UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF LOUISIANA

In re:	**CASE NO. 07-11862**
	SECTION "A"
RON WILSON, **LaRHONDA WILSON,**	**CHAPTER 13**
Debtors.	

POST TRIAL BRIEF

I. Introduction

On May 21, 2010, the United States Trustee (the "UST") filed a Motion for Sanctions (the "Motion") against Lender Processing Services, Inc., formerly known as Fidelity National Information Services, Inc. ("Fidelity").[1] The UST's Motion accused Fidelity of (1) misrepresenting knowledge of unposted payments, (2) misrepresenting whether it communicated with the Boles Law Firm (sometimes referred to as the "Firm") about unposted payments, and (3) misrepresenting whether it functioned as a "go between" with respect to unposted payments, all at a hearing before this Court on August 21, 2009.[2] The UST conducted discovery on its Motion during the following six months, taking depositions of several Fidelity employees, and the parties agreed on a pre trial order setting forth these accusations which was filed on November 29, 2010.[3] After a trial on the merits on December 1, 2010, this Court directed the

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[1] P-219.

[2] Motion, ¶ 5.

[3] P-286.

parties to file post trial briefs no later than February 1, 2011.[4] Fidelity submits that at the conclusion of the evidence the UST has not met its burden to show this Court by clear and convincing evidence that Fidelity misrepresented its knowledge, communication and functions as a "go between" at the August 21, 2008 hearing.

II. Summary of Argument

The UST bears the burden of proving its claims by clear and convincing evidence. The UST has not met its burden. The crux of the UST's Motion is that Ms. Dory Goebel testified at the August 21, 2008 hearing as the corporate representative of Fidelity, charged with all of Fidelity's corporate knowledge pursuant to rule 30(b)(6) of the *Federal Rules of Civil Procedure*. However, the Fifth Circuit has explained that there is no rule that requires a corporate designee to testify vicariously at trial. *Brazos River Auth. v. GE Ionics, Inc.*, 469 F.3d 416, 434 (5th Cir. 2006). In *Brazos*, the Fifth Circuit held that a prerequisite for permitting a corporate representative to testify as to matters outside of his personal knowledge is that he was deposed as a corporate representative pursuant to rule 30(b)(6). Because Ms. Goebel was never so designated, she could only speak as to her personal knowledge pursuant to FED. R. EVID. 602.

This is exactly what Ms. Goebel did at the August 21 hearing: Ms. Goebel testified as to the procedures that she would follow in executing affidavits. However, the examination of Ms. Goebel strayed outside of the protocol she followed to broad, often imprecise, questioning about what other Fidelity employees did, or should have done, as part of the relationship between and among Fidelity, Option One Mortgage Company, and the Boles Law Firm. Such questions were well outside of what Ms. Goebel was prepared to testify about.

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[4] P-287.

Ms. Goebel was not the only witness at the August 21 hearing. Mr. Arthur Simmons, an Option One employee, confirmed much of Ms. Goebel's testimony agreeing with the Court's summary that Fidelity is a "warehousing facility." Mr. Simmons confirmed that no one at Fidelity would have the ability to post payments. Furthermore, Mr. Simmons testified that while there was a screen on the Option One system that would show that unposted payments had been sent to counsel but not deposited, that screen was not available to Fidelity or to any other vendor. Ms. Goebel simply would not have had access to that screen before she executed the Affidavit of Debt.

It is undisputed that at the time that the Motion for Relief from Stay was filed, the Debtors had sent payments to Option One which were not posted to the Debtor's account. Each of these payments were forwarded to the Boles Law Firm at the Firm's request. Fidelity attempted on numerous occasions to remind the Firm that it was in possession of the unposted payments. Regardless, Mr. Wirtz at the Boles Law Firm prepared and filed a Motion for Relief from Stay and an Affidavit of Debt that failed to mention the unposted payments in his possession. Mr. Wirtz's failure to list these payments and lack of candor after filing the motion was sanctioned by this Court. It is undisputed that Mr. Wirtz's lack of candor in this matter led to substantial confusion.

Regardless, the witnesses at the December 1, 2010 hearing confirm that Ms. Goebel did not intend to mislead this Court on August 21, 2008. Ms. Terrie Jones's testimony confirms that the Boles Law Firm knew of the unposted payments, yet filed the Motion to Lift Stay without mentioning the payments. Ms. Jones, while communicating with several employees at Fidelity never communicated directly with Ms. Goebel before she executed the Affidavit of Debt. Mr. Scott Walter confirmed that when Ms. Goebel's testimony is put in its proper context, it is clear

that Ms. Goebel testified truthfully. Indeed, with regards to the two main complaints of the UST: that Ms. Goebel stated that Fidelity would not work with Option One on its postings and that Fidelity would not notify a law firm about additional payments that may be received by Option One, Mr. Walter's testimony confirms that the UST took Ms. Goebel's testimony out of context. When put in its proper context – in the context of her role executing affidavits – it becomes clear that Ms. Goebel's testimony was materially correct, albeit confusing.

At the August 21 hearing, Ms. Goebel testified that she never intended to mislead the Court. Her understanding of the purpose of her testimony at that hearing was that she was brought to Court to testify about her execution of the Affidavit of Debt. This she did to the best of her ability and the testimony was mostly correct, except for a single contradiction, produced in a moment of confusion. The UST cannot point to any place where Ms. Goebel intentionally misled the Court on August 21. Indeed, the evidence adduced by the UST during the following year fails to show by clear and convincing evidence that either Fidelity or Ms. Goebel intended to mislead the Court on August 21.

II. Burden of Proof

11 U.S.C. § 105(a) gives bankruptcy courts broad authority to "take any action that is necessary or appropriate to 'prevent an abuse of process.'" *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 127 S. Ct. 1105, 1112 (2007). The Fifth Circuit has cautioned, however, that the threshold for the use of either inherent power sanctions or section 105 sanctions is high, must be "exercised with restraint and discretion," and must be accompanied by a "specific finding that the [sanctioned party] acted in bad faith." *Crowe v. Smith*, 151 F.3d 217, 226 (5th Cir. 1998)(*citing Chaves v. M/V Medina Star*, 47 F.3d 153, 156 (5th Cir. 1995)).

The UST insists that the appropriate standard of proof is preponderance of the evidence. However, judges in this circuit have held that a Court should apply a clear and convincing

standard. *E.g. In re Parsley*, 384 B.R. 138, 179 (Bankr. S.D. Tex. 2008). In *Parsley*, Judge Bohm considered the standard that a bankruptcy court should use in issuing sanctions pursuant to section 105. Judge Bohm noted that "in order for the Court to impose sanctions pursuant to its inherent power of § 105(a), it must make a "specific finding of bad faith." *Id.* (*citing Goldin v. Bartholow*, 166 F.3d 710, 722 (5th Cir. 2006)). Judge Bohm noted that the Fifth Circuit has applied a clear and convincing standard when the sanction imposed is attorney suspension or disbarment. *Id.* (*citing Crowe v. Smith*, 261 F.3d 558 (5th Cir. 2001)). While the Fifth Circuit has never directly stated the standard for other sanctions that the Court may order pursuant to section 105, judges in this circuit have concluded that the clear and convincing standard is appropriate.

In *In re Cochener*, District Judge Sim Lake ruled that the Fifth Circuit would apply a clear and convincing standard when the sanction is penal in nature. *In re Cochener*, 382 B.R. 311, 326-38 (S.D. Tex. 2007)(*rev'd on other grounds*, 297 Fed. App'x 382 (5th Cir. 2008)). In *Cochener*, Judge Lake, noting an absence of Fifth Circuit precedent, confirmed that other circuits are in agreement that a clear and convincing standard of proof is required for sanctions that are fundamentally punitive in nature as opposed to those that are fundamentally remedial in nature. *Id.* at 327. For example, in *Shepherd v. Am. Broadcasting Co.*, 62 F.3d 1469, 1478 (D.C. Cir. 1995), the court held that a court may impose issue-related sanctions in the form of adverse evidentiary determinations or preclusion of evidence when a preponderance of the evidence established that a party's misconduct tainted the evidence. However, the *Shepherd* court continued that "for those inherent power sanctions that are fundamentally penal – dismissals and default judgments, as well as contempt orders, awards of attorney's fees, and the imposition of fines – the district court must find clear and convincing evidence of the predicate misconduct."

Id. at 1477. *See also Autorama Corp. v. Stewart*, 802 F.2d 1284, 1287 (10th Cir. 1986)(holding that attorney's fees can only be awarded when there is clear and convincing evidence.); *Fed. Trade Comm'n v. Freecom Commc'ns, Inc.*, 401 F.3d 1192, 1201 (10th Cir. 2005). Judge Lake, therefore, concluded that the Fifth Circuit would follow its sister circuits and require clear and convincing evidence for any fundamentally punitive sanction. *Cochener*, 382 B.R. at 328.

In this case, like in *Cochener*, the only sanction that the Court could issue would be punitive in nature. Because Fidelity is no longer in the business of executing affidavits,[5] there is no remedial sanction that seems appropriate given the evidence. The only possible sanctions are penal in nature in that this Court is being asked to sanction Fidelity for alleged misrepresentations that already occurred. Indeed, this Court has already sanctioned Ms. Goebel for signing the Affidavit of Debt in the Wilson case, and for a failure to appear at a hearing before this Court.[6] Further, this Court denied the Motion for Relief from Stay at issue in these hearings.[7] Because there is no further remedial action that this Court can take with regards to the Affidavit of Debt, the only avenue left for the Court is a punitive sanction. Such a sanction requires clear and convincing evidence.

Further, while bankruptcy courts have the authority to conduct civil contempt proceedings, the Fifth Circuit has held that the burden of proof is clear and convincing evidence. *See In re Rodriguez*, No. 06-323, 2007 WL 593582 (W.D. Tex. Feb. 20, 2007) (*citing Petroleos Mexicanos v. Crawford Enters., Inc.*, 826 F.2d 392, 401 (5th Cir. 1987)). The Fifth Circuit has

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[5] Fidelity stopped executing affidavits by September, 2008. Transcript, Page 245, lines 22-25, Transcript, Page 246, line 1. *See also* Transcript, Page 318, line 16; Transcript, Page 354, line 12; Transcript, Page 383, line 23.

[6] *See* P-46.

[7] *See* P-36.

explained that in a civil contempt proceeding, clear and convincing evidence is "that weight of proof which produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct, weighty, and convincing as to enable the fact finder to come to a clear conviction, without hesitancy, of the truth of the precise facts of the case." *Id.* (*citing Travelhost, Inc. v. Blandford*, 68 F.3d 958, 961 (5th Cir. 1995)). The *Rodriguez* court confirmed that in the Fifth Circuit, bankruptcy courts are not permitted to conduct criminal contempt proceedings.

Accordingly, no matter the source of the bankruptcy court's contempt or sanctions power, courts in the Fifth Circuit have concluded that the proper burden of proof is clear and convincing. The UST must have shown, by clear and convincing evidence that Fidelity intentionally misrepresented its positions to this Court. The UST has not met its burden and instead spent much time and effort parsing facts that were outside the scope of the Pre-Trial Order.

III. Argument

A. Ms. Goebel Did Not Testify at the August 21, 2008 Hearing as a 30(b)(6) Corporate Representative

As already explained, the UST accused Fidelity of three things in its Motion: (1) misrepresenting knowledge of unposted payments; (2) misrepresenting whether it communicated with the Boles Law Firm about unposted payments; and (3) misrepresenting that it did not function as a "go between" with respect to unposted payments. Despite this straightforward presentation in its Motion, and again in the Pre Trial Order, the UST announced at trial that the evidence will show three additional things: (1) how it came to be that material and misleading

testimony was presented to the Court;[8] (2) that there was a culture of indifference to the truth at Fidelity;[9] and (3) that there was a culture at Fidelity that permitted false affidavits to be created.[10] Despite these new allegations, voiced for the first time at the December, 1, 2010 hearing, the UST failed to meet its burden of showing by clear and convincing evidence that Fidelity intentionally misled the Court in any testimony.

The crux of the UST's argument is that Ms. Goebel, at the August 21, 2008 hearing, was testifying as a representative of Fidelity and that she should be imputed with the knowledge of all Fidelity as she testified. In essence, the UST asserts that Ms. Goebel acted as a corporate representative pursuant to rule 30(b)(6) of the *Federal Rules of Civil Procedure*. However, the Fifth Circuit has explained that "there is no rule that requires a corporate designee to testify 'vicariously' at trial, as distinguished from . . . the rule 30(b)(6) deposition." *Brazos River Auth. v. GE Ionics, Inc.*, 469 F.3d 416, 434 (5th Cir. 2006). In *GE Ionics*, the Fifth Circuit explained that a corporate representative is only allowed to testify as to matters within his personal knowledge. *Id.* at 432 (*citing* FED. R. EVID. 602). However, when the corporate representative testifies to matters within the corporate knowledge pursuant to a Rule 30(b)(6) deposition, he may not refuse to answer the same questions at trial on the grounds that he lacks personal knowledge. *Id.* at 434. According to the Fifth Circuit, a prerequisite for permitting a corporate representative to testify as to matters outside of his personal knowledge is that he was deposed as the corporate representative pursuant to FED. R. CIV. P. 30(b)(6).

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[8] Transcript, Page 11, line 11-13.

[9] Transcript, Page 12, lines 20-21.

[10] Transcript, Page 13, lines 11-13.

In this case, Ms. Goebel was never deposed as a corporate representative of Fidelity. Indeed, she was brought to Court pursuant to two orders. On July 11, 2008, this Court ordered "Ms. Goebel, Assistant Secretary at Option One Mortgage Corporation . . . to appear and explain the amounts due on the mortgage loan."[11] Also on July 11, 2008, this Court ordered that Fidelity produce a representative "and explain the amounts due on the mortgage loan."[12] Ms. Goebel was produced as ordered by the Court. She was never designated a corporate representative of either Option One or Fidelity pursuant to Rule 30(b)(6) and therefore was not charged with the entire corporate knowledge of either entity in her responses. She was only required to speak as to her personal knowledge pursuant to FED. R. EVID. 602.[13]

This is exactly what Ms. Goebel did at the August 21 hearing. As required by the Court, Ms. Goebel's testimony began by explaining the process that she would go through when she executes an Affidavit of Debt.[14] However, the examination of Ms. Goebel strayed far outside of the protocol she followed in executing the Affidavit of Debt to broad, often imprecise, questioning about what other Fidelity employees do, or should do, as part of the relationship

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[11] *See* P-46.

[12] *See* P-45.

[13] Mr. Cash filed a motion to allow Fidelity to voluntarily appear in this bankruptcy (P-43). However, Mr. Cash's motion does not change what Ms. Goebel was brought to court to testify about. The UST's assumption that Mr. Cash's motion somehow changes the scope of Ms. Goebel's testimony is merely argument. Mr. Cash's motion did not alter Ms. Goebel's role from Fidelity's perspective. Ms. Goebel's testimony is that she was called to testify about the process she followed in executing the Affidavit of Debt. *See* Transcript, Page 361, lines 1-5.

[14] *See* August 21 Transcript, Page 38, lines 20-25 ("To execute such an affidavit, once I receive the affidavit, I will review the information that is in the affidavit with Option One's system. So, I will validate the information based on their system and the information that is there."). The August 21 Transcript is Trial Exhibit 26, and will be referred to as the August 21 Transcript for clarity.

between and among Fidelity, Option One Mortgage Company ("Option One") and the Boles Law Firm. Ms. Goebel explained, in detail, the three screens that she reviewed[15], and explained that if there was a problem with the affidavit she would return the affidavit to counsel and ask counsel to edit the affidavit.[16] Ms. Goebel correctly testified that if there was a payment that arrived after counsel prepared the Affidavit of Debt that Option One could communicate with the Boles Law Firm or with Fidelity if they wished to stop the execution or the filing of the Affidavit.[17]

Ms. Goebel even sought to clarify that her testimony was limited to the procedures that she followed when executing the affidavit. At the August 21 hearing, Mr. Myers, counsel for the Debtors asked: "You keep answering all the questions 'we' and I don't want to have a problem with the record later on where if we find that one of these things that you're saying that you need to do to verify the affidavit isn't done and you come back and say, 'But I said we and not I.'"[18] Ms. Goebel responded, after the Court asked an additional clarifying question,[19] "We as in the company would do this. As the signer, this is the procedure that I would follow when executing the affidavit."[20] At the very beginning of her testimony, Ms. Goebel attempted to define what she was there to testify about, a limit to which she has consistently adhered.

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[15] *See* August 21 Transcript, Page 69, lines 10-25.

[16] *See* August 21 Transcript, Page 71, lines 11-18.

[17] *See* August 21 Transcript, Page 79, lines 12-24.

[18] August 21 Transcript, Page 67, lines 2-6.

[19] The Court's clarifying question was as follows: "So, what you're saying is 'we' as in your company?" August 21 Transcript, Page 67, line 12.

[20] August 21 Transcript, Page 67, lines 13-15.

However, the UST continued to ask Ms. Goebel questions outside of what she did in executing this specific Affidavit of Debt. For example, the UST asked whether Ms. Goebel would check to determine if Option One was holding payments in suspense before executing an Affidavit of Debt.[21] Ms. Goebel correctly testified that if there were amounts in the suspense account (i.e. shown on her PAY 4 screen), she would notify Option One before she executed the Affidavit of Debt.[22] The UST then asked how Option One would respond.[23] The UST focused on this despite the fact that there is no evidence that there was any amount ever put into suspense by Option One.[24] This is but one small example of how Ms. Goebel's examination strayed far afield from what she appeared in Court to testify about: the protocol she followed in executing the Affidavit of Debt.

Indeed, the UST asked Ms. Goebel specifically about the correspondence between Fidelity employees and the Boles Law Firm.[25] The UST pressed Ms. Goebel to defend why Fidelity did not look at communications between Option One and the Boles Law Firm before executing her Affidavit of Debt.[26] The UST's question posed a hypothetical change to the procedure Ms. Goebel followed in executing the Affidavit of Debt. However, these hypothetical changes to the procedure were well beyond what Ms. Goebel was called to testify about. The

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[21] *See* August 21 Transcript, Page 92, lines 4-7.

[22] *See* August 21 Transcript, Page 93, lines 7-12.

[23] *See* August 21 Transcript, Page 94, lines 16-22.

[24] *See* August 21 Transcript, Page 95, lines 10-17.

[25] *See* August 21 Transcript, Page 100-01.

[26] *See* August 21 Transcript, Page 101, lines 1-16.

UST's questions show that it expected Ms. Goebel to have knowledge of everything that happened at Fidelity.

The UST complains that Ms. Goebel testified that she would not communicate with the Boles Law Firm regarding unposted payments, or work with Option One or the Boles Law Firm regarding posting instructions.[27] The UST ignores that Ms. Goebel was testifying as to what she did in executing the affidavits, not as to what everyone at Fidelity knew or should have known. Ms. Goebel answered truthfully that when she executed the Affidavit of Debt, she herself did not work with Option One or the Boles Law Firm as to how the payments should be posted. Ms. Goebel testified correctly that she did not know of additional payments at the time that she executed the Affidavit of Debt. Rather, contrary to Fifth Circuit precedent, the UST, incorrectly and erroneously assumes that Ms. Goebel should be treated a corporate representative charged with the knowledge of Fidelity as a whole. As a matter of law, because Ms. Goebel was never designated as a corporate representative pursuant to FED. R. CIV. P. 30(b)(6), the corporate knowledge of Fidelity should not be imputed to Ms. Goebel.

B. Mr. Simmons Testimony at the August 21 Hearing Supports Much of Ms. Goebel's Testimony.

The August 21 hearing was confusing at times, but a fair reading of Ms. Goebel's testimony shows that she never intended to mislead the Court. Indeed, Option One's representative, Mr. Simmons also testified on August 21 and in large part supports Ms. Goebel's testimony. In response to the Court's question to Mr. Simmons as to whether he agreed with Ms.

[27] *See* Memorandum in Support of Motion (P-221), page 8.

Goebel's testimony that Fidelity "is simply a warehousing facility . . . and performs no other real functions for Option One," Mr. Simmons responded, "Correct."[28]

Importantly, Mr. Simmons was not questioned about this specific loan but was questioned about the process between Option One and Fidelity. Mr. Simmons was a "Legal Action Specialist III" at Option One, responsible for "monitoring loans, handling the escrow piece, just various bankruptcy functions."[29] He was later described as a "line worker . . . directly responsible for the Wilson file during the phase when it's in bankruptcy."[30] It seems evident that Mr. Simmons was not in a position to speak about the nature of relationship between Option One and Fidelity. Mr. Simmons admitted that he did not know a lot about the parameters of the relationship between Option One and Fidelity.[31] When the Court asked about the contract between Option One and Fidelity, Mr. Simmons explained: "I am not familiar with the Contract between Fidelity and Option One."[32] Like Ms. Goebel, it appears that Mr. Simmons intended to only speak about "the amounts due on the mortgage loan." [33]

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[28] August 21 Transcript, Page 122, lines 3-6.

[29] August 21 Transcript, Page 123, lines 13-17.

[30] August 21 Transcript, Page 203, lines 20-23.

[31] August 21 Transcript, Page 122, lines 21 – 25, Page 123, line 1.

[32] *Id*. *See also,* August 21 Transcript, Page 160, lines 11-12 (Mr. Simmons states that he does not know the specifics of how Mr. Wirtz is paid.); Pages 165-66 (Mr. Simmons states that he is not familiar with the contractual arrangements between Fidelity and Option One.); Page 168, lines 7-8 (Mr. Simmons states that he is not sure whose responsibility it is to review proposed Chapter 13 plans.)

[33] Order of July 11, 2008, page 2. (P-46).

Mr. Simmons correctly testified that when unposted payments came in he opened an issue to ask Fidelity to ask the Boles Law Firm how to post the payments.[34] As is explained in great detail below, each payment was sent to the Boles Law Firm at the request of the Firm. Mr. Simmons explained that Fidelity is not capable of posting payments, and that only Option One can post the payments.[35] Mr. Simmons testified that there is a screen on the Option One system that would show that the unposted payments had been sent to counsel, but that the screen is not available to Fidelity or any vendor.[36] It is possible to complain that maybe Ms. Goebel should have had access to that screen, but the facts are that she did not when she executed the Affidavit of Debt.[37]

Mr. Simmons explained that in this case, his review of process management notes showed that, at the request of Option One, Fidelity asked the Boles Law Firm about payments that the Firm held.[38] Mr. Simmons knew that this was a correct procedure for Fidelity to follow because he had sent the funds to the Boles Firm.[39] Mr. Simmons confirmed that Fidelity had no ability to make changes in Option One system, but could only read certain documents to which Option One gave them access.[40] According to Mr. Simmons, Fidelity had no ability to make any

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[34] August 21 Transcript, Pages 134-36.

[35] August 21 Transcript, Page 138, lines 15-21.

[36] August 21 Transcript, Page 139, lines 4-15.

[37] *See id.*

[38] *See* August 21 Transcript, Pages 155-57.

[39] *See* August 21 Transcript, Page 155, line 25; Page 156 lines 1-12.

[40] *See* August 21 Transcript, Page 258, lines 15-25.

decisions about what Option One was supposed to do with the unposted payments.[41] Rather, Fidelity simply communicated instructions from attorneys and acted as a vehicle for communications.[42]

C. A History of the Unposted Payments Shows that Fidelity Alerted the Boles Law Firm that There Were Unposted Payments that Required Attention

The August 21 hearing centered on this Court's investigation of the Motion for Relief from Stay filed by the Boles Law Firm on behalf of Option One. The Affidavit of Debt attached to that Motion to Lift Stay was signed by Ms. Goebel, and indicated that the Debtors were delinquent for the months of November 1, 2007 through and including February 1, 2008.[43] It is uncontradicted that the Debtors sent three payments to Option One which would have brought their loan current if they had been posted to the Debtor's account. Each payment was forwarded by Option One, unposted, to the Boles Law Firm, at the request of the Firm.

On December 27, 2007, the Debtors mailed check number 1151 (the "December Check") in the amount of $1,546.84 to Option One for the loan payment due December 1, 2007.[44] Option One received the December Check on January 2, 2008.[45] On January 3, 2008, Bob Yang at Fidelity sent a communication to the Boles Law Firm inquiring "if funds should be applied or returned (and to whom)?"[46] Terrie Jones, a paralegal at the Boles Law Firm, responded that day, and instructed Fidelity to "Return them [meaning the payments] to Terrie Jones at the Boles Law

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[41] *See Id.*

[42] *See* August 21 Transcript, Page 259, lines 11-25.

[43] Trial Exhibit 2A, ¶ 6.

[44] *See* June 26, 2008 Transcript, Page 14; Stipulation 31 in the Pre Trial Order (P-286).

[45] *See* Stipulation 32 in the Pre-Trial Order (P-286).

[46] *See* Trial Exhibit 5, Note 305 at FID 0057.

Firm."[47] Option One mailed the check to the Boles Law Firm per these instructions on January 9, 2008.[48] As of January 9, 2008, the Boles Law Firm was holding $1,546.84 that was not posted by Option One.

On January 26, 2008, the Debtors mailed checks to Option One in the amounts of $1,000.00; $546.84; and $312.00 (collectively, the "January Checks") for the payment due on January 1, 2008.[49] The January Checks were received by Option One on January 31, 2008.[50] On February 1, 2008, Gregory Biersack at Fidelity asked the Boles Law Firm for posting instructions: "URGENT POSTING INSTRUCTIONS. PLEASE RESPOND TODAY! . . . Also, if funds are to be applied and will require alterations to NOD [meaning Notice of Default] or MFR [meaning Motion for Relief from Stay]. Please open an MFR Stop issue . . . ."[51] On February 4, 2008, Ms. Jones responded: "Sorry, I have been out sick. Return to Terrie Jones at the Boles Law Firm."[52] Option One sent the January Checks to the Boles Law Firm on February 8, 2008.[53] Therefore, as of February 8, 2008, the Boles Law Firm was holding $3,405.68 from the Debtors. However, Ms. Jones responded to Fidelity's inquiries about whether the funds the Firm was holding brought the loan current by stating that she had $1,858.84 for the "correct loan" and that for "a check" sent to her in January 2008 "totaling $530.00," the loan number and

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[47] Trial Exhibit 14B, page 0720; Trial Exhibit 5, Note 301 at FID 0056-57.

[48] Stipulation 33 in the Pre-Trial Order (P-286)

[49] Stipulation 34 in the Pre-Trial Order (P-286).

[50] Stipulation 35 in the Pre-Trial Order (P-286).

[51] Trial Exhibit 15A, page 0769 and page 0772.

[52] *See* Trial Exhibit 15A, page 0775.

[53] *See* Stipulation 36 in the Pre-Trial Order (P-286).

name did not correspond.[54] Ms. Jones stated that she would send the $530.00 check "back to Option today."[55]

Despite having these unposted payments, and despite being warned that the funds might bring the loan current, the Boles Law Firm proceeded to prepare a Motion to Lift Stay, and presented an Affidavit of Debt for Ms. Goebel to sign on February 28, 2008.[56] Neither the Motion to Lift Stay nor the Affidavit of Debt mentioned the unposted payments.[57]

Also on February 28, 2008, the Debtors mailed checks in the amount of $1,546.84 and $77.33 (collectively, the "February Checks") to Option One for the payment due on February 1, 2008.[58] The February Checks were received by Option One on March 3, 2008.[59] On March 4, 2008, Gregory Biersack at Fidelity again requested posting instructions from the Boles Law Firm: "URGENT POSTING INSTRUCTIONS; PLEASE RESPOND TODAY. Please provide posting instructions for $1,623.84. If funds are to be applied and will require alterations to NOD or MFR, please open an MFR Sop issue detailing this and allow 3-5 business days to allow time for the funds to be applied. Thank you."[60] On March 7, 2008, Ms. Jones responded that the funds should be sent to her at the Boles Law Firm.[61] On March 7, 2008, Option One mailed the

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[54] Trial Exhibit 5, Note 234 at FID 0044.

[55] *Id.*

[56] See Trial Exhibit 5, Note 189 at FID 0035-36; *see also* Transcript, Pages 129-30.

[57] *See* Trial Exhibit 3 (P-20).

[58] Stipulation No. 37 in the Pre-Trial Order (P-286).

[59] Stipulation No. 38 in the Pre-Trial Order (P-286).

[60] Trial Exhibit 5, Note 160 at FID 0031.

[61] *See* Trial Exhibit 5, Note 153 at FID 0029; *see also* Transcript, Page 133, lines 6-11.

February Checks to the Boles Law Firm.[62] At this point, the Boles Law Firm was holding $5,029.85.[63] Regardless, on March 10, 2008 the Boles Law Firm filed a Motion for Relief from Stay along with Ms. Goebel's Affidavit of Debt, which failed to mention the unposted payments.[64]

The Boles Law Firm, apparently after learning from the Debtors that the loan should be current, asked Fidelity for a "pencil post petition history ledger."[65] The pencil post petition ledger was completed on February 28, 2010.[66] The UST is concerned that the pencil post petition ledger did not include the December, January or February checks. Yet, Ms. Jones, Mr. Walter, and Ms. Goebel all confirmed in their testimony that unposted payments would not be included on pencil post petition ledgers.[67]

Fidelity gave the Boles Law Firm more than sufficient information to discover that it was holding over $5,000 of the Debtors' money that had not been posted to the Debtors' account. Fidelity employees told the Boles Law Firm that the Firm should consider issuing a MFR Stop. Regardless, the Firm moved forward with the Motion for Relief from Stay. Despite the UST's unfounded accusations to the contrary, Fidelity did not have a "culture of indifference to the truth." Indeed, its actions in trying to get the Boles Law Firm to recognize that the Firm might

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[62] Stipulation No. 39 in the Pre-Trial Order (P-286).

[63] Transcript, Page 134, lines 2-5.

[64] *See* Trial Exhibit 3, (P-20).

[65] Transcript, Page 88, lines 20-24; Trial Exhibit 5, Note 270, FID 0051.

[66] Transcript, Page 90, line 25, Page 91, lines 1-5.

[67] Transcript, Page 120, lines 2-6; Transcript, Page 240, lines 12-15; Transcript, Page 315, lines 18-20.

be holding enough funds to bring the loan current and to stop the Motion for Relief from Stay show that Fidelity tried to make sure that the Boles Law Firm and Option One were aware of all pertinent information with regards to the Wilson loan to enable the Firm and Option One to make informed decisions.

What is especially clear is that there is not a single document and no witness testified that Ms. Goebel saw any of this correspondence when she executed the Affidavit of Debt. None of the communications were directed to her and most were not directed to people under her direct supervision. As will be explained in greater detail below, the evidence shows that Ms. Goebel would not have looked at this correspondence when she executed the Affidavit of Debt.

D. This Court Recognized Mr. Wirtz's Lack of Candor in this Matter.

It is undisputed that Mr. Wirtz's incorrect statements led to direct confusion in this matter. At a hearing on this matter on June 26, 2008, Mr. Wirtz acknowledged to the Court that the Boles Law Firm was in possession of the unposted payments, but left the impression with this Court that no one at the Boles Law Firm knew why Option One had forwarded the payments to the Firm.[68] However, as explained above, and as this Court found in October, "as to each of the Debtors' payments that were in Boles' possession, Boles' paralegal Terrie Jones had previously instructed Option to forward each of those payments to Boles as opposed to posting those payments to the Debtors' account."[69] This Court found that Mr. Wirtz's "statement and conduct at the June 26, 2008 hearing, with respect to why Boles possessed the Debtors' payments, failed to meet the standard for the duty of candor owed to a tribunal under Louisiana

[68] Stipulation and Order, October 27, 2010, ¶12 (P-275).

[69] *Id.* ¶ 13.

Rule of Professional Conduct 3.3."[70] Mr. Wirtz's lack of candor and misrepresentations created the confusion that ensued in this case. Mr. Wirtz tried to add to that confusion by suggesting, at the end of Mr. Simmons' testimony on August 21, 2008, that Fidelity incorrectly instructed Option One to send the payments to the Boles Law Firm.[71]

However, as is explained above, and evidenced by the process management notes, the Boles Law Firm specifically directed that payments not be posted and be sent directly to it. Because these payments were kept from being posted, they did not show up on the screens that Ms. Goebel looked at when executing affidavits. Fidelity tried to alert the Boles Law Firm that there were unposted payments that could bring the loan current, but the Firm ignored the warnings. Mr. Wirtz's lack of candor before this Court as to his decision-making role perpetrated confusion that continued for two more years, through the hearing on December 1, 2010.

E. The Witnesses at the December 1, 2010 Hearing Confirm that Ms. Goebel Did Not Intend to Mislead the Court on August 21, 2008.

The UST, despite all the evidence mentioned above to the contrary, still insists that Ms. Goebel's testimony on August 21, 2008 was materially misleading. However, each of the witnesses called by the UST supports that (a) Ms. Goebel did not have personal knowledge of any communications between Fidelity and the Boles Law Firm regarding unposted payments, (b) that Fidelity warned the Boles Law Firm that it had unposted payments, and (c) that Fidelity was not authorized to make any decision with regards to posting of payments or the filing or stopping of a Motion for Relief from Stay.

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[70] *Id.* ¶ 14.

[71] *See* August 21 Transcript, Page 261.

1. Ms. Terrie Jones' Testimony Confirms That the Boles Law Firm Knew of the Unposted Payments, Yet Filed the Motion to Lift Stay Without Mentioning the Payments.

The UST introduced several pieces of evidence and called Ms. Terri Jones to the stand to show that there was a lot of discussion in emails (or process management notes) prior to Ms. Goebel's execution of the Affidavit of Debt on February 28, 2008 that indicates that the debtor made two payments; that certain employees at Fidelity knew it; that the payments were not posted by Option One to the debtors' account; that the reason the payments were not posted was based on the advice of counsel – the Boles Firm; that Clay Wirtz of the Boles Firm was responsible for the decision; that the Boles Firm did not disclose to Ms. Goebel that there were two unposted payments received from the Debtor; and that Clay Wirtz of the Boles Firm did not fully disclose the facts when he was before the Court. Fidelity does not dispute any of these facts. However, it should be noted that according to Ms. Jones, she did not actually work on the Debtors' file and made no decisions with regards to the Wilson file.[72] Ms. Jones testified that all decisions on the Debtors' file were made by Clay Wirtz.[73] Importantly, Ms. Jones confirms that no decisions on the Debtors' file were made by Fidelity.[74]

As explained in detail above, Ms. Jones testified that she communicated with Fidelity with regards to the payments and that she asked for a pencil ledger regarding the payments made by the Debtors.[75] Ms. Jones testified that Mr. Wirtz reviewed everything that she or any other

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[72] *See* Transcript, Page 104, lines 4-14.

[73] *See* Transcript, Page 107, lines 4-9.

[74] *See* Transcript, Page 107, lines 10-11.

[75] *See* Transcript, Pages 70-103.

paralegal did at the Boles Firm, and therefore was the person responsible for all filings.[76] Ms. Jones confirmed that while Fidelity repeatedly relayed Option One's requests for posting instructions for payments Option One received, the Boles Law Firm directed that the checks not be posted and to be sent directly to the Firm.[77]

Importantly, Ms. Jones also testified that pencil ledgers only reflect posted payments.[78] They were not intended to and *did not include payments that had not been posted against the account*.[79] And further, that she knew that the pencil ledgers were not intended to and, in fact, did not include unposted payments.[80] It seems that the UST misunderstands this point and is intent on trying to convince the Court that the "failure" to list unposted payments on pencil ledgers is some sort of deception by Fidelity.

Most notably, Ms. Jones' testimony confirmed that Fidelity employees attempted to inform the Boles Law Firm that the Firm had the payments. Indeed, on February 15, 2008, Mr. Timm warned the Boles Law Firm that "We received information from the client [meaning Option One] stating that funds were forwarded to your office per their cash log. These funds would bring the loan current. Do you have these funds?"[81] Despite holding checks totaling $3,405.68, Ms. Jones replied "The letter sent to me in January has a check totaling $530.00, but the loan and name on the check do not correspond to the loan number and on the letter. I am

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[76] *See* Transcript, Pages 114, lines 1-4.

[77] *See* Transcript, Page 82, lines 5-8; Transcript, Page 85, lines 17-21.

[78] *See* Transcript, Page 120, lines 2-6.

[79] *Id.*

[80] *Id.*

[81] Trial Exhibit 33.

sending this back to Option One today. I do however have $1,850.84 for the correct loan. I don't have enough to reinstate that loan."[82] Although Fidelity reminded the Boles Firm in mid-February that the Firm had unposted payments for January and February in its possession, and even suggested that those fund were sufficient to bring the account current, the Boles Law Firm chose to prepare and file a Motion for Relief from Stay and an Affidavit of Debt that failed to make any mention of the unposted payments that were in the possession of the Firm. Indeed, by March 7, 2008, the Boles Law Firm had $5,029.68 of the Debtors' funds.[83] The Boles Law Firm again directed that the funds not be posted to the Debtors account, and instead be sent to the Firm.

Because the funds were never posted to the account they never appeared on Option One's "screen shots" that Ms. Goebel reviewed before executing the Affidavit of Debt. Ms. Jones confirms that she never directly communicated with Ms. Goebel, and that she did not communicate with Ms. Goebel about the execution of the Affidavit of Debt.[84] Indeed, no documents exist that show that Ms. Goebel was aware of the ongoing discussion between the Boles Law Firm and the Fidelity employees who were raising questions about the proper posting of the Debtors' funds. Yet, Mr. Wirtz was completely aware of these discussions and chose to ignore them when he prepared the Affidavit of Debt.

The UST contends that Fidelity employees knew of the unposted funds, but attempted to keep that information from the Court. The UST complains that the pencil post ledger prepared by Fidelity omitted the payments that had been sent to the Boles Firm. However, Ms. Jones

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[82] *Id.*

[83] *See* Transcript, Page 134, lines 2-5.

[84] *See* Transcript, Page 130-31.

confirmed that pencil post ledgers do not reflect unposted payments. Because the payments sent to the Boles Firm were not posted, they were not included on the pencil post ledgers.[85] Ms. Jones further confirmed that Fidelity did not make posting decisions.[86]

Ms. Jones' testimony confirms that Mr. Wirtz had actual knowledge of the unposted payments and, therefore, had a responsibility to the Court to include them in the Affidavit of Debt that he drafted and then filed. At a hearing held on June 26, 2008, addressing Mr. Wirtz, the Court emphasized as follows: "if after you send out for execution an affidavit of debt, new payments are received, it's your responsibility to update that affidavit to show what the facts are."[87] The Court continued, "if you have personal knowledge that something in the affidavit is incorrect, you are responsible for that."[88] At the June 26, 2008 hearing, Mr. Wirtz left this Court with the incorrect impression that he had unexpectedly received payments in the mail from Option One, after he had already prepared the Affidavit of Debt.[89] Ms. Jones also testified that it was unusual for the Boles Law Firm to hold these unposted payments. Ms. Jones explained that after the Firm filed a Motion for Relief, it was the Firm's procedure to return any funds received by the Debtor to the Debtor's attorney unless there was an agreed order to be submitted.[90] However, for some reason, the Boles Law Firm decided not to follow its procedure and held onto these unposted payments and did not reveal their existence to the Court.

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[85] *See* Transcript, Page 120, lines 4-5.

[86] *See* Transcript, Page 140, lines 6-9.

[87] Trial Exhibit 4-A, page 37, lines 15-17.

[88] *Id.*, page 37, lines 22-24.

[89] Stipulation and Order, October 27, 2010, ¶12 (P-275).

[90] Transcript, Page 97 lines 6-25, Page 98, lines 1-7.

As Ms. Jones' testimony makes clear, there are actually three unposted payments that were made in January, February, and March, 2008.[91] Mr. Wirtz instructed, through Ms. Jones, that each of the unposted payments should be mailed by Option One to the Boles Law Firm. Although he did not disclose it at the earlier hearings, Mr. Wirtz actually had personal knowledge of the January and February unposted payments before the Affidavit of Debt was filed on March 10, before the Boles Law Firm sent the Affidavit of Debt to Fidelity for execution on February 27, 2008, and before the Affidavit of Debt was executed by Ms. Goebel on February 28, 2008.

2. Mr. Walter's Testimony Shows That When Ms. Goebel's Testimony Is Put into Its Proper Context, Ms. Goebel Did Not Mislead this Court.

Mr. Walter was called by the UST as the corporate representative of Fidelity. He was deposed by the UST on September 23, 2010 as the corporate representative of Fidelity pursuant to Rule 30(b)(6), and was the only witness in this case prepared to testify as to certain corporate knowledge of Fidelity.[92] The UST used Mr. Walter's testimony to explain the corporate structure currently at Fidelity and the amounts that Fidelity charged the Boles Law Firm for the services it provided.[93] Mr. Walter explained that one of the many purposes of the Fidelity services is to provide a "means by which a lender or servicer could give a company access to their mainframe, but also limit it in some way, protect their entire system by just allowing" the third party to only view certain documents or information. [94] Furthermore, the Fidelity system

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[91] Transcript, page 133, lines 13-25, and page 134, lines 1-20.

[92] *See* Transcript, Page 149, lines 14-24.

[93] *See* Transcript, Pages 164-71.

[94] Transcript, Page 180, lines 1-7.

drives efficiencies because the technology system offered by Fidelity can standardize communications between a lender and its attorneys, track processes, and handle data requests in a secure environment without overburdening the lender's systems or employees.[95] Mr. Walter again confirmed that employees at Fidelity requested posting instructions from the Boles Law Firm, and that the Boles Law Firm requested that payments be sent to the Firm.[96] Mr. Walter further agrees that Ms. Goebel followed Fidelity's and Option One's procedures when she executed the Affidavit of Debt in the Wilson bankruptcy.[97]

The UST took Ms. Goebel's testimony out of context and tried to rely on Mr. Walter to state that her testimony on August 21 was incorrect. The UST asked Mr. Walter if Ms. Goebel was correct in her testimony that "We do not . . . work with Option One on their postings."[98] At the August 21 hearing, the Court asked Ms. Goebel: "Is there a means by which Option One keeps you, your company, informed on a daily basis of the receipt of funds so that you have real time access to money that might be arriving at their offices?"[99] Ms. Goebel responded "We do not . . . work with Option One on their postings."[100] However, the UST took Ms. Goebel's testimony out of context. The context shows that the questions posed to Ms. Goebel were in the context of her execution of the affidavit. The Court provided the appropriate context: "Let's

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[95] Transcript, Page 188, lines 4-19; Transcript, Page 190, lines 3-8; Transcript, Page 191, lines 15-25.

[96] Transcript, Pages 194-96.

[97] Transcript, Page 248, lines 15-22.

[98] Transcript, Page 208, line 25, Page 209, lines 1-2.

[99] August 21 Transcript, Page 79, lines 4-7.

[100] August 21 Transcript, Page 79, lines 7-11.

assume that unbeknownst to you, a check has been delivered to Option One for those three months of payment and it literally has crossed in the mail. It has arrived at their offices. Counsel has already been contacted to file the Motion for Relief. . . . So you look at the computer screen and you see three months past due, because you see the next contractual date was June 1, fine."[101] This important pretext to the Court's question about the receipt of funds makes it clear that Ms. Goebel was talking about her execution of the Affidavit of Debt. On being questioned by undersigned counsel, Mr. Walter confirmed that, when executing an Affidavit of Debt, Ms. Goebel is not kept current on a daily basis of the receipt of funds in real time.[102] As such, he later corrected and clarified his earlier testimony, adduced by the UST's misleading questions at pages 208 and 209 of the transcript, that Ms. Goebel's August 21 testimony on this point was "materially incorrect." In the process of executing her Affidavit of Debt, Ms. Goebel would only know of funds that have been posted to the loan in question. Put in its proper context, Ms. Goebel's testimony on August 21 was correct and Mr. Walter was in agreement.[103]

Mr. Walter confirmed that the UST "misunderstood" Ms. Goebel's answer regarding whether Fidelity would notify a law firm about payments on a borrower's account.[104] At the August 21 hearing, the UST asked Ms. Goebel "After your office executes the affidavit and sends it to the attorney, is it the typical process that you would notify the law firm about any additional information with regard to the payments on a borrower's account?"[105] Ms. Goebel

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[101] August 21 Transcript, Page 78, lines 20-25, Page 79, lines 1-2.

[102] Transcript, Page 286, lines 2-11.

[103] Transcript, Page 286, lines 6-11.

[104] Transcript, Page 212, lines 2-6.

[105] August 21 Transcript, Page 110, lines 18-21.

responded: "We would not notify them about payments on a borrower's account. That would be Option One."[106] On December 1, Mr. Walter testified that Ms. Goebel's testimony was correct given the context of the question. Mr. Walter testified: "If [Ms. Goebel] was referring to after she signs the affidavit for this given loan is she now done with that loan in respect to signing an affidavit, then she is accurate in her statement of her answer."[107] Ms. Goebel confirmed that in 2008, while she knew that Fidelity employees might be involved in requesting posting instructions for Option One, in connection with executing the Affidavit of Debt, she would not have looked to see if there were any posting instructions under discussion in the file.[108]

In other words, Mr. Walter confirms that Ms. Goebel's answer is in the context of her role in executing the Affidavit of Debt. In understanding the clear context of her testimony, it is important to note that when the UST first asked Mr. Walter about Ms. Goebel's August 21 testimony, he omitted the first part of the question: "After your office executes the affidavit and sends it to the attorney," and posed the question "Is it the typical process that you would notify the law firm about any additional information with regard to the payments on a borrower's account?"[109] Obviously, the UST wants to convince the Court, despite the evidence to the contrary, that Ms. Goebel was testifying globally for all of Fidelity's services in answering questions on August 21. When one places the question into its proper context, it is clear that Ms. Goebel was testifying only about her role in executing the Affidavit. The UST is unfairly

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[106] August 21 Transcript, Page 110, lines 22-23.

[107] Transcript, Page 212, lines 2-6.

[108] Transcript, Page 367, lines 13-20.

[109] Transcript, Page 209, lines 8-11.

attempting to twist the facts in order to prove its case by deliberately taking Ms. Goebel's testimony out of context.

Further, the UST admits that the question was inartfully worded. At the December 1, 2010 hearing the UST attempted to rephrase the question. The UST wanted to know how Ms. Goebel would respond if the question had instead been: "'Does [Fidelity] communicate with the Boles Law Firm about payments that Option One has received that are not yet posted.'"[110] Ms. Goebel responded that she knew in 2008 that Fidelity may communicate with Counsel regarding payments received after the posting of an affidavit, but such communications would not have occurred in connection with the executing of the affidavit.[111]

Mr. Walter testified that simply because Ms. Goebel signed the Affidavit of Debt does not mean that the employees she supervised were the only ones that worked on the Wilson loan.[112] While the UST expects that Ms. Goebel, as an officer of Fidelity, should have intimate details about all communications among Fidelity, Option One, and the Boles Law Firm, Mr. Walter exposed the logical inconsistencies in the UST's assumptions.

Mr. Walter reiterated that Ms. Goebel was testifying on August 21, 2008 in her capacity as the affiant. Mr. Walter stated that in signing the Affidavit of Debt, Ms. Goebel was "following a procedure which did not include" reviewing the process management notes.[113] Mr. Walter continued, "even if [Ms. Goebel] did look at the notes . . . Boles is saying 'Don't post

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[110] Transcript, Page 370, lines 22-25.

[111] Transcript, Pages 372-73.

[112] Transcript, Page 222, lines 1-10.

[113] Transcript, Page 223, lines 14-17.

them. Send them to me.' She may have signed it anyway."[114] The UST assumes that because Ms. Goebel is an officer at Fidelity she should be imputed with the corporate knowledge of everything that happens there, including the discussions regarding whether funds should be posted. However, the UST cannot and did not prove that Ms. Goebel was testifying as to anything other than her execution of the Affidavit of Debt.

Mr. Walter further confirmed Ms. Jones' testimony that the ledger attached to the Affidavit of Debt that was prepared by Mr. Timm was not supposed to include the unposted payments. Ledgers prepared by Fidelity include "processed payments," whether those payments are applied to the loan or put in suspense.[115] However, in this case, the payments were never cashed by Option One and were sitting in the Boles Law Firm offices at the Firm's request.[116] Mr. Walter confirms, yet again, the fact that the ledger does not include the unposted payments is not evidence of any attempt by Fidelity to mislead this Court. Both the Boles Law Firm and Fidelity understood that unposted payments were not included on that ledger.[117] Mr. Walter agreed that Fidelity knew that its ledgers were sometimes attached to affidavits prepared by counsel, but was not provided for the specific purpose of being attached to a pleading.[118]

Likely recognizing that its complaints about Ms. Goebel's testimony were unfounded, the UST attacked Ms. Goebel's Affidavit of Debt with two, previously unmentioned, pieces of

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[114] Transcript, Page 223, lines 18-20.

[115] Transcript, Page 240, lines 12-15.

[116] *Id.*

[117] Transcript, Page 240, lines 23-25; Transcript, Page 120, lines 4-5.

[118] Transcript, Page 244, lines 15-22.

evidence.[119] The UST asked the Court to take judicial notice of an opinion written by Bankruptcy Judge Hardin in the Southern District of New York, in *In re Fagan*, where he found that an affidavit signed by a "Mr. Goebel" was false.[120] The UST suggests that the *Fagan* opinion shows that Ms. Goebel has a history of signing false affidavits. However, Ms. Goebel was not sanctioned in connection with the *Fagan* case and was not represented by counsel. Indeed, Fidelity and Ms. Goebel were unaware of the *Fagan* opinion until shortly before this hearing.[121] The *Fagan* opinion simply does not show, with clear and convincing evidence, that Ms. Goebel intentionally misled the Court on August 21, 2008.

The UST also tries to assert that Ms. Goebel's Affidavit of Debt is materially incorrect because it is possible that another entity besides Option One actually owned the Debtors' mortgage and note.[122] However, the UST forgets that this Court has already sanctioned Ms. Goebel for inaccuracies in the Affidavit of Debt.[123] Mr. Walter testified that Ms. Goebel would rely on the attorney and Option One for the accuracy of that information.[124] Ms. Goebel confirmed that she would rely on the attorney for that information.[125] The issue before the Court concerns whether Ms. Goebel's testimony was materially misleading.[126] Whether the Affidavit

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[119] Neither piece of information was included in the UST's Motion.

[120] Transcript, Page 232, lines 6-8.

[121] Transcript, Page 226, lines 11-18; Transcript, Page 380, lines 10-25

[122] Transcript, Pages 255 – 267.

[123] P-46.

[124] Transcript, Page 262, lines 7-10.

[125] Transcript, Page 341, lines 5-8.

[126] Motion, P-219.

of Debt may have additional inaccuracies is not relevant to the Motion, and was not part of the Pre-Trial Order.[127]

3. Dory Goebel.

The heart of the UST's accusations in its Motion surrounded Ms. Goebel's testimony that Fidelity did not act as a "go-between." Despite devoting an entire section of its Motion to the "go between" issue and spending an extraordinary amount of time related to the meaning of "go-between" during depositions, the UST did not ask a single question about the "go-between" testimony at the December 1, 2010 hearing. Indeed, after opening statements not a single person, attorney or witness, mentioned the words "go-between." The UST appears to have dropped that issue.[128] Rather the UST focused on different testimony: that Ms. Goebel misrepresented that Fidelity knew about unposted payments and that Fidelity actually did communicate with the Boles Law Firm.

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[127] *See* Pre-Trial Order, (P-286).

[128] The UST's argument that the use of the term "go-between" represented a misrepresentation by Fidelity was completely baseless and particularly insidious. On August 21, 2008, Mr. Cash asked Ms. Goebel: "And I think there was a questions asked, and I don't remember who asked it, but it was: And if Option One got a payment and they notified you, then would you notify the lawyer to stop? Fidelity isn't a go-between are they?" Ms. Goebel responded: "No." (August 21 Transcript, Page 112, lines 2-6). However, there are two questions posed by Mr. Cash and one answer. It is impossible to tell from the transcript which question Ms. Goebel was answering.

Further, it is worth noting, that "not a go-between" is not a term used by Ms. Goebel or anyone at Fidelity. The term was pulled out of the air by Mr. Cash on the spur of the moment. While it is perhaps a fair criticism of Mr. Cash that he could have used a better set of words to capture the point that he was making, the UST wants to pull out the dictionary to have a "gotcha" moment. This is not the type of clear and convincing evidence that is sufficient for a finding that Ms. Goebel misrepresented Fidelity's function with respect to the unposted payments based on Mr. Cash's inartful questions.

Regardless, Ms. Goebel testified that she followed the agreed upon procedure in executing the Affidavit of Debt in this case.[129] Mr. Goebel confirmed, like every other witness, that none of the "screen shots" she would look at and had access to prior to executing an affidavit would have shown unposted funds.[130]

Ms. Goebel admitted that her testimony on August 21, 2008, with respect to reviewing process management notes, was imprecise and unclear.[131] Ms. Goebel testified that she did not mean to leave the impression that she reviews process management notes before executing affidavits because she did not do so as a matter of procedure.[132] The facts remain that Ms. Goebel did not check communications prior to signing affidavits. At the August 21 hearing, Ms. Goebel testified as follows:

> THE COURT: All right. You said there were notations in the Fidelity system. Let me just make sure we've got this straight, that Option One had notified the Boles Law Firm that payments had been received?
>
> THE WITNESS: Correct.
>
> THE COURT: And you saw those?
>
> THE WITNESS: Yes, and the information –
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> THE COURT: When you reviewed for today?
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> THE WITNESS: Yes.
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> THE COURT: Okay. When you were verifying the affidavit, you don't review correspondence, correct?

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[129] Transcript, Page 319, lines 2-19.

[130] Transcript, Page 329, lines 7-22.

[131] Transcript, Page 355, lines 15-19.

[132] *Id.*

THE WITNESS: **Correct.**[133]

THE COURT: Okay. So, you don't look at the correspondence screens either, from Option One to Boles, or from Option One to Fidelity?

THE WITNESS: **We would review communication to Fidelity.**[134]

THE COURT: All right.

THE WITNESS: But the communication between Option One and the Boles Law Firm, we would not review.

THE COURT: All right. So an additional screen then that you would look at when you were verifying the affidavit would be a quick check of the correspondence between Fidelity and Option One?

THE WITNESS: Right.

THE COURT: Okay.

THE WITNESS: Correct.

THE COURT: So, that would be one more step you would perform before you signed the affidavit?

THE WITNESS: We would look within our system to see the communication, yes.

THE COURT: Okay. I'm just trying to get – but you don't have – but the step isn't taken out. Now, when you looked at this particular case, preparing for today, you saw correspondence between Option One and Boles regarding your receipt of additional payments. Does that correspondence date to before you signed your affidavit?

THE WITNESS: It would appear that there was communication before the execution of the affidavit and after the execution of the affidavit. [She is disclosing by that statement the existence of the Process Management Notes.]

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[133] Emphasis added.

[134] Emphasis added.

THE COURT: Okay. So it was during this entire time frame?

THE WITNESS: Correct.

THE COURT: The payments were being received. Do you remember how many?

THE WITNESS: I do not recall.

THE COURT: Okay. Did you see any correspondence that directed the Boles Law Firm to stop its action to Lift the Motion to Stay, early?

THE WITNESS: No.

THE COURT: Okay.

BY MR. HAYNES:

Q. Ms. Goebel, you indicated that before coming to testify today that you did look at the communications that were available there in the Fidelity screen. And I want to ask you, I know you indicated -- well, let me ask you to do this: Clarify whether Fidelity ever, in preparing its affidavits, looks at the communication between Option and the law firm?

MR. CASH: Objection, Your Honor. Fidelity doesn't prepare affidavits.

THE COURT: All right. For purposes of this record if anybody says that we are going to have on the record it's straight that we have gotten it established that they don't prepare the affidavits, they just verify the amounts and the allegations in the affidavits, based on the information that they are testifying that they checked.

MR. HAYNES: I apologize Your Honor, I don't mean to –

THE COURT: Okay, let's go.

MR. HAYNES: All right.

BY MR. HAYNES:

Q. When Fidelity – in the process of verifying affidavits for Option, does Fidelity look at the communication going on between Option and its law firm?

A. **No.**[135]

Q. And why is that?

A. With regard to the procedure for executing the affidavit, we validate the information within the affidavit.

Q. But wouldn't that communication between Option and its attorney be a source of information that would indicate that the amounts due screen or the date due screen might be inaccurate?

A. No. The attorney prepares and requests the execution of the affidavit. They are familiar with the information going on with the case and they have direct access to talk with Option One. We would leave it in the hands of the attorney to handle the case.

Q. But at the time that Option is preparing – I mean, excuse me, that Fidelity is verifying an affidavit, it could access those communications going on through Fidelity's system?

A. Yes.[136]

Clearly Ms. Goebel contradicted herself in her August 21 testimony and the UST has pounced on it to make its case. But a fair reading of the transcript shows that in the space of three and a half pages of transcript, Ms. Goebel responded to essentially the same question three times and said in this order: "No,[137] Yes,[138] No.[139]" The overall testimony when looked at fairly is that Ms. Goebel testified that while she could look at messages or communication in the Fidelity system that are made both before and after she executed affidavits; she does not. She rejects the UST's suggestion that if she did look, that those communications might indicate that

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[135] Emphasis added.

[136] August 21 Transcript, Page 98, line 1 through Page 101, line 15.

[137] August 21 Transcript, Page 98, line 12.

[138] August 21 Transcript, Page 98, lines 16-17.

[139] August 21 Transcript, Page 101, line 25.

the amounts due screen is inaccurate.[140] Ms. Goebel responded on August 21 that she relied on the attorney who prepared the Affidavit of Debt to have the correct information regarding unposted payments.[141]

Ms. Goebel, herself, explained on December 1, that her answer may have been confusing but that she did her best to testify truthfully. Ms Goebel stated "Again, what I had said was, and if you read this full thing, The [sic] Court, Mr. Cash, Mr. Haynes, there's a lot of people going back and forth. To me my recollection was it was questions, ping-pong balls coming at me and I was trying to answer the best to my knowledge. I do agree that there maybe was some confusion with my testimony. I was there to be truthful and say what I had. I may not have been clear. There is – so that's how I recall from the hearing of 2008 and that I was there just to speak on the execution of the affidavit."[142] Ms. Goebel made clear in this halting statement that she was confused by some of the questioning on August 21 and that confusion may have caused her testimony to be garbled and confusing. However, there is no evidence that Ms. Goebel ever intended to mislead the Court.

The UST also complains that Ms. Goebel testified on August 21 that the Debtors were delinquent as of November 1, 2007.[143] The UST thinks that Ms. Goebel misled the Court because another person at Fidelity, presumably Mr. Timm, put together a ledger indicating that the Debtors were current on November 1, 2007 and did not become delinquent until December 1,

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[140] August 21 Transcript, Page 101, lines 4-12.

[141] *See* August 21 Transcript, Page 101, lines 8-12.

[142] Transcript, Page 373, line 25, Page 374 lines 1-8.

[143] Transcript, Page 356, lines 21-25; August 21 Transcript, Page 104, line 9.

2007.[144] Ms. Goebel explained that she did not know what this employee looked at or where he got his information.[145] However, she looked at the books and records in Option One's system to verify and execute affidavits.[146] This apparent contradiction, easily explained by the fact that there was an error in setting up the Bankruptcy Work Station,[147] is not clear and convincing evidence that Ms. Goebel intended to mislead this Court on August 21, and simply shows that there was some confusion with regard to the specific dates that the Debtors were delinquent.

The UST wholly ignores that Ms. Goebel understood her testimony to only be focused on the procedures that she followed in executing the Affidavit of Debt.[148] No less than three times did she state that she was only testifying as the representative in the context of executing the Affidavit. The UST further ignores that Ms. Goebel attempted to clarify her role at the August 21 hearing. As already explained, at the August 21 hearing, Ms. Goebel testified in

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[144] Transcript, Page 357, lines 6-10.

[145] Transcript, Page 358, lines 3-5.

[146] Transcript, Page 357, lines 11-14.

[147] *See* Transcript, Page 279, lines 13-21 (Mr. Walter explaining that because of the error, the due date was "30 days wrong and cause a domino reaction which in this case happened.")

[148] Transcript, Page 360, line 25, Page 361, lines 1-5. ("I recall that my testimony from August 21st and the reason I believed to be here was just to explain the policies and procedures around executing the documents, not around all of [Fidelity's] policies and procedures. So, at the time my understanding was that was the only part of my job function that I was testifying to."); Transcript, Page 362, lines 15-19 ("My testimony is that from what I was explained the August 21st hearing, I was going as a representative of Fidelity because I executed the affidavit in the Wilson case and to talk about the procedures in executing an affidavit. That's what I was instructed."); Transcript, Page 363, lines 2-5 ("As I just said, my understanding of why I was here was as a Fidelity representative to discuss the procedures for executing an affidavit and what they were in early 2008. That's what I understood it to be.")

response to questioning by Mr. Myers: "We as in the company would do this. As the signer, this is the procedure that I would follow when executing the affidavit."[149]

Ms. Goebel's testimony is that she recognized that she misspoke at the August 21, 2008 hearing.[150] The UST has failed to show with clear and convincing evidence that there was an attempt to mislead the Court. Ms. Goebel repeatedly testified that her intention was to answer questions truthfully, and within the bounds of why she believed she was called to testify. When one steps back and attempts to fairly understand the context of her testimony as a whole, it is submitted that Ms. Goebel was indeed candid and truthful on August 21.

IV. Conclusion

The UST seeks to hold Fidelity accountable for alleged misrepresentations to this Court on August 21, 2008. However, the UST has failed to show with clear and convincing evidence that Ms. Goebel should be imputed with the knowledge of everyone at Fidelity or that Ms. Goebel intentionally sought to deceive this Court. Without these findings, Fidelity respectfully submits that this Court should not issue additional sanctions.

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[149] August 21 Transcript, Page 67, lines 13-15.

[150] Transcript, Page 355, lines 12-19.

Respectfully submitted, this 1st day of February, 2011 at New Orleans, Louisiana.

/s/ R. Patrick Vance

R. PATRICK VANCE (LA Bar No. 13008)
ELIZABETH J. FUTRELL (LA Bar No. 0563)
MARK A. MINTZ (LA Bar No. 31878)
Jones, Walker, Waechter, Poitevent,
Carrère & Denègre, L.L.P.
201 St. Charles Avenue, 49th Floor
New Orleans, Louisiana 70170-5100
Telephone (504) 582-8194
Telefax (504) 589-8194
pvance@joneswalker.com
efutrell@joneswalker.com
mmintz@joneswalker.com

Attorneys for Lender Processing Service, Inc., formerly known as Fidelity National Information Services, Inc.