

The Respondent Went Bankrupt- Now What?

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This article is designed to aid the securities arbitration practitioner to understand some key aspects of the bankruptcy process, and learn how to use it to the advantage of their clients. Subjects include, the automatic stay, filing a proof of claim, taking discovery, locating witnesses and clients through bankruptcy, filing an adversary proceeding for nondischargeability, and liquidating claims. This article is meant as an overview of these topics. Securities arbitration practitioners are encouraged to cocounsel with members of the bankruptcy bar when navigating bankruptcy court.

The Origins of Bankruptcy

The concept of bankruptcy has been with us for hundreds of years. The term "bankruptcy" is said to derive from a Roman term that loosely translates to "broken bench," referring to the practice of breaking a tradesman's bench in a public square if he could not pay his debts, itself symbolizing the fact that his business was broken. The seven-year waiting period between bankruptcy filings is said to have its origins in the Bible in Chapter 15, Verses 1-2 of the Book of Deuteronomy, which counsels to forgive debts every seven years. England passed its first bankruptcy law in 1570, during the time of Henry VIII. As American colonial law was so closely related to English common law, the pilgrims most likely brought the concept of bankruptcy law with them.

What is a Chapter 7 Bankruptcy?

This is a liquidation proceeding in which all of a debtor's non-exempt assets are sold and the proceeds distributed to creditors according to the priority determined by the Bankruptcy Code. Claims with a higher priority---such as unpaid wages, spousal or child support and unpaid taxes--must be paid in full before lower priority claims can be paid. Claims are generally paid as follows: bankruptcy estate administration costs first, priority claims next and, finally, unsecured claims, if any proceeds remain from the asset sale. Priority claims are paid from the proceeds of the asset liquidation. Unsecured claims, for which the creditor holds no security or collateral, are paid in proportion to the size of the claim relative to the total of unsecured claims. Creditors have no claim on wages earned after the bankruptcy filing. Most securities claimants are considered unsecured claimants; however, if the claimant has obtained a judgment, and recorded it as a lien against the debtor's assets, the claimant may be deemed a secured creditor entitled to priority to the debtor's assets subject to the lien over other creditors, depending on when the lien was

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recorded.

What is a Chapter 11 Bankruptcy?

A Chapter 11 proceeding effects reorganization of a corporation's or partnership's debts. In certain cases, an individual can file for Chapter 11 protection if his debts exceed the limits imposed in a Chapter 13 proceeding. In a Chapter 11 proceeding, the debtor remains in possession of its assets and continues to operate its business under the supervision of the court and a creditors' committee. Creditors' claims are paid according to the terms of a reorganization plan that has been agreed upon by a majority of the creditors and approved by the court.

What is a Chapter 13 Bankruptcy?

Chapter 13 bankruptcy proceedings establish a repayment plan for a debtor having steady income and secured and unsecured debts within the limits established by the Bankruptcy Code. The debtor retains possession of his assets and makes regular payments to the trustee for distribution to creditors. This repayment period generally lasts three to five years. Creditors receive payment of either a portion or all of the outstanding debt, depending on the debtor's income and the number of creditors involved.

Filing A Proof of Claim

A proof of claim is a form that must be filed with the bankruptcy court setting forth the amount of the creditor's claim, the type of claim, and documents to support that claim. The Proof of Claim Form, a copy of which is in Appendix 1, should be filled out by recording the specifics of the debt and attaching copies of supporting documents, such as contracts, court judgments, invoices or liens. In the case of a securities arbitration, it is acceptable to attach a copy of the Statement of Claim, and if already obtained, a copy of the arbitration award, or even the judgment confirming the award, if available. Do not submit the original documents. Determine whether the Claimant in the securities claim is listed on the debtor's schedule of creditors, which is normally filed with the Voluntary Petition (See Appendix 2). Your client should be listed on Schedule F-Creditors Holding Unsecured NonPriority Claims (See Appendix 3), or Schedule B4-List of Creditors Holding 20 Largest Unsecured Claims (See Appendix 4).² If not, contact the debtor's counsel and give him a

². In the context of Section 523 of the Bankruptcy Code, discussed *infra*, notice that affords due process is accomplished by a debtor's adherence to, among other things, the requirements of Section 521 of the Bankruptcy Code and Fed. R. Bankr.P. 1007. These rules require that a debtor, among other duties, prepare schedules listing creditors names and addresses. 11 U.S.C. § 521(1) and Fed. R. Bankr.P. 1007(a). This information is used to notify creditors of the commencement of the bankruptcy filing and the deadlines by which creditors must, among other things, file proofs of claim or institute nondischargeability actions. Given the significance of such deadlines and the mandate of due process, a debtor is required to use diligence in completing its schedules. *Lubeck v. Littlefield's Rest. Corp.* (*In re Fauchier*), 71

copy of your statement of claim, arbitration award, or judgment, as available, and demand to be added to the list of creditors.

While reviewing the Bankruptcy Schedules, also check to see if your client's litigation is listed in Form B7, the debtor's Statement of Financial Affairs (Appendix 5). At question 4, the debtor must disclose "4. Suits and administrative proceedings, executions, garnishments and attachments. a. List all suits and administrative proceedings to which the debtor is or was a party within one year immediately preceding the filing of this bankruptcy case." Your client's case should be listed. If not, contact the debtor's counsel and the US Trustee to notify them that the information is missing, and give them a copy of your Statement of Claim.

The Proof of Claim form must be filed with the Clerk of the Bankruptcy Court—filing it with the debtor's attorney is not legally sufficient. If you do not file the Proof of Claim, and the securities claimant (called a creditor in bankruptcy) is not on the list of creditors, that claimant will not be able to claim any part of the debtor's assets. File the proof of claim within 90 days after the date set for the meeting of creditors (called a 341 meeting) if you are filing a claim in a Chapter 7 bankruptcy. For a Chapter 13 bankruptcy, the claimant must file the claim as soon as possible, because late claims are discharged.

Locating Witnesses and Clients From the Bankruptcy Schedules

As noted above, a debtor must file a various schedules in a bankruptcy case, along with the Voluntary Petition for bankruptcy.³ The list of creditors at Schedule F, and the list of creditors holding the 20 largest unsecured non-priority claims, may yield the names of witnesses to your securities arbitration, and even other customers of the debtor/broker/broker-dealer who may have also suffered actionable losses. Follow your local bar association rules regarding direct mail advertising in order to contact the creditors, if your intent is to locate new clients. If you are contacting creditors who you believe may be witnesses, note that you must still follow your local law regarding contacting witnesses, because there may be limitations on contacting creditors who are also employees of the Respondent that your client is suing.⁴

B.R. 212, 215 (9th Cir. BAP1987).

³. Involuntary Petitions can be filed by creditors, and if left unchallenged by the debtor, the debtor will still have to file the schedules of assets, liabilities, creditors, and other information.

⁴. Though beyond the scope of this article, a majority of courts considering the application of the ethical prohibition against communicating with represented persons of adverse interest have generally held that this prohibition does not apply to prohibit communications with former employees. *See Valassis v. Samelson*, 143 F.R.D. 118, 122 (E.D.Mich.1992); Right of Attorney to Conduct ex parte interviews with former corporate employees, 57 A.L.R. 5th 633, § 2[a] (2008). At the same time, courts consistently have enforced a prohibition against ex parte

Most bankruptcy court filings can be found on PACER, the Public Access to Court Electronic Records (PACER), an electronic public access service that allows users to obtain case and docket information from Federal Appellate, District and Bankruptcy courts, and from the U.S. Party/Case Index via the Internet. Links to all courts are provided from this web site. Electronic access is available by registering with the PACER Service Center, the judiciary's centralized registration, billing, and technical support center, <https://pacer.psc.uscourts.gov/psco/cgi-bin/register.pl>. Access to web based PACER systems will generate an \$.08 per page charge.

Each court maintains its own databases with case information. Because PACER database systems are maintained within each court, each jurisdiction will have a different URL. Accessing and querying information from each service is comparable; however, the format and content of information provided may differ slightly.

The Automatic Stay

The very first issue that arises when a securities arbitration lawyer when he or she receives a “Notice of Bankruptcy” or similar notice, is the automatic stay. The automatic stay, is essentially a bar to the initiation or continuation of any legal proceedings, actions or efforts to collect any debt against a debtor who has filed a petition for bankruptcy. Therefore, a securities practitioner cannot continue an arbitration proceeding or proceed to collect on an arbitration award once a bankruptcy petition is filed, without navigating the bankruptcy process in compliance with the Bankruptcy Code (11 USC § 101 et seq.). Under 11 U.S.C. § 362, it states in pertinent part:

§ 362. Automatic stay

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of--

(1) the commencement or continuation, including the issuance or employment of

communications with former employees of adverse corporate parties where the contacts involve privileged or confidential information. *Bryant v. Yorktowne Cabinetry, Inc.* 538 F.Supp.2d 948 (W.D.Va.,2008); *Compare, Armsey v. Medshares Management Services, Inc.*, 184 F.R.D. 569 (W.D.Va.1998)(court prohibited plaintiff's counsel from communicating with former employees of defendant corporation as he sought to speak to each of these former employees because Plaintiffs believe that they can impute liability upon [Defendant] through the statements, actions or omissions of these former employees.”) with *NAACP v. Fla.*, 122 F.Supp.2d 1335, 1341 (M.D.Fla.2000) (holding that plaintiff could make ex parte contact with former employees of defendant within the bounds of applicable ethical and procedural rules as well as court delineated guidelines).

process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor....

Further, a broker-dealer or registered representative *cannot* run to bankruptcy court and claim the use the Automatic Stay to stop a regulatory investigation. The Automatic Stay *does not bar* the initiation or continuation of an investigation or action by a securities regulator; 11 USC § b362(b)(25), states in part:

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, *does not operate as a stay*—

(25) under subsection (a), of--

(A) the commencement or continuation of an investigation or action by a securities self regulatory organization to enforce such organization's regulatory power;

(B) the enforcement of an order or decision, other than for monetary sanctions, obtained in an action by such securities self regulatory organization to enforce such organization's regulatory power; or

(C) any act taken by such securities self regulatory organization to delist, delete, or refuse to permit quotation of any stock that does not meet applicable regulatory requirements....

A bankruptcy petition automatically stays most pre-petition actions against the debtor or property of the estate. 11 U.S.C. § 362(a). The purpose of the automatic stay is “to protect the debtor from an uncontrollable scramble for its assets in a number of uncoordinated proceedings in different courts, to preclude one creditor from pursuing a remedy to the disadvantage of other creditors, and to provide the debtor ... with a reasonable respite from protracted litigation.” *A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 998 (4th Cir.1986).

There is nothing wrong with the filing of a legitimate bankruptcy petition with the intention of taking advantage of the Automatic Stay. “Indeed, the legislative history of the Bankruptcy Code makes clear that one of the purposes of the automatic stay is to give a debtor a “breathing spell from his creditors” during which the debtor can “attempt a repayment ... plan, or simply ... be relieved of the financial pressures that drove him into bankruptcy.” *In re Sherman*, 491 F.3d 948, (9th Cir. 2007); H.R. Rep. No. 95-595, at 340 (1977), as reprinted in 1978 U.S.C.C.A.N. 5963, 6296-97 (observing that another purpose of the automatic stay is to protect creditors by providing “an orderly liquidation procedure under which all creditors are treated equally” rather than “a race of diligence by creditors for the debtor's assets”); *see also Stringer v. Huet (In re Stringer)*, 847 F.2d 549, 551-52 (9th Cir.1988) (citing this legislative history and noting the purposes of the automatic stay).

The effect of the Automatic Stay puts an *immediate* halt to an arbitration proceeding. In one case, the Third Circuit Court of Appeals ruled that to avoid interfering with the broad purposes served by automatic stay, an arbitration panel had to halt an arbitration proceeding arising out of an insurance coverage dispute between a liability insurer and an insured-asbestos insulation, and by continuing, the Court found that the arbitration proceeding violated the automatic stay and both the panel's deliberations and resulting award were void. *See Acands, Inc. v. Travelers Cas. and Sur. Co.*, 435 F.3d 252 (3rd Cir. 2006), *certiorari denied* 126 S.Ct. 2291, 547 U.S. 1159 (2006).

Similarly, the Fourth Circuit Court of Appeals also found that an arbitration award was not a mere “ministerial function” excepted from the Automatic Stay, notwithstanding that the award was based entirely on evidence submitted prior to debtor's bankruptcy filing, where arbitrators had not yet completed their deliberations before petition was filed. *See In re Knightsbridge Development Co. Inc.*, 884 F.2d 145(4th Cir 1989).

Sanctions For Violating The Automatic Stay

Securities arbitration practitioners are cautioned that a violation of the Automatic Stay can lead to sanctions, including damages, attorneys fees, and costs. Under 11 U.S.C. § 362, it states in part:

(k)(1) Except as provided in paragraph (2), an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

(2) If such violation is based on an action taken by an entity in the good faith belief

that subsection (h) applies to the debtor, the recovery under paragraph (1) of this subsection against such entity shall be limited to actual damages.

Relief From The Automatic Stay and Nondischargeability of Debts

The procedure to avoid the pitfalls of the Automatic Stay is to file a petition with the bankruptcy court to seek relief from the automatic stay. If granted, the securities arbitration practitioner can proceed with the securities arbitration. Under 11 U.S.C. § 362(d), it states in part:

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay--

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest.

“Congress ... has granted broad discretion to bankruptcy courts to lift the automatic stay to permit enforcement of rights against property of the estate.” *Cloughton v. Mixson*, 33 F.3d 4, 5 (4th Cir.1994). Section 362(d)(1) provides that a “court shall grant relief from the stay provided under [section 362(a)] ..., such as by terminating, annulling, modifying, or conditioning such stay ... for cause.” 11 U.S.C. § 362(d)(1) (emphasis added). “Cause” is not defined in the Bankruptcy Code. Rather, “courts must determine when discretionary relief is appropriate on a case-by-case basis.” *Cloughton*, 33 F.3d at 5.

In determining whether cause exists to terminate the automatic stay, a court “must balance potential prejudice to the bankruptcy debtor's estate against the hardships that will be incurred by the person seeking relief from the automatic stay if relief is denied.” *Robbins v. Robbins (In re Robbins)*, 964 F.2d 342, 345 (4th Cir.1992). The factors courts consider include: (1) whether the issues in the pending litigation involve only state law, so the expertise of the bankruptcy court is unnecessary; (2) whether modifying the stay will promote judicial economy and whether there would be greater interference with the bankruptcy case if the stay were not lifted because matters would have to be litigated in bankruptcy court; and (3) whether the estate can be protected properly by a requirement that creditors seek enforcement of any judgment through the bankruptcy court.

It is relevant if the action is “well advanced” and “ready for trial,” including parties have completed discovery, a trial date has been set, or the court has issued preliminary rulings. *Gibbons v. Knefel (In re Knefel)*, No. 07-11534-SSM, 2007 WL 2416535, at *1-2, 2007 Bankr.LEXIS 2890, at *4 (Bankr.E.D.Va. Aug. 17, 2007); *In re Hogan*, No. 04-12336C-7G, 2004 WL 3510112, at *2 (Bankr.M.D.N.C. Oct. 18, 2004); *In re Long Bay Dunes Homeowners Ass'n, Inc.*, 246 B.R. 801, 806 (Bankr.D.S.C.1999). Relief from stay may be necessary to allow the complete resolution of all claims in a single proceeding, without unnecessary duplication of litigation. *Dunnam v. Sportsstuff, Inc.*, 2008 WL 200287 (E.D.Va. 2008); *In re Hogan*, 2004 WL 3510112 (M.D.N.C.,2004); *IRS v. Robinson (In re Robinson)*, 169 B.R. 356, 358 (E.D.Va.1994).

Further, whether relief from stay would foster the expeditious and economical resolution of the proceeding, *In re Robbins*, 964 F.2d at 346; *In re Hogan*, 2004 WL 3510112, at *2, and whether litigating in multiple fora causes inconvenience and potential prejudice to the trustee and the bankruptcy estate are also considered. *In re Hogan*, 2004 WL 3510112, at *2; *In re Robinson*, 169 B.R. at 359. Finally, courts consider whether the claims could nevertheless be resolved centrally in the more efficient proof of claim process. *In re Dorris Mktg. Group, Inc.*, 2005 Bankr.LEXIS 282, at *4-5. *See generally, Ivester v. Miller*, 398 B.R. 408 (M.D.N.C.,2008)(relief from stay denied as summary judgment from prior court proceeding was not perfected as a lien against assets in an investment fraud case).

Nondischargeability of Debts Under 11 USC § 523(a)

The goal of every debtor in a Chapter 7 or 13 is to obtain a “discharge” of his debts. The discharge in bankruptcy is to protect the “honest but unfortunate debtor” and to give the debtor a fresh start. *Grogan v. Garner*, 498 U.S. 279, 287, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991). There are several debts, however, that for public policy reasons are excepted from discharge. These debts include liabilities the debtor has incurred due to malfeasant activity. *See Cohen v. de la Cruz*, 523 U.S. 213, 222, 118 S.Ct. 1212, 140 L.Ed.2d 341 (1998). Congress codified this principle in 11 U.S.C. § 523(a). *Id.* (quoting *Grogan*, 498 U.S. at 287) (“The various exceptions to discharge in § 523(a) reflect a conclusion on the part of Congress ‘that the creditors’ interest in recovering full payment of debts in these categories outweigh[s] the debtors’ interests in a complete fresh start.’ ”); *In re Rodriguez*, 2007 WL 543750 *3 (Bankr.S.D.Tex. Feb.15, 2007).“The burden of proof in an adversary proceeding under 11 U.S.C. § 523 is on the creditor who seeks to show that his debt is not to be discharged.” *In re Harrell*, 94 B.R. 86, 90 (Bankr.W.D.Tex.1988) (*citing Hill v. Smith*, 260 U.S. 592, 43 S.Ct. 219, 67 L.Ed. 419 (1923)). The creditor must prove his case by a preponderance of the evidence. *Grogan*, 498 U.S. at 287 (1990).

Section 523 of the Bankruptcy Code precludes discharge of all obligations arising from the prohibited conduct. *Cohen v. de la Cruz*, 523 U.S. 213, 118 S.Ct. 1212, 140 L.Ed.2d 341 (U.S.1998) (holding that punitive damages and attorneys’ fees recovered in a fraud action are non-dischargeable); *In re Gober*, 100 F.3d 1195, 1208 (5th Cir.1996). “Once it is established that specific money or property has been obtained by fraud, however, ‘any debt’ arising therefrom is excepted from discharge.” *Id.* at 214. The Supreme Court specifically rejected an argument that § 523(a) debts are limited only to the value of the money or property obtained by the conduct prohibited by §523(a). *Id.* at 219. The Supreme Court noted: Section 523(a) defines several categories of liabilities that are excepted from discharge, and the words “debt for” introduce many of them ... None of these use “debt for” in the restitutionary sense of “liability on a claim to obtain;” it makes little sense to speak of “liability on a claim to obtain willful and malicious injury” or “liability on a claim to obtain fraud or defalcation.” Instead, “debt for” is used throughout to mean “debt as a result of,” “debt with respect to,” “debt by reason of,” and the like. *Id.* at 219-20.

Importantly, a Claimant in a securities arbitration can seek relief from the Automatic Stay due to the amendments under the Bankruptcy Abuse Prevention and Consumer Protection Act of

2005 (“BAPCPA”)⁵. The BAPCPA amended 11 U.S.C. § 523(a)(19), which provides in part (italicized words added by BAPCPA):

(a) A discharge ... does not discharge an individual from any debt-
(19) that-

(A) is for-

(i) the violation of any of the Federal securities laws ..., any of the State securities laws, or any regulation or order issued under such Federal or State securities laws; or

(ii) common law fraud, deceit, or manipulation in connection with the purchase or sale of any security; and

(B) results, *before, on, or after BAPCPA's amendments, which did not become effective until October 17, 2005, which was six months after its enactment. BAPCPA § 1501(a). The amendments to § 523(a)(19), however, made by BAPCPA § 1404(a), became effective as of the date of enactment of the Sarbanes-Oxley Act, which was July 30, 2002. BAPCPA § 1404(b).*
the date on which the petition was filed, from-

(i) any judgment, order, consent order, or decree entered in any Federal or State judicial or administrative proceeding;

(ii) any settlement agreement entered into by the debtor; or

(iii) any court or administrative order for any damages, fine, penalty, citation, restitutionary payment, disgorgement payment, attorney fee, cost, or other payment owed by the debtor.

⁵ 11 U.S.C. § 523(a)(19) (Supp. II 2002). Section 523(a)(19) was added to § 523 by the Sarbanes-Oxley Act, passed on July 30, 2002. See Sarbanes-Oxley Act of 2002, Pub.L. No. 107-204, § 803(3), 116 Stat. 745; see also *Smith v. Gibbons (In re Gibbons)*, 289 B.R. 588, 591-97 (Bankr.S.D.N.Y.2003) (holding that § 523(a)(19) applies to all bankruptcies pending at the time it was enacted), *aff'd*, 311 B.R. 402 (S.D.N.Y.2004), *aff'd*, 155 Fed.Appx. 534 (2d Cir.2005) (unpublished). Section 523(a)(19) was amended slightly by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub.L. No. 109-8, § 1404(a), 119 Stat. 23. The BAPCPA's amendments became effective October 17, 2005. BAPCPA § 1501(a). The amendments to §523(a)(19), however, made by BAPCPA § 1404(a), became effective as of the date of enactment of the Sarbanes-Oxley Act, which was July 30, 2002. BAPCPA § 1404(b).

See 11 U.S.C. § 523(a)(19).⁶

As one court found, “Section 523(a)(19) expressly contemplates a postpetition determination of liability by a nonbankruptcy forum for debts resulting from securities law violations as well as common law fraud, deceit, or manipulation in connection with the purchase or sale of a security. Importantly, § 362(c)(1) does not require the bankruptcy court to determine nondischargeability. Taken together, therefore, § 523(a)(19) and § 362(c)(1) express a Congressional determination that creditors asserting a debt of this nature have the right to pursue their claims under nonbankruptcy law in other courts, notwithstanding the bankruptcy filing.” See *In re Zimmerman*, 341 B.R. 77 (N.D.Ga.,2006). The *Zimmerman* court therefor modified the Automatic Stay found in 11 U.S.C. § 362(a) to permit the Claimants to proceed with arbitration and to stay the bankruptcy proceeding pending the conclusion of arbitration of their claims of the type described in § 523(a)(19).Id.

In modifying the Automatic Stay to allow the securities arbitration case to proceed, the *Zimmerman* court noted that “if the basis for a debtor's liability is violation of Federal or State securities laws or common law fraud, deceit, or manipulation in connection with the purchase or sale of a security, there is no bankruptcy policy that competes with the policy of the Arbitration Act that generally requires courts, including bankruptcy courts, to order arbitration of disputes.” *Id.*

The Claimants in the *Zimmerman* case also had additional claims that were likely outside of in § 523(a)(19). The *Zimmerman* Court found that other legal theories, such as misrepresentation, negligent misrepresentation, breach of contract, breach of fiduciary duty, suitability, failure to diversify and breach of an agent's duty to conduct a principal's business solely for the benefit of the principal may likely not fall within Section 523(a)(19). *Id.* These claims would have to be determined in an adversary proceeding in bankruptcy court in an action for nondischargeability under 11 USC § 523(a)(2), (4), or (6). *Id.*

In sum, a Claimant’s arbitration award will not be “discharged” (wiped out) in a bankruptcy proceeding if: 1) the Claimant first obtains relief from the Automatic Stay; 2) the arbitration award makes a finding that the debtor has committed a violation of any of the Federal securities laws, any of the State securities laws, or any regulation or order issued under such Federal or State securities laws, or if the debtor is found liable for common law fraud, deceit, or manipulation in connection with the purchase or sale of any security; and 3) the bankruptcy court, following a hearing, finds that the arbitration award and/or evidence submitted is sufficient proof, by a preponderance of the evidence, that the debtor has a nondischargeable debt as defined by 11 U.S.C. § 523(a)(19). Therefor, the securities arbitration practitioner is cautioned to first seek relief from the Automatic

⁶. See *In re Kilroy*, 354 B.R. 476, 488 (Bankr.S.D.Tex.2006). Section 523(a)(19) “was designed to close a ‘loophole’ which allowed debtors convicted of securities fraud or other securities violations to discharge the debt owed to their victims.” *In re Presto*, 376 B.R. 554, 592 (Bankr.S.D.Tex.2007) (citing *Gibbons*, 289 B.R. 588, 592 (Bankr.S.D.N.Y.2003) (other citations omitted)).

Stay from the bankruptcy judge, and then proceed to arbitration, and obtain a finding from the arbitration panel, in the arbitration award, that the debtor has committed one of the violations found in 11 U.S.C. § 523(a)(19). It would likely be wise to give a copy of the statute to the panel so they can make the requisite findings. Once the arbitration award is obtained, the Claimant will have to file a petition with the bankruptcy court to have the arbitration award deemed a nondischargeable debt under 11 U.S.C. § 523(a)(19), and then to petition to confirm the award as a judgment against the debtor as provided for by state law or under the Federal Arbitration Act (FAA).⁷

A copy of the Complaint to Determine Dischargeability of Debt, and the amendment to the complaint alleging nondischargeability under 11 U.S.C. § 523(a)(19), from the *Zimmerman* case, is appended to this article at Appendix 6. The parties settled the case, and Zimmerman consented to a nondischargeable debt of \$1,000,000. A copy of the Consent to NonDischargeability is appended to this article at Appendix 6.

Liquidating Claims

Often the value of a securities claim, that has not reached a judgment, is uncertain, and until there is an agreement with the debtor or a ruling by the bankruptcy judge, the claim is considered “unliquidated” and “contingent.” Therefore, the securities practitioner, who has a pending arbitration claim, should file a motion for relief from the automatic stay and to compel arbitration, asking the court to modify the stay for the purpose of permitting the plaintiff to liquidate his or her claim against the debtor/defendant in the arbitration, and for purposes of nondischargeability. *See In re Goldbronn*, 263 B.R. 347 (Bkrcty.M.D.Fla.,2001). Alternatively, the complaint for dischargeability can request that the Court determine both the value of the claim, and whether that claim is nondischargeable, in an adversary proceeding.

Courts have allowed Claimants in arbitration to determine the amount of the claim and whether there was common law fraud or a violation of the securities laws under 11 U.S.C. § 523(a)(19). *See In re Jafari* 401 B.R. 494 (Bkrcty.D.Colo.,2009); *See also Bricker v. Martin*, 348

⁷. The FAA allows district courts to confirm arbitration awards. 9 USC §10. A bankruptcy court is not a district court. Technically, the United States district courts have subject matter jurisdiction over bankruptcy matters (see 28 U.S.C. § 1334(a)). However, each such district court may, by order, “refer” bankruptcy matters to the bankruptcy court (see 28 U.S.C. § 157(a)). As a practical matter, most district courts have a standing “reference” order to that effect, so that all bankruptcy cases in that district are handled, at least initially, by the bankruptcy court. In unusual circumstances, a district court may in a particular case “withdraw the reference” (i.e., take the case or a particular proceeding within the case away from the bankruptcy court and decide the matter itself) under 28 U.S.C. § 157(d). The overwhelming majority of all proceedings in bankruptcy are held before a United States bankruptcy judge, whose decision in all matters is final, subject to appeals to the district court. In some judicial circuits, appeals may be taken to a Bankruptcy Appellate Panel (“BAP”).

B.R. 28 (W.D.Pa.2006), aff'd 265 Fed.Appx. 141 (3d Cir.2008) (affirming bankruptcy court's sua sponte decision to abstain from deciding investors' § 523(a)(19) claim).

However, some Courts still will not allow an investor to have their claim determined in arbitration, state or federal court, and will retain jurisdiction in the bankruptcy court to determine both the alleged misconduct, and whether the misconduct should result in a nondischargeable debt under 11 U.S.C. § 523(a)(19). *See, e.g., In re Chan*, 355 B.R. 494 (Bankr.E.D.Pa.2006). The bankruptcy court in *Chan* denied the motion for stay relief to allow the continuation of a district court lawsuit against Chan, the debtor, for a securities law violation. In that case, a Mrs. Park alleged that Mrs. Chan fraudulently induced her into investing \$300,000 in a company, promising a return of 10%, without disclosing many of the debts of the company, which failed. In refusing to grant stay relief, the *Chan* court found it “perfectly appropriate for either the bankruptcy court or another court to make a dischargeability determination under § 523(a)(19).” *Id.*

The *Chan* court reasoned that, because the nondischargeability of any claim listed in §523(c) may only be tried in the bankruptcy court, then the nondischargeability as well as the liability of any claim not listed in § 523(c) may be tried either in the bankruptcy court or in another forum. In short, the *Chan* court assumed that because Congress intended concurrent jurisdiction over § 523(a)(19) claims, it also intended that the determination of the underlying securities law violation or fraud determination itself could be made by any court sharing that concurrent jurisdiction. The *Chan* court further found that the amendment to § 523(a)(19) was not intended to indicate Congressional intent that such claims be litigated in non-bankruptcy court forums, but was intended only to remove a temporal limitation as to when the determination of liability had to have been made. The *Chan* court reasoned that since the determination could now occur post-petition, and since either a bankruptcy court or a non-bankruptcy court could render the determination as to dischargeability, the bankruptcy court's own order could suffice.

This leaves the securities practitioner with the age-old quandry: should the claim be submitted and tried in arbitration, court, or ask the bankruptcy court judge to determine liability, damages, and dischargeability. The answer is not clear. There are claims that would survive a motion to dismiss in arbitration, that might not survive in a court of law. There are legal defenses, such as the economic loss rule, that bar all tort claims when there is a contract between the parties. *See Behrman vs. Allstate*, 2006 WL 561207 (C.A.11 (Fla.))(district court properly dismissed all tort claims under economic loss rule in action by investor who claimed that the annuity was sold to him via misrepresentations). There may be limitations of liability or exculpatory clauses in the customer account agreement. *Metz v. Independent Trust Corp.* 994 F.2d 395 (7th Cir. 1993)(case law mandates judicial enforcement of a clear and unambiguous exculpatory clause in a trust agreement in a mismanagement case, unless the claimant demonstrates “bad faith” or “reckless indifference” on the part of the defendant). The burden to plead intent to defraud (scienter) and loss-causation in a federal securities law claim is likely to be stringently interpreted in Court, rather than the equity-conscious principles taught to arbitrators.

However, most state securities law claims do not require proof of either scienter or loss-causation, and only a showing of negligence. Further, a investor (referred to as a creditor in

bankruptcy court with an unliquidated claim) in an adversary proceeding gets something not provided in an arbitration—depositions and discovery decisions by a likely learned bankruptcy judge. One of the reasons that broker-dealers prefer arbitration is the private nature of the process and the lack of depositions. Many broker-dealers would prefer never to have their brokers, branch managers, compliance officers, administrative managers, sales assistants or other employees be deposed, which transcripts may long haunt them in other cases. The flip side to depositions is that the investor will be deposed, and a poor deposition can render a valuable case less valuable. However, in this author's opinion, the ability to take discovery in the bankruptcy case, and have a bankruptcy judge hear the case, is preferable to a FINRA arbitration. Note that the case is a bench trial, and not a jury trial.⁸

In the *Chan* case, *supra*, the bankruptcy judge conducted the trial on liability, damages and nondischargeability, and found that Chan made misrepresentations. *In re Chan*, 2008 WL 5428271 (Bkrcty.E.D.Pa.,2008). The Chan bankruptcy court found that the debtor's debt to the investor was non-dischargeable, but did not enter a money judgment. *Id.* The bankruptcy court in Chan determined that it did not believe that the bankruptcy courts should enter money judgments, and allowed the investor to pursue a money judgment in a court of competent jurisdiction, noting that issues of collateral estoppel on the basis of the findings by the bankruptcy court may apply.⁹ *Id.*

11 U.S.C. § 523(a)(19) and Control Person Liability

At least two courts have denied the use of control person liability as a basis to deny claims for nondischargeability. See *Hoffend v. Villa*, 261 F.3d 1148 (11th Cir.2001); *In re Miller*, 276 F.3d

⁸. A dischargeability determination is not the only part of the bankruptcy process that may override a creditor's right to a jury trial right. Creditors who wish to participate in a distribution from the bankruptcy estate also may have to forego their right to a jury trial. See, e.g., *Travellers International AG v. Robinson*, 982 F.2d 96 (3d Cir.1992) (filing of proof of claim is a waiver of the right to a jury trial).

⁹. Compare *In re Kennedy*, 108 F.3d 1015, 1017-18 (9th Cir.1997) (concluding that a bankruptcy court has jurisdiction to enter a money judgment in conjunction with a finding that a debt is nondischargeable); *In re McLaren*, 3 F.3d 958, 966 (6th Cir.1993) (same); *Matter of Hallahan*, 936 F.2d 1496, 1507-1508 (7th Cir.1991) (recognizing bankruptcy court's jurisdiction to enter money judgment for claim found to be excepted from discharge); *In re Lang*, 293 B.R. 501, 517 (B.A.P. 10th Cir.2003) (concluding that a bankruptcy court has jurisdiction to award money damages in § 523(a) cases); *Matter of Valencia*, 213 B.R. 594, 596 (D.Colo.1997) (same); *Harris v. U.S. Fire Ins. Co.*, 162 B.R. 466, 468 (E.D.Va.1994) (same) *with*, *In re Cambio*, 353 B.R. 30 (B.A.P. V Cir.2004) (bankruptcy court did not have jurisdiction to enter money judgment on nondischargeable debt in chapter 7 case in which there was no estate property available for distribution to creditors); *In re Losanno*, 291 B.R. 1 (Bankr.D.Mass.2003) (bankruptcy court does not have jurisdiction to enter money judgment in nondischargeability action); *In re Thrall*, 196 B.R. 959 (Bankr.D.Colo.1996) (same).

424 (8th Cir. 2002). Both courts determined that agency law, which imputes bad acts to those that supervise the agent, and is a basis for nondischargeability, *See Strang v. Bradner*, 114 U.S. 555, 561, 5 S.Ct. 1038, 29 L.Ed. 248 (1885), should not be extended to include the much broader sweep of § 20(a) liability. Both courts reasoned that Section 523 of the Bankruptcy Code “addresses actual, traditional fraud, and we are not persuaded that it should be read in such a way as to encompass the nontraditional liability imposed under § 20(a).” *See, In re Miller*, 276 F.3d 424 (8th Cir. 2002).

Nondischargeability of Debts under § 523(a)(2), § 523(a)(4), and § 523(a)(6)

In addition to 11 U.S.C. § 523(a)(19), there are at least three bankruptcy code sections which can provide a claimant in an arbitration case the ability to have their losses determined as a nondischargeable debt in bankruptcy, namely § 523(a)(2), § 523(a)(4), and § 523(a)(6).¹⁰

11 U.S.C. § 523(a)(2)

§ 523(a)(2) excepts from discharge debt:

(2) for money ... obtained by-

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;

(B) use of a statement in writing-

(i) that is materially false;

(ii) respecting the debtor's or an insider's financial condition;

(iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and

(iv) that the debtor caused to be made or published with intent to deceive....

11 U.S.C. § 523(a)(2)(A)-(B). *See also, HSSM #7 Limited Partnership v. Bilzerian (In re Bilzerian)*, 100 F.3d 886, 892 (11th Cir.1996).

Securities broker-dealers have been held liable for significant losses of their clients under the circumstances where fraudulent misrepresentation on the part of the broker led to the loss of money by their clients, under a theory that the brokers must only reap some benefit (i.e., a

¹⁰. There are other bankruptcy code sections that can result in a denial of a discharge, but are beyond the scope of this article. A debtor's pre-petition transfers of assets and inaccuracies in the schedules and statement of affairs are addressed by § 727(a)(1) and § 727(a)(4)(A). A debtor who transfers property with the intent to hinder, delay or defraud creditors, or a representative the estate, can have its discharge denied. 11 U.S.C. § 727(a)(1). So too a debtor that knowingly and fraudulently makes a false oath in connection with the case. 11 U.S.C. § 727(a)(4)(A). Misconduct of this type should be the subject of a complaint objecting to a Chapter 7 debtor's discharge and not, under the guise of bad faith, a motion to dismiss for cause under § 707(a).

commission) from the money lost by the creditor. *See Bilzerian* at 890. *In Cohen v. de la Cruz*, 523 U.S. 213, 118 S.Ct. 1212, 140 L.Ed.2d 341 (1998), the Supreme Court made it clear that once it has been established that money has been obtained by fraudulent conduct as set forth in § 523(a)(2)(A), “any debt” (which would include a loss in a brokerage account) arising therefrom is excepted from discharge.

Silence on the part of the Debtor with regard to a material fact can constitute a false representation under § 523(a)(2)(A). *See In re Waters*, 239 B.R. 893, 901 (Bankr.W.D.Tenn.1999) and the cases cited therein. Therefore, a Court may consider the omission of material information by the Debtor when analyzing the Debtor's conduct pursuant to § 523(a)(2)(A). Section 523(a)(2)(A) excepts from discharge debts “for money...to the extent obtained by false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition.” 11 U.S.C. § 523(a)(2)(A). The Fifth Circuit has distinguished “actual fraud” from “false pretenses” and “false representations” when defining the elements of nondischargeability under § 523(a)(2)(A). *RecoverEdge L.P. v. Pentecost*, 44 F.3d 1284, 1293 (5th Cir.1995).

False Pretenses

For the debtor's representation to constitute “false pretenses” or a “false representation,” the movant must prove: “(1) a knowing and fraudulent falsehood, (2) describing past or current facts, (3) that was relied on by the other party.” *See RecoverEdge L.P.*, 44 F.3d at 1293 (5th Cir.1995) (*citing In re Allison*, 960 F.2d 481, 483 (5th Cir.1992)).

Actual Fraud

For a debtor's representation to constitute “actual fraud,” the movant must prove: “(1) the debtor made representations; (2) at the time they were made the debtor knew they were false; (3) the debtor made the representations with the intention and purpose to deceive the creditor; (4) that the creditor relied on such representations; and (5) that the creditor sustained losses as a proximate result of the representations.” *See RecoverEdge L.P. v. Pentecost*, 44 F.3d 1284, 1290 (5th Cir.1995). In the Fifth Circuit, “reasonable reliance is not, as a matter of law, required under section 523(a)(2)(A).” *In re Allison*, 960 F.2d at 485. However, the movant must still show actual reliance. “[R]easonableness of reliance is strong circumstantial evidence in the factual determination regarding actual reliance, which is an element of subparagraph (A).”

Statements of opinion will not be upheld as a fraud sufficient to deny a discharge under 11 U.S.C. § 523(a)(2)(A). *See In re Dupree*, 336 B.R. 506 Bkrtcy.M.D.Fla.,2005. In *Dupree*, the Plaintiff contended that that Debtor told her that he could “do better” with the variable annuities he was selling her than her original investments with First Union. “However, to be actionable under 11 U.S.C. § 523(a)(2)(A), a representation must be one of existing fact, and not merely an expression of opinion or expectation.” *Id.*, *See In re Schwartz & Meyers*, 130 B.R. 416, 423 (Bankr.S.D.N.Y.1991)(Judge Brozman's opinion that even if the “safe as in a bank” analogy was made, the statement would not warrant a denial of discharge under § 523(a)(2)(A)).

Fraudulent concealment, which is very similar to actual fraud, allows a plaintiff to recover if the defendant intentionally suppresses material facts. Otherwise, the elements of fraudulent concealment are the same as the elements of common law fraud and negligent misrepresentation, and include: “(1) a misrepresentation of material fact or suppression of the truth; (2) [a] knowledge of the representor of the misrepresentation, or [b] representations made by the representor without knowledge as to either the truth or falsity, or [c] representations made under circumstances in which the representor ought to have known, if he did not know, of the falsity thereof; (3) an intention that the representor induce another to act on it; and (4) resulting injury to the party acting in justifiable reliance on the representation.” *Greenberg v. Miami Children's Hospital Research Institute, Inc.*, 264 F.Supp.2d 1064, 1073 (S.D.Fla.2003) (citing *Jones v. General Motors Corp.*, 24 F.Supp.2d 1335, 1339 (M.D.Fla.1998)) (internal citation omitted) (emphasis added).

Like common law fraud and negligent misrepresentation, Florida law also “imposes a reliance requirement in an omissions case” *Humana, Inc. v. Castillo*, 728 So.2d 261, 265 (Fla.2d DCA 1999) (citing *Morgan v. Canaveral Port Authority*, 202 So.2d 884 (Fla. 4th DCA 1967)), and “requires a party asserting fraud to establish that, but for the alleged misrepresentation or nondisclosure, the party would not have entered the transaction.” *Humana*, 728 So.2d at 265 (citing *Great American Ins. Co. v. Suarez*, 92 Fla. 24, 109 So. 299 (Fla.1926); *Atlantic Nat'l Bank v. Vest*, 480 So.2d 1328 (Fla.2d DCA 1985); *Billian v. Mobil Corp.*, 710 So.2d 984 (Fla. 4th DCA 1998); *Hauben v. Harmon*, 605 F.2d 920 (5th Cir.1979).

Common law fraud and negligent misrepresentation involve more or less the same elements of proof: (i) a false statement of fact; (ii) made for the purpose of inducing another to act in reliance thereon; (iii) action by the other person in reliance on the correctness of the statement; and (iv) resulting damage to the other person. *Gandy v. Trans World Computer Technology Group*, 787 So.2d 116, 118 (Fla.2d DCA 2001) (citing *Mettler, Inc. v. Ellen Tracy, Inc.*, 648 So.2d 253 (Fla.2d DCA 1994)); *Hasenfus v. Secord*, 962 F.2d 1556 (11th Cir.1992). The only slight difference between proving common law fraud and negligent misrepresentation is that in common law fraud a plaintiff must show that the defendant made a false statement that the defendant knew to be false, whereas with negligent misrepresentation a plaintiff need only show that the defendant failed to ascertain the truth or falsity of his or her representation. *Hasenfus v. Secord*, 962 F.2d 1556, 1561 (11th Cir.1992) (citing *Emerson Electric Co. v. Farmer*, 427 F.2d 1082, 1087-88 (5th Cir.1970) (applying Florida law)). “If a plaintiff claims to be misled, but cannot demonstrate a causal connection between the defendant's conduct and the plaintiff's misapprehension, the plaintiff cannot recover.” *Humana, Inc. v. Castillo*, 728 So.2d 261, 265 (Fla.2d DCA 1999); *City Bank & Trust Co. v. Vann (In re Vann)*, 67 F.3d 277, 280 (11th Cir.1995) (ruling, in connection with a case under Section 523(a)(2), that a creditor cannot establish non-dischargeability without proof of reliance on misrepresentations by the debtor). The reliance upon the debtor's false representation must be justified. *Field v. Mans*, 516 U.S. 59, 73-75, 116 S.Ct. 437, 133 L.Ed.2d 351 (1995).

11 U.S.C. § 523(a)(4)

Section 523(a)(4) of the Bankruptcy Code provides an exception to a debtor's discharge for a debt “for fraud or defalcation while acting in a fiduciary capacity...” Although in many

circumstances the term “fiduciary relationship” has been considered to be a special relationship of confidence, trust, and good faith, this generalization is too broad for purposes of § 523(a)(4). The scope of this relationship pursuant to § 523(a)(4) includes only those fiduciary relationships arising from express and technical trusts, and in some cases, statutorily-created trusts. *In re Jones*, 306 B.R. 352, 355 (Bankr.N.D.Ala.2004). Also, the fiduciary obligations imposed on the relationship must have existed prior to the act that created the debt, for the debt to fall within this exception. *Id.*, citing *Quaif v. Johnson*, 4 F.3d 950, 953 (11th Cir.1993).

Florida law is clear that a securities broker owes a fiduciary duty of care and loyalty to an investor. *First Union Brokerage v. Milos*, 717 F.Supp. 1519, 1526 (S.D.Fla.1989), citing *Gochbauer v. A.G. Edwards & Sons, Inc.*, 810 F.2d 1042, 1049 (11th Cir.1987). However, a general fiduciary duty arising out a relationship does not create a technical trust. *In re Woods*, 284 B.R. 282, 288 (D.Colo.2001). The possible common law action for breach of fiduciary duty does not translate to an actionable breach of an express or technical trust relationship for purposes of § 523(a)(4). See *In re Dupree*, 336 B.R. 506 Bkrctcy.M.D.Fla.,2005.

Section 523(a)(4) applies to debts “for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny.” 11 U.S.C. § 523(a)(4). Fraud under § 523(a)(4) involves “intentional deceit, rather than implied or constructive fraud.” *In re Swor*, 2008 WL 938940 *5 (Bankr.S.D.Tex. Apr.4, 2008); *In re Tripp*, 189 B.R. 29 (Bankr.N.D.N.Y.1995); *In re McDaniel*, 181 B.R. 883 (Bankr.S.D.Tex.1994); *COLLIER on Bankruptcy*, ¶ 523.10[1][a]. “A defalcation is a willful neglect of duty, even if not accompanied by fraud or embezzlement.” *In re Bennett*, 989 F.2d 779, 790 (5th Cir.1993) (citing *Moreno v. Ashworth*, 892 F.2d 417, 421 (5th Cir.1990)). Willful neglect is “essentially a recklessness standard.” *In re Felt*, 255 F.3d 220, 226 (5th Cir.2001) (quoting *Schwager v. Fallas*, 121 F.3d 177, 185 (5th Cir.1997)). “Thus, willfulness is measured objectively by reference to what a reasonable person in the debtor's position knew or reasonably should have known.” *Id.*

Under § 523(a)(4) “a fiduciary is limited to instances involving express or technical trusts.” *In re Miller*, 156 F.3d 598, 602 (5th Cir.1998) (quoting *Tex. Lottery Comm'n v. Tran (In re Tran)*, 151 F.3d 339, 342 (5th Cir.1998)). A constructive trust is not sufficient to create a fiduciary relationship. See *Angelle v. Reed (In re Angelle)*, 610 F.2d 1335, 1339 (5th Cir.1980). The trustee's duties must “arise independent of any contractual obligation.” *In re Tran*, 151 F.3d at 342 (citing *Angelle*, 610 F.2d at 1339). The trustee's obligations “must have been imposed prior to, rather than by virtue of, any claimed misappropriation or wrong.” *Id.* (citing *Davis v. Aetna Acceptance Co.*, 293 U.S. 328, 333, 55 S.Ct. 151, 79 L.Ed. 393 (1934)); *Angelle*, 610 F.2d at 1339 (A technical trust must “exist prior to the act creating the debt and without reference to that act.”). However, the Fifth Circuit recognizes that the “ ‘technical’ or ‘express’ trust requirement is not limited to trusts that arise by virtue of a formal trust agreement, but includes relationships in which trust-type obligations are imposed pursuant to statute or common law .” *LSP Inv. P'ship v. Bennett (In re Bennett)*, 989 F.2d 779, 784-85 (5th Cir.1993) (citing *Moreno v. Ashworth*, 892 F.2d 417, 421 (5th Cir.1990)).

Accordingly, when “determining whether a particular debtor was acting in a fiduciary capacity for purposes of section 523(a)(4), the Court must look to both state and federal law.” *In*

re Bennett, 989 F.2d at 784. “The scope of the concept of fiduciary under 11 U.S.C. § 523(a)(4) is a question of federal law; however, state law is important in determining whether or not a trust obligation exists.” *Id.* (citing *Angelle v. Reed (In re Angelle)*, 610 F.2d 1335 (5th Cir.1980)). In Texas, a fiduciary is a “person owing a duty of integrity and fidelity ... apply[ing] to any person who occupies a position of peculiar confidence towards another.” *Lee v. Hasson*, 2007 WL 236899 at *8 (Tex.App.-Houston [14 Dist.] Jan. 30, 2007, rev. denied) (citing *Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 138 Tex. 565, 160 S.W.2d 509, 512 (Tex.1942)).

Defalcation

A defalcation is a willful neglect of duty, even if not accompanied by fraud or embezzlement. *See L. King, 3 Collier on Bankruptcy* ¶ 523.14, at 523-93 to 523-95 (15th ed.1988), quoting *Central Hanover Bank & Trust Co. v. Herbst*, 93 F.2d 510 (2d Cir.1937) (L.Hand, J.).

Embezzlement

Embezzlement for purposes of § 523(a)(4), is not limited to instances where a fiduciary duty exists. *4 Resnick & Sommer Collier on Bankruptcy* ¶ 523.10[1] [d] (15th ed. 2005) (“The phrase ‘while acting in a fiduciary capacity’ clearly qualifies the words ‘fraud or defalcation’ and not ‘embezzlement’ or ‘larceny’ ”). Embezzlement is defined by federal law. *Rainey v. Davenport (In re Davenport)*, 353 B.R. 150, 199 (Bankr.S.D.Tex.2006) (citing *In re Hayden*, 248 B.R. 519, 525 (Bankr.N.D.Tex.2000)). Under federal law, embezzlement is a “fraudulent appropriation of property by a person to whom such property has been entrusted, or into whose hands it has lawfully come.” *In re Miller*, 156 F.3d 598, 602 (5th Cir.1998). To constitute embezzlement, the fraudulent appropriation must be “of another's property.” *In re Davenport*, 353 B.R. at 199; *In re Dobek*, 278 B.R. 496, 509 (Bankr.N.D.Ill.2002) (“To prove embezzlement, Plaintiff must show that debtor appropriated the funds for her own benefit, and that it did so with fraudulent intent.”) (quoting *In re Weber*, 892 F.2d 534, 538 (7th Cir.1989)).

“To ‘appropriate’ is to exercise control over or to take possession of property.” *In re Davenport*, 353 B.R. at 200 (citing *Hayden*, 248 B.R. at 525). Fraudulent intent is “an intent to deceive another person and thereby induce such other person to transfer, alter or terminate a right with respect to property.” *Id.* (citing *First Nat’l Bank of Midlothian v. Harrell (In re Harrell)*, 94 B.R. 86, 91 (Bankr.W.D.Tex.1988)). “Fraudulent intent may be inferred from the conduct of the Debtor and from circumstances of the situation.” *Harrell*, 94 B.R. at 91 (citing *U.S. v. Powell*, 413 F.2d 1037 (4th Cir.1969)).

In the securities arbitration context, at least one court found that unauthorized transactions, resulting in the transfer of a margin position of one customer to another customer’s account, constituted embezzlement, sufficient to deny a discharge. *See Sherman v. Potapov* 403 B.R. 151, (D.Mass.2009)(See Complaint, Appendix 8). In *Sherman*, there was an NASD award of \$983,000, and a finding of unauthorized trading. The bankruptcy court, however, conducted its own evidentiary hearing, because its first decision, utilizing the NASD arbitration award as collateral estoppel, was reversed on appeal. *In re: Alexander v. Sherman*, 1:08cv11296 (Docket) (D.Mass. Jul.

30, 2008). The district court in the first appeal found that “there was no explicit or implicit finding that the debtors, either collectively or individually, acted with a sufficient mental state to constitute “fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny” under § 523(a)(4) or “for willful and malicious injury” under § 523(a)(6).” *Sherman v. Potapov* 403 B.R. 151, (D.Mass.2009). This points to the critical need of every securities arbitration practitioner, in an NASD arbitration award, to obtain the requisite findings of fraud, and intent to defraud, in the arbitration award, consistent with “fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny” under § 523(a)(4) or “for willful and malicious injury” under § 523(a)(6).

11 U.S.C. § 523(a)(6)

Section 523(a)(6) excepts from discharge, a debt “for willful and malicious injury by the debtor to another entity or to the property of another entity.” 11 U.S.C. § 523(a)(6).

The word “willful” in (a)(6) modifies the word “injury,” indicating that nondischargeability takes a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury. Had Congress meant to exempt debts resulting from unintentionally inflicted injuries, it might have described instead “willful acts that cause injury.” Or, Congress might have selected an additional word or words, i.e., “reckless” or “negligent,” to modify “injury.” Moreover ... the (a)(6) formulation triggers in the lawyer's mind the category “intentional torts,” as distinguished from negligent or reckless torts.

Kawaauhau v. Geiger, 523 U.S. 57, 61 (1998) (emphasis in original).

The injury caused by the debtor must also be malicious, meaning “wrongful and without just cause or excuse, even in the absence of personal hatred, spite, or ill-will.” *In re Tognetti*, 2007 WL 1080147 (Bkrcty.S.D.N.Y.,2007); *In re Stelluti*, 94 F.3d 84, 87 (2d Cir.1996) (citing Collier on Bankruptcy). Malice may be implied “by the acts and conduct of the debtor in the context of [the] surrounding circumstances” *Id.* at 88 (alteration in original, internal quotation marks omitted). “Maliciousness will be found where the ‘debtor has breached a duty to the plaintiff founded in contract, statute or tort law, willfully in the sense of acting with deliberate intent, in circumstances where it is evident that the conduct will cause injury to the plaintiff and under some aggravating circumstance to warrant the denial of discharge.’ “ *In re Hambley*, 329 B.R. 382, 402 (Bankr.E.D.N.Y.2005) (quoting *In re Blankfort*, 217 B.R. 138, 144 (Bankr.S.D.N.Y.1998)).

Is A Settlement Admissible To Prove The NonDischargeability of the Debt?

The United States Supreme Court in *Archer v. Warner*, 538 U.S. 314, 123 S.Ct. 1462, 155 L.Ed.2d 454 (2003) held that a settlement or stipulated judgment reducing a previous claim for fraud into a monetary obligation without a specific finding of fraud can continue to be barred from discharge under 11 U.S.C. § 523. In *Archer*, the debtors sold a company to the creditors, and the creditors sued the debtors for fraud in connection with the sale. The parties settled the lawsuit.

However, when the debtors failed to make payments under the settlement agreement and filed for bankruptcy, the creditors asserted that the debt was nondischargeable under § 523(a)(2)(A). The issue was whether the settlement agreement was a novation of the original debt for money obtained by fraud, with the novation negating the fraud claim. The Supreme Court held that the entire settlement debt was nondischargeable under § 523(a)(2)(A), even though the parties had executed a settlement agreement. As long as the creditor is able to prove that the debtor fraudulently took something of value, such as money, property, or services from the creditor, then any damages resulting from that fraud are nondischargeable under Section 523(a)(2)(A).

Is a Default in a Prior Proceeding Sufficient to Support a Finding of NonDischargeability?

The issue is “whether, in a bankruptcy discharge exception proceeding, a default judgment based upon allegations of fraud may be used to establish conclusively the elements of fraud and prevent discharge of the judgment debt.” *In re Bush*, 62 F.3d 1319 (11th Cir.1995). The Eleventh Circuit was persuaded by the reasoning of bankruptcy courts giving preclusive effect in a dischargeability proceeding to a prior default judgment because the debtor did not deserve “a second bite at the apple.” *Id.* at 324. In *Bush*, the Debtor/defendant was given the full opportunity to defend himself in the [prior] action and he chose not to do so. The Court found that the “Debtor/defendant could have reasonably foreseen the consequences of not defending an action based in part on fraud. It would be undeserved to give debtor/defendant a second bite at the apple when he knowingly chose not to defend himself in the first instance.” *Id.* Because the debtor in *Bush* had participated in the prior action over an extended period of time and, subsequently, engaged in conduct that resulted in the sanction of a default judgment, the court of appeals was reluctant to give him a second chance. *Id.*

The Ninth Circuit also affirmed the use of a default judgment entered as a sanction to estop the debtor from denying fraud in bankruptcy court. *In re Daily*, 47 F.3d 365 (9th Cir.1995). The *Bush* court found the facts in *Daily* “very similar” to its case. Like *Daily*, *Bush* did not simply give up at the outset. He actively participated in the adversary process for almost a year. He was represented by counsel. He answered the complaint. He filed a counterclaim. He filed discovery requests. After undertaking to represent himself, he began to refuse to cooperate in discovery. He refused to produce documents despite repeated requests. He refused to appear at his properly noticed deposition. He did respond to [plaintiff's] Motion for Sanctions claiming he was out of state on the scheduled day. At the district court's properly noticed pre-trial conference, *Bush* failed to appear. As in *Daily*, the default judgment for fraud against *Bush* was entered pursuant to Rule 37 as a sanction for deliberate refusal to participate in discovery. *Id.* at 62 F.3d at 1325-26. Finding that *Bush* had participated in the prior action and had been given a full and fair opportunity to defend on the merits, but chose not to, the Eleventh Circuit affirmed: “Just as due process is not offended by the entry of a default judgment against a party for failure to cooperate with discovery, ... neither is due process offended if a debtor is held to the consequences of that judgment in a subsequent bankruptcy discharge proceeding.” *Id.* at 1325 (citations omitted). *See also In re Smith*, 362 B.R. 438 (Bkrcty.D.Ariz.,2007).

Is a Cease and Desist Order From a Securities Regulator Sufficient to Satisfy the NonDischargeability Provisions of 523(a)(19)?

At least one case found that a Cease and Desist Order from a securities regulator satisfied the requirements for nondischargeability under 523A19. In *In re Civiello* 348 B.R. 459 (Bkrcty.N.D.Ohio,2006), the Plaintiffs charged that the debtor sold them unregistered securities. The Ohio Division of Securities issued a Cease and Desist Order, which made findings. It was Plaintiffs' position that the cease and desist order, which found Defendant violated Ohio Revised Code section 1707.44. The cease and desist order clearly and unequivocally states that Defendant violated O.R.C. § 1707.44(A)(1): (15) Civiello, as described in Paragraphs (4) through (8), sold securities to Ohio residents, without having been licensed by the Division of Securities as a dealer, and therefore, in violation of R.C. 1707.44(A)(1).

The debtor's act of selling unregistered securities was also found to violate Ohio securities law: "(17) The securities described in paragraphs (4) through (7) are not exempt under R.C. 1707.02 from the registration requirements of the Ohio Securities Act, not the subject matter of an exempt transaction under R.C. 1707.03, 1707.04 or 1707.34, not registered by description, coordination or qualification, and not the subject matter of a transaction that was registered by description, and, therefore, were sold in violation of R.C. 1707.44(C)(1)." Id.

The Court in *In re Civiello* reasoned that "if Defendant was provided due process in the investigation, the cease and desist order was a valid adjudication by the division in accordance with its powers and duties." Thereafter, the *Civiello* court found:"

The debtor did not challenge the procedure utilized by the agency. Further, the debtor was provided notice, including an opportunity for hearing, as well as rights to appeal the determination. Therefore, the bankruptcy court concluded that the cease and desist order was a valid adjudication wrought by an administrative agency empowered to enforce Ohio securities law. Id. Plaintiffs thus satisfied the first element of a section 523(a)(19) action, proving that Debtor did violate Ohio securities law.

In re Civiello 348 B.R. 459 (Bkrcty.N.D.Ohio,2006).

The second element, that the finding also resulted in a debt arise from the violation of the securities laws and memorialized in some form of judicial or administrative determination or in a settlement agreement., was also satisfied. The Cease and Desist Order made a finding of the violation of Ohio' securities laws. The remedy under the statute, is for a automatically entitles them to a refund of their entire investment pursuant to O.R.C. § 1707.43(A). That provision provides, in its entirety:

(A) Subject to divisions (B) and (C) of this section, every sale or contract for sale made in violation of Chapter 1707. of the Revised Code, is voidable at the election of the purchaser. The person making such sale or contract for sale, and every person that has participated in or aided the seller in any way in making such sale or contract for sale, are jointly and

severally liable to the purchaser, in an action at law in any court of competent jurisdiction, upon tender to the seller in person or in open court of the securities sold or of the contract made, for the full amount paid by the purchaser and for all taxable court costs, unless the court determines that the violation did not materially affect the protection contemplated by the violated provision.”

The Court concluded that since the Plaintiffs had filed their adversary proceeding within the statute of limitations in the bankruptcy court for nondischargeability, that Plaintiffs had satisfied their burden that there was a violation of the securities laws, resulting in a debt owed by the debtor that should be nondischargeable under 523A(19). *In re Civiello* 348 B.R. 459 (Bkrcty.N.D.Ohio,2006).

Can A Prior Arbitration Award Be Used in a Bankruptcy Case as Collateral Estoppel For Purposes of Dischargeability?

At least one court has found that a prior NASD arbitration award can collateral ly estop the debtor from relitigating the issues from the arbitration, and be used as a basis to find nondischargeability of the debt established by the arbitration award. *See In re Appel* 315 B.R. 645 (E.D.N.Y.,2004). In *Appel*, the claimant had obtained an NASD award from a panel in Florida. The claimant then filed a complaint for nondischargeability, using the NASD award as a basis for a finding of fraud. The debtor opposed the complaint, arguing that he should be able to relitigate whether a fraud was committed in the bankruptcy Court. The *Appel* Court denied the debtor’s objection, noting that “the Debtor was found, in the Arbitration Proceeding, to have committed a fraud.” *Id.* Moreover, the *Appel* Court applied Florida law, as that was the locale where the arbitration award was obtained”:

Under Florida Law, three elements must be met for issue preclusion to apply: “(1) the issue at stake must be identical to the one involved in the prior proceeding; (2) the issue must have been actually litigated in the prior proceeding; and (3) the determination must have been a critical and necessary part of the judgment in that prior proceeding.” *In re Hartman*, 274 B.R. at 914 (interpreting Florida's law of collateral estoppel); *In re Bush*, 62 F.3d 1319, 1322 (11th Cir.1995) (same).

The *Appel* Court analyzed each of these three elements and found that collateral estoppel precluded the debtor from relitigating the allegations in the arbitration. *Id.* The *Appel* Court applied the Supreme Court's decision in *Grogan v. Garner*, 498 U.S. 279, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991), which specifically stated that “collateral estoppel or issue preclusion may be applied in reaching conclusions about certain underlying factual issues that are necessary to establish dischargeability in actions commenced under 11 U.S.C. Sec. 523(a).” *In re Zangara*, 217 B.R. at 35 (citing *Grogan*, 498 U.S. at 284-85, 111 S.Ct. 654). The *Appel* Court then went on to find that the elements of a fraud claim under Florida law are the same as the elements for establishing the non-dischargeability of a debt under § 523(a), and ruled debt in question was non-dischargeable, upholding the decision of the Bankruptcy Court. *Id.*

Conclusion

Bankruptcy does not mean the death of a viable securities case. Bankruptcy law supports the public policy that debtors who commit fraud should not use bankruptcy court to discharge (wipe out) fraudulent misconduct in the sale of securities. Securities arbitration practitioners can use the bankruptcy process to obtain a denial of the discharge of their client's claim, and thereafter use that judgment to collect against the debtor for that fraudulent conduct, for years to come. Debtors who are able to discharge all of their debts, save the nondischarged claim of the securities claimant, are in a better financial position post-bankruptcy to pay back a customer who was wronged by the debtor's securities fraud.

Appendix

Appendix 1 - Proof of Claim Form

Appendix 2 - Voluntary Petition

Appendix 3- Schedule F

Appendix 4- Schedule B4

Appendix 5- Schedule B7

Appendix 6-Complaint to Determine Dischargeabilty-Zimmerman

Appendix 7- Consent to NonDischargeability, Zimmerman

Appendix 8-Complaint to Determine Dischargeabilty-Sherman

UNITED STATES BANKRUPTCY COURT _____ DISTRICT OF _____		PROOF OF CLAIM
Name of Debtor: _____		Case Number: _____
NOTE: <i>This form should not be used to make a claim for an administrative expense arising after the commencement of the case. A request for payment of an administrative expense may be filed pursuant to 11 U.S.C. § 503.</i>		
Name of Creditor (the person or other entity to whom the debtor owes money or property): _____		<input type="checkbox"/> Check this box to indicate that this claim amends a previously filed claim. Court Claim Number: _____ <i>(If known)</i> Filed on: _____
Name and address where notices should be sent: _____		
Telephone number: _____		
Name and address where payment should be sent (if different from above): _____		<input type="checkbox"/> Check this box if you are aware that anyone else has filed a proof of claim relating to your claim. Attach copy of statement giving particulars. <input type="checkbox"/> Check this box if you are the debtor or trustee in this case.
Telephone number: _____		
1. Amount of Claim as of Date Case Filed: \$ _____ If all or part of your claim is secured, complete item 4 below; however, if all of your claim is unsecured, do not complete item 4. If all or part of your claim is entitled to priority, complete item 5. <input type="checkbox"/> Check this box if claim includes interest or other charges in addition to the principal amount of claim. Attach itemized statement of interest or charges.		5. Amount of Claim Entitled to Priority under 11 U.S.C. §507(a). If any portion of your claim falls in one of the following categories, check the box and state the amount. Specify the priority of the claim. <input type="checkbox"/> Domestic support obligations under 11 U.S.C. §507(a)(1)(A) or (a)(1)(B). <input type="checkbox"/> Wages, salaries, or commissions (up to \$10,950*) earned within 180 days before filing of the bankruptcy petition or cessation of the debtor's business, whichever is earlier – 11 U.S.C. §507 (a)(4). <input type="checkbox"/> Contributions to an employee benefit plan – 11 U.S.C. §507 (a)(5). <input type="checkbox"/> Up to \$2,425* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use – 11 U.S.C. §507 (a)(7). <input type="checkbox"/> Taxes or penalties owed to governmental units – 11 U.S.C. §507 (a)(8). <input type="checkbox"/> Other – Specify applicable paragraph of 11 U.S.C. §507 (a)(____). Amount entitled to priority: \$ _____ <i>*Amounts are subject to adjustment on 4/1/10 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.</i>
2. Basis for Claim: _____ (See instruction #2 on reverse side.)		
3. Last four digits of any number by which creditor identifies debtor: _____ 3a. Debtor may have scheduled account as: _____ (See instruction #3a on reverse side.)		
4. Secured Claim (See instruction #4 on reverse side.) Check the appropriate box if your claim is secured by a lien on property or a right of setoff and provide the requested information. Nature of property or right of setoff: <input type="checkbox"/> Real Estate <input type="checkbox"/> Motor Vehicle <input type="checkbox"/> Other Describe: Value of Property: \$ _____ Annual Interest Rate ____% Amount of arrearage and other charges as of time case filed included in secured claim, if any: \$ _____ Basis for perfection: _____ Amount of Secured Claim: \$ _____ Amount Unsecured: \$ _____		
6. Credits: The amount of all payments on this claim has been credited for the purpose of making this proof of claim.		
7. Documents: Attach redacted copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. You may also attach a summary. Attach redacted copies of documents providing evidence of perfection of a security interest. You may also attach a summary. <i>(See definition of "redacted" on reverse side.)</i> DO NOT SEND ORIGINAL DOCUMENTS. ATTACHED DOCUMENTS MAY BE DESTROYED AFTER SCANNING. If the documents are not available, please explain: _____		
Date: _____	Signature: The person filing this claim must sign it. Sign and print name and title, if any, of the creditor or other person authorized to file this claim and state address and telephone number if different from the notice address above. Attach copy of power of attorney, if any.	
		FOR COURT USE ONLY

Penalty for presenting fraudulent claim: Fine of up to \$500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

INSTRUCTIONS FOR PROOF OF CLAIM FORM

The instructions and definitions below are general explanations of the law. In certain circumstances, such as bankruptcy cases not filed voluntarily by the debtor, there may be exceptions to these general rules.

Items to be completed in Proof of Claim form**Court, Name of Debtor, and Case Number:**

Fill in the federal judicial district where the bankruptcy case was filed (for example, Central District of California), the bankruptcy debtor's name, and the bankruptcy case number. If the creditor received a notice of the case from the bankruptcy court, all of this information is located at the top of the notice.

Creditor's Name and Address:

Fill in the name of the person or entity asserting a claim and the name and address of the person who should receive notices issued during the bankruptcy case. A separate space is provided for the payment address if it differs from the notice address. The creditor has a continuing obligation to keep the court informed of its current address. See Federal Rule of Bankruptcy Procedure (FRBP) 2002(g).

1. Amount of Claim as of Date Case Filed:

State the total amount owed to the creditor on the date of the Bankruptcy filing. Follow the instructions concerning whether to complete items 4 and 5. Check the box if interest or other charges are included in the claim.

2. Basis for Claim:

State the type of debt or how it was incurred. Examples include goods sold, money loaned, services performed, personal injury/wrongful death, car loan, mortgage note, and credit card.

3. Last Four Digits of Any Number by Which Creditor Identifies Debtor:

State only the last four digits of the debtor's account or other number used by the creditor to identify the debtor.

3a. Debtor May Have Scheduled Account As:

Use this space to report a change in the creditor's name, a transferred claim, or any other information that clarifies a difference between this proof of claim and the claim as scheduled by the debtor.

4. Secured Claim:

Check the appropriate box and provide the requested information if the claim is fully or partially secured. Skip this section if the claim is entirely unsecured. (See DEFINITIONS, below.) State the type and the value of property that secures the claim, attach copies of lien

documentation, and state annual interest rate and the amount past due on the claim as of the date of the bankruptcy filing.

5. Amount of Claim Entitled to Priority Under 11 U.S.C. §507(a).

If any portion of your claim falls in one or more of the listed categories, check the appropriate box(es) and state the amount entitled to priority. (See DEFINITIONS, below.) A claim may be partly priority and partly non-priority. For example, in some of the categories, the law limits the amount entitled to priority.

6. Credits:

An authorized signature on this proof of claim serves as an acknowledgment that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

7. Documents:

Attach to this proof of claim form redacted copies documenting the existence of the debt and of any lien securing the debt. You may also attach a summary. You must also attach copies of documents that evidence perfection of any security interest. You may also attach a summary. FRBP 3001(c) and (d). Do not send original documents, as attachments may be destroyed after scanning.

Date and Signature:

The person filing this proof of claim must sign and date it. FRBP 9011. If the claim is filed electronically, FRBP 5005(a)(2), authorizes courts to establish local rules specifying what constitutes a signature. Print the name and title, if any, of the creditor or other person authorized to file this claim. State the filer's address and telephone number if it differs from the address given on the top of the form for purposes of receiving notices. Attach a complete copy of any power of attorney. Criminal penalties apply for making a false statement on a proof of claim.

DEFINITIONS**Debtor**

A debtor is the person, corporation, or other entity that has filed a bankruptcy case.

Creditor

A creditor is the person, corporation, or other entity owed a debt by the debtor on the date of the bankruptcy filing.

Claim

A claim is the creditor's right to receive payment on a debt that was owed by the debtor on the date of the bankruptcy filing. See 11 U.S.C. §101 (5). A claim may be secured or unsecured.

Proof of Claim

A proof of claim is a form used by the creditor to indicate the amount of the debt owed by the debtor on the date of the bankruptcy filing. The creditor must file the form with the clerk of the same bankruptcy court in which the bankruptcy case was filed.

Secured Claim Under 11 U.S.C. §506(a)

A secured claim is one backed by a lien on property of the debtor. The claim is secured so long as the creditor has the right to be paid from the property prior to other creditors. The amount of the secured claim cannot exceed the value of the property. Any amount owed to the creditor in excess of the value of the property is an unsecured claim. Examples of liens on property include a mortgage on real estate or a security interest in a car.

A lien may be voluntarily granted by a debtor or may be obtained through a court proceeding. In some states, a court judgment is a lien. A claim also may be secured if the creditor owes the debtor money (has a right to setoff).

Unsecured Claim

An unsecured claim is one that does not meet the requirements of a secured claim. A claim may be partly unsecured if the amount of the claim exceeds the value of the property on which the creditor has a lien.

Claim Entitled to Priority Under 11 U.S.C. §507(a)

Priority claims are certain categories of unsecured claims that are paid from the available money or property in a bankruptcy case before other unsecured claims.

Redacted

A document has been redacted when the person filing it has masked, edited out, or otherwise deleted, certain information. A creditor should redact and use only the last four digits of any social-security, individual's tax-identification, or financial-account number, all but the initials of a minor's name and only the year of any person's date of birth.

Evidence of Perfection

Evidence of perfection may include a mortgage, lien, certificate of title, financing statement, or other document showing that the lien has been filed or recorded.

INFORMATION**Acknowledgment of Filing of Claim**

To receive acknowledgment of your filing, you may either enclose a stamped self-addressed envelope and a copy of this proof of claim or you may access the court's PACER system (www.pacer.psc.uscourts.gov) for a small fee to view your filed proof of claim.

Offers to Purchase a Claim

Certain entities are in the business of purchasing claims for an amount less than the face value of the claims. One or more of these entities may contact the creditor and offer to purchase the claim. Some of the written communications from these entities may easily be confused with official court documentation or communications from the debtor. These entities do not represent the bankruptcy court or the debtor. The creditor has no obligation to sell its claim. However, if the creditor decides to sell its claim, any transfer of such claim is subject to FRBP 3001(e), any applicable provisions of the Bankruptcy Code (11 U.S.C. § 101 *et seq.*), and any applicable orders of the bankruptcy court.

United States Bankruptcy Court		Voluntary Petition
Name of Debtor (if individual, enter Last, First, Middle):		Name of Joint Debtor (Spouse) (Last, First, Middle):
All Other Names used by the Debtor in the last 8 years (include married, maiden, and trade names):		All Other Names used by the Joint Debtor in the last 8 years (include married, maiden, and trade names):
Last four digits of Soc. Sec. or Individual-Taxpayer I.D. (ITIN) No./Complete EIN (if more than one, state all):		Last four digits of Soc. Sec. or Individual-Taxpayer I.D. (ITIN) No./Complete EIN (if more than one, state all):
Street Address of Debtor (No. and Street, City, and State): <div style="text-align: right;">ZIP CODE</div>		Street Address of Joint Debtor (No. and Street, City, and State): <div style="text-align: right;">ZIP CODE</div>
County of Residence or of the Principal Place of Business:		County of Residence or of the Principal Place of Business:
Mailing Address of Debtor (if different from street address): <div style="text-align: right;">ZIP CODE</div>		Mailing Address of Joint Debtor (if different from street address): <div style="text-align: right;">ZIP CODE</div>
Location of Principal Assets of Business Debtor (if different from street address above): <div style="text-align: right;">ZIP CODE</div>		
<p>Type of Debtor (Form of Organization) (Check one box.)</p> <p><input type="checkbox"/> Individual (includes Joint Debtors) <i>See Exhibit D on page 2 of this form.</i></p> <p><input type="checkbox"/> Corporation (includes LLC and LLP)</p> <p><input type="checkbox"/> Partnership</p> <p><input type="checkbox"/> Other (If debtor is not one of the above entities, check this box and state type of entity below.)</p>	<p>Nature of Business (Check one box.)</p> <p><input type="checkbox"/> Health Care Business</p> <p><input type="checkbox"/> Single Asset Real Estate as defined in 11 U.S.C. § 101(51B)</p> <p><input type="checkbox"/> Railroad</p> <p><input type="checkbox"/> Stockbroker</p> <p><input type="checkbox"/> Commodity Broker</p> <p><input type="checkbox"/> Clearing Bank</p> <p><input type="checkbox"/> Other</p> <hr/> <p>Tax-Exempt Entity (Check box, if applicable.)</p> <p><input type="checkbox"/> Debtor is a tax-exempt organization under Title 26 of the United States Code (the Internal Revenue Code).</p>	<p>Chapter of Bankruptcy Code Under Which the Petition is Filed (Check one box.)</p> <p><input type="checkbox"/> Chapter 7 <input type="checkbox"/> Chapter 15 Petition for Recognition of a Foreign Main Proceeding</p> <p><input type="checkbox"/> Chapter 9 <input type="checkbox"/> Chapter 15 Petition for Recognition of a Foreign Nonmain Proceeding</p> <p><input type="checkbox"/> Chapter 11</p> <p><input type="checkbox"/> Chapter 12</p> <p><input type="checkbox"/> Chapter 13</p> <hr/> <p>Nature of Debts (Check one box.)</p> <p><input type="checkbox"/> Debts are primarily consumer debts, defined in 11 U.S.C. § 101(8) as "incurred by an individual primarily for a personal, family, or household purpose." <input type="checkbox"/> Debts are primarily business debts.</p>
<p>Filing Fee (Check one box.)</p> <p><input type="checkbox"/> Full Filing Fee attached.</p> <p><input type="checkbox"/> Filing Fee to be paid in installments (applicable to individuals only). Must attach signed application for the court's consideration certifying that the debtor is unable to pay fee except in installments. Rule 1006(b). See Official Form 3A.</p> <p><input type="checkbox"/> Filing Fee waiver requested (applicable to chapter 7 individuals only). Must attach signed application for the court's consideration. See Official Form 3B.</p>		<p>Chapter 11 Debtors</p> <p>Check one box:</p> <p><input type="checkbox"/> Debtor is a small business debtor as defined in 11 U.S.C. § 101(51D).</p> <p><input type="checkbox"/> Debtor is not a small business debtor as defined in 11 U.S.C. § 101(51D).</p> <p>Check if:</p> <p><input type="checkbox"/> Debtor's aggregate noncontingent liquidated debts (excluding debts owed to insiders or affiliates) are less than \$2,190,000.</p> <p>-----</p> <p>Check all applicable boxes:</p> <p><input type="checkbox"/> A plan is being filed with this petition.</p> <p><input type="checkbox"/> Acceptances of the plan were solicited prepetition from one or more classes of creditors, in accordance with 11 U.S.C. § 1126(b).</p>

<p>Statistical/Administrative Information</p> <p><input type="checkbox"/> Debtor estimates that funds will be available for distribution to unsecured creditors.</p> <p><input type="checkbox"/> Debtor estimates that, after any exempt property is excluded and administrative expenses paid, there will be no funds available for distribution to unsecured creditors.</p>	<p>THIS SPACE IS FOR COURT USE ONLY</p>										
<p>Estimated Number of Creditors</p> <table style="width:100%; text-align: center;"> <tr> <td><input type="checkbox"/> 1-49</td> <td><input type="checkbox"/> 50-99</td> <td><input type="checkbox"/> 100-199</td> <td><input type="checkbox"/> 200-999</td> <td><input type="checkbox"/> 1,000-5,000</td> <td><input type="checkbox"/> 5,001-10,000</td> <td><input type="checkbox"/> 10,001-25,000</td> <td><input type="checkbox"/> 25,001-50,000</td> <td><input type="checkbox"/> 50,001-100,000</td> <td><input type="checkbox"/> Over 100,000</td> </tr> </table>	<input type="checkbox"/> 1-49	<input type="checkbox"/> 50-99	<input type="checkbox"/> 100-199	<input type="checkbox"/> 200-999	<input type="checkbox"/> 1,000-5,000	<input type="checkbox"/> 5,001-10,000	<input type="checkbox"/> 10,001-25,000	<input type="checkbox"/> 25,001-50,000	<input type="checkbox"/> 50,001-100,000	<input type="checkbox"/> Over 100,000	
<input type="checkbox"/> 1-49	<input type="checkbox"/> 50-99	<input type="checkbox"/> 100-199	<input type="checkbox"/> 200-999	<input type="checkbox"/> 1,000-5,000	<input type="checkbox"/> 5,001-10,000	<input type="checkbox"/> 10,001-25,000	<input type="checkbox"/> 25,001-50,000	<input type="checkbox"/> 50,001-100,000	<input type="checkbox"/> Over 100,000		
<p>Estimated Assets</p> <table style="width:100%; text-align: center;"> <tr> <td><input type="checkbox"/> \$0 to \$50,000</td> <td><input type="checkbox"/> \$50,001 to \$100,000</td> <td><input type="checkbox"/> \$100,001 to \$500,000</td> <td><input type="checkbox"/> \$500,001 to \$1 million</td> <td><input type="checkbox"/> \$1,000,001 to \$10 million</td> <td><input type="checkbox"/> \$10,000,001 to \$50 million</td> <td><input type="checkbox"/> \$50,000,001 to \$100 million</td> <td><input type="checkbox"/> \$100,000,001 to \$500 million</td> <td><input type="checkbox"/> \$500,000,001 to \$1 billion</td> <td><input type="checkbox"/> More than \$1 billion</td> </tr> </table>	<input type="checkbox"/> \$0 to \$50,000	<input type="checkbox"/> \$50,001 to \$100,000	<input type="checkbox"/> \$100,001 to \$500,000	<input type="checkbox"/> \$500,001 to \$1 million	<input type="checkbox"/> \$1,000,001 to \$10 million	<input type="checkbox"/> \$10,000,001 to \$50 million	<input type="checkbox"/> \$50,000,001 to \$100 million	<input type="checkbox"/> \$100,000,001 to \$500 million	<input type="checkbox"/> \$500,000,001 to \$1 billion	<input type="checkbox"/> More than \$1 billion	
<input type="checkbox"/> \$0 to \$50,000	<input type="checkbox"/> \$50,001 to \$100,000	<input type="checkbox"/> \$100,001 to \$500,000	<input type="checkbox"/> \$500,001 to \$1 million	<input type="checkbox"/> \$1,000,001 to \$10 million	<input type="checkbox"/> \$10,000,001 to \$50 million	<input type="checkbox"/> \$50,000,001 to \$100 million	<input type="checkbox"/> \$100,000,001 to \$500 million	<input type="checkbox"/> \$500,000,001 to \$1 billion	<input type="checkbox"/> More than \$1 billion		
<p>Estimated Liabilities</p> <table style="width:100%; text-align: center;"> <tr> <td><input type="checkbox"/> \$0 to \$50,000</td> <td><input type="checkbox"/> \$50,001 to \$100,000</td> <td><input type="checkbox"/> \$100,001 to \$500,000</td> <td><input type="checkbox"/> \$500,001 to \$1 million</td> <td><input type="checkbox"/> \$1,000,001 to \$10 million</td> <td><input type="checkbox"/> \$10,000,001 to \$50 million</td> <td><input type="checkbox"/> \$50,000,001 to \$100 million</td> <td><input type="checkbox"/> \$100,000,001 to \$500 million</td> <td><input type="checkbox"/> \$500,000,001 to \$1 billion</td> <td><input type="checkbox"/> More than \$1 billion</td> </tr> </table>	<input type="checkbox"/> \$0 to \$50,000	<input type="checkbox"/> \$50,001 to \$100,000	<input type="checkbox"/> \$100,001 to \$500,000	<input type="checkbox"/> \$500,001 to \$1 million	<input type="checkbox"/> \$1,000,001 to \$10 million	<input type="checkbox"/> \$10,000,001 to \$50 million	<input type="checkbox"/> \$50,000,001 to \$100 million	<input type="checkbox"/> \$100,000,001 to \$500 million	<input type="checkbox"/> \$500,000,001 to \$1 billion	<input type="checkbox"/> More than \$1 billion	
<input type="checkbox"/> \$0 to \$50,000	<input type="checkbox"/> \$50,001 to \$100,000	<input type="checkbox"/> \$100,001 to \$500,000	<input type="checkbox"/> \$500,001 to \$1 million	<input type="checkbox"/> \$1,000,001 to \$10 million	<input type="checkbox"/> \$10,000,001 to \$50 million	<input type="checkbox"/> \$50,000,001 to \$100 million	<input type="checkbox"/> \$100,000,001 to \$500 million	<input type="checkbox"/> \$500,000,001 to \$1 billion	<input type="checkbox"/> More than \$1 billion		

Voluntary Petition <i>(This page must be completed and filed in every case.)</i>	Name of Debtor(s):
--	--------------------

All Prior Bankruptcy Cases Filed Within Last 8 Years (If more than two, attach additional sheet.)

Location Where Filed:	Case Number:	Date Filed:
Location Where Filed:	Case Number:	Date Filed:

Pending Bankruptcy Case Filed by any Spouse, Partner, or Affiliate of this Debtor (If more than one, attach additional sheet.)

Name of Debtor:	Case Number:	Date Filed:
District:	Relationship:	Judge:

<p style="text-align: center;">Exhibit A</p> <p>(To be completed if debtor is required to file periodic reports (e.g., forms 10K and 10Q) with the Securities and Exchange Commission pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 and is requesting relief under chapter 11.)</p> <p><input type="checkbox"/> Exhibit A is attached and made a part of this petition.</p>	<p style="text-align: center;">Exhibit B</p> <p>(To be completed if debtor is an individual whose debts are primarily consumer debts.)</p> <p>I, the attorney for the petitioner named in the foregoing petition, declare that I have informed the petitioner that [he or she] may proceed under chapter 7, 11, 12, or 13 of title 11, United States Code, and have explained the relief available under each such chapter. I further certify that I have delivered to the debtor the notice required by 11 U.S.C. § 342(b).</p> <p><input checked="" type="checkbox"/> _____ Signature of Attorney for Debtor(s) (Date)</p>
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Exhibit C

Does the debtor own or have possession of any property that poses or is alleged to pose a threat of imminent and identifiable harm to public health or safety?

Yes, and Exhibit C is attached and made a part of this petition.

No.

Exhibit D

(To be completed by every individual debtor. If a joint petition is filed, each spouse must complete and attach a separate Exhibit D.)

Exhibit D completed and signed by the debtor is attached and made a part of this petition.

If this is a joint petition:

Exhibit D also completed and signed by the joint debtor is attached and made a part of this petition.

Information Regarding the Debtor - Venue
 (Check any applicable box.)

Debtor has been domiciled or has had a residence, principal place of business, or principal assets in this District for 180 days immediately preceding the date of this petition or for a longer part of such 180 days than in any other District.

There is a bankruptcy case concerning debtor's affiliate, general partner, or partnership pending in this District.

Debtor is a debtor in a foreign proceeding and has its principal place of business or principal assets in the United States in this District, or has no principal place of business or assets in the United States but is a defendant in an action or proceeding [in a federal or state court] in this District, or the interests of the parties will be served in regard to the relief sought in this District.

Certification by a Debtor Who Resides as a Tenant of Residential Property
 (Check all applicable boxes.)

Landlord has a judgment against the debtor for possession of debtor's residence. (If box checked, complete the following.)

 (Name of landlord that obtained judgment)

 (Address of landlord)

Debtor claims that under applicable nonbankruptcy law, there are circumstances under which the debtor would be permitted to cure the entire monetary default that gave rise to the judgment for possession, after the judgment for possession was entered, and

Debtor has included with this petition the deposit with the court of any rent that would become due during the 30-day period after the filing of the petition.

Debtor certifies that he/she has served the Landlord with this certification. (11 U.S.C. § 362(l)).

Voluntary Petition

(This page must be completed and filed in every case.)

Name of Debtor(s):

Signatures

Signature(s) of Debtor(s) (Individual/Joint)

I declare under penalty of perjury that the information provided in this petition is true and correct.

[If petitioner is an individual whose debts are primarily consumer debts and has chosen to file under chapter 7] I am aware that I may proceed under chapter 7, 11, 12 or 13 of title 11, United States Code, understand the relief available under each such chapter, and choose to proceed under chapter 7.

[If no attorney represents me and no bankruptcy petition preparer signs the petition] I have obtained and read the notice required by 11 U.S.C. § 342(b).

I request relief in accordance with the chapter of title 11, United States Code, specified in this petition.

X _____
Signature of Debtor

X _____
Signature of Joint Debtor

Telephone Number (if not represented by attorney)

Date

Signature of a Foreign Representative

I declare under penalty of perjury that the information provided in this petition is true and correct, that I am the foreign representative of a debtor in a foreign proceeding, and that I am authorized to file this petition.

(Check only **one** box.)

I request relief in accordance with chapter 15 of title 11, United States Code. Certified copies of the documents required by 11 U.S.C. § 1515 are attached.

Pursuant to 11 U.S.C. § 1511, I request relief in accordance with the chapter of title 11 specified in this petition. A certified copy of the order granting recognition of the foreign main proceeding is attached.

X _____
(Signature of Foreign Representative)

(Printed Name of Foreign Representative)

Date

Signature of Attorney*

X _____
Signature of Attorney for Debtor(s)

Printed Name of Attorney for Debtor(s)

Firm Name

Address

Telephone Number

Date

*In a case in which § 707(b)(4)(D) applies, this signature also constitutes a certification that the attorney has no knowledge after an inquiry that the information in the schedules is incorrect.

Signature of Non-Attorney Bankruptcy Petition Preparer

I declare under penalty of perjury that: (1) I am a bankruptcy petition preparer as defined in 11 U.S.C. § 110; (2) I prepared this document for compensation and have provided the debtor with a copy of this document and the notices and information required under 11 U.S.C. §§ 110(b), 110(h), and 342(b); and, (3) if rules or guidelines have been promulgated pursuant to 11 U.S.C. § 110(h) setting a maximum fee for services chargeable by bankruptcy petition preparers, I have given the debtor notice of the maximum amount before preparing any document for filing for a debtor or accepting any fee from the debtor, as required in that section. Official Form 19 is attached.

Printed Name and title, if any, of Bankruptcy Petition Preparer

Social-Security number (If the bankruptcy petition preparer is not an individual, state the Social-Security number of the officer, principal, responsible person or partner of the bankruptcy petition preparer.) (Required by 11 U.S.C. § 110.)

Address

X _____

Date

Signature of bankruptcy petition preparer or officer, principal, responsible person, or partner whose Social-Security number is provided above.

Names and Social-Security numbers of all other individuals who prepared or assisted in preparing this document unless the bankruptcy petition preparer is not an individual.

If more than one person prepared this document, attach additional sheets conforming to the appropriate official form for each person.

A bankruptcy petition preparer's failure to comply with the provisions of title 11 and the Federal Rules of Bankruptcy Procedure may result in fines or imprisonment or both. 11 U.S.C. § 110; 18 U.S.C. § 156.

Signature of Debtor (Corporation/Partnership)

I declare under penalty of perjury that the information provided in this petition is true and correct, and that I have been authorized to file this petition on behalf of the debtor.

The debtor requests the relief in accordance with the chapter of title 11, United States Code, specified in this petition.

X _____
Signature of Authorized Individual

Printed Name of Authorized Individual

Title of Authorized Individual

Date

In re _____,
Debtor

Case No. _____
 (if known)

SCHEDULE F - CREDITORS HOLDING UNSECURED NONPRIORITY CLAIMS

State the name, mailing address, including zip code, and last four digits of any account number, of all entities holding unsecured claims without priority against the debtor or the property of the debtor, as of the date of filing of the petition. The complete account number of any account the debtor has with the creditor is useful to the trustee and the creditor and may be provided if the debtor chooses to do so. If a minor child is a creditor, state the child's initials and the name and address of the child's parent or guardian, such as "A.B., a minor child, by John Doe, guardian." Do not disclose the child's name. See, 11 U.S.C. §112 and Fed. R. Bankr. P. 1007(m). Do not include claims listed in Schedules D and E. If all creditors will not fit on this page, use the continuation sheet provided.

If any entity other than a spouse in a joint case may be jointly liable on a claim, place an "X" in the column labeled "Codebtor," include the entity on the appropriate schedule of creditors, and complete Schedule H - Codebtors. If a joint petition is filed, state whether the husband, wife, both of them, or the marital community may be liable on each claim by placing an "H," "W," "J," or "C" in the column labeled "Husband, Wife, Joint, or Community."

If the claim is contingent, place an "X" in the column labeled "Contingent." If the claim is unliquidated, place an "X" in the column labeled "Unliquidated." If the claim is disputed, place an "X" in the column labeled "Disputed." (You may need to place an "X" in more than one of these three columns.)

Report the total of all claims listed on this schedule in the box labeled "Total" on the last sheet of the completed schedule. Report this total also on the Summary of Schedules and, if the debtor is an individual with primarily consumer debts, report this total also on the Statistical Summary of Certain Liabilities and Related Data..

Check this box if debtor has no creditors holding unsecured claims to report on this Schedule F.

CREDITOR'S NAME, MAILING ADDRESS INCLUDING ZIP CODE, AND ACCOUNT NUMBER <i>(See instructions above.)</i>	CODEBTOR	HUSBAND, WIFE, JOINT, OR COMMUNITY	DATE CLAIM WAS INCURRED AND CONSIDERATION FOR CLAIM. IF CLAIM IS SUBJECT TO SETOFF, SO STATE.	CONTINGENT	UNLIQUIDATED	DISPUTED	AMOUNT OF CLAIM
ACCOUNT NO.							
ACCOUNT NO.							
ACCOUNT NO.							
ACCOUNT NO.							
Subtotal ▶							\$
Total ▶							\$

____ continuation sheets attached

(Use only on last page of the completed Schedule F.)
 (Report also on Summary of Schedules and, if applicable, on the Statistical
 Summary of Certain Liabilities and Related Data.)

In re _____,
Debtor

Case No. _____
 (if known)

SCHEDULE F - CREDITORS HOLDING UNSECURED NONPRIORITY CLAIMS
 (Continuation Sheet)

CREDITOR'S NAME, MAILING ADDRESS INCLUDING ZIP CODE, AND ACCOUNT NUMBER <small>(See instructions above.)</small>	CODEBTOR	HUSBAND, WIFE, JOINT, OR COMMUNITY	DATE CLAIM WAS INCURRED AND CONSIDERATION FOR CLAIM. IF CLAIM IS SUBJECT TO SETOFF, SO STATE.	CONTINGENT	UNLIQUIDATED	DISPUTED	AMOUNT OF CLAIM
ACCOUNT NO. 							
ACCOUNT NO. 							
ACCOUNT NO. 							
ACCOUNT NO. 							
ACCOUNT NO. 							
Sheet no. _____ of _____ continuation sheets attached to Schedule of Creditors Holding Unsecured Nonpriority Claims							Subtotal▶ \$
(Use only on last page of the completed Schedule F.) (Report also on Summary of Schedules and, if applicable on the Statistical Summary of Certain Liabilities and Related Data.)							Total▶ \$

UNITED STATES BANKRUPTCY COURT

_____ District Of _____

In re _____,
Debtor

Case No. _____
 Chapter _____

LIST OF CREDITORS HOLDING 20 LARGEST UNSECURED CLAIMS

Following is the list of the debtor's creditors holding the 20 largest unsecured claims. The list is prepared in accordance with Fed. R. Bankr. P. 1007(d) for filing in this chapter 11 [*or* chapter 9] case. The list does not include (1) persons who come within the definition of "insider" set forth in 11 U.S.C. § 101, or (2) secured creditors unless the value of the collateral is such that the unsecured deficiency places the creditor among the holders of the 20 largest unsecured claims. If a minor child is one of the creditors holding the 20 largest unsecured claims, state the child's initials and the name and address of the child's parent or guardian, such as "A.B., a minor child, by John Doe, guardian." Do not disclose the child's name. See, 11 U.S.C. §112 and Fed. R. Bankr. P. 1007(m).

(1)	(2)	(3)	(4)	(5)
<i>Name of creditor and complete mailing address, including zip code</i>	<i>Name, telephone number and complete mailing address, including zip code, of employee, agent, or department of creditor familiar with claim who may be contacted</i>	<i>Nature of claim (trade debt, bank loan, government contract, etc.)</i>	<i>Indicate if claim is contingent, unliquidated, state value of disputed or subject to setoff</i>	<i>Amount of claim [if secured also security]</i>

Date: _____

 Debtor

[Declaration as in Form 2]

UNITED STATES BANKRUPTCY COURT

_____ DISTRICT OF _____

In re: _____,
Debtor

Case No. _____
(if known)

STATEMENT OF FINANCIAL AFFAIRS

This statement is to be completed by every debtor. Spouses filing a joint petition may file a single statement on which the information for both spouses is combined. If the case is filed under chapter 12 or chapter 13, a married debtor must furnish information for both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed. An individual debtor engaged in business as a sole proprietor, partner, family farmer, or self-employed professional, should provide the information requested on this statement concerning all such activities as well as the individual's personal affairs. To indicate payments, transfers and the like to minor children, state the child's initials and the name and address of the child's parent or guardian, such as "A.B., a minor child, by John Doe, guardian." Do not disclose the child's name. See, 11 U.S.C. §112 and Fed. R. Bankr. P. 1007(m).

Questions 1 - 18 are to be completed by all debtors. Debtors that are or have been in business, as defined below, also must complete Questions 19 - 25. **If the answer to an applicable question is "None," mark the box labeled "None."** If additional space is needed for the answer to any question, use and attach a separate sheet properly identified with the case name, case number (if known), and the number of the question.

DEFINITIONS

"In business." A debtor is "in business" for the purpose of this form if the debtor is a corporation or partnership. An individual debtor is "in business" for the purpose of this form if the debtor is or has been, within six years immediately preceding the filing of this bankruptcy case, any of the following: an officer, director, managing executive, or owner of 5 percent or more of the voting or equity securities of a corporation; a partner, other than a limited partner, of a partnership; a sole proprietor or self-employed full-time or part-time. An individual debtor also may be "in business" for the purpose of this form if the debtor engages in a trade, business, or other activity, other than as an employee, to supplement income from the debtor's primary employment.

"Insider." The term "insider" includes but is not limited to: relatives of the debtor; general partners of the debtor and their relatives; corporations of which the debtor is an officer, director, or person in control; officers, directors, and any owner of 5 percent or more of the voting or equity securities of a corporate debtor and their relatives; affiliates of the debtor and insiders of such affiliates; any managing agent of the debtor. 11 U.S.C. § 101.

1. Income from employment or operation of business

None

State the gross amount of income the debtor has received from employment, trade, or profession, or from operation of the debtor's business, including part-time activities either as an employee or in independent trade or business, from the beginning of this calendar year to the date this case was commenced. State also the gross amounts received during the **two years** immediately preceding this calendar year. (A debtor that maintains, or has maintained, financial records on the basis of a fiscal year rather than a calendar year may report fiscal year income. Identify the beginning and ending dates of the debtor's fiscal year.) If a joint petition is filed, state income for each spouse separately. (Married debtors filing under chapter 12 or chapter 13 must state income of both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

AMOUNT

SOURCE

2. Income other than from employment or operation of business

None

State the amount of income received by the debtor other than from employment, trade, profession, operation of the debtor's business during the **two years** immediately preceding the commencement of this case. Give particulars. If a joint petition is filed, state income for each spouse separately. (Married debtors filing under chapter 12 or chapter 13 must state income for each spouse whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

AMOUNT

SOURCE

3. Payments to creditors

Complete a. or b., as appropriate, and c.

None

a. *Individual or joint debtor(s) with primarily consumer debts:* List all payments on loans, installment purchases of goods or services, and other debts to any creditor made within **90 days** immediately preceding the commencement of this case unless the aggregate value of all property that constitutes or is affected by such transfer is less than \$600. Indicate with an asterisk (*) any payments that were made to a creditor on account of a domestic support obligation or as part of an alternative repayment schedule under a plan by an approved nonprofit budgeting and credit counseling agency. (Married debtors filing under chapter 12 or chapter 13 must include payments by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF CREDITOR	DATES OF PAYMENTS	AMOUNT PAID	AMOUNT STILL OWING
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None

b. *Debtor whose debts are not primarily consumer debts:* List each payment or other transfer to any creditor made within **90 days** immediately preceding the commencement of the case unless the aggregate value of all property that constitutes or is affected by such transfer is less than \$5,475. If the debtor is an individual, indicate with an asterisk (*) any payments that were made to a creditor on account of a domestic support obligation or as part of an alternative repayment schedule under a plan by an approved nonprofit budgeting and credit counseling agency. (Married debtors filing under chapter 12 or chapter 13 must include payments and other transfers by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF CREDITOR	DATES OF PAYMENTS/ TRANSFERS	AMOUNT PAID OR VALUE OF TRANSFERS	AMOUNT STILL OWING
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None

c. *All debtors:* List all payments made within **one year** immediately preceding the commencement of this case to or for the benefit of creditors who are or were insiders. (Married debtors filing under chapter 12 or chapter 13 must include payments by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF CREDITOR AND RELATIONSHIP TO DEBTOR	DATE OF PAYMENT	AMOUNT PAID	AMOUNT STILL OWING
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4. Suits and administrative proceedings, executions, garnishments and attachments

None

a. List all suits and administrative proceedings to which the debtor is or was a party within **one year** immediately preceding the filing of this bankruptcy case. (Married debtors filing under chapter 12 or chapter 13 must include information concerning either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

CAPTION OF SUIT AND CASE NUMBER	NATURE OF PROCEEDING	COURT OR AGENCY AND LOCATION	STATUS OR DISPOSITION
------------------------------------	----------------------	---------------------------------	--------------------------

None

b. Describe all property that has been attached, garnished or seized under any legal or equitable process within **one year** immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include information concerning property of either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF PERSON FOR WHOSE BENEFIT PROPERTY WAS SEIZED	DATE OF SEIZURE	DESCRIPTION AND VALUE OF PROPERTY
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5. Repossessions, foreclosures and returns

None

List all property that has been repossessed by a creditor, sold at a foreclosure sale, transferred through a deed in lieu of foreclosure or returned to the seller, within **one year** immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include information concerning property of either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF CREDITOR OR SELLER	DATE OF REPOSSESSION, FORECLOSURE SALE, TRANSFER OR RETURN	DESCRIPTION AND VALUE OF PROPERTY
---	--	---

6. Assignments and receivershipsNone

a. Describe any assignment of property for the benefit of creditors made within **120 days** immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include any assignment by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF ASSIGNEE	DATE OF ASSIGNMENT	TERMS OF ASSIGNMENT OR SETTLEMENT
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None

b. List all property which has been in the hands of a custodian, receiver, or court-appointed official within **one year** immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include information concerning property of either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF CUSTODIAN	NAME AND LOCATION OF COURT CASE TITLE & NUMBER	DATE OF ORDER	DESCRIPTION AND VALUE Of PROPERTY
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7. GiftsNone

List all gifts or charitable contributions made within **one year** immediately preceding the commencement of this case except ordinary and usual gifts to family members aggregating less than \$200 in value per individual family member and charitable contributions aggregating less than \$100 per recipient. (Married debtors filing under chapter 12 or chapter 13 must include gifts or contributions by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF PERSON OR ORGANIZATION	RELATIONSHIP TO DEBTOR, IF ANY	DATE OF GIFT	DESCRIPTION AND VALUE OF GIFT
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8. LossesNone

List all losses from fire, theft, other casualty or gambling within **one year** immediately preceding the commencement of this case **or since the commencement of this case**. (Married debtors filing under chapter 12 or chapter 13 must include losses by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

DESCRIPTION AND VALUE OF PROPERTY	DESCRIPTION OF CIRCUMSTANCES AND, IF LOSS WAS COVERED IN WHOLE OR IN PART BY INSURANCE, GIVE PARTICULARS	DATE OF LOSS
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9. Payments related to debt counseling or bankruptcyNone

List all payments made or property transferred by or on behalf of the debtor to any persons, including attorneys, for consultation concerning debt consolidation, relief under the bankruptcy law or preparation of a petition in bankruptcy within **one year** immediately preceding the commencement of this case.

NAME AND ADDRESS OF PAYEE	DATE OF PAYMENT, NAME OF PAYER IF OTHER THAN DEBTOR	AMOUNT OF MONEY OR DESCRIPTION AND VALUE OF PROPERTY
------------------------------	---	--

10. Other transfersNone

a. List all other property, other than property transferred in the ordinary course of the business or financial affairs of the debtor, transferred either absolutely or as security within **two years** immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include transfers by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF TRANSFEREE, RELATIONSHIP TO DEBTOR	DATE	DESCRIBE PROPERTY TRANSFERRED AND VALUE RECEIVED
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None

b. List all property transferred by the debtor within **ten years** immediately preceding the commencement of this case to a self-settled trust or similar device of which the debtor is a beneficiary.

NAME OF TRUST OR OTHER DEVICE	DATE(S) OF TRANSFER(S)	AMOUNT OF MONEY OR DESCRIPTION AND VALUE OF PROPERTY OR DEBTOR'S INTEREST IN PROPERTY
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11. Closed financial accountsNone

List all financial accounts and instruments held in the name of the debtor or for the benefit of the debtor which were closed, sold, or otherwise transferred within **one year** immediately preceding the commencement of this case. Include checking, savings, or other financial accounts, certificates of deposit, or other instruments; shares and share accounts held in banks, credit unions, pension funds, cooperatives, associations, brokerage houses and other financial institutions. (Married debtors filing under chapter 12 or chapter 13 must include information concerning accounts or instruments held by or for either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF INSTITUTION	TYPE OF ACCOUNT, LAST FOUR DIGITS OF ACCOUNT NUMBER, AND AMOUNT OF FINAL BALANCE	AMOUNT AND DATE OF SALE OR CLOSING
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12. Safe deposit boxesNone

List each safe deposit or other box or depository in which the debtor has or had securities, cash, or other valuables within **one year** immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include boxes or depositories of either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF BANK OR OTHER DEPOSITORY	NAMES AND ADDRESSES OF THOSE WITH ACCESS TO BOX OR DEPOSITORY	DESCRIPTION OF CONTENTS	DATE OF TRANSFER OR SURRENDER, IF ANY
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13. SetoffsNone

List all setoffs made by any creditor, including a bank, against a debt or deposit of the debtor within **90 days** preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include information concerning either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF CREDITOR	DATE OF SETOFF	AMOUNT OF SETOFF
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14. Property held for another personNone

List all property owned by another person that the debtor holds or controls.

NAME AND ADDRESS OF OWNER	DESCRIPTION AND VALUE OF PROPERTY	LOCATION OF PROPERTY
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15. Prior address of debtorNone

If debtor has moved within **three years** immediately preceding the commencement of this case, list all premises which the debtor occupied during that period and vacated prior to the commencement of this case. If a joint petition is filed, report also any separate address of either spouse.

ADDRESS	NAME USED	DATES OF OCCUPANCY
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16. Spouses and Former Spouses

None

If the debtor resides or resided in a community property state, commonwealth, or territory (including Alaska, Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Puerto Rico, Texas, Washington, or Wisconsin) within **eight years** immediately preceding the commencement of the case, identify the name of the debtor's spouse and of any former spouse who resides or resided with the debtor in the community property state.

NAME

17. Environmental Information.

For the purpose of this question, the following definitions apply:

"Environmental Law" means any federal, state, or local statute or regulation regulating pollution, contamination, releases of hazardous or toxic substances, wastes or material into the air, land, soil, surface water, groundwater, or other medium, including, but not limited to, statutes or regulations regulating the cleanup of these substances, wastes, or material.

"Site" means any location, facility, or property as defined under any Environmental Law, whether or not presently or formerly owned or operated by the debtor, including, but not limited to, disposal sites.

"Hazardous Material" means anything defined as a hazardous waste, hazardous substance, toxic substance, hazardous material, pollutant, or contaminant or similar term under an Environmental Law.

None

a. List the name and address of every site for which the debtor has received notice in writing by a governmental unit that it may be liable or potentially liable under or in violation of an Environmental Law. Indicate the governmental unit, the date of the notice, and, if known, the Environmental Law:

SITE NAME AND ADDRESS	NAME AND ADDRESS OF GOVERNMENTAL UNIT	DATE OF NOTICE	ENVIRONMENTAL LAW
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None

b. List the name and address of every site for which the debtor provided notice to a governmental unit of a release of Hazardous Material. Indicate the governmental unit to which the notice was sent and the date of the notice.

SITE NAME AND ADDRESS	NAME AND ADDRESS OF GOVERNMENTAL UNIT	DATE OF NOTICE	ENVIRONMENTAL LAW
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None

c. List all judicial or administrative proceedings, including settlements or orders, under any Environmental Law with respect to which the debtor is or was a party. Indicate the name and address of the governmental unit that is or was a party to the proceeding, and the docket number.

NAME AND ADDRESS OF GOVERNMENTAL UNIT	DOCKET NUMBER	STATUS OR DISPOSITION
--	---------------	--------------------------

18. Nature, location and name of business

None

a. *If the debtor is an individual*, list the names, addresses, taxpayer-identification numbers, nature of the businesses, and beginning and ending dates of all businesses in which the debtor was an officer, director, partner, or managing

executive of a corporation, partner in a partnership, sole proprietor, or was self-employed in a trade, profession, or other activity either full- or part-time within **six years** immediately preceding the commencement of this case, or in which the debtor owned 5 percent or more of the voting or equity securities within **six years** immediately preceding the commencement of this case.

If the debtor is a partnership, list the names, addresses, taxpayer-identification numbers, nature of the businesses, and beginning and ending dates of all businesses in which the debtor was a partner or owned 5 percent or more of the voting or equity securities, within **six years** immediately preceding the commencement of this case.

If the debtor is a corporation, list the names, addresses, taxpayer-identification numbers, nature of the businesses, and beginning and ending dates of all businesses in which the debtor was a partner or owned 5 percent or more of the voting or equity securities within **six years** immediately preceding the commencement of this case.

NAME	LAST FOUR DIGITS OF SOCIAL-SECURITY OR OTHER INDIVIDUAL TAXPAYER-I.D. NO. (ITIN)/ COMPLETE EIN	ADDRESS	NATURE OF BUSINESS	BEGINNING AND ENDING DATES
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None

b. Identify any business listed in response to subdivision a., above, that is "single asset real estate" as defined in 11 U.S.C. § 101.

NAME

ADDRESS

The following questions are to be completed by every debtor that is a corporation or partnership and by any individual debtor who is or has been, within **six years** immediately preceding the commencement of this case, any of the following: an officer, director, managing executive, or owner of more than 5 percent of the voting or equity securities of a corporation; a partner, other than a limited partner, of a partnership, a sole proprietor, or self-employed in a trade, profession, or other activity, either full- or part-time.

*(An individual or joint debtor should complete this portion of the statement **only** if the debtor is or has been in business, as defined above, within six years immediately preceding the commencement of this case. A debtor who has not been in business within those six years should go directly to the signature page.)*

19. Books, records and financial statements

None

a. List all bookkeepers and accountants who within **two years** immediately preceding the filing of this bankruptcy case kept or supervised the keeping of books of account and records of the debtor.

NAME AND ADDRESS

DATES SERVICES RENDERED

None

b. List all firms or individuals who within **two years** immediately preceding the filing of this bankruptcy case have audited the books of account and records, or prepared a financial statement of the debtor.

NAME

ADDRESS

DATES SERVICES RENDERED

None

c. List all firms or individuals who at the time of the commencement of this case were in possession of the books of account and records of the debtor. If any of the books of account and records are not available, explain.

NAME	ADDRESS
------	---------

None

d. List all financial institutions, creditors and other parties, including mercantile and trade agencies, to whom a financial statement was issued by the debtor within **two years** immediately preceding the commencement of this case.

NAME AND ADDRESS	DATE ISSUED
------------------	-------------

20. Inventories

None

a. List the dates of the last two inventories taken of your property, the name of the person who supervised the taking of each inventory, and the dollar amount and basis of each inventory.

DATE OF INVENTORY	INVENTORY SUPERVISOR	DOLLAR AMOUNT OF INVENTORY (Specify cost, market or other basis)
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None

b. List the name and address of the person having possession of the records of each of the inventories reported in a., above.

DATE OF INVENTORY	NAME AND ADDRESSES OF CUSTODIAN OF INVENTORY RECORDS
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21 . Current Partners, Officers, Directors and Shareholders

None

a. If the debtor is a partnership, list the nature and percentage of partnership interest of each member of the partnership.

NAME AND ADDRESS	NATURE OF INTEREST	PERCENTAGE OF INTEREST
------------------	--------------------	------------------------

None

b. If the debtor is a corporation, list all officers and directors of the corporation, and each stockholder who directly or indirectly owns, controls, or holds 5 percent or more of the voting or equity securities of the corporation.

NAME AND ADDRESS	TITLE	NATURE AND PERCENTAGE OF STOCK OWNERSHIP
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22 . Former partners, officers, directors and shareholdersNone

a. If the debtor is a partnership, list each member who withdrew from the partnership within **one year** immediately preceding the commencement of this case.

NAME	ADDRESS	DATE OF WITHDRAWAL
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None

b. If the debtor is a corporation, list all officers or directors whose relationship with the corporation terminated within **one year** immediately preceding the commencement of this case.

NAME AND ADDRESS	TITLE	DATE OF TERMINATION
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23 . Withdrawals from a partnership or distributions by a corporationNone

If the debtor is a partnership or corporation, list all withdrawals or distributions credited or given to an insider, including compensation in any form, bonuses, loans, stock redemptions, options exercised and any other perquisite during **one year** immediately preceding the commencement of this case.

NAME & ADDRESS OF RECIPIENT, RELATIONSHIP TO DEBTOR	DATE AND PURPOSE OF WITHDRAWAL	AMOUNT OF MONEY OR DESCRIPTION AND VALUE OF PROPERTY
---	-----------------------------------	--

24. Tax Consolidation Group.None

If the debtor is a corporation, list the name and federal taxpayer-identification number of the parent corporation of any consolidated group for tax purposes of which the debtor has been a member at any time within **six years** immediately preceding the commencement of the case.

NAME OF PARENT CORPORATION	TAXPAYER-IDENTIFICATION NUMBER (EIN)
----------------------------	--------------------------------------

25. Pension Funds.None

If the debtor is not an individual, list the name and federal taxpayer-identification number of any pension fund to which the debtor, as an employer, has been responsible for contributing at any time within **six years** immediately preceding the commencement of the case.

NAME OF PENSION FUND	TAXPAYER-IDENTIFICATION NUMBER (EIN)
----------------------	--------------------------------------

* * * * *

[If completed by an individual or individual and spouse]

I declare under penalty of perjury that I have read the answers contained in the foregoing statement of financial affairs and any attachments thereto and that they are true and correct.

Date	_____	Signature of Debtor	_____
Date	_____	Signature of Joint Debtor (if any)	_____

[If completed on behalf of a partnership or corporation]

I declare under penalty of perjury that I have read the answers contained in the foregoing statement of financial affairs and any attachments thereto and that they are true and correct to the best of my knowledge, information and belief.

Date	_____	Signature	_____
		Print Name and Title	_____

[An individual signing on behalf of a partnership or corporation must indicate position or relationship to debtor.]

____continuation sheets attached

Penalty for making a false statement: Fine of up to \$500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571

DECLARATION AND SIGNATURE OF NON-ATTORNEY BANKRUPTCY PETITION PREPARER (See 11 U.S.C. § 110)

I declare under penalty of perjury that: (1) I am a bankruptcy petition preparer as defined in 11 U.S.C. § 110; (2) I prepared this document for compensation and have provided the debtor with a copy of this document and the notices and information required under 11 U.S.C. §§ 110(b), 110(h), and 342(b); and, (3) if rules or guidelines have been promulgated pursuant to 11 U.S.C. § 110(h) setting a maximum fee for services chargeable by bankruptcy petition preparers, I have given the debtor notice of the maximum amount before preparing any document for filing for a debtor or accepting any fee from the debtor, as required by that section.

Printed or Typed Name and Title, if any, of Bankruptcy Petition Preparer

Social-Security No. (Required by 11 U.S.C. § 110.)

If the bankruptcy petition preparer is not an individual, state the name, title (if any), address, and social-security number of the officer, principal, responsible person, or partner who signs this document.

Address

Signature of Bankruptcy Petition Preparer

Date

Names and Social-Security numbers of all other individuals who prepared or assisted in preparing this document unless the bankruptcy petition preparer is not an individual:

If more than one person prepared this document, attach additional signed sheets conforming to the appropriate Official Form for each person

A bankruptcy petition preparer's failure to comply with the provisions of title 11 and the Federal Rules of Bankruptcy Procedure may result in fines or imprisonment or both. 18 U.S.C. § 156.

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE	)	CASE NO. 05-83637-pwb
)	
SCOTT M. ZIMMERMAN,	)	JUDGE BONAPFEL
)	
Debtor.	)	CHAPTER 7
_____)	
)	
CYNTHIA HOLLAND, INDIVIDUALLY AND	)	ADVERSARY PROCEEDING
AS TRUSTEE OF THE MICHAEL T.)	
HOLLAND, INC. PENSION PLAN AND TRUST,	)	NO. _____
MICHAEL HOLLAND, INDIVIDUALLY AND)	
AS TRUSTEE OF THE MICHAEL T.)	
HOLLAND, INC. PENSION PLAN AND TRUST,)	
WILLIAM KELLER,)	
SUZANNE KELLER,)	
SUZAN LATONA,)	
CARMEN LATONA,)	
ED HALL,)	
WILLIAM KLUMPP,)	
ROBERT THORN,)	
WAYNE WITTER,)	
JO ANN WORRELL and)	
RICHARD WORRELL,)	
)	
Plaintiffs,)	
)	
v.)	
)	
SCOTT M. ZIMMERMAN,)	
)	
Defendant.)	

COMPLAINT TO DETERMINE DISCHARGEABILITY OF A DEBT

COME NOW Plaintiffs, by and through undersigned counsel, and pursuant to Federal Rule of Bankruptcy Procedure 4007(c) hereby file this Complaint to Determine Dischargeability

of a Debt in the case of the above named debtor, Scott M. Zimmerman (“Debtor”). In support of the Complaint, Plaintiffs show the Court as follows:

1. On October 15, 2005 (the “Petition Date”), Debtor filed a voluntary petition for relief under Title 11, Chapter 7 of the United States Code (the “Bankruptcy Code”), case number 05-83637, in the United States Bankruptcy Court for the Northern District of Georgia, Atlanta Division. By virtue of the filing, Debtor has submitted himself to the jurisdiction and venue of this bankruptcy court.

2. This is a civil proceeding which arises in or relates to this bankruptcy case under Title 11. It is a core proceeding within the meaning of 28 U.S.C. §157(b)(2)(I). This Court has jurisdiction pursuant to 28 U.S.C. §§ 157 and 1334(b).

3. This adversary proceeding is initiated in accordance with Rule 7003 of the Federal Rules of Bankruptcy Procedure.

4. Plaintiffs are creditors and parties in interest in the bankruptcy case of Debtor because of investments they made that were recommended and sold to them by Debtor and others.

5. Prior to the Petition Date, in July, 2005, Plaintiffs filed 3 separate arbitration proceedings (the “Arbitrations”) before the National Association of Securities Dealers (“NASD”) setting forth claims against Debtor and other named respondents (the “Additional Respondents”).¹ The statements of claim filed in the Arbitrations are attached as collective Exhibit “A.”

¹In the statements of claim, Plaintiffs named as additional respondents: MidSouth Capital, Inc., Z Capital Management, Mark David Hill, David Blume, John D. Margeson, Jr., Melanie P. Megenity, John Baron, Jr. and Jean Marie Baun.

6. The Arbitrations arise out of investments made by Plaintiffs in a fund called the Get Long? LP Fund (“the Fund”) which was recommended and sold to them by Debtor and the Additional Respondents. The Fund was apparently nothing other than a hedge fund and vehicle for Debtor to engage in high risk, speculative trading. As a result of Debtor’s actions, Plaintiffs collectively lost well over \$1 million.

7. In the Arbitrations, Plaintiffs have alleged that the conduct of Debtor has given rise to legal claims including, but not limited to, the following:

(a) Violations of the registration provisions of various state securities acts, including those of Arkansas, Florida, Pennsylvania, Minnesota and Georgia, and the Securities Act of 1933, 15 U.S.C. §77a, *et seq.* (“the 1933 Act”);

(b) Violations of the antifraud provisions of various state securities acts, including those of Arkansas, Florida, Pennsylvania, Minnesota and Georgia, the 1933 Act and the Securities and Exchange Act of 1934; 15 U.S.C. §78a, *et seq.*;

(c) Common law fraud, misrepresentation and negligent misrepresentation;

(d) Breach of contract and breach of duty;

(e) Breach of fiduciary duty;

(f) Suitability and failure to diversify;

(g) Negligence; and,

(h) Breach of an agent’s duty to conduct a principal’s business solely for the benefit of the principal.²

8. The Commissioner of Securities for the State of Georgia initiated an investigation of Debtor because of his actions relating to the Fund, and on June 2, 2005, Debtor consented to an entry of a Consent Order in which he admitted to certain findings of fact and conclusions of

² These same claims and other additional claims have been asserted against the Additional Respondents.

law. A copy of that Consent Order is attached as Exhibit “B.” In that Consent Order, Debtor admitted that:

(a) He violated the Georgia Securities Act when he offered and sold the Fund units which were securities because he was not registered with the Georgia Securities Commissioner as a securities salesperson for either Z Capital or the Fund;

(b) He violated the Georgia Securities Act when he charged Fund investors a “management fee” because he was not registered with the Georgia Securities Commissioner as an investment adviser or investment adviser representative with Z Capital;

(c) He violated the Georgia Securities Act because the offer and sale of the units in the Fund were not subject to an effective registration statement or exempt from registration as required under that act; and,

(d) He violated the Georgia Securities Act when he offered and sold the Fund units because he failed to disclose the inherent risks associated with “day trading”.

9. Under the terms of the Consent Order, Debtor agreed to be permanently barred from working in the securities industry ever again. Plaintiffs further believe based on testimony given by Debtor at his §341 hearing that he entered into a similar consent order with the NASD.

CONCLUSION

10. In recommending that Plaintiffs invest in the Fund, Debtor violated numerous provisions of various federal and state securities statutes and committed, *inter alia*, fraud, misrepresentation and breaches of fiduciary duty. In addition, Debtor willfully and maliciously caused injury to Plaintiffs. Accordingly, the debt that Debtor owes Plaintiffs as a result of Plaintiffs’ investment in the Fund is excepted from discharge pursuant to 11 U.S.C. §523(a)(2), (4) and (6).

11. Contemporaneous with the filing of this Complaint to Determine Dischargeability of a Debt Plaintiffs are filing a Motion to Stay Adversary Proceeding and Lift Automatic Stay so that Plaintiffs May Pursue Arbitrations. This adversary proceeding is commenced to meet the filing requirements of Federal Rule of Bankruptcy Procedure 4007(c), but Plaintiffs believe that the Court should stay this action pending the conclusion of the Arbitrations under, inter alia, the strong presumption in favor of arbitration, to promote judicial economy and the interest of justice.

WHEREFORE, Plaintiffs prays that this Court:

(a) Determine that the debts arising from and in connection with amounts invested by Plaintiffs in the Fund are nondischargeable debts of Debtor pursuant to 11 U.S.C. §523(a)(2), (4) and (6); and,

(b) Grant such other and further relief as is just and proper.

This 19th day of January, 2006.

LAMBERTH, CIFELLI, STOKES
& STOUT, P.A.

/s/ Chris D. Phillips
James C. Cifelli
Georgia Bar No. 125750
Chris D. Phillips
Georgia Bar No. 575913
3343 Peachtree Road, NE
Suite 550, East Tower
Atlanta, Georgia 30326
(404) 262-7373
Fax: (404) 262-9911

and

Frank A. Lightmas, Jr.
LIGHTMAS & DELK
Georgia Bar No. 452325
Suite 1150, The Peachtree
1355 Peachtree St., N.E.
Atlanta, GA 30309
(404) 876-3335
Fax: (404) 876-3338

UNITED STATES BANKRUPTCY COURT
 NORTHERN DISTRICT OF GEORGIA
 ATLANTA DIVISION

IN RE	)	CASE NO. 05-83637-pwb
)	
SCOTT M. ZIMMERMAN,	)	JUDGE BONAPFEL
)	
Debtor.	)	CHAPTER 7
_____)	
)	
CYNTHIA HOLLAND, INDIVIDUALLY AND	)	ADVERSARY PROCEEDING
AS TRUSTEE OF THE MICHAEL T.)	
HOLLAND, INC. PENSION PLAN AND TRUST,	)	NO. 06-06047
MICHAEL HOLLAND, INDIVIDUALLY AND)	
AS TRUSTEE OF THE MICHAEL T.)	
HOLLAND, INC. PENSION PLAN AND TRUST,)	
WILLIAM KELLER,)	
SUZANNE KELLER,)	
SUZAN LATONA,)	
CARMEN LATONA,)	
ED HALL,)	
WILLIAM KLUMPP,)	
ROBERT THORN,)	
WAYNE WITTER,)	
JO ANN WORRELL and)	
RICHARD WORRELL,)	
)	
Plaintiffs,)	
)	
v.)	
)	
SCOTT M. ZIMMERMAN,)	
)	
Defendant.)	

**AMENDMENT TO COMPLAINT TO
 DETERMINE DISCHARGEABILITY OF A DEBT**

COME NOW Plaintiffs, by and through undersigned counsel, and hereby file this Amendment to their Complaint to Determine Dischargeability of a Debt (the “Complaint”) in the

case of the above named debtor, Scott M. Zimmerman (“Debtor”) and show the Court as follows:

1. Plaintiffs hereby amend the Complaint to amend paragraph 10 so that it will now read as follows:

10. In recommending that Plaintiffs invest in the Fund, Debtor violated numerous provisions of various federal and state securities statutes and committed, *inter alia*, fraud, misrepresentation and breaches of fiduciary duty. In addition, Debtor willfully and maliciously caused injury to Plaintiffs. Accordingly, the debt that Debtor owes Plaintiffs as a result of Plaintiffs’ investment in the Fund is excepted from discharge pursuant to 11 U.S.C. §523(a)(2), (4), (6), and (19).

2. Plaintiffs hereby amend the Complaint to amend the prayer so that it will now read as follows:

WHEREFORE, Plaintiffs prays that this Court:

- (a) Determine that the debts arising from and in connection with amounts invested by Plaintiffs in the Fund are nondischargeable debts of Debtor pursuant to 11 U.S.C. §523(a)(2), (4),(6), and (19); and,
- (b) Grant such other and further relief as is just and proper.

3. Any and all other paragraphs in Plaintiffs’ Complaint not specifically amended herein shall remain as originally filed.

WHEREFORE, Plaintiffs pray that its Amendment be allowed and for such other and further relief as this Court deems just and proper.

(Signatures Continued on Next Page)

[AMENDMENT TO COMPLAINT TO DETERMINE DISCHARGEABILITY OF A DEBT, Case No. 05-83637-pwb, Adv. Proc. 06-06047]

This 27th day of March, 2006.

LAMBERTH, CIFELLI, STOKES
& STOUT, P.A.

/s/ Chris D. Phillips
James C. Cifelli
Georgia Bar No. 125750
Chris D. Phillips
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3343 Peachtree Road, NE
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(404) 262-7373
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and

Frank A. Lightmas, Jr.
LIGHTMAS & DELK
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Fax: (404) 876-3338

ENTERED ON DOCKET
MAR 13 2007

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE)

CHAPTER 7)

SCOTT M. ZIMMERMAN,)

CASE NO. 05-83637-pwb)

Debtor.)

CYNTHIA HOLLAND, INDIVIDUALLY AND)
AS TRUSTEE OF THE MICHAEL T.)
HOLLAND, INC. PENSION PLAN AND TRUST,)
MICHAEL HOLLAND, INDIVIDUALLY AND)
AS TRUSTEE OF THE MICHAEL T.)
HOLLAND, INC. PENSION PLAN AND TRUST,)
WILLIAM KELLER,)
SUZANNE KELLER,)
SUZAN LATONA,)
CARMEN LATONA,)
ED HALL,)
WILLIAM KLUMPP,)
ROBERT THORN,)
WAYNE WITTER,)
JO ANN WORRELL and)
RICHARD WORRELL,)

ADVERSARY PROCEEDING)

NO. 06-06047)

Plaintiffs,)

v.)

SCOTT M. ZIMMERMAN,)

Defendant.)

CONSENT ORDER EXCEPTING SECURITIES DEBT FROM DISCHARGE

This adversary proceeding came before the Court on Plaintiff's complaint, filed January 19, 2006, against Scott M. Zimmerman ("Debtor") requesting that the Court determine that obligations arising out of Debtor's dealings with Plaintiffs in connection with their investments in a fund called the Get Long? LP Fund are nondischargeable debts of Debtor pursuant to 11

U.S.C. § 523(a)(2), (4) and (6). Also on January 19, 2006, Plaintiffs filed a "Motion to Stay Adversary Proceeding and Lift Automatic Stay so that Plaintiffs May Pursue Arbitrations." Prior to filing this adversary proceeding, in July of 2005, Plaintiffs had filed three separate arbitration proceedings before the National Association of Securities Dealers (the "NASD Arbitrations") setting forth claims against Debtor and other named respondents.

On March 27, 2006, Plaintiffs filed a Motion for Leave to Amend Complaint to Determine Dischargeability of Debt, and on April 13, 2006, the Court entered a Consent Order Amending Complaint to Determine Dischargeability of a Debt to Add a Claim Under § 523(a)(19). On April 19, 2006, the Court entered an order (the "Order") modifying the automatic stay of 11 U.S.C. § 362(a) to permit the Plaintiffs to proceed with the NASD Arbitrations, and staying this adversary proceeding pending further order of the Court.

On or about November 1, 2006, Plaintiffs and Debtor signed a "Stipulated Consent Award" which stated that "[a]n award is hereby entered in favor of [Plaintiffs] and against [Debtor] in the amount of \$1 million." See Exhibit "A" to Motion for Consent Order Excepting Securities from Discharge (Doc. No. 25). On or about December 6, 2006, an "Arbitration Award" was issued by the NASD arbitration panel in accordance with NASD dispute resolution procedure, stating that "an award is hereby entered in favor of [Plaintiffs] in the amount of \$1,000,000." See Exhibit "B" to Motion for Consent Order Excepting Securities from Discharge (Doc. No. 25).

On ~~January~~ ^{March} 8, 2007, Plaintiffs, with the consent of Debtor, filed a Motion for Consent Order Excepting Securities from Discharge (the "Motion"). The Motion stated that, "Plaintiff agrees that the \$1 million debt set forth in the Stipulated Consent Award and Arbitration Award (the "Securities Debt") is a debt for the violation of Federal and State securities laws and is

nondischargeable pursuant to 11 U.S.C. § 523(a)(2),(4), (6) and (19).” Motion, ¶ 8.

Accordingly, it is hereby,

ORDERED and ADJUDGED, that the Securities Debt is nondischargeable pursuant to 11 U.S.C. § 523(a)(2),(4), (6) and (19); and it is further


ORDERED, that Plaintiffs have a nondischargeable debt of \$1,000,000 against Defendant/Debtor Scott M. Zimmerman, consistent with the Stipulated Consent Award and Arbitration Award described herein.

IT IS SO ORDERED this 7 day of ^{March} ~~January~~, 2007.


PAUL W. BONAPFEL
Judge, United States Bankruptcy Court

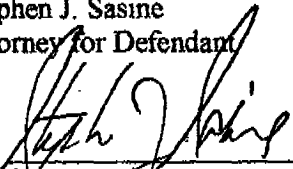
Prepared and Consented to by:

LAMBERTH, CIFELLI, STOKES
& STOUT, P.A.
Attorneys for Plaintiffs

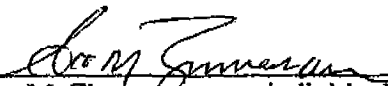
By: 
Chris D. Phillips
Georgia Bar No. 575913
3343 Peachtree Road N.E.; Suite 550
Atlanta, GA 30326-1009
(404) 262-7373

Consented to by:

Stephen J. Sasine
Attorney for Defendant

By: 
Stephen J. Sasine
Georgia Bar No. 626850
Suite 275 Lenox Plaza
3384 Peachtree St., NE
Atlanta, GA 30326-1106
(404) 869-8929

Consented to by:

By: 
Scott M. Zimmerman, an individual
Resident of the State of Georgia

Distribution List:

Chris D. Phillips, Lamberth, Cifelli, Stokes & Stout, P.A., 3343 Peachtree Rd. N.E., Suite 550,
Atlanta, GA 30326

Steve J. Sasine, Suite 275 Lenox Plaza, 3384 Peachtree St., NE, Atlanta, GA 30326-1106

Scott M. Zimmerman, 160 Wicksford Glenn, Atlanta, GA 30350

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS

_____)	
IGOR POTAPOV and)	
B.A. MAKDEN CORPORATION,)	
Plaintiffs/Creditors,)	Adversary Proceeding No. 05-01076
v.)	Consolidated Proceedings: 05-01600
IRINA DUNN, ALAN DAVIDSON)	05-01601
and ALEXANDER SHERMAN)	
Defendants/Debtors.)	
_____)	

PLAINTIFFS' AMENDED COMPLAINT

NOW COME the Plaintiffs/Creditors, Igor Potapov and B.A. Makden Corp. and hereby file their amended complaint to determine the non-dischargeability of a debt owed by the Defendants/Debtors, Irina Dunn, Alan Davidson and Alexander Sherman.

PARTIES

1. Plaintiff, Igor Potapov (hereinafter referred to as "Potapov" or "Plaintiff") is an individual who has a usual address located in Newton, Middlesex County, Massachusetts.

2. Plaintiff, B.A. Makden Corporation (hereinafter referred to as "Makden" or "Plaintiff") is a Massachusetts corporation with a usual address located in Framingham, Middlesex County, Massachusetts.

3. Defendant, Irina Dunn (hereinafter referred to as "Dunn" or "Defendant") is an individual who resides in Brookline, Norfolk County, Massachusetts. On or about

January 14, 2005, Dunn filed a Petition under Chapter 7 of the United States Bankruptcy Code pursuant to 11 U.S.C §101 *et. seq.*

4. Defendant, Alexander Sherman (hereinafter referred to as “Sherman” or “Defendant”) is an individual who resides in Chestnut Hill, Norfolk County, Massachusetts. On or about October 14, 2005, Sherman filed a Petition under Chapter 7 of the United States Bankruptcy Code pursuant to 11 U.S.C §101 *et. seq.*

5. Defendant, Alan Davidson (hereinafter referred to as “Davidson” or “Defendant”) is an individual who resides in Needham, Norfolk County, Massachusetts. On or about October 14, 2005, Davidson filed a Petition under Chapter 7 of the United States Bankruptcy Code pursuant to 11 U.S.C §101 *et. seq.*

JURISDICTION

6. This action is a core proceeding pursuant to 28 U.S.C. §157. This Court has jurisdiction over this proceeding pursuant to 28 U.S.C. §§ 151, 157 and 1334.

FACTS

7. On or about December 10, 2004, the National Association of Securities Dealers (hereinafter the “NASD”) issued an arbitration award in a certain securities arbitration matter that had been commenced by Potapov and Makden against the Debtors captioned: Igor Potapov, et al. v. Whitehorne & Co., Ltd., et al. NASD Case No. 01-04937 (hereinafter the “NASD arbitration”).

8. The Defendants, Dunn, Davidson and Sherman were three of the named Respondents in the NASD arbitration filed by the Plaintiffs.

9. The NASD arbitration award held that Dunn, Davidson and Sherman were jointly and severally liable to Potapov and Makden for damages in the sum of \$983,000.00.

10. The NASD arbitration arose from certain improper and illegal trading activities which occurred in the Plaintiffs' margin accounts that they held at a broker/dealer firm known as Whitehorne & Co., Ltd. (hereinafter 'Whitehorne') which was located in Newton, Massachusetts.

11. Dunn, Davidson and Sherman were all partners in Whitehorne and each managed and operated that broker/dealer firm.

12. Dunn was a licensed broker with Whitehorne and she was a registered representative for the firm from on or about of March 1999 through January of 2000.

13. Davidson was a licensed securities principal, compliance officer and a licensed broker for the Whitehorne firm from on or about March 1999 through November of 2001.

14. Sherman was a director, officer and active control person of Whitehorne from on or about March 1999 through November of 2001.

15. Dunn, Davidson and Sherman planned and participated in a scheme to convert and/or misappropriate the Plaintiffs' Whitehorne margin accounts and the funds that they held in their accounts.

16. From on or about October 15, 1999 through December 1, 1999, the Defendants transferred and/or caused to be transferred certain losing positions from four of their customers' account to the Plaintiffs' accounts in order to cover the positions and pay off the substantial losses which had resulted from those trades.

17. Dunn, Davidson and Sherman made an agreement and decision to cover and satisfy the substantial deficiencies that had occurred in the accounts known as Coero, Duhon, Anselm and Lender accounts by instructing Whitehorne's clearing broker to transfer and/or rebill those losing positions to the Plaintiffs' accounts which held sufficient funds to cover the losses.

18. Each Defendant had knowledge and understood that Whitehorne's customers, Coero, Duhon and Anselm would not pay the deficiencies in their accounts, and therefore, Whitehorne's business operations would be shut down and the clearing broker would ultimately look to the Defendants to satisfy the losses.

19. In order to keep Whitehorne in operation and to avoid substantial personal liability for the customers' deficiencies, the Defendants agreed to transfer and/or caused

to be transferred certain open and uncovered option positions from the Coero, Duhon, Anselm and Lender accounts to the Plaintiffs' margin accounts which were used to satisfy the deficiencies.

20. The transfer of the positions into the Plaintiffs' accounts resulted in losses of approximately \$983,000.00 which the Plaintiffs incurred.

21. Potapov and Makden had no knowledge of the improper trading activities which occurred in their accounts until mid December of 1999, after the positions had already been transferred and booked and the losses had accrued on their accounts.

22. The Plaintiffs commenced the NASD arbitration against Dunn, Sherman and Davidson on or about September 10, 2001. Whitehorne and the clearing broker named Fiserv Securities, Inc. were also named as respondents in the arbitration.

23. The NASD held a hearing on merits over eleven days in Boston, Massachusetts which concluded on October 25, 2004.

24. The Defendants' actions and conduct with respect to the illegal and improper trading activities in the Plaintiffs' accounts which they participated in and benefited from, constituted embezzlement, larceny, conversion, misappropriation, fraud and/or deceit,

25. Each Defendant participated in the NASD arbitration and each was represented by counsel.

26. One hundred and forty seven exhibits were introduced into evidence in the arbitration proceeding and the NASD panel heard testimony from thirteen witnesses.

27. Pursuant to the Memorandum and Order of the United States District Court (Saris, J) dated February 27, 2007 that was issued in this matter, it has been established as "Law of the Case" that an unlawful conversion of the Plaintiffs' margin accounts had occurred and which is now a binding determination with respect to that claim in this adversary proceeding.

28. Pursuant to the Memorandum and Order of the United States District Court (Saris, J) dated February 27, 2007 that was issued in this matter, it has been established as "Law of the Case" that there was no authorization by the Plaintiffs for the transfers of the securities and positions into the Plaintiffs' margin accounts which resulted in \$983,000.00 in losses and which is now a binding determination with respect to that issue and defense which was proffered by the Defendants in this adversary proceeding.

COUNT I
(§523(a)(4))

29. The Plaintiffs repeat and incorporate paragraphs 1-28 as if fully stated herein.

30. Dunn, Davidson and Sherman participated in and committed an intentional and deliberate conversion, misappropriation, embezzlement and/or larceny of the Plaintiffs' margin accounts and/or of the funds that the Plaintiffs held in said accounts.

31. Each Defendant benefited from the conversion, misappropriation, embezzlement and/or larceny which was perpetrated with respect to the Plaintiffs' Whitehorne accounts.

32. The NASD award which arose from the Defendants' actions and conduct as aforesaid, constitutes a non-dischargeable debt under 11 U.S.C. §523(a)(4) which provides that a debt is excepted from discharge when it arises from "fraud or defalcation while acting in a fiduciary capacity, embezzlement or larceny."

33. The NASD award is a non-dischargeable debt under §523(a)(4) as to each Defendant individually and as to all of the Defendants jointly and severally.

COUNT II
(§523(a)(6))

34. The Plaintiffs repeat and incorporate paragraphs 1-28 as if fully stated herein.

35. Dunn, Davidson and Sherman actions and conduct as aforesaid, constitutes a willful, intentional and malicious injury to the Plaintiffs and/or their property.

36. Each Defendant benefited from the willful, intentional and malicious injury to the Plaintiffs and/or their property.

37. The NASD award which arose from the Defendants' actions and conduct as aforesaid, constitutes a non-dischargeable debt under 11 U.S.C. §523(a)(6) which provides that a debt is excepted from discharge when it arises from a "willful and

malicious injury by the debtor to another entity or to the property of another entity.”

38. The NASD award is a non-dischargeable debt under §523(a)(6) as to each Defendant individually and as to all of the Defendants jointly and severally.

COUNT III
(§523(a)(19))

39. The Plaintiffs repeat and incorporate paragraphs 1-28 as if fully stated herein.

40. The NASD award issued against the Defendants, jointly and severally, constituted violations of Federal and/or State securities laws, rules and/or regulations.

41. The Defendants’ actions and/or conduct with respect to their agreement and scheme to illegally transfer and/or rebill customer losses into the Plaintiffs’ accounts, were in violation of the following securities laws, rules and/or regulations:

- a. Rule 10(b)(5) of the Securities Exchange Act of 1934, 15 U.S.C §78j(b);
- b. §20 of the Securities Exchange Act of 1934, 15 U.S.C. §78t(a);
- c. NASD Conduct Rules 2120 and IM-2310-2; and
- d. Massachusetts General Laws, ch. 110A §101.

42. The NASD Award issued against the Defendants, jointly and severally, also arose from the Defendants’ conduct and actions as set forth herein and which constituted common law fraud, deceit or manipulation in connection with the purchase or sale of any security.

43. The NASD Award held by the Plaintiffs and issued against the Defendants, jointly and severally, constitutes a judgment, order, decree or administrative order in accordance with 11 U.S.C. §523(a)(19)(B)(i),(iii).

44. The NASD award is a non-dischargeable debt under §523(a)(19) as to each Defendant individually and as to all of the Defendants jointly and severally.

WHEREFORE, Plaintiffs, Igor Potapov and B.A. Makden Corporation request judgment against Defendant, Dunn, Davidson and Sherman as follows:

a. that the Court rule and determine that the debt owed to the Plaintiffs in connection with the NASD arbitration award in the amount of \$983,000.00 is non-dischargeable as to each Defendant individually under 11 U.S.C. §523(a)(6) and/or §523(a)(4) and/or §523(a)(19);

b. that the Court rule and determine that the debt owed to the Plaintiffs in connection with the NASD arbitration award in the amount of \$983,000.00 is non-dischargeable as to the Defendants jointly and severally under 11 U.S.C. §523(a)(6) and/or §523(a)(4) and/or §523(a)(19);

c. that the Court determine and enter an order that the Defendants' debt to the Plaintiffs is in the sum of \$983,000.00 and is non-dischargeable;

e. that the Court award interest on said judgment and costs; and

f. for such other and further relief that the Court deems just and proper.

RESPECTFULLY SUBMITTED
IGOR POTAPOV,
and B.A. MAKDEN CORPORATION.
By their attorney

/s/ Edward J. Fallman
Edward J. Fallman
BBO# 561326
607 North Ave.-Suite 17
Wakefield, MA 01880
(781) 246-2429

CERTIFICATE OF SERVICE

I, Edward J. Fallman, hereby certify that a copy of the within amended complaint was served on the counsel of record for each party in the adversary proceeding by filing the same with Court's Electronic Case Filing (ECF) System on this 11th day of March, 2008 which provided electronic service and notice of the amended complaint to each party and/or counsel of record.

/s/ Edward J. Fallman.