

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE: . Chapter 7
. .
RUSTY HAYNES . Case No. 11-23212 (RDD)
. .
Debtor. .

RUSTY HAYNES, INDIVIDUALLY .
AND ON BEHALF OF ALL OTHERS .
SIMILARLY SITUATED . Adv. Pro. No. 13-08370- rdd
. .
v. .
. .
CHASE BANK USA, N.A. .
_____.

Modified Bench Ruling on Motion to Dismiss or to Strike Class
Allegations

BEFORE THE HONORABLE ROBERT D. DRAIN
UNITED STATES BANKRUPTCY COURT JUDGE

U.S. Bankruptcy Court, SDNY
300 Quarropas Street Room 248
White Plains, NY 10601

APPEARANCES:

Attorney for Rusty Haynes: Charles W. Juntikka, ESQ.
CHARLES JUNTIKKA & ASSOCIATES
George F. Carpinello, ESQ.
Adam R. Shaw, ESQ.
BOIES, SCHILLER & FLEXNER, LLP

Attorneys for Chase: Michael Y. Scudder, ESQ.
Al Hogan, ESQ.

SKADDEN ARPS SLATE MEAGHER &
FLOM

Also present:
via telephone

Deborah A. Reperowitz
TROUTMAN SANDERS

1 THE COURT: I have before me a motion by Chase
2 Bank USA, N.A., the defendant in this adversary proceeding,
3 to dismiss the proceeding under Bankruptcy Rule 7012,
4 incorporating Federal Rule of Civil Procedure 12(b)(6),
5 for failure to state a claim on behalf of the lead
6 plaintiff, Mr. Haynes, or, in the alternative, to strike
7 the class action allegations in the complaint, premised
8 again on Bankruptcy Rule 7012, in this instance as it
9 incorporates Federal Rule of Civil Procedure 12(b)(1), on
10 the basis that the Court lacks subject matter jurisdiction
11 or the statutory authority to adjudicate a class action of
12 this nature.

13 The standard for dismissal under Rule 12(b)(6)
14 is well known. When considering such a motion, the Court
15 must assess the legal feasibility of the complaint, not
16 weigh the evidence that might be offered in its support.
17 *Koppel v. 4987 Corp.*, 167 F.3d 125, 133 (2d Cir. 1999).
18 The Court's consideration is limited to facts stated on
19 the face of the complaint and in the documents appended to
20 the complaint or incorporated into the complaint by
21 reference, as well as to matters of which judicial notice
22 may be taken. *Hertz Corp. v. City of New York*, 1 F.3d.
23 121, 125 (2d Cir. 1993), cert. denied, 510 U.S. 1111(1994).
24 See also *Difolco v. MSNBC Cable, LLC*, 62 F.3d 104, 111 (2d
25 Cir. 2010) ("Where a document is not incorporated by

1 reference, the court may nevertheless consider it where
2 the complaint relies heavily upon its terms and effect.").
3 The Court accepts the complaint's factual allegations as
4 true, even if they are doubtful in fact, and must draw all
5 reasonable inferences in favor of the plaintiff. *Tellabs,*
6 *Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 321-23
7 (2007). However, if a complaint's allegations are clearly
8 contradicted by documents incorporated into the pleadings
9 by reference, the Court need not accept them. *Labajo v.*
10 *Best Buy Stores, LP*, 478 F.Supp.2d 523, 528 (S.D.N.Y.
11 2007). Moreover, the Court "is not bound to accept as
12 true a legal conclusion couched as a factual allegation."
13 *Papasan v. Allain*, 478 U.S. 265, 286 (1986). Instead, the
14 complaint must "state more than labels and conclusions,
15 and a formulaic recitation of the elements of the cause of
16 action will not do." *Bell Atlantic Corp. v. Twombly*, 550
17 U.S. 544, 555 (2007).

18 In addition, while the Supreme Court has
19 confirmed, in light of the notice pleading standard of
20 Federal Rule of Civil Procedure 8(a), that a complaint
21 does not need detailed factual allegations to survive a
22 motion under Rule 12(b)(6), see *Erickson v. Pardus*, 551
23 U.S. 89, 93, (2007), and *Twombly* 550 U.S. at 556, its
24 "factual allegations must be enough to raise a right to
25 relief above the speculative level." *Twombly*, 550 U.S. at

1 555. If the claim would not otherwise be plausible on its
2 face, therefore, the complaint must allege sufficient
3 facts, to "nudge the claim across the line from
4 conceivable to plausible." Id. at 570. Otherwise, the
5 defendant should not be subjected to the burdens of
6 continuing discovery and the worry of overhanging
7 litigation. Id. at 556.

8 Applying this plausibility standard is "a
9 context-specific task that requires the reviewing court to
10 draw on its judicial experience and common sense."
11 *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

12 "Plausibility thus depends on a host of considerations:
13 the full factual picture presented by the complaint, the
14 particular cause of action and its elements, and the
15 existence of alternative explanations so obvious that they
16 render plaintiff's inferences unreasonable." *L-7 Designs*
17 *Inc. v. Old Navy, LLC*, 647 F.3d 419, 430 (2d Cir. 2011).

18 In sum, the Court applies a two-step approach
19 under Rule 12(b)(6). After identifying the elements of
20 the applicable cause of action, *Iqbal*, 556 U.S. at 675,
21 the Court must first note where the allegations are not
22 entitled to the assumption of truth because they are only
23 legal conclusions, id. at 679-80, and, second, it must
24 assess the factual allegations in context to determine
25 whether they plausibly suggest an entitlement to relief.

1 Id. at 681. See generally, *Harris v. Mills*, 572 F.3d 66,
2 72, (2d Cir. 2009), and *L-7 Designs Inc.*, 647 F.3d at 430.

3 With regard to a motion to dismiss under Federal
4 Rule of Civil Procedure 12(b)(1), the plaintiff bears the
5 burden of proving jurisdiction by a preponderance of the
6 evidence. *Aurecchione v. Schoolman Transportation Systems,*
7 *Inc.* 426 F.3d 635, 638 (2d Cir. 2005). Where the Court
8 relies solely on the pleadings and supporting affidavits,
9 the plaintiff need only make a prima facie showing of
10 jurisdiction, however. *Robinson v. Overseas Military*
11 *Sales Corp.*, 21 F.3d 502, 507 (2d Cir. 1994). Here, the
12 issue of jurisdiction pertains to the Court's power to
13 issue an order granting the ultimate class action relief
14 sought. Whether the Court has subject matter jurisdiction
15 over a nationwide class action to remedy alleged
16 widespread breaches of debtors' discharges under Section
17 524(a) of the Bankruptcy Code is a question of law;
18 therefore, extrinsic facts are not relevant.

19 The Court addresses Chase's Rule 12(b)(6) motion
20 first. In an action premised upon the alleged violation
21 of Mr. Haynes and the class members' discharges for
22 failure to correct their credit reports that list their
23 debt, post-discharge under Section 727 of the Bankruptcy
24 Code, as being only "charged off," rather than being
25 "discharged in bankruptcy," Chase contends that, under the

1 circumstances pled in the complaint, it in fact has no
2 obligation to revise or correct the credit reporting that
3 it has previously done.

4 Chase recognizes, for purposes of the motion
5 before me, although reserving its rights on appeal, the
6 general case law on this issue, which, as discussed at
7 length in *In re Torres*, 367 B.R. 478 (Bankr. S.D.N.Y.
8 2007), as well as in a number of other bankruptcy cases,
9 including *In re Nassoko*, 405 B.R. 515 (Bankr. S.D.N.Y.
10 2009); *McKenzie-Gilyard v. HSBC Bank, Nevada NA*, 388 B.R.
11 474 (Bankr. E.D.N.Y. 2007); *Russell v. Chase Bank, U.S.A.,*
12 *NA*, 378 B.R. 735 (Bankr. E.D.N.Y. 2007); and *Laboy v.*
13 *Firstbank P.R. (In re Laboy)*, 2010 Bankr. LEXIS 345 (Bankr.
14 D. P.R. Feb.2, 2010), holds to the effect that, as stated
15 by Collier,

16 "The failure to update a credit report to
17 show that a debt has been discharged is also a
18 violation of the discharge injunction if shown to be
19 an attempt to collect the debt. Because debtors
20 often feel compelled to pay debts listed in credit
21 reports when entering into large transactions, such
22 as a home purchase, it should not be difficult to
23 show that the creditor, by leaving discharged debts
24 on a credit report, despite failed attempts to have
25 the creditor update the report, is attempting to

1 collect the debt.”

2 4 Collier on Bankruptcy, paragraph 524.02[2][B] (16th Ed.
3 2013), at page 524-23.

4 Chase contends, however, that under the facts of
5 the complaint this case law, much of which has arisen in
6 the context of motions to dismiss, is not applicable for
7 two reasons. First, because Chase, as acknowledged by the
8 plaintiff with respect to the lead plaintiff's claim, sold
9 its debt pre-bankruptcy and therefore pre-discharge, to a
10 third party, Chase contends that it neither has an ongoing
11 obligation with respect to credit reporting under the Fair
12 Credit Reporting Act, 15 U.S.C. § 1681 et seq., nor, as it
13 no longer has a debt to enforce, under Section 524(a) of
14 the Bankruptcy Code. Second, Chase argues that, if, as it
15 contends, it has no continuing obligation after the sale
16 of the debt, prepetition, under the Fair Credit Reporting
17 Act, it has no other duties under Section 524(a) of the
18 Bankruptcy Code.

19 Let me address that latter argument first. The
20 complaint does not specifically assert a claim under the
21 FCRA. Instead, it asserts a claim specifically under
22 Sections 105(a) and 524(a) of the Bankruptcy Code for
23 violation of the discharge under Section 727 of the Code.
24 In essence, then, Chase is asserting that the Fair Credit
25 Reporting Act has implicitly repealed Section 524(a) of

1 the Bankruptcy Code as interpreted by the foregoing case
2 law, or at least circumscribes Chase's duties under
3 Section 524(a) of the Bankruptcy Code with respect to
4 correcting debtors' credit reports. Of course, the FCRA
5 did not expressly repeal or curtail Section 524(a) of the
6 Bankruptcy Code. Absent a clearly expressed congressional
7 intention, moreover, repeal by implication is not favored.
8 *Branch v. Smith*, 538 U.S. 254, 273 (2003). An implied
9 repeal will only be found where provisions in two federal
10 statutes are in fact in irreconcilable conflict or where
11 the latter statute covers the whole subject of the earlier
12 one and is clearly intended as a substitute. *Id.* at 273,
13 quoting *Posadas v. National Citibank*, 296 U.S. 497, 503
14 (1936). See also *In re Jacques*, 416 B.R. 63, 71-72 (Bankr.
15 E.D.N.Y. 2009).

16 Generally speaking, with regard to Section
17 524(a)/105(a) fact patterns, the case law as to implied
18 repeal has been contrary to Chase's argument. That is,
19 courts have found that Sections 524(a) and 105(a) of the
20 Bankruptcy Code preempt other federal statutes that might,
21 on their face, otherwise be applicable, such as the FCPA.
22 See *Diamonte v. Solomon & Solomon P.C.*, 2001 U.S. Dist.
23 LEXIS 14818 (N.D.N.Y. Sept. 18, 2001), and the cases cited
24 therein. Where courts have allowed a federal statute to
25 be applied, even in the context of a Section 524(a)/105(a)

1 cause of action, they have done so by showing that the two
2 statutes are not in irreconcilable conflict and not by
3 ruling out the Section 524 cause of action. See, for
4 example, *Randolph v. IMBS Inc.*, 368 F.3d 726 (7th Cir.
5 2004).

6 I conclude that there is no irreconcilable
7 conflict between the Fair Credit Reporting Act and
8 Sections 524(a) and 105(a) of the Bankruptcy Code. While,
9 as discussed in *In re Torres*, 367 B.R. at 489-90, a
10 lender's compliance with the FCRA is relevant to the
11 factual analysis of a Section 524(a)/105(a) claim, I
12 conclude that Section 524(a) of the Bankruptcy Code, as a
13 matter of drafting and Congressional intent, is intended
14 to be read broadly, given Congress' purpose, evident from
15 the face of the statute as well as its legislative history
16 -- including not only the legislative history of the
17 specific provision, but also its evolution from the
18 Bankruptcy Act of 1898 -- that Section 524(a) give as
19 complete effect as possible to the discharge under Section
20 727 of the Code. See 4 *Collier on Bankruptcy*, paragraph
21 524.02 at 524-19. See also, Robert P. Lawson Jr.,
22 *Remedying Violation of the Discharge Injunction under*
23 *Bankruptcy Code 524*, 20 *Bankr. Dev. J.* 77 (2003). See
24 also *Marrama v. Citizens Bank of Massachusetts*, 549 U.S.
25 365, 367 (2007), noting that the discharge is a, if not

1 the, primary purpose of the Bankruptcy Code or the primary
2 protection offered by the Bankruptcy Code. See also In re
3 Bogdanovich, 292 F.3d 104, 107 (2d Cir. 2007), and In re
4 Rizzo-Cheverier, 364 B.R. 532, 537 (Bankr. S.D.N.Y. 2007)
5 (same). Thus, even if Chase did not have an ongoing duty
6 under the FCRA to correct Mr. Haynes' credit reports, the
7 complaint's Section 524(a)/105(a) claim is not preempted.

8 Chase's other argument is closely related,
9 namely that, having sold its debt it cannot be seen in a
10 plausible way to have any interest in continuing to
11 enforce that discharged debt and, therefore, not only does
12 it lack an ongoing FCRA duty to correct the credit reports,
13 it also cannot be liable under Section 524 of the
14 Bankruptcy Code, which "operates as an injunction against
15 the commencement or continuation of an action, the
16 employment of process, or an act, to collect, recover or
17 offset any such debt as a personal liability of the debtor,
18 whether or not discharge of such debt has been waived."
19 11 U.S.C. Section 524(a). See also In re Torres, 367 B.R.
20 at 489-90.

21 In support of this apparently common sense
22 contention, Chase relies upon an advisory note in
23 connection with proposed rule-making under the FCRA, which
24 states that, "The agencies do not expect that, after
25 transferring an account to a third-party, a furnisher

1 would update the current status of the account beyond
2 providing information to a credit reporting agency that
3 the account has been transferred." This appears at Volume
4 74 of the Federal Register, paragraph 31494. I should
5 note, however, that no rules were adopted as part of this
6 process and the FCRA itself is more broadly worded,
7 requiring reporting, including a duty to correct and
8 update information, by a person who "regularly, in the
9 ordinary course of business, furnishes information to one
10 or more consumer reporting agencies about the person's
11 transactions or experiences with any consumer, and has
12 furnished to a consumer reporting agency information that
13 the person determines is not complete or accurate." 15
14 U.S.C. Section 1681s-2(a)(2). Such a person "shall
15 promptly notify the consumer reporting agency of that
16 determination and provide to the agency any corrections to
17 that information or any individual information that is
18 necessary to make the information provided by the person
19 to the agency complete and accurate and shall not,
20 thereafter, furnish to the agency any of the information
21 that remains not complete or accurate." 15 U.S.C. Section
22 1681s-2(a)(2).

23 Even applying that statutory language to the
24 exclusion of the advisory note, however, Chase contends
25 that its last "transaction or experience" with respect to

1 plaintiff's debt was the sale itself to a third party,
2 pre-bankruptcy and, thus, pre-discharge, and, therefore,
3 that it has no obligation to continue to deal with the
4 credit reporting agencies to report that the debt is no
5 longer merely charged off, but, instead, has been
6 discharged through bankruptcy, or that it has any interest
7 in the debt's subsequent collection. Thus, Chase contends,
8 the complaint does not show even inferentially that Chase
9 intended to assist the collection of Mr. Haynes'
10 discharged debt when it refused to correct his credit
11 report

12 The complaint, however, suggests otherwise.

13 First, as stated in paragraph 29, after the debt
14 was, in fact, discharged post-sale, Mr. Haynes called
15 Chase to request removal of the "charged-off" notation
16 next to his Chase account in light of the discharge, but
17 Chase refused to remove the "charged off" notation.
18 Paragraph 30 of the complaint goes on to state that "Chase
19 only did so after the Court issued an opinion involving
20 another Chase matter, In re Odenthal, at which time Chase
21 requested that the credit reporting agencies delete and
22 suppress the former Chase debt on Haynes' record."

23 Standing alone, such allegations, particularly
24 in light of Chase's prior sale of the debt, might not
25 support a claim that Chase refused Mr. Haynes' request to

1 correct his credit reports with the intention of assisting
2 in the debt's collection. Significantly, however, other
3 sections of the complaint put Chase' handling of Mr.
4 Haynes' request in a context that sufficiently supports
5 such an inference.

6 Thus the complaint asserts in paragraph 16 that
7 "Chase has chosen not to advise the credit reporting
8 agencies to the fact that the class members' debts have
9 been discharged because Chase continues to receive payment
10 either directly or indirectly on discharged debts." More
11 specifically, paragraph 19 states that "Chase has adopted
12 a pattern and practice of failing and refusing to update
13 credit information with regard to debts discharged in
14 bankruptcy because it sells those debts and profits by the
15 sale. Chase knows that if credit information is not
16 updated, many class members will feel compelled to pay off
17 the debt, even though it is discharged in bankruptcy.
18 Thus, buyers of Chase debt know and are willing to pay
19 more for the fact that they will be able to collect
20 portions of Chase debt, despite the discharge of that debt
21 in bankruptcy." Paragraph 20 then states, "Upon
22 information and belief, Chase receives a percentage fee of
23 the proceeds of each debt repaid to Chase and forwarded to
24 the buyer of Chase debt."

25 I conclude, therefore, based on the foregoing

1 allegations in the complaint that the complaint, if true -
2 - and I need to accept it as true -- states a cause of
3 action against Chase for breach of the discharge under
4 Sections 727 and 524(a)(2) of the Bankruptcy Code for
5 intentionally assisting in the collection of discharged
6 debt by not correcting the debtors' credit reports to
7 reflect that the debt has, in fact, been discharged.

8 I do so for two reasons. First, paragraph 20 of
9 the complaint alleges that Chase continues to receive a
10 percentage payment of the proceeds of each debt repaid to
11 Chase and forwarded to the buyer of the debt. In addition,
12 therefore, to having an economic interest in the debt
13 notwithstanding its sale, as alleged in paragraph 16,
14 Chase is alleged to act as the buyer's agent in forwarding
15 payments to the buyer of debt that it is aware has been
16 discharged after retaining a percentage. Instead of
17 sending the money back or at least acting as if that debt
18 has been discharged, it thus is helping to enforce the
19 debt's collection for its and its buyer's benefit. Given
20 Chase's continuing relationship with the debt, therefore,
21 and drawing, as I should, all inferences in favor of the
22 plaintiff in a motion to dismiss context, I conclude that
23 the complaint shows a motive and intent to assist the
24 collection of the discharged debt lying behind Chase's
25 refusal to correct the credit reports.

1 Based on the plain language of the FCRA Section
2 1681s-2(a)(2), as well, it appears to me, given paragraphs
3 16 and 20 of the complaint, that Chase is, notwithstanding
4 the sale of the debt, engaging in a "transaction or
5 experience" involving its former debtor. Thus, limited
6 even to a reading of Section 524 that largely overlaps
7 with Chase's duties under the FCRA, the complaint alleges
8 a cause of action for Chase's ongoing intentional failure
9 to correct the credit reports and thereby assist in the
10 collection of discharged debt.

11 Furthermore, by failing on a systematic basis to
12 correct the credit reports, as alleged in the complaint,
13 Chase is enhancing its purchasers' ability to collect on
14 the debt, which is, after all, charged-off debt when
15 purchased, with a relatively high, I can infer, prospect
16 of the borrower going into bankruptcy. Chase profits, I
17 can infer and as the complaint states, from that practice
18 by getting a higher purchase price from its buyers, even
19 if those buyers buy the debt before the bankruptcy has
20 occurred. The buyers know, that is, that post-sale Chase
21 will refuse to correct the credit report to reflect the
22 obligor's bankruptcy discharge, which means that the
23 debtor will feel significant added pressure to obtain a
24 "clean" report by paying the debt. Separate and apart
25 from Chase seemingly having a duty to correct the report

1 under the FCRA, as discussed above, no one has pointed to
2 any provision of applicable law that prohibits Chase from
3 correcting the credit reports. And, in fact, Chase
4 eventually did so in respect of Mr. Haynes' credit report.
5 Therefore, I believe the complaint sets forth a cause of
6 action that Chase is using the inaccuracy of its credit
7 reporting on a systematic basis to further its business of
8 selling debt and its buyer's collection of such debt.

9 How the sale of the debt is reported supports
10 this conclusion. In other words, such disclosure, or,
11 more aptly, its limited nature, also puts Chase's refusal
12 to correct the credit reports in context. Mr. Haynes'
13 credit reports have been referred to repeatedly in the
14 complaint, as well as at oral argument; obviously, they
15 are front and center in this litigation and may be
16 considered in connection with Chase's 12(b)(6) motion. It
17 is acknowledged that although those credit reports list
18 the debt as "sold," they do not identify the purchaser.
19 Therefore, as far as the debtor is concerned, the only
20 creditor to approach to correct the credit reports is
21 Chase, which, though it appears to be the only game in
22 town, as a matter of policy refuses to correct them (while,
23 in addition, retaining a percentage of payments sent to
24 Chase by the debtor, as opposed to Chase's -- undisclosed
25 -- buyer), highlighting further the perniciousness of

1 Chase's allegedly systematic approach in refusing to
2 correct such reports.

3 So, I will deny the motion for those reasons.

4 The motion also asserts, as noted, that the
5 complaint's class action request should be circumscribed
6 on jurisdictional grounds only to those breaches of
7 Section 524(a)(2) that have occurred in this District
8 during the time set forth in the complaint, that is, in
9 the Southern District of New York. The basis for that
10 assertion is that the Court lacks subject matter
11 jurisdiction, more specifically, the power to enforce the
12 discharge of any debtor with the exception of debtors who
13 received a discharge in the Southern District of New York.
14 The motion accurately states that class actions comprising,
15 or brought on behalf of, debtors seeking to correct
16 alleged violations of their discharge under Section 524 of
17 the Bankruptcy Code have received a very mixed reception;
18 in fact, the majority of courts have either held that they
19 lack the power to determine such class actions or, as
20 stated in Chase's motion, can do so only with respect to
21 debtors who have been discharged in cases in their
22 district. See generally, Kara Bruce, *The Debtor Class*, 88
23 *Tulane Law Review* 21 (2013).

24 There are three theories upon which courts have
25 refused to entertain nationwide debtor class actions to

1 remedy discharge violations or have circumscribed them on
2 a district-by-district basis. The motion, I think
3 correctly, focuses on the third, which, as I stated during
4 oral argument, raises a close question for the Court. But
5 before turning to that rationale, I should note the other
6 two grounds for dismissing on jurisdictional grounds a
7 nationwide class action regarding alleged violations of
8 the discharge.

9 The first is premised upon the notion that the
10 Court's exercise of jurisdiction over debtors other than
11 the debtor before it, or, in some courts, the debtors in
12 its district, will not lie because that determination does
13 not affect the lead plaintiff's estate, its bankruptcy
14 estate, and there is no "related to" jurisdiction in
15 respect of the other debtor class members' claims under 28
16 U.S.C. Section 1334(b). See, for example, *In re Knox*, 237
17 B.R. 687, 693-94 (Bankr. N.D. Ill. 1999), and *Fisher v.*
18 *Federal National Mortgage Ass'n*, 151 B.R. 895 (Bankr. N.D.
19 Ill. 1993). This line of cases is premised upon a
20 misreading of the statutory basis for bankruptcy
21 jurisdiction, however.

22 While it is true that a substantial portion of
23 bankruptcy jurisdiction is in rem, that is, jurisdiction
24 over the debtor's estate wherever located, it is not the
25 only basis for bankruptcy jurisdiction, which, under 28

1 U.S.C. Section 1334(b), extends to "all civil proceedings
2 arising under title 11," including under 11 U.S.C.
3 Sections 524 and 727. In fact, as I noted before, these
4 fundamental, if not the fundamental, provisions of the
5 Bankruptcy Code have nothing to do with the debtor's
6 estate or in rem jurisdiction. They have everything to do
7 with prohibiting the collection of in personam debts that,
8 before the bankruptcy discharge, were owed by the debtor.

9 In fact, the discharge does not even apply to in
10 rem interests, such as liens, which can be enforced
11 notwithstanding the discharge. *Canning v. Beneficial Maine,*
12 *Inc. (In re Canning)*, 706 F.3d 64, 69 (1st Cir. 2013);
13 *Holloway v. John Hancock Mut. Life Ins. Co. (In re*
14 *Holloway)*, 81 F.3d 1062, 1063 n. 1 (11th Cir. 1996).
15 Therefore, it is an abdication of the Court's jurisdiction
16 to limit it, as cases like *Knox* and *Fisher* have done, to
17 in rem matters.

18 Similarly, some courts have dismissed similar
19 national class actions on jurisdictional grounds based on
20 28 U.S.C. Section 1334(e), which states, "Only the
21 district court in which a case under title 11 is commenced
22 or is pending shall have exclusive jurisdiction of all the
23 property, wherever located, of the debtor as of the
24 commencement of such case, and of property of the estate
25 and overall claims or causes of action that involve

1 construction of section 327 of title 11 [which pertains to
2 the retention and compensation of professionals.]” See
3 Williams v. Sears Roebuck & Company, 244 B.R. 858, 866
4 (Bankr. S.D. Ga. 2000). Again, however, the present class
5 action does not involve a debtor's interests in property
6 or property of the estate, and, of course, it is not
7 related to the retention of professionals or other matters
8 under Section 327 of the Bankruptcy Code. It is an action
9 to enforce the discharge, that is, to protect a statutory
10 right prohibiting the collection of in personam claims
11 against the members of the debtor class that arose pre-
12 bankruptcy.

13 The Court's jurisdiction here, as previously
14 noted, is premised instead upon a different provision of
15 the Judicial Code, 28 U.S.C. Section 1334(b). It is worth
16 quoting first, however, 28 U.S.C. Section 1334(a), which
17 states, "Except as provided in Subsection (b) of this
18 section, the district courts shall have original and
19 exclusive jurisdiction of all cases under title 11." That
20 provision thus gives the district courts exclusive
21 jurisdiction of the bankruptcy case generally, that is,
22 this Chapter 7 case, for example, which is located in a
23 particular venue. That section, however, has a proviso:
24 "except as provided in Subsection (b)." And Subsection
25 (b) states, "except as provided in Subsection (a)(2)

1 [which is irrelevant], and notwithstanding any act of
2 Congress that confers exclusive jurisdiction on a court or
3 courts other than the district courts, the district courts
4 shall have original, but not exclusive, jurisdiction of
5 all civil proceedings arising under title 11, or arising
6 in or related to cases under title 11." 11 U.S.C. Section
7 1334(b). (Emphasis added.) As noted, the cause of action
8 before me arises under title 11; it arises under Sections
9 727, 524(a)(2) and 105(a) of the Bankruptcy Code, which
10 latter section provides, "The Court may issue any order,
11 process or judgment that is necessary or appropriate to
12 carry out the provisions of this title," i.e., in this
13 case, Sections 524(a)(2) and 727.

14 For purposes of this adversary proceeding,
15 therefore, 28 U.S.C. Section 1334(b) is the source of
16 bankruptcy jurisdiction in the federal courts generally,
17 lodging it with the district courts and then, by the
18 General Order of Reference, referring it pursuant to 28
19 U.S.C. Section 157(a)-(b) to the bankruptcy judges for
20 this district. See 28 U.S.C. Section 157(b)(1), which
21 provides that bankruptcy judges "may hear and
22 determine . . . all core proceedings arising under title
23 11." A "core proceeding" includes enforcement of the
24 discharge, there being few matters as "core" to the basic
25 function of the bankruptcy courts as the enforcement of

1 the discharge under Sections 524 and 727 of the Bankruptcy
2 Code.

3 I would spend more time on the foregoing two
4 ineffective rationales for denying jurisdiction over
5 nationwide class actions to address allegedly systemic
6 discharge violations; however, they are well dealt with in
7 an opinion from the Southern District of Texas Bankruptcy
8 Court, *In re Cano*, 410 B.R. 506 at pages 550 through 554
9 (Bankr. S.D. Tex. 2009). As noted by Judge Isgur in that
10 opinion, one never gets to the issue of "related to"
11 jurisdiction under 28 U.S.C. Section 1334(b) or to 28
12 U.S.C. Section 1334(e) in this context, given the proper
13 source of the Court's "arising under title 11"
14 jurisdiction in 28 U.S.C. Section 1334(b).

15 The remaining rationale for the courts that have
16 found a lack of jurisdiction over nationwide debtor class
17 actions to address systematic discharge violations, is, as
18 I said, more closely reasoned. In essence, these courts
19 contend that the basis for enforcing the discharge under
20 Sections 524(a)(2) and 727 of the Bankruptcy Code is the
21 individual court's discharge order. These courts then
22 note extensive precedent in the non-bankruptcy context
23 under the All Writs Act, currently at 28 U.S.C. Section
24 1651 but going back to cases such as *In re Debs*, 158 U.S.
25 564, 594-95 (1895), for the proposition that only the

1 issuing court, that is, only the court issuing an
2 injunction, should have the power to enforce that
3 injunction. This was the analysis undertaken by *Cox v.*
4 *Zale Delaware, Inc.*, 239 F.3d, 910, 916-17 (7th Cir. 2001),
5 and several other courts cited in Chase's motion.

6 There is, however, a fundamental difference
7 between the normal injunction issued by a court after
8 considering the factors required to be applied in issuing
9 an injunction order and the injunction created by Congress
10 in Section 524(a) to support the discharge under Section
11 727 of the Bankruptcy Code.

12 As I noted during oral argument, the bankruptcy
13 discharge order is a form, a national form, which is
14 issued in every case when there is, in fact, a discharge.
15 By statute, in 524(a)(2), it operates as an injunction.
16 For the discharge injunction to be granted, the debtor
17 does not have to prove the factors required for an
18 injunction under Federal Rule of Civil Procedure 65. He
19 or she merely needs to prove that the debt was, in fact,
20 subject to the discharge under Section 727 and not
21 declared non-dischargeable under Section 523 of the
22 Bankruptcy Code. It is not a handcrafted order. As I
23 stated during oral argument, although I review every order
24 that comes before me, I make one exception, the discharge
25 orders. Those are entered routinely on my behalf and on

1 behalf of every judge in this district and I believe every
2 judge in the nation, by the Clerk of the Court once
3 certain milestones have been met in a bankruptcy case.

4 In addition, the logic behind Cox and similar
5 cases, which rely upon, in turn, cases in the context of
6 the All Writs Act, do not consider the difference between
7 Section 105(a) of the Bankruptcy Code and the All Writs
8 Act. The latter states that "[t]he Supreme Court, and all
9 courts established by act of Congress, may issue all writs
10 necessary or appropriate in aid of their respective
11 jurisdictions and agreeable to the usages and principles
12 of law." Very clearly, that statute is court-specific,
13 referring to "their respective jurisdictions," or the
14 respective jurisdictions of the individual courts whose
15 orders are to be enforced.

16 Section 105(a) of the Bankruptcy Code is quite
17 different. Although modeled on the All Writs Act, it
18 states "The court may issue any order, process or judgment
19 that is necessary or appropriate to carry out the
20 provisions of this title." It does not refer to aiding
21 the Court's own jurisdiction. As I noted at oral argument,
22 the legislative history of this section, in H.R. Rep. 95-
23 595, states that, among other things, Section 105 is
24 intended to "cover any powers traditionally exercised by a
25 bankruptcy court that are not encompassed by the all writs

1 statute." (Emphasis added.) The statutes are different,
2 in other words. And I believe it is a mistake to rely
3 upon All Writs Act cases to hold that a bankruptcy court
4 has power under the applicable statute only to enforce its
5 own orders, as opposed to the Bankruptcy Code generally
6 and Sections 524(a) and 727 of the Code, in particular.
7 Again, this is well-discussed in the *In re Cano* case, 410
8 B.R. at 555. The Court has its own contempt power, but it
9 also has Section 105(a) of the Code, which goes beyond its
10 own contempt power by, in its own terms, enabling the
11 Court to carry out specific provisions of the Bankruptcy
12 Code.

13 I should note that, in a somewhat different
14 context, although still relevant, the Second Circuit has
15 made it clear that the bankruptcy court does not have
16 exclusive jurisdiction to enforce the automatic stay under
17 Section 362(a) of the Bankruptcy Code, a similarly-worded
18 statutory injunction to Section 524(a). That is, contrary
19 to the rationale of the *Cox* line of cases, its enforcement
20 is not "issuing court" specific. See *In re Baldwin-United*
21 *Corp. Litigation*, 765 F.2d 343 (2d Cir. 1985); see also *In*
22 *re Colasuonno*, 697 F.3d 164, 172 n.4 (2d Cir. 2012).
23 Other courts have recognized a similar non-exclusivity
24 concept with regard to interpretation and enforcement of
25 the discharge under sections 524 and 727. See *In re*

1 Watson, 192 B.R. 739, 746 (B.A.P. 9th Cir. 1996), aff'd
2 U.S. App. LEXIS 14663 (9th Cir., June, 16, 1997), and
3 Cisneros v. Cost Control Marketing & Sales Management, 862
4 F.Supp 1531, 1533 (W.D. Va. 1994), aff'd 64 F.3d 970 (4th
5 Cir. 1995), cert. denied, 517 U.S. 1187 (1996). (There is
6 a caveat to this case law, at least as applied in the
7 Second Circuit, which is that while courts other than the
8 bankruptcy court have concurrent jurisdiction over
9 disputes pertaining to Section 362 of the Bankruptcy Code,
10 the automatic stay provision, and Section 524, if they are
11 erroneous their decision may be viewed as void ab initio
12 as being in violation of the stay or the discharge. See
13 In re Kilmer, 501 B.R. 208, 214-15 (Bankr. S.D.N.Y. 2013),
14 and In re Enron Corp., 306 BR 465, 477 (Bankr. S.D.N.Y.
15 2004).)

16 There should be no issue here, either, that
17 Section 105(a) is properly exercisable to enforce the
18 discharge under Sections 524(a) and 727 of the Bankruptcy
19 Code. Whereas Section 105(a) of the Code is not a license
20 for the Court to exercise general equity powers except in
21 furtherance of specific provisions of the Bankruptcy Code,
22 here there are such specific provisions, Sections
23 524(a)(2) and 727, for which Section 105(a) provides the
24 Court with enforcement power. See In re Rizzo-Cheverier,
25 364 B.R. 532, 536-37 (Bankr. S.D.N.Y. 2007); see generally,

1 In re Kalikow, 662 F.3d 82, 97 (2d Circuit 2010):

2 "[A] court may invoke Section 105(a) if the
3 equitable remedy utilized is demonstrably necessary
4 to preserve a right elsewhere provided in the Code.
5 Those powers are in addition to whatever contempt
6 powers the court may have and must include the award
7 of monetary and other forms of relief to the extent
8 such awards are necessary and appropriate to carry
9 out the provisions of the Bankruptcy Code and provide
10 full remedial relief."

11 (Internal quotations and citations omitted.)

12 I conclude for the foregoing reasons, therefore,
13 that the Court has the statutory power and the subject
14 matter jurisdiction to decide this nationwide class action.
15 I have again been largely informed by the analysis
16 undertaken by Judge Isgur in the Cano case. I also rely
17 heavily upon the First Circuit's analysis of 28 U.S.C.
18 Section 1334 and Section 105(a) of the Bankruptcy Code in
19 *Bessette v. Avco Financial Services, Inc.*, 230 F.3d 439
20 (1st Cir. 2000), which reversed and remanded the District
21 Court's determination that only the court that had issued
22 a discharge order could decide a claim based on the
23 violation of the discharge.

24 It is true that, on remand, the district court,
25 rather than certifying a nationwide class, concluded that

1 the class should comprise only those debtors who received
2 discharges in the applicable district, in that case, the
3 District of Rhode Island. See *Bessette v. Avco Financial*
4 *Services Inc.*, 279 B.R. 442 (D.R.I. 2002). As noted, that
5 approach has been taken by several other courts in other
6 districts, as well. See, for example, *In re Montano*, 2012
7 Bankr. LEXIS 5155 (Bankr. D.N.M. Nov. 2, 2012). I believe,
8 however, that the Court has broader jurisdiction than
9 those courts have applied, which is a hybrid, if you will,
10 of the two internally consistent approaches, (1) the
11 approach that premises the right to enforce the discharge
12 upon the All Writs Act, i.e., finding the power to enforce
13 only in the issuing court, or (2), alternatively, the
14 approach applying the full reach of bankruptcy
15 jurisdiction under Section 1334(b) of the Judicial Code
16 and Sections 105(a), 524 and 727 of the Bankruptcy Code to
17 the issue. Therefore, I decline to follow the "district
18 only" cases and believe that any particular bankruptcy
19 court has the power to decide a nationwide class action
20 intended to remedy the alleged systematic violation of the
21 discharge.

22 That, of course, leaves the issue of whether
23 class certification itself is appropriate, and that's left
24 for another day.

25 So, I'm going to ask counsel for the plaintiffs

1 to submit an order to chambers, copying counsel for Chase,
2 consistent with that ruling.

3
4 Dated: White Plains, New York
5 July 22, 2014
6

7 /s/ Robert D. Drain
8 Hon. Robert D. Drain
9 United States Bankruptcy Judge