**IN THE UNITED STATES BANKRUPTCY COURT**
**FOR THE SOUTHERN DISTRICT OF IOWA**

In the Matter of:

Robert Alan Henkel — Case No. 15-00347-als7

Debtor — Chapter 7

NuScience Corporation — Adv. Pro. 15-30023-als

Plaintiff

v.

Robert Alan Henkel

Defendant

**MEMORANDUM OF DECISION**
**(date entered on docket: January 20, 2016)**

Before the Court is the Plaintiff's ("NuScience") Motion for Summary Judgment ("Motion") on its complaint alleging that attorney fees in the amount of $54,533.09 are not dischargeable pursuant to 11 U.S.C. §523(a)(6) and for declaratory judgment that equitable and injunctive relief granted in a federal court action is not subject to discharge. At hearing, NuScience appeared by counsel, Abbe M. Stensland. The Defendant Robert A. Henkel ("Henkel") appeared pro-se. The Court has jurisdiction over this matter pursuant to 11 U.S.C. §§ 157(b)(1) and 1334. Based upon the record and arguments the following findings and

conclusions of law are entered by the Court pursuant to Federal Rules of Bankruptcy Procedure 7052 and 9014. For the reasons stated Plaintiff's Motion is granted.

## FACTS

NuScience is in the business of researching, developing and distributing oxygen based health and beauty products and other mineral supplements. In August 2008 NuScience sued Robert Henkel, Deutrocell and Michael Henkel (collectively and individually "defendants") in the United States District Court for the Central District of California ("District Court"). The suit sought damages for trade secret misappropriation, federal trademark infringement, unfair competition, false advertising and intentional interference with business relationships. In April 2009 a default judgment in favor of NuScience was entered. Compensatory damages were ordered in the amount of $100,000 against each defendant, along with payment of plaintiff's attorneys' fees and costs. Punitive damages in the amount of $100,000 were also imposed against each defendant. The judgment specifically included a permanent injunction that prohibited the defendants from: taking certain actions related to NuScience's trade secrets[1], using its trademarks and licenses; engaging in unfair competition; or intentionally interfering with NuScience's business.

NuScience filed multiple contempt actions against the defendants for violations of the permanent injunction. Each of these actions resulted in a determination that the defendants were in contempt. The District Court initially ordered the defendants to pay NuScience its attorney fees and costs associated with its prosecution for contempt in the amount of $109,106.18 which

[1] "possessing, using, selling, offering to sell, transferring, controlling, communicating, providing, revealing, giving away, marketing, publishing, advertising or otherwise transferring to any person in any manner any of NuScience's trade secrets or trade secret assets" and "from stating, telling, representing or claiming to third persons that it knows, possesses, controls, is able to use, or has knowledge of the ingredients formula, recipe, know-how, specifications, mixing formula, secret processes or other technical data of any of ÑuScience's trade secrets."

were assessed equally between Robert Henkel and Michael Henkel. Eventually, the District Court found it necessary to impose a fine against the defendants in the amount of $5,000 per diem until they complied with the terms of the injunction.

Henkel filed a voluntary chapter 7 petition on February 27, 2015. NuScience was identified as a creditor on Schedule F in the amount of $539,438.18 based upon a claim incurred on April 23, 2008.

## DISCUSSION

Federal Rule of Bankruptcy Procedure 7056 incorporates Federal Rule of Civil Procedure 56, which applies to the Motion for Summary Judgment. Rule 56 states, in part:

> (a) The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.
>
> (c)(1) A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:
>
> > (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or
> > (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Krein v. DBA Corp.*, 327 F.3d 723, 726 (8th Cir. 2003) (citing Fed. R. Civ. P. 56(c) (2013)). Once the moving party has met its burden, the burden shifts to the non-moving party to set forth specific facts that prove a genuine issue of material fact exists. *Celotex Corp. v. Catrett*, 47 U.S. 317,

324 (1986); *N. Am. Specialty Ins. v. Thomas* (*In re Thomas*), Bankr. No. 08-42852, No. 4:09-CV-248, 2010 U.S. Dist. LEXIS 16269, at *8 (E.D. Mo. Feb. 24, 2010) (citing Fed. R. Civ. P. 56(e)).

**1. 11 U.S.C. 523(a)(6)**

NuScience alleges that Henkel's obligation to pay attorney fees in the amount of $54,533.09 qualifies as a debt arising from a willful and malicious injury. In support of its Motion for Summary Judgment NuScience relies upon the District Court's Order's finding of contempt against Henkel due to his conduct in violation of the injunction. The first step in evaluating whether summary judgment is appropriate requires a determination of whether "there [is] a genuine dispute of material fact – i.e., a triable issue as to a fact necessary to satisfy an essential element of the claim or defense in question, under the governing law[.]" *Cmty. Fin. Group, Inc. v. Fields* (*In re Fields*), 449 B.R. 387, 391 (Bankr. D. Minn. 2011).

The bankruptcy code states that a discharge under section 727 does not discharge an individual debtor from any debt for willful and malicious injury by the debtor to another entity or to the property of another entity. *See* 11 U.S.C. § 523(a)(6) (2015). The United States Supreme Court has determined that reckless or negligent conduct that results in injury does not meet the standard required under 11 U.S.C. section 523(a)(6). *See Kawaauhau v. Geiger*, 523 U.S. 57 (1998). The statute requires two distinct elements. "Willfulness is defined as 'headstrong and knowing' conduct and 'malicious' as conduct 'targeted at the creditor . . . at least in the sense that the conduct is certain or almost certain to cause . . . harm.'" *Fischer v. Scarborough* (*In re Scarborough*), 171 F.3d 638, 641 (8th Cir. 1999) (quoting *Johnson v. Miera* (*In re Miera*), 926 F.2d 741, 743 (8th Cir. 1991)). The Eighth Circuit further clarified its interpretation of "willfulness" and stated, "in this circuit the 'willful' element is a subjective one, requiring proof that the debtor desired to bring about the injury or was, in fact, substantially certain that his

conduct would result in the injury that occurred." *Blocker v. Patch* (*In re Patch*), 526 F.3d 1176, 1180-81 (8th Cir. 2008). The malicious behavior must be more than reckless or intentional acts that result in harm. *See Fischer v. Scarborough* (*In re Scarborough*), 171 F.3d at 641.

The District Court held Henkel in contempt for violating the terms of the permanent injunction. The exhibits submitted in support of the Motion include specific descriptions of the conduct that was the basis for its findings. For example, shortly after entry of the original judgment the defendants made threats in telephone conversations with NuScience's counsel and postings made on their websites, to publish the trade secret formula and technical know-how for Cellfood on the internet if NuScience did not "back off" and stop sending "legal papers." An internet posting referring to the "fraudulent judgment" obtained stated that "if you do not stop harassing me and my brother Bob, we are fully prepared to give the formula for Cellfood to the world for free." Other statements made by Henkel provide additional insight as to his intent. He threatened to sell the formula if NuScience would not pay him "tens of millions of dollars" and stated that he was selling "loads" of a product using the trade secret formula through his company, Revive Organics. During an FBI investigation, Henkel informed an agent that he would disclose NuScience's trade secret formula to the world if NuScience did not agree to dismiss its action and forgo enforcement of its judgment. NuScience and its customers received e-mails from Henkel which included communications that were: disparaging of NuScience's business practices and products, offering to sell them their product which was basically the same as Cellfood, threatening to contact Cellfood retailers directly to inform them that the product is not made from an original formula, but rather from a formula for "drain cleaner" and demanding payment from NuScience of $300 million.

In response to the pending Motion, Henkel raises the following arguments: that NuScience should not be permitted to bring this case because it already chose to pursue its remedies in California; that the basis for the default judgment entered in California stemmed from a single $12.00 transaction; and that NuScience has not demonstrated that the amount of its attorney fee awards are in any way related to the amount of its injury and that there is no evidence it ever actually incurred the stated fees. No affidavits or exhibits were filed by Henkel in support of these positions.[2] These statements standing alone, without additional factual or legal grounds, are insufficient to call into question the determination of the fee amount by the District Court or generate an issue of material fact in this adversary proceeding. Henkel further suggests that NuScience's complaint is duplicative of the California litigation and unnecessary because it could have been brought by motion. These positions are simply not correct. NuScience's complaint in this adversary proceeding is for the sole purpose of determining whether Henkel's liability to pay the attorney fees awarded in the contempt action are excepted from his bankruptcy discharge. As to the procedure for objecting to dischargeability of a debt, Federal Rule of Bankruptcy Procedure 7001(4) defines such an action as an adversary proceeding which requires a complaint to be filed. Fed. R. Bankr. P. 7003. Finally, Henkel's statement that he is unable to pay the attorney fees is neither relevant nor material to a determination of whether that claim is non-dischargeable under 11 U.S.C. § 523(a)(6).

An order of contempt may qualify as a final judgment for collateral estoppel purposes and under appropriate circumstances courts have granted summary judgment based upon orders of contempt in the context of a dischargeability action under 11 U.S.C. §523(a)(6). *See Musilli v. Droomers* (*In re Musilli*), 379 Fed. Appx. 494, 2010 WL 2222806 at *5 (6th Cir. 2010);

[2] Henkel stated at the hearing that he did dispute NuScience's allegations in the District Court but no information supporting these challenges were included in his filings with this Court.

*Williams v. Int'l Brotherhood of Elec. Workers Local 520* (*In re Williams*), 337 F.3d 504, 511-13 (5th Cir. 2003)*; In re Nangle*, 274 F.3d 481, 484 (8th Cir. 2001); *CMCO Mortgage, LLC v. Hill.* 540 B.R. 331, 342 (Bankr. W.D. KY 2015). "Congress intended the bankruptcy court to determine the final result of dischargeability [yet this] does not require the bankruptcy court to redetermine all the underlying facts." *Leonard v. RDLG, LLC*, 529 B.R. 239, 247 (E.D. Tenn. 2015) (citations omitted). While redetermination of issues is "warranted" if there is a reason to doubt the prior court's underlying factual determinations, no such reconsideration is necessary when the "quality, extensiveness, or fairness of procedures followed in prior litigation" is not called into question. *See id.* at 248. A finding of contempt does not automatically establish a willful and malicious injury as a matter of law. *Suarez v. Barrett* (*In re Suarez*), 400 B.R. 732, 736-37 (B.A.P. 9th Cir. 2009). In this Circuit an examination of the facts and circumstances that warranted a finding of contempt are examined to determine whether the elements of willful and malicious conduct have been satisfied. *In re Nangle*, 274 F.3d 481 (8th Cir. 2001).

> [W]hen a court . . . issues an injunction or other protective order telling a specific individual what actions will cross the line into injury to others, then damages resulting from an intentional violation of that order as is proven either in the Bankruptcy Court or, so long as there was a full and fair opportunity to litigate the questions of volition and violation, in the issuing court are *ipso facto* the result of a "willful and malicious injury."
>
> This is because what is "just" or "unjust" conduct as between the parties has been defined by the court.... An intentional violation of the order is necessarily without "just cause or excuse" and cannot be viewed as not having the intention to cause the very harm to the protected persons that order was designed to prevent.

*Williams v. Int'l Brotherhood of Elec. Workers Local 520* (*In re Williams*), 337 F.3d 504, 512 (5th Cir. 2003) (quoting *Buffalo Gyn Womenservices, Inc. v. Behn* (*In re Behn*), 242 B.R. 229, 238 (Bankr. W.D.N.Y. 1999).

Henkel has not disputed the allegations made by NuScience or provided any facts to justify or excuse his behavior. The record reflects that he wilfully engaged in conduct that was targeted toward NuScience and was intended to cause harm. The attorney fees awarded represent damages incurred by NuScience as a direct result of Henkel's continued and intentional violation of the District Court's orders. Based upon the principles of collateral estoppel, the conduct which warranted a finding of contempt in the District Court is sufficient to determine that the award of attorney fees is excepted from discharge as a willful and malicious injury pursuant to 11 U.S.C. § 523(a)(6) in this case. Accordingly, no genuine issues of material fact exist and entry of summary judgment in favor of NuScience in this adversary proceeding is appropriate.

For the reasons stated the portion of the attorney fees and costs assessed against Henkel by the District are not dischargeable pursuant to 11 U.S.C. § 523(a)(6).

**2. Declaratory Judgment**

Under Count II of its complaint NuScience seeks a declaratory judgment that the equitable relief ordered by the District Court is injunctive in nature and therefore not subject to discharge.

A discharge in bankruptcy operates to eliminate a debtor's obligation on a debt, which is defined as liability on a claim. 11 U.S.C. § 101(12). A "claim" is defined by the bankruptcy code at 11 U.S.C. § 101(5) as:

> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to

> an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

An equitable remedy for breach of performance is a "claim" if the same breach also gives rise to a right to a payment "with respect to" the equitable remedy. If the right to payment is an "alternative" to the right to an equitable remedy, the necessary relationship clearly exists, for the two remedies would be substitutes for one another." *Matter of Udell*, 18 F.3d 403, 408 (7th Cir. 1994).

The District Court ordered the defendants to undertake specific action to cease the conduct that violated the injunctive relief and to turn over data and information to NuScience. Although a fine was imposed, payment of this amount was not awarded to NuScience. The District Court's order does not contemplate substitution of monetary damages in lieu of compliance with these directives. Based upon the statutory language the injunctive remedies which require Henkel's compliance do not meet the definition of a "claim" and as a result are not subject to discharge in this bankruptcy proceeding.

Henkel contends that this adversary proceeding is redundant because NuScience elected to enforce its judgments in California and there is no showing of continuing conduct. These positions are not contrary to the result reached here. The District Court retains jurisdiction to enforce its prior orders and that authority is not affected by the ruling of this court. Second, to the extent the conduct is not continuing, there would be no grounds for further contempt actions by NuScience.

## CONCLUSION

For the reasons stated herein the Court determines that no genuine issue of material fact exists and NuScience is entitled to judgment as a matter of law.

IT IS HEREBY ORDERED:

1. The objection(s) filed by the Defendant is overruled.

2. The Plaintiff's Motion for Summary Judgment is granted.

3. The amount of $54,533.09 owing to NuScience is excepted from discharge pursuant to 11 U.S.C. § 523(a)(6).

4. The injunctive relief ordered by the California District Court are not claims that are subject to discharge.

5. Judgment shall enter accordingly.

6. The parties shall bear their own costs.

/s/ Anita L. Shodeen
Anita L. Shodeen
U.S. Bankruptcy Judge

Parties receiving this Memorandum of Decision from the Clerk of Court:
Electronic Filers in this Adversary Proceeding
Others: Robert Henkel