

SUMMARY OF COMPLAINT

Dominique Black (“Plaintiff”) filed her First Amended Complaint on April 4, 2019, in this Adversary Proceeding. Dckt. 21. The Certificate of Service states that it was served on April 18, 2019. Dckt. 26. It states that the “attached Summons and Notice of Status Conference in an Adversary Proceeding and a copy of the complaint” were served. No documents attesting to what was served are “attached.”

Plaintiff’s new counsel, who substituted in to represent the previously *pro se* Plaintiff in February 2019, filed a Status report on April 17, 2019. Dckt. 22. Plaintiff explains the investigation undertaken, the preparation of a First Amended Complaint, and that counsel is awaiting a reissued summons from the court.

Defendant-Debtor’s counsel, making a special appearance at the hearing on an Order to Show Cause, provided a review of the applicable rules and law governing the initial prosecution of an adversary proceeding and service of process. Dckt. 10.

The allegations in the First Amended Complaint are summarized by the court as follows:

1. Plaintiff was the owner of what is described as a 1977 Classic GMC Motorhome (“Motor”).
2. Defendant and associates represented that they operated a licensed business specializing in restoration of vehicles such as the Motorhome.
3. Defendant and associates entered into a contract to restore the Motorhome.
4. Plaintiff advanced \$147,622.75 for the restoration
5. Plaintiff alleges that Defendant and associates created false invoices and “embezzled” the monies that he provided for the restoration.
6. Defendant represented he had a California BAR license and a GMC license, and was under contract to GMC through an east Bay Dealership, Hilltop Buick.
7. Plaintiff asserts that he discovered in this process that Defendant’s brother was using the Motorhome as a residence and for other activities not related to restoration of the vehicle.
8. It is asserted that in 2006 Defendant attempted to seize title to the Motorhome by foreclosing on a mechanic’s lien.
9. Plaintiff made arrangements with the owner of the property on which Defendant was doing business, and for whom the lease was terminated, to go on the property to recover the Motorhome. It is alleged that Defendant then dismantled and vandalized the Motorhome, removing the valuable parts therefrom.
10. It is further alleged that Defendant then abandoned the Motorhome on a public roadway, further vandalized the Motorhome by pouring paint on it, leaving waste on it, and having used it

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for other than legal enterprises.

11. Plaintiff obtained a State Court Judgment against Defendant and associates in the amount of \$323,804.85, which Plaintiff computes to have a judgment balance of \$193,612.97 as of August 9, 2018 (Plaintiff having received a partial payment from some of the other judgment debtors on the State Court Judgment).

12. Plaintiff asserts that the obligation on the State Court Judgment is nondischargeable pursuant to: 11 U.S.C. § 523(a)(2)(A) [fraud]; § 523(a)(4) [embezzlement, larceny]; and § 523(a)(6) [willful and malicious injury].

SUMMARY OF ANSWER

No answer has been filed to the First Amended Complaint.

FINAL BANKRUPTCY COURT JUDGMENT

Plaintiff Dominique Black alleges in the Complaint that jurisdiction for this Adversary Proceeding exists pursuant to 28 U.S.C. §§ 1334 and 157(b)(2), 11 U.S.C. § 523(a), and that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (I). First Amended Complaint ¶¶ 3, 5, 6; Dckt. 21.

2. [17-22515-E-7](#)
[18-2181](#)
XIONG V. HER

LANG HER
OHS-1

MOTION FOR SUMMARY JUDGMENT
2-28-19 [[18](#)]

No tentative ruling is posted for the above captioned Adversary Proceeding. Copies of the court's tentative ruling have been provided to counsel for the parties.

Debtor's Atty: W. Steven Shumway

Notes:

Continued from 2/12/19

[BRL-1] Order granting creditor Darrell Klotzbach, et al.'s motion for relief from stay filed 2/22/19
[Dckt 45]

The Status Conference is xxxxxxxxxxxxxxxxxxxx

APRIL 20, 2019 STATUS CONFERENCE

No updated Status Report has been filed by the Debtor in Possession ("DIP"). The last Monthly Operating Report was filed on January 14, 2019 (Dckt. 36), for the month of November 2018. No Monthly Operating Reports have been filed for December 2018, January 2019, February 2019, and March 2019.

At he Status Conference xxxxxxxxxxxxxxxxxxxx

FEBRUARY 12, 2019 STATUS CONFERENCE

No updated Status Report has been filed by the Debtor in Possession. Since the November 14, 2018 Status Conference the November 2018 Monthly Operating Report (timely filed on December 13, 2018, Dckt. 35) and the December 2018 Monthly Operating Report (timely filed on January 14, 2019, Dckt. 36) have been filed.

For November 2018, the Debtor in Possession Reports having \$0.00 in cash receipts and \$0.00 in cash disbursements. Dckt. 35. For December 2018, the Debtor in Possession reports having received \$100 in "Capital Contributions." Dckt. 36. The Monthly Operating Report does not state how a bankruptcy estate receives "capital contributions." The December Monthly Operating Report further discloses that the bankruptcy estate had not cash disbursements and that it's end of month cash balance was \$100. *Id.*

On January 25, 2019, Creditors Darrell Klotzbach; Chan Klotzbach; Brian Nesse; and Ignatius Palmera, as Trustee; and Barbara Lloyd, as Trustee filed a Motion for Relief From the Automatic Stay. Dckt. 37. The deadline for the Debtor in Possession for filing a response or opposition to the Motion for Relief expired on February 7, 2019. As of the court's February 8, 2019 review of the Docket, no opposition or response had been filed.

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The Motion seeks relief from the stay to foreclose on the real property commonly known as East Grass Valley Street, Colfax, California.

At the Status Conference, Debtor in Possession counsel reported that the owner advanced the \$100.00 to the estate.

NOVEMBER 14, 2018 STATUS CONFERENCE

Status Report

On November 2, 2018, the Debtor in Possession filed its Status Report. Dckt. 22. It is reported that the Debtor purchased the Colfax Hotel on May 15, 2013 from the bankruptcy estate of James Payne (Case No. 11-033534). The Debtor is stated to have been remodeling the building to be a mixed use retail and office building.

In 2017, the City of Colfax presented Debtor with a list of 27 items to be corrected in the commercial property. The Debtor in Possession reports that 26 were completed by Debtor. Due to a dispute with a City Inspector, the Debtor in Possession reports that the City shut down the project.

The Debtor in Possession is talking with investors who are interested in the project if the above dispute can be resolved.

The Debtor has filed a statement that this is a Single Asset Real Estate Case. Dckt. 30.

At the Status Conference it was reported that the Debtor in Possession is trying to communicate with the City of Colfax about the claims. There are investors ready to invest to pay the fine.

Review of Schedules and Statement of Financial Affairs

This Chapter 11 case was commenced on October 11, 2018. On Schedule A/B Debtor has listed owning an 11,000 square foot commercial building with a value of \$700,000. The only asset listed by Debtor is a checking account with a \$100 balance.

The Debtor states that it has no other assets, including no: (1) deposits, (2) accounts receivables, (3) investments, (4) inventory, (5) office furniture, equipment or fixtures, or (6) machinery or equipment. Schedule A/B, Dckt. 15. Debtor further states that it has no executory contracts or unexpired leases. Schedule G, Id.

For Creditors, Debtor states in the Schedules the following:

1. Secured claims, Schedule D

Creditor	Amt. of Claim	Collateral
City of Colfax	(\$ 50,000)	Commercial Bldg PMC Lender
Services	(\$471.824.95)	Commercial Bldg

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5. [18-25524-E-7](#)
[18-2166](#)

RANDY/CAROLYN SHREVE

CONTINUED STATUS CONFERENCE
RE: COMPLAINT
10-8-18 [1]

SHREVE ET AL V. SN SERVICING
CORPORATION

Final Ruling: No appearance at the April 24, 2019 Status Conference is required.

Plaintiff's Atty: Kyle W. Schumacher
Defendant's Atty: Michelle R. Ghidotti-Gonsalves

Adv. Filed: 10/8/18
Answer: 10/23/18

Nature of Action:
[Adversary Proceeding Cover Sheet does not state the nature of suit]

Notes:
Continued from 2/20/19 to allow the Parties to document their settlement.

The Adversary Proceeding having been dismissed with prejudice (Stipulation, Dckt. 20) on April 18, 2019, **the Status Conference is concluded and removed from the Calendar.**

The Stipulation dismissing this Adversary Proceeding having been filed, the Clerk of the Court may close the file herein.

6. [17-26125-E-7](#)
18-2030

FIRST CAPITAL RETAIL,

FIRST DATA MERCHANT SERVICES
LLC V. MCA RECOVERY, LLC ET AL

CONTINUED STATUS CONFERENCE
RE: AMENDED COMPLAINT
LLC
5-17-18 [\[39\]](#)

Plaintiff's Atty: Randy B. Soref; Andrew Joseph Nazar

Defendants' Atty:

Robert S. McWhorter [MCA Recovery, LLC]

Gabriel E. Liberman [First Capital Retail, LLC]

Jeffrey D. Ganz; J. Russell Cunningham [13th Floor/Pilot, LLC]

Adv. Filed: 3/22/18

Answer: 4/23/18 [First Capital Retail, LLC]

Amd. Cmplt. Filed: 5/17/18

Answer: 7/20/18 [13th Floor/Pilot, LLC]

7/20/18 [First Capital Retail, LLC]

7/20/18 [MCA Recovery, LLC]

Amd. Answer: 8/3/18 [MCA Recovery, LLC]

Cross-Claim Filed [by 13th Floor/Pilot, LLC]: 7/20/18

Answer: none

Cross-Claim Filed [by MCA Recovery, LLC]: 8/3/18

Answer: 8/22/18 [13th Floor/Pilot, LLC]

Amd. Cross-Claim Filed [by 13th Floor/Pilot, LLC]: 8/22/18

Answer: 10/23/18 [MCA Recovery, LLC]

Nature of Action:

Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy estate)

Notes:

Continued from 3/20/19 to afford the Parties additional time for their settlement negotiations.

Second Joint Status Report and Discovery Plan filed 4/18/19 [Dckt 154]

MARCH 20, 2019 STATUS CONFERENCE

On February 13, 2019, the Parties filed a Stipulation to Continue the then pending Status Conference. Dckt. 144. The Parties advised the court that they were engaged in settlement discussions and requested the continuance to save the parties what might be unnecessary attorney's fees. The Parties further advised the court that their Joint Discovery Plan would be filed by March 15, 2019.

Nothing further has been filed in this case by the Parties.

At the March 20, 2019 Status Conference, the parties reported that they are continuing in their negotiations and are working to settlement. The Parties filed on March 19, 2019 a request for a further continuance. (Dckt. 150).

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**SUMMARY OF FIRST AMENDED COMPLAINT
AND CROSS-COMPLAINTS**

Given the complexity of the pleadings and identification of parties in this multi-cross complaint adversary proceeding, the court has constructed the following chart of the live matters before the court.

<p>FIRST AMENDED COMPLAINT (Dckt. 39) First Data Merchant Services, LLC ("Plaintiff") alleges in its First Amended Complaint that it has commenced this interpleader action:</p> <ol style="list-style-type: none"> 1. Plaintiff is holding \$214,923.33. 2. Defendant First Capital Retail, LLC (Defendant-Debtor) has filed a bankruptcy petition in the Eastern District of California. 3. Plaintiff is a payment card processor for Defendant-Debtor. 4. Plaintiff was served with a Restraining Notice by MCA Recovery, LLC for \$214,932.33 of payments being processed for Defendant-Debtor. Plaintiff has frozen the payments. 5. On November 8, 2017, Defendant-Debtor filed a Motion for an Order Avoiding Preferential Transfer, Directing Turn Over and Mandating Delivery of the Frozen Funds. 6. On April 6, 2018, the court approved the sale of Defendant-Debtor's assets to 13th Floor/Pilot LLC. 7. Defendant-Debtor and Defendant MCA Recovery, LLC each have demanded the \$214,932.33. 	<p>AMENDED CROSS-CLAIM of 13th Floor (Dckt. 108) against MCA Recovery which alleges:</p> <ol style="list-style-type: none"> 1. Cross-Claimant seeks recovery against Defendant-MCA Recovery. 2. It is asserted that asserted obligation of Defendant-Debtor to Defendant-MCA Recovery are avoidable as fraudulent conveyances pursuant to 11 U.S.C. § 548. 3. It is further asserted that Cross-Claimant can recover payments made by Defendant-Debtor to and a purported judgment lien against Defendant-Debtor by Defendant-MCA Recovery as fraudulent conveyances pursuant to 11 U.S.C. §§ 548, 550, and 551. 4. It is asserted that the agreement with Yellowstone by which Defendant-MCA Recovery asserts its interests was entered into by a person who had not authority to act for Defendant-Debtor. 5. No monies for which Defendant-MCA Recovery asserts its rights were delivered to Defendant-Debtor. 6. The unauthorized representative of Defendant-Debtor made unauthorized payments to Yellowstone. These payments were made within the period for avoidable fraudulent conveyances and preferential transfers. 	<p>CROSS-COMPLAINT of MCA Recovery (Dckt. 89) against Defendant-Debtor and 13th Floor, asserting:</p> <ol style="list-style-type: none"> 1. That for the Cross-Complaint jurisdiction exists pursuant to 28 U.S.C. § 1332, § 1334, and § 1335, and that it is core proceeding pursuant to 28 U.S.C. § 157(b)(2)(a), (k), and (o). 2. The rights of MCA Recovery, as the assignee of Yellowstone, in the underlying contract and the monies that are the subject of the Interpleader Complaint are to be determined in favor of MCA Recovery.

<p>First Capital Retail, LLC ("Defendant-Debtor") filed its Answer(Dckt. 73) which:</p> <ol style="list-style-type: none"> 1. Admits and denies specific allegations in the First Amended Complaint. 2. Asserts four affirmative defenses, including that Defendant MCA Recovery, LLC is barred from receiving the monies because such would be a preferential transfer. 3. Seeks to have the court determine that the \$214,932.33 be awarded to 13th Floor/Pilot, Inc. as Defendant-Debtor's successor. 	<p>Defendant-MCA filed its Answer (Dckt. 127) to the Amended Cross-Claim, that:</p> <ol style="list-style-type: none"> 1. Admits and denies specific allegations in the Cross-Claim. 2. Asserts ten affirmative defenses. 3. Does not state whether this is a core proceeding and if not, if it consents to the entry of final orders and judgment by the bankruptcy judge. 	<p>13th Floor Answer to Cross-Complaint Filed by MCA Recovery (Dckt 107)</p> <p>13th Floor has filed its Answer (Dckt. 107) to the Cross-Complaint that:</p> <ol style="list-style-type: none"> 1. Admits and denies specific allegations in the Cross-Complaint. 2. Asserts seven affirmative defenses.
<p>13th Floor/Pilot LLC ("Defendant-13th Floor") has filed an Answer (Dckt. 70) that:</p> <ol style="list-style-type: none"> 1. Admits and denies specific allegations in the First Amended Complaint. 2. States three affirmative defenses. 	<p>Order (Dckt. 135) Dismissing Claims 1, 2, 3, 4, and 7 (in part) of the Amended Cross-Complaint filed by 13th Floor.</p>	
<p>MCA Recovery, LLC, as the Assignee of Yellowstone Capital West, LLC ("Defendant-MCA Recovery") filed its Answer (Dckt. 75) to the Complaint for Interpleader, stating:</p> <ol style="list-style-type: none"> 1. The Answer admits and denies specific allegations in the Complaint. 2. The Answer states two affirmative defense. 		

FINAL BANKRUPTCY COURT JUDGMENT

Plaintiff does not allege in the Complaint how jurisdiction for this Adversary Proceeding exists pursuant to 28 U.S.C. §§ 1334 and 157(b)(2), or whether this is a core proceeding in the Complaint. The court notes that if the issue presented was one whether the property at issue was property of the bankruptcy estate, then such claims/issues arising under the Bankruptcy Code, 11 U.S.C. § 541, would, in addition to be subject to the exclusive jurisdiction of the federal courts (28 U.S.C. § 1334(e)), be a claim arising under the Bankruptcy Code.

In its Answer, Defendant-13th Floor does not allege a basis for federal court jurisdiction in this bankruptcy court or whether it is a core matter. For the Cross-Claim, it is alleged that subject matter jurisdiction exists pursuant to 28 U.S.C. § 1334(b), § 157(a) and § 157(b) [core matter], and further that Defendant-13th Floor consents to the entry of final orders and judgment by the bankruptcy judge.

In its Amended Answer, Defendant-MCA Recovery asserts that the Complaint for Interpleader is not a core matter and it does not consent to a bankruptcy judge issuing final orders and judgment in such action

However, in its Cross-Complaint for a determination of the respective rights of the parties in the contract upon which MCA Recovery asserts its interest in the interpleader monies and against the fraudulent conveyance and preference claims, MCA Recovery alleges that jurisdiction exists pursuant to 28 U.S.C. § 1332, § 1334, and § 1335, and that it is core proceeding pursuant to 28 U.S.C. § 157(b)(2)(a), (k), and (o).

From review of the Complaint and Cross-Claims, the substance of the claims in this Adversary Proceeding is for the court to determine conflicting claims in the monies at issue of:

First Capital Retail, LLC, the Chapter 7 Debtor in Chapter 7 case 17-26125

13th Floor/Pilot, LLC, which asserts to be the successor to the above Debtor pursuant to a sale of assets from the bankruptcy trustee (17-26125; Order, Dckt. 378).

MCA Recovery, LLC, which is asserted to have received transfers from Debtor

The sale of assets to 13th Floor/Pilot, LLC sold are stated in the Motion to Sell, ¶ 13; 17-26125, Dckt. 304 as:

[a]ll or substantially all of the Debtor's business-related assets . . . included, but were not limited to, the following: inventory, account receivables, executory contracts, cash, deposits, franchise agreements (including the Franchise Agreement with Franchisor), supply agreements, permits, licenses, software systems, fixtures, furniture, equipment, tools, supplies, intellectual property, all leasehold interests and tenant improvements, and all other assets used in connection with operating Debtor's various franchise businesses (collectively the "**Acquired Assets**").

(Emphasis in original).

The Asset Purchase Agreement is filed as Exhibit C in support of the Motion to Sell Assets. Exhibit C is found in the court's files at Docket 307, beginning on page 38 of the Exhibit Document. The Purchase Agreement with its attachments is seventy-one (71) pages in length. In this detailed agreement, the "Acquired Assets" being sold and purchased are:

The assets of the Seller, which the Agreement defines as "'Seller' has the meaning set forth in the preamble" to the Agreement. Agreement page 14. The "Seller" is defined in the "Preamble," which appears to be the introductory paragraph to the Agreement as "First Capital Retail, LLC." *Id.* at 1. At this time the case was one under Chapter 7 so that "First Capital Retail, LLC" was the debtor and also serving as the debtor in possession. The signature block at the end of the Agreement has it being signed by First Capital Retail, LLC, Debtor and Debtor in Possession."

At issue in this contested matter are that transfers may be avoided as fraudulent conveyances pursuant to 11 U.S.C. § 548. The assets being purchased are then stated to be the "Acquired Assets," which are defined as:

"Acquired Assets" means, all of Seller's right, title and interest, free and clear of all Liens (other than Permitted Liens), in and to all of the properties, rights, interests and other tangible and intangible assets of Seller for use in or relating to the Business (wherever located and whether or not required to be reflected on a balance sheet prepared in accordance with GAAP) including any assets acquired by Seller after the date hereof but prior to the Closing; provided, however, that the Acquired Assets shall not include any Excluded Assets. Without limiting the generality of the foregoing, the Acquired Assets shall include the following (except to the extent listed or otherwise included as an Excluded Asset):

. . .

(w) any avoidance actions under chapter 5 of the Bankruptcy Code relating to (1) any Transferred Contract or trade vendor that Buyer will conduct business with following the Closing (the "Acquired Avoidance Actions"), and (2) any cause of action, lawsuit, judgment, claim, refund, right of recovery, right of set-off, counterclaim, defense, demand, warranty claim, right to indemnification, contribution, advancement of expenses or reimbursement, or similar rights of Seller from and against First Data Merchant Services LLC (the "First Data Claims"); provided, that in the event the Buyer (x) realizes a recovery from the prosecution and/or settlement of any First Data Claims, the proceeds realized therefrom shall be allocated and paid according to the following waterfall: first, to reimburse Buyer all costs of collection incurred by Buyer; second, an amount not to exceed \$100,000 in the aggregate for payment to Debtor's retained professionals for actual, reasonable and documented unpaid fees and expenses; and third, the remaining balance, if any, to Buyer for its own account; provided, further, that in the event Buyer determines, after due investigation, not to prosecute the First Data Claims, Buyer agrees that it shall provide prompt written notice of such determination to the Seller, and upon delivery of such notice the First Data Claims shall thereupon become Excluded Assets for all purposes of this Agreement; . . .

In addition to having purchased rights and interests, it appears that 13th Floor/Pilot, LLC is seeking to exercise rights of a trustee under 11 U.S.C. § 548 to avoid transfers. None of the proceeds are to be paid to the bankruptcy estate.

At the Status Conference the Parties reported **XXXXXXXXXXXXXXXXXXXX**

Joint Status Report

On April 18, 2019, the Parties filed a Second Joint Status Report. Dckt. 154. In it they jointly report to the court:

A. The Parties have not yet engaged in discovery.

B. The Parties discovery plan is:

1. Discovery will be needed on the following subjects: all claims and defenses of 13th Floor and Yellowstone.
2. All discovery commenced in time to be completed by November 1, 2019.
3. Maximum of 5 depositions by each party.
4. Each deposition limited to maximum of 7 hours unless extended by agreement of parties.
5. Reports from retained experts under Rule 26(a)(2) due:
 - a. from 13th Floor by August 1, 2019;
 - b. from Yellowstone by August 15, 2019;
6. All potentially dispositive motions should be filed by December 15, 2019.
7. (g) The proceeding should be ready for trial by January 30, 2020. The trial is expected to take approximately 3 days.

As with the Complaint, Answers, and Cross-Claims, the issue of federal court jurisdiction and core/non-core proceeding issues are not addressed.

ISSUANCE OF PRE-TRIAL SCHEDULING ORDER

The court shall issue a Pre-Trial Scheduling Order setting the following dates and deadlines:

- a. The Plaintiff alleges that jurisdiction exists for this Adversary Proceeding pursuant to 28 U.S.C. § 1334 and 157, and the referral to this bankruptcy court from the United States District Court for the Eastern District of California. Further, that this is a core proceeding before this bankruptcy court pursuant to 28 U.S.C. § 157(b)(2)(A), (N), and (O). **First Amended** Complaint, ¶¶ X, X, Dckt. X. The Defendant admits the jurisdiction and that this

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is a core proceeding. Answer, ¶¶ X, X, Dckt. X. To the extent that any issues in the existing Complaint as of the Status Conference at which the Pre-Trial Conference Order was issued in this Adversary Proceeding are related to proceedings, the parties consented on the record to this bankruptcy court entering the final orders and judgement in this Adversary Proceeding as provided in 28 U.S.C. § 157(c)(2) for all claims and issues in this Adversary Proceeding referred to the bankruptcy court.

b. Initial Disclosures shall be made on or before -----, **2019**.

c. Expert Witnesses shall be disclosed on or before -----, **2019**, and Expert Witness Reports, if any, shall be exchanged on or before -----, **2019**.

d. Discovery closes, including the hearing of all discovery motions, on -----, **2019**.

e. Dispositive Motions shall be heard before -----, **2019**.

f. The Pre-Trial Conference in this Adversary Proceeding shall be conducted at ----- **p.m.** on -----, **2019**.

7. [11-44540-E-13](#) **MERCEDES PEREZ**
[18-2042](#)
PEREZ V. FREY ET AL

**STATUS CONFERENCE RE: AMENDED
COMPLAINT**
3-11-19 [\[31\]](#)

Plaintiff's Atty: Peter L. Cianchetta
Defendant's Atty: unknown

Adv. Filed: 4/5/18
Answer: none
Amd. Cmplt. Filed: 3/11/19
Answer: none

Nature of Action:
Declaratory judgment
Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy case)

Notes:
Set by court re reissued Summons filed 3/11/19 [Dckt 32]

Status conference heard 3/20/19 continued to 5/29/19 [Dckt 34]

The Status Conference is XXXXXXXXXX.

APRIL 26, 2019 STATUS CONFERENCE

No updated Status Conference Statement has been filed by Plaintiff. No certificate of service has been filed attesting to a summons and complaint having been served on any defendant.

At the Status Conference, counsel for Plaintiff reported XXXXXXXXXX

MARCH 20, 2019 STATUS CONFERENCE

An Amended Complaint was filed in March 11, 2019. Dckt. 29. The order vacating the dismissal of the Complaint was filed on January 14, 2019. Civil Minutes, Dckt. 23; Order, Dckt. 27.

In a Status Report filed on March 15, 2019, Counsel for Plaintiff reports that the Defendant is now deceased. Dckt. 33. Plaintiff is now prosecuting two new motions to value secured claims in the bankruptcy cases that was filed in 2011. Further, that Plaintiff is pursuing discovery to identify the successor in interest to the deceased defendant.

At he Status Conference Counsel for Plaintiff reported that discovery is pending to identify the defendants, and once identified, the bankruptcy case valuation motions will be filed. Plaintiff anticipates that this Adversary Proceeding will be dismissed while the valuation motions are being prosecuted, but is delaying doing so because the discovery to identify the real parties in interest has been issued in this Adversary Proceeding.

8. [10-90080-E-7](#)
[JAD-2](#)

FRED EICHEL

PRE-EVIDENTIARY HEARING RE:
MOTION FOR SANCTIONS FOR
VIOLATION OF THE DISCHARGE
INJUNCTION
9-7-18 [31]

**THE APPEARANCE OF MICHAEL BABITZKE, COUNSEL FOR RESPONDENT
IS NOT REQUIRED FOR THE APRIL 24, 2019 HEARING**

**THE ATTENDANCE OF JESSICA DORN, COUNSEL FOR MOVANT IS
REQUESTED TO ASSIST THE COURT IN RESCHEDULING THIS CONFERENCE**

Debtor's Atty: Jessica A. Dorn
Attorney for Scarlett Fiorini: Michael F. Babitzke

Notes:

Debtor's Pre-Evidentiary Hearing Statement filed 4/17/19 [Dckt 57]

SUMMARY OF MOTION

Fred Eichel, the Movant-Debtor, has filed a Motion seeking the recovery of sanctions against the Respondent for alleged violations of the discharge injunction. It is asserted that the alleged marital obligations that Respondent has asserted in a state court proceeding were discharged in the 2010 bankruptcy case.

SUMMARY OF OPPOSITION

Scarlett Severson-Fiorini, Respondent, filed her Opposition to the Motion. Dckt. 38. She asserts that the obligations are post-2010 bankruptcy and could not have been discharged.

FINAL BANKRUPTCY COURT JUDGMENT

The rights at issue, violation of the discharge injunction, arising under the Bankruptcy Code itself. Arising under the Bankruptcy Code, such are core matter proceedings. 28 U.S.C. § 1334, 157(a) and (b); *Wellness Int'l Network, Ltd. v. Sharif*, ___ U.S. ___, 135 S. Ct. 1932 (2015), *Exec. Bens. Ins. Agency v. Arkison*, 573 U.S. 25 (2014), *Stern v. Marshall*, 564 U.S. 462 (2011), and the referral of bankruptcy cases and all related matters to the bankruptcy judges in this District. ED Cal. Gen Order 182, 223.

PRE-EVIDENTIARY HEARING STATEMENTS

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Movant has filed his Statement (Dckt. 57), which includes a reference to opposing counsel currently addressing a serious health issue and stating that in light of such, this Pre-Evidentiary Hearing Conference should be rescheduled.

Respondent has filed a Notice stating that Respondent plans on submitting two depositions. The Notice also provides a statement of the Debtor suffering a serious health issue, with major medical treatment being given shortly before this Conference.

At the Pre-Evidentiary Hearing **xxxxxxxxxxxxxxxx**

The court shall issue an Evidential Hearing Scheduling Order for this Contested Matter setting the following dates and deadlines:

- A. Evidence shall be presented pursuant to Local Bankruptcy Rule 9017-1.
- B. **Movant/Objector xxxxxxxx** shall lodge with the court and serve their Direct Testimony Statements and Exhibits on or before -----, **2019**.
- C. **Respondent xxxxxxxx** shall lodge with the court and serve their Direct Testimony Statements and Exhibits on or before -----, **2019**.
- D. The Parties shall lodge with the court, file, and serve Evidentiary Hearing Briefs and Evidentiary Objections on or before -----, **2019**.
- E. Oppositions to Evidentiary Objections, if any, shall be lodged with the court, filed, and served on or before -----, **2019**.
- F. The Evidentiary hearing shall be conducted at ----**x.m. on** -----, **2019**.

The Parties in their respective Pretrial Conference Statements, Dckts. -----, -----, and as stated on the record at the Pretrial Conference, have agreed to and establish for all purposes in this Adversary Proceeding the following facts and issues of law:

Movant	Respondent
<p>Jurisdiction and Venue:</p> <p>1. 28 U.S.C. § 157(b)(2) and that this is core proceeding.</p>	<p>Jurisdiction and Venue:</p> <p>1.</p> <p>2.</p> <p>3.</p>
<p>Undisputed Facts:</p> <p>1. Debtor and Creditor were married and separated on December 5th, 2007.</p>	<p>Undisputed Facts:</p> <p>1.</p>

2. Creditor filed for a legal separation in Stanislaus County on June 12th, 2008 and Judgment for Legal Separation was filed and entered by Superior Court of Stanislaus County on October 30th, 2008.

3. Creditor was awarded the real property located at 204 Orangeburg Avenue Modesto, California as her sole and separate property within the Judgment for Dissolution of Marriage.

4. On October 14th, 2009, Creditor signed a Deed of Trust with Harry Kullijuan against her 2004 Orangeburg Avenue, Modesto California property.

5. On January 12th, 2010, Debtor filed a Chapter 7 Bankruptcy, Case Number 2010-90080 in the Eastern District of California and named Creditor as a creditor within his bankruptcy schedules. Creditor was notified by Debtor's bankruptcy case and failed to file any documents within Debtor's bankruptcy case. Debtor received his Chapter 7 Bankruptcy Discharge on April 26th, 2010.

6. On November 21st, 2012, A Judgment for Dissolution of Marriage was entered by the Superior Court of San Joaquin County, Case Number Fl 374322, which terminated the Debtor and Creditor's marital status. Creditor was personally served with Debtor's Petition for Dissolution of Marriage and failed to file a Response, therefore, the Debtor proceeded by way of Default Judgment.

7. On March 25th, 2013, a Judgment for Dissolution of Marriage was entered by the Superior Court of Stanislaus County, which incorporated a Marital Settlement Agreement that was signed after Entry of the Judgment for Dissolution of Marriage in San Joaquin County.

8. Within the Marital Settlement Agreement that was signed by the parties, and incorporated the Superior Court of Stanislaus County

2.

3.

Judgment for Dissolution of Marriage, the debtor agreed to pay the Deed of Trust to Harry Kullijuan.

9. On August 23rd, 2016, Creditor filed a Request for Order in the Stanislaus County action seeking to enforce the Judgment for Dissolution of Marriage. The Superior Court of Stanislaus County deferred the issue until the San Joaquin County Court made a determination that the Judgment for Dissolution of Marriage entered in San Joaquin County was valid or void.

10. On February 17th, 2017 Creditor filed a Complaint in San Joaquin County Superior Court based on Failure of Jurisdiction and Judgment was obtained by Extrinsic Fraud. The matter was set for trial. Creditor claimed that she was not properly served with the San Joaquin action as Debtor personally served her with the Petition and Summons.

11. The parties conducted discovery including four depositions, including Debtor and Creditor's depositions. Creditor admitted within her deposition that she was in fact personally served by the person who signed the Proof of Service of Summons and not the Debtor.

12. The parties moved forward with trial and the court heard testimony from the parties. The Superior Court of San Joaquin County issued a ruling determining that Wife was properly served and had knowledge of the San Joaquin County action and her request to set aside the Judgment for Dissolution of Marriage was denied.

13. On May 11th, 2018, the creditor filed a Motion in San Joaquin County Action Number FL37433 to Adjudicate Community Assets and Liabilities, stating that community assets and debts had not been divided in the Judgment for Dissolution of Marriage.

14. Debtor filed his Motion for Contempt after the May 11th, 2018 motion, as Creditor was seeking to enforce a Marital Settlement

<p>Agreement that was attached to a now dismissed Judgment for Dissolution of Marriage in Stanislaus County.</p>	
<p>Disputed Facts:</p> <ol style="list-style-type: none"> 1. Debtor asserts that by Creditor filing her request to adjudicate community assets that were acquired prior to debtor filing for bankruptcy that she admits the debt was owed by debtor at the time of filing his Chapter 7 Bankruptcy, therefore the debt was discharged. 2. Creditor has previously admitted within her prior civil and family law cases that Debtor promised to pay the debt at the time that she incurred the debt owed to Harry Kullijian, which was October 2008. 3. The debt owed is dischargeable, as the Judgment for Dissolution of Marriage that the Marital Settlement Agreement was attached to is now dismissed, therefore, at best the agreement is a contract between two parties and is not entitled to priority status. 4. The Debt that Creditor seeks Debtor to pay was owed by Debtor at the time he filed for bankruptcy and therefore it has been discharged. 5. The "contract" that was signed by Debtor and Creditor after discharge was for debt owed at the time of filing Debtor's bankruptcy, therefore, any contract to pay debts owed at the time of filing bankruptcy must be approved by the Bankruptcy Court, which this "contract" was not approved by the bankruptcy court. 	<p>Disputed Facts:</p> <ol style="list-style-type: none"> 1. 2. 3.
<p>Disputed Evidentiary Issues:</p> <ol style="list-style-type: none"> 1. None Identified 	<p>Disputed Evidentiary Issues:</p> <ol style="list-style-type: none"> 1. 2. 3.

<p>Relief Sought:</p> <ol style="list-style-type: none"> 1. “Debtor seeks monetary damages for his attorney fees and sanctions against Debtor for violation of his discharge order. Debtor is seeking an award of \$15,000 in attorney fees as sanctions.” 	<p>Relief Sought:</p> <ol style="list-style-type: none"> 1. 2. 3.
<p>Points of Law:</p> <ol style="list-style-type: none"> 1. 11 U.S.C. § [524](a)(3). 2. <i>In re Erin Food Services, Inc.</i> (1st Cir. 1992) 980 F2d 792 (1st Cir. 1992). 3. <i>In re Perea</i>, 89 B.R. 128 (Bankr. D. Colo 1988). 4. <i>In re Heilman</i>, 430 B.R. 213 (2010); <i>In Re Miller</i>, 246 B.R. 559 (2000). 5. <i>In re Edwards</i>, 91 B.R. at 96. 6. <i>In re Azevedo</i> 506 B.R. 277 (Bkcy ED CA 2013) 7. <i>Barrientos v. Wells Fargo Bank, NA.</i>, 633 F 3d 1186 (2011). The Court in <i>Walls v. Wells Fargo Bank, NA.</i> 276 F3d 502 (9th Cir. 2002). 8. <i>In re Rivera Torres</i>, 432 F 3d. 20 (2005); <i>In re Breui</i>, 533 8 B.R. 782. 	<p>Points of Law:</p> <ol style="list-style-type: none"> 1. 2. 3.
<p>Abandoned Issues:</p> <ol style="list-style-type: none"> 1. None Identified 	<p>Abandoned Issues:</p> <ol style="list-style-type: none"> 1. 2. 3.
<p>Witnesses:</p> <ol style="list-style-type: none"> 1. Fred Eichel 	<p>Witnesses:</p> <ol style="list-style-type: none"> 1.

<p>2. Scarlett Severson-Fiorini</p>	<p>2. 3.</p>
<p>Exhibits:</p> <ol style="list-style-type: none"> 1. Creditor's disposition that was conducted in the civil litigation by the Trust of Harry Kullijian and the San Joaquin County Family Law matter between Debtor and Creditor. 2. Stanislaus County Petition for Dissolution of Marriage filed by Creditor 3. Deed of Trust recorded on October 30th, 2008. 4. Judgment for Legal Separation filed in Stanislaus County. 5. Straight Note for \$263,093.43 between Harry Kullijian and Creditor. 6. Discharge of Debtor. 7. Judgment for Dissolution of Marriage in San Joaquin County. 8. Request for Order filed by Creditor in Stanislaus County seeking an Order to Enforce Judgment entered by Stanislaus Superior Court. 9. Order dismissing Stanislaus County Superior Court Judgment for Dissolution matter. 10. Declaration of Scarlett Severson-Fiorini (Creditor) filed in Stanislaus County signed October 1st, 2016. 11. Complaint filed in San Joaquin County seeking to Set Aside the Judgment for Dissolution of Marriage for lack of jurisdiction and extrinsic fraud. 12. Order Denying Set Aside of Judgment of Dissolution of Marriage dated March 12th, 2018. 	<p>Exhibits:</p> <ol style="list-style-type: none"> 1. 2. 3.

<p>13. Notice of Motion for Court to Adjudicate Community Assets and Liabilities filed by Creditor on May 11th, 2018.</p> <p>14. Memorandum of Points and Authorities in support of Motion to Adjudicate Community assets and liabilities filed by Creditor on May 11th, 2018.</p> <p>15. Declaration of Scarlett Serverson-Fiorini in support of Motion for Good Faith Settlement filed in Superior Court of Stanislaus County in Civil Case# 2006141.</p> <p>16. Prepared I 099 tax statements by Creditor to Debtor not filed with the taxing agency.</p>	
<p>Discovery Documents:</p> <p>1. Creditor's deposition dated November 14th, 2017 page 15 lines 13-25. Page 16 lines 17 1-16. Page 17 lines 1-25.</p> <p>2. Creditor's deposition in the Lesslee J. Fennell vs. Fred Von Eichel and Scarlett A. Von Eichel Stanislaus Civil Case Number 2006141. Page 135 lines 1-25. page 138 lines 1-25. Page 146 lines 20 1-25.</p>	<p>Discovery Documents:</p> <p>1.</p> <p>2.</p> <p>3.</p>
<p>Further Discovery or Motions:</p> <p>1. None Identified.</p>	<p>Further Discovery or Motions:</p> <p>1.</p> <p>2.</p>
<p>Stipulations:</p> <p>1. None Identified.</p>	<p>Stipulations:</p> <p>1.</p> <p>2.</p>
<p>Amendments:</p>	<p>Amendments:</p>

1. None Identified	1. 2.
Dismissals: 1. None Identified	Dismissals: 1.
Agreed Statement of Facts: 1. None Prepared, which appears to be in light of Respondent counsel's recent health issues.	Agreed Statement of Facts: 1. 2. 3.
Attorneys' Fees Basis: 1. Movant seeks attorney's fees, but no statutory or commonly law basis stated, other than because this matter has been litigated as a request for sanctions.	Attorneys' Fees Basis: 1. 2. 3.
Additional Items 1. Continuance of this Hearing due to health issues opposing counsel is addressing.	Additional Items 1. 2.
Trial Time Estimation: 3 hours	Trial Time Estimation:

9. [17-22481-E-7](#)
[17-2139](#)

WILLIAM LANDES

CONTINUED STATUS CONFERENCE
RE: COMPLAINT
7-27-17 [1]

LANDES V. LANDES

Plaintiff's Atty: Brant J. Bordsen; David R. Lane
Defendant's Atty: Douglas B. Jacobs

Adv. Filed: 7/27/17
Answer: 8/7/17

Nature of Action:

Dischargeability - domestic support

Dischargeability - divorce or separation obligation (other than domestic support)

Dischargeability - fraud as fiduciary, embezzlement, larceny

Dischargeability - willful and malicious injury

Notes:

Continued from 12/19/18

Status Statement [Defendant - William Landes] filed 4/16/19 [Dckt 47]

Status Statement [Plaintiff - Marie Landes] filed 4/16/19 [Dckt 50]

The Status Conference is ~~XXXXXXXXXXXXXXXXXXXX~~

APRIL 24, 2019 STATUS CONFERENCE

Defendant-Debtor Status Conference Report (Dckt. 47)

Defendant-Debtor states that his Chapter 7 bankruptcy case was filed in 2017, when he was in the middle of a State Court Dissolution Proceeding. Defendant-Debtor has filed a Motion to Stay this Adversary Proceeding while the parties prosecute the Dissolution Proceeding. Defendant-Debtor states that the hearing on that Motion to Stay was conducted on September 25, 2017. The Order staying this Adversary Proceeding was entered on October 6, 2017. Dckt. 21.

The U.S. Trustee filed an Adversary Proceeding, 17-2244, seeking to have the Defendant-Debtor denied his discharge in the Chapter 7 bankruptcy case. Pursuant to a stipulation between Defendant-Debtor and the U.S. Trustee judgment was entered in said Adversary Proceeding denying the Defendant-Debtor a discharge in Chapter 7 case 17-22481. 17-2244; Order on Stipulation, Dckt. 40.

The court notes that the Order denying the Defendant-Debtor his discharge was entered on July 19, 2018 – which was two hundred seventy-nine (279) days before the April 24, 2019 Status

April 24, 2019 at 2:00 p.m.

- Page 27 of 28 -

Conference.

Defendant-Debtor asserts that this Adversary Proceeding should be dismissed as moot, given that it seeks to have obligations determined nondischargeable pursuant to 11 U.S.C. § 523 in a bankruptcy case in which the Defendant-Debtor has been denied his discharge.

Plaintiff Status Conference Report (Dckt. 50)

The Plaintiff filed a Status Report on April 16, 2019. In it counsel for Plaintiff requests that Defendant-Debtor is suffering from a major health issue and the Dissolution Proceeding is in flux.

Plaintiff then requests a six month continuance in this Adversary Proceeding. The Status Report does not address whether there is an actual case in controversy for which a federal court may exercise federal judicial power.

A review of the Complaint, Dckt. 1, seeks relief pursuant to 11 U.S.C. § 523(a)(4) [fraud/defalcation in a martial fiduciary capacity]; § 523(a)(5) [domestic support obligations]; and § 523(a)(6) [willful and malicious injury]; § 523(a)(15) [obligation from a dissolution proceeding]. All of these claims sound in exempting from discharge specific obligations. There being no discharge granted the Defendant-Debtor in the Chapter 7 bankruptcy case for which Plaintiff wants specific debts to be excepted, it appears that this issue is moot.

Subject matter jurisdiction defines a court's power to hear cases. *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 89 (1998). Before a federal court exercises its jurisdiction over parties, it must determine that there is a sufficient "case" or "controversy as required by the United States Constitution, Article III, Section 2, Clause 1, which states,

Sec. 2, Cl 1. Subjects of jurisdiction.

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

At the Status Conference counsel for Plaintiff addressed the question of what Constitutionally sufficient "case or controversy" exists for the exercise of federal judicial power. Counsel for the Plaintiff stated **XXXXXXXXXXXXXXXXXXXX**