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OPINIONS AND ORDERS

REHEARING ORDER

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT (AUGUST 17, 2021)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

IN THE MATTER OF: EDWARD MANDEL,

Debtor,

EDWARD MANDEL,

Appellant,

v.

WHITE NILE SOFTWARE, INCORPORATED; ROSA R. ORENSTEIN; MASTROGIOVANNI, SCHORSCH AND MERSKY,

Appellees,

No. 20-40026

IN THE MATTER OF: EDWARD MANDEL,

Debtor,

EDWARD MANDEL,

Appellant,

v.

STEVEN THRASHER, INDIVIDUALLY; WHITE NILE SOFTWARE, INCORPORATED; JASON COLEMAN; MADDENSWELL, L.L.P.; LAW OFFICES OF MITCHELL MADDEN,

Appellees,

CONSOLIDATED WITH

No. 20-40340

Appeals from the United States District Court
for the Eastern District of Texas
USDC Nos. 4:17-CV-261 and 4:17-CV-262

Before: JONES, SOUTHWICK, AND ENGELHARDT, Circuit Judges.

PER CURIAM:*

These consolidated appeals are the latest in a number of appeals that this court has addressed stemming from Appellant Edward Mandel's bankruptcy proceedings. Because a notice of appeal was not timely filed regarding the district court's rulings in case number 4:17-cv-262, we lack appellate jurisdiction over assertions of error relating solely to the discharge-ability of debts owed Appellees Steven Thrasher, White Nile Software Incorporated, and Jason Coleman.

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* Pursuant to 5th Circuit Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Circuit Rule 47.5.4.

Otherwise, finding no reversible error, we AFFIRM for the reasons stated herein.

I.

The complete factual and procedural background of these appeals is more than adequately set forth in our four prior opinions, issued between August 2014 and September 2018, regarding these bankruptcy proceedings. *See In re Mandel*, No. 13-40751, 578 F. App'x 376 (Aug. 15, 2014) (*Mandel I*); No. 15-40864, 641 F. App'x 400 (Mar. 7, 2016) (*Mandel II*); No. 17-40059, 720 F. App'x 186 (Feb. 15, 2018) (*Mandel III*); and No. 17-40392, 747 F. App'x 955 (Sept. 7, 2018) (*Mandel IV*). For purposes of the instant consolidated appeals, the district court's two December 19, 2019 memorandum opinions (both entitled "Memorandum on Appeal from Bankruptcy Court") in case numbers 4:17-cv-261 and 4:17-cv-262, and the district court's April 24, 2020 order, in case number 4:17-cv-262, denying leave to appeal—together with the bankruptcy court's September 12, 2013 Order and March 31, 2017 Findings of Fact and Conclusions of Law—provide the rulings of which Mandel seeks review in this court.

For issues raised in these appeals, the following background information should suffice. This matter involves several disputes between cofounders of the company White Nile. Mandel and Thrasher initially formed White Nile, in early 2005, to develop Thrasher's internet search invention. White Nile then hired Coleman to be its chief creative officer. By the end of 2005, however, the business relationship had disintegrated.

In essence, Thrasher contended that he had developed valuable intellectual property and, based

on Mandel's misrepresentations, assigned that property to White Nile. Then, Mandel, in concert with others, purported to act for White Nile in order to release himself and others from non-disclosure agreements, so that he could misappropriate trade secrets for use by his new corporation, NeXplore. Mandel's actions, Thrasher maintained, prevented him from realizing value from his own inventions. Coleman alleged that he was fraudulently induced by Mandel to enter into a consulting agreement with White Nile and was deprived of compensation for his work and his interest in the intellectual property as a co-inventor. Mandel denied all of Thrasher's and Coleman's claims, asserting among other things that NeXplore was formed to develop an internet search engine concept with an entirely different web-based inference.

As we explained in *Mandel I*, Mandel was found to have misappropriated White Nile's trade secrets and formed a new company, NeXplore. The bankruptcy court held Mandel liable for (1) theft or misappropriation of trade secrets; (2) breach of contract; (3) breach of fiduciary duty; (4) fraud and fraudulent inducement; (5) oppression of shareholder rights; and (6) conspiracy. It awarded $400,000 in damages to Coleman; $1,000,000 to Thrasher; and $300,000 to White Nile. In *Mandel I*, we affirmed the liability holdings but remanded the matter to the bankruptcy court to "either conduct an additional evidentiary hearing on the issue of damages or explain its award of damages on the basis of the evidence in the present record." Following remand, we affirmed the district court's judgment, in February 2018, regarding damages imposed in favor of Thrasher, Coleman, and White Nile. *See Mandel III.*

Also pertinent here are previous rulings regarding fees owed by Mandel to Appellees Rosa Orenstein and Mastrogiovanni, Schorsch & Mersky (hereinafter, "MSM"). Orenstein was appointed by a Texas state court to serve as a receiver for White Nile in connection with a lawsuit regarding ownership of White Nile. With court approval, Orenstein retained MSM as counsel to assist her in her duties. As set forth in *Mandel IV*, three state court orders regarding the receivership are relevant here.

The first state court receivership order was entered on November 1, 2008, by consent of the parties. It established the scope of the receiver's authority and the manner in which the receiver would be selected. Mandel agreed to pay 52.5% of the receiver's fees and Thrasher 47.5% of the receiver's fees. The order also stated that the receiver lacked authority to retain independent counsel without notice to the parties and court approval.

The second state court receivership order, dated May 29, 2009, appointed Orenstein, a bankruptcy attorney and one of the parties' proposed candidates, as the receiver. The second order restated the fee-sharing agreement between Mandel and Thrasher but did not include the prohibition on the retention of independent counsel. There also was no language in the second receivership order stating that it vacated or supplanted the first receivership order.

Thereafter, Orenstein retained MSM to assist her in her capacity as receiver. Mandel and Thrasher initially agreed to Orenstein's retention of counsel, but Mandel soon began to object to the continued retention of MSM. Over Mandel's objection, the state court entered the third receivership order, in September

2009, finding MSM's retention to be authorized under the receivership orders and stating the terms of Mandel's and Thrasher's payment to the receiver and MSM.

Later, when Orenstein sent Mandel a bill for $14,000 in attorney's fees related to the receivership, he failed to pay and wrote to the state court claiming an inability to financially comply. Orenstein moved to compel compliance and the state court ordered financial discovery. A hearing was held after Orenstein alleged that Mandel was not complying with the ordered financial discovery. Rather than issuing a ruling at that time, the court continued the hearing to allow Mandel another opportunity to voluntarily comply. Subsequently, Mandel initiated mandamus proceedings concerning the validity of the payment order; the Supreme Court of Texas ultimately denied relief. (Orenstein hired an attorney at Hankinson Levinger to represent her in those mandamus proceedings.) On January 24, 2010, the day that the state trial court was set to resume the hearing on the enforcement of the payment order, Mandel filed for bankruptcy.

Eventually, the bankruptcy court decided that Orenstein was entitled to $315,553 in total fees for her work as White Nile's receiver and that MSM was entitled to $155,517 in total fees for its work assisting Orenstein. The district court subsequently overruled each of Mandel's objections and affirmed the award. On appeal in *Mandel IV*, we determined, in September 2018, that the state court had authorized the retention of counsel to assist Orenstein in her duties as receiver, and that Orenstein's retention of counsel for the

mandamus proceedings were done in her capacity as the receiver.[1]

Meanwhile, after *Mandel II* issued on March 7, 2016, the bankruptcy court tried Appellees' objections to discharge and dischargeability in August and September 2016. On March 31, 2017, the bankruptcy court issued its 66 page Findings of Fact and Conclusions of Law sustaining some, but not all, of Appellees' objections to Mandel's discharge and the dischargeability of the debts owed to Appellees. Thereafter, we issued *Mandel III*, on February 15, 2018, affirming the compensatory damage awards owed to Thrasher, Coleman, and White Nile, and, on September 7, 2018, *Mandel IV* regarding the categories of fees recoverable by Orenstein and MSM. The district court's memorandum opinions regarding Mandel's appeals of the bankruptcy court's March 31, 2017 Findings of Fact and Conclusions of Law—regarding discharge and dischargeability of debt—followed on December 19, 2019.

II.

In these consolidated appeals, Mandel challenges the district court's December 19, 2019 rulings (affirming the bankruptcy court's determinations) that he should be denied discharge of his debts both

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[1] The retention of counsel to assist in the bankruptcy case was not authorized, however, because Orenstein was not acting in her capacity as receiver when representing White Nile as a creditor in the bankruptcy. However, those attorney fees already were excluded from the award. Thus, at the conclusion of *Mandel IV*, we remanded the fee award, in September 2018, for recalculation solely to remove any fees attributable to Orenstein's representation of White Nile as a creditor in the bankruptcy.

generally, pursuant to 11 U.S.C. § 727, and particularly, pursuant to 11 U.S.C. § 523, relative to the debts owed to Appellees. Mandel additionally contends the bankruptcy court and the district court erred in deciding that the claims asserted by Thrasher and White Nile were not extinguished by a 2012 state-court settlement of litigation between Thrasher and one of Mandel's former attorneys (hereinafter, the "Thrasher/Shore litigation").

III.

When this court reviews the decision of a district court acting as an appellate court, we "apply[] the same standard of review to the bankruptcy court's conclusions of law and findings of fact that the district court applied." *In re JFK Capital Holdings, L.L.C.*, 880 F.3d 747, 751 (5th Cir. 2018) (quoting *Barron & Newburger, P.C. v. Tex. Skyline, Ltd.* (*In re Woerner*), 783 F.3d 266, 270 (5th Cir. 2015) (en banc)). Accordingly, questions of fact are reviewed for clear error and conclusions of law *de novo*. *Matter of Cowin*, 864 F.3d 344, 349 (5th Cir. 2017). Mixed questions of law and fact also are reviewed *de novo*. *Id.*

An appellate court must afford great weight to the bankruptcy court's factual findings because the bankruptcy court is "in a far superior position to gauge the [debtor's] credibility than a court that has been provided only with cold transcripts." *In re Acosta*, 406 F.3d 367, 373–74 (5th Cir. 2005) (quoting *In re Martin* 963 F.2d 809, 814 (5th Cir. 1992)). A factual finding is clearly erroneous "when, although there is evidence to support it, the reviewing court on the entire evidence is left with a firm and definite conviction that a mistake has been committed." *Matter of*

Missionary Baptist Found. of America Inc., 712 F.2d 206, 209 (5th Cir. 1983) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)).

IV.

At the outset, we address the timeliness of the notice of appeal filed by Mandel regarding the December 19, 2019 memorandum opinion entered by the district court, in case number 4:17-cv-262, relative to Thrasher, Coleman, and White Nile. As discussed in the district court's April 24, 2020 order denying leave to appeal, and the parties' briefs, Mandel timely filed a notice of appeal only in case number 4:17-cv-261, despite the issuance of separate memorandum opinions in both case numbers 4:17-cv-261 and 4:17-cv-262. Although much of the content of the two memorandum opinions is identical, substantive differences do exist, particularly regarding the dischargeability of debts owed solely to the claimants in the respective cases, *i.e.*, Orenstein and MSM in case number 4:17-cv-261, and Thrasher, Coleman, and White Nile in case number 4:17-cv-262. Furthermore, a separate notification was provided for each matter and each memorandum opinion bears a different case number and caption.

Although we understand the logic of Mandel's position, and readily acknowledge that mistakes occasionally do happen in the course of busy legal practices, the time limits of Federal Rules of Appellate Procedure 4(a)(1) and 4(a)(6) are jurisdictional. *Bowles P. Russell*, 551 U.S. 205, 208 (2007); 28 U.S.C. § 2107. The requirements of Rule 4(a)(6) do not permit the reopening of the time for filing an appeal when the rule's requirements are not met. And they are not here, given that

notice of each opinion was provided and received by Mandel's former counsel and, indeed, Mandel himself. In any event, as detailed herein, we find no basis for reversing any of the district court's rulings.

V.

Both the bankruptcy court and the district court rejected Mandel's preliminary assertion that a 2012 settlement of the Thrasher/Shore litigation extinguished any debts that Mandel owed to Thrasher and White Nile, such that a consideration of their dischargeability was unnecessary. After hearing argument, and considering trial testimony, documentary evidence, and the parties' briefs, the bankruptcy court determined that the September 2012 settlement did not encompass the instant claims asserted by Thrasher and White Nile. Despite Mandel's considerable efforts, the record before us provides no basis to disregard the bankruptcy court's logical and well-reasoned conclusion based, *inter alia*, on the language in the settlement agreement expressly limiting its scope to "claims, demands, or suits, unliquidated whether or not asserted in the above case, as of this date, *arising from or related to the events or transactions which are the subject matter of this case.*"[2]

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[2] (Emphasis added.) Because this issue was addressed in the memorandum opinions issued by the district court in both case number 4:17-cv-261 and case number 4:17-cv-262, we address it herein despite its seeming relevance only to the debts asserted by White Nile and Thrasher. The settlement was reached in connection with Texas state court litigation between Thrasher (and related entities) against Michael Shore; Alfonso Chan; Shore, Chan and Bragalone, L.L.P.; Shore Deary, L.L.P.; Judy Shore; David Deary; Karen Deary; W. Ralph Canada; Jeff Bragalone; Pat Conroy; and Joe DePumpo, et al., bearing Cause Nos. DC-11-

To the contrary, Mandel's assertion that the "release" language of the agreement should essentially be ignored is itself nonsensical, given the purpose and function of settlement agreements, as well as the nature of the attorneys' fee-sharing dispute at issue in the Thrasher/Shore litigation compared to the intellectual property misappropriation and related business disputes giving rise to the claims allowance/discharge litigation involved here. Further, as noted by the bankruptcy court, there has been no showing that Thrasher had the capacity or authority to individually settle/release claims on behalf of White Nile.

Nor are we swayed by Mandel's assertion that, in September 2013, the bankruptcy court erred in failing to (1) hold an expedited pre-trial evidentiary hearing regarding the scope and impact of the 2012 settlement *and* (2) issue an "indicative ruling"[3] to ensure that we were aware of the bankruptcy court's assessment whilst considering the appeal of the district court's July 2013 judgment regarding the bankruptcy court's September 2011 (liability and damages) determinations relative to the allowance of the claims asserted by Thrasher, Coleman, and White Nile. The bankruptcy court certainly has discretion over the timing and organization of its docket and Mandel offers no basis for a conclusion that an abuse of that discretion occurred. Finally, as the Findings of Fact in paragraphs 11–19 and 55–66 of the March 31, 2017 Findings of Fact and Conclusions of Law reveal, the bankruptcy court certainly gave due considera-

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14842 and DC-09-02907.

[3] *See* Fed. R. Bankr. P. 8008.

tion of Mandel's assertions regarding the scope of the 2012 settlement prior to rendering its discharge rulings.[4]

VI.

Regarding discharge of debt, the bankruptcy court concluded, and the district court affirmed, that Mandel should be denied discharge under 11 U.S.C. § 727(a)(3) and § 727(a)(4). Regarding the particular debts owed to the Appellees, the same conclusions were reached, pursuant to 11 U.S.C. § 523(a)(2)(A), § 523(a)(4), and § 523(a)(6).

A.

The exceptions to discharge set forth in subsections 727(a)(3) and 727(a)(4)(A) apply when:

> (3) the debtor has concealed, destroyed, mutilated, falsified or failed to keep or preserve any recorded information, including books, documents, records, and papers from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case; or
>
> (4)(A) the debtor knowingly and fraudulently, in or in connection with the case—made a false oath or account.[5]

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[4] We thus affirm the judgment of the district court without the necessity of engaging in the convoluted consideration of various dates and rulings that an evaluation of the district court's collateral estoppel determination would require.

[5] 11 U.S.C. §§ 727(a)(3) and (a)(4)(A).

Regarding 11 U.S.C. § 523, subsections 523(a)(2)(A), 523(a)(4), and 523(a)(6) prevent a discharge under section 727 . . . from any debt:

> (2) for money, property, services or an extension, renewal or refinancing of credit, to the extent 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; [or]
>
> (4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny; [or]
>
> (6) for willful or malicious injury by the debtor to another entity or to the property of another entity[.][6]

B.

Section 727 of Title 11 of the United States Code establishes exceptions to the discharge that Chapter 7 of that title otherwise grants to a debtor. Discharge of the debtor is required unless a statutory exception applies. *See* 11 U.S.C. § 727(a). The exceptions are construed strictly against the creditor and liberally in favor of the debtor. *In re Duncan*, 562 F.3d 688, 695 (5th Cir. 2009); *In re Hudson*, 107 F.3d 355, 356 (5th Cir. 1997).

Under § 727(a)(3), a plaintiff must show, by a preponderance of the evidence: (1) the debtor failed to maintain and preserve adequate records; and (2)

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[6] 11 U.S.C. §§ 523(a)(2)(A), (a)(4), and (a)(6).

such failure makes it impossible to ascertain his financial condition and material business transactions. *In re Dennis*, 330 F. 3d 696, 703 (5th Cir. 2003). As explained in *Duncan,* 562 F.3d at 697:

> Under this section, the creditor objecting to the debtor's discharge bears the initial burden of production to present evidence that the debtor failed to keep adequate records and that the failure prevented the creditor from evaluating the debtor's financial condition. *Dennis,* 330 F.3d at 703. . . . "A debtor's financial records need not contain 'full detail,' but 'there should be written evidence' of the debtor's financial condition." *Dennis,* 330 F.3d at 703 (quoting *Goff v. Russell Co. (In re Goff),* 495 F.2d 199, 201 (5th Cir. 1974)); *see also In re Juzwiak,* 89 F.3d at 428 ("[C]ourts and creditors should not be required to speculate as to the financial history or condition of the debtor, nor should they be compelled to reconstruct the debtor's affairs." (citations omitted)); [*Pher Partners v. Womble (In re Womble),* 289 B.R. 836, 856 (Bankr. N.D. Tex. 2003)] ("Creditors are entitled to written evidence of the debtor's financial situation and past transactions; maintenance of such records is a prerequisite to a discharge."). The adequacy of the debtor's records is determined on a case by case basis, using such considerations as the "debtor's occupation, financial structure, education, experience, sophistication and any other circumstances that should be considered in the interest of justice." *Womble,* 289 B.R. at 856

> (internal quotation marks omitted).
>
> If the plaintiff satisfies this initial burden of production—that the debtor's failure to produce adequate records makes it impossible to discern his financial status—the debtor must prove the inadequacy is "justified under all the circumstances." *Dennis,* 330 F.3d at 703. The bankruptcy court has "wide discretion" in analyzing these shifting burdens, and its determination is reviewed for clear error. *Id.*

In preserving business and finance records, sophisticated debtors may be held to a higher standard. *See In re Jones*, 237 B.R. 297, 305 (S.D. Tex. 2005).

Under § 727(a)(4)(A), the plaintiff in a bankruptcy proceeding must show that: (1) the debtor made a statement under oath; (2) the statement was false; (3) the debtor knew the statement was false; (4) the debtor made the statement with fraudulent intent; and (5) the statement related materially to the bankruptcy case. *Matter of Beaubouef*, 966 F.2d 174, 178 (5th Cir. 1992). "[T]he purpose of § 727(a)(4)(A) is to enforce a debtor's duty of disclosure and to ensure that the debtor provides reliable information to those who have an interest in the administration of the estate." *In re Lindemann*, 375 B.R. 450, 469 (Bankr. N.D. Ill. 2007). A plaintiff asserting a § 727 (a)(4)(A) discharge exception bears the burden of demonstrating an actual intent to hinder, delay or defraud creditors. *Matter of Chastant*, 873 F.2d 89, 91 (5th Cir. 1989). "Circumstantial evidence may be used to prove fraudulent intent, and the cumulative effect of false statements may, when taken together, evidence a reckless disregard for the truth sufficient

to support a finding of fraudulent intent." *Duncan,* 562 F.3d at 695; *see also Matter of Reed*, 700 F.2d 986, 991 (5th Cir. 1983)("Fraudulent intent of course may be established by circumstantial evidence, or by inferences drawn from a course of conduct.")

"False statements in the debtor's schedules or false statements by the debtor during the proceedings are sufficient to justify denial of discharge." *Duncan,* 562 F.3d at 695 (citing *Beaubouef,* 966 F.2d at 178.) Further, the materiality of an omission is not solely based on the value of the item omitted or whether it was detrimental to creditors. *Id.* Rather, the statement need only "bear [] a relationship to the bankrupt's business transactions or estate, or concern[] the discovery of assets, business dealings, or the existence and disposition of his property." *Beaubouef*, 966 F.2d at 178 (quoting *In re Chalik*, 748 F.2d 616, 617 (11th Cir. 1984)).

The bankruptcy court found the requirements of both 11 U.S.C. §§ 727(a)(3) and (a)(4) satisfied. The district court agreed, highlighting various deficiencies and misrepresentations outlined by the bankruptcy court in making its determinations. Importantly, as the district court emphasized, many of these determinations turned, in significant part, on the bankruptcy court's credibility findings after considering extensive argument, testimony, and numerous exhibits in several proceedings conducted over a five-year period. The district court found no reason to disturb these credibility determinations and neither do we.

The record more than sufficiently demonstrates Mandel's aptitude and willingness to utilize various entities controlled by him to improve his financial position and maximize opportunities for his various

business interests with little regard for accounting transparency. Furthermore, this remained true even after he sought the protections of the bankruptcy statutes. The bankruptcy court details numerous inaccuracies and omissions in the payment schedules and monthly operating reports submitted by Mandel. Even worse, he persisted in this practice subsequent to being specifically instructed, in accordance with Bankruptcy Rule 2015.3, to disclose information fully and accurately, under the penalty of perjury, regarding closely held companies in which he held a "substantial or controlling interest." *See* Fed. R. Bankr. P. 2015.3; Official Form 426.[7]

Additionally, despite his obvious business acumen, sophistication, and intelligence, Mandel does not hesitate to claim innocent confusion and/or invoke his non-attorney status, as well as a proclaimed reliance on the advice of counsel (*without* waiving attorney-client privilege and providing evidentiary support for that assertion), when confronted with unfavorable evidence that he cannot otherwise explain away. Finally, though replete with numerical record citations, conclusory assertions of sufficient record-keeping, and color commentary, Mandel's numerous briefs fail to provide the detailed factual support and contextual explanation necessary to demonstrate clear error in the district court's and bankruptcy court's assessments of record evidence, as it existed at the time those determinations were made rather than some time thereafter. Accordingly, we likewise find no

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[7] Rule 2015.3 implements section 419 of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), Pub. L. No. 109-8, 119 Stat. 23 (April 20, 2005).

error in the determination that Mandel's false statements were both material and made with fraudulent intent. Thus, we affirm the district court's rulings regarding both § 727(a)(3) and § 727(a)(4)(A).

C.

As set forth above, 11 U.S.C. §§ 523(a)(2)(A), 523 (a)(4), and 523(a)(6) prevent a discharge under section 727 . . . from any debt:

> (2) for money, property, services or an extension, renewal or refinancing of credit, to the extent 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; [or]
>
> (4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny; [or]
>
> (6) for willful or malicious injury by the debtor to another entity or to the property of another entity[.][8]

Regarding the debts owed to Orenstein and MSM, Mandel argues that he did not contemplate owing attorney's fees when he initially agreed to the appointment of a receiver. Thus, he contends, he did not engage in fraud for purposes of § 523(a)(2)(A) in attempting to avoid paying those fees because he honestly never thought he had to pay attorney's fees. The bankruptcy court obviously did not find this assertion credible and,

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[8] 11 U.S.C. §§ 523(a)(2)(A), (a)(4), and (a)(6).

like the district court, we find no basis on the record before us to reject that assessment.

The bankruptcy court found that Mandel had entered into an agreed receiver order without any intent to comply with the agreement. In support of this conclusion, the bankruptcy court emphasized Mandel's untruthful representation of indigency to the state court with regard to a $14,000 outstanding attorney fee, and his ability and tendency to move funds around "at will depending on where it was needed and who he wanted to pay, [keeping] few, if any accurate records of his business transactions." The bankruptcy court explained: "Here, the demands for payment by Orenstein and MSM were relatively small prior to Mandel's bankruptcy. [But] he simply refused to pay them." And, "[h]e did not tender any payments . . . except in the shadow of sanctions proceedings before the state court, and misrepresented his financial condition to Orenstein, MSM, and the state court." Thus, the bankruptcy court concluded: "The preponderance of the evidence established that Mandel entered into the agreed receiver order without any intent to comply with its requirements." Thus, finding Orenstein's and MSM's claims arose from actual fraud, the bankruptcy court concluded that Mandel should be denied discharge, pursuant to 11 U.S.C. § 523(a)(2)(A), regarding these debts. The district court agreed.

Although the original receivership order did not authorize retention of counsel, it provided notice of that eventual possibility by stating that the receiver was without authority to retain independent counsel "without notice to the parties and court approval." *See Mandel IV*, 747 F. App'x at 957. Indeed, in

Mandel IV we noted that "Mandel and Thrasher initially agreed to Orenstein's retention of counsel, but soon began to object[.]" *Id.* On this record, we find no clear error in the bankruptcy court's determinations of Mandel's intent.

Lastly, it is unnecessary for us address the dischargeability, under 11 U.S.C. § 523(a), of debts owed to Thrasher, White Nile, and Coleman, given the absence of a timely filed notice of appeal of the district court's rulings in case number 4:17-cv-262. Lengthy discussion of the issue is unwarranted, in any event, considering our claims allowance determinations (relative to misappropriation, fraud, theft, and breach of fiduciary duty) in *Mandel I* and *III*. Given those determinations, the requirements of 11 U.S.C. §§ 523(a)(2)(A), 523(a)(4), and 523(a)(6) are satisfied.

VII.

Regarding appeal number 20-40026, the district court is AFFIRMED. Regarding appeal number 20-40340, the appeal is DISMISSED for lack of jurisdiction.

MEMORANDUM OPINION ON APPEAL FROM BANKRUPTCY COURT IN *MANDEL v. WHITE NILE, INC. ET AL.* 4:17-CV-261

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

EDWARD MANDEL,

Appellant,

v.

WHITE NILE SOFTWARE, INC., ROSA R. ORNSTEIN, RECEIVER and MASTROGIOVANNI, SCHORSCH and MERSKY

Appellees.

Case No. 4:17-CV-261

Appeal from Bankruptcy Case No. 12-04127
Related to Bankruptcy Case No. 10-40219

Before: Michael TRUNCALE,
United States District Judge.

I. Procedural Background

This appeal and related Case No. 4:17-CV-262 stem from a series of claims that involve a company called White Nile Software, Inc ("White Nile") formed

by Debtor Edward Mandel ("Mandel") and his friend Steven Thrasher ("Thrasher"). Mandel and Thrasher formed White Nile in 2005 for the purpose of developing search engine technology. White Nile hired Jason Coleman ("Coleman") to work on several projects. On February 4, 2006, prior to the bankruptcy petition, state court litigation involving Mandel, Thrasher, and Coleman arose. On May 29, 2009, the state court appointed Rosa R. Orenstein ("Orenstein") as the Receiver for White Nile, and Mandel agreed to pay 52.5% of her fees. In September 2009, the state court issued an order (the "Receiver Counsel Order") approving Orenstein's designation of Mastrogiovanni, Schorsch & Mersky, P.C. ("MSM") as independent counsel for Orenstein. Orenstein sent Mandel a bill for $14,000 for attorney's fees related to the receivership. Mandel refused to pay the bill, and on January 25, 2010, Mandel filed for bankruptcy under Chapter 11.

Over the next two years, the bankruptcy court granted several motions by Thrasher, White Nile, Orenstein and MSM to extend the deadline and approved a stipulation among the parties, including Mandel, to extend deadlines. On February 13, 2012, several of the Plaintiffs sought the appointment of a trustee in the Chapter 11 proceeding. The bankruptcy court conducted a hearing on the matter and on June 18, 2012, the court appointed Milo Segner as the Chapter 11 trustee after granting the motion filed by the Plaintiffs.

On August 22, 2012, White Nile Software, Rosa Orenstein, and MSM filed an adversary complaint against Mandel. The bankruptcy court assigned the

proceeding number 12-4127.[1] On the same day, Thrasher, on behalf of White Nile and in his individual capacity, Jason Coleman, Maddenswell LLP, and the Law Offices of Mitchell Madden filed their own adversary complaint against Mandel. The bankruptcy court assigned that proceeding the number 12-4128.

The parties in the Orenstein proceeding objected to Mandel's discharge under 11 U.S.C §§ 727(a)(2), (a)(3) and (a)(4) as well as 11 U.S.C § § 523(a)(2)(A), (a)(4) and (a)(6). The parties in the Thrasher proceeding filed claims for unliquidated damages against Mandel's bankruptcy estate and objected to Mandel's discharge under 11 U.S.C 727(a)(2)(A) and (B), (a)(3) and (a)(4), they also objected to discharge under 11 §§ 523(a)(2)(A), (a)(4) and (a)(6). Mandel objected to the allowance of these claims. The bankruptcy court tried these claims and entered a decision and order awarding $1,000,000 to Thrasher, $400,000 to Coleman, and $300,000 to White Nile. *See In re Mandel*, 2011 WL 4599969 (Bankr. E.D. Tex. 2011). Additionally, the bankruptcy court ordered Thrasher and Coleman their reasonable attorney's fees in the total amount of $1,500,000. *See Id.*

As relevant to the current appeal, the bankruptcy court made the following findings and reached the following conclusions:

> Mandel breached his fiduciary duties as an officer of White Nile by failing to preserve White Nile's Assets. In particular, Mandel failed to timely prosecute White Nile's patent

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[1] The bankruptcy court called 12-4127 the "Orenstein proceeding" and 12-4128 the "Thrasher proceeding" for clarity, this court refers to them as the same.

rights and transferred money invested in White Nile to NeXplore Corporation, among other breaches.

In order to induce Thrasher to go into business with him, Mandel misrepresented material facts to Thrasher, such as his intent to invest $300,000 of his own funds into White Nile, to develop its intellectual property.

In order to obtain access to White Nile's intellectual property and trade secrets, Mandel fraudulently represented to White Nile that he had recruited an investor in the Philippines and that there was a team of highly qualified individuals in the Philippines working to develop White Niles intellectual property.

In order to induce Coleman to become a consultant for White Nile, Thrasher made numerous false and inaccurate representations to Coleman.

Mandel breached his obligations to Thrasher and White Nile under non-disclosure agreements he entered into with them.

Mandel conspired with others to misappropriate and use White Nile's intellectual property.

Mandel knowingly communicated White Nile's trade secrets to NeXplore.

Mandel knew his actions were improper, but he did not act with the requisite malice to support an award of exemplary damages.

[Dkt. #1 Attachment 4 Pg6-7]. Mandel appealed to the district court. *See Mandel v. Thrasher*, WL 3367297 (E.D. Tex. 2013). The discourt court affirmed the findings of the bankruptcy court on appeal. Mandel then appealed to the Fifth Circuit. The Fifth Circuit affirmed the bankruptcy court's findings of fact. *See In re Mandel*, 578 Fed. Appx. 376 (5th Cir. 2014). However, The Fifth Circuit remanded the issue of compensatory damages. [Dkt #1 Attachment 4 Pg 7].[2]

> Meanwhile, Orenstein and independent counsel MSM filed independent claims against Mandel's bankruptcy estate seeking their fees related to the state court receivership of White Nile. Mandel objected to these claims. The bankruptcy court conducted a trial related to Orenstein's claims seeking fees. The bankruptcy court allowed Orenstein an unsecured claim of $315,535 for her reasonable and necessary fees as Receiver incurred through December 1, 2011. The bankruptcy court also allowed an unsecured claim of $155,517 for reasonable and necessary attorneys' fees incurred through December 1, 2011. The bankruptcy court found the following facts in its decision:
>
> Prior to Mandel's bankruptcy, on May 29, 2009, a state court entered an agreed order

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[2] The district court affirmed the bankruptcy courts award of compensatory damages on remand. *See Mandel v. Thrasher,* WL 7374428 (E.D.Tex. 2016). On appeal, the Fifth Circuit affirmed the district court's determination. *See matter of Mandel*, 720 Fed. Appx. 186 (5th Cir. 2018).

appointing Orenstein as the receiver for White Nile.

The agreed order placed Orenstein in control of White Nile's claims against Mandel, among other things.

The agreed order provided that Mandel would pay 52.5% of the receiver's fees.

The agreed order required Mandel to pay the fees of the receiver herself as well as the fees of any counsel she retained.

In an order dated September 15, 2009, the state court approved Orenstein's retention of MSM as independent counsel and required Mandel to pay 52.5% of the fees of the receiver's counsel. The state court also approved the fees of Orenstein and MSM through September 9, 2009, specifically finding their fees to be fair, reasonable, and necessary.

In the state court proceeding, Mandel claimed that he did not have the financial resources to pay his portion of all the fees charged by Orenstein and MSM

In the state court proceeding, Orenstein conducted discovery regarding Mandel's financial ability to pay pursuant to orders issued by the state court.

Orenstein testified, credibly, that she had to fight to get business and financial information from Mandel and that Mandel's business structure and finances are unusually complicated.

> Orenstein filed two motions to compel Mandel to respond to her discovery requests in the state court proceeding, and the state court ordered Mandel to comply.

[Dkt. #1 Attachment 4 Pg. 8-9]. Mandel appealed the bankruptcy court's order. The district court dismissed the appeal for lack of standing. The Fifth Circuit reversed and remanded the appeal to the district court, finding that Mandel did have standing. *See In re Mandel*, 641 Fed.Appx. 400 (5th Cir. 2016). On remand, the district court affirmed the findings of the Bankruptcy Court. *See In re Mandel*, WL 1197117 (E.D.Tex. 2017). On appeal to the Fifth Circuit, Mandel only challenged "the legal findings to support the fee award – not the specific numeric amounts awarded" *Id* at 960. The Fifth Circuit affirmed in part and reversed in part. The Fifth Circuit found that while the Receiver Counsel Order issued in state court did authorize Orenstein to have counsel, it did not authorize Orenstein to represent White Nile as a creditor in the bankruptcy proceeding, and therefore her retention of independent counsel to assist her in those matters would likewise not be authorized" *Id* at 964. The Fifth Circuit remanded only the award amount with regard to Orenstein and MSM.

Mandel filed a "Motion to Enforce Settlement Agreement and to Dismiss All Thrasher and Related Claims and Causes of Action" in the bankruptcy court. The motion, based on a mediated settlement agreement arising out of state court litigation regarding a fee-sharing agreement between Thrasher and Michael Shore, was heard by the bankruptcy court on September 4, 2013. In his motion, Mandel argued that because the mediated settlement agreement includes

a release of claims, the bankruptcy court should find Mandel a party to that agreement and broadly construe the agreement to release all the claims of Thrasher and White Nile against Mandel. Thrasher, Coleman, Orenstein, and MSM objected, arguing that White Nile was not a party to the litigation, and that the bankruptcy court lacked jurisdiction to dismiss the pending claims because, at the time, the bankruptcy courts findings were on appeal.

After the September 4, 2013 hearing the bankruptcy court made the following findings of fact:

> White Nile was not a party to the Thrasher/ Shore Litigation.
>
> The claims litigation in the bankruptcy court did not arise from or relate to the fee-sharing arrangement that was the subject of the dispute in the Thrasher/Shore litigation.
>
> Even if there was some reasonable argument that White Nile could be construed to be a claimant in the Thrasher/Shore litigation, Thrasher did not have the authority or capacity to individually waive or release White Nile's claims.
>
> The bankruptcy court found that its ruling was interlocutory and without prejudice to the parties to return to the state court for a determination of the enforcement of the settlement agreement.

[Dkt. #1 Attachment 4 Pg. 10-11]. Segner as trustee eventually moved to convert Mandel's case to a Chapter 7 proceeding due to the impossibility of confirming a

plan of reorganization. The bankruptcy court granted the motion and entered an order converting the case to Chapter 7 on December 19, 2014. The deadline for objecting to Mandel's discharge or the dischargability of a particular debt was March 13, 2015.

Because the legal claims, evidence and legal arguments substantially overlapped, the bankruptcy court tried both the Thrasher claims and the Orenstein claims together over a four-day period. At trial, Thrasher, White Nile and Coleman sought to prove that the bankruptcy court's prior decision on the allowance of claims as affirmed by the Fifth Circuit established the required elements of non-dischargability under the bankruptcy code, 11 U.S.C §§ 523(a)(2)(A), (a)(4) and (a)(6). Orenstein and MSM pursued the same theories of non-dischargability as to the outstanding fees and expenses. The plaintiffs in both the Thrasher proceeding and the Orenstein proceeding sought a judgment denying the dischargability of Mandel's debts under 11 U.S.C. §§ 727(a)(2), (a)(3) and (a)(4).

The Bankruptcy Courts Findings of Fact

A. Background

The bankruptcy court found that Mandel is a sophisticated debtor. He holds an undergraduate degree in Computer Science and a Master's Degree in Business Administration. He has an ownership interest in numerous businesses. He has been involved in numerous lawsuits, retained dozens of lawyers, and been involved in businesses for many years. The bankruptcy court found that Mandel directed litigation strategies for his numerous companies. The court

found that Mandel owns and controls many businesses, including: NeXplore, Positive Software Solutions, Mandel Capital Partners, LP, Mandalay Villas, which he owns with his father, eFocus Solutions, Inc., Premier Debt Recovery Centers, Inc., as well as a real estate holding company. Most of these companies are controlled by Mandel Management Inc, which is owned and operated by Mandel and his wife, Irene. Mandel and his companies also own numerous tracts of land and homes.

Mandel brought litigation against Thrasher and Coleman in 2005 in state court. This litigation was discussed in depth in the bankruptcy courts decision entered on September 30, 2011, however as relevant here, the parties entered into a tentative settlement agreement in October of 2007. There was an agreed $900,000 judgment against Mandel if Mandel failed to make payments agreed to under the settlement agreement. In December of 2007, Mandel withdrew from the agreement, and in January of 2008, Mandel executed two quit claim deeds transferring two lots from his real estate holding company (Mandel Real Estate Partners, Ltd) to the Mandel Children's 2005 Irrevocable Trust (the "Mandel Children's Trust"). Mandel filed a petition in bankruptcy court on behalf of White Nile in the Northern District of Texas in an effort to stay the state court litigation, however, Thrasher filed a motion to dismiss the White Nile bankruptcy petition. That motion was granted. The following year, Mandel executed numerous quit claim deeds to the Mandel Children's Trust relating to numerous properties in Texas and Florida in a similar fashion to those executed from Mandel Real Estate Partners, Ltd. Mandel chose not to record the quit

claim deeds, and taxes were still paid by the company from which Mandel had transferred ownership.

B. Bankruptcy

Mandel filed his bankruptcy petition in January of 2010. The day before filing his bankruptcy petition, Positive Software transferred $50,000 to Mandel and his wife, $35,000 to his wife Irene Mandel in her individual bank account, and $80,000 to Americare. Mandel's first set of schedules were filed in February 2010. In those schedules, Mandel did not include the money he or his wife had received from Positive Software the day before filing the petition. Mandel instead included $400 in cash on hand and less than $15,000 in his personal bank accounts. Mandel amended his bankruptcy schedules multiple times. In doing so, he changed the valuations of his multiple companies, as well as his ownership interests in the companies.

A Chapter 11 trustee was eventually appointed, and Mandel was required to file additional reports. In one of those reports, Mandel repeatedly represented that Americare had over $1.2 million in cash in its bank accounts. This was false. He also listed numerous real estate lots in Florida in the amended schedules, all of which were subject to the quit claim deeds. None of the schedules or amended schedules reflected the quit claim deeds.

One of the listed claims was Mandel's interest in Positive Software, which possessed a $15 million bankruptcy claim against a company called New Century Mortgage and another $15 million against an entity called New Century Finance. This claim was sold during Mandel's bankruptcy for $3 million to an entity specializing in the purchase of bankruptcy claims.

Approximately $1.3 million of that $3 million was used to pay legal fees associated with the settlement of claims, the other $1.7 million went to Positive Software's bank account. This money was immediately transferred to Americare pursuant to a "Subordinated Convertible Debenture" or a loan agreement. Mandel falsely recorded this debenture as cash. In the bankruptcy proceedings Mandel testified he thought that the debenture was the same as cash. The bankruptcy court did not find this testimony credible. The bankruptcy court found that the transfer of Positive Software's assets to Americare was part of a scheme to hide assets from Mandel's estate and make it more difficult for creditors to find. [Dkt. #1 EXHIBIT 4 Pg27]. Mandel owned Americare through another company called Zulu Ventures which acquired a controlling interest in Americare when Mandel and his sold their controlling shares. The bankruptcy court further found that Mandel and his wife used Americare's funds for living expenses and did not include that money in Mandel's monthly operating reports filed with the bankruptcy court. Mandel testified further that he used a program called QuickBooks to keep track of his finances. He claimed that a computer crash had prevented him from presenting evidence of his financial condition and operating expenses. The bankruptcy court did not find this testimony credible.

II. Issues Presented

Mandel raises the following issues on appeal:

(1) Whether the bankruptcy court erred in denying Mandel's Motion to Enforce Settlement Agreement.

(2) Whether the bankruptcy court erred by denying Mandel's discharge under 11 U.S.C. 727 of the bankruptcy code.

(3) Whether the bankruptcy court erred by finding Orenstein and MSM's debts non-dischargeable under 11 U.S.C 523(a)(2)(A).

A. Standard of Review

A bankruptcy court's findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of witnesses. Bankruptcy Rule 8013; *see also Matter of Herby's Foods, Inc.*, 2 F.3d 128, 130-31 (5th Cir. 1992). A finding is clearly erroneous "when, although there is evidence to support it, the reviewing court on the entire evidence is left with a firm and definite conviction that a mistake has been committed." *Matter of Missionary Baptist Foundation of America Inc.*, 712

F.2d 206, 209 (5th Cir. 1983) (quoting *United States v. United States Gypsum Co.*, 333 U.S. (1948)).

Issues of law are reviewed de novo as are mixed questions of fact and law. *In re CPDC, Inc.*, 337 F.3d 436, 441 (5th Cir. 2003). A finding of fact which is premised on an improper legal standard, or on a proper standard improperly applied, will also be reviewed *de novo. Missionary Baptist Foundation*, 712 F.2d 206, 209 (5th Cir. 1983) (*rev'd on other grounds).*

B. Analysis

1. The Bankruptcy Court Did Not Err in Denying Debtor's *Omnibus Motion to Enforce Settlement Agreement.*

i. Procedural Bar

Mandel argues that the bankruptcy court erred when it did not enforce the mediated settlement agreement. In response, Appellees, Orenstein, White Nile, and MSM, Orenstein's independent counsel, correctly note that the claim is procedurally barred by Federal Rule of Bankruptcy Procedure 8009(a)(1)(A) because Appellant did not raise it in his statement of the issues on appeal. Rule 8009(a)(1)(A) states, in pertinent part,

> (a) Designating the Record on Appeal; Statement of the Issues.
>
> (1) Appellant.
>
> (A) The appellant must file with the bankruptcy clerk and serve on the appellee a designation of the items to be included in the record on appeal and a statement of the issues to be presented.
>
> (B) The appellant must file and serve the designation and statement within 14 days after:
>
> (i) the appellant's notice of appeal as of right becomes effective under Rule 8002; or
>
> (ii) an order granting leave to appeal is entered.

Mandel does not contend that the issue was raised in his statement of issues, but instead argues that the failure to designate the issue is the result of excusable neglect and therefore this court should consider the issue despite the procedural bar. An issue is not preserved for appeal unless the appellant includes an issue in the statement of issues on appeal. *In re GGM, P.C.*, 165 F.3d 1026, 1032 (5th Cir. 1999). However, the Fifth Circuit has held that 'dismissal is a harsh and drastic sanction that is not appropriate in all cases, even though it lies within the district courts discretion." *In the Matter of CPDC Inc.*, 221 F.3d 693, 699 (5th Cir. 2000). The four factor test a district court must utilize to determine whether or not a claim should be procedurally barred or dismissed is: "(1) a finding of bad faith or negligence; (2) give appellant notice or opportunity to explain the delay; (3) consider possible prejudicial effect of delay on other parties and (4) consider the impact of the sanctions and available alternatives." *Id* at 699-700.

Appellees do not point to any prejudice they have suffered by the delay. Mandel points to the late retention of counsel and the unusually complex nature of the proceedings to combat a finding of bad faith and explain the delay. This court finds that Mandel's late filing was due to excusable delay and will proceed to consider the merits of the argument.

ii. Collateral estoppel

Mandel argues that the bankruptcy court erred in not enforcing a settlement agreement between Thrasher and Shore as to claims involving White Nile and Thrasher against Mandel. Appellees counter by arguing that Mandel is collaterally estopped from

making this argument on appeal. In support of the collateral estoppel argument, Appellees point to the tortured history of this litigation, and indicates that there is a Fifth Circuit opinion allowing claims by both White Nile and Thrasher against Mandel. Further, there is a decision from the Texas Fifth District Court of Appeals ("Appellate State Court Order") dismissing Mandel's declaratory judgment action seeking the state court's approval of the Thrasher/ Shore Settlement interpreted to include release of claims by third parties, including Appellees.

Collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit" *Schiro v. Farley*, 510 U.S. 222, 232 (1994). Collateral estoppel "prevents litigation of an issue when: (1) the identical issue was previously adjudicated; (2) the issue was actually litigated; and (3) the previous determination was necessary to the decision. *Bradberry v. Jefferson County, Tex.*, 732 F.3d 540, 550 (5th Cir. 2013).

Mandel's claim is collaterally estopped both under the traditional doctrine of collateral estoppel due to the Fifth Circuit's previous decision on the pending claims, and the *Rooker-Feldman* doctrine as a result of the Appellate State Court Order. The bankruptcy court determined that Coleman, Thrasher, and White Nile all had valid claims against the bankruptcy estate. *See In re Mandel* WL 4599969 (Bankr.E.D.Tex. 2011). While the Fifth Circuit reversed the bankruptcy courts finding as to the amount of damages, the Circuit found evidentiary support in the record for breach of contract, misappropriation of trade secrets,

breach of fiduciary duty, conspiracy and fraudulent inducement. *See In re Mandel*, 578 Fed. Appx. 376 (5th Cir. 2014). In affirming the record evidence and affirming the claims of Coleman, Thrasher, and White Nile, the Fifth Circuit has precluded any further ruling on the issue of the settlement agreement by this court.

Further, Mandel fully litigated this issue in a hearing in the state court proceeding. The Fifth District Court of Appeals affirmed the state court's finding that Mandel could not enforce the settlement agreement. *See Depumpo v. Thrasher.* 2016 WL 147294 (Tex. App. – Dallas 2016). This court cannot reach the merits of the claim given the Fifth District Court of Appeals and Fifth Circuit decisions on point. *Exxon Mobile Corp v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 282 (2005).[3]

2. The Bankruptcy Court Did Not Err in Denying Mandel's Discharge Under 11 U.S.C. 727 of the Bankruptcy Code.

At the outset, a bankruptcy court may deny a debtor's discharge only if the plaintiff can show a violation of § 727(a) by a preponderance of the evidence.

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[3] Additionally, where there is a full and final state court judgment, as here, the *Rooker-Feldman* doctrine applies. The *Rooker-Feldman* doctrine is "confined to cases . . . brought by state court losers complaining of injuries caused by-state court judgments rendered before the federal district court proceedings and inviting district court review and rejection of those judgments" *Exxon Mobil. Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 282 (2005).

See In re Womble, 289 B.R. 836, 844 (Bankr. N.D. Tex. 2003) (reaffirming use of a preponderance of evidence standard to prove each of the elements within § 727). Establishment of only a single sub-section of § 727(a) is sufficient to deny a debtor's discharge. *See In re Moseman*, 436 B.R. 398, 405 (Bankr. E.D.Tex 2010).

I. 11 U.S.C. § 727(a)(3)

11 U.S.C §§ 727(a)(3) allows for an exception to discharge when

> (4) The debtor has concealed, destroyed, mutilated, falsified or failed to keep or preserve any recorded information, including books, documents, records, and papers from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case.

Under § 727(a)(3) a plaintiff must show, by a preponderance of the evidence: (1) the debtor failed to maintain and preserve adequate records; and (2) such failure makes it impossible to ascertain his financial condition and material business transactions. *In re Dennis*, 330 F. 3d 696, 703 (5th Cir. 2003). The objecting party bears "the initial burden to prove that [debtor] failed to keep and preserve her financial records and that this failure prevented him from ascertaining her financial condition" *In re Sandler*, 282 B.R. 254, 263 (Bankr. M.D.Fla. 2002). The debtor's burden to maintain and preserve records is not onerous, financial records need not contain full detail, only "some written evidence of the debtors financial

condition" *In re Goff*, 495 F.2d 199, 201 (5th Cir. 1974).[4] However, § 727(a)(3) does not require a demonstration of fraudulent intent, negligence will suffice to bar discharge. *In re Henley*, 480 B.R. 780, 781 (Bankr. S.D. Tex. 2012). In preserving business and finance records, sophisticated debtors may be held to a higher standard. *See In re Jones*, 237 B.R. 297, 305 (S.D.Tex. 2005).

Without question, Mandel is a sophisticated businessman who was the owner, manager, president, or CEO of more than ten entities. Mandel has engaged the advice of dozens of attorneys and has been engaged in more than fifteen lawsuits. There have been eleven appeals stemming from this bankruptcy action alone. The bankruptcy court found that (1) Mandel failed to maintain accurate records based on back-dating documents, that Mandel (2) falsified records in maintaining his business finances, (3) Mandel failed to disclose or keep adequate records of transfers between Positive to Americare, and (4) Mandel was not keeping adequate business before or after the alleged computer crash, and therefore the testimony regarding the corruption was not credible. Further, Mandel obstructed the recovery of information related to financial documents at every turn. Multiple motions to compel were litigated in the bankruptcy proceeding as well as the state court proceeding once Orenstein was appointed as Receiver. Indeed, the trustee appointed referred to recovery of documents as having to "pull teeth." Based on the credible evidence admitted at trial, the bankruptcy court did not commit clear error in denying

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[4] The Fifth Circuit notes in *Dennis* that *Goff* interprets an older version of the statute. However, that version is materially identical to the current one. *See in re Dennis*, 330 F.3d 696, 703. (5th Cir. 2003).

discharge under 11 U.S.C 727 § (a)(3). The record demonstrates a lengthy, complicated bankruptcy proceeding that was frustrated by Mandel's behavior and lack of cooperation.

The bankruptcy court found that "Mandel falsified the books and records of several of his businesses by omitting the execution of quit claim deeds to the Mandel Children's Trust, and he did not record the deeds publicly." [Dkt. #1 EXHIBIT 4, Pg46]. In this appeal, Mandel argues that, "Debtor is not a lawyer, and did not understand the legal implications of an unrecorded deed." [Dkt. #15 pg17]. This argument strains credibility. The record evidence demonstrates, and the bankruptcy court found that Mandel is a sophisticated businessman. Mandel consulted with lawyers on every aspect of his businesses. There is no evidence supporting the assertion that Mandel should be held to a lesser standard because he's not an attorney with regard to the quit claim deeds he executed just days prior to declaring bankruptcy, nor should Mandel be held to a lesser standard as to the quit claim deeds Mandel executed during the bankruptcy. Mandel continued to pay property taxes and exercise control over the property using the company that had previously owned the lot of land. There is no legitimate purpose in doing so other than to obfuscate the proceeding. Further, he never disclosed the quit claim deeds he executed. There is ample record evidence for the conclusion the bankruptcy court made, that Mandel simply did not want the properties to be part of the bankruptcy and therefore executed a deed to his children in an effort to hide the properties.

Mandel further argues that this court should make a factual determination contrary to the fact find-

ings of the bankruptcy court in that, "Mandel also back-dated business documents to suit his needs, making it difficult or impossible to analyze the substance of some of his business dealings." [Dkt. #15 Pg. 19] and that the bankruptcy court erred in not finding Mandel's explanation that his computer had corrupted his QuickBooks account credible. This court declines to do so. Findings of fact in bankruptcy proceedings will not be set aside unless they are clearly erroneous. *In re Acis Capital Management, L.P.* 604 B.R. 484 (Bankr. N.D. Tex. 2019). An appellate court must afford great weight to the bankruptcy courts finding because the bankruptcy court is "in a far superior position to gauge the [debtors] credibility than a court that has been provided only with cold transcripts." *In re Acosta* 406 F.3d, 373-74 (5th Cir. 2005) (quoting *In re Martin* 963 F.2d 809, 814 (5th Cir. 1992)). Appellate points to no credible basis for disturbing the bankruptcy court's findings. This proceeding consisted of a lengthy, tortured history full of attempted concealment and adversarial proceedings. This court finds no reason to disturb the credibility findings of the bankruptcy court who handled this case for over five years, heard witness testimony and made credibility determinations based on more than the "cold transcripts."

II. 11 U.S.C. § 727(a)(4)

11 U.S.C § 727(a)(4) of the Bankruptcy Code provides, in relevant part, an exception to discharge when "(4) The debtor knowingly and fraudulently, in or in connection with the case – (a) made a false oath or account . . . " Under § 727(a)(4), the plaintiff in a bankruptcy proceeding must show that: (1) [Debtor] made a statement under oath; (2) the statement was false (3) debtor knew the statement was false; (4)

[Debtor] made the statement with fraudulent intent; and (5) the statement related materially to the bankruptcy case. *Matter of Beaubouef*, 966 F.2d 174 (5th Cir. 1992). "[T]he purpose of § 727(a)(4)(A) is to enforce a debtor's duty of disclosure and to ensure that the Debtor provides reliable information to those who have an interest in the administration of the estate." Thus, "complete financial disclosure is a condition precedent to the privilege of discharge." *In re Lindemann*, 375 B.R. 450, 469 (Bankr. N.D. Ill. 2007). A plaintiff in a § 727(a)(4)(A) bears the burden of demonstrating an actual intent to hinder, delay or defraud, further there must be more than a constructive intent, plaintiff must demonstrate evidence of actual intent to defraud creditors. *Matter of Chastant*, 873 F.2d 89, 91 (5th Cir. 1989). A debtor is usually the only person who can testify directly concerning intent, and "rare will be the debtor who willingly provides direct evidence of a fraudulent intent" *In re Darby*, 3766 B.R. 534, 541 (Bankr. E.D. Tex. 2007). Therefore, courts must look to a course of conduct in discovering fraudulent intent. *See In re Reed*, 700 F.2d 986, 991 (5th Cir. 1989). While fraudulent intent is required, "reckless indifference to the truth is sufficient to deny the debtor a discharge if the subject matter is material to the administration of the bankruptcy." *In re Kinard*, 518 B.R. 290, 305 (Bankr. E.D.Pa. 2014). A finding of materiality requires, "a relationship to the [debtor's] business transactions or estate, or concerns the discovery of assets, business dealings or the existence and disposition of his property." *In re Duncan*, 562 F.3d 688, 695. (5th Cir. 2009).

Mandel argues that he lacked the fraudulent intent required for a denial under § 727(a)(4). Mandel

relies on many of the same factual and credibility disputes raised under § 727(a)(3), given the similar analysis. Mandel largely pleads ignorance with regard to failures to disclose, or that he made an honest mistake. Ultimately, Mandel argues that the statements were made in good faith and thus the elements of (1) knowledge of falsity and (2) fraudulent intent are lacking. This is incorrect.

Mandel submitted verified payment schedules to the court that he knew were false. Mandel omitted the income he received due to the transfer of assets from Americare from his operating reports. Mandel paid numerous personal expenses from various business funds and did not include those payments as income in his payment schedules. The schedules were provided under oath by Mandel. Mandel used the businesses to pay bills and then hid those transactions or failed to keep records of them and did not submit those records to the court. Mandel spent numerous hours with numerous bankruptcy attorneys drafting his initial schedules. After the errors were pointed out, he spent numerous hours with new counsel correcting the schedules, and they still contained errors. The bankruptcy court did not credit Mandel's testimony that he had been advised by his attorneys not to include the payments from Americare.

It would overstep this court's scope of review for this court to now find that those errors were unintentional, or not a "reckless indifference to the truth" and therefore reverse the bankruptcy courts finding as to fraudulent intent. It is equally not credible that Mandel was blind to the obvious falsity of the records. The court found Mandel to be a sophisticated debtor who was operating sophisticated businesses and was

assisted by sophisticated counsel. This court finds no basis to disturb the bankruptcy court's credibility findings and now find that Mandel instead had was totally blind-sided and unable to maintain accounting records.

3. The bankruptcy court did not err by finding Orenstein and MSM's debts non-dischargeable under 11 U.S.C § 523(a)(2)(A).

11 U.S.C § 523(a)(2)(A) prevents a discharge in bankruptcy when, "(2) for money, property, services or an extension, renewal or refinancing of credit, to the extent 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." In a decision entered on September 30, 2011, the bankruptcy court found that Thrasher, on his own behalf and on behalf of White Nile and Coleman, had established claims against Mandel for fraud under Texas law. The bankruptcy court found that based on the finding of fraud, Mandel was precluded from discharge, and that those debts were nondischargable under § 523(a)(2)(A). With regard to Orenstein and MSM, the bankruptcy court found that Mandel entered into an agreed receiver order without any intent to comply with the agreement. The court found that based on Mandel's untruthful representation of indigency to the state court with regard to the $14,000 outstanding fee, and that Mandel continued to move assets around to avoid paying the outstanding receivership fee, Mandel had committed fraud was denied discharged under 11 U.S.C. 523(a)(2)(A).

Appellant argues that because Mandel was not contemplating attorney's fees when he entered into the Receivership Agreement, he did not engage in fraud in attempting to avoid paying those fees because he honestly never thought he had to pay attorney's fees. This is a collateral attack on the Fifth Circuits ruling on the Affirmed Claim Allowance, and therefore, Mandel is collaterally estopped from raising it. *Matter of Mandel*, 747 Fed. Appx. 955, 963 (5th Cir. 2018) ("[T]he bankruptcy court did not err in awarding fees for attorneys retained in the attempt to collect Mandel's share of the receivership payments"). Alternatively, the court finds the record is littered with evidence that based on the false statements to the state court, Mandel's ability to move funds to his various entities and family members, and because Mandel's recordkeeping was poor, the bankruptcy court committed no error in finding that Mandel had no intention to pay the outstanding fees for the receivership.

Mandel next argues that because the bankruptcy court erred in its reliance on the agreed order to find fraud, Appellees may only proceed on a traditional § 523(a)(2)(A) allegation. Even if this were the case, Appellant's argument fails. Based on a traditional theory of § 523(a)(2)(A), the plaintiff must show (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, and that (4) the creditor justifiably relied on such representations. Appellant argues that Appellees did not prove justified reliance.

In assessing a claim of justified reliance, this court is required to utilize the clear error standard. *In re Riebesell*, 586 F.3d 782, 792 (10th Cir. 2009). Clear error will be found only where there "the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances" *In re Stewart*, 604 B.R. 900, 905 (Bankr. W.D. Okla. 2019). The bankruptcy courts decision was based on a sufficient factual basis to determine that Appellees justifiably relied on Mandel's representations of his finances. Mandel represented that he could not pay the $14,000 attorney's fees, and his finances were not publicly available. Moreover, Mandel obstructed every attempt to investigate his finances. The bankruptcy court was correct to determine that the based on what was publicly available at the time, Appellees were justified in relying on Mandel's representations.

Finally, Appellant argues that the bankruptcy court erred in its reliance on *Husky v. Internatioal Electronics, Inc. v. Ritz,* 136 S.Ct. 1581 (2016) because there is no evidence that Mandel attempted to "drain" his companies of assets in an attempt to avoid paying Appellees. That is not the case. Appellant transferred real estate from Mandel Real Estate Partners, Mandel

Capital Partners and Premier Debt Recovery Centers to the Mandel Children's Trust. Those transfers were concealed from the court and appellees. Mandel repeatedly moved money to and from businesses in an attempt to appear insolvent. As referenced herein, the record is overflowing with evidence that Mandel attempted to conceal assets and made false statements regarding his assets. The bankruptcy court's factual findings do not rise to the level of "clearly erroneous."

III. Conclusion

IT IS THEREFORE ORDERED that the bankruptcy court's March 31, 2017 Findings of Fact and Conclusions of Law [Dkt. #112] and March 31, 2017 Judgment [Dkt. #113] are AFFIRMED.

SIGNED this 19th day of December, 2019.

/s/ Michaet J. Truncate

United States District Judge

MEMORANDUM OPINION ON APPEAL FROM BANKRUPTCY COURT IN *MANDEL v. STEVEN THRASHER ET AL.* 4:17-CV-262 (DECEMBER 19, 2019)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

EDWARD MANDEL,

Appellant,

v.

STEVEN THRASHER, INDIVIDUALLY AND FOR WHITE NILE SOFTWARE, INC., JASON COLEMAN, MADDENSEWELL, LLP,

Appellees.

Case No. 4:17-CV-262

Appeal from Bankruptcy Case No. 12-04127
Related to Bankruptcy Case No. 10-40219

Before: Michael TRUNCALE,
United States District Judge.

I. Procedural Background

This appeal and related Case No. 4:17-CV-261 stem from a series of claims that involve a company called White Nile Software, Inc ("White Nile") formed

by Debtor Edward Mandel ("Mandel") and his friend Steven Thrasher ("Thrasher"). Mandel and Thrasher formed White Nile in 2005 for the purpose of developing search engine technology. White Nile hired Jason Coleman ("Coleman") to work on several projects. On February 4, 2006, prior to the bankruptcy petition, state court litigation involving Mandel, Thrasher, and Coleman arose. On May 29, 2009, the state court appointed Rosa R. Orenstein ("Orenstein") as the Receiver for White Nile, and Mandel agreed to pay 52.5% of her fees. In September 2009, the state court issued an order (the "Receiver Counsel Order") approving Orenstein's designation of Mastrogiovanni, Schorsch & Mersky, P.C. ("MSM") as independent counsel for Orenstein. Orenstein sent Mandel a bill for $14,000 for attorney's fees related to the receivership. Mandel refused to pay the bill, and on January 25, 2010, Mandel filed for bankruptcy under Chapter 11.

Over the next two years, the bankruptcy court granted several motions by Thrasher, While Nile, Orenstein and MSM to extend the deadline and approved a stipulation among the parties, including Mandel, to extend deadlines. On February 13, 2012, several of the Plaintiffs sought the appointment of a trustee in the Chapter 11 proceeding. The bankruptcy court conducted a hearing on the matter and on June 18, 2012, the court appointed Milo Segner as the Chapter 11 trustee after granting the motion filed by the Plaintiffs.

On August 22, 2012, White Nile Software Inc, Rosa Orenstein, and MSM filed an adversary complaint against Mandel. The bankruptcy court assigned the

proceeding number 12-4127.[1] On the same day, Thrasher, in his individual capacity and on behalf of White Nile, Jason Coleman, Maddenswell LLP, and the Law Offices of Mitchell Madden filed their own adversary complaint against Mandel. The bankruptcy court assigned that proceeding the number 12-4128.

The parties in the Orenstein proceeding objected to Mandel's discharge under 11 U.S.C §§ 727(a)(2), (a)(3) and (a)(4) as well as 11 U.S.C § § 523(a)(2)(A), (a)(4) and (a)(6). The parties in the Thrasher proceeding filed claims for unliquidated damages against Mandel's bankruptcy estate and objected to Mandel's discharge under 11 U.S.C. 727(a)(2)(A) and (B), (a)(3) and (a)(4), the also objected to discharge under 11 §§ 523(a)(2)(A), (a)(4) and (a)(6). Mandel objected to the allowance of these claims. The bankruptcy court tried these claims and entered an order awarding $1,000,000 to Thrasher, $400,000 to Coleman, and $300,000 to White Nile. *See In re Mandel*, 2011 WL 4599969 (Bankr. E.D. Tex. 2011). Additionally, the bankruptcy court ordered Thrasher and Coleman their reasonable attorney's fees in the total amount of $1,500,000. *See Id.*

As relevant to the current appeal, the bankruptcy court made the following findings and reached the following conclusions:

> Mandel breached his fiduciary duties as an officer of White Nile by failing to preserve White Nile's Assets. In particular, Mandel failed to timely prosecute White Nile's patent rights and transferred money invested in

[1] The bankruptcy court called 12-4127 the "Orenstein proceeding" and 12-4128 the "Thrasher proceeding" for clarity, this court refers to them as the same.

White Nile to NeXplore Corporation, among other breaches.

In order to induce Thrasher to go into business with him, Mandel misrepresented material facts to Thrasher, such as his intent to invest $300,000 of his own funds into White Nile, to develop its intellectual property.

In order to obtain access to White Nile's intellectual property and trade secrets, Mandel fraudulently represented to White Nile that he had recruited an investor in the Philippines and that there was a team of highly qualified individuals in the Philippines working to develop White Niles intellectual property.

In order to induce Coleman to become a consultant for White Nile, Thrasher made numerous false and inaccurate representations to Coleman.

Mandel breached his obligations to Thrasher and White Nile under non-disclosure agreements he entered into with them.

Mandel conspired with others to misappropriate and use White Nile's intellectual property.

Mandel knowingly communicated White Nile's trade secrets to NeXplore.

Mandel knew his actions were improper, but he did not act with the requisite malice to support an award of exemplary damages.

[Dkt. #1 Attachment 4 Pg6-7]. Mandel appealed to the district court. *See Mandel v. Thrasher*, WL 3367297 (E.D. Tex. 2013). The district court affirmed the findings of the bankruptcy court on appeal. Mandel then appealed to the Fifth Circuit. The Fifth Circuit affirmed the bankruptcy court's findings of fact. *See In re Mandel*, 578 Fed. Appx. 376 (5th Cir. 2014). However, The Fifth Circuit remanded the issue of compensatory damages. [Dkt #1 Attachment 4 Pg 7].[2]

Meanwhile, Orenstein and independent counsel MSM filed independent claims against Mandel's bankruptcy estate seeking their fees related to the state court receivership of White Nile. Mandel objected to these claims. The bankruptcy court conducted a trial related to Orenstein's claims seeking fees. The bankruptcy court allowed Orenstein an unsecured claim of $315,535 for her reasonable and necessary fees as Receiver incurred through December 1, 2011. The bankruptcy court also allowed an unsecured claim of $155,517 for reasonable and necessary attorneys' fees incurred through December 1, 2011. The bankruptcy court found the following facts in its decision:

> Prior to Mandel's bankruptcy, on May 29, 2009, a state court entered an agreed order appointing Orenstein as the receiver for White Nile.
>
> The agreed order placed Orenstein in control of White Nile's claims against Mandel, among

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[2] The district court affirmed the bankruptcy courts award of compensatory damages on remand. *See Mandel v. Thrasher,* WL 7374428 (E.D. Tex. 2016). On appeal, the Fifth Circuit affirmed this courts determination. *See matter of Mandel*, 720 Fed. Appx. 186 (5th Cir. 2018).

other things.

The agreed order provided that Mandel would pay 52.5% of the receiver's fees.

The agreed order required Mandel to pay the fees of the receiver herself as well as the fees of any counsel she retained.

In an order dated September 15, 2009, the state court approved Orenstein's retention of MSM as independent counsel and required Mandel to pay 52.5% of the fees of the receiver's counsel. The state court also approved the fees of Orenstein and MSM through September 9, 2009, specifically finding their fees to be fair, reasonable, and necessary.

In the state court proceeding, Mandel claimed that he did not have the financial resources to pay his portion of all the fees charged by Orenstein and MSM

In the state court proceeding, Orenstein conducted discovery regarding Mandel's financial ability to pay pursuant to orders issued by the state court.

Orenstein testified, credibly, that she had to fight to get business and financial information from Mandel and that Mandel's business structure and finances are unusually complicated.

Orenstein filed two motions to compel Mandel to respond to her discovery requests in the state court proceeding, and the state court ordered Mandel to comply.

[Dkt. #1 Attachment 4 Pg. 8-9]. Mandel appealed the bankruptcy court's order. The district court dismissed the appeal for lack of standing. The Fifth Circuit reversed and remanded the appeal to the district court, finding that Mandel did have standing. *See In re Mandel*, 641 Fed. Appx. 400 (5th Cir. 2016). On remand, the district court affirmed the findings of the Bankruptcy Court. *See In re Mandel*, WL 1197117 (E.D. Tex. 2017). On appeal to the Fifth Circuit, Mandel only challenged "the legal findings to support the fee award–not the specific numeric amounts awarded" *Id* at 960. The Fifth Circuit affirmed in part and reversed in part. The Fifth Circuit found that while the Receiver Counsel Order issued in state court did authorize Orenstein to have counsel, it did not authorize Orenstein to represent White Nile as a creditor in the bankruptcy proceeding, and therefore her retention of independent counsel to assist her in those matters would likewise not be authorized" *Id* at 964. The Fifth Circuit remanded only the award amount with regard to Orenstein and MSM.

Mandel filed a "Motion to Enforce Settlement Agreement and to Dismiss All Thrasher and Related Claims and Causes of Action" in the bankruptcy court. The motion, based on a mediated settlement agreement arising out of state court litigation regarding a fee-sharing agreement between Thrasher and Michael Shore, was heard by the bankruptcy court on September 4, 2013. In his motion, Mandel argued that because the mediated settlement agreement includes a release of claims, the bankruptcy court should find Mandel a party to that agreement and broadly construe the agreement to release all the claims of Thrasher and White Nile against Mandel. Thrasher, Coleman, Oren-

stein, and MSM objected, arguing that White Nile was not a party to the litigation, and that the bankruptcy court lacked jurisdiction to dismiss the pending claims because, at the time, the bankruptcy courts findings were on appeal.

After the September 4, 2013 hearing the bankruptcy court made the following findings of fact:

> White Nile was not a party to the Thrasher/ Shore Litigation.
>
> The claims litigation in the bankruptcy court did not arise from or relate to the fee-sharing arrangement that was the subject of the dispute in the Thrasher/Shore litigation.
>
> Even if there was some reasonable argument that White Nile could be construed to be a claimant in the Thrasher/Shore litigation, Thrasher did not have the authority or capacity to individually waive or release White Nile's claims.
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> The bankruptcy court found that its ruling was interlocutory and without prejudice to the parties to return to the state court for a determination of the enforcement of the - settlement agreement.

[Dkt. #1 Attachment 4 Pg. 10-11]. Segner as trustee eventually moved to convert Mandel's case to a Chapter 7 proceeding due to the impossibility of confirming a plan of reorganization. The bankruptcy court granted the motion and entered an order converting the case to Chapter 7 on December 19, 2014. The deadline for objecting to Mandel's discharge or the dischargeability of a particular debt was March 13, 2015.

Because the legal claims, evidence and legal arguments substantially overlapped, the bankruptcy court tried both cases together over a four-day period. At trial, Thrasher, White Nile and Coleman sought to prove that the bankruptcy court's prior decision on the allowance of claims as affirmed by the Fifth Circuit established the requirements of non-dischargeability under the bankruptcy code, 11 U.S.C §§ 523(a)(2)(A), (a)(4) and (a)(6). Orenstein and MSM pursued the same theories of non-dischargeability as to the outstanding fees and expenses. The plaintiffs in both the Thrasher proceeding and the Orenstein proceeding sought a judgment denying the dischargeability of Mandel's debts under 11 U.S.C. §§ 727(a)(2), (a)(3) and (a)(4).

II. The Bankruptcy Courts Findings of Fact

A. Background

The bankruptcy court found that Mandel is a sophisticated debtor. He holds an undergraduate degree in Computer Science and a Master's Degree in Business Administration. He has an ownership interest in numerous businesses. He has been involved in numerous lawsuits, retained dozens of lawyers, and been involved in businesses for many years. The bankruptcy court found that Mandel directed litigation strategies for his numerous companies. The court found that Mandel owns and controls many businesses, including: NeXplore, Positive Software Solutions, Mandel Capital Partners, LP, Mandalay Villas, which he owns with his father, eFocus Solutions, Inc., Premier Debt Recovery Centers, Inc., as well as a real estate holding company. Most of these companies are controlled by Mandel Management Inc, which is owned and operated by Mandel and his wife, Irene.

Mandel and his companies also own numerous tracts of land and homes.

Mandel brought litigation against Thrasher and Coleman in 2005 in state court. This litigation was discussed in depth in the bankruptcy courts decision entered on September 30, 2011, however as relevant here, there was a tentative settlement agreement entered into in October of 2007. There was an agreed $900,000 judgment against Mandel if Mandel failed to make payments agreed to under the settlement agreement. In December of 2007, Mandel withdrew from the agreement, and in January of 2008, Mandel executed two quit claim deeds transferring two lots from his real estate holding company (Mandel Real Estate Partners, Ltd) to the Mandel Children's 2005 Irrevocable Trust (the "Mandel Children's Trust"). Mandel filed a petition in bankruptcy court on behalf of White Nile in the Northern District of Texas in an effort to stay the state court litigation, however, Thrasher filed a motion to dismiss the White Nile bankruptcy petition. That motion was granted. The following year, Mandel executed numerous quit claim deeds to the Mandel Children's Trust relating to numerous properties in Texas and Florida in a similar fashion to those executed from Mandel Real Estate Partners, Ltd. Mandel chose not to record the quit claim deeds, and taxes were still paid by the company from which Mandel had transferred ownership.

B. Bankruptcy

Mandel filed his bankruptcy petition in January of 2010. The day before filing his bankruptcy petition, Positive Software transferred $50,000 to Mandel and his wife, $35,000 to his wife Irene Mandel in her

individual bank account, and $80,000 to Americare. Mandel's first set of schedules were filed in February 2010. In those schedules, Mandel did not include the money he or his wife had received from Positive Software the day before filing the petition. Mandel instead included $400 in cash on hand and less than $15,000 in his personal bank accounts. Mandel amended his bankruptcy schedules multiple times. In doing so, he changed the valuations of his multiple companies, as well as his ownership interests in the companies.

A Chapter 11 trustee was eventually appointed, and Mandel was required to file additional reports. In one of those reports, Mandel repeatedly represented that Americare had over $1.2 million in cash in its bank accounts. This was false. He also listed numerous real estate lots in Florida in the amended schedules, all of which were subject to the quit claim deeds. None of the schedules or amended schedules reflected the quit claim deeds.

One of the listed claims was Mandel's interest in Positive Software, which possessed a $15 million bankruptcy claim against a company called New Century Mortgage and another $15 million against an entity called New Century Finance. This claim was sold during Mandel's bankruptcy for $3 million to an entity specializing in the purchase of bankruptcy claims. Approximately $1.3 million of that $3 million was used to pay legal fees associated with the settlement of claims, the other $1.7 million went to Positive Software's bank account. This money was immediately transferred to Americare pursuant to a "Subordinated Convertible Debenture" or a loan agreement. Mandel falsely recorded this debenture as cash. In the bankruptcy proceedings Mandel testified he thought that

the debenture was the same as cash. The bankruptcy court did not find this testimony credible.

The bankruptcy court found that the transfer of Positive Software's assets to Americare was part of a scheme to hide assets from Mandel's estate and make it more difficult for creditors to find. [Dkt. #1 EXHIBIT 4 Pg27]. Mandel owned Americare through another company called Zulu Ventures which acquired a controlling interest in Americare when Mandel and his sold their controlling shares. The bankruptcy court further found that Mandel and his wife used Americare's funds for living expenses and did not include that money in Mandel's monthly operating reports filed with the bankruptcy court. Mandel testified further that he used a program called QuickBooks to keep track of his finances. He claimed that a computer crash had prevented him from presenting evidence of his financial condition and operating expenses. The bankruptcy court did not find this testimony credible.

III. Issues Presented

Mandel raises the following issues on appeal:

(1) Whether the bankruptcy court erred in denying Mandel's Motion to Enforce Settlement Agreement.

(2) Whether the bankruptcy court erred by denying Mandel's discharge under 11 U.S.C. § 727 of the bankruptcy code.

(3) Whether the bankruptcy court erred by finding the debts to Coleman, Thrasher and White Nile non-dischargeable under 11 U.S.C § 523.

A. Standard of Review

A bankruptcy court's findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of witnesses. Bankruptcy Rule 8013; *see also Matter of Herby's Foods, Inc.*, 2 F.3d 128, 130-31 (5th Cir. 1992). A finding is clearly erroneous "when, although there is evidence to support it, the reviewing court on the entire evidence is left with a firm and definite conviction that a mistake has been committed." *Matter of Missionary Baptist Foundation of America Inc.*, 712 F.2d 206, 209 (5th Cir. 1983) (quoting *United States v. United States Gypsum Co.*, 333 U.S. (1948)).

Issues of law are reviewed de novo as are mixed questions of fact and law. *In re CPDC, Inc.*, 337 F.3d 436, 441 (5th Cir. 2003). A finding of fact which is premised on an improper legal standard, or on a proper standard improperly applied, will also be reviewed *de novo. Missionary Baptist Foundation*, 712 F.2d 206, 209 (5th Cir. 1983) (*rev'd on other grounds).*

B. Analysis

1. The Bankruptcy Court Did Not Err in Denying Debtor's *Omnibus Motion to Enforce Settlement Agreement* due to collateral estoppel.

Appellant argues that the bankruptcy court erred in not enforcing a settlement agreement between Thrasher and Shore as to claims involving White Nile and Thrasher against Mandel. Appellee counters by arguing that Appellant is collaterally estopped from making this argument on appeal. In support of

the collateral estoppel argument, Appellee points to the tortured history of this litigation, and indicates that there is a Fifth Circuit opinion allowing claims by both White Nile and Thrasher against Mandel. Further, there is a decision from the Fifth District Court of Appeals ("Appellate State Court Order") dismissing Appellant declaratory judgment action seeking the state court's approval of the Thrasher/ Shore Settlement interpreted to include release of claims by third parties, including Appellees.

Collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit" *Schiro v. Farley*, 510 U.S. 222, 232 (1994). Collateral estoppel "prevents litigation of an issue when: (1) the identical issue was previously adjudicated; (2) the issue was actually litigated; and (3) the previous determination was necessary to the decision. *Bradberry v. Jefferson County, Tex.*, 732 F.3d 540, 550 (5th Cir. 2013). Additionally, where there is a full and final state court judgment, as here, the *Rooker-Feldman* doctrine applies. The *Rooker-Feldman* doctrine is "confined to cases brought by state court losers complaining of injuries caused by-state court judgments rendered before the federal district court proceedings and inviting district court review and rejection of those judgments" *Exxon Mobil. Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 282 (2005). The four factor test in applying the *Rooker-Feldman* doctrine requires: (1) the federal court plaintiff must have lost in state court; (2) the plaintiff must complain of injuries caused by the state court judgment; (3) the plaintiff must invite federal court review of that

judgment; and (4) the state court judgment must have been entered before the district court proceedings commenced. *Id* at 286.

Mandel's claim is collaterally estopped both under the traditional doctrine of collateral estoppel due to the Fifth Circuit's previous decision on the pending claims, and the *Rooker-Feldman* doctrine as a result of the Appellate State Court Order. The bankruptcy court determined that Coleman, Thrasher, and White Nile all had valid claims against the bankruptcy estate and thus, as derivative claims, any claims for attorney's fees would in turn be valid claims. *See In re Mandel* WL 4599969 (Bankr. E.D. Tex. 2011). While the Fifth Circuit reversed the bankruptcy courts finding as to damages, the Circuit did not overrule the record evidence supporting the finding of claims. *See In re Mandel*, 578 Fed. Appx. 376 (5th Cir. 2014). In affirming the record evidence and affirming the claims of Coleman, Thrasher, and White Nile, the Fifth Circuit has precluded any further ruling on the issue by the district court. Further, Appellant fully litigated this issue in a hearing in the state court proceeding. The Fifth District Court of Appeals affirmed the state court's finding that Mandel could not enforce the settlement agreement. *See Depumpo v. Thrasher.* 2016 WL 147294 (Tex. App.–Dallas 2016). This court cannot reach the merits of the claim given the Fifth District Court of Appeals and Fifth Circuit decisions on point. *Exxon Mobile Corp* at 282; *See also In re Paige*, 610 F.3d 865 873-876 (5th Cir. 2010).

Even if Mandel's claim were not subject to collateral estoppel on more than one ground (both state and federal courts have provided a full and final decision on the matter), Mandel's contention that

"the Bankruptcy Court abused its discretion when it declined to even conduct an evidentiary hearing on the matter . . . " [Dkt. #12 Pg 16]. Mandel's contention is incorrect. The bankruptcy court specifically allowed for Mandel to seek an additional state court ruling to support the settlement release. Mandel appealed to the Fifth District Court of Appeals. *See Depumpo v. Thrasher*, 2016 WL 147294 (Tex. App.–Dallas 2016). That state appellate court found that

> "The declaratory judgment sought by Mandel and SCD would reinterpret the Final Judgment to enjoin Thrasher from pursuing any suit against Mandel on any claim that accrued before the effective date of the settlement. They do not contend the 298th District Court lacked jurisdiction of the parties, the property, the subject matter, or to render the Final Judgment, nor do they contend that court lacked the capacity to act as a court. Thus, they are making an improper collateral attack on that judgment."

Thus for this court to now entertain the merits of a claim that has been ruled on by an appellate state court would be overstepping the bounds of federalism. Further this court is bound by the full and final judgment in the Fifth Circuit. *See In re Mandel*, 578 Fed. Appx. 376 (5th Cir. 2014).

2. The Bankruptcy Court Did Not Err in Denying Mandel's Discharge Under 11 U.S.C. § 727 of the Bankruptcy Code.

At the outset, a bankruptcy court may deny a debtor's discharge only if the plaintiff can show a violation of § 727(a) by a preponderance of the evidence.

See In re Womble, 289 B.R. 836, 844 (Bankr. N.D. Tex. 2003) (reaffirming use of a preponderance of evidence standard to prove each of the elements within § 727). Establishment of only a single sub-section of § 727(a) is sufficient to deny a debtor's discharge. *See In re Moseman*, 436 B.R. 398, 405 (Bankr. E.D. Tex 2010).

A. U.S.C. § 727(a)(3)

11 U.S.C §§ 727(a)(3) allows for an exception to discharge when

> (4) The debtor has concealed, destroyed, mutilated, falsified or failed to keep or preserve any recorded information, including books, documents, records, and papers from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case.

Under § 727(a)(3) a plaintiff must show, by a preponderance of the evidence: (1) the debtor failed to maintain and preserve adequate records; and (2) such failure makes it impossible to ascertain his financial condition and material business transactions. *In re Dennis*, 330 F. 3d 696, 703 (5th Cir. 2003). The objecting party bears "the initial burden to prove that [debtor] failed to keep and preserve her financial records and that this failure prevented him from ascertaining her financial condition" *In re Sandler*, 282 B.R. 254, 263 (Bankr. M.D. Fla. 2002). The debtor's burden to maintain and preserve records is not onerous, financial records need not contain full detail, only "some written evidence of the debtors financial condition" *In re Goff*,

495 F.2d 199, 201 (5th Cir. 1974).[3] However, § 727(a)(3) does not require a demonstration of fraudulent intent, negligence will suffice to bar discharge. *In re Henley*, 480 B.R. 780, 781 (Bankr. S.D. Tex. 2012). In preserving business and finance records, sophisticated debtors may be held to a higher standard. *See In re Jones*, 237 B.R. 297, 305 (S.D. Tex. 2005).

Without question, Mandel is a sophisticated businessman who was the owner, manager, president, or CEO of more than ten entities. Mandel has engaged the advice of dozens of attorneys and has been engaged in more than fifteen lawsuits. There have been eleven appeals stemming from this bankruptcy action alone. The bankruptcy court found that (1) Mandel failed to maintain accurate records based on back-dating documents, that Mandel (2) falsified records in maintaining his business finances, (3) Mandel failed to disclose or keep adequate records of transfers between Positive to Americare, and (4) Mandel was not keeping adequate business before or after the alleged computer crash, and therefore the testimony regarding the corruption was not credible. Further, Mandel obstructed the recovery of information related to financial documents at every turn. Multiple motions to compel were litigated in the bankruptcy proceeding as well as the state court proceeding once Orenstein was appointed as Receiver. Indeed, the trustee appointed referred to recovery of documents as having to "pull teeth." Based on the credible evidence admitted at trial, the bankruptcy court did not

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[3] The Fifth Circuit notes in *Dennis* that *Goff* interprets an older version of the statute. However, that version is materially identical to the current one. *See in re Dennis*, 330 F.3d 696, 703. (5th Cir. 2003).

commit clear error in denying discharge under 11 U.S.C 727 § (a)(3). The record demonstrates a lengthy, complicated bankruptcy proceeding that was frustrated by Mandel's behavior and lack of cooperation.

The bankruptcy court found that "Mandel falsified the books and records of several of his businesses by omitting the execution of quit claim deeds to the Mandel Children's Trust, and he did not record the deeds publicly." [Dkt. #1 EXHIBIT 4, Pg46]. In this appeal, Mandel argues that, "Debtor is not a lawyer, and did not understand the legal implications of an unrecorded deed." [Dkt. #12 pg1]. Mandel's argument strains credibility. The record evidence demonstrates, and the bankruptcy court found that Mandel is a sophisticated businessman. Mandel consulted with lawyers on every aspect of his businesses. There is no evidence supporting the assertion that Mandel should be held to a lesser standard because he's not an attorney with regard to the quit claim deeds he executed just days prior to declaring bankruptcy, nor should Mandel be held to a lesser standard as to the quit claim deeds Mandel executed during the bankruptcy. Mandel continued to pay property taxes and exercise control over the property using the company that had previously owned the lot of land. There is no legitimate purpose in doing so other than to obfuscate the proceeding. Further, he never disclosed the quit claim deeds he executed. There is ample record evidence for the conclusion the bankruptcy court made, that Mandel simply did not want the properties to be part of the bankruptcy and therefore executed a deed to his children in an effort to hide the properties.

Appellant further argues that this court should make a factual determination contrary to the fact

findings of the bankruptcy court in that, "Mandel also back-dated business documents to suit his needs, making it difficult or impossible to analyze the substance of some of his business dealings." [Dkt. #15 Pg. 19] and that the bankruptcy court erred in not finding Mandel's explanation that his computer had corrupted his QuickBooks account credible. This court declines to do so. Findings of fact in bankruptcy proceedings will not be set aside unless they are clearly erroneous. *In re Acis Capital Management, L.P.* 604 B.R. 484 (Bankr. N.D. Tex. 2019). An appellate court must afford great weight to the bankruptcy courts finding because the bankruptcy court is "in a far superior position to gauge the [debtors] credibility than a court that has been provided only with cold transcripts." *In re Acosta* 406 F.3d, 373-74 (5th Cir. 2005) (quoting *In re Martin* 963 F.2d 809, 814 (5th Cir. 1992)). Appellate points to no credible basis for disturbing the bankruptcy court's findings. This proceeding consisted of a lengthy, tortured history full of attempted concealment and adversarial proceedings. This court finds no reason to disturb the credibility findings of the bankruptcy court who handled this case for over five years, heard witness testimony and made credibility determinations based on more than the "cold transcripts."

B. U.S.C. § 727(a)(4)

11 U.S.C § 727(a)(4) of the Bankruptcy Code provides, in relevant part, an exception to discharge when "(4) The debtor knowingly and fraudulently, in or in connection with the case–(a) made a false oath or account . . . " Under § 727(a)(4), the plaintiff in a bankruptcy proceeding must show that: (1) [Debtor] made a statement under oath; (2) the statement was

false (3) debtor knew the statement was false; (4) [Debtor] made the statement with fraudulent intent; and (5) the statement related materially to the bankruptcy case. *Matter of Beaubouef*, 966 F.2d 174 (5th Cir. 1992). "[T]he purpose of § 727(a)(4)(A) is to enforce a debtor's duty of disclosure and to ensure that the Debtor provides reliable information to those who have an interest in the administration of the estate." Thus, "complete financial disclosure is a condition precedent to the privilege of discharge." *In re Lindemann*, 375 B.R. 450, 469 (Bankr. N.D. Ill. 2007). A plaintiff in a § 727(a)(4)(A) bears the burden of demonstrating an actual intent to hinder, delay or defraud, further there must be more than a constructive intent, plaintiff must demonstrate evidence of actual intent to defraud creditors. *Matter of Chastant*, 873 F.2d 89, 91 (5th Cir. 1989). A debtor is usually the only person who can testify directly concerning intent, and "rare will be the debtor who willingly provides direct evidence of a fraudulent intent" *In re Darby*, 3766 B.R. 534, 541 (Bankr. E.D. Tex. 2007). Therefore, courts must look to a course of conduct in discovering fraudulent intent. *See In re Reed*, 700 F.2d 986, 991 (5th Cir. 1989). While fraudulent intent is required, "reckless indifference to the truth is sufficient to deny the debtor a discharge if the subject matter is material to the administration of the bankruptcy." *In re Kinard*, 518 B.R. 290, 305 (Bankr. E.D. Pa. 2014). A finding of materiality requires, "a relationship to the [debtor's] business transactions or estate, or concerns the discovery of assets, business dealings or the existence and disposition of his property." *In re Duncan*, 562 F.3d 688, 695 (5th Cir. 2009).

Appellant argues that Mandel lacked the fraudulent intent required for a denial under § 727(a)(4). Appellant relies on many of the same factual and credibility disputes raised under § 727(a)(3), given the similar analysis. Appellant largely pleads ignorance with regard to failures to disclose, or that he made an honest mistake. Ultimately, Appellant argues that the statements were made in good faith and thus the elements of (1) knowledge of falsity and (2) fraudulent intent are lacking. This is incorrect. Mandel omitted the income he received due to the transfer of assets from Americare from his operating reports, which are sworn statements to the court. Mandel paid numerous personal expenses from various business funds and did not include those payments as income as required and thus committed fraud by omission. Mandel used the businesses to pay bills and then hid those transactions or failed to keep records of them. Mandel spent numerous hours with numerous bankruptcy attorneys drafting his initial schedules. After the errors were pointed out, he spent numerous hours with new counsel correcting the schedules, and they still contained errors or omissions. The bankruptcy court did not credit Mandel's testimony that he had been advised by his attorneys not to include the payments from Americare. By failing to include the payments from Americare in his schedules, Mandel fraudulently misrepresented his assets and signed sworn statement in doing so.

It would overstep this court's scope of review for this court to now find that those errors were unintentional, or not a "reckless indifference to the truth" and therefore reverse the bankruptcy courts finding as to fraudulent intent. It is equally not credible that

Mandel was blind to the obvious falsity of the records. The court found Mandel to be a sophisticated debtor who was operating sophisticated businesses and was assisted by sophisticated counsel. This court finds no basis to disturb the bankruptcy court's credibility findings and now find that Mandel instead had was totally blind-sided and unable to maintain accounting records.

3. The bankruptcy court did not err by finding the debts to Coleman, Thrasher and White Nile non-dischargeable under 11 U.S.C § 523.

A. Collateral Estoppel

Appellant argues that because the Damages Remand Order was on appeal at the time of briefing, it's a fundamentally unfair application of collateral estoppel, as the fact findings by the bankruptcy court could be reversed on appeal. [Dkt. #12 Pg30]. The Fifth Circuit affirmed the findings of the bankruptcy court. *See matter of Mandel*, 720 Fed. Appx. 186 (5th Cir. 2018). In so ruling, the Fifth Circuit has mooted Mandel's argument that the bankruptcy court improperly applied the doctrine of collateral estoppel.

B. 11 U.S.C § 523 (a)(2)(A)

Mandel next argues that the bankruptcy court erred by finding the Thrasher, Coleman and White Nile debts non-dischargeable under 11 U.S.C § 523. 11 U.S.C § 523(a)(2)(A) prevents a discharge in bankruptcy when, "(2) for money, property, services or an extension, renewal or refinancing of credit, to the extent obtained by (A) false pretenses, a false representa-

tion, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition." In a decision entered on September 30, 2011, the bankruptcy court found that Thrasher, on his own behalf and on behalf of White Nile and Coleman, had established claims against Mandel for fraud under Texas law. The bankruptcy court found that based on the finding of fraud, Mandel was precluded from discharge, and that those debts were non-dischargeable under § 523(a)(2)(A).

Appellant argues that because he did not obtain "money, property or services" as a result of fraud the bankruptcy court erred in denying discharge under § 523(a)(2)(A). This is inconsistent with the law. A debtor need only benefit indirectly from a fraud in order to create a non-dischargeable debt under § 523 (a)(2)(A). *See Matter of Scarborough*, 836 F.3d 447 (5th Cir. 2016). The bankruptcy court determined that Mandel had improperly benefited from White Nile's intellectual property. There is sufficient record evidence for the bankruptcy court to determine that the Mandel's fraud and exploitation of White Nile's intellectual property indirectly led to a benefit for Mandel, and thus discharge was properly denied under § 523 (a)(2)(A).

C. 11 U.S.C § 523(a)(4)

Appellant next argues that because the bankruptcy court did not find evidence of fraudulent intent in either the larceny or the misappropriation claims, the court erred in finding the claims non-dischargeable under § 523(a)(4). Further, Mandel argues that he did not owe a fiduciary duty to White Nile, and because he was not the type of fiduciary that owes a duty, § 523

(a)(4) does not apply. These issues have been expressly ruled on by the Fifth Circuit. *In re Mandel* 578 Fed. Appx. 376 (5th Cir. 2014).

As to the claim that Mandel does not owe a fiduciary duty, the Fifth Circuit held,

> "The bankruptcy court found seven breaches of the fiduciary duty Mandel owed to White Nile. The elements of a breach of fiduciary duty claim are: (1) a fiduciary relationship between the plaintiff and defendant exists; (2) a breach by the defendant of his fiduciary duty; and (3) an injury to the plaintiff or a benefit to the defendant from the breach. The bankruptcy court found that Mandel failed to prosecute White Nile's patent rights, failed to enforce nondisclosure agreements, released members from nondisclosure agreements, competed with White Nile by forming NeXplore, transferred funds from White Nile to NeXplore, disseminated White Nile's trade secrets, and failed to disclose to other officers and shareholders the formation of NeXplore. Mandel contends that he could not have breached his fiduciary duty because a resolution of the board of directors released him from his non-disclosure and non-compete agreements. This analysis elides that this resolution was adopted after Mandel purported to force Thrasher and Martin out of the company and purported to elect two of his allies to the board. In any event, a board resolution adopted by interested directors does not negate a breach of fiduciary duties. Mandel has not shown that the bankruptcy

> court's detailed findings on this issue were incorrect."

Id at 388. With regard to whether Mandel's actions constituted embezzlement or larceny,

> "The bankruptcy court found that "Mandel specifically intended to take control of White Nile's intellectual property and use it to start up his own business" and that Mandel and his co-conspirators were "fully aware of exactly what they were doing." These conclusions are not clearly erroneous based on the record. Rather, the facts present a premeditated, calculated plan to siphon the intellectual property of White Nile for the benefit of NeXplore. Mandel counters that, as an officer of White Nile, he had the ability to give "effective consent" to the theft of the trade secret and thus he cannot be held liable. But this argument is unconvincing. A single officer and shareholder cannot give "effective consent" to breaching his own fiduciary duty to the company by stealing that company's trade secrets. Mandel was not "legally authorized" to consent to this own theft. We affirm the bankruptcy court's ruling on this claim."

Id at 384. Because the Fifth Circuit has expressly ruled on these issues, the fraudulent intent required under 523(a)(4) is established as a principle of the doctrine of collateral estoppel. *Grogan v. Garner*, 111 S. Ct. 654, 658-659 ("In sum, if nondischargeability must be proved only by a preponderance of the evidence, all creditors who have secured fraud judgments, the elements of which are the same as those of the

fraud discharge exception, will be exempt from discharge under collateral estoppel principles") *See In re Cowin* 538 B.R. 721, 738 (Bankr. S.D. Tex. 2015), *aff'd sub nom.*

D. § 523(a)(6)

Finally, Mandel argues that he lacked the requisite actual intent to cause harm. Mandel argues, "523(a)(6) requires a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury. Thus that Mandel may have intended the result, *i.e.* to take control of White Nile and its property, that does not mean that Mandel intended the injury" [Dkt. #12 Pg40].

Willful injury under 523(a)(6) is "a deliberate and intentional injury, not merely a deliberate and intentional act that leads to injury" *Kawawaauhau v. Geiger*, 523 U.S. 57, 61 (1998). In interpreting *Kawaauhau*, The Fifth Circuit has held "that an injury is 'willful and malicious' where there is either an objective substantial certainty of harm or a subjective motive to cause harm." *In re Miller*, 156 F.3d 598, 606 (5th Cir. 1998). This court must review the question of substantial certainty of harm under the clear error standard. *In re Shankle*, 554 Fed.Appx. 264 (5th Cir. 2014).

Mandel attempted to misappropriate White Nile's intellectual property and capital related to operating expenses and use them in conjunction with his new venture, NeXplore. In finding those facts, the bankruptcy court determined that there was an objective substantial certainty of harm. This court agrees with the findings of the bankruptcy court, and finds no clear error.

IV. Conclusion

IT IS THEREFORE ORDERED that the bankruptcy court's March 31, 2017 Findings of Fact and Conclusions of Law [Dkt. #112] and March 31, 2017 Judgment [Dkt. #113] are AFFIRMED.

SIGNED this 19th day of December, 2019.

/s/ Michael Truncale
United States District Judge

EDWARD MANDEL,

Appellant,

v.

STEVEN THRASHER, INDIVIDUALLY; WHITE NILE SOFTWARE, INCORPORATED; JASON COLEMAN; MADDENSWELL, L.L.P.; LAW OFFICES OF MITCHELL MADDEN,

Appellees.

No. 20-40340

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 4:17-CV-261
USDC No. 4:17-CV-262

Before: JONES, SOUTHWICK,
and ENGELHARDT, Circuit Judges.

The petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (Fed. R. App. P. 35 and 5th Cir. R. 35), the petition for rehearing en banc is DENIED.

Additional material from this filing is available in the Clerk's Office.