

Motion to Amend or Alter Judgment
Motion to Extend Time to Appeal
Motion for Stay of Proceedings to
Enforce Judgment
Motion for Stay of Proceedings
Pending Appeal without Bond
Fed. R. Civ. P. 59
Fed. R. Bankr. P. 9023
Fed. R. Bankr. P. 8002
Fed. R. Civ. P. 62
Fed. R. Bankr. P. 7062

Wilkes v. Cancelosi, Adversary No. 10-3099-rld
In re Cancelosi, Case No. 10-30182-rld7

08/26/2011 RLD

Published

Plaintiffs filed a complaint against debtor to except a debt from discharge under 11 U.S.C. § 523(a)(4) and (a)(19) for securities sold to plaintiffs by debtor and his 50% owned broker-entity. Plaintiffs also sought to proceed with state court arbitration involving debtor and other parties. At trial, the bankruptcy court made oral findings and conclusions on the record, dismissing plaintiffs' § 523(a)(4) claim and finding in favor of plaintiffs on their § 523(a)(19) claim. The bankruptcy court entered judgment against debtor ("Judgment") in the amount of \$160,000 plus 9% interest thereon to be excepted from discharge, subject to a limitation which allowed for an offset depending on plaintiffs' recovery from the disposition of the securities and/or from other respondents in the arbitration.

After the bankruptcy court entered the Judgment, debtor filed post-judgment omnibus motions ("Motion") which contained the following: (1) Motion to Alter or Amend Judgment, or, in the Alternative, Motion for New Trial ("Motion to Alter or Amend Judgment"); (2) Precautionary Motion to Extend Time Pursuant to Rule 8002; (3) Motion for Stay of Proceedings to Enforce a Judgment Pending Disposition of a Motion; and (4) Motion for Stay of Proceedings Pending Appeal without Bond.

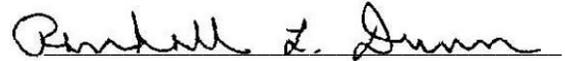
The bankruptcy court considered debtor's Motion. Neither plaintiffs nor debtor offered any additional exhibits or testimony. In light of the evidentiary record before it and its analysis of relevant legal authorities, the bankruptcy court denied the Motion for Stay Pending Appeal without Bond and the Motion to Alter or Amend the Judgment.

The bankruptcy court also determined that no order was necessary on the Precautionary Motion to Extend the Time to file a

notice of appeal, as the running of the 14-day period in which to file a notice of appeal is tolled under Rule 8002(b). It further determined that debtor need not put up any security or bond during the period of the stay, as requested in the Motion for Stay of Proceedings to Enforce the Judgment Pending Disposition of a Motion. The bankruptcy court terminated the stay on collection of the Judgment and the underlying state court judgment, as established by its order titled, "Stay Pending Further Order of the Court," entered on July 28, 2011.

P11-14(18)

Below is an Opinion of the Court.



RANDALL L. DUNN
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

11	In Re:)	
12	ROBERT RAYMOND CANCELOSI)	Bankruptcy Case
13	REBEKAH MALIA CANCELOSI,)	No. 10-30182-rld7
14	Debtors.)	
15	RICHARD H. WILKES and BEVERLEE J. WILKES,)	
16	Plaintiffs,)	Adv. Proc. No. 10-03099-rld
17	v.)	MEMORANDUM OPINION
18	ROBERT RAYMOND CANCELOSI, III,)	
19	Defendant.)	

On June 24, 2011, I conducted the trial ("Trial") on stipulated facts of the Complaint ("Complaint") of Beverlee J. Wilkes and Richard H. Wilkes ("the Wilkes") to except their claim against debtor Robert Raymond Cancelosi III ("Mr. Cancelosi") from discharge pursuant to §§ 523(a)(4)

1 and (19) of the Bankruptcy Code.¹ Following argument from the parties, I
2 stated oral findings of fact and conclusions of law on the record and
3 found in favor of the Wilkes on their § 523(a)(19) claim and dismissed
4 their § 523(a)(4) claim. I prepared and entered a judgment ("Judgment")
5 in favor of the Wilkes on June 27, 2011.

6 On July 11, 2011, Mr. Cancelosi filed Defendant's Post-Judgment
7 Omnibus Motions ("Motion") requesting four types of relief: 1) that the
8 Judgment be altered or amended, or in the alternative, for a new trial
9 pursuant to Civil Rule 59 and Rule 9023; 2) a precautionary motion to
10 confirm the Motion's status as a tolling motion for purposes of extending
11 the time for filing a notice of appeal pursuant to Rule 8002; 3) that
12 enforcement of the Judgment be stayed pending disposition of the Motion
13 pursuant to Civil Rule 62(b) and Rule 7062; and 4) that enforcement of
14 the Judgment be stayed pending appeal, pursuant to Civil Rule 62(d) and
15 Rule 7062. The Wilkes filed a Response ("Response") to the Motion on
16 July 20, 2011. I heard argument on the Motion at a hearing ("Hearing")
17 on July 26, 2011, and took determination of the Motion under advisement.

18 Since the Hearing, I have considered carefully the arguments
19 presented by the parties, the Motion and the Response, the exhibits
20 ("Exhibits") admitted at the Trial, and applicable authorities. I
21 further take judicial notice of the docket and documents filed in this
22 adversary proceeding ("Adversary Proceeding") and in Mr. Cancelosi's main
23 chapter 7 case, Case No. 10-30182 ("Main Case"), for purposes of

24
25 ¹ Unless otherwise indicated, all chapter and section references are
26 to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and all "Rule" references
are to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037. The
Federal Rules of Civil Procedure are referred to as "Civil Rules."

1 confirming and ascertaining facts not reasonably in dispute. Federal
2 Rule of Evidence 201; In re Butts, 350 B.R. 12, 14 n.1 (Bankr. E.D. Pa.
3 2006).

4 In light of that consideration and review, this Memorandum
5 Opinion sets forth the court's findings and conclusions under Civil Rule
6 52(a), applicable with respect to the Motion under Rule 7052.

7
8 Factual Background

9 Although the parties differ substantially in their
10 interpretations of how relevant facts apply in this Adversary Proceeding,
11 the underlying facts are not in dispute.

12 Mr. Cancelosi and his wife, Rebekah Malia Cancelosi
13 ("Ms. Cancelosi"), filed for relief under chapter 7 of the Bankruptcy
14 Code on January 12, 2010. Main Case Docket No. 1. Prior to the
15 Cancelosis' bankruptcy filing, the Wilkes had initiated an arbitration
16 proceeding ("Arbitration") in 2008 against Mr. Cancelosi, Bret Costelow
17 ("Mr. Costelow"), and Acuity Lending Corp. ("Acuity Lending"), of which
18 Mr. Cancelosi was president and a 50% shareholder, alleging fraud and
19 securities law violations, among other things. See Complaint, Adversary
20 Proceeding Docket No. 1. The deadline to file adversary proceeding
21 complaints to except claims from the Cancelosis' discharge was April 12,
22 2010. Main Case Docket No. 4. The Wilkes timely filed the Complaint on
23 April 5, 2010 against both Mr. Cancelosi and Ms. Cancelosi.

24 In the Complaint, after describing the pending Arbitration and
25 the claims asserted therein, the Wilkes requested that their claim be
26 excepted from the Cancelosis' discharge pursuant to §§ 523(a)(4) and

1 (19). See Adversary Proceeding Docket No. 1. Ms. Cancelosi moved to
2 dismiss the Complaint against her for failure to state a claim upon which
3 relief could be granted by motion ("Motion to Dismiss") filed on May 5,
4 2010. See Adversary Proceeding Docket No. 6. I granted the Motion to
5 Dismiss by order entered on May 26, 2010. See Adversary Proceeding
6 Docket No. 11. The Wilkes do not contest that ruling.

7 In the meantime, Mr. Cancelosi filed an answer to the Complaint
8 (see Adversary Proceeding Docket No. 5), and an initial pretrial
9 conference in the Adversary Proceeding was held on May 25, 2010. See
10 Adversary Proceeding Docket No. 9. At the initial pretrial conference,
11 after discussing with Ms. Wilkes and counsel for the Cancelosis the most
12 efficient and cost-effective way to proceed to resolve the Adversary
13 Proceeding, I granted relief from stay to allow the Arbitration to
14 proceed and scheduled a further pretrial conference for August 10, 2010.
15 Id. On May 28, 2010, I entered an order granting relief from stay to
16 allow the Arbitration to proceed, effective immediately. See Adversary
17 Proceeding Docket No. 12.

18 Ultimately, an evidentiary hearing in the Arbitration took
19 place on November 30-December 1, 2010, and the arbitrator's Award
20 ("Award") was issued on January 18, 2011. See Exhibit A. In the Award,
21 the arbitrator discussed and decided three claims:

22 1) Sale of Securities

23 In the Award, after discussing the nature of the subject
24 transactions, the arbitrator found that all three Respondents (Mr.
25 Cancelosi, Mr. Costelow and Acuity Lending) had sold unregistered
26 securities, with no credible evidence that the subject sales were exempt

1 from registration under Oregon's "Blue Sky" laws. The arbitrator further
2 found that the Respondents were "jointly and severally liable for the
3 damages resulting from those sales." See Award, Exhibit A at pp. 1-3.

4 2) Breach of Fiduciary Duties

5 While the arbitrator found that the Respondents had breached
6 fiduciary duties, specifically finding that Mr. Cancelosi had "either
7 direct or imputed knowledge" of the subject breaches, no separate damages
8 were proven, and any recoverable amounts would be payable to Acuity
9 Lending rather than to the Wilkes. See Award, Exhibit A at pp. 3-4.

10 3) Breach of Contract

11 The arbitrator further found that Mr. Cancelosi was liable on a
12 \$160,000 payment guarantee to the Wilkes. See Award, Exhibit A at p. 4.

13 4) Damages

14 The arbitrator discussed damages separately. Under ORS
15 59.115(2), as noted by the arbitrator, the party damaged as a result of a
16 violation of the Oregon securities laws has two recovery options:

17 (a) Upon tender of the security, the consideration
18 paid for the security, and interest from the date of
19 payment equal to the greater of the rate of interest
20 specified in ORS 82.010 for judgments for the payment
of money or the rate provided in the security if the
security is an interest-bearing obligation, less any
amount received on the security; or

21 (b) If the purchaser no longer owns the security,
22 damages in the amount that would be recoverable upon a
23 tender, less the value of the security when the
24 purchaser disposed of it and less interest on such
value at the rate of interest specified in ORS 82.010
for judgments for the payment of money from the date
of disposition.

25 The arbitrator found that the Wilkes retained the subject securities and
26 were attempting to recover from their disposition in mitigation of their

1 damages. See Award, Exhibit A at p. 5. The Wilkes had claimed damages
2 with respect to their investments in a total amount of \$767,353.42
3 without contradiction from the Respondents. Accordingly, the arbitrator
4 found that the Wilkes' damages from the Respondents' violations of the
5 Oregon securities laws totaled \$767,353.42. Id. at 5. The arbitrator
6 noted,

7 Prior to entry of judgment the [Wilkes] are required
8 to tender the securities to Respondents in order to
9 recover their damages. Metal Tech Corp. v. Metal
10 Technologies Co., Inc., 74 Or. App. 297, 302 (1985).
11 If they intend to hold the securities, they do so at
12 their own risk and are not entitled to a recovery for
13 the Oregon Securities Law violation.

14 Id. The arbitrator further noted, however,

15 Since the alternate theory of liability results in
16 damages that are duplicative of the damages resulting
17 from the breach of the securities law, they are
18 included in the final damage award upon a tender.
19 Absent a tender, the alternate liability theory would
20 apply.

21 Id. (Emphasis added.)

22 The following "Award" is short:

23 For the foregoing reasons, an Award is entered in
24 favor of the [Wilkes] and against the individual
25 Respondents, jointly and severally, in the amount of
26 \$767,353.42, plus interest from the date of this
27 Award, conditioned on tendering the securities in
28 question to the Respondents prior to the entry of
29 judgment on this Award. If the [Wilkes] elect not to
30 tender, an Award will be entered in their favor in the
31 amount of \$160,000 against the Respondent Cancelosi.

32 Id. at 6.

33 On January 21, 2011, Ms. Wilkes filed a copy of the Award with
34 the court. See Adversary Proceeding Docket No. 23. At a further
35 pretrial conference on March 8, 2011, it was noted that no Circuit Court

1 judgment yet had been entered confirming the Award, and a schedule for
2 trial on the issue of damages only was discussed. See Adversary
3 Proceeding Docket No. 27. A scheduling order subsequently was entered
4 scheduling the trial for May 25, 2011. See Adversary Proceeding Docket
5 No. 28.

6 The Trial ultimately was set over to June 24, 2011 to
7 accommodate the Multnomah County Circuit Court's ("Circuit Court")
8 schedule for entry of a judgment confirming the Award. See Adversary
9 Proceeding Docket Nos. 30 and 31. On or about June 10, 2011, the Circuit
10 Court entered a General Judgment and Money Award ("Confirming Judgment"),
11 noting 1) that the Award had been presented to the Circuit Court for
12 confirmation, and 2) that the Wilkes had not tendered the subject
13 securities to the Respondents, and 3) awarding judgment in favor of the
14 Wilkes against Mr. Cancelosi in the amount of \$160,000 to bear interest
15 from the date of entry of the Confirming Judgment at the rate of 9% per
16 annum. See Exhibit D at pp. 1-2.

17 As noted above, the Trial was duly held on June 24, 2011, and
18 after hearing argument from the parties in light of the admitted
19 Exhibits, I dismissed the Wilkes' claim under § 523(a)(4) but found in
20 their favor on their claim under § 523(a)(19). In the Judgment, I
21 formally dismissed the § 523(a)(4) claim and awarded the Wilkes judgment
22 against Mr. Cancelosi excepted from his discharge under § 523(a)(19) in
23 the amount of \$160,000 plus 9% interest, as provided in the Confirming
24 Judgment, with the following limitation:

25 [T]o the extent that the [Wilkes] recover from the
26 disposition of the subject securities and/or other
respondents in the underlying arbitration an amount of

1 the \$767,353.42 arbitration award that would leave
2 less than the judgment of \$160,000 plus 9% interest
3 owing on the [Wilkes'] claim excepted from [Mr.
Cancelosi's] discharge, [Mr. Cancelosi] will receive a
dollar for dollar offset.

4 Judgment, Adversary Proceeding Docket No. 48 at p. 2.

5 As noted above, I heard argument on the Motion in light of the
6 Response on July 26, 2011, and took the matter under advisement.

7
8 Jurisdiction

9 I have core jurisdiction to hear and resolve the Adversary
10 Proceeding generally and the Motion specifically under 28 U.S.C. §§ 1334
11 and 157(b)(2)(B) and (I).

12 Preliminary Matters

13 As noted at the outset, the Motion requests a number of
14 different forms of relief, some of which I addressed at the Hearing. My
15 dispositions as to matters allowing for summary determination are as
16 follows:

17 A) Precautionary Motion to Extend the Time to File a Notice of Appeal.

18 Rule 8002(b) provides that,

19 If any party makes a timely motion of a type specified
20 immediately below, the time for appeal for all parties
21 runs from the entry of the order disposing of the last
22 such motion outstanding. This provision applies to a
timely motion: . . .(2) to alter or amend the judgment
under Rule 9023; (3) for a new trial under Rule 9023 .
. . .

23 In fact, the Motion included motions to alter or amend the Judgment or in
24 the alternative, for a new trial under Civil Rule 59 and Rule 9023. The
25 deadline for filing such motions under Rule 9023 is "no later than 14
26 days after entry of judgment."

1 The Judgment was entered on June 27, 2011. The Motion was
2 filed on July 11, 2011, 14 days later. I find that the Motion was filed
3 timely for purposes of tolling the running of the 14-day period to file a
4 notice of appeal under Rule 8002(a). Accordingly, the time to file a
5 notice of appeal does not begin to run until I have entered an order
6 fully resolving the Motion. Since Rule 8002(b) so provides, no further
7 order is required to implement its tolling effect.

8 B) Motion for Stay of Proceedings to Enforce the Judgment Pending
9 Disposition of the Motion.

10 In order to maintain the status quo while I considered the
11 Motion, at the Hearing, I granted Mr. Cancelosi's motion to stay
12 enforcement of the Judgment pending a decision on the Motion, pursuant to
13 Civil Rule 62(b), as applicable under Rule 7062. I entered an
14 implementing stay order on July 28, 2011. In light of the limited period
15 contemplated between the Hearing and my entry of the under advisement
16 disposition of the Motion, I did not require, and I do not require
17 Mr. Cancelosi to put up any security or bond during the period of the
18 stay, which will terminate upon entry of an order fully deciding the
19 Motion.

20 C) Motion for Stay Pending Appeal without Bond.

21 Since the decision of any party to appeal the Judgment and/or
22 any order deciding the Motion will be made only after I have decided the
23 Motion, the motion for stay pending appeal pursuant to Civil Rule 62(d)
24 and Rule 7062 is premature, and I decline to consider it at this time.

25 D) Motion for New Trial.

26 At the hearing, I confirmed with the parties that neither side

1 had any additional exhibits to submit, and neither party suggested that
2 additional testimony was required or appropriate. Accordingly, the
3 issues raised by the Motion concerning altering or amending the Judgment
4 can be resolved as a matter of law, based on the evidence presented
5 through the already-admitted Exhibits. In these circumstances, I will
6 deny the motion for new trial and will rely on the evidentiary record
7 from the Trial in analyzing and deciding the remaining issues presented
8 for my consideration in the Motion.

9 The unresolved issues presented by the Motion and the Response
10 are dealt with in the following Discussion.

11 12 Discussion

13 1) Standards for Deciding a Motion to Alter or Amend the Judgment

14 As recognized by Mr. Cancelosi, a motion to alter or amend a
15 judgment "should not be granted absent highly unusual circumstances,
16 unless the . . . [trial] court is presented with newly discovered
17 evidence, committed clear error, or if there is an intervening change in
18 the controlling law." McDowell v. Calderon, 197 F.3d 1253, 1255 (9th
19 Cir. 1999) (quoting 389 Orange St. Partners v. Arnold, 179 F.3d 656, 665
20 (9th Cir. 1993), emphasis added by McDowell). See Brown v. Wright, 588
21 F.2d 708, 710 (9th Cir. 1978) ("There are three grounds for granting new
22 trials in court-tried actions under [Civil] Rule 59(a)(2): (1) manifest
23 error of law; (2) manifest error of fact; and (3) newly discovered
24 evidence."); Ankeny v. Meyer (In re Ankeny), 184 B.R. 64, 73 (9th Cir.
25 BAP 1995).

26 In the Motion, Mr. Cancelosi does not contend that he has any

1 "newly discovered evidence" to present that would justify altering or
2 amending the Judgment. Rather, Mr. Cancelosi argues that the Judgment is
3 infected with "clear error," without necessarily specifying whether the
4 error is factual, a matter of law, or both. I disagree that the Judgment
5 is flawed by any clear error of fact or law for the following reasons.

6 2) Exceptions to Discharge and § 523(a)(19)

7 Mr. Cancelosi argues that I erred in not giving sufficient
8 deference to the principle that exceptions to discharge should be
9 construed narrowly. I recognize that the statutory exceptions to
10 discharge generally are to be construed strictly in favor of the debtor
11 and strictly against those seeking to except debts from the debtor's
12 discharge. See, e.g., Snoke v. Riso (In re Riso), 978 F.2d 1151, 1154
13 (9th Cir. 1992). However, application of that principle is leavened by
14 the relatively lenient preponderance of the evidence burden of proof
15 standard applying with respect to such claims since the Supreme Court's
16 decision in Grogan v. Garner, 498 U.S. 279 (1991), and by the terms of
17 the particular exception to discharge invoked.

18 Section 523(a)(19) provides an exception to discharge for
19 claims resulting from violations of federal and/or state securities
20 laws.² It was adopted as part of the Sarbanes-Oxley Act of 2002

21
22 ² Section 523(a)(19) specifically provides a chapter 7 discharge
23 does not discharge an individual debtor from any debt that

24 (A) is for-(i) the violation of any of the Federal securities
25 laws (as that term is defined in Section 3(a)(47) of the
26 Securities Exchange Act of 1934), any of the State securities
laws, or any regulation or order issued under such Federal or
State securities laws; or (ii) common law fraud, deceit, or

(continued...)

1 ("Sarbanes-Oxley"), the purpose of which is "to protect investors by
2 improving the accuracy and reliability of corporate disclosures made
3 pursuant to the securities laws, and for other purposes." Pub. L. No.
4 107-204, 116 Stat. 745 (2002).

5 Title VIII of Sarbanes-Oxley is entitled "The Corporate and
6 Criminal Fraud Accountability Act of 2002" (the "Accountability Act").
7 The purposes of the Accountability Act are:

8 To provide for criminal prosecution and enhanced
9 penalties of persons who defraud investors in publicly
10 traded securities or alter or destroy evidence in
11 certain Federal investigations, to disallow debts
12 incurred in violation of securities fraud laws from
13 being discharged in bankruptcy, to protect
14 whistleblowers who report fraud from retaliation by
15 their employers, and for other purposes.

16 S. Rep. No. 107-146, at 2 (2002) (emphasis added). Section 803 of the
17 Accountability Act added § 523(a)(19) to the Bankruptcy Code to "[a]mend
18 the Bankruptcy Code to make judgments and settlements based upon
19 securities law violations nondischargeable, protecting victims' ability
20 to recover their losses." 148 Cong. Rec. S11787 (daily ed. March 12,
21 2002) (statement of Senator Leahy). The related Senate Committee Report
22 states:

23 ²(...continued)

24 manipulation in connection with the purchase or sale of any
25 security; and

26 (B) results, before, on, or after the date on which the
petition was filed, from-(i) any judgment, order, consent
order, or decree entered in any Federal or State judicial or
administrative proceeding; (ii) any settlement agreement
entered into by the debtor; or (iii) any court or
administrative order for any damages, fine, penalty, citation,
restitutionary payment, disgorgement payment, attorney fee,
cost, or other payment owed by the debtor.

1 Current bankruptcy law may permit such wrongdoers to
2 discharge their obligations under court judgments or
3 settlements based on securities fraud and other
4 securities violations. This loophole in the law
5 should be closed to help defrauded investors recoup
6 their losses and to hold accountable those who violate
7 securities laws after a government unit or private
8 suit results in a judgment or settlement against the
9 wrongdoer.

6 S. Rep. No. 107-146 (2002).

7 The legislative history of § 523(a)(19) emphasizes its remedial
8 purpose and intended broad application. See, e.g., Smith v. Gibbons (In
9 re Gibbons), 289 B.R. 588, 593 (Bankr. S.D.N.Y. 2003). In his section by
10 section analysis of the Accountability Act, Senator Leahy stated:
11 "[Section 523(a)(19)] is meant to prevent wrongdoers from using the
12 bankruptcy laws as a shield and to allow defrauded investors to recover
13 as much as possible." 148 Cong. Rec. S7418 (daily ed. July 26, 2002)
14 (statement of Senator Leahy). His section by section analysis was
15 adopted as legislative history for the Accountability Act "in order to
16 provide guidance in the legal interpretation of these provisions of Title
17 VIII of H.R. 2673." Id.

18 As relevant to the Complaint in this Adversary Proceeding, the
19 Wilkes bore the burden of proof to establish each of two elements by a
20 preponderance of the evidence: 1) their claim was for a debt resulting
21 from a violation(s) of state securities laws; and 2) the subject debt
22 resulted from a "judgment, order, consent order or decree in a federal or
23 state judicial or administrative proceeding or any settlement agreement
24 entered by the debtor or any court or administrative order for the
25 payment of damages, a fine, penalty, citation, restitutionary payment,
26 disgorgement payment, attorney fee, cost or other payment owed by the

1 debtor." Peterman v. Whitcomb (In re Whitcomb), 303 B.R. 806, 810
2 (Bankr. N.D. Ill. 2004). See also Mollago v. Tills (In re Tills), 419
3 B.R. 444, 451 (Bankr. S.D. Cal. 2009); Hodges v. Buzzeo (In re Buzzeo),
4 365 B.R. 578, 582 (Bankr. W.D. Pa. 2007). While Mr. Cancelosi does not
5 contest the finding of fact in the Award that Mr. Cancelosi and the other
6 Respondents violated Oregon's securities laws by selling unregistered
7 securities in nonexempt transactions, Mr. Cancelosi argues that I clearly
8 erred in my interpretation and application of the Confirming Judgment.

9 3) The Confirming Judgment is a General Judgment Not Limited by its Terms
10 to Breach of Contract

11 Mr. Cancelosi argues both frequently and fervently that the
12 Judgment is in error because the underlying Confirming Judgment is "only
13 for breach of contract." See Motion, Adversary Proceeding Docket No. 52
14 at pp. 3, 4, 5 and 7. The fundamental problem with that argument is it
15 is inconsistent with the terms of the Confirming Judgment.

16 The title of the Confirming Judgment is "General Judgment and
17 Money Award." The Confirming Judgment notes that the Award had been
18 presented to the Circuit Court for confirmation. The Confirming Judgment
19 further notes that the Wilkes did not tender the securities that were the
20 subject of the Arbitration to the Respondents. The Confirming Judgment
21 then recognizes that the Wilkes "should have and recover judgment
22 against" Mr. Cancelosi, and it awards a judgment in the amount of
23 \$160,000 to the Wilkes against Mr. Cancelosi with interest at 9% from the
24 date of entry of the Confirming Judgment. The Confirming Judgment is a
25 general money judgment that never mentions "breach of contract" at any
26 point.

1 It is Mr. Cancelosi rather than this court who then "goes
2 behind" the Confirming Judgment to the findings of the arbitrator in the
3 Award to link the \$160,000 damages amount to the arbitrator's breach of
4 contract findings.³ However, in doing so, Mr. Cancelosi runs straight
5 into the arbitrator's further finding that "the alternate theory of
6 liability results in damages that are duplicative of the damages
7 resulting from the breach of the securities law." See Exhibit A at p. 5.
8 None of the arbitrator's findings in the Award are repudiated in the
9 Confirming Judgment.

10 Section 523(a)(19) provides a claim for relief under federal,
11 not state, law to except a debt from a debtor's discharge. Analyzing the
12 claim as such is appropriate since Mr. Cancelosi seeks to discharge the
13 Confirming Judgment debt as a breach of contract claim, a remedy that
14 would not be available to him under Oregon state law.

15 Under § 101(12), the term "debt" is defined as "liability on a
16 claim." The debt in this case arises from the Confirming Judgment
17 awarding a general judgment to the Wilkes of \$160,000 plus 9% interest
18 against Mr. Cancelosi. The Confirming Judgment does not state that the

19
20 ³ Mr. Cancelosi also argues that the Wilkes recognized that the
21 Confirming Judgment "was found . . . in Breach of Contract," citing the
22 Wilkes' Motion to Allow Exception from Discharge, Adversary Proceeding
23 Docket No. 38 at p. 1, ¶ 2. I note that the Wilkes have appeared pro se
24 throughout the Adversary Proceeding, and I interpret their statements in
25 pleadings as those of laymen. In the Ninth Circuit, pleadings from pro
26 se parties are to be construed liberally. See Beaty v. Schiro, 554 F.3d
780, 783 (9th Cir. 2004). I further note that in the pleadings included
in Adversary Proceeding Docket No. 38, the Wilkes clearly argue that any
claim for breach of contract is tied to their claims with respect to
sales of securities. Mr. Cancelosi does not argue that the Wilkes are
estopped from pursuing their claim under § 523(a)(19) by any admissions
in their pleadings.

1 money judgment award is based solely on a breach of contract claim. In
2 light of the arbitrator's finding that the Wilkes' breach of guarantee
3 damages were duplicative of a portion of the Wilkes' breach of securities
4 law damages, the Circuit Court's failure to include such a limitation in
5 the Confirming Judgment is appropriate.

6 Particularly relevant to the circumstances I face in this case
7 is the decision in Voss v. Pujdak (In re Pujdak), ___ B.R. ___, 2011 WL
8 2619506 (Bankr. D.S.C. June 30, 2011). In Pujdak, the Greenville County,
9 South Carolina Court of Common Pleas ("Court") entered a judgment in
10 favor of the plaintiff after imposing terminating sanctions for discovery
11 abuses on the defendants. Id. at *1. In its findings, the Court found
12 that the defendants had caused damages to the plaintiff in the amount of
13 \$41,541.96 plus \$1,288.72 (a total of \$42,830.68) based on, among other
14 things, the defendants' violations of the SC Securities Act, SC Code 35-
15 1-509, and the SC Unfair Trade Practices Act ("SCUTPA"). Id. at *2.

16 However, in terms of recovery, Plaintiff can only
17 recover under one theory of damages. Plaintiff elects
18 recovery under SCUTPA. Under the SCUTPA claim,
19 specifically SC Code 39-5-140, Plaintiff is entitled
20 to a trebling of damages, and costs and attorney fees.
21 Damages are awarded in the amount of \$128,492.04.

22 Id.

23 The Pujdaks subsequently filed for relief under chapter 7, and
24 the plaintiff filed an adversary proceeding against them under
25 §§ 523(a)(2)(A) and (a)(19). Id. Ultimately, the bankruptcy court
26 excepted the Pujdaks' debt to the plaintiff from discharge under
§ 523(a)(19) to the extent of \$42,830.68 (including the amount of damages
not trebled) in spite of the plaintiff's election of her remedy under

1 SCUTPA in the Court's judgment.

2 Based on the foregoing analysis, I conclude that I committed no
3 "clear error" in excepting the Wilkes' claim in the amount of \$160,000
4 plus 9% interest from Mr. Cancelosi's discharge pursuant to § 523(a)(19),
5 based on the Award and the Confirming Judgment.

6 4) Appropriateness of the Offset Provision

7 If any clarification on the point needs to be made, the
8 Judgment excepts only the \$160,000 plus 9% interest provided for in the
9 Confirming Judgment from Mr. Cancelosi's discharge under § 523(a)(19).
10 Mr. Cancelosi complains that I "alluded to" the damages of \$767,353.42
11 the arbitrator found for securities law violations in the Judgment. My
12 reference was for one purpose only: The Wilkes allegedly lost
13 \$767,353.42, based on the securities law violations of the Arbitration
14 Respondents, as found by the arbitrator in the Award, subject to
15 potential recoveries from disposition of the subject securities and
16 recoveries from the various Respondents. I included the offset provision
17 in the Judgment so that Mr. Cancelosi would be entitled explicitly to a
18 dollar for dollar offset against the \$160,000 plus 9% interest
19 nondischargeable debt to the extent that the Wilkes' recoveries from the
20 disposition of subject securities and recoveries from Respondents other
21 than Mr. Cancelosi reduce their overall losses from their securities
22 transactions with the Respondents to less than the \$160,000 plus 9%
23 interest judgment debt excepted from Mr. Cancelosi's discharge.⁴ If I
24

25 ⁴ The record reflects that Acuity Lending is in receivership, and
26 the Wilkes may recover something when net receivership proceeds from
(continued...)

1 erred in giving that equitable potential benefit to Mr. Cancelosi in the
2 Judgment, I expect that I will be so instructed following an appeal.

3 As for Mr. Cancelosi's argument that an offset should be
4 provided for any recovery by the Wilkes on Loan ALC061060 specifically,
5 as Mr. Cancelosi's guarantee against loss only applied with regard to
6 Loan ALC061060, Mr. Cancelosi has never submitted documentation for Loan
7 ALC061060 or his guarantee for admission as evidence in this Adversary
8 Proceeding. Consequently, I have no basis in the record to evaluate his
9 suggestion for offset and decline to do so now.

10
11 Conclusion

12 Based on the foregoing review and analysis of the record and
13 relevant authorities, I will deny Mr. Cancelosi's Motion to the extent he
14 seeks alteration or amendment of the Judgment. A separate order will be
15 entered contemporaneously deciding all open issues raised in the Motion.

16 ###

17 cc: Richard J. Wilkes
18 Ann K. Chapman

19
20
21
22
23
24
25
26

⁴(...continued)
liquidation are distributed.