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

Wednesday, June 13, 2018 **Hearing Room 301**

9:30 AM
1:17-11443 Martin Cohn **Chapter 13**

#1.00 Motion for relief from stay [RP]

WELLS FARGO BANK, N.A.
VS
DEBTOR

fr. 3/7/18; 4/11/18; 5/9/18;

Docket 45
***** VACATED *** REASON: Order approving stipulation entered 5/31/18 [doc. 58]**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Martin Cohn — Represented By
Nathan A Berneman

Movant(s):

Wells Fargo Bank, N.A. — Represented By
Dane W Exnowski

Trustee(s):

Elizabeth (SV) F Rojas (TR) — Pro Se

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

Wednesday, June 13, 2018 **Hearing Room 301**

9:30 AM

1:18-11307 Eusebio Dela Cruz Valle **Chapter 7**

#2.00 Motion for relief from stay [UD]

ECHAS LLC
VS
DEBTOR

Docket 4

***** VACATED *** REASON: Case dismissed on 6/8/18**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Eusebio Dela Cruz Valle Pro Se

Trustee(s):

David Seror (TR) Pro Se

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

Wednesday, June 13, 2018 **Hearing Room 301**

9:30 AM
1:18-11106 Vic Saroyan **Chapter 7**

#3.00 Motion for relief from stay [PP]

TOYOTA MOTOR CREDIT CORPORATION
VS
DEBTOR

Order of dismissal of case entered 5/18/18

Docket 17
***** VACATED *** REASON: Case dismissed on 5/18/18**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Vic Saroyan — Represented By Yeznik O Kazandjian

Trustee(s):

Diane C Weil (TR) — Pro Se

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

Wednesday, June 13, 2018 **Hearing Room 301**

9:30 AM

1:18-10849 David Perez and Cynthia Margarita Perez **Chapter 13**

#4.00 Motion for relief from stay [PP]

TOYOTA MOTOR CREDIT CORPORATION
VS
DEBTOR

Docket 15

Tentative Ruling:

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

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

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

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

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

Party Information

Debtor(s):

David Perez	Represented By Todd J Roberts

Joint Debtor(s):

Cynthia Margarita Perez	Represented By Todd J Roberts

Trustee(s):

Elizabeth (SV) F Rojas (TR)	Pro Se

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

Wednesday, June 13, 2018 **Hearing Room 301**

9:30 AM

1:16-10774 Michel A. Contreras, IV and Carmen Contreras **Chapter 13**

#5.00 Motion for relief from stay [RP]

THE BANK OF NEW YORK MELLON
VS
DEBTOR

Docket 85

Tentative Ruling:

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

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

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

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

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

Party Information

Debtor(s):

Michel A. Contreras IV — Represented By Rene Lopez De Arenosa Jr

Joint Debtor(s):

Carmen Contreras — Represented By Rene Lopez De Arenosa Jr

Trustee(s):

Elizabeth (SV) F Rojas (TR) — Pro Se

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

Wednesday, June 13, 2018 **Hearing Room 301**

9:30 AM

1:15-10035 Maria E Carrillo **Chapter 13**

#6.00 Motion for relief from stay [RP]

U.S.BANK N.A.
VS
DEBTOR

Stip for adequate protection filed 5/30/18

Docket 67

***** VACATED *** REASON: Order approving stipulation entered 5/31/18.**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Maria E Carrillo — Represented By Todd J Roberts

Trustee(s):

Elizabeth (SV) F Rojas (TR) — Pro Se

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

Wednesday, June 13, 2018 **Hearing Room 301**

9:30 AM
1:17-12748 Mercedes Benitez **Chapter 13**

#7.00 Motion for relief from stay [RP]

THE BANK OF NEW YORK MELLON
VS
DEBTOR

Docket 39

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Mercedes Benitez — Represented By
Matthew D Resnik
Kevin T Simon

Trustee(s):

Elizabeth (SV) F Rojas (TR) — Pro Se

9:30 AM
1:17-12988 Parminder Singh **Chapter 13**

#8.00 Motion for relief from stay [RP]

15425 SHERMAN WAY HOMEOWNERS ASSOCIATION
VS
DEBTOR

Docket 44

Tentative Ruling:

As an initial matter, the Court will not make a finding that the debtor filed this case in bad faith. On November 10, 2017, the debtor filed a motion to continue the automatic stay (the "Motion to Continue Stay") [doc. 13]. Notice of the Motion to Continue Stay was served on movant. Movant did not oppose the Motion to Continue Stay. On December 7, 2017, the Court entered an order granting the Motion to Continue Stay, on the grounds that the debtor's case was filed in good faith [doc. 19]. Such a finding is now the law of the case. "Under the [law of the case] doctrine, a court is generally precluded from reconsidering an issue previously decided by the same court, or a higher court in the identical case." *Milgard Tempering, Inc. v. Selas Corp. of Am.*, 902 F.2d 703, 715 (9th Cir. 1990).

The debtor states that he will pay $2,185.12 to movant, to cure his post-petition deficiency owing to movant. Unless he does so, there is cause for relief from the automatic stay. In addition, the Court questions the debtor's ability to stay current on his chapter 13 plan payments and his post-petition deed of trust payments to Bank of America, N.A. ("Bank of America"), with respect to the debtor's residence located at 15425 Sherman Way #354, Van Nuys, CA 91406.

In his schedules, the debtor represents that he has monthly income of $5,200 and monthly expenses, as set forth in Schedule J of $3,661.59, allegedly leaving $1,538.41 in net monthly income. The debtor's expenses include payments of $1,171.59 per month to Bank of America and $305 per month to movant. (*See* doc. 1, pp. 33–37.) The debtor's confirmed chapter 13 plan provides for a monthly plan payment in the amount of $1,471.77 for month one, $0 for months two through four, and $1,550.61

9:30 AM

CONT... Parminder Singh **Chapter 13**

for months five through 60. (*See* doc. 22 at p. 2.)

Despite the lack of plan payments to be made from months two through four, debtor has not remained current on his postpetition payments to Bank of America or to movant. On May 17, 2018, Bank of America filed a motion for relief from the automatic stay, alleging that the debtor had not made post-petition payments due for January 2018 forward. (*See* doc. 42, at p. 9.) On June 8, 2018, the debtor and Bank of America filed a stipulation for adequate protection (the "Stipulation") [doc. 53]. Pursuant to the Stipulation, the debtor agreed to cure his delinquency to Bank of America by making monthly payments of $593.43 from May 15, 2018 to June 15, 2018, in addition to making his regular monthly deed of trust payment of $1,204.79. (*See id.*, at p. 2.)

Given the debtor's defaults on his postpetition obligations to Bank of America and to movant, it appears that the debtor cannot successfully complete his chapter 13 plan.

Party Information

Debtor(s):

Parminder Singh	Represented By Jeffrey J Hagen

Trustee(s):

Elizabeth (SV) F Rojas (TR)	Pro Se

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

Wednesday, June 13, 2018 **Hearing Room 301**

9:30 AM

1:17-12988 Parminder Singh **Chapter 13**

#9.00 Motion for relief from stay [RP]

BANK OF AMERICA, N.A.
VS
DEBTOR

Docket 42

***** VACATED *** REASON: Order ent 6/11/18 approving stip re adequate protection**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Parminder Singh — Represented By Jeffrey J Hagen

Trustee(s):

Elizabeth (SV) F Rojas (TR) — Pro Se

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

Wednesday, June 13, 2018 **Hearing Room 301**

9:30 AM

1:18-10288 Adaure Chinyere Egu **Chapter 13**

#10.00 Motion for relief from stay [RP]

THE BANK OF NEW YORK MELLON
VS
DEBTOR

Docket 30

***** VACATED *** REASON: Notice of withdrawal filed 5/31/18 [Dtk.35]**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Adaure Chinyere Egu — Represented By Jeffrey J Hagen

Trustee(s):

Elizabeth (SV) F Rojas (TR) — Pro Se

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

Wednesday, June 13, 2018 **Hearing Room 301**

9:30 AM

1:17-11546 Ravello Ventures Inc. **Chapter 11**

#11.00 Motion for relief from stay [AN]

LILLY SILBERT
VS
DEBTOR

Docket 53

Tentative Ruling:

Grant.

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

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

Party Information

Debtor(s):

Ravello Ventures Inc.

Represented By
Jeffrey S Shinbrot
Amelia Puertas-Samara

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

Wednesday, June 13, 2018 **Hearing Room 301**

1:30 PM
1:11-11603 Kevan Harry Gilman **Chapter 7**

#12.00 Status conference re: remand

Docket 577

Tentative Ruling:

In light of the Ninth Circuit Court of Appeals' ruling, *In re Gilman*, 887 F.3d 956 (9th Cir. 2018), the Court intends to set an evidentiary hearing to determine whether the debtor is entitled to a general homestead exemption. The parties should be prepared to discuss the following dates and deadlines:

The Court will not require a joint pretrial stipulation. Deadline to file witness lists, exhibits lists and a schedule estimating the amount of time necessary to examine each witness: 8/8/18.

Pretrial conference: 1:30 p.m. on 8/22/18.

Party Information

Debtor(s):

Kevan Harry Gilman — Represented By Mark E Ellis

Trustee(s):

Amy L Goldman (TR) — Pro Se

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

Wednesday, June 13, 2018 **Hearing Room 301**

1:30 PM

1:12-16951 Walter James Burns **Chapter 13**

Adv#: 1:17-01109 Burns v. Education Credit Management Corporation et al

#13.00 Pretrial conference re complaint to determine dischargeability of student loans

from: 2/14/18

Docket 3

***** VACATED *** REASON: Order entered 4/17/18 continuing hearing to 8/15/18 at 1:30 PM [Dkt. 10]**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Walter James Burns	Represented By Vahe Khojayan

Defendant(s):

Education Credit Management	Pro Se
PHEAA	Pro Se
United States Department of	Pro Se

Plaintiff(s):

Walter James Burns	Represented By Vahe Khojayan

Trustee(s):

Elizabeth (SV) F Rojas (TR)	Pro Se

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

Wednesday, June 13, 2018 **Hearing Room 301**

1:30 PM

1:17-11811 Brian Thomas Jones **Chapter 7**

Adv#: 1:17-01082 Jones v. United States Department Of Education

#14.00 Pretrial conference re: 2nd amended complaint to determine dischargeability of student loans due to undue hardship

fr. 12/6/17

Stip to dismiss filed 3/26/18

Docket 7

***** VACATED *** REASON: Order approving stipulation to dismiss case entered 3/17/18 [Dkt.20]**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Brian Thomas Jones	Represented By David S Hagen

Defendant(s):

United States Department Of	Pro Se

Plaintiff(s):

Brian Thomas Jones	Pro Se

Trustee(s):

Amy L Goldman (TR)	Pro Se

2:30 PM
1:10-17214 Darin Davis **Chapter 7**
Adv#: 1:10-01354 Asphalt Professionals Inc v. Davis

#15.00 Trial conference on plaintiff's 11 U.S.C. § 523 claims
[FOR RULING]

fr. 12/9/15; 4/13/16; 10/19/16; 4/19/17; 6/21/17; 9/13/17; 10/4/17; 5/11/18

Docket 1

Tentative Ruling:

For the reasons set forth below, the Court will enter judgment under 11 U.S.C. § 523 (a)(2)(A) in favor of Darin Davis ("Defendant").

I. BACKGROUND

A. The Yolanda Project

Defendant was a developer of small real estate projects. (Declaration of Darin Davis ("Davis Decl.") [doc. 189], ¶ 2.) [FN1]. From January 20, 1989 to January 31, 2015, Defendant held a personal California General Builder Contractor's license. (*Id.*, ¶ 3.) For many construction projects, Defendant would form a limited liability company ("LLC") with other investors to coordinate the project. After the project was completed and sold, the LLC would distribute money to its members and Defendant would dissolve the LLC. Defendant testified that he used the LLCs for tax purposes and to insulate himself and other investors from liability.

In 1998, Defendant and Stephen Bock formed D&S Development, LLC ("D&S Development") for the purpose of developing small real estate projects. (*Id.*, ¶ 7.) In 2001, D&S Development constructed homes in Reseda on a project called the Yolanda Project. (*Id.*, ¶ 8.) The Yolanda Project was the first time Defendant built more than four homes in a single project. (*Id.*) The Yolanda Project was owned by Yolanda, LLC, which in turn was owned by D&S Development.

B. The Whitman Project

On August 30, 2002, Defendant and Mr. Bock also formed T.O. IX, LLC ("T.O.").

2:30 PM
CONT... Darin Davis **Chapter 7**

(*Id.*, ¶ 2.) Defendant and Mr. Bock created T.O. to develop nine single family residences at Whitman Court, in Thousand Oaks, California (the "Whitman Project"). (*Id*.) T.O. did not have a California general contractor's license. (*Id.*, ¶ 3.)

As a member of T.O., Defendant was responsible for "vetting and hiring the sub-contractors, applying for and obtaining all necessary permits, and ensuring that the Whitman Project was being completed according to plans and that it complied with all permits." (*Id.*, ¶ 4.) Defendant made the final decision on construction matters and made sure his architect and engineer obtained the necessary site and building permits. A superintendent would visit the construction sites. Defendant did not visit the sites himself.

In 2003, Defendant and an architect obtained the initial site building permits for the Whitman Project from the City of Thousand Oaks, California (the "City"). (Davis Decl., ¶ 10.) Defendant testified that his personal contractor's license number was associated with the Whitman Project permits.

Relying on advice from legal counsel, Defendant believed it was unnecessary for D&S Development or T.O. to have a contractor's license, because Defendant and his partners were operating as "owner/builders." (*Id.*, ¶ 9.) Defendant also believed that D&S Development and T.O. were exempt because Defendant personally held a California general builder contractor's license. (*Id.*)

Defendant further believed that neither D&S Development nor T.O. were allowed to hold a contractor license. Under then-operative California law, LLCs could not hold contractor licenses. [FN2] Plaintiff's expert witness, Michael Poles, agreed with Defendant that the Contractors State License Board ("CSLB") was not authorized to issue contractor licenses to LLCs during the relevant time periods.

T.O. did not perform any construction work itself. Instead, subcontractors were hired to perform work. MC Consulting was employed to solicit subcontractor bids. Typically, MC Consulting would solicit three bids in each category. Defendant and a project manager, Jeannie Church, would pick the best two bids and discuss them. Defendant had the final say as to which subcontractors were hired. Ms. Church prepared the subcontractor agreements and sent them out for signatures. It was Defendant's normal course of business to check that all subcontractors were licensed

and bonded before hiring them.

C. Plaintiff's Contract with Defendant

Asphalt Professionals, Inc. ("Plaintiff") is a general engineering contractor that builds roads, streets, and sidewalks. Plaintiff's president and chief executive officer, Jeffrey Ludlow, has worked for Plaintiff since 1992. Plaintiff's vice-president of operations, Matthew Ludlow, has worked for Plaintiff since approximately 2002. Matthew Ludlow had worked for Plaintiff during high school and had run his own construction company for 11 years before returning to work for Plaintiff.

Plaintiff and T.O. entered into an 11-page construction subcontract agreement dated June 2, 2004 (the "2004 Agreement"). (Trial Exh. 3.) On July 21, 2004, Jeffrey Ludlow signed the 2004 Agreement on behalf of Plaintiff. (*Id.*) On July 27, 2004, Defendant signed the 2004 Agreement on behalf of T.O. (*Id.*)

1. T.O. as Owner/Builder

On the first page and in the signature block of the 2004 Agreement, T.O. was listed as the "Owner/Builder" of the Whitman Project. The 2004 Agreement was defined as an agreement between "Contractor" and "Subcontractor." Plaintiff was the "Subcontractor" that agreed to perform asphalt and concrete street improvement services for the Whitman Project. The term "Contractor" was not defined. Defendant testified that T.O., as owner/builder, also acted as the "Contractor" under the 2004 Agreement. The 2004 Agreement disclosed a contractor's license number for Plaintiff. However, the 2004 Agreement did not list a contractor's license number for T.O. or for Defendant. The 2004 Agreement also contained interlineations on pages two, four, six, and ten. Jeffery Ludlow testified that he initialed each of these interlineations.

At the time T.O. and Plaintiff entered into the 2004 Agreement, Defendant never personally spoke to any employee of Plaintiff about whether T.O. was licensed or unlicensed. Matthew Ludlow testified that, before Plaintiff entered into the 2004 Agreement, he had worked on "hundreds of roadway projects." He also stated that Plaintiff's insurance policy did not allow Plaintiff to contract with unlicensed entities.

Matthew Ludlow also testified that Plaintiff had received the plans and specification

for the Whitman Project from Ms. Church, in her capacity as an employee of D and S Homes, Inc. ("D&S Homes"). Haaland Group, Inc. ("Haaland"), the engineering firm hired for the Whitman Project, was responsible for site plans. According to Matthew Ludlow, nothing appeared to be unusual to him until Plaintiff received the 2004 Agreement, which stated that the parties to the agreement were Plaintiff and T.O. Jeffrey Ludlow, CEO and President of Plaintiff, testified that there was no contractor's license number listed for T.O. in the 2004 Agreement, and that he then was aware that there should have been. Matthew Ludlow and another employee of Plaintiff contacted Ms. Church to ask who T.O. was and how it was related to the Whitman Project. According to Matthew Ludlow, Ms. Church stated that "this was how the 2004 Agreement was set up," and provided *Defendant's* contractor license as the operative license for the Whitman Project.

Both Matthew and Jeffrey Ludlow stated that Plaintiff regularly checked the license status of subcontractors it hired, but that they never checked "upstream" to determine whether a general contractor hiring Plaintiff had a valid license.

Mr. Poles testified that T.O. had a duty to disclose to Plaintiff that it was unlicensed, or at least the 2004 Agreement should have disclosed Defendant's personal license in connection with the Whitman Project. Mr. Poles also argued that T.O. should not have presented itself as the "Owner/Builder" of the Whitman Project, because part of the Whitman Project involved improvements to a public roadway, and T.O. was not the owner of the public roadway. Mr. Poles further testified that no subcontractor would ask a general contractor about its license status, because doing so would cause the subcontractor to lose the bid.

2. The As-Built Survey

The majority of the work on the Whitman Project progressed without incident. During the construction of the Whitman Project, Plaintiff was responsible for altering a median on a public roadway. Plaintiff constructed the first 150 feet of the median curb, but stopped work when it discovered that there was a five-inch difference between the curb elevation and the street elevation. If uncorrected, such a difference in elevation would have caused water to pool on the roadway surface after it rained. A City inspector visited the site and determined that the work on the median could not proceed without a new site plan. Plaintiff then learned that the incorrect site plan for

2:30 PM
CONT... Darin Davis **Chapter 7**

the median curb had been based on an outdated, as-built survey.

Defendant testified that he did not know whether the as-built survey was current, and that it was up to Haaland to review the as-built survey. Defendant said that Dale Ortmann of Haaland had given Defendant the option of using an as-built survey or re-surveying the project. Defendant decided to use the as-built survey because it seemed accurate and it would save money. Defendant did not prepare the site plans, which were Haaland's responsibility. Haaland submitted the site plans to the City, which reviewed the site plans and issued the appropriate permits. Defendant did not see the site plans before they were reviewed by the City.

Defendant did not disclose to Plaintiff the age of the as-built survey for the Whitman Project. Had Defendant disclosed that the relevant plans relied upon an outdated as-built survey, Plaintiff allegedly would not have entered into the 2004 Agreement. At trial, Jeffrey Ludlow testified that site plans based on as-built surveys were not necessarily bad. However, if an as-built survey is not recent, problems may arise because of intervening construction or ground subsidence since the date of the as-built survey. Jeffrey Ludlow further testified that if site plans had been approved by an engineer and reviewed by a governing agency, it was not Plaintiff's custom to inquire about the age of the survey used for such site plans. He further stated that Defendant never personally gave Plaintiff the bidding plans or any documentation regarding the Whitman Project.

Mr. Poles opined that Defendant should have disclosed that the as-built survey was 33 years old or commissioned a new survey. According to Mr. Poles, it was Defendant's duty to know the age of the as-built survey and to discuss this with Haaland.

During construction on the Whitman Project, Plaintiff sent several invoices to "D&S Homes, Inc." (Trial Exhs. 17–24). Defendant, Mr. Bock, and the Leon Family Trust owned 84% of D&S Homes. (Trial Exh. 4.) D&S Homes, in turn, owned 60% of T.O. (*Id.*)

After the construction problems arose, Matthew Ludlow met with Defendant and his office manager regarding the as-built survey issue. Defendant told Mr. Ludlow that he wanted a street built, and that it was Plaintiff's job to get the street built. Defendant stated he would not pay Plaintiff for the additional work to the street based on the required revision of the inaccurate site plans. Plaintiff refused to do such work

without payment. Between April and July 2005, Plaintiff sent D&S Homes several change orders, arising from work it had to perform as a result of the construction stoppage. (Trial Exhs. 52–55.)

On August 11, 2005, D&S Homes gave notice to Plaintiff that it had violated provisions of the 2004 Agreement. [FN3] In that letter, D&S Homes referred to the 2004 Agreement as "our contract," and notified Plaintiff that it had "no option . . . but to terminate" the 2004 Agreement. (*Id*.) Defendant hired another subcontractor to complete the street work using the new plans. T.O. then sent Plaintiff a change order, back-charging Plaintiff in the amount of $79,185.36 for the cost to complete the street work with the new plans and new subcontractor. (Trial Exh. 39.)

D. Citations Against Defendant and His Entities

In April 2004, the CSLB responded to a complaint by a homeowner regarding a title issue on the Yolanda Project. (Davis Decl., ¶ 13.) [FN4] During the course of CSLB's investigation, Defendant first learned that he had to attach his personal contractor's license to the contracting entity when developing a project with more than four homes. (*Id*.) On September 8, 2004, Defendant formed Fairland Construction, Inc. ("Fairland") to act as the management company for T.O. (*Id.*, ¶ 15.) However, Defendant was not able to associate his contractor's license to Fairland immediately. Fairland did not receive its license until May 19, 2005. (*Id.*, ¶ 16.)

While Defendant was waiting for Fairland's license, Defendant understood that the CSLB was aware of T.O.'s unlicensed status and that the CSLB was "okay with" T.O. proceeding with work on the Whitman Project in the meantime. Defendant testified that he called the CSLB every month to update them on the Whitman Project.

At that time, Defendant believed that he had remedied the licensing issue. (Davis Decl., ¶ 16.) On May 21, 2005, T.O. entered into a construction management agreement with Fairland. (*Id*.) Neither Defendant nor Mr. Bock informed the City that Fairland was acting as the construction manager on the Whitman Project, nor did Defendant believe it was necessary to inform the City. (*Id.*, ¶ 17.)

In late 2004, another homeowner on the Yolanda Project complained to CSLB about D&S Development. (Davis Decl., ¶ 18.) As a result, on January 31, 2005, CSLB issued a citation to T.O., noting the need for a contractor's license when constructing

a project with more than four homes. The violation date was noted as July 31, 2001. (*Id*.; Trial Exh. 1, at p. 4.) On April 27, 2005, D&S Development signed a stipulation to resolve the citation. (Davis Decl., ¶ 19.) The stipulation required D&S Development to "disclose that [it] is not licensed by the [CSLB] by providing a Notice to Unlicensed Person to said purchaser." (*Id*.)

On July 27, 2007, the CSLB issued a citation to T.O. c/o Defendant, for acting in the capacity of a contractor without a license as to the Whitman Project. On July 27, 2007, the CSLB issued another citation to T.O. c/o Mr. Bock for the same violation on the Whitman Project. For both these citations, the violation date was noted as July 21, 2004. (Trial Exh. 1, pp. 1–2.)

E. The State Court Action

T.O. did not pay Plaintiff for all the work it performed on the Whitman Project. On September 29, 2005, Plaintiff sued T.O., Defendant and others in state court (the "State Court Action"), alleging breach of contract and foreclosure on a mechanic's lien. (Trial Exh. B.) Plaintiff later amended the complaint, joining additional defendants to the action and adding causes of action for fraud, conspiracy, and quantum meruit. (*Id.*)

In the operative complaint in the State Court Action (the "Fourth Amended Complaint"), Plaintiff's breach of contract and fraud causes of action were based on the same facts. (*Id.*) One of Plaintiff's fraud counts from the State Court Action is based on Defendant's failure to pay Plaintiff the amount owed under the 2004 Agreement. (*Id.*, pp. 12-14.) The other fraud count is based on Defendant's alleged failure to disclose that T.O. was an unlicensed entity at the time the parties entered into the 2004 Agreement. (*Id.*, pp. 14-15.) In the Fourth Amended Complaint, Plaintiff requested specific damages based on Defendant's failure to pay Plaintiff under the 2004 Agreement. (*Id.*, pp. 18-20.) With respect to the fraud counts, Plaintiff requested "general damages" and punitive damages.

The trial court trifurcated the State Court Action into three trial phases. The first phase involved Plaintiff's causes of action for breach of contract, foreclosure on a mechanic's lien and quantum meruit. (Trial Exh. 12.) In 2010, the trial court conducted a bench trial on the first phase. On October 29, 2010, the trial court entered an interlocutory judgment as to the first phase (the "Phase One Judgment").

(*Id.*) After entry of the Phase One Judgment, Plaintiff filed a motion for an award of attorneys' fees. The trial court awarded Plaintiff $1.65 million in attorneys' fees (the "Fee Award"). (Defendant's Request for Judicial Notice ("RJN"), Exh. 3.)

T.O. appealed the Fee Award. (Trial Exh. G.) On appeal, T.O. argued that the trial court erred by awarding fees to Plaintiff without apportioning counsel's work on the contract cause of action from the work on the other issues in the State Court Action. (*Id*., at p. 3.) Plaintiff argued that apportionment was not appropriate because the trial court could reasonably find that the contract and fraud issues were "inextricably intertwined." (*Id.*, at p. 4.) The Court of Appeal agreed with Plaintiff and upheld the Fee Award. (*Id.*, at p. 12.)

F. The Alter Ego Trial

The second phase of the State Court Action involved Plaintiff's alter ego claims. On December 23, 2011, the state court issued a statement of decision after phase two of trial (the "Phase Two Decision"). (Trial Exh. H.) In relevant part, the Phase Two Decision reads:

> Defendant [T.O.] failed to disclose to [Plaintiff] the entities that were actually involved in the construction contract;
>
> Defendant [T.O.] failed to disclose to [Plaintiff] that it was not a licensed contractor and has never been a licensed contractor;

(*Id.*, at p. 2.) The state court also made findings that T.O., D&S Homes, D&S Development, and other entities were alter egos of Defendant. As a result, the state court held that:

> [t]he liability of the [Phase One Judgment] and the [Fee Award] and any other or future order or orders awarding damages, punitive damages, attorneys fees and/or costs to [Plaintiff] against [T.O.] in this case hereby is and will be extended to defendants [D&S Homes], [D&S Development], [Defendant, Mr. Bock and Mr. Leon] . . . jointly and severally, based upon the doctrine of *alter ego*;
>
> Each of the following defendants: [D&S Homes], [D&S

Development], [Defendant, Mr. Bock and Mr. Leon], hereby is jointly and severally liable with [T.O.] in this case.

(*Id.*, at pp. 2–6.) In the Phase Two Decision, the state court also made findings regarding certain entities. As to T.O., D&S Homes, and D&S Development, the state court found that each entity "used its business form as a subterfuge for an illegal transaction, to wit, contracting without a license." (*Id.*, at pp. 7–8.) As to Defendant, the state court found:

> [Defendant] represented himself to be an experienced builder with a general contractor's license. Once [D&S Development] was cited, fined, and censured by and stipulated with [CSLB] for contracting without a license, [Defendant] formed [Fairland], and in 2005 obtained a general contractor's license. [Defendant] and [Mr.] Bock admit that Fairland was formed to satisfy the demands of the [CSLB] and in order to comply with the contractor license laws. [Defendant] admits that after Fairland was formed and licensed "nothing changed." [Defendant] and [Mr.] Bock continued to build as "owner/builder," notified no one of the formation or licensure of Fairland, and continued to contract with the personal contractor's license of [Defendant].

(*Id*.) The state court entered a judgment conforming to the Phase Two Decision (the "Phase Two Judgment"). (Trial Exh. D.)

Defendant appealed the Phase Two Judgment. (Trial Exh. I.) The appellate court upheld the Phase Two Judgment, except as against two defendants not involved in this adversary proceeding. (*Id.*, at p. 1.)

G. Defendant's Satisfaction of Judgment

On June 26, 2013, Plaintiff filed an Acknowledgment of Satisfaction of Judgment (the "Satisfaction of Judgment") in state court. (Trial Exhs. E, F.) Through the Satisfaction of Judgment and the stipulation attached thereto, Plaintiff acknowledged that the Phase One Judgment and any attorneys' fees awarded to date had been paid in full. (*Id*.)

H. Defendant's Bankruptcy Case

On June 15, 2010, Defendant filed a voluntary chapter 7 petition. On January 12, 2011, Plaintiff filed a claim against the estate, asserting an unsecured claim in the amount of $3 million (the "Claim"). On September 17, 2014, Defendant filed an objection to the Claim (the "Objection to Claim") [Bankruptcy Docket, doc. 89]. In the Objection to Claim, Defendant asserted that Plaintiff had been paid the total $1,869,048.05 owed to pursuant to the Phase One Judgment and the Phase Two Judgment. Defendant also noted that Plaintiff had not provided evidence regarding any remaining damages.

On October 2, 2014, Plaintiff filed an opposition to the Objection to Claim [Bankruptcy Docket, doc. 95], arguing that the state court had not yet tried Plaintiff's fraud cause of action and that Plaintiff may obtain an additional award of damages after that trial. [FN5] On October 30, 2014, the Court held a hearing on the Objection to Claim. On November 20, 2014, the Court entered an order disallowing $1,869,048.05 of the Claim because that portion of the Claim had already been paid (the "Claim Order") [Bankruptcy Docket, doc. 101].

As to the remaining $1,130,951.42, the Court found that this amount "is allowed . . . *pending the outcome of [the fraud phase of the State Court Action]*, presently pending in the Superior Court of the State of California for the County of Ventura." (emphasis added). The Court did not decide whether Plaintiff was entitled to the remaining $1,130,951.42. The Court refrained from deciding whether to disallow the remaining portion of Plaintiff's claim until the State Court Action concluded.

I. The Adversary Proceeding

On August 16, 2010, Plaintiff filed a complaint against Defendant, objecting to Defendant's discharge pursuant to 11 U.S.C. §§ 727(a)(2) and (a)(4) and requesting nondischargeability of any debt owed to it pursuant to 11 U.S.C. § 523(a)(2)(A). The Court bifurcated this proceeding, such that the Court first heard Plaintiff's claims under 11 U.S.C. § 727. On December 23, 2014, the Court entered judgment in favor of Defendant on Plaintiff's claims under 11 U.S.C. § 727 [doc. 113].

The Court initially stayed this adversary proceeding to await conclusion of the State Court Action. On April 19, 2017, nearly seven years after Defendant filed his chapter 7 petition, Plaintiff and Defendant appeared for a status conference. The Court informed the parties that it would no longer delay prosecution of this adversary

proceeding until the State Court Action was resolved. The Court subsequently set a pretrial conference and instructed the parties to file a joint pretrial stipulation. On August 31, 2017, the parties filed their joint pretrial stipulation [doc. 140].

On October 4, 2017, the parties appeared at a continued pretrial conference. At that time, the Court informed the parties that they could file motions for summary judgment before trial. On October 13, 2017, the Court entered an order instructing the parties to file and serve their motions for summary judgment no later than November 6, 2017 [doc. 156].

On November 6, 2017, Plaintiff timely filed its motion for summary judgment ("Plaintiff's MSJ") [doc. 165]. Through Plaintiff's MSJ, Plaintiff requested the Court enter summary judgment in its favor on Plaintiff's § 523(a)(2)(A) claim based on: (A) Defendant's failure to disclose that T.O. was unlicensed; (B) Defendant's failure to disclose that Defendant relied on an as-built survey; and (C) Defendant's alleged manipulation of the construction drawings to appear as though a recent survey had been performed. To prove its damages, Plaintiff referred to the Claim Order, asserting that the Claim Order established that Plaintiff was damaged in the amount of $1,130,951.42.

On the same day, Defendant timely filed its motion for summary judgment ("Defendant's MSJ") [doc. 162]. Through Defendant's MSJ, Defendant requested the Court enter summary judgment in its favor on the following bases: (A) a prior lawsuit precluded this Court's litigation of the issues in this adversary proceeding; and (B) all of Plaintiff's damages have been paid and Plaintiff cannot establish additional damages related to its fraud cause of action.

On February 28, 2018, the Court entered an order granting summary adjudication in favor of Plaintiff only on the following issue: that nondisclosure of T.O.'s status as an unlicensed entity would be material (the "MSJ Order") [doc. 208]. The Court otherwise denied both Plaintiff's MSJ and Defendant's MSJ. (*Id.*)

II. LEGAL STANDARD

The plaintiff's burden of proof in a nondischargeability action under 11 U.S.C. § 523 (a) is "the ordinary preponderance-of-the-evidence standard." *Grogan v. Garner*, 498

U.S. 279, 291 (1991).

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

To prevail on a § 523(a)(2)(A) claim, Plaintiff must prove by a preponderance of the evidence:

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

In re Weinberg, 410 B.R. 19, 35 (B.A.P. 9th Cir. 2009) (citing *Turtle Rock Meadows Homeowners Ass'n v. Slyman* (*In re Slyman*), 234 F.3d 1081, 1085 (9th Cir. 2000).

A. False Representation, Fraudulent Omission, or Deceptive Conduct

"'False representation' refers to express misrepresentations, either oral or written." *Dancor Constr., Inc. v. Haskell (In re Haskell)*, 475 B.R. 911, 920 (Bankr. C.D. Ill. 2012), *adhered to on reconsideration*, Case No. 11-80231, 2012 WL 4754673 (Bankr. C.D. Ill. Oct. 4, 2012).

"[S]ilence, or the concealment of a material fact, can be the basis of a false impression which creates a misrepresentation actionable under § 523(a)(2)(A)." *In re Evans*, 181 B.R. 508, 514 (Bankr. S.D. Cal. 1995). "Under common law, a false representation can be established by an omission when there is a duty to disclose." *In re Eashai*, 87 F.3d 1082, 1082 (9th Cir. 1996). "[A] party to a business transaction has a duty to

disclose when the other party is ignorant of material facts which he does not have an opportunity to discover." *Apte v. Japra (In re Apte)*, 96 F.3d 1319, 1324 (9th Cir. 1996). "[T]he plaintiff must establish that the debtor concealed facts and that the facts concealed were material. Concealed facts are material if 'a reasonable man would attach importance to the alleged omission in determining his course of action.'" *Evans*, 181 B.R. at 515 (quoting *Titan Group, Inc. v. Faggen*, 513 F.2d 234, 239 (2d Cir. 1975)).

"[A] false pretense refers to an implied misrepresentation of 'conduct intended to create and foster a false impression.'" *Shannon v. Russell (In re Russell)*, 203 B.R. 303, 312 (Bankr. S.D. Cal. 1996).

B. Knowledge of Falsity and Intent to Deceive

> [A] misrepresentation is fraudulent if the maker (a) knows or believes that the matter is not as he represents it to be, (b) does not have the confidence in the accuracy of his representation that he states or implies, or (c) knows that he does not have the basis for his representation that he states or implies.

Gertsch v. Johnson & Johnson, Fin. Corp.(In re Gertsch), 237 B.R. 160, 168 (B.A.P. 9th Cir. 1999). "[Section] 523(a)(2)(A) requires that the debtor actually intend to defraud the creditor and that the debt arise as a result of the fraud." *Tsurukawa v. Nikon Precision, Inc. (In re Tsurukawa)*, 258 B.R. 192, 198 (B.A.P. 9th Cir. 2001).

Because intent is difficult to prove through direct evidence, it "may be established by circumstantial evidence, or by inferences drawn from a course of conduct. Therefore, in determining whether the debtor had no intention to perform, a court may look to all the surrounding facts and circumstances." *In re Barrack*, 217 B.R. 598, 607 (B.A.P. 9th Cir. 1998) (internal quotations omitted). A court may infer intent to deceive from a false representation. *In re Rubin*, 875 F.2d 755, 759 (9th Cir. 1989); *see also Eashai*, 87 F.3d at 1087 ("a court may infer the existence of the debtor's intent not to pay if the facts and circumstances of a particular case present a picture of deceptive conduct by the debtor"); and *Gertsch*, 237 B.R. at 167–68 ("intent to deceive can be inferred from the totality of the circumstances, including reckless disregard for the truth").

C. Justifiable Reliance

To satisfy the reliance requirement of § 523(a)(2)(A), a plaintiff must show "justifiable" reliance, not "reasonable reliance." *Field v. Mans*, 516 U.S. 59, 74–75, 116 S.Ct. 437, 446 (1995). Justifiable reliance takes into account the "qualities and characteristics of the particular plaintiff, and the circumstances of the particular case, rather than of the application of a community standard of conduct to all cases." *Id.*, 516 U.S. at 71; 116 S.Ct. at 444. Thus, a plaintiff does not have a duty to investigate. *Id.*, 516 U.S. at 70, 75 n.12; 116 S.Ct. at 444, 446 n.12. "If, however, obvious red flags are raised, [a party] is required to investigate further." *Haskell*, 475 B.R. at 922; *see also Apte*, 180 B.R. at 229. "[A] person cannot rely upon a representation if 'he knows that it is false or its falsity is obvious to him.'" *Eugene Parks Law Corp. Defined Benefit Pension Plan v. Kirsh (In re Kirsh),* 973 F.2d 1454, 1458 (9th Cir. 1992) (quoting Restatement (Second) of Torts § 541 (1977).

III. DISCUSSION

A. False Representation, Fraudulent Omission, or Deceptive Conduct

Plaintiff has not shown by a preponderance of the evidence that Defendant made a false representation, made a fraudulent omission, or engaged in deceptive conduct.

1. False Representation

As for the status of T.O.'s license, Plaintiff did not establish that Defendant made an oral or written representation to Plaintiff regarding T.O.'s license status before the parties entered into the 2004 Agreement. In the 2004 Agreement, Defendant did not list a contractor's license for T.O., and T.O. was identified as an "Owner/Builder." When Plaintiff asked Ms. Church about the 2004 Agreement, Ms. Church gave Plaintiff the personal contractor's license number of ***Defendant*** as the license number associated with the Whitman Project. Plaintiff did not call Ms. Church as a trial witness or present any evidence that Ms. Church falsely represented to Defendant that the license number belonged to T.O.

As for the as-built survey, Plaintiff did not establish that Defendant made an oral or written representation to Plaintiff regarding the age of the as-built survey before the parties entered into the 2004 Agreement. Defendant testified that he did not know the

age of the as-built survey before he elected to use it. Haaland, not Defendant, reviewed the survey and prepare the site plans. Defendant did not see the site plans before they were reviewed by the City. Plaintiff did not call Mr. Ortmann of Haaland as a witness or present any evidence that Defendant knew the age of the as-built survey. [FN6]

2. Fraudulent Omission

Plaintiff did not present sufficient evidence to establish that Defendant's omission regarding T.O.'s license status was fraudulent pursuant to § 523(a)(2)(A).

In *Evans*, the debtor and the plaintiff met at their country club and formed a friendship playing golf. *Id*. at 510. Eventually, the debtor approached the plaintiff about borrowing $110,000 to pay off a judgment lien. *Id*.

As security for part of the $110,000 loan, the debtor executed a second deed of trust on a vacant lot he owned in favor of the plaintiff. *Id*. at 511. The debtor represented that the value of the lot exceeded the $65,000 first deed of trust plus the $65,000 second deed of trust and that the lot was "buildable." *Id*. at 512. However, the debtor was aware that a permit to build on the lot could not be obtained due to the lack of an adequate easement. *Id*. at 515. For this reason, the debtor had originally purchased the vacant lot for a price materially less than that of other properties in the same development. *Id*. In addition, the debtor had applied multiple times for a permit to build on the lot, and each time his application had been denied. *Id*.

The debtor did not inform the plaintiff that the lot was not buildable in its present state, that his applications for a permit had been denied, or that anyone who decided to build on the lot would have to pursue costly proceedings or purchase additional property to build an easement. *Id*. The *Evans* court found that these facts were material, that "the debtor intentionally concealed these facts to mislead the plaintiff" and that the plaintiff "undoubtedly would have attached importance [to these facts] in deciding whether or not to make the loan." *Id*.

In *Apte*, one of the debtor's corporations leased an office building from Rosewood Associates ("Rosewood"), intending to sublet the space to doctors. 96 F.3d at 1321. After failing to secure any subtenants, the debtor fell behind in lease payments to Rosewood, and Rosewood initiated an unlawful detainer action. *Id*. Soon after

Rosewood filed the unlawful detainer action, Dr. Romesh Japra approached the debtor about subleasing the office space. *Id*.

At the time of the lease transaction, Dr. Japra insisted that his sublease contain a priority provision that would allow him to remain in possession of the office space even if the debtor's master lease with Rosewood terminated. *Id*. After the parties signed the sublease, the debtor told Dr. Japra that Rosewood had approved the sublease, even though Rosewood had told the debtor that it would not approve the sublease until the priority provision was deleted. *Id*. In addition, the debtor told Dr. Japra that he was allowed to improve the property, even though Rosewood had told the debtor to put a stop to all construction. *Id*. The debtor never disclosed to Dr. Japra that Rosewood had filed an unlawful detainer action against the debtor or that Rosewood had previously terminated the master lease. *Id*.

The Ninth Circuit Court of Appeals found that the "myriad of nondisclosures" were material and had an effect on Dr. Japra's decision to enter into the sublease agreement. *Id*., at 1323.

> Apte carried on the sublease negotiations without disclosing that he was $1.3 million in default on the master lease, that Rosewood had instituted an unlawful detainer action against him, that Rosewood had officially terminated the master lease, and that Rosewood would never accept a lease containing Japra's priority provision. After Japra entered into the sublease, Apte never disclosed that Rosewood had not approved it, or that Rosewood had discovered Japra's improvements and ordered the construction to stop.

Id. The debtor was Dr. Japra's sole source of information. The Court of Appeals found that the debtor had a duty to disclose such facts to Dr. Japra because Dr. Japra was ignorant of these facts and did not have an opportunity to discover them. *Id*. at 1324.

Unlike the debtors in *Evans* and *Apte*, Defendant did not knowingly conceal any material facts from Plaintiff before the parties entered into the 2004 Agreement. In *Evans*, the debtor concealed the material fact that the lot at issue was not buildable in its present state. In *Apte*, the debtor concealed numerous material facts from Dr. Japra. In both *Evans* and *Apte*, the respective debtors communicated directly to the

deceived parties. Here, Defendant never communicated directly to Plaintiff regarding the status of T.O.'s license. In the MSJ Order, the Court held that T.O.'s license status was a material fact. Mr. Poles testified that T.O. had a duty to disclose to Plaintiff that it was unlicensed, or at least the 2004 Agreement should have disclosed Defendant's personal license in connection with the Whitman Project. However, both Defendant and Mr. Poles testified that at the time of the 2004 Agreement, under California law, an LLC ***could not hold*** a contractor's license.

In *Evans*, the debtor knew that the lot was not buildable in its present state, that his applications for a permit had been denied, or that anyone who decided to build on the lot would have to pursue costly proceedings or purchase additional property to build an easement. The 2004 Agreement did not disclose a license number for T.O. and listed T.O. as an "Owner/Builder." Unlike the debtor in *Evans*, Defendant believed that T.O. could lawfully operate as an owner/builder, and that Defendant could associate his contractor's license with the Whitman Project. In short, Defendant did not knowingly conceal material facts from Plaintiff before the parties entered into the 2004 Agreement.

As noted above, Defendant had a duty to disclose "when the other party is ignorant of material facts which he does not have an opportunity to discover." *Apte*, 96 F.3d at 1324. In *Apte*, the debtor was the sole source of information for Dr. Japra. Here, if Michael and Jeffrey Ludlow were unaware that an LLC could not hold a contractor's license, Plaintiff had an opportunity to discover T.O.'s license status independently. As Matthew Ludlow and Mr. Poles testified, Plaintiff could have verified with the CSLB whether T.O. was a licensed entity. Plaintiff did not do so.

Both Matthew and Jeffrey Ludlow testified that Plaintiff would not have entered into the 2004 Agreement had they known T.O. was unlicensed. The Court does not find their testimony to be credible. Jeffrey Ludlow stated that he was aware that there was no license for T.O. disclosed in the 2004 Agreement, and that a license should have been disclosed. Matthew Ludlow stated that Plaintiff regularly checked the license status of the subcontractors they hired, because their insurance required them to do so. However, Plaintiff never checked the license status of the general contractors who hired Plaintiff.

Plaintiff also did not present sufficient evidence to establish that Defendant's omission regarding the age of the as-built survey was fraudulent pursuant to § 523(a)

(2)(A). As noted above, Defendant had no knowledge of the age of the as-built survey, and it was Haaland's responsibility to draw up the site plans for the Whitman Project. Mr. Poles opined that Defendant should have known and disclosed the age of the as-built survey. However, the Court finds credible Defendant's testimony that he did not know, or understand the import of, the age of the survey.

Regarding the age of the as-built survey, Jeffrey Ludlow testified that site plans based on an as-built survey are not *per se* flawed. He also testified that it was not Plaintiff's custom to inquire about the age of the surveys used for site plans that were approved by an engineer and reviewed by a governing agency. Nonetheless, Plaintiff was never misled about the age of the as-built survey, and it appears that Plaintiff could have discussed that issue with Haaland, if Plaintiff had sought to do that.

3. Deceptive Conduct

Plaintiff also has not established that Defendant engaged in any deceptive conduct intended to create and foster a false impression. Defendant did not act in any way to give Plaintiff the impression that T.O. had a contractor's license. Based on the evidence at trial, Ms. Church was the only individual who gave Plaintiff a contractor's license number associated with the Whitman Project, which was Defendant's license number.

B. Knowledge of Falsity or Intent to Deceive

To meet its burden of proof as to this element of a claim under § 523(a)(2)(A), Plaintiff must demonstrate by a preponderance of the evidence that Defendant knew that his omissions were wrongful and that Defendant's omissions were motivated by an intent to deceive Plaintiff. *Harmon*, 250 F.3d at 1246 n.4.

Plaintiff has not met its burden of showing that Defendant knew that nondisclosure of T.O. license status was wrongful. Defendant testified that at the time, he never spoke to any employee of Plaintiff about T.O.'s license status. At the time of the 2004 Agreement, Defendant was relying on the advice of counsel, and he believed that it was unnecessary for T.O. to have a contractor's license because Defendant and his partners were operating as an "owner/builder." Defendant further believed that T.O. was exempt because Defendant personally held a contractor's license. In fact, as noted above, both Defendant and Mr. Poles testified that in 2004, an LLC such as

T.O. ***could not*** hold a contractor's license. Thus, Defendant could not have lawfully included a contractor's license for T.O. in the 2004 Agreement. Based on the evidence at trial, Defendant did not know that his nondisclosure of T.O.'s license status was wrongful.

In addition, Plaintiff has not met its burden of showing by a preponderance of the evidence that Defendant's omission of T.O.'s unlicensed status was motivated by an intent to deceive Plaintiff. *Harmon*, 250 F.3d at 1246 n.4. Plaintiff relied on Mr. Poles to show that Defendant acted with an intent to deceive. However, Mr. Poles does not have personal knowledge of Defendant's intent. At trial, Mr. Poles offered legal conclusions as to Defendant's intent. The Court would not admit such testimony even if Mr. Poles qualified as a legal expert. *See United States v. Diaz*, 876 F.3d 1194, 1197 (9th Cir. 2017) ("Consistent with [Federal Rule of Evidence] 704(a), this court has repeatedly affirmed that an expert witness cannot give an opinion as to her legal conclusion, i.e., an opinion on an ultimate issue of law.") (internal quotation omitted).

As with the nondisclosure of T.O.'s license status, Plaintiff has not met its burden of showing that Defendant knew that his nondisclosure of the age of the as-built survey was wrongful. Defendant testified that he did not know the age of the as-built survey, and that Mr. Ortmann at Haaland had given Defendant the option of using the as-built survey or commissioning a new survey. Defendant chose to use the as-built survey because it was the cheaper option. Defendant did not prepare the site plans, which were Haaland's responsibility. Defendant also did not see the site plans before they were reviewed by the City.

Because Plaintiff has not demonstrated that Defendant had any knowledge of the age of the as-built survey, Plaintiff cannot demonstrate that Defendant's omission was motivated by an intent to deceive. As noted above, Mr. Poles is not qualified to testify as to Defendant's intent. In addition, none of the evidence presented at trial established that Defendant, prior to Plaintiff's entry into the 2004 Agreement, had any reason to believe the as-built survey was unreliable.

C. Justifiable Reliance

As noted above, a plaintiff does not have a duty to investigate. *Field*, 516 U.S. at 70, 75 n.12; 116 S.Ct. at 444, 446 n.12. However, where a party ignores obvious "red

flags" and fails to investigate further, there is no justifiable reliance. *Haskell*, 475 B.R. at 922.

In *Winston-Salem City Employees' Fed. Credit Union v. Casper (In re Casper)*, 466 B.R. 786 (Bankr. M.D.N.C. 2012), a credit union hired the debtor to assist with selling repossessed vehicles. After each vehicle was repossessed, the credit union would deliver the vehicle to the debtor, but retain the certificate of title. When the debtor sold each vehicle, the credit union would deliver to the debtor the certificate of title with the security interest released. Within two days after the certificate of title was delivered, the debtor would typically remit the sale proceeds to the credit union. On rare occasions, the debtor would take longer than the customary two days, but there were never any extended delays. However, starting in June 2009, the debtor did not remit the sale proceeds to the credit union for 10 vehicles. By October 2009, nearly six months later, the credit union began asking the debtor about the 10 missing payments. The debtor told the credit union he would pay. In November 2009, the credit union again confronted the debtor, and the debtor told the credit union he was having "issues." *Id.* at 791–92.

After the debtor filed a chapter 7 petition, the credit union filed an adversary proceeding, seeking nondischargeability of the debt owed, in part, under § 523(a)(2)(A). The court denied relief under § 523(a)(2)(A), finding that the credit union's reliance was not justifiable because it "disregarded critical warning signs." *Id.* at 794. The court noted that the credit union's reliance as to the first unpaid-for vehicle was justifiable, based on the occasional prior delay. However, after the second unpaid-for vehicle, the credit union "should have been put on notice that something had gone awry." *Id.*

> Continuing to assign the titles of vehicles to [the debtor's company] with the expectation of receiving payment was not justifiable. A creditor must react in a timely fashion upon discovery of the falsity of a debtor's representation if justifiable reliance is to be established. . . . The [credit union] here—a sophisticated actor that is in the business of loaning and collecting money—blindly ignored numerous red flags by continuing to do business with the [d]ebtor even after he repeatedly failed to remit monies to the [credit union] after the sale of a vehicle.

Id. at 795 (citation omitted).

Like the credit union's reliance in *Casper*, Plaintiff's reliance regarding T.O.'s license was not justifiable. Plaintiff ignored numerous red flags before entering into the 2004 Agreement, and Plaintiff's testimony regarding its reliance on the 2004 Agreement is not credible.

Both of Plaintiff's principals are sophisticated, experienced construction professionals who have worked on hundreds of constructions projects, all of which likely required agreements similar to the 2004 Agreement. The 2004 Agreement is an 11-page agreement and appears to be a standard form subcontract agreement. The 2004 Agreement was dated June, 2, 2004, and Jeffrey Ludlow signed the 2004 Agreement on July 21, 2004. Plaintiff took nearly 50 days to review the 2004 Agreement before signing it, and Jeffrey Ludlow made several interlineations to the 2004 Agreement. As noted above, on the first page and in the signature block of the 2004 Agreement, T.O. was listed as the "Owner/Builder" of the Whitman Project. The 2004 Agreement was defined as an agreement between "Contractor" and "Subcontractor." Plaintiff was the "Subcontractor" that agreed to perform asphalt and concrete street improvement services for the Whitman Project. The term "Contractor" was not defined. The 2004 Agreement ***clearly*** did not list a contractor's license number for T.O. or for Defendant.

Matthew Ludlow testified that after Plaintiff received the 2004 Agreement from Ms. Church, Plaintiff had questions about the identity of T.O. In response to Plaintiff's questions, Ms. Church stated that "this was how the 2004 Agreement was set up" and gave Plaintiff the personal contractor's license number of Defendant. Jeffrey Ludlow testified that there should have been a license number associated with T.O. stated in the 2004 Agreement.

Notwithstanding the evident red flags, Plaintiff did not insist that the license number be expressly incorporated into the 2004 Agreement, and did not ask Defendant to amend the 2004 Agreement to more clearly define T.O.'s role. Despite its initial concerns, Plaintiff entered into the 2004 Agreement and proceeded to work on the Whitman Project. As noted above, Plaintiff could have verified T.O.'s license status with the CSLB, but Plaintiff chose not to do that. Plaintiff's present allegation—that it would not have entered into the 2004 Agreement had it known T.O. was unlicensed—appears to be a belated attempt to transform a standard breach of contract

action into a fraud action against Defendant.

Mr. Poles testified that subcontractors generally did not question the license status of their general contractors, because a subcontractor would risk losing their bid if they did so. This testimony is not credible. As both Mr. Poles and Matthew Ludlow admitted, anyone could inquire of the CSLB to verify the status of a contractor's license. A subcontractor could make such an inquiry without notifying the general contractor.

Plaintiff's reliance on the site plans based on the as-built survey appears to have been justifiable. Plaintiff's employees testified that their job was to perform construction work according to site plans, and that it was not their practice to question site plans that are stamped by the engineer and reviewed by the City. However, Plaintiff has not established that Defendant acted with any knowledge of falsity or intent to deceive Plaintiff as to the as-built survey.

IV. CONCLUSION

Pursuant to 11 U.S.C. § 523(a)(2)(A), the Court will enter judgment in favor of Defendant.

Defendant must submit a proposed judgment within seven (7) days.

FOOTNOTES

1. Unless otherwise indicated, the facts are derived from testimony at trial.

2. In 2010, the Contractors State License Board was authorized to issue contractor licenses to limited liability companies. Cal. Bus. & Prof. Code § 7025 (amended by Stats. 2010, Ch. 698, Sec. 2. [SB 392]).

3. At trial, Plaintiff introduced the August 11, 2005 letter as an exhibit to impeach Defendant's testimony. Defendant did not contest the authenticity of the letter or otherwise object to the letter.

4. On November 23, 2004, the CSLB issued a citation to D&S Development

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CONT... Darin Davis **Chapter 7**

regarding the Yolanda Project, for acting in the capacity of a contractor without a license. (Trial Exh. 1, p. 3.) The citation stated that the date of the alleged violation was August 3, 2001. This citation appears to have arisen from the first complaint regarding the Yolanda Project.

5. On October 15, 2014, after all the briefing on the Objection to Claim, Plaintiff filed a separate claim for $2 million, based on the fraud action in state court. In his declaration, Jeffrey Ludlow states that the $2 million claim was meant to amend the original $3 million claim. (Declaration of Jeffrey Ludlow [doc. 179], ¶ 12.) The Court did not use this proof of claim in its calculation because the proof of claim was filed after the parties completed their briefing.

6. Mr. Poles also argued that T.O. should not have presented itself as the owner/builder of the Whitman Project, because part of the Whitman Project involved improvements to a public roadway, and T.O. was not the owner of the public roadway. However, this issue was not identified in the parties' joint pretrial stipulation. Moreover, Plaintiff's area of expertise is paving and roadway construction. If an owner/builder cannot develop a project involving improvements to a public roadway, it appears that Plaintiff would have been aware of such a bar against owner/builders soliciting bids for such developments.

Party Information

Attorney(s):

Danning, Gill, Diamond & Kollitz,	Represented By Michael G D'Alba

Debtor(s):

Darin Davis	Represented By Alan W Forsley Casey Z Donoyan

Defendant(s):

Darin Davis	Represented By Alan W Forsley

Interested Party(s):

Carolyn Davis	Represented By

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CONT... Darin Davis **Chapter 7**

	Ana Vasquez Alan W Forsley
Rodney H Dixon	Pro Se

Plaintiff(s):

Asphalt Professionals Inc	Represented By Ray B Bowen JR

Trustee(s):

David Seror (TR)	Represented By Richard K Diamond (TR) Robert A Hessling Robert A Hessling Michael G D'Alba

US Trustee(s):

United States Trustee (SV)	Pro Se

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1:17-10825 Amie Suzanne Greenberg **Chapter 7**
Adv#: 1:17-01061 Rubin v. Greenberg

#16.00 Defendant's motion in limine to preclude plaintiff from introducing evidence of damages and avidence to determine dischargeability of debts

fr. 5/16/18

Docket 24

Tentative Ruling:

Deny.

I. BACKGROUND

On March 31, 2017, Amie Suzanne Greenberg ("Defendant") filed a voluntary chapter 7 petition.

On June 26, 2017, Jeff Rubin ("Plaintiff") filed a complaint against Defendant (the "Complaint"), requesting nondischargeability of the debt owed to him pursuant to 11 U.S.C. § 523(a)(15). Through the Complaint, Plaintiff requests nondischargeability of $43,411.66, plus interest, awarded to Plaintiff by the family court in the parties' dissolution proceeding (the "Family Court Order"). Complaint, Exhibit 1. Plaintiff also requests $4,438.28 "for the children's medical, therapy and educational expenses." *Id*. In the Family Court Order, the family court ordered that Defendant pay Plaintiff $38,411.66 in attorneys' fees and costs incurred by Plaintiff as well as a sanction of $5,000. The Family Court Order also stated that Defendant was to reimburse Plaintiff for "one-half the costs of the minor children's therapy with Dr. Gold," but does not provide a specific amount.

On August 23, 2017, the Court held an initial status conference. The joint status report [doc. 6] the parties prepared in preparation for the initial status conference indicated that the parties had not complied with Federal Rule of Bankruptcy Procedure ("FRBP") 7026. As such, on August 24, 2017, the Court entered an order [doc. 8] continuing the status conference and instructing the parties to comply with

FRBP 7026 by, among other things, providing initial disclosures to one another.

On September 29, 2017, the parties filed a joint discovery plan (the "Discovery Plan") [doc. 13]. In the Discovery Plan, Plaintiff stated that he believed Defendant had the same documents in her possession that Plaintiff had, but that any initial disclosures would be made by October 2, 2017 in accordance with the Court's scheduling order.

On October 25, 2017, the Court held a continued status conference. At the continued status conference, the Court asked the parties about the status of their initial disclosures. Plaintiff stated that he and Defendant were the only individuals with discoverable information. In addition, the parties stated that they each had proof of payments made by Defendant. The Court instructed the parties to exchange all of those documents. Regarding a computation of damages, Plaintiff indicated at the status conference that he had previously provided a schedule of payments to Defendant.

On October 30, 2017, the Court entered a scheduling order (the "Scheduling Order") [doc. 14]. Through the Scheduling Order, the Court set the following dates and deadlines: (A) January 31, 2018 as the discovery cutoff date; (B) February 15, 2018 as the last day to file pretrial motions; (C) March 21, 2018 as the deadline by which the parties must file a pretrial stipulation; and (D) April 4, 2018 as the pretrial conference.

On April 12, 2018, Plaintiff filed a substitution of counsel, indicating that Plaintiff retained counsel to represent him in this action [doc. 37]. On February 12, 2018, Defendant filed a motion in limine (the "Motion") [doc. 24], asking the Court to prohibit Plaintiff from introducing evidence of damages based on Plaintiff's failure to timely provide initial disclosures in accordance with Federal Rule of Civil Procedure 26(a). Plaintiff opposes the Motion [doc. 40].

II. ANALYSIS

Pursuant to Rule 26(a)(1)—

(A) *In General*. Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:

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(i) the name and, if known, the address and telephone number of each individual likely to have discoverable information – along with the subjects of that information – that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

(ii) a copy – or a description by category and location – of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

(iii) a computation of each category of damages claimed by the disclosing party – who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and

(iv) for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

Under Rule 37(c)—

(1) Failure to Disclose or Supplement. If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:

(A) may order payment of the reasonable expenses, including attorney's fees, caused by the failure;

(B) may inform the jury of the party's failure; and

(C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)-(vi).

The Court has discretion to determine if a violation of Rule 26(a) is "justified" or

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"harmless" based on several factors:

(1) the surprise to the party against whom the evidence would be offered;
(2) the ability of that party to cure the surprise;
(3) the extent to which allowing the evidence would disrupt the trial;
(4) the importance of the evidence; and
(5) the nondisclosing party's explanation for its failure to disclose the evidence.

Dey, L.P. v. Ivax Pharmaceuticals, Inc., 233 F.R.D. 567, 571 (C.D. Cal. 2005) (citing *Southern States Rack & Fixture, Inc. v. Sherwin–Williams Co.*, 318 F.3d 592 (4th Cir. 2003)*). The party facing sanctions bears the burden of proving its failure to disclose the required information was substantially justified or harmless. R & R Sails, Inc. v. Insurance Co. of Penn*., 673 F.3d 1240, 1246 (9th Cir. 2012).

Here, although Plaintiff admits to not having timely provided initial disclosures to Defendant, the failure to do so was harmless. First, Plaintiff informed Defendant at the initial status conference that he believed only Plaintiff and Defendant had discoverable information, and that Plaintiff would be relying on documents available to both parties, namely, the family court's findings and orders. As such, most of the initial disclosures Plaintiff would have provided are not a surprise to Defendant.

The main disclosure Defendant asserts is missing is a computation of damages outlining how Plaintiff reached the $4,438.28 amount for the parties' children's medical, therapy and educational expenses. However, Plaintiff has now cured the surprise by providing his initial responses to Defendant and by supplementing those responses one week later. In light of the fact that the Court has not yet set trial of this matter, the fact that Defendant belatedly received some of the Rule 26(a) disclosures will not disrupt any future trial.

Moreover, because the Court intends to extend the deadline by which the parties may file pretrial motions, Defendant will have an opportunity to file another motion disputing the damages claimed by Plaintiff now that she has received Plaintiff's initial disclosures. Whether the documentation provided by Plaintiff supports his claim of damages is not a complex issue that will unduly delay this matter or require an extensive amount of research or resources to adjudicate. Finally, Plaintiff has explained that he did not timely provide initial disclosures to Defendant because he

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was confused by the requirements of Rule 26(a) and believed Defendant already had all of the information she needed. At the time Plaintiff did not comply with Rule 26 (a), he was acting in pro per. Now that Plaintiff has retained counsel, Plaintiff appears to be curing his deficient disclosures.

Based on the above, Plaintiff has shown that all of the factors weigh in favor of deeming Plaintiff's belated production of initial disclosures "harmless." As a result, the Court will not impose sanctions under Rule 37(c).

III. CONCLUSION

The Court will deny the Motion.

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

Party Information

Debtor(s):

Amie Suzanne Greenberg	Represented By Steven J Renshaw

Defendant(s):

Amie Greenberg	Pro Se

Plaintiff(s):

Jeff Rubin	Represented By Sevan Gorginian

Trustee(s):

Amy L Goldman (TR)	Pro Se

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Adv#: 1:17-01061 Rubin v. Greenberg

#17.00 Defendant's Motion for summary judgment

fr. 5/16/18

Docket 19

Tentative Ruling:

The Court will grant summary adjudication as to the issue of partial satisfaction in the amount of $6,900. The Court will deny summary adjudication on all other issues.

I. BACKGROUND

A. The Family Court Proceedings

Jeffrey Rubin ("Plaintiff") and Amie Greenberg ("Defendant") were married. On November 3, 2008, Plaintiff filed a petition for dissolution in Ventura County Superior Court, case no. D330558. Defendant concurrently filed a petition in Los Angeles County Superior Court, case no. KD074715 (the "Family Court"). On January 29, 2009, the parties stipulated to transfer the Ventura action to the Family Court. (Complaint, doc. 1, ¶ 8.)

On February 1, 2011, the Family Court entered the parties' divorce decree (the "Divorce Decree"). (*Defendant's Separate Statement of Uncontroverted Facts and Conclusions of Law Pursuant to Local Rule 7056.1* ("Defendant's Statement"), doc. 23, ¶ 3; Defendant's Request for Judicial Notice ("RJN"), doc. 22, Exh. B.) The Divorce Decree provided that "[e]ach party shall pay one-half the cost of future therapy with Dr. Gold for the minor children." (RJN, Exh. B, ¶ 12.)

On July 8, 2011, five months after the Divorce Decree was entered, Defendant filed an ex parte request for an order to show cause, "requesting immediate orders modifying the previous child custody and visitation orders and granting to her legal and physical custody" of the parties' two children ("Defendant's OSC Request"). (Declaration of Amie Greenberg ("Defendant's Decl."), doc. 21, ¶ 22; RJN, Exh. A, at p. 7.) In Defendant's OSC Request, Defendant alleged that Plaintiff had abused their children.

(Defendant's Decl., ¶ 23; RJN, Exh. A, pp. 7–12.)

On September 4, 2012, the Family Court issued its *Findings and Orders of the Court on the Submitted Matter of [Defendant's] Order to Show Cause Filed July 8, 2011; and Court's Order to Show Cause on its Own Motion Under Family Code Section 3027.1* (the "September 2012 Order"). (Complaint, ¶ 9; Defendant's Decl., ¶ 19; RJN, Exh. A.) The September 2012 Order ordered the following: (a) Defendant individually shall pay to Plaintiff attorneys' fees and costs, as sanction, in the amount of $38,411.66, pursuant to Family Code § 3027.1, for false reporting of child abuse; (b) Defendant shall pay Plaintiff attorneys' fees and costs as a sanction under Family Code § 271 the amount of $5,000; and (c) Defendant shall reimburse Plaintiff one-half the cost of the minor children's therapy with Dr. Gold, pursuant to the Divorce Decree. (Defendant's Decl., ¶¶ 20, 39–40; RJN, Exh. A, at p. 37.) The September 2012 Order set a subsequent hearing on why the foregoing sanctions should not be imposed on Defendant. (RJN, Exh. A, at p. 38.)

At the hearing on November 14, 2012, the Family Court stated, regarding the September 2012 Order:

> [The Divorce Decree] doesn't say any other doctors. It says Dr. Gold. So that's a fixed liquid amount and then other therapists and other health care providers fall within child support and add ons to child support if not covered by that specific language in the judgment. That's what I did when I made that decision.

(Defendant's Decl., Exh. F, at p. 213.)

On December 21, 2012, the Family Court issued an order directing Defendant to pay Plaintiff "as for attorney's fees and costs as a sanction, the amount of $38,411.66 without interest, pursuant to *Family Code* Section 3027.1, due and payable in full within 30 days of November 14, 2012" (the "December 2012 Order"). (Defendant's Statement, ¶ 35; RJN, Exh. C, at p. 75 (emphasis in original).)

B. Defendant's Bankruptcy Case and the Pending Adversary

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CONT... Amie Suzanne Greenberg **Chapter 7**
Proceeding

On March 31, 2017, Defendant filed a voluntary chapter 7 petition, commencing case no. 1:17-bk-10825-VK. On July 3, 2017, Defendant received a chapter 7 discharge [case no. 1:17-bk-10825-VK, doc. 25]. On October 16, 2017, Defendant's chapter 7 case was closed [case no. 1:17-bk-10825-VK, doc. 44].

On June 26, 2017, Plaintiff filed the pending adversary proceeding *in pro per*, seeking a determination that the debts owed to him by Defendant are nondischargeable pursuant to 11 U.S.C. §§ 523(a)(15) (the "Complaint") [doc. 1]. In the Complaint, Plaintiff alleged that the September 2012 Order provided for "payment of sanctions in favor of Plaintiff the amount of $43,411.66 plus interest[,]" and "payment of $4,438.28 for the children's medical, therapy and educational expenses." (Complaint, ¶ 10.) On July 21, 2017, Defendant filed an answer to the Complaint [doc. 5].

Plaintiff did not serve Defendant with his initial disclosures. On December 19, 2017, Defendant served discovery on Plaintiff. (Defendant's Decl., ¶ 4.) On January 23, 2018, Plaintiff served his discovery responses on Defendant. (*Id.*, ¶ 5.) The following chart summarizes the relevant requests for admissions ("RFA") and Plaintiff's responses:

RFA	Plaintiff's Response
REQUEST NUMBER TWO: Admit that You have received payments from Amie Greenberg on the debt in the amount totaling $6,900. (Defendant's Decl., Exh. G, at p. 226.)	Admit. (Defendant's Decl., Exh. G, at p. 306.)
REQUEST NUMBER THIRTEEN: Admit that on November 14, 2012, the State Court in its order entered December 21, 2012 order ordered [sic] that Amie Greenberg individually shall pay to Jeffrey Rubin as for attorney's fees and costs as a sanction, the amount of $38,411.66, without interest. (Defendant's Decl., Exh. G, at p. 227.)	I can neither Admit nor Deny as statement is incomplete and does include the time period in which the payment was required to be paid in full. (Defendant's Decl., Exh. G, at p. 305.)

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REQUEST NUMBER SIXTEEN: Admit that the debt in the amount of $5,000 awarded in the September 4, 2012 order is not a debt for alimony, maintenance or support. (Defendant's Decl., Exh. G, at p. 228.)	Admit. (Defendant's Decl., Exh. G, at p. 306.)
REQUEST NUMBER SEVENTEEN: Admit that the debt in the amount of $38,411.66 awarded in the September 4, 2012 Order and in the December 12, 2012 Order is not a debt for alimony, maintenance or support. (Defendant's Decl., Exh. G, at p. 228.)	Admit. (Defendant's Decl., Exh. G, at p. 306.)
REQUEST NUMBER FORTY: Admit that the debt is not a domestic support obligation as defined in 11 U.S.C. § 101 (14A). (Defendant's Decl., Exh. G, at p. 232.)	Deny. (Defendant's Decl., Exh. G, at p. 307.)
REQUEST NUMBER SIXTY-FOUR: Admit that the September 4, 2012 Order does not order Petitioner to reimburse You $4,438.28 for the minor children's medical, education and therapy expenses. (Defendant's Decl., Exh. G, at p. 235.)	Deny as it was implied that the cost of therapy, medical and educational [sic] be equally shared regardless of the therapist. The Transcripts from the hearing on November 14, 2012, specifically addresses that on Page 27. (Defendant's Decl., Exh. G, at p. 309.)

In addition, in response to Defendant's interrogatory no. 17, Plaintiff stated that he was entitled to interest on the sanctions awards because Defendant did not pay them within 30 days, as ordered by the Family Court. (Defendant's Decl., Exh. L, at p. 327.)

On February 12, 2018, Defendant filed a *Motion for Summary Judgment Pursuant to Fed. R. Civ. P. 56* (the "Motion") [doc. 19] and a supporting memorandum of points and authorities (the "Memorandum") [doc. 20]. Defendant also filed a supporting declaration [doc. 21] and the RJN [doc. 22].

On April 12, 2018, Plaintiff filed a substitution of attorney, indicating that he had obtained counsel [doc. 37]. On April 20, 2018, Plaintiff filed an opposition to the Motion (the "Opposition") [doc. 40] and a *Statement of Genuine Issues in Support of Plaintiff's Opposition to Defendant's Motion for Summary Judgment [Adv. Dkt. 19]*

("Plaintiff's Statement") [doc. 41]. Plaintiff does not dispute that the September 2012 Order provided, in part, that Defendant shall reimburse Plaintiff one-half the costs of the minor children's therapy with Dr. Gold. (Plaintiff's Statement, at p. 2.) However, Plaintiff disputes Defendant's contention that there are no triable issues of fact as to Plaintiff's claim for $4,438.28 for the children's medical, therapy, or educational expenses. Plaintiff also contends that he is entitled to post-judgment interest as a matter of California law. (*Id.*, at p. 5.)

On May 2, 2018, Defendant filed her reply (the "Reply") [doc. 47]. In the Reply, Defendant asks the Court not to consider the Opposition because it was untimely served. Defendant alleges that she did not receive the Opposition until May 2, 2018, the day that the Reply was due. The Court continued the hearing on the Motion from May 16, 2018 to June 13, 2018.

II. THE MOTION

Defendant seeks summary judgment on Plaintiff's claim for relief under 11 U.S.C. § 523(a)(15). Defendant argues that the monies awarded as sanctions by the Family Court constitute a debt that was incurred post-dissolution, and thus not incurred "in connection with" the parties' dissolution proceedings. On these grounds, Defendant seeks a determination that the debt owed to Plaintiff is dischargeable.

III. LEGAL STANDARDS

A. General Motion for Summary Judgment Standard

Pursuant to Federal Rule of Civil Procedure ("Rule") 56, applicable to this adversary proceeding under Federal Rule of Bankruptcy Procedure ("FRBP") 7056, the Court shall grant summary judgment if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S.Ct. 2505, 2509-10, 91 L.Ed.2d 202 (1986); Rule 56; FRBP 7056. "By its very terms, this standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material*

fact." 477 U.S. at 247–48 (emphasis in original).

> As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted. . . . [S]ummary judgment will not lie if the dispute about a material fact is "genuine," that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. . . .

Id. at 248–50 (internal citations omitted). Additionally, issues of law are appropriate to be decided in a motion for summary judgment. *See Camacho v. Du Sung Corp.*, 121 F.3d 1315, 1317 (9th Cir. 1997).

The initial burden is on the moving party to show that no genuine issues of material fact exist based on "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed. 265 (1986). Once the moving party meets its initial burden, the nonmoving party bearing "the burden of proof at trial on a dispositive issue" must identify facts beyond what is contained in the pleadings that show genuine issues of fact remain. *Id.* at 324; *see also Anderson*, 477 U.S. at 256 ("Rule 56(e) itself provides that a party opposing a properly supported motion for summary judgment may not rest upon mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial.").

The nonmoving party meets this burden through the presentation of "evidentiary materials" listed in Rule 56, such as depositions, documents, electronically stored information, affidavits or declarations, stipulations, admissions, and interrogatory answers. *Id.* To establish a genuine issue, the non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986); *see also Anderson*, 477 U.S. at 252 ("The mere existence of a scintilla of evidence in support of the [non-moving party's] position will be insufficient."). Rather, the nonmoving party must provide "evidence of such a caliber that 'a fair-minded jury could return a verdict for the [nonmoving party] on the evidence presented.'" *U.S. v. Wilson*, 881 F.2d 596, 601 (9th Cir. 1989) (quoting

Anderson, 477 U.S. at 266).

B. 11 U.S.C. § 523(a)(15)

Pursuant to 11 U.S.C. § 523(a)(15), a bankruptcy discharge does not discharge an individual debtor from any debt:

> to a spouse, former spouse, or child of the debtor and not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, or a determination made in accordance with State or territorial law by a governmental unit[.]

A plaintiff seeking a determination of nondischargeability under § 523(a)(15) must establish three elements:

> (1) that the debt in question is owed to a [spouse,] former spouse[, or child] of the debtor; (2) that the debt is not a support obligation within the meaning of § 523(a)(5); and (3) that the debt was incurred in the course of a divorce or separation or in connection with a separation agreement, divorce decree, or other order of a court of record.

In re Adam, Case No. ADV 12-01295-DS, 2015 WL 1530086, at *6 (B.A.P. 9th Cir. Apr. 6, 2015), *aff'd,* 677 F. App'x 353 (9th Cir. 2017).

> [T]he trend in recent case law is to construe § 523(a)(15) expansively to cover a broader array of claims related to domestic relations within the discharge exception. *See, e.g.*, *In re Wise*, 2012 WL 5399075, at *6 (Bankr. E.D. Tex. Nov.5, 2012) (§ 523(a)(15) "rendered as non-dischargeable virtually all obligations arising between spouses as a result of a divorce decree."); *Quarterman v. Quarterman (In re Quarterman)*, 2012 Bankr. LEXIS 4924, at *9–10 (Bankr. D. Ariz. October 17, 2012) ("The Section is not limited to simply divorce decree judgments alone but excepts any debt incurred by the debtor in the course of divorce or any debt in connection with a divorce

decree.").

Id. at *5–6.

IV. DISCUSSION

Here, Plaintiff has opposed the Motion. After a review of the pleadings, the Court finds that there remain genuine issues of material fact as to (i) whether the September 2012 Order and the December 2012 Order were issued in connection to the parties' dissolution proceedings; (ii) whether Plaintiff is entitled to claim $4,438.28 for the children's medical, therapy, and educational expenses; and (iii) whether Plaintiff is entitled to post-judgment interest. However, the parties do not dispute that Defendant has already paid $6,900 to Plaintiff in partial satisfaction of her debt.

A. Untimely Opposition

In her Reply, Defendant asks the Court not to consider the Opposition because it was untimely served. Defendant alleges that she did not receive the Reply until May 2, 2018, the day the Reply was due. Aside from this allegation, Defendant has not alleged that she suffered any prejudice as a result of her delayed receipt of the Opposition. In fact, since the Court continued the hearing from May 16, 2018 to June 13, 2018, Defendant was afforded additional time to file a supplemental reply if she wished. Because it does not appear that Defendant was prejudiced, the Court will consider the Opposition in ruling on the Motion.

B. Request for Judicial Notice

As an initial matter, pursuant to Federal Rule of Evidence 201(b)(2), the Court will grant Defendant's unopposed request for judicial notice of documents attached to her RJN. The judicially noticeable documents are copies of court records. *See, e.g.*, *Rosales-Martinez v. Palmer*, 753 F.3d 890, 894 (9th Cir. 2014) ("It is well established that we may take judicial notice of judicial proceedings in other courts."); *Golden Gate v. Marincovich*, 286 F. 105, 106 (9th Cir. 1923) ("Every court takes judicial notice of its own records in the same case.").

C. 11 U.S.C. § 523(a)(15)

Defendant has not met her burden of proving that she is entitled to summary judgment

on Plaintiff's claim under 11 U.S.C. § 523(a)(15).

1. Debt Owed to Defendant

Defendant concedes that Plaintiff has established the first element of a claim under § 523(a)(15). All the amounts at issue are owed by Defendant, a former spouse of Plaintiff, to Plaintiff.

2. Support Obligation Pursuant to § 523(a)(5).

To prevail on a claim for relief under § 523(a)(15), Plaintiff must show that the amounts at issue are not support obligations pursuant to § 523(a)(5). Section 523(a)(5) excepts from discharge any debt for a "domestic support obligation." Pursuant to § 101(14A):

> (14A) The term "domestic support obligation" means a debt that accrues before, on, or after the date of the order for relief in a case under this title, including interest that accrues on that debt as provided under applicable nonbankruptcy law notwithstanding any other provision of this title, that is—
>
> (A) owed to or recoverable by—
>
> (i) a spouse, former spouse, or child of the debtor or such child's parent, legal guardian, or responsible relative; or
>
> (ii) a governmental unit;
>
> (B) in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of such spouse, former spouse, or child of the debtor or such child's parent, without regard to whether such debt is expressly so designated;
>
> (C) established or subject to establishment before, on, or after the date of the order for relief in a case under this title, by reason of applicable provisions of-
>
> (i) a separation agreement, divorce decree, or property

settlement agreement;

(ii) an order of a court of record; or

(iii) a determination made in accordance with applicable nonbankruptcy law by a governmental unit; and

(D) not assigned to a nongovernmental entity, unless that obligation is assigned voluntarily by the spouse, former spouse, child of the debtor, or such child's parent, legal guardian, or responsible relative for the purpose of collecting the debt.

Defendant argues that she is entitled to summary judgment because Plaintiff cannot establish this element of his claim. In RFA no. 40, Defendant asked, "Admit that the debt is not a domestic support obligation as defined in 11 U.S.C. § 101(14A)." (Defendant's Decl., Exh. G, at p. 232.) Plaintiff's response was, "Deny." (Defendant's Decl., Exh. G, at p. 307.) Defendant interprets this response as, "Plaintiff admits the sanction is a domestic support obligation as defined in 11 U.S.C. § 101(14A)." (Memorandum, at p. 8.) Because of this admission, Defendant argues, it has been conclusively established that the debt is a domestic support obligation excepted from discharge under § 523(a)(5). Therefore, Defendant contends that the debt cannot be excepted from discharge under § 523(a)(15).

However, there are several problems with Defendant's reasoning. First, RFA no. 40 is somewhat confusing, in that it asks Plaintiff to admit to a negative. At the time Plaintiff served his responses, he was *in pro per* and may not have clearly understood the RFA.

Second, Plaintiff's denial of RFA no. 40 is ***not*** equivalent to an affirmative admission that the sanctions are a domestic support obligation pursuant to § 101(41A).

> [A party] cannot create an end-run around the jurisdictional requirements by forcing a denial of a negative and then claim the positive is admitted and conclusively determined. It is true that in formal logic, and even in everyday language, that what is may be inferred from a statement about what is not. Or, that denial is the opposite of affirmation. . . . In the context of a request for admission to

a plaintiff from a defendant, however, the effect of a denial is not the same. On the one hand, when a party admits to a fact in response to a request for admission, that fact is conclusively established for purposes of the litigation. Fed.R.Civ.P. 36(b) ("A matter admitted under this rule is conclusively established unless the court, on motion, permits the admission to be withdrawn or amended."); *see U.S. v. 2204 Barbara Lane,* 960 F.2d 126, 129 (11th Cir.1992). ***On the other, the effect of a denial is not to admit the opposite of the proposition offered for admission, but rather is simply to establish that the matter is in dispute.***

Harmon v. Wal-Mart Stores, Inc., Case No. 3:08-CV-309-MEF, 2009 WL 707403, at *4 (M.D. Ala. Mar. 16, 2009) (emphasis added).

Third, Plaintiff's response to RFA no. 40 contradicts his responses to other RFAs. In RFA no. 16, Defendant asked: "Admit that the debt in the amount of $5,000 awarded in the September 4, 2012 order is not a debt for alimony, maintenance or support." (Defendant's Decl., Exh. G, at p. 228.) Plaintiff responded, "Admit." (Defendant's Decl., Exh. G, at p. 306.) In RFA no. 17, Defendant asked: Admit that the debt in the amount of $38,411.66 awarded in the September 4, 2012 Order and in the December 12, 2012 Order is not a debt for alimony, maintenance or support." (Defendant's Decl., Exh. G, at p. 228.) Plaintiff responded, "Admit." (Defendant's Decl., Exh. G, at p. 306.)

Pursuant to Rule 36(b), "a matter admitted under this rule is conclusively established" unless otherwise ordered by the court. Thus, Plaintiff's responses to RFAs nos. 16 and 17 conclusively establish that the debts at issue are ***not*** debts for alimony, maintenance, or support as defined in § 101(41A), and therefore not excepted from discharge under § 523(a)(5). As noted above, Plaintiff's denial of RFA no. 40 lacks the same conclusive effect as an affirmative admission. Accordingly, the debts at issue could potentially still be excepted from discharge under § 523(a)(15).

3. Debts Incurred in Connection with Dissolution Proceedings

Defendant has not established that she is entitled to judgment as a matter of law as to the final element of the § 523(a)(15) discharge exception. The language of § 523(a)(15) is broad, excepting from discharge debts "incurred in the course of a divorce or

separation ***or in connection with*** a separation agreement, divorce decree, ***or*** other order of a court of record."

California Family Code § 3027.1(a) provides:

> If a court determines, based on the investigation described in Section 3027 or other evidence presented to it, that an accusation of child abuse or neglect made during a child custody proceeding is false and the person making the accusation knew it to be false at the time the accusation was made, the court may impose reasonable money sanctions, not to exceed all costs incurred by the party accused as a direct result of defending the accusation, and reasonable attorney's fees incurred in recovering the sanctions, against the person making the accusation.

The September 2012 Order and the December 2012 Order (together, the "Sanctions Orders") relied on Family Code § 3027.1 in determining that sanctions against Plaintiff were warranted. Defendant tries to portray the Sanctions Orders as imposing post-dissolution sanctions designed primarily to deter her future conduct, with no connection to the parties' dissolution proceedings. However, the Defendant's OSC Request was filed specifically to modify previous child custody and visitation orders. The Family Court issued the Sanctions Orders in response to Defendant's OSC Request, which was based on false allegations of child abuse. These facts appear to show that the sanctions were debts to Plaintiff incurred "in connection with" the Divorce Decree.

Defendant argues that "[a] debt constitutes a debt incurred in connection with a divorce decree or separation agreement when it has been specifically incorporated into such divorce decree or separation agreement." *McFadden v. Putnam (In re Putnam)*, Case No. 10-19719-A-7, 2012 WL 8134423, at *19 (Bankr. E.D. Cal. Aug. 30, 2012). Defendant interprets *Putnam*'s holding as requiring that ***all*** debts incurred in connection with a divorce decree ***must be specifically incorporated into*** the divorce decree to be nondischargeable under § 523(a)(15). However, this is not what *Putnam* holds. Instead, *Putnam* holds that ***when*** a debt is incorporated into a divorce decree, then it is necessarily incurred in connection with the divorce decree. *Putnam* does not hold that "***only when*** a debt is incorporated into a divorce decree is a debt incurred in connection with the divorce decree."

Defendant's interpretation of *Putnam* is too restrictive and is contrary to the weight of authority in favor of an expansive interpretation of § 523(a)(15). Courts have held that attorneys' fees and sanctions awards issued in connection with a dissolution proceeding are nondischargeable under § 523(a)(15). In *Tritt v. Tritt (In re Tritt)*, Case No. 12-42446, 2014 WL 1347763 (Bankr. E.D. Tex. Apr. 4, 2014), the plaintiff and defendant obtained a divorce decree that contained provisions regarding custody of their two children. During the course of subsequent litigation involving child custody disputes, the defendant filed an "emergency motion to protect children and request for temporary restraining order." The family court denied defendant's motion and imposed sanctions on her, finding that the motion had been filed in bad faith. In a subsequent proceeding, the family court found the defendant in contempt of prior court orders, and imposed further penalties upon her, including reimbursement of certain health care expenses of the children and confinement in the county jail. The family court further awarded attorneys' fees to plaintiff in connection with the custody litigation.

The defendant never paid plaintiff any of the amounts awarded. Subsequently, the defendant filed a chapter 7 petition. The plaintiff filed an adversary proceeding against the defendant, seeking a determination that the debts owed by defendant were nondischargeable pursuant to § 523(a)(5) and/or § 523(a)(15). The plaintiff filed a motion for partial summary judgment on his claims for relief. The defendant filed a cross-motion for summary judgment, asserting that the post-divorce sanctions and fee awards were discharged in her chapter 7 case. The court granted the plaintiff's motion and denied the defendant's motion, holding that the attorneys' fees, sanctions, and contempt awards were subject to the § 523(a)(15) exception:

> Sanctions awarded against a debtor for engaging in bad faith litigation tactics, such as in the Sanctions Order in this case, are not excluded from the scope of § 523(a)(15). . . . The same analysis applies to fee awards arising from contempt proceedings . . . particularly when, as in this instance, the fee award compensates the former spouse for the necessity of bringing action to compel compliance with the Family Court's standing order regarding the propriety of parental behavior toward the children.

Id. at *8.

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Here, the facts are similar to those in *Tritt*. Like the defendant in *Tritt*, Defendant sought to modify the child custody provisions of the Divorce Decree. When the Family Court found Defendant's allegations of child abuse to be false, it imposed sanctions on Defendant pursuant to Family Code § 3027.1, in part to compensate Plaintiff for having to defend against Defendant's unfounded allegations.

Defendant next argues that a debt excepted from discharge under § 523(a)(15) must be incurred in the course of a divorce, and not after a divorce decree has been entered. Defendant relies on *Tracy v. Tracy (In re Tracy)*, Case No. 06-40044-JDP, 2007 WL 420252 (Bankr. D. Idaho Feb. 2, 2007). However, *Tracy* does not support Defendant's position. In *Tracy*, the plaintiff and the defendant obtained a divorce decree in October 2003. After the divorce, the defendant rented their home from the plaintiff until March 2005. When the defendant vacated the residence, she took several items from the home and withdrew $3,179 from a joint account that had not been dealt with in the divorce proceedings. The plaintiff sued the defendant and obtained a money judgment against her. In the defendant's bankruptcy proceeding, the plaintiff and his current wife sought to except the money judgment from discharge under § 523(a)(15). The bankruptcy court held that the money judgment did not fall within the § 523(a)(15) exception:

> [T]he parties' property dispute arose approximately a year and a half after the divorce decree was entered. Although the residence was awarded to Plaintiff in the divorce as his separate property, he thereafter rented it to Defendant. ***This created a new, landlord/tenant relationship between the parties.*** The subsequent lawsuit involved claims for damages Defendant allegedly caused to the residence as a tenant; claims that Defendant converted Plaintiff's personal property when she vacated the residence; and claims that she wrongfully withdrew funds from a joint bank account that the parties stipulated was not mentioned in the divorce decree. . . ***None of these claims gave rise to debts owed by Defendant to Plaintiff arising from their prior status as spouses.***

Tracy, 2007 WL 420252, at *3 (emphasis added).

Tracy does not hold, as Defendant suggest, that all debts incurred post-dissolution are outside the § 523(a)(15) exception. In *Tracy*, the new landlord/tenant relationship

between the plaintiff and the defendant was the basis for the post-divorce money judgment. The court found that such damages were unrelated to the divorce proceedings and did not arise from the parties' prior status as spouses. Here, even though the Sanctions Orders were entered several months after the Divorce Decree, the Sanctions Orders stem directly from Defendant's and Plaintiff's status as former spouses and their dispute over child custody.

In light of the foregoing, Defendant is not entitled to judgment as a matter of law on Plaintiff's claim for relief under § 523(a)(15).

D. The Children's Medical, Therapy, and Educational Expenses

In the Complaint, Plaintiff alleges that the September 2012 Order directed Defendant to pay "$4,438.28 for the children's medical, therapy and educational expenses[.]" (Complaint, ¶ 10.) The Divorce Decree provided that the each party was to "pay one-half the cost of future therapy with Dr. Gold for the minor children." (RJN, Exh. B, ¶ 12.) The September 2012 Order provided that Defendant was to reimburse Plaintiff for "one-half the costs of the minor children's therapy with Dr. Gold[,]" pursuant to the Divorce Decree. (RJN, Exh. A, at p. 37.)

Plaintiff does not dispute the language in the September 2012 Order, regarding Defendant's reimbursement of one-half the cost of the children's therapy with Dr. Gold. Plaintiff asserts that there are disputed facts as to his claim for $4,438.28 for the children's medical, therapy, and education expenses. Notwithstanding his assertion, his claimed $4,438.28 does not appear in the Divorce Decree, the September 2012 Order, or the December 2012 Order.

In his responses to Defendant's RFAs, Plaintiff states that "it was implied that the cost of therapy be equally shared regardless of the therapist." (Defendant's Decl., Exh. G, at p. 309.) At the November 14, 2012 hearing, the Family Court stated that "other therapists and other health care providers fall within child support and add ons to child support if not covered by that specific language in the judgment." (Defendant's Decl., Exh. F, at p. 213.) The Family Court's statement refers to other health care and therapy providers, but does not refer to educational expenses. Without further evidence, it is not clear whether this $4,438.28 debt alleged by Plaintiff was contemplated by the Divorce Decree, the September 2012 Order, or the December

2012 Order.

Because there appear to be material facts in dispute as to the amount of, and Defendant's responsibility for, the children's medical, therapy, and educational expenses, the Court cannot grant summary judgment in favor of Defendant on this issue at this time.

E. Interest Owed to Plaintiff

Defendant argues that Plaintiff has not produced any evidence that he is entitled to interest. In his Complaint, Plaintiff alleges that the September 2012 Order provides for the payment of sanctions in the total amount of $43,411.66 plus interest. The September 2012 Order provides for sanctions in the amount of $38,411.66 pursuant to Family Code § 3027.1 and $5,000 pursuant to Family Code § 271. (RJN, Exh. A, at p. 37.) However, the September 2012 Order does not provide for interest. In addition, the December 2012 Order specifically provides that the sanctions under Family Code § 3027.1 in the amount of $38,411.66 were awarded ***without*** interest. (RJN, Exh. C, at p. 75.) The December 2012 Order does not mention the $5,000 in sanctions awarded pursuant to Family Code § 271.

Notwithstanding the foregoing, Plaintiff argues that he is entitled to interest on the sanctions awards under California law, because the sanctions were not paid in full within 30 days. California Code of Civil Procedure 685.010(a) provides that "[i] nterest accrues at the rate of 10 percent per annum on the principal amount of a money judgment remaining unsatisfied." Defendant does not dispute that the sanctions awards remain unsatisfied. Nor has Defendant met her burden of showing that Plaintiff is not entitled to any interest whatsoever. Accordingly, Defendant is not entitled to summary judgment on this issue.

F. Partial Satisfaction

Defendant has provided evidence that she has paid Plaintiff the sum of $6,900 in partial satisfaction of the sanctions awards. Plaintiff does not dispute this fact. Accordingly, the Court will enter summary adjudication on this issue.

V. CONCLUSION

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In light of the foregoing, the Court will grant partial summary adjudication as to the issue of partial satisfaction in the amount of $6,900. The Court will deny summary adjudication as to all other issues.

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

Party Information

Debtor(s):

Amie Suzanne Greenberg	Represented By Steven J Renshaw

Defendant(s):

Amie Greenberg	Pro Se

Plaintiff(s):

Jeff Rubin	Pro Se

Trustee(s):

Amy L Goldman (TR)	Pro Se

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1:17-10825 Amie Suzanne Greenberg **Chapter 7**
Adv#: 1:17-01061 Rubin v. Greenberg

#18.00 Plaintiff's motion for an order extending the deadline to file pretrial motions set forth in Court's October 30, 2017 scheduling order

fr. 5/16/18

Docket 38

Tentative Ruling:

Grant.

I. BACKGROUND

On March 31, 2017, Amie Suzanne Greenberg ("Defendant") filed a voluntary chapter 7 petition.

On June 26, 2017, Jeff Rubin ("Plaintiff") filed a complaint against Defendant (the "Complaint"), requesting nondischargeability of the debt owed to him pursuant to 11 U.S.C. § 523(a)(15). Through the Complaint, Plaintiff requests nondischargeability of $43,411.66, plus interest, awarded to Plaintiff by the family court in the parties' dissolution proceeding (the "Family Court Order"). Complaint, Exhibit 1. Plaintiff also requests $4,438.28 "for the children's medical, therapy and educational expenses." *Id*.

On August 23, 2017, the Court held an initial status conference. The joint status report [doc. 6] the parties prepared in preparation for the initial status conference indicated that the parties had not complied with Federal Rule of Bankruptcy Procedure ("FRBP") 7026. As such, on August 24, 2017, the Court entered an order [doc. 8] continuing the status conference and instructing the parties to comply with FRBP 7026 by, among other things, providing initial disclosures to one another.

On October 25, 2017, the Court held a continued status conference. On October 30, 2017, the Court entered a scheduling order (the "Scheduling Order") [doc. 14]. Through the Scheduling Order, the Court set the following dates and deadlines: (A)

January 31, 2018 as the discovery cutoff date; (B) February 15, 2018 as the last day to file pretrial motions; (C) March 21, 2018 as the deadline by which the parties must file a pretrial stipulation; and (D) April 4, 2018 as the pretrial conference.

On April 12, 2018, Plaintiff filed a substitution of counsel, indicating that Plaintiff retained counsel to represent him in this action [doc. 37]. On April 20, 2018, Plaintiff filed a motion to extend the pretrial motion deadline found in the Scheduling Order (the "Motion") [doc. 38]. On May 1, 2018, Defendant filed an opposition to the Motion [doc. 45] and requested sanctions pursuant to 11 U.S.C. § 105(a), Federal Rule of Civil Procedure 37(c) and Federal Rule of Bankruptcy Procedure 9011.

II. ANALYSIS

A. Modification of Scheduling Order

Pursuant to Federal Rule of Civil Procedure ("Rule") 16(b)(4), as incorporated into this proceeding by Fed. R. Bankr. P. 7016, "[a] schedule may be modified only for good cause and with the judge's consent." "The district court is given broad discretion in supervising the pretrial phase of litigation…." *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 607 (9th Cir. 1992).

Rather than use the "good cause" standard of Rule 16(b)(4), the parties argue whether there was excusable neglect, an issue the Court need not decide in connection with a request to modify one of the Court's own orders. Instead, the Court need only find "good cause" to extend the deadline by which the parties may file pretrial motions.

Here, there is good cause to extend the deadline. Allowing Plaintiff the opportunity to file a motion for summary judgment will expedite this matter, especially in light of the fact that the issues present here are mostly legal, not factual. As a result, all of the issues may be disposed through a motion for summary judgment, which will save time and resources for both parties. In addition, the Court has not set trial dates, such that the Court will not have to alter any dates or deadlines related to trial. Moreover, Plaintiff has now retained counsel, and the Court expects counsel to meet deadlines diligently going forward. The Court will closely scrutinize any future missed deadlines.

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In addition, Defendant concedes that she has now received Plaintiff's initial disclosures. To the extent Plaintiff's disclosures provide an additional basis for Defendant to file another motion for summary judgment, the deadline will now be also extended for Defendant to have the opportunity to do so. It is in the best interest of both parties to attempt resolution through a motion for summary judgment, or at least a motion for partial summary adjudication, for the purpose of saving the time and money that would otherwise be spent preparing for trial. As such, the Court will grant the Motion.

B. Sanctions

The Court also will deny Defendant's request for sanctions under 11 U.S.C. § 105(a), Rule 37(c) and Federal Rule of Bankruptcy Procedure ("FRBP") 9011. Defendant's arguments under Rule 37(c) are repetitive of her arguments in the separately filed motion in limine, and will be denied for the same reasons outlined in the ruling on that motion.

Pursuant to 11 U.S.C. § 105(a), the Court "may issue any order, process, or judgment that is necessary or appropriate to carry out provisions of this title," and take "any action or mak[e] any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process." "The standard for finding a party in civil contempt is well settled: The moving party has the burden of showing by clear and convincing evidence that the contemnors violated a specific and definite order of the court." *In re Dyer*, 322 F.3d 1178, 1190-91 (9th Cir. 2003).

Here, Defendant has not pointed to a "specific and definite" order of the Court. The October 30, 2017 scheduling order did not include a deadline by which the parties had to exchange initial disclosures. That deadline is governed by Rule 26(a), and the appropriate remedy is to seek sanctions under Rule 37(c), which Defendant already did in a separate motion. Regarding Defendant's assertions about the pretrial stipulation, it appears that Plaintiff timely filed a unilateral pretrial statement. If Plaintiff did not timely serve Defendant with his portion of a joint pretrial stipulation, the more appropriate remedy at this time is to continue the pretrial conference for the parties to file a joint pretrial stipulation, especially now that Plaintiff has retained counsel.

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As for Defendant's requests for sanctions under FRBP 9011, any request for sanctions under FRBP 9011 must "be made separately from other motions or requests…." FRBP 9011(c)(1)(A). Even if Defendant had filed a separate motion, there is no basis for relief under FRBP 9011. In the Motion, Plaintiff mostly quotes the family court's orders in his statement of facts. The inclusion of these orders for the purpose of providing background is not sanctionable conduct under FRBP 9011. Moreover, Plaintiff did not call Defendant a vexatious litigant; Plaintiff stated that Defendant "did not change her vexatious ways." Although the language is strong, Plaintiff did not falsely represent to the Court that Defendant was deemed a vexatious litigant by any other court. There being no basis for sanctions under any of the authorities above, the Court will deny Defendant's request.

III. CONCLUSION

The Court will grant the Motion. The Court will extend the deadline for the parties to file pretrial motions to **September 14, 2018**.

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

Tentative ruling regarding Defendant's evidentiary objections to the identified paragraphs in the Declaration of Jeff Rubin set forth below:

paras. 4-5: sustain

Regarding Defendant's remaining objections, those objections do not involve "evidence," because Defendant is objecting to language in the Motion instead of to actual evidence, such as testimony in a declaration or exhibits attached thereto. Moreover, it is unclear to which language Defendant objects because Defendant did not quote the allegedly objectionable language. As such, the Court will overrule the remaining objections made by Defendant.

Party Information

Debtor(s):

Amie Suzanne Greenberg — Represented By
Steven J Renshaw

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

Wednesday, June 13, 2018 **Hearing Room 301**

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CONT... Amie Suzanne Greenberg **Chapter 7**

Defendant(s):

Amie Greenberg	Pro Se

Plaintiff(s):

Jeff Rubin	Represented By Sevan Gorginian

Trustee(s):

Amy L Goldman (TR)	Pro Se

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

Wednesday, June 13, 2018 **Hearing Room 301**

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1:17-10825 Amie Suzanne Greenberg **Chapter 7**
Adv#: 1:17-01061 Rubin v. Greenberg

#19.00 Pretrial conference re: complaint to determine dischargeability of debt pursuant to sections 523(a)(15)

fr. 8/23/17; 10/25/17; 4/4/18;5/13/18

Docket 1

Tentative Ruling:

The Court intends to continue this pretrial conference to **1:30 p.m. on November 7, 2018**. The parties should be prepared to discuss their availability. If the Court continues the pretrial conference to this date, the parties must file a joint pretrial stipulation no later than **October 24, 2018**.

Party Information

Debtor(s):

Amie Suzanne Greenberg	Represented By Steven J Renshaw

Defendant(s):

Amie Greenberg	Pro Se

Plaintiff(s):

Jeff Rubin	Pro Se

Trustee(s):

Amy L Goldman (TR)	Pro Se