



1 present case. For the reasons set forth below, Plaintiff's  
2 motion is granted in part. Debtors' request for sanctions is  
3 denied.

4 This Court has subject matter jurisdiction over the  
5 proceeding pursuant to 28 U.S.C. § 1334 and General Order  
6 No. 312-D of the United States District Court for the Southern  
7 District of California. This is a core proceeding under  
8 28 U.S.C. § 157(b)(2)(A) & (I).

9 **FACTS**

10 This is Debtors' second bankruptcy case. Debtors' first  
11 case was filed as a chapter 11 on February 25, 1997, Case No.  
12 97-2797 (Prior Case). In the Prior Case Plaintiff filed its  
13 "Complaint to Determine Dischargeability of Debt," commencing  
14 Adversary Proceeding No. 97-90390. A few years later, the  
15 parties entered into a settlement agreement (Settlement  
16 Agreement) which the Court approved on June 21, 2001 via the  
17 "Stipulation of Parties Re: Settlement of Complaint to Determine  
18 Nondischargeability and Order Thereon." (Stipulation Order).

19 The Settlement Agreement provides in relevant part:

20 -- that one of the disputes resolved thereby is Adv. Proc.  
21 No. 97-90390 (¶ I.A.);

22 - that the Debtors (with their wholly owned salons Bravo  
23 Hair Design, Inc., DFW Hair LLC, and Salon Group, Inc.) will pay  
24 to Plaintiff \$360,000.00, in monthly installments of \$7,500.00  
25 beginning May 10, 2001 (¶ II.1.);

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1 - that the Debtors will pay an additional \$55,000.00 prior  
2 to May 10, 2005 (¶ II.1.); and

3 - that in the event of default the entire amount would  
4 become due and payable. ¶ II.3.

5 The Settlement Agreement also provided that the \$360,000.00  
6 debt would be nondischargeable:

7 Non-dischargeability of Obligation. The monthly  
8 installment payments totaling \$360,000 of Alfredo  
9 Dinunzio and Rosanna Dinunzio provided in this  
10 agreement have not and will not be discharged by any  
11 bankruptcy petition or proceeding of Alfredo Dinunzio  
12 and Rosanna Dinunzio, or Bravo Hair Design, Inc.,  
13 including the proceedings pending in the United States  
14 Bankruptcy Court for the Southern District of  
15 California known as Case No. 97-02797 B11 (Dinunzio)  
16 and 97-02795 (Bravo). In furtherance of this  
17 agreement, Alfredo Dinunzio and Rosanna Dinunzio and  
18 Bravo Hair Design, Inc. will sign and submit to the  
19 court a stipulation regarding the non-dischargeability  
20 of their obligations as provided in this agreement and  
21 cooperate through their counsel to obtain an order from  
22 the United States Bankruptcy Court that the obligations  
23 provided by this agreement have not and will not be  
24 discharged pursuant to bankruptcy laws of the United  
25 States. If Bankruptcy Court approval of this agreement  
26 is required by law, or any party to this agreement  
requests Bankruptcy Court approval, the parties will  
also seek such approval and cooperate with one another  
in doing so.

19 Settlement Agreement ¶ II.5.

20 Debtors made one or two payments under the Settlement  
21 Agreement (\$10,000.00) but quickly defaulted.

22 On September 29, 2004, Plaintiff commenced an action in  
23 San Diego Superior Court seeking judgment on the Settlement  
24 Agreement. On May 27, 2005, judgment was entered in favor of  
25 Plaintiff in the amount of \$525,403.56, representing the amounts  
26 owing under the Settlement Agreement plus pre-judgment interest

1 as of May 27, 2005. (State Court Judgment). However, earlier on  
2 that same day the Debtors had filed the petition commencing the  
3 present bankruptcy case.

4 On August 15, 2005, Plaintiff filed a new complaint to have  
5 the debts determined excepted from discharge.

6 Plaintiff brought this motion for summary judgment seeking a  
7 ruling that the debt, as liquidated in the State Court Judgment,  
8 is nondischargeable under Bankruptcy Code § 523(a)(10) because it  
9 was determined to be non-dischargeable in the Prior Case. In  
10 their opposition Debtors contend that there was no determination  
11 that the debt was nondischargeable in the Prior Case. Debtors  
12 also seek sanctions against Plaintiff for its violation of the  
13 automatic stay in obtaining the State Court Judgment after the  
14 petition was filed and its reliance thereon in connection with  
15 this motion.

16 At the hearing the Court referred the parties to In re  
17 Moncur, 328 B.R. 183 (9<sup>th</sup> Cir. BAP 2005), a case which neither  
18 had cited. The Court heard argument and then gave the parties an  
19 opportunity to file supplemental brief on the applicability of  
20 the Moncur case. Plaintiff filed a supplemental brief, and the  
21 Court thereafter took the matter under submission.

## 22 23 **DISCUSSION**

### 24 **Nondischargeability of the Debt**

25 Plaintiff's motion has a couple of problems. First,  
26 Plaintiff cites to and relies upon § 523(a)(10) which provides:

1 (a) A discharge under section 727, 1141, 1228(a),  
2 1228(b), or 1328(b) of this title does not discharge an  
3 individual debtor from any debt-  
4 (10) that was or could have been listed or scheduled by  
5 the debtor in a prior case concerning the debtor under  
6 this title or under the Bankruptcy Act in which the  
7 debtor waived discharge, or was denied a discharge  
8 under section 727(a)(2), (3), (4), (5), (6), or (7) of  
9 this title, or under section 14c(1), (2), (3), (4),  
10 (6), or (7) of such Act . . . .

11 The problem is that there is neither evidence nor even argument  
12 that the Debtors "waived discharge, or [were] denied a discharge  
13 under section 727" in the Prior Case. The fact is that an order  
14 granting the Debtors' discharge in the Prior Case was entered on  
15 December 4, 1998. Section 523(a)(10) simply does not apply to  
16 the facts of this case. See In re Garcia, 313 B.R. 307, 309 n.6  
17 (9<sup>th</sup> Cir. BAP 2004) ("Section 523(a)(10) is inapplicable here, as  
18 Debtors did receive their discharge in the 1993 California  
19 bankruptcy.")

20 However, while § 523(a)(10) does not afford Plaintiff the  
21 relief sought, § 523(b) does. Moncur, 328 B.R. at 186. In  
22 Moncur the debtors had stipulated to a money judgment excepted  
23 from discharge in a chapter 12 case in favor of creditor  
24 Agricredit. Debtors filed a subsequent chapter 7 case and  
25 obtained a discharge. Agricredit did not file an adversary  
26 proceeding in the second case. Nevertheless, the Panel upheld  
the bankruptcy court's ruling that the debt remained  
nondischargeable in the second and any other subsequent case:

Section 523(b) indirectly acknowledges that, except for  
the several exceptions stated therein, the general rule  
is that if a particular debt is determined to be

1 nondischargeable in a valid and final judgment by a  
2 court with jurisdiction and from which there was an  
3 opportunity to appeal, then the debt is always  
4 nondischargeable on the basis determined in the  
5 judgment. Paine, 283 B.R. at 37-38. In other words:  
6 once nondischargeable, always nondischargeable.

7 In re Moncur, 328 B.R. at 186. As stated above, in the Prior  
8 Case the Court did order that the specific debt to Plaintiff was  
9 nondischargeable. The Settlement Agreement resolved Plaintiff's  
10 nondischargeability adversary proceeding. The Settlement  
11 Agreement specifically provided that the payments totaling  
12 \$360,000 called for in the Settlement Agreement "have not and  
13 will not be discharged by any bankruptcy petition or proceeding  
14 of [Debtors] including the [prior case] . . ."

15 Debtors admit entering into the Settlement Agreement, but  
16 contend that there was no adjudication of nondischargeability in  
17 the Prior Case because the Stipulation Order "does not provide  
18 for nondischargeability." The Court disagrees. The Settlement  
19 Agreement clearly provided that the \$360,000 debt would be  
20 nondischargeable. The Stipulation Order provided that the "terms  
21 and conditions of the parties' settlement are set forth in detail  
22 in the fully executed Settlement Agreement and Release of All  
23 Claims attached hereto . . .". Debtors have provided no  
24 authority for the implicit proposition that a specifically worded  
25 judgment is necessary. The cases the Court has reviewed indicate  
26 that no special wording is required. In Garcia the Panel held  
that a default judgment in a nondischargeability action was  
entitled to preclusive effect even though it did not specifically

1 state that the claim was nondischargeable. Id. at 312-13. There  
2 is also no requirement that the issue have been litigated in the  
3 Prior Case. As noted above, as in this case, the order in Moncur  
4 was based upon a stipulation. The Court finds that there was  
5 clearly a finding of nondischargeability in the Prior Case.

6 Accordingly, under § 523(b) Plaintiff is entitled to a  
7 judgment that some portion of the debt is nondischargeable in  
8 this case.

9 The foregoing brings us to the second problem with  
10 Plaintiff's motion. Plaintiff seeks a judgment that "the debt  
11 owed by [Debtors] to [Plaintiff] in the sum of \$523,403.56 is  
12 non-dischargeable." Motion at 4:20-21. The amount of the debt  
13 claimed by Plaintiff is based on the State Court Judgment.  
14 However, as noted above, the State Court Judgment was entered  
15 after the petition was filed. It is thus void ab initio. In re  
16 Schwartz, 954 F.2d 569, 571 (9<sup>th</sup> Cir. 1992). The amount of the  
17 debt based upon the Settlement Agreement and order thereon  
18 remains to be liquidated. The Court also notes that based  
19 upon the Settlement Agreement, not all of the claim appears to  
20 be nondischargeable. The Settlement Agreement provides only  
21 that the "[t]he monthly installment payments totaling \$360,000.00  
22 of Alfredo Dinunzio and Rosanna Dinunzio provided in this  
23 agreement have not and will not be discharged . . ." The  
24 nondischargeability order does not appear to reach the additional  
25 \$55,000.00 to be paid by the Debtors under the Settlement  
26 Agreement. It is not clear from the record whether the amount of

1 the State Court Judgment is based on only the \$360,000.00 or also  
2 includes the \$55,000.00. This, too, will have to be resolved.

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4 **Sanctions for State Court Judgment**

5 This leaves us with Debtors' request for sanctions for  
6 Plaintiff's violation of the automatic stay in obtaining the  
7 State Court Judgment under Bankruptcy Code § 362(k) (formerly  
8 (h)) and for relying on the State Court Judgment in the  
9 declaration of Walter Chung in support of the motion for  
10 summary judgment under Rule 56(g) of the Federal Rules of Civil  
11 Procedure (made applicable to this adversary proceeding by  
12 Fed.R.Bankr.Proc. 7056.)

13 As the Court explained at the hearing, sanctions under  
14 § 362(k) must be sought in a separately noticed motion. See  
15 Fed.R.Bankr.Proc. 9014 and 9020. Counsel sought to avoid the  
16 requirement of a separately noticed motion by arguing that  
17 authority for sanctions could also be found in Rule 56(g) which  
18 provides:

19 (g) Affidavits Made in Bad Faith. Should it appear to  
20 the satisfaction of the court at any time that any of  
21 the affidavits presented pursuant to this rule are  
22 presented in bad faith or solely for the purpose of  
23 delay, the court shall forthwith order the party  
24 employing them to pay to the other party the amount of  
the reasonable expenses which the filing of the  
affidavits caused the other party to incur, including  
reasonable attorney's fees, and any offending party or  
attorney may be adjudged guilty of contempt.

25 FRCP Rule 56. The first question under this Rule is whether the  
26 Court finds that Plaintiff submitted an affidavit in bad faith.

1 The only affidavit submitted by Plaintiff in support of its  
2 motion for summary judgment is the declaration of Walter Chung.  
3 The declaration does attach the State Court Judgment and provides  
4 "[s]aid Judgment was filed May 27, 2005. There having been no  
5 appeal taken to this order, it is now a final order under  
6 California law." Chung Dec. at ¶ 12. This is not only an  
7 inaccurate statement of the facts and the law -- as noted above  
8 the State Court Judgment was void ab initio -- but it is also a  
9 statement Plaintiff and Plaintiff's counsel knew or should have  
10 known to be inaccurate. Nearly a year earlier, on June 7, 2005,  
11 counsel for the Debtors sent a letter to Mr. Chung explaining  
12 that the State Court Judgment had been obtained after the  
13 petition was filed, that it was void under federal bankruptcy  
14 law, and that it was incumbent upon him to take steps to cancel  
15 the judgment. Those were all accurate statements of the law and  
16 counsel should have, at the very least, ceased to rely on the  
17 State Court Judgment. Thus, the Court does find that to the  
18 extent the Chung declaration relies on the State Court Judgment  
19 it was filed in bad faith. The next question is whether and to  
20 what extent an award of sanctions is appropriate.

21 An award of damages under Rule 56(g) is limited by its terms  
22 to "the amount of the reasonable expenses which the filing of the  
23 affidavits caused the other party to incur . . . ." Counsel for  
24 the Debtors provided no evidence of any costs incurred due to  
25 Plaintiff's reliance on the State Court Judgment in connection  
26 with the motion for summary judgment. Debtors simply seek

1 "attorney's fees for opposing this Motion, plus punitive damages  
2 . . ." Clearly punitive damages are not available under Rule  
3 56(g). The Court has reviewed the opposition and determines  
4 that any fees incurred as a result of Plaintiff's reliance on the  
5 void State Court Judgment in connection with the motion for  
6 summary judgment are negligible. The opposition does include a  
7 discussion of the voidness of the judgment and the availability  
8 of sanctions under § 362(h) and 56(g). However, counsel for the  
9 Debtors had done that research and drafted that identical  
10 language before the Chung declaration was even filed. Compare  
11 Cawdry Letter dated June 7, 2005 with the Opposition 5:15-6:26.  
12 All that was required of counsel for the Debtors was a simple cut  
13 and paste.

14 Accordingly, while the Court finds that the Chung  
15 declaration was filed in bad faith, no actual damages, as  
16 required under Rule 56(g), resulted.

17 **CONCLUSION**

18 Plaintiff's motion for summary judgment is granted to this  
19 extent - that portion of its claim which was stipulated to being  
20 nondischargeable under the Settlement Agreement remains  
21 nondischargeable in this case.

22 Debtors' motion for sanctions under § 362(k) is denied as it  
23 must be brought by separately noticed motion. Debtors' motion  
24 for sanctions under Rule 56(g) is denied as the Court finds no  
25 evidence that any violation thereof resulted in any actual  
26 damages.

1           The amount of Plaintiffs' nondischargeable claim remains to  
2 be resolved. The parties will be notified of a status  
3 conference.

4           IT IS SO ORDERED.

5           DATED:   JUN 30 2006  



PETER W. BOWIE, Chief Judge  
United States Bankruptcy Court

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