UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS

* * * * * * * * * * * *

IN THE MATTER OF:	*	**NO. 07-11862**
RON WILSON AND LARHONDA WILSON,	*	**SECTION "A"**
DEBTORS.	*	**CHAPTER 13**

* * * * * * * * * * * *

Transcript of the proceedings taken in the above captioned matter on **Thursday, March 26, 2009,** the Honorable Elizabeth W. Magner, United States Bankruptcy Judge, presiding.

AUDIO OPERATOR: Kathy Whyte

TRANSCRIPTIONIST: Ann B. Schleismann
1403 Calder Street
Gretna, Louisiana 70053
(504) 366-6672

Proceedings recorded by electronic sound recording, transcript produced by transcription service.

APPEARANCES:

Office of the U.S. Trustee
By: Sean Haynes, Esquire
By: Carolyn S. Cole, Esquire
By: Amanda Burnette, Esquire
400 Poydras Street, Suite 2110
New Orleans, Louisiana 70130

Representing the United States Trustee's Office

Watkins Ludlam Winter & Stennis, PA
By: Susan Fahey Desmond, Esquire
2510 14th Avenue, Suite 1125
Gulfport, Mississippi 39501

Reed Smith, LLP
By: Kurt F. Gwynne, Esquire
1201 Market Street, Suite 1500
Wilmington, Delaware 19801

Representing Sand Canyon Corporation

Winstead PC
By: Michael P. Cash, Esquire
By: Joseph G. Epstein, Esquire
1100 JP Morgan Chase Tower
600 Travis Street
Houston, Texas 77002

Representing Fidelity National Foreclosure Solutions

The Boles Law Firm
By: Jacob S. Edwards, Esquire
1818 Avenue of America
Monroe, Louisiana 71201

Representing the Boles Law Firm

P R O C E E D I N G S

(Thursday, March 26, 2009)

THE CLERK: In the matter of Wilson, 07-11862.

THE COURT: Appearances, please.

MR. HAYNES: Sean Haynes for the United States Trustee, my colleague, Carolyn Cole, and another attorney, Amanda Burnette, is observing with us today. Thank you, Your Honor.

MR. CASH: Your Honor, Michael Cash and Joe Epstein for Fidelity.

MR. GWYNNE: Kurt Gwynne from and Susan Desmond for Sand Canyon, formerly known as Option One.

THE COURT: Okay.

MR. GWYNNE: Thank you.

MR. EDWARDS: Jacob Edwards for the Boles Law Firm.

THE COURT: Thank you.

All right, gentlemen, who wants to go first?

MR. CASH: Your Honor, I won’t go through a lot of the background because I know you’re imminently familiar with this case.

THE COURT: Right.

MR. CASH: The biggest issue and the issue I want to start with, Your Honor, is jurisdiction. Jurisdiction is not a tangential issue, it is a central issue that can be raised -- it is so important to be raised for the first time on appeal.

In the Court's reasons for order it is relegated to a footnote on Page 4. Fidelity has never been a party to this case. Dory Goebel -- it is undisputed. Even the U.S. Trustee does not dispute that Dory Goebel at all times was acting in this case on behalf of Option One.

THE COURT: What does that have to do with discovery dispute, Mr. Cash? Jurisdiction can extend beyond the parties to a case.

MR. CASH: Well, Your Honor, --

THE COURT: And to the extent that Ms. Goebel was speaking through -- was getting direction either from Fidelity, whether or not she was a nominee officer for Option One to sign affidavits or whether, or not her duties were supervised or directed by Fidelity, or whether or not she was paid by Fidelity or paid by Option One in this capacity is the subject of the discovery. And I --

MR. CASH: You --

THE COURT: No. Subject matter jurisdiction for discovery purposes is much broader. You can subpoena and you can obtain documents from third parties that have nothing to do with a lawsuit if they may have information that is relevant to the lawsuit.

MR. CASH: Exactly, Your Honor. If we have information which may be relevant --

THE COURT: How do you know --

MR. CASH: -- to the lawsuit.

THE COURT: -- until you answer the subpoena?

MR. CASH: How do we know, Your Honor, if we don't know what is relevant and what is not because there is no scope to this discovery, which is my second point.

THE COURT: There is scope to the discovery.

MR. CASH: What is the scope, Your Honor?

THE COURT: Well, they defined --

MR. CASH: That's one of the motions for clarification.

THE COURT: Mr. Haynes defined what documents he wanted.

MR. CASH: Defining what documents you want does not give scope to discovery, Your Honor. For us to know to what's relevant in any lawsuit in any court --

THE COURT: Tell me why his specific items are not defined. Limit your argument to that. Tell me what --

MR. CASH: Your Honor, here's what is not defined --

THE COURT: No, wait, wait, wait, wait. Let me get the question out. Tell me why the items that he has subpoenaed from your institution are not defined. I want a specific example.

MR. CASH: Because there is no definition, Your Honor, and we have to start here, with all due respect, what is the issue in this lawsuit?

THE COURT: No. What it --
MR. CASH: No, Your Honor, it has to start there, --
THE COURT: No, no, no. Mr. Cash --
MR. CASH: -- because how can we say --
THE COURT: Mr. Cash, --
MR. CASH: Your Honor, how can we know --
THE COURT: Mr. Cash, answer the question.
MR. CASH: May I make my argument, Your Honor?
THE COURT: No. Answer my question first. Tell me --
MR. CASH: I am trying to.
THE COURT: No, tell me from the items that he has subpoenaed --
MR. CASH: All of them.
THE COURT: -- what is not defined.
MR. CASH: All of them.
THE COURT: Why?
MR. CASH: Each and every one.
THE COURT: Why?
MR. CASH: Because, Your Honor, there is no underlying definition as to what controversy we are here on. If I have a breach of contract case I know that what is relevant is all issues relating to the --
THE COURT: Okay, Mr. Cash, this has been argued in the main phase. I'm denying your motion. I'm not going to

listen to a rehash of what you --

MR. CASH: It's not a rehash, Your Honor.

THE COURT: Yes, it is a rehash.

MR. CASH: Your Honor, I am asking this Court to clarify.

THE COURT: Mr. Cash, you can continue to argue with, I've ruled. Your motion is denied.

Next argument Option One, please.

MR. CASH: Your Honor, for the record, are you telling me that I can make no more argument about how unclear this Court's order is?

THE COURT: I specifically made my order, my ruling. You can take it on appeal.

MR. CASH: I am going to, Your Honor, but I want on the record --

THE COURT: Fine. Have a seat.

MR. CASH: -- that I am not allowed to argue any further and I have appeared here in this Court from Houston ready to argue my case --

THE COURT: Mr. Cash, --

MR. CASH: -- and that I am being cut off.

THE COURT: -- on a motion to reconsider I didn't have to give oral argument. Now, please be seated. The record is clear.

MR. CASH: Very clear.

MR. GWYNNE: May it please the Court, Kurt Gwynne from Reed Smith on behalf of Option One.

First of all, Your Honor, I'm sorry to hear about what happened yesterday.

THE COURT: It's fine, Mr. Gwynne. What I really need to hear in this particular motion is what -- something that I haven't already heard.

MR. GWYNNE: Understood.

Your Honor, there are four things I'd like to address today. The first is that Sand Canyon Corporation, formerly know as Option One, although I'll use the term "Option One" because I think that's what we've all been using, is not a participant in the mortgage process anymore period. Secondly, that the U.S. Trustee is not a party to the sua sponte proceedings. Now, that is something Your Honor has heard before and has --

THE COURT: Right.

MR. GWYNNE: -- said twice they're not, but the UST, Your Honor, has argued that it is, so --

THE COURT: Okay, I've already ruled on that issue, Mr. Gwynne. I need something that's different. Motions for Reconsideration are not to rehash the same arguments that were made in the original motion and that have been ruled on. That's what appeals are for. I need something different.

MR. GWYNNE: Understood, Your Honor, but with respect

to that, because it is relevant to the other arguments I make, when you say Your Honor has already ruled on it, I believe you held the U.S. Trustee is not a party, but is still entitled to take discovery.

THE COURT: Correct.

MR. GWYNNE: Okay, thank you.

The third issue, Your Honor, is that Rule 2004 does not provide a basis for the U.S. Trustee to take discovery.

THE COURT: You've already made that argument in the original motion.

MR. GWYNNE: Your Honor, I respectfully submit that I did not. In Your Honor's ruling you use the fact that the U.S. Trustee could be able to take a 2004 as the basis for allowing them to take discovery under the Federal Rules of Civil Procedure. We haven't been through the issue of 2004 and whether they're entitled to take an examination.

THE COURT: Okay, you can argue that, but understand that I have researched that particular issue and I have a different opinion than you, but you can argue it.

MR. GWYNNE: Well, understood, Your Honor, and I would like the opportunity to convince you otherwise, because I have some things beyond what was in my paper in terms of the statute and the rules that I think it's clear, and I also will talk about the *Countrywide* opinion and the cases cited therein. And then lastly, Your Honor, is just the 105 issue which we

have not addressed before, whether that authorizes the Court to let the U.S. Trustee take discovery otherwise unavailable.

But in turning to the first issue, Your Honor, and it's the only one I was hoping to have to make to today is that Sand Canyon Corporation it's basically cash left over from the sale and litigation claims. It is not a mortgage servicer. It has no mortgage servicing rights. It owns no mortgages. Your Honor said at the last hearing probably ten times to us and the message was clear that it's about the process and the integrity of the process. And as Your Honor knows, you're already sanctioned Option One both for failing to appear --

THE COURT: The problem that I had, Mr. Gwynne, was at various times in these proceedings you were unclear -- I should say Option One was unclear as to whether or not they still held mortgages, whether or not they still supervised or retained other individuals to service those mortgages, and could not answer that direct question.

MR. GWYNNE: We -- sorry, Your Honor.

THE COURT: So, that was one issue that was brought up the last time. I remember specifically asking the question, because you made this argument that we've already been sanctioned. We're not making any new loans anymore. We don't exist anymore. And I said, "Do you own loans and are you, therefore, contracting with even third parties to service those loans?"

MR. GWYNNE: Understood.

THE COURT: And you could not answer that question.

MR. GWYNNE: Right, Your Honor. And when that actually came up was not in the arguments we had in court. It was on our telephonic conference on December 29th or 30th and I said, Your Honor, "I will find out." I didn't realize that that was even an issue because these things are securitized mortgages which means they're never really held in their name. Soon after they're originated they're securitized. They're owed by the trustee in the pool.

I didn't want to say to Your Honor that they didn't hold any other --

THE COURT: I understand.

MR. GWYNNE: -- ones, because obviously here it's important that we be correct if we say something.

THE COURT: Absolutely.

MR. GWYNNE: So that's why I didn't want to say at that hearing what I thought was -- I mean at that telephonic conference what I thought was true. But Option One does not have any servicing rights. They were all sold to American Home Mortgage Servicing, Inc., a Wilbur Ross affiliate. Option One owns no mortgages, has none in its name. It's not involved in the consumer mortgage business at all.

THE COURT: It's not a trustee for any of the securitized trust --

MR. GWYNNE: It is not a trustee, Your Honor.
THE COURT: -- special purpose trust?
MR. GWYNNE: Option One was -- it originated loans and then it also serviced some loans, but the loans were all securitized so the title was transferred and then they basically --
THE COURT: So it didn't hold any -- continue to hold any in its own name --
MR. GWYNNE: Correct.
THE COURT: -- even when it was operating.
MR. GWYNNE: Correct. Right. They would be securitized and then they would service them under Option One Mortgage Corporation Servicing. All of those rights were sold as of April 30, 2008. And I don't know if Your Honor saw, but we did file a declaration from the President of Sand Canyon.
THE COURT: I've seen it.
MR. GWYNNE: I have a copy, Your Honor, if I may --
THE COURT: I've got it.
MR. GWYNNE: Okay. And it's very, you know, short and sweet, but I think it deals with those issues. And for that reason, Your Honor, I understand what Your Honor wants to do and Your Honor was very clear.
THE COURT: I've got it. Thank you.
MR. GWYNNE: And Your Honor was very clear that this was about the process and how the information is submitted to

the Court. Since they sold the mortgage servicing business as of April 30, 2008, if there were issues with things that have been filed, Your Honor, I imagine they'd have made their way to the Court by now. To the extent that something does arise in the future, if it's prior to April 30, 2008 the existing entity is liable to deal with that claim and address it in the Court. But since we're talking really about the process going forward, we're not involved in that. To the extent we filed something, if there are issues that arise we will deal with them, but for those reasons, Your Honor, we don't think we should be still subject to this process whether 2004 or discovery because as we've also indicated, we have been sanctioned and the client paid them promptly. We're not, you know, thumbing our nose at the authority of the Court or anything like that. We --

THE COURT: You just don't think it's relevant at this point.

MR. GWYNNE: We just don't believe it's relevant at this point because we're not involved in that process.

THE COURT: Okay.

MR. GWYNNE: So that was the first argument, Your Honor.

Turning to the second issue was the UST not being a party, and I'm going to skip over that because as Your Honor said you've already ruled on that issue.

I would like to talk a little bit about Section 307, what rights that gives the Trustee, and then whether that makes them a party, and then ultimately I'll move to the party in interest issue under Rule 2004.

The U.S. Trustee did not file an objection here. The U.S. Trustee did not formally intervene. I don't believe they could even intervene, because when you intervene you're a movant or a respondent, you're a plaintiff or a defendant. In a sua sponte proceeding the Court can't proceed with another party on its side. It is the Court against the parties that are subject to the order to show cause.

So this is a case where the U.S. Trustee or this proceeding the U.S. Trustee can appear, can raise issues, can be heard. The U.S. Trustee could and did cross-examine witnesses at the hearing. The U.S. Trustee can participate, can show up and tell Your Honor we think A, B, or C should happen, we think A, B, or C witnesses should be here. But because they are not a party, then their right to do those things, appear, raise issues, and be heard does not give them the right to serve formal discovery.

THE COURT: Let me ask you something, Mr. Gwynne, because this came up at one point during one of the previous hearings and my comment, I think -- and there have been so many hearings and so many conferences I couldn't tell you which one it was whether it was on the record or not, but I remember

discussing this issue. And my concern, frankly, is that if I take what the Trustee believes is relevant, let's just take it in a general context. If the U.S. Trustee's Office comes in and says, "We'd like to depose the following five people and we'd like the following documents produced because we think they are either relevant or can lead to relevant information on this particular matter." And as you say, the Court can consider that in terms -- not in discovery terms, but in terms of whether or not the Court wants to hear from those people. It seems to me that it would be more expensive if you will for the Court to say, you know, I think the U.S. Trustee's Office has made a point. Fly all five people down here. It may take us two weeks, but we'll put them on the stand one at a time and I will question them. I will allow everybody else in the room to question them including the U.S. Trustee's Office, because you admitted that they could do that, and we'll see whether or not what they come up with leads to anything that is relevant, or leads to relevant information. By the way, produce all those exhibits. I think this might be an interesting review as well, so produce all the exhibits. I think I said on the record that there were certain exhibits that I thought would be relevant and that I wanted to see, in particular the e-mails that went between the various parties.

I could in a sense conduct my own discovery, collect all those exhibits, start reading them saying, well, you know,

this document refers to something else. I'd like to see those papers as well. And this could go on for six months, it could go on for a year, and you could come as often as I ordered you to come and put as many people on the stand as I ordered you to come until I was satisfied.

That is a very practical concern for me. While I am not shy about taking up court time, or giving parties court time, or questioning witnesses, I litigated for a living. I am perfectly capable of questioning a witness on the stand. It seemed to me that it was less burdensome, frankly, to your client to conduct what I would call normal, civil discovery. Let the two of you who are very experienced and presumably can get down to the nut of things quickly zero in on what documents and what witnesses were really critical to this determination rather than have to guess what I might be thinking.

The proceeding between a lawyer and the judge is not the normal type of proceeding. You can't call me up on the phone and say, "Well, what do you really want? What do you really mean?" I can't call you up on the phone and say, "You know what? I've been thinking about this. I think you'd better plan this is going to take two hours or four hours." We don't have that luxury.

MR. GWYNNE: I understand that, Your Honor, and I think Your Honor made that point before at one of the hearings or in the teleconference. But with respect to the U.S.

Trustee, Your Honor, and our client, they're a governmental agency --

THE COURT: They are.

MR. GWYNNE: -- the United States Trustee. Their taking discovery is different than when the Court does. Right now the Court is the "opposing party" with respect to Option One. And Your Honor makes the rules and decisions and if you say someone has to be there, they have to be here. If you say --

THE COURT: It's kind of unfair, isn't it, because I get to be the person who orders it and the person who decides it's right.

MR. GWYNNE: It's a little difficult, Your Honor. It makes it hard to have a discovery objection with the Court.

But with respect to the U.S. Trustee, Your Honor, the simple fact is that they are not the Court. And I realize it may not be as efficient of a process --

THE COURT: Well, it also gives you in some sense a third party if they cross the boundaries. You're not shy either about filing motions to quash, motions to limit, motions to declare the discovery irrelevant. It gives you a third party -- I mean not completely, because it is my order, to say, right, U.S. Trustee's Office, this is getting beyond the bounds. Just like you were arguing this morning, we're really not servicing loans. We really don't own loans. So,

therefore, this is all irrelevant. Please reconsider that portion of it, because now I've discovered this information and I can assure the Court that we no longer own any loans and we no longer service any loans.

That might not be possible with the U.S. Trustee's Office. They might say, well, you know, so what; I still want the information. Whereas if you have me to say, okay, maybe the dynamic has changed, that's better.

MR. GWYNNE: Well, and that's exactly I think part of what I'm saying. We have Your Honor in that dynamic and we're asking Your Honor to say that this was your Order to Show Cause and that we're asking Your Honor to release us from it --

THE COURT: Right.

MR. GWYNNE: -- having been sanctioned and not being in the process.

THE COURT: But that's a different argument. That's the argument one. The second argument is that they have no right to take discovery and I can't allow them to take discovery.

MR. GWYNNE: Right.

THE COURT: And that's what I'm having the conversation about right now.

MR. GWYNNE: Well, Your Honor, you know assuming they're not a party, as we said we've dealt with that issue, when you are a defendant in a show cause proceeding and you

have the government -- as Your Honor said you used to be a litigator. You have the government that's not a party that wants to get involved and take discovery from you and may or may not want to file its own motion for sanctions. You don't want to give the potential plaintiff the opportunity to take that discovery, because it is not a party and you don't want them to have what you consider to be the unfair opportunity to take that discovery from you as if it were a party when it's not a party and then use that against you with respect to any litigation.

THE COURT: Okay. So, your real concern is that since they're not a party they may use the information they gain in this proceeding to launch some other type of action against Option One.

MR. GWYNNE: Right. And Your Honor to the extent that they ask witnesses questions in court, or that Your Honor requires there to be things produced in court at those proceedings, they have rights under Section 307 --

THE COURT: And they can use that information to bring ---

MR. GWYNNE: To appear, participate, and be heard. There's nothing I can do about that. But we don't want to give them --

THE COURT: As much as you'd like to.

MR. GWYNNE: But we don't want to give them the

opportunity to go beyond that and to start taking their own discovery asking for things that maybe the Court wouldn't ask for, taking depositions, asking the questions the Court may not ask. From our perspective it multiples the proceedings more to deal with them outside of court than it does to just deal with them in the court within the confines of this courtroom.

And there are also for Option One, as I said, it is basically the cash from the sale and litigation claims. But if there are other claims with the U.S. Trustee's Office, we don't want to do anything to prejudice us and that's why we're saying --

THE COURT: Are there other claims with the U.S. Trustee's Office?

MR. GWYNNE: I'm not aware of any, Your Honor.

THE COURT: Okay.

MR. GWYNNE: I know the Trustee often has national task force with respect to other parties in this process. And perhaps Mr. Haynes could answer that.

THE COURT: But you're not aware of any?

MR. GWYNNE: I'm not aware of any. This is the only case I'm involved in for Option One.

THE COURT: Okay. Or that you're aware that Option One might be involved in --

MR. GWYNNE: Or that I'm aware of.

THE COURT: -- with the U.S. Trustee's Office.

MR. GWYNNE: That's correct. That's correct.

THE COURT: Mr. Gwynne, let me ask you, this raises -- we're on the theoretical, but this raises an issue. Let's suppose that the U.S. Trustee's Office has reason to believe that proofs of claim filed by a particular mortgage servicer are incorrect. Let's just say that. They sit in open court and they hear Motions to Lift Stay and they see a pattern with two or -- they're not participating. They see a pattern that two or three motions come up and the same lender has to stand in front of the Court and say, you know, we were withdrawing the affidavit. We're removing the motion for relief. We found that here was an error and we're taking it. And the parties are happy, because the debtor has gotten what the debtor needs. The motion has been withdrawn or denied. The loan is reinstated. Maybe there's even some attorney's fees that they just voluntarily pay to the debtor's lawyer for having to come and object to the motion. It happens a lot, frankly, in my courtroom.

And the U.S. Trustee's Office says, well, you know this is very disconcerting, because potentially there are other lawyers who are not as diligent, or debtors who are not as responsive, and there may be a real issue here. I mean I'm sure you've read the Wells Fargo cases. There's an issue with accounting in those with that lender. But they don't want to file a lawsuit because they don't want to charge someone with

wrongdoing until they are sure that there is wrongdoing. So, you're saying they could not conduct a 2004.

MR. GWYNNE: That's correct, Your Honor. You said on Page -- I don't remember, I think it was Page 7 of your opinion you analogize the U.S. Trustee's role to that of a prosecutor. And, Your Honor, a prosecutor can't take discovery from a defendant before it decides --

THE COURT: Actually, it can.

MR. GWYNNE: -- it wants to prosecute.

THE COURT: Actually, he can. They can take the Fifth, but --

MR. GWYNNE: Well, that's right, Your Honor, that's what I mean --

THE COURT: But they can.

MR. GWYNNE: Right. But you have the ability --

THE COURT: In fact that's the whole point of a grand jury investigation is that it's an investigative process where testimony is taken, documents are introduced, subpoenas are issued all for the purpose of determining if there's a chargeable offense.

MR. GWYNNE: But, A, they have to file charges with the grand jury, so they have to take a statement, take a position, and the defendant doesn't have to participate. The defendant doesn't have to say, "I did A, B, or C, or I didn't do A, B, or C."

THE COURT: Okay. So that would be --

MR. GWYNNE: So, they can't compel --

THE COURT: So the concern would be that the Trustee's Office doesn't have to show their hand and say what they're really concerned about. They can just launch into an investigation and not reveal the purpose of the investigation.

MR. GWYNNE: Well, Your Honor, and the government has plenty of investigatory powers besides the U.S. Trustee's Office in the mortgage industry. I mean Congress --

THE COURT: The FBI.

MR. GWYNNE: The FBI, Congress, there are many other governmental agencies that have pretty significant investigatory powers and that's why I think --

THE COURT: But does that limit any one agency from investigating just because other agencies have that power?

MR. GWYNNE: No, unless the statute and the applicable rules evidence an intent for this governmental agency not to be able to take discovery. And I have a few things, if I may approach, Your Honor?

THE COURT: Okay.

MR. GWYNNE: And I did in our Motion for Reconsideration address some of the statutory reasons why I do not believe that the U.S. Trustee is a party in interest, but there's actually even more than that having looked into and continued to read the Bankruptcy Code.

THE COURT: Which I'm sure was a very stimulating exercise.

MR. GWYNNE: Yes, very exciting. Well, actually the librarian helped me figure out how to search it electronically, which was really the quickest way to get some information that was helpful.

THE COURT: Well, but this is really the argument, that by Congress setting forth in certain sections that the U.S. Trustee's Office had a specific right, that that meant that the general granting of authority is limited, that it's not a general grant of authority, that it is in fact a specific grant under these statutes. And there are many cases that hold the other way, that despite the fact that there are provisions in the Code that specifically say that the U.S. Trustee's Office is a party in interest for purposes of "X," that that did not limit the general authority.

MR. GWYNNE: And first of all I disagree when you say there are many courts that hold. There's the *Countrywide* decision -- well, in the 2004 context there's the *Countrywide* decision, and I'll talk to you about the cases that it cite, because if you go beyond that, Your Honor, you'll see they don't hold the U.S. Trustee is a party in interest. And where they say it a few times in passing it's without citation to authority and case law, sometimes just a citation to Section 307. But the argument here --

THE COURT: Well, that's what judges do. They don't have to have case laws to decide. They interpret statutes.

MR. GWYNNE: Understood, Your Honor. And in *Countrywide* I don't believe the arguments in the sections of the Code and Rules that I'm presenting were presented to Judge Agresti, so it's not the court's responsibility to --

THE COURT: Right.

MR. GWYNNE: -- make arguments for parties either. He said notwithstanding --

THE COURT: We try to pay attention though.

MR. GWYNNE: Oh, understood, and Your Honor pays attention, no doubt. But Judge Agresti said in that case that it was a close call whether the U.S. Trustee was a party in interest in 2004. And that's without any of the statutory or rule analysis that I'd like to go through, because to me that shows it's clear, especially one change that was made in 1986, to I think it was Section 1104 or 1105. But it's not, Your Honor, that in some instances -- and the change was not to 2004. The issue is not that in some instances the U.S. Trustee is given a specific grant of authority and in others it's not, and, therefore, 307 is this broad grant of authority that covers everything. The issue was whether 2004 says on motion of a party in interest for cause -- well, it doesn't say "for cause," but the case law all says for good cause the court can

order the 2004 --

THE COURT: Well, certainly, because if for example the court found it completely irrelevant or found it to be --

MR. GWYNNE: Right.

THE COURT: -- harassing --

MR. GWYNNE: Right.

THE COURT: -- that you could always say no.

MR. GWYNNE: But 2004 says only party in interest. So, the question is, is the U.S. Trustee a party in interest or is it an entity --

THE COURT: For purposes of this hearing and in 2004 for use --

MR. GWYNNE: For purposes of 2004. Because there is a distinct but important difference between the U.S. Trustee having rights similar to a party in interest under Section 307 and being a party in interest. And Congress used the term "party in interest," where it meant to limit the statute to a party in interest not the U.S. Trustee. And that's why I think if you look through the sections you will see that Section 1306 talks about -- sorry, 1307(c) talks about the court can convert or dismiss a case on request of a party in interest or the United States Trustee. That shows that Congress made a distinction between --

THE COURT: Although as I recall, and you'll correct me I'm sure if I'm wrong, that particular phrase "or party in

interest" was added when some courts held that the U.S. Trustee's Office did not have the right to bring an action, and so to make it specifically clear it was added in. Congress was overruling some Bankruptcy Courts who were taking the statute very literally.

And that's part of what my concern is. The Code is not the work of always a group of individuals that think in terms of its overall impact and they tend to spot address issues. If a judge in Des Moines decides that the U.S. Trustee's Office is not a party in interest for purposes of a particular statute, then you often find Congress coming in and saying, "Okay, then we'll just add the language in to make it absolutely clear." They don't necessarily consider that to be a change. They're just trying to clarify that they include the U.S. Trustee's Office as a party in interest.

MR. GWYNNE: Well, I understand, Your Honor. I think when we get to one of the other changes I'll talk about made to Section 1121 that was not made to 1307 and the fact that the rules promulgated well after 1986 to 2007 on Point 1 and Point 2 still evidence the distinction between those terms.

The Supreme Court said in *Ron Pair* that if the language of the statute is plain and unambiguous, the court's sole function is to enforce it as written. And even more on point in *Rake v Wade* which is a Chapter 13 case, the Supreme Court said the Bankruptcy Code must be interpreted to give

effect and significance to every word.

THE COURT: Yes.

MR. GWYNNE: The only way to read a phrase party in interest or the U.S. Trustee is to interpret the U.S. Trustee as being something else. If the U.S. Trustee is subsumed within party in interest, then there's no reason for that language. Section 1105 of the Bankruptcy Code also says "On request of a party in interest, or the United States Trustee."

Section 1104 is another section that uses the same language, "On request of a party in interest, or the United States Trustee." Now, this is the section, Your Honor, that in 1986 used to only say "On request of a party in interest." I'm not sure if that was also true with respect to 1307, but with respect to this section I know it used to read "Only party in interest." In 1986 Congress added "Or the United States Trustee."

If the U.S. Trustee was already a party in interest there wouldn't have been a reason for Congress to add it to the statute. They could have defined the term "party in interest" and said that includes the U.S. Trustee. There's a lot of things they could have done other than adding something in that would be surplusage if party in interest really was included within that definition.

THE COURT: You're absolutely right in your argument, Mr. Gwynne, but the history of the Code is that the Code

existed before the U.S. Trustee's Office existed. And as a Chapter 11 practitioner I can tell you that for many years I practiced without a U.S. Trustee's Office existing at all. And then when they came in, they came in initially as a pilot program. And then they came in years later as the U.S. Trustee's Office. Now, those of us who have been practicing for, you know, many years before that -- I won't say how many because I don't want to age myself more than necessary, but wondered what are these people for? What do they do? It was not clear exactly what their role would be. They were a completely new creation. We had operated without them for many years and particularly in the 11 arena, the last two statutes are in the 11 arena where the parties tend to be very active. You have committees, you know, unsecured creditors' committees, you often have trustees, you have secured lenders. These are commercial cases that are generally well funded and very well watched. There was this question of so what's the point? Why are they here? And I think courts were wondering what their particular role was. That's why when you say an amendment was made say in '86, it's fairly easy for me to put that into context and to say there was a real question as to what their particular role would be.

At this point in time many years later I think it's fairly well established, it gets quoted frequently, that the U.S. Trustee's Office is to be the watchdog for the bankruptcy

system, that they are to try to insure the integrity of the system, and that they are in some ways a policeman for the system. I mean judges are warned not to be roving commissions, you know, to find problems. I get accused of that on a very frequent basis.

MR. GWYNNE: We'll get to that later.

THE COURT: On a very frequent basis. So, if I can't do a roving commission to do the integrity of the system, and they can't do a roving commission to insure the integrity of the system, how is the system protected, particularly in the consumer arena -- that's where I really want you to address, particularly in the consumer arena where the dollars are low, the parties are not well funded, debtor's counsel is often not paid to start a fight against Option One as Option One for everyone in the whole case. And it's frequently argued in front of me by lender's counsel that they don't have an interest in pursuing whether or not proofs of claim are correct in other cases.

MR. GWYNNE: Well, Your Honor, first of all the Court does have authority to conduct order to show cause hearings where the Court has jurisdiction and where there's an issue before the Court that -- where it's permissible to do that. So, Your Honor, has authority to control the integrity of the process within the bounds of doing that.

The U.S. Trustee has the watchdog role, as Your Honor

mentioned. And by the way, I want to be clear, I'm not arguing the U.S. Trustee has to have an economic interest in the case in order to be a party --

THE COURT: Well, it can't.

MR. GWYNNE: Yeah, right. I mean that I think is ridiculous. I'm just saying that here they don't have authority to do what they're --

THE COURT: Then we'd say they were conflicted.

MR. GWYNNE: -- trying to do.

Right. Well, a lot of times you see the cases where people argue because they don't have a pecuniary interest they're not a person aggrieved --

THE COURT: Right.

MR. GWYNNE: -- and, therefore, don't have standing. And that's not our issue here and I wanted to be clear on that.

But with respect to what they can and can't do, I don't want to tell the U.S. Trustee how to litigate against my client. But I'm not going to sit here and say there's nothing the U.S. Trustee could do to investigate things in cases.

Also with respect to individual debtors and their attorneys, Your Honor, there are class action attorneys that are out there that bring class actions in the bankruptcy context against folks in the consumer services industry. And we've seen that and we've seen that increasingly in the country in the last year and a half.

THE COURT: I know. But you see my problem is that's not really, as I said in *Wells Fargo's* case, that's not really my answer. My point, although some lenders may not understand this, is not to create a class action context against lenders. I'm just trying to make sure that the documents I make decisions on are correct. And by correct I mean that lenders are entitled to receive every dime that is owed them, honestly, every dime that is owed them. I lift stays every day. I throw debtors out of bankruptcy and dismiss cases. And, you know, sit through a motion day; I'm very hard on the debtors as well. And my point is the integrity of the information that I make decisions on.

To say to me, "Well, you know a lawyer can go out and file a civil action in either federal court or state court for a class action and in that way assure that the system is correct," doesn't really insure that my bankruptcy system is correct. It may ultimately correct, maybe, correct the process. I think it's a very poor tool, if you really want to know my opinion, on correcting an issue. But it does --

MR. GWYNNE: Well, I'm just pointing out that there are a lot of forces at work on consumer lenders or servicers putting pressure on them where they are mistakes. I mean there have been Chapter 13 Trustees that have brought litigation. There are different issues with respect to that context in my opinion, but there are Chapter 13 Trustees that have started

litigation. There are the individual debtors that have litigated and asked for attorney's fees. And in this environment the last year and a half --

THE COURT: There are, in front of me.

MR. GWYNNE: -- and this last year and a half, Your Honor, courts have been more receptive to that. There is a place where debtor's attorneys can go to learn how to sue lenders. So, it's not as if the consumer --

THE COURT: Camp Max.

MR. GWYNNE: -- debtors bar is not able to protect the rights of debtors, they are. Your Honor has the authority to maintain the integrity of the process within the other bounds that I've mentioned. Your Honor entered an order to show cause here and Your Honor is wanting to make sure the process is correct. And that sort of loops me back to my first point, which I don't want to get back to about us not being involved anymore in that.

But with respect to your arguments about the language of the Code, Your Honor, I think that the next change is in Section 1121 undercuts any distinction that -- I'm sorry, 1112.

THE COURT: Eleven twelve.

MR. GWYNNE: Right. Undercuts any argument that Congress does not presently maintain a distinction between a party in interest or the U.S. Trustee. And this is part of BAPCPA amendments and in 1112(b) Congress dropped "or the

United States Trustee" in 1112(b). Congress did not strike "or the United States Trustee" in Section 1307(c) which is parallel provision for Chapter 11 which shows that if Congress was putting in the phrase "or the U.S. Trustee" to clarify that the U.S. Trustee was included in party in interest, well then something's changed, Your Honor.

THE COURT: I -- keep going.

MR. GWYNNE: Okay. So, Congress made a change to 1112 that it did not make to 1307. That shows that Congress presently does distinguish between party in interest and the U.S. Trustee. Yes, under Section 307 the U.S. Trustee has rights like a party in interest that where the Code also gives them the right to do something they can do it without an economic interest. But I don't think it can be credibly concluded when you look at the amendments in '86 and then you look at what happened in 2005 to argue that the U.S. Trustee is a party in interest and Congress included them in all of these sections to make it clear that they were a party in interest, because Congress has taken them out of one but not all the others evidencing the distinction.

In addition, Your Honor, that same -- and by the way, the Supreme Court also in *Timbers* said statutory interpretation is a holistic endeavor. So, as Your Honor mentioned, yes, I'm talking about some sections in Chapter 11, but the Bankruptcy Code in phrases used in one place mean the same thing.

THE COURT: Granted.

MR. GWYNNE: Right. Okay, so the same principal of statutory interpretation would apply to construing the rules. So if we turn to the rules we obviously see 2004, which is not in my packet, but that obviously refers only to a party in interest. It does not refer to the United States -- it does not say “or the United States Trustee.”

Section 2007.2, this was one of the -- sorry, not Section but Rule 2007.2. This was one of the sections that was added after BAPCPA about the ombudsman (indiscernible, mumbling). It says in Paragraph C, uses the phrase “Any other party in interest, their respective attorneys and accountants, the United States Trustee,” evidencing again well after 1986 that there is a distinction. Rule 2007.1 uses the same language in multiple places.

In addition one of the things that is not in the packet but another rule that does specifically use the phrase “a party in interest or the United States Trustee,” is Rule 2003(f). So, the rules, again, before and after 1986 evidence a distinction between the phrase party in interest and the United States Trustee.

When you look at the whole historical context, Your Honor, and Your Honor gave an alternative argument for why Congress did what it did in 1986, or an argument as to why they did that, I don’t believe that that can still be considered a

valid reason for the language in the Code when you look at the amendments that have been made since then. And the U.S. Trustee not being a party in interest and not having the right to take a 2004 doesn't preclude the Trustee from appearing, raising issues, and being heard.

I'd like to talk about the *Countrywide* decision that the UST relied upon, and I believe the Court did as well in it's opinion. As I mentioned, the judge in that case specifically said it was a close call and specifically said so without any statutory analysis or without any -- I'm sorry, not without any, but without any of this phrases that I'm talking about today, and without any analysis of the phrases in the Bankruptcy Rules that I went through. But there are more reasons to reject *Countrywide*. And, again, Your Honor, I'm not saying it's the Court's fault, parties don't raise it, the judge doesn't have to address it, but the --

THE COURT: I might not even know it's an issue.

MR. GWYNNE: Exactly. In that case, Your Honor, the court cited I believe six cases in support of the proposition that the U.S. Trustee was a party in interest. And I'll just address them in the order in which they were cited in the *Countrywide* opinion. The first is the Tenth Circuit *Interwest* case.

Interwest was not about 2004. It was not about whether the Trustee had the right to do anything. What

Interwest was about is whether the Code says that an issue can be raised by a party in interest, did that prevent the court from sua sponte raising an issue. That was the issue in *Interwest*. All the court said in a footnote, Footnote 10, was "A party in interest includes a creditor, 11 USCA Section 1109(b), and the U.S. Trustee, 11 USC Section 307."

That was a passing reference to the fact that where the statute said a party in interest had to do something, whether or not the court could do it sua sponte was the question didn't have anything to do with the U.S. Trustee. The court wasn't deciding whether the U.S. Trustee was a party in interest. And I think when you look at these cases, Your Honor, and you look at the statute and the things that I went through you see that the U.S. Trustee may have rights like a party in interest in many instances, but is not in fact a party in interest where that language is used in the Code.

The next case that was relied upon in the *Countrywide* decision was the *Columbia Western* case, 1995 Bankruptcy District of Massachusetts. That case dealt with a Motion to Dismiss for improper venue. Again, there was no issue as to whether the U.S. Trustee was a party in interest. It was again a passing statement. The issue was whether the court could transfer a venue if all the parties in interest consented, and if parties in interest didn't consent then the court would have to transfer venue. And the court simply says, "Pursuant to 11

USC 307 the U.S. Trustee is a party in interest and doesn't consent." Therefore, --

THE COURT: Well, but then it made it an issue, correct?

MR. GWYNNE: Well, yeah, but Your Honor the court wasn't addressing the issue whether the U.S. Trustee was a party in interest under the statute, because the statute I believe referred to -- I think that the language was creditors.

THE COURT: All right, but the problem is that in that particular case the U.S. Trustee's Office was not a party in interest, then the court could just sidestep it completely and say everybody's consented as opposed to there was an opposition. Otherwise the court wouldn't have had to address the opposition.

MR. GWYNNE: Well, Your Honor, I'm not saying the case was wrongly decided. This is an instance like all of these cases -- well, not all of, but nearly all the cases in Footnote 7 in Your Honor's opinion where it says the U.S. Trustee is a party in interest and has standing to do certain things. It's true that the U.S. Trustee has rights very similar to a party in interest and does have standing to do things like object to this. That's why I'm saying it wasn't an issue in this case.

THE COURT: Well, but for example in that case the statute said only creditors and the court expanded it to say

creditors and the U.S. Trustee's Office. I think that's right. I mean I'm doing this on the fly sort of as you're telling me the facts of the case if I'm remembering correctly. It is the same argument that party in interest under 2004 is expansive and includes more than just the parties to the litigation, which would be the court, and the parties under the order to show cause, but can include the U.S. Trustee's Office. And it goes to the argument that 307 is not limited by the other provisions of the Code. Now, I mean granted these are judges deciding these things and that's what judges do, they interpret and they make decisions. And we all know that you can find judges that go one way or go another, but --

MR. GWYNNE: Right.

THE COURT: -- that's what these jurists believed they had the authority to do.

MR. GWYNNE: Right. I think though, Your Honor, I was looking through that while Your Honor was talking because I didn't --

THE COURT: I'm sorry.

MR. GWYNNE: No, I was listening and trying to do two things at once. Hopefully, I did them both, but the case dealt with the venue statute and I looked at that real quickly, the 1412 and 1404(a) which didn't specifically say anything about who -- it only deals with transferring the case. It doesn't deal with the consent issue. It looks like the consent issue

was just under case law about parties consenting, and that's on Page 664.

THE COURT: But if you weren't entitled to consider the objection, the court might not have even discussed it is the point.

MR. GWYNNE: Your Honor, the U.S. Trustee absolutely had the right to --

THE COURT: Objected.

MR. GWYNNE: -- appear, raise issues, and be heard in that case, had the right to object. And if they filed an objection to whatever the debtor wanted to do in that case, then they would actually be a party. But what I'm saying is this case doesn't deal with whether the U.S. Trustee -- nobody was disputing whether they were a party in interest under the Code. The court was just saying, well, they're a party in interest and they objected. Again, what I'm saying is all these cases can be read as saying the U.S. Trustee has rights similar to party in interest under 307, but is not one, because all these decision say, including this one, pursuant to Section 307. And when you look at the language of 307 it's very similar to 1109(b) which says it gives parties in interest a right to appear, raise issues, and be heard. So that's why courts often say pursuant to 307 the U.S. Trustee is a party in interest.

But, interestingly, you read the U.S. Trustee's

objection to our Motion for Reconsideration in a footnote where they talk about *Countrywide*, they actually say the court held that -- something along the lines they had rights similar to a party in interest. And there the court actually held they were a party in interest under Rule 2004. But the decisions that it relied upon really were saying that the UST has rights like a party in interest.

The next case we relied upon, the *Gold Standard* case. The issue there was the U.S. Trustee's requirement that debtor-in-possession be put on checks, not something that's statutory. The court said, again in passing, that the U.S. Trustee was a party in interest. There was no discussion of case law, no discussion of language, party in interest, in the Bankruptcy Code. It was irrelevant to the court's holding. The court cited only to Section 307. Obviously, the Trustee has the right to even file a motion to say you need to put DIP on your checks, that's what our guidelines require.

The next case, the *Gideon* case, dealt with the U.S. Trustee's requirement that the debtor provide original checks, not just copies of checks. The court specifically said in that case on Page 530 "The U.S. Trustee is the equivalent of a party in interest." That's really what these cases are saying. That again was also not a statutory interpretation. The court wasn't interpreting party in interest in any section of the Code or the Rule.

The *BAB Enterprises* case dealt with the U.S. Trustee's objection to the lessor's attorney's fees. Obviously, the U.S. Trustee as the watchdog has standing to object to attorney's fees. Once it does it becomes a party. No dispute that the Bankruptcy Code doesn't limit the rights of who can object to attorney's fees. In that case the court said the U.S. Trustee was a "sufficient party in interest."

The next case, *Costello*, Bankruptcy in the Eastern District of Kentucky, 1992, the U.S. Trustee's objection to attorney's fees. The court said in passing the U.S. Trustee was a party in interest, again citing to Section 307. No discussion of the case law and no issue again about the language of the statute and whether they were a party in interest within that particular language. Obviously, they had the -- well, dispute the holding in any of the cases that were relied upon by Judge Agresti or that U.S. Trustee had the right in those cases to appear, raise issues, and be heard.

THE COURT: But the common thread in all of these decisions is that the power of the U.S. Trustee's Office was unclear. Someone was either objecting to that ability, or there was an issue raised in someone's brief that they did not have the right to be heard, and the courts all expanded, or took an expansive view of the U.S. Trustee's authority and their standing and held that the U.S. Trustee's Office is a party in interest, is like a party in interest. That would be

the same ruling that one would hold in 2004 that by using the words “party in interest” it applies to the U.S. Trustee’s Office as well as the technical parties in interest.

I understand your argument, Mr. Gwynne, but when you say to me the courts didn’t discuss all the precedent, judges don’t have to have precedent.

MR. GWYNNE: Understood.

THE COURT: Judges can make decisions based on their own interpretation of the statutes. And what I found in my research was that the large body of the law really was expansive in favor of the U.S. Trustee’s Office. That is the clear tenor and the clear direction of all of these decisions, that the U.S. Trustee’s Office is going to be given a very wide berth, a very expansive role in the bankruptcy process, and frankly, there are very few, I can’t remember if there are any decisions where the U.S. Trustee’s Office was told it could not do something.

MR. GWYNNE: I think you cited a couple in your Footnote 7 of your opinion, Your Honor. But none of those --

THE COURT: I think those were fairly egregious.

MR. GWYNNE: The only case that held the U.S. Trustee was a party in interest within that language was the *Countrywide* decision. The other ones the court was not addressing a dispute regarding the language of the statute.

THE COURT: But I found the *Countrywide* decision to

be very persuasive, not that I needed it, but I found it to be very well reasoned and very persuasive.

MR. GWYNNE: Well, Your Honor --

THE COURT: That's why I cited it. I don't generally cite for the reasons espoused unless I really believe that it would be superfluous for me to repeat what the judge decided.

MR. GWYNNE: Understood. But, Your Honor, in that case the judge said it was a close call. Without the --

THE COURT: Why do you think I've had three hearings on this issue?

MR. GWYNNE: Well, Your Honor, but I really respectfully submit on this issue this is really the first time, because --

THE COURT: I mean, no, you have argued -- I mean in fairness, because I am not the kind of judge that's going to look at just the narrow window. You have argued in fairness that the U.S. Trustee's Office couldn't be involved, wasn't a party in the case, couldn't conduct discovery. When I took those issues I go from Mr. Cash is arguing subject matter jurisdiction, you've argued standing, you've argued whether or not there was actually a dispute, case, or controversy. I have looked at this particular issue through many, many lenses and arguments. And the issue that you are bringing today I also addressed in my opinion. I went through the analysis of whether 307 is limited by specific provisions of the Code, or

whether or not the specific provisions of the Code are just adding or clarifying the authority. I ruled that they were adding or clarifying the authority.

So, in fairness, I have considered these issues and I have gone through. It is an area of the law that I understand the lenders are very concerned about and are raising many, many issues, but the close call is the three hearings, the multiple briefing, the opportunities to make argument, the multiple opinions I have written on the subject as opposed to giving rulings. So I don't think it's really fair to say that the Court has not considered these issues. I have considered the issues and that's why I've given you this opportunity, but I'm not hearing anything different than what I went through in my own analysis.

MR. GWYNNE: I understand. Well, Your Honor, from reading your opinion which didn't address the language in these sections that I've addressed today or the language in these Bankruptcy Rules, and like you said, if you agree with another court you're not going to repeat its whole analysis, but, Judge, the judge in that case didn't address these things either.

THE COURT: But the judges in some of the other cases did.

MR. GWYNNE: No. No court has addressed --

THE COURT: I know that I have -- I know that in my

analysis I specifically looked at -- I mean I'm talking about my internal analysis, I specifically looked at the arguments that you're speaking of. And it is I will add to you, generally unusual for a court to hold that a general statute is not modified by more specific language. That's a fairly standard or usual statement of construction and it is one that I apply on a regular basis that if you have a general statute and then you have a more specific one, the more specific controls. So, I understand the argument completely. But my conclusion was for very good reasons the courts were going a different way. Now, that's not to say that some appellate court doesn't say, no, we're going to go with the standard rules of construction, but it is pretty clear that the courts are giving the U.S. Trustee's Office a wide berth. They believe Congress is clarifying statutes as opposed to trying to limit or circumscribe authority. They believe that the U.S. Trustee's Office has been given a broad grant to police or to insure the integrity of the system. And as long as the U.S. Trustee's Office does not overstep that authority, abuse it, they will find that they have the right to assert that authority and to involve themselves in many different ways throughout the Code.

The whole point of their involvement in the motions is that then the parties have the opportunity to file Motions to Quash, Motions to Limit Discovery in this case if the

parties believe that the U.S. Trustee's Office is being abusive or is exceeding the scope of the dispute.

MR. GWYNNE: Your Honor, we raised one more issue with respect to that, then I'm almost done here.

THE COURT: Good.

MR. GWYNNE: You made my last issue shorter. But as we discussed earlier as I advised the Court, we believe that the rights under 307, the language in that section is very similar to the language in 1109 with respect to the right to appear, raise issues, and be heard. If what Your Honor is saying or what these other cases are saying, which I don't read them as saying this, that if you're a party in interest either under 1109 or like the U.S. Trustee under Section 307, then you then cannot file an objection to something, but you can sit back and say, you know what, I'm interested in that dispute. I'm going to search some interrogatories and document requests on this party and I'm going to rely upon the more general section of 1109 which gives me the right to appear, raise issues, and be heard. Or I like this adversary over here. I'm not going to intervene; I'm not going to become a plaintiff or defendant. I'm just going to serve discovery and I'm going to argue that I can do it because this greater right, this general right governs the lesser.

It's inconsistent. You can't read Section 307, respectfully, different than 1109 with the import of that same

language. If the right to appear, raise issues, and be heard means you can serve discovery when you're not a party or take a 2004 --

THE COURT: Well, the 2004 though has often been described as a fishing expedition. It can be utilized as a pre-litigation tool.

MR. GWYNNE: Absolutely, Your Honor. All the more reason why it makes sense that Congress distinguished between party in interest or the U.S. Trustee in the Code and why the rules do the same thing.

THE COURT: But how would you --

MR. GWYNNE: Because the government has --

THE COURT: But how are you a party in interest before there's a dispute?

MR. GWYNNE: Well, Your Honor, if you're a creditor you're a party in interest.

THE COURT: Okay, so now you're arguing that you'd have to have a pecuniary interest?

MR. GWYNNE: No. No, I'm giving you an example. You said how.

THE COURT: I know, but that's what my question --

MR. GWYNNE: The U.S. Trustee --

THE COURT: The only distinction between the U.S. Trustee's Office and a creditor before there's actually a dispute is the pecuniary interest.

MR. GWYNNE: No, the U.S. Trustee has a non-economic role to, as Your Honor described it, as being the watchdog, which makes them -- that gives them the right to be involved under Section 307 in many proceedings. It does not make them a party in interest. Congress says party in interest or the U.S. Trustee --

THE COURT: I don't understand your distinction there. You admit that they don't have to have a pecuniary interest to be involved in a case, but as a pre-litigation tool, purely pre-litigation tool 2004, who would be a party in interest? The only distinction between a creditor and the U.S. Trustee would be the pecuniary nature of the interest.

MR. GWYNNE: There can be folks that -- you don't have to be a creditor to be a party in interest. For example the --

THE COURT: That's true.

MR. GWYNNE: -- you could owe the debtor money, but you could still be involved in something.

THE COURT: Again, a pecuniary interest though in the case, the outcome of the case.

MR. GWYNNE: Well, that's not really. Your pecuniary interest --

THE COURT: Sure it is. If you owe them money and you don't think you --

MR. GWYNNE: -- there -- well, it's protecting

yourself.

Right, no, no, no, but that's not in the case. That's in avoiding giving money to the case.

THE COURT: No, they could be in the case because you could be sued in the case. It's property of the estate. So that's what I don't quite understand. It is clear that there are certain --

MR. GWYNNE: The SEC --

THE COURT: -- entities that are going to be pecuniarily affected by the case, creditor, people who owe money to the debtor, people who own property with the debtor, people who might have a lease, you know, with the debtor. They have business relations, contractual relationships with the debtor. And they clearly are -- I mean they are not suing the debtor, there may not be any pending lawsuit. So, the normal term, "party in interest" when you think of litigants is broader than just litigants to the process.

MR. GWYNNE: I agree with that, because there are --

THE COURT: Okay, because it's clearly been held that 2004 can be a pre-litigation exercise.

MR. GWYNNE: We agree with that as well.

THE COURT: So where if you admit that the U.S. Trustee's Office does not have to have a pecuniary interest to be involved, then why can't they conduct pre-litigation discovery?

MR. GWYNNE: Well, Your Honor, every analysis the Supreme Court has said starts with the language of the statute or the rule. And you're jumping to there's a policy reason whether they should be able to --

THE COURT: No, I'm jumping to how the rule is --

MR. GWYNNE: Okay --

THE COURT: -- actually been interpreted by courts, which allow --

MR. GWYNNE: A court.

THE COURT: -- people who are not -- no, people who are not litigants to pursue discovery.

MR. GWYNNE: Well, the cases I'm aware of 2004 being used for pre-litigation discovery, I'm aware of those cases where a debtor may use it before it files an objection or where a creditor wants to take a 2004 of the debtor to see what's going on.

THE COURT: Before it files its motion objecting to discharge for example.

MR. GWYNNE: Or objection to discharge, or whether a fraudulent transfer was made. But the language of Rule 2004 says party in interest. And what I started with, Your Honor, because to me it appears to be clear and unambiguous that there are rules that say party in interest or the United States Trustee, and here we have a rule that says party in interest. And that's the end of the story. The U.S. Trustee should not

be entitled to take a 2004. The court has said several times, especially Justice Scalia, that when the language of the statute or rule is plain and unambiguous that's the end of the analysis. We don't then go into to considering the policy of what Congress may or may not have been thinking.

THE COURT: But I'm taking it to the point where I think they are a party in interest, that's the point. You are arguing that they are something other than a party in interest. I haven't said that. And so that's why I'm having the difficulty, because in my mind they are a party in interest. And under the application of that statute historically, 2004 historically, they are parties who are not in litigation are allowed to pursue discovery. The typical definition of a party in interest is you are in litigation against each other. But that has not been -- in the bankruptcy context it's parties who have an interest in the case. And it has been held that the U.S. Trustee's Office has sufficient interest in a case to do a very broad range of different activities.

MR. GWYNNE: I know --

THE COURT: I mean you and I aren't going to agree on this, as you might tell from this argument. So that's where I am. What I'd ask you, because this has been going on a while, is to move to your third point.

MR. GWYNNE: Okay. The last point, my fourth and last point, Your Honor, is that under Section 105, as

Your Honor mentioned, that's not a roving commission to do equity. And the Fifth Circuit has said in the *Scribner* and *Smith* cases, which we did cite in our papers, that 105 is not a basis to create rights and remedies in derogation of the Bankruptcy Code or the Bankruptcy Rules.

THE COURT: Okay, but now -- see this is where we're getting into --

MR. GWYNNE: Well, this is the rabbit in the hat, because Your Honor believes they're a party in interest, we strongly disagree. I don't see how one can conclude that when the rule or statute says party in interest or the U.S. Trustee that they are a party in interest.

THE COURT: Okay, --

MR. GWYNNE: I'm not going to repeat that, Your Honor.

THE COURT: All right, but I don't have authority to do it and they don't have authority to do it, we're back to my original point of then who has authority to police the system? And your answer is that no one, that individual debtors just have to bring causes of action against a lender and that the Court nor the U.S. Trustee's Office have authority even with evidence to insure that the pleadings and the documents that are filed into the court that are made decisions are correct.

MR. GWYNNE: That is exactly not what I said, Your Honor.

THE COURT: Okay, then tell me --

MR. GWYNNE: I said --

THE COURT: Then tell me, start with the roving commission, because that says to me in bright lights you don't have authority to inquire as to whether or not the documents that my client filed in this courtroom are correct.

MR. GWYNNE: Not what I'm saying.

THE COURT: Okay.

MR. GWYNNE: Your Honor, what I mean by that and what I think what the Fifth Circuit meant by that is that that doesn't give the Court the right to override specific language in the Bankruptcy Code or the Bankruptcy Rules, and in fact --

THE COURT: Oh, so this is the argument that I can't give the U.S. Trustee's Office authority.

MR. GWYNNE: Right.

THE COURT: Not that I don't have authority.

MR. GWYNNE: Right, Your Honor. You have authority and you are proceeding to do that and have been doing that for a while as you know. All that I'm saying is that the U.S. Trustee can't do it in this fashion.

THE COURT: I'm glad to know there's somebody that y'all would rather not litigate against other than me. I'm glad to know I'm not the absolute worst nightmare of all parties.

MR. GWYNNE: Well, Your Honor, I didn't necessarily

say that either. I said in addition to, in addition to litigating with the Court we don't want to litigate with the U.S. Trustee.

THE COURT: All right, so if I hold they are a party in interest under my interpretation that's sort of -- I don't think I'm changing it. I don't think I am circumventing the law or saying anything different. I have a different interpretation of the statute than I understand your client --

MR. GWYNNE: Understood. That's why I said I'd be short on that last argument because if I'm right about what party in interest means, then 105 shouldn't give you authority. If Your Honor disagrees, then from that perspective the 105 wouldn't help me.

THE COURT: In my mind I didn't use 105 to get to whether they had an interest in the case. I just think they do. I think they are a party in interest under 2004.

MR. GWYNNE: And Your Honor mentioned, by the way, you said the parties in litigation or parties in interest, to me that's a party. If you're involved, then you're a party under Rule 33 and 34 and you can serve discovery. A party in interest is a bankruptcy term just like --

THE COURT: It is and it's very broad.

MR. GWYNNE: It is broad.

THE COURT: It is very broad.

MR. GWYNNE: It is broad, Your Honor, no doubt about

it, but it doesn't include the U.S. Trustee or the --

THE COURT: See, that's where you and I --

MR. GWYNNE: Right. I understand that and I guess I will leave it at that, Your Honor. I appreciate the time.

THE COURT: That's all right.

MR. GWYNNE: If Your Honor has any questions, I'm happy to answer them, otherwise, we'd just ask that you please release us perhaps on our first argument that we're not involved in the process.

THE COURT: Okay.

MR. GWYNNE: Thank you, Your Honor.

THE COURT: Mr. Edwards, do you want to make an argument?

MR. EDWARDS: Yes, ma'am.

Good morning, Your Honor.

THE COURT: Good morning.

MR. EDWARDS: Jacob Edwards for the Boles Law Firm.

This is kind of a different motion that what Fidelity and Option One has brought before you today. It's a Motion to Stay the Proceedings of the Subpoena issued by the Trustee. It's obvious Fidelity is going to appeal what your decision is, with Option One may or may not lead to an appeal. I think the decisions all stem from --

THE COURT: Well, who knows if they'll -- this is interlocutory. Who knows if they will get the appeals and who

knows if there will be a stay, but go ahead.

MR. EDWARDS: Possibly, Your Honor.

It seems that they're challenging the underlying authority or the power of the Trustee to take discovery.

THE COURT: They are. That's pretty clear.

MR. EDWARDS: Right. And because of that and the Boles Law Firm is not a party to the show cause proceeding. Clay Wirtz, a former attorney in our firm, was. We've been served with a subpoena. If the underlying discovery is being challenged, I think it's only fair, and equitable, and reasonable to delay the enforcement of the --

THE COURT: That would assume that I felt that the challenge of the discovery was of such an import that it was likely to succeed on the merits. You know I haven't gone through all of this exercise and given everybody the opportunities to argue lightly.

MR. EDWARDS: Yes, ma'am.

THE COURT: I understand that this is a very important issue to certain parties, probably not as much to the Boles Law Firm. It probably deals more with just cost.

MR. EDWARDS: Right. Well, we do still practice before your Court and we appear --

THE COURT: Well, but I'm not -- it's fair to argue whatever you want to argue. My point is the reason I have allowed as much briefing and as many hearings and let this go

on as much is because I understood the bigger picture issue that, frankly, Mr. Gwynne is raising, whether or not the U.S. Trustee's Office has the authority, which is a big picture issue. But having gone through this process, I am convinced that they do and that in fact their authority is necessary in order for Bankruptcy Courts to property function.

And I think that while Mr. Gwynne is correct, I could go on my own and determine what witnesses I wanted to hear from and what documents and have this sort of be this endless colloquy between myself and all the parties that are in front of me today, I really don't think that's fair to the parties, because I get to sit here and decide that I'm not completely satisfied and fly somebody else down and deliver me some more documents. And I don't necessarily think, as much as I get accused of being proactive, that that's an appropriate role. It is one I will do if I have to in order to insure that the decisions I make are accurate. But it's certainly not one that I relish or that I look for opportunities to undertake, though others may disagree. They may think that I do. I don't.

And so I think that the U.S. Trustee's Office is a very necessary party to this process and, frankly, a party that would enable it to have a fair resolution. I don't see the U.S. Trustee's Office -- when I say they're a prosecutor, they are, but in my mind, and I'll admit right here in front of everyone my husband is a prosecutor, a federal prosecutor.

That doesn't mean he goes out and creates a crime, you know, if you would. He's a criminal prosecutor. If he believes someone did not commit a crime after looking at it, he doesn't indict. He doesn't try them. His job is not to convict people. His job is to investigate and if a crime has been committed, then pursue them.

I see the Trustee's Office in much the same way. They investigate. They may come back to me and say, you know what, we've looked at everything and we think it's all okay.

MR. EDWARDS: Right.

THE COURT: It's not about we will definitely find a problem.

MR. EDWARDS: Right, Your Honor. I understand that. But while the inherent authority of the Trustee is being questioned by Option One, or Sand Canyon now, and Fidelity, there's still an underlying issue as to whether this discovery is even going to be allowed. And to allow the Trustee to continue on and enforce this subpoena against the Boles Law Firm is kind of jumping the gun, Your Honor.

THE COURT: No, it's not. This happens, you know, often in litigation, and judges make calls; that's why it's interlocutory. Judges make calls and they make decisions based on whether or not -- you're asking for a stay on the likelihood of success on the merits and --

MR. EDWARDS: No, Your Honor, not on the likelihood,

just until some final non-appealable decision from a court of competent jurisdiction is rendered saying the Trustee is entitled to take discovery or not.

THE COURT: I don't see that that is something that, frankly, the courts above me are willing to get into. I'm not going to certify it. I'm not going to have them -- this drag on for a year or two.

MR. EDWARDS: I understand you want to get this over with and --

THE COURT: But it won't. Even if I certified it, it would be two years.

MR. EDWARDS: Right.

THE COURT: So, I'm not willing to. I don't think there's a likelihood of reversal on the merits and I think the grounds exist and that's what appeals are for. You know, if after the end of the day if an action is brought and a judgment is entered, then I fully expect that that will go up on appeal and those issues can be raised at that time.

MR. EDWARDS: Thank you, Your Honor.

THE COURT: Okay. Mr. Haynes?

MR. HAYNES: Your Honor, for the record I'm Sean Haynes for the United States Trustee.

Your Honor, we just touched on Boles and if may respond to that, Your Honor, Boles has asked for a stay, but their papers don't really say what would be the authority for a

stay.

THE COURT: Right.

MR. HAYNES: And so we've outlined how that it would seem --

THE COURT: In this case it would really be a voluntary -- the Court just decides it's going to stay.

MR. HAYNES: Right, right. And so, Your Honor, you understand the argument. We contend that there is no procedural basis, even if there was a dilemma. And let's turn to that; let's assume the dilemma and as it's posed by Boles. If we honor the order, we violate the privilege. If we honor they privilege, the attorney/client privilege, we violate the order. And, Your Honor, factually and legally that's not a dilemma that exists.

Factually, we've heard Mr. Simmons, Arthur Simmons for Option One testify about a lot of things and it sounds to me -- or sounds that there's little if any privilege that would exist at this point. It is been discussed that he sent -- that Option One sent checks to the Boles Law Firm. That's not privileged now.

THE COURT: Right.

MR. HAYNES: The checks themselves, the payment instruments themselves, that's not privileged.

THE COURT: Right.

MR. HAYNES: The advice that Mr. Simmons sought from

his attorney would not appear to be privileged. And if we turn to that transcript, roughly Pages 246 to 257 where we very specifically went through the process, what I heard said was that the checks would come in and Mr. Simmons wanted to know what to do with them. Following his ordinary procedure he poses the question to Fidelity. Fidelity in turn poses the question to Boles. Mr. Wirtz answers the question, sends his response to Fidelity, and Fidelity sends the response to the client. So, again with Fidelity involved in that process that would not seem to be a privileged communication. I can only conceive of one instance where there might be a privilege.

THE COURT: Well, there's a potential that it could be privileged, but the other issue is when a client is claiming that it is not responsible because it relied on counsel, then what counsel advised becomes discoverable.

MR. HAYNES: Right. And, thirdly, Your Honor, there is a procedural safeguard under Rule 26(b)(5)(a). If the contention is this is privileged material, then you use a privilege log. And we cited the case that says how to do that.

THE COURT: Right.

MR. HAYNES: And then we turn to the instructions that we sent with the subpoena. Instruction E says "Don't produce privileged material."

THE COURT: Well, and I think in one order I said if there was privileged information, do a log of what's privileged

and you file your motion asserting the privilege and you deal with it.

MR. HAYNES: So for those reasons we would ask that the Court deny the Boles' Motion for a Stay.

THE COURT: I'm denying that.

MR. HAYNES: All right. And then with respect to Option One, Your Honor, I know we have spent a lot of time talking about, you know, Rule 2004, and party in interest, and those issues. Again, this central issue is we've issued formal discovery and the party in interest, you know, I submit deals more with Rule 2004. And I want to try to address in order the issues that have been raised by Mr. Gwynne.

He says, well, we're no longer in the servicing business and they submitted an affidavit a few days ago in support of that. Well, Your Honor, that may be the case, but they have the percipient witnesses. We can't escape that.

THE COURT: They have -- excuse me, what?

MR. HAYNES: The percipient witnesses, the witnesses who were involved such as Mr. Simmons who know the facts, who were involved in that process.

THE COURT: And this is to existing claims?

MR. HAYNES: Correct.

THE COURT: Existing proofs of claim on mortgages' past conduct.

MR. HAYNES: Right, correct, Your Honor. And so --

well, and specifically within the *Wilson* case. They are the witness -- he is one of the witnesses who has intimate knowledge about this and we need him to participate. Again, it was Option One who started this whole process by filing this motion.

Secondly, there is a conflict or a contradiction in the affidavit with the Motion for a Protective Order. The chronology as I understand it is April 30th Option One sells its servicing rights to American Home Mortgage. Then on November 3rd, Option One files its Motion for a Protective Order. And in Paragraph 2 it says that it does have a claim against the debtor. I take that to mean it owns the note and mortgage. Now we see in this affidavit filed in the last few days that we don't hold any mortgages. So, if we look at everything, you know, the first two are not contradictory.

THE COURT: So that's why I said I didn't understand, because that was a question I specifically asked.

MR. HAYNES: Right, right. And it's possible that you don't own the servicing rights but you do own the note --

THE COURT: Correct.

MR. HAYNES: -- but again the affidavit doesn't clarify that distinction. If anything what the affidavit says is we don't own the mortgage. Well, does that mean you own the note or you hold a claim, but you don't hold security to the claim? So, I would ask the Court not to consider that

affidavit and not get into this practical issue about well, because we're no longer in the servicing we shouldn't have to participate in this. We need the witnesses and we need the documents that Option One has for this investigation.

Your Honor, in our objection to the Motion to Reconsider we cited and discussed at length the *Perry Hollow* decision from the First Circuit. And the issue there was whether the U.S. Trustee was a party. And I see that both in the reply Option One took the occasion to file a reply to our objection and has taken a good amount of time this morning to discuss party or party in interest, but they don't address *Perry Hollow*.

And just to briefly walk through the facts of that case, the Bankruptcy Trustee filed a motion, a contested matter to sell golf carts. And as I recall, the secured creditor objected. And so there was a hearing on that. I don't see any reference in the opinion to the U.S. Trustee having filed its own objection. But what happened was is that the First Circuit found that the U.S. Trustee participated and that the Assistant U.S. Trustee at the hearing on the motion cross-examined the witness. Well, what happens -- what the First Circuit is considering is the timing of the notice of appeal and whether the 30-day rule applies or whether the 60-day rule applies.

And so the determination is and it all hinges on whether the United States Trustee is a party, and the First

Circuit says, yes, they are. It says they participated. They participated by cross-examining the witness.

And that's what happened on August 21st here is we cross-examined two witnesses. That doesn't even get into the fact that on June 30th we filed our Notice of Appearance and said we not only were appearing, but intended to conduct an inquiry. That same day we filed a Motion for a Scheduling Conference and there was no objection by Option. There was no objection. I'm not sure Mr. Cash had filed his Notice of Appearance by that point, but shortly thereafter. Then the Court grants that motion and an order is entered. There is no appeal from Option, there's no appeal from Fidelity, there's no appeal from Boles. So, we're way down the road for this issue to be -- whether it's waiver, or laches, what have you.

So again, *Perry Hollow* is, you know, again I think it so cogently explains, yep, when the U.S. Trustee participates, they are a party.

Mr. Gwynne would seem to say that that the watchdog is chained to the doghouse, that, sure, when witnesses come in you can ask questions, when documents are in the courtroom --

THE COURT: You can look at them.

MR. HAYNES: -- you can look at them. First, there's no authority cited for that distinction and, secondly, why would we draw that line to say, well, if it's in the courtroom. Well, what about the door outside the courtroom? What about

outside the building and where do we stop? And I don't mean to be --

THE COURT: Well, his argument is that you're not a party in interest unless you file a specific pleading to participate, that you can become a party in interest. He's not arguing you have to have a pecuniary interest. He does see that there is -- or concedes that there is the ability to file objections to introduce. What he's arguing is in this case since there's not a, I guess, what you'd call a formal intervention, there was a Notice to Participate, there have been motions and there has been participation, that the U.S. Trustee's Office is not, you know, not really a party in interest as the term is usually understood.

The reason I analogize this situation to 2004 was because I saw this as very similar to a pre-trial discovery vehicle. The Court is doing an order to show cause on the notion that there is something that the Court is trying to investigate if it needs to do something further, if it needs to hold a motion for further sanctions, if it needs to direct the parties to change their behavior, if this is a broader problem based on the testimony that I heard. The U.S. Trustee's Office is investigating the particulars of the case, because I assume the Court also is concerned that we haven't gotten to the bottom of who's responsible for the wrongdoing. That sort of leads to both issues in my mind, who was responsible, and

whether or not it's broader than just this particular debtor.

So when I said that I analogized this to the 2004 and a pre-litigation discovery method, I believed that the U.S. Trustee's Office had sufficient interest to be a party in interest under 2004. It's just that simple.

It does somewhat concern me that the U.S. Trustee's Office did not file a specific objection, or pleading, or some request and I'd like to hear something about why that was not done.

MR. HAYNES: Your Honor, our view is this is that there were two alternatives to us, a 2004 motion and this formal discovery. And, Your Honor, as we elected in this case because there were benefits, and we discussed this at the November hearing, that there were benefits to issuing formal discovery, chief among them is the right to pose interrogatories and to have a framework that when we begin depositions or as we're looking at documents to understand -- to put all that in context and be better equipped as we go in. And we certainly believe and I think I hear Your Honor saying that you certainly would be entitled, not only academically, but in this case that there would be cause for a Rule 2004 exam.

And I've seen this reply, we were certainly not trying to thumb our nose at the Court or make light of that the Court saw that as preferable. But again, Your Honor, that was

a decision we made to elect one of those alternatives, and again --

THE COURT: So you believe that the discovery options, the formal discovery options were broader than what would have allowed -- the process would have allowed you under 2004?

MR. HAYNES: It's different. Again, --

THE COURT: Right, it's different.

MR. HAYNES: -- because I know --

THE COURT: That's what I mean, it's a broader process under formal discovery than 2004, because there are more tools. There are more arrows in the quiver, if you will.

MR. HAYNES: Correct. Correct, Your Honor.

THE COURT: Okay.

MR. HAYNES: So, again, we would -- I'll say it again, you know, we do believe we certainly could take a Rule 2004 motion in this matter, or file a Rule 2004 motion and the Court could authorize that for cause. But again we elected to go forward with this. And, again, the logic was is that an order to show is a contested matter, that because it's a contested matter it comes in under 9014 and --

THE COURT: I've already ruled on that one.

MR. HAYNES: Right.

THE COURT: So, the scope of your particular discovery, Mr. Haynes, as I read it, it's only designed to deal

with the Wilsons' case, is that correct? You're only seeking documents and production on the facts and the circumstances of the Wilson loan, is that correct?

MR. HAYNES: Your Honor, we have very narrowly tailored that discovery. I think, if I'm not mistaken, that one of the earlier requests for production is the contract between let's say Option One and Fidelity. Well, that certainly could have import for other cases.

THE COURT: Right, but it's designed to find out who's responsible for what portion of the Wilson case.

MR. HAYNES: Right.

THE COURT: That's how I read it.

MR. HAYNES: I mean we've been down this path before in other cases where you make a very broad discovery request and you come back and the court says, uh-uh, you're not going there.

THE COURT: Right.

MR. HAYNES: But they were tailored for this Wilson case. I will say that we would not limit the use of what we learn in the Wilson case and say, well, we can't use that in some other case. But the discovery was tailored, and that's any litigation. I mean you learn something about one case, you learn a pattern or a system, and it has application in other cases. But the Court has already looked at the discovery and made the ruling in the reasons opinion that it's narrowly

tailored.

So, Your Honor, we would ask that the Court deny Option's motion. I don't believe, and I submit that Option doesn't really cross that threshold that the Fifth Circuit has said that there has to be, you know, a significant error of law or fact, manifest error, in essence almost a blunder. And so not having crossed that threshold we'd ask that the Court deny that motion.

Thank you.

THE COURT: Thank you.

MR. CASH: Your Honor, at the risk of having -- getting to go down the hall with the gentleman from the U.S. Marshal's Office, I would like to visit with you just briefly on a couple of points.

Your Honor, one of the problems here is we are not a formal party. Whether we should participate or not I'm not arguing; we're not a formal party. The rules allow interrogatories to be served upon another party by a party. We are a non-party which is one of the problems we have with them not doing a 2004 is they're treating us as though they can do all of these things. I understand the Court has said you're not going to stay this, so I won't go there. I understand the other courts' rulings.

What I would ask, Your Honor, is we had a similar situation in Pennsylvania. In the *Taylor* case the court

entered an order telling the U.S. Trustee you can use these documents. You're here for my case. You can use them in my case, but you can't share them around the country. You can't copy them. They aren't yours to use freely once you're done --

THE COURT: Two different issues. Let me ask you this, Mr. Cash, two different issues. One, you're arguing that you're not a party, so the interrogatories are not appropriate to you. All right, that's different from arguing that they're not entitled to get discovery from you.

MR. CASH: Correct.

THE COURT: All right, you are not a party.

MR. CASH: No.

THE COURT: I don't think I've made you a subject to the Rule to Show Cause. All right, I will rule that the U.S. Trustee's Office may only utilize techniques that are available against non-parties against you. So, document production, depositions, not interrogatories. That's easy enough. But I'm not going to limit their use. At this point I'm not going to limit whatever they discovery their use to other parties. I don't think that that is the normal. I understand some judges do it, but I'm not willing to do that at this juncture.

MR. CASH: And I think, and I may not have been clear, what I was asking, Your Honor, is that once they get the documents -- because these are highly proprietary and if the Court is not going to stay and let us go to the Fifth Circuit

and have the Fifth Circuit maybe say they shouldn't have ever gotten them, once they have them --

THE COURT: Well, there's a difference between saying give me a protective order that says that they're proprietary. You're just asking that they not be allowed to share whatever they receive from you. I'm not willing to give you that type of a blanket order. If after they have propounded discovery upon you, you file a motion with very specific requests for very specific documents that you are producing, I'll address it at that time. But I'm not giving a blanket order.

MR. CASH: Could I give to the Court the order in *Taylor* so you can at least see what was entered in that?

THE COURT: I know the order in *Taylor*. I've read it. I'm familiar with it.

MR. CASH: Okay. I wasn't --

THE COURT: Judges talk.

MR. CASH: I just wasn't aware that it was freely available.

MR. HAYNES: Your Honor, I would go back to an essential point Your Honor has just ruled on about whether Fidelity is a party. Your Honor, has an order from --

THE COURT: Are they the subject of my Rule to Show Cause?

MR. HAYNES: Yes, Your Honor.

THE COURT: They are?

MR. HAYNES: Yes. I don't know the precise docket number. I know the date is July 11th, 2008. "It is ordered sua sponte that a representative of Fidelity National Network appear."

THE COURT: Okay, thank you. I couldn't remember that.

So, Mr. Cash, why are you not a party?

MR. CASH: Your Honor, I think for the purposes of discovery on this issue we have been brought in and we were asked to show cause on a very specific issue which we came in and did. I don't think that that makes us generally a party for discovery from the United States Trustee.

THE COURT: Okay, the Order to Show Cause is against Fidelity. So, that does make --

MR. CASH: A representative of Fidelity.

THE COURT: -- you a party.

Now, the ruling still stands on if you believe that you need a protective order on a specific item that's proprietary or privileged, I'll hear that at the time, but I'm not giving you a blanket protective order.

MR. CASH: And I guess I'm unclear now on whether or not the interrogatory --

THE COURT: You have to respond to the interrogatories, Mr. Haynes having clarified the Court's memory.

MR. GWYNNE: Your Honor, you've been generous with time today for me. I know that, so I'll be very brief.

I just want to be clear, I didn't say the U.S. Trustee could become a party in interest by filing a motion or an objection. They would become --

THE COURT: Okay, those are my words. That's my interpretation.

MR. GWYNNE: Right.

THE COURT: And I won't hold you to that.

MR. GWYNNE: Yeah. They could become a party to litigation by doing that. I don't believe they ever can become a party in interest --

THE COURT: Okay.

MR. GWYNNE: -- as a term of art under the Code.

THE COURT: All right, so that was a misinterpretation of your argument. You can't be held to that in any future proceeding whatsoever.

MR. GWYNNE: Okay. With respect to the U.S. Trustee admitted that there are more arrows in their quiver proceeding as a party in this 2004, that, Your Honor, is another reason why they shouldn't be allowed to proceed as a party when they're not. Counsel for the U.S. Trustee mentioned, Mr. Haynes, that I didn't discuss the *Perry Hollow* case. Well, I didn't discuss it because I thought we agreed Your Honor has already twice held the U.S. Trustee is not a party. And we

cited a case --

THE COURT: Well, they're not a formal -- yes, they're not a formal party.

MR. GWYNNE: They're not a formal party.

THE COURT: They're a party in interest.

MR. GWYNNE: Right, and parties are the ones that serve discovery under Rule 33 and 34. And we cited the *McVay* case which says, a 2004 a more recent case, and that dealt with the sua sponte show cause order. The *Perry* didn't saying the U.S. Trustee is not a party to that. So, with respect to the finality, I don't necessary agree and I'm not willing to agree, not that Your Honor is asking me to, but I want to the record to be clear --

THE COURT: I'm not.

MR. GWYNNE: -- that any order you enter is interlocutory. As I mentioned --

THE COURT: I don't expect you to and that was more just in the nature of argument with Mr. Edwards --

MR. GWYNNE: Okay.

THE COURT: -- because he seemed to assume that there would be an appeal and that it would be taken and that it would be stayed and that's a lot of jumps.

MR. GWYNNE: Right. And, Your Honor, whether or not --

THE COURT: And I don't think I'm speaking out of

turn, because I think everybody at the table is smart enough to know that the first response is going to be this is interlocutory and it doesn't need to be addressed at this point in time.

MR. GWYNNE: Although I think that the U.S. Trustee cites to Rule 59 in its reply which only applies to final orders. So, I think even the U.S. Trustee may believe it's a final order. But in any event --

THE COURT: Well, but --

MR. GWYNNE: -- Rule 59 doesn't apply to interlocutory orders.

THE COURT: Right, but -- anyway, go forward.

MR. GWYNNE: Okay. Your Honor, with respect to if Your Honor denies our Motion for Reconsideration in full, and I'm still hoping, as I said, that you free our people, but with respect that Your Honor mentioned I believe that you wouldn't grant a stay pending appeal, under Rule 8005 if a party appeals we have to come first to this Court --

THE COURT: I'm telling you --

MR. GWYNNE: -- or explain to the District Court why we're not.

THE COURT: I'm telling you, I'm saying on the record I'm not going to grant it, so go straight to the District Court.

MR. GWYNNE: Understood.

THE COURT: Don’t waste your time and money coming here. That’s not to be ugly, or to be -- it’s just not worth your time and money.

MR. GWYNNE: Okay.

THE COURT: You know, save it, save it for the District Court.

MR. GWYNNE: And with respect to --

THE COURT: And I really mean that in a very open, non-hostile way.

MR. GWYNNE: I didn't take it as being hostile, Your Honor.

With respect to, lastly, the privilege issue, I just want to point out the privilege belongs to Option One, not the Boles Law Firm.

THE COURT: Right.

MR. GWYNNE: And I understand what the rules are with respect to when you represent -- when you’re reply upon counsel and your defense -- in your defense when you’re relying upon their advice and the scope of that, and we’ll deal with that appropriately.

THE COURT: You’ll raise it when it comes.

MR. GWYNNE: Right.

THE COURT: Just like Mr. Cash’s argument about confidential and proprietary information, give me the specifics.

MR. GWYNNE: Right.

THE COURT: The document, the time. I don't want to grant broad --

MR. GWYNNE: Understood. Thank you, Your Honor.

THE COURT: Okay.

MR. CASH: Your Honor, the only other thing about the *Taylor* order is that it protects the integrity of each Bankruptcy Court, because if a Bankruptcy Court sitting in Houston says, no, U.S. Trustee, you are not entitled to this type of information, they should not be allowed to hopscotch around the country and find a judge who says, well, yes, you are, and then share it throughout the U.S. Trustee's Office.

THE COURT: Mr. Cash, people do that every day though. You know, let's be real. Litigants look for judges that they think are favorable to their interest. You know, I understand that this is -- that every judge is also entitled to come to their own conclusions. And just because a judge in some other state, Pennsylvania, decides that it can't be used doesn't mean I'm bound by that.

MR. CASH: It was just in protecting the integrity of the system, Your Honor, it would seem that even though litigants do forum shop that we should do all we can to prevent that.

THE COURT: Well, but I also have the right to make my own decisions --

MR. CASH: No doubt.

THE COURT: -- and not have them made by another judge who I don't know that well and don't know what the arguments were. So, that's also a point.

All right, with all this information I'm going to deny the Motions for Reconsideration. I find that the U.S. Trustee's Office has sufficient interest in this matter to continue to pursue discovery.

I find that Fidelity is a party for purposes of the Order to Show Cause and, therefore, is subject to that discovery under those rules.

Though Option One has argued, and I will take the representations in the affidavit and by the Counsel at face value that they are no longer a servicer or an owner of notes, there still remains the question as to what the existing case and other files, pleadings, proofs of claim within the district may be affected by their actions. I do believe that the Court has authority under 2004 to allow the U.S. Trustee's Office to conduct discovery, not because I'm expanding the rules of 2004, but I believe that they would be within the spirit of the law, a party in interest under 2004. The clear indication of the case law is that the courts read the provisions of the Bankruptcy Code in an expansive manner and that they do not limit the Trustee's authority even though specific sections of the statute provide for the U.S. Trustee's Office and other

parties to perform certain tasks or responsibilities. The general view, the majority view is that Section 307 is expansive and is not limited by any particular provision of the Code.

So for those reasons I will deny the Motions for Reconsideration.

I will also state on the record that I've indicated to the parties that should they seek an appeal of this ruling that they do not need to present the request to the Court or a request for the stay, that the Court has already held many hearings, and read many briefs, and done significant research on the matter, and doesn't believe that a stay is warranted, as it is not likely to be overturned on the merits. Therefore, I would direct the parties to ask for any stay directly to the District Court and to tell the District Court that that was at the Bankruptcy Court's request.

Anything else?

Thank you all very much.

MR. HAYNES: And will the Court be entering the order, drawing the orders on the motion?

THE COURT: Yes.

MR. HAYNES: All right, thank you, Your Honor.

* * * * *

(Hearing Concluded)

C E R T I F I C A T E

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceeding in the above-entitled matter.

/S/Ann B. Schleismann **3/31/09**
ANN B. SCHLEISMANN **Date**