IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§	
	§	CASE NO. 12-12345
PRIMA DONNA,	§	(JUDGE TOUGH)
	§	CHAPTER 13
DEBTOR.	§	

AJAY FAITH'S AMENDED RESPONSE TO
SHOW CAUSE ORDER

TO THE HONORABLE BARRY TOUGH,
UNITED STATES BANKRUPTCY JUDGE:

Ajay Faith, former counsel for the above-captioned chapter 13 debtor, files this Amended Response to this Court's Show Cause Order of August 5, 2012 (Dkt # 56). The hearing on the Court's show cause order is scheduled for September 30, 2012 at 3 p.m. Neither the Debtor, the U.S. Trustee or Chapter 13 Trustee opposes the filing of this amended response, which modifies Mr. Faith's prior response to the show cause order (Dkt # 42). Therefore, any statement in the prior response that is not specifically incorporated in this amended response is withdrawn.

OVERVIEW

1. Mr. Faith made unintentional errors in preparing pleadings relating to a post-confirmation modification of the Debtor's plan. Mr. Faith compounded those errors by failing to appear at a August 5, 2012 hearing that had been scheduled on the proposed modification that he mistakenly thought had been rescheduled. Mr. Faith apologizes to the Court, the Debtor, to all other parties-in-interest and their counsel for his errors and failure to appear at the August 5th hearing.

2. Although not meant to excuse those mistakes, this amended response explains the context under which the errors occurred, as well as advising the Court of the steps that Mr. Faith has taken so that (i) his mistakes do not occur again, and (ii) the Debtor, the Chapter 13 Trustee and the U.S. Trustee are reimbursed for their costs attributable to his mistakes.

3. Inasmuch as his errors were unintentional and not the product of bad faith, Mr. Faith's mistakes were not violations of either the automatic stay under 11 U.S.C. § 362 or Title 18. Accordingly – and in view of the $1,500 sanction that the Court has already assessed and the substantial sanctions described below that Mr. Faith has imposed on himself – Mr. Faith requests that the Court assess no further sanctions against him.

BACKGROUND

4. Mr. Faith is a 25-year lawyer who immigrated to Dallas from Ghana 32 years ago to complete his undergraduate education and to attend law school. He maintains a solo law practice in the southwest part of Dallas near the intersection of W. Illinois and Wright Rd. A copy of Mr. Faith's résumé is exhibit 1 of the appendix to this amended response. A full copy of the appendix bookmarked in Adobe Acrobat may be downloaded through this link.

5. In his practice, Mr. Faith fulfills the important market need of providing legal services to mostly low-income individuals and small businesses in the southwest part of Dallas. Mr. Faith's office is located in a strip shopping center where he routinely provides free consultations to dozens of people each month who literally drop into his office with legal problems. Only a small percentage of these "walk-in" consultations ultimately develop into cases in which Mr. Faith earns a fee. Due in large part to his free consultation policy and extensive *pro bono* services (he is a member of the State Bar of Texas *Pro Bono* College), Mr. Faith maintains an excellent reputation in his community.

6. Mr. Faith's practice focuses on immigration and family law, but he provides services in other areas such as consumer bankruptcy as an accommodation to his clients. Nevertheless, Mr. Faith is not a consumer bankruptcy specialist and his bankruptcy cases represent less than 10% of his practice.

7. The Debtor retained Mr. Faith in February, 2012 to represent her in a chapter 13 case, the primary purpose of which was to stay a Big Bank N.A. foreclosure sale of the Debtor's home scheduled for March 6, 2012. The Debtor agreed to pay Mr. Faith a fee of $3,000 for handling the chapter 13 case, $1,500 paid pre-petition and $1,500 paid under the chapter 13 plan. Mr. Faith agreed to pay the $281 filing fee from the Debtor's $1,500 pre-petition payment.

8. Mr. Faith filed the case and the foreclosure sale of the Debtor's home was stayed. Subsequently, the Debtor's first amended chapter 13 plan ("the confirmed plan") was confirmed on May 20, 2012 (Dkt # 36). A copy of the confirmed plan is exhibit 2 of the appendix.

9. Under the confirmed plan, the Debtor's monthly plan payment was $1,500, $1,127.69 of which was attributable to the Debtor's monthly mortgage payment (including tax and insurance escrow) to Big Bank. The balance of the plan payment – net of the Chapter 13 Trustee's fee – was applied to the arrearage of $24,623.63 on the mortgage debt that the Debtor owed to Big Bank.

10. The Debtor made her first four monthly plan payments (March, April, May and June) totaling $6,000. However, on July 12, 2012, Big Bank filed a proof of claim that increased the arrearage portion of its secured claim from $24,623.63 to $26,384.62 (exhibit 3 of the appendix).

11. Inasmuch as the Debtor's plan payment under the confirmed plan was based upon the lower arrearage amount, the Chapter 13 Trustee notified the Debtor and Mr. Faith by

letter dated June 20, 2012 that a post-confirmation modification of the plan was necessary to account for the increased amount of the arrearage component of Big Bank's claim (the trustee's notice is exhibit 4 of the appendix).

12. In the previous bankruptcy cases that he handled before this case, Mr. Faith had never prepared a post-confirmation modification of a chapter 13 plan. Thus, on July 3, 2012, Mr. Faith conferred with the support personnel at his bankruptcy software manufacturer to receive instruction on how to prepare the forms necessary for a post-confirmation plan modification. Moreover, on July 5, 2012, Mr. Faith confirmed the amount of the Debtor's plan payments to date and corresponded with a Big Bank representative to obtain additional information regarding the bank's amended proof of claim and the larger arrearage amount.

13. Mr. Faith then called the Debtor on July 6, 2012 and left a voicemail message regarding the necessity of filing a post-confirmation modification to preserve the Debtor's chapter 13 plan. In so doing, Mr. Faith – who did not know at the time that post-confirmation legal services were only compensable under the plan and with Bankruptcy Court approval – advised the Debtor that his fee for preparing and filing the modification would be $550. A transcript of the voicemail message is exhibit 5 of the appendix.

14. The Debtor returned Mr. Faith's call on July 6th and advised him that she did not have the resources to pay him $550 for legal services in connection with the post-confirmation plan modification. As he does with many of his low-income clients, Mr. Faith waived the fee and continued preparing the plan modification. In the same phone conference, the Debtor requested Mr. Faith to try and limit the increase in her monthly plan payment to $180 or less.

15. Later on August 5th, Mr. Faith learned in an email exchange with Big Bank representative that, even with the increase in the arrearage portion of the bank's claim, the

amount of the Debtor's monthly mortgage payment (including tax and insurance escrow payments) actually declined by $51.40 from $1,127.69 to $1,076.29 effective April 1, 2012. A copy of the email exchange between Mr. Faith and the Big Bank representative with Mr. Faith's notes is exhibit 6 of the appendix.

16. Thus, during the evening of August 5th, Mr. Faith reported the good news to the Debtor that – as a result of the reduction in her monthly mortgage payment to Big Bank – he did not believe that it would be necessary to increase her monthly plan payment under the post-confirmation plan modification. In this phone conference, the Debtor and Mr. Faith discussed – and the Debtor authorized Mr. Faith to prepare and file – a plan modification that provided the following:

- Maintained the Debtor's monthly plan payment at $1,200;
- Changed the amount of the monthly plan payment attributable to the Debtor's monthly mortgage payment to $776.29;
- Ensured that the Debtor had been given credit for her $4,800 in plan payments made her May payment; and
- Postponed the monthly payment due in July to August to allow the Debtor to begin earning income in her new job.

17. Based on his August 5th discussions with the Debtor and the Debtor's foregoing authorization, Mr. Faith incorrectly believed that he could affix the Debtor's electronic signature to the Debtor's verification of the post-confirmation modification – "I declare under penalty of perjury that the foregoing statements of value contained in this document are true and correct" – without her actually reviewing and physically signing the document.

18. Accordingly, Mr. Faith proceeded to finalize (i) on June 6, 2012 the Debtor's second amended plan ("the amended plan" – exhibit 7), and (ii) on June 7, 2012 the Debtor's

motion to amend the confirmed plan (exhibit 8). In so doing, Mr. Faith coordinated with the Chapter 13 Trustee and obtained the August 5th hearing date on the proposed plan modification. Immediately before filing the amended plan on the evening of June 6th, Mr. Faith conferred with the Debtor again by telephone and confirmed to her that he was preparing to file the plan modification documents with the Court.

19. Unfortunately, the proposed plan modification that Mr. Faith and the Debtor thought that he had filed with the Court was not what was actually filed. Due to his lack of familiarity with his bankruptcy form software, Mr. Faith placed numbers in the wrong fields of the modification form and did not properly save certain entries. As a result, he inadvertently made three errors in preparing the post-confirmation plan modification:

- In section 1 of the amended plan, Mr. Faith placed the $4,800 in plan payments that the Debtor had already made in the wrong column so that it appeared as if the Debtor's June plan payment would be $4,800 rather than the intended $1,200;

- Also in section 1, Mr. Faith failed to insert the different amounts of principal and interest under the Debtor's monthly mortgage payment paid to Big Bank pre-plan modification and to be paid to the bank post-modification; and

- The motion to amend plan that Mr. Faith filed was confusing in that it included the difference in arrearage amounts attributable to Big Bank secured claim ($23,384.62 minus $21,623.63 = $1,760.99) rather than the entire arrearage portion of the bank's claim. Thus, the motion can be read to suggest that the amount of the Debtor's monthly plan payment attributable to paying the arrearage ($389.75) would be applied to only the $1,760.99 difference rather than the entire $23,384.62 arrearage.

20. Mr. Faith did not intend to file a proposed plan modification with terms that the Debtor had not approved. Rather, Mr. Faith intended to file the proposed plan modification that the Debtor had approved in their August 5th and 6th telephone conferences, but his errors in preparing the proposed plan modification changed the terms of the modification filed with the Court to ones that the Debtor had not authorized.

21. The first time that Mr. Faith became aware of a problem with the proposed plan modification was on June 21, 2012. On that date, he received an email from the Chapter 13 Trustee notifying him and the Debtor that the plan modification did not include necessary information regarding the different amounts of principal and interest paid to Big Bank pre-plan modification and to be paid to the bank post-plan modification. A copy of the trustee's email is exhibit 9 of the appendix.

22. Meanwhile, unknown to Mr. Faith, the Chapter 13 Trustee attempted on June 20, 2012 to withdraw $4,800 from the Debtor's bank account to apply to the erroneous June payment contained in the proposed plan modification (it's unclear why the Trustee attempted to withdraw the higher amount when the Court had not yet approved the proposed plan modification). Inasmuch as the Debtor's bank immediately notified the Debtor that it had rejected the Trustee's withdrawal attempt because of insufficient funds, the Debtor sent a letter to the Trustee dated June 21, 2012 objecting to the withdrawal attempt and pointing out that the plan payment should have remained $1,200. A copy of the Debtor's letter to the Trustee is exhibit 10 of the appendix.

23. Unfortunately, the Debtor did not provide Mr. Faith with a copy of her June 21st letter and did not call him to inform him of the Trustee's attempted withdrawal of $4,800 from her account. Similarly, the Trustee did not immediately contact Mr. Faith to advise him of the problem with the Debtor's June plan payment.

24. Consequently, the first time that Mr. Faith learned about the problem with the Debtor's June plan payment was on August 5, 2012 (after the morning hearing in this matter) when he received via regular mail the Trustee's June 29, 2012 notice relating to the missed plan payment. A copy of the Trustee's June 29th notice is exhibit 11 of the appendix.

25. Moreover, between June 21st and the August 5th hearing, Mr. Faith was dealing with three other matters that distracted him from properly addressing the errors in the plan modification:

- On June 18th, Mr. Faith's computer system was infected with a devastating virus that caused loss of a substantial number of Mr. Faith's digital files and computer programs. For the next two weeks, Mr. Faith was pre-occupied with recovering his digital files and computer programs, as well as attempting to preserve his computer system's equipment was operational after extraction of the virus;

- In early June, Mr. Faith's legal assistant and office manager – his sole employee – had to take an extended leave of absence because of several recent deaths in her family. Her absence required Mr. Faith to absorb the numerous office-related tasks that she normally handles and also deprived Mr. Faith of his proof-reader, who may have caught Mr. Faith's mistakes in the Debtor's proposed plan modification; and

- On June 13th, in another of Mr. Faith's chapter 13 cases currently pending in this Court (*In re*: *Florence Nightgale*, case no. 11-12345 – "the Nightgale case"), the chapter 13 trustee (Mr. Lowman) filed an objection to a proposed amended plan that Mr. Faith had filed on behalf of the debtor (coincidentally, the plan amendment in the Nightgale case also related to a Big Bank claim secured by the debtor's homestead). In filing his plan objection in the Nightgale case, the chapter 13 trustee arranged for a postponement of the July 9th hearing on the debtor's proposed amended plan to a later date. A copy of the Navarrete docket is exhibit 12 of the appendix.

26. Consequently, when Mr. Faith received the Chapter 13 Trustee's Notices of Rescheduled Modification Hearing (Dkt ## 31 & 33) on June 21 and 23, 2012, Mr. Faith – preoccupied with his law office's computer problems – presumed that the purpose of the Trustee's notices was to reschedule the pending August 5th hearing on the proposed plan modification to a later date, similar to what the trustee in the Nightgale case had done with regard to the plan modification in that case a few days earlier. Unfortunately, closer scrutiny of the notices by Mr. Faith would have revealed that the date of the Trustee's rescheduled

modification hearing was actually the same date that Mr. Faith had arranged when he filed the proposed plan modification – August 5, 2012.

27. Mr. Faith did not communicate adequately with either the Chapter 13 Trustee or the Debtor regarding his misunderstanding that the August 5th hearing had been rescheduled. As a result, Mr. Faith failed to appear at the scheduled hearing until this Court called him during the hearing and ordered him to do so. Subsequently, Mr. Faith complied with the Court's order to reimburse the Debtor $1,500 that she had paid him in attorneys' fees (Dkt # 43). The Court also issued its order during the August 5th hearing ordering Mr. Faith to appear on July 20, 2012 to show cause why he should not be sanctioned. On July 20th, the Court continued the show cause hearing to August 31, 2012 and approved the Debtor's request to replace Mr. Faith with her current counsel.

RESPONSE TO SHOW CAUSE ORDER

LEGAL STANDARD

28. This Court's power to impose sanctions on an attorney derives from Federal Rule of Bankruptcy Procedure 9011 and the Court's inherent role as guardian of the integrity of the bankruptcy process. *Campbell v. Countrywide Home Loans, Inc.*, 545 F.3d 348, 356 n.1 (5th Cir. 2008) Similarly, under 11 U.S.C. § 105, this Court has the power to issue sanctions against attorneys to effectuate the provisions of the Bankruptcy Code, *In re Volpert*, 110 F.3d 494, 500-01 (7th Cir. 1997), as well as the inherent power to police the conduct of attorneys who appear before it. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43-46, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991). *In re Cochener*, 360 B.R. 542, 570 (Bankr. S.D. Tex. 2007), *aff'd in part, rev'd in part*, 382 B.R. 311 (S.D. Tex. 2007), *rev'd*, 297 Fed. Appx. 382, 2008 WL 4681579 (5th Cir. 2008). Although the Court has wide discretion to determine whether sanctions are appropriate, a key factor guiding the Court's discretion is that it should impose the least sanction necessary to serve FED. R. BANKR. P. 9011's primary goal, which is deterrence. *Keiter v. Stracka*, 192 B.R. 150, 156 (S.D. Tex. 1996); *In re Rainbow Magazine, Inc.* 136 B.R. 545 (B.A.P., 9th Cir. 1991).

29. This Court's show cause order provides that "[c]ounsel's actions appear to violate the automatic stay and potentially, Title 18." Although Mr. Faith made mistakes in his handling of the Debtor's post-confirmation plan modification, his mistakes were unintentional and not the product of bad faith. Accordingly, Mr. Faith's errors did not violate either the automatic stay or Title 18.

AUTOMATIC STAY

30. Due to his unfamiliarity with applicable law relating to compensation of post-confirmation professional services for chapter 13 debtors, Mr. Faith initially informed the Debtor that he would charge $550 for preparing and handling the proposed post-confirmation plan modification. However, even before discussing that proposed fee with the Debtor, Mr. Faith took steps to collect the information necessary to prepare and file the post-confirmation modification. When the Debtor informed Mr. Faith that she did not have the resources to pay the proposed fee, he immediately waived it and proceeded to prepare and file the post-confirmation plan modification on behalf of the Debtor. Mr. Faith neither requested nor received any further funds from the Debtor other than the funds disclosed to the Court in the amended plan, and he did not make the receipt of any additional funds a *quid pro quo* for taking any action on behalf of the Debtor. Accordingly, Mr. Faith took no action against the Debtor that would constitute a violation of the automatic stay.

TITLE 18

31. Mr. Faith conferred with the Debtor in a series of telephone conferences on August 5th and 6th and confirmed her agreement to the terms of the plan modification that did not change her monthly payment. Mr. Faith mistakenly believed that the Debtor's confirmation to him during their telephone conferences of her consent to the terms of the proposed plan modification was a sufficient basis for him to affix her electronic signature to the amended plan's verification without the Debtor actually reviewing and physically signing the amended plan.

32. As explained above, Mr. Faith inadvertently prepared the plan modification with different terms than those that the Debtor had authorized in their telephone conferences.

However, Mr. Faith's mistakes were unintentional, partially the product of his lack of familiarity with post-confirmation plan modifications, and not done to mislead this Court or other parties-in-interest. He certainly did not intend to file a plan modification with the Court that contained terms that the Debtor had not authorized. Accordingly, although Mr. Faith should not have affixed the Debtor's signature to the amended plan without her physically reviewing and signing the document, Mr. Faith submits that his error does not rise to the level of a Title 18 violation.

SELF-IMPOSED SANCTIONS

33. In recognition of his mistakes in this case, Mr. Faith has taken the following actions:

- Reimbursed the Debtor for all fees ($1,500) paid to Mr. Faith pursuant to the Court's August 5th show cause order (Dkt # 40);

- Reimbursed the Debtor's counsel for their fees ($2,500) that they estimated were attributable to handling the remainder of the Debtor's chapter 13 case and for appearing at the July 20th and August 31st hearings. Mr. Faith made these $2,500 in reimbursements without regard to any position that Debtor's counsel or the Debtor may take at the August 31st hearing in this matter;

- Reimbursed the Debtor for her expenses ($200) that her counsel estimated she incurred in attending the July 20th hearing and would incur in attending the August 31st hearing. Mr. Faith made this reimbursement without regard to any position that the Debtor may take at the August 31st hearing in this matter;

- Reimbursed the U.S. Trustee for the fees ($600) that the Trustee's counsel estimated were attributable to having counsel attend the July 20th and August 31st hearings. Mr. Faith made this reimbursement without regard to any position that the U.S. Trustee may take at the August 31st hearing in this matter;

- Reimbursed the Chapter 13 Trustee for the fees ($780) that the Trustee's counsel estimated were attributable to having counsel attend the August 5th, July 20th, and August 31st hearings. Mr. Faith made this reimbursement without regard to any position that the Chapter 13 Trustee may take at the August 31st hearing in this matter;

- Mr. Faith will not undertake any further consumer bankruptcy cases until he attends the upcoming State Bar of Texas Continuing Education Course, "Bankruptcy 101" (5.75 hours MCLE Credit) ($195), on September 12, 2012 at the Adolphus Hotel in Dallas;

- Implemented a procedure in his office that no document that requires a debtor's verification will be filed with the Bankruptcy Court unless or until the debtor has signed and delivered to Mr. Faith's office a signed original of the document; and

- Implemented a procedure in his office that no hearing in the Bankruptcy Court will be presumed continued until a later date unless such continuance is confirmed with the Court's case manager or through an appropriate docket entry in the ECF system.

CONCLUSION

34. Mr. Faith understands the seriousness of his mistakes. Despite financial hardship to him in doing so, Mr. Faith has reimbursed other parties-in-interest's costs attributable to his mistakes. Moreover, Mr. Faith has implemented office procedures so that the errors do not occur again and will attend a continuing education course on consumer bankruptcy before handling another such case. Given the aberrational nature of Mr. Faith's errors, and in view of the fact that the primary goal of sanctions (*i.e.*, deterrence) is likely to be accomplished through this Court's already imposed $1,500 sanction and Mr. Faith's self-imposed sanctions, Mr. Faith respectfully requests that the Court impose no further sanctions.

Respectfully submittted:

/s/ Tom Kirkendall

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CERTIFICATION OF CONFERENCE

The undersigned counsel discussed the filing of the foregoing amended response with respective counsel for the Debtor, the Chapter 13 Trustee, and the U.S. Trustee. The foregoing parties-in-interest do not oppose the filing of this amended response.

/s/ Tom Kirkendall
Tom Kirkendall

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing response to this Court's show cause order of August 5, 2012 was served upon the Debtor, Debtor's counsel, the United States Trustee, the Chapter 13 Trustee and all parties-in-interest who have requested notice of pleadings in this chapter 11 case by either first class mail or electronic transmission on August 22, 2012.

/s/ Tom Kirkendall
Tom Kirkendall