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

9:30 AM

1: - **Chapter**

#0.00 **All hearings on this calendar will be conducted in Courtroom 301 at 21041 Burbank Boulevard, Woodland Hills, California, 91367. All parties in interest, members of the public and the press may attend the hearings on this calendar in person.**

Additionally, (except with respect to evidentiary hearings, or as otherwise ordered by the Court) parties in interest (and their counsel) may connect by ZoomGov audio and video free of charge, using the connection information provided below. Members of the public and the press may only connect to the zoom audio feed, and only by telephone. Access to the video feed by these individuals is prohibited.

Parties in interest may participate by ZoomGov video and audio using a personal computer (equipped with camera, microphone and speaker), or a handheld mobile device (such as an iPhone or Android phone). Members of the public, the press and parties in interest may participate by audio only using a telephone (standard telephone charges may apply).

Neither a Zoom nor a ZoomGov account is necessary to participate remotely and there are no fees for doing so. No pre-registration or prior approval is required.
The audio portion of each hearing will be recorded electronically by the Court and that recording will constitute its official record. Recording, retransmitting, photographing or imaging Court proceedings by any means is strictly prohibited.

Join CACB ZoomGov Meeting

Video/audio web address: https://cacb.zoomgov.com/j/1604086641

Meeting ID: 160 408 6641

Password: 475604

Join by Telephone

Telephone conference lines: 1-669-254-5252 OR 1-646-828-7666

Meeting ID: 160 408 6641

9:30 AM
CONT... **Chapter**

Password: 475604

For more information on appearing before Judge Kaufman by ZoomGov, please see the information entitled "Tips for a Successful ZoomGov Court Experience" on the Court's website at: https://www.cacb.uscourts.gov/judges/honorable-victoria-s-kaufman under the tab "Telephonic Instructions."

Docket 0

Tentative Ruling:

- NONE LISTED -

9:30 AM
1:24-11411 Keith D Price **Chapter 13**

#1.00 Motion for relief from stay [RP]

CAPITAL BENEFIT, INC.
VS
DEBTOR

fr. 9/18/24; 10/2/24; 12/5/24(stip)

Docket 6

Tentative Ruling:

On November 18, 2024, Nancy Zamora, chapter 7 trustee (the "Trustee") filed a stipulation (the "Stipulation") [doc. 71] between the Trustee and creditor Capital Benefit, Inc. ("Movant") to continue the hearing on the *Notice of Motion and Motion for In Rem Relief from the Automatic Stay Under 11 U.S.C. § 362 (Real Property)* (the "Motion") [doc. 6].

In the Stipulation, the Trustee stated that she was administering the real property located at 19052 Santa Rita Street, Tarzana, CA 91356 (the "Property"), which was the subject of the Motion. In addition, the Trustee asserted that the sale of the Property would close on or before December 31, 2024, and that Movant would be paid in full, rendering the Motion moot.

On December 13, 2024, the Court entered an order authorizing the Trustee to sell the Property free and clear of liens [doc. 88].

Has the sale of the Property closed?

Party Information

9:30 AM
CONT... **Keith D Price** **Chapter 13**

Debtor(s):

Keith D Price	Pro Se

Movant(s):

Capital Benefit, Inc.	Represented By Katherine K Meleski

Trustee(s):

Elizabeth (SV) F Rojas (TR)	Pro Se

9:30 AM
1:24-10935 Michael DeVon Bowers **Chapter 7**

#2.00 Motion For Damages For Violation of the Automatic Stay Pursuant to 11 U.S.C. § 362(k); and Contempt Pursuant to 11 U.S.C. § 105(a)

fr. 11/27/24

Docket 33

Tentative Ruling:

For the reasons set forth below, the Court will deny *Debtor's Motion for: (a) Damages for Violation of Automatic Stay Pursuant to 11 U.S.C. § 362(k); and (b) Contempt Pursuant to 11 U.S.C. § 105(a)* (the "Motion") [doc. 33].

I. BACKGROUND

A. The State Court Action

In October 2023, Michael Bowers ("Debtor") entered into a lease agreement with The Weddington ("Weddington"), predecessor of OZH Holding 1, LLC ("OZH"), to rent the apartment located at 11058 Chandler Blvd., Unit 3051E, Los Angeles, CA 91601 (the "Apartment") beginning on October 19, 2023. Exh. A to the Declaration of Alixandra Solis ("November Solis Decl.") [doc. 38]. In accordance with the Lease Agreement, Debtor was required to pay Weddington (and later, OZH) rent payments in the amount of $2,321.00 per month on or before the third of each month. *Id*., p. 2.

In addition, the Lease Agreement provided that Debtor would "be obligated to pay to [the lessor] a fee of $100 if you fail to pay any amount due under this Contract." *Id*. As concerns default by Debtor, specifically regarding legal fees, the Lease Agreement states:

> Upon your default, we will have all other legal remedies including lease termination, lockout under statute, and the remedy set forth in Civil Code § 1951.2. The prevailing party may recover from a non-prevailing party attorney's fees and costs of litigation in an amount of no more than $1800.

Lease Agreement, attached as Exh. A to the November Solis Decl., p. 9.

Under the Lease Agreement, Debtor provided Weddington with a security deposit in the amount of $2,821.00 (the "Security Deposit"). *Id*., p. 1. Regarding the lessor's potential application of the Security Deposit, the Lease Agreement states:

> 52. SECURITY DEPOSIT DEDUCTIONS AND OTHER CHARGES…We may withhold from the security deposit only such amounts as are reasonably necessary to remedy your defaults including, but not limited to, the following:
>
> a) Defaults in the payment of rent;
> b) To repair damage to the premises caused by you, exclusive of ordinary wear and tear, and/or;
> c) To clean the premises, if necessary, upon termination of the tenancy in order to return the unit to the same level of cleanliness it was in at the inception of the tenancy, and/or;
> d) To restore, replace, or return personal property or appurtenances, exclusive of ordinary wear and tear.
>
> 53. DEPOSIT RETURN, SURRENDER, AND ABANDONMENT. You are required to provide us written notice of your forwarding address, on or before termination of this [Lease Agreement]. We'll mail you, to the forwarding address you provide, your security deposit refund (less lawful deduction) and an itemized accounting of any deductions within 21 days after surrender or abandonment, unless statutes provide otherwise. If you fail to provide us with your forwarding address in writing, as required above, we will process the unclaimed security deposit in accordance with state law…

Id., p. 12.

Subsequently, Debtor fell behind on his monthly lease payments. November Solis Decl., ¶ 5. On February 5, 2024, Greystar, acting as property management agent on behalf of OZH, served a notice to pay rent in 3 days or to quit in 30 days on Debtor (the "Notice to Quit"). *Id*. and Exh B thereto. Debtor did not cure his arrears on the lease payments or vacate the Apartment within three days. *See id*., ¶ 5. On March 15, 2024, OZH initiated an unlawful detainer action against Debtor in the Superior Court of California, County of Los Angeles, case no. 24PDUD00964 (the "State Court Action"). *See id*.

In April 2024, Debtor and OZH entered into a stipulation for entry of judgment in the State Court Action (the "Stipulated Judgment"). *Id*., ¶ 6 and Exh. C thereto; *see also* Exh. C to the Declaration of Michael DeVon Bowers ("November Bowers Decl.") [doc. 33]. The Stipulated Judgment provided, in part, for a judgment of possession of the Apartment. In addition, the Stipulated Judgment provided, in relevant part:

> 1. JUDGMENT. Judgment shall immediately enter in favor of Plaintiff and against Defendant for:…(c) past due rent in the amount of $2,672.99; (d) rental holdover damages in the amount of $7,917.76; (e) attorneys fees in the amount of $1,535.87 and (f) costs in the amount of $450.00, for a total judgment in the amount of $14,112.49….
>
> 2. CONDITIONAL REINSTATEMENT OF LEASE. Plaintiff agrees to forbear on its right to enforce the judgment entered in this action and any Writ of Possession/Execution issued thereon provided Defendant complies with all of the following conditions:
>
> > a. PAYMENTS. Defendant pays Plaintiff the following amounts on or before the following dates:
> >
> > April 19, 2024…………………..…$2,576.67
> > May 1, 2024……………………$5,767.91
> > June 1, 2024………………....…$5,767.91
> >
> > AND
> >
> > b. COMPLIANCE WITH LEASE. Defendant observes and performs all of Defendant's other obligations under the Lease, including making all lease payments and utility payments on the first of each month, together with any

addenda, amendments and rules and regulations as if the Lease had not been terminated.

If Defendant complies with foregoing conditions, then upon full payment of all amounts set forth in this Paragraph 2, the Lease shall be deemed reinstated.

The payments set forth in this Paragraph 2 are intended to cover rent for the Premises through and until April 22, 2024 plus attorneys fees and costs incurred by Plaintiff in connection with this unlawful detainer action. All payments required by this Stipulation shall be made in the form of a cashier's check or money order. To reinstate the Lease, Defendant must comply with all of the foregoing conditions, including, but not limited to, timely making <u>all</u> payments set forth in this Paragraph 2.

3. NONCOMPLIANCE. If Defendant fails to comply with any of the conditions set forth in Paragraph 2 of this Stipulation, then in addition to Plaintiff's other rights and remedies, Plaintiff may, without further notice, enforce the judgment entered in this action and any Writ of Possession/Execution issued thereon including, without limitation, proceeding with a Sheriff lockout at the Premises.

Stipulated Judgment, attached as Exhibit C to both the November Solis Decl. and the November Bowers Decl., ¶¶ 1-3 (emphasis added).

B. The Bankruptcy Case

On June 10, 2024, Debtor filed a chapter 7 petition, initiating case no. 1:24-bk-10935-VK (the "Case"). In his voluntary petition, Debtor indicated that his landlord had obtained an eviction judgment against him.

In his schedule A/B, Debtor identified his personal property, including a couch, a TV, a cell phone, a laptop, clothes and shoes, costume jewelry, cash and an EDD Money Mart card. Debtor stated that his personal property had an aggregate value of

$1,230.00. In his schedule A/B, Debtor did not disclose a security deposit.

In his list of creditors, Debtor included OZH and Weddington; in his schedule G, Debtor disclosed his lease with Weddington. In his schedule E/F, Debtor did not disclose a debt owed to Weddington or OZH.

With his chapter 7 petition, Debtor filed an *Initial Statement About an Eviction Judgment Against You* (the "Initial Statement") [doc. 5], and he submitted a rental deposit in the amount of $2,319.00 **[FN1]** with the clerk of the Court. *See* doc. 8. In the Initial Statement, Debtor stated that he rented the Apartment and that his landlord had obtained a judgment for possession against him in an eviction, unlawful detainer action or similar proceeding. Initial Statement, p. 1. In addition, Debtor certified that: (1) under the state or other nonbankruptcy law that applies to the judgment for possession, Debtor had the right to stay in the Apartment by paying his landlord the entire delinquent amount; and (2) he had given the bankruptcy court clerk a deposit for the rent that would be due during the 30 days after the petition was filed. *Id*.

The Initial Statement explained, in relevant part, that:

Stay of Eviction: **(a) First 30 days after bankruptcy.** If you checked both boxes above, signed the form to certify that both apply, and served your landlord with a copy of this statement, the automatic stay under 11 U.S.C. § 362(a)(3) will apply to the continuation of the eviction against you for 30 days after you file your *Voluntary Petition for Individuals Filing for Bankruptcy* (Official Form 101).

(b) Stay after the initial 30 days. If you wish to stay in your residence after that 30-day period and continue to receive the protection of the automatic stay under 11 U.S.C. § 362(a)(3), you must pay the entire delinquent amount to your landlord as stated in the eviction judgment before the 30-day period ends. You must also fill

> out *Statement About Payment of an Eviction Judgment Against You* (Official Form 101B), ***file it*** with the bankruptcy court, ***and serve your landlord a copy of it before the 30-day period ends***.

Id. (bolded emphases in original, bolded italicized emphases added).

No later than July 10, 2024, Debtor was required to pay the entire delinquent amount in the Stipulated Judgment to OZH, fill out a *Statement About Payment of an Eviction Judgment Against You* (Official Form 101B) (the "Payment Statement"), file the Payment Statement with the Court and serve a copy of it on OZH. In Debtor's declaration filed in support of the Motion, Debtor states that: (1) a "true and correct copy of the certified check receipt for the full and final payment of the stipulation agreement" is attached as Exhibit F (the "Check Receipt"); (2) a "true and correct copy of the letter of reinstatement of lease/vacate judgment request sent to the landlord, per the stipulation agreement that shows that I complied with the Certificate, Official Form 101B" is attached as Exhibit G; and (3) a "true and correct copy of form 101B – Statement About Payment of an Eviction Judgment Against You" is attached as Exhibit H. November Bowers Decl., ¶¶ 20-22, 24. The Check Receipt appears to have been provided by Priority One Credit Union, and it states that the amount of the check is $5,767.91. However, in his declaration, Debtor does not state that he paid this amount to OZH by **July 10, 2024**, nor does Debtor provide documentary evidence that he timely delivered this amount to OZH. Similarly, Debtor does not state that he actually served a copy of the Payment Statement on OZH by **July 10, 2024**, nor does Debtor provide documentary evidence that he timely served a copy of the Payment Statement on OZH. **[FN2]**

On September 9, 2024, nearly two months after the mandatory deadline to do so, Debtor filed the Payment Statement [doc. 24]. Debtor's signature on the Payment Statement is dated September 6, 2024. In the Payment Statement, Debtor certified that, within 30 days after Debtor filed his voluntary petition, Debtor paid his landlord the entire amount he owed as stated in the judgment for possession. *See also* Payment Statement [Exhibit H to November Bowers Decl.], p. 1.

On September 23, 2024, the Court entered Debtor's discharge (the "Discharge") [doc.

25]. **[FN3]** The next day, the Case was closed. In October 2024, on Debtor's request, the Court reopened the Case [doc. 31].

C. The Eviction

On or around August 16, 2024, more than one month after the deadline for Debtor to file and serve the Payment Statement, the County of Los Angeles Sheriff's Department posted a 5-day notice to vacate the Apartment (the "Notice to Vacate") on the front entrance to the building containing the Apartment. November Bowers Decl., ¶ 11 and Exh. N thereto. On August 20, 2024, the Sheriff's Department reposted the Notice to Vacate on the Apartment's door. *Id*.

On August 28, 2024, Debtor received an email from Greystar inquiring as to whether Debtor still resided at the Apartment (the "August 28 Email"). *Id*. On or around September 12, 2024, the Sheriff's Department evicted Debtor from the Apartment. *See* November Bowers Decl., ¶ 11 and Exh. O thereto. The same day, Debtor received an email from Greystar which stated that Debtor's access to the Apartment had been removed and that Debtor could schedule a time to retrieve his belongings from the Apartment within the next 14 days. *See* Exh. O to the November Bowers Decl. Greystar requested that Debtor email Greystar with a date and time when Debtor would be available to retrieve his belongings. *Id*.

D. Activity Following the Close of the Case

On September 25, 2024, Debtor sent an email to Greystar and stated that he would be available to collect his belongings on September 26, 2024. Exh. Q to November Bowers Decl. On September 25, 2024, Greystar responded to Debtor via email and advised him to go to the leasing office so that maintenance could take Debtor to the Apartment. *Id*.

On September 26, 2024, Debtor went to the Apartment to retrieve his belongings. November Bowers Decl., ¶ 12. On September 27, 2024, Debtor sent Greystar an email asserting that items were missing from the Apartment and attached a note setting forth the alleged missing items (the "Missing Items Letter"). November Bowers Decl., ¶ 12 and Exh. Q thereto. In addition, in this email, Debtor requested the return of the Security Deposit. *Id*.

On October 4, 2024, Greystar sent Debtor an email (the "October 4 Email") stating that "[t]here is a remaining balance of $7,176.79 that needs to be settled" and that "if the payment is not made within 30 days after receiving this notice, we will have to send your file to collections." Exh. R to November Bowers Decl.

E. The Motion

On November 5, 2024, Debtor filed the Motion and his supporting declaration [doc. 33], and a hearing was set for November 27, 2024. In the Motion, Debtor asserts that he cured the entire monetary default that gave rise to the Stipulated Judgment on July 1, 2024. Debtor further contends that he complied with 11 U.S.C. § 362(l) and that the following actions of OZH, Weddington and Greystar consequently constituted a violation of the automatic stay: (1) the August 16 and 20, 2024 postings of the Notice to Vacate; (2) the August 28 Email; (3) the eviction; (4) removing Debtor's items from the Apartment on September 25, 2024; and (5) the October 4 Email.

Debtor requests that the Court hold OZH in contempt for violation of the automatic stay and award actual damages in the amount of $25,517.10, $5,000 in emotional damages and $20,000 in punitive damages. Debtor also requests that the Court order OZH to remove the Stipulated Judgment from Debtor's credit report and the eviction from Debtor's consumer report and rental history.

With respect to Debtor's alleged actual damages, in his declaration, Debtor states, in pertinent part:

> I incurred $238.52 in travel expenses dealing with the violation of the automatic stay by: driving 126 miles back and forth to the Pasadena Courthouse; I drove 230 miles roundtrip to the Woodland Hills Bankruptcy Court Self-Help Center for assistance and filing this motion. This is 356 miles. Mileage costs calculated at the standard IRS rate of $0.67 per mile.
>
> I incurred $960.00 in lost wages because I could not work while dealing with the violation of the automatic stay by taking time from work to go to the courthouses and the sheriff's office. This is a total of

> 30 hours missed, at $32.00/hour.
>
> I incurred $1,170.00 in damages because I had to pay for a hotel stay for nine (9) nights at $130.00 per night, and purchase food and clothes in the amount of $225.
>
> I incurred $13,148.58 in damages from rent payments to satisfy the stipulation agreement and to the bankruptcy court that they accepted, yet never credited to my account until after they illegally evicted me.

November Bowers Decl., ¶¶ 7-10. In addition, in the Motion, Debtor contends that he incurred approximately $5,000 in damages for items that were removed from the Apartment. Debtor further asserts that he anticipates incurring an additional $5,000 in housing costs as a result of the eviction showing on his rental history and potential identify theft, because documents containing personally identifiable information were missing from the Apartment, after Debtor returned there to remove his belongings.

As concerns Debtor's emotional damages, in his declaration, Debtor states, in relevant part:

> I have suffered significant harm in the following ways: I had a panic attack and an anxiety attack that required medical attention, stemming from the embarrassment of having eviction notices placed on my door and the stress of having to figure out my legal options and how to assert them; I was diagnosed with "Adjustment disorder with depression and suicidal ideations" after being evicted, having to stay in hotels, and the impending threat of homelessness…

Id., ¶ 14.

F. The Opposition

On November 13, 2024, OZH filed an opposition to the Motion (the "Opposition") [doc. 36]. Among other things, OZH states that Debtor did not comply with 11 U.S.C. § 362(l) and, as a result, there was no stay in place after the initial 30-day postpetition period. In support of the Opposition, OZH filed the November Solis

9:30 AM
CONT... Michael DeVon Bowers **Chapter 7**

Decl. and the Declaration of OZH's counsel Richard Sontag ("Sontag Decl.") [doc. 37].

In her declaration, Ms. Solis states, in pertinent part:

> I am employed by Greystar, the authorized property management agent for [OZH], as the community manager of the Weddington apartment complex in North Hollywood, California….
>
> In April 2024 the Debtor and OZH entered into a Stipulation for Entry of Judgment – Unlawful Detainer in [the State Court Action]….The [Stipulated Judgment] provided for a judgment for possession of the Premises, plus $14,112.49 in back rent, rental damages, costs and fees. The [Stipulated Judgment] also provided that if the Debtor made three payments the judgment would be vacated and the Debtor's tenancy would be reinstated. The Debtor made the first 2 payments, but failed to make the third payment.
>
> On June 10, 2024, the Debtor filed the within bankruptcy case. At that time, the Debtor also filed an "Initial Statement About an Eviction Judgment Against You", and made a payment of $2,391.00 **[FN4]** to this Court. On or about June 11, 2024, OZH received that payment from this Court.
>
> No further payments were received from the Debtor until on or about August 5, 2024, when my office received money orders from the Debtor totaling $4,804.73.
>
> I understand that the Debtor contends that on July 1, 2024, he sent my office a letter with a check for $5,767.91, and a "Statement About Payment of an Eviction Judgment Against You." My office never received that letter, check or Statement.

November Solis Decl., ¶¶ 1 and 6-9. To her declaration, Ms. Solis attached: (1) a copy of the Lease Agreement as Exhibit A; (2) a copy of the Notice to Quit as Exhibit B; and (3) a copy of the Stipulated Judgment as Exhibit C.

9:30 AM
CONT... **Michael DeVon Bowers** **Chapter 7**

In his declaration, Mr. Sontag states, in relevant part:

> Based on the Debtor's actions my office instructed the Sheriff's Department to cancel any "lockout" regarding the Premises. We then waited for 30 days to see if the Debtor complied with the requirements of 11 U.S.C. § 362(l). On July 11, 2024, I reviewed the PACER docket in this bankruptcy case. The docket did not show such compliance (though a Statement About Payment of an Eviction Judgment Against You was filed in this case on September 6, 2024). Additionally, at that time I was informed that OZH had not received any additional monies from the Debtor.
>
> Based on the Debtor's failure to comply with the requirements of 11 U.S.C. § 362(l) OZH elected to move forward with the Debtor's eviction, and my office instructed the Sheriff's Department to proceed with a "lockout".

Sontag Decl., ¶¶ 7-8.

G. November 27, 2024 Hearing and Subsequent Declarations

At the November 27, 2024 hearing on the Motion, the Court stated that OZH had not explained whether the October 4 Email was based on alleged prepetition debt or postpetition debt owed by Debtor to OZH. The Court continued the hearing on the Motion so that OZH could provide additional evidence which explained the basis for the October 4 Email, and so that Debtor could respond to any supplemental evidence. *See* doc. 39.

On December 19, 2024, OZH filed the Declaration of Alixandra Solis ("December Solis Decl.") [doc. 41]. In her declaration, Ms. Solis states, in relevant part:

> On or about October 19, 2023, the Debtor and OZH's predecessor in interest entered into a written lease agreement for the Premises (the "Lease")….Under the Lease monthly rent for the Premises was $2,321.00, or $77.36 a day.

> …
> Since filing bankruptcy the Debtor made the following payments to OZH –
>
> (a) June 10, 2024, $2,391.00 **[FN5]**
> (b) August 5, 2024, $4,804.73
>
> This totals $7,195.73. **[FN6]**
> …
> From June 11, 2024, through September 12, 2024 (94 days), the Debtor lived at the Premises and incurred rent, utilities and other lease charges in the total sum of $11,715.19. This included rent of $7,271.84 (94 x $77.36 = $7,271.84), $478.99 for utilities, and $400.00 for late fees (for June 2024, July 2024, August 2024 and September 2024), $2,821.00 for legal fees, and $743.36 for move-out turn over charges.

December Solis Decl., ¶¶ 4, 11 and 12.

On January 6, 2025, Debtor belatedly filed his declaration in response to the December Solis Decl. (the "January Bowers Decl.") [doc. 42]. In this declaration, Debtor states, in pertinent part:

> I submitted the third and final payment of the stipulation on July 1st, 2024, along with form 101B – Statement About Payment of An Eviction Judgment Against You – and a letter requesting the full reinstatement of my lease to the landlord.
> …
> Upon and after filing bankruptcy, I paid a total of $9,944.73 **[FN7]** to the landlord:
>
> a. $2,319.00 for July 2024 rent on June 10, 2024 (as part of the petition and form 101A filing) **[FN8]**
> b. $2,485.00 for August 2024 rent and utilities on August 3, 2024
> c. $2,319.73 for September 2024 rent on September 1, 2024

I understand that Ms. Solis contends that I owe $400.00 for late fees. The leasing office failed to apply these payments to my account until after evicting me, although I paid my rent on time. As such, I should not have incurred any further late fees.

I understand that Ms. Solis contends that I owe legal fees in the amount of $2,821.00, however, legal fees related to the UD Action and the Stipulation were included in the bankruptcy petition. Further, the lease agreement states that legal fees would not exceed $1,500.00. **[FN9]**

January Bowers Decl., ¶¶ 7 and 9-11.

II. LEGAL AUTHORITY

A. Automatic Stay Under 11 U.S.C. § 362

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

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title...operates as a stay, applicable to all entities, of—

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;
(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;
(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secured a claim that arose before the commencement of the case under this title;
(6) any act to collect, assess, or a recover a claim against the debtor that arose before the commencement of the case;
(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor;…

B. Exception to the Automatic Stay Under 11 U.S.C. § 362(b)(22) and the Temporary Stay Under 11 U.S.C. § 362(l)

Pursuant to 11 U.S.C. § 362(b)(22), a bankruptcy petition does not operate as a stay—

> [S]ubject to subsection (l), under subsection (a)(3), of the continuation of any eviction, unlawful detainer action, or similar proceeding by a lessor against a debtor involving residential property in which the debtor resides as a tenant under a lease or rental agreement and with respect to which the lessor has obtained before the date of the filing of the bankruptcy petition, a judgment for possession of such property against the debtor[.]

11 U.S.C. § 362(l) provides, in relevant part:

> (1) Except as otherwise provided in this subsection, subsection (b)(22) shall apply on the date that is 30 days after the date on which the bankruptcy petition is filed, if the debtor files with the petition and serves upon the lessor a certification under penalty of perjury that—
>
> (A) under nonbankruptcy law applicable in the jurisdiction, there are circumstances under which the debtor would be permitted to cure the entire monetary default that gave rise to the judgment for possession, after that judgment for possession was entered; and

(B) the debtor (or an adult dependent of the debtor) has deposited with the clerk of the court, any rent that would become due during the 30-day period after the filing of the bankruptcy petition.

(2) If, **within the 30-day period after the filing of the bankruptcy petition**, the debtor …complies with paragraph (1) and files with the court and serves upon the lessor a further certification under penalty of perjury that the debtor (or an adult dependent of the debtor) has cured, under nonbankruptcy law applicable in the jurisdiction, the entire monetary default that gave rise to the judgment under which possession is sought by the lessor, subsection (b)(22) shall not apply, unless ordered to apply by the court under paragraph (3).

…

(4) If a debtor, in accordance with paragraph (5), indicates on the petition that there was a judgment for possession of the residential rental property in which the debtor resides and does not file a certification under paragraph (1) or (2)—

(A) subsection (b)(22) shall apply immediately upon failure to file such certification, and relief from the stay provided under subsection (a)(3) shall not be required to enable the lessor to complete the process to recover full possession of the property; …

11 U.S.C. § 362(l) (emphasis added). *See also* Local Bankruptcy Rule 4001-1(f).

"[S]ection 362(b)(22) provides an exception to the automatic stay." *In re Arrieta*, 612 B.R. 342, 346 (Bankr. D. S.C. 2020). "Nonetheless, the Bankruptcy Code provides an 'exception to the exception' of the automatic stay by allowing debtors who are tenants in a residential lease to obtain, in essence, a temporary 30-day stay (with the possibility of obtaining an extended stay) through the certification process of § 362(l)." *Id*., at 346-47.

Under § 362(l)(2), the exception to the automatic stay under § 362(b)

> (22) shall not apply for the entirety of the case…if within the first 30 days after the filing of the petition, the debtor: (1) complies with the initial certification process under § 362(l)(1), (2) cures the entirety of the monetary default that resulted in the judgment of possession, and (3) files a further certification with the Court that the cure payment has been made to the landlord. The failure to file this further certification results in the application of the exception to the automatic stay under § 362(b)(22) upon the 30th day after the filing of the petition, which would allow the landlord to resume eviction proceedings.

Id., at 347.

Section 362(l)(4) provides that if a debtor does not file the certifications required by section 362(l), the exception to the stay found in section 362(b)(22) takes effect immediately, and the automatic stay does not apply to the continuation of an eviction proceeding. *See In re Simpson*, 642 B.R. 255, 256 (Bankr. D. S.C. 2022); *see also In re Jackson*, 2013 WL 3956994, at *3 (Bankr. D. Colo. July 30, 2013) (noting that temporary stay under section 362(l)(1) is immediately lifted 30 days after petition date if debtor fails to file certification under section 362(l)(2)).

Section 362 is inflexible with respect to the deadline for the debtor to cure the entire monetary default that gave rise to the judgment and filing and serving the required certification on the lessor. *In re Parker*, 2008 WL 2081536, at *2 (Bankr. D. D.C. May 8, 2008); *see also Simpson*, 642 B.R. at 257 ("There is no indication from that statute that the time for filing the certification can be extended."); *In re Good*, 2015 WL 6125523, at *3 (Bankr. D. D.C. Oct. 16, 2015) (holding that section 362(l)(2) does not authorize the court to extend the 30–day postpetition deadline). A certification filed outside of the initial 30-day postpetition period is too late to trigger the protections of section 362(l)(2). *See Parker*, 2008 WL 2081536, at *2.

C. Lessor's Ability to Exercise Setoff Against Security Deposits

11 U.S.C. § 553(a) states, in pertinent part:

> Except as otherwise provided in this section and in sections 362 and 363 of this title, this title does not affect any right of a creditor to offset

> a mutual debt owing by such creditor to the debtor that arose before the commencement of the case under this title against a claim of such creditor against the debtor that arose before the commencement of the case…

As concerns the application of section 553(a) to security deposits, in *In re Zeinel Furniture, Inc.*, 13 B.R. 264 (Bankr. E.D. Wis. 1981), the court explained:

> The rights to parties to real estate leases are governed by state law unless there are contrary provisions in the Bankruptcy Code. The landlord's right to set-off the security deposit with the tenant's obligations under the lease agreement is established by Section 553 of the Bankruptcy Code. Section 553 creates a right of a creditor to offset a mutual debt owing by such creditor to the debtor that arose before the commencement of the case against a claim of such creditor against the debtor that arose before the commencement of the case.

Id. at 265-66. In *Zeinel Furniture*, based on section 553(a), the court held that the landlord's security deposit could be offset against, among other things, the rent accrued at the time of the debtor's filing of the petition and the charges for utilities and common area charges as provided in the lease. *See also In re Pal-Playwell*, 334 F.2d 389, 392 (2d Cir. 1964) (holding that landlords were entitled to set off lease security deposit made by bankrupt tenant against landords' claim for tenant's use and occupation and rubbish removal).

Regarding a lessor's use and application of a security deposit for residential real property, Cal. Civ. Code § 1950.5(b) provides, in relevant part:

> As used in this section, "security" means any payment, fee, deposit, or charge, including, but not limited to, any payment fee, deposit, or charge…that is imposed at the beginning of the tenancy to be used to reimburse the landlord for costs associated with processing a new tenant or that is imposed as an advance of payment of rent, used or to be used for any purpose, including, but not limited to, any of the following:

(1) The compensation of a landlord for a tenant's default in the payment of rent.

(2) The repair of damages to the premises, exclusive of ordinary wear and tear, caused by the tenant or by a guest or licensee of the tenant.

(3) The cleaning of the premises upon termination of the tenancy necessary to return the unit to the same level of cleanliness it was in at the inception of the tenancy. The amendments to this paragraph enacted by the act adding this sentence shall apply only to tenancies for which the tenant's right to occupy begins after January 1, 2003.

(4) To remedy future defaults by the tenant in any obligation under the rental agreement to restore, replace, or return personal property or appurtenances, exclusive of ordinary wear and tear, if the security deposit is authorized to be applied thereto by the rental agreement…

Security deposits are intended to afford creditors some form of protection against a debtor's nonpayment; a landlord may offset a security deposit against landlord’s prepetition claim arising from the debtor’s lease. *In re Condor Systems, Inc.*, 296 B.R. 5, 19 (B.A.P. 9th Cir. 2003).

D. Discharge Injunction Under 11 U.S.C. § 524(a)

Under 11 U.S.C. § 524(a), a discharge "operates as an injunction against the commencement or continuation of an action ... to collect, recover or offset any [discharged] debt as a personal liability of the debtor." 11 U.S.C. § 524(a)(2). "[S]ection 524(a) may be enforced by the court's contempt power under 11 U.S.C. section 105(a)." *In re Bennett*, 298 F.3d 1059, 1069 (9th Cir. 2002). A bankruptcy court "may hold a creditor in civil contempt for violating a discharge order where there is not a ‘fair ground of doubt’ as to whether the creditor's conduct might be lawful under the discharge order." *Taggart v. Lorenzen*, 587 U.S. 554, 565, 139 S.Ct. 1795, 204

L.Ed.2d 129 (2019).

In *In re Mellem*, the Ninth Circuit Bankruptcy Appellate Panel, explained: "[t]he *Taggart* refinements of the civil contempt standard in the bankruptcy discharge context did not otherwise alter a movant's threshold burden of going forward. The moving party still must show at the outset that the alleged contemnor: (1) knew the discharge injunction applied; and (2) *intended* the actions that violated the injunction." *Id*., 625 B.R. 172, 178 (B.A.P. 9th Cir. 2021) (citing *In re Marino*, 577 B.R. 772, 782-83 (B.A.P. 9th Cir. 2017), *aff'd in part & appeal dismissed in par*t, 949 F.3d 483 (9th Cir. 2020)) (emphasis added); *see also In re Ragone*, 2021 WL 1923658 at *5 (B.A.P. 6th Cir. May 13, 2021) ("The contempt inquiry is a two-step one….First, a court must determine whether the creditor's actions violated the discharge injunction. Second, the court must determine 'whether there was any objectively reasonable basis for believing that the [action] did not violate the discharge'").

III. ANALYSIS

A. *Application of 11 U.S.C. § 362(b)(22) and (l)*

In order for the temporary stay under section 362(l)(1) to have been extended past the initial 30-day postpetition period, Debtor would have had to certify that he cured the entire monetary default that gave rise to the Stipulated Judgment within the initial 30-day postpetition period. *See* 11 U.S.C. § 362(l)(2).

The Case docket reflects that 30-day postpetition period passed without Debtor providing the required certification under section 362(l)(2). Although Debtor filed the Payment Statement on September 6, 2024, this was untimely, and the deadline for such filing cannot be extended. *See Simpson*, 642 B.R. at 257 (denying debtor's request for extension of time to file certification); *Good*, 2015 WL 6125523, at *3; *Parker*, 2008 WL 2081536, at *2 (same). Moreover, Debtor did not provide a proof of service evidencing that he timely served the Payment Statement on his OZH. As a result, on July 10, 2024, the exception to the automatic stay arising under section 362(b)(22) took effect. Consequently, in August and September 2024, OZH was not required to obtain relief from the automatic stay in order to effectuate Debtor's eviction. *See* 11 U.S.C. § 362(l)(4)*; Simpson*, 642 B.R. 255, 256; *Arrieta*, 612 B.R. at 347; *Jackson*, 2013 WL 3956994, at *3.

Even if Debtor had timely filed and served his certification under section 362(l)(2), Debtor has not demonstrated that he cured the entire monetary default within the mandatory 30–day window. OZH acknowledges that Debtor made the first two payments set forth in paragraph 2 of the Stipulated Judgment. However, OZH disputes that Debtor made the required third payment of $5,767.91. Although Debtor has submitted a copy of a receipt for certified check in that amount dated July 1, 2024, OZH asserts that it did not receive the certified check. November Solis Decl., ¶ 9. Debtor has not provided convincing evidence that he sent the certified check to OZH or Greystar within 30 days of the filing of his chapter 7 petition.

After Debtor provided the required postpetition rental deposit to the Court, it appears that Debtor did not send additional payments to OZH or Greystar until on or around August 3, 2024. *See* Exh. I to the November Bowers Decl. **[FN10]** If Debtor intended to have this payment applied to his prepetition monetary default (rather than to his postpetition payment obligations under the Lease Agreement), this is outside of the applicable 30-day deadline for Debtor to cure that default. Furthermore, the aggregate amount which Debtor paid in August 2024 was less than the amount necessary to cure the remaining monetary default set forth in the Stipulated Judgment, i.e, $5,767.91. As such, Debtor's attempted section 362(l)(2) certification was both untimely and incorrect. *See Parker*, 2008 WL 2081536, at *3 n. 1. Because of these deficiencies, OZH did not violate the automatic stay when it: (1) caused the Notice to Vacate to be posted on August 16 and 20, 2024; (2) sent, through its agent Greystar, the August 28 Email to Debtor inquiring as to whether Debtor still resided at the Property; and (3) caused Debtor to be evicted in September 2024.

1. Debtor's Personal Property

Debtor contends that OZH violated the automatic stay by removing, or causing another to remove, Debtor's personal items from the Property on September 25, 2024. Despite contrary statements in his bankruptcy schedule A/B, Debtor represents that the value of those items was $5,000.

Because the Case was closed on September 24, 2024, there was no automatic stay in place regarding Debtor's personal property as of September 25, 2024. *See* 11 U.S.C. § 362(c). Moreover, Debtor's contention regarding the value of any personal items removed from the Apartment is contradicted by his bankruptcy schedules.

In his schedule A/B, Debtor does not identify an interest in any of the items listed in the Missing Items Letter. Rather, in his schedule A/B, Debtor represents that the aggregate value of his personal property, including a couch, a TV, a cell phone, a laptop, clothes and shoes, costume jewelry, cash and an EDD Money Mart card, is $1,230.00. **[FN11]**

2. The Security Deposit

Debtor has not shown that OZH violated the automatic stay by retaining the Security Deposit. After the automatic stay had terminated (based on the Case having been closed and Debtor's receipt of the Discharge), OZH was permitted to apply the Security Deposit to the prepetition indebtedness which arose from Debtor's occupancy of the Apartment and its prosecution of the State Court Action. *See* 11 U.S.C. §§ 362(c) and 553(a); *Condor Systems*, 296 B.R. at 19.

Debtor's assertion that he sent a certified check in the amount of $5,767.91 to OZH on July 1, 2024 is credibly contradicted by the testimony of Ms. Solis, an employee of Greystar. Ms. Solis has testified that these funds were never received. Other than the funds which Debtor paid in August 2024 (which properly could be applied to Debtor's postpetition occupancy of the Apartment), it appears that the only other payment OZH received from Debtor was the $2,319.00 payment which Debtor provided when Debtor filed his chapter 7 petition. That payment was for rent that would come due within 30 days following Debtor's bankruptcy filing; it was not for payment of Debtor's prepetition debt to OZH. *See* November Solis Decl., ¶¶ 7-8.

In light of the foregoing, the outstanding prepetition balance owed to OZH under the Stipulated Judgment appears to exceed the amount of the Security Deposit, i.e., $2,821.00. Consequently, Debtor has not shown that OZH has impermissibly retained the Security Deposit.

3. October 4 Email

Debtor contends that OZH violated the automatic stay when it sent or caused Greystar to send the October 4 Email, which advised Debtor that "[t]here is a remaining balance of $7,176.79 that needs to be settled" and that "if the payment is not made within 30 days after receiving this notice, we will have to send your file to collections." Exh. R to the November Bowers Decl. The October 4 Email was sent well after the automatic stay had terminated.

Moreover, Debtor has not provided evidence that he was damaged by the October 4 Email. Debtor's claimed damages concern the impact of his lockout from the Apartment, which took place in accordance with section 362(b)(22) and did not violate the automatic stay. *See* November Bowers Decl., ¶¶ 7-10 and 14 ("I have suffered significant harm…stemming from the embarrassment of having eviction notices placed on my door and the stress of having to figure out my legal options and how to assert them."). Because Debtor has not provided evidence of improper collection efforts by OZH or its agents, with respect to debt that arose before Debtor's bankruptcy filing and was subject to the Discharge, the Court will not award damages to Debtor for violations of the automatic stay.

B. The Discharge Injunction

OZH has demonstrated that the October 4 Email was sent to collect rent or charges which Debtor became liable to pay under the Lease Agreement **on or after** June 10, 2024, when Debtor continued to occupy the Apartment. OZH has shown that, postpetition, Debtor became liable for, at least, the following charges, totaling $8,494.19: (1) rent in the amount of $7,271.84, based on 94 days, from June 11, 2024 through September 12, 2024, at a rate of $77.36 per day; (2) utilities in the amount of $478.99; and (3) $743.36 for move-out turnover charges. December Solis Decl., ¶¶ 4 and 12.

With respect to late fees, OZH contends that Debtor owes $100 per month for June through September 2024. Because rent due in June 2024 was not timely paid, Debtor would be liable, on a prepetition basis, for that $100 late fee. However, it is unclear which of the funds which OZH received from Debtor postpetition would constitute timely payments for the rent due for July through September 2024.

As concerns alleged legal fees, the Lease Agreement provides that OZH may recover from Debtor attorney's fees and costs of litigation in an amount of no more than $1,800. *See* Lease Agreement, Exh. A to the November Solis Decl., p. 9. Given that the Stipulated Judgement included attorney's fees in the amount of $1,535.87 and costs in the amount of $450.00, it appears that OZH may not charge Debtor for any additional legal fees or costs.

The parties do not dispute that, postpetition, Debtor paid $7,123.73 to OZH. In the January Bowers Decl., Debtor asserts that he paid the following amounts to OZH postpetition: (1) $2,319 on June 10, 2024; (2) $2,485 on August 3, 2024; and (3) $2,319.73 on September 1, 2024. January Bowers Decl., ¶ 9. **[FN12]** OZH contends that it received the following payments from Debtor postpetition: (1) $2,319 on June 10, 2024 **[FN13]**; and (2) $4,804.73 on August 5, 2024. December Solis Decl., ¶ 11; doc. 8.

Debtor's statement that he submitted the third payment pursuant to the Stipulated Judgment on July 1, 2024 is belied by his above-referenced statements regarding the payments he made to OZH postpetition. *See* January Bowers Decl., ¶ 9. Moreover, as discussed *supra,* Debtor's assertion that he sent a certified check in the amount of $5,767.91 to OZH on July 1, 2024 is credibly contradicted by Ms. Solis's testimony.

Also, as discussed *supra*, OZH may properly apply the Security Deposit to Debtor's **prepetition** debts under the Lease Agreement. Therefore, after accounting for the postpetition payments by Debtor, totaling $7,123.73, Debtor owes OZH at least $1,370.46 for rent or charges which Debtor became liable to pay under the Lease **postpetition**. As such, with respect to the October 4 Email, the Court will not hold OZH liable for violating the discharge injunction and will not award damages to Debtor.

IV. CONCLUSION

The Court will deny the Motion.

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

FOOTNOTES

FN1: Given that Debtor's monthly rental payment is $2,321.00 under the Lease Agreement, it is unclear why Debtor deposited $2,319.00. *See* Lease

Agreement, attached as Exh. A to the November Solis Decl., p. 2.

FN2: In comparison, attached as Exhibit J to the November Bowers Decl. is a letter allegedly sent by Debtor to notify OZH that its actions were a violation of the automatic stay, together with a receipt from the United States Postal Service, dated August 29, 2024, with a tracking number.

FN3: On July 29, 2024, the chapter 7 trustee had filed a no distribution report in the Case.

FN4: This appears to be a typographical error; Debtor deposited $2,319 with the Court. *See* doc. 8.

FN5: *See* FN4.

FN6: Taking into account the typographical error referenced in FN3, the total amount OZH allegedly received postpetition is $7,123.73.

FN7: Debtor's statement that he paid a total of $9,944.73 to OZH upon filing the Case and postpetition is contradicted by the amounts Debtor lists immediately after this statement, which total $7,123.73. *See* January Bowers Decl., ¶ 9.

FN8: To the extent that Debtor contends he is not responsible for paying any rent due for June 2024, such contention is not well-taken. To invoke the temporary stay under 11 U.S.C. § 362(l), Debtor was required to, among other things, deposit "with the clerk of the court, **any rent that would become due during the 30-day period after the filing of the bankruptcy petition**." 11 U.S.C. § 362(l)(3)(D) (emphasis added). Given that Debtor filed the Case on June 10, 2024, the rental deposit in the amount of $2,319.00 constituted rent that came due during the period of June 11, 2024 through July 11, 2024.

FN9: The Lease Agreement provides that attorney's fees and costs of litigation would not exceed $1,800.00. *See* Lease Agreement, attached as Exh. A to the November Solis Decl., p. 9.

FN10: OZH represents that on August 5, 2024, it received money orders from Debtor

9:30 AM
CONT... **Michael DeVon Bowers** **Chapter 7**

totaling $4,804.73. November Solis Decl., ¶ 8; December Solis Decl., ¶ 11.

FN12: If Debtor suffered damages in connection with any loss of his personal property in September 2024, in connection with the handling of Debtor's personal property after Debtor was evicted from the Apartment, Debtor may pursue his rights to recover such damages from OZH in state court.

FN12: *See* FN7.

FN13: *See* FN4.

Party Information

Debtor(s):

Michael DeVon Bowers	Pro Se

Trustee(s):

Nancy J Zamora (TR)	Pro Se

9:30 AM

1:24-10584 Leticia Hernandez **Chapter 13**

#3.00 Motion for relief from stay [RP]

GATEWAY MORTGAGE
VS
DEBTOR

Docket 29

***** VACATED *** REASON: Order approving stipulation to continue hearing to 9:30 a.m. on 2/13/25 entered on 1/7/25 [doc. 34].**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Leticia Hernandez	Represented By Jeffrey J Hagen

Movant(s):

Gateway Mortgage, a division of	Represented By Jennifer C Wong

Trustee(s):

Elizabeth (SV) F Rojas (TR)	Pro Se

9:30 AM

1:24-11274 Richard Barrett **Chapter 13**

#4.00 Motion for relief from stay [RP]

SELENE FINANCE LP
VS
DEBTOR

CASE DISMISSED 12/11/24

Docket 56

***** VACATED *** REASON: Case dismissed on 12/11/24**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Richard Barrett	Represented By Robert S Altagen

Movant(s):

U.S. Bank Trust National	Represented By Kelli M Brown Sean C Ferry

Trustee(s):

Elizabeth (SV) F Rojas (TR)	Pro Se

9:30 AM
1:24-11753 Cory Beth Honickman **Chapter 13**

#5.00 Motion for relief from stay [RP]

AMWEST FUNDING CORP.
VS
DEBTOR

Docket 33

Tentative Ruling:

The Court will grant the request of AmWest Funding Corp. ("Amwest") to annul the automatic stay.

I. BACKGROUND

A. The Debtor's Bankruptcy Cases

1. The First Case

On August 8, 2022, Cory Beth Honickman ("Debtor") filed a chapter 13 petition, in pro per, initiating case no. 1:22-bk-10922-VK (the "First Case"). On August 30, 2022, the First Case was dismissed for failure to file documents.

2. The Second Case

On September 23, 2024, Debtor filed a chapter 7 petition, in pro per, initiating case no. 1:24-bk-11589-VK (the "Second Case"). On October 8, 2024, the Second Case was dismissed for failure to file documents.

3. The Current Case

On October 21, 2024, Debtor filed a chapter 13 petition in pro per, initiating case no. 1:24-bk-11753-VK (the "Current Case"). The same day, at 11:00 a.m., Prestige Default Services, LLC ("Prestige"), the trustee for Amwest, proceeded with a foreclosure sale. *See* Supplemental Declaration of Patricia Sanchez ("Sanchez Decl."),

¶ 2 [doc. 33]; Declaration of Julian Tioseco ("Tioseco Decl."), ¶ 9.e. [doc. 33].

a. Debtor's Schedules

In her schedule A/B, Debtor identifies an interest in the real property located at 21173 San Miguel St., Woodland Hills, CA 91364 (the "Property") and provides a value for the Property of $1.4 million. According to the petition, Debtor lives in the Property.

In her schedule D, Debtor discloses a debt owed to Amwest in the amount of $738,898, secured by the Property. In her schedule I, Debtor represents that she receives $293 per month from food stamps and a $7,700 monthly contribution from her caregiver. In her schedule J, Debtor discloses no expenses except for monthly deed of trust payments of $5,908 and food and housekeeping supplies of $293. According to Debtor, all her utilities are paid for by her caregiver. *See* schedule J, doc. 19.

b. The Motion to Extend the Automatic Stay

In November 2024, Debtor filed a motion to extend the automatic stay (the "Motion to Extend Stay") [doc. 11] and her declaration in support thereof (the "November Honickman Decl.") [doc. 16]. To the November Honickman Decl., Debtor attached as Exh. 3 a reinstatement letter from Amwest dated October 17, 2024 (the "Reinstatement Letter"). Pursuant to the Reinstatement Letter, as of October 18, 2024, the amount to reinstate her loan was $95,202.96. Exh. 3 to the November Honickman Decl.

On November 17, 2024, Debtor filed a *Substitution of Attorney* [doc. 18] and substituted in attorney Kevin Tang as her counsel. The same day, Debtor filed a chapter 13 plan (the "Plan") [doc. 20]. In the Plan, Debtor proposes to make plan payments of $1,779 per month for 60 months. Plan, p. 2. With respect to Amwest's claim, Debtor proposes to: (1) pay prepetition arrears of $91,610 to Amwest through the Plan; and (2) maintain and make the current contractual installment payments on Amwest's claim by making direct payments. *Id.*, pp. 5-6.

Regarding Amwest's prepetition efforts concerning the debt secured by its deed of trust, on May 19, 2022, a Notice of Trustee's Sale was recorded in the Los Angeles

9:30 AM
CONT... Cory Beth Honickman Chapter 13

County Recorder's Office, which set a foreclosure sale of the Property for June 29, 2022 (the "Original Sale"). Tioseco Decl., ¶ 20 and Exh. 4 thereto. The Original Sale was postponed multiple times to allow Debtor to obtain a loan modification. *Id*.

On or about August 15, 2022, Amwest agreed to a temporary loan modification, which deferred 30 months of defaulted payments (from April 1, 2020 through September 1, 2022) that were recapitalized and added to the loan (the "Loan Modification"). Exh. 5 to the Tioseco Decl. Pursuant to the Loan Modification, Debtor was to start making payments of $6,531.46 on December 1, 2022. Tioseco Decl., ¶¶ 7 and 21 and Exh. 5 thereto.

Debtor made four payments under the Loan Modification before she defaulted again. Tioseco Decl., ¶ 22. On or about May 1, 2023, Debtor submitted a claim for fire damage and the insurance company issued a check to Amwest and Debtor as loss payees. *Id.* Ultimately the insurance proceeds paid the April 1, 2023 to August 1, 2023 mortgage payments, leaving the loan due for September 1, 2023. *Id*., ¶ 23.

On May 24, 2024, a Notice of Default and Election to Sell Under Deed of Trust was recorded with the Los Angeles County Recorder's Office. *See id*., ¶ 9 and Exh. 6 to the Tioseco Decl. On August 23, 2024, a Notice of Trustee's Sale was recorded in the Los Angeles County Recorder's Office, which set a foreclosure sale of the Property for September 23, 2024 (the "Sale"). Exh. 7 to the Tioseco Decl.

On September 20, 2024, Amwest agreed to postpone the Sale because Debtor represented to Amwest that she was selling the Property and had an offer. Tioseco Decl., ¶ 24 and Exh. 8 thereto. The Sale was postponed to October 21, 2024 at 11:00 a.m.

After the initial hearing regarding the Motion to Extend Stay, the Court entered an order continuing the hearing to December 5, 2024 (the "Order") [doc. 25]. The Order provided, in relevant part:

> ORDERED, that Debtor must timely pay: (1) her first deed of trust payment for November 2024 as to the real property located at 31173 San Miguel St., Woodland Hills, CA 91364, if any; and (2) her November 2024 chapter 13 plan payment; and it is further

> ORDERED, that, by no later than November 28, 2024, Debtor must file a declaration which demonstrates that she timely made her required postpetition deed of trust payment, if any, and her required chapter 13 plan payment[.]

Order, p. 2 (emphasis in original). Contrary to the Order, Debtor did not file a declaration which demonstrated that she timely made her November 2024 deed of trust payment to Amwest and her November 2024 chapter 13 plan payment (the "Declaration") by November 28, 2024.

At the December 5, 2024 hearing regarding the Motion to Extend Stay, Debtor advised the Court that she had not had a chance to file the Declaration. To provide Debtor with additional time to do so, the Court continued the hearing to December 12, 2024.

On December 11, 2024, Debtor filed a supplemental declaration (the "December Honickman Decl.") [doc. 39]. To the December Honickman Decl., Debtor attached evidence that she had made her November chapter 13 plan payment as Exh. A. However, the December Honickman Decl. did not demonstrate that she timely made her November 2024 deed of trust payment to Amwest.

On December 16, 2024, the Court entered an order denying the Motion to Extend Stay [doc. 42]. In its ruling, the Court stated, in pertinent part, that "Debtor has not rebutted the presumption that this case was not filed in good faith with clear and convincing evidence. It appears that Debtor's case will not conclude with a confirmed plan that will be fully performed. Consequently, the Court will deny the Motion." Court’s ruling on the Motion to Extend Stay [doc. 41].

c. The Motion For Relief from the Automatic Stay

On November 27, 2024, Amwest filed the *Motion for Relief from the Automatic Stay Under 11 U.S.C. § 362 (Real Property)* (the "Motion") [doc. 33]. In the Motion, Amwest requests that the Court annul the automatic stay retroactive to the petition date. To the Motion, Amwest attached the Tioseco Decl. and the Sanchez Decl. In her declaration, Ms. Sanchez states, in pertinent part:

> Prior to proceeding with the foreclosure sale on October 21, 2024, as per Prestige's routine process, I ran a bankruptcy check via Pacer at 8:30 a.m. ("Pacer Report"). Said Pacer Report did not reflect a pending bankruptcy that would stay the foreclosure sale. Between 8:30 a.m. and 11:00 a.m., I did not receive any notice of a bankruptcy case. Accordingly, Prestige proceeded with its scheduled Sale at 11:00 a.m.

Sanchez Decl., ¶ 4. In his declaration, Mr. Tioseco states, in relevant part, that "[p]rior to proceeding with the Sale on October 21, 2024, Amwest did not receive notice of [the Current Case]." Tioseco Decl., ¶ 25.

On December 5, 2024, Debtor filed a response to the Motion (the "Response") [doc. 37]. The same month, Debtor filed the December Honickman Decl. in support of the Response. To the December Honickman Decl., Debtor attached a narrative of alleged violations by Amwest as Exh. B. Also in December 2024, Amwest filed a reply in support of the Motion [doc. 43].

II. ANALYSIS

"Many courts have focused on two factors in determining whether cause exists to grant [retroactive] relief from the stay: (1) whether the creditor was aware of the bankruptcy petition; and (2) whether the debtor engaged in unreasonable or inequitable conduct, or prejudice would result to the creditor." *In re National Environmental Waste Corp.*, 129 F.3d 1052, 1055 (9th Cir. 1997). "[T]his court, similar to others, balances the equities in order to determine whether retroactive annulment is justified." *Id*.

Here, Amwest was unaware of the Current Case prior to the foreclosure sale, and Debtor acted unreasonably in a way that has prejudiced Amwest. Amwest ran a bankruptcy check the morning of the October 21, 2024 sale. After Amwest ran the check, Debtor filed the Current Case. Amwest has submitted a declaration testifying that it was not notified of the Current Case until after the sale. *See* Tioseco Decl., ¶ 25; Sanchez Decl., ¶ 4. Debtor does not contest that Amwest did not receive notice of the Current Case before the sale. Consequently, retroactive relief from the automatic stay is appropriate in this case.

9:30 AM
CONT... **Cory Beth Honickman** **Chapter 13**

With respect to Debtor's conduct, the Current Case appears to have been filed not in good faith. The First Case and the Second Case were dismissed within weeks of filing for failure to file documents. In the Current Case, Debtor has represented that she will make plan and postpetition deed of trust payments using income primarily supplied by an unverified monthly contribution of a "caregiver."

Moreover, Debtor has not accurately represented the amount of the prepetition arrears or the amount of the ongoing monthly payments owed to Amwest. The Loan Modification provides that the current monthly payments due to Amwest are $6,531.46; however, in her schedule J, Debtor states that those payments are $5,908. *See* Exh. 5 to the Tioseco Decl., p. 1; Debtor’s schedule J. Before she filed the Plan, Debtor received correspondence from Amwest indicating that the amount necessary to reinstate her loan as of October 18, 2024 was $95,202.96. However, in the Plan, Debtor indicated that the prepetition arrears owed to Amwest were $91,610. *See* Exh. 3 to the November Honickman Decl.; Plan, p. 6.

Debtor’s schedule J reflects net monthly income of $1,792. Considering that the ongoing deed of trust payments are apparently $6,531.46, and Debtor's apparent lack of sufficient income to make plan and deed of trust payments, it appears that Debtor is unable to fund a confirmable chapter 13 plan.

Debtor's prepetition failure to comply with the Loan Modification, the timing of the First Case, the Second Case and the Current Case and Debtor’s unverified postpetition income and misrepresentations regarding the amount of her prepetition arrears and monthly deed of trust payments indicate that Debtor filed this bankruptcy petition merely to delay foreclosure proceedings. For these reasons, the Court finds that annulment of the automatic stay is appropriate.

III. CONCLUSION

The stay is annulled retroactive to the bankruptcy petition date. Any postpetition actions taken by Amwest to enforce its remedies regarding the Property will not constitute a violation of the stay.

Amwest (and any successors or assigns) may proceed under applicable nonbankruptcy

9:30 AM

CONT... Cory Beth Honickman Chapter 13

law to enforce its remedies to foreclose upon and obtain possession of the property.

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

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

Party Information

Debtor(s):

Cory Beth Honickman	Represented By Kevin Tang

Trustee(s):

Elizabeth (SV) F Rojas (TR)	Pro Se

9:30 AM
1:22-10535 Lawrence G Zeno **Chapter 13**

#6.00 Motion to Modify Automatic Stay and Co-Debtor Stay

Docket 48

Tentative Ruling:

The Court will continue the hearing in order for the debtor to obtain Court approval to incur the debt at issue and to secure the debt with a subordinate deed of trust against the debtor's real property.

The debtor must: (1) file a motion to obtain the Court's approval for the debtor to incur the debt and (2) provide notice of the motion and the applicable deadline to file any response to the motion to **all of the debtor's creditors**.

I. BACKGROUND

On May 3, 2022, Lawrence G. Zeno ("Debtor") filed a chapter 13 petition, initiating bankruptcy case no. 1:22-bk-10535-VK (the "Case"). In his schedule A/B, Debtor identifies a joint tenancy interest in the real property located at 11924 Bromont Avenue, Pacoima, CA 91331 (the "Property"), and states that his "[r]oomate Gary is on the Loan." Schedule A/B, doc. 1. In his schedule D, Debtor discloses a debt in the amount of $526,636, secured by a deed of trust against the Property. In his schedule D, Debtor does not disclose any other encumbrances against the Property.

In his schedule I, Debtor represents that he is a sound engineer at Entertainment Partners Enterprises, LLC and had been employed there for 22 years. Debtor also disclosed that his monthly gross wages were $4,260.58 per month and that he received Social Security payments in the amount of $2,794.00 per month.

In July 2024, Debtor filed a *Motion Under LBR 3015-1(n) and (w) to Modify or Suspend Plan Payments* (the "Plan Modification Motion") [doc. 37]. In his *Declaration of Current/Post-Petition Income and Expenses*, attached to the Plan Modification Motion, Debtor represents that: (1) he still is employed as a sound engineer at Entertainment Partners Enterprises, LLC; (2) his wages have increased to $6,100.00 per month; (3) his Social Security payments have increased to $3,146.70

per month; and (4) his monthly net income has increased to $4,327.73 per month.

A. The Plan and Confirmation Order

In August 2022, Debtor filed his first amended chapter 13 plan (the "Plan") [doc. 17]. With respect to the claim secured by the Property, Debtor proposed to: (1) pay prepetition arrears of $116,115.22 through the Plan; and (2) maintain and make the current contractual installment payments on the secured claim by making direct payments. Plan, pp. 5-6. The term of the Plan is 60 months. As set forth in Claim 7-1, filed by or on behalf of LoanCare, LLC, the prepetition arrearages on the secured claim apparently include $80,419.20 in principal and interest due, $5,351.13 in prepetition fees, $27,670.19 as an escrow deficiency for funds advanced and $2,674.70 as a projected escrow shortage.

The Plan provides that "Debtor must not incur debt greater than $1,000 without prior court approval unless the debt is incurred in the ordinary course of business pursuant to 11 U.S.C. § 1304(b) or for medical emergencies." *Id*., p. 4. In September 2022, the Court entered an order confirming the Plan (the "Confirmation Order") [doc. 25]. The Confirmation Order provides that "Debtor must not incur debt greater than $1,000 without prior court approval unless the debt is incurred in the ordinary course of business pursuant to 11 U.S.C. § 1304(b)." Confirmation Order, p. 3.

B. The Motion to Dismiss the Case and the Motion to Modify the Plan

In March 2024, the chapter 13 trustee (the "Trustee") filed a motion to dismiss the Case (the "Motion to Dismiss") [doc. 33], which Debtor opposed. In the Motion to Dismiss, the Trustee asserted that Debtor was delinquent on his chapter 13 plan payments.

In July 2024, Debtor filed the Plan Modification Motion, to which the Trustee filed a response. In the Plan Modification Motion, Debtor proposed increasing his plan payments from $2,489.42 to $2,825.00 until the end of the Plan's term. In addition, Debtor proposed increasing the dividend to general unsecured creditors from 0% to 100%.

In August 2024, the Court entered an order granting the Plan Modification Motion (the "Order Modifying Plan") [doc. 42]. In the Order Modifying Plan, the Court stated, in relevant part:

> [I]t is ordered that Debtor's motion is:
> …
> Granted on the following conditions:
> 1. The Debtor suspends 3.25 plan payments ($8,104.10) to resolve the current delinquency; and
> 2. The Plan payment is increased to $2,975.00 to maintain feasibility at the proposed 100%.

Order Modifying Plan, pp. 1-2. After the Court entered the Order Modifying Plan, the Trustee voluntarily dismissed the Motion to Dismiss [doc. 45].

C. The Motion to Modify the Automatic Stay and the Co-Debtor Stay

On October 30, 2024, Lakeview Loan Servicing LLC ("Lakeview") filed a *Motion to Modify Automatic Stay and Co-Debtor Stay* (the "Stay Modification Motion") [doc. 48]. In support of the Stay Modification Motion, Lakeview filed the declaration of Jacqueline VanDerMiller (the "VanDerMiller Decl.") [doc. 50].

Attached as Exh. A to the VanDerMiller Decl. allegedly is a copy of a promissory note dated December 14, 2018 in the amount of $442,612, payable to Movement Mortgage, LLC and signed by Debtor and Gary Ward (the "Note"). VanDerMiller Decl., para. 3. Among other things, the Note provides for monthly principal and interest payments in the amount of $2,513.10 and for interest in the amount of 5.5% per year. The maturity date of the Note is January 1, 2049.

Lakeview contends that Debtor and Mr. Ward executed a second promissory note dated on or around September 25, 2023 in the amount of $98,127.74 (the "Subordinate Note"). The Subordinate Note is made payable to the Secretary of Housing and Urban Development. VanDerMiller Decl., para. 8 and Exh. D thereto.

Ms. VanDerMiller states that the Subordinate Note is secured by a deed of trust encumbering the Property (the "Subordinate DOT"), which allegedly is attached to the VanDerMiller Decl. VanDerMiller Decl., para. 9 and Exh. E thereto. The Subordinate

DOT was recorded in the Official Records of Los Angeles County on October 23, 2023. *Id*. Based on Debtor's representations regarding his employment in his schedule I and the Plan Modification Motion, it appears that the debt set forth in the Subordinate Note was not incurred in Debtor's ordinary course of business, within the meaning of 11 U.S.C. § 1304(a).

Lakeview requests that the Court modify the automatic stay and the co-debtor stay of 11 U.S.C. § 1301(a) for the purpose of ratifying the Subordinate Note and the recordation of the Subordinate DOT. Lakeview initially served the Stay Modification Motion on Debtor using negative notice pursuant to LBR 9013-1(o) (the "Initial Notice") [doc. 49]. Lakeview later served notice on Debtor that the Stay Modification Motion would be heard on January 9, 2025 at 9:30 a.m. (the "Amended Notice") [doc. 56, amended by doc. 58]. Lakeview has not served the Initial Notice nor the Amended Notice on Mr. Ward and Debtor's creditors.

II. DISCUSSION

"There is no provision in the Bankruptcy Code that specifically authorizes an individual chapter 13 debtor to incur postpetition debt." *In re Nacci*, 586 B.R. 733, 736 (Bankr. N.D. Ohio, 2018); *see also Higgins v. Logan*, 635 B.R. 776, 781 (E.D. N.C. 2021) ("[N]o commensurate provision in the Bankruptcy Code provides debtors with a substantive, definite right to incur post-petition debt.").

> While § 364 provides a statutory basis for obtaining unsecured credit and incurring unsecured debt, in chapter 13 cases the authority is granted to a trustee operating a debtor's business under § 1304. Only self-employed debtors engaged in business are entitled to exercise the § 364 powers of a trustee. Debtors are not self-employed and are not operating a business. Consequently, at least one court concluded this left debtors unable to avail themselves of § 364. *See In re Ward*, 546 B.R. 667 (Bankr. N.D. Tex. 2016).
>
> Yet simultaneously, § 1305 creates a pathway for certain postpetition debt to be included in a plan. *Id*. This provision allows creditors to include postpetition claims for (1) taxes that come due and (2) for consumer debts "that arise[ ] after the date of the order for relief under

> this chapter, and that is for property or services necessary for the debtor's performance under the plan" in a plan. 11 U.S.C. § 1305(a)(1) and (2). **Where practicable, a debtor must obtain the approval of the trustee**. 11 U.S.C. § 1305(c). Plainly, Congress anticipated situations where a debtor incurs postpetition debt. Although there is no provision that authorizes it, § 1305 acquiesces its existence.

Nacci, 586 B.R. at 736–37 (emphasis added); *see also Higgins*, 365 B.R. at 779-80 ("Through [11 U.S.C. §§ 1305(c) and 1328], the Bankruptcy Code contemplates trustee supervision over a debtor's decision to incur post-petition debt.").

In *Nacci*, the debtors sought to incur student loan debt on behalf of their daughter. In considering whether the debtors were required to obtain the court's approval to incur the debt, it looked to the debtors' confirmed chapter 13 plan, which "prohibits debtors from incurring 'debt exceeding $500.00 in the aggregate without notice to the Trustee and approval of the Court[.]'" *Nacci*, 586 B.R. at 737. On that ground, the court held that it must approve the student loan sought by the debtors.

As concerns the automatic stay, pursuant to 11 U.S.C. § 362(d), the court can grant relief from the automatic stay "by terminating, annulling, modifying, or conditioning such stay…for cause[.]" 11 U.S.C. § 362(d)(1). Here, Lakeview seeks to modify the automatic stay for the limited purpose of ratifying the Subordinate Note and the recordation of the Subordinate DOT.

The Confirmation Order provides that "Debtor must not incur debt greater than $1,000 without prior court approval unless the debt is incurred in the ordinary course of business pursuant to 11 U.S.C. § 1304(b)." Confirmation Order, p. 3. It appears that Debtor is not self employed and that he did not incur the debt referenced in the Subordinate Note in the ordinary course of self-employment.

The Court did not authorize Debtor to incur the debt set forth in the Subordinate Note as a postpetition debt. Moreover, notice of the Stay Modification Motion and the deadline to file any response has not been provided to Mr. Ward and all of Debtor's creditors. As a result, at this time, the Court will not grant relief from the automatic stay and the co-debtor stay to ratify the Subordinate Note and the postpetition recordation of the Subordinate DOT.

9:30 AM

CONT... Lawrence G Zeno Chapter 13

III. CONCLUSION

The Court will continue the hearing on the Stay Modification Motion to provide time for Debtor to file a motion to incur the debt set forth in the Subordinate Note and to secure that debt with the Subordinate DOT. Prior to the continued hearing on the Stay Modification Motion, Debtor must obtain the Court's authorization of that transaction. Debtor must provide notice of that motion and the deadline to file a response **to all creditors**.

The Court will prepare the order.

Party Information

Debtor(s):

Lawrence G Zeno	Represented By Joshua Sternberg

Movant(s):

LAKEVIEW LOAN SERVICING,	Represented By Jenelle C Arnold

Trustee(s):

Elizabeth (SV) F Rojas (TR)	Pro Se

9:30 AM

1:24-11920 1143 Venlee LLC **Chapter 11**

#7.00 Motion for relief from stay [RP]

1SHARPE OPPORTUNITY INTERMEDIATE TRUST
VS
DEBTOR

CASE DISMISSED 12/19/24

Docket 15

***** VACATED *** REASON: Order dismissing the case with a 180-day bar to debtor filing another bankruptcy petition was entered on December 19, 2024.**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

1143 Venlee LLC	Represented By Kevin Tang

Movant(s):

1Sharpe Opportunity Intermediate	Represented By Mitchell B Ludwig

1:30 PM

1:22-11019 Steven Louis Miller **Chapter 7**

Adv#: 1:22-01062 Miller et al v. Miller

#8.00 Ruling re:
Trial re Complaint for non-dischargeability and objection to discharge for:
1) Obligation/money obtained through false pretenses, false representation or actual fraud under 11 U.S.C. §523(a)(2)(A)
2) For conversion/embezzlement under 11 U.S.C. § 523(a)(4)
3) Objection to discharge under 11 U.S.C. § 727(a)(2)
4) Objection to discharge under 11 U.S.C. § 727(a)(2)
5) Objection to discharge under 11 U.S.C. § 727(a)(5)

fr. 11/19/24; 12/19/24

Docket 1

***** VACATED *** REASON: Memorandum of decision after trial entered on January 7, 2025 [doc. 100].**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Steven Louis Miller	Pro Se

Defendant(s):

Steven Louis Miller	Pro Se

Plaintiff(s):

Keri Miller	Represented By Daren M Schlecter
Michael Miller	Represented By Daren M Schlecter

Trustee(s):

David Seror (TR)	Pro Se

1:30 PM

CONT... **Steven Louis Miller** **Chapter 7**

1:30 PM

1:23-10565 John W. Scheuplein, IV **Chapter 7**

Adv#: 1:23-01042 Copy Solutions Inc. v. Scheuplein, IV

#9.00 Status Conference Re:
Trial re: complaint objecting to dischargeability of certain debt under 11 U.S.C.§§ 523(a)(4), 523(a)(6), 523(a)(11)

fr. 12/17/24

Docket 1

***** VACATED *** REASON: Adversary proceeding reassigned to Judge Mund on 1/6/25 [doc. 37].**

Tentative Ruling:

- NONE LISTED -

Party Information	
Debtor(s):	
John W. Scheuplein IV	Represented By James D. Hornbuckle
Defendant(s):	
John W. Scheuplein IV	Represented By James D. Hornbuckle
Plaintiff(s):	
Copy Solutions Inc.	Represented By Robert Schiller Crowder Jason M Torf
Trustee(s):	
David Seror (TR)	Pro Se

1:30 PM
1:23-11082 Philip M. Lawrence, II **Chapter 7**
Adv#: 1:23-01053 Moi et al v. Lawrence, II

#10.00 Status conference re: first amended complaint to determine dischargeability of debt
11 U.S.C. §523(a)(2)(A), (4)and (6)

fr. 2/21/24, 4/17/24; 5/15/24; 9/4/24; 9/18/24; 11/13/24

Docket 11

Tentative Ruling:

Parties should be prepared to discuss the following:

Within seven (7) days after this status conference, the plaintiff must submit an Order Assigning Matter to Mediation Program and Appointing Mediator and Alternate Mediator using Form 702. **During the status conference, the parties must inform the Court of their choice of Mediator and Alternate Mediator.** The parties should contact their mediator candidates before the status conference to determine if their candidates can accommodate the deadlines set forth below.

Deadline to complete discovery: **May 30, 2025**

Deadline to complete one day of mediation: **June 20, 2025**

Deadline to file pretrial motions: **July 14, 2025**

Deadline to complete and submit pretrial stipulation in accordance with Local Bankruptcy Rule 7016-1: **August 7, 2025**

Pretrial: **August 21, 2025 at 1:30 p.m.**

In accordance with Local Bankruptcy Rule 7016-1(a)(3), within seven (7) days after this status conference, the plaintiff must submit a Scheduling Order.

If any of these deadlines are not satisfied, the Court will consider imposing sanctions

1:30 PM

CONT... Philip M. Lawrence, II **Chapter 7**

against the party at fault pursuant to Local Bankruptcy Rule 7016-1(f) and (g).

Party Information

Debtor(s):

Philip M. Lawrence II	Represented By Robert M Yaspan

Defendant(s):

Philip M. Lawrence II	Represented By Robert M Yaspan

Plaintiff(s):

Patrizio Moi	Represented By Matthew D. Resnik
Moi Productions, Inc., a Delaware	Represented By Matthew D. Resnik
The Record Plant, Inc., a Delaware	Represented By Matthew D. Resnik

Trustee(s):

David Keith Gottlieb (TR)	Represented By Ron Bender Jeffrey S Kwong

1:30 PM
1:24-11175 Darci Penn **Chapter 7**

#11.00 Creditors' Objection to Debtor's Claim of Homestead Exemption Pursuant to 11 U.S.C. Section 522(q)

fr. 11/14/24

Docket 12

***** VACATED *** REASON: Hearing Continued to 2/19/25 at 1:30 p.m. per order #21.**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Darci Penn	Represented By David S Hagen

Trustee(s):

Amy L Goldman (TR)	Pro Se

1:30 PM

1:24-11175 Darci Penn **Chapter 7**

Adv#: 1:24-01057 Jasmine et al v. Penn et al

#12.00 Status conference re: complaint for:
1. Objection to discharge under 11 U.S.C. §§727(a)(2)(A); 727(a)(3) and 727(a)(4);
2. Exception from discharge under 11 U.S.C. §§523(a)(2)(A); 523(a)(4) and 523(a)(19);
3. Objection to community discharge under 11 U.S.C. §524

Docket 1

***** VACATED *** REASON: Heard today at 2:00 pm**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Darci Penn	Represented By David S Hagen

Defendant(s):

Darci Penn	Pro Se
Andrew Penn	Pro Se

Plaintiff(s):

Nick Jasmine	Represented By Jeffrey S Shinbrot
Marissa Jasmine	Represented By Jeffrey S Shinbrot
Elan Buller	Represented By Jeffrey S Shinbrot
Joy Anne Buller	Represented By Jeffrey S Shinbrot
Jason Sabolic	Represented By

1:30 PM

CONT... Darci Penn **Chapter 7**

	Jeffrey S Shinbrot
Teri Sabolic	Represented By Jeffrey S Shinbrot
Kyle Fujitaki	Represented By Jeffrey S Shinbrot
Viet-Linh Fujitaki	Represented By Jeffrey S Shinbrot
Jeffrey Wilson	Represented By Jeffrey S Shinbrot
Ellanee Wilson	Represented By Jeffrey S Shinbrot

Trustee(s):

Amy L Goldman (TR)	Pro Se

2:00 PM

1:23-10270 Linda Ezor Swarzman **Chapter 7**

Adv#: 1:24-01038 Smith Geborkoff v. Swarzman

#13.00 Motion to Dismiss Adversary Complaint to Determine Dischargeability of Debt, or Alternatively, to Dismiss Claims for Relief (FRCP 12(b)(6))

fr. 11/6/24

Docket 5

***** VACATED *** REASON: Cont'd to 1/16/25 at 2:00 p.m. per Ord. #19.**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Linda Ezor Swarzman	Represented By Paul A Beck

Defendant(s):

Linda Ezor Swarzman	Represented By Paul A Beck

Plaintiff(s):

Michelle Smith Geborkoff	Pro Se

Trustee(s):

David M Goodrich (TR)	Represented By Matthew A Lesnick

2:00 PM

1:23-10270 Linda Ezor Swarzman **Chapter 7**

Adv#: 1:24-01038 Smith Geborkoff v. Swarzman

#14.00 Status conference re: complaint to determine dischargeability of debt under Code 11 U.S.C. § 523

fr. 10/30/24; 11/6/24

Docket 1

***** VACATED *** REASON: Cont'd to 1/16/25 at 2:00 p.m. per Ord. #19.**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Linda Ezor Swarzman	Represented By Paul A Beck

Defendant(s):

Linda Ezor Swarzman	Pro Se

Plaintiff(s):

Michelle Smith Geborkoff	Pro Se

Trustee(s):

David M Goodrich (TR)	Represented By Matthew A Lesnick

2:00 PM

1:24-11175 Darci Penn **Chapter 7**

Adv#: 1:24-01057 Jasmine et al v. Penn et al

#15.00 Defendant's Motion For Order Dismissing Complaint Objecting To Dischargeability of Debt 523(a)(4) and Objection to Discharge 727(a)(2)(A), 727(a)(3) and 727(a)(4) For Failure to State a Cause of Action

Docket 5

Tentative Ruling:

For the reasons set forth below, the Court will: (1) grant the motion to dismiss as to the plaintiffs' claims against the debtor under 11 U.S.C. §§ 727(a)(2), (a)(3) and (a)(4)(D), with leave to amend the complaint; and (2) deny the motion to dismiss as to the plaintiffs' claims against the debtor under 11 U.S.C. §§ 523(a)(4) and 727(a)(4)(A).

I. BACKGROUND

A. The Bankruptcy Case

On July 17, 2024 (the "Petition Date"), Darci Penn ("Debtor") filed a voluntary chapter 7 petition, initiating case no. 1:24-bk-11175 (the "Bankruptcy Case"). *Petition* [Bankruptcy Case, doc. 1]. Amy L. Goldman was appointed as chapter 7 trustee (the "Trustee"). *Notice of Chapter 7 Bankruptcy Case*, ¶ 5 [doc. 5]. In her schedule A/B, Debtor disclosed an interest in "[p]ersonal jewelry" in the amount of $2,000. *Schedule A/B*, ¶ 12 [doc. 1]. In her schedule C, Debtor claimed an exemption in the jewelry in the amount of $2,000 under Cal. Civ. Proc. Code § 704.040. *Schedule C* [doc. 1].

In her schedule E/F, Debtor disclosed a disputed, unsecured nonpriority claim of Jeffrey and Ellanee Wilson in the amount of $122,000, based on a "[l]awsuit arising over contention that debtor's separated spouse sold securities to plaintiff that ultimately were deemed worthless." *Schedule E/F*, ¶ 4.3 [Bankruptcy Case, doc. 1]. In her statement of financial affairs, Debtor disclosed a civil action pending in the Superior Court of California, County of Los Angeles, entitled *Jeffrey Alan Wilson and Ellanee Ann Wilson v. Andrew Lorin Penn and Darci Penn*, case no. 23VECV01405 (the "State Court Action"). *Statement of Financial Affairs*, ¶ 9 [doc. 1]. Debtor represented that the nature of the State Court Action is a "[s]uit by former investor of Andrew L. Penn, debtor's separated spouse, alleging breach of contract, breach of implied covenant of good faith, breach of fiduciary dut[y], fraud, constructive fraud, theft, convers[]ion, common count." *Id*.

B. The Adversary Proceeding

On October 18, 2024, Nick Jasmine, Marissa Jasmine, Elan Buller, Joy Anne Buller, Jason Sabolic, Kyle Fujitake, Viet-Linh Fujitaki, Jeffrey Wilson and Ellanee Wilson (collectively, "Plaintiffs") filed a complaint (the "Complaint") against Debtor and Debtor's non-filing spouse, Andrew Penn (together, "Defendants"), initiating this adversary proceeding. *Complaint* [doc. 1]. The Complaint seeks: (1) denial of Debtor's discharge and Mr. Penn's discharge (if any) as to community property under 11 U.S.C. § 727(a)(2); (2) denial of Debtor's discharge and Mr. Penn's discharge (if any) under 11 U.S.C. §§ 727(a)(3) and (a)(4); and (3) a determination of nondischargeability as to debts owed to Creditors under 11 U.S.C. §§ 523(a)(2)(A), (a)(4) and (a)(19).

In relevant part, the Complaint makes the following factual allegations:

> According to the California Department of Financial Protection & Innovation, commencing in 2019, chapter 7 Debtor and her non-debtor spouse Andrew Penn sold, and assisted in the sale of, unregistered securities to Plaintiffs. The sale[s] of investments were accompanied by materially false and misleading statements. Plaintiffs invested a total of $761,624 with the Debtor and Andrew—the vast majority of the money was never returned.
>
> Although Debtor had actual knowledge of all of the Plaintiffs, she omitted as creditors from her bankruptcy schedules all but one of the families that comprise the Plaintiffs in this case.
>
> In the years preceding the Petition Date, Debtor and Andrew engaged in a fraudulent scheme to prevail upon their friends to invest in

investment agreements with "guaranteed" returns, based on the alleged purchases and sale of art work investments in violation of California securities law, including:

a. The Jasmine Family: Marissa Jasmine met Darci Penn in a college class at Cal State Northridge in approximately 2007. … [I]n 2019, Darci started speaking to Marissa about how well her husband Andrew was doing financially and when Marissa mentioned to Darci that she and her husband Nick were interested in purchasing investment property, Darci stated to Marissa that Andrew was very good at investing in art and suggested that Marissa and Nick invest in art deals instead. After this initial solicitation by Darci, Andrew followed up with a series of text messages to Marissa describing an investment in art which were "pre-sold for an already known and guaranteed return" that has "zero risk." … [I]n November 2019, Marissa and Nick wire transferred $22,000 to Darci and Andrew's joint bank account. Based on additional false promises, in February 2020, the Jasmines wired Darci and Andrew an additional $64,450; $75,000 in August 2020; $100,000 in October 2020; $15,325 in December 2020, and $50,000 in January 2021. All of the "investments" were made to the joint bank account of Darci and Andrew Penn. Despite having knowledge that the Jasmines had transferred $326,775 to Darci's bank account and Darci had paid nothing back, Darci failed to list the Jasmines as creditors in her bankruptcy case. The statements made regarding the investments by Darci and Andrew were intentionally and knowingly false and misleading.

b. The Sabolic Family: Jason and Teri Sabolic were also personal friends of the Debtor, having met her at their children's pre-school. … In January 2020, Darci sent a text message to Teri soliciting the Sabolic's participation in an art investment. Darci's text included the specific investment and the alleged return on investment. The Sabolics made the investment as set forth in Darci's text. Later in 2020, the Sabolics invested an additional $10,000 in an alleged "portfolio" with the Defendants. On January 7, 2021, Andrew texted Jason stating that he had "secured a large art deal" and that "[t]he net return is right around 24%." After more texts and a meeting, the Sabolics invested an additional $50,000 with Defendants. In June 2021, Andrew again solicited the Sabolics for money, resulting in another $35,000 investment by the Sabolics. In September 2021, the Sabolics and Defendants had dinner together and the Sabolics investment was discussed, Darci was present at the dinner and had actual knowledge of the investments made by the Sabolics and that they were owed money. The Sabolics invested a total of $95,000 with Defendants and received only $24,510 back. Darci failed to list the Sabolics as creditors in her bankruptcy case. The statements made by Darci and Andrew regarding the investments were intentionally and knowingly false and misleading.

c. The Fujitaki Family: Kyle Fujitaki met Darci and Andrew when they attended El Camino High School together. At a dinner at Nobu in 2021, Darci told Kyle and his wife Viet-Linh Fujitaki that Andrew's art transactions had reached a scale and frequency where they were bringing in friends and family; Andrew boasted of past transactions and how the investments were structured. Shortly thereafter, in July 2021, the Fujitakis invested $20,000 with Defendants and then rolled that alleged transaction over to a subsequent transaction. The Fujitakis also invested an additional $65,000 in August 2021, $50,000 in September 2021 and $6,000 in July 2022, for a total investment of $141,000. The total amount returned by Defendants to the Fujitakis was $3,148. The statements made by Darci and Andrew regarding the investments were intentionally and knowingly false and misleading. Darci failed to list Kyle and Viet-Linh Fujitaki in her bankruptcy schedules.

d. The Wilson Family: Jeffrey and Ellanee Wilson also met the Debtor and her husband in high school. In July 2022, Andrew solicited Jeffrey via text regarding an alleged investment opportunity with "guaranteed returns." In November 2022, Andrew contacted Jeffrey and informed him that Darci and he were attempting to "buy out an investor who needed the money out because of a divorce" and that in three months, the Wilsons would earn the investor's impending return of 22%. Thereafter, the Wilsons transferred Darci and Andrew $100,000.

Shortly thereafter, Andrew stopped returning Jeffrey's calls. Ellanee contacted Darci who reassured Ellanee that the art deals were legitimate and made excuses for Andrew's failure to return the calls. The Wilsons never received any repayment from Darci or Andrew. Jeffrey executed a "Private Investment Agreement" in connection with the fraudulent investment. Darci's statements to Ellanee regarding the investments were knowingly and intentionally false and misleading.

e. The Buller Family: Elan and Joy Buller first met Defendants in 2015 and became "friends" with them in 2018. The Bullers transferred $100,000 to Darci and Andrew on August 11, 2022 and have received no money back. In August 2022, the Bullers executed a Private Investment Agreement which falsely promised a "guaranteed return" of "40% over a term of 19 months." Darci failed to list the Bullers in her bankruptcy schedules.

Plaintiffs are informed and believe that the monies transferred in consideration of "art investments" were delivered to a joint checking account held in the name of Darci and Andrew Penn.

…

Plaintiffs are informed and believe that the Debtor had actual knowledge that her husband was not investing Plaintiffs' money in legitimate investments yet she affirmatively represented to Plaintiffs that her husband was making legitimate investments. The Debtor made these false statements with the intent to deceive Plaintiffs so that Plaintiffs would send and continue to send money to the Debtor's and Andrew's joint bank account.

Plaintiffs are informed and believe that instead of expending the money sent to the Debtor and Andrew's joint bank accounts they spent the money on luxury items and vacations for the Penn family.

. . .

> Plaintiffs are informed and believe that the Debtor owns valuable jewelry that was not disclosed in her bankruptcy schedules or was transferred within one year of the filing of her bankruptcy case.

Complaint, ¶¶ 9, 12-14, 18-19, 22 [doc. 1].

C. The Motion and Opposition Thereto

On November 8, 2024, the Debtor filed a motion to dismiss portions of the Complaint for failure to state certain causes of action (the "Motion") [doc. 5]. Namely, the Motion seeks dismissal of the claims under 11 U.S.C. § 523(a)(4) and §§ 727(a)(2)(A), (a)(3) and (a)(4). On December 13, 2024, Plaintiffs filed an opposition to the Motion [doc. 8].

II. LEGAL STANDARDS

A. General Federal Rule of Civil Procedure ("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 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)).

“A complaint that merely recites statutory language fails to state a claim under Rule 12(b)(6).” *In re Kubick*, 171 B.R. 658, 660 (B.A.P. 9th Cir. 1994). This is because “mere statutory language does not plead facts sufficiently so that they may be answered or denied.” *Id.* “[F]acts must be alleged to sufficiently apprise the defendant of the complaint against him.” *Id.*

B. Leave to Amend

Under Rule 15(a)(1)(B), a plaintiff has a one-time right to file an amended complaint "as a matter of course" 21 days after the earlier of (i) service of a responsive pleading or (ii) service of a Rule 12(b), (e) or (f) motion. Even if a plaintiff does not have the right to amend "as a matter of course," the court may grant leave to amend. Rule 15(a)(2) provides that "the court should freely give leave [to amend] when justice so requires." Dismissal without leave to amend is appropriate, however, 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).

C. Allegations of Fraud Under Rule 9(b)

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, knowledge, and other conditions of a person’s mind may be alleged generally.” Particularity means that allegations must be stated with “specificity including an account of the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentations.” *Lepton Labs, LLC v. Walker*, 55 F.Supp.3d 1230, 1243 (C.D. Cal. 2014) (citing *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir 2007)). 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

2:00 PM
CONT... **Darci Penn** **Chapter 7**

531, 540 (9th Cir. 1989).

D. 11 U.S.C. § 523(a)(4)

A bankruptcy discharge does not discharge an individual debtor from any debt "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny." 11 U.S.C. § 523(a)(4). For purposes of section 523(a)(4), federal law and not state law controls the definition of "embezzlement." *In re Wada*, 210 B.R. 572, 576 (B.A.P. 9th Cir. 1997). "Embezzlement is defined as 'the fraudulent appropriation of property by a person to whom such property has been [e]ntrusted or into whose hands it has lawfully come.'" *Id*. (quoting *Moore v. United States*, 160 U.S. 268, 269 (1885)).

The proponent of the nondischargeability determination must prove: (1) property rightfully in the possession of a nonowner; (2) the nonowner's appropriation of the property to a use other than that for which it was entrusted; and (3) circumstances indicating fraud. *In re Littleton*, 942 F.2d 551, 555 (9th Cir. 1991); *In re Peltier*, 643 B.R. 349, 360 (B.A.P. 9th Cir. 2022). With respect to establishing nondischargeability of a debt for embezzlement, a fiduciary relationship is not required. *Littleton*, 942 F.2d at 555.

"'[E]mbezzlement requires a showing of wrongful intent.'" *Peltier*, 643 B.R. at 360 (quoting *Bullock v. BankChampaign, N.A.*, 569 U.S. 267, 274 (2013)). "[W]rongful intent in this context has been described as 'moral turpitude or intentional wrong' or 'felonious intent.'" *Id*. "Courts to consider the scienter requirement for an embezzlement claim consistently have ruled, or otherwise stated, that a claim of embezzlement requires a specific intent to defraud." *In re Razavi*, 539 B.R. 574, 600 (Bankr. N.D. Cal. 2015). "A wrongful appropriation of property under an erroneous belief of entitlement does not equate to the fraudulent intent necessary for embezzlement." *In re McVay*, 461 B.R. 735, 745 (Bankr. C.D. Ill. 2012).

"Fraudulent appropriation requires an intent to deprive, which can be inferred from the conduct of the person accused and from the circumstances of the situation." *Savonarola v. Beran*, 79 B.R. 493, 496 (Bankr. N.D. Fla. 1987). "Circumstances indicating fraud can be situations where the debtor intended to conceal the misappropriation." *In re Campbell*, 490 B.R. 390, 402 (Bankr. D. Ariz. 2013) (quotations and citation omitted).

E. 11 U.S.C. § 727(a)(2)

11 U.S.C. § 727(a)(2) provides that a court shall grant a debtor a discharge unless "the debtor, with intent to hinder, delay or defraud a creditor or an officer of the estate charged with custody of property … has transferred, removed, destroyed, mutilated, or concealed … (A) property of the debtor, within one year before the date of the filing of the petition; or (B) property of the estate, after the date of the filing of the petition."

"[T]wo elements comprise an objection to discharge under § 727(a)(2)(A): 1) a disposition of property, such as transfer or concealment, and 2) a subjective intent on the debtor's part to hinder, delay or defraud a creditor." *In re Lawson*, 122 F.3d 1237, 1240 (9th Cir. 1997) The transfer must occur within one year prepetition. *Id.* Lack of injury to creditors is irrelevant under § 727(a)(2). *In re Bernard*, 96 F.3d 1279, 1281–82 (9th Cir. 1996).

"The standard for denial of discharge under § 727(a)(2)(B) is the same as § 727(a)(2)(A), but the disposition must be of estate property occurring after the petition date." *In re Miller*, 2015 WL 3750830, at *3 (Bankr. C.D. Cal. June 12, 2015).

Intent may be inferred from the actions of the debtor. *In re Devers*, 759 F.2d 751, 753-54 (9th Cir. 1985). The necessary intent under § 727(a)(2) "may be established by circumstantial evidence, or by inferences drawn from a course of conduct." *In re Adeeb*, 787 F.2d 1339, 1343 (9th Cir. 1986) (quoting *Devers*, 759 F.2d at 753–54).

"The standard for denial of discharge under § 727(a)(2)(B) is the same as § 727(a)(2)(A), but the disposition must be of estate property occurring after the petition date." *In re Miller*, 2015 WL 3750830, at *3 (Bankr. C.D. Cal. June 12, 2015).

F. 11 U.S.C. § 727(a)(3)

Section 727(a)(3) places an affirmative duty on the debtor to keep and preserve records accurately documenting his or her business and personal affairs. *See In re Caneva*, 550 F.3d 755, 762 (9th Cir. 2008). Requiring accurate documentation "removes the risk to creditors of ‘the withholding or concealment of assets by the bankrupt under cover of a chaotic or incomplete set of books or records.’" *Id*. (quoting *Burchett v. Myers*, 202 F.2d 920, 926 (9th Cir. 1953)).

"‘In order to state a prima facie case under section 727(a)(3), a creditor objecting to discharge must show (1) that the debtor failed to maintain and preserve adequate records, and (2) that such failure makes it impossible to ascertain the debtor's financial condition and material business transactions.’" *In re Cox*, 41 F.3d 1294, 1296 (9th Cir. 1994) (quoting *Meridian Bank v. Alten*, 958 F.2d 1226, 1232 (3d Cir. 1992)). "[I]ntent to conceal one's financial conditions is not a necessary element for the denial of discharge under § 727(a)(3)." *Cox*, 41 F.3d at 1297. A debtor's "duty to keep records is measured by what is necessary to ascertain [his] financial status." *Moffett v. Union Bank*, 378 F.2d 10, 11 (9th Cir. 1967); *see also In re Hong Minh Tran*, 464 B.R. 885, 893 (Bankr. S.D. Cal. 2012) (type of debtor, as well as debtor’s sophistication, informs the bankruptcy court’s determination).

G. 11 U.S.C. § 727(a)(4)(A)

Pursuant to 11 U.S.C. § 727(a)(4)(A), the court shall not grant a debtor a discharge if "the debtor knowingly and fraudulently, in or in connection with the case—made a false oath or account." 11 U.S.C. § 727(a)(4)(A). "The fundamental purpose of § 727(a)(4)(A) is to insure that the trustee and creditors have accurate information without having to conduct costly investigations." *In re Retz*, 606 F.3d 1189, 1196 (9th Cir. 2010).

To prevail on a claim under § 727(a)(4)(A), the plaintiff must show that: (1) the debtor made a false oath in connection with the case; (2) the oath related to a material fact; (3) the oath was made knowingly; and (4) the oath was made fraudulently. *Id*. at 1197.

"Intent is usually proven by circumstantial evidence or by inferences drawn from the debtor’s conduct." *Id*. at 1199. "[M]ultiple omissions of material assets or information may well support an inference of fraud if the nature of the assets or transactions suggests that the debtor was aware of them at the time of preparing the schedules and that there was something about the assets or transactions which, because of their size or nature, a debtor might want to conceal." *In re Coombs*, 193 B.R. 557, 565-66 (Bankr. S.D. Cal. 1996). "'[T]he cumulative effect of false statements may, when taken together, evidence a reckless disregard for the truth sufficient to support a finding of fraudulent intent' under § 727(a)(4)." *Stamat v. Neary*, 635 F.3d 974, 982 (7th Cir. 2011) (quoting *In re Duncan*, 562 F.3d 688, 695 (5th Cir. 2009)).

H. 11 U.S.C. § 727(a)(4)(D)

Section 727(a)(4)(D) provides that a discharge shall be denied to a debtor who "knowingly and fraudulently, in or in connection with the case … withheld from an officer of the estate entitled to possession under this title, any recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs."

"[A] party objecting to discharge under [§ 727(a)(4)(D)] has the initial burden of proving…: 1) the withholding of documents was done by the debtor or someone for whose conduct the debtor is legally responsible; 2) was in connection with a case; 3) was withheld from an officer of the estate entitled to possession; 4) was done knowingly and fraudulently; and 5) relates to the debtor's property or financial affairs." *In re Sohmer*, 434 B.R. 234, 250 (Bankr. D. Mass. 2010).

III. ANALYSIS

A. Plaintiffs' § 523(a)(4) Cause of Action

In the Complaint, Plaintiffs allege the following in support of their cause of action for embezzlement under § 523(a)(4): (1) Plaintiffs entrusted their monies with Debtor and her husband for the alleged purpose of investment in art; (2) Debtor and her husband took Plaintiffs' monies with the specific intent to defraud them; and (3) Debtor appropriated Plaintiffs' monies for "luxury items and vacations for the Penn family." These allegations are sufficient to state a claim under § 523(a)(4). *See Littleton*, 942 F.2d at 555.

For purposes of asserting a claim for embezzlement under § 523(a)(4), Plaintiffs need not allege the existence of a fiduciary relationship. *See id*. Consequently, as to the §

523(a)(4) cause of action, the Court will deny the Motion.

B. Plaintiffs' § 727(a)(2) Causes of Action

Plaintiffs allege that Debtor concealed valuable jewelry or transferred valuable jewelry either (a) within one year before the Petition Date, or (b) after the Petition Date. At the motion to dismiss stage, Plaintiffs may allege Debtor's intent to hinder, delay or defraud creditors generally. *See* Rule 9(b).

However, Plaintiffs' factual allegations relating to § 727(a)(2), as concerns jewelry allegedly concealed or transferred by Debtor, are insufficient for the Court "to draw the reasonable inference that [Debtor] is liable" under § 727(a)(2). *See Fayer*, 649 F.3d at 1064.

The Complaint does not provide a description of Debtor's allegedly concealed or transferred jewelry or plead factual allegations that support Debtor's current or former ownership of jewelry with a value which exceeds $2,000 (as disclosed in Debtor's schedules A and C). The Complaint states only that the allegedly concealed or transferred jewelry is "valuable." Plaintiffs also do not explain why they believe Debtor owned or possessed jewelry worth more than the scheduled value of $2,000, or transferred valuable jewelry. For example, did Plaintiffs see Debtor wearing such jewelry? Did Debtor, or another identifiable person with knowledge of Debtor's ownership of such jewelry, discuss Debtor's acquisition, ownership or transfer of such jewelry with them?

Consequently, as to the § 727(a)(2) cause of action, the Court will grant the Motion. Because this deficiency could possibly be cured by an amendment, the Court will grant Plaintiffs leave to amend the Complaint.

C. Plaintiffs' § 727(a)(3) Cause of Action

Plaintiffs allege that Defendants "failed to keep, concealed, destroyed, mutilated, and/or falsified books and records detailing investments by Plaintiffs, what the money was used for, and where it is currently." As stated by the Ninth Circuit Court of Appeals in *Fayer*, the "plausibility standard . . . asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* at 1061. Consequently, this contention is insufficient to state a plausible claim under § 727(a)(3); the Complaint does not set forth sufficient factual allegations supporting Plaintiffs' contention that Debtor "failed to keep, concealed, destroyed, mutilated, and/or falsified" such books and records.

As a result, the Court will grant the Motion as to the § 727(a)(3) cause of action. Because this deficiency could possibly be cured by an amendment, the Court will grant Plaintiffs leave to amend the Complaint.

D. Plaintiffs' § 727(a)(4)(A) Cause of Action

In the Complaint, Plaintiffs allege that Debtor made false oaths in her schedules by failing to disclose Plaintiffs as creditors and failing to disclose allegedly valuable jewelry and/or transfers of jewelry. As previously noted, Debtor's intent and state of mind may be generally alleged.

Regarding Debtor's failure to include each of Plaintiffs as creditors (but not Plaintiffs' contentions regarding false oaths about jewelry), the allegations in the Complaint are sufficient to state a claim under § 727(a)(4)(A). Consequently, as to the § 727(a)(4)(A) cause of action, the Court will deny the Motion.

E. Plaintiffs' § 727(a)(4)(D) Cause of Action

The Complaint states that Debtor withheld books and records related to Plaintiffs' claims and/or jewelry from the Trustee. As previously noted, Plaintiffs do not plead sufficient facts regarding jewelry allegedly owned or transferred prepetition or postpetition by Debtor. Plaintiffs also do not plead sufficient facts underlying their assertion that Debtor withheld books and records from the Trustee.

Consequently, the Court will grant the Motion as to the § 727(a)(4)(D) cause of action. Because these deficiencies could possibly be cured by an amendment, the Court will grant Plaintiffs leave to amend the Complaint.

IV. CONCLUSION

2:00 PM

CONT... Darci Penn Chapter 7

Taking into account the analysis set forth above, the Court will: (1) grant the Motion as to the §§ 727(a)(2), (a)(3) and (a)(4)(D) claims, with leave to amend the Complaint; and (2) deny the Motion as to the §§ 523(a)(4) and 727(a)(4)(A) claims.

No later than fourteen (14) days after the entry of the Court's order deciding the Motion, Plaintiffs may file and serve a first amended complaint. If Plaintiffs will not be filing a first amended complaint, then by that deadline, Plaintiffs must file and serve on Defendants a notice that Plaintiffs will only go forward with the claims in the Complaint which have not been dismissed.

No later than fourteen (14) days after the filing and service date of the first amended complaint, or the notice that an amended complaint will not be filed, Defendants must file and serve a response to the remaining claims in the Complaint or to Plaintiffs' first amended complaint.

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

Party Information

Debtor(s):

Darci Penn	Represented By David S Hagen

Defendant(s):

Darci Penn	Represented By David S Hagen
Andrew Penn	Pro Se

Movant(s):

Darci Penn	Represented By David S Hagen

Plaintiff(s):

Nick Jasmine	Represented By Jeffrey S Shinbrot

2:00 PM

CONT... Darci Penn **Chapter 7**

Marissa Jasmine	Represented By Jeffrey S Shinbrot
Elan Buller	Represented By Jeffrey S Shinbrot
Joy Anne Buller	Represented By Jeffrey S Shinbrot
Jason Sabolic	Represented By Jeffrey S Shinbrot
Teri Sabolic	Represented By Jeffrey S Shinbrot
Kyle Fujitaki	Represented By Jeffrey S Shinbrot
Viet-Linh Fujitaki	Represented By Jeffrey S Shinbrot
Jeffrey Wilson	Represented By Jeffrey S Shinbrot
Ellanee Wilson	Represented By Jeffrey S Shinbrot

Trustee(s):

Amy L Goldman (TR)	Pro Se

2:00 PM

1:24-11175 Darci Penn **Chapter 7**

Adv#: 1:24-01057 Jasmine et al v. Penn et al

#16.00 Status conference re: complaint for:
1. Objection to discharge under 11 U.S.C. §§727(a)(2)(A); 727(a)(3) and 727(a)(4);
2. Exception from discharge under 11 U.S.C. §§523(a)(2)(A); 523(a)(4) and 523(a)(19);
3. Objection to community discharge under 11 U.S.C. §524

Docket 1

Tentative Ruling:

In light of the Court's ruling on the debtor's motion to dismiss, *see* cal. no. 15, the Court will continue the status conference to **1:30 p.m. on March 6, 2025**. Pursuant to Local Bankruptcy Rule 7016-1(a), the parties are required to file a joint status report by no later than **February 20, 2025**.

Plaintiffs must submit and serve a scheduling order within seven days.

Party Information

Debtor(s):

Darci Penn	Represented By David S Hagen

Defendant(s):

Darci Penn	Pro Se
Andrew Penn	Pro Se

Plaintiff(s):

Nick Jasmine	Represented By Jeffrey S Shinbrot
Marissa Jasmine	Represented By Jeffrey S Shinbrot

2:00 PM

CONT... Darci Penn Chapter 7

Elan Buller	Represented By Jeffrey S Shinbrot
Joy Anne Buller	Represented By Jeffrey S Shinbrot
Jason Sabolic	Represented By Jeffrey S Shinbrot
Teri Sabolic	Represented By Jeffrey S Shinbrot
Kyle Fujitaki	Represented By Jeffrey S Shinbrot
Viet-Linh Fujitaki	Represented By Jeffrey S Shinbrot
Jeffrey Wilson	Represented By Jeffrey S Shinbrot
Ellanee Wilson	Represented By Jeffrey S Shinbrot

Trustee(s):

Amy L Goldman (TR)	Pro Se