WRITTEN DECISION – FOR PUBLICATION

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CLERK, U.S. BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY 104 DEPUTY

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF CALIFORNIA

In re:	Bankruptcy Case No. 20-04322-CL7
PHILIP EDWARD BOHRER,	Adversary Proceeding No. 20-90118-CL
Debtor,	Chapter 7
LISA M. CARROLL,	MEMORANDUM DECISION AND ORDER OF NONDISCHARGEABILITY
Plaintiff,	
v.	
PHILIP EDWARD BOHRER,	Judge: Christopher B. Latham
Defendant.	

MEMORANDUM DECISION AND ORDER OF NONDISCHARGEABILITY

Before the court are Plaintiff Lisa M. Carroll's and Defendant Phillip E. Bohrer's cross-motions for judgment on the pleadings under Federal Rule of Civil Procedure 12(c).[1] Plaintiff and Defendant were formerly married and had one child. In 2007, they filed for divorce. From 2007 through 2018, those proceedings entailed numerous appearances in the family court to modify the parties' child custody and visitation rights. During the ongoing litigation, Defendant brought a separate civil action predicated on alleged negative or untrue statements Plaintiff made about his fitness to be a parent to the family court, their child, law enforcement, and other third parties. Ultimately, that action was dismissed and Plaintiff was awarded her fees and costs incurred to defend the suit – the debt at issue here.

In August 2020, Defendant filed a voluntary Chapter 7 petition. Shortly after, Plaintiff brought this adversary proceeding seeking a nondischargeability determination under § 523(a)(6) or (a)(15) and declaratory relief. Defendant answered and now moves for judgment on the pleadings as to all causes. Plaintiff opposes and cross-moves for judgment on the pleadings as to her § 523(a)(15) action. Defendant opposes that. Based on the following, the court will **grant** Plaintiff's motion. It will likewise **deny** Defendant's motion as to the § 523(a)(15) cause and **grant** it as to the § 523(a)(6) cause and prayer for declaratory relief.

I. JURISDICTION AND VENUE

The court has jurisdiction over this adversary proceeding under 28 U.S.C. §§ 1334(b) and 157(b)(2)(A) and (I). Venue is proper under 28 U.S.C. § 1409(a).

[1] Unless otherwise noted, all statutory citations hereafter are to the Bankruptcy Code, Title 11 of the United States Code. All "Rule" references are to the Federal Rules of Civil Procedure.

II. BACKGROUND[2]

A. Parties' History and State Court Litigation

The record before the court is sparse as to the parties' history, although it is apparently lengthy and litigious. Plaintiff and Defendant were once married. Their union produced one child and ended in 2007. That year, a judgment of dissolution was entered in the family division of the San Diego Superior Court establishing the parties' custody and visitation rights with the minor child. From 2008 through 2018, those rights were continuously modified by court order and stipulation. *See* Case No. DN 143198 (the "Family Law Proceedings").

In 2016 – amidst the ongoing Family Law Proceedings – Defendant brought a parallel civil action against Plaintiff in the civil division of the Superior Court. There, he alleged that she made negative and untrue statements about his fitness to be a parent to the family court, their child, law enforcement, and other third parties. Based on those statements, he sued her for: (1) intentional and negligent infliction of emotional distress; (2) tortious interference with custodial relationship; (3) intentional interference with custodial relationship; and (4) violation of the fundamental right to parent under the state and federal constitutions. *See* Case No. 37-2016-00006783-CU-PO-NC (the "Defamation Action").

In response, Plaintiff filed a demurrer, motions for sanctions, and a special motion to strike the complaint under California's Anti-Strategic Lawsuit Against Public Participation ("anti-SLAPP") statute.[3] In each, she asserted that Defendant's lawsuit amounted to an unsubstantiated attempt to retaliate against her for – and to gain advantage in – the ever-ongoing custody and visitation battle in the Family Law Proceedings. The Superior Court denied each motion. Plaintiff then appealed the denial of her anti-SLAPP motion. The California Court of Appeal reversed and remanded, directing the Superior Court to enter an order granting the motion and awarding Plaintiff her costs on appeal. *See* Case No. D070767 (the "Appeal").

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[2] The following recitation is based on the allegations in Plaintiff's complaint that were admitted in Defendant's answer (*See* ECF Nos. 1 & 5). As a result, none of the facts established below are disputed.

[3] California's anti-SLAPP provision is codified at CAL. CIV. PROC. CODE § 425.16.

On remand, the Superior Court granted Plaintiff's anti-SLAPP motion, struck and dismissed Defendant's complaint, and awarded Plaintiff $44,189.26 in attorney's fees and costs.[4] For reasons unclear, some nine months later Plaintiff was awarded an additional $5,000 in attorney's fees in the Family Law Proceedings. In total, she is owed $49,189.26.

B. Defendant's Bankruptcy and Adversary Proceeding

On August 28, 2020, Defendant filed a voluntary Chapter 7 petition (Bankr. ECF No. 1). Shortly after, Plaintiff brought the present adversary seeking a nondischargeability determination as to the two fee awards under 11 U.S.C. § 523(a)(6) and (15) and declaratory relief (ECF No. 1). Defendant answered (ECF No. 5) and now moves for judgment on the pleadings as to all causes under Rule 12(c) (ECF No. 7). Plaintiff opposes and cross-moves for judgment on the pleadings as to the § 523(a)(15) cause only (ECF No. 13). Defendant opposes that (ECF No. 17).

III. LEGAL STANDARDS

Under Rule 12(c), made applicable here through Federal Rule of Bankruptcy Procedure 7012, "[a]fter the pleadings are closed—but not early enough to delay trial—a party may move for judgment on the pleadings." FED. R. CIV. P. 12(c).

On a plaintiff's motion, "[j]udgment on the pleadings is proper when the moving party clearly establishes on the face of the pleadings that no material issue of fact remains to be resolved and that it is entitled to judgment as a matter of law." *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1550 (9th Cir. 1990). It is the moving party's burden to demonstrate that both of these requirements are met. *See Doleman v. Meiji Mut. Life Ins. Co.*, 727 F.2d 1480, 1482 (9th Cir. 1984). And a plaintiff is not entitled to judgment on the pleadings if the answer raises issues of fact or an affirmative defense, which, if proved, would defeat recovery. *See Gen. Conference Corp. of Seventh-Day Adventists v. Seventh-Day Adventist Congregational Church*, 887 F.2d 228, 230 (9th Cir. 1989) (citing 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1368 (1969)). However, "judgment on the pleadings may nonetheless be granted when a defendant's affirmative defenses do not

[4] The award comprises $43,447.50 in attorney's fees and $741.76 in costs.

contain sufficient factual matter to state a defense that is plausible on its face." *Travelers Commercial Ins. Co. v. Ancona*, No. 14-cv-04379-RS, 2015 WL 13376709, at *3 (N.D. Cal. Apr. 6, 2015) (quotation omitted).

A defendant's motion under Rule 12(c) is "'functionally identical' to Rule 12(b)(6)." *Cafasso v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1055 n.4 (9th Cir. 2011) (quoting *Dworkin v. Hustler Magazine, Inc.*, 867 F.2d 1188, 1192 (9th Cir. 1989)). "As under a Rule 12(b)(6) motion, a Rule 12(c) motion for judgment on the pleadings is properly granted only when, 'taking all the allegations in the pleadings as true, the moving party is entitled to judgment as a matter of law.'" *Herrera v. Zumiez, Inc.*, 953 F.3d 1063, 1068 (9th Cir. 2020) (quoting *Heliotrope Gen., Inc. v. Ford Motor Co.*, 189 F.3d 971, 979 (9th Cir. 1999)). To survive, the complaint must "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (establishing the standard under Rule 12(b)(6))); *see also Cafasso*, 637 F.3d at 1055 n.4 (the standards for Rule 12(b)(6) and 12(c) are functionally identical).

> A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief.

Id. (citing *Twombly*, 550 U.S. at 556–57).

In reviewing a Rule 12(c) motion, the court may consider the parties' pleadings, any documents attached to those pleadings or incorporated by reference, and any documents properly subject to judicial notice. *See Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 999 (9th Cir. 2018); *see also Harris v. Cty. of Orange*, 682 F.3d 1126, 1132 (9th Cir. 2012); *Heliotrope Gen., Inc.*, 189 F.3d at 981 n.18.

> For purposes of a motion for judgment on the pleadings, all allegations of fact of the opposing party are accepted as true. The allegations of the moving party which have been denied are taken as false. Only if it appears that, on the facts so admitted, the moving party is clearly entitled to prevail can the motion be granted.

Austad v. United States, 386 F.2d 147, 149 (9th Cir. 1967).

IV. LEGAL ANALYSIS AND DISCUSSION

A. Requests for Judicial Notice

Both parties ask for judicial notice of certain documents in considering the present cross-motions (ECF Nos. 8 & 13). A court may take judicial notice of a fact that: "(1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." FED. R. EVID. 201(b). Judicial notice is appropriate in "matters of public record" not disputed by the opposing party. *Khoja*, 899 F.3d at 999. Relevant here, the court may take notice of orders and filings in other proceedings. *See United States v. Black*, 482 F.3d 1035, 1041 (9th Cir. 2007) ("[A court] 'may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue.'") (quoting *United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992)).

Defendant requests judicial notice of four documents filed in the Defamation Action: (1) Plaintiff's motion for sanctions under California Civil Procedure Code ("CCP") § 128.5; (2) Plaintiff's motion for sanctions under CCP § 128.7; (3) the Superior Court's minute order after hearing dated May 7, 2016; and (4) the Superior Court's minute order and statement of decision denying Plaintiff's demurrer, motions for sanctions, and anti-SLAPP motion (ECF No. 8). These all qualify under Federal Rule of Evidence 201(b) and Ninth Circuit precedent. *See* FED. R. EVID. 201(b); *Black*, 482 F.3d at 1041. Seeing no opposition, and good cause appearing, the court will grant Defendant's request and take judicial notice of those documents.

Plaintiff in turn asks for notice of five documents: (1) the Appeal decision; (2) the Superior Court's order on remand awarding her attorney's fees and costs in the Defamation Action; (3) the December 28, 2018 order awarding her fees in the Family Law Proceedings; (4) her complaint in the present action; and (5) Defendant's answer in the present action (ECF No. 13). As with Defendant's request, these likewise qualify under Federal Rule of Evidence 201(b) and Ninth Circuit precedent. *See* FED. R. EVID. 201(b); *Black*, 482 F.3d at 1041. Again, seeing no opposition, and good cause appearing, the court will grant Plaintiff's request and take judicial notice of those documents.

In granting each request the court is mindful of Rule 12(d), which provides that if "matters outside the pleadings are . . . not excluded by the court, the motion must be treated as one for summary judgment under Rule 56." FED. R. CIV. P. 12(d). However, the Ninth Circuit recognizes several exceptions to this mandate, including: (1) attachments to a complaint, *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001); (2) judicially noticed documents, *Khoja*, 899 F.3d at 988; and (3) documents incorporated by reference, *Coto Settlement v. Eisenberg*, 593 F.3d 1031, 1038 (9th Cir. 2010). Because the court takes judicial notice of the documents set forth above, they are properly considered here. *See Khoja*, 899 F.3d at 988. It consequently declines to convert the present cross-motions to ones for summary judgment and analyzes each under the applicable Rule 12(c) standard. Now to Plaintiff's motion.

B. Plaintiff's Motion for Judgment on the Pleadings

Plaintiff moves for judgment on the pleadings solely on her § 523(a)(15) cause (ECF No. 13). She asserts that there are no disputed issues of material fact and that both state court fee awards are nondischargeable as a matter of law (ECF No. 13). Defendant apparently concedes that the $5,000 award falls within § 523(a)(15)'s ambit and is nondischargeable (*See* ECF No. 17). But he opposes Plaintiff's motion as to the $44,189.26 award entered in the Defamation Action, arguing that it was not incurred in connection with the parties' divorce as § 523(a)(15) requires. *Id.* To prevail, Plaintiff must show that: (1) no material issue of fact remains to be resolved; and (2) she is entitled to judgment as a matter of law. *See Hal Roach Studios, Inc.*, 896 F.2d at 1550. The court addresses each requirement in turn.

1. No Material Issue of Fact Remains to Be Resolved

Neither party contends that there is a disputed issue of fact that would preclude judgment on the pleadings here (*See* ECF Nos. 13, 17 & 20). Indeed, Defendant readily concedes that the only remaining issues are legal questions ripe for decision at this stage (ECF No. 17, p. 6). The court agrees. The first requirement under Rule 12(c) is therefore satisfied.

2. Plaintiff Is Entitled to Judgment as a Matter of Law

Section 523(a)(15) excepts from discharge any debt:

> [T]o a spouse, former spouse, or child of the debtor and not of the kind described in [§ 523(a)(5)] that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record,

> or a determination made in accordance with State or territorial law by a governmental unit.

11 U.S.C. § 523(a)(15).

To prevail under § 523(a)(15) a plaintiff must prove: "(1) that the debt in question is owed to a former spouse of the debtor; (2) that the debt is not a support obligation within the meaning of § 523(a)(5); and (3) that the debt was incurred in the course of a divorce or separation or in connection with a separation agreement, divorce decree, or other order of a court of record." *In re Adam*, BAP No. CC-14-1416-PaKiTa, 2015 WL 1530086, at *4 (B.A.P. 9th Cir. Apr. 6, 2015).

The parties agree that the first two elements are satisfied here (*See* ECF Nos. 13, 16, 17 & 20). The court thus addresses only whether the fee award was incurred "in the course of a divorce or separation or in connection with a separation agreement, divorce decree, or other order of a court of record." Plaintiff asserts it was (ECF No. 13). Defendant contends it was not (ECF No. 17).

The court notes that neither the Ninth Circuit nor its Bankruptcy Appellate Panel has decided the precise issue at hand: whether a fee award entered in a civil action parallel to and intertwined with ongoing dissolution proceedings is within the scope of § 523(a)(15)'s phrases "in the course of a divorce or separation" or "in connection with [an] . . . other order of a court of record." As well, there is a dearth of caselaw interpreting the provision both in and outside the Ninth Circuit. Neither the parties nor the court could locate a case – binding or persuasive – directly on point. For that reason, the court begins by looking at the statute's plain meaning. *See Alaska, Dep't of Envtl. Conservation v. U.S. E.P.A.*, 298 F.3d 814, 818 (9th Cir. 2002); *see also Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570 (1982) ("Our task is to give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive.").

"When a statute does not define a term, we typically 'give the phrase its ordinary meaning.'" *FCC v. AT&T Inc.*, 562 U.S. 397, 403 (2011) (quoting *Johnson v. United States*, 559 U.S. 133, 138 (2010)); *see also Animal Legal Def. Fund v. U.S. Dep't. of Agric.*, 933 F.3d 1088, 1093 (9th Cir. 2019). "To determine the ordinary meaning of a word, 'consulting common dictionary definitions is the usual course.'" *Animal Legal Def. Fund*, 933 F.3d at 1093 (quoting *Cal. All. of Child & Family Servs. v. Allenby*, 589 F.3d 1017, 1021 (9th Cir. 2009)). "'If the language has a plain meaning or is

unambiguous, the statutory interpretation inquiry ends there.'" *Id.* (quoting *CVS Health Corp. v. Vividus, LLC*, 878 F.3d 703, 706 (9th Cir. 2017)). It is presumed that the legislature "says in a statute what it means and means in a statute what it says." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) (citations omitted).

Section 523(a)(15)'s third prong is written in the disjunctive and encompasses two types of debt to a former spouse; specifically, those incurred: (1) *in the course of* a divorce or separation; or (2) *in connection with* a separation agreement, divorce decree, or other order of a court of record." *See* 11 U.S.C. § 523(a)(15) (emphasis supplied). The Bankruptcy Code does not define either "in the course of" or "in connection with." The court therefore looks to general and legal dictionaries to determine each phrase's ordinary meaning. *See Animal Legal Def. Fund*, 933 F.3d at 1093. As to the former, it finds the word "course" means "progression through a development or period or a series of acts or events." *Course*, Webster's Collegiate Dictionary (11th ed. 2012); *see also Course*, The American Heritage Dictionary of the English Language (5th ed. 2011) (defining course as "[a] systematic or orderly succession; a sequence"). The phrase "in the course of a divorce or separation" therefore means during the progression or period of a divorce or separation. It operates as a temporal limitation on the dischargeability of debts owed to a former spouse, requiring the debt be incurred during the time when the divorce or separation is ongoing.

As to the latter, it finds the word "connection" means to have a "causal or logical relation or sequence." *Connection*, Webster's Collegiate Dictionary (11th ed. 2012); *see also Connection*, Black's Law Dictionary (6th ed. 1990) (defining connection as "[t]he state of being connected or joined; union by junction, by an intervening substance or medium, by dependence or relation, or by order in a series."); *Connection*, The American Heritage Dictionary of the English Language (5th ed. 2011) (defining connection as "[o]ne that connects, a link; [a]n association or relationship; [t]he logical or intelligible ordering of words; [r]eference or relation to something else, context."). The phrase "in connection with a separation agreement, divorce decree, or other order of a court of record" therefore operates as a topical limitation, requiring that the debt be logically or causally related to an enumerated document.

As defined, the words course and connection are unambiguous. The one acts as a limitation on time and the other as a limitation on relationship. Each limitation, however, is broad and may include a

wide array of divorce-related debts. Consequently, the court must interpret and apply each statutory phrase broadly. To that point, so long as the debt owed is linked either through time or relation, it is nondischargeable under § 523(a)(15).

This approach is consistent with those Ninth Circuit and Bankruptcy Appellate Panel decisions that have interpreted § 523(a)(15). *See, e.g., In re Adam*, 2015 WL 1530086, at *4 (noting that § 523(a)(15) is "construed more liberally than other § 523 exceptions" and spreads "as large a net" to include "as many marriage dissolution-related claims as possible"); *see also In re Francis*, 505 B.R. 914, 919 (B.A.P. 9th Cir. 2014) ("Decisions of Circuit Courts of Appeals interpreting § 523(a)(15) have been consistent in recognizing its breadth.") (citing cases); *In re Gunness*, 505 B.R. 1, 6 (B.A.P. 9th Cir. 2014) (expanding § 523(a)(15) to encompass a debt owed to a non-enumerated payee where the "bounty of [the] debt [flows] to one of those family members explicitly covered by the statute.").

In light of this, the debt at issue comes within § 523(a)(15)'s scope. First, the fee award was entered while the Family Law Proceedings were ongoing. Those proceedings began in 2007 and ended in 2018. The fee award was entered in 2017. Thus, the debt was incurred "in the course of a divorce or separation."

Second, the fee award bears a direct causal and logical relation to the Family Law Proceedings. In reversing the Superior Court's denial of her anti-SLAPP motion, the Court of Appeal noted several times that the Defamation Action arose from and would not have occurred but for the ongoing Family Law Proceedings (ECF No. 1-1, pp. 15, 16, 18 & 19). That is, Defendant sought to litigate issues – allegedly untrue statements – that arose in the Family Law Proceedings, and but for those proceedings the alleged injury – interference with his right to parent – would not have occurred (ECF No. 1-1, pp. 15–16). Based on this direct nexus, it determined that the family court had exclusive jurisdiction over the claims asserted in the Defamation Action (ECF No. 1-1, p. 18). And it ultimately concluded that Defendant could not have prevailed in the Defamation Action because he improvidently brought his claims outside of the Family Law Proceedings in contravention of the family court's exclusive jurisdiction. *Id.* Consequently, it directed the Superior Court to grant Plaintiff's anti-SLAPP motion and enter the fee award at issue here (ECF No. 1-1, p. 22). Thus, the sole reason the debt was incurred was Defendant's failure to raise his grievances as to the underlying custody and visitation order in the

forum with exclusive jurisdiction, the family court. Indeed, as noted by the Court of Appeal, the parties' separation and custody orders were the but-for cause of the debt. It therefore was incurred "in connection with a separation agreement, divorce decree, or other order of a court of record" also.

In sum, the debt falls within both phrases of § 523(a)(15)'s third prong. It is inextricably linked – temporally and topically – with the parties' divorce and the ongoing custody and visitation litigation in the Family Law Proceedings. Given the breadth with which this court must construe § 523(a)(15), that link mandates a finding that the debt is nondischargeable. *See In re Adam*, 2015 WL 1530086, at *4; *see also In re Francis*, 505 B.R. at 919.

Defendant opposes this result for two reasons. First, he asserts that California's anti-SLAPP provision is procedurally unavailable in family proceedings (ECF Nos. 17 & 23). Specifically, he argues that the family court could not have entered the fee award giving rise to the debt at issue, so it cannot have been incurred in the course of or in connection with the parties' divorce. *Id.* In support he cites *Greco v. Greco*, 2 Cal. App. 5th 810 (2016) (ECF Nos. 17 & 23). There, the denial of an anti-SLAPP motion in response to a probate petition alleging breach of fiduciary duty, constructive fraud, and conversion was affirmed as substantively unmeritorious. *Id.* at 824–27. Defendant contends this result obtained because the Court of Appeal found the anti-SLAPP provision procedurally unavailable in the probate court, and through analogy he asserts it is unavailable in the family court as well (ECF Nos. 17 & 23). This reading of *Greco* is flawed. The Court of Appeal did not hold – or state – that anti-SLAPP was procedurally unavailable in the probate court. *See Greco*, 2 Cal. App. 5th at 824–27. Rather, it affirmed the trial court's denial of the motion on substantive grounds. *Id.* Had the Court of Appeal believed anti-SLAPP motions to be procedurally improper in the probate court, it would not have addressed the merits of the motion. For that reason, Defendant's analogy fails.

Further, it is important to note that the family court is a division within – and not separate and distinct from – the Superior Court. And California Family Code ("CFC") § 210 provides: "Except to the extent that any other statute or rules adopted by the Judicial Council provide applicable rules, the rules of practice and procedure applicable to civil actions generally . . . apply to, and constitute the rules of practice and procedure in, proceedings under this code. CAL. FAM. CODE § 210. The anti-SLAPP provision is contained in Title 6, Part 2 of California Code of Civil Procedure ("CCP"). CAL. CIV. PROC.

CODE § 425.16. Thus, CFC § 210 plainly incorporates CCP § 425.16 as a valid and binding rule of procedure in the family court. Tellingly, Defendant does not cite authority – nor is the court aware of any – purporting to exclude § 425.16 from the rules governing practice and procedure in California's family courts. Because Defendant misreads *Greco* and since the CFC expressly incorporates CCP § 425.16, his first argument is unpersuasive.

Second, Defendant asserts that the fee award falls outside of § 523(a)(15)'s scope because it was entered by the civil – rather than the family – division of the Superior Court (ECF Nos. 17 & 23). This distinction, he says, prohibits a finding that the debt was incurred in the course of or in connection with the parties' divorce. *Id.* This argument is not well taken for two reasons. To start, nothing in § 523(a)(15)'s language limits it to orders entered by a family law court. *See* 11 U.S.C. § 523(a)(15). Rather, it is expansive and expressly includes any "order by *other* court of record." *See id.* (emphasis supplied). It is presumed that the legislature "says in a statute what it means and means in a statute what it says." *Conn. Nat'l Bank*, 503 U.S. at 253–54 (citations omitted). Had Congress intended to limit § 523(a)(15) nondischargeability solely to debts entered by family courts, it would have done so expressly. It did not, and this court declines to read such a provision into the statute.

Further, each of the cases Defendant relies on in support are inapposite. He begins by citing to *In re Taylor*, 478 B.R. 419 (B.A.P. 10th Cir. 2012), and *In re Langman*, 465 B.R. 395 (Bankr. D.N.J. 2012).[5] He reads those to establish that even where attorney's fees are incurred in the course of a divorce, if the family court did not enter the fee award, they remain dischargeable notwithstanding § 523(a)(15). Defendant, however, misreads each case.

In re Taylor analyzed the dischargeability of two distinct types of fees: (1) fees previously awarded by the state court during the parties' dissolution proceedings; and (2) a new request for fees incurred in prosecuting the adversary proceeding and appeal in an attempt to have the former determined nondischargeable. 478 B.R. at 422, 430. The Tenth Circuit's Bankruptcy Appellate Panel ultimately found that the fees previously awarded were nondischargeable under § 523(a)(15) but that it had no

[5] *In re Taylor* and *In re Langman* are out-of-circuit cases and so not binding on this court. It nonetheless addresses them for whatever persuasive value they may have.

authority – either statutory or under the fee shifting provisions in the parties' marital settlement agreement – to award fees in the first instance incurred during the bankruptcy proceedings. *Id.* at 429–30. And since it had no authority to award the newly-requested fees, it likewise could not hold them nondischargeable. *Id.* Here, Plaintiff does not ask the court to award fees in the first instance (*See* ECF No. 1). Rather, she seeks a determination that the previously awarded fees are nondischargeable under § 523(a)(15). *Id.* This is analogous to the first type of fee addressed in *In re Taylor*. And the court in that case resolved the issue by finding those fees nondischargeable. *In re Taylor*, then, mandates a conclusion opposite to what Defendant desires.

In re Langman addressed whether an attorney's charging lien arising from her representation of the debtor in a prepetition divorce was nondischargeable under § 523(a)(15). 465 B.R. at 397. There the Bankruptcy Court for the District of New Jersey noted that although the debt was incurred in the course of a divorce, it was not a debt owed to a spouse, former spouse, or child of the debtor as required by § 523(a)(15). *Id.* at 409. Rather, it was a debt owed by the debtor to her own attorney. *Id.* So it concluded that the charging lien was not excepted from discharge under § 523(a)(15)'s plain language and dismissed the adversary proceeding. *Id.* The facts of the present case are readily distinguishable. Here, the parties agree that the debt at issue is owed by Defendant to his former wife, Plaintiff (*See* ECF Nos. 13 & 17). As a result, *In re Langman* is inapplicable and Defendant's reliance thereon is misplaced.

Next, Defendant cites to *In re Tracy*, 2007 WL 420252 (Bankr. D. Id. Feb. 2, 2007), for the proposition that a debt incurred after a divorce has been finalized falls outside of § 523(a)(15)'s scope.[6] There, a husband and wife entered into a stipulation to divide their marital assets. *Id.* at *1. That stipulation provided the man the parties' marital home as his separate property but granted the woman an option to purchase it within 90 days. *Id.* She was unable to obtain financing, and the parties entered into a second agreement allowing her to rent the residence for some time. *Id.* She later vacated the property, taking several items from the house and withdrawing cash from a joint account that had not been dealt with in the divorce proceedings. *Id.* The man and his new wife brought suit to recover the property. *Id.* After a trial, the state court entered a money judgment and awarded them attorney's fees

[6] As with the two prior cases, *In re Tracy* is not binding. Again, the court addresses it for whatever persuasive value it may have.

and costs. *Id.* The defendant then filed for Chapter 7 relief, and the man and his new wife sought a § 523(a)(15) nondischargeability determination as to the state court judgment. *Id.* at *2. The Bankruptcy Court for the District of Idaho found the debt dischargeable concluding that: (1) any debt owed to the man's new spouse was not a debt owed to a former spouse as required by § 523(a)(15); and (2) the debt arose after the divorce was complete based upon later dealings between the parties wholly unrelated to their separation. *Id.* at *3. The debt at issue in the present case is again distinguishable. Namely, it is owed to Defendant's former spouse and it arose during and as a direct result of the parties ongoing dissolution proceedings. Unlike the debt in *In re Tracy*, it is both temporally and topically linked to the parties' divorce. Defendant's reliance on *In re Tracy* is misplaced also.

Finally, Defendant cites to *In re Lowther*, 321 F.3d 946 (10th Cir. 2002), and *Adams v. Zentz*, 963 F.2d 197 (8th Cir. 1992).[7] In both, the court found attorney's fees incurred in connection with a divorce to be dischargeable. However, each is a pre-Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA") case which analyzed the issue under § 523(a)(5), rather than § 523(a)(15).[8] So they are of questionable persuasive value. And both are distinguishable. The *In re Lowther* court held the fees dischargeable only under the narrow exception to § 523(a)(5) for cases presenting unusual circumstances. 321 F.3d at 949. Notably, Defendant does not contend that exception applies here. *In re Lowther* is therefore inapplicable. The *Adams* court found the debt dischargeable because it was not a support obligation as needed under § 523(a)(5). 963 F.2d at 201. However, § 523(a)(15) does not require the underlying debt to be a support obligation – indeed, those debts are expressly excluded. *Adams* is thus inapplicable as well.

To conclude, the debt at hand comes within § 523(a)(15)'s plain language. Defendant's arguments to the contrary are unpersuasive. None overcome the court's determination that the debt is nondischargeable as a matter of law. The second requirement under Rule 12(c) is therefore satisfied.

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[7] Again, both cases are non-binding but addressed for any persuasive value they have.

[8] That each was decided pre-BAPCPA is significant. *See In re Adam*, 2015 WL 1530086, at *5 ("Courts have acknowledged that BAPCPA's changes to § 523(a)(15) significantly expanded the scope of the debts covered by that section. Because Congress enacted § 523(a)(15) to broaden the types of marital debts that are nondischargeable, beyond those described in § 523(a)(5), 'by implication a § 523(a)(15) exception from discharge would also be construed more liberally than other § 523 exceptions.'" (quoting *In re Taylor*, 478 B.R. at 428)).

3. No Affirmative Defense Precludes Judgment on the Pleadings[9]

A plaintiff is not entitled to judgment on the pleadings if the answer raises issues of fact or an affirmative defense, which, if proved, would defeat plaintiff's recovery. *See Gen. Conference Corp. of Seventh-Day Adventists*, 887 F.2d at 230 (citing 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1368 (1969)). However, "judgment on the pleadings may nonetheless be granted when a defendant's affirmative defenses do not contain sufficient factual matter to state a defense that is plausible on its face." *Travelers Commercial Ins. Co.*, 2015 WL 13376709, at *3 (quotation omitted).

Defendant's answer asserts 15 affirmative defenses (ECF No. 5). Of those, the first, second, third, fourth, eighth, ninth, eleventh, and twelfth relate only to Plaintiff's § 523(a)(6) cause. *See id.* They consequently need not be addressed here. Defendant's fifth affirmative defense is entitled "not a debt during the course of divorce, separation agreement, or divorce decree." *Id.* The court does not see this to be a recognized affirmative defense. And as set forth above, it finds that the debt was incurred in the course of the parties' divorce as a matter of law. The fifth affirmative defense is thus not plausible on its face and does not bar judgment on the pleadings. *See Travelers Commercial Ins. Co.*, 2015 WL 13376709, at *3.

Defendant's sixth and seventh affirmative defenses are entitled "Debtor does not have the ability to pay" and "Defendant's discharging debt benefit outweighs any detrimental consequences to Plaintiff," respectively (ECF No. 5). These apparently rely on the pre-BAPCPA version of § 523(a)(15). Before 2005, § 523(a)(15)'s text contained two affirmative defenses which required courts to analyze: (1) whether the debtor had the ability to repay the obligation; and (2) whether discharge of the debt would yield a benefit to the debtor that outweighed the detriment of the discharge to the former spouse or child. *See In re Adam*, 2015 WL 1530086, at *4 (discussing BAPCPA's changes to § 523(a)(15)). But in 2005, those affirmative defenses were removed from the statute. *See id.* So the sixth and seventh affirmative defenses are inapposite, implausible, and do not bar judgment on the pleadings. *See Travelers Commercial Ins. Co.*, 2015 WL 13376709, at *3.

[9] Although neither party raised the issue – either in briefing or at the hearing on the matter – of whether Defendant's affirmative defenses bar judgment on the pleadings, the court finds it appropriate to address them here.

Defendant's tenth, thirteenth, and fourteenth affirmative defenses are entitled "failure to mitigate," "unclean hands," and "estoppel," respectively (ECF No. 5). Defendant has not asserted that any of these would preclude judgment on the pleadings here (*See* ECF Nos. 17 & 23). Nor does the court believe he could. None contain factual matter sufficient to state a defense that is plausible on its face which would bar granting Plaintiff's motion. *See Travelers Commercial Ins. Co.*, 2015 WL 13376709, at *3.

Defendant has not asserted that any of his affirmative defenses would preclude granting Plaintiff's motion. Likewise, the court does not otherwise see that they would. The rule set forth in *Gen. Conference Corp. of Seventh-Day Adventists* is therefore inapplicable. The court may accordingly grant the motion notwithstanding the affirmative defenses pled.

4. Conclusion

As set forth above, there are no disputed material facts, no affirmative defenses which if proved would prevent recovery, and Plaintiff is entitled to judgment on the pleadings as a matter of law on her § 523(a)(15) cause. The court will therefore grant her motion.

C. Defendant's Motion for Judgment on the Pleadings

Defendant moves for Rule 12(c) judgment on the pleadings as to all causes (ECF No. 7). He argues that Plaintiff's complaint failed to state a claim upon which relief can be granted as to each. *Id.* Plaintiff opposes, averring that all causes are sufficiently pled (ECF No. 13). The court addresses each cause in turn.

1. § 523(a)(15)

First, Defendant moves for judgment on the pleadings on the § 523(a)(15) cause (ECF No. 7). As set forth *supra* under the court's analysis of Plaintiff's cross-motion, it finds the debt nondischargeable as a matter of law under § 523(a)(15). For the same reasons it will grant Plaintiff's motion as to this cause, it will therefore deny Defendant's.

2. § 523(a)(6)

Second, Defendant moves for judgment on the pleadings on the § 523(a)(6) cause (ECF No. 7). He argues that the complaint does not satisfy Rule 8 because Plaintiff has failed to put forth facts

sufficient to allege that either fee award constitutes a willful and malicious injury. *Id.* So he asserts it failed to state a claim for relief and the cause must be dismissed. *Id.* The court agrees.

Section 523(a)(6) excepts from discharge any debt "for willful and malicious injury by the debtor to another entity or to the property of another entity." 11 U.S.C. § 523(a)(6). A plaintiff asserting a § 523(a)(6) cause must demonstrate that the injury was both malicious and willful. *See Ormsby v. First Am. Title Co. of Nev. (In re Ormsby)*, 591 F.3d 1199, 1206 (9th Cir. 2010); *see also Barboza v. New Form, Inc. (In re Barboza)*, 545 F.3d 702, 711 (9th Cir. 2008). The elements are analyzed separately. *See, e.g., In re Barboza*, 545 F.3d at 706. And both must be proven. *See In re Ormsby*, 591 F.3d at 1206.

> The word "willful" in (a)(6) modifies the word "injury," indicating that nondischargeability takes a deliberate or intentional *injury*, not merely a deliberate or intentional *act* that leads to injury. . . . [T]he (a)(6) formulation triggers in the lawyer's mind the category intentional torts, as distinguished from negligent or reckless torts. Intentional torts generally require that the actor intend the consequences of an act, not simply the act itself.

Kawaauhau v. Geiger, 523 U.S. 57, 61–62 (1998) (emphasis in original). An injury is willful if the debtor "acted with either the desire to injure or a belief that injury was substantially certain to occur." *Ditto v. McCurdy*, 510 F.3d 1070, 1078 (9th Cir. 2007). "A malicious injury involves (1) a wrongful act, (2) done intentionally, (3) which necessarily causes injury, and (4) is done without just cause or excuse." *In re Ormsby*, 591 F.3d at 1207 (quoting *Petralia v. Jercich* (*In re Jercich*), 238 F.3d 1202, 1209 (9th Cir. 2001)).

Moreover, "tortious conduct is a required element for a § 523(a)(6) nondischargeability finding." *In re Rodriguez*, 568 B.R. 328, 339 (Bankr. S.D. Cal. 2017) (citing *Lockerby v. Sierra*, 535 F.3d 1038, 1040 (9th Cir. 2008)); *see also In re Jercich*, 238 F.3d at 1205. And conduct "is only tortious if it constitutes a tort under state law." *Lockerby*, 535 F.3d at 1041 (citing *In re Jercich*, 238 F.3d at 1206). A criminal violation or tort-like statutory violation may also suffice, however. *See In re Riley*, BAP No. CC-15-1379-TaLKi, 2016 WL 3351397, at *3 n.6 (B.A.P. 9th Cir. June 8, 2016).

The complaint fails to meet Rule 8(a)(2)'s pleading standard. Rule 8(a)(2) requires "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2). But, "a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and

conclusions, a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp.*, 550 U.S. at 555. The plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (citing *Ashcroft*, 556 U.S at 678).

Plaintiff does not meet this standard for two reasons. First, the complaint does not plead facts sufficient to support an allegation that Defendant acted willfully in causing Plaintiff's injury. To that point, it is not apparent that he intended to cause her harm – the incurrence of additional attorney's fees and costs – or that he was substantially certain that would result. It is not enough that his actions eventually worked injury; he must have taken those actions with the requisite intent. *See Ditto*, 510 F.3d at 1078. And in light of the Superior Court's initial ruling in Defendant's favor, it is not apparent that he did. Rather, it seems that the lawsuit may have asserted a colorable and fair claim, although in an improper forum. This is further supported by the Superior Court's denial of Plaintiff's motions for sanctions under CCP § 128.5 and 128.7 – a ruling she apparently did not challenge on appeal.

Second, the complaint fails to plead facts which establish that Defendant's conduct in bringing the Defamation Action was tortious under state law or that it constituted a criminal violation or tort-like statutory violation. It is not apparent from the complaint that Defendant's filing of the Defamation Action constitutes a recognized tort under California law. Nor is it apparent that Defendant violated any criminal or tort-like statute. That is, the court does not see that Plaintiff's affirmative use of California's anti-SLAPP provision as a procedural mechanism to dismiss the Defamation Action and obtain the fee award at issue constitutes a statutory violation by Defendant.

For those reasons, Plaintiff has failed to state a § 523(a)(6) claim that is plausible on its face. The court will therefore grant Defendant's motion as to this cause. Because further factual enhancement might possibly cure this defect, however, the court will allow Plaintiff leave to amend if warranted. *See United States v. City of Redwood*, 640 F.2d 963, 966 (9th Cir. 1981) (noting that dismissal without leave to amend is proper only in extraordinary cases); *see also Moss*, 572 F.3d at 972 ("Dismissal without leave to amend is improper unless it is clear, upon de novo review, that the complaint could not be saved by any amendment.") (citation omitted).

3. Declaratory Relief

Third, Defendant moves for judgment on the pleadings on Plaintiff's request for a declaration that the debt owed to her is nondischargeable (ECF No. 7). The court agrees with Defendant that the declaratory relief sought duplicates, and is subsumed under, the § 523(a)(6) and (a)(15) causes of action (*See* ECF Nos. 7 & 16). "When an action for declaratory relief is duplicative of the relief sought under another cause of action, dismissal of the declaratory relief claim is proper." *In re Davies*, BAP No. CC-11-1221-MkHPa, 2012 WL 370689, at *6 (B.A.P. 9th Cir. Jan. 12, 2012) (citing *Swartz v. KPMG LLP*, 476 F.3d 756, 766 (9th Cir. 2007)). Plaintiff's request is wholly derivative of her § 523(a)(6) and (a)(15) causes: the requested declaration could not be granted unless the court determined the debt was nondischargeable under one of those sections. The court will therefore grant Defendant's motion as to this cause. And because amendment cannot remedy this flaw, it will be dismissed with prejudice.

V. CONCLUSION

For the foregoing reasons, the court **grants** Plaintiff's motion. It further **denies** Defendant's motion as to Plaintiff's § 523(a)(15) cause, **grants** it as to the § 523(a)(6) cause with leave to amend, and **grants** it as to the declaratory relief cause with prejudice. Plaintiff may amend her § 523(a)(6) cause within 21 days of this order's entry. Defendant's response will then be due 21 days after that.

If Plaintiff does not timely amend, a final judgment of § 523(a)(15) nondischargeability will issue.

IT IS SO ORDERED.

Dated: April 27, 2021

CHRISTOPHER B. LATHAM, JUDGE
United States Bankruptcy Court

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