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Ethics: Discharge Issues and Elements of Proof Under § 523/ Consumer Mock Trial of a § 523 Discharge Case

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CONCURRENT SESSION

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I. 2004 EXAMINATION PRIOR TO FILING COMPLAINT

A. Duty of Investigation (Ethics)

In the context of Section 523(a) litigation, there is a duty of pre-filing investigation that should be performed before filing a complaint. The Bankruptcy Court for the Northern District of Illinois in *In re Ryan*, summarized that duty in the context of Section 523(a) litigation:

> Bankruptcy Rule 9011(b)(1) prohibits the filing of a pleading for an improper purpose, such as delay, harassment, or causing expense, even if the filing relates to a claim that is otherwise colorable. Id. Bankruptcy Rule 9011(b)(2)-(4) requires a party's attorney to perform a reasonable preliminary investigation of the facts and the applicable law before filing a paper in federal court. *Id*.
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> The "improper purpose clause," under Bankruptcy Rule 9011(b)(1) is directed at abusive litigation practices and encompasses papers filed to cause unnecessary delay, to increase litigation costs, or filed to harass. *Troost v. Kitchin (In re Kitchin)*, 327 B.R. 337, 366 (Bankr.N.D.Ill.2005); *Am. Telecom*, 319 B.R. at 872. In order to determine whether a paper was interposed for any improper purpose, a court must look to "objectively ascertainable circumstances that support an inference" that the non-movant's purpose for filing a paper was improper within the meaning of Bankruptcy Rule 9011(b)(1). *Collins*, 250 B.R. at 662. "A paper interposed for any improper purpose is sanctionable whether or not it is supported by the facts and the law, and no matter how careful the pre-filing investigation." *Kitchin*, 327 B.R. at 366.1112
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> With respect to the "frivolousness clauses," the relevant inquiry has two prongs: (1) whether the attorney made a reasonable inquiry into the facts and (2) whether the attorney made a reasonable investigation of the law. *Home Savs. Ass'n of Kansas City, F.A. v. Woodstock Assocs. I, Inc. (In re Woodstock Assocs. I, Inc.)*, 121 B.R. 238, 242 (Bankr.N.D.Ill.1990). "The legal papers an attorney files in any case must be grounded in both a nonfrivolous legal theory and well-founded factual contentions and/or denials that, at a minimum, have a reasonable possibility of having evidentiary support after further investigation and discovery." Am. Telecom, 319 B.R. at 867. Good faith alone is not enough to comply with the frivolousness clauses of Bankruptcy Rule 9011. Id. Indeed, "Rule 9011 imposes an affirmative obligation upon counsel to conduct a reasonable inquiry into both the law and the facts before advancing a particular position 616 to the court." *In re Martin*, 350 B.R. 812, 817 (Bankr.N.D.Ind.2006).
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> In making the determination of whether a reasonable inquiry was made with respect to the facts of a case, courts must consider five factors:
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> (1) whether the signer of the document had sufficient time for investigation;

(2) the extent to which the attorney had to rely on the client for the factual foundation underlying the pleading;

(3) whether the case was accepted from another attorney;

(4) the complexity of the facts and the attorney's ability to perform a sufficient pre-filing investigation; and

(5) whether discovery would have been beneficial to the development of the underlying facts. *Woodstock*, 121 B.R. at 242. In sum, the investigation of the facts must have been reasonable under the particular circumstances of the case. *In re Excello Press, Inc.*, 967 F.2d 1109, 1112–13 (7th Cir.1992). A pleading is well-grounded in fact if it has some reasonable basis in fact. *Woodstock*, 121 B.R. at 242. On the other hand, a pleading is not well-grounded in fact if it is contradicted by uncontroverted evidence that was or should have been known by the attorney signing the document. Id. Nonetheless, the Rule does not require investigation to the point of absolute certainty. *Kaliana*, 207 B.R. at 601.

In re Ryan, 411 B.R. 609, 615–16 (Bankr. N.D. Ill. 2009)

II. SELECTED DISCOVERY CONSIDERATIONS

A. Rule 2004 v. Part VII Rules (Rules 7001, et seq.)

Rule 2004 provides, on motion and entry of an order of the court, that a party in interest may examine any entity, including the debtor, regarding "the acts, conduct, or property or to the liabilities and financial condition of the debtor, or to any matter which may affect the administration of the debtor's estate, or to the debtor's right to a discharge." FED. R. BANKR. P. 2004(b). Despite the broad coverage of Rule 2004, its coverage is not unlimited. "Rule 2004 examinations cannot be used for the purpose of abuse or harassment and the examination cannot go beyond the bounds of what is, or may be, relevant to the inquiry." *In re Strecker*, 251 B.R. 878, 882 (Bankr. D. Colo. 2000). "Although Rule 2004 examinations have been characterized as fishing expeditions, they are not without bounds." *In re Buick*, 174 B.R. 299, 305 (Bankr. D. Colo. 1994).

One such limitation on the use of Rule 2004 is where a pending adversary proceeding exists and the parties seek information that is properly addressed in the adversary proceeding and the relevant rules governing discovery in the adversary proceeding (*see* Part VII Rules, Rules 7001 et seq.). *See, e.g., In re Brooke Corp.*, 2013 WL 3948866, *3 (Bankr. D. Kan. 2013) ("Where a party requests a Rule 2004 examination and an adversary proceeding or other litigation in another forum is pending between the parties, the relevant inquiry is whether the Rule 2004 examination will lead to the discovery of evidence related to the pending proceeding or whether the requested examination seeks to discover evidence unrelated to the pending proceeding.") (citation omitted). If the proposed examination seeks information related to the adversary, Rule 2004 is not the proper procedural vehicle for such information, and instead the protections of Rules 7026 through 7037 should govern the production of such discovery.

Also, Rule 2004 examinations cannot be used for the purpose of abuse or harassment and the examination cannot go beyond the bounds of what is, or may be, relevant to the inquiry." *In re Strecker*, 251 B.R. 878, 882 (Bankr. D. Colo. 2000). "Limitation of discovery using Rule 2004 is especially appropriate when the actual motion for the request is an improper purpose. *See In re Enron Corp.,* 281 B.R. 836 (Bankr. S.D.N.Y. 2002) (Rule 2004 discovery could not be used to circumvent discovery limitations in pending security fraud action)." *In re El Toro Exterminator of Florida, Inc.*, 05-60015-BKC-LMI, 2006 WL 2882519, at *2 (Bankr. S.D. Fla. July 6, 2006).

"It is well recognized that once an adversary proceeding or other contested matter is commenced, discovery should be pursued under the Federal Rules of Civil Procedure and not Rule 2004." *In re Enron Corp.*, 281 B.R. at 840.

> Courts have exhibited similar concerns and reached similar results when confronted with the propriety of Rule 2004 examinations where the party requesting the Rule 2004 examination could benefit their pending litigation outside of the bankruptcy court against the proposed Rule 2004 examinee. *See Snyder v. Soc'y Bank,* 181 B.R. 40, 42 (S.D. Tex. 1994) *aff'd sub nom. In re Snyder,* 52 F.3d 1067 (5th Cir. 1995) (mem.) (characterizing the use of Rule 2004 to further a state court action as an abuse of Rule 2004 and stating that the bankruptcy court did not abuse its discretion by denying production under a subpoena issued under Rule 2004, where appellant's primary motivation was to use those materials in a state court action against the examinee); *see also Collins v. Polk,* 115 F.R.D. 326, 328–29 (M.D. La. 1987) (granting motion to impound all depositions taken pursuant to Rule 2004 and strongly condemning practice where plaintiff in district court action had filed suit but did not serve the pleadings, including an amended complaint, on Rule 2004 examinee/defendants until after having participated in bankruptcy trustee's Rule 2004 examinations); *cf. In re Coffee Cupboard, Inc.,* 128 B.R. 509, 515–517 (Bankr. E.D.N.Y. 1991) (balancing the individualized elements of the case to conclude that limited discovery under Rule 2004 was warranted, but only to the extent relevant to the transfer of assets within the trustee's administrative power. The court recognized the normative principle that "Rule 2004 examinations should not be used to obtain information for use in an unrelated case or proceeding pending before another tribunal").

In re Enron Corp., 281 B.R. at 842.

In *In re Enron Corp*., the bankruptcy court denied the plaintiff in a fraud action the opportunity to conduct Rule 2004 discovery against a third party where discovery in the fraud action had been stayed pending the outcome of a motion to dismiss. *Id.* at 844. *See also In re Comdisco, Inc.*, 06 C 1535, 2006 WL 2375458, at *7 (N.D. Ill. Aug. 14, 2006) (reversing bankruptcy court's order for third party to produce confidential settlement agreement pursuant to Rule 2004 where the settlement agreement was not relevant to bankruptcy proceeding and production would circumvent discovery rules governing pending state and federal litigation).

B. Recent Changes to Rule 26(b)(1)

Rule 26(b)(1), made applicable to adversary proceedings by Rule 7026, was revised in 2015, among other reasons, to restore explicitly the concept of proportionality to the scope of discovery and to correctly define the scope of discovery. Rule 26(b)(1) now provides

> Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

FED. R. CIV. P. 26(b)(1). The Advisory Committee Notes related to the 2015 Amendment make clear that the court and parties should consider factors related to the proportionality of the discovery sought by the parties, and that the court, using information provided by the parties, should assist in reaching case-specific determinations regarding the scope of discovery. Additionally, the Advisory Committee Notes point out the following:

- "Restoring the proportionality calculation to Rule 26(b)(1) does not change the existing responsibilities of the court and the parties to consider proportionality, and the change does not place on the party seeking discovery the burden of addressing all proportionality considerations."

- "The burden or expense of proposed discovery should be determined in a realistic way. This includes the burden or expense of producing electronically stored information. … Courts and parties should be willing to consider the opportunities for reducing the burden or expense as reliable means of searching electronically stored information become available."

- "The former provision for discovery of relevant but inadmissible information that appears 'reasonably calculated to lead to the discovery of admissible evidence' is also deleted. The phrase has been used by some, incorrectly, to define the scope of discovery. … Discovery of nonprivileged information not admissible in evidence remains available so long as it is otherwise within the scope of discovery."

C. Strive to Play Well with Others and to Not Annoy the Court—Ethical Considerations in Discovery

Discovery in adversary proceedings is largely an attorney-managed process, requiring the court's involvement only if the parties cannot agree on issues of scope, responsiveness, privilege, proportionality, timing, and the like. Parties (and counsel) would do well to keep the following points in mind when propounding or producing discovery:

- The purpose of discovery is to allow parties and the court to determine the truth and to prepare for trial without having any side subjected to ambush or surprise. "One of the primary objectives of the discovery provisions embodied by the Federal Rules of Civil Procedure is elimination of surprise in civil trials." *Erskine v. Consol. Rail Corp.*, 814 F.2d 266, 272 (6th Cir. 1987). "All parties are entitled to reasonable access to 'all evidence bearing on the controversy between them, including that in control of adverse parties. This, of course, requires the absolute honesty of each party in answering discovery request and complying with discovery orders.'" *Wagner v. Dryvit Sys., Inc.*, 208 F.R.D. 606, 609 (D. Neb. 2001)

- Parties are not the only ones who must play nice—counsel must also work in good faith during the discovery process. Rule 26(g) requires counsel to sign disclosures, objections, and requests, thereby certifying accuracy and completeness as to disclosures, and with respect to discovery requests, objections, and responses, that the same are made consistent with the Rules and are otherwise proper and reasonable as more fully described in the Rule. *See also Resolution Trust Corp. v. Williams*, 162 F.R.D. 654, 658 (D. Kan. 1995) ("Careful inquiry by counsel is mandated in order to determine the existence of discoverable documents and to assure their production. The responsibility for determining the existence of and implementing the production of discoverable documents is not that of the party alone, but also its counsel."). Prudent counsel will work with parties to ensure that documents and electronically stored information are properly preserved during the course of litigation, and that parties are gathering and producing documents and information in an open, honest, and complete manner.

- Parties must prepare discovery requests with an aim toward describing the information sought with "reasonable particularity." It is improper to abuse the broad discovery privileges given to parties under the Rules. *See, e.g., Regan-Touhy v. Walgreen Co.*, 526 F.3d 641, 649 (10th Cir. 2008) ("Under our rules, parties to civil litigation are given broad discovery privileges. But with those privileges come certain modest obligations, one of which is the duty to state discovery requests with "reasonable particularity.") Interrogatories and document requests "should be sufficiently definite and limited in scope that it can be said 'to apprise a person of ordinary intelligence what documents are required and [to enable] the court ... to ascertain whether the requested documents have been produced.'" *Id.* at 650 (citations omitted).

- Parties and counsel must be mindful of asserting proper objections so as not to obstruct the proper scope of discovery. "Abusive discovery tactics, such as those characterized by a party's repetitive, frivolous, obstructionist, boilerplate objections, will not be countenanced. Rule 26(g), incorporated by FED. R. BANKR. P. 7026, allows the court to impose sanctions on the signer of a discovery response which is incomplete, evasive or objectively unreasonable under the circumstances." *In re Smith*, 2006 WL 3000071, *2 (Bankr. N.D. Iowa 2006).

- In the event that parties cannot agree on scope or particularities of discovery, the parties must meet and confer, or at least attempt to meet and confer, in good faith prior to seeking intervention of the court. *See, e.g.*, Utah Local Rule 7026-1(a), "[t]he court will not entertain any motions related to discovery under FED. R. BANKR. P. 7026 through 7037 unless the moving attorney has in good faith conferred or attempted to confer, with the opposing attorney and the parties are unable to reach an agreement on the matters set forth in the motion. The moving attorney must certify in writing, at the time of filing the motion, that he has complied with this requirement and must state the date, time, and place of the conference or attempts to confer, and the names of all participating parties or attorneys."

- Parties have a continuing duty to supplement disclosures and discovery responses, and counsel should be mindful of following up with their clients regarding supplementation on a timely basis so as to avoid claims of surprise or prejudice. *See* FED. R. CIV. P. 26(e).

III. FILING OF COMPLAINT

A. New Rules for Pleadings, Including Consent to Entry of Final Orders in Both Complaint and Responsive Pleadings

Amended Rules 7008, 7012, 7016, 9027 and 9033.

Pursuant to General Procedure Order Number 2016-01 in the District of Colorado:

> [P]ending amendments to Rules 7008, 7012, 7016, 9027, and 9033 of the Federal Rules of Bankruptcy Procedure in light of *Stern v. Marshall*, 131 S.Ct. 2594 (2011) and *Wellness Int'l Network, Ltd. v. Sharif*, 135 S.Ct. 1932 (2015). Section 157 of title 28, U.S.C. designates certain bankruptcy matters as "core proceedings" by statute. *Stern* held, however, that the bankruptcy court lacks the constitutional authority to enter final judgment on a state-law counterclaim against a creditor who had filed a claim against the estate, notwithstanding the express designation of such a counterclaim as a "core proceeding" under the statute. *Wellness* subsequently held that the bankruptcy court may enter final judgment on a so-called "*Stern* claim" -- one designated as "core" by statute but not subject to final adjudication by the bankruptcy court under the Constitution -- with a party's consent. Such consent to final judgment in bankruptcy court may be express or implied; either way, consent must be knowing and voluntary.
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> The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States has submitted proposed amendments to Federal Rules of Bankruptcy Procedure 7008, 7012, 7016, 9027 and 9033, to address *Stern* and *Wellness*, with an anticipated effective date of December 1, 2016. The proposed amendments: (1) eliminate the "core" and "non-core" distinction in the current rules; (2) require parties to state in pleadings whether they consent to entry of final judgment by the bankruptcy court; and (3) allow the bankruptcy court to

> determine the proper treatment of proceedings involving *Stern* claims, including whether to hear and determine such proceedings fully and finally, whether to propose findings of fact and conclusions of law to the United States District Court, or whether to take other appropriate action.

Accordingly, in all adversary proceedings, and in addition to the general rules of pleadings under FED. R. BANKR. P. 7008 and FED. R. CIV. P. 8, the complaint, counterclaim, cross-claim, or third-party complaint shall contain a statement that the pleader does or does not consent to entry of final orders or judgment by the bankruptcy court;

Under FED. R. BANKR. P. 7012 and FED. R. CIV. P. 12 (as applicable), shall include a statement that the party does or does not consent to entry of final orders or judgment by the bankruptcy court;

Under FED. R. BANKR. P. 7016 and FED. R. CIV. P. 16, the bankruptcy court shall decide, on its own motion or a party's timely motion, whether: (a) to hear and determine the proceeding; (b) to hear the proceeding and issue proposed findings of fact and conclusions of law; or (c) take some other action;

Under FED. R. BANKR. P. 9027, in addition to the requirements of the rule, the party filing such notice shall state whether it does or does not consent to entry of final orders and judgment by the bankruptcy court upon removal. Any party who has filed a pleading in connection with a claim or cause of action removed shall file a statement no later than fourteen days after the notice of removal stating whether it does or does not consent to entry of final orders and judgment by the bankruptcy court;

FED. R. BANKR. P. 9033 shall apply to all proceedings in which the bankruptcy court has issued proposed findings of fact and conclusions of law, whether designated as "non-core" or otherwise;

This GPO has been superceded by implementation of the amended Federal Bankruptcy Rules of Procedure as of December 1, 2016.

IV. MOTION TO DISMISS STANDARDS

To withstand a motion to dismiss pursuant to Rule 12(b)(6), the Plaintiff's complaint "must contain enough allegations of fact to state a claim to relief that is plausible on its face." *Robbins v. Oklahoma,* 519 F.3d 1242, 1247 (10th Cir. 2008) (internal quotations omitted). Under this standard, "the mere metaphysical possibility that *some* plaintiff could prove *some* set of facts in support of the pleaded claims is insufficient; the complaint must give the court reason to believe that *this* plaintiff has a reasonable likelihood of mustering factual support for *these* claims." *Ridge at Red Hawk, L.L.C. v. Schneider,* 493 F.3d 1174, 1177 (10th Cir. 2007) (emphasis in original). A court must ask whether the alleged facts, if true, demonstrate that each element of Plaintiff's claim is in fact "plausible," not merely "conceivable" or "possible." *See Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 570 (2007) (factual allegations must "nudge" claim from merely "conceivable" to "plausible"); *see also Phillips v. County of Allegheny*, 515 F.3d 224, 234 (3d Cir. 2008) (explaining *Twombly* applies to each "necessary element"); *and*

Wright v. Vanderbilt Mortg. and Fin., Inc. (In re Wright), 2009 WL 3633811, *3 (Bankr. D.N.M. Oct. 30, 2009).

The Plaintiff bears the burden to "frame a complaint with enough factual matter (taken as true) to suggest that he or she is entitled to relief." *Robbins,* 519 F.3d at 1247 (internal quotations omitted) (quoting *Twombly,* 550 U.S. at 544 (2007)). Factual allegations must be "enough to raise a right to relief above the speculative level." *Id.*

V. IS SUMMARY JUDGMENT PROPER WHEN CLAIM IS BASED ON FRAUD?

Rule 56, incorporated into adversary proceedings by Rule 7056, provides that "[t]he court shall grant summary judgment 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). In nondischargability actions premised on fraud, which necessarily involve a person's state of mind involving intent to deceive, and states of mind regarding reliance (or not) on a person's representations, finally resolving matters on summary judgment, rather than after trial, "should be the exception rather than the rule." *People's State Bank of Mazeppa v. Drenckhahn (In re Drenckhahn)*, 77 B.R. 697, n. 16 (Bankr. D. Minn. 1987) ("More often than not, discharge objections involve questions of subjective motive and intent, which by their nature are particularly inappropriate for summary adjudication. . . . . Because discharge objections challenge acts which concern the very integrity of the bankruptcy process, they should ordinarily be tried on their merits unless it is clear that there is no evidence in the record which can support the complaint.") (citations omitted)

The intent to defraud under Section 523(a)(2)(A) is subjective and does not lend itself to summary judgment in normal circumstances. *See PNC Bank v. Laskey (In re Laskey)*, 441 B.R. 853, 856 (Bankr. N.D. Ohio 2010) ("Whether a debtor possessed an intent to defraud a creditor within the scope of § 523(a)(2)(A) is measured by a subjective standard, meaning that the debtor's personal characteristics and circumstances must be considered. This facet normally makes adjudication of an action brought under § 523(a)(2)(A) inappropriate on a motion for summary judgment."); *In re Glasgow*, 370 B.R. 362 (Bankr. D. Colo. 2007) (summary judgment denied; justifiable reliance standard under Section 523(a)(2)(A) is subjective and not proper for summary judgment) *but see First Federal Savings & Loan v. Kelley (In re Kelley),* 163 B.R. 27 (Bankr. E.D.N.Y. 1993) (summary judgment granted on 523(a)(2)(B) issue; circumstantial evidence used to show intent of debtor). Trial, rather than summary judgment, "is usually necessary to adjudicate issues involving an individual's state of mind. The reason: Determinations concerning a debtor's state of mind require a subjective assessment of the debtor's intent which often can only be made by the trier-of-fact after it has had the opportunity to assess the credibility and the demeanor of witnesses who testify at trial during both direct and cross examination." *Laskey*, 441 B.R. at 856.

VI. DEFINING "DEFALCATION" BY A FIDUCIARY UNDER § 523(a)(4)

In *Bullock v. BankChampaign*, *N.A.,* 133 S.Ct. 1754 (2013), the Supreme Court resolved a split among the circuits as to the type of "mens rea" or requisite mental state of the debtor that a plaintiff is required to prove in order to establish a claim for defalcation by a fiduciary under § 523(a)(4). Prior to this decision, in the Tenth Circuit, the standard was relatively low,

requiring only "some portion of misconduct." *Okla. Grocers Ass'n, Inc. v. Millikan (In re Millikan)*, 188 Fed. App'x 699, 702 (10th Cir. 2006) (unpublished). In fact, in our circuit, the focus was not on "mens rea" at all but on the "actus reus" of a fiduciary failing to account for a trust's "res." If a debtor fit within the narrow definition of a "fiduciary," then the failure to account and produce the trust res created a form of strict liability. *Antlers roof-Truss & Builders Supply v. Storie (In re Storie)*, 216 B.R. 283, 288 (10th Cir. BAP 1997). However, this strict liability was not imposed for any mistake or error by a fiduciary. It was reserved only the failure to account for the trust's res. Unfortunately, the Supreme Court did not even consider the approach of those circuits, including the Tenth Circuit, that had employed this limited form of strict liability. Nor did the Court consider the historical meaning of this term as it first appeared in the 1841 Bankruptcy Act. For a historical analysis of this term's meaning, *see Discharging Fiduciary Debts,* 87 Am. Bankr. L. J. 51 (2013).

In *Bullock*, the Supreme Court held that defalcation requires proof of an "intentional wrong." *Bullock v. BankChampaign, N.A*., 133 S.Ct. 1754, 1759 (2013). An intentional wrong includes not only conduct that the fiduciary knows is improper, but also reckless conduct. *Id.* Thus, liability can be imposed where the fiduciary "'consciously disregards' (or is willfully blind to) 'a substantial and unjustifiable risk' that his conduct will turn out to violate a fiduciary duty." *Id.* (quoting Model Penal Code § 2.02(2)(c)). The risk "must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation." *Id.* (quoting Model Penal Code § 2.02(2)(c)).

The *Bullock* standard for defalcation relies heavily on the criminal law definition for recklessness found in the Model Penal Code. *Bullock*, 133 S.Ct. at 1759 ("Thus, we include reckless conduct of the kind set forth in the Model Penal Code."). This contrasts with the tort definitions the Supreme Court has applied to define terms in other subsections of § 523. *See Field v. Mans*, 516 U.S. 59, 69 (1995) (relying on the Restatement (Second) of Torts to define the term "actual fraud" found in § 523(a)(2)). In the case of recklessness, this distinction is important because the criminal and civil definitions of that term differ. The test for criminal recklessness is subjective, while the tort definition is objective. *Farmer v. Brennan*, 511 U.S. 825, 836-37 (1994). Under the civil definition, it is enough to show that the actor *should have known* of risk of harm his actions created. *Id.* For example, the Restatement (Second) of Torts' definition applies a reasonable person standard—an act is reckless if the actor has reason to know of facts that would lead a reasonable person to realize that the conduct creates an unreasonable risk of harm. Restatement (Second) of Torts § 500. In criminal law, liability for reckless conduct depends on a finding that the defendant "disregards a risk of harm *of which he is aware*." *Farmer*, 511 B.R. at 836-37 (emphasis added). As explained by the commentary to the Model Penal Code, recklessness "involves conscious risk creation." Model Penal Code and Commentaries § 20.02 cmt. 3, at 234. Recklessness "resembles acting knowingly in that a state of awareness is involved, but the awareness is of risk, that is of a probability less than substantial certainty; the matter is contingent from the actor's point of view." *Id.* A jury's assessment of criminal recklessness is always made "from the point of view of the actor's perceptions, i.e., to what extent he was aware of risk, of factors relating to its substantiality and of factors relating to its unjustifiability." *Id.* at 238.

In the criminal context, the risk involved is often physical harm to another. *E.g., People v. Hall*, 999 P.2d 207, 222-24 (Colo. 2000) (considering whether the defendant's conduct created a substantial and unjustifiable risk of death for charge of reckless manslaughter). When the Supreme Court incorporated the criminal standard into the defalcation context, it specified that the risk involved is that the debtor's conduct "will turn out to violate a fiduciary duty." *Bullock*, 133 S.Ct. at 1759. Thus, to meet *Bullock*'s recklessness standard, there must be evidence that the debtor was subjectively aware that his conduct might violate a fiduciary duty. It is not enough that the debtor objectively *should have been* aware of the risk—such a finding would only support a finding of criminal negligence, not recklessness. *Hall*, 999 P.2d at 219-20 ("An actor is criminally negligent when he should have been aware of the risk but was not, while recklessness requires that the defendant actually be aware of the risk but disregard it."); Model Penal Code and Commentaries § 2.02 cmt. 3, at 241 (noting that, in contrast to recklessness, where the fact finder assesses "what the actor's perceptions actually were," a negligence determination is made "in terms of an objective view of the situation as it actually existed"). Indeed, the *Bullock* decision specifically overruled the "objective recklessness" standard that the lower court had applied and remanded for application of the new heightened standard. *Bullock*, 133 S.Ct. at 1761.

This heightened, subjective standard supplants the prior quasi-strict liability for defalcation. Pre-*Bullock* cases considered a debtor's subjective intent to breach a fiduciary duty to be "irrelevant." *Antlers Roof-Truss & Builders Supply v. Storie (In re Storie)*, 216 B.R. 283, 287 (10th Cir. BAP 1997). A debtor's lack of knowledge of his or her fiduciary requirements was not a defense. *Id.* ("Courts also agree that fiduciaries are charged with knowledge of their duties and of applicable law."); *see also People v. Mendro*, 731 P.2d 704, (Colo. 1987) ("The defendant's violation of [Colo. Rev. Stat.] section 38-22-127 is not immune from prosecution because of his ignorance of that statute's existence."). In the post-*Bullock* context, simply imputing knowledge of a statutory fiduciary duty will not suffice to establish recklessness. *See* Jonathon S. Byington, *The Challenges of the New Defalcation Standard*, 88 Am. Bankr. L.J. 3, 31 (2014) ("Even where constructive knowledge of fiduciary duties is imposed, Bullock's new standard requiring the debtor have subjective awareness of the risk changes the law and would preclude the imposition of constructive knowledge of fiduciary duties (because that would result in an objective 'should have known' standard)."). A debtor cannot *consciously* disregard a risk of violating a fiduciary duty if he or she is wholly unaware of that duty. There must be some evidence that the debtor was aware of the fiduciary duty and of the risk that his conduct would violate that duty. This is not to say a debtor must admit to being aware of a fiduciary duty. Conscious disregard, like other intent elements, may be inferred from the particular facts of the case. *Hall*, 999 P.2d at 220 ("A court or trier of fact may infer a person's subjective awareness of a risk from the particular facts of a case, including the person's particular knowledge or expertise.").

In addition to conscious disregard of a risk, the *Bullock* decision held that defalcation occurs where a debtor is "willfully blind" to a substantial and unjustifiable risk that his conduct will turn out to violate a fiduciary duty. *Bullock*, 133 S.Ct. at 1759. Willful blindness is another term imported from criminal law. The term is not included in the Model Penal Code's definition of recklessness. Rather, the commentary to the Model Penal Code explains that "willful blindness" is a method of establishing the *mens rea* of knowledge. Section 2.02(7) of the Model Penal Code provides that "knowledge is established if a person is aware of a high probability of

its existence, unless he actually believes that it does not exist." Model Penal Code § 2.02(7). The commentary explains that this section "deals with the situation that British commentators have denominated 'wilful blindness' or 'connivance,' the case of the actor who is aware of the probable existence of a material fact but does not determine whether it exists or does not exist." Model Penal Code and Commentaries § 2.02 cmt. 9, at 248. The Supreme Court has established a two-part test for willful blindness: "(1) the defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact." *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S.Ct. 2060, 2070 (2011). The scope of willful blindness actually surpasses that of recklessness, because a "willfully blind defendant is one who takes deliberate actions to avoid confirming a high probability of wrongdoing and who can almost be said to have actually known the critical facts" whereas a reckless defendant "is one who merely knows of a substantial and unjustified risk of such wrongdoing." *Id.* at 2070-71.

Assuming there is either conscious disregard or willful blindness to a risk of violating a fiduciary duty, there must also be evidence that the risk disregarded was "substantial" and "unjustifiable" to establish a § 523(a)(4) claim. These attributes are more objective in nature and depend on an assessment of the surrounding circumstances and the nature and purpose of the defendant's conduct. Model Penal Code and Commentaries § 20.02 cmt. 3, at 237-38. As one court put it, "[w]hether a risk is substantial must be determined by assessing both the likelihood that harm will occur and the magnitude of the harm should it occur . . . . [W]hether a risk is unjustifiable must be determined by assessing the nature and purpose of the actor's conduct relative to how substantial the risk is." *People v. Hall*, 999 P.2d 207, 218 (Colo. 2000). In addition, a fact finder must assess whether the defendant's disregard was a "gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation." *Bullock*, 133 S.Ct. at 1759. This is essentially an objective "value judgment" by the fact finder as to whether the defendant's conduct "justifies condemnation." Model Penal Code and Commentaries § 20.02 cmt. 3, at 237.

VII. WITNESS PREPARATION

In dischargeability cases, parties often omit depositions of the other party to avoid the cost. You know what your client has told you in the comfort of your office, but your client may be nervously forgetful and you do not know how your client will react to being cross-examined. That makes preparing your client to testify at trial even more important.

There are many theories and strategies for how to best prepare your witness for trial, any of which could be the subject of its own presentation. A few general points:

1. Practice direct with your client with the key testimony you want from your witness. A client may think a particular point is important that you would prefer the client not emphasize, while there may be things you want the client to emphasize the client may not think to mention (i.e., "the loan officer told me the application didn't matter.").

2. Practice cross-examination with your client with your case's key weaknesses in mind. Some clients may want to fight with opposing counsel. Some clients may

quickly get on the "yes train" without fully listening to the question. It is possible you'll cure your client of the behavior, but practice may at least help you know some subjects you'll need to cover in re-direct or that you'll want to spend more time on in direct.

3. Practice with actual exhibits books, or if using electronic evidence, by using exhibits electronically.

4. Most clients will forget many of the instructions you give them. Focusing the preparation and any suggestions for the witness on the key points may help the client remember the key points. The preparation, however, will still help the attorney ask the best questions in light of how the witness's idiosyncrasies.

VIII. TRIAL

A. Electronic Evidence Presentation

1. Available courtroom equipment:

- Podium with touchscreen and ELMO
- Monitor at judge, clerk and counsel tables
- Touchscreen at witness stand
- Big screen
- Video conferencing
- Digital whiteboard

2. Hardware counsel must provide:

- Any laptop, tablet, etc. with HDMI or VGA capability
- Appropriate wire adapter for HDMI or VGA for your device
- Wireless connection to the monitors through Air Media™ is possible
- Access to the internet is **NOT** available in the courthouse

3. What software works (any software or no software):

- Apple programs

  TrialPad ($129.99) - TrialPad is the leading trial presentation and legal file management app for your iPad! Inexpensive, easy,

effective, and intuitive, TrialPad can be used to present and annotate evidence in any trial, hearing or ADR setting. www.litsoftware.com

TrialDirector (Free) - TrialDirector for iPad is a simple, easy to use evidence management and presentation tool designed specifically for use with the iPad. www.indatacorp.com

ExhibitView ($49.99) - Organize by folders, issues, annotate, and present with ease using our cutting edge iPad App. Intuitive features, easy file management, and email and phone support ensure your success with ExhibitView iPad! www.exhibitview.net

RLTC Evidence ($4.99) - Evidence is image presentation software built for trial lawyers. Organize and annotate documents and images on the iPad, then present them via the standard Apple iPad VGA Adapter. http://www.rosenltc.com/app.html

- Windows programs

Trial Director ($795 plus $159 annual maintenance) – Trial presentation software with transcript management, document management, video management functions. www.indatacorp.com

Sanction (cost varies) - Sanction provides litigators with a single resource to quickly assemble documents, exhibits, transcripts, questions, visuals and video that will be used to manage and present evidence throughout litigation, categorize them, and then create clear, polished and compelling presentation materials necessary for building a case. http://www.lexisnexis.com/en-us/litigation/products/sanction.page

Powerpoint (cost varies) - non-litigation specific presentation software

Prezi (free to $20.00 per month) – non-litigation specific, Prezi is a multimedia presentation tool that lets you combine various file types to create persuasive and engaging presentations. www.prezi.com

Adobe PDF Reader (Free) - for viewing .PDF documents

4. Key Features of electronic evidence presentation

- Electronic batch exhibit labeling (not all software)

- Allows electronically exchanging exhibits (sign up for free Dropbox account)

- No bankers boxes of trial notebooks
- No fumbling for the right page (or right notebook)
- Electronically annotating exhibits at trial
- Side by side document comparison
- Highlighting, call outs, and magnifying parts of documents
- Impeaching with deposition transcripts electronically
- Document management and organization
- Opening / closing visuals

5. Tips

- Check individual chambers procedures for specific requirements / equipment limitations
- Equipment tests in the courtroom available/required in advance of scheduled trial date
- Provide thumb drive of exhibits to court (this is the record in event of appeal)
- Aspect ratio issues from 8.5 x11 documents to monitor can make documents harder to read on screen or require magnification

IX. EVIDENTIARY ISSUES

A. Business Records FED. R. EVID. 803(6)

Records of a regularly conducted activity. A record of an act, event, condition, opinion, or diagnosis if:

1. the record was made at or near the time by—or from information transmitted by—someone with knowledge;
2. the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;
3. making the record was a regular practice of that activity;
4. all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

5. the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

Authentication—FED. R. EVID. 902(11) Certified Domestic Records of a Regularly Conducted Activity. The original or a copy of a domestic record that meets the requirements of Rule 803(6)(A)–(C), as shown by a certification of the custodian or another qualified person that complies with a federal statute or a rule prescribed by the Supreme Court. Before the trial or hearing, the proponent must give an adverse party reasonable written notice of the intent to offer the record—and must make the record and certification available for inspection—so that the party has a fair opportunity to challenge them.

B. Impeaching

A witness may be impeached with nearly anything, but it most often occurs with a prior statement of the witness. FED. R. EVID. 613(a) does not require the statement to be shown to the witness, but the statement must be available to opposing counsel.

A procedure for impeachment:

1. Ask the question exactly as it was asked at deposition (generally reading the question from the transcript is best).

2. Do you remember answering questions at your deposition in this case?

3. You were under oath and swore to tell the truth at the deposition?

4. You did tell the truth at the deposition?

5. At the deposition you were asked "(read the question as it was asked at deposition)?"

6. You answered, "… (read witness's answer)".

C. Refreshing Recollection

FED. R. EVID. 612 (a) Scope. This rule gives an adverse party certain options when a witness uses a writing to refresh memory:

(1) while testifying; or

(2) before testifying, if the court decides that justice requires the party to have those options.

D. Adverse Party's Options; Deleting Unrelated Matter.

Unless 18 U.S.C. § 3500 provides otherwise in a criminal case, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's

testimony. If the producing party claims that the writing includes unrelated matter, the court must examine the writing in camera, delete any unrelated portion, and order that the rest be delivered to the adverse party. Any portion deleted over objection must be preserved for the record.

E. Failure to Produce or Deliver the Writing.

If a writing is not produced or is not delivered as ordered, the court may issue any appropriate order. But if the prosecution does not comply in a criminal case, the court must strike the witness's testimony or—if justice so requires—declare a mistrial.

A procedure for refreshing recollection

1. Re-phrase the question series to elicit the desired response.

2. If rephrasing does not work, witness must demonstrate that he/she knew at one time but cannot remember. "I don't know" is not the same as "I don't remember." This point can be easily overlooked, especially when it's your witness and you know the witness just forgot.

3. If the forgotten answer is to an important issue, consider asking questions for why witness does not remember (many details, memory is in relation to another event, etc.)

4. Ask witness if anything (or a specific document) would refresh their memory.

5. Show the document to opposing counsel.

6. Hand the document to the witness for review.

7. After review, have the witness give back the document.

8. Re-ask the question.

X. CONFORMING THE PLEADINGS TO THE EVIDENCE AFTER TRIAL

In a perfect world, plaintiffs would always anticipate the need to plead all possible claims in the alternative. Too often in bankruptcy litigation, however, they fail to do so. It is not unusual to see a plaintiff plead a claim for fraud under § 523(a)(2)(A), but not § 523(a)(2)(B), only to realize at trial that the false statements are deemed to be statements of financial condition that are covered only by the latter statute. Or the plaintiff will plead a claim for fraud or defalcation by a fiduciary under § 523(a)(4), but fail to include a claim for "embezzlement" under the same statute. Then when the court rules that the debtor was not the type of fiduciary that is within the scope of § 523(a)(4), the plaintiff is left without the embezzlement claim that might have served as a backup to cover the debtor's misappropriation of funds or property. Similarly, the trustee may plead a claim for a preference but omit an alternative claim for fraudulent conveyance.

In these situations, when is it permissible for the court to conform the pleadings to include the omitted claims that actually were proven at trial? FED. R. CIV. P. 15(b), made applicable by FED. R. BANKR. P. 7015, expressly addresses this question. It would allow amendment of the pleadings at or after trial under two conditions.

(1) **Based on an Objection at Trial.** If, at trial, a party objects that evidence is not within the issues raised in the pleadings, the court may permit the pleadings to be amended. The court should freely permit an amendment when doing so will aid in presenting the merits and the objecting party fails to satisfy the court that the evidence would prejudice that party's action or defense on the merits. The court may grant a continuance to enable the objecting party to meet the evidence.

(2) **For Issues Tried by Consent.** When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move – at any time, even after judgment – to amend the pleadings to conform them to the evidence and to raise an unpleaded issue. But failure to amend does not affect the result of the trial of that issue.

These two conditions permitting amendment of the pleadings have to be kept separate. The first is invoked only if a party objects to the introduction of evidence on an unpled claim at trial. If an objection is raised, then there can be no implied or express consent to amendment. Upon objection, the party offering the evidence should request amendment and the court should freely grant it, unless the objecting party would be prejudiced. The burden of showing prejudice falls on the objecting party. *Monrod v. Futura, Inc.,* 415 F.2d 1170, 1174 (10th Cir. 1969). If there is a showing of prejudice, then the court should consider whether the prejudice can be rectified by granting a continuance.

The second basis for conforming the pleadings arises only when there has been no objection to the introduction of evidence at trial on the unpled claim. The difficulty with applying this second condition lies with finding "implied" consent.

> Implied consent "is much more difficult to establish and seems to depend on whether the parties recognized that an issue not presented by the pleadings entered the case at trial. If they do not, there is no consent and the amendment cannot be allowed." Charles Alan Wright, Arthur R. Miller & Mary Kay Kane § 1493 (*citing Gisriel v. Uniroyal, Inc.,* 517 F.2d 699, 703 n.9 (8th Cir. 1975)). Stated differently, the test for such consent is "'whether the opposing party had a fair opportunity to defend and whether he would have presented additional evidence had he known the substance of the amendment.'" *In re Prescott,* 805 F.2d 719, 724-25 (7th Cir. 1986)(*quoting Hardin,* 691 F.2d at 456).

In determining whether a party recognized a new issue had been raised a trial, the court should consider whether the evidence was relevant to a claim already at issue in the case. If it was, then the opposing party may not have recognized the introduction of a new claim. "'The reasoning behind this view is sound, since, if the evidence is introduced to support basic issues that already have been pleaded, the opposing party may not be conscious of its relevance to

issues not raised by the pleadings Unless The Fact Is Made Clear." *In re Richards & Conover Steel, Co.,* 267 B.R. 602, 611 (8th Cir. BAP 2001)(citations omitted).

In making these determinations, the court should be guided by the purpose behind Rule 15(b). The clear intent of this rule is "to provide maximum opportunity for each claim to be decided on its merits rather than on procedural niceties." *Hardin v. Manitowoc-Forsythe Corp.,* 691 F.2d 449, 456 (10th Cir. 1982). On the other hand,

> [t]he liberalized pleading rules . . . do not permit plaintiffs to wait until the last minute to ascertain and refine the theories on which they intend to build their case. This practice, if tolerated, "would waste the parties' resources, as well as judicial resources, on discovery aimed at ultimately unavailing legal theories and would unfairly surprise defendants, requiring the court to grant further time for discovery or continuances."

Green Country Food Mkt., Inc. v. Bottling Grp., LLC, 371 F.3d 1275, 1279 (10th Cir. 2004)(citations omitted). Thus, whether to permit a late amendment of the pleadings requires the court to balance these competing interests. Accordingly, a trial court's grant or denial of a motion to amend or to treat the complaint as amended is reviewed under an abuse of discretion standard. *Koch v. Koch Indus., Inc.,* 203 F.3d 1202, 1216 (10th Cir. 2000).

Applying these principles, the Tenth Circuit has been reluctant to imply consent for a different legal theory unpled in the complaint. In *In re Santa Fe Downs, Inc.,* 611 F.2d 815 (10th Cir. 1980), the trustee pled a preference action against a mortgage holder to void its lien only under a Bankruptcy Act statute that governed nonconsensual liens. At trial, the trustee sought to introduce evidence of the mortgage holder's knowledge of insolvency, which was an element of a preference claim only under another statute governing consensual liens. The mortgage holder objected to this evidence. The trustee did not then seek to amend the pleadings. The Tenth Circuit acknowledged that, if the trustee had sought amendment, there was little doubt that the bankruptcy court would have granted it. Without seeking amendment, and in the face of an objection, there was no basis for late amendment under Rule 15(b)(1). With an objection, there was no basis for implied consent under Rule 15(b)(2). Moreover, the court held:

> We cannot say that the incorrect statutory citation was an unimportant detail implicitly corrected by the facts alleged in the complaint. Indeed, the alleged facts do Not [sic] make out a § 60 claim: knowledge of insolvency is not alleged, and the mortgages are identified only as "liens," . . . . The trustee is, of course, correct that the Federal Rules of Civil Procedure abolished full fact pleading. . . . However, a fundamental statutory citation is not a mere fact and, if incorrect, may topple the structure of the complaint, particularly where the citation appears to represent the legal theory upon which the plaintiff relies.

Id. at 816. *See also Green Country Food Mart v. Bottling Grp., LLC,* 371 F.3d at 1279.

Practice Pointers:

1. Consider all alternative claims when pleading;

2. Object to the introduction of evidence only relevant to a claim not pled;

3. If an objection is lodged, seek permission for a late amendment;

4. If a late amendment is requested, argue prejudice;

5. If prejudice is argued, argue there is no real prejudice but in the alternative offer a continuance to address the prejudice;

6. If no objection is lodged, present the evidence and at some point seek to amend – even if it is in closing or after judgment;

7. If no objection was lodged, and opposing counsel seeks a determination of implied consent, argue against implied consent by claiming no awareness that a new claim had been introduced either because the evidence was relevant to a claim already pled or for some other reason.

8. "Educating the judge" (ethics)

XI. POST-TRIAL MOTIONS

The trial court ruled against your client in whole or part and you think the court got it wrong. Do you file a motion to alter or amender under Rule 59 or just appeal? A motion to alter or amend (commonly captioned as a motion to reconsider) is to provide the trial court an opportunity to correct errors, not to disagree with the court. *Committee for First Amendment v. Campbell*, 962 F.2d 1517, 1523 (10th Cir. 1992). Thus, the circumstances in which a motion to alter or amend is likely to be well taken are limited.

Circumstances in which a motion to alter or amend may have merit include an error in the calculation of the judgment. For example, the court awards prejudgment interest, but the calculation does not compound interest when the applicable law provides for compounding. Another circumstance in which a motion to alter or amend may be well taken is when the Court reaches an issue that was not briefed or argued by the parties.

If the court considered your argument and facts and it is clear from the order/judgment the court disagreed with your client's position, a Rule 59 motion is unlikely to be granted absent an intervening change in law. In that case, filing an appeal is the better approach.

XII. COLLECTING A JUDGMENT

Because a bankrupt debtor rarely has non-exempt property following a bankruptcy, a non-dischargeable judgment creditor's options for collecting in the near term are likely limited to garnishing wages, creating a lien against any real estate owned by the debtor, or settling. Hopefully the ability (or lack thereof) to collect was discussed prior to commencing a case so the client is not disappointed post-judgment. The likely absence of non-exempt assets often drastically lowers the value of a judgment and makes settling attractive, especially since it avoids the cost of collection.

If a settlement is not possible, collection activities may occur through the bankruptcy court or the state court after domestication, if necessary. FED. R. CIV. P. 69 applies in adversary proceedings under FED. R. BANKR. P. 7069. Execution/collection in the bankruptcy court may be had consistent with the procedures available in the state where the court is located. FED. R. CIV. P. 69. Thus, garnishment is generally available through the bankruptcy courts to the extent available under state law in the state in which the bankruptcy court is located. In addition, a federal judgment creates a lien on real property if an abstract is obtained from the court and properly recorded. 28 U.S.C. § 3201.

Many states have adopted the Uniform Enforcement of Foreign Judgments Act, which permits a federal judgment to be "domesticated" and then enforced the same as judgment entered by that state's courts. A judgment from one federal district may also be registered in another federal district and then enforced under 28 U.S.C. § 1963 to aid in collection if a debtor moves.

A. Electronic presentation

B. Conforming the pleadings to the evidence

C. Evidentiary issues (ethics)

   i. Business records foundation

   ii. Impeaching with deposition testimony

   iii. Etc.

D. Stipulations to exhibits and authenticity of exhibits

E. Witness preparation

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO

In re:	)	
	)	
DERRICK DEBTOR,	)	Bankruptcy Case No. 16-01001-EEB
	)	
Debtor.	)	Chapter 7
	)	
SYMPATHETIC PLAINTIFF,	)	
	)	Adversary Case No. 16-01234-EEB
Plaintiff,	)	
	)	
v.	)	
	)	
DERRICK DEBTOR,	)	
	)	
Defendant.	)	

COMPLAINT

Sympathetic Plaintiff, through counsel, for its Complaint, states as follows:

PARTIES, JURISDICTION, AND VENUE

1. Sympathetic Plaintiff, is an individual whose address is 1111 West Oak Street, Denver, Colorado.

2. Derrick Debtor is an individual whose address is 1800 Songbird Lane, Denver, Colorado.

3. Derrick Debtor filed a voluntary petition for relief under chapter 7 on October 31, 2016, commencing case number16-01001-EEB.

4. This Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. § 1334 as this matter arises in a case under title 11.

5. This is a core proceeding under 28 U.S.C. § 157(b)(2)(I).

6. Pursuant to Fed. R. Bankr. P. 7008, Sympathetic Plaintiff consents to entry of final orders by the bankruptcy court.

7. Venue is proper pursuant to 28 U.S.C § 1409(a).

GENERAL ALLEGATIONS

8. Derrick Debtor's previous occupation was as an investment broker for Safe Stock, LLC, which was owned in part by Derrick Debtor.

9. Sympathetic Plaintiff is a retired person whose primary source of money is distributions from an IRA. In 2005, Sympathetic Plaintiff hired Derrick Debtor and Safe Stock, LLC, to manage the investments in Sympathetic Plaintiff's IRA.

10. By early 2013, Sympathetic Plaintiff's IRA had lost substantial value as the result of being invested primarily in stocks. At the same time, Derrick Debtor approached Sympathetic Plaintiff with an opportunity to invest in an assisted living facility and retirement community for people over 70. The project was going to be created and operated by Golden Pond, LLC, which was owned by Derrick Debtor and his non-filing ex-spouse.

11. Over multiple conversations, Derrick Debtor, his non-filing ex-spouse, and Sympathetic Plaintiff discussed details of the project, including acquiring the real estate for the project, construction of the improvements that would be required, licensing requirements, rules, regulations and staff requirements, and how the project would be funded and in turn receive revenue.

12. Derrick Debtor and his non-filing ex-spouse represented to Sympathetic Plaintiff that Golden Pond, LLC, was under contract to purchase real estate for the project and Golden Pond, LLC, was going through the city review process to obtain the necessary use and construction approvals. Derrick Debtor and his non-filing ex-spouse represented that purchase would close and the city approval would be obtained by June 1, 2013.

13. Derrick Debtor and his non-filing ex-spouse represented that Golden Pond, LLC, needed $100,000 for the down payment to purchase the real estate for the project.

14. On May 1, 2013, Sympathetic Plaintiff gave $100,000 to Derrick Debtor to use as the down payment to purchase the real estate where the project would be located. Derrick Debtor represented that Golden Pond, LLC, would repay the $100,000 investment within (5) years with interest at ten percent (10.0%). In addition, Derrick Debtor and his spouse represented that Sympathetic Plaintiff would have a 20% interest in the project. Derrick Debtor represented that Golden Pond, LLC, would make monthly interest only payments to Sympathetic Plaintiff beginning January 1, 2014.

15. Derrick Debtor and his non-filing ex-spouse represented the $100,000 investment would be secured by the real estate.

16. In June 2013, Derrick Debtor told Sympathetic Plaintiff that the purchase of real estate fell through because the city would not allow Golden Pond, LLC, to build enough units on the real estate for the project to make sense. As a result, Golden Pond, LLC, was searching for a new location.

17. In May 2014, Derrick Debtor represented that it would close on a new location for the project in July 2014. Derrick Debtor stopped communicating with Sympathetic Plaintiff after June 2014. Golden Pond, LLC, stopped making interest only payments in June 2014.

18. In November 2014, Sympathetic Plaintiff obtained a default judgment against Golden Pond, LLC, for:

a. Failure to repay the $100,000 with interest, and
b. that Derrick Debtor and Golden Pond, LLC are alter egos.

19. In August 2014, Golden Pond, LLC, transferred $25,000 to Blue Lagoon, LLC, for no consideration. Blue Lagoon, LLC, is owned in part by Derrick Debtor.

20. In September 2014, Derrick Debtor transferred $25,000 to Derrick Debtor's non-filing ex-spouse for no consideration.

FIRST CLAIM FORRELIEF
(Non-Dischargeability of Debt Pursuant to 11 U.S.C. § 523(a)(2)(A))

21. Golden Pond, LLC, obtained $100,000 from Sympathetic Plaintiff through false representations of Derrick Debtor, including that:

a. Golden Pond, LLC, needed the $100,000 as the down payment on the real estate,
b. Golden Pond, LLC, would purchase the real estate by June 1, 2013,
c. The city approval would be obtained by June 1, 2013,
d. The $100,000 investment would be secured by the real estate, and
e. Golden Pond, LLC, would close on the substitute real estate by July 1, 2014.

22. The representations above were false and made with the intent to deceive Sympathetic Plaintiff. Sympathetic Plaintiff relied on the representations.

23. Derrick Debtor is liable to Sympathetic Plaintiff for the $100,000 investment, which debt is non-dischargeable under 11 U.S.C. § 523(a)(2)(A).

SECOND CLAIM FORRELIEF
(Non-Dischargeability of Debt Pursuant to 11 U.S.C. § 523(a)(4)

24. Derrick Debtor acted in a fiduciary capacity for Sympathetic Plaintiff as an investment advisor.

25. Derrick Debtor defalcated, committed theft, or embezzled the $100,000 from Golden Pond, LLC.

26. Derrick Debtor is liable to Sympathetic Plaintiff for $100,000, which debt is nondischargeable under 11 U.S.C. § 523(a)(4).

THIRD CLAIM FOR RELIEF
(Non-Dischargeability of Debt Pursuant to 11 U.S.C. § 523(a)(2)(A))

27. Golden Pond, LLC, transferred $25,000 to Blue Lagoon, LLC, for no consideration, while Golden Pond, LLC, was insolvent, and for the purpose of hindering, delaying, and defrauding Sympathetic Plaintiff.

28. Derrick Debtor liable to Sympathetic Plaintiff for a nondischargeable debt under *Husky Intern. Electronics, Inc. v. Ritz*, 136 S. Ct. 1581 (2016) for Golden Pond, LLC's fraudulent transfer to Blue Lagoon, LLC.

FOURTH CLAIM FORRELIEF
(Non-Dischargeability of Debt Pursuant to 11 U.S.C. § 523(a)(2)(A))

29. Derrick Debtor transferred $25,000 to his non-filing ex-spouse for no consideration, while Derrick Debtor was insolvent, and for the purpose of hindering, delaying, and defrauding Sympathetic Plaintiff.

30. Derrick Debtor liable to Sympathetic Plaintiff for a nondischargeable debt under *Husky Intern. Electronics, Inc. v. Ritz*, 136 S. Ct. 1581 (2016) for his fraudulent transfer to his non-filing ex-spouse.

WHEREFORE, Sympathetic Plaintiff requests that the Court enter a non-dischargeable judgment in the amount of $100,000, plus interest and attorneys' fees against Derrick Debtor.

Dated December 13, 2016

Respectfully submitted,

Signature block