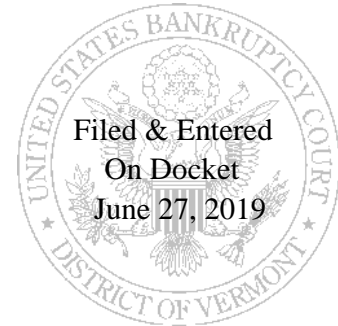


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**UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT**



In re:
**Nicholas and Amanda Gravel,
Debtors.**

**Chapter 13 Case
11-10112**

In re:
**Allen and Laurie Beaulieu,
Debtors.**

**Chapter 13 Case
11-10281**

In re:
**Matthew and Emilie Knisley,
Debtors.**

**Chapter 13 Case
12-10512**

*Appearances: Mahesha Subbaraman, Esq.
Subbaraman PLLC
Minneapolis, Minnesota
For the Trustee*

*Alexandra Edelman, Esq.
Primmer Piper Eggleston & Cramer, PC
Burlington, Vermont
For the Creditor*

ORDER

DENYING TRUSTEE’S MOTION FOR REIMPOSITION OF SANCTIONS AGAINST PHH, CERTIFICATION UNDER 28 U.S.C. § 158(d)(2), AND ISSUANCE OF A STAY PENDING APPEAL

This matter, involving the propriety of sanctions against a mortgage servicer, has a lengthy procedural history, which greatly influences the outcome of the motion presently before this Court.

On September 12, 2016, this Court entered a memorandum of decision and order (doc. ## 82, 83, the “Sanctions Order”) granting the chapter 13 trustee’s motion for sanctions (doc. # 75), awarding sanctions of \$375,000 against PHH Mortgage Corp. (“PHH”), payable to Legal Services Vermont, and overruling the objection PHH had filed to that motion (doc. # 77). On September 21, 2016, PHH filed a notice of appeal (doc. # 87). On December 18, 2017, the U.S. District Court (Crawford, J.) entered a final order granting PHH’s motion for reconsideration and remanding the case to this Court (doc. # 104, the “Remand Decision”). The chapter 13 trustee (the “Trustee”) subsequently filed a notice of appeal with the Second Circuit Court of Appeals. The Court of Appeals granted PHH’s motion to dismiss the appeal due to a lack of appellate jurisdiction, finding the Remand Decision “contemplat[es] significant further

proceedings.” See doc. # 109 (citing In re Penn Traffic Co., 466 F.3d 75, 78 (2d Cir. 2006)). On September 17, 2018, this Court issued a Supplemental Notice of Hearing, and set a hearing for October 3, 2018, to address the Remand Decision (doc. ## 111, 117,¹ the “Notice”).

On October 1, 2018, prior to the hearing on the Notice, the Trustee filed a 16-page document captioned as “Motion & Memorandum of Law for: (1) Reimposition of Substantial Punitive Non-Contempt Sanctions Against PHH; (2) Certification under 28 U.S.C. § 158(d)(2); and (3) Issuance of a Stay Pending Appeal” (doc. # 119, “the Trustee’s Motion”). Specifically, the Trustee requested six distinct, but sequentially interrelated, forms of relief. First, the Trustee moves the Court to:

1. reimpose the \$375,000 punitive non-contempt sanction; and
2. order payment of the sanction to the Trustee in annual increments of \$93,750.

Additionally, the Trustee requests the Court:

3. deny the Trustee’s request for reimposition of the \$375,000 sanction;
4. determine that but for the District Court’s decision, the Court would reimpose the \$375,000 sanction and order payment of the sanction to the Trustee;
5. certify an appeal under 28 U.S.C. § 158(d)(2) and Bankruptcy Rule 8006; and
6. issue a stay under 28 U.S.C. § 158(d)(2)(D) pending the certified appeal.

Doc. # 119, p. 1.

The Court held a hearing on the Notice on October 3, 2018, as scheduled, with each party presenting their views regarding the scope of legal issues to be addressed pursuant to the Remand Decision. While the Court stated it would not address the merits of the Trustee’s Motion at the hearing, or prior to giving PHH an opportunity to respond to that Motion, it heard arguments from both parties on the question of whether to decide the Trustee’s Motion before addressing the issues raised in the Remand Decision and Notice.

The Trustee urged this Court to rule on his Motion prior to addressing the legal issues raised in the Remand Decision and Notice. The Trustee stated, while he did not expect PHH to respond to his Motion, or expect the Court would address his Motion, at the Hearing, it served the principles of both judicial economy and fair play to file the Motion in advance of the hearing. The Trustee echoed the argument set forth in his Motion that direct certification under 28 U.S.C. § 158(d)(2) would save the parties from needlessly expending resources relitigating the matter in both the bankruptcy and district courts (doc. # 119, p. 7). A direct appeal, the Trustee asserted, would serve judicial economy because a ruling from the Second Circuit could provide clear guidance on questions of first impression both the Remand Decision and this Court’s Notice have identified as the open legal issues. For its part, PHH vigorously criticized the

¹ All document docket numbers refer to the numbers assigned to them on the docket in the case of Nicholas and Amanda Gravel (#11-10112), unless otherwise indicated; all such documents are docketed in all three of the above-captioned cases.

timing of, and rationale for, the filing of the Trustee's Motion, and insisted the Court should rule on the legal issues raised in the Notice and Remand Decision, prior to considering the Trustee's Motion.

On October 5, 2018, the Court entered a scheduling order for the filing of memoranda of law on both the Notice and the Trustee's Motion (doc. # 124). Because it found such a course would not produce an excessive burden to either the Trustee or PHH, the Court required the parties prepare and file their papers on these matters simultaneously, rather than wait for the Court to issue an order on the Trustee's Motion before proceeding to brief the Notice. On November 6, 2018, PHH filed its Memorandum of Law in Opposition to the Trustee's Motion (doc. # 129, the "Opposition") and on November 13, 2018, the Trustee filed a Reply (doc. # 130). The Court then took the matter under advisement.²

After considering the arguments and papers of the parties, the Court resolves the Trustee's multi-part Motion in the following manner. First, the Trustee's Motion to Reimpose the \$375,000 in sanctions against PHH and redirect the full payment of the sanction to the Trustee is denied. While the Court has considered the Trustee's request to redirect a portion of the sanction to his office, rather than entirely to Legal Services Vermont, see doc. # 83, the Court does so within the proper context of addressing the Remand Decision. See this Court's Memorandum of Decision and Order on Remand, of even date (doc. ## 134, 135). Second, the Trustee's request for direct certification is denied, as untimely under Federal Bankruptcy Rule 8006 and outside the scope of the Remand Decision, without prejudice to the Trustee's opportunity to request certification anew in the event this Court's order on remand is timely appealed. Third, the Trustee's request for a stay pending appeal is denied as moot, as the Court has denied the Trustee's request for direct certification and the parties have already fully briefed the issues raised in the Remand Decision.

In his Motion, the Trustee asks the Court to certify a direct appeal to the Second Circuit Court of Appeals, pursuant to 28 U.S.C. § 158(d)(2), to consider three questions of law.³ Section 1233 of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) amended 28 U.S.C.

² In accordance with the timeline established in the Court's October 5th scheduling order (doc. # 124), the Trustee filed his Response to the Notice on November 20, 2018 (doc. # 131) and PHH filed its Reply to the Trustee's Response on November 27, 2018 (doc. # 132). The Court considered both the Notice and the Trustee's Motion fully submitted as of November 27th.

³ The Trustee argued the following three questions are appropriate for direct certification:

1. Whether bankruptcy courts may impose substantial punitive non-contempt sanctions under Bankruptcy Rule 3002.1(i)(2), which authorizes bankruptcy courts to "award ... other appropriate relief" for Rule 3002.1 violations;
2. Whether bankruptcy courts may impose substantial punitive non-contempt sanctions under § 105(a), which authorizes bankruptcy courts to "issue any order ... that is necessary or appropriate to carry out" the Bankruptcy Code;
3. Whether bankruptcy courts may impose substantial punitive non-contempt sanctions as a matter of inherent judicial authority.

Doc. # 119, p. 13. Because the Trustee's Motion fails for procedural infirmities under Rule 8006, and because it runs counter to the remand mandate this Court must address, it is unnecessary at this time to discuss the merits of the Trustee's request for certification.

§ 158(d)(2) to permit direct appeal from a bankruptcy court to the appropriate court of appeals if the bankruptcy court certifies that either “(i) the judgment, order, or decree involves a question of law as to which there is no controlling decision ... or involves a matter of public importance; (ii) the judgment, order, or decree involves a question of law requiring resolution of conflicting decisions; or (iii) an immediate appeal from the judgment, order, or decree may materially advance the progress of the case.” Weber v. United States Tr., 484 F.3d 154, 157 (2d Cir. 2007) (quoting 28 U.S.C. § 158(d)(2)(A)(i)-(iii)). Federal Bankruptcy Rule 8006 describes the procedure for appeals taken under § 158(d)(2), the latter of which the leading bankruptcy treatise has noted “is hardly an example of precise and careful drafting.” COLLIER ON BANKRUPTCY ¶ 5.06(1).⁴

Critical among the procedural requirements is that a party’s request for certification “must be filed with the clerk of the court where the matter is pending within 60 days after the entry of the judgment, order, or decree.” Fed. R. Bankr. P. 8006(f)(1). In its Opposition, PHH asserts the Trustee’s request for certification under 28 U.S.C. § 158(d)(2) is untimely, as the request should have been made on or before November 11, 2016, which was 60 days after entry of this Court’s Sanctions Order (doc. # 129, p. 10). The procedural course of this case is comparable to that found in Stansbury v. Holloway (In re Holloway), 425 Fed. Appx. 354 (5th Cir. 2011). In Holloway, as in this case, one party appealed the bankruptcy court order to the district court and, following the district court’s decision, the Fifth Circuit dismissed the appeal of that decision for want of jurisdiction as it was not a final order under § 158(d)(1). Id. at 356. After the Fifth Circuit dismissed the appeal, thus sending the matter back to the bankruptcy court, “the parties requested that the bankruptcy court certify its original order for direct appeal to [the Fifth Circuit] pursuant to 28 U.S.C. § 158(d)(2).” Id. The bankruptcy court granted the certification, but the Holloway court found it lacked jurisdiction as the request was not made within the timeline established by Rule 8006. Id. at 357. The request for certification, the Fifth Circuit found, should have been made within 60 days after the bankruptcy court first issued its original order and thus the request before it exceeded the 60-day timeframe by approximately seventeen months. Id. at 357.

As the basis for his request for certification, the Trustee “asks the Court to re-impose the \$375,000 punitive, non-contempt sanction that the Court first imposed in its September 12, 2016 decision” and “for the same reasons and in the same amounts stated in the Court’s decision” (doc. # 119, p. 8). The Trustee seeks only “one modification” to the Court’s original Sanctions Order: payment of the sanction to the

⁴ The First Circuit, in dismissing a direct certification for failure to file the underlying notice of appeal in the bankruptcy court, cautioned that “[t]o avoid such problems in future cases, litigants, bankruptcy courts, district courts and bankruptcy appellate panels should be careful to follow the procedures set forth in section 158 itself and in the applicable rules.” Weaver v. Harmon Law Offices, P.C. (In re Weaver), 542 F.3d 257, 259 (1st Cir. 2008).

Trustee rather than to Legal Services Vermont (doc. # 119, p. 8). The Trustee points to this single modification to argue that “the Trustee’s Motion here is not the same as the motion that spurred the Court’s original sanctions order” and thus, the 60-day timeframe in which it may request direct certification “only starts to run *after* the Court enters an order deciding the Trustee’s Motion” (doc. # 130, p. 10) (emphasis original). It is true that Holloway does not describe a situation where, as here, a bankruptcy court is asked to reenter a decision anew, with few if any alterations, rather than simply certify its original decision. See Stansbury v. Holloway (In re Holloway), 425 Fed. Appx. 354, 358 n. 3 (5th Cir. 2011) (“In any event, the bankruptcy court simply granted the parties’ certification request. We find no indication that the bankruptcy court amended or reentered its original order, nor do we decide whether such actions could re-trigger the time limit in 28 U.S.C. § 158(d)(2)(E).”). Though the request for certification presently before this Court is less straightforward than the situation in Holloway, the Trustee’s Motion must similarly fail as untimely, for the following reasons.

First, although the Trustee acknowledges this Court must deny his request to reimpose sanctions, the Trustee’s Motion essentially asks this Court to reenter its original Sanctions Order, purely as a vehicle by which to pursue timely appeal and direct certification. Courts have frequently condemned comparable methods of reentering an order or judgment to restart a lapsed appeals period, absent extraordinary circumstances such as lack of notice. See Mendes Junior Int’l Co. v. Banco Do Brasil, S.A., 215 F.3d 306, 315 (2d Cir. 2000) (concluding that interpreting Rule 58 “as authorizing the district court to revive an expired time to appeal is contrary to the implications and purposes of the Civil and Federal Rules of Appellate Procedure.”); see also Perez v. Stephens, 745 F.3d 174, 181 (5th Cir. 2014) (rejecting attempt to use Rule 60(b) motion, and subsequent reentering of judgment, “as a means of achieving an untimely appeal”); Rivers v. United States, 2013 U.S. Dist. LEXIS 164513, *2 (E.D.N.Y. 2013) (“The circumstances in which a district court may use Rule 60(b) to reset the time for appeal are limited to cases in which the party seeking to appeal lacked both actual and constructive notice of the judgment or order.”); cf. Washington v. Ryan, 833 F.3d 1087, 1102 (9th Cir. 2016) (“Having traced the history and interpretation of Rule 60(b), we conclude that when Congress adopted the Federal Rules, it entrusted the courts with the essential task of identifying the rare cases that warrant reentry of judgment for purposes of restoring the right to appeal.”). The Trustee’s Motion is a comparable request for the Court to reenter its original Sanctions Order in order to restart the appeals period for direct certification under 28 U.S.C. § 158(d)(2). Though the Trustee argues this current request is distinct from his original motion for sanctions, that argument is not persuasive because the Trustee’s Motion asks the Court to “reimpose” the sanction “that the Court first imposed in its September 12, 2016 decision” with only “one modification” as to the recipient of the sanction payment (doc. # 119, p. 8). The Trustee has not identified anything that

would have postponed the deadline for filing his request for direct certification of the Sanctions Motion, see Mendes, 215 F.3d at 315, nor does he claim a lack of notice or other extraordinary circumstance that would justify this Court reentering its original Sanctions Order. Thus, the Motion to reimpose the sanction, as well as the adjoining request for certification, must collectively be denied as an unwarranted effort to reenter an order for the purpose of salvaging an otherwise untimely appeal.

Second, assuming, *arguendo*, that the Trustee's Motion is a permissible means by which to restart the appeals period on a request for direct certification, the Court must nevertheless deny the request for certification because it runs counter to the Court's mandate on remand. "[W]here a case has been decided by an appellate court and remanded, the court to which it is remanded must proceed in accordance with the mandate and such law of the case as was established by the appellate court." Kerman v. City of New York, 374 F.3d 93, 109 (2d Cir. 2004) (internal citation omitted). "A lower court has 'no discretion in carrying out the mandate.'" Statek Corp. v. Dev. Specialists, Inc. (In re Coudert Bros. LLP), 809 F.3d 94 (2d Cir. 2015) (internal citation omitted). This Court "must follow both the specific dictates of the remand order as well as the broader 'spirit of the mandate.'" Id. (citing United States v. Ben Zvi, 242 F.3d 89, 95 (2d Cir. 2001)) (emphasis added). See also Puricelli v. Republic of Arg., 797 F.3d 213, 218 (2d Cir. 2015) ("We consider both the express terms and broader spirit of the mandate to ensure that its terms have been 'scrupulously and fully carried out.'" (citing Ginett v. Comput Task Grp., Inc., 11 F.3d 359, 360–61 (2d Cir. 1993))). In its Remand Decision, the District Court presented this Court with two options: (i) refer the question of punitive sanctions to the District Court; or (ii) determine an appropriate sanction that is "short of ... the scope and type" it originally imposed on PHH. See doc. # 104, p. 17. Simply reimposing the same sanction, or denying the Trustee's request to do so, solely for the purpose of allowing direct appeal, without engaging with the issues on remand, would not comport with the "broader spirit of the mandate."⁵

The Trustee argues that denying his request for certification and proceeding to issue a revised sanctions order on remand is inefficient and requires the Court "spending unnecessary time and effort on deciding whether to impose alternative sanctions against PHH" (doc. # 130, p. 4). That may be so, but the perceived inefficiency has, in large measure, resulted from the Trustee's own litigation choices. Echoing the First Circuit, while the Trustee's options "may be unappealing at this stage in the game ... he ignores the fact that Congress laid out other options for him – options that he did not pursue." Bullard v. Hyde

⁵ While the Trustee is correct that lower courts are free "to signal their disagreement with appellate mandates in the course of carrying them out," the case he cites favorably for this principle cautions that a lower court "should ... signal its disagreement, but carry out the mandate" (doc. # 130, p. 6) (quoting Donohoe v. Consolidated Operating & Production Corp., 30 F.3d 907, 910 (7th Cir. 1994) (emphasis added)). Reimposing the same sanction without any further analysis of the issues the District Court elaborated upon in vacating the original Sanctions Order, would not constitute a good faith attempt to carry out the mandate.

Park Sav. Bank (In re Bullard), 752 F.3d 483, 487 (1st Cir. 2014), aff'd sub nom. Bullard v. Blue Hills Bank, 135 S. Ct. 1686 (2015). The Trustee could have sought certification and authorization to directly appeal the original Sanctions Order under 28 U.S.C. § 158(d)(2), once PHH filed its notice of appeal. The Trustee also could have sought permission to appeal the District Court's non-final Remand Decision under the general interlocutory appeals statute 28 U.S.C. § 1292(b). Id. The Trustee did not avail himself of these options, however, thus leaving this matter in its current procedural position. This Court concurs with PHH that granting the Trustee's request for certification at this time, and in the manner described, is akin to "engineering a vehicle for fast-track review of an appeal by the Second Circuit when the Second Circuit has already dismissed and sent the Trustee's appeal back down to this Court for 'significant further proceedings' on remand" (doc. # 129). While "this series of events was undoubtedly inefficient," Bullard, 752 F.3d at 489, it was the consequence of the Trustee's decisions not to pursue other viable appellate procedures.

Therefore, this Court denies the Trustee's request to certify direct appeal and will instead proceed with a new sanctions analysis in compliance with the District Court's Remand Decision. This aligns with the approach adopted by bankruptcy courts considering direct appeal requests at a similar procedural posture. See, e.g., Gomez v. Kamper Invs., L.L.C. (In re Gomez), 404 Fed. Appx. 850, 851 (5th Cir. 2010) (bankruptcy court, after remand, issued a new judgment and "then specifically, and repeatedly, instructed the [debtors] to file a request for certification" of that judgment); Jaffe v. Samsung Elecs. Co. (In re Qimonda AG), 470 B.R. 374 (E.D. Va. 2012) (after the district court vacated and remanded, the bankruptcy court issued a new final order, which the district court then certified for a direct appeal). Moreover, this Court's additional analysis and articulation of its rationale for whether to impose sanctions against PHH, in light of the District Court's instructions in the Remand Decision, may prove beneficial to the appellate courts in the event the matter is further litigated.

While the Court denies the Trustee's requests to reimpose the same sanctions and certify a direct appeal, it has considered, in the course of addressing the District Court's Remand Decision, the Trustee's arguments to "conduct a new windfall analysis" (doc. # 119, p. 9), and redirect a portion of the sanction to his office, rather than entirely to Legal Services Vermont. Altering, in part, the recipient of the sanctions awarded in this matter is within the Court's mandate on remand, as described in the Memorandum of Decision and Order on Remand, filed contemporaneously with this Order (doc. ## 134, 135).

Denying the Trustee's request for certification is without prejudice to the Trustee's right to request certification once more if he, or PHH, appeals the Court's remand decision. That remand decision, addressing the issues raised by the District Court when it vacated the Sanctions Order, incorporates many of the same issues the Trustee argues are appropriate for direct certification and, as "it is a separate final

order,” it may be directly appealed to the Second Circuit under § 158(d)(2) “if the statutory requirements for certification are met.” See Qimonda, 470 B.R. at 389. Any appeal of this Court’s remand decision will thus start anew the applicable deadline by which to request certification under Rule 8006.

Finally, the Trustee’s request for a stay pending appeal under 28 U.S.C. § 158(d)(2)(D) is denied as moot, as the Court has denied the request for direct certification, the parties have already filed their memoranda of law, and the Court is issuing its decision on remand contemporaneously with this order.

Accordingly, IT IS HEREBY ORDERED that the Trustee’s motion to reimpose sanctions is denied as a vehicle for direct certification, except as otherwise provided in the memorandum of decision of even date addressing the District Court’s Remand Decision.

IT IS FURTHER ORDERED that the Trustee’s request to certify a direct appeal to the Court of Appeals, under 28 U.S.C. § 158(d)(2) is denied, without prejudice to the Trustee’s right to request certification if this Court’s remand decision is timely appealed.

IT IS FURTHER ORDERED that the Trustee’s request for a stay pending appeal under 28 U.S.C. § 158(d)(2)(D) is denied as moot.

SO ORDERED.

June 27, 2019
Burlington, Vermont



Colleen A. Brown
United States Bankruptcy Judge