

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

Wednesday, August 18, 2021

Hearing Room 301

9:30 AM

1: -

Chapter

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Docket 0

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Central District of California
San Fernando Valley
Judge Victoria Kaufman, Presiding
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CONT...

Chapter

Tentative Ruling:

- NONE LISTED -

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1:20-11600 Florence Estella Johnson

Chapter 13

#1.00 Motion for relief from stay [RP]

THE MONEY SOURCE INC.
VS
DEBTOR

fr. 4/7/21; 5/5/21

Docket 50

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Florence Estella Johnson

Represented By
R Grace Rodriguez

Movant(s):

The Money Source Inc

Represented By
Kirsten Martinez
Austin P Nagel

Trustee(s):

Elizabeth (SV) F Rojas (TR)

Pro Se

United States Bankruptcy Court
Central District of California
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Wednesday, August 18, 2021

Hearing Room 301

9:30 AM

1:21-10809 RT Development, LLC

Chapter 11

#2.00 Motion for relief from stay [RP]

VICTORIA CAPITAL TRUST
VS
DEBTOR

fr. 6/16/21

STIP TO CONTINUE FILED 8/5/21 - jc

Docket 28

***** VACATED *** REASON: Order approving stip entered 8/6/21.
Hearing continued to 9/22/21 at 9:30 AM.**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

RT Development, LLC

Represented By
Michael Jay Berger

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1:21-11097 Darrel Christopher Arthur and Jennifer Srivani Arthur

Chapter 7

#3.00 Motion for relief from stay [PP]

PENTAGON FEDERAL CREDIT UNION
VS
DEBTOR

Docket 12

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 repossess and sell the property.

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

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

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

Party Information

Debtor(s):

Darrel Christopher Arthur

Represented By
Daniel King

Joint Debtor(s):

Jennifer Srivani Arthur

Represented By
Daniel King

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CONT... Darrel Christopher Arthur and Jennifer Srivani Arthur

Chapter 7

Movant(s):

Pentagon Federal Credit Union

Represented By
Dane W Exnowski

Trustee(s):

Nancy J Zamora (TR)

Pro Se

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9:30 AM

1:21-10612 Amir Roshanghiace and Mona Saeedipour

Chapter 7

#4.00 Motion for relief from stay [PP]

TOYOTA MOTOR CREDIT CORPORATION
VS
DEBTOR

Docket 11

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 repossess and sell the property.

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

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

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

Party Information

Debtor(s):

Amir Roshanghiace

Represented By
Devin Sawdayi

Joint Debtor(s):

Mona Saeedipour

Represented By
Devin Sawdayi

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CONT... Amir Roshanghiace and Mona Saeedipour

Chapter 7

Movant(s):

Toyota Motor Credit Corporation

Represented By
Kirsten Martinez

Trustee(s):

Nancy J Zamora (TR)

Pro Se

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9:30 AM

1:21-10217 Ela Koc Stankiewicz

Chapter 7

#5.00 Motion for relief from stay [RP]

NEWREZ LLC
VS
DEBTOR

Docket 15

Tentative Ruling:

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

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

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

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

Movant must include the following provision in the order: "This order does not terminate any moratorium on evictions, foreclosures or similar relief. Nothing in this order should be construed as making any findings of fact or conclusions of law regarding the existence of, or merits of any dispute regarding, any such moratorium."

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

Party Information

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CONT... Ela Koc Stankiewicz

Chapter 7

Debtor(s):

Ela Koc Stankiewicz

Represented By
Matthew D. Resnik

Movant(s):

NewRez LLC d/b/a Shellpoint

Represented By
Dane W Exnowski

Trustee(s):

David Seror (TR)

Pro Se

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9:30 AM

1:21-11093 Susanna Shahinyan

Chapter 13

#6.00 Motion for relief from stay [PP]

NISSAN MOTOR ACCEPTANCE CORPORATION
VS
DEBTOR

Docket 21

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 repossess and sell the property.

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

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

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

Party Information

Debtor(s):

Susanna Shahinyan

Represented By
Thomas B Ure

Movant(s):

Nissan Motor Acceptance

Represented By
Kirsten Martinez

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CONT... Susanna Shahinyan

Chapter 13

Trustee(s):

Elizabeth (SV) F Rojas (TR)

Pro Se

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Hearing Room 301

9:30 AM

1:20-11277 Monte Verde Ranch, LLC

Chapter 11

#7.00 Motion for relief from stay [PP]

KUBOTA CREDIT CORPORATION
VS
DEBTOR

Docket 109

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 repossess and sell the property.

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

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

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

Party Information

Debtor(s):

Monte Verde Ranch, LLC

Represented By
Ian Landsberg

Movant(s):

Kubota Credit Corporation

Represented By
Kirsten Martinez

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CONT... Monte Verde Ranch, LLC

Chapter 11

Trustee(s):

Andrew W. Levin (TR)

Pro Se

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Hearing Room 301

1:30 PM

1:18-11620 Antoine R Chamoun

Chapter 7

Adv#: 1:21-01013 Seror v. Chamoun

#8.00 Status conference re: complaint by David Seror
against Antoine R Chamoun

fr. 5/12/21; 7/14/21

STIP TO CONTINUE FILED 8/10/21 - jc

Docket 1

***** VACATED *** REASON: Order approvng stip entered 8/12/21.
Hearing continued to 10/20/21 at 1:30 PM**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Antoine R Chamoun

Represented By
William H Brownstein

Defendant(s):

Antoine R Chamoun

Pro Se

Plaintiff(s):

David Seror

Represented By
Ryan Coy

Trustee(s):

David Seror (TR)

Represented By
Richard Burstein
Jorge A Gaitan
Robyn B Sokol
Ryan Coy

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1:30 PM

1:19-11696 Peter M. Seltzer

Chapter 11

Adv#: 1:19-01151 Kessler v. Seltzer

#9.00 Pretrial conference re: first amended complaint for the denial of discharge pursuant to 11 U.S.C. sec 727(a)(2), (a)(4) and (a)(5) and non-dischargeability of debt pursuant to 11 U.S.C. sec 523(a)(2), (a) (4) and (a)(6)

fr. 2/19/20; 4/8/20; 4/29/20; 6/24/20; 8/5/20; 9/23/20; 4/21/21; 6/23/21

Docket 15

***** VACATED *** REASON: Order dismissing adversary entered 7/30/21 [doc. 103].**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Peter M. Seltzer

Represented By
Michael H Raichelson

Defendant(s):

Peter M. Seltzer

Pro Se

Plaintiff(s):

Darren Kessler

Represented By
Craig G Margulies

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1:19-11696 Peter M. Seltzer

Chapter 7

Adv#: 1:19-01151 Kessler v. Seltzer

#10.00 Plaintiff's Motion for Order: (1) Compelling Defendant to Respond to Plaintiffs First Set of Requests for Production of Documents and Interrogatories; (2) Compelling Defendant to Appear for Oral Examination; (3) Continuing Discovery Cutoff Deadline; and (4) Awarding Plaintiff Discovery Sanctions Against Defendant

fr. 4/21/21(stip); 5/5/21; 6/9/21(stip)

Stip to dismiss motion filed 7/29/21

Docket 65

***** VACATED *** REASON: Order of dismissal entered 7/30/21. [Dkt. 103]**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Peter M. Seltzer

Represented By
Misty A Perry Isaacson

Defendant(s):

Peter M. Seltzer

Represented By
Rebecca J Winthrop

Plaintiff(s):

Darren Kessler

Represented By
Craig G Margulies
Noreen A Madoyan
Montserrat Morales

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CONT... Peter M. Seltzer

Chapter 7

Trustee(s):

Diane C Weil (TR)

Represented By
David Seror
Jorge A Gaitan
Jessica L Bagdanov

**United States Bankruptcy Court
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2:30 PM

1:20-11006 Lev Investments, LLC

Chapter 11

Adv#: 1:21-01020 Lev Investments, LLC v. Feygenberg et al

#11.00 Defendants' motion to dismiss complaint and counterclaims

fr. 7/28/21

Docket 5

Tentative Ruling:

Grant in part and deny in part.

I. BACKGROUND

On June 1, 2020, Lev Investments, LLC ("Debtor") filed a voluntary chapter 11 petition. On May 4, 2021, Debtor filed a complaint (the "Complaint") against Sensible Consulting and Management, Inc. ("Sensible"), Ruvyn Feygenberg and Michael Leizerovitz (collectively, "Defendants"). In the Complaint, Debtor alleges—

In December 2018, Debtor was interested in purchasing a promissory note (the "Note") from The Evergreen Advantage, LLC ("Evergreen") secured by a deed of trust against real property located at 13854 Albers Street, Sherman Oaks, CA 91401 (the "Property"). The Note was in default and headed towards a Trustee's Sale. Debtor's counsel, Gina Lisitsa, introduced Debtor to Mr. Feygenberg and Mr. Leizerovitz (the "Investors"), both of whom stated that they were interested in participating in the purchase of the Note.

The purchase price for the Note was \$2,037,302.61. On December 26, 2018, Debtor and the Investors entered into an agreement for the purchase of the Note (the "Agreement"). Pursuant to the Agreement, Debtor was to contribute \$1,022,500 towards the purchase of the Note, and the Investors were to contribute \$1,257,675 towards the purchase of the Note. The Agreement further provided that, upon foreclosure of the Property, title to the Property was to be placed in Debtor's name, with the Investors receiving a secured note and deed of trust against the

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Lev Investments, LLC

Chapter 11

Property in the amount of \$1,257,675. The Agreement also provided that the Investors would help Debtor sell the Property as soon as possible.

On December 31, 2018, Debtor and the Investors purchased the Note. In January 2019, a Trustee's Sale of the Property was held and, on January 31, 2019, a Trustee's Deed Upon Sale was recorded (the "Deed Upon Sale"). The Deed Upon Sale purported to transfer title to the Property as follows: (A) 50% to Debtor; (B) 25% to Mr. Feygenberg; and (C) 25% to Mr. Leizerovitz. Shortly after recordation of the Deed Upon Sale, Ming Zhu, LLC ("Ming Zhu") asserted an interest in the Property based on a judgment lien against Mr. Feygenberg.

On March 22, 2019, a short form deed of trust and assignment of rents (the "Deed of Trust") was recorded against the Property in favor of Mr. Feygenberg and Sensible. The Deed of Trust referenced a "promissory note of even date;" however, a promissory note was not prepared or executed. On April 2, 2019, an assignment of the Deed of Trust was recorded, through which Mr. Feygenberg transferred his interest in the Deed of Trust to Sensible.

In March 2019, Debtor entered into an agreement to sell the Property to Landmark Land, LLC ("Landmark") for \$3,150,000, which would allow for a payoff of the loan without a prepayment penalty and stop the further accrual of interest. Initially, Defendants refused to provide a payoff statement to the escrow company. After extensive discussions, Defendants provided two payoff statements for incorrect amounts. In addition, Defendants refused to resolve the abstract of judgment recorded by Ming Zhu against the Property. As a result, the sale to Landmark was not consummated.

On December 29, 2019, Sensible charged to Debtor a loan renewal fee of \$150,921. On January 22, 2020, less than one month after the alleged renewal, Defendants recorded a Notice of Default against the Property. The recording was not permitted under the Deed of Trust. On April 23, 2020, Defendants recorded a Notice of Trustee's Sale,

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Lev Investments, LLC

Chapter 11

which also was not permitted under the Deed of Trust. On May 11, 2020, Debtor received documents from Ms. Lisitsa showing, for the first time, that the Investors did not contribute cash in the sum of \$1,257,675 towards the purchase of the Note, as required under the Agreement. Rather, after initially contributing \$1,257,675, the Investors caused Ms. Lisitsa, who controlled all of the funds contributed towards purchase of the Note, to return \$210,000 to them and to pay additional fees to Ms. Lisitsa. As such, the Investors actually contributed only \$1,022,500.

Postpetition, Debtor sold the Property to Landmark for \$200,000 less than the purchase price Landmark agreed to pay in April 2019. Debtor's counsel maintains the net proceeds from the sale in a segregated trust account. Pursuant to Debtor's confirmed chapter 11 plan, Debtor has paid \$722,675 to Sensible on the undisputed portion of Sensible's claim.

Complaint, pp. 3-7. To the Complaint, Debtor attached a copy of the Agreement and the Deed of Trust. Exhibits 1, 6. On these allegations, Debtor asserts seventeen claims for relief against Defendants, including claims objecting to Defendants' claims against the bankruptcy estate, fraud and breach of contract.

On June 5, 2021, Defendants filed a motion to dismiss the Complaint (the "Motion") [doc. 5]. On July 14, 2021, Debtor filed an opposition to the Motion (the "Opposition") [doc. 12]. In the Opposition, Debtor contends that it does not oppose dismissal of the seventh, tenth and twelfth claims. On July 21, 2021, Defendants filed a reply to the Opposition [doc. 16].

II. ANALYSIS

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

A motion to dismiss [pursuant to Rule 12(b)(6)] will only be granted if the complaint fails to allege enough facts to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the

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Lev Investments, LLC

Chapter 11

reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully.

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

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

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

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

"A court may [also] consider certain materials—documents attached to the complaint, documents incorporated by reference in the complaint, or matters of judicial notice—without converting the motion to dismiss into a motion for summary judgment." *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003). Under the "incorporation by reference" doctrine, a court may look beyond the four corners of the complaint to take into account documents whose contents are alleged in a complaint, but not physically attached, and may do so without converting a Rule 12(b)(6) motion into a motion for summary judgment. *Davis v. HSBC Bank Nevada, N.A.*, 691 F.3d 1152, 1160 (9th Cir. 2012). The court "may treat the referenced document as part of the complaint, and thus may assume that its contents are true for purposes of a motion to dismiss under Rule 12(b)(6)." *Id.*, quoting *United States v. Ritchie*, 342 F.3d 903, 908

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(9th Cir. 2003). State court pleadings, orders and judgments are subject to judicial notice under Federal Rule of Evidence 201. *See McVey v. McVey*, 26 F.Supp.3d 980, 983-84 (C.D. Cal. 2014) (aggregating cases); and *Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 742, 746 n.6 (9th Cir. 2006) ("We may take judicial notice of court filings and other matters of public record.").

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

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

B. The First Claim – Objection to Claim Based on Invalid Security Interest

Through the first claim for relief, Debtor asserts that, because the Deed of Trust referred to a promissory note "of even date herewith," and because the parties did not execute a promissory note concurrently with the Deed of Trust, the Deed of Trust does not secure any obligation to Defendants. In the Motion, Defendants argue that: (A) the Agreement qualifies as the promissory note; and (B) Debtor is equitably estopped from denying Defendants' security interest.

As to the latter argument, equitable estoppel is an affirmative defense that must be pled and proven by Defendants. Under both California and federal law, Defendants bear the burden of proving every element of an affirmative defense. *See Consumer Cause, Inc. v. SmileCare*, 91 Cal.App.4th 454, 469 (Ct. App. 2001); and *Payan v. Aramark Mgmt. Servs. Ltd. P'ship*, 495 F.3d 1119, 1122 (9th Cir. 2007). As such, if Debtor has adequately stated a claim for relief, Defendants' as-yet-unproven affirmative defense is not cause for dismissal under Rule 12(b)(6).

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As to the dispute regarding whether the Deed of Trust is supported by a valid obligation, the Deed of Trust provides—

For the purpose of securing: 1. Performance of each agreement of Trustor incorporated by reference or contained herein. 2. Payment of the indebtedness evidenced by one promissory note of even date herewith, and any extension or renewal thereof, in the principal sum of \$1,257,675.00 executed by Trustor in favor of Beneficiary by order. 3. Payment of such further sums as the then record owner of said property hereafter may borrow from Beneficiary, when evidenced by another note (or notes) reciting it is so secured.

Complaint, Exhibit 6. Debtor alleges that the Deed of Trust, which is incorporated into the Complaint, refers to a promissory note "of even date herewith." The Complaint also includes allegations that the parties did not execute any such promissory note. On the other hand, Defendants argue that the parties intended the Agreement to be the underlying obligation secured by the Deed of Trust.

In California, "[a] contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." Cal. Civ. Code § 1636. "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." Cal. Civ. Code § 1641. Pursuant to these statutes, the clause referenced by Debtor, taken as a whole, refers to a promissory note "of even date herewith," but also sets forth that the Deed of Trust secured "[p]erformance of each agreement of [Debtor] incorporated by reference." The clause also specifically provides for security of \$1,257,675, the same amount set forth in the Agreement.

As such, there is an ambiguity requiring production of extrinsic evidence. If such an ambiguity exists, a court may allow the parties "full opportunity to produce evidence of the facts, circumstances and conditions surrounding its execution as well as the conduct of the parties to the contract." *Walter E. Heller Western, Inc. v. Tecrim Corp.*, 196 Cal.App.3d 149, 158 (Ct. App. 1987). The court also may admit extrinsic evidence "to explain or interpret ambiguous language." *Rosenfeld v. Abraham Joshua Heschel Day School, Inc.*, 226 Cal.App.4th 886, 897 (Ct. App. 2014). Eventually, the issue of ambiguity will require an assessment of evidence, which is not appropriate

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under Rule 12(b)(6). At this pleading stage, taking the allegations in the light most favorable to Debtor, the first claim adequately alleges a claim to recharacterize Sensible's claim as an unsecured claim.

***C. The Second Claim – Objection to Claim Based on Obligation
Commencement Date***

Through its second claim for relief, Debtor asserts that the Agreement contemplated Debtor having a 100% interest in the Property prior to commencement of any obligation under the loan. In the Motion, Defendants argue that the Agreement provided for an earlier commencement date. The Agreement, attached and incorporated into the Complaint, notes that a Trustee's Sale of the Property was scheduled for December 26, 2018. The Agreement further provides—

1. *Payment.* [Debtor] shall pay \$1,022,500.00 towards the purchase of the Loan on or before December 28, 2018. Feygenberg and Leizerovitz shall pay \$1,257,675.00 towards the purchase of the Loan on or before December 28, 2018. Parties to deposit all funds to Lisitsa Law Trust Account on or before December 28, 2018.
...
5. *Foreclosure.* Upon foreclosure of the Real Property, title to the Real Property shall go to [Debtor] and concurrently therewith Feygenberg and Leizerovitz shall place a first position deed of trust against the Real Property in the amount of \$1,257,675.00 (the First Position Loan), with the following terms, maturity date one year after Closing Date of Escrow and pre-payment penalty of \$120,000 in the first 6 months if and only if [Debtor] pays off the First Position Loan, but not if the Real Property is sold. There is no pre-payment penalty if the Real Property is sold with [sic] the pre-payment period.
6. *Sale of Real Property.* Upon sale of the Real Property, Feygenberg and Leizerovitz shall get paid \$1,257,675.00 plus their incurred expenses first in priority, then [Debtor] gets paid the rest of the sale price. [Debtor] shall use all of its best efforts to sell the Real Property as soon as possible. Feygenberg and Leizerovitz promise and warrant to help [Debtor] sell the Real Property as soon as possible.

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Complaint, Exhibit 1. In an addendum to the Agreement, dated December 27, 2018, the parties agreed that the "[f]ull term of the loan is 12 months from funding...."

Pursuant to the terms of the Agreement, incorporated into the allegations of the Complaint, the parties agreed to the loan commencing in late December 2018, i.e., upon funding the loan and close of escrow after foreclosure. Debtor does not appear to dispute this point. Rather, Debtor appears to argue that the following language created a condition precedent to loan commencement: "Upon foreclosure of the Real Property, title to the Real Property shall go to [Debtor] and concurrently therewith [the Investors] shall place a first position deed of trust against the Real Property in the amount of \$1,257,675.00...."

Pursuant to Cal. Civ. Code § 1436, "[a] condition precedent is one which is to be performed before some right dependent thereon accrues, or some act dependent thereon is performed." As discussed above, the Court must construe the allegations in the light most favorable to Debtor, as the nonmoving party. Reading the Complaint and the terms of the Agreement in this light, the provision that Debtor would take sole title upon foreclosure of the Property may be interpreted as a condition precedent to Debtor's performance under the Agreement. At this time, Debtor has sufficiently alleged a claim to change the commencement date of the loan.

D. The Third Claim – Objection to Claim Based on Invalid Charges re: Foreclosure

In the third claim for relief, Debtor asserts that the Deed of Trust did not contain a power to record a notice of default or a power of sale and that, as a result, foreclosure and attorneys' fees requested in Sensible's proof of claim should be disallowed. This claim is undermined by the plain language of the Deed of Trust, which is attached and incorporated into the Complaint. The first page of the Deed of Trust explicitly provides that Debtor "**IRREVOCABLY GRANTS, TRANSFERS, AND ASSIGNS TO TRUSTEE IN TRUST, WITH POWER OF SALE,**" the Property. Deed of Trust, p. 1 (capitalization and bold type in Deed of Trust).

Given the provisions in the Deed of Trust, Debtor has not stated a claim for relief regarding the alleged lack of power to sell the Property. The Court will dismiss this

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claim with prejudice, and will not disallow the portion of Sensible's claim for foreclosure fees, charges and attorneys' fees on the basis set forth in this claim.

E. The Fifth Claim – Breach of the Agreement

"The elements of a cause of action for breach of contract are (1) the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to plaintiff." *Tribeca Companies, LLC v. First Am. Title Ins. Co.*, 239 Cal.App.4th 1088, 1109 (Ct. App. 2015) (internal quotations omitted).

In the Complaint, Debtor bases its claim for breach of contract on the following allegations: (A) the Investors agreed to contribute \$1,257,675 towards the purchase of the Note; in light of the refund, they contributed only \$1,022,500; (B) contrary to the Agreement, Debtor initially received a 50% interest instead of a 100% interest in the Property; (C) the Investors were required to help Debtor sell the Property, but delayed in providing payoff statements, later provided inaccurate payoff statements and failed to resolve the abstract of judgment in favor of Ming Zhu; and (D) the Investors were required to provide a one year loan to Debtor, but recorded a Notice of Default less than one year after loan commencement.

Debtor has adequately alleged a claim based on Defendants' alleged failure to resolve the judgment in favor of Ming Zhu. Debtor alleged that: (A) the parties agreed that the Investors would help Debtor sell the Property as soon as possible; (B) the Investors breached the promise by failing to resolve the judgment when Debtor had a sale lined up with a purchaser; and (C) Debtor was damaged because, as a result of these actions, the sale was not consummated and the Property eventually sold for \$200,000 less than the purchase price available in April 2019.

Regarding the allegations related to the purported refund, Debtor adequately alleges a contract through which Defendants promised to contribute \$1,257,675 towards the acquisition of the Property. Debtor also alleges that it performed all of its obligations under the Agreement and that Defendants breached by receiving a refund in the amount of \$235,175. However, given that Debtor admits that it obtained the Note and, eventually, a 100% interest in the Property, and Debtor has not yet paid the claim of Sensible in full, Debtor has not adequately alleged the damages it has suffered from the "secret refund."

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With respect to the allegations regarding a premature Notice of Default, Debtor also has failed to allege adequately how it was damaged by the recording of the Notice of Default. Even if the Court construes the terms of the Agreement as stating a condition precedent to commencement of the loan, as discussed above, Debtor alleges that it received a 100% interest in the Property in March 2019. As such, Defendants would have been able to record a Notice of Default, under Debtor's own interpretation of the Agreement, by March 2020, i.e., months before Debtor filed its bankruptcy petition. Given this timeline, Debtor has not adequately alleged how the recording of the Notice of Default in January 2020, rather than in March 2020, caused damages.

F. The Sixth Claim – Fraud Related to the Agreement

"The required elements for fraudulent concealment are: (1) concealment or suppression of a material fact; (2) by a defendant with a duty to disclose the fact to the plaintiff; (3) the defendant intended to defraud the plaintiff by intentionally concealing or suppressing the fact; (4) the plaintiff was unaware of the fact and would not have acted as he or she did if he or she had known of the concealed or suppressed fact; and (5) plaintiff sustained damage as a result of the concealment or suppression of the fact." *Graham v. Bank of Am., N.A.*, 226 Cal.App.4th 594, 606 (Ct. App. 2014).

In the Motion, Defendants contend that Debtor did not plead its fraud claim with specificity. However, the Complaint, taken as a whole, includes allegations regarding each element. In the Complaint, Debtor alleges that: (A) the Investors concealed the fact that they would receive a refund of \$235,175 and consequently advanced less than \$1,257,675; (B) the payoff demands contained a principal balance of \$1,257,675; (C) the Investors intended to deceive Debtor; (D) Debtor did not know about the secret refund and would not have agreed to a principal loan amount of \$1,257,675 if it knew. As noted above, allegations regarding intent may be alleged generally. Rule 9(b).

The Complaint also includes adequate allegations regarding the Investors' duty to disclose.

There are four circumstances in which nondisclosure or concealment may constitute actionable fraud: (1) when the defendant is in a fiduciary relationship with the plaintiff; (2) when the defendant had exclusive

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knowledge of material facts not known to the plaintiff; (3) when the defendant actively conceals a material fact from the plaintiff; and (4) when the defendant makes partial representations but also suppresses some material facts.

LiMandri v. Judkins, 52 Cal.App.4th 326, 336 (Ct. App. 1997) (internal quotation omitted). "[W]here material facts are known to one party and not to the other, failure to disclose them is not actionable fraud unless there is *some relationship* between the parties which gives rise to a duty to disclose such known facts." *Id.* at 337 (internal quotations and citations omitted) (emphasis in *LiMandri*). "Thus, a duty to disclose may arise from the relationship between seller and buyer, employer and prospective employee, doctor and patient, *or parties entering into any kind of contractual agreement.*" *Id.* (emphasis added).

Because Debtor alleges that the Investors were parties to a contract with Debtor, Debtor has adequately pled a relationship giving rise to a duty to disclose material facts. As such, the Complaint includes adequate allegations regarding fraudulent concealment.

In the Motion, Defendants also argue that the allegations that Debtor did not know about the refund are contradicted by the allegation that the refund was facilitated by Ms. Lisitsa, Debtor's attorney. However, in the Complaint, Debtor expressly alleges that Ms. Lisitsa acted "without the consent or knowledge of" Debtor. Complaint, ¶ 95. Finally, Defendants contend that the addendum to the Agreement contradicts Debtor's allegations because the addendum contemplated an investment that was less than the amount initially advanced. However, the proration calculations set forth in the addendum are distinct from the alleged secret refund and, as a result, have no bearing on Debtor's claim for fraud. Debtor having adequately pled a claim for fraud, the Court will not dismiss this claim.

G. The Eighth Claim – Breach of the Deed of Trust

"The elements of a cause of action for breach of contract are (1) the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to plaintiff." *Tribeca Companies, LLC v. First Am. Title Ins. Co.*, 239 Cal.App.4th 1088, 1109 (Ct. App. 2015) (internal quotations omitted).

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Through this claim, Debtor asserts that Defendants breached the Deed of Trust by recording a default and noticing a sale when the Deed of Trust did not include a power of sale. As discussed above, the Deed of Trust, attached by Debtor and incorporated into the Complaint, explicitly provides for a power of sale. Thus, the Court will dismiss this claim.

H. The Ninth Claim – Fraud Related to the Deed of Trust

Debtor's ninth claim for relief is a fraud claim based on the allegation that Defendants falsely represented that the Deed of Trust provided powers to record a Notice of Default and Notice of Trustee's Sale and to proceed with a foreclosure sale. As discussed above, the Deed of Trust, attached to and incorporated into the Complaint, does include a power of sale.

Debtor also bases its fraud claim on the allegation that the Investors "misrepresented, concealed or failed to disclose to [Debtor] that there was no underlying promissory note of even date with the Deed of Trust...." Complaint, ¶ 127. This allegation does not meet the heightened pleading requirement of Rule 9(b). Debtor does not allege specific representations or omissions made by the Investors on which Debtor justifiably relied. In addition, as discussed above, the language in the Deed of Trust which references the obligation(s) that it secures is ambiguous. As such, the allegations of fraud arising from the Deed of Trust, without more, are insufficient to meet the standard of Rule 9(b).

Moreover, Debtor's ninth claim, as alleged, is not plausible. For instance, is Debtor alleging that the Investors knew that, without "a promissory note of even date," the Deed of Trust would be invalid? Why would the Investors intentionally execute a Deed of Trust that does not legally secure the sums they advanced to acquire the Note and the Property? Given that Debtor, as the obligor, would have to be involved in the execution of a promissory note, why would Debtor rely on any representations from the Investors, rather than Debtor's own knowledge that it did not execute "a promissory note of even date?" Consequently, the Court will dismiss Debtor's ninth claim for fraud.

I. The Eleventh Claim – Cal. Civ. Code § 1113

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Pursuant to Cal. Civ. Code § 1113—

IMPLIED COVENANTS. From the use of the word "grant" in any conveyance by which an estate of inheritance or fee simple is to be passed, the following covenants, and none other, on the part of the grantor for himself and his heirs to the grantee, his heirs, and assigns, are implied, unless restrained by express terms contained in such conveyance:

1. That previous to the time of the execution of such conveyance, the grantor has not conveyed the same estate, or any right, title, or interest therein, to any person other than the grantee;
2. That such estate is at the time of the execution of such conveyance free from encumbrances done, made, or suffered by the grantor, or any person claiming under him.

Such covenants may be sued upon in the same manner as if they had been expressly inserted in the conveyance.

"One of the meanings of the term 'suffer to occur' is to allow, to admit, or to permit. It implies an approval of or acquiescence in an act, and more than nonresistance. And denotes knowledge and intention." *Osborne v. Winter*, 133 Cal.App. 664, 666–67 (Ct. App. 1933) (internal citations omitted). "'Suffered,' as used in the statute, implies reasonable control, and it cannot be held to apply to an incumbrance not caused by the act of the party nor within his power to prevent." *Crist v. Fife*, 41 Cal.App. 509, 511 (Ct. App. 1919).

Here, the Complaint does not allege that the judgment lien was "done, made, or suffered by" the Investors. As discussed in the authorities above, this language indicates that the Investors must have had reasonable control over and the power to prevent attachment of the lien. In the Complaint, Debtor alleges that, through the Agreement, the parties intended for Debtor to obtain a 100% interest in the Property; however, Debtor alleges that the Deed Upon Sale mistakenly transferred a 50% interest in the Property to Debtor and the remaining 50% interest in the Investors. Debtor does not allege that the Investors had any control over or power to prevent the

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flawed transfer arising from the Deed Upon Sale. There being no allegations that the Investors controlled their receipt of a 50% interest in the Property, which resulted in the judgment lien attaching to the Property, the Investors are not liable under Cal. Civ. Code § 1113.

Debtor also has not adequately alleged damages. Damages in an action under Cal. Civ. Code § 1113 are the amount "the covenantee actually expends in removing the encumbrance, not exceeding the value of the property at the time of the breach." *Evans v. Fought*, 231 Cal.App.2d 698, 712-13 (Ct. App. 1965). Debtor has not included any allegations regarding whether it incurred damages removing the judgment lien. As such, the Court will dismiss, with leave to amend, Debtor's request for damages under Cal. Civ. Code § 1113.

J. The Thirteenth Claim – Cal. Civ. Code § 2943

Pursuant to Cal. Civ. Code § 2943(a)(5)—

"Payoff demand statement" means a written statement, prepared in response to a written demand made by an entitled person or authorized agent, setting forth the amounts required as of the date of preparation by the beneficiary, to fully satisfy all obligations secured by the loan that is the subject of the payoff demand statement. The written statement shall include information reasonably necessary to calculate the payoff amount on a per diem basis for the period of time, not to exceed 30 days, during which the per diem amount is not changed by the terms of the note.

Under Cal. Civ. Code § 2943(c)—

A beneficiary, or his or her authorized agent, shall, on the written demand of an entitled person, or his or her authorized agent, prepare and deliver a payoff demand statement to the person demanding it within 21 days of the receipt of the demand. However, if the loan is subject to a recorded notice of default or a filed complaint commencing a judicial foreclosure, the beneficiary shall have no obligation to prepare and deliver this statement as prescribed unless the written

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demand is received prior to the first publication of a notice of sale or the notice of the first date of sale established by a court.

Here, Debtor alleges that Defendants delayed in the provision of a payoff statement and that the payoff statements eventually provided were "inaccurate." However, Debtor has not provided sufficient allegations regarding that delay or how Sensible's payoff statements were inaccurate.

To the extent the "inaccuracy" refers to a failure to account for an offset of the judgment lien in favor of Ming Zhu, Cal. Civ. Code § 2943 requires only that a beneficiary provide the amounts that will "fully satisfy all obligations secured by the loan" and "include information reasonably necessary to calculate the payoff amount...." Cal. Civ. Code § 2943(a)(5). Debtor's alleged claim for offset is not an "obligation[]" secured by the loan" that must be accounted for in the written payoff demand. Moreover, because Debtor knew about its claim for offset prior to the payoff demand (dated April 5, 2019), the payoff demand included sufficient information "reasonably necessary" for Debtor to "calculate the payoff amount."

In any event, the Complaint does not contain adequate allegations regarding the delayed payoff demands and the purported errors in the written payoff demands. Consequently, the Court will dismiss Debtor's claim for damages under Cal. Civ. Code § 2943.

K. The Fourteenth Claim – Declaratory Relief

The Declaratory Judgment Act (the "DJA"), 28 U.S.C. § 2201(a), provides in pertinent part:

In a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

"The DJA's operation 'is procedural only.'" *Flores v. EMC Mortg. Co.*, 997 F.Supp.2d

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1088, 1111 (E.D. Cal. 2014) (quoting *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 240, 57 S.Ct. 461, 463, 81 L.Ed. 617 (1937)). "A declaratory judgment is not a theory of recovery. The DJA "merely offers an *additional remedy* to litigants." *Id.* (internal quotation omitted) (emphasis in *Flores*). "Declaratory relief is appropriate (1) when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding." *Id.* (internal quotation omitted).

"Since a declaratory judgment is not a corrective action, it should not be used to remedy past wrongs." *Clinton v. Boladian*, 2013 WL 12126107, at *3 (C.D. Cal. May 2, 2013) (citing *Marzan v. Bank of Am.*, 779 F.Supp.2d 1140, 1146 (D. Haw. 2011) ("[B]ecause Plaintiffs' claims are based on allegations regarding Defendants' past wrongs, a claim under the Declaratory Relief Act is improper and in essence duplicates Plaintiffs' other causes of action.")). The "useful purpose served by the declaratory judgment is the clarification of legal duties for the future." *Amsouth Bank v. Dale*, 386 F.3d 763, 786 (6th Cir. 2004); see also *Societe de Conditionnement en Aluminium v. Hunter Eng'g Co.*, 655 F.2d 938, 943 (9th Cir. 1981) ("[The Declaratory Judgment Act] brings to the present a litigable controversy, which otherwise might only by [sic] tried in the future.").

Debtor's declaratory relief claim is based on the following allegations: (A) a promissory note "of even date" does not exist and, as a result, any obligation owed to Defendants was not legitimately secured by the Deed of Trust; and (B) the Deed of Trust did not contain a power of sale.

As to the former issue, the Complaint alleges that, after sale of the Property through Debtor's bankruptcy case, any liens against the Property attached to the sale proceeds. As a result, a determination regarding the validity of the Deed of Trust is not merely to remedy past wrongs, but to dictate how the sale proceeds should be distributed in the future. As discussed above, Debtor has adequately alleged a claim for relief regarding whether the Deed of Trust is supported by a valid promissory note.

As to the latter issue, the Property was voluntarily sold by Debtor through the bankruptcy case. As such, a determination regarding whether the Deed of Trust contains a power of sale is unnecessary for clarification of future legal duties.

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Moreover, Debtor has not adequately stated a claim for relief related to its allegations that the Deed of Trust did not contain a power of sale; the Deed of Trust attached to the Complaint contradicts these allegations. Thus, the Court will dismiss the declaratory relief claim related to the power of sale allegations, but will not dismiss the declaratory relief claim related to whether the Deed of Trust is supported by a valid promissory note.

L. The Sixteenth Claim – Attorneys’ Fees Under Cal. Civ. Code § 1717

Defendants argue that Debtor’s claim under Cal. Civ. Code § 1717, for attorneys’ fees, is not appropriately pled as a separate claim. However, Defendants do not cite any authority that prevents parties from requesting attorneys’ fees through a claim, as opposed to in the prayer for relief. [FN1]. Defendants do not provide a substantive basis for dismissal. [FN2]. As such, the Court will not dismiss Debtor’s request for attorneys’ fees.

M. The Seventeenth Claim – Objection to Claims Under 11 U.S.C. § 502(b)

In the Motion, Defendants argue that offset is not a proper claim for relief, but an affirmative defense. However, Debtor’s claim is not for offset. Debtor’s claim is for disallowance or reduction of Defendants’ claims under 11 U.S.C. § 502(b), which may be brought as a claim. Defendants having provided no other basis for dismissal of this claim, the Court will deny Defendants’ request for dismissal of the seventeenth claim.

III. CONCLUSION

Based on Debtor’s consent to dismissal, the Court will dismiss the seventh, tenth and twelfth claims. The Court will dismiss the third, eighth and ninth claims with prejudice. The Court will dismiss the eleventh and thirteenth claims for relief with leave to amend. The Court will not dismiss the first, second, sixth, sixteenth and seventeenth claims.

Regarding the fifth claim for relief, the Court will dismiss, with leave to amend, the breach of contract claims based on the Investors' receipt of a refund and the alleged premature filing of a Notice of Default. The Court will not dismiss the remaining

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claims contained in the fifth claim for relief.

Regarding the fourteenth claim for relief, the Court will dismiss, with prejudice, the declaratory relief claim based on the Deed of Trust lacking a power of sale. The Court will not dismiss the remainder of the fourteenth claim.

If Debtor elects to amend the Complaint, Debtor must file and serve an amended complaint **no later than September 1, 2021**. If Debtor files an amended complaint by that date, Defendants must file and serve a response to the amended complaint **no later than September 15, 2021**.

If Debtor elects to proceed with the remaining claims in the Complaint, Debtor must file and serve a notice of such an election **no later than August 25, 2021**. If Debtor files a notice that it will proceed with the Complaint, Defendants must file and serve an answer **no later than September 8, 2021**.

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

FOOTNOTES

1. In fact, a prior iteration of Federal Rule of Bankruptcy Procedure 7008 *required* parties to plead attorneys' fees as claims. *See In re Luchini*, 511 B.R. 664, 679 (Bankr. E.D. Cal. 2014). This Rule was amended because the requirement "had the potential to serve as a trap for the unwary." Fed. R. Bankr. P. 7008, Advisory Committee Notes (2014).
2. It is unclear if Investors have a right to attorney's fees under the Agreement, and if Debtor has a right to attorneys' fees under Cal. Civ. Code § 1717. The Agreement states that "[e]ach of the Parties shall bear their own attorneys' fees and costs incurred in connection with the subject matter of this Agreement." Agreement, ¶ 16. On the other hand, the addendum to the Agreement provides that additional expenses "including any legal fees incurred by [the Investors]" are to be reimbursed. Addendum, ¶ 4.

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Debtor(s):

Lev Investments, LLC

Represented By
David B Golubchik
Juliet Y Oh
Richard P Steelman Jr

Defendant(s):

Ruvyn Feygenberg

Represented By
John Burgee

Michael Leizerovitz

Represented By
John Burgee

Sensible Consulting and

Represented By
John Burgee

Movant(s):

Ruvyn Feygenberg

Represented By
John Burgee

Michael Leizerovitz

Represented By
John Burgee

Sensible Consulting and

Represented By
John Burgee

Plaintiff(s):

Lev Investments, LLC

Represented By
Juliet Y Oh
David B Golubchik

Trustee(s):

Caroline Renee Djang (TR)

Pro Se

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Adv#: 1:21-01020 Lev Investments, LLC v. Feygenberg et al

#12.00 Status conference re complaint objecting to claim and counterclaims

fr. 7/7/21; 7/28/21

Docket 1

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Lev Investments, LLC

Represented By
David B Golubchik
Juliet Y Oh

Defendant(s):

Ruvin Feygenberg

Pro Se

Michael Leizerovitz

Pro Se

Sensible Consulting and

Pro Se

Plaintiff(s):

Lev Investments, LLC

Represented By
Juliet Y Oh
David B Golubchik

Trustee(s):

Caroline Renee Djang (TR)

Pro Se