UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE:	.	Chapter 7
	.	
RUSTY HAYNES	.	Case No. 11-23212 (RDD)
	.	
	.	
Debtor.	.	
_____	.	
RUSTY HAYNES, INDIVIDUALLY	.	
AND ON BEHALF OF ALL OTHERS	.	
SIMILARLY SITUATED	.	Adv. Pro. No. 13-08370- rdd
	.	
v.	.	
	.	
	.	
CHASE BANK USA, N.A.	.	
_____	.	

Modified Bench Ruling on Motion to Dismiss or to Strike Class Allegations

BEFORE THE HONORABLE ROBERT D. DRAIN
UNITED STATES BANKRUPTCY COURT JUDGE

U.S. Bankruptcy Court, SDNY
300 Quarropas Street Room 248
White Plains, NY 10601

APPEARANCES:

Attorney for Rusty Haynes:	Charles W. Juntikka, ESQ. CHARLES JUNTIKKA & ASSOCIATES George F. Carpinello, ESQ. Adam R. Shaw, ESQ. BOIES, SCHILLER & FLEXNER, LLP
Attorneys for Chase:	Michael Y. Scudder, ESQ. Al Hogan, ESQ.

	SKADDEN ARPS SLATE MEAGHER & FLOM
Also present: via telephone	Deborah A. Reperowitz TROUTMAN SANDERS

THE COURT: I have before me a motion by Chase Bank USA, N.A., the defendant in this adversary proceeding, to dismiss the proceeding under Bankruptcy Rule 7012, incorporating Federal Rule of Civil Procedure 12(b)(6), for failure to state a claim on behalf of the lead plaintiff, Mr. Haynes, or, in the alternative, to strike the class action allegations in the complaint, premised again on Bankruptcy Rule 7012, in this instance as it incorporates Federal Rule of Civil Procedure 12(b)(1), on the basis that the Court lacks subject matter jurisdiction or the statutory authority to adjudicate a class action of this nature.

The standard for dismissal under Rule 12(b)(6) is well known. When considering such a motion, the Court must assess the legal feasibility of the complaint, not weigh the evidence that might be offered in its support. Koppel v. 4987 Corp., 167 F.3d 125, 133 (2d Cir. 1999). The Court's consideration is limited to facts stated on the face of the complaint and in the documents appended to the complaint or incorporated into the complaint by reference, as well as to matters of which judicial notice may be taken. Hertz Corp. v. City of New York, 1 F.3d. 121, 125 (2d Cir. 1993), cert. denied, 510 U.S. 1111(1994). See also Difolco v. MSNBC Cable, LLC, 62 F.3d 104, 111 (2d Cir. 2010) ("Where a document is not incorporated by

reference, the court may nevertheless consider it where the complaint relies heavily upon its terms and effect."). The Court accepts the complaint's factual allegations as true, even if they are doubtful in fact, and must draw all reasonable inferences in favor of the plaintiff. Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 321-23 (2007). However, if a complaint's allegations are clearly contradicted by documents incorporated into the pleadings by reference, the Court need not accept them. Labajo v. Best Buy Stores, LP, 478 F.Supp.2d 523, 528 (S.D.N.Y. 2007). Moreover, the Court "is not bound to accept as true a legal conclusion couched as a factual allegation." Papasan v. Allain, 478 U.S. 265, 286 (1986). Instead, the complaint must “state more than labels and conclusions, and a formulaic recitation of the elements of the cause of action will not do." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007).

In addition, while the Supreme Court has confirmed, in light of the notice pleading standard of Federal Rule of Civil Procedure 8(a), that a complaint does not need detailed factual allegations to survive a motion under Rule 12(b)(6), see Erickson v. Pardus, 551 U.S. 89, 93, (2007), and Twombly 550 U.S. at 556, its "factual allegations must be enough to raise a right to relief above the speculative level." Twombly, 550 U.S. at

555. If the claim would not otherwise be plausible on its face, therefore, the complaint must allege sufficient facts, to “nudge the claim across the line from conceivable to plausible." Id. at 570. Otherwise, the defendant should not be subjected to the burdens of continuing discovery and the worry of overhanging litigation. Id. at 556.

Applying this plausibility standard is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009). "Plausibility thus depends on a host of considerations: the full factual picture presented by the complaint, the particular cause of action and its elements, and the existence of alternative explanations so obvious that they render plaintiff's inferences unreasonable." L-7 Designs Inc. v. Old Navy, LLC, 647 F.3d 419, 430 (2d Cir. 2011).

In sum, the Court applies a two-step approach under Rule 12(b)(6). After identifying the elements of the applicable cause of action, Iqbal, 556 U.S. at 675, the Court must first note where the allegations are not entitled to the assumption of truth because they are only legal conclusions, id. at 679-80, and, second, it must assess the factual allegations in context to determine whether they plausibly suggest an entitlement to relief.

Id. at 681. See generally, Harris v. Mills, 572 F.3d 66, 72, (2d Cir. 2009), and L-7 Designs Inc., 647 F.3d at 430.

With regard to a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1), the plaintiff bears the burden of proving jurisdiction by a preponderance of the evidence. Aurecchione v. Schoolman Transportation Systems, Inc. 426 F.3d 635, 638 (2d Cir. 2005). Where the Court relies solely on the pleadings and supporting affidavits, the plaintiff need only make a prima facie showing of jurisdiction, however. Robinson v. Overseas Military Sales Corp., 21 F.3d 502, 507 (2d Cir. 1994). Here, the issue of jurisdiction pertains to the Court's power to issue an order granting the ultimate class action relief sought. Whether the Court has subject matter jurisdiction over a nationwide class action to remedy alleged widespread breaches of debtors' discharges under Section 524(a) of the Bankruptcy Code is a question of law; therefore, extrinsic facts are not relevant.

The Court addresses Chase's Rule 12(b)(6) motion first. In an action premised upon the alleged violation of Mr. Haynes and the class members' discharges for failure to correct their credit reports that list their debt, post-discharge under Section 727 of the Bankruptcy Code, as being only "charged off," rather than being "discharged in bankruptcy," Chase contends that, under the

circumstances pled in the complaint, it in fact has no obligation to revise or correct the credit reporting that it has previously done.

Chase recognizes, for purposes of the motion before me, although reserving its rights on appeal, the general case law on this issue, which, as discussed at length in In re Torres, 367 B.R. 478 (Bankr. S.D.N.Y. 2007), as well as in a number of other bankruptcy cases, including In re Nassoko, 405 B.R. 515 (Bankr. S.D.N.Y. 2009); McKenzie-Gilyard v. HSBC Bank, Nevada NA, 388 B.R. 474 (Bankr. E.D.N.Y. 2007); Russell v. Chase Bank, U.S.A., NA, 378 B.R. 735 (Bankr. E.D.N.Y. 2007); and Laboy v. Firstbank P.R. (In re Laboy), 2010 Bankr. LEXIS 345 (Bankr. D. P.R. Feb.2, 2010), holds to the effect that, as stated by Collier,

> "The failure to update a credit report to show that a debt has been discharged is also a violation of the discharge injunction if shown to be an attempt to collect the debt. Because debtors often feel compelled to pay debts listed in credit reports when entering into large transactions, such as a home purchase, it should not be difficult to show that the creditor, by leaving discharged debts on a credit report, despite failed attempts to have the creditor update the report, is attempting to

collect the debt."

4 Collier on Bankruptcy, paragraph 524.02[2][B] (16th Ed. 2013), at page 524-23.

Chase contends, however, that under the facts of the complaint this case law, much of which has arisen in the context of motions to dismiss, is not applicable for two reasons. First, because Chase, as acknowledged by the plaintiff with respect to the lead plaintiff's claim, sold its debt pre-bankruptcy and therefore pre-discharge, to a third party, Chase contends that it neither has an ongoing obligation with respect to credit reporting under the Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq., nor, as it no longer has a debt to enforce, under Section 524(a) of the Bankruptcy Code. Second, Chase argues that, if, as it contends, it has no continuing obligation after the sale of the debt, prepetition, under the Fair Credit Reporting Act, it has no other duties under Section 524(a) of the Bankruptcy Code.

Let me address that latter argument first. The complaint does not specifically assert a claim under the FCRA. Instead, it asserts a claim specifically under Sections 105(a) and 524(a) of the Bankruptcy Code for violation of the discharge under Section 727 of the Code. In essence, then, Chase is asserting that the Fair Credit Reporting Act has implicitly repealed Section 524(a) of

the Bankruptcy Code as interpreted by the foregoing case law, or at least circumscribes Chase's duties under Section 524(a) of the Bankruptcy Code with respect to correcting debtors' credit reports. Of course, the FCRA did not expressly repeal or curtail Section 524(a) of the Bankruptcy Code. Absent a clearly expressed congressional intention, moreover, repeal by implication is not favored. Branch v. Smith, 538 U.S. 254, 273 (2003). An implied repeal will only be found where provisions in two federal statutes are in fact in irreconcilable conflict or where the latter statute covers the whole subject of the earlier one and is clearly intended as a substitute. Id. at 273, quoting Posadas v. National Citibank, 296 U.S. 497, 503 (1936). See also In re Jacques, 416 B.R. 63, 71-72 (Bankr. E.D.N.Y. 2009).

Generally speaking, with regard to Section 524(a)/105(a) fact patterns, the case law as to implied repeal has been contrary to Chase's argument. That is, courts have found that Sections 524(a) and 105(a) of the Bankruptcy Code preempt other federal statutes that might, on their face, otherwise be applicable, such as the FCPA. See Diamonte v. Solomon & Solomon P.C., 2001 U.S. Dist. LEXIS 14818 (N.D.N.Y. Sept. 18, 2001), and the cases cited therein. Where courts have allowed a federal statute to be applied, even in the context of a Section 524(a)/105(a)

cause of action, they have done so by showing that the two statutes are not in irreconcilable conflict and not by ruling out the Section 524 cause of action. See, for example, Randolph v. IMBS Inc., 368 F.3d 726 (7th Cir. 2004).

I conclude that there is no irreconcilable conflict between the Fair Credit Reporting Act and Sections 524(a) and 105(a) of the Bankruptcy Code. While, as discussed in In re Torres, 367 B.R. at 489-90, a lender's compliance with the FCRA is relevant to the factual analysis of a Section 524(a)/105(a) claim, I conclude that Section 524(a) of the Bankruptcy Code, as a matter of drafting and Congressional intent, is intended to be read broadly, given Congress' purpose, evident from the face of the statute as well as its legislative history -- including not only the legislative history of the specific provision, but also its evolution from the Bankruptcy Act of 1898 -- that Section 524(a) give as complete effect as possible to the discharge under Section 727 of the Code. See 4 Collier on Bankruptcy, paragraph 524.02 at 524-19. See also, Robert P. Lawson Jr., Remedying Violation of the Discharge Injunction under Bankruptcy Code 524, 20 Bankr. Dev. J. 77 (2003). See also Marrama v. Citizens Bank of Massachusetts, 549 U.S. 365, 367 (2007), noting that the discharge is a, if not

the, primary purpose of the Bankruptcy Code or the primary protection offered by the Bankruptcy Code. See also In re Bogdanovich, 292 F.3d 104, 107 (2d Cir. 2007), and In re Rizzo-Cheverier, 364 B.R. 532, 537 (Bankr. S.D.N.Y. 2007) (same). Thus, even if Chase did not have an ongoing duty under the FCRA to correct Mr. Haynes' credit reports, the complaint's Section 524(a)/105(a) claim is not preempted.

Chase's other argument is closely related, namely that, having sold its debt it cannot be seen in a plausible way to have any interest in continuing to enforce that discharged debt and, therefore, not only does it lack an ongoing FCRA duty to correct the credit reports, it also cannot be liable under Section 524 of the Bankruptcy Code, which "operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt has been waived." 11 U.S.C. Section 524(a). See also In re Torres, 367 B.R. at 489-90.

In support of this apparently common sense contention, Chase relies upon an advisory note in connection with proposed rule-making under the FCRA, which states that, "The agencies do not expect that, after transferring an account to a third-party, a furnisher

would update the current status of the account beyond providing information to a credit reporting agency that the account has been transferred." This appears at Volume 74 of the Federal Register, paragraph 31494. I should note, however, that no rules were adopted as part of this process and the FCRA itself is more broadly worded, requiring reporting, including a duty to correct and update information, by a person who "regularly, in the ordinary course of business, furnishes information to one or more consumer reporting agencies about the person's transactions or experiences with any consumer, and has furnished to a consumer reporting agency information that the person determines is not complete or accurate." 15 U.S.C. Section 1681s-2(a)(2). Such a person "shall promptly notify the consumer reporting agency of that determination and provide to the agency any corrections to that information or any individual information that is necessary to make the information provided by the person to the agency complete and accurate and shall not, thereafter, furnish to the agency any of the information that remains not complete or accurate." 15 U.S.C. Section 1681s-2(a)(2).

Even applying that statutory language to the exclusion of the advisory note, however, Chase contends that its last "transaction or experience" with respect to

plaintiff's debt was the sale itself to a third party, pre-bankruptcy and, thus, pre-discharge, and, therefore, that it has no obligation to continue to deal with the credit reporting agencies to report that the debt is no longer merely charged off, but, instead, has been discharged through bankruptcy, or that it has any interest in the debt's subsequent collection. Thus, Chase contends, the complaint does not show even inferentially that Chase intended to assist the collection of Mr. Haynes' discharged debt when it refused to correct his credit report

The complaint, however, suggests otherwise.

First, as stated in paragraph 29, after the debt was, in fact, discharged post-sale, Mr. Haynes called Chase to request removal of the "charged-off" notation next to his Chase account in light of the discharge, but Chase refused to remove the "charged off" notation. Paragraph 30 of the complaint goes on to state that "Chase only did so after the Court issued an opinion involving another Chase matter, In re Odenthal, at which time Chase requested that the credit reporting agencies delete and suppress the former Chase debt on Haynes' record."

Standing alone, such allegations, particularly in light of Chase's prior sale of the debt, might not support a claim that Chase refused Mr. Haynes' request to

correct his credit reports with the intention of assisting in the debt's collection. Significantly, however, other sections of the complaint put Chase' handling of Mr. Haynes' request in a context that sufficiently supports such an inference.

Thus the complaint asserts in paragraph 16 that "Chase has chosen not to advise the credit reporting agencies to the fact that the class members' debts have been discharged because Chase continues to receive payment either directly or indirectly on discharged debts." More specifically, paragraph 19 states that "Chase has adopted a pattern and practice of failing and refusing to update credit information with regard to debts discharged in bankruptcy because it sells those debts and profits by the sale. Chase knows that if credit information is not updated, many class members will feel compelled to pay off the debt, even though it is discharged in bankruptcy. Thus, buyers of Chase debt know and are willing to pay more for the fact that they will be able to collect portions of Chase debt, despite the discharge of that debt in bankruptcy." Paragraph 20 then states, "Upon information and belief, Chase receives a percentage fee of the proceeds of each debt repaid to Chase and forwarded to the buyer of Chase debt."

I conclude, therefore, based on the foregoing

allegations in the complaint that the complaint, if true -- and I need to accept it as true -- states a cause of action against Chase for breach of the discharge under Sections 727 and 524(a)(2) of the Bankruptcy Code for intentionally assisting in the collection of discharged debt by not correcting the debtors' credit reports to reflect that the debt has, in fact, been discharged.

I do so for two reasons. First, paragraph 20 of the complaint alleges that Chase continues to receive a percentage payment of the proceeds of each debt repaid to Chase and forwarded to the buyer of the debt. In addition, therefore, to having an economic interest in the debt notwithstanding its sale, as alleged in paragraph 16, Chase is alleged to act as the buyer's agent in forwarding payments to the buyer of debt that it is aware has been discharged after retaining a percentage. Instead of sending the money back or at least acting as if that debt has been discharged, it thus is helping to enforce the debt's collection for its and its buyer's benefit. Given Chase's continuing relationship with the debt, therefore, and drawing, as I should, all inferences in favor of the plaintiff in a motion to dismiss context, I conclude that the complaint shows a motive and intent to assist the collection of the discharged debt lying behind Chase's refusal to correct the credit reports.

Based on the plain language of the FCRA Section 1681s-2(a)(2), as well, it appears to me, given paragraphs 16 and 20 of the complaint, that Chase is, notwithstanding the sale of the debt, engaging in a "transaction or experience" involving its former debtor. Thus, limited even to a reading of Section 524 that largely overlaps with Chase's duties under the FCRA, the complaint alleges a cause of action for Chase's ongoing intentional failure to correct the credit reports and thereby assist in the collection of discharged debt.

Furthermore, by failing on a systematic basis to correct the credit reports, as alleged in the complaint, Chase is enhancing its purchasers' ability to collect on the debt, which is, after all, charged-off debt when purchased, with a relatively high, I can infer, prospect of the borrower going into bankruptcy. Chase profits, I can infer and as the complaint states, from that practice by getting a higher purchase price from its buyers, even if those buyers buy the debt before the bankruptcy has occurred. The buyers know, that is, that post-sale Chase will refuse to correct the credit report to reflect the obligor's bankruptcy discharge, which means that the debtor will feel significant added pressure to obtain a "clean" report by paying the debt. Separate and apart from Chase seemingly having a duty to correct the report

under the FCRA, as discussed above, no one has pointed to any provision of applicable law that prohibits Chase from correcting the credit reports. And, in fact, Chase eventually did so in respect of Mr. Haynes' credit report. Therefore, I believe the complaint sets forth a cause of action that Chase is using the inaccuracy of its credit reporting on a systematic basis to further its business of selling debt and its buyer's collection of such debt.

How the sale of the debt is reported supports this conclusion. In other words, such disclosure, or, more aptly, its limited nature, also puts Chase's refusal to correct the credit reports in context. Mr. Haynes' credit reports have been referred to repeatedly in the complaint, as well as at oral argument; obviously, they are front and center in this litigation and may be considered in connection with Chase's 12(b)(6) motion. It is acknowledged that although those credit reports list the debt as "sold," they do not identify the purchaser. Therefore, as far as the debtor is concerned, the only creditor to approach to correct the credit reports is Chase, which, though it appears to be the only game in town, as a matter of policy refuses to correct them (while, in addition, retaining a percentage of payments sent to Chase by the debtor, as opposed to Chase's -- undisclosed -- buyer), highlighting further the perniciousness of

Chase's allegedly systematic approach in refusing to correct such reports.

So, I will deny the motion for those reasons.

The motion also asserts, as noted, that the complaint's class action request should be circumscribed on jurisdictional grounds only to those breaches of Section 524(a)(2) that have occurred in this District during the time set forth in the complaint, that is, in the Southern District of New York. The basis for that assertion is that the Court lacks subject matter jurisdiction, more specifically, the power to enforce the discharge of any debtor with the exception of debtors who received a discharge in the Southern District of New York. The motion accurately states that class actions comprising, or brought on behalf of, debtors seeking to correct alleged violations of their discharge under Section 524 of the Bankruptcy Code have received a very mixed reception; in fact, the majority of courts have either held that they lack the power to determine such class actions or, as stated in Chase's motion, can do so only with respect to debtors who have been discharged in cases in their district. See generally, Kara Bruce, The Debtor Class, 88 Tulane Law Review 21 (2013).

There are three theories upon which courts have refused to entertain nationwide debtor class actions to

remedy discharge violations or have circumscribed them on a district-by-district basis. The motion, I think correctly, focuses on the third, which, as I stated during oral argument, raises a close question for the Court. But before turning to that rationale, I should note the other two grounds for dismissing on jurisdictional grounds a nationwide class action regarding alleged violations of the discharge.

The first is premised upon the notion that the Court's exercise of jurisdiction over debtors other than the debtor before it, or, in some courts, the debtors in its district, will not lie because that determination does not affect the lead plaintiff's estate, its bankruptcy estate, and there is no “related to” jurisdiction in respect of the other debtor class members' claims under 28 U.S.C. Section 1334(b). See, for example, In re Knox, 237 B.R. 687, 693-94 (Bankr. N.D. Ill. 1999), and Fisher v. Federal National Mortgage Ass’n, 151 B.R. 895 (Bankr. N.D. Ill. 1993). This line of cases is premised upon a misreading of the statutory basis for bankruptcy jurisdiction, however.

While it is true that a substantial portion of bankruptcy jurisdiction is in rem, that is, jurisdiction over the debtor's estate wherever located, it is not the only basis for bankruptcy jurisdiction, which, under 28

U.S.C. Section 1334(b), extends to “all civil proceedings arising under title 11,” including under 11 U.S.C. Sections 524 and 727. In fact, as I noted before, these fundamental, if not the fundamental, provisions of the Bankruptcy Code have nothing to do with the debtor’s estate or in rem jurisdiction. They have everything to do with prohibiting the collection of in personam debts that, before the bankruptcy discharge, were owed by the debtor.

In fact, the discharge does not even apply to in rem interests, such as liens, which can be enforced notwithstanding the discharge. Canning v. Beneficial Maine, Inc. (In re Canning), 706 F.3d 64, 69 (1st Cir. 2013); Holloway v. John Hancock Mut. Life Ins. Co. (In re Holloway), 81 F.3d 1062, 1063 n. 1 (11th Cir. 1996). Therefore, it is an abdication of the Court's jurisdiction to limit it, as cases like Knox and Fisher have done, to in rem matters.

Similarly, some courts have dismissed similar national class actions on jurisdictional grounds based on 28 U.S.C. Section 1334(e), which states, "Only the district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate and overall claims or causes of action that involve

construction of section 327 of title 11 [which pertains to the retention and compensation of professionals.]" See Williams v. Sears Roebuck & Company, 244 B.R. 858, 866 (Bankr. S.D. Ga. 2000). Again, however, the present class action does not involve a debtor's interests in property or property of the estate, and, of course, it is not related to the retention of professionals or other matters under Section 327 of the Bankruptcy Code. It is an action to enforce the discharge, that is, to protect a statutory right prohibiting the collection of in personam claims against the members of the debtor class that arose pre-bankruptcy.

The Court's jurisdiction here, as previously noted, is premised instead upon a different provision of the Judicial Code, 28 U.S.C. Section 1334(b). It is worth quoting first, however, 28 U.S.C. Section 1334(a), which states, "Except as provided in Subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11." That provision thus gives the district courts exclusive jurisdiction of the bankruptcy case generally, that is, this Chapter 7 case, for example, which is located in a particular venue. That section, however, has a proviso: "except as provided in Subsection (b)." And Subsection (b) states, "except as provided in Subsection (a)(2)

[which is irrelevant], and notwithstanding any act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original, but not exclusive, jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." 11 U.S.C. Section 1334(b). (Emphasis added.) As noted, the cause of action before me arises under title 11; it arises under Sections 727, 524(a)(2) and 105(a) of the Bankruptcy Code, which latter section provides, "The Court may issue any order, process or judgment that is necessary or appropriate to carry out the provisions of this title," i.e., in this case, Sections 524(a)(2) and 727.

For purposes of this adversary proceeding, therefore, 28 U.S.C. Section 1334(b) is the source of bankruptcy jurisdiction in the federal courts generally, lodging it with the district courts and then, by the General Order of Reference, referring it pursuant to 28 U.S.C. Section 157(a)-(b) to the bankruptcy judges for this district. See 28 U.S.C. Section 157(b)(1), which provides that bankruptcy judges "may hear and determine . . . all core proceedings arising under title 11." A "core proceeding" includes enforcement of the discharge, there being few matters as "core" to the basic function of the bankruptcy courts as the enforcement of

the discharge under Sections 524 and 727 of the Bankruptcy Code.

I would spend more time on the foregoing two ineffective rationales for denying jurisdiction over nationwide class actions to address allegedly systemic discharge violations; however, they are well dealt with in an opinion from the Southern District of Texas Bankruptcy Court, In re Cano, 410 B.R. 506 at pages 550 through 554 (Bankr. S.D. Tex. 2009). As noted by Judge Isgur in that opinion, one never gets to the issue of “related to” jurisdiction under 28 U.S.C. Section 1334(b) or to 28 U.S.C. Section 1334(e) in this context, given the proper source of the Court's “arising under title 11” jurisdiction in 28 U.S.C. Section 1334(b).

The remaining rationale for the courts that have found a lack of jurisdiction over nationwide debtor class actions to address systematic discharge violations, is, as I said, more closely reasoned. In essence, these courts contend that the basis for enforcing the discharge under Sections 524(a)(2) and 727 of the Bankruptcy Code is the individual court's discharge order. These courts then note extensive precedent in the non-bankruptcy context under the All Writs Act, currently at 28 U.S.C. Section 1651 but going back to cases such as In re Debs, 158 U.S. 564, 594-95 (1895), for the proposition that only the

issuing court, that is, only the court issuing an injunction, should have the power to enforce that injunction. This was the analysis undertaken by Cox v. Zale Delaware, Inc., 239 F.3d, 910, 916-17 (7th Cir. 2001), and several other courts cited in Chase's motion.

There is, however, a fundamental difference between the normal injunction issued by a court after considering the factors required to be applied in issuing an injunction order and the injunction created by Congress in Section 524(a) to support the discharge under Section 727 of the Bankruptcy Code.

As I noted during oral argument, the bankruptcy discharge order is a form, a national form, which is issued in every case when there is, in fact, a discharge. By statute, in 524(a)(2), it operates as an injunction. For the discharge injunction to be granted, the debtor does not have to prove the factors required for an injunction under Federal Rule of Civil Procedure 65. He or she merely needs to prove that the debt was, in fact, subject to the discharge under Section 727 and not declared non-dischargeable under Section 523 of the Bankruptcy Code. It is not a handcrafted order. As I stated during oral argument, although I review every order that comes before me, I make one exception, the discharge orders. Those are entered routinely on my behalf and on

behalf of every judge in this district and I believe every judge in the nation, by the Clerk of the Court once certain milestones have been met in a bankruptcy case.

In addition, the logic behind Cox and similar cases, which rely upon, in turn, cases in the context of the All Writs Act, do not consider the difference between Section 105(a) of the Bankruptcy Code and the All Writs Act. The latter states that “[t]he Supreme Court, and all courts established by act of Congress, may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.” Very clearly, that statute is court-specific, referring to “their respective jurisdictions,” or the respective jurisdictions of the individual courts whose orders are to be enforced.

Section 105(a) of the Bankruptcy Code is quite different. Although modeled on the All Writs Act, it states "The court may issue any order, process or judgment that is necessary or appropriate to carry out the provisions of this title." It does not refer to aiding the Court's own jurisdiction. As I noted at oral argument, the legislative history of this section, in H.R. Rep. 95-595, states that, among other things, Section 105 is intended to "cover any powers traditionally exercised by a bankruptcy court that are not encompassed by the all writs

statute." (Emphasis added.) The statutes are different, in other words. And I believe it is a mistake to rely upon All Writs Act cases to hold that a bankruptcy court has power under the applicable statute only to enforce its own orders, as opposed to the Bankruptcy Code generally and Sections 524(a) and 727 of the Code, in particular. Again, this is well-discussed in the In re Cano case, 410 B.R. at 555. The Court has its own contempt power, but it also has Section 105(a) of the Code, which goes beyond its own contempt power by, in its own terms, enabling the Court to carry out specific provisions of the Bankruptcy Code.

I should note that, in a somewhat different context, although still relevant, the Second Circuit has made it clear that the bankruptcy court does not have exclusive jurisdiction to enforce the automatic stay under Section 362(a) of the Bankruptcy Code, a similarly-worded statutory injunction to Section 524(a). That is, contrary to the rationale of the Cox line of cases, its enforcement is not “issuing court” specific. See In re Baldwin-United Corp. Litigation, 765 F.2d 343 (2d Cir. 1985); see also In re Colasuonno, 697 F.3d 164, 172 n.4 (2d Cir. 2012). Other courts have recognized a similar non-exclusivity concept with regard to interpretation and enforcement of the discharge under sections 524 and 727. See In re

Watson, 192 B.R. 739, 746 (B.A.P. 9th Cir. 1996), aff'd U.S. App. LEXIS 14663 (9th Cir., June, 16, 1997), and Cisneros v. Cost Control Marketing & Sales Management, 862 F.Supp 1531, 1533 (W.D. Va. 1994), aff'd 64 F.3d 970 (4th Cir. 1995), cert. denied, 517 U.S. 1187 (1996). (There is a caveat to this case law, at least as applied in the Second Circuit, which is that while courts other than the bankruptcy court have concurrent jurisdiction over disputes pertaining to Section 362 of the Bankruptcy Code, the automatic stay provision, and Section 524, if they are erroneous their decision may be viewed as void ab initio as being in violation of the stay or the discharge. See In re Kilmer, 501 B.R. 208, 214-15 (Bankr. S.D.N.Y. 2013), and In re Enron Corp., 306 BR 465, 477 (Bankr. S.D.N.Y. 2004).)

There should be no issue here, either, that Section 105(a) is properly exercisable to enforce the discharge under Sections 524(a) and 727 of the Bankruptcy Code. Whereas Section 105(a) of the Code is not a license for the Court to exercise general equity powers except in furtherance of specific provisions of the Bankruptcy Code, here there are such specific provisions, Sections 524(a)(2) and 727, for which Section 105(a) provides the Court with enforcement power. See In re Rizzo-Cheverier, 364 B.R. 532, 536-37 (Bankr. S.D.N.Y. 2007); see generally,

In re Kalikow, 662 F.3d 82, 97 (2d Circuit 2010):

> "[A] court may invoke Section 105(a) if the equitable remedy utilized is demonstrably necessary to preserve a right elsewhere provided in the Code. Those powers are in addition to whatever contempt powers the court may have and must include the award of monetary and other forms of relief to the extent such awards are necessary and appropriate to carry out the provisions of the Bankruptcy Code and provide full remedial relief."

(Internal quotations and citations omitted.)

I conclude for the foregoing reasons, therefore, that the Court has the statutory power and the subject matter jurisdiction to decide this nationwide class action. I have again been largely informed by the analysis undertaken by Judge Isgur in the Cano case. I also rely heavily upon the First Circuit's analysis of 28 U.S.C. Section 1334 and Section 105(a) of the Bankruptcy Code in Bessette v. Avco Financial Services, Inc., 230 F.3d 439 (1st Cir. 2000), which reversed and remanded the District Court's determination that only the court that had issued a discharge order could decide a claim based on the violation of the discharge.

It is true that, on remand, the district court, rather than certifying a nationwide class, concluded that

the class should comprise only those debtors who received discharges in the applicable district, in that case, the District of Rhode Island. See Bessette v. Avco Financial Services Inc., 279 B.R. 442 (D.R.I. 2002). As noted, that approach has been taken by several other courts in other districts, as well. See, for example, In re Montano, 2012 Bankr. LEXIS 5155 (Bankr. D.N.M. Nov. 2, 2012). I believe, however, that the Court has broader jurisdiction than those courts have applied, which is a hybrid, if you will, of the two internally consistent approaches, (1) the approach that premises the right to enforce the discharge upon the All Writs Act, i.e., finding the power to enforce only in the issuing court, or (2), alternatively, the approach applying the full reach of bankruptcy jurisdiction under Section 1334(b) of the Judicial Code and Sections 105(a), 524 and 727 of the Bankruptcy Code to the issue. Therefore, I decline to follow the "district only" cases and believe that any particular bankruptcy court has the power to decide a nationwide class action intended to remedy the alleged systematic violation of the discharge.

That, of course, leaves the issue of whether class certification itself is appropriate, and that's left for another day.

So, I'm going to ask counsel for the plaintiffs

to submit an order to chambers, copying counsel for Chase, consistent with that ruling.

Dated: White Plains, New York
July 22, 2014

/s/ Robert D. Drain
Hon. Robert D. Drain
United States Bankruptcy Judge