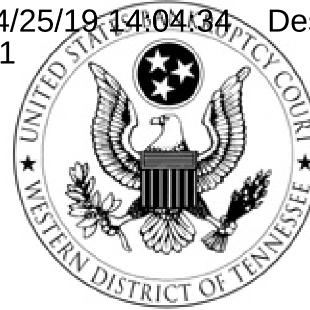
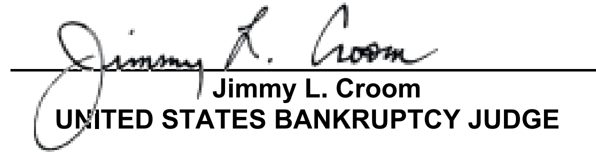


Dated: April 25, 2019
The following is SO ORDERED:



Jimmy L. Croom
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

In re

JAMES TRENT BLANKENSHIP and
WENDY DEANN BLANKENSHIP, **Case No. 16-10839**

Debtors. **Chapter 7**

Agrifund, LLC, dba
Ag Resource Management,

Plaintiff,

v. **Adv. Proc. No. 17-5098**

James Trent Blankenship and
Wendy Deann Blankenship,

Defendants.

ORDER DENYING MOTION TO STRIKE CERTAIN ITEMS FROM APPELLANTS' DESIGNATION OF RECORD ON APPEAL

At issue in this proceeding is whether three items the debtors designated as part of the record on appeal should be stricken. The defendant asserts these items were

improperly designated because (1) none of these documents were entered into evidence during the trial in this matter and (2) the Court did not rely on the documents in ruling on the dischargeability complaint that is currently on appeal in the United States District Court for the Western District of Tennessee. The debtors argue that the items are properly included and that this Court has no discretion to strike items from a party's designation of record.

The Court conducted a hearing in this matter on April 25, 2019.

I. FACTS

The Court conducted a trial in this adversary proceeding on November 14, 2018. On January 2, 2019, this Court issued a memorandum opinion and an order granting Agrifund, LLC dba Ag Resource Management ("ARM") a non-dischargeable judgment against James Trent Blankenship and Wendi Deann Blankenship ("Debtors") under 11 U.S.C. § 523(a)(2)(B) in the amount of $335,012.44. The Court issued an amended judgment on January 3, 2019 (collectively, the opinion and orders shall be referred to as the "§ 523 Judgment").[1] In issuing the § 523 Judgment, the Court specifically found and concluded the following:

> The Court concludes that the Debtors represented to ARM that they were in need of financing to plant approximately 8,200 acres of soybeans in 2016. The Debtors attested that the Farm List was an accurate representation of the amount of land they were going to farm soybeans on in 2016. The Debtors stated that they made this list by "copying" the list of land they farmed in 2015. According to Wendi Blankenship's sworn testimony at her May 4, 2018 deposition, the only alteration they made to the list of land from 2015 was to add FSA farm numbers to the list. The Debtors' 2015 578 Report shows they only planted row crops on 5,200 acres of land in 2015. As a result of these facts, the Court concludes that ARM has met its burden of demonstrating that Debtors submitted the 2016 Crop Loan Application and the Farm List attached thereto with an intent to deceive ARM. Thus, ARM has met its last burden with respect to its § 523(a)(2)(B) dischargeability claim.

(Mem. Op. at 17, ECF No. 33.[2]) In so ruling, the Court referenced the Debtors' allegation that a large portion of their soybean crop had been stolen.

> In their main bankruptcy case and this adversary proceeding, the Debtors alleged that [Ronnie] Bates and his employees had absconded with approximately 100 truckloads, or 92,000 bushels, of the Debtors' soybeans. Although the Debtors raised this allegation with their chapter 11 attorneys and with this Court, the Debtors never took any action against Mr. Bates or his business. They did not

[1] The amended order was issued solely to correct the spelling of Wendi Deann Blankenship's name.
[2] All references to the record are to Adversary Proceeding No. 17-5098 unless specifically noted.

> report the alleged theft to the authorities nor did they bring any type of action against Bates in this Court. They also failed to contact Mr. Bates about this alleged theft. At the trial in this proceeding, Trent Blankenship asserted that he did not contact Bates about the missing soybeans because he did not think it was "proper" to call someone and accuse them of stealing $1,000,000.00 worth of soybeans. Instead, he reported the theft to his bankruptcy attorneys. Mr. Bates testified that he was unaware of any discrepancies with respect to these allegedly missing soybeans. He stated that he provided load tickets to the Debtors for all the loads he carried from the Debtors' farm to the Bates grain elevator.

(*Id.* at 8.) The Court concluded that the Debtors' allegation was without merit.

> Although it is true that the Debtors claimed that approximately $1 million of their soybean crop was stolen, the Debtors offered no evidence of this. They did not take any affirmative steps against the alleged thief. When asked if he ever confronted the alleged wrongdoer, Trent Blankenship stated that he did not think it was "proper" to do so. When asked whether he reported the theft to law enforcement, he said he had not. He reported it to his attorneys and claimed that he had done all he could to resolve the situation. The Court finds the Debtors' allegations with respect to the alleged theft to be without merit.

(*Id.* at 17.)

The Debtors appealed the § 523 Judgment on February 28, 2019. They filed their Designation of Record on Appeal on March 14, 2019 ("Designation of Record"). On March 27, 2019, ARM filed a Motion to Strike three of the designated items from the record (Motion to Strike"). The three items at issue are as follows:

> ·Schedules and Statement of Financial Affairs filed on May 31, 2016. (Bankr. Case No. 16-10839, ECF No. 49);
>
> ·Objection of Willard Park to Omnibus Motion filed on July 7, 2016. (Bankr. Case No. 16-10840, ECF No. 80);[3] and
>
> ·Emergency Motion for Status Conference filed on February 15, 2017. (Bankr. Case No. 16-10840, ECF No. 169).

ARM argues that

> A review of the Trial Transcript indicates that none of the disputed items were offered or received into evidence in this Adversary Proceeding. Further, a review of the Court's Memorandum Opinion indicates that the disputed items were not considered by the Court in its ruling.

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[3] In its Motion to Strike, ARM lists the docket number for this objection as 81; however, at the hearing in this matter, ARM's attorney stated that was a typographical error. The correct docket number is 80. .

(Mot. to Strike at 2, ECF No. 71.) The Court notes that it did not take judicial notice of any of these documents during the trial in this matter.

The first items ARM objects to are the original chapter 11 schedules and Statement of Financial Affairs ("SOFA") in the Debtors' bankruptcy case. (Bankr. Case No. 16-10839, ECF No. 49.) ARM's argument in favor of striking the schedules and SOFA from the Designation of Record is twofold. First, ARM asserts that the Court did not consider the documents in issuing its § 523 Judgment. Second, ARM argues that the Debtors failed to enter the documents into evidence pursuant to the Pre-Trial and Scheduling Order issued in this proceeding on July 23, 2018. If the Debtors had complied with the scheduling order and attempted to submit the schedules and SOFA into evidence, ARM asserts that it would have more thoroughly examined the documents and would have called the Debtors as witnesses. ARM also asserts that it will be prejudiced if the schedules and SOFA are now made a part of the record on appeal because ARM will have no opportunity to examine the documents and/or the Debtors about the information contained therein.

The second item ARM objects to is Willard Park's Objection to the Debtor's Motion to Assume Land Leases in the Blankenship Farms case ("Park Objection"). (Bankr. Case No. 16-10840, ECF No. 80). In their Motion to Assume, the Debtors indicated they wanted to assume a lease of Willard Park's land in Henderson County. In his objection thereto, Willard Park stated that his lease with the Debtors was terminated pre-petition and that the Debtors were not farming any of his land in the 2016 crop season. *Id.* Willard Park testified at the trial in this matter.

> ARM's fifth witness was Willard Park, owner of 29 acres in Henderson County that the Debtors leased for farming. Park testified that Trent Blankenship asked to borrow money from him in late February or early March 2016. Seeing that Debtors could not afford to lease the land for the 2016 crop year, he leased it to someone else. Park testified that he informed the Debtors of this decision that same month.[4]

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[4] In their Motion to Assume, the Debtors stated they were assuming a lease with Willard Park on 56 acres of land in Henderson County. At the trial in this matter, Willard Park testified that the tract of land he rented to the Debtors consists of only 29 acres. *See* Tr. of Nov. 14, 2018 Trial at 48 ("It's a 30-acre field with ditches all the way around it, and I was just charging rent on 29 acres, because we was leaving out a strip all around for my children to walk.) The Court referenced the Debtors' overstatement of the acreage on page 13 of the dischargeability opinion: "[T]he

(ECF No. 33 at 7.) As with the original schedules and SOFA, ARM argues that the Court did not rely on the Park Objection in issuing the § 523 Judgment and that the objection was not entered into evidence. Consequently, ARM argues that it will be prejudiced if the Park Objection is not stricken from the Designation of Record.

The last item ARM is seeking to have stricken from the record is the Debtors' February 15, 2017 Emergency Motion for Status Conference in the Blankenship Farm's case ("Status Conference Motion"). (Bankr. Case No. 16-10840, ECF No. 169). This is the motion in which the Debtors first made the claims that a portion of their crop had allegedly been stolen by Ronnie Bates and the granary. (*Id.* at 2.) ARM argues that if the Status Conference Motion had been entered into evidence at the trial, a number of issues regarding attorney-client privilege would have been raised. ARM also argues that it would have called the attorneys who filed the Status Conference Motion to investigate the alleged theft. ARM also argues that it would have examined Mr. Bates about these claims during the trial. As such, ARM asserts that allowing the Status Conference Motion to be part of the record on appeal will prejudice ARM.

The Debtors filed an objection to the motion to strike on April 16, 2019. (ECF No. 77.) The Debtors offer two arguments in response to ARM's Motion to Strike. First, the Debtors assert that this Court lacks discretion to strike any items in a designation of record under Federal Rule of Bankruptcy Procedure 8009(a)(4). Because that subsection reads "t[h]e record on appeal must include . . . [i]tems designated by the parties," the Debtors argue that a court has no discretion to strike anything designated as part of the record. Second, the Debtors argue that should the Court determine it has discretion to modify the record on appeal, the items in dispute were properly included because the Court considered each of them in issuing the § 523 Judgment.

II. CONCLUSIONS OF LAW

The first argument the Debtors raise in their objection to ARM's Motion to Strike is that this Court lacks the discretion to strike anything from a designation of the record. The Debtors base this argument on the language of Federal Rule of Bankruptcy Procedure 8009(a)(4) which states that the record on appeal "*must include . . .* items designated by

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Debtors indicated they were going to farm 56 acres of land owned by Willard Park, but he testified at the trial that the Debtors only farmed 29 acres." (Mem. Op. at 13, ECF No. 33.)

the parties." The Debtors cite several cases in support of this argument; however, these cases address a court's ability to strike items from a designation of record under a previous version of the rule governing the record on appeal. As will be set forth below, there is a crucial difference in the current version of the rule that rebuts the Debtors' argument.

In December 2014, the rules governing appeals from bankruptcy court decisions were renumbered and, in some cases, expanded upon. Prior to this time, the record on appeal was addressed by Federal Rule of Bankruptcy Procedure 8006 ("Rule 8006"). When the changes went into effect on December 1, 2014, Rule 8006 was renumbered to 8009. The new version of the rule was reorganized into 7 subsections. Everything addressed in Rule 8006 can now be found in subsections (a), (b) and (g) of Federal Rule of Bankruptcy Procedure 8009 ("Rule 8009").

The language about what is included in the record on appeal remains unchanged. Rule 8009 provides that "[t]he record on appeal must include . . . items designated by the parties[.]" Fed. R. Bankr. P. 8009(a)(4). What is different from Rule 8006, however, is that Rule 8009 now contains subsection (e), titled "Correcting or Modifying the Record." This subsection provides that

> if any difference arises about whether the record accurately discloses what occurred in the bankruptcy court, the difference must be submitted to and settled by the bankruptcy court and the record conformed accordingly. *If an item has been improperly designated as part of the record on appeal, a party may move to strike that item.*

Fed. R. Bankr. P. 8009(e)(1) (emphasis added). The Advisory Committee Notes state "[s]ubdivision (e), modeled on [Federal Rule of Appellate Procedure] 10(e), provides a procedure for correcting the record on appeal if an item is improperly designated, omitted, or misstated." Fed. R. Bankr. P. 8009 advisory committee's note to 2014 amendments. Clearly, the Federal Rules of Bankruptcy Procedure now explicitly provide a bankruptcy court with discretion to strike items from a party's designation of the record.

Although Rule 8009 provides a court with the ability to strike, it does not provide any guidance on how to determine whether "an item has been 'improperly designated' or what analysis should be done in making this determination." *In re Digerati Techs., Inc.*, 531 B.R. 654, 660 (Bankr. S.D. Tex. 2015). Consequently, a court must look to caselaw

in ruling on a motion to strike. In the case of *In re Blasingame*, 559 B.R. 692 (B.A.P. 6th Cir. 2016), the Bankruptcy Appellate Panel of the Sixth Circuit had occasion to address this precise issue. In that case, the debtors appealed from the bankruptcy court order striking certain documents. The debtors argued that the stricken documents "contain[ed] important factual findings and conclusions of law related to" the issue on appeal. *Id.* at 700. In striking the items, the bankruptcy court determined that it "did not consider those orders and related documents when making its decision on the discharge issue." *Id.*

On appeal, the 6th Circuit BAP set forth the law a court must use in ruling on a motion to strike.

> The general rule for designation of the record is that only items considered by the bankruptcy court in reaching a decision should be included. *In re Ames Department Stores, Inc.*, 320 B.R. [518] at 521 [(Bankr. S.D.N.Y. 2005)] (quoting *Metro North State Bank v. The Barrick Grp., Inc.* (*In re Barrick Grp., Inc.*), 100 B.R. 152, 154 (Bankr. D. Conn.1989)) (other citations omitted). As noted in the *Purvi Petroleum* decision, there is a recognized exception to this rule. *In re Purvi Petroleum III, LLC*, 2012 WL 360047 at *2 [(Bankr. M.D.Tenn. 2012)]. Courts have allowed the inclusion of other pleadings in a case even though they were not made exhibits and were not considered by the court if the pleading to be added is closely related to the matter at issue. *Food Distribution Ctr. v. Food Fair, Inc.*, (*In re Food Fair, Inc.*), 15 B.R. 569, 572 (Bankr. S.D.N.Y. 1981) (finding record may be supplemented with materials from other adversary proceedings arising from the same bankruptcy case **closely related** to the appeal); *Saco Local Development Corp. v. Armstrong Business Credit Corp.* (*In re Saco Local Development Corp.*), 13 B.R. 226, 230 (Bankr. D. Me. 1981).

In re Blasingame, 559 B.R. at 700–01 (emphasis in original). Using these guidelines, the BAP determined that the bankruptcy court had improperly stricken two bankruptcy court orders from the designation of record. In so ruling, the BAP reasoned that "[a]lthough the bankruptcy court did not consider those documents in reaching its decision, they contain findings of fact and legal conclusions regarding the actions of Debtors' former counsel in this case." *Id.* Because those findings and conclusions related directly to the issue on appeal, the BAP concluded the orders should have been included in the record on appeal "even though they were not considered by the bankruptcy court." *Id.*

The debtors in *Blasingame* also argued that the bankruptcy court had improperly stricken motions and briefs filed by the parties. The BAP determined that the bankruptcy court did not err in striking these documents. *Id.* "Those documents were filed by the

parties; do not contain findings of fact or legal conclusions of the court, and thus are not appropriately included in the record for this appeal." *Id.* In so ruling the BAP cautioned

> When considering motions to strike designated items for the record on appeal, bankruptcy courts should be mindful that they should only strike documents that were not filed in the case, have no bearing on the appeal, or contain evidence which was not admitted at trial. When in doubt, it is better to err on the side of caution, include the items, and allow the appellate court to determine the relevance of the designated items.

Id. at 701 (citation omitted).

Other courts around the country use the same standards set forth by the Sixth Circuit Bankruptcy Appellate Panel in *Blasingame.* The bankruptcy court in *In re National Century Financial Enterprises, Inc.,* 334 B.R. 907 (Bankr. S.D. Ohio 2005), held that "[b]ecause the Disputed Items were neither filed with or presented to the Court, nor considered when the Order was rendered, they will be stricken from the Designation." *Id.* at 917. In so ruling, the Ohio court relied on a bankruptcy court decision out of the Southern District of New York. "As the court noted in Ames, '[t]he record on appeal should contain all items considered by the bankruptcy court in reaching a decision.... Conversely, if an item was not considered by the court, it should be stricken from the record on appeal.' " *Id.* (citing *In re Ames Dep't. Stores, Inc.*, 320 B.R. 51 8, 521 (Bankr. S.D.N.Y. 2005) (other citations omitted)). "While the record should contain all documents necessary to afford a full understanding of the case.... Items not before the Bankruptcy Court and not considered by it in rendering its decision may not be included in the record." *In re Nat'l Century Fin. Enterprises, Inc.,* 334 B.R. at 917 (citation and internal quotation marks omitted).

When the item at issue was not a pleading in the bankruptcy case, the analysis is somewhat easy. If such an item was not introduced into evidence, then it is typically stricken from the record. *See In re Digerati Techs., Inc.*, 531 B.R. 654, 661 (Bankr. S.D. Tex. 2015). If, however, the items at issue are pleadings, transcripts of hearings in the bankruptcy court or minute entries on the bankruptcy court docket sheet, the analysis is more complicated. This was the issue raised by the appellants in *Digerati*. The *Digerati* appellants argued

> that in order to give the appellate court an overview of the entire Chapter 11 case of the Debtor, he (or any other appellant) has the unfettered right to designate any pleading or minute entry that is on the docket in the main case or on the docket in any adversary proceeding filed in this Chapter 11 case.

Id. at 662. After analyzing relevant case law, the *Digerati* court disagreed and held "although pleadings do not need to be introduced into evidence to be subsequently designated for appeal, they can only be designated if the bankruptcy court actually considered these pleadings in rendering its ruling." *Id.* at 663 (citing *In re Chateaugay Cor*p., 64 B.R. 990, 995 (S.D.N.Y.1986) and *In re Neshaminy Office Building Associates*, 62 B.R. 798, 802 (E.D.Pa.1986)).

In the case at bar, it is true that none of the items at issue were introduced into evidence during the trial in this proceeding. It is also true that the Court did not take judicial notice of any of these items during the trial nor did the Court specially reference any of the items in the § 523 Judgment. However, all of the disputed documents were filed as pleadings in either this adversary proceeding or the underlying bankruptcy cases. Thus, if the Court considered the pleadings at issue in ruling on ARM's dischargeability complaint, the Court cannot strike the items from the Debtors' Designation of Record. In determining whether the Debtors improperly designated the items at issue as part of the record on appeal, the Court will follow the guidance set forth by the Sixth Circuit Bankruptcy Appellate Panel in *In re Blasingame* and will only strike the documents if they "have no bearing on the appeal, or contain evidence which was not admitted at trial." *In re Blasingame*, 559 B.R. at 701. In considering the issue, the Court is mindful of the advice set forth by the Bankruptcy Appellate Panel in *Blasingame*: "When in doubt, it is better to err on the side of caution, include the items, and allow the appellate court to determine the relevance of the designated items." *Id.*

As for the schedules and SOFA filed in Bankruptcy Case No. 16-10839 on May 31, 2016, the Court did not reference these documents in ruling on ARM's dischargeability complaint. However, the Court can see no reason to strike these documents from the Designation of Record. Because the Court is unsure about what relevance these particular documents have to the issue on appeal, the Court will err on the side of caution

and let it be included on the Debtor's Designation of Record. It will be up to the appellate court to determine what relevance, if any, they have.

Turning to the Park Objection, the Court did not specifically reference this objection in ruling on the dischargeability complaint; however, the Court reviewed the objection in issuing the § 523 Judgment. The Court referenced the Debtors' motion to assume various leases on page 4 of the memorandum opinion. It also referenced the fact that three leases, including the one with Mr. Park, were excepted from this assumption. The lease with Mr. Park was excluded from the assumption for the reasons stated in the Park Objection. So, although the Court did not cite the Park Objection, it clearly reviewed it in issuing the § 523 Judgment. Additionally, Willard Park testified at the trial in this matter. His testimony was essentially a reiteration of the allegations set forth within the Park Objection. The Court relied on both Mr. Park's trial testimony and the allegations in the Park Objection in concluding that the Debtors made a fraudulent misrepresentation as to the number of acres they were going to farm in 2016. Accordingly, there is no basis for striking the Park Objection from the Designation of Record.

Lastly, the Court did not specifically cite the Status Conference Motion in the § 523 Judgment; however, in discussing the Debtors' allegations about the missing soybean crop, the Court acknowledged that "the Debtors raised this allegation with their chapter 11 attorneys and with this Court[.]" (Mem. Op. at 8, ECF No. 33.) The vehicle by which the Court first learned of the alleged theft was the Status Conference Motion. As with the Park Objection, the allegations set forth in the Status Conference Motion were repeated at the trial in this matter. The Court clearly considered the Status Conference Motion in issuing the § 523 Judgment. As such, there is no basis for striking the Status Conference Motion from the Debtors' Designation of Record.

None of the items ARM is asking the Court to strike contain evidence. They were all pleadings filed in the instant adversary proceeding or in the underlying bankruptcy cases. Including a pleading on a designation of record does not somehow automatically imbue that document with any evidentiary or probative value. It merely allows an appellate court to review the document in order to get a fuller view of the case.

For the reasons set forth herein, the Motion to Strike Certain Items from Appellants' Designation of Record on Appeal filed by Agrifund, LLC, dba Ag Resources Management ("ARM"), on March 27, 2019 is **HEREBY DENIED.**

The Debtors' Objection to the Motion to Strike Certain Items from Appellants' Designation of Record on Appeal is **OVERRULED IN PART** and **SUSTAINED IN PART.** The Debtors'

assertion that this Court does not have discretion to strike items from the Designation of Record is Overruled. The Debtors' assertion that the items at issue should not be stricken from the Designation of Record is Sustained.

IT IS SO ORDERED.

Mailing List
Debtor
Marianna Williams, Chapter 7 Trustee
Russell W. Savory, attorney for Agrifund, LLC