UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

Honorable Fredrick E. Clement
Fresno Federal Courthouse
2500 Tulare Street, 5th Floor
Courtroom 11, Department A
Fresno, California

PRE-HEARING DISPOSITIONS

DAY: WEDNESDAY
DATE: MARCH 28, 2018
CALENDAR: 10:00 A.M. CHAPTER 7 ADVERSARY PROCEEDINGS

Each matter on this calendar will have one of three possible designations: No Ruling, Tentative Ruling, or Final Ruling. These instructions apply to those designations.

No Ruling: All parties will need to appear at the hearing unless otherwise ordered.

Tentative Ruling: If a matter has been designated as a tentative ruling it will be called. The court may continue the hearing on the matter, set a briefing schedule or enter other orders appropriate for efficient and proper resolution of the matter. The original moving or objecting party shall give notice of the continued hearing date and the deadlines. The minutes of the hearing will be the court's findings and conclusions.

Final Ruling: Unless otherwise ordered, there will be no hearing on these matters. The final disposition of the matter is set forth in the ruling and it will appear in the minutes. The final ruling may or may not finally adjudicate the matter. If it is finally adjudicated, the minutes constitute the court's findings and conclusions. If the parties stipulate to continue the hearing on the matter or agree to resolve the matter in a way inconsistent with the final ruling, then the court will consider vacating the final ruling only if the moving party notifies chambers before 4:00 pm at least one business day before the hearing date: Department A-Kathy Torres (559)499-5860; Department B-Jennifer Dauer (559)499-5870. If a party has grounds to contest a final ruling because of the court's error under FRCP 60 (a) (FRBP 9024) ["a clerical mistake (by the court) or a mistake arising from (the court's) oversight or omission"] the party shall notify chambers (contact information above) and any other party affected by the final ruling by 4:00 pm one business day before the hearing.

Orders: Unless the court specifies in the tentative or final ruling that it will issue an order, the prevailing party shall lodge an order within 14 days of the final hearing on the matter.

1. 17-14347-A-7 **IN RE: AMY AGTARAP**
18-1003

STATUS CONFERENCE RE: COMPLAINT
1-19-2018 [1]

AYALA V. AGTARAP
RONALD CALHOUN/ATTY. FOR PL.
RESPONSIVE PLEADING

No Ruling

2. 17-12781-A-7 **IN RE: DALIP NIJJAR**
17-1065

CONTINUED STATUS CONFERENCE RE: AMENDED COMPLAINT
5-5-2017 [63]

SALVEN V. NIJAR
RESPONSIVE PLEADING

No Ruling

3. 17-12781-A-7 **IN RE: DALIP NIJJAR**
17-1066

CONTINUED STATUS CONFERENCE RE: AMENDED COMPLAINT
1-31-2018 [151]

SALVEN V. NIJJAR ET AL
PETER SAUER/ATTY. FOR PL.

No Ruling

4. 17-12781-A-7 **IN RE: DALIP NIJJAR**
17-1066 GMJ-4

MOTION TO DISMISS CAUSE(S) OF ACTION FROM SECOND AMENDED COMPLAINT
2-21-2018 [159]

SALVEN V. NIJJAR ET AL
DAVID GILMORE/ATTY. FOR MV.
RESPONSIVE PLEADING

Tentative Ruling

Motion: Dismiss Adversary Complaint under Rule 12(b)(6)
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Granted in part without leave to amend; denied in part
Order: Civil minute order

Virpal Nijjar, VK Nijjar Farms, Inc. and Nijjar Farms, LLC ("the Nijjar defendants") move under Rule 12(b)(6) to dismiss an adversary proceeding filed against them by James E. Salven ("Salven"), chapter 7 trustee of the Estate of Dalip Nijjar. Dalip Nijjar and Virpal Nijjar married in 1989 and, allegedly, divorced in 2008 in Nevada. Both before and after their divorce Dalip Nijjar and Virpal Nijjar, individually and/or through entities owned by one or both of them, purchased land and engaged in farming operations in the San Joaquin Valley.

Salven has filed a second amended adversary complaint against the Nijjar defendants alleging the following claims: (1) the Nevada divorce decree is invalid; (2) if valid the Nevada divorce decree as valid, that the Nijjars' community property was never divided and, therefore is property of the estate, 11 U.S.C. § 541(a)(2); (3) Dalip Nijjar's transfer of four of the couple's parcels of real property in 2008, and thereafter were actually fraudulent, 11 U.S.C. § 544(b); (4) Dalip Nijjar's transfer of four of the couple's parcels of real property in 2008, and thereafter were constructively fraudulent, 11 U.S.C. § 544(b); (5) an "interspousal transfer" of real property, transfers of two checks aggregating $6,648 deposited to Nijjar Farms Inc., 13 checks aggregating $79,090 deposited into Virpal's account # 3651 and two checks aggregating $2,942.30 were fraudulent transfers, 11 U.S.C. § 548; (6) three transfers aggregating $96,280.03, three transfers aggregating $135,000 to VK Nijjar Farms, LLC, and two transfers aggregating $78,525.65 were fraudulent, 11 U.S.C. § 544(b); (7) Dalip Nijjar holds a 50% ownership in VK Nijjar Farms, LLC and request an order so declaring; and (8) entitlement to an order to windup, sale and liquidate the assets of VK Nijjar Farms, LLC, *see* Cal. Corp. Code §§ 17707.04, 17707.05.

The Nijjar defendants have moved under Rule 12(b)(6) to dismiss the first through fourth, as well as the seventh and eighth,

causes of action in the Second Amended complaint. Salven has opposed that motion.

LAW

Iqbal and *Twombly*

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).

"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.

Iqbal then requires a two-prong analysis as discussed in a well-known treatise on procedure:

> 1) [9:226.22] **Conclusory allegations disregarded**: First, the court must identify which statements in the complaint are factual allegations and which are legal conclusions. Courts are not bound to accept as true allegations that are legal conclusions, even if cast in the form of factual allegations. [*See Ashcroft v. Iqbal, supra*, 556 US at 681, 129 S. Ct. at 1951—"It is the conclusory nature of respondent's allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth" (emphasis added); *Chaparro v. Carnival Corp.* (11th Cir. 2012) 693 F3d 1333, 1337—"if allegations are indeed more conclusory than factual, then the court does not have to assume their truth"]. . . .
>
> 2) [9:226.25] **Sufficiency of factual allegations**: Second, the court, drawing "on its judicial experience and common sense," must decide in the specific context of the case whether the factual allegations, if assumed true, allege a plausible claim. [*Ashcroft v. Iqbal, supra*, 556 US at 679, 129 S.Ct. at 1950; *Wilson v. Birnberg* (5th Cir. 2012) 667 F3d 591, 595]
>
> "(T)he complaint should be read as a whole, not parsed piece by piece to determine whether each allegation, in isolation, is plausible." [*Braden v. Wal-Mart*

> *Stores, Inc.* (8th Cir. 2009) 588 F3d 585, 594 (emphasis added); *García-Catalán v. United States* (1st Cir. 2013) 734 F3d 100, 103]
>
> An inference of liability is not plausible when the allegations of the complaint give rise to an "obvious alternative explanation" of legality. [*Ashcroft v. Iqbal*, supra, 556 US at 682, 129 S.Ct. at 1951]
>
> However, "(t)he choice between two plausible inferences that may be drawn from factual allegations is not a choice to be made by the court on a Rule 12(b)(6) motion." The court cannot dismiss a complaint that alleges a "plausible version of the events merely because the court finds a different version more plausible." [*AndersonNews, L.L.C. v. American Media, Inc.* (2nd Cir. 2012) 680 F3d 162, 185; *see HDC,LLC v. City of Ann Arbor* (6th Cir. 2012) 675 F3d 608, 613— "mere existence of an 'eminently plausible' alternative, lawful explanation … not enough to dismiss a complaint raising a plausible claim . . . ."

O'Connell and Stevenson, *Federal Civil Procedure Before Trial: California and Ninth Circuit Edition* §§ 9:226.21-9:226.25 (Rutter Group 2017).

Rule 12(b)(6)

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).

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 curium) (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).

Declaratory Relief

Plaintiff's first and fifth causes of action request declaratory relief under Fed. R. Civ. P. 57. First Am. Compl., May 5, 2017, ECF # 63. Rule 57 is not applicable to adversary proceedings. *In re City of Cent. Falls, R.I. v. Central Falls Teachers Union (In re City of Cent. Falls, R.I.)*, 468 B.R. 36, 44 (Bankr. D.R.I. 2012).

But § 2201(a) of title 28 of the United States Code does authorize declaratory relief by this court. It 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.

28 U.S.C.A. § 2201(a).

Bankruptcy courts are courts of the United States for purposes of § 2201(a). Moreover, declaratory relief is specifically contemplated by Fed. R. Bankr. P. 7001(2). As a consequence, the court will treat causes of action pled under Rule 57 as a request for relief under 28 U.S.C. § 2201(a).

DISCUSSION

First Cause of Action: Declaratory Relief (Nevada Divorce)

Salven seeks declaratory relief determining that the Nijjars' divorce decree rendered in Nevada is invalid. Second Am. Compl., January 31, 2018, ECF # 151. The Nijjar defendants move to dismiss the first cause of action because (1) Nevada Revised Statute § 125.185 precludes a third party from attacking an order of marital dissolution, (2) *Rooker-Feldman* precludes collateral

attack of the Nevada dissolution judgment, and (3) under the standards enunciated in *Iqbal* and *Twombly*, Salven has failed to plead sufficient facts from which the court may independently concluded that a cause of action exists.

A thorny set of legal issues arises from a collateral attack of a foreign dissolution proceeding on a variety of grounds, including lack of subject matter jurisdiction, lack of personal jurisdiction, a statute precluding such attack, the *Rooker-Feldman* doctrine. The court first will set forth several black-letter legal principles.

> **With one exception [not applicable here, Cal. Fam. Code § 2320(b)(1)], a judgment of dissolution entered by a state in which neither party is domiciled is 'void.'** [*Crouch v. Crouch* (1946) 28 C2d 243, 249, 169 P2d 897, 900—"decree of divorce rendered in one state may be impeached and denied recognition in another upon the ground that neither of the parties had domicile at the divorce forum"]
> Thus, subject to the bar of res judicata or collateral estoppel, a court's domicile jurisdiction to dissolve a marriage may be challenged by: [1] direct attack in the dissolution action (motion to dismiss or quash in the pending action, see Ch. 4; or after default judgment, by timely set-aside motion or direct appeal, see Ch. 16); or [2] collateral attack (e.g., in a subsequent enforcement action). [See *Crouch v. Crouch*, supra, 28 C2d at 249-252, 169 P2d at 900-902—W's Calif. dissolution action not barred by H's earlier divorce decree rendered by Nevada court lacking domicile jurisdiction][.]

Hogoboom and King, *California Practice Guide: Family Law* § 3:79 (Rutter Group 2017) (emphasis added).

> **A judgment imposing personal obligations (support, etc.) is subject to collateral attack if the forum court lacked personal jurisdiction over the obligor.** [See, e.g., *Kulko v. Super.Ct.* (1978) 436 US 84, 98 S.Ct. 1690; *Marriage of Stich* (1985) 169 CA3d 64, 214 CR 919; *Marriage of Nosbisch* (1992) 5 CA4th 629, 6 CR2d 817].

Id. § 18:957 (emphasis added).

> **If the disputed issue has already been litigated by the parties, or could have been litigated in the underlying proceeding, the determination is res judicata and cannot be challenged by collateral attack in a later proceeding.** [See *Moffat v. Moffat* (1980) 27 C3d 645, 653-660, 165 CR 877, 881-886; *Wall v. Donovan*

(1980) 113 CA3d 122, 169 CR 644—estoppel to attack domicile jurisdiction; *Smith v. Smith* (1981) 127 CA3d 203, 179 CR 492—prior judgment binding even if incorrectly decided]

Res judicata parameters: Collateral attack will be barred by res judicata if: [A] The challenging party participated in the underlying proceeding; [B] The challenging party had a full opportunity to contest the rendering court's jurisdiction, even if the jurisdictional issue was not actually raised; and [C] The judgment could not be collaterally attacked in the rendering state. [*Sherrer v. Sherrer* (1948) 334 US 343, 351-352, 68 S.Ct. 1087, 1091—first forum's finding of domicile jurisdiction not subject to collateral attack where complaining party appeared and participated in the proceeding; *Heuer v. Heuer* (1949) 33 C2d 268, 201 P2d 385, 386-387; *Souza v. Super.Ct. (Bristow)* (1987) 193 CA3d 1304, 1311, 238 CR 892, 896-897].

Id. at §§ 18:965-66 (emphases added).

Nevada has a statute of the species described in *Sherrer*. It provides, "No divorce from the bonds of matrimony heretofore or hereafter granted by a court of competent jurisdiction of the State of Nevada, which divorce is valid and binding upon each of the parties thereto, may be contested or attacked by third persons not parties thereto." NRS § 125.185. Every known case that has considered NRS § 125.185 has barred a collateral third party from attacking a Nevada divorce. *Gutowsky v. Gutowsky*, 38 Misc. 2d 827 (1963); *Madden v. Cosden*, 271 Md. 118 (1974); *In re Marriage of Winegard*, 278 N.W. 2d 505 (1979); *Kelley v. Kelley*, 147 So. 3d 597 (2014).

As when the court ruled on the defendants' motion to dismiss the First Amended Complaint, Civil Minutes, January 10, 2018, ECF # 131, the court need not, however, address whether NRS § 125.185 precludes Salven from collaterally attacking the divorce judgment issued by the Nevada state court. Nor does the court need to address whether *Rooker-Feldman* precludes such a collateral attack. The reason these arguments need not be addressed is that the first cause of action does not plead facts from which the court may conclude that a cause of action exists against the defendants. As required by Crouch, the Second Amended Complaint does not pled that Virpal Nijjar never resided in Nevada. Second Am. Comp. ¶¶ 6-27, 132. Rather, the Second Amended Complaint consistently pleads that defendant Virpal Nijjar "never moved to Nevada in 2008 with the intent of making Nevada her personal residence." Second Am. Comp. ¶¶ 9, 10, 132. Similar allegations are made as to Dalip Nijjar. Second Am. Comp. ¶¶ 11, 132.

As this court said when it ruled on the defendants' motion to dismiss the First Amended Complaint, "At best, these allegations are ambiguous as to whether Virpal Nijjar resided in Nevada at all, whether she did so other than in 2008, or whether she did so without the intent of making Nevada her personal residence. . . ." Civil Minutes, p. 7, January 10, 2018, ECF # 131. This is a pregnant denial, from which the court infers an admission that Virpal Nijjar resided for some period of time in Nevada, and thus Salven does not satisfy the *Crouch*, standards for attacking the marital dissolution decree.

More importantly, the trustee has plead himself into box canyon. As this court explained in ruling on the motion to dismiss the First Amended Complaint, collateral attack of a marital dissolution proceeding will not lie where the challenging party participated in the underlying proceeding. Civil Minutes, p. 6, January 10, 2018, ECF # 131, quoting Hogoboom and King, *California Practice Guide: Family Law* § 18:965-66, citing *Sherrer v. Sherrer*, 334 U.. 343, 351-352 (1948). Here, the challenging party is the trustee and not Dalip Nijjar. But the court deems the trustee to stand in the husband's shoes. Both the First and Second Amended Complaints plead that the petition was "joint." First Am. Comp. ¶ 35; Second Am. Comp. ¶ 7. This court finds that filing a "joint" petition for dissolution of marriage is sufficient participation within the meaning of *Sherrer* to bar collateral attack.

As a result, the motion will be granted as to the first cause of action.

Second Cause of Action: Declaratory Relief (Community Property Part of the Estate)

Salven's second cause of action seeks a declaration that the four parcels quitclaimed from Dalip Nijjar to Virpal Nijjar remain property of the estate.

The defendants Nijjar move to dismiss arguing transmutation. Salven opposes the motion.

Preliminary Matters

Two matters warrant comment at the outset. First, because the parties assume California law applies, notwithstanding the Nevada marital dissolution, this court will apply California law for purposes of resolving this motion. Second, because the complaint refers to the quitclaim deeds but does not attach copies, the court may consider actual copies of the quitclaim deeds. Second Am. Comp. ¶ 102, January 31, 2018, ECF # 151; Request for Judicial Notice Exh. 4, February 21, 2018, ECF # 162.

Arguments

The trustee argues that, because the Nevada court never divided community property, it remains and is subject to his reach under 11 U.S.C. § 541. The defendants argue that a transmutation occurred from Dalip Nijjar to his spouse when he executed and recorded quitclaim deeds, thus preventing the property from being part of the estate or that the trustee's attack is barred by an unspecified statute of limitations.

Generally

As a rule, community property not divided as a part of marital dissolution proceedings remains after the termination of the marital status and remain subject to the reach of creditors or, in this case, the trustee. *Meija v. Reed*, 31 Cal.4th 657 (2003); *Miller v. Walpin*, 167 B.R. 202 (Bankr. C.D. Cal. 1994).

Transmutation

Two provisions of the Family Code control. Section 850 provides:

> Subject to Sections 851 to 853, inclusive, married persons may by agreement **or transfer**, with or without consideration, do any of the following:
>
> (a) Transmute community property to separate property of either spouse.
> (b) Transmute separate property of either spouse to community property.
> (c) Transmute separate property of one spouse to separate property of the other spouse.

Section 8520 provides:

> California Family Code § 852 governs transmutation. In the pertinent part it provides,
>
> (a) A transmutation of real or personal property is not valid unless made in writing by an express declaration that is made, joined in, consented to, or accepted by the spouse whose interest in the property is adversely affected.
>
> (b) A transmutation of real property is not effective as to third parties without notice thereof unless recorded.

Without more, transfer of one spouse's interest to the other does not work a transmutation.

> A “transfer” of property between spouses is not necessarily a “transmutation” that changes characterization or ownership. As discussed below, a transmutation can occur only by adherence to statutory formalities, which involve more than a mere transfer of or direction to transfer property. [*Marriage of Barneson* (1999) 69 CA4th 583, 591, 81 CR2d 726, 731—“transmutation may be effected by means of a transfer, but a transfer is not necessarily a transmutation”]

Hogoboom and King, *California Practice Guide: Family* § 8:471.2 Transmutation requires an express writing that contains specific elements.

> Fam.C. § 852 is strictly construed to draw a “bright line” between valid and invalid transmutation agreements. Clearly, the agreement must be *in writing*, signed by the spouse whose interest is adversely affected. [Fam.C. § 852(a)] **But, more significantly, “a writing signed by the adversely affected spouse is *not* an ‘express declaration’ … [within the meaning of the statute] *unless* it contains language which expressly states that the characterization or ownership of the property is being changed.”** [*Estate of MacDonald* (1990) 51 C3d 262, 264, 272, 272 CR 153, 155, 160 (original and added emphasis; brackets added); *Marriage of Benson*, supra, 36 C4th at 1107, 32 CR3d at 478-479].

Id. § 8:477 (emphasis added).

The parties debate whether the four quitclaim deeds, which each provide that Dalip Nijjar “remise(s), release(s) and forever quitclaim(s) to Valip Nijjar to parcels at issue is sufficient.

But this court need not reach the close question of whether the language of the deeds meets the express declaration requirement. And that is so because these deeds are presumptively invalid.

> **Fiduciary duty limitation:** Like all interspousal property transactions, property transmutations are subject to the Fam.C. § 721(b) fiduciary standards. **Thus, even if a transmutation is evidenced by the requisite writing, its validity depends on the parties' compliance with the special standards of disclosure respecting marital property that arise out of their confidential and fiduciary relationship** (Fam.C. §§ 721(b), 1100; *see* ¶ 8:576 ff.). [*Marriage of Haines* (1995) 33 CA4th 277, 293, 39 CR2d 673, 683; *Marriage of Barneson*, supra, 69 CA4th at 588, 81 CR2d at 730]

> (a) [8:471.6] **Presumption of undue influence:** Because transmutations are subject to the Fam.C. § 721(b) fiduciary standards, **a transmutation that *unfairly advantages one spouse* (or registered domestic partner) over the other is presumed to have been induced by undue influence. As a result, when the "disadvantaged" party contests the alleged transmutation, the advantaged party has the burden of proving by a preponderance of the evidence (*¶ 8:611.16*) that the transaction was not consummated in violation of his or her fiduciary duties (i.e., evidence showing the transaction was freely and voluntarily consummated, with full knowledge of all the facts and a complete understanding of the effect of the transfer).** [*Marriage of Haines*, supra, 33 CA4th at 296-297, 39 CR2d at 685-686; see also *Marriage of Balcof* (2006) 141 CA4th 1509, 1519-1522, 47 CR3d 183, 190-192; *Marriage of Lund* (2009) 174 CA4th 40, 55, 94 CR3d 84, 97; *and detailed discussion at ¶ 8:611.11, 9:241*]
>
> The nature of the transmutation is immaterial (whether from joint title to SP or vice versa). Fam.C. § 721(b) and its concomitant presumption of undue influence apply to *any* interspousal property transaction where evidence is offered that one spouse has been unfairly disadvantaged by the other. [*Marriage of Delaney* (2003) 111 CA4th 991, 999, 4 CR3d 378, 384; see also *Lintz v. Lintz* (2014) 222 CA4th 1346, 1354, 167 CR3d 50, 56—presumption applicable to multiple unfair property transactions between elderly H (now deceased) and W (*¶ 8:611.20*)]

Id. § 8:471.5-471.6.

As a result, even if the quitclaim deed was a sufficient writing, the quitclaim deeds are presumptively invalid. As a result, the motion will be denied as to the second cause of action.

Third and Fourth Causes of Action: Actual and Constructively Fraudulent Transfers

Salven's third and fourth causes of action attempt to recover the four parcels quitclaimed to Virpal Nijjar as actual or fraudulent transfers.

The Nijjar defendants move to dismiss, arguing the statute of limitations and *Iqbal* and *Twombly*. Salven opposes the motion.

Law of Fraudulent Transfers

Section 544(b) of the Bankruptcy Code establishes the applicable legal rule. It states: "[T]he trustee may avoid any transfer of

an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502(e) of this title." 11 U.S.C. § 544(b)(1).

California has adopted the Uniform Fraudulent Transfer Act, Cal. Civ. Code §§ 3439-3439.14, and recognizes two species of fraudulent transfers: actual fraud and constructive fraud.

As to actual fraud, the statute provides:

> A transfer made or obligation incurred by a debtor is voidable as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation . . . [w]ith actual intent to hinder, delay, or defraud any creditor of the debtor.

Cal. Civ. Code § 3439.04(a)(1).

As to constructive fraud, the statute provides:

> A transfer made or obligation incurred by a debtor is voidable as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation . . . [w]ithout receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor either: (A) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction[; or] (B) Intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due.

Cal. Civ. Code § 3439.04(a)(2).

The statute establishes an alternative test for constructive fraud. It further provides:

> A transfer made or obligation incurred by a debtor is voidable as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor

> became insolvent as a result of the transfer or obligation.

Cal. Civ. Code § 3439.05.

Statute of Limitations

Bankruptcy trustees invoking the avoidance powers under 11 U.S.C. § 544(b) must satisfy two time deadlines: (1) applicable state law statutes of limitation or repose, and (2) 11 U.S.C. § 546(a) (ordinarily two years after the order for relief). Section 546(a) is not applicable here. And the only issue is whether any creditor held a claim not barred by applicable state law on the date of the petition. *In re EDP Inv.*, 523 B.R. 680, 692 (9th Cir. BAP 2015).

Actual and constructive fraud have different statutes of limitations. For actual fraud actions, the statute of limitations extends "[1] not later than four years after the transfer was made or obligation was incurred; or [2] if later, not later than one year after the transfer or obligation was or reasonably could have been discovered. [Calif. Civ.C. § 3439.09(a); *see Monastra v. Konica Business Machines*, U.S.A., Inc. (1996) 43 CA4th 1628, 1645, 51 CR2d 528, 539; *In re Serrato* (BC ND CA 1997) 214 BR 219, 226]." March, Ahart & Shapiro, *California Practice Guide: Bankruptcy*, Prejudgment Collection § 3:352.1 (Rutter Group 2017).

For constructive fraud in which transfers were made for less than "reasonably equivalent value," leaving the debtor insolvent or with unreasonably small assets for its operations, the statute of limitations extends to "not later than four years after the transfer was made or the obligation was incurred. [Calif. Civ.C. § 3439.09(b); *Monastra v. Konica Business Machines, U.S.A., Inc.*, supra, 43 CA4th at 1645, 51 CR2d at 539]" *Id.* § 3:352.2.

Subject to tolling exceptions, both are subject to a seven year statute of repose. "Notwithstanding any other provision of law, a cause of action under this chapter with respect to a transfer or obligation is extinguished if no action is brought or levy made within seven years after the transfer was made or the obligation was incurred." Cal. Civ. Code § 3439.09(c).

Actual or Constructive Fraudulent Transfers

Construed in the light most favorable to the trustee as the non-movant, the Second Amended Complaint does not plead a cause of action for actual or fraudulent transfer within the 4-year statute of limitations. The outside date on which an actual fraudulent transfer action must have been filed is four years after the transfer or the debt was incurred ("the presumptively timely rule") or, if later, not later than one year after the

transfer “was or reasonably could have been discovered” (“discovery rule”). The outside date for a constructive fraudulent transfer is four years after the transfer or the debt was incurred. There is no delayed discovery rule for constructively fraudulent transfers. Neither action may be brought later than 7 years after the transfer was made or obligation was incurred. Cal. Civ. Code § 3439.09(a),(c).

For purposes of the four-year statute of limitations, the clock started on the later of date the transfer was recorded or the obligation incurred. *See* Cal. Civ. Code § 3439.06(a)(1). Here, those transfers occurred on July 7, 2008, and August 12, 2008. Second Am. Comp. ¶ 36, 102, January 31, 2018, ECF # 151. The clock stopped when a creditor (here, Fresno Truck Center) or the trustee filed a complaint challenging the transfer. *Kupetz v. Wolf*, 845 F.2d 842, 845 (9th Cir. 1988); *In re Brun*, 360 B.R. 669, 671 (Bankr. C.D. Cal. 2007). Here, that occurred on December 2, 2014. Second Am. Comp. ¶ 78, January 31, 2018, ECF # 151. Since creditor Fresno Truck Center’s complaint was filed more than 4 years after the quitclaim deed was recorded or the debt incurred, the Second Amended Complaint pleads facts indicating this creditor’s complaint fell outside the statute of limitations. As a result, the constructive fraudulent transfer is barred and, absent, the delayed discovery rule, the actual fraudulent transfer is barred.

Actual Fraudulent Transfer-Delayed Discovery Rule

The discovery rule, moreover, applies to cases that fall outside the four-year statute of limitations. In this case, under the discovery rule, the complaint is only timely if it was filed within one year after the transfer “was or reasonably could have been discovered” *and* within the statute of repose (before July 7, 2015, the 7 year anniversary of the transfer.

The Ninth Circuit Appellate Panel has rejected the argument that the mere recordation of a deed starts the clock for the purposes of the discovery rule. *In re Ezra*, 537 B.R. 924 (9th Cir. BAP 2015) (rejecting recordation as a reason the trustee should have known of the transfer). The *Ezra* court noted that the discovery rule “does not commence until the plaintiff has reason to discover the fraudulent nature of the transfer.”

The Bankruptcy Appellate Panel recently applied this discovery rule. It stated as follows:

> In any event, for purposes of this appeal, suffice it to say that [the trustee] could not have properly invoked this discovery rule **unless he alleged facts plausibly tending to demonstrate that the fraudulent nature of the transfers was not discovered earlier and reasonably could not have been discovered earlier.** See

> *Denholm v. Houghton Mifflin Co.*, 912 F.2d 357, 362 (9th Cir. 1990); *Sun 'n Sand, Inc. v. United Cal. Bank*, 21 Cal. 3d 671, 701–02 (1978); *see also Ezra v. Seror (In re Ezra)*, 537 B.R. 924, 933 (9th Cir. BAP 2015) ("the one-year period under Cal. Civ. Code § 3439.09(a)'s discovery rule does not commence until the plaintiff has reason to discover the fraudulent nature of the transfer.").

In re Mihranian, No. 2:13-BK-39026-BR, 2017 WL 2775044, at *10 (B.A.P. 9th Cir. June 26, 2017)

Mihranian requires a two-part factual showing: (1) the fraudulent nature of the transfer was not **actually** discovered earlier; and (2) the fraudulent nature of the transfer **could not reasonably** have been discovered earlier. The complaint adequately pleads the former. Second Am. Comp. ¶ 159, January 31, 2018, ECF # 151. It does not satisfy the later. It pleads only that Fresno Truck Center "had no reason to be aware of the Quit Claim Deeds at the time they were recorded." Second Am. Comp. ¶ 160, January 31, 2018, ECF # 151. This is not a fact, but rather a conclusion. And it is insufficient to invoke the delayed discovery rule under *Mihranian*.

Super-creditor/IRS

Salven contends that he stands in the shoes of the IRS, who might assert a claim given the allegations that the debtor and Virpal Nijjar alleged filed false tax returns by contending that they are married. But § 544(b) requires the existence of "a creditor holding an unsecured claim that is allowable." The complaint contains no such allegation. Moreover, review of the claim register contains no such claim.

As a result, the motion will be granted as to the third and fourth causes of action.

Seventh Cause of Action: Declaratory Relief (50% Ownership of VK Nijjar Farms)

Salven's seventh cause of action seeks declaratory relief that the debtor is an equity holder of VK Nijjar Farms.

Defendants Nijjar move to dismiss, citing *Iqbal* and *Twombly*. Salven opposes the motion.

California Corporations Code § 17704.01 provides:

After formation of a limited liability company, a person becomes a member as follows:
(1) As provided in the operating agreement.

(2) As the result of a transaction effective under Article 10 (commencing with Section 17710.01).
(3) With the consent of all the members.

When this court ruled on the defendants Nijjar's motion to dismiss the First Amended Complaint it stated:

> Most generously read, the representations to creditors with respect to Dalip's ownership give rise to an inference of consent. But the court does not find these allegations sufficient under *Iqbal* and *Twombly*'s standards, particularly because the First Amended Complaint does not address whether the consent provisions have been modified by the Certificate of Formation, Articles of Incorporation or the Operating Agreement.

Civil Minutes p. 17, January 10, 2018, ECF # 131.

The amended complaint adds the allegations, "The Operating Agreement of VK Nijjar Farms, LLC, allows for a member to be added by the consent of the member. By her actions and representations delineated herein, Virpal [Nijjar] consented to add the Debtor as a member of VK Nijjar Farms, LLC." Second Am. Comp. ¶¶ 244-245. Consent is, of course, a question of fact. But these allegations demonstrate a plausible claim for relief under *Iqbal* and *Twombly*.

As a result, the motion will be denied as to the seventh cause of action.

<u>Eight Cause of Action: Declaratory Relief (50% Ownership of VK Nijjar Farms)</u>

Salven's eight causes of action seeks an order of judicial dissolution of VK Nijjar Farms, LLC.

The Nijjar defendants move to dismiss the eight cause of action. Salven opposes.

California Corporations Code § 17707.03 controls:

> (a) Pursuant to an action filed by any manager or by any member or members of a limited liability company, a court of competent jurisdiction may decree the dissolution of a limited liability company whenever any of the events specified in subdivision (b) occurs.
> (b)(1) It is not reasonably practicable to carry on the business in conformity with the articles of organization or operating agreement.
> (2) Dissolution is reasonably necessary for the protection of the rights or interests of the complaining members.

> (3) The business of the limited liability company has been abandoned.
> (4) The management of the limited liability company is deadlocked or subject to internal dissension.
> (5) Those in control of the limited liability company have been guilty of, or have knowingly countenanced, persistent and pervasive fraud, mismanagement, or abuse of authority.

Cal. Corp. Code § 17707.03(a)-(b)(emphasis added).

Assuming that Dalip Nijjar is ultimately found to be a member of VK Nijjar Farms based on Virpal Nijjar's consent, as described in the seventh cause of action, the trustee as the successor in interest has standing to assert the debtor's right to seek judicial dissolution.

Moreover, dissolution is authorized where reasonable necessary to protect the rights of complaining members. A chapter 7 trustee's duty is to reduce to money estate assets. 11 U.S.C. § 704(a)(1). This presents at least a colorable claim under Cal. Corporations Code § 17707.03(b)(2).

As a result, the motion will be denied as to the eighth cause of action.

NO LEAVE TO AMEND

After a motion to dismiss is granted, plaintiff should be given at least once opportunity to amend the complaint. [*National Council of La Raza v. Chegavske,* 800 F3d 1032, 1041 (9th Cir. 2015).

This is the second time this court has granted, at least in part, defendants' motion to dismiss the complaint. Further opportunities to amend the complaint would not be fruitful. Leave to amend is denied.

CIVIL MINUTE ORDER

The court shall issue a civil minute order that conforms substantially to the following form:

Defendants Virpal Nijjar, VK Nijjar Farms, Inc. and Nijjar Farms, LLC's motion to dismiss the First Amended Complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure has been presented to the court. Having reviewed the motion and papers filed in support and opposition to it, and having heard the arguments of counsel, if any, and good cause appearing,

IT IS ORDERED that the motion is granted without leave to amend as to the first, third, and fourth causes of action.

IT IS FURTHER ORDERED that the motion is denied as to the second, seventh and eight causes of action.

IT IS FURTHER ORDERED that Defendants Virpal Nijjar, VK Nijjar Farms, Inc. and Nijjar Farms, LLC shall file and serve either an answer not later than April 18, 2018.

IT IS FURTHER ORDERED that the parties shall not enlarge time without order of this court and, if any of the defendants fail to respond within the time specified herein, the plaintiff shall forthwith and without delay seek to enter the default of such non-responsive defendant[s].