UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA—LOS ANGELES DIVISION

In re: MyLife.com Inc., Debtor.	Case No.: 2:22-bk-14858-ER Adv. No.: 2:23-ap-01094-ER
United States Of America, Plaintiff, v. MyLife.com Inc., Defendant.	**MEMORANDUM OF DECISION DENYING DEBTOR'S MOTION TO DISMISS COMPLAINT** **[RELATES TO ADV. DOC. NO. 15]** Date: May 2, 2023 Time: 11:00 a.m. Location: Ctrm. 1568 Roybal Federal Building 255 East Temple Street Los Angeles, CA 90012

At the above-captioned date and time, the Court conducted a hearing on the *Motion to Dismiss Adversary Proceeding and Complaint to Determine that Debt is Excepted from Discharge* [Adv. Doc. No. 15] (the "Motion to Dismiss") filed by MyLife.com Inc. (the "Debtor"). For the reasons set forth below, the Motion to Dismiss is **DENIED**. The Debtor shall file an Answer to the Complaint by no later than **May 24, 2023**.

I. Facts and Summary of Pleadings

The Debtor filed a voluntary Chapter 11 petition on September 2, 2022 (the "Petition Date"). Jeffrey Tinsley ("Tinsley") is the Debtor's CEO and holds a 49% interest in the Debtor. The Debtor operates a website that allows subscribers to run background checks on individuals.

On July 27, 2020 (prior to the Petition Date), the United States of America (the "United States") filed a complaint against the Debtor and Tinsley in the District Court (the "District Court Complaint"), seeking relief for (1) deceptive business practices in violation of § 5(a) of the Federal Trade Commission Act (the "FTC Act"), 15 U.S.C. § 45(a), (2) violation of the Telemarketing Sales Rule (the "TSR"), 16 C.F.R. § 310.3(a)(1)–(2), and (3) violation of the

Restore Online Shoppers Confidence Act ("ROSCA"), 15 U.S.C. § 8403 (collectively, the "Consumer Protection Statutes"). *See* Case No. 2:20-cv-6692-JFW (Central District of California) (the "District Court Action").

On October 19, 2021, the District Court entered summary judgment in favor of the United States [Complaint, Ex. B] (the "District Court Summary Judgment Order"). In a 17-page decision, the District Court found that the Debtor had violated the Consumer Protection Statutes by, among other things, (1) maintaining a website that was likely to mislead consumers in violation of § 5 of the FTC Act, (2) violating the TSR by making misleading telemarketing calls to consumers, and (3) violating ROSCA by failing to provide customers simple mechanisms to stop recurring credit-card charges. *See generally* District Court Summary Judgment Order.

On December 15, 2021, the District Court approved a *Stipulated Order for Permanent Injunction and Equitable Monetary Relief* [Complaint, Ex. C] (the "Stipulated Judgment") entered into between the United States, on the one hand, and Tinsley and the Debtor, on the other hand. The Stipulated Judgment provided in relevant part:

> The facts alleged in the Complaint shall be taken as true, without further proof, in any subsequent civil litigation by or on behalf of the Commission, including in a proceeding to enforce its rights to any payment or monetary judgment pursuant to this Order, such as a nondischargeability complaint in any bankruptcy case.
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> The facts alleged in the Complaint establish all elements necessary to sustain an action by the Commission pursuant to Section 523(a)(2)(A) of the Bankruptcy Code, 11 U.S.C. § 523(a)(2)(A), and this Order will have collateral estoppel effect for such purposes.

Stipulated Judgment at § VIII(B)–(C).

The Stipulated Judgment further stated that "Defendants waive all rights to appeal or otherwise challenge or contest the validity of this Order." *Id.* at "Findings," ¶ 5. It also stated that "Defendants neither admit nor deny any of the allegations in the Complaint, except as specifically stated in their answer to the Complaint." *Id.* at "Findings," ¶ 3.

The Stipulated Judgment entered a monetary judgment of $28,945,968 against the Debtor to be paid to the United States, and contained a schedule for payment of the judgment. The Debtor made only two payments under the payment schedule, in the total amount of $3,166,666.66.

On March 6, 2023, the United States filed a *Complaint to Determine that its Debt is Excepted from Discharge Under 11 U.S.C. § 1141(d)(6)(A)* [Adv. Doc. No. 1] (the "Complaint") against the Debtor. The Complaint seeks declaratory judgment under 28 U.S.C. § 2201(a) declaring that the Stipulated Judgment is excepted from discharge under §§ 1141(d)(6)(A) and 523(a)(2)(A).

Summary of Papers Filed in Connection with the Debtor's Motion to Dismiss

The Debtor moves to dismiss the Complaint for failure to state a claim upon which relief can be granted under Civil Rule 12(b)(6). It argues that the Stipulated Judgment falls outside the scope of § 523(a)(2)(A), because it is payable to the United States, not to the victims of the Debtor's misconduct. It further argues that the Complaint's allegations are not pleaded with the particularity required by Civil Rule 9. Finally, the Debtor argues that to the extent the Stipulated Judgment contains a pre-petition waiver of the Debtor's discharge, such waiver is unenforceable as a violation of public policy.

The United States opposes the Motion to Dismiss. It cites *FTC v. Lake*, 647 B.R. 213, 224 (Bankr. C.D. Cal. 2022) for the proposition that the Stipulated Judgment is non-dischargeable even though it is payable to the United States, rather than to the victims of the Debtor's misconduct. It distinguishes the cases cited by the Debtor holding that a pre-petition waiver of the Debtor's discharge are unenforceable by noting that those cases involved individuals, as opposed to corporations.

II. Findings and Conclusions

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal citations omitted). To state a plausible claim for relief, a complaint must satisfy two working principles:

> First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitations of the elements of a cause of action, supported by mere conclusory statements, do not suffice…. Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. Determining whether a complaint states a plausible claim for relief will … be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not "show[n]"—"that the pleader is entitled to relief."

Id. (citing Civil Rule 8(a)(2)).

Although the pleading standard Civil Rule 8 announces "does not require 'detailed factual allegations,' … it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation…. A pleading that offers 'labels and conclusions' or a 'formulaic recitation of the elements of a cause of action will not do.' Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Id.* (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

The Complaint States a Claim Under §§ 1141(d)(6)(A) and 523(a)(2)(A)

Section 1141(d)(6)(A) provides that "the confirmation of a plan does not discharge a debtor that is a corporation from any debt of a kind specified in paragraph (2)(A) or (2)(B) of section 523(a) that is owed to a domestic governmental unit …."

Section 523(a)(2)(A) provides: "A discharge under section 727 … of this title does not discharge an individual debtor from any debt for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition."

To state a claim for relief under § 523(a)(2)(A), a creditor must plausibly allege that:

1) the debtor made the representations;
2) that at the time he knew they were false;
3) that he made them with the intention and purpose of deceiving the creditor;

4) that the creditor relied on such representations; and
5) that the creditor sustained the alleged loss and damage as the proximate result of the misrepresentations having been made.

Ghomeshi v. Sabban (In re Sabban), 600 F.3d 1219, 1222 (9th Cir. 2010).

Claims for relief under §523(a)(2)(A) involve allegations of fraud, and therefore must be pleaded with particularity in accordance with the requirements of Civil Rule 9(b). To satisfy Civil Rule 9(b), allegations of fraud must be "'specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong.' A pleading 'is sufficient under Rule 9(b) if it identifies the circumstances constituting fraud so that the defendant can prepare an adequate answer from the allegations.' The complaint must specify such facts as the times, dates, places, benefits received, and other details of the alleged fraudulent activity." *Neubronner v. Milken*, 6 F.3d 666, 671–72 (9th Cir. 1993); *see also Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) ("Averments of fraud must be accompanied by 'the who, what, when, where, and how' of the misconduct charged.").

1. The Fact that the Stipulated Judgment is Payable to the United States Does Not Place the Stipulated Judgment Outside the Scope of § 523(a)(2)(A)

The fact that the Stipulated Judgment is payable to the United States, as opposed to the victims of the Debtor's misconduct, does not place the Stipulated Judgment outside the scope of § 523(a)(2)(A). Multiple cases decided within the Ninth Circuit have held that judgments owed to the United States arising from the debtor's violation of various consumer protection statutes are non-dischargeable under § 523(a)(2)(A). *See, e.g.*, *Fed. Trade Comm'n v. Lake*, 647 B.R. 213 (C.D. Cal. 2022) (holding that judgment arising from debtor's violations of the Mortgage Assistance Relief Services Rule and Telemarketing Services Rule was non-dischargeable under § 523(a)(2)(A)); *Fed. Trade Comm'n v. Gugliuzza (In re Gugliuzza)*, 527 B.R. 370, 373 (C.D. Cal. 2015) (holding that judgment arising from debtor's violation of § 5 of the FTC Act was potentially non-dischargeable).

The Stipulated Judgment falls within the scope of § 523(a)(2)(A) even though it is payable to the United States, rather than to the victims of the Debtor's misconduct. As explained by one court:

> [T]o be nondischargeable, the debt need not be owed, either in whole or part, to a victim of the fraud, or represent compensation to such a victim. For example, in *Pleasants v. Kendrick* (*In re Pleasants*), 219 F.3d 372, 375 (4th Cir. 2000), the debtor, Pleasants, had falsely held himself out as a licensed architect and bungled the job for which the creditor, Kendrick, had contracted with him. Kendrick brought a suit for damages; Pleasants then filed for bankruptcy. Pleasants argued that Kendrick's claim against him did not fall under § 523(a)(2)(A), because that provision "requires that some portion of a creditor's claim must have been directly transferred from the creditor to the debtor," but "the [creditor's] claim included only amounts paid by the [creditor] to third parties, such as payments to the architect and builder hired to correct and complete the project." *Id.* The Fourth Circuit, however, held that the formulation and analysis in *Cohen* "is broad enough to encompass a situation in which no portion of a creditor's claim was literally transferred to the fraudulent debtor." *Id.* (quoting *Cohen*, 523 U.S. at 215, 118

> S.Ct. 1212 ("We hold that § 523(a)(2)(A) prevents the discharge of *all* liability *arising from* fraud." (emphasis in original)), and *id.* at 218, 118 S.Ct. 1212 (§ 523(a)(2)(A) bars "discharge of debts 'resulting from' or 'traceable to' fraud" (quoting *Field*, 516 U.S. at 61, 64, 116 S.Ct. 437)). *See also Hatfield v. Thompson*, 555 B.R. 1, 12 (B.A.P. 10th Cir. 2016) ("[T]here is no requirement that the debt be for something the debtor obtains from the creditor.").
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> The FCC Penalty here similarly falls within the scope of the § 523(a)(2)(A) exemption, given the breadth of the Supreme Court's construction and description of the exemption in *Cohen.* Although the United States—the creditor as to the FCC Penalty—was not among the victims of Birch's fraud, and although that penalty is on top of the sums needed to make the victims (consumers) whole, those features of the penalty do not prevent the exemption from applying. *Cohen* made that clear, in holding exempt from discharge both the treble damages award and the award of attorney's fees and costs owed by the debtor, and in noting that liabilities exempted from discharge under § 523(a)(2)(A) "may exceed the value obtained by the debtor." 523 U.S. at 223, 118 S.Ct. 1212.

United States v. Fusion Connect, Inc. (In re Fusion Connect, Inc.), 634 B.R. 22, 31 (S.D.N.Y. 2021).

The Debtor cites an unpublished decision, *TK Holdings Inc. v. Hawai'i (In re TK Holdings Inc.)*, Nos. 17-11375 (BLS), 17-51886 (BLS), 2018 Bankr. LEXIS 414, at *20 (Bankr. D. Del. Feb. 14, 2018), for the proposition that the Stipulated Judgment is dischargeable. The *TK Holdings* court reasoned that a penalty payable to a government for violation of consumer protection statutes did not fall within the scope of § 523(a)(2): "Where the governmental unit is the actual victim of a corporate debtor's fraudulent conduct or representations, Congress has precluded a discharge. But if the fraud is perpetrated not upon the government but on citizens and consumers, the requirements of § 523(a)(2) are not satisfied." *Id.*

The Court finds the reasoning of *In re Fusion Connect* to be more persuasive than that of *TK Holdings*, and declines to follow *TK Holdings*. The Court notes that if it were to follow *TK Holdings*, corporate debtors would almost always be able to discharge judgments entered against them for violating consumer protection statutes. This would make bankruptcy courts a haven for corporations who have been found responsible for defrauding consumers.

2. The Stipulated Judgment Remains Potentially Non-Dischargeable Notwithstanding § 523(a)(7)

The Debtor next argues that the Stipulated Judgment is dischargeable because it is a penalty owed to a governmental unit. Section 523(a)(7) excepts from discharge penalties payable to a governmental unit, but applies only to individual debtors. Section 1141(d)(6)(A), which governs dischargeability since the Debtor is a corporation rather than an individual, incorporates § 523(a)(2) but does *not* incorporate § 523(a)(7). The Debtor argues that because Congress did not extend § 523(a)(7)'s discharge exception to corporations, Congress should be viewed as having intended that penalties such as the Stipulated Judgment be dischargeable.

There is a split of authority regarding whether penalties payable to governmental units are dischargeable in corporate bankruptcies. *TK Holdings*, upon which the Debtor relies, concludes with little analysis that such penalties are dischargeable because § 1141(d)(6)(A) does not

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incorporate § 523(a)(7). *TK Holdings*, 2018 Bankr. Lexis 414 at *20. *Fusion Connect*, which reaches the opposite conclusion, is worth quoting at length:

> Congress's inaction with respect to extending § 523(a)(7) to corporate debtors does not bear on the application of § 523(a)(2)(A)—as extended to corporate debtors by § 1141(d)(6)(A)—to penalties of the character of the FCC Penalty. Fusion objects that construing the FCC Penalty as nondischargeable under § 523(a)(2)(A) would create an overlap, in that, as to individual debts taking the form of penalties to government entities arising from fraud, both §§ 523(a)(2)(A) and 523(a)(7) apply. Fusion posits that the Bankruptcy Code does, or ought, not permit such overlap, lest one section be rendered superfluous. Fusion further argues that any tension between these sections should be resolved its favor, with Congress's inaction in not extending § 523(a)(7)(A) to chapter 11 proceedings, carrying the day, so as either to dictate, or override, the Court's construction of § 523(a)(2)(A).
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> Fusion is wrong. Statutory overlaps happen. As the Supreme Court has noted in the very context of § 523 of the Bankruptcy Code, there are some sections for which "[t]here is, in short, overlap, but that overlap appears inevitable." *Husky Int'l Elecs., Inc. v. Ritz*, 578 U.S. 356, 136 S. Ct. 1581, 1588, 194 L.Ed.2d 655 (2016). Such is the case here. And reading § 523(a)(2)(A) to cover civil penalties arising out of fraud that are due a government creditor does not make superfluous one of the two provisions within § 523(a). It merely creates a "narrow redundanc[y] in § 523" of the sort that that "appear unavoidable." *Id.* For example, in *Husky*, the Court explained that its interpretation of "actual fraud" in § 523(a)(2)(A) "preserves meaningful distinctions between that provision and §§ 523(a)(4) [and] (a)(6)," even though under certain circumstances fraudulent conveyance schedules could fall under all three sections. *Id.* ("§ 523(a)(4), for instance, covers only debts for fraud while acting as a fiduciary, whereas § 523(a)(2)(A) has no similar limitation[.]").
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> Similarly, here, a Venn diagram assessment of the coverages of §§ 523(a)(2) as construed here and § 523(a)(7)) yields a narrow overlap: with respect to non-compensatory penalties owed to government entities by individual debtors arising out of fraudulent conduct. But there remain "meaningful distinctions" between the sections. Section § 523(a)(2) covers all debts arising from fraud, including, significantly, the vast body of debts that are not owed to the Government. And § 523(a)(7) covers all debts in the form of non-compensatory penalties payable to governmental units, including those that have nothing to do with fraud, such as the penalty for air-pollution violations addressed in *Exide.* Thus, as the Sixth Circuit and other courts have noted, § 523(a)(2) and § 523(a)(7) need not be read as mutually exclusive to avoid making one or the other superfluous….
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> Finally, to the extent Fusion argues that § 1141(d)(6)(A)'s construction should be shaped by Congress' decision to import § 523(a)(2)(A) but not § 523(a)(7) to chapter 11, that is also wrong. Congress's decision to extend to chapter 11 proceedings only the § 523(a)(2) exception does not mean that—as to the subset of debts mutually covered by it and § 523(a)(7)—§ 1141(d)(6)(A) has a narrower reach than does its progenitor, § 523(a)(2)(A). At the time that Congress enacted § 1141(d)(6)(A), § 523(a)(2) had an established meaning, including based on the analysis in *Cohen*, as reviewed above. That

> meaning, not inferences drawn from Congress's inaction as to a separate and only partly overlapping provision, § 523(a)(7), controls as to § 1141(d)(6)(A)'s construction.

Fusion Connect, 634 B.R. at 36–37.

Once again, the Court finds the reasoning of *Fusion Connect* to be more persuasive than that of *TK Holdings*. As noted by *Fusion Connect*, certain debts fall within the scope of both § 523(a)(2)(A) and 523(a)(7). Such debts remain non-dischargeable in corporate bankruptcies given § 1141(d)(6)(A)'s incorporation of § 523(a)(2)(A). This does not change merely because § 1141(d)(6)(A) does not also incorporate § 523(a)(7). That is, a debt that would be non-dischargeable in an individual case under both § 523(a)(2)(A) and 523(a)(7) remains non-dischargeable in a corporate case under § 523(a)(2)(A).

Fusion Connect's reasoning is reinforced by the conclusions reached in *Fed. Trade Comm'n v. Lake*, 647 B.R. 213 (C.D. Cal. 2022) and *Fed. Trade Comm'n v. Gugliuzza (In re Gugliuzza)*, 527 B.R. 370, 373 (C.D. Cal. 2015), both decided within the Ninth Circuit. Neither case discusses the overlap between § 523(a)(2)(A) and 523(a)(7). However, both cases held that a penalty payable to the government could qualify as non-dischargeable under § 523(a)(2)(A). *See Lake*, 647 B.R. at 220–24 (explaining how penalty owed to government met the five elements necessary to fall within the § 523(a)(2)(A) fraud exception to discharge); *Gugliuzza*, 527 B.R. at 374–78 (same). By omitting any discussion of § 523(a)(7), the cases demonstrate that the issue of a debt's non-dischargeability as a penalty under § 523(a)(7) has no bearing upon the issue of whether that same debt is non-dischargeable under § 523(a)(2)(A).

3. The Debtor is Not Entitled to Dismissal of the Complaint on the Ground that the Stipulated Judgment is Void as a Prepetition Waiver of the Debtor's Discharge

The Debtor argues that the Complaint fails to state a claim because the Stipulated Judgment constitutes an unenforceable pre-petition waiver of the Debtor's discharge. The issue of the enforceability of the Stipulated Judgment's provisions regarding discharge is more appropriately determined in connection with the United States' pending Motion for Summary Judgment (the "MSJ"). The Debtor may renew its arguments with respect to that issue at the hearing on the MSJ.

4. The Complaint's Allegations of Fraud Are Pleaded With Sufficient Particularity

The Debtor argues that the Complaint's allegations of fraud are not pleaded with sufficient particularity, because the Complaint does contain factual allegations regarding the specific instances in which the Debtor defrauded various consumers. However, where, as here, the underlying debt is established by a judgment in favor of a government entity, it is not necessary for a complaint to contain such allegations in order to state a claim under § 523(a)(2)(A). In *Gugliuzza*, the court held that in order to obtain a finding that a judgment for violation of consumer protection statutes was non-dischargeable, the government was *not* required to provide "proof of reliance [upon the debtor's misrepresentations] by every individual consumer …." *Gugliuzza*, 527 B.R. at 378. Requiring such proof, the *Gugliuzza* court held, "would undermine the FTC Act's purpose of preventing widespread consumer fraud" and "would be entirely inconsistent with the Bankruptcy Code's core principles." *Id.*

Gugliuzza's reasoning applies with equal force here. Requiring the Complaint to contain detailed factual allegations with respect to each instance of consumer fraud engaged in by the

Debtor would defeat the purposes of the Consumer Protection Statutes and run counter to fundamental principles of the Bankruptcy Court.

Further, the Complaint does contain detailed allegations with respect to the misconduct alleged, and such allegations are sufficient to enable the Debtor to file an Answer. For example, the Complaint alleges that the Debtor operated a website containing profile pages about hundreds of millions of individuals; that the profile pages contained misleading information about certain of the individuals; that the inclusion of the misleading information on the profile pages induced customers to purchase subscriptions to the Debtor's services, and that the Debtor knew this; that the Debtor falsely represented to subscribers that it had the ability to remove information about subscribers from third-party websites; that the Debtor mislead subscribers into believing that its billing would cease at the end of a subscription's original term but continued to charge subscribers beyond that term; that all of the foregoing misconduct violated the Consumer Protection Statutes; and that as a result of the foregoing misconduct, the Debtor wrongfully obtained in excess of $33 million from consumers. Complaint at ¶ 16. The Complaint also incorporates by reference the District Court Complaint, the 17-page District Court Summary Judgment Order, and the District Court Stipulated Order, all of which provide further notice to the Debtor of the misconduct alleged.[1]

III. Conclusion

Based upon the foregoing, the Motion to Dismiss is **DENIED**. The Debtor shall file an Answer to the Complaint by no later than **May 24, 2023**. The Court will prepare and enter an order denying the Motion to Dismiss.

[1] At the hearing, the Debtor argued that it was unfair for it to be required to answer a complaint that incorporated other documents by reference. There is no merit to this argument. It is common practice for a complaint to incorporate other documents by reference. *See, e.g.*, *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 1002 (9th Cir. 2018) (discussing the incorporation-by-reference doctrine).

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Date: May 9, 2023

Ernest M. Robles
United States Bankruptcy Judge