

UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF MISSOURI
THOMAS F. EAGLETON U.S. COURTHOUSE
111 SOUTH TENTH STREET – SUITE 7.143
ST. LOUIS, MISSOURI 63102

KATHY A. SURRETT-STATES
CHIEF UNITED STATES BANKRUPTCY JUDGE

Voice (314) 244-4541
Fax (314) 244-4545

January 28, 2021

Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

Sent via email: RulesCommittee_Secretary@ao.uscourts.gov

Re: Comments on Official Bankruptcy Forms 101 and 309

Dear Committee Members:

I write to raise concern about collection of the Employer Identification Number (EIN) in paragraph 4 on Official Bankruptcy Form 101, Voluntary Petition for Individuals Filing for Bankruptcy (Voluntary Petition) and the potential for unintended consequences when the Judiciary collects this data.

Paragraph 4 on page 2 of the Voluntary Petition asks the debtors to provide:

	About Debtor 1:	About Debtor 2 (Spouse Only in a Joint Case):
4. Any business names and Employer Identification Numbers (EIN) you have used in the last 8 years Include trade names and doing business as names	<input type="checkbox"/> I have not used any business names or EINs.	<input type="checkbox"/> I have not used any business names or EINs.
	Business name	Business name
	Business name	Business name
	EIN	EIN
	EIN	EIN

The debtors can either mark a box that indicates the debtors have not used any business names or EINs or can enter the requisite information about the business names and EINs.

The issue is whether providing this information has any bearing on the bankruptcy case at hand. A conscientious debtor provides this information because it is asked of the debtor and because the debtor is signing the petition under penalty of perjury. The reality is that the business name and any associated EIN may or may not have a bearing upon the debtor's current bankruptcy case and may be entirely distinct legally from the debtor and the newly created debtor's bankruptcy estate.

I provide two examples where a debtor would provide the business name and EIN in Paragraph 4 on page 2 that would have no bearing on the debtor's newly filed case. In example 1, the business name and accompanying EIN may be for a thriving, operating business in which the debtor

previously held a co-ownership stake but who sold that ownership stake within the 8-year window before the debtor's bankruptcy filing, making the operating business legally and financially distinct from the debts of the debtor who is filing for bankruptcy protection in the instant case. In example 2, the business name and accompanying EIN may be from a now defunct business closed under state law protection within the 8-year window before the debtor's bankruptcy filing, again raising the issues of legal and financial distinction between individual and business debts. As required by the Voluntary Petition, the debtor would disclose the business name and associated EIN in both situations in the newly filed case, even though the action of doing so raises reputational and/or financial risk.

The Voluntary Petition contains no guidance to the reader to form an understanding of what Paragraph 4 means to the case filed by the debtor. The public who views the PDF of the Voluntary Petition has no idea whether the business name and associated EIN has any bearing on the newly filed bankruptcy case. For that reason, it is safe to assume that an individual reading the four corners of the document would conclude that this business name and associated EIN must have something to do with the newly filed bankruptcy case, regardless of the reality at hand. The reader may even consider the business named in Paragraph 4 as also having filed for bankruptcy protection. There is no language present in the Voluntary Petition to dispel such an assumption.

The natural flow of the debtor providing this data to the Court means the data is captured in the Case Management/Electronic Case Filing (CM/ECF) program. Fields in CM/ECF store both the debtor's Social Security Number (SSN) or Taxpayer Identification Number (TIN) and the EIN of the business names in Paragraph 4 on page 2. The data in these fields are used to populate the Official Bankruptcy Form 309 Notice of Bankruptcy Case (Notice of Case), often referred to as the §341 Meeting of Creditors Notice. That Notice of Case would indicate to a lay reader that the bankruptcy case encompasses all of these numbers, when in reality, the bankruptcy case may only legally involve the debtor's SSN or TIN. Including the EIN on the Notice of Case reinforces to the recipient of the Notice of Case a conclusion that business named in Paragraph 4 on page 2 has also filed for bankruptcy protection when it has not taken action to do so. Two examples of this situation are attached to this letter [Cases In re: Cunningham-Plaza and In re: Smith].

CM/ECF also captures the business names listed in Paragraph 4 on page 2 and stores them in fields for later retrieval, even if the debtor does not also list an EIN on the Voluntary Petition. In turn, these business names are included in the Notice of Case under the heading "**All other names used in the last 8 years**", as shown in the example below. By listing the business name on the Notice of Case, a reader can be misled into believing that this particular business has filed for bankruptcy protection when it has not done so. An example of this situation is attached to this letter [Case In re: Beattle-Benson].

About Debtor 1:	About Debtor 2:
1. Debtor's full name	
2. All other names used in the last 8 years	

Following entry into CM/ECF, this same data is then ported to the Public Access to Court Electronic Records (PACER) program. These same fields are accessible through PACER, meaning that a search in PACER solely using tax identification information, specifically by the EIN found in Paragraph 4 on page 2, will lead to two entries: (1) the bankruptcy case under the party name of the debtor; and (2) the bankruptcy case under the party name of the business name listed in Paragraph 4 on page 2. Two examples of this situation are attached to this letter [Cases In re: Cunningham-Plaza and In re: Smith]. Further, any entity that gathers data from PACER electronically will receive both the correct SSN or TIN for the debtor and also the EIN for the business name listed in Paragraph 4 on

page 2. For both situations, one can readily conclude that the business named in Paragraph 4 on page 2 has filed for bankruptcy protection when it has not taken action to do so. In light of the numerous individuals, researchers, and entities who gather data from PACER on bankruptcy cases, including credit reporting agencies, the unintended consequence of listing case entries in PACER consisting of the party names and EINs of businesses who have not filed for bankruptcy protection is both troubling and legally suspect.

While there may be justification for requesting this data from debtors and instances may exist where the information contained in Paragraph 4 on page 2 is pertinent to the case filed by the debtor, doing so as currently designed creates unintended consequences, many of which I have outlined in this letter. I suggest the Committee consider the following actions:

- (1) Add language or provide some form of context to the reader of Paragraph 4 of the Voluntary Petition, explaining that inclusion of the business names and EINs does not constitute a declaration of bankruptcy for these businesses/EINs nor constitute a part of the bankruptcy estate.
- (2) Eliminate from Official Bankruptcy Form 309 Notice of Bankruptcy Case lines for inclusion of the EINs for these businesses. Taking this action will mean that recipients of the Notice of Case are no longer misled into believing these businesses have filed for bankruptcy protection when they have not.
- (3) Eliminate from Official Bankruptcy Form 309 Notice of Bankruptcy Case, under the heading "**All other names used in the last 8 years**", inclusion of the business name found in Paragraph 4 of the Voluntary Petition.
- (4) Coordinate with the Electronic Public Access (EPA) Program to determine how to no longer create a record in PACER showing a bankruptcy case record under the party name listed in Paragraph 4 on page 2 of the Voluntary Petition and how to correct, if possible, the past instances where such erroneous records were created in PACER from the same fields in CM/ECF and the Voluntary Petition. I suggest the Committee coordinate with the EPA Program to determine the best way to inform entities who gather bankruptcy data that these particular EINs do not belong to businesses who have filed for bankruptcy protection per se.

I urge the Committee to examine the harm caused by the unintended consequences resulting from the collection and dissemination of this information and consider the suggestions I raise in this letter as ways to mitigate this harm. If you have any question or if I can be of further assistance, please do not hesitate to contact me at (314) 244-4541.

Sincerely,



Kathy A. Surratt-States

Cc sent via email:

Hon. Barry S. Schermer, Bankruptcy Judge, Eastern District of Missouri
Hon. Bonnie L. Clair, Bankruptcy Judge, Eastern District of Missouri
Hon. Sara Darrow, Chair, Committee on Administration of the Bankruptcy System

Hon. Audrey G. Fleissig, Chair, Committee on Court Administration and Case Management
Hon. Dennis Dow, Chair, Advisory Committee on Bankruptcy Rules
Dana C. McWay, Clerk of Court, Bankruptcy Court for the Eastern District of Missouri
Scott Myers, Attorney Advisor, Office of General Counsel – Rules Committee Staff
Bridget Healy, Attorney Advisor, Office of General Counsel – Rules Committee Staff
Julie Wilson, Counsel, Office of General Counsel – Rules Committee Staff

Enclosures

1. Case No. 20-42719 In Re: Theodisa Cunningham-Plaza Voluntary Petition and Schedules
2. Case No. 20-42719 In Re: Theodisa Cunningham-Plaza Official Form 309A Order and Notice of Chapter 7 Bankruptcy Case
3. Case No. 20-44558 In re: Robert Smith, Jr. Voluntary Petition and Schedules
4. Case No. 20-44558 In re: Robert Smith, Jr. Official Form 309A Order and Notice of Chapter 7 Bankruptcy Case
5. Case No. 19-46996 In re: Ebony Beattle-Benson Voluntary Petition
6. Case No. 19-46996 In re: Ebony Beattle-Benson Official Form 309I Order and Notice of Chapter 13 Bankruptcy Case
7. Case No. 20-42719 In Re: Theodisa Cunningham-Plaza Pacer Screen Shot
8. Case No. 20-44558 In re: Robert Smith, Jr. Pacer Screen Shot