

UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF FLORIDA  
FORT MYERS DIVISION  
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In re: Case No. 9:19-bk-01289-FMD  
Chapter 7

Scott Glenn Newcom,

Debtor.

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U.S. Commodity Futures Trading Commission,  
Plaintiff,

vs. Adv. Pro. No. 9:19-ap-136-FMD

Scott Glenn Newcom,

Defendant.

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**ORDER (1) GRANTING  
PLAINTIFF'S AMENDED  
RENEWED MOTION FOR  
SUMMARY JUDGMENT AND  
(2) DENYING DEFENDANT'S  
MOTION FOR SUMMARY JUDGMENT**

THIS PROCEEDING came before the Court for hearing on October 21, 2019, of *Plaintiff CFTC's Amended Renewed Motion for Summary Judgment*<sup>1</sup> and *Scott Newcom's Motion for Summary Judgment*.<sup>2</sup>

Plaintiff, U.S. Commodity Futures Trading Commission ("Plaintiff"), timely filed a complaint<sup>3</sup> to determine that a debt owed by Debtor, Scott Glenn Newcom ("Debtor"), is nondischargeable under 11 U.S.C. § 523(a)(2) (the "Complaint").<sup>4</sup> The debt arises from Plaintiff's March 2013 *Order Instituting Proceedings Pursuant to Sections 6(c)*

and 6(d) of the Commodity Exchange Act, as Amended, Making Findings and Imposing Remedial Sanctions (the "Sanctions Order").<sup>5</sup> Debtor consented to the entry of the Sanctions Order, in which he was ordered to pay restitution in the amount of \$635,457.44 for violations of § 4(a) and § 4b of the Commodity Exchange Act, 7 U.S.C. § 1, *et seq.* (the "Act").

Plaintiff contends that it is entitled to summary judgment under principles of collateral estoppel. Debtor asserts that he is entitled to summary judgment because, he contends, enforcement of the Sanctions Order is barred by the applicable statute of limitations. As set forth below, the Court will grant Plaintiff's Motion for Summary Judgment and deny Debtor's Motion for Summary Judgment.

**A. The Sanctions Order**

The following facts are not in dispute. Debtor and Anthony Pulieri ("Pulieri") were the sole owners and principals of Joseph Glenn Commodities LLC ("Joseph Glenn") and JGCF LLC ("JGCF").<sup>6</sup> In 2010, Joseph Glenn, Debtor, and Pulieri entered into an agreement to act as a dealer for Hunter Wise Commodities LLC ("Hunter Wise"), a company that held itself out as providing commodity trading and related services.<sup>7</sup>

In 2012, Plaintiff instituted an administrative proceeding to determine whether Joseph Glenn, JGCF, Debtor, and Pulieri (collectively referred to in the administrative proceeding and in the Sanctions Order as "Respondents") violated the Act in their solicitation of customers for Hunter Wise. In March 2013, Respondents, including Debtor, consented to the entry of the Sanctions Order to settle the administrative proceeding.<sup>8</sup>

Critical to this Court's ruling, in Section II of the Sanctions Order, Respondents, including Debtor, consented to the use of the Sanctions Order's findings

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<sup>1</sup> Doc. No. 39.

<sup>2</sup> Doc. No. 32.

<sup>3</sup> Doc. No. 1.

<sup>4</sup> Unless otherwise noted, all statutory references are to the United States Bankruptcy Code, 11 U.S.C. § 101, *et seq.*

<sup>5</sup> Exhibit to Doc. No. 1.

<sup>6</sup> Sanctions Order, p. 2.

<sup>7</sup> *Id.* at pp. 2-3.

<sup>8</sup> *Id.* at pp. 1-2.

. . . in this proceeding and in any other proceeding brought by [Plaintiff] or to which [Plaintiff] is a party; provided, however, that Respondents do not consent to the use of the Offer, or the findings or conclusions in this Order consented to in the Offer, as the sole basis for any other proceeding brought by [Plaintiff], *other than in a proceeding in bankruptcy or to enforce the terms of this Order.*<sup>9</sup>

Section III of the Sanctions Order includes a summary of the findings, a description of the parties, and the following statement of facts:<sup>10</sup>

1. Respondents solicited retail customers, generally by telephone or through their website, to enter into Retail Commodity Transactions as part of a “leveraged program.”

2. Respondents represented to prospective customers that: (1) the customer could purchase physical commodities, including gold, silver, copper, platinum, or palladium, by paying as little as 20% of the purchase price; (2) customers would receive a loan for the remaining portion of the purchase price on which the customer would be charged interest; and (3) upon confirmation of the customer’s purchase, the physical commodity the customer purchased would be stored at an independent depository on the customer’s behalf in an account in the customer’s name.

3. However, when retail customers placed orders to enter into Retail Commodity Transactions, the Respondents did not purchase physical commodities on the customers’ behalf, provide loans to customers for the remaining portion of the purchase price, or store any physical commodities for customers.

4. Instead, the Respondents simply passed all the details of the purchase,

customer payments, and financing on to Hunter Wise, whose existence the Respondents did not disclose to retail customers.

5. Similarly, Hunter Wise did not purchase or sell physical commodities, arrange for or provide loans, or store physical commodities in independent depositories in connection with Respondents’ customers’ Retail Commodity Transactions.

6. The Respondents’ customers never owned, possessed, or received title to the physical commodities that they believed that they purchased, no funds were expended by Respondents or Hunter Wise to purchase physical commodities for the customers, and no physical commodities were stored for the customers.

Section IV, paragraph D of the Sanctions Order, includes the following findings:<sup>11</sup>

First, that §§ 4b(a)(2)(A) and 4b(a)(2)(C) of the Act make it illegal for any person to cheat or defraud another person in connection with any contract of sale of a commodity in interstate commerce; second, that fraudulent solicitation of prospective customers violates § 4b(a) of the Act, and that to establish solicitation fraud, Plaintiff must prove that (1) a misrepresentation occurred, (2) with scienter, and (3) the misrepresentation was material; third, that in their solicitation of customers, Respondents represented to potential clients that they would earn greater returns than they had ever earned before and that investments by existing customers had been profitable, even though they knew that more than 95% of existing customers had lost money, and that Respondents also failed to disclose commissions, service, and interest charges to customers; and fourth, that Respondents, including Debtor, engaged in fraudulent solicitation in violation of §§ 4b(a)(2)(A) and (C) of the Act.

Section IV, paragraph E of the Sanctions Order, includes the finding that Debtor and Pulieri were

<sup>9</sup> *Id.* at p. 2, n.1(emphasis added).

<sup>10</sup> *Id.* at p. 3.

<sup>11</sup> *Id.* at p. 7.

controlling persons of Joseph Glenn and JGCF, and that the Act provides that controlling persons are liable for violations of the Act to the same extent as the controlled entity.<sup>12</sup>

In a paragraph titled “Findings of Violation,” the Sanctions Order finds that Respondents, including Debtor, violated §§ 4(a) and 4b of the Act.<sup>13</sup>

Following a provision for Respondents’ (including Debtor’s) express consent to the Sanctions Order, Section VI of the Sanctions Order, titled “Order,” ordered Respondents, jointly and severally, to pay restitution in the amount of \$635,457.44 (the “Restitution Obligation”) within ten days of the Sanctions Order to a “Monitor,” who was charged with collecting the Restitution Obligation and making distributions to Respondents’ customers.<sup>14</sup>

Debtor did not pay the Restitution Obligation as required by the Sanctions Order.

### **B. Debtor’s bankruptcy case**

On February 18, 2019, Debtor filed a petition under Chapter 7 of the Bankruptcy Code. Plaintiff timely filed the Complaint. Despite initial challenges to Plaintiff’s standing, Debtor acknowledged that Plaintiff is authorized to bring an action to enforce compliance with administrative orders such as the Sanctions Order, and that agencies may contest the dischargeability of amounts payable to third parties under such administrative orders.<sup>15</sup>

In the Complaint, Plaintiff alleges that the Sanctions Order found that Debtor had defrauded his customers, that Debtor had engaged in

fraudulent solicitation in violation of § 4b(a)(2) of the Act, and that Debtor owed the Restitution Obligation in the amount of \$640,993.17. Accordingly, Plaintiff asserts that the Restitution Obligation is “a result of money obtained by false pretenses, false representations, or actual fraud, and is therefore not dischargeable pursuant to 11 U.S.C. § 523(a)(2)(A).”<sup>16</sup>

In its Amended Renewed Motion for Summary Judgment, Plaintiff contends that the Sanctions Order includes all of the necessary factual findings to establish that the Restitution Obligation is nondischargeable under § 523(a)(2)(A).<sup>17</sup> According to Plaintiff, principles of collateral estoppel entitle it to the entry of a summary judgment determining that the debt is nondischargeable.

Debtor also filed a motion for summary judgment. Debtor contends that “there is no valid and enforceable underlying debt to declare nondischargeable,” because Plaintiff’s enforcement of the Sanctions Order is barred by both Florida’s statute of limitations and the federal statute of limitations.<sup>18</sup>

### **C. The Sanctions Order has collateral estoppel effect in this proceeding.**

Principles of collateral estoppel generally apply in dischargeability proceedings under § 523.<sup>19</sup> Collateral estoppel bars the re-litigation of issues previously decided in a judicial or administrative proceeding if the party against whom the prior decision is asserted had a full and fair opportunity to litigate the issues in the prior case.<sup>20</sup> Here, the parties agree that the federal law of collateral estoppel applies in this proceeding.<sup>21</sup>

<sup>12</sup> *Id.* at pp. 7-8.

<sup>13</sup> *Id.* at pp. 1, 9.

<sup>14</sup> *Id.*, at p. 10.

<sup>15</sup> Doc. No. 20, p. 4. *See In re Abeyta*, 387 B.R. 846, 850 (Bankr. D. N.Mex. 2008) (the Federal Trade Commission has standing to bring a dischargeability action under § 523(a)(2)(A), even though the dischargeability claims were asserted on behalf of injured consumers.)

<sup>16</sup> Doc. No. 1, p. 5.

<sup>17</sup> Doc. Nos. 10, 39.

<sup>18</sup> Doc. No. 32. The applicability of the state or Federal statute of limitations depends on whether the enforcement action is brought for Plaintiff’s own enforcement purposes or on behalf of the recipients of the restitution.

<sup>19</sup> *In re Rensin*, 597 B.R. 177, 190 n. 2 (Bankr. S.D. Fla. 2018)(citing *Grogan v. Garner*, 498 U.S. 279, 285 n. 11, 111 S. Ct. 654, 112 L. Ed. 2d 755 (1991)).

<sup>20</sup> *In re Rensin*, 597 B.R. at 190 n. 2(quoted *In re St. Laurent*, 991 F.2d 672, 675 (11th Cir. 1993)).

<sup>21</sup> Doc. No. 19, p. 5; Doc. No. 20, p. 1.

“Under federal law, the application of collateral estoppel requires satisfying the following prerequisites: ‘(1) the issue be identical in both the prior and current action; (2) the issue was actually litigated; (3) the determination of the issue was critical and necessary to the judgment in the prior action; and (4) the burden of persuasion in the subsequent action not be significantly heavier.’”<sup>22</sup>

For the following reasons, the Court finds that all four requisites to collateral estoppel are satisfied in this proceeding. Therefore, Debtor is barred from challenging the issues decided in the Sanctions Order, and the determinations in the Sanctions Order establish the nondischargeability of the Restitution Obligation under § 523(a)(2)(A).

1. *Identity of issues*

Plaintiff brought the administrative proceeding pursuant to § 4(a) and § 4b of the Act. Section 4b(a)(2) provides:

**(a) Unlawful actions**

It shall be unlawful—

...

(2) for any person, in or in connection with any order to make, or the making of, any contract of sale of any commodity for future delivery, or swap, that is made, or to be made, for or on behalf of, or with, any other person, other than on or subject to the rules of a designated contract market—

(A) *to cheat or defraud or attempt to cheat or defraud the other person;*

...

(C) *willfully to deceive or attempt to deceive the other person by any means whatsoever* in regard to any order or contract or the disposition or execution of any order or contract, or in regard to any act

of agency performed, with respect to any order or contract for or, in the case of paragraph (2), with the other person.<sup>23</sup>

To establish liability under § 4b(a)(2), Plaintiff has the burden of proving three elements: (1) the making of a misrepresentation, misleading statement, or a deceptive omission; (2) scienter, meaning that Debtor intended to defraud, manipulate, or deceive, or that Debtor’s conduct was an extreme departure from the standards of ordinary care; and (3) materiality, meaning that a reasonable investor would consider the statement important in deciding whether to make an investment.<sup>24</sup>

Plaintiff brought this dischargeability action under § 523(a)(2)(A) of the Bankruptcy Code. Section 523(a)(2)(A) provides:

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—

...

(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—

(A) *false pretenses, a false representation, or actual fraud*, other than a statement respecting the debtor’s or an insider’s financial condition.<sup>25</sup>

To establish nondischargeability under § 523(a)(2)(A), Plaintiff must show the traditional elements of common law fraud: (1) a false representation with the purpose and intent to deceive Plaintiff, (2) Plaintiff’s reliance on the misrepresentation, (3) the reliance was justified, and (4) Plaintiff sustained a loss as a result of the misrepresentation.<sup>26</sup> Debtor’s reckless disregard for the truth or falsity of his representation may supply

<sup>22</sup> *In re Rensin*, 597 B.R. at 190 n. 2(quoted *In re Bilzerian*, 153 F.3d 1278, 1281 (11th Cir. 1998)).

<sup>23</sup> 7 U.S.C. § 6b(a)(2)(A),(C)(emphasis added).

<sup>24</sup> *Commodity Futures Trading Commission v. R.J. Fitzgerald & Co., Inc.*, 310 F.3d 1321, 1328-29 (11th Cir. 2002)(citations omitted).

<sup>25</sup> 11 U.S.C. § 523(a)(2)(A)(emphasis added).

<sup>26</sup> *In re Taylor*, 2016 WL 116331, at \*1 (Bankr. M.D. Fla. Jan. 11, 2016).

the necessary purpose and intent under § 523(a)(2)(A).<sup>27</sup>

The Sanctions Order entered in the administrative proceeding includes findings that Debtor represented to potential customers that they could buy commodities by paying as little as 20% of the purchase price and that the commodities would be stored at a separate depository, but the commodities were never purchased or stored after the customers placed the orders. The Sanctions Order also includes findings that Debtor represented to potential customers that they would earn greater returns than they had in the past and that investments by Debtor's existing customers had been profitable, even though he knew that 95% of his existing customers had lost money. Based on these factual findings, the Sanctions Order concludes that Debtor violated § 4b(a)(2) of the Act. In other words, based on the factual findings, the Sanctions Order concludes that Debtor made a material misrepresentation with the intent to defraud or deceive the customers.

The Court finds that the issues in Plaintiff's administrative proceeding and Sanctions Order are identical to the issues in this dischargeability proceeding.

## 2. *Actually litigated*

"Ordinarily, when a case is settled rather than litigated to a judgment, the settlement does not give rise to collateral estoppel unless it is clear that the parties intended the settlement to have such an effect."<sup>28</sup> In other words, consent judgments may not satisfy the "actually litigated" requirement for the federal law of collateral estoppel, unless it is clear that the parties intended the judgment to have preclusive effect. Courts generally consider two factors in determining the parties' intent: whether the consent judgment includes sufficient facts to support its use in a later proceeding, and whether the consent judgment contains language evidencing the

parties' intent for the prior litigation to have collateral estoppel effect.<sup>29</sup>

Here, both factors are present. First, the Sanctions Order contains specific factual findings that Debtor falsely represented to potential customers that the commodities that they ordered and paid for would be purchased and stored on their behalf, and that the investments of his existing customers were profitable. And second, the Sanctions Order expressly provides that Debtor consented to the use of Sanctions Order's findings in any other proceeding brought by Plaintiff, and consented to the use of the findings as the "sole basis" for any proceeding brought by Plaintiff in a bankruptcy proceeding.

The Court finds that Debtor intended for the Sanctions Order to have collateral estoppel effect and therefore determines that the issue of Debtor's fraudulent solicitation was actually litigated in the prior administrative proceeding.

## 3. *The determination was critical and necessary to the Sanctions Order.*

Under the federal law of collateral estoppel, the "critical and necessary" requirement means that the court in the prior proceeding "could not have reached the judgment by an alternative determination."<sup>30</sup> Here, to find that Debtor violated § 4b(a)(2) of the Act, Plaintiff was required to show in the prior proceeding that Debtor made a material misrepresentation, either with the intent to defraud or by the extreme departure from the standards of ordinary care.

The Court finds that the fraud elements were essential to the determination of a violation in the prior proceeding, and were critical and necessary to the Sanctions Order.<sup>31</sup>

<sup>27</sup> *In re Osborne*, 604 B.R. 582, 597 (Bankr. M.D. Ga. 2019).

<sup>28</sup> *In re Swilley*, 295 B.R. 839, 847 (Bankr. D.S.C. 2003).

<sup>29</sup> *Id.* at 847-48.

<sup>30</sup> *In re Smith*, 537 B.R. 1, 11 (Bankr. M.D. Ala. 2015)(citing *In re Held*, 734 F.2d 628, 629 (11th Cir. 1984)).

<sup>31</sup> *In re Ryals*, 424 B.R. 539, 546 (Bankr. M.D. Fla. 2009).

#### 4. *Burden of proof*

To establish Debtor's liability in the prior administrative proceeding, Plaintiff had the burden of proving all three elements under § 4b(a)(2) of the Act.<sup>32</sup> To establish nondischargeability in this proceeding under § 523(a)(2)(A), Plaintiff also had the burden of proving the elements of common law fraud by a preponderance of the evidence.<sup>33</sup> The Court finds that Plaintiff's burden of proof in this bankruptcy proceeding is not significantly higher than its burden in the prior administrative proceeding.

#### **D. Enforcement of the Sanctions Order is not barred by a limitations period.**

Debtor contends that Plaintiff cannot prevail in this dischargeability action unless it establishes the validity of the underlying debt in addition to the elements of a cause of action under § 523(a).<sup>34</sup> Debtor argues that even if the requisites for collateral estoppel are present, the Restitution Obligation is nevertheless dischargeable because (1) Plaintiff's only means of enforcing the Sanctions Order is to file an action or cause an action to be filed in District Court, and (2) Plaintiff is barred from bringing such an enforcement action by the applicable federal and state limitations periods, which are both five years.<sup>35</sup>

Debtor contends that Debtor's obligation under the Sanctions Order is no longer enforceable because the Sanctions Order was entered on March 27, 2013, and Plaintiff did not file suit to enforce the Sanctions Order before the five-year statute of

limitations lapsed in March 2018, nearly a year before Debtor filed his bankruptcy case.

But Debtor does not assert that Plaintiff's original claims against him for violating the Act were barred by the statute of limitations,<sup>36</sup> that Plaintiff lacked the authority to enter the Sanctions Order,<sup>37</sup> or that the Sanctions Order is invalid for any other reason. And Debtor has not established that the Sanctions Order is otherwise unenforceable by Plaintiff.

First, it is not clear that any state or federal statute of limitations applies to an action to collect a federal administrative judgment, and Debtor has not provided any case authority in which such a limitations period has been applied to an order imposing sanctions for violating the Act.

Second, 31 U.S.C. § 3716, part of the Federal Debt Collection Act, provides that a federal agency may collect a claim from a person by administrative offset, such as by offsetting a tax refund owed to a debtor against the amount due from the debtor.<sup>38</sup> A "claim" is an amount that has been determined by a government official to be owed to the United States, and includes "any amount the United States is authorized by statute to collect for the benefit of any person."<sup>39</sup>

And third, 31 U. S. C. § 3716(e) provides that, notwithstanding any other law, "no limitation on the period within which an offset may be initiated or taken pursuant to this section shall be effective."<sup>40</sup>

<sup>32</sup> *Commodity Futures Trading Commission v. R.J. Fitzgerald & Co., Inc.*, 310 F.3d at 1328.

<sup>33</sup> *In re Cascio*, 568 B.R. 851, 855 (Bankr. M.D. Fla. 2017).

<sup>34</sup> *Grogan v. Garner*, 498 U.S. 279, 283-84, 111 S. Ct. 654, 112 L. Ed. 2d 755 (1991).

<sup>35</sup> Doc. No. 32, pp. 3-4. According to Debtor, the applicable Florida statute of limitations is Fla. Stat. § 95.11, and the applicable federal statute of limitations is 28 U.S.C. § 2462 (Doc. No. 32, pp. 4-8).

<sup>36</sup> In his Motion for Summary Judgment (Doc. No. 32, p. 7), Debtor cited *U.S. Commodity Futures Trading Commission v. Gramalegui*, 2018 WL 4610953, at \*30 (D. Colo. Sept. 26, 2018) for the proposition that a restitution award sought by the CFTC was barred by the

statute of limitations. *Gramalegui* involved the CFTC's original action for violations of the Act, not an action to collect a restitution obligation following the entry of an order for sanctions.

<sup>37</sup> Debtor consented to the entry of the Sanctions Order without challenging Plaintiff's authority to determine the violations. *In re Robinson*, 256 B.R. 482, 489 (Bankr. S.D. Ohio 2000)(The National Grain and Feed Association was a "court of competent jurisdiction" to arbitrate disputes for *res judicata* purposes, where the parties submitted themselves to its jurisdiction by signing a contract without challenge.).

<sup>38</sup> 31 U.S.C. § 3716(a), (c).

<sup>39</sup> 31 U.S.C. § 3701(b)(1)(D).

<sup>40</sup> 31 U.S.C. § 3716(e).

Here, Plaintiff is authorized to seek restitution.<sup>41</sup> Under the Sanctions Order, payments from Debtor on the Restitution Obligation are overseen by a Monitor (the National Futures Association) appointed by Plaintiff,<sup>42</sup> and the Sanctions Order expressly provides that Plaintiff's acceptance of a partial payment is not a "waiver of [Plaintiff's] right to seek to compel payment of any remaining balance."<sup>43</sup>

Debtor has not established that the Sanctions Order is unenforceable; Plaintiff may collect the Restitution Obligation from Debtor through whatever methods are available to it, even if the only collection method available to Plaintiff is administrative offset, such as by offsetting a tax refund owed to Debtor.

### **E. Conclusion**

Plaintiff commenced this proceeding by filing a Complaint to determine that a debt owed by Debtor is nondischargeable pursuant to § 523(a)(2)(A) of the Bankruptcy Code. The Complaint is based on the Sanctions Order that required Debtor to pay a Restitution Obligation in the amount of \$635,457.44 for violating § 4(a) and § 4b of the Act.

The Sanctions Order is entitled to collateral estoppel effect in this dischargeability proceeding, and the Court determines that the Restitution Obligation is nondischargeable under § 523(a)(2)(A) because the issue of fraudulent misrepresentation was identical in both proceedings, the issue was actually litigated in the prior administrative proceeding, the determination of the issue was critical and necessary to the Sanctions Order, and the burden of proof was not significantly higher in this action.

Debtor has not shown that the Restitution Obligation is an invalid or unenforceable debt. For example, Debtor did not show that the Restitution Obligation may not be enforced or collected through administrative offset under 31 U.S.C. § 3716. Because Debtor did not establish that the debt is

completely unenforceable, the Court will deny his Motion for Summary Judgment.

Accordingly, it is

**ORDERED** that:

1. Plaintiff CFTC's Amended Renewed Motion for Summary Judgment is granted.

2. Defendant Scott Newcom's Motion for Summary Judgment is denied.

3. The Court will enter a separate Final Judgment determining that the Restitution Obligation set forth in the Sanctions Order and owed by Debtor in the amount of \$635,457.44 is nondischargeable under § 523(a)(2)(A) of the Bankruptcy Code.

**DATED:** December 9, 2019.

/s/ Caryl E. Delano

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Caryl E. Delano  
Chief United States Bankruptcy Judge

<sup>41</sup> 7 U.S.C. §§ 9, 13a-1; *Commodity Futures Trading Commission v. Brockbank*, 505 F. Supp. 2d 1169 (D. Utah 2007).

<sup>42</sup> Sanctions Order, p. 11.

<sup>43</sup> Sanctions Order, p. 13.