

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEW MEXICO

In re: GARY EDWARD SASSO,  
  
Debtor.

Case No. 12-14564-ja7  
Chapter 7

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DENNIS PANTANO, Independent Administrator of the Estate of Marie Sasso, Deceased, Co-Trustee of the Marie M. Sasso Trust dated August 15, 2001, as Restated on October 21, 2005; and MICHAEL MANNO, Co-Trustee of the Marie M. Sasso Trust dated August 15, 2001, and Restated on October 21, 2005,

Plaintiffs,

v.

Adv. Proc. No. 13-01024-ja

GARY SASSO, individually, as former Independent Administrator of the Estate of Marie Sasso, Deceased, and as beneficiary of the Marie M. Sasso Trust dated August 15, 2001 and Restated on October 21, 2005.

Defendant.

**ORDER ON ORDER TO SHOW CAUSE WHY DEFENDANT GARY SASSO SHOULD NOT BE HELD IN CONTEMPT AND A DEFAULT JUDGMENT DENYING DISCHARGE ENTERED AGAINST HIM BASED ON HIS FAILURE TO APPEAR AT COURT-ORDERED DEPOSITION**

After multiple failures by Defendant Gary Sasso to meaningfully participate in this adversary proceeding, including failures to appear for noticed depositions, and failures to respond to requests for discovery, the Court issued an Order to Show Cause Why Defendant Gary Sasso Should Not be Held in Contempt and a Default Judgment Denying Discharge Entered Against Him Based on his Failure to Appear at Court-Ordered Deposition (“Order to Show Cause”). *See* Docket No. 89. The Court held a final, evidentiary hearing on the Order to Show Cause and took the matter under advisement. After considering the evidence presented at

the hearing, the procedural history of this adversary proceeding, and applicable case law, the Court finds that Defendant Gary Sasso (“Sasso”) willfully disobeyed an order of this Court requiring him to appear for deposition and that judgment by default declaring denying Sasso’s discharge is an appropriate sanction.<sup>1</sup>

#### BACKGROUND, FACTS, AND PROCEDURAL HISTORY

Sasso filed a voluntary petition under Chapter 7 of the Bankruptcy Code on December 18, 2012. On March 19, 2013, Plaintiffs Dennis Pantano, Independent Administrator of the Estate of Marie Sasso, Deceased, Co–Trustee of the Marie M. Sasso Trust dated August 15, 2001, as Restated on October 21, 2005 (“Pantano”), and Michael Manno, Co-Trustee of the Marie M. Sasso Trust dated August 15, 2001, and Restated on October 21, 2005 filed this adversary proceeding against Sasso, individually, as former Independent Administrator of the Estate of Marie Sasso, Deceased, and as beneficiary of the Marie M. Sasso Trust dated August 15, 2001 and restated October 21, 2005 objecting to the dischargeability of certain debts under 11 U.S.C. § 523(a)(2)(A), 523(a)(4) and 523(a)(6) and objecting to Sasso’s discharge under 11 U.S.C. § 727(a)(3) and 727(a)(4)(A). Pantano filed an amended complaint on October 24, 2015. *See* Docket No. 9. In January of 2014, Pantano moved for entry of a default judgment against Sasso based on his failure to timely file an answer to the amended complaint. *See* Docket No. 17. Sasso’s bankruptcy counsel then entered an appearance on behalf of Sasso in this adversary proceeding and objected to Pantano’s motion for default judgment. *See* Docket No. 20. Sasso offered no explanation for his failure to timely answer, but simply asked for an opportunity to answer the complaint. *Id.* The Court granted that request. Sasso answered the amended

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<sup>1</sup> The Court issued the Order to Show Cause in connection with Plaintiff Dennis Pantano’s Second Motion for Order to Show Cause why Debtor Should not be Held in Contempt of Court, and (II) Second Motion to Compel Responses to Plaintiff’s Discovery Requests, and for Sanctions, Attorneys Fees and Costs Incurred in Connection with Depositions (“Second Motion to Compel”). *See* Docket No. 78. In light of the Court’s ruling on the Order to Show Cause, the request to compel discovery and for civil contempt contained in the Second Motion to Compel is denied.

complaint on February 10, 2014, nearly two months after the original deadline to answer the amended complaint. *See* Docket No. 24.

*The State Court Probate Action*

Before Sasso filed his Chapter 7 bankruptcy case, Sasso was involved in litigation before the Circuit Court of Cook County, Illinois, County Department, Probate Division, concerning the probate of the estate of Marie Sasso (the “Probate Action”). A default judgment had been entered in favor of Pantano and Michael Manno and against Sasso in the Probate Action in March of 2011. The debt represented by the default judgment entered in the Probate Action is the subject of Pantano’s non-dischargeability claims in this adversary proceeding. On March 14, 2014, Sasso filed a Motion to Suspend Proceeding in this Court. *See* Docket No. 28. In the Motion to Suspend Proceeding, Sasso requested time to seek to set aside the default judgment in the Probate Action, and asserted that this Court lacks jurisdiction over certain aspects of this adversary proceeding under the probate exception to federal jurisdiction. *Id.* To avoid any jurisdictional issues involving this Court’s determination of facts underlying the non-dischargeability claims during the pendency of the Probate Action, the Court bifurcated Pantano’s claims objecting to discharge from the non-dischargeability claims, resulting in a temporary stay of the non-dischargeability claims. *See* Order Resulting from Status Conference – Docket No. 54. Since then, Sasso’s attempt to set aside the default judgment in the Probate Action proved unsuccessful, and the parties agreed to reinstate litigation of Pantano’s non-dischargeability claims. *See* Docket No. 137.

*Sasso’s Repeated Failures to Appear for Deposition*

On February 13 2014, Pantano filed a notice Sasso’s deposition to take place on February 27, 2014. *See* Docket No. 25. The day before the scheduled deposition, Sasso filed a notice of

non-appearance which contained no explanation why Sasso would not attend the deposition. *See* Docket No. 26. The notice of non-appearance did not comply with the Court's local rules. *See* NM-LBR 7030-1(b) (requiring "at least three" days' notice of non-appearance before the scheduled deposition). Following a status conference held October 14, 2014 on Sasso's Motion to Suspend Proceeding and Pantano's objection to Sasso's claim of exemptions, the Court ordered Sasso to appear at a deposition before November 7, 2014 at the same place he was scheduled to appear at a deposition in the Probate Action. *See* Order Resulting from Status Conference in Adversary Proceeding and Main Bankruptcy Case ("October 2014 Scheduling Order") – Docket No. 42. The October 2014 Scheduling Order provided further:

[I]f a deposition is scheduled, and Debtor subsequently is unable to be deposed as scheduled, the parties are required to work in good faith to reschedule the deposition as soon as practical. If the parties cannot reach an agreement regarding the rescheduling, and the Debtor fails to appear or cooperate in the originally scheduled deposition, then Pantano may file a motion for sanctions pursuant to Fed. R. Bank. P. Rule 7037 and F. R. C. P. Rule 37.

On October 20, 2014, Pantano filed a notice of Sasso's deposition to take place on November 5, 2014 at 11:00 a.m. *See* Docket No. 41. Again, the day before the scheduled deposition, on November 4, 2014 at 4:28 p.m., Sasso filed a notice of non-appearance with no explanation about why he would not appear.<sup>2</sup> *See* Docket No. 45.

On February 25, 2015, the Court issued another order directing Sasso to appear for deposition regarding Pantano's claims objecting to Sasso's discharge on or before March 31, 2015 at the same place he was scheduled to appear for a deposition in the Probate Action. *See*

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<sup>2</sup> At a hearing held November 12, 2014 in connection with an objection to exemptions in Sasso's bankruptcy case, the Court extended the deadline for Sasso's deposition until November 24, 2014, and ruled that Sasso would be precluded from testifying at the final hearing on Pantano's objection to Sasso's homestead exemption if Sasso failed to appear for deposition. *See* Minutes of Hearing Held November 12, 2014 – Docket No. 48. The Court permitted Pantano to file a motion for sanctions no later than November 26, 2014, if Sasso failed to appear for a deposition before November 24, 2014 and Pantano wished to seek a greater sanction. *Id.* No further notice to take Sasso's deposition before November 24, 2014 was filed. Nor did Pantano file a motion for sanctions at that time. The Court did not hold a hearing on the objection to debtors' homestead exemption because the parties entered into a stipulated order denying the claim of homestead exemption. *See* Bankruptcy Case No. 12-14564 – Docket No. 66.

Order Resulting from Status Conference (“February 2015 Scheduling Order”) Docket No. 54.

The February 2015 Scheduling Order provided:

In connection with the probate proceeding, Defendant has been ordered to appear for deposition on or before Tuesday, March 31, 2015. Defendant is ordered to appear for deposition on the § 727 Claims in this adversary proceeding at the same date, time, and location that he is required to appear for deposition in the probate proceeding.

The February 2015 Scheduling Order provided further, that the “[f]ailure to comply with this order may result in dismissal of the action, default, the assessment of costs and attorney’s fees, or other appropriate penalties.” February 2015 Scheduling Order, ¶ 6.

On March 9, 2015, Pantano filed a notice of Sasso’s deposition to take place on Monday, March 30, 2015 at 9:00 a.m. in Albuquerque, New Mexico at the offices of Pantano’s counsel. *See* Docket No. 56. That was a date Sasso advised the Court he would be available for a deposition. Sasso did not appear for the March 30, 2015 deposition. On March 27, 2015, the Friday before Sasso’s scheduled deposition, Sasso’s counsel in the Probate Action sent an email to Pantano’s counsel confirming “that Gary has not made it to New Mexico and will not be available for his deposition next Monday.” *See* Exhibit 52. In fact, a private investigator hired by Pantano in connection with this adversary proceeding observed Sasso and his wife at a KOA Campground in Albuquerque, New Mexico on March 29, 2015 where it appeared that Sasso was living in a Monte Carlo recreational trailer. *See* Exhibit 1. Sasso did not appear for his deposition on March 30, 2015.

*Sasso’s Additional Failures to Participate in this Proceeding*

Pantano has filed three motions in this adversary proceeding seeking to compel discovery and/or requesting the Court to issue an order to show cause based on Sasso’s repeated failures to appear for deposition, failure to respond to written discovery requests, and failure to adhere to scheduling deadlines regarding the exchange of exhibits and identification of witnesses in

connection with Sasso's Motion to Suspend Proceeding. *See* Docket Nos. 29, 47, and 78.

Pantano served his first requests for admissions, interrogatories, and requests for production on Sasso on February 7, 2014. *See* Docket No. 23. To date, although Sasso has provided some answers to interrogatories and has produced some documents, he still has not fully responded to Pantano's discovery requests. The only certificate of service filed of record with respect to Sasso's discovery responses indicates that Sasso mailed his responses to Pantano's first set of requests for production of documents to Pantano's counsel on May 2, 2015. *See* Docket No. 112.<sup>3</sup> In an Order Resulting from Hearing on Motions to Suspend Proceedings or to Compel Discovery ("April 2014 Scheduling Order"), the Court directed Sasso to provide proof to Pantano that the social security number he provided with his bankruptcy petition is his real social security number no later than May 19, 2014. *See* Docket No. 33. The April 2014 Scheduling Order further provided for Sasso to file a motion to extend the May 19, 2014 deadline no later than May 5, 2014 if Sasso needed additional time to produce proof of his social security number. Sasso never sought an extension of time.

*Sasso's Failure to Obey a Discovery Order and the Issuance of the Order to Show Cause*

At a status conference held February 24, 2015, Pantano's counsel pointed out that Sasso failed to appear for several depositions, and asked the Court to impose consequences if Sasso did not comply with the Court's orders. In response, the Court stated on the record that it would not consider imposing sanctions unless Mr. Sasso again failed to appear for deposition by March 31, 2015, and Pantano filed a motion for sanctions under Rule 37. *See* Audio File – Docket No.143.

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<sup>3</sup>Pantano's discovery request included requests for production, request for admissions, and interrogatories together in one document. *See* Motion (I) to Compel Responses to the Plaintiff's First Request for Admission, Interrogatories, and Requests for Production from Defendant Gary Sasso, (II) to Compel Gary Sasso to Appear for a Deposition, (III) for Order Finding that Unanswered Requests for Admission are Deemed Admitted, and (IV) for Sanctions, Including Attorneys' Fees and Costs – Exhibit A (Docket No 29). Sasso's certificate of service only references requests for production. At the final hearing on the Order to Show Cause, Sasso's counsel agreed on the record that Sasso has not provided answers to all requested interrogatories.

If Pantano filed a motion for sanctions requesting default judgment based on Sasso's failure to appear at a court-ordered deposition, the Court indicated it would consider entering default judgment against Sasso, taking into account the entire history of Sasso's non-compliance in this adversary proceeding. *Id.* The Court issued the Scheduling Order following the February 24, 2015 status conference.

On April 12, 2015, Pantano filed a second motion for order to show cause, to compel discovery responses, and requesting sanctions. *See* Plaintiff Dennis Pantano's Second Motion for Order to Show Cause why Debtor Should not be Held in Contempt of Court, and (II) Second Motion to Compel Responses to Plaintiffs' Discovery Requests and for Sanctions, Attorneys' fees and Costs incurred in Connection with Depositions ("Motion to Compel and for OSC") - Docket No. 78. The Motion to Compel and for OSC recites that Sasso failed to appear for deposition on March 30, 2015 in violation of the Scheduling Order. *Id.* On April 24, 2015, the Court issued an order setting a hearing on April 27, 2015 to consider whether to issue an order to show cause why a default judgment should not be entered against Sasso based on his failure to appear at the Court-ordered deposition. *See* Docket No. 86.

At the April 27, 2015 hearing, Sasso acknowledged that he did not appear at the Court-ordered deposition scheduled for March 30, 2015. The Court issued the Order to Show Cause on April 27, 2015 directing Sasso to appear before the Court on June 2, 2015 to show cause why the Court should not hold him in contempt for failing to appear at the Court-ordered deposition and why the Court should not sanction him by entering default judgment against him based on Sasso's failure to appear at the Court-ordered deposition. *See* Docket 89.

*Sasso appears for deposition and provides some written discovery responses*

On May 12, 2015, Pantano filed a motion to compel Sasso to appear for deposition on May 28, 2015, which the Court granted, in part, following a hearing on the same day. *See* Docket Nos. 99, 100, and 109. On May 13, 2015 Pantano filed a notice to take Sasso's deposition on May 28, 2015. *See* Docket No. 103. Sasso appeared for his deposition on May 28, 2015.

*The June 2, 2015 hearing on the Order to Show Cause*

Sasso testified at the hearing on the Order to Show Cause. He testified that he could not remember why he did not appear for the deposition scheduled for February 27, 2014. He testified further that could not remember why he did not appear for the deposition scheduled for November 20, 2014. And he testified that he could not recall why he did not appear for the deposition scheduled for March 30, 2015. He also testified that he did not remember telling his counsel in the Probate Action that he was not in New Mexico and would not be available for the March 30, 2015 deposition. Sasso testified that he is currently being treated for anxiety and depression, and has been undergoing treatment for a long time. He indicated that he frequently cannot remember what happens, so he writes things down on note pads. Sasso had a note pad with him at the Order to Show Cause hearing. Sasso offered no corroborating evidence regarding his medical condition or treatment that would further support his testimony regarding his medical condition or the medications he currently takes. The Court finds that Sasso lied to his Probate Counsel about not being available for a deposition on March 30, 2015 because he had not returned to New Mexico.

Sasso did remember that he appeared to give his deposition on May 28, 2015, four days before the hearing on the Order to Show Cause. With respect to the Probate Action, Sasso testified that he did not attend hearings in that action out of fear of being beat up or arrested.



Additional evidence presented at the hearing on the Order to Show Cause suggests that Sasso has never provided sufficient identification to the Chapter 7 Trustee in connection with his bankruptcy case. The Chapter 7 Trustee testified that he has not been able to verify Mr. Sasso's social security number, although his notes from the meeting of creditors reflects a check mark which the Chapter 7 Trustee customarily makes as a note to himself that he has seen a debtor's identification. The transcript from the meeting of creditors makes no mention of an identification card. It is possible that Mr. Sasso presented an expired driver's license to the Chapter 7 Trustee at the meeting of creditors. Mr. Sasso testified that he does not have a current driver's license and has not had one for some time. He also testified that he does not have his social security card or the documents necessary to obtain a new one. The only current form of photo-identification Sasso has is a service animal identification card for his dog. Despite the Court's order directing Sasso to provide proof that the social security number he provided with his bankruptcy petition is his real social security number (*See* Docket No. 33), it is not apparent from the record that he has ever done so.

#### DISCUSSION

A party may seek discovery sanctions pursuant to Fed.R.Civ.P. 37, made applicable to adversary proceedings by Fed.R.Bankr.P. 7037. Subsection (b) of Rule 37, governing sanctions based on a party's failure to obey a discovery order, provides, in relevant part:

If a party . . . fails to obey an order to provide or permit discovery, including an order under Rule . . . 37(a), the court where the action is pending may issue further just orders. They may include the following:

- i) directing that the matters embraced in the order or other designated facts be taken as established or purposes of the action, as the prevailing party claims;
- ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;
- iii) striking pleadings in whole or in part;
- iv) staying further proceedings until the order is obeyed;

- v) dismissing the action or proceeding in whole or in part;
- vi) rendering a default judgment against the disobedient party; or
- vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

Fed.R.Civ.P. 37(b)(2)(A).

The failure to *obey* an order for purposes of Rule 37 is the equivalent of simply failing to comply with it. *Cf. Norman v. Young*, 422 F.2d 470, 473 (10<sup>th</sup> Cir. 1970) (explaining under the language of former Rule 37 that “‘refuses to obey’ simply means ‘failing to comply with an order.’”) (quoting *Societe Internationale Pour Participations, etc. v. Rogers*, 357 U.S. 197, 208, 78 S.Ct. 1087, 1094, 2 L.Ed.2d 1255 (1958)). Failing to appear for deposition may also result in the imposition of sanctions. *See* Fed.R.Civ.P. 37(d) (“The court where the action is pending may, on motion, order sanctions if . . . a party . . . fails, after being served with proper notice, to appear for that person’s deposition.”). The possible sanctions for failing to appear for deposition include those enumerated in Rule 37(b)(2)(A). Fed.R.Civ.P. 37(d)(3).<sup>4</sup>

Of the available discovery sanctions, dismissal of a plaintiff’s cause of action, or default judgment against a defendant, is “the most severe in the spectrum of sanctions.” *Nat’l Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643, 96 S.Ct. 2778, 2781, 49 L.Ed.2d 747 (1976) (per curiam).<sup>5</sup> Because it is so harsh, the sanction of default “will be imposed only when the failure to comply . . . is the result of willfulness, bad faith, or [some] fault of [the party to be sanctioned] rather than inability to comply.” *FDIC v. Daily*, 973 F.2d 1525, 1530 (10<sup>th</sup> Cir.

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<sup>4</sup> *See Gates v. United States*, 752 F.2d 516 (10<sup>th</sup> Cir. 1985) (affirming district court’s dismissal of action based on plaintiff’s failure to appear at court-ordered deposition, where the evidence established that plaintiffs failed to contact their attorney for a sixty-day period during the litigation).

<sup>5</sup> *See also Meade v. Grubbs*, 841 F.2d 1512, 1520 n.6 (10<sup>th</sup> Cir. 1988) (stating that “[d]ismissal of an action with prejudice is a severe sanction, applicable only in extreme circumstances. Because dismissal with prejudice defeats altogether a litigant’s right to access to the courts, it should be used as a weapon of last, rather than first, resort.”) (internal quotation marks and citations omitted).

1992) (internal quotation marks and citations omitted).<sup>6</sup> Furthermore, the Court generally must consider the following factors before imposing the harshest of sanctions:

- (1) the degree of actual prejudice to the [non-offending party];
- (2) the amount of interference with the judicial process;
- (3) the culpability of the litigant;
- (4) whether the court warned the party in advance that dismissal of the action [or default judgment] would be a likely sanction for noncompliance; and
- (5) the efficacy of lesser sanctions.

*Davis v. Miller*, 571 F.3d 1058, 1061 (10<sup>th</sup> Cir. 2009) (quoting *Ehrenhaus*, 965 F.2d at 921) (internal citations and quotation marks omitted)).

“Only when the aggravating factors outweigh the judicial system’s strong predisposition to resolve cases on their merits is dismissal [or default judgment] an appropriate sanction.” *Meade*, 841 F.2d at 1521 n.7 (citations omitted). Nevertheless, “[i]t is within a court’s discretion to dismiss a case [or enter default judgment] if, after considering all the relevant factors, it concludes that dismissal [or default] alone would satisfy the interests of justice.” *Ehrenhaus*, 965 F.2d at 918.<sup>7</sup>

In the bankruptcy context, denial of a debtor’s discharge is an extremely harsh penalty. *See Duff v. Ayala (In re Ayala)*, 516 B.R. 645, 650 (Bankr. D.N.M. 2014) (“Denial of discharge is a harsh remedy, to be reserved for a truly pernicious debtor.”) (citations omitted). *See also Rosen v. Bezner*, 996 F.2d 1527, 1534 (3<sup>rd</sup> Cir. 1993) (acknowledging “that a total bar to discharge is an extreme penalty.”). Even so, it may be appropriate to deny a debtor’s discharge by default based on the debtor’s failure to comply with discovery orders. *See, e.g., Int’l*

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<sup>6</sup> *See also The Proctor & Gamble Co. v. Haugen*, 427 F.3d 727, 738 (10<sup>th</sup> Cr. 2005)(the sanction of dismissal “is considered appropriate only in cases involving ‘willfulness, bad faith, or [some] fault’ on the part of the party to be sanctioned.”) (citation and quotation marks omitted); *Ehrenhaus v. Reynolds*, 965 F.3d 916, 920 (10<sup>th</sup> Cir. 1992) (recognizing that “dismissal represents an extreme sanction appropriate only in cases of willful misconduct.”) (citations omitted).

<sup>7</sup> *See also Daily*, 973 F.2d 1525 at 1530 (acknowledging that Rule 37 permits “a court to enter a default judgment against a party who fails to obey an order to provide discovery or who fails to respond to interrogatories or requests for production” and that the standard of review for the court’s imposition of sanctions is “abuse of discretion under the totality of the circumstances.”) (citing *M.E.N. Co. v. Control Fluidics, Inc.*, 834 F.2d 869, 872 (10<sup>th</sup> Cir. 1987)).

*Enterprises, Inc. v. Eddy (In re Eddy)*, 339 B.R. 8 (Bankr.D.Mass. 2006) (granting plaintiff's request for default judgment denying defendant's discharge as a sanction for defendant's failure to comply with discovery order); *In re Law*, 2006 WL 6810957 (9<sup>th</sup> Cir. BAP Dec. 29, 2006) (affirming bankruptcy court's entry of default judgment denying debtor's discharge based on debtor's continued refusal to obey and failure to comply with the court's discovery orders). The Court will consider each of the factors in light of the evidence to determine whether it is appropriate to enter a default judgment against Sasso based on his failure to comply with the Court's discovery orders.

*Prejudice to Plaintiff*

To date Pantano still has not received complete responses to written discovery requests. The information sought pertains in part to Pantano's claims seeking to deny Sasso's discharge which are based, in part, on Sasso's failure to account for the significant sum of money he received from Marie Sasso's probate estate, and his failure to disclose ownership interests, gifts, or other transfers in his bankruptcy schedules and statement of financial affairs. *See* Amended Complaint – Docket No. 9. Without receiving full and complete responses, Pantano will be prejudiced from proceeding to trial on claims for which Pantano bears the burden of proof. In addition, Pantano has incurred legal fees in seeking to compel Sasso to respond to discovery requests, which might never be collected even if the Court were to award attorneys' fees and expenses as a sanction.

*Interference with judicial process*

Sasso has failed to participate in these proceedings by failing to provide full and complete discovery to Pantano as required by the rules of civil procedure. Sasso disobeyed not one, but

two orders requiring him to appear for deposition. By failing to meaningfully participate in the proceeding, he has interfered with judicial process.

*Culpability of the litigant*

The Court has placed the most weight, considering all the circumstances, on the culpability of the litigant factor, that is, whether failure to comply with discovery is the result of willfulness or bad faith rather than an inability to comply.

The Court finds that Sasso lied to his probate counsel regarding why he could not attend the March 30, 2015 deposition and has offered no justifiable reason for his failure to attend the deposition. The email his probate counsel sent the Friday before his scheduled deposition was untrue – the private investigator observed Sasso in Albuquerque, New Mexico on March 29, 2015, the day before his scheduled deposition, and two days after his counsel’s email indicating that “Gary has not made it to New Mexico” and would not be available to appear for his deposition. Mr. Sasso provided no real explanation for his repeated failure to appear for deposition in connection with this adversary proceeding other than that he simply could not remember why he was not able to attend. Sasso’s failure to appear for deposition on March 30, 2015 was willful and in bad faith. No evidence presented supports a finding that Sasso’s failure to appear was the result of an inability to comply.

The impact of the sanction should be lodged where the fault lies, whether upon the client, or the client’s attorney. *See Miller*, 571 F.3d at 1061 (“The intent is to impose the sanction where the fault lies . . . . If the fault lies with the attorneys, that is where the impact of sanction should be lodged. If the fault lies with the clients, that is where the impact of the sanction should be lodged.”) (quoting *In re Baker*, 744 F.2d 1438, 1440 (10<sup>th</sup> Cir. 1994) (en banc)). Here, it is

abundantly clear that Sasso, not his attorney, is responsible for the noncompliance with discovery requirements.

*Warning of potential consequence*

The February 2015 Scheduling Order requiring Defendant Sasso to appear for deposition before March 31, 2015 contained a warning that the Court may consider granting judgment by default against him if he failed to comply with the order. *See* Docket No.54. The Court also stated on the record at the status conference held February 24, 2015 that it would consider entering a default judgment as a sanction if Sasso failed to appear for deposition by March 31, 2015 and Pantano filed a motion for sanctions under Rule 37 based on the failure to appear. At that time, Sasso had already failed to appear for two scheduled depositions.

The Order to Show Cause provided that the Court would consider whether to impose sanctions upon the Defendant based on his failure to appear at the March 30, 2015 deposition, and explained further that the Court may issue a default judgment denying Defendant's discharge if it found that Defendant's failure to appear was "willful or in bad faith or was a result of some fault on the part of Mr. Sasso rather than an inability to comply." *See* Docket No. 89. The February 2015 Scheduling Order and the Court's warning at the status conference held February 24, 2015 sufficiently put Sasso on notice that his continued failure to appear for scheduled depositions could have drastic consequences. Yet, Sasso still failed to appear.

*Efficacy of lesser sanctions*

Sasso has failed to meaningfully participate in this adversary proceeding. He failed to appear for a scheduled deposition on three separate occasions. He finally appeared for deposition only *after* the Court had issued the Order to Show Cause. Pantano's claims include non-dischargeability claims and objections to discharge. A default judgment of non-

dischargeability would have a less harsh result than denial of discharge. However, the “ chosen sanction must be both ‘just’ and ‘related to the particular claim which was at issue in the order to provide discovery.’” *Ehrenhaus*, 965 F.2d at 920 (quoting *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 707, 102 S.Ct. 2099, 2106, 72 L.Ed.2d 492 (1982)). Here, the deposition that Sasso failed to attend was restricted to Pantano’s claims objecting to discharge. Consequently, the sanction should relate to those claims.

Based on Sasso’s bad faith failure to attend the March 30, 2015 deposition after being warned of the consequences, coupled with his failures to attend prior scheduled depositions, and with his historical failure to fully respond to Pantano’s discovery requests, the Court believes a lesser sanction is not appropriate in the circumstances. Further, a lesser sanction such as designating factual issues contained in Pantano’s discovery requests as established for purposes of trial could ultimately yield the same result – denial of discharge.

In sum, after considering each of the factors, the Court has determined that the imposition of the harsh sanction of denial of the discharge by default is appropriate.

*Award of Attorneys’ Fees and Costs*

Once a Court has determined that a party has failed to comply with an order of the Court, the Court in most instances must also award the requesting party reasonable attorneys’ fees and expenses. *See* Fed.R.Civ.P. 37(b)(2)(C). Rule 37(b)(2)(C) provides:

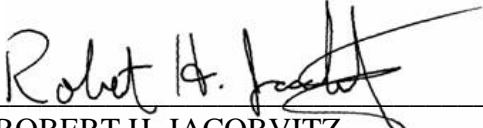
Instead of or in addition to the orders above, the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney’s fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

Fed.R.Civ.P. 37(b)(2)(C).

Pantano offered into evidence billing statements for work his attorneys performed in connection with discovery matters, including scheduling depositions, and filing the motions to compel. *See*

Exhibit 55. The highlighted entries total \$3,137.50. *Id.* At closing argument, Pantano's counsel asserted that Pantano has actually incurred even more attorneys' fees in connection with Sasso's discovery failures than those contained in the billing statements. Because the Court is imposing the harshest of sanctions by entering default judgment against Sasso denying his discharge, the Court finds that also awarding attorneys' fees would be unjust, and, therefore, will not impose against Sasso an award of Pantano's attorneys' fees and expenses.

WHEREFORE, IT IS HEREBY ORDERED THAT default judgment will be entered against Sasso denying his discharge.

  
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ROBERT H. JACOBVITZ  
United States Bankruptcy Judge

Date entered on docket: October 26, 2015

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