

**United States Bankruptcy Court
Central District of California
San Fernando Valley
Judge Victoria Kaufman, Presiding
Courtroom 301 Calendar**

Wednesday, November 16, 2016

Hearing Room 301

9:30 AM

1:16-12975 Hilda R Morales De Delgado

Chapter 13

#0.10 Motion in individual case for order imposing a stay or continuing the automatic stay as the Court deems appropriate

fr. 11/02/16

Docket 12

Tentative Ruling:

Grant.

Movant must submit the order within seven (7) days.

Note: No response has been filed. Accordingly, no court appearance by movant is required. Should an opposing party file a late opposition or appear at the hearing, the Court will determine whether further hearing is required and movant will be so notified.

Party Information

Debtor(s):

Hilda R Morales De Delgado

Represented By
William G Cort

Trustee(s):

Elizabeth (SV) F Rojas (TR)

Pro Se

**United States Bankruptcy Court
Central District of California
San Fernando Valley
Judge Victoria Kaufman, Presiding
Courtroom 301 Calendar**

Wednesday, November 16, 2016

Hearing Room 301

9:30 AM

1:14-13456 Gingko Rose Ltd.

Chapter 11

#1.00 Motion for relief from stay [AN]

NORA AND EDEN DARWISH
VS
DEBTOR

fr. 5/18/16; 8/3/16; 8/17/16; 8/24/16; 9/7/16; 10/26/16;

Docket 319

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Gingko Rose Ltd.

Represented By
Marc A Lieberman
Stephen E Ensberg Esq
Michael R Totaro

**United States Bankruptcy Court
Central District of California
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Wednesday, November 16, 2016

Hearing Room 301

9:30 AM

1:14-13456 Gingko Rose Ltd.

Chapter 11

#2.00 Motion for relief from stay [AN]

JUSTIN HALL; LARA ALLARD; KAY EWING;
ESTATE OF SAMMY EWING; NICHOLAS HORNBEK;
AND BRIAN HORNBEK
VS
DEBTOR

Docket 381

Tentative Ruling:

Grant relief from stay pursuant to 11 U.S.C. § 362(d)(1). The event that gave rise to the nonbankruptcy action occurred post-petition on July 4, 2015. Section 362(a)(1) does not stay litigation of this post-petition claim in the nonbankruptcy forum.

In addition, movants seek recovery primarily from third parties and agrees that the stay will remain in effect as to enforcement of any resulting judgment against the debtor or bankruptcy estate, except that movants will retain the right to file a proof of claim under 11 U.S.C. § 501.

Movants (and any successors or assigns) may proceed under applicable nonbankruptcy law to enforce their remedies to proceed to final judgment in the nonbankruptcy forum, provided that the stay remains in effect with respect to enforcement of any judgment against the debtor or property of the debtor's bankruptcy estate.

The Court will not annul the automatic stay. As noted above, no stay is in effect as to movants' litigating their post-petition claim in the nonbankruptcy forum. Therefore, annulment of the stay appears unnecessary.

The 14-day stay prescribed by FRBP 4001(a)(3) is waived.

Movants must submit order within seven (7) days.

Note: No response has been filed. Accordingly, no court appearance by movants is

**United States Bankruptcy Court
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CONT...

Gingko Rose Ltd.

Chapter 11

required. Should an opposing party file a late opposition or appear at the hearing, the Court will determine whether further hearing is required and movants will be so notified.

Party Information

Debtor(s):

Gingko Rose Ltd.

Represented By

Marc A Lieberman

Stephen E Ensberg Esq

Michael R Totaro

**United States Bankruptcy Court
Central District of California
San Fernando Valley
Judge Victoria Kaufman, Presiding
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Wednesday, November 16, 2016

Hearing Room 301

9:30 AM

1:16-12649 Andrew John Nehme

Chapter 7

#3.00 Motion for relief from stay [PP]

FINANCIAL SERVICES VEHICLE TRUST
VS
DEBTOR

Docket 12

Tentative Ruling:

Grant relief from stay pursuant to 11 U.S.C. § 362(d)(1) and (d)(2).

Movant (and any successors or assigns) may proceed under applicable nonbankruptcy law to enforce its remedies to repossess and sell the property.

The 14-day stay prescribed by FRBP 4001(a)(3) is waived.

Movant must submit order within seven (7) days.

Note: No response has been filed. Accordingly, no court appearance by movant is required. Should an opposing party file a late opposition or appear at the hearing, the Court will determine whether further hearing is required and movant will be so notified.

Party Information

Debtor(s):

Andrew John Nehme

Represented By
Donald E Iwuchuku

Trustee(s):

Diane Weil (TR)

Pro Se

**United States Bankruptcy Court
Central District of California
San Fernando Valley
Judge Victoria Kaufman, Presiding
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Wednesday, November 16, 2016

Hearing Room 301

9:30 AM

1:16-10024 Paulette Vonetta Moses

Chapter 7

#4.00 Amended motion for relief from stay [RP]

US BANK NA
VS
DEBTOR

Docket 167

Tentative Ruling:

Grant relief from stay pursuant to 11 U.S.C. § 362(d)(2).

Movant (and any successors or assigns) may proceed under applicable nonbankruptcy law to enforce its remedies to foreclose upon and obtain possession of the property.

Movant, or its agents, may, at its option, offer, provide and enter into a potential forbearance agreement, loan modification, refinance agreement or other loan workout or loss mitigation agreement. Movant, through its servicing agent, may contact the debtor by telephone or written correspondence to offer such an agreement. Any such agreement shall be nonrecourse unless stated in a reaffirmation agreement.

The 14-day stay prescribed by FRBP 4001(a)(3) is waived.

Movant must submit order within seven (7) days.

Party Information

Debtor(s):

Paulette Vonetta Moses

Represented By
Donna R Dishbak

Trustee(s):

Amy L Goldman (TR)

Represented By
Lovee D Sarenas

**United States Bankruptcy Court
Central District of California
San Fernando Valley
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Wednesday, November 16, 2016

Hearing Room 301

9:30 AM

CONT...

Paulette Vonetta Moses

Annie Verdries

Chapter 7

**United States Bankruptcy Court
Central District of California
San Fernando Valley
Judge Victoria Kaufman, Presiding
Courtroom 301 Calendar**

Wednesday, November 16, 2016

Hearing Room 301

9:30 AM

1:12-14048 Cesar A Reyes and Frida Hernandez Moraga

Chapter 13

#5.00 Motion for relief from stay [RP]

DEUTSCHE BANK NATIONAL TRUST COMPANY
VS
DEBTOR

Docket 73

Tentative Ruling:

Grant relief from stay pursuant to 11 U.S.C. § 362(d)(1).

Movant (and any successors or assigns) may proceed under applicable nonbankruptcy law to enforce its remedies to foreclose upon and obtain possession of the property.

Movant, or its agents, may, at its option, offer, provide and enter into a potential forbearance agreement, loan modification, refinance agreement or other loan workout or loss mitigation agreement. Movant, through its servicing agent, may contact the debtor by telephone or written correspondence to offer such an agreement. Any such agreement shall be nonrecourse unless stated in a reaffirmation agreement.

The 14-day stay prescribed by FRBP 4001(a)(3) is waived.

Movant must submit order within seven (7) days.

Note: No response has been filed. Accordingly, no court appearance by movant is required. Should an opposing party file a late opposition or appear at the hearing, the Court will determine whether further hearing is required and movant will be so notified.

Party Information

Debtor(s):

Cesar A Reyes

Represented By
Kenumi T Maatafale

**United States Bankruptcy Court
Central District of California
San Fernando Valley
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9:30 AM

CONT... Cesar A Reyes and Frida Hernandez Moraga

Chapter 13

Joint Debtor(s):

Frida Hernandez Moraga

Represented By
Kenumi T Maatafale

Trustee(s):

Elizabeth (SV) F Rojas (TR)

Pro Se

**United States Bankruptcy Court
Central District of California
San Fernando Valley
Judge Victoria Kaufman, Presiding
Courtroom 301 Calendar**

Wednesday, November 16, 2016

Hearing Room 301

9:30 AM

1:14-10770 Dilip Ghotikar

Chapter 13

#6.00 Motion for relief from stay [RP]

LOGIX FEDERAL CREDIT UNION
VS
DEBTOR

Docket 52

Tentative Ruling:

Grant relief from stay pursuant to 11 U.S.C. § 362(d)(1).

Movant (and any successors or assigns) may proceed under applicable nonbankruptcy law to enforce its remedies to foreclose upon and obtain possession of the property.

Movant, or its agents, may, at its option, offer, provide and enter into a potential forbearance agreement, loan modification, refinance agreement or other loan workout or loss mitigation agreement. Movant, through its servicing agent, may contact the debtor by telephone or written correspondence to offer such an agreement. Any such agreement shall be nonrecourse unless stated in a reaffirmation agreement.

Upon entry of the order, for purposes of Cal. Civ. Code § 2923.5, the Debtor is a borrower as defined in Cal. Civ. Code § 2920.5(c)(2)(C).

The 14-day stay prescribed by FRBP 4001(a)(3) is waived.

Movant must submit order within seven (7) days.

Note: No response has been filed. Accordingly, no court appearance by movant is required. Should an opposing party file a late opposition or appear at the hearing, the Court will determine whether further hearing is required and movant will be so notified.

Party Information

Debtor(s):

Dilip Ghotikar

Represented By

**United States Bankruptcy Court
Central District of California
San Fernando Valley
Judge Victoria Kaufman, Presiding
Courtroom 301 Calendar**

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9:30 AM

CONT...

Dilip Ghotikar

Todd J Roberts

Chapter 13

Trustee(s):

Elizabeth (SV) F Rojas (TR)

Pro Se

**United States Bankruptcy Court
Central District of California
San Fernando Valley
Judge Victoria Kaufman, Presiding
Courtroom 301 Calendar**

Wednesday, November 16, 2016

Hearing Room 301

9:30 AM

1:14-11554 Jean Ann Kallie

Chapter 13

#7.00 Motion for relief from stay [RP]

HSBC BANK USA, N.A.
VS
DEBTOR

Docket 91

Tentative Ruling:

Grant relief from stay pursuant to 11 U.S.C. § 362(d)(1).

Movant (and any successors or assigns) may proceed under applicable nonbankruptcy law to enforce its remedies to foreclose upon and obtain possession of the property.

Movant, or its agents, may, at its option, offer, provide and enter into a potential forbearance agreement, loan modification, refinance agreement or other loan workout or loss mitigation agreement. Movant, through its servicing agent, may contact the debtor by telephone or written correspondence to offer such an agreement. Any such agreement shall be nonrecourse unless stated in a reaffirmation agreement.

The 14-day stay prescribed by FRBP 4001(a)(3) is waived.

Movant must submit order within seven (7) days.

Note: No response has been filed. Accordingly, no court appearance by movant is required. Should an opposing party file a late opposition or appear at the hearing, the Court will determine whether further hearing is required and movant will be so notified.

Party Information

Debtor(s):

Jean Ann Kallie

Represented By
Kevin T Simon

**United States Bankruptcy Court
Central District of California
San Fernando Valley
Judge Victoria Kaufman, Presiding
Courtroom 301 Calendar**

Wednesday, November 16, 2016

Hearing Room 301

9:30 AM

CONT... Jean Ann Kallie

Chapter 13

Trustee(s):

Elizabeth (SV) F Rojas (TR)

Pro Se

**United States Bankruptcy Court
Central District of California
San Fernando Valley
Judge Victoria Kaufman, Presiding
Courtroom 301 Calendar**

Wednesday, November 16, 2016

Hearing Room 301

9:30 AM

1:14-13673 Leo Hobocienski Vargas

Chapter 13

#8.00 Motion for relief from stay [RP]

WELLS FARGO BANK NA
VS
DEBTOR

Docket 68

Tentative Ruling:

Grant relief from stay pursuant to 11 U.S.C. § 362(d)(1) and (d)(4).

Movant (and any successors or assigns) may proceed under applicable nonbankruptcy law to enforce its remedies to foreclose upon and obtain possession of the property.

Movant, or its agents, may, at its option, offer, provide and enter into a potential forbearance agreement, loan modification, refinance agreement or other loan workout or loss mitigation agreement. Movant, through its servicing agent, may contact the debtor by telephone or written correspondence to offer such an agreement. Any such agreement shall be nonrecourse unless stated in a reaffirmation agreement.

If recorded in compliance with applicable state laws governing notices of interests or liens in real property, the order is binding in any other case under this title purporting to affect the property filed not later than 2 years after the date of the entry of the order by the court, except that a debtor in a subsequent case under this title may move for relief from the order based upon changed circumstances or for good cause shown, after notice and hearing.

Any other request for relief is denied.

The 14-day stay prescribed by FRBP 4001(a)(3) is waived.

Movant must submit order within seven (7) days.

Note: No response has been filed. Accordingly, no court appearance by movant is

**United States Bankruptcy Court
Central District of California
San Fernando Valley
Judge Victoria Kaufman, Presiding
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CONT... Leo Hobocienski Vargas Chapter 13

required. Should an opposing party file a late opposition or appear at the hearing, the Court will determine whether further hearing is required and movant will be so notified.

Party Information

Debtor(s):

Leo Hobocienski Vargas

Represented By
D Justin Harelik

Trustee(s):

Elizabeth (SV) F Rojas (TR)

Pro Se

**United States Bankruptcy Court
Central District of California
San Fernando Valley
Judge Victoria Kaufman, Presiding
Courtroom 301 Calendar**

Wednesday, November 16, 2016

Hearing Room 301

9:30 AM

1:16-11948 Sona Arouchian

Chapter 13

#9.00 Motion for relief from stay [RP]

THE BANK OF NEW YORK MELLON
VS
DEBTOR

Docket 24

Tentative Ruling:

Grant relief from stay pursuant to 11 U.S.C. § 362(d)(1).

Movant (and any successors or assigns) may proceed under applicable nonbankruptcy law to enforce its remedies to foreclose upon and obtain possession of the property.

Movant, or its agents, may, at its option, offer, provide and enter into a potential forbearance agreement, loan modification, refinance agreement or other loan workout or loss mitigation agreement. Movant, through its servicing agent, may contact the debtor by telephone or written correspondence to offer such an agreement. Any such agreement shall be nonrecourse unless stated in a reaffirmation agreement.

The 14-day stay prescribed by FRBP 4001(a)(3) is waived.

Movant must submit order within seven (7) days.

Note: No response has been filed. Accordingly, no court appearance by movant is required. Should an opposing party file a late opposition or appear at the hearing, the Court will determine whether further hearing is required and movant will be so notified.

Party Information

Debtor(s):

Sona Arouchian

Represented By
Charles Shamash

**United States Bankruptcy Court
Central District of California
San Fernando Valley
Judge Victoria Kaufman, Presiding
Courtroom 301 Calendar**

Wednesday, November 16, 2016

Hearing Room 301

9:30 AM

CONT... Sona Arouchian

Chapter 13

Trustee(s):

Elizabeth (SV) F Rojas (TR)

Pro Se

**United States Bankruptcy Court
Central District of California
San Fernando Valley
Judge Victoria Kaufman, Presiding
Courtroom 301 Calendar**

Wednesday, November 16, 2016

Hearing Room 301

1:30 PM

1:14-13401 Juan Carlos Orozco

Chapter 7

Adv#: 1:14-01166 Parker et al v. Orozco

#10.00 Pre-trial conference re: second amended complaint to determine nondischargeability of debt pursuant to 11U.S.C. sec 523(a)(2)(A) and 11 U.S.C. sec 523(a)(4)

fr. 8/3/16; 9/14/16(stip); 10/5/16;

Docket 42

Tentative Ruling:

According to the status report filed on November 9, 2016 [doc. 84], the parties have settled this matter. The Court will continue this status conference to **1:30 p.m. on January 18, 2017**, to allow the parties to finalize their settlement agreement. If the parties dismiss this action prior to that time, the Court will take the status conference off calendar.

Appearances are excused on November 16, 2016.

Party Information

Debtor(s):

Juan Carlos Orozco

Represented By
Faith A Ford

Defendant(s):

Juan Carlos Orozco

Represented By
Gerald N Silver

Plaintiff(s):

Howard Leese

Represented By
I Donald Weissman

Bobby Kimball

Represented By
I Donald Weissman

**United States Bankruptcy Court
Central District of California
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Wednesday, November 16, 2016

Hearing Room 301

1:30 PM

CONT... **Juan Carlos Orozco**
Robert D Parker

Represented By
I Donald Weissman

Chapter 7

Trustee(s):

Diane Weil (TR)

Pro Se

**United States Bankruptcy Court
Central District of California
San Fernando Valley
Judge Victoria Kaufman, Presiding
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Hearing Room 301

1:30 PM

1:15-10741 Emil Soorani, M.D.

Chapter 11

Adv#: 1:15-01089 Manning & Kass v. Soorani, M.D.

#11.00 Pretrial conference re complaint to determine debt to be non-dischargeable

fr. 7/22/15; 9/2/15, 11/4/15; 11/19/15; 3/2/16; 5/4/16, 9/14/16, 10/19/16

Docket 1

Tentative Ruling:

The defendant must provide additional detail concerning his exhibits, such as the dates and amounts of the checks and the dates and specific descriptions of the mortgage and tax lien documents.

The Court intends to set this matter for trial for two days on the week of **March 27, 2017**. The parties should be prepared to discuss which two consecutive days between **March 27, 2017 and March 30, 2017** they prefer. In their joint pretrial stipulation, the parties indicate that whether the plaintiff failed to include an indispensable party to this action is an issue for trial. Should the Court resolve this issue prior to trial?

TRIAL BRIEFS:

The plaintiff's trial brief must be filed and served **28 days** before trial.

The defendant's trial brief must be filed and served **21 days** before trial.

Any reply brief by the plaintiff must be filed and served **14 days** before trial.

WITNESS TESTIMONY:

Testimony of witnesses **must be presented live** at trial pursuant to the Federal Rules of Evidence.

**United States Bankruptcy Court
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1:30 PM

CONT... Emil Soorani, M.D.

Chapter 11

The Court will NOT consider the testimony of any witnesses who were not identified on a party's witness list, and will not consider the testimony of any witness which is not relevant to the issues of fact and law for trial.

EXHIBITS:

All trial exhibits must be numbered and marked as required by Local Bankruptcy Rule ("LBR") 9070-1(a).

The Court will NOT consider any exhibit that was not identified on a party's exhibit list, and will not consider any exhibit which is not relevant to the issues of fact and law for trial.

One week prior to trial, each party must deliver to the chambers of Judge Victoria S. Kaufman the original and one copy of a notebook containing all of that party's trial exhibits, or the parties may deliver a joint exhibit notebook.

The Court will issue an order incorporating its trial procedures, the related deadlines and the trial dates.

Party Information

Debtor(s):

Emil Soorani, M.D.

Represented By
Stella A Havkin

Defendant(s):

Emil Soorani, M.D.

Pro Se

Plaintiff(s):

Manning & Kass

Represented By
Allan Herzlich

US Trustee(s):

United States Trustee (SV)

Pro Se

**United States Bankruptcy Court
Central District of California
San Fernando Valley
Judge Victoria Kaufman, Presiding
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Hearing Room 301

1:30 PM

1:15-10763 Howard Irving Napolske

Chapter 7

Adv#: 1:15-01093 Hana Financial, Inc., a California corporation v. Napolske

#12.00 Pretrial conference re complaint for:
Determination that Debt is Non-Dischargeable
Pursuant to 11 USC 523(a)(2)(A), (a)(2)(B),
and (a)(6)

fr. 8/12/15; 2/10/16; 4/13/16, 6/1/16; 8/10/16; 9/14/16

Docket 1

***** VACATED *** REASON: Order ent 8/23/16, cont to 1/18/17 @
1:30pm.**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Howard Irving Napolske

Represented By
Heidi Hohler

Defendant(s):

Howard I. Napolske

Pro Se

Plaintiff(s):

Hana Financial, Inc., a California

Represented By
Michael W Davis

Trustee(s):

Diane Weil (TR)

Pro Se

Diane Weil (TR)

Pro Se

US Trustee(s):

United States Trustee (SV)

Pro Se

**United States Bankruptcy Court
Central District of California
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Wednesday, November 16, 2016

Hearing Room 301

1:30 PM

1:15-11148 Michael Anthony Rhomateo Mabugat

Chapter 7

Adv#: 1:15-01104 Gordon v. Mabugat

#13.00 Status conference re complaint to determine dischargeability of debt

fr. 9/2/15(stip); 9/16/15; 10/14/15; 11/18/15; 3/16/16; 7/20/16

Docket 1

Tentative Ruling:

In light of the joint status report filed on November 3, 2016 [doc. 33], the Court will continue this status conference to **1:30 p.m. on March 8, 2017**. The plaintiff must give written notice to the defendant of the continued status conference. The parties must file a joint status report no later than **February 22, 2017**.

Appearances are excused on November 16, 2016.

Party Information

Debtor(s):

Michael Anthony Rhomateo

Represented By

Edmond Nassirzadeh

Defendant(s):

Michael Anthony Rhomateo

Pro Se

Plaintiff(s):

Craig Gordon

Represented By

Alan W Forsley

Trustee(s):

Amy L Goldman (TR)

Pro Se

US Trustee(s):

United States Trustee (SV)

Pro Se

**United States Bankruptcy Court
Central District of California
San Fernando Valley
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Wednesday, November 16, 2016

Hearing Room 301

1:30 PM

1:16-10119 Louis S Gray

Chapter 7

Adv#: 1:16-01061 United States Of America v. Gray

#14.00 Pretrial conference re: complaint objecting to discharge of certain debts pursuant to 11 U.S.C. Sections 523(a)(2)(A) and 523(c)(1)

fr. 6/8/16

Docket 1

*** VACATED *** REASON: Closed 10/05/2016

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Louis S Gray

Represented By
David H Chung

Defendant(s):

Louis S Gray

Pro Se

Plaintiff(s):

United States Of America

Represented By
Elan S Levey

Trustee(s):

Nancy J Zamora (TR)

Pro Se

Nancy J Zamora (TR)

Pro Se

US Trustee(s):

United States Trustee (SV)

Pro Se

**United States Bankruptcy Court
Central District of California
San Fernando Valley
Judge Victoria Kaufman, Presiding
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Wednesday, November 16, 2016

Hearing Room 301

1:30 PM

1:16-10224 Thomas Joel Gajewski

Chapter 7

Adv#: 1:16-01132 Gajewski v. ACS/ Access Group et al

#15.00 Status conference re complaint

Docket 1

***** VACATED *** REASON: Another summons issued 10/17/16; status
conference set for 12/7/16 at 1:30 p.m.**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Thomas Joel Gajewski

Represented By
Giovanni Orantes

Defendant(s):

Department of Education/ Navient

Pro Se

ACS/ Access Group

Pro Se

Plaintiff(s):

Thomas Joel Gajewski

Represented By
Giovanni Orantes

Trustee(s):

Amy L Goldman (TR)

Pro Se

**United States Bankruptcy Court
Central District of California
San Fernando Valley
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Wednesday, November 16, 2016

Hearing Room 301

1:30 PM

1:16-11150 Laura Kay James

Chapter 7

Adv#: 1:16-01104 James et al v. Navient Solutions, Inc. et al

#16.00 Status conference re: complaint to determine dischargeability of student loan(s)

fr. 9/21/16; 10/5/16

Docket 1

Tentative Ruling:

The Court will continue this status conference to **2:30 p.m. on December 7, 2016**, to be held in connection with the hearings on Educational Credit Management Corporation's motions [docs. 13, 14].

Appearances are excused on November 16, 2016.

Party Information

Debtor(s):

Laura Kay James Pro Se

Defendant(s):

SLC Student Loan Trust Pro Se

NY State Higher Ed Pro Se

Navient Solutions, Inc. Pro Se

Joint Debtor(s):

Jake Guillermo James Pro Se

Plaintiff(s):

Jake Guillermo James Pro Se

Laura Kay James Pro Se

**United States Bankruptcy Court
Central District of California
San Fernando Valley
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Wednesday, November 16, 2016

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1:30 PM

CONT... Laura Kay James

Chapter 7

Trustee(s):

Nancy J Zamora (TR)

Pro Se

**United States Bankruptcy Court
Central District of California
San Fernando Valley
Judge Victoria Kaufman, Presiding
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Wednesday, November 16, 2016

Hearing Room 301

1:30 PM

1:16-11199 Enrique Flores, Jr.

Chapter 7

Adv#: 1:16-01101 Matsudaira v. Flores, Jr.

#16.10 Defendant's motion to dismiss for failure to state a claim pursuant to F.R.C.P. Rule 12(b)(6) and F.R.B.P. Rule 7012

fr. 11/2/16

Docket 4

Tentative Ruling:

Have the parties selected mediators from the panel, as directed by the Court at the last hearing?

11/2/2016 Tentative:

The defendant's reply [doc. 9] raises issues that were not discussed in the motion to dismiss, such as claim preclusion and additional facts about the Deed of Trust for the purchase of the real property at issue. The Court intends to continue this hearing to **2:30 p.m. on November 23, 2016**, to allow the plaintiff to brief these issues.

The plaintiff must file a supplemental brief no later than **November 16, 2016**. In the brief, the plaintiff should discuss whether: (1) the extent to which, if any, claim preclusion bars litigation of the complaint; (2) issue preclusion limits the damages to \$10,345, based on the state court's judgment; and (3) the effect of title to the subject property being held in the name of LTV Driven, Inc., a corporation.

Party Information

Debtor(s):

Enrique Flores Jr.

Represented By
R Grace Rodriguez

Defendant(s):

Enrique Flores Jr.

Represented By
Lesley Davis

**United States Bankruptcy Court
Central District of California
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CONT... Enrique Flores, Jr.

Chapter 7

Plaintiff(s):

Judith Matsudaira

Represented By
Barry E Cohen

Trustee(s):

David Keith Gottlieb (TR)

Pro Se

**United States Bankruptcy Court
Central District of California
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Wednesday, November 16, 2016

Hearing Room 301

1:30 PM

1:16-11199 Enrique Flores, Jr.

Chapter 7

Adv#: 1:16-01101 Matsudaira v. Flores, Jr.

#16.20 Status conference re: complaint to determine dischargeability
of debt pursuant to section 523(a)(4) & 523(a)(2)(a)

fr. 9/14/16; 11/2/16

Docket 1

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Enrique Flores Jr.

Represented By
R Grace Rodriguez

Defendant(s):

Enrique Flores Jr.

Pro Se

Plaintiff(s):

Judith Matsudaira

Represented By
Barry E Cohen

Trustee(s):

David Keith Gottlieb (TR)

Pro Se

**United States Bankruptcy Court
Central District of California
San Fernando Valley
Judge Victoria Kaufman, Presiding
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Hearing Room 301

2:30 PM

1:13-14649 Marilyn S. Scheer

Chapter 7

Adv#: 1:13-01241 Scheer v. State Bar Of California et al

#17.00 Status conference re complaint for declaratory and injunctive relief, and monetary damages for: (1) violation of the automatic/permanent stay of 11 U.S.c. §§362,524 and 727 and; (2) Discriminatory treatment under 11 U.S.C. §525(a)

fr. 7/20/16; 10/5/16

Docket 1

Tentative Ruling:

The Court will deny in part and grant in part the defendants' motion to dismiss (the "Motion").

I. BACKGROUND

On July 12, 2013, Marilyn S. Scheer ("Plaintiff") filed a voluntary chapter 7 petition. In her mailing list, Plaintiff included the State Bar of California (the "State Bar").

On November 1, 2013, Plaintiff filed a complaint (the "Complaint") against the State Bar, Luis J. Rodriguez, Joseph Dunn, Joanna Remke and Kenneth E. Bacon (collectively, "Defendants"), alleging violation of the automatic stay under 11 U.S.C. § 362 and discriminatory treatment against a bankruptcy debtor under 11 U.S.C. § 525 (a). The Complaint alleges that:

In December 2011, one of Plaintiff's former clients demanded that the State Bar pursue administrative enforcement proceedings against Plaintiff for the unpaid balance of an arbitration award owed to the client. Subsequently, on May 1, 2013, after an arbitration award was entered in favor of Plaintiff's client, the State Bar Court suspended Plaintiff's law license unless Plaintiff paid the arbitration award amount.

Plaintiff then filed for bankruptcy protection. No complaints were

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filed objecting to Plaintiff's discharge or for a determination that a debt owed by Plaintiff was nondischargeable. As such, the debt owed to Plaintiff's former client was discharged. Accordingly, Plaintiff made demand on Defendants to reinstate her law license.

Defendants have refused to reinstate Plaintiff's license in violation of the automatic stay and the provisions of 11 U.S.C. § 525(a).

On November 18, 2013, Plaintiff obtained a discharge. On December 2, 2013, Defendants filed the Motion [doc. 3]. On June 5, 2014, the Court entered an order granting the Motion (the "Order") [doc. 50]. Among other things, the Court held that the suspension of Plaintiff's license was not subject to § 525(a) because the debt that Plaintiff had to pay to reinstate her license was nondischargeable under § 523(a)(7).

Plaintiff appealed the Order to the United States District Court (the "USDC"). On September 22, 2014, the USDC entered an order affirming the Order (the "USDC Order") [doc. 67]. Plaintiff then appealed the USDC Order. On April 14, 2016, the Ninth Circuit Court of Appeals held that the debt Plaintiff had to pay to reinstate her license did not fall within the scope of § 523(a)(7) and was subject to discharge [doc. 69]. The Court of Appeals remanded the proceeding to the USDC to determine whether Plaintiff has stated a claim under §§ 362 and 525. The USDC then remanded the proceeding to this Court.

On July 21, 2016, the Court entered a scheduling order [doc. 76], requesting supplemental briefing by the parties in light of the decision by the Court of Appeals. On August 19, 2016, Defendants timely filed their supplemental brief [doc. 79]. On September 8, 2016, Plaintiff timely filed her supplemental brief [doc. 81].

Defendants assert that they cannot reinstate Plaintiff's license because Plaintiff must first pay the arbitration award and then file a motion for reinstatement to be heard by the State Bar Court. Cal. Bus. & Prof. Code § 6203(d)(4); State Bar R. Proc. 5.370.

Under Cal. Bus. & Prof. Code § 6203(d)(4), "[t]he board shall terminate the inactive enrollment upon proof that the attorney has complied with the award, judgment, or agreement and upon payment of any costs or penalties, or both, assessed as a result of the attorney's failure to comply." Pursuant to State Bar R. Proc. 5.730—

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(A) Eligibility. **When the award debtor has paid in full the arbitration award plus any costs and penalties assessed because of the award debtor's failure to comply, the award debtor may move to terminate an involuntary inactive enrollment ordered under these rules.**

(B) Motion; Response. The motion must be accompanied by one or more declarations and by proof of payment. It must be served on the Presiding Arbitrator, who has 10 court days after service to respond.

(C) Order. When the Presiding Arbitrator files the response or the time to file the response expires, the Court will promptly issue an order on the motion. **If the Court finds that the arbitration award and any costs and penalties have been paid, it will terminate any involuntary inactive enrollment ordered under this chapter.**

(emphasis added). On August 19, 2016, Defendants filed a request for judicial notice (the "RJN") [doc. 80]. Defendants requested that the Court take judicial notice of, *inter alia*, a July 16, 2014 decision by the California Supreme Court suspending Plaintiff's license (the "July 2014 Decision") and Plaintiff's State Bar profile, which details the reasons for her suspension. RJN, Exhibits 1, 4. The Court ruled it would take judicial notice of the documents attached to the RJN [doc. 88].

While Plaintiff was previously placed on inactive enrollment under Cal. Bus. & Prof. Code § 6203 based on her failure to pay an arbitration award, the July 2014 Decision suspended Plaintiff from practice and placed her on probation for three years for different reasons. RJN, Exhibit 1. As explained in Plaintiff's State Bar profile, Plaintiff's suspension was based on the following:

A hearing judge found [Plaintiff] culpable of misconduct in 32 loan modification cases concerning four clients in California and 28 clients in 12 other states.

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A three-judge review panel agreed with the judge's findings of culpability and aggravation in 30 of the client matters, found less

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evidence in mitigation and agreed that she should be suspended for a minimum of two years.

Specifically, the panel found her culpable of 26 acts of out-of-state unauthorized practice of law, 26 acts of collecting illegal fees and four acts of demanding and collecting fees prior to performing loan modification work in California.

RJN, Exhibit 4.

The July 2014 Decision states that Plaintiff's suspension will not be lifted until she: (1) makes restitution to 30 former clients; (2) "provides proof to the State Bar Court of her rehabilitation, fitness to practice and learning and ability in the general law;" (3) complies with "other conditions of probation recommended by the Review Department of the State Bar Court;" (4) "take[s] and pass[s] the Multistate Professional Responsibility Examination during the period of her suspension and provide[s] satisfactory proof of such passage to the State Bar's Office of Probation;" and (5) "compl[ies] with California Rules of Court, rule 9.20, and perform[s] the acts specified in subparts (a) and (c) of that rule within 30 and 40 calendar days...after the effective date of this order." RJN, Exhibit 1.

II. ANALYSIS

A. Federal Rule of Civil Procedure ("Rule") 12(b)(6)

A motion to dismiss [pursuant to Rule 12(b)(6)] will only be granted if the complaint fails to allege enough facts to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully.

We accept factual allegations in the complaint as true and construe the pleadings in the light most favorable to the non-moving party. Although factual allegations are taken as true, we do not assume the

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truth of legal conclusions merely because they are cast in the form of factual allegations. Therefore, conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss.

Fayer v. Vaughn, 649 F.3d 1061, 1064 (9th Cir. 2011) (internal quotation marks omitted); citing, *inter alia*, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 547, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007); and *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009)).

In evaluating a Rule 12(b)(6) motion, review is "limited to the contents of the complaint." *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754 (9th Cir. 1994). However, without converting the motion to one for summary judgment, exhibits attached to the complaint, as well as matters of public record, may be considered in determining whether dismissal is proper. *See Parks School of Business, Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995); *Mack v. South Bay Beer Distributors, Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986).

Dismissal without leave to amend is appropriate when the court is satisfied that the deficiencies in the complaint could not possibly be cured by amendment. *Jackson v. Carey*, 353 F.3d 750, 758 (9th Cir. 2003); *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000).

B. The Complaint is Insufficient as to Defendants Luis J. Rodriguez and Joseph Dunn

The Complaint does not adequately allege a claim against Mr. Rodriguez and Mr. Dunn. The allegations that are specific to Mr. Rodriguez and Mr. Dunn are found in paragraphs 7 and 8 of the Complaint. As to Mr. Rodriguez, the Complaint states that Mr. Rodriguez "is the President of the Board of Trustees, the governing and policy-making body of the State Bar" and "is in charge of, and presides over the Board of Trustee of the State Bar." Complaint, ¶ 7. As to Mr. Dunn, the Complaint alleges that Mr. Dunn "is the Executive Director of the State Bar" and "oversees the daily operations of the State Bar and is actively involved in policy making and decisions regarding the treatment of individual cases." Complaint, ¶ 8. These allegations do not lead to a "reasonable inference that the [defendants are] liable for the misconduct alleged" because they do not allege any misconduct by these specific defendants at

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all. *Fayer*, 649 F.3d at 1064. Consequently, the Court will dismiss Mr. Rodriguez and Mr. Dunn with leave to amend.

C. Immunity

The Ninth Circuit Court of Appeals' decision in this case states that the Eleventh Amendment does not shield the State Bar from this action. *In re Scheer*, 819 F.3d 1206, 1212 n.4 (9th Cir. 2016). Nevertheless, the question remains whether the remaining individual defendants, Ms. Remke and Mr. Bacon, are immune.

The Bar Court judges and prosecutor have quasi-judicial immunity from monetary damages. Administrative law judges and agency prosecuting attorneys are entitled to quasi-judicial immunity so long as they perform functions similar to judges and prosecutors in a setting like that of a court. . . . Thus, the Bar Court judges and prosecutors are immune from damages.

Hirsh v. Justices of the Supreme Court of the State of California, 67 F.3d 708, 715 (9th Cir. 1995) (citing *Butz v. Economou*, 438 U.S. 478, 511-17, 98 S.Ct. 2894, 2913-16, 57 L.Ed.2d 895 (1978)).

Ms. Remke, the Presiding Judge of the California State Bar Court, and Mr. Bacon, the Presiding Arbitrator of the State Bar, have quasi-judicial immunity because they are alleged to have "perform[ed] functions similar to judges and prosecutors in a setting like that of a court." *Hirsh*, 67 F.3d at 715. In the Complaint, Plaintiff alleges that Ms. Remke "is responsible for the fair, impartial and lawful determination of all matters coming before the State Bar Court" and "signed the Order...suspending [Plaintiff's] law license...." Complaint, ¶ 9. Regarding Mr. Bacon, Plaintiff alleges that Mr. Bacon "functioned...in an administrative capacity with responsibility for the fair and impartial administrative enforcement of the arbitration award...." Complaint, ¶ 10. As a result, Ms. Remke and Mr. Bacon are immune from monetary damages.

D. Violation of the Automatic Stay

11 U.S.C. § 362 provides in pertinent part:

(a) Except as provided in subsection (b) of this section, a petition filed under

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section 301, 302, or 303 of this title...operates as a stay, applicable to all entities, of—

- (6) any act to collect, assess, or a recover a claim against the Debtor that arose before the commencement of the case;

11 U.S.C. § 362(k)(1) provides the following:

Except as provided in paragraph (2), an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

A prima facie case under section 362(k) requires a showing (1) by an individual debtor of (2) injury from (3) a willful (4) violation of the stay. *In re Fernandez*, 227 B.R. 174, 181 (B.A.P. 9th Cir. 1998).

An entity "who attempts collection of prepetition debt after it knows of the debtor's bankruptcy is subject to sanctions for willful violation of the automatic stay." *In re Bourke*, 543 B.R. 657, 664 (Bankr. D. Mont. 2015). "[T]he willfulness test for automatic stay violations merely requires that: (1) the creditor know of the automatic stay; and (2) the actions that violate the stay be intentional." *Morris v. Peralta*, 317 B.R. 381, 389 (B.A.P. 9th Cir. 2004) (citing *Eskanos v. Adler, P.C. v. Leetien*, 309 F.3d 1210, 1215 (9th Cir. 2002)). "Once a creditor has knowledge of the bankruptcy, it is deemed to have knowledge of the automatic stay. *In re Breul*, 533 B.R. 782, 787-88 (Bankr. C.D. Cal. 2015) (citing *In re Ramirez*, 183 B.R. 583, 589 (B.A.P. 9th Cir. 1995)).

In *In re Bertuccio*, 414 B.R. 604, 605 (Bankr. N.D. Cal. 2008) *aff'd in part sub nom. Employment Dev. Dep't v. Bertuccio*, 2011 WL 1158022 (N.D. Cal. Mar. 28, 2011), the debtor filed a complaint against the California State Contractors License Board ("CSLB"), the California State Employment Development Department ("EDD"), Stephen P. Sands as the Registrar of the CSLB and Sally McKeag as the Chief Deputy Director of the EDD (collectively, the "State Defendants"). The complaint alleged that the State Defendants "willfully violated the automatic stay by failing to timely reinstate the Debtor's contractor's license upon notice of the bankruptcy filing." *Id.*, at

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Prior to the debtor's bankruptcy filing, the EDD advised the CSLB that the debtor was in violation of state law for failing to pay taxes based on an audit by the EDD. *Id.*, at 607. After the debtor did not resolve his tax liability, the CSLB suspended the debtor's contractor's license for failure to pay his taxes. *Id.* Subsequently, the debtor filed a chapter 13 petition and provided notice of his filing to the State Defendants. *Id.*, at 608. Despite several requests to the State Defendants to lift the debtor's suspension, the State Defendants did not reinstate the debtor's license. *Id.*, at 608-09.

After trial on the violation of the automatic stay issue, the bankruptcy court first held that the State Defendants' refusal to reinstate the debtor's license was a violation of the automatic stay because the State Defendants had an affirmative duty to reinstate the debtor's license. *Id.*, at 613-14. The court stated:

An affirmative duty to undo actions taken before the imposition of the automatic stay has been recognized by many cases, albeit in slightly different factual contexts than the case at hand. *See In re Del Mission, Ltd. (EDD v. Taxel)*, 98 F.3d 1147 (9th Cir.1996)(State's continued retention of taxes violated the automatic stay), *In re Roberts (FTB v. Roberts)*, 175 B.R. 339, 343 (9th Cir. BAP 1994)("[A] garnishing creditor has an affirmative duty to stop garnishment proceedings when notified of the automatic stay."), *In re Abrams*, 127 B.R. 239 (9th Cir. BAP 1991) (creditor that repossessed a car postpetition without notice of the bankruptcy violated the stay by refusing to turn the car over when notified of the bankruptcy filing). *See also In re Henry*, 328 B.R. 664 (Bankr. E.D.N.Y. 2005)(law firm violated the stay when the firm failed to release a lien placed prepetition on the debtor's bank account), *In re Jessamey*, 330 B.R. 80 (Bankr. D. Mass. 2005)(judgment on the pleadings denied since City could violate the automatic stay by failing to release a hold on the debtor's car registration which had been lawfully blocked prepetition for the debtor's failure to pay a tax).

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The sole basis for the initial suspension of the Debtor's license was his non-payment of a debt owed to the EDD. The practical effect of the

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[State] Defendants non-action is the same as if they were refusing to reinstate the license solely because of the potential discharge of the debt to the EDD in the Debtor's bankruptcy. In this regard, the facts presented are analogous to those in the *Del Mission, Roberts, Abrams, Henry* and *Jessamey* cases noted above, in which an affirmative duty to undo prepetition actions was found. For these reasons, under the circumstances presented, the Court finds that the [State] Defendants did have an affirmative duty to reinstate the Debtor's contractor's license upon notice of his bankruptcy filing.

Id. The bankruptcy court next considered whether an exception to the automatic stay applied, specifically, 11 U.S.C. § 362(b)(4). *Id.*, at 614.

Pursuant to 11 U.S.C. § 362(b), the filing of a petition does not operate as a stay—

- (1) under paragraph (1), (2), (3), or (6) of subsection (a) of this section, of the commencement or continuation of an action or proceeding by a governmental unit or any organization exercising authority under the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, opened for signature on January 13, 1993, to enforce such governmental unit's or organization's police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power;

The *Bertuccio* court found that this exception did not apply:

By its own language, the "police and regulatory powers" exception of [§] 362(b)(4) does not include actions by the governmental unit to enforce a money judgment. "This exception is intended to allow governmental units to sue a debtor 'to prevent or stop violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws, or attempting to fix damages for violation of such a law....' " *In re Dunbar*, 235 B.R. 465, 471 (9th Cir. BAP 1999), *aff'd*, 245 F.3d 1058 (9th Cir.2001), *quoting*, House and Senate Reports (Reform Act of 1978) (H.Rep. No. 595, 95th Cong., 1st Sess. 343 (1977); S.Rep. No. 989, 95th Cong., 2d Sess. 52 (1978)). The

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police power exception must be narrowly construed and is only meant to apply to actions that further public health and safety. *In re PMI-DVW Real Estate Holdings, LLP*, 240 B.R. 24, 31 (Bankr.D.Ariz.1999).

Bertuccio, 414 B.R. at 614-15.

Generally, two tests are used to determine whether a state agency's action falls within the "police powers" exception:

Under the "pecuniary purpose" test, the court must determine whether the government action relates "primarily to the protection of the government's pecuniary interest in the debtors' property or to matters of public safety and welfare." *In re Universal Life Church, Inc.*, 128 F.3d 1294, 1297 (9th Cir.1997), *cert. denied*, 524 U.S. 952, 118 S.Ct. 2367, 141 L.Ed.2d 736 (1998) (*citing N.L.R.B. v. Continental Hagen Corp.*, 932 F.2d 828, 833 (9th Cir.1991)). "Indeed, most government actions which fall under [§ 362(b)(4)] have some pecuniary component, particularly those associated with fraud detection. This does not abrogate their police power function. Only if the action is pursued 'solely to advance a pecuniary interest of the governmental unit' will the automatic stay bar it." *Universal Life Church*, 128 F.3d at 1299 (9th Cir.1997) (*quoting Thomassen*, 15 B.R. at 909).

The "public policy" test distinguishes between those proceedings that effectuate public policy and those that adjudicate private rights. *Universal Life*, 128 F.3d at 1297; *In re Charter First Mortg., Inc.*, 42 B.R. 380, 383 (Bankr.D.Or.1984). Under the latter test, the court considers whether the administrative agency is exercising legislative, executive, or judicial functions. *In re Poule*, 91 B.R. 83, 86 (9th Cir. BAP 1988). "Where the agency's action affects only the parties immediately involved in the proceedings, it is exercising a judicial function and the debtor is entitled to the same protection from the automatic stay as if the proceeding were being conducted in a judicial form." *Id.*

In re Dunbar, 235 B.R. 465, 471 (B.A.P. 9th Cir. 1999).

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In *Bertuccio*, the court found that, under both tests, the State Defendants' actions did not fall within § 362(b)(4). *Bertuccio*, 414 B.R. at 616-17. Regarding the "pecuniary purpose" test, the court found:

The pecuniary purpose test distinguishes "between governmental actions which are aimed at obtaining a pecuniary advantage for the unit in question or its citizens, and those actions which represent a direct application of the unit's police or regulatory powers." *In re Thomassen*, 15, B.R. 907, 909 (9th Cir. BAP 1981). In the Debtor's case, the continued suspension of his contractor's license was unquestionably for the purpose of "obtaining a pecuniary advantage." There can be no doubt that if the Debtor had paid the taxes owing to the EDD, his license would have been reinstated promptly by the CSLB. ... Thus, the Debtor needed to do nothing more than pay the debt owing to the EDD. The EDD readily admits that one of its purposes in requiring review of the Debtor's plan before it would allow the suspension to be released was so that the EDD could ensure its claims would be paid under the plan. There was no issue of public safety or welfare behind the continued suspension of the Debtor's license. It was simply a matter of owing back taxes. It is clear, therefore, that the continued suspension of the Debtor's license was done solely to advance the pecuniary interests of the EDD. For that reason, the [State] Defendants actions fail the "pecuniary interest" test for the police powers exception.

Id. As to the "public policy" test, the court found:

The EDD also argues that the [State] Defendants should prevail under the "public policy test" for determining whether the police powers exception applies. *In re Herr*, 28 B.R. 465, 468 (Bankr. D. Me. 1983). This approach distinguishes between proceedings that effectuate a public policy and those that adjudicate private rights. The EDD says that neither it nor the CSLB was attempting to adjudicate private rights in this case, therefore, this test is satisfied.

While it may be true that the [State] Defendants were not pursuing private rights such as restitution for victims of violations of California

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State laws, that does not necessarily mean that the [State] Defendants' actions meet the "public policy" test. The Ninth Circuit Bankruptcy Appellate Panel has provided some additional guidance with the respect to the "public policy" test:

[W]here a state agency is attempting to punish a debtor for fraudulent conduct by assessing civil penalties, or where it is attempting to prevent future occurrences of fraud through injunctive relief, the action comes within the scope of section 362(b)(4).

Poule, 91 B.R. at 87. The purpose of the State of California's Contractor's Licensing Law is "to guard the public against the consequences of incompetent workmanship, imposition, and deception." *Poule*, 91 B.R. at 87, citing *Asdourian v. Araj*, 38 Cal.3d 276, 282, 211 Cal.Rptr. 703, 696 P.2d 95 (1985). Its purpose is not to ensure the payment of taxes owing to the EDD, which is how it was used against the Debtor in this case. In this case, there was no such incompetent, fraudulent or deceptive conduct underlying the suspension of the Debtor's license or the EDD's refusal to authorize the release of this suspension. Therefore, the actions of the [State] Defendants also fail the "public policy" test for the police powers exception.

Id., at 617. As a result, the court held that the State Defendants violated the automatic stay. *Id.*, at 627.

In *In re Psychotherapy and Counseling Center, Inc.*, 195 B.R. 522, 524 (Bankr. D.D.C. 1996), the United States Department of Health and Human Services ("HHS") sought a declaration by the bankruptcy court that the automatic stay did not bar it from excluding the debtor from participating in Medicare based on the debtor's default under a prepetition settlement agreement with the HHS. Pursuant to the settlement agreement, upon default, the debtor would remain excluded from participating in Medicare until it cured the default. *Id.*, at 525. On these facts, the bankruptcy court held that conditioning inclusion on curing a default "would be an effort by HHS to gain a pecuniary advantage in the bankruptcy by enforcing the debt under the

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settlement agreement" and did not fall under the exception of § 362(b)(4). *Id.*, at 529; *see also In re Nu-Process Brake Engineers, Inc.*, 119 B.R. 700, 702-03 (Bankr. E.D. Mo. 1990) ("[A] review of the applicable reinstatement statute has disclosed that all back sales taxes must be paid by a former licensee prior to a reinstatement. The Court finds this requirement to be a condition of reinstatement which is violative of 11 U.S.C. § 362 if applies in these circumstances, in that it requires pre-petition taxes to be paid in full before the agency will reinstate the license.").

The allegations in the Complaint are analogous to the facts in *Bertuccio*. Taking the allegations as true, upon receipt of notice of Plaintiff's bankruptcy filing, the State Bar had an obligation to reinstate her professional license. As in *Bertuccio*, the basis for Plaintiff's involuntary inactive enrollment was nonpayment of a prepetition debt.

In addition, the § 362(b)(4) exception to the automatic stay does not apply here under either the "pecuniary purpose" or the "public policy" test. With respect to the "pecuniary purpose" test, as in *Bertuccio*, Plaintiff's involuntary inactive enrollment would be lifted upon Plaintiff's payment of a prepetition debt; the object of the State Bar's action was Plaintiff's payment of a debt to a former client. Under *Dunbar*, the rationale for Plaintiff's involuntary inactive enrollment does not implicate "matters of public safety and welfare." *Dunbar*, 236 B.R. at 471. There being no purpose to Plaintiff's involuntary inactive enrollment other than to enforce payment of a prepetition debt, the State Bar's alleged actions do not fit the § 362(b)(4) exception under the "pecuniary purpose" test.

Moreover, as to the "public policy" test, the pertinent debt here is a prepetition debt owed to one of Plaintiff's clients. The State Bar's purpose in refusing to terminate Plaintiff's involuntary inactive enrollment was to effectuate Plaintiff's payment to her former client. Significantly, this debt was discharged in Plaintiff's bankruptcy case.

As noted by Plaintiff, *In re Moss*, 270 B.R. 333 (Bankr. W.D.N.Y. 2001), cited by Defendants, is not factually similar to this case. There, the debt which the debtor had to pay prior to reinstatement of his benefits under federal law was nondischargeable. *Id.*, at 340. As such, the same concerns regarding a discharged debt were not present in *Moss*. Moreover, the court's reasoning in *Moss* is not in line with Ninth Circuit authority. *See, e.g., Bertuccio*, 414 B.R. at 613-14.

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As a result of the foregoing, Plaintiff has adequately alleged a willful violation of the automatic stay, in that Plaintiff has alleged that the State Bar and potentially other defendants were aware of the automatic stay and they intended their action of refusing to terminate Plaintiff's involuntary inactive enrollment. *Peralta*, 317 B.R. at 389.

E. Discriminatory Treatment under 11 U.S.C. § 525

Pursuant to 11 U.S.C. § 525(a)—

[A] governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such a grant to, discriminate with respect to such a grant against, deny employment to, terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor under this title or a bankrupt or a debtor under the Bankruptcy Act, or another person with whom such bankrupt or debtor has been associated, solely because such bankrupt or debtor is or has been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act, has been insolvent before the commencement of the case under this title, or during the case but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act.

Defendants' arguments as to Plaintiff's § 525(a) claim are that Plaintiff was not a bankruptcy debtor at the time she was subject to involuntary inactive enrollment and that, once the California Supreme Court denied Plaintiff's petition for review, Defendants had no power to reinstate Plaintiff.

As to the first argument, Defendants' reliance on *In re Majewski* is misplaced. 310 F.3d 653 (9th Cir. 2002). There, the debtor informed his private employer that he intended to file for bankruptcy and the employer fired him. *Id.*, at 654. The Court of Appeals, analyzing § 525(b), found that the statute barred discrimination against an individual who "is or has been a debtor..." *Id.*, at 655 (quoting 11 U.S.C. § 525(b) (1)). The Court of Appeals held that this language referred to debtors who were discriminated against because they were currently debtors or had been a debtor, not discrimination against those who threatened to file for bankruptcy. *Id.*

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Here, the proper analysis is under § 525(a), which includes the same pertinent language. However, unlike in *Majewski*, the discrimination alleged here occurred not only prepetition, but during and after Plaintiff's bankruptcy filing. To provide some background, section 525 was codified as a result of the holding of *Perez v. Campbell*, 402 U.S. 637, 91 S.Ct. 1704, 29 L.Ed.2d 233 (1971). See *In re Brown*, 244 B.R. 62, 65-66 (Bankr. D. N.J. 2000) (noting that § 525 codifies the holding of *Perez*). In *Perez*, the Supreme Court of the United States struck down an Arizona law that conditioned reinstatement of a debtor's driver's license on repayment of an accident-related judgment that had been discharged in bankruptcy. *Perez*, 402 U.S. at 656. The Supreme Court held that this law violated the policies underlying the Bankruptcy Code that debtors be provided a "new opportunity in life... unhampered by the pressure and discouragement of pre-existing debt." *Id.*, at 648. The Supreme Court further found that Arizona's law gave creditors "a powerful weapon with which to force bankrupts to pay their debts despite their discharge." *Id.*, at 654.

This holding, which led to the enactment of § 525, encompasses the current factual scenario. See also *In re Williams*, 158 B.R. 493, 495-96 (Bankr. D. Idaho 1993) (holding that the Idaho State Bar could not condition renewal of a suspended license on the debtor's failure to pay costs and expenses of his disciplinary hearing because such costs and expenses were subject to discharge and such conduct would run afoul of § 525(a)); and *Psychotherapy and Counseling Center*, 195 B.R. at 534 ("HHS's determination that the debtor is to be excluded from the program is going to have to involve more than simply rubber-stamping the settlement agreement. Otherwise, the proposed exclusion of the debtor would be based solely on the fact that the debtor failed to pay a dischargeable debt which is impermissible under § 525(a).").

Moreover, Defendants' alleged actions may also be classified as a refusal to renew a license postpetition. In other words, if Plaintiff were to attempt to renew her bar license by paying her yearly fee, she would be denied unless she paid the discharged debt at issue. As such, the allegations in the Complaint sufficiently state a claim under § 525(a).

F. Reinstatement of Plaintiff's License

Aside from monetary damages, the Complaint prays for reinstatement of Plaintiff's license to practice law. Defendants assert that they have no power to reinstate Plaintiff's license. First, Defendants assert that the Complaint is partially moot

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because, subsequent to the Complaint, the Supreme Court of California suspended Plaintiff's license on grounds other than those alleged in the Complaint. RJN, Exhibit 1.

This Court cannot order reinstatement of Plaintiff's license if Plaintiff's license was suspended for reasons outside those alleged in the Complaint. Still, had the State Bar timely terminated Plaintiff's involuntary inactive enrollment, she may have been able to practice law between the date of filing her petition, on July 12, 2013, and the California Supreme Court's suspension decision, on July 16, 2014. Because Plaintiff may be entitled to monetary damages arising from any violation of §§ 362 and 525, the Complaint is not moot.

Defendants further contend that they could not terminate Plaintiff's involuntary inactive enrollment until Plaintiff completed the procedural steps set forth in Cal. Bus. & Prof. Code § 6203 and State Bar R. Proc. 5.370. However, (1) Defendants have an affirmative duty to undo a violation of the automatic stay and cannot place that burden on Plaintiff, and (2) to the extent a state statute conflicts with the Bankruptcy Code, the Bankruptcy Code prevails. *Perez v. Campbell*, 402 U.S. 637, 91 S.Ct. 1704, 29 L.Ed.2d 233 (1971).

1. The Burden to Undo a Violation of the Automatic Stay is Not on Plaintiff

An affirmative duty is imposed on non-debtor parties to comply with the stay, and to remedy any violations, even if inadvertent, of the automatic stay. *In re Dyer*, 322 F.3d 1178, 1191-92 (9th Cir. 2003). As noted in *Bertuccio*, *supra*, Defendants had an affirmative duty to "undo actions taken before the imposition of the automatic stay" by terminating Plaintiff's involuntary inactive enrollment. *Bertuccio*, 414 B.R. at 614.

"The Bankruptcy Code does not burden the debtor with a duty to take additional steps to secure the benefit of the automatic stay." *In re Schwartz*, 954 F.2d 569, 572 (9th Cir. 1992). "The responsibility is placed on the creditor and not on the debtor because to place the burden on the debtor to undo the violation 'would subject the debtor to the financial pressures the automatic stay was designed to temporarily abate.'" *In re Johnston*, 321 B.R. 262, 283 (D. Ariz. 2005) (quoting *In the Matter of Sams*, 106 B.R. 485, 490 (Bankr. S.D. Ohio 1989).

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Requiring Plaintiff to take the steps set forth in Cal. Bus. & Prof. Code § 6203(d)(4) and State Bar R. Proc. 5.370 would improperly place the burden on undoing a violation of the automatic stay on Plaintiff. Under binding Ninth Circuit authority, this burden must be borne by Defendants rather than be placed on Plaintiff's shoulders. While this argument may now be moot because Plaintiff's license has been suspended for reasons outside of those alleged in the Complaint, the Court notes that Defendants cannot require a debtor to respond to a violation of the automatic stay outside of this Court.

**2. Cal. Bus. & Prof. Code § 6203 and State Bar R. Proc. 5.370 Conflict
with the Bankruptcy Code**

To the extent Cal. Bus. & Prof. Code § 6203 and State Bar R. Proc. 5.370 require Plaintiff to take affirmative action on a discharged debt prior to having her inactive enrollment terminated, they are preempted by federal law.

In *Perez v. Campbell*, 402 U.S. 637, 638, 91 S.Ct. 1704, 1705, 29 L.Ed.2d 233 (1971), the Supreme Court of the United States evaluated whether an Arizona statute was invalid under the Supremacy Clause because it conflicted with a provision of the Bankruptcy Act. There, the debtor was involved in an automobile accident but was not covered by liability insurance at the time. *Id.* The driver of the second car sued the debtor for personal injury and property damage and obtained a judgment against the debtor. *Id.* Subsequently, the debtor filed a bankruptcy petition and obtained a discharge of the debt owed on account of the judgment. *Id.*, at 638-39.

At the time, under the Arizona Motor Vehicle Safety Act (the "Act"), if a judgment arising from a car accident was entered against the operator of a vehicle, the operator would have his or her license suspended until the judgment was paid in full, whether or not the judgment was discharged in bankruptcy. *Id.*, at 641-42. The Supreme Court phrased the issue before it narrowly: "What is at issue here is the power of a State to include as part of [its financial responsibility laws] designed to secure compensation for automobile accident victims a section providing that a discharge in bankruptcy of the automobile accident tort judgment shall have no effect on the judgment debtor's obligation to repay the judgment creditor, at least insofar as such repayment may be enforced by the withholding of driving privileges by the State." *Id.*, at 643.

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The Supreme Court held that Arizona could not frustrate federal bankruptcy law by excepting certain debts from discharge. *Id.*, at 652. "[A]ny state legislation which frustrates the full effectiveness of federal law is rendered invalid by the Supremacy Clause." *Id.*

Similarly, in *In re Duke*, 167 B.R. 324, 325 (Bankr. D.R.I. 1994), the Rhode Island Department of Transportation, Division of Motor Vehicles ("RIDOT") suspended the debtor's driver's license because of the debtor's failure to satisfy a prepetition judgment that arose from an accident. The suspension was based on a state statute, which provided that every suspension would remain in effect until a judgment was stayed or satisfied in full. Upon filing her bankruptcy petition, the debtor notified RIDOT of her filing, which informed the debtor that, in its opinion, the suspension would remain in effect until the underlying judgment was discharged.

The bankruptcy court found that "the automatic stay under 11 U.S.C. § 362(a)(1) bars RIDOT from enforcing [the statutory] collection remedy, after the judgment debtor files a petition under the Bankruptcy Code." *Id.* In *Duke*, RIDOT remedied its violation by "formally agreed to change its current practice, by reinstating a debtor's driver's license immediately upon being notified of a bankruptcy filing...." *Id.*, at 326.

Here, Defendants cite Cal. Bus. & Prof. Code § 6203 and State Bar R. Proc. 5.370 for the proposition that they could not terminate Plaintiff's involuntary inactive enrollment unless and until she paid a discharged debt. However, to the extent these statutes require payment of discharged debts, they are "rendered invalid by the Supremacy Clause." *Perez*, 402 U.S. at 652. Defendants cannot rely on these statutes as protection from a violation of the automatic stay or discriminatory treatment of Plaintiff. As a result, Plaintiff's claim under § 362 or § 525 will not be dismissed on the basis that Plaintiff has not complied with Cal. Bus. & Prof. Code § 6203(d)(4) or State Bar R. Proc. 5.370.

G. Plaintiff's Request for Punitive Damages

Pursuant to 11 U.S.C. § 106(a)(3), "[t]he court may issue against a governmental unit an order, process, or judgment...including an order or judgment awarding a money recovery, *but not including an award of punitive damages.*" (emphasis added). In accordance with this statute, the Court will dismiss Plaintiff's request for punitive

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damages.

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III. CONCLUSION

As concerns compensatory damages, the Motion is denied as to the State Bar, but the Court will dismiss Mr. Rodriguez and Mr. Dunn with leave to amend. The Court also will dismiss Plaintiff's request for punitive damages without leave to amend. At this time, because the allegations in the Complaint do not encompass the reasons for which the California Supreme Court subsequently suspended Plaintiff's license, the Court will also dismiss Plaintiff's request for reinstatement of her license with leave to amend.

If Plaintiff elects to amend the Complaint, she must file and serve an amended complaint within **14 days** of this hearing. Defendants must file and serve any response to an amended complaint within **14 days** of the filing of the amended complaint. If Plaintiff elects not to file and serve an amended complaint, Defendants must file and serve an answer or other appropriate response within **21 days** of this hearing.

Plaintiff must submit an order within seven (7) days.

Party Information

Debtor(s):

Marilyn S. Scheer

Represented By
David M Reeder

Defendant(s):

Joann Remke

Represented By
Kevin W Coleman

Kenneth E. Bacon

Represented By
Kevin W Coleman

Joseph Dunn

Represented By
Kevin W Coleman

State Bar Of California

Represented By
Kevin W Coleman

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Luis J Rodriguez

Represented By
Kevin W Coleman

Plaintiff(s):

Marilyn S. Scheer

Pro Se

Trustee(s):

David Seror (TR)

Pro Se

David Seror (TR)

Pro Se

US Trustee(s):

United States Trustee (SV)

Represented By
Katherine Bunker

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Adv#: 1:15-01264 El Sabor Latino v. Linqui

#18.00 Defendant's motion to dismiss second amended adversary complaint to determine nondischargeability of debt pursuant to 11 U.S.C. § 523(a)(2) and 11 U.S.C. § 523 (a)(4)

Docket 34

Tentative Ruling:

Grant in part and deny in part.

I. BACKGROUND

On August 18, 2015, Carlos Maximiliano Linqui ("Defendant") filed a chapter 13 petition. Defendant's case was later converted to a chapter 7 [Bankruptcy Docket, doc. 44].

On December 30, 2015, El Sabor Latino, LLC ("Plaintiff") filed a complaint against Defendant, seeking nondischargeability of the debt owed to it under 11 U.S.C. §§ 523 (a)(2)(A) and (a)(6).

On August 30, 2016, Plaintiff filed a second amended complaint (the "SAC") [doc. 31]. The SAC makes the following allegations:

In May and June 2014, Defendant and La Chiquita Corp. ("La Chiquita"), by way of Defendant, promised Plaintiff they would sell to Plaintiff an existing restaurant (the "Restaurant") with all its supplies and equipment in exchange for installment payments totaling \$30,000. In addition, Defendant and La Chiquita, by way of Defendant, represented that in exchange for Plaintiff's payment of \$12,000, Defendant would execute a written lease on behalf of La Chiquita allowing for five years of operation of the Restaurant.

Based on Defendant's representations, Plaintiff made payments, took possession of the Restaurant, hired employees, purchased supplies and

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delivered rent to Defendant. However, Defendant purposely failed to inform Plaintiff that Defendant and La Chiquita had not obtained the landlord's permission to sublease the Restaurant and did so fraudulently to induce Plaintiff to deliver money to Defendant. Defendant also did not inform Plaintiff that Defendant and La Chiquita were behind on rent. Defendant thereafter refused to return Plaintiff's money to Plaintiff.

In September 2014, Defendant claimed that he and La Chiquita were owed money and unlawfully changed locks and denied Plaintiff's employees access to the Restaurant. Defendant also told Plaintiff's employees that the Restaurant was no longer Plaintiff's business. As a result, Plaintiff had no access to its supplies and equipment and Plaintiff's employees quit. In addition, Plaintiff had purchased large amounts of food and meat products, which Plaintiff could not sell despite Plaintiff's best efforts. Defendant has not returned Plaintiff's supplies and equipment and has instead converted these items to his own use.

On September 30, 2016, Defendant filed a motion to dismiss the SAC (the "Motion") [doc. 34]. In the Motion, Defendant asserts that the SAC does not distinguish between Defendant and La Chiquita, a corporate entity. Defendant contends that to impose liability on Defendant, the SAC must allege that Defendant acted outside the course and scope of his authority as an agent of La Chiquita before liability can exist. Defendant argues that the SAC otherwise fails to adequately state a claim under either 11 U.S.C. §§ 523(a)(2)(A) or (a)(6). As an alternative to dismissal of the SAC, Defendant requests summary judgment in favor of Defendant or a more definite statement pursuant to Federal Rule of Civil Procedure ("Rule") 12(e). Plaintiff opposed the Motion [doc. 37].

II. LEGAL STANDARDS

A. General Rule 12(b)(6) Standard

A motion to dismiss [pursuant to Rule 12(b)(6)] will only be granted if the complaint fails to allege enough facts to state a claim to relief that

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is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully.

We accept factual allegations in the complaint as true and construe the pleadings in the light most favorable to the non-moving party.

Although factual allegations are taken as true, we do not assume the truth of legal conclusions merely because they are cast in the form of factual allegations. Therefore, conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss.

Fayer v. Vaughn, 649 F.3d 1061, 1064 (9th Cir. 2011) (internal quotation marks omitted); citing, *inter alia*, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 547, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007); and *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009)).

In evaluating a Rule 12(b)(6) motion, review is "limited to the contents of the complaint." *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754 (9th Cir. 1994). However, without converting the motion to one for summary judgment, exhibits attached to the complaint, as well as matters of public record, may be considered in determining whether dismissal is proper. *See Parks School of Business, Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995); *Mack v. South Bay Beer Distributors, Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986). Further, a court may consider evidence "on which the complaint necessarily relies if: (1) the complaint refers to the document; (2) the document is central to the plaintiff's claim; and (3) no party questions the authenticity of the copy attached to the [Rule] 12(b)(6) motion." *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006) (internal quotation marks omitted). "The court may treat such a document as part of the complaint, and thus may assume that its contents are true for purposes of a motion to dismiss under Rule 12(b)(6)." *Id.* (internal quotation marks omitted).

Pursuant to Rule 9(b), "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent,

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knowledge, and other conditions of a person's mind may be alleged generally." Allegations must be "specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged...." *Neubronner v. Milken*, 6 F.3d 666, 671 (9th Cir. 1993). "[M]ere conclusory allegations of fraud are insufficient." *Moore v. Kayport Package Exp., Inc.*, 885 F.2d 531, 540 (9th Cir. 1989).

Dismissal without leave to amend is appropriate when the court is satisfied that the deficiencies in the complaint could not possibly be cured by amendment. *Jackson v. Carey*, 353 F.3d 750, 758 (9th Cir. 2003); *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000).

B. 11 U.S.C. § 523(a)(2)(A)

Pursuant to 11 U.S.C. § 523(a)(2)(A), a bankruptcy discharge does not discharge an individual debtor from any debt "for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by – false pretenses, a false representation, or actual fraud, other than a statement respecting a debtor's or an insider's financial condition."

To prevail on a § 523(a)(2)(A) claim, the plaintiff must allege the following five elements:

- (1) misrepresentation, fraudulent omission or deceptive conduct by the debtor;
- (2) knowledge of the falsity or deceptiveness of his statement or conduct;
- (3) an intent to deceive;
- (4) justifiable reliance by the creditor on the debtor's statement or conduct; and
- (5) damage to the creditor proximately caused by its reliance on the debtor's statement or conduct

In re Weinberg, 410 B.R. 19, 35 (B.A.P. 9th Cir. 2009) (citing *In re Slyman*, 234 F.3d 1081, 1085 (9th Cir. 2000)).

I. Misrepresentations with Knowledge of Falsity and Intent to Deceive

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Representations made without an intent to perform satisfy the first three requirements of § 523(a)(2)(A). *In re Rubin*, 875 F.2d 755, 759 (9th Cir. 1989). A promise can also be considered fraudulent when the promisor knew or should have known of his inability to perform. *In re Barrack*, 217 B.R. 598, 606 (B.A.P. 9th Cir. 1998). A promise to perform in the future is not a false representation or false pretense unless the debtor did not have an intent to perform at the time he made the representation. *Matter of Bercier*, 934 F.2d 689, 691-92 (5th Cir. 1991) ("A mere promise to be executed in the future is not sufficient to make a debt nondischargeable, even though there is no excuse for the subsequent breach.") (citations omitted).

2. *Justifiable Reliance*

To satisfy the reliance requirement of § 523(a)(2)(A), a plaintiff must show "justifiable" reliance, not "reasonable reliance." *Field v. Mans*, 516 U.S. 59, 74-75 (1995). Justifiable reliance takes into account the "qualities and characteristics of the particular plaintiff, and the circumstances of the particular case, rather than of the application of a community standard of conduct to all cases." *Id.* at 71.

3. *Proximate Causation/Damages*

Section 523(a)(2)(A) requires that the damage to the creditor be proximately caused by the debtor's fraud. *In re Sabban*, 600 F.3d 1219, 1223 (9th Cir. 2010) (explaining that the debtor will not receive a discharge of debts "resulting from" or "traceable" to fraud). "Further, as the Supreme Court explained in *Field*, a court may turn to the Restatement (Second) of Torts (1976), 'the most widely accepted distillation of the common law of torts,' for guidance on this issue." *In re Russell*, 203 B.R. 303, 313 (Bankr. S.D. Cal. 1996) (citing to *Field*, 516 U.S. at 70).

"Turning to the Restatement, proximate cause entails (1) causation in fact, which requires a defendant's misrepresentations to be a 'substantial factor in determining the course of conduct that results in [the plaintiff's] loss,' § 546; and (2) legal causation, which requires the plaintiff's loss to have been 'reasonably expected to result from the reliance,' § 548A. In determining the presence of proximate cause, however, courts must refrain from relying on speculation to determine whether and to what extent a creditor would have suffered a loss absent fraud. *Id.* (citing to *In re Siriani*, 967 F.2d 302, 306 (9th Cir. 1992)).

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C. *11 U.S.C. § 523(a)(6)*

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11 U.S.C. § 523(a)(6) states that a discharge under 11 U.S.C. § 727 does not discharge an individual debtor from any debt "for willful and malicious injury by the debtor to another entity or to the property of another entity."

1. Willfulness

Demonstrating willfulness requires a showing that defendant intended to cause the injury, *not* merely the acts leading to the injury. *Kawaauhau v. Geiger*, 523 U.S. 57, 61–62, 118 S.Ct. 974, 977 (1998). Thus, debts "arising from recklessly or negligently inflicted injuries do not fall within the compass of § 523(a)(6)." *Id.*, 523 U.S. at 64, 118 S.Ct. at 978. It suffices, however, if the debtor knew that harm to the creditor was "substantially certain." *In re Su*, 290 F.3d 1140, 1145-46 (9th Cir. 2002); *In re Jercich*, 238 F.3d 1202, 1208 (9th Cir. 2001) ("the willful injury requirement of § 523 (a)(6) is met when it is shown either that debtor had *subjective* motive to inflict injury *or* that the debtor believed that injury was substantially certain to occur as a result of his conduct")(emphasis in original).

2. Maliciousness

Under § 523(a)(6), the injury must *also* be the result of maliciousness. *Su*, 290 F.3d at 1146. Maliciousness requires (1) a wrongful act; (2) done intentionally; (3) which necessarily causes injury; (4) without just cause or excuse. *Id.* at 1147. Maliciousness does not require "personal hatred, spite, or will-will." *In re Bammer*, 131 F.3d 788, 791 (9th Cir. 1997).

D. Rule 12(e)

Rule 12(e) states in relevant part that "[a] party may move for a more definite statement of a pleading . . . which is so vague or ambiguous that the party cannot reasonably prepare a response. The motion must be made before filing a responsive pleading and must point out the defects complained of and the details desired."

A court may grant a Rule 12(e) motion when the pleading is "so vague or ambiguous that the opposing party cannot respond, even with a simple denial, in good faith or without prejudice to himself." *Hicks v. Arthur*, 843 F.Supp. 949, 959 (E.D. Pa. 1994)

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(quoting 5A Charles A. Wright and Arthur R. Miller, *Federal Practice & Procedure, Civil 2d*, § 1376 (1990)). "[Rule 12(e)] is concerned with defects in the complaint . . . Any inconsistency with other papers or lack of detail can be explored during the pretrial discovery phase of the litigation." *Stanton v. Manufacturers Hanover Trust Co.*, 388 F.Supp. 1171, 1174 (S.D.N.Y. 1975).

"Rule 12(e) is designed to strike at unintelligibility rather than want of detail." *Resolution Trust Corp. v. Dean*, 854 F.Supp. 626, 649 (D. Ariz. 1994); *Cox v. Maine Maritime Academy*, 122 F.R.D. 115, 116 (D. Me. 1988); *Woods v. Reno Commodities, Inc.*, 600 F.Supp. 574 (D.Nev. 1984). "Therefore, a rule 12(e) motion properly is granted only when a party is unable to determine the issues he must meet." *Cox*, 122 F.R.D. at 116 (citing *Innovative Digital Equipment*, 597 F.Supp. 983, 989 (N.D. Oh. 1984); and *Usery v. Local 886, International Brotherhood of Teamsters*, 72 F.R.D. 581, 582 (W.D.Okla. 1976)).

III. DISCUSSION

A. *Defendant's Agency Defense*

Defendant maintains that because the alleged violations of 11 U.S.C. §§ 523(a)(2)(A) and (a)(6) took place while Defendant was acting as an agent for La Chiquita within the scope of such agency, liability cannot be imputed onto Defendant. Specifically, Defendant contends that there are no facts supporting the "claim of fraud or misrepresentation by the individual outside the court and scope of his authority granted as an officer." Motion, at 4, ¶ 7-9. However, Defendant cites no authority in the Motion regarding agency law. Further, he does not defend his implied assertion that an agent is not responsible for torts committed on behalf of a principal, other than asserting that there are "no facts" to show how Defendant acted individually rather than on behalf of La Chiquita. *Id.* ¶ 10-12. To summarize Defendant's argument, so long as Defendant defrauded and intentionally and maliciously injured Plaintiff within the scope of his agency relationship with La Chiquita, he cannot be held liable for those torts.

To the contrary, under California law, "[a]n agent or employee is always liable for his or her own torts, whether the principal is liable or not, and in spite of the fact that the agent acts in accordance with the principal's directions. Similarly, an agent who

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commits an independent tort, such as fraud, remains liable despite the fact that the principal, by ratification, also becomes liable." *Bock v. Hansen*, 225 Cal.App.4th 215, 230 (2014), *review denied* (July 16, 2014); *see also Holt v. Booth*, 1 Cal.App.4th 1074, 1080, fn. 5, (1991); *Mottola v. R.L. Kautz & Co.*, 199 Cal.App.3d 98, 108 (1988); *Bayuk v. Edson* 236 Cal.App.2d 309, 320 (1965); *accord Michaelis v. Benavides*, 61 Cal.App.4th 681, 686 (1998); *Crawford v. Nastos* 182 Cal.App.2d 659, 664–665 (1960).

The allegations in the SAC sufficiently detail conduct by Defendant. That Defendant was, at times, acting on behalf of La Chiquita does not provide him immunity from Plaintiff's claims under Defendant's agency theory.

B. Sufficiency of Plaintiff's § 523(a)(2)(A) Claim

Plaintiff sufficiently stated a claim under § 523(a)(2)(A). In the SAC, Plaintiff alleged that Defendant made misrepresentations (or material omissions) [doc. 31, ¶¶ 5, 6, 9, 10]; that Defendant knew his representations were false/his statements or conduct was deceptive [doc. 31, ¶¶ 9, 22]; that Defendant had intent to deceive [doc. 31, ¶¶ 9, 22]; that Plaintiff justifiably relied on those representations [doc. 31, ¶¶ 7, 8, 19]; and that Plaintiff suffered damages as a result [doc. 31, ¶¶ 7, 8, 11, 12, 13, 14, 15, 16]. Consequently, the Court will not dismiss Plaintiff's claim under § 523(a)(2)(A).

C. Sufficiency of Plaintiff's § 523(a)(6) Claim

In order to state a claim under § 523(a)(6), the injury must be willful *and* malicious. The SAC fails to adequately plead willfulness, except in paragraph ¶ 26, which states in relevant part "[Defendant's] above-described conduct was willful and malicious, and intended to and did cause damage to Plaintiff..." [Doc. 31, ¶ 26]. "[C]onclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss." *Fayer*, 649 F.3d at 1064.

Absent adequate allegations of Defendant's subjective intent to cause injury, or allegations tending to show that Defendant was substantially certain that Plaintiff would be injured as a result of Defendant's actions, Plaintiff cannot state a claim for relief under 11 U.S.C. § 523(a)(6). As such, the Court will dismiss Plaintiff's § 523(a)(6) claim with leave to amend.

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D. Defendant's Request for Summary Judgment

"A motion to dismiss made under Rule 12(b)(6) must be treated as a motion for summary judgment under Rule 56 if either party to the motion to dismiss submits materials outside the pleadings in support or opposition to the motion, *and if the district court relies on those materials.*" *Anderson v. Angelone*, 86 F.3d 932, 934 (9th Cir. 1996) (emphasis added).

The Court cannot rely on Defendant's declaration or the exhibits attached thereto. The exhibits attached to Defendant's declaration are not probative of the dischargeability of the debt at issue. Further, the Court cannot make a determination as to Defendant's credibility at this time and will not rely on Defendant's declaration. Therefore, Plaintiff's objection is moot.

E. Rule 12(e)

In the Motion, Defendant requested that if Plaintiff is granted leave to amend, the Court require it to provide a more definite statement and more evidence, pursuant to Rule 12(e). Defendant specifically mentions that the Court should require Plaintiff to provide "the missing details and evidence. . . ." Motion, [doc. 34] at 11, ¶ 10-11.

However, the purpose of rule 12(e) is not concerned with lack of detail, but rather unintelligibility. Rule 12 (e), *supra*. Defendant does not contend that the SAC is unintelligible and the Court does not find that the SAC is "so vague or ambiguous" as to prohibit Defendant from filing a response.

IV. RECOMMENDATION

The Court will dismiss Plaintiff's § 523(a)(6) claim with leave to amend. The Court will not dismiss Plaintiff's claim under § 523(a)(2)(A).

Defendant must submit an order within seven (7) days. If Plaintiff elects to file an amended complaint, it must file and serve an amended complaint no later than **14 days** from the date of this hearing. Any response to an amended complaint must be filed and served no later than **14 days** from the date of the filing of an amended

**United States Bankruptcy Court
Central District of California
San Fernando Valley
Judge Victoria Kaufman, Presiding
Courtroom 301 Calendar**

Wednesday, November 16, 2016

Hearing Room 301

2:30 PM

CONT... Carlos Maximiliano Linqui

Chapter 7

complaint. Should Plaintiff elect to proceed with the SAC, Defendant must file an answer or other appropriate response within **21 days** of this hearing.

Party Information

Debtor(s):

Carlos Maximiliano Linqui

Represented By
Kevin T Simon

Defendant(s):

Carlos Maximiliano Linqui

Represented By
Kevin T Simon

Plaintiff(s):

El Sabor Latino

Represented By
Scott E Shapiro Esq

Trustee(s):

Amy L Goldman (TR)

Pro Se

**United States Bankruptcy Court
Central District of California
San Fernando Valley
Judge Victoria Kaufman, Presiding
Courtroom 301 Calendar**

Wednesday, November 16, 2016

Hearing Room 301

2:30 PM

1:15-12754 Carlos Maximiliano Linqui

Chapter 13

Adv#: 1:15-01264 El Sabor Latino v. Linqui

#19.00 Status conference re second amended complaint :
1) for determination of non-dischargeability of debt
(11 U.S.C. sec 523(a)(2)); and
2) for determination of non-dischargeability of debt
(11 U.S.C. sec 523(a)(6))

fr. 3/9/16; 5/11/16; 7/20/16; 9/7/16(stip); 11/9/16(stip)

Docket 31

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Carlos Maximiliano Linqui

Represented By
Kevin T Simon

Defendant(s):

Carlos Maximiliano Linqui

Pro Se

Plaintiff(s):

El Sabor Latino

Represented By
Scott E Shapiro Esq

Trustee(s):

Elizabeth (SV) F Rojas (TR)

Pro Se

Elizabeth (SV) F Rojas (TR)

Pro Se

US Trustee(s):

United States Trustee (SV)

Pro Se