No. 02-0819

# In The Supreme Court of the United States

ANDREW J. KONTRICK,

*Petitioner,*

v.

ROBERT A. RYAN,

*Respondent.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit**

## BRIEF FOR RESPONDENT


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## QUESTION PRESENTED

Whether the 60-day period for objecting to a discharge in bankruptcy provided in Bankruptcy Rule 4004(a) is a non-jurisdictional time prescription that may be waived if not timely raised, in accord with traditional principles of equity.

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## STATEMENT OF THE CASE

This matter arises out of the bankruptcy of petitioner, Dr. Andrew J. Kontrick ("Dr. Kontrick" or the "Debtor"). Respondent, Dr. Robert A. Ryan ("Dr. Ryan"), holds a judgment against the Debtor arising out of a dispute relating to their prior affiliation in a medical practice (5/6/98 Amd. Adv. Compl. at ¶¶ 41-42; 6/10/98 Answ. to Amd. Adv. Compl. at ¶¶ 41-42).

### A. The Arbitration Awards Entered In Favor Of Dr. Ryan Against Dr. Kontrick.

Dr. Ryan founded a cosmetic and plastic surgery practice, which Dr. Kontrick subsequently joined, first as an employee and later as a 50% shareholder. Pet. App. 2a. Soon after becoming a shareholder, Dr. Kontrick breached the three agreements governing his professional relationship with Dr. Ryan. Pet. App. 42a. Two arbitration proceedings ensued between the doctors, both resulting in judgments in Dr. Ryan's favor. Pet. App. 2a. Dr. Ryan was awarded $47,157.81 in the first arbitration and $519,324.42, including punitive damages, in the second arbitration. *Id*. Although Dr. Kontrick satisfied the judgment entered on the first arbitration award, *id*., he has never satisfied the judgment entered on the second award. (5/6/98 Amd. Adv. Compl. at ¶¶ 41-42; 6/10/98 Answ. to Amd. Adv. Compl. at ¶¶ 41-42).

### B. Dr. Kontrick's Admissions Concerning The Purpose Behind His Transfer Of Assets And Changes In The Family Account.

Following the first arbitration, Dr. Ryan commenced a citation proceeding to discover Dr. Kontrick's assets. Pet.

App. 2a. During his deposition, Dr. Kontrick admitted that in 1992 or 1993 he removed his name from a joint checking account with his wife (the "Family Account"), from which the couple paid their expenses. Pet. App. 3a. Nevertheless, Dr. Kontrick continued to deposit his paychecks into the account in an effort to shield his assets from his creditors. *Id.* When asked about his personal finances, including the decision to remove his name from the Family Account, Dr. Kontrick admitted that the change was "prompted" by "the ridiculous maneuvers that you and your client [Dr. Ryan] have put me through in order to collect money which you don't have coming to you." Pet. App. 34a.

### C. Dr. Kontrick's Chapter 7 Bankruptcy Case And Dr. Ryan's Objection To Discharge.

In April 1997, Dr. Kontrick filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code. Pet. App. 3a. On January 13, 1998, Dr. Ryan timely filed an adversary complaint with the bankruptcy court objecting to Dr. Kontrick's discharge (1/13/98 Adv. Compl.). The complaint sought to deny a bankruptcy discharge to Dr. Kontrick, the Debtor, pursuant to 11 U.S.C. § 727(a)(2), (3), (4), and (5), as well as a determination that Dr. Kontrick's debt to Dr. Ryan was nondischargeable pursuant to 11 U.S.C. § 523(a)(2), (4), and (6). *Id.*[1]

[1] An individual debtor who files for bankruptcy under chapter 7 of the Bankruptcy Code may obtain a discharge of his or her pre-existing debts. *See* 11 U.S.C. § 727(a); *see also* 11 U.S.C. § 524 (specifying the effects of a discharge in bankruptcy). Section 727 prescribes the statutory grounds for the denial *in toto* of the debtor's discharge. In contrast, section 523 specifies the categories of particular debts that are

(Continued on following page)

Dr. Kontrick argues in his brief that "the complaint contained no allegations regarding the Family Account" issue and that he did not know this issue was part of the adversary proceeding until "four months after the deadline." Petitioner's Br. at 4. In fact, Dr. Kontrick's answer to the complaint contains an admission that he divested himself of assets by "taking his name off the family bank account" (2/12/98 Answ. to Adv. Compl. at ¶ 3).

Dr. Ryan thereafter sought to file an amended adversary complaint. On May 6, 1998, the bankruptcy court found that good cause existed to grant Dr. Ryan's motion and allowed the amended pleading to be filed (5/6/98 Order). At no point in his answers to the original complaint or the amended complaint did Dr. Kontrick raise an affirmative defense that the Family Account claim was not timely filed (2/12/98 Answ. to Adv. Compl.; 6/10/98 Answ. to Amd. Adv. Compl.).

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excepted from the scope of the debtor's discharge. In this case, Dr. Ryan objected both to the Debtor's discharge under section 727 as well as to the discharge of the Debtor's specific obligations to him under section 523. Rule 4004(a) of the Federal Rules of Bankruptcy Procedure establishes the deadline for filing an objection to a debtor's discharge under section 727, while Rule 4007(c) establishes the relevant deadlines for filing a complaint to determine the dischargeability of individual debts under section 523.

### D. The Debtor Did Not Raise The Rule 4004(a) Limitations Period Affirmative Defense Until After The Bankruptcy Court Granted Summary Judgment On The Family Account Claim.

Dr. Ryan moved for summary judgment on all counts of his amended adversary complaint. Pet. App. 4a. The bankruptcy court granted Dr. Ryan's summary judgment motion, finding that the Debtor was not entitled to a discharge under section 727(a)(2)(A) of the Code based on the Family Account claim. Pet. App. 55a. Section 727(a)(2)(A) provides that a discharge shall not be granted to a debtor who, "with intent to hinder, delay, or defraud a creditor . . . , has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed property of the debtor, within one year before the date of the filing of the petition." 11 U.S.C. § 727(a)(2)(A).

Only after the bankruptcy court had decided the summary judgment motion in Dr. Ryan's favor did the Debtor, in a motion for reconsideration, assert the affirmative defense that the Family Account claim had not been timely filed pursuant to Bankruptcy Rule 4004(a) (3/7/00 Reconsid. Motion at 3-4).[2] The Debtor further argued that

[2] In his brief on appeal to the district court, the Debtor "piece[d] together quotes and sentences from his motion to strike" in the bankruptcy court "in an attempt to demonstrate" that even though he had not raised his objection to the timeliness of the Family Account claim in his answer to the amended adversary complaint, he had at least raised the issue in his motion to strike filed before summary judgment was granted. Pet. App. 28a. The district court rejected this contention, however, noting that the motion to strike had not raised an argument concerning the untimeliness of the Family Account claim. Pet. App. 29a (quoting Debtor's Mot. to Strike at 5).

his late assertion of the affirmative defense based on the Rule 4004(a) limitations period could not constitute waiver, claiming that the time limitation is jurisdictional (4/10/00 Reconsid. Motion Reply at 2).

The bankruptcy court denied the Debtor's motion to reconsider, reasoning that Dr. Ryan's failure to assert his Family Account claim within the time limit set by the rule was not jurisdictional and that the Debtor had waived his timeliness argument by failing to assert it prior to the entry of summary judgment. Pet. App. 72a. The remaining counts of the amended adversary complaint were dismissed as moot (6/13/00 Judgment Order at ¶ 2).

### E. The District Court And Court Of Appeals Affirmed The Bankruptcy Court's Ruling That The Debtor Waived The Rule 4004(a) Affirmative Defense.

The district court affirmed the bankruptcy court's decision. Pet. App. 6a. The district court agreed that Rule 4004(a) was a limitations period rather than a jurisdictional prerequisite. Pet. App. 32a-33a. The district court also found that the Debtor had waived his Rule 4004(a) limitations period defense by failing to assert the defense in a timely manner. Pet. App. 33a.

The United States Court of Appeals for the Seventh Circuit affirmed the district court's ruling. Pet. App. 2a. Recognizing the general rule that "'[s]tatutory filing deadlines are generally subject to the defenses of waiver, estoppel, and equitable tolling,'" Pet. App. 7a (quoting *United States v. Locke,* 471 U.S. 84, 94 n.10 (1985)), the court of appeals considered whether the deadline imposed by Rule 4004(a) constitutes an exception to this general

principle. Noting the similarities between the provisions of Rule 4004(a) and Rule 4007(c) (the latter of which provides the limitations period for filing complaints to determine the dischargeability of particular debts), the court of appeals concluded that the texts of both rules fail to supply a definitive answer, and directed its inquiry elsewhere. Pet. App. 8a-9a.

First, the court of appeals examined the role that Rules 4004(a) and 4007(c) play in determining discharge objections in bankruptcy proceedings. Observing that claims of untimeliness under both rules are affirmative defenses properly pleaded at the initial stages of a discharge proceeding, the court distinguished these rules from other procedural requirements said to impose deadlines of a jurisdictional nature at the conclusion of an action. Pet. App. 10a-11a (rejecting analogy to F.R.Civ.P. 50(b) and 6(b)). Although the court acknowledged that establishing a deadline to object to a debtor's discharge serves important bankruptcy interests, the court concluded nonetheless that "it is not at all evident that Congress intended to limit the authority of the bankruptcy court so rigidly as to preclude all relief from the time constraints of the rule." Pet. App. 11a. On the contrary, the court reasoned that a rigid interpretation of Rules 4004(a) and 4007(c) "also could be inequitable at times and frustrate the goals of the [Bankruptcy] Code." Pet. App. 12a.

Second, the court examined the jurisdictional statutes accompanying the Code. Pet. App. 12a-13a. Observing that, in certain other sections of these statutes, Congress expressly predicated the exercise of jurisdiction upon timely assertion of claims, the court concluded that Congress's failure to do so with respect to discharge objections

indicated that Congress had not intended timeliness to serve as a jurisdictional prerequisite. *Id.*

Third, the court examined the legislative history behind the rules. Pet. App. 13a. Finding this inquiry to be of "marginal assistance," the court nevertheless determined that the legislative history indicated "that some flexibility was intended by the drafters," counseling against a rigid jurisdictional construction. *Id.*

Fourth, the court examined this Court's decision in *Taylor v. Freeland & Kronz*, 503 U.S. 638 (1992), which held that the provisions of Rule 4003(b) governing the deadline for objecting to a debtor's claimed exemptions must be strictly construed and do not embrace a "good-faith" exception. Pet. App. 14a-15a. The court of appeals reasoned that *Taylor* reinforced its determination that a party waives a timeliness objection if not asserted at a proper point in the proceeding. Pet. App. 15a.

Concluding that Rule 4004(a) is not jurisdictional in nature, the Seventh Circuit then inquired whether the bankruptcy court had properly determined that the Debtor had, in fact, waived his claim. Pet. App. 16a-18a. Finding that he had, the court affirmed the judgment of the district court. Pet. App. 23a.

## SUMMARY OF ARGUMENT

Bankruptcy Rule 4004(a) provides a limitations period, or time period designed to operate as a limitations period, requiring that any objection to a discharge in bankruptcy must be filed within 60 days after the first

date set for the meeting of creditors. In this case, a creditor, Dr. Ryan, commenced such an adversary proceeding challenging the Debtor's discharge. The Debtor, however, failed to raise any affirmative defense based on non-compliance with the 60-day period until after summary judgment had been entered against him.

In order to avoid operation of the traditional equitable defense of waiver resulting from his failure to timely assert such affirmative defenses, the Debtor argues that Rule 4004(a)'s limitations period should be deemed jurisdictional. In fact, the plain language of the Bankruptcy Rules, and the structure and policies of the Bankruptcy Code, demonstrate that the jurisdiction of the lower federal courts remains unaffected by Rule 4004(a) and the traditional equitable defense of waiver is available.

This Court has previously recognized the general rule that limitations periods are subject to waiver and other traditional equitable defenses. *United States v. Locke*, 471 U.S. 84, 94 n.10 (1985); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982). Moreover, this "background principle" is particularly presumed in bankruptcy, due to the equitable nature of such courts and proceedings. *Young v. United States*, 122 S. Ct. 1036, 1040-41 (2002).

Nothing in the Bankruptcy Rules suggests that the 60-day deadline in Rule 4004(a) is jurisdictional. Quite to the contrary, Bankruptcy Rule 9030 expressly states that the Bankruptcy Rules "shall *not* be construed to extend or limit the jurisdiction of the courts" (emphasis added). Moreover, the express limitations on the Court's rule-making authority in the bankruptcy context under 28 U.S.C. § 2075 demonstrates that Rule 4004(a) should not

be construed to restrict the scope of the express jurisdictional provisions of 28 U.S.C. § 157(b).

Further, the plain language of the applicable bankruptcy rules demonstrates that the doctrine of waiver remains available to bar untimely assertions of the affirmative defense premised on the 60-day period contained in Bankruptcy Rule 4004(a). Although Bankruptcy Rules 4004(b) and 9006(b)(3) expressly preclude the availability of "excusable neglect" as a defense to an untimely objection to discharge, neither rule states that traditional equitable defenses such as waiver or estoppel are abrogated. Indeed, the failure to exclude the traditional equitable defenses of waiver or estoppel plainly means that those defenses remain viable.

The Debtor attempts to draw analogies to the strict application of time limitations referenced in F.R.Civ.P. 6(b) and F.R.Crim.P. 45(b) concerning *post-judgment* proceedings. These analogies have no bearing on the application of the *pretrial* 60-day time limitation in Bankruptcy Rule 4004(a). The exceptions to such post-judgment time limits are understandably circumscribed and sharply honed due to concerns about the transfer of jurisdiction from the district court to the court of appeals and the finality of judgments. The same policy considerations, however, do not apply in the pretrial context in which Rule 4004(a) operates. In this pretrial realm, where no such competing jurisdictional issues are presented, the benefit of providing a claimant with at least one opportunity to be heard on the merits of his or her claim outweighs any arguable benefit which may flow from eliminating traditional equitable defenses.

This Court has the authority, within the statutory scheme and structure established by Congress, to prescribe rules that set deadlines for taking actions under the Bankruptcy Code, and it may therefore prescribe consequences for a party's failure to abide by a deadline. This does not suggest, however, that bankruptcy courts can or should be rendered powerless to apply traditional equitable defenses such as waiver. Because the presumption in favor of the availability of such traditional equitable defenses is "doubly true" when Congress enacts limitations periods in the bankruptcy context, it is even more compelling in the context of Court-created rules such as Bankruptcy Rule 4004(a).

## ARGUMENT

### I. THE AVAILABILITY OF EQUITABLE DEFENSES SUCH AS WAIVER IS PRESUMED, PARTICULARLY IN THE EQUITABLE CONTEXT OF BANKRUPTCY.

The case before the Court involves Federal Rule of Bankruptcy Procedure 4004(a), which provides as follows:

> [A] complaint objecting to the debtor's discharge under § 727(a) of the Code shall be filed no later than 60 days after the first date set for the meeting of creditors . . . .

Bankruptcy Rule 4004(a) prescribes a time limit within which a creditor's right to assert any objection he or she may have to debtor's discharge in bankruptcy needs to be raised. As such, it operates as a limitations period. *Young v. United States*, 122 S. Ct. 1036, 1039 (2002) (citing 1 H. Wood, *Limitations of Actions* § 1, p. 1 (4th D. Moore ed.

1916)); *see also* Note, *Developments in the Law: Statutes of Limitations*, 63 Harv. L. Rev. 1176, 1185 (1950) (a limitations statute "prescribes time limits on the assertion of rights").

Such a limitations defense generally must be raised in an answer or other responsive pleading. *Jackson v. Rockford Hous. Auth.*, 213 F.3d 389, 392-93 (7th Cir. 2000). Rule 8(c) of the Federal Rules of Civil Procedure, applicable to adversary proceedings involving objections to a debtor's discharge under Bankruptcy Rules 4004(d) and 7008(a),[3] provides that a party "shall set forth" any "matter constituting an . . . affirmative defense," including a "statute of limitations." F.R.Civ.P. 8(c). Thus, an allegation regarding the timeliness of a discharge complaint under section 727 of the Bankruptcy Code constitutes an affirmative defense that must be raised in an answer or responsive pleading. *See, e.g., In re Kleinoeder*, 54 B.R. 33, 34-35 (Bankr. N.D. Ohio 1985), *cited with approval in In re Santos*, 112 B.R. 1001, 1008 (B.A.P. 9th Cir. 1990).

A litigant's failure to timely assert an affirmative defense that a limitations period bars the claim of his or her opponent has traditionally constituted waiver of that defense. *See, e.g., United States v. Locke*, 471 U.S. 84, 94 n.10 (1985); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982). Consistent with this well-established principle, the decisions rendered by the courts below

[3] Bankruptcy Rule 4004(d) provides that "[a] proceeding commenced by a complaint objecting to discharge is governed by Part VII of these rules." Part VII of the rules includes Bankruptcy Rule 7008(a), which provides that "Rule 8 F.R.Civ.P. applies in adversary proceedings. . . . "

properly recognized that the Debtor had waived the limitations period defense based on Bankruptcy Rule 4004(a) by failing to raise the affirmative defense until after summary judgment had been entered against him.

Where defenses, such as waiver, have historically been applied to the assertion of limitations periods, their availability is presumed unless the relevant statute expressly precluded such defenses. Limitations periods "are generally subject to the defenses of waiver, estoppel, and equitable tolling." *United States v. Locke*, 471 U.S. 84, 94 n.10 (1985); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982); *see also Utah v. Evans*, 536 U.S. 452, 463 (2002) ("We do not normally read into a statute an unexpressed congressional intent to bar jurisdiction that we have previously exercised."); *Am. Trucking Ass'n v. Smith*, 496 U.S. 167, 221 (1990) (Stevens, J., dissenting) (the application of a statute of limitations is "an area over which the federal courts historically have asserted equitable discretion to craft rules of tolling, laches, and waiver"); *Braun v. Sauerwein*, 77 U.S. (10 Wall.) 218, 223 (1869) ("It seems, therefore, to be established, that the running of a statute of limitation may be suspended by causes not mentioned in the statute itself.").

This general rule is particularly robust in the bankruptcy context. In *Young v. United States*, 122 S. Ct. 1036 (2002), this Court recognized that the availability of such defenses is presumed in a bankruptcy case. The Court held that when limitations periods are contained in a statute,

> Congress must be presumed to draft limitations periods in light of this background principle. This is doubly true when it is enacting limitations periods to be applied by bankruptcy courts, which

> are courts of equity and "appl[y] the principles and rules of equity jurisprudence."

*Id.* at 1040-41 (quoting *Pepper v. Litton*, 308 U.S. 295, 304 (1939)) (other citations omitted). If Congress is presumed to draft limitations periods in light of the well-established principle of waiver and similar equitable defenses, this presumption is even more compelling when the limitations period is contained in a Court-adopted rule such as Bankruptcy Rule 4004(a).

Notwithstanding the fact that time prescriptions seldom, if ever, expressly recognize that the limitations period can be waived, the courts regularly apply the well-recognized traditional defense of waiver. *See, e.g., Johnson v. Sullivan*, 922 F.2d 346, 355 (7th Cir. 1991) (affirming finding that 60-day period in which to obtain review of the denial of disability benefits under 42 U.S.C. § 405(g) was an affirmative defense and was waived by the HHS Secretary "because the Secretary did not raise the statute of limitations in its original answer"); *Am. Nat'l Bank v. FDIC*, 710 F.2d 1528, 1537 (11th Cir. 1983) (finding that litigant "waived its right to advance the statute of limitations defense by its failure to assert this affirmative defense in any pleading filed below in compliance with F.R.Civ.P. 8(c)"); *cf. New York v. Hill*, 528 U.S. 110, 114 (2000) (affirming that a criminal defendant's attorney waived his client's right to a trial within 180 days under the provisions of the Interstate Agreement on Detainers based on the attorney's agreement to a delay in commencing the trial until after the period had run, despite the lack of any provision in the subject interstate compact "prescrib[ing] the effect on a defendant's assent to delay on the applicable time limits"). Such rulings comport with the

traditional and pervasive view that a "statute of limitations is a personal defense." Note, *Developments in the Law: Statutes of Limitations* 63 Harv. L. Rev. 1177, 1233 (1950); *see also* 1 H. Wood, *Limitations of Actions* § 41 (4th D. Moore ed. 1916) ("The plea of the statute of limitations is generally a personal privilege, and may be waived by a defendant . . . at his election.").

In short, absent some basis for holding Rule 4004(a)'s limitations period to be jurisdictional, claimed violations of the 60-day restriction set forth in Rule 4004(a) are properly subject to the equitable defense of waiver, if not timely raised.

## II. THE 60-DAY TIME LIMITATION UNDER BANKRUPTCY RULE 4004(a) IS NOT JURISDICTIONAL.

Nothing in the text of Bankruptcy Rule 4004(a) provides that this deadline is jurisdictional. Although the deadline must be taken seriously, it should not be construed to constitute a jurisdictional requirement – a holding that would contravene the text of the rules and the structure of the governing statutory scheme.

### A. The Text Of The Rule And Structure Of The Statutory Scheme Demonstrate That The Jurisdiction Of The Lower Federal Courts Is Not Affected By Rule 4004(a).

Article III, section 1 of the Constitution grants Congress the power to determine the jurisdiction of the lower federal courts. Congress has, pursuant to 28 U.S.C. §§ 1334 and 157, prescribed the jurisdiction of the federal courts in bankruptcy matters. *See Fed. Power Comm'n v.*

*Pacific Power & Light Co.*, 307 U.S. 156, 159 (1939) ("Congress determines the scope of the jurisdiction of the lower federal courts."). Under Congress's scheme, the district courts exercise jurisdiction over all civil proceedings arising under the Bankruptcy Code, as well as all proceedings arising in or related to bankruptcy cases. 28 U.S.C. § 1334(b). Pursuant to 28 U.S.C. § 157(a), this jurisdiction is further delegated to federal bankruptcy judges, who are authorized under section 157(b)(1) to enter final orders in all "core proceedings arising under [the Bankruptcy Code], or arising in a case under [the Code]."[4]

Under 28 U.S.C. § 157(b)(2), core proceedings specifically include "determinations as to the dischargeability of particular debts" as well as "objections to discharge." 28 U.S.C. § 157(b)(2)(I) & (J). Significantly, nothing in section 157(b) limits the jurisdiction of the bankruptcy courts over discharge objections based on the timeliness of the objection.

The absence of any timeliness prerequisite under section 157(b) stands in stark contrast to other provisions of sections 1334 and 157 that do incorporate specific timeliness requirements. For example, section 1334(c)(2), governing mandatory abstention in bankruptcy proceedings, expressly provides for abstention "[u]pon *timely* motion of a party in a proceeding." 28 U.S.C. § 1334(c)(2) (emphasis added). Similarly, section 157(c), governing the jurisdiction of the bankruptcy courts over proceedings that

[4] Pursuant to 28 U.S.C. § 151, federal bankruptcy judges in each district "constitute a unit of the district court to be known as the bankruptcy court for that district."

are not "core" bankruptcy matters, but are otherwise "related to" a bankruptcy case, provides that the decisions of bankruptcy courts in these proceedings are subject to *de novo* review in the district courts, but only with respect to "those matters to which any party has *timely* and specifically objected." 28 U.S.C. § 157(c)(1) (emphasis added).

These provisions demonstrate that, where Congress intends to require the timeliness of a particular action in a bankruptcy case to be jurisdictional, it does so expressly. Conversely, Congress's decision to omit any timeliness requirement in establishing the bankruptcy court's jurisdiction over discharge proceedings demonstrates the absence of any intent to create such a prerequisite. *See Toibb v. Radloff*, 501 U.S. 157, 161 (1991) (refusing to infer limitation on bankruptcy eligibility, stating "Congress knew how to restrict recourse to the avenues of bankruptcy relief"); *Johnson v. Home State Bank*, 501 U.S. 78, 87 (1991) (refusing to infer exception to bankruptcy relief, concluding that express exceptions precluded inference of additional exceptions); *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 522-23 (1984); *see also Bates v. United States*, 522 U.S. 23, 29-30 (1997) (it is "generally presumed that Congress acts intentionally" in the "disparate inclusion or exclusion" of particular language).

Nor may the Bankruptcy Rules be construed to superimpose a jurisdictional limitation where none is provided or intended in the governing statutory scheme. First, the Bankruptcy Rules themselves preclude such a construction. Bankruptcy Rule 9030 expressly acknowledges that "[t]hese rules shall not be construed to extend or limit the jurisdiction of the courts." The term, "jurisdiction" as used in Rule 9030 refers to the "subject matter jurisdiction of the district and bankruptcy courts." 10

*Collier on Bankruptcy* ¶ 9030.01 (15th ed. 2003). Under Rule 9030, the deadline set by Rule 4004(a) cannot be construed to restrict in any way the subject matter jurisdiction of the district and bankruptcy courts over discharge matters.[5]

Moreover, the authority to adopt procedural bankruptcy rules is governed by 28 U.S.C. § 2075, which vests this Court with the power "to prescribe by general rules, the forms of process, writs, pleading, and motions, and the practice and procedure in cases under [the Bankruptcy Code]." 28 U.S.C. § 2075. Importantly, however, section 2075 further provides that "[s]uch rules shall not abridge, enlarge, or modify any substantive right." *Id*.[6] By way of comparison, the Rules Enabling Act, 28 U.S.C. § 2072, authorizing this Court to adopt rules governing the practice and procedure in the district courts and courts of appeals outside the bankruptcy context, provides that "[a]ll laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." 28 U.S.C.

[5] The term "jurisdiction" refers to "the courts' statutory or constitutional *power* to adjudicate the case." *United States v. Cotton*, 122 S. Ct. 1781, 1785 (2002) (quoting *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 89 (1998)). In general, it "is anomalous to classify time prescriptions, even rigid ones, under the heading 'subject matter jurisdiction.'" *Carlisle v. United States*, 517 U.S. 416, 434 (1996) (Ginsburg, J., concurring).

[6] As amended in 1978, section 2075 discontinued and proscribed the former practice under the Bankruptcy Act of 1898 of promulgating procedural rules in bankruptcy that superceded conflicting laws, including provisions of the Act. *See* 9 *Collier on Bankruptcy* ¶ 1001.02 at 1001-04 (15th ed. 2003). Prior to its amendment in 1978, section 2075 authorized the adoption of bankruptcy rules similar to the authorization currently found in 28 U.S.C. § 2072 governing the promulgation of general rules of civil procedure. *See id.*

§ 2072(b). No such provision is contained in section 2075. This statutory scheme denotes that "the Bankruptcy Rules are rules only, having no statutory effect, and that the time for filing a complaint objecting to discharge is not jurisdictional." *In re Dombroff*, 192 B.R. 615, 621 (S.D.N.Y. 1996) (holding that the time period fixed by Bankruptcy Rule 4004(a) is not jurisdictional).

When considering the "jurisdictional" nature of rules adopted under a broad statutory grant from Congress, "it is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it." *Schacht v. United States*, 398 U.S. 58, 68 (1970). Contrary to this authority, the Debtor's argument that Rule 4004(a) implicitly curtails the jurisdiction of a bankruptcy court to adjudicate an objection to discharge on the grounds of untimeliness improperly construes a rule to "abridge" or "modify" a substantive right. In this case, Dr. Ryan objected to the Debtor's discharge under section 727(a)(2)(A) of the Bankruptcy Code. 11 U.S.C. § 727(a)(2)(A). As the Code provides, he was entitled to do so under section 727(c)(1) (stating that "a creditor . . . may object to the granting of a discharge under subsection (a)").[7] The bankruptcy court possessed jurisdiction over his objection pursuant to 28 U.S.C. § 157(b), and nothing in any of these provisions eliminates the court's jurisdiction or power to adjudicate

[7] There is no dispute that Dr. Ryan is a "creditor" for purposes of this statutory provision. "Creditor" is defined as an "entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor." 11 U.S.C. § 101(10).

his objection even if he presented one of his allegations beyond the deadline set forth in the rule.

This Court has the authority to prescribe rules that set deadlines for taking actions under the Bankruptcy Code, and may prescribe consequences for a party's failure to abide by a deadline, including the denial of otherwise available relief. But it is one thing to set a deadline for the filing of objections in order to regulate the administration of the debtor's discharge; it is something else entirely to interpret that deadline in a manner that would render the bankruptcy court powerless to entertain an untimely objection under well-recognized principles such as waiver. Bankruptcy rules cannot curtail the court's jurisdiction, where the governing jurisdictional provisions do not themselves recognize or require any such limitation.

Given the express restrictions on the Court's rule-making authority in 28 U.S.C. § 2075, this Court should not construe Rule 4004(a) to restrict the scope of the express jurisdictional provisions of 28 U.S.C. § 157(b). Rule 4004(a) is not jurisdictional and thus, like ordinary limitations periods, should be subject to the established defense of waiver. *See Zipes v. Trans World Airlines, Inc*., 45 U.S. 385, 393, 395 n.12 (1982) (concluding in a Title VII discrimination case that "filing a timely charge . . . is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver" and noting this Court's tendency, in discussing such time periods, to "us[e] the limitations label to the exclusion of the jurisdictional label").

### B. The Non-Jurisdictional Nature Of Bankruptcy Rule 4004(a) Is Further Established By The Rule's Failure To Implement Any Of The Bankruptcy Code's Jurisdictional Provisions.

That Bankruptcy Rule 4004(a) does not implement any of the Bankruptcy Code's jurisdictional provisions further corroborates the rule's non-jurisdictional nature. As the Advisory Committee Note to the rule explains, Rule 4004(a) implements section 727 of the Bankruptcy Code. Advisory Committee Notes to Rule 4004 ("Subdivisions (a) and (b) of this rule prescribe the procedure for determining whether a discharge will be granted *pursuant to § 727 of the Code*.") (emphasis added). Although section 727 governs the right of a creditor to object to a debtor's discharge, that section does not prescribe the jurisdiction of the bankruptcy court to adjudicate the creditor's objection, which is instead covered by 28 U.S.C. § 157(b), as set forth above.

Even those rules which do implement various provisions of the bankruptcy jurisdictional statutes, including the two provisions discussed previously that contain *express* timeliness requirements – 28 U.S.C. § 1334(c)(2), governing abstention matters, and 28 U.S.C. § 157(c)(1), governing *de novo* review of "non-core" proceedings – are not jurisdictional. For example, Bankruptcy Rule 9033(b) implements the timeliness requirement of 28 U.S.C. § 157(c)(2) by requiring that objections to a bankruptcy court's proposed findings of fact are timely if filed within 10 days after being served with a copy of the court's findings, but that rule is not jurisdictional.

The Advisory Committee Note to Rule 9033(b) states that the rule is patterned after Rule 72(b) of the Federal

Rules of Civil Procedure, a provision governing objections to the recommended findings of magistrate judges. In turn, Rule 72(b) implements 28 U.S.C. § 636(b)(1)(C). Generally speaking, a party who fails to timely object to a magistrate judge's proposed factual findings may be deemed to have waived any right to object, as well as any right to subsequent review of the judge's factual determinations in the district court. *See Thomas v. Arn*, 474 U.S. 140, 147-48 (1985) (construing circuit court rule implementing timeliness requirement). Nevertheless, because the timeliness requirement is not jurisdictional, it does not preclude the district court's exercise of jurisdiction to review the matter, or its ability to excuse an untimely objection. *See id.* at 155 ("because the rule is a nonjurisdictional waiver provision, the Court of Appeals may excuse the default in the interests of justice")*; Kruger v. Apfel,* 214 F.3d 784, 786-87 (7th Cir. 2000); 14 *Moore's Federal Practice* § 72.11[2][b] (3d ed. 2003).

Because Rule 9033(b) is patterned after Rule 72(b), courts have construed it synonymously. *See, e.g., Nantahala Village, Inc. v. NCNB Nat'l Bank*, 976 F.2d 876, 879-80 (4th Cir. 1992); *see also* 10 *Collier on Bankruptcy* ¶ 9033.10 at 9033-10-11 (15th ed. 2003). But if Rule 9033(b) is not jurisdictional even though it implements the express timeliness requirement of a bankruptcy jurisdictional statute, it follows that Rule 4004(a) also cannot be jurisdictional because it does not implement either a jurisdictional provision or any express statutory requirement of timeliness.[8]

[8] Similar to Bankruptcy Rule 9033(b), Bankruptcy Rule 5011(b) implements the provisions of 28 U.S.C. § 1334(c) governing abstention in bankruptcy cases. Although Rule 5011(b) prescribes certain

(Continued on following page)

### C. The Equitable Nature Of The Bankruptcy Courts And Section 105 Of The Bankruptcy Code Further Demonstrate That The Defense Of Waiver May Be Applied To The Time Limitation Contained in Bankruptcy Rule 4004(a).

Bankruptcy courts are equitable tribunals that apply equitable principles. *Local Loan Co. v. Hunt*, 292 U.S. 234, 240 (1934) ("courts of bankruptcy are essentially courts of equity, and their proceedings inherently proceedings in equity"); *see also Young v. United States*, 122 S. Ct. 1036, 1040 (2002) ("bankruptcy courts [are] courts of equity and 'appl[y] the principles and rules of equity jurisprudence' ") (quoting *Pepper v. Litton*, 308 U.S. 295, 304 (1939)); *United States v. Energy Res. Co.*, 495 U.S. 545, 549 (1990) ("bankruptcy courts, as courts of equity, have broad authority to modify creditor-debtor relationships"); H.R. Rep. No. 95-595, at 359 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6315 (stating that, under the Bankruptcy Code, "[t]he bankruptcy court will remain a court of equity") (citing *Local Loan Co.*, 292 U.S. at 240).

Congress has expressly recognized the equitable powers of the bankruptcy courts to issue "any order . . . that is necessary or appropriate to carry out the provisions

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requirements for the filing of abstention motions, it does not specify a time limit. Instead, the timeliness of the motion is left for resolution on a case-by-case basis. *See, e.g., In re Fulfer*, 159 B.R. 921, 922 (Bankr. D. Idaho 1993) (abstention motion filed four months after removal of action was timely where, among other reasons, debtor did not object that it was untimely); *Robinson v. Michigan Consol. Gas. Co.*, 918 F.2d 579, 584 (6th Cir. 1990) (abstention motion filed eight months after removal was untimely).

of" the Bankruptcy Code. 11 U.S.C. § 105(a). "These statutory directives are consistent with the traditional understanding that bankruptcy courts, as courts of equity, have broad authority to modify creditor-debtor relationships." *Energy Res. Co.*, 495 U.S. at 549.

It is the equitable nature of bankruptcy proceedings and the status of bankruptcy courts as equitable tribunals that render the general rule, that limitations periods are generally subject to waiver and other traditional equitable defenses, "doubly true" in the bankruptcy context. *Young*, 122 S. Ct. at 1040-41. Of course, equitable principles will not prevail to the extent "inconsistent with the text of the relevant statute." *Id.* at 1040 (quoting *United States v. Beggerly*, 524 U.S. 38, 48 (1998)). In this case, however, no textual provision intervenes to defeat application of the strong presumption that the principle of waiver is an available doctrine in this case. Like most other rules governing pretrial procedure, Bankruptcy Rule 4004(a) establishes a purely non-jurisdictional limitations period. Accordingly, it is properly subject to the traditional equitable principle of waiver.

## III. THE DEBTOR'S ARGUMENTS FAIL TO DEMONSTRATE ANY ABROGATION OF THE TRADITIONAL EQUITABLE DEFENSE OF WAIVER.

### A. The Plain Language Of The Bankruptcy Rules Demonstrates That The Doctrine Of Waiver Is Applicable To Untimely Assertions Of The Affirmative Defense Premised On The 60-Day Period Contained In Rule 4004(a).

The Debtor argues that Rule 4004(a) must be jurisdictional in nature because the deadline it establishes is a

strict one. As support for this argument, the Debtor observes that, under Rule 9006(b)(3), a litigant may not claim "excusable neglect" as a reason for failing to comply with the deadline set forth in Rule 4004(a). He further observes that, pursuant to Rule 9006(b)(3), a litigant may only extend the time for filing discharge objections set by Rule 4004(a) in accordance with the provisions of Rule 4004(b).

In fact, the plain language of the applicable bankruptcy rules does not support the Debtor's jurisdictional argument, demonstrating instead that the doctrine of waiver remains applicable to untimely assertions of the affirmative defense premised on the 60-day period contained in Rule 4004(a). While it is true that Rules 4004(b) and 9006(b)(3) restrict the grounds on which a party may seek an extension of the deadline, careful attention must be paid to what these rules do not say. *See* Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 536 (1947) ("One must also listen attentively to what [the statute] does not say."). As with statutes, Court-adopted rules are to be given their plain meaning. *Pavelic & LeFlore v. Marvel Entm't Group*, 493 U.S. 120, 123 (1989) (citing *Walker v. Armco Steel Corp.*, 446 U.S. 740, 750 n.9 (1980)).

No ambiguity exists in Rules 4004(a) and 9006(b). Neither rule states that its time limitations provision is jurisdictional. More importantly, neither states that, beyond excusable neglect, other defenses such as waiver or estoppel are eliminated. The defense of excusable neglect to the operation of a time deadline "entails . . . an equitable inquiry." *Pioneer Inv. Serv. Co. v. Brunswick Ass'n Ltd. P'ship*, 507 U.S. 380, 389 (1993). As a result, the canon *expressio unius est exclusio alterius* – the expression of one

item of an associated group excludes another left unmentioned, *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73, 80 (2002) – further supports the conclusion that the failure to mention the unavailability of other traditional equitable defenses such as waiver or estoppel demonstrates that the rules did not abrogate their application in proper circumstances. *See, e.g., Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993) (applying the canon of construction in support of holding that F.R.Civ.P. 9(b) does not require the pleading of municipal liability claims under 42 U.S.C. § 1983 with particularity because it is not one of the matters enumerated in the rule); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 513 (2002) (applying the same canon of construction in support of holding that employment discrimination claims "must satisfy only the simple requirements of Rule 8(a)" of the Federal Rules of Civil Procedure).

Indeed, it is highly unlikely that the drafters would have intended to eliminate traditional defenses such as waiver and estoppel. As discussed above, these traditional defenses have long been a part of equitable jurisprudence. If the drafters intended to exclude these defenses, they would have done so expressly. Although the rules explicitly preclude a creditor from seeking relief due to excusable neglect, they do not expressly or impliedly abrogate the equitable doctrine of waiver, which is a different equitable concept that focuses on the debtor's failure to timely raise the issue, rather than on the reasons for the creditor's late assertion of his claim.

As a result, both the plain language of Bankruptcy Rules and traditional equitable considerations support the conclusion that Dr. Ryan's assertion of the defense of

waiver to an untimely assertion of a discharge objection was not barred by Rules 4004 or 9006(b)(3).

### B. The Bankruptcy Code And The Policies Underlying The Code Further Support Application Of Waiver.

The statutory scheme and policies embodied in the Bankruptcy Code also demonstrate that the traditional defense of waiver has not been abandoned. Nevertheless, the Debtor asserts that ignoring his waiver of the limitations defense would promote the policy of affording debtors a "fresh start." It is true, of course, that bankruptcy law has long embraced a fresh start concept. But since the Nation's first bankruptcy law, it has equally been true that discharge relief has always been limited to the "honest but unfortunate debtor." *See Brown v. Felsen*, 442 U.S. 127, 128 (1979) ("By seeking discharge, however, respondent placed the rectitude of his prior dealings squarely in issue, for, as the Court has noted, the Act limits that opportunity to the 'honest but unfortunate debtor.' "); *Local Loan Co. v. Hunt*, 292 U.S. 234, 244-45 (1934) ("One of the primary purposes of the Bankruptcy Act is to relieve the *honest* debtor from the weight of oppressive indebtedness, and permit him to start afresh.") (emphasis added); *McIntyre v. Kavanaugh*, 242 U.S. 138, 142 (1916) ("It was an honest debtor, and not a malicious wrongdoer, that was to be discharged."); *Wetmore v. Markoe*, 196 U.S. 68, 77 (1904).

Although most debtors seeking bankruptcy relief clearly fit the paradigm of the "honest but unfortunate debtor," on occasion there are those who do not. Recognizing this, the drafters of Rule 4004(a) would not likely have intended to foreclose all ability to relieve creditors from the deadline that it establishes. Instead, it is far more

likely that the drafters intended to foreclose only that which they expressly foreclosed, namely, relief on grounds of excusable neglect.

The Debtor's jurisdictional construction is further undercut by reference to Bankruptcy Rule 1001 and the long-established principle that a party's failure to raise an adversary's untimeliness constitutes a waiver of the argument. The timely pleading of affirmative defenses based on limitations periods ultimately serves the purposes of "secur[ing] the just, speedy, and inexpensive determination of every case and proceeding." F.R.Bankr.P. 1001. This admonition is consistent with the guiding principle of the "prompt and effectual administration" of federal bankruptcy law as a whole. *Katchen v. Landy*, 382 U.S. 323, 328 (1966).

The Debtor suggests that efficiency is best served by curtailing the ability of creditors to pursue untimely discharge objections. But it is also served at least as well by the rule that arguments over untimeliness must be raised by a debtor before the conclusion of litigation over a debtor's right to a discharge. If the deadline in Rule 4004(a) were truly jurisdictional, the untimeliness of an objection could be raised at any time, even on appeal. As the court of appeals suggested, the Debtor's argument would vastly expand the ability of litigants, having failed to properly raise their defenses in the trial court, to raise them for the first time even on appeal. Pet. App. 11a. Thus, treating Rule 4004(a) as a jurisdictional deadline does not promote finality or fairness.

If Bankruptcy Rule 4004(a) is held to be jurisdictional, then it is difficult to understand why most other procedural rules that establish strict deadlines are not also

"jurisdictional." Indeed, the Debtor offers no principled basis upon which to distinguish Rule 4004(a) from many other time limitations that are not jurisdictional and therefore are subject to traditional equitable defenses such as waiver. If all of these limitations periods are deemed "jurisdictional," then a creditor's failure to timely assert a claim or objection may be raised by the debtor at any time during the litigation on jurisdictional grounds – thereby ensuring repetition in future cases of a debtor's failure to properly plead the limitations defense until he or she chooses. If not barred by waiver, a debtor could save that argument for post-judgment motions or appeal if his or her other arguments fail. Allowing a debtor to hold that procedural issue in strategic reserve, which would be an option if waiver were not available, would not advance finality or judicial efficiency. Recognition of these facts further demonstrates that the traditional doctrine of waiver, where properly applied, effectively promotes efficiency and justice.

### C. The Policies Applicable To The Time Limits Governing Post-Judgment Matters Differ From Those Applicable To Pretrial Proceedings.

The Debtor argues that because some time deadlines contained in certain *post-judgment* rules "may not be altered by equitable defenses, . . . [t]he same may be said for Rules 4004 and 9006(b)." Petitioner's Br. at 8. In fact, the time limitation contained in Bankruptcy Rule 4004 operates in the very different *pretrial* context where a party has not yet had an opportunity to be heard – a context in which materially different policy considerations are implicated.

As noted by the Debtor, the Advisory Committee Note to Bankruptcy Rule 9006(b) states that the rule is patterned on Rule 6(b) of the Federal Rules of Civil Procedure. That rule prohibits the enlargement of time for any act under Rules 50(b), 52(b), 59(b), (d) and (e), and 60(b) of the Federal Rules of Civil Procedure, "except to the extent and under the conditions stated" in the rules themselves. F.R.Civ.P. 6(b). Each of these affected rules, however, involves limitations periods in the context of post-judgment proceedings.[9] In contrast, Rule 4004(a) operates in the pre-judgment context.

The Debtor also points to F.R.Crim.P. 45(b), a rule likewise modeled on F.R.Civ.P. 6(b). Again, he attempts to analogize the relevant Bankruptcy Rules to this post-trial context, pointing to language in *United States v. Robinson*, 361 U.S. 220 (1960), that it "must be presumed" that the Court knew of the construction of F.R.Civ.P. 6(b) as "mandatory and jurisdictional" when F.R.Crim.P 45(b) was adopted.[10] Petitioner's Br. at 18 (quoting *Robinson,* 361

[9] F.R.Civ.P. 50(b) requires the filing of a renewed motion for judgment as a matter of law within 10 days after the judgment was entered. F.R.Civ.P. 52(b) requires a motion to amend findings of fact to be filed within 10 days. F.R.Civ.P. 59(b), (d) and (e) provide time limits for filing motions for a new trial or to alter or amend the judgment. F.R.Civ.P. 60(b) provides the time limits for obtaining relief from a judgment.

[10] F.R.Crim.P. 45(b) provides that the courts "may not extend the time for taking any action under [F.R.Crim.P.] 29, 33, 34 and 35, except to the extent and under the conditions stated in them." Each of these rules addresses post-verdict actions. A motion for acquittal under F.R.Crim.P. 29(c), a motion for a new trial under F.R.Crim.P. 33, and a motion for arrest of judgment under F.R.Crim.P. 34 must be made within seven days *after* verdict or a finding of guilt, or within such further time as the court may fix during the seven-day period. A motion

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U.S. at 229). What the Debtor fails to discuss or appreciate is that the "mandatory and jurisdictional" nature of those rules is directly tied to the post-judgment or appellate context in which they operate. *See, e.g., Robinson*, 361 U.S. at 229 ("The courts have uniformly held that the *taking of an appeal* within the prescribed time is mandatory and jurisdictional.") (emphasis added).

Post-judgment limitations periods such as those referenced in F.R.Civ.P. 6(b) and F.R.Crim.P 45(b) have two major functions. First, they allocate decision-making authority between the district court and court of appeals, determining when jurisdiction over the case moves from the district court to the appellate court – a point in time that must be without doubt in order for the judicial system to work effectively and efficiently. *Bailey v. Sharp*, 782 F.2d 1366, 1368 (7th Cir. 1986); *Rector v. Approved Fed. Sav. Bank*, 265 F.3d 248, 252-53 (4th Cir. 2001). Second, post-judgment time limits set a definite point in time at which judgments become final. *Mendes Junior Int'l Co. v. Banco Do Brasil, S.A.*, 215 F.3d 306, 314 (2d Cir. 2000); *Rector*, 265 F.3d at 253.[11]

On the other hand, as the Seventh Circuit recognized in this case, Bankruptcy Rule 4004(a) applies in the pretrial context, "before any adjudication has taken place."

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for reduction of sentence under F.R.Crim.P. 35 must be made within 120 days after appellate proceedings are ended.

[11] The Court in *Robinson*, further noted that mitigation of the time limits applicable to post-verdict proceedings in criminal matters "seems unnecessary for the accomplishment of substantial justice, for there are a number of collateral remedies available to redress denial of basic rights." *Id.* at 230 n.14.

Pet. App. 10a. Issues concerning the allocation of judicial business and the finality of judgments are not implicated. In the pre-judgment context, when the claimant has not yet had his or her day in court, different policy considerations are brought to bear on limitations periods. Indeed, the purpose of waiver and other equitable defenses to time limits "is to soften the harsh impact of technical rules which might otherwise prevent a good faith litigant from having a day in court." *Daviton v. Columbia/HCA Healthcare Corp.*, 241 F.3d 1131, 1137 (9th Cir. 2001) (applying California law and quoting *Addison v. California*, 21 Cal. 3d 313, 316, 578 P.2d 941, 942 (1978)).

Similarly, in *Utah v. Evans*, 536 U.S. 452 (2002), this Court rejected the argument that a statute authorizing lawsuits commenced prior to the conclusion of the census implicitly forbade the State of Utah's lawsuit challenging a certain statistical method after completion of the census. The Court noted that the statute "does not explain why Congress would have wished to deprive [a State] of its day in court." *Id.* at 463. *See also Richards v. Jefferson County*, 517 U.S. 793, 803 (1996) ("Because the guarantee of due process is not a mere form, . . . [a] category of taxpayer cases [exists] in which the State may not deprive individual litigants of their own day in court."); *Rock v. Arkansas*, 483 U.S. 44, 51 (1987) (recognizing that due process concerns protects a litigant's "right to his day in court").

The policy of avoiding a construction of statutes and rules that would deprive litigants of their day in court is undoubtedly why, "[t]raditionally, courts have treated statutes of limitations and prescriptions designed to operate as statutes of limitations as flexible, *i.e.*, 'subject to waiver, estoppel, and equitable tolling.'" *AFL-CIO v. OSHA*, 905 F.2d 1568, 1570 (D.C. Cir. 1990) (citing *Zipes v.*

*Trans World Airlines*, 455 U.S. 385, 393 (1982)). Indeed, as previously noted, that the untimely assertion of a limitations defense constitutes waiver of that defense is nothing more than a specific application of the general rule that affirmative defenses that are not pleaded are waived. The "failure to plead an affirmative defense results in the waiver of that defense and its exclusion from the case." 5 Wright & Miller, *Federal Practice and Procedure*, Civil § 1278 (2d ed. 1990). For example, in *Venters v. City of Delphi*, 123 F.3d 956, 967-68 (7th Cir. 1997), the court found that a statute of limitations defense was waived where the defendant did not mention the defense until the reply brief in support of summary judgment.

Although courts have discretion in determining under what circumstances a defendant's failure to timely raise an affirmative defense should constitute waiver, a finding of waiver can seldom, if ever, be avoided *after* summary judgment has been granted. For example, in *United States v. Mason Tenders Dist. Council*, 909 F. Supp. 882 (S.D.N.Y. 1995), the defendants in an ERISA case sought to raise a statute of limitations defense after partial summary judgment had been entered against them. The court properly refused because the defendants "had ample opportunity to raise a statute of limitations defense" and Rule 8(c) "dictates that their failure to do so constitutes a waiver of the defense." *Id.* at 891. This holding comports with the general rule's goal of fostering finality by recognizing the waiver of limitations defenses that are not timely asserted.

The Debtor's argument that an affirmative defense based on the time limitation in Rule 4004(a) cannot be waived, despite his failure to plead the affirmative defense, would render Rule 7008(a)'s requirement of pleading affirmative defenses a nullity. Rules 4004 and 7008 are

rules *in pari materia* that should be construed and harmonized to the extent possible. *See Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 879 (1994) (holding that courts should construe statutes to foster harmony with other statutes); *see also Marek v. Chesney*, 473 U.S. 1, 21 (1985) (Brennan, J., dissenting) (Federal Rules should be read *in pari materia* because to "do otherwise would 'attribute a schizophrenic intent to the drafters'").

This issue also raises fairness considerations. If a creditor fails to timely assert his objection to the debtor's discharge and the debtor timely raises that defense, the creditor would lose the opportunity to have his or her objection heard on the merits, even if his failure to timely object was due to excusable neglect. On the other hand, if the creditor asserts his objection late, but the debtor fails to timely assert that defense, then the limitations defense should be waived and the creditor's objection to the debtor's discharge should be heard on the merits. In other words, if both parties fail to comply with the timeliness requirements of Rules 4004(a) and 7008, then the only consequence is that the merits of the discharge objection would be heard. This consequence is certainly not bad and generally should lead to the most just result. Moreover, allowing for waiver promotes evenhandedness – if both parties fail to act timely, then neither party should be able to secure an advantage in the case. Permitting a claim to be heard and determined on the merits is a legitimate and valued goal of our judicial system.

Finally, any departure from the application of the principle of waiver premised on a reading of Bankruptcy Rule 4004(a)'s time limit as jurisdictional – despite the defense having first been raised after entry of summary judgment – would have the undesirable effect of undermining

finality. The decision would be subject to collateral attack even after a hearing and decision on the merits. As the court of appeals noted,

> the doctrine of waiver . . . requires parties to put all of their arguments before the appropriate court at the appropriate time for a full resolution of their claims. . . . [P]arties are prompted to action and finality is served by our conclusion that parties may waive any objection to the untimeliness of a creditor's complaint if the objection is not raised at the proper time.

Pet. App. 15a-16a.

For these reasons, the Debtor's comparison to certain strictly construed post-judgment time limitations fails to support his argument that the pre-judgment limitations period contained in Rules 4004 should be treated as jurisdictional.

### D. The Debtor's Reliance On The *Taylor* and *Carlisle* Decisions Is Misplaced.

The Debtor argues that the Court's decisions in *Taylor v. Freeland & Kronz*, 503 U.S. 638 (1992), and *Carlisle v. United States*, 517 U.S. 416 (1996), "reinforce the conclusion that the plain meaning of Rule 4004 does not allow for equitable exceptions." Petitioner's Br. at 19. As noted above, however, the plain language of the statute actually demonstrates that Rule 4004(a) precludes application only of the "excusable neglect" defense. The plain language does not purport to bar other traditional equitable defenses. Nor does it demonstrate that the Rule 4004 is jurisdictional. In fact, neither *Taylor* nor *Carlisle* addressed with the key fact

in this case: a defendant's undisputed waiver of the claimant's failure to comply with a limitations period. These decisions do not hold or suggest that a finding of waiver would be inappropriate in such a situation.

Nothing in *Taylor* establishes the Debtor's point. The Debtor claims that this Court held in *Taylor* that the Rule 4003(b) limitations period for objecting to a debtor's listing of property exempt from the bankruptcy estate "was mandatory and could not be extended on equitable grounds, even for a claim not made in good faith." Petitioner's Br. at 7. This description mischaracterizes the holding in *Taylor*. First, the Court never describes the limitations period as "jurisdictional" or "mandatory." On the contrary, the Court held that the debtor's *timely* assertion of the untimeliness of the exemption objection was proper. In *Taylor*, the debtor (or more precisely, the debtor's counsel) did not wait until after the rendering of an adverse decision denying the exemption to raise the Rule 4003(b) limitations period defense; instead, the objection was raised before any hearing or adjudication of the merits had occurred.

In fact, the decision in *Taylor* did not address waiver or any other traditionally recognized equitable defenses routinely applied in bankruptcy. That the Court in *Taylor* refused to adopt a new "good faith exception" that would overcome the Rule 4003(b) limitations period defense certainly cannot be understood to mean that waiver and other traditional equitable defenses are unavailable as a matter of law. The trustee in *Taylor* was trying to create a new equitable doctrine, something this Court has expressly stated it is unwilling to do. *See Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308,

332 (1999) ("the equitable powers conferred by the Judiciary Act of 1789 did not include the power to create remedies previously unknown to equity jurisprudence"). Moreover, the Court expressly declined to consider section 105's effect on that argument because the argument had been waived due to the failure to raise it in the lower court. *Id.* at 645-46. As Justice Stevens noted in his dissent in *Taylor*, the Court did not hold that it lacks the authority to apply the traditional doctrine of equitable tolling to the 30-day period in Rule 4003(b) in an appropriate case. *Id.* at 646 (Stevens, J., dissenting).

Indeed, even if one of the traditional equitable defenses were deemed unavailable, such a ruling would not mean that the others are also barred. These doctrines or defenses are not fungible. The decision in *In re Santos*, 112 B.R. 1001 (B.A.P. 9th Cir. 1990), demonstrates that the unavailability of one equitable defense does not signify that other equitable defenses would likewise fail. After concluding that the time limits in Bankruptcy Rules 4004(a) and 4007(c) are not jurisdictional, the court in *Santos* found that equitable tolling was not available because the running of the 60-day period in these rules "is not dependent on the discovery or accrual of a cause of action as it would be in a statute to which tolling is more appropriately applied." *Id.* at 1006. Nonetheless, the court in *Santos* recognized the continuing viability of the waiver defense, remanding the case to the bankruptcy court for a determination on the waiver issue. *Id.* at 1008-09.

Similarly, the decision in *Carlisle v. United States*, 517 U.S. 416 (1996), fails to supports the Debtor's argument in this case. As in the *Taylor* decision, the Court in *Carlisle* held that the Government's *timely* objection to the untimeliness of the motion – in this case, a motion for judgment of

acquittal under F.R.Crim.P. 29(c) – precluded consideration of the motion[12]. No issue of waiver was involved in *Carlisle*: the Government did not wait until after the district court had considered the merits of the motion to raise its limitations defense.

As the Court recognized in *Carlisle*, the case did not involve the abrogation of established principles, such as the traditional equitable doctrine of waiver or the scope of a court's inherent power:

> In *Chambers v. NASCO, Inc.*, 501 U.S. 32, 47 (1991), we said that we would not "'lightly assume that Congress has intended to depart from established principles' such as the scope of a court's inherent power," *id.*, at 47 (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982)). Similarly, in *Link v. Wabash R. Co.*, 370 U.S. 626, 629-632 (1962), we said that since a district court's authority to dismiss *sua sponte* for lack of prosecution was a "sanction of wide usage," we would not assume, in the absence of a clear expression, that Federal Rule of Civil Procedure 41(b), which allowed a party to *move* for dismissal for lack of prosecution, abrogated this "long . . . unquestioned" power. That cautionary principle does

[12] F.R.Crim.P. 29(c) states: "MOTION AFTER DISCHARGE OF JURY. If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period. If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned the court may enter judgment of acquittal. It shall not be necessary to the making of such a motion that a similar motion has been made prior to the submission of the case to the jury."

> not apply in the present case, not only because of the clarity of the text, but also because we are unaware of any "long unquestioned" power of federal district courts to acquit for insufficient evidence *sua sponte*, after return of a guilty verdict.

*Id.* at 426 (emphasis original).

In this case, however, holding that Rule 4004(a) bars application of the traditional doctrine of waiver on jurisdictional grounds would be a "depart[ure] from established principles," *id.*, because this equitable defense is presumptively available, particularly in bankruptcy proceedings. *See Young v. United States*, 122 S. Ct. 1036, 1040-41 (2002).

Moreover, even in this post-verdict context, the time prescription of F.R.Crim.P. 29(c) cannot be deemed jurisdictional because its application is not "utterly exceptionless." *Carlisle*, 517 U.S. at 435-36 (Ginsburg, J., concurring) (noting that the "sharply honed exception to rules of the 29(c)/45(b) genre" was not implicated because "Carlisle's counsel was not misled by any trial court statement or action").

That the exception to F.R.Crim.P. 29(c) is "sharply honed" should be expected, given the post-verdict context in which F.R.Crim.P. 29(c) operates. In that context, this Court did not allow the untimely filing of a motion for judgment of acquittal. The rule at issue in *Carlisle* governs a matter after a verdict has been rendered and the Debtor's attempt to analogize this post-trial situation governed by different policies to the pretrial setting in which Bankruptcy Rule 4004(a) operates is not persuasive. *See* discussion in section III.C, *supra* at 28-34. Moreover, as noted above, the limited exceptions applicable to Rule

29(c) are materially different from the established equitable principles underlying the application of waiver to untimely limitations defenses.

In short, nothing in the *Taylor* or *Carlisle* decisions suggests that the limitations period contained in Bankruptcy Rule 4004(a) should preclude assertion of the long-established doctrine of waiver applied to litigants who fail to timely raise a limitations period as an affirmative defense.

## CONCLUSION

As noted above, waiver and other equitable defenses are generally applicable to time limitations such as those provided in Rule 4004. This presumption is particularly strong in the bankruptcy context given the equitable nature of bankruptcy courts and proceedings. *Young v. United States*, 122 S. Ct. 1036, 1040-41 (2002).

Nothing in the text of Bankruptcy Rule 4004 or the structure of the Bankruptcy Code suggests that the traditional equitable defense of waiver is barred on jurisdictional or other grounds. On the contrary, the plain language of this Rule, particularly applicable in the pretrial context of an adversary proceeding, demonstrates that the rule does not expressly or impliedly preclude a finding of waiver when an affirmative defense based on the creditor's failure to comply with Rule 4004(a)'s time limitations is first raised after summary judgment.

For the foregoing reasons, the judgment of the United States Court of Appeals for the Seventh Circuit should be affirmed.

Respectfully submitted,

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