No. 06-6077

UNITED STATES BANKRUPTCY APPELLATE PANEL
FOR THE EIGHTH CIRCUIT

TANNA LATISHA SUGGS,
Debtor/Appellant,

v.

REGENCY FINANCIAL CORPORATION
Debtor/Appellee

ON APPEAL FROM THE UNITED STATES
BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF MISSOURI

CASE NO. 06-4126

BRIEF OF NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT AND REVERSAL OF THE DECISION OF THE BANKRUPTCY COURT

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March 23, 2007

CORPORATE DISCLOSURE STATEMENT

Tanna LaTisha Suggs v. Regency Financial Corporation, 06-6077.

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure *Amicus Curiae* the National Association of Consumer Bankruptcy Attorneys makes the following disclosure:

1) For non-governmental corporate parties please list all parent corporations.
NONE.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock.
NONE.

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests.
NONE.

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.
NOT APPLICABLE.

__s/Tara Twomey_____ Dated: March 23, 2007
Tara Twomey, Esq.
Attorney for the National Association of Consumer Bankruptcy Attorneys

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STATEMENT OF INTEREST OF NACBA

Incorporated in 1992, the National Association of Consumer Bankruptcy Attorneys ("NACBA") is a non-profit organization of more than 2500 consumer bankruptcy attorneys nationwide. Member attorneys and their law firms represent debtors in an estimated 500,000 bankruptcy cases filed each year. Eighth Circuit NACBA members file many thousands of bankruptcy cases each year.

NACBA's corporate purposes include education of the bankruptcy bar and the community at large on the uses and misuses of the consumer bankruptcy process. Additionally, NACBA advocates nationally on issues that cannot adequately be addressed by individual member attorneys. It is the only national association of attorneys organized for the specific purpose of protecting the rights of consumer bankruptcy debtors. NACBA has filed *amicus curiae* briefs in various courts seeking to protect the rights of consumer bankruptcy debtors. *See*, *e.g.*, *Kawaauhau v. Geiger*, 118 S.Ct. 974 (1998); *In re Scarborough*, 461 F.3d 406 (3rd Cir. 2006); *In re Tanner*, 217 F.3d 1357 (11th Cir. 2000).

NACBA and its membership have a vital interest in the outcome of this case. The proper functioning of the bankruptcy system depends on rules of procedure that protect the debtor's ability to obtain a fresh start and result in the orderly repayment of creditors to the extent possible. However, local rules that abridge and modify the rights of the debtor and that are inconsistent with the Code and the

Federal Rules of Civil Procedure jeopardize the effective functioning of the system. Specifically with respect to the automatic stay, the debtors against whom relief is sought have the right to expect that the proper procedures will be followed.

SUMMARY OF ARGUMENT

The automatic stay is one of the most fundamental rights afforded to debtors under the Bankruptcy Code. A request for relief from the automatic stay is a contested matter that, in accordance with Federal Rules of Bankruptcy Procedure 4001 and 9014, must be initiated by motion. Local Rule 4070-1, which allows a creditor to seize possession of the debtor's property without first filing a motion for relief from the stay, abridges and modifies the debtor's substantive rights under the Code and is inconsistent with the Rules.

The fact that cause for relief under section 362(d) may exist does not alter the procedure for seeking relief from the stay. A creditor, with full knowledge of the debtor's bankruptcy, is simply not permitted to disregard the stay, engage in self-help, and then seek the court's retroactive permission for such action. The same effect may not be accomplished by local rule. Relief from stay is a contested matter to be initiated by motion by a party in interest. Accordingly, Local Rule 4070-1 should be declared invalid and of no effect. The Bankruptcy Court's decision below should be reversed.

ARGUMENT

I. Local Rules that conflict with the Bankruptcy Code and/or the Federal Rules of Bankruptcy Procedure are invalid.

Federal Rule of Bankruptcy Procedure 9029(a) authorizes district courts to adopt local rules governing practice and procedure in the bankruptcy courts. The district court may also delegate the adoption of local rules to the bankruptcy court. Although the district court and bankruptcy court have the authority to adopt such rules, that authority is limited to prescribing the conduct of business. *In re Rivermeadows Assoc., Ltd.*, 205 B.R. 264 (B.A.P. 10th Cir. 1997).

> As a general rule of law, any local rule of bankruptcy procedure that conflicts with a federal rule of bankruptcy procedure is invalid and of no effect. In re Falk, 96 B.R. 901, 903 (Bankr. D. Minn. 1989)(en banc). A local rule "may only be upheld if (a) it is consistent with the Bankruptcy Code in that it does not 'abridge, enlarge, or modify any substantive right,' as required by 28 U.S.C. § 2075 and (b) it is 'a matter of procedure not inconsistent with' the Bankruptcy Rules as required by Bankruptcy Rule 9029." *Id.* at 904. If a local rule fails either prong of the two-pronged test, it is invalid. *Id.* "Consistent is defined as 'coexisting and showing no noteworthy opposing, conflicting, inharmonious, or contradictory qualities or trends' or 'jointly assertable so as to be true or not contradictory.' " *Id.* at 905 (*quoting* Webster's Third New International Dictionary 484 (1976)).

In re McGowan, 226 B.R. 13, 20 (B.A.P. 8th Cir. 1998). *See also In re Pacific Atlantic Trading Co.*, 33 F.3d 1064, 1066 (9th Cir. 1994)(stating that "any conflict between the Bankruptcy Code and the Bankruptcy Rules must be settled in favor of the Code); *U.S. v. Cardinal Mine Supply, Inc.*, 916 F.2d 1087, 1089 (6th Cir.

1990)(stating that to the extent that a rule contradicts a statute, that rule cannot stand); *In re Sunahara*, 326 B.R. 768 (B.A.P. 9th Cir. 2005)(local rule prohibiting debtor from taking action permitted under the Code invalid under Rule 9029).

II. Relief from the automatic stay is a contested matter which must be initiated by motion.

The automatic stay is a fundamental cornerstone of the bankruptcy system established under the Bankruptcy Code. *See* H.R. Rep. No. 95-595, 95th Cong., 1st Sess. At 340 (1977). It serves two primary purposes: 1) it grants the debtor breathing room and provides time to attempt reorganization, and 2) it prevents creditors from racing to the courthouse in an attempt to drain the debtor's assets. The filing of a bankruptcy petition instantly triggers the automatic stay. 11 U.S.C. § 362(a). The stay prohibits creditors from taking any collection action including seizing property of the debtor. The protection that it affords debtors is an integral part of the federal rights created under the Bankruptcy Code. *See Budget Service Co. v. Better Homes of Virginia, Inc*., 804 F.2d 289 (4th Cir. 1986).

Section 362(b) details the circumstances in which the automatic stay does not go into effect. None of those exceptions are applicable in this case. Sections 362(c)(3) and (4) limit the applicability of the automatic stay in cases of repeat filings. Neither of those sections applies in this case. When the Debtor filed her petition for bankruptcy relief, the automatic stay became effective immediately

with respect to the Ford Windstar. Once in effect, the stay continues in full force until the property is no longer the property of the estate or until a court grants relief from the stay by terminating, annulling, modifying, or conditioning the stay. *See* 11 U.S.C. § 362(c), (d).

Section 362(d) provides, in relevant part,

> On request of a party in interest, and after notice and a hearing, the court shall grant relief from the stay provided in subsection (a) of this section such as by terminating, annulling, modifying, or conditioning such stay—
>
> (1) for cause, including the lack of adequate protection of an interest in property of such party in interest.

Pursuant to section 362(d) and Federal Rule of Bankruptcy Procedure 4001(a)(1), a court may only grant relief upon motion of a party in interest. Specifically, Rule 4001(a) states that the proper method of proceeding "shall" be by motion under Bankruptcy Rule 9014. *See* 9-4001 Collier on Bankruptcy ¶ 4001.02 (A. Resnick and H. Sommer, eds., 15th ed. Rev. 2006)("a proceeding for relief from an automatic stay under the Code, or a proceeding to prohibit or condition the use, sale or lease of property, must be brought as a contested matter commenced by motion"). In turn, Rule 9014 requires that "reasonable notice and opportunity for hearing" be afforded to the party against whom the relief is sought. The motion and notice requirements are not meaningless formality. Like other

procedures for initiating actions in the bankruptcy court, they serve as important steps in protecting both debtors' and creditors' rights under the Code.

In bankruptcy cases, there are four types of pleadings that can initiate judicial actions. Some procedural rules call for adversary proceedings that are commenced by complaints and accompanied by summons. *See* Fed R. Bankr. P. 4004, 4007, 7001. Others call for contested matters that a commenced by motions. *See, e.g.,* Fed R. Bankr. P. 4001, 4003. The third type of proceeding in the rules is an "application" and the fourth is an "objection" to proofs of claim. *See* Fed R. Bankr. P. 1006(b)(1), 3007. Courts have been very clear that where the rules provide a specific procedure for initiating an action, that procedure must be followed. *See, e.g*., *In re Ruehle*, 307 B.R. 28 (B.A.P. 6th Cir. 2004)(discharge of student loan through plan confirmation inconsistent with Code and Rules which require an adversary proceeding); *Cen-Pen Corp., v. Hansen*, 58 F.3d 89 (4th Cir. 1995)(adversary proceeding prerequisite to challenging the validity or existence of lien against property); *In re McKay*, 732 F.2d 44 (3d Cir. 1984)(lien avoidance under predecessor rule to Rule 4003 must be by motion rather than in plan).

Relief from the automatic stay is a contested matter that must be initiated by motion. It cannot be accomplished by agreement of the parties, by adversary proceeding, or by local rule. *See In re Fugazy Express*, 982 F.2d 769 (2d. Cir. 1992)(parties' agreement without court approval insufficient); *In re Harvey*, 13

B.R. 608 (Bankr. M.D. Fla. 1980)(stay proceeding dismissed when commenced in improper form); *Farm Credit of Cent. Fla., ACA v. Polk*, 160 B.R. 870 (M.D. Fla. 1993)(prepetition agreement by the debtor that the stay will not apply to a particular creditor can not be enforced). The party against whom relief from stay is sought has the right to expect that the proper procedures will be followed. *See In re Commercial Western Finance Corp*., 761 F.2d 1329, 1336-38 (9th Cir. 2005).

Section 362(f) and Rule 4001(a)(2) do afford the opportunity for relief from the stay on an ex parte basis. However, this rule only modifies the notice requirement, not how a contested matter seeking relief from the stay is initiated. Specifically, Rule 4001(a)(2) sets forth the conditions under which relief from stay under section 362(a) "may be granted without prior notice." Those conditions require the moving party to demonstrate facts that show an "immediate and irreparable injury, loss, or damage will result to the **movant** before the adverse party or the attorney for the adverse party can be heard in opposition." *See also* 11 U.S.C. § 362(f). The plain language of even the rule regarding ex parte relief pre-supposes that there is a movant who has filed a motion for relief from stay.

III. Local Rule 4070-1 that allows a secured creditor to take possession of the debtor's property without relief from the automatic stay directly contradicts both the Code and the Federal Rules of Bankruptcy Procedure, and is therefore invalid.

Local Rule 4070-1 provides in relevant part,

> If debtor fails to provide the creditor proof of insurance within three business days after service of notice in subsection (1), debtor shall surrender the vehicle or ***the secured creditor may take possession and hold it*** pending presentation of proof of insurance. (emphasis added).

In cases in which the creditor does take possession of a vehicle, the creditor is required to fill a motion for lift of stay within five days. The court may then grant the creditor relief without further hearing or notice. The bankruptcy court concluded that stated that Local Rule 4070-1(d) "merely implements the authorization given by Section 362(f) and Rule 4001(a)(2) in the context of a claim secured by a motor vehicle when the debtor has failed to provide evidence of insurance." *See* Hearing Transcript at p.12. While inadequate insurance may be cause for relief under section 362(d), nothing in the Code or the Federal Rules of Bankruptcy Procedure allows courts to pre-approve *nunc pro tunc* motions. The fact that cause for relief under section 362(d)—such as lack of insurance--may exist does not alter the procedure for seeking relief from the stay. A creditor, with full knowledge of the debtor's bankruptcy, is simply not permitted to disregard the

stay, engage in self-help, and then seek the court's retroactive permission for such action. To authorize such conduct by local rule is not only inconsistent with the Code and the Federal Rules of Bankruptcy Procedure, it is antithetical to them.

The automatic stay is one of the most fundamental rights afforded to debtors under the Bankruptcy Code. A local rule such at 4070-1 that allows a creditor to seize possession of the debtor's property without filing a motion for relief from stay abridges and modifies the debtor's substantive rights under the Code. In addition, the rule also directly contradicts Federal Rule of Bankruptcy Procedure 4001 and 9014 which state that relief from the automatic stay, which is a contested matter, shall be made by motion.

CONCLUSION

For the foregoing reasons, the decision of the Bankruptcy Court below should be reversed.

Respectfully submitted:

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CERTIFICATE OF COMPLIANCE

This brief, exclusive of the certifications, tables of contents and authorities and the identity of counsel at the end of the brief, is 2058 words in text and footnotes as counted by Microsoft Word, the word processing system used to prepare this brief. This brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

The text of the electronic brief and the hard copies are identical.

A virus check was performed on the electronic brief using Virus Scan software and no virus was detected.

I certify under penalty of perjury that the foregoing is true and correct.

Date: March 23, 2007

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of March, 2007, an original and five copies of the foregoing Brief of Amicus Curiae in Support of Appellant and Reversal were sent to the Clerk of the Bankruptcy Appellate Panel for the Eighth Circuit via Federal Express and one copy mailed to counsel listed below:

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