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

Wednesday, July 17, 2024 **Hearing Room 301**

9:30 AM
1: - **Chapter**

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

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

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

Neither a Zoom nor a ZoomGov account is necessary to participate remotely and there are no fees for doing so. No pre-registration or prior approval is required.
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9:30 AM
CONT... **Chapter**

Password: 474358

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Docket 0

Tentative Ruling:

- NONE LISTED -

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

Wednesday, July 17, 2024 **Hearing Room 301**

9:30 AM

1:23-11723 Bruce E. Campbell **Chapter 13**

#1.00 Motion for relief from stay [RP]

SELENE FINANCE LP, AS SERVICER FOR U.S. BANK TRUST NATIONAL ASSOCIATION
VS.
DEBTOR

Docket 45

Tentative Ruling:

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

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

Movant, or its agents, may, at its option, offer, provide and enter into a potential forebearance agreement, loan modification, refinance agreement or other loan workout or loss mitigation agreement. Movant, through its servicing agent, may contract the debtor by telephone or written correspondence to offer such an agreement.

The co-debtor stay of 11 U.S.C. § 1201(a) and § 1301(a) is terminated, modified or annulled as to the co-debtor, on the same terms and conditions as to the debtor.

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.

9:30 AM
CONT... Bruce E. Campbell **Chapter 13**

Party Information

Debtor(s):

Bruce E. Campbell	Represented By R Grace Rodriguez

Movant(s):

U.S. Bank Trust National	Represented By Fanny Zhang Wan Sean C Ferry

Trustee(s):

Elizabeth (SV) F Rojas (TR)	Pro Se

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

Wednesday, July 17, 2024 **Hearing Room 301**

1:30 PM

1:17-10673 Hermann Muennichow **Chapter 7**

Adv#: 1:23-01027 Seror, Chapter 7 Trustee v. Muennichow

#2.00 Status conference re: Complaint For Turnover of Property of the Estate and for Related Injunctive Relief

fr. 9/27/23; 11/1/23; 12/6/23; 1/24/24, 2/21/24; 4/3/24, 4/10/24 (Stip), 5/29/24; 6/26/24

Stipulation resolving adversary filed 7/15/24

Docket 1

Tentative Ruling:

Having reviewed the Stipulation filed by the parties on July 15, 2024 [doc. 35], the Court will continue this status conference to **January 15, 2025 at 1:30 p.m.**

Appearances on July 17, 2024 are excused.

Party Information

Debtor(s):

Hermann Muennichow — Represented By
Stuart R Simone
Nicholas A West

Defendant(s):

Helayne Muennichow — Pro Se

Plaintiff(s):

David Seror, Chapter 7 Trustee — Represented By
Jessica L Bagdanov

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CONT... Hermann Muennichow **Chapter 7**

Trustee(s):

David Seror (TR)

Represented By
Richard Burstein
Jessica L Bagdanov

1:30 PM
1:22-10981 Jeffrey A Harman **Chapter 7**
Adv#: 1:22-01060 Zhang v. Harman

#3.00 Pretrial conference re: complaint for determination of non-dischargeability of debt pursuant to: (1) 11 U.S.C. section 523(a)(2)(A) for fraud and fraudulent inducement; (2) 11 U.S.C. §523(a)(4) for fraud and defalcation while acting as fiduciary; and (3) 11 U.S.C. section 523(a)(6) for willful malicious injury

fr. 1/25/23; 2/15/23; 4/12/23; 10/18/23(stip); 1/17/24(stip); 3/20/24 (stip); 5/8/24(stip)

Docket 1

Tentative Ruling:

Trial will commence at 9:30 a.m. on September 23, 2024 and will continue at 9:30 a.m. on September 24 through September 27, 2024.

On July 12, 2024, the parties filed a *Pretrial Stipulation and Order* (the "Pretrial Stipulation") [doc. 50]. The Pretrial Stipulation includes, among other things, the parties' exhibit lists for trial.

Contrary to Local Bankruptcy Rule ("LBR") 9070-1(a)(2), the defendant's exhibits are not identified by letter; they are identified by number.

By no later than **August 5, 2024**, the defendant must file and serve on the plaintiff a revised exhibit list that consistently identifies the defendant's exhibits by letter. *See* LBR 9070-1(a)(2).

Prior to trial, **with the exception of hostile witnesses, the Court will require the parties to submit written declarations of all witnesses (including the parties) providing direct testimony** ("Witness Declarations"), signed under penalty of perjury, otherwise admissible under the Federal Rules of Evidence. At the upcoming pretrial conference, the parties should be prepared to address any issues they foresee in filing such written declarations.

In addition, prior to trial, the parties must submit a schedule for cross-examination of

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CONT... Jeffrey A Harman **Chapter 7**

third-party witnesses, i.e., which witnesses will be cross-examined on which date, and whether that witness must be present in the morning and/or in the afternoon.

Cross-examination, if requested, will take place on the scheduled trial dates.

The following procedures are to be followed for the presentation of evidence to be offered at the trial.

A Witness Declaration will be admissible at trial, subject to timely objections, only if the declarant is present at trial, and subject to cross-examination, **unless cross-examination has been waived in writing, before trial, by the opposing party**.

If a portion of a Witness Declaration concerns an exhibit to be admitted into evidence at trial, the exhibit must be attached to the Witness Declaration.

TIME FOR FILING DECLARATIONS AND OBJECTIONS TO DECLARATIONS:

Plaintiff must serve and file her Witness Declaration(s) on or before **August 28, 2024**.

Defendant must serve and file his Witness Declaration(s) and any evidentiary objections he has to plaintiff's declaration(s) on or before **September 4, 2024**.

Plaintiff must serve and file her reply declaration(s) and any evidentiary objections she has to defendant's Witness Declaration(s) on or before **September 11, 2024**.

Defendant must serve and file any evidentiary objections to plaintiff's reply Witness Declaration(s) on or before **September 18, 2024**.

TIME FOR FILING BRIEFS:

Plaintiff's trial brief must be filed and served on or before **August 28, 2024**.

Defendant's trial brief must be filed and served on or before **September 4, 2024**.

Any reply brief by plaintiff must be filed and served on or before **September 11,**

1:30 PM
CONT... Jeffrey A Harman **Chapter 7**

2024.

JUDGE'S COPIES:

Judge's copies of all Witness Declarations and briefs which exceed 25 pages must be delivered to Judge Victoria Kaufman.

EXHIBITS:

All trial exhibits must be numbered and marked as required by Local Bankruptcy Rule 9070-1(a). By **September 16, 2024**, each party must deliver to the chambers of Judge Victoria Kaufman the original and one copy of a notebook containing all of that party's trial exhibits. **In addition, each party must bring two additional copies of their trial exhibits to the trial.**

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

Party Information

Debtor(s):

Jeffrey A Harman	Represented By Stella A Havkin

Defendant(s):

Jeffrey A Harman	Pro Se

Plaintiff(s):

Huan Zhang	Represented By Jennifer L Nassiri

Trustee(s):

Amy L Goldman (TR)	Pro Se

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CONT... Jeffrey A Harman **Chapter 7**

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

Wednesday, July 17, 2024 **Hearing Room 301**

1:30 PM
1:22-11019 Steven Louis Miller **Chapter 7**
Adv#: 1:22-01062 Miller et al v. Miller

#4.00 Pre-trial conference re: complaint

fr. 1/25/23; 10/25/23; 3/20/24; 6/12/24

Docket 1

Tentative Ruling:

The Court will continue the pretrial conference to **August 7, 2024 at 1:30 p.m.**

Appearances on July 17, 2024 are excused.

Party Information

Debtor(s):

Steven Louis Miller	Pro Se

Defendant(s):

Steven Louis Miller	Pro Se

Plaintiff(s):

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

Trustee(s):

David Seror (TR)	Pro Se

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1:23-10324 Lisa Fancher **Chapter 13**
Adv#: 1:23-01026 Mayorga v. Fancher et al

#5.00 Defendant's Motion for Partial Summary Adjudication

Docket 41

Tentative Ruling:

The Court will deny the *Defendant's Motion for Partial Summary Adjudication* (the "Motion") [doc. 41].

I. BACKGROUND

A. Prepetition Events

Louis Mayorga ("Plaintiff") is a former member of the band Suicidal Tendencies, for whom he wrote and performed music. Declaration of Eduardo Martorell (the "Martorell Decl."), ¶ 2 [doc. 59]. In April 1983, Plaintiff, along with other members of Suicidal Tendencies, entered into a recording agreement (the "Agreement") with Lisa Fancher dba Frontier Records and dba American Lesion Music ("Defendant"), for their self-entitled debut album, "Suicidal Tendencies." *Id.*; Declaration of Michael B. Ackerman (the "Ackerman Decl."), ¶ 4 and Exh. 1 thereto [doc. 41].

In December 2016, Plaintiff filed a complaint in Los Angeles Superior Court against Defendant and others, initiating state court case no. BC643234 (the "State Court Action"). Ackerman Decl., ¶ 9; Martorell Decl., ¶ 3. In an amended complaint filed in the State Court Action, Plaintiff asserted claims for: (1) breach of contract; (2) accounting; and (3) fraud and concealment. Martorell Decl., ¶ 3; Exh. 2 to the Ackerman Decl. The claims arose from a dispute related to the Agreement.

In August 2019, the court granted Plaintiff a preliminary injunction (the "Preliminary Injunction") enjoining Defendant from denying an audit of royalty records. Martorell Decl., ¶ 13 and Exh. E thereto. In the Preliminary Injunction, the court stated, in relevant part:

> Plaintiff moves for an order enjoining defendant from denying plaintiff

> an audit under Civil Code section 2501.
> …
> Plaintiff has established a reasonable likelihood of prevailing on the merits in his breach of contract and accounting causes of action.
> …
> [T]he parties do not contest that plaintiff is entitled to an audit under section 2501, and that defendant has to date refused to allow plaintiff to conduct an audit.
> …
> Defendant is ordered to allow plaintiff to conduct the audit to which he is entitled under Civil Code section 2501 prior to September 27, 2018 or a later date if agreed to by plaintiff.

Exh. E to the Martorell Decl., pp. 1, 2 and 3.

The parties stipulated to try the State Court Action in two phases. Exh. A to the Martorell Decl., p. 2. In March 2021, the court held a bench trial on phase one, which concerned the breach of contract and accounting claims. *Id*. The court found in favor of Plaintiff. *Id*. In its statement of decision dated August 12, 2021 (the "Statement of Decision"), the court stated, in pertinent part:

> This statement of decision addresses phase one of the trial, in which the Court was called upon to adjudicate whether Plaintiff is entitled to receive royalties on digital streaming rights under the April 28, 1983 governing contract…. As part of this ruling, the Court will determine also whether Plaintiff is entitled to an accounting, and if so, how the accounting will be conducted. As Plaintiff has prevailed in Phase One of the trial, the accounting is essential for the parties to determine the amount of damages in Phase Two of the trial.
> …
> The testimony from both experts and Defendant herself was undisputed that in the age of streaming, [Plaintiff's] rights now account for 80% to 85% of revenue generated from recorded music. There was also an agreement that to this point in time, Defendant has retained 100% of this money for herself. It is a breach of the contract as well as a violation of the covenant of good faith and fair dealing, a principle of

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CONT... Lisa Fancher **Chapter 13**

> law applied to all contracts, for the Defendant to retain all this income while the artist (Plaintiff) is deprived of his contractual share of this valuable revenue stream.
> …
> Plaintiff is entitled to royalty payments under the Agreement for the exploitation of the sound recordings that he made.
> …
> Defendant testified that the agreement required her to provide a royalty statement to Plaintiff twice per year…. Defendant admitted that she had not provided Plaintiff with a royalty statement since 2008. By Defendant's own testimony, she has not honored the agreement to provide royalty statements to Plaintiff.
> …
> The Court has been advised that Defendant, during the litigation, has prepared Excel spreadsheets from September 2015 through the end of 2020 regarding digital streaming royalties. These spreadsheets, and all the native files upon which they rely, as well as all other native files concerning digital streaming rights from December 2012 to the present and continuing, shall be turned over through some electronic method to Plaintiff's designated forensic accountant within 21 days of entry of the Court's statement of decision in this phase one of the trial. This ruling is made independent of the OSC re: contempt for violating the terms of the preliminary injunction order which remains pending at the request of Plaintiff.
> …
> Plaintiff is the prevailing party in phase one of this trial. Costs will be awarded at the conclusion of the entire case as part of the judgment to be entered at that time.

Id., pp. 2, 4-5, 6, 8, 9 and 10.

In February 2023, the court found Defendant in contempt of the Preliminary Injunction. Martorell Decl., ¶ 14 and Exh. F thereto. In its order regarding contempt (the "Contempt Order"), the court stated, in relevant part:

> The Court finds Defendant Lisa Fancher guilty on Count 1 - willful

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CONT... Lisa Fancher **Chapter 13**

> disobedience of this Court's August 13, 2019 Preliminary Injunction ordering her to allow Plaintiff to conduct an audit to which he is entitled under Civil Code section 2501 prior to September 27, 2019 or a later date if agreed to by plaintiff.
>
> Contempt Hearing (Sentencing) is scheduled for 03/30/2023 at 01:45 PM in Department 1 at Spring Street Courthouse. Hearing on Motion for Attorney Fees in Connection with Contempt Proceedings is scheduled for 03/30/2023 at 01:45 PM in Department 1 at Spring Street Courthouse.
> …
> The parties are ordered to file separate reports concerning (1) the status of accounting and recommendations for the process to achieve final resolution of the case and entry of judgment; and (2) the fraud cause of action and what remains necessary for trial…

Exh. F to the Martorell Decl., pp. 1 and 2.

B. The Bankruptcy Case and the Adversary Proceeding

On March 16, 2023, Defendant filed a chapter 13 petition, initiating case no. 1:23-bk-10324. On July 17, 2023, Plaintiff filed a complaint against Defendant (the "Complaint"), requesting nondischargeability of the debt owed to him under 11 U.S.C. §§ 523(a)(2)(A), (a)(4) and (a)(6), and objecting to Defendant's discharge under 11 U.S.C. §§ 727(a)(3) and (a)(4).

In October 2023, Defendant filed a motion to dismiss the Complaint (the "Motion to Dismiss") [doc. 9], which the Court granted in part and denied in part. *See* doc. 20. In November 2023, the Court issued its ruling on the Motion to Dismiss and held, in pertinent part:

> Given the allegations in the Complaint, the findings contained in the Statement of Decision and the Order Regarding Defendant's Contempt, Plaintiff has stated a claim for nondischargeability of a debt based on embezzlement. Defendant took royalties payable to Plaintiff, which Defendant received under the Agreement, and Defendant did not

> provide Plaintiff with royalty statements, despite her contractual obligation to do so. Consequently, it is plausible that Defendant knowingly and deliberately concealed Defendant's receipt and use of royalties that were payable to Plaintiff.
>
> Based on the factual allegations in the Complaint and the factual conclusions of the state court, as set forth in Exhibits A and B to the Complaint, it is reasonable to infer that Defendant misappropriated royalties to which Plaintiff was entitled, and that Defendant intended to deprive Plaintiff of those royalties. In addition, it is reasonable to infer that Defendant intended to conceal her misappropriation of Plaintiff's royalties.

Court's ruling on the Motion to Dismiss, p. 14 [doc. 16].

The same month, Plaintiff filed a first amended complaint (the "FAC") [doc. 24], requesting nondischargeability of the debt owed to him based on: (1) actual fraud under 11 U.S.C. § 523(a)(2)(A); (2) false representation and false pretenses under 11 U.S.C. § 523(a)(2)(A); and (3) embezzlement under 11 U.S.C. § 523(a)(4). With respect to Plaintiff's claim for embezzlement, the FAC alleged that "[t]he Court's November 9, 2023 Order denied Defendant's Motion to as to Plaintiff's claim under 11 U.S.C. § 523(a)(4) for embezzlement. Therefore, the paragraphs included within this cause of action are substantively unchanged from the [Complaint]." FAC, p. 8 n.2.

On May 1, 2024, Defendant filed the Motion. On June 26, 2024, Plaintiff filed an opposition to the Motion [doc. 57], to which Defendant filed a reply (the "Reply") [doc. 63].

On July 2, 2024, Plaintiff filed a *Supplemental Declaration of Louis Mayorga in Support of Opposition to Debtor's Motion for Partial Summary Adjudication* (the "Mayorga Decl.") [doc. 62], to which Defendant objected. *See* doc. 67.

II. ANALYSIS

A. Evidence

1. Authenticating Evidence

Pursuant to Federal Rule of Evidence 901, "[t]o satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." Fed. R. Evid. 901(a). Testimony of a witness with knowledge, "that an item is what it is claimed to be" is an example of evidence that satisfies this requirement. *See* Fed. R. Evid. 901(b).

To his declaration, Mr. Martorell attached a number of emails sent to Plaintiff and others between May 2015 and August 2018. *See* Exhs. B-D of the Martorell Decl. However, because none of the emails were sent to Mr. Martorell, he is not a witness with knowledge that the emails are what they are claimed to be. Consequently, Exhs. B-D of the Martorell Decl. will not be considered in connection with the Motion.

2. The Rule Against Hearsay

Federal Rule of Evidence 801 provides, in relevant part:

> (a) Statement. "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.
>
> (b) Declarant. "Declarant" means the person who made the statement.
>
> (c) Hearsay. "Hearsay" means a statement that:
>
> > (1) the declarant does not make while testifying at the current trial or hearing; and
> >
> > (2) a party offers in evidence to prove the truth of the matter asserted in the statement.

Fed. R. Evid. 801. Pursuant to Federal Rule of Evidence 802, "[h]earsay is not admissible unless any of the following provides otherwise: a federal statute; these

rules; or other rules prescribed by the Supreme Court." Fed. R. Evid. 802.

To his declaration, Mr. Martorell attached an email dated July 14, 2017 from Evan Cohen to Plaintiff (the "July 2017 Email"). Exh. D to the Martorell Decl. With respect to this email, Mr. Martorell states, in relevant part:

> For several years, [Defendant] responded to requests from my client for royalties from the exploitation of the recordings, by repeatedly telling Plaintiff that the checks that she did send to him were the true and correct amount that [Defendant] owed to him (at the particular time that [Defendant] wrote the checks), including representations that [Plaintiff] was "caught up," that "sales are bad", and "no one has any money."… Attached as Exhibit D is a true and correct copy of the July 2017 email obtained in discovery and admitted during the March 2021 trial.

Martorell Decl., ¶ 8. The contents of the July 2017 Email are out-of-court statements. To the extent that Plaintiff is offering Exh. D to the Martorell Decl. to prove the truth of the statements made in the July 2017 Email, this exhibit is inadmissible.

B. Motion to Strike

Local Bankruptcy Rule ("LBR") 7056-1(c)(1) provides, in relevant part: "Any party who opposes [a motion for summary judgment] must serve and file a response not later than 21 days before the date of the hearing on the motion." In the Reply, Defendant asserts that the Mayorga Decl. should be stricken because it was untimely filed. Given that the Mayorga Decl. was filed on July 2, 2024, which is later than 21 days before the date of the hearing on the Motion, the Court will grant Defendant's request to strike the Mayorga Decl.

C. General Motion for Summary Judgment Standard

Pursuant to Fed. R. Civ. P. ("Rule") 56, 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. *See* Rule 56; Fed. R.

Bankr. P. ("FRBP") 7056; *Anderson v. Liberty Lobby*, *Inc.*, 477 U.S. 242, 247, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). "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." *Anderson*, 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. 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, 91 L.Ed.2d 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. *Celotex Corp.*, 477 U.S. at 224. To establish a genuine issue, the nonmoving 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, 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 [nonmoving 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.'" *United States v. Wilson*, 881 F.2d 596, 601 (9th Cir. 1989) (quoting *Anderson*, 477 U.S. at 266). On issues where the moving party does not have the burden of proof at trial, the moving party is required only to show that no evidence supports the nonmoving party's case. *See Celotex Corp.*, 477 U.S. at 325.

D. Embezzlement Under 11 U.S.C. § 523(a)(4)

Pursuant to 11 U.S.C. § 523(a)(4), a bankruptcy discharge does not discharge an individual debtor from any debt "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny." "[T]he issue of nondischargeability has been a matter of federal law governed by the terms of the Bankruptcy Code." *Grogan*, 498 U.S. at 284. For purposes of section 523(a)(4), federal law and not state law controls the definition of "embezzlement." *In re Wada*, 210 B.R. 572, 576 (B.A.P. 9th Cir. 1997). Embezzlement is defined as "the fraudulent appropriation of property by a person to whom such property has been entrusted or into whose hands it has lawfully come." *In re Littleton*, 942 F.2d 551, 555 (9th Cir. 1991) (quoting *Moore v. United States*, 160 U.S. 268, 269 (1885)). The proponent of the nondischargeability determination must prove: (1) property rightfully in the possession of a nonowner; (2) nonowner's appropriation of the property to a use other than which it was entrusted; and (3) circumstances indicating fraud. *Id.*; *In re Peltier*, 643 B.R. 349, 360 (9th Cir. B.A.P. 2022).

"'[E]mbezzlement requires a showing of wrongful intent.'" *Peltier*, 643 B.R. at 360 (quoting *Bullock v. BankChampaign, N.A.*, 569 U.S. 267, 274, 133 S.Ct. 1754, 185 L.Ed.2d 922 (2013)). "[W]rongful intent in this context has been described as 'moral turpitude or intentional wrong' or 'felonious intent.'" *Id*. "Courts to consider the scienter requirement for an embezzlement claim consistently have ruled, or otherwise stated, that a claim of embezzlement requires a specific intent to defraud." *In re Razavi*, 539 B.R. 574, 600 (Bankr. N.D. Cal. 2015). "A wrongful appropriation of property under an erroneous belief of entitlement does not equate to the fraudulent intent necessary for embezzlement." *In re McVay,* 461 B.R. 735, 745 (Bankr. C.D. Ill.

2012).

"Fraudulent appropriation requires an intent to deprive, which can be inferred from the conduct of the person accused and from the circumstances of the situation." *Savonarola v. Beran*, 79 B.R. 493, 496 (Bankr. N.D. Fla. 1987). "Circumstances indicating fraud can be situations where the debtor intended to conceal the misappropriation." *In re Campbell*, 490 B.R. 390, 402 (Bankr. D. Ariz. 2013) (holding debt nondischargeable based on embezzlement when, among other things, debtor failed to provide financial information, even after repeated requests) (quotations and citation omitted). With respect to establishing nondischargeability of a debt as a result of embezzlement, a fiduciary relationship is not required. *Id*. (citing *Wada*, 210 B.R. at 576).

Defendant has not met her burden of showing that there is no genuine issue as to any material fact. *See* Rule 56; FRBP 7056; *Anderson*, 477 U.S. at 247. Defendant, as the party who does not have the burden of proof at trial, need only show that there is no evidence to support Plaintiff's case. However, based on the Statement of Decision, the Preliminary Injunction and the Contempt Order, genuine issues of material fact exist as to whether: (1) Plaintiff's property was rightfully in Defendant's possession; (2) Defendant misappropriated Plaintiff's property (i.e., any digital streaming royalty payments that belonged to Plaintiff) to a use other than to which it was entrusted; and (3) Defendant fraudulently appropriated Plaintiff's property. Consequently, Defendant is not entitled to judgment as a matter of law.

Defendant asserts that, by executing the Agreement, Plaintiff voluntarily signed away property rights in recordings and compositions. Defendant also represents that Plaintiff had no express right to royalties and, to the extent that he did, Plaintiff's right did not constitute tangible property. However, the state court determined that Plaintiff was entitled to receive royalties on digital streaming rights under the Agreement. *See* Statement of Decision, Exh. A to the Martorell Decl., pp. 2, 6 and 10.

With respect to intent, Defendant contends that Defendant believed Plaintiff did not have a right to monies derived from digital streaming. Motion, p. 12. Defendant has not provided any evidentiary support for this representation as to her state of mind, nor is it undisputed. In addition, Defendant contends that Plaintiff, without substantiation, asserts the amount of money he was paid was incorrect. However, as

discussed above, the state court determined that Plaintiff was entitled to receive royalties on digital streaming rights. *See* Exh. A to the Martorell Decl., pp. 2, 6 and 10. The state court also found that Defendant had not provided Plaintiff with a royalty statement since 2008, despite Defendant's known obligation to do so under the Agreement. *Id*., p. 8. Finally, the state court held that Defendant willfully disobeyed the Preliminary Injunction, which ordered Defendant to allow Plaintiff to conduct an audit. *See* Contempt Order, Exh. F to the Martorell Decl., p. 1. Therefore, there are genuine issues of material fact as to whether Defendant knowingly and deliberately concealed her receipt and use of royalties which belonged to Plaintiff, and whether Defendant intended to conceal her misappropriation of Plaintiff's royalties.

Finally, Defendant states that there is no fiduciary relationship between the parties. However, in establishing embezzlement under section 523(a)(4), a fiduciary relationship is not required. *Campbell*, 490 B.R. at 402. Moreover, Plaintiff does not assert a claim under section 523(a)(4) for fraud or defalcation while acting in a fiduciary capacity.

E. Statute of Limitations

"[T]he question of the dischargeability of [a] debt under the Bankruptcy Code is a distinct issue governed solely by the limitations periods established by bankruptcy law." *In re McKendry*, 40 F.3d 331, 337 (10th Cir. 1994). FRBP 4007(c) provides, in relevant part, that "…a complaint to determine whether a debt is dischargeable under § 523(c) must be filed within 60 days after the first date set for the § 341(a) meeting of creditors."

> [T]here are two distinct issues to consider in the dischargeability analysis: first, the establishment of the debt itself, which is subject to the applicable state statute of limitations; and, second, a determination as to the nature of that debt, an issue within the exclusive jurisdiction of the bankruptcy court and thus governed by Bankruptcy Rule 4007.

In re Banks, 263 F.3d 862, 868 (9th Cir. 2001). In *Banks*, 263 F.3d at 866, a creditor initiated a state court lawsuit against the debtor for breach of a settlement agreement. The creditor did not allege fraud in the state court complaint. Before the state court lawsuit was concluded, the debtor filed a chapter 7 petition. The creditor timely filed a

nondischargeability action under sections 523(a)(2) and (a)(4). The debtor asserted that the creditor could not obtain a fraud determination in the bankruptcy court because California's statute of limitations for fraud actions had expired prepetition. In addition, the debtor contended that the creditor should not be allowed to assert claims in the bankruptcy court the elements of which would be time-barred elsewhere.

With respect to the first issue to consider in the dischargeability analysis, the Court of Appeals held that "the state court action was timely filed and that…was sufficient to establish a debt for the purposes of the *McKendry* test." *Id*. at 868. The Court of Appeals reasoned:

> The Bankruptcy Code defines the term "debt" to mean "liability on a claim," 11 U.S.C. § 101(12), and "claim" is defined as a "right to payment, whether or not such right is reduced to judgment...." 11 U.S.C. § 101(5). Nothing under the Bankruptcy Code requires a debt to have been reduced to a pre-petition state court judgment.

Id. As concerned the second issue, the Court of Appeals held that "[a]lthough the state statute of limitation for fraud had run by the time [the creditor] filed the timely state court contract action, [the creditor] is not prevented from raising these issues in the dischargeability proceeding." *Id*. at 869. The Court of Appeals reasoned:

> [T]here is no requirement that the allegations of a complaint filed in state court prior to a debtor filing a petition in bankruptcy correspond to the elements of the grounds contained in § 523(a) of the Bankruptcy Code. Otherwise plaintiffs in state court would be required to anticipate the bankruptcy of every defendant and litigate every conceivable issue under § 523(a) in the event a defendant should subsequently file bankruptcy. Such needless litigation is not required by the Bankruptcy Code.

Id. at 868. The Court of Appeals further reasoned:

> Here, [the creditor] sued for breach of the settlement agreement, the instrument by which the debt was created. [The creditor's] claims in bankruptcy court were for recovery on the same debt that was at issue

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> in the state court contract action…. While an action may seem to be non-fraud-based for state purposes, this does not foreclose a later determination by the bankruptcy court that what occurred was fraudulent and therefore nondischargeable…. Although in *Gergely* and *McKendry* the creditors had obtained their judgments before bankruptcy, the same rationale applies where, as here, the creditor brought suit on the debt in a timely fashion and was prevented from obtaining and enforcing judgment in that suit only by the debtor's bankruptcy.

Id. at 868-69.

In addition, the Court of Appeals emphasized the policy rationale expressed by the Supreme Court in *Brown v. Felsen*, 442 U.S. 127, 99 S.Ct. 2205, 60 L.Ed.2d 767 (1979), in which the Supreme Court held that res judicata did not prevent a creditor from bringing a nondischargeability claim where the creditor had failed to plead fraud in a related state court case. *Brown v. Felsen*, 442 U.S. at 135. As explained by the Supreme Court:

> To hold otherwise…would inspire needless litigation by forcing "an otherwise unwilling party to try § 17 questions to the hilt in order to protect himself against the mere possibility that a debtor might take bankruptcy in the future." [**FN1**]

Banks, 263 F.3d at 868 (quoting *Brown,* 442 U.S. at 135). Moreover, "[t]he [Supreme] Court observed that the creditor in *Brown* was not asserting a new ground for recovery. What the creditor was attempting to do was to meet 'the defense of bankruptcy which respondent has interposed between petitioner and the sum determined to be due to him.'" *Id.* (quoting *Brown,* 442 U.S. at 133).

In *In re Gergely*, 110 F.3d 1448 (9th Cir. 1997), the debtor, an obstetrician, had performed an amniocentesis on a patient. As a result of difficulties with the procedure, a creditor, who was the patient's child, was blinded in one eye. The creditor later brought a claim against the debtor in state court, asserting that the debtor misrepresented the need for an amniocentesis and that he performed the procedure negligently. After the creditor obtained a judgment, the debtor filed a chapter 7

petition. The creditor initiated an adversary proceeding and asserted claims under 11 U.S.C. § 523. The debtor contended that the creditor's claims should be dismissed because the creditor did not bring a fraud action before the applicable California limitations period had expired.

The Court of Appeals held that "[t]he state limitations period for fraud actions is irrelevant to the dischargeability of an established debt." *Id*. at 1453. The Court of Appeals reasoned:

> In construing dischargeability under § 17 of the former Bankruptcy Act, we rejected the argument that Gergely now presents: "[The creditor] is not seeking a new money judgment based on fraud; he is litigating the issue of dischargeability ..., and the timeliness of the petition is governed by the Bankruptcy rules."

Id. (quoting *Matter of Gross*, 654 F.2d 602, 604 (9th Cir.1981). The Court of Appeals noted that the Tenth Circuit Court of Appeals had reached the same conclusion in *McKendry*:

> "[T]he question of the dischargeability of the debt under the Bankruptcy Code is a distinct issue governed solely by the limitations periods established by bankruptcy law. In this case, the debt has already been established, so the state statute of limitations is immaterial."
> …
> The law has not changed since *Gross* and *McKendry*.

Id. at 1453-54 (quoting *McKendry*, 40 F.3d at 337).

Here, Defendant asserts that there is no material issue of fact in dispute because Plaintiff did not plead embezzlement in the State Court Action, and because the statute of limitations to plead such a claim had run. Defendant contends that the Court must consider California statutes concerning criminal embezzlement and civil conversion to determine what an appropriate statute of limitations would be for embezzlement in this adversary proceeding. According to Defendant, Plaintiff's claim under section 523(a)(4) satisfies none.

Defendant's assertion that Plaintiff is estopped from bringing his nondischargeability claim for embezzlement under section 523(a)(4), because the statute of limitations for claims under California state statutes have expired, is unpersuasive. Defendant ignores the established authority holding that nondischargeability is within the exclusive jurisdiction of the bankruptcy court and is governed by the Bankruptcy Code and Federal Rules of Bankruptcy Procedure. *Grogan*, 498 U.S. at 284; *see also McKendry*, 40 F.3d at 337 ("[T]he question of the dischargeability of [a] debt under the Bankruptcy Code is a distinct issue governed solely by the limitations periods established by bankruptcy law.").

Plaintiff's claim under section 523(a)(4) is based on the court's assessment of Plaintiff's debt to Defendant in the State Court Action, which alleged: (1) breach of contract; (2) an accounting; and (3) fraud and concealment. Martorell Decl., ¶ 3; Exh. 2 to the Ackerman Decl. Like in *Banks*, Plaintiff timely filed the State Court Action and asserted claims for, among other things, breach of contract; Defendant filed the underlying bankruptcy case while the State Court Action was pending. *See Banks*, 263 F.3d at 866.

Like in *Brown,* 442 U.S. at 133, Plaintiff is not asserting a new ground for recovery. Rather, Plaintiff's claims in this proceeding are for recovery on the same debt that was at issue in the State Court Action. This Court may determine that Defendant's conduct constituted embezzlement under section 523(a)(4), thereby rendering the debt nondischargeable. *See Banks*, 263 F.3d at 869.

Defendant's contention that *McKendry* is distinguishable because Plaintiff did not obtain a valid judgment prepetition is unconvincing. As articulated in *Banks*: "Although in *Gergely* and *McKendry* the creditors had obtained their judgments before bankruptcy, the same rationale applies where, as here, the creditor brought suit on the debt in a timely fashion and was prevented from obtaining and enforcing judgment in that suit only by the debtor's bankruptcy." *Banks*, 263 F.3d at 868-69.

Defendant's reliance on *In re Gergely*, 186 B.R. 951 (9th Cir. B.A.P. 1995), in support of her assertion that state statutes of limitations are relevant here, is misguided. First, that decision of the Bankruptcy Appellate Panel was reversed by the Ninth Circuit Court of Appeals. *See Gergely*, 110 F.3d at 1454 ("The state limitations

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period for fraud actions is irrelevant to the dischargeability of an established debt."). Second, even if a state statute of limitations had run by the time Plaintiff filed the State Court Action, Plaintiff is not prevented from raising issues related to his embezzlement claim in this proceeding. *See Banks*, 263 F.3d at 869.

It is undisputed that Plaintiff timely filed the State Court Action and Plaintiff prevailed in phase one of that action, which included his claims for breach of contract and an accounting. Exh. A to the Martorell Decl. This is sufficient to establish a debt for nondischargeability purposes. *See Banks*, 263 F.3d at 868. Plaintiff's claims in this proceeding are for recovery on the same debt that was at issue in the State Court Action. *See Brown,* 442 U.S. at 133. Plaintiff may raise issues related to his claims in this proceeding, and the Court may determine that Defendant's conduct constituted embezzlement under section 523(a)(4). *See Banks*, 263 F.3d at 869. In conclusion, as concerns Plaintiff's claim regarding embezzlement under section 523(a)(4), Defendant has not shown that there is no issue of material fact and that Defendant is entitled to judgment as a matter of law.

III. CONCLUSION

The Court will deny the Motion.

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

FOOTNOTES

FN1: Section 17 here refers to Section 17 of the Bankruptcy Act of 1938, which is the predecessor to 11 U.S.C. § 523.

Party Information

Debtor(s):

Lisa Fancher — Represented By James R Selth

Defendant(s):

Lisa Fancher — Represented By James R Selth

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BMG Rights Management (US) Pro Se

Movant(s):

Lisa Fancher Represented By
James R Selth

Plaintiff(s):

Louis Mayorga Represented By
Eduardo Martorell

Trustee(s):

Elizabeth (SV) F Rojas (TR) Pro Se

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Adv#: 1:23-01026 Mayorga v. Fancher et al

#6.00 Louis Mayorga's Motion for Summary Adjudication

Docket 42

Tentative Ruling:

The Court will deny the *Motion for Summary Adjudication* (the "Motion") [doc. 42].

I. BACKGROUND

A. Prepetition Events

Louis Mayorga ("Plaintiff") is a former member of the band Suicidal Tendencies, for whom he wrote and performed music. Declaration of Eduardo Martorell (the "Martorell Decl."), ¶ 2 [doc. 42]. In April 1983, Plaintiff, along with other members of Suicidal Tendencies, entered into a recording agreement (the "Agreement") with Lisa Fancher dba Frontier Records and dba American Lesion Music ("Defendant"), for their self-entitled debut album, "Suicidal Tendencies." *Id.*; Declaration of Michael B. Ackerman (the "Ackerman Decl."), ¶ 4 and Exh. A thereto [doc. 55].

In December 2016, Plaintiff filed a complaint in Los Angeles Superior Court against Defendant and others, initiating case no. BC643234 (the "State Court Action"). Ackerman Decl., ¶ 8; Martorell Decl., ¶ 3. In an amended complaint filed in the State Court Action, Plaintiff asserted claims for: (1) breach of contract; (2) accounting; and (3) fraud and concealment. Martorell Decl., ¶ 3; Exh. B to the Ackerman Decl. The claims arose from a dispute related to the Agreement.

The parties stipulated to try the State Court Action in two phases. Exh. A to the Martorell Decl., p. 2. In August 2019, the court granted Plaintiff a preliminary injunction (the "Preliminary Injunction") enjoining Defendant from denying an audit or royalty records. Martorell Decl., ¶ 11 and Exh. D thereto.

In March 2021, the court held a bench trial on phase one, which concerned the breach of contract and accounting claims. *Id*. The court found in favor of Plaintiff. *Id*.

In February 2023, the court found Defendant in contempt of the Preliminary Injunction. Martorell Decl., ¶ 11 and Exh. E thereto. In its order regarding contempt (the "Contempt Order"), the court stated, in relevant part:

> The Court finds Defendant Lisa Fancher guilty on Count 1 - willful disobedience of this Court's August 13, 2019 Preliminary Injunction ordering her to allow Plaintiff to conduct an audit to which he is entitled under Civil Code section 2501 prior to September 27, 2019 or a later date if agreed to by plaintiff.
>
> Contempt Hearing (Sentencing) is scheduled for 03/30/2023 at 01:45 PM in Department 1 at Spring Street Courthouse. Hearing on Motion for Attorney Fees in Connection with Contempt Proceedings is scheduled for 03/30/2023 at 01:45 PM in Department 1 at Spring Street Courthouse. The motion for attorney's fees, opposition, and reply briefs shall be filed and served pursuant to the Code.

Exh. E to the Martorell Decl., p. 1.

B. The Bankruptcy Case and the Adversary Proceeding

On March 16, 2023, Defendant filed a chapter 13 petition, initiating case no. 1:23-bk-10324-VK. On July 17, 2023, Plaintiff filed a complaint against Defendant (the "Complaint"), requesting nondischargeability of the debt owed to him under 11 U.S.C. §§ 523(a)(2)(A), (a)(4) and (a)(6), and objecting to Defendant's discharge under 11 U.S.C. §§ 727(a)(3) and (a)(4).

In October 2023, Defendant filed a motion to dismiss the Complaint (the "Motion to Dismiss") [doc. 9], which the Court granted in part and denied in part. *See* doc. 20. With respect to Plaintiff's claim under section 523(a)(6), in its ruling on the Motion to Dismiss, the Court stated, in pertinent part:

> "A Chapter 13 discharge is broader than one in other chapters, and it discharges some claims that § 523(a) makes nondischargeable in other contexts." *In re Ang*, 589 B.R. 165, 177 (Bankr. S.D. Cal. 2018)

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(citation and quotations omitted). "[Section] 1328(a) only incorporates specific subsections of § 523(a)." *Id*. (citations omitted). "Section 1328(a)(2)…provides that debts for willful and malicious injuries under § 523(a)(6) [**FN1**] are dischargeable in a Chapter 13 case with one notable exception - when the debtor seeks a hardship discharge under § 1328(b)." *In re Young*, 425 B.R. 811, 815 (Bankr. E.D. Tex. 2010) and 11 U.S.C. § 523(a); *see also* Fed. R. Bankr. P. 4007(d).

When a chapter 13 debtor "is proceeding toward a full compliance discharge, that would by definition discharge a Section 523(a)(6) debt, there is no reason to litigate the issue of whether the debt is, in fact, one for a willful and malicious injury." *In re Liescheidt*, 404 B.R. 499, 504-505 (Bankr. C.D. Ill. 2009).

…

Defendant's bankruptcy case is under chapter 13. In addition, at this time, Defendant has not sought a hardship discharge pursuant to 11 U.S.C. § 1328(b). Consequently, at this time, Plaintiff cannot state claim for relief against Defendant under section 523(a)(6).

…

Having assessed the standards, and taking into account the analysis set forth above:…

The Court will grant the Motion as to Plaintiff's [claim] under 11 U.S.C. § 523(a)(6)…without prejudice, should Defendant seek a discharge under 11 U.S.C. § 1328(b) or Defendant's bankruptcy case be converted to one under chapter 7.

Court's ruling on the Motion to Dismiss, pp. 4 and 15 [doc. 16].

In November 2023, Plaintiff filed a first amended complaint (the "FAC") [doc. 24], requesting nondischargeability of the debt owed to him based on: (1) actual fraud under 11 U.S.C. § 523(a)(2)(A); (2) false representation and false pretenses under 11 U.S.C. § 523(a)(2)(A); and (3) embezzlement under 11 U.S.C. § 523(a)(4).

In May 2024, Plaintiff filed the Motion. In June 2024, Defendant filed an opposition to the Motion (the "Opposition") [doc. 54], to which Plaintiff filed a reply [doc. 66].

II. ANALYSIS

A. Fed. R. Civ. P. ("Rule") 8(a)

Under Rule 8(a):

> A pleading that states a claim for relief must contain:
>
> > (1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;
> >
> > (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and
> >
> > (3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

"A pleading must contain 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" *OTR Wheel Engineering, Inc. v. West Worldwide Services, Inc.*, 897 F.3d 1008, 1024 (9th Cir. 2018) (citing Rule 8(a)(2)). "[W]ithout some factual allegation in the complaint, a claimant cannot satisfy the requirement that he or she provide not only 'fair notice,' but also the 'grounds' on which the claim rests." *Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 232 (3rd Cir. 2008) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 n.3, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)).

"The Ninth Circuit has held that plaintiffs cannot proceed on a theory of liability that is raised for the first time at summary judgment." *Bax v. Doctors Medical Center of Modesto, Inc.*, 393 F.Supp.3d 1000, 1018 (E.D. Cal. 2019) (citing *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1291–94 (9th Cir. 2000) ("Because [plaintiffs] raised the disparate impact theory of liability for the first time at summary judgment, the district court did not err when it did not allow them to proceed on it."). "A complaint guides the parties' discovery, putting the defendant on notice of the evidence it needs to adduce in order to defend against the plaintiff's allegations.… A defendant suffers

prejudice if a plaintiff is allowed to proceed with a new theory of recovery after close of discovery." *OTR Wheel Engineering, Inc.*, 897 F.3d at 1024 (internal quotations and citation omitted).

B. General Motion for Summary Judgment Standard

Pursuant to Rule 56, 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. *See* Rule 56; Fed. R. Bankr. P. ("FRBP") 7056; *Anderson v. Liberty Lobby*, *Inc.*, 477 U.S. 242, 247, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). "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." *Anderson*, 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. 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, 91 L.Ed.2d 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. *Celotex Corp.*, 477 U.S. at 224. To establish a genuine issue, the nonmoving 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, 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 [nonmoving 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.'" *United States v. Wilson*, 881 F.2d 596, 601 (9th Cir. 1989) (quoting *Anderson*, 477 U.S. at 266).

C. Summary Judgment Based on Issue Preclusion

Collateral estoppel, or issue preclusion, "generally refers to the effect of a prior judgment in foreclosing successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment, whether or not the issue arises on the same or a different claim." *New Hampshire v. Maine*, 532 U.S. 742, 749, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001); *see Oyeniran v. Holder*, 672 F.3d 800, 806 (9th Cir. 2012). The Supreme Court has recognized that the doctrine of collateral estoppel applies in dischargeability proceedings. *See Grogan v. Garner*, 498 U.S. 279, 284–85, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991).

Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of that issue if the party had "a full and fair opportunity to litigate that issue in the earlier case." *See Allen v. McCurry*, 449 U.S. 90, 95, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980). "A bankruptcy court may rely on the issue preclusive effect of an existing state court judgment . . . . In so doing, the bankruptcy court must apply the forum state's law of issue preclusion." *In re Plyam*, 530 B.R. 456, 462 (9th Cir. BAP 2015); *see also* 28 U.S.C. § 1738 (federal courts must give "full faith and credit" to state court judgments). The

requirements for issue preclusion in California are:

> (1) the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding;
> (2) the issue to be precluded must have been actually litigated in the former proceeding;
> (3) the issue to be precluded must have been necessarily decided in the former proceeding;
> (4) the decision in the former proceeding musts be final and on the merits;
> (5) the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding; and
> (6) application of issue preclusion must be consistent with the public policies of preservation of the integrity of the judicial system, promotion of judicial economy, and protection of litigants from harassment by vexatious litigation.

White v. City of Pasadena, 671 F.3d. 918, 927 (9th Cir. 2012) (citing *Lucido v. Superior Court*, 51 Cal.3d 335, 341-43 (Cal. 1990). "The burden is on the party seeking to rely upon issue preclusion to prove each of the elements have been met." *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1050–51 (9th Cir. 2008). "This means providing 'a record sufficient to reveal the controlling facts and pinpoint the exact issues litigated in the prior action.'" *Plyam*, 530 B.R. at 462 (quoting *In re Kelly*, 182 B.R. 255, 258 (9th Cir. BAP 1995), *aff'd*, 100 F.3d 110 (9th Cir. 1996)). "Any reasonable doubt as to what was decided by a prior judgment should be resolved against allowing the [issue preclusive] effect." *Kelly*, 182 B.R. at 258.

"The bar is asserted against a party who had a full and fair opportunity to litigate the issue in the first case but lost." *DKN Holdings LLC v. Faerber*, 61 Cal.4th 813, 826–27 (Cal. 2015). "The point is that, once an issue has been finally decided against such a party, that party should not be allowed to relitigate the same issue in a new lawsuit." *Id*. "Issue preclusion operates 'as a shield against one who was a party to the prior action to prevent' that party from relitigating an issue already settled in the previous case." *Id*. (quoting *Rice v. Crow*, 81 Cal.App.4th 725, 735 (Cal. Ct. App. 2000).

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1. Issues Identical to Those Decided in Former Proceeding

a. 11 U.S.C. § 523(a)(2)(A)

i. Actual Fraud

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."

In *Husky Intern. Electronics, Inc. v. Ritz*, 578 U.S. 355, 136 S.Ct. 1581, 194 L.Ed.2d 655 (2016), the Supreme Court clarified that misrepresentation is not an element of actual fraud under section 523(a)(2)(A), and that actual fraud may include a wider array of misconduct. *In re Phillips*, 2016 WL 7383964, at *5 (9th Cir. BAP Dec. 16, 2016). "The term 'actual fraud' in § 523(a)(2)(A) encompasses forms of fraud…that can be effected without a false representation." *Husky*, 578 U.S. at 359.

"The word 'actual' has a simple meaning in the context of common-law fraud: It denotes any fraud that 'involv[es] moral turpitude or intentional wrong.'" *Id*. at 360 (quoting *Neal v. Clark*, 95 U.S. 704, 709, 5 Otto 704 (1877)). "'Actual' fraud stands in contrast to 'implied' fraud or fraud 'in law,' which describe acts of deception that 'may exist without the imputation of bad faith or immorality.'" *Id*. When fraud is not perpetrated through a misrepresentation to a creditor, establishing reliance is not required. *Id*. at 365–66.

ii. False Pretenses and False Representation

A false representation is an express misrepresentation, while a false pretense refers to an implied misrepresentation or conduct intended to create and foster a false impression. *In re Reingold*, 2013 Bankr. LEXIS 1660, *8-10 n.4 (9th Cir. BAP Mar. 19, 2013). To prevail on a § 523(a)(2)(A) claim concerning false pretenses or false representation, plaintiffs must prove by a preponderance of the evidence the following five elements:

(1) misrepresentation, fraudulent omission or deceptive conduct by the

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

In re Weinberg, 410 B.R. 19, 35 (9th Cir. BAP 2009) (citing *In re Slyman*, 234 F.3d 1081, 1085 (9th Cir. 2000)). The plaintiff bears the burden of proof to establish each of these elements by a preponderance of the evidence. *In re Deitz*, 760 F.3d 1038, 1050 (9th Cir. 2014).

With respect to § 523(a)(2)(A), "Ninth Circuit case law confirms that the elements of fraud under California law match the ones under § 523(a)(2)(A)." *In re Davis*, 486 B.R. 182, 191 (Bankr. N.D. Cal. 2013) (citing *In re Younie*, 211 B.R. 367, 373–74 (9th Cir. BAP 1997). The same elements apply to fraud in the inducement. *Parino v. BidRack, Inc.*, 838 F.Supp.2d 900, 906 (N.D. Cal. 2011) (applying California law on fraud in the inducement); *see also In re Nga Tuy Pham*, 2009 WL 3367046, *1 (Bankr. N.D. Cal. 2009) ("A debt is excepted from discharge if it results from fraud in the inducement. 11 U.S.C. § 523(a) (2).").

Defendant disputes that the issues in this proceeding are identical to those decided in the State Court Action. Plaintiff asserts that the findings in the State Court Action, upon which his debt is premised, demonstrate that Defendant obtained and withheld Plaintiff's royalties through a series of false representations and fraud. According to Plaintiff, the state court found that: (1) Defendant did not pay streaming royalties to Plaintiff; (2) Defendant's conduct was "conscious and deliberate"; (3) Defendant breached the Agreement and the implied covenant of good faith and fair dealing; (4) Plaintiff upheld his end of the Agreement by creating sound recordings and assigning his interest in those recordings to Defendant; and (5) Defendant would only infrequently send Plaintiff a check for "some round amount" and "only when he pleaded with her to do so." *See* Motion, pp. 3, 13 and 14. Plaintiff contends that these findings, among others, establish the elements for his cause of action under section 523(a)(2)(A).

Plaintiff represents that the Statement of Decision "explicitly state[s] that [Defendant], with unclean hands purposefully concealed information, including royalty statements, making it impossible for Plaintiff to discern the accuracy of royalty payments owed to him." *See id*., p. 9. Plaintiff further contends that the state court "specifically [found] that [Defendant], with unclean hands, made fraudulent concealments and false representations as to Plaintiff's rights under the recording agreement." *Id*., p. 14. However, in the Statement of Decision, the state court made no reference to purposeful concealment, fraudulent concealments or false representations. [**FN2**] Rather, the state court found:

> Defendant is not entitled to prevail on her equitable defenses, as a party who does not come into court with clean hands may not obtain equitable relief….Defendant testified that the agreement requires her to provide a royalty statement to plaintiff twice per year….Defendant admitted that she had not provided Plaintiff with a royalty statement since 2008. By Defendant's own testimony, she has not honored the agreement to provide royalty statements to Plaintiff.
>
> Defendant further testified that she began receiving digital streaming royalties commencing in approximately 2011. Defendant's failure to provide royalty statements to Plaintiff made it impossible to know if and how Defendant was calculating royalty payments….Defendant admitted that she has not provided a royalty statement to Plaintiff since 2008…

Exh. A to the Martorell Decl., p. 8.

Plaintiff also asserts that the state court's "determination of 'willful disobedience'…underscore[s] the intentional nature of [Defendant's] actions." Motion, p. 9. However, in the Contempt Order, the state court only found that Defendant was "guilty on Count 1 - willful disobedience of [the Preliminary Injunction][.]" Exh. E to the Martorell Decl., p. 1. The state court does not discuss Defendant's intentions as to why she disobeyed the Preliminary Injunction. Plaintiff's attempts to equate the state court's finding of Defendant's "willful disobedience" with a finding of fraud under section 523(a)(2)(A) are unpersuasive.

Although the state court held that Defendant is liable to Plaintiff for breach of contract and an accounting, the state court did not make any specific findings related to fraud, false representations or false pretenses. Consequently, Plaintiff has not met his burden of showing that the elements of section 523(a)(2)(A) were decided in the State Court Action.

b. *Breach of Contract*

"[T]he elements of a cause of action for breach of contract are (1) the existence of the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to the plaintiff." *Oasis West Realty, LLC v. Goldman*, 51 Cal.4th 811, 821 (Cal. 2011); *see also Careau & Co. v. Security Pacific Business Credit, Inc.*, 222 Cal.App.3d 1371, 1388 (Cal. Ct. App. 1990). "The elements necessary to prove breach of contractare separate and distinct from those necessary to prove fraud." *Louison v. Yohanan*, 117 Cal.App.3d 258, 267 n.9 (Cal. Ct. App. 1981)

Contrary to Plaintiff's representation that "[n]ecessary to the adjudication of Debtor's breach of the recording agreement, the trial court's statement of decision expressly established the elements of fraud inherent in Debtor's dealings with Plaintiff[,]" the elements of fraud are not necessary to establish breach of contract under California law. Motion, pp. 11-12. Consequently, that the state court found in Plaintiff's favor on his breach of contract claim does not establish that fraud under section 523(a)(2) was decided in the State Court Action. Moreover, that the parties did not move forward with phase two of the State Court Action as a result of Defendant's bankruptcy filing underscores that, as of the petition date, the state court had not held Defendant liable for fraud in the State Court Action.

c. *Covenant of Good Faith and Fair Dealing*

"The implied covenant of good faith and fair dealing is implied by law in every contract to prevent a contracting party from depriving the other party of the benefits of the contract." *Moore v. Wells Fargo Bank, N.A.*, 39 Cal.App.5th 280, 291 (Cal. Ct. App. 2019). "Thus, '[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.'" *Id*. (citing *Carma Developers*

(Cal.), Inc. v. Marathon Development California, Inc., 2 Cal.4th 342, 371 (Cal. 1992)).

> "It is universally recognized the scope of conduct prohibited by the covenant of good faith is circumscribed by the purposes and express terms of the contract." (*Carma Developers (Cal.), Inc. v. Marathon Development California, Inc.*, *supra*, 2 Cal.4th at p. 373, 6 Cal.Rptr.2d 467, 826 P.2d 710.) Violation of an express provision is not, however, required. (*Ibid*.) "*Nor is it necessary that the party's conduct be dishonest. Dishonesty presupposes subjective immorality; the covenant of good faith can be breached for objectively unreasonable conduct, regardless of the actor's motive*." (*Ibid*.) "A party violates the covenant if it subjectively lacks belief in the validity of its act or if its conduct is objectively unreasonable.["]

Id. (emphasis added).

The state court's decision that Defendant violated the covenant of good faith and fair dealing does not establish fraud under section 523(a)(2). Moreover, the state court's reference to *Careu & Co. v. Security Pacific Business Credit, Inc.*, 222 Cal.App.3d 1371, 1395 (1990) in the Statement of Decision does not establish that Defendant acted fraudulently. Fraud and breach of the implied covenant of good faith and fair dealing are two separate claims under California law; even if they are not mutually exclusive, Plaintiff has not met his burden of showing that there is no genuine issue of material fact as to Defendant's alleged fraud, false representations or false pretenses.

d. *Accounting*

"An action for an accounting has two elements: (1) that a relationship exists between the plaintiff and defendant that requires an accounting and (2) that some balance is due the plaintiff that can only be ascertained by an accounting." *Sass v. Cohen*, 10 Cal.5th 861, 869 (2020) (internal quotations and citation omitted).

> An action for an accounting has been characterized as a means of discovery…The plaintiff's lack of knowledge drives the need for discovery; and the fact that the gap can be filled via discovery implies

> the information is within the control of the defendant. In other words, the defendant in an accounting action possesses information unknown to the plaintiff that is relevant for the computation of money owed.

Id. The elements of an accounting under California law do not include an act of deception or an intent to deceive. As a result, although the state court held in Plaintiff's favor on his accounting claim, this does not establish that the state court decided all elements of section 523(a)(2). Consequently, this requirement for issue preclusion is not satisfied.

2. Issues Actually Litigated

Under California law, an issue is "actually litigated" when it is "properly raised by a party's pleadings or otherwise, when it is submitted to the court for determination, *and when the court actually determines the issue*." *In re Harmon*, 250 F.3d 1240, 1247 (9th Cir. 2001) (emphasis added). In the alternative, "if an issue was necessarily decided in a prior proceeding, it was actually litigated." *Id*. at 1248.

Defendant disputes that the issues in this proceeding were actually litigated in the State Court Action. As noted in the Statement of Decision, the parties to this proceeding appeared in the State Court Action, where Plaintiff and Defendant presented evidence in the form of testimony and expert opinions. Exh. A to the Martorell Decl. After evaluating the evidence at the trial for phase one, as concerns Plaintiff's claims for breach of contract and for an accounting, the state court rendered a decision in Plaintiff's favor. *Id*. However, as discussed above, Plaintiff has not established that the state court determined the issues of fraud, false representation or false pretenses.

Although the state court ruled in Plaintiff's favor on his breach of contract and accounting claims, as discussed above, breach of contract and an accounting are not identical to Plaintiff's claim under section 523(a)(2)(A). Moreover, the state court did not make any findings regarding fraud, false representation or false pretenses. *See* Exhs. A, D and E to the Martorell Decl. Therefore, Plaintiff has not established that the parties actually litigated the issues of fraud, false representation or false pretense in the State Court Action. Therefore, this element is not satisfied.

3. Issues Necessarily Decided

"In order for the determination of an issue to be given preclusive effect, it must have been necessary to a judgment." *Creative Venture, LLC v. Jim Ward & Assocs.*, 195 Cal.App.4th 1430, 1451 (Cal. Ct. App. 2011). This prevents "the incidental or collateral determination of a nonessential issue from precluding reconsideration of that issue in later litigation." *Id*.

Because the elements of breach of contract and an accounting are not the same as the required elements under section 523(a)(2)(A), in order to rule in Plaintiff's favor during phase one of the State Court Action, the state court did not have to decide Defendant's liability for fraud, false representation or false pretense. Consequently, this element of issue preclusion is not satisfied.

4. Prior Decision is Final and on the Merits

"Under California law, a judgment is not final for the purposes of collateral estoppel until it is free from the potential of a direct attack, i.e. until no further direct appeal can be taken." *Geographic Expeditions, Inc. v. Est. of Lhotka ex rel. Lhotka*, 599 F.3d 1102, 1106 (9th Cir. 2010). Defendant did not appeal the Statement of Decision or the Contempt Order. In addition, it appears that Defendant does not dispute that this element is met. Consequently, the Statement of Decision and the Contempt Order are final and on the merits.

5. Privity

"[T]he party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding." *Lucido*, 51 Cal.3d at 341. Defendant was a defendant in the State Court Action, and the Statement of Decision was against Defendant. In addition, Defendant is the defendant in this adversary proceeding. Plaintiff was the claimant in the State Court Action and is the plaintiff in this proceeding. As such, this element is satisfied.

6. Consistent with the Public Policies Underlying Collateral Estoppel

Courts will apply collateral estoppel only if application of preclusion furthers the public

policies underlying the doctrine. *In re Baldwin*, 249 F.3d 912, 917 (9th Cir. 2001). The three polices underlying the doctrine of collateral estoppel include: "preservation of the integrity of the judicial system, promotion of judicial economy, and protection of litigants from harassment by vexatious litigation." *Id.* at 919–20; *see also Lucido*, 51 Cal.3d at 343. With respect to preservation of the judicial system's integrity, courts evaluate "whether eliminating the possibility of inconsistent verdicts-which would follow from the application of collateral estoppel-would undermine or enhance the public's confidence in the judicial system." *Baldwin*, 249 F.3d at 920.

Because Plaintiff has not shown that the issues of fraud, false pretenses and representation were previously decided in the State Court Action, litigating these issues in this adversary proceeding would not undermine the public's confidence in the judicial system or jeopardize principles of federalism under the Full Faith and Credit Act. Similarly, there is no need to conserve judicial resources where, as here, an issue was not previously adjudicated. Lastly, it is not unfair to require Plaintiff to litigate the issues in the FAC before this Court when he has not shown that the state court previously decided those issues. Thus, the public policies underlying the doctrine of collateral estoppel would not be furthered by the application of preclusion in this case.

D. Unclean Hands

"A plaintiff asking a court for equitable relief 'must come with clean hands."" *Northbay Wellness Group, Inc. v. Beyries*, 789 F.3d 956, 959 (9th Cir. 2015) (quoting *Johnson v. Yellow Cab Transit Co.*, 321 U.S. 383, 387, 64 S.Ct. 622, 88 L.Ed. 814 (1944)). The unclean hands doctrine is "an affirmative defense in actions seeking equitable relief." *Wilson v. S.L. Rey, Inc.*, 17 Cal.App.4th 234, 244 (Cal. Ct. App. 1993). For a defendant to successfully assert the unclean hands defense, the defendant must prove that the plaintiff's inequitable conduct relates directly to the same subject matter as the plaintiff's claims against the defendant. *Lanard Toys Ltd. v. Dimple Child, L.L.C.*, 843 Fed.Appx. 894, 897 (9th Cir. 2021) *(*citing *Levi Strauss & Co. v. Shilon*, 121 F.3d 1309, 1313 (9th Cir. 1997)).

"Because bankruptcy courts are courts of equity…a plaintiff deemed to have unclean hands cannot obtain a judgment of nondischargeability." *Id*. (quoting *Young v. United States*, 535 U.S. 43, 50, 122 S.Ct. 1036, 152 L.Ed.2d 79 (2002)).

> [D]etermining whether the doctrine of unclean hands precludes relief requires balancing the alleged wrongdoing of the plaintiff against that of the defendant, and "weigh[ing] the substance of the right asserted by [the] plaintiff against the transgression which, it is contended, serves to foreclose that right."

Northbay, 789 F.3d at 958 (quoting *Republic Molding Corp. v. B.W. Photo Utils.*, 319 F.2d 347, 350 (9th Cir. 1963). In *Northbay*, 789 F.3d at 958, a creditor brought a nondischargeability action under section 523(a)(4). There, the debtor, an attorney, had stolen $25,000 in a legal defense trust fund from his client, a medical marijuana dispensary. The bankruptcy court noted that the debt would normally be nondischargeable; however, because the creditor had created the trust fund using the proceeds of illegal marijuana sales, the bankruptcy court held that the unclean hands doctrine precluded a judgment for the creditor. *Id*. at 959.

The Court of Appeals reversed the bankruptcy court's ruling in favor of the debtor and held that the bankruptcy court did not conduct the required balancing but rather "concluded solely from the fact that [the plaintiff] had engaged in wrongful activity that the doctrine of unclean hands applied." *Id*. at 960. The Court of Appeals held that the defendant debtor's wrongdoing, i.e., stealing from his client, outweighed the plaintiff creditor's wrongdoing, i.e., its illegal marijuana sales. *Id*.

The doctrine of unclean hands is an affirmative defense, not a cause of action. *See Wilson*, 17 Cal.App.4th at 244. In addition, the issue in *Northbay* was whether the *plaintiff's* unclean hands prevented the court from entering judgment in *plaintiff's* favor. Moreover, Plaintiff did not raise the unclean hands doctrine in the Complaint or the FAC. Until the Motion, Plaintiff had not put Defendant on notice that Plaintiff was asserting a claim for nondischargeability based on the unclean hands doctrine.

In connection with the Motion, the Court will not consider causes of action that did not appear in the FAC. *See Coleman*, 232 F.3d at 1294. Assuming that the unclean hands doctrine provides a basis for establishing the nondischargeability of Defendant's debt, granting summary judgment based on this doctrine would not comport with the notions of fairness that underlie Rule 8(a). *See OTR Wheel Engineering, Inc.*, 897 F.3d at 1024. Consequently, the Court will not grant the Motion based on the doctrine

of unclean hands.

E. 11 U.S.C. § 1328(a)(4)

1. Willful or Malicious Injury

Pursuant to 11 U.S.C. § 1328(a)(4), a debt "for…damages, awarded in a civil action against the debtor as a result of willful or malicious injury by the debtor that caused personal injury to an individual" is not dischargeable. "[A] claim for liability that has not been reduced to a judgment at the time a debtor files a petition may nevertheless be excepted from discharge pursuant to § 1328(a)(4)." *In re Grosso*, 512 B.R. 768, 773 (Bankr. D. Del. 2014) (citing *In re Waag*, 418 B.R. 373 (9th Cir. BAP 2009)). "Nothing in phraseology of section 1328(a)(4) requires, either implicitly or explicitly, entry of a prepetition judgment." *Waag*, 418 B.R. at 379.

> Section 1328(a)(4) differs from section 523(a)(6) in three significant ways: (1) it applies to "willful *or* malicious" injuries instead of to "willful *and* malicious" injuries; (2) it applies to personal injuries or death and not to injuries to property; and (3) it applies to restitution and damages "awarded in a civil action against the debtor" as a result of such injuries.

Id. at 377 (emphasis in original).

a. Willfulness

"'Willful' conduct, in the context of personal injury, entails a deliberate or intentional injury and not merely an injury resulting from a deliberate or intentional act." *In re Grossman*, 538 B.R. 34, 39 (Bankr. E.D. Cal. 2015) (citing *Kawaauhau v. Geiger*, 523 U.S. 57, 61–62, 118 S.Ct. 974, 140 L.Ed.2d 90 (1998)). "The debtor must either subjectively have intended to cause injury or have believed injury was substantially certain to result….The requisite state of mind may be established by circumstantial evidence that tends to show what the debtor must actually have known when acting in the manner that produced injury." *Id*. (citing *In re Su*, 290 F.3d 1140, 1146–47 n.6. (9th Cir. 2002)).

In *Kawaauhu*, 523 U.S. at 61, the Supreme Court "confront[ed] th[e] pivotal question concerning the scope of the 'willful and malicious injury' exception: Does § 523(a)(6)'s compass cover acts, done intentionally, that cause injury,…or only acts done with the actual intent to cause injury…?" [**FN3**] In considering this, the Supreme Court noted:

> The word "willful" in (a)(6) modifies the word "injury," indicating that nondischargeability takes a deliberate or intentional *injury*, not merely a deliberate or intentional act that leads to injury. Had Congress meant to exempt debts resulting from unintentionally inflicted injuries, it might have described instead "willful acts that cause injury." Or, Congress might have selected an additional word or words, i.e., "reckless" or "negligent," to modify "injury." Moreover, as the Eighth Circuit observed, the (a)(6) formulation triggers in the lawyer's mind the category "intentional torts," as distinguished from negligent or reckless torts. Intentional torts generally require that the actor intend "the *consequences* of an act," not simply "the act itself."

Id. at 57 (emphasis in original). The Supreme Court then suggested:

> The [creditors'] more encompassing interpretation could place within the excepted category a wide range of situations in which an act is intentional, but injury is unintended, i.e., neither desired nor in fact anticipated by the debtor. Every traffic accident stemming from an initial intentional act—for example, intentionally rotating the wheel of an automobile to make a left–hand turn without first checking oncoming traffic—could fit the description.

Id. at 62. Partially because "[a] construction so broad would be incompatible with the 'well-known' guide that exceptions to discharge 'should be confined to those plainly expressed[,]'" the Supreme Court held that "debts arising from recklessly or negligently inflicted injuries [did] not fall within the compass of § 523(a)(6)." *Id*. at 62-63.

b. *Maliciousness*

"[T]he 'malicious' injury requirement of § 523(a)(6) is separate from the 'willful' requirement." *Su*, 290 F.3d at 1146. [**FN4**] Maliciousness requires (1) a wrongful act; (2) done intentionally; (3) which necessarily causes injury; (4) without just cause or excuse. *Id*. at 1147. Maliciousness does not require "personal hatred, spite, or ill-will." *In re Bammer*, 131 F.3d 788, 791 (9th Cir. 1997).

Plaintiff represents that the evidence of Defendant's "fraudulent concealment and false representations," including the state court's findings in the Statement of Decision, shows that Defendant caused Plaintiff injury in lost earnings and emotional distress. Motion, p. 17. According to Plaintiff, pursuant to section 1328(a)(4), Defendant should not be allowed to discharge this debt. However, Plaintiff has not met his burden of showing that the state court decided that Defendant's conduct was willful or malicious, as required to establish Plaintiff's claim under section 1328(a)(4).

As discussed above, the state court did not make any factual findings regarding "fraudulent concealment and false representations" in the State Court Action. Exhs. A, D and E to the Martorell Decl. Plaintiff has not established that Defendant either subjectively intended to cause injury to Plaintiff or believed that injury was substantially certain to result. *See Grossman*, 538 B.R. at 39 (citing *Su*, 290 F.3d at 1146–47 n.6). On this record, the Court cannot determine that no genuine issues of material fact exist as to whether Defendant's conduct was willful or malicious.

Finally, Plaintiff did not plead this cause of action in the Complaint or the FAC. Until the Motion, Plaintiff had not put Defendant on notice that Plaintiff was asserting a claim for nondischargeability based on section 1328(a)(4). *See OTR Wheel Engineering, Inc.*, 897 F.3d at 1024.

Plaintiff has been represented by counsel during this entire proceeding; it is unclear why Plaintiff did not amend the FAC to include a claim under section 1328(a)(4). With respect to the Motion, the Court will not consider claims that did not appear in the FAC. *See Coleman*, 232 F.3d at 1294.

F. Sanctions

FRBP 9011 provides, in relevant part:

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CONT... Lisa Fancher **Chapter 13**

(b) Representations to the court

By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) Sanctions

If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) How Initiated

> (A) By Motion
>
> A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in [FRBP] 7004. The motion for sanctions may not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected, except that this limitation shall not apply if the conduct alleged is the filing of a petition in violation of subdivision (b).

In the Opposition, Defendant asserts that the Motion warrants sanctions under Rule 11. Because Defendant did not comply with the safe harbor provisions set forth in FRBP 9011(c)(1)(A), the Court will deny her request for sanctions.

III. CONCLUSION

The Court will deny the Motion.

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

FOOTNOTES

FN1: In its ruling on the Motion to Dismiss, the Court included the following as footnote 1: "Under 11 U.S.C. § 523(a), '[a] discharge under section 727,…or 1328(b) of this title does not discharge an individual debtor from any debt—…(6) for willful and malicious injury by the debtor to another entity or to the property of another entity[.]'" Doc. 16, p. 4 n.1.

FN2: Similarly, in the Preliminary Injunction and the Contempt Order, the state court does not mention purposeful concealment, fraudulent concealment or

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CONT... Lisa Fancher **Chapter 13**

false representations.

FN3: Although *Kawaauhu* specifically references section 523(a)(6), its interpretation of "willful" can be applied to 1328(a)(4). *See Grossman*, 538 B.R. at 39 (citing *Kawaauhau*, 523 U.S. at 61–62 in connection with section 1328(a)(4)).

FN4: Although *Su* specifically references section 523(a)(6), its interpretation of "malicious" can be applied to 1328(a)(4). *See Grossman*, 538 B.R. at 39 (citing *Su*, 290 F.3d at 1146–47 (9th Cir. 2002) in connection with section 1328(a)(4)).

Party Information

Debtor(s):

Lisa Fancher	Represented By James R Selth

Defendant(s):

Lisa Fancher	Represented By James R Selth
BMG Rights Management (US)	Pro Se

Movant(s):

Louis Mayorga	Represented By Eduardo Martorell

Plaintiff(s):

Louis Mayorga	Represented By Eduardo Martorell

Trustee(s):

Elizabeth (SV) F Rojas (TR)	Pro Se

2:00 PM
1:23-10324 Lisa Fancher **Chapter 13**
Adv#: 1:23-01026 Mayorga v. Fancher

#7.00 Status conference re: First Amended Complaint for nondischargeability and objection to discharge 11 U.S.C. §§ 523(a)(2)(A), 523(a)(4)

fr. 11/1/23; 12/20/23; 6/12/24

Docket 1

Tentative Ruling:

In May 2024, the defendant filed a motion to bifurcate the trial in this proceeding (the "Motion to Bifurcate") [doc. 39]. The Court has evaluated the Motion to Bifurcate and will deny it.

The defendant also has filed a motion in limine to limit evidence at trial (the "Motion in Limine") [doc. 40]. The Court will set the Motion in Limine for hearing on the same date and time as the pretrial conference, as set forth below, or after the pretrial conference. With reference to the parties' filed pretrial stipulation, the defendant must supplement the Motion in Limine to refer specifically to what evidence the defendant is seeking to have excluded from trial. Any response to the Motion in Limine must be filed and served no later than one week before the pretrial conference.

If the plaintiff seeks to obtain additional discovery to prepare for trial, then the plaintiff must file and serve a motion to extend the discovery cutoff date. In that motion, the plaintiff must specifically identify the type of additional discovery which the plaintiff seeks leave to obtain and for what purpose and to whom the plaintiff's additional discovery will be directed.

In addition, the parties should be prepared to discuss the following:

Deadline to complete and submit pretrial stipulation in accordance with Local Bankruptcy Rule 7016-1: 10/23/24.

Pretrial: 11/6/24 at 1:30 p.m.

2:00 PM

CONT... Lisa Fancher **Chapter 13**

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

If any of these deadlines are not satisfied, the Court will consider imposing sanctions against the party at fault pursuant to Local Bankruptcy Rule 7016-1(f) and (g).

Party Information

Debtor(s):

Lisa Fancher	Represented By James R Selth

Defendant(s):

Lisa Fancher	Represented By James R Selth

Plaintiff(s):

Louis Mayorga	Represented By Eduardo Martorell

Trustee(s):

Elizabeth (SV) F Rojas (TR)	Pro Se

2:00 PM

1:23-11451 Vartan Kinatyan **Chapter 7**

Adv#: 1:24-01001 Travelers Express Company Inc. now known as Moneyg v. Harutyunyan

#8.00 Status conference re: first amended complaint to determine the dischargeability of a debt

fr. 3/20/24; 3/27/24; 5/15/24; 5/29/24

Docket 19

Tentative Ruling:

Parties should be prepared to discuss the following:

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

Deadline to complete discovery: 11/1/24.

Deadline to complete one day of mediation: 11/15/24.

Deadline to file pretrial motions: 12/13/24.

Deadline to complete and submit pretrial stipulation in accordance with Local Bankruptcy Rule 7016-1: 1/13/25.

Pretrial: 1/22/25 at 1:30 p.m.

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

If any of these deadlines are not satisfied, the Court will consider imposing sanctions against the party at fault pursuant to Local Bankruptcy Rule 7016-1(f) and (g).

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

Wednesday, July 17, 2024 **Hearing Room 301**

2:00 PM
CONT... Vartan Kinatyan **Chapter 7**

Party Information

Debtor(s):

Vartan Kinatyan — Represented By Margarit Kazaryan

Defendant(s):

Seda Harutyunyan — Represented By Margarit Kazaryan

Joint Debtor(s):

Seda Harutyunyan — Represented By Margarit Kazaryan

Plaintiff(s):

Travelers Express Company Inc. — Represented By Robert L Rentto

Trustee(s):

Amy L Goldman (TR) — Pro Se