

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA**

Honorable Fredrick E. Clement
Bakersfield Federal Courthouse
510 19th Street, Second Floor
Bakersfield, California

PRE-HEARING DISPOSITIONS

DAY: WEDNESDAY
DATE: MARCH 8, 2017
CALENDAR: 10:30 A.M. CHAPTER 7 ADVERSARY PROCEEDINGS

GENERAL DESIGNATIONS

Each pre-hearing disposition is prefaced by the words "Final Ruling," "Tentative Ruling" or "No Tentative Ruling." Except as indicated below, matters designated "Final Ruling" will not be called and counsel need not appear at the hearing on such matters. Matters designated "Tentative Ruling" or "No Tentative Ruling" will be called.

ORAL ARGUMENT

For matters that are called, the court may determine in its discretion whether the resolution of such matter requires oral argument. See *Morrow v. Topping*, 437 F.2d 1155, 1156-57 (9th Cir. 1971); accord LBR 9014-1(h). When the court has published a tentative ruling for a matter that is called, the court shall not accept oral argument from any attorney appearing on such matter who is unfamiliar with such tentative ruling or its grounds.

COURT'S ERRORS IN FINAL RULINGS

If a party believes that a final ruling contains an error that would, if reflected in the order or judgment, warrant a motion under Federal Rule of Civil Procedure 60(a), as incorporated by Federal Rules of Bankruptcy Procedure 9024, then the party affected by such error shall, not later than 4:00 p.m. (PST) on the day before the hearing, inform the following persons by telephone that they wish the matter either to be called or dropped from calendar, as appropriate, notwithstanding the court's ruling: (1) all other parties directly affected by the motion; and (2) Kathy Torres, Judicial Assistant to the Honorable Fredrick E. Clement, at (559) 499-5860. Absent such a timely request, a matter designated "Final Ruling" will not be called.

4. [16-12375](#)-A-7 ULISES/ALEJANDRA CAMACHO MOTION TO DISMISS ADVERSARY
[16-1102](#) DMG-2 PROCEEDING/NOTICE OF REMOVAL
VETTER V. CAMACHO ET AL 2-2-17 [48]
D. GARDNER/Atty. for mv.

Tentative Ruling

Motion: Dismiss Under Rule 12(b)(6)

Notice: LBR 9014-1(f)(1); written opposition required

Disposition: Granted in part with 14 days leave to amend, denied in part

Order: Civil minute order

Defendant Alejandra Camacho ("Camacho") moves to dismiss with prejudice plaintiff Jeffrey Vetter's ("Vetter") First Amended Complaint, January 18, 2017, ECF # 42. Vetter opposes the motion.

HISTORY OF THIS ADVERSARY PROCEEDING

On October 31, 2016, Chapter 7 trustee Vetter filed his complaint against defendants Camacho. Defendant Camacho filed her motion to dismiss under Rule 12(b)(6). After hearing on January 4, 2017, granted Camacho's motion to dismiss, issuing a six pages decision. Civil minutes, January 4, 2017. Vetter was given leave to amend. On January 18, 2017, filed his First Amended Complaint. Once again Camacho moves to dismiss the complaint.

PLEADINGS IN THIS ADVERSARY PROCEEDING AND A RELATED AVOIDANCE ACTION

Vetter is the trustee in a Chapter 7 case filed by Rafael Alonso ("Alonso"). *In re Rafael Alonso*, No. 12-11008 (Bankr. E.D. Cal. 2012). Alejandra Camacho is Alonso's daughter; Ulises P. Camacho is Alonso's son-in-law.

This is not the first adversary proceeding involving Vetter and Camacho. Following Alonso's bankruptcy petition in February 2012, Vincent Gorski was appointed the Chapter 7 trustee. Gorski later resigned and Vetter was appointed the trustee. Vetter brought an adversary proceeding against Camacho. *Vetter v. Camacho*, No. 15-1044 (Bankr. E.D. Cal. 2015) ("Avoidance Action"). There Vetter sought to avoid transfers to Camacho under 11 U.S.C. § 547, 548, 549, 550 and California Civil Code § 3439 et seq. The facts giving rise to those causes of action are three-fold: (1) 16 checks totaling \$923,973.25 written from Alonso (or his sole proprietorship, Sun Fresh International) to Camacho (or her sole proprietorship Summer Fresh Company) between August 8, 2011, and November 11, 2011; (2) 2 checks totaling \$41,480.50 diverted from Alonso (or his company, Golden Star Citrus, Inc.) to Camacho; and (3) 1 check for \$25,750.00 diverted from Alonso (or this company, Golden Star Citrus, Inc.) to Camacho. Complaint ¶¶ 18-23, Avoidance action.

Prior to trial of the avoidance action, In June 2016, Camacho filed a Chapter 7 bankruptcy. *In re Camacho*, No. 16-12375 (Bankr. E.D. Cal. 2016). Randell Parker was appointed the trustee of that case.

This adversary proceeding followed. *Vetter v. Camacho*, No. 16-1102 (Bankr. E.D. Cal. 2016) ("Discharge Action"). It is based on the same facts alleged in the avoidance action, Vetter asserts nine cause of action under 11 U.S.C. §§ 727 and 523.

After the court sustained the defendants Camacho's Rule 12(b)(6) motion to all ninth causes of action, Vetter filed his First Amended Complaint, January 18, 2017, ECF # 42 ("First Amended Complaint"). That amended complaint is very similar to the original complaint. Key differences include the addition of paragraphs 23 & 24 as a part of the "General Allegations." Those paragraphs provide: "The Defendants have concealed their ownership interest in the business, Summer Fresh Company and/or the disposition of the money transferred to them by Rafael Alonso by failing to list the money, its location or disposition, the business ownership interest and its going concern value and/or interest in summer Fresno Company within one year of filing and continue to conceal property of the estate after the filing of their petition. The business continues to operate and the Defendants have concealed their interest and its operation. In the alternative, the Defendants have transferred their interest back to Rafael Alonso or another family member within one year of the filing of their petition." Additionally, Vetter has amended each of the ninth cause of action. Some amendments are substantive and others less so.

It is to the First Amended Complaint in the discharge action that this motion is directed.

RULE 12(b)(6) STANDARDS

Under Federal Rule of Civil Procedure 12(b)(6), a party may move to dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6), *incorporated by* Fed. R. Bankr. P. 7012(b). "A Rule 12(b)(6) dismissal may be based on either a lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Johnson v. Riverside Healthcare Sys., LP*, 534 F.3d 1116, 1121-22 (9th Cir. 2008); *accord Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001).

The Supreme Court has established the minimum requirements for pleading sufficient facts. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556).

In ruling on a Rule 12(b)(6) motion to dismiss, the court accepts all factual allegations as true and construes them, along with all reasonable inferences drawn from them, in the light most favorable to the non-moving party. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001); *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996). The court need not, however, accept legal conclusions as true. *Iqbal*, 556 U.S. at 678. "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Id.* (quoting *Twombly*, 550 U.S. at 555).

In addition to looking at the facts alleged in the complaint, the court may also consider some limited materials without converting the motion to dismiss into a motion for summary judgment under Rule 56. Such materials include (1) documents attached to the complaint as

exhibits, (2) documents incorporated by reference in the complaint, and (3) matters properly subject to judicial notice. *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003); accord *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007) (per curiam) (citing *Jacobson v. Schwarzenegger*, 357 F. Supp. 2d 1198, 1204 (C.D. Cal. 2004)). A document may be incorporated by reference, moreover, if the complaint makes extensive reference to the document or relies on the document as the basis of a claim. *Ritchie*, 342 F.3d at 908 (citation omitted).

DISCUSSION

Count I: 11 U.S.C. § 727(a)(2)

The court shall grant the debtor a discharge, unless . . . (2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed--(A) property of the debtor, within one year before the date of the filing of the petition; or (B) property of the estate, after the date of the filing of the petition. . . ."

"To determine whether a pleading adequately states a plausible claim for relief, a court must first take "note of the elements a plaintiff must plead to state a claim." [*Ashcroft v. Iqbal*, *supra*, 556 US at 675, 129 S.Ct. at 1947; *Burtch v. Milberg Factors, Inc.* (3rd Cir. 2011) 662 F3d 212, 220; *Ebner v. Fresh, Inc.* (9th Cir. 2016) 838 F3d 958, 962, 963] *Iqbal*, *supra*, then requires a two-prong analysis: First, conclusory allegations are disregarded; Second, "(w)hen there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." [*Ashcroft v. Iqbal*, *supra*, 556 US at 679, 129 S.Ct. at 1950; *Rodríguez-Reyes v. Molina-Rodríguez* (1st Cir. 2013) 711 F3d 49, 53." O'Connell & Stevenson, *California Practice Guide: Federal Civil Procedure Before Trial: Ninth Circuit and California*, General Pleading Requirements § 8:125 (Rutter Group 2017).

Vetter's § 727(a)(2) count contains to different allegations: (1) transfer of asset; or (2) concealment of assets.

An objection to discharge under § 727(a)(2)(A) requires the plaintiff to prove that (1) a disposition of property, such as a transfer or concealment, occurred and (2) the debtor had the subjective intent to hinder, delay, or defraud a creditor through the act of disposing of the property. *Hughes v. Lawson (In re Lawson)*, 122 F.3d 1237, 1240 (9th Cir. 1997). Both elements must have taken place within the one-year period prior to the petition date. *Id.* The debtor's intent does not need to be fraudulent; it is sufficient that the debtor's intent is only to hinder or delay a creditor. *Bernard v. Sheaffer (In re Bernard)*, 96 F.3d 1279, 1281 (9th Cir. 1996). Further, "lack of injury to creditors is irrelevant for purposes of denying a discharge in bankruptcy." *Id.* at 1281-82 (citing *First Beverly Bank v. Adeeb (In re Adeeb)*, 787 F.2d 1339, 1343 (9th Cir. 1986)).

Transfer

The First Amended Complaint alleges conclusions, but insufficient **facts** to support the complaint. "While brevity is required, it is not enough simply to allege that a wrong has been committed and demand

relief. The underlying requirement is that a pleading give "fair notice" of the claim being asserted and the "grounds upon which it rests." [*Bell Atlantic Corp. v. Twombly* (2007) 550 US 544, 555, 127 S.Ct. 1955, 1964 (internal quotes omitted); *Swierkiewicz v. Sorema N.A.* (2002) 534 US 506, 513, 122 S.Ct. 922, 998 (same); *Oliver v. Ralphs Grocery Co.* (9th Cir. 2011) 654 F3d 903, 908].” *Id.* at § 8:115.

The complaint states only "In the alternative, the Defendants have transferred their interest back to Rafael Alonso or another family member within one year of the filing of their petition." First Amended Complaint ¶¶ 24, 26(c). This does not fairly put the defendant on notice of the claim asserted or the grounds upon which it rests. Second, as to the second element, i.e. delay, hinder or defraud, the complaint has no factual allegations. The complaint fails to state a cause of action under 11 U.S.C. § 727(a)(2)(A) for transfer. It is made worse by the only vague allegation of time, i.e. "within one year of the filing of their petition." Had the complaint been more specific with respect to the transfers and intent a general statement of time, "within one year" of the petition might be sufficient. But here it only makes the problem worse.

Concealment

The First Amended Complaint does state a cause of action under a concealment theory. It pleads concealment. "The Defendants have **concealed their ownership** interest in the business, Summer Fresh Company **The business continues to operate and the Defendants have concealed their interest and its operation. . . .**" First Amended Complaint ¶ 23. It also pleads the subjective intent to hinder, delay or defraud creditors. "The Defendants have **concealed** their ownership interest in the business, Summer Fresh Company **by failing to list** the money, its location or disposition, **the business ownership interest** and its going concern value and/or interest in summer Fresno Company" *Id.* By alleging that the business continues to operate brings it within the one year of the petition. *Id.*

As a result, the motion will be denied with respect to Count I of the complaint.

Count II: 11 U.S.C. § 727(a)(3)

"The court shall grant the debtor a discharge, unless . . . (3) the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case." 11 U.S.C. § 727(a)(3).

The Supreme Court has established the minimum requirements for pleading sufficient facts. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556).

As one source noted, "Whether a debtor's books and records are "adequate" is a fact specific inquiry—i.e., what is reasonably required under the circumstances: "It is a question in each instance of reasonableness in the particular circumstances. Complete disclosure is in every case a condition precedent to the granting of discharge, and if such a disclosure is not possible without the keeping of books or records, then the absence of such amounts to that failure to which (§ 727(a)(3)) applies." [*In re Schifano* (1st Cir. 2004) 378 F3d 60, 68 (parentheses added); *Meridian Bank v. Alten* (3rd Cir. 1992) 958 F2d 1226, 1230]." March, Ahart & Shapiro, *California Practice Guide: Bankruptcy*, Discharge and Nondischargeability § 22:960 (Rutter Group 2016).

"In determining the adequacy of books and records under § 727(a)(3), the court considers: the debtor's intelligence and educational background; the debtor's experience in business matters; the extent of involvement in the businesses for which discharge is sought; the debtor's reliance, including his or her knowledge of whether records were being kept; the nature of the marital relationship; and any recordkeeping or inquiry duties imposed upon the debtor by state law. [*In re Lopez* (BC CD CA 2015) 532 BR 140, 150; see also *In re Caneva* (9th Cir. 2008) 550 F3d 755, 762—sophisticated business people held to higher standard of recordkeeping]." March, Ahart & Shapiro, *California Practice Guide: Bankruptcy*, Discharge § 22:965 (Rutter Group 2016)

The First Amended Complaint alleges that the debtor failed to keep records for transactions that occurred four and one-half years before they filed bankruptcy. Compare, First Amended Complaint ¶ 29 (dates of August 2011, through January 2012), with Petition (June 30, 2016). Paragraph 31 of the complaint alleges "There is no justification for not keeping or preserving the business records" First Amended Complaint ¶ 31. This court disagrees. The passage of four and one-half years between the transactions that give rise to the records claim and the petition and a lack of additional showings under the *Lopez* factors does not state a plausible claim under § 727(a)(3).

As a result the motion will be granted as to Count II.

Count III: 11 U.S.C. § 727(a)(4)(A)

The court shall grant the debtor a discharge, unless-- the debtor knowingly and fraudulently, in or in connection with the case--(A) made a false oath or account." 11 U.S.C. § 727(a)(4)(A).

"False oath: Discharge will be denied where: the debtor made a false oath in connection with the bankruptcy case; the oath related to a material fact; the oath was made knowingly; and the oath was made fraudulently. [*In re Retz* (9th Cir. 2010) 606 F3d 1189, 1197; *In re French* (4th Cir. 2007) 499 F3d 345, 352; *In re Roberts* (9th Cir. BAP 2005) 331 BR 876, 882]." Id. at § 22:896. False oaths must be material. 11 U.S.C. s 727(a)(4)(A); *In re Retz*, 606 F.3d 1189, 1197 (9th Cir. 2010). ". . . A statement is material if it bears on the debtor's business transactions, the debtor's estate, the discovery of assets, or the existence and disposition of the debtor's property."

March, Ahart & Shapiro, California Practice Guide: Bankruptcy, Discharge and Nondischargeability § 22:905(Rutter Group 2016) (internal citation omitted).

Vetter argues that six species of false oaths apply: (1) representations in the schedules that the debtor had no cash or money in her bank account on the petition date, First Amended Complaint ¶ 35; (2) failure to list the business checking account for Summer Fresh, First Amended Complaint ¶ 36; (3) failure to list the Chapter 7 trustee or his counsel as creditors, First Amended Complaint ¶ 37; (4) indicating Camacho has no co-debtors on Schedule H "in a community property state," First Amended Complaint ¶ 38; (5) misidentifying the Gorski [the former trustee] litigation as pending in Sacramento, not Fresno, First Amended Complaint ¶ 39; and (6) indicating the that debtor did not own a business within 4 years of the petition, First Amended Complaint ¶ 40.

Noticing Issues/Co-debtors/Venue

This court has already ruled that materiality was lacking as to failure to list the Chapter 7 trustee or his counsel as creditors, indicating Camacho has no co-debtors on Schedule H "in a community property state," misidentifying the Gorski [the former trustee] litigation as pending in Sacramento, not Fresno. Civil minutes * 3, January 4, 2017, ECF # 34. The First Amended Complaint restates without change these allegations. As a consequence, the court will not now change its ruling.

Cash and Checking Accounts

As to first (cash and personal checking), second (business checking) and sixth (business ownership) omissions, Vetter has not plead that these are false or fraudulent intent. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). As to the cash and checking accounts, the complaint does not plead falsity. The closest it comes is paragraph 35 of the First Amended Complaint, which states, "The Defendants could not have paid their day-to-day expenses without any cash or any money in the bank account." This is an insufficient showing of falsity under *Iqbal* and *Twombly*.

Business Interests

Vetter alleges ownership of a business ownership and/or operation within four years of the petition. First Amended Complaint ¶¶ 40-41.

Ninth Circuit law provides guidance on materiality as applied to a false oath under § 727(a)(4)(A). It is generally true that ". . . A statement is material if it bears on the debtor's business transactions, the debtor's estate, the discovery of assets, or the existence and disposition of the debtor's property." March, Ahart & Shapiro, California Practice Guide: Bankruptcy, Discharge and Nondischargeability § 22:905(Rutter Group 2016) (internal citation

omitted). But there are two corollaries. First, a false statement or an omission may be material even if there is not direct financial prejudice to creditors. *In re Bernard*, 96 F.3d 1279, 1281-82 (1996); *United States v. Lindholm*, 24 F.3d 1079, 1083 (1994). Second, omissions or misstatements about assets with nominal value are not material. *In re Swanson*, 36 B.R. 99, 100 (9th Cir. BAP 1984). And omission may be material if it detrimentally impacts administration of the estate. *In re Willis*, 243 B.R. 58, 63-64 (9th Cir. BAP 1999).

Here, "The Defendants indicated that they did not own a business within 4 years of the petition despite the fact both Defendants knew the Wife Defendant owned businesses that operated within 4 years of filing. The failure to list business interests within 4 years of filing was part of a scheme to hinder delay and conceal asset of the estate from the Trustee, creditors and other parties in interest by knowingly and fraudulently making a false oath and account in connection with this case." First Amended Complaint ¶¶ 40-41. The most that can be said of the trustee's First Amended Complaint is that it pleads that Camacho's omitted that Wife Defendant operated her business, Summer Fresh, within fours of the date of her bankruptcy. But it does not plead that the estate was adversely effected, e.g. that the business continued to own assets of more than a nominal value that the trustee might liquidate or that the business had engaged in avoidable transfers the statute of limitations for which had not yet expired. For these reasons, the trustee has not yet shown that the omission was material for purposes of 727(a)(4)(A).

As a result, the motion will be granted as to Count III.

Count IV: 11 U.S.C. § 727(a)(4)(D)

"The court shall grant the debtor a discharge, unless-- the debtor knowingly and fraudulently, in or in connection with the case--(D) withheld from an officer of the estate entitled to possession under this title, any recorded information, including books, documents, records and papers, relating to the debtor's property or financial affairs." 11 U.S.C. § 727(a)(4)(D).

Vetter's sole allegation is that "The Defendants withheld from an officer of this estate, Randell Parker, and the officer of the Bankruptcy Estate of Rafael Alonso, case no. 12-11008-A-7, Vincent Gorski [the former trustee], the recorded information, including but not limited to books, documents or records related to the business activities of the Defendants." First Amended Complaint ¶ 44. Paragraph 44 then specifies the particular records demanded. *Id.*

Two of the three problems related to the original complaint continued to exist. First, Vetter has no right to assert trustee Randell Parker's rights under § 727(a)(4)(D). Parker is the trustee and sole representative of the Camacho estate. 11 U.S.C. § 323(a).

Second, as to the Camacho estate, there is no indication that Vetter, the trustee in the Alonso bankruptcy, is "entitled" to any records from the defendants Camacho, over whom Vetter holds no rights. Vetter does not allege these are property of the estate. 11 U.S.C. § 542. Much to the contrary, the records he seeks belong to the debtors'

personally. First Amended Complaint ¶¶ 9-10, 44.

As a result, the motion will be granted as to Count IV.

Count V: 11 U.S.C. § 727(a)(5)

"The court shall grant the debtor a discharge, unless . . . the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities..." 11 U.S.C. § 727(a)(5).

As one commentator noted, "Under § 727(a)(5), once it is shown that the debtor had a cognizable ownership interest in a specific identifiable property at a time not too far removed from the date of filing his petition, the burden is on the debtor to satisfactorily explain the loss of that particular asset, if at the time the petition is filed, the debtor claims he no longer has the particular property." [*In re Beausoleil* (BC D RI 1992) 142 BR 31, 37; *In re Lane* (BC D ID 2003) 302 BR 75, 81]." March, Ahart & Shapiro, California Practice Guide: Bankruptcy, Discharge and Nondischargeability § 22:992 (Rutter Group 2016)

Vetter argues Camacho's discharge should be denied for failure to explain the loss of assets, which he describes as "\$991,203.77 million (sic) dollars in assets plus the going concern value of the Summer Fresh Company business worth an estimated \$1 million dollars, which is still believed to be in operation." First Amended Complaint ¶ 48.

\$991,203.77

The \$991,203.77 is the aggregate amount of the alleged avoidable transfers. First Amended Complaint ¶¶ 13, 15 & 18. The problem is that some four and one-half years before the petition date these assets do not meet the proximity requirements of *Beausoleil*.

\$1 Million Dollar Goodwill

The only pleadings pertaining to going concern value is "plus the going concern value of the Summer Fresh Company business worth an estimated \$1 million dollars, which is still believed to be in operation." First Amended Complaint ¶ 48. This does not satisfy the factual requirements of *Iqball* and *Twombly*.

As a result, the motion will be granted as to Count V.

Count VI: 11 U.S.C. § 727(a)(7)

"The court shall grant the debtor a discharge, unless . . . the debtor has committed any act specified in paragraph (2), (3), (4), (5), or (6) of this subsection, on or within one year before the date of the filing of the petition, or during the case, in connection with another case, under this title or under the Bankruptcy Act, concerning an insider." 11 U.S.C. § 727(a)(7).

"Section 727(a)(7) is limited to acts occurring within one year before the filing of (or during) the bankruptcy case of the debtor whose discharge is at issue (not one year from the filing of the other debtor's case). [*In re Goodman* (BC ED PA 1998) 227 BR 626, 629]." March, Ahart & Shapiro, *California Practice Guide: Bankruptcy, Discharge and Nondischargeability* § 22:1047 (Rutter Group 2016).

There are two problems in this regard.

One Year Rule

There must be an act by these debtor within one year before their case. The acts of which Vetter complains occurred in 2011 and 2012. As a result, they do not fall within the one year limitation described in § 727(a)(7).

Plaintiff Vetter attempts to bring himself within the one year rule by pleading that "It is believed that the Summer Fresh Company business continued to operate until the day of the filing and continues to operate. Therefore, the Defendants have committed acts described within one year of filing and during the bankruptcy." First Amended Complaint ¶ 52. Even if this were so, Vetter does not plead how these acts impact the Alonso case and, therefore, fall within § 727(a)(7).

By these Debtors in Another Case

The defendant debtors must perform an act of the kind described in § 727(a)(2)-(6) in another case. But Vetter has not yet plead these debtors committed one of those acts in another case, e.g. Alonso bankruptcy.

The motion will be granted as Count VI.

Count VII: 11 U.S.C. § 523(a)(2)(A)

"To except a debt from discharge under § 523(a)(2)(A), the creditor must show: the debtor made representations that at the time the debtor knew to be false; the debtor made those representations with the intention and purpose of deceiving the creditor (scienter); the creditor justifiably relied on those representations; and the creditor sustained losses as a proximate result of the debtor's representations. [*In re Shannon* (9th Cir. BAP 2016) 553 BR 380, 388; *In re Sabban* (9th Cir. 2010) 600 F3d 1219, 1222; *In re Eashai* (9th Cir. 1996) 87 F3d 1082, 1086]." March, Ahart & Shapiro, *California Practice Guide: Bankruptcy, Discharge and Nondischargeability* § 22:452 (Rutter Group 2016).

Vetter pleads that at defendant Alejandra Camacho's 2004 examination on January 26, 2015, she falsely represented the Summer Fresh commenced operations in August 2011, and cease operations in December 2013. As a result, the trustee withheld avoidance actions for (1) pre-petition actions, occurring between August 2011, and early February 2012, First Amended Complaint ¶ 13, 15, and (2) one post-petition transfer, February 9, 2012. First Amended Complaint 18.

Goods/Property/Services/Extensions

Defendants Camacho argues that only debts for "money, property, services, or an extension of credit. 11 U.S.C. § 523(a)(2)(A). This court disagrees. *Husky Int'l Electronics, Inc. v. Ritz*, 136 S.Ct. 1581, 1586 (2016) (fraudulent transfers). But the court need not actually reach this issue.

Justifiable Reliance

Here, there is no justifiable reliance. Defendant Camacho merely represented the start and stop dates for the business. She did not represent that the offending transactions, if any, did not occur.

Proximately Caused Damages

Damages could not be proximately caused by any false representation because the statute of limitations had already expired. For pre-petition transactions the statute of limitations expired 2 years after the order for relief. 11 U.S.C. § 546(a)(1). Since Alonso filed his petition February 6, 2012, the statute expired on February 6, 2014, almost one year before the statements. For the post-petition transfer the statute expired two years after the transaction. 11 U.S.C. § 546(d). That date was February 9, 2014, again before defendant Camacho made her statements.

The motion will be granted as to Count VII.

Count VIII: 11 U.S.C. § 524(a)(4)

Vetter pleads that the three factual transactions described form the basis to except the debt as larceny. First Amended Complaint ¶ 63-65.

The First Amended Complaint adds nothing of significance to the original complaint. "For purposes of § 523(a)(4), the bankruptcy court is not bound by the concept of larceny as defined by state law; it may follow the federal common law, which defines larceny as a "felonious taking of another's personal property with the intent to convert it or deprive the owner of same." [*Matter of Ormsby* (9th Cir. 2010) 591 F3d 1199, 1205 (internal quotes omitted)]1) [22:650.1] "Felonious" defined: "Felonious" means "proceeding from an evil heart or purpose; malicious; villainous ... Wrongful; (of an act) done without excuse of color of right." [*Matter of Ormsby*, supra, 591 F3d 1205, fn. 4 (internal quotes omitted)]." March, Ahart & Shapiro, *California Practice Guide: Bankruptcy, Discharge and Nondischargeability* § 22:650 (Rutter Group 2016).

Vetter's allegation that Alonso voluntarily transferred the money to Camacho to avoid creditors defeats any argument that Camacho has committed larceny. Dischargeability Action ¶¶ 12-18.

The motion will be granted as to Count VIII.

Count IX: 11 U.S.C. 523(a)(6)

Vetter contends that Camacho action support excepting the debt under the willful and malicious exception. 11 U.S.C. § 523(a)(6).

"A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt . . . for willful and malicious injury by the debtor to another entity or to the property of another entity." 11 U.S.C. § 523(a)(6).

"The type of debts excluded from discharge under § 523(a)(6) "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." [*Kawaauhau v. Geiger* (1998) 523 US 57, 61-62, 118 S.Ct. 974, 977 (internal quotes and emphasis omitted); *In re Steger* (8th Cir. BAP 2012) 472 BR 533, 537]." March, Ahart & Shapiro, *California Practice Guide: Bankruptcy, Discharge and Nondischargeability* § 22:662(Rutter Group 2016).

"The "willful injury" requirement is met when the creditor shows that: the debtor had a subjective motive to inflict the injury; or the debtor believed the injury was substantially certain to occur as a result of his or her conduct. [*In re Jercich* (9th Cir. 2001) 238 F3d 1202, 1208; *In re Su*, supra, 290 F3d at 1144; *Matter of Ormsby*, supra, 591 F3d at 1206]." March, Ahart & Shapiro, *California Practice Guide: Bankruptcy, Discharge and Nondischargeability* § 22:670(Rutter Group 2016).

"A "malicious injury" under § 523(a)(6) involves: a wrongful act; done intentionally; that necessarily causes injury; and that is committed without just cause or excuse. [*In re Jercich*, supra, 238 F3d at 1209; *In re Thiara* (9th Cir. BAP 2002) 285 BR 420, 427; *In re Qari* (BC ND CA 2006) 357 BR 793, 798]." March, Ahart & Shapiro, *California Practice Guide: Bankruptcy, Discharge and Nondischargeability* § 22:680(Rutter Group 2016).

Vetter argues that Camacho's embezzlement and larceny constitute a "willful and malicious injury" as to another entity, e.g. the Rafael Alonso estate. The First Amended Complaint fails to plead the subjective intent to injure or knowledge that injury is substantially certain to follow. Much to the contrary, it pleads that defendants "knew or should have known" that these were wrongful acts." First Amended Complaint ¶¶ 74. Moreover, even if consistent with the willfulness intent standards (which they are not), the pleading fails to plead facts from which the court can independently decide whether such a cause of action exists.

The motion will be granted as to Count IX.

6. [12-11008](#)-A-7 RAFAEL ALONSO
[15-1044](#)
VETTER V. CAMACHO
RESPONSIVE PLEADING

CONTINUED STATUS CONFERENCE RE:
AMENDED COMPLAINT
12-10-15 [[44](#)]

No tentative ruling.