UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MONTANA

In re **JEFFERY PAUL WILSON**, and **SHONI LEE CARD**, Debtors.	Case No. **05-65161-12**
In re **WILSON SCOTCH MOUNTAIN ANGUS, LLC,** f/k/a Wilson Scotch Cap Angus, LLC, Debtor.	Case No. **06-60369-12**

O R D E R

At Butte in said District this 2nd day of February, 2007.

On February 1, 2007, the Paul E. Harper Revocable Trust ("the Trust") filed a request for Judicial Notice requesting this Court to take judicial notice of the following: "Schedules and Statement of Financial Affairs filed in Case No. 05-65161-12, and particularly Schedules A and D; Application to Employ Attorneys filed March 22, 2006 filed in Case No. 05-65161-12; Chapter 12 Plan (dated March 27, 2006) filed in Case No. 05-65161-12; All pleadings filed in Adversary Proceeding No. 06-00017; and Schedules and Statement of Financial Affairs filed in

Case No. 06-60369-12, and particularly Schedules A and D." The Court is uncertain as what adjudicative facts the Trust is requesting the Court to consider.

FED. R. EVID. 201(b) requires that the "judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." The Court can judicially notice what has been filed in the Court docket, but that does not mean that the Court can judicially notice the truth of the facts asserted in the documents filed in the court record, including pleadings and affidavits. The Court will not take judicial notice of hearsay allegations merely because they are part of the court file. *See* Hon. B. Russell, *Bankruptcy Evidence Manual,* 2004 ed., § 201.5; and Hon. Terry L. Myers, *Does Anybody Even Notice?* www.idb.uscourts.gov/judgearticles.htm. Further, this Court in *Rapid Excavating, Inc., v. Stock (In re Rapid Excavating, Inc.)*, 21 Mont. B.R. 472, 499-500 (Bankr. D. Mont. 2003) discussed judicial notice by quoting the following:

> Fed.R.Evid. 201(c) and (f) permit the Court to take judicial notice of any adjudicative facts at any time. The question becomes whether the statements made within the Schedules, IRS's Proof of Claim and Stipulation concerning the IRS's claim are evidential or judicial admissions. Chief Judge Lindquist, in *In re Earl*, 140 B.R. 728, 730-31 n.2 (Bankr. N.D.Ind. 1992), stated in a note:
>
> > . . . a bankruptcy court is duty bound to take judicial notice of its records and files. (citation omitted).
> >
> > The Court is aware that there is a very crucial distinction between taking judicial notice of the fact that an entity has filed a document in the case, or in a related case, on a given date, i.e., the *existence* thereof, and the taking of judicial notice of the truth or falsity *contents* of any such document for the purposes of making a finding of fact.
> >
> > However, the verified Schedules and Statements filed by a

> debtors(sic) are not just pleadings, motions or exhibits thereto. They are evidentiary admissions. *In re Cobb*, 56 B.R. 440, 442 n.3 (Bankr.N.D. Ill. 1985). *See*, Fed.R.Evid. 801(d)(2) (Admission by a party opponent not hearsay).

Judge Ginsberg's note, in *In re Cobb*, 56 B.R. 440, 442 n.3 (Bankr.N.D.Ill 1985), is instructive:

> Arguably, a question exists whether statements by a debtor in schedules filed with the court are judicial or evidential admissions. If the schedules are regarded as pleadings in this proceeding, the debtor's statements in the schedules are judicial admissions, conclusive unless the Court allows them to be withdrawn or amended. On the other had an evidential admission is not conclusive. (Citation omitted). Because the schedules were filed in this case in general, not in this particular contested matter, the Court does not view them as a "pleading" for purposes of the stay motion as such, and thus statements in the schedules are evidential rather than judicial admissions for these purposes. (Citation omitted). In addition, the statement of value in the schedules relates to value and is a matter of opinion rather than fact. As such, it probably cannot give rise to a judicial admission. . . .

In addition to the FED. R. EVID. 201 analysis, this Court also considers FED. R. EVID. 801 (d)(1). Judge Myers provides the following instructive comment in the above cited article:

> Nevertheless, it is still clear that evidence may properly be found in the Court's record. A prime example are the assertions debtors make in the schedules and the statement of financial affairs they sign and file in a case. This result arrives *not* by way of the vehicle of judicial notice but, instead, is based on the proposition that statements made under penalty of perjury in bankruptcy schedules and statements may be treated as non-hearsay statements or admissions under Fed. R. Evid. 801.
>
> Rule 801 provides definitions relative to the hearsay rule and its exceptions. Under Rule 801(a), a "statement" includes both oral and written assertions. The debtor is the "declarant" insofar as written assertions in the schedules and statement of financial affairs are concerned. Fed. R. Evid. 801(b).
>
> According to Rule 801(d)(1), a prior "statement" of a witnesses is not hearsay. This subdivision applies where "[t]he declarant testifies at the trial or hearing and is subject to cross-examination[.]" The next subdivision, entitled

"admission by party-opponent," includes additional statements which are not hearsay. *See* Fed. R. Evid. 801(d)(2). Unlike Rule 801(d)(1), nothing in Rule 801(d)(2) expressly or implicitly limits its application to oral statements.

Rule 801(d)(2) makes a "a statement . . . offered against a party" non-hearsay if it is (A) the party's own statement, in either an individual or representative capacity, or (B) a statement of which the party has manifested an adoption or belief in its truth. Fed. R. Evid. 801(d)(2)(A), (d)(2)(B).

So, a non-debtor may seek to admit, as evidence (and, usually, as impeachment evidence), a prior written statement of the debtor found in his bankruptcy schedules. Such a statement is a Rule 801(d)(2) admission, because it is the debtor's own statement and, by swearing to its accuracy (under penalty of perjury) and filing it with the Court in support of the request for bankruptcy relief, the debtor has "manifested an adoption or belief in its truth."

One example of the interplay between Rules 201 and 801 is found in *Weatherbee v.Willow Lane, Inc. (In re Bestway Products, Inc.)*, 151 B.R. 530 (Bankr. E.D. Cal. 1993). Bankruptcy (and BAP) Judge Christopher Klein there discussed at length the concept of a court taking judicial notice of its records, noting that part of the process goes to the question of establishing the genuineness and authenticity of documents. *Id.* at 540. However:

> The fact that the documents are genuine does not mean that the court can automatically accept as true the facts contained in such documents. Unless they relate to a preliminary question of admissibility as to which the rules of evidence (other than privilege) do not ordinarily apply, or are not adjudicative facts, statements therein must be admissible under the Federal Rules of Evidence.
>
> In this instance, the statement is offered against Weatherbee and is his own statement. Accordingly, it is not hearsay. Fed. R. Evid. 801(d)(2). Because it pertains directly to the issue [before the court], it is relevant and admissible.

Id. at 541 (citations omitted). Another court commented, in a similar vein:

> The Court is aware that there is a very crucial distinction between taking judicial notice of the fact that an entity has filed a document in the case, or in a related case, on a given date, i.e., the *existence* thereof, and the taking of judicial notice of the truth or falsity [of the] *contents* of any such document for the purpose of

making a finding of fact.

> However, the verified Schedules and Statements filed by a debtor are not just pleadings, motions or exhibits thereto. They are evidentiary admissions. *In re Cobb*, 56 B.R. 440, 442 n.3 (Bankr. N.D. Ill. 1985). *See*, Fed. R. Evid. 801(d)(2) (Admission by a party opponent not hearsay).

In re Earl, 140 B.R. 728, 730 n.2 (Bankr. N.D. Ind. 1992). This Court has validated the use, as evidence under Rule 801, of debtors' assertions in schedules. *In re Webb*, 03.1 I.B.C.R. 25, 26 (Bankr. D. Idaho 2003); *In re Kaskel*, 269 B.R. 709, 715, 01.4 I.B.C.R. 139, 141-42 (Bankr. D. Idaho 2001).

Based upon the foregoing, the Court will take judicial notice that "Schedules and Statement of Financial Affairs filed in Case No. 05-65161-12, and particularly Schedules A and D; Application to Employ Attorneys filed March 22, 2006 filed in Case No. 05-65161-12; Chapter 12 Plan (dated March 27, 2006) filed in Case No. 05-65161-12; All pleadings filed in Adversary Proceeding No. 06-00017; and Schedules and Statement of Financial Affairs filed in Case No. 06-60369-12, and particularly Schedules A and D" have been filed in the respective cases and adversary proceeding, but will defer until the hearing on the Debtors' objection to proof of claim no. 1 filed by the Trust scheduled for February 8, 2007, at 9:00 a.m., in Missoula, any further ruling on the Trust's request for judicial notice until the Trust clarifies whether it is requesting the Court to make some evidentiary or judicial finding based on the above identified pleadings and documents. For cause,

IT IS ORDERED that the Court grants the request by the Paul E. Harper Revocable Trust for judicial notice in part and denies it in part; that the Court takes judicial notice that certain pleadings and documents have been filed of record in the above identified cases and adversary proceeding; and that any additional evidentiary or judicial finding on such pleadings and documents will be considered at the hearing on the objection to proof of claim no. 1, and the

response thereto, scheduled for February 8, 2007, at 9:00 a.m., or as soon thereafter as counsel can be heard, in the BANKRUPTCY COURTROOM, RUSSELL SMITH COURTHOUSE, 201 EAST BROADWAY, MISSOULA, MONTANA.

BY THE COURT

HON. RALPH B. KIRSCHER
U.S. Bankruptcy Judge
United States Bankruptcy Court
District of Montana