

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF)	
)	
PAULA MOORE,)	CASE NO. 12-30150 HCD
DEBTOR.)	CHAPTER 7
)	
ESTATE OF IRIS Y. JONES, by PAUL CHOLIS,)	
PERSONAL REPRESENTATIVE,)	
PLAINTIFF,)	
vs.)	PROC. NO. 12-3024
)	
PAULA MOORE,)	
DEFENDANT.)	

Appearances:

R. William Jonas, Jr., Esq., counsel for plaintiff, Hammerschmidt, Amaral & Jonas, 137 North Michigan Street, South Bend, Indiana 46601; and

Steve Bom, Esq., counsel for defendant, 628 Boston Street, LaPorte, Indiana 46350.

MEMORANDUM OF DECISION

At South Bend, Indiana, on June 17, 2013.

Before the court are the Complaint to Determine Dischargeability of Debt Pursuant to 11 U.S.C. § 523(a)(4), filed by the plaintiff Paul Cholis, Personal Representative of the Estate of Iris Y. Jones, and the Answer filed by the defendant Paula Moore, chapter 7 debtor. Trial was held on the Complaint, and post-trial briefs were submitted by the parties. The court then took the matter under advisement. For the reasons presented below, the court finds that the debt owed by Paula Moore to the Estate of Iris Y. Jones is excepted from discharge in the defendant's bankruptcy case.¹

BACKGROUND

A. Procedural Background

The plaintiff in this adversary proceeding is Paul Cholis, on behalf of the Estate of Iris Y. Jones ("Mrs. Jones"), and the defendant is the daughter of Mrs. Jones and a debtor in a pending chapter 7 case.

¹ The court has jurisdiction to decide the matter before it pursuant to 28 U.S.C. § 1334 and § 157 and the Northern District of Indiana Local Rule 200.1. The court has determined that this matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I).

Mrs. Jones was diagnosed to have Alzheimer's disease in 2002. Her two daughters, Paula Moore ("Moore" or "defendant") and Valerie Paschen ("Paschen"), cared for her until she passed away on May 3, 2010. The defendant, Mrs. Jones' older daughter, acted as attorney in fact for her mother from 2002 through 2008 and as guardian of the person for her mother for about a year longer. However, Paschen, the younger daughter, challenged her sister's conduct as attorney in fact holding power of attorney. Paschen filed a guardianship petition in state court and demanded an accounting. The St. Joseph Probate Court granted the guardianship, giving Paschen control over her mother's estate and finances and awarding Moore guardianship of the person. Because the disputes between the sisters continued after Mrs. Jones died on May 3, 2010, Cholis was appointed to replace Moore as the personal representative of Mrs. Jones' estate. Moore filed a voluntary chapter 7 bankruptcy petition on January 25, 2012, and Cholis timely filed this adversary proceeding to determine whether Moore owed a debt to her mother's estate that was excepted from Moore's discharge pursuant to 11 U.S.C. § 523(a)(4).

B. Positions of the Parties

The plaintiff claimed that the defendant was a fiduciary to her mother who breached her fiduciary duty by depleting her mother's brokerage account, taking cash from it, and depositing funds into her own personal account at Teachers Credit Union ("TCU"). Cholis alleged that the defendant converted Mrs. Jones' funds to her own use and failed to account properly for the cash withdrawn from her mother's accounts. He charged that the defendant owed her mother's estate a debt in the amount of not less than \$228,121.77 for the funds improperly taken and expended. In the Complaint the plaintiff asked the court to find that the debt was nondischargeable under 11 U.S.C. § 523(a)(4) for "fraud, embezzlement or defalcation while acting in a fiduciary capacity." R. 1 at 2. Throughout the adversary proceeding, however, he focused specifically on the § 523(a)(4) ground of "defalcation while acting in a fiduciary capacity."

The defendant asserted that, when she was given a power of attorney by her mother in 2001, she was not instructed about her record-keeping responsibility and did not know to keep an accounting. Moore claimed that her mother continued to handle most of her own financial transactions or directed Moore to do

specific tasks. In addition, no one told the daughters to restrict their mother's ability to manage her own affairs once Mrs. Jones was declared to be incompetent. Moore insisted that any negligence in her failure to keep records and accounts did not bring this action within the contemplation of § 523(a)(4). Nor did it warrant treble damages and attorney fees. She argued that she was a 50% heir to her mother's estate and that, after taking into account her 50% interest and the annual gifts to herself that were permitted under the power of attorney, she did not misappropriate any monies of the estate.

C. Factual Background

The underlying facts are in large part undisputed. On August 8, 2001, Mrs. Jones executed two documents with the investment brokerage firm A.G. Edwards & Sons, Inc.: "Full Trading Authorization with Privileges to Withdraw Money and/or Securities and Commodities" and "Durable Power of Attorney" (together, "Authorization").² Pl. Ex. 4.1. Working with the investment adviser Edward Patzer, Mrs. Jones named her older daughter Paula Moore as agent or attorney in fact with authority to conduct transactions on behalf of Mrs. Jones. The Authorization stated: "This Agreement establishes a fiduciary relationship between you [Mrs. Jones] and the Authorized Agent [Moore], who may act only in your interest." *Id.* The execution was witnessed by Edward Patzer and Denice Barrett.

On August 31, 2001, Mrs. Jones executed a General Durable Power of Attorney ("POA"), appointing her older daughter Paula Moore to serve as her Agent and her younger daughter Valerie Paschen to serve as Alternate Agent if Moore was unable or unwilling to serve. *See* Pl. Ex. 1. She also executed a Last Will and Testament ("Will") and a Revocable Living Trust Agreement ("Trust"), both of which stated her desire that her daughters would share equally in her estate.³ *See* R. 2, 3. Moore was named as Mrs.

² A.G. Edwards subsequently became Wachovia Securities and then Wells Fargo Advisors, L.L.C. Mrs. Jones continued to work with the same financial advisor, Edward Patzer, and his associate Denice Barrett, despite the change in the institutions. The court will refer to Mrs. Jones' brokerage account as the A.G. Edwards account throughout this Memorandum of Decision.

³ Iris Jones' Will was a pour-over will, and her Trust split everything 50-50 per stirpes.

Jones' personal representative and as trustee of her Trust, and Paschen was named the substitute or successor personal representative and trustee. The documents were prepared by an attorney.

Mrs. Jones suffered from dementia. By 2002, the disease was severe enough that she was diagnosed as having Alzheimer's, was treated by medication, and needed assistance with her financial matters. The defendant already had been appointed as attorney in fact, with the power to handle her mother's financial affairs. The major portion of Mrs. Jones' financial holdings was held in her brokerage account at A. G. Edwards. Mrs. Jones set up an automatic withdrawal of \$1,200.00 from that account which was deposited monthly into a checking account at 1st Source Bank. That bank account also received monthly deposits of her pension and social security checks. From the 1st Source Bank account she paid her living expenses and bills. *See* Pl. Ex. 5 (1st Source Bank monthly statements, cashed checks). Two other accounts were located at TCU: One listed joint ownership, with Mrs. Jones as the primary owner and Paula Moore as the second owner ("the Jones Account"). *See* Pl. Ex. 6 (monthly statements, 2002-08). The other listed the defendant as the primary owner and included Mrs. Jones' name ("the Moore Account"). *See* Pl. Ex. 7 (monthly statements 2003-08).

The defendant's sister, Valerie Paschen, initiated a state court guardianship proceeding in October 2008 after she discovered that the value of her mother's assets in the A.G. Edwards account had decreased. Paschen sought an accounting from the defendant as her mother's attorney in fact. Moore defended against her sister's allegations, first in the state court guardianship and probate proceedings and now in this bankruptcy case, which was filed on January 25, 2012.⁴

When Mrs. Jones died on May 3, 2010, Paula Moore first served as the duly appointed personal representative of the decedent's estate, as Mrs. Jones' Will directed. However, because of the contentious disagreements between the sisters, the St. Joseph Probate Court appointed Paul Cholis to be the personal

⁴ The plaintiff charged in his briefs that the defendant's bankruptcy petition was a bad faith filing. He argued that the defendant falsely stated that she owned no real property, when she jointly owned a residential lot with her husband, and that she had sufficient disposable income to satisfy all the debt she listed on her schedules. *See* R. 14 at 8. However, the Complaint alleges only that the debt the defendant owes to the Jones estate should be excepted from her discharge, and only that issue is before the court.

representative of Mrs. Jones' estate on September 28, 2010. *See* Pl. Ex. 14. In that capacity, he filed the Complaint that initiated this adversary proceeding. *See* R. 1. The Complaint alleged that the defendant Paula Moore, while serving as power of attorney for her mother Iris Jones, misappropriated her mother's funds and directed them to her personal benefit and to the benefit of her husband, in violation of 11 U.S.C. § 523(a)(4). It asked the court to find Moore's debt to the Jones estate nondischargeable for "fraud, embezzlement or defalcation while acting in a fiduciary capacity." *See id.* ¶ 5. It also claimed entitlement to treble damages under Indiana Code § 34-24-3-1. *See id.* ¶ 6. The defendant denied the essential allegations of the Complaint.

In the parties' jointly submitted Pretrial Order, the plaintiff more specifically alleged that, in the period from May 2002 through May 2009, the defendant breached her fiduciary duty by converting her mother's funds to her own use or by failing to account properly for cash withdrawn from Mrs. Jones' accounts. *See* R. 10, ¶ C.6. The plaintiff asserted that the defendant drew checks on an account of A.G. Edwards in an amount of at least \$300,000.00; that she withdrew cash of at least \$73,845.77 from the TCU account⁵; made money orders payable to her husband; and paid her household and personal bills and expenses with money from her mother's accounts. *See id.* He asserted that the debt the defendant owed to the Jones estate was nondischargeable under § 523(a)(4). *See id.* ¶ C.8.

The defendant's position in the Pretrial Order was that she was given a power of attorney but was not instructed in the necessary record-keeping. *See id.* ¶ D.2. The power of attorney authorized her to give gifts of the maximum amount allowed by the Internal Revenue Service each year, and she chose to give that amount to herself each year. She claimed that most of the financial transactions were done at her mother's direction or for her mother's benefit. She also insisted that she was entitled to a half-interest in the Jones estate and in annual gifts to herself. Once those amounts were recognized as hers, she asserted, it was clear that there was no misappropriation of monies of the estate. The defendant also contended that her negligent

⁵ The plaintiff charged that the defendant took cash withdrawals from the TCU "Jones Account" of at least \$73,845.77: \$21,230.00 in 2002, \$18,000.00 in 2003; \$20,860.77 in 2004; \$10,155.00 in 2005; \$600.00 in 2006; \$0 in 2007; and \$3,000.00 in 2008. *See* R. 10, p. 2.

failure to keep records and accounts while acting as her mother's attorney in fact and guardian did not constitute fraud, embezzlement, or defalcation pursuant to § 523(a)(4). Finally, she argued that the Bankruptcy Code did not contemplate treble damages and that a determination of nondischargeability was sufficiently punitive in itself. *See id.* ¶¶ D.3-8.

At the trial, each of the daughters of Iris Jones testified.⁶ Valerie Paschen, the younger daughter, stated that she was an operations manager at 1st Source Bank in Walkerton. She told the court that, in 2002, when Mrs. Jones started to forget things and to have difficulty handling her finances, a doctor tested her memory and diagnosed dementia. He prescribed Aricept, a medication to slow down the process of dementia. Familiar with finances and with her mother's account at 1st Source Bank, Paschen helped her mother with her checks and checking account. However, when Paschen broke her foot she turned the job over to her sister Paula Moore.

One of Paschen's duties at 1st Source Bank was the review of overdraft accounts. She was quite surprised, in 2008, to discover that her mother's account had a negative balance. Paschen acknowledged that her mother took trips with her and/or with Moore once or twice a year and enjoyed shopping, but she always had money in her account. When Paschen asked her sister about it, however, Moore told her that she knew nothing about the overdraft. Paschen then covered her mother's overdrawn checks, but began to question her mother's and sister's statements that everything was fine. In 2008, based upon the overdraft, the unkempt condition of her mother's house, and her mother's inability to keep food in the home, Paschen filed a state court guardianship petition. The St. Joseph Probate Court granted the guardianship, giving Paschen control over her mother's estate and finances and naming Moore guardian of the person. When controversies and disputes continued after Mrs. Jones died, concerning the personal representation of her estate, attorney Paul Cholis was named personal representative.

⁶ Plaintiff's exhibits 1-9.1 were admitted by stipulation, and exhibits 10-14 were admitted during the trial. Exhibit 15 was admitted after the objection was overruled. Defendant's exhibit A was admitted.

Paschen testified that her home was only two blocks from her mother's house and that she often took her mother to the doctor and grocery store, cleaned her house, and cooked dinner. She took care of other things whenever it was necessary, she said. It was her understanding that their mother's estate, under the Will and Trust, was to be divided equally between the two daughters.

The next witness at trial was Paul Cholis, a licensed attorney admitted to practice in October 1974. Over the last three decades, he said, his practice focused primarily on estate and trust law. As the appointed personal representative of the Estate of Iris Jones, he was responsible for marshaling assets, paying bills, filing inheritance tax returns, and managing the estate. He knew of Paschen's lawsuit and its demand for an accounting and reimbursement of funds, but he was not a party to that suit. Although he reviewed the pleadings and depositions in that state court action, his review of Mrs. Jones' bank records and brokerage account statements was made in order to marshal assets for the Estate of Iris Jones.

Cholis recognized that Mrs. Jones' 1st Source bank account was used like an operating account; from it she paid her monthly bills and made living expense disbursements. Each month her pension check, social security check, and a \$1,200 automatic transfer from her brokerage account at A.G. Edwards were deposited into Mrs. Jones' 1st Source account. He opined that Mrs. Jones' living expenses were very modest and that the amounts put in the 1st Source account certainly were adequate to pay Mrs. Jones' bills.

Cholis examined the monthly A.G. Edwards statements from 2002-2009 and reviewed the checks disbursed from the brokerage account. In early 2002, he testified, the balance in the A.G. Edwards account was approximately \$663,000.00. Over the next years, it continually declined in value. When he filed an Indiana inheritance return in 2010, the account was about \$142,000.00, he stated. The automatic withdrawals from the brokerage account into the 1st Source account and the checks written on that account were identifiable for living expenses.⁷ However, other A.G. Edwards funds were traced to the TCU "Jones Account." Cholis found that, between December 2002 and August 2008, about \$179,700.00 was deposited

⁷ The court notes that, when Mrs. Jones wrote checks on 1st Source Bank checks, she indicated the purpose of each check on the "memo" line of the check. When Paula Moore wrote the checks, she also made notations concerning the use of those funds on the "memo" line. *See* Pl. Ex. 5.

from the A.G. Edwards account into the TCU “Jones Account,” and \$6,706.77 was withdrawn as cash. He insisted that the transfer of those funds into the “Moore Account” without explanation of their use was a breach of Moore’s fiduciary duty. He further testified that the cash withdrawals of \$41,115.00 were made from the TCU “Jones Account” between December 2002 and July 2004 and that those takings constituted a breach of Moore’s fiduciary duty.

The plaintiff prepared a summary of the monthly withdrawals and transfers from the A.G. Edwards account into the 1st Source Bank account from January 2002 through January 2009. (See Ex. 13.) In addition, he proffered a summary of damages and of prejudgment interest, calculated at 8% interest per annum. (See Ex. 15.) His report summarized the movement of funds, in the form of securities checks and cash withdrawals, from the A.G. Edwards account into the TCU “Jones Account” and “Moore Account.” The plaintiff claimed damages from Moore’s violation of § 523(a)(4) based upon that summary, herein presented:

Year	Category of Damages	Amount	Prejudgment Interest to 10/15/2012 (8% per annum)	
2002	Securities checks to Moore	5,000.00	7,500.00	5,709.03
	Cash withdrawals from Jones	2,500.00		
2003	Securities checks to Moore	14,000.00	35,200.00	23,978.42
	Cash withdrawals from Jones	21,200.00		
2004	Securities checks to Moore	21,500.00	42,421.77	25,504.19
	Cash withdrawals from Jones	17,315.00		
	Cash from Moore	3,606.77		
2005	Securities checks to Moore	44,400.00	44,500.00	23,193.64
	Cash from Moore	100.00		
2006	Securities checks to Moore	31,500.00	31,500.00	13,897.97
2007	Securities checks to Moore	35,500.00	35,000.00	12,642.19
2008	Securities checks to Moore	29,000.00	32,000.00	8,998.56
	Cash from Moore	3,000.00		
Total			\$228,121.77	\$113,924.00 Plus 49.9993 per diem after 10/15/2012

Pl. Ex. 15 (using “Moore” for “Moore Account,” “Jones” for “Jones Account”).⁸

Cholis testified that he also reviewed the bankruptcy filings to determine whether the assertions in the petition and schedules were true and correct. Noting that Moore declared that she owned no real property, Cholis went to the county court house and to a title company to see if there were real estate holdings in her name. He found that real property in LaPorte County had been purchased by Moore and her husband on September 1, 2001, and that its assessed value for tax purposes was \$20,700. *See* Pl. Ex. 10.

The plaintiff summarized that the defendant took \$228,121.77 in withdrawals and cash transfers from her mother’s A.G. Edwards account over the years in which she was appointed as her mother’s fiduciary. He asserted that prejudgment interest in the amount of \$113,924.00.00 was authorized. He also argued that the Indiana Victim Reparation Statute, Indiana Code § 34-24-3-1, provided for treble damages when the court found criminal damage for conversion or theft. He further requested attorney fees in the amount of approximately \$70,000.00. He explained that the fee request included disbursements to the firm of May Oberfell that were advanced by Paschen before Cholis was appointed, and to his counsel R. William Jonas, Jr., and his law firm Hammerschmidt, Amaral & Jonas. He asserted that their legal services were reasonable and necessary in this bankruptcy adversary proceeding. He further sought a judgment that the debt Paula Moore owed to the Estate of Iris Jones be entered as nondischargeable.

⁸ Defendant’s counsel voir dired Cholis on this exhibit. The witness stated that, although he did not know how the diverted funds were spent, he was sure they were wrongfully appropriated from Mrs. Jones’ brokerage account and were not accounted for by Mrs. Jones’ fiduciary Paula Moore. He pointed out that the funds listed in the Summary were transferred or withdrawn from the brokerage account without any explanation for their use. Cholis admitted that none of the withdrawal checks was signed by Moore alone and that Iris Jones had a right to do with her money as she chose. Nevertheless, he asserted that he did not attach much significance to the signatures, in light of the fact that the funds were deposited into the TCU accounts and then rapidly, completely disbursed from those accounts. Iris Jones did not need that amount of money for her own life and livelihood, he commented. He further pointed out that an attorney in fact was responsible to account for the funds under his or her control. In this case, no accounting was made of at least a quarter of a million dollars. The court overruled the defendant’s objection and allowed the exhibit.

After Cholis' testimony the plaintiff rested. The defendant called Paula Moore as the first witness.⁹ She stated that she held a full-time job at Good Will Industries for \$7.25 an hour. She had worked at Polygon 30 years and drew a pension of about \$600 a month, she said.¹⁰ She testified that she withdrew money from the A.G. Edwards account to pay for taxes, expenses, and trips. She further asserted that no one explained the duties and responsibilities of an attorney in fact, and so she did not know about record-keeping. According to Moore, even though her mother was declared incompetent in 2002, Mrs. Jones wrote checks until at least 2006 for whatever she wanted and made financial decisions. Stating that her mother made cash withdrawals for the benefit of grandchildren, she proffered Defendant's Exhibit A, copies of withdrawals from the "Jones Account" at TCU: 25 withdrawal slips signed by Mrs. Jones between July 29, 2003 and June 21, 2004, in the total amount of \$6,930.00. Moore pointed out the notation on one, which indicated that the \$100 withdrawal was intended for her grandson Troy to go to the doctor for poison ivy. *See* Def. Ex. A, p. 9. She testified that another was used to pay attorney fees for Moore's son and Paschen's daughter; however, no notation corroborated that statement. Moore admitted that she had no other evidence of her mother's gift-giving; nor did she prepare and file a gift tax return.

Moore testified that she had nothing to do with taking the money out of her mother's brokerage account. Once she became aware that she was supposed to keep a complete accounting of her mother's finances, she tried to go back to 2002 to put together an accounting of where her mother's money went, but couldn't do it. She mentioned trips with her mother to Las Vegas, Indianapolis, Brown County, Florida, and Michigan. She firmly stated that she did not think she spent money wrongfully.

⁹ Plaintiff's counsel objected to Moore's competence to address the question whether there was a claim and what was the amount of the claim. He argued that the Deadman's Statute prevented this witness from testifying concerning the claim: When the lips of the decedent were sealed, the lips of every other witness were sealed, he asserted. Counsel for the defendant argued that Paula Moore had a right to testify about her use of the funds. The court determined that the issue before the court was one of dischargeability of a debt and that the defendant had a right to explain what she did with the money transferred from her mother's brokerage account. It overruled the plaintiff's objection.

¹⁰ On Schedule I, the defendant reported a monthly pension of \$1,639, not \$600.

The defendant also explained that, when she filed bankruptcy, she did not claim to own any real property because she contributed no money to the lot registered to herself and her husband. She was not even aware if she signed the mortgage for the lot, she said. However, she admitted that she was listed on the public records as having an interest in that lot and therefore that her Schedule A was not accurate.¹¹ When she was asked about the unsecured debt of \$100,000 listed on Schedule F, a debt to the St. Joseph Superior Court on a “civil estate matter,” Moore admitted that “technically” she owed the debt to her mother’s estate even though she didn’t believe she really owed the state court that money.¹²

Moore could not remember whether she or her mother most often arranged for the withdrawals and checks from A.G. Edwards, but probably her mother did, she said. Nor did she recall whether her mother ever made withdrawals from the TCU “Jones Account.” Moore described the TCU Jones Account as a joint account to pay either her own bills or her mother’s. She acknowledged that approximately \$350,000 was taken out of her mother’s brokerage account over six years. She testified that she thought “it was OK” not to keep records of those withdrawals and transfers, but admitted she didn’t know what she did with the \$179,000 that went into her TCU account. She also admitted that she did not try to get copies from TCU of the checks written on the TCU accounts or the check registers for the “Moore Account.”

The defendant testified that the monthly bank account statements came in the mail to her mother and that Moore did not review them. She told the court that her mother’s doctor did not tell her to take away her mother’s keys and check book, even though her mother was found to be incompetent in 2002. She stated that, when the state court litigation began and requests for production of documents were made, she turned over whatever statements, cancelled checks, and check registers she had. When she was asked whether her mother’s estate was to be divided equally between herself and her sister, she responded “technically, no.” She understood that there was to be an even split of whatever was left after her mother died.

¹¹ The record in Paula Moore’s case does not reflect an amendment of Schedule A.

¹² This state court debt was not explained further at the hearing or in the record.

The next witness to testify was Paula Moore's husband, Gordon Moore. He stated that he and the defendant had not commingled their assets or shared banking accounts. In addition, he bought the real property at issue in the bankruptcy; his wife had nothing to do with the lot, he testified. He took out a mortgage on that lot in his name alone. Gordon Moore also stated that he and Paula saw Mrs. Jones quite often and that his wife and her mother traveled and shopped together a lot. He thought Mrs. Jones paid for their shopping trips; he said that Mrs. Jones would give him a check or his wife would pay him back.

The final witness to testify on behalf of the defendant was Beatrice M. Kessler, a friend of many years to Mrs. Jones and the defendant. She often went on shopping trips with them. She testified that they didn't spend more than \$1,000 when they shopped.

The plaintiff called as a rebuttal witness Marcellus Lebbin, an Indiana attorney in the law firm of May, Oberfell & Lorber. In August 2008, he testified, Moore asked him to draft a deed to transfer Iris Jones' home out of her Trust and to Moore instead. On September 2, 2008, Moore brought Mrs. Jones to the office. However, Lebbin met with Mrs. Jones alone to discuss her estate plan and her future plans. In his discussion with Mrs. Jones, he testified, she made it very clear that she wanted her daughters to share equally in everything. The deed did not fit into that plan, he said, and for that reason it was not executed. Once he explained to her how the estate was set up, Mrs. Jones was passionate that she did not want the property transferred to the one daughter. He reassured her that everything was left as she wanted it and that the deed would not be executed. The attorney testified that he did not know Mrs. Jones had been declared incompetent in 2002.

The final rebuttal witness was Denice Barrett, an employee of Wells Fargo Advisors who handled administrative and clerical responsibilities and customer service. She had worked 21 years with Mr. Patzer when the investment firm was named A.G. Edwards; it now is Wells Fargo Advisors, she said. Throughout that time, Iris Jones held an account, and Ms. Barrett knew her and handled her account. She testified that, when customers wanted to make a withdrawal, they called her. She said that the majority or all of Mrs.

Jones' contacts with respect to withdrawals came from Moore, not Mrs. Jones. In fact, she testified, she did not remember any withdrawal requests from Mrs. Jones.

When the presentation of evidence and testimony were concluded, the parties gave closing arguments. The court allowed the parties time to file post-trial briefs and then took the matter under advisement.

DISCUSSION

The plaintiff's Complaint asks the court to declare that the debt owed by Paula Moore to the Estate of Iris Jones, her mother, is nondischargeable based upon § 523(a)(4), which excepts from a debtor's discharge any debt "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny." 11 U.S.C. § 523(a)(4). In order to show that the debt at issue is one that falls into that discharge exception, the complainant must prove the elements of that exception by a preponderance of the evidence. *See In re Berman*, 629 F.3d 761, 765 (7th Cir. 2011) (citing *Grogan v. Garner*, 498 U.S. 279, 291, 111 S. Ct. 654, 112 L.Ed.2d 755 (1991)). As the party objecting to the discharge of the debt, the plaintiff bears that burden of proof initially and ultimately. Nevertheless, the defendant must produce some evidence in response when the creditor presents a sufficient showing of the elements of the case with persuasive evidence of the defendant's acts of fraud, defalcation, embezzlement or larceny.

An objecting creditor bears the ultimate burden of persuading the Court on the elements of non-dischargeability under Section 523(a)(4) by a preponderance of the evidence. However, once a creditor has demonstrated a loss of assets under a fiduciary's care, the burden of production shifts to the fiduciary to demonstrate that such losses were *not* incurred as a result of his defalcation.

In re Firer, 317 B.R. 457, 465 (Bankr. D. Conn. 2004) (citations omitted); *see also In re Mayer*, 173 B.R. 373, 377 (N.D. Ill. 1994) (describing shifting burden of proof).

Although the plaintiff listed, in the Complaint, the § 523(a)(4) elements of "embezzlement, larceny, or defalcation while acting in a fiduciary capacity," he did not attempt to prove embezzlement and

larceny; instead, he focused on defalcation while acting in a fiduciary capacity.¹³ To succeed with such an adversary claim, he was required to establish “(1) that the debtor acted as a fiduciary to the creditor at the time the debt was created, and (2) that the debt was caused by fraud or defalcation.” *In re Berman*, 629 F.3d at 766 (citations omitted). In this case Cholis maintained that the defendant was a fiduciary to her mother, whose estate he represented, and that she misappropriated or defalcated funds from her mother’s accounts while acting in a fiduciary capacity. Moore admitted that she was appointed as her mother’s agent and attorney in fact under two power-of-attorney documents but disputed that she committed any acts of defalcation or, indeed, that there even was a debt owed to the plaintiff.¹⁴

A. *Fiduciary Capacity*

The court begins by considering the first criterion, whether the defendant acted as a fiduciary to her mother at the time the debt was created. Iris Jones designated Paula Moore as her agent and attorney in fact in the two documents she executed in August 2001 – the POA and the A.G. Edwards Authorization with its attached durable power of attorney. By appointing her daughter to those roles, Mrs. Jones conferred upon her the authority to perform specified acts on her behalf. The Authorization explicitly stated that a fiduciary relationship existed between them, and it required Moore to act only in Mrs. Jones’ interest. *See* Pl. Ex. 4.1, ¶ 6. The Authorization became effective upon signing and continued in full force unless Mrs. Jones revoked it in writing. The appended durable power of attorney reiterated Moore’s ongoing power to act on Mrs. Jones’ behalf, despite Mrs. Jones’ disability or incapacity. The POA, executed three weeks later by Mrs.

¹³ In *In re Berman*, the Seventh Circuit noted that “[d]efalcation can be distinguished from fraud and embezzlement on the basis that subjective, deliberate wrongdoing is not required to establish defalcation, though some degree of fault is required. We have held that defalcation requires something more than negligence or mistake, but less than fraud.” *Id.*, 629 F.3d at 765, n.3 (citations omitted).

¹⁴ The defendant also challenged the plaintiff’s standing to bring this action because the term “estate” is not included in the definition of “person” found in Indiana Code § 34-6-2-103. However, that statutory provision is inapposite to this proceeding. More importantly, the personal representative of an estate “has the exclusive authority to bring an action on behalf of the probate estate.” *In re Trutko-Clayton*, 384 B.R. 813, 817 (Bankr. N.D. Ind. 2007). Personal Representative Paul Cholis, not the estate, properly brought this adversary proceeding on behalf of the Estate of Iris Y. Jones.

Jones through her attorney, granted a much broader durable power of attorney. Although it did not explicitly impose a fiduciary duty upon Moore, it granted Moore the power to handle Mrs. Jones' finances, personal property, and real estate; to transact business for her; to represent her; to manage her care and maintenance; to make gifts from her; and to create intervivos trusts for her benefit.

State law defines whether a fiduciary duty exists. As a matter of law in Indiana, “[a] power of attorney creates a fiduciary relationship between a principal and her agent, or attorney in fact.” *In re Miller*, 935 N.E.2d 729, 738 (Ind. App. 2010) (citing *In re Estate of Rickert*, 934 N.E.2d 726, 729-30 (Ind. 2010)). Under the Indiana Power of Attorney Act, an attorney in fact is required to “use due care to act for the benefit of the principal,” to act “in a fiduciary capacity,” and to “keep complete records of all transactions entered into by the attorney in fact on behalf of the principal.” Ind. Code §§ 30-5-6-2,-3, -4.

However, the Seventh Circuit has made clear that “[n]ot all persons treated as fiduciaries under state law are considered to ‘act in a fiduciary capacity’ for purposes of federal bankruptcy law,” because the determination of what constitutes a fiduciary relationship under § 523(a)(4) “is a matter of federal law.” *In re Berman*, 629 F.3d at 767 (citing *In re Frain*, 230 F.3d 1014, 1017 (7th Cir. 2000)). One criterion of such a relation is that the defendant must have been in that fiduciary relationship “‘before the wrong and without reference thereto.’” *Id.* (quoting *Davis v. Aetna Acceptance Co.*, 293 U.S. 328, 333, 55 S. Ct. 151, 79 L.Ed. 393 (1934)). Another requirement is that it must involve “a difference in knowledge or power between fiduciary and principal which . . . gives the former a position of ascendancy over the latter.” *In re Marchiando*, 13 F.3d 1111, 1116 (7th Cir.), *cert. denied*, 512 U.S. 1205, 114 S. Ct. 2675, 129 L.Ed.2d 810 (1994). As examples, the *Marchiando* court pointed out that, in a lawyer-client relationship the lawyer holds an elevated professional status, with greater knowledge and power over his client, and in a guardian-child relationship the guardian holds a position of special confidence in relation to the principal, because of his greater knowledge and power over the child. The court summarized that, when the principal cannot monitor the fiduciary’s performance in his duties, then “the law does not treat the relation as an arm’s length between equals.” *Id.*

According to *Marchiando*, courts determine whether a debt is nondischargeable under § 523(a)(4) by considering whether the relations involve either an express trust or a fiduciary status based upon “relations of inequality that justify the imposition on the fiduciary of a special duty, basically to treat his principal’s affairs with all the solicitude that he would accord to his own affairs.” *Id.*; *see also In re Berman*, 629 F.3d at 769-70 (finding neither an express trust nor an implied fiduciary status and no substantial inequality in power or knowledge between the parties); *In re Alomari*, 486 B.R. 904, 915 (Bankr. N.D. Ill. 2013) (finding that plaintiff failed to establish substantial inequality in power).

This court finds that the A.G. Edwards Authorization contains some of the hallmarks of an express trust: It is a signed voluntary agreement which sets forth the rights, duties, and obligations of the parties with respect to segregated funds that are managed by a financial entity. *See In re Berman*, 629 F.3d at 769 (listing hallmarks of a trust, citing *In re McGee*, 353 F.3d 537, 540-41 (7th Cir. 2003)); *see also Presbytery of Ohio Valley, Inc. v. OPC, Inc.*, 973 N.E.2d 1099, 1108 (Ind. 2012), *cert. denied*, 133 S. Ct. 2022 (April 29, 2013) (requiring express trust to be written, signed by settlor-property owner; citing Ind. Code § 30-4-2-1(a)). However, the Authorization neither calls itself a trust nor expresses the intention to create a trust. *See Beck v. General Accident Ins.*, 114 B.R. 168, 171 (S.D. Ind. 1990) (“In Indiana, an express trust is created by direct and positive acts of the parties as evidenced by an instrument wherein the language expressly or by plain implication evinces an intention to create a trust.”). The court concludes that the Authorization is not an express trust.

Nevertheless, it is clear that the Authorization explicitly established a fiduciary relationship requiring Moore to act only in her mother’s interest. Through that document Mrs. Jones entrusted her brokerage funds to Moore and authorized her to conduct financial transactions on Mrs. Jones’ behalf. The POA granted Moore much more extensive power to manage her mother’s finances, property, business, and care. She even had the power to make gifts, using her mother’s money. Those documents placed Moore in a “position of special confidence in relation to” her mother. *See In re Marchiando*, 13 F.3d at 1116. The court finds that the POA implicitly and the Authorization explicitly created a fiduciary relationship of the

kind required under § 523(a)(4). *See In re Scott*, 481 B.R. 119, 193-95 (Bankr. N.D. Ala. 2012) (finding that POA created fiduciary relationship sufficiently elevated for § 523(a)(4) to apply); *In re Goepf*, 455 B.R. 388, 397 (Bankr. D.N.J. 2011) (finding that debtor's POA created fiduciary obligations contemplated by § 523(a)(4)); *see also In re Woods*, 284 B.R. 282, 290 (D. Colo. 2001) (stating that a POA could create § 523(a)(4) fiduciary status when a debtor with a general durable power of attorney held complete control over assets; contrasting it with the limited powers found therein). This court concludes that Moore was a fiduciary of her mother under both Indiana and federal bankruptcy law.

The court now considers whether Moore was acting as the fiduciary of Iris Jones at the time the debt was created. It finds first that the time element has been satisfied: The defendant was given the power to act in a fiduciary capacity (specifically, the authority to manage her mother's brokerage and banking accounts) in August 2001; and the debt alleged by the plaintiff was created thereafter, in a series of financial transactions between 2002 and 2008. To decide whether Moore was acting in a fiduciary capacity when she made the withdrawals and other monetary transactions that gave rise to that debt, the court reviewed the testamentary and documentary evidence before it. Moore's signature on the power of attorney documents attested to her agreement to accept the responsibility of carrying out the duties established in the POA and Authorization. It was clear from her testimony that Moore knew her mother's medical diagnosis of Alzheimer's, dementia, and loss of capability in handling her financial affairs, and recognized her mother's growing incapacity. *See, e.g., In re Goepf*, 455 B.R. at 397 (describing plaintiff's declining mental abilities, power imbalance in debtor-plaintiff relationship, debtor's use of plaintiff as "personal piggy bank"; finding debt nondischargeable). In fact, Mrs. Jones herself must have believed herself in need of help, for she executed the documents that turned over to her older daughter virtually all responsibility over her life.

Some of the evidence reflected Moore's understanding of the role entrusted to her. She testified that she paid her mother's taxes, took trips with her, shopped with her, and paid her bills when her mother no longer wrote checks. When Moore signed 1st Source Bank checks on her mother's behalf, she used the initials "P.O.A." after her name and indicated the purpose of each check on the "memo" line, as her mother

had done. *See* Pl. Ex. 5. Either she or her mother wrote a similar notation on one of the withdrawal slips of the “Jones Account” at TCU. *See* Def. Ex. A. In the court’s view, those notations on the exhibits demonstrated that Moore knew how to keep a simple record of expenditures. If similar records from the TCU “Moore Account” had been offered in evidence, as well, they might have indicated the use of the funds deposited into that account. No such records were presented.¹⁵

The plaintiff has shown by a preponderance of the evidence that a fiduciary relationship existed between Iris Jones and her daughter Paula Moore. The plaintiff met his burden of demonstrating that Moore began acting in a fiduciary capacity once the power of attorney documents were executed in August 2001, in full knowledge of her mother’s diagnosis of dementia and Alzheimer’s. Their relationship was one of inequality, one in which Moore had an elevated responsibility over her mother’s life that would “justify the imposition on the fiduciary of a special duty, basically to treat [her mother’s] affairs with all the solicitude that [s]he would accord to [her] own affairs.” *In re Marchiando*, 13 F.3d at 1116; *see In re Scott*, 481 B.R. at 193 (finding principal was incapable of handling financial affairs (confirmed by medical evidence and defendant’s appointment as attorney in fact); holding that defendant’s elevated responsibility over principal’s life qualified for § 523(a)(4) status). The plaintiff also successfully demonstrated that the acts of defalcation alleged in the Complaint occurred in 2002 and later. *See In re Marchiando*, 13 F.3d at 1115 (requiring fiduciary duty to pre-exist any breach of that duty); *ColeMichael Investments, L.L.C. v. Burke*, 436 B.R. 53, 61 (N.D. Ill. 2010) (finding that debtor was acting as creditor’s fiduciary when he transferred “its funds out

¹⁵ The court, having observed the demeanor and heard the testimony of the witnesses at trial, found that the witnesses who had business and financial dealings with Mrs. Jones – Marcellus Lebbin and Denice Barrett – gave credible testimony that was supported by other evidence in the record and was consistent with their dealings with Mrs. Jones and her daughter. It further found that Mrs. Jones’ friend Beatrice Kessler and her son-in-law Gordon Moore were credible, but that their testimony had little bearing on the issue of dischargeability under § 523(a)(4). Plaintiff Paul Cholis presented a professional demeanor and a well documented case to support his legal theory under § 523(a)(4). The defendant Paula Moore and her sister Valerie Paschen testified with civility and a relatively composed demeanor. However, in the case of each witness, the testimony given was not always consistent with other undisputed facts and documents in evidence. Nevertheless, the court credited the testimony of Moore and Paschen to the extent that the evidence and circumstances corroborated their statements, with an understanding that family relationships, when caring for a parent with dementia, are complicated and that hindsight may over-simplify them.

of his client trust account, never to be seen again”). The court concludes that the first prong of § 523(a)(4) has been satisfied.

B. *Defalcation*

The plaintiff must also prove, by a preponderance of the evidence, that the defendant committed acts of defalcation while acting in her fiduciary capacity. “Defalcation” is not defined in the Bankruptcy Code, and courts have not agreed on its meaning. This term the Supreme Court, reviewing an Eleventh Circuit decision, considered the scope of the term “defalcation” and focused particularly on the kind of scienter or mental state it requires. Justice Breyer delivered the opinion of the unanimous Court:

We hold that [defalcation] includes a culpable state of mind requirement akin to that which accompanies application of the other terms in the same statutory phrase. We describe that state of mind as one involving knowledge of, or gross recklessness in respect to, the improper nature of the relevant fiduciary behavior.

Bullock v. BankChampaign, N.A., 569 U.S. ___, 133 S. Ct. 1754, 1757, 81 USLW 4292 (May 13, 2013).¹⁶

After describing the historical usage of the term, the Supreme Court interpreted “defalcation” to include or to be associated with (a) “positive fraud, or fraud in fact, involving moral turpitude or intentional wrong”; (b) “intentional wrong,” which encompasses “conduct that the fiduciary knows is improper” and “reckless conduct of the kind that the criminal law often treats as the equivalent”; and (c) conduct which “‘consciously disregards’ (or is willfully blind to) ‘a substantial and unjustifiable risk’ that his conduct will turn out to violate a fiduciary duty.” *Id.*, 133 S. Ct. at 1759 (quoting ALI, Model Penal Code § 2.02(2)(c), p. 226 (1985)).

¹⁶ In the Supreme Court case, *Bullock* was a nonprofessional trustee of a trust established by his father for the benefit of his five children. The trust contained a single asset, a life insurance policy, which permitted the trustee to borrow funds from it. *Bullock* borrowed money from the trust several times, and he repaid the borrowed funds with interest. When his brothers sued him in state court, that court ruled that *Bullock* had committed a breach of fiduciary duty by borrowing funds from the trust, not from any malicious motive but rather because he was involved in self-dealing. *Bullock* tried to liquidate his interests in certain assets to make the court-ordered payments, but failed. He filed bankruptcy. The bank blocked his efforts to discharge the debt. The bankruptcy court granted summary judgment to the bank, holding that the debt was nondischargeable for defalcation while acting in a fiduciary capacity under § 523(a)(4). The district court and the Eleventh Circuit Court of Appeals affirmed. The appellate court stated that “defalcation requires a known breach of a fiduciary duty, such that the conduct can be characterized as objectively reckless.” *Bullock v. BankChampaign, N.A. (In re Bullock)*, 670 F.3d 1160, 1166 (11th Cir. 2012)).

That risk “must be of such a nature and degree that, considering the nature and purpose of the actor’s conduct and the circumstances known to him, its disregard involves *a gross deviation* from the standard of conduct that a law-abiding person would observe in the actor’s situation.”

Id. at 1760 (quoting ALI, Model Penal Code § 2.02(2)(c), at p. 226 (emphasis added)). Without commenting specifically on the Eleventh Circuit’s standard of objective recklessness, the Supreme Court vacated the judgment of the appellate court and remanded the case to permit the court to determine whether it corresponded to the Court’s “heightened standard.”¹⁷ *Id.* at 1761.

This court deferred its ruling herein so that *Bullock* could provide the necessary guidance on defalcation. Applying the Supreme Court’s analysis to the facts in this case, the court now considers whether the plaintiff met his burden of proving that the defendant committed acts of defalcation when she was acting in a fiduciary capacity as her mother’s attorney in fact under the power of attorney.

The plaintiff demonstrated that Moore breached her fiduciary duty to her mother by failing to maintain records and to account for the monies in her possession during her tenure as attorney in fact. Moore admitted that she had not kept records, but asserted that no one told her that she was required to do so. She testified that she withdrew money for legitimate purposes – to pay for taxes, expenses, and trips for her mother and herself, for example. She further asserted that her mother wrote her own checks and made withdrawals for years after she was declared incompetent. To demonstrate some records showing valid uses of Mrs. Jones’ funds, Moore proffered copies of withdrawal slips from the “Jones Account” at TCU, totaling \$6,930.00, that were signed by Mrs. Jones. On one of the slips was written a notation that the \$100 withdrawal was intended for a grandson’s doctor visit to treat poison ivy.

The court finds significant Moore’s admission that she didn’t “keep complete records of all transactions,” as the state statute requires of an attorney in fact. *See* Ind. Code § 30-5-6-4. Her exhibit of

¹⁷ The Eleventh Circuit, in *Bullock*, aligned itself with the Fifth, Sixth, and Seventh Circuits, which “require[d] a showing of recklessness by a fiduciary.” *Bullock*, 670 F.3d at 1165. It cited *In re Berman*, 629 F.3d 761, 766 n.3 (7th Cir. 2011) (stating that “defalcation requires something more than negligence or mistake, but less than fraud”). *Id.* at 1166. Applying that recklessness standard, the circuit court found that *Bullock*, as trustee, should have known that he was engaging in self-dealing, given that he knowingly benefitted from the loans. It concluded that his conduct was objectively reckless, rising to the level of a § 523(a)(4) defalcation, and thus affirmed the bankruptcy court’s order that the debt was nondischargeable.

selected withdrawal slips was self-serving, and her excuses for failing to keep records were disingenuous and lacked veracity. By agreeing to be her mother's attorney in fact, the defendant accepted responsibility for handling her mother's finances. Her method of indicating the purpose for each 1st Source Bank check she wrote also reflects an awareness that such minimal record-keeping was necessary. The court does not accept that she needed to be told to maintain her mother's financial information. After all, records were required in order to handle her mother's business transactions, to pay her taxes, and to validate her mother's affairs upon her death, and yet none of them was produced at trial. Moreover, although Moore proffered some withdrawal slips, one of which indicated that her mother paid for a grandchild's medical bill, the court noted that, in contrast, she did not produce records or explanations concerning the funds transferred from her mother's brokerage account into the TCU accounts. The court concludes that Moore, by failing to keep bookkeeping and accounting records, utterly failed to account for her mother's financial assets throughout the years she acted in a fiduciary capacity to her mother.¹⁸

Moore acknowledged at trial that \$350,000 had been taken out of the A.G. Edwards account over the years, but testified that she had nothing to do with taking the money out. However, rebuttal witness Denice Barrett testified that withdrawals from the A.G. Edwards account were made by Moore; she did not remember any withdrawal requests from Mrs. Jones. The court found Denice Barrett's testimony credible and the defendant's testimony both implausible and lacking in credibility. Moore also testified that she did not think she spent her mother's money wrongfully. According to her, "it was OK" not to keep records of those withdrawals and transfers. When asked what she did with the \$179,000 that went into her TCU account, however, she could not tell the court. The evidence showed that Moore failed to account for the transfers and cash removed from her mother's accounts and made clear that the defendant's testimony was

¹⁸ The court notes, as well, that the records from the TCU "Moore Account" and records she claims she tendered in the state court proceedings were documents in the defendant's control. She did not provide them. Nor did she give any explanations that might provide legitimate uses for the large amounts of her mother's money that had been withdrawn. Nor did she proffer any attempts to construct an accounting for the court. The defendant's sister demanded an accounting in state court in 2008, but five years later, in this court, the defendant's only accounting was what was provided in Defendant's Exhibit A.

incredible and self-serving. The court finds that Moore clearly was engaged in self-dealing and committed defalcation.

The facts in this case are similar to those in *In re Scott*, 481 B.R. 119 (Bankr. N.D. Ala. 2012). In *Scott*, the bankruptcy court recounted that the defendant, who held a power of attorney on behalf of her aunt (who had dementia), opened a joint account with her aunt and made unexplained withdrawals; deposited funds from her aunt's account into her sons' accounts; and maintained a personal account into which she routinely deposited large sums of money, for which no records were maintained. *See id.* at 196-97. The *Scott* court found the defendant's methods careless and concluded that, under the law of the Eleventh Circuit, she was reckless:

In all, the defendant failed to keep specific records. She did not keep any cumulative accounting, and there was no reconciliation of the specific amounts withdrawn from these various accounts. Simply put, the defendant did not keep, and did not provide this Court with even the simplest form of her credit and debit transactions, that is, balanced bank statements.

Id. at 197. The court characterized that conduct as “objectively reckless,” and concluded that “it rises to the level of defalcation under § 523(a)(4).” *Id.* It used the objective recklessness standard set forth by the Eleventh Circuit in *Bullock v. BankChampaign, N.A.*, 670 F.3d 1160 (11th Cir. 2012), the case whose judgment was vacated and remanded by the Supreme Court to determine whether it should apply the Court's heightened standard of “defalcation.”

This court therefore applies that heightened standard. The Supreme Court requires a “culpable state of mind,” that is, “one involving [either] knowledge of, or gross recklessness in respect to, the improper nature of the relevant fiduciary behavior.” *Bullock*, 133 S. Ct. at 1757. The court finds that the testimony of the attorney Marcellus Lebbin demonstrates Paula Moore's culpable state of mind. He testified that Moore brought her mother to him with the intent that Mrs. Jones would change her Trust. Moore wanted her mother to remove her home from the Trust assets and to deed the home to Moore. However, Mrs. Jones made it clear to the attorney that she wanted her daughters to share her estate equally, and she was insistent that the property should remain in her estate and should not be transferred to Moore. This attempt by the defendant to manipulate her mother (with dementia) and to effect the transfer of her mother's home to herself

was conduct which consciously, indeed blatantly, disregarded her mother's clearly stated wishes in her Will and Trust that her children would receive equal shares of her estate. Her action involved "a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation." *Id.* at 1760; *see also In re Warburton*, 2013 WL 2237526 at *24 (Bankr. D. Mont. May 21, 2013) (finding that defendants' failure to deposit cash receipts, misappropriation of money, and taking away inventory was intentional conduct or gross deviation from the proper standard of conduct; concluding that the defendants' debt was nondischargeable under § 523(a)(4)).

The court also finds that Moore's culpable state of mind is reflected in her admission that transfers of about \$350,000 were made out of the A.G. Edwards account without any accounting of those funds. It determines that her state of mind, in failing to provide records of the transfers or explanations for the disappearance of those funds from her mother's account, was one of gross recklessness concerning the improper nature of her fiduciary behavior. *See id.* at 1757. The defendant's excuses and justifications – that someone should have taught her about record-keeping; that it would be unfair to make Moore account for withdrawals made and checks written by Mrs. Jones herself; that her bookkeeping failure was simply negligence; and that Moore had the power to give gifts to any heir she chose (and she chose only herself) each year – were not supported by citations to statutes or case law and are completely without merit.

In summary, this court determines that the defendant's attempt to transfer her mother's home to herself was an intentional wrong, an act that Moore knew or should have known was improper conduct for a fiduciary. It also considers her complete lack of accounting and record-keeping to be grossly reckless fiduciary conduct. Furthermore, it finds that Moore's systematic transfers and withdrawals of funds from her mother's A.G. Edwards account over many years were actions described in *Bullock* as conduct that "consciously disregards (or is willfully blind to) a substantial and unjustifiable risk that [her] conduct will turn out to violate a fiduciary duty." *Id.* at 1759 (internal quotation marks omitted). The defendant, acting in her fiduciary capacity, simply used her mother's assets for her own purposes. She stated, at trial, that she used her mother's money to pay for her mother's bills and her own bills, and to take trips and to go shopping

with her mother. The court does not doubt that, from the time she was given power of attorney over her mother, Moore had greater knowledge and power than her mother did. That difference in power increased over time, as Alzheimer's disease took more control of her mother's abilities. From the time of the medical diagnosis of Alzheimer's disease and dementia, Moore held "a position of ascendancy over" Mrs. Jones. *In re Marchiando*, 13 F.3d 1111, 1116 (7th Cir. 1994). The court finds that Moore used that position to help herself to her mother's funds for many years.

It is clear that Moore held a fiduciary obligation created by the power of attorney documents, and that the duty existed prior to the wrongdoing. *See id.* As a fiduciary in a relationship of inequality, she owed to her mother "a special duty, basically to treat [her mother's] affairs with all the solicitude that [she] would accord to [her] own affairs." *Id.* Instead, during the course of her fiduciary relationship with her mother, Moore knowingly, willfully, or recklessly breached her fiduciary duties of due care, of acting for the benefit of her mother in a fiduciary capacity, and of keeping complete records of all the transactions she handled on behalf of her mother. *See In re Hunt*, 439 B.R. 690, 693 (Bankr. N.D. Ind. 2010). Unlike the defendant in *In re Hunt*, who was "undoubtedly negligent . . . , gullible and even quintessentially stupid," *id.*, Moore systematically moved funds from her mother's brokerage account at A.G. Edwards into her own account at TCU for many years, without recording or accounting for the transfers, and might have depleted her mother's account even more if her sister had not discovered an overdraft in the 1st Source Bank account, the fund from which everyday expenses were paid. Moore's plea of ignorance of record-keeping and other mechanics of her duties under the power of attorney for which she was chosen "is inconsistent with the essence of [her] fiduciary position." *Matter of Woolbert*, 672 N.E.2d 412, 416 (Ind. 1996) (finding attorney-executor's conduct far more culpable than mere negligence, concluding conduct constituted conversion).

The court concludes that Moore, as her mother's attorney in fact, either knew of the improper nature of her fiduciary behavior or was grossly reckless concerning her fiduciary behavior, consciously disregarding the risk that she was violating her fiduciary duties. It holds, therefore, that Moore committed

defalcation while acting in a fiduciary capacity, pursuant to 11 U.S.C. § 523(a)(4), and that the debt owed to the plaintiff because of those actions is excepted from Moore's discharge.

C. Damages

A bankruptcy judge is authorized to find a debt nondischargeable and to determine the dollar amount of the debt. *See In re Boricich*, 464 B.R. 335, 336-37 (Bankr. N.D. Ill. 2011) (citing *In re Hallahan*, 936 F.2d 1496, 1508 (7th Cir. 1991)). The Supreme Court has held that the bankruptcy court can determine the amount of a debt that is excepted from discharge under § 523(a)(2)(A), and can include treble damages, attorney's fees, and costs pursuant to state law. *See Cohen v. de la Cruz*, 523 U.S. 213, 223, 118 S. Ct. 1212, 1219, 140 L.Ed.2d 341 (1998). Since *Cohen*, courts have found that a treble damages award can be nondischargeable under § 523(a)(4) and (a)(6). *See In re Roussos*, 251 B.R. 86, 94 (9th Cir. B.A.P. 2000) ("The Court read § 523(a)(2) *in pari materia* with other nondischargeability sections, including § 523(a)(4) and (a)(6)."); *In re Luedtke*, 429 B.R. 241, 252 n.26 (Bankr. N.D. Ind. 2010) (stating that the "entire debt, including treble damages and attorney fees, . . . is excepted from discharge if state law provides consequential damages with respect to conduct which meets the exception to discharge standards of 11 U.S.C. § 523(a)").

The plaintiff requested actual damages (for Moore's withdrawals and cash transfers from the A.G. Edwards account from 2002-2008, years in which Moore acted as a fiduciary) of \$228,121.77 and prejudgment interest in the amount of \$113,924.00. He also sought treble damages under the Indiana Victim Reparation Statute, Indiana Code § 34-24-3-1, and reasonable and necessary attorney fees in the amount of approximately \$70,000.00.

The defendant insisted that she demonstrated valid uses for the withdrawals from her mother's account by proffering the withdrawal slips presented in Defendant's Exhibit A, funds withdrawn from the TCU "Jones Account." She asked that the damages be reduced by the amounts reflected therein (\$6,930.00), and urged the court to recognize that the deduction should not be limited to only those amounts found in

Exhibit A, for two reasons: First, she turned over boxes of documents in the state court proceeding, before the defendant's bankruptcy, that would reflect many other justifications for the withdrawals and uses of the funds; and second, it was the plaintiff's burden to prove that the defendant actually misused the funds.

The defendant misstates the burden of proof in a case brought under § 523(a)(4). As the court set forth in the Discussion section above, the plaintiff has the initial burden to demonstrate, by a preponderance of the evidence, the elements of § 523(a)(4): that the defendant acted as a fiduciary at the time the debt was created, and that the debt was caused by defalcation. However, after he shows evidence of those elements, the burden of proof shifts to the fiduciary to demonstrate that she did not commit defalcation while acting in a fiduciary capacity. *See In re Firer*, 317 B.R. 457, 465 (Bankr. D. Conn. 2004). In addition, under Indiana law, which governs trusts and fiduciary issues, the plaintiff has the burden of proving a breach of fiduciary duty, but the burden then shifts to the defendant fiduciary:

However, if the questionable transactions benefited the attorney-in-fact as agent of the principal, Indiana law "imposes a presumption of undue influence and fraudulent transfer. The burden of proof [then] shifts to the agent who must demonstrate by clear and unequivocal evidence that he or she acted in good faith and did not take advantage of [the] trusted relationship."

WW Extended Care, Inc. v. Swinkunas, 764 N.E.2d 787, 792 (Ind. App. 2002) (citations omitted).

In this case, the plaintiff successfully proved that Moore acted as a fiduciary; that she withdrew, transferred, and defalcated funds from her mother's brokerage account while she was acting as a fiduciary; and that she breached her fiduciary duty by failing to maintain records and to account for the funds entrusted to her management. The burden then shifted to the defendant to show that her conduct did not constitute defalcation while acting in a fiduciary capacity.

The defendant failed to make that showing. She did not bring into this court the boxes of documents she submitted in the state court proceeding. The only evidence to justify the transfers of her mother's A.G. Edwards funds over many years was Defendant's Exhibit A, withdrawal slips for a period of less than a year. Moreover, Moore admitted at trial that \$350,000 of her mother's brokerage account savings disappeared without any explanation; that she had no records to indicate how she used the \$179,000 that was deposited from the brokerage account into her TCU "Moore Account"; and that she failed to keep any

accounting of her mother's financial records. Therefore, the defendant failed to disprove the plaintiff's *prima facie* proof of the elements of § 523(a)(4).

Indeed, other testimony given by the defendant – her assertions that it “was O.K.” not to keep records, that no one told her to keep an accounting, that she didn't use her mother's money wrongfully, that she had no fiduciary responsibility over her mother's assets as long as her mother wrote the checks or made the withdrawals – simply confirmed her gross recklessness and conscious disregard of the violation of her fiduciary duties. In addition, her willingness to blame her failings on others and the lack of remorse for her admitted withdrawal of large amounts of funds from her mother's brokerage account were clearly evident throughout the trial.

Nevertheless, the plaintiff was willing to concede that the defendant's Exhibit A demonstrated valid reasons for some transfers out of the TCU “Jones Account.”¹⁹ He argued that, even if \$6,930 (the total amount reflected in the Defendant's Exhibit A withdrawal slips) was deducted from the total damages, the remaining amount of damages was still more than \$300,000. However, the court questions whether the defendant's Exhibit A is evidence that justifies her lack of record-keeping and accounting. The defendant's position was that Mrs. Jones could have used her own money in any way she chose. Moore suggested that the Jones signature on the documents indicated that her mother was managing her own finances without Moore and was even paying for her grandson's trip to the doctor. In Moore's view, she was not acting in a fiduciary capacity when her mother was making those withdrawals.

The court, like the plaintiff, did not attach much significance to Mrs. Jones' signature. Moore's breach of her fiduciary duty, her failure to maintain a record of those withdrawals, was not excused because Mrs. Jones signed the withdrawal slips. Moreover, Cholis testified that the A.G. Edwards funds were withdrawn, deposited into the TCU accounts, and then rapidly, completely disbursed from those accounts. He stated that at least a quarter of a million dollars was transferred in that manner with no accounting for the

¹⁹ The plaintiff estimated that transfers of up to \$8,000 might have been justified by the defendant. However, the court finds that the transfers evidenced by the Defendant's Exhibit A are the only evidence presented by the defendant, and those slips reflect total withdrawals of \$6,930.

funds. The court finds that the signature of Mrs. Jones, a woman who had been diagnosed with Alzheimer's several years earlier, without further evidence of the use of the funds, is not sufficient proof that the funds were used for a valid reason. Moore, as her mother's fiduciary, had responsibility over her mother's assets and a special duty to treat her mother's affairs with all the solicitude that she would accord to her own affairs. *See In re Marchiando*, 13 F.3d at 1116. Even with her mother's signature on some transfer documents, Moore breached her fiduciary duty by failing to record the transfers or to account for her mother's financial assets, by transferring large amounts of funds out of her mother's accounts, and by failing to act as a fiduciary after her mother had entrusted her with power of attorney. *See, e.g., In re Scott*, 481 B.R. at 192-93 (finding that defendant owed fiduciary duty to his relative with dementia who was incapable of handling her financial affairs and could not have taken financial actions on her own).

The court finds that the plaintiff clearly demonstrated that the defendant, while acting in a fiduciary capacity, transferred funds from the A.G. Edwards account into the TCU "Moore Account" and "Jones Account," in the amount of \$228,121.77, without any accounting or record-keeping. It further finds that the defendant did not shoulder the burden of proof that shifted to her at that point to explain Mrs. Jones' lost funds. Having determined that evidence of Mrs. Jones' signature was not, by itself, sufficient to explain or to justify the withdrawal of the funds seen in Defendant's Exhibit A, the court denies the defendant's request for a reduction of the damages award – except with respect to the last withdrawal exhibit. It finds that Mrs. Jones' notation on the withdrawal slip of June 21, 2004, indicating that the withdrawn amount would cover Troy's doctor visit, was a sufficient record of the disbursed \$100.00. The court therefore will reduce the damages award by \$100.00. It holds that \$228,021.77 is excepted from Paula Moore's discharge pursuant to § 523(a)(4).

D. *Treble Damages*

The defendant also argued that treble damages were not warranted in this case because her failure to keep records was simply negligent and did not rise to the level of the commission of a criminal act. She pointed out that the statute required criminal acts such as theft and criminal conversion, conduct with a

criminal aspect to it, and that such conduct required proof beyond a reasonable doubt. That level of proof was not shown, she asserted, and therefore treble damages were not justified.²⁰

Treble damages are authorized under the Indiana Crime Victim Relief Act, found at Indiana Code § 34-24-3-1. The statute provides that, if a person suffers a pecuniary loss as a result of a violation of Indiana Code 35-43 [enumerated crimes, which include theft and conversion], the person may bring a civil action against the person who caused the loss for the following:

- (1) An amount not to exceed three (3) times:
 - (A) the actual damages of the person suffering the loss, . . . ; or
 - (B) the total pump price of the motor fuel received
- (2) The costs of the action.
- (3) A reasonable attorney's fee.
- (4) Actual travel expenses
- (5) - (6) [Other compensatory expenses related to court proceedings].
- (7) All other reasonable costs of collection.

Ind. Code § 34-24-3-1. The plaintiff must demonstrate his right to recover damages under this statute by proving all the elements of the alleged criminal act by a preponderance of the evidence, not by proof beyond a reasonable doubt. *See In re Baker*, 2011 WL 4549156 at *4 n.5 (Bankr. S.D. Ind. Sept. 28, 2011); *Ruse v. Bleeke*, 914 N.E.2d 1, 8 (Ind. App. 2009).

²⁰ In her post-trial brief, the defendant raised a statute of limitations defense. She pointed out that, in order to claim treble damages in a civil suit under Indiana Code § 34-24-3-1, the action must be commenced within two years after the cause of action accrues. *See* R. 18 at 3 (citing Ind. Code § 34-11-2-4(2)). She argued that neither the state court civil suit nor this adversary proceeding was filed within that two-year period.

The court decides whether a statute of limitations bars the plaintiff's claims by determining when the statute began to run. In Indiana, "the statute of limitations does not begin to run until 'the plaintiff knew or, in the exercise of ordinary diligence, could have discovered that an injury had been sustained as a result of the tortious act of another.'" *Estate of Verdak v. Butler University*, 856 N.E.2d 126, 133 (Ind. App. 2006) (quoted citation omitted). The facts of this case show clearly that the statute of limitations does not bar the plaintiff's Complaint. Mrs. Jones died on May 3, 2010, and her Estate came into existence upon her death. The Estate's action for injury to Mrs. Jones' property accrued once the Estate's personal representative was appointed and once he discovered or could have discovered the injury. When Paula Moore filed bankruptcy on January 25, 2012, less than two years after Mrs. Jones' death, the automatic stay went into effect. *See Del Vecchio v. Conseco, Inc.*, 788 N.E.2d 446, 449 n.1 (Ind. App. 2003) (noting stayed state court litigation due to bankruptcy filing). In addition, this adversary proceeding was timely filed on April 19, 2012, before the bar date terminated. The court finds that the personal representative's filings have fulfilled the procedural requirements for timeliness and that this adversary proceeding, brought less than two years after Mrs. Jones' death and after Cholis discovered the defalcation, is not barred by the statute of limitations.

The plaintiff successfully proved that the estate suffered a pecuniary loss as a result of the defendant's violation of § 523(a)(4), and asserted in his closing argument that the defendant committed theft or conversion. The state statutes provide:

Ind. Code § 35-43-4-2. Theft. A person who knowingly or intentionally exerts unauthorized control over property of another person, with intent to deprive the other person of any part of its value or use, commits theft.

Ind. Code § 35-43-4-3. Criminal conversion. A person who knowingly or intentionally exerts unauthorized control over property of another person commits criminal conversion.

The court finds that the plaintiff did not present evidence that Moore “knowingly or intentionally exert[ed] unauthorized control” over her mother’s assets or formed an “intent to deprive” her of them. *See, e.g., Pichon v. American Heritage Banco, Inc.*, 983 N.E.2d 589 (Ind. App. 2013) (affirming trial court’s ruling that bank engaged in acts of criminal conversion by knowingly using proceeds in unauthorized manner to benefit certain individuals); *Ruse v. Bleeke*, 914 N.E.2d 1 (Ind. App. 2009) (affirming trial court’s ruling that second partner, with fiduciary duty to first partner, exerted unauthorized control over first partner’s money by creating false impression that he had invested the funds); *Matter of Woolbert*, 672 N.E.2d 412 (Ind. 1996) (holding that attorney, executor of estate, held fiduciary obligation and committed criminal conversion by withdrawing estate funds without court authorization, exercising unauthorized control over funds, and failing to hold funds separate from his own).

The plaintiff proved that Moore’s transfers of money from her mother’s account into her own account was unexplained, unaccounted for, and probably unjustified, but he did not give evidence of Moore’s intent to exert “unauthorized control” or to deprive her mother of the use or value of that money. In the Trial Brief, the plaintiff presented a one-sentence argument that “[o]ne whose control is authorized in the first instance can lose authorization when the control exceeds the purposes originally permitted.” R. 14 at 10. He cited only to an unpublished, noncitable Indiana appellate court decision, *Moss v. State*, 966 N.E.2d 791 (Ind. App. 2012), a shoplifting case, the written opinion of which was not provided.²¹ The court

²¹ The court notes that *Moss v. State* is red-flagged in WestLaw to indicate that the case is “no longer (continued...)”

finds that neither this cursory analysis nor the equally brief assertions in closing arguments were sufficient to demonstrate that the defendant violated the state law of conversion or theft.

Without proof of the elements of theft or conversion, exemplary or treble damages are not warranted under Indiana Code § 34-24-3-1. The court therefore declines to award treble damages in this case. *See In re Baker*, 2011 WL 4549156 at *7 (noting that treble damages set an upper limit to a court's authority to award damages but are not mandatory).

E. Attorneys' Fees

The plaintiff requested attorneys' fees in the amount of approximately \$70,000, but did not present reasons to justify his entitlement to a fee award. The court has considered the different avenues by which a creditor may be granted the right to payment of reasonable attorneys' fees.

The Supreme Court has stated "the general rule that, absent statute or enforceable contract, litigants pay their own attorneys' fees." *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 257, 95 U.S. 1612, 44 L.Ed.2d 141 (1975); *see also In re Bauman*, 461 B.R. 34, 49-50 (Bankr. N.D. Ill. 2011) (defining the "American Rule"). However, Congress has carved out specific provisions that allow attorneys' fees in some statutes. *See Alyeska Pipeline*, 421 U.S. at 261. The Bankruptcy Code is one such statute; it provides a reasonable fee award to a debtor who prevails in a dischargeability determination concerning a consumer debt under § 523(a)(2), but only if "the court finds that the position of the creditor was not substantially justified." 11 U.S.C. § 523(d). The statutory grant of attorneys' fees clearly is not applicable in this case, however, because the plaintiff prevailing in this dischargeability proceeding is the creditor, not the debtor. A prevailing creditor is not authorized to recover attorney fees under the Bankruptcy Code. *See, e.g., Matter of Luce*, 960 F.2d 1277, 1286 (5th Cir. 1992).

A successful creditor may be awarded attorney fees, nevertheless, when a debt is determined to be nondischargeable under § 523(a) if those fees were awarded in a prepetition state court judgment. *See*

²¹(...continued)
good for at least one point of law." The citation is in no way reliable as support.

Klingman v. Levinson (In re Levinson), 831 F.2d 1292, 1296 (7th Cir. 1987) (affirming award of fees under § 523(a)(4) as ancillary obligation of the primary judgment debt). The plaintiff herein was not involved in the earlier state court litigation, however, and therefore was not awarded fees therein. Nor has the plaintiff suggested that he can claim fees that were part of any underlying debt. See *Cohen v. de la Cruz*, 523 U.S. 213, 223, 118 S. Ct. 1212, 1219, 140 L.Ed.2d 341 (1998) (allowing fees, costs, and punitive damages that were provided for by state statute creating liability in underlying fraud action).

Another avenue for the recovery of fees in a dischargeability action is through a contract provision. See *In re Sheridan*, 105 F.3d 1164, 1166 (7th Cir. 1997). If the contract forming the basis for the debt provides attorneys' fees, and the contractual debt is nondischargeable, "so are the other elements of the debt." *In re Mayer*, 51 F.3d 670, 677 (7th Cir.), cert. denied, 516 U.S. 1008, 116 S. Ct. 563, 133 L.Ed.2d 488 (1995); see also *Pierce v. Pyritz*, 200 B.R. 203, 205 (N.D. Ill. 1996) (citing *Mayer*, striking award of attorneys' fees). In this case, the plaintiff did not refer the court to a contract between Paula Moore and her mother and did not point to any provision in the power of attorney documents obligating a party to pay attorney fees, costs, or damages. Moreover, the court's review of the record did not uncover a contractual basis for an award of fees.

One more source of recovery of attorneys' fees is a state statute. The plaintiff claimed treble damages under the Indiana Crime Victim Relief Act, found at Indiana Code § 34-24-3-1, and the statute includes an award of fees. However, as the court concluded *supra*, he is not entitled to treble damages under the statute because he failed to prove the elements of conversion or theft. Nor is attorney compensation available if the essential burden of proving the underlying crime was not met. See *Steve Silveus Ins., Inc. v. Goshert*, 873 N.E.2d 165, 183-84 (Ind. App. 2007) (affirming trial court ruling that, because party did not prevail on conversion claim, no attorney fees were awarded).

Having found that the plaintiff cannot claim entitlement to attorneys' fees under a Bankruptcy Code provision, a state statute, a state court judgment, or a contract, the court concludes that the plaintiff's request for an award of attorneys' fees must be denied as unauthorized.

F. Interest

The plaintiff sought damages and the accruing interest thereon. Although the defendant did not raise any challenge concerning the nondischargeability of the interest amount or rate of interest, the court reviewed the plaintiff's request to determine the Estate's entitlement to interest.

The Supreme Court, in *Bruning v. United States*, 376 U.S. 358, 360, 84 S. Ct. 906, 11 L.Ed.2d 772 (1964), held that a debtor remained personally liable for post-petition interest accruing on an unpaid tax debt that was held to be nondischargeable. Since then, courts in this circuit and other circuits have allowed both pre-petition and post-petition interest under various subsections of § 523(a) when the underlying debt was held to be nondischargeable. See *Pierce v. Pyritz*, 200 B.R. at 206 (finding interest nondischargeable in § 523(a)(4) case, citing cases); see also *Matter of Larson*, 862 F.2d 112, 119 (7th Cir. 1988) (affirming that pre-petition interest on nondischargeable tax debt was nondischargeable); *ColeMichael Investments, L.L.C. v. Burke*, 436 B.R. 53, 64 (N.D. Ill. 2010) (affirming that § 523(a)(4) debt caused by fiduciary's defalcation was not discharged, interest also nondischargeable); *In re Long*, 478 B.R. 441, 448 (Bankr. D. Colo. 2012) (finding nondischargeable the interest accruing from date of loan through date of judgment at rate of 18.433%).

In light of this clear precedential authority, and without challenge from the defendant, the court concludes that the plaintiff is entitled to recover the interest that has accrued before and after the defendant's bankruptcy filing on the nondischargeable debt that was caused by the defendant's defalcation while acting in a fiduciary capacity pursuant to § 523(a)(4).²² The plaintiff specified that interest in the amount of

²² The plaintiff requested an "award of prejudgment interest in accord with Indiana law," the rate of which is established pursuant to Indiana Code § 24-4.6-1-102 at eight percent (8%) per annum. R. 14 at 9-10. The statute provides that, "[w]hen the parties do not agree on the rate, interest on . . . things in action shall be at the rate of eight percent (8%) per annum until payment of judgment." According to the plaintiff, the prejudgment interest that accrued prior to the bankruptcy court's trial in this matter totaled \$113,924.00. He further calculated that postjudgment interest would accrue at a rate of \$49.9993 per diem. The defendant has not argued with these figures, and the court accepts the plaintiff's calculations. See, e.g., *In re Roussos*, 251 B.R. 86, 94 (9th Cir. B.A.P. 2000) (stating that it was proper, in a § 523(a)(4) proceeding, "to apply state law to calculate prejudgment interest into the amount of the nondischargeable debt").

\$113,924.00 had accrued in this case up to the trial date in this matter, October 15, 2012. He also stated that the interest would continue to accrue thereafter at a rate of 8% per day (which calculated to be \$49.9993 per diem) until judgment would enter. The court finds that 245 days have passed from the date of the trial until today's date.

The court therefore grants interest to the plaintiff in the specified amounts of \$113,924.00 accrued pre-trial and \$12,249.83 accrued post-trial, for a total accrual of interest to this date, the date of issuance of this Memorandum of Decision and Judgment, of \$126,173.83. In addition, post-judgment interest on the nondischargeable debt accrues at the federal judgment rate set forth under 28 U.S.C. § 1961.

CONCLUSION

For the reasons presented in this Memorandum of Decision, the court finds that the defendant Paula Moore, having committed defalcation while acting in a fiduciary capacity, owes a debt to the plaintiff Estate of Iris Y. Jones, by its personal representative Paul Cholis, that is nondischargeable pursuant to 11 U.S.C. § 523(a)(4). Judgment is entered in favor of the Estate of Iris Y. Jones and against the defendant Paula Moore in the amount of \$228,021.77 in actual damages and \$126,173.83 in prejudgment interest. Post-judgment interest shall accrue from this date forward until all payments are completed at the federal judgment rate under 28 U.S.C. § 1961. Plaintiff's requests for an award of treble damages and reasonable attorneys' fees are denied.

SO ORDERED.

/s/ HARRY C. DEES, JR. _____
HARRY C. DEES, JR., JUDGE
UNITED STATES BANKRUPTCY COURT