

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA
FRESNO DIVISION

In re:

Case No.: 17-10245-B-13

Michael Lloyd Lusk, and
Carol Ann Lusk

Chapter 13

Debtors.

Susan Peterson,

ADVERSARY PRO. NO.:
17-01016-B

Plaintiff,

V.

Michael Lloyd Lusk,

Defendant

MEMORANDUM DECISION REGARDING ADVERSARY
EDING OBJECTING TO DISCHARGEABILITY OF DE

23 Susan P. Peterson ("Ms. Peterson") filed her adversary
24 proceeding complaint against Michael Lloyd Lusk ("Mr. Lusk") to
25 determine nondischargeability of debt under 11 U.S.C. §§
26 1328(a)(2) and 523(a)(4). Ms. Peterson filed her first amended
27 complaint on March 10, 2017, whereby Ms. Peterson alleged that
28 Mr. Lusk engaged in fraud or defalcation regarding Allstate

1 retirement benefits that were community property of Ms.
2 Peterson and Mr. Lusk's marriage. Mr. Lusk filed his answer on
3 March 24, 2017, which included no affirmative defenses.

4 The matter was tried to the court on March 22 and March
5 23, 2018. Lisa Holder, Esq., appeared on behalf of Ms.
6 Peterson. Peter Bunting, Esq., appeared on behalf of Mr. Lusk.

7 The court ordered the parties to prepare proposed findings
8 of fact and conclusions of law, and after submission the matter
9 was deemed submitted. For the reasons set forth below, judgment
10 will be entered in favor of Peterson and the debt is
11 nondischargeable in Mr. Lusk's bankruptcy.

12 This memorandum decision contains findings of fact and
13 conclusions of law required by Federal Rule of Civil Procedure
14 52(a), made applicable to this adversary proceeding by Federal
15 Rule of Bankruptcy Procedure 7052.¹ The bankruptcy court has
16 jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334 and
17 157, 11 U.S.C. §§ 1328(a)(2) and 523(a)(4) and Rules 4007(c)
18 and 7001(6) of the Fed. R. Bankr. Proc., and General Orders 182
19 and 330 of the U.S. District Court for the Eastern District of
20 California. This is a core proceeding pursuant to 28 U.S.C. §§
21 157(b)(2)(I). Peterson (by her complaint) and Lusk (by his
22 answer) agreed that this court may enter final orders regarding
23 this adversary proceeding under 28 U.S.C. § 157(c)(2).

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27 ¹ Unless otherwise indicated, all chapter, section and rule references are to
28 the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and to the Federal Rules of
Bankruptcy Procedure, Rules 1001-9036, as enacted and promulgated after
October 17, 2005, the effective date of The Bankruptcy Abuse Prevention and
Consumer Protection Act of 2005, Pub. L. 109-8, Apr. 20, 2005, 119 Stat. 23.

1 **Background and Findings of Fact.**

2 The joint chapter 13 case was filed on January 26, 2017 by
3 spouses Michael Lloyd Lusk and Carol Ann Lusk. [Exhibit 37.]²
4 The Lusks' Schedule F reflected a \$146,877.00 debt owed to Ms.
5 Peterson described as "Judgment," not subject to offset, and
6 not contingent, unliquidated, or disputed. [Id., at 295.]

7 Ms. Peterson and Mr. Lusk stipulated to facts, and facts
8 were adduced at trial. The court finds the below facts to be
9 true.

10 Michael Lusk is an educated and professional man, with a
11 bachelor's degree in marketing from California State University
12 at Chico. [TT1 12:23-25; 13:1-2.]³ He is a California licensed
13 insurance agent, for personal property and causality insurance.
14 [TT1 13:4-6, 19-20.] In his profession, he deals with
15 contracts. [TT1 14:3-5.] He's been self-employed as an
16 insurance agent since 2006. [TT1 14:5-8.] Before then, he
17 worked with Allstate Insurance from 1986 until 2005. [TT1 14:9-
18 14.]

19 During his time with Allstate, he earned retirement
20 benefits, some of which were the community property of Mr.
21 Lusk's marriage to Susan Peterson. [SF 21, 22.]⁴

22 Lusk and Peterson were married April 10, 1982, and
23 separated January 7, 1994. [SF 1.] During Peterson's marriage
24 to Lusk, Lusk was employed by Allstate Insurance Company

25 ² "Exhibit" means the number of the joint trial exhibit from the trial
binders.

26 ³ "TT1" means Trial Transcript 1, from the first day of trial, March 22,
2018. The first number (here 12) refers to the transcript page, and the
27 following numbers (here 23-25) refer to the lines on the page. "TT2" means
the trial transcript from the second day of trial, March 23, 2018.

28 ⁴ "SF" means stipulated fact, from the Joint Pretrial Order, document 41 on
the court's docket.

1 ("Allstate") and earned retirement benefits through his
2 employment with Allstate. [SF 2.]

3 On August 5, 1994, the Ventura County Superior Court
4 entered its Judgment of Dissolution of Marriage between
5 Peterson and Lusk (the "Dissolution Judgment"). [SF 3.] The
6 Dissolution Judgment incorporated a marital settlement
7 agreement ("MSA"; Exhibit 2; SF 4.) The MSA provides that the
8 "pension benefits in Husband's name arising out of this
9 employment with Allstate Insurance Company" must be divided
10 equally between the parties [Exhibit 2:11, 12; SF 5.] The MSA
11 states "The parties agree that there is a community interest in
12 the Husband's pension and retirement plan through his
13 employment by Allstate Insurance Company." (Id.) [SF 6.] The
14 MSA states "The parties further agree that the court that
15 enters the decree of dissolution between them shall reserve
16 jurisdiction to enforce the Wife's right to receive such
17 [retirement.] payments from Husband, or directly from the
18 retirement plan." (Id.) [SF 7.]

19 In 2007, Ms. Peterson wanted to move out of state, and the
20 parties entered into an agreement whereby Ms. Peterson waived
21 spousal support, and they agreed to child visitation ("Move
22 Away Order"). [Exhibit 55:1469-1472; TT1 105:16-106:8.]
23 Community property division was never discussed in the context
24 of the 1997 Move Away Order. [TT1 106:9-15; TT2 32:9-33:2.] Mr.
25 Lusk's position that the Move Away Order absolved him from
26 community property division and any obligation regarding the
27 retirement division [TT2 15:19-16:9] is not supported by the
28 plain meaning of the Move Away Order, and implausible. Mr. Lusk

1 did not raise the Move Away Order as a defense in the Ventura
2 County Superior Court [TT2 34:20-35:6.]

3 Matthew graduated from college in 2010. [TT1 106:16-20.]
4 Ms. Peterson involved Mr. Lusk in the graduation by sending Mr.
5 Lusk a graduation announcement. Then she sent graduation
6 pictures and some correspondence. [TT1 106:24-107:6.] Ms.
7 Peterson included a note in one of the correspondences that
8 "the retirement plan is all that we have to deal with." [TT1
9 107:7-16.] Mr. Lusk did not respond. [TT1 107:17-20.]

10 Ms. Peterson does not have any retirement benefits coming
11 to her from any employer during marriage or before marriage.
12 [TT1 107:24-108:4.]

13 As determined by the 2016 Order of the state court, Lusk
14 owed Peterson a fiduciary duty under the terms of the 1994
15 Judgment with regard to the Allstate Pension Plan and the
16 Allstate 401(k) Savings Plan. [SF 8.] On September 6, 2013,
17 Lusk requested and received a lump sum distribution from the
18 Allstate Pension Plan in the amount of \$578,686.19. This was a
19 complete distribution of Lusk's benefits under the Allstate
20 Pension Plan (Exhibit 43:0457). [SF 9.] Lusk withdrew the
21 \$578,686.19 from the Allstate Pension Plan without notifying
22 Peterson and without paying any portion of said monies to her.
23 [SF 10.]

24 In addition to the Allstate Pension Plan, Lusk also had
25 the Allstate 401(k) Savings Plan with Allstate. [SF 11.] On May
26 18, 1999, Lusk withdrew the sum of \$34,197.59 from the Allstate
27 401(k) Savings Plan (Exhibit 43:0458). [SF 12.] The withdrawal
28 of the \$34,197.59 from the Allstate 401(k) Savings Plan by Lusk

1 was done without Peterson's knowledge or consent and without
2 paying any portion of said monies to her. [SF 13.]

3 Despite the MSA, Peterson never received any monies from
4 either the Allstate Pension Plan or the Allstate 401(k) Savings
5 Plan. [SF 14.] Lusk never informed Peterson that he had
6 withdrawn all of the funds from the Allstate Pension Plan or
7 the \$34,197.59 from the Allstate 401(k) Savings Plan. [SF 15.]
8 In March 2014, Peterson began inquiring to Lusk about her
9 interest in the Allstate Pension Plan or the Allstate 401(k)
10 Savings Plan [SF 16; Trial Exhibits 4, 5, and 6, 32 -37.]. Mr.
11 Lusk received the Letters from Mr. Goodman, but did not respond
12 to either Ms. Peterson or Mr. Goodman to enquire why Mr.
13 Goodman sought information about the plans. [TT1 20:2 - 22:1;
14 99:12-100:18.]

15 Lusk did not provide any information to Peterson regarding
16 his withdrawal of all of the funds from the Allstate Pension
17 Plan and the Allstate 401(k) Savings Plan. [SF 17.] Peterson
18 learned of Lusk's withdrawals from the Allstate Pension Plan
19 and the Allstate 401(k) Saving Plan only after retaining an
20 attorney and requesting an accounting from QDRO Consultants Co.
21 ("QDRO Consultants"), Allstate's administrator of Qualified
22 Domestic Relations Orders (Exhibit 8:44 - 45; Exhibit 43:0457 -
23 465). [SF 18.] Mr. Goodman submitted a subpoena to Allstate,
24 and Mr. Lusk moved to quash the subpoena. [TT1 23:10-12.] Mr.
25 Goodman made another subpoena to Allstate, and Mr. Lusk again
26 moved to quash. [TT1 23:12-18.] The parties went to court on
27 the motion to quash, and the subpoena was quashed. [Id..] Mr.
28 Lusk then realized that "Ms. Peterson is not going away." [TT1

1 23:18-19.] Mr. Lusk then signed the release authorizing
2 Allstate to release information regarding the plans [Exhibit
3 7:42; TT1 23:2-5, 22.], and realized "She's not going to stop."
4 [TT1 23:21.]. At no time did Mr. Lusk contact Ms. Peterson
5 regarding the letters sent by Mr. Goodman. [TT1 100:23-101:1.]
6 Ms. Peterson learned that Allstate retirement benefits had been
7 completely distributed to Mr. Lusk by the May 23, 2016 letter
8 [Exhibit 8:44; TT1 101:15-102:2.] Ms. Peterson filed her
9 request for order (motion) to determine her interest in the
10 retirement benefits on August 27, 2015 [Exhibit 56:1474; TT1
11 102:3-18.]

12 Mr. Lusk testified Wells Fargo account numbers ending in
13 7910 [Exhibit 10.] and 2931 [Exhibit 19.] were funded from the
14 pension plan. [TT1 31:1-4.] On February 28, 2015, Wells account
15 number 7910 held \$100,000.21. [TT1 31:18-20.] Between March 1,
16 2015, and March 22, 2016, Mr. Lusk transferred \$85,377.66 from
17 account 7910 to Mr. Lusk's separately-owned Wells Fargo
18 checking account 9751 [Plaintiff's Trial Exhibit 62; Exhibits
19 10 through 18 and 44; TT1 32:10-37:10.] On January 1, 2015, Mr.
20 Lusk's Wells Fargo Traditional IRA account 2931 held
21 \$252,980.95. [Plaintiff's Trial Exhibit 62; Exhibit 19; TT1
22 37:11-23.] Between January 1, 2015 and January 26, 2017, MT
23 took \$26,000 in cash withdrawals, and transferred \$180,619.85
24 to his separately owned checking account, Wells number 9751.
25 [Plaintiff's Trial Exhibit 62; Exhibits 19 through 34 and 44;
26 TT1 37:11-37:23.]

27 Mr. Lusk's testimony and bank records showed that Mr. Lusk
28 made these withdrawals From Wells Fargo Account 9751:

	Date	Amount	Type	Purpose	Record
1	April 16, 2015	\$ 2,200.00	Withdrawal in branch	No recollection	Exhibit 44: 491; TT1 38:17-39:1
2	April 21, 2015	\$ 3,000.00	Withdrawal in branch	No recollection	Exhibit 44: 491; TT1 39:2-6
3	May 5, 2015	\$ 3,000.00	Withdrawal in branch	No recollection	Exhibit 44: 496; TT1 39:7-11
4	June 5, 2015	\$ 1,000.00	Withdrawal in branch	No recollection	Exhibit 44: 504; TT1 39:12-19
5	June 8, 2015	\$ 2,000.00	Withdrawal in branch	No recollection	Exhibit 44: 504; TT1 39:20-25
6	June 24, 2015	\$ 3,800.00	Withdrawal in branch	No recollection	Exhibit 44: 505; TT1 40:1-6
7	June 30, 2015	\$ 11,500.00	Withdrawal in branch	No recollection	Exhibit 44: 505; TT1 40:7-13
8	July 8, 2015	\$ 3,000.00	Withdrawal in branch	No recollection	Exhibit 44: 510; TT1 40:14-21
9	July 31, 2015	\$ 5,300.00	Withdrawal in branch	No recollection	Exhibit 44: 511; TT1 40:22-41:2
10	August 6, 2015	\$ 3,500.00	Withdrawal in branch	No recollection	Exhibit 44: 515; TT1 41:3-12
11	September 3, 2015	\$ 3,000.00	Withdrawal in branch	No recollection	Exhibit 44: 516; TT1 41:19-42:2
12	September 10, 2015	\$ 1,000.00	Withdrawal in branch	No recollection	Exhibit 44: 491; TT1 42:3-6
13	September 21, 2015	\$ 8,000.00	Withdrawal in branch	No recollection	Exhibit 44: 521; TT1 42:7-13
14	September 21, 2015	\$ 3,000.00	Withdrawal in branch	No recollection	Exhibit 44: 521; TT1 42:14-20
15	October 23, 2015	\$ 7,000.00	Bank check purchase	No recollection	Exhibit 44: 527; TT1 42:21-43:3
16	October 26, 2015	\$ 16,000.00	Bank check purchase	No recollection	Exhibit 44: 528; TT1 43:4-10
17	November 6, 2015	\$ 3,000.00	Withdrawal in branch	No recollection	Exhibit 44: 534; TT1 43:11-18
18	November 9, 2015	\$ 1,700.00	Withdrawal in branch	No recollection	Exhibit 44: 534; TT1 43:19-24
19	November 30, 2015	\$ 12,000.00	Bank check purchase	No recollection	Exhibit 44: 536; TT1 43:25-44:7
20	December 3, 2015	\$ 1,500.00	Withdrawal in branch	No recollection	Exhibit 44: 540; TT1 44:8-14
21	January 4, 2016	\$ 3,500.00	Withdrawal in branch	No recollection	Exhibit 44: 547; TT1 44:15-21
22	January 8, 2016	\$ 18,852.23	Bank check purchase	No recollection	Exhibit 44: 548; TT1 44:22-45:1
23	January 8, 2016	\$ 5,000.00	Withdrawal in branch	No recollection	Exhibit 44: 548; TT1 45:2-5
24	January 20, 2016	\$ 13,000.00	Bank check purchase	No recollection	Exhibit 44: 548; TT1 45:6-12
25	January 22, 2016	\$ 3,000.00	Withdrawal in branch	No recollection	Exhibit 44: 548; TT1 45:13-16
26	January 27, 2016	\$ 3,000.00	Withdrawal in branch	No recollection	Exhibit 44: 549; TT1 45:17-22
27	February 2, 2016	\$ 2,600.00	Withdrawal in branch	No recollection	Exhibit 44: 554; TT1 45:23-46:5
28					

February 3, 2016	\$ 1,700.00	Withdrawal in branch	No recollection	Exhibit 44: 554; TT1 46:6-11
February 16, 2016	\$ 2,000.00	Withdrawal in branch	No recollection	Exhibit 44: 555; TT1 46:12-18
February 18, 2016	\$ 5,000.00	Bank check purchase	No recollection	Exhibit 44: 556; TT1 46:19-25
March 1, 2016	\$ 1,115.00	Bank check purchase	No recollection	Exhibit 44: 562; TT1 47:1-7
March 23, 2016	\$ 26,500.00	Bank check purchase	No recollection	Exhibit 44: 564; TT1 47:8-14
March 28, 2016	\$ 3,916.49	Withdrawal in branch	No recollection	Exhibit 44: 564; TT1 47:15-20
April 11, 2016	\$ 10,035.00	Withdrawal in branch	No recollection	Exhibit 44: 570; TT1 47:21-48:4
April 11, 2016	\$ 5,000.00	Withdrawal in branch	No recollection	Exhibit 44: 570; TT1 48:5-7
May 3, 2016	\$ 1,700.00	Withdrawal in branch	No recollection	Exhibit 44: 576; TT1 48:23-49:6
May 11, 2016	\$ 2,050.00	Withdrawal in branch	No recollection	Exhibit 44: 577; TT1 49:7-11
June 3, 2016	\$ 1,700.00	Withdrawal in branch	No recollection	Exhibit 44: 583; TT1 49:12-18
August 3, 2016	\$ 3,900.00	Withdrawal in branch	No recollection	Exhibit 44: 589; TT1 49:19-50:2
September 2, 2016	\$ 3,000.00	Withdrawal in branch	No recollection	Exhibit 44: 597; TT1 50:3-13
October 1, 2016	\$ 2,500.00	Withdrawal in branch	No recollection	Exhibit 44: 604; TT1 50:14-22
October 20, 2016	\$ 8,200.00	Withdrawal in branch	No recollection	Exhibit 44: 605; TT1 50:23-51:4
November 1, 2016	\$ 1,000.00	Withdrawal in branch	No recollection	Exhibit 44: 610; TT1 51:5-12
November 8, 2016	\$ 1,400.00	Withdrawal in branch	No recollection	Exhibit 44: 611; TT1 51:13-18
December 28, 2016	\$ 1,000.00	Withdrawal in branch	No recollection	Exhibit 44: 620; TT1 51:19-52:1
TOTAL \$225,168.72				

Mr. Lusk testified regarding the vehicles scheduled on Schedule A/B:

Vehicle	Scheduled Value	Date Purchased	Driver	Record
2015 Volkswagen Passat	\$ 12,012.00		Mr. Lusk	Exhibit 37:278; TT1 53:15-54:4
2010 Mercedes-Benz GL-550	\$ 21,231.00	2014-2016	Carol Lusk	Exhibit 37:278; TT1 54:5-23
2012 Nissan Cube	\$ 9,707.00	2014-2015	Daughter	Exhibit 37:278; TT1 54:24-55:13
2006 Chevy Corvette	\$ 27,215.00	2014-2016	Carol Lusk	Exhibit 37:278; TT1 55:14-23, 56:9-13
2000 GMC Sierra	\$ 2,598.00	2014-2016	Daughter Kelly	Exhibit 37:278; TT1 56:14-57:8

1	2008 Piaggio	\$ 1,000.00	2014-2016	No one	Exhibit 37:279; TT1 57:16-58:1
2	2004 Kawasaki Vulcan	\$ 3,500.00	2014-2017	Mr. Lusk	Exhibit 37:279; TT1 58:2-11
3	2014 Can-AM	\$ 18,000.00	2014-2017	Carol Lusk	Exhibit 37:279; TT1 58:13-23
4	2005 Kawasaki Nomad	\$ 3,000.00	2014-2017	Mr. Lusk	Exhibit 37:279; TT1 58:24-59
5	VALUE	\$ 98,263.00			

Schedule A/B at question 21 reflected the Wells Fargo Bank Rollover IRA account 2931 held \$83,983.51 on the January 26, 2017 petition date [Exhibit 37:282; TT1 60:9-19.], and Wells Fargo Bank Rollover IRA account 7910 held \$9,792.64 [Exhibit 37:282; TT1 63:6-9.]. On the trial date (March 22, 2018), Wells Fargo Bank Rollover IRA account 2931 held "just a little over 30." [TT1 63:10-12.] Mr. Lusk used the approximately \$54,000.00 between January 2017 and March 2018 to supplement his income. [TT1 63:17-64:5.] On the trial date, Wells Fargo Bank Rollover IRA account 7910 held about \$2,000.00. [TT1 64:13-25.] Mr. Lusk used the approximately \$8,000.00 between January 2017 and March 2018 to supplement his income. [TT1 65:5-9.]

Joint debtors' income from all sources (other than the Wells Fargo Bank Rollover IRA accounts) was \$140,847 in 2015, and \$161,155 in 2016. MT's Wells Fargo Bank Rollover IRA account distributions in 2015 of \$189,998 made 2015 income \$330,845; IRA distributions in 2016 of \$100,499 in 2016 made 2016 income \$261,654. [Exhibit 37:309; TT1 67:23-70:3.] Mr. Lusk testified that he and his wife had business expenses of about \$25-26,000 per year. [TT1 90:15-23.] Mr. Lusk testified that he and his wife received a tax bill for the income in these years. [TT1 90:10-91:11.]

1 While Mr. Lusk and Ms. Peterson were rearing their son,
2 Matthew, they exchanged notes regarding financial matters, such
3 as debts and reimbursements for support and activities.
4 [Exhibit 48:1345-1387; TT1 76:22-85:19.]

5 Ms. Peterson delivered to Mr. Lusk a noted dated June 11,
6 2005 regarding child support arrearage owned by Mr. Lusk to Ms.
7 Peterson. [Exhibit 48:1384; TT1 85:21-86:6.] Ms. Peterson
8 delivered to Mr. Lusk a noted dated September 10, 2005,
9 regarding a payment plan to cure the child support arrearage
10 owned by Mr. Lusk to Ms. Peterson. [Exhibit 48:1384; TT1 86:7-
11 14.] In or about July 2005, Mr. Lusk called Ms. Peterson to
12 discuss the June 11, 2005 letter, and to resolve the issues
13 regarding Matthew's outstanding support. [Exhibit 48:1384; TT1
14 94:9-96-13.] Mr. Lusk and Ms. Peterson resolved the outstanding
15 support issues during the call. [TT1 96:14-16.] Ms. Peterson
16 has a clear recollection of the telephone call. [TT1 96:17-19;
17 TT2 46:2-47:7.] As a result of the phone call, Ms. Peterson
18 wrote a note to Mr. Lusk dated September 10, 2005,
19 memorializing the child support settlement agreement. [Exhibit
20 48:1385; TT1 97:1-13.]

21 During the July 2005 telephone conversation with Mr. Lusk,
22 Ms. Peterson commented "that now all we have to deal with is
23 the retirement and savings plan. His response was that was not
24 available to him right now." [TT1 97:17-98:3.] Mr. Lusk has no
25 recollection of the telephone call. [TT2 21:16-25.] However,
26 Mr. Lusk produced no writings that showed the agreement reached
27 regarding child support arrearage cure, as memorialized by Ms.
28 Peterson's letter dated September 10, 2005, was reach by

1 writings rather than by phone. Ms. Peterson testified that if
2 such a letter existed she would have a copy and would have
3 produced it [TT2 45:7-46:1.]

4 On August 5, 2016, Peterson filed with the Ventura County
5 Superior Court, Case No. D219257, a post-judgment Request for
6 Orders for a determination and distribution of the community
7 property interest in Lusk's Allstate Pension Plan and the
8 Lusk's Allstate 401(k) Savings Plan (Exhibit 56, DX1474 -
9 1523). [SF 19.] Mr. Lusk asserted at the October 26, 2016
10 hearing, in the Ventura County Superior Court, that Ms.
11 Peterson and Mr. Lusk intended to each waive their rights to
12 the other's retirement benefits. [TT2 18:17-25.] The Ventura
13 County Superior Court did not find that credible in the face of
14 the unambiguous MSA. [Exhibit 54.] Further, Mr. Lusk never
15 raised the argument in the Ventura County Superior Court that
16 the 1997 Move Away Order absolved him of his community property
17 responsibilities regarding the retirement accounts. [Id.]

18 Mr. Lusk never raised the argument in the Ventura County
19 Superior Court that Ms. Peterson was entitled to an interest in
20 the 401(k) Plan, but not the pension. [Exhibits 54, 56; TT2
21 29:1-19; 30:1.]

22 After a hearing on October 26, 2016, the Ventura County
23 Superior Court made its Findings and Order After Hearing on
24 December 12, 2016 (the "State Court Order") (Exhibits 35 and
25 36:0254 - 0262). [SF 20.] The State Court Order granted
26 Peterson's request for a determination of her community
27 property interest in the Allstate Pension Plan and the Allstate
28 401(k) Savings Plan. (Id.) [SF 21.] The State Court Order

1 provides that Peterson's interest in the Allstate Retirement
2 Plan is \$119,788, "which Lusk shall pay directly to Peterson
3 forthwith." (Id.) [SF 22.] The State Court order further
4 provides that \$34,198 withdrawn by Lusk from the Allstate
5 401(k) Savings Plan constituted the community property interest
6 of Peterson and Lusk and that "Lusk shall pay forthwith to
7 Peterson \$17,089.00 as her one-half share." (Id.) [SF 23.]
8 Finally, the State Court order awarded Peterson attorneys' fees
9 and costs in the amount of \$10,000.00. (Id.) [SF 24.] Lusk
10 never paid Peterson any of Peterson's interest in the Allstate
11 Pension Plan and the Allstate 401(k) Savings Plan, or
12 attorneys' fees and costs. [SF 25.] Ms. Peterson took no
13 significant steps to collect the State Court Order. [TT1 105:7-
14 13.]

15 Mr. Lusk now contends that Ms. Peterson had retirement
16 benefits that were undisclosed at the time of the MSA. Mr. Lusk
17 bases this contention on a box checked on Ms. Peterson's 1993
18 W-2 [Exhibit 59:1552; TT1 117:15-120:10.]. Ms. Peterson's
19 testimony directly controverts the contention. [Id.; 128:17-
20 129:21.] There is no other evidence of that Ms. Peterson had an
21 undisclosed retirement account. The court finds that Ms.
22 Peterson did not have an undisclosed retirement account.

23 Lusk filed his chapter 13 case on January 26, 2017
24 (Exhibit 37), seeking to discharge his obligation to Peterson.
25 The \$146,877 debt owed to Ms. Peterson scheduled by MT on this
26 Schedule F is undisputed and not subject to setoff. [Exhibit
27 37:295; TT1 67:3-17.] The Petition was filed 45 days after
28 entry of the December 12, 2016 State Court Order. [SF 26.] Lusk

1 admits he owed a fiduciary duty to Peterson regarding
2 Peterson's community property interest in the Allstate Pension
3 Plan and the Allstate 401(k) Savings Plan. [SF 27.] Lusk admits
4 he breached his fiduciary duty to Peterson when he withdrew all
5 funds from the Allstate Pension Plan and the Allstate 401(k)
6 Savings Plan and did not pay Peterson her community property
7 share of the Allstate Pension Plan and the Allstate 401(k)
8 Savings Plan. [SF 28.]

9 **Issue Presented.**

10 1. Whether Mr. Lusk engaged in fraud or defalcation
11 while acting in a fiduciary capacity when Mr. Lusk breached his
12 fiduciary duty to Ms. Peterson by not delivering to Ms.
13 Peterson her community property interest in the retirement
14 funds earned during their marriage.

15 2. Whether Ms. Peterson's December 12, 2016 Ventura
16 County Superior Court Findings and Order After Hearing (the
17 "State Court Order") dividing community property and
18 quantifying Peterson's community property interest in the
19 Allstate Retirement Plan and the Allstate 401(k) Savings Plan
20 is not dischargeable in Mr. Lusk's chapter 13 bankruptcy
21 because Mr. Lusk breached his marital fiduciary duty to
22 Peterson by embezzling the funds for his own use.

23 3. Whether the Allstate Pension Plan and the Allstate
24 401(k) Savings Plan funds (and the traceable proceeds of those
25 funds, which on the petition date were held in Lusk's bank
26 accounts) were/are held by Lusk for Peterson in trust; and
27 Whether the funds, which on the petition date were held in
28 Lusk's bank accounts, belong to Peterson.

1 **The Parties Contentions.**

2 Mr. Lusk contends:

3 1. Lusk's removal of the funds was not an intentional
4 violation of the 1994 court order. When he removed the funds
5 Allstate Pension Plan and the Allstate 401(k) Savings Plan,
6 Lusk believed Peterson had no right to any of the funds;

7 2. Peterson has only a state court order awarding her
8 the amount of \$146,877. No trust corpus was identified by the
9 state court order. No express trust was created by the state
10 court order;

11 3. There is no showing that the award of money is not an
12 adequate remedy;

13 4. The belated request for equitable remedy is an
14 attempt to circumvent the consequences of Lusk's confirmed
15 Chapter 13 Plan;

16 5. Peterson's conduct in obtaining the state court
17 orders constitutes "unclean hands" which prevents her from
18 qualifying for equitable remedy of tracing I constructive
19 trust;

20 6. To the extent that Peterson seeks an equitable
21 remedy, it affects the property rights of Lusk's spouse, Carol,
22 who is not a party to this lawsuit.

23
24 Ms. Peterson contends:

25 1. Lusk owed Peterson a fiduciary duty with regard to
26 the Allstate Pension Plan and the Allstate 401(k) Savings Plan.

27 2. Lusk engaged in fraud or defalcation regarding the
28 Allstate Pension Plan and the Allstate 401(k) Savings Plan when

1 Lusk withdrew the funds from the plan and (i) did not provide
2 information to Peterson, or (ii) pay Peterson's share of the
3 funds to Peterson.

4 3. Once Lusk withdrew the Peterson's funds from the
5 Allstate Pension Plan and the Allstate 401(k) Savings Plan, he
6 held the Peterson's funds in trust for Peterson.

7 4. The funds held by Lusk in trust for Peterson and must
8 be turned over to Peterson.

9 5. All funds, proceeds, or assets traceable from the
10 Allstate Pension Plan and the Allstate 401(k) Savings Plan, to
11 the amounts determined to be Peterson's (\$146,877) must be
12 turned over to Peterson.

13 6. To the extent Lusk does not possess funds, proceeds,
14 or assets traceable from the Allstate Pension Plan and the
15 Allstate 401(k) Savings Plan, to the amounts determined to be
16 Peterson's (\$146,877), that remaining debt is not dischargeable
17 in Lusk's chapter 13 case.

18 7. Peterson is entitled to attorneys' fees and expenses
19 incurred.

20 **Analysis and Conclusion of law.**

21 The complaint asserts a single claim, under 11 U.S.C. §§
22 1328(a)(2) and 523(a)(4), to determine dischargeability of debt
23 for fraud or defalcation while acting in fiduciary capacity.
24 The complaint also asserts Defendant held the funds withdrawn
25 from the Allstate Pension Plan and the Allstate 401 (k) Savings
26 Plan as trustee for Peterson.

27 Lusk owed Peterson a fiduciary duty with regard to the
28 community property acquired during their marriage, which

1 existed from the date of marriage to the date of division of
2 the community assets. California Family Code Section 1100(e)
3 defines the marital relationship as a fiduciary relationship.
4 In addition, it spells out the duty of full disclosure. It
5 provides:

6 Each spouse shall act with respect to the
7 other spouse in the management and control
8 of the community assets and liabilities in
9 accordance with the general rules governing
10 fiduciary relationships which control the
11 actions of persons having relationships of
personal confidence as specified in Section
721, until such time as the assets and
liabilities have been divided by the
parties or by a court.

12 This duty includes the obligation to make
13 full disclosure to the other spouse of all
14 material facts and information regarding
the existence, characterization, and
15 valuation of all assets in which the
16 community has or may have an interest and
debts for which the community may be
17 liable, and to provide equal access to all
information, records, and books that
18 pertain to the value and character of those
assets and debts, upon request.

19 Cal. Fam. Code § 1100(e)

20 California Family Code Section § 721(b) further defines
21 the duties to make full disclosure and account for community
22 assets:

23 [I]n transactions between themselves,
24 spouses are subject to the general rules
governing fiduciary relationships that
25 control the actions of persons occupying
confidential relations with each other.
26 This confidential relationship imposes a
duty of the highest good faith and fair
27 dealing on each spouse, and neither shall
28 take any unfair advantage of the other..

1 This confidential relationship is a
2 fiduciary relationship subject to the same
3 rights and duties of nonmarital business
4 partners, as provided in Sections Sections
5 16403, 16404, and 16503 of the Corporations
6 Code , including, but not limited to, the
7 following:

8 (1) Providing each spouse access at all
9 times to any books kept regarding a
10 transaction for the purposes of inspection
11 and copying.

12 (2) Rendering upon request, true and full
13 information of all things affecting any
14 transaction that concerns the community
15 property. Nothing in this section is
16 intended to impose a duty for either spouse
17 to keep detailed books and records of
18 community property transactions.

19 (3) Accounting to the spouse, and holding
20 as a trustee, any benefit or profit derived
21 from any transaction by one spouse without
22 the consent of the other spouse that
23 concerns the community property.

24 Cal. Fam. Code § 721

25 *In re Stanifer (Lovell v. Stanifer) (1999) 236 B.R. 709.*

26 (1) California statutes requiring each spouse to make full
27 disclosure of existence of all community assets, and to provide
28 full information regarding any transaction affecting such
community assets, together with California case law regarding
fiduciary obligations of spouses as regards community property,
gave rise to ``express trust, '' of kind required under
dischargeability exception, and (2) debtor-husband's retention
of lump sum distribution from his individual retirement account
(IRA), as community property that was not divided at time of
divorce, and failure to account to his former wife therefor,
was in nature of ``defalcation. ''

1 *Bullock v. Bankchampaign, N.A.* (2013) 133 S. Court. 1754;
2 569 U.S. 267. The term “defalcation” in the Bankruptcy Code
3 includes a culpable state of mind requirement involving
4 knowledge of, or gross recklessness in respect to, the improper
5 nature of the fiduciary behavior. Where the conduct at issue
6 does not involve bad faith, moral turpitude, or other immoral
7 conduct, “defalcation” requires an intentional wrong. An
8 intentional wrong includes not only conduct that the fiduciary
9 knows is improper but also reckless conduct of the kind that
10 the criminal law often treats as the equivalent. Where actual
11 knowledge of wrongdoing is lacking, conduct is considered as
12 equivalent if, as set forth in the Model Penal Code, the
13 fiduciary “consciously disregards,” or is willfully blind to,
14 “a substantial and unjustifiable risk” that his conduct will
15 violate a fiduciary duty.

16 To show the Lusk held the funds in trust for Peterson for
17 purposes of § 523(a)(4), the fiduciary relationship must be one
18 arising from an express or technical trust imposed by statute.
19 For a trust relationship to be established under § 523(a)(4),
20 the applicable statute must clearly define fiduciary duties and
21 identify trust property. The trust giving rise to a fiduciary
22 relationship under § 523(a)(4) must be imposed prior to (and
23 without reference to) any wrongdoing by the debtor. See
24 *Nondischargeable Debts (Exceptions to Discharge)*, Cal. Prac.
25 Guide Bankruptcy Ch. 22-C, and the cases cited there. Cal. Fam.
26 Code § 721 provides that spouses hold as a trustee any benefit
27 or profit derived from any transaction by one spouse without
28 the consent of the other spouse that concerns the community

1 property. See Cal. Fam. Code § 721.

2 The evidence establishes that Mr. Lusk consciously
3 disregarded, or was willfully blind to, a substantial and
4 unjustifiable risk that his conduct would violate a fiduciary
5 duty.

6 Mr. Lusk pleads ignorance that he had a responsibility to
7 Ms. Peterson regarding the retirement benefits. Mr. Lusk has
8 made inconsistent arguments regarding why he had no
9 responsibility to Ms. Peterson, from claiming misunderstanding
10 of the unambiguous MSA; to an argument that Ms. Peterson is
11 entitled to only a portion of the smaller 401(k) account and
12 not the substantial Pension; to an argument that the 1997 Move
13 Away Order, which never mentioned community property but only
14 support, extinguished his obligation. These contentions are not
15 credible.

16 Mr. Lusk is a well-educated and capable man. He holds a
17 bachelor's degree in marketing, and is a licensed insurance
18 agent, and has been since 1986. Insurance contracts are indeed
19 contracts, like the MSA and the Move Away Order, which were
20 agreements Mr. Lusk entered into with Ms. Peterson. Both the
21 MSA and Move Away Order are unambiguous regarding the subjects
22 addressed.

23 The Ventura County Superior Court specifically found the
24 MSA was clear and unambiguous, and applied to formula in the
25 MSA to determine Ms. Peterson's interest in the retirement
26 funds.

27 Mr. Lusk initially argued that Ms. Peterson had a right to
28 only the 401(k) funds. But he had already withdrawn the 401(K)

1 funds in 1999. That admission in itself demonstrates Mr. Lusk's
2 overarching intent to deprive Ms. Peterson of her share of the
3 retirement funds. That demonstrates not only a reckless
4 disregard for Ms. Peterson's rights, but the culpable state of
5 mind involving knowledge of the improper nature of the
6 fiduciary behavior.

7 On his sixtieth birthday, in September 2013, Mr. Lusk
8 asked Allstate to distribute the entire benefit to him as a
9 lump-sum distribution. Just six months later, Ms. Peterson
10 began inquiring about the pension. Mr. Lusk engaged in a
11 determined effort to dodge Ms. Peterson, apparently in the hope
12 that she would go away. Upon her persistence, he realized "Ms.
13 Peterson is not going away," and "She's not going to stop" her
14 efforts. Upon receiving three letters from Mr. Goodman, Mr.
15 Lusk did not raise his asserted defenses that (1) the MSA did
16 not require him to share the retirement with Ms. Peterson, (2)
17 the 1997 Move Away Order extinguished his responsibility to Ms.
18 Peterson, or (3) her asserted failure to disclose her own non-
19 existent retirement plan excused his performance. In 2005, at
20 Matthew's high school graduation, Mr. Lusk did not tell Ms.
21 Peterson she was wrong that they still needed to deal with the
22 pension aspect of the MSA; neither did he in 2010 after Matthew
23 graduated from college. That is because Mr. Lush knew the issue
24 was outstanding. At the very least, the comments, and the
25 letters, put Mr. Lusk on notice that he had a duty to Ms.
26 Peterson. Under *S. Stone Co. v. Singer*, 665 F.2d 698, 703 (5th
27 Cir. 1982), and *United States v. Hale*, 422 U.S. 171, 176
28 (1975), the failure to reply to a letter containing statements

1 which it would be natural under all the circumstances for the
2 addressee to deny if he or she believed them untrue is
3 receivable as evidence of an admission by silence.

4 On February 28, 2015, ten months after her first inquiry,
5 Mr. Lusk's Wells Fargo Bank account 7910 held \$100,000.21.
6 Between March 1, 2015, and March 22, 2016, Mr. Lusk transferred
7 \$85,377.66 from account 7910 to Mr. Lusk's separately-owned
8 Wells Fargo checking account 9751. On January 1, 2015, Mr.
9 Lusk's Wells Fargo Traditional IRA account 2931 held
10 \$252,980.95. Between January 1, 2015 and January 26, 2017, MT
11 took \$26,000 in cash withdrawals, and transferred \$180,619.85
12 to his separately owned checking account, Wells Fargo Bank
13 account number 9751.

14 Between April 16, 2015 and December 2016, Mr. Lusk
15 dispensed with \$225,168.72, through large in-bank cash
16 withdrawals and cashier check purchases. During a similar
17 timeframe, from 2014 to 2016, Mr. Lush purchased nine vehicles,
18 with a value on the petition date of \$98,263.00 – all during
19 the timeframe when Ms. Peterson was seeking information about
20 her retirement funds, and Mr. Peterson knew she was asking
21 questions. This demonstrates an intention to disburse the funds
22 before Ms. Peterson could get ahold of them.

23 Even after the Ventura county Superior Court entered the
24 order in December 2016, Mr. Lusk's Wells Fargo Bank Rollover
25 IRA account 2931 held \$83,983.51 on the January 26, 2017
26 petition date; Wells Fargo Bank Rollover IRA account 7910 held
27 \$9,792.64. On the trial date, the accounts held "just a little
28 over 30" and about \$2,000.00, respectively. This depletion was

1 after Mr. Lusk knew—through a final order of the Superior
2 Court—that Ms. Peterson was entitled to the money in those
3 accounts.

4 Mr. Lusk knowingly and intentionally breached his
5 fiduciary duty to Ms. Peterson. Clearly, the minimum conscious
6 disregard or is willful blindness to a substantial and
7 unjustifiable risk that his conduct will violate a fiduciary
8 duty is met here. *Bullock v. Bankchampaign, N.A.*, *supra*.

9 Because Mr. Lusk held the funds in express trust for Ms.
10 Peterson, turnover of the remaining funds to Ms. Peterson is
11 appropriate. Ms. Peterson did not make an election of remedies
12 in the Ventura County Court. 28 Cal.Jur.3d, election of
13 remedies at Section 11. The general rule is an election occurs
14 when a party who is entitled to force two inconsistent remedies
15 institutes an action on one such remedy or performs an act in
16 pursuit of such remedy whereby he or she gains an advantage
17 over the other party or causes the other party damages. Ms.
18 Peterson was able to take essentially no action in furtherance
19 of her State Court Order.

20 Ms. Peterson requests a judgment that the remaining debt
21 is non-dischargeable in the chapter 13 bankruptcy case, which
22 is granted. Under *In re Davies*, 494 B.R. 453 (Bankr. C.D. Cal.
23 2013), under California law, any of Chapter 7 debtor's
24 obligations to a judgment creditor determined to be
25 nondischargeable would also be nondischargeable against
26 postpetition community property. 11 U.S.C. §§ 523, 524(a)(3),
27 (b); Cal.Fam.Code § 910. 11 U.S.C. § 1328.

1 Peterson is entitled to an award of her attorneys' fees
2 and costs incurred in this adversary proceeding. Under Cal.
3 Civ. Proc. Code § 1021:

4 Except as attorney's fees are specifically
5 provided for by statute, the measure and
6 mode of compensation of attorneys and
7 counselors at law is left to the agreement,
8 express or implied, of the parties; but
parties to actions or proceedings are
entitled to their costs, as hereinafter
provided.

9 Cal. Civ. Proc. Code § 1021.

10 This statute permits attorney's fees agreements, but
11 contains no restriction as to the nature of the lawsuits for
12 which such fees may be recovered. California cases have held
13 that where attorney's fees are not recoverable for a non-
contract action under section 1717, they may nonetheless be
14 recoverable under section 1021. See *3250 Wilshire Blvd. Bldg.*
15 *v. W.R. Grace & Co.*, 990 F.2d 487, 489 (9th Cir. 1993).

16 Under the MSA, Peterson is entitled to recover her
17 attorneys' fees. Under the MSA, at page 9, paragraph VII(B):

18 If either party fails to perform his or her
19 respective obligations under this Agreement
20 or the judgment of dissolution of marriage,
21 and the other is thereby required to incur
attorneys' fees, accountants' fees, or other
22 fees or costs then either party shall be
entitled to apply to any court of competent
23 jurisdiction for stich fees and costs
against the other party. The same rights
24 apply if either party has breached any
warranties or representations contained in
25 this Agreement.

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1 Respectfully submitted by:

2 Dated: May 11, 2018

KLEIN, DENATALE, GOLDNER,
COOPER, ROSENLIEB & KIMBALL, LLP

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By: 

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Original