IN THE UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:	*	Case No. 08-32599 Adv. Case No. 08-03007
Oakland Gaerke	*	Judge Richard L. Speer
Debtor	*	
Oakland Gaerke .	*	**RESPONSE TO PLAINTIFF TO MOTION TO DISMISS OR ABSTAIN OF THE DEFENDANT, ASHLEY GAERKE**
Plaintiff	*	
vs.	*	
Ashley Gaerke, et. al.	*	
Defendants		
*	*	*

Now comes the Plaintiff, Oakland Gaerke and would respond to the renewed Motion to Dismiss or Abstain filed by the Defendant, Ashley Gaerke, all as is more fully set forth in the following Memorandum In Support.

WHEREFORE, the Plaintiff would pray that the Court issue an order denying the Motion to Dismiss or abstain and other such relief as is just and equitable.

Respectfully submitted

/s/Steven L. Diller
Steven L. Diller (0023320)
Attorney for Plaintiff
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MEMORANDUM

Introduction

The Defendant, Ashley Gaerke has requested the dismissal of this proceeding or in the

alternative that the Court abstain from jurisdiction.

Motion to Dismiss.

The basis this request is the assertion that the complaint “fails to state a claim upon which relief may be granted.”

The standard to be applied in ruling on a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), as made applicable by Federal Rule of Bankruptcy Procedure 7012(b), is well established. A court must accept all factual allegations in the complaint as true, construe the complaint in a light most favorable to the plaintiff, and recognize that dismissal is inappropriate "unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of his claim." *Baird v. Rose*, 192 F. 3rd 462, 467 (4th Cir. 1999); accord *Hishon v. King v. Spalding*; 467 US 69, 73, 104 S. Ct. 2229, 81 L. Ed. 59 (1984) ("A court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.").

As to this Defendant, the amended complaint states as follows:

> 1. That Oakland Gaerke, (hereinafter referred to as “Plaintiff”), commenced the related proceedings as a voluntary Chapter 13 under 11 USC §301.
> 2. This Court has jurisdiction of this proceeding under 28 USC §1334 and venue is proper in this Court pursuant to 28 USC §1408 and this matter is a core proceeding under 28 USC §157(b)(2).
> 3. That at the time of the commencement of this case, the Plaintiff was married, but separated from the Defendant, Ashley Gaerke.
> 4. That upon information and belief, all the named Defendants are credit card companies or accounts for which credit was incurred in the name of the Plaintiff by the Defendant, Ashley Gaerke without the knowledge and consent of the Plaintiff and or by actual fraud and identify theft by the Defendant, Ashley Gaerke.
> 44. That the Defendant, Ashley Gaerke fraudulently utilized the name and credit of the Plaintiff in opening of the accounts which are the subject of this action.
> 45. That the Defendant, Ashley Gaerke concealed from the Plaintiff the creation and use of such accounts.
> 46. That the identify theft and fraud of Ashley Gaerke in creation and use of such accounts has irreparably damaged the credit of the Plaintiff, required the Plaintiff to resort to the filing of the related proceedings and damaged the Plaintiff in such amounts as will be shown at the trial in this cause.

Federal Rule of Civil Procedure 9 states that "in all averments of fraud or mistake, the circumstances constituting the fraud or mistake shall be stated with particularity." Fed. R. Civ. P. 9(b). "This exception to the generally liberal standard of pleading helps to ensure that defendants receive fair notice of allegations of fraud and to protect them from the serious harm to reputation or goodwill that can result from such allegations." *Wells Fargo Bank Northwest N.A. v. Taca Int'l Airlines*, 247 F. Supp. 352, 364 (S.D.N.Y. 2002) Applying the foregoing standards, the Plaintiff believes that the amended complaint clearly meets the requirements of particularity and places the Defendant on notice of the allegations against her.

In addition, Ohio law recognizes that claims for fraud may be separate and independent actions from divorce proceedings. See for e.g., *Koepke v. Koepke* (1989) 52 Ohio App. 3rd 47, 556 NE 2d 1198. As a result, notwithstanding the fact that the Plaintiff and the Defendant are presently party to a divorce proceeding, the Plaintiff may maintain an independent action for fraud. The fact that the Plaintiff is a debtor in the related case entitles him to bring and maintain this adversary proceeding against the Defendant. As a result, the Plaintiff believes that the motion to Dismiss for failure to state a claim should be denied.

Abstention.

This request for relief is based on 11 USC 1334(c)(1) which states in pertinent part as follows:

> "….a district court, in the interests of justice, or in the interest of comity with State Courts or respect for State law [can] abstain from hearing a particular proceeding under Title 11 or arising or related to a case under Title 11.

This statute recognizes the longstanding limitations on federal-court jurisdiction otherwise properly exercised based on the so-called "domestic relations" and "probate"

exceptions. The Supreme Court was again called upon to address the exceptions to jurisdiction in the case of *Marshall v. Marshall***,** 547 U.S. 293, 126 S.Ct. 1735, U.S., 2006.

The Court in *Marshall*, supra recognized that abstention is neither compelled by the text of the Constitution or federal statute, but were judicially created doctrines stemming in large measure from "misty understandings of English legal history." While the Defendant seeks to advance the case of *Ankenbrandt v. Richards*, 504 US 689, 112 S. Ct. 2206, 112 S. Ct. 2206, 119 L. Ed. 2d 468 as supporting her request, the Court in *Marshall* viewed such case as an effort to "rein in the domestic relations exception." *Marshall*, at 1737.

The Court further discussed *Akenbrandt* as follows:

> "…*Akenbrandt* the domestic relations exception's derivation and limits. Among other things, the Court, …(citation omitted), traced the current exception to *Barber v. Barber*, 21 How. 582, 584-589, 16 L. Ed. 226, in which the Court had announced in dicta-without citation or discussion-that federal courts lack jurisdiction over suits for divorce or alimony. Finding no Article III impediment to federal-court jurisdiction in domestic relations cases, …(citation omitted), the *Ankenbrandt* Court, …(citation omitted) anchored the exception in the Judiciary Act of 1789, which, until 1948, provided circuit court diversity jurisdiction over "all suits of a civil nature at common law or in equity." The *Barber* majority, the *Ankenbrandt* Court acknowledged, …(citation omitted) did not expressly tie its announcement of a domestic relations exception to the text of the diversity statute, but the *Barber* dissenters made the connection. Because English chancery courts lacked authority to issue divorce and alimony decrees, the dissenters stated, United States courts similarly lacked authority to decree divorces or award alimony, …(citation omitted) The *Ankenbrandt* Court was "content" "to rest [its] conclusion that a domestic relations exception exists as a matter of statutory construction not on the accuracy of [*Barber's*] historical justifications, but, "rather," on "Congress' apparent acceptance of this construction of the diversity jurisdiction provisions in the years prior to 1948," citation omitted). *Ankenbrandt* further determined that Congress did not intend to terminate the exception in 1948 when it "replace[d] the law/equity distinction with the phrase 'all civil actions.' " …(citation omitted) The *Ankenbrandt* Court nevertheless **emphasized that the exception covers only "a narrow range of domestic relations issues.**" **Id, at 701, 112 S. Ct. 2206. Noting that some lower federal courts had applied the exception "well beyond the circumscribed situations posed by *Barber* and its progeny," the Court clarified that only "divorce, alimony, and child custody decrees" remain outside federal jurisdictional bounds, id, at 703, 704, 112 S. Ct. 2206. While recognizing state tribunals' "special proficiency" in handling issues arising in the granting of such decrees, *id*., at 704, 112 S. Ct. 2206, the Court viewed federal courts as equally equipped to deal with complaints alleging torts, *ibid* Pp.**

1744-1746. (Emphasis Added)

There are several reasons why this proceeding and this Court is the best forum for the resolution of the issues between the Plaintiff and the Defendants. First, the State Court is continuing to go forward as to the issues of custody and alimony.[1]

Second, because of the actions of the Defendant, Ashley Gaerke, the Plaintiff has been required to file the related proceedings in order to deal with the allowed claims against him.[2] In that related proceeding, the Plaintiff's plan provides for the surrender of the marital residence and the leased Mercedes that was in the possession of the Defendant. The confirmed Plan of the Plaintiff provides that all claims that are duly proved and allowed against him will be paid in full.

Third, this type of case and the financial issues raised in it are exactly the type of claim resolution that the Court resolves on a regular basis and arguably is better suited and more efficient in resolve the limited issues presented by this case.

Fourth, and most important is that by inclusion of both the Defendant and the credit card Defendants in this proceeding it is the most judicially economical manner of proceeding. The trial on the merits of these claims would be binding on both the Defendant, Ashley Gaerke and the credit card Defendants. The divorce proceeding would not affect the credit card Defendants and even if the State Court held that the Plaintiff would not be obligated for the debt, the Plaintiff would still be required to repeat the same the process in this Court.

For all of the foregoing reasons, the Plaintiff believes that the Defendant's motion for abstention should be denied and this matter should be allowed to proceed on the merits.

/s/Steven L. Diller
Steven L. Diller

[1] The Plaintiff is willing to also agree to modification of the stay to permit the granting of the divorce.
[2] The Plaintiff has gained confirmation of the Plan.

CERTIFICATE OF SERVICE

I, Steven L. Diller, do hereby certify that a copy of the foregoing Response was mailed or electronically sent to Randy L. Reeves, 973 West North Street, Lima, Ohio 45805, to Lawrence G. Reinhold, Esq. at 25211 East Roycourt, Huntington Woods, MI 48070, to Patricia B. Fugee, Esq. at One Seagate, Suite 1700, Toledo, Ohio 43604 Dawn D. Johnson, One Montgomery Street, Suite 2200, San Francisco, CA 94104-5501, Arch W. Riley, Jr., Esq. at 1217 Chapline Street, PO Box 831, Wheeling, WV 26003-8731, US Bank, PO Box 790408, St. Louis, MO 63719, Chase Bank, PO Box 15298, Wilmington, DE 19850-5298 and Citi Card, PO Box 183064, Columbus, Ohio 43218 by ordinary US mail this 19th day of May, 2008.

/s/Steven L. Diller
Steven L. Diller