UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

December 11, 2018 at 1:30 p.m.

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1. **16-28316-E-13** **SHARRY STEVENS-GOREE**
17-2070 **Gary Ray Fraley**

STEVENS-GOREE V. CITIZENS

CONTINUED PRE-TRIAL CONFERENCE RE: COMPLAINT FOR DECLARATORY RELIEF, VIOLATION OF THE AUTOMATIC STAY AND RELATED STATE AND EQUITY FIRST CREDIT UNION FEDERAL CAUSES OF ACTION
4-28-17 [1]

Final Ruling: No appearance at the December 11, 2018 Status Conference is required.

ADV. PROCEEDING DISMISSED 12/6/18

Plaintiff's Atty: Gary Fraley; Paramprit Bindra
Defendant's Atty: Mark K. Worthge; Ji Yeon Yoo

The Adversary Proceeding having been dismissed, **the Status Conference is Concluded and Removed From the Calendar.**

Notes:
Joint Statement of Parties Regarding Status of Compliance with Order Dated November 14, 2018 filed 11/28/18 [Dckt 36]

Notice of Stipulated Dismissal of Adversary Proceeding filed 12/6/18 [Dckt 38]

2. **17-20220-E-7** **WILLIAM/FAYE THOMAS** **CONTINUED STATUS CONFERENCE**
18-2090 **Kristy Hernandez** **RE: AMENDED COMPLAINT**
8-29-18 [18]

PUTNAM V. THOMAS, JR. ET AL

Plaintiff's Atty: Pro Se
Defendant's Atty: Lucas B. Garcia

Adv. Filed: 6/7/18
Answer: none
Amd. Cmplt Filed: 8/29/18
Answer: none

Nature of Action:
Recovery of money/property - fraudulent transfer
Validity, priority or extent of lien or other interest in property
Objection/revocation of discharge
Dischargeability - false pretenses, false representation, actual fraud
Dischargeabilty - fraud as fiduciary, embezzlement, larceny
Dischargeability - willful and malicious injury

The Status Conference is xxxxxxxxxxxxxxxxxxxxxx

Notes:
Continued from 11/15/18 to be heard in conjunction with other matters on calendar.

3. **17-20220-E-7** **WILLIAM/FAYE THOMAS** **CONTINUED ORDER TO SHOW CAUSE**
18-2090 **Kristy Hernandez** **10-26-18 [34]**

PUTNAM V. THOMAS, JR. ET AL

Final Ruling: No appearance at the December 11, 2018 Hearing is required.

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The Order to Show Cause was served by the Clerk of the Court on Debtor-Defendant, Plaintiff, Chapter 7 Trustee, and Office of the U.S. Trustee as stated on the Certificate of Service on October 31, 2018. The court computes that 15 days' notice has been provided.

The court issued an Order to Show Cause requiring Plaintiff Robert Putnam ("Plaintiff") show cause why the court should not instruct the Clerk of the Court to deem the Case Cover Sheet in this Adversary Proceeding and the First Amended Complaint herein is not an action seeking relief pursuant to 11 U.S.C. § 727, and that this Adversary Proceeding is not one in which there is an objection to the entry of the discharge in William Carter Thomas, Jr. and Faye Wales Thomas' ("Defendant-Debtor") bankruptcy case.

The Order to Show Cause is discharged.

The First Amended Complaint in this Adversary Proceeding was filed on August 29, 2018. Dckt. 18. When the original Complaint was filed (Dckt. 1) on June 7, 2018, Plaintiff Robert Putnam filed the required Adversary Proceeding Cover Sheet. Dckt. 2. No amended Adversary Proceeding Cover Sheet has been filed.

The First Amended Complaint states "This is an adversary proceeding to determine the dischargeability of a debt pursuant to Bankruptcy Rules 4007 and 7001(6)." First Amended Complaint ¶ 1. Plaintiff seeks to have an obligation of $118,156.92 determined to be "excepted" from discharge in bankruptcy. *Id.* ¶ 3.

The First Amended Complaint continues, asserting that "Pursuant to section 523(a)(4) and 523(a)(6) title 11 of the United States Code, the discharge of debtors would not release the debtors from the aforesaid debt." *Id.* ¶ 5. The First Amended Complaint concludes with the prayer for the relief requested, which is stated to be:

> Wherefore, plaintiff prays for an order determining said debt to be nondischargeable and for judgment against debtors in the sum of $118,156.92, together with interest

thereon from August 21, 14 2017, the date of the APS settlement, and for such other and further relief as is just.

Id., p. 4:11-15.

Federal Rule of Bankruptcy Procedure 4007 relates to the determination of the dischargeability of a specific debt - not the granting/denial of the general discharge in the bankruptcy case (see Fed. R. Bankr. P. 4004 for the procedure relating to the granting or denial of the discharge). Likewise, Federal Rule of Bankruptcy Procedure 7001(6) is the provision stating that a proceeding to determine the discharageability of a debt must be by adversary proceeding (see Fed. R. Bankr. P. 7001(4) for the requirement that a proceeding to object to or revoke a discharge must be through an adversary proceeding).

The original Complaint filed is very similar to the First Amended Complaint, makes reference to the same Bankruptcy Code sections and Bankruptcy Rules, and requests that the debt of $118,156.92 be nondischargeable.

The provisions of 11 U.S.C. § 523 are those that relate to the discharageability of an individual debt. For objections to discharge, those grounds are generally found in 11 U.S.C. § 727.

The Adversary Proceeding Cover Sheet filed by Plaintiff checks various boxes identifying the nature of the adversary proceeding, consisting of : [1] Recover of Money or Property pursuant to § 548 (fraudulent conveyance), [2] Validity, priority, or extent of lien, and [3] Nondischargeability of debt under 11 U.S.C. § 523(a)(2) (fraud), § 523(a)(4) (fraud, embezzlement, larceny), § 523(a)(6) (willful and malicious injury). All of these are consistent with the nondischargeability and the assertion of an attorney's lien by Plaintiff.

One other box is check - "Objection/revocation of discharge - § 727(c), (d), (e)." This checked box is not consistent with the relief sought in the original complaint or the First Amended Complaint. It appears that this box may have been inadvertently checked, with confusion between the term "nondischargeable" (what the Plaintiff is seeking for his debt) and denial of "discharge" (which obtains such relief for all creditors of the debtor).

When an action objecting to the discharge of a debtor has been filed and pending, it requires special handling of the bankruptcy case for the Clerks' Office. The most significant is that the entry of the discharge as it applies to all other claims is not entered. (The entry of the discharge is not effective as to any claim for which there is an action for nondischargeability pending - as there is for Plaintiff.)

PLAINTIFF'S RESPONSE

Plaintiff filed a Response to this Order to Show Cause on November 15, 2018. Dckt. 38. The Response states Plaintiff mistakenly checked the box on the Adversary Proceeding Cover Sheet titled "Objection/revocation of discharge - § 727 (c), (d), (e)." Plaintiff states further he has filed a separate, 3 amended Adversary Proceeding Cover Sheet which does not check that box, and reflects the true nature of this suit. *See* Amended Adversary Proceeding Cover Sheet, Dckt. 39.

DISCUSSION

Plaintiff has identified that only in error did he check the box indicating this Adversary Proceeding is one in which Plaintiff objects to Debtor's discharge. Plaintiff has filed an Amended Cover Sheet remedying the issue. Dckt. 39. Therefore, the Order to Show Cause is discharged.

The court shall issue a minute order substantially in the following form holding that:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Order to Show Cause having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Order to Show Cause is discharged, Plaintiff having confirmed in writing that relief is sought only pursuant to 11 U.S.C. § 523 relating to the nondischargeability of Plaintiff's debt, and no relief is sought pursuant to 11 U.S.C. § 727.

4. **17-20220-E-7** **WILLIAM/FAYE THOMAS** **CONTINUED MOTION TO DISMISS**
18-2090 **Kristy Hernandez** **ADVERSARY PROCEEDING**
LBG-2 **9-28-18 [25]**

PUTNAM V. THOMAS, JR. ET AL

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Local Rule 9014-1(f)(1) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Plaintiff, Chapter 7 Trustee, and Office of the United States Trustee on September 28, 2018. By the court's calculation, 48 days' notice was provided. 28 days' notice is required.

The Motion to Dismiss Adversary Proceeding has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 4004(a). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Motion to Dismiss Adversary Proceeding is denied.

William Carter Thomas, Jr. ("Defendant" or "Debtor") moves for the court to dismiss all claims against it in Robert Putnam's ("Plaintiff") First Amended Complaint according to Federal Rule of Civil Procedure 12(b)(1) and (b)(6) for failure to state a claim and lack of ripeness.

Defendant filed a Chapter 13 case on January 13, 2017. Case No. 17-20220, Dckt. 1. On May 24, 2018, Defendant converted this case to one under Chapter 7. Case No. 17-20220, Dckt. 135. Hank Spacone has been appointed as the Interim Chapter 7 Trustee. Case No.17-20220, Dckt. 136. All property of the bankruptcy estate, including 100% of the shares of stock in APS, are under the exclusive control of the Chapter 7 Trustee. Case No. 17-20220, Schedule B, Dckt. 1 at 15; 11 U.S.C. §§ 541, 506.

Plaintiff filed this Adversary Proceeding challenging the dischargeability of debt on June 7, 2018. Case No. 18-02090, Dckt. 1. On August 17, 2018, the court issued an Order granting a Motion to Dismiss filed by Defendant and dismissing the Complaint with leave to amend. Order, Case No. 18-02090, Dckt. 17. Plaintiff filed this First Amended Complaint on August 29, 2018. Amended Complaint, Dckt. 18.

MOTION TO DISMISS

The Motion responds to the Complaint's claims with the following grounds:

A. Plaintiff has failed to state a claim upon which relief may be granted. Plaintiff only asserts legal conclusions and does not state facts supporting any claims. Dckt. 25 at ¶¶ 4-5

B. Plaintiff does not state facts supporting a claim that Defendant-Debtor committed "wilful and malicious" injury where Defendant-Debtor merely filed bankruptcy and dismissed state court litigation. *Id*. at ¶ 5.a. Plaintiff needs to state facts as to behavior equating to "wilful" and "malicious." *Id.* ¶ 5.b.

C. Plaintiff bases his secured claim status on a lien filed after this bankruptcy was filed. *Id.* at ¶ 5.c.

D. Defendant-Debtor dismissing his case pursuant to settlement before seeking bankruptcy court approval does not imply wilful or malicious conduct. *Id*. at ¶ 5.d. The only true factual assertion in the entire complaint appears to be the 41 day difference between when the defendant verbally stated that the case had been settled and dismissed with prejudice and the actual entry of the document that were for the purpose of settling and dismissing the subject lawsuit. *Id.* at ¶ 5.e.

E. Plaintiff's conclusion the case settled by Defendant-Debtor was worth hundreds of thousands of dollars is not supported. *Id.* at ¶ 5.f. Defendant-Debtor knowing the settlement would harm Plaintiff is not enough to establish "wilful" and "malicious." *Id.* at ¶ 5.g. Furthermore, Plaintiff does not establish he was harmed by the settlement. *Id.* ¶ 5.j.

F. All other Plaintiff claims are vague or purposefully obfuscated. Settling a case does not establish intent to harm Plaintiff and is merely conclusory. *Id*. at ¶ 6.a-6.b.

G. Plaintiff had access to limited discovery after the Complaint was dismissed. No new facts are alleged in the First Amended Complaint. *Id*. at ¶ 7.a.-7.b.

H. Plaintiff has failed to prove that this complaint is ripe because the court may not approve of the settlement of Defendant-Debtor's claims. *Id.* at ¶ 8.

I. This court should dismiss with prejudice the complaint for failure to state grounds upon which relief can be granted. *Id*. at ¶ 10.

PLAINTIFF'S OPPOSITION

Plaintiff filed an Opposition to the Motion on October 15, 2018. Dckt. 30. Plaintiff responds to Defendant-Debtor arguing the following:

1. Defendant-Debtor undoubtedly knew settling claims would eliminate any possibility Plaintiff could recover funds. *Id.* at 2:14-16. By settling claims before receiving approval from the bankruptcy court, Defendant-Debtor hindered Plaintiff's right to object to settlement. *Id*. at 2:18-24.

2. Defendant-Debtor refusing to allow Plaintiff to litigate state court claims on behalf of the Estate was a beach of fiduciary duty. *Id*. at 4:2-20.

3. Whether Plaintiff's lien was filed timely is immaterial because an attorney's lien takes effect when the agreement is executed. Id. at 4:25-5:9.

4. Plaintiff mistakenly stated in the First Amended Complaint that the telephone conversation plaintiff had with defendant, in which plaintiff offered to try the APS case and defendant misrepresented that the case had already been dismissed, took place on July 28, 2017. That conversation actually took place on August 28, 2017. *Id* at 6:6-11.

5. Plaintiff believes the state court case settled was valued approximately $550,001.00. *Id.* at 6:18-21.

6. In the Motion, Defendant-Debtor contends that Plaintiff withdrew. Plaintiff did not withdraw; but rather, agreed to a substitution after the defendant rejected plaintiff's request that the new attorney associate with plaintiff. *Id*. at 7:6-10.

7. Defendant-Debtor does not cite supporting case law. *Id*. at 7:27-8:11.

8. The case here is ripe. The Motion For Approval of Compromise filed by the Trustee was denied after the August 30, 2018 hearing. The Trustee indicated to Plaintiff he did not intend to file a subsequent motion or oppose the settlement. *Id.* at 8:13-9:3.

APPLICABLE LAW

Failure to State a Claim for Relief

In considering a motion to dismiss, the court starts with the basic premise that the law favors disputes being decided on their merits. Federal Rule of Civil Procedure 8 and Federal Rule of Bankruptcy Procedure 7008 require that a complaint have a short, plain statement of the claim showing entitlement to relief and a demand for the relief requested. FED. R. CIV. P. 8(a). Factual allegations must be enough to raise

a right to relief above the speculative level. *Id.* (citing 5 C. WRIGHT & A. MILLER, FED. PRACTICE AND PROCEDURE § 1216, at 235–36 (3d ed. 2004) ("[T]he pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action")).

A complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to the relief. *Williams v. Gorton*, 529 F.2d 668, 672 (9th Cir. 1976). Any doubt with respect to whether to grant a motion to dismiss should be resolved in favor of the pleader. *Pond v. Gen. Elec. Co.*, 256 F.2d 824, 826–27 (9th Cir. 1958). For purposes of determining the propriety of a dismissal before trial, allegations in the complaint are taken as true and are construed in the light most favorable to the plaintiff. *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 810 (9th Cir. 1988); *see also Kossick v. United Fruit Co.*, 365 U.S. 731, 731 (1961).

Under the Supreme Court's formulation of Federal Rule of Civil Procedure 12(b)(6), a plaintiff cannot "plead the bare elements of his cause of action, affix the label 'general allegation,' and expect his complaint to survive a motion to dismiss." *Ashcroft v. Iqbal*, 556 U.S. 662, 687 (2009). Instead, a complaint must set forth enough factual matter to establish plausible grounds for the relief sought. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) ("[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of a cause of action's elements will not do.").

In ruling on a motion to dismiss brought under Federal Rule of Civil Procedure 12(b)(6), the Court may consider "allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice." *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007). The court need not accept unreasonable inferences or conclusory deductions of fact cast in the form of factual allegations. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). Nor is the court "required to"accept legal conclusions cast in the form of factual allegations if those conclusions cannot reasonably be drawn from the facts alleged." *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754–55 (9th Cir. 1994) (citations omitted).

A complaint may be dismissed as a matter of law for failure to state a claim for two reasons: either a lack of a cognizable legal theory, or insufficient facts under a cognizable legal theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988) (citation omitted).

DISCUSSION

Failure to State a Claim

Defendant-Debtor's Motion

The Motion seeks dismissal of the Amended Complaint on the basis the Amended Complaint fails to state a claim upon which relief may be granted.

Several of Defendant-Debtor's arguments are factual disputes and not relevant to a determination of whether a complaint states a claim. Plaintiff failing to prove the worth of the settled case is a factual

question to be proven during the merits of the case. Whether Plaintiff's asserted claim is secured or unsecured has no impact on dischargeability under 11 U.S.C. § 523(a). Plaintiff's choice not to assert new facts after limited discovery is not dispositive of failure to state a claim.

What remains is whether Plaintiff has only made legal conclusions as to "wilful and malicious." However, Defendant-Debtor already concedes Plaintiff provided more than legal conclusion, going on to argue that settling a case and filing for bankruptcy do not constitute wilful and malicious conduct or an intent to harm Plaintiff. Motion, Dckt. 25 at ¶¶ 5.d., 6.a-6.b.

Here, Plaintiff seeks a determination of nondischargeability based on Defendant-Debtor committing fraud or defalcation while acting in a fiduciary capacity, or in the alternative based on willful and malicious injury by Defendant-Debtor to another entity. *See* 11 U.S.C. §§ 523(a)(4), (a)(6). Defendant-Debtor has not provided legal authority for the proposition that filing a bankruptcy case or settling a claim cannot be wilful and malicious conduct, or fraud or defalcation. Whether the acts of Defendant-Debtor here were intended to harm Plaintiff is a factual determination not properly determined on a Motion to Dismiss. *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 810 (9th Cir. 1988).

Plaintiff's Amended Complaint states that Debtor was the fiduciary of the Estate. Dckt. 18 at 3:4. While working in that capacity, Debtor had the right to settle a claim worth significant value, but chose to settle the case for no money. *Id*. at 3:5-12. Debtor knew that settling the case would harm the Plaintiff, and Plaintiff was harmed. *Id*. at 3:12-16.

Plaintiff has pleaded the bare elements required by 11 U.S.C. §§ 523(a)(4) and (a)(6). *Ashcroft v. Iqbal*, 556 U.S. 662, 687 (2009).

"Punch-List" of Claim Alleged

In reviewing the First Amended Complaint, the court reads the claims and basis thereon upon which such claims are asserted to be as follows (summarized):

A. Plaintiff is owed $118,156.92 for services provided to Defendant-Debtor William Thomas.

B. Plaintiff represented Defendant-Debtor and his corporation in a state court action over a period of four years preceding the filing of Defendant-Debtor's bankruptcy case and then for four months thereafter.

C. In June 2017, another attorney was substituted in to represent Defendant-Debtor and his corporation.

D. Plaintiff asserts an attorney's lien and has filed a Notice of such lien in the state court action.

E. Defendant-Debtor proposed a Chapter 13 Plan which provided for the bankruptcy estate and Debtor to surrender the proceeds due in the state court action, in which proceeds Plaintiff asserts his attorney's lien.

F. Plaintiff asserts that the state court action claims of Defendant-Debtor and his corporation have a value of several hundred thousand dollars.

G. Defendant-Debtor, without bankruptcy court approval, purports to have dismissed with prejudice the state court action.

H. When Defendant-Debtor purported to dismiss the state court action, he knew it would prejudice the interests of Plaintiff in such claims.

I. Defendant-Debtor, serving as the Chapter 13 debtor was a fiduciary of the bankruptcy estate and breached his fiduciary duties in purporting to dismiss with prejudice the state court action, which then caused damage to Plaintiff's interests in such claims.

First Amended Complaint, Dckt. 18.

Willful and Malicious Claim Stated

The court does not concur with Defendant-Debtor's contention that the First Amended Complaint does not identify the alleged willful and malicious conduct. The First Amended Complaint alleges: (1) Plaintiff was owed a debt secured by the claims in the state court action, (2) after filing bankruptcy, Defendant-Debtor and replacement counsel purported to dismiss with prejudice the claims subject to the lien, (3) in purporting to dismiss with prejudice the claims the Plaintiff's rights and interests in the collateral, the claims, has been damaged, (4) Defendant-Debtor purported to grant the dismissal with prejudice without the actual authority to so do.

Congress provides in 11 U.S.C. § 523(a)(6) for the nondischaragebility of damages arising from willful and malicious conduct.

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title [11 USCS § 727, 1141, 1228(a), 1228(b), or 1328(b)] does not discharge an individual debtor from any debt--
>
> (6) for willful and malicious injury by the debtor to another entity or to the property of another entity

As discussed in *Ormsby v. First Am. Title Co. (In re Ormsby)*, 591 F.3d 1199 (9th Cir. 2010).

> The Supreme Court in *Kawaauhau v. Geiger (In re Geiger)*, 523 U.S. 57, 118 S. Ct. 974, 140 L. Ed. 2d 90 (1998), made clear that for section 523(a)(6) to apply, the actor must intend the consequences of the act, not simply the act itself. Id.

at 60. Both willfulness and maliciousness must be proven to block discharge under section 523(a)(6).

> In this Circuit, " § 523(a)(6)'s willful injury requirement is met only when the debtor has a subjective motive to inflict injury or when the debtor believes that injury is substantially certain to result from his own conduct." *Carrillo v. Su (In re Su)*, 290 F.3d 1140, 1142 (9th Cir. 2002). The Debtor is charged with the knowledge of the natural consequences of his actions. *Cablevision Sys. Corp. v. Cohen (In re Cohen)*, 121 B.R. 267, 271 (Bankr. E.D.N.Y. 1990); see *Su*, 290 F.3d at 1146 ("In addition to what a debtor may admit to knowing, the bankruptcy court may consider circumstantial evidence that tends to establish what the debtor must have actually known when taking the injury-producing action.").
>
> "A malicious injury involves (1) a wrongful act, (2) done intentionally, (3) which necessarily causes injury, and (4) is done without just cause or excuse." *Petralia v. Jercich (In re Jercich)*, 238 F.3d 1202, 1209 (9th Cir. 2001) (internal citations omitted). Malice may be inferred based on the nature of the wrongful act. See *Transamerica Commercial Fin. Corp. v. Littleton (In re Littleton)*, 942 F.2d 551, 554 (9th Cir. 1991). 7 To infer malice, however, it must first be established that the conversion was willful. See *Thiara*, 285 B.R. at 434.

The First Amended Complaint does assert that Defendant-Debtor intentionally, wrongfully damaged the collateral and damaged Plaintiff's interests therein.

Most of what Defendant-Debtor argues is that "the evidence will show it was worthless." That evidentiary determination is made based on evidence, not basic pleading.

The Complaint Fails to State A Breach of Fiduciary Duty Claim

The Complaint alleges that the Defendant-Debtor was a fiduciary of the bankruptcy estate and breached Defendant-Debtor's duty to the bankruptcy estate by purporting to dismiss with prejudice the claims in the state court action. The Complaint does not allege what basis exists for there being a fiduciary duty running to the Plaintiff.

Congress provides in 11 U.S.C. § 523(a)(4) that claims for "fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny" will be nondischargeable. The Ninth Circuit Court of Appeals addressed this fiduciary capacity fraud or defalcation in *Blyler v. Hemmeter* (*In re Hemmeter*), 242 F.3d 1186 (9th Cir. 2001), stating:

> Whether a person is a fiduciary under §523(a)(4) is a question of federal law. *Lewis v. Scott* (*In re Lewis*), 97 F.3d 1182, 1185 (9th Cir. 1996) (citing *Ragsdale v. Haller (In re Haller)*, 780 F.2d 794, 795 (9th Cir. 1986)). The origins of the fiduciary capacity discharge exception date to the Bankruptcy

Act of 1841. 5 Stat 440. From 1884 to the present, courts have construed "fiduciary" in the bankruptcy discharge context as including express trusts, but excluding trusts ex maleficio, i.e., trusts that arose by operation of law upon a wrongful act. *Davis v. Aetna Corp.*, 293 U.S. 328, 333, 79 L. Ed. 393, 55 S. Ct. 151 (1934); *Chapman v. Forsyth*, 43 U.S. 202, 2 HOW 202, 208, 11 L. Ed. 236 (1844). We have adhered to this construction in interpreting the scope of 11 U.S.C. §523(a)(4), refusing to deny discharge to those whose fiduciary duties were established by constructive, resulting and implied trusts. *Runnion v. Pedrazzini* (*In re Padrazzini*), 644 F.2d 756, 758 (9th Cir. 1981); *Schlecht v. Thornton* (*In re Thornton*), 544 F.2d 1005, 1007 (9th Cir. 1976)." The core requirements are that the relationship exhibit characteristics of the traditional trust relationship, and that the fiduciary duties be created before the act of wrongdoing and not as a result of the act of wrongdoing." *Runnion*, 644 F.2d at 758. Fiduciary relationships imposed by statute may cause the debtor to be considered a fiduciary under §523(a)(4). *Quaif v. Johnson*, 4 F.3d 950, 953-54 (11th Cir. 1993); *Runnion*, 644 F.2d at 758 n. 2. In general, a statutory fiduciary is considered a fiduciary for the purposes of §523(a)(4) if the statute: (1) defines the trust res; (2) identifies the fiduciary's fund management duties; and (3) imposes obligations on the fiduciary prior to the alleged wrongdoing. Cf. *Windsor v. Librandi*, 183 B.R. 379, 383 (M. D. Pa. 1995) (discussing whether a fiduciary under state securities act qualifies as a fiduciary under §523). See also *Runnion*, 644 F.2d at 759...

Holding that statutory ERISA fiduciaries qualify as fiduciaries under §523(a)(4) does not end our inquiry. We must also decide whether the violations of those duties alleged in the complaint are viable claims for defalcation under §523(a)(4). The definition of defalcation includes both the "misappropriation of trust funds or money held in any fiduciary capacity; [and the] failure to properly account for such funds." *Lewis*, 97 F.3d at 1186 (quoting Black's Law Dictionary 417 (6th ed. 1990)). Even innocent acts of failure to fully account for money received in trust will be held as non-dischargeable defalcations; no intent to defraud is required. *F.D.I.C. v. Jackson*, 133 F.3d 694, 703 (9th Cir. 1998); *Lewis*, 97 F.3d at 1186. However, regardless of the *mens rea* required, the essence of defalcation in the context of §523(a)(4) is a failure to produce funds entrusted to a fiduciary. *Quaif*, 4 F.3d at 954. This concept does not embrace the normal acts within the business judgment of the fiduciary that, however flawed, do not involve failure to account for or produce a beneficiary's funds. Thus, we have declined to extend the concept of defalcation to include the acts alleged by the Plan Participants. There are no allegations of accounting failure or misappropriation. Rather, the Plan Participants allege only damages resulting from a decline in value of the MK stock, in which the Plans were specifically authorized to invest. Thus, although we have as yet not fully defined the contours of defalcation under

> §523(a)(4), the breach of duties alleged by the Plan Participants with respect to the ESOP and 401K Plans does not amount to a "defalcation while acting in a fiduciary capacity" within the meaning of §523(a)(4).

The Supreme Court more recently curtailed such breaches by a fiduciary to the beneficiaries, providing the following guidance in *Bullock v. Bankchampaign, N.A.*, 200 U.S. 321 (2013):

> "We hold that it includes a culpable state of mind requirement akin to that which accompanies application of the other terms in the same statutory phrase. We describe that state of mind as one involving knowledge of, or gross recklessness in respect to, the improper nature of the relevant fiduciary behavior."
>
> "Thus, where the conduct at issue does not involve bad faith, moral turpitude, or other immoral conduct, the term requires an intentional wrong. We include as intentional not only conduct that the fiduciary knows is improper but also reckless conduct of the kind that the criminal law often treats as the equivalent. Thus, we include reckless conduct of the kind set forth in the Model Penal Code. Where actual knowledge of wrongdoing is lacking, we consider conduct as equivalent if the fiduciary "consciously disregards" (or is willfully blind to) "a substantial and unjustifiable risk" that his conduct will turn out to violate a fiduciary duty. ALI, Model Penal Code §2.02(2)(c), p. 226 (1985). See id., §2.02 Comment 9, at 248 (explaining that the Model Penal Code's definition of "knowledge" was designed to include "'wilful blindness'"). That risk "must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation." Id., §2.02(2)(c), at 226 (emphasis added). Cf. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 194, n. 12, 96 S. Ct. 1375, 47 L. Ed. 2d 668 (1976) (defining scienter for securities law purposes as "a mental state embracing intent to deceive, manipulate, or defraud")."

Even when one is in an established fiduciary position, merely making a "mistake" does not give rise to nondischargeability.

The First Amended Complaint does not state a claim for breach of a fiduciary duty running to Plaintiff. If such claim exists, it is now in the hands of the Chapter 7 Trustee.

Lack of Ripeness

The Motion also seeks dismissal on the basis the Plaintiff's claims are not ripe. This is asserted to be because the Trustee is allegedly still considering whether to oppose the settlement, and Plaintiff therefore "has not proven that the alleged settlement will stand."

Defendant-Debtor's argument is that the lack of finality and possibility of the settlement being revoked renders the Plaintiff's claims premature. However, at the present the harm alleged by Plaintiff has already occurred. Furthermore, while there could be more development of the issues here if the Trustee

challenges the settlement, there is no guarantee this will happen. Therefore, the issues here are not premature. *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003).

The problem with Debtor's argument is that by converting the case to one under Chapter 7, Debtor has now mandated that this Complaint be brought. Failure to timely file the Complaint would then insulate Defendant-Debtor from the alleged misconduct. 11 U.S.C. § 523(c).

Therefore, upon review of the Motion, Opposition, First Amended Complaint:

A. The court denies the Motion to Dismiss as it applies to relief requested pursuant to 11 U.S.C. § 523(a)(6), and

B. Grants the Motion and dismisses the claims asserted arising under 11 U.S.C. § 523(a)(4).

The court shall issue a minute order substantially in the following form holding that:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Dismiss Adversary Proceeding filed by William Carter Thomas, Jr. ("Defendant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Dismiss is denied to the extent that it seeks the dismissal of claims arising under 11 U.S.C. § 523(a)(6).
>
> **IT IS FURTHER ORDERED** and the Motion is granted and claims arising under 11 U.S.C. § 523(a)(4) - for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny– are dismissed.

5.	**18-26358-E-13**	**TANESHIA WRAY** **Pro Se**	**CONTINUED COPY OF LETTER FROM TANESHIA LANNETTE WRAY RE: LETTER (MSTS).** **11-19-18 [31]**

No Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(C).

Local Rule 9014-1(f)(3) Motion—Hearing Required.

The court specially set the hearing for November 27, 2018. Order, Dckt. 32. The Order setting the hearing on the Motion required Debtor serve a copy of the Order on the agents of the Creditor conducting a foreclosure sale on Debtor's property. *Id.*

The Reconsideration Of Motion To Extend Stay was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). Debtor, creditors, the Chapter 13 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing **----------**.

The Reconsideration Of Motion To Extend Stay is XXXXXXXXXX.

On October 9, 2018, Taneshia Lannette Wray ("Debtor") commenced this Chapter13 case. This is not Debtor's first recent Chapter 13 case. Her other prior recent cases and the results thereof are summarized below:

18-21233 Chapter 13 Case Atty: Kristy Hernandez, Esq.	Filed: March 2, 2018	Dismissed: July 13, 2018
	Case was dismissed due to Debtor making no plan payments and not prosecuting an amended plan. 18-21233; Civil Minutes, Dckt. 6.	
17-26138 Chapter 13 Case *In Pro Se*	Filed: September 15, 2017	Dismissed: February 28, 2018

	Case Dismissed due to Debtor failing to prosecute an amended plan. 17-26138; Order, Dckt. 37. Debtor made no Plan payments to the Chapter 13 Trustee in the case. *Id.*; Trustee's Final Report, Dckt. 40

Debtor having two prior cases pending and dismissed in the past year, no automatic stay went into effect upon the filing of this current case. 11 U.S.C. § 362(c)(4)(A). When stay has not gone into effect pursuant to 11 U.S.C. § 362(c)(4), a party in interest may request within 30 days of filing that the stay take effect as to any or all creditors (subject to such conditions or limitations as the court may impose), after notice and a hearing, only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed. 11 U.S.C. § 362(c)(4)(B).

In determining if good faith exists, the court considers the totality of the circumstances. *In re Elliot-Cook*, 357 B.R. 811, 814 (Bankr. N.D. Cal. 2006); *see also* Laura B. Bartell, *Staying the Serial Filer - Interpreting the New Exploding Stay Provisions of § 362(c)(3) of the Bankruptcy Code*, 82 Am. Bankr. L.J. 201, 209–10 (2008). An important indicator of good faith is a realistic prospect of success in the second case, contrary to the failure of the first case. *See, e.g.*, *In re Jackola*, No. 11-01278, 2011 Bankr. LEXIS 2443, at *6 (Bankr. D. Haw. June 22, 2011) (citing *In re Elliott-Cook*, 357 B.R. 811, 815–16 (Bankr. N.D. Cal. 2006)). Courts consider many factors—including those used to determine good faith under §§ 1307(c) and 1325(a)—but the two basic issues to determine good faith under § 362(c)(3) are:

A. Why was the previous plan filed?

B. What has changed so that the present plan is likely to succeed?

In re Elliot-Cook, 357 B.R. at 814–15.

Correspondence From Debtor

On October 9, 2018, Debtor filed a letter with the court. Dckt. 9. In the letter, Debtor states the following:

> I Taneshia Wray, am respectfully requesting a motion to stay in my current Chapter 13 case. This request is due to me having new employment which could lead to future retirement and my desire to hire an attorney to assist with this current case. I desire to make this current case a solution to my financial difficulties.

The court having reviewed the letter "requesting a motion," it appears that Debtor believed the court would generate pleadings for Debtor, there being no motion and no supporting evidence, the court issued an order for a Status Conference in this case so that the court could address issues with the Debtor in open court. Order, Dckt. 10. As noted in the court's order, this would afford Debtor the opportunity to get her counsel "on board" and at the hearing.

The court conducted the Status Conference, however, Debtor failed to appear at the Status Conference to address these issues for the court. Civil Minutes, Dckt. 29.

On November 19, 2018, Debtor delivered a second letter to the court. Dckt. 30. In this second letter Debtor states:

> I am respectfully requesting a reconsideration of my prior request for an automatic stay for my current case #18-26538. I was unable to attend the November 14, 2018 case conference due to me filing a workers compensation claim and sustaining a work related injury on October 25, 2018 at my worksite.

While phrased as a "reconsideration," there has not yet been a motion supported by evidence presented to the court.

Debtor then filed a third letter with the court on November 19, 2018. Dckt. 31. In this third letter Debtor states:

> Today on November 19, 2018, I requested reconsideration of my prior request for an automatic stay for my current case # 18-26358. I am requesting a shorten time to be heard for this request and I am requesting to be heard today on November 19, 2018. I have a foreclosure sale date on my property for tomorrow November 20, 2018 and this is an urgent matter.

To the extent that the third letter is treated as a motion for imposition of the automatic stay, it fails to state grounds and is not supported by any evidence.

Review of Chapter 13 Plan

Debtor's Chapter 13 Plan requires monthly plan payments of $3,040.57 a month, commencing with the first payment due by November 25, 2018. Dckt. 24. From this Debtor states that she will make the current monthly mortgage payment of $1,400, and a monthly payment of $1,400 to cure an $84,000 pre-petition arrearage. Plan ¶3.07. Debtor also appears to have a $240.57 tax obligation to be paid (incorrectly listing it in ¶4.01 of the Plan.

November 19, 2018 Order Setting Hearing

On November 19, 2018 the court issued an Order specially setting a hearing for Debtor's Motion on November 27, 2018. Order, Dckt. 32. In issuing its Order, the court observed that Debtor does not have the personal ability to prosecute this case in federal court, not being able to formulate motions, present evidence, or set matters for hearing. The court further found Debtor had not made a showing that her present case is filed in good faith, with the exception of Debtor agreeing to her first proposed plan payment of $3,040.57.

The Order imposed the automatic stay in this case on an interim basis for all purposes and persons, pending further order of this court. The court further ordered that Debtor Taneshia Lannette Wray

appear at the November 25, 2018 hearing (no telephonic appearance permitted) and present evidence of payment having been made on or before November 25, 2018 of the November 2018 plan payment in the amount of $3,040.57.

NOVEMBER 27, 2018 HEARING

At the hearing, Debtor appeared, without counsel. Civil Minutes, Dckt. 38. Debtor stated that she is now discussing with an attorney filing suit in another court asserting claims for bad faith and improperly not allowing Debtor to modify the loan.

The court addressed with Debtor her continuing failings in prosecuting the bankruptcy case(s). Debtor stated that in the event that over the next couple weeks the filing of the action did not go as planned, she would then seek counsel. The court has heard Debtor is seeking counsel several times in the past, without Debtor obtaining counsel to prosecute a bankruptcy case and assist the Debtor in asserting her rights.

Debtor then discussed, if the litigation did not advance as hoped, she would convert to Chapter 7 so "she" could liquidate such assets. The court briefly discussed with Debtor the effect of a Chapter 7 case and the Chapter 7 trustee, not the Debtor, being in control of all assets (including any claims against her lender).

Debtor advised the court that the foreclosure sale had been continued to December 18, 2018.

The court continued the hearing on the Motion to December 11, 2018, at 1:30 p.m. to afford Debtor the opportunity to hire counsel, said counsel to assist in the active prosecution of this case, counsel filing pleadings demonstrating that counsel and the Debtor are actively prosecuting this case, Debtor be current in Plan payments, and Debtor and counsel demonstrating that this Chapter 13 case is being prosecuted as permitted by Congress and not as an abuse of the Bankruptcy Laws and abuse of the federal judicial system. Order, Dckt. 40.

Additionally, the court extended the automatic stay e in full force and effect for all persons and purposes until 11:59 p.m. on December 14, 2018, at which time it will expire, unless terminated sooner or extended by further order of this court. *Id.*

TRUSTEE'S STATUS REPORT

The Chapter 13 Trustee, David Cusick ("Trustee"), filed a Status Report on December 5, 2018. Dckt. 41. Trustee provides the following information as to the current status of the case:

1. Debtor appeared at the November 29, 2018, Meeting of Creditors, but had not retained counsel.

2. Debtor has not made her first plan payment and is delinquent $3,040.51. Another payment in that amount is due November 25, 2018.

3. Debtor has not provided Trustee copies of employer pay advices for the 60 days prior to filing.

4. Debtor has not filed a motion to confirm.

5. Debtor's current plan would not finish within the 60 month plan term allowed.

6. Debtor's expenses on Schedule J are not realistic. Debtor provides only $80 a month for food, which would be $2.66 a day for meals. Debtor cannot make plan payments if her expenses are higher than stated.

7. Debtor has filed an old version of the plan form, and has incorrectly filled out her Statement of Financial Affairs (reporting no income for the prior two years) and Schedules (reporting no clothes, or worker's compensation claim which Debtor stated at the prior hearing she had).

DISCUSSION

On December 7, 2018, a substitution of counsel was filed, with a well know local consumer bankruptcy attorney stepping in to represent Debtor. Dckt. 48.

From the evidence provided, Debtor still has not retained counsel, or prosecuted her bankruptcy case in any way. No plan payments have been made, necessary documents have not been filed/provided to the Trustee, a feasible plan has not been proposed or sought to be confirmed.

Nothing has been filed by Debtor indicating the status on prospective state court litigation.

At the hearing, **XXXXXXXXXXXXX**.

The court shall issue an order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Reconsideration Of Motion To Extend Stay filed by Debtor Taneshia Lannette Wray ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that **XXXXXXXXXXX**.

6. **10-90080-E-7** **FRED EICHEL** **CONTINUED MOTION FOR**
JAD-2 **Jessica Dorn** **SANCTIONS FOR VIOLATION**
OF THE DISCHARGE INJUNCTION
9-7-18 [31]

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(C).

Local Rule 9014-1(f)(2) Motion—Final Hearing.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee, Respondent, and Office of the United States Trustee on September 7, 2018. By the court's calculation, 62 days' notice was provided. 14 days' notice is required.

The Motion for Sanctions for Violation of the Automatic Stay was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 7 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. The briefing schedule was set by the court.

The Motion for Sanctions for Violation of the Automatic Stay is denied.

The present Motion for Sanctions for Violation of the Automatic Stay provided by 11 U.S.C. § 362(a) and for damages pursuant to 11 U.S.C. § 362(k) and the inherent power of this court has been filed by the Debtor Fred Charles Eichel ("Movant" or "Debtor"). The claims are asserted against Scarlette Fiorini ("Respondent") and her attorney Michael Babitske.

LEGAL STANDARD

A request for an order of contempt by a debtor, United States Trustee, or another party in interest is made by motion governed by Federal Rule of Bankruptcy Procedure 9014. FED. R. BANKR. P. 9020. A bankruptcy judge has the authority to issue a civil contempt order. *Caldwell v. Unified Capital Corp. (In re Rainbow Magazine)*, 77 F.3d 278, 283–85 (9th Cir. 1996). The statutory basis for recovery of damages by

an individual debtor is limited to willful violations of the stay, and then typically to actual damages, including attorneys' fees; punitive damages may be awarded in "appropriate circumstances." 11 U.S.C. § 362(k)(1). The court may also award damages for violation of the automatic stay (a Congressionally-created injunction) pursuant to its inherent power as a federal court. *Sternberg v. Johnston*, 595 F.3d 937, 946 (9th Cir. 2009). FN.1.

FN.1. Bankruptcy courts have jurisdiction and authority to impose sanctions, even when the bankruptcy case itself has been dismissed. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 395 (1990); *Miller v. Cardinale (In re DeVille)*, 631 F.3d 539, 548–49 (9th Cir. 2004). The bankruptcy court judge also has the inherent civil contempt power to enforce compliance with its lawful judicial orders. *Price v. Lehtinen (In re Lehtinen)*, 564 F.3d 1052, 1058 (9th Cir. 2009); *see* 11 U.S.C. § 105(a). A bankruptcy judge is also empowered to regulate the practice of law in the bankruptcy court. *Peugeot v. U.S. Trustee (In re Crayton)*, 192 B.R. 970, 976 (B.A.P. 9th Cir. 1996). The authority to regulate the practice of law includes the right and power to discipline attorneys who appear before the court. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991); *see In re Lehtinen*, 564 F.3d at 1058.

Attorneys' fees may be recovered for work involved in bringing about an end to the stay violation and for pursuing an award of damages. *America's Servicing Co. v. Schwartz-Tallard (In re Schwartz-Tallard)*, 803 F.3d 1095, 1101 (9th Cir. 2015). A monetary penalty may not be imposed on a creditor unless the conduct occurred after the creditor receives notice of the order for relief as provided by § 342. 11 U.S.C. § 342(g)(2).

The automatic stay imposes an affirmative duty of compliance on the non-debtor. *State of Cal. Emp't Dev. Dep't v. Taxel (In re Del Mission Ltd.)*, 98 F.2d 1147, 1151–52 (9th Cir. 1996). A party who acts in violation of the stay has an affirmative duty to remedy the violation. *Knupfer v. Lindblade (In re Dyer)*, 322 F.3d 1178, 1191–92 (9th Cir. 2003).

In addition, Congress provides in 11 U.S.C § 362(a) & (k) additional relief for violation of the automatic stay, which may be requested by an individual debtor.

REVIEW OF MOTION

In asserting this claim pursuant to 11 U.S.C. § 362(a) & (k), Movant states with particularity (Federal Rule of Bankruptcy Procedure 9013) the following grounds for relief:

A. Debtor filed this case on January 12, 2010. Motion, Dckt. 31a t ¶ 1. Debtor received a discharge on April 26, 2010. *Id* at ¶ 2. Respondent was listed on Debtor's Schedule F. *Id*. at ¶ 7.

B. On May 11, 2018, Respondent filed a Notice of Motion for Court Adjudicate Community Assets and Liability for the Marital Settlement Agreement signed by the Debtor on or about January 12, 2013. *Id.* at ¶ 3.

C. Debtor informed Respondent the debt pursued through the family court litigation was owed when Debtor filed his bankruptcy case and therefore was discharged. *Id*. at ¶ 4. Debtor has thereafter continued to instruct Respondent not to pursue collection. *Id*. at ¶¶ 8,10.

D. Despite Debtor providing notice of this case, Respondent continues to seek collection of a discharged debt, arguing the marital agreement was signed after discharge. *Id*. at ¶¶ 5,9-12.

E. Debtor filed an Ex-Parte Motion to reopen this case on September 7, 2018. *Id*. at ¶ 6.

Debtor requests the court find Respondent in civil contempt for willful violation of the Discharge pursuant to 11 U.S.C. § 524, impose sanctions, and order punitive damages and attorney's fees.

In Debtor's accompanying Memorandum of Points and Authorities, Debtor argues the debt was owed at the time Debtor filed this case and was not a debt listed within 11 U.S.C. § 523. Dckt. 34. Debtor argues further the Agreement, requiring Debtor to pay discharged obligations, was in the nature of a reaffirmation agreement that, not having been entered into before discharge and or approved by the court, is void.

Review of Evidence

Movant has provided the Declaration of Jessica A. Dorn in support of the Motion. Dckt. 33. The Declaration states the Debtor was married to Respondent until 2007, with a Legal Separation filed Jun 12, 2008. Dckt. 33 at ¶ 1. Default judgement for legal separation was approved and entered by the Stanislaus County Superior Court on October 30, 2008. *Id.* A Judgement for Dissolution of Marriage was entered by the Superior Court County of San Joaquin, Case No. FL 374322 (the "First Judgment") terminating the Debtor and Respondent's marital status, which was later incorporated by a Stanislaus County Superior Court Judgment entered March 25, 2013 (the "Second Judgement"). *Id*. at ¶ 5-6.

The Second Judgment incorporated a Marital Settlement Agreement entered into January 12, 2013 (the "Agreement"), which included Debtor's agreement to pay debt owed by Respondent to Harry Kullijian that Respondent incurred purchasing sole and separate property. *Id.* at ¶¶ 2, 7.

Respondent filed a Request for Order in the Stanislaus Superior Court , Case no. 688421, seeking to enforce the Second Judgement on August 23, 2016. *Id*. at ¶ 8. In Debtor's response to the Request for Order, Debtor asserted that the debt sought to be enforced was included in the Debtor's bankruptcy case. *Id*. Respondent there argued that the debt was secured, and that liability for the debt did not arise until the Agreement was signed. *Id*. The court continued the hearing to resolve the issue of two competing judgments.

On February 17, 2018, Respondent sought to set aside the First Judgment. *Id*. at ¶ 10. The San Joaquin County court denied Respondent's request and found the First Judgement to be valid. *Id.*

On May 11, 2018, Respondent filed a Motion to Adjudicate Community Assets and Liabilities in the San Joaquin County court, Case no. FL374332, to enforce the Agreement. That matter is pending and waiting for resolution of this Contested Matter. *Id.* at ¶ 11.

Schedule F filed on February 8, 2010, lists as a creditor holding an unsecured claim Scarlett A. Von Eichel. Schedule F, Dckt. 17.The debt is identified as "possible claims," and marked as contingent, unliquidated, and disputed. *Id*.

RESPONDENT'S OPPOSITION

Respondent filed a Memorandum of Points and Authorities in Opposition on October 22, 2018. Dckt. 38. Respondent opposes the Motion on the following grounds:

A. There was no claim relation to 204 Orangeburg listed in this bankruptcy case. Dckt. 38 at 1:25-28. Respondent did no assert claims in this bankruptcy case. *Id*. at 1:28-2:1. "The dissolution, occurring years later resolved marital claims that existed at that time." *Id.* at 2:1-2. Debtor as a result paid no support, which would not be dischargeable. *Id.* at 2:3-4.

B. The parties here made efforts to get back together before the Agreement was entered into in 2013. *Id*. at 2:6-10.

C. Respondent would have been entitled to lifetime support, but in stead opted for the relief provided through the Agreement, including the assignment of a debt for her separate property to Debtor. *Id*. at 2:22-27.

D. Respondent did not violate the discharge injunction because the debt here was not a community debt. *Id.* at 4:2-21. The separation did not create any obligation for Debtor to pay Harry Kullijuan; that liability did not incur until the Agreement was entered in 2013. *Id.* at 5:2-11.

DISCUSSION

Respondent's arguments are well-taken. Movant argues the debt incurred by Debtor in signing the Agreement was actually discharged in this bankruptcy case on April 26, 2010. However, the debt here was not one owed and discharged in the bankruptcy case.

The Agreement was entered into on January 12, 2013. Dckt. 33. That Agreement was entered into as part of a settlement agreement relating to the division of assets between Debtor and Respondent after dissolution of their marriage.

A reaffirmation agreement is a debt that is an agreement between a holder of a claim and a debtor, the consideration for which, in whole or in part, is based on a debt that is dischargeable. 11 U.S.C. § 524(c). The Agreement here was a new agreement entered into for new consideration. Both parties had rights to various assets after marital dissolution, and sought to resolve their disputes. The Agreement

provides for the clean division of assets as consideration for the deal; as a pat of this deal Debtor incurred the debt that was previously the sole and separate property of the Respondent. Being separate property of Respondent, the debt was not included in the discharge.

Also possibly at play in the Agreement was the addressing of domestic support obligations, which would not have been discharged regardless of whether those claims were actively asserted in this case. 11 U.S.C. § 523(a)(5). Though no comprehensive explanation has been provided regarding the moving parts of the Agreement, Respondent argues and the court agrees that entitlement to domestic support obligations was a consideration in the Agreement. Any domestic support obligations would be an asset the Respondent was entitled to; the Agreement instead assigns debt to the Movant as a way of paying tomorrow for money that otherwise would have been owed today.

The Motion is denied.

The court shall issue a minute order substantially in the following form holding that:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Sanctions for Violation of the Automatic Stay by Fred Charles Eichel, Debtor ("Movant"), having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is denied without prejudice**.**