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7 UNITED STATES BANKRUPTCY COURT  
8 EASTERN DISTRICT OF CALIFORNIA

9 In re: ) Case No. 06-23654-D-7  
10 DENNIS J. JACOPETTI, )  
11 )  
12 Debtor. )  
13 VAN DE POL ENTERPRISES, INC., ) Adv. Pro. No. 06-2392-D  
14 ) Docket Control No. PA-2  
15 Plaintiff, )  
16 v. )  
17 DENNIS J. JACOPETTI, )  
18 Defendant. )  
19 )  
20 )

21 This memorandum decision is not approved for publication and may  
22 not be cited except when relevant under the doctrine of law of  
the case or the rules of claim preclusion or issue preclusion.

23 MEMORANDUM DECISION

24 On July 13, 2007, Dennis J. Jacopetti ("Defendant") filed a  
25 Motion to Dismiss First and Second Causes of Action of Complaint  
26 to Determine Dischargeability of Debt, bearing Docket Control No.  
27 PA-2 (the "Motion"). For the reasons set forth below, the court  
28 will deny the Motion.

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1 had received notice of the bankruptcy, it would have filed a  
2 successful objection to the discharge. Thus, the Plaintiff  
3 asserts that the Defendant is judicially estopped from asserting  
4 the discharge as a defense, and that application of the discharge  
5 to its claim would amount to a denial of due process.

6 On December 13, 2006, the Defendant filed an answer to the  
7 complaint and asserted certain affirmative defenses, including  
8 that the complaint fails to state a cause of action upon which  
9 relief can be granted and that any obligation the Defendant may  
10 have owed to the Plaintiff was extinguished by the Defendant's  
11 bankruptcy discharge.

12 On July 13, 2007, the Defendant filed the Motion, together  
13 with a memorandum of points and authorities and a number of  
14 exhibits. On August 1, 2007, the Plaintiff filed opposition to  
15 the Motion, and on August 8, 2007, the Defendant filed a  
16 memorandum of points and authorities in reply. On August 15,  
17 2007, the Motion came before the court for hearing, counsel  
18 appeared and presented oral argument, and the matter was  
19 submitted.

## 20 II. CONTENTIONS OF THE PARTIES

21 The Defendant seeks an order dismissing the Complaint under  
22 Fed. R. Civ. P. 12(b)(6), incorporated in this proceeding by Fed.  
23 R. Bankr. P. 7012(b), for failure to state a claim upon which  
24 relief can be granted.

25 The Defendant's argument centers on the undisputed fact that  
26 his chapter 7 case was at all times a "no-asset case;" that is,  
27 that the notice by which creditors were advised of the case also  
28 advised them not to file a proof of claim unless they later

1 received a notice to do so, that the chapter 7 trustee filed a  
2 no-asset report after the conclusion of the meeting of creditors,  
3 and the case was thereafter closed as a no-asset case, without  
4 creditors ever being advised to file proofs of claim. It is also  
5 undisputed that the debt allegedly owed to the Plaintiff was a  
6 pre-petition debt. Thus, the argument goes, the debt was  
7 discharged by operation of law when the Defendant received his  
8 bankruptcy discharge on June 3, 1994. The Defendant cites  
9 Beezley v. California Land Title Co., 994 F.2d 1433 (9th Cir.  
10 1993).

11 The Defendant also relies on Lone Star Sec. & Video, Inc. v.  
12 Gurrola (In re Gurrola), 328 B.R. 158 (9th Cir. BAP 2005), in  
13 which the Bankruptcy Appellate Panel held that "the bankruptcy  
14 discharge cannot be circumvented on equitable grounds" (328 B.R.  
15 at 160), and thus, that the Plaintiff's judicial estoppel theory  
16 must fail.

17 The Plaintiff responds that Beezley and Gurrola are  
18 inapposite, and relies instead on Ford v. Ford (In re Ford), 159  
19 B.R. 590 (Bankr. D.Or. 1993), in which the court held that a debt  
20 otherwise covered by a discharge would be excepted from discharge  
21 if the debtor obtained it by violating the creditor's right to  
22 procedural due process.

23 The Defendant, in turn, replies that Ford is inapposite, and  
24 that the facts of this case bring it within the holding of White  
25 v. Nielsen (In re Nielsen), 383 F.3d 922 (9th Cir. 2004), with  
26 the result that the discharge applies to the Plaintiff's claim.

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III. ANALYSIS

This court has jurisdiction over the Motion pursuant to 28 U.S.C. §§ 1334 and 157(b)(1). The Motion is a core proceeding under 28 U.S.C. § 157(b)(2)(I).

A. Standards for Dismissal under Rule 12(b)(6)

The United States Supreme Court has recently adopted a "plausibility" standard for assessing Rule 12(b)(6) motions, analyzing the complaint before it in terms of whether it contained enough factual allegations, taken as true, to plausibly suggest that the plaintiff was entitled to relief. Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1965, 167 L. Ed. 2d 929, 945 (2007). "[W]e do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face." 127 S. Ct. at 1974.

The Court did not disturb its earlier pronouncement in Scheuer v. Rhodes, 416 U.S. 232, 94 S. Ct. 1683 (1974), that on a motion to dismiss, "[t]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." 416 U.S. at 236. Thus, "a well-pleaded complaint may proceed even if it appears 'that a recovery is very remote and unlikely.'" Bell Atl. Corp., 127 S. Ct. at 1965, quoting and characterizing Scheuer v. Rhodes, 416 U.S. at 236.

B. Effect of Defendant's Discharge on Plaintiff's Debt

The Defendant begins his analysis with In re Beezley,  
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1 supra,<sup>2</sup> for the proposition that, because his case was a no-asset  
2 case, and because the Plaintiff's debt does not fall within the  
3 terms of 11 U.S.C. § 523(a)(2), (4), or (6), the discharge per  
4 force applies to the Plaintiff's debt. The court concludes,  
5 instead, that this case turns on the requirement for procedural  
6 due process, and for this reason, the Defendant's reliance on  
7 Beezley is misplaced. Beezley deals only with application of the  
8 discharge to an unlisted debt in situations where due process is  
9 not at issue.

10 In Beezley, the Ninth Circuit Court of Appeals held that in  
11 a no-asset chapter 7 case, a debt of a type covered by 11 U.S.C.  
12 § 523(a)(3)(A) is discharged, even though the creditor was  
13 omitted from the schedules and did not receive notice of the  
14 bankruptcy filing, and thus, that reopening of the case to  
15 schedule the creditor would serve no purpose. 994 F.2d at 1434.

16 The Plaintiff distinguishes Beezley, arguing that here, the  
17 Defendant omitted the Plaintiff and other creditors from his  
18 schedules in a bad faith attempt to bring himself within the  
19 chapter 13 debt limits, and in doing so, in bad faith deprived  
20 the Plaintiff of his right to object to the Defendant's  
21 discharge. The court agrees that Beezley does not govern the  
22 outcome of this case.

23 Instead, the court concludes that this case fits squarely  
24 within the holding of the Ford decision. Although the conduct of  
25 the debtor in Ford was arguably more egregious than that of the  
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27 2. The Defendant also discusses at length In re Mendiola, 99  
28 B.R. 864 (Bankr. N.D. Ill. 1989), which is to the same effect as  
Beezley.

1 Defendant in the present case, if this court finds in further  
2 proceedings that the Defendant's conduct was sufficiently  
3 egregious to have warranted a denial of his discharge, the Ford  
4 holding will be on all fours.

5 In Ford, the court first rejected the creditor's argument  
6 that the debt was nondischargeable as an omitted debt under 11  
7 U.S.C. § 523(a)(3)(A). The court rightly observed that because  
8 the case was a no-asset case, under Beezley, the debt did not  
9 fall within the § 523(a)(3)(A) exception (159 B.R. at 591-92),  
10 and further, that "[t]here is no other statutory basis under §  
11 523 for excepting the debt from the discharge of § 727, . . . ."  
12 Id. at 592. The same conclusions apply in this case.

13 However, the court in Ford went on to conclude that  
14 application of the discharge to the debt in that case would  
15 violate the procedural due process rights of the creditor.

16  
17 The due process infirmity in the instant case is that  
18 the plaintiff had no notice that her debt was subject  
19 to discharge in bankruptcy, and therefore had no  
20 opportunity to challenge that discharge. [Citation.]  
21 Had the plaintiff received such timely notice, I am  
22 convinced that she would have succeeded in preventing  
23 the discharge of her debt or, if the discharge had  
24 already been entered, obtaining revocation of the  
25 discharge.

21  
22 The plaintiff's right to protect her debt from  
23 discharge was valuable. The debtor made no attempt to  
24 give plaintiff notice of the bankruptcy, and  
25 effectively prevented the plaintiff from coming into  
26 court to protect her rights. Declaring plaintiff's  
27 debt discharged under such circumstances violates the  
28 procedural due process guaranteed by the Fifth  
Amendment of the United States Constitution, which  
requires notice and an opportunity to be heard.  
[Citation.]

27 159 B.R. at 594.

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1 Similarly, in the present case, if the court finds that if  
2 the Plaintiff had been given timely notice of the bankruptcy  
3 filing, it would have been successful in objecting to the  
4 Defendant's discharge, the court must conclude that application  
5 of the discharge to the Plaintiff's debt would amount to a denial  
6 of the Plaintiff's right to due process.

7 The Defendant argues that the Plaintiff's theory in this  
8 case is identical to the one rejected in the Nielsen case. The  
9 court in Nielsen followed the Beezley decision, and held that  
10 because the case before it was a no-asset case, § 523(a)(3)(A)  
11 did not protect the creditor's claim from the discharge. 383  
12 F.3d at 927. The court also held that because the creditor could  
13 not establish that the discharge was obtained through fraud, she  
14 was not entitled to revoke it. "For Ms. White to prove that the  
15 Nielsens' discharge was 'obtained through' the fraud, she must at  
16 least show that, but for the fraud, the discharge would not have  
17 been granted. That she cannot do." 383 F.3d at 925 (emphasis  
18 added). Finally, the court rejected the creditor's due process  
19 argument for similar reasons. "Ms. White's due process claim  
20 fails because nothing was taken from her. If she has a  
21 dischargeable debt, its discharge was not brought about by the  
22 lack of notice. If she had a non-dischargeable debt, she still  
23 has it. The lack of notice had no effect on her." 383 F.3d at  
24 927.

25 The difference here is that the Defendant is alleged to have  
26 deliberately omitted several creditors, including the Plaintiff,  
27 in order to orchestrate his financial situation to fit within the  
28 chapter 13 debt limits. The court is not prepared to conclude



1 that this conduct could not possibly have prevented the Debtor's  
2 discharge. On the contrary, if the Defendant is found to have  
3 deliberately made a false oath that was material, and if such  
4 conduct rises to a level sufficient to warrant denial of the  
5 discharge, then the court must also conclude that the Plaintiff  
6 was denied his due process right to challenge the discharge.  
7 Nielsen itself suggests this conclusion.

8 Had [the creditor], in her proceeding to revoke the  
9 discharge, shown that, in truth, there were assets, or  
10 that there was some reason that the Nielsens should not  
have been discharged, this would be quite a different  
case.

11 In re Nielsen, 383 F.3d at 926 (emphasis added).

12 To dismiss the action on the present motion might well mean  
13 rewarding a debtor for manipulating the information on his  
14 schedules in an attempt to keep the most boisterous creditor from  
15 participating in the case until it was too late to deny or revoke  
16 the discharge. This result would be contrary to every principle  
17 of fairness, and certainly, contrary to the requirement of due  
18 process.

19 This decision should not be construed as holding that the  
20 Defendant's discharge may be revoked. The bar date for a  
21 complaint to revoke the discharge passed long ago (11 U.S.C. §  
22 727(e)), and it applies regardless of whether the discharge was  
23 procured through fraud. In re Ford, supra, 159 B.R. at 593.  
24 Nor should this decision be interpreted to mean that if a debtor  
25 manipulates his schedules so as to keep a particular creditor  
26 from participating in the case, that alone will be grounds for  
27 excepting that creditor's debt from the discharge. Nielsen holds  
28 to the contrary.

1        Rather, the court's holding here is that if the Plaintiff  
2 can prove that the Defendant's discharge would have been denied  
3 or revoked if the Plaintiff had had notice in time to object,  
4 then it will have succeeded where the creditor in Nielsen  
5 failed--it will have succeeded in demonstrating that the  
6 Defendant's failure to schedule it changed the outcome of the  
7 case. In that circumstance, the Plaintiff will have succeeded in  
8 showing that it was deprived of a valuable right--the right to  
9 protect its claim from discharge, and the requirement for due  
10 process will mandate that the discharge be determined not to  
11 apply to that claim.

12        Similar considerations apply in the court's analysis of the  
13 Plaintiff's claim of judicial estoppel. The court recognizes the  
14 holding of the Gurrola case, that estoppel theories may not be  
15 used to circumvent the discharge. However, the decision itself  
16 contains limiting language. "The gravamen of our analysis is  
17 that § 524(a) eliminates the revival of the discharged debt as a  
18 remedy for post-petition misconduct." Ibid. (emphasis added).  
19 The decision did not address the issue presented in this case;  
20 namely, whether the Defendant's pre-petition conduct can form the  
21 basis for a successful judicial estoppel argument. The same  
22 judge who authored the Gurrola decision had earlier suggested in  
23 dicta, in a case involving the effect of a discharge on an  
24 omitted creditor, "the possibility of imposing judicial estoppel  
25 against a party who plays 'fast and loose' with the court." See  
26 Paine v. Griffin (In re Paine), 283 B.R. 33, 40 (9th Cir. BAP  
27 2002).

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1 In Gurrola, the debtor fairly obtained his discharge. In  
2 the instant case, it is asserted that the Defendant procured his  
3 discharge through fraud. The fraud was not discovered within a  
4 year of entry of the discharge, and thus, the discharge was and  
5 is insulated from being revoked. The court is not prepared to  
6 expand the Gurrola holding to these facts. When a discharge is  
7 fraudulently procured, it does not receive the protection  
8 afforded by Gurrola, and consideration of equitable estoppel  
9 principles is not precluded.

10 In short, the court is not prepared to hold that, under the  
11 facts of this case, judicial estoppel cannot possibly apply to  
12 prevent the application of the Defendant's discharge to the  
13 Plaintiff's debt.

#### 14 IV. CONCLUSION

15 In any event, however, the court concludes that, regardless  
16 of the applicability of judicial estoppel, if the court is  
17 persuaded in further proceedings that the discharge would have  
18 been denied had the Plaintiff had timely notice, it will also  
19 conclude that application of the discharge to the Plaintiff's  
20 debt would offend the requirement of procedural due process.

21 For the reasons set forth above, the court will issue an  
22 order denying the Motion.

23  
24 Dated: September 4, 2007

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25 /s/ ROBERT S. BARDWIL  
26 United States Bankruptcy Judge  
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