority from bankruptcy courts; (3) Congress would have included important jurisdictional limitations in the statute itself, rather than "squirrel them away in section 1920."*Id.* pp 2258-9. "This analysis demonstrates that in order to argue that the jurisdictional requirement of section 1920 limits section 2412(b) and 2412(d), one must presume that Congress meant to limit EAJA jurisdiction indirectly-by first attaching the jurisdiction of section 1920 to section 2412(a) and then extending the supposed jurisdictional limit of subsection (a) to subsections (b) and (d). A simpler interpretation of the reference to section 1920-and one better supported by the textual and historical record-is that it provides a shorthand delineation of the types of costs courts have historically been able to award to preserve equitable treatment of all parties. The argument put forth by the Eleventh Circuit that the Bankruptcy courts lack EAJA authority because they are not listed in section 451 is therefore incorrect because it conflicts with the plain meaning of the EAJA, it leads to incongruous results, and it rests on a strained interpretation of the statutory structure." *Id* p. 2260.

In addition, the enactment history of the bankruptcy code itself sheds light on the Congressional intent to include bankruptcy courts in the EAJA framework. At the time the EAJA was enacted, the Bankruptcy Reform Act of 1978 controlled jurisdiction of the bankruptcy courts. Id. p. 2262. Congress passed the EAJA during a statutory transition period between the old bankruptcy system and the system created by the Bankruptcy Reform Act. "Section 241 of the [Bankruptcy Reform Act] gave bankruptcy courts all the jurisdiction of the district courts with respect to title 11 cases and proceedings. This 'pass through' jurisdiction was in place when the EAJA was enacted in 1980. It is undisputed that a district court may exercise EAJA authority in a case related to title 11. Therefore, when Congress granted the district courts the power to shift fees under the EAJA in 1980, the bankruptcy courts, by way of the pass-through jurisdiction of section 241 of the [bankruptcy Reform Act] were also vested with jurisdiction under the EAJA." Id. pp2262, 2263 and footnotes referenced therein.

An argument in favor of continuing jurisdiction of bankruptcy courts in spite of repeal of the Bankruptcy Reform Act and its replacement by the Bankruptcy Amendments and Federal Judgeship Act of 1984 in Pub. L. No. 98-353, 98 Stat. 333 (1984)(codified at scattered sections of 11 U.S.C. and 28 U.S.C.) may be found in the language of *Northern Pipeline Construction co., v. Marathon Pipeline Co*., 458 U.S. 50 (1982), the very case that held unconstitutional the bankruptcy courts' jurisdictional authority under the Bankruptcy Reform Act section 241. Marathon invalidated the Bankruptcy Reform Act on the ground that bankruptcy courts cannot adjudicate questions of private rights.

Marathon at 83-84. "The *Marathon* plurality noted, however, that matters involving public rights could by adjudicated by federal tribunals that lacked Article III protections. The government creates a public right when it waives its sovereign immunity and consents to be sued as it did in passing the EAJA. EAJA applications are complaints against the government in an area where Congress has full authority to waive sovereign immunity. EAJA applications therefore qualify as public rights which may be adjudicated by non-article III bodies, including bankruptcy courts." *Id.* pp 2266-2267 and multiple footnotes therein.

One last matter before this section is laid to rest. Some question must arise from the fact that 28 U.S.C. has been amended to specifically add a number of Article 1 courts. The thought is that in amending to add certain Article 1 courts, Congress must have intended to include only those Article 1 courts. "Courts should reject this argument for three reasons. First, the language of the 1985 amendment simply does not lend itself to interpretation under *expressio unius*. The 1985 Amendment to the EAJA definition of court includes the Claims Court. According to the Supreme Court, 'the term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle.'" Id. p. 2270. In addition, the legislative history of the amendment indicates that the 1985 amendment was a particularized response to confusion concerning scope of EAJA jurisdiction int eh Claims court, not a comprehensive review of EAJA jurisdiction, but most importantly states that the amendment is just a clarification, rather than a change in existing law. As indicated earlier, "The legislative history indicates that Congress used the

1985 amendment to respond to misinterpretations of the EAJA, suggesting that the 1985 amendment was a legislative interpretation of the EAJA rather than an act of lawmaking that might support an *expressio unius* analysis. Moreover, in 1985, no confusion or conflicting caselaw existed concerning the applicability of the EAJA to bankruptcy courts." Id. pp 2271-2 and footnotes therein.

Even now, there is not a great deal of controversy regarding authority of the bankruptcy courts to consider and rule on EAJA applications. A bankruptcy case is considered a civil action, a contested matter is defined by rule as a civil action, and either the bankruptcy court can issue an order or it can issue findings of fact and conclusions of law. Therefore, this Court has authority to rule on Ms. Teter's application for fees under 28 U.S.C. Sec. 2412(b) and (d).

4. The United States Trustee is Liable for Ms. Teeter's fees and costs

However interesting this arcane statutory analysis, it is imperative to recall that this case is about Megan Teter. The question is whether she should be stuck with massive legal fees because the US Trustee at best failed to conduct even a rudimentary means test before alleging a presumption of abuse and moving to dismiss, and at worst, inexplicably, acted maliciously in doing so. Ms. Teter should not be stuck with these fees. That would be antithetical to her fresh start. Nor should her counsel have to bear the loss. The loss should fall squarely on the party whose conduct was not substantially justified in bringing the contested matter to begin with. It should not be forgotten that the US Trustee has never denied that it failed to

prepare a means test to see if there actually was a presumption of abuse before filing its notice and before filing its motion. It should not be forgotten that when challenged on this question in discovery and through multiple efforts by telephone and e-mail, it made spurious claims of attorney client privilege and work product immunity. This merits an award of fees under 28 U.S.C. 2412(b) which makes the United States liable as any private individual. The conduct of the United States Trustee fits squarely within the judicially created bad faith exception to the American rule permitted in *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975). The bad faith exception is also referred to as 'the exception for unreasonably obdurate behavior." *F.D. Rich Co. v Indus. Lumber Co.*, 417 U.S. 116, 129 (1974). The Motion to Dismiss was baseless because it had no factual or legal basis. The US trustee had all the necessary information and documents to prepare a means test to determine if the fact indeed established a presumption of abuse. That is the basis for a 707(b) motion and that was not done. The vexatious nature of the conduct is shown by absolute refusal to come to terms with the facts that, upon consideration, would have brought the matter to a prompt end. The vexatious nature is emphasized by the 'one-two punch' accompanying the motion to dismiss with a 'motion to show cause' for failure to amend an accurate disclosure statement, and falsely claiming, by reference to Rittenhouse *v. Eisen (In re Rittenhouse)* 404 F. 3d 395 (6th Cir. 2005), that Ms. Teter's counsel was suing her to collect pre-petition legal fees. This could have no purpose but to discredit Ms. Teter's counsel and to interfere with that relationship of trust and confidence that underlies the attorney client relationship.

The United States Trustee is liable under 28 U.S.C. Sec. 2412(d) for the same conduct, though no bad faith need be proven under that section. Ms. Teter need only have prevailed by earning her discharge in spite of the Trustee's conduct. The US Trustee can avoid an award of fees under Sec. 2412(d) if its conduct was substantially justified, but its only claim to substantial justification is that it is the US Trustee's Office. Ms. Teter should be awarded her fees and costs incurred in the original contested matter and in this motion under 28 U.S.C. Sec. 2412. To rule otherwise defeats the EAJA's plain language and clearly expressed legislative purpose of encouraging individuals to challenge unjustified government action.

It may be worth pondering, in conclusion, the question raised by the scarcity of cases of this nature. It seems to this brief-writer, that the cases seeking fees against the US Trustee under EAJA are scarce because incidents of this nature are rare. EAJA and the US Trustee system have been around since long before this writer began private practice in 1993. This writer has been well aware of the one, and has worked well with the other over nearly 30 years. There have been some occasions when the language of US Trustee motions to dismiss seemed unnecessarily harsh, but they were resolved quickly with attorneys at the US Trustee office willing to look at the evidence listen to persuasive argument. Over nearly 30 years there has been no need to turn to the protection afforded by the Equal Access to Justice Act. This case is different. As the exhibits attached to the original motion demonstrate, the office of the United States Trustee, inexplicably refused to see the evidence in front of it and refused to perform the basic first step to precede a

challenge under 707(b). This request for fees is exceptional because this case is exceptional. But it fits squarely within the confines of the Equal Access to Justice Act and fees should be awarded.

Respectfully submitted,

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