Dated: December 27, 2006
The following is ORDERED:

Jennie D Latta

Jennie D. Latta
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re STEPHEN HENRY WINTERS,

Debtor.

Case. No. 03-40517-L
Chapter 7

STEPHEN HENRY WINTERS,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

Adv. Proc. No. 04-00692

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT IN PART AND DENYING MOTION IN PART

BEFORE THE COURT is the motion of the defendant, United States of America, for summary judgment. The motion was filed on June 23, 2006. The plaintiff, Stephen Henry Winters ("Winters") was given notice of the filing of the motion and directed to file a response on or before

July 28, 2006. Winters filed a motion for extension of time to respond on July 11, 2006, based upon his health. The motion was granted by order entered July 24, 2006. Winters was given a sixty-day extension, and directed to respond on or before September 26, 2006. No response has been filed on behalf of Winters and the motion for summary judgment is now ripe for consideration.

FACTS

In support of its motion for summary judgment, the United States relies upon the final Order entered September 16, 2002, in the Middle District of Tennessee in the case of United States *ex rel.* A+ Homecare, Inc. v. Medshares, Mgmt. Group, Inc., No. 3:97-1059, and the Memorandum filed contemporaneously therewith. The United States obtained a civil judgment against Winters in the United States District Court for the Middle District of Tennessee in excess of $1.8 million. *United States ex rel A+ Homecare, Inc., v. Winters,* No. 3:97-1059 (M.D. Tenn/ 2001), *aff'd., United States ex rel. A+ Homecare, Inc. v. Medshares Mgmt. Group, Inc.* 400 F.3d 428 (6th Cir. 2005), *cert. denied, Winters v. U.S. ex rel. A+ Homecare, Inc.,* ___ U.S. ___, 126 S.Ct. 797, 163 L.Ed.2d 630 (Dec. 2005). The judgment was based upon violations by Winters of the False Claims Act ("FCA"), 31 U.S.C. §§ 3729-33.[1] After trial, a jury determined that Winters was liable for two FCA violations in connection with healthcare claims. The Memorandum contains a summary of the findings of the jury and the district court's review of those findings to determine the sufficiency of the evidence.

---

[1] Section 3729 of the FCA imposes liability on any person or entity who:

> (1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval; [or]
> ((2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government. 31 U.S.C. § 3729(a)(1)-(2).

The district court draws the following conclusions:

> Upon a review of the record, the Court concludes that Winters' second motion for new trial should likewise be denied. First, the Plaintiffs presented sufficient proof from which a reasonable jury could conclude that Winters had not signed the THHS board minutes on June 4, 1993, which would have reflected the adoption of the MMG pension plan as is required to file a pension claim under Medicare rules.
>
> Second, the Court finds that a jury could reasonably have concluded that Winters submitted a knowingly false statement in THHS's fourth quarter IRR and cost report for the 1993 fiscal year. . . . The evidence in the record is sufficient to support a reasonable inference from the jury to find that Winters filed knowingly false statements relating to THHS's pension contribution in the fourth quarter IRR and cost report for the 1993 fiscal year. Although Plaintiffs may have failed to present any direct evidence of Winters' intent to defraud, knowledge and intent may be inferred from circumstantial evidence. . . . Thus a jury could have reasonably inferred that *Winters acted in deliberate ignorance or in reckless disregard of the truth or falsity* of the information he possessed related to the actual number of THHS employees submitted in the pension accrual cost reports.
>
> Third, the Court also concludes that there was sufficient evidence for a reasonable jury to conclude, under the "implied certification" theory, that Winters submitted a false claim. . . . Because *Winters acted in deliberate ignorance, or in reckless disregard*, in failing to ascertain the actual number of THHS employees submitted in the pension accrual cost reports that formed the basis for THHS's claim for reimbursement, the Court concludes that a jury could reasonably infer that Winters violated his "continuing duty to comply with the regulations on which payment is conditioned." (Citation omitted).
>
> As to causation, the Court also concludes that the evidence supports a verdict of liability against Winters. . . . [T]he Court concludes that a jury could have reasonably concluded that Winters caused damage to the United States by making a false claim to the government. . . .
>
> In sum, based on the evidence at trial, the Court concludes that a reasonable jury could have inferred an improper motive on Winters' part because a jury could have reasonably concluded that Winters submitted false claims for Medicare reimbursement *with deliberate ignorance, or reckless disregard of the truth*.

Motion for Summary Judgment, Ex. 2 (emphasis added).

Following the trial, Winters and the United States filed a post-trial motions. As a result, although the jury had awarded the United States $1,061,138.80 in damages, the district court remitted the jury's award to $602,565.43. This represents the actual damages found to have been sustained by the United States. The district court trebled this amount, as provided in the FCA. In addition, the district court imposed a civil penalty of $5,000.00 per false claim for a total award of $10,000. The district court also awarded the United States attorney's fees, expenses, and costs associated with the litigation.

Winters filed a voluntary petition under Chapter 11 of the Bankruptcy Code on December 1, 2003. His case was subsequently voluntarily converted to Chapter 7 on June 22, 2004. The Debtor filed his complaint against the United States on September 7, 2004, seeking a declaration that his debt to the United States is dischargeable. The United States filed its timely answer asserting that the court should deny the relief requested by Winters and instead declare that the debt owed to the United States is nondischargeable under 11 U.S.C. § 523 and/or § 727[2]. The United States had not previously filed a complaint to determine the dischargeability of this debt.

STANDARD FOR GRANTING SUMMARY JUDGEMENT

In order to grant a motion for summary judgment, the court must first be satisfied that no reasonable trier of fact could find for the non-movant. *Matsushita Elec. Indus. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986). When judgment is appropriate as a matter of law, whether or not a motion for summary judgment is opposed, this requirement is met. Fed. R. Bankr. Proc. 7056(c). On a motion for summary judgment, the movant has the initial burden of showing the absence of a genuine issue of material fact and that it is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 2554,

---

[2] The United States advanced no argument that the Debtor's discharge should be denied pursuant to section 727, so the court has not addressed this section.

91 L. Ed. 2d 265 (1986) ("the burden on the moving party may be discharged by 'showing' . . . that there is an absence of evidence to support the non-moving party's case.") If that initial burden is not met, the opposing party is under no obligation to offer evidence in support of its opposition. *See Investors Credit Corp. v. Batie (In re Batie)*, 995 F. 2d 85, 90 (6th Cir. 1993); *In re Rogstad*, 126 F.3d 1224, 1227 (9th Cir. 1997); *Hibernia Nat. Bank v. Admin. Cent. Sociedad*, 776 F.2d 1277, 1279 (5th Cir. 1985). Indeed, the court may sua sponte grant summary judgment for the non-movant, "so long as the losing party [movant] was on notice that she had to come forward with all her evidence." *Celotex Corp. v. Catrett*, 477 U.S. at 326, 106 S.Ct. at 91. *See also, Grand Rapids Plastics, Inc. v. Lakian,* 188 F.3d 401, 407 (6th Cir. 199), *cert. den*. 529 U.S. 1037, 120 S.Ct. 1531 (2000) (District court did not err in granting sua sponte summary judgment motion in favor of defendant on grounds that action was barred by applicable statute of limitations when plaintiff was put on notice by other parties' motions for summary judgment that, "it had to come forward with evidence showing that the statute of limitations did not bar its . . . claims."). All legitimate factual inferences must be made in favor of the non-movant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 2513, 91 L. Ed. 2d 202 (1986). Bankruptcy Rule 7056 (c) mandates the entry of summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp.*, 477 U.S. at 322.

ISSUES PRESENTED

Two issues are presented for determination: (1) Is failure to timely file a 523(c) complaint by the United States a waivable defect? (2) Are the damages awarded to United States a fine or penalty payable to the United States for purposes of 523(a)(7)?

ANALYSIS

The United States asserts that the debt owed to it by Winters is nondischargeable, either by virtue of section 523(a)(2)(A) of the Bankruptcy Code or section 523(a)(7). Section 523(a)(2)(A) excepts from discharge claims based upon "false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition." Section 523(a)(7) excepts debts for "a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit [which] is not compensation for actual pecuniary loss" other than certain tax penalties.

A. The debt of Winters is dischargeable pursuant to section 523(a)(2)(A) because no timely complaint was filed.

In order for claims based upon the fraud of the debtor to be found to be nondishargeable in bankruptcy, a complaint must be timely filed. The Bankruptcy Code provides:

> Except as provided in subsection (a)(3)(B) of this section, the debtor shall be discharged from a debt of the kind specified in paragraph (2), (4) or (6) of subsection (a) of this section unless, on request of a creditor to who such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge . . . .

11 U.S.C. § 523(c)(1). Subsection (a)(3)(B) relates to claims which were neither listed nor scheduled by the debtor under section 521(1) of the Bankruptcy Code. The United States does not claim that the debt to it was neither listed nor scheduled. Federal Rule of Bankruptcy Procedure 4007(c) requires that a complaint to determine the dischargeability of a debt pursuant to section 523(c) be filed no later than 60 days after the first date set for the meeting of creditors. As stated, the United States has never filed a complaint to determine the dischargeability of Winters' debt to it, but has merely requested that the court declare the debt to be nondischargeable in its answer to Winters' complaint. The first date set for the meeting of creditors in this case was January 9, 2004. The last day to oppose discharge or dischargeability was March 9, 2004. The answer of the United

States was filed October 8, 2004. The only order entered extending the deadline to file complaints to determine the dischargeability of a debt was obtained for the benefit of Darcy Haines LaFountain and specifically extends the deadline only as it applied to Ms. LaFountain. The deadline for Ms. LaFountain to file a complaint to determine the dischargeability of a debt was extended to June 30, 2004. The deadline for the United States to file a complaint remained March 9, 2004. The United States failed to request a determination by that time and has not requested an extension of time to do so. The court may not *sua sponte* enlarge the time for filing a complaint to determine the dischargeability of a debt. *See Nicholson v. Isaacman (In re Isaacman)*, 26 F.3d 629, 631-32 (6th Cir. 1994). Therefore, the United States' request that the debt be declared nondischargeable pursuant to section 523(a)(2)(A) is untimely and must be denied as a matter of law. This result is not altered by the fact that the Debtor raised the question of the discharge of the debt to the United States in his own complaint. The time for the creditor to seek that determination had passed, and the debt became dischargeable, even if it ever was nondischargeable for fraud, when that occurred.

While not necessary to its decision, the court notes that the findings of the district court are not sufficient as a matter of law to determine that the debt to the United States is nondischargeable pursuant to section 523(a)(2)(A). Exceptions to discharge are to be strictly construed in favor of the debtor. *Rembert v. ATT universal Card Services (In re Rembert)*, 141 F.3d 277, 281 (6th Cir. 1998). The record reflects a finding that the claims submitted to Medicare, while false, resulted from deliberate ignorance or reckless disregard of their truth or falsity on the part of the Debtor. It is not clear, without more, that this finding rises to the level of scienter required for purposes of rendering a debt nondischargeable pursuant to section 523(a)(2)(A). *See Ward*, 857 F.2d at 1083 ("Creditor must prove that debtor obtained money through a material misrepresentation that at the time the debtor knew was false or made with *gross* recklessness as to its truth." (emphasis added)). Further, there is no analysis of the reliance placed upon the statements by the United States. In order for a debt to be excepted from discharge under section 523(a)(2)(A) the creditor must demonstrate not mere reliance in fact, but *justifiable* reliance upon the false statements. *Field v. Mans*, 516 U.S. 59, 116 S.Ct. 437 (1995).

B. Except for the civil penalty, the debt of Winters is dischargeable pursuant to section 523(a)(7) because the underlying debt is dischargeable.

In the alternative, the United States argues that the debt to it is nondischargeable pursuant to section 523(a)(7), as a fine, penalty or forfeiture payable to or for the benefit of a governmental unit. The question whether damages awarded under the FCA are nondischargeable in bankruptcy has not been decided by the United States Supreme Court or the United States Court of Appeals for the Sixth Circuit. There appear to be five components to the award made in Winters' case. First, judgment was entered in the amount of $602,565.43, for the actual pecuniary loss sustained by the government. Second, that amount was trebled pursuant to 31 U.S.C. § 3729(a). Third, a civil penalty in the amount of $10,000 was imposed pursuant to 31 U.S.C. § 3729(a). Fourth, the United States was awarded reasonable attorney fees in the amount of $202,105.35, and expenses in the amount of $5,535.67. Fifth, the United States was awarded costs in an unspecified amount.

The United States has cited a number of authorities that it asserts support the proposition that the court should refuse to allow the Debtor to discharge the FCA judgment. The first is *Vt. Agency of Natural Res. v. United States ex rel Stevens*, 529 U.S. 765, 120 S.Ct. 1858 (2000). That case was not a bankruptcy case, and thus the question of discharge was not addressed. The issue before the Court was whether a private individual may bring suit in federal court on behalf of the United States against a State (or state agency) under the FCA. The Court held that a State is not a "person"subject to *qui tam* liability under 31 U.S.C. § 3729(a). In the course of its opinion, the Court noted that "the current version of the FCA imposes damages that are essentially punitive in nature, which would be inconsistent with state *qui tam* liability in light of the presumption against the imposition of punitive damages on governmental entities." *Id.*, 529 U.S. at 784-85. The Court indicated that the imposition of treble damages under the current statute, as opposed to double damages under a prior version, indicate an intent to punish past wrongs and to deter future bad conduct. *Id.* This at most indicates that some portion of the amount awarded against Winters would be excepted from discharge as a penalty, but does not fully resolve the issues before this court.

The second case relied upon by the United States is *United States ex rel. Roby v. Boeing Co.*, 302 F.3d 637 (6th Cir. 2002). This case involved issues arising out of the loss of a helicopter remanufactured by Boeing that came before the court of appeals as a question certified for interlocutory appeal by the district court after all other issues had been resolved by settlement after trial. This case was not a bankruptcy case, and thus, did not involve the question whether Boeing's debt to the United States was dischargeable in bankruptcy.[3] Further, the question of whether and to what extent Boeing's conduct constituted fraud was not before the court of appeals. *Id*., 302 F.3d at 640. Rather, the question before the court was whether a High Value Items Clause inserted into the contract between Boeing and the United States based upon federal acquisition regulations precluded claims under the FCA, assuming that liability was otherwise established. *Id.* The majority of the panel concluded that the HVIC did not preclude the United States from suing Boeing under the FCA for loss of the helicopter. *Id*., 302 F.3d at 642. There was a strong dissent, however.

---

[3] Corporations are not eligible for discharge under section 727(a) in any event. *See* 11 U.S.C.§ 727(a)(1).

United States ex rel. Roby v. Boeing Co., 302 F.3d 637, 649-653 (6th Cir. 2002) (Boggs, J. dissenting). For present purposes, *Roby* adds little that is new to the analysis of what portion of an award under the FCA, if any, represents a fine, penalty or forfeiture. It notes that the "Supreme Curt understands the current version of FCA damages to be 'essentially punitive' in nature." *Roby*, 302 F.3d at 641, but also includes a discussion of the measure for the actual damages suffered by the government, which is referred to as the "baseline" for measuring the award under the FCA. *Id.*, 302 F.3d at 646 (citing *United States v. Boorstein*, 423 U.S. 303, 96 S.Ct 523, 46 L.Ed.2d 514 (1976)).

The third case relied upon by the United States, *In re Cassidy*, 213 B.R. 673 (Bankr. W.D. Ky. 1997), is indeed a bankruptcy case and does involve the question of dischargeability of a debt under the FCA. It is factually distinguishable from the present case in that the debtor in that case had previously entered a guilty plea to three criminal counts of submitting false claims and fraud, and further in that it was the bankruptcy court itself that entered judgment against the debtor under the FCA based upon the guilty plea. The bankruptcy court then determined that "the treble damages imposed by the Act are penal in nature, as opposed to being compensation for actual pecuniary loss." *Id.*, 213 B.R. at 679. Unfortunately, no analysis accompanies this conclusory statement. The case relied upon by the bankruptcy court that most closely resembles the present controversy was *In re Sokol*, 170 B.R. 556 (Bankr. S.D.N.Y. 1994), which stands for the proposition that even those criminal restitution judgments that are designed to compensate a government for false claims are nevertheless penal in nature for purposes of section 523(a)(7) because they are imposed as part of a criminal sentence. *Id.* at 559. This was based upon the Supreme Court's decision in *Kelly v. Robinson*, 479 U.S. 36, 107 S.Ct 353, 93 L.Ed.2d 216 (1986), to the effect that the Bankruptcy Code's discharge provisions are not intended to interfere with state criminal sentencing procedures.

Sokol, 170 B.R. at 559. This case, and others like it relied upon by the court in *Cassidy* highlights an important distinction between *Cassidy* and the case before this court. The FCA award against the Debtor did not, so far as the record reflects, result from a criminal judgment. As a result, *Sokol* is not helpful to the court's analysis in this case. The fourth case relied upon by the United States, *In re Aiello*, 1996 WL 585308 (Bankr. E.D. CA 1996), is factually similar to *Cassidy*, and thus adds nothing to the court's analysis.

The fifth case, *United States v. Custodio*, 1995 WL 670137 (D. Co. 1995), contains the same sort of conclusory statement as to the nondischargeabiliy of treble damages as *Cassidy*. It relies upon *Unites States v. RePass*, 688 F.2d 154 (2d Cir. 1982), however, which is instructive. *RePass* involved a suit by the United States to recover under the FCA moneys paid out by the Small Business Administration based on a falsely obtained loan guarantee. RePass defended himself on the basis of discharge in bankruptcy. The case was decided under the Bankruptcy Act of 1898, pursuant to which the "provability" of a claim was an issue to be decided before discharge. The district court held that the government's claim under the FCA stated a cause of action for intentional tort, a claim not provable (i.e., subject to discharge) in bankruptcy. *Id*., 688 F.2d at 156. The court of appeals modified the judgment, holding that the portion of the judgment that represented the actual pecuniary loss of the government was a provable claim because it originated upon a contract, even though the government's claim included an action for fraud. The balance of the claim, the doubled damages and the specific penalty of $2,000, was not provable, and thus was not dischargeable. Because the government failed to timely file an application to determine whether the debt for pecuniary loss was dischargeable, it was discharged. The judgment also included pre-judgment interest, which were not allowable as damages under the FCA. Thus, the judgment against

RePass was reduced by the amount of the judgment representing actual pecuniary loss and by that representing pre-judgment interest. As an interesting note, the claim for doubled damages and civil penalty was not an allowable claim against the bankruptcy estate under Bankruptcy Act § 57(j) (11 U.S.C. § 93(j) (1976)) because to allow claims for penalties to share in the distribution from the estate was thought to improperly penalize innocent creditors for a debtor's wrongdoing. *See id.*, 688 F.2d at 157-58.

Since the decision in *RePass,* both the bankruptcy laws and the FCA have been modified. Provability is no longer an issue under the Bankruptcy Code of 1978, as modified, most recently by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. Another way in which the bankruptcy laws have been changed is that claims for penalties may be allowed and may share in the distribution from a bankruptcy estate. The FCA has been modified to provide for treble rather than double damages. Nevertheless, it does not appear that the underlying analysis of *RePass* has been rendered inapplicable, that is, it seems clear that the court must consider each element of the award to the United States separately to determine its dischargeability.

Another decision that is instructive in regard to the analysis of this case is the Supreme Court's decision in *Cohen v. de la Cruz,* 523 U.S. 213, 118 S.Ct. 1212 (1998). In that case, the Court abrogated a number of prior decisions holding that punitive damages and attorney's fees and costs awarded in connection with a debt procured by fraud were dischargeable. The Court held instead that "[t]he most straightforward reading of § 523(a)(2)(A) is that it prevents discharge of 'any debt' respecting 'money, property, services, or . . .credit' that the debtor has fraudulently obtained, including treble damages assessed on account of the fraud." *Id.*, 523 U.S. at 218, 118 S.Ct. at 1216. There is no question that the civil penalty of $10,000 imposed upon the Debtor in this case is not dischargeable. It is clearly denominated a civil penalty; it is clearly payable to a governmental unit; and it clearly is not intended as compensation for pecuniary loss. It thus falls squarely within those debts excepted from discharge pursuant to section 523(a)(7). Likewise, there is no question that the amount awarded representing the pecuniary loss of the government, $602,565.43, *is* dischargeable because it is specifically excluded from the reach of section 523(a)(7) and because the United States failed to timely file a complaint to determine its dischargeability pursuant to sections 523(a)(2)(A) and 523(c), and Rule 4007(c).

The interesting question posed by this case is whether the amounts awarded to the United States for punitive damages, attorneys fees, expenses and costs therefore are also dischargeable. Had the United States timely filed its complaint and the underlying debt been determined to be a nondischargeable debt for fraud, these awards would have been nondischargeble as well pursuant to section 523(a)(2)(A) according to the Supreme Court's decision in *Cohen v. de la Cruz.* This case presents the converse of *Cohen*. That is, it asks the question whether awards of punitive damages, attorney's fees, expenses and costs are excepted from discharge when the underlying debt is not.

It is fairly clear that the awards for attorney's fees, expenses and costs are dischargeable because no other subsection of section 523 other than section 523(a)(2)(A) would render them nondischargeable. The more difficult question, perhaps, is that of the trebled damages. This is a difficult question only because of the argument made by the United States on the basis of the Court's decision in *Vermont Agency of Natural Resources*, which indicated that the purpose of the treble damage provision of the FCA is to punish rather than merely to compensate the governmental victim. While it is true that the treble damage provision of the FCA is intended to punish, this does not, however, transform an award of punitive damages into a civil penalty for purposes of section

523(a)(7). This is the result that the United States hopes to achieve by its argument, but it is an argument that cannot withstand close scrutiny. There is no indication that Congress intended to impose a second form of civil penalty when it increased the damages recoverable under the FCA from double damages to treble damages. The statute clearly provides for the award of a civil penalty "plus" treble damages *See* 31 U.S.C. § 3729(a). The treble damages is distinguished from, and is not, a civil penalty. As a result, the trebled damages are not excepted from discharge under section 523(a)(7). Further, because they depend upon an award for pecuniary loss that the court has already found to be dischargeable as the result of the United States' failure to timely file a complaint, they are likewise dischargeable under section 523(a)(2)(A).

CONCLUSION

For the foregoing reasons, the motion of the United States is GRANTED IN PART and DENIED IN PART. Summary judgment is granted as to the civil penalty of $10,000 imposed upon the Debtor. This debt is not dischargeable as a matter of law pursuant to 11 U.S.C. § 523(a)(7). Summary judgment is denied as to the balance of the award. This debts is dischargeable as the result of the failure of the United States to timely file a complaint to determine dischargeability.