United States Bankruptcy Court
Central District of California
21041 Burbank Boulevard
Woodland Hills, CA 91367

16-BK-F

GERALDINE MUND
United States Bankruptcy Judge

Telephone: (818) 587-2840

May 2, 2016

Honorable Sandra Segal Ikuta
Chair, Advisory Committee on Bankruptcy Rules
United States Court of Appeals
Richard H. Chambers Court of Appeals Building
125 South Grand Avenue, Room 204
Pasadena, CA 91105-1621

Re: Certification of Direct Appeal (F.R.B.P. 8006(e))

Dear Judge Ikuta:

On December 30, 2015 I timely entered a Certification of Direct Appeal under FRBP 8006(e) and our clerk mailed it to the Ninth Circuit Court of Appeals and to the district court that same day. I did not receive a ruling and since the appeal had already been filed in the district court, I did not expect to hear. But a few weeks ago I checked the Ninth Circuit docket and also that of the district court and I could find no record of this certification. I then notified the district judge, who was totally unaware of it. This created the issue of whether he had jurisdiction to go forward with the appeal.

This week I contacted the Clerk of the Ninth Circuit Court of Appeals and she, in turn, had her Chief Deputy follow-up. She informed me that a party must file a petition with the court of appeals for permission to appeal. This appears to be the case under FRBP 8006(g), which requires that a party to the appeal must seek permission of the court of appeals for the direct appeal (F.R.App. 6(c), which does not remove the applicability of F.R.App. 5(a), (b)). Further, the request for permission must be filed within thirty dates after the bankruptcy judge files the certification.

Assuming that this is the correct interpretation of the rules, I urge the Committee to consider an amendment so that the only filing required is that of the bankruptcy judge. This is for several reasons:

(1) If there needs to be a party who is a petitioner and thus can stop the process of direct appeal merely by failing to file a permission, the concept of direct certification on the judge's own motion is superfluous since the party always

had the right to initiate the certification without the judge although the judge is involved in determining whether it will go forward to the court of appeals.

(2) The judge is the most familiar with the case and ruling in a dispassionate fashion and can best decide that a direct appeal will be beneficial to the process, the parties, and the courts which are involved.

(3) Unlike an interlocutory appeal in that the matter may be resolved by further action at the trial court level, if these are appeals from final orders, there is an appeal of right to the court of appeals. The issue here is whether it is useful to bypass the normal intermediate level appeal by giving the court of appeals sufficient information so that it can decide that there will be no benefit in that intermediate step.

(4) Requiring a party to serve as a petitioner when the court has certified a direct appeal only allows the parties to slow down the process and also to burden the lower appellate court when that is not needed – particularly when the issue is one of law and it is obvious that ultimately there will be an appeal to the court of appeals.

(5) If the appeal concerns a case of first impression, the several year delay on the intermediate appeal is harmful to the system.

I strongly urge the Committee to create a single-step process when it is the bankruptcy judge or the district judge who is certifying a direct appeal.

I attach my certification as an example of the type of matter that I believe should be placed before the court of appeals without the need for a party to seek permission to do so.

Thank you for considering this matter.

Very Truly Yours,

Geraldine Mund

cc. Rebecca Womeldorf
Scott Myers

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

SAN FERNANDO VALLEY DIVISION

In re: Avram Moshe Perry Debtor.	CHAPTER 7 Case No.: 1:09-bk-11476-GM Adv No: 1:10-ap-01043-GM **CERTIFICATION OF APPEAL ON COURT'S OWN MOTION** **Fed.R.Bank.P. 8006(e)**
Avram Moshe Perry Plaintiff, v. Chase Auto Finance, Does 1-100, JPMorgan Chase Bank, N.A., Key Auto Recovery Defendants.	

Avram Moshe Perry has filed numerous appeals and I have previously suggested that the appellate court(s) declare him to be a vexatious litigant. That matter is on appeal in the District Court of the Central District of California: 2:15-CV-07155-FMO.

However, there are two appeals currently pending that I believe are valid and should be certified to the Ninth Circuit Court of Appeals pursuant to Federal Rule of Bankruptcy Procedure 8006. These fall under 28 U.S.C. §158(d)(2)(A)(i) and §158(d)(2)(A)(iii).

Both matters arose in Perry v. Chase Auto Finance, et al., 1:10-AP-01043-GM. On November 13, 2015, I issued a memorandum and order granting the motion for summary judgment brought by Chase Auto Finance (dkt. 327, 328) and on December 14, 2015, I issued an order granting the motion for summary judgment brought by Key Auto Recovery (dkt. 338). Although the Key facts can separately support the summary judgment, I also based the determination on the law underlying the summary judgment as to Chase. The Chase ruling was appealed by Mr. Perry on November 30, 2015 (dkt. 333) and is now pending in the District Court as 2:15-CV-09440-JFW. The Key ruling was appealed on December 22, 2015 (dkt. 342) and is now pending in the District Court as 2:15-CV-09899-JFW.

The last day to file this certification as to the Chase ruling is the 30th day after November 30, 2015, being December 30, 2015. F.R.Bank. P. 8006(b). The Key ruling would be January 21, 2016.

Summary of the Issue:

Prior to the bankruptcy, Mr. Perry missed several car payments and Chase Auto Finance employed Key Auto Recovery to repossess the vehicle. The repossession was completed prior to the bankruptcy and the car was under the control of Chase at the time that Mr. Perry filed his bankruptcy case. Although he immediately demanded return of the car, Chase refused. Chase waited almost a month after receiving notice of the bankruptcy case before it filed its motion for relief from the automatic stay and then set the hearing on regular notice for another month in the future.

Mr. Perry filed this adversary proceeding, seeking damages for Chase's failure to turn over the car in a timely manner as a violation of both 11 U.S.C. §542(a) and 11 U.S.C. §362(a)(3). He also named Key as a defendant.

Chase Auto Finance brought its motion for summary judgment and I found that it is probable that Chase Auto Finance violated the automatic stay by its delay in turning over the vehicle to Mr. Perry or in seeking relief from stay to keep possession of the vehicle and then to sell it. However, I held that because Mr. Perry's interest in the vehicle was exempt, he lacks standing to pursue this matter under §542(a) and under §362(a)(3). Further, even if the Trustee had been a party, she would also have lacked standing. This led to the conclusion that a creditor who keeps possession of exempt property or otherwise violates 11 USC §362(a)(3) and/or §542(a) can do so with impunity and no one has recourse against that violation.

The Reason Why Certification is Appropriate:

The appeals turn on a matter of law as previously determined by the Ninth Circuit Bankruptcy Appellate Panel. While the ruling of the BAP seems to leave a window

open for the Debtor to move forward as to a violation of the automatic stay, when this is applied in conjunction with a prior ruling by the Ninth Circuit Court of Appeals in a different case, there is no remedy available to a Debtor for violation of the automatic stay as to property that he has claimed as exempt.

(1) As to 11 U.S.C. §542(a), some courts have held that a chapter 7 debtor cannot seek turnover while others have held that chapter 7 debtors do have standing to do so. The Ninth Circuit BAP denied standing in Collect Access v. Hernandez (In re Hernandez), 483 B.R. 713, 725 (B.A.P. 9th Cir. 2012). Thus, the Debtor, whether or not he has exempted the property, is barred from seeking turnover or damages for the failure to turn over the property.

(2) As to 11 U.S.C. §362(a)(3), Collect Access then holds that although a debtor has no standing to pursue a remedy under 11 U.S.C. §542(a) he does have standing under §362(a)(3). However, in Mwangi v. Wells Fargo Bank (In re Mwangi), 764 F.3d 1168, 1170-71 (9th Cir. 2014) the Ninth Circuit determined that a chapter 7 debtor is barred from seeking damages under 11 U.S.C. §362(a)(3) whether or not the property has been exempted (before exemption the property is property of the estate and the debtor has no right to possess it, and after exemption it is no longer property of the estate and §362(a)(3) no longer applies).

(3) Mwangi deals with a deposit account, which was exempt, but distinguished it from other types of property (such as a vehicle), in which the debtor's "interest" in the asset was exempt under state law. With only a "interest" exempted (although as here there is nothing remaining for the estate due to the value of the car), the Debtor has no right to possession or control of the vehicle and so he has no right to assert damages due to the violation of §362(a)(3).

(4) The practical effect of these holdings is that a Debtor has no remedy for violation of the automatic stay and creditors can act without liability if they hold onto tangible property that the trustee would never want to administer.

Beyond the need to clarify the apparent conflict between the holdings of the BAP and of the Ninth Circuit, it is a certainty that these appeals will eventually end up at the Ninth Circuit should the District Court affirm my rulings. Prior to August 24, 2015, Mr. Perry had filed 12 appeals to the Ninth Circuit (2 from the District Court, 8 from the BAP, and 2 from motions for rehearing or reconsideration). He has an appeal of right from any decision made by the District Court in these matters. Since the ruling is based on the interplay of a published decision by the BAP and one by the Ninth Circuit, it is appropriate that the Court of Appeals review this and an intermediate review by the District Court would cause unnecessary delay and an inefficient use of judicial resources.

Served herewith are the relevant orders and memorandum:

Memorandum and Order granting summary judgment to Chase Auto Finance (dkt. 327, 328).

Order granting summary judgment to Key Auto Recovery (dkt. 338).

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Date: December 30, 2015

Geraldine Mund
United States Bankruptcy Judge

PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is:

A true and correct copy of the foregoing document entitled (*specify*): Certification of Appeal on Court's Own Motion Fed.R.Bank.P. 8006(e)

will be served or was served **(a)** on the judge in chambers in the form and manner required by LBR 5005-2(d); and **(b)** in the manner stated below:

1. **TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF)**: Pursuant to controlling General Orders and LBR, the foregoing document will be served by the court via NEF and hyperlink to the document. On (*date*) _____, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following persons are on the Electronic Mail Notice List to receive NEF transmission at the email addresses stated below:

☐ Service information continued on attached page

2. **SERVED BY UNITED STATES MAIL**:
On (*date*) 12/30/2015, I served the following persons and/or entities at the last known addresses in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States mail, first class, postage prepaid, and addressed as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

☑ Service information continued on attached page

3. **SERVED BY PERSONAL DELIVERY, OVERNIGHT MAIL, FACSIMILE TRANSMISSION OR EMAIL** (state method for each person or entity served): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on (*date*) _____, I served the following persons and/or entities by personal delivery, overnight mail service, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that personal delivery on, or overnight mail to, the judge will be completed no later than 24 hours after the document is filed.

☐ Service information continued on attached page

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

12/30/2015 Liliana Fix
Date *Printed Name* *Signature*

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