SO ORDERED.

SIGNED this 9th day of April, 2014.

Janice Miller Karlin
United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

In re: **Charif M. Albadawi,** **Debtor.**	**Case No. 12-23050** **Chapter 7**
Richard A. Wieland, **Office of U.S. Trustee,** **Plaintiff,** **v.** **Charif M. Albadawi,** **Defendant.**	**Case No. 14-06024** **Adversary Proceeding**

Order Denying Defendant's Motion to Dismiss

The United States Trustee, Richard A Wieland ("U.S. Trustee"), filed this adversary proceeding against Defendant/Debtor Charif M. Albadawi for revocation of discharge under 11 U.S.C. §§ 727(d) and (e), alleging Defendant both concealed assets and made a false oath and account. Defendant has moved to dismiss the U.S. Trustee's

complaint in its entirety,[1] arguing a settlement agreement that Defendant entered into with the panel trustee of his chapter 7 bankruptcy case should be binding on the U.S. Trustee. Defendant argues that the adversary complaint is prohibited because the U.S. Trustee cannot assert the same allegations against Defendant that have already been settled between the chapter 7 panel trustee and Defendant.

Because this Court concludes that the U.S. Trustee is not bound by the settlement agreement made by the chapter 7 panel trustee, the Court finds no support for Defendant's motion to dismiss. The U.S. Trustee is a distinct entity from the chapter 7 panel trustee, and there is no basis for concluding the U.S. Trustee was bound by the separate actions of the chapter 7 panel trustee. The Court therefore denies Defendant's motion to dismiss.

I. Findings of Fact

The factual allegations of the U.S. Trustee's complaint, which are assumed true for the consideration of this motion, are included herein. Other procedural facts are included from the docket of Defendant's main bankruptcy case.

Defendant filed a voluntary petition under chapter 7 of the Bankruptcy Code, and signed his petition, schedules, and statement of financial affairs under penalty of perjury. Specifically, Defendant's Schedule I stated that Defendant's total income consisted of food stamps, wages from part-time employment as a clerk at Dollar Value, and contributions from family members. Defendant's Schedule B indicated that his sole

[1] Doc. 5.

bank account was at the Bank of Blue Valley, account number ending in 75, with $150 on deposit as of filing. Defendant's statement of financial affairs stated that he had no safety deposit box holding cash or other valuables, and had not had the same for the preceding year.

A chapter 7 trustee, Eric C. Rajala, was appointed to serve as the case trustee for Defendant's bankruptcy. At the creditors' meeting held pursuant to 11 U.S.C. § 341, Defendant reaffirmed, under oath, the accuracy and completeness of his schedules and statement of financial affairs. Defendant was granted a discharge, and Rajala, relying on Defendant's representations, filed a report of no distribution. Shortly thereafter, a final decree was signed and Defendant's bankruptcy case was closed on April 17, 2013.

That very date—April 17, 2013—Defendant deposited $250,000 in cash into his personal bank account (the same account discussed above, ending in 75) at Bank of Blue Valley. The $250,000 cash deposit consisted of $100-currency bundles, individually wrapped in "Bank of America" bundle straps. Defendant informed the Bank of Blue Valley teller that the funds were the result of a cashed certificate of deposit from Bank of America in 2009, and that the funds had been held in a safe deposit box until the deposit at Bank of Blue Valley on April 17, 2013.[2]

Both the chapter 7 panel trustee and the U.S. Trustee requested that the Court reopen Defendant's bankruptcy case, and this Court entered an order reopening the

[2] Defendant disputes the facts of this paragraph. As discussed below, however, the Court accepts the allegations of a complaint as true for purposes of a motion to dismiss. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("[A] court must accept as true all of the allegations contained in a complaint.").

case on July 19, 2013. The chapter 7 panel trustee eventually filed a motion for intended compromise in the main bankruptcy case[3] between himself, the Defendant/Debtor, and Defendant's wife, dated January 31, 2014, seeking to settle the chapter 7 trustee's demand for turnover of the alleged undisclosed $250,000.

Shortly after the motion for compromise was filed in the bankruptcy case, the U.S. Trustee filed this adversary proceeding, stating two bases for revocation of Defendant's bankruptcy discharge under §§ 727(d) and (e): (1) concealment of assets and (2) false oath and account at Defendant's creditors' meeting. To support his first claim, the U.S. Trustee alleges that Defendant falsely answered questions within his schedules and statement of financial affairs and concealed property, all with the intent to hinder, delay, or defraud his creditors. To support his second claim, the U.S. Trustee alleges that Defendant's sworn testimony at his meeting of creditors was false, and done with the intent to hinder, delay, or defraud his creditors. In addition, regarding both claims, the U.S. Trustee alleges that Defendant's behavior was not known, and could not have been known, until after discharge was entered.

The day after the U.S. Trustee's adversary complaint was filed, Defendant filed an objection to the motion to compromise in the main bankruptcy case. Defendant argued that the settlement agreement should be deemed a full compromise of all claims held by both the chapter 7 panel trustee and the U.S. Trustee. Defendant stated that he had no objection to the Court approving the motion to compromise if, and only if, it

[3] Doc. 39.

included the U.S. Trustee's adversary complaint for revocation of discharge. In other words, he objected to approval of the motion to compromise unless the main case compromise precluded the U.S. Trustee from pursuing this adversary proceeding seeking the revocation of Defendant's discharge.

Shortly thereafter, Defendant filed the motion to dismiss the U.S. Trustee's adversary complaint that is the subject of this order. Defendant's main basis for dismissal is that the U.S. Trustee is bound by the settlement agreement made by the chapter 7 panel trustee. Defendant states that "[t]he U.S. Trustee is bound by the acts of the Chapter 7 Trustee, and the U.S. Trustee . . . cannot assert the same allegations against the Debtor that have been settled."[4] The motion to compromise in the main bankruptcy case has been stayed pending resolution of this motion to dismiss.

This matter constitutes a core proceeding over which the Court has the jurisdiction and authority to enter a final order.[5]

II. Analysis

A. Standards for Motions to Dismiss

Although Defendant never states the basis for his motion to dismiss, or argues legal standards for dismissal within his motion, the motion is presumably brought under Federal Rule of Civil Procedure 12(b)(6), which permits a motion to dismiss for

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[4] Doc. 5 ¶ 8.

[5] *See* 28 U.S.C. § 157(b)(2)(J) (stating that objections to discharge are core proceedings); § 157(b)(1) (granting authority to bankruptcy judges to hear core proceedings).

"failure to state a claim upon which relief can be granted."[6] The requirements for a legally sufficient claim stem from Rule 8(a), which requires "a short and plain statement of the claim showing that the pleader is entitled to relief."[7] To survive a motion to dismiss, a complaint must present factual allegations, that when assumed to be true, "raise a right to relief above the speculative level."[8] The complaint must contain "enough facts to state a claim to relief that is plausible on its face."[9] "[T]he complaint must give the court reason to believe that this plaintiff has a reasonable likelihood of mustering factual support for these claims."[10] The Court must accept the nonmoving party's factual allegations as true and may not dismiss on the ground that it appears unlikely the allegations can be proven.[11]

B. Is the U.S. Trustee Bound by the Settlement Agreement of the Chapter 7 Panel Trustee?

Defendant's motion to dismiss is based entirely on the assertion that the U.S.

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[6] Rule 12 is made applicable to adversary proceedings via Federal Rule of Bankruptcy Procedure 7012(b).

[7] Rule 8 is made applicable to adversary proceedings via Federal Rule of Bankruptcy Procedure 7008(a).

[8] *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

[9] *Id.* at 570. The plausibility standard does not require a showing of probability that a defendant has acted unlawfully, but requires more than "a sheer possibility." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). However, "mere 'labels and conclusions,' and 'a formulaic recitation of the elements of a cause of action' will not suffice; a plaintiff must offer specific factual allegations to support each claim." *Kan. Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1214 (10th Cir. 2011) (quoting *Twombly*, 550 U.S. at 555).

[10] *Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007).

[11] *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556).

Trustee is bound by the settlement agreement made by the chapter 7 panel trustee. Defendant contends the panel trustee is the agent of the U.S. Trustee, with "express, implied and apparent authority to bind the U.S. Trustee."[12] Defendant argues, apparently as a policy matter, that the U.S. Trustee must be bound by the settlement agreement between Defendant and the chapter 7 panel trustee, "or literally every settlement with a panel Chapter 7 Trustee will need to be questioned which will increase the costs of every Chapter 7 case."[13]

Defendant's motion, however, cites no legal support for his agency theory, and this Court can find no support in the case law. To the contrary, the U.S. Trustee and the chapter 7 panel trustee are two separate entities. Facing a very similar factual scenario, wherein a debtor challenged a U.S. Trustee's adversary proceeding based on a prior settlement with a panel trustee, one bankruptcy court succinctly stated:

> Debtor's assumptions are based largely, if not entirely, upon Debtor's assumption that the U.S. Trustee and the Chapter 7 Trustee are the same entity and that the U.S. Trustee's Office is therefore bound by an asserted agreement between Debtor and the Chapter 7 Trustee. This assumption is incorrect. One of the duties of the U.S. Trustee is to

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[12] Doc. 9 at ¶ 12. Defendant never actually discusses his agency theory at all. Presumably he does not contend there is an express agency between the U.S. Trustee and the panel trustee, as an express agency requires an express grant of agency from a principal to an agent. *See, e.g.*, *BancOklahoma Mortgage Corp. v. Capital Title Co., Inc.*, 194 F.3d 1089, 1104 (10th Cir. 1999). But even an implied agency relationship requires "actual authority granted implicitly by the principal to the agent [that] is often inferred from a prior course of dealing between the alleged principal and the agent," *id.* at 1105, none of which factors are addressed by Defendant. And finally, an apparent agency relationship is only found when a "principal's acts lead others to believe the agent possesses authority to act on the principal's behalf," *id.,* again, a scenario that Defendant fails to address in any way.

[13] Doc. 5 ¶ 15.

> supervise a panel of Chapter 7 trustees. He also appoints an interim trustee for every Chapter 7 case. The U.S. Trustee is treated as an officer of the United States. Either the Chapter 7 trustee or the U.S. Trustee may object to the granting of a discharge or request the Court to revoke a discharge. Although the Chapter 7 trustee and the U.S. Trustee may possess a comity of interests, they are two separate entities.[14]

Additional courts analyzing other scenarios have detailed the separate status of the U.S. Trustee and panel trustees. For example, in *Curry v. Castillo (In re Castillo)*, the Ninth Circuit discussed at length the current structure of the bankruptcy trustee system, and the separate duties of the U.S. Trustee and panel trustees.[15] The Ninth Circuit noted that the "United States Trustee is the 'watchdog' of the bankruptcy system, charged with preventing fraud and abuse," and that the U.S. Trustee establishes and supervises the panel of bankruptcy trustees, detailing the separate functions of the panel trustees.[16] Similarly, the Tenth Circuit BAP has recognized the separate status of both entities, stating:

> Panel trustees make only limited decisions. Just because panel trustees have some decision making power, this does not mean that they are classified as a government agency. For example, *In re Hughes Drilling Co.*, 75 B.R. 196, 197 (Bankr. W.D. Okla. 1987), classified a panel trustee

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[14] *In re Houston*, Case No. 07-01798, 2008 WL 5215190, at *3 (Bankr. N.D. Iowa Nov. 18, 2008) (internal citations omitted) (emphasis added).

[15] 297 F.3d 940, 949–50 (9th Cir. 2002).

[16] *Id.* at 950–51 (internal citation omitted). The *In re Castillo* decision discusses the history and progression of the bankruptcy trustee program from common law through the current bankruptcy trustee program. *Id.* Other more recent cases have similarly defined the scope of the duties of the U.S. Trustee and panel trustees. *See, e.g.*, *Youngman v. Bursztyn (In re Bursztyn)*, 366 B.R. 353, 364–65 (Bankr. D.N.J. 2007) (discussing the scope of the duties of the U.S. Trustee and the appointment process for panel trustees). Defendant's argument that the U.S. Trustee relies on outdated cases decided prior to the Bankruptcy Reform Act of 1978 is simply unfounded.

> as 'a representative of the estate, not an officer, agent or instrumentality of the United States.'[17]

The takeaway from these cases is that, despite the fact that the U.S. Trustee and panel trustees sometimes work closely together, they are not the same entity.[18]

The only legal authority for Defendant's agency theory is found in his reply brief. There he cites the Fifth Circuit case, *Bell v. Thornburg*,[19] (and a few additional cases) for the proposition that a chapter 7 panel trustee has "delegated authority" from the U.S. Trustee to carry out his responsibilities, and this delegated authority from the U.S. Trustee binds the U.S. Trustee to settlement agreements entered by the panel trustee. The first part of Defendant's argument is correct: as discussed above, panel trustees do have delegated authority received from the U.S. Trustee to administer bankruptcy cases.[20] But the second part of Defendant's argument is a leap too far.

The *Bell* case considered whether a chapter 13 standing trustee "acted under" the U.S. Trustee for purposes of the federal officer removal statute of 28 U.S.C. § 1442.[21] The Fifth Circuit concluded that the standing trustee did act under the U.S.

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[17] *Olsen v. Rupp (In re Olsen)*, Case No. UT-98-088, 1999 WL 513846, at *4 (10th Cir. BAP June 24, 1999).

[18] Although admittedly in another context, the Supreme Court has also noted: "Nor is the bankruptcy trustee so closely connected to the Federal Government that the two cannot realistically be viewed as separate entities." *Cal. State Bd. of Equalization v. Sierra Summit, Inc.*, 490 U.S. 844, 849 (1989) (internal quotation marks omitted).

[19] 743 F.3d 84 (5th Cir. 2014).

[20] *See* 28 U.S.C. § 586(a) (governing the duties and supervision powers of the U.S. Trustee in chapter 7 cases).

[21] *Bell*, 743 F.3d at 88.

Trustee. The Fifth Circuit based this decision on two factors: (1) recent Supreme Court guidance that the removal statute be liberally construed and (2) the current bankruptcy trustee program, under which a chapter 13 standing trustee receives delegated authority from the U.S. Trustee to assist the office of the U.S. Trustee.[22]

The *Bell* decision does not assist Defendant, however, because it does not go beyond the principle that a panel trustee has delegated authority from a U.S. Trustee. As discussed at length above, a chapter 7 panel trustee is appointed by the U.S. Trustee to administer chapter 7 cases, and, as such, is given authority to act within the scope of that chapter 7 case and the Bankruptcy Code. But the panel trustee and the U.S. Trustee are separate and distinct entities. As stated in a leading treatise on bankruptcy:

> Supervision of cases with trustees must be distinguished from supervision of the trustees who administer the cases. The United States trustee supervises trustees by setting standards for case administration. However it is not the United States trustee's function to formally direct a trustee's action in a particular case, the trustee having fiduciary responsibility to others. The case trustee simply does not act as the United States trustee's agent in a case.[23]

Defendant's argument seems to be that, simply by acting as a panel trustee, anything the panel trustee does binds the U.S. Trustee from acting in any way inconsistent therewith. But there is simply no support for this position in the case law, and a

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[22] *Id.* at 88–89.

[23] 1 *Collier on Bankruptcy* ¶ 6.11, at 6-36 (Alan N. Resnick & Henry J. Sommer eds., 16th ed.) (emphasis added); *also see id.* ¶ 6.12[6], at 6-41 ("[T]he United States trustee does not supervise cases by directing the trustee's actions in particular cases.").

motion to dismiss on this basis must be denied. A settlement agreement by a chapter 7 panel trustee does not automatically bind the U.S. Trustee just because the panel trustee is appointed by the U.S. Trustee.[24]

III. Conclusion

The U.S. Trustee's adversary complaint states a claim under §§ 727(d) and (e). Defendant's motion to dismiss must be denied, as it states no basis for dismissal of the claims made by the U.S. Trustee. As a result, Defendant's answer is due 14 days from the date this order is entered pursuant to Federal Rule of Bankruptcy Procedure 7012(a), and a Scheduling Conference will be set by the Clerk.

The settlement agreement filed in the main bankruptcy case expressly states

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[24] Furthermore, even if a panel trustee *could* bind a U.S. Trustee with a settlement agreement based on nothing more than the panel trustee's delegated authority, it is far from clear that the actual settlement agreement in this case would so bind. The settlement agreement, attached as Exhibit A to Defendant's motion to dismiss, expressly states that it is between the chapter 7 panel trustee, Defendant, and Defendant's wife. Conspicuously absent is any mention that the U.S. Trustee is involved with, or bound by, the agreement.

The parties' briefing debates what Counsel for Defendant was told concerning the U.S. Trustee's position on the settlement. Defendant alleges he spoke with the panel trustee about the U.S. Trustee's position, but admits that the panel trustee "advised he was told to do what he thought was appropriate." Doc. 5 ¶ 9. The U.S. Trustee's response to the motion to dismiss argues that Counsel for Defendant was told "that the U.S. Trustee was not a party to the settlement negotiations and not bound by any proposed settlement" and that Counsel was specifically advised that "the case was under review by the U.S. Trustee's office." Doc. 8 ¶¶ 16–17. Defendant disputes this exchange. But regardless of the content of any verbal exchanges between counsel, the actual settlement agreement itself contains a classic integration clause, labeled "Entire Agreement," which states that the settlement agreement constitutes the entire agreement between the parties "and there are no other understandings, representations, or agreements, oral or otherwise, concerning the Settlement Agreement." Doc. 5 Exh. A ¶ 8. If consent of the U.S. Trustee was a condition required by Defendant's counsel, he could and should have required the U.S. Trustee to be a party and signatory to the settlement agreement.

that it is not effective until it receives Court approval.[25] The U.S. Trustee states in response to Defendant's motion to dismiss that he does not object to Defendant rescinding the settlement agreement with the chapter 7 panel trustee. The parties must be prepared to state their positions regarding enforcement versus rescission of the settlement agreement at the hearing on the motion to compromise set in the main bankruptcy case on April 18, 2014, at 9:30 a.m. If the parties agree the settlement agreement should be rescinded, the panel trustee should withdraw his motion to approve the compromise prior to the April 18 hearing.

It is so ordered.

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[25] Doc. 5 Exh. A ¶ 2.