UNITED STATES BANKRUPTCY COURT
DISTRICT OF RHODE ISLAND

In re: Marsha S. Hang Debtor	BK No. 17-11567 Chapter 7
Robert W. Bernier Plaintiff v. Marsha S. Hang Defendant	A.P. No. 18-01028

DECISION AND ORDER ON MOTION TO DISMISS

Creditor Robert Bernier commenced this adversary proceeding seeking the denial of debtor Marsha Hang's discharge under Bankruptcy Code § 727(a)(3) and (4)[1] based on her alleged misconduct in or in connection with her bankruptcy case. As it turns out, Ms. Hang is ineligible for a discharge under the temporal discharge bar of § 727(a)(8) because she received a discharge in a prior bankruptcy case filed within eight years of the filing of her present case. She moves to dismiss the complaint for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1), made applicable to this proceeding by Federal Rule of Bankruptcy Procedure 7012(b). The motion raises the issues of Mr. Bernier's Article III standing, the ripeness of his claims for judicial review, and whether Ms. Hang's ineligibility for a discharge under § 727(a)(8) moots Mr. Bernier's § 727(a)(3) and (4) claims. Mr. Bernier objects to the motion, citing the immediate adverse impact an order dismissing the complaint would have on his rights as a creditor and his ability to assert those rights under §§ 727(a)(3) and (4) and 523(a)(10).

[1] Unless otherwise indicated, the terms "Bankruptcy Code," "Chapter," "section" and "§" refer to Title 11 of the United States Code, 11 U.S.C. §§ 101, *et seq*. as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 37. References to the "Federal Rules" or "Rules" shall mean the Federal Rules of Civil Procedure.

The use of the temporal discharge bar of § 727(a)(8) as a shield against denial of discharge under § 727(a)(2) through (7), which relate to a debtor's misconduct in or in connection with a case, presents an issue of first impression. At first blush, Ms. Hang's position appears deceptively straightforward and appealing. Why waste judicial time and resources adjudicating such claims if the debtor is ineligible for a discharge under § 727(a)(8)? Upon a more in-depth review, however, the flaws in her arguments become apparent; they ignore the important distinctions between § 727(a)'s subsections, their underlying legislative goals, and the significance of the interplay between §§ 523(a)(10) and 727(a)(2) through (7). Accordingly, the motion to dismiss must be denied.

I. Jurisdiction

The Court has jurisdiction over this matter under 28 U.S.C. §§ 1334 and 157(b), and Rule 109 of the Local Rules of the United States District Court for the District of Rhode Island. This is a core proceeding under 28 U.S.C. § 157(b)(2)(J).

II. Background

Although required to do so, Ms. Hang did not disclose on her bankruptcy petition that she previously filed a chapter 7 bankruptcy case in the United States Bankruptcy Court for the Middle District of Florida on June 6, 2010, and received a discharge on October 7, 2010. *See* Bk. No. 10-13349-KRM. Some seven years later, on September 8, 2017, she filed the present chapter 7 case in this Court. Ms. Hang readily agrees that § 727(a)(8)'s eight-year bar renders her ineligible for a discharge in this present case. In fact, her discharge ineligibility is the foundation of her dismissal arguments.

In support of his § 727(a)(3) claim, Mr. Bernier alleges that Ms. Hang unjustifiably failed to maintain business records for the cleaning business she operated for at least five years before filing this case, a business which was her primary source of income during that period. *See* Plaintiff's

Complaint to Deny Discharge ("Complaint," Doc. #1). To support his § 727(a)(4) claim, Mr. Bernier alleges that Ms. Hang knowingly engaged in fraudulent behavior in connection with this case by omitting, misrepresenting, or failing to accurately disclose on her bankruptcy petition, schedules, and statement of financial affairs material information about her pre-bankruptcy financial condition, the value of her assets and liabilities, her prior filing history, past and present employment and income, property interests, bank accounts, and pre-petition property transfers or sales. Notably, Ms. Hang stated under oath at the initial § 341 meeting of creditors that she had read each page of these documents before they were filed and that they contained accurate and true information.[2]

III. Positions of the Parties

A. Ms. Hang's Motion

Seeking dismissal under Rule 12(b)(1), Ms. Hang asserts that: (i) Mr. Bernier lacks standing because there is no particularized injury that is actual or imminent, (ii) her ineligibility for a discharge under § 727(a)(8) precludes the Court from affording him meaningful relief and renders this proceeding moot, (iii) the controversy is not ripe because any alleged harm is merely prospective, and (iv) Mr. Bernier will not suffer a hardship if review is denied because his request for relief is moot. *See* Defendant's Motion to Dismiss Complaint to Deny Discharge ("Motion," Doc. #7). At their core, her arguments are that Mr. Bernier's claims fail to present a justiciable "case or controversy," thereby divesting the Court of subject matter jurisdiction over this adversary proceeding.[3]

[2] The § 341 meeting was continued several times to enable the chapter 7 trustee to conduct further examinations of Ms. Hang about her assets and financial affairs.

[3] Ms. Hang also moved to dismiss the complaint under Rule 12(b)(6). At the hearing on the motion, she clarified that the grounds she relies upon for dismissal under this rule are the same as those for dismissal under Rule 12(b)(1). Those grounds are properly framed and analyzed in the context of a 12(b)(1) challenge. Article III's case or controversy requirement and the limitations it places on federal courts' subject matter jurisdiction embody the doctrines of standing,

B. Mr. Bernier's Objection

Defending against the motion, Mr. Bernier counters that Ms. Hang erroneously conflates the temporal discharge bar under § 727(a)(8) with the significantly different grounds for denial of a discharge under § 727(a)(3) and (4). *See* Plaintiff's Objection to Motion to Dismiss ("Objection," Doc. #8). He maintains that the Court has jurisdiction to hear his claims because of the "critical distinction" between temporary ineligibility for discharge for an objective time period and the permanency of the discharge bar effectuated by § 523(a)(10) where discharge has been denied under § 727(a)(2) through (7). Unlike the time limitations imposed by § 727(a)(8), he emphasizes, § 523(a)(10) severely sanctions a debtor for misconduct in or in connection with a particular case that undermines the integrity of the bankruptcy system. This distinction, Mr. Bernier contends, gives rise to a concrete injury for purposes of standing, which ripens his adversary proceeding for adjudication and provides the basis for meaningful relief.

IV. Dismissal Motions Under Rule 12(b)(1)

A motion to dismiss under Rule 12(b)(1) may be brought by (i) accepting "the plaintiff's version of jurisdictionally-significant facts" while challenging their sufficiency to establish subject matter jurisdiction, or (ii) "controverting the accuracy" of those facts and providing "materials of evidentiary quality in support of that position." *Resurgent Capital Servs., L.P. v. Harrington (In re Cushman)*, Adv. Proc. No. 16-1017, 2017 WL 818254, at *1 (Bankr. D. Me. Mar. 1, 2017) (quoting

ripeness, and mootness. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006). "The proper vehicle for challenging a court's subject-matter jurisdiction is Federal Rule of Civil Procedure 12(b)(1)." *Valentin v. Hosp. Bella Vista*, 254 F.3d 358, 362-63 (1st Cir. 2001) (noting that ripeness and mootness are aspects of subject matter jurisdiction that may be challenged in a 12(b)(1) motion); *see also Renco Group, Inc*. v. *Wilmington Trust, N.A.* (*In re Magnesium Corp. of America*), 583 B.R. 637, 646 (Bankr. S.D.N.Y. 2018) ("The proper procedural challenge to Article III standing is a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), rather than [a] motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6)."); *Resurgent Capital Servs., L.P. v. Harrington* (*In re Cushman*), Adv. Proc. No. 16-1017, 2017 WL 818254, at *1 (Bankr. D. Me. Mar. 1, 2017) (treating motion to dismiss for lack of ripeness under Rule 12(b)(1) and (b)(6) as if brought solely under Rule 12(b)(1)) (citing *St. Clair v. City of Chicago*, 880 F.2d 199, 201 (9th Cir. 1989)).

Valentin v. Hosp. Bella Vista, 254 F.3d 358, 363 (1st Cir. 2001)). When a motion attacks the sufficiency of jurisdictionally-significant facts, the court "must credit the plaintiff's well-pleaded factual allegations . . . , draw all reasonable inferences from them in [the plaintiff's] favor, and dispose of the challenge accordingly." *Id.* (citation omitted).

V. Relevant Discharge Provisions

A. Denial of Discharge Under § 727(a) and the Impact of § 523(a)(10)

Section 727(a) provides that the court shall grant a discharge to a chapter 7 debtor unless one or more of the grounds for denial of discharge listed in subsections (a)(1) through (12) are established. Enforcement of these subsections is through § 727(c)(1), which vests the right in "[t]he trustee, a creditor, or the United States trustee [to] object to the granting of a discharge under subsection (a) of this section." 11 U.S.C. § 727(c)(1). The permanency of a discharge denial under subsections (a)(2) through (7), however, is established by § 523(a)(10), which provides that:

> A discharge under § 727 . . . does not discharge an individual debtor from any debt . . . that was or could have been listed or scheduled by the debtor in a prior case . . . in which the debtor . . . was denied a discharge under section 727(a)(2), (3), (4), (5), (6), or (7) . . . .

11 U.S.C. § 523(a)(10).

Section 523(a)(10) applies where the debtor is denied a discharge under any of the grounds listed in § 727(a)(2) through (7). *See Cheng v. Wong* (*In re Wong*), Adversary No. 09-01112 (REG), 2010 WL 1544415, at *2 (Bankr. S.D.N.Y. Apr. 19, 2010) ("By negative implication and basic logic, § 523(a)(10) is not applicable when a debtor was denied a discharge in a previous case solely pursuant to a subsection of § 727(a) that is not listed in § 523(a)(10)."). The denial of a discharge under any of the enumerated subsections in § 523(a)(10) renders debts in a prior case permanently and automatically nondischargeable. *See McDermott v. Graft* (*In re Graft*), 489 B.R. 65, 73 (Bankr. S.D. Ohio 2013) (discussing revocation of discharge under § 727(a)(6) and ability to apply

§ 523(a)(10) in later case); *Osenkowski v. Moretti* (*In re Moretti*), 278 B.R. 300, 301 n.1 (Bankr. D.R.I. 2002) ("Because the Debtor's prior Chapter 7 case[] was filed more than six years prior to the instant Chapter 7 petition, Section 727(a)(8) [then a 6-year bar] is not implicated and the Debtor is entitled to another discharge in this proceeding."). Unlike the denial of a discharge based on an objective time period, "the grounds for denial of [a] chapter 7 discharge under §§ 727(a)(2) through (a)(7) are all on account of blameworthy conduct[.]" *Filice v. United States* (*In re Filice)*, 580 B.R. 259, 263 (Bankr. E.D. Cal. 2018). Section 523(a)(10) does not prevent the discharge of debts in a subsequent bankruptcy that survived the earlier case because of the time-limited discharge bar of § 727(a)(8). *Id*.

B. Section 727(a)(3) and (4)

By invoking § 727(a)(3) and (4), Mr. Bernier seeks to bar the discharge of all of Ms. Hang's pre-petition debts existing as of the filing date based on of her alleged improper conduct in or in connection with the present case. Section 727(a)(3) addresses an individual debtor's failure to maintain adequate records of his or her assets or financial affairs, and directs the court to grant a discharge unless:

> the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case[.]

11 U.S.C. § 727(a)(3).

A party invoking § 727(a)(3) "must make a prima facie showing that the debtor has failed to maintain adequate records. Record-keeping need not be precise . . . . [A] debtor's records must sufficiently identify the transactions [so] that intelligent inquiry can be made of them." *Harrington v. Simmons* (*In re Simmons*), 810 F.3d 852, 857-58 (1st Cir. 2016) (internal quotations and citations

omitted). The standard is an objective one, and a debtor can be denied a discharge under § 727(a)(3) regardless of the lack of any subjective intent to conceal financial information. *Id*. at 858. Although § 727(a)(3) provides for a justification defense, "the debtor has the burden of proving justification and his ability to prevail on such a defense turns on whether his asserted justification is objectively reasonable." *Id*. (internal citations omitted).

Section 727(a)(4) addresses an individual debtor's fraudulent conduct in or in connection with a pending case, and directs the court to deny a discharge where:

> the debtor knowingly and fraudulently, in or in connection with the case–(A) made a false oath or account; (B) presented or used a false claim; (C) gave, offered, received, or attempted to obtain money, property, or advantage, or a promise of money, property, or advantage, for acting or forbearing to act; or (D) withheld from an officer of the estate entitled to possession under [the Code], any recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs[.]

11 U.S.C. § 727(a)(4).

"The elements that must be proved to avoid discharge under [§ 727(a)(4)] are (1) the debtor knowingly and fraudulently made a false oath, and (2) the false oath related to a material fact in connection to the bankruptcy case." *Razzaboni v. Schifano (In re Schifano)*, 378 F.3d 60, 67 (1st Cir. 2004). Because a debtor's bankruptcy schedules and statement of financial affairs are submitted under oath,[4] a material false statement made therein constitutes a false oath under § 727(a)(4)(A). *Carto v. Oakley* (*In re Oakley*), 503 B.R. 407, 425 (Bankr. E.D. Pa. 2013). "While an omission or false statement caused by an honest mistake or oversight will not be sufficient to deny [a discharge], an omission or misstatement made with a 'reckless indifference to the truth' will fall within the scope of § 727(a)(4)(A) if the subject matter is material to the administration of the bankruptcy

[4] See Rule 1008 of the Federal Rules of Bankruptcy Procedure.

case." *Id*. (quoting *Boroff v. Tully (In re Tully)*, 818 F.2d 106, 112 (1st Cir. 1987)) (internal citation omitted).

A false oath is material if it relates "to the [debtor's] business transactions or estate, or concerns the discovery of assets, business dealings, or the existence and disposition of his property." *Id*. (quoting *Chalik v. Moorefield (In re Chalik)*, 748 F.2d 616, 618 (11th Cir. 1984)). "A statement is considered to have been made with knowledge of its falsity if it was known by the debtor to be false, made without belief in its truth, or made with reckless disregard for the truth." *Id.* at 426 (quoting *Montey Corp. v. Maletta (In re Maletta)*, 159 B.R. 108, 112 (Bankr. D. Conn. 1993)). A debtor is not likely to admit to fraudulent intent and so it may be inferred from the particular facts and circumstances of a case. *See Giansante & Cobb, LLC v. Singh* (*In re Singh*), 433 B.R. 139, 159 (Bankr. E.D. Pa. 2010). Reckless indifference also "can be inferred from numerous errors and omissions in the bankruptcy schedules or statement of financial affairs." *In re Oakley*, 503 B.R. at 426. Once the plaintiff produces "persuasive evidence of a false statement under oath . . . the burden shifts to the defendant to prove it was not intentionally false[.]" *In re Maletta*, 159 B.R. at 112.

C. Section 727(a)(8)

Section 727(a)(8) is by it terms impermanent. It prohibits a debtor from obtaining a discharge in a pending case if "the debtor has been granted a discharge under [§ 727] . . . in a case commenced within 8 years before the date of filing of the petition." 11 U.S.C § 727(a)(8). This time period is intended to "prevent the creation of serial debtors, who would otherwise seek Chapter 7 relief every time they found themselves unable to repay their debts." *U.S. Trustee v. Stone (In re Stone)*, Nos. 09-3072, 09-32346, 2009 WL 3459863, at *2 (Bankr. N.D. Ohio Oct. 6, 2009).

The paramount distinction between §§ 727(a)(2) through (7) and 727(a)(8) is readily apparent. The former subsections address a debtor's failure to provide truthful and complete

information to the trustee and creditors. As a sanction for such abusive conduct, § 523(a)(10) renders the creditors' claims permanently nondischargeable. In contrast, § 727(a)(8) represents congressional intent to limit the frequency by which an "honest" debtor may obtain a discharge of debts. The punitive sanction of § 523(a)(10) does not apply. Even though § 727(a)(8) affords a creditor temporary relief from the discharge of its claims, the "post-bankruptcy legal consequence of not entering a discharge for any reason other than the grounds specified in § 523(a)(10) for permanent nondischargeability is that the debtor remains liable for debts but might be eligible for discharge in a future chapter 7 case" once the eight-year bar to discharge expires. *In re Filice*, 580 B.R. at 269. Thus, the remedy afforded a party moving under § 727(a)(2) through (7) by virtue of § 523(a)(10) is vastly different from the time-limited relief provided by § 727(a)(8).

VI. Analysis

A. Mr. Bernier's Standing

"The party invoking federal jurisdiction bears the burden of demonstrating it has standing to bring the case." *Renco Group, Inc. v. Wilmington Trust, N.A. (In re Magnesium Corp. of America)*, 583 B.R. 637, 645-46 (citing *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 1547 (2016), *as revised* (May 24, 2016)). This burden falls squarely on Mr. Bernier. Standing, "a doctrine rooted in the traditional understanding of a case or controversy," has two aspects: (1) constitutional standing and (2) prudential standing. *Id*. at 646 (citing *Warth v. Seldin*, 422 U.S. 490, 498 (1975) ("[T]he question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues. This inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise.")). The Court concludes that Mr. Bernier has satisfied standing in both respects.

Constitutional standing stems "from Article III of the Constitution, which provides that the 'judicial power' of the United States extends only to 'cases' or 'controversies.'" *In re Magnesium*

Corp., 583 B.R. at 646. "To establish [constitutional standing], the plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Id*. (internal quotations and citations omitted). The Supreme Court's decision in *Spokeo* clarified that the injury-in-fact prong requires the plaintiff to show "that he or she suffered an invasion of a *legally protected interest* that is *concrete and particularized* and *actual or imminent*, not conjectural or hypothetical." *Id*. (quoting *Spokeo*, 136 S.Ct. at 1548). An injury is "particularized" if it "affect[s] the party invoking federal jurisdiction in a personal and individual way," while a "concrete injury must . . . actually exist." *Id*. (internal quotations and citations omitted). Further, the required injury "may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 578 (1992) (internal quotations and citations omitted). In other words, a party must have "a personal stake in the outcome of the controversy." *Warth*, 422 U.S. at 498. If a plaintiff fails to satisfy this test a federal court is prohibited from adjudicating the matter.

Prudential standing is concerned with litigants "asserting the rights or legal interests of others in order to obtain relief from injury to themselves." *In re Magnesium Corp.*, 583 B.R. at 647 (internal quotations and citations omitted). Prudential (or statutory) standing "is not really standing in a jurisdictional sense, and as such, a defendant may not bring a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) where the alleged 'lack of standing' is merely prudential[.]" *Id*. (citing *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S.Ct. 1377, 1388 n.4 (2014)). When a plaintiff "asserts a cause of action based on a statute, the Court should inquire whether the particular plaintiff has a cause of action under the statute." *Id*. (internal quotations and citations omitted). Challenges to the validity of a cause of action do not fall under

the constitutional standing inquiry "because the absence of a valid . . . cause of action does not implicate subject-matter jurisdiction . . . ." *Id*. (internal citations and quotations omitted).[5]

Ms. Hang asserts that Mr. Bernier lacks constitutional standing because he has not suffered a particularized injury that is either actual or imminent due to her discharge ineligibility under § 727(a)(8). As alluded to earlier, this argument is fundamentally flawed because it assumes the goals and legal consequences of § 727(a)(3) and (4) mirror those of § 727(a)(8). They do not. Additionally, her argument conflates the various doctrines of standing, ripeness, and mootness. Mr. Bernier alleges sufficient facts in the Complaint, if proven, to establish that he is a creditor with a personal stake in the outcome of this proceeding who suffers an actual injury that would be redressed by a denial of Ms. Hang's discharge under § 727(a)(3) or (4).

The unforgiving consequences of § 727(a)(3) and (4) "make certain that those who seek the shelter of the bankruptcy code do not play fast and loose with their assets or with the reality of their affairs . . . so that decisions can be made by the parties in interest based on fact rather than fiction . . . ." *In re Tully*, 818 F.2d at 110. "In exchange for a fresh start, a debtor must paint a basic picture of his financial condition and satisfactorily explain the disposition of his assets during the period leading up to the filing of his bankruptcy petition." *In re Simmons*, 810 F.3d at 855. The purpose of § 727(a)(3) is "to give interested parties and the court a reasonably complete picture of the debtor's financial condition during the period prior to bankruptcy." *Id*. at 857. Similarly, § 727(a)(4) seeks to ensure that the debtor has made "full, honest, and accurate disclosure of her financial circumstances so the bankruptcy trustee and the creditors have sufficient information for

[5] Procedurally, a motion to dismiss that attacks a plaintiff's ability to bring an action under a specific statute should be framed under Rule 12(b)(6) for failure to state a claim for relief. *In re Magnesium Corp.*, 583 B.R. at 646-47. As noted, Ms. Hang does not challenge the sufficiency of the allegations in the Complaint for purposes of establishing, if proven at trial, a cause of action for a discharge denial under § 727(a)(3) and (4).

the proper administration of the chapter 7 case without having to incur the time and expense of an investigation into her affairs." *In re Oakley*, 503 B.R. at 424 (citations omitted).

Creditors like Mr. Bernier have a legal right to such complete and accurate financial disclosures and are sufficiently harmed by a debtor's failure to do so. Such rights and the remedies afforded by § 727(a)(3) and (4) give rise to their standing to seek the denial of a discharge under these provisions. *See DenBeste v. Power* (*In re DenBeste*), Nos. NC-12-1087-HPaMk, NC-12-1180-HPaMk, 2012 WL 5416513, at *5 (9th Cir. BAP 2012); *Lussier v. Sullivan (In re Sullivan)*, 455 B.R. 829, 835–36 (1st Cir. BAP 2011).

This brings us to Ms. Hang's remaining arguments of mootness and lack of ripeness.

B. Mootness

"The Supreme Court has described mootness as 'the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue through its existence (mootness).'" *D.H.L. Assocs., Inc. v. O'Gorman*, 199 F.3d 50, 54 (1st Cir. 1999) (quoting *United States Parole Comm'n v. Geraghty,* 455 U.S. 388, 397 (1980)). Mootness applies when a case no longer satisfies Article III's case-or-controversy requirement. *Rosenfeld v. Rosenfeld* (*In re Rosenfeld)*, 535 B.R. 186, 190 (Bankr. E.D. Mich. 2015). To satisfy this continuing standing requirement, "the dispute between the parties must be 'actual' and 'ongoing'" because "[f]ederal courts have no power to decide questions that cannot affect the rights of litigants in the case before them." *Mapley v. Mapley (In re Mapley)*, 437 B.R. 225, 227 (Bankr. E.D. Mich. 2010) (quoting *Day v. Klingler* (*In re Klingler*), 301 B.R. 519, 523-24 (Bankr. N.D. Ill. 2003)). As *Klingler* more fully explained:

> When the controversy ceases to be actual or ongoing–when the issues presented are no longer live, or the parties lack a legally cognizable interest in the outcome, it is moot . . . .

> A controversy ceases to exist, and the claim in question becomes moot, if events outrun the controversy so that the court can grant no meaningful relief. In particular, a claim is moot when the court can grant no effective relief because the plaintiff has already received all the relief he could.

Klingler, 301 B.R. at 523-24 (internal quotations and citations omitted).

Mootness challenges have been successfully lodged in nondischargeability actions brought under § 523(a) where a debtor has been permanently denied a discharge under § 727(a). Under those circumstances, courts have concluded that § 523(a) determinations are "meaningful only in the context of a discharge" and are moot when a debtor is ineligible for a general discharge under § 727(a). *Perotti v. Perotti* (*In re Perotti*), Adversary No. 1-07-ap-00144, 2008 WL 5158543, at *10 (Bankr. M.D. Pa., Aug. 27, 2008); *see also Ammini v. Labgold* (*In re Labgold),* 532 B.R. 276, 280 (Bankr. E.D. Va. 2015) (stating it is "almost universally agreed" that when a debtor is denied a discharge any action under the § 523(a) discharge exceptions for a particular debt becomes moot); *Siu v. Martinez* (*In re Martinez*), 500 B.R. 608, 635 (Bankr. N.D. Cal. 2013) (holding denial of discharge rendered § 523 nondischargeability claims moot); *Ng v. Adler* (*In re Adler*), 494 B.R. 43, 56 (Bankr. E.D.N.Y. 2013) (same); *Kiel v. U.S. Dept. of Health & Human Servs.* (*In re Von Kiel*), 473 B.R. 78, 88 (Bankr. E.D. Pa. 2012) (same).

In the reverse situation, courts also have held actions for denial of discharge under § 727(a) moot where the moving creditor's claim is *already excepted* from discharge under one of the § 523(a) nondischargeability provisions. *See In re Rosenfeld*, 535 B.R. at 191 (concluding the court lacked subject matter jurisdiction over plaintiff's § 727(a) action where any debt owed the plaintiff was already nondischargeable under § 523(a)(15)); *Mapley*, 437 B.R. at 228-30 (dismissing as moot the § 727(a) proceeding brought by the debtor's ex-wife because any debts owed to her by the debtor were nondischargable under either § 523(a)(5) or 523(a)(15) and, therefore, the relief she sought under § 727(a) "would give her nothing she does not already have").

Neither of these situations is presented here; Mr. Bernier seeks to deny Ms. Hang a discharge solely under § 727(a)(3) and (4) and has not asserted the nondischargeability of his claim under § 523(a). The parties have not cited to specific case law addressing whether a debtor's ineligibility under § 727(a)(8) moots an action brought under § 727(a)(2) through (7), and the Court was unable to find any cases directly on point. Still, given the important distinctions between the purposes of these subsections, their underlying legislative goals, and the consequences of such discharge denials under §§ 727(a)(3) and (4) and 523(a)(10), the Court easily concludes that Mr. Bernier's claims are not moot. Ms. Hang's characterization of the relief sought under § 727(a)(3) or (4) as simply whether a discharge is entered or denied is far too constricted; it disregards § 523(a)(10)'s permanent sanctions for the blameworthy conduct in or in connection with a particular case that is the focus of these § 727(a) subsections. *See In re Filice*, 580 B.R. at 263. In short, adjudication of this proceeding on the merits will enable Mr. Bernier, should he be successful, to pursue his rights as a creditor irrespective of whether Ms. Hang files a subsequent case. Mr. Bernier has, therefore, demonstrated a legally cognizable interest in the outcome of this proceeding and this Court can afford him meaningful relief (if he proves his claims) by denying Ms. Hang a discharge under § 727(a)(3) or (4).

C. Ripeness

Similar to standing, the ripeness doctrine is "mandated by the constitutional requirement that federal jurisdiction extends only to actual cases or controversies." *Ernst & Young v. Depositors Econ. Prot. Corp.*, 45 F.3d 530, 535 (1st Cir. 1995) (citing U.S. Const. art. III, § 2). The doctrine also encompasses "prudential considerations of judicial restraint from unnecessary or premature decision of constitutional questions." *In re Cushman*, 2017 WL 818254, at *3 (citing *Sindicato Puertorriqueno de Trabajadores v. Fortuno*, 699 F.3d 1, 8-9 (1st Cir. 2012)). Just as the standing doctrine "seeks to keep federal courts out of disputes involving conjectural or hypothetical

injuries, the Supreme Court has reinforced that the ripeness doctrine seeks to prevent the adjudication of claims relating to 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Reddy v. Foster*, 845 F.3d 493, 500 (1st Cir. 2017) (quoting *Texas v. United States*, 523 U.S. 296, 300 (1998)). "[T]he facts alleged, under all the circumstances, [must] show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of" the relief sought. *Labor Relations Div. of Constr. Indus. of Mass., Inc. v. Healey*, 844 F.3d 318, 326 (1st Cir. 2016) (internal quotations and citations omitted).

Whether a proceeding is ripe for judicial review is an aspect of subject matter jurisdiction that may be challenged by a Rule 12(b)(1) motion to dismiss. *In re Cushman*, 2017 WL 818254, at *1. The plaintiff must prove sufficient facts to establish ripeness. *Id*. (citing *Healey*, 844 F.3d at 326). In considering the ripeness of a dispute, courts "evaluate both the fitness of the issues for judicial decision and the hardship to the parties by withholding court consideration." *Id*. at *3 (citations omitted). The fitness prong concerns the timing of the request for relief and "typically involves subsidiary queries concerning finality, definiteness, and the extent to which resolution of the challenge depends upon facts that may not yet be sufficiently developed." *Ernst & Young,* 45 F.3d at 535; *see also In re Cushman* 2017 WL 818254, at *4 (finding fitness prong satisfied where the propriety of the defendant's conduct would not be placed "in sharper focus" by events that had not yet occurred or may never occur).

The hardship prong "focuses on the hardship that may be entailed in denying judicial review." *Ernst & Young,* 45 F.3d at 536. It "involves a prudential analysis of the utility of judicial review." *In re Cushman*, 2017 WL 818254, at *4. "The ultimate question is whether granting relief would serve a useful purpose, or, put another way, whether the sought-after declaration would be of practical assistance in setting the underlying controversy to rest." *Id.* at 5. (internal quotations and

citation omitted). The First Circuit has stated that "although both prongs of the test must be satisfied, 'a strong showing on one may compensate for a weak one on the other.'" *Id.* at *4 (quoting *McInnis-Misenor v. Me. Med. Ctr*., 319 F.3d 63, 70 (1st Cir. 2003)).

Ms. Hang's ripeness challenge fails because it erroneously assumes that Mr. Bernier will only sustain an injury and suffer a hardship if she files a future bankruptcy case and his debt is discharged. Mr. Bernier's alleged injury, the propriety of Ms. Hang's alleged conduct, and the hardship Mr. Bernier would sustain in the absence of this Court's adjudication of this adversary proceeding are *not* contingent on whether Ms. Hang files a subsequent bankruptcy case.

i. Fitness Prong Applied

The events leading to Ms. Hang's alleged liability under § 727(a)(3) and (4) have already occurred. The allegations in the Complaint relate to her alleged misconduct in connection with the present case—the failure to maintain appropriate business records of her pre-petition business and the knowing failure to disclose material information about her assets, income, and financial affairs. If proven, such behavior contravenes Mr. Bernier's legal rights as a creditor to such information, and the impairment of his rights qualifies as the requisite injury for purposes of standing and ripeness. *See Lujan*, 504 U.S. at 578. Already having occurred, the events leading to Ms. Hang's alleged liability under § 727(a)(3) or (4) and Mr. Bernier's resulting injury "will not be placed in sharper focus by events that have not yet occurred[.]" *In re Cushman*, 2017 WL 818254, at *4.

ii. Hardship Prong Applied

The nature of the relief sought—denial of discharge under § 727(a)(3) and (4), rendering Mr. Bernier's claim permanently nondischargeable under § 523(a)(10)—underscores the hardship he would sustain if denied review by this Court. Although Mr. Bernier's claims (as well as those of all the other creditors) would soon be vulnerable to discharge in another bankruptcy case Ms. Hang could file as soon as the present one is closed, this by itself does not satisfy the hardship prong for

ripeness. Rather, what does satisfy this prong is the forfeiture of Mr. Bernier's right to seek a denial of Ms. Hang's discharge under § 727(a)(3) and (4) for her alleged misconduct in or in connection with the *present case*, leading to § 523(a)(10)'s permanent exception to the discharge of his claim. His loss of this relief would occur whether or not Ms. Hang files a future bankruptcy case. The allegations supporting these claims are unique to this case and cannot be reasserted in a subsequent case as grounds for discharge denial. In the end, denying review of his claims in this proceeding would deprive Mr. Bernier of his right to seek redress for Mr. Hang's alleged conduct in this case and to obtain the automatic, permanent nondischargeability of his claims under § 523(a)(10).

Lastly, the Court would be remiss if it overlooked the important public policy issues at stake here. Were the Court to accept Ms. Hang's position and dismiss this proceeding, she would escape the severe consequences of her alleged wrongdoing exclusive to this case. Allowing § 727(a)(8)'s temporary discharge denial to be used as both a sword and a shield thwarts the clear purposes and legislative objectives of §§ 727(a)(3) and (4) and 523(a)(10).

VII. Conclusion

Granting the motion to dismiss this adversary proceeding simply because of the temporal limits of § 727(a)(8) would unfairly deprive Mr. Bernier of his present right to obtain redress for Ms. Hang's alleged abusive behavior in connection with this case and the automatic, permanent nondischargeability of his claims against her. Such an outcome would trample the vitally important public policies encompassed in § 727(a)(3) and (4), effectuated through § 523(a)(10).

The motion to dismiss is DENIED.

Date: June 22, 2018

By the Court,

Diane Finkle

Diane Finkle
U.S. Bankruptcy Judge