

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION**

In re:

**TONY HUNG DAO,**

**Debtor.**

§  
§  
§  
§  
§

**CHAPTER 7**

**Case No. 06-37227-7**

**MOTION FOR ORDER (I) THAT PRO BONO LEGAL COUNSEL IS NOT A DEBT RELIEF AGENCY AND (II) THAT THIS PRO BONO DEBTOR AND HIS COUNSEL ARE NOT SUBJECT TO SECTIONS 526-529 OF THE BANKRUPTCY CODE**

IF YOU WANT A HEARING, YOU MUST REQUEST ONE IN WRITING, AND YOU MUST RESPOND SPECIFICALLY TO EACH PARAGRAPH OF THIS PLEADING. YOU MUST FILE YOUR RESPONSE WITH THE CLERK OF THE BANKRUPTCY COURT WITHIN TWENTY DAYS FROM THE DATE YOU WERE SERVED AND GIVE A COPY TO THE PERSON WHO SENT YOU THE NOTICE; OTHERWISE, THE COURT MAY TREAT THE PLEADING AS UNOPPOSED AND GRANT THE RELIEF.

IF A PARTY REQUESTS EMERGENCY CONSIDERATION, THE COURT MAY ACT EXPEDITIOUSLY ON THE MATTER. IF THE COURT ALLOWS A SHORTER RESPONSE TIME THAN TWENTY DAYS, YOU MUST RESPOND WITHIN THAT TIME. IF THE COURT SETS AN EMERGENCY HEARING BEFORE THE RESPONSE TIME WILL EXPIRE, ONLY ATTENDANCE AT THE HEARING IS NECESSARY TO PRESERVE YOUR RIGHTS. IF AN EMERGENCY HEARING IS NOT SET, YOU MUST RESPOND BEFORE THE RESPONSE TIME EXPIRES.

TO THE HONORABLE JUDGE OF  
THE UNITED STATES BANKRUPTCY COURT:

Tony Hung Dao (“Debtor”) files this Motion for Order (i) That Pro Bono Legal Counsel Is Not a Debt Relief Agency and (ii) That This Pro Bono Debtor and His Counsel Are Not Subject to Sections 526-529 of the Bankruptcy Code (the “Motion”) and states as follows:

### **A. Factual Background**

1. Tony Hung Dao ("Debtor") filed this chapter 7 bankruptcy case on December 22, 2006. He is represented by the undersigned counsel pro bono on referral from The Houston Volunteers Lawyers' Program ("HVLP").

2. The Debtor immigrated from Viet Nam in 2000, who since 2005 is a United States Citizen. The Debtor is a student. He has no income.

3. Soon after arriving in the United States, the Debtor was offered virtually unlimited consumer credit through a number of mass mailed credit card applications. The Debtor was ill informed of the nature of the credit offers received, and did not understand their terms at the time, nor the amount of interest he would be charged.

4. In the course of his stay and before starting his education, the Debtor incurred sizable credit card debt. For several years he has attempted to make payment on the debt, and paid what the card companies usually required as a minimum payment, not realizing that this would not even cover the interest and late fees charged. However, because the interest rates charged often exceeded 20% he was unable, despite making the payments and greatly reducing all expenses except those literally required to stay off the streets, to actually pay down the debt. Indeed, the debt actually grew larger given the high interest rates charged.

5. The Debtor has attempted to work through his debts through credit counseling. However, given the size of the debt and his lack of income while a student, he was advised there was no assistance that could be offered.

6. The Debtor has sought legal assistance from several places, but cannot afford to pay for assistance in a bankruptcy case. In addition, he has sought assistance from Lone Star Legal Aid which was unable to assist him. He twice requested assistance from HVLP. HVLP is a non profit

corporation founded by the Houston Bar Association to increase legal access to residents of Harris County who could not otherwise afford representation. Each year HVLP links qualified applicants with volunteer attorneys who represent them in a variety of civil matters. HVLP also has staff lawyers who can provide direct representation if required. However, historically this has not included bankruptcy representation. However, beginning in 1999 the Courts initiated a program to enable the HVLP to administer a pro bono program that could service the needs of the indigent pro bono debtor.

7. The result of these efforts was initiation of a bankruptcy pro bono program for the United States Bankruptcy Court for the Southern District of Texas (the "Project"). The goal of the Project was to make available pro bono legal representation in bankruptcy cases to poor and working poor debtors. A system for referring debtors who do not qualify for assistance to either the publicly funded Lone Star Legal Services ("Lone Star") or the Houston Bar Association's Lawyer Referral Service ("LRS"), which also has a reduced fee panel, was also instituted. Until enactment of BAPCPA, the Project had been able to match qualified clients with attorney volunteers, because the pool of volunteer attorneys included both consumer bankruptcy attorneys as well as (i) volunteer nonbankruptcy attorneys willing to undertake what was once straightforward chapter 7 representation and (ii) a significant number of business bankruptcy lawyers who volunteered to serve the program where they could. Since October 16, 2005, however, with the changes brought to the consumer practice by BAPCPA, including extensive new requirements imposed on consumer chapter 7 lawyers who charge their debtor clients a fee for their time, few lawyers and firms who do not specialize in consumer bankruptcy law were willing to accept any pro bono consumer filings to the extent that uncertainty over their status as debt relief agencies might affect their normal practice.

8. HVLP was initially unable to obtain assistance for the Debtor because of the shortage of any volunteer lawyers to take this case and others like it because either (i) a number of prior volunteer lawyers have refused to continue to serve as volunteers because of the complexities of the new law under BAPCPA, in particular those associated with being a debt relief agency or (ii) because many volunteers who are business bankruptcy lawyers having some familiarity with the practice area refuse to undertake this type of consumer bankruptcy representation because of the concern that these lawyers or their firms will be labeled "debt relief agencies" under the Bankruptcy Code, thereby affecting their practices in unknown ways.

9. After the second visit by the Debtor, HVLP circulated a renewed request to the Bar to seek assistance for Mr. Dao, and other bankruptcy eligible candidates that have come to HVLP for assistance. After clearing conflicts, Haynes and Boone, LLP (the "Firm"), through the undersigned, agreed to attempt to represent the Debtor. However, concerns have been raised both internally at the Firm and in discussions with other business bankruptcy lawyers and firms on whether the Bankruptcy Code amendments may affect a corporate law department or a commercial firm's ability to have its lawyers represent consumer debtors in pro bono bankruptcy cases referred by nonprofit organizations. Nonetheless, the Firm agreed to the representation provided he does not cause the Firm to be either (i) a debt relief agency, which it should not be under the plain language of the law as written, and (ii) is not required to comply with BAPCPA requirements imposed upon debtors who are represented by attorneys for a fee who otherwise are debt relief agencies. The Debtor, having been informed of this, still requests the undersigned represent him in this case.

### **B. Relief Requested**

10. The Debtor is an individual qualified under chapter 7 of the Code. He is indigent, and only is able to complete his studies because of sponsorship from a friend. He was referred to and

qualified under the requirements of the HVLP for assistance under its guidelines and referred to the under signed counsel.

11. Under BAPCPA, there are certain requirements imposed on debtors who file a chapter 7 bankruptcy case, and also upon their legal counsel as well. The Code appears by its plain language to impose certain additional obligations on debtors who retain counsel for a fee, as distinct from this Debtor who is indigent and is represented by pro bono counsel. Certainly there is significant controversy over whether attorneys are debt relief agencies and even the legality of these “debt relief agency” provisions. Several courts have weighed in on whether attorneys are debt relief agents, and a couple have even declared portions of these requirements to be constitutionally infirm or suspect, particularly as to those that relate to what lawyers must or must not say in representing their clients. *See In re Attorneys at Law and Debt Relief Agencies*, 2006 WL 2925199 (S.D. Ga. Aug. 25, 2006) (the District Court effectively agreed with the US Trustee that there was no case or controversy to justify declaration that attorneys are not debt relief agencies, but dismissed the US Trustee's appeal for lack of standing.); *Olsen v. Gonzales*, Case No. 05-6365-HO (D. Or. Aug. 11, 2006) (Court held unconstitutional the provisions prohibiting certain advice, but otherwise upheld several other provisions); *Hersh v. U.S.*, 2006 WL 2088270 (N.D. Tex. Jul. 26, 2006) (which held attorneys by plain meaning are debt relief agents, but held the same provision unconstitutional); *and Geisenberger v. Gonzales*, 2006 WL 1737405 (E.D. Pa. Jun. 19, 2006) (which declined to address the constitutional issues on standing grounds); *Milavetz, Gallop & Milavetz v. United States*, 2006 WL 3524399 (D. Minn. Dec. 7, 2006) (attorneys are not debt relief agents). However, none of these reported decisions appear to address an even narrower question on whether BAPCPA's broad "debt relief agency" provisions are inapplicable to attorneys in pro bono cases where there is no fee paying client “assisted person,” as the statute seems to require.

12. With regard to this pro bono Debtor, it is important to this case and to pro bono programs everywhere to determine whether the proposed pro bono legal counsel for the Debtor is a “debt relief agency.” The Debtor and his pro bono firm request the Court rule that the attorney is not a debt relief agency in undertaking representation of this pro bono debtor, who is not a fee paying client.

13. In addition, because the Code imposes significant new requirements on individual consumer debtors in sections 526 to 529 which requirements appear by the plain language of the Code to apply only to debtors who are represented by counsel under a fee, and not to debtors represented by pro bono counsel, the Debtor and his counsel request an order confirming this is the case in order to properly satisfy the requirements for the chapter 7 case.

14. In the event that the Debtor and his attorney cannot get confirmation that the attorney is not a debt relief agency, then continued representation will be jeopardized. Pro bono counsel on referral from HVLP should not be burdened with the often intrusive types of requirements imposed upon debtors and counsel who are paid a fee and otherwise plainly within the possible coverage of being debt relief agents, such as the following:

**§ 526. Restrictions on debt relief agencies**

...

(c)(1) Any contract for bankruptcy assistance between a debt relief agency and an assisted person that does not comply with the material requirements of this section, section 527, or section 528 shall be void and may not be enforced by any Federal or State court or by any other person, other than such assisted person.

The Debtor was referred to the undersigned counsel by HVLP. Currently, HVLP has an approved form of representation agreement that its referred counsel present to the prospective client for execution if the case is accepted. That form contract has not yet been updated to reflect the

referenced requirement nor, would it seem, need to be. While counsel might seek to work with HVLP if there is a need for the form representation agreement to be updated under a statutory requirement, there is no reason to do so if the form agreement in its current format is adequate and compliant with the requirements. Moreover, any such changes might invoke other matters, such as insurance provided through HVLP to its volunteers for this work.

15. The new Code also provides:

(2) Any debt relief agency shall be liable to an assisted person in the amount of any fees or charges in connection with providing bankruptcy assistance to such person that such debt relief agency has received, for actual damages, and for reasonable attorneys' fees and costs if such agency is found, after notice and a hearing, to have--

(A) intentionally or negligently failed to comply with any provision of this section, section 527, or section 528 with respect to a case or proceeding under this title for such assisted person;

(B) provided bankruptcy assistance to an assisted person in a case or proceeding under this title that is dismissed or converted to a case under another chapter of this title because of such agency's intentional or negligent failure to file any required document including those specified in section 521; or

(C) intentionally or negligently disregarded the material requirements of this title or the Federal Rules of Bankruptcy Procedure applicable to such agency.

This provision should not be applicable to pro bono counsel given no fee is charged—why would anyone performing a public service assume such liability in circumstances where these provisions do not apply, and under such a mandate? This language would appear to further confirm the apparent plain meaning of this entire series of provisions to not apply to pro bono counsel, who are not receiving a fee and are not otherwise receiving consideration that would trigger this section of the Code.

16. The new Code provides further:

(3) In addition to such other remedies as are provided under State law, whenever the chief law enforcement officer of a State, or an official or agency designated by a State, has reason to believe that any person has violated or is violating this section, the State—

(A) may bring an action to enjoin such violation;

(B) may bring an action on behalf of its residents to recover the actual damages of assisted persons arising from such violation, including any liability under paragraph (2); and

(C) in the case of any successful action under subparagraph (A) or (B), shall be awarded the costs of the action and reasonable attorneys' fees as determined by the court.

This provision seems directed to abusive practices whereby mass marketers who never really service their paying bankruptcy clients act in a way that is contrary to acceptable minimum thresholds of conduct. While the undersigned pro bono counsel has every expectation of providing responsible and diligent representation of the Debtor, having the specter of this government action imposes burdens that go far beyond the usual oversight provided to legal counsel in any matter, much less one that is pro bono in nature.

17. The new Code also provides:

(5) Notwithstanding any other provision of Federal law and in addition to any other remedy provided under Federal or State law, if the court, on its own motion or on the motion of the United States trustee or the debtor, finds that a person intentionally violated this section, or engaged in a clear and consistent pattern or practice of violating this section, the court may—

(A) enjoin the violation of such section; or

(B) impose an appropriate civil penalty against such person.

The undersigned counsel do not want to run afoul of the requirements imposed, and while the plain language of the statute seemingly do not apply here for a debtor having the help of pro bono counsel the Firm does not want to incur added responsibility or risk adverse action as contemplated.

18. The new Code states:

(d) No provision of this section, section 527, or section 528 shall—

(1) annul, alter, affect, or exempt any person subject to such sections from complying with any law of any State except to the extent that such law is inconsistent with those sections, and then only to the extent of the inconsistency; or

(2) be deemed to limit or curtail the authority or ability—

(A) of a State or subdivision or instrumentality thereof, to determine and enforce qualifications for the practice of law under the laws of that State; or

(B) of a Federal court to determine and enforce the qualifications for the practice of law before that court.

As noted, if this section does apply to this representation then counsel needs to know and understand what needs to be done beyond the normal level of diligent representation expected, without the threat of sanction or enforcement.

19. The new Code in section 527 provides:

**§ 527. Disclosures**

(a) A debt relief agency providing bankruptcy assistance to an assisted person shall provide—

(1) the written notice required under section 342(b)(1); and

(2) to the extent not covered in the written notice described in paragraph (1), and not later than 3 business days after the first date on which a debt relief agency first offers to provide any bankruptcy assistance services to an assisted person, a clear and conspicuous written notice advising assisted persons that—

(A) all information that the assisted person is required to provide with a petition and thereafter during a case under this title is required to be complete, accurate, and truthful;

(B) all assets and all liabilities are required to be completely and accurately disclosed in the documents filed to commence the case, and the replacement value of each asset as defined in > section 506 must be stated in those documents where requested after reasonable inquiry to establish such value;

(C) current monthly income, the amounts specified in section 707(b)(2), and, in a case under chapter 13 of this title, disposable income (determined in accordance with section 707(b)(2)), are required to be stated after reasonable inquiry; and

(D) information that an assisted person provides during their case may be audited pursuant to this title, and that failure to provide such information may result in dismissal of the case under this title or other sanction, including a criminal sanction.

The pro bono counsel not normally undertaking such representation does not have forms that probably are being used to fulfill this requirement. The limits of how far such counsel must go in a pro bono qualified debtor case to satisfy the requirements imposed by these provisions remains undefined. Many non consumer lawyers will simply refuse to work at all pro bono with these types of requirements overhanging the representation. The undersigned counsel is not inclined to do so either, but is willing to proceed based on what the plain language of the statute appears to say--that pro bono counsel are not debt relief agencies and therefore these provisions do not apply. As a matter of disclosure in this regard, the undersigned counsel has not within "3 business days after the first date on which a debt relief agency first offers to provide any bankruptcy assistance services to an assisted person, a clear and conspicuous written notice" referred to, though a meeting to review issues, the chapters, and to obtain information was conducted for several hours.

20. The new Code section goes on to provide:

(b) A debt relief agency providing bankruptcy assistance to an assisted person shall provide each assisted person at the same time as the notices required under subsection (a)(1) the following statement, to the extent applicable, or one substantially similar. The statement shall be clear and conspicuous and shall be in a single document separate from other documents or notices provided to the assisted person:

"IMPORTANT INFORMATION ABOUT BANKRUPTCY ASSISTANCE SERVICES FROM AN ATTORNEY OR BANKRUPTCY PETITION PREPARER.

"If you decide to seek bankruptcy relief, you can represent yourself, you can hire an attorney to represent you, or you can get help in some localities from a bankruptcy petition preparer who is not an attorney. THE LAW REQUIRES AN ATTORNEY OR BANKRUPTCY PETITION PREPARER TO GIVE YOU A WRITTEN CONTRACT SPECIFYING WHAT THE ATTORNEY OR BANKRUPTCY PETITION PREPARER WILL DO FOR YOU AND HOW MUCH IT WILL COST. Ask to see the contract before you hire anyone.

"The following information helps you understand what must be done in a routine bankruptcy case to help you evaluate how much service you need. Although bankruptcy can be complex, many cases are routine.

"Before filing a bankruptcy case, either you or your attorney should analyze your eligibility for different forms of debt relief available under the Bankruptcy Code and which form of relief is most likely to be beneficial for you. Be sure you understand the relief you can obtain and its limitations. To file a bankruptcy case, documents called a Petition, Schedules and Statement of Financial Affairs, as well as in some cases a Statement of Intention need to be prepared correctly and filed with the bankruptcy court. You will have to pay a filing fee to the bankruptcy court. Once your case starts, you will have to attend the required first meeting of creditors where you may be questioned by a court official called a 'trustee' and by creditors.

"If you choose to file a chapter 7 case, you may be asked by a creditor to reaffirm a debt. You may want help deciding whether to do so. A creditor is not permitted to coerce you into reaffirming your debts.

"If you choose to file a chapter 13 case in which you repay your creditors what you can afford over 3 to 5 years, you may also want help with preparing your chapter 13 plan and with the confirmation hearing on your plan which will be before a bankruptcy judge.

"If you select another type of relief under the Bankruptcy Code other than chapter 7 or chapter 13, you will want to find out what should be done from someone familiar with that type of relief.

"Your bankruptcy case may also involve litigation. You are generally permitted to represent yourself in litigation in bankruptcy court, but only attorneys, not bankruptcy petition preparers, can give you legal advice."

The undersigned pro bono counsel has not within three (3) business days transmitted this notice either. However, approximately five (5) business days after meeting the counsel did transmit a draft of this Motion to the Debtor for review and requested the Debtor review the Motion and issues raised, and to inquire further as needed.

21. The new Code section then provides:

(c) Except to the extent the debt relief agency provides the required information itself after reasonably diligent inquiry of the assisted person or others so as to obtain such information reasonably accurately for inclusion on the petition, schedules or statement of financial affairs, a debt relief agency providing bankruptcy assistance to an assisted person, to the extent permitted by nonbankruptcy law, shall provide each assisted person at the time required for the notice required under subsection (a)(1) reasonably sufficient information (which shall be provided in a clear and conspicuous writing) to the assisted person on how to provide all the information the assisted person is required to provide under this title pursuant to section 521, including--

(1) how to value assets at replacement value, determine current monthly income, the amounts specified in section 707(b)(2) and, in a chapter 13 case, how to determine disposable income in accordance with section 707(b)(2) and related calculations;

(2) how to complete the list of creditors, including how to determine what amount is owed and what address for the creditor should be shown; and

(3) how to determine what property is exempt and how to value exempt property at replacement value as defined in section 506.

(d) A debt relief agency shall maintain a copy of the notices required under subsection (a) of this section for 2 years after the date on which the notice is given the assisted person.

In regard to this requirement, legal advice was provided that generally addressed the forgoing matters but no written notice was transmitted, and the undersigned pro bono counsel does not have forms for this use.

22. The new Code section 528 provides:

**§ 528. Requirements for debt relief agencies**

(a) A debt relief agency shall—

(1) not later than 5 business days after the first date on which such agency provides any bankruptcy assistance services to an assisted person, but prior to such assisted person's petition under this title being filed, execute a written contract with such assisted person that explains clearly and conspicuously—

(A) the services such agency will provide to such assisted person; and

(B) the fees or charges for such services, and the terms of payment;

As indicated above there was a form of HVLP representation agreement signed. However, until the plain meaning is confirmed it remains uncertain if this is compliant with the terms of this section.

23. Code section 528 then states this requirement:

(4) clearly and conspicuously use the following statement in such advertisement: "We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code." or a substantially similar statement.

The undersigned legal counsel did not include this in the representation agreement and does not consider itself to be a debt relief agency under the Code nor would it ever make such disclaimer in any advertisements done, which when done exclusively target business clients.

**C. Arguments and Authorities**

24. The Debtor and undersigned Firm submit that a law firm that does not normally undertake consumer bankruptcy law matters need not refuse pro bono assignments in consumer debtor cases after October 17, 2005, that are properly screened and referred by organizations such as the local bar associations or other nonprofit public service organizations, for fear of being labeled a nefarious "debt relief agency." This type of public service representation should not automatically

transform a law firm (or corporation) into a debt relief agency under the Code. However, while the plain language of the statute would seemingly control this determination, the absence of judicial precedent in this particular area and the conflicting decisions referred to above on whether attorneys are indeed debt relief agencies makes it impossible to know for sure, leaving the Firm unsure of the ultimate result if the representation of this Debtor continues.

25. The Code in section 101 provides this new definition:

(12A) The term “debt relief agency” means any person who provides any bankruptcy assistance to an assisted person *in return for the payment of money or other valuable consideration*, or who is a bankruptcy petition preparer under section 110, but does not include –

...

(B) a nonprofit organization that is exempt from taxation under section 501(c)(3) of the Internal Revenue Code of 1986;

11 U.S.C. § 101(12A), (B) (emphasis supplied). If a firm or attorney is a debt relief agency, then the new Code adds a number of requirements for consumer practitioners and those debt relief agencies who are deemed “Debt Relief Agencies” to follow. New section 526 provides restrictions applicable only to Debt Relief Agencies, with section 527 imposing new disclosure requirements on debt relief agencies.

26. The volunteer attorney’s acceptance of clients who are referred to them by either the Project or other similar nonprofit organizations should not render the accepting firm or lawyer a “debt relief agency” because the business lawyers and firm or company otherwise not usually doing consumer cases is accepting the representation pro bono; it is not providing legal assistance in return for payment or fee, and there is no apparent “other valuable consideration” involved. As a result, the restrictions on debt relief agencies enumerated in section 526 should not apply to the law firm not

otherwise representing paying consumer debtor clients on such cases.<sup>1</sup> However, the Code’s definition of “assisted person” refers to “*any person* whose debts consist primarily of consumer debts and the value of whose nonexempt property is less than \$150,000.” 11 U.S.C. § 101(3). And what may comprise “valuable consideration” is not defined.<sup>2</sup>

27. The reason for the concern in this case, and generally, is in defining the limits of what is required of pro bono counsel and pro bono debtors under BAPCPA. The new section is specific, and in part provides:

**§ 526. Restrictions on debt relief agencies**

(a) A debt relief agency shall not –

...

(2) make any statement, or counsel or advise any assisted person or prospective assisted person to make a statement in a document filed in a case or proceeding under this title, that is untrue and misleading, or that upon the exercise of reasonable care, should have been known by such agency to be untrue or misleading;

...

(4) advise an assisted person or prospective assisted person to incur more debt in contemplation of such person filing a case under this title or to pay an attorney or bankruptcy petition preparer fee or charge for services performed as part of preparing for or representing a debtor in a case under this title.

...

(c) ...

(2) Any debt relief agency shall be liable to an assisted person in the amount of any fees or charges in connection with providing

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1 At least one scholarly article seems to agree. *See, e.g.,* Vance and Cooper, Nine Traps and One Slap: Attorney Liability Under the New Bankruptcy Law, 77 Am. Bankr. L.J. 283 (2005).

2 Can pro bono representation be considered valuable consideration? While one might expect the answer to be no, there is no guidance in the statute regarding what Congress was intending when it drafted this language. Case law has not yet developed. Typically, a subjective appreciation such as what Mr. Dao has for the assistance should not be deemed valuable consideration under the statute, but is it enough to be tagged as a “debt relief agency”? *See In re Kelsey*, 270 B.R. 776 (BAP 10<sup>th</sup> Cir. 2001)(“Value is not measured from the subjective, emotional perspective of Mr. Kelsey, but instead from the objective, economic perspective of [Debtor’s] creditors”); *Matter of Galbreath*, 207 B.R. 309 (Bankr. M.D. Ga. 1997); *but see In re Marlar*, 246 B.R. 606 (Bankr. W.D. Ark. 2000)(love and affection can under state law be adequate consideration for transfer of real estate, but was not reasonably equivalent value), *affirmed* 267 F.3d 749 (8<sup>th</sup> Cir. 2001). Certainly, Mr. Dao is grateful for the representation. In the absence of unambiguous case law or other statutory guidance, the Firm requests confirmation on this point.

bankruptcy assistance to such person that such debt relief agency has received, for actual damages, and for reasonable attorneys' fees and costs if such agency is found, after notice and a hearing, to have –

(A) intentionally or negligently failed to comply with any provision of this section, section 527, or section 528 with respect to a case or proceeding under this title for such assisted person;

(B) provided bankruptcy assistance to an assisted person in a case or proceeding under this title that is dismissed or converted to a case under another chapter of this title because of such agency's intentional or negligent failure to file any required document including those specified in section 521; or

(C) intentionally or negligently disregarded the material requirements of this title or the Federal Rules of Bankruptcy Procedure applicable to such agency.

11 U.S.C. § 526. Section 526 imposes a number of requirements that require a lawyer who is a “debt relief agency” to advise the client debtor to maintain a status quo leading up to a bankruptcy. Similarly, section 527 has additional “counseling” requirements that debt relief agencies must provide to consumer debtor clients:

#### **§ 527. Disclosures**

(a) A debt relief agency providing bankruptcy assistance to an assisted person shall provide –

(1) the written notice required under section 342(b)(1); and  
(2) to the extent not covered in the written notice described in paragraph (1), and not later than 3 business days after the first date on which a debt relief agency first offers to provide any bankruptcy assistance services to an assisted person, a clear and conspicuous written notice advising assister persons that –

(A) all information that the assisted person is required to provide with a petition and thereafter during a case under this title is required to be complete, accurate, and truthful;

(B) all assets and all liabilities are required to be completely and accurately disclosed in the documents filed to commence the case, and the replacement value of each asset as defined in section 506 must be stated in those documents

where required after reasonable inquiry to establish such value;

(C) current monthly income, the amounts specified in section 707(b)(2), and, in a case under chapter 13 of this title, disposable income (determined in accordance with section 707(b)(2), are required to be stated after reasonable inquiry; and

(D) information that an assisted person provides during their case may be audited pursuant to this title, and that failure to provide such information may result in dismissal of the case under this title or other sanction, including a criminal sanction.

...

(c) Except to the extent the debt relief agency provides the required information itself after reasonably diligent inquiry of the assisted person or others so as to obtain such information reasonably accurately for inclusion on the petition, schedules or statement of financial affairs, a debt relief agency providing bankruptcy assistance to an assisted person, to the extent permitted by nonbankruptcy law, shall provide each assisted person at the time required for the notice required under subsection (a)(1) reasonably sufficient information (which shall be provided in a clear and conspicuous writing) to the assisted person on how to provide all the information the assisted person is required to provide under this title pursuant to section 521, including –

(1) how to value assets at replacement value, determine current monthly income, the amounts specified in section 707(b)(2) and, in a chapter 13 case, how to determine disposable income in accordance with section 707(b)(2) and related calculations;

(2) how to complete the list of creditors, including how to determine what amount is owed and what address for the creditor should be shown; and

(3) how to determine what property is exempt and how to value exempt property at replacement value as defined in section 506.

11 U.S.C. § 527. Pro bono counsel who otherwise do not undertake pro bono cases for a fee should not be subject to these requirements if not engaged in any paying consumer practice, or if the law is interpreted otherwise from what appears to be its plain meaning, then pro bono counsel needs this directive in advance to ensure the representation satisfies this requirement or so if need be it can

withdraw. In addition to the foregoing sections, section 528 also sets forth a number of specific requirements applicable and to be performed by debt relief agencies.

28. There has also been considerable concern voiced by the bankruptcy bar generally, and now in this case, that the certification requirements now impose duties on a consumer debtor's counsel that go beyond typical Rule 11 standards applicable in other practice areas. For the attorney who is a debt relief agency, these may be legitimate. *See, e.g., Vance and Cooper, Nine Traps and One Slap: Attorney Liability Under the New Bankruptcy Law, 77 Am. Bankr. L.J. 283 (2005),<sup>3</sup> see also Sommer, Trying to Make Sense Out of Nonsense: Representing Consumers Under the "Bankruptcy Abuse Prevention and Consumer Protection Act of 2005" 79 Am. Bankr. L.J. 191 (2005).* Counsel has met with the Debtor, on referral from HVLP. The Firm has not pursued any extraordinary search of records to confirm this pro bono Debtor is what was represented to HVLP and to counsel. How far must counsel go to do this? How much expense must a pro bono debtor incur to prove his or her status?

29. The plain meaning of the Code seems to not apply the term "debt relief agency" to pro bono attorneys. As a result, because sections 526 through 529 are directed only to debt relief agencies, it must entail these do not apply to the pro bono debtor or counsel in such cases.

WHEREFORE Tony Hung Dao prays the Court enter an Order that the law firm is not a debt relief agency and affirming that this attorney representing the Debtor on a pro bono basis is not a

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<sup>3</sup> Wherein the point is well made: "The language of this provision is quite similar to the former language of Rule 9011 and it is not clear that it adds anything to current Rule 9011. One difference is the use of the phrase "reasonable investigation" rather than "reasonable inquiry." However, the existing texts of both the Moore's Federal Practice discussion of Rule 11 and the Collier on Bankruptcy discussion of Rule 9011 use the words "inquiry" and "investigation" interchangeably. In discussing the duty to investigate, Moore states: "An attorney may rely on objectively reasonable representations of his or her client." It elaborates that "[a]ll available documents that are relevant to the case should be examined." This would certainly include all documents in the possession of the client, but does not appear to require an attorney to obtain documents that are not easily accessible. In view of the similarities to Rule 9011, it is unlikely that courts will draw a distinction between this certification and Rule 9011. They will, at most, use it as additional ammunition to sanction bad conduct that would have been punishable in any event."

debt relief agency and that therefore Sections 526-529 of the Bankruptcy Code do not apply in this case and need not be followed.

Respectfully submitted this 27th day of December, 2006.

HAYNES AND BOONE, L.L.P.

By: /s/ Patrick L. Hughes

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ATTORNEYS FOR DEBTOR

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing has been served via ECF and/or via first class U.S. Mail, postage prepaid and properly addressed on those individuals or entities appearing on the attached Service List on this 27th day of December, 2006.

/s/ Patrick L. Hughes

PATRICK L. HUGHES

## SERVICE LIST

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UNITED STATES TRUSTEE  
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Smithtown NY 11787-9006

Collect America  
370 17<sup>th</sup> Street, Suite 5000  
Denver CO 80202

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Richmond VA 23285-5075

Foley's  
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Houston TX 77001

HSBC Best Buy  
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Wilmington, DE 19808

Providian Financial  
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Pleasanton, CA 94566

Washington Mutual Bank  
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Pleasanton, CA 94566

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Greenville, SC 29603

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Unifund Corporation  
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Cincinnati, OH 45242

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