

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA**

IN RE:

Jeffrey Jerel Rhodes,

Debtor(s).

C/A No. 14-03965-HB

Chapter 13

**CERTIFICATION REGARDING
DIRECT APPEAL TO
THE COURT OF APPEALS**

Before the Court for consideration is the Joint Certification of Direct Appeal to the Court of Appeals filed by appellant and appellee, regarding an order of this Court entered on January 13, 2016. The issue on appeal is: were the debtors barred by *res judicata* from objecting to LVNV's claim after confirmation of the plan or did the plan's language permitting post-confirmation objections remove these objections from *res judicata*.¹

A bankruptcy appeal may proceed directly to the Court of Appeals *if* that court authorizes the direct appeal *and*:

... if the bankruptcy court, the district court, or the bankruptcy appellate panel involved, acting on its own motion or on the request of a party to the judgment, order, or decree ... or all the appellants and appellees (if any) acting jointly, certify that--

- (i) the judgment, order, or decree involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States, or involves a matter of public importance;
- (ii) the judgment, order, or decree involves a question of law requiring resolution of conflicting decisions; or
- (iii) an immediate appeal from the judgment, order, or decree may materially advance the progress of the case or proceeding in which the appeal is taken;

28 U.S.C. § 158(d)(2)(A). The Joint Certification states all three requirements of 28 U.S.C.

§ 158(d)(2)(A) are met.

¹ This is the issue on appeal identified by the parties in the Joint Certification filed the same day as the Notice of Appeal. The Statement of Issues on Appeal as required by Fed. R. Bankr. P. 8009 is not yet due.

28 U.S.C. § 158(d)(2)(A)(i)

The filing certifies that 28 U.S.C. § 158(d)(2)(A)(i) is applicable because the issues on appeal involve a question of law to which there is no controlling decision. In support of this position, the Joint Certification states:

[t]he Fourth Circuit recently held that confirmation of a Chapter 13 plan is res judicata as to claims or objections that could have been brought by the same debtor against the same creditor prior to confirmation. *See Covert v. LVNV Funding, LLC*, 779 F.3d 242 (4th Cir. 2015). The Fourth Circuit has not addressed, however, whether general reservations in a Chapter 13 plan allowing post-confirmation objection are permissible. Other circuits have addressed this question. *See e.g., D & K Properties Crystal Lake v. Mut. Life Ins. Co. of New York*, 112 F.3d 257, 261 (7th Cir. 1997).

While the undersigned notes that the cases cited in the Joint Certification are factually distinguishable from the issue presented here, it is true that there is no controlling decision regarding the issue on appeal.

28 U.S.C. § 158(d)(2)(A)(ii)

The parties cite *In re Nix*, Adv. No. 11-80062-HB, 2012 WL 27667, at *6 (Bankr. D.S.C. Jan. 5, 2012) (Burris, J.), *In re Ginn*, 465 B.R. 84, 91 (Bankr. D.S.C. 2012) (Burris, J.), and *In re Russo-Chestnut*, 522 B.R. 148, 153 (Bankr. D.S.C. 2014) (Waites, J.) in support of the contention that the issue on appeal involves a question of law requiring resolution of conflicting decisions pursuant to 28 U.S.C. § 158(d)(2)(A)(ii). A review of *Russo-Chesnut* reveals no conflict with the order on appeal. In the recent decision of *In re Harling*, 541 B.R. 330 (Bankr. D.S.C. 2015), Judge Duncan considered *Nix* and distinguished that case, finding it not inconsistent with the decision in *Harling*. *Id.* at 335 n.10.² *Harling* is indistinguishable from the instant matter and the undersigned expressly followed *Harling* when entering the order on appeal. The decisions cited in the Joint

² *Ginn* is substantially similar to *Nix* and was based on the reasoning of *Nix*.

Certification simply involve factually distinguishable matters, as is typical in *res judicata* determinations, and the undersigned cannot certify that conflicting decisions over a question of law exist that require resolution.

28 U.S.C. § 158(d)(2)(A)(iii)

The U.S. District Court recently entered a text order granting a consent motion for direct appeal of the *Harling* decision based on representations essentially identical to those found in the Joint Certification here.³ Therefore, should the Court of Appeals agree to authorize the direct appeal of *Harling*, 28 U.S.C. § 158(d)(2)(A)(iii) is applicable.

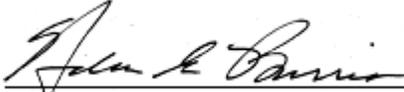
Certification

The undersigned certifies that 28 U.S.C. § 158(d)(2)(A)(i) and (iii) are applicable to the appeal of the order of this Court entered on January 13, 2016.

**FILED BY THE COURT
02/01/2016**



Entered: 02/01/2016


US Bankruptcy Judge
District of South Carolina

³ *LVNV Funding, LLC v. Harling*, C/A No. 8:15-cv-04903-MGL (ECF No. 6, entered Jan. 25, 2016).