UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

April 19, 2018, at 11:00 a.m.

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1. **16-20734-E-13** **EUGENE SPENCER** **MOTION FOR ENTRY OF JUDGMENT**
16-2059 **Mohammad Mokarram** **3-14-18 [56]**
MAS-2

SPENCER V. SPENCER, III

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Local Rule 9014-1(f)(1) Motion—No Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Defendant on March 14, 2018. By the court's calculation, 36 days' notice was provided. 28 days' notice is required.

The Motion for Entry of Judgment has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion for Entry of Judgment is granted.

Disarie Ranessa Spencer ("Plaintiff") moves for the court to enter a judgment in this Adversary Proceeding against Eugene Spencer, III, ("Defendant"). Plaintiff asserts that following the court's modification of the automatic stay to allow the parties to litigate in state court, the state court entered a

judgment for Plaintiff with a total damages amount of $14,104.76. Plaintiff prays that the court find that state court judgment to be non-dischargeable.

At the June 23, 2016 hearing, the court denied a request for abstention, and instead, the court modified the automatic stay to allow the respective rights and interests in community property and related issues be determined in state court. Dckt. 28. The court stayed further proceedings in this Adversary Proceeding pending completion of the state court matters, including any appeals. *Id.*

Prior Proceedings Modifying the Automatic Stay to Allow State Court Adjudication of Underlying Debt

The court modified the automatic stay for a state court to issue final judgment for the following claims, interests, and rights:

A. Undisclosed bank accounts:

1. Determination of whether the claim asserted by Plaintiff that her husband's undisclosed bank accounts on the date of separation, which are stated to have been $5,951.64 in savings and $3,105.34 in checking, were undisclosed assets and that by operation of California Family Law, and what portion, if any, the state court awards to Plaintiff as her property.

2. Determination of whether the claim asserted by Plaintiff that her husband withdrew from his 401(k) account after the date of separation: (1) $16,000.00 on October 18, 2006; (2) $7,590.00 on November 14, 2006; and (3) $16,000.00 on December 5, 2006, for a total of $39,590.00, were undisclosed assets and that by operation of California Family Law, and what portion, if any, the state court awards to Plaintiff as her property.

3. Determination of whether the claim asserted by Plaintiff that her husband received $74,797.00 deposited into a secret account in 2004 from the proceeds of another refinance of the marital residence were undisclosed assets and that by operation of California Family Law, and what portion, if any, the state court awards to Plaintiff as her property.

4. Determination of whether the claim asserted by Plaintiff that community funds were used by her husband to make monthly payments of $1,772.12 to $1,940.00 to Provident Bank were undisclosed assets and that by operation of California Family Law, and what portion, if any, the state court awards to Plaintiff as her property.

5. Determination of attorney's fees and costs, if any, awarded to Plaintiff for the claims asserted by her in state court.

Dckt. 28. Since the court's ruling, the court has conducted several status conferences to track the progress of state court litigation. *See* Dckt. 34, 39, 45, 51.

State Court Judgment

On February 16, 2018, a notice of the state court determination was filed with this court and served on Defendant. Dckt. 52, 55. The Notice is accompanied by the Declaration of Karen Leder, who testifies under penalty of perjury that she is a licensed California attorney who represented Plaintiff in state court. Dckt. 53. She states that trial was held after several delays on September 29, 2017, and that even though the court had ruled a while ago, a final order was not entered until recently. *Id.*

An authenticated copy of the state court judgment is attached as Exhibit A. Dckt. 54. The judgment shows that the Superior Court of California, County of Sacramento found for Plaintiff in the amount of $14,104.76. *Id.* at 12. As to the determinations that this court discussed at the June 23, 2016 hearing, the state court determined that Defendant failed to disclose a secret checking account on the date of separation with a balance of $5,951.64, as well as his 401(k) and 457 deferred compensation plans that had a combined balance of $8,564.42. *Id.* at 12. The court awarded Plaintiff one half of the amount of those accounts—$7,258.03—plus 10% interest from August 14, 2006, for a total sum of $8,104.76. Additionally, the court sanctioned Defendant $6,000.00 for breach of fiduciary duty by failing to disclose community property under his sole possession and control and ordered that the sanctions be paid to Plaintiff. *Id.*

Application of State Court Judgement and
Granting of Federal Judgment for Nondischargeability

The doctrine of *res judicata* "gives certain conclusive effect to a former judgment in subsequent litigation involving the same controversy." *People v. Barragan*, 32 Cal. 4th 236, 252 (Cal. 2004) (internal citation omitted). Courts do not try and re-try what has already been determined in prior proceedings. The Ninth Circuit Court of Appeals addressed the modern application of the doctrine of *res judicata* in *Robertson v. Isomedix, Inc. (In re International Nutronics)*, 28 F.3d 965 (9th Cir. 1994). It describes the doctrine as follows:

> As generally understood, "[t]he doctrine of *res judicata* gives certain conclusive effect to a former judgment in subsequent litigation involving the same controversy." (7 Witkin, Cal. Procedure (4th ed. 1997) Judgment, § 280, p. 820.) The doctrine "has a double aspect." (*Todhunter v. Smith* (1934) 219 Cal. 690, 695.) "In its primary aspect," commonly known as claim preclusion, it "operates as a bar to the maintenance of a second suit between the same parties on the same cause of action. [Citation.]" (*Clark v. Lesher* (1956) 46 Cal.2d 874, 880" "In its secondary aspect," commonly known as collateral estoppel, "[t]he prior judgment … 'operates' " in "a second suit … based on a different cause of action … 'as an estoppel or conclusive adjudication as to such issues in the second action as were actually litigated and determined in the first action.'

Id., 252–53.

In addition to the prior ligation having been between the same parties as in the second suit, the court considers four factors, which are stated in *Robertson* as:

> (1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts.

Id. at 970 (citing *Clark v. Bear Sterns & Co.*, 966 F.2d 1318, 1320 (9th Cir. 1992)).

Here, the court indicated that it would stay this proceeding until state court litigation was complete and then would apply the doctrine of collateral estoppel to determine what claims, if any, are nondischargeable in bankruptcy. Dckt. 28 at 10. The state court has issued its final ruling, finding that Defendant maintained secret accounts and awarding Plaintiff half of their value as of the date of separation—$8,104.76. Additionally, the state court found that Defendant breached a fiduciary duty and sanctioned him $6,000.00, which was awarded to Plaintiff. This court gives preclusive effect to the findings of fact and conclusions of law of the Superior Court.

The Motion is granted, and the court shall issue a judgment for Plaintiff in this Adversary Proceeding finding that the state court judgment in the amount of $14,104.76, and any additional amounts owing pursuant thereto for the enforcement of that amount, are determined nondischargeable in Bankruptcy Case No. 16-20734 pursuant to 11 U.S.C. § 523(a)(4).

The court shall issue a minute order substantially in the following form holding that:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Entry of Judgment by Disarie Ranessa Spencer ("Plaintiff") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, and the court shall issue a judgment determining that the order and judgment of the California Superior Court for the County of Sacramento in the case *Disarie Spencer v. Eugene Spencer, III*, 06FL06410 ("State Court Judgment") in favor of Disarie Spencer and against Eugene Spencer, III, in the amount of $14,104.76, and amounts allowable thereunder for post-judgment interest and enforcement of the State Court Judgment are nondischargeable pursuant to 11 U.S.C. § 523(a)(4). A copy of the State Court Order for which the $14,104.76, interest, and post-judgment expenses are nondischargeable is attached hereto as Addendum "A" (emphasis added).

ADDENDUM A

FL-340

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address):	FOR COURT USE ONLY
KAREN R. LEDER 125450 ATTORNEY AT LAW 8920 EMERALD PARK DRIVE, SUITE K ELK GROVE, CA 95624 TELEPHONE NO.: (916) 681-2342 FAX NO. (Optional): (916) 714-3109 E-MAIL ADDRESS (Optional): ATTORNEY FOR (Name): DISARIE RANESSA SPENCER	FILED/ENDORSED FEB - 7 2018 By Deputy Clerk
SUPERIOR COURT OF CALIFORNIA, COUNTY OF SACRAMENTO STREET ADDRESS: 3341 POWER INN ROAD MAILING ADDRESS: 3341 POWER INN ROAD CITY AND ZIP CODE: SACRAMENTO, CA 95826 BRANCH NAME: FAMILY RELATIONS COURTHOUSE	
PETITIONER/PLAINTIFF: DISARIE RANESSA SPENCER RESPONDENT/DEFENDANT: EUGENE J. SPENCER, III OTHER PARTY:	
FINDINGS AND ORDER AFTER HEARING	CASE NUMBER: 06FL06410

1. This proceeding was heard
on *(date)*: 9/29/2017 at *(time)*: 8:30 A.M. In Dept.: 121 Room:
by Judge *(name)*: HON. THOMAS A. SMITH ☐ Temporary Judge
On the order to show cause, notice of motion or request for order filed *(date)*: 5/7/2016/15/16 by *(name)*: PETITIONER
a. ☒ Petitioner/plaintiff present ☒ Attorney present *(name)*: KAREN R. LEDER
b. ☒ Respondent/defendant present ☐ Attorney present *(name)*:
c. ☐ Other party present ☐ Attorney present *(name)*:

THE COURT ORDERS

2. Custody and visitation/parenting time:	As attached	☐	on form FL-341	☐	Other	☒ Not applicable
3. Child support:	As attached	☐	on form FL-342	☐	Other	☒ Not applicable
4. Spousal or family support:	As attached	☐	on form FL-343	☐	Other	☒ Not applicable
5. Property orders:	As attached	☐	on form FL-344	☒	Other	☒ Not applicable
6. Attorney's fees	As attached	☐	on form FL-346	☒	Other	☐ Not applicable
7. Other orders:	☒ As attached	☐	Not applicable			

8. All other issues are reserved until further order of court.

9. ☐ This matter is continued for further hearing on *(date)*: at *(time)*: In Dept.:
on the following issues:

Date: FEB - 7 2018

JAMES M. MIZE
SIGNATURE PURSUANT TO JUDICIAL OFFICER

Approved as conforming to court order.

EUGENE J. SPENCER, III
SIGNATURE OF ATTORNEY FOR ☐ PETITIONER/PLAINTIFF ☐ RESPONDENT/DEFENDANT ☐ OTHER PARTY

Form Adopted for Mandatory Use
Judicial Council of California
FL-340 [Rev. January 1, 2012]

FINDINGS AND ORDER AFTER HEARING
(Family Law—Custody and Support—Uniform Parentage)

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SPENCER, DISARIE RANESSA

In re Marriage of Spencer, Disarie Ranessa and Eugene J. III
Sacramento County Superior Court No. 06FL06410
Attachment to Findings and Order After Hearing for September 29, 2017

The above-entitled matter came on regularly for hearing on September 29, 2017 before Hon. Thomas A. Smith, assigned judge presiding. Petitioner Disarie Spencer ("Disarie") appeared with her attorney Karen R. Leder, Esq. And respondent Eugene J. Spencer, III ("Eugene") appeared as a self-represented litigant.[1] Oral and documentary evidence was presented and the matter was argued and submitted for decision.

BACKGROUND

The parties married on September 3, 1994 and separated on August 14, 2006. Disarie filed a petition for dissolution of marriage on August 25, 2006 and served Eugene with her preliminary and final declarations of disclosure on April 7, 2007 and May 2, 2007.

On July 19, 2007, both parties appeared without counsel for a mandatory settlement conference and entered into a stipulation which included a provision for division of marital assets. On August 2, 2007, Eugene served Disarie with his preliminary and final declaration of disclosure. A judgment of dissolution of marriage was filed on April 1, 2008.

By April 28, 2014, Disarie retained Ms. Leder as her attorney. On May 7, 2014, she filed a request for order seeking [1] an award of the former family home at 8191 Gandy Dancer Way, Sacramento, California with no equalizing payment,[2] [2] a finding Eugene breached a spousal fiduciary duty by refinancing the home in February 2007 without her knowledge or consent, and [3] a finding Eugene breached his fiduciary duty by diverting and failing to account for $75,000 receiving by Eugene in connection with a refinance of the

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1 As is common in family law matters, the parties' first names are used for convenience only. No disrespect is intended.

2 Disarie alleged the house was then valued at $150,000, yet had a $246,834 mortgage, and thus had negative equity in the amount of $96,834. Eugene subsequently signed an interspousal transfer deed to the family home to Disarie.

home in 2004. Disarie requested attorney's fees pursuant to Family Code §271. These issues were set for trial on August 21, 2014 and subsequently continued to November 14, 2014.

On November 14, 2014, Disarie stated that she had conducted discovery regarding her May 7, 2014 request for order and asserted she discovered additional omitted assets and breaches of Eugene's fiduciary duties. She requested the court trial be vacated and continued to a future date so additional claims could be heard at a later date. The court continued the matter to a "new (unspecified) trial date."

On June 10, 2015, Disarie filed a second request for order in which she claimed Eugene breached his fiduciary duties to her (in addition to the claims asserted in the May 7, 2014 request for order) by maintaining undisclosed checking and savings accounts at Golden 1 Credit Union, maintaining an undisclosed state employee 401(k) account from which he transferred funds to his secret Golden 1 Credit Union account, and using community funds to make periodic payments to Provident Bank for an undisclosed asset. Disarie also made a request for attorney's fees under Family Code §§271 and 2030.

FINDINGS

On May 6, 2004, the parties refinanced their family residence. The sum of $21,277 was paid directly from the escrow to pay the loan balance of Disarie's 2000 Toyota Tundra (which was awarded to her in the judgment of dissolution). Based on escrow instructions signed by both Disarie and Eugene, the net proceeds from the refinance, $74,797, were wired to Golden 1 Credit Union account number 30092 ("the secret account"), a combined vehicle loan/savings/checking account in Eugene's sole name. Although Disarie signed the escrow instruction, she did not notice the funds were to be wired to that specific account.

Prior to the transfer of the loan proceeds, the secret account held $811 in savings, $1,136 in checking, and the balance due on a loan secured by a Ford Expedition as $32,219. After the loan proceeds were deposited into the secret checking account, it had a balance of

$75,933. On May 8, 2004, Eugene transferred $32,219 from the secret account to pay the loan secured by his Ford Expedition (which was awarded to him in the judgment of dissolution.) Disarie was fully aware the Ford Expedition loan would be paid from the cash-out refinance.

The secret account was not listed in Eugene's August 2, 2007 preliminary and final declaration of disclosure. Eugene testified that he thought the secret account had been closed when he completed the disclosure, but the court finds that testimony is not credible. The July 2007 bank statement shows 53 withdrawals and seven deposits during the month of Jul 2007. The August 2007 statement lists 14 withdrawals and two deposits. In fact, the August statement shows an August 2, 2007 withdrawal of $40 having occurred at 3341 Power Inn Road (which is the street number of the Sacramento Superior Court family law division). The court finds Eugene was fully aware of the existence of the secret account when he completed his inaccurate declaration of disclosure.

The secret account as opened prior to January 2004; the checking portion was closed on September 20, 2007, and by November 2007 the savings portion had a zero balance. Thousands of transactions occurred in the interim. Eugene was not able to recall the source of a $36,573 deposit made on August 10, 2007. Disarie requests the court find the $36,573 must have come from some unknown community source and requests the court award it to her. She also suggests the court find a $18,904 deposit on May 30, 2006 (which the court finds was transferred as a loan from Eugene's undisclosed CalPERS Nationwide Retirement Solutions 457 deferred compensation account) came from a community property source and should be awarded to her.

Disarie further requests the court find Eugene made monthly payments toward the acquisition of an unknown community property asset. Between June 2004 and May 2005,

Eugene made ten monthly payments in the amount of $1,722 each.[3] Between June 2005 and April 2006 he wrote seven checks in various amounts between $1,850 and $2,405; he made various/ATM withdrawals ($1,000 to $2,005) between January 2006 and June 2007. Disarie asserts those expenditures total the sum of $46,125 and should be awarded to her. She is also requesting reimbursement of $40,000 withdrawn from Eugene's Nationwide 457 account.

Eugene withdrew $20,000 from his Nationwide 457 account on October 16, 2006 and deposited $16,000 in the secret savings account on October 18, 2006. He made another $20,000 withdrawal on December 1, 2006 and deposited $16,000 in the secret savings account on December 5, 2006. The reason for the 20% reduction between the withdrawals from the 457 deferred compensation plan and the deposits into the savings account is easily solved: Eugene would have incurred a 20% tax penalty for early withdrawal of sums from his deferred compensation plan, i.e. prior to reaching normal retirement age.

Eugene testified he used the secret account to pay the mortgage on the family home and other community obligations. [See Petitioner's Exhibit 2.] He has no other undisclosed assets. While Disarie claims she paid most of the mortgage payments from the parties' joint checking account, she failed to provide any documentary evidence to support her conclusion. She subpoenaed and introduced into evidence 207 pages of bank records for the secret account, yet she failed to submit any checks from the parties' joint account showing it to be the source of payment of the mortgage or other expenses. "If the weaker and less satisfactory evidence is offered when it was within he power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust." Evidence Code §412. Disarie asserts the deposits into the secret account are attributable to an undisclosed asset and the payments from the account reflect the purchase of something, perhaps a parcel of real estate. Disarie is simply asking the court to engage in rank speculation.

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[3] The first of the payments was made to Provident Bank. No evidence was introduced to indicate the payee of the remaining nine checks.

The court finds nothing extraordinary in Eugene's failure to identify the source of all funds deposited into the secret account considering the considerable passage of time since the event occurred. However, the court finds his testimony convincing the payments from the secret account were used for community purposes.

Disarie claims Eugene received undisclosed proceeds in 2007 from a secret re-finance of the family home. Her claim has not been established. She produced Petitioner's Exhibit 7, loan application documents, but no evidence was presented the loan application was approved, that it was funded, or that Eugene received any cash-out proceeds.

Disarie has met her burden to establish Eugene failed to disclose all assets. He failed to disclose the secret account which at the date of separation had a balance of $5,951.64. He failed to disclose the existence of his Nationwide 401(k) and 457 deferred compensation plans which had a combined balance of $8,564.42. Thus, the court will award Disarie one-half of the value of the accounts, to wit: the sum of $7,258.03 plus legal interest at the rate of 10% from August 14, 2006, i.e., the sum of $8,104.76. Additionally, the court will award Disarie sanctions for Eugene's breach of fiduciary duty for his failure to fully disclose community property under his sole possession and control in the amount of $6,000. Disarie's separate request for attorneys' fees pursuant to Family Code section 2030 is denied.

2. **17-27740-E-13** **RANDY KEMP** **AMENDED MOTION TO DISMISS CASE**
17-2227 **Pro Se** **3-19-18 [16]**
CRB-6

KEMP V. TIDALWAVE FINANCE CORP.

Final Ruling: No appearance at the April 19, 2018 hearing is required.

Local Rule 9014-1(f)(1) Motion—No Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Plaintiff-Debtor on January 9, 2018. FN.1. By the court's calculation, 72 days' notice was provided. 28 days' notice is required.

FN.1. Defendant filed the Notice of Hearing and Proof of Service in this matter as one document. Defendant also filed the Mothorities and Proof of Service as one document. That is not the practice in the Bankruptcy Court. "Motions, notices, objections, responses, replies, declarations, affidavits, other documentary evidence, exhibits, memoranda of points and authorities, other supporting documents, proofs of service, and related pleadings shall be filed as separate documents." LOCAL BANKR. R. 9004-2(c)(1). Counsel is reminded of the court's expectation that documents filed with this court comply as required by Local Bankruptcy Rule 9004-1(a). Failure to comply is cause to deny the motion. LOCAL BANKR. R. 1001-1(g), 9014-1(l).

These document filing rules exist for a very practical reason. Operating in a near paperless environment, the motion, points and authorities, declarations, exhibits, requests for judicial notice, and other pleadings create an unworkable electronic document for the court (some running hundreds of pages). It is not for the court to provide secretarial services to attorneys and separate an omnibus electronic document into separate electronic documents that can then be used by the court.

The Motion to Dismiss Adversary Proceeding has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 4004(a). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Dismiss Adversary Proceeding is granted.

Tidalwave Finance Corporation ("Defendant") moves for the court to dismiss all claims against it in Randy Kemp's ("Plaintiff-Debtor") Complaint according to Federal Rule of Civil Procedure 12(b)(6).

APPLICABLE LAW

In considering a motion to dismiss, the court starts with the basic premise that the law favors disputes being decided on their merits. Federal Rule of Civil Procedure 8 and Federal Rule of Bankruptcy Procedure 7008 require that a complaint have a short, plain statement of the claim showing entitlement to relief and a demand for the relief requested. FED. R. CIV. P. 8(a). Factual allegations must be enough to raise a right to relief above the speculative level. *Id.* (citing 5 C. WRIGHT & A. MILLER, FED. PRACTICE AND PROCEDURE § 1216, at 235–36 (3d ed. 2004) ("[T]he pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action")).

A complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to the relief. *Williams v. Gorton*, 529 F.2d 668, 672 (9th Cir. 1976). Any doubt with respect to whether to grant a motion to dismiss should be resolved in favor of the pleader. *Pond v. Gen. Elec. Co.*, 256 F.2d 824, 826–27 (9th Cir. 1958). For purposes of determining the propriety of a dismissal before trial, allegations in the complaint are taken as true and are construed in the light most favorable to the plaintiff. *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 810 (9th Cir. 1988); *see also Kossick v. United Fruit Co.*, 365 U.S. 731, 731 (1961).

Under the Supreme Court's formulation of Federal Rule of Civil Procedure 12(b)(6), a plaintiff cannot "plead the bare elements of his cause of action, affix the label 'general allegation,' and expect his complaint to survive a motion to dismiss." *Ashcroft v. Iqbal*, 556 U.S. 662, 687 (2009). Instead, a complaint must set forth enough factual matter to establish plausible grounds for the relief sought. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) ("[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of a cause of action's elements will not do.").

In ruling on a motion to dismiss brought under Federal Rule of Civil Procedure 12(b)(6), the Court may consider "allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice." *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007). The court need not accept unreasonable inferences or conclusory deductions of fact cast in the form of factual allegations. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). Nor is the court "required to"accept legal conclusions cast in the form of factual allegations if those conclusions cannot reasonably be drawn from the facts alleged." *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754–55 (9th Cir. 1994) (citations omitted).

A complaint may be dismissed as a matter of law for failure to state a claim for two reasons: either a lack of a cognizable legal theory, or insufficient facts under a cognizable legal theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988) (citation omitted).

REVIEW OF MOTHORITIES

The Mothorities (portmanteau of Motion and Memorandum of Points & Authorities) responds to the Complaint's claims with the following grounds:

A. Plaintiff-Debtor does not allege any facts that support a finding that Defendant violated the automatic stay; and

B. Plaintiff-Debtor has no private right of action under 18 U.S.C. § 242.

REVIEW OF COMPLAINT

The Complaint in this Adversary Proceeding was filed on December 4, 2017. Dckt. 1. The handwritten Complaint states in its entirety:

Cause of Actions

I. 11 U.S. Code § 362 - Automatic Stay, by way of collect fees or/and demand of cancelled protection (auto).
Defendants dates of contact or/and mailing, happened Nov, 30th 2017 - Dec 1st 2017.

II. 18 U.S. Code § 242
Defendants [*illegible*] behavior towards plaintiff request and/or [*illegible*] property return back to plaintiff which defendants failure to comply § 542.

Nature Suit

III. § 542 Recovery of money/property
Plaintiff property Chevy Camaro SS 2010

Relief Sought

Plaintiff request defendants to return vehicle Chevy Camaro SS 2010 as of 12/5/2017. Additional demand $20,000 due to defendants violated 18 U.S. Code § 242 and 11 U.S. Code § 362 automatic stay on and/or date plaintiff filed Chapter 13 petition

Dckt. 1. On its face, the Complaint appears to allege that Defendant violated the automatic stay by seizing a vehicle post-petition.

DEFENDANT'S REQUEST FOR CONTINUANCE

On March 19, 2018, Defendant filed a request to continue this hearing to 11:00 a.m. on April 19, 2018. Dckt. 15. Defendant states that it seeks a continuance because it needs to revise the Motion to be in line with the court's comments, which were from the February 21, 2018 Status Conference.

Defendant states that there have been unforeseen circumstances (not disclosed), however, that have prevented Defendant from revising the Motion. Defendant expects to have the revised motion filed by March 23, 2018, one day after the scheduled hearing.

MARCH 22, 2018 HEARING

At the March 22, 2018 hearing, the court reviewed how it had previously provided Defendant with a detailed discussion of how the Motion was defective because it merely stated the rule of law for a motion to dismiss based upon Plaintiff-Debtor not stating a claim upon which relief could be granted. *See* Dckt. 13. Defendant failed in the original Motion to provide actual grounds, and instead, chose to place them in the Memorandum of Points and Authorities only.

The court noted that Defendant filed a request to continue the hearing to correct the deficient Motion and present actual grounds upon which the court could rule. *See* Dckt.15. In the interest of avoiding what would surely be a near-immediate refiling of the Motion (but with actual grounds), the court continued the hearing 11:00 a.m. on April 19, 2018, to allow Defendant to correct the Motion and to avoid having to notice a new hearing date.

FILING OF AMENDED MOTION

Defendant filed an Amended Motion on March 19, 2018. Dckt. 16. FN.2. Defendant primarily copies its arguments from the Memorandum of Points and Authorities and inserts them into the Motion, nearly verbatim.

FN.2. Once again, Defendant filed the Motion and Proof of Service in this matter as one document. That is not the practice in the Bankruptcy Court. "Motions, notices, objections, responses, replies, declarations, affidavits, other documentary evidence, exhibits, memoranda of points and authorities, other supporting documents, proofs of service, and related pleadings shall be filed as separate documents." LOCAL BANKR. R. 9004-2(c)(1). Counsel is reminded of the court's expectation that documents filed with this court comply as required by Local Bankruptcy Rule 9004-1(a). Failure to comply is cause to deny the motion. LOCAL BANKR. R. 1001-1(g), 9014-1(l).

These document filing rules exist for a very practical reason. Operating in a near paperless environment, the motion, points and authorities, declarations, exhibits, requests for judicial notice, and other pleadings create an unworkable electronic document for the court (some running hundreds of pages). It is not for the court to provide secretarial services to attorneys and separate an omnibus electronic document into separate electronic documents that can then be used by the court.

One new addition to the Amended Motion, however, is Defendant's assertion that the court no longer has subject matter jurisdiction because the underlying bankruptcy case has been dismissed. Defendant asserts that Federal Rule of Civil Procedure 12(b)(1) is now a proper ground to dismiss this case.

DISCUSSION

Federal Rule of Civil Procedure 12(b)(6)

Defendant argues, correctly, that Plaintiff-Debtor does not allege facts that support the legal conclusions espoused in the Complaint. The only fact alleged in the Complaint appears to be that Defendant contacted and/or mailed items to Plaintiff-Debtor between November 30 and December 1, 2017. The underlying bankruptcy case—No. 17-27740—was filed on November 27, 2017.

Plaintiff-Debtor does not provide any information about how the contact with Defendant constitutes a violation of the automatic stay. He does not argue that Defendant seized his vehicle post-petition; he does not argue that Defendant demanded payment. Instead, he argues that he was contacted.

Additionally, the part of the requested relief demanding the return of Plaintiff-Debtor's vehicle has occurred already according to Defendant's Motion. Dckt. 8 at 5:10–12. Defendant argues that return of the vehicle made the Complaint moot.

The Motion also asserts correctly that 18 U.S.C. § 242 is a criminal statute that does not provide a private right of action in a civil matter. *Id.* at 5:15–20 (citing *Allen v. Gold Country Casino*, 464 F.3d 1044, 1048 (9th Cir. 2006); *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980)).

The First Cause of Action presented by Plaintiff-Debtor fails because there are no facts alleged to support a finding that the alleged contact by Defendant violated the automatic stay. Plaintiff-Debtor has only presented his conclusory opinion that the stay was violated.

The Second Cause of Action fails because it is a criminal statute that does not give rise to civil liability, making it inapplicable in this Adversary Proceeding.

Federal Rule of Civil Procedure 12(b)(1)

Defendant has not cited the court to any case law interpreting either 28 U.S.C. §§ 157(b)(1) or 1334(b) for the scenario when a bankruptcy case is dismissed but an adversary proceeding is pending still. The court's review of Ninth Circuit law shows that dismissal of a bankruptcy case causes all issues related to reorganization to be moot, but the bankruptcy court maintains jurisdiction for ancillary matters, such as determining attorney's fees and enforcing its orders in the case. *See, e.g.*, *Tsafaroff v. Taylor (In re Taylor)*, 884 F.2d 478, 481 (9th Cir. 1989); *Azam v. US Bank N.A. (In re Azam)*, Nos. CC-13-1345-DKiKu, CC-13-1538-DKiKu, CC-14-1136-DKiKu, 2015 Bankr. LEXIS 1581, at *20–21 (B.A.P. 9th Cir. May 8, 2015).

As the court has noted, here, the Complaint appears to allege that Defendant violated the automatic stay by seizing estate property post-petition. To the extent that those allegation are litigable, they

arise out of Plaintiff-Debtor's bankruptcy case, but they do not directly impact Plaintiff-Debtor's opportunity for successful reorganization. A determination that a party may have violated the automatic stay does not become moot merely because a bankruptcy case is dismissed. A creditor does not get a "free pass" for violating the Code.

Nevertheless, Plaintiff-Debtor has chosen not to respond to the Motion to present evidence and arguments that would keep this adversary proceeding open.

The Motion to Dismiss Adversary Proceeding is granted, and the Adversary Proceeding is dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6).

The court shall issue a minute order substantially in the following form holding that:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Dismiss Adversary Proceeding filed by Tidalwave Finance Corporation ("Defendant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Dismiss is granted, and Adversary Proceeding is 17-2227 is dismissed without prejudice pursuant to Federal Rule of Civil Procedure 12(b)(6).