No. 08-630

# In The Supreme Court of the United States

JOHN D. MASHBURN,
U.S. Bankruptcy Trustee of the Bankruptcy
Estate of Toby Scrivner and Angelique Pissano,

*Petitioner,*

v.

TOBY SCRIVNER and ANGELIQUE PISSANO,

*Respondents.*

**On Petition For Writ Of Certiorari**
**To The United States Court Of Appeals**
**For The Tenth Circuit**

## BRIEF IN OPPOSITION

MARK W. HAYES
426 N.W. 9th
Oklahoma City, Oklahoma 73102
*Cellular* (405) 326-6124
*Office* (405) 236-0163
*Facsimile* (405) 236-0165
*E-Mail* mwh17810law@yahoo.com

*Counsel for the Respondents*

February 11, 2009

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

## QUESTIONS PRESENTED

I

WHETHER *SCRIVNER II* WAS CORRECT TO REJECT § 105 AS SUPPORT FOR THE SURCHARGE DOCTRINE.

II

WHETHER *SCRIVNER II* WAS CORRECT TO REVERSE THE SURCHARGE ORDER WHERE THERE WERE NO FINDINGS THAT THE RESPONDENTS COMMITTED FRAUD OR OTHER BAD CONDUCT.

III

WHETHER *SCRIVNER II* WAS CORRECT TO FOLLOW THE PLAIN LANGUAGE OF THE CODE IN REVERSING THE SURCHARGE ORDER.

IV

WHETHER THE COURT IN *SCRIVNER II* HAD ANY BASIS TO REVERSE THE SURCHARGE ORDER OF THE BANKRUPTCY COURT AND THE COURT IN *SCRIVNER I*.

**QUESTIONS PRESENTED** – Continued

V

WHETHER *SCRIVNER II* MISREAD THE BANKRUPTCY CODE TO EXCLUDE THE SURCHARGE DOCTRINE.

## PARTIES TO THE PROCEEDING

Petitioner (Appellee below):
JOHN D. MASHBURN, U.S. Bankruptcy Trustee of the Bankruptcy Estate of Toby Scrivner and Angelique Pissano

Respondents (Appellants below):
TOBY SCRIVNER and ANGELIQUE PISSANO

TABLE OF CONTENTS

# TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued



STATUTES

TABLE OF AUTHORITIES – Continued

## STATEMENT OF THE CASE

The statement of facts, as presented by the Petitioner to this Court leaves a plethora of information out that is necessary to show why the Tenth Circuit Court Appeals (*hereinafter Scrivner II*) was correct to overturn the surcharge order issued by the Bankruptcy Court of the Western District of Oklahoma (*hereinafter* "bankruptcy court") and affirmed by the Bankruptcy Appellate Panel of the Tenth Circuit (*hereinafter Scrivner I*).

"*Surcharge*" can be described as "*eye for an eye and a tooth for a tooth*" common law bankruptcy doctrine. The loose theory behind the doctrine states that if non-exempt property is dissipated by a debtor from a bankruptcy estate, then the courts have the *power* to transfer exempt assets to the estate in an equal or greater amount. The long or short term financial hardship on a debtor has generally not been considered by the courts in relation to the surcharge doctrine. The alleged "*power*" to surcharge is comprised of an unstable mixture between common law equity principals and the "*catch all*" provision under Title 11 U.S.C. § 105(a).[1] That *power*, and the bankruptcy court's authority to use it, is the crux of the Petitioner's allegations before this court.

---

[1] Hereinafter the subsections of Title 11 U.S.C. *et seq.* referred to will be by section number only. All other statutes will be referred to in full citation.

It has been alleged, in some of the cases the Petitioner has presented, that the court has unseen "*inherent powers*" to authorize surcharge under § 105(a). (See *In re Karl*, 313 B.R. 827 at 830 (Bankr. W.D. Mo. 2004)). However, other cases the Petitioner has argued have inferred that the power to surcharge emanates from the trustee's right under the code to create remedies such as surcharge. (See *Latman v. Burdette*, 366 F.3d 774 at 782 (9th Cir. 2004)). A trustee's statutory right to surcharge has been associated with reasoning contained in §§ 544 *et seq.* and § 704. (See *In re Onubah*, 375 B.R. 549 at 557 (9th Cir. 2007)).

Generally, the lower courts have inserted their own support beams drawn out or inferred from various code provisions, common law or equity principals in order to make the surcharge doctrine work. In some cases the court actually has created other doctrines either directly or indirectly to support the surcharge of exempt assets. In one such instance the court created the "*exceptional circumstances*" doctrine to justify and support the surcharge doctrine. (See *Latman v. Burdette*, 366 F.3d 774 at 786 (9th Cir. 2004)). The adhesive used to attach the surcharge doctrine together appears to be drawn from an assortment of traditional legal doctrines such as set-off principals, equity, fairness, and reasonable expectations. In summary, the final product has resulted in "*an exception that swallows up the rule.*"

There are two underlying policy concerns that can be generally deciphered out of the cases the

Petitioner has advocated to some degree concerning the validity of the surcharge doctrine. First, the estate's interest comes first before any other interest. Second, the estate must be made whole regardless of any controlling federal statutes or state laws. From these policies the courts and the Petitioner allege they are free of the exemption laws under the bankruptcy code. However, this position has caused a chain reaction under § 522 that has resulted in setting aside the state of Oklahoma's right to reserve certain property for its citizens in the bankruptcy courts.

Typically, the bankruptcy courts and the Petitioner have utilized the surcharge doctrine as a remedy of *first* resort before turning to any statutory code remedies such as denial and revocation of a discharge. Part of the allure of the surcharge doctrine for bankruptcy courts and trustees is that the court can retain jurisdiction over a debtor without the inconvenience of a formal adversarial complaint. This in turn gives the trustee time to rummage through the best and most lucrative exempt property available to liquidate for the benefit of the estate. For example, the Petitioner specifically sought to surcharge part of the Respondents' retirement accounts valued at over sixty thousand dollars in the bankruptcy case before filing an adversary complaint to revoke the Respondents' discharge. (Appx. p. 7, para. 5, p. 8, para. 6).

Generally, the triggering device used to implement the surcharge doctrine is for the court to make

some sort of finding that a debtor has committed fraud, concealment or other bad conduct. However, the case at the bar is yet another variation of the surcharge doctrine, because the surcharge order in the present case did not make a finding of wrongful behavior. (Appx. p. 6-8). This why the Petitioner alleges incorrectly to this court that the Respondents have "defrauded" the estate. (Writ. p. 4, para. 1, line 2).

For the most part, the cases on surcharge, and the Petitioner, have failed to provide a reason why the federal exemptions written in the bankruptcy code and state laws can be swept aside. For example, the surcharge order at issue did not explain why the estate's interest superceded the Respondents' exemption rights under §§ 522 *et seq.* (Appx. p. 6-8). The Petitioner drafted the surcharge order at issue and had full opportunity to identify some sort of statutory authority for the order to rest upon. In addition, the Petitioner wrote the underlying turnover order and presented it to the bankruptcy court. (Appx. p. 4-5). The turnover order, which was subsequently reduced to judgment in the surcharge order at issue, did not include a calendar date or time limit for the Respondents to comply with the order. (Appx. p. 4-5). Therefore, there was no specific time frame in the turnover order the Respondents violated. Yet, the alleged reason that the bankruptcy court could surcharge exempt assets was based upon an alleged refusal or failure of the Respondents to comply with the turnover order.

The "*fresh start*" policy as intended by Congress under code and explained in *Marrama v. Citizens*

*Bank of Massachusetts*, 549 U.S. 365, 127 S.Ct. 1105, 1107, 166 L.Ed.2d 956 (2007), as well as *Grogan v. Garner*, 498 U.S. 279, 286, 287, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991), has generally been ignored under the surcharge doctrine. Even where the *"fresh start"* policy has been acknowledged, the courts, and the Petitioner to some degree, have alleged that surcharging actually preserves the *"fresh start."* However, the case before this court today is probably the most notorious example of how the surcharge doctrine operates to undermine the *"fresh start"* policy. The Respondents have lost their right to a *"fresh start"* not once, but twice during the course of this case. The first time was in the surcharge order at issue where the bankruptcy court placed all of the Respondents' exempt assets at the disposal of the estate. This included the Respondents' ERISA protected retirement accounts, vehicle and all their personal property. (Appx. p. 6-8). At that point the Respondents had a discharge, but were not free to make a *"fresh start"* with the exempt property they were entitled to retain under state law after bankruptcy. More recently, the Respondents *"fresh start"* was eliminated a second time in an adversary complaint based on the facts before this court where the Respondents' discharge was revoked. The Respondents now have their exempt property back as a result of *Scrivner II*, but are left with no discharge to give them a *"fresh start."*

The seminal case on the surcharge doctrine is *Latman v. Burdette*, 366 F.3d 774 (9th Cir. 2004), which has been extensively cited by the Petitioner and succeeding courts as a blueprint. *Latman* and the

Petitioner have alleged that when non-exempt property is dissipated by a debtor, then the estate is entitled to exempt replacement property in return. The confused reasoning in *Latman* and vague references to statutory law have enticed several of the lower courts into building their own model of surcharge. The result has been that no two cases generally rely upon the exact same legal foundations as another and each are a "*house of cards*" ready to fall at any moment.

The Petitioner verifies this instability to a large degree in his proposition where it is alleged that the decision in *Scrivner II* conflicts with decisions of the Ninth Circuit (Writ. p. 7). According to the Petitioner, this conflict has resulted in confusion, uncertainty and varying standards for the surcharge doctrine in the lower courts and trustees. (Writ. p. 7). The epicenter of the actual conflict is the fact that there are no bankruptcy code provisions authorizing surcharge against exempt assets. *Scrivner II* is not a conservative or liberal reading of the law and in essence is the only Court to follow the plain language of the bankruptcy code.

A recurring argument by the Petitioner is that the "*catch all*" provision under § 105(a) carries "*inherent powers*," enabling the courts to surcharge exempt assets. At worst, such argument using § 105(a) has probably convinced lower courts to venture out on to "*thin ice*" with the surcharge doctrine when they should have applied the standard remedies provided in the bankruptcy code. For example, the Petitioner

in his surcharge motion to the bankruptcy court argued that § 105 gave the court the authority to surcharge exempt assets. This apparently was a contributing factor in convincing the bankruptcy court to err in deciding to surcharge the Respondents' exempt assets including ERISA protected retirement accounts.

## PROCEDURAL HISTORY

The Respondents filed a joint petition of bankruptcy under chapter seven on October 14, 2005, three days before the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 became effective on October 17, 2005. The Petitioner was appointed trustee at the outset of the Respondents' bankruptcy case.

The Respondents clearly listed in schedule "B" of their bankruptcy petition on October 14, 2005, personal property as: "LIMITED PARTNERSHIP IN THE CHEATERS LLC TV SHOW WITH INTEREST OF .5 PERCENT WITH A MONTHLY INCOME RANGING FROM $700.00 TO $1,700.00 PER MONTH[,] Location: in debtor's possession." (*Hereinafter* "Cheaters" or "Cheaters income" or "income"). The Respondent, Mr. Scrivner, listed in the petition Schedule "I" of "current income of individual debtors" he had a total of $1,200.00 in regular income from operation or business or profession or farm which was the Cheaters income referred to in Schedule "B." The

Co-Respondent, Angelique Pissano, listed in Schedule "I" no income for 2005 and 2006.

Cheaters L.L.C. is a reality based television program where adults contact the staff for assistance in determining whether their love interest, or spouse, is having an affair or "*cheating.*" (See http://www.cheaters.com/). Upon acceptance as a participant on the program, the "*Cheaters*" staff employs licensed private investigators to track the alleged cheating party with sophisticated surveillance equipment, video cameras and microphones to make an alleged evidentiary record of the purported unfaithful partner's acts of infidelity.

After the investigation is completed, and a documentary record is compiled, the parties are bought together where the host of the program appears with the alleged participant or "victim," camera crew, and bodyguards for presentation of the evidence to the alleged "cheater." The program's appeal to the viewing audience is to watch the extreme emotional, verbal and physical responses of the alleged victim and cheater in conjunction with the estranged third party love interest. Ratings are generated and revenues are derived from commercial sponsorship of the program. The Respondent, Mr. Scrivner, was paid according to his .5% operating interest depending upon the monthly schedule of profits generated from the program.

The Respondents received a joint discharge under chapter seven on March 7, 2006. On March 29,

2006 the Petitioner filed a "Trustee's Motion to Turnover Property of the Estate and Brief in Support" (*hereinafter* "turnover motion"), on March 29, 2006 for the surrender of Cheaters income. (Appx. p. 1-3). The bankruptcy court issued an "Order on Trustee's Motion to Turnover Property of the Estate" (*Hereinafter* "turnover order") on June 1, 2006, that did not specify a calendar date or time for the Respondents to comply with the order for turnover. (Appx. p. 4-5). The turnover order made no findings concerning fraud or willful conduct by the Respondents. (Appx. p. 4-5).

On August 23, 2006, the Petitioner filed a "Trustee's Motion for Order of Contempt and Motion to Surcharge Debtor's Exemptions for Failure to Comply with Order For Turnover and Brief in support thereof." (*Hereinafter* "surcharge motion"). The Respondents filed a response and the bankruptcy court issued an "Order on Trustee's Motion on Order of Contempt and Motion to Surcharge Debtor's Exemptions for Failure to Comply with Turnover Order" (*Hereinafter* "surcharge order") filed October 24, 2006 that included a judgment for $17,424.75. (Appx. p. 6-8).

The surcharge order made no findings of fraud or willful conduct by the Respondents and was based solely upon the reasoning of two cases: *Latman v. Burdette*, 366 F.3d 744 (9th Cir. 2004) and *In re Karl*, 313 B.R. 827 (Bankr. W.D. Mo. 2004). (Appx. p. 6). The order specifically handed the Petitioner an unlimited power to seize and convert to cash any of the Respondents' assets claimed as exempt under

§§ 522 *et seq.* and *Okla. Stat.* 31 § 1 in satisfaction of the judgment for $17,424.75. (Appx. p. 7-8). In particular, the surcharge order specifically included the power to liquidate ERISA retirement accounts protected under 5 – and *Okla. Stat.* 31 § 1. (Appx. p. 7-8). The contempt part of the Petitioner's surcharge motion was never litigated and remains unresolved as of today. (Appx. p. 6-8).

The Respondents appealed the surcharge order to the Appellate Panel on October 24, 2006. *Scrivner v. Mashburn* (*In re Scrivner*), 370 B.R. 346 (10th Cir. 2007) (*Hereinafter "Scrivner I"*) that sustained the bankruptcy court's decision on June 20, 2007. The Respondents appealed to the Tenth Circuit which issued an opinion August 8, 2008, reversing the bankruptcy court and Tenth Circuit Appellate Panel only on the issue concerning surcharge of exempt assets. *In re Scrivner*, 535 F.3d 1258 (10th Cir. 2008). *Scrivner II* left the judgment for $17,424.75 intact and denied the Petitioner attorney fees and cost in its opinion.

During *Scrivner I* the Petitioner filed an adversary complaint, No. 07-01141 (*Hereinafter* "complaint"), on July 16, 2007. Under Count I the Petitioner prayed that the court would consolidate the previous surcharge and enforcement orders into one single judgment. Count II requested that the bankruptcy court revoke the Respondents' discharge based upon an alleged failure to comply with prior orders of the court. Motions for summary judgment were filed and on September 12, 2008, the bankruptcy court

issued an order and judgment ruling Count I as moot. On Count II, the bankruptcy court revoked the Respondents' discharge under § 727(d)(3)(a)(6) stating only that the Respondents had refused to comply with the turnover order.

The Respondents appealed Count II of the adversary complaint to the Appellate Panel in case number WO-08-083 on September 19, 2008 (*Hereinafter "Scrivner III"*). The court in *Scrivner III* has dismissed that appeal on January 30, 2009 based in large part on the grounds that the court had no jurisdiction because the bankruptcy court order was not final. It is anticipated that the Respondents will appeal that decision to the Tenth Circuit Court of Appeals.

## REASONS FOR DENYING THE WRIT

### I

### WHETHER *SCRIVNER II* WAS CORRECT TO REJECT § 105 AS SUPPORT FOR THE SURCHARGE DOCTRINE

The Petitioner makes the argument that the bankruptcy court has the discretion "[b]y both the inherent power of all federal courts to sanction and deter bad faith and abusive conduct under the broad authority of Title 11 U.S.C. § 105." (Writ. p. 8, para. 1, line 1). That maybe true in some limited cases, but nothing in § 105 indicates the courts have the

authority to override or supplant the written statutory provisions for exemptions under the bankruptcy code.

The Petitioner's definition of § 105 and its broad authority to deter bad faith and abusive conduct would not apply to the present case. The bankruptcy court did not make any findings of "*bad faith*" or "*abusive conduct*" in the surcharge order at issue which in turn negates the applicability of § 105. (Appx. p. 6-8). Therefore, § 105 has no applicability to this case. Further, the bankruptcy court in the present case did not point to any statutory provision as authority in the surcharge order. (Appx. p. 6-8).

The bankruptcy court in the present case pointed to *Latman v. Burdette*, 366 F.3d 744 (9th Cir. 2004), as one of two authorities that support the surcharge order. (Appx. p. 6). Just like the surcharge order at issue, the Ninth Circuit *Latman* Court (*Hereinafter* "*Latman* Court") did not mention § 105 or "*inherent powers*" it was operating under when the decision was made to surcharge. Instead, the *Latman* court appears to have relied upon the bankruptcy code to give the trustee the powers to infer or create the remedy of surcharge under §§ 704 *et seq.*: "[t]he Bankruptcy Code gives trustees cumulative remedies against improper debtor behavior. See 11 U.S.C. § 704." Id. at 782. In addition, the Court stated: "The Bankruptcy Code directs trustees to pursue all available remedies to protect the value of the bankruptcy estate for

creditors. See 11 U.S.C. § 704." Id. at 784. One of those *available remedies* appears to be surcharge. Therefore, the court is not exercising its powers but is actually enforcing an unwritten statutory remedy available to the trustee via § 704. Id.

The upper court in *Latman* appears to have pioneered the "*exceptional circumstances*" doctrine as a support pedestal for the surcharge doctrine that was later used again in *In re Onubah*, 375 B.R. 549 at 553 (9th Cir. 2007). Id. at 786. The *Latman* court stated:

> Under exceptional circumstances, such as those presented here, surcharge may be the only means fairly to ensure that debtors retain their statutory "fresh start" while also permitting creditors access to property in excess of that which is properly exempted under the Bankruptcy Code. Id. at 786.

Apparently, the lower and upper *Latman* courts believed that the remedies prescribed by Congress in the code were not comprehensive enough to cover all situations that arise in the course of bankruptcy proceedings. The Petitioner cites this portion of *Latman* in his brief without any specific reference as to its meaning or how it shows that the Tenth Circuit was in error for reversing the case at the bar. (Writ. p. 11-12).

The "*exceptional circumstances*" doctrine apparently means the court is willing to protect the "*fresh start*" policy in the bankruptcy code, so long as creditors are held in a priority position. This is in keeping

with the general proposition under the surcharge doctrine that the estate comes first. From all indicators, "*exceptional circumstances*" appears to have been created as an emergency exit out of the code just like the surcharge doctrine. Apparently, once a bankruptcy court finds that some sort or misconduct on the debtor's part has occurred, then an "*exceptional circumstance*" can be declared where the statutory provisions of the bankruptcy code ceases to operate. This is consistent with the surcharge doctrine that it is a remedy of "*first*" resort. Further, it appears that when an "*exceptional circumstances*" emergency has been declared, and surcharge is called for, then the bankruptcy court is free to create other equitable doctrines to justify its use.

The problem is there is no bankruptcy code provision identified as "*exceptional circumstances*" or surcharge under any of the chapters of the bankruptcy code. Another problem is the *Latman* court did not define what facts or "*exceptional circumstances*" warrants deployment of the surcharge doctrine. Id. Lastly, the court did not provide a plausible answer as to why "*exceptional circumstances*" or the surcharge doctrine are able to negate statutorily enacted exemptions under the bankruptcy code. Id. Unsurprisingly, the *Latman* opinion, appears to have thrown away its own reasoning in adopting these doctrines and resorted to simple equity principals to support surcharge by stating: "We also hold that the surcharge remedy fashioned by the bankruptcy judge

did not exceed the equitable powers of the bankruptcy court." Id. at 788.

The bottom line is the lower court and the Ninth Circuit in *Latman* simply manufactured their doctrines and remedies out of "*whole cloth*" and used traditional equity to override the exemption statutes. Id. However, equity alone cannot override the specific statutory exemptions as provided under the bankruptcy code. *Scrivner II* was correct to observe:

> As we have previously noted, "[t]o allow the bankruptcy court, through principles of equity, to grant any more or less than what the clear language of [a statute] mandates would be tantamount to judicial legislation and is something that should be left to Congress, not the courts." *In re Alderete*, 412 F.3d at 1207 (quotation omitted). (Writ. Appx. p. 7).

The Petitioner cites another case in support of § 105, *Marrama v. Citizens Bank of Massachusetts*, 549 U.S. 365, 127 S.Ct. 1105, 1107, 166 L.Ed.2d 956 (2007). *Marrama* has no application to the facts before this court for two reasons. First, the debtor in *Marrama*, misrepresented the value of real property in his bankruptcy schedules and then attempted to convert chapters. In the present case, there has been no finding of misrepresentation or legal maneuvering on the Respondents' part of any kind. (Appx. p. 4-8). The income at issue in this case was clearly listed in the schedules from the first day the Respondents' filed their bankruptcy case. Second, *Marrama* dealt exclusively with bankruptcy

code provisions concerning conversion between chapters under the federal bankruptcy code that did not involve state law. Id.

The first sentence of § 105(a) reads "[t]he court may issue any order, process, or judgment that is necessary or appropriate ***to carry out the provisions of this title***." Id. (Emphasis added). The Petitioner has argued that this language signals support for the surcharge doctrine. However, Congress granted the states the power to enact its own list of exemptions outside of the bankruptcy code in § 522. Under *Okla. Stat.* 31 § 1, property a debtor may exempt in bankruptcy is detailed and authorized pursuant to the bankruptcy code via § 522(b)(1)(2)(A)(B).

As *Scrivner II* indicates, § 105(a) does not grant the bankruptcy court an "*inherent power*" to alter or override a debtors' federal or state exemptions as specified in § 522. The plain language of § 105(a) is limited to the bankruptcy code provisions, and does not include specific or "*inherent powers*" to override state law. Congress meant for the courts to carry out the plain language of the code under §§ 522 *et seq.* and any exceptions to the exemption provisions are clearly written out in that section.

The Petitioner's case *In re Karl*, 313 B.R. 827 (Bankr. W.D. Mo. 2004) was used as a companion to *Latman* as support for the bankruptcy court's surcharge order in this case. (Appx. p. 6). The Petitioner points out that *Karl*: "invoked the court's inherent power to sanction contempt" and quotes from this

passage as support for the surcharge doctrine. Id. at 831. (Writ. p. 12, para. 1, line 1). (Writ. p. 13-14, para. 1). The facts in *Karl* bear no resemblance to the facts in the case before this court. *Karl* begins its opinion with a mixed discussion on the court's *"inherent powers"* to sanction conduct in relation to civil contempt under § 105(a) which is another legal concept the courts have used to justify the logic of surcharge:

> Based on § 105 of the Bankruptcy Code, [citation omitted] a bankruptcy court has the inherent power to sanction contumacious conduct and to impose civil contempt sanctions. 11 U.S.C. § 105(a) ("The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."); *Mountain America Credit Union v. Skinner (In re Skinner),* 917 F.2d 444, 447 (10th Cir.1990) (***"While bankruptcy courts do not have inherent civil contempt power . . . we conclude that Congress has granted them civil contempt power by statute."***). . . . Id. at 830.

The complete quote from *Skinner* reads:

> **Like the Fourth Circuit, "[w]e see no reason to read into th[e] language [of section 105(a)] anything other than its plain meaning that a court of bankruptcy has authority to issue any order necessary or appropriate to carry out the provisions of the bankruptcy code."** *Burd v. Walters (In re Walters)*, 868 F.2d 665, 669 (4th Cir.1989). An order like that entered

> by the bankruptcy court below, which compensates a debtor for injuries suffered as a result of a creditor's violation of the automatic stay, is both necessary and appropriate to carry out the provisions of the bankruptcy code and to enforce or implement a previous court order. **When statutory language is not ambiguous, it is controlling.** See *Roberts v. United States* (*In re Roberts*), 906 F.2d 1440, 1442 (10th Cir.1990); *Miller v. Commissioner*, 836 F.2d 1274, 1280-85 (10th Cir.1988). **While we are mindful of the opinion of the Ninth Circuit *In re Sequoia Auto Brokers, Ltd.*, 827 F.2d at 1289-90, that civil contempt powers [sic] should not be implied from section 105(a), based on the legislative history of the bankruptcy statutes, we disagree that the language of section 105(a) is ambiguous, and, therefore, we do not think the Ninth Circuit's reasoning is sufficient to overcome the plain language of the section. *In re Walters*, 868 F.2d at 669.** Id. at 447.

*Skinner* reinforces *Scrivner II* in its adoption of the plain language of § 105(a). In *Karl*, the court appears in a large degree to have abandoned the "*inherent powers*" under § 105(a) in favor of a compromise between a surcharge based upon *Latman* and the set-off principals in the case *In re Ward*, 210 B.R. 531, 537-38 (Bankr. E.D. Va. 1997). The *Karl* court said:

> When a debtor's contemptuous conduct involves the suppression of estate property, or when a debtor fails to adequately explain its loss, a court may surcharge the debtor's exemptions in an effort to prevent a fraud on the bankruptcy court and to protect creditors by preventing the debtor from sheltering more assets than permitted by the Bankruptcy Code. Latman v. Burdette, 366 F.3d 774, 784-85 (9th Cir.2004). In re Ward, 210 B.R. 531, 537-38 (Bankr.E.D.Va.1997) (allowing the trustee to "setoff" funds owing to the debtor from exempt property of the estate with property of the estate that the debtor was wrongfully retaining). **Whether deemed a "surcharge" or a "setoff" the purpose is not to "punish" the debtor, but to reach an equitable result by preserving the spirit of the Bankruptcy Code and the creditors' reasonable expectations in the event of liquidation.** Id. at 831.

The quote "*surcharge*" or a "*setoff*" from *Karl* shows the struggle the court was encountering in explaining what doctrine it was actually applying. What makes *Karl* even more difficult to understand is the court's insistence that surcharge of exempt assets was not a punishment to the debtor. Whether acknowledging it or not, the reality is that exacting a surcharge against statutorily protected exempt property is a penalty. Id. at 831. The debtors lose their federal and state rights which is a penalty and the physical property that is removed from their

possession. It appears in the end the *Karl* court could not decide and settled for the "*spirit of the [b]ankruptcy [c]ode*" and "*reasonable expectations*" as the final justification for its decision. Id. at 831. *Scrivner II* probably expresses the most clear and concise view on "*inherent powers*" attributed to § 105(a) and its effect on § 522:

> [W]e are not at liberty "to grant any more or less than what the clear language of [the Bankruptcy Code] mandates." In re Alderete, 412 F.3d at 1207 (quotation omitted). The Code contains specific provisions governing exemptions. See 11 U.S.C. § 522 . . . Furthermore, the Code contains a limited number of exceptions to the rule that exempted property cannot be used to satisfy prepetition debts or administrative expenses. See § 522(c), (k). These enumerated exceptions do not include a surcharge of exempt property for failure to turn over estate property. Because the Code contains explicit exceptions to the general rule placing exempt property beyond the reach of the estate, we may not read additional exceptions into the statute. See TRW, Inc. v. Andrews, 534 U.S. 19, 28 (2001) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." (quotation omitted)); see also In re Sadkin, 36 F.3d 473, 478 (5th Cir. 1994) ***("Section 105(a) does not allow the bankruptcy court to override explicit mandates of other sections of the***

***Bankruptcy Code. (quotation omitted))***. (Writ. Appx. p. 9). (Emphasis added).

## II

## WHETHER *SCRIVNER II* WAS CORRECT TO REVERSE THE SURCHARGE ORDER WHERE THERE WERE NO FINDINGS THAT THE RESPONDENTS COMMITTED FRAUD OR OTHER BAD CONDUCT

The Petitioner misstates to this court that the: "Respondents defrauded the bankruptcy estate of $17,424.75 in Cheaters dividends. . . ." (See Writ. p. 4, para. 1, line 1). There is no language in the surcharge order on appeal where the bankruptcy court found that the Respondents committed fraud. (Appx. p. 6-8). The Petitioner's statement is true for the most part that: "[o]ver $13,000.00 . . . was received *after* Respondents received notice of Petitioner's Motion for Turnover. . . ." (Writ. p. 4, para. 1, line 1). However, the bankruptcy court did not issue an order to turnover the income until June 1, 2006. (Appx. p. 4-5). Even then, the turnover order did not specify a calendar date or deadline for the Cheaters income to be turned over to the estate. (Appx. p. 4-5). The Petitioner admits that in June of 2006 he began intercepting Cheaters income and has been receiving it ever since. (See Writ. p. 4, para. 1, line 2-3). Therefore, because the turnover order was issued June 1, 2006 and was not specific, and the Petitioner's interception of the income began in the same month, no serious argument can be made that the Respondents

defrauded the estate or knowingly withheld funds while a court order was in place.

The Petitioner did not bring to this court's attention that he failed to timely notify the Respondents the estate wanted the Cheaters income. From the time the Respondents' bankruptcy petition was filed on October 14, 2005 through March 29, 2006, the Petitioner was aware or had a duty to know, the Respondents were receiving money on a monthly basis from Cheaters L.L.C. At the time the motion for turnover was filed March 29, 2006, the Petitioner knew or should have known by looking at the schedule of income that the Respondents' only source of income for several months was derived exclusively from Cheaters L.L.C.

The Petitioner has never specifically accounted for his silence during the crucial months between October 2005 and March of 2006. From the Petitioner's silence the Respondents were led to believe that the estate had no interest in the Cheaters income. The Petitioner has not admitted it, but the lack of early notice is the focal point that allowed the Cheaters income to accumulate over time. The bankruptcy court at no time has inquired into the Petitioner's lack of due diligence. However, the Honorable Judge Clark from the dissent of the Appellate Panel did question this particular point when he said:

> ***Certainly, fault lies with the Debtors, but to the extent that the Trustee contributed to this problem, the Trustee***

> ***should contribute to the solution – with cash.*** [citation omitted] ***It seems rather disingenuous for the Trustee to seek an "equitable" remedy from the court, given the facts of this case and the apparent failings by the Trustee.*** (Writ. Appx. p. 40, para. 1, line 3).[2] (Emphasis added).

Perhaps the most unbelievable part of this case is that Petitioner has sought refuge with this court knowing his own inaction is the single most important factor in creating the backlog of income that he claims is owed to the estate. If it were not for *Scrivner II* the proceeds of the Respondents' exempt assets would have gone to compensate the estate for the Petitioner's own errors. The Petitioner appears before this court with "*unclean hands*" in the apparent hope that his own shortcomings in administering the bankruptcy case will go unnoticed or better yet, be condoned by this court.

---

[2] Footnotes 6 and 7 supporting the above passages by the Honorable Judge Clark reads: (Footnote 6) "***Nowhere in the Trustee's Motion for Turnover, and nowhere in the Trustee's Motion for Surcharge, does the Trustee allege that he made any demand that the Debtors turnover the income stream prior to the March, 2006 Turnover Motion.*** (Footnote 7). ***Pursuant to Bankruptcy Rule 2010, all trustees must carry a bond conditioned upon the faithful performance of the trustee's official duties.***" Id. at 5.

## III

## WHETHER *SCRIVNER II* WAS CORRECT TO FOLLOW THE PLAIN LANGUAGE OF THE CODE IN REVERSING THE SURCHARGE ORDER

The Petitioner presents various arguments in his brief to this court to support the surcharge doctrine from *In re Mazon*, 368 B.R. 906 (Bankr. M.D. Fla. 2007) (*Hereinafter "Mazon I"*). (Writ. p. 14, para. 1). The facts in *Mazon I* have no similarity to the present case. The trustee in *Mazon I* found unscheduled assets while the income in the surcharge order in the present case was disclosed from the beginning of the case. (Writ. p. 14, para. 2).

*In re Mazon*, ___ B.R. ___, 2008 WL 4234240 (M.D. Fla. 2008) (*Hereinafter "Mazon II"*) the District Court for the Middle District of Florida reversed the surcharge order in *Mazon I* under a well reasoned opinion. The Court in *Mazon II* compared *Latman v. Burdette,* 366 F.3d 774 (9th Cir. 2004) with *Scrivner II* and said:

> "The two federal appellate decisions concerning whether Section 105(a) allows a bankruptcy court to impose a surcharge on exempt assets have reached opposite results. In *Latman v. Burdette*, 366 F.3d 774, 785 (9th Cir. 2004), the debtors failed to list all their assets and then gave inaccurate accountings of the assets' proceeds. The Trustee obtained an order of surcharge on exempt assets in the amount of the unaccounted for

proceeds of these undisclosed assets. While recognizing that the Bankruptcy Code did not explicitly provide for a remedy of surcharge against exempt property in a case of under-reported assets, the Ninth Circuit upheld the surcharge under the bankruptcy court's equitable powers, stating: "The surcharge remedy fashioned by the bankruptcy judge prevented what would otherwise have been a fraud on the bankruptcy court and the Latmans' creditors caused by the Latmans' nondisclosure of monies that should have been listed on the bankruptcy schedules and available for the Latmans' creditors." *Latman*, 366 F.3d at 785.

The Court held "that the bankruptcy court may equitably surcharge a debtor's statutory exemptions when reasonably necessary both to protect the integrity of the bankruptcy process and to ensure that a debtor exempts an amount no greater than what is permitted by the exemption scheme of the Bankruptcy Code." *Id.* at 786.

More recently, *In re Scrivner*, 535 F.3d 1258 (10th Cir. 2008), found that a bankruptcy court could not impose a surcharge on exempt property. The Court stated that the bankruptcy court's equitable powers were codified in § 105(a); that these equitable powers may not be exercised in a manner inconsistent with the other, more specific provisions of the Bankruptcy Code; that a bankruptcy court's exercise of authority under § 105(a) may not grant any more or any

less than what the plain language of the Bankruptcy Code mandates; and that because the Bankruptcy Code contains explicit exceptions to the general rule placing exempt property beyond the reach of the bankruptcy estate, and contains specific remedies other than a surcharge for a debtor's failure to turn over estate property to the trustee, a bankruptcy court may not read additional exceptions or remedies into the statute. The Court held that "because the surcharge of exempt property is inconsistent with the Code's provisions governing exemptions and debtor misconduct, it is beyond the scope of a bankruptcy court's equitable authority under § 105(a). Section 105(a) does not empower courts to create remedies and rights in derogation of the Bankruptcy Code and Rules." Id. at 1258 (citations omitted).

The Court concludes that *Scrivner II* sets forth the correct approach. Like *Scrivner II*, the Eleventh Circuit has held that a bankruptcy court's equitable powers under § 105(a) do not allow it to override a specific provision of the Bankruptcy Code, and do not allow it to grant any more or any less than what the clear language of the Bankruptcy Code would mandate. *In re Cox*, 338 F.3d 1238, 1243 (11th Cir. 2003), *cert. denied*, 541 U.S. 991 (2004). Rather, § 105(a) authorizes orders only as long as it is "necessary or appropriate to carry out the provisions of" the Bankruptcy Code. *Hardy*, 97 F.3d at 1389. The Eleventh Circuit has held that once the property is removed from the bankruptcy

> estate through exemption, the debtor may use it as his own, free of the administration of the bankruptcy trustee. *Gamble*, 168 F.3d at 444; *Sinnreich*, 391 F.3d at 1296-97.
>
> An order returning such exempt property to the administration of the trustee is not one which carries out the express provisions of the Bankruptcy Code. Additionally, as *Scrivner II* noted, the Bankruptcy Code contains express exceptions to the rule that exempted property cannot be used to satisfy pre-petition debts or administrative expenses, and therefore a court may not read additional exceptions such as a surcharge into the statute. *E.g., TRW, Inc. v. Andrews*, 534 U.S. 19, 28 (2001) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." (citation omitted)). Scrivner is also correct that the Bankruptcy Code contains specific remedies for a debtors bankruptcy misconduct. Indeed, in this case the Bankruptcy Court, after entry of the Memorandum Decision in this case, entered an Order Revoking Discharge of Debtors (Doc. #217) [*Scrivner II*]. ***While the remedies may be viewed as inadequate, that is a matter for Congress and not the court.*** Id. at 10-11.

The Petitioner's discussion of *Mazon I* in his brief to this court cannot be reconciled with the sound opinion in *Mazon II.* Id. (Writ. p. 14-16). This is also true for the most part in the Petitioner's criticisms of

the opinion in *Scrivner II,* because there is no statutory language in the bankruptcy code to support surcharge. (Writ. p. 17-20). Both the bankruptcy court and the court in *Scrivner I* apparently lacked an understanding of the express written intent of Congress to reserve certain property as part of a "*fresh start.*" The court in *Scrivner II* is apparently in a minority because it understands the plain language of what Congress meant in the code concerning exemptions and the "*fresh start*" policy.

## IV

## WHETHER THE COURT IN *SCRIVNER II* HAD ANY BASIS TO REVERSE THE SURCHARGE ORDER OF THE BANKRUPTCY COURT AND THE COURT IN *SCRIVNER I*

The Petitioner cites to *In re Onubah*, 375 B.R. 549 (9th Cir. 2007) as "specifically approving of the surcharge rulings in *Latman*, *Karl* and *Scrivner I.*" (See Writ. p. 21, para. 1, line 1). *Onubah*, probably takes second place behind the case before the bar as the most egregious demonstration of how the surcharge doctrine has been shaped to override the plain language of the bankruptcy code. What is most notable about *Onubah* is that you can actually see the progression of the courts reasoning as they have tried to "*shoe horn*" surcharge into the statutory exemption provisions of the bankruptcy code.

Nowhere in *Onubah* did the court cite to § 105(a) or "*inherent powers*" to justify its authority to surcharge exempt assets. Id. The *Onubah* court acknowledged its previous decision and reasoning from *Latman* and interpreted the opinion as resting on new grounds:

> A surcharge of a debtor's exemptions is appropriate only in "exceptional circumstances." *Latman,* 366 F.3d at 786. Exceptional circumstances are present when a debtor engages in inequitable conduct that, when left unchallenged, denies "creditors access to property in excess of that which is properly exempted under the Bankruptcy Code. *Latman,* 366 F.3d at 786." Id. at 553.

*Onubah* failed to cite any statutory authority established from *Latman,* under § 704 that would allow the trustee or the court jurisdiction in "*exceptional circumstances*" to surcharge exempt assets. Id. Instead, the *Onubah* court appears to have broke with all previous cases by inferring § 544(a) as a source equitable power the courts can enforce on behalf of the trustee to surcharge exempt assets:

> Section 544(a) gives the bankruptcy trustee the rights and powers of certain creditors, including a creditor whose claim is secured by a judicial lien, to avoid transfers of property of the debtor under applicable nonbankruptcy law. **However, section 544(a) does not limit the trustee's other rights and powers, including the right to seek equitable remedies, like surcharge, to**

> **prevent a debtor from violating the integrity of the bankruptcy process.** Id. at 557. (Emphasis added).

According to another statement by the *Onubah* court, the trustee has two remedies when property is not surrendered to the estate; denial of discharge under 11 U.S.C. § 727(a) or surcharge:

> When a chapter 7 debtor fails to turn over property of the estate to the trustee, the trustee generally has two tools to deal with the problem. First, the trustee may seek a denial of the debtor's discharge pursuant to 11 U.S.C. § 727(a). However, even when successful, the denial of a debtor's discharge will not compensate the estate for the additional costs incurred to recover property of the estate from an uncooperative debtor. ***This is one reason trustees have been given resort to a second remedy, the surcharge of the debtor's exemptions.*** Id. at 557.

The *Onubah* court appears to believe that Congress failed under § 727(a) to provide an adequate remedy for all situations and needed the court to judicially legislate an alternative solution. Therefore, it appears the *Onubah* court took it upon itself to create the "*second remedy*" doctrine in conjunction with § 727(a). Apparently, the theory behind this doctrine is when the court determines the estate may lose money by enforcing the statutory remedy under § 727(a) of denial or revocation of a discharge, then it is appropriate to surcharge exempt assets under the new "*second remedy*" doctrine.

There are three problems with *Onubah* court's overall reasoning and reading of the bankruptcy code in the creation of "*second remedy*" doctrine. First, under the plain reading of § 727(a) and § 544(a) neither provision specifically authorizes the surcharge of exempt assets. Second, the court failed to identify either the legislative or judicial branches of government it was referencing that gives the trustee the right to seek any "*second remedy*" under §§ 727 *et seq.* Apparently, the *Onubah* court also believed that the courts should have a choice to follow the code under § 727(a) or abandon it whenever there is an equitable reason. Third, and perhaps the most alarming is that *Onubah,* just like the *Latman* court, is apparently attempting to be an activist court in judicially legislating solutions to problems that the bankruptcy code has already addressed.

Congress mandates that bad conduct is dealt with by denying or revoking a debtor's discharge. In this manner the debtor receives a penalty of receiving no assistance from the courts to prevent liquidation of non-exempt assets by their creditors. The bankruptcy code has operated efficiently for decades in the courts and it appears Congress has felt no great need to codify additional remedies like surcharge.

*Onubah* is useful in pointing out the unique evolutionary process the surcharge doctrine has undergone in the Ninth Circuit since the *Latman* case was decided. In review, it appears the surcharge doctrine began as common law equity doctrine with the lower court case *Latman.* The Ninth Circuit

*Latman* used a combination of non-code reasoning from § 704 in conjunction with its own "*exceptional circumstances*" doctrine to enact the surcharge doctrine. Later in *Onubah*, the Ninth Circuit used the surcharge and exceptional circumstances doctrines in conjunction with new reasoning associated with § 544(a) to recreate surcharge doctrine as an optional "*second remedy*" to § 727(a).

Unfortunately, the court in the Petitioner's case *In re Price*, 384 B.R. 407 (Bankr. E.D. Va. 2008) only read *Scrivner I* and did not get the benefit of the opinion in *Scrivner II*. Tragically, the *Price* court also missed receiving the well reasoned opinion in *Mazon II*. Because of these deficiencies and the fact the circumstances in *Onubah* are very different from the case at the bar, *Price* has no present value. Id.

However, *Price* is a unique portal to see the course of future decisions on exemptions in the bankruptcy courts without the opinions of *Mazon II* and *Scrivner II*. *Price* also points out how the courts have quickly embraced *Latman* and the surcharge doctrine over the plain language of the code. *Price* is also an example of how each succeeding court is using the surcharge doctrine to instruct the next court on ways to circumvent the exemption laws under the bankruptcy code. Congress would no doubt be alarmed to find out how the bankruptcy courts have been taking the lead in writing new law for the bankruptcy code. This is why *Scrivner II* is an important decision that must remain standing.

## V

## WHETHER *SCRIVNER II* MISREAD THE BANKRUPTCY CODE TO EXCLUDE THE SURCHARGE DOCTRINE

The Petitioner infers that since the opinions in *Mazon II* and *Scrivner II* are in a minority then logically they must be in error. (Writ. p. 23). The Petitioner also states that *Scrivner II* "misread the provisions of the Bankruptcy Code upon which its opinion is grounded and *Mazon II* builds its ruling upon. . . . *[Scrivner II]*. . . ." (Writ. p. 23). The court in *Scrivner II* read the plain meaning of the words in code which say nothing about the court's ability to override federal and state statutory exemptions. The actual problem is the Ninth Circuit, along with other lower courts, have misread the plain language of the bankruptcy code and created powers that the courts do not have to override statutory exemptions.

The Petitioner's quotes from *Scrivner II* alleging the court veered off course is inaccurate when it actually was on the right road under the plain meaning rule:

> [W]e are not at liberty "to grant any more or less than what the clear language of [the Bankruptcy Code] mandates." *In re Alderete*, 412 F.3d at 1207 (quotation omitted). The Code contains specific provisions governing exemptions. *See* 11 U.S.C. § 522. Generally, if the debtor claims property as exempt and "a party in interest" does not object, that property is exempt from property of the estate.

> *See* § 522(*l*); *see also* Fed. R. Bankr. P. 4003. . . . (Writ. Appx. p. 9).

Apparently, the Petitioner also argues that *Scrivner II* misread the exclusions in §§ 522 *et seq.* which provide for "the enumerated exceptions have no application to the liability of otherwise exempt property for debts arising after the commencement of the case. . . ." (Writ. p. 25). The Petitioner adds: "[i]t is undisputed that the debt owed to the estate by Respondents is a post-petition debt for post-petition distributions from Cheaters. . . ." (Writ. p. 26). Basically, the Petitioner's final argument appears to be the general idea that § 522(c) & (k) are not a post-petition bar or to the enforcement of a trustee's right to recover property. Therefore, if § 522 does not specifically say there is a bar to post-petition actions, then it must be inferred trustees are not prohibited from surcharging exempt assets. The problem with these arguments is that they originate from silence under § 522 and require an inference Congress did not intend for the courts to make.

As evidence that silence is the wrong approach, Congress provided yet another section dealing with bad conduct under the heading of "*exceptions to discharge*" § 523. Under § 523, there is a comprehensive list of infractions where a debtor may keep the bulk of their discharge after negative conduct has been discovered. For example, § 523(a)(6) reads: "(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt; (6) for willful and malicious

injury by the debtor to another entity or to the property of another entity. . . ."

If Congress wanted to surcharge a debtor's exempt assets for bad conduct, it would have at least inserted a section declaring such debt non-dischargable under § 523. Nowhere in § 523 do the words "exempt property," "surcharge," "equity," or "non-exempt property" appear. Section 727 uses the same style as § 523 in laying out specific circumstances in detail where the courts are authorized to deny or revoke a general discharge.

These bankruptcy statutes § 727, § 523 and § 522 have operated effectively for decades in the regulation of a debtor's conduct under the plain language encompassed in each section. The code, for the most part, has operated as Congress intended in apportioning the right amount of punishment according to the facts. Losing exemptions is not part of the Congressional scheme under the bankruptcy code. Therefore, *Scrivner II* was correct to resort to the plain language of § 522 and limit its exceptions to sections (c) & (k).

The Petitioner states that "the case at the bar is a glaring example of the inadequacy of non-surcharge remedies to make the estate whole." (Writ. p. 27 para. 2, line 1). Until Congress comes to the Petitioner's conclusion, *Scrivner II* was correct to reject the surcharge doctrine under the plain language rule. It is not the task of a trustee or the bankruptcy courts outside the walls of Congress to rewrite the code to fit their own subjective expectations. However, it is the

duty of a trustee and the bankruptcy court to carry out the plain language of the current law as written and enacted by Congress.

*Latman* was decided well before the Bankruptcy Abuse and Consumer Protection Act of 2005 became effective on October 17, 2005. It is reasonable to assume Congress was aware of the surcharge doctrine when it passed the legislation. In addition, Congress has had over four years since *Latman* to amend the code to include surcharge as a statutory remedy.

The Petitioner states: "[c]ontrary to the argument of the Tenth Circuit, dismissal of a bankruptcy case is often the very thing a debtor wants most when faced with the realization that there are significant assets that are going to be administered by the trustee." (Writ. p. 17, para. 1, line 12). Dismissal is the greatest concern of a Debtor. There will always be those limited cases where a debtor attempts to abuse the bankruptcy code. And, it makes sense that the trustee's comments concerning "dismissal" (which seldom takes place) may be what he is referring to.

However, the reality is individuals who file bankruptcy do so for the purpose of preventing their creditors from garnishing wages or foreclosing on their home. Experience teaches that two major causes of bankruptcy are medical bills or divorce. Debtors enter bankruptcy with their counsel informing them they will be able to make a "*fresh start*" and retain

certain assets after their discharge as guaranteed under the federal or state exemption statutes.

Once a discharge is revoked or denied, the Debtor's creditors are free to exercise whatever legal remedies are available to them in state courts. The normal debtor realizes if they lose their discharge, they will likely suffer the loss of everything they possess except for their exempt personal property. This is the reason the bankruptcy laws exist to provide parameters and an orderly process of liquidation or reorganization that is fair to both the debtors and creditors alike. Therefore, contrary to the Petitioner's and court's reasoning, it is not in a debtor's best interest to have their bankruptcy case dismissed or have their exempt property surcharged.

## CONCLUSION

The disagreement among the two circuits concerning the surcharge doctrine is not great enough for this Court to examine the present case. Should this Court deny certiorari it would probably be enough signal to the courts as a whole to follow *Scrivner II* and *Mazon II*. For all foregoing reasons, the Respondents move to deny the Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

MARK W. HAYES OBA #17810
426 N.W. 9th
Oklahoma City, Oklahoma 73102
Telephone (405) 236-0163
Fax (405) 236-0165
*Attorney for Respondents*