

BAP No.: NV-23-1179

**UNITED STATES BANKRUPTCY APPELLANT PANEL
FOR THE NINTH CIRCUIT**

In re: TERRY LEE WIKE,

Debtor,

TERRY LEE WIKE, dba WIKE LAW GROUP

Appellant,

v.

STATE BAR OF NEVADA

Appellee.

APPELLANT, TERRY LEE WIKE'S, OPENING BRIEF

Appeal from the U.S. Bankruptcy Court, District of Nevada - Las Vegas
BK-21-11982-mkn, Appeal from the Hon. Mike K. Nakagawa, Chapter 7
Underlying Bankr. No.: BK-21-11982-mkn

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APPELLANT'S OPENING BRIEF

Appellant, TERRY LEE WIKE (“Wike” or “Appellant”) hereby submits his Opening Brief:

I. STATEMENT OF JURISDICTION

This appeal arises from the entry of a final judgment of the bankruptcy court, holding that the costs incurred by the State Bar of Nevada (“State Bar”) for its disciplinary proceedings against Wike are non-dischargeable under 11 U.S.C. § 523(a)(7), and thus, the State Bar did not violate 11 U.S.C. § 525(a) by conditioning Wike’s full reinstatement to the practice of law upon payment of the costs. [1-ER-1-5].

On October 30, 2023, Wike timely appealed from the final judgment entered on October 18, 2023. [21-11982]; [4-ER-323-24].

The Bankruptcy Court had jurisdiction under 28 U.S.C. § 1334 and 28 U.S.C. § 157(b). The BAP has jurisdiction under 28 U.S.C. § 158(b).

II. STANDARD OF REVIEW

The decision of a bankruptcy court to declare a debt non-dischargeable is reviewed de novo. In *Scheer v. State Bar (In re Scheer)*, 819 F.3d 1206, 1209 (9th Cir. 2016) the court stated “[W]e review de novo a district court’s decision on

appeal from a bankruptcy court.”¹ Further, there are no factual issues in this matter. “Because a fundamental policy of the Bankruptcy Code is to afford debtors a fresh start, ‘exceptions to discharge should be strictly construed against an objecting creditor in favor of the debtor.’”² [2-ER-99]. Thus, as a matter of law, bankruptcy courts may not even defer the issue to state courts, but must take jurisdiction over any *potential* or *possible* claim involving 11 U.S.C. § 525(a).³ [2-ER-96].

III. STATEMENT OF THE ISSUES

A. Whether the Bankruptcy Court erred in finding that actual pecuniary costs incurred by the State Bar in its disciplinary proceedings against Wike were not discharged in the Order of Discharge pursuant to 11 U.S.C. § 523(a)(7). [1-ER-5].

B. Whether the Bankruptcy Court erred in finding that the holding in *In re Taggart*, 249 F.3d 987 (9th Cir. 2001), did not apply to the instant case, based upon the Ninth Circuit’s decisions in *In re Findley*, 593 F.3d 1048 (9th Cir. 2010), and *Kassas v. State Bar of California*, 49 F.4th 1158 (9th Cir. 2022). [1-ER-4].

¹ *Citing, Barrientos v. Wells Fargo Bank, N.A.*, 633 F.3d 1186, 1188 (9th Cir. 2011).

² *Scheer* 819 F.3d at 1209, *citing Snoke*, 978 F.2d at 1154.

C. Whether the Bankruptcy Court erred in finding that “rehabilitation and the protection of the public” without statutory support, serve as a basis to deny Wike the discharge of the costs of the disciplinary proceedings under § 523(a)(7). [1-ER-2].

D. Whether the Bankruptcy Court erred in finding that the State Bar did not violate the protection against discriminatory treatment under 11 U.S.C. § 525(a), by conditioning Wike’s full reinstatement to the practice of law upon the payment of a discharged debt. [1-ER-5].

E. Whether the Bankruptcy Court erred in denying injunctive relief to the Wike by enjoining the State Bar from conditioning Wike’s full reinstatement to the practice of law upon the payment of costs incurred by the State Bar Nevada in its disciplinary proceedings. [1-ER-5].

IV. STATEMENT OF THE FACTS AND CASE

On or about May 8, 2019, the State Bar held a disciplinary hearing against Wike for the mishandling of client funds. Based upon the facts presented to the the Hearing Panel it recommended that Wike receive a *public reprimand* with a two-year probation period. [1-ER-16-19]. The State Bar incurred costs for the disciplinary proceedings in the amount of \$14,991.34. [2-ER-43-44].

³ *In re Bradley*, 989 F.2d 802, 804 (5th Cir. 1993).

On or about May 28, 2020, the State Bar held a second disciplinary hearing against Wike for the commingling of client funds with his earned fees. Based upon the facts presented to the Hearing Panel it recommended Wike receive a six-month *stayed* suspension with a two-year probationary period. [1-ER-11-14]. The State Bar incurred costs for the second disciplinary proceedings in the amount of \$5,146.81. [2-ER-46-48]. Hence the total amount of actual pecuniary costs incurred by the State Bar is \$21,138.15.

Notably, at no time did Wike owe any money to clients or lienholders, nor did the State Bar charge him with owing any restitution or reimbursement to clients or lienholders. [1-ER-11-14]; [1-ER-16-19].

Subsequently, on April 19, 2021, Wike filed his Chapter 7 Bankruptcy Petition under case number 21-11982-mkn. [3-ER-231-322]. Wike listed the debt owed to the State Bar in his bankruptcy petition. [3-ER-288]. On April 20, 2021, the Bankruptcy Court gave notice to the State Bar in its Notice of Bankruptcy Case Filing. [2-ER-27-30]. On May 20, 2021, the Bankruptcy Trustee held the meeting of creditors. Without objection, the Order of Discharge was entered on July 20, 2021. [3-ER-229-230]. On July 20, 2021, the State Bar received notice of the discharge. [2-ER-36-39].

In the interim, on April 21, 2021, Wike filed his Petition for Reinstatement with the State Bar after serving out his suspension. [1-ER-6-10]. On May 28, 2021, the Reinstatement Panel and the State Bar unanimously found, by clear and convincing evidence, that Wike possessed the honesty and integrity to practice law pursuant to SCR 116. [1-ER-6-10]. During the hearing, Wike presented evidence that the costs of the disciplinary proceedings incurred by the State Bar were being discharged in Wike's bankruptcy petition. The State Bar then took the position that the outstanding costs were excepted from discharge in bankruptcy under 11 U.S.C. § 523(a)(7), by arguing the debt served as a fine, penalty, or forfeiture payable to a governmental agency. The Reinstatement Panel accepted the argument of the State Bar and conditioned Wike's full reinstatement upon the payment of the debt. [1-ER-6-10].

Upon review, the NSC affirmed Wike's conditional reinstatement. [1-ER-6-10]. However, the NSC rejected the reasoning of the State Bar that the payment of the costs of the disciplinary proceedings are intended to serve as a fine, penalty or forfeiture, but rather, the NSC held the debt is nondischargeable because it serves to rehabilitate Wike and to protect the public. *See Order of Conditional Reinstatement*, 2-4. [1-ER-7-9]. The decision of the NSC was premised upon the rationale in *Kelly v. Robinson*, 479 U.S. 36, 50,107 S. Ct. 353, 93 L.Ed.2d 216

(1986) and *Brookman v. State Bar*, 46 Cal. 3d. 1004 (1988). *Id.* [1-ER-6-10]; [2-ER-100-102]. On February 24, 2022, the NSC reinstated Wike to the practice of law, with the requirement that he pay the State Bar's costs of the disciplinary proceedings within 24 months. [1-ER-6-10].

On April 5, 2023, Wike filed his motion to reopen his Chapter 7 case, which was granted on May 5, 2023. [3-ER-169-228]; [3-ER-111-112]. On May 19, 2023, Wike filed his motion arguing that the debt had not been excepted from discharge § 523(a)(7), and that by requiring Wike to pay the discharged debt as a condition to his reinstatement, the State Bar was in violation of 11 U.S.C. § 525(a). [2-ER-94-110]. On June 12, 2023, the State Bar filed its Opposition to Wike's Motion, arguing that the debt was akin to a sanction to support rehabilitation and to protect the public. [2-ER-75-93]. Wike filed his Reply on June 20, 2023. [2-ER-65-74]. On October 18, 2023, the bankruptcy court issued its Order denying Wike's Motion. [1-ER-1-5]. Thus, on October 30, 2023, Wike filed his Notice of Appeal. [4-ER-323-324].

V. SUMMARY OF THE ARGUMENT

The underlying issues in contention are: (1) whether Wike's debt for the costs incurred by the State Bar in its disciplinary proceedings against Wike were

excepted from discharge under 11 U.S.C. § 523(a)(7); and (2) whether the State Bar violated 11 U.S.C. § 525(a) when it conditioned Wike's reinstatement to the practice of law upon the payment of the [discharged] debt. [2-ER-99]

The Order of the bankruptcy court held that Wike's debt is non-dischargeable as the repayment of the debt was transformed into a rehabilitation process and to protect the public. [1-ER-1-5]. The bankruptcy court reasoned that *Kassas v. State Bar of California*, 49 F.4th 1158 (9th Cir. 2022), supports the position that rehabilitation and the protection of the public serve as an exception to discharge under § 523(a)(7). However, Wike believes *Kassas* supports the exact opposite result, and does so by clarifying the reasoning of the Ninth Circuit in: *In re Taggart*, 249 F.3d 987, 994, (9th Cir. 2001); *In re Findley*, 593 F.3d 1048 (9th Cir. 2010); *In re Scheer*, 819 F.3d 1206 (9th Cir. 2016); and *Albert-Sheridan*, 960 F.3d 1188, 1194 (2020).

In *Albert-Sheridan* and in *Kassas*, the Ninth Circuit rejected the position that rehabilitation and the protection of the public serve as an exception to discharge under § 523(a)(7). 960 F.3d at 1195-96; 49 F.4th at 1166. [2-ER-103]. Both courts found that, when the debt owed to the governmental unit constitutes "compensation for actual pecuniary loss," the debt is dischargeable. *Id.* In doing so, both courts also rejected the transformation of the debts into rehabilitation and

to the protection of the public under the rationale in *Kelly* and *Brookman*, to avoid the discharge of the debt. 960 F.3d at 1194; 49 F.4th at 1165. [2-ER-103].

The *Albert-Sheridan*, the court rejected the argument under *Kelly* that “sanctions” may be transformed into a process of rehabilitation to avoid discharge. 960 F.3d at 1194. [2-ER-99]. In *Kassas*, the court rejected the argument that “reimbursement” to the state bar’s Client Security Fund (“CSF”) was nondischargeable because it serves as rehabilitation and to protect to the public. 49 F.4th at 1166. Thus, in both *Albert-Sheridan* and *Kassas*, the courts held, that despite the efforts to transform the debts into the § 523(a)(7) exceptions to discharge, the debts were dischargeable as they constituted “compensation of actual pecuniary loss.”

The *Albert-Sheridan* and *Kassas* courts simply reason that under the plain text of § 523(a)(7), the debt is excepted from discharge only if it is a penalty “**and is not** compensation for actual pecuniary loss.” *Albert-Sheridan*, 960 F.3d at 1194; *see also Kassas*, 49 F.4th at 64. In contrast, the NSC believed it could simply claim that the debt serves to rehabilitate and to protect the public so that it could avoid its discharge under § 523(a)(7).⁴ Thus, even if the debt is a penalty or

⁴The bankruptcy court opines that the “Rooker-Feldman” doctrine would bar an attempt to challenge the holding of the NSC in federal court, *citing Cogan v. Trabucco*, 2022 WL 17081241, at *3-4 (D. Nev. Nov. 18, 2022). But the holding

serves as rehabilitation or some other laudable purpose, the debt cannot be simply be transformed under the plain text of § 523(a)(7) to avoid its discharge under § 523(a)(7).

To clarify the point that the plain text of a statute may not simply be transformed to avoid discharge of the debt, the *Albert-Sheridan* court looked to *In re Scheer*, 819 F.3d at 1211, which held that an *arbitration award* in favor of Scheer’s former client was ‘not a fine or penalty’ but ‘purely compensatory’ and not subject to exemption under § 523(a)(7).” *Id.* at 1164. [2-ER-105]. The *Albert-Sheridan* court signified the importance of applying the actual statutory text; “applying the plain language of the statutes promotes consistency and lessens confusion among the courts and practitioners in determining whether a debt is excepted from discharge under § 523(a)(7).” 960 F.3d at 1195. [2-ER-103]. Thus, the Ninth Circuit continues to apply the plain text of statutes by holding that “compensation for actual pecuniary loss” may not arbitrarily be transformed into a fine, penalty or forfeiture to avoid discharge, as doing so would undermine the

of the NSC, is that payment of the debt serves as “rehabilitation, deter misconduct and to protect the public.” This holding is not being challenged. What is being challenged, is whether under the Code, such goals serve as a fine, penalty or forfeiture under § 523(a)(7). The NSC did not challenge the fact that Wike’s debt constitutes compensation for actual pecuniary loss. Thus, under the Code and the reasoning in *Albert-Sheridan* and *Kassas*, regardless of whether it serves as a fine, penalty, forfeiture, rehabilitation, or to protect the public, it is dischargeable as

strict scrutiny analysis afforded the debtor under the plain text of the Code.

The bankruptcy court disagreed with Wike's argument that the discharge of the debt is supported under *In re Taggart*, 249 F.3d 987, 994, (9th Cir. 2001). The bankruptcy court stated the *Taggart* may have been overturned by the decision in *In re Findley*, 593 F.3d 1048 (9th Cir. 2010). [1-ER-4]. However, *In re Taggart* was decided based upon the 2001 version of California's disciplinary statute wherein the debt was not a fine or a penalty. [2-ER-103]. In contrast, the *In re Findley* was decided based upon the [2003] amendment to the state's disciplinary statute expressly defining the debt a "penalty." [2-ER-104]. Because Nevada's disciplinary statute does not define the costs as a penalty, *Taggart* is compelling authority based upon the facts in this case. Moreover, the Ninth Circuit actually distinguished its decision in *Taggart* in from its holdings in *In re Findley*, *In re Scheer*, *Albert-Sheridan* and in *Kassas*, and wherein none of these decisions indicate that *Taggart* has been overturned by *Findley*.

In the instant case, Wike's debt owed to the State Bar is purely compensation for actual pecuniary loss. The debt results from the costs the State Bar incurred in its disciplinary proceedings against Wike. Under the plain text of

actual pecuniary loss.

NSC Rule (“SCR”) 120, the debt does not serve as a penalty or fine.⁵ The NSC held as much in this case and in *State Bar of Nevada v. Claiborne*, 756 P.2d 464, 527 (Nev.1988)(disciplinary costs are not intended to be a penalty upon the errant attorney). [2-ER-102]. While the State Bar argues that the debt may be transformed to serve as a sanction to support rehabilitation and to protect the public, such transformation defies the plain text of the statute and § 523(a)(7). [2-ER-85]. The State Bar is unable to identify any debt beyond criminal restitution in *Kelly*, where the Ninth Circuit supports the transformation of the debt beyond the plain text of the statute. Thus, under the plain text of § 523(a)(7), Wike’s debt for the State Bar’s actual pecuniary loss is dischargeable.

Moreover, by conditioning Wike’s full reinstatement upon the arbitrary transformation of his debt, Wike has been denied the protections of the Code and the fresh start he is entitled to. Hence Wike believes; (1) the debt has been discharged under § 523(a)(7); (2) he is entitled to full reinstatement under 11 U.S.C. § 525(a); and (3) the State Bar should be enjoined from enforcing the repayment under 11 U.S.C. § 524(a)(2). [2-ER-106].

⁵See Order of Conditional Reinstatement (“the recommended condition of reinstatement does not run afoul of 11 USC § 525 because its purpose is not to penalize Wike for having obtained a discharge of his debt”). See Order of Conditional Reinstatement, p.3. [1-ER-8].

VI. ARGUMENT

As stated, the primary issue in this case is whether Wike's debt to the State Bar for costs incurred in the disciplinary proceedings is excepted from discharge under 11 U.S.C. § 523(a)(7). A debtor is entitled to a discharge of all pre-petition debts except for nineteen categories of debts set forth in the Code. 11 U.S.C. §§ 727(b), 523(a). "Because a fundamental policy of the Bankruptcy Code is to afford debtors a fresh start, 'exceptions to discharge should be *strictly* construed against an objecting creditor and in favor of the debtor.'"⁶ [2-ER-99, 107]. Hence resolution of whether the debt is dischargeable is determinative as to whether the State Bar is in violation of § 525(a) by conditioning Wike reinstatement upon the payment of the discharged debt.

The exceptions to discharge under § 523(a)(7) expressly require three elements for a debt to be non-dischargeable. The debt must: (1) be a fine, penalty, or forfeiture; (2) be payable to and for the benefit of a governmental unit; **and** (3) not constitute compensation for actual pecuniary costs. *In re Albert-Sheridan*, 960 F.3d at 1193; *Kassas*, 49 F.4th at 1163-64. [2-ER-99]. In this case, elements 1 and 3 cannot be satisfied. That is, under Nevada Law the NSC held that Wike's debt is not a fine, penalty or forfeiture. *See* Order of Conditional Reinstatement, p. 3. [1-

⁶*Scheer v. State Bar*, 819 F.3d at 1209, *citing Snoke*, 978 F.2d at 1154.

ER-8]; [2-ER-100]. Wike's debt is for the actual costs incurred by the State Bar in its disciplinary proceedings against Wike, which in turn, constitutes compensation for actual pecuniary loss. Thus, in applying the holding of *Albert-Sheridan*, Wike's debt is dischargeable, as it is compensation for actual pecuniary loss under § 523(a)(7).

Under 11 U.S.C. § 525(a) a governmental unit is prohibited from denying, revoking, suspending or refusing to renew a debtor's license solely because the debtor filed for bankruptcy or failed to pay a dischargeable debt. *In re Albert-Sheridan*, 960 F.3d at 1193. [2-ER-99]. By conditioning Wike's full reinstatement to the practice of law upon the payment of the discharged debt, the State Bar is in violation 11 U.S.C. § 525(a). [2-ER-99]. The bankruptcy court erred in finding that Wike's debt was nondischargeable because it may serve to rehabilitate and to protect the public. [1-ER-4-5]. As a result of bankruptcy court's error, it did not find a violation of § 525(a). However, because the debt constitutes compensation for actual pecuniary loss, it remains dischargeable even if it serves some penal or rehabilitative purpose, and thus, the State Bar is in violation of § 525(a).

A. In Nevada the Plain Text of SCR 120 does Not Provide that the Costs of the Disciplinary Proceedings are either a Fine, Penalty or Forfeiture.

In Nevada, the plain text of Nevada Supreme Court Rule 120 (“SCR”) does not provide that the costs imposed upon the disciplined attorney serve as a fine, penalty or forfeiture. [2-ER-101-102]. Expressly, SCR 120 provides:

1. An attorney subjected to discipline or seeking reinstatement under these rules shall be assessed the costs, in full or in part, of the proceeding, including, but not limited to, reporter’s fees, investigation fees, witness expenses, service costs, publication costs, and any other *fees or costs deemed reasonable by the panel and allocable to the proceeding.*
2. If, for any reason, bar counsel is disqualified or has a conflict of interest, the board of governors shall appoint an attorney, ad hoc, to act in the place of bar counsel.
3. In addition to any costs assessed as provided for herein, an attorney subjected to discipline shall be *assessed administrative costs allocable to the proceeding*, but in any case, shall not be less than the following amounts:

Reprimand:	\$1,500
Suspension:	\$2,500
Disbarment:	\$3,000

4. A final assessment for costs and fees shall have the force and effect of a civil judgment against the disciplined attorney and shall be subject to all legally available post-judgment enforcement remedies and procedure.

5. In addition, in any matter where any attorney is required to apply for reinstatement, administrative costs shall be assessed in any amount not less than \$2,500, and the attorney shall also be required to pay all costs previously assessed but not yet paid prior to the processing of the application for reinstatement.⁷

See also Claiborne, 756 P.2d at 527 (payment of the costs is not to penalize the errant attorney). [2-ER-101-102]. The plain text of SCR 120 does not include language that the payment of the costs serves as a fine, penalty, forfeiture, rehabilitation, or to protect the public. [1-ER-8]; [2-ER-100]. Moreover, the NSC has also clarified that in the instant case, the “payment of the costs was not to penalize Wike [Debtor] for having obtained a discharge of his debt.”⁸ [2-ER-102]. Thus, neither the State Bar nor the bankruptcy court claim that Wike’s debt under SCR 120 is expressly defined as a fine or as a penalty. [2-ER-83].

Instead, the State Bar argues herein that Wike’s debt is a *sanction* which is *analogous* to a fine and should not be discharged in bankruptcy. *See Opposition to Debtor’s Motion for Sanctions*, 10-13. [2-ER-84-87]. The State Bar also

⁷ Notably, the imposition of costs under SCR 120 are expressly mandatory as they “**shall be assessed.**”

argues that the fees and costs are the equivalent of “‘fines’ or ‘penalties’ within the *meaning* of § 523(a)(7).” Opp. 12:12-13. The bankruptcy court held that debt served some rehabilitative purpose and to protect the public.⁹ *See* Order, 4:23-5:2. [1-ER-5]. Put simply, the NSC, the State Bar and the bankruptcy court ignored the plain language of SCR 120 and § 523(a)(7), to conclude that the debt is nondischargeable because the debt was transformed under the rationale expressed in *Kelly* and *Brookman*.

The fact is, the Ninth Circuit consistently applies the plain text of the state statute and § 523(a)(7), to determine whether a debt is excepted from discharge. *In re Taggart*, 249 F.3d at 994. [2-ER-102]. The Ninth Circuit routinely rejects attempts to transform debts under *Kelly* to avoid the discharge of the debt, even when the *meaning* of § 523(a)(7) is argued to include *sanctions*, [*analogous fines*], or *rehabilitation*. *Albert-Sheridan*, 960 F.3d at 1195; *see also Kassas*, 49 F.4th at 1166. The Ninth Circuit also makes clear that it need not decide if a debt is a penalty or a fine, but rather, it simply needs to determine if the debt is “compensation for actual pecuniary loss” and if it is, the debt is dischargeable.

⁸*See* Order of Conditional Reinstatement, p.3.

⁹The State Bar has not offered any analysis as to how payment of the debt would serve to further rehabilitate Wike or to protect the public after he has already been conditionally reinstated, when the NSC and the State Bar already found that Wike possesses the honesty and integrity to be reinstated to the practice of law.

Albert-Sheridan, 960 F.3d at 1194.¹⁰ Thus, as the NSC held, Wike’s debt is neither a penalty nor a fine under Nevada Law, and even if it was, the plain text of the Code still allows for the discharge of the debt as it constitutes “compensation for actual pecuniary loss.”

B. Even if the Payment of Wike’s Debt Serves to Rehabilitate or to Protect the Public, the Debt Remains Dischargeable as it is Compensation for Actual Pecuniary Loss.

The bankruptcy court erred when it held that costs of the disciplinary proceedings against Wike were excepted from discharge under § 523(a)(7) because payment of the debt served some rehabilitative purpose. *See* Order, 4:23-5:2. [1-ER-5]. In reaching this decision, the bankruptcy court misunderstood the holding in *Kassas*. *Kassas* actually held that even if the debt served some rehabilitative purpose and served to protect the public, it remains dischargeable because state bar cannot escape the fact that it is compensation for actual pecuniary loss under § 523(a)(7). 49 F.4th at 1166. That is, *Kassas* actually stands contrary to the decision of the bankruptcy court. *Id.*

In *Kassas*, the attorney-turned-debtor (*Kassas*) was ordered to pay restitution to former clients, as rehabilitation and to protect the public. *Id.* at 1162.

¹⁰ *See In re Scheer*, 819 F.3d at 1211; *See also, Kassas*, 49 F.4th at 1164.

The *Kassas* court held, that the restitution payments were not excepted from discharge as they were in fact “compensation for actual pecuniary loss.” In *Kassas*, the state bar used its CSF to reimburse the victims of the errant attorney. *Id.* at 1162. The state bar argued that the debt was excepted from discharge as it serves a penal and rehabilitative purpose. *Id.* Hence the *Kassas* Court considered these arguments then turned to the plain text of the statutes involved.

In reviewing the plain text of the CSF Rules, the *Kassas* court found that the reimbursement to the fund served as compensation for actual pecuniary loss. *Id.* at 1161-62. The court then applied the plain text of § 523(a)(7) finding: “an individual debtor [is not discharged] from any debt – to the extent such debt is for a fine, penalty, or forfeiture, payable to and for the benefit of a governmental unit, **and is not** compensation for actual pecuniary loss ...” 49 F.4th at 1163. As a result of the plain text, the court then reasoned that it need not determine whether the restitution was a fine, penalty or forfeiture as it is compensation for actual pecuniary loss. *Id.* at 1163-64.

The court also reasoned that it need not consider whether the reimbursement served some penal or rehabilitative purpose, because the debt constituted compensation for actual pecuniary loss. *Id.* at 1166. Thus, *Kassas* followed the reasoning expressed in *Albert-Sheridan* that the plain language of § 523(a)(7)

expressly provides, that for the debt to be excepted from discharge, the debt must “not [be] compensation for actual pecuniary loss.” *Id.* at 1164. [2-ER-103].

That is, two components must be present to determine whether a debt owed to a governmental unit is excepted from discharge under § 523(a)(7). First, the debt must be defined as a fine, penalty or forfeiture. Second, the debt must not be compensation for actual pecuniary loss. Both the first and second components must exist for the debt to be excepted from discharge, and to survive the strict scrutiny analysis that a debtor is afforded. Thus, the *Albert-Sheridan* and the *Kassas* courts and make clear, that as long as the debt is compensation of actual pecuniary loss, there is no reason to determine if the debt serves as a fine, penalty or forfeiture § 523(a)(7), the debt remains dischargeable.

Furthermore, *Kassas* also follows the reasoning in *Albert-Sheridan* wherein the Ninth Circuit reversed the BAP, when it held that discovery sanctions may be transformed into a punitive sanction under *Kelly*. 960 F.3d at 1195. [2-ER-103]. That is, the court reversed the BAP in light of the plain text § 523(a)(7). *Id.* at 1196. The *Albert-Sheridan* court, among other reasons, found that the debt was dischargeable as it constitutes “compensation for actual pecuniary cost” under the Code. *Id.* at 1194. [2-ER-103]. In doing so, the *Albert-Sheridan* court recognized that the state bar would be in violation of 11 U.S.C. § 525(a) if it had conditioned

reinstatement upon the payment of a *discharged* debt.¹¹

In the instant case, Wike's debt to the State Bar is based upon the costs it incurred in its disciplinary proceedings against Wike. The State Bar's Memoranda of Costs identify the costs the State Bar incurred as its actual pecuniary loss. [2-ER-43-44]; [2-ER-46-48]. The State Bar does not dispute that the amount of Wike's debt is based upon the actual costs that *shall* be assessed under SCR 120 for its disciplinary proceedings against Wike. *See* SCR 120. Notably, the debt under SCR is not a measure of the attorney's misconduct. *Richmond v. N.H. Supreme Court Comm. on Prof'l Conduct*, 542 F.3d 913 (1st Cir. 2008). *See* Reply, 2:11-22 – 3:16. [2-ER-2-3]. Instead, the State Bar argues that the debt is a sanction analogous to a fine, which serves to rehabilitate and to protect the public. *Opp.*, pp. 10-13. [2-ER-75-93]. However, even if the State Bar is correct, its argument does not overcome the fact that payment of the debt is compensation for actual pecuniary loss, and thus, is dischargeable under § 523(a)(7).

According to the holdings in *Albert-Sheridan* or *Kassas*, it makes no difference if payment of Wike's debt serves as a penalty, it still remains dischargeable as it is compensation for actual pecuniary loss. That is, under §

¹¹960 F.3d at 1196 (holding that the state bar did not violate 11 U.S.C. § 525(a) by conditioning reinstatement upon the payment of the penalty under California's disciplinary statute because it was nondischargeable under *Findley*).

523(a)(7), for the penalty to be excepted from discharge, it must not also be compensation for actual pecuniary loss. *See Albert-Sheridan*, 960 F.3d at 1194; *see also Kassas*, 49 F.4th at 64. Thus the fact that Wike's debt constitutes compensation for actual pecuniary loss, means that the debt is not exempt from discharge under § 523(a)(7).

C. The Bankruptcy Court Erred in Not Applying the Holding in *In re Taggart* and the Reasoning in *Albert-Sheridan* to the Facts of the Instant Case.

The bankruptcy court erred in not applying the holding in *In re Taggart* and the reasoning in *Albert-Sheridan* to the fact of this case. Instead, the bankruptcy court held that there was no violation of § 525(a) because the debt was nondischargeable as it served as rehabilitation and protection of the public. [1-ER-4-5]. The bankruptcy court reasoned that *Taggart* was superseded by *Kassas* and therefore the costs of the disciplinary proceedings were not discharged. [1-ER-4, n.4]. The bankruptcy court's conclusion that the debt was nondischargeable is based upon its [mis]understanding of the holding in *In re Findley*, which was premised upon California's amended disciplinary statute. 593 F.3d at 1054-55; *see also Kassas*, 49 F.4th at 1166. [1-ER-4, n.5]. However, *Findley* is

inapplicable because the Nevada's disciplinary statute is separate and distinct from California's disciplinary statute which led to the holding in *Findley*.

The *In re Taggart* court, held that under 2001 version of California's disciplinary statute the attorney's debt for the costs of the disciplinary proceedings was dischargeable as it was not a fine or a penalty. [2-ER-103]. In contrast, the *In re Findley* court held that due to the subsequent [2003] amendment to the state's disciplinary statute expressly defining the debt a "penalty," the debt was excepted from discharge under § 523(a)(7). [2-ER-104]. After which, the costs of disciplinary proceedings in California are no longer excepted from discharge under § 523(a)(7). Hence until Nevada changes the text of its disciplinary statute, *In re Taggart* is compelling authority based upon the facts in this case.

As in the instant case, both *In re Taggart* and *In re Findley* involved the issue of whether debts owed to the State Bar of California for costs of their disciplinary proceedings were discharged under § 523(a)(7). *See Taggart*, 249 F.3d at 989-90; *see also Findley*, 593 F.3d at 1049-50. [2-ER-100, 103-104]. *Taggart* was decided in 2001 when the state's disciplinary statute did not provide that such debts were penalties. [2-ER-105]. In contrast, *Findley* was decided after California amended its disciplinary statute in response to *In re Taggart*, whereafter, such costs were expressly defined as penalties. 593 F.3d at 1052. [2-

ER-104].

Specifically, the *Findley* court looked to subsection (e) of the 2003 Cal. Bus. & Prof. Code § 6086.10, which provides:

In addition to other monetary sanctions as may be ordered by the Supreme Court pursuant to Section 6086.13, **costs imposed pursuant to this section are penalties**, payable to and for the benefit of the State Bar of California, a public corporation created pursuant to Article VI of the California Constitution, **to promote rehabilitation and to protect the public**. This subdivision is declaratory of existing law.

(emphasis added) *Id.* at 1052. [2-ER-104]. Not only did *Findley* distinguish its ruling from *Taggart*, but the *Kassas* court also explained that it was bound by the decision of the 3-judge panel in *Findley*. [2-ER-104]. Notably, the Ninth Circuit has never overruled *In re Taggart*, but has always taken the opportunity to clarify that the holding was based upon the plain text of California's disciplinary statute. [2-ER-104].

The Ninth Circuit has not had the opportunity to address Nevada's disciplinary statute. Unlike California's statute, Nevada's statute is similar to the statute applied in *Taggart*, which does not provide that the costs of the disciplinary proceedings are penalties. [2-ER-100-102]. In fact, under SCR 120(4), the debt is akin to a civil judgment with all available remedies, which

includes the right to file for bankruptcy protection to afford the debtor of a fresh start under the Code. [2-ER-102]. Hence *Findley* is not controlling authority in determining whether disciplinary costs in Nevada are dischargeable.

In the instant case, Wike's debt to the State Bar for the costs of the disciplinary proceedings is, indisputably, compensation for actual pecuniary loss. The debt is not a penalty under the Nevada law. By definition, the debt is not excepted from discharge under the plain text of § 523(a)(7). The State Bar seeks to avoid the discharge of the debt by any means possible, even if it means transforming the debt under *Kelly* and *Brookman*. [2-ER-79]. Such arbitrary transformations of such debts, undermine the plain text of § 523(a)(7), and the rule that "exceptions to discharge are to be strictly construed in favor of the debtor."¹² Thus, the bankruptcy court's holding, that the debt is non-dischargeable, because it serves a rehabilitative purpose and is for the protection of the public, simply rejects the plain text of the Code and the precedence of the Ninth Circuit.

¹²*Scheer*, 819 F.3d at 1209, *citing Snoke*, 978 F.2d at 1154.

D. The Bankruptcy Court Erred in Finding that “Rehabilitation, Deter Misconduct and Protect the Public” Serve as a Basis to Deny the Discharge of Wike’s Debt.

The bankruptcy court held that Wike’s debt is exempt from discharge under Section 523(a)(7), because it serves “to promote an attorney’s rehabilitation, deter misconduct, and protect the public.”¹³ In reaching its decision, the bankruptcy court relied the explanation of the NSC, “the primary purposes of attorney discipline are to promote an attorney’s rehabilitation, deter misconduct, and protect the public...” However, in reaching its conclusion the NSC relied upon the reasoning in *Kelly* and *Brookman*, which has been criticized when the courts attempt to expand the reach of *Kelly* beyond criminal restitution.

As argued by Wike and now clarified by the *Kassas* court, *Brookman* and *Kelly* are distinguished by the facts and law of the instant case. The facts in *Brookman*, and *Kassas* both involved debts to the CSF where the state bar sought restitution or reimbursement. In both *Brookman* and *Kassas*, the California Supreme Court ordered the disciplined attorneys to repay the CSF as a form of restitution, rehabilitation and for the protection of the public. *Brookman*, 760 P.2d at 1025; *Kassas*, 49 F.4th at 1160, and 1166. But that is where the similarities

¹³See Order, 5:1-2.

end. Brookman chose not to appeal to the Ninth Circuit, while Kassas exercised his right to appeal.

Upon review, the three-judge panel in *Kassas* looked to the express language of the CSF statutes, which were silent on whether the debt was a penalty. 49 F.4th at 1161-62. The *Kassas* court then considered the state bar's argument that the repayment served as rehabilitation and the protection of the public. *Id.* at 1162-63. *Kassas* also rejected the opinion of the Supreme Court of California in *Brookman*, which held that the repayment to the state bar's CSF is nondischargeable under § 523(a)(7) because it serves some rehabilitative purpose.

In the end, *Kassas*, followed *Albert-Sheridan*, by holding that even if the debt served some penal or rehabilitative purpose, the debt remains dischargeable as it was compensation for actual pecuniary loss. *Id.* That is, both *Albert-Sheridan* and *Kassas* rejected the expansion of *Kelly* to discharge other debts beyond those for criminal restitution. *Albert-Sheridan*, 960 F.3d at 1193; *Kassas*, 49 F.4th at 1165-66. Hence *Brookman* and *Kelly* are unlike the facts of the instant case, as there has never been a claim against Wike for restitution or reimbursement.

Taggart, *Brookman*, *Albert-Sheridan* and *Kassas*, all demonstrate attempts by the courts to transform debts of the disciplined attorney into penal and

rehabilitative exceptions to discharge under the *Kelly* rationale. However, in each case, the Ninth Circuit has rejected such transformations.

VII. CONCLUSION

Congress expressly provides us with 19 exceptions to the dischargeability of debts. The Supreme Court in *Kelly* gave us one more. Now, the State Bar asks the court for another one. The State Bar is asking that anything owed to or payable to the State Bar is nondischargeable under § 523(a)(7), because it may serve to rehabilitate and to protect the public. Absent in such arguments, is the application of the plain text of the Code or other statutory support showing why the debt falls within the exceptions to discharge under § 523(a)(7). Arbitrary transformation of such debts defies the concept of strict scrutiny. Because a fundamental policy of the Bankruptcy Code is to afford debtors a fresh start, ‘exceptions to discharge should be *strictly* construed against an objecting creditor and in favor of the debtor.’”¹⁴ As a result, Wike’s debt should be found dischargeable.

Dated January 12, 2024.

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¹⁴ *Scheer* 819 F.3d at 1209, *citing Snoke*, 978 F.2d at 1154.

CERTIFICATE OF INTERESTED PARTIES (BAP Rule 8015(a)-1(a))
BAP No.: NV-23-1179, Terry Lee Wike

The undersigned certifies that the following parties have an interest in the outcome of this appeal. These representations are made to enable judges of the Panel to evaluate possible disqualification or recusal:

Dan Hooge, Counsel for the State Bar of Nevada.

Signed: */s/Terry L. Wike*

Dated: January 12, 2024

CERTIFICATE OF RELATED CASES (BAP Rule 8015(a)-1-(b))
BAP No.: NV-23-1179, Terry Lee Wike

The undersigned certifies that there are no known related cases.

Signed: */s/Terry L. Wike*

Dated: January 12, 2024

CERTIFICATE OF COMPLIANCE (FRBP 8015(a)(7))

The foregoing document complies with the type-volume limitation of FRBP 8015(a)-1(b) and FRAP 32(a)(7)(B) because this Motion is proportionally spaced, has typeface of 14 points, using Times New Roman font and contains 6500 words as counted by Microsoft Word, excluding the portions exempted by FRAP 32(a)(7)(B), if applicable.

Signed: */s/Terry L. Wike*

Dated: January 12, 2024

CERTIFICATE OF SERVICE

I hereby certify that on January 12, 2024, I electronically filed the foregoing document with the Clerk of Court for the Bankruptcy Appellate Panel for the Ninth Circuit by using the CM/ECF system.

I further certify that all parties of record to this appeal either are registered CM/ECF users, or have registered for electronic notice, or have consented in writing to electronic service, and that service will be accomplished through the CM/ECF system.

Dated January 12, 2024.

Submitted by:

/s/ Terry L. Wike