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8 UNITED STATES DISTRICT COURT FOR THE
9 EASTERN DISTRICT OF CALIFORNIA
10 FRESNO DIVISION

11 In re) District Ct. No. 1:10-CV-01847-AWI-JLT

12 TIMOTHY JOHN HARDT fdba HARDEL,) Bankruptcy No. 09-62756-A-7

13 INC. fdba JOURNEY ELECTRICAL)
TECHNOLOGIES, INC. fdba THE) Adversary No.: 10-01206-A

14 FITNESS CENTRE, LLC DELAWARE fdba)
TRI STATE, INC. fdba THE FITNESS) **JOINT STIPULATION AND ORDER AS**
15 CENTRE LLC CA_101 and MICHELLE) **TO NONDISCHARGEABILITY OF**
RENE HARDT) **DEBT**

16 Debtors.)

17 HILDA L. SOLIS, Secretary of Labor,)
United States Department of Labor,)

18 Plaintiff,)

19 vs.)

20 TIMOTHY JOHN HARDT fdba HARDEL,)
21 INC. fdba JOURNEY ELECTRICAL)
TECHNOLOGIES, INC. fdba THE)
22 FITNESS CENTRE, LLC DELAWARE fdba)
TRI STATE, INC. fdba THE FITNESS)
23 CENTRE LLC CA_101 and MICHELLE)
RENE HARDT,)

24 Defendants.)
25)
26)

1 Plaintiff-Creditor HILDA L. SOLIS, Secretary of Labor, United States Department
2 of Labor (“Secretary”), on behalf of the Journey Electrical Technologies, Inc. 401(k) Plan
3 (“Plan” or “401(k) Plan”), and TIMOTHY JOHN HARDT fdba HARDEL, INC. fdba
4 JOURNEY ELECTRICAL TECHNOLOGIES, INC. fdba THE FITNESS CENTRE, LLC
5 DELAWARE fdba TRI STATE, INC. fdba THE FITNESS CENTRE LLC CA_101
6 (“Debtor”) and MICHELLE RENE HARDT (collectively “Debtors”), having agreed to
7 resolve any dispute as to the dischargeability of the debt owed by the Debtors to the Plan,
8 and pursuant to L.R. 143 and 144, hereby consent to the following Joint Stipulation and
9 Order as to Nondischargeability of Debt (“Stipulation”) and entry of an Order from the
10 Court in accordance herewith:

11 1. On December 30, 2009, the Debtors filed a Petition for protection under
12 Chapter 7 of the Bankruptcy Code in this Court.

13 2. The Notice to Creditors in this matter stated that it was not necessary to file a
14 Proof of Claim, as there were no assets to distribute in this matter; therefore, the Secretary
15 did not file a Proof of Claim.

16 3. This Court has jurisdiction over the parties and the subject matter of this
17 Stipulation.

18 4. Debtor Timothy Hardt is a fiduciary of the Plan within the meaning of
19 Section 3(21), 29 U.S.C. § 1002(21), of the Employee Retirement Income Security Act of
20 1974 (“ERISA”).

21 5. The Plan is an employee benefit plan within the meaning of section 3(3) of
22 the ERISA, 29 U.S.C. § 1002(3).

23 6. Debtor Timothy Hardt breached the fiduciary duties imposed upon him by
24 ERISA Sections 404(a)(1)(A), (B) and (D), 406(a)(1)(B), 406(b)(1) & (2), and 403(c)(1), 29
25 U.S.C. §§ 1104(a)(1)(A), (B), & (D); 1106(a)(1)(B), 1106(b)(1) & (2), and 1103(c)(1), by
26 failing to remit, and remit timely, employee contributions and participant loan payments to
the 401(k) Plan.

1 7. Debtor Timothy Hardt further breached the fiduciary duties imposed upon
2 him by ERISA Sections 404(a)(1)(A), (B) and (D), and 406(b)(2), 29 U.S.C.
3 §§ 104(a)(1)(A), (B), & (D), 1106(b)(2), by failing to collect, and collect timely, mandatory
4 employer prevailing wage contributions due to the 401(k) Plan.

5 8. As a result of the fiduciary breaches set forth in Paragraphs 6 and 7, *supra*,
6 and the Consent Judgment and Order between the Secretary of Labor and Defendant
7 Timothy John Hardt agreed to contemporaneously with this filing in Solis v. Hardt et al.,
8 Case No. 1:10-CV-02283-AWI-JLT, Debtor Timothy Hardt owes a debt of **\$472,235.11** to
9 the 401(k) Plan (“Amount Due”). Interest shall accrue on the Loss Amount at the rate set
10 forth in 28 U.S.C. § 1961 from the date this Court enters an Order finding the Amount Due
11 is nondischargeable until such time as the Amount Due is paid to the Plan in full.

12 9. The debt to the Plan arose from Debtor Timothy Hardt’s breaches of
13 fiduciary duties owed to the Plan, as set forth in Paragraphs 6 and 7, *supra*, and such
14 breaches also constitute fiduciary defalcation under Section 523(a)(4) of the Bankruptcy
15 Code, 11 U.S.C. § 523(a)(4).

16 10. The parties consent to an entry of an Order that the debt to the Plan shall be a
17 nondischargeable debt, without the need for trial or adjudication of any issue of fact or law.

18 11. This Joint Stipulation and Order does not in any manner affect the right of the
19 United States Department of Labor to assess a civil penalty of twenty percent (20%) on
20 amounts recovered pursuant to ERISA § 502(l), 29 U.S.C. § 1132(l), after the full recovery
21 of the Amount Due under the Consent Judgment and Order referred to in Paragraph 8 *infra*.
22 This Joint Stipulation and Order does not in any manner affect the right of Defendant Hardt
23 to apply for a waiver of such civil penalty pursuant to 29 C.F.R. § 2570.85-86, or contest
24 such civil penalty assessment under Title 11 of the United States Code.

25 12. While Section 524 of the Bankruptcy Code, 11 U.S.C. § 524, provides that
26 any agreement for the nondischargeability of debt may be rescinded at any time prior to
discharge or within sixty (60) days after such agreement is filed with the court, whichever

1 occurs later, Debtors agree that they will not rescind this Stipulation as to
2 Nondischargeability of Debt.

3 13. The parties understand that this agreement is not required under Title 11 of
4 the United States Code, under non-bankruptcy law, or under any agreement not in
5 accordance with the provisions of 11 U.S.C. § 524(c)(2)(B).

6 14. Debtors expressly waive any and all claims of any nature, which they have or
7 believe they may have against the United States Department of Labor, the Secretary, or any
8 of her officers, agents, employees, or representatives, arising out of or in connection with the
9 filing, prosecution, and maintenance of this adversary proceeding and any other proceeding
10 or investigation incident to this adversary proceeding.

11 15. Nothing in this Stipulation is binding on any governmental agency other than
12 the Employee Benefits Security Administration, United States Department of Labor.

13 16. The parties shall bear their own costs, expenses, and attorneys' fees incurred
14 in connection with any stage of the above-referenced proceeding to date, including but not
15 limited to, attorneys' fees which may be available under the Equal Access to Justice Act, as
16 amended.

17 17. The Secretary hereby waives and releases all claims asserted in her
18 Adversary Complaint against Debtor Michelle Rene Hardt.

19 The Court directs the entry of this Joint Stipulation and Order as a final order.
20 IT IS SO ORDERED, ADJUDGED, and DECREED.

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The undersigned consent to the foregoing Stipulation and consent to the entry of an Order from the Court consistent herewith.

<p>Approved this ____ day of _____, 2012:</p> <p>By: _____ TIMOTHY HARDT</p> <p>Approved this ____ day of _____, 2012:</p> <p>By: _____ MICHELLE HARDT</p> <p>Approved as to form this ____ day of _____, 2012:</p> <p>By: _____ Ray T. Mullen, Esq. Law Office Of Ray T. Mullen 1405 Commercial Way, Suite 130 Bakersfield, California 93309</p> <p>Murray Tragish, Esq. Law Offices of Murray Tragish 1405 Commercial Way, Suite 130 Bakersfield, California 93309 Counsel for Defendant Timothy Hardt</p>	<p>Approved this ____ day of _____, 2012:</p> <p>M. PATRICIA SMITH Solicitor of Labor</p> <p>JANET M. HEROLD Regional Solicitor</p> <p>BRUCE L. BROWN Associate Regional Solicitor, Seattle</p> <p>DANIELLE L. JABERG Counsel for ERISA</p> <p>By: _____ EVAN H. NORDBY Trial Attorney</p> <p>Attorneys for Plaintiff United States Department of Labor</p>
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IT IS SO ORDERED.

Dated: September 14, 2012



CHIEF UNITED STATES DISTRICT JUDGE