

**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

In re ) Chapter 11  
)  
GIORDANO'S ENTERPRISES, INC., *et al.*, ) Case No. 11-06098  
) (Jointly Administered)  
Debtors. )  
) Hon. Eugene R. Wedoff  
)  
) **Hearing Date: June 28, 2011**  
) **Hearing Time: 9:30 a.m. Central time**

**NOTICE OF MOTION**

**PLEASE TAKE NOTICE** that on **Tuesday, June 28, 2011, at 9:30 a.m. Central time**, or as soon thereafter as counsel may be heard, we shall appear before the Honorable Eugene R. Wedoff, Room 744, United States Courthouse, 219 South Dearborn Street, Chicago, Illinois, or any other Judge sitting in his place or stead, and then and there present the **Trustee's Motion For Sanctions Against Marshall E. Home**, a copy of which is herewith served upon you.

Dated: June 8, 2011

PHILIP V. MARTINO, not individually,  
but solely as Chapter 11 Trustee  
for Giordano's Enterprises, Inc., *et al.*

By: /s/ Christopher Combest  
One of his Attorneys

Christopher Combest  
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**CERTIFICATE OF SERVICE**

I, Christopher Combest, an attorney, certify that, on the 8th day of June, 2011, I caused the foregoing **Trustee's Motion For Sanctions Against Marshall E. Home** to be served on the following party via UPS Next Day Air:

Marshall E. Home  
3051 W. Mexico Street  
Tucson, AZ 85746

I also caused a copy of referenced motion to be electronically via the Court's CM/ECF System and thereby to be served upon the parties listed below, to whom the System automatically delivered an electronic copy at the following electronic mail addresses:

- Thomas V Askounis taskounis@askounisdarcy.com, jburt@askounisdarcy.com
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/s/ Christopher Combest  
Christopher Combest

**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

|  |   |                                    |
|--|---|------------------------------------|
| In re  | ) | Chapter 11                         |
|  | ) |                                    |
| GIORDANO’S ENTERPRISES, INC., <i>et al.</i> , <sup>1</sup> | ) | Case No. 11-06098                  |
|  | ) | (Jointly Administered)             |
| Debtors.   | ) |                                    |
|  | ) | Hon. Eugene R. Wedoff              |
|  | ) |                                    |
|  | ) | <b>Hearing Date: June 28, 2011</b> |
|  | ) | <b>Hearing Time: 9:30 a.m.</b>     |

**TRUSTEE’S MOTION FOR SANCTIONS AGAINST MARSHALL E. HOME**

Philip V. Martino, the duly appointed and serving Chapter 11 trustee (“Trustee”) for the estates of the above-captioned debtors (collectively, the “Debtors”) hereby requests that the Court enter an Order sanctioning Marshall E. Home for the conduct described herein. In support, the Trustee states:

**JURISDICTION**

1. This Court has jurisdiction pursuant to 28 U.S.C. §§157 and 1334(a) and Internal Operating Procedure 15(a) of the United States District Court for the Northern District of Illinois.
2. Venue is proper in this district pursuant to 28 U.S.C. §§1408 and 1409.
3. This is a core proceeding pursuant to 28 U.S.C. §157(b)(2).

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<sup>1</sup> The Debtors in these cases are: Giordano’s Enterprises, Inc., Illinois Management Company, Inc., JBA Equipment Finance, Inc., Altamonte Partners, LLC, Giordano’s Franchise, Inc., Giordano’s of Florida, Inc., Giordano’s Restaurants, Inc., Giordano’s Famous Stuffed Pizza, Inc., Americana Foods, Inc., Pizza Pizazze, Inc., Giordano’s, LLC, Oakbrook Partners, LLC, Randolph Partners, LLC, Randolph Partners, LLC 20-24 Series, Randolph Partners, LLC – 327 Series, Randolph Partners, LLC – Lake Street Series, Randolph Partners, LLC – Formosa Series, Randolph Partners, LLC – Minooka Series, Randolph Partners, LP, Randolph Partners, LLC – 740 Series, Randolph Partners, LLC – 308 Series, Randolph Partners, LLC – Ogden Oswego Series, Randolph Partners, LLC – 1425 Series, Randolph Partners, LLC – Mount Prospect Series, Belmont Pizza, Inc., Rush Pizza, Inc., Greektown Pizza, Inc., Rosemont Pizza, Inc., Willowbrook Pizza, Inc., Randolph Partners, LLC – Sherberth Series, Randolph Partners, LLC – Oakbrook Partners Series, Randolph Partners, LLC – Cotton Lane Series, and Randolph Partners, LLC – Randall Orchard Series.

4. The bases for the relief requested herein are 11 U.S.C. §§105(a), 362(a), 362(k), and the Court's inherent power to sanction vexatious and bad-faith conduct and otherwise to regulate practice before it.

### **FACTUAL BACKGROUND**

5. On February 16 and 17, 2011 (the "Petition Dates"), Debtors filed voluntary petitions for relief under chapter 11 of the United States Bankruptcy Code, 11 U.S.C. §§101 *et seq.* (the "Code").

6. Pursuant to Code §§1107(a) and 1108, the Debtors initially operated their businesses and managed their financial affairs as debtors in possession.

7. On March 7, 2011, the United States Trustee appointed a committee of unsecured creditors (the "Committee").

8. On May 12, 2011, upon the motion of the United States Trustee, the Court appointed Philip V. Martino to be the Trustee for the Debtors, thereby taking the Debtors out of possession and placing their assets and businesses under the control of the Trustee.

9. Upon the Trustee's appointment, he learned that a man named Marshall E. Home ("Home") was planning to file or had filed a lawsuit in Arizona against the Trustee.

10. In response, counsel for the Trustee sent a letter dated May 16, 2011 (the "May 16 Letter"), to Home, informing him that no party may sue the Trustee without the prior permission of the Court, pursuant to *Barton v. Barbour*, 104 U.S. 126 (1881), and its progeny. A copy of the May 16 Letter is attached hereto as **Exhibit A**.

11. In fact, on May 12, 2011, the day the Trustee was appointed, Home and numerous other parties plaintiff (including John and Eva Apostolou, the principal equity holders of the Debtors) initiated an adversary proceeding by filing a complaint (the "Arizona Complaint") in

the United States Bankruptcy Court for the District of Arizona (the “Arizona Court”). The Arizona Complaint, a copy of which is attached hereto as **Exhibit B**, named as defendants, among many others:

- (a) the Trustee;
- (b) the United States Bankruptcy Court for the Northern District of Illinois, Eastern Division;
- (c) United States Bankruptcy Judge Eugene R. Wedoff (to whom the captioned cases are assigned);
- (d) United States Bankruptcy Judge John H. Squires (who entered the order appointing the Trustee in Judge Wedoff’s absence);
- (e) United States Bankruptcy Judge Eileen W. Hollowell of the Arizona Court;
- (f) Fifth Third Bank (Debtors’ prepetition senior secured lender and their postpetition lender); and
- (g) Quarles & Brady LLP (Trustee’s counsel).

12. The Arizona Complaint was filed within an involuntary chapter 11 case (Bankr. Case No. 11-06731) that had been commenced in March of 2011 by numerous purported petitioning creditors – including Home and the Apostolous – against, among many others, the United States federal government (styled “U.S. Corp.”) and the State of Arizona.

13. On May 18, 2011, the Arizona Bankruptcy Court dismissed that involuntary case and entered an order (the “Arizona Bar Order”) designating Home as a “vexatious litigant” because, among other reasons: (a) he and the other petitioning creditors had filed the involuntary case as a “device to harass their creditors” and (b) he had filed *173 proofs of claim* on his own

behalf or on behalf of other petitioning creditors, each alleging that the claimant was a secured creditor under the UCC with a claim in a large dollar amount, against a bank or a taxing authority that was involved in a collection action against the claimant, “in an effort to advance Home’s claims that he and the other [p]etitioning [c]reditors are the *creditors* of their creditors.” Arizona Bar Order at 5 (emphasis added). The Arizona Bar Order bars Home or any entity owned or controlled by him from filing any pleading in the Arizona Bankruptcy Court, other than an appeal of the order, unless he obtains prior authorization from the Court. A copy of the Arizona Bar Order is attached hereto as **Exhibit C**.

14. In response to the Trustee’s May 16 Letter, Home sent a letter (the “Response Letter”) to the Trustee’s counsel, stating that he is the “Secured Party Creditor” in the Debtors’ bankruptcy cases and that he has a lien against Giordano’s Enterprises, Inc., in the amount of \$150,000,000. The Response Letter also claims that the Trustee must “repair the damage to . . . [Home’s] property, Giordano’s Enterprises, Inc., that he has trespassed upon, by . . . send[ing] [him] without delay the insurance identity carriers and location of the bonds of everyone in this attempted grand larceny *so that [he] can file more than 100 claims* against their bonds with the US Trustee . . .” (emphasis added). A copy of the Response Letter is attached hereto as **Exhibit D**.

15. Home attached to his Response Letter a signed proof of claim (Claim No. 70, the “Home Claim”), dated May 13, 2011, asserting a secured claim against the Debtors in the amount of \$150,000,000 – more than three times the amount of the prepetition secured claim asserted by Debtors’ senior prepetition lender, Fifth Third. Attached to the Home Claim is a UCC-1 financing statement (the “UCC-1 Financing Statement”), naming Home as secured party, which purports to perfect security interests in the assets of all of the Debtors to secure Home’s

alleged \$150,000,000 claim. Home's UCC-1 Financing Statement is stamped as filed with the California Secretary of State on May 13, 2011. The Home Claim was signed by Home on that same date and was filed with Debtors' claims agent on May 16, 2011. A copy of the Home Claim is attached hereto as **Exhibit E**.<sup>2</sup>

16. The Home Claim is fraudulent. It neither references nor includes any documentation to show that Debtors owe an obligation in any amount to Home or that Debtors granted Home a security interest in any of their property. To the Trustee's knowledge, Home is not owed a debt from the Debtors nor was he ever granted a security interest in any of the Debtors' assets.

17. Nonetheless, in a letter dated June 1, 2011 (the "Fifth Third Letter"), Home informed counsel for Fifth Third that he was the holder of a "Priority, Prepaid UCC lien on the [Debtors'] business and owns the debt of Giordano's Enterprises, Inc. and all affiliates [*sic*] Companies . . . ." (Fifth Third Letter at 2.) In the Fifth Third Letter, Home offers to "settle" the captioned cases with Fifth Third in his purported capacity as the senior creditor of the Debtors. A copy of the Fifth Third Letter is attached hereto as **Exhibit G**.

### **LEGAL ARGUMENT**

#### **A. Home Violated the Automatic Stay**

18. The automatic stay prohibits "any act to create, perfect, or enforce any lien against property of the estate." Code §362(a)(4). *See also Redmond v. Fifth Third Bank*, 624 F.3d 793, 800 (7th Cir. 2010) (the automatic stay prohibits any act post-petition to convert an unsecured pre-petition claim into a secured claim or otherwise attempt to perfect a lien against property of the estate). Home violated the automatic stay by filing the UCC-1 Financing

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<sup>2</sup> On May 13, 2011, the Apostolous also filed a proof of claim (Claim No. 69) in Debtors' cases, asserting a secured claim of almost \$104 million; however, the Apostolous filed a notice of withdrawal of that claim on April 22, 2011 (Docket No. 200). Copies of Claim No. 69 and the notice of withdrawal are attached hereto as **Exhibit F**.

Statement with the California Secretary of State on May 13, 2011, three months after the Petition Date.

**B. The Court Should Impose Sanctions Against Home Under 11 U.S.C. § 362(k) for Willfully Violating the Automatic Stay.**

19. Bankruptcy Code §362(k) states that “an individual injured by any willful violation of a stay...shall recover actual damages, including costs and attorneys’ fees, and, in appropriate circumstances, may recover punitive damages.” Code §362(k). Courts have held that a case trustee is an “individual” for the purposes of recovering damages under Code §362(k). *See Martino v. First National Bank of Harvey (In the Matter of Garofalo’s Finer Foods, Inc.)*, 186 B.R. 414, 438-440 (N.D. Ill. 1995) (finding that to hold otherwise would “produce a result demonstrably at odds with Congress’ presumed intent”); *see also Budget Serv. Co. v. Better Homes of Va.*, 804 F.2d 289, 292 (4th Cir. 1986) (reading §362(k) in conjunction with the rest of §362 to determine that “it seems unlikely that Congress meant to give a remedy only to individual debtors . . . as opposed to debtors which are corporations or other like entities. Such a narrow construction would defeat much of the purpose of the section . . .”).

20. Further, a violation of the automatic stay is willful when a party acts with knowledge of the bankruptcy filing. *In re Betts*, 165 B.R. 233, 242 (Bankr. N.D. Ill. 1994). A willful violation of the stay does not require a specific intent to violate the stay, only that the creditor has notice of the stay and the creditor’s actions were intentional in and of themselves. *In re Welch*, 296 B.R. 170, 171 (Bankr. C.D. Ill. 2003).

21. Home had prior knowledge of the Debtors’ bankruptcy cases: the Arizona Complaint was filed on May 12, 2011 – the date the Trustee was appointed – naming the defendants described above on account of their roles in the Debtors’ bankruptcy cases; moreover,



because the UCC-1 Financing Statement was filed by Home on the same day he signed the Home Claim, the only reasonable inference is that the purpose of filing the UCC-1 Financing Statement was to support the fraudulent Home Claim.

**C. Alternatively, Sanctions Against Home are Warranted Under 11 U.S.C. §105 (a).**

22. Alternatively, the Court should grant sanctions against Home pursuant to its broad powers under 11 U.S.C. §105(a)<sup>3</sup> to implement the provisions of the Code and to prevent an abuse of bankruptcy process. *In re Volpert*, 110 F.3d 494, 500 (7th Cir. 1997); *see also Geraci v. Bryson (In re Bryson)*, 131 F.3d 601, 603 (7th Cir. 1997) (explaining that a bankruptcy court's authority to impose sanctions under §105(a) permits it to punish conduct that Rule 9011 cannot reach); *In re Rainbow Magazine, Inc.*, 77 F.3d 278, 283-85 (9th Cir. 1996) (§105 allows a bankruptcy court "to prevent an abuse of process" and to sanction bad faith or vexatious conduct that does not fall within the purview of Rule 9011 or 11 U.S.C. §1927). Sanctions are justified under §105(a) where the court finds that a litigant "intentionally abused the judicial process in an unreasonable and vexatious manner." *In re Rimstat*, 212 F.3d 1039, 1047 (7th Cir. 2000).

23. Sanctions are warranted here for several reasons. Home willfully violated the automatic stay by filing the UCC-1 Financing Statement. Home then used that false UCC-1 Financing Statement to buttress his fraudulent proof of claim in the amount of \$150,000,000. Finally, Home represented to the Debtors' most significant secured creditor that he also holds

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<sup>3</sup> Section 105(a) of the Bankruptcy Code provides:

The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, *sua sponte*, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

11 U.S.C. § 105(a).

claims secured by liens and, further, has authority to speak for the Debtors in matters related to these cases.

24. Home's actions should not be dismissed as the harmless antics of an impotent crank. They are potentially much more dangerous to the Debtors' estates than his scores of pointless filings in the Arizona Bankruptcy Court. The UCC-1 Financing Statement confuses the state of the title to Debtors' assets and corrupts the UCC-1 notice-filing system upon which creditors, debtors, and potential purchasers of these Debtors' assets all depend. The Home Claim fraudulently inflates the apparent liabilities of the Debtors and damages the integrity of the claims register and the Court's docket in these cases. Home's actions interfere with the Trustee's administration of the estate, forcing the Trustee and other parties in interest to spend time and money clarifying the confusion created by Home, including by requiring the Trustee to explain Home's actions to interested bidders and the media. Accordingly, it is appropriate for the Court to impose the sanctions requested below on Home, pursuant to 11 U.S.C. §105(a) and the Court's inherent powers.

WHEREFORE, Philip V. Martino, as Chapter 11 Trustee, asks the Court to enter an order imposing sanctions upon Home by: (A) imposing upon Home monetary sanctions in, at minimum, the costs incurred by the Debtors' estates in preparing and prosecuting this Motion, along with such punitive damages as the Court deems appropriate; (B) holding Home in contempt of court for violating the automatic stay by filing the UCC-1 Financing Statement and for filing the fraudulent Home Claim; (C) provided that Home may purge the contempt by

withdrawing the Home Claim and UCC-1 Financing Statement, and (D) granting the Trustee such other and further relief as the Court deems appropriate.

Dated: June 8, 2011

PHILIP V. MARTINO, not individually,  
but solely as Chapter 11 Trustee  
for Giordano's Enterprises, Inc., *et al.*

By: /s/ Christopher Combest  
One of his Attorneys

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