UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

In re: BARRY J. BYRNES

Petitioner.

No. 22-2016
(D.C. No. 1:21-CV-00295-MV-JHR) (D. N.M.)

ORDER

Before **HARTZ**, **EID**, and **CARSON**, Circuit Judges.

This matter comes before the court on a Petition for Writ of Mandamus ("Petition") asking this court to (1) compel the district court to hear and decide his motion to withdraw the reference of adversary proceedings to the bankruptcy court;
(2) direct the district court to grant the motion and transfer the adversary proceeding to district court; and (3) disqualify the district court judge, the magistrate judge, and the bankruptcy court judge.
"[A] writ of mandamus is a drastic remedy, and is to be invoked only in extraordinary circumstances." *In re Cooper Tire & Rubber Co.*, 568 F.3d 1180, 1186 (10th Cir. 2009) (internal quotation marks omitted). "Three conditions must be met before a writ of mandamus may issue." *Id.* at 1187. First, the petitioner must show he has "no other adequate means to attain the relief he desires." *Id.* (internal quotation marks omitted). Second, the petitioner must show that his "right to the writ is clear and indisputable." *Id.* (internal quotation marks omitted). Third, the "court, in the exercise of
its discretion, must be satisfied that the writ is appropriate under the circumstances." *Id.*
(internal quotation marks omitted).

Petitioner filed his motion to withdraw the reference in March 2021. On November 10, 2021, the magistrate judge issued a Report and Recommendation that the district court deny the

motion. Petitioner filed objections on November 22, 2021. We conclude that the court's failure to rule on the motion in the four months since Petitioner filed his objections is not an extraordinary circumstance worthy of the drastic remedy of a writ to hear and decide the motion.

As for Petitioner's request for a writ directing the district court to grant the motion to withdraw the reference and disqualifying the judicial officers involved in the underlying proceedings, we have considered the Petition, the two supplements to the Petition, and the underlying orders in both the district court and bankruptcy court. As to the request to withdraw the reference, Petitioner has not shown that he has no other adequate means to obtain relief. Indeed, the means he has employed to obtain the relief—asking the district court to withdraw the reference—is still open to him since the district court has not yet ruled on his motion. And regarding the request for disqualification of judicial officers, Petitioner has not shown that his right to the writ is clear and indisputable. Accordingly, we deny the Petition.

Having denied the Petition, we deny Petitioner's motion to stay the district court and bankruptcy court proceedings pending resolution of the Petition as moot.

Entered for the Court

CHRISTOPHER M.
WOLPERT, Clerk

FILED
United States Court of
Appeals Tenth Circuit
April 7, 2022

Christopher M. Wolpert

Clerk of Court

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

In re:
SYLVIA MARIE BYRNES, Bankruptcy Court
No. 20-1070-t

Debtor.

BARRY J. BYRNES,

Appellant,

V. Civ. No. 22-426 JCH/GBW

SYLVIA MARIE BYRNES,

Appellee.

MEMORANDUM OPINION AND ORDER OVERRULING OBJECTIONS AND ADOPTING MAGISTRATE JUDGE'S PROPOSED FINDINGS AND RECOMMENDED DISPOSITION

This matter comes before the Court on the Honorable Gregory B. Wormuth's *Proposed Findings and Recommended Disposition* (ECF No. 27) ("the PFRD"), filed on July 6, 2023, and on Appellant Barry J. Byrnes's *Objections to Proposed Findings and Recommended Disposition* (ECF No. 28), timely filed on July 13, 2023. Judge Wormuth recommended in the PFRD that this Court affirm the final judgment of the United States Bankruptcy Court for the District of New Mexico, which dismissed Appellant's adversary proceeding with prejudice and

awarded to Appellee Sylvia Marie Byrnes a monetary judgment against Appellant for $12,921.14. The monetary judgment represented the attorney's fees and costs Ms. Byrnes incurred in the proceeding after it was removed to the Bankruptcy Court. After Appellant filed objections to the PFRD, Appellee filed a *Memorandum in Support of Judge Wormuth's Proposed Findings and Recommended Disposition* (ECF No. 29), on July 28, 2023. Appellant subsequently filed a *Motion to Refuse Consideration of Defendant-Appellee's Memorandum (Document 29)* (ECF No. 30), arguing that Appellee's memorandum was untimely and was not a proper response to Appellant's objections. For the reasons given herein, the Court will deny Mr. Byrnes's motion to refuse.

As for Appellant's objections, this Court conducted a *de novo* review of the PFRD to determine the validity of the objections. *See* 28 U.S.C. § 636(b)(1). The Court considered Appellants' Opening Brief (ECF No. 13), the Appellee's Response (ECF No. 17), Appellant's Reply Brief (ECF No. 18), Judge Wormuth's PFRD (ECF No. 27), Appellant's Objections (ECF No. 28), and Appellee's Memorandum (ECF No. 29). Based on the Court's review, the Court finds that Mr. Byrnes's Objections to the Magistrate Judge's PFRD should be overruled and that the PFRD is well-reasoned and should be adopted.

I. STANDARD

District courts may refer dispositive motions to a magistrate judge for a recommended disposition pursuant to 28 U.S.C. § 636 and Federal Rule of Civil Procedure 72. 28 U.S.C. § 636(b)(1)(B); Fed. R. Civ. P. 72(b)(1). Within 14 days after being served with a copy of the magistrate judge's recommended disposition, a party may serve and file specific written

objections to the proposed findings and recommendations. Fed. R. Civ. P. 72(b)(2); 28 U.S.C. § 636(b)(1). When resolving objections to a magistrate judge's proposal, the "district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to." Fed. R. Civ. P. 72(b)(3). "The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions." *Id.*

"[A] party's objections to the magistrate judge's report and recommendation must be both timely and specific to preserve an issue for de novo review by the district court or for appellate review." *United States v. One Parcel of Real Prop.*, 73 F.3d 1057, 1060 (10th Cir. 1996). "Issues raised for the first time in objections to the magistrate judge's recommendation are deemed waived." *Marshall v. Chater*, 75 F.3d 1421, 1426 (10th Cir. 1996).

District courts have jurisdiction to consider appeals from final judgments, orders, and decrees of bankruptcy judges. *See* 28 U.S.C. § 158(a). In conducting an appeal under § 158(a), the district court applies the same standards of review governing appellate review in other cases: de novo review of the bankruptcy court's legal determinations, clear-error review of its factual findings, and abuse-of-discretion review for discretionary matters. *See In re Country World Casinos, Inc.*, 181 F.3d 1146, 1149 (10th Cir. 1999); *In re Busch*, 294 B.R. 137, 140 (B.A.P. 10th Cir. 2003) (quoting *Pierce v. Underwood*, 487 U.S. 552, 558 (1988)). The decision to impose the sanction of dismissal for failure to follow court orders and rules is reviewed for abuse of discretion. *Gripe v. City of Enid, Okl.*, 312 F.3d 1184, 1188 (10th Cir. 2002).

II. BACKGROUND

Sylvia Marie Byrnes and Barry J. Byrnes are married but separated. (*See* Bankruptcy Record on Appeal ("R.") at 14, ECF No. 5.) On July 13, 2018, Ms. Byrnes called the police and alleged to the police that she was assaulted and the victim of domestic abuse, resulting in the police arresting and charging Mr. Byrnes with a misdemeanor. (*Id.*) Ms. Byrnes also filed a petition for an order of protection from domestic abuse, based on the alleged July 13th assault. (*Id.* at 25.) Mr. Byrnes subsequently filed in state court claims against Ms. Byrnes for defamation and intentional infliction of emotional distress ("IIED"), among other claims, based on Ms. Byrnes's statements to the police and in support of the petition for an order of protection. (*Id.* at 17, 24-25.) All but the two aforementioned tort claims were dismissed. (*Id.* at 17.)

On October 30, 2020, Ms. Byrnes filed a petition for relief under Chapter 7 of the Bankruptcy Code. (*See* R. at 14, 18, 179, 351, ECF No. 5.) Mr. Byrnes removed his state court tort action against Ms. Byrnes to the United States Bankruptcy Court for the District of New Mexico (the "Bankruptcy Court"). (Notice of Removal, ECF No. 6.) He also filed an Adversary Complaint in the Bankruptcy Court, which was subsequently consolidated with the removed case. (R. 12, 42, 559, ECF No. 5.) Although Mr. Byrnes is proceeding *pro se*, he was a licensed, practicing attorney with years of experience and an attorney of record in 35 bankruptcies between 1997 and 2003. (*Id.* at 73, 187.)

The Honorable David T. Thuma, United States Bankruptcy Judge, held a scheduling conference on January 11, 2021. (Jan. 11, 2021, Hr'g Tr. 2:10-15, ECF No. 21 at 41 of 90.) During that hearing, Judge Thuma tried to direct Mr. Byrnes to a removal issue,

but Mr. Byrnes kept talking, so Judge Thuma told him to be quiet. (*Id.* at 13:2-12.) Mr. Byrnes requested Judge Thuma not to talk down to him. (*Id.* at 13:13-14.) Mr. Byrnes continued speaking, so Judge Thuma again instructed him to be quiet. (*Id.* at 13:15-21.) After hearing from defense counsel, Mr. Byrnes again asked to speak, but Judge Thuma noted he had been talking a lot and needed him to be quiet from time to time. (*See id.* at 13:23-14:25.) Mr. Byrnes responded that he did not like being told to be quiet. (*Id.* at 15:1-2.) When Judge Thuma continued to try to get Mr. Byrnes to stop talking, with Mr. Byrnes again interrupting, Judge Thuma warned him that if he disobeyed, he would "have to fine you or find you in contempt because you're being totally annoying and unreasonable." (*Id.* at 15:3-12.) Later, when Judge Thuma asked Mr. Bynres about his position on consolidating the two cases and amending the complaint, Mr. Byrnes said to Judge Thuma that he didn't "understand the procedural games you and Attorney Pickett, Attorney Arvizu are proposing, but they are totally unnecessary." (*Id.* at 16:14-17:1, 17:10, 18:10-13.)

Judge Thuma ordered Plaintiff to amend his complaint to include all state law claims and all nondischargeability claims he wished to assert in the consolidated case. (R. at 43, ECF No. 5.) Mr. Byrnes complied by filing an amended complaint on February 10, 2021, containing two counts: claims for defamation and IIED against Ms. Byrnes arising from the July 13, 2018, incident for which he asked that any judgment be declared non-dischargeable (Count I); and a claim for declaratory judgment for which he requested declarations that Ms. Byrnes's various contract and domestic support obligations are non-dischargeable, including a declaration that Ms. Byrnes's contractual obligations imposed by the HUD reverse mortgage are nondischargeable in bankruptcy

(Count II). (*Id.* at 47-64. *See also Byrnes v. Byrnes*, No. 22-2049, Order 2 (10th Cir. Dec. 21, 2022) (also found at *Byrnes v. Byrnes*, 21cv295, Order, ECF No. 63).)

Judge Thuma held another scheduling conference in the case on March 8, 2021. (*See* Mar. 8, 2021, Hr'g Tr. 1-10, ECF No. 21 at 30-39 of 90.) During the hearing, when Judge Thuma asked defense counsel for his position on an issue, Mr. Byrnes interrupted. (*Id.* at 3:7-15.) After Judge Thuma continued seeking defense counsel's position, Mr. Byrnes said, "You son of a b- (inaudible)." (*Id.* at 3:16-17.) At the end of the hearing, Mr. Byrnes asked for a hearing on the motion to dismiss. (*Id.* at 6:15-8:19.) Judge Thuma said he would set the matter for hearing when it was fully briefed. (*Id.* at 8:24-25.) Mr. Byrnes then asked when the motion to dismiss would be fully briefed, to which Judge Thuma replied that it is in the local rules. (*Id.* at 9:2-5.) Mr. Byrnes responded:

> Judge, stop – you know, I'm a pro se guy, and I – you and your bankruptcy buddies there can play all the games you want with me, but I'm just trying to get a fair hearing. So why don't you comply with the rules of the scheduling conference and promote substantial justice and let's set a date for briefing on that there Rule 12(b)(6) motion?

(*Id.* at 9:6-13.) Judge Thuma asked defense counsel if there was anything further and ended the hearing. (*Id.* at 9:14-24.)

The main bankruptcy case was closed on March 11, 2021, as a "no asset" case. (R. 561, 791, ECF No. 5.) A week later, Mr. Byrnes filed with the Bankruptcy Court a motion to disqualify Judge Thuma (*Id.* at 117-128), and a motion to transfer the case to the United States District Court for the District of New Mexico (the "District Court") (*Id.* at 129-31.) On March 24, 2021, Mr. Byrnes filed a refusal to consent to the Bankruptcy Court hearing and determining his claims. (*Id.* at 133-34.) Judge Thuma denied the motion to transfer for lack of authority. (*Id.* at 136-37.)

Mr. Byrnes then filed a *Motion for Withdrawal of Reference* as to both counts of his amended complaint. (*Id.* at 146-152). The withdrawal motion was assigned case number No. 1:21- CV-00295 in District Court. (*Id.* at 792; *see also* 28 U.S.C. § 157(d) (permitting district court to withdraw reference to bankruptcy court upon timely motion of a party for cause shown).) The District Court referred the motion to Magistrate Judge Jerry Ritter for proposed findings of fact and a recommended disposition. (*Byrnes v. Byrnes*, No. 1:21-CV-00295, Order, ECF No. 7.)

Mr. Byrnes also filed a motion to stay or continue a hearing the Bankruptcy Court set on the defendant's motion to dismiss count two until the District Court ruled on the motion to withdraw reference. (*See* R. 195-98, 210, ECF No. 5.) On April 14, 2021, Mr. Byrnes filed a supplemental jury demand on all issues and did not consent to his claims being heard and adjudicated by the Bankruptcy Court. (*Id.* at 163-64.) Judge Thuma on May 27, 2021, denied Mr. Byrnes's request to stay or continue the hearing because, even if the District Court withdrew the reference and proceeded with a jury trial, the common practice was for Bankruptcy Court to oversee the pretrial preparation of adversary

proceedings. (*Id.* at 203-07.) Judge Thuma granted the motion to dismiss count two, (*id.* at 228-42), and Mr. Byrnes subsequently filed a Notice of Appeal of the dismissal to the Bankruptcy Appellate Panel ("BAP"), (*id.* at 257-72).

On July 19, 2021, Judge Thuma held a hearing on Defendant's motion for protective order arising from Mr. Byrnes's efforts to subpoena witnesses for depositions without noticing their depositions or conferring with defense counsel. (*See* July 19, 2021, Mot. Hr'g Tr. 2:10-16:15, ECF No. 21 at 5-19 of 90.) Defense counsel requested attorney's fees in preparing the motion under Rule 37(a)(5)(A). (*Id.* at 4:14-18.) During the hearing, Mr. Byrnes accused Judge Thuma of being "unfair" and said he was an "absolute disgrace as a judge." (*Id.* at 15:16-18.)

The next day, Judge Thuma entered a *Protective and Sanctions Order* based on his findings that Mr. Byrnes failed to follow the procedural rules for issuing witness subpoenas and scheduling depositions. (R. at 300-04, ECF No. 5.) He ordered Mr. Byrnes to pay attorney's fees and costs in the amount of $1,760.08 as a sanction for his conduct. (*Id.* at 303.) Mr. Byrnes promptly filed a motion to reconsider the protective order. (*Id.* at 311.) Judge Thuma entered an Opinion determining that the motion was baseless and a waste of time. (*Id.* at 333-44.) He warned Mr. Byrnes that he was "bordering on becoming a vexatious litigant." (*Id.* at 339.) Judge Thuma set forth Mr. Byrnes's "overly aggressive litigation tactics": "three appeals of interlocutory orders; numerous motions to reconsider; a motion to stay or continue hearing; two improper motions for default judgment; two jury demands for a core nondischargeability action; a motion to transfer this proceeding to the District Court; a motion to disqualify the presiding judge; and a motion to withdraw the reference." (R. at 340, ECF No. 5.) He noted that, as a retired lawyer, Mr. Byrnes appeared to be over-litigating the case on purpose to punish his estranged wife or coerce her into submission due to the brunt of attorney's fees and expenses. (*Id.*)

Judge Thuma put Mr. Byrnes on notice that the Court would not tolerate vexatious litigation or disruptive, rude, and insulting courtroom behavior that, to date, the Court had tolerated. (*Id.* at 340-42.) Judge Thuma warned him that further disruptive, rude, or insulting behavior would be dealt with by a contempt hearing.

(*Id.* at 341.) Mr. Byrnes appealed the protective and sanctions order to the BAP, which it promptly dismissed as an improper interlocutory appeal. (*See id.* at 347-67, 379-381.)

After Judge Thuma set a pre-trial conference in the case, on November 10, 2021, Mr. Byrnes filed a motion to stay the pre-trial conference, challenging the Bankruptcy Court's jurisdiction over the remaining tort claims. (*Id.* at 406-10.) According to Mr. Byrnes, he served his part of the pretrial order using the Rule 16 form, but defense counsel informed him he had to use the Bankruptcy Court form. (*Id.* at 408.) Mr. Byrnes asserted that the pretrial conference should be stayed because the claims should be decided by a jury in the District Court. (*Id.* at 409-10.) In addition, Mr. Byrnes filed a motion with the District Court to set a date for a District Court pretrial conference on grounds that he was entitled to a jury trial on his defamation and intentional infliction of emotional distress claims. (*See id.* at 411-16.) Defendant then filed a motion to enter the defense pretrial order and a request for sanctions, up to dismissal of the case with prejudice, based on Mr. Byrnes's failure to cooperate in preparing a joint pretrial order and his pattern of contemptuous behavior. (*Id.* at 419-27.)

Meanwhile, in the No. 1:21-CV-00295 case, Magistrate Judge Jerry Ritter on November 10, 2021, entered his PFRD, recommending that the motion to withdraw the reference be denied without prejudice. (DNM 54, ECF No. 7.) In analyzing the motion, Judge Ritter considered Mr. Byrnes's request for a jury trial. (*Id.* at 59-61.) Judge Ritter noted that the defamation and IIED claims would not need to be tried before a jury to the extent that the case is a nondischargeability proceeding seeking equitable relief. (*Id.*) However, he declined to consider the

issue at that time, explaining that the Bankruptcy Court retains jurisdiction over the pretrial proceedings, and the issue only needed to be decided when the threat of Seventh Amendment rights became concrete. (*See id.*) Judge Ritter recommended that the case stay in the Bankruptcy Court for pretrial

proceedings, and that when "the proceeding is ready for trial, Mr. Byrnes may refile his motion and the Court can determine which claims, if any, will be tried to a jury." (*Id.* at 60.)

Judge Thuma conducted a pretrial conference on November 15, 2021, after which he ordered briefing on the issue of the Court's jurisdiction to try count one, among other issues. (*See* R. 454-58, ECF No. 5.) In a February 16, 2022, Order, Judge Thuma ultimately concluded that Plaintiff timely refused to consent to the Bankruptcy Court trying his personal injury tort claims. (*Id.* at 597-99.) He sought input from the parties as to whether they preferred him to remand the claims to state court for trial or ask the District Court to withdraw the reference. (*Id.* at 598.)

Mr. Byrnes filed with the Tenth Circuit on February 16, 2022, a *Petition for a Writ of Mandamus/Prohibition to the United States District Court for the District of New Mexico*. (*Id.* at 602-41.) He sought an order, among other things, prohibiting Judge Thuma from requiring him to file a bankruptcy form pretrial order and from requiring him to appear at the bankruptcy pretrial conference, as well as an order mandating that the District Court assume jurisdiction over the personal injury tort claims and mandate a jury trial. (*Id.* at 626-27.) The Tenth Circuit denied his petition for the writ on April 7, 2022. (*Id.* at 741-43.)

According to 28 U.S.C. § 157(b)(5), personal injury tort claims "shall be tried in the district court in which the bankruptcy case is pending...." On March 11, 2022, Judge Thuma, adopted a narrow interpretation of "personal injury tort" and entered an Opinion and an Order ruling that the defamation claim was not a personal injury tort and that the Bankruptcy Court could try it. (R. 697-716, ECF No. 5.) As for the IIED claim, Judge Thuma concluded

that it was based on the same alleged defamation, and it should remain in the Bankruptcy Court for trial. (*See id.*) He further noted that if the claims were "core," because they were brought as part of a nondischargeability proceeding (an issue to be decided later), then he would enter a final judgment.

(*Id.* at 712.) But if the claims were not "core," then Judge Thuma would instead enter proposed findings of fact and conclusions of law for review by the district court. (*Id.*) Finally, Judge Thuma stated he would schedule the claims for a bench trial, with sufficient intervening time for the district court to rule on Mr. Byrnes's motion for withdrawal of reference. (*Id.* at 713.)

In April 2022, the Honorable Kea W. Riggs entered a Memorandum Opinion and Order adopting Judge Ritter's PFRD, dismissing Mr. Byrnes's *Motion for Withdrawal of Reference* without prejudice, denying his motion to set a date for a district court pretrial conference, and denying his motion to stay the bankruptcy pretrial conference. (R. at 751-56, ECF No. 5.) She also entered a Final Judgment dismissing the action, 21-cv-00295, without prejudice. (*Id.* at 744.) Mr. Byrnes appealed Judge Riggs's decisions to the Tenth Circuit on April 27, 2022, (*id.* at 762-65), and on the same day he also filed a motion to reconsider Judge Riggs's ruling, (DNM 333, ECF No. 7). The Tenth Circuit promptly issued an Order abating the appeal pending the district court's disposition of the motion to reconsider. (*See id.* at 417; Order, 21cv295, ECF No. 49.)

In the meantime, Judge Thuma scheduled a pretrial conference, which had already been rescheduled once at Plaintiff's request. (R. at 792, ECF No. 5.) Judge Thuma held a final pretrial conference on May 13, 2022. (*Id.*; May 13, 2022, Hr'g Tr. 1, ECF No. 21 at 21 of 90.) At the pretrial conference, Judge Thuma noted that Mr. Byrnes called his office that morning and said he was not going to participate. (*See* May 13, 2022, Hr'g Tr. 2:23-25, ECF No. 21.) Judge Thuma asked if Mr. Byrnes was willing to participate in the pretrial conference in good faith, and Mr. Byrnes responded, "No,"

stating his belief that Judge Riggs dismissed the action, which he appealed, and that Judge Thuma was trying to conduct a bench trial on a dismissed case. (*Id.* at 2:23-3:12.) When Judge Thuma tried to explain that Judge Riggs only ruled on the motion to withdraw reference and had not ruled on the merits of the case, Mr. Byrnes replied, "Well, you're

not the ... Tenth Circuit. You're just a bankruptcy judge." (*Id.* at 4:19-25.) Mr. Byrnes continued, "You're nobody." (*See id.* at 5:2; R. at 793, ECF No. 5.) Judge Thuma said he was going to sanction Mr. Byrnes $500 for his comments. (May 13, 2022, Hr'g Tr. 5:4-9, ECF No. 21.) Judge Thuma continued, "I'm going to ask you if you're going to participate in this pretrial conference in good faith. Because if you're not, I'm going to sanction you – and I might dismiss this proceeding as well as the sanction under Rule 16." (*Id.* at 5:9-13) Mr. Byrnes replied, "Judge, you can do what you want. I'm not participating. And if you're going to issue a sanction where – make sure that it's an appealable order." (*Id.* at 5:14-17.) Judge Thuma then asked defense counsel about his position on an appropriate sanction. (*Id.* at 5:21-6:16.) Defense counsel, Mark Pickett, requested dismissal of the case with prejudice. (*Id.* at 6:14-16.) Judge Thuma again asked Mr. Byrnes if he wanted to be heard on this point, to which Mr. Byrnes replied, "you heard me already, Judge." (*Id.* at 6:17-20.)

Next, Judge Thuma asked Mr. Pickett what he thought about attorney's fees. (*Id.* at 6:21- 22.) Mr. Pickett requested an award of attorney's fees. (*Id.* at 6:23-7:3.) Judge Thuma suggested Mr. Pickett file an affidavit of attorney's fees "incurred in connection with this adversary proceeding," to "include the Tenth Circuit and the District Court proceedings." (*Id.* at 7:6-11.) When asked if there was anything else, Mr. Byrnes requested certification for immediate appeal of any order issued. (*Id.* at 7:14-22.)

On May 18, 2022, Mark Pickett submitted an affidavit stating he spent a total of 46.52 hours defending Ms. Byrnes in federal district court, federal bankruptcy court, and the BAP, discounting the time he spent on a motion for protective order for

which attorney's fees had already been awarded. (R. at 767-72, ECF No. 5.) At his hourly rate of $225.00 and accounting for gross receipts tax, the total amount of fees he requested was $11,337.07. (*Id.* at 768.) Subsequently, Mr.

Pickett moved to correct the sanctions previously ordered arising from the protective order, from

$1,760.08 to $1,584.07, upon realizing that he used his customary $250 hourly rate, rather than the $225 hourly rate applicable to this case. (*Id.* at 783-85.)

Mr. Byrnes moved to strike the affidavit for attorney's fees on May 23, 2022. (*Id.* at 773- 82.) According to Mr. Byrnes, he "was unable to participate in the conference because the Count One tort claims are still subject to trial by jury," and he did not intend to waive his jury trial right. (*Id.* at 777.) Additionally, he moved to reconsider the order awarding prior sanctions arising from the protective order. (*Id.* at 786-89.)

On May 27, 2022, Judge Thuma entered an Opinion finding that, at the final pretrial conference, "Plaintiff refused to participate in good faith and stated that he would not participate in a trial," (*id.* at 790), and that Plaintiff's refusal to proceed prevented Judge Thuma from conducting the conference or setting the case for trial, (*id.* at 793). He additionally found that Plaintiff's prosecution of his case "has been in bad faith and constitutes vexatious and harassing litigation." (*Id.* at 791.) After considering the factors set forth in *Ehrenhaus v. Reynolds*, 965 F.2d 916 (10th Cir. 1992), for determining whether the sanction of dismissal is appropriate, he concluded that the case should be dismissed with prejudice as a sanction under Rules 16(f) and
41(b). (R. at 791-800, ECF No. 5.) Judge Thuma determined that Mr. Byrnes's interpretation of Judge Riggs's ruling was not reasonable and was a pretext for refusing to try his case. (*Id.* at 796.) Based on the record, including evidence that a judgment against Ms. Byrnes would be uncollectible, Judge Thuma found that Mr. Byrnes wanted to litigate his case,

rather than try it, as a means of harassing his wife and draining her of what little resources she had. (*Id.* at 796-97.) Based on Rule 16(f)(2) and the court's inherent contempt authority to prevent abusive litigation when a party acts in bad faith, vexatiously, wantonly, or for oppressive reasons, Judge Thuma

ordered Mr. Byrnes to pay Defendant's attorney's fees in the amount of $12,921.14. (*See id.* at 797-800.) The amount of attorney's fees accounted for the corrected billing rate previously identified by counsel (53.02 hours x $225 hourly rate + gross receipts tax). (*Id.* at 799.) The same day, Judge Thuma entered a Final Judgment dismissing the adversary proceeding with prejudice. (*Id.* at 802-03.)

Mr. Byrnes appealed Judge Thuma's Final Judgment to the District Court. (*Id.* at 821-24.) The appeal opened this case on June 6, 2022. (*Id.* at 825; Notice of Appeal, ECF No. 1-1.) This Court entered an order of referral to Magistrate Judge Gregory B. Wormuth to conduct hearings and to perform any legal analysis required to recommend to the Court an ultimate disposition of the case. (Order, ECF No. 2.) The parties filed their respective opening brief (ECF No. 13), response brief (ECF No. 17), and reply brief (ECF No. 18).

On December 19, 2022, in the No. 1:21-CV-00295 case, Judge Riggs entered an *Order Denying Plaintiff's Motion for Reconsideration*. Judge Riggs determined that the motion to reconsider was rendered moot by Judge Thuma's entry of final judgment in the adversary proceeding and Plaintiff's appeal of that final judgment. (*Byrnes v. Byrnes*, 21cv295, Order 1-3, ECF No. 62.) Alternatively, she concluded that motion to reconsider did not have merit in fact or law. (*Id.* at 3-8.) Two days later, the Tenth Circuit dismissed Mr. Byrnes's appeal of Judge Riggs's orders. *Byrnes v. Byrnes*, No. Civ. 22-2049, Order 5 (10th Cir. Dec. 21, 2022) (also found at *Byrnes v. Byrnes*, 1:21-cv-00295, Order, ECF No. 63). The Tenth Circuit explained that the order denying the motion to withdraw the reference, from which Mr. Byrnes appealed, "is an interlocutory, non-appealable order over which this court lacks

appellate jurisdiction." *Id.* at 4.

Litigation in this case continued. Judge Wormuth subsequently ordered Appellant to show cause why his appeal should not be dismissed for failure to comply with applicable procedural

rules and with the Court's Order Setting Briefing Schedule. (Order 1-3, ECF No. 26.) Mr. Byrnes responded. (Resp, ECF No. 26.) After considering all three briefs, Judge Wormuth entered a PFRD on July 6, 2023, recommending this Court affirm the final judgment of the Bankruptcy Court. (PFRD 1, ECF No. 27.) Mr. Byrnes filed timely objections to the PFRD on July 13, 2023. (Obj., ECF No. 28.)

III. ANALYSIS

A. Appellant's *Motion to Refuse Consideration of Defendant-Appellee's Memorandum (Document 29)* will be denied

Turning first to Appellant's motion to disregard Appellee's memorandum in support of the PFRD, the Court will deny the motion. A party may respond to another party's objections within
14 days after being served with a copy. Fed. R. Civ. P. 72(b)(2). Appellee filed her memorandum

15 days after Appellant filed his objections, so it was filed one day late. Nevertheless, the Court finds that delay did not prejudice Appellant and the one-day delay does not warrant striking the memorandum. As for Appellant's arguments that the memorandum does not respond to his specific objections, the Court finds that striking the memorandum is not the appropriate remedy.

B. Appellant's Objections will be overruled

Before turning to Appellant's enumerated 20 objections, the Court will address Mr. Byrnes's separate argument concerning bias. Mr. Byrnes asserts that the issuance of Judge Wormuth's *Order*

to Show Cause indicates that Judge Wormuth's PFRD is "tainted by bias and prejudice" and that Judge Wormuth "obviously intended to prevent plaintiff from appealing." (Obj. 24-25, ECF No. 28.) Judge Wormuth issued the *Order to Show Cause* regarding Appellant's failures to comply with the Court's *Order Setting Briefing Schedule* (ECF No. 10) and applicable procedural rules. (Order 1, ECF No. 25.) Judge Wormuth set forth the grounds for why Appellant had not followed the relevant rules and provided him an opportunity to respond as to why sanctions

should not be assessed. (*Id.* at 2-6.) After Appellant filed a response, Judge Wormuth did not thereafter impose any sanctions based on the procedural deficiencies he identified, and he considered the merits of Appellant's appeal.

The moving party has a substantial burden "to demonstrate that the judge is not impartial." *United States v. Burger*, 964 F.2d 1065, 1070 (10th Cir. 1992). The test is whether a reasonable person, with knowledge of all relevant facts, would doubt the judge's impartiality. *Id.* A judge has an obligation not to recuse when there is no cause for him to do so. *Id.* Appellant failed to show that Judge Wormuth was impermissibly biased or prejudiced against him or that he prevented Appellant from appealing. Nor could Judge Wormuth's impartiality reasonably be questioned based on the record. Mr. Byrnes's objection based on bias is overruled. The Court will now address Appellant's enumerated objections.[1]

Objection 1: Factual finding on lack of good faith participation

In his first objection, Mr. Byrnes contends that he never said that he was not prepared to participate in good faith in a properly scheduled pretrial conference. (Obj. 15, ECF No. 28.) The record cited above, however, shows that Mr. Byrnes expressly stated his refusal to participate in good faith in the pretrial conference set by Judge Thuma. Judge Thuma's factual finding that Plaintiff refused to participate in good faith at the pretrial conference is not clearly erroneous. The first objection is overruled.

Objections 2, 3, and 6: Jurisdiction to enter order of dismissal and sanctions award

According to Appellant in his second, third, and sixth objections, Judge Thuma did not have jurisdiction over the tort claims or to enter the dismissal order and judgment. (Obj. 15-17) Mr. Byrnes asserts that Judge Thuma was divested of administrative control when he filed his

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[1] The Court has grouped related objections together. Consequently, the Court's analysis of the objections is largely, but not entirely, in the numeric order as Mr. Byrnes presented them.

Tenth Circuit appeal. (Obj. 15-17, ECF No. 28.) He argues that at the time of the May 13, 2022, conference, he did not know how Judge Riggs would rule on the motion for reconsideration or what the Tenth Circuit would do on his appeal. (*Id.* at 17.) Mr. Byrnes argues that Magistrate Judge Wormuth erred in concluding that the transfer of jurisdiction to the Tenth Circuit never took place. (*Id.* at 15-17.) He further contends that Judge Thuma did not have jurisdiction because he is not an Article III judge and could only exercise administrative control over the tort claims until the district court withdrew its reference. (*Id.* at 16.)

Mr. Byrnes appealed Judge Riggs's Final Judgment in No. 1:21-CV-295 on April 27, 2022. At the time Judge Thuma held his final pretrial conference on May 13, 2022, the Tenth Circuit had issued an order abating the appeal pending Judge Riggs's disposition of the motion to reconsider, so the appeal was still pending. Nevertheless, despite the general rule that filing a notice of appeal divests the trial court of jurisdiction with respect to any matters involved in the appeal, Judge Wormuth relied in his ruling on the exception to that rule for jurisdictionally defective appeals, discussed in *Arthur Andersen & Co. v. Finesilver*, 546 F.2d 338 (10th Cir. 1976), and *In re Shannon*, 670 F.2d 904 (10th Cir. 1982). (PFRD 8, ECF No. 27.)

Under Tenth Circuit law, if "the notice of appeal is deficient by reason of untimeliness, lack of essential recitals, *reference to a non-appealable order*, or otherwise, the district court may ignore it and proceed with the case." *Arthur Andersen*, 546 F.2d at 340-41 (italics added). "If the district court proceeds with the case under the mistaken belief that the notice of appeal is inoperative, the complaining party may seek relief from the court of appeals under 28

U.S.C. s 1651 and Rule 21, F.R.A.P." *Id.* at 341. When an appeal is jurisdictionally defective, appellate jurisdiction never transfers from the district court. *See In re Shannon*, 670 F.2d at 907.

As the Tenth Circuit explained in its order dismissing Mr. Byrnes's appeal, withdrawal of reference orders only involve the selection of the forum in which final decisions will ultimately be reached and do not end the litigation. *Byrnes v. Byrnes*, No. 22-2049, 2022 WL 19693003, at *2 (10th Cir. Dec. 21, 2002). Mr. Byrnes's appeal was "an interlocutory, non-appealable order" over which the Tenth Circuit lacked appellate jurisdiction. *Id.* Judge Wormuth was therefore correct that appellate jurisdiction never transferred to the Tenth Circuit, such that Judge Thuma was not divested of jurisdiction over the bankruptcy case by reason of Mr. Byrnes's appeal. Mr. Byrnes cites no authority to the contrary.

Mr. Byrnes nevertheless argues that Judge Wormuth did not consider his argument that Judge Thuma, as a bankruptcy judge, did not have jurisdiction over the tort claims. To the contrary, Judge Wormuth relied on the reasoning of Judge Riggs in adopting Judge Ritter's conclusions in the PFRD that the Bankruptcy Court should retain jurisdiction over pretrial proceedings for Mr. Byrnes's tort claims. (PFRD 10, ECF No. 27.) Judge Wormuth concluded that Judge Riggs thoroughly analyzed and settled that issue. (*Id.*) For the reasons given herein, the Court likewise concludes that Judge Thuma had jurisdiction to conduct pretrial proceedings, including a pretrial conference, on Mr. Byrnes's tort claims.

A federal district court has nonexclusive subject matter jurisdiction over "all civil proceedings arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. § 1334(b). District courts are authorized to refer such proceedings to bankruptcy court, which is a practice of this District. 28 U.S.C. § 157(a). A reference may be withdrawn where a defendant can show cause. *See* 28 U.S.C. §

157(d). Cause may be shown where a bankruptcy court lacks the constitutional authority to enter final judgments on the claims at issue or where the litigant has a Seventh Amendment right to a jury trial on claims brought against the defendant. *See Frictionless*

World, LLC v. Frictionless, LLC, No. 19-cv-03583-CMA, 2020 WL 8996615, at *1 (D. Colo. May 26, 2020). Nevertheless, even for matters that should be tried by a jury in a district court, pretrial matters, including the approval of a pretrial order, may be decided by the bankruptcy court. *Sigma Micro Corp. v. Healthcentral.com*, 504 F.3d 775, 787 (9th Cir. 2007) (holding that "a Seventh Amendment jury trial right does not mean the bankruptcy court must instantly give up jurisdiction and that the case must be transferred to the district court" because "the bankruptcy court is permitted to retain jurisdiction over the action for pre-trial matters," to include pretrial conferences); *Frictionless World*, 2020 WL 8996615 at *2 & n.2 (determining that, although final judgment must be entered by an Article III court, "withdrawing the automatic reference and remanding pretrial proceedings to the Bankruptcy Court is the most efficient, economical, and practical way of administering a case of this kind").

The order of reference remained in effect at the time Judge Thuma held his pretrial conference. Judge Riggs expressly denied Mr. Byrnes's motion to stay the pre-trial conference. Judge Thuma had jurisdiction to proceed with the pretrial conference. He likewise had jurisdiction to enter the order of dismissal and the attorney's fees sanction. Notably, Mr. Byrnes did not follow the procedure available to him if he believed Judge Thuma was acting without jurisdiction – seeking a writ under 28 U.S.C. § 1651 or FRAP Rule 21. Instead, he refused to participate in the bankruptcy court pretrial proceeding that Judge Thuma had the jurisdictional authority to conduct. For the foregoing reasons, Mr. Byrnes's second, third, and sixth objections are overruled.

Objections 5, 8, 9, 10, 11, 12, 13, and 14: Order dismissing the case

Mr. Byrnes makes numerous objections regarding Judge Thuma's order of dismissal of the case. Turning to his fifth objection, Mr. Byrnes challenges Judge Thuma's legal right to deny Plaintiff's right to a jury trial, arguing that as a bankruptcy judge, he could submit findings of fact

and conclusions of the law, but only the district court could dismiss the case. (*See* Obj. 17-18, ECF No. 28.)

"A bankruptcy court has statutory authority to 'issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of" the Bankruptcy Code." *Law v. Siegel*, 571 U.S. 415, 420-21 (2014) (quoting 11 U.S.C. § 105(a)). A bankruptcy court has both the statutory authority and inherent powers to issue sanctions orders against a party for conduct abusive of the judicial system. *See id.*; *In re Thomas*, 397 B.R. 545, 2008 WL 4570267, at *4 (10th Cir. BAP Oct. 14, 2008); *In re Courtesy Inns, Ltd., Inc.*, 40 F.3d 1084, 1089 (10th Cir. 1994). Because Judge Thuma had jurisdiction over the case at the time he imposed the sanction of dismissal, Judge Thuma had the legal right to dismiss the case without infringing on Mr. Byrnes's Seventh Amendment right to a jury trial if the sanctions ruling was properly imposed. *See Richardson v. Safeway, Inc.*, 109 F. App'x 275, 2004 WL 1950456, at *3 (10th Cir. Sept. 3, 2004) ("a district court's discretionary authority to dismiss an action under Rule 41(b) is not limited by a party's right to a jury trial under the Seventh Amendment, as it is axiomatic that a party does not have a right to a jury trial if a dismissal sanction is properly imposed"). As discussed *infra*, because the Court finds no error in the imposition of dismissal as a sanction, Appellant had no right to a jury trial. The Court thus overrules Mr. Byrnes's fifth objection.

Judge Thuma dismissed the underlying case based on Rules 16(f) and 41(b). Federal Rule of Civil Procedure 16(f) permits a court on its own motion to issue "any just orders, including those authorized by Rule 37(b)(2)(A)(ii)-(vii)" if a party fails to appear at a pretrial conference, does not participate in good faith, or fails to obey a pretrial order. Fed. R. Civ. P.

16(f)(1). Rule 37(b)(2)(A)(v) allows for the dismissal of an action in whole or in part. Fed. R. Civ. P.

37(b)(2)(A)(v). Rule 41(b) provides that if a plaintiff fails to comply with the rules or a court order, a defendant may move to dismiss the action. Fed. R. Civ. P. 41(b).

Dismissal with prejudice is a sanction of last resort. *Ehrenhaus v. Reynolds*, 965 F.2d 916, 920 (10th Cir. 1992). While the rules permit dismissal as a sanction, due process requires that dismissal is based on willfulness, bad faith, or some fault of the petitioner. *Archibeque v. Atchison, Topeka & Santa Fe Ry. Co.*, 70 F.3d 1172, 1174 (10th Cir. 1995). Willfulness is an intentional act or failure, as distinguished from involuntary noncompliance. *M.E.N. Co. v. Control Fluidics, Inc.*, 834 F.2d 869, 872-73 (10th Cir. 1987). When the court imposes a sanction, it must be just and related to the particular claim that was at issue in the order the party failed to obey. *See Ehrenhaus*, 965 F.2d at 920. A court must consider the following facts in determining whether dismissal is appropriate as a sanction: "the degree of actual prejudice to the defendant; (2) the amount of interference with the judicial process; (3) the culpability of the litigant; (4) whether the court warned the party in advance that dismissal of the action would be a likely sanction for non- compliance; and (5) the efficacy of lesser sanctions." *Archibeque*, 70 F.3d at 1174 (quoting *Ehrenhaus*, 965 F.2d at 921). *See also Gripe*, 312 F.3d at 1188 (explaining that dismissals under Rules 41(b), 16(f) and 37(b)(2)(C) should be determined using *Ehrenhaus* criteria). Dismissal is only proper when the aggravating factors outweigh the strong predisposition to resolve cases on the merits. *Ehrenhaus*, 965 F.2d at 921.

In his eighth objection, Appellant argues that Judge Wormuth wrongfully concluded that the abuse-of-discretion standard applied in his review of

the *Ehrenhaus* factors. (*Id.* at 18.) Judge Wormuth, however, did not err in applying the abuse-of-discretion standard in his review of the imposition of dismissal as a sanction. *See In re BCB Contracting Services, LLC*, BAP No. AZ-21- 1254-BSF, 2022 WL 1198232, at *4 (9th Cir. BAP Apr. 21, 2022) (reviewing award of sanctions

by bankruptcy court for abuse of discretion); *see also* cases cited *supra* (discretionary decisions are reviewed for abuse of discretion). The Court thus overrules Appellant's eighth objection.

With respect to his ninth objection, Mr. Byrnes argues that Judge Wormuth erred in concluding that Mr. Byrnes filed his tort claims in bad faith and erred in relying on conjectures about Mr. Byrnes's motives for asserting the claims against his wife that had no support in the record. Instead, Mr. Byrnes contends that the credible evidence shows that he is litigating in good faith. As support, he contends that the state court judge found no basis to dismiss the tort claims, that defense counsel never moved to dismiss those claims, and that he was merely trying to exercise his right to a trial by jury. (Obj. 18-19, ECF No. 28.)

A factual finding of bad faith will be overturned if clearly erroneous. *In re BCB Contracting Services*, 2022 WL 1198232 at *4. "A factual finding is clearly erroneous if it is illogical, implausible, or without support in the record." *Id.* Judge Thuma's factual findings regarding Mr. Byrnes's vexatious and bad faith litigation were not based on analyzing the merits of the underlying tort claims, but rather by considering the manner in which Mr. Byrnes carried out his litigation. (*See* Opinion 5-8, ECF No. 5 at 794-97 of 882.) The record contains evidentiary support for the finding that Mr. Byrnes filed numerous frivolous motions and numerous frivolous appeals that unnecessarily increased the costs of defending the case, draining his wife of what little financial resources she had without the prospect of a collectible judgment. The record also shows that Mr. Byrnes refused to proceed with the pretrial conference in good faith. Judge Riggs had already denied Mr. Byrnes's request to stay the pretrial conference in the Bankruptcy Court. The district

court's orders made plain that Mr. Byrnes was to proceed with the pretrial conference, but he could move again to withdraw the order of reference when the case was fully ready for trial. Judge Thuma attempted to explain why Mr. Byrnes was not correct in his interpretation of Judge

Riggs's order. Mr. Byrnes, however, ignored Judge Thuma's explanations and instead acted in a disrespectful manner, saying to Judge Thuma that he was "just a bankruptcy judge" and a "nobody." (May 13, 2022, Hr'g Tr. 4:19-2:2, ECF No. 21.)

Judge Wormuth applied the correct clearly erroneous standard in analyzing the factual findings as to the third *Ehrenhaus* factor: "The record is replete with examples of Mr. Byrnes's aggressive litigation tactics and contumacious and disrespectful behavior toward opposing counsel and the court, so the undersigned finds that the Bankruptcy Judge's analysis of this point is not clearly erroneous." (PFRD 15, ECF No. 27.) Contrary to Mr. Byrnes's argument, Judge Wormuth's finding that Mr. Byrnes's behavior at the January 11, 2021, scheduling conference was disrespectful is amply supported by the record, as described *supra*. This Court agrees that Judge Thuma's factual findings concerning Mr. Byrnes's bad faith in conducting vexatious litigation are logical, plausible, with support in the record, and thus, not clearly erroneous. Evidence in the record also shows that Mr. Byrnes was a retired lawyer, and as such, he knew or should have known courtroom procedural rules, expectations for courtroom behavior, and the sanctionable consequences of bad faith conduct. Judge Thuma's finding of culpability is likewise not clearly erroneous.

Mr. Byrnes additionally argues that Judge Wormuth "has no justification for saying Plaintiff acted in 'bad faith' because he refused to obey the bankruptcy judge's unlawful orders." (Obj. 19, ECF No. 28.) As an initial matter, for the reasons given above, Judge Thuma did not act unlawfully in scheduling and conducting the pretrial conference. To the extent Plaintiff disagreed with setting a non-jury trial date, Plaintiff had other options at his

disposal, including filing a second motion to withdraw the order of reference, a step Judge Ritter specifically discussed in his PFRD, which Judge Riggs adopted. (DNM 60, ECF No. 7 ("When the proceeding is ready for

trial, Mr. Byrnes may refile his motion and the Court can determine which claims, if any, will be tried to a jury"); R. at 751-56, ECF No. 5.) Instead, Mr. Byrnes disrespected Judge Thuma and refused to participate in the pretrial conference in good faith in violation of Rule 16(f). Judge Thuma's conclusion is therefore correct that Plaintiff acted in bad faith in refusing to participate in the pretrial conference. For the foregoing reasons, the Court overrules Mr. Byrnes's ninth objection.

With respect to his tenth objection, Mr. Byrnes objects to the finding that he interfered with the judicial process by failing to prepare a pretrial order. (Obj. 21, ECF No. 28.) According to Mr. Byrnes, he provided a pretrial order on the district court form and there was no order requiring him to submit a specific form of pretrial order before the May 13, 2022, conference. (*See* Obj. 19, ECF No. 28.) Contrary to Mr. Byrnes's assertion, Judge Thuma had ordered the parties to use the bankruptcy form for the pretrial order. On March 12, 2021, Judge Thuma ordered Plaintiff to submit a consolidated pretrial order by November 12, 2021, "in the form of, and include the information set forth in, the sample pretrial order on the Court's web page." (Case 20-01070-t, ECF No. 37.) At that time, Mr. Byrnes refused to use the bankruptcy pretrial order form, prompting Ms. Byrnes to file a motion for sanctions. (Case 20-01070-t, ECF No. 123.) Subsequently, on January 28, 2022, Judge Thuma rescheduled the final pretrial conference for March 14, 2022, and in the *Order Setting Deadlines and Final Pretrial Conference*, he ordered Plaintiff to submit by March 11, 2022, the consolidated pretrial order "in the form of, and include the information set forth in, the sample pretrial order posted on the judges' General Procedures page of the Court's website:

www.nmb.uscourts.gov." (Order 1, ECF No. 5 at 573 of 882.) Judge Thuma warned in the same order that the failure to comply with the order may result in dismissal of the action, default, or imposition of costs and attorney's fees. (*Id.* at 2.)

Mr. Byrnes does not argue that he submitted a pretrial order in accordance with the bankruptcy court form; instead, he continues to assert that he had the right to use a district court form because he had a right to a jury trial. (*See* Obj. 19, ECF No. 28.) Mr. Byrnes violated a clear order of Judge Thuma to submit a consolidated pretrial order using the bankruptcy court's form, and Judge Thuma therefore did not clearly err in finding that Plaintiff did not comply with the Court's order to use the bankruptcy court's form. (Opinion 6, ECF No. 5 at 795 of 882.) Appellant's tenth objection is overruled.

In his eleventh objection, Mr. Byrnes asserts that he was not responsible for delays that occurred in the case. (Obj. 21, ECF No. 28.) This statement may be directed to Judge Wormuth's analysis in the PFRD whereby he noted that Mr. Byrnes did not explain how his refusal to prepare a pretrial order or participate in the final pretrial conference could not have had the effect of delaying trial. (PFRD 16, ECF No. 27.) This finding and analysis was not erroneous. The Court overrules Appellant's eleventh objection.

Twelfth, Mr. Byrnes argues that the Bankruptcy Court did not give him advance notice the tort claims would be dismissed if Plaintiff did not submit any specific form of pretrial order. (Obj. 22, ECF No. 28.) Judge Thuma, however, specifically warned in his *Order Setting Deadlines and Final Pretrial Conference* that the failure to comply with the order, which included using the bankruptcy court's form for the pretrial order, might result in dismissal of the action, default, or imposition of costs and attorney's fees. (Order 1-2, ECF No. 5 at 573-74 of 882.) The Court overrules Objection Twelve.

As for his thirteenth objection, Mr. Byrnes contends he did not refuse to take his tort claims to trial, but he objected to setting dates for a non-jury

trial on the tort claims. (Obj. 22, ECF No. 28.) Judge Thuma found that Mr. Byrnes refused to participate in the pretrial conference and to

proceed to trial and that Mr. Byrnes gave frivolous reasons for not proceeding (saying that Judge Riggs dismissed the proceeding by denying the motion to withdraw reference). (*See* Opinion 6-7, ECF No. 5 at 796 of 882.) Judge Thuma believed that Mr. Byrnes's frivolous argument was so lacking in reason that it was really a pretext for refusing to try his case, indicating that he only wanted to litigate the case, not try it. (*Id.* at 7.) Judge Thuma's findings are logical, plausible, and have support in the record, and thus, they were not clearly erroneous. Appellant's thirteenth objection is overruled.

As for his fourteenth objection, Mr. Byrnes argues that Judge Thuma did not properly rely on Rule 41(b) to dismiss because only a defendant may move to dismiss the action, and defense counsel "did not file a motion to dismiss" under Rule 41(b). (Obj. 22, ECF No. 28.) At the May 13, 2022, pretrial conference, Judge Thuma asked defense counsel about his position on an appropriate sanction for Mr. Byrnes's refusal to participate in the pretrial conference, and defense counsel responded that he requested the case be dismissed with prejudice. (May 13, 2022, Hr'g Tr. 5:9-6:16, ECF No. 21.) Defense counsel's verbal request for dismissal with prejudice as a sanction satisfies Rule 41(b). Judge Thuma did not err in relying on Rule 41(b) in imposing sanctions. The Court therefore overrules Objection 14.

Objections 7, 15, 16, 17, 18, 20: Monetary award of attorney's fees

The next set of objections concern Appellant's claims of error as to the monetary judgment Judge Thuma imposed.

In his seventh objection, Mr. Byrnes contends that the Bankruptcy Court abused its discretion in awarding the monetary judgment because

Plaintiff did not act in bad faith in not consenting to set a date for a non-jury trial of the tort claims. (*See* Obj. 18, ECF No. 28.) For the

reasons given *supra*, the Court disagrees that Mr. Byrnes acted in good faith in refusing to participate in the pretrial conference and overrules his seventh objection.

As for his fifteenth, sixteenth, and twentieth objections, Mr. Byrnes asserts Judge Thuma erred in imposing legal fees for punitive, not remedial purposes, and without a nexus between the alleged non-compliance with Rule 16 and the amount of expenses awarded. (*See* Obj. 22, 24, ECF No. 28.) According to Mr. Byrnes, Judge Thuma abused his discretion in awarding attorney's fees for time spent on litigation activities that took place before May 13, 2022, because they were not the byproduct of his alleged bad faith refusal to set dates for a non-jury trial. (*See id.*)

"Sanctions under Rule 16(f) and Rule 37(b)(2) must be in the interests of justice and proportional to the specific violation of the rules." *Olcott v. Delaware Flood Co.*, 76 F.3d 1538, 1557 (10th Cir. 1996). The amount of the sanction should depend on the seriousness of the violation and who is at fault. *Id.* (quoting *Turnbull v. Wilcken*, 893 F.2d 256, 259 (10th Cir. 1990)). "The district court's discretion to choose a sanction is limited in that the chosen sanction must be both 'just' and 'related to the particular 'claim' which was at issue in the order to provide discovery.'" *Ehrenhaus*, 965 F.2d at 920-21 (quoting *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 707 (1982)). Where a party willfully disobeyed a court order, a court may assess attorney's fees as a sanction, up to and including the entire cost of the litigation. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 45 (1991).

Judge Thuma found three reasons to impose monetary sanctions in the amount Ms. Byrnes spent on attorney's fees in the case following removal: (1)

his disrespectful behavior to the Court throughout the proceedings; (2) wasting the Court's and Defendant's time at the final pretrial conference by refusing to confer in good faith for pretextual reasons; and (3) his bad faith, vexatious, wanton, harassing, and oppressive litigation tactics throughout the case that were

designed to increase costs on his estranged wife. (*See* Opinion 10, ECF No. 5 at 799 of 882.) Judge Thuma's factual findings had support in the record, including his finding of bad faith, and were not clearly erroneous. Nor was the imposition of the sanction an abuse of discretion given his finding that Mr. Byrnes's litigation throughout the case was abusive and designed to increase Ms. Byrnes's litigation costs to punish his estranged wife. That finding provided the necessary nexus for the sanctions amount for the entire litigation costs, which comported with compensating Ms. Byrnes for the losses she sustained in defending the bad faith litigation throughout the case. *See Goodyear Tire & Rubber Co. v. Haeger*, 581 U.S. 101, 110-11 (2017) (explaining that court may shift all a party's fees as a sanction in exceptional cases where the sanctioned party's entire course of conduct was in bad faith). Appellant's fifteenth, sixteenth, and twentieth objections are overruled.

In his seventeenth objection, Mr. Byrnes asserts that he did not interfere with the Bankruptcy Court's ability to manage discovery. (Obj. 23, ECF No. 28.) Judge Thuma's dismissal order and sanctions award were based on the vexatious and numerous frivolous motions, petitions, and appeals, as well as Mr. Byrnes's interference with the judicial process by willfully failing to participate in good faith at the pretrial conference to move the case forward. (Opinion 5-6, ECF No. 5 at 794-95 of 882.) As discussed *supra*, those findings and conclusions were supported in the record and not erroneous. Additionally, in support of his seventeenth objection, Mr. Byrnes asserts that defense counsel improperly moved for sanctions regarding the scheduling of depositions. (*See* Obj. 23, ECF No. 28.) To the extent Mr. Byrnes is attempting to relitigate the basis for the entry by Judge Thuma of the July 20, 2021,

Protective and Sanctions Order following Mr. Byrnes's failure to follow the procedural rules for issuing witness subpoenas and scheduling depositions, (R. at 300-04, ECF No. 5), the objection has no merit. Judge Thuma superseded the July 20, 2021,

sanctions order when he entered the money judgment for Ms. Byrnes's entire litigation costs, and in doing so, he corrected the error that used the $250/hour rate instead of the $225/hour rate. (*See* Opinion 10 & n.11, ECF No. 5 at 799 of 882.) For all the foregoing reasons, the Court overrules Objection 17.

Turning to his eighteenth objection, Mr. Byrnes asserts that Judge Thuma improperly imposed the monetary judgment without a hearing that gave Mr. Byrnes an opportunity to challenge the reasonableness of the lawyer's hourly rate and the time spent on litigation activities. (Obj. 23-24, ECF No. 28.) He cites *Braley v. Campbell*, 832 F.2d 1504 (10th Cir. 1987), for the argument that the Bankruptcy Court did not allow him the right to challenge these issues. In *Braley*, however, the Tenth Circuit explained that due process requires that, before imposing sanctions, the party have notice that such sanctions are being considered by the court and a subsequent opportunity to respond. *Id.* at 1514. The opportunity to respond does not require a hearing, but it may be satisfied with the chance to file a responsive brief. *See id.* at 1514-15.

Here, Judge Thuma gave Mr. Byrnes notice at the May 13, 2022, pretrial conference that he was considering the imposition of dismissal and attorney's fees as a sanction. (*See* May 13, 2022, Hr'g Tr. 5:11-7:6, ECF No. 21, ECF No. 25-27 of 90.) After Mr. Pickett requested an award of attorney's fees, Judge Thuma suggested Mr. Pickett file an affidavit of attorney's fees "incurred in connection with this adversary proceeding," to "include the Tenth Circuit and the District Court proceedings." (*Id.* at 6:23-7:11.) Judge Thuma asked if there was anything else, providing Mr. Byrnes a chance to respond, and Mr. Byrnes requested certification for immediate appeal of any order issued. (*Id.* at 7:14-22.) Thereafter,

defense counsel submitted his affidavit for attorney's fees. (R. at 767-72, ECF No. 5.) On May 23, 2022, Mr. Byrnes moved to strike the affidavit, providing arguments as to why the hourly rate was unjustified and why the amount requested was

not supported by the record. (*See* R. at 773-82.) Subsequently, Judge Thuma entered his order of dismissal and for sanctions. (*See* R. at 790-803.) The Court therefore finds that Mr. Byrnes had the requisite notice and opportunity to respond, and it will overrule Objection 18.[2]

Although not an enumerated objection, Mr. Byrnes relatedly asserts that Judge Wormuth ignored that defense counsel filed a false affidavit regarding his hourly billing rate and that his internal accounting records do not support the judgment awarded. (*See* Obj. 4, ECF No. 28.) Contrary to Appellant's contention, Judge Wormuth considered defense counsel's initial error in his hourly rate, and he determined that Judge Thuma's monetary judgment superseded the prior sanctions order and used the correct rate. (*See* PFRD 25 & n.10, ECF No. 27.) Judge Wormuth also concluded that affidavits supported the reasonableness of the monetary judgment. (*Id.* at 25- 28.) This Court agrees with Judge Wormuth that Judge Thuma's findings concerning the amount for the award were not clearly erroneous.

Objection 4: Dismissal and monetary judgment

Finally, in his fourth objection, Mr. Byrnes argues generally that Judge Thuma erred in dismissing the case and in issuing a judgment that compensated his wife for her legal fees. (*See* Obj. 17, ECF No. 28.) For all the foregoing reasons, the Court concludes that Judge Thuma's factual findings were not clearly erroneous and that his discretionary decisions did not abuse his discretion. He did not commit error in dismissing the tort claims with prejudice and issuing a monetary judgment against him for attorney's fees for $12,921.14. Consequently,

Appellant's fourth objection is overruled.

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[2] Mr. Byrnes's enumerated objections skip from 18 to 20, so there is no enumerated nineteenth objection to address. (*See* Obj. 23-24, ECF No. 28.)

IT IS THEREFORE ORDERED that

1. Mr. Byrnes's *Motion to Refuse Consideration of Defendant-Appellee's Memorandum (Document 29)* (**ECF No. 30**) is **DENIED**.
2. Appellant Byrnes's *Objections to Proposed Findings and Recommended Disposition*

   (**ECF No. 28**) are all **OVERRULED**.

3. The United States Magistrate Judge's *Proposed Findings and Recommended Disposition* (**ECF No. 27**) as to Appellant's Bankruptcy Appeal is **adopted** by the Court.
4. The decision of the United States Bankruptcy Court dismissing with prejudice the proceeding and its judgment in favor of Sylvia Byrnes against Barry J. Byrnes for $12,921.14 is **affirmed**.

5. This civil proceeding is **dismissed with prejudice** and a final order will be entered concurrently with this order.

SENIOR UNITED STATES DISTRICT JUDGE

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

In re:

SLYVIA MARIE BYRNES, No. 20-12086-t7

Debtor.

BARRY J. BYRNES,

Plaintiff,

v. Adv. No. 20-1070-t

SYLVIA MARIE BYRNES,

Defendant.

OPINION

At a final pretrial conference in this proceeding, the Court asked the parties to consider whether Plaintiff's state law tort claims could be adjudicated by the Court. The parties briefed the issue and on January 12, 2022, the Court heard oral arguments. Having considered the arguments and relevant law, the Court concludes that Plaintiff has no right to a jury trial of any part of this proceeding and consented to the Court trying his tort claims. The Court therefore will reschedule the final pretrial conference and set this matter for a prompt trial.

A. Facts.[1]

Based on the docket in this proceeding, the Court finds:

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[1] The Court takes judicial notice of its docket in this consolidated adversary proceeding, the main bankruptcy case, and the State Court Action (defined below). *See St. Louis Baptist Temple, Inc. v. Fed. Deposit Ins. Corp.*, 605 F.2d 1169, 1172 (10th Cir. 1979) (a court may sua sponte take judicial notice of its docket and of facts that are part of public records).

Barry Byrnes, the pro se[2] plaintiff, is Defendant/Debtor's estranged husband. On March 29, 2019, Plaintiff filed a state court action against Defendant and their son in the Third Judicial District Court, State of New Mexico, styled *Barry Byrnes v. Sylvia and Matthew Byrnes*, No. D- 307-CV-2019-00916 (the "State Court Action"). The complaint alleged six causes of action. The state court judge dismissed four of the claims, leaving only claims for defamation and intentional infliction of emotional distress ("IIED"). These claims relate to a heated argument between Plaintiff and Defendant in July 2018, which prompted Defendant to call the police and report that Plaintiff had assaulted her.

Defendant filed this chapter 7 bankruptcy case on October 30, 2020. Plaintiff filed a notice of removal on November 18, 2020, removing the State Court Action to this Court. The removed action was docketed as an adversary proceeding. On the same day Plaintiff commenced another adversary proceeding by filing a complaint alleging, inter alia, the defamation and IIED claims plead in the removed action and asking the Court to declare any damages nondischargeable.

Fed. R. Bankr. P. ("Bankruptcy Rule") 9027(a) requires that all notices of removal "contain a statement that upon removal of the claim or cause of action, the party filing the notice does or does not consent to entry of final orders or judgment by the bankruptcy court " Similarly,
Bankruptcy Rule 7008 requires all adversary proceeding complaints to contain similar language. Neither Plaintiff's notice of removal nor complaint contained the required language.

There was substantial litigation after the notice of removal and complaint were filed. Defendant filed a motion to dismiss this adversary proceeding, which the Court denied. The Court

ordered that the two adversary proceedings be consolidated and that Plaintiff file an amended complaint. Plaintiff filed a motion for default judgment and for a refund of a filing fee, as well as

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[2] Mr. Byrnes used to be licensed to practice law in New Mexico. He currently is on inactive status.

a motion for relief from the Court's order requiring him to file an amended complaint. The Court denied these motions. Plaintiff appealed the denials to the Tenth Circuit Bankruptcy Appellate Panel (BAP).

Plaintiff filed an amended complaint on February 10, 2021. As with his first complaint, the language required by Bankruptcy Rule 7008 was not included.[3]

The amended complaint has two counts. In count one, which incorporates a "supplemental" complaint filed in the State Court Action, Plaintiff asserts his removed claims for defamation and IIED and asks that any judgment thereon be declared nondischargeable. Count two seeks an order requiring Debtor "to pay and continue to pay her share of contract and/or domestic support obligations" related to their marital residence and alleging numerous theories under which such obligations are nondischargeable. Count Two also asks for an accounting "to identify and value" the parties' community and separate assets, and to "determine the value of his lien on the Debtor's interest in community property."

Defendant answered count one of the amended complaint and filed a motion to dismiss count two for failure to state a claim upon which relief can be granted.

The Court held a scheduling conference on March 8, 2021, and entered a scheduling order March 12, 2021. On the same day, Plaintiff filed a supplemental motion for default judgment and a motion to strike Defendant's answer, while the BAP dismissed Plaintiff's appeals.

[3] To preserve his right to a jury trial, Plaintiff was required to "serv[e] the other parties with a written demand-which may be included in a pleading " Bankruptcy Rule 9015 and Fed. R. Civ. P. 38(b). Plaintiff's attempts to comply with this requirement were weak. He included an allegation in count one of his amended complaint that "Plaintiff requests trial by jury." In his supplemental state court complaint, which is attached to the amended complaint as an exhibit, the "Wherefore" clause includes a request for "trial by jury." This language probably is sufficient to preserve any right Plaintiff might have had to jury trial of count one, but it certainly could have been clearer.

The main bankruptcy case was closed on March 11, 2021.

On March 18, 2021, Plaintiff filed a motion to disqualify the Court from presiding over the adversary proceeding.

On March 24, 2021, Plaintiff filed a motion to transfer the proceeding to the District Court and a document titled "Consent or Refusal to Consent to the Bankruptcy Court Hearing and Determining Contested Matters," in which Plaintiff stated that "the undersigned **does not consent** to the bankruptcy court hearing and determining this Contested Matter or entering final orders or judgment in this Contested Matter" (emphasis in original).[4] With the filing of this latter document, Plaintiff tacitly acknowledged that he had not previously stated his consent or nonconsent.

On July 2, 2021, the Court granted Defendant's motion to dismiss count two, leaving only the defamation and IIED claims to be adjudicated.

The proceeding has progressed through the pretrial stages. Discovery is now complete and the defamation and IIED claims are ready for trial. The question before the Court is whether it, the District Court, or the state court should try the claims.

B. <u>There is No Right to a Jury Trial in Nondischargeability Proceedings</u>.

Plaintiff does not have a right to a jury trial of this nondischargeability proceeding. In *In re Varney*, 81 F.3d 152 (4th Cir. 1996) (unpublished), for example, the Fourth Circuit held:

> The consensus in the courts which have addressed this issue is that there is no constitutional right to a jury trial on the

issue of dischargeability. *Billing v. Ravin, Greenberg & Zackin, P.A.*, 22 F.3d. 1242 (3d Cir.), *cert. denied,* —— U.S. # 6D 6D6D#, 63 U.S.L.W. 3381 (U.S. Nov. 14, 1994) (No. 94–315); *In re Maurice,* 21 F.3d 767, 773 (7th Cir.1994) (11 U.S.C.A. §§ 523(a)(2)(A) & (a)(6) (West 1993)); *In re McLaren,* 3 F.3d 958, 960 (6th Cir.1993); *In re Hallahan*, 936 F.2d 1496, 1505–06 (7th Cir.1991) (11 U.S.C. § 523(a)(6) (1988)); *In re Hooper,* 112 B.R. 1009, 1012 (Bankr. 9th Cir. 1990).

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[4] Plaintiff apparently copied this from a form available on the Court's web site. The form is to be used in contested matters, not adversary proceedings.

> We agree with these decisions that a proceeding by a creditor to determine dischargeability is equitable in nature and that a debtor who filed a voluntary bankruptcy petition has no right to a jury trial in such a proceeding. *See Hallahan,* 936 F.2d at 1505–06. We therefore affirm the district court order affirming the bankruptcy court's denial of Cecil Varney's request for a jury trial on the issue of dischargeability of his debt to Angela.

81 F.3d 152 at *2. Similarly, in *In re Hallahan*, 936 F.2d 1496 (7th Cir. 1991), the Seventh Circuit held:

> Applying the Supreme Court's teachings to this case, we conclude that Hallahan had no Seventh Amendment right to a jury trial on his dischargeability claim. Two independent lines of reasoning support this conclusion. First, application of the two-part test set forth in *Granfinanciera* reveals that a dischargeability proceeding is a type of equitable claim for which a party cannot obtain a jury trial. Dischargeability proceedings, like actions to recover preferential or fraudulent transfers, are core proceedings. *See* 28 U.S.C. § 157(b)(2)(I) and (J) (1988). However, dischargeability proceedings are unlike actions to recover preferential transfers in that historically they have been equitable actions tried without juries:
>
> > [A] bankruptcy discharge and questions concerning the dischargeability of certain debts, involve issues with an equitable

> history and for which there was no entitlement to a jury trial in the courts of England prior to the merger of law and equity.
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> *In re Hooper,* 112 B.R. 1009, 1012 (Bankr. 9th Cir. 1990); *In re Johnson,* 110 B.R. 433, 434 (Bankr. W.D. Mo. 1990); *In re Brown,* 103 B.R. 734 (Bankr. [ ].D. Md. 1989), *see also* Countryman, *The New Dischargeability Law,* 45 Am. Bankr. L.J. 1, 36–39 (1971). The relief sought is also equitable since the essence of a dischargeability claim is a declaration that the debt is indeed dischargeable or non- dischargeable. *Hooper,* 112 B.R. at 1012.

936 F.2d at 1505; *see also Smith-Scott v. U.S. Trustee*, 2018 WL 572866, at *5 (D. Md.) (debtor not entitled to a jury trial of discharge litigation); *In re Hutchins,* 211 B.R. 322, 324 (Bankr. E.D. Ark. 1997) (debtor/plaintiff had no right to a jury trial, having submitted himself to the equitable jurisdiction of the bankruptcy court); *In re Grabis*, 2020 WL 7346467, at *18 (Bankr. S.D.N.Y.) (debtor had no jury trial right in nondischargeability litigation; collecting cases);

While these cases addressed a *debtor's* right to a jury trial in a nondischargeability action, their reasoning applies with equal force to a *creditor's* right to a jury trial. An often cited case is

In re Devitt, 126 B.R. 212 (Bankr. D. Md. 1991). Relying on the "well-known maxim that once equitable jurisdiction has been properly invoked it will proceed to render a full and complete disposition of the controversy," the court held:

> If it is acknowledged as beyond question that a complaint to determine dischargeability of a debt is exclusively within the equitable jurisdiction of the bankruptcy court, then it must follow that the bankruptcy court may also render a money judgment in an amount certain without the assistance of a jury. This is true not merely because equitable jurisdiction attaches to the entire cause of action but more importantly because it is impossible to separate the determination of dischargeability function from the function of fixing the amount of the nondischargeable debt.

126 B.R. at 215. The court concluded that "*when a creditor voluntarily submits himself to bankruptcy jurisdiction by filing a lawsuit in the bankruptcy court against a debtor on an equitable cause of action, he is not entitled to a jury trial under the Seventh Amendment.*" 126 B.R. at 216 (emphasis in original). Similarly, in *In re Fink*, 294 B.R. 657 (W.D.N.C. 2003), the district court held:

> [T]he Court is unpersuaded by Plaintiff's argument that it has brought a fraud action seeking money damages, and thus that its cause of action is legal, rather than equitable, in nature. As at least one other court has noted, "the fact that the plaintiff [has] asked for monetary damages does not change the equitable nature of this proceeding." *Berryman,* 84

> B.R. at 180 (also noting, "[t]here is no such thing as a 'fraud action' in bankruptcy court when it is coupled with a nondischargeability claim."). Plaintiff's fraud claim is asserted as a nondischargeability claim over which the bankruptcy court exercises equitable jurisdiction. Of course, a court sitting in equity may always grant monetary relief where appropriate, so the fact that Plaintiff seeks money damages does not affect the Court's analysis. *Id.*

294 B.R. at 660; *see also In re Smith*, 84 B.R.175, 180 (Bankr. D. Ariz. 1988) ("The fact that the plaintiffs have asked for monetary damages does not change the equitable nature of this proceeding."); *In re Duffy*, 317 B.R. 49, 51 (Bankr. D.R.I. 2004) (parties in dischargeability litigation are not entitled to a jury trial); *In re Dambowsky*, 526 B.R. 590, 608 (Bankr. M.D.N.C. 2015) (plaintiffs' claims are being determined in a non-dischargeability action, an equitable

proceeding, which means that plaintiff has no right to a jury trial); *U.S. v. Stanley*, 595 Fed. App'x. 314, 320-21 (5th Cir. 2014) (a dischargeability proceeding is a type of equitable claim for which a party cannot obtain a jury trial); *In re Hashemi*, 104 F.3d 1122, 1124 (9th Cir. 1997) (bankruptcy litigants have no right to a jury trial in dischargeability proceedings); *In re Hawkins*, 231 B.R. 222, 225 (D.N.J. 1999) ("the reasoning underlying the *Hallahan* decision has been accepted by a legion of other federal courts"); *In re White,* 222 B.R. 831, 834–35 (Bankr. W.D. Tenn. 1998) (parties to nondischargeability litigation are not entitled to a jury trial); *In re Tanner,* 1997 WL 578746, at *4 (Bankr. N.D. Ill.) (same); *In re Fineberg,* 170 B.R. 276, 280–81 (E.D. Pa. 1994) (creditor had no right to a jury trial of its nondischargeability action); *In re Choi*, 135 B.R. 649, 652 (Bankr. N.D. Cal. 1991) ("a creditor which invokes the bankruptcy court's jurisdiction seeking a declaration that a debt is nondischargeable has no stronger right to a jury trial than a creditor which files a claim"). *See also In re Lang*, 166 B.R. 964, 966 (D. Utah 1994) ("As noted by the court in *Choi*, it is functionally impossible to determine whether a debt is dischargeable without addressing issues of liability and damages.").

There is a minority view. In *In re Henderson*, 423 B.R. 598 (Bankr. N.D.N.Y. 2010), the court stated:

> "Dischargeability actions are historically equitable in nature and tried without juries." *Coke Chevrolet Co. v. Cummins,* 1992 WL 21979[9], *1, 1992 Bankr. LEXIS 1352, at *2 (Bankr. W.D. Ark. May 12, 1992). A proceeding which addresses solely the issue of dischargeability, without reaching questions of liability and amount, does

> not give rise to an entitlement to a jury trial. *Id.*, 1992 WL 21979[9], *1, 1992 Bankr. LEXIS 1352, at *7–8. If the plaintiff seeks an adjudication of liability and damages, however, predicated upon a common law action for fraud, plaintiff may be entitled to a jury trial on those issues.

423 B.R. at 626 n.17 (citing *Boudle v. The CMI Network, Inc.*, 2007 WL 3306962, *4 (E.D.N.Y.));

see also In re Weinstein, 237 B.R. 567, 577 (Bankr. E.D.N.Y. 1999) (while creditor did not have

a right to a jury trial on question of nondischargeability, it did on the question of liability and damages).

The Court find the majority view persuasive, and adopts it. If a creditor files a proof of claim, he subjects himself to the bankruptcy court's equitable jurisdiction. *Langenkamp v. Culp,* 498 U.S. 42, 44 (1990). Similarly, a creditor subjects himself to the bankruptcy court's equitable jurisdiction if he files a nondischargeability action. Section 523(a) requires the creditor to prove the existence and amount of a debt and that the debt comes within one of the nondischargeability provisions of § 523(a)(2), (4), or (6). Thus, proof of liability and amount of damages are elements of § 523(a) claim, just as much as proof of the nondischargeable nature of the debt.

Furthermore, bankruptcy courts must carefully consider all the facts relevant to a debt to determine whether it is dischargeable, including those relevant to liability and amount. The nondischargeability inquiry is not separable from analysis of liability and damages.

Finally, Plaintiff could have preserved his jury trial right by keeping his claims in state court and moving for relief from the automatic stay. Rather than doing that, Plaintiff elected to litigate his claims in bankruptcy court as part of the nondischargeability action. In doing so, Plaintiff submitted to the equitable jurisdiction of the Court. Plaintiff cannot eat his cake and have it too.

C. Plaintiff's Complaint is an Informal Proof of Claim.

As an additional basis for ruling that Plaintiff has no right to a jury trial, the Court holds that his complaint constituted an informal proof of claim. In *Lang*, a case similar in some respects to this

proceeding, the debtor's husband filed a nondischargeability action against her, which restated all of the state law claims he had brought against her prepetition. The plaintiff/husband asserted a right to a jury trial of the state law claims. The *Lang* court first observed:

> Where a creditor submits a claim against the bankruptcy estate, however, the claimant loses his right to a jury and submit to the bankruptcy court's equitable power.

166 B.R. at 966. The court went on:

> This court is satisfied that Dr. Lang filed an informal proof of claim in the bankruptcy court when, in addition to requesting a determination of dischargeability, he added four counts restating each of his state law claims. Just as a counterclaim sufficed as an informal proof of claim in *Americana,* Dr. Lang's Complaint for damages arising from his state law claims amounts to a written demand against Ms. Lang's estate and constitutes an informal proof of claim. Consequently, Dr. Lang has waived his right to a jury trial . . . .

166 B.R. at 967.

In the Tenth Circuit, an informal proof of claim (1) must be in writing; (2) must contain a demand by the creditor on the debtor's estate; (3) must express an intent to hold the debtor liable for the debt; (4) must be filed with the Bankruptcy Court; and (5) based on the facts of the case, it would be equitable to allow the amendment. *In re Reliance Equities, Inc.*, 966 F.2d 1338, 1345 (10th Cir. 1992). Here, the first four elements are satisfied and the fifth one does not apply.[5]

Like the court in *Lang*, the Court concludes that Plaintiff filed an informal proof of claim in the case and has no right to a jury trial of the asserted

claims.

D. Are Defamation and IIED "Personal Injury Torts"?

Having concluded that Plaintiff has no right to a jury trial of his nondischargeability action against Defendant, the Court will address whether the defamation and IIED claims must be tried

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[5] Element number 2 is satisfied because Plaintiff's count two of the amended complaint incorporated all allegations in the original complaint, including requests for an accounting of the parties' separate and community property and a determination of the value of Plaintiff's alleged lien on estate property. In the amended complaint, Plaintiff also alleged that Defendant "testified that she abandoned her interest in all community property but for the marital residence." These allegations seek ownership of, or to establish a lien on, estate property, given that all community property was part of Defendant's bankruptcy estate, 11 U.S.C. § 541(a)(2), and had not been abandoned when the complaint was filed. 11 U.S.C. § 554(c).

by the District Court because they are "personal injury torts." 28 U.S.C. § 157(b)(5) provides:

> The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

Plaintiff argues that his defamation and IIED claims are "personal injury torts" and must be tried by the District Court.

It is unclear whether one or both of Plaintiff's claims are personal injury torts. Many courts have construed the scope of the phrase "personal injury torts" in 28 U.S.C. § 157(b)(5). The results fall into three camps, the "narrow," "broad," and "middle" interpretations of the phrase. The Tenth Circuit has not addressed the issue.

Courts applying a "narrow" construction hold that a personal injury tort "requires a trauma or bodily injury or psychiatric impairment beyond mere humiliation." *In re Gawker Media LLC*, 571 B.R. 612, 620 (Bankr. S.D.N.Y 2017); *see also Massey Energy Co. v. W. Va. Consumers for Justice,* 351 B.R. 348, 351 (E.D. Va. 2006) (claims for defamation and business conspiracy were not personal injury torts where there was no allegation of actual physical injury); *In re Interco,* 135 B.R. 359, 362 (Bankr. E.D. Mo. 1991) (an emotional distress claim was not within the meaning of "personal injury tort"); *In re Vinci,* 108 B.R. 439, 442 (Bankr. S.D.N.Y. 1989) ("[A] tort without trauma or bodily injury is not within the statutory exception for a personal injury claim."); *In re Cohen*, 107 B.R. 453, 455 (S.D.N.Y

1989) ("Congress intended [the § 157(b)(5)] exception for a narrow range of claims" "such as a slip and fall or a psychiatric impairment beyond mere shame and humiliation."); *In re C.W. Mining Co.*, 2012 WL 4882295, at *6 (D. Utah.) (adopting the narrow view).

Courts applying a broad view "interpret[] personal injury tort to embrace a broad category of private or civil wrongs or injuries for which a court provides a remedy in the form of an action

for damages and include damage to an individual's person and any invasion of personal rights, such as libel, slander, and mental suffering." *Gawker Media*, 571 B.R at 620, quoting *In re Residential Capital, LLC*, 536 B.R 566, 572 (Bankr. S.D.N.Y 2015) (collecting cases).

Other courts take a "hybrid" or "middle" view and consider the content of the complaint ostensibly presenting a personal injury tort claim for "earmarks of financial, business or property tort claim[s] or a contract claim" which may cause it to fall outside of the § 157(d) exception. *Residential Capital*, 536 B.R. at 572; *In re Sheehan Memorial Hosp.*, 377 B.R. 63, 68 (W.D.N.Y. 2007) (the "middle view . . . weighs the personal nature of the injury against characteristics involving financial, business, property or contract rights"); *In re Smith*, 389 B.R. 902, 908 (Bankr. D. Nev. 2008) (adopting the "middle ground"); *In re Bailey*, 555 B.R. 557, 563 (Bankr. N.D. Miss. 2016) (same).

E. Plaintiff Consented to the Court trying the Defamation and IIED Claims.

The Court need not predict how the Tenth Circuit would interpret "personal injury torts" because, even if defamation and IIED are personal injury torts, Plaintiff consented to the Court trying his tort claims and entering a final judgment.

1. Parties can consent to the bankruptcy court hearing personal injury tort claims. 28

U.S.C. § 157(b)(5) is not jurisdictional; parties can consent to the bankruptcy court, rather than the district court, hearing personal injury torts. In *In re Je Hyeon Lee*, 2015 WL 1299747 (Bankr. C.D. Cal.),

for example, the court held that "[b]ecause 28 U.S.C. § 157(b)(5) is not jurisdictional, a party may effectively consent to the bankruptcy court adjudicating a personal injury tort claim by failing to raise an objection in that court and thus waive the restriction on bankruptcy court adjudication under § 57(b)(5)." *Id.* at *4, citing *Stern v. Marshall,* 131 S. Ct. 2594, 2606–2608 (2011). Similarly, in *In re Larsen*, 2019 WL 4621256, at *45 (Bankr. C.D. Cal.), the court held:

> Ordinarily, the bankruptcy court cannot liquidate an unliquidated personal injury tort claim for the purpose of distribution in a bankruptcy case, and such a claim must be tried by the federal district court. . . . Because 28 U.S.C. § 157(b)(5) is not jurisdictional, a party may effectively consent to the bankruptcy court adjudicating a personal injury tort claim by failing to raise an objection in that court and thus waive the restriction on bankruptcy court adjudication under § 157(b)(5). *Stern v. Marshall*, 564 U.S. 462, 478-482 (2011).

See also In re Saenz, 2016 WL 9021733, at *4 (Bankr. S.D. Tex.) ("Even if the liquidation of a claim in a dischargeability proceeding is not a core proceeding in bankruptcy, a bankruptcy court may hear, determine, and enter final orders and judgments on this issue with the express or implied consent of all of the parties to the proceeding.").

2. Consent may be implied. As the above cases indicate, consent need not be express.

In *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1948 (2015), the Supreme Court held:

> [Respondent] contends that to the extent litigants may validly consent to adjudication by a bankruptcy court, such consent must be express. We disagree. Nothing in the Constitution requires that consent to adjudication by a bankruptcy court be express. Nor does the relevant statute, 28 U.S.C. § 157, mandate express consent; it states only that a

bankruptcy court must obtain "the consent"—consent *simpliciter*— "of all parties to the proceeding" before hearing and determining a non-core claim. § 157(c)(2). And a requirement of express consent would be in great tension with our decision in *Roell v. Withrow,* 538 U.S. 580, 123 S.Ct. 1696, 155 L.Ed.2d 775 (2003). That case concerned the interpretation of § 636(c), which authorizes magistrate judges to "conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case," with "the consent of the parties." The specific question in *Roell* was whether, as a statutory matter, the "consent" required by § 636(c) had to be express. The dissent argued that "[r]eading
§ 636(c)(1) to require express consent not only is more consistent with the text of the statute, but also" avoids constitutional concerns by "ensur[ing] that the parties knowingly and voluntarily waive their right to an Article III judge." 538 U.S., at 595, 123 S.Ct. 1696 (opinion of THOMAS, J.). But the majority—thus placed on notice of the constitutional concern—was untroubled by it, opining that "the Article III right is substantially honored" by permitting waiver based on "actions rather than words." *Id.,* at 589, 590, 123 S.Ct. 1696.
The implied consent standard articulated in *Roell* supplies the appropriate rule for adjudications by bankruptcy courts under § 157. Applied in the bankruptcy context, that standard possesses the same

pragmatic virtues—increasing judicial efficiency and checking gamesmanship—that motivated our adoption of it for consent-based adjudications by magistrate judges. See *id.*, at 590, 123 S.Ct. 1696.

135 S. Ct. at 1947-48.

3. Plaintiff impliedly consented to the Court hearing his tort claims. Plaintiff was

required by Bankruptcy Rules 7008 and 9027 to state in his initial filings whether or not he consented to the Court trying and determining his tort claims. He did not do so. Local Rule 7016- 1(a) provides:

> (a) (Implied Consent) A party's failure to comply with BR 7008, BR 7012, or BR 9027 (requiring each party to state whether the party does or does not consent to the bankruptcy court entering final orders or judgment) constitutes implied consent.

Plaintiff had two chances to state his nonconsent in his initial pleadings and did not do so. It was not until more than four months later that Plaintiff attempted to state his nonconsent. By then it was too late. Indeed, the timing makes it appear that Plaintiff waited to see how he would fare with the Court before deciding whether to consent. By the time Plaintiff filed his belated notice of nonconsent, the Court had already made a number of rulings in the proceeding and issued two scheduling orders, while Plaintiff had filed and lost two appeals, moved to disqualify the Court, and moved to transfer the proceeding to the District Court. Parties are required to state their consent or nonconsent at the outset to prevent forum shopping in the middle of a case. The Court's local rule "check[s] gamesmanship." *Wellness*, 135 S. Ct. at 1948.

Plaintiff's tardy attempt to file his nonconsent was ineffective. Under the plain language of the

Bankruptcy Rules and the Local Rule, Plaintiff impliedly consented to the Court hearing his defamation and IIED claims and entering a final judgment.

1. The Court adopts the "narrow" interpretation of "personal injury tort" found in 28 U.S.C. § 157(b)(5);
2. Under the narrow interpretation, Plaintiff's defamation claim is not a personal injury tort; Plaintiff's IIED claim may be subject to dismissal or summary disposition because it is based entirely on Defendant's alleged defamatory statements;
3. In any event, the Court can try the IIED claim because the gravamen of Plaintiff's claims is defamation; and
4. The Court will not remand the claims, but will try them in Las Cruces.

If the District Court has a different view about the legal issues before the Court and/or how best to proceed, it can supersede the Court's decision(s) when it rules on the Reference Withdrawal Motion.

A. Facts.[1]

Based on the docket in this proceeding and the State Court Action (defined below), the Court finds:

Barry Byrnes, the pro se[2] plaintiff, is Defendant/Debtor's estranged husband. On March 29, 2019, Plaintiff filed a state court action against Defendant and their son in the Third Judicial District Court, State of New Mexico, styled *Barry Byrnes v. Sylvia and Matthew Byrnes*, No. D- 307-CV-2019-00916 (the "State Court Action"). The complaint alleged six causes of action. The state court judge dismissed four of the claims, leaving only the defamation and IIED claims. These claims relate to a heated argument between Plaintiff and

Defendant in July 2018, which prompted Defendant to call the police and report that Plaintiff had assaulted her.

Defendant filed this chapter 7 bankruptcy case on October 30, 2020. Plaintiff removed the claims to this Court, simultaneously filing additional claims in a separate proceeding. The Court

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[1] The Court takes judicial notice of its docket in this consolidated adversary proceeding, the main bankruptcy case, and the State Court Action (defined below). *See St. Louis Baptist Temple, Inc. v. Fed. Deposit Ins. Corp.*, 605 F.2d 1169, 1172 (10th Cir. 1979) (a court may sua sponte take judicial notice of its docket and of facts that are part of public records).

[2] Mr. Byrnes used to be licensed to practice law in New Mexico. He currently is on inactive status.

ordered the proceeding consolidated and ordered Plaintiff to file an amended complaint in the consolidated proceeding.

Plaintiff's amended complaint has two counts. In count one, Plaintiff asserts the defamation and IIED claims and asks that any judgment thereon be declared nondischargeable. Count two seeks an order requiring Debtor "to pay and continue to pay her share of contract and/or domestic support obligations" related to their marital residence, and alleging numerous theories under which such obligations are nondischargeable. Defendant answered count one and filed a motion to dismiss count two.

The main bankruptcy case was closed as a "no asset" case on March 11, 2021.

On March 18, 2021, Plaintiff filed the Reference Withdrawal Motion. The motion was assigned no. CV 21-00295 MV/JHR and is pending.

On July 2, 2021, the Court granted Defendant's motion to dismiss count two, leaving only the defamation and IIED claims to be adjudicated.

Slightly paraphrased, Plaintiff alleges the following conduct by Defendant in count one:

> 7. On July 13, 2018, Plaintiff and Defendant had a domestic argument at their residence.
>
> 8. Defendant called the police after the argument and alleged that she was assaulted during the argument and that she was a victim of domestic abuse.
>
> 9. Defendant's factual statement to police are malicious and willful and false.
>
> 14. On July 16, 2018, Defendant filed a petition in state court for an order of protection from domestic abuse.

16. Defendant again alleged that she was assaulted during the domestic argument of July 13 and was a victim of domestic violence.

17. Defendant's malicious and false factual statements are handwritten and contained in paragraphs 5 and 6 of the petition.

27. Defendant's malicious and willful and false statement about the nature of the alleged assault caused Plaintiff to be targeted for the grand jury investigation.

43. The malicious and false and injurious words Defendant spoke to police about Plaintiff are recorded by the arresting officer in the Magistrate Court misdemeanor complaint.

44. Defendant's malicious and false and injurious written words communicated to the state court and the Domestic Violence Special Commissioner are recorded in the petition she filed in the state court for protection from domestic abuse.

The proceeding has progressed through the pretrial stages. Discovery is now complete and the defamation and IIED claims are ready for trial.

To date, Plaintiff has filed the following appeals and motions related to his claims:

Court	Filing	Date	Disposition
1. State court	Notice of appeal	1/27/20	Dismissed
2. State court	Notice of appeal	2/26/20	Dismissed
3. Bankruptcy court	Notice of appeal	2/16/21	Dismissed
4. Bankruptcy court	Notice of appeal	2/16/21	Dismissed
5. Bankruptcy court	Motion to disqualify judge	3/18/21	Denied
6. Bankruptcy court	Notice of appeal	7/12/21	Dismissed
7. Bankruptcy court	Notice of appeal	8/2/21	Dismissed
8. Bankruptcy court	Notice of appeal	2/7/22	Dismissed
9. District court	Notice of appeal	7/12/21	Pending
10. District court	Motion to vacate the order of reference to Magistrate Judge	11/12/21	Pending
11. Tenth Circuit	Petition for Writ of Mandamus	2/18/22	Pending

Based on the record in this case, Defendant is judgment proof. Thus, it appears Plaintiff is pursuing

his claims for noneconomic reasons.

B. Trial of "Personal Injury Torts."

28 U.S.C. § 157(b)(5) provides in part:

> The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending . . . .

Although this provision does not deprive the bankruptcy court of jurisdiction to hear personal injury claims, *see, e.g., Stern v. Marshall*, 564 U.S. 462, 479 (2011) (§ 157(b)(5) is not jurisdictional); and *In re Smith*, 389 B.R. 902, 913 (Bankr. D. Nev. 2008) (same), it allocates jurisdiction between the district court and the bankruptcy court. As a result, "the district court will almost always hear personal injury tort cases, especially if a timely request to do so it made." *Smith*, 389 B.R. at 913. The Court must determine whether the defamation and IIED claims are personal injury tort claims.

C. The Court Adopts the Narrow Interpretation of "Personal Injury Tort."

In *In re Gawker Media LLC*, 571 B.R. 612 (Bankr. S.D.N.Y. 2017), Judge Bernstein stated:

> Lower courts in the Second Circuit and elsewhere have adopted different approaches to determine whether a particular claim constitutes a "personal injury tort" claim. [*In re Residential Capital, LLC*, 536 B.R. 566, 571–75 (Bankr. S.D.N.Y. 2015)] (collecting cases). The "narrow view" requires a trauma or bodily injury or psychiatric impairment beyond mere shame or

> humiliation to meet the definition of "personal injury tort." *Id.* at 571–72 (citations omitted); *accord Perino v. Cohen (In re Cohen)*, 107 B.R. 453, 455 (S.D.N.Y. 1989) The broad view interprets "personal injury tort" to "embrace[ ] a broad category of private or civil wrongs or injuries for which a court provides a remedy in the form of an action for damages, and include[ ] damage to an individual's person and any invasion of personal rights, such as libel, slander and mental suffering." *Residential Capital*, 536 B.R. at 572 (quoting *Boyer v. Balanoff (In re Boyer)*, 93 B.R. 313, 317–18 (Bankr. N.D.N.Y. 1988) and collecting cases). Finally, under the intermediate, "hybrid" approach, a bankruptcy court may adjudicate claims bearing the "earmarks of a financial, business or property tort claim, or a contract claim" even where those claims might appear to be "personal injury torts" under the broad view. *Id.* (quoting *Stranz v. Ice Cream Liquidation, Inc. (In re Ice Cream Liquidation, Inc.)*, 281 B.R. 154, 161 (Bankr. D. Conn. 2002) and citing, *inter alia*, *Adelson v. Smith (In re Smith)*, 389 B.R. 902, 908–13 (Bankr. D. Nev. 2008)).

571 B.R. at 620. *See also Smith*, 389 B.R. at 907-08 (discussing the three interpretations); *In re Ice Cream Liquidation, Inc.*, 281 B.R. 154, 160-61 (Bankr. D. Conn. 2002) (same).

The United States Supreme Court acknowledged the disagreement on the proper interpretation of "personal injury tort" in *Stern*, 564

U.S. at 479 n.4, but did not decide it. Neither the Tenth Circuit nor the Tenth Circuit Bankruptcy Appellate Panel has addressed the issue. A Utah district court judge adopted the narrow interpretation. *See In re C.W. Mining Co.*, 2012 WL 4882295, at *6 (D. Utah.).

Judge Bernstein concluded that the narrow interpretation is the proper one:

> Turning first to the canons of statutory interpretation, and specifically the canon *noscitur a sociis*, the Court concludes that the narrow interpretation, which requires trauma or bodily injury, or a psychic injury beyond mere shame or humiliation, is the correct interpretation. *Noscitur a sociis* is, put simply, the principle that "a word is known by the company it keeps." *Yates v. United States*, —— U.S. ——, 135 S. Ct. 1074, 1085, 191 L. Ed. 2d 64 (2015) . . . The Supreme Court has relied on the *noscitur a sociis* canon "to avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving 'unintended breadth to the Acts of Congress.'" *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575, 115 S. Ct. 1061,
> 131 L. Ed. 2d 1 (1995) (quoting *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307,
> 81 S. Ct. 1579, 6 L. Ed. 2d 859 (1961)). Here, the relevant statutory provisions couple "personal injury torts" and "wrongful death." "Wrongful death" refers to "[a] death caused by a tortious injury." BRYAN A. GARNER, BLACK'S LAW DICTIONARY 485 (10th ed. 2014) ("BLACK'S"). The term "personal injury

> tort" should be construed in a manner meaningfully similar to "wrongful death," and require a physical trauma.

Gawker Media, 571 B.R. at 620-21. He also reviewed the legislative history of § 157(b)(5) in detail and concluded that "the exception was intended to be narrow and not derogate from the bankruptcy court's traditional role of resolving claims through the claims resolution process." *Id.* at 622. Judge Bernstein was critical of the broad interpretation because it "cuts a broad exception that removes all tort claims from the jurisdiction of the bankruptcy court's claims resolution process." *Id.* at 622. Finally, Judge Bernstein was critical of the hybrid approach, opining that it "finds no support in the words of the relevant statutes, any canon of construction or the legislative history, and is unworkable " *Id.* at 623.

Similarly, in *Massey Energy Co. v. W. Va. Consumers for Justice*, 351 B.R. 348 (E.D. Va. 2006), the district court held that "the personal injury exception under § 157 is limited to a narrow range of claims that involve an actual physical injury. . . . it is the opinion of this Court that Congress intended to limit the claims fitting the exception by introducing the narrow, modifying language 'personal injury.'" *Id.* at 351.

Likewise, in *In re Cohen*, 107 B.R. 453 (S.D.N.Y. 1989), the district court held:

> This is not a claim for a "personal injury tort" in the traditional, plain-meaning sense of those words, such as a slip and fall, or a psychiatric impairment beyond mere shame and humiliation. The Supreme Court has repeatedly held that "'[a]bsent a clearly expressed legislative intention to the contrary, [statutory] language must ordinarily be regarded as

> conclusive.'" *Escondido Mut. Water Co. v. LaJolla Indians,* 466 U.S. 765, 772, 104 S. Ct. 2105, 2110, 80 L. Ed. 2d 753 (1984), *quoting North Dakota v. United States,* 460 U.S. 300, 312, 103 S. Ct. 1095, 1102, 75 L. Ed. 2d 77 (1983). There is no legislative history that would bring this plaintiff's claim for a tort without trauma within the statutory exception for a personal injury tort. *See, U.S. Code Congr. & Admin. News,* 1984, at 576 *et seq.* On the contrary, the legislative history indicates that Congress intended this exception for a "narrow range" of claims. *Id.,* Statement of Congr. Kastenmeier at 580.

Id. at 455. Judge Stevenson agreed with *Cohen* in *In re Atron Inc. of Mich.*, 172 B.R. 541 (Bankr. W.D. Mich. 1994):

> We believe, however, that drawing the distinction as did *Interco, Cohen, Vinci,* and *Bertholet* between the "traditional, plain meaning sense" of the words "personal injury" and the emotional distress and humiliation of nontraditional personal injury tort claims yields the logical, preferable result. We are unwilling to adopt the broad exception to bankruptcy court jurisdiction urged by Claimant and thus open the door to a mass exodus of the claims allowance process to the district court . . . .

Id. at 545.

For other cases adopting the "narrow"

interpretation, *see In re C.W. Mining Co.*, 2012 WL 4882295, at *6 (quoting *Massey* with approval); *Belcher v. Doe*, 2008 WL 11450550, at *4 (W.D. Tex.) (adopting the "narrow understanding" of personal injury tort); *Hurtado v. Blackmore*, 2007 WL 9753286, at *2 (S.D. Tex.) (quoting and following *Massey* and *Cohen*); *Lombard v. Greenpoint Savings Bank*, 1997 WL 114619, at *2 (D. Conn.) (citing *Cohen* for the proposition that the "exception for personal injury torts applies to a narrow range of claims"); *In re Finley, Kumble*, 194 B.R. 728, 734 (S.D.N.Y. 1995) (a "tort claim 'without trauma or bodily injury is not within statutory exception for a personal injury tort'"); *In re Interco, Inc.*, 135 B.R. 359, 362 (Bankr. E.D. Mo. 1991) (adopting the narrow view); *In re Vinci*, 108 B.R. 439, 442 (Bankr. S.D.N.Y. 1989) (following *Cohen*); *In re Sheehan Mem'l Hosp.*, 377 B.R. 63, 68 (Bankr. W.D.N.Y. 2007) (adopted the narrow interpretation); *Bertholet v. Harman*, 126 B.R. 413, 415 (Bankr. D.N.H. 1991) (citing *Cohen* and *Vinci* with approval); *In re Davis*, 334 B.R. 874, 878 n.2 (Bankr. W.D. Ky. 2005), aff'd in part and reversed in part on other grounds, 347 B.R. 607 (W.D. Ky. 2006) (citing *Cohen*, the court rules that libel is not a personal injury tort); *In re Chateaugay Corp.*, 111 B.R. 67, 76 (Bankr. S.D.N.Y. 1990) ("the law in this district is that Congress intended this exception for a 'narrow range of claims'").

In contrast, under the "broad" interpretation:

> The term "personal injury tort" embraces a broad category of private or civil wrongs or injuries for which a court provides a remedy in the form of an action for damages, and includes damage to an individual's person and any invasion of personal rights, such as libel, slander

> and mental suffering, BLACK'S LAW DICTIONARY 707, 1335 (5th ed. 1979).

In re Boyer, 93 B.R. 313, 317-18 (Bankr. N.D.N.Y. 1988).[3] In addition to the definitional argument, courts adopting the broad interpretation point to § 522(d)(11), which uses the term "personal bodily injury." These courts argue that if Congress had intended to limit § 157(b)(5) to torts resulting in bodily injury, it could have said so. *See, e.g., In re Nifong*, 2008 WL 2203149, at
*3, (Bankr. M.D.N.C.) (narrow view ignores the language of § 522(d)(11)); *In re Ice Cream Liquidation, Inc.*, 281 B.R. 154, 160 (Bankr. D. Conn. 2002) (same).

The "hybrid" interpretation agrees with the "broad" interpretation but fears that

> the "broader" view may place too much reliance on whether the alleged claim would be considered a "personal injury tort" in a nonbankruptcy context. That presents at least some risk that financial, business or property tort claims also could be withdrawn from the bankruptcy system if that "broader" view is blindly followed. . . . Accordingly in cases where it appears that a claim might be a "personal injury tort claim" under the "broader" view but has earmarks of a financial, business or property tort claim, or a contract claim, the court reserves the

[3] As discussed below, the definition quoted in *Boyer* is one of two definitions in the current version of Black's Law Dictionary. The first definition supports the narrow interpretation of "personal injury tort."

> right to resolve the "personal injury tort claim" issue by (among other things) a more searching analysis of the complaint.

Ice Cream Liquidation, 281 B.R. at 161; *see also Smith*, 389 B.R. at 908 (same).

> The Court concludes that "personal injury tort" should be interpreted narrowly. First, Judge Bernstein's *Noscitur a sociis* analysis is persuasive. Because "personal injury tort" is next to "wrongful death," the terms should be construed together as dealing with similar types of injuries.
>
> Second, the legislative history shows that Congress meant "personal injury tort" to refer to torts similar to "claims arising from automobile accidents," i.e., a "narrow range of claims.[4]
>
> Third, consideration of the personal injury attorney lobbying effort after *Johns-Manville* leads to the conclusion that the personal injury torts referred to in § 157(b)(5) were the "traditional, plain-meaning types."
>
> Fourth, there is no constitutional problem with bankruptcy courts hearing tort claims, so a broad interpretation of "personal injury tort" is not required to satisfy *Northern Pipeline Const. Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982). *See In re Dow Corning Corp.*, 215 B.R. 346, 353-54 (Bankr. E.D. Mich. 1997) (no constitutional dimension to § 157(b)(2)).
>
> Fifth, a narrow interpretation of "personal injury tort" avoids unduly burdening the District Court with trial of bankruptcy-related claims, which burden Congress could not have intended.
>
> Sixth, Black's Law Dictionary's *first* definition of personal injury tort is "any harm caused to a person, such as a broken bone, a cut, or a bruise; bodily injury." Black's Law Dictionary (10th ed.).

The *second* definition was the one relied upon by *Boyer* and *Ice Cream Liquidation*. Thus, Black's supports the narrow interpretation as much as or more than the broad one.

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[4] *Gawker Media*, 571 B.R. at 621-22, quoting legislative history.

Seventh, as Judge Bernstein observed, the "broad" interpretation "essentially equates 'personal injury tort' with any tort " *Gawker Media*, 571 B.R. at 622. The broad interpretation

> reads "personal injury" out of § 157(b)(5), contrary to the rule that statutes should be construed so that, "if it can be prevented, no clause, sentence, or word is superfluous, void, or insignificant." *TWR, Inc. v. Andrews*, 534 U.S. 19, 31 (2001).

Eighth, it is true that 11 U.S.C. § 522(d)(11) refers to "personal bodily injury" while 28 U.S.C. § 157(b)(5) refers to "personal injury." That difference does not outweigh the reasons favoring a narrow interpretation. Further, the sections were adopted six years apart, addressed different issues, and are in different titles of the United States Code.[5] Finally, Black's Law Dictionary (first definition) equates the two terms.

Ninth, the Court finds persuasive Judge Bernstein's opinion that the hybrid approach lacks "support in the words of the relevant statutes, any canon of construction or the legislative history, and is unworkable " 571 B.R. at 623. The hybrid approach is not an attempt to construe the statute as much as a judicially crafted compromise between two alternative constructions. The compromise is unsatisfactory. Whatever Congress intended when it used the term "personal injury tort," it wasn't the hybrid interpretation.

D. <u>The Defamation Claim</u>.

Under the narrow interpretation, defamation claims are not personal injury torts. In *Gawker Media*, for example, Judge Bernstein held:

> Having adopted the narrow interpretation, the Court readily concludes that the Claims do not assert

"personal injury torts." Torts such as defamation, false light and injurious falsehood do not require proof of trauma, bodily injury or severe psychiatric impairment, and the *Complaint* does not allege that the Claimants suffered these injuries.

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[5] *Cf. Dewsnup v. Timm*, 502 U.S. 410 (1992) (identical language ("allowed secured claim") has different meanings in §§ 506(a) and (d).

571 B.R. at 623. *See also Massey Energy Co.*, 351 B.R. at 351 (defamation claim is not a personal injury tort); *Hurtado v. Blackmore*, 2007 WL 9753286, at *2 (same); *In re Davis*, 334 B.R. at 878 n.2 (libel is not a personal injury tort). The other cases adopting the narrow interpretation of "personal injury tort," cited above, did not involve defamation claims, but it is highly likely that they would have agreed with *Massey Energy* and *Gawker Media* that defamation is not a personal injury tort.[6]

E. The IIED Claim.

1. The IIED claim may be subject to dismissal or other summary disposition. A

number of courts have ruled that alleged defamatory statements cannot be the basis of an IIED claim. In *Grimes v. Carter*, 50 Cal. Rptr. 808 (Ct. App. 1966), for example, the court refused to recognize an independent claim for intentional infliction of emotional distress arising from the alleged defamatory statements, holding:

> It is elementary that, although the gravamen of a defamation action is injury to reputation, libel or slander also visits upon a plaintiff humiliation, mortification and emotional distress. In circumstances where a plaintiff states a case of libel or slander, such personal distress is a matter which may be taken into account in determining the amount of damages to which the plaintiff is entitled, but it does not give rise to an independent cause of action on the theory of a separate tort. To accede to the contentions of the plaintiff in this case would be, in the words of Prosser, a step

> toward "swallowing up and engulfing the whole law of public defamation." If plaintiff should prevail in her argument it is doubtful whether any litigant hereafter would file a slander or libel action, post an undertaking and prepare to meet substantial defenses, if she could, by simply contending that she

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[6] Courts adopting the "broad" or "hybrid" interpretation of "personal injury tort" come to the opposite conclusion: they have uniformly ruled that defamation claims *are* personal injury torts. *See, e.g.*, *In re Smith*, 389 B.R. at 908 (under the hybrid interpretation, libel is a personal injury tort); *In re Arnold*, 407 B.R. 849, 853 (Bankr. M.D.N.C. 2009) (same); *In re Von Volkmar*, 217
B.R. 561, 566 (Bankr. N.D. Ill. 1998) (same); *In re Bailey*, 555 B.R. 557, 561 (Bankr. N.D. Miss. 2016) (same); *Control Ctr., LLC v. Lauer,* 288 B.R. 269, 286 (M.D. Fla. 2002) ("Defamation is a personal injury tort"); *In re Roman Catholic Church for Archdiocese of New Orleans*, 2021 WL 3772062, at *4 (E.D. La.) (same); *In re White*, 410 B.R. 195, 203 (Bankr. W.D. Va. 2008) (same). Thus, the key issue is the proper interpretation of "personal injury tort."

> was predicating her claim solely on emotional distress, avoid the filing of such bond and render unavailable such substantial defenses as for example, justification by truth.

50 Cal. Rptr. at 813. Similarly, in *Barker v. Huang*, 610 A.2d 1341, 1351 (Del. 1992), the Delaware Supreme Court quoted *Grimes* and stated: "we hold with the great weight of foreign precedent that an independent action for intentional infliction of emotional distress does not lie where, as here, the gravamen of the complaint sounds in defamation."

For other cases in agreement with *Grimes* and *Barker*, *see Dworkin v. Hustler Magazine, Inc.*, 668 F. Supp. 1408, 1420 (C.D. Cal. 1987) ("Without such a rule, virtually any defective defamation claim ... could be revived by pleading it as one for intentional infliction of emotional distress; thus, circumventing the restrictions . . . on defamation claims"); *DeMeo v. Goodall*, 640
F. Supp. 1115, 1117 (D.N.H. 1986) (cause of action for intentional infliction of emotional distress may not be maintained concurrently with a defamation action); *Wilson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 490 N.Y.S.2d 553, 555 (App. Div. 1985) ("[I]t would be improper to allow plaintiff to evade the specific prerequisites for a libel action by presenting his cause of action in terms of the generalized tort of intentional infliction of emotional distress"); *Flynn v. Higham,* 197 Cal. Rptr. 145, 148 (Ct. App. 1984) ("to allow an independent cause of action for the intentional infliction of emotional distress based on the same acts which would not support a defamation action, would ... render meaningless any defense of ... privilege"); *Draker v. Schreiber*, 271 S.W.3d 318, 325 (Tex. App. 2008) ("As the gravamen of Draker's complaint was one of

defamation, the trial court did not err in dismissing her claim for intentional infliction of emotional distress"); *Rykowsky v. Kickinson Public School Dist. No. 1*, 508 N.W. 2d 348, 352 (N.D. 1993) (IIED claim does not lie where the gravamen of the complaint sounds in defamation); *Fridovich v. Fridovich,* 598 So.2d 65, 70 (Fla.1992) ("the successful invocation of a defamation privilege *will* preclude a

cause of action for intentional infliction of emotional distress if the sole basis for the latter cause of action is the defamatory publication"); *Hoffmann–La Roche Inc. v. Zeltwanger,* 144 S.W.3d 438, 447 (Tex. 2004) ("[w]here the gravamen of a plaintiff's complaint is really another tort, intentional infliction of emotional distress should not be available"); *Kirschstein v. Haynes*, 788 P.2d 941, 954 (Okla. 1990) (a claim "for intentional infliction of emotional distress ... based on the same factual underpinnings as a defamation claim for which the privilege applies, ... is also barred by the reach of the absolute privilege"); *Rubinson v. Rubinson*, 474 F. Supp.3d 1270, 1278- 79 (S.D. Fla. 2020) (plaintiff cannot transform a defamation action into an IIED claim by characterizing the alleged defamatory statements as "outrageous"); *Miller v. Target Corp.*, 854 Fed. Appx. 567, 569 (5th Cir. 2021) (IIED is not recoverable in the alternative to a defamation claim); *Durepo v. Flower City Television Corp.*, 537 N.Y.S.2d 391, 392 (App. Div. 1989) (IIED cause of action is redundant to the defamation action and should have been dismissed); *Basilius v. Honolulu Pub. Co., Ltd.*, 711 F. Supp. 548, 552 (D. Haw. 1989) (IIED claim stands or falls with the defamation claim; it is parasitic of it); *Decker v. Princeton Packet, Inc.*, 116 N.J. 418, 432 (1989) ("it comports with the first amendment protections to deny an emotional-distress claim based on a false publication that engenders no defamation *per se*"); *Illaraza v. HOVENSA LLC*, 73 F. Supp. 3d 588, 614 (D.V.I. 2014) (under Virgin Islands law, an IIED claim cannot lie where the gravamen of the complaint sounds in defamation).

New Mexico has not ruled directly on the issue, However, in *Andrews v. Stallings*, 119

N.M. 478, 491 (Ct. App. 1995), the New Mexico Court of Appeals stated:

> In recent years, public figures increasingly have attempted to use the intentional infliction of emotional distress claim "to make an end-run around the obstacles posed by defamation law's harm to reputation element and its constitutional aspects." Arlen W. Langvardt, *Stopping the End–Run by Public Plaintiffs: Falwell and the Refortification of Defamation Law's Constitutional Aspects,* 26 Am. Bus. L.J. 665, 666 (1989) (footnote omitted) [hereinafter *Stopping the End–Run*]. In *Hustler Magazine, Inc. v. Falwell,* 485 U.S. 46, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988), the Supreme Court "drastically limited, if not eliminated, public officials' and public figures' ability to employ the emotional distress option to evade the obstacles imposed by defamation law." *Stopping the End–Run, supra,* at 668.

119 N.M. at 491. *Andrews* shows that New Mexico law does not allow litigants to evade the requirements for proving defamation by pleading an IIED claim on the same facts.

Here, the IIED claim is based entirely on Defendant's alleged defamatory statements to the police, the state court, and others. Under the "great weight" of the authority cited above, Plaintiff's IIED claim appears unviable.

2. In any event, the gravamen of plaintiff's claims is defamation, so the Court can try them both. When deciding whether an IIED claim is a personal injury tort, the Court must

determine if the alleged emotional distress is central to the cause of action or is merely an element of damages. In *In re Residential Capital, LLC*, 536 B.R. 566 (Bankr. S.D.N.Y. 2015), Judge Glenn observed that "[s]ome courts have held, without analysis or explanation, that the bankruptcy court does not have subject matter jurisdiction to adjudicate the emotional distress claim under section 157(b)(5)," *Id.* at 572-73. After citing a number of cases, Judge Glenn stated:

> Some courts have found it unnecessary to settle on one single approach for determining whether an emotional distress claim involves a personal injury tort, focusing instead on the "gravamen" of the claim The court's analysis in [*In re Thomas*, 211 B.R. 838 (Bankr. D.S.D. 1997)] and in other cases points strongly towards analyzing the context and central focus of the claims—if an IIED claim is the tail wagging the dog, section 157(b)(5) should not require dislodging the claim from bankruptcy court resolution of a portion of a claim asserted against a debtor. If the IIED claim is the gravamen of the claim, as the South Carolina bankruptcy court found in *Thomas,* section 157(b)(5) does not permit the bankruptcy court to try the claim absent consent.

536 B.R. at 573. The district court in Utah came to the same conclusion in *In re Lang*, 166 B.R. 964 (D. Utah 1994), holding:

> Regardless of whether intentional infliction of emotional distress is a true

> personal injury tort under § 157(b)(5), Dr. Lang's claims are fundamentally allegations of fraud. Thus, the court finds Dr. Lang's allegation of emotional distress claim too tangential to his lawsuit to support withdrawal of the entire matter solely on the basis of the emotional distress claim. Further, Dr. Lang's claim of emotional distress is intimately connected to his claims of fraud, making it impractical and inefficient to withdraw the emotional distress claim by itself.

166 B.R. at 967. Similarly, in *Bertholet v. Harman* the bankruptcy court held:

> I believe the better rule is that if a mental distress claim does not involve physical injury, then only if the claim is the gravamen of a complaint would § 157(b)(5) be invoked. Otherwise, as stated above, jurisdiction would too easily be lost from this court, and I cannot believe Congress intended that.
> In short, the claims in the present case do not rise to the level of "psychiatric impairment" caused by wilful conduct in that regard. The claims are more in the nature of humiliation and other emotional harm which are incidental claims in this action. This does not implicate § 157(b)(5).

126 B.R. at 416.

The approach taken by these courts is reasonable and will be followed here. The gravamen

of Plaintiff's claims is defamation. Defamation is the "context and central focus of the claim," 536 B.R. at 573. Plaintiff does not allege any wrongful conduct by Defendant other than her allegedly defamatory statements. The Court concludes that even if the IIED claim is viable, it is the "tail wagging the dog," *id.*, and should remain in the bankruptcy court for trial.[7]

F. The Court Will Try the Claims.

Subject to a different conclusion by the District Court on the Reference Withdrawal Motion, this Court will try the torts claims because defamation is not a personal injury tort and is the gravamen of Plaintiffs' claims. The claims can be tried relatively quickly and inexpensively.[8] The Court does not want to shirk its duty to hear cases filed in bankruptcy court, especially contentious cases like this one. *See, e.g., Dear v. Nair*, 2021 WL 1517983, at *5, n.1 (D.N.M.)

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[7] Emotional distress damages are available in defamation cases. *See Castillo v. City of Las Vegas*, 145 N.M. 205, 212 (Ct. App. 2008), *citing Marchiondo v. Brown*, 98 N.M. 394, 402 (S. Ct. 1982). [8] The Court proposes to try the claims in Las Cruces, given the age and economic situation of the parties and the location of the parties, witnesses, and counsel.

("the Court is mindful of its continuing jurisdictional duty to hear claims properly presented before it "); *Russell v. Bank of America, N.A.*, 2012 WL 1739721, at *1 (D. Nev.) ("This Court has a duty to hear all cases in which its subject matter jurisdiction is properly invoked. . . ."); *In re Hillsborough Holdings Corp.*, 123 B.R. 1004, 1013 (Bankr. M.D. Fla. 1990) (alludes to "the court's presumptive duty to hear and resolve matter which are properly before it").

If the claims are "core" because they were brought as part of a nondischargeability proceeding, then the Court will enter a final judgment. If the claims are not "core," then the Court will enter proposed findings of fact and conclusions of law for review by the District Court. *See* 28 U.S.C. § 157(c)(1). This issue will be determined later.

G. Remand.

As an alternative to trying the claims, this Court and the District Court have the right to remand the claims to state court "on any equitable ground." *See* 28 U.S.C. § 1452(b). *See also CitiMortgage, Inc. v. Davis*, 20 F.4th 352, 356-57 (7th Cir. 2021) (the bankruptcy court may remand a case under 28 U.S.C. § 1452(b)); *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127 (1995) ("Congress has placed broad restriction on the power of federal appellate courts to review district court orders remanding removed cases to state court").

There are good reasons to remand the claims, e.g., convenience of the parties, location of witnesses, and the purely state law nature of the claims. The main reason not to remand them is the potential expense of a state court jury trial. Defendant has no income other than social security. She is 79 and lives with the parties' son. Unlike

court dismissed the proceeding when it denied his motion to withdraw the reference. Although the Court pointed out that Plaintiff's reading of the district court's order was obviously wrong--the district court could not keep the reference in place yet dismiss the proceeding--Plaintiff refused to yield.

After reviewing the facts and the law, the Court concludes that this proceeding should be dismissed with prejudice. Furthermore, because the Court finds that Plaintiff's prosecution of this proceeding is and has been in bad faith and constitutes vexatious and harassing litigation, the Court will order Plaintiff to pay Defendant's attorney fees.

A. Facts.[1]

The Court finds:

Barry Byrnes, the pro se[2] plaintiff, is Defendant/Debtor's estranged husband. On March 29, 2019, Plaintiff filed a state court action against Defendant and their son in the Third Judicial District Court, State of New Mexico, styled *Barry Byrnes v. Sylvia and Matthew Byrnes*, No. D- 307-CV-2019-00916 (the "State Court Action"). The complaint alleged six causes of action. The state court judge dismissed four of them, leaving only claims for defamation and the intentional infliction of emotional distress. They relate to a heated argument between Plaintiff and Defendant in July 2018, which prompted Defendant to call the police and report that Plaintiff had assaulted her.

Defendant filed this chapter 7 bankruptcy case on October 30, 2020. Plaintiff removed the State Court Action to this Court, simultaneously filing additional claims in a separate proceeding. The Court consolidated the proceedings and ordered Plaintiff to file an amended complaint.

The main bankruptcy case was closed as a "no asset" case on March 11, 2021.

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[1] The Court takes judicial notice of its docket in this consolidated adversary proceeding, the main bankruptcy case, the State Court proceeding, and the District Court proceeding. *See St. Louis Baptist Temple, Inc. v. Fed. Deposit Ins. Corp.*, 605 F.2d 1169, 1172 (10th Cir. 1979) (a court may sua sponte take judicial notice of its docket and of facts that are part of public records).

[2] Mr. Byrnes used to be licensed to practice law in New Mexico. He currently is on inactive status.

On March 18, 2021, Plaintiff filed with the United States District Court for the District of New Mexico (the "District Court") a motion to withdraw the reference.[3] The motion was given a District Court case number (CV 21-00295) and assigned to District Judge Martha Vasquez and Magistrate Judge Jerry Ritter.

Judge Ritter entered his proposed findings and recommended disposition ("PFRD") on November 10, 2021. In his PFRD, Judge Ritter recommended that the motion to withdraw the reference be denied without prejudice.

The matter was later reassigned to District Judge Kea Riggs. On April 15, 2022, Judge Riggs entered an opinion and order that:

> **adopts** Magistrate Judge Ritter's PFRD;
> **dismisses** Mr. Byrnes' Motion for Withdrawal of Reference without prejudice; **denies** Mr. Byrnes' Motion to Set a Date for a District Court Pretrial Conference; and
> **denies** Mr. Byrnes' Motion to Stay Pretrial Conference and Related Relief.

Judge Riggs entered a final judgment implementing the opinion and order, which provided:

> Pursuant to the Memorandum Opinion and Order (doc. 42) entered on April 15, 2022, the Court enters this Final Judgment under Fed. R. Civ. P. 58, DISMISSING this action WITHOUT PREJUDICE. IT IS SO ORDERED.[4]

Upon receipt of Judge Riggs' ruling, the Court scheduled a final pretrial conference. The conference was continued once at Plaintiff's request. The Court held the rescheduled pretrial conference on May 13,

2022. At the conference, Plaintiff stated he would not be participating

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[3] *See* 11 U.S.C. § 157(d). The proceeding was referred to the Court pursuant to 28 U.S.C. § 157(a) and Misc. No. 84-0324, entered July 18, 1984, in the United States District Court for the District of New Mexico.

[4] Plaintiff appealed Judge Riggs' ruling. On the same day Plaintiff filed a motion to reconsider the ruling. The Tenth Circuit issued an order abating the appeal until Judge Riggs has ruled on the motion to reconsider. The Tenth Circuit also noted that there are other potential jurisdictional issues. Although the issues were not identified, the Tenth Circuit may be referring to the fact that orders denying motions to withdraw the reference are interlocutory. *See In re Commercial Financial Services, Inc.*, 97 Fed. App'x 238, 239 (10th Cir. 2004) because, in his opinion, Judge Riggs dismissed the adversary proceeding. The following exchange then took place:

> COURT: Are you willing to participate in this pretrial conference in good faith?
>
> PLAINTIFF: No. I'm not willing to participate Judge because as you know that on April 15 there's a final judgment entered which dismisses the action, so you're proposing to conduct a bench trial on an action that's dismissed. There's an appeal from the final judgment and motions were filed with Judge Riggs based upon her underlying decision and order which was entered on April 15, 2022, so I'm not participating in this cause.

The Court attempted to correct Plaintiff's misinterpretation of the Final Judgment:

> COURT: Alright that's not how I interpret her decision, I don't think she ruled on the merits of your case, I think she ruled on your motion to withdraw the reference.

Plaintiff responded:

> PLAINTIFF: You're not the 10th Circuit, you're just a Bankruptcy Judge, you're nobody.

Plaintiff refused to accede.

Because of Plaintiff's position, the Court could not conduct the conference or set the proceeding for trial. The Court asked Defendant's counsel about an appropriate sanction for Plaintiff's conduct. Defendant asked that the Court dismiss the proceeding with prejudice.

B. Federal Rule of Civil Procedure ("Rule") 16(f).

Rule 16(f)[5] provides:

> On a motion or on its own, the court may issue any just orders, including those authorized by Rule 37(b)(2)(A)(ii)-(vii),[6] if a party or its attorney: . . . (B) is substantially unprepared to participate—or does not participate in good faith—in the conference.

[5] Made applicable in adversary proceedings pursuant to Fed. R. Bankr. Pro. 7016.

[6] Made applicable in adversary proceedings pursuant to Fed. R. Bankr. Pro. 7037

"Rule 16(f) 'indicates the intent to give courts very broad discretion to use sanctions where necessary to insure . . . that lawyers and parties . . . fulfill their high duty to insure the expeditious and sound management of the preparation of cases for trial.'" *Teague v. Riddle*, 2021 WL 3362572 *2 (D.N.M.), affirmed, 2022 WL 103392 (10th Cir.), quoting *Gripe v. City of Enid*, 312 F.3d 1184, 1188 (10th Cir. 2002).

C. Dismissal as a Rule 16(f) Sanction.

One sanction available under Rule 16(f) is to "dismiss[] the action or proceeding in whole or in part." Rule 37(b)(2)(A)(v). Dismissal is a drastic remedy, *see Davis v. Miller*, 571 F.3d 1058, 1061 (10th Cir. 2009), and *In re Quick Cash, Inc.*, 2019 WL 4307550, at *4 (Bankr. D.N.M.), but one that should be imposed when appropriate. *See, e.g., Gripe*, 312 F.3d 1184 (affirming dismissal with prejudice); and *Jones v. Trujillo*, 2012 WL 13081962, at *5 (D.N.M.) (recommending dismissal with prejudice). When determining whether to impose the sanction of dismissal, courts analyze the so-called *Ehrenhaus*[7] factors, namely "(1) the degree of actual prejudice to the other party; (2) the amount of interference with the judicial process; (3) the culpability of the litigant;
(4) whether the court warned the party in advance that dismissal of the action would be a likely sanction for noncompliance; and (5) the efficacy of lesser sanctions." 965 F.2d at 921. "The factors do not create a rigid test but are simply criteria for the court to consider." *Gripe*, 312 F.3d at 1188.

The Court analyzes the *Ehrenhaus* factors as follows:

Factor	Analysis
(1) The degree of actual prejudice to the other party;	Over the past three years and more, Plaintiff has filed numerous motions, petitions, and appeals, including three motions to disqualify a presiding judge. The litigation has largely been vexatious and undertaken in bad faith. Although many of Plaintiff's arguments and actions have lacked merit, Defendant has been required to defend against them in state court (trial and appellate), bankruptcy

[7] *See Ehrenhaus v. Reynolds*, 965 F.2d 916 (10th Cir. 1992).

	court, District Court, the Bankruptcy Appellate Panel, and the Tenth Circuit Court of Appeals. Defendant has incurred $12,921.14 in attorney fees since the proceeding was removed to this Court. This factor weighs in favor of dismissal.
(2) The amount of interference with the judicial process;	"Interference with the judicial process can result from 'willful failure to comply with a direct court order.'" *Quick Cash,* 2019 WL 4307550 *6, quoting *Ehrenhaus*, 965 F.2d at 921. Plaintiff did not comply with the Court's order to prepare a pretrial order using the bankruptcy court's form. Plaintiff also refusing to participate in good faith at the pretrial conference. More broadly, Plaintiff's willingness to file and litigate all his motions and appeals, while refusing to try his case, constitutes a major, ongoing interference in the judicial process. To date, 18 state and federal court trial and appellate judges have been involved in this proceeding.[8] This factor weighs in favor of dismissal.
(3) The culpability of the litigant;	Plaintiff is a former lawyer. He knows how he is expected to behave in court and towards opposing counsel. He knows court orders are requirements, not mere suggestions. He also knows that bad faith, vexatious litigation is wrong and

	sanctionable. Plaintiff's actions have been culpable throughout this litigation. This factor weighs in favor of dismissal.
(4) Whether the court warned the party in advance that dismissal of the action would be a likely sanction for noncompliance; and	At the pretrial conference, the Court warned Plaintiff that it might dismiss this proceeding under Rule 16. Plaintiff responded, "Judge you can do what you want, I'm not participating." This factor weighs in favor of dismissal.
(5) The efficacy of lesser sanctions.	If a plaintiff refuses to take his case to trial, no sanction other than dismissal would be efficacious or appropriate. A plaintiff must try his case when it is ready for trial, or have it dismissed.

The *Ehrenhaus* factors weigh heavily in favor of dismissing the adversary proceeding with prejudice.

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[8] Hon. Harris L Hartz; Hon Joel M. Carson; Hon. Allison H. Eid; Hon. Martha A. Vasquez; Hon. Kea W. Riggs; Hon. Jerry Ritter; Hon. David T. Thuma; Hon. Tom Cornish; Hon Janice Loyd; Hon. Casey Parker; Hon. Terry Michael; Hon. William Thurman; Hon. Judith K. Nakamura; Hon. Linda M. Vanzi; Hon. J. Miles Hanisee; Hon. James T. Martin; Hon. Richard M. Jacquez; and Hon. Casey B. Fitch.

To excuse his refusal to participate in the pretrial conference or proceed to trial, Plaintiff argued that Judge Riggs dismissed this proceeding when she denied Plaintiff's motion to withdraw the reference. The argument is frivolous. Judge Riggs' order "dismisses Mr. Byrnes' Motion for Withdrawal of Reference [Doc. 1] without prejudice." Nowhere does Judge Riggs say that the underlying proceeding should be dismissed. That is because (i) dismissal of the proceeding was not before her, and (ii) it is impossible to keep the reference in place and dismiss the proceeding. The final judgment, entered at the same time as the opinion and order, dismissed CV 21-00295 but not this proceeding.[9]

Because there is only one reasonable interpretation of Judge Riggs' ruling, the Court finds that Plaintiff's alleged interpretation was a pretext for refusing to try his case.

The Court further finds that Plaintiff does not want to *try* the case against his wife, only to *litigate* it. Plaintiff knows his wife has limited means and cannot afford litigation. Relying on his experience as a lawyer, Plaintiff used this proceeding to harass his wife and drain her of what little money she had, without incurring any substantial expenses of his own. However, when Plaintiff was given his "day in court," he balked on the flimsiest pretext. Based on everything that has happened in this proceeding since it was removed from state court, the Court finds and concludes that Plaintiff "has acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *Chambers*
v. Nasco, Inc., 501 U.S. 32, 45-46 (1991) (internal quotation marks and citation omitted). Plaintiff has used litigation in the state district court, the state appellate and Supreme Courts, this Court, the

[9] Plaintiff's 20-page motion to reconsider Judge Riggs' ruling never mentions Plaintiff's concern that his claims were dismissed as part of the ruling. On the contrary, Plaintiff states in the first paragraph that Judge Riggs' opinion and order are "the basis for a final judgment that dismisses civil action No. 21 CV 00295 without prejudice." That is an accurate statement, and entirely different from Plaintiff's assertion at the pretrial conference that Judge Riggs dismissed his claims. Furthermore, in his notice of appeal Plaintiff alleges six errors. Dismissal of Plaintiff's claims is not one of them.

district court, the Tenth Circuit Bankruptcy Appellate Panel, and the Tenth Circuit Court of Appeals, to vex, harass, and impoverish his wife. Plaintiff does not want a judgment, which would be uncollectible, but to keep this litigation going as long as possible.

Dismissal with prejudice is a fair and reasonable response to Plaintiff's prolonged misuse of the state and federal court systems.

D. Dismissal Under Rule 41(b).

Rule 41(b) provides:

> If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) . . . operates as an adjudication on the merits.

Dismissal also is appropriate under this rule. Plaintiff has not only failed to prosecute this proceeding, he refuses to do so. Further, Plaintiff has refused to comply with Rule 16 and the Court's order setting the pretrial conference. Based on Plaintiff's failure to prosecute, Defendant asked that the proceeding be dismissed with prejudice. Granting the requested relief pursuant to Rule 41(b) is appropriate. *See, e.g., Tafoya v. Colorado*, 628 Fed. App'x 617, 619 n.4 (10th Cir. 2016) (the *Ehrenhaus* factors should be weighed when considering a motion to dismiss under Rule 41(b); *Padilla v. Mnuchin*, 802 Fed. App'x 426, 427 (10th Cir. 2020) (dismissal under Rule 41(b) is within the discretion of the trial court); *Davis v. Operation Amigo, Inc.*,

378 F.2d 101, 103 (10th Cir. 1967) (same); *S.E.C. v. Power Resources Corp.*, 495 F.2d 297, 298 (10th Cir. 1974) (no precise rule as to what circumstances justify a dismissal for failure to prosecute).

E. Award of Attorney Fees.

> Rule 16(f)(2) provides Imposing Fees and Costs. Instead of or in addition to any other sanction, the court must order the party, its attorney, or both to pay the reasonable expenses--including attorney's fee—incurred because of any noncompliance with this rule, unless the noncompliance was substantially justified or other circumstances make an award of expenses unjust.

In addition, courts have the power and the obligation to prevent abusive litigation by entering appropriate sanctions. In *Durango v. Cohen*, 2013 WL 12328881, at *4 (D.N.M.), the court held:

> It is well established that the "federal courts have inherent power to assess attorney's fees against counsel" when "a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *Chambers v. Nasco, Inc.*, 501 U.S. 32, 45-46 (1991) (internal quotation marks and citation omitted).
>
> The imposition of sanctions in this instance transcends a court's equitable power concerning relations between the parties and reaches a court's inherent power to police itself, thus serving the dual purpose of vindicat[ing] judicial authority without resort to the more drastic sanctions available for contempt of court and mak[ing] the

> prevailing party whole for expenses caused by his opponent's obstinacy.

Id. at 46 (internal quotation marks and citation omitted; alterations in original). Such awards are punitive and, therefore, "appropriate only in exceptional cases and for dominating reasons of justice." *Mountain West Mines, Inc. v. Cleveland-Cliffs Iron Co.*, 470 F.3d 947, 953 (10th Cir. 2006) (internal quotation marks and citation omitted); *see also Hall v. Cole*, 412 U.S. 1, 5 (1973) (holding that such awards are, "of course, punitive, and the essential element in triggering the award of fees is therefore the existence of 'bad faith' on the part of the unsuccessful litigant.").

See also Kornfeld v. Kornfeld, 393 Fed. App'x 575, 578 (10th Cir. 2010) (the bad faith fee-shifting rule allows the court to police itself and serves the dual purposes of vindicating judicial authority and making innocent parties whole); *Green v. Price*, 76 F.3d 392, at *1 (10th Cir.) (unpublished) (when deciding to impose sanctions on an abusive litigant the court must balance the litigant's constitutional right of access to the courts against the court's inherent power to regulate its docket); *see generally Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980) (federal court must have and exercise the contempt sanction power to protect the orderly administration of justice and in maintain the authority and dignity of the court).

There are three reasons to impose substantial monetary sanctions in this proceeding. The first and least significant reason is Plaintiff's contumacious conduct toward the Court. As a former attorney, Plaintiff knows how he is expected to conduct himself in court. His behavior at the pretrial conference and throughout this proceeding has been remarkably disrespectful. Plaintiff's rudeness to opposing counsel and the Court is inexcusable.

Second, and more importantly, Plaintiff wasted the Court's and the Defendant's time at the final pretrial conference by refusing to confer in good faith, giving as his reason an obvious pretext.

Finally, and by far most importantly, Plaintiff's actions throughout this proceeding have been in bad faith, vexatious, wanton, harassing, and oppressive. It is bad faith to litigate and then refuse, on the flimsiest grounds, to try the case. It makes obvious that Plaintiff's claims were brought and litigated to torment his estranged wife with bad faith, vexatious litigation that cost him little or nothing but forced her to incur ever-mounting attorney fees. Plaintiff's conduct merits a significant sanction.

Defendant has incurred the following attorney fees in this proceeding after removal:

Hours billed	Hourly rate	Fees billed	Gross receipts tax	Total
53.02	$225	$11,929.50	$991.64	$12,921.14

The Court finds that the fees charged to Defendant are quite reasonable, given all of the work Plaintiff has put Defendant to. Had Defendant retained one of the large Albuquerque defense firms, her legal fees could easily have been several times

this amount.

The Court will enter a money judgment in favor of Defendant and against Plaintiff for $12,921.14. The money judgment will supersede the Court's July 20, 2021, sanctions order.[11]

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[10] These figures are from two affidavits filed by Defendant's counsel, docs. 89 and 165. Gross receipts tax in Las Cruces, New Mexico is 8.3125%.

[11] The judgment resulting from this opinion will correct an error in the first affidavit, which had a $250/hour rate instead of $225/hour rate.

CONCLUSION

This proceeding will be dismissed with prejudice as a sanction for Plaintiff's refusal to confer in good faith at the final pretrial conference and to try his case. As an addition sanction, the Court will enter a money judgment in favor of Defendant and against Plaintiff for the $12,921.14, representing the fees and costs Defendant has incurred in this proceeding. A separate order shall be entered.

Hon. David T. Thuma

United States Bankruptcy Judge

Entered :May 27, 2022 Copies to: counsel of record

Barry J. Byrnes 1857 Paisano Rd.
Las Cruces, N.M. 88005

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF NEW MEXICO

IN RE:

Byrnes, et al., v. Byrnes.

Adversary No. 20-1070

BE IT REMEMBERED that this matter came on for a Final Pretrial Conference before THE HONORABLE DAVID T. THUMA on May 13, 2022, in Albuquerque, New Mexico.

A P P E A R A N C E S

Telephonic:

For the Plaintiff: Barry Byrnes, pro se For Debtor/Defendant

Sylvia Byrnes: Mark Pickett, Esq.

R Trey Arvizu III, Esq.

THE COURT: Okay. We're on record in Byrnes v. Byrnes, Adversary 20-1070. On the docket this morning is a final pretrial conference.

Mr. Arvizu, are you there?

MR. ARVIZU: Yes, I'm here, Your Honor.

THE COURT: Mr. Pickett, are you there?

MR. PICKETT: Yes, Your Honor, I am present.

THE COURT: And, Mr. Byrnes, are you there?

BARRY BYRNES: Yes, I'm present, but subject to objection.

THE COURT: Okay. Trey Arvizu and Mark Pickett represent the Debtor and the Defendant, and Barry Byrnes is pro se as the Plaintiff.

Well, based upon the recent ruling by the District Court and the Tenth Circuit, I thought it was appropriate to set this matter for trial, so I wanted to hear from the parties about trial dates and go ahead and get the matter set.

Mr. Byrnes, you called my office earlier this morning and said you weren't going to participate. Is that true? Or are you willing to

participate in this pretrial conference in good faith?

BARRY BYRNES: No, I'm not. I'm not willing to participate, Judge, because as you know, that on April 15th is -- a final judgment entered, which dismisses the action. So you're proposing to conduct a -- a bench trial on an action that's dismissed. The -- there's an appeal from the final judgment and motions were filed, but Judge Riggs, based upon her underlying decision and order, which was entered on April 15, 2022, so I -- I'm not participating in this Court's . . .

THE COURT: Mr. Pickett, was -- has this proceeding been dismissed?

MR. PICKETT: No, Your Honor. There -- the final judgment that Mr. Byrnes is referring to is the district court case where Mr. Byrnes filed his Motion for Withdrawal of the (inaudible). Judge Riggs issued a memorandum opinion and order just denying the motion and then entered a final judgment in that proceeding dismissing the district court case. This case was not affected by that final judgment.

THE COURT: Okay. That's kind of how I -- I remember seeing Judge Riggs' decision. I --

BARRY BYRNES: Judge -- Bankruptcy Judge Thuma, can I reply to that nonsense?

THE COURT: Well -- yeah, go ahead.

BARRY BYRNES: Okay. Judge, I'm quoting the document that was filed, District Court Document 43. It says, quote, "Final Judgment. Pursuant to the memorandum opinion and order, Document 42 entered on April 15, 2022, the Court enters this final judgment under Federal Rule of Civil Procedure 58 dismissing this action without prejudice."

Any action is the action described in the caption, which is indexed under your bankruptcy Court Number 20-1070 and under the -- and also indexed in district court under 21-CV-00295.

So I think we should let the Tenth Circuit do its job, and I think you should do something else in the meantime.

THE COURT: All right. That's not how I interpret her decision. I don't think she ruled on the merits of your case. I think she ruled on your motion (inaudible) --

BARRY BYRNES: Well, you're not the -- you're not the Tenth Circuit. You're just a bankruptcy judge.

THE COURT: All right.

BARRY BYRNES: (Inaudible) nobody. So (inaudible) --

THE COURT: I'm going to sanction --

BARRY BYRNES: -- isn't appeal and the Tenth Circuit (inaudible) --

THE COURT: Mr. Byrnes, I'm going to sanction you. I'm going to sanction you $500 for your comments. I'm going to ask you if you're going to participate in this pretrial conference in good faith. Because if you're not, I'm going to sanction you -- and I might dismiss this proceeding as well as the sanction under Rule 16.

BARRY BYRNES: Judge, you can do what you want. I'm not participating. And if you're going to issue a sanction where -- make sure that it's an appealable order.

THE COURT: All right.

BARRY BYRNES: (Inaudible) can appeal from that order.

THE COURT: Mr. Pickett, I think it's appropriate at this point, since Mr. Byrnes is not going to participate in the pretrial conference in good faith, that we talk about what sanctions are appropriate. Now, I don't want to set a trial and

drive to Las Cruces and not have Mr. Byrnes appear. So give me your thoughts about appropriate sanction for failure to participate in good faith.

MR. PICKETT: Your Honor, I -- I think dismissal of the case is the appropriate sanction. And the reason that -- for that is we could go forward today. You could set this case for trial, but if Mr. Byrnes isn't even willing to participate in this pretrial conference, I can't imagine that he would be willing to show up for trial and participate in the trial.

So it would waste your time, our time, our client's time, our witnesses' time for the Court to do that. I think at this point, the only sanction that makes sense is dismissal in this -- of this case.

THE COURT: Okay. Mr. Byrnes, do you want to be heard on this point?

BARRY BYRNES: You've -- you -- you heard me already, Judge.

THE COURT: Okay. Mr. Pickett, what do you think about attorney fees?

MR. PICKETT: I would ask that, based on Mr. Byrnes' conduct and his refusal to participate in these proceedings that have been

pending for -- I don't know how long now, but over a year and the time and the work we've put into it, I would ask that the Court award attorney fees.

THE COURT: Okay. I'm going to do some research. I'm going to get an opinion on this issue. In the meantime, Mr. Pickett, if you could file an affidavit of attorney fees that you've incurred in connection with this adversary proceeding. And why don't you include the Tenth Circuit and the District Court proceedings, I will take that into account when I make my ruling.

MR. PICKETT: Okay. We will do that, Your Honor.

THE COURT: Anything else this morning?

BARRY BYRNES: Judge, I just request that -- that you certify this for immediate appeal -- and just in case that this is not -- they don't think it's an appealable order, which I believe it should be. So grant -- issue a certification along with any order that you issue in this case.

THE COURT: I will take your request into consideration, Mr. Byrnes.

We'll be in recess.

MR. PICKETT: Thank you, Your H nor.
Nothing further from the Defendant.
THE COURT: Okay.
MR. ARVIZU: Thank you, Judge.

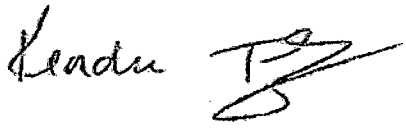
STATE OF NEW MEXICO

COUNTY OF BERNALILLO

C E R T I F I C A T E

I, Kendra D. Tellez, New Mexico #205 CSR, RMR, CRR, within and for the State of New Mexico, DO HEREBY CERTIFY that the foregoing audio transcription was prepared from provided audio, that the audio was reduced to typewritten transcript by Kendra Tellez Court Reporting, Inc., and that the testimony contained herein is a true and correct transcript of the recorded proceedings, to the best of my knowledge and hearing ability. The audio was of poor quality recording.

I FURTHER CERTIFY that I am neither employed by nor related to any of the parties or attorneys recorded in this matter, and that I have no interest in this matter.



Kendra D. Tellez, CCR #205
License Expires: 12/31/2022

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

In re: SYLVIA MARIE BYRNES,

Debtor

FILED
United States Court of Appeals
Tenth Circuit
September 17, 2024
Christopher M. Wolpert
Clerk of Court

BARRY J. BYRNES,

Plaintiff-Appellant,

v.

No. 24-2015
(D.C. No. 2:22-CV-00426-JCH-GBW)
(D. N.M.)

SYLVIA MARIE BYRNES,

Defendant - Appellee.

ORDER AND JUDGMENT*

Before **HOLMES**, Chief Judge, **HARTZ**, and **ROSSMAN**, Circuit Judges.

The bankruptcy court sanctioned Appellant Barry J. Byrnes, dismissing his adversary proceedings with prejudice, and the

district court affirmed. Exercising jurisdiction under 28 U.S.C. § 158(d) and 28 U.S.C. § 1291, we also affirm.

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Background

Mr. Byrnes, who is a retired lawyer, sued his estranged wife for defamation and intentional infliction of emotional distress after she told police and a state court he had physically assaulted her. When his wife filed for bankruptcy, Mr. Byrnes removed his tort claims to the bankruptcy court, which consolidated them with another adversary proceeding he had filed.

Extensive litigation followed, including multiple pretrial conferences and hearings in the bankruptcy court; imposition of monetary sanctions against Mr. Byrnes for discovery violations; denial of his motion to disqualify the bankruptcy judge; dismissal of his five requests for interlocutory relief from the Bankruptcy Appellate Panel; this court's denial of his petition for mandamus; the district court's dismissal of his motion to withdraw its reference to the bankruptcy court of his adversary proceeding; and our dismissal of his appeal from that ruling. In those proceedings Mr. Byrnes's efforts to avoid advancing toward trial in the bankruptcy court were repeatedly rejected.

In May 2022 the bankruptcy court held a pretrial conference, which the district court had refused to stay. The bankruptcy judge asked Mr. Byrnes: "[A]re you willing to participate in this pretrial conference in good faith?" R. Vol. 3, at 165–66. He answered, "No, I'm not. I'm not willing to participate . . . ," *id.* at 166, later reiterating, "Judge, you can do what you want. I'm not participating," *id.* at 168.

In a written order the bankruptcy court sanctioned Mr. Byrnes, finding his litigation conduct had been in bad faith, vexatious, and harassing, and that:

[Mr. Byrnes] does not want to *try* the case against his wife, only to *litigate*
it. [He] knows his wife has limited means and cannot afford litigation. Relying on his experience as a lawyer, [Mr. Byrnes] used this proceeding to harass his wife and drain her of what little money she had, without incurring any substantial expenses of his own. [Mr. Byrnes] has used
litigation in the state district court, the state appellate and Supreme Courts, this Court, the district court, the Tenth Circuit Bankruptcy Appellate Panel, and the Tenth Circuit Court of Appeals, to vex, harass, and impoverish his wife. [Mr. Byrnes] does not want a judgment, which would be uncollectible, but to keep this litigation going as long as possible.

R. Vol. 1, at 808–09 (citations and internal quotation marks omitted). It dismissed his claims with prejudice, evaluating the factors identified in *Ehrenhaus v. Reynolds*, 965 F.2d 916, 921 (10th Cir. 1992). It also required Mr. Byrnes to pay his wife's attorney fees, concluding his conduct warranted imposition of a monetary sanction for three reasons:

The first and least significant reason is Plaintiff's contumacious conduct toward the Court. As a former attorney, Plaintiff knows how he is expected to conduct himself in court. His behavior at the pretrial conference and throughout this proceeding has been remarkably disrespectful. Plaintiff's rudeness to opposing counsel and the Court is inexcusable. Second, and more importantly, Plaintiff wasted the Court's and the Defendant's time at the final pretrial conference by refusing to confer in good faith, giving as his reason an obvious pretext. Finally, and by far most importantly, Plaintiff's actions throughout this proceeding have been in bad faith, vexatious, wanton, harassing, and oppressive. It is bad faith to litigate and then refuse, on the flimsiest grounds, to try the case. It makes obvious that Plaintiff's claims were brought and litigated to torment his estranged wife with bad faith, vexatious litigation that cost him little or nothing but forced her to incur ever- mounting attorney fees. Plaintiff's conduct merits a significant sanction. *Id.* at 811.

Mr. Byrnes appealed to the district court. A magistrate judge recommended affirming the bankruptcy court's rulings, and the district court adopted and followed

that recommendation in a detailed memorandum opinion and order. A few examples of Mr. Byrnes's attitude toward the court highlighted by the district court include calling the bankruptcy judge, "[y]ou son of a b-", R. Vol. 3, at 175; arguing to the
same judge, "you and your bankruptcy buddies there can play all the games you want with me," *id.* at 181; and responding to adverse rulings by telling him: "I think you're unfair.

And I think you're a absolute disgrace as a judge," *id.* at 161, and
"You're just a bankruptcy judge . . . [a] nobody," *id.* at 167–68.

The district court agreed dismissal with prejudice was appropriate, affirming the magistrate judge's finding that "[t]he record is replete with examples of
Mr. Byrnes's aggressive litigation tactics and contumacious and disrespectful behavior," *id.* at 473, and affirming the bankruptcy court's dismissal based on his "vexatious and numerous frivolous motions, petitions, and appeals, as well as [his] interference with the judicial process . . . ." *id.* at 478. Mr. Byrnes appeals.

Discussion

Mr. Byrnes has not adequately briefed any claim of error in compliance with Federal Rule of Appellate Procedure 28 and Tenth Circuit Rule 28.1. He has thereby forfeited his opportunity to have us review the rulings below on their merits. *See Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840–41 (10th Cir. 2005).

We decline to give Mr. Byrnes's briefing the liberal treatment ordinarily afforded pro se litigants, because he is a retired attorney. *See Smith v. Plati*, 258 F.3d 1167, 1174 (10th Cir. 2001). And even if he lacked such legal training and experience, he must "follow the same rules of procedure that govern other litigants."

Garrett, 425 F.3d at 840. Rule 28 requires an appellant's brief to contain "a concise statement of the case . . . with appropriate references to the record," and an argument section presenting "appellant's contentions . . . with citations to the authorities and parts of the record on which the appellant relies." Fed. R. App. P. 28(a)(6) & (8)(A). A brief that does not "explain what was wrong with the reasoning that the district court relied on," is deficient and cannot carry the appellant's burden. *See Nixon v. City & Cnty. of Denver*, 784 F.3d 1364, 1366 (10th Cir. 2015). Mr. Byrnes's briefing does not meet these requirements in at least two respects.

First, throughout Mr. Byrnes's briefing, he does not provide appropriate citations "to the . . . parts of the record on which [he] relies," Fed. R. App. P. 28(8)(A), or to the volume and page number of the record on appeal, 10th Cir. R. 28.1(A)(2). His brief frequently makes factual and legal assertions with no supporting citations. Where he does give citations for events in the procedural history, they are typically only general descriptions of documents filed below, such as "Order on Trial of Tort Claims," or "Bankruptcy Documents 43 and 143." *See* Aplt. Opening Br. at 20, 22. Even if his assertions of law were correct, he does not explain how they apply in the context of this case.

Our concern with this deficiency is not a mere technical quibble. Mr. Byrnes's citations are insufficient to indicate where, if at all, the referenced materials may be found within the three volumes of the 1,825-page record. Although he generally appears to cite materials filed below, the case history includes documents filed under multiple case numbers, in both the district and bankruptcy courts. Even assuming we

could locate the materials he references, that does not cure the defect. By not using appropriate citations, Mr. Byrnes asks the court to search within the record, and perhaps outside it, on his behalf. We will not do that work for him. *See Garrett*, 425 F.3d at 840 ("[T]he court cannot take on the responsibility of serving as the litigant's attorney in . . . searching the record"); *United States v. Rodriguez-Aguirre*, 108 F.3d 1228, 1237 n.8 (10th Cir. 1997) ("[T]he court will not sift through the record to find support for the claimant's arguments." (internal quotation marks omitted)).[1]

The deficiency is made even more important because Mr. Byrnes's characterization of the facts is untrustworthy. For instance, although he claims he "participated in the May [2022 settlement conference] subject to valid objection," Aplt. Opening Br. at 20, he told the bankruptcy judge unequivocally, "I'm not participating." R. Vol. 3, at 168; *see also id.* at 166 ("I'm not willing to participate."). Because we can neither trust Mr. Byrnes's factual statements, nor verify them using his citations, we will not look past the deficiency to reach his legal contentions.

Second, Mr. Byrnes's briefing is substantively deficient. "The first task of an appellant is to explain to us why the district court's decision was wrong." *Nixon*, 784

[1] Mr. Byrnes argues that because Local Rule 28.1(A)(2) uses the word "should," it only "recommends or proposes but does not mandate a citation convention." Aplt. Reply Br. at 6. But the deficiencies in Mr. Byrnes's briefing go beyond failure to use a particular citation style, and the requirement to provide appropriate citations is mandatory. *See* Fed. R. App. P. 28(a)(6) & (8); Local Rule 28.1(A).

F.3d at 1366. Mr. Byrnes has not done so. On appeal he restates positions he took in the district court, but without explaining why what the lower court said was wrong. For example, he contends his April 2022 appeal from the denial of his motion to withdraw the reference "divested the district court and its bankruptcy court of administrative control," so the bankruptcy court lacked jurisdiction to sanction him and dismiss his claims. Aplt. Opening Br. at 22. The district court rejected that argument, explaining that because his appeal was from a nonappealable order, and dismissed for lack of jurisdiction, the district and bankruptcy courts never lost jurisdiction. *See* R. Vol. 3, at 467–68; *Kellogg v. Watts Guerra LLP*, 41 F.4th 1246, 1259 (10th Cir. 2022) ("[A] district court can proceed when the appeal involved a non-appealable order.").

The district court also explained, contrary to Mr. Byrnes's contentions, that the bankruptcy court had jurisdiction at the May 2022 pretrial conference, because the district court had denied his motion for a stay, the order of reference remained in effect, and the bankruptcy court could approve a pretrial order even for claims to be tried in district court. Further, contrary to Mr. Byrnes's argument that the bankruptcy court lacked jurisdiction to enter judgment on his tort claims, the district court concluded that 11 U.S.C. § 105(a), authorized it to "issue any order . . . *or judgment* . . . necessary or appropriate" under the Bankruptcy Code, and to "tak[e] any action

. . . necessary or appropriate . . . to prevent an abuse of process." (emphasis added). *See also In re Courtesy Inns, Ltd., Inc.*, 40 F.3d 1084, 1089 (10th Cir. 1994) (holding Section 105(a) grants bankruptcy courts inherent power to impose sanctions).

On appeal Mr. Byrnes does not address this reasoning, or the authorities relied on by the district court. He merely repeats the conclusory claims that the bankruptcy court could not adjudicate his noncore claims and that his appeal stripped it of jurisdiction. Most, if not all, of his arguments likewise only repeat positions rejected by the district court, without presenting any error in its reasoning. This is insufficient to meet his burden. *See Nixon*, 784 F.3d at 1366, 1369. Given the other deficiencies in his briefing, and because of his disrespectful conduct,[2] we decline either to list each such shortcoming or to search his briefs for any colorable claims of error.

Conclusion

We affirm the judgment of the district court.

Entered for the Court

Harris L Hartz Circuit Judge

[2] Mr. Byrnes's improper attacks on the bankruptcy judge have continued on appeal. *See, e.g.*, Aplt. Opening Br. at 39 (maligning the bankruptcy judge as, "a hardline debtor oriented judge who acts as if he has the power and authority of a Title [*sic*] III judge"); *id.* at 16 (arguing "[t]he bankruptcy judge took advantage of [alleged procedural] delay and prevented Tenth Circuit review by entering final judgment").