IN THE CIRCUIT OF KANAWHA COUNTY, WEST VIRGINIA

A. KARIM KATRIB, M.D.,

Plaintiff,

v.

CIVIL ACTION NO. 21-C-409
Judge Tabit

HERBERT J. THOMAS MEMORIAL HOSPITAL ASSOCIATION, and THOMAS HEALTH SYSTEM, INC.,

Defendants.

ORDER GRANTING DEFENDANTS HERBERT J. THOMAS MEMORIAL HOSPITAL ASSOCIATION, AND THOMAS HEALTH SYSTEM, INC.'S MOTION TO DISMISS

I. Introduction

Pending is the Motion to Dismiss filed by Defendants, Herbert J. Thomas Memorial Hospital Association ("Thomas Hospital"), and Thomas Health System, Inc. (the "System," and together with Thomas Hospital, the "Defendants"), pursuant to Rules 12(b)(1) and 12(b)(6) of the West Virginia Rules of Civil Procedure. On September 13, 2021, the Court held a remote hearing[1] on the Motion to Dismiss and heard oral argument by counsel for the parties. The Court, having reviewed the motions and memoranda of law and considered counsel's argument, **FINDS** resolution of the motion under Rules 12(b)(1) and (b)(6) is appropriate and **GRANTS** the Defendants' Motion to Dismiss, making the following Findings of Fact and Conclusions of Law.

II. Procedural History

Plaintiff, A. Karim Katrib, M.D., filed the Complaint against Defendants on May 14, 2021. On June 4, 2021, Defendants filed a Notice of Bankruptcy and Discharge of Proceedings. The

[1] The Court held the hearing by video conference using Microsoft Teams.

notice set forth provisions from the United States Bankruptcy Court for the Southern District of West Virginia's *Findings of Fact, Conclusions of Law, and Order Granting Final Approval of the Debtors' Disclosure Statement and Confirming Debtors' Joint Chapter 11 Plan of Reorganization* [Dkt. No. 938] (the "Discharge Injunction") in Defendants' lead bankruptcy case, *In re Thomas Health System, Inc., et al.*, Case No. 2:20-bk-20007 ("Bankruptcy Case"). *See* Defs.' Motion to Dismiss, Exhibit A. The notice informed the Court and Plaintiff that Plaintiff's Complaint is a violation of the Discharge Injunction and subject to permanent injunction, and thus, this case cannot proceed or otherwise go forward with respect to the Defendants' assets or liabilities.

On June 10, 2021, Defendants filed the Motion to Dismiss, with an accompanying Memorandum of Law, arguing that the Plaintiff's Complaint be dismissed under Rules 12(b)(1) and (b)(6) of the West Virginia Rules of Civil Procedure because Plaintiff's claims are in violation of the Discharge Injunction. Defendants assert that Dr. Katrib is permanently enjoined from proceeding or otherwise going forward with respect to these claims against Defendants. Dr. Katrib served a response in opposition on August 19, 2021, and Defendants served a reply on September 2, 2021.

III. FINDINGS OF FACT

1. On January 10, 2020 ("Petition Date"), the System, and its subsidiaries, including Thomas Hospital, filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101-1532 ("Bankruptcy Code").

2. The Defendants' Chapter 11 cases were jointly administered in the Bankruptcy Court under the Bankruptcy Case.

3. On June 18, 2020, the Defendants filed the proposed disclosure statement and chapter 11 plan of reorganization with the Bankruptcy Court, which were both ultimately modified to address certain concerns and comments of various parties.

4. As a result, the Defendants later filed the *Disclosure Statement for Amended Joint Chapter 11 Plan of Reorganization* [Dkt. No. 863] and *Amended Joint Chapter 11 Plan of Reorganization* [Dkt. No. 861] (the "Plan") on August 3, 2020.

5. On August 19, 2020, the Bankruptcy Court entered the Discharge Injunction, whereby the Debtors' Plan was confirmed. The Plan became effective on September 30, 2020.

6. Both parties agreed during the remote hearing that Dr. Katrib, through two prior law firms, and Thomas Hospital's counsel had been in negotiations over the termination of Dr. Katrib's clinical privileges prior to and during the pendency of the Bankruptcy Case. The Complaint is silent as to this issue.

7. Dr. Katrib did not take any action to retain his Claims in the Defendants' Bankruptcy Case. Dr. Katrib did not file a proof of claim in the Defendants' Bankruptcy Case, request a modification of the Plan to exclude his Claims, or object to the confirmation of the Plan—all actions that he could have taken if he believed he had a cause of action because of the suspension of his clinical privileges.

8. More than seven months after Defendants' Plan became effective on September 30, 2020, Dr. Katrib filed a Complaint against Defendants in this Court for claims arising from alleged pre-petition injuries suffered by Plaintiff in 2018 and 2019.

9. Dr. Katrib's Complaint asserts that the following pre-petition actions by Defendants caused Plaintiff's damages:

a. In 2018, Thomas Hospital's Medical Executive Committee ("MEC") required Dr. Katrib to engage in a six-month "Focused Profession Practice Evaluation" with regard to the timeliness of Plaintiff's medical documentation. Compl. ¶ 9.

b. Dr. Katrib alleges that he complied with all of the MEC's requests and was informed by Defendants on December 17, 2018, that he was found to be in "sufficient compliance" with regard to the timeliness of his record documentation. Compl. ¶ 10.

c. On the same date that he was found to be in compliance with regard to his record documentation, Dr. Katrib alleges he was informed of Thomas Hospital's Peer Review Committee's concerns about "a standard of care issue" with regard to a patient he treated in September 2018. Compl. ¶ 11.

d. Dr. Katrib alleges he was asked to address his treatment of the patient in writing and he did so by letter dated January 21, 2019. Complaint ¶ 12.

e. Dr. Katrib alleges the Peer Review Committee sent the matter for external peer review without informing him that it had done so. Compl. ¶ 13.

f. By letter dated May 16, 2019, Dr. Katrib alleges the Defendants informed him that "[e]ffective immediately, a precautionary suspension of all [of the plaintiff's] clinical privileges at Thomas Memorial Hospital has been ordered. . . " and "the medical staff peer review and investigation process" would be completed "within 30 days of this notice." Compl. ¶ 14.

g. As a result of the suspension of his privileges, Dr. Katrib alleges that, at the age of 68 years old, he was unable to treat his patients at Thomas Hospital, which substantially limited his ability to provide medical services. Compl. ¶¶ 15–16.

h. Dr. Katrib alleges he heard nothing from the Defendants about his privileges between May 17, 2019, and June 15, 2019, the 30-day period referenced in the May 16, 2019 letter. Compl. ¶ 17.

i. By letter dated August 14, 2019, Dr. Katrib alleges his then counsel provided Defendants with the opinion of Dr. Jeremy Tiu, a physician board certified in Otolaryngology, regarding Dr. Katrib's treatment of the patient in question and opining the patient received "excellent care" and Dr. Katrib "saved [the patient's] life." Compl. ¶ 18.

j. By letter dated September 19, 2019, Defendants informed Dr. Katrib that "a recommendation for revocation of [his] medical staff membership and all clinical privileges" has been made by MEC to the Thomas Hospital Board of Trustees. Compl. ¶ 19.

k. By letter dated October 2, 2019, Dr. Katrib's prior counsel requested a hearing regarding the MEC's recommendation. Compl. ¶ 20.

l. To date, Dr. Katrib has not been given a hearing by Defendants to contest the MEC's recommendation, and Dr. Katrib asserts that the suspension of his clinical privileges and medical staff membership at Thomas Hospital has been continuous from May 16, 2019 to the date of the Complaint. Compl. ¶¶ 21–22.

10. Dr. Katrib asserts the following pre-petition claims in his Complaint (hereinafter, the "Claims"):

a. In Count I of the Complaint, Dr. Katrib sets forth five arguments as to why the Defendants violated the Medical Staff Bylaws by: (1) placing Dr. Katrib's privileges under an immediate "precautionary suspension" on May 16, 2019, even thought there was no imminent danger to the health and safety of any individual or the orderly operations of Thomas Hospital; (2) failing to complete investigation within 30 days of May 16, 2019 "precautionary suspension" notice; (3) not allowing Dr. Katrib to participate in the review process of the investigation; (4) not providing Dr. Katrib with a hearing as soon as reasonable after he timely requested a hearing on October 2, 2019; (5) denying him due process, acted in bad faith, and did not have substantial evidence to support the suspension of his privileges on May 16, 2019 and September 19, 2019. Compl. ¶¶ 24–45.

b. In Count II of the Complaint, Dr. Katrib alleges a violation of Patient Safety Act, asserting he was a "health care worker" as defined in the Patient Safety Act, W. Va. Code §16-39-1, *et seq.*, and voiced patient safety concerns at various times prior to 2018. Compl. ¶¶ 46–48.

c. In Count III of the Complaint, Dr. Katrib alleges a violation of West Virginia Public Policy/Human Rights Act under W. Va. Code §5-11-9(1), when Defendants suspended his clinical privileges and medical staff membership on May 16, 2019 and September 19, 2019. Compl. ¶¶ 54–58.

d. In Count IV of the Complaint, Dr. Katrib alleges Defendants committed tortious interference by suspending his clinical privileges and medical staff membership on May 16, 2019 and September 19, 2019. Compl. ¶¶ 60–62.

e. In Count V of the Complaint, Dr. Katrib alleges intentional infliction of emotional distress as a result of the suspension of his clinical privileges and medical staff membership on May 16, 2019 and September 19, 2019. Compl. ¶¶ 63–66.

11. Plaintiff's Complaint only seeks compensatory and punitive damages and does not seek a hearing on his clinical privileges and medical staff membership. *See* Compl. at p.12.

12. All allegations against Defendants in Dr. Katrib's Complaint relate to actions by the Defendants in 2018 and 2019.

13. Further, all of Dr. Katrib's Claims, except the Patient Safety Act, arise from the dispute over Defendants' suspension of his clinical privileges and medical staff membership on May 16, 2019 and September 19, 2019. The Patient Safety Act claim is based on complaints Dr. Katrib asserts he made prior to 2018.

IV. CONCLUSIONS OF LAW

A. Defendants' Actions as Asserted in Dr. Katrib's Complaint Occurred Pre-petition and Were Therefore Discharged in Bankruptcy.

14. Rule 12(b)(1) of the West Virginia Rules of Civil Procedure provides a court may dismiss a plaintiff's case when it lacks subject matter jurisdiction. W. Va. R. Civ. P. 12(b)(1). "Whenever it is determined that a court has no jurisdiction to entertain the subject matter of a civil action, the forum court must take no further action in the case other than to dismiss it from the docket." Syl. Pt. 1, *Hinkle v. Bauer Lumber & Home Bldg. Ctr., Inc.*, 211 S.E.2d 705, 706 (W. Va. 1975). Here, the Defendants argue the court lacks subject matter jurisdiction because of the Defendants' discharge in bankruptcy (an affirmative defense under Rule 8(c) of West Virginia Rules of Civil Procedure).

15. Rule 12(b)(6) of the West Virginia Rules of Civil Procedure permits a court to dismiss a complaint for "failure to state a claim upon which relief can be granted." W. Va. R. Civ. P. 12(b)(6). The purpose of a Rule 12(b)(6) motion to dismiss is "to test the formal sufficiency of the complaint." *John W. Lodge Distributing Co. v. Texaco, Inc.*, 245 S.E.2d 157, 158 (W. Va. 1978).

16. "For purposes of the motion to dismiss, the complaint is construed in the light most favorable to plaintiff, and its allegations are to be taken as true." *Id.* "The trial court should not dismiss a complaint merely because it doubts that the plaintiff will prevail in the action." *Id.* at 159 (citing Wright & Miller, Federal Practice and Procedure § 1216 (1969)). However,

"liberalization in the rules of pleading in civil cases does not justify a carelessly drafted or baseless pleading." *Sticklen v. Kittle*, 287 S.E.2d 148, 164 (W. Va. 1981) (quoting Lugar & Silverstein, West Virginia Rules of Civil Procedure 75 (1960)).

17. Therefore, the "essential material facts must appear on the face of the complaint." *Fass v. Nowsco Well Serv., Ltd.*, 350 S.E.2d 562, 563 (W. Va. 1986). "[I]f it is clear that no relief could be granted under any set of facts that could be proven consistent with the allegations contained within the pleadings," a party is entitled to a motion to dismiss. *Kopelman & Assocs., L.C. v. Collins*, 473 S.E.2d 910, 914 (W. Va. 1996).

18. Courts may resolve affirmative defenses on motions to dismiss where facts sufficient to rule are alleged in the complaint. *S.U. v. C.J.*, No. 19-1181, 2021 WL 365824, at *3 (W. Va. Feb. 2, 2021) (resolving the affirmative defense of *res judicata* on a motion to dismiss); *Goodman v. Praxair, Inc.*, 494 F.3d 458, 464 (4th Cir. 2007); *see also Richmond, Fredericksburg & Potomac R.R. v. Forst*, 4 F.3d 244, 250 (4th Cir. 1993) (acknowledging that a motion to dismiss based upon an affirmative defense may be granted where all facts necessary to the affirmative defenses clearly appear on the face of the complaint). Here, the Court finds that the Complaint sets forth the necessary factual allegations to permit resolving the defense of discharge in bankruptcy under Rule 8(c) of West Virginia Rules of Civil Procedure.

19. Section 1141(d)(1)(A) of the Bankruptcy Code provides "[e]xcept as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan—discharges the debtor from any debt that arose before the date of such confirmation." 11 U.S.C. § 1141(d)(1)(A) (emphasis added).

20. Section 524(a) of the Bankruptcy Code provides "[a] discharge in a case under this title—voids any judgment at any time obtained, to the extent that such judgment is a determination

of the personal liability of the debtor with respect to any debt discharged under section . . . 1141 . . . of this title" and "operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived." 11 U.S.C. § 524(a)(1)-(2).

21. The United States Court of Appeals for the Fourth Circuit has held that a confirmed chapter 11 plan of reorganization is binding and entitled to *res judicata* effect over claims that were brought, could have, or should have been brought, prior to confirmation. *In re Varat Enter., Inc.*, 81 F.3d 1310, 1315 (4th Cir. 1996) ("parties may be precluded from raising claims or issues that they could have or should have raised before confirmation of a bankruptcy plan, but failed to do so") (emphasis added).

22. The essential factual allegations in the Complaint arise from actions taken by the Defendants prior to the Petition Date, January 10, 2020. The Patient Safety Act claim is based on complaints made prior to 2018. Compl. at ¶¶ 47–49. All other claims derive from the dispute over Defendants' precautionary suspension of Dr. Katrib's clinical privileges and medical staff membership on May 16, 2019 and September 19, 2019—all prior to the Petition Date. *See* Compl. at Counts I, III–V.

23. In addition, all of the factual allegations occurred prior to the confirmation of the Plan, under which the Discharge Injunction became effective, on September 30, 2020.

24. Plaintiff's Complaint plainly alleges the suspension of Plaintiff's clinical privileges occurred on May 16, 2019 and September 19, 2019—both dates prior to Defendants' Discharge Injunction. Compl. at ¶¶ 14 and 19.

25. Dr. Katrib's Patient Safety Act claim arises from alleged complaints prior to 2018 that are unequivocally pre-discharge. *See* Compl. at ¶¶ 46–51.

26. The Complaint alleges a violation of West Virginia Humans Rights Act, tortious interference, and intentional infliction of emotional distress, all of which derive from for the suspension of Dr. Katrib's clinical privileges on May 16, 2019 and September 19, 2019—again, both pre-discharge. *See* Compl. at ¶¶ 52–66.

27. There is no dispute that the allegations in Dr. Katrib's Complaint, as a whole, are based on conduct of Defendants both pre-petition and pre-discharge.

28. Dr. Katrib failed to take any action to retain his Claims during the pendency of Defendants' Bankruptcy Case, and as a result, his pre-petition Claims were discharged on September 30, 2021, by Defendants' confirmed Plan.

29. Defendants' Plan is entitled *res judicata* effect over claims that were brought, could have, or should have been brought, prior to confirmation, including the Dr. Katrib's pre-petition Claims in this case.

30. Consequently, any judgment Dr. Katrib would obtain against Defendants post-confirmation in this case would be void.

31. Dr. Katrib is also permanently enjoined from proceeding or otherwise going forward with respect to his pre-petition Claims against Defendants in this case.

32. Given that the Plaintiff's pre-petition Claims against Defendants in his Complaint were discharged when Defendants' Plan became effective on September 30, 2020, the Court **FINDS** that it lacks the subject matter jurisdiction to hear Plaintiff's Complaint under Rule 12(b)(1) of the West Virginia Rules of Civil Procedure, and as such, Plaintiff's Complaint fails "to

state a claim upon which relief can be granted" under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure.

B. The Dispute over Clinical Privileges Does Not Make Dr. Katrib a "Known" Creditor Entitled to Actual Notice of Defendants' Bankruptcy Case.

33. Dr. Katrib denies knowledge of the Defendants' bankruptcy and argues that he was a "known" creditor, and therefore, entitled to actual notice of the bankruptcy filing and claims bar date, which he asserts he did not receive. Pl's Resp. at 9–12. The Defendants argue that the dispute over clinical privileges did not make Dr. Katrib a "known" creditor and that public notice, approved by the Bankruptcy Court, was sufficient and binds Dr. Katrib.[2] Defs.' Reply at 4–7.

34. The Supreme Court of the United States defined a "known" creditor as one whose identity is either known or "reasonably ascertainable by the debtor." *Tulsa Pro. Collection Serv., Inc. v. Pope*, 485 U.S. 478, 490 (1988). An "unknown" creditor is one whose "interests are either conjectural or future or, although they could be discovered upon investigation, do not in due course of business come to knowledge [of the debtor]." *Chemetron Corp.*, 72 F.3d at 346 (citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 317 (1950)); *Trump Taj Mahal Assocs. v. O'Hara (In re Trump Taj Mahal Assocs.)*, Adv. No. 93–2056, WL 534494 at * 9 (D.N.J. Dec. 13, 1993) (explaining that "those creditors who hold only conceivable, conjectural or speculative claims" are "unknown").

35. To be a "known" creditor, Plaintiff's identity must have been "reasonably ascertainable" through "reasonably diligent efforts." *Chemetron Corp. v. Jones*, 72 F.3d 341, 346 (3d Cir. 1995). "Reasonable diligence does not require 'impracticable and extended searches . . .

[2] The Supreme Court "has not hesitated to approve of resort to publication as a customary substitute" for actual notice. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 317 (1950)); *see also Tulsa Pro. Collection Serv., Inc. v. Pope*, 485 U.S. 478, 490 (1988) ("For creditors who are not 'reasonably ascertainable,' publication notice can suffice").

in the name of due process.'" *Id.* (citing *Mullane*, 339 U.S. at 317). More specifically, "[a] debtor does not have a 'duty to search out each conceivable or possible creditor and urge that person or entity to make a claim against it.'" *Id.*

36. Dr. Katrib's Complaint does not allege that he was a "known" creditor, nor does it allege he made a claim for damages against the Defendants prior to this case. In response to the Motion to Dismiss, Dr. Katrib did not provide an affidavit or other evidence to establish that he was a "known" creditor. Thus, this Court does not have any basis to find that Dr. Katrib is a "known" creditor.

37. His argument is largely based on the assertion that there were negotiations to resolve the privileges dispute as stated in Defendants' Reply memorandum. Plaintiff also relied on this assertion at the remote hearing.

38. But even if Dr. Katrib would have alleged or provided evidence to establish or support that he was a "known" creditor during the pendency of the Defendants' Bankruptcy Case, the fact that he and Defendants had a dispute over his privileges does not rise to the level of making him a "known" creditor entitled to actual notice of the Bankruptcy Case.

39. Requiring a search of every possible creditor would place an impossible burden on Defendants during their Bankruptcy Case. *Chemetron Corp.*, 72 F.3d at 347 (distinguishing between the applicable "reasonably ascertainable" standard and the expansive "reasonably foreseeable" test that places an impossible burden on debtors).

40. Such requirement for an unlimited investigation would also depart from established rules and decisions on this issue. *See In re Provident Hosp., Inc.*, 122 B.R. 683, 685 (D. Md. 1990), *aff'd,* 943 F.2d 49 (4th Cir. 1991) (unpublished opinion) (holding appellant injured by deranged brother who was a patient of the debtor was an "unknown creditor" because he was not

"reasonably ascertainable"); *Novak v. Callahan (In re GAC Corp.)*, 681 F.2d 1295, 1300 (11th Cir. 1982) (finding that persons who had purchased but no longer held debentures at the time the claims bar order was issued were merely speculative). *See also Charter Int'l Oil Co. v. Ziegler (In re Charter Co.)*, 113 B.R. 725, 728 (M.D. Fla. 1990) (finding that the supplier with a pre-petition contract for the sale of oil to debtor was not a known creditor because "[e]ven assuming that [the debtor] knew there was a possibility of a claim by [supplier], [the debtor] was not required to give actual notice to creditors with merely conceivable, conjectural or speculative claims"); *In re Texaco Inc.*, 182 B.R. 937, 954–55 (Bankr. S.D.N.Y. 1995) (holding owners of adjacent land were "unknown"); *In re New York Trap Rock Corp.*, 153 B.R. 642, 646 (Bankr. S.D.N.Y. 1993) (holding government agency that failed to file claim for environmental cleanup to be an "unknown creditor" even where debtor had entered real estate contract with another agency of same governmental entity); *In re AMF Bowling Worldwide, Inc.*, 520 B.R. 185 (Bankr. E.D. Va. 2014), *aff'd sub nom. Bd. v. AMF Bowling Worldwide, Inc.*, 533 B.R. 144 (E.D. Va. 2015) (finding claimant who, post-petition but pre-confirmation, was struck by motor vehicle operated by intoxicated minor who was allegedly served alcohol at bowling alley operated by debtor was merely an "unknown claimant"); *In re Hunt*, 146 B.R. 178, 182 (Bankr. N.D. Tex. 1992) (holding claims unknown where plaintiffs filed state court suit and counterclaim after bar claims date).

41. Moreover, requiring the Defendants to engage in this type of investigation to ascertain and urge all possible creditors, like Dr. Katrib, would have defeated one of the most valuable aspects of the bankruptcy process—a "prompt and effectual administration and settlement of debtor's estate." *Chemetron*, 72 F.3d at 346 (citing *Katchen v. Landy*, 382 U.S. 323, 328 (1966))

(explaining the purpose of claim bar dates and filing timely proofs of claims to allow claimants to participate in the reorganization).[3]

42. Dr. Katrib's assertion that there were negotiations to resolve the privileges dispute—as stated in Defendants' Reply memorandum—is not enough to demonstrate he is a known creditor. If so, any person with any dispute could frustrate the bar of bankruptcy by ignoring a bankruptcy filing, waiting until the case is dismissed, and then bringing a claim.

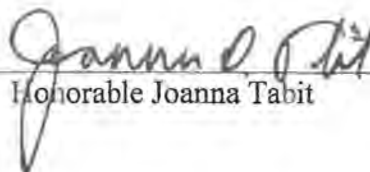
43. Therefore, the Court **FINDS** Plaintiff's Claims are not retained as a result of his argument that he is a "known" creditor.

ORDER

IT IS ORDERED AND ADJUDGED that the Motion to Dismiss by Herbert J. Thomas Memorial Hospital Association and Thomas Health System, Inc. is therefore **GRANTED** and the Plaintiff's Complaint is **DISMISSED WITH PREJUDICE**.

The Clerk of Court is **ORDERED** to send a certified copy of this Order to all counsel of record.

ENTER this 24th day of September, 2021.



Honorable Joanna Tabit

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY FROM THE RECORDS OF SAID COURT
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 24
DAY OF September 2021
Cathy S. Gatson CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

[3] As explained herein, Dr. Katrib failed to participate in the Defendants' reorganization. He did not take any action to protect his claims, including failing to file a timely proof of claim. Thus, Dr. Katrib's pre-petition Claims were discharged upon confirmation of the Defendants' Plan. *See* 11 U.S.C. § 1141(d).