UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	Chapter 7
ANTHONY RYAN LESLIE,	:	Case No. 13-13078 (REG)
Debtor.	:	
ARMIN AUGSTEIN,	:	
Plaintiff,	:	
v.	:	Adv. Pro. No. 14-01917 (REG)
ANTHONY RYAN LESLIE,	:	
Defendant.	:	

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF MOTION TO DISMISS NON-DISCHARGEABILITY COMPLAINT

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Defendant Anthony Ryan Leslie, debtor and defendant in this action (the "**Debtor**"), by and through his litigation counsel DiConza Traurig Kadish LLP, respectfully submits this reply memorandum of law in further support of his motion (the "**Motion**") pursuant to Federal Rule of Civil Procedure 12(b)(6), made applicable here by Federal Rule of Bankruptcy Procedure 7012, to dismiss the Complaint to Determine Dischargeability of Debt (the "**Complaint**") filed by plaintiff Armin Augstein (the "**Plaintiff**") in this adversary proceeding for failure to state a claim upon which relief may be granted.

PRELIMINARY STATEMENT

Plaintiff's non-dischargeability complaint should be dismissed with prejudice. Plaintiff does not seek the return of money or property that he was duped into giving up because of fraud – he merely seeks a windfall for having found the Debtor's property in a German park. As the Debtor's initial memorandum of law (the "**Initial Memorandum**") demonstrated, Plaintiff's claim for that windfall may be enforceable as a matter of contract law, but it is not non-dischargeable, for reasons including the following:

1. ***Plaintiff failed to allege the written misrepresentation which is required to state a claim under section 523(a)(2)(B) of the Bankruptcy Code, 11 U.S.C. §§ 101, et seq***. Plaintiff has now withdrawn this claim. (*See* Plaintiff's Memorandum of Law in Opposition ("**Pl. Mem.**") at 5 n.5.)
2. ***Plaintiff does not and cannot assert a non-dischargeable claim under section 523(a)(2)(A) of the Bankruptcy Code because he did not justifiably rely on a misrepresentation to his detriment.*** After finding the Debtor's property and learning of the Debtor's reward offer, Plaintiff merely (a) notified the police and the Debtor, as German law required him to do, and (b) left the Debtor's property with the police, which he argues he was not legally required to do. However, Plaintiff did not give the property to the police in reliance on the reward offer, because the offer did not require him to do so. (*See* Initial Mem. at 12; Point I.A below.)
3. ***Plaintiff does not and cannot assert a non-dischargeable claim under section 523(a)(2)(A) of the Bankruptcy Code because he did not incur any compensable damages.*** Expectation damages such as the $1,000,000 reward offer are recoverable for breach of contract, but not for fraud, and the Debtor

suffered no other compensable damage. He merely gave the Debtor's property to the police, which the reward offer did not require, and emailed the Debtor that he had done so. (*See* Initial Mem. at 7, 11-13; Point I.B below.)

4. ***Plaintiff does not and cannot assert a non-dischargeable claim under section 523(a)(6) of the Bankruptcy Code because the Complaint fails to allege that the Debtor owes a debt for a genuinely "willful and malicious injury."*** (*See* Initial Mem. at 13-17; Point III below.)

Plaintiff's Memorandum does nothing to remedy the Complaint's fatal defects. As discussed in more detail below, Plaintiff offers essentially two arguments in support of his claim under section 523(a)(2)(A). First, he argues that his Complaint satisfies all of the elements of a claim under section 523(a)(2)(A), but he does so without addressing the contrary arguments in the Debtor's Initial Memorandum, and in discussing the key elements of reliance and damages, he does not offer a single citation to the Complaint's allegations. Plaintiff's discussion of damages, for example, is as follows:

> Finally, there can be no disputing that Augstein was damaged by Leslie's knowingly false reward offer. He was due $1,000,000 under a valid and binding contract that Leslie had no intention of honoring. As such, Augstein's Complaint satisfies the fifth element of a claim under Section 523(a)(2)(A).

(Pl. Mem. at 17.) These conclusory assertions do nothing to satisfy Plaintiff's burden of pleading facts with particularity and stating a plausible claim for relief. (*See* Initial Mem. at 8-9.)

Second, Plaintiff argues that he is entitled to claim all liability "arising from fraud" under the Supreme Court's decision in *Cohen v. De la Cruz*, 523 U.S. 213 (1998), which allowed plaintiffs to claim treble damages for fraud as a non-dischargeable claim. *De la Cruz* requires a plaintiff to establish both fraud and actual damages before claiming any additional damages, however, and Plaintiff cannot do so. Moreover, *De la Cruz* holds that treble damages awarded under a non-bankruptcy statute can be non-dischargeable, but not that a plaintiff may

seek much greater damages than the common law would allow, such as the expectation damages for fraud that Plaintiff seeks here.

Plaintiff's other arguments in support of his claim under section 523(a)(2)(A) do not merit a detailed response. Plaintiff argues, for example, that fraudulent breaches of contract can be non-dischargeable (Pl. Mem. at 2-3), which the Debtor does not deny. Plaintiff does not assert that any breach of contract cases yielded non-dischargeable expectation damages claims, however. (*See* Pl. Mem. at 12-13.) Nor does he deny that, to be non-dischargeable under section 523(a)(6), a debt for breach of contract must be accompanied by an independent tort. (*See* Initial Mem. at 3-4, 14-16.)

Plaintiff also asserts that he is entitled to rely on issue preclusion to establish certain facts based on his district court litigation (Pl. Mem. at 3-5), but this argument is premature at a minimum. It is merely worth noting that "reliance" in the sense of believing a contractual offer to be genuine is not the same as "detrimental reliance" for purposes of a fraud claim. Plaintiff further argues that New York law recognizes claims for rewards (Pl. Mem. at 4 n.4), but not that this negates the duty to return found property or that it makes reward claims non-dischargeable.

Plaintiff's assertion that the Debtor "secured services from Augstein which were allegedly valued at $1,000,000" (Pl. Mem. at 14) is particularly curious given the complete lack of support for the $1,000,000 valuation and the fact that section 523(a)(2)(A) properly values services from the creditor's rather than the debtor's perspective. In addition, as discussed below, once Plaintiff notified the police that he had found the Debtor's property – as he concedes he was legally required to do – and gave the property to the police, which the Debtor's reward offer did

not require him to do, his decision to email the Debtor to claim his reward was more a service to himself than a service to the Debtor.

Finally, Plaintiff offers four paragraphs to show that he has stated a "valid" claim under section 523(a)(6) of the Bankruptcy Code. The first two paragraphs are mere boilerplate, the third describes a case involving "aggravating circumstances" such as the "submission of false reports" that are not relevant here, and the fourth is a somewhat colorful restatement of Plaintiff's allegations, which Plaintiff, though not the law, appears to find "aggravating." This argument does nothing to answer the Initial Memorandum's demonstration that Plaintiff fails to state a claim under section 523(a)(6) for four independently sufficient reasons. Plaintiff's frustration at not receiving his reward may be understandable, but his frustration does not make his claim non-dischargeable. Plaintiff's Complaint is without merit, and should be dismissed with prejudice.

COUNTER-STATEMENT OF FACTS

Plaintiff's Complaint and Memorandum contain numerous factual inaccuracies. Nevertheless, this Memorandum assumes the truth of the Complaint's allegations, as Federal Rule of Bankruptcy Procedure 7012 and Federal Rule of Civil Procedure 12(b) require, for purposes of this Motion. The documents other than court records which Plaintiff annexes to the Declaration of Michael S. Fischman dated June 23, 2014 (the "**Fischman Declaration**"), however, cannot properly be considered on this Motion. *See Hertz Corp. v. City of New York*, 1 F.3d 121, 125 (2d Cir.), *cert. denied*, 510 U.S. 1111(1993) ("In ruling on a motion to dismiss, the Court's consideration "is limited to facts stated on the face of the complaint and the documents appended to the complaint or incorporated in the complaint by reference, as well as to matters of which judicial notice may be taken."); *see also Burton v. Chrysler Group, LLC (In re Old Carco*

LLC), 492 B.R. 392, 401-02 (Bankr. S.D.N.Y. 2013) (quoting *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007)).

ARGUMENT

I. PLAINTIFF DOES NOT PLEAD, AND CANNOT PLEAD, RELIANCE AND DAMAGES, TWO ESSENTIAL ELEMENTS OF A NON-DISCHARGEABILITY CLAIM UNDER SECTION 523(A)(2)(A) OF THE BANKRUPTCY CODE

As the Debtor demonstrated in his Initial Brief, Plaintiff's Complaint can survive a motion to dismiss only if it pleads a plausible claim with the particularity required by Federal Rule of Bankruptcy Procedure 7009. (*See* Initial Mem. at 9.) Plaintiff cannot sustain this burden because he does not sufficiently allege at least two essential elements of a claim under section 523(a)(2)(A): reliance and damages. *See, e.g., Fellows, Read & Assocs. v. Rieder*, 194 B.R. 734, 737 (S.D.N.Y. 1996), *aff'd.*, 116 F.3d 465 (2d Cir. 1997) ("To bar discharge from a debt under § 523(a)(2)(A), a creditor must prove . . .(4) the creditor relied on the representation; and (5) his reliance was the proximate cause of his damage.") Moreover, because Plaintiff's allegations establish that he ***cannot*** plead these elements, his 523(a)(2)(A) claim should be dismissed with prejudice.

A. Plaintiff Does Not, and Cannot, Sufficiently Plead Reliance

Plaintiff admits that, to prevail, he must allege and prove that he was damaged by his justifiable reliance on a misrepresentation by the Debtor. (*See* Pl. Mem. at 14, 17.) *See also* 4 Collier on Bankruptcy § 523.08[d], [e] (stating that reliance which proximately caused damages is an element of a claim under section 523(a)(2)(A)). The Complaint does not contain the requisite allegations.

According to the Complaint, Plaintiff found the Debtor's laptop bag, discovered the Debtor's "fraudulent" reward offer on the internet, turned the laptop bag over to the police,

and then wrote an email to the Debtor to claim his reward. (*See* Complaint ¶¶ 36-38, 42.) Plaintiff admits that he had an independent duty under German law to notify the Debtor or the authorities that he had found the Debtor's property, though he suggests that he may have had a right to retain the property if a reward or "outlays" were due to him. (*See* Pl. Mem. 19-21.)

In telling this story, the Complaint does not allege facts to show that Plaintiff detrimentally relied on an alleged misrepresentation. Plaintiff's amended District Court complaint does not allege reliance at all, or even that Plaintiff had discovered the owner of the Debtor's property before he gave it to the police. (*See* Amended Complaint, Fischman Decl. Exh. A, ¶¶ 15-19.) Plaintiff's current Complaint alleges that Plaintiff discovered who owned the Debtor's property before he gave it to the police, but it does not allege that Plaintiff gave the property to the police in reliance on the Debtor's reward offer or any other alleged misrepresentation. Rather, Plaintiff's only allegation of reliance is conclusory, stating ***that*** he relied, but providing no facts concerning ***how*** he relied: "Augstein justifiably and detrimentally relied on Defendant's fictitious reward offer as set forth above." (Complaint ¶ 92; *see also* Complaint at ¶¶ 36-42, 93.) As a result, the Complaint does not sufficiently plead reliance and Plaintiff's 523(a)(2)(A) claim must be dismissed.

Moreover, the Complaint's 523(a)(2)(A) claim should be dismissed with prejudice, because Plaintiff ***cannot*** allege detrimental reliance. Even taking the Complaint's allegations as true, Plaintiff took only three relevant actions after he learned of the reward offer. First, he notified the police that he had found the Debtor's laptop bag. Plaintiff admits that notifying a party who lost property, or "another person entitled to receive," was required by German law. (*See* Pl. Mem at 20.) Plaintiff therefore cannot claim that he provided notice solely in justifiable reliance on a misrepresentation – at a minimum, the Court should not countenance

an argument that Plaintiff would have disobeyed the law if not for his reliance on a misrepresentation.

Second, Plaintiff gave the police the Debtor's laptop bag. Plaintiff's motivation for doing so is not pled – he may have acted from good citizenship, or the police may have asked for the Debtor's property. *See* German Civil Code § 967 ("Duty to Deliver. The finder is … on the order of the competent authority obliged to deliver the thing … to the competent authority). Plaintiff did not, however, turn the property over in reliance on the Debtor's reward offer, because ***the reward offer did not require Plaintiff to give the property to the police as a condition of claiming the reward***. Indeed, Plaintiff's Memorandum states that the reward was conditioned on returning the Debtor's property to ***the Debtor***. (*See* Pl. Mem. at 8.) Turning the laptop bag over to the police without insisting on receiving a reward was the Plaintiff's decision, and the morally correct one, but it was ***not*** due to reliance on an alleged misrepresentation.

Plaintiff's last relevant action was to notify the Debtor that he had found the laptop bag and claim his reward by email. As Plaintiff admits, however, German law mandates that "[a] person who finds a lost thing and takes possession of it must without undue delay notify the loser or the owner or another person entitled to receive." (*See* Pl. Mem. at 20 (quoting German Civil Code § 965).) Accordingly, as discussed above with respect to notifying the police, Plaintiff cannot allege that he sent his email in justifiable reliance on a misrepresentation, and should not be heard to make that allegation, because his action was legally required.

It is possible that Plaintiff might attempt to plead, though he has not pled, that he emailed the Debtor in reliance on a misrepresentation because notifying the police relieved him of any further legal obligation. This would not make his Complaint viable, however, for at least three reasons. First, as discussed in the Debtor's Initial Memorandum, Plaintiff's damages for

this reliance would be limited to his out-of-pocket costs in sending the email, which were *de minimis*. Second, Plaintiff should not be heard to plead that, notwithstanding the mandate and policy of German law, he would not have contacted the Debtor except in reliance on a misrepresentation. Third, given that Plaintiff had already notified the police about the Debtor's property, Plaintiff's email was irrelevant to his fraud claim – it was not a service to the Debtor, and likely was not required for him to obtain his property, because he could and should have received the property as a result of the initial notice to the police. Rather, because Plaintiff's email was a claim for a reward, it was actually a service the Plaintiff performed for ***himself***. For the foregoing reasons, therefore, Plaintiff does not and cannot plead reliance, and his claim under section 523(a)(2)(A) should be dismissed with prejudice.

B. Plaintiff Does Not, and Cannot, Sufficiently Plead Damages

For some of the same reasons that Plaintiff cannot plead reliance, he cannot sufficiently plead damages. Proximately caused "loss and damage," Plaintiff admits, is a necessary element of a claim under section 523(a)(2)(A). (*See* Pl. Mem. at 14.) *See also Nunnery v. Rountree (In re Rountree)*, 333 B.R. 166, 171 (E.D. Va. 2004) (stating that before section 523(a)(2)(A) applies, "'the debtor's fraud must result in a loss of property to the creditor'") (quoting 4 Collier on Bankruptcy § 523.08[I], [a]), *aff'd*, 478 F.3d 215 (4th Cir. 2007).

The Complaint pleads only one element of damage: that the Debtor did not pay the promised reward: "As a direct and proximate result of Defendant's fictitious reward offer and Augstein's justifiable reliance thereon, Augstein was damaged in an amount of no less than $1,000,000, including interest." (Complaint ¶ 93; *see id.* ¶ 101.) This allegation is insufficient to support Plaintiff's section 523(a)(2)(A) claim, because as the Debtor's Initial Memorandum points out, his damages for fraud under New York law would be limited to his out-of-pocket

losses. Expectation damages, such as a failure to receive a reward, are not compensable for fraud. (*See* Initial Mem. at 4, 15-16.) Plaintiff does not dispute this proposition in his Memorandum, and he does not argue that this Court would apply a different rule.

Plaintiff's Memorandum also does not argue that German law would govern his fraud claim or that it would allow him to recover expectation damages. German law most likely would not apply given that Plaintiff and the Debtor have different domiciles and that the alleged misrepresentation was disseminated over the internet rather than specifically in Germany. In any event, German law, like New York law, appears to limit recovery for fraudulent inducement to out-of-pocket damages. *See, e.g.,* German Civil Code § 249 ("A person who is liable in damages must restore the position that would exist if the circumstance obliging him to pay damages had not occurred.") Thus, given Plaintiff's failure to plead or argue otherwise, the Court should determine that Plaintiff has not pled, and cannot plead, a fraud claim for expectation damages under relevant law.

Plaintiff also fails to plead, and cannot plead, a fraud claim for out-of-pocket damages. No such damages are expressly alleged or quantified in Plaintiff's Complaint, and as discussed above, any such damages would be either *de minimis* or not compensable. Plaintiff's notifications to the police and the Debtor were *de minimis* items of damage at best and, as Plaintiff admits, at least one notice was legally required, and the other was an attempt to claim a reward. Also, Plaintiff's decision to leave the Debtor's property with the police cannot be pled as damages because Plaintiff did not do so in reliance on the reward offer.

Finally, as part of the necessary allegation of damages, a claim under section 523(a)(2)(A) must plead that reliance on a misrepresentation was the proximate cause of the plaintiff's damages. (*See* Pl. Mem. at 14.) Plaintiff's claim does not and cannot do so because,

as noted above, he was obligated by German law to notify the Debtor and/or the police irrespective of any alleged misrepresentation, and his decision to turn over the Debtor's property was not made in reliance on the Debtor's reward offer.

Accordingly, for all of the foregoing reasons, Plaintiff's section 523(a)(2)(A) claim should be dismissed with prejudice not only for failure to reliance, but also for failure to plead compensable damages.

II. THE SUPREME COURT'S DECISION IN *DE LA CRUZ* DOES NOT EXCUSE PLAINTIFF'S FAILURE TO PLEAD, OR INABILITY TO PLEAD, RELIANCE AND DAMAGES

Plaintiff argues that his $1 million claim under section 523(a)(2)(A) is "valid" despite the fact that "the property at issue belonged to Leslie" because, under *Cohen v. De la Cruz*, 523 U.S. 213 (1998), the Debtor's debt is one "resulting from" and "traceable to" the Debtor's obtaining property by fraudulent means. (*See* Pl. Mem. at 13, 17.) Apparently, Plaintiff maintains that *De La Cruz* allows him to assert a non-dischargeable claim for a full $1 million even though he cannot allege that he incurred any substantial damages as a result of fraud. *De La Cruz* does not do so, and it does not save Plaintiff's Complaint.

De La Cruz concerned "whether § 523(a)(2)(A) bars the discharge of treble damages awarded on account of the debtor's fraudulent acquisition of 'money, property, services or … credit,' or whether the exception [from discharge] only encompasses the value of the 'money property, services or … credit.'" *De la Cruz*, 523 U.S. at 214 (quoting 11 U.S.C. § 523(a)(2)(A)). The Court held that, "§ 523(a)(2)(A) prevents the discharge of all liability arising from fraud, and that an award of treble damages falls within the scope of the exception." *Id.* In *De La Cruz*, the treble damages were imposed under a New Jersey statute after the bankruptcy

court found that the debtor had committed "actual fraud" within the meaning of section 523(a)(2)(A). *See De la Cruz*, 523 U.S. at 215-16.

De La Cruz does not apply here for several reasons, two of which are clear from a single sentence in *De La Cruz* that Plaintiff himself quotes: "'***Once it is established that specific money or property has been obtained by fraud*** … 'any debt' arising therefrom is excepted from discharge.'" (Pl. Mem. at 13 (quoting *De la Cruz*, 523 U.S. at 218) (emphasis added).) This sentence makes clear that 'any debt' can be non-dischargeable ***only after*** the plaintiff has shown both fraud and actual damages. Cases applying *De La Cruz* have also insisted on these requirements. *See*, *e.g.*, *Ghomeshi v. Sabban (In re Sabban)*, 600 F.3d 1219 (9th Cir. 2010) (holding that a claim was not non-dischargeable due to the absence of damages and fraud); *Nunnery v. Rountree (In re Rountree)*, 333 B.R. 166, 173 (E.D. Va. 2004) (holding that section 523(a)(2)(A) did not make a debt non-dischargeable because, *inter alia*, "the Debtor did not receive any money, property or services from the Creditor as a result of the Debtor's misrepresentations"), *aff'd*, 478 F.3d 215, 222 (4th Cir. 2007) (section 523(a)(2)(A) requires that "the debtor have fraudulently obtained money, property, services or credit").

Ghomeshi v. Sabban is particularly instructive. In that case, Mr. Ghomeshi sued a debtor/remodeling contractor under a California statute providing for disgorgement of payments to an unlicensed contractor irrespective of whether the plaintiff sustained actual harm and irrespective of whether the contractor committed fraud. *Sabban*, 600 F.3d at 1220. Ghomeshi contended, as Plaintiff appears to contend here, that the debtor's debt to him was non-dischargeable even though he suffered no actual loss from the misrepresentation at issue. *Id.* at 1223. Ghomeshi "emphasize[d]," the court wrote, "that the state court found that [the debtor] made a fraudulent misrepresentation that induced [Plaintiff] to enter into a contract … and that

the court awarded [Plaintiff] $123,000." *Id.* Ghomeshi also contended, relying on *De La Cruz* exactly as Plaintiff does here, that his debt should be non-dischargeable because it was "traceable to" or "resulting from" fraud. *Id.*

The Ninth Circuit disagreed, pointing to two distinctions between Ghomeshi's case and *De La Cruz*: First, "Ghomeshi suffered no actual harm," unlike the plaintiffs in *De La Cruz*. And second, the statute underlying Ghomeshi's claim, in contrast to the statute in *De La Cruz*, was "not premised on the commission of fraud." *Sabban* at 1224. Both of these distinctions apply here, and they demonstrate that Plaintiff's reliance on *De la Cruz* is misplaced.

A third reason why *De la Cruz* does not save Plaintiff's Complaint is that it provides no support for Plaintiff's alleged entitlement to expectation damages. *De la Cruz* concerned an entitlement to treble damages that were provided as a statutory punishment under non-bankruptcy law. Plaintiff seeks expectation damages that are not compensatory, punitive or statutory and that the underlying non-bankruptcy law declines to provide. *De La Cruz* and its rationale does not extend so far, and Plaintiff cites no authority to support such an extension.

Indeed, an award of expectation damages cannot be squared with some of the broadest pronouncements in *De La Cruz*. *De la Cruz* states, in a much-quoted passage, that section 523(a)(2)(A) "prevents discharge of 'any debt' respecting 'money, property, services or credit' that the debtor has fraudulently obtained." *De la Cruz*, 523 U.S. at 218. Expectation damages, however, are not debts respecting property or services that a debtor has "***obtained***." They are debts respecting property or services that a debtor has ***promised to provide in the future.***

Suppose, for example, that a debtor promised to sell $20,000 worth of gold for half price to a creditor, took the creditor's money, and failed to deliver. The creditor's $10,000

rescission claim would be a claim for property the debtor obtained, and might well be non-dischargeable. Any claim for the $20,000 value of the gold would not, however, because the debtor did not "obtain" $20,000. Consequently, the creditor's claim for expectation damages would not be within the scope of the "any debt" made non-dischargeable, at least in dictum, by *De La Cruz*. And of course, the Debtor's behavior here was very different from the debtor in this hypothetical, because the Debtor here did not did not seek to bilk an investor – he sought only the return of his own stolen property.

Accordingly, for all of the foregoing reasons, *De la Cruz* does not remedy the Complaint's failure to plead reliance and damages or the Plaintiff's inability to plead these elements in any amended pleading. The Debtor's Motion to dismiss Plaintiff's section 523(a)(2)(A) claim with should be granted with prejudice.

III. PLAINTIFF'S CLAIM UNDER SECTION 523(A)(6) SHOULD BE DISMISSED FOR THE REASONS STATED IN THE DEBTOR'S INITIAL MEMORANDUM

Plaintiff's Initial Memorandum demonstrated that Plaintiff's claim under section 523(a)(6) of the Bankruptcy Code should be dismissed because the claim is for breach of contract, not a "willful and malicious injury." (*See* Initial Mem. at 13-17.) The Initial Memorandum showed that Plaintiff did not and could not allege a legally cognizable "injury" that was either "willful" or "malicious" under governing law and that the Complaint failed to allege the tort that must be alleged together with a claim for breach of contract to satisfy the requirements of section 523(a)(6). For these four independently sufficient reasons, the Initial Memorandum concluded, Plaintiff's 523(a)(6) claim should be dismissed with prejudice.

Plaintiff's response does nothing to challenge these conclusions. Plaintiff offers two paragraphs of boilerplate that do not differ materially from the Debtor's statement of the relevant law, one paragraph discussing the inapposite *Khafaga* case, and one paragraph attempt-

ing to characterize the Debtor as a bad man. (*See* Pl. Mem. at 17-18.) *Khafaga* is inapposite because the "aggravating circumstances" at issue there – which Plaintiff describes as the "secret creation and operation of a competing business," "diversion of business from the plaintiff-franchisor," failure to provide financial disclosure "even after demand by plaintiff," and "the submission of false reports …with the intention of withholding royalties" – bear no relation to the facts alleged here. (*See* Pl. Mem. at 18 (discussing *Rescuecom v. Khafaga (In re Khafaga)*, 419 B.R. 939 (Bankr. E.D.N.Y. 2009)).

Accordingly, the arguments in the Debtor's Initial Memorandum are dispositive. For the reasons stated above and in the Debtor's Initial Memorandum, Plaintiff's claim under section 523(a)(6) of the Bankruptcy Code, and his Complaint as a whole, should be dismissed with prejudice.

CONCLUSION

For all of the foregoing reasons, the Debtor respectfully requests entry of an order dismissing the Complaint in its entirety and with prejudice, and granting such other and further relief as the Court may determine to be just.

Dated: New York, New York
June 29, 2014

Respectfully submitted,

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