UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

April 7, 2022 at 11:00 a.m.

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1. **14-24616-E-13** **NICOLE GOLDEN/STEPHEN** **CONTINUED MOTION FOR SUMMARY**
21-2012 **John Downing** **ALTER JUDGMENT**
GOLDEN ET AL V. UNITED STATES **12-3-21 [17]**
OF AMERICA (INTERNAL REVENUE

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—Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on all parties appearing in this action on December 3, 2021. By the court's calculation, 48 days' notice was provided. 42 days' notice is required. Local Bankruptcy Rule 7056-1(a).

The Motion for Summary Judgment has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). 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). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006).

The Motion for Summary Judgment is granted, and judgment for Plaintiff-Debtor shall be entered determining that the tax obligation remaining for 2008 income taxes has been discharged.

Nicole Golden and Stephen Alter ("Plaintiff-Debtor") filed the instant adversary proceeding on February 8, 2021, against the Internal Revenue Service (" Defendant-IRS").

Before the court is Defendant-IRS' Motion for Summary Judgment requesting a determination that Plaintiff-Debtor's claim is nondischargeable pursuant to 11 U.S.C. §523(a). Dckt. 17. Fn.1.

FN. 1. For its Motion for Summary Judgment, Defendant-IRS has not designated a docket control number for this motion and all related pleadings as required by Local Bankruptcy Rule 9014-1(c).

The court begins with a review of the Complaint and the Answer.

REVIEW OF COMPLAINT AND ANSWER

The Complaint begins with a statement that the Adversary Proceeding is brought as provided in Federal Rule of Bankruptcy Procedure 7001(2), requiring an adversary proceeding to determine the extent, validity, and priority of a lien or interest in property (with stated exceptions not applicable here), and 7001(6), requiring an adversary proceeding to determine the dischargeability of a debt. Complaint, ¶ 1; Dckt. 1.

The Complaint then lays out the following short and plain statement of the claim showing that Plaintiff-Debtor is entitled to the relief requested (*Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)):

A. On or about April 30, 2014, Plaintiff-Debtor filed a voluntary petition under Chapter 13 of the Bankruptcy Code and was assigned Case Number 14-24616. Complaint, ¶ 2; Dckt. 1.

B. Defendant-IRS filed Proof of Claim 2-1 in Plaintiff-Debtor's bankruptcy case which was an asserted tax obligation in the amount of $88,515.94, which was stated to be comprised of a:

   1. $7,979.51 secured claim, $49,871.18 priority unsecured claim, and $30,665.25 general unsecured claim. *Id*., ¶3.

C. For the tax year 2008 tax obligation included in Proof of Claim 2-1, it asserts the following is owed based on a July 8, 2011 assessment:

   1. $21,572 was owed for back taxes, and
   2. $4,085.50 was owed in interest. *Id*.

D. Plaintiff-Debtor's Chapter 13 plan was confirmed on December 29, 2014. *Id*., ¶ 4.

E. Plaintiff-Debtor was granted a discharge in the Chapter 13 case on February 18, 2020. *Id*.

F. Though the Chapter 13 Plan Plaintiff-Debtor paid off all secured and priority taxes identified in Claim 2-1. *Id*.

G. On June 29, 2020, Plaintiff-Debtor received from Defendant-IRS a notice that Defendant-IRS asserted a tax lien for the 2008 asserted tax obligation. *Id*. ¶ 6.

H. With respect to the asserted 2008 asserted tax obligation, Plaintiff-Debtor states the following time line, *Id*. ¶ 7:

1.	4/15/2009	Request for extension of time filed seeking an extension date of 10/15/2009. (The Complaint contains a clerical error identifying the year of the extension as being 2010.)
2.	8/16/2010	Substitute Return filed by Defendant-IRS.
3.	3/10/2011	2008 Tax Return filed (as the undisputed facts show, this is the date signed by Plaintiff-Debtor, not necessarily filed) filed by Plaintiff-Debtor..
4.	3/14/2011	IRS Letter to Alter re: 2008 Tax Deficiency of $276,506.
5.	7/18/2011	Tax Assessed of $21,572.

I. Plaintiff-Debtor states that Defendant-IRS asserts that the 2008 Tax obligation is not dischargeable based on 11 U.S.C. § 1328(a) and 11 U.S.C. § 523(a). Plaintiff-Debtor cites to 11 U.S.C. § 1328(a)(1)(B)(ii). *Id*. ¶ 8.

J. Plaintiff-Debtor asserts that the 2008 Tax Return filed on March 10, 2011 was more than two years prior to the April 30, 2014 filing of the Chapter 13 Bankruptcy Case, and therefore the nondischargeability provisions of 11 U.S.C. § 523(a)(1)(B)(ii) do not apply. *Id*. ¶ 9.

The relief requested in the prayer of the Complaint is stated as:

(1) A Judgment that Plaintiff-Debtor does not owe any taxes for the year 2008, and

(2) Any lien asserted with respect to a tax obligation for the year 2008 is void.

Id., p. 3:13-14.

Review of the Answer

In response, Defendant-IRS filed its answer (Dckt. 7) on March 15, 2021, admitting and denying specific allegations in the Complaint. These admissions and denials include that the Defendant-

IRS is without sufficient knowledge to admit or deny some of the factual allegations.

With respect to the 2008 taxes, the admissions and denials include the following:

1. Defendant-IRS admits including in Proof of Claim 2-1 $21,572 for 2008 taxes and $4,083.50 for interest thereon. Answer, p. 2:9-14.

2. Defendant-IRS admits that Plaintiff-Debtor received a discharge on February 18, 2020, but -

    a. Defendant-IRS lacks knowledge of whether it was paid for all of its secured and priority taxes stated in Proof of Claim 2-1. *Id*., p. 2:24.

3.

4. Defendant-IRS lacks sufficient knowledge to admit or deny that it sent a notice that Defendant-IRS (through the IRS) asserted a tax lien. *Id*., p. 3:1-3.

5. Defendant-IRS denies that Plaintiff-Debtor was granted an extension to October 15, 2010, and that the 2008 Tax Return was filed on March 10, 2011. *Id*., p. 3:14-15. Defendant-IRS admits:

    a. The Request for Extension was filed on April 15, 2009;

    b. The Substitute Return was prepare don August 16, 2010; and

    c. The $21,572 was assessed on July 18, 2011. *Id*., p. 3:15-18.

6. Defendant-IRS asserts that the 2008 tax obligation is nondischargeable based on the provisions of 11 U.S.C. § 523 (it appears there is a clerical error in the Complaint that references 11 U.S.C. § 1328). *Id*., p. 4:5-7.

7. Defendant-IRS asserts that the 2008 Tax Return was:

    a. Filed "before two years before the date of the filing of the [bankruptcy] petition" in the Chapter 13 case, and therefore are nondischargeable.

REVIEW OF THE DEFENDANT-IRS' MOTION FOR SUMMARY JUDGMENT

The grounds stated with particularity, as required by Federal Rule of Civil Procedure 7(b), which is incorporated into Federal Rule of Bankruptcy Procedure 7007, consist of:

A. Defendant-IRS moves for summary judgment. MSJ, p. 1:23-25; Dckt. 17.

B. Defendant-IRS states the legal conclusion that it is entitled to a judgment as a matter of law that the 2008 income tax assessment is "exempt" from discharge under 11 U.S.C. § 523(a)(1)(B)(I). *Id*., p. 1:26-27, 2:1.

11 U.S.C. § 523(a)(1)(B)(I) provides for a tax obligation to be nondischargeable in which a return, or equivalent report or notice, if required, was not filed or given.

C. Defendant-IRS asserts that since the 2008 taxes were assessed prior to a return being filed, and therefore it is exempt from discharge because it is not a debt relating to a return filed, but an assessed tax obligation. *Id*., p. 2:1-3.

Response of Plaintiff-Debtor

No opposition to Defendant-IRS' Motion for Summary Judgment has been filed by Plaintiff-Debtor. *See* L.B.R. 7056-1(b). However, a Counter Motion for Summary Judgement has been filed by Plaintiff-Debtor, using a separate docket control number (DCN: JDG-10) as required by Local Bankruptcy Rule 9014-1(c)(4).

The court provides for countermotions in Local Bankruptcy Rule 9014-1(I), which provides:

> (I) Related Motions and Countermotions. Any countermotion or other motion related to the general subject matter of the original motion set for hearing pursuant to this Local Rule may be filed and served no later than the time opposition to the original motion is required to be filed. In the event a counter or related motion is filed by the responding party, the judge may continue the hearing on the original and all related motions so as to give the responding and moving parties reasonable opportunity to serve and file oppositions and replies to all pending motions. No written opposition need be filed to any related matter unless the matter is continued by the Court. Nothing herein shall be construed to require the filing of a counter or related motion.

Under this rule, if there is a countermotion desired to be filed, which it is a separate motion, it is to be set for hearing at the same time at the original motion so that the parties and court can address them in tandem.

For the Motion for Summary Judgment and the Countermotion for Summary Judgment, it appears that they are arguing the different sides of the same coin, each motion effectively serving as an opposition to the other.

REVIEW OF THE MOTION FOR PLAINTIFF-DEBTOR'S COUNTER MOTION FOR SUMMARY JUDGMENT

In the Motion for Summary Judgment filed by Plaintiff-Debtor, the grounds stated with particularity, as required by Federal Rule of Civil Procedure 7(b) and Federal Rule of Bankruptcy Procedure 7007, are:

A. Debtors contend that the amounts alleged to be owed for 2008, which was listed by the IRS as general unsecured, were discharged as a result of their completion of their Chapter 13 Plan. Plaintiff-Debtor Motion, p. 1:24-26; Dckt. 28.

B. The Motion is and shall be based on this Motion, and the Notice of Motion,

> Memorandum of Points & Authorities, Separate Statement of Undisputed, Declaration of Stephen Michael Alter, each concurrently filed in support of this Motion, and such other matters as may be presented at or before the hearing of this matter. *Id*., p. 2:3-6.

Thus, in substance, there are no grounds stated in the Countermotion for summary judgment. Rather, the court is instructed to read the Motion, read the Notice of Motion, read the Memorandum of Points and Authorities, read the Separate Statement of Undisputed Facts, read the Declaration of Stephen Alter, and read whatever else Plaintiff-Debtor chooses to file up to the date of the hearing (though such is not permitted under the Federal Rules of Civil Procedure, Federal Rules of Bankruptcy Procedure, and Local Bankruptcy Rules) and then assemble whatever grounds the court thinks that are best for Plaintiff-Debtor.

Though the court generally denies such work assignments from parties, in light of the Parties having reached an agreed statement of undisputed facts and this appearing to be substantially a legal issue, for this Countermotion, and this Countermotion only, the court will wade through the various pleadings and state what it believes the grounds to be.

Grounds From the Memorandum of Points and Authorities

In the Points and Authorities filed by Plaintiff-Debtor there is a section titled "Relevant Facts" which appears to state the factual grounds (not legal authorities and points/arguments) that are suppose to be stated with particularity in the Motion. Using this portion of the Points and Authorities, the grounds stated by Plaintiff-Debtor are:

> 1. In 2008, Plaintiffs began experiencing financial difficulties. A rental property they owned was foreclosed on. The financial difficulties adversely affected their jointly owned and operated business, All Seasons Concierge. The financial difficulties adversely affected their marriage.
>
> 2. On April 15, 2009, Plaintiffs filed a Request for Extension of Time, extending the date for filing the 2008 Tax Return to October 15, 2009.
>
> 3. In February 2010, Plaintiffs, whose daughters at the time were 4 and 6, permanently separated. Nicole Golden alone began operating the Business as a sole proprietorship. It took time for Ms. Golden to take over the tax responsibilities, which had previously been Mr. Alter's responsibility. This was another extremely difficult year for Plaintiffs, personally and financially.
>
> 4. On March 8, 2011, Plaintiffs filed their 2009 Tax Return.
>
> 5. On March 10, 2011, Plaintiffs tax preparer Jean Barnett completed Plaintiffs' 2008 Individual Income Tax Return (the "Return"), showing a total tax of $23,377 and a Balance Due of $23,040. Barnett and Plaintiffs signed the Return on March 10, 2011.
>
> 6. On March 14, 2011, the IRS sent a letter to Plaintiffs asserting that there was a tax deficiency of $276,506, which was based primarily on Self-Employment

Income of $760,199.00.

7. Although the 2008 Return had been completed prior to receiving the March 14, 2011 Letter from the IRS, they held off on filing the return in an effort to put together the money to pay off the taxes and to understand the basis for the IRS position.

8. On August 10, 2011, the IRS received the 2008 Return. This return showed Gross Income of $760,200 for Plaintiffs' vacation rental business, but a Net Profit of $132,123 after accounting for expenses, including $460,426 to housekeeping contractors.

9. The 2008 return: (1) was a return; 2) was executed under penalty of perjury; 3) contained sufficient data to allow calculation of tax; and 4) represents an honest and reasonable attempt to satisfy the requirements of the tax law.

10. For nineteen (19) months, Plaintiffs attempted to get the IRS to correct the balance owed on 2008.

11. On February 11, 2013, the IRS confirmed that the IRS has made mistakes on the 2008 Return and reduced the balance from $417,000 to $23,040.

12. Debtors attempted to work with the IRS on the back taxes that remained owed.

13. On or about April 30, 2014, Debtors filed a voluntary petition under Chapter 13 of the Bankruptcy Code in the United States Bankruptcy Court, Eastern District of California and were assigned Case Number 14-24616.

14. On or about June 11, 2014, the Internal Revenue Service filed Claim 2-1 (the "IRS Claim") for a total of $88,515.94, of which $7,979.51 was identified as secured and $49,871.18 was listed as priority and the balance of $30,665.25 was listed as general unsecured.

15. The IRS Claim listed the 2008 taxes as general unsecured, showing an assessment date of July 28, 2011.

16. On July 18, 2014, Debtors filed a First Amended Chapter 13 Plan (the "Plan"), which was confirmed on December 29, 2014.

17. The IRS did not object to the Plan, nor did the IRS file an objection to discharge before the deadline of August 11, 2014.

18. Debtors completed their plan, paying a total of $51,093.03 to the IRS.

19. On February 18, 2020, Debtors obtained their discharge.

20. On June 29, 2020, Debtors received notice that the IRS had a lien based on taxes claimed to be owed for 2008.

21. The IRS did not object to the 1st Amended Plan or file an objection to the discharge

Plaintiff-Debtor Points and Authorities, p. 2-4; Dckt. 33.

APPLICABLE LAW FOR A MOTION FOR SUMMARY JUDGMENT

In an adversary proceeding, summary judgment is proper when "[t]he movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a), incorporated by Fed. R. Bankr. P. 7056. The key inquiry in a motion for summary judgment is whether a genuine issue of material fact remains for trial. Fed. R. Civ. P. 56(c), incorporated by Fed. R. Bankr. P. 7056; *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248–50 (1986); 11 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 56.11[1][b] (3d ed. 2000). "[A dispute] is 'genuine' only if there is a sufficient evidentiary basis on which a reasonable fact finder could find for the nonmoving party, and a dispute [over a fact] is 'material' only if it could affect the outcome of the suit under the governing law." *Barboza v. New Form, Inc. (In re Barboza)*, 545 F.3d 702, 707 (9th Cir. 2008), citing *Anderson v. Liberty Lobby, Inc*., 477 U.S. at 248 (1986).

The party moving for summary judgment bears the burden of showing the absence of a genuine dispute of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). To support the assertion that a fact cannot be genuinely disputed, the moving party must "cit[e] to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations ..., admissions, interrogatory answers, or other materials." Fed. R. Civ. P. 56(c)(1)(A), incorporated by Fed. R. Bankr. P. 7056.

In response to a sufficiently supported motion for summary judgment, the burden shifts to the nonmoving party to set forth specific facts showing that there is a genuine dispute for trial. *Barboza*, 545 F.3d at 707, citing *Henderson v. City of Simi Valley*, 305 F.3d 1052, 1055–56 (9th Cir. 2002). The nonmoving party cannot rely on allegations or denials in the pleadings but must produce specific evidence, through affidavits or admissible discovery materials, to show that a dispute exists. *Id.* (citing *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1409 (9th Cir. 1991)). The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

In ruling on a summary judgment motion, the court must view all of the evidence in the light most favorable to the nonmoving party. *Barboza*, 545 F.3d at 707 (citing *County. of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1154 (9th Cir. 2001)). The court "generally cannot grant summary judgment based on its assessment of the credibility of the evidence presented." *Agosto v. INS*, 436 U.S. 748, 756 (1978). "[A]t the summary judgment stage [,] the judge's function is not himself to weigh the evidence and determine the truth of the matter[,] but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249.

DENIAL OF DISCHARGE LAW

For the Crossmotions for Summary Judgment, the Parties cite to two subparagraphs of 11 U.S.C. § 523(a)(1)(B), which provides (emphasis added):

(a) A discharge under section 727, 1141, 1192, 1228(a), 1228(b), or 1328(b) of

this title does not discharge an individual debtor from any debt—
. . .

(B) with respect to which a **return**, or equivalent report or notice, if required—

(I) **was not filed or given**; or

(ii) was **filed** [August 10, 2011, postmarked August 8, 2011] **or given after the date** on which such return, report, or notice **was last due, under applicable law or under any extension** [October 15, 2009], and **after two years before the date of the filing of the petition** [April 30, 2014]; or . . . .

Prior to 2005, Congress did not provide a statutory definition of "return," so "the Tax Court developed a widely-accepted interpretation of that term" commonly known as the *Beard* test. *United States v. Hatton* (*In re Hatton*), 220 F.3d 1057, 1070 (9th Cir. 2000) (citing *Beard v. Comm'r*, 82 T.C. 766, 767 (1984)). In order for a document to qualify as a return under this interpretation, the document must:

(1) purport to be a return;

(2) be executed under penalty of perjury;

(3) contain sufficient data to allow calculation of tax; and

(4) represent an honest and reasonable attempt to satisfy the requirements of the tax law.

(*Id.* at 1060-61.)

Though Congress amended § 523 to include a definition of "return" ("[f]or purposes of this subsection, the term 'return' means a return that satisfies the requirements of applicable nonbankruptcy law (including applicable filing requirements)," 11 U.S.C. § 523(a)), the Ninth Circuit has determined that the four-factor test in *Hatton* continues to apply with the new definition to determine what constitutes a tax return. *Smith v. United States IRS* (*In re Smith*), 828 F.3d 1094, 1096 (9th Cir. 2016).

DISCUSSION

In the present case, there are no issues of material facts in dispute. Plaintiff-Debtor filed a Response (Dckt. 48) indicating they do not dispute Defendant-IRS' Statement of Undisputed Facts (Dckt. 19). The Parties and their counsel have each provided detailed statements of material facts not in dispute, and confirmed that they do not dispute, with one exception, the facts asserted not to be in dispute by the other. The following chart lists the facts asserted, and not disputed, to not be in *bona fide* dispute:

Table of Undisputed Facts

Plaintiff-Debtor	Defendant-IRS
Plaintiff-Debtor experienced financial difficulties which adversely affected their business and marriage. Dckt. 29. Defendant-IRS does not specifically dispute this fact in its response. Dckt. 41.	
	Income tax returns for tax year 2008 were due on April 15, 2009. Dckt. 19. Plaintiff-Debtor does not specifically dispute this fact in its response. Dckt. 48.
On April 15, 2009, Plaintiff-Debtor filed a Request for Extension of Time and extended the date for filing their 2008 Tax Return to October 15, 2009. Dckt. 29.	Plaintiff-Debtor sought and received a 6-month extension of their 2008 Tax Return deadline to October 15, 2009. Dckt. 19.
Plaintiff-Debtor permanently separated in 2010. Dckt. 29. Defendant-IRS does not specifically dispute this fact in its response. Dckt. 41.	
	On April 12, 2010, Defendant-IRS sent an inquiry regarding Plaintiff-Debtor's failure to file their 2008 Return. Dckt. 19. Plaintiff-Debtor does not specifically dispute this fact in its response. Dckt. 48.
	In August 2010, Plaintiff-Debtor's accounts were referred for an income tax examination. Dckt. 19. Plaintiff-Debtor does not specifically dispute this fact in its response. Dckt. 48.
	Defendant-IRS prepared a substitute tax return for the Plaintiff-Debtor. Dckt. 19. Plaintiff-Debtor does not specifically dispute this fact in its response. Dckt. 48.
On March 8, 2011, Plaintiff-Debtor filed their 2009 Tax Return. Dckt. 29. Defendant-IRS does not specifically dispute this fact in its response. Dckt. 41.	
At the end of 2010, Plaintiff-Debtor began working with tax preparer Jean Barnett to prepare their back taxes. Dckt. 29. On March 10, 2011, Barnett completed Plaintiff-Debtor's 2008 Tax Return. *Id.* This return showed a total tax of $23,377.00 and a balance due of $23,040.00. *Id.* Plaintiff-Debtor signed the Return on the same day. *Id.*	Plaintiff-Debtor retained Jean Barnett to prepare their 2008 Tax Return. Dckt. 19. The Return was signed by Plaintiff-Debtor and Barnett on the same day. *Id.*
On March 14, 2011, Plaintiff-Debtor received a letter from Defendant-IRS asserting a tax deficiency of $276,506.00 which was based primarily on self-employment income of $760,199.00. Dckt. 29.	On March 14, 2011, Defendant-IRS issued a Notice of Deficiency to Plaintiff-Debtor, which identified a deficiency of $276,506.00 and multiple statutory additions. Dckt. 19.

	The Notice informed Plaintiff-Debtor that if they wanted to contest Defendant-IRS' determination before making any payment, they had 90 days to file a petition in the U.S. Tax Court. Dckt. 19. Plaintiff-Debtor does not specifically dispute this fact in its response. Dckt. 48.
	Plaintiff-Debtor did not file any petition in the Tax Court. Dckt. 19. Plaintiff-Debtor does not specifically dispute this fact in its response. Dckt. 48.
Plaintiff-Debtor mailed their 2008 Return to Defendant-IRS, which Defendant-IRS received on August 10, 2011. Dckt. 29. Plaintiff-Debtor's Return showed a gross income of $760,200 from Plaintiff-Debtor's business, but a net profit of $132,123 after accounting for expenses. *Id.*	Defendant-IRS received Plaintiff-Debtor's 2008 Return on August 10, 2011. Dckt. 19. Defendant-IRS notes that the 2008 return was postmarked on August 8, 2011. *Id.*
	Defendant-IRS noted Plaintiff-Debtor's mailed return as a "Duplicate" and "Amended" since Defendant-IRS already prepared a substitute return for Plaintiff-Debtor. Dckt. 19. Plaintiff-Debtor does not specifically dispute this fact in its response. Dckt. 48.
For nineteen (19) months, Plaintiff-Debtor attempted to get Defendant-IRS to correct the balance owed on the 2008 Return. Dckt. 29. Defendant-IRS does not specifically dispute this fact in its response. Dckt. 41.	
On February 11, 2013, Defendant-IRS confirmed they made mistakes on Plaintiff-Debtor's 2008 Return and reduced the balance from $417,000.00 to $23,040.00. Dckt. 29.	At various points in 2012 and 2013, large portions of the deficiencies identifies in Defendant-IRS' Notice were removed from Plaintiff-Debtor's accounts. Dckt. 19.
Plaintiff-Debtor attempted to "work with" Defendant-IRS regarding the back taxes owed. Dckt. 29. Defendant-IRS does not specifically dispute this fact in its response. Dckt. 41.	
On April 30, 2014, Plaintiff-Debtor filed a voluntary petition under Chapter 13 of the Bankruptcy Code in this court. Dckt. 29.	On April 30, 2014, Plaintiff-Debtor filed a voluntary Chapter 13 petition in this court. Dckt. 19.
On June 11, 2014, the IRS filed Claim 2-1 for a total of $88,515.94, of which $7,979.51 was identified as secured, $49,871.18 was identified as priority, and $30,665.25 was identified as general unsecured. Dckt. 29.	On June 11, 2014, the IRS filed Claim 2-1 for a total of $88,515.94, of which $7,979.51 was identified as secured, $49,871.18 was identified as priority, and $30,665.25 was identified as general unsecured. Dckt. 19.
Claim 2-1 listed the 2008 taxes as general unsecured and showed an assessment date of July 8, 2011. Dckt. 29.	Claim 2-1 listed $21,572 for tax year 2008 based on a July 8, 2011 assessment. Dckt. 19. Claim 2-1 included $4,083.50 in interest on the 2008 outstanding balance. *Id.*

On July 18, 2014, Plaintiff-Debtor filed a First Amended Chapter 13 Plan ("Plan"). Dckt. 29.	On July 18, 2014, Plaintiff-Debtor filed a First Amended Chapter 13 Plan ("Plan"). Dckt. 19.
On December 29, 2014, Plaintiff-Debtor's Plan was confirmed. Dckt. 29.	On December 29, 2014, Plaintiff-Debtor's Plan was confirmed. Dckt. 19.
Defendant-IRS did not object to Plaintiff-Debtor's Plan and did not file an objection to discharge before the deadline of August 11, 2014. Dckt. 29. Defendant-IRS does not specifically dispute this fact in its response. Dckt. 41.	
Plaintiff-Debtor completed their Plan, paying a total of $51,093.03 to Defendant-IRS. Dckt. 29.	Plaintiff-Debtor paid of all secured and priority taxes identified in Claim 2-1. Dckt. 19.
On February 18, 2020, Plaintiff-Debtor obtained their discharge. Dckt. 29.	On February 18, 2020, Plaintiff-Debtor obtained their discharge. Dckt. 19.
On June 29, 2020, Plaintiff-Debtor received notice that Defendant-IRS had a lien based on owed taxes from 2008. Dckt. 29.	On June 29, 2020, Plaintiff-Debtor received notice that Defendant-IRS recorded notice of a federal tax lien based on the 2008 tax year. Dckt. 19.
	On February 8, 2021, Plaintiff-Debtor initiated the present adversary proceeding. Dckt. 19. Plaintiff-Debtor does not specifically dispute this fact in its response. Dckt. 48.
	On April 15, 2020, Defendant-IRS transferred a credit of $3,628.00 from at least one of Plaintiff-Debtor's 2019 accounts to the 2008 account. Dckt. 19. Plaintiff-Debtor does not specifically dispute this fact in its response. Dckt. 48.

The only issue that appears to be in contention between the parties is whether Plaintiff-Debtor's delay in filing their 2008 Return constitutes "an honest and reasonable attempt to satisfy the requirements of the tax law." *See* Memorandum of Points and Authorities at 3, Dckt. 26; *United States v. Hatton* (*In re Hatton*), 220 F.3d at 1060-61. Accordingly, there are no material facts in dispute, rather, a legal question as to whether Plaintiff-Debtor's actions constituted an honest and reasonable attempt.

Defendant-IRS notes that Plaintiff-Debtor's conduct in the present case is analogous to the taxpayer's conduct in prior controlling cases *United States v. Hatton* (*In re Hatton*), 220 F.3d 1057 (9th Cir. 2000); *Smith v. United States IRS* (*In re Smith*), 828 F.3d 1094 (9th Cir. 2016); and *United States v. Martin* (*In re Martin*), Bankr. No. 11-62436, A.P. No. 12-1131, Doc. 106 (Jan. 17, 2017).

In *Hatton*, the taxpayer, Hatton, failed to file a federal tax return on his own initiative and never attempted to cure this failure until after the Internal Revenue Service threatened to levy his wages and bank account and seize his personal property. *United States v. Hatton* (*In re Hatton*), 220 F.3d, 220 F.3d 1057, 1061 (9th Cir. 2000). Additionally, it took months of negotiations between the Internal Revenue Service and Hatton to agree on a settlement for an installment agreement. *Id.* The Ninth

Circuit found that Hatton's "belated acceptance of responsibility" does not constitute an "honest and reasonable attempt" to comply with tax law. *Id.* Instead, Hatton waited until the Internal Revenue Service left him with no other choice. The Ninth Circuit thus concluded that Hatton's tax liability for the year at issue was nondischargeable due to a lack of an honest and reasonable attempt to satisfy the *Beard* test. *Id.*

In *Smith*, another Ninth Circuit case, the taxpayer, Smith, failed to make a tax filing until seven years after his return was due and three years after the Internal Revenue Service calculated the deficiency and issued an assessment. *Smith v. United States IRS* (*In re Smith*), 828 F.3d 1094, 1097 (9th Cir. 2016), stating:

> Here, Smith failed to make a tax filing until seven years after his return was due and three years after the IRS went to the trouble of calculating a deficiency and issuing an assessment. Under these circumstances, Smith's "belated acceptance of responsibility" was not a reasonable attempt to comply with the tax code. Many of our sister circuits have held that post-assessment tax filings are not "honest and reasonable" attempts to comply and are therefore not "returns" at all. *See In re Justice*, 817 F.3d at 746; *In re Payne*, 431 F.3d 1055, 1057-60 (7th Cir. 2005); *In re Moroney*, 352 F.3d 902, 907 (4th Cir. 2003); *In re Hindenlang*, 164 F.3d 1029, 1034-35 (6th Cir. 1999). But *see In re Colsen*, 446 F.3d 836, 840-41 (8th Cir. 2006). We need not decide the close question of whether any post-assessment filing could be "honest and reasonable" because these are not close facts; the IRS communicated with Smith for years before assessing a deficiency, and Smith waited several more years before responding to the IRS or reporting his 2001 financial information.

In *Smith*, the debtor not only waited seven years after the return was first due to file a return, and then three years after the IRS issued the substitute return, but then eighteen months after filing the substitute return filed bankruptcy. *IRS v. Smith (In re Smith)*, 527 B.R. 14, 15 (N.D. Cal 2014), the District Court decision that was affirmed by the Ninth Circuit.

In reviewing the above cases cited by the Ninth Circuit, they truly present some "interesting" circumstances in which the debtor asserted an honest and reasonable attempt to satisfy the debtor's obligations. These include the tax return being sent to Arlington National Cemetery rather than the IRS (*Payne*), multiple tax years for returns not filed and filing of returns multiple years after the substitute return was filed (*Justice*, *Moroney*), and the conclusion that once a substitute return is filed no subsequently filed 1040 tax return can ever quality as a "tax return" for 11 U.S.C. § 523(a)(1)(B) (*Hindenlang*).

In a recent Decision, the Ninth Circuit Court of Appeals applied the *Beard* to a California State tax obligation, concluding that California applies an almost identical standard for what constitutes a return. *Sienega v. Cal. Franchise Tax Bd. (In re Sienega)*, 18 F.4th 1164 (9th Cir. 2021). In concluding that the *Beard* factors were not satisfied, the facts determined by the Circuit Court included:

> The faxes [which that debtor sent the California Franchise Tax Board providing notice of a adjustment to his federal tax return] fail the *Beard* and *Tonsberg* tests. First, Sienega did not file state tax returns that complied with California law. RTC section 18501(a) provides that "[e]very individual taxable under Part 10

(commencing with Section 17001) shall make a return to the Franchise Tax Board, stating [*1169] specifically the items of the individual's gross income from all sources and the deductions and credits allowable, if the individual" meets certain criteria for the tax year. Cal. Rev. & Tax. Code § 18501(a). RTC section 18621 sets forth certain requirements of form and content, namely that:

> any return, declaration, statement, or other document required to be made under any provision of Part 10 . . . shall contain, or be verified by, a written declaration that it is made under the penalties of perjury. Those returns, and all other returns, declarations, statements, or other documents or copies thereof required, shall be in any form as the Franchise Tax Board may from time to time prescribe . . . and shall be filed with the Franchise Tax Board. The Franchise Tax Board shall prepare blank forms for the returns, declarations, statements, or other documents and shall distribute them throughout the state and furnish them upon application. Failure to receive or secure the form does not relieve any taxpayer from making any return, declaration, statement, or other document required.

Cal. Rev. & Tax. Code § 18621. Sienega did not file any document that complied with these requirements, and the faxes do not "purport to be a return." Indeed, in its response, the FTB communicated to Sienega that he had not filed returns. Nor did the FTB indicate that it considered the faxes to be returns.

Second, the faxes were not submitted under penalty of perjury. In fact, Sienega did not sign them at all; they were transmitted by his lawyer. Even though Sienega may have been subject to criminal prosecution if he provided false information, that is not the same as signing a document under penalty of perjury.

Third, although the faxes communicated adjustments to federal taxes, and the FTB issued preliminary assessments, the faxes did not contain enough data to allow complete computation of state tax.

Fourth, nothing in the faxes indicates an "honest and reasonable attempt to satisfy the requirements of tax law." The faxes simply communicate information about the outcome of a federal proceeding.

In short, one of these things is not like the other. Thus, the BAP correctly held that the faxes did not constitute state tax returns under § 523(a)'s hanging paragraph. The BAP's conclusion is in accord with our interpretation of the pre-BAPCPA version of § 523(a)(1)(B). *See In re Jackson*, 184 F.3d 1046, 1051 (9th Cir. 1999) (holding, before BAPCPA added the "equivalent report or notice" clause, that a "report" submitted to the FTB under RTC section 18622(a)'s predecessor statute did not qualify as a "return" under § 523(a)(1)(B)), superseded by statute, BAPCPA of 2005, Pub. L. No. 109-8 § 714, 119 Stat. 23, 128-29, as recognized in *In re Berkovich*, 15 F.4th 997, 998 (9th Cir. 2021).

Id., 1168-1169. As discussed herein, the Plaintiff-Debtor's conduct is one hundred eighty degrees opposite of the debtor in *Sienega*.

In *Martin*, the Ninth Circuit Bankruptcy Appeal Panel noted that there is binding Ninth Circuit Authority predating the 2005 amendments to determine when a taxpayer should be treated as a return for nondischargeability purposes. *United States v. Martin* (*In re Martin*), 542 B.R. 479, 480 (B.A.P. 9th Cir. 2015). *Martin* establishes that *Hatton* is the appropriate legal standard to determine whether there is an honest and reasonable effort to comply with the applicable tax laws. Additionally, *Martin* uses *Hatton* and *Nunez* to confirm that post-assessment tax return is not the functional equivalent of "no tax return at all." The Ninth Circuit Bankruptcy Appeal Panel vacated and remanded to apply the proper legal standard.

Defendant-IRS asks the court to review the remand of *Martin*. This court held a short trial of the case. Case No. 12-01131; Dckt. 106. A judgment was issued in favor of the United States. Dckt. 108. It is unclear to the court why judgment was issued in favor of the United States as no transcript has been provided of the trial. However, the facts of *Martin* indicate that the Martins failed to file their tax returns for 2004, 2005, and 2006 at the time they were due. The Internal Revenue Service issued a notice of deficiency for each of the years, which the Martins did not respond to. The Martins prepared their missing tax returns through an accountant, but did not sign them until about six months later. The Internal Revenue Service had not heard from the Martins and had to make assessments without the returns. The Internal Revenue Service then gave the Martins notice of its intent to collect the assessed taxes by levy. Only after the Internal Revenue Service threatened to collect the unpaid tax did they finally file their tax returns.

Collier on Bankruptcy, discusses this issue and consideration of factors in determining whether the late filed return is one that can prevent the tax obligation being nondischargeable. 11 Collier on Bankruptcy P TX4.02 (16th 2021). The discussion by Collier in this section of the treatise includes:

> Thus, the First, Fifth and Tenth Circuits, along with the majority of lower courts, have adopted a literal interpretation of section 523(a)(1)(B) and held that the phrase "applicable filing requirements" is unambiguous and includes deadlines for filing tax returns. This has been referred to as the "one day late" rule because a return filed even one day late will preclude discharge. While this approach is one reading of the statutory text and is simple to apply, an increasing number of courts, including most recently the Eleventh Circuit, have correctly criticized the approach as inconsistent with the statutory intent and for the harshness of its results.
>
> . . .
>
> In *In re Shek*, the Court of Appeals for the Eleventh Circuit reasoned that "applicable filing requirements" do not unambiguously include filing deadlines, but instead should only include aspects of the return that have a "material bearing on whether or not it can reasonably be described as a 'return'—but not to more tangential considerations." The court contrasted its ruling from the rulings in the First, Fifth and Tenth Circuits by asserting that those courts "discounted the force of the surplusage canon" and that their interpretation would render section 523(a)(1)(B)(ii) "insignificant." In addition, even the IRS does not support the "one day late" rule [citing to briefs filed by the IRS in other cases].

. . .
In *In re Martin*, the Bankruptcy Appellate Panel for the Ninth Circuit also rejected the literal approach to interpreting the hanging paragraph in section 523(a)(*) as applying an "unforgiving view of congressional intent." The court instead held that the determination of whether a return is filed is governed by *United States v. Hatton (In re Hatton)*, which considers whether the document (1) purports to be a return, (2) is executed under penalty of perjury, (3) contains sufficient data to calculate the tax and (4) is an honest and reasonable attempt to satisfy the law.
. . .
Other courts after the *Hindenlang* decision disagreed with *Hindenlang* and recognized a return filed by a taxpayer even after the assessment of a tax liability under section 6020(b) of the IRC. One example is a decision of the Ninth Circuit Bankruptcy Appellate Panel which, on very similar facts, came to the opposite conclusion. In *In re Nunez*, the debtor did not timely file tax returns, the IRS prepared substitutes for returns and assessed tax liabilities for the years in question, and the debtor filed income tax returns reflecting the same wage income as the substitute returns filed by the IRS. The IRS argued for "an absolute rule that where it prepares substitute returns and assesses the taxes due, any document subsequently filed by the debtor cannot be deemed a return." The Ninth Circuit B.A.P. rejected this approach first by concluding that the existence of an assessment by the IRS does not bar dischargeability. Section 523(a)(1)(B) does not state that a return must be filed prior to an assessment by the IRS to be effective for dischargeability purposes.
. . .
The fourth prong of the four part test for the filing of a "return" is the factual issue of good faith: is there an honest and reasonable attempt to satisfy the requirements of the tax laws? The Courts of Appeals for the Third and Eleventh Circuits recently have joined the Fourth, Sixth, Seventh and Ninth Circuits in holding that delinquency in filing is relevant to this *Beard* factor. In *In re Justice*, the Eleventh Circuit held that "[f]ailure to file a timely return, at least without a legitimate excuse or explanation, evinces the lack of a reasonable effort to comply with the law. This interpretation comports with the common-sense meaning of 'honest and reasonable.' " In *In re Giacchi*, the Third Circuit cited Justice in concluding that a debtor's "belated filings [were] merely self-serving bids to reduce his tax liabilities, rather than attempts to comply with the requirements and objectives of prompt self-reporting and self-assessment."

The Court of Appeals for the Tenth Circuit in *In re Savage* concluded the honest and reasonable attempt test requires the document to "appear on its face to constitute an honest and genuine endeavor to satisfy the law." Under this version of the test for a "good faith" filing, a court is asked only to determine if the document in question "on its face" was filed in good faith. The good faith standard for the filing of a return under section 523(a)(1)(B) was therefore narrow in scope:

> The good faith inquiry under section 523(a)(1)(B) should focus on the debtor's intent at the time the returns were filed. This keeps the inquiry relevant to section 523(a)(1)(B). A focus on the delay in filing, or the

> number of missed years is relevant instead to an inquiry under section 523(a)(1)(C). …
> … .
> The IRS has the ultimate burden of proof as to whether a return has been filed. It has failed to present evidence raising a genuine issue as to a material fact on the issue of good faith, even under the broad scope argued for by the IRS.

> The decision in *In re Nunez* confirms the requirement for a factual determination of the taxpayer's good faith in filing the returns, and further places the burden of proof on the existence of a filed return on the IRS. This burden is consistent with the general rule that exceptions to discharge are to be narrowly construed and the party objecting to the granting of a discharge bears the burden of proof.

Supplemental Pleadings

Plaintiff-Debtor presses the point that Bankruptcy Law favors honest but unfortunate debtor. Counsel for Plaintiff-Debtor recounted the events occurring in 2008, which included: (1) rental property foreclosure, (2) business difficulties, and (3) marital difficulties. These led to the two persons who are the Plaintiff-Debtor permanently separating in 2010 and having to address custody and support issues for their two children. Additionally, the wife Plaintiff-Debtor took "family" business, and the husband Plaintiff-Debtor stopped working on the business.

With respect to the tax returns, in 2010 Plaintiff-Debtor contacted with an accountant to prepare the 2008 and 2009 returns. The 2009 return was filed, but the 2008 was given to the Plaintiff-Debtor to file given the tax liability. Plaintiff-Debtor held the 2008 tax return, not filing it, while they attempted to find money to pay the tax obligation.

Plaintiff-Debtor points to there being no ongoing tax collection efforts by the Defendant-IRS and that Plaintiff-Debtor communicated (though belatedly) with Defendant-IRS. Plaintiff-Debtor points to their The duplicate/amended return was filed, the assessment was reduced consistent with Plaintiff-Debtor's return, and several years passed for the IRS to collect the corrected amount consistent with the duplicate/amended return.

At the February 10, 2022 hearing, the court requested the parties provide supplemental briefing on the issues of what the federal tax law provides with respect to filing of returns by a tax payer after the filing of a substitute return.

On February 25, 2022, Defendant-IRS filed a Supplemental Brief addressing tax issues the court seeks further guidance on. Dckt. 54. In detailed summary, Defendant-IRS provides:

> Procedural Effect of a Substitute Return
>
> The substitute for return "shall be *prima facie* good and sufficient for all legal purposes", 26 U.S.C. § 6020(b)(2), but it does not qualify as a return within the meaning of 11 U.S.C.§ 523(a)(1)(B)(I) because it is not signed by the taxpayer, *Wetzel v. United States*, No. CC-96-1811, 1997 WL 834810 at *5 (B.A.P. 9th Cir. July 15, 1997). Dckt. 54 at 2:20-24. Once the substitute is

completed, if there is a deficiency, IRS mails a "Notice of Deficiency." 26 U.S.C. § 6212(a). The taxpayer then has two options:

1. The taxpayer can then file a petition within 90 days if they contest the amount in the deficiency. 26 U.S.C. § 6213(a).

2. The taxpayer can file their return as if the substitute were not already filed because the substitute does not take effect until the deficiency procedures are first completed. *Millsap v. Comm'r*, 91 T.C. 926, 932, 937–38 (1988).

If the taxpayer fails to do either of the above, the deficiency shall be assessed (assessment) and paid upon notice and demand. 26 U.S.C. § 6213(c); see 26 U.S.C. § 6303(a). The IRS can determine a further deficiency and notify the taxpayer.26 C.F.R. § 301.6213-1(c).

Consequences of an Assessment

An assessment shifts the burden to the taxpayer to show they do not owe the amount of tax the IRS has assessed. *Fior D'Italia Inc. v. United States*, 242 F.3d 844, 847 (9th Cir. 2001), reversed on other grounds by 536 U.S. 238 (2002). The IRS only needs to show minimal facts to support the assessment. *Id*. (quoting *Palmer v. IRS*, 116 F.3d 1309, 1312 (9th Cir. 1997)). Once the assessment is made, it becomes collectible. *Romano-Murphy v. Comm'r*, 152 T.C. 278, 309 (2019).

Post-Substitute Return

If a taxpayer files a return before the deficiency progresses into an assessment, it is a challenge to the deficiency. See *Millsap*, 91 T.C. at 938. If a taxpayer files a return after an assessment, there are two possibilities if taxpayer disagrees:

1. Overpayment - CLAIM FOR REFUND assuming it is timely. 26 U.S.C. § 6401. Either:

    a. IRS renders a decision on the merits; or

    b. Taxpayer can bring suit under 26 U.S.C. § 7422 and court will decide on the merits

2. No Overpayment - AMENDED RETURN. 26 C.F.R. § 301.6402-3.

    a. The Code does not provide for the taxpayer's filing or IRS's acceptance of an

amended return. *Badaracco v. Comm'r*, 464 U.S. 386, 393 (1984).

b. IRS is not required to accept it or treat as superseding the original. *Fayeghi v. Comm'r*, 211 F.3d 504, 507 (9th Cir. 2000).

c. The only way to force the IRS to decide on an amended return is to pay the full amount of outstanding liability so the amended return constitutes a claim for refund.

Effect of Debtor's "Return" filed in August 2011

Defendant-IRS states prior to filing their 2008 Tax Returns in August 2011, at no point did Plaintiff pay toward their 2008 account. Therefore, the return did not constitute a claim for refund and the IRS considered the August 2011 return to be an amended return. As an amended return, it had no effect on the assessment from the substitute return.

Defendant-IRS further states "it does not really make a difference whether the Court construes the taxpayers' return filed in August 2011 as an amended return . . . or . . . an original return . . .". Supplemental Brief, Dckt. 54 at 5:20-22. Defendant-IRS argues the *Beard* test controls., and the taxpayers did not make an honest and reasonable attempt to comply.

Discussion

The court requested Defendant-IRS' Supplemental Brief to address various tax law issues. The court was most interested in whether Defendant-IRS would consider an amended return a "return" for purposes of 11 U.S.C. § 523(a) and the four-factor *Hatton* test. Defendant-IRS contends that they are not forced to accept the amended return of Plaintiff-Debtor. While Defendant-IRS is not statutorily required to accept an amended return or treat it as superseding an original return (See *Fayeghi v. Comm'r*, 211 F.3d 504, 507 (9th Cir. 2000)) this is not dispositive of whether an amended return constitutes a "return."

Bankruptcy Code § 523(a)(1)(B) states a debtor cannot discharge an income tax with respect to which a return, or equivalent report or notice, if required—

(I) was not filed or given; or

(ii) was filed or given after the date on which such return, report, or notice was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition.

Here, since the amended return was filed or given before the two years preceding the petition date, the crux of the issues falls under whether it constitutes a "return." If not a "return" for purposes of 11 U.S.C. § 523(a)(1)(B), then under subsection (I), a return was never filed and Plaintiff-Debtor could

not be discharged from the debt. If, however, this court determines the 2011 filing was a "return," then it will be discharged.

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") added the following "hanging paragraph" as § 523(a)(19) which further defines "return":

> For purposes of this subsection, the term "return" means a return that satisfies the requirements of applicable nonbankruptcy law (including applicable filing requirements). Such term includes a return prepared pursuant to section 6020(a) of the Internal Revenue Code of 1986, or similar State or local law, or a written stipulation to a judgment or a final order entered by a nonbankruptcy tribunal, but does not include a return made pursuant to section 6020(b) of the Internal Revenue Code of 1986, or a similar State or local law.

Section 6020 of the IRS Code, 26 U.S.C. § 6020, provides under 6020(a) a person who fails to make a return but assists the IRS in preparing it may constitute a return. However, 6020(b) refers to a return made by the IRS without the assistance of the taxpayer.

Here, the substitute return was made without the assistance of Plaintiff-Debtor. Therefore, under the hanging paragraph of 11 U.S.C. § 523(a)(19), the substitute return prepared by Defendant-IRS does not constitute a "return." However, the hanging paragraph does not address whether an amended return filed after the substitute return constitutes a "return."

Upon the court's research of whether any amended return filed after the IRS' assessment under 26 U.S.C. § 6020(b) may still constitute a return, even after the BAPCPA amendment, courts appear persuaded to continue applying the four factor test adapted in *Hatton*, which includes a broad honest and reasonableness prong. Court's do not appear convinced that a tax return filed after a substitute return is never a return for purposes of 11 U.S.C. § 523(a)(1)(B). *Wogoman v. United States* IRS (*In re Wogoman*), 475 B.R. 239, 249-250 (10th Cir. BAP (Colo.) 2012); *Van Arsdale v. United States IRS* (*In re Van Arsdale*), No. 13-40873 CN, 2017 WL 2267021, at *2 (Bankr. N.D. Cal. May 18, 2017).

In *Smith*, the Ninth Circuit reaffirmed the four factor test adapted in *Hatton* still applies:

> We have not interpreted this new definition, but both parties and several of our sister circuits agree that Hatton's four-factor test still applies, *see In re Ciotti*, 638 F.3d 276, 280 (4th Cir. 2011); *In re Justice*, 817 F.3d 738, 740–41 (11th Cir. 2016).

Smith v. United States IRS (*In re Smith*), 828 F.3d 1094, 1096 (9th Cir. 2016) (determining whether the BAPCPA amendment changed what constitutes a "return"). Additionally, the Ninth Circuit Bankruptcy Appellate Panel stated that a bankruptcy court should view all of the relevant facts through the legal standard set forth in *Hatton* to determine whether there was an honest and reasonable effort to comply with the applicable tax laws. *United States v. Martin* (*In re Martin*), 542 B.R. 479, 491 (B.A.P. 9th Cir. 2015).

Although determined based on the pre-BAPCPA amendment, at least one circuit has found tax returns filed after an IRS's assessment can be considered "returns." *See Colsen v. United States IRS*

(*In re Colsen*), 446 F.3d 836 (8th Cir. 2006). In *Colsen*, the debtor failed to file tax returns for the years 1992 through 1996. The IRS prepared substitutes for the missing returns and issued notices of deficiency. In mid-1999, the IRS assessed taxes for the years 1992 through 1996. By late 1999, the debtor filed 1040 forms for 1992 through 1998. *Colsen* determined that absent information that forms appear obviously inaccurate or fabricated, the information was honest and genuine enough to satisfy the honest and reasonableness prong. *Id.* at 840. *Colsen*, however, distinguishes from *Martin* and *Hatton* and only inquires into whether the form itself has an honest and genuine attempt to satisfy the tax laws. *Colsen*'s standard does not does not "require inquiry into the circumstances under which a document was filed." *Id.* *Colsen* suggests courts do not look at all relevant facts surrounding a debtor's late filing, only look to the document itself.

This court follows the decisions of the Ninth Circuit Court of Appeals and concurs with the Ninth Circuit Bankruptcy Appellate Panel. The "fresh start" policy encompassing the Bankruptcy Code favors broad construction of exceptions to discharge favorable to debtors. *Grogan v. Garner*, 498 U.S. 279, 283 (1991). Creditors have the burden to prove nondischargeability by a preponderance of the evidence. *Id.* at 285. Therefore, applying *Hatton* and *Martin*, this court looks to the totality of circumstances to determine if Plaintiff-Debtor acted honest and reasonably.

Here, under the totality of circumstances and in viewing all relevant facts surrounding Plaintiff-Debtor and their late filing, illuminated in Plaintiff-Debtor's Statement of Undisputed Facts and presented at Oral Argument, the court finds that Plaintiff-Debtor's late filing was honest and reasonable. These facts include:

1. Plaintiff-Debtor's 2008 return was received roughly one hundred and fifty days after Defendant-IRS mailed the Notice of Deficiency.

2. Plaintiff-Debtor explained to the court outstanding circumstances that delayed their filing including -

    a. In 2008 Plaintiff-Debtor began experiencing financial difficulties (as did many at the start of the Great Recession). These financial difficulties including Plaintiff-Debtor losing a rental property through a foreclosure.

    b. The two Plaintiff-Debtor began suffering martial difficulties, which resulted in them being permanently separated in 2010.

    c. Ms. Golden, on of the two constituting the Plaintiff-Debtor began operating their business as a sole-proprietorship, taking over the tax responsibilities from Mr. Alter, the other person constituting the Plaintiff-Debtor.

    d. Plaintiff-Debtor having filed the Amended Return after the Substitute Return had been filed by the Defendant-IRS, the IRS was able to reduce the outstanding tax obligation for 2008 from the assessed $417,000.00 (original $276,506 assessment plus interest and penalties) to $23,000.00.

3. Plaintiff-Debtor's filed return provided accurate information by which the large portions of the deficiencies were removed or reduced.

4. The Plaintiff-Debtor filed their bankruptcy case on filed April 30, 2014, which was three years after Plaintiff-Debtor's 2008 tax return was received by Defendant-IRS.

5. Through their completed Chapter 13 Plan Plaintiff-Debtor paid in full all priority and secured tax claims totaling $58,059.56, and a dividend of $1,221.85 on the ($30,665.25) general unsecured claim. 14-24616; CH 13 Trustee's Final Report, Dckt. 93.

From the evidence presented, the court concludes that Plaintiff-Debtor did not act with a belated acceptance of responsibility or attempted to present inaccurate or fabricated information to Defendant-IRS. Although Plaintiff-Debtor failed to file a timely return, the evidence provides a basis for concluding that Plaintiff-Debtor did file a return and that favors a finding of a reasonable effort to comply with the law.

Plaintiff-Debtor has established that the four prong test is satisfied: (1) purports to be a return, (2) is executed under penalty of perjury, (3) contains sufficient data to calculate the tax and (4) is an honest and reasonable attempt to satisfy the law. *Smith v. United States IRS (In re Smith)*, 828 F.3d 1094, 1096 (9th Cir. 2016). Though belated, Plaintiff-Debtor has made an honest and reasonable attempt to satisfy the law. Solid and accurate information was provided. Plaintiff-Debtor communicated with the Defendant-IRS. Plaintiff-Debtor obtained the assistance of a tax professional for the filing of the late return to present accurate and necessary information for the determination of the correct 2008 tax obligation.

Plaintiff-Debtor has addressed significant claims, including secured and priority tax obligations (admittedly, which Plaintiff-Debtor was required to do to confirm and complete the Chapter 13 Plan). In addition to filing the late return, Debtor has not tried to walk away from debt, but has elected to spend five years in "bankruptcy purgatory" in order to obtain a discharge and financial "redemption."

With respect to filing the late amended return, the Defendant-IRS has confirmed that accurate information was provided, reducing the amount of the 2008 Defendant-IRS assessed tax obligation. This is not a situation where there were multiple years of unfiled returns. This is not a situation where Plaintiff-Debtor dropped a return on the IRS acknowledging the assessed tax debt and then trying to slip out in a Chapter 7 bankruptcy case filed two years and one day after the return was filed.

In these facts, both Plaintiff-Debtor and Defendant-IRS present the situation where both the tax payer and the IRS work to address tax obligations, have the tax payer file a return and provide the IRS with accurate information, Defendant-IRS acted to insure that correct amounts of tax obligations owed, and then recover substantial amounts of tax liabilities. Plaintiff-Debtor has acted property, though beset with financial difficulties arising out of the Great Recession and then marital difficulties.

The Motion is granted and the court determines that the remaining obligations for Plaintiff-Debtor for the 2008 tax year have been discharged through their Chapter 13 case in which they have completed their Chapter 13 Plan and the discharge has been entered.

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 Summary Judgment filed by the Internal Revenue Service ("Defendant-IRS") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Motion for Summary Judgment is granted in favor of Nicole Golden and Stephen Alter, and each of them, the Plaintiff-Debtor and against the United States of America, the Internal Revenue Service, and judgment shall be entered that any obligations of the Plaintiff-Debtor, and each of them, for the 2008 federal income taxes have been discharged through the completion of their Chapter 13 Plan and the discharge entered in Plaintiff-Debtor's Chapter 13 case (14-24616; Order of Discharge, Dckt. 101).

2.	**14-24616-E-13 21-2012**	**NICOLE GOLDEN/ STEPHEN ALTER JGD-10 John Downing**	**CONTINUED MOTION FOR SUMMARY JUDGMENT**
	GOLDEN ET AL V. UNITED STATES OF AMERICA (INTERNAL REVENUE		**12-3-21 [28]**

The court will issue a joint ruling on the Debtor's Motion for Summary Judgment and the IRS Counter Motion for Summary Judgment and has not posted it here as it duplicates the above ruling on the Debtor's Motion.

3. **14-24616-E-13 21-2012** **NICOLE GOLDEN/ STEPHEN ALTER CAE-1 John Downing**
GOLDEN ET AL V. UNITED STATES OF AMERICA (INTERNAL REVENUE

CONTINUED PRE-TRIAL CONFERENCE
RE: COMPLAINT FOR DETERMINING DISCHARGEABILITY AND VOIDING LIEN
2-8-21 [1]

Plaintiff's Atty: John G. Downing
Defendant's Atty: Ty Halasz

Adv. Filed: 2/8/21
Answer: 3/15/21

Nature of Action:
Validity, priority or extent of lien or other interests in property
Dischargeability - other
Declaratory judgment

Notes:
Continued from 2/10/22 to be conducted in conjunction with the hearings on the Cross-motions for Summary Judgment.

The Status Conference is continued to 2:00 p.m. on xxxxxxx , 2022.

MARCH 7, 2022 STATUS CONFERENCE

On March 7, 2022, the court conducted the final hearings on the cross-summary judgment motions, each of which would resolve all issues in this Adversary Proceeding. The Parties, working in good faith, were able to determine that there were no material facts in bona fide dispute, and that the remaining issues were questions of law.

The court **xxxxxxx**

4. **21-23301-E-7** **BRIAN ROYER** **CONTINUED STATUS CONFERENCE**
22-2002 **CAE-1** **RE: COMPLAINT**
BARNES V. ROYER **1-10-22 [1]**

Plaintiff's Atty: Cheryl C. Rouse
Defendant's Atty: Carl R. Gustafson

Adv. Filed: 1/20/22
Answer: 3/8/22

Nature of Action:
Dischargeability - false pretenses, false representation, actual fraud

Notes:
Continued from 3/9/22. On 1/25/22, the Parties filed a Stipulation in which Plaintiff agreed to an extension of thirty days for Defendant to file a responsive pleading to the Complaint. The extended deadline expired on 3/11/22.

Answer to Plaintiff's Complaint filed 3/8/22 [Dckt 9]

MARCH 7, 2022 CONTINUED STATUS CONFERENCE

Charles Barnes, the Plaintiff, has filed a Complaint seeking a determination that the obligation owed Plaintiff by Brian Royer, the Defendant-Debtor, is nondischargeable based on fraud (11 U.S.C. § 523(a)(2)(A)). Dckt. 1. The "short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. Pro. 8(a)(2) and Fed. R. Bankr. P. 7008 include (identified by paragraph number in the Complaint):

A. "Plaintiff is the successor in interest to John Gajkowski, who is Plaintiff's deceased father." ¶ 3.

B. "Mr. Gajkowski obtained a judgment against the Defendant and Defendant's spouse, Sara Royer, in the action entitled *John Gajkowski v. Brian Royer and Sara Royer*, case no. FCS047960 filed in the Superior Court, state of California, county of Solano ("State Court Action")." *Id*.

C. " The amount of the Judgment was $385,038.54. The amount of $129,360.81 was paid through wage garnishments and other involuntary payments after the entry of judgment. The balance as of April 26, 2019 was $255,677.73." "The outstanding total balance on the Judgment is $324,817.08 as of the date of the filing of this action. Interest continues to accrue at the legal rate of 10% per annum." ¶ 7.

D. The State Court Judgment was for an obligation owning on a loan made by John Gajkowski to Defendant-Debtor and his spouse. With respect to the alleged fraud, the allegations in the Complaint include:

1. "At the time of making the loan, Mr. Gajkowski was 79 years old and in ill

health. He was suffering from diabetes, PTSD from his military service in Vietnam, prostate problems, Parkinson's Disease, bronchial issues and heart problems. The Veteran's Administration deemed him to be 100% totally disabled." ¶ 8.

2. " Defendant was the grandson-in-law of Mr. Gajkowski. His spouse was Mr. Gajkowski's granddaughter. Defendant was well acquainted with Mr. Gajkowski and therefore well aware of Mr. Gajkowski's advanced age and poor physical condition when he approached him for the short term loan." ¶ 9.

3. "Defendant represented to Mr. Gajkowski that the purpose of the loan was to make improvements to the real property located at 7720 Locke Road, Vacaville, CA (the "Property"), which was solely owned by Defendant at the time the loan was made." ¶ 10.

4. "However, at the time that the loan was made, Defendant was substantially in default on a loan secured by a deed of trust against the Property. This fact was never disclosed to Mr. Gajkowski, who would not have made the loan to Defendant and his spouse had he known that Defendant was unable to make the mortgage payments on the existing loan secured by the Property and that a portion of the money loaned was to bring the existing loan current." *Id*.

5. "At the time of that the loan was made, Defendant told Mr. Gajkowski that he would provide Mr. Gajkowski, as security for the loan, a recorded interest in the Property to secure the debt." ¶ 11.

6. "Mr. Gajkowski relied upon this representation, which was a material inducement to him making the loan." *Id*.

7. "Defendant, after obtaining the money, refused to provide Mr. Gajkowski with a security interest in the Property." *Id*.

8. " In addition, at the time that the loan was made, Defendant represented to Mr. Gajkowski that he would obtain a loan from an institutional lender to be secured by the Property and would use that loan to repay the Note by the agreed date of January 1, 2010." ¶ 12.

9. "After obtaining the loan from Mr. Gajkowski, Defendant refused to obtain the institutional loan or any other loan to repay the Note." *Id*.

10. "At the time that the loan was made, Defendant never intended to repay the loan by January 1, 2010 or at any time thereafter, nor intended to provide Mr. Gajkowski with a security interest in the Property." ¶ 13.

11. "When Defendant represented to Mr. Gajkowski that he would repay the loanby January 1, 2010, that he would provide Mr. Gajkowski with a

security interest in the Property, and that he would obtain a loan from an institutional lender to repay the loan, he knew these representations to be false and made these representations with the intention to induce Mr. Gajkowski to act in reliance on these representations in the manner hereinabove alleged, or with the expectation that Mr. Gajkowski would so act." ¶ 17.

12. "Defendant knew that an existing loan secured by the Property was substantially in default. This was a material fact that Defendant should have disclosed to Mr. Gajkowski prior to his making the loan." *Id*.

13. "Defendant knew that he was unable to make payments on the pre-existing loan and therefore knew that he would not be able to make the balloon payment required by the Note." *Id*.

14. "Had Mr. Gajkowski known the actual facts, he would not have made the loan. Mr. Gajkowski's reliance on Defendant's representations were justified based upon the fact that Defendant was married to Mr. Gajkowski's granddaughter, that he was making the loan to both of them, and that he was elderly and infirm." ¶ 19.

Answer

On March 8, 2022, Defendant-Debtor filed his Answer. Dckt. 9. Defendant-Debtor admits and denies specific allegations in the Complaint. Defendant-Debtor states the following fifteen Affirmative Defenses as part of the Answer (identified by the Affirmative Defense number used in the Complaint):

1. Defendant denies each and every allegation of the Complaint that is not expressly admitted herein or that he is unable to admit or deny.

2. Defendant's representations related to his financial condition cannot be the basis for the 11 USC 523(a)(2)(A) relief that the Plaintiff is seeking.

3. Plaintiff did not rely on the alleged misrepresentations made by Defendant, and thus has no substantially justifiable reason to bring this action.

4. Defendant had no duty to disclose any information to the lender that was not requested of him at the time the loan was made.

5. Defendant invokes the statute of frauds defense to the allegations in the complaint. The alleged oral arrangements are not part of the contract between the parties.

6. Defendant asserts that there is insufficient evidence to support the allegations regarding intent and reliance brought in the complaint and that any such evidence is inadmissible by the parole evidence rule.

7. Plaintiff's pleading is vague and lacks the particularity required by Bankruptcy Rule 7009(9). The Complaint fails to meet the fundamental tests of properly pleading fraud under Rule 9(b), Fed. R. Civ. P. The Complaint also fails to state allegations of fact sufficient in particularity and clarity to fairly and reasonably advise the Debtor/ Defendant of the "circumstances constituting fraud."

8. Plaintiff has failed to aver sufficient allegations to set forth a cause of action under 523(a)(2)(A).

9. Plaintiff is estopped from recovery against Plaintiff due to her alleged predecessor's own conduct and actions, including but not limited to, failure to act in a reasonable manner when he issued the loan.

10. "In lending to Defendant, Plaintiff assumed the risk of the transaction.

11. This complaint is barred by the fact that Plaintiff lacks standing to bring an action. Plaintiff is not a party to the underlying transaction and is not connected to the transaction. Defendant owes no duty to respond to Plaintiff's allegations regarding the transaction.

12. The Plaintiff lacks privity with the Defendant. Defendant has no contract with Plaintiff and the underlying debt was not properly assigned.

13. Any alleged actions of the Defendant in the present matter do not rise to the legal standards identified within 11 USC 523(a)(2)(A) which would be applicable to satisfy any claimed exception of the debt (if any) owed to the Plaintiff from being discharged in the underlying bankruptcy case.

14. Defendant specifically denies acting with any willfulness, malice, or deliberate intent to deceive Plaintiff.

15. Defendant affirmatively asserts that as dictated through equitable principles, and consistent with 11 U.S.C. 523(d), no substantial justification exists for the Plaintiff's commencement of the present litigation. Thus, it is proper and just that the Defendant be found to be entitled to recoupment of all legal fees and expenses incurred through defense of the present action. The Plaintiff should be held accountable to compensate Defendant for all such expenses incurred pursuant to 11 U.S.C. 523(d).

MOTION TO DISMISS

On March 31, 2022, Defendant-Debtor combined a combined Motion for Summary Judgment and To Dismiss Case. Dckt. 14. The grounds stated with particularity in the Motion (Fed. R. Civ. P. 7(b) and Fed. R. Bankr. 7007) by Defendant-Debtor in the Motion upon which the requested relief is based are:

> The Court should enter judgment in favor of the Defendant because Plaintiff cannot produce any evidence to establish, by a preponderance, the elements of fraud.
>
> Plaintiff's case should be dismissed with prejudice because Plaintiff has neither pled its cause of action with particularity nor stated relief upon which relief can be granted.

Motion, p. 1:28, 2:1-3; Dckt. 14.

The Motion continues, directly the court to read the memorandum of points and authorities, the notice of hearing, declarations, requests for judicial notice, and exhibits, separate statement of undisputed material facts, pleadings and papers on file in the underlying bankruptcy case, and then any further evidence, whether oral or documentary, that Defendant-Debtor produces at the hearing. *Id*., p. 2:4-9.

In substance, Defendant-Debtor instructs the court to review anything and everything filed in this Adversary Proceeding and anything and everything filed in Defendant-Debtor's Bankruptcy Case, and anything and everything that Defendant-Debtor elects to drop on the court at the hearing, and from all of that assemble the grounds that are to be stated with particularity to support the legal conclusions stated in the Motion.

The court generally declines to state grounds with particularity upon which a party is affirmatively stating (subjection to the Federal Rule of Bankruptcy Procedure 9011 certifications) upon which the requested relief is based.

The hearing no the Motion for Summary Judgment/Motion to Dismiss is set for May 12, 2022.

FINAL BANKRUPTCY COURT JUDGMENT

Plaintiff Charlene Barnes alleges in the Complaint that jurisdiction for this Adversary Proceeding exists pursuant to 28 U.S.C. §§ 1334 and 157(b)(2), 11 U.S.C. § 523(a)(2)(I), and that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I). Complaint ¶ 2, Dckt. **1**. In the Answer, Defendant-Debtor Brian Royer admits the allegations of jurisdiction and that this is a core proceeding. Answer ¶¶ 2; Dckt. 9. To the extent that any issues in the existing Complaint as of the Status Conference at which the Pre-Trial Conference Order was issued in this Adversary Proceeding are "related to" matters, the parties consented on the record to this bankruptcy court entering the final orders and judgement in this Adversary Proceeding as provided in 28 U.S.C. § 157(c)(2) for all issues and claims in this Adversary Proceeding referred to the bankruptcy court.

5. **18-25001-E-7** **JOSEPH AKINS** **CONTINUED MOTION FOR**
18-2187 **RLF-20 Sheila Gropper Nelson** **COMPENSATION FOR SHEILA GROPPER NELSON,**

BLACK V. AKINS **DEFENDANTS ATTORNEY(S)**
1-14-22 [260]

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's Attorney on January 14, 2022. By the court's calculation, 62 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(6) (requiring twenty-one days' notice when requested fees exceed $1,000.00); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

The Motion for Prevailing Party Fees has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). 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 for Prevailing Party Fees is denied.

DEFENDANT'S MOTION
AND SUPPORTING PLEADINGS

Joseph H. Akins Jr. ("Defendant") filed this Motion seeking prevailing party fees in the amount of $275,500.00 pursuant to 11 USC §523(d); Federal Rules of Civil Procedure 54(d) as incorporated into Federal Rules of Bankruptcy Procedure 7054; and 11 U.S.C. § 105(a).

The Motion itself does not state the period Defendant is requesting fees for. After review of Defendant's Attorney's Declaration, Sheila Gropper Nelson, Esq., (Dckt. 263) it appears it began with the filing of this adversary and throughout the course of litigation. However, Defendant has not provided a clear task billing analysis nor any exhibits evidencing Defendant's Attorney's time and billing records to establish the proper period of services provided in this Adversary. The Motion's evidentiary shortcomings are discussed below.

The Motion states that the fees are requested pursuant to Federal Rule of Civil Procedure

54(d) and Federal Rule of Bankruptcy Procedure 7054(b)(2). The basis for the attorneys' fees is statutory, 11 U.S.C. § 523(d) and 11 U.S.C. § 105(a).

Court's February 3rd Order

On February 3, 2022, the court issued an order requesting a supplemental pleading to Defendant's Motion to state grounds with particularity upon which the relief if based (as required by Fed. R. Civ. P. 7(b) and Fed. R. Bankr. P. 7007). Dckt. 292. The court was concerned with the lack of grounds stated in Defendant's Motion, and would not be mining the pleadings in an attempt to state (and possibly inadvertently misstate) state what grounds the court believed Defendant would want to state with particularity.

Defendant's Supplement

On February 14, 2022, Defendant filed a pleading titled "Supplemental Motion for Attorney's Fees as Costs & Allowed by Law. Dckt. 300 (The "Supplement"). The court interprets this to be the "supplement to the [existing] Motion (not an amended motion) which states the grounds with particularity upon which th requested relief is based." Order, Dckt. 292.

In the Supplement, Defendant states with particularity the grounds for this Motion for Prevailing Party Fees, which include:

A. "On Dec. 6, 2021, [Defendant] was determined by the Court to be the prevailing party after 5 days of trial. This Court found that [Plaintiff] had failed to sustain his burden of proof as to each cause of action and that Mr. Black lacked credibility. Supplement, p. 2:7-10; Dckt. 300."

B. "Mr. Black's adversary action sought to determine that his "alleged" claim(s) were non-dischargeable under 11 U.S.C. §523(a)(2), (a)(4) & (a)(6). Mr. Black had filed his pro se Complaint on November 13, 2018, and it was amended on April 4, 2019 (Doc. No. 21). After vigorous motion practice the Amended Complaint was answered on September 12, 2019 (Doc. No. 75). Mr. Black had obtained a default judgment against deceased debtor more than 8 ½ years before the petition had been filed in August, 2018." *Id*., p.2:12-16.

As noted in the Supplement, what Defendant frames as Plaintiff seeking "to determine that his 'alleged' claim(s) were nondischargeable" were actually obligations owing on a final judgment issued by the California Superior Court. What Defendant states as being a "vigorous motion practice" consisted of first a Motion to Dismiss by Defendant that was denied without prejudice for a failure to state with particularity any grounds for dismissal of the Complaint. Civil Minutes and Order; Dckts. 49, 50.) The second part of the "vigorous motion practice" was a second Motion to Dismiss by Defendant. The court issued an order denying the second Motion to Dismiss, with the court concluding:

> Contrary to Defendant's assertion that the above is not "a short and plain statement of the claim showing that the pleader is entitled to relief," in order to "give the defendant fair notice of what the ... claim is and the grounds upon which it rests," it clearly does. While Defendant may need to avail himself of his right to conduct discovery, it is clear what is alleged to have occurred.

> Plaintiff took the Vehicle to NORCAL and Defendant to have it restored, with a time period specified in which this occurred. It is alleged that NORCAL is a business that Defendant owned or was associated with, and one in which Defendant obtained sole control over the lease for the property in which NORCAL did business.
>
> The specific promises made by NORCAL and attributed to Defendant are alleged as to the restoration and customization work to be done, the monies paid in reliance on the promises made, and that the work was not done. It is further alleged what Defendant failed to do, personally and through NORCAL, in addition to the taking and use of the Vehicle for use by Defendant's brother.
>
> Defendant is clearly on fair notice as to what the claim is based on, with whom Plaintiff communicated, what is alleged to have been said, and how it is attributed or stated to have been said by Defendant.

Civil Minutes, p. 10-11; Dckt. 81. The court's Ruling on the second Motion to Dismiss concludes with:

> While Defendant may dispute what is alleged, that is subject to evidence to be presented to the court. The First Amended Complaint sufficiently states the basis for the claims asserted, with the Defendant being on full, fair, and quite detailed notice of what is alleged. Defendant's "concerns" over identifying specific dates is the subject of good faith discovery. There are no naked assertions, or formalistic pleading of sterile legal grounds in the First Amended Complaint. The "facts" alleged are many, sufficient, and clearly provide a basis for Defendant to fairly know what is asserted, the claims made, and what he needs to address in asserting his defense.
>
> The Motion is denied. Defendant shall file and serve his Answer on or before September 12, 2019.

Id., p. 12. Order, Dckt. 82.

C. "[Plaintiff] engaged in numerous acts to increase the costs of litigation and to thwart discovery by [Defendant], identified in the supporting declarations and other papers previously filed with the Court." Supplement, p. 2:19-21; Dckt. 300.

D. "A significant portion of the fees sought relate to the time prior to and during trial that was required to deal with the redundant and irrelevant exhibits lodged by Mr. Black with the Court. [Plaintiff]'s counsel admitted both in the Omnibus Opposition to the *limine* motions and during oral argument at trial that there had been an absence of discretion in plaintiff's production of exhibits. (Doc. No. 233 Omnibus Opposition to Motions *in Limine*) Significant time was required, prior to trial to deal with [Plaintiff's] repeated conduct to abuse the discovery process." *Id*., p. 2:24-27, 3:1-3.

E. "As a direct result of plaintiff's lodging of redundant and irrelevant trial exhibits, trial was continued for two additional days increasing the costs to defend the litigation. Trial concluded on December 6, 2021." *Id*., p. 3:4-5.

F. "As reflected in Mr. Black's own testimony and despite his repeated assertion that he had 20,000 pages of materials to support his alleged "claims", he failed to meet his burden of proof." *Id*., p. 3:6-7.

G. "The Court made oral findings from the bench on December 6, 2021 in favor of Mr. Akins Jr. on all causes of action and finding that Mr. Black lacked credibility." *Id*., p. 3:10-12.

Defendant continues in the Argument section of the Supplement to state the following legal grounds for the requested relief.

A. "A prevailing party in an adversary action, brought under 11 U.S.C. § 523(a)(2), can move for attorney fees under 11 U.S.C. § 523(d)." *Id*. at 3:22-23.

B. "A court can disallow recovery of attorney fees under 11 U.S.C. §523(d) if the creditor can demonstrate that the alleged "claim" was substantially justified or if the Court determines that the alleged claim was either a "business" debt or interstitial in nature." *Id*., p. 4:1-4.

C. "This Supplemental Motion and the supporting papers move for the award requested on the grounds that the claim(s) by [Plaintiff] were not substantially justified; and that the alleged "claim" was illusory and therefore does not fit neatly into the categories of "consumer" "business" or "interstitial"." *Id*., 4:4-7.

D. " That [Plaintiff]'s conduct included a failure to file a claim in the underlying bankruptcy action, pursuit of the adversary with knowledge that the asserted claims would not be supported by admissible evidence as set forth in both the Court's findings from the bench and the final judgment, and the act of failing to exercise due diligence in the lodging of irrelevant and redundant exhibits for the trial, with knowledge that such conduct would and did increase the costs for defense of the litigation, justifies an award of attorney fees as requested." *Id*., 4:9-14.

E. As an additional basis for awarding attorney's fees to Defendant, "11 U.S.C. § 105(a) provides the court with inherent discretion to protect the judicial process." *Id.* at 4:16.

1. "The award of attorney fees sought by the motion are intended to deter the conduct evidenced by Mr. Black in abusing the judicial process without regard to the burden on time and resources for both the other participants and the Court. *Id*., p. 4:17-19.

F. "The motion for fees was a stand alone motion as required by FRCP Rule 54(2)(A) made applicable by FRBP 7054(b)(2)(A). Under 11 U.S.C. §523(d) and 11 U.S.C. §105(a) the Court is vested with broad discretion to award attorney fees as costs in

the within matter to the prevailing party." *Id*.. 5:4-6.

Defendant's Declaration

On January 14, 2022, Defendant filed a declaration in support of the Motion. Dckt. 262. Defendant's six (6) page declaration contains many factual assertions including:

A. Defendant has incurred increased costs to defend the litigation as a result of Plaintiff.

B. Defendant assisted their counsel in reviewing document production.

C. Defendant attended Plaintiff's deposition and witnessed Plaintiff's contested behavior.

D. Defendant's Counsel did not pursue motions to avoid costs of litigation.

Defendant also includes statements that are not based on personal knowledge, but are rather statements that appear in part to be speculation by Plaintiff and Plaintiff's Counsel and also legal contentions, not appropriate as a lay witness:

A. "I know the information set forth herein of my own personal knowledge unless set forth on information and belief and as to that information I believe it to be true." Declaration, Dckt. 262 at 1:23-25.

With this statement, Defendant is telling the court that some of what is in his Declaration is his personal knowledge, as required by Federal Rule of Evidence 601 and 602, but some of it is only what only based on information and belief. The personal knowledge testimony and the information and belief testimony are not identified.

B. "He intended to increase my costs to defend the litigation to increase the burden of litigation to harass me into settling." *Id.* at 2:6-7.

While this may be Defendant's factual or legal conclusion, arguing why he should be awarded attorney's fees, it is not personal knowledge testimony of a fact or event.

C. "I believe that was always the intent of Dominique Black and his conduct to make a settlement, even if unjustified, attractive enough for him to continue to get money for a claim that lacked merit." *Id.* at 2:13-15.

Not facts, but his argumentative belief.

D. "It would not surprise me if those attorneys simply added their names to pleadings which were actually produced by Dominique Black. Even if that is accurate, whether they authored the pleadings or just lent their processional veneer to his handiwork, they made pursuit of his baseless claims possible." *Id.* at 2:20-23.

Not facts, but his argumentative belief.

E. "Had Young & Lazzarini engaged in such professional diligence I am confident that they would have determined that the alleged 'claims' lacked merit even when viewed through the lens of zealous advocacy." *Id.* at 3:3-5.

No basis for Defendant providing a legal opinion concerning "professional diligence" or his conclusion that Plaintiff counsel could prospectively conclude that Plaintiff's claims lacked merit.

F. "That conduct, by both Black and his attorneys, was intentional and deliberate as demonstrated by the conduct and comments of both." *Id.* at 3:17-18.

G. "My belief that all of the conduct was intended to increase the burden and costs to defend the litigation and to harass me into settling is also based on the fact that Mr. Black knows no boundaries . . ." *Id.* at 4:1-3.

H. "Like so many others I have had to deal with Black's harassment, the financial burden he has created, and emotional stress caused by his pursuing baseless claims." *Id.* at 6:21-22.

The court has been presented with a declaration in which the witness provides some identified portion of the testimony based only oh "information and belief." That Declaration is the testimony of a witness presented in writing in lieu of the witness being put on the stand. Non-expert witness testimony must be based on the personal knowledge of the witness. FED. R. EVID. 602. As discussed in Weinstein's Federal Evidence § 602.02:

> A witness may testify only about matters on which he or she has first-hand knowledge. Because most knowledge is inferential, personal knowledge includes opinions and inferences grounded in observations or other first-hand experiences. The witness's testimony must be based on events perceived by the witness through one of the five senses.

Recently, the Ninth Circuit Court of Appeal addressed this personal knowledge issue, stating:

> Under Rule 602, "[a] witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." FED. R. EVID. 602. Rule 602 requires any witness to have sufficient memory of the events such that she is not forced to 'fill[] the gaps in her memory with hearsay or speculation.' 27 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE Evidence § 6023 (2d ed. 2007). Witnesses are not 'permitted to speculate, guess, or voice suspicions.' *Id.* § 6026. However, '[p]ersonal knowledge includes opinions and inferences grounded in observations and experience.' *Great Am. Assurance Co. v. Liberty Surplus Ins. Co.*, 669 F. Supp. 2d 1084, 1089 (N.D. Cal. 2009) (citing *United States v. Joy*, 192 F.3d 761, 767 (7th Cir. 1999)). Lay witnesses may testify about inferences pursuant to Rule

701:

> If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: (a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

FED. R. EVID. 701.

United States v. Whittemore, 776 F.3d 1074, 1082 (9th Cir. 2015).

As discussed in Moore's Federal Practice, Civil § 8.04, the use of "information and belief" is a pleading device for the use in a complaint (or motion) to allow a plaintiff (movant) to fill in the gaps of alleging a claim pending discovery.

> [4] Allegations Supporting Claims for Relief May Be Made on Information and Belief
>
> Rule 8 does not expressly permit statements supporting claims for relief to be made on information and belief (see § 8.06[5]). However, Rule 11 permits a pleader, after reasonable inquiry, to set forth allegations that "will likely have evidentiary support after a reasonable opportunity for further investigation or discovery" (see Ch. 11, Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions). Courts have read the policy underlying Rule 8, together with Rule 11, to permit claimants to aver facts that they believe to be true, but that lack evidentiary support at the time of pleading. Generally, however, such averments are allowed only when the facts that would support the allegations are solely within the defendant's knowledge or control.
>
> Nothing in the *Twombly* plausibility standard (see [1], above) prevents a plaintiff from pleading on information and belief. A pleading is sufficient if the pleading as a whole, including any allegations on information and belief, states a plausible claim. On the other hand, if the pleading fails to permit a plausible inference of wrongdoing, or if the allegations are nothing more than legal conclusions, the pleading will not survive a motion to dismiss.

This is incorporated to Federal Rule of Bankruptcy Procedure 9011, which repeats the provisions of Federal Rule of Civil Procedure 11(b), stating:

> (b) Representations to the court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances[,]—
>
> > (1) it is not being presented for any improper purpose, such as to harass

> or to cause unnecessary delay or needless increase in the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
>
> (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
>
> (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

Though allowed as a pleading device, the certification required by 28 U.S.C. § 1746 does not allow testimony in declaration to be provided under penalty of perjury being true because the witness merely "is informed and believes (or desires because likely it would mean the witness party would prevail) it is true."

The objectionable statements in Defendant's declaration will not be taken into consideration by the court.

Defendant's Attorney's Declaration

Defendant's Counsel submitted an eleven (11) page declaration in support of Defendant's Motion on January 14, 2022. Dckt. 263. Defendant's Counsel largely reaffirmed many of the grounds already listed in Defendant's Motion and Declaration. Defendant's Counsel also mentions contemporaneous time entries were maintained from the petition date to the present time. Declaration, Dckt. 263 at 3:5-7. However, those billing records are not provided in support of this Motion.

Additionally, Defendant's Counsel provides summary of increased time spent litigating the matter:

> **Review 375 Documents Produced** - Defendant's Counsel states they spent 27.50 hours reviewing 375 pages of poorly labeled documents that were produced 100-days late.
>
> Fees Requested: 27.50 hours,
> $475.00 hourly rate =
> **$13,062.50**
>
> Dckt. 263 at 4:16.

> **Plaintiff's Deposition** - Defendant's Counsel states they spent 9.75 hours trying to get Plaintiff to appear at the deposition. Additionally, they spent 35 hours

preparing and conducting for the deposition, including time spent preparing for cancelled depositions and 18.50 hours conducting the deposition.

Fees Requested: 63.25 hours,
$475.00 hourly rate =
$30,043.75

Id. at 4:25-26.

Review of 18,444 Insurance Documents Produced - Defendant's Counsel states they spent 17.5 hours going through 18,444 documents of "irrelevant and duplicate" material relating to Plaintiff's insurance company. Defendant's Counsel states motions to compel and/or motions for protective order were not filed because wanted to keep the costs of litigation down.

Fees Requested: 17.75 hours,
$475.00 hourly rate =
$8,431.25

Id. at 6:1-2.

Plaintiff's Deposition Cancellations - Defendant's Counsel states Plaintiff frequently cancelled scheduled depositions. Defendant's Counsel spent 17.75 hours preparing for each of the cancelled depositions and attendance of the September deposition. Dckt. 270 at 6:17-18.

Fees Requested: 17.75 hours,
$475.00 hourly rate =
$8,431.25

Id. at 6:13-14.

Preparation for Trial - Defendant's Counsel states they took 300 hours to prepare for their five (5) day trial. This equates to $142,500.00 billed. Defendant's Counsel states this is exclusive of the motions in limine and objects to evidence and **some** of the time directed to the repetitive materials. It is concerning to the court that "some" of the time directed to the repetitive materials may be double billed. The court cannot confirm this, however, without billing statements that have not been provided to the court. *Id.* at 6.

Fees Requested: 300 hours,
$475.00 hourly rate =
$142,500.00

Id. at 6:18-19.

Motions in Limine - Defendant's Counsel states it took **at least 39.5 hours** to research, draft, and file the motions in limine and objections to evidence. Again, Defendant's Counsel's billing records are of concern as she states "at least," instead of concretely giving a number. Defendant's Counsel additionally states it took 3.5 hours at trial and after the first day of trial to organize the exhibits.

Fees Requested: 43 hours
$475.00 hourly rate =
$20,425.00

Id. at 7

Duplicate Exhibits at Trial - Defendant's Counsel states there was a "conservative estimate" of 3 hours of the courts time taken up by dealing with Plaintiff's exhibits.

Fees Requested: 3 hours
$475.00 hourly rate =
$1,425.00

Id. at 7:22-23.

Counsel represents that there are an additional $80,000.00 of fees and costs incurred for time caused by Plaintiff and his tactics for which recovery either is not mandated by the cost bill or are not being sought by Defendant's motion. Dckt. 263 at 8:10-12.

The court notes Defendant's Counsel's comment that Plaintiff's Counsel "knew or should have known" their conduct was "intended to, would and did increase the costs of litigation." *Id.* at 10:2-3. How can an individual "should have known" their conduct's intent? They either have intent or do not have intent. It is not a known or should have known situation.

Memorandum of Points and Authorities

Defendant filed their Points and Authorities in Support of Motion on January 14, 2022. Dckt. 264. The Points and Authorities largely reiterates the legal arguments stated above.

PLAINTIFF'S OPPOSITION
AND SUPPORTING PLEADINGS

Plaintiff filed an opposition on March 1, 2022. Dckt. 304. Plaintiff opposes on the following grounds:

1. In Defendant's Pre-Trial Statement (Dckt. 195), Defendant stated there is no basis or provision for attorneys' fees. The court adopted this in their August 10, 2021 Trial Order (Dckt. 207). Plaintiff states Defendant waived any claim for attorney's fees. Upon court's review, the Pre-Trial Conference Statement by Defendant's Counsel states "There is no basis or provision for attorneys fees." Dckt. 195 at 5:15-16. Additionally, the

Notice and Order for Trial, issued on August 10, 2021, states no basis for attorney's fees. Dckt. 207:22-23.

2. 11 U.S.C. § 523(d) applies to consumer debts. The underlying debt is commercial. *Id.* at 5:20-24.

3. Plaintiff was substantially justified in litigating the business debt against Defendant. *Id.* at 5:26-28.

4. Plaintiff was at a disadvantage of attempting to establish fraud by memory and death of a witness constitutes a Special Circumstance. *Id.* at 6:23-7:6.

5. Relief under 11 U.S.C. § 105(a) is not warranted because Defendant's Motion does not allege bad faith that would warrant sanctioning Plaintiff with $275,500.00 in attorney's fees. *Id.* at 12:7-10.

6. Total fees in the amount of $275,500.00 are excessive. *Id.* at 12:16-19.

Plaintiff's Declaration

On March 1, 2022, Plaintiff filed a Declaration in support of the Opposition. Dckt. 306. The Declaration does not state that any portion of it is based on "information and belief." Plaintiff's two (2) page declaration contains several factual assertions including:

1. "At no time in this litigation did I take any action in bad faith, nor did I have any intent to abuse the judicial process or harass or unduly burden the Defendant or his counsel in this case. Declaration, Dckt. 306 at 2:5-7.

Defendant may point to this as being a factual or legal conclusion. It is the witness stating what he believes he did. But it is for the court to make a conclusion as to whether the act or action taken was in bad faith or with an intent to abuse.

2. "I brought this litigation in the good faith belief that I was defrauded by Defendant and his business associates and based on the judgment I had obtained in state court. *Id.* at 2:8-10.

3. "I did not instruct my counsel to take any actions for the purposes of harassment nor to delay proceedings in this litigation." *Id.* at 2:11-12.

4. "The 20,000 pages of documents referenced as the Fireman's Fund documents or the Insurance Litigation Documents were produced to me in the same manner and format as they were produced by my counsel to Defendant. Fireman's Fund created the PDF files. The 20,000 pages of Fireman's Fund documents were produced to Plaintiff in the same manner they were produced to Defendant. *Id.* at 2:13-16

5. "In or about December 2020, prior to my scheduled deposition, I had a COVID exposure in my office. Due to my age and the age and health of my wife, I took extra quarantine precautions that required me to postpone my December deposition." *Id.* at 2:17-20.

6. "I was prepared to attend my deposition on January 21, 2021 before it was unilaterally cancelled by Defendant." *Id.* at 2:21-22.

Plaintiff's Counsel's Declaration

On March 1, 2022, Plaintiff's Counsel filed a declaration in support of the Opposition. Dckt. 305. The Declaration does not state that any portion of it is based on "information and belief." Plaintiff's Counsel's seven (7) page declaration contains many factual assertions including:

1. "At no time in this litigation did I take any action in bad faith, nor did I have any intent to abuse the judicial process or harass or unduly burden the Defendant or his counsel in this case. This litigation was highly contentious with a great deal of personal animus between the parties." *Id.* at 2:7-8.

2. "In or about October 2020, I began a series of meet and confer discussions with Defendant's counsel regarding Plaintiff's responses to Defendant's Requests for Production. Due to Plaintiff's records being kept off-site and under restricted access due to local COVID protocols and due to Plaintiff's work providing staffing and resources for bio-tech companies working on the COVID vaccine, Plaintiff was unable to produce documents by the response date for Defendant's document request." *Id.* at 2:14-18.

3. "Plaintiff requested a sixty (60) day extension to provide written responses and all responsive documents, which Defense counsel denied. Counsel instead offered a 14-day extension, which was insufficient to provide the records under the circumstances during a peak period of the COVID-19 pandemic." *Id*. at 2:19-22.

4. "Unable to meet the 14-day extension deadline, Plaintiff served written responses stating he had no documents in his possession at that time, but that documents would be provided as soon as possible." *Id*. at 2:23-25.

5. "During this entire period between October 2020 and December 2020, I engaged in regular meet and confer correspondence with counsel for Defendant and kept counsel updated on the status of production." *Id*. at 25-28.

6. "On or about December 28, 2020, Plaintiff served written, supplemental responses to Plaintiff's document requests including document production of approximately 375 pages." *Id.* at 3:1-3.

7. "The documents consisted largely of invoices and payment records which were separated out into 'A' and 'B' folders each with a different file name including the date of the invoice on the Norcal Invoices." *Id.* at 3:12-14.

8. "During meet and confer discussions between March 2021 and May 2021, Counsel for Defendant requested Plaintiff's Counsel identify and produce the 20,000 documents referenced by Plaintiff at his deposition (the "Insurance Litigation Documents"). " *Id.* at 3:18-21.

9. During the same time period, Defendant served their Motion for Summary Judgment interrupting the production of documents in order for Counsel to respond. *Id.* at 3:22-23.

10. Counsel reviewed the documents for privileged content and categorized them to correspond to Defendant's document requests. *Id.* at 3:28.

11. "The Document requests included Request No. 15: 'Any and all writings which constitute, evidence, discuss, set forth, summarize or in any way relate to any and all communications between YOU and anyone relating to the VEHICLE from January 1, 1999 through to the present time, that YOU do not claim as privileged.'" *Id.* at 4:4-7.

12. "The Insurance Litigation Documents also included pictures of the Vehicle, handwritten correspondence between Plaintiff, Mr. Tirpak, and Mr. Sarganis, and other highly relevant documents to this dispute. Many of the records in the Insurance Litigation Documents were used as trial exhibits by Plaintiff." *Id.* at 4:8-11.

13. "When I received the Insurance Litigation Documents, they were divided into approximately 35 PDF files with pages sequentially numbered. [informed and believed sentence] The files as produced to me contained security settings on the files that prevented deleting pages in the series or extracting pages. I was unable to remove any duplicate pages from the PDF files and instead was only able to sort and organize the files as responsive to Defendant's request by referencing the series of documents it was contained in. All documents were already sequentially BATES stamped with FFIC notation." *Id.* at 4:16-25.

14. " On or about December 10, 2020, I emailed counsel for Defendant stating that Plaintiff would need to reschedule his December 18, 2020 deposition due to a potential COVID exposure." *Id*. at 4:8-10.

15. "On or about December 17, 2020, counsel for the parties agreed to reschedule Plaintiff's deposition to January 21, 2021." *Id*. at 5:11-12.

16. " On January 20, 2021, I emailed counsel for Defendant requesting log-in instructions for Plaintiff's remote deposition. Counsel for

Defendant responded the deposition would not go forward on January 21, 2021 and would be rescheduled. Prior to January 20, 2021, I received no notice from Defense Counsel the deposition was being postponed." *Id*. at 4:13-17

17. " Following Defendant's unilateral cancellation, the parties agreed to hold Plaintiff's deposition on March 29, 2021 and Plaintiff appeared on that date." *Id*. at 5:18-19.

18. "In reviewing documents to prepare Plaintiff's trial binders in this action, I noticed there were several versions of the invoices and payment records. Some records contained handwritten notations that were either not present or not readily apparent on the original or copies of the records. I elected to be overinclusive in production of his trial exhibits so as not to be left missing any records when presenting Plaintiff's case at trial." *Id.* at 5:20-25.

19. "While preparing Plaintiff's trial binders, I was working alone in my office, with support staff and Plaintiff available only by remote means due to COVID-19 protocols." *Id.* at 5:26-28.

20. " I was and am in a high-risk demographic for complications that could arise from COVID." *Id*. at 6:1-2.

21. Plaintiff's Counsel's efforts were further hindered by his inability to use his normal printing company. *Id*. at 6:9-18.

22. After duplication of the trial binders Plaintiff's Counsel became aware of errors in the printing and page numbering, but did not have time to correct the issues before delivery to the Court. *Id.* at 6:19-21.

23. Plaintiff's Counsel was unaware that amended trial binders would be allowed and had they known they would have brought corrected binders to the first day of trial. *Id.* at 6:22-25.

24. Any conduct related to the trial binders was inadvertent and not intentional. *Id.* at 6:26-28.

25. "When the issue was raised by the Defendant at trial, the Court asked if I could fix the binders. With the help and hard work of support staff, my office made its best efforts to correct the errors, including hand delivering copies to Defense counsel's hotel room after hours." *Id.* at 7:1-4.

26. At no time in this litigation did I fail to respond to correspondence sent by Defendant's counsel." *Id.* at 7:9-10.

27. At no time did Plaintiff's Counsel take any action for the purpose of

harassment or delay nor did they act with any intent to abuse the judicial process or disrespect the court. *Id.* at 7:11-12.

Exhibits in Support of Plaintiff's Opposition

On March 1, 2022, Plaintiff filed the following exhibits in support of their opposition:

1. Defendant's 3rd Amended Notice of Taking of Deposition & Request for Document Production to Dominique Black.

2. Screenshot of Fireman's Fund Document Production.

3. Dominique Black's Amended Second Supplemental Responses to First Set of Request for Production.

4. Screenshot of Document Production for First Set of Requests for Production.

Dckt. 307.

DEFENDANT'S REPLY
AND SUPPORTING PLEADINGS

On March 8, 2022, Defendant filed a reply to Plaintiff's opposition (Dckt. 317) stating:

A. Plaintiff failed to provide credible evidence to support their Causes of Action in the First Amended Complaint. *Id.* at 2:9-10.

B. The claim was not supported by law and fact and therefore was not substantially justified. *Id.* at 2:10-13.

C. Mr. Black was represented by competent counsel. *Id.* at 2:18-20.

D. Mr Black intended to increase the cost of litigation in order to force a settlement. To not award fees would reward that conduct. Which is the very kind of conduct which 11 U.S.C. §523(d) was intended to discourage. *Id.* at 4.

E. The court should use broad discretion to thwart abuse of the adversary process **"[independent] of the difficulty to label the claim as a 'consumer' debt."** *Id.* at 4:22-25.

F. "The fees sought demonstrate billing judgment and are identified with sufficient specificity to allow the Court to exercise the broad discretion vested in it under 11 U.S.C. §523(d)." *Id.* at 5:2-4.

G. Adequate time was available to correct the trial exhibits and Plaintiff's

Counsel's claims that they did not know they could correct the trial binders is unsupported by the court's pre-trial order and the docket. *Id.* at 5:11-14.

H. Plaintiff's conduct supports a determination of abuse of the litigation process. *Id.* at 6:3-4.

I. The right to seek fees was not abandoned because Defendant identified their was no contractual basis for a fee award, but the answer to the First Amended Complaint set out a demand for attorney's fees. *Id.* at 6:22-28.

J. Prevailing party attorney's fees can be awarded under 11 U.S.C. § 105(a) when another party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons. *Id.* at 7:1-7.

K. Plaintiff continues to spread misinformation. *Id.* at 7:12-20.

L. Fees are consistent with market values. *Id.* at 8:5-14.

Defendant's Counsel's Declaration

On March 10, 2022, Defendant's Counsel filed a Supplemental Declaration in support of the Reply repeating much of the previous arguments. Dckt. 321.

Defendant's Counsel also includes statements, as personal knowledge testimony under penalty of perjury, that are not based on personal knowledge, but are rather statements requiring speculation of Defendant's Counsel or her personal legal conclusions being dictated to the court:

A. "The materials that were produced by Messrs. Black and Lazzarini were produced with their actual knowledge . . ." Declaration, Dckt. 321 at 2:4-7.

B. ". . . they did not fulfil [*sic*] that statutory obligation and produced those materials knowing that they were burdensome and were not responsive to the request for production." *Id.* at 3:13-15.

C. " . . . they knew or should have known that substantially none of the produced materials were responsive to the request for document production . . ." *Id.* at 4:8-9.

D. "The conduct by Messrs Black and Lazzarini were intended to and did increase the costs of the defense of the litigation." *Id.* at 5:16-17.

These statements/legal conclusions provided by Defendant's Counsel's in her Supplemental Declaration offer little of evidential value, and demonstrate the long, dark hole of litigation maneuvering by Defendant and Defendant's Counsel.

Exhibits in Support of Defendant's Response

On March 10, 2022, Defendant filed the following Supplemental Exhibits in support of their response:

1. Redacted emails.

2. 3rd Amended Notice of Deposition & Request for Document Production to Dominique Black.

3. Email from Mr. Lazzarini to Ms. Gropper Nelson dated May 14, 2021.

Dckt. 323-325.

APPLICABLE LAW

Prevailing Party and Attorneys's Fees

The court may allow costs to the prevailing party except when a statute of the United States or these rules otherwise provides. Costs against the United States, its officers and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on 14 days' notice; on motion served within seven days thereafter, the action of the clerk may be reviewed by the court. *Fed. R. Bank. P.* 7054(b)(1).

Attorney's fees and costs, if any, must be requested as provided by Federal Rule of Civil Procedure 54 and Federal Rules of Bankruptcy Procedure 7054 and 9014. Furthermore, a claim for attorney's fees and related nontaxable expenses must be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages. *Fed. R. Civ. P.* 54(d)(2)(A); *Fed R. Bankr. P.* 7054. Federal Rule of Civil Procedure 54(d)(2)(B)(ii) governs motions for attorney's fees. *Collier on Bankruptcy* discusses the requirements for prevailing party attorney's fees:

> Civil Rule 54(d)(2)(B)(ii) requires the motion to specify the judgment, as well as any statute, rule, or other grounds that would entitle the movant to the award. This conforms to the standard in the United States, known as the 'American Rule' that individual attorney's fees are, without a statute, contract, or special circumstances stating otherwise, the responsibility of the litigants who hire those attorneys.

10 Collier on Bankruptcy P 7054.06 (16th 2021).

Under the American Rule, the prevailing party in a lawsuit does not collect attorney's fees absent contractual or statutory authorization. *International Union of P.I.W. v. Western Indus. Maintenance, Inc.*, 707 F.2d 425, 428 (9th Cir. 1983). A prevailing party need not achieve all of the relief claimed, but merely some of the benefit the parties sought in bringing the suit. *Park, ex rel. Park v. Anaheim Union High School Dist.*, 464 F.3d 1025, 1035 (9th Cir. 2006). Additionally, this generous formulation brings the plaintiff only across the statutory threshold and remains for the district court to determine what fee is "reasonable." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983).

In the Ninth Circuit, the customary method for determining the reasonableness of a professional's fees is the "Lodestar Calculation." *Morales v. City of San Rafael*, 96 F.3d 359, 363 (9th Cir. 1996), amended, 108 F.3d 981 (9th Cir. 1997). Additionally, California courts use the Lodestar

method. *Ketchum v. Moses*, 24 Cal. 4th 1122, 1133-36 (2001); *Serrano v. Priest*, 20 Cal. 3d 25, 48-49 (1977).

"The 'lodestar' is calculated by multiplying the number of hours the prevailing party reasonably expended on the litigation by a reasonable hourly rate." *Morales*, 96 F.3d at 363 (citation omitted). "This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services." *Hensley* 461 U.S. at 433. An attorney's fee award based on the lodestar is a presumptively reasonable fee. *In re Manoa Fin. Co.*, 853 F.2d 687, 691 (9th Cir. 1988).

The Lodestar method may be adjusted based on factors including "(1) the novelty and difficulty of the questions involved, (2) the skill displayed in presenting them, (3) the extent to which the nature of the litigation precluded other employment by the attorneys, (4) the contingent nature of the fee award." *Ketchem*, 24 Cal. 4th at 1132.

In rare or exceptional instances, if the court determines that the Lodestar figure is unreasonably low or high, it may adjust the figure upward or downward based on certain factors. *Miller v. Los Angeles County Bd. of Educ.*, 827 F.2d 617, 620 n.4 (9th Cir. 1987). Therefore, the court has considerable discretion in determining the reasonableness of a professional's fees. *Gates v. Duekmejian*, 987 F.2d 1392, 1398 (9th Cir. 1992). Having this discretion is appropriate "in view of the [court's] superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters." *Hensley*, 461 U.S. at 437.

A trial court can reduce attorney's fees when a party achieves limited success. *See, Save Our Uniquely Rural Cmty. Env't v. Cty. of San Bernardino*, 235 Cal. App. 4th 1179, 1185 (2015). "Where the plaintiff has failed to prevail on a claim that is distinct in all respects from his successful claims, the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee." *Hensley v. Eckerhart*, 461 U.S. at 440. Where a plaintiff achieved limited success, the district court awards fees that are reasonable to the results obtained. *Id*. The *Hensley* court adopted the following analysis which California courts follow:

> Where the plaintiff has failed to prevail on a claim that is distinct in all respects from his successful claims, the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee. Where a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the district court did not adopt each contention raised. But where the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained.

Hensley v. Eckerhart, 461 U.S. 424, 440, 103 S. Ct. 1933, 1943 (1983); *See also Chavez v. City of Los Angeles*, 47 Cal. 4th 970, 989 (2010) ("If a plaintiff has prevailed on some claims but not others, fees are not awarded for time spent litigating claims unrelated to the successful claims, and the trial court 'should award only that amount of fees that is reasonable in relation to the results obtained.'" (quoting *Hensley* 461 U.S. at 440)). Therefore, if a party fails on one claim that is completely distinct from any claims plaintiff prevailed on, the hours expended should be excluded from the final fees awarded. Additionally, if a party achieved limited success on a claim, the district court shall award only a reasonable amount of fees for the time expended.

Defendant's Assertion 11 U.S.C. § 523(d) is a Basis for Attorney's Fees For This State Court Judgment Arising Out of Debtor's Business is Incorrect

The statutory basis for the requested prevailing party attorneys' fees is 11 U.S.C. § 523(d), which provides (emphasis added):

> (d) If a creditor requests a **determination of dischargeability of a consumer debt** under subsection (a)(2) of this section, and such debt is discharged, the court shall grant judgment in favor of the debtor for the costs of, and a reasonable attorney's fee for, the proceeding if the court finds that the position of the creditor was not substantially justified, except that the court shall not award such costs and fees if special circumstances would make the award unjust.

Collier on Bankruptcy, ¶ 523.30 has a succinct discussion of this point, stating that fees are recoverable if: (1) dischargeability was challenged for a consumer debt and (2) the debt was discharged. Creditor can defeat such request by showing that there was a reasonable basis in law or fact to challenge discharge, or other special circumstances. Collier directs the court to the Ninth Circuit Bankruptcy Appellate Panel decision *American Savings Bank v. Harvey (In re Harvey)*, 172 B.R. 314 (B.A.P. 9th Cir. 1994).

The term "consumer debt" is defined in 11 U.S.C. § 101(8) as: "(8) The term "consumer debt" means debt incurred by an individual primarily for a personal, family, or household purpose." The plain language of the statute, 11 U.S.C. § 101(8) clearly states that the debt must have been incurred for either:

1. A personal purpose;

2. A family purpose; or

3. A household purpose.

Here, the "debt" at issue is the State Court Judgment awarded Plaintiff against the late Debtor (for who the Defendant is the successor representative in the late Debtor's bankruptcy case and this Adversary Proceeding) was for an obligation asserted to arise from the late Debtor's business, for failure of Defendant to provide the work in renovating the motor home in Defendant's and others' related businesses. It was asserted that Defendant's business and other businesses failed to properly renovate Plaintiff's motor vehicle.

The State Court Judgment is for obligations asserted to have arise from the late Debtor's business operations. The Plaintiff is not asserting claims for residential rent, nor personal clothing purchases, or buying gifts for the family, or personal/family medical expenses and the like. The debt now ensconced in the State Court Judgments is for claims arising out of the late Debtor's commercial business operation – the late Debtor's failure to perform contractual duties relating to his business, and not debt incurred for a personal, family, or household purpose.

Defendant admits to this shortcoming, stating in their Response (Dckt. 317) (emphasis

added), "The fee motion identified and recognizes **the difficulty presented by 11 U.S.C. §523(d) and the rubric of 'consumer debt**'" (page 4 lines 2-4) and recognizing a **"difficulty to label the claim as a 'consumer' debt**" (page 3 lines 23-25). At numerous times, Defendant mentions a "broad discretion" the court has to award fees "in a case like this."

The "difficulty presented by 11 U.S.C. § 523(d)" appears to be the difficulty that the plain language of the statute offers no support to Defendant's contention that the court should consider a debt arising out of the late Debtor's commercial business operation as a personal, family, or household debt. Such an assertion by Defendant is without merit.

It appears Defendant is under the belief that if the court is wildly offended by Plaintiff's actions, then the court should use broad discretion to rewrite the plain language of 11 U.S.C. § 523(d) to allow the court to penalize Plaintiff and cause Plaintiff to forfeit monies to Defendant. Defendant cites no authority giving the court discretion to "wave its judicial wand" and create law beyond what Congress plainly and clearly stated in 11 U.S.C. § 523(d). Defendant offers no basis for the court to add additional provisions to 11 U.S.C. § 523(d), usurping the Constitutional powers of Congress and the President of the United States.

The court, in following with the plain language provided by Congress, concludes that Defendant's assertion that 11 U.S.C. § 523(d) can be extended for litigation not relating to a consumer debt of a debtor.

Defendant's Assertion that Court Should Order
Payment of Attorney's Fees Pursuant to *11 U.S.C. § 105(a)*

Under Section 105(a), "[t]he court may issue any order . . . necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a) grants the court its inherent sanctioning power. 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).

Defendant asserts that prevailing party fees under 11 U.S.C. § 105(a) are warranted. Defendant directs the court to *In re Schwartz Tallard*, 473 B.R. 340 (B.A.P. 9th Cir. 2012), aff'd, 751 F.3d 966 (9th Cir. 2014), opinion withdrawn and superseded, 765 F.3d 1096 (9th Cir. 2014), on reh'g *en banc*, 803 F.3d 1095 (9th Cir. 2015), and aff'd, 765 F.3d 1096 (9th Cir. 2014), and on reh'g *en banc*, 803 F.3d 1095 (9th Cir. 2015), and aff'd, 803 F.3d 1095 (9th Cir. 2015). Thus, the Bankruptcy Appellate Panel decision has been replaced by a Circuit Court of Appeal decision, which is based on 11 U.S.C. § 362(k) and not the grounds asserted by Defendant for this Motion.

In *Schwartz*, the Bankruptcy Appellate Panel did discuss that a court "may award a prevailing party attorneys' fees when another party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons.'" *Id.* at 347 (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 33 (1991)). This authority is granted under the court's inherent sanctioning power. *Chambers,* 501 U.S. at 33.

10 Moore's Federal Practice - Civil § 54.171 (2021) (citing *Chambers*, 501 U.S. at 43-51); *see also Alyeska Pipeline Serv. Co. V. Wilderness Society*, 421 U.S. 240, 258-59 (1975), discusses this principle of law, stating:

> When a party acts "in bad faith, vexatiously, wantonly, or for oppressive reasons," the court may employ its inherent equitable powers to award attorney's fees as sanctions. Such a fee award is permissible under the bad faith exception to the American Rule, and its purpose is to compensate the wronged party, punish the wrongdoer, and protect the integrity of the court.

This exception only applies to bad faith relating to conduct in the litigation. *Association of Flight Attendants v. Horizon Air Indus., Inc.*, 976 F.2d 541, 549 (9th Cir. 1992). However, the prevailing party's bad faith may also serve as a ground for denying costs or attorney's fees to which the prevailing party would be otherwise entitled.

Going to the Supreme Court decision upon which is principle is based, Chambers v. NASCO, Inc., 501 U.S. 32, 43, 45-46, 50 (1991), the exercise of this power to sanction is stated as:

> For this reason, "Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates." *Anderson v. Dunn*, 19 U.S. 204, 6 Wheat. 204, 227, 5 L. Ed. 242 (1821); see also *Ex parte Robinson*, 86 U.S. 505, 19 Wall. 505, 510, 22 L. Ed. 205 (1874). These powers are "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Link v. Wabash R. Co.*, 370 U.S. 626, 630-631, 8 L. Ed. 2d 734, 82 S. Ct. 1386 (1962).
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> . . .
>
> Because of their very potency, inherent powers must be exercised with restraint and discretion. *See Roadway Express*, *supra*, at 764. A primary aspect of that discretion is the ability to fashion an appropriate sanction for conduct which abuses the judicial process. As we recognized in *Roadway Express*, outright dismissal of a lawsuit, which we had upheld in *Link*, is a particularly severe sanction, yet is within the court's discretion. 447 U.S. at 765. Consequently, the "less severe sanction" of an assessment of attorney's fees is undoubtedly within a court's inherent power as well. *Ibid. See also Hutto v. Finney*, 437 U.S. 678, 689, n. 14, 57 L. Ed. 2d 522, 98 S. Ct. 2565 (1978).
>
> Indeed, "there are ample grounds for recognizing . . . that in narrowly defined circumstances federal courts have inherent power to assess attorney's fees against counsel," *Roadway Express, supra*, at 765, even though the so-called "American Rule" prohibits fee shifting in most cases. *See Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 259, 44 L. Ed. 2d 141, 95 S. Ct. 1612 (1975). As we explained in *Alyeska*, these exceptions fall into three categories. The first, known as the "common fund exception," derives not from a court's power to control litigants, but from its historic equity jurisdiction, *see Sprague v. Ticonic National Bank*, 307 U.S. 161, 164, 83 L. Ed. 1184, 59 S. Ct. 777 (1939), and allows a court to award attorney's fees to a party whose litigation efforts directly benefit others. *Alyeska*, 421 U.S. at 257-258. Second, a court may assess attorney's fees as a sanction for the '"willful disobedience of a court order.'" *Id.*, at 258 (quoting *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718, 18 L. Ed. 2d 475, 87 S. Ct. 1404 (1967)). Thus, a court's discretion to

determine "the degree of punishment for contempt" permits the court to impose as part of the fine attorney's fees representing the entire cost of the litigation. *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399, 428, 67 L. Ed. 719, 43 S. Ct. 458 (1923).

Third, and most relevant here, a court may assess attorney's fees when a party has "'acted in bad faith, vexatiously, wantonly, or for oppressive reasons.'" *Alyeska, supra*, at 258-259 (quoting *F. D. Rich Co. v. United States ex rel. Industrial Lumber Co.*, 417 U.S. 116, 129, 40 L. Ed. 2d 703, 94 S. Ct. 2157 (1974)). *See also Hall v. Cole*, 412 U.S. 1, 5, 36 L. Ed. 2d 702, 93 S. Ct. 1943 (1973); *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402, n. 4, 19 L. Ed. 2d 1263, 88 S. Ct. 964 (1968) (*per curiam*). In this regard, if a court finds "that fraud has been practiced upon it, or that the very temple of justice has been defiled," it may assess attorney's fees against the responsible party, *Universal Oil*, *supra*, at 580, as it may when a party "shows bad faith by delaying or disrupting the litigation or by hampering enforcement of a court order," *Hutto*, 437 U.S. at 689, n. 14. The imposition of sanctions in this instance transcends a court's equitable power concerning relations between the parties and reaches a court's inherent power to police itself, thus serving the dual purpose of "vindicating judicial authority without resort to the more drastic sanctions available for contempt of court and making the prevailing party whole for expenses caused by his opponent's obstinacy." *Ibid.*

. . .

But neither is a federal court forbidden to sanction bad-faith conduct by means of the inherent power simply because that conduct could also be sanctioned under the statute or the Rules. A court must, of course, exercise caution in invoking its inherent power, and it must comply with the mandates of due process, both in determining that the requisite bad faith exists and in assessing fees, *see Roadway Express, supra*, at 767. Furthermore, when there is bad-faith conduct in the course of litigation that could be adequately sanctioned under the Rules, the court ordinarily should rely on the Rules rather than the inherent power. But if in the informed discretion of the court, neither the statute nor the Rules are up to the task, the court may safely rely on its inherent power.

There is no quarrel that this federal court has such inherent powers, in addition to what may be construed under 11 U.S.C. § 105(a) to "that is necessary or appropriate to carry out the provisions of this title." Though Defendant does not tie the request to provisions of Title 11, such does not limit this court's inherent power.

In reviewing the Defendant's Motion (Dckt. 260), Supplement to Motion (Dckt. 300), Points and Authorities (Dckt. 264), and Reply (317), Defendant provides the following legal bases and analyses for asserting that awarding sanctions pursuant to 11 U.S.C. § 105(a) and the inherent power of the court:

A. Reply, p. 7:3-12; Dckt. 317.

The request for fees under §105 is warranted. As identified in the opposition "Section 105(a) authorizes a bankruptcy court to 'issue any order, process, or judgment that is necessary to carry out the

provisions of [title 11].'" *In re Schwartz Tallard*, 473 B.R. 340, 351 (BAP 9th Cir. 2012). "[A] court may award a prevailing party attorneys' fees when another party has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons." Id. at 347

The conduct by Messrs Black and Lazzarini in continuing to pursue the adversary where they were in control and possession of the very evidence that they produced at trial was in bad faith. That "evidence" and their conduct in response to discovery support the fees as requested. All of the identified time was required to mount the defense that resulted in the judgment on all counts in favor of the successor representative. *Hensley v. Eckhart*, 461 U. S. 424 (1983)

B. Supplement to Motion, p. 4:16-23; Dckt. 300.

11 U.S.C. §105(a) provides the Court with the inherent discretion to protect the judicial process. The award of attorney fees sought by the motion are intended to deter the conduct evidenced by Mr. Black in abusing the judicial process without regard to the burden on time and resources for both the other participants and the Court.

Throughout the underlying adversary action Dominique Black intended to and did increase the costs of litigation without regard for the burdens and costs that conduct would create. The Court was witness to that conduct throughout the five days of trial. (*Daggett v. Cardinale*, 280 B.R. 483, 495 (9th Cir. BAP2002))

While Defendant complains of Plaintiff's shortcoming and "devious" tactics, the court's observation is that Defendant gave "tit for tat," and that much of Defendant's litigation expenses are a result of Defendant's intentional litigation strategy. As discussed below, Defendant chose to not utilize the rights and remedies to address discovery disputes and perceived improper "gamesmanship" by an opponent. As experienced litigation counsel know, a judge's ruling on a discovery motion or two brings into line an attorney who thinks Federal Court litigation is a game where "anything goes, so long as the other side lets you get away with it."

There are many tools available to conduct discovery within the adversary through the Federal Rules of Civil Procedure (Fed. R. Civ. P. 28-37) as incorporated into the Federal Rules of Bankruptcy Procedure (Fed. R. Bankr. P. 7028-7037, 9014(c)). Rule 37 of the Federal Rules of Civil Procedure (as incorporated by Federal Rule of Bankruptcy Procedure 7037) provides the procedure for the court to resolve discovery disputes. Under Federal Rules of Civil Procedure Rule 37, a party may move for an order compelling disclosure or discovery. The motion must include "a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action." *Id*.

Federal Rules of Civil Procedure Rule 37(a)(3)(B) permits a party seeking discovery to move for an order compelling an answer, designation, production, or inspection, if a party fails to answer deposition question submitted under Federal Rules of Civil Procedure Rule 30 or 31, or fails to produce documents as requested under Federal Rules of Civil Procedure Rule 34.

The alleged bad faith, improper litigation conduct asserted by Defendant includes the following major items.

1. Production of 375 Pages of Late Documents

Defendant's Counsel's declaration in support of Defendant's Motion mentions 375 pages of late produced documents that were poorly labeled, in violation of Federal Rules of Civil Procedure 34 as incorporated in Federal Rules of Bankruptcy Procedure 7034. Dckt. 263 at 4:8-12. Defendant's Counsel states no motions to compel or protective orders were pursued as a need to keep costs of the defense down, not because there were no grounds to support such motions. *Id.* at 5:3-5.

The discovery proceedings are in place to ensure proper and efficient information sharing between parties. If one side fails to comply with discovery requests, the court can step in so long as there was good faith effort to obtain a response from the opposition,"meet and confer." The court's power to compel a party to comply with discovery requests are for situations like the present case. If a party fails to comply with the Federal Rules, a court can compel them to produce relevant and organized documents to make document review easier for the propounding party and allow for more affective advocacy.

Motions to compel are not designed to be costly. If anything, filing a motion to compel in the case of a "document dump" is the most economically efficient option. An attorney can quickly file the motion and the court can order a party to comply with Rule 34 and produce untimely documents in an organized manner. See Federal Rules of Civil Procedure 37(a); 34(b)(2)(E) as incorporated into Federal Rules of Bankruptcy Procedure 7037; 7034. A motion to compel could therefore save an attorney from billing countless hours.

Defendant's Counsel failed to employ this tactic and instead "sat on their hands" waiting to receive the documents and once received, racked up over $13,000 in attorney's fees by sorting through asserted poorly labeled and late produced documents. Additionally, Defendant's Counsel's denied Plaintiff's request for an extension, illustrating a possible failure to act in good faith in the "attempt to confer" with Plaintiff as required by Federal Rules of Civil Procedure 37(a)(1).

As there was no order compelling Plaintiff to comply with Federal Rules of Civil Procedure 34, Plaintiff never failed to comply with a court order. Only after Defendant wallowed in "discovery misery," went to trial, and amassed large legal fees, does Defendant seek to obtain a remedy for these past alleged "sins" which were not addressed when they were alleged to occur.

2. Production of 18,444 Pages of Documents from Insurance Company

For the same reasons above, Plaintiff never failed to comply with a court order regarding the production of these documents. Defendant's inaction in failing to seek court assistance in managing these 18,444 pages of documents shows to the court that this document dump was consensual. Defendant should not be awarded for the 17.75 hours billed while sorting through the documents when the court could have easily directed Plaintiff to reorganize the documents. Rather, Defendant billed their client over $8,000 in attorney's fees for what could possibly have been resolved in a simple motion.

Plaintiff has argued, and Plaintiff's counsel has testified, Insurance Litigation Documents were provided to Plaintiff in the same form and format as they had been produced by the insurance

company. Plaintiff's Counsel further testifies that due to security settings on the electronic file he could not alter that file.

There was no order compelling Plaintiff to comply with Federal Rules of Civil Procedure 34, Plaintiff never failed to comply with a court order. There was no attempt by Defendant to address any asserted defect or deficiency in the Insurance Litigation Documents presented.

3. Delayed Deposition and Behavior During Deposition

Deposition was postponed twice. As explained in Plaintiff's opposition and testimony, Plaintiff was exposed to COVID-19. Dckt. 304 at 16. This is a more than reasonable reason to postpone a deposition, even on the eve of the proceeding. Additionally, Plaintiff states Defendant unilaterally cancelled Plaintiff's second scheduled deposition. *Id.* No court order was requested by Defendant under Federal Rules of Civil Procedure 45 as incorporated into Federal Rules of Bankruptcy Procedure 7045 to command Plaintiff's attendance of any deposition. The deposition was eventually completed, although much later than the originally scheduled deposition.

With respect to Plaintiff's conduct during the deposition, a motion to compel can be used to compel an answer to a hostile deponent. Federal Rules of Civil Procedure 37 as incorporated into Federal Rules of Bankruptcy Procedure 7037. This can even be done after completing or adjourning the examination. No such order was requested. Although Defendant may believe that the opposing party Plaintiff may have acted with hostility, the entire life of this case has been hostile through actions of both parties. Plaintiff's described actions do not amount to prevailing fees under the bad faith exception.

Again, Defendant chose to take no action when the alleged wrongs are asserted to have occurred.

4. Trial Binders

The court, like Defendant, found the trial binders provided by Plaintiff to be unsuitable for any use in a federal court trial. Many of the exhibits were duplicative and otherwise unnecessary time was taken from trial to review the exhibits and determine their relevance. Plaintiff's Counsel admits to errors in preparing the trial binders. Although Plaintiff's trial binder presented him as unprepared, the court does not find Plaintiff acted in bad faith. The court does not find it necessary nor appropriate to award Defendant prevailing party fees because of Plaintiff's unorganized trial binder, even if it caused delays in the proceedings.

It is no secret this proceeding has been riddled with questionable conduct from both parties. Most recently, Defendant's Attorney improperly requesting attorney's fees through a Bill of Costs, rather than separate Motion as required by Federal Rules of Civil Procedure 54 as incorporated into Federal Rules of Civil Procedure 7054. See Dckt. 275.

The court also observes that there were many shortcomings by Plaintiff and Plaintiff's counsel. As the court determined at trial, Plaintiff's testimony of "facts" he stated he "knew" and how he drew such conclusions was not credible. Plaintiff's presentation of his case appears to be a client driven, evidence presented as the client demanded, and the client "knowing" he has to be right and the attorney's job is to do the client's bidding.

Although Plaintiff and their Counsel may have acted questionably throughout the course of the litigation, their conduct does not arise to the level of "bad faith," especially when considering the conduct and litigation strategy of Defendant and Defendant's Counsel to ignore the conduct they now what to complain of, ignoring and effectively waiving their discovery rights and to have the court correct any asserted improper conduct at the time it was relevant, and Defendant selecting a strategy that is essentially running up a huge legal bill while not wanting to "waste money" on filing a discovery motion to nip the alleged improper conduct in the bud. In substance, rather than exercising Defendant's rights and remedies, Defendant's strategy was to let legal fees purportedly pile up and then try to cash it in at the end of the litigation.

Defendant's strategy have been to deprive the court of an ability to impose an appropriate corrective sanction as discussed in *Chambers*:

> Because of their very potency, inherent powers must be exercised with restraint and discretion. *See Roadway Express, supra*, at 764. A primary aspect of that discretion is the ability to fashion an appropriate sanction for conduct which abuses the judicial process. . .

but instead leave the court with only a scorched earth, nuclear sanction – each and every legal fee that Defendant has incurred in this Adversary Proceeding. *Chambers v. NASCO, Inc.*, 501 U.S. at 44-45.

Defendant's strategy has been to maximize the attorney's fees sought to be recovered those these inherent powers sanctions. Defendant's conduct is that it elected to "go with the flow" and sleep on Defendant's rights, apparently hoping to create an attorney's fees payday after trial if successful.

Again, while Plaintiff and Plaintiff's counsel is questionable with respect to some of the complained of conduct, colorable explanations have been provided. Even more significantly, Defendant did not find such conduct, when it occurred, to warrant the simple filing of a motion, having the court address the issue, and avoiding the large amount of attorney's fees now sought.

Defendant's election to strip the court of the ability to issue an appropriate sanction to address asserted improper conduct, and instead to paint the court into the corner of only having the ability to issue sanctions of hundreds of thousands of dollars (or for what ever portion of the conduct the court concluded was improper) is itself conduct akin to acting in bad faith, vexatiously, wantonly, or for oppressive reasons. The court does not reward such conduct.

The court concludes there is no basis for imposing appropriate and proper sanctions under the inherent powers of the court and 11 U.S.C. § 105(a), to the extent applicable.

Required Lodestar Analysis and Evidence

Even if the court were to believe that imposing attorney's fees sanctions was proper, Defendant has chosen to ignore basic, well established Ninth Circuit law of what must be provided for a court to make an informed, intelligent determination of attorney's fees to be awarded. Defendant's "strategy" in advancing this Motion is consistent with what appears to be consistent with Defendant's litigation strategy - just ask for it, say it, argue it, don't do what is required, or for Defendant to do anything to manage or reduce litigation expenses. Then, be offended and demand to be paid for conduct

that Defendant did not file improper enough to exercise his rights and avoid running up huge legal fees.

As well established in the Ninth Circuit, whether for a prevailing party or professional in a bankruptcy case, "the primary method" to determine whether a fee is reasonable is by using the lodestar analysis. *Marguiles Law Firm, APLC v. Placide (In re Placide)*, 459 B.R. 64, 73 (B.A.P. 9th Cir. 2011) (citing *Yermakov v. Fitzsimmons (In re Yermakov)*, 718 F.2d 1465, 1471 (9th Cir. 1983)). The lodestar analysis involves "multiplying the number of hours reasonably expended by a reasonable hourly rate." *Id.* (citing *In re Yermakov*, 718 F.2d at 1471). Both the Ninth Circuit and the Bankruptcy Appellate Panel have stated that departure from the lodestar analysis cab be appropriate, however. *See id.* (citing *Unsecured Creditors' Comm. v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 960, 961 (9th Cir. 1991) (holding that the lodestar analysis is not mandated in all cases, thus allowing a court to employ alternative approaches when appropriate); *Digesti & Peck v. Kitchen Factors, Inc. (In re Kitchen Factors, Inc.)*, 143 B.R. 560, 562 (B.A.P. 9th Cir. 1992) (stating that lodestar analysis is the primary method, but it is not the exclusive method)).

Time Records

Pursuant to Federal Rules of Civil Procedure 54(d) as incorporated into Federal Rules of Bankruptcy Procedure 7054, the Motion must specify the judgment entitling Movant to fees, specify grounds for the fee award, and state or estimate the amount of the fees sought. Federal Rules of Civil Procedure 54(d)(2)(B). Later evidentiary submissions can provide the factual proof of the amount claimed. Pursuant to the United States Supreme Court, "the fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates. The applicant … should maintain billing time records in a manner that will enable a reviewing court to identify distinct claims." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983).

Even if no opposition is filed, the court is required to review movant's evidentiary submissions and reduce the fee request if submissions are insufficient. Every court of appeals has expressed a preference that documentation of the claimed hours be in the form of contemporaneously prepared time records. 10 Moore's Federal Practice - Civil § 54.155 (2021). Under the Ninth Circuit, lack of contemporaneous records does not justify an automatic reduction in the hours claimed, however, those hours should be credited only if reasonable under the circumstances and supported by other evidence, such as testimony or secondary. *Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc.*, 886 F.2d 1545, 1557 (9th Cir. 1989) (citing *Johnson v. University College*, 706 F.2d 1205, 1207 (11th Cir. 1983) (prevailing party was able to substantiate prevailing party's fees claim by providing testimony based on diary entries and work product found in her files)).

This court finds helpful, and in most cases essential, for professionals to provide a basic task billing analysis for the services provided and fees charged. This has long been required by the Office of the U.S. Trustee, and it is nothing new for professionals in this District. The task billing analysis requires only that the professional organize his or her task billing. The simpler the services provided, the easier it is for Applicant to quickly state the tasks. The more complicated and difficult to discern the tasks from the raw billing records, the more evident it is for Applicant to create the task billing analysis to provide the court, creditors, and U.S. Trustee with fair and proper disclosure of the services provided and fees being requested. FN.2.

Additionally, the court finds it necessary for attorneys to provide their time and billing records so the court can see what legal services are asserted to be recoverable.. Absent these records, the

court has no ability to confirm whether the limited task billing provided is true, correct, reasonable, and awardable.

Here, Movant merely states, "Contemporaneous time records are available for in camera review by the Court as the Plaintiff has filed a notice of appeal." Motion, Dckt. 260 at 2:12-13. However, Defendant has chosen to withhold those time and billing records from the court.

Instead, Defendant merely has Defendant's counsel state the following lump sum amounts demanded:

> **Review 375 Documents Produced** - Defendant's Counsel states they spent 27.50 hours reviewing 375 pages of poorly labeled documents that were produced 100-days late.
>
> Fees Requested: 27.50 hours,
> $475.00 hourly rate =
> **$13,062.50**
>
> Dckt. 263 at 4:16.
>
> **Plaintiff's Deposition** - Defendant's Counsel states they spent 9.75 hours trying to get Plaintiff to appear at the deposition. Additionally, they spent 35 hours preparing and conducting for the deposition, including time spent preparing for cancelled depositions and 18.50 hours conducting the deposition.
>
> Fees Requested: 63.25 hours,
> $475.00 hourly rate =
> **$30,043.75**
>
> *Id.* at 4:25-26.
>
> **Review of 18,444 Insurance Documents Produced** - Defendant's Counsel states they spent 17.5 hours going through 18,444 documents of "irrelevant and duplicate" material relating to Plaintiff's insurance company. Defendant's Counsel states motions to compel and/or motions for protective order were not filed because wanted to keep the costs of litigation down.
>
> Fees Requested: 17.75 hours,
> $475.00 hourly rate =
> **$8,431.25**
>
> *Id.* at 6:1-2.
>
> **Plaintiff's Deposition Cancellations** - Defendant's Counsel states Plaintiff frequently cancelled scheduled depositions. Defendant's Counsel spent 17.75 hours preparing for each of the cancelled depositions and attendance of the

September deposition. Dckt. 270 at 6:17-18.

Fees Requested: 17.75 hours,
$475.00 hourly rate =
$8,431.25

Id. at 6:13-14.

Preparation for Trial - Defendant's Counsel states they took 300 hours to prepare for their five (5) day trial. This equates to $142,500.00 billed. Defendant's Counsel states this is exclusive of the motions in limine and objects to evidence and **some** of the time directed to the repetitive materials. It is concerning to the court that "some" of the time directed to the repetitive materials may be double billed. The court cannot confirm this, however, without billing statements that have not been provided to the court. *Id.* at 6.

Fees Requested: 300 hours,
$475.00 hourly rate =
$142,500.00

Id. at 6:18-19.

Motions in Limine - Defendant's Counsel states it took **at least 39.5 hours** to research, draft, and file the motions in limine and objections to evidence. Again, Defendant's Counsel's billing records are of concern as she states "at least," instead of concretely giving a number. Defendant's Counsel additionally states it took 3.5 hours at trial and after the first day of trial to organize the exhibits.

Fees Requested: 43 hours
$475.00 hourly rate =
$20,425.00

Id. at 7

Duplicate Exhibits at Trial - Defendant's Counsel states there was a "conservative estimate" of 3 hours of the courts time taken up by dealing with Plaintiff's exhibits.

Fees Requested: 3 hours
$475.00 hourly rate =
$1,425.00

Id. at 7:22-23.

Counsel further represents that there are an additional $80,000.00 of fees and costs incurred for time caused by Plaintiff and his tactics for which recovery either is not mandated by the cost bill or are not being sought by Defendant's

motion. Dckt. 263 at 8:10-12.

Defendant and Defendant's counsel provide the court with a forty three (43) hour, a three hundred (300) hour, a sixty three point two (63.2) hour, twenty seven point five (27.5) hour, and then some smaller hour lump sum amounts. Essentially, Defendant's Counsel provides large blocks of time, to be paid at $475 an hour, provides a short summary description of the general area of the services, and then dictates that the dollar amounts are to be allowed.

Defendant's strategy, with his experienced $475 an hour billing rate attorney, is have Defendant's Counsel replace the court, make the required judicial determination that the actual services are reasonable and necessary, and give lump sum dollar amounts to be inserted into the order Defendant will had to the court. There is little for the court to do, other than rubber stamp Defendant and Defendant's Counsels findings and conclusions.

Defendant has chosen to not present the court with the necessary evidence for the court to make an informed, intelligent, proper award of attorney's fees and costs - if such were proper pursuant to this court's inherent powers or 11 U.S.C. § 105(a), to the extent applicable. This is a separate and independent basis for denying the request for hundreds of thousands of dollars in attorney's fees as sanctions, if such sanctions could properly be awarded.

The Motion is denied.

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 Motion for Prevailing Party Fees filed by the Defendant, Joseph H. Akins ("Movant"), in this Adversary Proceeding and prevailing party on appeal having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing.
>
> **IT IS ORDERED** that Movant, is denied.

6. **18-25001-E-7** **JOSEPH AKINS** **CONTINUED MOTION FOR**
18-2187 **RLF-21 Sheila Gropper Nelson** **SANCTIONS**
BLACK V. AKINS **1-28-22 [267]**

Local Rule 9014-1(f)(1) Motion—Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Plaintiff's Attorney on January 28, 2022. By the court's calculation, 48 days' notice was provided. 28 days' notice is required.

However, in reviewing the Notice of hearing, while it states the date and time of the hearing, it includes much other information. The extra information includes: (1) a summary of the trial proceedings, (2) a reservation of the right to amend the Motion if Movant believes that opposing counsel engages in further asserted improper acts, (3) that in addition to the Motion and supporting pleadings the Motion is based on each and every other pleading that is in Defendant's bankruptcy case file.

However, what is missing from the Notice is what is required in Local Bankruptcy Rule 9014-1(d)(3)(B), including:

A. Whether written opposition is required;

B. Deadline for filing and serving written opposition;

C. Names and addresses of persons to be served with the written opposition;

D. That if written opposition is required and not filed, then the court may rule on the motion without a hearing;

E. That the parties can determine whether a tentative or final ruling on the motion has been made by the court, stating that it my be found on the court's website (giving the website address) the day before the hearing; and

F. For parties appearing telephonically, they must review the pre-hearing dispositions prior to the hearing.

Though the Notice is deficient, Plaintiff's counsel has filed an Opposition, with supporting declarations and exhibits. Dckts. 308-311. The filing of the Opposition has adequately remedied the Notice shortcomings.

The Motion for Sanctions was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1).

The Motion for Sanctions is denied.

DEFENDANT'S MOTION
AND SUPPORTING PLEADINGS

Joseph H. Atkins ("Defendant") filed this Motion seeking sanctions in the amount of $81,818.75 pursuant to Local Rule 9017-1; 11 U.S.C. § 105(a); and 28 U.S.C. § 1927. Dckt. 267. Defendant argues fees and costs were incurred during the defense of the litigation due to the conduct and tactics undertaken by Plaintiff and their Attorneys. Defendant points to Plaintiff's discovery and trial documents as the source of Plaintiff's bad faith.

This is in addition to the attorney's fees that Defendant requested as the prevailing party, citing 11 U.S.C. § 523(d), and 11 U.S.C. § 105(a) and the inherent powers of the court.

Court's February 3, 2022 Order

On February 3, 2022, the court issued an order requesting a supplemental pleading to Defendant's Motion to state grounds with particularity upon which the relief if based (as required by Fed. R. Civ. P. 7(b) and Fed. R. Bankr. P. 7007). Dckt. 293. The court was concerned with the lack of grounds stated in Defendant's Motion, and would not be mining the pleadings in an attempt to state possibly inadvertently misstate) state what grounds the court believed Defendant would want to state with particularity.

Defendant's Supplement

On February 14, 2022, Defendant filed a pleading titled "Supplemental Motion for Sanctions." Dckt. 302 (The Supplement"). The court interprets this to be the "supplement to the [existing] Motion (not an amended motion) which states the grounds with particularity upon which the requested relief is based." Order, Dckt. 293.

In the supplement, Defendant states with particularity the grounds for this Motion for Sanctions:

A. Plaintiff intended and increased the costs of defense of litigation for litigant and the court through "evasive and argumentative" responses to discovery and at deposition, multiple cancellations of deposition dates on the eve of the dates, and the production of 18,444 pages of irrelevant, duplicate, and non-responsive document production. Supplement, Dckt. 302 at 3:2-5.

B. Local Rule 9017-1 identifies a duty to not increase costs of litigation. *Id.* at 4:12-15. The court reviewed the local rules and although 9017-1 lays out rules the procedural rules for Alternate Direct Testimony, Exhibits, and Qualification of Expert Witnesses, the rule does not mention a duty to not increase costs of litigation.

C. 28 U.S.C. § 1927 supports sanctions because Plaintiff's Counsel reviewed the materials and still produced them, showing actual intent to harass, burden, and delay the proceedings. *Id.* at 4:23-27.

D. "[Plaintiff] engaged in numerous acts to increase the costs of litigation and to thwart discovery by [Defendant], identified in the supporting declarations and other papers previously filed with the Court." Supplement, p. 3:1-2; Dckt. 302.

E. "A portion of the sanctions sought relate to the time prior to and during trial that was required to deal with all of the redundant and irrelevant materials produced by Mr. Black, as exhibits and document production. The identification of those materials, through counsel, were produced solely to increase the cost of litigation. That is obvious from the content of the materials; and was admitted in the statements made by Mr. Black's counsel in both the May 11 and 14, 2021 emails identifying that he had reviewed the 18,444 pages before production them and in his Omnibus Opposition to the limine motions and during oral argument at trial where he admitted that there had been no due diligence in the production of plaintiff's exhibits. (Doc No 233 Omnibus Opposition to Motions in Limine)" *Id*., p. 3:12-17.

F. "Because of Plaintiff's inclusion of irrelevant, redundant and duplicate exhibits and evasive testimony by Mr. Black trial did not conclude until December 6, 2021 taking up 5 calendar days." *Id*., p. 3:7-9.

G. "A portion of the sanctions sought relate to the time prior to and during trial that was required to deal with all of the redundant and irrelevant materials produced by Mr. Black, as exhibits and document production. The identification of those materials, through counsel, were produced solely to increase the cost of litigation." *Id.* p. 3:10-13.

H. "The Court made oral findings from the bench on December 6, 2021 finding that Mr. Black had not met his burden of proof as to all causes of action, and finding that Mr. Black lacked credibility." *Id*., p. 3:27 - p. 4:1.

Defendant continues in the Argument section of the Supplement to state the following legal grounds for the requested relief.

A. "Sanctions are sought under Local Rule 9017-1 which identifies a duty not to increase the costs of litigation. " *Id*. p. 4:13-14.

B. "The duty owed is to all who come before the court, including the opposition, to not unnecessarily increase the costs and burdens of litigation." *Id.* p. 4:16-17.

C. "28 U.S.C. §1927 supports the imposition of sanctions, jointly and severally, as against a client and counsel, where the complained of conduct can be identified as having been joint and several." *Id.* p. 4:24-25.

D. "[T]he conduct complained of directly required and was undertaken by [Plaintiff's] counsel on behalf of Mr. Black." *Id.* p. 5:25-26.

E. "11 U.S.C. § 105(a) provides s the Court with the inherent discretion to protect the judicial process. The award of sanctions sought through this Supplemental Motion are intended to deter the conduct by Mr. Black, aided and abetted through his counsel; conduct which abused this Court's time and resources as well as increasing the costs to defend the litigation." *Id.* p. 6:8-11.

Defendant's Declaration

On January 28, 2022, Defendant filed a declaration in support of the Motion. Dckt. 269. Defendant's seven (7) page declaration contains many factual assertions including:

A. Defendant has incurred increased costs to defend the litigation as a result of Plaintiff.

B. Defendant assisted their counsel in reviewing document production.

C. Defendant attended Plaintiff's deposition and witnessed Plaintiff's contested behavior.

D. Defendant's Counsel did not pursue motions to avoid costs of litigation.

Defendant also includes statements that are not based on personal knowledge, but are rather statements that appear in part to be speculation by Plaintiff and Plaintiff's Counsel and also legal contentions, not appropriate as a lay witness:

A. "I know the information set forth herein of my own personal knowledge unless set forth on information and belief and as to that information I believe it to be true." Declaration, Dckt. 269 at 1:23-25.

With this statement, Defendant is telling the court that some of what is in his Declaration is his personal knowledge, as required by Federal Rule of Evidence 601 and 602, but some of it is only what only based on information and belief. The personal knowledge testimony and the information and belief testimony are not identified.

B. "[I]t is clear to me that he intended to increase my costs to defend the litigation to increase the burden of litigation to harass me into settling." *Id.* at 2:6-8.

While this may be Defendant's factual or legal conclusion, arguing why he should be awarded sanctions, it is not personal knowledge testimony of a fact or event.

C. "I believe that it was the actual intent of [Plaintiff] and his attorneys to increase those costs . . .". *Id*. at 2:12-14.

Not facts, but his argumentative belief.

D. "If they had reviewed those materials they knew that the materials were

substantially irrelevant . . .” *Id.* at 3:17-18.

No basis for Defendant providing a legal opinion concerning “professional diligence” or his conclusion that Plaintiff counsel could prospectively conclude that Plaintiff’s claims lacked merit.

E. “[H]e intended to increase my costs to defend . . .” *Id.* at 20-21.

Not facts, but his argumentative belief.

F. “That I was able to assist in that manner does not diminish the appropriateness of issuing sanctions . . .” *Id.* at 3-4.

Not facts, but his argumentative belief.

G. “Though I have no evidence to support this statement . . .” *Id.* at 5:8.

Not facts, but his argumentative belief.

H. “That conduct . . . was intentional and deliberate.” *Id.* at 5:15-16.

Not facts, but his argumentative belief.

I. “I am confirmed in my belief that all the conduct was intended to increase my burden . . .” *Id.* at 5:26.

Not facts, but his argumentative belief.

J. “I believe [Plaintiff] will continue to abuse the judicial process . . .” *Id.* at 6:4-6.

Not facts, but his argumentative belief.

K. “[Plaintiff’s] conduct was aided and abetted by his attorneys.” *Id.* at 7:12-14.

Not facts, but his argumentative belief.

The court has been presented with a declaration in which the witness provides some identified portion of the testimony based only on “information and belief.” That Declaration is the testimony of a witness presented in writing in lieu of the witness being put on the stand. Non-expert witness testimony must be based on the personal knowledge of the witness. FED. R. EVID. 602. As discussed in Weinstein's Federal Evidence § 602.02:

> A witness may testify only about matters on which he or she has first-hand knowledge. Because most knowledge is inferential, personal knowledge includes opinions and inferences grounded in observations or other first-hand experiences. The witness’s testimony must be based on events perceived by the witness through one of the five senses.

Recently, the Ninth Circuit Court of Appeal addressed this personal knowledge issue, stating:

> Under Rule 602, "[a] witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." FED. R. EVID. 602. Rule 602 requires any witness to have sufficient memory of the events such that she is not forced to 'fill[] the gaps in her memory with hearsay or speculation.' 27 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE Evidence § 6023 (2d ed. 2007). Witnesses are not 'permitted to speculate, guess, or voice suspicions.' *Id.* § 6026. However, '[p]ersonal knowledge includes opinions and inferences grounded in observations and experience.' *Great Am. Assurance Co. v. Liberty Surplus Ins. Co.*, 669 F. Supp. 2d 1084, 1089 (N.D. Cal. 2009) (citing *United States v. Joy*, 192 F.3d 761, 767 (7th Cir. 1999)). Lay witnesses may testify about inferences pursuant to Rule 701:
>
> > If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: (a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.
>
> FED. R. EVID. 701.

United States v. Whittemore, 776 F.3d 1074, 1082 (9th Cir. 2015).

As discussed in Moore's Federal Practice, Civil § 8.04, the use of "information and belief" is a pleading device for the use in a complaint (or motion) to allow a plaintiff (movant) to fill in the gaps of alleging a claim pending discovery.

> [4] Allegations Supporting Claims for Relief May Be Made on Information and Belief
>
> Rule 8 does not expressly permit statements supporting claims for relief to be made on information and belief (see § 8.06[5]). However, Rule 11 permits a pleader, after reasonable inquiry, to set forth allegations that "will likely have evidentiary support after a reasonable opportunity for further investigation or discovery" (see Ch. 11, Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions). Courts have read the policy underlying Rule 8, together with Rule 11, to permit claimants to aver facts that they believe to be true, but that lack evidentiary support at the time of pleading. Generally, however, such averments are allowed only when the facts that would support the allegations are solely within the defendant's knowledge or control.
>
> Nothing in the *Twombly* plausibility standard (see [1], above) prevents a plaintiff from pleading on information and belief. A pleading is sufficient if the pleading as a whole, including any allegations on information and belief, states a plausible claim. On the other hand, if the pleading fails to permit a plausible inference of

> wrongdoing, or if the allegations are nothing more than legal conclusions, the pleading will not survive a motion to dismiss.

This is incorporated to Federal Rule of Bankruptcy Procedure 9011, which repeats the provisions of Federal Rule of Civil Procedure 11(b), stating:

> (b) Representations to the court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances[,]—
>
> > (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
> >
> > (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
> >
> > (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
> >
> > (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

Though allowed as a pleading device, the certification required by 28 U.S.C. § 1746 does not allow testimony in declaration to be provided under penalty of perjury being true because the witness merely "is informed and believes (or desires because likely it would mean the witness party would prevail) it is true."

The objectionable statements in Defendant's declaration will not be taken into consideration by the court.

Defendant's Counsel's Declaration

Defendant's Counsel submitted a eleven (11) page declaration in support of Defendant's Motion on January 28, 2022, largely reaffirming many of the grounds already listed in Defendant's Motion and Declaration. Dckt. 270. Defendant's Counsel also mentions contemporaneous time entries were maintained from the petition date to the present time. Declaration, Dckt. 270 at 3:6. However, those billing records are not provided in support of this Motion.

Additionally, Defendant's Counsel provides summary of increased time spent litigating the matter FN.1.:

Review 375 Documents Produced - Defendant's Counsel states they spent 27.50 hours reviewing 375 p
were produced 100-days late.

Sanctions Requested: 27.50 hours,
$475.00 hourly rate =
$13,062.50

Dckt. 270 at 4:3-4.

Plaintiff's Deposition - Defendant's Counsel states they spent 9.75 hours trying to get Plaintiff to appear at the deposition. Additionally, they spent 35 hours preparing and conducting for the deposition, including time spent preparing for cancelled depositions and 18.50 hours conducting the deposition.

Sanctions Requested: 63.25 hours,
$475.00 hourly rate =
$30,043.75

Id. at 4:15-16.

Review of 18,444 Insurance Documents Produced - Defendant's Counsel states they spent 17.5 hours going through 18,444 documents of "irrelevant and duplicate" material relating to Plaintiff's insurance company. Defendant's Counsel states motions to compel and/or motions for protective order were not filed because wanted to keep the costs of litigation down.

Sanctions Requested: 17.75 hours,
$475.00 hourly rate =
$8,431.25

Id. at 6:2-3.

Plaintiff's Deposition Cancellations - Defendant's Counsel states Plaintiff frequently cancelled scheduled depositions. Defendant's Counsel spent 17.75 hours preparing for each of the cancelled depositions and attendance of the September deposition. Dckt. 270 at 6:17-18.

Sanctions Requested: 17.75 hours,
$475.00 hourly rate =
$8,431.25

Id. at 6:5-8.

Preparation for Trial - Defendant's Counsel states they took 300 hours to prepare for their five (5) day trial. This equates to $142,500.00 billed. Defendant's Counsel states this is exclusive of the motions in limine and objects to evidence and **some** of the time directed to the repetitive materials. It is

concerning to the court that "some" of the time directed to the repetitive materials may be double billed. The court cannot confirm this, however, without billing statements that have not been provided to the court. However, it does not appear Defendant's Counsel is requesting sanctions for trial prep as the $81,818.75 figure is the sum of all the other categories, not including trial prep. *Id.* at 6.

Motions in Limine - Defendant's Counsel states it took **at least 39.5 hours** to research, draft, and file the motions in limine and objections to evidence. Again, Defendant's Counsel's billing records are of concern as she states "at least," instead of concretely giving a number. Defendant's Counsel additionally states it took 3.5 hours at trial and after the first day of trial to organize the exhibits.

Sanctions Requested: 43 hours
$475.00 hourly rate =
$20,425.00

Id. at 7:10-11, 7:16-19.

Duplicate Exhibits at Trial - Defendant's Counsel states there was a "conservative estimate" of 3 hours of the courts time taken up by dealing with Plaintiff's exhibits.

Sanctions Requested: 3 hours
$475.00 hourly rate =
$1,425.00

Id. at 8:4-5.

FN.1. Defendant's Counsel gave the court no billing records. The stark issues with not providing contemporaneous time records is addressed in Defendant's Motion for Prevailing Party Fees, Docket Control No. RLF-20.

Defendant's counsel states Defendant seeks sanctions in an **amount of not less than $81,818.75.** Dckt. 270 at 9:3-5.

The court notes Defendant's Counsel's comment that Plaintiff's Counsel "knew or should have known" their conduct was "intended to, would and did increase the costs of litigation." *Id.* at 9:15-17. How can an individual "should have known" their conduct's intent? They either have intent or do not have intent. It is not a known or should have known situation.

Defendant's Points and Authorities in Support of Motion

Defendant filed their Points and Authorities in Support of Motion on January 28, 2022. Dckt. 271. The Points and Authorities largely reiterates the legal arguments stated above.

PLAINTIFF'S OPPOSITION

AND SUPPORTING PLEADINGS

Plaintiff's Opposition

Plaintiff filed an opposition on March 1, 2022, stating at no point did Plaintiff or their Counsel act with bad faith or with any intent to abuse the judicial process. Dckt. 308. Plaintiff states throughout the course of litigation, although certain interactions between the parties were heated, they still corresponded regularly, and navigated through issues and disagreements without court intervention. With respect to issues Defendant raises, Plaintiff states:

> **Discovery Production of 375 Documents** - These documents were produced electronically and organized in document folders responsive to corresponding requests and were identified in written responses to Defendant's discovery requests. Additionally, although they were produced 100 days after the statutory deadline, Plaintiff attempted to receive a sixty day extension, which was denied by Defendant, but continued to correspond with Defendant and provide updates regarding the document production. Dckt. 308 at 7.
>
> **Document Production of 18,444 Pages** - These 18,444 pages of documents comprised of Plaintiff's litigation file with their insurance company. Although the size was large, Defendant's Attorney requested Plaintiff produce all pages of documents. Additionally, they were produced in the same manner received by Plaintiff from their insurance company and included BATES numbering. Plaintiff provided the documents in thirty-five (35) PDF files, which were security protected by the insurance company making it difficult to separate out. Also. Defendant requested broadly any communications between Plaintiff and anyone relating to the vehicle since 1999. Since the dispute with Plaintiff's insurance spanned several years, there were hundreds of correspondences. Dckt. 308 at 2-3.
>
> **Attorney Time Conducting Deposition** - Defendant's Attorney requests sanctions for 63.25 hours in connection with Plaintiff's 1.5 day deposition. Although Plaintiff's deposition was rescheduled twice, it was still conducted, and therefore he did not act with bad faith. Additionally, Plaintiff provides reasons for the rescheduling: (1) COVID-19 exposure and (2) **Defendant unilaterally rescheduling the second date of the deposition**. Dckt. 308 at 11.
>
> **Trial Binders** - Although there were duplicates in Plaintiff's trial binder, Plaintiff's counsel did so to ensure nothing would be left out of the exhibits when presenting their case. Additionally, Plaintiff was forced to use printing services not normally in the course of their business, which led to some errors that Plaintiff did not have time to correct before trial. Dckt. 308 at 12-13.

Declarations of Plaintiff's Attorney and Plaintiff have been filed under penalty of perjury in support of the opposition. The declarations do not state any portion is based on "information and belief." Dckts. 309, 310.

Plaintiff's Declaration

On March 1, 2022, Plaintiff filed a Declaration in support of the Opposition. Dckt. 310. Plaintiff's two (2) page declaration contains factual assertions including:

1. "At no time in this litigation did I take any action in bad faith, nor did I have any intent to abuse the judicial process or harass or unduly burden the Defendant or his counsel in this case. Declaration, Dckt. 310 p. 2:6-8.

Defendant may point to this as being a factual or legal conclusion. It is the witness stating what he believes he did. But it is for the court to make a conclusion as to whether the act or action taken was in bad faith or with an intent to abuse.

2. "I brought this litigation in the good faith belief that I was defrauded by Defendant and his business associates and based on the judgment I had obtained in state court." *Id.* at 2:9-11.

3. "I did not instruct my counsel to take any actions for the purposes of harassment nor to delay proceedings in this litigation." *Id.* at 2:12-13.

4. "The 20,000 pages of documents referenced as the Fireman's Fund documents or the Insurance Litigation Documents were produced to me in the same manner and format as they were produced by my counsel to Defendant. Fireman's Fund created the PDF files. " *Id.* at 2:14-17.

5. "In or about December 2020, prior to my scheduled deposition, I had a COVID exposure in my office. Due to my age and the age and health of my wife, I took extra quarantine precautions that required me to postpone my December deposition." *Id.* at 2:18-21.

6. "I was prepared to attend my deposition on January 21, 2021 before it was unilaterally cancelled by Defendant." *Id.* at 2:22-23.

Plaintiff's Counsel's Declaration

On March 1, 2022, Plaintiff's Counsel filed a declaration in support of the Opposition. Dckt. 309. The declaration does not state that any portion of it is based on "information and belief." Plaintiff's Counsel's seven (7) page declaration contains many factual assertions including:

1. "At no time in this litigation did I take any action in bad faith, nor did I have any intent to abuse the judicial process or harass or unduly burden the Defendant or his counsel in this case. This litigation was highly contentious with a great deal of personal animus between the parties." *Id.* at 2:7-11.

2. "In or about October 2020, I began a series of meet and confer discussions with Defendant's counsel regarding Plaintiff's responses to Defendant's Requests for Production. Due to Plaintiff's records being kept off-site and under restricted access due to local COVID protocols

and due to Plaintiff's work providing staffing and resources for bio-tech companies working on the COVID vaccine, Plaintiff was unable to produce documents by the response date for Defendant's document request." *Id.* at 2:12-18.

3. "Plaintiff requested a sixty (60) day extension to provide written responses and all responsive documents, which Defense counsel denied. Counsel instead offered a 14-day extension, which was insufficient to provide the records under the circumstances during a peak period of the COVID-19 pandemic." *Id*. at 2:19-22.

4. "Unable to meet the 14-day extension deadline, Plaintiff served written responses stating he had no documents in his possession at that time, but that documents would be provided as soon as possible." *Id*. at 2:23-25.

5. "During this entire period between October 2020 and December 2020, I engaged in regular meet and confer correspondence with counsel for Defendant and kept counsel updated on the status of production." *Id*. at 25-28.

6. "On or about December 28, 2020, Plaintiff served written, supplemental responses to Plaintiff's document requests including document production of approximately 375 pages." *Id.* at 3:1-3.

7. "The documents consisted largely of invoices and payment records which were separated out into 'A' and 'B' folders each with a different file name including the date of the invoice on the Norcal Invoices." *Id.* at 3:12-14.

8. "During meet and confer discussions between March 2021 and May 2021, Counsel for Defendant requested Plaintiff's Counsel identify and produce the 20,000 documents referenced by Plaintiff at his deposition (the "Insurance Litigation Documents")." *Id.* at 3:18-21.

9. During the same time period, Defendant served their Motion for Summary Judgment interrupting the production of documents in order for Counsel to respond. *Id.* at 3:22-23.

10. Defendant's Counsel reviewed the documents for privileged content and categorized them to correspond to Defendant's document requests. *Id.* at 3:28.

11. "The Document requests included Request No. 15: 'Any and all writings which constitute, evidence, discuss, set forth, summarize or in any way relate to any and all communications between YOU and anyone relating to the VEHICLE from January 1, 1999 through to the present time, that YOU do not claim as privileged.'" *Id.* at 4:4-7.

12. "The Insurance Litigation Documents also included pictures of the Vehicle, handwritten correspondence between Plaintiff, Mr. Tirpak, and Mr. Sarganis, and other highly relevant documents to this dispute. Many of the records in the Insurance Litigation Documents were used as trial exhibits by Plaintiff." *Id.* at 4:8-11.

13. "When I received the Insurance Litigation Documents, they were divided into approximately 35 PDF files with pages sequentially numbered. [informed and believed sentence] The files as produced to me contained security settings on the files that prevented deleting pages in the series or extracting pages. I was unable to remove any duplicate pages from the PDF files and instead was only able to sort and organize the files as responsive to Defendant's request by referencing the series of documents it was contained in. All documents were already sequentially BATES stamped with FFIC notation." *Id.* at 4:16-25.

14. " On or about December 10, 2020, I emailed counsel for Defendant stating that Plaintiff would need to reschedule his December 18, 2020 deposition due to a potential COVID exposure." *Id*. at 4:8-10.

15. "On or about December 17, 2020, counsel for the parties agreed to reschedule Plaintiff's deposition to January 21, 2021." *Id*. at 5:11-12.

16. "On January 20, 2021, I emailed counsel for Defendant requesting log-in instructions for Plaintiff's remote deposition. Counsel for Defendant responded the deposition would not go forward on January 21, 2021 and would be rescheduled. Prior to January 20, 2021, I received no notice from Defense Counsel the deposition was being postponed." *Id*. at 4:13-17.

17. " Following Defendant's unilateral cancellation, the parties agreed to hold Plaintiff's deposition on March 29, 2021 and Plaintiff appeared on that date." *Id*. at 5:18-19.

18. "In reviewing documents to prepare Plaintiff's trial binders in this action, I noticed there were several versions of the invoices and payment records. Some records contained handwritten notations that were either not present or not readily apparent on the original or copies of the records. I elected to be overinclusive in production of his trial exhibits so as not to be left missing any records when presenting Plaintiff's case at trial." *Id.* at 5:20-25.

19. "While preparing Plaintiff's trial binders, I was working alone in my office, with support staff and Plaintiff available only by remote means due to COVID-19 protocols." *Id.* at 5:26-28.

20. "I was and am in a high-risk demographic for complications that could arise from COVID." *Id*. at 6:1-2.

21. Plaintiff's Counsel's efforts were further hindered by his inability to use his normal printing company. *Id*. at 6:9-18.

22. After duplication of the trial binders Plaintiff's Counsel became aware of errors in the printing and page numbering, but did not have time to correct the issues before delivery to the Court. *Id.* at 6:19-21.

23. Plaintiff's Counsel was unaware that amended trial binders would be allowed and had they known they would have brought corrected binders to the first day of trial. *Id.* at 6:22-25.

24. Any conduct related to the trial binders was inadvertent and not intentional. *Id.* at 6:26-28.

25. "When the issue was raised by the Defendant at trial, the Court asked if I could fix the binders. With the help and hard work of support staff, my office made its best efforts to correct the errors, including hand delivering copies to Defense counsel's hotel room after hours." *Id.* at 7:1-4.

26. At no time in this litigation did I fail to respond to correspondence sent by Defendant's counsel." *Id.* at 7:9-10.

27. At no time did Plaintiff's Counsel take any action for the purpose of harassment or delay nor did they act with any intent to abuse the judicial process or disrespect the court. *Id.* at 7:11-12.

Plaintiff's Exhibits

Plaintiff supplied the court with exhibits in support of their opposition. Dckt. 311. The exhibits are the following:

1 Defendant's 3rd Amended Notice of Taking of Deposition & Request for Document Production to Dominique Black

2 Screenshot of Fireman's Fund Document Production

3 Dominique Black's Amended Second Supplemental Responses to First Set of Requests for Production

4 Screenshot of Document Production for First Set of Requests for Production

DEFENDANT'S REPLY

On March 8, 2022, Defendant filed a seven (7) page reply. Dckt. 319. Defendant repeated much of their previous arguments, asserting Plaintiff's conduct was intentional. Defendant's Counsel

provides a declaration to support the reply (Dckt. 326) (repeating much of the previous arguments) and supplies the court with the following Exhibits (Dckts. 327-329):

A. Portions of the 18,444 page digital production.

B. 3rd Amended Notice of Deposition of Dominique Black and Request for Document Production.

C. Email from Plaintiff's Counsel producing the digital documents.

LEGAL STANDARD

Defendant's Assertion that Court Should Order Sanctions Pursuant to *11 U.S.C. § 105(a)*

Under Section 105(a), "[t]he court may issue any order . . . necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a) authorizes the court its inherent sanctioning power. 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). 28 U.S.C. § 1927, any attorney who "multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct."

In reviewing the Defendant's Motion (Dckt. 267), Supplement to Motion (Dckt. 302), Points and Authorities (Dckt. 271), and Reply (319), Defendant provides the following legal bases and analyses for asserting that awarding sanctions pursuant to 11 U.S.C. § 105(a) and the inherent power of the court:

A. Reply, p. 2:16-19; Dckt. 319.

> The conduct by Mr. Black and [Plaintiff's] Counsel . . . were more than mere hinderance. The conduct was intentional. It was undertaken in bad faith and was intended to burden, and to increase the costs of the litigation.

B. Supplement to Motion, p. 4:8-14; Dckt. 300.

> 11 U.S.C. §105(a) provides the Court with the inherent discretion to protect the judicial process. The award of sanctions sought by [the motion] are intended to deter the conduct evidenced by Mr. Black, aided and abetted through his counsel; conduct which abused this Court's time and resources as well as increasing the costs to defend the litigation.
>
> Throughout the underlying adversary action Dominique Black intended to and did increase the costs of litigation without regard for the burdens and costs that conduct would create. The Court was witness to that conduct throughout the [five] days of trial.

While Defendant complains of Plaintiff's shortcoming and "devious" tactics, the court's observation is that Defendant gave "tit for tat," and that much of Defendant's litigation expenses are a result of Defendant's intentional litigation strategy. As discussed below, Defendant chose to not utilize the rights and remedies to address discovery disputes and perceived improper "gamesmanship" by an opponent. As experienced litigation counsel know, a judge's ruling on a discovery motion or two brings into line an attorney who thinks Federal Court litigation is a game where "anything goes, so long as the other side lets you get away with it."

There are many tools available to conduct discovery within the adversary through the Federal Rules of Civil Procedure (Fed. R. Civ. P. 28-37) as incorporated into the Federal Rules of Bankruptcy Procedure (Fed. R. Bankr. P. 7028-7037, 9014(c)). Rule 37 of the Federal Rules of Civil Procedure (as incorporated by Federal Rule of Bankruptcy Procedure 7037) provides the procedure for the court to resolve discovery disputes. Under Federal Rules of Civil Procedure Rule 37, a party may move for an order compelling disclosure or discovery. The motion must include "a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action." *Id*.

Federal Rule of Civil Procedure Rule 37(a)(3)(B) permits a party seeking discovery to move for an order compelling an answer, designation, production, or inspection, if a party fails to answer deposition question submitted under Federal Rules of Civil Procedure Rule 30 or 31, or fails to produce documents as requested under Federal Rules of Civil Procedure Rule 34.

1. Production of 375 Pages of Late Documents

Defendant's Counsel's declaration in support of Defendant's Motion mentions 375 pages of 100-day late produced documents that were poorly labeled. Defendant's Counsel states "Formulaic non-responsive written objections were received to written discovery, unilateral refusal to produce documents, and a unilateral 60 day extension was claimed to produce documents." Dckt. 271 at 2. Defendant's Counsel states these documents were in violation of Federal Rules of Civil Procedure 34 as incorporated into Federal Rules of Bankruptcy Procedure 7034.

Plaintiff's opposition states these documents were produced electronically and organized in document folders responsive to corresponding requests and were identified in written responses to Defendant's discovery requests. Plaintiff states although they were produced 100 days after the statutory deadline, Plaintiff attempted to receive a sixty day extension, which was denied by Defendant. Plaintiff states they continued to correspond with Defendant and provide updates regarding the document production. Opposition, Dckt. 271 at 4.

Defendant's Counsel admits at numerous times that no motions to compel or protective orders were pursued as a need to keep costs of the defense down, not because there were no grounds to support such motions.

The discovery proceedings are in place to ensure proper and efficient information sharing between parties. If one side fails to comply with discovery requests, the court can step in so long as there was good faith effort to obtain a response from the opposition,"meet and confer." The court's power to compel a party to comply with discovery requests are for situations like the present case. If a party fails to comply with the Federal Rules, a court can compel them to produce relevant and organized

documents to make document review easier for the propounding party and allow for more affective advocacy.

Motions to compel are not designed to be costly. If anything, filing a motion to compel in the case of a "document dump" is the most economically efficient option. An attorney can quickly file the motion and the court can order a party to comply with Rule 34 and produce untimely documents in an organized manner. See Federal Rules of Civil Procedure 37(a); 34(b)(2)(E) as incorporated into Federal Rules of Bankruptcy Procedure 7037; 7034. A motion to compel could therefore save an attorney from billing countless hours.

Defendant's Counsel failed to employ this tactic and instead "sat on their hands" waiting to receive the documents. Once received, Defendant's Counsel racked up over $13,000 in attorney's fees by sorting through asserted poorly labeled and late produced documents. Additionally, Defendant's Counsel's denied Plaintiff's request for an extension, illustrating a possible failure to act in good faith in the "attempt to confer" with Plaintiff as required by Federal Rules of Civil Procedure 37(a)(1).

As there was no order compelling Plaintiff to comply with Federal Rules of Civil Procedure 34, Plaintiff never failed to comply with a court order. Only after Defendant wallowed in "discovery misery," went to trial, and amassed large legal fees, does Defendant seek to obtain a remedy for these past alleged "sins" which were not addressed when they were alleged to occur.

2. Production of 18,444 Pages of Documents from Insurance Company

For the same reasons above, Plaintiff never failed to comply with a court order regarding the production of these documents. Defendant's inaction in failing to seek court assistance in managing these 18,444 pages of documents shows to the court that this document dump was consensual. Plaintiff should not be sanctioned for the 17.75 hours Defendant billed while sorting through the documents when the court could have easily directed Plaintiff to reorganize the documents. Rather, Defendant billed their client over $8,000 in attorney's fees for what could possibly have been resolved in a simple motion.

Plaintiff has argued, and Plaintiff's counsel has testified, Insurance Litigation Documents were provided to Plaintiff in the same form and format as they had been produced by the insurance company. Plaintiff's Counsel further testifies that due to security settings on the electronic file he could not alter that file.

There was no order compelling Plaintiff to comply with Federal Rules of Civil Procedure 34, Plaintiff never failed to comply with a court order. There was no attempt by Defendant to address any asserted defect or deficiency in the Insurance Litigation Documents presented.

3. Delayed Deposition and Behavior During Deposition

Deposition was postponed twice. As explained in Plaintiff's opposition and testimony, Plaintiff was exposed to COVID-19. Dckt. 304 at 16. This is a more than reasonable reason to postpone a deposition, even on the eve of the proceeding. Additionally, Plaintiff states Defendant unilaterally cancelled Plaintiff's second scheduled deposition. *Id.* No court order was requested by Defendant under Federal Rules of Civil Procedure 45 as incorporated into Federal Rules of Bankruptcy Procedure 7045 to command Plaintiff's attendance of any deposition. The deposition was eventually completed, although much later than the originally scheduled deposition.

With respect to Plaintiff's conduct during the deposition, a motion to compel can be used to compel an answer to a hostile deponent. Federal Rules of Civil Procedure 37 as incorporated into Federal Rules of Bankruptcy Procedure 7037. This can even be done after completing or adjourning the examination. No such order was requested. Although Defendant may believe that the opposing party Plaintiff may have acted with hostility, the entire life of this case has been hostile through actions of both parties. Plaintiff's described actions do not amount to sanctionable conduct.

Again, Defendant chose to take no action when the alleged wrongs are asserted to have occurred.

4. Trial Binders

The court, like Defendant, found the trial binders provided by Plaintiff to be unsuitable for any use in a federal court trial. Many of the exhibits were duplicative and otherwise unnecessary time was taken from trial to review the exhibits and determine their relevance. Plaintiff's Counsel admits to errors in preparing the trial binders. Although Plaintiff's trial binder presented him as unprepared, the court does not find Plaintiff acted in bad faith. The court does not find it necessary nor appropriate to award Defendant sanctions because of Plaintiff's unorganized trial binder, even if it caused delays in the proceedings.

It is no secret this proceeding has been riddled with questionable conduct from both parties. Most recently, Defendant's Attorney improperly requesting attorney's fees through a Bill of Costs, rather than separate Motion as required by Federal Rules of Civil Procedure 54 as incorporated into Federal Rules of Civil Procedure 7054. See Dckt. 275.

The court also observes that there were many shortcomings by Plaintiff and Plaintiff's counsel. As the court determined at trial, Plaintiff's testimony of "facts" he stated he "knew" and how he drew such conclusions was not credible. Plaintiff's presentation of his case appears to be a client driven, evidence presented as the client demanded, and the client "knowing" he has to be right and the attorney's job is to do the client's bidding.

Although Plaintiff and their Counsel may have acted questionably throughout the course of the litigation, their conduct does not arise to the level of "bad faith," especially when considering the conduct and litigation strategy of Defendant and Defendant's Counsel to ignore the conduct they now what to complain of, ignoring and effectively waiving their discovery rights and to have the court correct any asserted improper conduct at the time it was relevant, and Defendant selecting a strategy that is essentially running up a huge legal bill while not wanting to "waste money" on filing a discovery motion to nip the alleged improper conduct in the bud. In substance, rather than exercising Defendant's rights and remedies, Defendant's strategy was to let legal fees purportedly pile up and then try to cash it in at the end of the litigation.

Defendant's strategy has been to maximize sanctions sought to be recovered from these inherent powers sanctions. Defendant's conduct is that it elected to "go with the flow" and sleep on Defendant's rights, apparently hoping to create a sanctions payday after trial if successful.

Again, while Plaintiff and Plaintiff's counsel is questionable with respect to some of the complained of conduct, colorable explanations have been provided. Even more significantly, Defendant

did not find such conduct, when it occurred, to warrant the simple filing of a motion, having the court address the issue, and avoiding the large amount of sanctions now sought.

Defendant's election to strip the court of the ability to issue an appropriate sanction to address asserted improper conduct, and instead to paint the court into the corner of only having the ability to issue sanctions of hundreds of thousands of dollars (or for what ever portion of the conduct the court concluded was improper) is itself conduct akin to acting in bad faith, vexatiously, wantonly, or for oppressive reasons. The court does not reward such conduct.

The court concludes there is no basis for imposing appropriate and proper sanctions under the inherent powers of the court and 11 U.S.C. § 105(a), to the extent applicable.

The court denies Defendant's Motion for Sanctions in its entirety.

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 Motion for Sanctions pursuant to Local Rule 9017-1; 11 U.S.C. § 105(a); and 28 U.S.C. § 1927 by Joseph H. Akins, Defendant, ("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 for Sanctions is denied.

FINAL RULINGS

7. **10-22378-E-13** **DEREK/ALISA FREEMAN** **CONTINUED STATUS CONFERENCE**
21-2010 **CAE-1** **RE: COMPLAINT**
FREEMAN ET AL V. HFC ET AL **2-2-21 [1]**

Final Ruling: No appearance at the April 7, 2022 Status Conference is required.

Plaintiff's Atty: Timothy J. Walsh
Defendant's Atty: unknown

Adv. Filed: 2/2/21 [Reissued Summons 6/22/21]
Answer: none

Nature of Action:
Validity, priority or extent of lien or other interest in property

Notes:
Continued from 3/9/22 to be heard in conjunction with the Order to Show Cause as to why this Adversary Proceeding should not be dismissed for failure to prosecute.
Status Conference Report, Response to Order to Show Cause filed 3/24/22 [Dckt 48]
Plaintiffs' Request for Dismissal of Complaint filed 3/24/22 [Dckt 49], Order [Dckt. 50]

> The Adversary Proceeding having been dismissed by the court (Order, Dckt. 50) pursuant to the request of the Plaintiff-Debtor, **the Status Conference is concluded and removed from the Calendar.**

8. **10-22378-E-13** **DEREK/ALISA FREEMAN** **ORDER TO SHOW CAUSE**
21-2010 **CAE-1 Timothy Walsh** **3-14-22 [45]**
FREEMAN ET AL V. HFC ET AL

Final Ruling: No appearance at the April 7, 2022 hearing is required.

> The Adversary Proceeding having previously been dismissed, **the Order to Show Cause is discharged as moot.**

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, this Adversary Proceeding having been previously dismissed pursuant to the request of the Plaintiff-Debtor, 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 as moot, with no sanctions ordered pursuant thereto.