UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

Kathleen Joanne Cole, BKY Case No. 03-38456

Debtor.

Michael Edward Cole, Jr.

Plaintiff,

ADV No. 04-3088

vs.

Kathleen Joanne Cole,

Defendant.

NOTICE OF HEARING AND MOTION FOR AN ORDER (1) GRANTING JUDGMENT ON THE PLEADINGS IN FAVOR OF THE DEFENDANT; (2) DISMISSING THIS PROCEEDING WITH PREJUDICE; AND (3) IMPOSING SANCTIONS ON PLAINTIFF AND HIS COUNSEL

TO: PLAINTIFF MICHAEL EDWARD COLE, JR. AND HIS ATTORNEY, JAMES C. WHELPEY, ESQ., 2151 NORTH HAMLINE AVENUE, SUITE 202, ROSEVILLE, MN 55113.

1. Defendant, Kathleen Joanne Cole ("Kathleen Cole"), by and through her undersigned counsel, hereby moves the Court for the relief requested below and hereby gives notice of hearing and motion.

2. The Court will hold a hearing on this verified Motion at 1:30 p.m. on Tuesday, November 2, 2004 in Courtroom 228B, at 200 Warren E. Burger Federal Building, 316 North Robert St., St. Paul, Minnesota 55101.

3. Any response to this Motion must be filed and delivered not later than 1:30 p.m. on Monday, November 1, 2004, which is 24 hours before the time set for the hearing, or filed and served by mail not later than October 28, 2004 which is three (3) days before the time set for the hearing, excluding the weekend. UNLESS A WRITTEN RESPONSE OPPOSING THE MOTION IS TIMELY FILED, THE COURT MAY GRANT THE RELIEF REQUESTED IN THE MOTION WITHOUT A HEARING.

4. This Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334, Fed. R. Bankr. P. 5005. The Motion arises and is filed under Fed. R. Civ. P. 12, 37 and 41 as incorporated by Fed. R. Bankr. P. 7012, 7037 and 7041, and Fed. R. Bankr. P. 9011, 9013 and 9014. This is a core proceeding.

5. On December 17, 2003, Kathleen Cole filed a voluntary petition for relief in this Court under Chapter 7 of the United States Bankruptcy Code.

6. On or about March 22, 2004, Plaintiff Michael Edward Cole ("Plaintiff") commenced the current adversary proceeding seeking the entry of judgment against Kathleen Cole and a declaration of nondischargeability under Sections 523(a)(2)(A), (a)(6), and (a)(15) of the Bankruptcy Code, an order that Kathleen Cole not be granted discharge under Section 727 of the Bankruptcy Code, and an order that Kathleen Cole's underlying bankruptcy case be dismissed or proceedings suspended under Section 305(a) of the Bankruptcy Code.

7. Plaintiff commenced the current adversary proceeding seeking the aforementioned relief in connection with a certain loan from Household Finance (hereinafter "Third Mortgage" or "Debt") described in paragraph 4 of the Complaint filed by Plaintiff in this matter, said Complaint dated March 21, 2004 (hereinafter

"Complaint"), along with ambiguous and unsubstantiated "other debt" as mentioned in paragraph 5 of the Complaint, all of which was incurred jointly by Plaintiff and Kathleen Cole as husband and wife and all of which Plaintiff alleges in his Complaint was used "in [its] entirety or substantially in [its] entirety" or "exclusively or primarily" to pay the gambling debts of Kathleen Cole. Although Plaintiff grounds each of his claims on certain debt owed to Plaintiff by Kathleen Cole, Plaintiff fails in his Complaint to set forth any description of such debt.

8. Kathleen Cole, by and through her undersigned counsel, answered the Complaint, strongly disputing the allegations set forth therein and raising the affirmative defense that Plaintiff failed in his Complaint to state a claim for which relief can be granted. In addition, paragraph 2 of the Affirmative Defenses section of Kathleen Cole's Answer (hereinafter "Answer") set forth the affirmative defense that Plaintiff in his Complaint failed to plead with the specificity and particularity required and contemplated by Fed. R. Bankr. P. 7009(b).

9. On August 3, 2004, the Court conducted a Scheduling Conference for this adversary proceeding and counsel for the parties participated in person. During the Scheduling Conference, Kathleen Cole, by and through her undersigned counsel, called the Court's attention to the deficiencies apparent on the face of the Complaint and, at that time, expressed serious concerns about the merits of the claims and the vagaries of the pleadings. Without waiving any rights, Kathleen Cole, by and through her undersigned counsel, nevertheless indicated that she would not move the Court at that time for the relief now sought, but would instead cooperate with Plaintiff and Plaintiff's counsel throughout the then-impending discovery stage of this adversary proceeding in order that

true and correct evidence might be brought to bear on the allegations and arguments set forth by Plaintiff in his Complaint.

10. In accordance with this Court's Scheduling Order that "[i]nitial discovery requests…be served *promptly*" (emphasis in original), Kathleen Cole, by and through her undersigned counsel, served the following initial discovery requests upon Plaintiff's counsel: (1) Defendant's Interrogatories and Requests for Production of Documents (Set One) (served on August 2, 2004); and (2) Defendant's Requests for Admission (Set One) (served on August 12, 2004) (collectively "Discovery Requests"). Attached hereto as Exhibits A and B are true and correct copies of Defendant's Discovery Requests.

11. The 30-day response deadline for both Discovery Requests has long since passed, and Plaintiff and his counsel have inexplicably failed to respond to those Discovery Requests in any manner whatsoever despite repeated communications from Kathleen Cole and her undersigned counsel requesting factual support and responses subsequent to the serving of the Discovery Requests.

12. Plaintiff has failed to respond in any manner to Kathleen Cole's Discovery Requests.

13. Kathleen Cole, by and through her undersigned counsel, asked Plaintiff and his counsel to provide documents supporting the factual contentions set forth in his Complaint. Plaintiff and his counsel failed to provide any such documents. As a result, Kathleen Cole's undersigned counsel independently obtained and provided Plaintiff's counsel, in a letter dated August 16, 2004, a Revolving Loan Voucher from Household Finance delineating the disbursements made from the advance received under the terms of the Third Mortgage. Attached hereto as Exhibits C and D, respectively, are true and

correct copies of the Revolving Loan Voucher and the August 16, 2004 letter. As the Revolving Loan Voucher made clear, the proceeds received under the Third Mortgage were not used in the manner alleged by Plaintiff in his Complaint. Indeed, those proceeds were used to pay for the parties' living expenses and to pay off credit card debt and related expenses, including obligations owed to Zale's and Best Buy. In light of this unambiguous and indisputable fact which renders the allegations set forth in Plaintiff's Complaint false and without merit, Kathleen Cole's undersigned counsel, in that August 16 letter, urged and requested Plaintiff's counsel to dismiss this adversary proceeding because Plaintiff lacks evidentiary support for his claims.

14. Despite a request to advise Kathleen Cole's undersigned counsel at Plaintiff's counsel's "earliest opportunity," Plaintiff and his counsel failed to respond to that August 16, 2004 letter in any manner whatsoever.

15. Due to Plaintiff's counsel's continued and complete failure to communicate or cooperate in any way, Kathleen Cole's undersigned counsel served Plaintiff's counsel with notice on September 8, 2004, pursuant to Rule 9011 of the Federal Rules of Bankruptcy Procedure. Attached hereto as Exhibit E is a true and correct copy of the September 8, 2004 letter. In that letter, Kathleen Cole's undersigned counsel pointed out the deficiencies in the legal arguments and factual contentions set forth in Plaintiff's Complaint and pointed out the fact that Plaintiff has failed to respond to Kathleen Cole's Discovery Requests or any other communication sent by Kathleen Cole and her undersigned counsel. After demonstrating to Plaintiff's counsel his utter failure to cooperate after commencement of a frivolous lawsuit as evinced by the Complaint that fails to satisfy the fundamental requirements of the Federal Rules of

Bankruptcy Procedure (see, e.g., Fed. R. Bankr. P. 7009) and has no legal or evidentiary support, Kathleen Cole's undersigned counsel again urged and requested Plaintiff's counsel to dismiss this adversary proceeding.

16. Again, Plaintiff and his counsel failed to respond to that September 8, 2004 correspondence in any manner whatsoever.

17. On September 20, 2004, Kathleen Cole's undersigned counsel provided Plaintiff's counsel with an e-mail correspondence again pointing out Plaintiff's (and his counsel's) utter failure to communicate or cooperate with Kathleen Cole and her undersigned counsel. Attached hereto as Exhibit F is a true and correct copy of the September 20, 2004 e-mail correspondence. In that correspondence, Kathleen Cole's undersigned counsel again requested that Plaintiff stipulate to a dismissal of this proceeding on account of the many grounds cited above. Furthermore, in that correspondence, Kathleen Cole's undersigned counsel indicated to Plaintiff's counsel that if no response from Plaintiff or his counsel was received by Kathleen Cole's undersigned counsel by September 22, 2004, Kathleen Cole, by and through her undersigned counsel, would file this Motion.

18. Again, Plaintiff's counsel failed to respond to that September 20, 2004 e-mail correspondence in any manner whatsoever.

19. On September 24, 2004, Kathleen Cole sent Plaintiff an e-mail correspondence pleading with Plaintiff to cooperate in this adversary proceeding and their marital dissolution action, requesting that he remedy his conduct and facilitate progress in both proceedings. Attached hereto as Exhibit G is a true a correct copy of that September 24, 2004 e-mail correspondence. As Kathleen Cole's subsequent e-mail

correspondence to Plaintiff dated September 30, 2004 demonstrates, Plaintiff again failed to respond in any manner whatsoever to her earlier correspondence. Attached hereto as Exhibit H is a true and correct copy of that September 30, 2004 e-mail correspondence. Plaintiff has also failed to respond to this subsequent e-mail correspondence.

20. Because the Complaint failed to state a claim for which relief can be granted, this Court should, ruling on the pleadings, enter judgment in favor of Kathleen Cole. Plaintiff's position is untenable as there exists no basis in law or fact to proceed with an adversary proceeding predicated on Section 305(a), 523(a) or 727 of the Bankruptcy Code. This is further evidenced by Plaintiff's failure to plead with specificity and particularity as required by Rule 7009(b) of the Federal Rules of Bankruptcy Procedure. Plaintiff could not plead with the required specificity and particularity because his claim is lacks any foundation or support.

21. Further, the Court should dismiss this adversary proceeding on account of Plaintiff's complete failure to prosecute his Complaint. Not only has Plaintiff initiated an unfounded action; he and his counsel have done nothing but intentionally hinder and delay the action throughout the discovery phase. Plaintiff and his counsel have failed to cooperate in every way imaginable despite the many efforts of Kathleen Cole and her undersigned counsel over the months to facilitate such cooperation. Plaintiff's counsel has not only failed to timely respond to Kathleen Cole's Discovery Requests, but he has also failed to make any effort to communicate with Kathleen Cole's undersigned counsel in any manner despite repeated attempts to engage communication.

22. In the unlikely event that the Court does not find that Plaintiff's Complaint should be dismissed as a matter of law or that the conduct of Plaintiff and his counsel

amounts to a failure to prosecute his Complaint, Kathleen Cole should, in the least, be afforded more time to conduct discovery. Without such relief, Kathleen Cole will clearly be prejudiced. Pursuant to the customs of this Court, Kathleen Cole, by and through her undersigned counsel, has acted promptly, collegially, and wholly without Court supervision in conducting all discovery proceedings. The instant Motion was filed prior to the expiration of the discovery deadlines. These encouraged practices should not be punished where Plaintiff and his counsel have failed to cooperate at every turn. Instead, this Court should grant forbearance to Kathleen Cole by extending the discovery period for the defendant and compelling Plaintiff to perform under each of Kathleen Cole's discovery requests, including those Discovery Requests already served on Plaintiff and any discovery that Kathleen Cole might conduct in light of the relief granted.

23. Plaintiff and his counsel should be sanctioned and Kathleen Cole should be awarded attorneys' fees and costs on account of the commencement of this meritless action. Plaintiff and his counsel, as a result of their above-cited actions, have evinced a clear violation of the letter and spirit of Rule 9011 of the Federal Rules of Bankruptcy Procedure. Counsel for Kathleen Cole has provided Plaintiff's counsel with the notice required by Rules. See Exhibits E and F. Kathleen Cole's undersigned counsel has devoted significant resources to date in connection with the defense of this matter and Plaintiff's failing prosecution of this lawsuit. On information and belief, Plaintiff has waged this meritless action for the sole purpose of attempting to somehow manipulate Kathleen Cole with regards to the marital dissolution action in which Plaintiff and Kathleen Cole are currently involved. Indeed, Plaintiff, when questioned about this matter, has in fact recently admitted to Kathleen Cole that he "has no proof."

24. Further, Plaintiff and his counsel should be sanctioned and Kathleen Cole should be awarded attorneys' fees and costs on account of Plaintiff's failure to timely serve any response to the Discovery Requests served on him by Kathleen Cole, by and through her undersigned counsel.

25. Prior to or at the hearing on the Motion, counsel for Kathleen Cole will submit an affidavit setting forth in detail the time and costs in expended in connection with the defense of this adversary proceeding and the Motion.

WHEREFORE, Defendant, Kathleen Joanne Cole, prays for relief as follows:

1. For an Order granting judgment on the pleadings in favor of Defendant; or, in the alternative, an Order dismissing this adversary proceeding with prejudice;

2. Or, in the alternative, for an Order compelling Plaintiff to respond to Kathleen Cole's discovery requests and extending the period during which discovery proceedings may be conducted by the Defendant;

3. For an Order granting Defendant her costs, reasonable attorneys' fees and disbursements incurred in defending this action in the amount to be determined in accordance with an affidavit submitted to the Court; and

4. Such other and further relief as the Court deems just and equitable.

Dated: October 1, 2004.

LINDQUIST & VENNUM, P.L.L.P.

By: /e/ George H. Singer

George H. Singer, Esq., #262043
Jonathan M. Harris, Esq. #0323962
4200 IDS Center
80 South Eighth Street
Minneapolis, Minnesota 55402
Telephone: (612) 371-3211
Facsimile: (612) 371-3207

ATTORNEYS FOR KATHLEEN COLE

VERIFICATION

I, George H. Singer, an attorney at Lindquist & Vennum P.L.L.P. which represents the Movant, Kathleen Cole, in the foregoing motion declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

Dated: October 1, 2004

/e/George H. Singer
George H. Singer, Esq.

LINDQUIST & VENNUM P.L.L.P.

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ATTORNEYS AT LAW

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GEORGE H. SINGER
(612) 371-2493
gsinger@lindquist.com

August 2, 2004

VIA FACSIMILE & U.S. MAIL
James C. Whelpley, Esq.
Twin City Attorneys P.A.
2151 N Hamline Avenue
Suite 202
Roseville, MN 55113

Re: *In re: Kathleen Joanne Cole*
Bky Case No.: 03-38456
Michael Edward Cole Jr. v. Kathleen Joanne Cole
Adv. No.: 04-3088

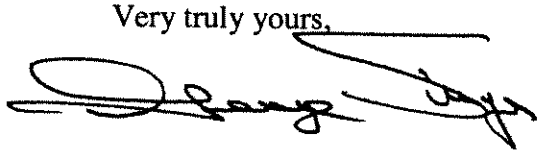
Dear Mr. Whelpley:

As we discussed, enclosed and hereby served upon you in connection with the above-referenced matter, please find our initial set of discovery requests consisting of: Defendants' Interrogatories and Request for Production of Documents (Set One).

We anticipate taking your client's deposition upon receipt of your responses to those requests. Please advise me if you or your client have any scheduling issues that I need to be aware of for the months of August and September.

If you have any questions or matters that you would like to discuss, do not hesitate to contact me.

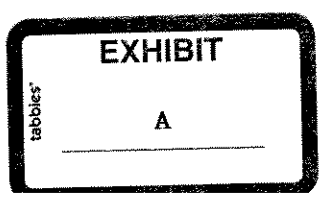
Very truly yours,



George H. Singer

GHS/jkg
Enclosure
cc: Kathleen J. Cole (w/enc.)
Jonathan M. Harris, Esq. (w/enc.)

Doc# 1915551\1



UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

Kathleen Joanne Cole,

Debtor.

BKY Case No. 03-38456

Michael Edward Cole, Jr.

Plaintiff,

vs.

Kathleen Joanne Cole,

Defendant.

ADV No. 04-3088

DEFENDANT'S INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS (SET ONE)

TO: Plaintiff Michael Edward Cole, Jr. and his attorney, James C. Whelpley, Esq., 2151 North Hamline Avenue, Suite 202, Roseville, MN 55113.

PLEASE TAKE NOTICE that, pursuant to Rule 7034 of Federal Rules of Bankruptcy Procedure and other applicable law, Defendant Kathleen Cole hereby requests Plaintiff, Michael Edward Cole, Jr., to produce and permit Defendant, her attorneys and agents to inspect and copy the documents listed below at the offices of Lindquist & Vennum P.L.L.P., 4200 IDS Center, 80 South Eighth Street, Minneapolis, Minnesota 55402 within 30 days of this request. This request calls for all documents in the possession, custody or control of Plaintiff or Plaintiff's employees, officers, agents, attorneys or others acting on Plaintiff's behalf.

PLEASE TAKE FURTHER NOTICE that, pursuant to Rule 7033 of Federal Rules of Bankruptcy Procedure, Defendant Kathleen Cole hereby requests Plaintiff Michael Edward Cole, Jr. to answer the following interrogatories under oath, within 30 days of this request and in

accordance with the provisions of the Federal Rules of Bankruptcy Procedure and other applicable law.

DEFINITIONS AND INSTRUCTIONS

1. **Communication.** The term "communication" means the transmittal of information (in the form of facts, ideas, inquiries, or otherwise).

2. **Document.** The term document means all writings of any kind, including the originals and all non-identical copies, including without limitation, correspondence, memoranda, notes, diaries, statistics, data, letters, telegrams, minutes, contracts, reports, studies, checks, statements, receipts, returns, summaries, pamphlets, books, interoffice and intra-office communications, notations of any sort of conversations, telephone calls, meetings or other communications, bulletins, printer matter, computer printouts, teletypes, telefax, invoices, worksheets, all drafts, alterations, modifications, notations, changes and amendments of any of the foregoing, graphic or oral records or representations of any kind (including, without limitation, photographs, charts, graphs, microfiche, microfilm, video-tapes, recordings, motion pictures), and any electronic, mechanical, or electric records or representations of any kind (including, without limitation, tapes, cassettes, discs, recordings, and computer memories). A draft or non-identical copy is a separate document within the meaning of this term.

3. **Identify (With Respect to Persons).** When referring to a person, "to identify" means to give, to the extent known, the person's full name, present or last known address. Once a person has been identified in accordance with this subparagraph, only the name of that person need be listed in response to subsequent discovery requesting the identification of that person.

4. **Identify (With Respect to Documents).** When referring to documents, "to identify" means to give, to the extent known, the (i) type of document; (ii) general subject matter; (iii) date of the document; and (iv) author, addressee, and recipient.

5. **Parties.** The terms "plaintiff" and "defendant" as well as a party's full or abbreviated name or a pronoun referring to a party means the party and, where applicable, its officers, employees, partners, agents and attorneys. This definition is not intended to impose a discovery obligation on any person who is not a party to the litigation.

6. **Person.** The term "person" is defined as any natural person or business, legal or governmental entity or association.

7. **Third Mortgage or Debt.** The term "Third Mortgage" or "Debt" shall be construed to mean the mortgage described in paragraph 4 of the Complaint you filed in this matter, said Complaint dated March 21, 2004 (hereinafter "Complaint").

8. **Gambling Debt.** The term "Gambling Debt" shall be construed to mean the obligations referenced in paragraphs 4 and 5 of the Complaint.

9. **Concerning.** The term "concerning" means relating to, referring to, describing, evidencing or constituting.

10. **You/Your.** The terms "you" and "your" shall be construed to mean Plaintiff Vang Xiong, and his employees, agents, representatives, and consultants.

11. **All/Each.** The terms "all" and "each" shall be construed as all and each.

12. **And/Or.** The connectives "and" and "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery request all responses that might otherwise be construed to be outside of its scope.

13. **Number.** The use of a single form of any word includes the plural and vice versa.

14. If a privilege or work product protection is asserted concerning any information sought or any document for which identification is requested, provide the following:

(b) identify all communications by stating the participants in the communication, the date of the communication, and the general subject matter of the communication;

(c) identify all communications by stating the participants in the communication, the date of the communication, and the general subject matter of the communication;

(d) identify all documents by identifying the (i) type of document (letter, memo, and so forth); (ii) general subject matter of the document; (iii) date of the document; (iv) author(s), addressee(s), and recipient(s);

(e) state the nature of the privilege or protection asserted; and

(f) state in detail the factual and legal basis for the claim of privilege or protection.

15. If your response is that the information or document requested is not in your possession or custody, describe in detail the unsuccessful efforts you made to locate the requested information or document.

16. If your response is that the information or document are not in your control, identify who has control and the location of any and all records.

17. **The following requests shall be deemed to be continuing in nature and if information or documents are discovered or come to your attention after these interrogatories are answered which would change or supplement the answer given, demand is hereby made that said information and documents be furnished immediately.**

18. **Lost or Destroyed Documents.** If any request set forth below calls for the production of a document that was at one time in existence but has been lost, discarded or destroyed, as part of your response to that request, identify each such document, providing as much of the following information as possible: its type and subject matter; its date; the date or approximate date it was lost, discarded or destroyed; a description of the circumstances and manner in which it was lost, discarded or destroyed; the reason for disposing of the document (if discarded or destroyed); an identification of all persons authorizing or having knowledge of the circumstances surrounding the disposal of the document; an identification of the person who lost, discarded or destroyed the document; and an identification of all persons having knowledge of the content of the document.

INTERROGATORIES:

1. Identify all individuals with knowledge of the facts related to this dispute and the allegations set forth in or contemplated by the Complaint, including each person's full name, address, and relationship to Plaintiff. State the subject matter and the substance of the facts known to each individual.

2. Describe the events that led to the creation of a gambling debt as alleged in Paragraph 4 of Plaintiff's Complaint, including, without limitation, information reflecting when this gambling debt arose, the place at which the gambling debt was incurred, the amount of the gambling debt, and how Plaintiff first came to learn of it.

3. Describe in detail the mechanism by which the gambling debt was satisfied.

4. Describe in detail how the proceeds of the third mortgage were expended.

5. Set forth in detail the substance of all discussions between you and the Defendant involving the repayment of the debt incurred by reason of the third mortgage, including the time

and place of these discussions and the identity of any persons who may have been present at the time of said discussions.

6. Describe in detail all discussions between you and the Defendant concerning Defendant's failure or refusal to pay additional amounts toward the debt upon her vacating the marital homestead.

7. Quantify how much of the debt had been repaid by the time Kathleen Cole vacated the marital residence.

8. Identify all previous amounts that had been used exclusively or primarily to pay Defendant's gambling debts as referenced in paragraph 5 of the Complaint, and the source of the funds used to pay those debts.

9. State in detail what was said by Defendant with respect to her representation that she would repay the debt, as alleged in Paragraph 5 of the Complaint. Identify all persons who were present at the time of these statements.

10. Describe in detail all factual issues which must be determined as part of the parties' marital dissolution action as cited in paragraph 8 of the Complaint.

11. Describe with particularity all purportedly false representations made by Kathleen Cole to the Defendant regarding her intentions to remain married and to repay joint debts as referenced in paragraph 10 of the Complaint and the amount and nature of damages that you claimed to have sustained as a result thereof.

12. Identify, list and describe the amount and each and every source of gross income earned by the Plaintiff for the last five years.

13. Identify, list and describe any and all assets owned by or held for the benefit of the Plaintiff.

14. Identify the fair market value of the assets identified, listed and described in paragraph 13 above.

15. Identify, list and describe any and all liabilities and the amount owed by Plaintiff therefore.

16. Describe in detail, all facts that support Plaintiff's claim that Defendant acted willfully and maliciously to harm Plaintiff.

17. Identify and describe with particularity how the detrimental consequences to Plaintiff outweighs the benefit to the Defendant of discharging the Defendant from all indebtedness.

18. Describe with particularity all purportedly false representations made by Kathleen Cole in her bankruptcy schedules concerning her financial situation, as alleged in paragraph 9 of the Complaint.

19. Notwithstanding the foregoing, state with particularity the factual basis for the assertions or allegations in your Complaint set forth in paragraphs 4, 5, 8, 9, 10, 11, 12 and 13 thereof.

20. Identify all documents that support, refute, and/or relate to the allegations in the Complaint and your answers to these interrogatories, and for each such document, specify the paragraph of the Complaint and/or the interrogatory to which it supports, refutes, and/or relates.

DOCUMENT REQUESTS

1. All documents that support, refute, and/or relate to your answers to the above interrogatories.

2. All documents identified or referred to in Plaintiff's Complaint.

3. All notes, letters, or documents of any kind that related to the gambling debt referenced in Paragraph 4 of the Complaint and its satisfaction, including, without limitation, copies of

documents memorializing the gambling debt and checks paid or other monetary instruments used towards the satisfaction of the gambling debt.

4. All notes, calendars, diaries and other documents that refer or relate to either the gambling debt or the third mortgage.

5. All notes, letters, telephone logs, or other records of any contact you made to any person, other than your attorneys, regarding the gambling debt, the third mortgage and/or the allegations, claims and defenses at issue in this dispute.

6. All documents reflecting Defendant's purported assurance that she would repay the debt as indicated in paragraph 4 of the Complaint.

7. All documents evidencing or associated with securing the third mortgage.

8. All check books, cancelled checks and/or other documents reflecting the payment of any funds toward the satisfaction of the third mortgage.

9. Copies of all financial reports, statements and applications associated with securing the third mortgage.

10. All check books, cancelled checks and/or other documents reflecting the payment of any funds toward the satisfaction of the gambling debt.

11. All documents concerning or reflecting payments relating to any financial obligations owed jointly by Plaintiff and Defendant other than the third mortgage, including, without limitation, first and/or second mortgages, outstanding between January 1, 2002 and December 19, 2003.

12. All documents concerning the conversation(s) between Kathleen Cole and Michael Cole referenced in paragraph 4 of Plaintiff's Complaint.

13. All documents reflecting credit card debt owed jointly or severally by Kathleen Cole and/or Michael Cole at the time of the application to secure the third mortgage.

14. All documents reflecting home equity loans outstanding at the time of the application to secure the third mortgage.

15. All documents establishing that Kathleen Cole falsely represented her financial situation in her bankruptcy schedules, including without limitations, documents relating to her income and expenses, as alleged in paragraph 10 of the Complaint.

16. All documents relating to her purportedly false representations to Plaintiff regarding Defendant's intentions to remain married and to repay joint debts, including without limitation, the third mortgage and gambling debt referenced in the Complaint.

17. Your bank statements or other bank records for the past two years.

18. Bank statements or other bank records reflecting jointly held accounts with Kathleen Cole.

19. Documents reflecting payments made by you or for your benefit by any third party towards obligations associated with any mortgages on the property located at 8912 Inman Avenue South, Cottage Grove, MN.

20. All Documents constituting or evidencing the financial condition of Plaintiff including, without limitation, financial statements, credit and/or loan applications, credit reports, institutional or other statements for the last three calendar years (i.e. checking, savings, money market, investment account, retirement account, pension, annuities, ERISA-qualified plans, insurance, stocks, bonds, IRAs, savings and retirement plans, etc.), asset and liabilities list, income and expenses, asset valuations and appraisals, real estate valuations (including tax

assessment statements), mortgages, loan agreements and other evidences of long-term indebtedness.

21. Copies of all of Plaintiff's tax returns, whether filed jointly with Defendant or single, for the previous three calendar years.

22. Plaintiff's employment payroll records, including copies of check stubs from any and all employers for the last twelve months.

23. All resumes and applications for employment prepared or delivered to any employer or prospective employer in the last five years.

24. Documents reflecting child support payments made by Michael Cole between December 17, 2003 and the present.

21. Documents reflecting any payments by Kathleen Cole to Michael Cole in satisfaction, in whole or in part, of the gambling debt cited in paragraph 4 of the Complaint.

22. All other documents you may seek to introduce as exhibits at trial or in support or opposition to any motion in this matter.

Dated: August 2, 2004

LINDQUIST & VENNUM P.L.L.P.

By

George H. Singer, #262043
Jonathan M. Harris, #0323962
4200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
Telephone: (612) 371-3211

ATTORNEY FOR KATHLEEN COLE

AFFIDAVIT OF SERVICE

Re: *In re: Kathleen Joanne Cole*
Bky Case No.: 03-38456
Michael Edward Cole Jr. v. Kathleen Joanne Cole
Adv. No.: 04-3088

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

Jennifer K. Grove of the City of Minneapolis, County of Hennepin, State of Minnesota, being first duly sworn on oath, states that on the 2nd day of August, 2004, she served the following document:

Defendant's Interrogatories And Request For Production Of Documents (Set One)

upon:

James C. Whelpley, Esq.
Twin City Attorneys P.A.
2151 N Hamline Avenue
Suite 202
Roseville, MN 55113

Fax Number: 651-639-0056

via facsimile and by placing a true and correct copy thereof in an envelope, postage pre-paid, and by mailing same at the U.S. Post Office, Minneapolis, Minnesota, addressed to the above attorney at the last known address.

Jennifer K. Grove

Subscribed and sworn before me
this 2nd day of August, 2004.

Helen J. Lifson
Notary Public

HELEN J. LIFSON
Notary Public
Minnesota
My Commission Expires January 31, 2005

Doc# 1549811\1

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GEORGE H. SINGER
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August 12, 2004

VIA FACSIMILE & U.S. MAIL
James C. Whelpley, Esq.
Twin City Attorneys P.A.
2151 N Hamline Avenue
Suite 202
Roseville, MN 55113

Re: *In re: Kathleen Joanne Cole*
Bky Case No.: 03-38456
Michael Edward Cole Jr. v. Kathleen Joanne Cole
Adv. No.: 04-3088

Dear Mr. Whelpley:

Enclosed herewith and served upon you please find the Requests for Admission (Set One) in regard to the above-referenced matter.

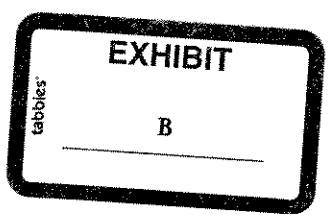
Very truly yours,

George H. Singer

GHS/jkg
Enclosure

cc: Kathleen J. Cole (w/enc.)
Jonathan M. Harris, Esq. (w/enc.)

Doc# 1919394\1



UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

Kathleen Joanne Cole,

Debtor.

BKY Case No. 03-38456

Michael Edward Cole, Jr.

Plaintiff,

vs.

Kathleen Joanne Cole,

Defendant.

ADV No. 04-3088

REQUESTS FOR ADMISSION
(SET ONE)

TO: Plaintiff Michael Edward Cole, Jr. and his attorney, James C. Whelpley, Esq., 2151 North Hamline Avenue, Suite 202, Roseville, MN 55113.

PLEASE TAKE NOTICE that, pursuant to Rule 7036 of Federal Rules of Bankruptcy Procedure and other applicable law, Defendant Kathleen Cole hereby demands that Plaintiff, Michael Edward Cole, Jr.,

INSTRUCTIONS

You must serve your responses and/or objections to the following Requests for Admission within thirty (30) days of service hereof. These Requests shall be admitted, without the necessity of a court order, unless within thirty (30) days after service of these Requests, you serve upon counsel for Kathleen Cole a written answer or objection addressed to the matter and signed by an authorized representative or your attorney.

If objection is made, the reason therefore shall be stated and shall include and identify the exact portion or part of the Request that you have refused to admit. The

answer shall specifically admit or deny the matter or set forth in detail the reasons you cannot truthfully admit or deny each matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that you qualify your answer or deny only a part of the matter of which an admission is requested, you shall specify so much of it as is true and qualify or deny the remainder. You may not give lack of information or knowledge as a reason for failure to admit or deny unless you state that you have made reasonable inquiry and that the information known or obtainable by you is insufficient to enable you to admit or deny. If you consider that a matter of which an admission is requested presents a genuine issue for trial, you may not, on that ground alone, object to the request; you may, subject to the provisions of the applicable rules, deny the matter or set forth reasons why you cannot admit or deny it.

To the fullest extent permitted by the Federal Rules of Bankruptcy Procedure, these Requests are intended to be continuing in nature. You are required to timely supplement your responses when appropriate or necessary to make them correct or complete as required by the Federal Rules of Bankruptcy Procedure. These Requests are intended to include all information within your possession or care or subject to your custody or control, whether directly or indirectly. Information is deemed to be within your possession, care, custody, or control if: (a) it is within your actual knowledge or possession; and/or (b) it is within the knowledge of any other person or entity and you have the right to obtain the information or document from such entity or person.

You are further notified and instructed that if you fail to admit the truth of any matter herein, and Kathleen Cole later proves the truth of such matter, Federal Rule of Bankruptcy Procedure 7037(c)(2) permits Kathleen Cole to recover her

reasonable expense, including her reasonable attorneys' fees, incurred in making that proof.

If you feel that the use of any term in these Requests is ambiguous, or if you do not understand any of these Requests, definitions, or instructions, you should immediately contact the undersigned, and an unambiguous definition or clarification will be promptly supplied.

DEFINITIONS

The following words shall have the following meanings as used in this Request for Admissions Interrogatory:

a. "Describe," "state," or "explain" means to provide a comprehensive, complete, accurate, and detailed description, explanation, or listing of the matter inquired of.

b. "Identify or identification" – documents. In each case where you are asked to identify documents in your answer, state the document, documents, category of documents, their location, and a brief summary of their contents.

c. "Relate to," "relating to," or "concerning" means discussing, describing, referring to, reflecting, containing, comprising, analyzing, studying, reporting on, commenting on, evidencing, constituting, setting forth, considering, recommending, concerning, or pertaining to in whole or in part.

d. "You" and "Your" shall mean the Plaintiff, Michael Edward Cole, Jr., the Plaintiff or any employee, agent, manager, or representative thereof.

DEFINITIONS AND INSTRUCTIONS

1. **Communication.** The term "communication" means the transmittal of information (in the form of facts, ideas, inquiries, or otherwise).

2. **Document.** The term document means all writings of any kind, including the originals and all non-identical copies, including without limitation, correspondence, memoranda, notes, diaries, statistics, data, letters, telegrams, minutes, contracts, reports, studies, checks, statements, receipts, returns, summaries, pamphlets, books, interoffice and intra-office communications, notations of any sort of conversations, telephone calls, meetings or other communications, bulletins, printer matter, computer printouts, teletypes, telefax, invoices, worksheets, all drafts, alterations, modifications, notations, changes and amendments of any of the foregoing, graphic or oral records or representations of any kind (including, without limitation, photographs, charts, graphs, microfiche, microfilm, video-tapes, recordings, motion pictures), and any electronic, mechanical, or electric records or representations of any kind (including, without limitation, tapes, cassettes, discs, recordings, and computer memories). A draft or non-identical copy is a separate document within the meaning of this term.

3. **Identify (With Respect to Persons).** When referring to a person, "to identify" means to give, to the extent known, the person's full name, present or last known address. Once a person has been identified in accordance with this subparagraph, only the name of that person need be listed in response to subsequent discovery requesting the identification of that person.

4. **Identify (With Respect to Documents).** When referring to documents, "to identify" means to give, to the extent known, the (i) type of document; (ii) general subject matter; (iii) date of the document; and (iv) author, addressee, and recipient.

5. **Parties.** The terms "plaintiff" and "defendant" as well as a party's full or abbreviated name or a pronoun referring to a party means the party and, where

applicable, its officers, employees, partners, agents and attorneys. This definition is not intended to impose a discovery obligation on any person who is not a party to the litigation.

6. **Person**. The term "person" is defined as any natural person or business, legal or governmental entity or association.

7. **Third Mortgage or Debt.** The term "Third Mortgage" or "Debt" shall be construed to mean the loan from Household Finance described in paragraph 4 of the Complaint you filed in this matter, said Complaint dated March 21, 2004 (hereinafter "Complaint").

8. **Gambling Debt**. The term "Gambling Debt" shall be construed to mean the obligations referenced in paragraphs 4 and 5 of the Complaint.

9. **Concerning.** The term "concerning" means relating to, referring to, describing, evidencing or constituting.

10. **You/Your.** The terms "you" and "your" shall be construed to mean Plaintiff Vang Xiong, and his employees, agents, representatives, and consultants.

11. **All/Each.** The terms "all" and "each" shall be construed as all and each.

12. **And/Or.** The connectives "and" and "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery request all responses that might otherwise be construed to be outside of its scope.

13. **Number.** The use of a single form of any word includes the plural and vice versa.

14. If a privilege or work product protection is asserted concerning any information sought or any document for which identification is requested, provide the following:

(b) identify all communications by stating the participants in the communication, the date of the communication, and the general subject matter of the communication;

(c) identify all communications by stating the participants in the communication, the date of the communication, and the general subject matter of the communication;

(d) identify all documents by identifying the (i) type of document (letter, memo, and so forth); (ii) general subject matter of the document; (iii) date of the document; (iv) author(s), addressee(s), and recipient(s);

(e) state the nature of the privilege or protection asserted; and

(f) state in detail the factual and legal basis for the claim of privilege or protection.

15. If your response is that the information or document requested is not in your possession or custody, describe in detail the unsuccessful efforts you made to locate the requested information or document.

16. If your response is that the information or document are not in your control, identify who has control and the location of any and all records.

17. **The following requests shall be deemed to be continuing in nature and if information or documents are discovered or come to your attention after these**

Requests for Admission are answered which would change or supplement the answer given, demand is hereby made that said information and documents be furnished immediately.

18. **Lost or Destroyed Documents.** If any request set forth below calls for the production of a document that was at one time in existence but has been lost, discarded or destroyed, as part of your response to that request, identify each such document, providing as much of the following information as possible: its type and subject matter; its date; the date or approximate date it was lost, discarded or destroyed; a description of the circumstances and manner in which it was lost, discarded or destroyed; the reason for disposing of the document (if discarded or destroyed); an identification of all persons authorizing or having knowledge of the circumstances surrounding the disposal of the document; an identification of the person who lost, discarded or destroyed the document; and an identification of all persons having knowledge of the content of the document.

REQUESTS FOR ADMISSION

1. Admit that the principal amount of the Third Mortgage from Household Finance was in the amount of $18,000, and that the balance of $3,000 represented interest charges on the debt.

2. Admit that the Gambling Debt was in the amount of $3,000, and that the balance of the funds received were used for other living expenses and to pay off credit card debt and related expenses, including obligations owed to Zale's and Best Buy. Provide documentation reflecting the amounts paid out of the

proceeds of the Third Mortgage to third parties pursuant to credit card debt or installment loans.

3. Admit that the Third Mortgage was secured in part to purchase two computers. Provide documentation reflecting the costs of these computers.

4. Admit that the Third Mortgage with Household Finance was secured on or about March 18, 2002.

5. Admit that you asked for a divorce on or about July 8, 2003, and that Kathleen Cole vacated the marital premises in or about November 2003.

6. Admit that some portion of the Third Mortgage had been repaid prior to the filing of a Petition in Bankruptcy by Kathleen Cole in or about December 2003, and identify the amount of the debt outstanding as of that date.

7. Admit that a third-party currently occupies the marital premises with you and this third-party makes periodic contributions towards the maintenance of the premises. Identify the amount of such contributions, the frequency of the contributions, and when they commenced.

8. Admit that at the time the Third Mortgage loan was secured Plaintiff and Defendant intended to continue the marital relationship.

9. Admit that if at the time that the Third Mortgage was secured Defendant intended to maintain and continue the marital relationship, Plaintiff's claim under Paragraph 10 of the Complaint must fail.

10. Admit that if at the time that the Third Mortgage was secured Defendant intended to maintain and continue the marital relationship, Plaintiff's claim under Paragraph 11 of the Complaint must fail.

11. Admit that if at the time that the Third Mortgage was secured Defendant intended to maintain and continue the marital relationship, Plaintiff's claim under Paragraph 12 of the Complaint must fail.

12. Admit that if at the time that the Third Mortgage was secured Defendant intended to maintain and continue the marital relationship, Plaintiff's claim under Paragraph 13 of the Complaint must fail.

13. Admit that Plaintiff's Complaint fails to state a claim for which relief can be granted pursuant to the Bankruptcy Code.

14. Admit that Plaintiff has failed to plead with the specificity and particularity required and contemplated by Rule 7009(b) of the Federal Rules of Bankruptcy Procedure.

Dated: August 12, 2004

LINDQUIST & VENNUM, P.L.L.P.

By: _____

George H. Singer, Esq., #262043
Jonathan M. Harris, Esq., #0323962
4200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
Telephone (612) 371-3211
Facsimile (612) 371-3207

ATTORNEYS FOR KATHLEEN COLE

AFFIDAVIT OF SERVICE

Re: *In re: Kathleen Joanne Cole*
Bky Case No.: 03-38456
Michael Edward Cole Jr. v. Kathleen Joanne Cole
Adv. No.: 04-3088

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

Jennifer K. Grove of the City of Minneapolis, County of Hennepin, State of Minnesota, being first duly sworn on oath, states that on the 12th day of August, 2004, she served the following document:

Requests for Admission (Set One)

upon:

James C. Whelpley, Esq.
Twin City Attorneys P.A.
2151 N Hamline Avenue
Suite 202
Roseville, MN 55113

Fax Number: 651-639-0056

via facsimile and by placing a true and correct copy thereof in an envelope, postage pre-paid, and by mailing same at the U.S. Post Office, Minneapolis, Minnesota, addressed to the above attorney at the last known address.

Jennifer K. Grove

Subscribed and sworn before me
this 12th day of August, 2004.

Notary Public

SHEILA MAE VEIEN
NOTARY PUBLIC-MINNESOTA
My Commission Expires Jan. 31, 2005

Doc# 1549811\1

LINDQUIST & VENNUM P.L.L.P.

4200 IDS CENTER
80 SOUTH EIGHTH STREET
MINNEAPOLIS, MN 55402-2274
TELEPHONE: 612-371-3211
FAX: 612-371-3207

IN DENVER:
600 17TH STREET, SUITE 1800 SOUTH
DENVER, CO 80202-5441
TELEPHONE: 303-573-5900
FAX: 303-573-1956

ATTORNEYS AT LAW

www.lindquist.com

GEORGE H. SINGER
(612) 371-2493
gsinger@lindquist.com

August 16, 2004

VIA FACSIMILE & U.S. MAIL
James C. Whelpley, Esq.
Twin City Attorneys P.A.
2151 N Hamline Avenue
Suite 202
Roseville, MN 55113

Re: *In re: Kathleen Joanne Cole*
Bky Case No.: 03-38456
Michael Edward Cole Jr. v. Kathleen Joanne Cole
Adv. No.: 04-3088

Dear Mr. Whelpley:

Enclosed please find records that our office obtained from Household Finance relating to the sums that are in dispute and the subject of the above-reference adversary proceeding. You will note that the advances were used by the parties to satisfy a number of household obligations and clearly support our client's factual account of the matter.

In light of the foregoing, we believe that it is incumbent upon you to dismiss the above-referenced adversary proceeding and hereby request that you do so. Please advise me of your intentions with respect to this matter at your earliest opportunity so that we can take whatever steps are appropriate under the circumstances.

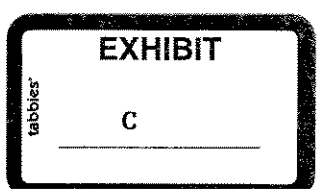
Very truly yours,

George H. Singer

GHS/jkg
Enclosure

cc: Kathleen J. Cole (w/enc.)
Jonathan M. Harris, Esq. (w/enc.)

Doc# 1920308\1



REVOLVING LOAN VOUCHER

CREDITOR

HOUSEHOLD INDUSTRIAL FINANCE COMPANY
1737 C BEAM AVENUE
BIRCH RUN STATION
MAPLEWOOD MN 55109

BORROWERS
COLE, KATHLEEN J
COLE JR , MICHAEL E
8912 INMAN AVE S
COTTAGE GROV MN 55016

LOAN NO: 547201-10-135355

Borrowers agree to and direct the disbursements and Advance indicated below. If any estimated amount shown below varies from the actual amount paid, Borrowers agree to the disbursement of the actual amount and a corresponding change to the Advance shown below. Borrowers agree that this Advance is made under Borrowers' Revolving Loan Agreement (account number shown above.)

TO: DISCOVR CD	$ 5211.00
TO: AMER GENRL	$ 3919.00
TO: WF FIN BNK	$ 3164.00
TO: WFFINANCE	$ 2055.00
TO: PROGROWTH	$ 1488.00
TO: HHLD BANK	$ 289.00
TO: FST PREMIE	$ 259.00
TO: HB/MENARDS	$ 245.00
TO: CAP 1 BANK	$ 208.00
TO: MORTGAGE REGISTRATION TAX PAID TO WASHINGTON COUNTY	$ 53.53
REAL ESTATE TITLE EXAMINATION AND/OR TITLE INSURANCE	$ 75.00
CASH OR CHECK TO BORROWER	$ 3135.47
TOTAL ADVANCE(S)	$ 21100.00

WITNESS

DATE
09-27-99 Voucher

BORROWERS:

US147911

*C11CA55C1056RLV8000US147911O**COLE * ORIGINAL

EXHIBIT
D

LINDQUIST & VENUM P.L.L.P.

4200 IDS CENTER
80 SOUTH EIGHTH STREET
MINNEAPOLIS, MN 55402-2274
TELEPHONE: 612-371-3211
FAX: 612-371-3207

IN DENVER:
600 17TH STREET, SUITE 1800 SOUTH
DENVER, CO 80202-5441
TELEPHONE: 303-573-5900
FAX: 303-573-1956

ATTORNEYS AT LAW

www.lindquist.com

GEORGE H. SINGER
(612) 371-2493
gsinger@lindquist.com

September 8, 2004

VIA FACSIMILE & U.S. MAIL

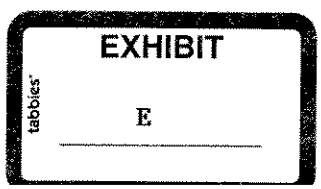
James C. Whepley, Esq.
Twin City Attorneys, P.A.
2151 N. Hamline Avenue
Suite 202
Roseville, MN 55113

Re: *In re: Kathleen Joanne Cole*
Bky Case No.: 03-38456
Michael Edward Cole Jr. v. Kathleen Joanne Cole
Adv. No.: 04-3088

Dear Mr. Whepley:

Pursuant to Rule 9011 of the Federal Rules of Bankruptcy Procedure, I am writing to provide you and your client with notice and the opportunity to dismiss your complaint and correct a number of violations of Rule 9011 within your complaint. The allegations and other factual contentions in the complaint against Kathleen Cole have no evidentiary support. The documentary evidence and other information that we have provided to date make it abundantly clear that the facts and allegations set forth in the complaint and that you have otherwise asserted against Ms. Cole are not supported by the evidence, are directly contradicted, otherwise false, not formed after an inquiry reasonable under the circumstances, and are not supportable by the facts and existing law.

On several occasions since the commencement of the above-referenced adversary proceedings, I have indicated to you and your colleague the relevant facts of this matter. I have also requested that your office provide us with information that supports your client's claims and allegations. So far, these requests have fallen upon deaf ears and efforts to ascertain your position have been unsuccessful. Indeed, you and your client have failed to timely respond to our interrogatories and requests for production of documents (served upon you August 2, 2004). The records that we obtained from Household Finance and provided to you in my August 16, 2004 correspondence make it abundantly clear that the proceeds from the third mortgage were not used in the manner your client alleges in his complaint. As I mentioned to you in that August



16 correspondence, these records instead make it clear that these proceeds were used by the parties to satisfy a number of household obligations.

These unambiguous facts along with your client's failure to plead with specificity and particularity pursuant to Rule 7009(b) evince a clear violation of the letter and spirit of Rule 9011 in pursuit of these claims. As a result, we believe that you have an affirmative duty to withdraw your claims and dismiss this matter at this juncture. As you know, Ms. Cole has made a previous request upon you to dismiss this matter.

Your client's position in this matter is simply not tenable. There is simply no basis in fact or in law to proceed with an adversary proceeding predicated on 11 U.S.C. §§ 523(a), 727. Our law firm has devoted significant resources to date in connection with the defense of this matter and your prosecution of this lawsuit. The facts, issues and law in this matter are straightforward. Accordingly, please take this opportunity to dismiss this lawsuit so that further costs and expenses may be avoided.

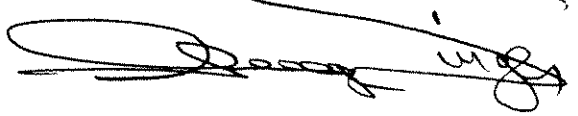
If you do not withdraw the complaint and dismiss this matter, it is our intention to move the Court for appropriate relief under Bankruptcy Rule 9011 and/or otherwise. Specifically, we intend to ask the Court to dismiss this matter and to award attorneys' fees and costs in conjunction with the defense of this matter, including those associated with bringing the motion.

We reserve all rights under the Federal Rules of Bankruptcy Procedure and applicable law.

Please feel free to contact me if you would like to discuss this matter further.

Very truly yours,

LINDQUIST & VENNUM P.L.L.P.



George H. Singer

GHS/mpw
cc: Kathleen J. Cole
Jonathan M. Harris, Esq.

George H. Singer

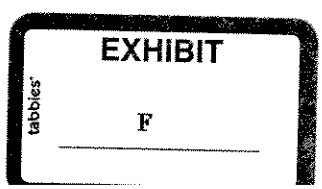
From: George H. Singer
Sent: Monday, September 20, 2004 10:48 AM
To: 'jw2180@tcq.net'
Cc: Jonathan M. Harris
Subject: ADV No. 04-3088

Mr. Whelpley, I have written you on a number of occasions now requesting that you dimiss this matter. We have had no responses whatsoever to our communications and our discovery has been ignored. Please advise us immediately of whether you intend to stipulate to a dismissal of this matter or whether we will be required to bring a motion to dismiss and request for sanctions/attorneys' fees.

If we do not hear from you by close of business on Wednesday, we will have no alternative but to proceed with our motions.

George H. Singer
Lindquist & Vennum, P.L.L.P.
80 South Eighth Street
Suite 4200
Minneapolis, MN 55402
Phone: (612) 371-2493
Fax: (612) 371-3207

This message is intended for the individual or entity named above. If you are not the intended recipient, please do not read, copy, use or disclose this communication to others; also please notify the sender by replying to this message, and then delete it from your system. Please verify that you will delete the e-mail in your reply. Thank you.



George H. Singer

From: kathleen cole [kathleencolehi@msn.com]
Sent: Friday, September 24, 2004 1:28 PM
To: MikeCole
Cc: GloriaBogen; George H. Singer
Subject: Please read and respond.

Mike,

I think it has been long enough for this to keep going on. I want to be divorced by the end of the year. I have been very patient waiting for you to get it together, and I want it to end. You have chosen your life and have been living it, now it is my turn and I want to get on with it. So do what you have to do to get this over with. When you said that you are not happy with your life where your at and don't like where it is headed, you can change it and move on.

Please do what you have to do with the Bankruptcy stuff and get it over with. As soon as that is done then we can get divorced. I want it over with so I can start over with my life. I am asking very nicely for you to get this over with, so we both can save money and time.

Please think about it and get back to me.

Thank you very much
Kathy

EXHIBIT
G

George H. Singer

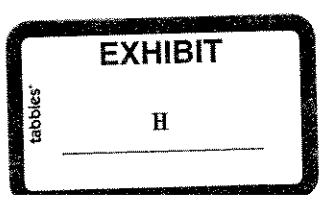
From: kathleen cole [kathleencolehi@msn.com]
Sent: Thursday, September 30, 2004 12:23 PM
To: MikeCole
Cc: GloriaBogen; George H. Singer
Subject: divorce

Mike,

Did you get my earlier e-mail about moving on? I really want this divorce done and over with. My best friend has her divorce and I want mine. I am tired of the bull!!!!!!! Please, I am begging you, do what you need to do to get this over with.

Thank you!!!!

Kathy



UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

Kathleen Joanne Cole, BKY Case No. 03-38456

Debtor.

Michael Edward Cole, Jr.

Plaintiff,

ADV No. 04-3088

vs.

Kathleen Joanne Cole,

Defendant.

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION FOR AN ORDER (1) GRANTING JUDGMENT ON THE PLEADINGS IN FAVOR OF THE DEFENDANT; (2) DISMISSING THIS PROCEEDING WITH PREJUDICE; AND (3) IMPOSING SANCTIONS ON PLAINTIFF AND HIS COUNSEL

Kathleen Cole, by and through her undersigned counsel, submits the following Memorandum of Law in Support of her Motion for Judgment on the Pleadings and to Dismiss the Complaint of Plaintiff Michael Edward Cole, Jr. ("Plaintiff") with Prejudice and for Sanctions against Plaintiff and his counsel.

FACTUAL BACKGROUND

The salient factual background for this Memorandum of Law is set forth in the Motion and is incorporated herein.

ARGUMENT

I. JUDGMENT ON THE PLEADINGS SHOULD BE GRANTED IN FAVOR OF THE DEFENDANT AND THIS ADVERSARY PROCEEDING SHOULD BE DISMISSED BECAUSE PLAINTIFF'S COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED.

Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, as incorporated by Rule 7012 of the Federal Rules of Bankruptcy Procedure, a defendant may move to dismiss all or part of the plaintiff's complaint for "failure to state a claim upon which relief can be granted." See Fed. R. Civ. P. 12(b)(6). Technically, a Rule 12(b)(6) motion cannot be filed after an answer has been submitted. Westcott v. Omaha, 901 F.2d 1486, 1488 (8th Cir. 1990). Instead, under Rule 12(c), as incorporated by Rule 7012 of the Federal Rules of Bankruptcy Procedure, a party may move for judgment on the pleadings "[a]fter the pleadings are closed but within such time as not to delay the trial." See Fed. R. Civ. P. 12(c). However, Rule 12(h)(2), which is also incorporated by Rule 7012 of the Federal Rules of Bankruptcy Procedure, provides that "[a] defense of failure to state a claim upon which relief can be granted…may be made…by motion for judgment on the pleadings." See Fed. R. Civ. P. 12(h)(2). As a result, the distinction between the pre-answer 12(b)(6) motion and the post-answer 12(c) motion is purely formal, and the Court should review a 12(c) motion under the standards that govern 12(b)(6) motions. Westcott, 901 F.2d at 1488 (citing St. Paul Ramsey County Med. Ctr. V. Pennington County, 857 F.2d 1185, 1187 (8th Cir. 1988)).

A motion to dismiss for failure to state a claim will be granted if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Hishon v. King & Spaulding, 467 U.S. 69, 73 (1984);

Hughes v. Rowe, 449 U.S. 5, 10 (1980). Thus, the purpose of Rule 12(b)(6) is to test the formal sufficiency of the allegations contained in the plaintiff's complaint.

In evaluating the sufficiency of a complaint under Rule 12(b)(6), the court must take the well-pleaded allegations of the complaint as true, and construe the complaint, and all reasonable inferences arising therefrom, most favorably to the pleader. Westcott, 901 F.2d at 1488; Morton v. Becker, 793 F.2d 185, 187 (8th Cir. 1986). Nevertheless, where a plaintiff fails to allege a necessary element of the plaintiff's claim for relief, or where a complaint contains mere conclusory allegations of law, the Court should properly dismiss the complaint under Rule 12(b)(6). See Westcott, 793 F.2d at 1488 (citing Morgan v. Church's Fried Chicken, 829 F.2d 10, 12 (6th Cir. 1987)).

In this adversary proceeding, Plaintiff appears to be requesting relief from this Court under five sections of the Bankruptcy Code: 11 U.S.C. §§ 305(a), 523(a)(2)(A), 523(a)(6), 523(a)(15), and 727. From the face of the Complaint, however, it is clear that Plaintiff has completely failed to allege many of the elements necessary to state a claim for relief under each of these Bankruptcy Code provisions. Instead, Plaintiff alleges mere conclusory allegations of law. No facts are set forth in the Complaint that would afford a basis for relief. Moreover, Plaintiff has, as a matter of law, admitted that his Complaint fails to state any claim upon which relief can be granted. The following discussion will address each claim in turn as they appear in the Complaint.

A. Plaintiff's Section 523(a)(2)(A) Claim.

Plaintiff alleges in paragraph 11 of his Complaint that certain debt owed to Plaintiff by Kathleen Cole (apparently the Third Mortgage and ambiguous "other debt," both of which Plaintiff previously alleges were jointly incurred, and therefore, cannot be

a debt owed to Plaintiff) should be excepted from discharge pursuant to 11 U.S.C. § 523(a)(2)(A). Section 523(a)(2)(A) states that any debt for "money, property, services, or an extension, renewal, or refinancing of credit" shall be excepted from a discharge under Section 727 of the Bankruptcy Code to the extent such debt was obtained by "false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition." See 11 U.S.C. § 523(a)(2)(A).

In this Circuit, a creditor alleging debt *obtained* by Section 523(a)(2)(A) conduct must prove the following elements: (1) the debtor made false representations; (2) at the time made, the debtor knew them to be false; (3) the representations were made with the intention and purpose of deceiving; (4) the creditor justifiably relied on the representations; and (5) the creditor sustained the alleged injury as a proximate result of the representations having been made. Cambridge Tempositions, Inc. v. Cassis (In re Cassis), 220 B.R. 979, 984-985 (Bankr. N.D. Iowa 1998) (citing In re Van Horne, 823 F.2d 1285, 1287 (8th Cir. 1987), as modified by Field v. Mans, 516 U.S. 59, 74-75 (1995)). Pursuant to Rule 9(b) of the Federal Rules of Civil Procedure, as incorporated by Rule 7009 of the Federal Rules of Bankruptcy Procedure, a Plaintiff alleging fraud under Section 523(a)(2)(A) must plead such a claim with specificity and particularity. See Fed. R. Civ. P. 9(b); see also In re Burrow, 131 B.R. 113, 114 (Bankr. E.D. Ark. 1991) (finding that plaintiff's complaint which merely stated that the debt at issue was obtained "by actual fraud" failed to satisfy Rule 9(b) when attempting to delineate a Section 523(a)(2)(A) claim and should therefore be dismissed).

In this case, Plaintiff merely alleges in his Complaint that Kathleen Cole "assured Plaintiff that she would repay this debt" and "represented that she would repay the debt

out of her future earnings." Complaint, ¶¶ 4 and 5. Even if these allegations are taken as true, such allegations clearly fail to set forth any of the Section 523(a)(2)(A) elements cited above, and as a result, Plaintiff's Complaint not only fails to plead with the specificity required by Rule 9(b), he fails altogether to state any claim upon which relief can be granted. Plaintiff does not allege that at the time Kathleen Cole made any of these statements she knew them to be false or that she made them with the purpose and intention of deceiving him. Further, Plaintiff fails to allege that he relied in any way on these statements concerning the debt or that any injury sustained by him was the proximate result of these statements. Even more fundamentally, Plaintiff does not even allege that any credit was "obtained" due to a fraud at the inception of any transaction. These are the necessary elements of Section 523(a)(2)(A) which Plaintiff must be alleged in order for his Complaint to withstand a 12(b)(6) motion. Instead, Plaintiff merely makes the conclusory allegation of law that this debt "is excepted from discharge pursuant to 11 U.S.C. § 523(a)(2)(A)." See Complaint, ¶ 11.

B. Plaintiff's Section 523(a)(6) Claim.

Plaintiff alleges in paragraph 12 of his Complaint that "Defendant's debt to Plaintiff" (again, apparently the Third Mortgage and ambiguous "other debt," both of which Plaintiff previously alleges were jointly incurred, and therefore, cannot be a debt owed to Plaintiff) should be "excepted from discharge pursuant to 11 U.S.C. § 523(a)(6)." In a failed attempt to render this more than a mere conclusory allegation of law, Plaintiff further alleges that "[b]y her false representations to Plaintiff regarding her intentions to remain married to Plaintiff and to repay joint debts, Defendant willfully and maliciously converted property belonging to Plaintiff." Complaint, ¶ 10. Section

523(a)(6) states that a debt "for willful and malicious injury by the debtor to another entity or to the property of another entity" shall not be excepted from discharge under Section 727. 11 U.S.C. § 523(a)(6). "The word 'willful' in (a)(6) modifies the word 'injury,' indicating that nondischargeability takes a deliberate or intentional *injury*, not merely a deliberate or intentional *act* that leads to injury." Kawaauhau v. Geiger, 523 U.S. 57, 61 (1998) (emphasis in original).

Even if the facts alleged by Plaintiff in paragraph 10 of his Complaint are taken as true, Plaintiff has still failed to state a claim under Section 523(a)(6). Plaintiff has only alleged that Kathleen Cole "willfully and maliciously" injured him "[b]y her false representations to Plaintiff regarding her intentions to remain married to Plaintiff and to repay joint debts." Complaint, ¶ 10. Plaintiff has failed to allege any facts demonstrating the necessary element of 523(a)(6) that Kathleen Cole acted intentionally and deliberately *to injure* Plaintiff. As alleged in the Complaint, Kathleen Cole's conduct does not amount to "willful and malicious conduct." Instead, Plaintiffs allegations with respect to this claim are merely conclusory allegations of law.

C. Plaintiff's Section 523(a)(15) Claim.

Plaintiff alleges without more in paragraph 13 of his Complaint that "Defendant's debt to Plaintiff" (still again, apparently the Third Mortgage and ambiguous "other debt," both of which, as is mentioned above, Plaintiff previously alleges were jointly incurred, and therefore, cannot be a debt owed to Plaintiff) should be "excepted from discharge pursuant to 11 U.S.C. § 523(a)(15)." Section 523(a)(15) states that debt, other than for alimony or child support, "that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of

a court of record, a determination made in accordance with State or territorial law by a governmental unit." 11 U.S.C. § 523(a)(15).

Nowhere in Plaintiff's Complaint does he allege that the debt at issue (Third Mortgage and "other debt") was incurred in the manner contemplated by Section 523(a)(15). Indeed, Plaintiff's allegations clearly demonstrate that this debt was incurred jointly by Plaintiff and Kathleen Cole *prior* to the couple's dissolution action. See Complaint, ¶¶ 4,5, and 7. If Plaintiff had alleged, by way of example, that, in the course of the dissolution action, the presiding judge entered a decree or a separation agreement was executed whereby the burden of this jointly incurred debt was shifted to him alone, then perhaps a claim under Section 523(a)(15) would have been set forth because the debt would have arisen in a manner delineated by this section. However, Plaintiff makes no (and can factually make no) such allegations. As a result, Plaintiff has failed in his Complaint to allege any of the necessary elements of a claim under Section 523(a)(15). Because he makes merely conclusory allegations of law, Plaintiff's claim under this section cannot withstand this Motion.

D. Plaintiff's Section 727 Claim.

In his prayer for relief, Plaintiff requests that this Court enter an order "that Defendant not be granted discharge under 11 U.S.C. 727." In examining the Complaint, the only other allegation which could potentially be read to support this otherwise conclusory allegation of law is found in paragraph 9: "Defendant falsely represented her financial situation in her bankruptcy schedules in that she failed to schedule any debt owed to Plaintiff." Complaint, ¶ 9. Plaintiff appears, with this allegation, to be attempting to invoke a claim under Section 727(a)(4) which states in pertinent part:

> The court shall grant the debtor a discharge, unless…the debtor knowingly and fraudulently…made a false oath or account…or [] withheld from an officer of the estate entitled to possession under this title, any recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs.

11 U.S.C. § 727(a)(4)(A) and (D). Even if this is the unspecified claim Plaintiff is attempting to set forth, it fails for the following simple reason.

Plaintiff fails to allege any debt owed by Kathleen Cole to Plaintiff in his Complaint. As is discussed parenthetically above, the only debt alleged by Plaintiff in his Complaint is the Third Mortgage and certain "other debt" both of which Plaintiff states were jointly incurred by Kathleen Cole and him. See Complaint, ¶¶ 4 and 5. No other debt is set forth. The Third Mortgage and "other debt," as alleged, are owed to Home Finance and other creditors, not to Plaintiff. As a result, even if each of Plaintiff's allegations were taken as true, it would be factually impossible for Kathleen Cole to have violated Section 727(a)(4) with respect to this allegation. As a result, this claim must also be dismissed for failure to state a claim upon which relief might be granted.

E. Plaintiff's Section 305(a) Claim.

Also in his prayer for relief, Plaintiff requests that this Court enter an order that "Defendant's bankruptcy case be dismissed or proceedings suspended under 11 U.S.C. 305(a)." Section 305(a) of the Bankruptcy Code provides that the Court, after notice and a hearing, "may dismiss a case…or suspend all proceedings…if—(1) the interests of creditors and the debtor would be better served by such dismissal; or (2)(A) there is pending a foreign proceeding; and (B) the factors specified in section 304(c) of this title warrant such dismissal or suspension." 11 U.S.C. § 305(a).

In examining the Complaint it is clear that Plaintiff simply fails to allege any of the necessary elements contemplated by and set forth in Section 305(a). He merely throws in this final conclusory allegation of law at the end of his Complaint with no factual allegations supporting the failed claim. As a result, this claim cannot withstand this Motion.

F. Plaintiff has admitted that his Complaint fails to state a claim upon which relief can be granted.

Under Rule 36 of the Federal Rules of Civil Procedure, as incorporated by Rule 7036 of the Federal Rules of Bankruptcy Procedure, a party is *deemed to have "admitted"* a matter unless such party fails to answer or object to a request for such admission within 30 days after service of such request. Fed. R. Civ. P. 36(a).

As stated in the Motion and evidenced by its supporting documents, Kathleen Cole, by and through her counsel, served Plaintiff with her Requests for Admission (Set One) on August 12, 2004. To date (more than 50 days after service of these Requests for Admission), Plaintiff has failed to serve Kathleen Cole with any answer or objection to these requests.

In her Requests for Admission, Kathleen Cole, by and through her counsel, requested that Plaintiff admit "that [his] Complaint fails to state a claim for which relief can be granted pursuant to the Bankruptcy Code" and "that Plaintiff failed to plead with the specificity and particularity required and contemplated by Rule 7009(b) of the Federal Rules of Bankruptcy Procedure." Defendant's Requests for Admissions (Set One), ¶¶ 13, 14. These requests were made in conjunction with a number of other requests which, in short, requested that Plaintiff admit that many of the key factual contentions set forth in his Complaint are false. See id. at ¶¶ 2, 5, 6 and 8.

By operation of Rule 36, Plaintiff's failure to timely respond to Kathleen Cole's Requests for Admission renders each of those requests deemed admitted by him. As a result, Plaintiff has admitted that his Complaint fails to state a claim upon which relief can be granted, and this Court should summarily dispose of this proceeding as a result.

II. THIS ADVERSARY PROCEEDING SHOULD BE DISMISSED WITH PREJUDICE FOR PLAINTIFF'S FAILURE TO PROSECUTE HIS COMPLAINT.

Under Rule 41 of the Federal Rules of Civil Procedure, as incorporated by Rule 7041 of the Federal Rules of Bankruptcy Procedure, a defendant may move for dismissal of an action "[f]or failure of the plaintiff to prosecute or to comply with these rules," and unless otherwise specified, a successful motion operates as an adjudication on the merits. Fed. R. Civ. P. 41(b).

This sanction should be used in cases of willful disobedience of a court order or "where a litigant exhibits a pattern of intentional delay." Hunt v. Minneapolis, 203 F.3d 524, 527 (8th Cir. 2000); see also Hutchins v. A.G. Edwards & Sons, Inc., 116 F.3d 1256, 1259-1260 (8th Cir. 1997). It is also appropriate in cases of "persistent failure to prosecute a complaint." Rodgers v. Curators of U. of Mo., 135 F.3d 1216, 1219 (8th Cir. 1998). The Court need not find that the plaintiff acted in bad faith in his failure to prosecute; rather, it must find simply that he acted intentionally as opposed to accidentally or involuntarily. Hunt, 203 F.3d at 527. Although a court in this Circuit is encouraged to warn litigants when they are "skating on the thin ice of dismissal," such admonitions are not mandatory before ordering a Rule 41(b) dismissal. Id. (quotations omitted).

Since its commencement, this adversary proceeding has been fraught with conduct of intentional delay on the part of Plaintiff and his counsel. As is demonstrated in the Motion and its supporting documents, Plaintiff has persistently failed to prosecute his Complaint. He has wholly failed (let alone timely failed) to respond to Kathleen Cole's Discovery Requests. He and his counsel are in receipt of myriad correspondences, formal and informal, from Kathleen Cole and her counsel, and both Plaintiff and his counsel have yet to respond to any. Plaintiff's utter failure to cooperate and communicate at every turn since his initiation of this case evidences an unambiguous intention to delay this proceeding and clearly amounts to a "persistent failure to prosecute [his] complaint." Such conduct warrants dismissal of this adversary proceeding with prejudice under Rule 41(b).

III. PLAINTIFF AND HIS COUNSEL SHOULD BE SANCTIONED AND DEFENDANT SHOULD BE AWARDED REASONABLE COSTS AND ATTORNEYS' FEES BECAUSE OF PLAINTIFF'S FRIVOLOUS, UNWARRANTED, AND FACTUALLY UNSUPPORTED COMPLAINT AND DISCOVERY PHASE CONDUCT.

A. Sanctions are appropriate under Rule 9011 of the Federal Rules of Bankruptcy Procedure and Section 105 of the Bankruptcy Code.

Under Rule 9011 of the Federal Rules of Bankruptcy Procedure, a court may impose sanctions "upon the <u>attorneys</u>, law firms, <u>or parties</u> that have violated subdivision (b) [of the Rule] or are responsible for the violation." Fed. R. Bankr. P. 9011(c)(emphasis added). Subdivision (b) states in part:

> By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, or other paper, an attorney…is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,—

> * * *
>
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
>
> (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

Fed. R. Bankr. P. 9011(b). Rule 9011 also permits the court to award the party prevailing on a motion for sanctions under the Rule reasonable expenses and attorneys' fees incurred in presenting or opposing the motion. Fed. R. Bankr. P. 9011(c); see In re Clark, 223 F.3d 859, 864 (8th Cir. 2000).

As stated in the Motion and evidenced by its supporting documents, Kathleen Cole, by and through her counsel, has acted in accordance with the procedural requirements set forth in Rule 9011, serving Plaintiff's counsel with notice of this Motion 21 days before so moving the Court. See Fed. R. Bankr. P. 9011(c)(1)(A).

The established standard for imposing sanctions under Rule 9011 is "an objective determination of whether a party's conduct was reasonable under the circumstances." In re Mahendra, 131 F.3d 750, 759 (8th Cir. 1997). Sanctions are appropriate where Plaintiff's action is not "well-grounded in fact" nor warranted by existing law, nor a good faith argument for its extension, modification, or reversal. See id. at 760; see also In re Coones Ranch, Inc., 7 F.3d 740 (8th Cir. 1993).

The allegations and other contentions in Plaintiff's Complaint lack any evidentiary support, and discovery of this fact involved minimal investigation on the part of Kathleen Cole, by and through her counsel. Plaintiff alleges that the proceeds of the Third Mortgage, which was jointly incurred, were used "in their entirety or substantially

in their entirety" to pay the gambling debts of Kathleen Cole. Complaint, ¶ 4. His entire Complaint rests on the evidentiary merit of this allegation. However, as the Revolving Loan Voucher received by Kathleen Cole, by and through her counsel, from Household Finance makes clear, the proceeds received under the Third Mortgage were not used in the manner alleged. Instead, this document demonstrates that the proceeds of the Third Mortgage were used to pay for living expenses and to pay off credit card debt and related expenses, including obligations owed to Zale's and Best Buy. An "inquiry reasonable under the circumstances" would clearly have revealed this fact, and it is objectively unreasonable to fail to conduct such an inquiry where the entire thrust of the Complaint is premised on such a factual contention. Moreover, it is incumbent upon counsel to amend or withdraw his pleadings upon receipt of facts that call in to question the factual foundation for the claims or allegations.

Instead, Plaintiff failed to conduct such an inquiry, commenced this lawsuit on grounds which are wholly unfounded and unsubstantiated, and chose to ignore the unambiguous evidence when it was brought to his attention. This is further evidenced by his poorly pleaded Complaint and failure to respond to the Discovery Requests and demands for dismissal and factual support. As is shown above, his Complaint fails to state any claim upon which relief might be granted. Indeed, as is discussed above, by operation of Rule 36 of the Federal Rules of Civil Procedure where Plaintiff has failed to timely respond to Kathleen Cole's Requests for Admission, Plaintiff has admitted that he has failed to state a claim upon which relief can be granted and that many of the key factual contentions he sets forth in his Complaint are false.

In short, Plaintiff simply had no basis in fact or in law to proceed with an adversary proceeding predicated on Sections 305, 523, of 727 of the Bankruptcy Code. This conduct evinces a clear violation of the letter and spirit of Rule 9011. In defense of this matter, Kathleen Cole and her counsel have devoted significant resources to date. As a result, this Court should sanction Plaintiff and his counsel for these violations, and grant whatever other relief the Court sees fit as a result.

It should be noted that, by virtue of the bankruptcy court's broad power enunciated in Section 105 of the Bankruptcy Code, this Court has the inherent authority to impose civil sanctions for abuses of the bankruptcy process. See In re Clark, 223 F.3d at 864. As a result, even if this Court fails to see a clear violation of Rule 9011, it may nevertheless impose sanctions where it finds that the conduct of Plaintiff and his counsel so warrants 11 U.S.C. §§ 105. In this case, such relief would be clearly appropriate.

B. Sanctions are also appropriate under Rule 37 of the Federal Rules of Civil Procedure.

Under Rule 37 of the Federal Rules of Civil Procedure, as incorporated by Rule 7037 of the Federal Rules of Bankruptcy Procedure, a party may move the Court to sanction an opposing party and award costs and attorneys' fees to the moving party as a result of the opposing party's failure to comply with certain rules of discovery. See Fed. R. Civ. P. 37. Specifically, subdivision (c) of the Rule states in relevant part:

> If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or of the truth of the matter, the requesting party may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including attorneys' fees. The court shall make the order unless it finds that (A) the request was held objectionable pursuant to Rule 36(a), or

> (B) the admission sought was of no substantial importance, or (C) the party failing to admit had reasonable ground to believe that the party might prevail on the matter, or (D) there was other good reason for the failure to admit.

Fed. R. Civ. P. 37(c)(2). Subdivision (d) of Rule 37 authorizes the Court, on a motion, to require an opposing party, or his counsel, who has failed to serve answers or objections to interrogatories pursuant to Rule 33 of the Federal Rules of Civil Procedure to pay the reasonable expenses, including attorneys' fees, caused by the failure to comply. Fed. R. Civ. P. 37(d).

"Rule 37 sanctions are to be applied diligently." Booker v. Stauffer Seeds, Inc. (In re Stauffer Seeds, Inc.), 817 F.2d 47, 49 (8th Cir. 1987) (citing Roadway Express v. Piper, 447 U.S. 752, 763-764 (1980)). If the Court finds a clear discovery abuse, it should follow through with sanctions so as to not allow "misconduct to escape undeterred." See id. (finding appropriate an award of attorneys fees incurred to obtain proper responses to discovery requests and in proving matters that should have been admitted).

Because Rule 37 offers the Court a great deal of discretion and flexibility in the award of sanctions, the imposition of costs and fees is generally considered to be a "lesser" sanction. In re Haney, 234 B.R. 743, 745 (Bankr. E.D. Ark. 1999) (citing Nat'l Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 643 (1976)). The fees and costs allowed under Rule 37, when "interpreted consistent with its purposes," include "an award encompassing all expenses, whenever incurred, that would not have been sustained had the opponent conducted itself properly." Stauffer Seeds, Inc., 817 F.2d at 50 (quotations omitted); see generally Marquis v. Chrysler Corp., 577 F.2d 624 (9th Cir. 1974) ($2,000 for failure to produce documents was a "light sanction."); Toner v. Wilson,

102 F.R.D. 275 (M.D.Pa. 1984) (5 hours legal work in preparing Rule 37 motion reasonable).

As the Motion and its supporting documents show, Kathleen Cole, by and through her counsel, served Plaintiff with Defendant's Interrogatories (Set One) on August 2, 2004 and Defendant's Request for Admissions and Production of Documents (Set One) on August 12, 2004. Pursuant to Rules 33 and 36 of the Federal Rules of Civil Procedure, Plaintiff was under a duty to serve upon Kathleen Cole the appropriate responses to the Discovery Requests within 30 days from the date of service. See Fed. R. Civ. P. 33(b)(2) and 36(a). The 30 days for each Discovery Request have passed, and Plaintiff has yet to serve Kathleen Cole with any responses despite the best efforts of her and her counsel to communicate with Plaintiff and his counsel in hopes of facilitating the discovery process. Because of this blatant abuse of the discovery rules, this Court should sanction Plaintiff and his counsel awarding Kathleen Cole attorneys' fees and costs as it sees fit. Both counsel for Kathleen Cole and Kathleen Cole herself have acted diligently and in good faith in this matter.

Counsel for the undersigned will supplement the Motion with an affidavit setting forth the time and costs expended in connection with this matter prior to or in advance of the hearing on the Motion.

CONCLUSION

The allegations contained in Plaintiff's Complaint are insufficient as a matter of law to sustain any of the claims he makes under the Bankruptcy Code. As a factual matter, each of his claims hinge on the existence of certain debt owed to Plaintiff, debt which Plaintiff never alleges. Instead, Plaintiff's only factual contention as to debt in his

Complaint is the Third Mortgage and "other debt" all of which was jointly incurred by Kathleen Cole and him, and all of which is owed to Home Finance and other creditors, not to Plaintiff. As a matter of law, Plaintiff failed in his Complaint to set forth many of the necessary elements of each of his Bankruptcy Code claims. Instead, he makes merely conclusory allegations of law. Such pleading cannot withstand this Motion for judgment on the pleadings and request that this Complaint be dismissed for failure to state a claim upon which relief might be granted. Moreover, Plaintiff is deemed to have admitted that his Complaint fails to state a claim upon which relief might be granted, and as result, this Court has further reason to summarily dispose of this adversary proceeding.

Plaintiff's utter failure to prosecute his Complaint gives this Court further reason to dismiss this action with prejudice. Plaintiff's conduct since the commencement of this case has evidenced a clear intention to delay this proceeding and a persistent failure to prosecute his claims. Such conduct further warrants dismissal of this adversary proceeding.

A reasonable inquiry into the underlying facts of this case, facts on which Plaintiff's entire Complaint rests, would have revealed that Plaintiff's allegations and factual contentions lack any evidentiary support. Plaintiff and his counsel failed to conduct such an inquiry, and instead, commenced this lawsuit grounded on unsubstantiated facts. As a result, Plaintiff put forth legal arguments lacking any merit, and he is clearly not making any good faith effort to change the law. Certainly, Plaintiff and his legal counsel had an obligation to amend or dismiss their pleadings upon receipt of the evidentiary support that our office provided. One can only infer from the conduct in this case that this matter has been brought and maintained for purposes of harassment

and to derive some advantage in the family law proceeding. Plaintiff also displayed sanctionable conduct during the discovery phase of this proceeding when he failed to serve any response on Kathleen Cole after being served with her Discovery Requests. In light of the foregoing, Kathleen Cole respectfully requests that this Court sanction Plaintiff and his counsel for this conduct and award Kathleen Cole attorneys' fees and costs where it sees fit.

Dated: October 1, 2004.

LINDQUIST & VENNUM, P.L.L.P.

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ATTORNEYS FOR KATHLEEN COLE

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

Kathleen Joanne Cole, BKY Case No. 03-38456

Debtor.

Michael Edward Cole, Jr.

Plaintiff,

ADV No. 04-3088

vs.

Kathleen Joanne Cole,

Defendant.

UNSWORN CERTIFICATE OF SERVICE

I, Marie Dagostino, declare under penalty of perjury that on October 1, 2004, I faxed and mailed a copy of the foregoing Notice of Hearing and Motion for an Order (1) Granting Judgment on the Pleadings in Favor of the Defendant; (2) Dismissing this Proceeding with Prejudice; and (3) Imposing Sanctions on Plaintiff and his Counsel; Memorandum of Law in Support of Defendant's Motion for an Order (1) Granting Judgment on the Pleadings in Favor of the Defendant; (2) Dismissing this Proceeding with Prejudice; and (3) Imposing Sanctions on Plaintiff and his Counsel; and Order by first class mail, postage prepaid to each entity named below at the address stated below for each entity.

James C. Whelpley, Esq.
Twin City Attorneys P.A.
2151 N Hamline Avenue, Suite 202
Roseville, MN 55113
Fax: 651-639-0056

Mr. Michael Cole
8912 Inman Avenue South
Cottage Grove, MN 55016
(VIA U.S. MAIL ONLY)

Dated: October 1, 2004

By: /e/Marie Dagostino
Marie Dagostino

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

Kathleen Joanne Cole, BKY Case No. 03-38456

Debtor.

Michael Edward Cole, Jr.

Plaintiff,

ADV No. 04-3088

vs.

Kathleen Joanne Cole,

Defendant.

ORDER

The Motion of Kathleen Joanne Cole seeking judgment on the pleadings in her favor and a dismissal of this adversary proceeding with prejudice along with the imposition of sanctions against Plaintiff Michael Edward Cole, Jr. and his counsel, James C. Whelpey, came on for hearing before the Court. Appearances, if any, were noted in the Court's record. Based upon the files, records and proceedings herein, due notice given and upon the arguments of counsel,

IT IS HEREBY ORDERED:

1. That the Motion of Kathleen Joanne Cole seeking judgment on the pleadings in her favor and a dismissal of this adversary proceeding with prejudice is, in all respects, GRANTED;

2. The above-entitled adversary proceeding is in all things dismissed with prejudice; and

3. That sanctions shall be imposed upon Michael Edward Cole, Jr. and his counsel, James C. Whelpey, in a dollar amount equal to the costs, reasonable attorneys' fees and disbursements of Kathleen Cole and her counsel as set forth in the affidavit of George H. Singer.

Dated: November ___, 2004

_____
Gregory Kishel, Chief U.S. Bankruptcy Judge