Dated: March 29, 2017
The following is ORDERED:

Jennie D. Latta
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re
FAYE FOODS, INC.,
Debtor.

Case No. 05-23072-L
Chapter 11

ORDER DENYING MOTION FOR SANCTIONS AGAINST TENNESSEE DEPARTMENT OF REVENUE FOR VIOLATION OF DISCHARGE INJUNCTION

BACK BEFORE THE COURT is the motion of Michael E. Collins, "the Chapter 11 Trustee and Post-Confirmation Distribution Agent under the confirmed Amended Plan of Reorganization," for sanctions against the Tennessee Department of Revenue ("TDOR") for knowingly and intentionally violating the discharge injunction when it levied upon the bank account of the reorganized Debtor, resulting in the delivery of $38,965.06 to the TDOR, in payment of a post-petition tax claim. In a prior opinion entered February 5, 2016, this court held that the motion should be denied both because there was no violation of the discharge injunction and because the period for levy was tolled during the pendency of the automatic stay.

Mr. Collins appealed the bankruptcy court's decision to the district court, which issued its opinion on August 3, 2016, affirming the bankruptcy court's opinion that there was no violation of the discharge injunction, but reversing the decision that the statute of limitations was tolled during the pendency of the bankruptcy case. The district court held, for reasons set forth in its opinion, that the period for levy was extended only thirty days after the termination of the automatic stay. This matter was then remanded to the bankruptcy court for entry of an order consistent with the opinion of the district court, and for consideration of whether sanctions should be imposed upon the TDOR.

FACTS

Briefly, the underlying facts are as follows: Faye Foods, Inc. filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code on February 28, 2005. While the case was pending but before a trustee was appointed, Faye Foods filed tax returns for sales and use taxes, and franchise and excise taxes, but did not pay the taxes owed. Michael E. Collins was appointed Trustee on June 23, 2011. Mr. Collins proposed an amended plan of reorganization which was confirmed by an Amended Order of Confirmation entered September 21, 2012. "Trustee's Amended Plan of Reorganization of Faye Foods, Inc. Under Chapter 11 of the Bankruptcy Code," May 15, 2012, Dkt. No. 486 (the "Plan"). The Amended Order of Confirmation specified that applications for allowance of administrative claims be filed within 60 days after the entry of the order. Dkt. No. 525. The TDOR filed its "POST PETITION PRIORITY TAX CLAIM" on October 4, 2012 (i.e., within 60 days after entry of the confirmation order) seeking payment of post-petition taxes in the amount of $34,821.97. The TDOR did not file a separate motion or application for allowance of its claim.

The Plan designated Collins as "Post-Conformation [sic] Distribution Agent" ("PCDA"). Plan II. D.1. The Final Decree, entered February 14, 2013, discharged Collins as trustee. Dkt. No.

550. Collins continues to serve in the capacity of PCDA, but was not reappointed trustee upon the reopening of this case on December 2, 2015. See "Order Granting Emergency Motion to Reopen Case, etc.," December 4, 2015, Dkt. No. 565.

Although the Plan provided for prompt payment of all administrative expenses, the reorganized Debtor made no payment to the TDOR and Collins took no action to ensure payment. On July 21, 2015, the TDOR sent a notice of default letter to Faye Foods. On September 14, 2015, the TDOR sent a notice of intent to levy to Faye Foods. According to the TDOR, on October 9, 2015, it discussed post-petition taxes with someone on behalf of the Debtor and sent an email detailing the outstanding liabilities. On October 20, 2015, the TDOR issued a Levy Notification in the amount of $38,965.06, to BanCorp South, which held the operating account for the reorganized Debtor. BanCorp South froze the accounts of the reorganized Debtor, which left the Debtor without funds to operate its business. Faye Stiles, the owner and Chief Executive Officer of Faye Foods, together with her husband obtained a personal loan to cover the operating expenses of the reorganized Debtor. The Debtor incurred various expenses as a result of the levy. Collins filed his Emergency Motion for Sanctions on November 2, 2015.

ISSUES

Two issues remain for decision. Based upon the decision of the district court that the levy was untimely, (1) what is the amount of refund or credit to which Faye Foods is entitled? and (2) is the reorganized Debtor entitled to damages or sanctions as a result of the untimely levy?

Issue I. What is the Amount of the Refund or Credit to Which Faye Foods is Entitled?

The parties agree that $23,280.64 is the amount of the levy not already returned to Faye Foods. There is no question and the court finds that $210.12 of this amount represents taxes for

which the statute of limitations had not run and thus which were properly collected by the TDOR. When this amount is deducted, there remains $23,070.52 to be refunded or credited to Faye Foods.

Issue 2. Is Faye Foods Entitled to Damages or Sanctions for Wrongful Levy?

In its prior opinion, the bankruptcy court did not consider the question of damages or sanctions because it ruled that the levy by the TDOR was proper. The court returns to the question of damages and sanctions now because of the ruling of the district court that $23,070.52 of the amount levied by the TDOR represented taxes for which the time period for making levy provided at Tennessee Code Annotated section 67-1-1429(a)(1)(A) had expired.

Before reaching the question of the appropriateness of sanctions, Collins raises two other arguments. First, Collins argues that the district court erred in its determination that the TDOR was not required to file an application for allowance of its administrative expenses because the court relied upon section 503(b)(1)(D),[1] which became effective on October 17, 2005, and should not be given retroactive effect. This is not an argument that was made in Collins's original motion or brief, nor was it argued in this court. See Dkt. Nos. 554 and 570. Collins correctly notes that this court may not consider the argument that the district court erred; because that is left for consideration by the court of appeals. Rather, Collins suggests that the court consider the possibility that the district court's determination will be overturned in its evaluation of his request for damages and sanctions. This court is not persuaded that such consideration is necessary or appropriate. Even if the court of appeals ultimately decides that section 503(b)(1)(D) should not apply in a case that was filed before the effective date of that section, this court made its determination that the taxes were not

[1] Section 503(b)(1) provides that "notwithstanding the requirements of subsection (a), a governmental unit shall not be required to file a request for the payment of an expense described in subparagraph (B) or (C), as a condition of its being allowed an administrative expense."

discharged for the additional reasons that (1) 28 U.S.C. § 960(a) directs that "any officers or agents conducting business under authority of a United States court shall be subject to all Federal, State and local taxes applicable to such business to the same extent as if it were conducted by an individual or corporation"; (2) tax returns were prepared and filed by Faye Foods as Debtor-in-Possession but the taxes were not paid as they came due; (3) the TDOR in fact filed a proof of claim labeled "POST PETITION PRIORITY TAX CLAIM" before the deadline for filing applications for allowance of administrative expense claims; and (4) the provisions of a confirmed plan cannot override the laws of the United States requiring payment of state taxes during the pendency of a bankruptcy case. The proof of claim filed by the TDOR satisfied the requirement of section 503(a) that a request for payment of administrative expenses be filed. No additional steps were necessary for allowance of its administrative claim, and that claim should have been paid together with other administrative claims as provided in the Plan. The failure of the reorganized Debtor to do so was a breach of the Plan.

Second, contrary to the position taken by Collins in his first brief, Collins now argues that the TDOR's administrative proof of claim was filed late because it was filed more than thirty days after the termination of the automatic stay. In support of this argument, Collins says that the TDOR's tax claims expired[2] 30 days after the entry of the initial order of confirmation on August 24, 2012. "Trustee's Reply Brief Regarding Damages," March 14, 2017, Dkt. No. 620, p. 3. In his initial brief, Collins argued that "the Plan was confirmed and the automatic stay was extinguished as to all creditors on September 21, 2012, so the 30-day extension equates with October 21, 2012."

[2] Applicable Tennessee law says nothing about the "expiration" of assessed taxes. It speaks only about when certain forms of collection must be initiated. See Tenn. Code Ann. § 67-1-1429. Once a tax liability has been reduced to judgment, the tax may be collected at any time without limitation after the entry of the judgment. It is certainly arguable that the allowed administrative claim of the TDOR would be deemed the equivalent of a judgment by a Tennessee court of competent jurisdiction.

"Trustee's Brief in Support of Emergency Motion, etc.," December 17, 2015, Dkt. No. 570, p. 5; see also p. 7.[3]

The TDOR, however, correctly notes that the automatic stay did not terminate until the Effective Date of the Plan, which the court has already found to be October 1, 2017. Order Denying Motion for Sanctions, Dkt. No. 579, p. 8. This conclusion flows from the terms of the Plan and the provision of the Bankruptcy Code for termination of the automatic stay. Under the terms of the Plan, property of the bankruptcy estate remained property of the estate until the Effective Date of the Plan, defined to be ten days after the entry of the Amended Order of Confirmation. Plan, I.I; V.H. The tenth day after the entry of the Amended Order of Confirmation was October 1, 2012. That date was the Effective Date of the Plan and that was the date on which property of the estate vested in the reorganized Debtor. Pursuant to section 362(c)(1) of the Bankruptcy Code, the stay of an act against property of the estate continues until that property is no longer property of the estate. The automatic stay, therefore, terminated with respect to acts against property of the estate in this case on October 1, 2012, and the time for the TDOR to levy on property of the reorganized Debtor was extended at least until October 31, 2012. See 11 U.S.C. § 108(c).

Moreover, the deadline for filing applications for allowance of administrative claims was established by the Amended Order of Confirmation to be 60 days after the entry of that order. The Amended Order of Confirmation was entered on September 21, 2012, so the deadline for filing applications for payment of administrative expenses was November 20, 2012. See Order Denying Motion for Sanctions, Dkt. No. 579, p. 9. The TDOR timely filed its POST PETITION PRIORITY

[3] The failure of Collins to bring this change in position to the attention of the court is troubling.

TAX CLAIM on October 4, 2012. This court noted in its prior opinion that the Bankruptcy Code specifies no particular form for the "request for payment of an administrative expense," and held that the Proof of Claim filed by the TDOR was more than adequate for that purpose. No objection has ever been filed with respect to this Proof of Claim, and it is therefore deemed allowed. 11 U.S.C. § 502(a) ("A claim or interest, proof of which is timely filed ... is deemed allowed, unless a party in interest ... objects."). The Plan provides for the payment of allowed Administrative Expense Claims "on the later of (1) the Effective Date, (2) ten (10) days after such claim is allowed by the Bankruptcy Court, and (3) the date such claim is due and payable pursuant to the agreement or law under which the claim arises." Plan, II.A.3. The later of those three dates in this case was the date ten days after the claim was allowed. As we have seen, the claim was deemed allowed upon filing. The claim should have come as no surprise to the reorganized Debtor because the claim was based upon the tax returns prepared and filed during the administration of the bankruptcy case. The reorganized Debtor breached the terms of the Plan when it failed to pay the claim of the TDOR or file an objection to the claim within ten days after the claim was filed.

Notwithstanding the Debtor's breach of the Plan, Collins argues that he and the Debtor should be awarded compensatory and even *punitive* damages against the TDOR. The court is urged to make these awards on the basis of the bankruptcy court's equitable powers provided at section 105(a) of the Bankruptcy Code and upon the basis of the Plan.

Section 105(a) of the Bankruptcy Code authorizes a bankruptcy court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [title 11]." Collins argues that this section empowers the bankruptcy court to sanction a party "for actions that have or could impact the recovery of creditors generally in a bankruptcy case or imperil the success

of a plan of reorganization." Collins relies on three cases, none of which provide support for his claim that sanctions should be imposed upon the TDOR under the facts of this case.

The first case relied upon by Collins is *Colo. Mountain Express, Inc. v. Aspen Limousine Serv., Inc. (In re Aspen Limousine Serv., Inc.),* 198 B.R. 341, 350 (D. Colo. 1996), in which a creditor solicited acceptances for a competing plan not conditionally approved by the bankruptcy judge and in violation of the bankruptcy judge's order that the debtor be given "first opportunity" to solicit acceptances of its plan. The bankruptcy judge sanctioned the creditor for an unlawful solicitation in violation of 11 U.S.C. § 1125(b), and the district court affirmed. The case is easily distinguishable from the present case which involves conduct that occurred well after confirmation of a plan of reorganization and not in violation of any federal law. This court has held, and the district court has affirmed, that the acts of the TDOR did not violate the discharge injunction. Collins has pointed to no other federal law allegedly violated by the TDOR.

Collins relies upon two other cases, both of which involve sanctions for violation of the discharge injunction, *Turner v. Mellon Mort. Co. (In re Turner),* 221 B.R. 920, 925 (Bankr. M.D. Fla. 1998), and *In re Adesta Commc'ns, Inc.*, No. BK01-83236-TJM, 2010 WL 3089167, at *1-2 (Bankr. D. Neb. Aug. 5, 2010). Although the *Adesta* case involved sanctions against the State of Illinois, it differs remarkably from the present case because the State admitted that it took retaliatory action against the reorganized debtor for its failure to pay discharged taxes.

The reorganized Debtor, not the TDOR, breached the terms of the Plan when it failed to pay taxes owed to the State of Tennessee pursuant to the terms of the Plan. The TDOR gave notice of this default and notice of its intent to levy. Apparently, the reorganized Debtor did nothing to protect itself until after the levy was actually served and its accounts frozen. It was only then that

the reorganized Debtor, through Chief Executive Officer Faye Stiles, contacted Collins and the pending litigation commenced. If Stiles or her representative had promptly responded to the TDOR when the initial notice of default or notice of intent to levy was given, the levy might have been avoided altogether. As is discussed more fully below, the reorganized Debtor could have availed itself of remedies provided by state law to prevent the levy. Collins cannot now complain that expenses were incurred by the reorganized Debtor as the result of the levy. Expenses were incurred as the result of the inaction of the reorganized Debtor.

This court finds no basis whatsoever upon which to award damages to the reorganized Debtor or to sanction the TDOR.

Anticipating possible problems with his request for damages and sanctions, Collins makes a second and extended argument about the jurisdiction of the bankruptcy court to award sanctions against an agency of the State of Tennessee, and about the immunity enjoyed by the State of Tennessee. The TDOR has made no claim to immunity, so that issue need not be discussed.[4]

The court has a separate obligation to determine whether it has jurisdiction over a particular dispute, however. Once it has been determined that there was no violation of the discharge

[4] The court notes, however, that the section relied upon by Collins for his arguments concerning a waiver by the TDOR of sovereign immunity, section 106 of the Bankruptcy Code, applies to the assertion of a claim against a governmental unit that is "property of the estate and arose out of the same transaction or occurrence out of which the claim of such governmental unit arose." 11 U.S.C. § 106(b). As the result of the confirmation of the Plan, all property of the estate vested in the reorganized Debtor upon the Effective Date. There is no claim against the TDOR that can be property of the estate because there no longer is a bankruptcy estate. Indeed, although the TDOR has not objected to the standing of Collins to pursue this action, the court notes that upon confirmation of the plan, Mr. Collins was appointed PCDA ("Post-Confirmation Distribution Agent"). Plan II. D.1. Among his limited duties, the PCDA is to monitor the Debtor's compliance with the terms of the Plan and to seek appropriate relief in the event of a default under the Plan. These duties indicate that the PCDA is an agent of the creditors, not an agent of the reorganized Debtor.

injunction, the bankruptcy court's interest in the dispute between these parties is minimal. The Debtor not only failed to pay state taxes as they came due in breach of federal law, but also failed to pay the taxes as an allowed administrative expense pursuant to the terms of the Plan. The Plan contains no default provisions. The TDOR has pursued collection pursuant to the laws of the State of Tennessee. Those laws provide the applicable time limit for proceeding "by levy or by a proceeding in court" to collect a state tax at Tennessee Code Annotated section 67-1-1429. The parties disagree about the effect of the pendency of the bankruptcy case on that time period. The bankruptcy court determined that the period was tolled during the automatic stay, but the district court reversed, determining that the period for levy only extended 30 days beyond the termination of the automatic stay. *Collins v. Tennessee Dep't of Revenue*, 555 B.R. 670, 679-80 (W.D. Tenn. 2016). The district court determined that the levy was wrongful because it was out of time. Tennessee provides remedies for a taxpayer whose assets have been the subject of a wrongful levy. In fact, Tennessee law specifies that its courts have "sole and exclusive jurisdiction for determining liability for all taxes collected ... by the commissioner of revenue." Tenn. Code Ann. § 67-1-1804. Tennessee law permits a taxpayer to file suit in the chancery court of either Davidson County or the county of the taxpayer's domicile or in the county in which the taxpayer has its principal place of business in Tennessee. Tenn. Code Ann. § 67-1-1803(a). That section also provides that in the event the chancery court determines that the tax was not due for reasons that go to the merit of the tax, it will certify that the tax was wrongfully paid and ought to be refunded, together with interest. Tenn. Code Ann. § 67-1-1803(b). The chancery court is also authorized to award reasonable attorneys' fees and expenses of litigation up to 20% of the amount assessed or denied. Tenn. Code Ann. § 67-1-1803(d). Further appeal is provided for pursuant to the Tennessee Rules of Appellate

Procedure. Tenn. Code Ann. § 67-1-1803(f). These remedies depend upon timely action by the taxpayer. Nothing in the record suggests that the Debtor disputed the assessments of tax because, of course, the assessments resulted from returns it filed. Tennessee law further provides a remedy in the event of wrongful collection:

> To the extent of any amounts collected by or paid to the commissioner with respect to an assessment, or any portion of the assessment, challenged by suit by the taxpayer, whether such collection was pursuant to a jeopardy proceeding, by application of assets restored to the taxpayer pursuant to subsection (h), *or otherwise*, the suit shall proceed as a timely suit for refund of taxes paid, as if a timely claim for refund had been filed by the taxpayer and denied by the commissioner.

Tenn. Code Ann. § 67-1-1801(i) (emphasis added). The reorganized Debtor has simply failed to avail itself of these remedies.

Both this court and the district court have determined that no violation of the discharge injunction resulted from the levy of the TDOR. The TDOR has an allowed claim for administrative expense by virtue of the timely filing of its claim. The remaining dispute concerning the timeliness of the levy and whether any damages may result from it is one that arises under Tennessee law and one that is under the sole and exclusive jurisdiction of the Tennessee courts. Because this court finds that the TDOR did not violate the terms of the Plan or any other provision of federal law brought to its attention, the court concludes that it is without jurisdiction to entertain this dispute between a taxpayer and the state taxing authority.

CONCLUSION

Based upon the foregoing, the Tennessee Department of Revenue is ordered to refund or credit to Faye Foods, Inc. the sum of $23,070.52.[5] Collins's request for damages or sanctions against the TDOR is **DENIED** for two reasons: (1) the court, in the exercise of its discretion, does not find that damages or sanctions are warranted under the facts and circumstances of this case; and (2) the question of damages for untimely levy is within the sole and exclusive jurisdiction of the Tennessee courts.

cc: Debtor
Attorneys for Debtor
Chapter 11 Trustee
Attorney for Chapter 11 Trustee
Tennessee Department of Revenue
Attorneys for Tennessee Department of Revenue
United States Trustee

[5] In its "Response Brief Regarding Damages," filed March 14, 2017, Dkt. No. 619, the TDOR asked that any order to pay be stayed pending appeal. That request should be the subject of a separate motion. *See* Fed. R. Bankr. P. 8007.