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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

ERIC W. OLSEN,  
KEVIN D. SWARTZ, and  
JASON C. MCBRIDE,

Case No. 05-6365-HO

Plaintiffs,

v.

ALBERTO GONZALES, in his official  
capacity as Attorney General of the  
United States of America, and

ILENE LASHINSKY, in her official  
capacity as United States Trustee

Defendants.

PLAINTIFFS' RESPONSE TO  
DEFENDANTS' MOTION TO  
RECONSIDER AND MOTION FOR  
JUDGMENT ON THE PLEADINGS

COMES NOW, Plaintiffs and respond to Defendants' Motion to Reconsider and Motion  
for Judgment on the Pleadings as follows.

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## INTRODUCTION

Plaintiffs brought this suit, challenging the constitutionality of several of the provisions of the Bankruptcy Code as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act (“BAPCPA”). Defendants moved to dismiss each of Plaintiffs’ claims pursuant to Fed. R. Civ. P. 12(b)(6). After briefing and a hearing, the Court granted Defendants’ motion in part, finding that Plaintiffs’ lacked standing to pursue many of their claims. However, the Court did find that Plaintiffs had standing to challenge those provisions that impermissibly chill protected speech in violation of the First Amendment. The Court held that section 526(a)(4) of the Bankruptcy Code unconstitutionally restricts Plaintiffs’ protected speech. Defendants now seek a reconsideration of the Court’s decision with respect to section 526(a)(4) on the issues of Plaintiff’s standing and the merits of Plaintiff’s claim.

Plaintiffs request that the Court deny Defendants’ Motion to Reconsider and further request that the Court consider the fact submitted in conjunction with Plaintiffs’ Motion for Summary Judgment, which has been filed contemporaneously with this Response.

## ARGUMENT

Defendants, without any new facts or evidence, seek a review of the Court’s Order of August 11, 2006 (“the Order”). Essentially, they contend that Plaintiffs’ complaint fails to establish standing and, for the same reasons cited in their Motion to Dismiss, that Plaintiffs’ claim under section 526(a)(4) fails on the merits.

### I. Standing

Defendants claim that Plaintiffs’ complaint fails to establish standing, based on two

alleged deficiencies. First, Defendants argue that Plaintiffs' complaint fails to allege that section 526(a)(4) restricts or chills Plaintiffs' protected speech. As stated in the Order, "plaintiffs have alleged the chilling effect of section 526(A)(1) and a simple amendment could also provide that allegation that the more troubling section 526(a)(4) also chills speech as argued in the briefing." Order, p. 11.

Plaintiffs are prepared to submit facts that would support such an allegation. But for the restriction in section 526(a)(4), Plaintiffs would advise their clients to incur debt in contemplation of a future bankruptcy in a number of situations. As highlighted by the Court, there are a variety of legitimate scenarios where an attorney may advise a client to incur debt in advance of a bankruptcy that would not be abusive or fraudulent. *See* Order, p. 15-16.

Moreover, the threat of enforcement is far more concrete than stated by either the Court or Defendants. As cited by the Defendants, a plaintiff may satisfy the standing requirement with facts showing it has foregone speech because of an actual and well-founded fear that the law will be enforced against it. *California Pro-Life Council v. Getman*, 328 F.3d 1088, 1094-95 (9<sup>th</sup> Cir. 2003). Specifically, Plaintiffs would refer this Court to the Statement of Clifford J. White III, Director of the Executive Office for the United States Trustees U.S. Department of Justice to the Senate Committee on the Judiciary Subcommittee on Administrative Oversight and the Courts concerning "Oversight of the Implementation of the Bankruptcy Abuse and Prevention and Consumer Protection Act" presented on December 6, 2006.<sup>1</sup> On page 3 the Director states:

The BAPCPA provides new tools for the Program to combat bankruptcy fraud and abuse. One of the reasons we have been able to meet the extraordinary challenges

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<sup>1</sup> Available at [http://www.usdoj.gov/ust/eo/public\\_affairs/testimony/docs/testimony061206.pdf](http://www.usdoj.gov/ust/eo/public_affairs/testimony/docs/testimony061206.pdf)

and new responsibilities presented to us by the reform law is that we are building on five years of steady progress realized through civil and criminal enforcement initiatives. These enforcement efforts reflect a balanced approach to address wrong-doing, as well as to protect consumer debtors who are victimized by attorneys, petition preparers, and others.

In Fiscal Year 2006, we estimate that we took more than 58,000 civil enforcement and related actions, including actions not requiring court resolution, with a monetary impact of more than \$878 million in debts not discharged, fines, penalties, and other relief. Since we began tracking our results in 2003, we have taken more than 220,000 actions with monetary impact in excess of \$2.6 billion. Enforcement actions include such wide-ranging litigation as denials of discharge against debtors who conceal assets and monetary sanctions against attorneys who fail to fulfill their obligations to their debtor clients.

This statement indicates a clear intent on behalf of Defendants to use the “new tools” provided by BAPCPA to conduct enforcement action against attorneys. Given 526(a)(4)’s generalized prohibition on speech relating to incurring debt in contemplation of bankruptcy, Plaintiffs’ have an actual and well-founded fear that even legitimate advice would result in an enforcement action.

Moreover, 28 U.S.C. sections 583 and 586 establish that it is more likely than not that the U.S. Trustee will enforce the BAPCPA amendments against Plaintiffs. The statute that creates the Office of the U.S. Trustee requires Defendant Lashinsky to “faithfully execute [her] duties.” 28 U.S.C. § 583. Defendant’s duties include the requirement to “perform the duties prescribed for the United States trustee under title 11 and this title, and such duties consistent with title 11 and this title as the Attorney General may prescribe.” 28 U.S.C. § 586(a)(5). Title 11 allows the U.S. Trustee to bring a motion for failure to comply with the debt relief agency provisions. 11 U.S.C. § 526(c)(5).

Plaintiffs further have an ethical obligation to abide by the requirements of the code.<sup>2</sup> Because Plaintiffs are officers of this Court and have a duty to abide by the rules, Plaintiffs are being forced to choose between giving undesired speech to those who may not be assisted persons or face civil enforcement of the debt relief agency provisions, disgorgement and disciplinary proceedings.

Defendants also argue that Plaintiffs' complaint is deficient because it lacks an allegation that Plaintiffs provide advice to "assisted persons." 11 U.S.C. § 101(3). Plaintiffs are prepared to submit facts in conjunction with their Motion for Summary Judgment to support such an allegation. Moreover, the complaint specifically references the Bankruptcy Code's definitions concerning "assisted persons," "debt relief agency," and "bankruptcy assistance." Complaint, ¶¶ 15-17. The complaint further alleges that each of the plaintiffs is a debt relief agency and provides advice to clients within the definition of an assisted person. Complaint, ¶ 18. These allegations are sufficient to demonstrate that the restriction in section 526(a)(4) encompasses Plaintiffs' intended speech.

Therefore, this case is analogous to *New York State Bar Association v. Reno* where the court found standing when attorneys were self-censoring in fear of penalties for advising clients. *New York State Bar Association v. Reno*, 999 F.Supp. 710 (1998). The Court should deny Defendants' motion to reconsider the issue of Plaintiffs' standing.

## II. Merits

Defendants' further request that the Court reconsider their arguments regarding the

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<sup>2</sup> Oregon Rule of Professional Conduct 3.4(c).

merits of Plaintiffs' 526(a)(4) claim. For the most part, Defendants simply reargue the points raised in their initial memorandum in support of their Motion to Dismiss. Plaintiffs rely on the arguments made in their response to the Motion to Dismiss, the Court's analysis in the Order, and the analysis of sister courts in the following cases: *Hersch v. United States*, Case No. 05-2330 (N. Tex. July 26, 2006), *Zelotes v. Martini*, Case No. 05-1591 (D. Conn. Nov. 7, 2006), and *Milavetz, Gallop & Milavetz, P.A. v. United States of America*, Case No. 05-02626-JMR-FLN (D. Minn. Dec. 7, 2006). Because 526(a)(4) is not sufficiently narrow to meet the constitutional standard of strict scrutiny (or even the standard under *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991)), this section impermissibly chills Plaintiffs' protected speech and is unconstitutional.

#### CONCLUSION

For the reasons stated above, Plaintiffs request that the Court deny Defendants' Motion to Reconsider and proceed to consideration of Plaintiffs' Motion for Summary Judgment.

DATED December 27, 2006

/s/ Keith D. Karnes  
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