UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

March 11, 1997

UNITED STATES OF AMERICA,)
Complainant,)
)
v.) 8 U.S.C. §1324a Proceeding
) Case No. 96A00086
MAC SPECIALTIES LTD,)
Respondent.)
)

ORDER REGARDING RESPONDENT'S FIRST AFFIRMATIVE DEFENSE

I. *Procedural History and Factual Background*

On September 30, 1993, MAC Specialties, Ltd. (hereinafter MAC or Respondent) filed a voluntary petition for bankruptcy under chapter 11, or the reorganization provisions, of the Bankruptcy Code in the United States Bankruptcy Court for the Eastern District of New York.[1] R. Br. at 1. The chapter 11 reorganization case was converted to a chapter 7 liquidation case on or about January 3, 1994, and a bankruptcy trustee was appointed at the same time. *Id.* The bankruptcy proceedings were reconverted to a chapter 11 case on April 8, 1994. Ans. Ex. A at 1.[2] While the bankruptcy case was pending, the Immigration and Naturalization Service (INS or Complainant) conducted an inspection of the Respondent business in the spring of 1994.[3] By order of December 22, 1994, the bankruptcy judge set a

[1] A chronology showing the relationship between important dates in Respondent's bankruptcy proceedings and dates key to the present Immigration and Naturalization Service proceedings against Respondent is included as Addendum A to this Order.

[2] Respondent submitted its exhibits unmarked. See *infra* pp.3, 5 for information regarding the designation of Respondent's exhibits.

[3] Respondent claims the inspection took place in March 1994, R. Br, at 2, but information Complainant has supplied indicates the inspection may have occurred in Aapril 1994, *see* C. Br. Exs. A-B.

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bar date,[4] or deadline, for filing claims against MAC that arose before it filed its petition in bankruptcy.[5]

Respondent created a Second Amended Plan of Reorganization, dated August 17, 1995. By order of January 19, 1995,[6] the bankruptcy judge closed Respondent's chapter 11 bankruptcy case and ended the role of the trustee. Ans. Ex. B.

Complainant served Respondent with a Notice of Intent to Fine on April 26, 1996. Compl. Ex. A at 2. Respondent requested a hearing, *see* Compl. Ex. B, and Complainant subsequently filed a three-count Complaint against Respondent on August 2, 1996. In Count I of the Complaint, Complainant alleges that Respondent hired 225 named employees for employment in the United States after November 6, 1986, and that Respondent failed to prepare the Employment Eligibility Verification Form (I-9 form) for those 225 employees, in violation of section 274A(a)(1)(B) of the Immigration and Nationality Act (INA), 8 U.S.C. §1324a(a)(1)(B). Compl. ¶¶I.A, B, D. Alternatively, Complainant alleges that Respondent failed to present the I-9 forms for those 225 individuals at a scheduled inspection, in violation of section 274A(a)(1)(B) of the INA, 8 U.S.C. §1324a(a)(1)(B). *Id.* ¶¶I.C, E. Complainant seeks a civil money penalty of $370.00 per violation in Count I, for a total penalty of $83,250.00.

In Count II, Complainant alleges that Respondent hired fifty-five named employees for employment in the United States after November 6, 1986, and failed to complete the I-9 forms for those employees within three business days of the date of hire for each of those employees, in violation of section 274A(a)(1)(B) of the INA, 8 U.S.C. §1324a(a)(1)(B). Compl. ¶¶II.A-C. Complainant requests a

[4] A glossary of bankruptcy terms relevant to the present case is included as Addendum B to this Order.

[5] The exact bar date is unclear, although it appears to have been around the end of January or beginning of February 1995. Respondent refers to January 22, 1995, as the bar date, R. Br. At 3, but includes documentation that notes February 1, 1996, as the bar date, R. Br. Ex. A at 2. Also, the order setting the bar date fixes that date asa forty days after the date of the order. Using that formulation, a bar date of January 31, 1995, is reached.

[6] It seems likely that the year is recorded incorrectly on this order, as the bar date for filing claims that arose before Respondent filed its petition in bankruptcy was in January or February 1995, *see supra* n.5

penalty of $300.00 per violation in Count II, for a total penalty of $16,500.00.

In Count III, Complainant alleges that Respondent hired two named employees for employment in the United States after November 6, 1986, that Respondent failed to ensure that those two employees properly completed section one of their respective I-9 forms, and that Respondent failed to properly complete section two of the I-9 forms for those employees, in violation of section 274A(a)(1)(B) of the INA, 8 U.S.C. §1324a(a)(1)(B). Compl. ¶¶III.A-D. Complainant seeks a fine of $440.00 for the violation listed in ¶III.A.1 and a fine of $340.00 for the violation listed in ¶III.A.2, for a total penalty with respect to Count III of $770.00. Adding the requested penalty amounts in each of the three counts, Complainant seeks a total civil money penalty of $100,520.00.

By Order of September 12, 1996, Respondent was granted an extension of time until September 30, 1996, to answer the Complaint. Respondent, however, did not file its Answer until October 9, 1996.[7] In its Answer, Respondent summarily denies the allegations contained in Counts I, II and III of the Complaint. Ans. ¶1. Respondent also asserts two affirmative defenses in its Answer. First, Respondent maintains that its discharge in bankruptcy "foreclose[s the INS] from seeking any monetary penalty against the Debtor MAC pursuant to the United States Bankruptcy Code." *Id.* ¶7. In support of that affirmative defense, Respondent sets forth the following statements of fact: (1) "[t]he alleged violations . . . all occurred prior to the time that Respondent MAC filed and administered a Chapter 11 Bankruptcy Petition in the Eastern District of New York beginning in September of 1993," *Id.* ¶2; (2) Respondent's reorganization plan was filed and approved during the time in which the INS investigation took place, and the INS never made any claim during the pendency of the bankruptcy proceedings even though it was informed of the pending bankruptcy action, *id.* ¶3; (3) pursuant to the December 22, 1994, order of the bankruptcy judge, "any claims against the Bankruptcy Estate were to be filed before the expiration of forty days of said Order," *id.* ¶4; (4) "[t]he I.N.S., although posessing [sic] actual knowledge of the pending Chapter 11 case took no action, filed no claim and fialed [sic] to appear in the pending Chapter 11 case," *id.* ¶5; and (5) by the January 19, 1995, order of

[7] There is no indication in the case file that Respondent requested leave to file its Answer beyond the deadline of September 30, 1996.

the bank ruptcy judge, Respondent's previously confirmed reorganization plan was closed "and a final decree discharging the debtor in bankruptcy was approved," *id.* ¶6.

Respondent asserts a second affirmative defense in its Answer. Respondent contends that the requested penalties are "uncharacteristically harsh," considering Respondent's lack of previous INA violations, and that the requested penalties "should be reduced at the discretion of the Administrative Law Judge." *Id.* ¶8.

Respondent attaches the following unmarked exhibits to its Answer:

1. Amended Order Fixing Bar Date for Filing of Pre-Petition Claims and Objections Thereto, dated December 22, 1994 [hereinafter Ans. Ex. A].

2. Order and Decree Closing Chapter 11 Case, dated January 19, 1995 [hereinafter Ans. Ex. B].

By Order of October 10, 1996, Respondent and Complainant were required to submit briefs discussing the issues raised in Respondent's first affirmative defense.[8] Respondent submitted its Memorandum of Law in response to the above Order on November 15, 1996. In its Memorandum, Respondent argues that INS' failure to assert its claim while the bankruptcy case was pending bars recovery:

> The delay in serving a Notice of Intention to Fine and in serving a complaint seeking a fines [sic] for pre-petition activities and actions which took place during the bankruptcy is improper and unfair and denied MAC the opportunity to provide for the claim in its Chapter 11 Reorganization Plan or to finalize all pre-petition debt in the course of the bankruptcy proceeding.

R. Br. at 4. Respondent argues that it is unfair for the INS to wait and not participate in the bankruptcy proceedings; Respondent states that it would have considered the INS' claim in setting how much it would pay other creditors and that it would have had to pay a reduced amount to the INS. *See id.* at 5-6. Respondent further states that, although Complainant knew of the pending bankruptcy proceedings, it "chose to wait almost two years" before bringing its

[8] Neither party has filed a motion with respect to the affirmative defenses. However, given the possibly dispositive nature of the first affirmative defense, I ordered the parties to brief this issue.

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claim. *Id.* at 6. "By virtue of its delay, and its failure to assert its claim," Respondent urges, "the INS should be estopped and foreclosed from now asserting its claim against the reorganized MAC." *Id.*

Additionally, Respondent contends in its Memorandum that it should not be held responsible for violations that occurred during the tenure of the trustee in bankruptcy.[10] Respondent declares that "[t]he trustee in a Chapter 11 case may operate the debtor's business with considerable authority within which to exercise his business judgment. Once he has taken control of the business however, it is his place and not the debtor's to make decisions." *Id.* at 7 (citing 11 U.S.C. §1106). Specifically, Respondent contends:

> The complaint alleges a failure to make available for inspection Forms I-9 or alternatively failure to prepare those forms. Since the surprise inspection[9] took place during the operation and control of MAC by the Operating Trustee who was responsible for the operation of the company and compliance with governmental laws and regulations, it would be wrong to charge MAC with any violation prior to the final decree in Bankruptcy.

Id. at 4-5. Respondent notes that, once it resumed control of the business, it "complied with INS rules and regulations and is currently in compliance." *Id.* at 7.

Respondent cites no case authority anywhere in its brief to support any of its contentions, stating that "[t]he unique factual background of this case makes it impossible to find authority on point." *Id.* at 8. Finally, Respondent attaches the following unmarked exhibits in support of its brief:

1. Debtor's Second Amended Plan of Reorganization, dated August 17, 1995 [hereinafter R. Br. Ex. A].

2. Debtor's Fourth Amended Disclosure Statement Pursuant to Section 1125 of the Bankruptcy Code, dated August 17, 1995 [hereinafter R. Br. Ex. B], along with six of its own exhibits, each of which provides details about Respondent's bankruptcy proceedings.

[9] Respondent explicitly makes this argument for the first time in its brief. It is arguable whether Respondent sets forth facts to support the defense in its Answer at paragraphs 2 and 7. However, since the case is still in an early stage, Respondent may seek to amend its Answer, if necessary, to include this defense.

[10] The inspection appears to have occurred in March or April of 1994. *See supra* n.3.

After receiving an extension of time that gave it nearly two months to respond to Respondent's memorandum, Complainant filed a page-and-a-half Response Brief on January 15, 1997, which consisted largely of a statement of facts and a half page of legal discussion. Complainant's entire argument is as follows:

> The INS is not barred from enforcing employer sanctions law despite Respondent's filing for Chapter 11 bankruptcy.
>
> The automatic stay provision of the bankruptcy code, 11 U.S.C. §362(a), does not apply to the commencement or continuation of an action or proceeding by a governmental unit to enforce the unit's police or regulatory power. *United States v. A&A Maintenance Enterprise, Inc.*, 1996 W.L. 382262; *United States v. James Q. Carlson*, 1 OCAHO 260 (1990). OCAHO precedent makes clear that whether Respondent is or was in bankruptcy has no effect upon the jurisdiction of OCAHO and is not an affirmative defense to proceedings pursuant to the INA. *Id.; see NLRB v. 15th Avenue Iron Works, Inc.*, 964 F.2d 1336 (2d. Cir. 1992).
>
> Accordingly, Respondent's affirmative defense is meritless.

C. Br. at 2. On February 6, 1997, Complainant filed the following exhibits in support of its brief:[11]

Exhibit A: Notice of Inspection.

Exhibit B: Receipt for sixty-five original I-9 forms taken from Respon dent by INS Special Agent Glovack on April 22, 1994.

II. *Issues*

1. Whether operation of Respondent's business by trustee in bankruptcy immunizes Respondent from liability for INA violations that occurred during the trustee's tenure.

2. Whether Complainant's action for a civil money penalty constitutes a "debt," within the meaning of the Bankruptcy Code.

3. Whether Respondent's discharge in bankruptcy bars INS' action for a civil money penalty brought under the INA for violations that occurred before Respondent filed for bankruptcy.

[11] The brief refers to these exhibits, which mistakenly were not sent with the brief.

4. Whether Respondent's discharge in bankruptcy bars INS' action for a civil money penalty brought under the INA for violations that occurred after Respondent filed for bankruptcy but before the bankruptcy court approved Respondent's plan for reorganization.

5. If issues three and/or four are answered in the affirmative, whether any exceptions to discharge allow Complainant to proceed with the present action.

III. *Analysis*

A. *Automatic Stay Provision*

Complainant relies in its brief exclusively on the automatic stay provision of the Bankruptcy Code, which provides that the filing of a petition in bankruptcy operates as an automatic stay of:

> the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under [the bankruptcy] title, or to recover a claim against the debtor that arose before the commencement of the case under [the bankruptcy] title. . . .

11 U.S.C. §362(a)(1) (1994). Complainant is correct in noting that the automatic stay provision does not apply to "the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power." *Id.* §362- (b)(4); *see* C. Br. at 2. Prior OCAHO decisions, including one from the Chief Administrative Hearing Officer (CAHO), have determined that "the INS is exempted from the automatic stay provision of 11 U.S.C. 362(a) because it is a governmental unit acting to enforce its police and regulatory power." *United States v. United Pottery Mfg. & Accessories,* 1 OCAHO 57, at 355 (1989), 1989 WL 433960, at *5[12] (Memorandum of Law in Support of the Final Agency Order by the Chief Administrative Hearing Officer); *see also United States v. A&A Maintenance Enter.,* 6 OCAHO 852 (1996), 1996 WL 382262 (Order Denying Complainant's Motion for Default Judgment, Granting in Part and Denying in Part Complainant's Motion to Strike, Granting Respondent's Motion to Leave to File Late Answer,

[12] If available, parallel Westlaw citations will be given to OCAHO decisions. OCAHO decisions published in Westlaw are located in the "FIM-OCAHO" database.

and Allowing 15 Days to Amend Affirmative Defenses); *United States v. Broadcasters Unlimited,* 4 OCAHO 719 (1994), 1994 WL 765379; *United States v. Carlson,* 1 OCAHO 264 (1990), 1990 WL 512115 (Order Denying Respondent's Motion to Dismiss the Complaint); *United States v. DAR Distributing,* 1 OCAHO 60 (1989), 1989 WL 433836 (Order Granting Complainant's Motion for Judgment by Default).

The automatic stay, however, applies only to prepetition claims. *Pettibone Corp. v. Ramirez (In re Pettibone Corp.*), 90 B.R. 918, 930 (Bankr. N.D. Ill. 1988). Respondent filed its chapter 11 petition for bankruptcy on September 30, 1993. R. Br. at 1. The dates on the I-9 forms that are the subject of Counts II and III disclose that the alleged violations in those counts would have occurred after Respondent instituted its bankruptcy proceedings. *See* Addendum A. By its own definition, the automatic stay provision would not have applied to those allegations. Since the parties have not provided information as to the dates of hire for the individuals listed in Count I, the Court does not know whether the alleged violation in Count I of failure to prepare I-9 forms occurred before or after Respondent filed its bankruptcy petition. Count I's alternative violation of failure to present I-9 forms, however, would have occurred on the date of the INS inspection; therefore, that alleged violation occurred well after the bankruptcy case began on September 30, 1993. *See supra* n.3 and accompanying text. Even if the INS' charges were not an action to enforce its police and regulatory powers as a governmental unit, the present claims, with the possible exception of Count I's primary allegation, still would not have been affected by the automatic stay provision.

An automatic stay, moreover, dissolves at the occurrence of the earliest of the following events: (1) the closing of the bankruptcy case; (2) the dismissal of the bankruptcy case; or (3) in a case under chapter 11 of the bankruptcy code, the granting or denial of discharge. 11 U.S.C. §362(c)(2) (1994). An order closing the bankruptcy proceedings was entered on January 19, 1995.[13] Ans. Ex. B at 1; R. Br. at 4. Also, Respondent's debt previously was discharged at the time of confirmation of the reorganization plan.[14] *See* 11 U.S.C.

[13] *See supra* n.6.

[14] Respondent has not included a copy of an order confirming its reorganization plan, but the order closing the case refers to the "plan of reorganization previously confirmed."

§1141(d)(1)(A) (1994) (providing that the confirmation of the plan discharges any debt that arose before the date of confirmation). Consequently, any automatic stay imposed by the Bankruptcy Code no longer would exist at this point. The automatic stay provision and its exceptions, therefore, are inapplicable to the present proceedings.

B. *Laches*

Respondent seems to argue the equitable defense of laches, contending that the INS' delay in bringing its claim should bar the claim. Respondent states that Complainant waited approximately two years before bringing the current case and that Respondent "should not be forced to first shoulder that burden at this late date." R. Br. at 8.

Respondent argues that it is prejudiced[15] by the INS' delay in filing the present Complaint because Respondent would have considered the INS' claim in setting how much it would pay other creditors and it would have paid a reduced amount to the INS. *See* R. Br. at 5-6. If the INS had participated in Respondent's bankruptcy proceedings, however, it is likely that the INS' claims would have merited a high priority in the payment of Respondent's creditors. Administrative expenses, which include "the actual, necessary costs and expenses of preserving the estate," 11 U.S.C. §503(b)(1)(A) (1994), receive a first level priority in the payment of a debtor's creditors. *Id.* §507(a)(1); *Alabama Surface Mining Comm'n v. N.P. Mining Co. (In re N.P. Mining Co.)*, 963 F.2d 1449, 1450 (11th Cir. 1992) ("If a claim is accorded administrative-expense priority under section 503(b), that claim is paid in the first level of priority, ahead of, inter alia, the unsecured creditors; no other claim is paid until every administrative-expense claim is paid in full"). Only claims that arise postpetition may be considered for classification as administrative expenses. *Trustees of Amalgamated Ins. Fund v. McFarlin's, Inc.,* 789 F.2d 98,101 (2d Cir. 1986) ("[A]n expense is administrative only if it arises out of a transaction between the creditor and the bankrupt's trustee or debtor in possession. . . . "); *In re The Circle K Corp.*, 137 B.R. 346, 351 (Bankr. D. Ariz. 1992). Also, a claim must benefit the estate to be considered an actual and necessary cost of preserving

[15] To establish a defense of laches, Respondent would have to show that Complainant was "guilty of unreasonable and inexcusable delay that has resulted in prejudice" to Respondent. *Ivani Contracting Corp. v. City of New York*, No. 352, Docket 95-9186, 1997 WL 3614, at *2 (2d Cir. January 7, 1997).

the estate. *Trapp v. R-Vec Corp.,* 359 N.W.2d 323, 327 (Minn. Ct. App. 1984).

The first circuit to address the issue of "[w]hether and when postpetition, punitive, non-tax penalties can be accorded administrative-expense status under section 503(b)" has ruled in the affirmative.[16] *See N.P. Mining*, 963 F.2d at 1451-52, 1459 (holding that fines assessed postpetition for postpetition violations of environmental regulations were entitled to administrative priority). Relying on 2 U.S.C. §959-(b),[17] that court reasons that "[e]ven though these civil penalties are not compensatory, it makes sense that when a trustee or debtor in possession operates a bankruptcy estate, compliance with state law should be considered an administrative expense. Otherwise, the bankruptcy estate would have an unfair advantage over nonbankrupt competitors." *Id.* at 1459. The court states that the usual requirement of a benefit to the estate is not necessary in the context of fines for violations of regulations in regulated industries. *Id.* at 1455 (quoting *In re Bill's Coal Co.,* 124 B.R. 827, 830 (D. Kan. 1991) ("'[I]n the regulated atmosphere of the strip mining industry, a fine for the violation of environmental regulations should be considered "a cost ordinarily incident to operation of a business." This is sufficient for administrative expense status. A connection to some benefit to the estate is not required.'"). The Second Circuit likely would follow the Eleventh Circuit's lead. In ruling that compensatory expenses incurred postpetition to comply with environmental laws are entitled to administrative priority treatment, a New York district court states, albeit in dicta and without explanation,[17] that "civil penalties for post-petition violations would also be entitled to be treated as administrative expenses." *United States v. Chateaugay Corp. (In re Chateaugay Corp.)*, 112 B.R. 513, 525 (S.D.N.Y. 1990), *aff'd sub nom. United States v. LTV Corp. (In re Chateaugay Corp.)*, 944 F.2d 997 (2d Cir. 1991).[19] Although *N.P.*

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[16] The court in *N.P. Mining* notes that the Fourth Circuit, in *United States Department of Interior v. Elliott*, 761 F.2d 168 (4th Cir. 1985), has reached the same holding, but in reliance on a subsequently repealed portion of the bankruptcy code. *N. P. Mining*, 963 F.2d at 1452 n.2.

[17] Quoted *infra* pt. III.C.

[18] The district court cites *Elliott* in support of its statement, but, as previously noted, *see supra* n.16, that case is decided based on a section of the bankruptcy code that no longer remains in force.

[19] The Second Circuit affirms the district court's opinion, but without addressing the statement in question.

Mining, Bill's Coal and *Chateaugay* all involve the imposition of fines for violations of environmental regulations, the rationale applies with equal force to fines imposed for the violation of immigration-related employment regulations. It follows that any postpetition fines in the present case would have enjoyed a high priority in the development of Respondent's reorganization plan. That result diminishes Respondent's argument that the INS' failure to participate in the bankruptcy distribution prejudiced Respondent by making Respondent pay a higher amount than it would have paid if the INS had presented its claim to the bankruptcy court.[20]

Regardless of any possible prejudice to Respondent, the United States is exempt from the defense of laches. *United States v. 93 Court Corp.*, 350 F.2d 386, 388 (2d Cir. 1965) (citing *United States v. Summerlin*, 310 U.S. 414 (1940)), *cert. denied*, 382 U.S. 984 (1966); *United States v. Costello*, 275 F.2d 355, 356 (2d Cir. 1960) (upholding the United States' ability under the INA, enacted in 1952, to revoke a certificate of naturalization issued more than thirty years prior to the date of decision) (citing same), *aff'd*, 365 U.S. 265 (1961). Instead, a respondent may "offer evidence of undue hardship which INS' delay in filing [the] complaint caused in order to attempt to mitigate the penalty imposed," in the event a violation is found. *United States v. Central Neb. Packing, Inc.,* 4 OCAHO 714, at 2 (1994), 1994 WL 765374, at *1 (First Prehearing Conference Report and Order).

C. *Effect of Trustee on Respondent's Liability*

Respondent contends that it should not be held responsible for INA violations that occurred during the bankruptcy trustee's tenure. It is relevant to note that, although Respondent claims the bankruptcy trustee was responsible for operating the business, the signature of Matthew Cohn, Respondent's vice president, appears on all the I-9 forms that are the subject of Counts II and III. Respondent's trustee in bankruptcy was appointed on or about January 3, 1994, R. Br. at 1, and his tenure lasted until January 19, 1995, *see supra* n.6,

[20] As noted subsequently, evidence of prejudice resulting from undue delay in bringing a charge under the INA may be presented to support mitigation of the civil money penalty, if liability ultimately is found. As the parties have not had the opportunity to brief and argue that point, and as that issue is entirely premature at this juncture, any statements in this Order regarding any potential prejudice, or lack thereof, to Respondent are not dispositive on that issue as it relates to setting a civil money penalty.

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when the order and decree was issued closing the chapter 11 bankruptcy case, Ans. Ex. B. As noted above, *see supra* p. 7, the current record does not reveal information to indicate when the Count I allegation of failure to prepare I-9 forms occurred. However, the alternative violation alleged in Count I, failure to present I-9 forms, occurred after the trustee's appointment, which was on or about January 3, 1994. *See supra* n.3 and accompany ing text. Also, the dates on the I-9 forms that are the subject of Counts II and III reveal that the alleged violations in those counts occurred after the trustee was appointed. *See* Addendum A.

Respondent cites section 1106 of the Bankruptcy Code for the proposition that "[o]nce [the trustee] has taken control of the business . . . it is his place and not the debtor's to make decisions." R. Br. at 7. That section lists duties of the trustee. *See* 11 U.S.C. §1106 (1994). It is important to note, however, that that section does not expressly state the proposition for which Respondent cites it. Also, Respondent cites no authority interpreting section 1106 in the manner in which Respondent urges this Court to interpret it. Another provision, however, states that "[u]nless the court, on request of a party in interest and after notice and a hearing, orders otherwise, the trustee may operate the debtor's business." *Id.* §1108; *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 352 (1985). The Supreme Court also notes:

> the Bankruptcy Code gives the trustee wide-ranging management authority over the debtor. In contrast, the powers of the debtor's directors are severely limited. Their role is to turn over the corporation's property to the trustee and to provide certain information to the trustee and to the creditors. §§521, 343. Congress contemplated that when a trustee is appointed, he assumes control of the business, and the debtor's directors are "completely ousted."

Id. at 352-53 (certain internal citations omitted) (holding that the trustee, not the debtor's directors, controls the corporate attorney-client privilege). One of the debtor's duties, however, is to "cooperate with the trustee as necessary to enable the trustee to perform the trustee's duties under [the bankruptcy] title." 11 U.S.C. §521(3) (1994).

"The trustee is charged with the duty of acting as the chief executive officer of a corporate debtor." *In re Lowry Graphics, Inc.,* 86 B.R. 74, 76 (Bankr. S.D. Tex. 1988) (citing I. Sulmeyer et al., Collier Handbook for Trustees and Debtors-in-Possession, 10-28 (1985) and *Weintraub,* 471 U.S. at 356-58). The bankruptcy trustee may be held

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liable for breaches of his or her fiduciary duties. *See Lebovits v. Scheffel (In re Lehal Realty Associates)*, 101 F.3d 272 (2d Cir. 1996) (chapter 11 case); *In re Gorski*, 766 F.2d 723 (2nd Cir. 1985) (chapter 13 case). That principle, however, does not mean that the existence of a trustee immunizes the debtor business from liability; it merely means that the trustee may be held liable in a separate action for breaching the fiduciary duty.

No cases have been found that squarely address the present issue regarding a bankrupt company's liability for INA violations that occur during the bankruptcy trustee's tenure. In *Boteler v. Ingels*, 308 U.S. 57 (1939), the state of California assessed the debtor for penalties for failure to pay automobile license fees during the bankruptcy trustee's tenure. The Court notes that "[t]he [Judiciary] Act of June 18, 1934, 28 U.S.C.A. §124a, declares that a trustee in bankruptcy conducting a business, as this trustee was, 'shall . . . ibe subject to all State and local taxes applicable to such business the same as if such business were conducted by an individual or corporation.'"[21] *Boteler*, 308 U.S. at 60. The Court held that the lower court correctly found that the state could enforce the applicable statutory penalties against the bankruptcy estate, concluding:

> We need not determine whether, without legislation such as the 1934 Act, the fact that a local business in bankruptcy is operated by a bankruptcy trustee makes the business immune from State laws and valid measures for their enforcement. Clearly, means of permitting such immunity from local laws will not be read into the Bankruptcy Act. At any rate, Congress has here with vigor and clarity declared that a trustee and other court appointees who operate businesses must do so subject to State taxes 'the same as if such business(es) were conducted by an individual or corporation.'

Id. at 60-61. Although the statute on which the Court relies in *Boteler* does not apply to the present situation because section 124a involved state and local taxes, a similar statute may be relevant:

> Except as provided in section 1166 of title 11, a trustee, receiver or manager appointed in any cause pending in any court of the United States, including a debtor in possession, shall manage and operate the property in his possession as such trustee, receiver or manager according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof.

28 U.S.C. §959(b) (1994). If a debtor can be held liable under a state statute, then it certainly should be held liable for violating a federal

[21] The current version of this provision appears at 28 U.S.C. §960.

statute. Even though the INA is a federal statute and not a state statute, the rationale is the same. If the Court found, under what used to be 28 U.S.C. §124a, that the debtor could be made to pay tax penalties incurred by the trustee in bankruptcy, then it would make sense that a debtor, under 28 U.S.C. §959, would be responsible for fines incurred for statutory violations that happened during the trustee's tenure.

D. *Discharge in Bankruptcy as Affirmative Defense*

Respondent argues that its discharge in bankruptcy prevents the INS from seeking to recover a civil money penalty. Subject to certain exceptions, confirmation of a plan "discharges the debtor from any debt that arose before the date of such confirmation." 11 U.S.C. §1141(d) (1)(A) (1994). That rule raises two dominant issues: (1) whether INS' action constitutes a "debt" under the Bankruptcy Code and (2) when a debt must arise to be eligible for discharge.

1. *Discharge for "debts"*

First, only "debts" are discharged. *Id.*; George M. Treister et al., Fundamentals of Bankruptcy Law §6.01, at 307 (4th ed. 1996). If the INS' action against Respondent does not involve what the Bankruptcy Code calls a "debt," then the INS' civil money penalty cannot be discharged. Under the Bankruptcy Code, a "debt" is a "liability on a claim." *Id.* (citing 11 U.S.C. §101(12)). A "claim" is a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." 11 U.S.C. §101(5)(A) (1994).

> Thus, a note or other obligation that is not yet payable, damages that will arise in the future in tort or for breach of contract as well as past damages, and past or future damages that are yet to be determined are all included within the definition. The bankruptcy case can and does deal with all such claims. Their holders are entitled to share in the distribution of the estate, and the debtor's discharge applies to such claims.

Treister, *supra*, §6.01, at 307. In the context of deciding the dischargeability of environmental claims in a chapter 11 case, the Second Circuit[22] has decided that, when the Environmental Protection Agency knows of a debtor's responsibility for specific re-

[22] Since the violations are alleged to have occurred in New York, and the Respondent transacts business in that state, any review of a final order in this case would be by the United States Court of Appeals for the Second Circuit. *See* 8 U.S.C. §1324a(e)(8) (1994).

leases or threatened releases of hazardous wastes, the EPA's expenses for future cleanup activities regarding the debtor at yet-to-be-discovered sites constitutes a claim for bankruptcy purposes, as long as the releases or threatened releases at those sites occurred before the debtor filed its petition in bankruptcy. *United States v. LTV Corp. (In re Chateaugay Corp.),* 944 F.2d 997, 1005 (1991). That court notes:

> Though there does not yet exist between EPA and [the debtor] LTV the degree of relationship between claimant and debtor typical of an existing though unmatured contract claim, the relationship is far closer than that existing between future tort claimants totally unaware of injury and a tort-feasor. EPA is acutely aware of LTV and vice versa. The relationship between environmental regulating agencies and those subject to regulation provides sufficient "contemplation" of contingencies to bring most ultimately maturing payment obligations based on pre-petition conduct within the definition of "claims." True, EPA does not yet know the full extent of the hazardous waste removal costs that it may one day incur and seek to impose upon LTV, and it does not yet even know the location of all the sites at which such wastes may be found. But the location of these sites, the determination of coverage by CERCLA,[22] and the incurring of response costs by EPA are all steps that may fairly be viewed, in the regulatory context, as rendering EPA's claim "contingent," rather than as placing it outside the Code's definition of "claim."

Id. The Second Circuit held that EPA could not proceed against the debtor, affirming the district court's holding that "'response costs' incurred by the [EPA] under [CERCLA] are pre-petition 'claims,' dischargeable in bankruptcy, regardless of when such costs are incurred, as long as they concern a release or threatened release of hazardous substances that occurred before the debtor filed its Chapter 11 petition." *Id.* at 999.

Since the parties have not addressed the issue of whether the INS' action to recover a civil money penalty under the present factual circumstances constitutes a "claim" for bankruptcy purposes, this issue is not appropriate for adjudication at this time and will require further briefing by the parties. The matter of further briefing is discussed in the conclusion of this Order.

2. *When must debt arise to be eligible for discharge*

Next follows the issue of the timing of the debt for it to be eligible for discharge. As previously noted, confirmation of a chapter 11 plan

[23] Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §9601 *et seq*. (1994).

"discharges the debtor from any debt that arose before the date of such confirmation." 11 U.S.C. §1141(d)(1)(A) (1994). That language seems to be clear in discharging any debts that existed before the confirmation date, which would encompass both debts arising prepetition and debts arising postpetition but prior to confirmation.[24] Courts have stated that debts that arise prior to confirmation are discharged. *See Waterman S.S. Corp. v. Aguiar (In re Waterman S.S. Corp.)*, 157 B.R. 220, 221 (S.D.N.Y. 1993) (stating as background that "[u]nder §1141 of the Bankruptcy Code, the confirmation of a chapter 11 plan of reorganization discharges the debtor from any debt that arose prior to confirmation, unless the debt is exempt under the Code, plan or order confirming the plan"); *Orcon, Inc. v. Nevada Emergency Servs. (In re Nevada Emergency Servs.*), 39 B.R. 859, 863 n.4 (Bankr. D. Nev. 1984) ("[P]ostpetition preconfirmation claims are discharged by operation of §1141, assuming all of the other conditions for discharge have been met"); *Trapp v. R-Vec Corp.,* 359 N.W.2d 323, 328 (Minn. Ct. App. 1984) ("With limited exception [section 1141(d)(1)] provides that confirmation of a reorganization plan discharges all debts arising prior to confirmation"). However, the same district court[25] that decided *Waterman* also has stated that "confirmation of a plan of reorganization discharges a debtor from liability on *pre-petition* claims." *United States v. Chateaugay Corp. (In re Chateaugay Corp.)*, 112 B.R. 513, 519 (S.D.N.Y. 1990) (emphasis added), *aff'd sub nom. United States v. LTV Corp. (In re Chateaugay Corp.)*, 944 F.2d 997 (2d Cir. 1991).[26] The district court cites section 1141 and *Beard v. A.H. Robins Co.,* 828 F.2d 1029, 1031 (4th Cir. 1988), for that proposition.[27] Various circuit courts also provide contradictory language. *See Sequa Corp. v. Christopher (In re*

[24] "Confirmation" refers to the bankruptcy court's approval of MAC's reorganization plan. *See* Addendum B. The confirmation of a plan carries the effect of discharging the debtor from any debt that arose before the confirmation date, unless the plan, the order confirming the plan, or section 1141(d) provides otherwise. 11 U.S.C. §1141(d)(1)(A) (1994).

[25] Different judges were involved in these two decisions.

[26] The Second Circuit specifically acknowledges the district court judge's statement that "before a contingent claim can be discharged, it must result from pre-petition conduct fairly giving rise to that contingent claim." *Chateaugay,* 944 F.2d at 1005 (quoting *Chateaugay,* 112 B.R. at 521. The Second Circuit also states that "the District Court properly applied the Bankruptcy Code's definition of 'claim.'" *Id.* That statement, however, does not make it clear whether the Second Circuit approved only the lower court's treatment of the definition of "claim," or whether it also approved the lower court's treatment of the timing of a claim tomake it eligible for discharge.

[27] As noted earlier, 11 U.S.C. §1141(d)(1)(A) refers to discharge for debts that arise before the date of confirmation. *Beard* also does not seem to lend any support to the statement.

Christopher), 28 F.3d 512, 515 (5th Cir. 1994) (explaining that chapter 11 discharge "is broader than that obtained in a Chapter 7 bankruptcy; while a Chapter 7 discharge deals only with debts incurred prior to the filing of the petition, §1141(d) discharges the debtor from any debt (with certain exceptions) that arose before the date of *confirmation*") (emphasis in original); *Harstad v. First American Bank*, 39 F.3d 898, 904 (8th Cir. 1994) (stating as background that, in a chapter 11 proceeding, "the debtor is discharged from his pre-petition debts").

The distinction between whether preconfirmation or only prepetition debts are discharged is vital to the present case. As discussed earlier and as illustrated in Addendum A, with the possible exception of the failure to prepare I-9 forms (which may have occurred prepetition), all the alleged violations in this case occurred after Respondent filed its bankruptcy petition, but before the bankruptcy court confirmed its reorganization plan.[28] If preconfirmation debts are deemed to be discharged, then all of the INS' claims in this case would be discharged, subject to the exceptions to be discussed. If, however, only prepetition debts are deemed to be discharged, then only the charge regarding failure to prepare I-9 forms would be discharged, if it is found that that alleged violation occurred before Respondent filed for bankruptcy. Since the parties have not addressed this issue in their respective briefs, the Court will defer ruling on this question at the present time.

3. *Exceptions to discharge*

The discharge provision of section 1141 is subject to two primary statutory exceptions. *See* 11 U.S.C. §1141(d)(2), (3) (1994). Neither party has addressed whether those provisions are applicable to the present situation.[29] If Complainant relies on either of those excep-

[28] Although the exact date of confirmation is unknown based on the current record, *see infra* n.14, it cannot have been before August 17, 1995, which is the date of the Debtor's Second Amended Plan of Reorganization; i.e., the bankruptcy court could not have approved the plan before the date on which it officially existed. The date of the INS inspection and the dates on the I-9 forms that are the subjects of Counts II and III reveal that all violations currently charged occurred prior to that date.

[29] 1141(d)(2) applies only to individuals, not corporations, and, thus, would not be applicable here. Section 1141(d)(3) also does not appear pertinent because it applies only when the plan provides for the liquidation of the bankruptcy estate's property and when the debtor does not engage in business after bankruptcy. It would appear that section

tions, it shall include in its brief a discussion of the applicability to this case of the statutory exceptions to discharge.

Also, there remains the question of whether the INS was given adequate notice of the bankruptcy proceeding. "Due process requires the provision of reasonable notice to those parties whose claims are to be discharged. . . . " *Waterman,* 157 B.R. at 221 (citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). "Reasonable notice of a bankruptcy proceeding includes notice of the bar date for filing a proof of claim." *Id.* (citing *In re Spring Valley Farms, Inc.,* 863 F.2d 832, 834 (11th Cir. 1989), and *In re Turning Point Lounge, LTD.,* 111 B.R. 44, 47 (Bankr. W.D.N.Y. 1990)). "The proper inquiry in evaluating the adequacy of notice is whether a party 'acted reasonably in selecting means likely to inform persons affected.'" *Id.* (quoting *Weigner v. City of New York,* 852 F.2d 646, 649 (2d Cir. 1988), *cert. denied*, 488 U.S. 1005 (1989)). Actual notice is required for known creditors, which includes creditors whose names and addresses are "reasonably ascertainable" by the debtor, but "publication notice has been held adequate for unknown creditors." *Id.* (citing *Tulsa Profes sional Collection Servs., Inc. v. Pope*, 485 U.S. 478, 490 (1988)).

Respondent raises the issue of notice when it states that the INS "possess[ed] actual knowledge of the pending Chapter 11 case." Ans. ¶5. Complainant has not yet challenged Respondent's assertion, either because it acknowledges that Respondent provided it with actual knowledge of the bar date or because it erroneously believed that the automatic stay provision was the only issue necessary for the disposition of the validity of the asserted affirmative defense. This issue is not ripe for adjudication because the factual record has not been adequately developed, and the issue has not been fully briefed.

IV. *Conclusion*

It does not appear that the existence of a trustee in bankruptcy immunizes Respondent for liability for statutory violations that occurred during the trustee's tenure. Also, Respondent's argument regarding what is construed to be a laches defense does not bar Complainant's claims. I find that those two arguments do not assert valid affirmative defenses against the Complaint.

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The remaining issues surrounding Respondent's bankruptcy affirmative defense, i.e., whether INS' action constitutes a "debt" under the Bankruptcy Code, whether prepetition or preconfirmation debts are eligible for discharge, and whether any exceptions to discharge are germane to the present situation, require more information and more briefing before I will rule on them. I will not issue a decision regarding those remaining issues until the following occur: (1) the development of an adequate factual record; (2) the submission of appropriate motion(s) from one or both parties; (3) brief(s) in support of and in opposition to those motions, as the case may be, that include discussions of all the issues noted in this Order that require further briefing. Since the bankruptcy issue has been raised as an affirmative defense, Respondent is reminded that it bears the burden of proof in advancing its affirmative defense. The factual record must include at minimum the following:

(1) the dates that the individuals listed in the Complaint (including Count I) were hired;

(2) the date on which the INS inspection took place;

(3) the date the bankruptcy trustee was appointed;

(4) the bar date set by the bankruptcy court;

(5) the confirmation date and a copy of the confirmation order;

(6) the closing date for the bankruptcy case.

The factual information can be provided either by stipulations, requests for admissions or other discovery. However, since many of the dates should be undisputed, the parties are ordered to confer and to attempt to stipulate as to the appropriate dates. If they are unable to agree, then discovery may be needed to develop this information. Signed stipulations should be filed with the Court once they are completed.

Once the factual record is developed, Respondent may file an appropriate motion and brief, and Complainant then may file an answering brief. Those briefs shall include citations to relevant authority and shall address the remaining issues discussed in this Order. Specifically, the briefs shall address the issue of whether the INS' present action constitutes a "claim" under the Bankruptcy Code, considering all facts of the case, including but not limited to the fact that the INS did not issue a Notice of Intent to Fine until after the conclusion of MAC's bankruptcy proceed-

ings. The parties should cite relevant case law in support of their positions. Those discussions should include (but should not be limited to) the impact, if any, of the Second Circuit's decision in *Chateaugay*, 944 F.2d 997, on the present case [30] If a party believes that case does not apply to the present situation, it should explain why it believes so.

Further, given the contradictory statements that this Court has found regarding whether preconfirmation or prepetition debts are discharged in a chapter 11 proceeding, the parties are ordered to address that issue in their briefs, focusing on the United States Court of Appeals for the Second Circuit's position on the issue. If no clear position from the Second Circuit is available, then the parties should cite and discuss other relevant authority.

Finally, the possible exceptions to discharge raised by 11 U.S.C. §1141 (d)(2) and (3) (1994) and the question of adequate notice to the INS of the bankruptcy proceeding must be addressed. If the parties do not agree that INS had proper notice, then the parties shall discuss that issue in their briefs. In particular, the parties should focus on whether the INS should be classified as a known or an unknown creditor, the type of notice that was given, and the type of notice that was appropriate under the circumstances.

In addition to addressing the issues specifically raised in this Order, the parties also shall address in their briefs any other issues, arguments and authorities that are relevant to the disposition of the question of whether Respondent's bankruptcy bars the present cause of action.

Not later than March 25, 1997, the parties shall file a proposed procedural schedule proposing dates for the completion of discovery relating to the bankruptcy issue and for the filing of motion(s) and response briefs with respect to the bankruptcy defense.

ROBERT L. BARTON, JR.
Administrative Law Judge

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[30] In particular, the parties should focus on *Chateaugay's* treatment of the term "claim," whether the INS' action represents a contingent claim, and *Chateaugay's* statement that contingent claims are discharged only when they arise from prepetition conduct that fairly gives rise to the contingent claim.

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ADDENDUM A—TIMELINE OF IMPORTANT DATES

Event or alleged event	*Date*	*Authority*
Failure to prepare I-9 forms	Unknown based on current case record	
Respondent files chapter 11 bankruptcy petition	September 30, 1993	R. Br. at 1.
Bankruptcy trustee appointed	On or about January 3, 1994	R. Br. at 1.
Failure to complete I-9 forms within three business days of hire	Approximately March 29, 1994, through April 22, 1994	Calculated by adding four business days to the earliest and latest dates in section one of the I-9 forms in Count II
Notice of INS Inspection	April 8, 1994	C. Br. Ex. A.
Failure to ensure completion of section one of I-9 forms and failure to properly complete section two	April 18, 1994	Date in sections one and two of the I-9 forms in Count III
Failure to present I-9 forms/date of INS inspection	March 1994 or April 1994	R. Br. at 2. *See* C. Br. Exs. A-B.
Amended Order Fixing Bar Date for Filing of Pre-Petition Claims and Objections Thereto	December 22, 1994	Ans. Ex. A.

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Bar date	January 22, 1995 or January 31, 1995 or February 1, 1995	R. Br. at 3. Calculate by adding 40 days to bar date order. *See* Ans. Ex. A at 1-2.
Second Amended Plan of Reorganization	August 17, 1995	R. Br. Ex. A.
Confirmation date	Exact date unknown based on current record (*see supra* nn.14, 28)	
Order and decree closing the chapter 11 bankruptcy case and ending the role of the bankruptcy trustee	January 19, 1995 (*see supra* n.6)	Ans. Ex. B.
Notice of Intent to Fine served	April 26, 1996	Compl. Ex. A.
Complaint filed	August 2, 1996	

ADDENDUM B—GLOSSARY OF RELEVANT BANKRUPTCY TERMS

Bar date: deadline established by bankruptcy court for filing claims against the debtor.

Claim: "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured . . . ." 11 U.S.C.§101(5)(A) (1994).

Confirmation: approval of the plan by the bankruptcy court. *See* R. Br. Ex. A at 2.

Confirmation date: day on which the bankruptcy court approves the plan. *See id.*

Confirmation order: order entered by the bankruptcy court to ap prove the plan. *See id.*

Debt: "liability on a claim" 11 U.S.C. §101(12) (1994).

Plan: plan for dealing with the debtor's debts, pursu ant to 11 U.S.C. §§1121-23.

Petition/bankruptcy petition/petition in bankruptcy

papers filed to commence a bankruptcy proceeding. *Id.* §101(42).

Postconfirmation: occurring after the confirmation date.

Postpetition: occurring after the bankruptcy petition is filed. *Preconfirmation*:occurring before the confirmation date.

Prepetition: occurring before the bankruptcy petition is filed.