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UNITED STATES BANKRUPTCY COURT  
CENTRAL DISTRICT OF CALIFORNIA  
LOS ANGELES DIVISION

In re:  
ANTHONY ROBERT WAFFORD,  
Debtor.  
\_\_\_\_\_  
JEFFREY W. COWAN,  
Plaintiff,  
vs.  
ANTHONY ROBERT WAFFORD,  
Defendant.

Case No. 2:19-bk-15197 RK  
Chapter 7  
Adv. No. 2:21-ap-01102 RK  
FINDINGS OF FACT AND  
CONCLUSIONS OF LAW FOLLOWING  
TRIAL AND ORDER THEREON  
Trial: February 2, April 25  
and June 13, 2023,

This adversary proceeding was tried before the undersigned United States Bankruptcy Judge on February 2, April 25 and June 13, 2023. Plaintiff Jeffrey W. Cowan, The Cowan Law Firm, appeared for himself ("Cowan" or "Plaintiff"). Winston Kevin McKesson, Law Office of Winston Kevin McKesson, appeared for Defendant Anthony Robert Wafford ("Wafford" or "Defendant").

Having considered the testimony of the witnesses at trial and the evidence admitted at trial, the court makes the following findings of fact and conclusions of law in this adversary proceeding pursuant to Federal Rule of Bankruptcy Procedure 7052, making Federal Rule of Civil Procedure 52 applicable to this adversary proceeding. Any finding of fact that should be properly characterized as a conclusion of law should be

1 considered as such, and any conclusion of law that should be properly characterized as a  
2 finding of fact should be considered as such.

3 **FINDINGS OF FACT**

- 4 1. In 2008, Sharon Song Byrd (Byrd) filed a civil action against Wafford in the  
5 Superior Court of California, County of Los Angeles, California, for battery, sexual  
6 harassment, and other causes of action. Plaintiff's Exhibit 3, State Court  
7 Complaint.
- 8 2. In 2011, Byrd obtained a judgment in the civil action in the Superior Court against  
9 Wafford in the total amount of \$60,000.00 on her tort claims for battery and hostile  
10 work environment sexual harassment under California Fair Employment and  
11 Housing Act (FEHA), California Government Code § 12940(j), upon a jury verdict  
12 and a further bench trial on certain issues to remedy jury error. Plaintiff's Exhibit  
13 10, State Court Judgment. Afterwards, the Superior Court awarded Byrd  
14 \$235,972.00 in attorneys' fees and \$16,370.21 in costs. Plaintiff's Exhibit 11,  
15 State Court Order Granting Byrd's Motion for Attorneys' Fees, and Costs.
- 16 3. Cowan was Byrd's attorney who represented her in the state court action, and  
17 based on the terms of their attorney-client fee agreement, which provided that  
18 Cowan was entitled to a contingency fee of 45 percent of any gross recovery if the  
19 recovery is obtained 60 days before trial or thereafter (excluding awarded  
20 attorneys' fees), plus, in addition, an assignment of any statutory attorneys' fees  
21 awarded by a court pursuant to statute or public policy, for representing Byrd in the  
22 state court action. Declaration of Jeffrey W. Cowan re: Submission of Partially  
23 Redacted Engagement Agreement, Docket No. 108; Plaintiff's Exhibit 3, State  
24 Court Complaint. Regarding collection of Cowan's contingency fee, Byrd agreed  
25 to the following language in the agreement: "You agree that we may deduct the  
26 attorney's fees to which we are entitled pursuant to this Agreement from the  
27 proceeds of any recovery, whether by settlement, judgment, or otherwise; and that  
28 any costs and disbursements incurred will be deducted from your share." *Id.*

1 Cowan asserts based on this agreement with Byrd that he is an assignee of hers  
2 entitled to collect his fees from the debts owed her by Wafford representing her  
3 recovery from Wafford in the state court action and that he is a creditor of Wafford  
4 for these debts, which Cowan now seeks in this adversary proceeding to be  
5 determined as excepted from discharge pursuant to 11 U.S.C. § 523(a)(6).

6 4. Byrd testified at the trial in her state court action against Wafford on October 21,  
7 22 and 25, 2010, and Cowan offered into evidence copies of the transcripts of her  
8 state court trial testimony on October 21, 22 and 25, 2010 at the trial in this  
9 adversary proceeding, which was received into evidence at trial as her direct  
10 testimony along with a supplemental trial declaration.<sup>1</sup> Notice of No Counter-  
11 Designations or Objections to Plaintiff's Designated Portions of the 2010 Trial  
12 Transcript in *Byrd v. Wafford*, Docket No. 75: Supplemental Trial Declaration of  
13 Sharon Song Byrd, Docket No. 74. Byrd also testified live at the trial in this  
14 adversary proceeding on February 2, 2023.

15 5. In the state court trial as reflected on the transcripts and in the trial of this  
16 adversary proceeding, Byrd testified as follows:

17 a. Byrd started work at the Palms Residential Care Facility in Los Angeles,  
18 California, in March 2004, and Wafford was her supervisor at least 90  
19 percent of the work she did there. Byrd Testimony, Oct. 21, 2010,  
20 Transcript at [page: line(s)] 25:8-28:21; 38:26-41:2.<sup>2</sup>

21  
22  
23  
24 <sup>1</sup> The court ordered that the parties mark and countermark transcripts of testimony from the state court  
25 action and other proceedings being offered as evidence and interpose any objections in  
26 accordance with the procedures for receipt of deposition testimony pursuant to Local Bankruptcy  
Rule 7030-1. Cowan marked the transcript of Byrd's trial testimony from the state court case, but  
Wafford did not countermark the transcript and did not interpose any objections. Docket No. 75.

27 <sup>2</sup> The transcripts of Byrd's state court trial testimony are exhibits to Docket No. 75, and the citations are  
28 to the internal page citations of the transcripts. The references to Byrd's testimony at the trial in  
this adversary proceeding are to the official audio recording of the trial on February 2, 2023.

- 1 b. In April 2004, about three to four weeks after Byrd started work at Palm  
2 Residential Care Facility, she and Wafford began a consensual sexual  
3 relationship. *Id.* at 41:2-13.
- 4 c. Byrd made it clear to Wafford that she wanted an exclusive relationship with  
5 him. *Id.* at 43:17-27
- 6 d. Byrd ended the sexual relationship after she discovered that Wafford was  
7 also having sex with a female co-worker of hers. Byrd Testimony, Oct. 21,  
8 2010, Transcript at 41:14-44:8, 46:19-47:25; 49:8-25; 57:14-61:10 and  
9 62:5-65:6.
- 10 e. Byrd rejected Wafford's request to resume having a sexual relationship in  
11 March 2005 after the co-worker became ill, left work in early February 2005,  
12 and then died, and afterwards, starting in March 2005, and ending in  
13 January 2007, Wafford proceeded to pester Byrd with more requests to  
14 resume having sex with him, all of which she unequivocally rejected, which  
15 she said she did politely as he was her work supervisor. Byrd Testimony,  
16 Oct. 21, 2010, Transcript at 68:7-77:21; Byrd Testimony, Oct. 22, 2021,  
17 Transcript at 3:11-7:19; 31:8-27; and 38:24-39:3.
- 18 f. During this time from March 2005 through January 2007, while Byrd did not  
19 keep a log of Wafford's continuing requests to resume a sexual relationship,  
20 as she recalled, he constantly asked her for sex at work in the morning  
21 when only the two of them were in the office, which was three or four times  
22 a week. Byrd Testimony, Oct. 22, 2021, Transcript at 5:1-27.
- 23 g. On a "handful of times," Wafford called Byrd at home early in the morning  
24 during nonbusiness hours, starting the conversation about work, but then  
25 making sexual advances on her. *Id.* at 24:8-32:5. Wafford's telephone  
26 calls to Byrd made her feel "more or less cheap," and left her feeling upset  
27 and anxious. *Id.* at 31:28-32:5.
- 28

- 1 h. In March 2005, Wafford started to pester Byrd for sex even after he was  
2 now married, but had not told her about his change in marital status. Byrd  
3 Testimony, Oct. 21, 2010, Transcript at 6:1-9:19. In late September or early  
4 October 2005, Byrd learned from someone else at work that Wafford had  
5 married, which he only acknowledged after she discussed it with him. *Id.* at  
6 6:1-7:2. Despite Wafford's acknowledgment to Byrd that he had married, he  
7 continued to pester her about resuming a sexual relationship, and the  
8 frequency of his pestering continued. *Id.* at 7:7-19. Byrd specifically told  
9 Wafford that she did not want to have sex with him while married to  
10 someone else and to be an adulterer, which was against her religious  
11 beliefs. Byrd Testimony, Oct. 22, 2010, Transcript at 62:5-64:8.
- 12 i. Wafford repeatedly suggested having sex to Byrd saying that he could  
13 come to her home in the early morning around 5:30 or 6:00 a.m., which was  
14 the time they would meet to have sex during their previous consensual  
15 sexual relationship, but without success because she expressly refused  
16 every time he asked. Byrd Testimony, Oct. 21, 2010, Transcript at 30:6-  
17 31:17; Exhibit 4 at 1-5.
- 18 j. On July 15, 2006, Wafford had shown up at Byrd's home at the crack of  
19 dawn and rang the doorbell, even after she had told him the night before  
20 not to do so in response to his suggestion that he go to her home so they  
21 could have sex. Byrd Testimony, Oct. 22, 2010, Transcript at 87:3-91:27;  
22 Plaintiff's Exhibit 4. AOL Instant Messenger Messages between Wafford  
23 and Byrd.
- 24 k. Wafford also offered gifts to Byrd to induce her to have sex with him.  
25 During a meeting in his office, Wafford offered Byrd his Palm Pilot personal  
26 digital assistant computer device after she expressed an interest in having  
27 one, but he told her that it was not for sale, but for exchange upon condition  
28 that she have sex with him, saying that he could bring it over to her home in

1 the morning and leave it on her nightstand when he left; she refused his  
2 offer. Byrd Testimony, Oct. 22, 2010, Transcript at 7:20-11:13.

3 i. In 2005 or 2006 Wafford one day came into Byrd's office, telling her that  
4 she needed a new car and offered her money for a down payment on a car  
5 if she would have sex with him, telling her that he could bring the money  
6 over in the morning, and she had other similar conversations with Wafford  
7 about her car in which he offered money for a down payment for sex. Byrd  
8 Testimony, Oct. 22, 2010, Transcript at 11:14-18:20.

9 m. Wafford told Byrd that everyone "had their price" that they could be bought  
10 or relent to during the period in which he was making his repeated,  
11 unwelcome requests that she resume having sex with him. Byrd  
12 Testimony, Oct. 22, 2010, Transcript at 36:7-38:7. Wafford's solicitations of  
13 Byrd for sex in exchange for money and other gifts caused Byrd emotional  
14 distress because they made her feel "cheap" like a sex worker. Byrd  
15 Testimony, Feb. 2, 2023.

16 n. In November and December 2006, Wafford told Byrd that he was going to  
17 be appointed the president of the National Action Network, a civil rights  
18 organization, and was considering Byrd working as his administrative  
19 assistant for such outside work for which she could earn extra money but  
20 would only offer the job on condition she have sex with him. Byrd  
21 Testimony, Oct. 22, 2010, Transcript at 32:6-39:3.

22 o. Byrd had also helped Wafford in his outside work with other agencies, such  
23 as doing research and preparing spreadsheets, and when she asked him  
24 when she could give him an invoice for this extra work, he told her that he  
25 could bring payment to her at her house in the morning, referring to having  
26 sex with her, and she told him, "No, thank you." Byrd Testimony, Oct. 22,  
27 2010, Transcript at 32:6-39:3. Byrd felt that she had to continue to work on  
28 Wafford's outside projects because she believed that if she did not

1 continue, he would use it against her and try to get her fired. *Id.* at 35:12-  
2 28.

3 p. In December 2006, while at the office, the CEO of the Palms Residential  
4 Care Facility in a meeting told Wafford, Byrd and another co-worker that he  
5 had taken his wife to a “five star” hotel near the beach and enjoyed so much  
6 that at the suggestion of the other co-worker, the CEO offered to pay for  
7 each of them to stay at the hotel as a Christmas gift. Byrd Testimony, Oct.  
8 22, 2010, Transcript at 18:21-21:20, 43:23-26. The next day, Wafford  
9 spoke with Byrd about the CEO’s offer, telling her that he wanted to go to  
10 that hotel, and Byrd suggested that he take his wife there; in response,  
11 Wafford told Byrd that he missed her and wanted to take her there to have  
12 sex. *Id.* The conversation made Byrd feel very uncomfortable since  
13 Wafford was her supervisor and his talk made her feel cheap like his sex  
14 worker. *Id.*

15 q. As Byrd continued rejecting all Wafford’s sexual propositions, starting in  
16 November 2006 and into 2007, he became very abusive and mean to her.  
17 Byrd Testimony, Oct. 21, 2010, Transcript at 22:1-24:6; Exhibit 4 at 6. In  
18 November 2006, Byrd was meeting with the faith-based coordinator at the  
19 facility, who was a friend of Wafford’s, and Wafford came into the meeting  
20 and “blew up” and started yelling at her in the presence of the coordinator.  
21 *Id.* Seeing Byrd cry, the coordinator went over to talk to Wafford, his friend,  
22 asking why he was talking to her like that. *Id.* Byrd was very upset at being  
23 yelled at, and it took an hour for her to regain her composure and calm  
24 down. *Id.* Afterwards, according to Byrd, there were “many more times”  
25 that Wafford “erupted” at her, which she felt correlated to her rejections of  
26 his sexual advances. *Id.*

27 r. At least one occasion, Wafford expressly asked Byrd to have sex with him  
28 there and then at work. Byrd Testimony, Oct. 22, 2010, Transcript at 39:21-

1 42:34, 53:9-19. One morning, Wafford called Byrd into his office early  
2 before anyone else was on the premises, and he was masturbating with his  
3 penis fully exposed and erect when she came to his doorway, he asked her  
4 to have sex with him and then yelled at her to return and laughed when she  
5 refused and walked away. *Id.* Byrd found this incident to be very upsetting  
6 for her and very inappropriate and offensive. *Id.* at 43:14-19; Byrd  
7 Testimony, Feb. 2, 2023. However, Wafford never apologized to Byrd for  
8 this incident. Byrd Testimony, Oct. 22, 2010, Transcript at 42:25-43:15.

9 s. About a month or so later, Wafford again masturbated in Byrd's presence at  
10 the office while asking her this time to give him oral sex, but she refused  
11 and walked out, and again he never apologized to her for his actions. Byrd  
12 Testimony, Oct. 21, 2010, Transcript at 44:5-46:1, 53:9-19.

13 t. Byrd felt emotionally distressed from these two incidents, that is, she felt  
14 cheap, she could not believe that these incidents were happening to her  
15 and the incidents made her feel that he just thought of her as a prostitute  
16 who would do the things he asked. Byrd Testimony, Oct. 21, 2010,  
17 Transcript at 53:25-56:8; Byrd Testimony, Feb. 2, 2023. To address her  
18 emotional distress, Byrd saw a clinical psychologist for therapy for several  
19 months. Byrd Testimony, Feb. 2, 2023.

20 u. In 2007, Wafford started using profanity in discussing Byrd's work  
21 performance with her and started cursing at her at work. Byrd Testimony,  
22 Oct. 22, 2010, Transcript at 135:6-143:14. According to Byrd, she was the  
23 only person that Wafford was cursing at the office, and she was still his  
24 assistant. *Id.* The cursing and hostility from Wafford was affecting Byrd  
25 emotionally, and since she had to take direction from him as her supervisor,  
26 she was not able to get her job done, and she said she was "[e]motionally  
27  
28



1 . . . . just trying to hold it together.” *Id.* By this time, Wafford was giving  
2 Byrd less to do, less responsibility and less opportunity to grow from the  
3 job. *Id.* at 144:2-14.

4 v. On October 11, 2007, Wafford went into Byrd’s office, asking about a letter  
5 he asked her to mail out, and when she did not respond to his satisfaction,  
6 he started yelling and cursing at her, and they got into a heated argument  
7 about the allegedly unmailed letter. Byrd Testimony, Oct. 22, 2010,  
8 Transcript at 156:19-170:12; Byrd Testimony, Oct. 25, 2010, Transcript at  
9 1:22-9:5. Byrd observed that Wafford got angrier and angrier that his face  
10 was “all balled up.” Byrd Testimony, Feb. 2, 2023. In his anger, Wafford  
11 came close to Byrd and started to put his hand in front of her face, and  
12 while she told him to back away, she had to retreat behind her desk where  
13 he cornered her and forcefully hit her hand on her “pointer” (i.e., index)  
14 finger, trying to slap her face, after she refused to stop using her hand to  
15 protect herself from him. Byrd Testimony, Oct. 22, 2010, Transcript at  
16 156:19-170:12; Byrd Testimony, Oct. 25, 2010, Transcript at 1:22-9:5. The  
17 hit hurt Byrd so much because Wafford was wearing a heavy ring on his  
18 hand which hit the bone in her hand hard, which required her to seek  
19 medical attention. *Id.*

20 w. After Wafford hit Byrd, it appeared to her that he came to his senses, and  
21 he walked away without saying anything. Byrd Testimony, Oct. 25, 2010,  
22 Transcript at 1:22-9:5; Byrd Testimony, Feb. 2, 2023. Byrd then called 911,  
23 deputies from the Los Angeles County Sheriff’s Office, the law enforcement  
24 agency whose jurisdiction included the Palms Residential Care Facility,  
25 responded, and came to the premises, but did not make any arrest of  
26 Wafford. *Id.*

27 x. After the Sheriff’s deputies left the premises, Byrd and Wafford met with the  
28 CEO of the Palms Residential Care Facility about the incident, and she told

1 the CEO for the first time that she and Wafford had a prior consensual  
2 sexual relationship. Byrd Testimony, Feb. 2, 2023. The CEO met with  
3 Wafford separately and tried to get him to apologize to Byrd for hitting her,  
4 but Wafford did not apologize. Byrd Testimony, Oct. 25, 2010, Transcript at  
5 23:1-25:14.

6 y. About three weeks later, in early November 2007, Byrd and Wafford met  
7 with their supervisor again about the battery incident to discuss where Byrd  
8 and Wafford would work without contact with each other, Byrd Testimony,  
9 Oct. 22, 2010, Transcript at 29:1-30:15. During this meeting, Wafford  
10 admitted that he had pestered Byrd with requests for sex, saying to her,  
11 “Yes, I was sexually attracted to you, but I did what I did to keep the doors  
12 open,” but he never acknowledged or apologized for his conduct on  
13 October 11, 2007. *Id.*

14 z. Byrd stopped working at the Palms Residential Care Facility at the end of  
15 2007 and started a new job in January 2008. *Id.* at 57:10-58-1.

16 6. At the trial in this adversary proceeding, Wafford’s counsel cross-examined Byrd  
17 about her testimony, both oral and written. During her oral testimony at trial, Byrd  
18 testified that the verbal abuse and harassment by Wafford, especially the  
19 masturbation incidents, were very disturbing to her, causing her emotional distress  
20 for which she had to have months of psychological therapy from a clinical  
21 psychologist. Byrd Testimony, Feb. 2, 2023. Byrd testified at trial that Wafford’s  
22 continual sexual advances to her at work caused her emotional distress because  
23 they indicated that Wafford, her supervisor at work, considered her as his sex  
24 worker or mistress, which for her as a “Christian woman” especially distressed her  
25 because he kept asking her for sex after she learned, and he acknowledged, that  
26 he was married to another woman. *Id.*

27 7. Wafford offered his trial declaration as his direct testimony in which he stated that:  
28 (1) he never had sex with Byrd; (2) he never tried to have sex with Byrd and (3) he

1 never touched her in a sexual manner. Declaration of Anthony R. Wafford re:  
2 Testimony, Docket No. 87. Regarding the battery incident, Wafford stated in his  
3 trial declaration that: (1) at the time of the “incident”, he and Byrd were discussing  
4 paperwork that she did not have; (2) she pointed her finger towards his direction;  
5 (3) she was about 4-5 feet away from him at that time; (4) he told her to get her  
6 hand out of his face; (5) she then screamed and said that he hit her, which he  
7 stated that he did not; and (6) Wafford never touched Byrd. *Id.* Wafford also  
8 testified live at trial and was cross-examined by Cowan. During his testimony at  
9 trial, Wafford acknowledged that Byrd was his assistant, performing secretarial  
10 tasks, such as filing and answering the telephone, but reiterated his denials of  
11 having had sex with her, having or wanting a sexual relationship with her or  
12 touching her in a sexual manner. Wafford Testimony, Feb. 2, 2023. At trial,  
13 Wafford also denied that he signed the responses that his lawyer produced in  
14 response to Byrd’s discovery requests in the state court action in which it was  
15 admitted that he and Byrd had a consensual sexual relationship. *Id.* Wafford  
16 acknowledged that the lawyer represented him in the state court action, but denied  
17 knowledge of the admissions in the discovery responses the lawyer sent on his  
18 behalf, saying that it was not his signature on the discovery responses. *Id.*  
19 Wafford did not offer a transcript of his testimony at the state court trial.

20 8. In his case-in-chief, Cowan also offered into evidence copies of Byrd’s state court  
21 complaint, the judgment of the state court and the state court’s order awarding  
22 Byrd attorneys’ fees and costs. Plaintiff’s Exhibits 3, 10 and 11, State Court  
23 Complaint, State Court Judgment, State Court Order Awarding Attorneys’ Fees,  
24 and Costs.

25 9. As reflected in the State Court Judgment, the jury rendered a verdict in favor of  
26 Byrd and against Wafford on her cause of action for battery, finding: (1) Wafford  
27 did touch Byrd with the intent to harm or offend her; (2) Byrd did not consent to be  
28 touched; (3) Byrd was harmed or offended by Wafford’s conduct; (4) a reasonable

1 person in Byrd's situation would have been offended by the touching; and (5)  
2 Byrd's damages were \$23,726.17 consisting of \$20,126.17 for past medical  
3 expenses and \$3,600.00 for future medical expenses. Plaintiff's Exhibit 10, State  
4 Court Judgment.

5 10. As reflected in the State Court Judgment, the jury rendered a verdict in favor of  
6 Byrd and against Wafford on her cause of action for hostile work environment  
7 harassment, finding: (1) Byrd was a person providing contract services for Palms  
8 Residential Facility; (2) Byrd was subjected to unwanted harassing conduct  
9 because she is a woman; (3) the harassment was severe or pervasive; (4) a  
10 reasonable woman in Byrd's circumstances would have considered the work  
11 environment to be hostile or abusive; (5) Byrd did consider the work environment  
12 to be hostile or abusive; (6) Wafford did participate in the harassing conduct; (7)  
13 the harassing conduct was a substantial factor in causing harm to Byrd; but (8) no  
14 damages were awarded to Byrd. Plaintiff's Exhibit 10, State Court Judgment.

15 11. As reflected in the State Court Judgment, the jury awarded Byrd \$20,000 in  
16 punitive damages against Wafford, which was erroneous because the state court  
17 intended to bifurcate the issue of punitive damages, but inadvertently gave the jury  
18 the parties' special verdict form which included the issue; subsequently, the parties  
19 stipulated on the record outside the jury's presence to accept the jury's punitive  
20 damages award despite the inadvertent consideration of the issue, and the jury's  
21 punitive damages award was incorporated into the judgment. Plaintiff's Exhibit 10,  
22 State Court Judgment.

23 12. After the jury rendered its verdict, the Superior Court granted Byrd's motion for a  
24 new trial on the limited issue of her past and future non-economic damages on her  
25 battery and sexual harassment claims, and after a further bench trial, the Superior  
26 Court issued an order in 2011 awarding Byrd \$40,000 in general damages on her  
27 sexual harassment cause of action for her past and future pain and suffering.  
28 Plaintiff's Exhibit 10, State Court Judgment. The Superior Court thereupon

1 entered a total judgment in favor of Byrd and against Wafford in the amount of  
2 \$60,000.00, which consisted of the \$40,000.00 in general damages on the sexual  
3 harassment claim and the \$20,000.00 in punitive damages as the jury determined  
4 and the parties had stipulated to. *Id.* The State Court Judgment provided that  
5 Byrd was to recover her costs as may be determined pursuant to a motion for  
6 attorneys' fees and costs and that she was entitled to interest at the rate of 10  
7 percent per annum from the date of entry of the judgment on October 25, 2011,  
8 until paid. *Id.*

9 13. Subsequently, in 2012, upon Byrd's motion for an award of attorneys' fees and  
10 costs, the Superior Court entered an order awarding her \$235,972.00 in attorneys'  
11 fees and \$16,370.21 in costs against Wafford pursuant to the California Fair  
12 Employment and Housing Act (FEHA), including California Government Code §  
13 12965(b)).<sup>3</sup> Plaintiff's Exhibit 11, State Court Order Granting Byrd's Motion for  
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15 <sup>3</sup> The Superior Court's award of attorneys' fees under the California Fair Employment and Housing Act  
16 (FEHA) was based on a lodestar computation of 536 hours of attorney times multiplied by Cowan's  
17 then hourly rate of \$400.00 in 2011 resulting of a tentative award of \$214,520, which was then  
18 further multiplied by a multiplier of 1.1 pursuant to the FEHA. Plaintiff's Exhibit 11, State Court  
19 Order Granting Byrd's Motion for Attorneys' Fees and Costs. In making this award of statutory  
20 attorneys' fees, the record does not show that the Superior Court took into consideration Cowan's  
21 contingency fee arrangement with Byrd in determining and awarding reasonable attorneys' fees  
22 under the FEHA, including California Government Code § 12965(b). The Superior Court found that  
23 Cowan "reasonably spent" 536 hours of work for reasonable fees representing Byrd against  
24 Wafford in the state court case, and determined that Cowan was entitled to a lodestar figure of  
25 \$214,520 to be enhanced by a multiplier of 1.1 to compute "reasonable" attorneys' fees of  
26 \$235,972 as provided in the FEHA, i.e., California Government Code § 12965(b). There is no  
27 evidence in the record that Cowan submitted his attorney-client fee agreement with Byrd that  
28 provided him with a 45 percent contingency fee from her recovery in addition to any court awarded  
attorneys' fees, Docket No. 108, so that the Superior Court would have considered it as a factor in  
determining reasonable attorneys' fees under the FEHA. Cowan's fee arrangement providing for  
contingency fees in addition to a statutory award of attorneys' fees by a court presents an ethical  
issue unless the contingency fee agreement was submitted to the Superior Court to determine  
whether the results were reasonable. *Matter of Yagman*, 3 Cal. State Bar Ct. Rptr. 788, 798-801,  
1999 WL 811721, slip op. at \*9-13 (Rev. Dept. 1997), *citing inter alia*, former California Rule of  
Professional Conduct 4-200(B) and *Hamner v. Rios*, 769 F.2d 1404, 1409 (9<sup>th</sup> Cir. 1985), and *cited*  
*in* Tuft, Peck and Mohr, *Rutter Group California Practice Guide: Professional Responsibility &*  
*Liability*, ¶ 5:242 (online edition December 2022 update). There is no evidence in the record  
indicating that the Superior Court considered Cowan's contingency fee agreement to the Superior  
Court for determination of reasonable attorneys' fees in the state court action pursuant to the  
FEHA, including California Government Code § 12965(b). The Superior Court's fee award order  
did not discuss Cowan's contingency fee arrangement in its determination of a reasonable

1 Attorneys' Fees, and Costs. In its order awarding attorneys' fees, the Superior  
2 Court stated: "After deducting 50 hours of time (which the Court attributes to non-  
3 overlapping issues regarding Defendant Palms Residential Care Facility, which  
4 settled earlier in the lawsuit), the Court finds Plaintiff's counsel Jeffrey W. Cowan  
5 reasonably spent 536 hours (to date) prosecuting this lawsuit and that his stated  
6 regular hourly rate (in 2011) of \$400 is reasonable for the Los Angeles legal  
7 community/market. The Court therefore grants a fee award of \$214,520 based on  
8 the foregoing figures (536 hours x \$400). The Court also finds that a multiplier of  
9 1.1 is appropriate to the foregoing \$214,520 lode star figure and on that basis  
10 awards a total of \$235,972 in fees pursuant to the FEHA (including Government  
11 Code § 12965(b))." *Id.* The Superior Court in its fee award order further stated  
12 that the awarded fees and costs "are due now, subject to immediate execution,  
13 and to the extent not paid immediately are subject to interest at the legal rate." *Id.*

14 14. Byrd's testimony in the state court trial and in the trial in this adversary proceeding  
15 was that during the lengthy time that they worked together at the Palms  
16 Residential Care Facility, Wafford as her supervisor made sexual advances to her  
17 at work, which was mostly in the form of unwanted verbal advances, that the  
18 offensive sexual advances were frequent, that there was at least two incidents of  
19 indecent exposure when Wafford masturbated in front of her, that this offensive

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21 attorneys' fee award under FEHA, that is, the Superior Court only stated that a lodestar fee award,  
22 generally considered to be reasonable compensation under California case law, with a 1.1  
23 multiplier enhancement, was reasonable compensation for Cowan's services under the FEHA in  
24 the state court case, *see, e.g., PLCM Group v. Drexler*, 22 Cal.4<sup>th</sup> 1084, 1095 (2000). Based on  
25 this record, it appears that the Superior Court did not determine that Cowan's 45 percent  
26 contingency fee would be permitted in addition to its lodestar statutory fee award to reasonably and  
27 not unconscionably compensate Cowan for his work on Byrd's state court case. The record is  
28 devoid of any such exercise of discretion and supervision by the Superior Court, and the court  
infers from this lack of reference to the contingency fee agreement in the record that he did not  
disclose it to the Superior Court when the court was considering an award to Byrd, his client,  
reasonable attorneys' fees under the FEHA in the state court action. Plaintiff's Exhibit 11, State  
Court Order Granting Byrd's Motion for Attorneys' Fees and Costs. Under these authorities, Cowan  
was under an ethical obligation to disclose his contingency fee agreement to the Superior Court by  
submitting the agreement for review by the court when it was determining whether to make a  
statutory fee award on behalf of Byrd to pay for his services.

1 conduct occurred over a period of over 21 months from March 2005 through  
2 January 2007, and verbal abuse and hostility from Wafford ensued thereafter  
3 through October 2007, culminating in the battery, and that this offensive conduct  
4 occurred when Byrd and Wafford were together in the office at their place of work.  
5 The court finds that Byrd's testimony was credible, that the totality of the  
6 circumstances weighs in favor of a finding that Wafford's treatment of Byrd during  
7 her employment was sufficiently pervasive to create a hostile or offensive work  
8 environment as found by the state court jury and supports the jury verdict that Byrd  
9 has demonstrated by a preponderance of the evidence that Wafford unlawfully  
10 harassed her in violation of California Government Code § 12940(j)(1).  
11 Specifically, the court finds that Byrd has proven the tort of hostile work  
12 environment sexual harassment by a preponderance of the evidence that she (1)  
13 is a member of a protected class (i.e., female gender); (2) was subjected to  
14 unwelcome sexual advances, constituting sexual harassment by Wafford; (3) the  
15 harassment was based on Byrd's sex; and (4) the harassment was sufficiently  
16 pervasive so as to alter the conditions of employment and create a hostile or  
17 offensive work environment.

18 15. Wafford asserts in his defense that he has no liability to Plaintiff for alleged acts  
19 against Byrd because as Wafford testified at trial that (1) he never had a sexual  
20 relationship with her at any point; (2) he never requested to have a relationship  
21 with her; (3) he never showed up at her house as she claimed in her testimony in  
22 the state court trial; (4) he never exposed himself to her or masturbated in front of  
23 her or requested any sexual actions from her as she claimed in her state court  
24 testimony; (5) he never solicited any sexual favors from her in any way or had any  
25 conversation with her in which he tried to pay for sexual favors by way of gift, cash  
26 or otherwise as she claimed in her state court testimony; (6) he never was abusive  
27 to her at all and not any retaliation for being turned down; (7) he never struck her;  
28 and (8) he never made any statement in a meeting with their supervisor admitting

- 1 that he pestered her. Debtor's Reply to Creditor's Factual Findings and  
2 Conclusion[s] of Law and Alternative Assertions, Docket No. 102 at 1-6.
- 3 16. Wafford asserts that he believes that his testimony was "credible" and that Byrd  
4 "was being dishonest in their relationship dynamic, as well as what transpired  
5 between the parties." *Id.* at 6.
- 6 17. Wafford also asserts that as he testified at trial, he did not write any of the  
7 messages and/or verify his discovery responses in the state court case. *Id.*
- 8 18. Wafford further asserts that he did not sexually harass Byrd "in an[y] shape[,] form  
9 or fashion" and that "[e]very interaction that he has had with Ms. Byrd has been  
10 above board." *Id.*
- 11 19. Regarding Wafford's assertions that his testimony was "credible" (i.e., credible)  
12 and that Byrd was being "dishonest" in testifying about "their relationship dynamic,"  
13 the court listened to their live testimony in court as well as considered their written  
14 testimony in their trial declarations and the transcript of Byrd's lengthy testimony in  
15 the state court trial and observed their demeanor during their live testimony at trial.  
16 The court finds that Byrd's testimony was specific, concrete, detailed, and credible.  
17 The court finds that Wafford's testimony was not specific, concrete or detailed and  
18 that his testimony consisted of blanket and uncorroborated denials of misconduct  
19 towards Byrd, and was contradictory of admissions that he made in the state court  
20 case (e.g., his discovery responses in the state court case in which he admitted  
21 having a consensual sexual relationship with Byrd) and the evidence received into  
22 evidence consisting of AOL Instant Messenger text messages between Wafford  
23 and Byrd, which indicated a previous consensual sexual relationship. The court  
24 finds that Byrd's testimony to be more credible than Wafford's testimony.
- 25 20. In regard to the AOL Instant Messenger text messages purportedly between  
26 Wafford and Byrd, the court heard their testimony and finds that Byrd's testimony  
27 that the copies of the messages between Wafford and her retrieved from her cell  
28 phone, printed out and received in evidence at the state court trial were authentic



1 was credible. Plaintiff's Exhibit 4, AOL Instant Messenger Text Messages; Byrd  
2 Testimony, Feb. 2, 2023. Byrd's testimony about the text messages between  
3 Wafford and her is consistent with her credible testimony that they had a prior  
4 consensual sexual relationship and that the messages from him contained  
5 unwanted sexual advances from Wafford to her at the time he was her work  
6 supervisor. *Id.* Wafford's testimony that the text messages were fabricated by  
7 Byrd was not credible. Wafford Testimony, Feb. 2, 2023. Byrd's testimony at trial  
8 that Wafford's Instant Messenger text messages were from his private laptop  
9 computer for which she did not have the password rather than his work computer  
10 accessible to her was credible and unrebutted, and Wafford's testimony that Byrd  
11 must have fabricated the messages from his work computer was not credible. *Id.*;  
12 Byrd Testimony, Feb. 2, 2023. Wafford has no personal knowledge observing Byrd  
13 using his work computer to send text messages to him on his private Instant  
14 Messenger account, and that would have meant that she would have had to walk  
15 back and forth from her desk to his 30 feet away to type in messages to fabricate a  
16 correspondence between them. Wafford's theory that Byrd created all the Instant  
17 Messenger text messages is not supported by the evidence and is not credible.

18 21. Regarding the admissions of a prior consensual sexual relationship by Wafford in  
19 his responses to Byrd's discovery requests in the state court action, the court finds  
20 Wafford's testimony that the responses were not his as he does not, and did not,  
21 sign his name as "Tony Wafford" as shown on the responses, but only as "Anthony  
22 Wafford," was not credible. See Plaintiff's Exhibits 8 and 9, Defendant's Amended  
23 Discovery Responses in State Court Action (stating that "Defendant asserts that  
24 he did not keep a diary of sexual contacts and does not remember specific dates,  
25 times or locations of sexual contacts, with Ms. Byrd or other women, over the  
26 period of time he had consensual sex with Ms. Byrd. Sexual contact with Ms. Byrd  
27 began before 2000 and ended before the spring of 2008."). It is undisputed that  
28 the discovery responses in Wafford's name were produced in the state court

1 action by his then attorney. *Id.* Wafford’s testimony that the discovery responses  
2 produced by his then attorney were not authentic is not credible as it is not  
3 corroborated by anyone, including his prior attorney. Wafford offers no credible  
4 explanation of why his prior attorney would produce discovery responses in his  
5 name in the state court case if they were not truly his responses.

6 22. Wafford’s assertions that he did not sexually harass Byrd “in an[y] shape[,] form or  
7 fashion” and that “every interaction that he has had with Ms. Byrd has been above  
8 board” are refuted by the judgment of the state court based on the jury verdict  
9 determined that he committed the torts of hostile work environment sexual  
10 harassment and battery against Byrd. The court finds that the evidence at trial in  
11 this adversary proceeding supports the jury verdict that Wafford committed these  
12 torts against Byrd.

13 23. Wafford’s specific assertion that he never struck Byrd is contrary to the jury verdict  
14 and judgment of the Superior Court thereon which conclusively establishes as a  
15 matter of claim preclusion that he committed the tort of battery on Byrd.

16 24. Regarding Wafford’s assertions in his defense that he has no liability to Cowan for  
17 alleged acts against Byrd because as Wafford testified at trial that (1) he never  
18 had a sexual relationship with her at any point; (2) he never requested to have a  
19 relationship with her; (3) he never showed up at her house as she claimed in her  
20 testimony in the state court trial; (4) he never exposed himself to her or  
21 masturbated in front of her or requested any sexual actions from her as she  
22 claimed in her state court testimony; (5) he never solicited any sexual favors from  
23 her in any way or had any conversation with her in which he tried to pay for sexual  
24 favors by way of gift, cash or otherwise as she claimed in her state court  
25 testimony; (6) he never was abusive to her at all and not any retaliation for being  
26 turned down; (7) he never struck her; and (8) he never made any statement in a  
27 meeting with their supervisor admitting that he pestered her, the testimony of the  
28 witnesses, Wafford and Byrd, was conflicting and irreconcilable. Having heard the

1 live ten testimony of the witnesses, observing their demeanor, considering their  
2 written testimony and the other evidence in this adversary proceeding, the court  
3 finds that Byrd's testimony on these matters was credible whereas Wafford's was  
4 not. Byrd's testimony was specific, concrete, and detailed. The Instant  
5 Messenger text messages between Wafford and Byrd, Plaintiff's Exhibit 4, indicate  
6 that Wafford was tone deaf in pressing Byrd for sex and ignoring Byrd's hesitation  
7 in restarting their prior sexual relationship for moral and religious reasons because  
8 he was having sex with others and he had gotten married but wanted an  
9 extramarital and adulterous relationship with Byrd. Wafford's testimony was not  
10 credible as his testimony was mostly general denials and was contradicted by the  
11 other evidence at trial, such as the text messages and admissions in his discovery  
12 responses in the prior state court action that they had a prior consensual sexual  
13 relationship which he consistently denied having at trial in this adversary  
14 proceeding. This other evidence that they had a prior consensual sexual  
15 relationship (i.e., Defendant's amended discovery responses in the state court  
16 action and the Instant Messenger text messages) undermines the credibility of  
17 Wafford's testimony in general.

18 25. The preponderance of the evidence demonstrates that Byrd was a contract worker  
19 at the Palms Residential Care Facility, and Wafford was her direct supervisor, that  
20 Byrd and Wafford had a consensual sexual relationship, that Byrd ended the  
21 relationship after discovering that Wafford was also having sex with a co-worker of  
22 hers, that Wafford later tried to resume his sexual relationship with Byrd after the  
23 co-worker had died, that Byrd declined to resume a sexual or romantic relationship  
24 with Wafford, that Wafford then pestered and stalked Byrd with requests for sex,  
25 which she refused, that Wafford then became hostile and abusive to her due to her  
26 refusing to have sex with her and that Wafford's hostility and abuse culminated in  
27 a confrontation between Wafford and Byrd at work when he cornered her behind a  
28 desk, yelling and cursing at her, and then forcefully hitting her hand when she held

1 it up to shield herself from his intended blow to her face. As discussed herein, the  
2 preponderance of the evidence shows that Wafford's misconduct towards Byrd  
3 was knowing and wrongful and supports findings that the debts owed by him to her  
4 arose from his misconduct, which resulted in willful and malicious injury to her.

## 5 **CONCLUSIONS OF LAW**

### 6 **Jurisdiction**

- 7 1. Proceedings to determine the dischargeability of a particular debt are core  
8 pursuant to 28 U.S.C. § 157(b)(2)(I).
- 9 2. In this adversary proceeding, Plaintiff Cowan seeks to determine the  
10 dischargeability of a debt under 11 U.S.C. § 523(a) that was previously liquidated  
11 to a judgment in the Superior Court of California against Defendant Wafford in  
12 favor of Cowan's assignor, Byrd, and against Wafford. In this adversary  
13 proceeding, this court does not determine the amounts of the debts as the  
14 amounts have already been liquidated to judgment in state court, which judgment  
15 has claim preclusion effect as to the existence and amounts of the debts, and the  
16 court has granted partial summary adjudication of facts in favor of Cowan on the  
17 existence and amounts of the debts owed to Cowan through assignment by his  
18 assignor, Byrd. In this matter, the court determines whether the liquidated debts  
19 owed by Wafford first to Byrd as assigned to Cowan are excepted from discharge  
20 pursuant to 11 U.S.C. § 523(a)(6). The court previously denied Cowan's motion  
21 for summary judgment based on issue preclusion as the state court as the prior  
22 tribunal did not determine that the injury to Byrd, his assignor, was willful and  
23 malicious within the meaning of 11 U.S.C. § 523(a)(6).
- 24 3. The court has jurisdiction over this adversary proceeding as a core matter  
25 pursuant to 28 U.S.C. § 157(b)(2)(I) and 1334.
- 26 4. Venue is proper in this judicial district pursuant to 28 U.S.C. §§ 1408 and 1409  
27 because this proceeding arising under the Bankruptcy Code, 11 U.S.C., or arising  
28

1 in or related to a case under the Bankruptcy Code in the underlying bankruptcy  
2 case pending in this judicial district.

3 **Cowan's Status as Wafford's Creditor**

- 4 5. Cowan is a creditor of Wafford based on the assignment of any award of statutory  
5 attorneys' fees by court based on statute or public policy in the attorney-client fee  
6 agreement that he and Byrd entered into for his representation of her in the state  
7 court action against Wafford. As discussed above, the Superior Court made an  
8 award of statutory attorneys' fees under the California Fair Employment and  
9 Housing Act (FEHA) to her, which was subject to the assignment to Cowan in the  
10 attorney-client fee agreement. The court construes this agreement as an  
11 assignment of the right to collect an award of attorneys' fees once awarded to the  
12 client, which is not impermissible under California law. *See Pony v. County of Los*  
13 *Angeles*, 433 F.3d 1138, 1145 (9<sup>th</sup> Cir. 2006) (recognizing that a client can transfer  
14 the right to collect attorneys' fees but may not transfer the right to seek or waive  
15 them), *citing inter alia*, *Venegas v. Mitchell*, 495 U.S. 82, 87 (1990) and California  
16 Business & Professions Code § 6147. <sup>4</sup>
- 17 6. Cowan is also a creditor of Wafford based on his attorney's lien on Byrd's recovery  
18 from Wafford in the state court action for collection of his 45 percent contingency  
19 fee set forth in the attorney-client fee agreement between Byrd and Wafford. In  
20 their agreement, Byrd agreed that Wafford may collect his contingency fee from  
21 her recovery from Wafford, and this indicates that Cowan had an implied  
22 attorney's lien on the debt owed by Wafford to Byrd representing her recovery in  
23  
24

25 \_\_\_\_\_  
26 <sup>4</sup> In *Pony*, the Ninth Circuit held that a client could not assign her right to seek statutory attorneys' fees  
27 pursuant to 42 U.S.C. § 1988 on a claim under 42 U.S.C. § 1983 derivative of California tort law to  
28 her attorney in an attorney-client fee agreement, and the former attorney could not enforce that  
assignment. 433 F.3d at 1142-1145. In so holding, the Ninth Circuit stated that once the client  
exercised the right to receive fees, the attorney's right to collect them vests, and the attorney could  
pursue collection at that point. *Id.* at 1142.

1 her state court action against Wafford. *See Gelfand, Greet, Popko & Miller v.*  
2 *Shivener*, 30 Cal.App.3d 371 (1964).<sup>5</sup>

### 3 Damages Awarded Byrd in State Court

- 4 7. "Every person who suffers detriment from the unlawful act or omission of another,  
5 may recover from the person in fault a compensation therefor in money, which is  
6 called damages." California Civil Code § 3281.
- 7 8. "The general rule of damages in tort is that the injured party may recover for all  
8 detriment caused whether it could have been anticipated or not. In accordance  
9 with the general rule, it is settled in this state that mental suffering constitutes an  
10 aggravation of damages when it naturally ensues from the act complained of, and  
11 in this connection mental suffering includes nervousness, grief, anxiety, worry,  
12 shock, humiliation, and indignity as well as physical pain." *Crisci v. Security*  
13 *Insurance Co. of New Haven, Connecticut*, 66 Cal. 2d 425, 433 (1967), *citing inter*  
14 *alia*, California Civil Code § 3333; *see also, Capelouto v. Kaiser Foundation*  
15 *Hospitals*, 7 Cal. 3d 889, 892-893 (1972) (the detriment [from pain and suffering] is  
16 a genuine one that requires compensation, and the issue generally must be  
17 resolved by 'impartial conscience and judgment of jurors [or a judge] who may be  
18 expected to act reasonably, intelligently and in harmony with the evidence.'")  
19 (Citations omitted).
- 20 9. As indicated in the state court judgment, the Superior Court of California upon the  
21 jury verdict and after a further partial bench trial held that Byrd was entitled to  
22 \$40,000.00 in general damages on her sexual harassment cause of action for her  
23 past and future pain and suffering. Plaintiff's Exhibit 10, State Court Judgment.
- 24 10. In the state court judgment, the Superior Court of California also upon the jury  
25 verdict held that Byrd was entitled on her battery cause of action to \$20,126.17 in  
26

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27 <sup>5</sup> The language of the agreement did not expressly create an attorneys' lien as there is no specific  
28 language expressly creating a lien. The lien is implicit from the language allowing Cowan to take  
his fee out of Byrd's recovery.

1 damages for past medical expenses and \$2,000.00 in damages for future medical  
2 expenses, but that based on her settlement with her contract employer, Palms  
3 Residential Care Facility, also a defendant in the state court action, the Superior  
4 Court stated that credits from the settlement reduced her award of damages on  
5 her battery cause of action to \$0. Plaintiff's Exhibit 10, State Court Judgment.

6 11. As further indicated in the state court judgment, the Superior Court upon the jury  
7 verdict and based on the stipulation of the parties held that Byrd was entitled to  
8 \$20,000.00 in punitive damages as awarded by the jury, though the judgment did  
9 not specify whether the punitive damages were attributed to the battery cause of  
10 action, the sexual harassment cause of action, or both. Plaintiff's Exhibit 10, State  
11 Court Judgment. The Superior Court in its judgment in stating that credits from  
12 Byrd's settlement with her contract employer, Palms Residential Care Facility,  
13 reduced her award on her battery claim to \$0 suggests that the \$20,000.00 award  
14 for punitive damages, which remained outstanding, related to the sexual  
15 harassment claim. However, the jury verdict did not make this inference clear.

16 12. In an order subsequent to the state court judgment, the Superior Court of  
17 California awarded Byrd \$16,370.21 in costs and \$235,972.00 in attorneys' fees  
18 based on 536 hours of attorney time by her attorney, Cowan, prosecuting the state  
19 court action at his stated hourly rate of \$400.00, for a preliminary lodestar total  
20 amount of fees of \$214,520.00, multiplied by a factor of 1.1, for a final enhanced  
21 lodestar total amount of fees of \$235,972.00 as "reasonable" attorneys' fees  
22 awarded pursuant to the California Fair Employment and Housing Act (FEHA),  
23 including California Government Code § 12965(b). Plaintiff's Exhibit 11, Order  
24 Granting Plaintiff's Motion for Attorney's Fees, and Costs.

25 13. In granting partial summary adjudication of facts to Cowan, the court has  
26 previously determined that the amount of the debts determined by the Superior  
27 Court of California to be owed by Wafford to Byrd in the state court action are  
28 established as a matter of res judicata or claim preclusion.

1 14. The debts owed by Wafford to Byrd as determined by the state court action are  
2 attributable to her sexual harassment cause of action with the possible exception  
3 of the jury's award of punitive damages of \$20,000.00, which may be attributable  
4 to the battery cause of action, the sexual harassment cause of action, and/or both  
5 causes of action. Neither the state court jury nor the Superior Court made an  
6 express determination as to which claim or claims the punitive damages relate to.  
7 As discussed above, the court considers whether the debt from the punitive  
8 damages award relates to the battery cause of action as well as the sexual  
9 harassment cause of action.

10 15. The discharge exception of 11 U.S.C. § 523(a)(6) applies to all liability resulting  
11 from a debtor's willful and malicious conduct, including attorneys' fees and other  
12 relief awarded the creditor. In *Cohen v. de la Cruz*, 523 U.S. 213 (1998), the  
13 United States Supreme Court stated that the discharge exception under 11 U.S.C.  
14 § 523(a)(2)(A) applies to all liability resulting from a debtor's fraudulent conduct,  
15 including "attorney's fees, and other relief that may exceed the value obtained by  
16 the debtor." *Id.* at 223, *cited and quoted in, Brown v. Chamouille (In re Brown)*,  
17 BAP No. CC-22-1244-FLS, 2023 WL 4196946 (9<sup>th</sup> Cir. BAP Jun. 27, 2023), slip  
18 op. at \*8. The Bankruptcy Appellate Panel of the Ninth Circuit has extended this  
19 rule to nondischargeability claims under 11 U.S.C. § 523(a)(6) as recognized in  
20 *Bertola v. North Wisconsin Produce Co. (In re Bertola)*, 317 B.R. 95, 100 (9<sup>th</sup> Cir.  
21 BAP 2004) ("*Cohen*" held that a bankruptcy court could determine the 'debt' in a  
22 proceeding under § 523(a)(2)(A) to include attorneys' fees and costs. . . . The  
23 same should be true in cases under § 523(a)(6)."), *cited and quoted in, In re*  
24 *Brown*, BAP No. CC-22-1244-FLS, 2023 WL 4196946, slip op. at \*8.

25 16. Therefore, if the debts from Byrd's sexual harassment and battery causes of action  
26 are nondischargeable under 11 U.S.C. § 523(a)(6), all liability from Wafford's  
27 misconduct supporting these causes of action would be potentially  
28



1 nondischargeable, which would include the awards of attorneys' fees, costs and  
2 punitive damages.

3 **Legal Standard for a Claim under 11 U.S.C. § 523(a)(6)**

4 17. 11 U.S.C. § 523(a)(6) provides, "(a) A discharge under ... this title does not  
5 discharge an individual debtor from any debt.... (6) for willful and malicious injury  
6 by the debtor to another entity or to the property of another entity." That is, 11  
7 U.S.C. § 523(a)(6) excepts from discharge any debt arising from "willful and  
8 malicious injury by the debtor to another entity or to the property of another entity."  
9 *Id.*

10 18. The Ninth Circuit has defined "willful and malicious" as "a wrongful act . . . done  
11 intentionally, [which] necessarily produces harm and is without just cause or  
12 excuse . . . even absent proof of a specific intent to injure." *Impulsora del*  
13 *Territorio Sur, S.A. v. Cecchini (In re Cecchini)*, 780 F.2d 1440, 1443 (9th Cir.  
14 1986).

15 19. Willfulness and malice are both required elements to establish that a debt is  
16 nondischargeable under 11 U.S.C. § 523(a)(6). *Ormsby v. First American Title Co.*  
17 *of Nevada (Matter of Ormsby)*, 591 F.3d 1199, 1206 (9th Cir. 2010). The  
18 willfulness analysis is separate from the malice analysis, and the two elements  
19 must not be conflated. *Carrillo v. Su (In re Su)*, 290 F.3d 1140, 1146 (9th Cir.  
20 2002), *cited in, Brown v. Chamouille (In re Brown)*, BAP No. CC-22-1244-FLS,  
21 2023 WL 4196946 (9th Cir. BAP Jun. 27, 2023), slip op. at \*9.

22 20. The "willful injury" requirement is met when the creditor shows that the debtor had  
23 a subjective motive to inflict the injury; or the debtor believed the injury was  
24 substantially certain to occur because of his or her conduct. *Petralia v. Jercich (In*  
25 *re Jercich)*, 238 F.3d 1202, 1208 (9th Cir. 2001); *In re Su*, 290 F.3d at 1144.

26 21. A "malicious injury" under 11 U.S.C. § 523(a)(6) involves a wrongful act, done  
27 intentionally, that necessarily causes injury that is committed without just cause or  
28

1 excuse. *In re Jercich*, 238 F.3d at 1209; *Thiara v. Spycher Brothers (In re Thiara)*,  
2 285 B.R. 420, 433 (9th Cir. BAP 2002).

3 22. Furthermore, under 11 U.S.C. § 523(a)(6), the wrongful conduct must be tortious  
4 under state law. *Lockerby v. Sierra*, 535 F.3d 1038, 1040 (9th Cir. 2008).

5 23. Hostile work environment sexual harassment is a tort under California law as  
6 recognized by California Government Code § 12940(j)(1), which makes it an  
7 unlawful employment practice “for an employer. . . because of sex. . . to harass an  
8 employee. . .”

9 24. As stated by the California Supreme Court, “to establish liability in a FEHA [Fair  
10 Employment and Housing Act] hostile work environment sexual harassment case,  
11 a plaintiff employee must show she was subjected to sexual advances, conduct, or  
12 comments that were *severe enough or sufficiently pervasive to alter the conditions*  
13 *of her employment and create a hostile or abusive work environment.*” *Lyle v.*  
14 *Warner Brothers Television Productions*, 38 Cal.4th 264, 283 (2006) (emphasis in  
15 original; citations omitted); *see also*, California Government Code § 12940(j).

16 25. Regarding hostile or abusive work environment, in *Lyle*, the California Supreme  
17 Court observed: “[W]eather an environment is ‘hostile’ or ‘abusive’ can be  
18 determined only by looking at all of the circumstances [including] the frequency of  
19 the discriminating conduct; its severity; whether it is physically threatening or  
20 humiliating, or a mere offensive utterance; and whether it unreasonably interferes  
21 with an employee’s work performance.” 38 Cal.4th at 283, *citing and quoting*,  
22 *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23 (1993).

23 26. Regarding severity of harassment, the California Supreme Court in *Lyle* stated: “In  
24 determining the severity of harassment, [t]he United States Supreme Court has  
25 warned that the evidence in a hostile work environment sexual harassment case  
26 should not be viewed too narrowly; [T]he objective severity of harassment should  
27 be judged from the perspective of a reasonable person in the plaintiff’s position,  
28 considering all the circumstances. [Citation.] . . . [T]hat inquiry requires careful

1 consideration of the social context in which particular behavior occurs and is  
2 experienced by its target.... The real social impact of workplace behavior often  
3 depends on a constellation of surrounding circumstances, expectations, and  
4 relationships, which are not fully captured by a simple recitation of words used or  
5 the physical acts performed. Common sense, and an appropriate sensibility to  
6 social context, will enable courts and juries to distinguish between simple teasing  
7 and roughhousing ... and conduct which a reasonable person in the plaintiff's  
8 position would find severely or abusive." *Id.* (internal quotation marks omitted),  
9 *citing and quoting inter alia, Oncale v. Sundowner Offshore Services, Inc.*, 523  
10 U.S. 75, 81-82 (1998)

11 27. Regarding pervasiveness of harassment, the California Supreme Court in *Lyle*  
12 stated: "With respect to the pervasiveness of harassment, courts have held an  
13 employee generally cannot recover for harassment that is occasional, isolated,  
14 sporadic, or trivial; rather, the employee must show a concerted pattern of  
15 harassment of a repeated, routine, or generalized nature." *Id.*, *citing inter alia,*  
16 *Fisher v. San Pedro Peninsula Hospital*, 214 Cal. App. 3d 590, 610 (1989). In  
17 *Fisher*, the court observed: "Whether the sexual conduct complained of is  
18 sufficiently pervasive to create a hostile or offensive work environment must be  
19 determined from the totality of the circumstances." 214 Cal.App.3d at 608. "The  
20 factors that can be considered in evaluating the totality of the circumstances are:  
21 (1) the nature of the unwelcome sexual acts or works (generally, physical touching  
22 is more offensive than unwelcome verbal abuse); (2) the frequency of the  
23 offensive encounters; (3) the total number of days over which all of the offensive  
24 conduct occurs; and (4) the context in which the sexually harassing conduct  
25 occurred." *Id.*

26 28. In the state court action, Byrd proved her cause of action for hostile work  
27 environment sexual harassment under the California Fair Employment and  
28 Housing Act as determined by the Superior Court upon a jury verdict.

1 29. The essential elements of a tort cause of action for battery under California law  
2 are: (1) defendant touched plaintiff, or caused plaintiff to be touched, with the  
3 intent to harm or offend plaintiff; (2) plaintiff did not consent to the touching; (3)  
4 plaintiff was harmed or offended by defendant's conduct; and (4) a reasonable  
5 person in plaintiff's position would have been offended by the touching. *So v. Shin*,  
6 212 Cal.App.4<sup>th</sup> 652, 669 (2013), *citing*, California Civil Jury Instruction No. 1300  
7 (Judicial Council of California) and *Kaplan v. Mamelak*, 162 Cal.App.4<sup>th</sup> 637, 645  
8 (2008).

9 30. In the state court action, Byrd proved her cause of action for battery as determined  
10 by the Superior Court upon a jury verdict.

11 **Applicability of Res Judicata (Claim Preclusion) and Collateral**  
12 **Estoppel (Issue Preclusion)**

13 31. "Bankruptcy courts recognize and apply the basic principles of res judicata in  
14 determining the effect to be given in bankruptcy proceedings to judgments  
15 rendered in other forums." *Comer v. Comer (In re Comer)*, 723 F.2d 737, 739 (9th  
16 Cir. 1984) (citation omitted). In determining the res judicata effect of a state court  
17 judgment, federal courts must, as a matter of full faith and credit, apply that state's  
18 law of res judicata." 28 U.S.C. § 1738; *see also, In re Comer*, 723 F.2d at 739-741;  
19 *Bugna v. McArthur (In re Bugna)*, 33 F.3d 1054, 1057 (9th Cir. 1994) (full faith and  
20 credit applied to state court judgments for collateral estoppel purposes), citing 28  
21 U.S.C. § 1738. Bankruptcy courts must therefore give the preclusive effect to a  
22 state court judgment that it would receive in the courts of that state. *Id.* If a state  
23 court judgment is entitled to res judicata effect, the bankruptcy court may not look  
24 behind that judgment to determine the actual amount of the judgment debt  
25 obligation. *Id.* However, res judicata does not apply to the determination of  
26 whether a debt is excepted from discharge under the Bankruptcy Code since that  
27 matter is litigated for the first time in a debt dischargeability proceeding, and not in  
28

1 a prebankruptcy collection proceeding. *In re Comer*, 723 F.2d at 739-741, *citing*  
2 *inter alia*, *Brown v. Felsen*, 442 U.S. 127 (1979).

3 32. In California, “[r]es judicata, or claim preclusion, prevents relitigation of the same  
4 cause of action in a second suit between the same parties or parties in privity with  
5 them.” *Mycogen Corp. v. Monsanto Co.*, 28 Cal.4th 888, 896 (2002) (citation  
6 omitted). Res judicata precludes the relitigation of a cause of action only if (1) the  
7 decision in the prior proceeding is final and on the merits; (2) the present action is  
8 on the same cause of action as the prior proceeding; and (3) the parties in the  
9 present action or parties in privity with them were parties to the prior proceeding.  
10 *Busick v. Workmen's Compensation Appeals Board*, 7 Cal.3d 967, 974 (1972).

11 33. This court finds that Cowan has shown by a preponderance of the evidence that  
12 the judgment and fee award order in favor of Byrd and against Wafford in the state  
13 court action are final and on the merits, that the present action as to the amounts  
14 of the liabilities are the same as the prior proceeding and that the parties in the  
15 present action or parties in privity with them were parties to the prior proceeding  
16 (that is, Cowan is in privity with Byrd based on the assignment of statutory  
17 attorneys’ fees awarded her and his attorneys’ lien on her recovery against  
18 Wafford).<sup>6</sup>

19 34. The state court judgment was entered on October 25, 2011, and the ancillary  
20 order awarding attorneys’ fees and costs was entered on February 17, 2012.

21 There was no evidence presented at trial that the judgment and fee award order  
22

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23 <sup>6</sup> However, as discussed herein, res judicata may not apply to Cowan’s entitlement to both a statutory  
24 award of attorneys’ fees, plus a contingency fee in addition, as there is no showing in the record  
25 that the Superior Court was made aware of the contingency fee agreement he had with Byrd  
26 through submission to that court for consideration when it made the statutory fee award of  
27 reasonable attorneys’ fees pursuant to the FEHA. *Matter of Yagman*, 3 Cal. State Bar Ct. Rptr. at  
28 798-801, 1997 WL 817721, slip op. at \*9-13, *cited in* Tuft, Peck and Mohr, *Rutter Group California  
Practice Guide: Professional Responsibility & Liability*, ¶ 5:242. Based on this record, the court  
determines that the Superior Court in deciding Byrd’s motion for an award of attorneys’ fees and  
costs did not decide Cowan’s entitlement to recover any such award through an assignment in the  
contingency fee agreement, which it appears was not before the Superior Court when that court  
considered the fee award motion.

1 are not final. Thus, the court finds that the state court judgment and fee award  
2 order as to the amounts of the liabilities were final for res judicata purposes as the  
3 court previously ruled in granting Cowan partial summary adjudication of facts  
4 establishing the amounts of the liabilities of Wafford to Byrd.<sup>7</sup> The amounts of the  
5 debts owed by Wafford to Byrd on her sexual harassment and battery causes of  
6 action are conclusively established by the state court judgment and fee award  
7 order.

8 35. While a prior state court judgment in a prebankruptcy collection action may not  
9 have res judicata effect as to whether a debt is excepted from discharge, the state  
10 court judgment may have collateral estoppel effect. The doctrine of collateral  
11 estoppel applies in debt dischargeability proceedings in bankruptcy courts.  
12 *Grogan v. Garner*, 498 U.S. 279, 284 n. 11 (1991). “In determining the collateral  
13 estoppel effect of a state court judgment, federal courts must, as a matter of full  
14 faith and credit, apply that state's law of collateral estoppel.” *In re Bugna*, 33 F.3d  
15 at 1057, citing 28 U.S.C. § 1738. Bankruptcy courts must therefore give the  
16 preclusive effect to a state court judgment that it would receive in the courts of that  
17 state. *Gayden v. Nourbakhsh (In re Nourbakhsh)*, 67 F.3d 798, 800-802 (9th Cir.  
18 1995).

19 36. Under California law, there are five threshold requirements to apply collateral  
20 estoppel: (1) the issue sought to be precluded from relitigation must be identical to  
21 that decided in a former proceeding; (2) that issue must have been actually  
22 litigated in the former proceeding; (3) it must have been necessarily decided in the  
23 former proceeding; (4) the decision in the former proceeding must be final and on  
24

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25 <sup>7</sup> The court takes judicial notice pursuant to Federal Rule of Evidence 201 of the computerized case  
26 dockets of the California Court of Appeal, Second Appellate District accessible to the public online  
27 that Wafford had appealed orders of the Superior Court to the California Court of Appeal, Second  
28 Appellate District, Appellate Nos. B237584 and B240116, but such appeals were dismissed on  
October 30, 2012 and July 6, 2012 respectively, with no further appeal to the California Supreme  
Court, as shown on the computer docket of the Court of Appeal accessible at  
<https://appellatecases.courtinfo.ca.gov/search/case/dockets>.

1 the merits; (5) the party against whom preclusion is sought must be the same as,  
2 or in privity with, the party to the former proceeding. *Harmon v. Kobrin (In re*  
3 *Harmon)*, 250 F.3d 1240, 1245 (9<sup>th</sup> Cir. 2001), *citing, Lucido v. Superior Court*, 51  
4 Cal.3d 335, 341 (1990). The party asserting collateral estoppel has the burden to  
5 establish these requirements. *Id.*

6 37. California law imposes a notice requirement in addition to the five threshold  
7 requirements described in *Lucido v. Superior Court*, 51 Cal.3d at 340. In *Harmon*,  
8 Plaintiff sued and alleged, among other things, claims for conversion and contract  
9 violations. *In re Harmon*, 250 F.3d at 1244-1245. While the defendant was not  
10 personally served in the state court action, he had actual knowledge of the  
11 litigation, and the trial court found that the defendant participated in the litigation  
12 and that his default resulted not from ignorance of the litigation, but from his  
13 attorney's failure to adequately represent his interests, which would be sufficient to  
14 satisfy the notice requirement. *Id.* at 1244-1245, 1247 and n. 7 (citation omitted);  
15 *see also, Baldwin v. Kilpatrick (In re Baldwin)*, 249 F.3d 912, 919 (9<sup>th</sup> Cir. 2001)  
16 (Ninth Circuit held that despite any indication in the record to show personal  
17 service on defendant, his "participation in the state court litigation clearly shows  
18 that he "ha[d] actual knowledge of the existence of the litigation" which was  
19 sufficient to establish notice). Even after finding that the threshold requirements  
20 for collateral estoppel are met, California courts will not give preclusive effect to  
21 previous litigation of issues unless they find that the public policies underlying the  
22 collateral estoppel doctrine would be furthered by application of preclusion to the  
23 particular issue before the court. *Lucido v. Superior Court*, 51 Cal.3d at 354-355.  
24 In *Lucido v. Superior Court*, the California Supreme Court identified three policies  
25 underlying the doctrine of collateral estoppel that courts should consider: (1)  
26 preservation of the integrity of the judicial system; (2) promotion of judicial  
27 economy; and (3) protection of litigants from harassment by vexatious litigation.  
28 *Id.*

1 38. While Cowan asserted in the Joint Pretrial Stipulation, Docket No. 66, that an  
2 issue of law to be decided at trial was whether the judgments in favor of Byrd are  
3 entitled to preclusive effect based on a finding that the subject judgments cannot  
4 be discharged under 11 U.S.C. § 523(a)(6), he has the burden of establishing that  
5 the requirements of collateral estoppel are met to preclude Wafford from  
6 contesting the claims under 11 U.S.C. § 523(a)(6). Cowan has not shown in his  
7 trial briefing, that is, his trial brief, Docket No. 76, or his proposed findings of fact  
8 and conclusions of law, Docket No. 100, or otherwise, how the requirements of  
9 collateral estoppel are met in this case. Thus, the court determines that Cowan  
10 has not met his burden of establishing that collateral estoppel applies here based  
11 on the state court judgment and fee award order in favor of Byrd and against  
12 Wafford. Moreover, most, if not all, of the debts are attributable to Byrd's hostile  
13 work environment sexual harassment claim, and intent or willfulness is a required  
14 element for a debt dischargeability claim under 11 U.S.C. § 523(a)(6) but is not a  
15 required element to prove a claim for hostile work environment sexual harassment  
16 under the California Fair Employment and Housing Act (FEHA). *Compare, e.g., In*  
17 *re Su*, 290 F.3d at 1142 *with Lyle v. Warner Brothers Television Productions*, 38  
18 Cal.4<sup>th</sup> at 283. Thus, the state court judgment on Byrd's sexual harassment cause  
19 of action cannot serve as the basis for collateral estoppel on the debt  
20 dischargeability claim under 11 U.S.C. § 523(a)(6) because the issue of intent or  
21 willfulness in the present case regarding debt dischargeability was not actually  
22 litigated and necessarily decided in the prior state court action as required by the  
23 California case law governing collateral estoppel. *See Lucido v. Superior Court*,  
24 51 Cal.3d at 341.

25 39. As to the state court judgment on Byrd's battery cause of action, Cowan has not  
26 shown how the requirements of collateral estoppel are met to preclude Wafford  
27 from contesting the dischargeability claim under 11 U.S.C. § 523(a)(6).  
28



1 40. Accordingly, the court determines that Cowan has failed to meet his burden of  
2 proving that collateral estoppel applies in this case and that the court must  
3 determine that he has met his burden of proving his claim under 11 U.S.C. §  
4 523(a)(6) based on the preponderance of evidence at trial.

5 **Application of Legal Standard under 11 U.S.C. § 523(a)(6)**

6 41. Wafford's wrongful conduct was tortious under applicable California law as his  
7 actions constituted the torts of hostile work environment sexual harassment and  
8 battery as determined by the Superior Court of California in the state court action,  
9 thus, meeting the requirement of 11 U.S.C. § 523(a)(6) as held by the Ninth Circuit  
10 in *Lockerby v. Sierra, supra*, that the misconduct must be tortious under state law.

11 42. Based on the factual findings recited above, the court determines that the  
12 preponderance of the evidence demonstrates that Wafford's actions shown to  
13 constitute sexual harassment were willful because he intended his actions toward  
14 Byrd as a contract worker under his direct supervision, continually pestering her  
15 with requests for sex, knowing that she was not interested in his sexual advances,  
16 exposing himself to her on at least two occasions to solicit her to engage in sex at  
17 work, and engaging in verbal abuse and hostility to her after she refused his  
18 unwanted sexual advances.

19 43. For purposes of willfulness under 11 U.S.C. § 523(a)(6), Wafford as "[t]he Debtor  
20 is charged with the knowledge of the natural consequences of his actions." *In re*  
21 *Ormsby*, 591 F.3d at 1206 (citation omitted). That is, "[i]n addition to what a debtor  
22 may admit to knowing, the bankruptcy court may consider circumstantial evidence  
23 that tends to establish what the debtor must have actually known when taking the  
24 injury-producing action." *Id.*, citing and quoting, *In re Su*, 290 F.3d at 1146.  
25 Wafford generally did not admit any of the misconduct constituting the tort of  
26 hostile work environment sexual harassment that Byrd testified to in the state court  
27 action and in this case, but as the court has found the testimony of Byrd  
28 corroborated by his Instant Messenger texts constitutes credible circumstantial

1 evidence of Wafford's misconduct and his actual knowledge that his conduct was  
2 causing harm to Byrd. This circumstantial evidence indicates a pattern of willful  
3 conduct by Wafford towards Byrd was offensive and distressing to her, that is,  
4 Wafford, her work supervisor, made persistent unwanted sexual advances on her  
5 while both at work and during nonbusiness hours over a lengthy period of time in  
6 2005 through 2007, which included asking her to engage in sexual relations after  
7 she expressed to him her religious and moral qualms and exposing himself to her  
8 at work on multiple occasions. During this time period, Wafford also made  
9 telephone calls to Byrd early in the morning during nonbusiness hours under the  
10 pretext of discussing work matters, but eventually asking for sex, and at least, on  
11 one occasion, in the early morning, showed up at her residence, asking for sex.  
12 Wafford knew that his sexual advances were unwanted because Byrd had broken  
13 off their prior relationship because he was having sex with other women and she  
14 wanted a monogamous relationship with a man, and Byrd felt distress because  
15 Wafford was her work supervisor and was treating her on the job as a sexual  
16 object as he kept making sexual advances on her after she learned he was  
17 married and wanted to carry on an extramarital and adulterous relationship with  
18 her and she repeatedly told him that she was not interested.

19 44. The court determines that the preponderance of the evidence demonstrates that  
20 Wafford's actions shown to constitute the tort of hostile work environment sexual  
21 harassment were malicious because his actions continually asking her for sex  
22 while she was working for him as her supervisor were wrongful necessarily  
23 producing harm and without just cause or excuse. As described above, Wafford  
24 made continuous sexual advances towards Byrd, a contract employee under his  
25 direct supervision, while at work, over a lengthy period, over 21 months, and there  
26 was no justification or excuse for his actions when she repeatedly told him that she  
27 did not want a sexual relationship with him and that she did not want to date him or  
28 have sex with him. As Byrd credibly testified, the sexual harassment by Wafford

1 caused her emotional distress for which she had received psychological therapy  
2 from a clinical psychologist. There was no just cause or excuse for Wafford to  
3 have made repeated and persistent unwanted sexual advances to Byrd, a worker  
4 under his direct supervision.

5 45. Debts based on claims for sexual harassment and discrimination have been  
6 determined to be non-dischargeable under 11 U.S.C. § 523(a)(6). *See, e.g.,*  
7 *Jones v. Svreck (In re Jones)*, 300 B.R. 133, 139-141 (1st Cir. BAP 2003) (holding  
8 debt for sexual harassment was based on willful and malicious injury and  
9 nondischargeable under 11 U.S.C. § 523(a)(6)); *Basile v. Spagnola (In re*  
10 *Spagnola)*, 473 B.R. 518, 522-525 (S.D.N.Y. 2012) (same); *McDonough v. Smith*  
11 *(In re Smith)*, 270 B.R. 544, 549-550 (Bankr. D. Mass. 2001) (same); *Thompson v.*  
12 *Kelly (In re Kelly)*, 238 B.R. 156, 160-162 (Bankr. E.D. Mo. 1999) (same); *Shim v.*  
13 *Lee (In re Lee)*, Case No. 2:13-bk-10413-RK Chapter 7, Adv. No. 2:13-ap-01420-  
14 RK, 2015 WL 1299747 (Bankr. C.D. Cal. Mar. 19, 2015). The record of the  
15 offensiveness and pervasiveness of Wafford's sexual harassment of Byrd at their  
16 workplace described above based on the preponderance of the evidence justify  
17 findings of willful and malicious injury for purposes of determining that the debts  
18 owed by Wafford to Byrd and now Cowan from such misconduct should be  
19 excepted from discharge pursuant to 11 U.S.C. § 523(a)(6), which may also  
20 include the award of punitive damages.

21 46. Based on the factual findings recited above, the court determines that the  
22 preponderance of the evidence demonstrates that Wafford's action shown to  
23 constitute the tort of battery was willful because he hit Byrd intentionally after they  
24 got into an argument at work in light of their prior consensual sexual relationship  
25 and the history of Wafford's unwanted sexual advances once she broke off the  
26 relationship. Although it appears that Wafford simply lost his temper in arguing  
27 with Byrd over a completion of work task, he should not have physically  
28 approached her by cornering her behind her desk and putting his hand in her face,

1 and certainly, when she put her hand in front of her face to protect herself, he  
2 should not have gotten angry with that and should not have slapped her.  
3 Wafford's physical proximity to Byrd and refusal to back away as she requested  
4 and his growing anger which led to him hitting her, demonstrate that he had a  
5 subjective motive to inflict the injury and/or believed that injury was substantially  
6 certain to occur as a result of his conduct, that is, the circumstances that Wafford  
7 intended to strike Byrd by getting close to her, cornering her behind her desk, and  
8 slapping her when he lost his temper. In finding that Wafford committed a battery  
9 on Byrd, the state court jury found that he touched her with intent to harm without  
10 her consent, and likewise, this court finds that he willfully touched her with the  
11 intent to harm her or with the belief that injury was substantially certain to occur.

12 47. The court determines that the preponderance of the evidence demonstrates that  
13 Wafford's action shown to constitute the tort of battery was malicious because his  
14 action hitting her was a wrongful act necessarily producing harm and without just  
15 cause or excuse. As described above, Wafford dissatisfied with Byrd's work  
16 performance went to her office to express his dissatisfaction, and he became  
17 angry when she was not responsive to his criticism, which included his yelling and  
18 cursing at her, and his physically approaching her, cornering her behind her desk,  
19 trying to put his hand in her face, refusing to back away as she requested, and  
20 then slapping her hand hard when she put it up in front of her face to protect  
21 herself. Wafford's hitting Byrd was a wrongful act which produced harm to her,  
22 and there was no just cause or excuse for hitting her during a workplace  
23 argument. Wafford should not have physically approached Byrd and lost his  
24 temper, and he should have backed away when he got too close to her, and when  
25 she asked him to back away. As Byrd credibly testified, the battery by Wafford  
26 caused her to suffer physical pain and suffering and to incur medical expenses.

27 48. The record of the Wafford's battery of Byrd described above based on the  
28 preponderance of the evidence justify findings of willful and malicious injury for

1 purposes of determining that the debts owed by Wafford to Byrd and now Cowan  
2 from such misconduct should be excepted from discharge pursuant to 11 U.S.C. §  
3 523(a)(6), which may include the award of punitive damages.

4 49. As discussed above, the discharge exception of 11 U.S.C. § 523(a)(6) applies to  
5 all liability resulting from a debtor's misconduct, including attorneys' fees, and  
6 other relief awarded to the creditor. *In re Bertola*, 317 B.R. at 100, *cited and*  
7 *quoted in, In re Brown*, BAP No. CC-22-1244-FLS, 2023 WL 4196946, slip op. at  
8 \*8. The discharge exception thus theoretically applies to all liability that Wafford  
9 resulting from his sexual harassment of Byrd, including the statutory attorneys'  
10 fees awarded to Byrd and assigned to Cowan, and Byrd's recovery awarded to her  
11 against Wafford, which includes general damages for pain and suffering and her  
12 costs and may include punitive damages.

13 50. However, there is an ethical issue that should limit Cowan's recovery pursuant to  
14 his contingency fee agreement with Byrd as discussed above. As recognized by  
15 California State Bar Court published case precedent, a contingency fee agreement  
16 may provide that any court-awarded attorneys' fees belong to the attorney rather  
17 than the client, that is, such an agreement between the attorney and the client  
18 providing for collection by the attorney of both a court award of fees and a  
19 contingency fee is not *per se* in violation of the California Rules of Professional  
20 Conduct. *Matter of Yagman*, 3 Cal. State Bar Ct. Rptr. at 798-801, 1997 WL  
21 817721, slip op. at \*9-13, *citing inter alia, Venegas v. Mitchell*, 495 U.S. at 87-88  
22 and *Hamner v. Rios*, 769 F.2d at 1409, and *cited in Tuft, Peck and Mohr, Rutter*  
23 *Group California Practice Guide: Professional Responsibility & Liability*, ¶ 5:242.  
24 However, as the Review Department of the State Bar Court of California in a  
25 published opinion stated in *Matter of Yagman*, "[I]n the event an attorney seeks a  
26 contingency fee award pursuant to contract over and above court-awarded  
27 statutory fees, that agreement must be submitted to the court to determine  
28 whether the results are reasonable." *Matter of Yagman*, 3 Cal. State Bar Ct. Rptr.

1 at 799, 1997 WL 817721, slip op. at \*10-11, *citing, Hamner v. Rios*, 769 F.2d at  
2 1409. Such an agreement may be disallowed as unconscionable under former  
3 California Rule of Professional Conduct 4-200(A) and (B) in effect when Cowan's  
4 services for fees were rendered in the 2010 and 2011 time period (the current rule  
5 is California Rule of Professional Conduct 1.5(a) and (b) under the rules that went  
6 into effect in 2018), that is, whether the attorney may legally collect both a  
7 statutory fee award and a contingency fee for the same case is subject to the  
8 discretion and supervision of the court, which may decline to award the amount of  
9 the contingency fee in excess of the statutory award. See Tuft, Peck and Mohr,  
10 *Rutter Group California Practice Guide: Professional Responsibility & Liability*, ¶  
11 5:242, *citing, Matter of Yagman*, 3 Cal. State Bar Ct. Rptr. at 799, 1997 WL  
12 817721, slip op. at 10-11, *citing, Hamner v. Rios*, 769 F.2d at 1409. This  
13 reasoning makes sense because the rationale of an award of statutory court-  
14 ordered attorneys' fees is to relieve the prevailing party of a fee obligation rather  
15 than enhancing the client's contract fee obligation and that statutory fee awards,  
16 such as under the FEHA, are to be reasonable fees against the party an award is  
17 made. See Tuft, Peck and Mohr, *Rutter Group California Practice Guide:*  
18 *Professional Responsibility & Liability*, ¶¶ 5:235-5:237, *citing, Mahoney v. Sharff*,  
19 191 Cal.App.2d 191, 197 (1961). A contingency fee in excess of a statutory fee  
20 award for Cowan as Byrd's attorney may be permitted, but it was subject to review  
21 by the Superior Court in ruling upon Byrd's motion for statutory attorneys' fees  
22 because that court had the discretion and supervision over any such award, but  
23 such award was dependent on the attorney's submission of the contingency fee  
24 agreement to the court for review and determination of a reasonable statutory fee  
25 award. *Matter of Yagman*, 3 Cal. State Bar Ct. Rptr. at 798-801, 1997 WL  
26 817721, slip op. at \*9-13, *citing inter alia, Hamner v. Rios*, 769 F.2d at 1409 and  
27 *Venegas v. Skaggs*, 867 F.2d 527, 534 n. 7 (9<sup>th</sup> Cir. 1989), *affirmed sub nom.*,  
28 *Venegas v. Mitchell*, *supra* (commenting that plaintiff's attorneys are not entitled to

1 both a statutory fee award and the full amount of a contingency fee as a matter of  
2 right and that the compensation must be reasonable and not a windfall). The  
3 record before this court is inadequate to show that Cowan disclosed his  
4 contingency fee arrangement that he would receive both any statutory fee award,  
5 plus his full contingency fee, by submitting the contingency fee agreement to the  
6 Superior Court for its review of Byrd's motion for statutory attorneys' fees when it  
7 was determining whether to make an award of reasonable statutory attorneys' fees  
8 to Byrd.

9 51. This bankruptcy court acts as a court of equity in determining whether the debtor's  
10 debts are excepted from discharge and should not countenance an apparent  
11 violation of the applicable ethical rules by an attorney creditor in determining  
12 whether the debt owed to the attorney creditor should be excepted from discharge.  
13 *See Bank of Marin v. England*, 385 U.S. 99, 102 (1966) ("equitable principles  
14 govern the exercise of bankruptcy jurisdiction"); 11 U.S.C. § 105(a) (the  
15 bankruptcy court may issue, any order, process or judgment to carry out the  
16 provisions of the Bankruptcy Code, 11 U.S.C., which may include acting *sua*  
17 *sponte* to make any determination necessary or appropriate to enforce or  
18 implement orders or rules, or to prevent an abuse of process); *Equitable Bank v.*  
19 *Miller (In re Miller)*, 39 F.3d 301, 304 (11<sup>th</sup> Cir. 1994) (observing courts generally  
20 construe statutory exceptions to discharge liberally in favor of the debtor, and a  
21 narrow construction promotes the fresh start policy of the Bankruptcy Code).  
22 Thus, Cowan as a plaintiff asking this court for equitable relief to deny the  
23 dischargeability of Wafford's debts "must come with clean hands." *Northbay*  
24 *Wellness Group, Inc. v. Beyries*, 789 F.3d 956, 959 (9<sup>th</sup> Cir. 2015), *citing and*  
25 *quoting, Johnson v. Yellow Cab Transit Co.*, 321 U.S. 383, 387 (1944).

26 52. As stated by the Ninth Circuit in *Northbay Wellness Group, Inc.*, "a plaintiff  
27 deemed to have unclean hands cannot obtain a judgment of nondischargeability."  
28 789 F.3d at 959. However, as further stated by the Ninth Circuit in *Northbay*

1 *Wellness Group, Inc.*, “the doctrine of unclean hands ‘does not mean that courts  
2 must always permit a defendant wrongdoer to retain the profits of his wrongdoing  
3 merely because the plaintiff himself is possibly guilty of transgressing the law.” *Id.*  
4 at 960, *citing and quoting, Johnson v. Yellow Cab Transit Co.*, 321 U.S. at 387.  
5 Thus, as the Ninth Circuit also stated, “determining whether the doctrine of  
6 unclean hands precludes relief requires balancing the alleged wrongdoing of the  
7 plaintiff against that of the defendant, and ‘weigh[ing] the substance of the right  
8 asserted by [the] plaintiff against the transgression which, it is contended, serves  
9 to foreclose that right.’” *Id.*, *citing and quoting, Republic Molding Corp. v. B.W.*  
10 *Photo Utils.*, 319 F.2d 347, 350 (9<sup>th</sup> Cir. 1963).<sup>8</sup> The Ninth Circuit in *Northbay*  
11 *Wellness Group, Inc.*, further observed: “In addition, ‘the unclean hands doctrine  
12 should not be strictly enforced when to do so would frustrate a substantial public  
13 interest.’” *Id.* (footnote omitted), *citing and quoting, EEOC v. Recruit U.S.A., Inc.*,  
14 939 F.2d 746, 753 (9<sup>th</sup> Cir. 1991).

15 53. In applying the requisite balancing test in determining whether to apply the  
16 doctrine of unclean hands to Cowan’s debt dischargeability claim as described in  
17 *Northbay Wellness Group, Inc.*, the court first notes that while Wafford alleged an  
18 affirmative defense of unclean hands in his answer, his stated grounds for invoking  
19 the doctrine was the timeliness of Cowan’s adversary proceeding, and not the  
20 grounds of failure to disclose the contingency fee agreement to the Superior Court  
21 when it was considering Byrd’s motion for an award of statutory attorneys’ fees  
22 now being raised by this court. However, as discussed above, the bankruptcy  
23 court as a court of equity may raise the issue of unclean hands *sua sponte*.

24  
25  
26 <sup>8</sup> In *Northbay Wellness Group, Inc.*, the Ninth Circuit held that the bankruptcy court could apply the  
27 doctrine of clean hands to deny a creditor’s debt nondischargeability claim, but reversed the  
28 judgment of the bankruptcy court denying discharge based on the creditor’s transgression, holding  
that the bankruptcy court abused its discretion in only holding that the creditor’s transgression  
warranted denial of relief when the bankruptcy court should have balanced the relative wrongdoing  
of the parties and the public interest. 789 F.3d at 959-961.



1 54. In the state court action that Byrd represented by Cowan brought against Wafford,  
2 the Superior Court held that Wafford committed the torts of hostile work  
3 environment sexual harassment and battery, and to vindicate public policy for  
4 enforcement of the civil rights laws, namely, the California Fair Employment and  
5 Housing Act (FEHA), that court awarded Byrd, the victim of Wafford's wrongful  
6 sexual harassment, as the prevailing party in the state court action, her reasonable  
7 attorneys' fees in asserting her civil right to be free of sexual harassment. In this  
8 court's view, it was thus appropriate for the Superior Court to make an award of  
9 statutory attorneys' fees to Byrd as the prevailing party on her FEHA sexual  
10 harassment claim based on Wafford's wrongful conduct, but such award must be  
11 only reasonable attorneys' fees as stated in the FEHA. California Government  
12 Code § 12965(b). Moreover, the ethical rules applicable to California attorneys  
13 provide that fees must not be unconscionable and cannot be a "windfall."  
14 California Rules of Professional Conduct, Former Rule 4-200(A) and (B) and  
15 Current Rule 1.5(a) and (b). Thus, the applicable case law from the California  
16 State Bar Court and the Ninth Circuit construing the ethical rules for California  
17 attorneys provides that when an attorney seeks both a statutory award of  
18 attorneys' fees and a contingency fee, the attorney must disclose the contingency  
19 fee agreement to the court by submitting the agreement when the court is  
20 considering an award of fees to determine the reasonableness of the fees and to  
21 avoid awarding fees that would be unconscionable. *Matter of Yagman*, 3 Cal.  
22 State Bar Ct. Rptr. at 798-801, 1997 WL 817721, slip op. at \*9-13, *citing inter alia*,  
23 *Hamner v. Rios*, 769 F.2d at 1409 and *Venegas v. Skaggs*, 867 F.2d 527, 534 n. 7  
24 (9<sup>th</sup> Cir. 1989), *affirmed sub nom.*, *Venegas v. Mitchell*, *supra* (commenting  
25 plaintiff's attorneys are not entitled to both a statutory fee award and the full  
26 amount of a contingency fee as a matter of right and the compensation must be  
27 reasonable and not a windfall). As discussed previously, the record indicates that  
28 Cowan as the attorney seeking an award of statutory attorneys' fees for his client

1 and as the ultimate beneficiary of such award did not disclose his contingency fee  
2 agreement to the Superior Court in its consideration of a statutory attorneys' fee  
3 award to Byrd, and thus deprived that court of the opportunity to determine  
4 whether an award of statutory attorneys' fees, plus a full contingency fee, would be  
5 reasonable compensation and not an unconscionable windfall. In balancing the  
6 harms from the relative wrongdoing of the parties, the court determines that  
7 Wafford's obligations to pay statutory attorneys' fees for his wrongful sexual  
8 harassment of Byrd should be excepted from discharge, but he should only have  
9 to pay reasonable attorneys' fees, but not fees that could have been determined to  
10 be excessive or unconscionable. However, the public policy of requiring attorneys  
11 to make full disclosure of their contractual compensation under the ethical rules  
12 applying to California attorneys outweighs the interest in requiring Wafford to pay  
13 attorneys' fees that may have been excessive or unconscionable to Byrd, Cowan's  
14 client. Thus, the court concludes that under the clean hands doctrine, the  
15 statutory attorneys' fees awarded to Byrd based on the enhanced lodestar amount  
16 determined by the Superior Court, which amount constitutes Cowan's  
17 presumptively reasonable fees, should be excepted from discharge, but not  
18 Cowan's additional contractual compensation of the 45 percent contingency fee  
19 from Byrd's recovery which could have been determined by the Superior Court to  
20 be excessive or unconscionable if he had disclosed his contingency fee  
21 agreement to the Superior Court when it was determining Byrd's motion for an  
22 award of statutory fees. In consideration of the public interest, the application of  
23 the clean hands doctrine should not be so strictly construed as not to allow Cowan  
24 to collect the reasonable statutory attorneys' fees awarded to Byrd to promote the  
25 public policy of the FEHA to deter sexual discrimination.

26 55. Accordingly, based on the doctrine of unclean hands, the court exercises its  
27 discretion to limit Cowan's nondischargeability claim by excluding the contingency  
28 fee recovery of Byrd assigned to Cowan within the amount of the debts to be

1 determined as nondischargeable as Cowan has not shown in the evidentiary  
2 record to the satisfaction of this court that he submitted to the Superior Court for  
3 consideration of an award of reasonable attorneys' fees under the FEHA the  
4 contingency fee agreement providing for his compensation consisting of both a  
5 contingency fee and any statutory award of attorneys' fees as he was obligated to  
6 do under applicable State Bar Court and Ninth Circuit case law, so that the  
7 Superior Court could have considered Cowan's contingency fee agreement in  
8 awarding reasonable attorneys' fees under the FEHA to Byrd.

9 56. Because the court has raised the issue of unclean hands from lack of disclosure of  
10 the contingency fee agreement to the Superior Court *sua sponte*, and the parties  
11 have not briefed or have had an opportunity to argue the issue, Cowan is entitled  
12 to move for reconsideration of this ruling before he submits a proposed judgment if  
13 he believes that the court's ruling on this issue is in error. If Cowan moves for  
14 reconsideration by filing the appropriate written motion, the court expects that he  
15 would offer admissible evidence to substantiate his submission of the contingency  
16 fee agreement to the Superior Court for its review when it considered Byrd's  
17 motion for statutory attorneys' fees in the state court action in light of the  
18 applicable State Bar Court and Ninth Circuit case law relating to the issue. See  
19 Local Bankruptcy Rule 9013-1(i) (factual contentions in a motion must be  
20 supported by admissible evidence); *Matter of Yagman*, 3 Cal. State Bar Ct. Rptr.  
21 at 798-801, 1997 WL 817721, slip op. at \*9-13; *Hamner v. Rios*, 769 F.2d at 1409;  
22 *Venegas v. Skaggs*, 867 F.2d at 534 n. 7.

23 57. However, the ethical rules pertaining to allowing a contingency fee in excess of a  
24 statutory fee award do not pertain to Byrd's recovery of her litigation costs  
25 awarded by the Superior Court, and the debt owed by Wafford relating to Cowan's  
26 assigned recovery of her awarded costs should be excepted from discharge under  
27 11 U.S.C. § 523(a)(6). *In re Bertola*, *supra*.

28

1 58. The discharge exception under 11 U.S.C. § 523(a)(6) also theoretically applies to  
2 all liability that Wafford resulting from his battery on Byrd, including her recovery  
3 against Wafford, which may include punitive damages, but Cowan's recovery is  
4 subject to the limitations set forth herein regarding the ethical problem discussed  
5 above.

6 59. The discharge exception of 11 U.S.C. § 523(a)(6) theoretically applies to all liability  
7 of Wafford to Byrd resulting from his misconduct, including punitive damages,  
8 whether attributable to the sexual harassment cause of action, the battery cause of  
9 action, or both. This would theoretically include the award of punitive damages,  
10 which must have been based on one or the other causes of action upon which  
11 Byrd prevailed on in the state court action, or both. As such, the debt from the  
12 award of punitive damages is theoretically excepted from discharge debt owed by  
13 Wafford to Byrd from punitive damages, regardless of whether the punitive  
14 damages relate to the sexual harassment cause of action or the battery cause of  
15 action, or both, but Cowan's recovery as to these damages is subject to the  
16 limitations set forth herein regarding the ethical problem discussed above.

17 60. However, as discussed above, due to its ethical concerns, the court limits Cowan's  
18 claim pursuant to 11 U.S.C. § 523(a)(6) to the statutory award of attorneys' fees  
19 and Byrd's recovery of her awarded costs and excludes his contingency fee based  
20 on a percentage of Byrd's recovery of damages under his attorney-client fee  
21 agreement with her in light of the ethical problem identified herein.

### 22 **Wafford's Affirmative Defenses**

23 61. In his answer to Cowan's adversary complaint, Wafford asserted nine affirmative  
24 defenses: (1) the complaint fails to state facts sufficient to constitute a cause of  
25 action against him; (2) any injury or damages that Plaintiff suffered was a result of  
26 his conduct; (3) laches; (4) unclean hands in that Plaintiff had knowledge of  
27 Wafford's bankruptcy case and failed to act within the appropriate time frame; (5)  
28 the damages suffered by Plaintiff have "no cordial relationship" with any act

1 committed by Wafford or that could be attributed to Wafford; (6) Wafford did not  
2 possess the requisite intent; (7) Wafford did not cause any malicious and willful  
3 injury to Plaintiff; (8) there is no privity between Plaintiff and Wafford; and (9)  
4 Plaintiff lacks capacity and/or standing to sue.

5 62. However, issues relating to Wafford's affirmative defenses were not listed in the  
6 Joint Pretrial Stipulation filed by the parties, Docket No. 66, which was approved  
7 by an order of the court as modified, Docket No. 67. Because the affirmative  
8 defenses were not identified as issues to be litigated at trial in the final pretrial  
9 order approving the Joint Pretrial Stipulation, the court deems them waived  
10 pursuant to Federal Rule of Civil Procedure 16(e), made applicable to this  
11 adversary proceeding pursuant to Federal Rule of Bankruptcy Procedure 7016.

12 63. Alternatively, the court addresses and rules upon Wafford's affirmative defenses  
13 as follows.

14 64. Regarding Wafford's first affirmative defense of failure to state a sufficient claim to  
15 constitute a cause of action, the court rejects the defense because it determines  
16 that Cowan's complaint alleges a plausible claim for relief upon which relief can be  
17 granted in that the claim is based on the judgment debts owed by Wafford to Byrd,  
18 Cowan's assignor, for sexual harassment and battery, which may support a claim  
19 that the debt arises from willful and malicious injury caused by Wafford under 11  
20 U.S.C. § 523(a)(6) as discussed above.

21 65. Regarding Wafford's second affirmative defense that damages suffered by  
22 "Plaintiff" resulted from his own conduct, the court rejects the defense because  
23 there is no factual basis to support the defense that the injury or damages suffered  
24 by "Plaintiff", Cowan, or presumably Byrd, was a result of their conduct as the  
25 evidence discussed herein demonstrates, that is, the injury and damages suffered  
26 by Byrd, Cowan's assignor, were caused by Wafford.

27 66. Regarding Wafford's third affirmative defense of laches or other applicable legal  
28 statutes (i.e., statutes of limitation), the court rejects the defense because it

1 determines that Wafford did not offer any evidence at trial to prove that Cowan is  
2 barred by the doctrine of laches to assert his claim, and therefore, Wafford has not  
3 met his burden of proving this affirmative defense.

4 67. Regarding Wafford's fourth affirmative defense of unclean hands for failing to act  
5 within the appropriate timeframe despite knowledge of Wafford's bankruptcy case,  
6 the court rejects the defense because it determines that Wafford did not offer any  
7 evidence at trial to prove that Cowan is barred by the doctrine of unclean hands by  
8 virtue of not filing a claim within the appropriate time period, and therefore,  
9 Wafford has not met his burden of proving this affirmative defense.<sup>9</sup>

10 68. Regarding Wafford's fifth affirmative defense of the lack of "cordial relationship"  
11 between damages allegedly suffered by "Plaintiff" (presumably Byrd) and any act  
12 by Wafford or attributed to Wafford, the court rejects the defense because his  
13 assertion that the damages allegedly suffered by Plaintiff "have no cordial  
14 relationship" with any act committed by Wafford or that could be attributed to him  
15 is incomprehensible,<sup>10</sup> and as such, this defense must be denied.

16 69. Regarding Wafford's sixth affirmative defense that he lacked the requisite intent,  
17 the court rejects the defense because it determines that as discussed above,  
18 Cowan has proven by a preponderance of the evidence that Wafford had the  
19 requisite intent to establish a claim under 11 U.S.C. § 523(a)(6) based on the torts  
20 of sexual harassment and battery, which may support a claim that the debt arises  
21 from willful and malicious injury caused by Wafford as discussed above.

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22  
23 <sup>9</sup> Wafford did not offer evidence regarding this affirmative defense at trial. Regarding whether the  
24 adversary proceeding was timely filed was addressed in supplemental briefing on Cowan's motion  
25 for summary judgment and in argument at the hearing on this motion on July 14, 2022. The court  
26 orally stated at the hearing on July 14, 2022 that Wafford failed to give proper notice of the prior  
dismissal and reinstatement of his bankruptcy case in order for Cowan to file a timely  
dischargeability action under Federal Rule of Bankruptcy Procedure 4007(c), and not to afford  
Cowan the opportunity to prosecute this adversary proceeding based on this asserted defense  
would deny him due process of law.

27 <sup>10</sup> Perhaps Wafford meant "causal" as opposed to "cordial," but the court should have not to guess what he  
28 meant by his argument. If Wafford meant causal, the evidence as discussed herein demonstrates  
a causal relationship between his conduct and Byrd's injury.

1 70. Regarding Wafford's seventh affirmative defense that he did not cause any willful  
2 and malicious injury to "Plaintiff" (presumably Byrd), the court rejects the defense  
3 because it determines that as discussed above, Cowan has proven by a  
4 preponderance of the evidence that the debts arose from Wafford causing  
5 malicious and willful injury to Byrd, Plaintiff's assignor, for sexual harassment and  
6 battery to establish a claim under 11 U.S.C. § 523(a)(6). The reference in  
7 Wafford's defense to any malicious and willful injury to Plaintiff is not the relevant  
8 inquiry as the alleged injury was to Byrd, Plaintiff's assignor.

9 71. Regarding Wafford's eighth affirmative defense that there is no privity between him  
10 and Cowan, the court determines that the lack of privity between Cowan and  
11 Wafford does not bar recovery by Cowan in this adversary proceeding because as  
12 Cowan as assignee of Byrd may recover on the debts owed to her by Wafford and  
13 has standing and/or capacity to seek a determination of dischargeability of the  
14 debts, and the court rejects the defense.

15 72. Regarding Wafford's ninth affirmative defense that Cowan lacks capacity and/or  
16 standing to sue, the court determines that Cowan as assignee of Byrd may  
17 recover on the debts owed to her by Wafford and has standing and/or capacity to  
18 seek a determination of dischargeability of the debt, and the court rejects the  
19 defense.

20 73. The Superior Court of California determined in its judgment and fee award that  
21 Wafford was indebted to Byrd based on her tort cause of action for sexual  
22 harassment, and the debts attributable to the sexual harassment cause of action  
23 consist of: (1) \$40,000 in general damages; (2) \$235,972.00 in attorneys' fees;  
24 and (3) \$16,370.21 in costs.

25 74. The Superior Court of California also determined in its judgment based on the jury  
26 verdict and subsequent stipulation of the parties that Wafford was indebted to Byrd  
27 for \$20,000.00 punitive damages, though neither the jury nor the Superior Court  
28

1 specified that the punitive damages are attributable to Byrd's tort cause of action  
2 for sexual harassment, her tort cause of action for battery, or both.

3 75. Based on the foregoing, the court now determines that the debts owed by Wafford  
4 to Byrd now assigned to Cowan, specifically the awarded statutory attorneys' fees  
5 and costs (but excluding the debts subject to Cowan's contingency fee) are  
6 excepted from discharge under 11 U.S.C. § 523(a)(6) because the preponderance  
7 of the evidence recited herein shows that the debts resulted from willful and  
8 malicious injury caused by Wafford's wrongful acts against Byrd.

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1 76. The court further orders Cowan to submit a proposed form of judgment consistent  
2 with these findings of fact and conclusions of law within 30 days of the date of  
3 entry of these findings of fact and conclusions of law if he does not file a motion for  
4 reconsideration of the court's ruling with respect to his contingency fee claim. In  
5 this regard, the court notes that in this adversary proceeding, as shown in the  
6 adversary complaint, Docket No. 1, Cowan sought on his own behalf a  
7 determination of debt dischargeability as to the debts owed by Wafford to Byrd that  
8 were expressly assigned to him in the attorney-client fee agreement (i.e., the  
9 award of statutory attorneys' fees) and are the subject of Cowan's attorney's lien  
10 to secure payment of his contingency fee percentage of Byrd's recovery of  
11 damages and costs, which the court limits as discussed above. Thus, the court  
12 also notes that in bringing this adversary proceeding, Cowan was not acting on  
13 behalf of Byrd with respect to her recovery against Wafford. Accordingly, the court  
14 makes no determination of debt dischargeability as to the amounts of the debts  
15 owed by Wafford to Byrd that are not subject to the assignment to Cowan or his  
16 attorney's lien.

17 77. For the foregoing reasons, relief on Cowan's complaint alleging a claim under 11  
18 U.S.C. § 523(a)(6) will be granted in part and denied in part.

19 IT IS SO ORDERED.

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22  
23 Date: July 14, 2023



24 \_\_\_\_\_  
25 Robert Kwan  
26 United States Bankruptcy Judge  
27  
28