IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

IN RE:

ROBERT WILLIAM MATTHEWS, Debtor.	)	Bankr. Case No. 07-10108-BH Chapter 7

OKLAHOMA DEPARTMENT OF SECURITIES *ex rel.* IRVING L. FAUGHT, Administrator, et al., Plaintiff/Appellee, v. ROBERT WILLIAM MATTHEWS, Defendant/Appellant, and IN RE: MARVIN LEE WILCOX and PAMELA JEAN WILCOX, Debtors.	)	Adversary No. 07-01140-BH Bankr. Case No. 07-10610-BH Chapter 7

OKLAHOMA DEPARTMENT OF SECURITIES *ex rel.* IRVING L. FAUGHT, Administrator, et al., Plaintiff/Appellee, v. MARVIN LEE WILCOX and PAMELA JEAN WILCOX, Defendants/Appellants.	)	Adversary No. 07-01226-BH

APPELLANTS' REPLY TO PLAINTIFF'S RESPONSE TO MOTION FOR STAY OF ORDER

Defendants/Appellants, Robert William Matthews ("Matthews"), Marvin Lee Wilcox ("M Wilcox") and Pamela Jean Wilcox ("P. Wilcox") (collectively, "Appellants"), reply to Plaintiff's response to Appellants' motion for an order staying the Order Granting Summary Judgment entered by this Court on December 12, 2008, stating as follows:

It its response, Plaintiff goes to great lengths criticizing the likelihood of Appellant's success on its appellate efforts. Without here presenting an entire appellant brief, some discussion may serve to assist the Court's in its weighing of Appellant's argument.

Introduction

11 U.S.C. § 523(a)(19) renders nondischargeable a debt that is "for the violation" of certain federal securities laws and results from an order in a federal judicial proceeding. The facts concerning the subject debt are not in serious dispute. The parties agree that there is a "debt" and "violations of federal securities laws" were found to have been committed by a party other than the Appellants. The single question of law presented is whether the subject debt itself is "for" a securities "violation" as required by 11 U.S.C. § 523(a)(19) in the absence of a securities violation by the Appellants. Appellants have argued that the debt in this case is not for their own violations of securities laws. Rather, the debt itself is for disgorgement of an unjust enrichment by Appellants from third parties who were found to have committed securities violations. Appellants have been ordered to disgorge this unjust benefit to them.

Plaintiff's position appears to be that any "securities law claim" that it pursues against an otherwise innocent third party constitutes a "securities law violation" which prohibits discharge under 11 U.S.C. § 523(a)(19). This argument leads to the creation of a broad exception to discharge that would be carved out for the Plaintiff such that any debt owed by any innocent

third party to another would become nondischargeable the debt had any connection to another party was found to have committed a securities violation. **Plaintiff has not presented any evidence either in the state court or in the bankruptcy court actions that the Appellants violated any securities laws. The state court judgment against Appellants was for unjust enrichment.** Had Congress intended for all 'claims' 'arising' under securities laws to be nondischargeable, it would have used those terms instead of requiring an actual 'violation'. There is no basis in the case history or legislative analysis of 11 U.S.C. § 523(a)(19) that supports Plaintiff's argument.

Argument

Contrary to Plaintiff's assertions, 11 U.S.C. § 523(a)(19) does not apply to except Appellants' debt arising from the Disgorgement Order and the Bankruptcy Court Judgment is inconsistent with case authority, the statutory language of § 523(a)(19), the legislative history, prior court decisions interpreting § 523(a)(19), and the facts in this case.

A. The Plaintiff's interpretation of § 523(a)(1) is unsupported by the plain statutory language and the legislative intent supporting it.

In early 2002, Congress introduced the Sarbanes-Oxley Act ("SOA") in response to wrongdoing by corporate executives at Enron and the perceived negative effect said had on the capital markets. Title VIII of the SOA entitled, "The Corporate and Criminal Accountability Act ("CCAA")," was designed to punish corporate criminals and hold them accountable for defrauding investors. [S. REP. NO. 107-146, at 2 ("[An Act] to provide for criminal prosecution and enhanced penalties of persons who defraud investors in publicly traded securities ... to disallow debts **incurred in violation of securities fraud laws** from being discharged ....") (Emphasis added).]

Included in § 803 of the CCAA was an amendment to § 523(a) of the Bankruptcy Code,

adding subsection (19) to the exceptions to discharge. U.S.C. § 523(a)(19) states that it applies to a debt 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 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. (Emphasis added)

Paragraph (A)(i) will only except from discharge a debt that "is for - the violation" of the securities laws. A court cannot ignore a term or phrase selected by Congress. See Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 115 (2001); United States v. Coward, 296 F.3d 176, 183 (3rd Cir. 2002). Plaintiff's argument can be summed up as a novel interpretation of the preposition "for" and the term "violation." The dictionary defines "for" in the very context used in the statute as "for - in punishment of … as in *payment for the crime*." Plaintiff has urged this Court to hold that the Congress in using the preposition "for," meant nondischargeability of a debtor's debt "in punishment of" a crime committed by someone other than the debtor.

Black's Law Dictionary defines a "violation" as "[a]n infraction or breach of the law." See Black's Law Dictionary 1564 (7th Edition 1999). However the term "violation" is not defined in the Bankruptcy Code or the securities laws. 15 U.S.C. §§ 77b, 78b; 1 U.S.C. § 101. Plaintiff appears to argue that "violation" means any debt arising under the securities laws.

Interpreting "violation" to mean all claims arising under the securities laws or arising out of any litigation which touches on securities laws contravenes several canons of statutory interpretation.

This Court's adoption of Plaintiff's interpretation serves to define "violation" as a general right of payment. A right of payment, however, is defined in the Code as a "claim" and is one of the Code's most fundamental terms. 11 U.S.C. § 101(5)(A). See also Pennsylvania Dep't. of Pub. Welfare v. Davenport, 495 U.S. 552, 558 (1990). Similarly, the phrase 'any payment arising under' appears in other section 523 exceptions. "Violation" does not appear elsewhere in section 523(a).

"Violation" is an original term, but defining it as "a right of payment or a payment arising under the securities laws" is improper because unlike terms within a statute should be given different meanings. See Bank of Am. Nat'l. Trust & Sav. Ass'n. v. 203 N. LaSalle St. P'ship., 526 U.S. 434, 449-50 (1998); Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 479 (1992); Sullivan v. Stroop, 496 U.S. 478, 485 (1990).

If Congress intended to except from discharge all debts arising under the securities laws then it would not have selected an original term. One may presume that Congress has knowledge of terms that it uses in prior sections of the law, and how those terms affect a new provision. See Lorillard v. Pons, 434 U.S. 575, 581 (1978); United States v. Palozie, 166 F.3d 502, 504-05 (2nd Cir. 1999).

Under § 523(a)(13), debts for - "***any*** payment of an order for restitution issued under Title 18, United States Code (emphasis added)" are nondischargeable. If Congress desired to render nondischargeable debts for ***any and all*** claims arising under the securities laws, it could have easily drafted paragraph (A)(i) of § 523(a)(19) in this same manner. See BFP v. Resolution Trust Corp., 511 U.S. 531, 546, 556-57 (1994). Instead, Congress by selecting the term

"violation," rejected the interpretation put forth by the Plaintiff in this case. See Bd. of Educ. of Westside Cmty. Sch. v. Mergens, 496 U.S. 226, 242 (1990). Therefore, this Court's adoption of Plaintiff's interpretation requires this Court to invade the domain of the legislative branch by affirmatively disregarding a word selected by Congress. Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 625 (1978). Any "[a]nalysis of §523(a)(19) must begin 'with the language of the statute itself." In re Weilein, 319 B.R. 175, 178 (Bankr. N. D. Iowa 2004); United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 241, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989).

Additionally, the inclusion of the exception in paragraph (A)(ii) of § 523(a)(19) suggests that "violation" cannot mean "all debts arising under the securities laws." Paragraph (A)(ii) renders nondischargeable any debt that is for fraud, deceit or manipulation in connection with a securities transaction. If all debts arising from claims under federal and state securities laws are nondischargeable pursuant to paragraph (A)(i), it is difficult to discern what independent purpose paragraph (A)(ii) serves. It is not proper to interpret a paragraph in a way that will render another paragraph within the same subsection superfluous. Kawaauhau v. Geiger, 523 U.S. 57, 62 (1998); BFP v. Resolution Trust Corp., at 546, 556-57.

Perhaps the most important policy of the Bankruptcy Code is the "fresh start." Grogan v. Garner, 498 U.S. 279, 286 (1991); Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934). The fresh start ensures that an innocent debtor receives a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt. Due to the importance of the fresh start, the burden is charged to the creditor who must demonstrate that one of the enumerated exceptions applies even though the creditor was the deserving party outside of bankruptcy. Grogan, supra, at 291; Century 21 Balfour Real Estate v. Menna (In re Menna), 16 F.3d 7, 9 (1st Cir. 1994).

Congress could have easily created an exception that would clearly and unambiguously cover all securities debts. There is little evidence that such an exception was what Congress intended. As it would fundamentally change the concept of the fresh start for non-culpable debtors, this Court should not adopt this interpretation.

B. It is the consensus of the courts that Section 523(A)(19) applies only when the debt is the result of a securities violation by the debtor(s).

It is clear from a review of cases in the various circuits that § 523(a)(19) does not apply to the case at bar because the debt in question was not the result of a securities violation by Appellants. Appellants have not and cannot show that said debt arose from a securities violation or fraud in connection with the purchase or sale of a security, by Appellants.

In Peterman and Reactence, Inc v. Whitcomb (In re Whitcom), 303 B.R. 806 (Bankr. N.D. Ill. 2004), the court found that Whitcomb's debt was nondischargeable under 523(a)(19) because Whitcomb's "debt **results from** fraud, fraudulent inducement and fraudulent misrepresentations **made by the Debtor**" in the sale of securities to the plaintiffs. (emphasis added) Id. at 810.

In Barnes v. Jeffrey Michael Dupree (In re Dupree), 336 B.R. 520 (Bankr. M.D. Fla. 2005), the court noted that "[o]bviously, Congress intended to design a broad provision to except from bankruptcy discharge all securities fraud and other securities violations by '**wrongdoers**.'" (emphasis added), Id. at 527

In Frost, et al.v. Civiello (In re Civiello), 348 B.R. 459 (Bankr. N.D. Ohio 2006) the court found that "[t]he judgment '**results from Defendant's violation** of the securities law identified in the cease and desist order, thereby satisfying the requirement of 11 U.S.C. § **523**(a)(**19**)(B)" (emphasis added) Id. at 467

The consensus of the cases over the last six years in which a court found a debt

nondischargeable under Section 523(a)(19), it arose as a result of the individual debtor(s) committing securities law violations or fraud in connection with the purchase and sale of securities See also State of Idaho, Department of Finance, Securities Bureau v. Robert O. McClung (In re McClung), 304 B.R. 419 (Bankr. D. Idaho 2004); Nortman, et al. v. Gordon Sloan Smith (In re Smith), 362 B.R. 438 (Bankr. D. Ariz. 2007); Trucks v. Williams (In re Williams), 370 B.R. 397 (Bankr. M.D. Fla. 2007); Fishbach, et al. v. Simon (In re Simon), 311 B.R. 641 (Bankr. S.D. Fla. 2004).

Appellants' pending appeal does not yet require the full briefing of this issue. However, in direct reply to Plaintiff's apparent assertion that there remains no meaningful chance of appellate success by Appellants, Appellants urge this Court to consider their request for a stay of the order denying their discharge until this matter can be fully considered by the appellate court.

PHILLIPS MURRAH P.C.

/s/ Robert J. Haupt
Robert N. Sheets, OBA No. 8152
Robert J. Haupt, OBA No. 18940
Corporate Tower, Thirteenth Floor
101 North Robinson Avenue
Oklahoma City, Oklahoma 73102
405.235.4100 – telephone
405.235.4133 – facsimile

ATTORNEYS FOR DEFENDANTS/
APPELLANTS, ROBERT WILLIAM
MATTHEWS, MARVIN LEE WILCOX,
AND PAMELA JEAN WILCOX

CERTIFICATE OF SERVICE

On this 19th day of February 2008, I certify that a true and correct copy of the aforegoing was sent by first-class U.S. Mail, postage prepaid to:

Amanda M. Cornmesser
Gerri L. Stuckey
Oklahoma Department of Securities
First National Center, Suite 860
120 North Robinson
Oklahoma City, OK 73102

Jeffrey C. Trent
P.O. Box 851530
915 W. Main
Yukon, OK 73099

/s/ Robert J. Haupt