DISCHARGE INJUNCTION VIOLATIONS IN CONSUMER BANKRUPTCIES

After discussing the standard for proving a discharge violation and remedies for violations, the author turns to injunction violations, with examples from: (1) automobiles and mortgages; (2) "new" post-petition loans; and (3) class actions for discharge violations, including fail-safe classes.

By Sarah E. Edwards *

BASICS OF A DISCHARGE

Section 524(a) of Title 11 of the United States Code (the "Bankruptcy Code") protects a debtor who receives a bankruptcy discharge. The discharge effectuates the central goal of bankruptcy by providing debtors a financial fresh start. It discharges the debtor's personal liability for pre-bankruptcy debts, and operates as an injunction against acts to collect or recover any discharged debt as a personal liability of the debtor.

Entry of a discharge order in favor a debtor automatically extinguishes the automatic stay and creates the discharge injunction.[1] The injunction prohibits an act to collect, recover, or offset any discharged debt as a personal liability of the debtor, whether or not discharge of such debt is waived. Section 524 does not provide an express enforcement mechanism. Debtors have enforced the discharge injunction by reopening their bankruptcy cases, and filing adversary proceedings or motions requesting that the offending party be held in contempt.[2]

This survey is designed to assist consumer creditors and their counsel with identifying behavior that could result in significant penalties for violation of the discharge injunction.

Standard for Proving a Discharge Violation

A creditor is liable for its willful violations of the discharge injunction. To prove a claim of a discharge violation, a debtor must show that the alleged contemnor: (1) knew the discharge injunction was applicable and (2) intended the actions that violated the injunction.[3] The standard of proof may be clear and convincing evidence,[4] or preponderance of the evidence,[5] depending on the jurisdiction.

Courts differ on the requisite level of knowledge required to prove a discharge violation. Some

[1] 11 U.S.C. § 362(c)(2)(C); 11 U.S.C. § 524(a)(2) ("A discharge in a case under this title– . . . operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover, or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived[.]").

[2] Most courts agree that no private right of action exists for violation of the discharge injunction. *See, e.g., Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502 (9th Cir. 2002); *Pertuso v. Ford Motor Credit Co.*, 233 F.3d 417 (6th Cir. 2000). However, courts disagree on whether bankruptcy courts may invoke

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§ 105(a) of the Bankruptcy Code to remedy discharge injunction violations. *Compare Pertuso*, 233 F.3d 417 (holding that no private right of action exists to enforce discharge injunction and that § 105(a) cannot be invoked to remedy discharge injunction violations) *with In re Haynes*, No. 11-23212 (RDD), 2014 WL 3608891, at *3 (Bankr. S.D.N.Y. July 22, 2014) (using § 105(a) to enforce the discharge injunction).

[3] *Rogerson v. Shaw (In re Shaw)*, No. 1:14-BK-11318, 2017 WL 2791663 (B.A.P. June 27, 2017) (unpublished); *In re Zilog*, Inc., 450 F.3d 996, 1007 (9th Cir. 2006).

[4] *Shaw*, 2017 WL 2791663 at *5.

[5] *Sprague v. Williams, et. al. (In re Van Winkle)*, No. 13-11743 T7, 2017 WL 2729069 (Bankr. D.N.M. June 23, 2017).

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jurisdictions require the contemnor's actual knowledge that the discharge injunction was applicable.[6] Actual knowledge requires that the contemnor was aware of the discharge injunction and aware that it applied to his or her claim. A belief, even an unreasonable one, that the injunction did not apply to the claim, could preclude willfulness.[7]

However, other jurisdictions hold that a contemnor's constructive knowledge of the discharge injunction is all that is required to prove a violation.[8] In constructive knowledge jurisdictions, "the state of mind with which the contemnor violated the court order is irrelevant and therefore good faith, or the absence of intent to violate the order, is no defense."[9]

Remedies for Discharge Injunction Violations

Section 524 does not specify a particular remedy for a discharge violation. As a result, courts rely both on their statutory powers under section 105(a) of the Bankruptcy Code and on their inherent powers to sanction to remedy discharge injunction violations. Courts award a variety of damages for discharge injunction violations; however, courts in different jurisdictions may or may not choose to award damages at all, even in similar factual circumstances.

Courts may award actual damages to a debtor harmed by a willful discharge violation. Actual damages may include lost wages and costs for mileage, lodging, and other travel expenses.[10] Some courts even have awarded actual damages for emotional distress caused by a discharge violation.[11] However, the debtor will bear the burden to prove a direct relationship between the alleged contemnor's actions and the emotional distress.[12]

Courts have also awarded attorney's fees.[13] Attorney's fees awards for discharge violations are calculated using the lodestar method that also is used to calculate damages for stay violations.[14]

In some courts, an award of punitive damages also is available for discharge violations.[15] These courts rely on the broad language of section 105(a), allowing the court to issue "any order" necessary to carry out the provisions of title 11 to justify an award of punitive damages.[16] However, most courts hold that punitive damages awards are impermissible as criminal contempt sanctions, which are outside the authority of the bankruptcy courts.[17] A contempt proceeding for violation of the discharge injunction is civil in nature and should be designed to remedy past misconduct and

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[6] *Shaw*, 2017 WL 2791663 at *5 (holding that the bankruptcy court applied an incorrect standard when it failed to consider whether the alleged contemnor knew the discharge injunction applied to her cause of action).

[7] *Zilog*, 450 F.3d at 1009; *see also Romanucci & Blandin, LLC v. Lempesis,* 2017 Bankr. LEXIS 71526 at *12 (N.D. Ill. 5/4/17).

[8] *Erhart v. Fina (In re Fina)*, 2012 LEXIS 163855 (E.D. Va. 11/14/12); *In re Nassoko*, 405 B.R. 515, 522 (Bankr. S.D.N.Y. 2009).

[9] *In re Cherry*, 247 B.R. 176, 187 (Bankr. E.D. Va. 2000); *Scott v. Wells Fargo Home Mortg., Inc.,* 326 F. Supp. 2d 709, 718 (E.D. Va. 2003).

[10] *In re Ridley*, 572 B.R. 352 (Bankr. E.D. Okla. May 31, 2017); *In re Humbert*, 567 B.R. 512, 520 (Bankr. N.D. Ohio Feb. 16, 2017); *In re Lewis*, No. 16-60898-7, 2017 WL 1233816, at *3 (Bankr. D. Mont. Apr. 3, 2017).

[11] *Compare Lempesis*, 557 B.R. 659 (emotional distress damages allowed, at least as an addition to other financial damages) *with Aiello v. Providian Financial Corp.*, 239 F.3d 876, 880 (7th Cir. 2001) (damages not allowed as stand-alone remedy).

[12] *In re Bates*, No. AP 13-1043-JMD, 2015 WL 1777481, at *5 (Bankr. D.N.H. Apr. 16, 2015), *aff'd sub nom. Bates v. CitiMortgage, Inc.*, 550 B.R. 12 (D.N.H. 2016), *aff'd*, 844 F.3d 300 (1st Cir. 2016) (the evidence did not establish that the debtors' emotional distress were caused by a phone call in violation of the discharge injunction, rather than daily stresses of being married and raising children).

[13] *Sprague*, 2017 WL 2729069 ($33,161.70, composed of $31,046.45 in attorney's fees and $2,115.25 in estate representative fees); *Lewis*, 2017 WL 1233816 ($2,586.05).

[14] *Bates*, 2015 WL 1777481, at *5.

[15] *See, e.g., Lempesis*, 557 B.R. at 670 ($50,000.00); *Sprague*, 2017 WL 2729069 at *7 ($16,838.30).

[16] *Lempesis*, 557 B.R. at 669.

[17] *Humbert*, 567 B.R. at 521 (Bankr. N.D. Ohio Feb. 16, 2017) ("An award of punitive damages for contempt of a discharge injunction sounds in the nature of criminal contempt and therefore lies beyond the authority of a bankruptcy judge."); *In re Northlund*, 494 B.R. 507, 521 (Bankr. E.D. Cal. 2011); *Riser*, 298 B.R. at 472 ("Pursuant to its statutory contempt powers under § 105, a court may impose coercive but not punitive sanctions.").

deter future violations.[18] Bankruptcy courts have no criminal contempt power to punish past behavior.[19]

EXAMPLE CASES: AUTOS

In re Giglio:[20] Creditor, Ford Motor Company, attempted to gain court approval of a reaffirmation agreement affecting the debtor's car. Ford presented the agreement to the court post-discharge, but argued that, because the debtor executed the agreement pre-discharge, the agreement was validly "made" prior to discharge. At a hearing on the viability of the reaffirmation agreement, debtor's counsel stated that Ford already had repossessed the debtor's car, even though payments were current, and that Ford retained three payments made by the debtor, post-repossession. The bankruptcy court then ordered Ford to show cause why it should not be found to have violated the discharge injunction for attempting to collect on a discharged debt.

Ford argued that its retention of these payments did not violate the discharge injunction because the debtor made the payments voluntarily, pursuant to section 524(f). Ford also argued that it took no action to collect on the discharged debt from the debtor personally. The court disagreed, holding that the debtor's payments were not "voluntary" under section 524(f) because Ford enticed the debtor into payment with the promise that it would seek approval of the reaffirmation agreement. The court required Ford to return the three post-repossession payments and provide an accounting of all post-petition payments.

Pratt v. General Motors Acceptance Corporation, (*In re Pratt*):[21] Chapter 7 debtors filed notice of their intent to surrender their vehicle, pursuant to section 521(a)(2)(A). Although the lienholder, GMAC, obtained stay relief to repossess the vehicle, the company determined the cost of repossession outweighed the vehicle's value, and decided simply to write off the balance. When the car became inoperable, the debtors attempted to sell the vehicle to salvage dealers. However, state law required salvage dealers to obtain a lien release from GMAC. The debtors contacted GMAC, requesting that it either repossess the vehicle or release the lien. GMAC refused to release the lien until the outstanding balance was paid. The debtors reopened their bankruptcy case, alleging that GMAC was violating the discharge injunction by effectively coercing the debtors into paying the discharged outstanding balance on the vehicle. The bankruptcy court held that GMAC did not violate the discharge injunction by refusing to release the lien and the district court affirmed.

The First Circuit Court of Appeals reversed, finding that, although state law unqualifiedly entitled GMAC to refuse to release its lien, the federal interest of the Bankruptcy Code to provide the debtors with a financial fresh start trumped state law. Specifically, because GMAC exercised its state-law rights in a coercive manner, the company had violated the discharge injunction.

EXAMPLE CASES: MORTGAGES

Ocwen Loan Servicing, LLC v. Marino (*In re Marino*):[22] Chapter 7 debtors reopened their bankruptcy, alleging that their mortgage servicer, Ocwen, violated the discharge injunction by sending written and telephonic communications regarding their discharged mortgage. The debtors had surrendered their home in bankruptcy and subsequently vacated the property. The letters included account statements, notices regarding force-placed insurance, escrow statements, and other matters. Some letters contained disclaimers providing: "If you have filed for bankruptcy and your case is still active, and/or if you received a discharge, please be advised that this notice is for information purposes only and is not an attempt to collect a pre-petition or discharged debt." However, this disclaimer was located at the bottom of a page or end of each letter in small font. Often, the disclaimers were preceded by demands for payment by a certain date or information about the amount that "you must pay" in a more conspicuous font. Ocwen argued that its conduct was proper because the letters were not meant to collect any debt against the debtors personally and complied with federal and state law.

[18] *In re Diaz,* Order and Judgment on Debtors' Motion for Sanctions for Violation of the Discharge Injunction, Doc. No. 51, No. BKS-10-25047-BTB (Bankr. D. Nev. Oct. 23, 2017) (fines for future violations "are intended to deter (creditor's) contemptuous conduct and (creditor) may avoid these fines by not sending further correspondence to the Debtors.").

[19] *See, e.g., Humbert,* 567 B.R. at 521*; Lewis,* 2017 WL 1233816 at *3.

[20] 581 B.R. 251 (Bankr. N.D. Ohio 2009).

[21] 462 F.3d 14 (1st Cir. 2006).

[22] 577 B.R. 772 (B.A.P. 9th Cir. 2017).

The bankruptcy court rejected Ocwen's argument and awarded the debtors $119,000 for their emotional distress caused by the discharge injunction violations. During an evidentiary hearing, the debtors testified regarding the emotional stress of the correspondence and calls from Ocwen. These statements were supported by additional testimony from the debtors' friend, who observed their financial stress. Ocwen appealed to the Ninth Circuit Bankruptcy Appellate Panel, which affirmed.

On January 23, 2018, Ocwen appealed this decision to the Ninth Circuit Court of Appeals. At the time of publication of this article, the appeal was still pending with the Ninth Circuit.

Canning v. Beneficial Maine, Inc. et al., (In re Canning):[23] Chapter 7 debtors moved to reopen their bankruptcy case, alleging that their mortgage lender violated the discharge injunction by refusing to release its lien or foreclose on the debtors' surrendered home. Additionally, in response to a letter from the debtors demanding lien release, the lender stated that would not release the lien until the balance was satisfied. The lender's response letter provided that it would consider settlement or a short sale. Additionally, the letter explained that the debtors' account had been charged off, that they had no personal obligation to pay the lien balance, and that the letter was not an attempt to collect from them personally.

The bankruptcy court found that the lender had not violated the discharge injunction by refusing to release its lien or in attempting to negotiate a settlement or short sale. The Bankruptcy Appellate Panel affirmed, as did the First Circuit Court of Appeals. The First Circuit found that the lender was not refusing to release its lien in an effort to coerce the debtors into payment. Accordingly, the court held that the lender appropriately attempted to negotiate a settlement with the debtors, which was not in violation of the discharge injunction.

SPECIAL ISSUES: THE "NEW" POST-PETITION LOAN

The foregoing example cases demonstrate that, in a consumer bankruptcy, the debtor has three primary options for addressing her residential mortgage debt. The debtor may: (1) keep the property and pay off outstanding installments; (2) surrender the property; or (3) enter into a reaffirmation agreement.[24] A majority of courts also recognize a fourth option for residential mortgage loans in bankruptcy: "ride-through."[25] In a ride-through, the debtor does not affirmatively choose any of the three foregoing options, but simply does not address her mortgage in bankruptcy. When a debtor chooses ride-through, she is discharged of personal liability for her mortgage debt, but the lender retains *in rem* liability.

Because ride-through relieves the debtor of personal liability, a lender may choose to foreclose after the bankruptcy case closes. Creditors are not prevented from post-discharge enforcement of a valid pre-bankruptcy lien on the property, provided that the lien was not avoided or set aside under other provisions of the Bankruptcy Code. Alternatively, a borrower simply may continue to make monthly mortgage payments without a formal reaffirmation agreement and the mortgage creditor may service to loan.[26] The debtor's payments alone will not revive personal liability on the mortgage.

Courts debate whether consumer debtors may create new obligations on properties that ride through bankruptcies via modifications or refinancing. A debtor may be inclined to do this if her financial situation improves post-bankruptcy or if she decides, post-discharge, that she wants to maintain rights to keep her home, or if the creditor offers improved terms. Nothing in the Bankruptcy Code expressly prevents a debtor from entering into new financing post-discharge. However, it is difficult for a creditor to prove that a debtor's acquiescence to the new agreement is "voluntary." Case law considering the validity and enforceability of such agreements often conflicts, with one court of appeals describing case law as "replete with irreconcilable conflict and confusion."[27]

The following is a small sampling of cases considering this quandary.

[23] 706 F.3d 64 (1st Cir. 2013).

[24] 11 U.S.C. 521(a)(2)(A) (chapter 7).

[25] Some courts do not recognize the "ride-through" option. *See, e.g., In re Linderman*, 435 B.R. 715 (Bankr. M.D. Fla. 2009) (a debtor does not have the ability to "ride through" and cannot keep real property securing a mortgage loan simply by making payment and not reaffirming the debt after the enactment of BAPCPA in 2005").

[26] *See* 11 U.S.C. § 524(j).

[27] *Venture Bank v. Lapides*, 800 F.3d 442, 447 (8th Cir. 2015).

Example Cases

In re Eppolito:[28] The debtor received a discharge in Chapter 7 in 2012. The discharge included a release of the debtor's personal liability on her mortgage loan with CitiMortgage, Inc. However, the debtor continued to make post-discharge payments to Citi. Four years later, Citi and debtor negotiated a loan modification agreement that would have required the debtor to execute a subordinate note and mortgage in favor of HUD. After Citi sent the debtor a letter describing the terms of the modification, the debtor moved to reopen her bankruptcy and hold Citi in contempt for violating the discharge injunction. The court found Citi in contempt for attempting to collect on a discharged debt. The loan modification would have allowed Citi to offload up to $102,551.13 of the discharged debt through HUD's partial claim program. However, the subordinate note and mortgage documents did not contain language limiting the debtor's personal liability on the modified loan. The court held that simply delaying the debtor's obligation to repay the deferred amount of $102,551.13 for thirty years was not the same as releasing the debtor from any and all obligation to pay that debt. Accordingly, the loan modification was an attempt to collect on a discharged debt. The court awarded the debtor approximately $9,000 in attorney's fees.

Venture Bank v. Lapides:[29] Chapter 7 debtor discharged a third-mortgage on his home. During the pendency of bankruptcy, the debtor and lender executed a "Re-Affirmation" agreement that was not signed by the debtor's attorney or filed with the bankruptcy court. The debtor hoped to reestablish his credit with the lender in order to refinance his three mortgages. After the debtor received a discharge, he missed payments due under the Re-Affirmation agreement. The lender attempted to foreclose and filed suit seeking a declaratory judgment that the Re-Affirmation agreement was enforceable. The court of appeals considered whether the bankruptcy court erred when it found that the post-discharge loan agreements were valid if either (1) they complied with the requirements of section 524(c) or (2) all essential elements of a contract were present.

The appellate court found that the agreement must comply with section 524 and must contain all elements of a contract. Because the agreements did not comply with section 524(c), the court held that it need not consider whether the lender's promise not to foreclose constituted adequate consideration. Additionally, the court held that the debtor's payments were not "voluntary" because the lender required the debtor to obligate himself to repay his discharged debt in the hope that the lender would refinance his mortgages.

SPECIAL ISSUES: CLASS ACTIONS FOR DISCHARGE VIOLATIONS

Another issue relevant to discharge injunction violations that has been popular lately is the availability of class actions to enforce the discharge injunction.

Federal Rule of Civil Procedure 23, governing class actions, is made applicable to bankruptcy proceedings by Bankruptcy Rule 7023. Accordingly, every such action must meet the numerosity, commonality, typicality, and adequate representation requirements of Rule 23(a).[30] Bankruptcy class claims also must meet one of the elements of Rule 23(b) (risk of inconsistent adjudications, preservation of a limited fund, grounds generally applicable to the class or common questions of law or facts). Compliance with these elements presents issues unique to bankruptcy cases and the courts vary on their resolution of those issues.

Most often, bankruptcy courts grapple with their authority to adjudicate contempt claims for violations of the discharge injunction stemming from a discharge injunction order entered by a single court. The courts consider whether their jurisdiction is limited to enforcement on a districtwide level or may be expanded on a nationwide basis.

Another important element of a bankruptcy class action is the fail-safe class. A fail-safe class is one that, by definition, shields the plaintiff from an adverse decision as the class is defined so that the class includes only those whose claims would be successful on the merits.[31] A fail-safe benefits plaintiffs by allowing putative class members to seek a remedy but not be

[28] 583 B.R. 822 (Bankr. S.D.N.Y. 2018).

[29] *Lapides*, supra note 26.

[30] *See, e.g., In re Wilborn*, 609 F.3d 748 (5th Cir. 2010) (reversing the bankruptcy court's certification of a class of Chapter 13 debtors because the proposed class did not satisfy the requirements of Federal Rule of Civil Procedure 23 and Bankruptcy Rule 7023); see also *In re Rodriguez*, 695 F.3d 360 (5th Cir. 2012) (affirming certification of "fail-safe" class of Chapter 13 debtors whose membership could only be ascertained by a determination of the merits of the case).

[31] *Compare Mazzei v. The Money Store*, 2012 WL 6622706 (S.D.N.Y.2012) (court modifies class definition to avoid fail-safe designation), *with Rodriguez v. Countrywide Home Loans, Inc.*, 695 F.3d 360 (5th Cir. 2012) (approving fail-safe class).

bound by an adverse judgment.[32] There is a circuit split regarding the permissibility of fail-safe classes. The Sixth and Seventh Circuits preclude certification of any fail-safe class, while the Fifth and Ninth Circuits have declined to issue such a blanket prohibition.[33]

Example Cases

Sellers v. Rushmore Loan Management Services., LLC:[34] Former chapter 7 debtors filed class action against mortgage servicer that purchased their residential mortgage. The debtors received a discharge of their personal liability on the debt. However, their servicer continued to send them mortgage statements in connection with the discharged mortgage debt. The plaintiffs-debtors asserted claims for violation of the discharge injunction, FDCPA, and Florida Consumer Collection Practices Act (FCCPA).

The court limited its analysis to consideration of predominance under Rule 23(b), finding that certification was inappropriate because plaintiffs needed to introduce a great deal of individualized proof or argue a number of individualized legal points to establish most or all of the elements of their individual claims. In this matter alone, the court had to examine whether the property was plaintiffs' principal residence at the time they received the challenged communications and whether making periodic payments in lieu of foreclosure was an option available to them. These inquiries were relevant to both of the main issues before the court: whether the mortgage statements would be misleading to the least sophisticated consumer and whether the § 524(j) exception to the Bankruptcy Code discharge injunction applied. Accordingly, the court denied class certification.

Forson v. Nationstar Mortgage, LLC, (*In re Forson*):[35] Plaintiff successfully completed Chapter 13 bankruptcy wherein he received a discharge upon successful payment of his pre-petition arrearage and monthly mortgage maintenance payments. After the bankruptcy closed, the plaintiff moved to reopen and filed an adversary proceeding alleging that his mortgage lender failed to treat his loan as current post-bankruptcy. Plaintiff alleged that his lender collected discharged fees and that the lender systematically attempted to collect such fees from other discharged debtors. The debtor sought to certify a districtwide and nationwide class of similarly situated plaintiffs. The Bankruptcy Court found that it lacked jurisdiction to certify a nationwide debtor class because one bankruptcy court could not enforce injunctions issued by other courts across the country. However, the court left open possibility of district-wide certification.

Haynes v. Chase Bank, N.A., (In re Haynes):[36] Former debtor brought suit against his former lender, Chase, alleging that Chase fails to correct credit reports that list debts, post-discharge under Section 727 of the Bankruptcy Code, as being only "charged off," rather than being "discharged in bankruptcy." The debtor sued on behalf of himself and a class of similarly situated plaintiffs, nationwide. The Bankruptcy Court found that it has the statutory power and the subject matter jurisdiction to decide this nationwide class action. The court found that Chase fails, on a systematic basis, to correct credit reports of discharged debtors. The court also found that Chase profits from this practice by getting a higher purchase price from its debt buyers, even if those buyers purchase the debt before the bankruptcy has occurred. The buyers know that, post-sale, Chase will refuse to correct the credit report to reflect the obligor's bankruptcy discharge, which means that the debtor will feel significant added pressure to obtain a "clean" report by paying the debt. Although this class certification decision was rendered in 2014, this matter was still in litigation at the time this article went to print.[37] ■

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[32] *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 538 (6th Cir. 2012) (*quoting Randleman v. Fidelity Nat'l Title Ins. Co.*, 646 F.3d 347, 352 (6th Cir. 2011)).

[33] *Zarichny v. Complete Payment Recovery Servs., Inc.*, 2015 WL 249853, at *13 (E.D. Pa. Jan. 21, 2015) (disallowing fail-safe class and discussing circuit split).

[34] No. 3:15-CV-1106-J-32PDB, 2017 WL 6344315 (M.D. Fla. Dec. 12, 2017), *reconsideration denied,* No. 3:15-CV-1106-J-32PDB, 2018 WL 340009 (M.D. Fla. Jan. 9, 2018).

[35] 583 B.R. 704 (Bankr. S.D. Ohio 2018).

[36] No. 11-23212 (RDD), 2014 WL 3608891 (Bankr. S.D.N.Y. July 22, 2014).

[37] *Haynes v. Chase Bank, N.A.*, No. 18-cv-03307 (S.D.N.Y. Aug. 20, 2014).