The below described is SIGNED.

Dated: April 14, 2005

JUDITH A. BOULDEN
U.S. Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF UTAH

In re: DAVID F. BUTLER and COLLEEN A. BUTLER, Debtor(s).	Bankruptcy Number: 04-27637 Chapter 7
FREELIFE INTERNATIONAL, LLC, Plaintiff(s), vs. DAVID F. BUTLER and COLLEEN A. BUTLER, Defendant(s).	Adversary Proceeding No. 04-3012 Judge Judith A. Boulden

MEMORANDUM DECISION ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Before the Court is plaintiff, FreeLife International LLC's ("FreeLife" or the "Plaintiff") Motion for Partial Summary Judgment (Motion) on its third claim for relief seeking to have declared nondischargeable contempt judgments issued by a state trial court totaling more than $900,000. The state court contempt judgments encompass civil penalties assessed against the

Debtors for contempt sanctions, as well as attorney fees. Freelife seeks to have these judgments declared nondischargeable under 11 U.S.C. § 523(a)(7).[1] The defendant-debtors, David and Colleen Butler (the "Debtors," or the "Butlers"), object. After reviewing the pleadings, listening to oral arguments, and making an independent review of applicable case law, the Court enters the following Memorandum Decision.

I. BACKGROUND

On approximately February 20, 1995, FreeLife and the Butlers entered into various marketing and related agreements (Marketing Agreement). On October 21, 2002, FreeLife initiated an action (the "Connecticut Action") against the Butlers in the Superior Court, Judicial District of New Haven, in the State of Connecticut (the "Connecticut Court") seeking, among other causes of action, injunctive relief for alleged violations of the Marketing Agreement. On December 2, 2002, the Connecticut Court issued a temporary restraining order (TRO).

Later, in December 2002, the Connecticut Court entered a contempt order against the Butlers for having violated the TRO no less than 61 times and sanctioned the Butlers $2,500 per violation, payable to FreeLife – totaling $152,500. In April 2003, a second contempt order (together with the first order, the "Contempt Orders") was issued against the Butlers for 296 additional violations of the TRO at the same rate of $2,500 per violation. Attorney fees of

[1] Future statutory references are to Title 11 of the United States Code unless otherwise noted.

$19,605.95 were also assessed. In all, the Connecticut Court sanctioned the Butlers for more than $900,000[2] for their violations of the court's TRO.

The Butlers subsequently filed three separate bankruptcy petitions. The third and current bankruptcy was originally filed as a chapter 11 on May 10, 2004 but was converted by the Court to a chapter 7 on November 5, 2004. The Contempt Orders owed to FreeLife are among the debts the Butlers seek to discharge.

II. JURISDICTION AND SUMMARY JUDGMENT

This Court has jurisdiction over this adversary proceeding by virtue of 28 U.S.C. §§ 1334 as a matter arising under the Bankruptcy Code. This is a core proceeding under 28 U.S.C. § 157(b)(2)(I).

Under Federal Rule of Bankruptcy Procedure 7056, which adopts Federal Rule of Civil Procedure 56, a movant is entitled to summary judgment when, after consideration of the record, the Court determines that "there is no issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[3] In applying this standard, the Court examines the factual record in the light most favorable to the non-moving party.[4] The party opposing summary judgment may not rely on mere allegations or denials in its pleadings or briefs, but must identify specific and material facts for trial and significant probative evidence supporting

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[2] Also included in this figure offered by FreeLife is an additional $6,000 in attorney fees awarded by the Connecticut U.S. District Court on March 7, 2003 for a failed removal attempt by the Butlers. For the purpose of this decision, it is not necessary to break these awards out into a separate analysis.

[3] FED. R. CIV. P. 56(c).

[4] *See Wolf v. Prudential Ins. Co. of Am.*, 50 F.3d 793, 796 (10th Cir. 1995).

the alleged facts.[5] There is no genuine issue of fact "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party."[6] The moving party has the burden of establishing entitlement to summary judgment.

The Court concludes that there is no disputed issue of material fact regarding the history of the Connecticut Action, or the content of the Contempt Orders that are the subject of the Motion. Although the Debtors contest the events that occurred in the Connecticut Action and whether the Contempt Orders should have been issued, there is no dispute that they were in fact issued or their content.

III. ANALYSIS

Freelife argues that the monetary sanctions imposed upon the Debtors by the Connecticut Court are nondischargeable under § 523(a)(7) because they were fines or penalties which, even though not payable to a government entity, were for its benefit – in this case "in furtherance of vindicating the dignity and authority of the . . . court."[7] While it is true that there are trial courts in this and other Circuits that are split with respect to the requirement that a monetary sanction be both payable to *and* for the benefit of a governmental unit, there is no controlling case law in the Tenth Circuit.

To carry out the fundamental "fresh start" policy underlying the Bankruptcy Code, this Court is to narrowly construe the exceptions to discharge found in the subsections of § 523(a).

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[5] *Burnette v. Dresser Indus., Inc.*, 849 F.2d 1277, 1284 (10th Cir. 1988).

[6] *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

[7] *PRP Wine Int'l, Inc. v. Allison* (*In re Allison*), 176 B.R. 60, 64 (Bankr. S.D. Fla. 1994) (holding state court contempt judgment was entered, in part, for the benefit of a governmental entity and is nondischargeable).

Likewise, the claimant asserting the dischargeability exception must prove such exception by a preponderance of the evidence.[8]

The Plaintiff urges this Court to follow an interpretation of § 523(a)(7) which excepts from discharge civil contempt orders where the "punitive nature of the fine was clear. . . . [due to] the State Court's deliberate use of the term 'fine' to describe the . . . debt."[9] For this same holding, the Plainitff relies on a Florida bankruptcy court decision which takes a broad reading of § 523(a)(7) and similarly allows a contempt "fine" to be nondischargeable where "the fine was . . . imposed as a penalty to vindicate the dignity and authority of the court, and thus, the fine was for the benefit of a governmental unit, as required by § 523(a)(7)."[10] Finally, FreeLife places a great deal of emphasis upon a decision out of the Ninth Circuit which states, in *dicta*, that "civil contempt sanctions are generally non-dischargeable where . . . they are imposed to uphold the dignity and authority of the court."[11] If such a standard exists, this is precisely the fact scenario in which it would be applicable. The egregious nature of the Butler's TRO violations is underscored by the Connecticut Court's own statement that it "cannot recall a more blatant display of cynicism and unprofessional disregard for a court order than was revealed in

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[8] *Grogan v. Garner*, 498 U.S. 279, 286-87 (1991).

[9] *Thruway Messenger Serv., Inc. v. Marini* (*In re Marini*), 28 B.R. 262, 266 (Bankr. E.D.N.Y. 1983) (allowing exception to discharge "a fine for contempt levied primarily to uphold the dignity of the State Court").

[10] *School Pictures of Miss., Inc. v. Winn* (*In re Winn*), 92 B.R. 938, 940 (Bankr. M.D. Fla. 1988) (finding, on summary judgment, a daily fine imposed in contempt judgment nondischargeable).

[11] *Hansbrough v. Birdsell* (*In re Hercules Enter., Inc.*), 387 F.3d 1024, 1029 (9th Cir. 2004) (deciding whether a district court's judgment affirming a bankruptcy court's award of sanctions for contempt of court and the sanction in a corporate filing would not be dischargeable in a hypothetical subsequent personal bankruptcy filing of the individual against whom the sanction was issued and opining that these types of sanctions are "generally not dischargeable under § 523(a)(7)").

this proceeding."[12] As tempting as it is to extend the § 523(a)(7) exception, it does not appear such an expansive reading is warranted.

This Court's analysis is not controlled by any of the above-referenced cases upon which the Plaintiff relies – our analysis is controlled by the Supreme Court's decision in *Kelly v. Robinson*.[13] FreeLife argues that *Kelly* indicates the language of § 523(a)(7) is subject to interpretation. However, this Court believes the Supreme Court limits its ruling to state court criminal restitution orders because the entire opinion focuses on the important role federalism plays in choosing not to undermine *criminal* restitution orders issued by state criminal tribunals.[14] In addition, Judge Brooks thoughtful analysis of the issue in *Farmers Insurance Exchange v. Mills*[15] is consistent. *Mills*, in discussing *Kelly*, "recognizes . . . the long-standing tradition of restraint by bankruptcy courts and the policy of non-interference with state court

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[12] Connecticut Court MEM. OF DECISION ON PL.'S M. FOR CONTEMPT at 2.

[13] 479 U.S. 36 (1986).

[14] *See e.g., id*. at 44 ("[W]e must consider the language of §§ 101 and 523 in light of the history of bankruptcy court deference to criminal judgments and in light of the interests of the States in unfettered administration of their criminal justice systems."); *id*. at 47 ("Our interpretation of the Code also must reflect the basis for this judicial exception, a deep conviction that federal bankruptcy courts should not invalidate the results of state criminal proceedings. The right to formulate and enforce penal sanctions is an important aspect of the sovereignty retained by the States."); *id*. at 49 ("This Court has recognized that the States' interest in administering their criminal justice systems free from federal interference is one of the most powerful of the considerations that should influence a court considering equitable types of relief."); *id*. at 52 ("Unlike an obligation which arises out of a contractual, statutory or common law duty, here the obligation is rooted in the traditional responsibility of a state to protect its citizens by enforcing its criminal statutes and to rehabilitate an offender by imposing a criminal sanction intended for that purpose.") (quoting *Pellegrino v. Div. of Criminal Justice* (*In re Pellegrino*), 42 B.R. 129, 133 (Bankr. D. Conn. 1984)); and *id*. at 53 ("Because criminal proceedings focus on the State's interests in rehabilitation and punishment, rather than the victim's desire for compensation, we conclude that restitution orders imposed in such proceedings operate 'for the benefit' of the State.").

[15] 290 B.R. 822 (Bankr. D. Colo. 2003).

convictions."[16] The Colorado court goes on to explain that "[b]ecause criminal proceedings focus on the State's interest in rehabilitation and punishment, rather than the victim's desire for compensation . . . restitution orders imposed in such proceedings operate 'for the benefit of' the State."[17] In *Mills*, a state court restitution order required the defendant to pay a victim restitution in a *criminal* misdemeanor action and the court concluded "the restitution is a part of a criminal sentence and is [a] mechanism to rehabilitate the Defendant and deter future criminality."[18] Here, we are dealing with a *civil* sanction order made payable to the Plaintiff, and this Court rejects the invitation to expand the interpretation of the language of the statute to cover this fact circumstance.[19] This Court acknowledges that there are good policy arguments favoring an exception to discharge which would uphold a court's authority to impose sanctions and not allow

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[16] *Id*. at 828.

[17] *Id*. at 836.

[18] *Id*. at 838.

[19] This Court recognizes that there is a distinction between *civil* and *criminal* contempt but takes no position as to whether or not a criminal contempt order is nondischargeable. The Tenth Circuit, in summarizing the Supreme Court's distinction between civil and criminal contempt has explained:

> "[W]hether a contempt is civil or criminal turns on the character and purpose of the sanction involved. Thus, a contempt sanction is considered civil if it is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court." In civil contempt, "the contemnor is able to purge the contempt and obtain his release by committing an affirmative act, and thus carries the keys of his prison in his own pocket." On the other hand, "a completed act of disobedience that the contemnor cannot avoid" is criminal in nature.

Lucre Mgm't. Group, LLC v. Schempp Real Estate, LLC (*In re Lucre Mgt. Group, LLC*), 365 F.3d 874, 876 (10th Cir. 2004) (summarizing and quoting *Int'l Union, United Mine Workers of Amer. v. Bagwell*, 512 U.S. 821, 827-28 (1994)) (some internal quotations and citations omitted). *See also Fed. Trade Comm'n v. Kuykendall*, 371 F.3d 745, 752 (10th Cir. 2004) (explaining "where the sanctions sought in contempt proceedings are soley to be used to compensate injured consumers, the proceedings are civil in nature").

a party to circumvent that authority through a bankruptcy filing. However, the Court must comply with the plain meaning of the statute.

In interpreting a statute, a court must begin with the statutory language itself.[20] Of course, the analysis cannot be limited to portions of the statute but must "look to the provisions of the whole law, and to its object and policy."[21] The language in § 523(a)(7) is clear and unequivocal. It requires that for a fine, penalty, or forfeiture to be excepted from discharge, it must be "payable to *and* for the benefit of a governmental unit, and is not compensation for an actual pecuniary loss, other than a tax penalty."[22] In drafting statutes, Congress is well aware of the distinct effect of using "and" rather than "or" in a phrase consisting of more than one element. In this case, "even if the 'for the benefit of a governmental unit' requirement is met by the abstract benefit of upholding 'the dignity of the court,' the debt cannot be held nondischargeable under section 523(a)(7) because it is not payable to a governmental unit."[23] In this regard the language of the statute is unambiguous – a debt is nondischargeable only if *both* criteria are met.[24] Instead, as the Debtors emphasize, the Connecticut Court ordered sanction

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[20] *Kelly*, 479 U.S. at 43.

[21] *Id*. (internal quotations and citations omitted).

[22] § 523(a)(7).

[23] *Jeff-Mark P'ship v. Friedman* (*In re Friedman*), 253 B.R. 576, 579 (Bankr. S.D. Fla. 2000) (internal footnote omitted) (holding § 523(a)(7) does not except a state court civil contempt judgment from discharge comporting with "the general policy and plain meaning of the Bankruptcy Code"). *See also Commercial Bankers Life Insur. Co. v. Strutz* (*In re Strutz*), 154 B.R. 508, 510 (Bankr. N.D. Ind. 1993) ("Congress . . . has determined that only those [fines, penalties, or forfeitures] that are 'payable to *and* for the benefit of a governmental unit' qualify." (emphasis in original)).

[24] *Accord, Univ. of N.M. v. Bailey* (*In re Bailey*), 202 B.R. 317, 318 (Bankr. D. N.M. 1995) (concluding sanctions must not only benefit the governmental unit but must *also* be payable to a governmental unit).

was payable to FreeLife. In addition, a portion of the fine was compensation for actual pecuniary loss for attorney fees.

As reprehensible as it is for a party to violate a clear order of a court and despite the valid argument that state courts are entitled to uphold the dignity and authority of their courts, this Court is bound by the language of the statute, controlling caselaw interpreting the statute as well as Congressional intent.[25] "If the debt does not fit within the statute, it is dischargeable."[26]

IV. CONCLUSION

The Court finds that the better-reasoned approach is to rely upon the plain meaning of the statute and declines to follow the smattering of bankruptcy courts and *dicta* from the Ninth Circuit. Accordingly, the Court finds that § 523(a)(7) does not except from discharge the debts arising from civil sanctions imposed on the Debtors by the State Court. The Motion for Partial Summary Judgment is denied. A separate order consistent with this ruling shall be issued.

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[25] Currently, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, S. 256, as passed by the U.S. Senate on March 10, 2005 and by the House of Representatives April 14, 2005 (the "Bankruptcy Reform Act") is awaiting the President's signature. Among the many changes proposed by the Bankruptcy Reform Act is a section added to § 1328 which states that chapter 13 debtors shall receive a discharge of all debts except "for restitution, or damages, awarded in a civil action against the debtor as a result of willful or malicious injury by the debtor that cause personal injury to an individual or the death of an individual." S. 256, 109th Cong. § 1328(a)(4) (2005). Congress has had other opportunities to expand upon the exception to discharge in reaction to *Kelly* but has declined to extend it to civil sanctions.

[26] *Bailey*, 202 B.R. at 319.

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SERVICE LIST

Service of the foregoing **MEMORANDUM DECISION ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT** will be effected through the Bankruptcy Noticing Center to each party listed below.

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