UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Michael S. McManus
Bankruptcy Judge
Sacramento, California

March 31, 2014 at 10:00 a.m.

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1. 13-35308-A-7 DOROTHY PARENT — MOTION TO
14-2034 BJ-1 — DISMISS OR TO STAY PROSECUTION
SWENDEMAN V. PARENT ET AL — 2-26-14 [15]

Tentative Ruling: The motion will be granted as provided in the ruling below.

Defendants Brady & Vinding (successor to or assignee of Scharff, Brady & Vinding), Michael Brady and Michael Vinding move for dismissal of the second claim for relief in the complaint filed January 24, 2014 pursuant to Fed. R. Civ. P. 12(b)(6). The second claim in that complaint seeks avoidance of a senior encumbrance on a real property in Red Bluff, California - one-half of which is now property of the bankruptcy estate in the underlying bankruptcy case, seeks declaration that the encumbrance is void, and seeks declaration of the rights of the plaintiffs as to the property.

Plaintiff Robert E. Swendeman, a judgment creditor of defendant and debtor Dorothy Parent, the one-half owner of record, holds the junior encumbrance on the property, an abstract of a $225,333.47 judgment, recorded only eight days after the recordation of the senior encumbrance, a deed of trust securing a $350,000 note held by Brady & Vinding, a partnership of which Michael Brady and Michael Vinding are members.

Plaintiff Airport Acres, LLC apparently owns the other one-half interest in the subject property as a tenant in common with Ms. Parent.

In the alternative, the movants are asking the court to stay the prosecution of the second claim, pending the sale of the subject property.

The plaintiffs, Robert Swendeman, and Kevin Butler and Anita Butler, as trustees of the 1990 Butler Family Trust, established March 15, 1990, respond to this motion, stating that they have filed an amended complaint.

The movants reply that, despite the amended complaint, the prosecution of the second claim should be stayed.

Rule 12(b)(6) permits dismissal when a complaint fails to state a claim upon which relief can be granted. Dismissal is appropriate where there is either a lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. Saldate v. Wilshire Credit Corp., 686 F. Supp. 2d 1051, 1057 (E.D. Cal. 2010) (citing Balisteri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1990)(as amended)).

"In resolving a Rule 12(b)(6) motion, the court must (1) construe the complaint in the light most favorable to the plaintiff; (2) accept all well pleaded factual allegations as true; and (3) determine whether plaintiff can prove any

set of facts to support a claim that would merit relief." See Stoner v. Santa Clara County Office of Educ., 502 F.3d 1116, 1120-21 (9th Cir. 2007); see also Schwarzer, Tashmina & Wagstaffe, California Practice Guide: Federal Civil Procedure Before Trial, § 9.187, p. 9-46, 9-47 (The Rutter Group 2002).

"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.' . . . 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. . . . 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. . . . Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of "entitlement to relief."'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (Citations omitted).

"In sum, for a complaint to survive a motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." Moss v. U.S. Secret Service, 572 F.3d 962, 969 (9th Cir. 2009) (quoting Iqbal at 678).

More recently, the Supreme Court has applied a "two-pronged approach" to address a motion to dismiss:

"First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. . . . Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. . . . Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. . . . But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'-'that the pleader is entitled to relief.'

"In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When 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, 556 U.S. 662, 678-79 (2009) (Citations omitted).

The plaintiffs named in the original complaint included only Robert E. Swendeman, an individual doing business as T'N'T Real Estate, and Airport Acres, LLC, a Nevada limited liability company.

After the movants filed and served the instant motion on February 26, 2014, an amended complaint was filed timely on March 7, 2014. Dockets 20 & 21; see also Fed. R. Civ. P. 15(a)(1)(B), made applicable here by Fed. R. Bankr. P. 7015 (permitting amendment of a pleading as a matter of course within 21 days after service of a responsive pleading).

Airport Acres is no longer named a plaintiff in the amended complaint. The

plaintiffs named in the amended complaint are Robert E. Swendeman, an individual doing business as T'N'T Real Estate and Kevin C. Butler and Anita A. Butler, trustees of the 1990 Butler Family Trust, established March 15, 1990. The Butlers are alleged to be "successor[s] in interest to Airport Acres."

The court also notes that although the amended complaint names the same defendants named in the original complaint - Dorothy Parent, Brady & Vinding, Michael Vinding and Michael Brady - the amended complaint also names the chapter 7 trustee of the underlying bankruptcy case, Alan Fukushima, as a defendant.

As Airport Acres is not named as a plaintiff in this proceeding any longer, the court deems Airport Acres to have dismissed all its claims.

Further, while the original complaint has been superseded by the amended complaint, the court will address the merits of the subject motion because the second causes of action in both complaints are identical, except for the change in parties named in the amended complaint.

First, upon the filing of a voluntary bankruptcy petition, 11 U.S.C. § 362(a) institutes an automatic stay with respect to both the debtor and the bankruptcy estate. Actions taken in violation of the automatic stay are void. Sambo's Restaurants, Inc. v. Wheeler (In re Sambo's Restaurants), Inc., 754 F.2d 811, 816 (9th Cir. 1985); O'Donnell v. Vencor Inc., 466 F.3d 1104, 1110 (9th Cir. 2006).

A creditor who has violated the automatic stay is required to reverse its actions. For instance, the stay requires the creditor to direct a levying officer to return or reverse post-petition collections, such as bank account or wage levy. In re Johnson, 262 B.R. 831, 847-48 (Bankr. D. Idaho 2001). The stay obligates the creditor to maintain or restore the status quo that existed as of the petition date. Id. (quoting Franchise Tax Board v. Roberts (In re Roberts), 175 B.R. 339, 343 (B.A.P. 9th Cir. 1994)).

The underlying bankruptcy case was filed on December 2, 2013. The instant adversary proceeding was filed on January 24, 2014. The amended complaint is seeking to have the subject real property partitioned and is seeking to avoid the senior encumbrance on the estate's one-half interest in the property. Both causes of action in the amended complaint are asserted against Ms. Parent and the bankruptcy estate.

As the causes of action were filed post-petition and concern an interest in property that is property of the bankruptcy estate as well as the debtor, they were filed in violation of the automatic stay and are void. See 11 U.S.C. § 362(a)(1) (prohibiting the commencement of a process or proceeding against the debtor); see also 11 U.S.C. § 362(a)(3) (prohibiting "any act . . . to exercise control over property of the estate").

The plaintiffs have not sought relief from the automatic stay to commence the prosecution of the subject claims.

Second, even though Ms. Parent received her bankruptcy discharge in the underlying bankruptcy case on March 11, 2014, and the automatic stay was dissolved at that time with respect to Ms. Parent, this proceeding was filed on January 24, 2014, prior to the entry of discharge. See 11 U.S.C. § 362(c)(2)(C); see also Dockets 1 & 21.

Third, assuming the Butlers are indeed successors in interest to Airport Acres and they own the other half of the real property, they do not have standing to seek avoidance of the recordation of the deed securing the $350,000 note held by Brady & Vinding.

A plaintiff must meet both the constitutional and prudential requirements of standing. Bennett v. Spear, 520 U.S. 154, 162 (1997). To establish standing under the case or controversy requirement of Article III of the United States Constitution, a plaintiff (1) must have suffered some actual or threatened injury due to alleged illegal conduct, known as the "injury in fact" element; (2) the injury must be fairly traceable to the challenged action, known as the "causation element"; and (3) there must be a substantial likelihood that the relief requested will redress or prevent plaintiff's injury, known as the "redressability element." U.S.C.A. Const. Art. 3, § 1 et seq.; Allen v. Wright, 468 U.S. 737, 751 (1984); Dunmore v. United States, 358 F.3d 1107, 1111-12 (9th Cir. 2004) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)).

Here, only Ms. Parent's one-half interest in the property was encumbered by Brady & Vinding's deed of trust. The Butlers' one-half interest in the property is not encumbered by Brady & Vinding's deed. Thus, the Butlers' second claim to avoid Brady & Vinding's deed makes no sense. The Butlers have suffered no injury by the encumbrance and recordation of that deed against Ms. Parent's interest in the property. The Butlers then have no standing to seek the avoidance of Brady & Vinding's deed of trust.

Fourth, the only statements in the amended complaint that could be construed as pleading injury to the Butlers, resulting from Brady & Vinding's deed on the property, are those alleging that the deed resulted in "making [the property] more difficult to market." Docket 21 at 8. In other words, the plaintiffs are contending that Brady & Vinding's deed on the property has made the marketing of the property more difficult.

However, Ms. Parent's apparently signed a note for $350,000 and then signed a deed encumbering her interest in the property and securing the note. The encumbrance and recordation of Brady & Vinding's deed was done with the agreement and consent of Ms. Parent. There is no contractual privity between the Butlers, on one hand, and Brady & Vinding, Michael Brady and Michael Vinding, on the other hand.

The court is unaware of any legal basis or authority prohibiting Brady & Vinding from recording a deed of trust against Ms. Parent's interest in the property, given her voluntary execution of the note and deed. The court is not aware of and the plaintiffs have not cited to any such permissible restraints on alienation.

Overall, the court is not persuaded that the allegations in the amended complaint rise to the level of a plausible claim for relief by the Butlers against Brady & Vinding, Michael Brady and Michael Vinding, seeking to avoid Brady & Vinding's recorded deed on the property because the deed has made the property more difficult to market.

Finally, absent court approval, only the bankruptcy estate has the authority to prosecute claims for the benefit of the estate and the creditors, such as the avoidance of a transfer. In re O'Reilly, Case No. C 13-3177 PJH, WL 460767, at * 8 (N.D. Cal. Feb. 3, 2014); J & J Sports Prods., Inc. v. Benitez, Case No. 1:12-CV-00735-LJO-SMS, WL 5347547, at * 4 (E.D. Cal. Sept. 23, 2013);

Montgomery v. Wal-Mart Stores, Inc., Case No. 12CV3057 JLS (DHB), WL 5278649, at * 7 (S.D. Cal. Sept. 18, 2013); JMS Labs Ltd. (U.S.A.), LLC v. Silver Eagle Labs, Inc. (In re Lockwood), 414 B.R. 593, 602-03 (Bankr. N.D. Cal. 2008); State of California v. PG & E Corp. (In re Pac. Gas & Electric Co.), 281 B.R. 1, 13-15 (Bankr. N.D. Cal. 2002) (citations omitted).

11 U.S.C. § 541(a) provides that "[t]he commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held," including "all legal or equitable interests of the debtor in property as of the commencement of the case" and "[a]ny interest in property that the trustee recovers under section 329 (b), 363 (n), 543, 550, 553, or 723 of this title." 11 U.S.C. § 541(a)(1) & (3).

11 U.S.C. § 704 charges only the bankruptcy trustee to "collect and reduce to money the property of the estate" and to "examine proofs of claims and object to the allowance of any claim that is improper." 11 U.S.C. § 704(a)(1) & (5).

"[I]n order for a creditor . . . to obtain standing to object to another creditor's claims in such a case, the objecting party must first request the trustee to object to the claim, the trustee must refuse to object to the claim, and the Bankruptcy Court may then authorize the creditor . . . to proceed." In re Bakke, 243 B.R. 753, 756 (Bankr. D. Ariz. 1999).

Here, by seeking to avoid Brady & Vinding's deed, the plaintiffs are prosecuting a claim that only the bankruptcy trustee has authority to bring. Obviously, as the estate's one-half interest in the property is encumbered by Brady & Vinding's deed, the trustee would seek to avoid the deed, assuming there is actionable basis for such avoidance. Avoiding the deed would free equity in the property that could be liquidated for the benefit of the estate and all unsecured creditors.

The plaintiffs have not deferred to or asked the bankruptcy trustee about whether the estate would be seeking to avoid Brady & Vinding's deed. And, the plaintiffs have not sought court approval for their prosecution of the avoidance of the deed. Accordingly, the court will dismiss the amended complaint's second cause of action against Brady & Vinding, Michael Brady and Michael Vinding in the entirety.

2.	13-35308-A-7	DOROTHY PARENT	MOTION TO
	14-2034	DL-1	DISMISS CASE
	SWENDEMAN V. PARENT ET AL		2-24-14 [10]

Amended Tentative Ruling: The motion will be granted in accordance with the ruling on the another dismissal motion (DCN BJ-1). The ruling on that motion is incorporated by reference.

3.	11-25317-A-7	MOHAMMAD/SOUSAN MOTIEY	MOTION FOR
	13-2121	DNL-3	LEAVE TO AMEND COMPLAINT
	ACEITUNO V. MOTIEY ET AL		3-3-14 [79]

Final Ruling: This motion has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the defendants and any other party in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered as consent to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the

relief requested by the moving party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument.

The motion will be granted.

The plaintiff, Thomas Aceituno, the trustee in the underlying chapter 7 case, is asking the court to grant him leave to file a first amended complaint, adding a claim seeking a declaration that the trustee is the legal and equitable owner of the real property referred to in the other claims for relief which include fraudulent conveyance, turnover, and breach of contract, arising from the debtors' transfer of the property pre-petition without adequate consideration.

Fed. R. Civ. Proc. 15(a)(1), as incorporated by Bankruptcy Rule 7015, provides that "[a] party may amend its pleading once as a matter of course within: (A) 21 days after serving it, or (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier."

Rule 15(a)(2) provides that "[i]n all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires."

Absent undue delay, bad faith, dilatory motive, or prejudice to the opposing party, a presumption exists in favor of granting leave to amend. Eminence Capital, LLC v. Aspeon, Inc., 316 F.3d 1048, 1051-52 (9th Cir. 2003) (citing Foman v. Davis, 371 U.S. 178, 182 (1962)).

Rule 15(a)(3) provides that "[u]nless the court order otherwise, any required response to an amended pleading must be made within the time remaining to respond to the original pleading or within 14 days after service of the amended pleading, whichever is later."

The court perceives no undue delay, bad faith, dilatory motive, or prejudice to any of the defendants. Adding the claim does not prejudice them because the plaintiff is already trying to recover the real property via the turnover claim, which states: "To the extent that the Debtors retained a legal or equitable interest in the Subject Property or the proceeds thereof after the Transfer, such interest is property of the bankruptcy estate that Trustee may use, sell, or lease." Docket 1 at 5. Hence, by having asserted the turnover claim in the original complaint, the plaintiff has been by implication seeking already a declaration that the property is property of the bankruptcy estate.

While discovery in this case closed on March 17, 2014, the amendment has not been unduly delayed given that the additional claim arises from the same event, transaction or occurrence as the other claims, *i.e.*, the purported transfer of the real property. And, once again, the original turnover claim clearly attempts to recover the property itself. The defendants then have had sufficient notice, since the original complaint was filed, that the plaintiff has been seeking recovery of the property itself.

Finally, the plaintiff discovered most of the facts tending to support a claim that the debtors never really transferred the property, only recently during discovery. Thus, the court perceives no bad faith or dilatory motive on the part of the plaintiff in seeking to add the claim at this time.

4. 13-32417-A-11 BALBIR/SAWARNJIT SEKHON — MOTION FOR RELIEF FROM AUTOMATIC STAY
PPR-1 — 2-18-14 [121]
BANK OF AMERICA, N.A. VS.

Final Ruling: The motion will be dismissed as moot because the case was dismissed on March 18, 2014. See 11 U.S.C. § 362(c)(2)(B).

5. 13-25330-A-12 PAUL MENNICK — MOTION TO CONFIRM PLAN
WW-3 — 1-22-14 [66]

Tentative Ruling: The motion will be denied.

The hearing on this motion was continued from March 3, 2014. The debtor has filed a second supplemental declaration in support of his motion to confirm plan. An amended ruling from March 3 follows below.

The debtor moves for confirmation of his chapter 12 plan filed on January 22, 2014. Docket 71.

Creditor PSB Credit Services, Inc., opposes confirmation, arguing that the debtor does not qualify as a family farmer, the debtor has unreasonably delayed the prosecution of this case, the plan is unfeasible, and the plan's treatment of PSB's claim is unreasonable.

Creditor Lisabeth D. Rothman opposes confirmation, arguing that the debtor cannot make all payments under the plan, the plan does not comply with the disposable income requirement of 11 U.S.C. § 1225(b), and the debtor has not demonstrated good cause for increasing the plan term from three to five years.

The debtor has filed a reply that modifies the proposed plan by decreasing the repayment term of PSB's claim from 20 to 10 years (from 2034 to 2024), among other things.

The court has already addressed the issue of whether the debtor qualifies as a family farmer in its February 3, 2014 ruling. Docket 80. In addition, as to the unreasonable delay in prosecution of this case, the court has already given the debtor 60 days to confirm a plan in the ruling on the motion to dismiss. Docket 80. The court will not revisit these issues.

Next, the debtor's inability to pay creditors in full in three years is cause to extend the plan term to five years. And, the disposable income requirement of 11 U.S.C. § 1225(b)(B) is not implicated here as the debtor is paying all claims in full under the plan.

Further, PSB contends the plan's treatment of its claim is unreasonable because the debtor proposes to reamortize the term for 10 years, with a 4.5% interest rate. Under the proposed plan the Note will be extended for another 10 years (decreased from 15 years)- from 2014 to 2024.

The Supreme Court decided in Till v. SCS Credit Corp., 541 U.S. 465 (2004), that the appropriate interest rate is determined by the "formula approach." This approach requires the court to take the national prime rate in order to reflect the financial market's estimate of the amount a commercial bank should charge a creditworthy commercial borrower to compensate it for the loan's opportunity costs, inflation, and a slight risk of default.

The bankruptcy court is required to adjust this rate for a greater risk of default posed by a bankruptcy debtor. This upward adjustment depends on a variety of factors, including the nature of the security, and the plan's feasibility and duration. Cf. Farm Credit Bank v. Fowler (In re Fowler), 903 F.2d 694, 697 (9th Cir. 1990); In re Camino Real Landscape Main. Contrs., Inc., 818 F.2d 1503 (9th Cir. 1987).

To set the appropriate rate, the court is required to conduct an "objective inquiry" into the appropriate rate. The debtor's bankruptcy statements and schedules may be culled for the evidence to support an interest rate.

"Moreover, starting from a concededly *low* estimate and adjusting *upward* places the evidentiary burden squarely on the creditors, who are likely to have readier access to any information absent from the debtor's filing. . . ." Till at 479.

The prime rate on the petition date, April 18, 2013, was 3.25% as reported by Money Cafe.com. See http://www.moneycafe.com/library/primerate.htm. As surveyed by the Supreme Court in Till, courts using the formula approach typically have adjusted the interest rate 1% to 3%.

While PSB argues that the proposed interest rate and 10-year reamortization are unreasonable, PSB's opposition does not explain why they are unreasonable. PSB simply states in its opposition that "[t]he Debtor has not offered any justification or support for his proposal to reamortize the loan for an additional 15 years or to impose an interest rate of 4.5%." Docket 87.

More, PSB's opposition is not supported by any evidence, such as a declaration establishing the factual assertions in the opposition.

Nevertheless, the court will deny plan confirmation because of the following issues:

The debtor's response to the court's tentative ruling posted on March 3, 2014 is far from adequate.

Because the debtor is no longer receiving payments from his debtors on account of judgments against them, he is once again modifying his plan, providing for payments as follows: $17,000 to be paid by March 25, 2014; 59 monthly payments of $3,000 each; $5,100 in quarterly payments; 60% of any funds to be received from Mr. Fracchia, even though Mr. Fracchia has paid nothing to the debtor from November 2013 until March 2014. Docket 98 at 5-7.

First, the debtor is proposing to make substantial changes to his plan without filing an amended plan. There is no other plan filed with the court in connection with the debtor's second supplemental declaration. Docket 98. There is no new chapter 12 plan filed that incorporates the new plan payment schedule listed in the debtor's second supplemental declaration. Docket 98. The court will not confirm of a yet another plan without there being adequate notice and opportunity for response and hearing.

Second, the new plan calls for an additional 8 monthly payments beyond the 59 monthly payments. The term for the new plan will be 67 months, in violation of 11 U.S.C. § 1222(c), which caps chapter 12 plans at five years. The debtor does not explain or take into consideration that his $17,000 plan payment, when it was made to the trustee, represented five plan payments of $3,540 each, starting August 2013.

On the other hand, if the debtor will move up the plan term to March 2014, that would require a new plan with a new confirmation hearing date and new opportunity for responses.

In any event, the court cannot tell from the debtor's second supplemental declaration when the term of the new plan would start. Docket 98. The court will not confirm on this motion a plan that is different from the plan for which confirmation is sought in this motion.

Third, the court still cannot determine whether the plan - old or new - is feasible. The debtor's second supplemental declaration offers some factual bases for his monthly expenses. Docket 98. The debtor states that he will or could reduce some expenses, while increasing some of his income.

However, he makes no effort to calculate for the court his total projected *monthly* income for the life of the plan and his total projected *monthly* expenses for the life of the plan. The latest declaration by the debtor is vague and ambiguous on many points. For instance, when the debtor states what his income will be, the declaration adds "60% of any funds received from Fracchia," but it assigns no monthly dollar figure to those funds.

The declaration is also confusing. It says that his new plan payments have increased from $279,600 to $290,900, without stating what is the difference in income. The $290,900 calculation is based on paying "$17,000 by March 25, 2014, then 59 monthly payments of $3,000.00, plus $5,100.00 quarterly, plus 60% of any funds received from Fracchia."

But, even without the funds received from Fracchia, the sum of the foregoing figures over the plan term is $296,000 and not $290,900. $5,100 times 20 quarters is $102,000. $3,000 times 59 months is $177,000. Adding $177,000, $102,000 and $17,000 is $296,000.

The court needs a narrative explaining all income and expense calculations, as well as the assumptions made by the debtor in making those calculations. This is covered in part by the debtor's second supplemental declaration. However, the court also needs the obvious - an itemization of the projected income and expenses in a summary format, showing to the court that the debtor will have projected cash flow to make his debt obligations under the plan. That is an essential part of any feasibility analysis, especially when a business is involved.

Fourth, the debtor once again is attempting to testify in his declaration about his anticipated tax liability for 2007 through 2011 and 2013. The debtor has provided more facts in his most recent declaration explaining why he thinks he will not have to pay any taxes for those years. Docket 98. Yet, he is not a tax expert and the court cannot rely on his opinion about what he thinks his tax liability will be for those years. This is another hurdle to determining that the plan is feasible.

Fifth, while the debtor has decreased the term of repayment for the PSB claim from 20 to 10 years, changing the maturity date from 2034 to 2024, the debtor does not say how he is planning to pay PSB's claim in full, 10 years sooner than originally proposed, without changing the interest rate or monthly payment amount. The debtor's latest plan amendment, including the one in the second supplemental declaration, does not provide for a balloon payment on account of PSB's claim.

Given the foregoing issues, confirmation of the plan filed January 22, 2014 (Docket 71) will be denied.

6. 14-20348-A-11 JOE/CAROL MOBLEY — MOTION TO VALUE COLLATERAL
CAH-5
VS. INDYMAC BANK/ONEWEST BANK, FSB — 3-3-14 [31]

Tentative Ruling: The motion will be granted as provided in the ruling below.

The debtor moves for an order valuing a multi-unit fourplex real property in Richmond, California, in an effort to strip down Onewest Bank's only mortgage on the property and treat it as a partially unsecured claim. The property is not the debtor's residence.

The debtor is asking the court to value the bank's secured claim at $390,000.

11 U.S.C. § 1123(b)(5) permits a chapter 11 debtor to modify the rights of secured claim holders, other than claims secured only by the debtor's principal residence.

Pursuant to 11 U.S.C. § 506(a)(1), a secured claim is secured only to the extent of the creditor's interest in the estate's interest in the collateral. 11 U.S.C. § 506(a)(1) provides that:

"An allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property ... and is an unsecured claim to the extent that the value of such creditor's interest ... is less than the amount of such allowed claim."

"[The value of the collateral] shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest."

A debtor's opinion of value in the schedules is evidence of value and it may be conclusive in the absence of contrary evidence. Enewally v. Washington Mutual Bank (In re Enewally), 368 F.3d 1165, 1173 (9th Cir. 2004).

The debtor contends that the property has a value of $390,000. Schedule A; Docket 33. The property is subject to a property tax lien for $8,862.26 in favor of the Contra Costa County Tax Collector and a single mortgage in favor of Onewest Bank for approximately $751,225.53.

The court has received no evidence refuting the debtor's valuation of the property.

The subject property is not the debtor's residence. The anti-modification provision of 11 U.S.C. § 1123(b)(5) then does not apply. Onewest Bank's claim against the property is partially unsecured within the meaning of 11 U.S.C. § 506(a)(1) because the estate has no equity in the property, after deduction of the property tax lien. Onewest Bank's claim will be stripped down to $381,137.74, the value of the property, $390,000, minus the property tax lien of $8,862.26. Its claim in excess of $381,137.74 will be an unsecured claim. The motion will be granted only in connection with plan confirmation.

Valuations pursuant to 11 U.S.C. § 506(a) and Fed. R. Bankr. P. 3012 are

contested matters and do not require the filing of an adversary proceeding. It is only when such a motion or objection is joined with a request to determine the extent, validity or priority of a security interest, or a request to avoid a lien that an adversary proceeding is required. Fed. R. Bankr. P. 7001(2). Therefore, by granting this motion the court is only determining the value of the respondent's collateral. The court is not determining the validity of a claim or avoiding a lien or security interest. The respondent's lien will remain of record until the plan is completed. See 11 U.S.C. § 349(b). Once the plan is completed, if the respondent will not reconvey/cancel its lien, the court then will entertain an adversary proceeding.

7.	14-21555-A-11	ELK GROVE COMMUNICATIONS TOWER, INC.	STATUS CONFERENCE 2-19-14 [1]

Final Ruling: The status conference will be dropped from calendar as moot because the case was dismissed on March 18, 2014.

8.	13-33668-A-7 14-2018 NICHOLS ET AL V. NCO FIN'L SYS. INC., ET AL	RONALD/DIANA NICHOLS MH-1	MOTION TO DISMISS CASE 2-14-14 [10]

Tentative Ruling: The motion will be granted.

One of the defendants in this proceeding, American Education Services, asks for dismissal of the pending 11 U.S.C. § 523(a)(8) claim pursuant to Fed. R. Civ. P. 12(b)(5) and (b)(6).

AES asks for dismissal contending that: (1) there was insufficient service of process of the summons and complaint because AES was not served to the attention of an offers of an officer, a managing or general agent, or to any other agent authorized by law to receive service of process; and (2) AES is not the real party in interest as it does not own any interest in the subject student loans.

Fed. R. Civ. P. 12(b)(5) allows for dismissal for insufficient service of process.

Rule 12(b)(6) permits dismissal when a complaint fails to state a claim upon which relief can be granted. Dismissal is appropriate where there is either a lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. Saldate v. Wilshire Credit Corp., 686 F. Supp. 2d 1051, 1057 (E.D. Cal. 2010) (citing Balisteri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1990)(as amended)).

"In resolving a Rule 12(b)(6) motion, the court must (1) construe the complaint in the light most favorable to the plaintiff; (2) accept all well pleaded factual allegations as true; and (3) determine whether plaintiff can prove any set of facts to support a claim that would merit relief." See Stoner v. Santa Clara County Office of Educ., 502 F.3d 1116, 1120-21 (9th Cir. 2007); see also Schwarzer, Tashmina & Wagstaffe, California Practice Guide: Federal Civil Procedure Before Trial, § 9.187, p. 9-46, 9-47 (The Rutter Group 2002).

"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.' . . . 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. . . . 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. . . . Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of "entitlement to relief."'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (Citations omitted).

"In sum, for a complaint to survive a motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." Moss v. U.S. Secret Service, 572 F.3d 962, 969 (9th Cir. 2009) (quoting Iqbal at 678).

More recently, the Supreme Court has applied a "two-pronged approach" to address a motion to dismiss:

"First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. . . . Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. . . . Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. . . . But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'-'that the pleader is entitled to relief.'

"In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When 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, 556 U.S. 662, 678-79 (2009) (Citations omitted).

The court agrees with AES. The proof of service for the summons and complaint served on AES indicates that AES was not served "to the attention of an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process," as prescribed by Fed. R. Bankr. P. 7004(b)(3). Docket 6. Accordingly, dismissal is warranted under Fed. R. Civ. P. 12(b)(5).

Further, "[i]f, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56." Fed. R. Civ. P. 12(d); S&S Logging Co. v. Barker, 366 F.2d 617, 622 (9th Cir. 1966). If either party introduces evidence outside of the challenged pleading, a court *may* bring the conversion provision (Rule 12(d) - converting motion to dismiss into motion for summary judgment) into operation. Cunningham v. Rothery (In re Rothery), 143 F.3d 546, 548-549 (9th Cir. 1998).

Here, although this is a motion to dismiss under Fed. R. Civ. P. 12(b)(6), AES has produced evidence that is not the complaint, establishing that AES does not own any interest in the subject student loans. AES is only servicing student loans that have been executed by the plaintiffs. Docket 12 ¶¶ 1, 3.

The court will treat the motion to dismiss under Fed. R. Civ. P. 12(b)(6) as a motion for summary judgment, invoking Fed. R. Civ. P. 12(d).

Summary judgement is appropriate when there exists "no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The Supreme Court discussed the standards for summary judgment in a trilogy of cases, Celotex Corporation v. Catrett, 477 U.S. 317, 327 (1986), Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), and Matsushita Electrical Industry Co. v. Zenith Radio Corp., 475 U.S. 574 (1986). In a motion for summary judgment, the moving party bears the initial burden of persuasion in demonstrating that no issues of material fact exist. See Anderson at 255. A genuine issue of material fact exists when the trier of fact could reasonably find for the non-moving party. Id. at 248. The court may consider pleadings, depositions, answers to interrogatories and any affidavits. Celotex at 323. Where the movant bears the burden of persuasion as to the claim, it must point to evidence in the record that satisfies its claim. Id. at 252.

A plaintiff must meet both the constitutional and prudential requirements of standing. Bennett v. Spear, 520 U.S. 154, 162 (1997). To establish standing under the case or controversy requirement of Article III of the United States Constitution, a plaintiff (1) must have suffered some actual or threatened injury due to alleged illegal conduct, known as the "injury in fact" element; (2) the injury must be fairly traceable to the challenged action, known as the "causation element"; and (3) there must be a substantial likelihood that the relief requested will redress or prevent plaintiff's injury, known as the "redressability element." U.S.C.A. Const. Art. 3, § 1 et seq.; Allen v. Wright, 468 U.S. 737, 751 (1984); Dunmore v. United States, 358 F.3d 1107, 1111-12 (9th Cir. 2004) (citing Lujan, 504 U.S. at 560-61).

The plaintiffs have not responded to this motion, refuting the evidence that AES does not hold any interest in the loans. Based on that evidence, the court determines that AES does not own interest in the loans, it is not owed a debt on the loans by the plaintiffs and it is not a real party in interest to this action. Asserting the claim against AES then would not bring about the relief sought by the plaintiffs. The motion will be granted and the pending claim against AES will be dismissed, as it does not meet the redressability element of the case or controversy requirements under Article III of the United States Constitution.

9. 13-33668-A-7 RONALD/DIANA NICHOLS — STATUS CONFERENCE
14-2018 — 1-15-14 [1]
NICHOLS ET AL V. NCO FIN'L SYS. INC., ET AL

Tentative Ruling: None.

10. 12-41197-A-11 JOHN/MARTA SCHULZE — MOTION TO APPROVE AMENDED DISCLOSURE STATEMENT
JHH-7 — 2-17-14 [117]

Tentative Ruling: The motion will be granted and the disclosure statement will be approved, as it contains adequate information and the detail necessary that will permit creditors to make an informed decision regarding the plan. See 11 U.S.C. § 1125(a).