

**United States Bankruptcy Court  
Central District of California  
Santa Ana  
Theodor Albert, Presiding  
Courtroom 5B Calendar**

**Thursday, January 4, 2024**

**Hearing Room**

**5B**

10:00 AM

**8:00-000000**

**Chapter**

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**ZoomGov meeting number:** 161 709 9321

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completed your appearance(s).

Docket 0

**Tentative Ruling:**

- NONE LISTED -

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**8:22-11686 Triet Minh Dinh**

**Chapter 7**

Adv#: 8:23-01052 Platte River Insurance Company v. Shah et al

**#1.00 STATUS CONFERENCE RE: Complaint For Interpleader  
(cont'd from 8-31-23)  
(cont'd from 11-02-23 per court's own mtn)  
(cont'd from 11-09-23 per another summons issued on 10-12-23)**

Docket 1

**Tentative Ruling:**

Tentative for January 4, 2024

It would seem that Plaintiff intends to dismiss and refile in state court over the question of whether the bond at issue (in name of" DT Builders"?) really belongs to debtor's estate. If not (which appears likely) the court concurs that Superior Court is the better forum unless dischargeability is also at issue, which still might not be the deciding factor as dischargeability could be determined via collateral estoppel provided careful findings are achieved. Also, there is a question of service on Shaw parties. When will the Plaintiff decide these questions? Continue?

*Appearance required.*

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Tentative for August 31, 2023

When are we likely to know whether there will be a contest over interplead funds? Perhaps a continuance of this status conference for about 60 days may serve well, in case deadlines will be needed.

Appearance required.

<b>Party Information</b>
--------------------------

**Debtor(s):**

Triet Minh Dinh

Represented By

Andrew Edward Smyth

**Defendant(s):**

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**CONT... Triet Minh Dinh**

**Chapter 7**

Kirit Shah	Pro Se
Sonal Shah	Pro Se
G & L Seafood Inc.	Pro Se
T&T Excavating Inc.	Pro Se
Triet Minh Dinh	Pro Se

**Plaintiff(s):**

Platte River Insurance Company	Represented By Kirsten A Worley
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**Trustee(s):**

Karen S Naylor (TR)	Pro Se
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**8:23-10805    Babak Kazemi Shirazi**

**Chapter 7**

Adv#: 8:23-01109      Jafari v. Kazemi Shirazi

**#2.00    STATUS CONFERENCE RE: Adversary Complaint for Objection to Discharge  
Pursuant to 11 USC Section 523(a)(2)(A)**

Docket      1

**\*\*\* VACATED \*\*\*    REASON: CONTINUED TO 2-29-24 AT 10:00 A.M.  
PER ANOTHER SUMMONS ISSUED ON 11-30-23**

**Tentative Ruling:**

- NONE LISTED -

<b>Party Information</b>
--------------------------

**Debtor(s):**

Babak Kazemi Shirazi

Represented By  
Charles Shamash  
Joseph E. Caceres

**Defendant(s):**

Babak Kazemi Shirazi

Pro Se

**Plaintiff(s):**

Seyed Jafar Jafari

Represented By  
Nicholas S Nassif

**Trustee(s):**

Weneta M.A. Kosmala (TR)

Pro Se

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**8:23-11421 Juan Manuel Bernal**

**Chapter 11**

Adv#: 8:23-01112 Ginadan Venture 2, LLC v. Bernal

**#3.00 STATUS CONFERENCE RE:Complaint to Determine Dischargeability of Debt  
[11 USC Section 523(a)(2)(A), (4), and (6)]**

Docket 1

**Tentative Ruling:**

Tentative of January 4, 2024

The deadline for completing discovery is May 1, 2024.

The last date for filing pre-trial motions is May 24, 2024.

The pre-trial conference is on June 13, 2024 at 10:00 a.m.

The joint pre-trial stipulation and/or order due per local rules.

Refer to mediation. Order appointing mediator to be lodged by plaintiff within ten days.

One day of mediation to be completed by April 1, 2024.

*Appearance required.*

<b>Party Information</b>
--------------------------

**Debtor(s):**

Juan Manuel Bernal

Represented By  
Robert P Goe  
Reem J Bello

**Defendant(s):**

Juan Manuel Bernal

Pro Se

**Plaintiff(s):**

Ginadan Venture 2, LLC

Represented By  
Matthew D. Resnik

**Trustee(s):**

Arturo Cisneros (TR)

Represented By  
Arturo Cisneros

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**8:23-10028 Young Yol Byeon**

**Chapter 13**

Adv#: 8:23-01113 OH v. Bank of New York Mellon Corporation et al

**#4.00 STATUS CONFERENCE RE: Verified Complaint (1) For Declaratory Relief; (2)  
To Vacate Orders For Confirmation And Dismissal For Fraud Upon The Court**

Docket 2

**Tentative Ruling:**

Tentative for January 4, 2024

Status of service/default on all defendants? Continue until after dismissal  
motions, about 60 days. *Appearance required.*

<b>Party Information</b>
--------------------------

**Debtor(s):**

Young Yol Byeon

Represented By  
Rex Tran

**Defendant(s):**

Bank of New York Mellon	Pro Se
BAYVIEW LOAN SERVICING,	Pro Se
MTC Financial, Inc	Pro Se
Auction.Com, Inc.	Pro Se
McCalla Raymer Leibert Pierce,	Pro Se
Wright, Finlay & Zak, LLP	Pro Se
Klinedinst, PC	Pro Se
Locke Lord LLP	Pro Se
NewRez LLC	Pro Se
Dane Exnowski	Pro Se



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**CONT... Young Yol Byeon**

**Chapter 13**

**Plaintiff(s):**

MYONG Suk OH

Represented By  
Yi Y Oh

**Trustee(s):**

Amrane (SA) Cohen (TR)

Pro Se

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**8:23-11393 Gregory P. Sorensen**

**Chapter 13**

Adv#: 8:23-01115 Roley et al v. Sorensen et al

**#5.00 STATUS CONFERENCE RE: Complaint To Determine Nondischargeability Of  
Debt Pursuant To 11 USC Section 523**

Docket 1

**Tentative Ruling:**

Tentative of January 4, 2024

If dischargeability is not in question but only specific performance, the court would likely abstain. Can the parties so stipulate? The trustee should attend the conference. *Appearance required.*

<b>Party Information</b>
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**Debtor(s):**

Gregory P. Sorensen

Represented By  
Christopher J Langley

**Defendant(s):**

Gregory P Sorensen

Pro Se

Leah K. Kingston

Pro Se

**Joint Debtor(s):**

Leah K. Kingston

Represented By  
Christopher J Langley

**Plaintiff(s):**

Jordan van Durme

Represented By  
Michael A Wallin

Aja Roley

Represented By  
Michael A Wallin

**Trustee(s):**

Amrane (SA) Cohen (TR)

Pro Se

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**Gregory P. Sorensen**

**Chapter 13**

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**8:13-14887 Bret A Percival**

**Chapter 7**

Adv#: 8:23-01027 Kelly v. Percival

**#6.00** PRE-TRIAL CONFERENCE RE: Complaint To Determine Dischargeability Of Debt Under 11 USC Section 523(a)(2)(A), 523(a)(2)(B), 523(a)(4), and 523 (a) (6), Pursuant To Section 523(a)(3)(B)  
**(set from s/c hrg held on 6-29-23)**

Docket 1

**\*\*\* VACATED \*\*\* REASON: CONTINUED TO 2-29-24 AT 10:00 A.M.  
PER ORDER CONTINUING PRETRIAL CONFERENCE DATE  
ENTERED 12-28-23**

**Tentative Ruling:**

Tentative for 6/29/23:

Deadline for completing discovery: Nov. 1, 2023

Last date for filing pre-trial motions: Nov. 20, 2023

Pre-trial conference on: Dec. 7, 2023

Joint pre-trial stipulation and/or order due per local rules.

Appearance: required

<b>Party Information</b>
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**Debtor(s):**

Bret A Percival

Pro Se

**Defendant(s):**

Bret A Percival

Pro Se

**Plaintiff(s):**

Gregory Kelly

Pro Se

**Trustee(s):**

CASE REOP/CONV/OR CLOSED

Pro Se

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**8:18-10486 Ron S Arad**

**Chapter 7**

Adv#: 8:23-01108 Kosmala v. Brownstein et al

**#7.00** STATUS CONFERENCE RE: Complaint For: (1) Legal Malpractice (Professional Negligence), (2) Breach Of Fiduciary Duty; (3) Breach Of Contract; (4) Actual Fraud; (5) Constructive Fraud; (6) Conversion; (7) Unjust Enrichment; (8) Breach Of The Implied Covenant Of Good Faith And Fair Dealing  
**(cont'd from 12-14-23 per order approving stip. to cont. s/c entered 12-13-23)**

Docket 1

**Tentative Ruling:**

Tentative for January 4, 2024  
The deadline for completing discovery is May 1, 2024.  
The last date for filing pre-trial motions is May 24, 2024.  
The pre-trial conference is on June 6, 2024 at 10:00 a.m.  
Joint pre-trial stipulation and/or order due per local rules.  
*Appearance required.*

<b>Party Information</b>
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**Debtor(s):**

Ron S Arad

Represented By  
G Bryan Brannan

**Defendant(s):**

William H Brownstein

Pro Se

G Bryan Brannan

Pro Se

William H Brownstein & Associates,

Pro Se

Brannan Law Offices

Pro Se

**Plaintiff(s):**

Weneta M A Kosmala

Represented By  
Jeffrey I Golden

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**Trustee(s):**

Weneta M.A. Kosmala (TR)

Represented By  
Ryan W Beall  
Jeffrey I Golden

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**8:18-10486 Ron S Arad**

**Chapter 7**

Adv#: 8:23-01108 Kosmala v. Brownstein et al

**#8.00** Defendant's Motion To Dismiss Under FRBP 7012 And FRCP Rule 12(b)(6) And FRBP Rule 7009(b) And FCCP 9(b) Or, In The Alternative, For A More Definite Statement

Docket 16

**Tentative Ruling:**

Tentative for January 4, 2024

**A. Background Facts**

This is Defendants Brannan Law Offices and G. Bryan Brannan's (collectively "Brannan") Rule 12(b) motion to dismiss the Chapter 7 Trustee Weneta Kosmala's ("Trustee") adversary proceeding, or in the alternative, seek a more definite statement.

On January 31, 2018, Debtor Ron S. Arad ("Debtor") entered into an engagement agreement outlining the scope of representation of counsel for his initial chapter 11 bankruptcy case ("Engagement Agreement"). Although the Engagement Agreement was not signed by Brannan, he/it was listed as counsel alongside William H. Brownstein & Associates, a Professional Corporation ("Brownstein"). Specifically, the initial paragraph of the Engagement Agreement states that "William H. Brownstein & Associates, Professional Corporation *and* G. Bryan Brannan of Brannan Law Offices (the "Firm"), have agreed to represent you (the "Client") as counsel in providing consultation and providing bankruptcy and insolvency planning and representation in a case under Chapter 11 of the Bankruptcy Code."

On March 7, 2018, Brownstein filed a Motion to Employ General Bankruptcy Counsel, which allegedly lists both William H. Brownstein and G. Bryan Brannon. Brannon also allegedly began filing documents on behalf of the Debtor starting April 3, 2018. There is dispute as to whether Brannan worked on behalf of Brownstein, essentially as an employee, or instead as separate counsel to Debtor. Brannan contends that the controlling document that defines "Firm" should be the Motion to Employ which authorizes G. Bryan

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Brannon to work as an employee of Brownstein. Trustee's position is that Brannon was a separate party to the Engagement Agreement and acted as direct counsel to Debtor. This nuance is significant because Brannon may not have owed the same range of duties to Debtor as did Brownstein, but even that legal conclusion is somewhat murky.

Debtor filed schedules listing an interest in the following properties: 27850 Aleutia Way, Yorba Linda, CA 92887 ("Yorba Linda Property") and 841 N. Orange, La Habra, CA 90631 ("La Habra Property"). The La Habra Property was sold pursuant to a partial summary judgment entered on July 18, 2018, which required proceeds from the sale to be placed into a blocked and frozen account pending determination of ownership interests ("DIP Account").

**1. La Habra Property**

The summary judgment of a former adversary proceeding determined that the IRS held a 1/3 interest in the proceeds of the sale of the La Habra Property and directed the Trustee to disburse \$209,612.46 to the IRS within 14 days of the entry of the order. As of November 15, 2019, the total amounts deposited in the DIP Account were \$744,281.74. As of that date, the Debtor had an interest in \$251,075.77 of the \$744,281.74 deposited into the DIP Account. However, Debtor made disbursements on behalf of, or to the benefit of the chapter 11 estate from the DIP Account in the total amount of \$449,391.44. Thus, Debtor made disbursements in the amount of *\$198,315.48 more than the chapter 11 estate's interest.*

On September 24, 2018, the court entered an order allowing payment of interim fees and/or expenses in the amount of \$175,000, which apparently should not have occurred given the above over disbursement amount. However, the firm, which allegedly includes Brownstein and Brannon, claimed that it has a 90% interest in the La Habra Property sale proceeds and that there remains \$319,311.56 from the sale of the La Habra Property that is undisputed. The actual amount in dispute from the sale was at least 2/3 proceeds, or \$493,205.97. Thus, the true amount that was not in dispute was only \$246,602.69.

**2. Yorba Linda Property**



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The Yorba Linda Property was sold on September 27, 2019 and on November 21, 2019, \$679,824.03 in sale proceeds were deposited into the DIP Account. The chapter 11 estate had an interest in 75% of the sales proceeds, or \$509,868.02. The court entered an order authorizing payment of interim fees and expenses in the amount of \$643,597.70 and \$15,652.37 in expenses. The 2020 fee application states that Debtor holds \$675,000 that are able to be paid to fees when Debtor actually did not hold that amount. The maximum amount of funds in the account that were undisputed, unencumbered, and available to be paid to Brannon and Brownstein was only \$309,052.54.

**3. Conversion of the Case to Chapter 7**

On February 10, 2022, the bankruptcy case was converted to chapter 7. Trustee obtained turnover of \$423,842.24 from the DIP Account and \$43.62 from remaining escrow proceeds for sale of property. After disbursement to the IRS pursuant to the summary judgment, and payment of bank fees, the Trustee currently holds approximately \$213,841.03.

**B. Legal Standard**

When considering a motion under FRCP 12(b)(6), a court takes all the allegations of material fact as true and construes them in the light most favorable to the nonmoving party. *Parks School of Business v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995). A complaint should not be dismissed unless a plaintiff could prove no set of facts in support of his claim that would entitle him to relief. *Id.* Motions to dismiss are viewed with disfavor in the federal courts because of the basic precept that the primary objective of the law is to obtain a determination of the merits of a claim. *Rennie & Laughlin, Inc. v. Chrysler Corporation*, 242 F.2d 208, 213 (9th Cir. 1957).

"While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 554-556 (2007). A complaint must contain sufficient factual matter to state a claim to relief that is plausible on its face. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) citing *Twombly*. A claim has facial plausibility when the plaintiff pleads factual content that

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allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.* The plausibility standard asks for more than a sheer possibility that a defendant has acted unlawfully. *Id.* The tenet that a court must accept as true all factual allegations is not applicable to legal conclusions. *Id.*

**C. Brannan's Relationship with Debtor**

A significant issue disputed in these pleadings is the exclusivity of Brannan's representation of Debtor. Trustee's position is that Brannan and Brownstein were each parties to the Engagement Agreement and equally (and severally) represented Debtor as counsel. Brannan argues that while it was involved in the representation of Debtor, it was not in privity of contract with Debtor, but functioned as an employee under Brownstein. Thus, Brannan allegedly does not owe the same duties that Brownstein does and should not be held liable for the causes of action alleged. Why exactly that conclusion pertains is not made clear.

While this is an intriguing issue mixing law and fact, that the court expects will be further investigated, this is not the occasion to make this determination. The standard for a Rule 12(b)(6) motion to dismiss requires the court to take all allegations of material fact as true and construe them in the light most favorable to the nonmoving party (Trustee). See *Parks*, 51 F. 2d at 1484. At this point, the court is obliged to accept as true the factual allegations asserted in Trustee's complaint. Thus, for the purposes of this motion, the court will evaluate the pleadings and the sufficiency of the complaint under the assumption that Brannan represented Debtor as separate counsel from Brownstein.

**D. Motion to Dismiss**

**1. Count 1- Legal Malpractice**

Brannan contends that Count 1 contains only conclusory allegations of Legal Malpractice and lacks sufficient specificity as to the alleged acts of malpractice or cost to the bankruptcy estate. To prove a cause of action for professional negligence or legal malpractice, plaintiff must show (1) the duty of the attorney to use such skill, prudence, and diligence as members of his or her profession commonly possess and exercise;" (2) breach; (3) causation;

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and (4) damage. *Martorana v. Marlin & Saltzman*, 175 Cal.App.4th 685, 693, 96 Cal.Rptr.3d 172 (2009).

Trustee asserts that a duty existed because Brannon represented Debtor in numerous ways during the chapter 11 bankruptcy. First, Debtor was allegedly a party to the Engagement Agreement. Further, the retainer payment was allegedly paid to Mr. Brannon's Client Trust Account. The Motion to Employ also sought to employ both Brannon and Brownstein, although Mr. Brannon contends that he was included as an employee of Brownstein. Finally, Trustee alleges that Brannon began filing documents on behalf of Debtor beginning April 3, 2018. It is for these reasons that Trustee argues that Brannon had a duty as an attorney to Debtor. This duty was allegedly breached when Brannon and Brownstein were paid over \$640,000, yet the chapter 11 case was forced to be converted to chapter 7 with existing problems carrying over. It was also breached through the alleged misrepresentations to the court in the two fee applications, that Brannon provided a declaration supporting that funds were available to be distributed. These misrepresentation have damaged Debtor and the estate because Trustee did not hold sufficient funds to pay the entities that had an interest in the sales proceeds from the La Habra and Yorba Linda Properties. When taking these factual allegations as true and in the light most favorable to Trustee, the court finds that Trustee has adequately stated a plausible claim under *Iqbal* and *Twombly*.

**2. Count 2 – Breach of Fiduciary Duty**

The elements of a cause of action for breach of fiduciary duty are "the existence of a fiduciary relationship, its breach, and damage proximately caused by that breach." *Knox v. Dean*, 205 Cal.App.4th 417 (Ct. App. 2012); *Neel v. Magana, Olney, Levy, Cathcart & Gelfand*, 6 Cal.3d 176 (1971) ("The relation between attorney and client is a fiduciary relation of the very highest character.")

Here, for the same reasons stated above, Trustee alleges that Brannon represented Debtor as counsel, creating the fiduciary relationship. There was a breach of this fiduciary duty due to the misrepresentations by the firm, which allegedly includes Brannon, regarding the amount of funds available to be distributed to the firm. Trustee contends that Brannon was

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involved in the misrepresentations made in the fee applications because he provided a declaration in support of the reply for one of the fee applications. This resulted in damage to Debtor and the estate because there was a deficiency in funds intended to be distributed to creditors who had an interest in the sales proceeds of the two properties. Based on these allegations asserted by Trustee, the court agrees that sufficient facts were pled to adequately state a claim.

**3. Count 3 – Breach of Contract**

To prove a cause of action for breach of contract, plaintiff "must prove (1) the contract, (2) the plaintiff's performance of the contract or excuse for nonperformance, (3) the defendant's breach, and (4) the resulting damage to the plaintiff." *Richman v. Hartley*, 224 Cal.App.4th 1182 (Ct. App. 2014).

The Firm is defined as both Brownstein and Brannan in the Engagement Agreement. Even though Brannan apparently did not sign, there is clear intent to enter into the Engagement Agreement. Debtor performed under the Engagement Agreement. Brannan's breach, alongside Brownstein's, is the sale proceeds of the two properties improperly paid to the Firm based on the Firm's misrepresentations to the court, Debtor, and creditors as to the amount that was undisputed and available to be paid. The breach led to the damage to the Debtor and the estate in that there is a deficiency of funds available to be paid to the interested creditors. While it would have been clearer for Brannan to have been a signatory to the Engagement Agreement, the court agrees with Trustee that the terms and the language used indicate assent to represent Debtor. Whether Brannan was intended to work only as an employee or separate counsel is not of concern for this motion. Taking Trustee's allegations as true, there is an adequately stated and plausible claim for breach of contract under *Iqbal* and *Twombly*.

**4. Count 6 – Conversion**

The elements of a conversion claim are: "(1) the plaintiff's ownership or right to possession of the property; (2) the defendant's conversion by a wrongful act or disposition of property rights; and (3) damages." *Lee v. Hanley*, 61 Cal.4th 1225 (Ct. App. 2015).

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Here, the proceeds from the sale of the La Habra and the Yorba Linda Properties were supposed to be held in a segregated account pending determination of various interests of entities who assert an interest against the proceeds of the sale. However, because of the alleged misrepresentations of Brownstein and Brannon, those funds were instead paid to them as fees. Since Brownstein and Brannon ended up with hundreds of thousands based upon such alleged misrepresentations, and because such funds should not have yet been paid to Brownstein and Brannon as they were not properly determined property of the estate, Trustee argues that the funds were converted. Trustee specifically alleges that Brannon did participate in the fee application process, as shown by his declaration in the reply of the 2018 fee application. Trustee is currently in the process of determining the amount of Mr. Brannon's involvement in the fee applications. These allegations do show the elements of conversion of funds, but how much Brannon is responsible for is the question that will need to be further investigated moving forward. Nonetheless, Trustee alleges some involvement by Brannon in the representations made in the fee applications. The court finds that there are sufficient facts pled here to adequately assert a claim for conversion.

**5. Count 7 – Unjust Enrichment**

In general, "a person who has been unjustly enriched at the expense of another is required to make restitution to the other." *Unilogic, Inc. v. Burroughs Corp.*, 10 Cal.App.4th 612 (Ct. App. 1992). The amount of unjust enrichment "is typically measured by the defendant's profits flowing from the misappropriation." *Ajaxo Inc. v. E\*Trade Financial Corp.*, 187 Cal.App.4th 1295 (Ct. App. 2010).

Trustee contends that while the full nature and extent of Brannon's involvement is unknown, but he was involved in some capacity in the fee applications, by appearance Brannon's declaration in the reply to the 2018 fee application. As a result of the misrepresentations made in these fee applications, he allegedly obtained hundreds of thousands in funds that were not property of the estate, and unjustly benefited from these funds. It is unclear to what extent Brannon was involved in the fee applications or how much he was paid from the funds distributed to Brownstein. However, based on the previous allegations of Brannon's significant involvement in the overall

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representation of the Debtor, the court is not persuaded that Brannan had nothing to do with any of this. The amount Brannan was unjustly enriched will be determined later, but for the purposes of this motion, the court finds that Trustee has adequately stated a plausible claim for unjust enrichment.

**6. Count 8 - Breach of the Implied Covenant of Good Faith and Fair Dealing**

An implied covenant of good faith and fair dealing arises in every contract. *Comunale v. Trades & General Ins. Co.*, 50 Cal.2d 654 (1958) ("There is an implied covenant of good faith and fair dealing in every contract that neither party will do anything which will injure the right of the other to receive the benefits of the agreement.").

Trustee argues that Brannan and Brownstein breached the implied covenant of good faith and faith dealing because of the misrepresentations made in the fee applications. The result was the conversion of the chapter 11 proceeding, the dissipation of funds, the deficiency in funds to pay creditors which specifically gave rise to claims filed against the Debtor's estate, and the disappearance of funds that should or could have gone to the Debtor. As the alleged attorneys of a client in bankruptcy, there is an implied promise that they act in the benefit of the bankruptcy estate. There was allegedly a failure to do so here based on the factual allegations presented here. Thus, a claim for breach of the implied covenant of good faith and fair dealing survives the motion the dismiss.

**7. Counts 4 & 5 – Actual and Constructive Fraud**

Brannan moves for dismissal of both Count 4 for Actual Fraud and Count 5 for Constructive Fraud on the grounds that Plaintiff has failed to meet the heightened standards required for pleading fraud in the Ninth Circuit. At the pleading stage, FRCP 9(b) requires a party alleging fraud to "state with particularity the circumstances constituting fraud," although "intent... may be alleged generally." In order to satisfy Rule 9(b), "a plaintiff must set forth more than the neutral facts necessary to identify the transaction. . . The plaintiff must set forth what is false or misleading about a statement, and why it is false." *Cooper v. Pickett*, 137 F.3d 616, 625 (9th Cir. 1997) (internal quotation marks omitted).

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To prove actual fraud, a plaintiff must prove the following elements: "(1) a knowingly false representation by the defendant; (2) an intent to deceive or induce reliance; (3) justifiable reliance by the plaintiff; and (4) resulting damages." *Service by Medallion, Inc. v. Clorox Co.*, 44 Cal.App.4th 1807 (Ct. App. 1996).

Here, the false representations made by Brannan and Brownstein are the 2018 and 2020 fee applications relating to amounts available to pay both from undisputed funds of the Debtor's estate held in the DIP Account. Although the level of involvement of Brannan in the fee applications is unclear, Mr. Brannan's declaration in support of a reply to the 2018 fee application indicates some capacity of involvement. Trustee contends that the intent to deceive is present as the misrepresentation was made to allow for the payment to Brownstein and Brannon. The misrepresentation was justifiably relied upon by the court to authorize the fee applications. As a result, Brownstein and Brannon, to some extent, received funds to which they were not entitled, and caused massive deficiency in the estate. The court finds that Trustee has met the heightened standard required to allege fraud, as actual and misrepresented amount available in the DIP Account were specifically stated in sufficient detail.

To prove constructive fraud, plaintiff must show "(1) a fiduciary or confidential relationship; (2) nondisclosure (breach of fiduciary duty); (3) intent to deceive; and (4) reliance and resulting injury." *Younan v. Equifax Inc.*, 111 Cal.App.3d 498 (Ct. App. 1980). However, such cases conflict with the statute that specifically states that no fraudulent intent or intent to deceive is required, and also that this cause of action is not limited to nondisclosure, but also includes information that is disclosed, but misleading. See Cal. Civ. Code § 1573.

Here, as stated above, a confidential relationship existed between Debtor and Brownstein/Brannon arising from the Engagement Agreement and the representation of Debtor in the chapter 11 bankruptcy. The misrepresentation or breach of the fiduciary duty is explained above. It was allegedly made with the intent to receive funds that Brannon was not entitled to, and induced reliance by the court, Debtor, and the creditors to allow payment of these funds. The resulting injury is well-known as the massive



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deficiency to the estate and to the payment of interested creditors of the sale proceeds. For the same reasons stated under actual fraud, the court finds that Trustee adequately stated a claim for both actual and constructive fraud under *Iqbal* and *Twombly*.

**E. More Definite Statement**

Rule 12(e) of the Federal Rules of Civil Procedure, which Brannon misstates in its motion to dismiss as 12(f), provides that a party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response. Brannon requests that if the motion to dismiss is denied, that the court order a more definite statement that includes the factual basis for making the assertion that Brannon is liable for contracts to which it was not party, when it is not disputed that Brannon received from the estate directly and was paid as an employee of Brownstein.

The court acknowledges Brannon's involvement in the case is complex and, in some respects, a bit unclear regarding the claims asserted against him/it. But those nuances turn mostly on facts as they may be discovered; but there is more than sufficient to permit a response. Trustee has stated in some detail the factual background on Brannon's involvement and the reasons for which Brannon could be perceived as counsel and representative to Debtor. The court is open to hearing what exactly is still too vague or ambiguous about the complaint, but requesting a more definite statement does not seem necessary here for reasons stated.

*Deny. Appearance required.*

<b>Party Information</b>
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**Debtor(s):**

Ron S Arad

Represented By  
G Bryan Brannan

**Defendant(s):**

William H Brownstein

Represented By



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G Bryan Brannan

Heather L Rosing  
Brian Patrick Murphy

Represented By  
G Bryan Brannan

William H Brownstein & Associates,

Represented By  
Heather L Rosing  
Brian Patrick Murphy

Brannan Law Offices

Represented By  
G Bryan Brannan

**Plaintiff(s):**

Weneta M A Kosmala

Represented By  
Jeffrey I Golden

**Trustee(s):**

Weneta M.A. Kosmala (TR)

Represented By  
Ryan W Beall  
Jeffrey I Golden

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**8:23-11167 Five Rivers Land Company LLC**

**Chapter 11**

**#9.00 Order To Show Cause Re: Expansion Of Examiner's Powers  
(cont'd from 12-19-23 per order cont. hrg on osc re: expansion of  
examiner's powes and setting hrg thereon entered 12-18-23)**

Docket 0

**Tentative Ruling:**

Tentative for January 4, 2024

So, according to the Examiner's Supplemental Report filed January 2, the proposed financial accommodations and supporting information to be provided by Mr. Nino have not been fully delivered, despite extensions to do so. This is very disappointing. While the Examiner acknowledges some assistance was initially provided by Mr. Nino, it is incomplete and too little too late. His credibility is accordingly severely undermined. The court concurs that there is little reason to continue giving the DIP's management and Mr. Nino benefit of the doubt. Nor is there much reason to have confidence that his management in any capacity would enjoy the sort of confidence from the stakeholders required for a successful reorganization.

The court also notes the lack of any response by the parties in interest to the ultimate question framed in the OSC of whether the Examiner's powers ought to be expanded to undertake essentially all the powers and duties of the DIP. But the Examiner has in meantime acquired valuable expertise, credibility and experience in managing the debtor's operations which might yet profit the parties in interest through a successful reorganization.

Consequently, powers of the Examiner under §1106(b) will be expanded to the maximum allowed by law to include, but are not limited to: 1. all powers of operational management (and concomitantly prohibiting the DIP's exercise of such powers backed by injunction); 2. the power to propose and seek confirmation of a plan of reorganization alongside all other parties in interest ( i.e. any lingering exclusivity is terminated); 3. the power to sell, finance or encumber assets of the estate subject to standard court orders, or to sue or defend litigation on behalf of the estate; 4. the power to hire and fire as

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needed within the ordinary course of business (or beyond that if an order is obtained) and 5. the power to receive and respond to all inquiries and correspondence on behalf of the estate as its official representative and to investigate further regarding assets and liabilities as necessary. For clarification, all powers normally exercisable by a DIP are now vested solely in the Examiner to the maximum allowed by law. The Examiner is also tasked with making the sober evaluation on a continuing basis of whether operations should be expanded or contracted and/or whether a reorganization is still possible or advisable. The court expects that the Examiner will continue to weigh the prospects of success against the mounting administrative costs. The Examiner is requested to file periodic progress reports and to attend hearings on approximately a quarterly basis.

*Appearance required.*

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Tentative for December 19, 2023

Continued to January 4, 2024 at 11:00 a.m. per request of Examiner.  
Appearance waived.

<b>Party Information</b>
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**Debtor(s):**

Five Rivers Land Company LLC

Represented By  
Garrick A Hollander  
Matthew J Stockl  
Richard H Golubow

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**8:23-12759 Knotty Nuff Wood, Inc.**

**Chapter 11**

**#10.00** Debtor's Emergency Motion For Order Establishing Procedures For Providing Adequate Assurance Of Payment To Utility Companies For Post-Petition Services And Prohibiting Alteration, Refusal Or Discontinuance Of Utility Services  
**(OST Signed 1-02-24)**

Docket 9

**Tentative Ruling:**

Tentative for January 4, 2024  
Response due at hearing. Appearance required.

<b>Party Information</b>
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**Debtor(s):**

Knotty Nuff Wood, Inc.

Represented By  
Misty A Perry Isaacson

**Trustee(s):**

Robert Paul Goe (TR)

Pro Se

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**8:23-12759 Knotty Nuff Wood, Inc.**

**Chapter 11**

**#11.00 Debtor's Emergency Motion For Order Authorizing Debtor To Pay Pre-Petition  
Non-Insider Employee Wages & Benefits  
(OST Signed 1-02-24)**

Docket 10

**Tentative Ruling:**

Tentative for January 4, 2024  
Response due at hearing. Appearance required.

<b>Party Information</b>
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**Debtor(s):**

Knotty Nuff Wood, Inc.

Represented By  
Misty A Perry Isaacson

**Trustee(s):**

Robert Paul Goe (TR)

Pro Se

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**8:23-12759 Knotty Nuff Wood, Inc.**

**Chapter 11**

**#12.00** Emergency Motion By Debtor For Order (A) Authorizing Interim Use Of Cash Collateral; (B) Granting Adequate Protection For Use Of PrePetition Collateral; And (C) Granting Related Relief  
**(OST Signed 1-02-24)**

Docket 11

**Tentative Ruling:**

Tentative for January 4, 2024  
Response due at hearing. Appearance required.

<b>Party Information</b>
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**Debtor(s):**

Knotty Nuff Wood, Inc.

Represented By  
Misty A Perry Isaacson

**Trustee(s):**

Robert Paul Goe (TR)

Pro Se