IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
ENTERED
TAWANA C. MARSHALL, CLERK
THE DATE OF ENTRY IS
ON THE COURT'S DOCKET

IN RE:	§	
	§	
MICHAEL L. MULLER, JR. and	§	
JAIME R. MULLER,	§	
	§	
Debtors.	§	CASE NO. 04-48160-DML-13

MEMORANDUM OPINION AND ORDER

Before the court is DIRECTV, Inc.'s ("Movant") Motion to Dismiss (the "Motion") filed on November 17, 2004. Michael L. Muller, Jr. ("Mr. Muller") and Jaime R. Muller ("Mrs. Muller") (collectively, "Debtors") filed their Response to the Motion on December 7, 2004, and their Supplemental Response on December 17, 2004. Movant's Reply to Debtors' Supplemental Response was filed on December 20, 2004. A hearing on the Motion was held on December 20, 2004, and following arguments of counsel, the court took the matter under advisement.

BACKGROUND

On January 29, 2004, Debtors filed for voluntary relief under chapter 7 of the Bankruptcy Code,[1] Case No. 04-40967-DML-7 (the "Chapter 7 Case"), and also filed, *inter alia*, Debtors' Schedules A through J and Statement of Financial Affairs ("SOFA"). Debtors' Schedule F (Creditors Holding Unsecured Nonpriority Claims) ("Schedule F") listed Movant as the holder of an unsecured nonpriority claim in an "Unknown" amount based on "Consideration: Lawsuit." Debtors' SOFA listed a civil lawsuit for copyright violations pending in the District of Oregon[2]

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[1] 11 U.S.C. §§ 101-1330 (2004) (hereafter the "Code").

[2] Case No. CV-03-661Kl.

(the "Oregon Suit") as a "suit[] . . . to which the debtor is or was a party within one year immediately preceding the filing" of the Chapter 7 Case.

On April 26, 2004, Movant's Complaint to Determine Dischargeability of Debt Pursuant to 11 U.S.C. § 523 (the "Complaint") was filed against Mr. Muller in the Chapter 7 Case as Adversary Case No. 04-4192-DML (the "Adversary Case"). The Adversary Case alleged that Mr. Muller surreptitiously possessed and illegally used in violation of federal communications and copyright laws various devices and equipment designed to intercept and decrypt Movant's protected satellite communications and that Mr. Muller should therefore be denied discharge pursuant to Code section 523.

On April 27, 2004, this court entered its order discharging Debtors in the Chapter 7 Case but explained that "[d]ebts that the bankruptcy court specifically has decided or will decide in this bankruptcy case are not discharged."

On May 7, 2004, proof of service of the summons and Complaint in the Adversary Case was filed.

On June 9, 2004, the Chapter 7 Case was closed.

On June 30, 2004, Debtors' Expedited Motion to Reopen Case and Abate Discharge (the "Motion to Reopen") was filed, and on July 8, 2004, a hearing was held on the Motion to Reopen. Following argument of Debtors' counsel, the Motion to Reopen was taken under advisement pending Debtors' compliance with the court's oral instructions at the hearing that Debtors submit to the court by July 14, 2004, an order reflecting Debtors' decision to either (1) pursue reopening of the Chapter 7 Case or (2) pursue relief under chapter 13. No order from Debtors was received by the court.

On August 19, 2004, because Mr. Muller had filed no responsive pleadings in the Adversary Case and had not otherwise defended the lawsuit in the Chapter 7 Case, Movant filed Plaintiff's Request for Entry of Default and Default Judgment Against Michael Muller (the "Request for Default").

On August 25, 2004, Debtors filed for relief under chapter 13 of the Code, Case No. 04-48160-DML-13 (the "Chapter 13 Case"). On September 21, 2004, Debtors' Preliminary Chapter 13 Plan (the "Plan"), SOFA, and Schedules A through J were filed. Debtors' Schedule F in the Chapter 13 Case again listed Movant as the holder of an unsecured nonpriority claim in an "Unknown" amount based on "Consideration: Lawsuit." Debtors' Chapter 13 Case SOFA also listed the Oregon Suit as a "suit[] . . . to which the debtor is or was a party within one year immediately preceding the filing" of the Chapter 13 Case.

On August 26, 2004, a hearing was held on the Request for Default in the Chapter 7 Case and the Request for Default was granted by this court. The Order Granting Plaintiff's Request for Default and Default Judgment Against Michael L. Muller (the "Default Order and Judgment") was entered in the Chapter 7 Case on August 30, 2004. The Default Order and Judgment ordered the Clerk of this court to enter default and default judgment against Mr. Muller in the sum of $420,000, together with costs, disbursements, and attorneys' fees in the amount of $5,136.62, for a total default judgment in the principal amount of $425,136.62 (the "Default Judgment Amount"), plus postjudgment interest from the date of the Default Order and Judgment until paid. Pursuant to Code sections 523(a)(2), (4), and (6),[3] the Default Order and Judgment

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[3] Section 523(a) provides in relevant part:

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of

excepted from discharge in connection with Debtors' Chapter 7 Case Mr. Muller's liabilities in connection with the Default Judgment Amount.

DISCUSSION

Movant argues that the Default Order and Judgment entered against Mr. Muller in the Chapter 7 Case in the Default Judgment Amount disqualified Debtors from filing the Chapter 13 Case, because the Default Judgment Amount caused Debtors' noncontingent, liquidated, unsecured debts to exceed the $307,675[4] maximum limit set forth in Code section 109(e).[5]

Debtors respond that on the date the Chapter 13 Case was filed, Debtors' Chapter 13 Case Schedule F properly listed Debtors' noncontingent, liquidated, unsecured debts totaling

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> this title does not discharge an individual debtor from any debt . . .
>
> (2) for money, property, services . . . to the extent obtained by –
>
> (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition . . .
>
> (4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny . . .
>
> (6) for willful and malicious injury by the debtor to another entity or to the property of another entity . . . .

Code §§ 523(a)(2), (4), and (6).

4 Effective April 1, 2004, and applicable to cases commenced on or after such date, the maximum dollar amounts in Code section 109(e) for noncontingent, liquidated, unsecured debts were automatically adjusted, as provided by Code section 104(b), by substituting $307,675 for $290,525 wherever appearing.

5 Code section 109(e) provides:

> Only . . . an individual with regular income and such individual's spouse . . . that owe, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts that aggregate less than $307,675 . . . may be a debtor under chapter 13 of this title.

Code § 109(e).

$16,541.39,[6] and, consequently, Debtors had not exceeded the limits outlined in Code section 109(e) and qualified for eligibility to proceed under chapter 13 of the Code. Rather, Debtors argue that as of the date of Debtors' Chapter 13 Case petition Movant "only had a claim against [Mr.] Muller and such claim remained contingent and unliquidated." Debtors contend that Movant's claim must have been contingent and unliquidated on the date Debtors filed the Chapter 13 Case, because the Default Judgment Amount was determined and the Default Order and Judgment was entered in the Chapter 7 Case only after a hearing on the Request for Default was held one day *after* Debtors' Chapter 13 Case was filed. Debtors argue that the Default Judgment Amount determined in connection with the Chapter 7 Case should not be considered in calculating Debtors' eligibility under Code section 109(e), because section 109(e) provides that the debt limitation be satisfied "on the date of the filing of the petition."[7]

Movant bears the burden of proving that Debtors exceeded the section 109(e) debt limit. *See In re Horne*, 277 B.R. 712, 715 (Bankr. E.D. Tex. 2002). The parties do not dispute that Debtors were individuals with regular income or that the debt in question is unsecured. Thus, for purposes of determining Debtors' eligibility to utilize chapter 13, the issue before the court is whether Movant's claim for the Default Judgment Amount determined in the Chapter 7 Case should fairly be characterized on the date Debtors filed the Chapter 13 Case as (1) a contingent, unliquidated, unsecured debt or (2) a noncontingent, liquidated, unsecured debt.

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[6] The parties do not dispute the noncontingent, liquidated, unsecured characterization of the debts totaling $16,541.39.

[7] Code § 109(e).

Contingent/Noncontingent Debt

"Debt" is defined by the Code to mean "liability on a claim."[8] "Claim" is defined as a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured . . . ."[9] A debt is contingent if the debtor's liability depends upon an extrinsic event. *In re Pulliam*, 90 B.R. 241, 243 (Bankr. N.D. Tex. 1988). *See also In re All Media Props., Inc.*, 5 B.R. 126, 133 (Bankr. S.D. Tex. 1980), *aff'd per curiam*, 646 F.2d 193 (5th Cir. 1981) ("[C]laims are contingent as to liability if the debt is one which the debtor will be called upon to pay only upon the occurrence or happening of an extrinsic event which will trigger the liability of the debtor to the alleged creditor . . . ."); *Mazzeo v. United States (In re Mazzeo)*, 131 F.3d 295, 303 (2d Cir. 1997) (explaining that "future event" does not refer to a judicial determination as to liability and relief, because a claim may be noncontingent even though it has not been reduced to judgment); 2 COLLIER ON BANKRUPTCY ¶ 109.06[2][b] (15th ed. rev. 2004) ("A claim is contingent as to liability if the debtor's legal duty to pay does not come into existence until triggered by the occurrence of a future event. Thus, a creditor's claim is not contingent when the 'triggering event' occurred before the filing of the chapter 13 petition.").

Here, the genesis of Movant's claim is in events described in the Oregon Suit against Mr. Muller. The Complaint in the Adversary Case was, in turn, based on the Oregon Suit and culminated in the Default Order and Judgment entered by this court in the Chapter 7 Case.

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[8] Code § 101(12).

[9] Code § 101(5)(A).

The Oregon Suit alleged that Mr. Muller surreptitiously possessed and illegally used in violation of federal communications and copyright laws various devices and equipment designed to intercept and decrypt Movant's protected satellite communications. Movant's Oregon Suit against Mr. Muller was based on alleged occurrences, happenings, and/or events which took place prior to filing the Oregon Suit. Although Mr. Muller might dispute Movant's allegations made in the Oregon Suit, the court concludes that no further occurrences, future happenings, or additional events would be necessary to trigger Mr. Muller's liability to Movant; neither would it be necessary that Movant's cause of action under the Oregon Suit be reduced to judgment to be a "claim" under the Code.[10]

Moreover, the fact that Mr. Muller might dispute Movant's allegations in the Oregon Suit does not mean that Movant's claim is contingent. *See In re Pulliam*, 90 B.R. at 244 ("A claim is not contingent even if it is subject to a bona fide dispute."); *In re All Media Props., Inc.*, 646 F.2d at 132 (concluding that a claim need not "be reduced to judgment before it was not contingent as to liability"); *Gould v. Gregg, Hart, Farris & Rutledge*, 137 B.R. 761, 765 (W.D. Ark. 1992) ("The pendency of an appeal . . . does not make this debt contingent."). Indeed, "[t]he general rule is that disputed debts should be included in the § 109(e) debt calculations." *In re Pulliam*, 90 B.R. at 244. "Because Congress did not insert the term disputed in § 109(e), disputed debts must be counted in determining whether a petitioner may be a debtor under Chapter 13." *Id.* at 246. *See also In re Hatzenbuehler*, 282 B.R. 828, 831 (Bankr. N.D. Tex. 2002) ("It is also well settled that 'disputed' debts *are* included in the section 109(e) eligibility

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[10] Code § 101(5)(A).

analysis.") (emphasis in original); *Gould*, 137 B.R. at 765 (holding that a disputed debt is not excluded when determining whether section 109(e) limitation is exceeded).

Accordingly, the court concludes that Mr. Muller's liability to Movant was triggered by Mr. Muller's alleged copyright violations – events which occurred prior to the filing of both the Chapter 7 Case and the Chapter 13 Case – and that no conditions precedent remained unsatisfied prepetition in connection with the Chapter 13 Case and therefore Movant's claim is noncontingent. Further, even though Mr. Muller may dispute the allegations made by Movant in the Oregon Suit and upon which Movant's claim is based, the court holds that the noncontingent disputed debt must nevertheless be included in Debtors' calculations for eligibility to proceed with the Chapter 13 Case under Code section 109(e).

The court notes that its conclusions are supported by Debtors' schedules filed in both the Chapter 7 Case and the Chapter 13 Case. Debtors listed the Oregon Suit on Schedule F in the Chapter 7 Case but failed to indicate in the spaces available on the form that the claim was "contingent," "unliquidated," and/or "disputed." Although not dispositive, Debtors' recognition of the Oregon Suit in the schedules is certainly a factor this court may consider in deciding the issue at hand. Indeed, given the *Default* Order and Judgment entered in the Chapter 7 Case, it is apparent that Mr. Muller chose not to dispute Movant's characterization of the claim or otherwise argue against Movant's Complaint regarding dischargeability under Code section 523, thus buttressing the inference that Mr. Muller did not dispute the allegations made in the Complaint in the Chapter 7 Case.

Thereafter, Debtors' Schedule F in the Chapter 13 Case again failed to indicate in the spaces available on the form that Movant's claim was "contingent," "unliquidated," and/or

"disputed." Because Debtors failed to amend the Chapter 13 Case filings, and consistent with the fact that bankruptcy petitions are sworn statements under oath, the court believes a reasonable inference can be made that Debtors must have considered the schedules and SOFAs to be true and correct. While the court acknowledges that Debtors' failure to indicate the nature of Movant's claim on Schedule F in the Chapter 7 Case may have been an innocent mistake made in haste or otherwise, the court, on the facts before it, is not prepared to excuse as an oversight Debtors' failure to amend the subsequent Schedule F in the Chapter 13 Case if, in fact, Debtors considered Movant's claim to be "contingent," "unliquidated," and/or "disputed."

Finally, the court notes that Mr. Muller's answer to the Complaint in the Adversary Case was due on or before May 20, 2004. Thus, Mr. Muller was technically in default on May 21, 2004 – a date well in advance of the filing of the Chapter 13 Case. Movant had only to reduce Mr. Muller's default to judgment. However, as set forth *supra*, by definition the Code does not require a claim to be reduced to judgment.[11]

Thus, because (1) Mr. Muller's liability on Movant's claim did not depend on the happening or occurrence of a future extrinsic event and (2) disputed debts are included in eligibility calculations under section 109(e), the court is persuaded that on the date of the filing of the Chapter 13 Case Mr. Muller's liability on Movant's claim in the Chapter 7 Case was a noncontingent debt.

Liquidated/Unliquidated Debt

"A debt is liquidated if the amount due and the date on which it was due are fixed or certain, or when they are ascertainable by reference to (1) an agreement or (2) to a simple

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[11] Code § 101(5)(A).

mathematical formula." *In re Pulliam*, 90 B.R. at 244. "A debt is liquidated if it is capable of "ready determination and precision in computation of the amount due." *Nicholes v. Johnny Appleseed of Wash. (In re Nicholes)*, 184 B.R. 82, 89 (B.A.P. 9th Cir. 1995). "The test for 'ready determination' is whether the amount due is fixed or certain or otherwise ascertainable by reference to an agreement or by a simple computation." *Id. See also In re Mazzeo*, 131 F.3d at 304 ("If 'the value of the claim is easily ascertainable,' it is generally viewed as liquidated."); *In re Knight*, 55 F.3d 231, 235 (7th Cir. 1995) ("If the amount of a claim has been ascertained or can readily be calculated, it is liquidated – *whether contested or not*.") (emphasis added); *Interco Inc. v. ILGWU Nat'l Ret. Fund (In re Interco Inc.)*, 137 B.R. 993, 997 (Bankr. E.D. Mo. 1992) (defining an unliquidated claim "as one that is not subject to 'ready determination and precision in computation of the amount due' or 'capable of ascertainment by reference to an agreement or by simple computation'").

Here, Debtors insist that the Default Judgment Amount must have been unliquidated on the date of the filing of the Chapter 13 Case petition, because the Default Judgment Amount was determined and the Default Order and Judgment was entered in the Chapter 7 Case one day *after* Debtors' Chapter 13 Case was filed. Consequently, because eligibility to proceed under chapter 13 is to be determined "on the date of the filing of the petition" pursuant to section 109(e) of the Code, Debtors argue they are eligible to proceed with the Chapter 13 Case.

Movant argues that Debtors' Chapter 13 Case should be dismissed because Movant's claim was liquidated on the date of the filing of Debtors' petition. Movant contends that the Default Judgment Amount was easily ascertainable and was calculated without an evidentiary hearing according to a simple mathematical formula based on the statutory damages provisions

of the federal communications and copyright acts allegedly violated by Mr. Muller. Because the statutory damages included in the Default Judgment Amount exceeded the maximum amount of unsecured debt allowed by Code section 109(e), Movant argues that Debtors do not qualify to proceed with the Chapter 13 Case. The court agrees.

The Oregon Suit, upon which the Complaint was based and the Default Order and Judgment was entered, involved allegations that Mr. Muller, on forty-two separate occasions, surreptitiously possessed and illegally used in violation of federal communications and copyright laws[12] various devices and equipment designed to intercept and decrypt Movant's protected satellite communications. Each federal statute provides to any person aggrieved by violations of the statutes minimum statutory damages based on a mathematical formula.[13]

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[12] *See* 47 U.S.C. § 605 (2004) (the "Cable Communications Policy Act of 1984"); 18 U.S.C. § 2511 (2004) (the "Surreptitious Interception Act").

[13] The Cable Communications Policy Act provides:

> (B) The court –
>
> > (iii) shall direct the recovery of full costs, including awarding reasonable attorneys' fees to an aggrieved party who prevails.
>
> (C)(i) Damages awarded by any court under this section shall be computed, at the election of the aggrieved party, in accordance with . . .
>
> > (II) the party aggrieved may recover an award of statutory damages for each violation . . . in a sum of not less than $1,000 or more than $10,000 . . . .

47 U.S.C. § 605(e)(3).

The Surreptitious Interception Act provides:

> (2) . . . the court may assess as damages whichever is the greater of –
>
> > (B) statutory damages of whichever is the greater of $100 a day for each day of violation or $10,000.

At the hearing held on the Request for Default, Mr. Muller was found by this court to be in default for forty-two separate violations of the federal statutes. The court easily ascertained a calculable sum certain as the Default Judgment Amount based on the minimum statutory damages per violation as set forth in the federal statutes. *See In re Knight*, 55 F.3d at 235 (agreeing that, notwithstanding the fact no judgment had been rendered against debtor before debtor's chapter 13 petition was filed, the debt was liquidated and should be included in the section 109(e) eligibility calculations because the bankruptcy and district courts were easily able to calculate the statutory damages by multiplying the number of violations by the minimum statutory dollar amount); *In re Horne*, 277 B.R. at 715 (rejecting debtor's argument that amount was unliquidated because it had never been reduced to judgment and upholding bankruptcy court's determination that the amount of the debt was clear and, therefore, a liquidated debt).

Although the court is cognizant that the Default Judgment Amount was determined one day *after* Debtors filed the Chapter 13 Case, the court considers indisputable that Movant's debt was ascertainable prepetition (and so liquidated) to the extent of minimum damages. As that minimum caused Debtors to exceed the maximum unsecured debt permissible under section 109(e), it would be absurd to suggest that a dispute as to part of a debt would serve to denominate the undisputed remainder as unliquidated. Thus, the court does not believe it should be limited to Debtors' own characterization of the scheduled debt at an uncertain amount as conclusive regarding the court's eligibility determination. *See Lucoski v. IRS (In re Lucoski)*, 126 B.R. 332, 341 (S.D. Ind. 1991) (finding that to the extent the court relies upon the debtor's

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18 U.S.C. § 2520(c)(2)(B).

characterization of the debts in his schedules, "we do not believe that the debtor should be given unbridled authority to determine his eligibility for chapter 13 relief"); *Gould*, 137 B.R. at 765 (concluding that the bankruptcy court cannot be bound by the amounts set forth by the debtor in debtor's schedules for purposes of eligibility determination).

Given the court's determination of the Default Judgment Amount in the Chapter 7 Case *one day* following Debtors' petition in the Chapter 13 Case and that calculation of basic damages due Movant required only simple multiplication, the court finds that (1) Mr. Muller's debt as represented by the Default Judgment Amount was fixed within a reasonable time following the filing of the petition; (2) the Default Judgment Amount was easily calculated using simple arithmetical computation and was predictable prepetition; (3) the debt was liquidated on the date of the filing of the Chapter 13 Case; and (4) the Default Judgment Amount must be included in the section 109(e) eligibility calculations.

CONCLUSION

The court holds that Movant's claim for the Default Judgment Amount determined in the Chapter 7 Case was a noncontingent, liquidated, unsecured debt on the date of the filing of Debtors' Chapter 13 Case. The Default Judgment Amount must therefore be included in the eligibility calculations under Code section 109(e) to determine whether Debtors may proceed with the Chapter 13 Case. Because the Default Judgment Amount causes Debtors' noncontingent, liquidated, unsecured debts to exceed the $307,675 maximum limit set forth in

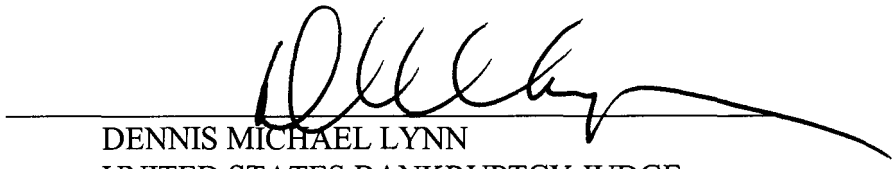
Code section 109(e), the court holds that Debtors are not eligible to proceed under the Chapter 13 Case.[14]

Therefore, **IT IS HEREBY ORDERED**:

1. that Movant's Motion should be, and hereby is, **GRANTED**; and

2. that Debtors notice all interested parties and set for hearing the Motion to Reopen which is pending in the Chapter 7 Case.

SO ORDERED this 19th day of January 2005.



DENNIS MICHAEL LYNN
UNITED STATES BANKRUPTCY JUDGE

[14] Based on the evidence before the court, it appears that the debt at issue herein is not Mrs. Muller's and that Mrs. Muller may or may not elect to again seek relief under chapter 13.