

UNITED STATES BANKRUPTCY COURT
 NORTHERN DISTRICT OF INDIANA
 HAMMOND DIVISION AT HAMMOND

IN RE: CASE NO. 05-62769)	
STEPHANIE APONTE)	
)	
Debtor)	
*****)	
STATE FARM MUTUAL)	
AUTOMOBILE COMPANY AS)	
SUBROGEE OF FLOYD R. WALLACE,)	
FRANK VALDEZ, AND MICHAEL)	
ECHTERLING)	
Plaintiffs)	
v.)	ADVERSARY PROCEEDING
STEPHANIE APONTE)	NO. 05-6095
)	
Defendant)	

**MEMORANDUM OPINION AND ORDER
 ON MOTION FOR SUMMARY JUDGMENT**

I

STATEMENT OF PROCEEDINGS

This Adversary Proceeding came before the Court on a Motion for Summary Judgment filed by the Plaintiff, State Farm Mutual Auto Insurance Company, (hereinafter: "State Farm") on March 29, 2006.

A Response or Answer to said Motion for Summary Judgment was filed by the Defendant and Chapter 13 Debtor Stephanie Aponte ("Debtor") on April 13, 2006.

No Reply to the Debtor's Response was filed by State Farm.

The Complaint of State Farm filed on June 16, 2006 alleges, in part, as

follows:

3. That Defendant was the proximate cause of an automobile collision which resulted in personal injuries and property damage to Floyd R. Wallace, Frank Valdez and property damage to Michael Echterling.
4. That Plaintiff became subrogated to the extent of the right of recovery of Floyd R. Wallace, Frank Valdez and Michael Echterling against the Defendant pursuant to valid contracts of automobile insurance policies.
5. Defendant was operating a motor vehicle while intoxicated when this collision occurred rendering her debt to the Plaintiff non-dischargeable under 11 USC 523. [a][9].
6. Plaintiff became subrogated to the extent of the right of recovery of Floyd R. Wallace (\$9,872.70), Frank Valdez(\$5,225.95), and, Michael Echterling (\$1,769.62 balance due) against the Defendant arising out of said collision in the sum of \$16,867.92.

The Complaint does not state whether the Debtor was “intoxicated” based on the use of alcohol, a controlled substance, a drug other than a controlled substance, or a combination thereof, so that there was an impaired condition of thought or actions and the loss of normal control of her faculties. See. I. C. 9-13-2-86 defining “intoxication”, as discussed Infra.

The Debtor filed an Answer on September 27, 2005 which was in substance a general denial. No affirmative defense was plead by the Debtor.

II
Conclusions of Law and Discussion
A
Jurisdiction

No objections were made by the parties to the subject- matter jurisdiction of this Court, and the Court concludes that it has subject matter jurisdiction over this Proceeding pursuant to 28 U.S.C. §1334(b). The Court further concludes that this Proceeding is a

Core Proceeding pursuant to 28 U.S.C. §157(b)(2)(I).

B

General Principles Relating to Summary Judgment

Under Rule 56(c) Fed. R. Civ. P., as made applicable by Fed. R. Bk. P. 7056, summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247, 106 S. Ct. 2505, 2509-10, 91 L. Ed. 2d 202 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86, 106 S. Ct. 1348, 1355, 89 L. Ed. 2d 538 (1986). The inquiry that the court must make is whether the evidence presents a sufficient disagreement to require trial or whether one party must prevail as a matter of law. Anderson, 477 U.S. at 251-252, 106 S. Ct. at 2511-12.

The purpose of Summary Judgment is to “pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.” McDonnell v. Cournia, 990 F.2d 963, 967 (7th Cir. 1993) (Quoting, Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986)). In reaching its determination, the Court has the power to penetrate the allegations of fact in the pleadings and look to any evidential source to determine whether there is an issue of fact to be tried.

Parmelee Transportation Co. v. Keeshin, 292 F.2d 794, 797 (7th Cir. 1961).

The moving party bears the burden of showing that there is an absence of evidence to support the nonmovant's case. Celotex Corp. v. Catrett, 106 S. Ct. at 2554, supra. Stated differently, the moving party, in making a motion for summary judgment, "has the burden of establishing the lack of a genuine issue of material fact." Big O Tire Dealers, Inc. v. Big O Warehouse, 741 F.2d 160, 163 (7th Cir. 1984); Korf v. Ball State University, 726 F.2d 1222, 1226 (7th Cir. 1984).

When ruling on a motion for summary judgment, inferences to be drawn from underlying facts contained in such materials as attached exhibits, and depositions must be viewed in a light most favorable to the party opposing the motion. United States v. Diebold, Inc., 369 U.S. 654, 655, 8 L. Ed. 2d 176, 82 S. Ct. 993, 994 (1962); See also, Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp., 106 S. Ct. at 1356, supra, (all inferences to be drawn from the underlying facts must be viewed in a light most favorable to the nonmoving party); Yorger v. Pittsburgh Corning Corp., 733 F.2d 1215, 1218 (7th Cir. 1984); Marine Bank Nat. Ass'n. v. Meat Counter, Inc., 826 F.2d 1577, 1579 (7th Cir. 1987).

Federal Rule of Civil Procedure 56(e) provides in part as follows:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

When a motion for summary judgment is made and supported by the movant, Fed. R. Civ. P. 56(e) requires the non-moving party to set forth specific facts, which demonstrate that genuine issues of fact remain for trial. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 106 S. Ct. at 1355, supra. Accordingly, once a moving party has met its initial burden, the opposing party must "set forth specific facts showing that there is a genuine issue for trial" and that the disputed fact is material. Posey v. Skyline Corp., 702 F.2d 102, 105 (7th Cir. 1983), cert. den., 464 U.S. 960, 104 S. Ct. 392, 78 L. Ed. 2d 336 (1983).

Thus, if the movant carries his initial burden, the opposing party may not defeat the motion by merely relying on the allegations or denials in its pleadings. Rather, its response must set forth in the required filings specific facts showing that there is a genuine issue for trial. Celotex, 477 U.S. at 324, 106 S. Ct. at 2553; Anderson, 477 U.S. at 248, 106 S. Ct. at 2510; Matsushita, 475 U.S. at 587, 106 S. Ct. at 1356. See also, First National Bank v. Cities Service Co., 391 U.S. 253, 289-90, 88 S. Ct. 1575, 1593, 20 L. Ed. 2d 569 (1968); Valance v. Wisel, 110 F.3d 1269, 1274 (7th Cir. 1997); Scherer v. Rockwell International Corp., 975 F.2d 356, 360 (7th Cir. 1992); United States v. Pent-R Books, Inc., 538 F.2d 519, 529 (2nd Cir. 1976), cert. den. 430 U.S. 906, 97 S. Ct. 1175, 51 L. Ed. 2d 582 (1977). The nonmovant cannot succeed in creating a factual dispute solely by pointing to allegations in his pleading; he must instead produce evidence showing there is a disputed issue for trial. Valance v. Wisel, 110 F.3d 1269, 1274 (7th Cir.

1997).¹

The United States Supreme Court in the case of Matsushita Electric Industrial Co., Ltd., et. al. v. Zenith Radio Corp., et. al., 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986), stated as follows:

[t]he issue of fact must be "genuine." Fed. Rules Civ. Proc. 56(c), (e). When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. See, DeLuca v. Atlantic Refining Co., 176 F.2d 421, 423 (CA2 1949) (L. Hand, J.), cert. denied, 338 U.S. 943 (1950); 10A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure §2727 (1983); Clark, Special Problems in Drafting and Interpreting Procedural Codes and Rules, 3 Vand. L. Rev. 493, 504-505 (1950). Cf. Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 627 (1944). In the language of the Rule, the nonmoving party must come forward with "specific facts showing that there is a genuine issue for trial." Fed. Rule Civ. Proc. 56(e) (emphasis added). See also, Advisory Committee Note to 1963 Amendment of Fed. Rule Civ. Proc. 56(e), 28 U.S.C. App., p. 616 (purpose of summary judgment is to "pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial"). Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no "genuine issue for trial." Cities Service, supra, at 289.

It follows from these settled principles that if the factual context renders

¹ If the non-movant does not come forward with evidence that would reasonably permit the finder of fact to find in the non-movant's favor on a material question, then the Court must enter Summary Judgment against the non-movant. Waldrige v. American Holchst Corp., 24 F.3d 918, 920 (7th Cir. 1994). The burden on the non-movant is not onerous. Id., 24 F.3d at 920. The non-movant need not tender evidence in a form that could be admissible at trial. Id., 24 F.3d at 921. Of course, the evidence set forth must be of a kind admissible at trial. Id., 24 F.3d at 921, N. 2. Moreover, the non-movant need not match the movant witness for witness, nor persuade the Court that the non-movant's case is convincing, the non-movant need only come forward with appropriate evidence demonstrating there is a pending dispute of material fact. Id., 24 F.3d at 921 (Collecting cases).

As noted by the Court in the case of Federal Deposit Insurance Corp. v. Meyer, 781 F.2d 1260, 1262 (7th Cir. 1986), a response is insufficient to raise a genuine issue of material fact if it is not based on the personal knowledge of the affiant, and where affiant alleges to be without information to admit or deny the allegations contained in the Movant's affidavit, and demands strict proof thereof, at best the response asserts a mere suspicion or theoretical question of fact that is insufficient to raise a genuine issue of fact.

respondents' claim implausible -- if the claim is one that simply makes no economic sense -- respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary.

Id., 475 U.S. at 586-87; 106 S. Ct. at 1356. And as stated by the Court in Grogan v. Commercial Union Insurance Co., 96 F.3d 971 (7th Cir. 1996):

The nonmovant must do more, however, than demonstrate some factual disagreement between the parties; the issue must be "material". Irrelevant or unnecessary facts do not preclude summary judgment even when they are in dispute. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986). The nonmovant fails to demonstrate a genuine issue for trial "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party..." Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986); see also, Sokaogon Chippewa Community v. Exxon Corp., 2 F.3d 219, 225 (7th Cir. 1993), cert. denied, 510 U.S. 1196, 114 S. Ct. 1304, 127 L. Ed. 2d 655 (1994); Colosi v. Electri-Flex Co., 965 F.2d 500, 503-04 (7th Cir. 1992).

Id., 96 F.3d at 978.

C.

Burden of Proof and Standard of Proof to be Applied on Motion for Summary Judgment

The ultimate burden of proof at the trial of this Adversary Proceeding is on State Farm who is the Movant. The party seeking an exception to discharge of a debt bears the burden of proof as to each element. Matter of Scarlata, 979 F.2d 521, 524 (7th Cir. 1992); In re Kreps, 700 F.2d 372, 376 (7th Cir. 1987). See also, In re Martin, 698 F.2d 883, 887 (7th Cir. 1983), (§727 general discharge). In bankruptcy "exceptions to discharge are to be construed strictly against a creditor and liberally in favor of the Debtor". In re Scarlata, 979 F.2d at 524, supra, (quoting, In re Zarzynski), 771 F.2d 304, 306 (7th Cir. 1985).)

As to the standard of proof, it should be noted that the Supreme Court in the case of Anderson, et. al. v. Liberty Lobby, Inc. and Willis A. Carto, 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed.2d 202 (1986) held that in determining whether a factual dispute exists on a motion for summary judgment, the court must be guided by the substantive evidentiary standards of the case that are applicable at trial, and thus in ruling on a motion for summary judgment the Supreme Court held that the court must apply the clear and convincing standard in a case where the actual malice rule applied, as this was thus the standard of proof for such a claim.

Here the standard of proof in a §523(a) nondischargeability Adversary Proceeding is by a preponderance-of-evidence, rather than the more stringent standard of clear and convincing evidence. See, Grogan v. Garner, 489 U.S. 279, 111 S. Ct. 654, 112 L. Ed.2d 755 (1991). Thus, the court must apply the preponderance of-of-the-evidence standard of proof to State Farm in this Adversary Proceeding in testing the sufficiency of the Motion for Summary Judgment by State Farm.

D

Materials to be Considered on a Motion for Summary Judgement

Federal Rule of Civil Procedure 56(c) provides as follows:

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character

may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. (Emphasis added).

Thus, pursuant to Fed. R. Civ. P. 56(c) the Court may consider all papers of record as specified therein. Federacion de Empleadas Del Tribunal General de Justicia v. Torres, 747 F.2d 35, 37 (1st Cir. 1984); Allen v. Carlotti, 400 F. Supp. 1037, 1039 (S.D. Fla. 1975), aff'd., 552 F.2d 1086 (5th Cir. 1977).²

The court has reviewed the following materials that have been filed of record to determine if they may be properly considered in ruling on the Motion for Summary Judgment by State Farm.

1. Motion for Summary Judgment by State Farm.
2. State Farm's Memorandum of Law in Support of its Motion which included a Statement of Material Facts and which attached thereto a Certified Copy of Court record of the Hammond City Court wherein the Debtor was charged with a Violation of I.C. 9-30-5-2(b), operating a vehicle while intoxicated, in a manner that endangers a person, together with a copy of the Probable Cause Affidavit and Information filed by the Arresting Officer, which was approved by the Prosecutor for Prosecution. State Farm also attached the Affidavit of the Claims Representative/Specialist of State Farm that it paid its insured Floyd Wallace and one Dawn Wallace the sum of \$9,765.70 pursuant to the

² It has been held that the Court is obligated to consider not only materials specifically offered in support of the motion, but also all "pleadings, depositions, answers to interrogatories and admissions" properly on file and thus properly before the Court. Smith v. Hudson, 600 F.2d 60, 64 (6th Cir. 1979), cert. dismissed, 444 U.S. 986, 100 S. Ct. 495, 62 L. Ed. 2d 415. Rule 56 does not distinguish between documents merely filed and those singled out by counsel for special attention; the Court must consider both before granting a summary judgment. Keiser v. Coliseum Properties, Inc., 614 F.2d 406, 410 (5th Cir. 1980). However, in the case of L.S. Heath & Son v. AT & T Information Systems, Inc., 9 F.3d 561 (7th Cir. 1993), the Seventh Circuit observed that the Court need not "scour" the record to determine whether there exists a genuine issue of fact to preclude a summary judgment; instead, the Court can rely upon the nonmovant to show such a dispute if one exists. Id., 9 F.3d at 567. And just as the Court is not required to "scour the record looking for factual disputes", it is not required to scour the party's various submissions to piece together appropriate arguments. Little v. Cox's Supermarkets, 71 F.3d 637, 641 (7th Cir. 1995). A Court need not make a lawyer's case. Id.

uninsured motorist provision in the policy based on the accident caused by the Debtor. No Affidavit was filed regarding any monies paid by State Farm based on personal injuries alleged to have been sustained by Frank Valdez and Michael Echterling as alleged by State Farm in Paragraph 6 of its Complaint, although, there is attached to the Affidavit an exhibit that alleges State Farm paid Frank and Lona Valdez the sum of \$1200.00

3. The Response thereto by the Debtor which did not include a Supporting Memorandum, a Statement of Genuine Issues, or any affidavits or other supporting materials in opposition to State Farm's Motion.

N.D. Ind. L.B.R. B-7056, Motions for Summary Judgment, states as follows:

In addition to complying with the requirements of N.D. Ind. L.B.R. B-7007-1, all motions for summary judgment shall be accompanied by a "Statement of Material Facts" which shall either be filed separately or as part of the movant's initial brief. The "Statement of Material Facts" shall identify those facts as to which the moving party contends there is no genuine issue and shall be supported by appropriate citations to discovery responses, depositions, affidavits, and other admissible evidence. Any party opposing the motion shall, within thirty (30) days of the date the motion is served upon it, serve and file a "Statement of Genuine Issues" setting forth all material facts as to which it is contended there exists a genuine issue, supported with appropriate citations to discovery responses, affidavits, depositions or other admissible evidence, together with any affidavits or other documentary material controverting the movant's position. The "Statement of Genuine Issues" may either be filed separately or as part of the responsive brief. In determining the motion for summary judgment, the court will assume that the facts as claimed and supported by admissible evidence by the moving party are admitted to exist without controversy, except to the extent that such facts are controverted in the "Statement of Genuine Issues" filed in opposition to the motion, as supported by the depositions, discovery responses, affidavits and other admissible evidence on file.³

³ The United States Court of Appeals, Seventh Circuit, has endorsed the exacting obligation of Local Rules, such as N. D. Ind. L.B.R. B-7056, which impose on a party contesting summary judgment to highlight which factual averments are in conflict as well as what record evidence there is to confirm the dispute, and explaining that the Courts are not obliged in our adversary system to scour the record looking for factual disputes, and may adopt local rules reasonably designed to streamline the resolution of summary judgment motions. Waldrige v. American Holchst Corp., 24 F.3d 918, 921-22 (7th Cir. 1994), (Citing, Herman v. City of Chicago, 870 F.2d 400, 404 (7th Cir. 1989); Bell, Boyd & Lloyd v. Tapy, 896 F.2d 1101, 1103-04 (7th

Pursuant to Local Rules, if a summary judgment respondent fails to file a timely statement of disputed material facts, uncontroverted statements in the moving party's statement in support of summary judgment are deemed admitted. Gianopolous v. Brach & Brock Confections, 109 F.3d 406, 412 (7th Cir. 1997) (collecting cases); Felbierty v. Kemper Corp., 98 F.3d 274, 277 (7th Cir. 1996); Wienco v. Katahn Associates, Inc., 965 F.2d 565, 567 (7th Cir. 1992); Schulz v. Serfilco, Ltd., 965 F.2d 516, 518-19 (7th Cir. 1992). Where the nonmovant has not followed the local rules requiring a response, supported by appropriate citations to each contested fact in the movant's statement, the moving party's facts remain uncontested. Brasic v. Heinemann's, Inc., 121 F.3d 281, 284 (7th Cir. 1997) (citing, Midwest Imports, Ltd. v. Coval, 71 F.3d 1311, 1313 (7th Cir. 1995)). A failure to properly contest the statement of material facts set out in the movant's statement constitutes a binding admission of those facts. Id.

In such a case, the Seventh Circuit has stated that the Court will “depart from our usual posture of construing all facts in favor of the nonmoving party; rather we accept as true all material facts contained in [the moving party's] 12(m) statement.” Brasic v. Heinemann's, Inc., 121 F.3d at 284 (citing Midwest Imports Ltd. v. Coval, 71 F.3d at

Cir. 1990)). The factual statements required by Local Rules are of significantly greater benefit to the Court than the parties, which does not have the advantage of the parties' familiarity with the record and often cannot afford the time combing the record to locate the relevant information. Id., 24 F.3d at 923-24.

The decision whether to apply a Local Rule, such as set out above, requiring the Movant for Summary Judgment to file a Statement of Material Facts supported by appropriate citations, and requiring the opponent to file any material controverting the Movant's position strictly, or to overlook any transgressions, is one left to the trial court's discretion. Little v. Cox's Supermarkets, 71 F.3d 637, 641 (7th Cir. 1995); Waldrige v. American Holchst Corp., 24 F.3d at 923, supra, (Court may sua sponte strictly enforce local rule governing nonmovant's response to summary judgment motion, even if movant's did not strictly comply with rule, and despite movant's failure to object to nonmovant's noncompliance with local rule).

1313) (quoting, Johnson v. Gudmundson, 35 F.3d 1104, 1108 (7th Cir. 1994)). “It is not our task or that of the district court, to scour the record in search of a general issue of triable fact. We rely on the nonmoving party to identify with reasonable particularity the evidence that precludes a summary judgment.” Brasic v. Heinemann’s, Inc., 121 F.3d at 285 (quoting, Richards v. Combined Ins. Co. of America, Inc., 55 F.3d 247, 251 (7th Cir. 1995)). However, the party opposing summary judgment is deemed to have admitted through failure to controvert, only those facts as set forth in the moving party’s statement. Wolf v. Buss (America), Inc., 77 F.3d 914, 922 (7th Cir. 1996).

E.

Section 523(a)(9) of Title 11

_____Section 523(a)(9), as presently constituted, upon which State Farms’s nondischargeability Complaint is bases states as follows:

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—

* * * *

(9) for death or personal injury caused by the debtor’s operation of a motor vehicle, vessel, or aircraft if such operation was unlawful because the debtor was intoxicated from using alcohol, a drug, or another substance;...⁴

⁴ Collier on Bankruptcy sets out the origin and legislative history to §523(a)(9). Collier states:

Section 523(a)(9) was added to the Bankruptcy Code by the Bankruptcy Amendments and Federal Judgeship Act of 1984, and was subsequently amended by the Criminal Victims Protection Act of 1990 and the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. The purpose of this exception is to deter drunk driving and protect the victims by preventing those who caused injury by driving while drunk from discharging their civil liability.

The issue of whether a debt is nondischargeable under §523(a)(9) is governed by Federal Bankruptcy law. However, in the absence of a national standard for intoxication, the Court must apply State law in determining legal intoxication. That is, the Court must determine whether the debtor met the legal standard for intoxication in the jurisdiction where the liability arose. Whitson v. Middleton, 898 F2d 950, 952 (4th Cir. 1990); In re Wiggins, 180 B.R. 676, 679 (M.D. Ala 1995).

The record in a prior State Court proceeding determining the debtor's liability may provide a sufficient basis by itself for the Bankruptcy Court to find a debt nondischargeable

As originally enacted, to fall within the exception to discharge, the debt had to arise from a judgment or consent decree entered against the debtor determining the debt had to arise from a judgment or consent decree entered against the debtor determining the debtor's liability as a result of the operation of a motor vehicle while legally intoxicated.

The amendment in 1990 broadened the exception to discharge by:

- removing the earlier requirement that the debt be evidenced by a judgment to be nondischargeable, and
- including drug-based intoxication within the scope of exception.

The 1990 amendment also made the exception applicable in chapter 13 cases.

At the same time, the amendment in 1990 narrowed the exception by limiting it to debts arising from death or personal injury caused by the debtor's unlawful operation of a motor vehicle.

The 2005 Act extended the exception beyond debts arising from the operation of a motor vehicle while impaired to debts arising from the operation of a vessel or aircraft while impaired. Prior to 2005, the exception was limited to motor vehicles and that term was not generally construed to include boats and aircraft.

Collier on Bankruptcy, Par. 523.15. pp 523-1.0411 (L. King 15th Ed. Rev.) (footnotes omitted).

The Debtor filed her Chapter 13 Petition on May 24, 2005. Thus, §523(a)(9) as amended by the 1990 Amendments as set out above apply.

under § 523(a)(9). In re Pahule, 849 F.2d 1056, 1058 (7th Cir. 1988); In re Dougherty, 51 B.R. 987, 989 (Bankr. S. D. Ind. 1986). In other cases, the prior record by itself will be insufficient. In re Wright, 66 B.R. 403, 407 (Bankr. S. D. Ind 1986); In re Christianson, 65 B.R. 157, 159 (Bankr. W. D. Mo. 1986). A drunk driving claim need not be reduced to judgment or consent decree before the Debtor files bankruptcy in order to have the consequent debt declared nondischargeable. In re Hudson, 859 F2d 1418, 1423-24 + n. 2 collecting cases. (9th Cir. 1988). § 523(a)(9) was amended in 1990 to remove the requirement that the debt be evidenced by a judgment to be nondischargeable. See, In re Mahlman, 136 B.R. 723, 725 (Bankr. S. D. Ohio 1992); In re Dale, 199 B.R. 1014, 1022 (Bankr. S. D. Fla 1995). However, property damage caused by a debtors operation of a motor vehicle while intoxicated does not come within the exception to discharge provided by § 523(a)(9) In re Wiggins, 180 B.R. 676, 681 (M.D. Fla. 1995); In re Peppers, 213 B.R. at 956, 961 (Bankr. W. D. Ky. 1996). Where the prior record is inadequate, the creditor may present bankruptcy court with additional evidence permitting the Court to find that the standards for nondischargeability under § 523(a)(9) are satisfied. In re Humphrey, 102 B.R. 629, 633-34 (Bankr. S. D. Ohio 1989).

An insurance carrier who pays a claim to its insured arising out of personal injuries caused by a debtor while intoxicated based upon uninsured motorist coverage, and who becomes subrogated to the claim versus the debtor, has standing to assert said claim versus the debtor under § 523(a)(9). In re Peppers, 213 B.R. at 961. See also, In re Felski, 277 B.R. 732, 735-79 (E. D. Mich. 2002).

Indiana Code 9-13-2-86 defines “intoxicated” as follows:

“Intoxicated” means under the influence of:

- (1) alcohol;
- (2) a controlled substance (as defined in IC 35-48-1);⁵
- (3) a drug other than alcohol or a controlled substance;
- (4) a substance described in IC 35-46-6-2 or IC 35-46-6-3;
or⁶

- (5) a combination of substances described in subdivisions (1) through (4); so that there is an impaired condition of thought and action and the loss of normal control of a person’s faculties.

See, Hornbach v. State, 693 N.E.2d 81, 85 (Ind. App. 1998) (“intoxicated” within the meaning of the driving while intoxicated statutes means being under the influence of alcohol such that there is impaired conditions of thought and loss of normal control of person’s faculties to extent that it endangers a person).

Pursuant to I.C. 9-13-2-131, “Prima facie evidence of intoxication” is defined as follows:

“Prima facie evidence of intoxication” includes evidence that at the time of an alleged violation the person had an alcohol concentration equivalent to at least

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Indiana Code 35-48-1-9 defines a “controlled substance” as follows:

“Controlled substance” means a drug, substance, or immediate precursor in Schedule I, II, III, IV, or V under:

- (1) IC 35-48-2-4, IC 35-48-2-6, IC 35-48-2-8, IC 35-48-2-10, or IC 35-48-2-12, if IC 35-48-2-14 does not apply; or
- (2) a rule adopted by the board, if IC 35-48-2-14 applies.

6

Indiana Code 35-46-6-2 refers to “glue sniffing”, while I.C. 35-46-6-3 refers to Nitrous oxide, neither of which are applicable in this Adversary Proceeding.

eight-hundredths (0.08) gram of alcohol per:

- (1) one hundred (100 milliliters of the person's blood; or
- (2) two hundred ten (210) liters of the person's breath.

Pursuant to I.C. 9-13-2-151, "Relevant evidence of intoxication" is defined as follows:

"Relevant evidence of intoxication" includes evidence that at the time of an alleged violation a person had an alcohol concentration equivalent to at least five-hundredths (0.05) gram, but less than eight-hundredths (0.08) gram of alcohol per:

- (1) one hundred (100) milliliters of the person's blood; or
- (2) two hundred ten (210) liters of the person's breath.

Indiana Code 9-30-6-1 states that a person who operates a vehicle impliedly consents to submit to the chemical test provisions of this Chapter as a condition of operating a vehicle in Indiana. Indiana Code 9-30-6-2(d) provides that a person must submit to each chemical test offered by law enforcement officers in order to comply with the implied consent provisions of that Chapter.

Indiana Code 9-30-6-2(a) provides that a law enforcement officer who has probable cause to believe that a person has committed an offense under I.C. 9-30-5 or I.C. 9-30-9, or a violation under I.C. 9-30-15, shall offer such person an opportunity to submit to a chemical test. Pursuant to I.C. 9-30-6-2(c), the test must be administered within three hours after the law enforcement officer had probable cause to believe the person committed an offense under I. C. 9-30-05 or a violation of I.C. 9-30-15.

The Information filed versus the Debtor by the Police officer charged the Debtor with the violation of I.C. 9-30-5-2(b), operating a vehicle while intoxicated endangering a person,

which is a Class A Misdemeanor

For the purposes of proving that the debtor operated a vehicle while intoxicated, proof of the debtor's intoxication may be established by showing impairment and does not require proof of blood alcohol content above the statutory amount. Jellison v. State, 656 N.E.2d 532, 535 (Ind. App. 1995). Proof of a particular blood alcohol content is not required. Miller v. State, 641 N.E.2d 64, 69 (Ind. App. 1994). See, e.g. Beasey v. State, 823 N.E.2d 759, 762, (Ind. App. 2005.) (evidence that defendant had strong odor of alcohol on breath, eyes were glossy, semi-hooded and red, was slurring his words, failed three field sobriety tests, and twice refused to take chemical test for intoxication was evidence to support conviction for operating a motor vehicle while intoxicated), Perkins v. State, 812 N.E.2d 836, 841 (Ind. App. 2004) (proof of intoxication may be established by showing impairment, evidence of impairment can be established by impaired attention and reflexes, watering and bloodshot eyes, odor upon one's breath, and failure of field sobriety tests).

The Statement of Material Facts filed by State Farm is very general in nature, and merely states that the Debtor operated a 1992 Chevrolet Lumina while she was "intoxicated" on December 29, 2001, that the Debtor's vehicle was in a collision, that as a result of the collision Frank Valdaz, the owner and operator of a 1980 Pontiac Grand Prix, and Dawn Wallace, who was driving a 1993 Chevrolet Cavalier owned by one Floyd R. Wallace, sustained personal injuries as a result of said collision, and that the vehicles of Valdez and Wallace were both insured by State Farm. No Mention is made in the Statement that one Michael Etcherling incurred personal injuries as a result of the collision as alleged in State

Farm's Complaint. The Statement is supported, as observed above, by the Certified copy of the record of the Hammond City Court, and the Probable Cause Affidavit by the Arresting Officer that formed the basis of the Information filed versus the Debtor.

The Debtor's unverified Response did not contain a Statement of Genuine Issues as required by N. D. Ind. L.B.R. B-7056-1, nor did the Debtor file any Affidavit or other supporting materials, or a supporting brief in opposition to the Motion. The Debtor's Response merely states: "here, the Debtor has maintained that she was not intoxicated at the time of the accident that is the subject of the action." This Response, standing alone is not sufficient to withstand a Motion for Summary Judgment. Although the Debtor did not file a Motion to Strike the "Police Report" the Debtor's Response does assert that State Farm's only supporting document is hearsay, i.e. the "Police Report" and the record of the Hammond City Court reveals that the criminal case versus the Debtor was dismissed.

Federal Rule 56(c) states that "The judgment sought shall be rendered forthwith of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits on file, if any, show there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." Although not expressly set out in Fed. R. Civ. P. 56, a party may submit evidence other than listed in Rule 56 in support of its position on a Motion for Summary Judgment. However, when a party seeks to offer evidence through other exhibits, they must be identified by affidavit, or otherwise made admissible in evidence. Martz v. Union Labor Life Insur. Co., 757 F.2d 135, 138 (7th Cir. 1985). Rule 56 does not authorize the use of unsworn statements or unverified reports

unless such other materials are either: (1) identified by affidavit as being authentic; or, (2) otherwise admissible. Id.

Any affidavits considered by the Court on a Motion for Summary Judgment must set forth facts that would be admissible in evidence. Federal Rule of Civil Procedure 56(e) provides in part as follows:

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits.

Inasmuch as the summary judgment procedure lacks the safeguards of cross-examination of the affiant, it must be shown that he is competent to testify as to the matters stated, and the facts to which he swears are admissible in evidence. American Securit Co. v. Hamilton Glass Co., 254 F.2d 889, 893 (7th Cir. 1958); Midland Engineering Co. v. John A. Hall Constr. Co., 398 F. Supp. 981, 989 (N.D. Ind. 1975).

Rule 56(e) requires that an affidavit: “(1) must be made on personal knowledge of the affiant: (2) set forth facts that would be admissible in evidence; and (3) show affirmatively that the affiant, is competent to testify to the matters stated therein.” Pfeil v Rogers, 757 F.2d 850, 860 (7th Cir. 1985), cert denied, 475 U.S. 1107, 106 S. Ct. 1513, 89 L. Ed. 2d 912 (1986). The Seventh Circuit has emphasized the personal knowledge requirement:

[W]itnesses who are not expert witnesses ... are permitted to testify only from their personal knowledge. Testimony about matters outside their personal knowledge is not admissible, and if not admissible at trial neither is it admissible in an affidavit used to support or resist the grant of summary judgment ... It is true that “personal knowledge” includes inferences--all knowledge is inferential--and therefore opinions. But the inferences and opinions must be grounded in observation or other first-hand personal experience. They must not be flights of fancy, speculations, hunches, intuitions, or rumors about matters remote from that experience.

Visser v. Packer Eng'g Assocs., Inc., 924 F.2d 655, 659 (7th Cir. 1991) (*en banc*) (citations omitted). See also, Karazanos v. Navistar Int'l Transp. Corp., 948 F.2d 332, 337 (7th Cir. 1991) (a party's “speculation is not a sufficient defense to a summary judgment motion”); Palucki v. Sears, Roebuck & Co., 879 F.2d 1568, 1572 (7th Cir. 1989) (an affidavit used for summary judgment purposes cannot be based on rumor or conjecture).

Thus, non-hearsay evidence must be used at summary judgment. Randle v. LaSalle Tele-Communications, Inc., 876 F.2d 563, 570 (7th Cir. 1989). Hearsay is inadmissible in summary judgment proceedings to the same extent it is inadmissible at trial. Eisenstadt v. Centel Corp., 113 F.3d 738, 742 (7th Cir. 1997) (collecting cases). However, affidavits and depositions which are not generally admissible at trial, are admissible in summary judgment proceedings to establish the truth of what is attested or deposed. Id. In ruling on a motion for summary judgment the Court can properly disregard an affidavit that contains only inadmissible hearsay. Leonard v. Dixie Well Service & Supply, Inc., 828 F.2d 291, 295 (5th Cir. 1987); Rossi v. Trans World Airlines Inc., 507 F.2d 404, 406 (9th Cir. 1974); Turoff v. May Co., 531 F.2d 1357, 1362 (6th Cir. 1976). An affidavit not based on personal knowledge is insufficient to support a motion for summary judgment. Hummel v. Wells

Petroleum Co., 111 F.2d 883, 886 (7th Cir. 1940).

On a motion for summary judgment the Court should disregard only the inadmissible portion of the affidavit, and is free to consider the admissible portions. Lee v. National Life Assur. Co., 632 F.2d 524, 529 (5th Cir. 1980), reh. den. 635 F.2d 516, United States v. Alessi, 599 F.2d 513, 514 (2nd Cir. 1979). In Cohen v. Ayers, 449 F. Supp. 298, 321 (N.D. Ill. 1978), aff'd. 596 F.2d 733 (7th Cir. 1979), it was held that an affidavit may be disregarded if it contains conclusions of law or of ultimate fact, statements made on information and belief, or argument, but that if admissible facts and inadmissible statements are mingled in the same affidavit, the Court may rely on the facts and disregard the rest. The Court is free to disregard the inadmissible argument or conclusions in an affidavit of support whether or not a motion to strike is filed. Prudential Ins. Co. v. Curt Bullock Builders, Inc., 626 F. Supp. 159, 164 (N.D. Ill. 1985).

If the evidence on a motion for summary judgment is not in admissible form, but there are indications that at trial the party will be able to offer it in proper form, the Court should consider it in ruling on a summary motion. Securities and Exchange Com. v. American Commodity Exchange, Inc., 546 F.2d 1361, 1369 (10th Cir. 1976); Western Land Corp. v. Crawford-Menz Co., 62 F.R.D. 550, 554 (D.C. Minn. 1973); see also, Shinabarger v. United Aircraft Corp., 262 F. Supp. 52, 56 (D. Conn. 1966), aff'd in part & rev'd in part on other grounds, 381 F.2d 808 (2nd Cir. 1967). As noted by the Court in Johnson v. Chilcott, 658 F. Supp. 1213, 1217 (D. Colo. 1987) (quoting, SEC. v. American Commodity Exchange, supra. "The relevant inquiry is whether the evidence will be admissible at trial.").

See also, Waldridge v. American Holchst Corp., 24 F.3d 918, 921 + N. 2, (7th Cir. 1994) (The evidence tendered need not be in a form that would be admissible at trial. Of course, the evidence set forth must be of a kind admissible at trial); Eisenstadt v. Centel Corp., 113 F.3d 738, 739-40 (7th Cir. 1997) (a party opposing summary judgment need not do so with evidence that is in a form that is admissible at trial, i.e., affidavits and depositions).

The Probable Cause Affidavit of the Arresting Officer of the Debtor submitted by State Farm in support of its Motion is clearly competent evidence that would be admissible at trial, and thus may be considered by the Court in deciding State Farm's Motion for Summary Judgment. The Affidavit was signed by the Arresting Officer under the penalties of perjury. The matters set out in the Affidavit were based on personal observations of the Debtor by the Arresting Officer at the time he arrested the Debtor, and were not based on mere speculation, conjecture, or on hearsay statements made by a third person to the Arresting Officer who was a bystander or other witness under no duty to respond. The matters set out in the Affidavit were thus not hearsay and would be the form of evidence that would be admissible at trial.

In addition, to the extent any portion of the Probable Cause Affidavit might be considered hearsay, Fed. R. Evid. 801(8)(b) and (c), as made applicable by Fed. R. Bk. P. 9017, provides an exception to the hearsay rule, whereby public records, reports, or data compilation in any form, of public offices or agencies setting forth matters observed pursuant to duty imposed by law, as to which matters there was a duty to report, and factual findings resulting from an investigation made pursuant to authority granted by law are not excluded as hearsay, even though the declarant is unavailable as a witness. Factual findings and matters

observed by a public official, such as a Police Officer, contained in public records, such as Police Reports, can be considered as admissible evidence under the public records exception to the hearsay rule. See, Baker v. Elcora Homes Corp., 588 F.2d 551, 556 (6th Cir. 1978); In re Byrd, 294 B.R. 808, 811-12 (Bankr. M. D. Ga. 2003). In re Chapman, 228 B.R. 899, 908 (Bankr. N. D. Ohio 1998).

The Probable Cause Affidavit by the Arresting Officer avers that on November 29, 2001 the Debtor was observed by him operating a motor vehicle while intoxicated. The Affidavit stated that the Arresting Officer personally observed the following as to the Debtor:

1. The Debtor had a “faint” odor of intoxicant.
2. The Debtor’s eyes were watery.
3. The Debtor’s face was flushed.
4. The Debtor’s clothing was neat and orderly.
5. The Debtor’s reactions were dull.
6. The Debtor’s speech was “mumbled”.
7. The Debtor’s manual dexterity was slow, and that she had trouble locating her driver’s license and her vehicle registration.
8. The Debtor’s attitude was “friendly” and “cooperative”.
9. The Debtor pulled herself from the vehicle.
10. The Debtor’s balance was “unsteady, swayed, needed support”, and the Debtor “leaned” against the vehicle, and “staggered” from the vehicle.

The Probable Cause Affidavit by the Arresting Officer also contained the results of a field sobriety test personally performed on the Debtor by the Arresting Officer. The Affidavit stated:

1. The Debtor failed the one leg stand test.
 2. The Debtor failed the walk and turn test, noticing the Debtor “had to stop-almost fell.”
 3. The Debtor failed the HGN test, both right and left.
- (The Arresting Officer did not complete the section of the Affidavit as to whether or not the Debtor passed or failed the finger to nose test.)

The Probable Cause Affidavit also averred that Debtor was administered a chemical test by an Officer of the Hammond Police Department, who was a Certified Operator, and the results were an alcohol concentration equivalent to .00% grams of alcohol per 210 liters of the Debtor's breath.

The Probable Cause Affidavit also averred that the Debtor was transported to St. Margarets Hospital, where a chemical test for intoxication was administered and that Arresting Officer was "awaiting the lab results". There is no evidence in the record that the lab results were ever furnished to the Hammond Police Department.

The Probable Cause Affidavit also averred that evidence of drug influence or recent drug usage was found on the Debtor, as her purse contained a prescription bottle of Diazepam, and that the Debtor admitted to having used the controlled substances of Diazepam and Vicodin. This admission by the Debtor as a party opponent is a statement which is not hearsay. See Fed. R. Evid 801 (d)(2).

The Record of the Hammond City Court is admissible as being self authenticated pursuant to Fed. R. Evid. 902(1), as a domestic public document under seal, as it was certified by the Clerk of the Hammond City Court under his seal. However, the record is clearly inconclusive, and of no assistance to the Court in deciding State Farm's Motion, as the last entry on the Criminal Chronological case summary reveals that the Information filed versus the Debtor was dismissed without prejudice.

Based on the record, the Court finds that State Farm has carried its initial burden by a preponderance of the evidence that there is an absence of evidence to support the Debtor's

case, and that there is no genuine issue of material fact that the Debtor was intoxicated pursuant to Indiana law at the time of the collision. Accordingly, the debt by the Debtor to State Farm is nondischageable pursuant to § 523(a)(9).

The failure of the field sobriety test by the Debtor, and the personal observations of the Arresting Officer that the Debtor's faculties were clearly impaired to the extent that the Debtor could endanger a person, together with the admission by the Debtor that she had used Diazepam and Vicodin, established that there is no genuine issue of material fact, and that State Farm should be granted a summary judgment as a matter of law, as the Debtor failed to come forward with any competent evidence whatsoever to reasonably permit the Court to find a genuine issue of material fact, whereby it could find in the Debtor's favor.

F

Damages

The Affidavit of State Farm dated May 21, 2003, or prior to the filing of the Debtor's Petition, as to damages only relates to the damages incurred by its insured Floyd Wallace, and one Dawn Wallace, and not as to Frank Valdez and Michael Echterling as alleged in Paragraph no. 6 of State Farm's Complaint.

The Affidavit avers that Floyd Wallace and one Dawn Wallace were paid the sum of \$9,765.70 by State Farm, plus \$107.00 for a filing fee paid by State Farm to the State Court for a total of \$9,872.70. However, the Affidavit states that of that sum \$3,104.75 was paid for "collision", and \$221.76 was paid for "rental", for a total of \$3,326.51. These sums representing property damage are not recoverable under § 523(a)(9). Thus, State

Farm shall be awarded a summary judgment in the principal sum of \$6,546.19 (\$9,872.70 - \$3,326.51), plus interest.

G

Interest

_____Ancillary obligations such as attorney's fees and interest may attach to the primary debt; consequently their status depends on that of the primary debt. Thus, when a debt is determined to be nondischargeable, the attendant attorney's fees, interest and costs are also nondischargeable. Klingman v. Levinson, 831 F.2d 1292, 1296-1297 (7th Cir. 1987), (citing, In re Hunter, 771 F.2d 1126, 1131 (8th Cir. 1985)) and In re Foster, 38 B.R. 639, 642 (Bankr. M. D. Tenn. 1984)). See also, Matter of Mayer, 51 F.3d 670, 677 (7th Cir. 1995); Matter of Church, 69 B.R. 425, 435-436 (Bankr. N. D. Tex. 1987).

When a federal judgment is based on a state law claim, as here, the Court must look to state law to determine the propriety of prejudgment interest on recovery. The Travelers Insurance Company v. Transport Insurance Company, 846 F.2d 1048, 1053 (7th Cir. 1988). However, federal law governs as to postjudgment interest on a federal judgment. Id. Thus, 28 U.S.C. §1961(a), rather than I.C. 24-4.6-1-101 applies as to postjudgment interest.

Indiana courts have awarded prejudgment interest to a claimant as an element of damages. Indiana Code 24-4.6-1-102 governs the rate of prejudgment interest in Indiana, in absence of an agreement, and provides as follows:

When the parties do not agree on the rate, interest on loans or forbearances

of money, goods or things in action shall be at the rate of eight percent (8%) per annum until payment of judgment.

In addition, Indiana has long held that a statute is not the exclusive authority for pre-judgment interest. Oil Supply Co. v. Hires Parts Service, Ind., 670 N.E.2d 86, 93-94 (Ind. app. 1996); Erie-Haven v. Tippman Refrig. Const., 486 N.E.2d 646, 650-651 (Ind. App. 1985); Ft. Wayne National Bank v. Scher, 419 N.E.2d 1308, 1310-12 (Ind. App. 3rd Dist. 1981) (prejudgment interest must be awarded in conversion action, where the damages sought to be recovered are complete and ascertainable as of a particular time in accordance with fixed rules of evidence and known standards of value) (collecting cases).

The date upon which prejudgment interest begins to accrue is governed by I.C. 24-4.6-1-103 which states as follows:

Interest at the rate of eight percent (8%) per annum shall be allowed:

(a) From the date of settlement on money due on any instrument in writing which does not specify a rate of interest, and which is not covered by IC 1971, 24-4.5 or this article;

(b) And from the date an itemized bill shall have been rendered and payment demanded on an account stated, account closed, or for money had and received and for the use of another and retained without his consent. (Emphasis supplied).

Prejudgment interest is computed pursuant to I.C. 24-4.6-1-103 from the time the principal amount was demanded or due, and is allowable at the permissible statutory rate when no contractual provision specifies the rate. See Sand creek Country Club v. CSO Architects, 582 N.E.2d 872, 876 (Ind. App. 3rd Dist. 1991). See also, In re Johnson, 120 B.R. 461, 474-477 (Bankr. N. D. Ind. 1990) (prejudgment interest accrues from the date of filing of

plaintiff's complaint where debtor did not prove when he had made demand on the debtor prior to filing of the complaint).

There is no evidence in the record when State Farm first made a demand on the Debtor. Thus, prejudgment interest shall be awarded from the date the nondischargeability Complaint was filed by the State Farm, or June 16, 2005, at the rate of 8% per annum to the date of the entry of judgment.

Pursuant to 28 U.S.C. § 1961(a), the postjudgment interest rate shall be computed at a rate equal to the weekly average one year constant maturity treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the judgment.⁷

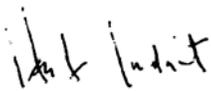
It is therefore,

ORDERED, ADJUDGED, AND DECREED, that the Plaintiff recover judgment versus the Defendant in the principal sum of \$6,546.19, together with prejudgment interest from June 16, 2005, at the rate of 8% per annum and costs. Postjudgment interest shall accrue at the rate of 5.04% per annum pursuant to 28 U.S.C. § 1961(a).

The Clerk shall set forth this judgment on a separate document pursuant to Fed. R. Bk.

P. 9021

Dated: October 24, 2006



JUDGE, U. S. BANKRUPTCY COURT

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Pursuant to Fed. R. Evid. 201, the Court takes judicial notice of Federal Reserve Statistical Release H.15 (519) October 19, 2006, Selected Interest Rates, where the weekly average one year constant maturity treasury yield was 5.04% per annum.

Distribution:
All counsel of record