UNITED STATES BANKRUPTCY COURT

DISTRICT OF IDAHO

IN RE	)	
	)	**Case No. 17-01027-TLM**
SHERRY LYNN SCHELINE,	)	
	)	**Chapter 13**
Debtor.	)	
_____	)	
	)	
McCALL WEDDINGS, LLC, an Idaho limited liability company, STEVE BERRY and SHANNON BERRY,	)	
Plaintiffs,	)	
	)	
v.	)	**Adv. No. 17-06029-TLM**
	)	
SHERRY LYNN SCHELINE,	)	
	)	
Defendant.	)	
_____	)	

MEMORANDUM OF DECISION

Sherry Scheline ("Defendant") filed a chapter 13 petition for relief on August 8, 2017.[1] Ten days later, she converted the case to a liquidation under chapter 7. On December 11, 2017, McCall Weddings, LLC ("McCall Weddings"), Steve Berry and Shannon Berry (the "Berrys" and collectively "Plaintiffs") filed a

[1] The Court takes judicial notice of its files and records. Fed. R. Evid. 201. Additionally, unless otherwise indicated, all statutory references are to the Bankruptcy Code, Title 11 U.S. Code §§ 101–1532, and all references to "Rules" are to the Federal Rules of Bankruptcy Procedure and those to "Civil Rules" are to the Federal Rules of Civil Procedure.

timely "Complaint For Denial of Discharge" commencing this adversary proceeding. Adv. Doc. No. 1 ("Complaint"). The Complaint, in 93 narrative paragraphs, alleges the facts on which Plaintiffs rely for their causes of action.[2] This is followed by another 64 paragraphs which make allegations, mostly conclusory, on a count-by-count basis.

Plaintiffs alleged seven counts: Count I (to deny discharge under § 727(a)(2)); Count II (to deny discharge under § 727(a)(3)); Count III (to deny discharge under § 727(a)(4)); Count IV (to determine a debt owed McCall Weddings is nondischargeable under § 523(a)(2)(A) for Defendant's fraud);[3] Count V (to determine a debt owed McCall Weddings is nondischargeable under § 523(a)(6);[4] Count VI (alleging slander or defamation per se and seeking damages); and Count VII (to determine that any debt for slander or defamation per se is nondischargeable under § 523(a)(6)). The majority of Plaintiffs' claims stem from Defendant's conduct while operating her business Wed Wedding and Event

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[2] Plaintiffs do not identify these as "facts" or "factual allegations" in their Complaint. Rather, they style certain allegations with topical references (*e.g.*, "Preface," "Defendant Infringes on McCall Weddings Trademark," "Defendant Breaches Settlement Agreement and Embarks on a Defamation Campaign Against Plaintiffs," "Defendant Evades Discovery in Valley County Action"). The Court has attempted to parse out actual factual allegations from both conclusions and arguments imbedded therein.

[3] In their prayer, *id.* at 21–22, Plaintiffs also request a judgment "in an amount to be proven at trial for [Defendant's] fraudulent transfer scheme." This appears to be a subset of the § 523(a)(2)(A) allegation, the gravamen of which is that Defendant deceptively transferred assets of her business "McWed" to herself or to her other business with actual intent to defraud McCall Weddings. Adv. Doc. 1 at 16–17.

[4] Counts IV and V also request piercing of the corporate veils of Defendants' businesses, if necessary, in order to determine her liability under these Code provisions.

Directory, LLC, dba McWed ("McWed"); a suit by Plaintiffs against Defendant in the U.S. District Court for the District of Idaho; and violation of a resulting settlement agreement.

A. District Court Action

In August 2014 Plaintiffs filed a trademark infringement suit against Defendant in the U.S. District Court for the District of Idaho. Case No. 1:14-cv-00315-REB. The matter was referred to a judicial settlement conference and a settlement was reached in July 2015. Ex. 1032 ("Settlement Agreement").

Under the Settlement Agreement, McWed[5] and Defendant individually and as principal of McWed, agreed that:

- After December 31, 2015, McWed would discontinue the use of the names "McCall Wedding and Event Directory, LLC" and "McWed" "in all future print publications and in its mirroring on-line presence."
- McWed would not originate the use of the phrases "#mccallweddings," "#mccallwedding," "#mccallweddingplanner," "#mccallweddingsplanner," "#mccallweddingeventplanner," or "#mccallweddingseventplanner" ("Prohibited Hashtags") in its publication or online marketing. Plaintiffs, however, agreed not to

[5] Also referred to several times in the Settlement Agreement as "WED."

hold McWed or Defendant responsible for the use by third parties of such phrases.

- McWed and Defendant would discontinue use of the URL "mccallwed.com" by December 31, 2015, and neither would renew registration of such beyond its February 11, 2016 expiration.

After entering into the Settlement Agreement, McWed and Defendant duplicated, shared, or re-posted a number of social media posts made by third-parties, many of which included Prohibited Hashtags. Plaintiffs filed a complaint in the state district court alleging McWed and Defendant breached the Settlement Agreement by duplicating the social media posts that included Prohibited Hashtags.

The state court agreed, holding duplication of social media posts that included Prohibited Hashtags was a breach of the Settlement Agreement. However, the state court held that, by the plain language of the Settlement Agreement, only McWed, and not Defendant, agreed to discontinue use of the Prohibited Hashtags. Accordingly, the state court held that McWed breached the Settlement Agreement, but Defendant did not. *See* Ex. 1050. The amount of McWed's liability for its breach of the Settlement Agreement is yet to be adjudicated.

B. Jurisdiction

The Court's jurisdiction over the Complaint's assertions under § 727 and

§ 523 is clear. 28 U.S.C. § 1334(b); 28 U.S.C. § 157(a), (b)(1), (b)(2)(I), (b)(2)(J). The Court inquired of Plaintiffs as to the jurisdictional basis for this Court's entertaining Count VI ("Slander Per Se") as a stand-alone cause of action. Neither the responses at hearing nor the comments in written closing argument are found persuasive. The Court lacks jurisdiction over this Count and it will be dismissed on that basis.[6]

The Complaint asserts that all claims being pursued are "core" under 28 U.S.C. § 157, and consistent with Rule 7004 asserts that Plaintiffs consent to this Court's entry of final orders and judgment. As will be discussed, Defendant has never filed an answer. Consequently, she has never explicitly addressed jurisdiction nor made the express statement of consent required under Rule 7012(b). However, she has participated in the adversary proceeding and indicated at hearing on several occasions that she wanted the matter to be decided by this Court in order to put these disputes "behind her." A litigant's actions may suffice to establish consent. *Exec. Benefits Ins. Agency v. Bellingham Ins. Agency, Inc. (In re Bellingham Ins. Agency, Inc.)*, 702 F.3d 553, 569 (9th Cir. 2012).[7] The Court

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[6] As the Court stated at hearing, jurisdiction exists to the extent that slander is alleged as a factual component of Plaintiffs' § 523(a)(6) cause of action. *See* Adv. Doc. No. 1 at Count VII.

[7] Additionally, this Court has held that a failure to answer implies consent when a defendant was properly served with a summons that provided "if you fail to respond to this summons, your failure will be deemed to be your consent to entry of a judgment by the bankruptcy court." *Hopkins v. M & A Ventures (In re Hoku Corp.)*, 2015 WL 8488949, *2 (Bankr. D. Idaho Dec. 10, 2015). Here, the record indicates that Defendant was served with a summons that contained identical language. *See* Adv. Doc. No. 2.

finds sufficient indicia of consent to proceed.

C. Default and the hearing

The Complaint was served on Defendant on December 12, 2017. Adv. Doc. No. 4.[8] On January 24, 2018, Plaintiffs filed an affidavit regarding Defendant's failure to plead and an application for entry of the Clerk's default. Adv. Doc. Nos. 5, 6. On that same day, Plaintiffs also filed a Motion for Default Judgment, Adv. Doc. No. 7 ("Motion"), and set the Motion for hearing to be held March 21, 2018, Adv. Doc. No. 8.[9] Plaintiffs then sought a continuance of that hearing to May 15, 2018, which was granted. While all such papers were shown to have been mailed to Defendant, she failed to appear at the May 15 hearing. At this hearing and after discussion, Plaintiffs requested a continuance, which was granted. Plaintiffs also requested entry of Clerk's default, which was granted. Adv. Doc. Nos. 16 (minute entry), 18 (default). Copies of both were served on Defendant, as well as a separate notice of hearing issued by the Clerk. Adv. Doc. No. 20.

Hearing on the Motion was held, as scheduled, on May 29, 2018. Plaintiffs

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[8] This return of summons/certificate of service seems to allege mail service as allowed by Rule 7004(b)(1). However, the appropriate box is not checked, even though the balance of the document appears to be completed.

[9] Plaintiffs indicated they were doing so "pursuant to rule." Though unstated, the reference necessarily is to Civil Rule 55(b)(2) incorporated by Rule 7055. That Civil Rule provides "The court may conduct hearings . . . when, to enter or effectuate judgment, it needs to: (A) conduct an accounting; (B) determine the amount of damages; (C) establish the truth of any allegation by evidence; or (D) investigate any other matter."

appeared through counsel and Defendant appeared pro se. Defendant made clear that she could not afford and could not obtain an attorney. She also made clear that she did not want a continuance of the hearing, but wanted to bring the matter to an end. She came prepared with certain documents she intended to use as evidence. Following dialogue, the Court proceeded to hear the Motion. A number of witnesses were called by Plaintiffs, and both Plaintiffs testified. Defendant cross-examined the same. She also testified and was cross-examined.

After close of evidence, the parties submitted written closing arguments. Adv. Doc. Nos. 30, 31. The Motion was at that time taken under advisement. This Decision constitutes the Court's findings of fact and conclusions of law on the matter under Rule 7052.

D. Determining the applicable facts

The threshold issue—one not addressed by either party, but essential to the Court's analysis—is whether Plaintiffs were required to provide evidence to support all elements of their claims. Plaintiffs recognize, by their Motion, that evidence would be required at a Civil Rule 55(b)(2) hearing. However, they take the position that all facts they believe to be pleaded in the Complaint are deemed admitted by the default entered in this case and, accordingly, their burden of proof is met thereby. They overstate the proposition.

> A plaintiff is not entitled to entry of default [*sic*, default judgment] as a matter of right; a court has discretion whether or not to enter a default judgment. *Lau Ah Yew v. Dulles*, 236 F.2d 415 (9th Cir. 1956).

. . .

> In considering the sufficiency of the complaint and the merits of the plaintiff's substantive claim, facts not relating to damages alleged in the complaint generally are deemed to be true by virtue of the defendant's default. *Geddes v. United Fin. Group*, 559 F.2d 557, 560 (9th Cir. 1977). A defendant is not held to admit facts that are not well-pleaded or to admit conclusions of law. *Nishimatsu Constr. Co., LTD v. Houston Nat'l Bank*, 515 F.2d 1206 (5th Cir. 1975) (holding that allegations existence and terms of a contract did not support liability where allegations were contradicted by actual contract). As a result, where the allegations in a complaint are not "well-pleaded," liability is not established by virtue of the defendant's default.

Armacost v. HSBC Bank USA, 2011 WL 825151, *12 (D. Idaho Feb. 9, 2011); *see also, Fair Housing of Marin v. Combs*, 285 F.3d 899, 906 (9th Cir. 2002) (holding that, on default, the "well pleaded factual" allegations of the complaint are taken as true); *Myers v. Household Finance Corp., III (In re Myers)*, 262 B.R. 445, 447 n.2 (Bankr. N.D. Ind. 2001) ("A default operates only as an admission of the well-pleaded factual allegations contained in the complaint . . . . Even after default, a defendant is still entitled to challenge the legal sufficiency of the complaint and whether its allegations state a claim upon which judgment may be entered."); *Nishimatsu Const. Co., Ltd. v. Houston Nat'l Bank*, 515 F.2d 1200, 1206 (5th Cir. 1975) ("A default judgment is unassailable on the merits but only so far as it is supported by well-pleaded allegations, assumed to be true . . . . The defendant is not held to admit facts that are not well-pleaded or to admit conclusions of

law.").[10]

The "well-pleaded factual allegations" requirement is evaluated under the standards of *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). In evaluating motions to dismiss complaints—or, here, the corollary proposition of what facts are established by default—the court must accept as true all non-conclusory, factual allegations contained in the complaint. As discussed in *Twombly*, its plausibility standard requires "more than labels and conclusions" and more than "a formulaic recitation of the elements of a cause of action." 550 U.S. at 570.

The nature and style of the Complaint creates serious issues under these standards. Many paragraphs merely echo the statutory language of the Code provisions and fall within the "formulaic recitation" prohibition. The Court had questions concerning alleged facts supporting required elements of Plaintiffs' claims, and it exercised its discretion to hold a hearing, pursuant to Civil Rule 55(b)(2), at which Plaintiffs were required to "establish the truth of any allegations by evidence."

"In order to do justice, a trial court has broad discretion to require that a

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[10] As similarly recognized by the Ninth Circuit, in evaluating a default judgment on appeal: "Upon entry of a default judgment, facts alleged to establish liability are binding on the defaulting party, and those matters may not be relitigated on appeal. . . . However, it follows from this that *facts which are not established by the pleadings of the prevailing party, or claims which are not well-pleaded*, are not binding and cannot support the judgment." *Danning v. Lavine*, 572 F.2d 1386, 1388 (9th Cir. 1978) (emphasis added).

plaintiff *prove up* even a purported *prima facie* case by requiring the plaintiff to establish the facts necessary to determine whether a valid claim exists that would support relief against the defaulting party." *Cashco Fin. Serv., Inc. v. McGee (In re McGee)*, 359 B.R. 764, 773 (9th Cir. BAP 2006). A court may deny a motion for default judgment if a plaintiff fails to offer evidence to prove a *prima facie* case. *See id*. at 774. Once a hearing to "establish the proof of any allegations by evidence" under Civil Rule 55(b)(2) is held, "factual allegations that are unsupported by exhibits are not well pled and cannot support a claim." *Haughton v. Am. Gen. Fin. (In re Haughton)*, 2012 WL 8442201, *2 (Bankr. E.D. Cal. Dec. 17, 2012). Accordingly, resolution of the Motion does not merely turn on what facts were alleged by Plaintiffs, but how they were alleged, and whether Plaintiffs provided evidence to make prima facie showings for their claims.

E. Discussion and disposition

The Ninth Circuit Court of Appeals articulated seven factors for a trial court to consider in determining whether to enter default judgment:

> (1) the possibility of prejudice to the plaintiff; (2) the merits of plaintiff's substantive claim, (3) the sufficiency of the complaint, (4) the sum of money at stake in the action, (5) the possibility of a dispute concerning material facts, (6) whether the default was due to excusable neglect, and (7) the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits.

Eitel v. McCool, 782 F.2d 1470, 1471–72 (9th Cir. 1986). Although the Court has considered all seven factors, this decision will focus on prejudice to Plaintiffs, the

policy favoring decisions on the merits, the merits of Plaintiffs' claims, and the sufficiency of the Complaint.

1. Prejudice to Plaintiffs

On a motion for default judgment, "prejudice" exists where the plaintiff has no "recourse for recovery" other than default judgment. *Philip Morris USA, Inc. v. Castworld Prods., Inc.*, 219 F.R.D. 494, 499 (C.D. Cal. 2003); *see also Microsoft Corp. v. Lopez*, 2009 WL 959219, at *2 (W.D. Wash. Apr. 7, 2009). A court must look at whether, if default judgment is denied, the plaintiff would be deprived of a remedy "until such time as Defendant participates . . . in the litigation—which may never occur." *Getty Images (US), Inc. v. Virtual Clinics*, 2014 WL 358412, *3 (W.D. Wash. Jan. 31, 2014). However, the mere fact that denying a default judgment motion deprives plaintiff of a quick, favorable outcome it might not obtain by litigating a case on the merits is not sufficient prejudice. *See TCI Group Life Ins. Plan v. Knoebber*, 244 F.3d 691, 701 (9th Cir. 2001). Here, Plaintiffs will be prejudiced if default judgment is not granted because default judgment is the only recourse they have to prevent their claim from being discharged. If default judgment is not entered in this case, Plaintiffs would be required to wait for relief until Defendant decided to seek relief from the Clerk's default, answer the Complaint, and participate in the litigation. It is not clear when or if she had any intention of doing so. The first factor therefore supports default judgment.

2. Policy favoring decisions on the merits

"Cases should be decided upon their merits whenever reasonably possible." *Eitel*, 782 F.2d at 1472. However, under Civil Rule 55(a), termination of a case before hearing the merits is allowed whenever a defendant fails to defend an action. The mere existence of Civil Rule 55(b) indicates that "this preference, standing alone, is not dispositive." *PepsiCo, Inc. V. Cal. Sec. Cans*, 238 F.Supp.2d 1172, 1177 (C.D. Cal. 2002) (quote omitted). Thus, the policy favoring decisions on the merits does not preclude the Court from granting default judgment.

3. Sufficiency of the Complaint and merits of the claims

The final two *Eitel* factors addressed here—the substantive merits of Plaintiffs' claim and the sufficiency of Plaintiffs' Complaint—are related. These factors "require that a plaintiff state a claim on which the [plaintiff] may recover." *Gugino v. Nelmap (In re Wallace)*, 2013 WL 1681780, *4 (Bankr. D. Idaho April 17, 2013). To weigh these factors, the Court must review each of the substantive causes of action on which Plaintiffs have requested default judgment and the evidence supporting such. *Id*.

a. Denial of Discharge under § 727(a)(3)

Section 727(a)(3) allows for a denial of a debtor's discharge if she "has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which [her] financial condition or business transactions might be ascertained,

unless such act or failure was justified under all of the circumstances of the case[.]"

This discharge exception should be strictly construed in order to serve the Code's purpose of giving debtors a fresh start. *Adams v. McKay (In re McKay)*, 504 B.R. 649, 654 (Bankr. D. Idaho 2014) (quoting *Caneva v. Sun Communities Operating Ltd. P'ship (In re Caneva)*, 550 F.3d 755, 761 (9th Cir. 2008) (quoting *Industrie Aeronautiche v. Kasler (Matter of Kasler)*, 611 F.2d 308, 310 (9th Cir. 1979))). "'[A] total bar to discharge is an extreme penalty,'" *Ditto v. McCurdy*, 510 F.3d 1070, 1079 (9th Cir. 2007) (quoting *Rosen v. Bezner*, 996 F.2d 1527, 1534 (3d Cir. 1993)), and "reasons for denial of a discharge must be real and substantial rather than technical and conjectural." *Id*. (quoting 6 Collier on Bankruptcy ¶ 727.01[4], 727–12 (16th ed., Alan N. Resnick and Henry J. Sommer, eds.)).

A prima facie case is made by showing that (1) the debtor failed to maintain and preserve adequate records and (2) this failure rendered it impossible to ascertain the debtor's financial condition and material business transactions. *Id.* Section 727(a)(3) does not require "absolute completeness in making or keeping records." *Caneva*, 550 F.3d at 761. The "adequacy" of records is considered on a case by case basis with consideration for the debtor's business operations and sophistication, and whether other debtors in like situations would keep them.

McKay, 504 B.R. at 654; *see generally Lansdowne v. Cox (In re Cox)*, 41 F.3d 1294, 1299 (9th Cir. 1994); *Lansdowne v. Cox. (In re Cox)*, 904 F.2d 1399, 1404 n.5 (9th Cir. 1990) (addressing potentially relevant factors). If the failure to maintain or preserve is shown, the burden shifts to the debtor to justify the inadequacy or nonexistence of records. *Gugino v. Clark (In re Clark)*, 525 B.R. 442, 462 (Bankr. D. Idaho 2015).

Plaintiffs' Complaint, parroting the language of § 727(a)(3), asserts that section is implicated by Defendant's unjustified failure to keep and preserve the records of her businesses McWed and IDoWed. Plaintiffs rely on ¶¶ 67–81 of the Complaint. Stricken of supposition, argument and characterization, these several paragraphs assert Defendant used an email account (mccallwed@gmail.com); an online account (17Hats) to manage IDoWed's billings, accessed through an IDoWed email account; an online Quickbooks account; and a PayPal account associated with an IDoWed email account.

There is nothing in the record indicating Defendant or her businesses had a Quickbooks account, that records from such account were requested, or that Defendant failed to provide such. The record does, however, contain evidence that, on March 17, 2017, Plaintiffs filed a discovery request in the state court action seeking information from IDoWed regarding accounts with PayPal, Square, Stripe, Wepay, Idaho First Bank account number ending in 8662, and Pine Tree

Community Credit Union. Ex. 1060 at 24. And, on May 19, 2016, Plaintiffs filed a motion to compel discovery of the requested items. *Id*. at 1. Although no state court order requiring production is in the record, on September 12, 2016, the defendants filed a "Response to Court Order." Ex. 1053. In that response, the state court defendants provided redacted legal bills, missing addresses, explained Defendant could not locate requested text messages, and provided some requested emails while explaining other emails were unavailable because the mccallwed@gmail.com email account was "closed in an effort to comply with a previous court's order." *Id*. at 3. Additionally, according to Defendant's comments at the hearing, access to the email account associated with IDoWed was terminated because payment to maintain the domain was not made and, therefore, it and the mail accounts associated with the domain were terminated.

Defendant's closure of the email accounts and failure to provide emails does not create a claim under § 727(a)(3). There is no evidence that the email accounts contained financial information that might have aided Plaintiffs in ascertaining Defendant's financial condition. Accordingly, the inability to provide emails from those accounts is irrelevant.

Plaintiffs also allege Defendant "was unable, or simply failed, to provide data or reports from . . . the 17Hats accounts during discovery" in state court. However, it was not shown that Defendant "failed to keep or preserve" the 17Hats

account records, only that she failed to produce those records during state court discovery. Even if Plaintiffs had shown Defendant failed to keep or preserve the 17Hats income and expense information, such a failure was adequately explained when Defendant was examined at the hearing.

Defendant testified the 17Hats account is not in fact closed, but it has been inaccessible to her. She explained that 17Hats uses a two-step login procedure. The first step is to enter a username and password, which Defendant has. The second step is to enter the amount of the most recent deposit by 17Hats into the bank account associated with the 17Hats account. In June 2017, the bank account associated with the 17Hats account was changed without Defendant's involvement to an account with a different bank.[11] Due to the bank account being changed, Defendant cannot complete the second step of the login process because she cannot verify the exact amount of the most recent bank transaction. Defendant explained that she contacted 17Hats, which suggested she contact Stripe—the entity that handles financial transaction processing for 17Hats. Defendant did so and has had many communications with 17Hats and Stripe over many months. At the end of her examination, Plaintiff's counsel questioned, "So you can't produce any of those reports that 17Hats would otherwise produce?" Defendant responded "I do have this though, right here, from Stripe and 17Hats that has my last

[11] Whether this was due to a computer glitch or nefarious conduct by another person, as suggested by Defendant, is not clear.

transactions. . . ." Plaintiffs' counsel cut off Defendant's answer and discontinued questioning at that point.

Plaintiffs' argument that Defendant caused her own inability to access the requested financial information is not supported by the record. Defendant's testimony provides that her inability to provide the 17Hats income and expense reports was caused by an error in which the bank account associated with the 17Hats account was changed. Further, the inability to access the 17Hats account is, according to Defendant, temporary and she has been working with 17Hats and Stripe to resolve the issue. While Plaintiffs were not provided income and expense reports, as requested, Defendant did provide copies of all her personal and business banking records, which provided information of all funds in and out of those accounts. *See* Exs. 1054 and 1055.

On the whole of the evidence provided, the Court concludes Plaintiffs have not shown Defendant "concealed, destroyed, mutilated, falsified, or failed to keep or preserve" any business records from which Plaintiffs could ascertain her business transactions or her businesses' financial condition. And to the extent her inability to access the 17Hats account may be deemed a failure to keep and preserve business records, Defendant has provided an adequate justification. Therefore, Plaintiffs have not met their burden of proving their claim for denial of Defendant's discharge under § 727(a)(3).

b. Denial of discharge under § 727(a)(4)(A)

Section 727(a)(4)(A) subjects a debtor to denial of discharge if she knowingly and fraudulently makes a false oath or account. This section has been found applicable to false statements made in bankruptcy schedules and statements filed by a debtor under penalty of perjury. A plaintiff must show by a preponderance of the evidence that "'(1) the debtor made a false oath in connection with the case; (2) the oath related to a material matter; (3) the oath was made knowingly; and (4) the oath was made fraudulently.'" *Retz v. Samson (In re Retz)*, 606 F.3d 1189, 1197 (9th Cir. 2010) (quoting *Roberts v. Erhard (In re Roberts)*, 331 B.R. 876, 882 (9th Cir. BAP 2005)). False statements or omissions in a debtor's schedules or statement of financial affairs can constitute a false oath under this section. *Retz*, 606 F.3d at 1196. (citation omitted). "An omission or misstatement that detrimentally affects administration of the estate is material." *Id.* at 1198 (citations omitted). A statement is made "knowingly" if the debtor acts "deliberately and consciously." *Id.* And, to be made "fraudulently" the plaintiff must show that it was made "with the intention and purpose of deceiving the creditors or trustee—that is, the [plaintiff] must show actual intent." *Id.* at 1198–99.

Plaintiffs contend that Defendant did not list on her schedule B her interest in "The Savvy Pineapple" or all her interests in bank accounts. Plaintiffs also contend that Defendant failed to disclose on her statement of financial affairs

(SOFA) all income received from all sources from January 1 through August 7, 2017, specifically funds she received from Clifford Scheline (Defendant's father) as a "stipend" for her support, and income from a "Belles and Beaux" trade show and income from the McWed and IDoWed businesses.

With regard to Plaintiff's claim that Debtor failed to disclose an interest in "The Savvy Pineapple" and undisclosed bank accounts, Plaintiffs provided no evidence that Defendant had any such interests. Similarly, Plaintiffs have not shown that Defendant had undisclosed income from a trade show or her business. Accordingly, Plaintiffs failed to prove these claims.

On the other hand, Defendant admitted in testimony that she received a "stipend" from her father in 2015 and 2016. She explained that she reported the income on her tax returns. Additionally, Defendant claimed she listed the income in the worksheet submitted to her bankruptcy counsel but, due to a clerical error on his end, the income was not included in Defendant's statement of financial affairs. The omission was raised during Defendant's § 341(a) meeting of creditors and Defendant failed to amend her statement of financial affairs to disclose the income. Defendant asserted that she and her attorney discussed amending her statement of financial affairs, but she was not sure why such an amendment was not made.

Beyond inferences from Defendant's testimony, there is nothing in the record to indicate the omission was entirely the fault of Defendant's bankruptcy

attorney or that she lacked culpability for the omission. However, there is also nothing in the record to suggest Defendant omitted information regarding the stipend from her father with the intention and purpose of deceiving her creditors or the trustee. Based on the record before the Court, Plaintiffs did not carry their burden of providing preponderating evidence that omissions were made with fraudulent intent. Accordingly, Plaintiffs failed to establish that Defendant's discharge should be denied under § 727(a)(4)(A).[12]

c. Nondischargeability under § 523(a)(2)(A)

Plaintiffs argue Defendant engaged in a "fraudulent transfer scheme" and "with deceptive conduct . . . commingled and transferred, on her own or through McWed, assets to herself or other entities she owned" and did so "with actual intent to defraud" Plaintiffs. They additionally assert that this was done by Defendant with the intent of depleting the assets of McWed and that McWed "did not receive an equivalent exchange of value for the assets it transferred to Defendant and/or IdahoWed." Adv. Doc. No. 1 at 16–17. Accordingly, Plaintiffs argue their claim should be excepted from Defendant's discharge pursuant to § 523(a)(2)(A).

As this Court summarized in *Huskey v. Tolman (In re Tolman)*, 491 B.R. 138 (Bankr. D. Idaho 2013):

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[12] As noted, Count I of the Complaint stated a cause of action under § 727(a)(2). However, a footnote in Plaintiffs' closing argument states that they "no longer pursue a denial of discharge pursuant to 727(a)(2)." Adv. Doc. No. 31 at 6, n.16. Consequently, dismissal on this Count will be entered for Defendant.

> A party seeking to except a debt from discharge under § 523 must prove its case by a preponderance of the evidence. *See Grogan v. Garner*, 498 U.S. 279, 291, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991). Generally, "exceptions to discharge are strictly construed against the objecting creditor and in favor of the debtor in order to effectuate the fundamental policy of providing debtors a fresh start." *Spokane Railway Credit Union v. Endicott (In re Endicott)*, 254 B.R. 471, 475 n. 5, 00.4 I.B.C.R. 199, 200 (Bankr. D. Idaho 2000) (citing *Snoke v. Riso (In re Riso)*, 978 F.2d 1151, 1154 (9th Cir. 1992)). While a central purpose of bankruptcy is to allow an honest but unfortunate debtor a fresh start, "a dishonest debtor, on the other hand, will not benefit from his wrongdoing." *Apte v. Japra (In re Apte)*, 96 F.3d 1319, 1322 (9th Cir. 1996) (citing *Grogan v. Garner*, 498 U.S. at 286–87, 111 S.Ct. 654).

491 B.R. at 149.

Section 523(a)(2)(A) excepts from discharge any debt "for money, property, services, or an extension, renewal, or refinancing of credit . . . *obtained by* false pretenses, a false representation, or actual fraud. . . ." (emphasis added).

The United States Supreme Court has held:

> It is of course true that the transferor does not "obtai[n]" debts in a fraudulent conveyance. But the *recipient* of the transfer—who, with the requisite intent, also commits fraud—can "obtai[n]" assets "by" his or her participation in the fraud. *See, e.g., McClellan v. Cantrell*, 217 F.3d 890 (C.A.7 2000); *see also supra*, at 1587–1588. If that recipient later files for bankruptcy, any debts "traceable to" the fraudulent conveyance, *see Field*, 516 U.S., at 61, 116 S. Ct. 437; *post*, at 1591, will be nondischargable under § 523(a)(2)(A). Thus, at least sometimes a debt "obtained by" a fraudulent conveyance scheme could be nondischargeable under § 523(a)(2)(A). Such circumstances may be rare because a person who receives fraudulently conveyed assets is not necessarily (or even likely to be) a debtor on the verge of bankruptcy, but they make clear that fraudulent conveyances are not wholly incompatible with the "obtained by" requirement.

Husky Int'l Elecs., Inc. v. Ritz, ___ U.S. ___, 136 S. Ct. 1581, 1589 (2016)

(emphasis added). The Supreme Court makes clear that a debt may be nondischargeable if the debtor, with the requisite intent, *received* assets through a fraudulent conveyance scheme.

Plaintiff's submissions lack clarity regarding what transfers—from whom and to whom—it claims were fraudulently made. The crux of Plaintiffs' allegations is that Defendant engaged in a "scheme" to fraudulently transfer her business assets out of the reach of her business' creditors. This, it appears, is based on dissolution of McWed and the creation of IDoWed, LLC.

Plaintiffs seek nondischargeable damages under this provision in the amount of $30,718.50. Adv. Doc. No. 31 at 14. Per Plaintiffs' evaluation of bank statements, Defendant's business deposited almost $123,000 over a 3 year period. Plaintiffs assume (sans evidence) 50% in overhead and costs and no more than $1,000/month as a "reasonable wage." Based upon their calculation, Plaintiffs conclude $30,718.50 remained and Defendant must have transferred the funds "from her business, which appears to have not received anything in return." *Id.*

There are two problems with Plaintiffs' claim. First, Plaintiffs have not shown that any amount was transferred from Defendant's businesses to herself. Instead, based on a calculation fraught with unsupported assumptions, Plaintiffs assume a transfer must have been made from McWed because the total amount of revenue received by McWed minus actual and/or assumed expenses suggests some funds should have remained available to McWed. The $30,718.50 figure asserted

is calculated using unsupported assumptions—notably, the overhead percentage and the amount of "reasonable wages" for Defendant. Second, even if some transfer occurred, Plaintiffs have failed to establish the amount of damages they suffered as a result of the alleged fraudulent transfer. *See FTE Networks, Inc. v. Ivie (In re Ivie)*, 2018 WL 3250152 (Bankr. D. Idaho July 2, 2018) (dismissing adversary proceeding due to the plaintiffs' failure to adequately establish a debt). Plaintiffs' calculation of funds transferred from McWed, which they claim is the amount of damages they suffered because the funds were not available to satisfy Plaintiffs' judgment against McWed, is mere speculation. The Court cannot award damages based upon speculation. *See id*. at *9. Accordingly, Plaintiffs have failed to establish a debt under this claim.

d. Nondischargeability under § 523(a)(6)

Plaintiffs asserts two basis for nondischargeability under § 523(a)(6): (a) breach of the Settlement Agreement and (b) defamation.

> There are two distinct issues that the Court evaluates in considering nondischargeability of a debt under § 523(a)(6). The first is the establishment of a debt itself, and the second is a determination of the nature—dischargeable or nondischargeable—of that debt. . . .
>
> Section 523(a)(6) excepts from an individual debtor's discharge any debt "for willful and malicious injury by the debtor to another entity or to the property of another entity." Both willfulness and maliciousness must be proven to prevail under § 523(a)(6). *Ormsby v. First Am. Title Co. of Nevada (In re Ormsby)*, 591 F.3d 1199, 1206 (9th Cir. 2010).

Meer v. Lilly (In re Lilly), 2012 WL 6589699, *6–7 (Bankr. D. Idaho Dec. 18,

2012). The willfulness requirement is met "only when the debtor has the subjective motive to inflict injury or when the debtor believes that injury is substantially certain to result from his own conduct." *Ormsby*, 591 F.3d at 1206 (quoting *Carrillo v. Su (In re Su)*, 290 F.3d 1140, 1142 (9th Cir. 2002)). "A malicious injury involves (1) a wrongful act, (2) done intentionally, (3) which necessarily causes injury, and (4) is done without just cause or excuse." *Ormsby*, 591 F.3d at 1207 (quoting *Petralia v. Jercich (In re Jercich)*, 238 F.3d 1202, 1209 (9th Cir. 2001)). "Within the plain meaning of this definition, it is the wrongful act that must be committed intentionally rather than the injury itself." *Jett v. Sicroff (In re Sicroff)*, 401 F.3d 1101, 1106 (9th Cir. 2005). Plaintiffs must prove all requisite elements for nondischargeability by a preponderance of the evidence. *See Cadleway Props., Inc. v. Armstrong (In re Armstrong)*, 2006 WL 2850527, *10 (Bankr. D. Idaho Oct. 3, 2006).

With regard to the first aspect of the § 523(a)(6) analysis, this Court has previously explained:

> At times the debt at issue has previously been liquidated; other times it has not. In the case of an unliquidated debt, the bankruptcy court must necessarily determine liability and damages in order to establish the underlying debt. Adjudication of the underlying claim, which arises under nonbankruptcy law, becomes part and parcel of the dischargeability determination and thus integral to restructuring the debtor-creditor relationship.

Stanbrough v. Valle (In re Valle), 469 B.R. 35, 43 (Bankr. D. Idaho 2012).

(1) Breach of the Settlement Agreement

(a) Domain renewal

Plaintiffs allege Defendant breached the Settlement Agreement clause in which she and McWed agreed they would not "make any effort to renew registration" of the domain mccallwed.com beyond its February 11, 2016 expiration because, on January 13, 2016, that domain was renewed. Exs. 1032 at 4, 1046 at 6. Plaintiffs appear to argue the domain's renewal is ipso facto proof of a breach.

The Settlement Agreement did not require McWed and Defendant to terminate the mccallwed.com domain registration. Nor did it require them to affirmatively prevent the domain's renewal. A plain reading of the prohibitive language in the Settlement Agreement—that McWed and Defendant would not "*make any effort*" to renew registration—shows that McWed and Defendant were prohibited from taking affirmative steps toward renewing the domain. Plaintiffs have not provided any evidence to show that any such affirmative steps were taken. Instead, the evidence before the Court shows the domain was "auto renewed" with payment by "US Credit Card via MoneyPress by 'Unknown.'" *See* Ex. 1046. Plaintiffs' evidence fails to show Defendant "made any effort" to renew in breach of the Settlement Agreement.[13]

[13] Were it shown such a debt exists because of the acts of Defendant, Plaintiffs have not carried their burden to prove the renewal was done willfully and maliciously.

(b) Prohibited Hashtags

Plaintiffs also argue Defendant is liable for damages resulting from the use of Prohibited Hashtags in violation of the Settlement Agreement, and that this liability should be held nondischargeable. Plaintiffs acknowledge the state court held that only McWed, and not Defendant, breached the Settlement Agreement.[14] Accordingly, Defendant is not directly liable for damages caused by the breach. However, Plaintiffs asserts that McWed's veil should be pierced in order to hold Defendant personally liable for the damages resulting from McWed's breach and that the damages should be nondischargeable because Defendant acted willfully and maliciously when she used the Prohibited Hashtags.

Even assuming, without deciding, the veil of McWed should be pierced,[15]

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[14] Regarding the Prohibited Hashtags provision—section 4 of the Settlement Agreement—the state court provided:

> Section 4's restriction on "originat[ing] the use" of certain phrases applies by its own terms only to Wed Wedding. In other words, Wed Wedding agreed not to originate the use of those phrases. Scheline herself did not also so agree. The Settlement Agreement's introductory paragraph collectively defines Wed Wedding and Scheline as "Defendants." The Settlement Agreement at times imposes obligations on "Defendants," meaning both Wed Wedding and Scheline. . . . Section 4 is structured differently; it imposes the obligation not to "originate the use" of the listed phrases on Wed Wedding alone, not on Scheline too. The record does not reveal why.

Ex. 1050 at 8.

[15] The Idaho Supreme Court has provided:

> Pursuant to Idaho law, a limited liability company is a legal entity "distinct from its members." I.C. § 30–6–104(1). Members of an LLC are not liable for the misconduct of the company unless it is proven that the company is the alter ego of the member. I.C. § 30–6–304(1); *Sirius LC v. Erickson*, 150 Idaho 80, 85, 244 P.3d 224, 229 (2010). This is the equivalent of piercing the corporate veil for a limited

(continued...)

Plaintiffs have not met their burden of showing that use of the Prohibited Hashtags was willful. They established no subjective motive of Defendant to inflict injury nor her belief that injury was substantially certain to result from this conduct. *See Su*, 290 F.3d at 1142.

Instead, the record shows Defendant, acting on behalf of McWed, did not believe any injury was caused by her conduct. In the state court case, McWed argued that it only agreed that it would not "originate" the use of the Prohibited Hashtags in its publication or online marketing and that it did not "originate" the Prohibited Hashtags, but merely reposted on its own social media pages third-party commentary that included references to the Prohibited Hashtags. *See* Ex. 1050 at 8. Defendant's belief, as her state court argument reflects, was that McWed was not in violation of the Settlement Agreement when it duplicated posts made by others.[16] This evidence puts at issue whether Defendant intended harm or

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[15] (...continued)
liability company. *Id*. Piercing the corporate veil imposes personal liability on otherwise protected corporate officers, directors, and shareholders for a company's wrongful acts allowing the finder of fact to ignore the corporate form. *VFP VC v. Dakota Co.*, 141 Idaho 326, 335, 109 P.3d 714, 723 (2005). To prove that a company is the alter ego of a member of the company, a claimant must demonstrate "(1) a unity of interest and ownership to a degree that the separate personalities of the [company] and individual no longer exist and (2) if the acts are treated as acts of the [company] an inequitable result would follow." *Id*.

Wandering Trails, LLC v. Big Bite Excavation, Inc., 329 P.3d 368, 376 (Idaho 2014).

[16] The State Court ultimately rejected this argument as a defense to the breach of contract claim, disagreeing with McWed's interpretation of "originate." The state court held that, by reposting the content, McWed caused the Prohibited Hashtags to "originate" on its own social media pages.

was substantially certain harm would result from duplicating posts containing the Prohibited Hashtags. Without additional evidence supporting the contention of such subjective belief, Plaintiffs have not proven Defendant's conduct was willful for purposes of § 523(a)(6). Having failed to show wilfulness, Plaintiffs have not met their burden of proving the liability for McWed's use of the Prohibited Hashtags should be excepted from discharge pursuant to § 523(a)(6).

(2) Defamation[17]

Plaintiffs allege Defendant willfully and maliciously engaged in a "defamation campaign" against them and her liability for such defamation should be excepted from discharge by operation of § 523(a)(6).

(a) Legal standards

The several instances of alleged defamation include the allegation that Defendant publicly accused Plaintiffs of "hacking" her email and of filing a "false police report" against her. Both of these, Plaintiffs contend, are not just untrue but also constitute accusations of criminal offenses and, thus, are defamation per se.

The Idaho Supreme Court has provided:

> "In a defamation action, a plaintiff must prove that the defendant: (1) communicated information concerning the plaintiff to others; (2) that the information was defamatory; and (3) that the plaintiff was damaged because of the communication." *Clark v. The Spokesman-Review*, 144 Idaho 427, 430, 163 P.3d 216, 219 (2007). . . .

[17] As noted earlier in this Decision, Count VI will be dismissed on jurisdictional grounds, and this discussion relates only to § 523(a)(6).

> "A defamatory statement is one that 'tend[s] to harm a person's reputation, [usually] by subjecting the person to public contempt, disgrace, or ridicule, or by adversely affecting the person's business.'" *Elliott v. Murdock*, 161 Idaho 281, 287, 385 P.3d 459, 465 (2016) (quoting Defamatory, Black's Law Dictionary 506 (10th ed. 2014)). In determining whether an assertion is defamatory, it "must be read and construed as a whole; the words used are to be given their common and usually accepted meaning and are to be read and interpreted as they would be read and understood by the persons to whom they are published." *Gough v. Tribune-Journal Co.*, 75 Idaho 502, 508, 275 P.2d 663, 666 (1954).
>
> Defamatory statements may be defamatory per se, meaning they are actionable without proof of special damages, when they impute "conduct constituting a criminal offense chargeable by indictment or by information either at common law or by statute and of such kind as to involve infamous punishment (death or imprisonment) or moral turpitude conveying the idea of major social disgrace." *Barlow v. Int'l Harvester Co.*, 95 Idaho 881, 890, 522 P.2d 1102, 1111 (1974) (quoting *Cinquanta v. Burdett*, 154 Colo. 37, 39, 388 P.2d 779, 780 (Colo. 1963)).

Irish v. Hall, 416 P.3d 975, 979–80 (Idaho 2018). Additionally, where statements contain an imputation upon an entity with respect to its business, its ability to do business, or its methods of doing business, the same is defamatory per se. *Barlow*, 522 P.2d at 1111.

> In determining whether a statement is defamatory per se, this Court has stated, "if the language used is plain and unambiguous, it is a question of law for the court to determine whether it is libelous per se, otherwise it is a question of fact for the trier of fact." *Weeks v. M-P Publ'ns, Inc.*, 95 Idaho 634, 636, 516 P.2d 193, 195 (1973) (citing *Bistline v. Eberle*, 88 Idaho 473, 401 P.2d 555 (1965)).
>
> However, not all statements are actionable for defamation. "Statements of opinion enjoy the constitutional protection provided by the First Amendment. But false statements of fact are actionable." *Elliott*, 161 Idaho at 287, 385 P.3d at 465 (citation omitted).

Irish, 416 P.3d at 980.

Plaintiffs contend they are not required to prove specific actual damages but only plead general damages and the Court can exercise its discretion to determine the amount. Nevertheless, Plaintiffs argue McCall Weddings suffered $95,000 in lost business income, and the Berrys personally suffered emotional damages of $50,000 ($25,000 each). Adv. Doc. No. 31 at 15–16.

(b) Defamatory statements

Plaintiffs allege Defendant defamed them when she stated that Plaintiffs had 1) hacked an email account, 2) filed a false police report, and 3) spread rumors about Defendant involving terrorism, child pornography and poisoning. Adv. Doc. No. 31 at 14–15.

On August 12, 2015, an email from the address tonyhart4life@gmail.com was sent to several individuals alleging that "[Defendant], the publisher of IDOWED magazine," plagiarized an article from "Bridal Musings." *See* Ex. 1053 at 7–10. The email also asserted that the magazine was not being printed and distributed, and then suggested, "[i]f you've paid for advertising, you may want to check this out for yourself." *Id*. The email was signed "Concerned in McCall." Additionally, a second email from the same email address was sent to many photographers alleging "YOUR photos appear in a plagiarized article on the IDoWed website owned by [Defendant]. The original author/photographer's photos were REMOVED, and replaced with YOURS, perhaps unbeknownst to

you." Ex. 1053 at 13–14. Several recipients of the emails then sent messages to the mccallwed@gmail.com expressing concerns about the allegations of plagiarism.

In response, an email was sent from Defendant, using the mccallwed@gmail.com address, to those who received one of the two emails accusing Defendant of plagiarism. *Id*. at 11 (the "Response"). That email began "First, let me start by apologizing. It is clear that my email was hacked because some of your personal emails were used this morning in the email which you all received that accused me of plagiarism." The Response asserted that Defendant had performed an internet search and contacted McCall police and that no individual named Tony Hart appeared to reside in McCall. Addressing the accusations of plagiarism, the email explained that Defendant did not intend to take credit for the content of the article and that the title of the article itself contained a hyperlink to the original article on the Bridal Musings website. After addressing the accusations at length, the Response continued by briefly describing the history of litigation between Defendant, McWed and Plaintiffs, stating:

> Before, during and after this lawsuit both McWED and I have been subjected to a constant stream of harassment from them[18] as well as their marketing contractor, Julie Conrad. I take very seriously all criticism and I urge you to please contact me anytime you have a concern or criticism. I also urge you to make your marketing decisions based on your own judgment and what works, not based on the grudge of another. *I have no*

[18] Defendant frequently refers to "them" and "they," apparently referring to McCall Weddings and the Berrys collectively.

> *direct evidence that McCall Weddings or Julie Conrad authored the email you received. However, the tone and content of the letter are very similar to Facebook posts made by Ms. Conrad.*

Id. at 12 (emphasis added).

In addition to this mass Response, Defendant sent an email to an employee at Brundage Resort[19] who had expressed concerns after receiving the email that accused Defendant of plagiarism. *Id.* at 7. That response email opened with "[t]his unfortunately is most likely the work product of McCall Weddings" and went on to explain that she had permission to use the article that was alleged to have been plagiarized. *Id.* at 17. The email continued by explaining how the printed magazines were distributed throughout McCall and Boise over a period of several months. One reason Defendant provided for the breadth of distribution was that an individual associated with Plaintiffs had been caught on video destroying and removing magazines in bulk from a distribution site. *Id*.

And, although the date is not clear from Plaintiffs' submissions, at some point Defendant had a conversation via text messages with an individual who was apparently a friend of hers. Ex. 1037.[20] In that conversation, Defendant said, "Did you know they filed a false police report against me? For Eyrrans death!!!! I have the police report for you!"

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[19] The identity and email address of this individual are in the record and need not be disclosed in this Decision. *See* Ex. 1053.

[20] Only four pages of Ex. 1037 were admitted at the hearing. Those four pages are number 1037A through 1037D. No other part of exhibit 1037 has been considered.

On January 20, 2016, an email was sent from IDoWed's email address, hello@idowed.com, to another individual, attempting to clarify "accusations you received from Shannon Berry." Ex. 1043.[21] After doing so, the email stated "Thank you for understanding. We just move on and let McCall Weddings keep going. They accuse me of terrorism, child pornography, and God only knows what else. I just keep going. Smile and move on." *Id*.

It is clear from the record and Defendant's testimony at hearing that Defendant believed Plaintiffs and other individuals were working in concert to harm Defendant's reputation and business. It is also clear that Defendant communicated to a number of individuals her belief that McCall Weddings and/or the Berrys hacked the McWed email account, filed a false police report, and made other accusations about her—either directly or through other individuals.

The Court is not persuaded that Defendant's comments accusing Plaintiffs of hacking an email account were defamatory. The communications expressed Defendant's opinion that she suspected Plaintiffs were "most likely" involved in hacking the email account, but did not assert their involvement as a matter of fact. To the contrary, Defendant clarified "I have no direct evidence that McCall Weddings or Julie Conrad authored the email you received," and that her opinion was based upon her belief that "the tone and content of the letter are very similar to Facebook posts made by Ms. Conrad." Defendant's statements of opinion are

[21] As with Ex. 1053, the identity and email address of this individual is not required in this Decision.

protected by the First Amendment and are not actionable as defamation. *See Wiemer v. Rankin*, 790 P.2d 347, 352 (Idaho 1990) (a writer cannot be sued for expressing an opinion "however unreasonable the opinion or vituperous the expressing of it may be"). Plaintiffs have failed to establish a claim for defamation based upon Defendant's statements regarding suspected email hacking.

With regard to Defendant's defamatory comment accusing Plaintiffs of filing a false police report, that constitutes defamation per se as to the Berrys, because such is a crime punishable by imprisonment under Idaho law.[22] Accordingly, the Berrys were not required to prove specific damages on that claim. *See Irish*, 416 P.3d at 979. That defamatory statement, however, does not constitute defamation per se with regard to McCall Weddings because it does not relate to the entity's business, its ability to do business, or its methods of doing business. *See Barlow*, 522 P.2d at 1111.[23]

c. Damages

Where defamation is actionable per se, the defamed person is entitled to damages without proving actual damages. *Barlow*, 522 P.2d at 1117. Though there is no exact measure of general damages to be applied in a defamation per se

[22] Idaho Code § 18-705.

[23] To the extent Plaintiffs allege the numerous other statements by Defendant in the record are defamatory, the claims fail for two reasons: Plaintiffs did not prove specific damage and Plaintiffs have not shown that any of the other statements constitute defamation per se.

action, *Barlow* instructs that the fact finder should award a sum that appears "just and proper in view of all the circumstances of the case." *Id* at 1118.

Several witnesses testified about the damage caused by Defendant. Melinda Roach, a photographer involved in the wedding industry in McCall, testified that Plaintiffs' reputations were "drastically" damaged by Defendant's comments. For example, she explained that she was friends with the owner of a local restaurant and was aware that the owner "absolutely refuses" to do business with McCall Weddings, explaining that McCall Weddings gained a general reputation for being litigious, which she claims is a result of Defendant's conduct. However, Roach's testimony about this reputation appears to be based on the litigation between Plaintiffs and Defendant generally, and was not directly tied to Defendant stating that the Berrys filed a false police report against her.

Julie Nichols, another wedding photographer who works in the McCall area, testified that she had purchased advertising in McWed's publication. In her interactions with Defendant, Nichols was told the Berrys bullied Defendant and were jealous of Defendant's success. Based on those comments, Nichols determined she should avoid doing business with Plaintiffs. However, after receiving a referral from Plaintiffs, which she initially declined, Nichols spoke with the Berrys and, ultimately accepted the referral. She has continued to work with Plaintiffs since that time. Nichols explained that through her interactions with other wedding vendors, she believes there are many who avoid working with

McCall Weddings due to its negative reputation resulting from Defendant's comments. However, as with Roach, Nichols' testimony does not establish that vendors avoided working with Plaintiffs as a result of Defendant's allegation that the Berrys filed a false police report.

Josh Kuhnel also works in the wedding industry, and testified that McCall Weddings is an excellent business and has a good reputation among wedding vendors. He did, however, explain that he believed brides and potential employees questioned whether to work with McCall Weddings due to Defendant's comments.

Steve Berry testified that he believed Plaintiffs were unable to increase sales because they were unable to hire additional wedding coordinators and vendors were not referring customers to Plaintiffs—both he attributes to Defendant's conduct including her defamatory comments. Exhibit 1058 provides Plaintiffs' calculation of a total projected loss from 2014–2018. The calculation is based on Plaintiffs' desire to grow its business by adding one wedding planner in 2014, another in 2016, and a third in 2018, each of whom they projected would have been able to coordinate seven weddings per year, yielding between $440 and $2,016 in profit per wedding. Based on these projections, Plaintiffs calculate and allege general damages of $94,736.

Other parts of Steve Berry's testimony, however, undermined his assertion

that Defendant's conduct caused significant harm. He testified, and the evidence supports, that McCall Weddings' sales from 2014 to 2018 increased. Those annual sales amounts were $4,599; $29,792; $55,825; and $69,203, respectively. Ex. 1058. Steve Berry also testified that Plaintiffs had stated numerous times on social media that their business was doing very well and was planning more weddings than ever. Finally, Steve Berry explained that, as a member of the Valley County Economic Council, he knew that the number one issue in that area was lack of employees, which he said is attributable to the lack of housing. The main driver Plaintiffs used for calculating damages—the availability of employees—is, according the Steve Berry's testimony, a problem affecting the region.

While Roach, Nichols, and Steve Berry all testified that Defendant's conduct caused damage generally, none touched specifically on the effect the accusation of filing a false police report had on Plaintiffs. The Court is persuaded that such defamation had some effect on the Berrys. But, it is not persuaded that the degree of damage is $94,736, as Plaintiffs estimate. Importantly, the Court is not persuaded that the tarnish on Plaintiffs' reputations caused by Defendant's defamatory *per se* comments substantially hindered Plaintiffs' business growth. This conclusion is supported by witness testimony that Plaintiffs have a good reputation in the wedding planning industry and the fact that Plaintiffs' revenues

have grown considerably year after year from 2014 to 2018.

The Court has considered the whole of the evidence, including all exhibits and testimony, and determines that the appropriate amount of general damages to be awarded the Berrys is $1,500 each, for a total of $3,000.

Further, Plaintiffs have provided preponderating evidence that Defendant made the statement with the intent and effect of causing harm and, thus, Defendant's conduct was wilful. Defendant did not provide a just cause or excuse for her conduct. Accordingly, the $1,500 award to each of the Berrys for damages is nondischargeable under § 523(a)(6).

F. Conclusion

Based on the foregoing, a nondischargeable judgment will be entered in favor of the Berrys for $3,000 under § 523(a)(6). All other requests for relief will be denied.

DATED: September 18, 2018

TERRY L. MYERS
CHIEF U. S. BANKRUPTCY JUDGE