

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

H. THOMAS MORAN, II,
in his Capacity as Receiver of
the Assets of Lifetime Capital,
Inc. and Certain Affiliated Persons
and Entities,

Plaintiff,

vs.

Case No.: 3:05-cv-72

DAVID W. SVETE,

Defendant

Judge Thomas M. Rose
Magistrate Judge Michael J. Newman

ORDER

This case is before the Court upon receipt of the Status Report filed by Receiver, H. Thomas Moran II (“Receiver”), advising the Court that the bankruptcy case filed by Defendant David W. Svete (“Svete”) was closed on October 29, 2013. Doc. 208. Upon notification of Svete’s pending bankruptcy case, the Court stayed all proceedings in this case on July 5, 2012. Doc. 193. Following the filing of this most recent Status Report, Receiver moved, on November 26, 2013, to lift the stay. Doc. 209.

I. BACKGROUND FACTS

This civil case arose out of Svete’s involvement in viaticals. The background facts are detailed in opinions issued by the Sixth and Eleventh Circuits:

Viaticals are legitimate insurance products in all states, allowing patients (“viators”) to sell the right to receive benefits under their life insurance policies for tax-free cash. The sale of viaticals is usually made to a provider company through a broker. The provider company, in turn, typically through a sales agent, finds independent purchasers to invest in the policies. Each purchaser (also referred to as “investor”) buys the right to become a beneficiary of the viator’s life insurance policy. Thereby, purchasers receive a high return on their investment if

the viator dies within the time projected by the viatical settlement provider. However, investors risk a reduction of their return or a complete loss if the viator does not die within the time projected because the investor must continue to pay the premiums on the policy as they accrue or the policy will lapse.

Svete became involved with viaticals in 1997 when he incorporated LifeTime Capital, Inc. (“LCI”) in Nevada as a provider company. He later incorporated Alexander Chase, d/b/a WSI, for the same purpose, as well as multiple additional businesses offering financial, office, marketing, and viatical services. According to trial testimony, Svete’s control of these corporations was secreted, thus misleading investors and providing an avenue to launder money taken by fraud.

United States v. Svete, 521 F.3d 1302, 1305 (11th Cir.) (hereinafter “*Svete I*”), *vacated, reh’g en banc granted*, 532 F.3d 1133 (11th Cir. 2008), *aff’d in part en banc*, 556 F.3d 1157 (11th Cir.), *reinstated in part*, 565 F.3d 1363 (11th Cir. 2009).

[LifeTime] was sold in 1998 to another company whose principal was allegedly under Svete’s control. Over the next several years, Svete formed and controlled a number of other entities associated with LifeTime’s viatical investment business, which were allegedly used to disguise Svete’s control, mislead investors, and facilitate the diversion of invested funds. For example, one company (Medical Underwriters, Inc.) allegedly misrepresented and even forged the purportedly independent medical evaluation of the viator’s life expectancy. Another company, touted as an independent investment servicing company, allegedly underfunded the premium reserve account and facilitated the diversion of funds from that account to Svete. Many investments failed to mature when expected, and additional premium payments were required. Investors also claimed that sales agents made false statements concerning life expectancy, the status of life insurance policies, and the risks associated with the investments. Overall, companies controlled by Svete obtained more than \$100 million in investments from over 3,000 investors.

Moran v. Svete, 366 F. App’x 624, 625 (6th Cir. 2010) (hereinafter “*Svete IV*”).

Svete and [his co-defendant] were charged in a superseding indictment with conspiracy to violate the laws of the United States in violation of 18 U.S.C. § 371 (Count One); conspiracy to launder money in violation of 18 U.S.C. § 1956(h) (Count Two); mail fraud in violation of 18 U.S.C. § 1341 (Counts Three through Seven); and substantive violations of interstate transportation of money obtained by fraud in violation of 18 U.S.C. § 2314 (Counts Eight through Ten). The jury convicted Svete and [his co-defendant] of all counts. . . . Svete was sentenced to a term of imprisonment of 60 months as to Count One and 200 months as to Counts Two through Ten, to run concurrently with one another. Svete was also ordered to pay a special monetary assessment of \$1,000, restitution

in the amount of \$100,722,605.34, a in \$21,000,000 forfeiture, and to serve a 3 year period of supervised release.

Svete I, 521 F.3d at 1304-05.

On appeal, a panel of the Eleventh Circuit vacated the four mail fraud convictions because the jury instruction conflicted with prior Eleventh Circuit precedent. *Svete I*, 521 F.3d at 1318. On rehearing en banc, the Eleventh Circuit overruled the prior precedent and remanded to the panel for further consideration. *United States v. Svete*, 556 F.3d 1157, 1170 (11th Cir. 2009) (en banc) (hereinafter “*Svete II*”). The panel then affirmed Svete’s four mail fraud convictions and reinstated its affirmance of his other convictions. *United States v. Svete*, 565 F.3d 1363, 1364 (11th Cir. 2009) (per curiam) (hereinafter “*Svete III*”). Svete is currently an inmate at Terminal Island, a federal correctional institution in San Pedro, California.

II. PROCEDURAL HISTORY

H. Thayne Davis, a LifeTime investor, filed suit in this Court against both LifeTime and Svete for fraud and breach of contract. *Davis v. LifeTime Capital, Inc.*, No. 3:04-cv-59 (S.D. Ohio filed Feb. 19, 2004). In *Davis*, the court found the need to create a LifeTime Receivership was “both necessary and appropriate in order to prevent waste and dissipation of the assets of Defendant [LifeTime] to the detriment of investors, including the receivership estate of LifeTime.” *Id.* at doc. 6, PageID 55. Consequently, H. Thomas Moran II was appointed as Receiver for LifeTime and was expressly authorized to:

take any and all action as the Receiver may deem necessary or prudent for the preservation, maintenance, and administration of the LifeTime Portfolio comprised of viatical and life settlement policies and beneficial interests therein[;]

[and]

to institute, defend, compromise or adjust such actions or proceedings in state or federal courts now pending and hereafter instituted as may, in his discretion, be advisable or proper for the protection of the Receivership Assets or proceeds

therefrom, and to institute, prosecute, compromise or adjust such actions or proceedings in state or federal court as may, in his judgment, be necessary or proper for the collection, preservation, and maintenance of the Receivership Assets.

Id. at doc. 6, PageID 57, 59.

The Court also provided protections for Receiver by setting the standard of care and instituting an indemnification provision. Specifically, the Order stated:

The Receiver and his agents are entitled to rely on all outstanding rules of law and court orders and shall not be liable to anyone for their own good faith compliance with any order, rule, law, judgment or decree. In no event shall the Receiver or his agents be liable to anyone for their good faith compliance with their duties and responsibilities as Receiver or agent for Receiver, nor shall the Receiver or his agents be liable to anyone for any actions taken or omitted by them except upon a finding by this Court that they acted or failed to act as a result of malfeasance, bad faith, gross negligence, or in reckless disregard of their duties. The Receiver and his agents shall be indemnified and held harmless out of the Receivership Assets for all costs and expenses, including reasonable attorney fees, incurred as a result of such actions.

Id. at PageID 60.

Receiver filed this action against Svete in his individual capacity in February 2005.¹ Doc. 1. Receiver asserts sixteen claims for relief: fraud; breach of fiduciary duty; civil conspiracy; misrepresentation; breach of contract; fraudulent transfer; unjust enrichment; alter ego; constructive trust; corrupt activities in violation of state law (Ohio Rev. Code § 2923.34); federal Racketeering Influenced and Corrupt Organization (RICO) Act claims (18 U.S.C. § 1962(a)-(d)); and violations of the Sarbanes-Oxley Act of 2002 (Pub. L. No. 107-204, 116 Stat. 745).

In a motion to dismiss the complaint and enforce arbitration filed in September 2006, Svete argued that all of Receiver's claims must be resolved through arbitration because the

¹ Although a number of Defendants were named in the Complaint, only Svete remains as a Defendant in this matter. *See* docs, 1, 9.

relevant contracts all contain arbitration clauses. Doc. 21. Magistrate Judge Sharon L. Ovington, to whom this case was then assigned,² recommended that Svete's motion be denied on the basis that Receiver sought to hold Svete liable in his personal capacity, whereas the contracts containing the arbitration clauses were executed by Svete in his capacity as an owner or officer of LifeTime. Doc. 30 at PageID 242-43. Svete objected to the Report and Recommendation, filed a motion to reconsider, and another motion to stay and compel arbitration. Docs. 31, 32, 34. In two separate Orders, Judge Rose adopted the Report and Recommendation in its entirety and denied Svete's motion to compel. Docs. 35, 36. Svete again moved for reconsideration and filed several objections. Docs. 38, 39, 42, 45, 47. Judge Rose denied all of Svete's motions in an Order issued on March 28, 2007. Doc. 51. This Order held that "[s]ince Svete seeks to enforce an arbitration clause in a contract that is the result of fraud or coercion, arbitration will not be compelled." *Id.* at PageID 449. Svete appealed to the Sixth Circuit. Docs. 53, 54, 55.

On February 24, 2010, the Sixth Circuit reversed this Court and remanded for further proceedings. *Svete IV*, 366 F. App'x at 631-32. The Sixth Circuit, relying on cases interpreting the Federal Arbitration Act, held that this Court erred in refusing to compel arbitration on the ground that the contract as a whole was the product of fraud. *Id.* at 631. Rather, the Sixth Circuit provided, this Court can examine only whether the arbitration clause itself was the product of fraud. *Id.* at 630-31. Questions as to the validity of the contract as a whole were properly reserved for the arbitrator to determine. *Id.* at 631-32. The Sixth Circuit set forth the limited scope of permissible review and remanded with instructions for this Court to determine: (1) whether there is an agreement to arbitrate; and (2) whether the specific dispute falls within the "substantive scope" of that agreement. *Id.* at 632.

² This case was transferred from Magistrate Judge Ovington to the undersigned on July 25, 2011. Doc. 169.

Consequently, on April 2, 2010, the Court ordered briefing on the arbitration issue to be completed by June 18, 2010. Doc. 71. In the interim, however, Svete requested several continuances, *see* docs. 72, 76, 90, and filed a number of appeals, *see* docs. 96, 105, 128, which caused briefing on the issue to be delayed for more than a year.

On April 8, 2011, the Court issued a revised Scheduling Order, which established new deadlines for the parties to submit their briefs. Doc. 130. Pursuant to the Scheduling Order, on May 9, 2011, the Receiver filed his brief, captioned as a “Memorandum Concerning Arbitration” (doc. 143); Svete’s brief, captioned as a “Motion to Dismiss, and, in the Alternative, Stay, For Lack of Subject Matter Jurisdiction,” (doc. 145), was delivered to prison officials on May 9, 2011 and filed with the Court on May 16, 2011. Svete renewed his argument that the Court should compel arbitration.

While Svete’s motion was pending, on November 18, 2011, Receiver filed a motion for partial summary judgment as to the claims for fraud, breach of fiduciary duty, civil conspiracy, unjust enrichment, and civil RICO. Doc. 177. Svete filed nothing in response to Receiver’s motion. In a Report and Recommendation issued on February 16, 2012, the Court recommended denying Svete’s motion to dismiss without prejudice. Doc. 178. The Court noted that complying with the Sixth Circuit’s instructions on remand would require an extensive review of hundreds of pages of briefings and exhibits, so the Court recommended deciding the merits of Svete’s motion in conjunction with Receiver’s motion for partial summary judgment in an effort to promote judicial efficiency. Judge Rose adopted the Report and Recommendation on April 4, 2012. Doc. 186.

On April 17, 2012, the Court, at Svete’s request, stayed all proceedings until May 31, 2012 due to a bicep tear in Svete’s right arm suffered on March 7, 2012 that required surgery and

prevented him from writing. Doc. 189. Svete thereafter filed an appeal with the Sixth Circuit on April 30, 2012, challenging Judge Rose's April 4, 2012 Order.³ Doc. 190. On June 21, 2012, while the appeal was pending, Svete notified the Sixth Circuit that he had filed a bankruptcy case. *Moran v. Svete*, No. 12-3534 (6th Cir. June 21, 2012), Doc. 6111354942. Pursuant to the automatic stay provision of 11 U.S.C. § 362(a), the Sixth Circuit stayed his appeal on June 29, 2012, and this Court followed suit on July 5, 2012. Docs. 192, 193.

III. BANKRUPTCY CASE

Svete filed a voluntary Chapter 7 Petition in the U.S. Bankruptcy Court for the Central District of California on April 23, 2012.⁴ *In re Svete*, No. 9:12-BK-11696 (Bankr. C.D. Cal. filed Apr. 23, 2012). As required by Fed. R. Bankr. P. 1007, Svete filed his schedules, statements, and other documents on May 9, 2012.⁵ In his Schedule B, Svete included among his assets twelve "pending lawsuits" with an unknown value. These lawsuits purportedly involved, *inter alia*, Receiver and several of his attorneys. Bankr. Doc. 14 at 4, 6-8. The schedule provided no further information as to the nature or basis of these lawsuits. Svete's Schedule F listed Receiver as a creditor holding a contingent, unliquidated nonpriority claim worth approximately \$900 million. *Id.* at 13.

³ In the Notice of Appeal dated April 26, 2012, Svete's signature is barely legible and a handwritten note appears in scrawled, barely legible text, as if written with his off-hand. Doc. 190.

⁴ All documents in support of Svete's petition are dated March 5, 2012, two days before his injury.

⁵ Svete's bankruptcy filings were dated May 1, 2012 and indicate that they were not prepared by a bankruptcy petition preparer. Bankr. Doc. 14 at 29, 35, 38. The majority of the pages are typewritten, but Svete signed, dated, and handwrote material on several pages in a legible manner. *See id.* at 29, 32, 35, 38, 39. The Court notes the discrepancy this creates with Svete's assertions in several filings in this case that indicate he was medically barred from using his right arm until May 31, 2012. Doc. 184 at PageID 2200-01; Doc. 188-9 at PageID 2251; Doc. 189 at PageID 22659-60.

Svete filed amended schedules in his bankruptcy case on October 31, 2012. The amended Schedule B valued the twelve pending lawsuits at approximately \$8 billion and detailed the nature of the claims. Bankr. Doc. 46 at 10-18, 20, 34. One claim was a \$10 million breach of contract claim against LifeTime and provided that these claims are “believed to have been filed as cross-claims or counterclaims in the matter of *H. Thomas Moran, II, Receiver v. David W. Svete*, Case No.: 3:05-CV-00072-TMR-MJN, USDC, S.D. Ohio, and are pending.” *Id.* at 14. Three separate claims for \$1 billion were listed against Receiver and two law firms representing him, all for “fraud, conversion, breach of duty, civil rights violations, RICO, and other claims related to their illegal acts and omission involving investigations and civil and criminal prosecutions of Debtor and their handling of LimeTime Capital, Inc. related matters.” *Id.* at 11, 14.

The Bankruptcy Trustee’s report filed on November 2, 2012 provided that the estate had neither received nor distributed any property, and that the estate would abandon \$8 billion in assets, which consisted almost entirely of the twelve lawsuits asserted by Svete.⁶ The Bankruptcy Court granted Svete a discharge pursuant to 11 U.S.C. § 727 on November 15, 2012, and the case was closed on November 19, 2012. Bankr. Doc. 47. Receiver was notified of Svete’s discharge via first class mail sent on November 15, 2012. Bankr. Doc. 48.

Svete notified the Court in a Status Report on January 7, 2013 that his bankruptcy case had been closed. Doc. 196. The Court then issued an Order to Show Cause on January 23, 2013, ordering Receiver to file a Status Report by March 15, 2013 addressing his participation in the bankruptcy case and the impact, if any, of Svete’s discharge. Doc. 197. Receiver’s Status Report, filed on March 15, 2013, revealed that Receiver had not made an appearance or

⁶ This is known as a “no asset” case.

otherwise participated in the bankruptcy case. Doc. 199 at PageID 2304-05. Receiver indicated that he had retained local bankruptcy counsel and averred that “if any further action is necessary with respect to Svete’s bankruptcy, such action will be commenced within sixty days.” *Id.* at PageID 2304. Receiver requested an additional sixty days in which to file an updated Status Report. *Id.* at PageID 2304-05. The Court granted that request, and ordered Receiver to file a Status Report on or before May 17, 2013. Doc. 200.

On April 2, 2013, the Bankruptcy Court granted Svete’s motion to reopen his bankruptcy case for the purpose of amending his Schedule C form. Bankr. Doc. 52. After Svete filed his amended Schedule C on May 17, 2013, the case was re-closed and the discharge remained in place. Bankr. Doc. 55. Svete filed another motion to reopen his case on June 13, 2013 for the purpose of filing amended Schedules C and F,⁷ which the Bankruptcy Court granted on June 20, 2013, and then closed the case the next day. Bankr. Docs. 57, 58, 60, 61, 64.

When Receiver failed to timely file his Status Report, the Court, acting *sua sponte*, extended the deadline to June 21, 2013. Doc. 201. Thereafter, Receiver filed his updated Status Report on June 17, 2013, advising the Court that Receiver had moved to reopen the bankruptcy case “for the purpose of attempting to negotiate a possible resolution with the Bankruptcy Trustee that would extinguish any possible claims the Defendant could have against the individuals and firms associated with the LifeTime Capital receivership action.” Doc. 204 at PageID 2319. Receiver then informed the Court that he would file an updated Status Report by August 20, 2013. *Id.* at PageID 2320.

On June 21, 2013, the same day the Bankruptcy Court re-closed the case after Svete filed his amended schedules, Receiver and the other parties listed as the subject of Svete’s twelve

⁷ The amended Schedule F listed several miscellaneous credit card, utility, and personal loan debts. Bankr. Doc. 61.

pending lawsuits filed a motion to reopen the bankruptcy case to “allow them to negotiate a possible settlement of the Debtor’s alleged ‘contingent and unliquidated’ claims against them listed in the Debtor’s amended Schedules B filed October 31, 2012.” Bankr. Doc. 62. The Bankruptcy Court ordered that the case again be reopened on June 24, 2013 for the limited purpose of allowing the parties to negotiate with the Trustee to settle the claims made by Svete against them. Bankr. 67.

On September 5, 2013, after Receiver for the second time failed to file a timely Status Report, the Court issued an Order to Show Cause. Doc. 205. Receiver’s Status Report, filed later that day, informed the Court that the bankruptcy case had been reopened and Receiver was in the process of negotiating with the Bankruptcy Trustee for a settlement of Svete’s claims against Receiver, his attorneys, and other associated persons. Doc. 206 at PageID 2322-23. On October 30, 2013, Receiver filed another Status Report indicating that he was unable to reach a settlement with the Trustee and that the bankruptcy case was closed on October 29, 2013, with Svete’s discharge unaltered. Doc. 208; Bankr. Doc. 78.

IV. RELEVANT BANKRUPTCY LAW

A petition for bankruptcy under Chapter 7 of the Bankruptcy Code generally results in the grant of a discharge from all debts incurred by the debtor before the filing of the petition. 11 U.S.C. § 727(b); *United States v. Storey*, 640 F.3d 739, 743 (6th Cir. 2011). The denial of a discharge is covered by 11 U.S.C. § 727(a). “Denial of a discharge is an extreme remedy and, therefore, exceptions to a debtor’s discharge under § 727(a) are to be construed liberally in favor of the debtor.” *U.S. Trustee v. Zhang (In re Zhang)*, 463 B.R. 66, 78 (Bankr. S.D. Ohio 2012). A creditor may object to a discharge pursuant to 11 U.S.C. § 727(c)(1), and must file a complaint in the bankruptcy court to initiate an adversary proceeding within sixty days after the first date

set for the meeting of creditors under 11 U.S.C. § 341(a). *Mickowski v. Visi-Trak Worldwide, LLC*, 415 F.3d 501, 508 (6th Cir. 2005); Fed. R. Bankr. P. 4004(a), 7001(4), 7003.

There are several exceptions to discharge enumerated in 11 U.S.C. § 523(a), which the creditor has the burden of proving by a preponderance of the evidence.⁸ *United States v. Hindenlang (In re Hindenlang)*, 164 F.3d 1029, 1034 (6th Cir. 1999); *see also Rittenhouse v. Eisen*, 404 F.3d 395, 396 (6th Cir. 2005) (“11 U.S.C. § 727(b) provides that a discharge under Chapter 7 relieves a debtor of all debts incurred prior to the filing of a petition for bankruptcy, except those nineteen categories of debts specifically enumerated in 11 U.S.C. § 523(a).”). These exceptions are “strictly construed in favor of the debtor.” *Storey*, 640 F.3d at 743. Creditors seeking an exception to a discharge under 11 U.S.C. § 523(a)(2), (4), or (6) must also institute an adversary proceeding in the bankruptcy court within sixty days after the first date set for the meeting of creditors under 11 U.S.C. § 341(a). 11 U.S.C. § 523(c); Fed. R. Bankr. P. 4007(c), 7001(6). A party seeking a determination of the dischargeability of a debt under any other exception provided by 11 U.S.C. § 523(a) may do so at any time. Fed. R. Bankr. P. 4007(b).

The entry of a discharge permanently enjoins the commencement or continuation of litigation to recover on a discharged debt. 11 U.S.C. § 524(a); *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 448 n.4 (2004) (“[A] discharge order under the Bankruptcy Code ‘operates as an injunction’ against creditors who commence or continue an action against a debtor *in personam* to recover or to collect a discharged debt.”); *Badovick v. Greenspan (In re Greenspan)*, No. 10-8019, 2011 WL 310703, at *3 (B.A.P. 6th Cir. Feb. 2, 2011) (“The bankruptcy discharge operates as an injunction to prevent any person or entity from commencing

⁸ A provision relevant to this case is 11 U.S.C. § 523(a)(13), which excludes from a discharge “any payment of an order of restitution issued under title 18, United States Code.”

or continuing an act to collect a discharged debt as a personal liability of the debtor.”). In *Moor v. Madison Cnty. Sheriff's Dep't*, 30 F. App'x 417 (6th Cir. 2002), one defendant filed a voluntary Chapter 7 bankruptcy petition during the pendency of a civil case. *Id.* at 418. Plaintiffs were adequately notified of the bankruptcy case, and took no action to set aside the automatic stay or object to the discharge. *Id.* The Sixth Circuit affirmed the district court's dismissal of all claims against this defendant because plaintiffs failed to respond to the discharge in bankruptcy. *Id.* at 419. The court held that plaintiffs' appeal was moot because “[p]laintiffs took no steps in either the bankruptcy or district courts to set aside or terminate the automatic stay or otherwise obtain an exception to the discharge and therefore failed to preserve their rights.” *Id.*

IV. CONCLUSION

In light of the above, the parties are **ORDERED** to advise the Court -- in writing, and on or before **January 10, 2014** -- as to their positions on the effect of the closing of Svete's bankruptcy case on this litigation.⁹ Specifically, the parties shall address whether they believe Receiver's claims were discharged, and whether Receiver is thus enjoined or otherwise prevented from further prosecuting this case. The parties shall also address any issues requiring the Court's attention and preventing the dismissal of this case and the winding up of the Receivership.

Receiver's motion to lift the stay is **DENIED WITHOUT PREJUDICE TO REFILE**, and this case remains **STAYED AND ADMINISTRATIVELY PROCESSED**.

⁹ Recognizing that Svete is incarcerated, and in the interest of justice, this date is purposefully extended beyond that normally selected by the Court in similar matters.

IT IS SO ORDERED.

December 10, 2013

s/ Michael J. Newman
United States Magistrate Judge