ETHICS AND ETIQUETTE IN THE COURTS:
A VIEW FROM THE BENCH

Presented by: U.S. Bankruptcy Judge Lisa G. Beckerman
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I. ABA MODEL RULES REGARDING ETHICS & ETIQUETTE

While attorneys take much of their behavioral mandates from the American Bar Association Model Rules, there are rules which specifically address ethics in the courtroom. A preliminary discussion about the ABA Model Rules on Ethics will include these Model Rules.

ABA Model Rule 3.1Meritorious Claims and Contentions
A lawyer cannot bring or defend a case unless there is a basis in law and fact that is not frivolous.

ABA Model Rule 8.2 Judicial & Legal Officials
A lawyer cannot make a statement that is false or reckless about the qualifications or integrity of a judge, public legal officer, or candidate for judicial office.

ABA Model Rule 3.3 Being Truthful in Court
A lawyer should not put a witness on the stand if they know the witness will lie. If a witness starts lying on the stand, the lawyer should try to get them to backtrack or tell the judge.

II. BANKRUPTCY CODE AND BANKRUPTCY RULES PERTINENT SECTIONS

11 USC §105 Power of court: 11 U.S.C. §105(a) grants broad equitable power to the court and states: 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 USC §362 Automatic Stay: 11 U.S.C. §362(a) states: **(a)**Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1940, operates as a stay, applicable to all entities, of—
(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;
(4) any act to create, perfect, or enforce any lien against property of the estate;
(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;
(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;
(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and
(8) the commencement or continuation of a proceeding before the United States Tax Court concerning a tax liability of a debtor that is a corporation for a taxable period the bankruptcy court may determine or concerning the tax liability of a debtor who is an individual for a taxable period ending before the date of the order for relief under this title.

III. OTHER PERTINENT FEDERAL STATUTES

Rule 11 of the Federal Rules of Civil Procedure – Signing of Papers; Representations to the Court; Sanctions; Verifications and Copies of Papers (Bankruptcy Rule 9011). provides that:
(a) Signature. Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name—or by a party personally if the party is unrepresented. The paper must state the signer's address, e-mail address, and telephone number. Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit. The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney's or party's attention.
(b) Representations to the Court. By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:
(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and
(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.
(c) Sanctions.
(1) *In General.* If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee.

(2) *Motion for Sanctions.* A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b). The motion must be served under Rule 5, but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets. If warranted, the court may award to the prevailing party the reasonable expenses, including attorney's fees, incurred for the motion.
(3) *On the Court's Initiative.* On its own, the court may order an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated Rule 11(b).
(4) *Nature of a Sanction.* A sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. The sanction may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation.
(5) *Limitations on Monetary Sanctions.* The court must not impose a monetary sanction:
(A) against a represented party for violating Rule 11(b)(2); or
(B) on its own, unless it issued the show-cause order under Rules 11(c)(3) before voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned.
(6) *Requirements for an Order.* An order imposing a sanction must describe the sanctioned conduct and explain the basis for the sanction.

28 U.S.C. 1927 Counsel's Liability for Excessive Costs: Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to personally satisfy the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

IV. CASE STUDY NO. 1 In re PB LIFE AND ANNUITY CO., LTD., *et al*

A discussion will be had regarding the clear disobedience of the Bankruptcy Court and North Carolina Court's Orders which resulted in an Order Holding parties and their Counsel in Contempt of Court and awarding Sanctions to the aggrieved parties.

Background:

- PB Life and Annuity Co., Ltd. is an insurance company incorporated in Bermuda that primarily provided life insurance and annuity products. The company is part of the larger Global Growth Holdings Inc. group, controlled by financier Greg Lindberg.
- Greg Lindberg, who was convicted in the U.S. for bribery and other offenses related to his business dealings, also faced allegations of mismanagement and fraud in connection with various insurance companies under his control, including PB Life.

Liquidation in Bermuda:

- PB Life became insolvent due to significant financial mismanagement, including the company's exposure to risky and potentially fraudulent investments.

- The Bermuda Monetary Authority intervened, and PB Life entered liquidation proceedings in Bermuda, with the liquidators seeking to recover assets for the benefit of creditors and policyholders.

Chapter 15 Filing in the U.S.:

- On June 27, 2020, PB Life's liquidators filed for Chapter 15 bankruptcy in the U.S. Bankruptcy Court for the Southern District of New York, seeking recognition of the Bermudian liquidation proceedings.
- Chapter 15 allows foreign representatives of insolvency proceedings to seek assistance in the U.S. to protect and recover assets located in the United States.

Adversary Proceeding against Gregrey Evan Lindberg a/k/a Greg Evan Lindberg, *et al*:

- On January 4, 2023 an adversary proceeding was commenced by John Johnston, as Joint Provisional Liquidator on Behalf of PB Life and Annuity Co., Ltd., Northstar Financial Services (Bermuda) Ltd., Omnia Ltd., and PB Investment Holdings Ltd., and PB Life and Annuity Co., Ltd., Northstar Financial Services (Bermuda) Ltd., Omnia Ltd., and PB Investment Holdings Ltd. with 41 causes of action against more than 970 defendants.
- The Plaintiffs sought, among other things, the avoidance of alleged fraudulently incurred indebtedness and the recovery of actual and constructive fraudulent transfers, a declaratory judgment voiding the IALA & MOU, and injunction against the implementation of the MOU, and an injunction compelling the payment of loan interest and principal
- On March 10, 2023, the Bankruptcy Court issued an "Order granting motion to stay adversary proceeding as to the PNC insurance company subject to plaintiffs obtaining an order from the rehabilitation court authorizing the filing of the complaint and the prosecution of the adversary proceeding" ("Stay Order").
- In the course of the adversary proceeding, the Bankruptcy Court ruled and the North Carolina Court confirmed in an "NC Anti-Suit Order" that the relief requested in the adversary proceeding would undermine the rehabilitation and liquidation plan for the NC companies - the MOU - and would invalidate, impair or supersede chapter 58 and the orders entered by the NC court. The "NC Anti-Suit Order" refers to a legal injunction issued by a North Carolina state court that sought to prevent parties involved in the litigation of Greg Lindberg's insurance companies from filing or continuing lawsuits in other jurisdictions, particularly those outside North Carolina. The purpose of the order was to centralize the handling of these legal disputes and protect the North Carolina Department of Insurance's (NCDOI) efforts to manage the rehabilitation or liquidation of Lindberg's insurance companies within the state.
- Despite the Stay Order and the NC Anti-Suit Order, the Plaintiffs, on September 27, 2023 filed an Amended Complaint.
- On October 17, 2023, the NC Insurance Companies filed a Motion to hold the JPLS and their Counsel in Contempt for Violating the Bankruptcy Court's Orders and for Sanctions Pursuant to Section 105 of the Bankruptcy Code and 28 U.S.C. §1927 in Connection with the Filing of the Amended Complaint. [Motion is appended as **Attachment "1"]**

Order Granting in Part the NC Insurance Companies' Motion (1) to Hold the JPLS [Plaintiffs]and their Counsel in Contempt for Violating This Court's Orders , and (II) for Sanctions Pursuant to Section 105 of the Bankruptcy Code and 28 U.S.C. §1927 in Connection with the Filing of the Amended Complaint

On February 1 2024, this Order [Appended as **Attachment "2"**] found and determined that

a) Each of the JPLs and Counsel were aware of the Stay Order
b) The Stay Order is clear and unambiguous and stayed the entire Adversary Proceeding as it related to the N Companies
c) The evidence of the JPLs and Counsel's noncompliance with the Stay Order is clear and convincing
d) The filing of the Amended Complaint … violated the Court's Stay Order
e) The JPLs and Counsel engaged in vexatious conduct in filing the Amended Complaints
f) The JPLs and Counsel are in Contempt of Court.

Further, the February 1, 2024 Order Adjudged and Decreed, in pertinent part [**see Attachment "2" for full details]**

1. Pursuant to Section 105 of the Bankruptcy Code, the JPL who authorized the filing of the Amended Complaint and Counsel are each found in **civil contempt** for having violated the Court's Stay Order
2. Monetary **sanctions** are imposed upon the JPLs law firm
3. There was no finding of an improper purpose required by 28 U.S.C. §1927
4. The NC Companies were awarded reasonable attorneys' fees of $579,049.75 plus $89,564.28 from two law firms.

V. CASE STUDY NO. 2 In re 286 RIDER AVE ACQUISITION LLC.

Background:

- 286 Rider Ave Acquisition LLC is a real estate development entity that owns a property located at 286 Rider Avenue, in the Mott Haven neighborhood of the Bronx, New York.
- The property was slated for a mixed-use development project, which included residential units, commercial space, and possibly affordable housing. The project was part of a broader trend of redevelopment in the Bronx.
- The entity faced financial difficulties, leading to the Chapter 11 filing in 2022, as it sought to reorganize its debts and resolve disputes with creditors.

Chapter 11 Filing

- On July 15, 2021, 286 Rider Ave Acquisition LLC filed for Chapter 11 bankruptcy protection in the U.S. Bankruptcy Court for the Southern District of New York.

Violations of the Automatic Stay

- Debtor's property was broken into on more than one occasion
- Unauthorized work was being done at the Property of the Debtor without its knowledge or approval
- Property of the Debtor was damaged

Order with Regards to Breach of the Automatic Stay

Evidence was presented that 286 Rider Ave Development LLC, or persons acting on its behalf had improperly replaced locks on the property, environmental remediation, asbestos

abatement, and other construction work had been carried out on the Property of the Debtor by third-parties, resulting in a complaint being filed with the NYC Department of Buildings.

On March 17, 2022, it was Ordered, Adjudged and Decreed, in pertinent part [see Order appended as **Attachment "3"** for full details]:

1. 286 Rider Ave Development, LLC is in breach of the automatic stay and in contempt of the Court's prior orders
2. 286 Rider Ave Development, LLC, ("Development") its principals and any affiliates, employees, agents and representatives (the "Development Parties") are enjoined from taking any further acts with respect to the Property unless specifically approved by a Bankruptcy Court Order
3. Development and its Principals would be required to pay for the costs of replacement locks, surveillance cameras, installation and maintenance of such systems on the Premises and the cost of a structural engineer

Dismissal of the Case

- Development paid approximately $950,000 for attorneys', U.S. Trustee's, and other professional fees incurred during the Chapter 11 proceedings
- Stipulations were entered into among the various parties
- On April 7, 2022, an Order of the Bankruptcy Court was entered Dismissing the Chapter 11 proceeding

VI. CASE STUDY NO. 3 In re KUMTOR GOLD COMPANY CJSC and KUMTOR OPERATION COMPANY CJSC

Background

- Kumtor Gold Company, located in Kyrgyzstan within the Kyrgyz Republic was owned and operated by Centerra Gold Inc., a Canadian-based mining company. The Kumtor mine is a major source of revenue for Centerra and contributes significantly to Kyrgyzstan's economy.
- Over the years, there were escalating tensions between Centerra Gold and the Kyrgyz government. Kyrgyz authorities accused Centerra of environmental damage, tax underpayment, and operational violations, while Centerra alleged that the government was trying to expropriate the mine.

Key Events Leading to Chapter 11:

- In May 2021, the Kyrgyz government passed legislation ("Temporary Management Law") allowing it to take control of the Kumtor Gold Mine, citing environmental concerns and other violations.
- The government installed its own management and began running the mine independently of Centerra Gold, effectively seizing the asset.
- This led to a sharp deterioration in relations between Centerra and the Kyrgyz government, culminating in legal battles over the ownership and control of the mine.

Chapter 11 Bankruptcy Filing:

- In response to the seizure of the mine, Kumtor Gold Company and its parent company, Kumtor Operating Company, filed for Chapter 11 bankruptcy protection in the Southern District of New York on May 31, 2021.
- The purpose of the Chapter 11 filing was to protect Kumtor Gold Company's U.S.-based assets and to seek a legal resolution regarding the ownership dispute, while also shielding

the company from creditor actions amid the ongoing conflict with the Kyrgyz government.
- Concurrently, Centerra Gold initiated international arbitration against the Kyrgyz government, claiming that the seizure of the mine was illegal under international law and violated agreements between Centerra and Kyrgyzstan.

Key Issues in the Chapter 11 Proceeding:

- Jurisdictional Challenges: The Kyrgyz government challenged the U.S. bankruptcy court's jurisdiction over the Kumtor mine, arguing that the mine was located in Kyrgyzstan and should not be subject to U.S. bankruptcy law.
- Although the Kyrgyz government appeared by Counsel in the Chapter 11 proceedings, it did so only on a limited basis, continually disputing that the Chapter 11 was legitimate and asserting that the U.S. Bankruptcy Court had no authority over the Kyrgyz government whatsoever.
- Centerra argued that because it is a Canadian company with U.S. assets and because of its listing on U.S. stock exchanges, the U.S. bankruptcy court had jurisdiction to hear the case and protect the company's interests.

Violations of the Automatic Stay under Bankruptcy Code Section 362

- On May 14, 2021, Centerra and the Debtors initiated arbitral proceedings to be held in Stockholm, ("the **Arbitration**") against the Kyrgyz Republic and Kyrgyzaltyn. Through the Arbitration, Centerra and the Debtors seek declaratory and injunctive relief as well as damages related to, among other things, the External Management Measures, the appointment of the External Manager, and the determination of various tax and environmental claims asserted against the Debtors. On July 16, 2021, the Bankruptcy Court entered an Order Modifying the Automatic Stay to Permit the Arbitration to Proceed.
- In the interim, however, and after the Chapter 11 was filed, the Leninsky District Court of Bishkek (the "Leninsky Court") issued an injunction (the "Kyrgyz Injunction") that purported to "suspend" the Chapter 11 Cases.
- The Debtors immediately moved for a Temporary Restraining Order and Preliminary Injunction against the Kyrgyz Republic.
- On July 20, 2021, an Order Regarding the Debtors' Emergency Motion for a Temporary Restraining Order and a Preliminary Injunction was granted holding the Kyrgyz Government to have violated the automatic stay pursuant to section 362(a)(3) of the Bankruptcy Code and further holding it in contempt of a prior order of the Court Enforcing Sections 362, 365(E)(1) and 525 of the Bankruptcy Code. [**Attachment "4"]**

VII. ABA Standing Committee on Ethics and Professional Responsibility Formal Opinion 512 regarding the use of Generative Artificial Intelligence Tools

On July 29, 2024, the ABA Standing Committee on Ethics and Professional Responsibility issued its Formal Opinion regarding the use of Generative Artificial Intelligence Tools by attorneys. A complete copy of said Opinion is appended as **Attachment "5"**.

A discussion will be had about this Opinion and the use of Artificial Intelligence by attorneys in the courtroom or in connection with the creation of legal documents.

The opening statement of the Opinion says:
To ensure clients are protected, lawyers using generative artificial intelligence tools must fully consider their applicable ethical obligations, including their duties to provide competent legal representation, to protect client information, to communicate with clients, to supervise their employees and agents, to advance only meritorious claims and contentions, to ensure candor toward the tribunal, and to charge reasonable fees.

The Opinion concludes by saying:
Lawyers using GAI tools have a duty of competence, including maintaining relevant technological competence, which requires an understanding of the evolving nature of GAI. In using GAI tools, lawyers also have other relevant ethical duties, such as those relating to confidentiality, communication with a client, meritorious claims and contentions, candor toward the tribunal, supervisory responsibilities regarding others in the law office using the technology and those outside the law office providing GAI services, and charging reasonable fees. With the ever-evolving use of technology by lawyers and courts, lawyers must be vigilant in complying with the Rules of Professional Conduct to ensure that lawyers are adhering to their ethical responsibilities and that clients are protected. using GAI tools, lawyers also have other relevant ethical duties, such as those relating to confidentiality, communication with a client, meritorious claims and contentions, candor toward the tribunal, supervisory responsibilities regarding others in the law office using the technology and those outside the law office providing GAI services, and charging reasonable fees. With the ever-evolving use of technology by lawyers and courts, lawyers must be vigilant in complying with the Rules of Professional Conduct to ensure that lawyers are adhering to their ethical responsibilities and that clients are protected.

ATTACHMENT “1”

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re: PB LIFE AND ANNUITY CO., LTD., *et al.*[1] Debtors in Foreign Proceedings.	Chapter 15 Case No. 20-12791 (LGB) (Jointly Administered)
JOHN JOHNSTON, AS JOINT PROVISIONAL LIQUIDATOR ON BEHALF OF PB LIFE AND ANNUITY CO., LTD., NORTHSTAR FINANCIAL SERVICES (BERMUDA) LTD., OMNIA LTD., AND PB INVESTMENT HOLDINGS LTD., AND PB LIFE AND ANNUITY CO., LTD., NORTHSTAR FINANCIAL SERVICES (BERMUDA) LTD., OMNIA LTD., AND PB INVESTMENT HOLDINGS LTD., Plaintiffs, v. GREGREY EVAN LINDBERG a/k/a GREG EVAN LINDBERG, *et al.* Defendants.	Adv. Pro. No. 23-01000 (LGB)

THE NC INSURANCE COMPANIES' MOTION (I) TO HOLD THE JPLS AND THEIR COUNSEL IN CONTEMPT FOR VIOLATING THIS COURT'S ORDERS, AND (II) FOR SANCTIONS PURSUANT TO SECTION 105 OF THE BANKRUPTCY CODE AND 28 U.S.C. § 1927 IN CONNECTION WITH THE FILING OF THE AMENDED COMPLAINT

Putative Defendants Colorado Bankers Life Insurance Company ("CBL"), Bankers Life Insurance Company, Southland National Insurance Corporation and Southland National Reinsurance Corporation (collectively, the "NC Companies"), respectfully submit this *Motion (I)*

[1] PB Life and Annuity Co., Ltd., Northstar Financial Services (Bermuda) Ltd., Omnia Ltd. and PB Investment Holdings Ltd. are Bermuda limited companies, with a registered address at c/o Deloitte Ltd., Corner House 20 Parliament Street, Hamilton, HM 12, Bermuda. The chapter 15 cases are jointly administered for procedural purposes by orders of this Court [ECF Nos. 11 and 42]. References to "ECF No." relate to documents filed in the Debtors' chapter 15 cases and references to "JPLs Adv. Pro. ECF No." relate to documents filed in this adversary proceeding. All references to "Plaintiffs" herein refer collectively to the JPLs and PB Life and Annuity Co., Ltd., Northstar Financial Services (Bermuda) Ltd., Omnia Ltd. and PB Investment Holdings Ltd.

to Hold the JPLs and their Counsel in Contempt for Violating this Court's Orders, and (II) for Sanctions Pursuant to Section 105 of the Bankruptcy Code and 28 U.S.C. § 1927 in Connection With the Filing of the Amended Complaint (the "Sanctions Motion") in connection with the *Amended Complaint* filed by Plaintiffs on September 27, 2023 [JPLs Adv. Pro. ECF No. 129] (the "Amended Complaint").

By this Sanctions Motion, the NC Companies seek a ruling from this Court finding the JPLs[2] and their counsel—Nicholas F. Kajon, Constantine D. Pourakis, Eric M. Robinson and Wade D. Koenecke of Steven & Lee, P.C. (together, "Counsel")—in contempt of this Court because, in filing the Amended Complaint, they violated this Court's order staying this Adversary Proceeding and violated this Court's oral ruling in connection with the proposed filing of an amended complaint (the "Limited Amendment Ruling")—even were they permitted to file ***any*** complaint naming the NC Companies following the issuance by the NC Court of the NC Court's Anti-Suit Order (as defined below).[3] In support of the Sanctions Motion, the NC Companies respectfully represent as follows:

[2] By Orders of the Supreme Court of Bermuda, John Johnston and Rachelle Frisby were together appointed as Joint Provisional Liquidators of the Debtors. In recent pleadings filed in this Court, Counsel has represented that Ms. Frisby no longer works for Deloitte Financial Advisory Ltd. Bermuda ("Deloitte") and resigned as a JPL on August 11, 2023. Counsel have also represented that on August 29, 2023, an application was filed with the Supreme Court of Bermuda seeking orders for the removal of Ms. Frisby as JPL and the appointment of Edward Willmott of Deloitte as a new JPL for the Debtors. According to Counsel, Mr. Johnston is acting in his capacity as a JPL of the Debtors pending the Bermuda Court's appointment of Mr. Willmott as a JPL. The NC Companies have no direct knowledge of any of these representations and are unaware as to which of Ms. Frisby, Mr. Johnston and/or Mr. Willmott (or any other Deloitte employee) authorized the filing of the Amended Complaint. Accordingly, the NC Companies respectfully request that this Court require Counsel to confirm for the record who authorized the filing of the Amended Complaint and when such authorization was given.

[3] As described below, because the JPLs and Counsel also blatantly violated the NC Court's Anti-Suit Order, the NC Companies have sought relief requesting that they be found either in civil or criminal contempt of the NC Court.

PRELIMINARY STATEMENT[4]

By filing the Amended Complaint, the JPLs and Counsel (together, the "Contemnors") have once again willfully flouted the Rehabilitation Order. Moreover, by virtue of their filing, the Contemnors have now also violated this Court's Stay Order, this Court's Limited Amendment Ruling, the NC Court's Liquidation Order and the NC Court's Anti-Suit Order.

The Amended Complaint contains not only all of the same specious claims against the NC Companies that were previously stayed by this Court and then expressly prohibited from being prosecuted by the NC Court, it adds multiple additional claims (including RICO claims) and scurrilous allegations against one or more of the NC Companies, as well as against the Commissioner of Insurance for the State of North Carolina and his appointed Special Deputy Rehabilitators/Liquidators.[5] Contemnors have left no doubt as to their willingness to defy court orders.

Put simply, Contemnors—by virtue of this Court's Stay Order, the Limited Amendment Ruling and the NC Anti-Suit Order—were ***prohibited from filing the Amended Complaint as against the NC Companies***. Contemnors attempt to justify their actions after the fact—as they have now done multiple times in multiple courts—by incredulously claiming that there "never was an understanding [sic] that the amendments pertaining to developments since the original Complaint was filed in January 2023 as to the NCIC conflicted with the intent of the May 2023 Order to

[4] Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them below, in the Complaint, the Amended Complaint or this Sanctions Motion, as applicable.

[5] A chart highlighting the new claims and additional allegations contained in the Amended Complaint, as well as a redline comparison between the original Complaint and the Amended Complaint, are attached hereto as Exhibits A and B, respectively.

protect the NCIC while the entities were in rehabilitation or liquidation."[6] Despite this self-serving attempt at justifying their contempt, it is plain that Contemnors willfully disobeyed this Court's (and the NC Court's) lawful orders.

Clearly, Contemnors will not be deterred absent appropriate action being taken by this Court. Accordingly, the NC Companies respectfully request that this Court enter an order finding Contemnors in contempt and dismissing or striking the Amended Complaint as against the NC Companies, with prejudice, as a remedy.

The NC Companies also seek monetary damages in the form of attorneys' fees and costs in defending all matters in connection with the Amended Complaint and the filing and prosecution of the instant motion, as provided under Local Civil Rule 83.6 of the Joint Local Rules, S.D.N.Y. and E.D.N.Y. Effective October 15, 2021 ("Local Rule 83.6") as well as under applicable federal law.

The NC Companies further request that this Court assess monetary sanctions against the JPLs and their Counsel pursuant to Section 105 of the Bankruptcy Code ("Section 105") to deter this behavior in the future and that the Court impose additional monetary sanctions on Counsel to ensure that Counsel is sufficiently deterred from further misconduct, as the Amended Complaint was filed in bad faith and vexatiously in violation of section 1927 of Title 28 of the United States Code ("Section 1927").[7] Alternatively, the NC Companies request that this Court strike or dismiss

[6] *Affidavit of Nicholas F. Kajon* filed in response to the Show Cause Motion and submitted to the Court by email on October 10, 2023. *See also, Order of Liquidation Against Southland National Insurance Corporation and Order for Injunctive Relief* (the "Liquidation Order"), a true copy of which is attached hereto as Exhibit C.

[7] The NC Companies note that the Amended Complaint suffers from numerous fatal defects with respect to the claims alleged against them and continue to reserve all their rights in connection with responding to the Amended Complaint if required. Accordingly, this Sanctions Motion has been brought exclusively to remedy the Contemnors' violation of two orders of this Court and is not—and should not be construed as—a responsive pleading or answer to the Amended Complaint. The NC Companies reserve all rights with respect to their procedural and substantive defenses and arguments, including all bases and any ground upon which the NC Companies may seek to dismiss or otherwise move with respect to the Amended Complaint, if ever required.

the Amended Complaint as having been filed in violation of Rule 15(a)(2) of the Federal Rules of Civil Procedure.

Based on the foregoing and for all the reasons set forth in detail below, it is respectfully submitted that this Court should grant the Sanctions Motion, find that the Contemnors are in contempt of Court and impose appropriate sanctions on the JPLs and Counsel.

JURISDICTION AND VENUE

Plaintiffs claim that this Court has jurisdiction over the Adversary Proceeding pursuant to 28 U.S.C. § 1334 and that it is a core proceeding pursuant to 28 U.S.C. §§ 157(b)(2)(H) and 157(b)(2)(P). Plaintiffs also claim that venue is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409. The NC Companies disputed and continue to dispute these assertions because, among other reasons, the McCarran–Ferguson Act applies and as such, the Bankruptcy Court lacks jurisdiction over this Adversary Proceeding.

BACKGROUND

The Adversary Proceeding and the Stay Motion

1. On January 4, 2023, Plaintiffs commenced an adversary proceeding in the Bankruptcy Court captioned *Johnston v. Lindberg, et al.*, Adv. Case No. 23-01000 (LGB) (Bankr. S.D.N.Y. Jan. 4, 2023) (the "Adversary Proceeding" or the "JPLAP") by filing a complaint asserting forty-one causes of action against more than 970 defendants (the "Original Complaint"). The Original Complaint includes eighteen causes of action against the NC Companies and sought approximately $700 million in damages from these insolvent insurance companies. The Original Complaint sought at least four different types of relief against the NC Companies: monetary damages, injunctive relief, declaratory judgment and the return of property.

2. Specifically, in the Original Complaint, Plaintiffs sought, in relevant part, (i) the avoidance of alleged fraudulently incurred indebtedness and the recovery of actual and constructive fraudulent transfers, (ii) a declaratory judgment voiding the IALA and MOU, (iii) an injunction against the implementation of the MOU, and (iv) an injunction compelling the payment of loan interest and principal. As this Court ruled and the NC Court confirmed in the NC Anti-Suit Order, this relief, if granted, would undermine the rehabilitation and liquidation plan for the NC Companies—the MOU—and would invalidate, impair, or supersede Chapter 58 and the orders entered by the NC Court.[8] While the MOU seeks to serve the best interest of the policyholders of all affiliated insurance companies—including the Debtors and the NC Companies—through the Original Complaint (and the Amended Complaint), Plaintiffs seek to substantially wipe out any recovery which may be available to the NC Companies' policyholders.

3. Despite the clear terms of the NC Court's June 27, 2019 *Order of Rehabilitation, Order Appointing Receiver, and Order Granting Injunctive Relief* (the "Rehabilitation Order"), Contemnors knowingly elected not to seek leave and consent from the NC Court to commence the JPLAP against the NC Companies—a direct violation of such order. As they conceded in numerous pleadings filed in this Court and the NC Court, Contemnors knew about the Rehabilitation Order and the injunction contained therein for at least two years before the JPLAP was commenced.[9]

[8] Feb. 27, 2023 Hr'g Tr. at 46:15–19 ("[T]he third prong of the Fabe test has been met because the Bankruptcy Code would invalidate, impair or supersede the North Carolina statute by allowing the adversary proceeding to continue against the [NC Companies]."), attached hereto in relevant part as Exhibit D.

[9] Motion for Permission (defined below) ¶ 2 ("The JPLs were aware of this Court's injunction against the filing of actions against the [NC Companies] at the time of the commencement of their [JPLAP].").

4. Because Plaintiffs improperly commenced the JPLAP in violation of the Rehabilitation Order, on January 18, 2023, the NC Companies filed their *Motion to Stay Adversary Proceeding as to the NC Insurance Companies Subject to Plaintiffs Obtaining a Final Order From the Rehabilitation Court Authorizing the Filing of the Complaint and the Prosecution of the Adversary Proceeding* [JPLs Adv. Pro. ECF No. 7] (the "Stay Motion").[10]

5. On January 31, 2023, Plaintiffs filed their opposition to the Stay Motion;[11] on February 8, 2023, the NC Companies filed their reply[12] and on February 21, 2023, Plaintiffs filed a sur-reply.[13] A hearing on the Stay Motion was held before this Court on February 10 and 27, 2023, at the conclusion of which this Court issued its oral ruling granting the Stay Motion. On March 10, 2023, this Court issued its written *Order Granting Motion to Stay Adversary Proceeding as to the NC Insurance Companies Subject to Plaintiffs Obtaining an Order From the Rehabilitation Court Authorizing the Filing of the Complaint and the Prosecution of the Adversary Proceeding* [JPLs Adv. Pro. ECF No. 78] (the "Stay Order").

6. In the Stay Order, the Court held that (i) the Rehabilitation Order did not violate the automatic stay protecting the Debtors; (ii) given the nature of the relief being sought by Plaintiffs in the JPLAP, the McCarran–Ferguson Act, 15 U.S.C. § 1011 *et seq.*—which mandates

[10] The Stay Motion addressed the threshold issue of Plaintiffs' willful failure to seek authorization from the NC Court to file the Original Complaint and commence the JPLAP and did not address the merits of the allegations set forth in the Original Complaint. *See* Stay Motion ¶ 8. The NC Companies, however, expressly denied each of the material allegations made against them in the JPLAP and reserved all their rights and remedies in connection therewith, as they continue to do here.

[11] *Plaintiffs' Opposition to NC Insurance Companies' Motion to Stay Adversary Proceeding as to the NC Insurance Companies Subject to Plaintiffs Obtaining a Final Order from the Rehabilitation Court Authorizing the Filing of the Complaint and the Prosecution of the Adversary Proceeding* [JPLs Adv. Pro. ECF No. 14].

[12] *Reply In Support Of Motion To Stay Adversary Proceeding As To The NC Insurance Companies* [JPLs Adv. Pro. ECF No. 30].

[13] *Plaintiffs' Sur-Reply To NC Insurance Companies' Motion To Stay Adversary Proceeding As To The NC Insurance Companies* [JPLs Adv. Pro. ECF No. 59].

that a state statute regulating the business of insurance reverse-preempts the Bankruptcy Code—was applicable; and (iii) the JPLs did not comply with the Rehabilitation Order by first obtaining authorization from the NC Court to commence the JPLAP.

7. Consequently, the Court ruled that (i) the JPLAP was stayed as to the NC Companies, (ii) all litigation deadlines were inapplicable to the NC Companies as long as the stay remained in effect, (iii) the stay would remain in effect until ten business days following the JPLs filing with the Bankruptcy Court an order of the NC Court evidencing that court's authorization for the JPLs to prosecute the JPLAP, and (iv) if such order was filed, a conference would be scheduled to establish pleading, discovery, and other deadlines in the JPLAP as they relate to the NC Companies.

8. On March 24, 2023, the Plaintiffs appealed the Stay Order to the United States District Court for the Southern District of New York (the Honorable Edgardo Ramos, presiding) [Appeal ECF No. 1].[14] The briefing on the appeal of the Stay Order was completed on August 11, 2023 and the matter remains *sub-judice*.

Plaintiffs' Motion for Permission and the NC Court's Ruling

9. On May 22, 2023—more than two months after the Stay Order was entered (and only following a conference before Judge Ramos where he questioned Counsel as to why the JPLs had not sought relief from the NC Court following entry of the Stay Order[15])—Plaintiffs filed in the NC Court the *Motion of Rachelle Frisby and John Johnston, in Their Capacities as the Joint Provisional Liquidators and Authorized Foreign Representatives for PB Life and Annuity Co.,*

[14] *In re PB Life and Annuity Co., LTD,* Case No. 1:23-cv-02604-ER (S.D.N.Y. March 28, 2023).

[15] May 5, 2023 H'rg Tr. at 4:18–21 (The Court: "Let me ask you a question – and I know this is sort of at the base of all this – why didn't you just go to North Carolina and seek relief to file the adversary proceeding?"), attached hereto in relevant part as Exhibit E.

Ltd., Northstar Financial Services (Bermuda) Ltd., Omnia Ltd. and PB Investment Holdings Ltd. for Permission to (I) Prosecute Adversary Proceeding and (II) File Counterclaims Against Respondents (the "Motion for Permission"), a copy of which, without exhibits, is attached hereto as Exhibit F. On June 15, 2023, the NC Companies filed their opposition to the motion, a copy of which, without exhibits, is attached hereto as Exhibit G, and on June 19, 2023, the NC Court held a hearing on the Motion for Permission, at the conclusion of which it issued its oral ruling *denying the motion*.[16]

10. Thereafter, on July 5, 2023, the NC Court entered its written order[17] denying the Motion for Permission, finding that (a) "[t]he JPLs had not sought or obtained this Court's permission to file the [JPLAP] against [the NC Companies] prior to filing the complaint on January 4, 2023;" (b) "[t]he JPLs had not sought or obtained this Court's permission to file the Counterclaims against [the NC Companies] prior to filing the Counterclaims on January 9,

[16] *See Causey v. Southland National Insurance Corporation, et al., 19-CV-8664,* June 19, 2023 Hr'g Tr. at 13:4–19 (**NC Court**: "I've got an order of the Court—this Court signed by Judge Ridgeway that prohibited the filing of those actions. And someone stands before me who's not only violated that once, has violated it twice. Now I understand you disagree, but it looks like you had approximately two years or more to seek some – some – some sort of guidance for file—before filing these actions as to whether the bankruptcy court took the position that the – that the order of the Court, that injunction [inaudible] has actually applied. And apparently you didn't. You filed two law – you filed one lawsuit and you filed a – a counterclaims (*sic*). And now four or five months later, you're asking this Court to allow you to proceed with those."), a copy of which is attached hereto as Exhibit H; *see also id.* at 61:21–62:1 (**NC Court**: "Given the violation of this Court's order and the fact that it would be inconsistent allowing these to proceed in the manner that the movement's (*sic*) wish would be inconsistent with the rehabilitation limitation process specifically set forth in Chapter 58, the Court denies the motion.").

At the outset of the hearing on the Motion for Permission—following Mr. Kajon's request that he be admitted *pro hac vice* for the purpose of being allowed to conduct the hearing—the NC Court indicated that "[i]f I grant your admission pro hoc [sic], and I find you violated an order of this Court. I'm going to have the hearing on whether I should revoke your admission pro hoc [sic] for violation of this Court's order. And you – you need to understand the effect that could have on your ability to practice in other states." *Id*. at 7:6–12.

[17] *See Causey v. Southland National Insurance Corporation, et al., 19-CV-8664* (Wake County Superior Court), *Order Denying JPLs' Motion for Permission to Prosecute Adversary Proceeding and File Counterclaims Against Respondents* (the "NC Court Anti-Suit Order"), a copy of which is attached hereto as Exhibit I.

2023;"[18] (c) "[t]he JPLs were aware of the Rehabilitation Order and the anti-suit injunction for at least one year prior to filing the [JPLAP] and Counterclaims in the Bankruptcy Court;" (d) "[t]he JPLs were aware of the MOU for at least two years prior to filing their actions in the Bankruptcy Court;" and (e) "[t]he JPLs filed the [JPLAP] and Counterclaims against [the NC Companies] in knowing violation of the anti-suit injunction contained in the Rehabilitation Order, which has been on file since June 27, 2019." NC Court Anti-Suit Order ¶¶ 8-13.

11. Accordingly, the NC Court ruled that (a) "[g]iven the JPLs' violation of this Court's order, the nature of the claims, the relief sought by the JPLs, and the current financial status of [the NC Companies], allowing the [JPLAP] and Counterclaims to proceed against [the NC Companies] would undermine the rehabilitation and liquidation of [the NC Companies] as set forth in Chapter 58 of the North Carolina General Statutes;" and (b) "[a]llowing the [JPLAP] and Counterclaims to proceed against [the NC Companies] would be inconsistent with the rehabilitation and liquidation of [the NC Companies] as set forth in Chapter 58 of the North Carolina General Statutes." NC Court Anti-Suit Order ¶¶ 14, 15.

12. The JPLs did not appeal the NC Court Anti-Suit Order and the time to do so has passed. Accordingly, the NC Anti-Suit Order is a final order and violating its unambiguous requirements is contempt of court.

Request to File Amended Complaint and JPLs' Filing of a Non-Compliant Amended Complaint

13. Just prior to the conclusion of the hearing on the Stay Motion held before this Court on February 27, 2023, the JPLs—without prior notice either to this Court or the NC Companies—

[18] As this Court knows, Plaintiffs pled certain counterclaims (the "Counterclaims") in a separate declaratory judgment action commenced by the NC Companies in this Court, which sought rulings regarding the scope of the automatic stay in response to a motion the JPLs filed seeking to enforce the automatic stay against the NC Companies. *In re PB Life and Annuity Co. Ltd.,* Case No. 1:20-bk-12791(LGB) (Bankr. S.D.N.Y. Sept. 20, 2023) [ECF No. 335]. Such motion was denied by order of this Court dated April 10, 2023 [ECF No. 504], which order was the subject of a second appeal commenced by Plaintiffs [ECF No. 506]. However, Plaintiffs elected to dismiss that appeal prior to their deadline to submit their opening brief.

informed the Court that they wished to amend the Original Complaint. The basis for this request was explained by Counsel as follows:

> **MR. KAJON**: When we when we filed our action on January 4th of this year, PBLA was not yet in a winding up proceeding. On February 17th of this year, the Bermuda Court issued an order winding up or placing PBLA into liquidation. That now means that PBLA has standing, now that it's in liquidation, to assert fraudulent transfer claims under Bermuda law, which is Count 1 in our complaint. It did not have standing to do so when we filed the complaint, which is why only the other three Debtors were parties to Count 1. As a result of what recently transpired in Bermuda, ***it was our intention to amend the complaint to add PBLA to Count 1 and to make some other, you know, clarifying amendments***, since we were amending it to add this, you know, PBLA as a party to Count 1. We would like to ask that, notwithstanding your ruling, we can file an amended complaint.

Exhibit D, Feb. 27, 2023 Hr'g Tr. at 47:7–23 (emphasis added).[19]

14. Although no written motion had been filed—nor any prior notice given—Counsel then orally requested that this Court confirm to what extent the Original Complaint could be amended. In response, this Court indicated that Plaintiffs could only seek to amend Count 1 of the Original Complaint and ***so long as the amendment did not involve the NC Companies:***

> **THE COURT**: ***Okay. Well, if it doesn't involve the North Carolina Insurance Companies, you're not stayed.*** … So, if you're really talking about what is Count 1 in own complaint, I don't think it's applicable. ….[20]

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[19] Counsel further explained that the Original Complaint allegedly had to be amended because:

> **MR. KAJON**: Because -- well, a number of our claims, or the claims we intended to bring and did bring, were governed by a three-year statute of limitation. … And for those we needed the Section 108 extension. It is my understanding -- I'm not a Bermuda lawyer -- but it's my understanding that claims for fraud under Bermuda law are governed by a six-year statute of limitations. So, fraud claims are not time barred today. They could be time barred or will be time barred at a future time. And it's not -- you know, one does not know how long an appeal will take. One does not know how long it will take to get a ruling from Judge Shirley. So, rather than seeing our statute tick down, which -- and various transfers will become time barred as time passes, you know, ***we'd rather***, notwithstanding the stay that Your Honor is going to issue, file an amended complaint now before any of those claims become time barred, rather than risk that we'll get a favorable ruling from the District Court or Judge Shirley before our statute expires.

Exhibit D, Feb. 27, 2023 Hr'g Tr. at 48:1–20 (emphasis added).

[20] The Court further clarified that:

Id. at 49:10–51:12 (emphasis added).

15. It is unclear to the NC Companies whether Mr. Kajon's colloquy with the Court was construed as an oral motion pursuant to Rule 15(a)(2) for permission to amend the Original Complaint, which the Court granted at that time, or whether the Court was setting limits for Counsel on the limits of any Rule 15(a)(2) motion to be filed by the Plaintiffs. In any event, however, even if this Court's comments constituted an actual ruling allowing the Original Complaint to be amended without a formal motion, it was only for the limited purpose of adding PBLA in Count 1—any amendments absolutely ***could not implicate the North Carolina Companies in any way***. As discussed below, the Amended Complaint unquestionably far exceeded any explicit or implicit authority granted to Plaintiffs by this Court.[21]

16. On September 21, 2023, a representative for the JPLs wrote to the Special Deputy Rehabilitators/Liquidators for the NC Companies via email—with JPL John Johnston copied—to provide notice that the JPLs would be filing an amended complaint. The representative did not provide a copy of the Amended Complaint, describe the contents of the Amended Complaint, or seek the NC Companies' consent to filing it. A copy of this correspondence is attached hereto as Exhibit J.

> **THE COURT**: No. It's only going to impact vis-à-vis ***any actions for the North Carolina Insurance Companies***. This is not staying this adversary proceeding with respect to the other 896 approximately Defendants in this action. It's only the North Carolina Insurance Companies. They're the parties that moved. They're involved in the liquidation and rehabilitation proceedings in the North Carolina Court. ***They are subject to the anti-suit injunction***, you know, their proceedings. That's not anybody else.

Id. at 51:24–52:7 (emphasis added).

[21] Although the Court did not address the request to make other, unspecified "clarifying amendments," the extensive material changes incorporated into the Amended Complaint could not possibly be so characterized and clearly exceeded the representations made by Counsel as to why the Original Complaint needed to be amended at all.

17. On September 22, 2023, Special Deputy Rehabilitator John Murphy responded to this email, warning that any claims against the NC Companies would be in violation of the NC Court's orders and requesting more information about the Amended Complaint. *See id.*

18. No one representing the JPLs responded to Mr. Murphy's email or his request for more information regarding the Amended Complaint.

19. Five days later, on September 27, 2023—seven months after advising this Court of their desire to amend and almost three months after the NC Court ruled that the JPLs were not authorized to file or prosecute the Adversary Proceeding—Plaintiffs filed the Amended Complaint. Contrary to Counsel's assertions and commitments made to this Court at the February 27, 2023 hearing and in direct and knowing violation of (i) the Rehabilitation Order, (ii) the Liquidation Order, (iii) the Stay Order, (iv) the Limited Amendment Ruling, and (v) the NC Court Anti-Suit Order—and without obtaining leave of court or the opposing parties' written consent—***the JPLs added the following new counts against the NC Companies in the Amended Complaint***:

a. **New Count XIV**: Declaratory Judgment Voiding the MOU Pursuant to N.C. Gen. Stat. § 58–30–35(d)(1) filed against, among other parties, the NC Companies.

b. **New Count XLIII**: Declaratory Judgment as to PBLA's rights and interests with respect PLIC MI Pursuant to North Carolina Law filed against, among other parties, the NC Companies.

c. **New Count XLIV**: Violation of 18 U.S.C. § 1962(c) filed against, among other parties, Colorado Bankers Life Insurance Company, one of the NC Companies.[22]

[22] One of the NC Insurance Companies—CBL—is listed as a "RICO Defendant," as defined in the Amended Complaint. *See* Amended Complaint § 1602. CBL is also listed as a "Company Borrower" and, therefore, a RICO Defendant. *See* Amended Complaint § 1604.

d. **New Count XLV**: Violation of 18 U.S.C. § 1962(a) filed against, among other parties, Colorado Bankers Life Insurance Company, one of the NC Companies.

e. **New Count XLVI**: Violation of 18 U.S.C. § 1962(b) filed against, among other parties, Colorado Bankers Life Insurance Company, one of the NC Companies.

f. **New Count XLVII**: Violation of 18 U.S.C. § 1962(d) filed against, among other parties, Colorado Bankers Life Insurance Company, one of the NC Companies.

g. **New Count XLVIII**: Racketeering Pursuant to North Carolina Law filed against, among other parties, Colorado Bankers Life Insurance Company, one of the NC Companies.

20. In addition to including entirely new counts against the NC Companies in the Amended Complaint, the JPLs also:

a. **Added New Request for Relief to Existing Claim**. *See* Count XIII (Declaratory Judgment Voiding the IALA and MOU Pursuant to North Carolina Law), seeking a new declaration that "the MOU and IALA are nullified, void, or by operation of law are rescinded or otherwise terminated and rendered unenforceable as to the Debtors (and each of them) due to a failure of consideration."

b. **Added New Statutory Ground and New Request for Relief to Existing Claim**. *See* Count XXVIII (adding Turnover of the Debtors' Property Pursuant to 11 U.S. Code § 542 to Conversion Pursuant to North Carolina Law), seeking that CBL and SNIC be required to turn over the Debtors' wrongfully converted property pursuant to 11 U.S.C. § 542 and North Carolina law.

c. **Expanded the Reach of the Requested Relief.** *See* Counts VIII and IX, adding that "the Plaintiffs are entitled to avoid the transfers and obligations incurred herein as

against Lindberg and/or the Lindberg Affiliates: (i) as the first transferee of the asset for whose benefit the transfer was made; or (ii) an immediate or mediate transferee of the first transferee."

d. Added New Facts Regarding the NC Companies to Substantiate Old and New Counts. *See, e.g.,* Amended Complaint §§ 1821-41 (*The MOU is Unenforceable in Light of the NCIC's Liquidations*) and Amended Complaint §§ 1842-51 (*NCIC's Failure to Assume the MOU*). *See also* Amended Complaint §§ 1132, 1173 ("As the following representative transactions demonstrate, the funds transferred from Northstar substantially were used to stanch the cash and liquidity failures of the NCIC and other Lindberg Affiliates"), 1175 ("Northstar's cash and liquid assets … were instead ransacked to … inflate the NCIC's balance sheets in an effort to mislead investors and regulators"), 1238 ("Stated differently, the NCIC drained Northstar of its liquid assets to reduce their own affiliate/PPN exposure."). *See also* Amended Complaint §§ 1817, 1819.

e. Lodged Ad Hominem and Baseless Attacks on Dinius and Causey. *See, e.g.,* Amended Complaint §§ 1259 ("Upon information and belief, Dinius and the NCDOI had awareness through their ongoing involvement with the administrative supervision of the NCIC that these and other liquidity diversions from Northstar for the benefit of the NCIC threatened or caused harm to Northstar and its financial condition, including its capacity to meet its obligations to its policyholders and stakeholders. There is no evidence available to the JPLs that Dinius or anyone acting for or on behalf of him or the NCDOI considered or acted to balance, mitigate, or otherwise reduce the potential damage to Northstar, its policyholders, or its stakeholders."), 1653 ("On information and belief, any rudimentary examination of the disadvantageous results of these transactions by Dinius would have made it plain that the transactions ostensibly beneficial to the

NCIC were at the expense of Northstar and its policyholders and stakeholders, but Dinius nevertheless pushed and endorsed them."). *See also* Amended Complaint §§ 1634, 1635.

21. In view of the intentionally egregious violation of multiple court orders by the Contemnors in filing the Amended Complaint, on October 2, 2023, the NC Companies filed in the NC Court *Respondents' Verified Motion for Order to Show Cause* (the "Show Cause Motion"), a copy of which is attached hereto as Exhibit K, seeking entry of an order holding the Contemnors in either criminal or civil contempt for filing the Amended Complaint in violation of the NC Court Anti-Suit Order and the Rehabilitation Order. The NC Court may elect to find probable cause of contempt based solely on the NC Companies' submission and issue a "Show Cause Order," or it may hold a hearing on that issue.[23]

22. On October 3 and 4, 2023, Mr. Kajon, one of the JPLs' Counsel, wrote to counsel for the NC Companies via email in response to the Show Cause Motion.[24]

23. In his October 3 email, Mr. Kajon attempted to justify including CBL as a defendant in the RICO counts, because "the Debtors' temporal, factual, and claims focus is directed to when Lindberg and his associates in the Enterprise controlled CBL." ***This assertion is false***, as the RICO claims incorporate allegations outside of that time frame and allege that the injuries continue to this day. *See, e.g.*, Amended Complaint ¶ 2239 (alleging that the Debtors "continue to be injured" by, among other things, "the ongoing subjugation of the Debtors' property such as loans and preferred equity interests to the MOU, IALA . . ."). In other words, the Amended Complaint alleges that the MOU—a contract which was enforced by the trial court in North Carolina that is

[23] Contemnors have filed several pleadings in the NC Court in response to the Show Cause Motion, which they have also submitted to this Court, apparently for the Court's *ex parte* consideration in advance of this motion even being filed.

[24] A true copy of Mr. Kajon's October 3 and October 4 correspondence is attached hereto as Exhibit L.

overseeing the NC Companies' rehabilitation and liquidation and which was then affirmed by the North Carolina Court of Appeals—is ***racketeering activity***.

24. The very next day, Mr. Kajon wrote again—but this time to offer to stipulate that CBL could be dismissed as a RICO defendant, because it was "included in error." *See* Exhibit L. This explanation—that the inclusion of CBL was somehow a scrivener's error—is wholly inconsistent with the substantive justification for including CBL that he offered the day before. Instead, ***it evidences Counsels' awareness of their grave error in violating multiple courts' orders through filing the Amended Complaint***.

25. In his October 4 email, Mr. Kajon stated that "[w]e do not believe that filing an amended complaint that we expressly conceded was stayed, but was only filed to preserve our clients' rights pending the outcome of the appeal of the Stay Order, violates any orders." *See* Exhibit L. Like the improper filing of the Original Complaint, Counsel once again seeks to rely on "beliefs" regarding the applicability of multiple court orders (and the applicability of the Federal Rules of Civil Procedure to such "beliefs"), rather than first moving before an appropriate court in order to determine whether such "beliefs" are factually or legally sound.

26. In response to these emails, Counsel for the NC Companies very clearly set out what was required for the JPLs and Counsel to purge their violations of multiple court orders—withdraw the Amended Complaint as against the NC Companies with prejudice. The JPLs and Counsel have had the opportunity for nearly three (3) weeks to rectify their violations, yet they have refused to do so.

The JPLs Seek to "Dismiss" Certain "Claims"

27. Instead of withdrawing the Amended Complaint, on October 7, 2023, Counsel sent a letter to this Court (the "Dismissal Letter") requesting that the Court enter an order dismissing

some—but not all—of the claims contained in the Amended Complaint against CBL (while failing even to address any of the additional allegations and claims against CBL and the other NC Companies set forth in the Amended Complaint).[25]

28. First, this request was procedurally improper—Plaintiffs were required to file a motion, not a letter, seeking any such relief. But more importantly, Federal Rule 41(a)[26] only permits dismissal of an "action"—not discrete claims. Thus, consistent with the overwhelming weight of authority, the JPLs' request for a partial "dismissal" is ineffective.[27]

29. The proper mechanism for the JPLs to dismiss CBL from Counts XLIV through XLVIII would have been to file a motion to amend pursuant to Federal Rule of Civil Procedure 15(a), made applicable to this Adversary Proceeding by Federal Rule of Bankruptcy Procedure 7015. But even doing so would not cure the JPLs' contempt, as the Amended Complaint improperly names the NC Companies as defendants—which is prohibited pursuant to multiple court orders—as well as adding numerous other claims, allegations, and requested relief against the NC Companies. *See Seidman v. Chobani, LLC*, No. 14 Civ. 4050 (PGG), 2016 WL 1271066, at *2 (S.D.N.Y. Mar. 29, 2016).

RELIEF REQUESTED

30. By this Sanctions Motion, the NC Companies seek entry of an order finding the JPLs and their Counsel in contempt because they: (i) violated the Stay Order; (ii) filed the

[25] Specifically, the Dismissal Letter filed with this Court requested that the Court dismiss CBL, without prejudice, from all claims in Counts XLIV through XLVIII of the Amended Complaint pursuant to Fed. R. Civ. P. 41(a)(2) and Fed. R. Bankr. P. 7041. *See* N. Kajon Letter to Court [JPLs Adv. Pro. ECF No. 134].

[26] Fed. R. Bankr. P. 7041 incorporates Fed. R. Civ. P. 41.

[27] Virtually every court to consider it has held that "voluntary dismissal of some, but not all claims, against a single defendant is not permitted under Rule 41(a)." *Chan v. Cty. Of Lancaster*, No. 10-cv-03424, 2013 WL 2412168, at *16 (E.D. Pa. June 4, 2013). "It seems well established that when multiple claims are filed against a particular defendant, Rule 41(a) is applicable only to the voluntary dismissal of all claims against the defendant." Federal Practice & Procedure Civ. (Wright & Miller) § 2632 (4th ed.).

Amended Complaint in violation of the Limited Amendment Ruling, and (iii) in light of the NC Court Anti-Suit Order—which was entered long after the Limited Amendment Ruling—***were prohibited from even naming the NC Companies as defendants in the Amended Complaint***.

31. Because of their contempt, the NC Companies respectfully request that this Court enter an order finding Contemnors in contempt and dismissing or striking the Amended Complaint as against the NC Companies, with prejudice, as a remedy. . Additionally, the Court should (a) dismiss or strike the entire Amended Complaint as against the NC Companies with prejudice; (b) award monetary damages in the form of attorneys' fees and costs in defending all matters in connection with the Amended Complaint and the filing and prosecution of the instant motion, as provided under Local Rule 83.6; (iii) assess monetary sanctions against the JPLs and their Counsel under Section 105 to deter this behavior in the future; and (c) impose additional monetary sanctions on Counsel to ensure that Counsel is sufficiently deterred from further misconduct as the Amended Complaint was filed in bad faith and vexatiously in violation of Section 1927..

ARGUMENT

A. This Court Should Hold JPLs and their Counsel in Contempt for Violating its Stay Order and Limited Amendment Ruling and Dismiss the Amended Complaint as a Remedy for the Contempt.

32. A bankruptcy court has the inherent power, under 11 U.S.C. § 105, to "hold parties in civil contempt for violation of its own order." *In re Masterwear Corp.,* 229 B.R. 301, 310 (Bankr. S.D.N.Y. 1999). Further, Local Civil Rule 83.6 of the Joint Local Rules, S.D.N.Y. and

E.D.N.Y. Effective October 15, 2021 provides this Court with authority to hold the JPLs and their Counsel in civil contempt.[28]

33. The civil contempt power is necessary to protect "the due and orderly administration of justice and in maintaining the authority and dignity of the court." *Roadway Express, Inc. v. Piper,* 447 U.S. 752, 763-64 (1980) (citing *Cooke v. United States,* 267 U.S. 517, 539 (1925)). A court's inherent power to hold a party in civil contempt may be exercised only when (1) the order the party allegedly failed to comply with is clear and unambiguous, (2) the proof of non-compliance is clear and convincing, and (3) the party has not diligently attempted in a reasonable manner to comply. When these elements are established, the civil contempt penalty may still be avoided by the party on whom the Court imposes sanction by that party's performance of the act required by the Court. *N.Y. State Org. for Women v. Terry*, 886 F.2d 1339, 1351 (2d Cir. 1989); *see also Huber v. Marine Midland Bank,* 51 F.3d 5 (2d. Cir. 1995). In this case, JPLs' and Counsel's actions satisfy each factor of the test for contempt.

34. First, this Court made clear that Plaintiffs could only amend the Original Complaint for the limited purpose of "add[ing] PBLA to Count 1." The Court did not address Counsel's request "to make some other … clarifying amendments," however even had authorization been granted to make "clarifying" amendments to the Original Complaint, the amendments actually made are indisputably not "clarifying." This Court could not have been clearer when directing that any amendment must not "involve" the NC Companies, because the Adversary Proceeding was stayed as against them.[29]

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[28] *See* Local Civil Rule 1.1 of the Joint Local Rules, S.D.N.Y. and E.D.N.Y., Effective October 15, 2021, providing that "[t]hese Local Civil Rules apply in all civil actions and proceedings governed by the Federal Rules of Civil Procedure."

[29] Exhibit D, Feb. 27, 2023 Hr'g Tr. at 47:7-23, 49:10–51:12.

35. In filing the Amended Complaint, the JPLs and Counsel: (a) once again, failed to seek leave of the NC Court to file the Amended Complaint, as required by the Stay Order[30] and the NC Anti-Suit Order, (b) violated this Court's Limited Amendment Ruling by asserting new allegations not previously raised in the Original Complaint against the NC Companies and the Special Deputy Rehabilitators/Liquidators, and (c) violated the Limited Amendment Ruling by filing new claims against the NC Companies—which they were expressly prohibited from doing.

36. The limited scope of the Court's ruling limiting to what extent the Original Complaint could be amended was made absolutely clear to the Contemnors—***the amendments to the Original Complaint could not "involve" the NC Companies***.

37. Sanctions are appropriate because the JPLs and Counsel knowingly violated (a) the Stay Order by filing the Amended Complaint and naming the NC Companies as defendants, and (b) the Limited Amendment Ruling when they filed the Amended Complaint and asserted new allegations and claims for relief against the NC Companies. *See A.P. Moller-Maersk A/S v. Ocean Express Miami*, 648 F. Supp. 2d 490, 499 (S.D.N.Y. 2009) (sanctions for civil contempt appropriate where party violated court's injunction order by commencing proceedings in another jurisdiction), *aff'd in part, rev'd in part on other grounds*, 429 F. App'x 25 (2d Cir. 2011). As discussed above, the Amended Complaint not only repeats the same improper claims against the NC Companies as the Original Complaint, but it also adds (a) multiple additional claims (including RICO claims); and (b) scurrilous allegations against the Commissioner of Insurance for the State of North Carolina and his appointed Special Deputy Rehabilitators/Liquidators.

[30] The Stay Order provides that the stay shall remain in effect until 10 days after the filing of an order from the NC Court permitting the action to go forward. *See* Stay Order at 3.

38. The JPLs' and Counsel's violations are irrefutable.[31] Counsel acknowledged as much when belatedly offering to enter into various stipulations in order to try and partially extract the Contemnors from their knowing violations of multiple court orders in the face of the Show Cause Motion. However, *these half-measures are only proof that the JPLs and Counsel know they were not allowed to do what they did.* ***It is certainly not enough to purge the contempt***. Specifically, Counsel responded to the Show Cause Motion with offers to stipulate that the Stay Order remained in effect and that the Amended Complaint would not be prosecuted pending a ruling on the Stay Appeal—both of which can only be characterized as "ice in the winter." *There should be no need to "stipulate" that multiple court orders remain in effect and that they must be followed*. Counsel also offered that certain new claims—***but not all***—that were allegedly inadvertently included against the NC Companies would be dismissed.

39. Notwithstanding the foregoing meager attempts, neither the JPLs nor their Counsel have purged the contempt by withdrawing the Amended Complaint, with prejudice. The NC Companies put the JPLs and Counsel on notice of the contempt before the Amended Complaint was filed and then again when filing the Show Cause Motion. But the JPLs and Counsel have still failed to dismiss the entire Amended Complaint as against the NC Companies with prejudice—the minimum required to purge the contempt (and no longer enough, given the NC Companies' already hefty investment of time and money addressing this issue and the additional reputational damage to the North Carolina Commissioner of Insurance and his Special Deputy Rehabilitators/Liquidators as a result of the new, scurrilous allegations in the Amended Complaint).

[31] Although "[w]illfulness is not required, and intent is irrelevant because of the remedial and coercive nature of civil contempt," *In re Damon,* 40 B.R. 367, 374 (Bankr. S.D.N.Y. 1984), Contemnors' willful violation of the Stay Order and the Limited Amendment Ruling amply supports—to say the least—an inference of intent.

40. The contempt is obvious on its face, and there is ample precedent to support the NC Companies' requested relief. For example, in *Cardell Financial Corp. v. Suchodolski Associates, Inc.*, No. 09 Civ 6148, 2012 WL 12932049, at *6 (S.D.N.Y. July 17, 2012), the court confirmed an arbitral award that contained an anti-suit injunction prohibiting a party from commencing a lawsuit in any jurisdiction against several named entities. Ignoring that order from the tribunal, the party filed an action against those entities in Brazil. *Id.* at *7. Those entities moved the court for an order of civil contempt and sanctions, which the magistrate recommended the court grant—noting that the party would need to withdraw the lawsuit to purge itself of contempt. *Id.* at *61.

41. Here too, the only way to purge the contempt—as the NC Companies previously advised Counsel—is to dismiss the NC Companies, with prejudice, as named defendants in the Amended Complaint. As summarized above, the JPLs and their Counsel refuse to purge their contempt and instead have only offered to take legally ineffective steps—like seeking a partial "dismissal" that is not even allowed by the Federal Rules of Civil Procedure.

42. This Court should not condone this misconduct. Instead, the Court should order the JPLs to dismiss the NC Companies, with prejudice, as defendants in the Amended Complaint as a remedy. *See E.E.O.C. v. Local 28 of the Sheet Metal Workers Intern. Ass'n*, 247 F.3d 333, 336 (2d Cir. 2001) ("In a civil contempt proceeding, the district court has 'broad discretion to fashion an appropriate coercive remedy[.]'") (quoting *N.A. Sales Co. v. Chapman Industries Corp.*, 736 F.2d 854, 857 (2d Cir. 1984)). Additionally, the Court should award monetary damages to the NC Companies in the form of attorneys' fees and costs in defending all matters in connection with the Amended Complaint and the filing and prosecution of the instant motion, as provided under Local Rule 83.6.

B. The Court Should Sanction the JPLs and Counsel Under 11 U.S.C. § 105 Because they Filed the Amended Complaint in Willful Violation of the Stay Order, the Limited Amendment Ruling, the Rehabilitation Order, the Liquidation Order and the NC Court Anti-Suit Order.

43. In addition to dismissal, the Contemnors' conduct warrants additional sanctions under Section 105.

44. Bankruptcy courts can impose sanctions for improper conduct pursuant to their inherent power under Section 105. This power stems from the bankruptcy courts' ability "to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Chambers v. NASCO, Inc.,* 501 U.S. 32, 43 (1991) (quotation omitted). One component of a court's inherent power is the power to assess costs and attorneys' fees against either the client or its attorney where a party has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y,* 421 U.S. 240, 258–59 (1975) (quotation omitted). Sanctions imposed under a court's inherent power "depend[] not on which party wins the lawsuit, but on how the parties conduct themselves during the litigation." *Chambers,* 501 U.S. at 53.

45. The Second Circuit has held that, to impose sanctions pursuant to its inherent powers, a court must find that the party to be sanctioned acted without a colorable basis and in bad faith. *Oliveri v. Thompson,* 803 F.2d 1265, 1272 (2d Cir. 1986) ("'[B]ad faith' may be found, not only in the actions that led to the lawsuit, but also in the conduct of the litigation.") (quotation omitted). "Bad faith" in this context means that the party was motivated by improper purposes, such as harassment or delay. *Id.* Thus, a court may impose sanctions pursuant to Section 105 "if the attorney's actions are so completely without merit as to require the conclusion that they must have been undertaken for some improper purpose such as delay." *Id.* at 1273. *See also Grand St.*

Realty, LLC v. McCord, No. 04-CV-4738(CBA), 2005 WL 2436214, at *8 (E.D.N.Y. Sept. 30, 2005) (stating same).

46. The inherent power of federal courts to impose attorneys' fees as a sanction for bad faith conduct in the course of litigation is not displaced by the sanctioning schemes provided for by Section 1927 or Federal Rule of Procedure 9011. The Supreme Court has opined that these other mechanisms for sanction, taken alone or together, are not substitutes for the court's inherent power, "for that power is both broader and narrower than other means of imposing sanctions." *Chambers,* 501 U.S. at 46.

47. Here, where the JPLs' actions could only have been undertaken for the improper purpose of harassing the NC Companies, attempting to render ineffective this Court's Stay Order and causing additional reputational damage to the Commissioner of Insurance for the State of North Carolina and his appointed Special Deputy Rehabilitators/Liquidators, such conduct clearly evidences pervasive bad faith. There is no conceivable legitimate basis for the JPLs and Counsel to have decided to file the Amended Complaint now—in the face of being put on notice that to do so would violate, among other things, the NC Anti-Suit Order—and to add new allegations and claims against the NC Companies, except to further harass and impede the NC Companies from implementing the MOU.[32] And even if the Contemnors believed that there was a legitimate need

[32] By their own admission, Plaintiffs are apparently not faced with an imminent statute of limitations problem, yet even if they were, they could have sought relief from either this Court or the NC Court in that regard. *See* Exhibit D, Feb. 27, 2023 Hr'g Tr. at 47:24–48:20 ("The Court: And let me ask you a question. Is there a timing issue about needing to do that? Mr. Kajon: Because – well, a number of our claims, or the claims we intended to bring and did bring, were governed by a three-year statute of limitation. The Court: No, I understand that. Mr. Kajon: And for those we needed the Section 108 extension. It is my understanding – I'm not a Bermuda lawyer – but it's my understanding that claims for fraud under Bermuda law are governed by a six-year statute of limitations. So, fraud claims are not time barred today. They could be time barred or will be time barred at a future time. And it's not – you know, one does not know how long an appeal will take. One does not know how long it will take to get a ruling from Judge Shirley. So, rather than seeing our statute tick down, which – and various transfers will become time barred as time passes, you know, we'd rather, notwithstanding the stay that Your Honor is going to issue, file an amended complaint now before any of those claims become time barred, rather than risk that we'll get a favorable ruling from the District Court or Judge Shirley before our statute expires.").

to amend the Original Complaint as reflected in the Amended Complaint, given the multiple orders that have been entered against them in connection with this Adversary Proceeding, any prudent Counsel would have at least sought permission to file it ***beforehand***.[33] The Contemnors knew—because it had been the subject of the prior Stay Order and rulings of this Court—that doing so violated numerous court orders and directives, including the Stay Order, the Limited Amendment Ruling, the Liquidation Order, the NC Court's Anti-Suit Order and the Rehabilitation Order.

48. This Court made clear that any amended complaint could only be filed for the limited purpose of adding PBLA to Count 1—as requested by Counsel—and specifically warned Counsel that any amendments could only relate to the other defendants and not "involve" the NC Companies because the Adversary Proceeding was stayed against them. This Court's warning (as well as the NC Anti-Suit Order) failed to deter the JPLs and Counsel from doing exactly what this Court admonished that they could not do.

49. Because the Court's prior orders and admonitions have not deterred the JPLs and their Counsel from continued abuse of the process, this Court should assess sanctions against the Contemnors. Perhaps that will succeed where unambiguous orders and clear, oral guidance have failed to deter them from filing pleadings in this (or any other) Court in bad faith.

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[33] Indeed, during the hearing on the Motion for Permission, Mr. Kajon conceded to Judge Shirley that Contemnors should have sought court approval prior to filing the Original Complaint:

> Well, Your Honor, I -- I am sitting here in state with you today with 2020 hindsight. I think a better course would have been to go -- to come either to you or to Judge Beckerman, or you both, and say -- you know, hey, we need to file this lawsuit by January 5th in a statutory -- you know, here's this anti-suit injunction in the state court or whatever. We don't need to respond. Please tell us we're right, or we're not right. Tell us what we need to do in order to prosecute these litigation crimes. But -- and again, 2020 hindsight, I – I think I should have done that, but I didn't and that's that's one of the reasons you file bankruptcy, to get out from under the State Court judgments and statutes of the requirements that Texaco did (inaudible).

Exhibit H, June 19, 2023 Hr'g Tr. at 25:3–19. Notwithstanding this admission, Contemnors shortly thereafter filed the Amended Complaint naming the NC Companies as defendants.

C. The Court Should Also Assess Sanctions Against Counsel Under Section 1927 Because the Amended Complaint is a Filing Made in Bad Faith and in a Frivolous, Vexatious, and Improper Manner, Violating Multiple Court Orders

50. The Court should also sanction Counsel under Section 1927 to further deter their misconduct and ensure that Counsel is sufficiently deterred from further bad faith misconduct.

51. Section 1927 of Title 28 provides that "[a]ny attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." 28 U.S.C. § 1927. By its terms, Section 1927 looks to unreasonable and vexatious multiplications of proceedings, and it imposes an obligation on attorneys throughout the entire litigation to avoid such tactics. *See Oliveri v. Thompson,* 803 F.2d 1265, 1273 (2d Cir. 1986).

52. The purpose of this statute is "to deter unnecessary delays in litigation." *Id.* The Second Circuit has explained that "an award under § 1927 is proper when the attorney's actions are so completely without merit as to require the conclusion that they must have been undertaken for some improper purpose such as delay." *Id. (citing Acevedo v. Immigration and Naturalization Service,* 538 F.2d 918, 920 (2d Cir.1976)).[34] Finally, an award of sanctions under Section 1927 must be supported by a finding of bad faith similar to that necessary to invoke the court's inherent power (discussed above). *Id.; accord Colucci v. New York Times Co.*, 533 F. Supp. 1011, 1013–14 (S.D.N.Y.1982).

[34] In contrast with Federal Rule of Procedure 11 and Section 105, awards pursuant to Section 1927 may be imposed only against the offending attorney and not the client. *Oliveri,* 803 F.2d at 1273.

53. The same basic facts that support sanctions and dismissal of the Amended Complaint and Section 105 sanctions support further Section 1927 sanctions against Counsel for their egregious tactics.

54. There is little reason beyond delay, harassment and attempts to inflict reputational harm for Counsel to have filed the Amended Complaint against the NC Companies. And Counsel's halfhearted attempt to fix the defect—purporting to "dismiss" only certain claims using the wrong procedural vehicle—only evidence Counsel's hostility to actually complying with this Court's (and the NC Court's) orders. Given the Court's unambiguous orders and express direction to Counsel, filing of the Amended Complaint clearly meets the definition of vexatious litigation.

55. Because the Court's prior orders and rulings have not deterred Counsel from continued abuse of the litigation process, this Court should assess separate sanctions against Counsel.

D. In Any Event, The Court Should Strike or Dismiss the Amended Complaint for Being Filed in Violation of Rule 15(a)(2) of the Federal Rules of Civil Procedure.

56. In the event that this Court does not dismiss the Amended Complaint as against the NC Companies for the JPLs' violation of this Court's Orders, the Court should strike the Amended Complaint for being filed in violation of Rule 15(a)(2) of the Federal Rules of Civil Procedure, which is applicable to this proceeding pursuant to Rule 7015 of the Federal Rules of Bankruptcy Procedure.

57. Rule 15(a)(1) allows a party to amend its pleading as a matter of course—meaning, without permission or consent—in two circumstances: within 21 days of serving the pleading, or within 21 days of a responsive pleading if one is required. Fed. R. Civ. P. 15(a)(1)(A)-(B).

58. The JPLs filed their Amended Complaint months after the Original Complaint was served, and no party has yet filed a responsive pleading. Accordingly, the JPLs are not within the window of time to file an Amended Complaint as of right. Thus, the JPLs were obligated to either (a) obtain the opposing parties' consent, or (b) seek the Court's leave before filing an Amended Complaint, pursuant to Rule 15(a)(2), which applies to all other amendments.

59. While Counsel did informally request permission to amend the Original Complaint, Plaintiffs did not file a motion seeking such relief, nor did the Plaintiffs put the more than 900 other defendants in the Adversary Proceeding—or this Court—on notice of the extensive amendments which they intended to make, apparently believing that they could simply get away with it (even if they were arguably granted limited relief pursuant to what may have been deemed an oral motion).

60. The proper remedy for a pleading filed in violation of Rule 15 is for such pleading to be stricken. *See, e.g., BPW Rhythmic Records, L.L.C. v. CDNOW, Inc.*, No. 99 CIV. 11299(LAK), 2000 WL 1512620, at *1 (S.D.N.Y. Oct. 12, 2000) (granting motion to strike amended complaint filed without leave of court); *Gucci America, Inc. v. Exclusive Imports Intern.*, No. 99 Civ. 11490(RCC)(FM), 2001 WL 21253, at *5 (S.D.N.Y. Jan. 9, 2011) (striking amended answer and counterclaims filed without leave of court); *cf. Securities Investor Protection Corporation v. Bernard L Madoff Investment Securities LLC*, 594 B.R. 167, 194 (Bankr. S.D.N.Y. 2018) (amended complaint filed without leave "is a nullity").

61. Accordingly, on this basis alone, the Court should strike or dismiss the Amended Complaint.

CONCLUSION

Based upon all of the foregoing, it is respectfully requested that: (i) the Court hold the JPLs and Counsel in contempt of court for their violation of this Court's orders and dismiss or strike the Amended Complaint as to the NC Companies, with prejudice, as a remedy, (ii) award monetary damages in the form of attorneys' fees and costs in defending all matters in connection with the Amended Complaint and the instant motion to the NC Companies and for damages suffered as a result of the JPLs' and their Counsels' contempt, (iii) assess sanctions under Section 105 against the JPLs and Counsel in the form of a monetary award to the NC Companies, and (iii) award monetary sanctions against Counsel under Section 1927 to further deter their misconduct and ensure that Counsel is sufficiently deterred from further bad faith misconduct. The NC Companies respectfully submit that the sanctions requested are proportional to the harms suffered and necessary to deter future sanctionable conduct by the JPLs and Counsel. Alternatively, the NC Companies request that this Court strike or dismiss the Amended Complaint as having been filed in violation of Rule 15(a)(2) of the Federal Rules of Civil Procedure.

Dated: New York, New York
October 17, 2023

Squire Patton Boggs (US) LLP

By: */s/ Norman N. Kinel*

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ATTACHMENT “2”

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re: PB LIFE AND ANNUITY CO., LTD., *et al.* Debtors in Foreign Proceedings.	Chapter 15 Case No. 20-12791 (LGB) (Jointly Administered)
JOHN JOHNSTON, AS JOINT PROVISIONAL LIQUIDATOR ON BEHALF OF PB LIFE AND ANNUITY CO., LTD., NORTHSTAR FINANCIAL SERVICES (BERMUDA) LTD., OMNIA LTD., AND PB INVESTMENT HOLDINGS LTD., AND PB LIFE AND ANNUITY CO., LTD., NORTHSTAR FINANCIAL SERVICES (BERMUDA) LTD., OMNIA LTD., AND PB INVESTMENT HOLDINGS LTD., Plaintiffs, v. GREGREY EVAN LINDBERG a/k/a GREG EVAN LINDBERG, *et al.* Defendants.	Adv. Pro. No. 23-01000 (LGB)

ORDER GRANTING IN PART THE NC INSURANCE COMPANIES' MOTION (I) TO HOLD THE JPLS AND THEIR COUNSEL IN CONTEMPT FOR VIOLATING THIS COURT'S ORDERS, AND (II) FOR SANCTIONS PURSUANT TO SECTION 105 OF THE BANKRUPTCY CODE AND 28 U.S.C. § 1927 IN CONNECTION WITH THE FILING OF THE AMENDED COMPLAINT

Upon consideration of Colorado Bankers Life Insurance Company, Bankers Life Insurance Company's, Southland National Insurance Corporation's, and Southland National Reinsurance Corporation's (collectively, the "NC Companies" or "NCIC") *Motion (I) to Hold the JPLs and their Counsel in Contempt for Violating this Court's Orders, and (II) for Sanctions Pursuant to Section 105 of the Bankruptcy Code and 28 U.S.C. § 1927 in Connection With the Filing of the Amended Complaint* (the "Sanctions Motion"), and the declaration of Norman N. Kinel in support

thereof together with all exhibits thereto filed on October 17, 2023 [Adv. Pro. ECF Nos. 142, 143] seeking an order holding the JPLs and their counsel—Nicholas F. Kajon, Constantine D. Pourakis, Eric M. Robinson, and Wade D. Koenecke of Stevens & Lee, P.C. (together, "Counsel") in contempt and granting monetary and other sanctions under Section 105, Section 1927, Local Rule 83.6, and this Court's inherent powers; [1] and the Court having reviewed all pleadings and briefing submitted by the parties, including declarations, exhibits and charts annexed thereto;[2] and the Court having held a status conference on the Sanctions Motion on October 26, 2023 and heard argument of the parties at hearings held on November 8, 2023 and November 28, 2023 (collectively, the "Hearing"); and the Court finding that due and sufficient notice of the Sanctions Motion was provided to all parties; and for the reasons stated by the Court on the record at the Hearing and the Court having granted the Sanctions Motion, in part, at the conclusion of the Hearing; and the Court having "So Ordered" the entire record of the Hearing, which record is incorporated in full by reference herein; and the Court having reviewed the subsequent submissions made by the parties regarding the fees and costs sought as part of the Sanctions

[1] Capitalized terms used herein which are undefined shall have the meanings ascribed to them in the Sanctions Motion, the Amended Complaint, the Reply or the Reply to the Sur-Reply (defined below).

[2] In addition to the Sanctions Motion, the Declaration of Norman N. Kinel and the exhibits attached thereto, such pleadings and briefing filed by the parties and considered by the Court were the following: *Opposition of the Joint Provisional Liquidators to the NC Companies' Motion (I) to Hold the JPLs and their Counsel in Contempt for Violating this Court's Orders, and (II) for Sanctions Pursuant to Section 105 of the Bankruptcy Code and 28 U.S.C. § 1927 in Connection With the Filing of the Amended Complaint* [Adv. Pro. ECF No. 166]; Declaration of Nicholas F. Kajon in Opposition [Adv. Pro. ECF No. 164]; Declaration of Constantine D. Pourakis in Opposition [Adv. Pro. ECF No. 165]; *Reply of the NCIC to the Opposition of the Joint Provisional Liquidators to the NC Companies' Motion (I) to Hold the JPLs and their Counsel in Contempt for Violating this Court's Orders, and (II) for Sanctions Pursuant to Section 105 of the Bankruptcy Code and 28 U.S.C. § 1927 in Connection With the Filing of the Amended Complaint* (the "Reply") [Adv. Pro. ECF No. 171]; *Plaintiffs' Sur-Reply to the NC Insurance Companies' Motion (I) To Hold the JPLS and Their Counsel in Contempt for Violating This Court's Orders; and (II) For Sanctions Pursuant to Section 105 of the Bankruptcy Code and 28 U.S.C. § 1927 in Connection with the Filing of the Amended Complaint* (the "Sur-Reply") [Adv. Pro. ECF No. 180]; and *Reply of the NCIC to the Plaintiffs' Sur-Reply to the Motion (I) To Hold the JPLS and Their Counsel in Contempt for Violating This Court's Orders; and (II) For Sanctions Pursuant to Section 105 of the Bankruptcy Code and 28 U.S.C. § 1927 in Connection with the Filing of the Amended Complaint* [Adv. Pro. ECF No. 183] (the "Reply to the Sur-Reply").

Motion;[3] and after due deliberation and sufficient cause appearing therefor, the Court makes the following findings of fact and conclusions of law:

IT IS HEREBY FOUND AND DETERMINED THAT:[4]

a. On June 27, 2019, the Wake County Superior Court of the State of North Carolina (the "NC Court") in the matter captioned *Causey v. Southland National Insurance Corporation, et al.*, No. 19 CV 008664, entered an *Order of Rehabilitation, Order Appointing Receiver, and Order Granting Injunctive Relief* (the "Rehabilitation Order"), pursuant to which the NC Court enjoined "any person from instituting or prosecuting any suit or other action" against the NC Companies without prior permission of the NC Court.

b. On January 4, 2023, the Plaintiffs commenced an adversary proceeding in the Bankruptcy Court captioned *Johnston v. Lindberg, et al.*, Adv. Pro. No. 23-01000 (LGB) (Bankr. S.D.N.Y. Jan. 4, 2023) (the "Adversary Proceeding" or the "JPLAP") by filing a complaint asserting eighteen causes of action against the NC Companies [Adv. Pro. ECF No. 1] (the "Original Complaint").

c. On January 18, 2023, the NC Companies filed their *Motion to Stay Adversary Proceeding as to the NC Insurance Companies Subject to Plaintiffs Obtaining a Final Order From the Rehabilitation Court Authorizing the Filing of the Complaint and the Prosecution of the Adversary Proceeding* [Adv. Pro. ECF No. 7] (the "Stay Motion").

[3] Supplemental Declaration of Norman N. Kinel [Adv. Pro. ECF No. 206], Supplemental Direction of Nicholas F. Kajon [Adv. Pro. ECF No. 222], Reply Declaration of Norman N. Kinel [Adv. Pro. ECF No. 226], Sur-Reply Declaration of Nicholas F. Kajon [Adv. Pro. ECF No. 235], Addendum to Sur-Reply Declaration [Adv. Pro. ECF No. 236], Reply Declaration of Norman N. Kinel [Adv. Pro. ECF No. 238], and Second Supplemental Declaration of Norman N. Kinel [Adv. Pro. ECF No. 239].

[4] The findings of fact and conclusion of law set forth herein constitute the Court's findings of fact and conclusions of law pursuant to Fed. R. Bankr. P. 7052, made applicable to this proceeding by Fed. R. Bankr. P. 9020 and Fed. R. Bankr. P. 9014. To the extent any of the findings of fact constitute conclusions of law, they are adopted as such. To the extent any of the conclusions of law constitute findings of fact, they are adopted as such.

d. Prior to the conclusion of the Hearing on February 27, 2023, Counsel—without prior notice either to this Court or the NC Companies—informed the Court that the JPLs wished to amend the Original Complaint and orally requested that this Court confirm to what extent the Original Complaint could be amended. In response, this Court stated that Plaintiffs could amend Count 1 of the Original Complaint so long as the amendment "doesn't involve the North Carolina Insurance Companies." Hr'g Tr. 47:17–52:9 [Adv. Pro. ECF No. 69].

e. On March 10, 2023, this Court issued its written *Order Granting Motion to Stay Adversary Proceeding as to the NC Insurance Companies Subject to Plaintiffs Obtaining an Order From the Rehabilitation Court Authorizing the Filing of the Complaint and the Prosecution of the Adversary Proceeding* [Adv. Pro. ECF No. 78] (the "Stay Order").

f. In the Stay Order, this Court ruled that (i) the JPLAP was stayed as to the NC Companies, (ii) all litigation deadlines were inapplicable to the NC Companies as long as the stay remained in effect, (iii) the stay would remain in effect until ten business days following the JPLs filing with the Bankruptcy Court an order of the NC Court evidencing that court's authorization for the JPLs to prosecute the JPLAP, and (iv) if such order was filed, a conference would be scheduled to establish pleading, discovery, and other deadlines in the JPLAP as they relate to the NC Companies.

g. On March 24, 2023, the JPLs filed a *Notice of Appeal* of the Stay Order to the U.S. District Court for the Southern District of New York [Adv. Pro. ECF No. 107] (the "Appeal"), which is *sub judice* as of the date hereof.

h. On May 22, 2023, the Plaintiffs filed in the NC Court the *Motion of Rachelle Frisby and John Johnston, in Their Capacities as the Joint Provisional Liquidators and Authorized Foreign Representatives for PB Life and Annuity Co., Ltd., Northstar Financial Services*

(Bermuda) Ltd., Omnia Ltd. and PB Investment Holdings Ltd. for Permission to (I) Prosecute Adversary Proceeding and (II) File Counterclaims Against Respondents (the "Motion for Permission"). On June 19, 2023, the NC Court held a hearing on the Motion for Permission, at the conclusion of which it issued its oral ruling denying the motion. Thereafter, on July 5, 2023, the NC Court entered the NC Anti-Suit Order, denying the Motion for Permission. The JPLs did not appeal the NC Anti-Suit Order and it is a final order.

i. On September 27, 2023, the Plaintiffs filed the Amended Complaint [Adv. Pro. ECF No. 142].

j. To date, the JPLs and Counsel have not withdrawn the Amended Complaint.

NOW, THEREFORE, IT IS FURTHER FOUND AND DETERMINED THAT:

r. The Court has jurisdiction to enforce the Stay Order during the pendency of the Appeal.

s. The Court finds that each of the JPLs and Counsel were aware of the Stay Order.

t. The Stay Order is clear and unambiguous and stayed the entire Adversary Proceeding as it related to the NC Companies.

v. The evidence of the JPLs' and Counsel's noncompliance with the Stay Order is clear and convincing.

w. Specifically, the filing of the Amended Complaint, (i) adding seven (7) new claims against the NC Companies, (ii) adding new requests for relief to existing claims against the NC Companies, (iii) adding new statutory grounds to requests for relief to existing claims, (iv) expanding the reach of the requested relief, (v) adding new allegations regarding the NC Companies to substantiate old and new counts, and (vi) making new allegations against the North

Carolina Commissioner of Insurance and the Special Deputy Rehabilitators/Liquidators, all violated this Court's Stay Order.

y. The JPLs and Counsel engaged in vexatious conduct in filing the Amended Complaint.

z. The JPLs and Counsel are in contempt of the Stay Order.

NOW THEREFORE IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. Pursuant to Section 105 of the Bankruptcy Code and this Court's inherent and contempt powers, Mr. John Johnston—the JPL who authorized the filing of the Amended Complaint—and Counsel—Nicholas F. Kajon, Constantine D. Pourakis, Eric M. Robinson, and Wade D. Koenecke of Stevens & Lee, P.C.—are hereby each found in civil contempt for having violated this Court's Stay Order.

2. As a result of their contempt, sanctions against Mr. Johnston and Counsel under Section 105 of the Bankruptcy Code are appropriate and warranted under the facts determined by this Court. The Court grants Counsel's request that the monetary sanctions for the contempt be imposed only upon the JPLs' law firm, Stevens & Lee, P.C. and not on the JPLs.

3. The Court does not find that there is sufficient evidence of an improper purpose on the part of the JPLs or Stevens & Lee, P.C. in filing the Amended Complaint and so accordingly, the Court does not find that the conduct of the JPLs or Stevens & Lee, P.C. supports a finding under 28 U.S.C. § 1927.

4. The Court also finds that striking the NC Companies as defendants from the Amended Complaint, with or without prejudice, is not appropriate relief under the circumstances.

5. The JPLs, through Counsel, shall provide to counsel for the NC Companies a "Restated and Amended Complaint," (as well as a redline showing the changes made from the Original Complaint and the Amended Complaint to the Restated and Amended Complaint), which shall not assert any new facts, allegations, claims, or causes of action against the NC Companies that were not in the Original Complaint. Counsel for the JPLs and the NC Companies shall confer in good faith regarding whether the "Restated and Amended Complaint" is in compliance with this Order before the JPLs file it with the Court.

6 Provided that counsel for the NC Companies confirm to Counsel for the JPLs that the "Restated and Amended Complaint" is in compliance with this Order, the JPLs shall file it on the docket of the Adversary Proceeding, together with redlines showing the changes made in the Restated and Amended Complaint as against the Original Complaint and the Amended Complaint, within three (3) days of such confirmation.

7. In the event counsel for the NC Companies advise Counsel for the JPLs that the Restated and Amended Complaint is not in compliance with this Order and the parties are unable to resolve the matter, either party may request an expedited conference with the Court to consider and rule on the matter.

8. The NC Companies are hereby awarded reasonable attorneys' fees and costs (the "Attorneys' Fees and Costs") in connection with the Sanctions Motion, all subsequent pleadings filed in connection with the Sanctions Motion, and the prosecution of the Sanctions Motion, including the submissions regarding fees and costs, as follows: (a) $579,049.75 in reasonable attorney's fees and $1,678.01 in costs are awarded to the NC Companies with respect to the fees and costs billed to the NC Companies by Squire Patton Boggs (USA) LLP[5] and (b) $89,564.28 in

[5] The Court has reviewed all of the pleadings submitted by the parties regarding fees and costs. The Court notes that the time records were not kept by a professional retained under section 327 or section 1103 of the Bankruptcy

reasonable attorney's fees and $0 in costs are awarded to the NC Companies with respect to the fees and costs billed to the NC Companies by Williams Mullin[6]. The Attorneys' Fees and Costs are awarded against the law firm of Stevens & Lee, P.C. and shall be paid to the NC Companies within ten (10) days of the date of this Order.

9. Within two (2) days of entry of this Order, the NC Companies shall serve a copy of this Order on Nicholas F. Kajon, Constantine D. Pourakis, Eric M. Robinson, and Wade D. Koenecke of Stevens & Lee, P.C., and the JPLs (via service upon Steven & Lee, P.C.), each by overnight Federal Express.

Code. Accordingly, neither Squire Patton Boggs (USA) LLP nor Williams Mullin would have expected to have to keep time in accordance with United States Trustee Guidelines. While having the time spent on each task broken out would have been helpful to the Court in evaluating the amount of time spent on the various tasks, there is no reason why counsel to the NC Companies would have been expected to keep time in that manner. Further, the Court has discretion in determining the proper amount of attorney's fees and expense awards as a compensatory sanction, guided by principles applied to fee and expense awards. The Court here has applied the lodestar analysis to evaluate fees and expenses sought as a compensatory sanction. Last, the Court agrees with Counsel for the JPLs that some adjustments need to be made to the amount of fees sought by Squire Patton Boggs (USA) LLP. The Court begins with the amount of fees sought in the Second Supplemental Declaration of Norman N. Kinel, $625,192.00. It reduces that amount by $12,000 for research conducted by Mr. Kinel and Ms. Hazan. Having reviewed the time records, the Court does not accept the explanation provided by Mr. Kinel with respect to research as Mr. Kinel and Ms. Hazan clearly use other language when reviewing cases in their time records. Because of the block billing, the Court had to make a reasonable analysis as to how much time was spent on that task on the five dates. Next, it reduces the amount by $ 9,251.25 relating to time spent regarding RICO. It does so because the JPLs did offer to remove those counts from the Complaint. So while counsel for the NC Companies would have had to spend time addressing RICO, not all of the time would have been necessary since Counsel for the JPLs tried to ameliorate their mistake. Last, it reduces the fees for time that incurred which is redundant of time spent by Williams Mullin on the same tasks. While the Court should not after the fact micromanage how co-counsel divide up tasks, having reviewed the time records, there does seem to be some redundancy with Williams Mullin and so it is reducing the fees by $24,891. The Court does not find that there were fees sought outside of the scope of what the Court awarded with respect the Sanctions Motion, including with respect to review of the Amended Complaint and tasks undertaken after the Amended Complaint was filed. The Court is including the time spent with respect to supplemental filings regarding fees and costs as part of the compensatory award. The Court otherwise overrules the other objections raised by Counsel to the JPLs with respect to the fees and costs of Squire Patton Boggs (USA) LLP.

[6] The Court starts with $92,513.28 which is the amount sought in the Second Supplemental Declaration of Norman N. Kinel. In addition to the reduction for time spent regarding RICO in the amount of $529.80 for the reasons discussed above, the Court also finds that too many attorneys billed for time attending conferences and hearings before the Court and so the Court has reduced the fees sought by $2,419.20. The Court otherwise overrules the other objections raised by Counsel to the JPLs with respect to the fees and costs of Williams Mullin.

10. Should Stevens & Lee, P.C. fail to timely remit full payment to the NC Companies as directed in paragraph 8 above, post-judgment interest shall accrue on all unpaid amounts at the rate set forth in 28 U.S.C. § 1961.

11. This Court shall retain jurisdiction over any and all matters arising from the interpretation and implementation of this Order.

Dated: February 1, 2023~~3~~4
New York, New York

/s/ Lisa G. Beckerman__
Honorable Lisa G. Beckerman
United States Bankruptcy Judge

ATTACHMENT “3”

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	**Chapter 11**
286 Rider Ave Acquisition LLC	**Case No. 21-11298 (LGB)**
Debtor.	

ORDER WITH REGARDS TO BREACH OF THE AUTOMATIC STAY

WHEREAS, on February 25, 2022, 286 Rider Ave Acquisition, LLC (the "Debtor") and Mr. Lee E. Buchwald, the Manager of the Debtor (the "Manager"), filed the *Motion to Reconsider Portion of Court's February 11, 2022 Order Regarding 286 Rider Ave Development, LLC's Motion to Confirm Disputed Pay-Off Amounts, Satisfaction of DIP Loan, and For Related Relief and Supplement to Same* [ECF No. 311] (the "Motion");

WHEREAS, on March 11, 2022, the Debtor and Manager filed a reply in support of the Motion [ECF No. 329] (the "Reply") reciting that (i) Manager, upon checking on the status of the real property owned by the Debtor (the "Property" or the "Premises"), discovered that 286 Rider Ave Development, LLC (hereafter, "Development") or persons acting on behalf of Development had improperly replaced the locks on the property, without the knowledge or consent of Manager or this Court; (ii) environmental remediation, asbestos abatement, and other construction work had been carried out on the Premises by third-parties, without the knowledge or consent of Manager or this Court; and (iii) this unauthorized work resulted in a complaint being filed with the New York City Department of Buildings;

WHEREAS, the Reply also contains photographs which demonstrate that there is significant damage to the roof and to the floor of the Property;

WHEREAS, on March 16, 2022, Development filed a surreply in opposition to the Motion [ECF No. 332] (the "Surreply") containing information about the environmental remediation and asbestos abatement work performed at the Property at Development's behest without the knowledge or consent of Manager or this Court. The Surreply states that Development contracted with Enviroscope Corporation (hereafter, "Enviroscope") for the environmental remediation and asbestos abatement which was carried out on the Premises without the knowledge or consent of Manager or this Court;

WHEREAS, the damage done to the building appears to have been caused by Enviroscope when it performed the unauthorized work on the Premises;

WHEREAS, on March 16, 2022, this Court held a hearing with respect to the Debtor's Motion during which the Court also addressed the above-described actions taken by Development and its principals, Toby Moskovits and Michael Lichtenstein (collectively the "Principals"); and

WHEREAS, on October 28, 2021, this Court entered an order which provided among other things that only the Manager and any employee of Buchwald Capital Advisors LLC are authorized to replace the locks with respect to the Property and take other measures with respect to the security of the Property [ECF No. 108].

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

1. Based on the Reply, the Surreply, and the record of the hearing held by the Court on March 16, 2022, pursuant to Bankruptcy Code Sections 105 and 362, the Court finds that

Development is in breach of the automatic stay and in contempt of this Court's prior orders as a result of its actions and the actions of its Principals, Enviroscope, and possibly other persons acting at the instruction of Development and its Principals with respect to the Property.

2. Pursuant to Bankruptcy Code Sections 105 and 362, Development, the Principals and any affiliates, employees, agents, and representatives of each such party (collectively, the "Development Parties"), are enjoined from taking any further acts with respect to the Property (except as expressly provided herein or as authorized by a further order of the Court) including, but not limited to, (i) obtaining or applying for any permits with respect to the Property on behalf of the Debtor, in the name of the Debtor, or otherwise; (ii) entering into any contracts with respect to the Property on behalf of the Debtor, in the name of the Debtor, or otherwise; (iii) making any filings with any governmental agency with respect to the Property on behalf of the Debtor, in the name of the Debtor, or otherwise; (iv) engaging in, authorizing, or contracting with any third-party to engage in, environmental remediation, asbestos abatement, or any other construction at the Premises; (v) replacing the locks and tampering with any devices utilized for security at the Premises; (vi) demolishing any existing structures at the Premises; (vii) removing or modifying any fixtures or equipment or other personal property located on the Premises; or (viii) entering the Premises or authorizing entrance to the Premises by any person other than a person authorized by Manager to enter the Premises.

3. This Court will enter a separate order (the "Initial Sanctions Order") requiring that Development and the Principals immediately pay to Manager a specified amount for (i) the cost of replacement locks, surveillance cameras, and the installation and maintenance of such systems on the Premises; and (ii) the cost of a structural engineer (a "Structural Engineer") selected by Manager who will inspect the Premises and deliver a report regarding whether the

Property is currently structurally sound and the extent to which repairs are required to make the Property structurally sound, including repairs to the damaged roof and floor. A copy of the Structural Engineer's report shall be filed with the Court and served on Development and the Principals.

4. Development, its Principals, and Enviroscope shall timely and accurately respond to any information requests from the Structural Engineer or Manager regarding the Premises.

5. This Court expressly reserves the right to order additional sanctions regarding the breach of the automatic stay and contempt of this Court's prior orders by Development, the Principals, Enviroscope, and possibly other persons or entities acting at the instruction of Development and its Principals once the report of the Structural Engineer is filed with this Court.

6. Nothing contained herein limits or otherwise impairs the authority of the Court to impose sanctions with respect to any violation of this Order or any other conduct, and to enter such other orders as it may deem necessary and appropriate.

7. This Court shall retain jurisdiction to hear and determine all matters arising from or related to the implementation, interpretation and/or enforcement of this Order.

Dated: March 17, 2022
New York, New York

/S/ Lisa G. Beckerman
Hon. Lisa G. Beckerman
United States Bankruptcy Judge

ATTACHMENT “4”

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	Chapter 11
Kumtor Gold Company CJSC and Kumtor Operating Company CJSC,[1]	:	Case No. 21-11051 (LGB)
Debtors.	:	Jointly Administered
Kumtor Gold Company CJSC and Kumtor Operating Company CJSC,	:	Adversary No. 21-01175 (LGB)
Plaintiffs.	:	
v.	:	
Kyrgyz Republic,	:	
Defendant.	:	

ORDER REGARDING (I) DEBTORS' EMERGENCY MOTION AND (II) PLATINIFF'S MOTION FOR A TEMPORARY RESTRAINING ORDER AND A PRELIMINARY INJUNCTION

Upon the *Debtors' (I) Reply in Support of the Debtors' Motion for Entry of an Order Modifying the Automatic Stay with Respect to the UNCITRAL Arbitration and (II) Emergency Motion to Enforce the Automatic Stay* [Case No. 21-11051, D.I. 57] (the "Emergency Motion") and the *Plaintiff's Motion for a Temporary Restraining Order and a Preliminary Injunction* [Case No. 21-01175, D.I. 2] (the "TRO Motion" and, together with the Emergency Motion, the "Motions")[2]; and this Court having jurisdiction to consider the Motion pursuant to

[1] The Debtors' corporate headquarters is located at 24 Ibraimova Street, 720001, Bishkek, the Kyrgyz Republic.

[2] Capitalized terms not otherwise defined herein shall be given the meanings ascribed to them in the Emergency Motion or the TRO Motion, as applicable.

28 U.S.C. §§ 157 and 1334; and venue of these chapter 11 cases and the Motions in this district being proper pursuant to 28 U.S.C. §§ 1408 and 1409; and this matter being a core proceeding pursuant to 28 U.S.C. § 157(b); and the response deadline to the TRO Motion having expired on July 16, 2021; and the Kyrgyz Government having interposed a timely objection; and a hearing having been held with respect to the Motions on July 19, 2021 (the "Hearing"); and after due deliberation and sufficient cause appearing therefor;

IT IS HEREBY ORDERED THAT:

1. For the reasons stated on the record at the Hearing, the Emergency Motion is GRANTED to the extent set forth herein.

2. For the reasons stated on the record at the Hearing, the Kyrgyz Government has violated the automatic stay pursuant to section 362(a)(3) of the Bankruptcy Code.

3. For the reasons stated on the record at the Hearing, Kyrgyz Government is in contempt, including of this Court's prior *Order Enforcing Sections 362, 365(E)(1) and 525 of the Bankruptcy Code* at docket no. 20, and, pursuant to section 105(a) of the Bankruptcy Code, shall reimburse the Debtors' actual costs and attorneys' fees in connection with the filing of the Emergency Motion and the commencement and prosecution of *Kumtor Gold Company CJSC and Kumtor Operating Company CJSC* v. *Kyrgyz Republic*, Case No. 21-01175 (LGB) (Bankr. S.D.N.Y.).

4. However, the Kyrgyz Government is not obligated to pay such costs until a copy of the Emergency Motion and this order has been served upon the Kyrgyz Government in accordance with 28 U.S.C. § 1608.

5. For the reasons stated on the record at the Hearing, the TRO Motion is DENIED.

6. This Court shall retain exclusive jurisdiction with respect to any matters, claims, rights or disputes arising from or related to the Motions or the implementation of this Order.

Dated: July 20, 2021
New York, NY

/s/ Lisa G. Beckerman
The Honorable Lisa G. Beckerman
United States Bankruptcy Judge

ATTACHMENT “5”

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 512 **July 29, 2024**

Generative Artificial Intelligence Tools

To ensure clients are protected, lawyers using generative artificial intelligence tools must fully consider their applicable ethical obligations, including their duties to provide competent legal representation, to protect client information, to communicate with clients, to supervise their employees and agents, to advance only meritorious claims and contentions, to ensure candor toward the tribunal, and to charge reasonable fees.

I. Introduction

Many lawyers use artificial intelligence (AI) based technologies in their practices to improve the efficiency and quality of legal services to clients.[1] A well-known use is electronic discovery in litigation, in which lawyers use technology-assisted review to categorize vast quantities of documents as responsive or non-responsive and to segregate privileged documents. Another common use is contract analytics, which lawyers use to conduct due diligence in connection with mergers and acquisitions and large corporate transactions. In the realm of analytics, AI also can help lawyers predict how judges might rule on a legal question based on data about the judge's rulings; discover the summary judgment grant rate for every federal district judge; or evaluate how parties and lawyers may behave in current litigation based on their past conduct in similar litigation. And for basic legal research, AI may enhance lawyers' search results.

This opinion discusses a subset of AI technology that has more recently drawn the attention of the legal profession and the world at large – generative AI (GAI), which can create various types of new content, including text, images, audio, video, and software code in response to a user's prompts and questions.[2] GAI tools that produce new text are prediction tools that generate a statistically probable output when prompted. To accomplish this, these tools analyze large amounts of digital text culled from the internet or proprietary data sources. Some GAI tools are described as "self-learning," meaning they will learn from themselves as they cull more data. GAI tools may assist lawyers in tasks such as legal research, contract review, due diligence, document review, regulatory compliance, and drafting letters, contracts, briefs, and other legal documents.

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[1] There is no single definition of artificial intelligence. At its essence, AI involves computer technology, software, and systems that perform tasks traditionally requiring human intelligence. The ability of a computer or computer-controlled robot to perform tasks commonly associated with intelligent beings is one definition. The term is frequently applied to the project of developing systems that appear to employ or replicate intellectual processes characteristic of humans, such as the ability to reason, discover meaning, generalize, or learn from past experience. BRITTANICA, https://www.britannica.com/technology/artificial-intelligence (last visited July 12, 2024).

[2] George Lawton, *What is Generative AI? Everything You Need to Know*, TECHTARGET (July 12, 2024), https://www.techtarget.com/searchenterpriseai/definition/generative-AI.

GAI tools—whether general purpose or designed specifically for the practice of law—raise important questions under the ABA Model Rules of Professional Conduct.[3] What level of competency should lawyers acquire regarding a GAI tool? How can lawyers satisfy their duty of confidentiality when using a GAI tool that requires input of information relating to a representation? When must lawyers disclose their use of a GAI tool to clients? What level of review of a GAI tool's process or output is necessary? What constitutes a reasonable fee or expense when lawyers use a GAI tool to provide legal services to clients?

At the same time, as with many new technologies, GAI tools are a moving target—indeed, a *rapidly* moving target—in the sense that their precise features and utility to law practice are quickly changing and will continue to change in ways that may be difficult or impossible to anticipate. This Opinion identifies some ethical issues involving the use of GAI tools and offers general guidance for lawyers attempting to navigate this emerging landscape.[4] It is anticipated that this Committee and state and local bar association ethics committees will likely offer updated guidance on professional conduct issues relevant to specific GAI tools as they develop.

II. Discussion

A. Competence

Model Rule 1.1 obligates lawyers to provide competent representation to clients.[5] This duty requires lawyers to exercise the "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation," as well as to understand "the benefits and risks associated" with the technologies used to deliver legal services to clients.[6] Lawyers may ordinarily achieve the requisite level of competency by engaging in self-study, associating with another competent lawyer, or consulting with an individual who has sufficient expertise in the relevant field.[7]

To competently use a GAI tool in a client representation, lawyers need not become GAI experts. Rather, lawyers must have a reasonable understanding of the capabilities and limitations

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[3] Many of the professional responsibility concerns that arise with GAI tools are similar to the issues that exist with other AI tools and should be considered by lawyers using such technology.

[4] This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2023. The Opinion addresses several imminent ethics issues associated with the use of GAI, but additional issues may surface, including those found in Model Rule 7.1 ("Communications Concerning a Lawyer's Services"), Model Rule 1.7 ("Conflict of Interest: Current Clients"), and Model Rule 1.9 ("Duties to Former Clients"). *See, e.g.*, Fla. State Bar Ass'n, Prof'l Ethics Comm. Op. 24-1, at 7 (2024) (discussing the use of GAI chatbots under Florida Rule 4-7.13, which prohibits misleading content and unduly manipulative or intrusive advertisements); Pa. State Bar Ass'n Comm. on Legal Ethics & Prof'l Resp. & Philadelphia Bar Ass'n Prof'l Guidance Comm. Joint Formal Op. 2024-200 [hereinafter Pa. & Philadelphia Joint Formal Opinion 2024-200], at 10 (2024) ("Because the large language models used in generative AI continue to develop, some without safeguards similar to those already in use in law offices, such as ethical walls, they may run afoul of Rules 1.7 and 1.9 by using the information developed from one representation to inform another."). Accordingly, lawyers should consider all rules before using GAI tools.

[5] MODEL RULES OF PROF'L CONDUCT R. 1.1 (2023) [hereinafter MODEL RULES].

[6] MODEL RULES R. 1.1 & cmt. [8]. *See also* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 477R, at 2–3 (2017) [hereinafter ABA Formal Op. 477R] (discussing the ABA's "technology amendments" made to the Model Rules in 2012).

[7] MODEL RULES R. 1.1 cmts. [1], [2] & [4]; Cal. St. Bar, Comm. Prof'l Resp. Op. 2015-193, 2015 WL 4152025, at *2–3 (2015).

of the specific GAI technology that the lawyer might use. This means that lawyers should either acquire a reasonable understanding of the benefits and risks of the GAI tools that they employ in their practices or draw on the expertise of others who can provide guidance about the relevant GAI tool's capabilities and limitations.[8] This is not a static undertaking. Given the fast-paced evolution of GAI tools, technological competence presupposes that lawyers remain vigilant about the tools' benefits and risks.[9] Although there is no single right way to keep up with GAI developments, lawyers should consider reading about GAI tools targeted at the legal profession, attending relevant continuing legal education programs, and, as noted above, consulting others who are proficient in GAI technology.[10]

With the ability to quickly create new, seemingly human-crafted content in response to user prompts, GAI tools offer lawyers the potential to increase the efficiency and quality of their legal services to clients. Lawyers must recognize inherent risks, however.[11] One example is the risk of producing inaccurate output, which can occur in several ways. The large language models underlying GAI tools use complex algorithms to create fluent text, yet GAI tools are only as good as their data and related infrastructure. If the quality, breadth, and sources of the underlying data on which a GAI tool is trained are limited or outdated or reflect biased content, the tool might produce unreliable, incomplete, or discriminatory results. In addition, the GAI tools lack the ability to understand the meaning of the text they generate or evaluate its context.[12] Thus, they may combine otherwise accurate information in unexpected ways to yield false or inaccurate results.[13] Some GAI tools are also prone to "hallucinations," providing ostensibly plausible responses that have no basis in fact or reality.[14]

Because GAI tools are subject to mistakes, lawyers' uncritical reliance on content created by a GAI tool can result in inaccurate legal advice to clients or misleading representations to courts and third parties. Therefore, a lawyer's reliance on, or submission of, a GAI tool's output—without

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[8] Pa. Bar Ass'n, Comm. on Legal Ethics & Prof'l Resp. Op. 2020-300, 2020 WL 2544268, at *2–3 (2020). *See also* Cal. State Bar, Standing Comm. on Prof'l Resp. & Conduct Op. 2023-208, 2023 WL 4035467, at *2 (2023) adopting a "reasonable efforts standard" and "fact-specific approach" to a lawyer's duty of technology competence, citing ABA Formal Opinion 477R, at 4).

[9] *See* New York County Lawyers Ass'n Prof'l Ethics Comm. Op. 749 (2017) (emphasizing that "[l]awyers must be responsive to technological developments as they become integrated into the practice of law"); Cal. St. Bar, Comm. Prof'l Resp. Op. 2015-193, 2015 WL 4152025, at *1 (2015) (discussing the level of competence required for lawyers to handle e-discovery issues in litigation).

[10] MODEL RULES R. 1.1 cmt. [8]; *see* Melinda J. Bentley, *The Ethical Implications of Technology in Your Law Practice: Understanding the Rules of Professional Conduct Can Prevent Potential Problems*, 76 J. MO. BAR 1 (2020) (identifying ways for lawyers to acquire technology competence skills).

[11] As further detailed in this opinion, lawyers' use of GAI raises confidentiality concerns under Model Rule 1.6 due to the risk of disclosure of, or unauthorized access to, client information. GAI also poses complex issues relating to ownership and potential infringement of intellectual property rights and even potential data security threats.

[12] *See,* W. Bradley Wendel, *The Promise and Limitations of AI in the Practice of Law,* 72 OKLA. L. REV. 21, 26 (2019) (discussing the limitations of AI based on an essential function of lawyers, making normative judgments that are impossible for AI).

[13] *See, e.g.*, Karen Weise & Cade Metz, *When A.I. Chatbots Hallucinate*, N.Y. TIMES (May 1, 2023).

[14] Ivan Moreno, *AI Practices Law 'At the Speed of Machines.' Is it Worth It?*, LAW360 (June 7, 2023); *See* Varun Magesh, Faiz Surani, Matthew Dahl, Mirac Suzgun, Christopher D. Manning, & Daniel E. Ho, *Hallucination Free? Assessing the Reliability of Leading AI Legal Research Tools*, STANFORD UNIVERSITY (June 26, 2024), *available at* https://dho.stanford.edu/wp-content/uploads/Legal_RAG_Hallucinations.pdf (study finding leading legal research companies' GAI systems "hallucinate between 17% and 33% of the time").

an appropriate degree of independent verification or review of its output—could violate the duty to provide competent representation as required by Model Rule 1.1.[15] While GAI tools may be able to significantly assist lawyers in serving clients, they cannot replace the judgment and experience necessary for lawyers to competently advise clients about their legal matters or to craft the legal documents or arguments required to carry out representations.

The appropriate amount of independent verification or review required to satisfy Rule 1.1 will necessarily depend on the GAI tool and the specific task that it performs as part of the lawyer's representation of a client. For example, if a lawyer relies on a GAI tool to review and summarize numerous, lengthy contracts, the lawyer would not necessarily have to manually review the entire set of documents to verify the results if the lawyer had previously tested the accuracy of the tool on a smaller subset of documents by manually reviewing those documents, comparing then to the summaries produced by the tool, and finding the summaries accurate. Moreover, a lawyer's use of a GAI tool designed specifically for the practice of law or to perform a discrete legal task, such as generating ideas, may require less independent verification or review, particularly where a lawyer's prior experience with the GAI tool provides a reasonable basis for relying on its results.

While GAI may be used as a springboard or foundation for legal work—for example, by generating an analysis on which a lawyer bases legal advice, or by generating a draft from which a lawyer produces a legal document—lawyers may not abdicate their responsibilities by relying solely on a GAI tool to perform tasks that call for the exercise of professional judgment. For example, lawyers may not leave it to GAI tools alone to offer legal advice to clients, negotiate clients' claims, or perform other functions that require a lawyer's personal judgment or participation.[16] Competent representation presupposes that lawyers will exercise the requisite level of skill and judgment regarding all legal work. In short, regardless of the level of review the lawyer selects, the lawyer is fully responsible for the work on behalf of the client.

Emerging technologies may provide an output that is of distinctively higher quality than current GAI tools produce, or may enable lawyers to perform work markedly faster and more economically, eventually becoming ubiquitous in legal practice and establishing conventional expectations regarding lawyers' duty of competence.[17] Over time, other new technologies have become integrated into conventional legal practice in this manner.[18] For example, "a lawyer would have difficulty providing competent legal services in today's environment without knowing how

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[15] *See generally* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 08-451, at 1 (2008) [hereinafter ABA Formal Op. 08-451] (concluding that "[a] lawyer may outsource legal or nonlegal support services provided the lawyer remains ultimately responsible for rendering competent legal services to the client under Model Rule 1.1").

[16] *See* Fla. State Bar Ass'n, Prof'l Ethics Comm. Op. 24-1, *supra* note 4.

[17] *See, e.g.*, Sharon Bradley, *Rule 1.1 Duty of Competency and Internet Research: Benefits and Risks Associated with Relevant Technology* at 7 (2019), *available at* https://ssrn.com/abstract=3485055 ("View Model Rule 1.1 as elastic. It is expanding as legal technology solutions expand. The ever-changing shape of this rule makes clear that a lawyer cannot simply learn technology today and never again update their skills or knowledge.").

[18] *See, e.g.*, Smith v. Lewis, 530 P.2d 589, 595 (Cal. 1975) (stating that a lawyer is expected "to possess knowledge of those plain and elementary principles of law which are commonly known by well-informed attorneys, and to discover those additional rules of law which, although not commonly known, may readily be found by *standard research techniques*") (emphasis added); Hagopian v. Justice Admin. Comm'n, 18 So. 3d 625, 642 (Fla. Dist. Ct. App. 2009) (observing that lawyers have "become expected to use computer-assisted legal research to ensure that their research is complete and up-to-date, but the costs of this service can be significant").

to use email or create an electronic document."[19] Similar claims might be made about other tools such as computerized legal research or internet searches.[20] As GAI tools continue to develop and become more widely available, it is conceivable that lawyers will eventually have to use them to competently complete certain tasks for clients.[21] But even in the absence of an expectation for lawyers to use GAI tools as a matter of course,[22] lawyers should become aware of the GAI tools relevant to their work so that they can make an informed decision, as a matter of professional judgment, whether to avail themselves of these tools or to conduct their work by other means.[23] As previously noted regarding the possibility of outsourcing certain work, "[t]here is no unique blueprint for the provision of competent legal services. Different lawyers may perform the same tasks through different means, all with the necessary 'legal knowledge, skill, thoroughness and preparation.'"[24] Ultimately, any informed decision about whether to employ a GAI tool must consider the client's interests and objectives.[25]

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[19] ABA Formal Op. 477R, *supra* note 6, at 3 (quoting ABA COMMISSION ON ETHICS 20/20 REPORT 105A (Aug. 2012)).

[20] *See, e.g.*, Bradley, *supra* note 17, at 3 ("Today no competent lawyer would rely solely upon a typewriter to draft a contract, brief, or memo. Typewriters are no longer part of 'methods and procedures' used by competent lawyers."); Lawrence Duncan MacLachlan, *Gandy Dancers on the Web: How the Internet Has Raised the Bar on Lawyers' Professional Responsibility to Research and Know the Law*, 13 GEO. J. LEGAL ETHICS 607, 608 (2000) ("The lawyer in the twenty-first century who does not effectively use the Internet for legal research may fall short of the minimal standards of professional competence and be potentially liable for malpractice"); Ellie Margolis, *Surfin' Safari—Why Competent Lawyers Should Research on the Web*, 10 YALE J.L. & TECH. 82, 110 (2007) ("While a lawyer's research methods reveal a great deal about the competence of the research, the method of research is ultimately a secondary inquiry, only engaged in when the results of that research process is judged inadequate. A lawyer who provides the court with adequate controlling authority is not going to be judged incompetent whether she found that authority in print, electronically, or by any other means."); Michael Thomas Murphy, *The Search for Clarity in an Attorney's Duty to Google*, 18 LEGAL COMM. & RHETORIC: JALWD 133, 133 (2021) ("This Duty to Google contemplates that certain readily available information on the public Internet about a legal matter is so easily accessible that it must be discovered, collected, and examined by an attorney, or else that attorney is acting unethically, committing malpractice, or both"); Michael Whiteman, *The Impact of the Internet and Other Electronic Sources on an Attorney's Duty of Competence Under the Rules of Professional Conduct*, 11 ALB. L.J. SCI. & TECH. 89, 91 (2000) ("Unless it can be shown that the use of electronic sources in legal research has become a standard technique, then lawyers who fail to use electronic sources will not be deemed unethical or negligent in his or her failure to use such tools.").

[21] *See* MODEL RULES R. 1.1 cmt. [5] (stating that "[c]ompetent handling of a particular matter includes . . . [the] use of methods and procedures meeting the standards of competent practitioners"); New York County Lawyers Ass'n Prof'l Ethics Comm. Op. 749, 2017 WL 11659554, at *3 (2017) (explaining that the duty of competence covers not only substantive knowledge in different areas of the law, but also the manner in which lawyers provide legal services to clients).

[22] The establishment of such an expectation would likely require an increased acceptance of GAI tools across the legal profession, a track record of reliable results from those platforms, the widespread availability of these technologies to lawyers from a cost or financial standpoint, and robust client demand for GAI tools as an efficiency or cost-cutting measure.

[23] Model Rule 1.5's prohibition on unreasonable fees, as well as market forces, may influence lawyers to use new technology in favor of slower or less efficient methods.

[24] ABA Formal Op. 08-451, *supra* note 15, at 2. *See also id.* ("Rule 1.1 does not require that tasks be accomplished in any special way. The rule requires only that the lawyer who is responsible to the client satisfies her obligation to render legal services competently.").

[25] MODEL RULES R. 1.2(a).

B. Confidentiality

A lawyer using GAI must be cognizant of the duty under Model Rule 1.6 to keep confidential all information relating to the representation of a client, regardless of its source, unless the client gives informed consent, disclosure is impliedly authorized to carry out the representation, or disclosure is permitted by an exception.[26] Model Rules 1.9(c) and 1.18(b) require lawyers to extend similar protections to former and prospective clients' information. Lawyers also must make "reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of the client."[27]

Generally, the nature and extent of the risk that information relating to a representation may be revealed depends on the facts. In considering whether information relating to any representation is adequately protected, lawyers must assess the likelihood of disclosure and unauthorized access, the sensitivity of the information,[28] the difficulty of implementing safeguards, and the extent to which safeguards negatively impact the lawyer's ability to represent the client.[29]

Before lawyers input information relating to the representation of a client into a GAI tool, they must evaluate the risks that the information will be disclosed to or accessed by others outside the firm. Lawyers must also evaluate the risk that the information will be disclosed to or accessed by others *inside* the firm who will not adequately protect the information from improper disclosure or use[30] because, for example, they are unaware of the source of the information and that it originated with a client of the firm. Because GAI tools now available differ in their ability to ensure that information relating to the representation is protected from impermissible disclosure and access, this risk analysis will be fact-driven and depend on the client, the matter, the task, and the GAI tool used to perform it.[31]

Self-learning GAI tools into which lawyers input information relating to the representation, by their very nature, raise the risk that information relating to one client's representation may be disclosed improperly,[32] even if the tool is used exclusively by lawyers at the same firm.[33] This can occur when information relating to one client's representation is input into the tool, then later revealed in response to prompts by lawyers working on other matters, who then share that output with other clients, file it with the court, or otherwise disclose it. In other words, the self-learning

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[26] MODEL RULES R. 1.6; MODEL RULES R. 1.6 cmt. [3].
[27] MODEL RULES R. 1.6(c).
[28] ABA Formal Op. 477R, *supra* note 6, at 1 (A lawyer "may be required to take special security precautions to protect against the inadvertent or unauthorized disclosure of client information when … the nature of the information requires a higher degree of security.").
[29] MODEL RULES R. 1.6, cmt. [18].
[30] *See* MODEL RULES R. 1.8(b), which prohibits use of information relating to the representation of a client to the disadvantage of the client.
[31] *See* ABA Formal Op. 477R, *supra* note 6, at 4 (rejecting specific security measures to protect information relating to a client's representation and advising lawyers to adopt a fact-specific approach to data security).
[32] *See generally* State Bar of Cal. Standing Comm. on Prof'l Resp. & Conduct, PRACTICAL GUIDANCE FOR THE USE OF GENERATIVE ARTIFICIAL INTELLIGENCE IN THE PRACTICE OF LAW (2024), *available at* https://www.calbar.ca.gov/Portals/0/documents/ethics/Generative-AI-Practical-Guidance.pdf; Fla. State Bar Ass'n, Prof'l Ethics Comm. Op. 24-1, *supra* note 4.
[33] *See* Pa. & Philadelphia Joint Formal Opinion 2024-200, *supra* note 4, at 10 (noting risk that information relating to one representation may be used to inform work on another representation).

GAI tool may disclose information relating to the representation to persons outside the firm who are using the same GAI tool. Similarly, it may disclose information relating to the representation to persons in the firm (1) who either are prohibited from access to said information because of an ethical wall or (2) who could inadvertently use the information from one client to help another client, not understanding that the lawyer is revealing client confidences. Accordingly, because many of today's self-learning GAI tools are designed so that their output could lead directly or indirectly to the disclosure of information relating to the representation of a client, a client's informed consent is required prior to inputting information relating to the representation into such a GAI tool.[34]

When consent is required, it must be informed. For the consent to be informed, the client must have the lawyer's best judgment about why the GAI tool is being used, the extent of and specific information about the risk, including particulars about the kinds of client information that will be disclosed, the ways in which others might use the information against the client's interests, and a clear explanation of the GAI tool's benefits to the representation. Part of informed consent requires the lawyer to explain the extent of the risk that later users or beneficiaries of the GAI tool will have access to information relating to the representation. To obtain informed consent when using a GAI tool, merely adding general, boiler-plate provisions to engagement letters purporting to authorize the lawyer to use GAI is not sufficient.[35]

Because of the uncertainty surrounding GAI tools' ability to protect such information and the uncertainty about what happens to information both at input and output, it will be difficult to evaluate the risk that information relating to the representation will either be disclosed to or accessed by others inside the firm to whom it should not be disclosed as well as others outside the firm.[36] As a baseline, all lawyers should read and understand the Terms of Use, privacy policy, and related contractual terms and policies of any GAI tool they use to learn who has access to the information that the lawyer inputs into the tool or consult with a colleague or external expert who has read and analyzed those terms and policies.[37] Lawyers may need to consult with IT professionals or cyber security experts to fully understand these terms and policies as well as the manner in which GAI tools utilize information.

Today, there are uses of self-learning GAI tools in connection with a legal representation when client informed consent is not required because the lawyer will not be inputting information relating to the representation. As an example, if a lawyer is using the tool for idea generation in a manner that does not require inputting information relating to the representation, client informed consent would not be necessary.

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[34] This conclusion is based on the risks and capabilities of GAI tools as of the publication of this opinion. As the technology develops, the risks may change in ways that would alter our conclusion. *See* Fla. State Bar Ass'n, Prof'l Ethics Comm. Op. 24-1, *supra* note 4, at 2; W. Va. Lawyer Disciplinary Bd. Op. 24-01 (2024), *available at* http://www.wvodc.org/pdf/AILEO24-01.pdf.

[35] *See* W. Va. Lawyer Disciplinary Bd. Op. 24-01, *supra* note 34.

[36] Magesh et al. *supra* note 14, at 23 (describing some of the GAI tools available to lawyers as "difficult for lawyers to assess when it is safe to trust them. Official documentation does not clearly illustrate what they can do for lawyers and in which areas lawyers should exercise caution.")

[37] Stephanie Pacheco, *Three Considerations for Attorneys Using Generative AI,* BLOOMBERG LAW ANALYSIS (June 16, 2023, 4:00 pm), https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-three-considerations-for-attorneys-using-generative-ai?context=search&index=7.

C. Communication

Where Model Rule 1.6 does not require disclosure and informed consent, the lawyer must separately consider whether other Model Rules, particularly Model Rule 1.4, require disclosing the use of a GAI tool in the representation.

Model Rule 1.4, which addresses lawyers' duty to communicate with their clients, builds on lawyers' legal obligations as fiduciaries, which include "the duty of an attorney to advise the client promptly whenever he has any information to give which it is important the client should receive."[38] Of particular relevance, Model Rule 1.4(a)(2) states that a lawyer shall "reasonably consult with the client about the means by which the client's objectives are to be accomplished." Additionally, Model Rule 1.4(b) obligates lawyers to explain matters "to the extent reasonably necessary to permit a client to make an informed decision regarding the representation." Comment [5] to Rule 1.4 explains, "the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation." Considering these underlying principles, questions arise regarding whether and when lawyers might be required to disclose their use of GAI tools to clients pursuant to Rule 1.4.

The facts of each case will determine whether Model Rule 1.4 requires lawyers to disclose their GAI practices to clients or obtain their informed consent to use a particular GAI tool. Depending on the circumstances, client disclosure may be unnecessary.

Of course, lawyers must disclose their GAI practices if asked by a client how they conducted their work, or whether GAI technologies were employed in doing so, or if the client expressly requires disclosure under the terms of the engagement agreement or the client's outside counsel guidelines.[39] There are also situations where Model Rule 1.4 requires lawyers to discuss their use of GAI tools unprompted by the client.[40] For example, as discussed in the previous section, clients would need to be informed in advance, and to give informed consent, if the lawyer proposes to input information relating to the representation into the GAI tool.[41] Lawyers must also consult clients when the use of a GAI tool is relevant to the basis or reasonableness of a lawyer's fee.[42]

Client consultation about the use of a GAI tool is also necessary when its output will influence a significant decision in the representation,[43] such as when a lawyer relies on GAI

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[38] Baker v. Humphrey, 101 U.S. 494, 500 (1879).

[39] *See, e.g.*, MODEL RULES R. 1.4(a)(4) ("A lawyer shall . . . promptly comply with reasonable requests for information[.]").

[40] *See* MODEL RULES R. 1.4(a)(1) (requiring lawyers to "promptly inform the client of any decision or circumstance with respect to which the client's informed consent" is required by the rules of professional conduct).

[41] See section B for a discussion of confidentiality issues under Rule 1.6.

[42] See section F for a discussion of fee issues under Rule 1.5.

[43] Guidance may be found in ethics opinions requiring lawyers to disclose their use of temporary lawyers whose involvement is significant or otherwise material to the representation. *See, e.g.*, Va. State Bar Legal Ethics Op. 1850, 2010 WL 5545407, at *5 (2010) (acknowledging that "[t]here is little purpose to informing a client every time a lawyer outsources legal support services that are truly tangential, clerical, or administrative in nature, or even when basic legal research or writing is outsourced without any client confidences being revealed"); Cal. State Bar, Standing Comm. on Prof'l Resp. & Conduct Op. 2004-165, 2004 WL 3079030, at *2–3 (2004) (opining that a

technology to evaluate potential litigation outcomes or jury selection. A client would reasonably want to know whether, in providing advice or making important decisions about how to carry out the representation, the lawyer is exercising independent judgment or, in the alternative, is deferring to the output of a GAI tool. Or there may be situations where a client retains a lawyer based on the lawyer's particular skill and judgment, when the use of a GAI tool, without the client's knowledge, would violate the terms of the engagement agreement or the client's reasonable expectations regarding how the lawyer intends to accomplish the objectives of the representation.

It is not possible to catalogue every situation in which lawyers must inform clients about their use of GAI. Again, lawyers should consider whether the specific circumstances warrant client consultation about the use of a GAI tool, including the client's needs and expectations, the scope of the representation, and the sensitivity of the information involved. Potentially relevant considerations include the GAI tool's importance to a particular task, the significance of that task to the overall representation, how the GAI tool will process the client's information, and the extent to which knowledge of the lawyer's use of the GAI tool would affect the client's evaluation of or confidence in the lawyer's work.

Even when Rule 1.6 does not require informed consent and Rule 1.4 does not require a disclosure regarding the use of GAI, lawyers may tell clients how they employ GAI tools to assist in the delivery of legal services. Explaining this may serve the interest of effective client communication. The engagement agreement is a logical place to make such disclosures and to identify any client instructions on the use of GAI in the representation.[44]

D. Meritorious Claims and Contentions and Candor Toward the Tribunal

Lawyers using GAI in litigation have ethical responsibilities to the courts as well as to clients. Model Rules 3.1, 3.3, and 8.4(c) may be implicated by certain uses. Rule 3.1 states, in part, that "[a] lawyer shall not bring or defend a proceeding, or assert or controvert and issue therein, unless there is a basis in law or fact for doing so that is not frivolous." Rule 3.3 makes it clear that lawyers cannot knowingly make any false statement of law or fact to a tribunal or fail to correct a material false statement of law or fact previously made to a tribunal.[45] Rule 8.4(c) provides that a

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lawyer must disclose the use of a temporary lawyer to a client where the temporary lawyer's use constitutes a "significant development" in the matter and listing relevant considerations); N.Y. State Bar Ass'n, Comm on Prof'l Ethics 715, at 7 (1999) (opining that "whether a law firm needs to disclose to the client and obtain client consent for the participation of a Contract lawyer depends upon whether client confidences will be disclosed to the lawyer, the degree of involvement of the lawyer in the matter, and the significance of the work done by the lawyer"); D.C. Bar Op. 284, at 4 (1988) (recommending client disclosure "whenever the proposed use of a temporary lawyer to perform work on the client's matter appears reasonably likely to be material to the representation or to affect the client's reasonable expectations"); Fla. State Bar Ass'n, Comm. on Prof'l Ethics Op. 88-12, 1988 WL 281590, at *2 (1988) (stating that disclosure of a temporary lawyer depends "on whether the client would likely consider the information material");.

[44] For a discussion of what client notice and informed consent under Rule 1.6 may require, see section B.

[45] MODEL RULES R. 3.3(a) reads: "A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if

lawyer shall not engage in "conduct involving dishonesty, fraud, deceit or misrepresentation." Even an unintentional misstatement to a court can involve a misrepresentation under Rule 8.4(c). Therefore, output from a GAI tool must be carefully reviewed to ensure that the assertions made to the court are not false.

Issues that have arisen to date with lawyers' use of GAI outputs include citations to nonexistent opinions, inaccurate analysis of authority, and use of misleading arguments.[46]

Some courts have responded by requiring lawyers to disclose their use of GAI.[47] As a matter of competence, as previously discussed, lawyers should review for accuracy all GAI outputs. In judicial proceedings, duties to the tribunal likewise require lawyers, before submitting materials to a court, to review these outputs, including analysis and citations to authority, and to correct errors, including misstatements of law and fact, a failure to include controlling legal authority, and misleading arguments.

E. Supervisory Responsibilities

Model Rules 5.1 and 5.3 address the ethical duties of lawyers charged with managerial and supervisory responsibilities and set forth those lawyers' responsibilities with regard to the firm, subordinate lawyers, and nonlawyers. Managerial lawyers must create effective measures to ensure that all lawyers in the firm conform to the rules of professional conduct,[48] and supervisory lawyers must supervise subordinate lawyers and nonlawyer assistants to ensure that subordinate lawyers and nonlawyer assistants conform to the rules.[49] These responsibilities have implications for the use of GAI tools by lawyers and nonlawyers.

Managerial lawyers must establish clear policies regarding the law firm's permissible use of GAI, and supervisory lawyers must make reasonable efforts to ensure that the firm's lawyers and nonlawyers comply with their professional obligations when using GAI tools.[50] Supervisory obligations also include ensuring that subordinate lawyers and nonlawyers are trained,[51] including in the ethical and practical use of the GAI tools relevant to their work as well as on risks associated with relevant GAI use.[52] Training could include the basics of GAI technology, the capabilities and limitations of the tools, ethical issues in use of GAI and best practices for secure data handling, privacy, and confidentiality.

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necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false."

[46] *See* DC Bar Op. 388 (2024).

[47] Lawyers should consult with the applicable court's local rules to ensure that they comply with those rules with respect to AI use. As noted in footnote 4, no one opinion could address every ethics issue presented when a lawyer uses GAI. For example, depending on the facts, issues relating to Model Rule 3.4(c) could be presented.

[48] *See* MODEL RULES R. 1.0(c) for the definition of firm.

[49] ABA Formal Op. 08-451, *supra* note 15.

[50] MODEL RULES R. 5.1.

[51] *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 467 (2014).

[52] *See generally*, MODEL RULES R. 1.1, cmt. [8]. One training suggestion is that all materials produced by GAI tools be marked as such when stored in any client or firm file so future users understand potential fallibility of the work.

Lawyers have additional supervisory obligations insofar as they rely on others outside the law firm to employ GAI tools in connection with the legal representation. Model Rule 5.3(b) imposes a duty on lawyers with direct supervisory authority over a nonlawyer to make "reasonable efforts to ensure that" the nonlawyer's conduct conforms with the professional obligations of the lawyer. Earlier opinions recognize that when outsourcing legal and nonlegal services to third-party providers, lawyers must ensure, for example, that the third party will do the work capably and protect the confidentiality of information relating to the representation.[53] These opinions note the importance of: reference checks and vendor credentials; understanding vendor's security policies and protocols; familiarity with vendor's hiring practices; using confidentiality agreements; understanding the vendor's conflicts check system to screen for adversity among firm clients; and the availability and accessibility of a legal forum for legal relief for violations of the vendor agreement. These concepts also apply to GAI providers and tools.

Earlier opinions regarding technological innovations and other innovations in legal practice are instructive when considering a lawyer's use of a GAI tool that requires the disclosure and storage of information relating to the representation.[54] In particular, opinions developed to address cloud computing and outsourcing of legal and nonlegal services suggest that lawyers should:

- ensure that the [GAI tool] is configured to preserve the confidentiality and security of information, that the obligation is enforceable, and that the lawyer will be notified in the event of a breach or service of process regarding production of client information;[55]
- investigate the [GAI tool's] reliability, security measures, and policies, including limitations on the [the tool's] liability;[56]
- determine whether the [GAI tool] retains information submitted by the lawyer before and after the discontinuation of services or asserts proprietary rights to the information;[57] and
- understand the risk that [GAI tool servers] are subject to their own failures and may be an attractive target of cyber-attacks.[58]

F. Fees

Model Rule 1.5, which governs lawyers' fees and expenses, applies to representations in which a lawyer charges the client for the use of GAI. Rule 1.5(a) requires a lawyer's fees and expenses to be reasonable and includes a non-exclusive list of criteria for evaluating whether a fee

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[53] ABA Formal Op. 08-451, *supra* note 15; ABA Formal. Op. 477R, *supra* note 6.
[54] *See* ABA Formal Op. 08-451, *supra* note 15.
[55] Fla. Bar Advisory Op. 12-3 (2013).
[56] *Id.* citing Iowa State Bar Ass'n Comm. on Ethics & Practice Guidelines Op. 11-01 (2011) [hereinafter Iowa Ethics Opinion 11-01].
[57] Fla. Bar Advisory Op. 24-1, *supra* note 4; Fla. Bar Advisory Op. 12-3, *supra* note 55; Iowa Ethics Opinion 11-01, *supra* note 56.
[58] Fla. Bar Advisory Op. 12-3, *supra* note 55; *See generally* Melissa Heikkila, *Three Ways AI Chatbots are a Security Disaster*, MIT TECHNOLOGY REVIEW (Apr. 3, 2023), www.technologyreview.com/2023/04/03/1070893/three-ways-ai-chatbots-are-a-security-disaster/.

or expense is reasonable.[59] Rule 1.5(b) requires a lawyer to communicate to a client the basis on which the lawyer will charge for fees and expenses unless the client is a regularly represented client and the terms are not changing. The required information must be communicated before or within a reasonable time of commencing the representation, preferably in writing. Therefore, before charging the client for the use of the GAI tools or services, the lawyer must explain the basis for the charge, preferably in writing.

GAI tools may provide lawyers with a faster and more efficient way to render legal services to their clients, but lawyers who bill clients an hourly rate for time spent on a matter must bill for their actual time. ABA Formal Ethics Opinion 93-379 explained, "the lawyer who has agreed to bill on the basis of hours expended does not fulfill her ethical duty if she bills the client for more time than she has actually expended on the client's behalf."[60] If a lawyer uses a GAI tool to draft a pleading and expends 15 minutes to input the relevant information into the GAI program, the lawyer may charge for the 15 minutes as well as for the time the lawyer expends to review the resulting draft for accuracy and completeness. As further explained in Opinion 93-379, "If a lawyer has agreed to charge the client on [an hourly] basis and it turns out that the lawyer is particularly efficient in accomplishing a given result, it nonetheless will not be permissible to charge the client for more hours than were actually expended on the matter,"[61] because "[t]he client should only be charged a reasonable fee for the legal services performed."[62] The "goal should be solely to compensate the lawyer fully for time reasonably expended, an approach that if followed will not take advantage of the client."[63]

The factors set forth in Rule 1.5(a) also apply when evaluating the reasonableness of charges for GAI tools when the lawyer and client agree on a flat or contingent fee.[64] For example, if using a GAI tool enables a lawyer to complete tasks much more quickly than without the tool, it may be unreasonable under Rule 1.5 for the lawyer to charge the same flat fee when using the GAI tool as when not using it. "A fee charged for which little or no work was performed is an unreasonable fee."[65]

The principles set forth in ABA Formal Opinion 93-379 also apply when a lawyer charges GAI work as an expense. Rule 1.5(a) requires that disbursements, out-of-pocket expenses, or additional charges be reasonable. Formal Opinion 93-379 explained that a lawyer may charge the

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[59] The listed considerations are (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent.

[60] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 93-379, at 6 (1993) [hereinafter ABA Formal Op. 93-379].

[61] *Id.*

[62] *Id.* at 5.

[63] *Id.*

[64] *See, e.g.*, *Williams Cos. v. Energy Transfer LP*, 2022 Del. Ch. LEXIS 207, 2022 WL 3650176 (Del. Ch. Aug. 25, 2022) (applying same principles to contingency fee).

[65] Att'y Grievance Comm'n v. Monfried, 794 A.2d 92, 103 (Md. 2002) (finding that a lawyer violated Rule 1.5 by charging a flat fee of $1,000 for which the lawyer did little or no work).

client for disbursements incurred in providing legal services to the client. For example, a lawyer typically may bill to the client the actual cost incurred in paying a court reporter to transcribe a deposition or the actual cost to travel to an out-of-town hearing.[66] Absent contrary disclosure to the client, the lawyer should not add a surcharge to the actual cost of such expenses and should pass along to the client any discounts the lawyer receives from a third-party provider.[67] At the same time, lawyers may not bill clients for general office overhead expenses including the routine costs of "maintaining a library, securing malpractice insurance, renting of office space, purchasing utilities, and the like."[68] Formal Opinion 93-379 noted, "[i]n the absence of disclosure to a client in advance of the engagement to the contrary," such overhead should be "subsumed within" the lawyer's charges for professional services.[69]

In applying the principles set out in ABA Formal Ethics Opinion 93-379 to a lawyer's use of a GAI tool, lawyers should analyze the characteristics and uses of each GAI tool, because the types, uses, and cost of GAI tools and services vary significantly. To the extent a particular tool or service functions similarly to equipping and maintaining a legal practice, a lawyer should consider its cost to be overhead and not charge the client for its cost absent a contrary disclosure to the client in advance. For example, when a lawyer uses a GAI tool embedded in or added to the lawyer's word processing software to check grammar in documents the lawyer drafts, the cost of the tool should be considered to be overhead. In contrast, when a lawyer uses a third-party provider's GAI service to review thousands of voluminous contracts for a particular client and the provider charges the lawyer for using the tool on a per-use basis, it would ordinarily be reasonable for the lawyer to bill the client as an expense for the actual out-of-pocket expense incurred for using that tool.

As acknowledged in ABA Formal Opinion 93-379, perhaps the most difficult issue is determining how to charge clients for providing in-house services that are not required to be included in general office overhead and for which the lawyer seeks reimbursement. The opinion concluded that lawyers may pass on reasonable charges for "photocopying, computer research, . . . and similar items" rather than absorbing these expenses as part of the lawyers' overhead as many lawyers would do.[70] For example, a lawyer may agree with the client in advance on the specific rate for photocopying, such as $0.15 per page. Absent an advance agreement, the lawyer "is obliged to charge the client no more than the direct cost associated with the service (i.e., the actual cost of making a copy on the photocopy machine) plus a reasonable allocation of overhead expenses directly associated with the provision of the service (e.g., the salary of the photocopy machine operator)."[71]

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[66] ABA Formal Op. 93-379 at 7.
[67] *Id.* at 8.
[68] *Id.* at 7.
[69] *Id.*
[70] *Id.* at 8.
[71] *Id.* Opinion 93-379 also explained, "It is not appropriate for the Committee, in addressing ethical standards, to opine on the various accounting issues as to how one calculates direct cost and what may or may not be included in allocated overhead. These are questions which properly should be reserved for our colleagues in the accounting profession. Rather, it is the responsibility of the Committee to explain the principles it draws from the mandate of Model Rule 1.5's injunction that fees be reasonable. Any reasonable calculation of direct costs as well as any reasonable allocation of related overhead should pass ethical muster. On the other hand, in the absence of an agreement to the contrary, it is impermissible for a lawyer to create an additional source of profit for the law firm beyond that which is contained in the provision of professional services themselves. The lawyer's stock in trade is the sale of legal services, not photocopy paper, tuna fish sandwiches, computer time or messenger services." *Id.*

These same principles apply when a lawyer uses a proprietary, in-house GAI tool in rendering legal services to a client. A firm may have made a substantial investment in developing a GAI tool that is relatively unique and that enables the firm to perform certain work more quickly or effectively. The firm may agree in advance with the client about the specific rates to be charged for using a GAI tool, just as it would agree in advance on its legal fees. But not all in-house GAI tools are likely to be so special or costly to develop, and the firm may opt not to seek the client's agreement on expenses for using the technology. Absent an agreement, the firm may charge the client no more than the direct cost associated with the tool (if any) plus a reasonable allocation of expenses directly associated with providing the GAI tool, while providing appropriate disclosures to the client consistent with Formal Opinion 93-379. The lawyer must ensure that the amount charged is not duplicative of other charges to this or other clients.

Finally, on the issue of reasonable fees, in addition to the time lawyers spend using various GAI tools and services, lawyers also will expend time to gain knowledge about those tools and services. Rule 1.1 recognizes that "[c]ompetent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Comment [8] explains that "[t]o maintain the requisite knowledge and skill [to be competent], a lawyer should keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology*, engaging in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject."[72] Lawyers must remember that they may not charge clients for time necessitated by their own inexperience.[73] Therefore, a lawyer may not charge a client to learn about how to use a GAI tool or service that the lawyer will regularly use for clients because lawyers must maintain competence in the tools they use, including but not limited to GAI technology. However, if a client explicitly requests that a specific GAI tool be used in furtherance of the matter and the lawyer is not knowledgeable in using that tool, it may be appropriate for the lawyer to bill the client to gain the knowledge to use the tool effectively. Before billing the client, the lawyer and the client should agree upon any new billing practices or billing terms relating to the GAI tool and, preferably, memorialize the new agreement.

III. Conclusion

Lawyers using GAI tools have a duty of competence, including maintaining relevant technological competence, which requires an understanding of the evolving nature of GAI. In

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[72] MODEL RULES R. 1.1, cmt. [8] (emphasis added); *see also* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 498 (2021).

[73] Heavener v. Meyers, 158 F. Supp. 2d 1278 (E.D. Okla. 2001) (five hundred hours for straightforward Fourth Amendment excessive-force claim and nineteen hours for research on Eleventh Amendment defense indicated excessive billing due to counsel's inexperience); *In re* Poseidon Pools of Am., Inc., 180 B.R. 718 (Bankr. E.D.N.Y. 1995) (denying compensation for various document revisions; "we note that given the numerous times throughout the Final Application that Applicant requests fees for revising various documents, Applicant fails to negate the obvious possibility that such a plethora of revisions was necessitated by a level of competency less than that reflected by the Applicant's billing rates"); Att'y Grievance Comm'n v. Manger, 913 A.2d 1 (Md. 2006) ("While it may be appropriate to charge a client for case-specific research or familiarization with a unique issue involved in a case, general education or background research should not be charged to the client."); *In re* Hellerud, 714 N.W.2d 38 (N.D. 2006) (reduction in hours, fee refund of $5,651.24, and reprimand for lawyer unfamiliar with North Dakota probate work who charged too many hours at too high a rate for simple administration of cash estate; "it is counterintuitive to charge a higher hourly rate for knowing less about North Dakota law").

using GAI tools, lawyers also have other relevant ethical duties, such as those relating to confidentiality, communication with a client, meritorious claims and contentions, candor toward the tribunal, supervisory responsibilities regarding others in the law office using the technology and those outside the law office providing GAI services, and charging reasonable fees. With the ever-evolving use of technology by lawyers and courts, lawyers must be vigilant in complying with the Rules of Professional Conduct to ensure that lawyers are adhering to their ethical responsibilities and that clients are protected.
