UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

Honorable Fredrick E. Clement
Sacramento Federal Courthouse
501 I Street, 7th Floor
Courtroom 28, Department A
Sacramento, California

DAY: TUESDAY
DATE: MAY 25, 2021
CALENDAR: 1:30 P.M. ADVERSARY PROCEEDINGS

RULINGS

Each matter on this calendar will have one of three possible designations: No Ruling, Tentative Ruling, or Final Ruling.

"**No Ruling**" means the likely disposition of the matter will not be disclosed in advance of the hearing. The matter will be called; parties wishing to be heard should rise and be heard.

"**Tentative Ruling**" means the likely disposition, and the reasons therefor, are set forth herein. The matter will be called. Aggrieved parties or parties for whom written opposition was not required should rise and be heard. Parties favored by the tentative ruling need not appear. Non-appearing parties are advised that the court may adopt a ruling other than that set forth herein without further hearing or notice.

"**Final Ruling**" means that the matter will be resolved in the manner, and for the reasons, indicated below. The matter will not be called; parties and/or counsel need not appear and will not be heard on the matter.

CHANGES TO PREVIOUSLY PUBLISHED RULINGS

On occasion, the court will change its intended ruling on some of the matters to be called and will republish its rulings. The parties and counsel are advised to recheck the posted rulings after 3:00 p.m. on the next business day prior to the hearing. Any such changed ruling will be preceded by the following bold face text: "**[Since posting its original rulings, the court has changed its intended ruling on this matter]**".

ERRORS IN RULINGS

Clerical errors of an insignificant nature, e.g. nomenclature ("2017 Honda Accord," rather than "2016 Honda Accord"), amounts, ("$880," not "$808"), may be corrected in (1) tentative rulings by appearance at the hearing; or (2) final rulings by appropriate ex parte application. Fed. R. Civ. P. 60(a) *incorporated by* Fed. R. Bankr. P. 9024. All other errors, including those occasioned by mistake, inadvertence, surprise or excusable neglect, must be corrected by noticed motion. Fed. R. Bankr. P. 60(b), *incorporated by* Fed. R. Bankr. P. 9023.

1. 19-26964-A-7 **IN RE: LYNN HARRINGTON**
20-2017

STATUS CONFERENCE RE: COMPLAINT
2-18-2020 [1]

EL DORADO COUNTY V. HARRINGTON
JAMIE DREHER/ATTY. FOR PL.

Final Ruling

This status conference is continued to July 20, 2021 at 1:30 p.m. as requested by the parties in the Joint Status Report, ECF No. 23, with a Joint Status Report due 14 days prior.

2. 15-29890-A-7 **IN RE: GRAIL SEMICONDUCTOR**
18-2180

CONTINUED PRE-TRIAL CONFERENCE RE: COMPLAINT
11-1-2018 [1]

SEDGWICK FUNDINGCO, LLC V.
NEWDELMAN ET AL
BETH GASCHEN/ATTY. FOR PL.

Final Ruling

The pretrial conference is removed from calendar. After the court rules on the cross-motions for summary judgment, FSL-7 and HSL-2, the court will re-schedule the pretrial conference. A civil minute order will issue.

3. 15-29890-A-7 **IN RE: GRAIL SEMICONDUCTOR**
18-2180 FSL-7

CONTINUED MOTION FOR SUMMARY JUDGMENT
2-19-2021 [255]

SEDGWICK FUNDINGCO, LLC V.
NEWDELMAN ET AL
BETH GASCHEN/ATTY. FOR MV.
RESPONSIVE PLEADING

Final Ruling

The hearings on the cross-motions for summary judgment, FSL-7 and HSL-2, are removed from calendar. The court needs additional time to review the material submitted. After the court has finished its review, it will schedule oral argument. A civil minute order will issue.

4. 15-29890-A-7 **IN RE: GRAIL SEMICONDUCTOR**
18-2180 HSL-2

CONTINUED MOTION FOR SUMMARY JUDGMENT
2-19-2021 [259]

SEDGWICK FUNDINGCO, LLC V.
NEWDELMAN ET AL
ALLAN NEWDELMAN/ATTY. FOR MV.
RESPONSIVE PLEADING

Final Ruling

The hearings on the cross-motions for summary judgment, FSL-7 and HSL-2, are removed from calendar. The court needs additional time to review the material submitted. After the court has finished its review, it will schedule oral argument. A civil minute order will issue.

5. 17-27892-A-7 **IN RE: DALE EISNER**
19-2123 FEC-2

CONTINUED MOTION FOR SUMMARY JUDGMENT
2-9-2021 [27]

EISNER V. INTERNAL REVENUE
SERVICE
CHRISTIAN MEJIA/ATTY. FOR MV.
RESPONSIVE PLEADING

Tentative Ruling

Motion: Summary Judgment
Notice: Written opposition filed
Disposition: Denied
Order: Civil minute order

This is a motion for summary judgment. Defendants United States of America ("United States") contends that plaintiff Dale Eisner's ("Eisner") 2007 federal income taxes are not excepted from discharge, 11 U.S.C. § 523(a)(1)(B). Plaintiff opposes the motion.

The only issue is "whether [Eisner's] late-filed Form 1040 for the tax year 2007..." is a "return" under 11 U.S.C. § 523(a)(1)(B)(i)" and, more to the point, whether there is a genuine dispute that the late filing was "an honest and reasonable attempt to satisfy [Eisner's] 2007 tax obligations." United State's Reply Brief, 1:3-6, 15-16, May 11, 2021, ECF No. 44.

FACTS

Eisner did not file his 2007 federal income tax return in a timely fashion. Nor did he seek an extension.

In December 2006, while driving under the influence of alcohol, Eisner caused the death of another. He was arrested, charged, and, between March 2007 and May 2007, was in jail. From May 2007, through May 2008, he was out on bail. In May 2008, he pled guilty to a lesser offense arising from the incident and was sentenced to 10 years and 4 months in prison. He was released in May 2012.

Apparently, in an effort to finance the defense of his criminal action, Eisner withdrew $265,000 from his pension at the Carpenter's Annuity Trust Fund. He withheld $69,000 for taxes. That amount was insufficient to cover the taxes arising from that withdrawal.

During his incarceration, the United States corresponded with Eisner and, in July 2011, assessed taxes of $100,000.

In September 2013, with the assistance of an accountant, Eisner filed his 2007 Form 1040. Eisner and his accountant computed his tax liability for the 2007 tax year at $99,989.

PROCEDURE

In 2017, Eisner filed a Chapter 7 bankruptcy and received his discharge.

In 2019, Eisner filed an adversary proceeding to determine whether the 2007 federal income tax debt was discharged. Fed. R. Bankr. P. 4007(a).

The United States moves for summary judgment. It offers two arguments: (1) the 2013 filing was not a return because it was not an honest and reasonable attempt to satisfy Eisner's 2007 tax obligations; and (2) the One-Day Late Rule precludes discharge of the debt. Eisner opposes the motion.

JURISDICTION

As to the October 2019 Lenders, this court has jurisdiction, 28 U.S.C. §§ 1334, 157 (a), (b) (1); General Order No. 182 of the U.S. District Court for the Eastern District of California, and this is a core proceeding in which this court may enter final orders and judgment, 28 U.S.C. § 157(b)(2)(I). Even if the matters raised by this adversary proceeding are non-core, this court may enter final orders and judgment with the consent of the parties. 11 U.S.C. § 157 (c) (1), (2); *Wellness Int'l Network, Ltd. v. Sharif*, 135 S.Ct. 1932 (2015). The plaintiff consents to the entry of final orders and judgments by this court; the defendant does not so consent. Scheduling Order § 2.0, December 1, 2020, ECF No. 22.

LAW

Federal Rule of Civil Procedure 56 requires the court to grant summary judgment on a claim or defense "if the 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. 56. "[T]he mere existence of some alleged factual dispute between the parties will not defeat an

otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *California v. Campbell*, 138 F.3d 772, 780 (9th Cir. 1998) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986)). "A fact is 'material' when, under the governing substantive law, it could affect the outcome of the case." *Thrifty Oil Co. v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 322 F.3d 1039, 1046 (9th Cir. 2003) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

"The court must view the evidence in the light most favorable to the non-movant and draw all reasonable inferences in the non-movant's favor." *Swoger v. Rare Coin Wholesalers*, 803 F.3d 1045, 1047 (9th Cir. 2015) (citing *Clicks Billiards Inc. v. Sixshooters Inc.*, 251 F.3d 1252, 1257 (9th Cir. 2001)).

A shifting burden of proof applies to motions for summary judgment. *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 387 (9th Cir. 2010). "The moving party initially bears the burden of proving the absence of a genuine issue of material fact." *Id.*

"Where the non-moving party [e.g., a plaintiff] bears the burden of proof at trial, the moving party need only prove that there is an absence of evidence to support the non-moving party's case. Where the moving party meets that burden, the burden then shifts to the non-moving party to designate specific facts demonstrating the existence of genuine issues for trial." *Id.* (citation omitted). The Ninth Circuit has explained that the non-moving party's "burden is not a light one. The non-moving party must show more than the mere existence of a scintilla of evidence." *Id.* "In fact, the non-moving party must come forth with evidence from which [the factfinder] could reasonably render a verdict in the non-moving party's favor." *Id.*

When the moving party has the burden of persuasion at trial (e.g., a plaintiff on claim for relief or a defendant as to an affirmative defense), the moving party's burden at summary judgment is to "establish beyond controversy every essential element of its . . . claim." *S. California Gas Co. v. City of Santa Ana*, 336 F.3d 885, 888 (9th Cir. 2003) (internal quotation marks omitted). In such a case, there is no need to disprove the opponent's case "[i]f the evidence offered in support of the motion establishes every essential element of the moving party's claim or [affirmative] defense." Hon. Virginia A. Phillips & Hon. Karen L. Stevenson, *Federal Civil Procedure Before Trials, Calif. & 9th Cir. Edit.*, Summary Judgment, Burden of Proof ¶ 14:126.1 (Rutter Group 2019).

A party may support or oppose a motion for summary judgment with affidavits or declarations that are "made on personal knowledge" and that "set out facts that would be admissible in evidence." Fed. R. Civ. P. 56(c)(4). The assertion "that a fact cannot be or is genuinely disputed" may be also supported by citing to other materials in the record or by "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1).

"A motion for summary judgment cannot be defeated by mere conclusory allegations unsupported by factual data." *Angel v. Seattle-First Nat'l Bank*, 653 F.2d 1293, 1299 (9th Cir. 1981) (citing *Marks v. U.S. Dep't of Justice*, 578 F.2d 261, 263 (9th Cir. 1978)). "Furthermore, a party cannot manufacture a genuine issue of material fact merely by making assertions in its legal memoranda." *S.A. Empresa de Viacao Aerea Rio Grandense v. Walter Kidde & Co.*, 690 F.2d 1235, 1238 (9th Cir. 1982).

DISCUSSION

Discharge of tax debts in Chapter 7 bankruptcy is governed by 11 U.S.C. § 523.

> (a) A discharge under section 727, 1141, 11921 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt--
>
> (1) for a tax or a customs duty—
>
> (A) of the kind and for the periods specified in section 507(a)(3) or 507(a)(8) of this title, whether or not a claim for such tax was filed or allowed;
>
> (B) 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; or
>
> (C) with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax...

11 U.S.C. § 523(a)(1).

The only issue here is whether Eisner's 2013 filing was a "return" for the purposes of § 523(a)(1)(B). A "return" is a statutorily defined term.

> 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.

11 U.S.C. § 523 (hanging paragraph).

The One-Day Late Rule

The United States correctly points out that three Circuit Courts of Appeal have held that filing deadlines for the tax returns are "applicable filing requirements," within the meaning of the hanging paragraph of 11 U.S.C. § 523; therefore, a late-filed return may never satisfy the § 523(a)(1)(B) requirement. *Fahey v. Massachusetts Dept of Revenue (In re Fahey)*, 779 F.3d 1, 5 (1st Cir. 2015); *Mallo v. Internal Revenue Service (In re Mallo)*, 774 F.3d 1313, 1321 (10th Cir. 2014); *McCoy v. Mississippi State Tax Comm'n (In re McCoy)*, 666 F.3d 924, 931-932 (5th Cir. 2012).

The Ninth Circuit has not ruled on this issue. *Smith v. United States (In re Smith)*, 828 F.3d 1094 (9th Cir. 2016) ("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."). But prior to *Smith*, the Ninth Circuit Bankruptcy Appellate Panel has rejected that construction. *United States v. Martin (In re Martin)*, 542 B.R. 479, 486-489 (9th Cir. 2015). *Martin* retains its vitality post-*Smith*. *In re Van Arsdale*, No. 13-40873 CN, 2017 WL 2267021, at *2 (Bankr. N.D. Cal. May 18, 2017) ("As noted by the Tenth Circuit BAP in *In re Wogoman*, 475 B.R. 239, 250 (Bankr. 10th Cir. 2012), the IRS has not persuaded any court (pre or post BAPCPA) of the merits of this argument. More importantly, the Ninth Circuit BAP rejected this argument in *In re Martin*, 542 B.R. 479 (BAP 9th Cir. 2015)"). As a consequence, this court finds that the One-Day Late Rule does not bar the plaintiff's action.

The *Beard* Test

In determining whether the 2013 late-filed return constitutes a "return" for the purposes of § 523(a)(1)(B), the Ninth Circuit follows the *Beard* rule. *Beard v. Commissioner*, 82 T.C. 766, 777 (1984), *aff'd*, 793 F.2d 139 (6th Cir. 1986); *Smith v. United States (In re Smith)*, 828 F.3d 1094 (9th Cir. 2016).

> The bankruptcy code exempts from discharge "any ... debt for a tax ... with respect to which a return, or equivalent report or notice, if required ... was not filed or given." 11 U.S.C. § 523(a)(1)(B)(I). In *In re Hatton*, we adopted the Tax Court's widely-accepted definition of "return." 220 F.3d at 1060 (internal citation omitted). There, we stated that "[i]n order for a document to qualify as a [tax] return: (1) it must purport to be a return; (2) it must be executed under penalty of perjury; (3) it must contain sufficient data to allow calculation of tax; and (4) *it must represent an honest and reasonable attempt to satisfy the requirements of the tax law.*" *Id.* at 1060–61 (internal citation and quotation marks omitted).

Id. at 1096 (emphasis added).

The United States concedes that the first three elements of the *Beard* test are satisfied. United States Reply Brief 1:14-16, May 11, 2021, ECF No. 44.

The parties disagree as to whether there is a genuine issue of fact with regard to whether the 2013 filing was an honest and reasonable attempt to satisfy applicable requirements. When deciding the issue, the court should consider not only the filings themselves but also "the number of missing returns, the length of the delay, and any other circumstances reasonably pertaining to the honesty and reasonableness of [the taxpayer debtor's] efforts." *Martin*, 542 B.R. at 491; *see also*, *In re Van Arsdale*, No. 13-40873 CN, 2017 WL 2267021, at *3 (Bankr. N.D. Cal. May 18, 2017) ("Moreover, this court must examine the entire time frame at issue, from the moment the taxes became due to when Van Arsdale filed his return in August 2005. Simply, "Failure to file a timely return, at least without a legitimate excuse or explanation, evidences the lack of a reasonable effort to comply with the law." *Earls v. United States of America (In re Earls)*, 549 B.R. 871, 879 (Bankr. S.D.Ohio 2016)").

Colloquially speaking, the court must consider the totality of the circumstances. Here, competing inferences preclude granting summary judgment. On one hand, the six year delay between the due date of the return, correspondence from the United States and the reduced tax burden under the 2013 return suggest a less than honest effort by the taxpayer. But on the other hand, the fact that but one return was unfiled, that the debtor had no resources to file the return while in prison from 2007 to 2012, that he voluntarily paid $69,000 against the 2007 tax upon withdrawal of pension funds and enlisted the assistance of a tax professional to prosecute the return suggest an honest and reasonable effort to comply. Finding competing inferences, the court will deny the motion for summary judgment.

CIVIL MINUTE ORDER

The court shall issue a civil minute order that conforms substantially to the following form:

The United States' motion for has been presented to the court. Having considered the motion together with papers filed in support and opposition, and having heard the arguments of counsel, if any,

IT IS ORDERED that the motion is denied.