UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

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

PRE-HEARING DISPOSITIONS

DAY: THURSDAY
DATE: MAY 23, 2019
CALENDAR: 9:15 A.M. CHAPTERS 13 AND 12 CASES

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

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

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

Final Ruling: Unless otherwise ordered, there will be no hearing on these matters. The final disposition of the matter is set forth in the ruling and it will appear in the minutes. The final ruling may or may not finally adjudicate the matter. If it is finally adjudicated, the minutes constitute the court's findings and conclusions.

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

1. 18-14586-A-13 **IN RE: JAMES/LAURA JORGENSEN**
NEA-1

CONTINUED MOTION TO CONFIRM PLAN
1-9-2019 [31]

JAMES JORGENSEN/MV
NICHOLAS ANIOTZBEHERE
RESPONSIVE PLEADING

No Ruling

2. 18-14586-A-13 **IN RE: JAMES/LAURA JORGENSEN**
19-1026

CONTINUED STATUS CONFERENCE RE: COMPLAINT
2-16-2019 [1]

ALUISI ET AL V. JORGENSEN ET
AL
DAVID JENKINS/ATTY. FOR PL.

No Ruling

3. 18-14586-A-13 **IN RE: JAMES/LAURA JORGENSEN**
19-1026 NEA-1

MOTION TO DISMISS ADVERSARY PROCEEDING/NOTICE OF REMOVAL
3-28-2019 [8]

ALUISI ET AL V. JORGENSEN ET
AL
NICHOLAS ANIOTZBEHERE/ATTY. FOR MV.
RESPONSIVE PLEADING

Tentative Ruling
Motion: Motion to Dismiss
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Granted in part with leave to amend; granted in part without leave to amend; denied in part
Order: Civil minute order

The defendants in this adversary proceeding, James Jorgensen and Laura Jorgensen, who are also the debtors in the underlying chapter 13 case ("the defendants"), move the court for dismissal of all causes of action against them in the subject complaint brought by the plaintiffs, Donald Aluisi and Karen Aluisi ("the plaintiffs"). The claims in the complaint are for determining the dischargeability of debt under 11 U.S.C. §§ 523(a)(2)(A) (fraud), 523(a)(4) (fraud while acting

in a fiduciary capacity), and 523(a)(6) (willful and malicious injury), and for denial of
discharge under 11 U.S.C. §§ 727(a)(2)(B), 727(a)(4)(A), and 727(a)(7) (concealment and false oath). The plaintiffs oppose dismissal.

FACTS

The facts giving rise to this dispute, as alleged in the complaint, are as follows. The plaintiffs complain of misconduct by the defendant James Jorgensen during the course of him providing financial services to them, in the form of tax preparation and the facilitation of 1031 exchange purchases and a sale of a real property. The complaint says that Mr. Jorgensen had been their "long-standing family accountant." ECF No. 1 ¶ 52. They also complain of misconduct by Mr. Jorgensen in the course of a pending state court malpractice litigation between the plaintiffs and the defendants ("the Malpractice Action"). The plaintiffs filed the malpractice action on June 6, 2017. The defendants filed the underlying chapter 13 case on November 13, 2018. The plaintiffs filed this adversary proceeding on February 16, 2019.

The complaint identifies seven distinct instances of misconduct. ECF No. 1 at 3-13.

1) Fraudulent concealment relating to the 2000 purchase of the Trading Post Shopping Center, and subsequent income tax preparation related thereto

The plaintiffs complain that upon their 1031 exchange 2000 purchase of a commercial building in Clovis, California, known as the Trading Post Shopping Center ("Trading Post building"), the defendant began preparing their tax returns with "a substantial discrepancy error." ECF No. 1 at 3-4. While the tax basis for the Trading Post building in the federal return was correct ($3,695,335), the tax basis in the California tax return was incorrect ($2,833,335). For the next 14 years, the discrepancy was repeated in the plaintiffs' tax returns. ECF No. 1 at 4.

The complaint alleges that the defendant "intentionally concealed this tax basis discrepancy error" from the plaintiffs. This, they say, caused financial harm because it understated their allowable depreciation on the building. ECF No. 1 at 4.

In 2014, the defendant used the incorrect tax basis figure on the federal return as well. ECF No. 1 at 4. It is not clear

from the complaint if this refers to the 2013 or 2014 or another return.

The plaintiffs contend that the defendant was aware of the discrepancies, including the ones in the 2014 returns, because he signed every one of the plaintiffs' returns. The complaint says that the defendant "intentionally concealed [the 2014 discrepancies] from Plaintiffs." ECF No. 1 at 4.

The defendant "knowingly and intentionally concealed [the inclusion of the incorrect tax basis on the federal return in 2014] to cover up his tax basis discrepancy error of the prior 14 years." This resulted in further lost depreciation harm to the plaintiffs. ECF No. 1 at 4.

The complaint further states that even if the defendant was correcting "a prior unknown error" by including the incorrect tax basis on the federal return in 2014, he owed the plaintiffs a duty to inform them that their federal return depreciation had been overstated since 2000. ECF No. 1 at 4-5.

The plaintiffs complain that they had to amend three past tax returns (maximum allowable) to correct as much as possible of these "discrepancies," resulting in a cost of $6,325. ECF No. 1 at 5.

2) Fraudulent concealment relating to Defendant's records concerning the 2000 purchase of the Trading Post

Here, the plaintiffs complain of Mr. Jorgensen making a false representation within the Malpractice Action that he was unable to explain the tax basis discrepancies on the plaintiffs' tax returns because his working papers relating to the 2000 purchase of the Trading Post building were destroyed in a fire Mr. Jorgensen had in his office in April 2000. ECF No. 1 at 5.

The plaintiffs argue that Mr. Jorgensen's representation about the destroyed papers is false and fraudulent - as part of his coverup of the tax basis discrepancies - because their purchase of the Trading Post building was not completed until after April 2000 and would not have been reported until April 15, 2001. The purported fire predates the creation of the papers. ECF No. 1 at 5.

The plaintiffs contend that, in the event Mr. Jorgensen's representation is not false, he had been intentionally concealing from them the destruction of the papers, for the 18 years prior to the representation. ECF No. 1 at 5.

3) Fraudulent concealment relating to Defendant James's e-filing of Plaintiffs' 2011 federal and state income tax returns

The plaintiffs complain that Mr. Jorgensen fraudulently concealed that he did not file their 2011 tax returns. The plaintiffs received notices in February 2013 from the tax authorities that their 2011 returns had not been filed. When they confronted Mr. Jorgensen about it, he blamed his accounting software for the filing failure. But, he must have known of the filing failure because if the returns had been filed, Mr. Jorgensen would have received document control numbers from the IRS and California Franchise Tax Board ("FTB"). ECF No. 1 at 5-6.

This led to the plaintiffs sustaining damages – in the form of additional taxes and interest - due to audits by the IRS of their 2011, 2012, and 2013 returns, triggered by the filing failure. ECF No. 1 at 5-6.

4) Fraudulent concealment relating to Defendant James's transfer of his accounting practice to his son-in-law, an unlicensed CPA

The plaintiffs complain that Mr. Jorgensen concealed from them when precisely Mr. Jorgensen's son-in-law David Justice became a CPA, in connection with Mr. Jorgensen transferring his accounting practice to Mr. Justice and notifying the plaintiffs of the transfer. On June 20, 2015, Mr. Jorgensen sent a letter to the plaintiffs, informing them that Mr. Justice will be taking over Mr. Jorgensen's accounting practice as of June 30, 2015. Yet, Mr. Justice did not become a CPA until October 8, 2015. Mr. Jorgensen's transfer of the accounting practice to a non-licensed CPA violated "California Board of Accountancy rules and regulations." ECF No. 1 at 6-7.

The complaint says that Mr. Jorgensen either knew of the violation or was chargeable with such knowledge. It also says that Mr. Jorgensen either knew that Mr. Justice was not a CPA when he notified the plaintiffs of the transfer of the practice or was chargeable with such knowledge. ECF No. 1 at 7.

Allegedly, Mr. Jorgensen intentionally concealed from the plaintiffs the ineligibility of Mr. Justice as a CPA at the time the practice was transferred to him, to prevent the plaintiffs from raising concerns about or objecting to the transfer. ECF No. 1 at 7. He also intentionally concealed from the plaintiffs his plan to transfer the practice to a non-CPA. ECF No. 1 at 7-8. Purportedly, the concealments

were to induce the plaintiffs not to raise concerns about or object to the transfer of the practice. *Id.*

According to the complaint, in the letter informing the plaintiffs of the practice transfer, Mr. Jorgensen stated that the new practice will have the name "Justice, Jorgensen & Company." The use of the word "Company" in the name violates "California Board of Accountancy rules and regulations because it conveys the false impression that at least two licensed CPAs would be working at the firm," when Mr. Jorgensen was in fact the sole CPA in the firm at the time of transfer. "[T]he fictitious business name permit was not issued by the California Board of Accountancy until November 18, 2015, after Justice became a licensed CPA on October 8, 2015. ECF No. 1 at 7.

Mr. Jorgensen allegedly furthered the concealment of the facts surrounding the transfer of his practice within the Malpractice Action, where he testified in a deposition that Mr. Justice became a CPA in approximately 2014. ECF No. 1 at 8.

5) Fraudulent concealment concerning Plaintiffs' client records

The plaintiffs further complain that in the Malpractice Action Mr. Jorgensen has intentionally concealed working papers he would have generated pertaining to his responding on the plaintiffs' behalf to the audits of the 2011, 2012, and 2013 returns, which started in 2014 and were concluded in 2015. They complain that the documents Mr. Jorgensen produced in the Malpractice Action to them did not include any such working papers. This is in spite of Mr. Jorgensen billing the plaintiffs many hours for work on the audits and him testifying in the Malpractice Action to his policy of retaining client records for at least seven years. The subject concealment is allegedly to hinder the plaintiffs' efforts to prove their claims in the Malpractice Action. ECF No. 1 at 8-9.

6) Fraudulent concealment and false representations regarding the failed and invalid 1031 exchange in 2015 regarding the Trading Post

The plaintiffs complain that Mr. Jorgensen made false representations to them about and intentionally concealed from them what should have been an obvious 1031 exchange failure of their plan to sell the Trading Post building and purchase a property for less than the sales price of the Trading Post building. ECF No. 1 at 9-12.

The plaintiffs allegedly had a series of meetings with Mr. Jorgensen starting in August 2014 and continuing through 2015, when they discussed their plans with him about the sale of the Trading Post building - valued at $11.5 million, subject to a $5.5 million mortgage - and the purchase of an unencumbered real property of lesser value, approximately $5 million. The plaintiffs were planning to use the remaining $1 million to pay the tax on the so called "cash boot" from the transaction. ECF No. 1 at 9-10.

The complaint says that Mr. Jorgensen did not inform them of the "mortgage boot" issue with the transaction, as they did not replace the mortgage debt on the Trading Post building with new mortgage debt on the replacement property, even though they had given him sufficient information to know about their "mortgage boot" problem. ECF No. 1 at 9-11.

The plaintiffs contend that Mr. Jorgensen intentionally concealed from them the "mortgage boot" 1031 exchange disqualifier of their transaction, with the purpose of inflicting them financial harm. ECF No. 1 at 11.

After they had completed the sale and purchase transaction, the plaintiffs purportedly contacted another accountant to help them with their 2015 tax return. It was then they were told that their 1031 exchange had failed because of the "mortgage boot," due to which they incurred approximately $2.114 million in additional taxes and $149,901 in interest they paid in order to borrow and pay these additional taxes. The plaintiffs have allegedly continued to incur monthly interest on the loan and have also incurred $69,930 in professional service expenses. ECF No. 1 at 10-11.

The complaint states that Mr. Jorgensen made false representations within the Malpractice Action about what he knew of the failed 1031 exchange transaction. He specifically testified under oath that it was not until mid-2017 (after the Malpractice Action was filed) that he discovered that the plaintiffs had sold the Trading Post building. Yet, it was Mr. Jorgensen who allegedly wrote a letter to the IRS on or about July 1, 2015, in connection with the audit of the 2011, 2012, and 2015 returns, informing the auditor that the plaintiffs had sold the Trading Post building and were looking for a replacement investment property. ECF No. 1 at 11-12.

Mr. Jorgensen was allegedly aware of the Trading Post sale as early as October 2014, when he sent the plaintiffs "a critique of background correspondence" they were to send to the IRS. Such correspondence allegedly references the escrow of the Trading Post building sale. ECF No. 1 at 12.

The complaint says that Mr. Jorgensen's false representations about when he actually first knew of the sale of the Trading Post building and the plaintiffs' search for a replacement investment property was intended to conceal the extent of his knowledge about the failed 1031 exchange, deflect liability for his role in the failure of the 1031 exchange, and conceal his purpose to harm the plaintiffs. ECF No. 1 at 12.

7) Post-petition false statements by Defendant James

The complaint says that the defendants' response of "no" to question 18 in their statement of financial affairs in the underlying chapter 13 case is a false statement. That question asks for any sale, trades, or other transfers of any property to anyone, other than property transferred in the ordinary course of business or financial affairs. The question asks that the response includes both outright transfers and transfers made as
Security, such as the granting of a security interest or mortgage on property. ECF No. 1 at 12.

The defendants have allegedly refinanced their residence twice within the two years before their filing of the underlying chapter 13 case. Yet, the defendants have not disclosed these alleged refinancing transactions. ECF No. 1 at 12-13.

The defendants have allegedly also failed to disclose in their bankruptcy case other transfers, including payments by Mr. Jorgensen to co-defendants Amrit Paul Singh Brar and David Justice in the Malpractice Action. ECF No. 1 at 13.

The defendants have allegedly failed to disclose in their bankruptcy case interests in other assets, including Mr. Jorgensen's "full ownership interests in, and past and present income derived from, various business entities with which he has been or is associated, including but not limited the Jorgensen Brar Accountancy Corporation, JBAC Tax & Accounting, Justice Jorgensen & Company, and James R. Jorgensen dba James R. Jorgensen CPA." ECF No. 1 at 13.

PROCEDURE

The plaintiffs filed an adversary proceeding to except from discharge any debt due them, under 11 U.S.C. §§ 523(a)(2) (fraud), 523(a)(4) (fraud while acting in a fiduciary capacity), and 523(a)(6) (willful and malicious injury), and for denial of
discharge under 11 U.S.C. §§ 727(a)(2)(B), 727(a)(4)(A), and 727(a)(7) (concealment and false oath). The defendants also argue that the complaint should be dismissed because the

plaintiffs failed to complete an adversary proceeding cover sheet.

The defendants move under Rule 12(b)(6) and 12(e) to dismiss the complaint arguing the insufficiency of the complaint under Rule 8, as construed by the Supreme Court's decision in *Iqbal and Twombly*. They also argue that fraud has not been pleaded with specificity.

The plaintiffs oppose the motion, conceding that there is no section 523(a)(6) liability for chapter 13 debtors but denying the failure to state a claim upon which relief can be granted as to the remaining causes of action.

PRELIMINARY ISSUES

Federal Rule of Civil Procedure 10(b)

Aggregating claims for relief is presumptively proper. "A party must state its claims or defenses in numbered paragraphs, each limited as far as practicable to a single set of circumstances. A later pleading may refer by number to a paragraph in an earlier pleading. **If doing so would promote clarity, each claim founded on a separate transaction or occurrence--and each defense other than a denial--must be stated in a separate count or defense.**" Fed. R. Civ. P. 10(b), incorporated by Fed. R. Bankr. P. 7010 (emphasis added).

Here, the complaint alleges at least seven separate instances of fraud, at different points in time, involving intentional misrepresentations and intentional concealments by the defendant James Jorgensen. ECF # 1 at 13 and 14 ¶ 51a-g. Yet, the complaint lumps these different factual scenarios into one cause of action. ECF No. 1 at 13-15. In that single cause of action, the complaint also lumps three different theories of liability together, nondischargeability claims under sections 523(a)(2), 523(a)(4), and 523(a)(6). *Id.*

Each separate instance of fraud should have been pleaded as a separate cause of action. The same is true with respect to each theory of liability.

Local Bankruptcy Rule 7003-1 Adversary Proceeding Cover Sheet

The defendants complain that the plaintiffs filed a blank adversary proceeding cover sheet, in violation of Local Bankruptcy Rule 7003-1.

However, a corrected cover sheet was filed by the plaintiffs on February 19, 2019, three days after this adversary

proceeding was initiated. ECF No. 6. Hence, the error in filing the blank cover sheet has been corrected. The motion will be denied with respect to this deficiency.

LAW on Rule 12(b)(6)

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

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

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

DISCUSSION

I. 11 U.S.C. §§ 523(a)(6), 727(a)(2)(B), 727(a)(4)(A), 727(a)(7) Claims

The court will grant the motion without leave to amend as to *all* 11 U.S.C. §§ 523(a)(6), 727(a)(2)(B), 727(a)(4)(A), and 727 (a)(7) causes of action.

The defendants' underlying bankruptcy case is a chapter 13 case. 11 U.S.C. § 1328(a), which outlines the exceptions to discharge in chapter 13, specifically excludes section

523(a)(6) as basis for exception to discharge, although it includes sections 523(a)(2) and 523(a)(4) exceptions to discharge. *See* 11 U.S.C. § 1328(a)(2). The court also notes that the plaintiffs have conceded this point.

Denials of discharge under 11 U.S.C. § 727 are also inapplicable in chapter 13 cases. Denials of discharge under section 727 are within Subchapter II of chapter 7 of title 11. And, 11 U.S.C. § 103(b) specifically prescribes that "[s]ubchapters I and II of chapter 7 of this title apply only in a case under such chapter," *i.e.*, chapter 7 cases.

The court will grant the motion without leave to amend, as to both defendants, dismissing all causes of action under sections 523(a)(6), 727(a)(2), 727(a)(4), and 727(a)(7). As the underlying bankruptcy is a chapter 13 case, these causes of action do not state a claim upon which relief can be granted.

This leaves only the causes of action against the defendants under sections 523(a)(2)(A) and 523(a)(4).

II. 11 U.S.C. §§ 523(a)(2)(A) and 523(a)(4) Claims Against Laura Jorgensen

The complaint's section 523(a)(2)(A) and (a)(4) claims make no reference to misconduct by the defendant Laura Jorgensen. All misconduct in the complaint with respect to those claims is attributed to the defendant James Jorgensen. *See* ECF No. 1. As such, the plaintiffs have not stated any claims against Laura Jorgensen under sections 523(a)(2) or 523(a)(4) upon which relief can be granted. Thus, the court will dismiss without leave to amend the 11 U.S.C. §§ 523(a)(2) and (a)(4) claims against her.

This leaves only two causes of action to address, the section 523(a)(2) and 523(a)(4) claims against the defendant James Jorgensen.

III. 11 U.S.C. § 523(a)(2)(A) Claim Against James Jorgensen

Law on § 523(a)(2)(A)

Section § 523(a)(2) offers creditors a narrow exception to the rule that debtors otherwise eligible for discharge are forgiven unsecured debts in chapter 7.

Most fraud claims must be pleaded with particularity. Fed. R. Civ. P. 9(b); *see, e.g.*, *Chase Bank, U.S.A., N.A. v. Vanarthos (In re Vanarthos)*, 445 B.R. 257, 264 (Bankr. S.D.N.Y. 2011). This rule's heightened pleading standard requires a plaintiff

to "state with particularity the circumstances constituting fraud." Fed. R. Civ. P. 9(b), incorporated by Fed. R. Bankr. P. 7009. This standard means that "the complaint must set forth what is false or misleading about a statement, and why it is false." *Rubke v. Capitol Bancorp Ltd.*, 551 F.3d 1156, 1161 (9th Cir. 2009) (quoting *Yourish v. Cal. Amplifier*, 191 F.3d 983, 993 (9th Cir. 1999)) (internal quotation marks omitted). The facts constituting fraud must be pleaded specifically enough to give a defendant sufficient "notice of the particular misconduct" so that the defendant may defend against the charge. *Vess v. Ciba-Geigy Corp. U.S.A.*, 317 F.3d 1097, 1106 (9th Cir. 2003). A plaintiff **must include the "who, what, when, where, and how" of the fraud**. *Id.* Generally, Rule 9(b) applies to § 523(a)(2) actions. *In re Craciun*, 2014 WL 2211742 (9th Cir. BAP May 28, 2014). And in the context of § 523(a)(2)(A) it also applies to actual fraudulent transfers. *Takiguchi v. MRI Int'l, Inc.*, 2015 WL 1609828, at *2 (D. Nev. Apr. 10, 2015). But it does not apply to constructively fraudulent transfers. *Id.*

Assuming the aggrieved creditor survives the pleading stage, proving fraud requires: "(1) misrepresentation, fraudulent omission or deceptive conduct by the debtor; (2) knowledge of the falsity or deceptiveness of his statement or conduct; (3) an intent to deceive; (4) justifiable reliance by the creditor on the debtor's statement or conduct; and (5) damage to the creditor proximately caused by its reliance on the debtor's statement or conduct." *Turtle Rock Meadows Homeowners Ass'n v. Slyman (In re Slyman)*, 234 F.3d 1081, 1085 (9th Cir. 2000). "The purposes of [§ 523(a)(2)(A)] are to prevent a debtor from retaining the benefits of property obtained by fraudulent means and to ensure that the relief intended for honest debtors does not go to dishonest debtors." *Id.*

> [A] creditor must establish each of the following elements by a preponderance of the evidence:
>
> (1) The debtor made the subject **representations, or omitted to state material facts,** equating to a misrepresentation(s).
>
> (2) At the time the subject representations or omissions were made, **the debtor knew the representations were false, or knew that the omissions created a materially false statement(s), and the debtor was under a duty to disclose the omitted statement(s).**
>
> (3) The debtor made the subject representations or omissions with the **intention of deceiving the creditor.**

(4) The creditor **justifiably relied** upon the debtor's representations or omissions to state material facts.

(5) The creditor **suffered the alleged damages as the proximate result of the subject representations or omissions** having been made.

See, e.g., In re Harmon, 250 F.3d 1240, 1246 n. 4 (9th Cir. 2001); and *In re Eashai*, 87 F.3d 1082, 1086 (9th Cir. 1996) (citing In re Britton, 950 F.2d 602, 604 (9th Cir. 1991)).

Vans, Inc. v. Rosendahl (In re Rosendahl), 307 B.R. 199, 216 (Bankr. D. Or. 2004) (emphasis added).

Among other things, § 523(a)(2)(A) renders nondischargeable a debt for money "to the extent obtained by" misrepresentation, fraudulent omission, or deceptive conduct. The operative phrase here is "to the extent obtained by." **To be actionable under § 523(a)(2)(A), the prescribed conduct must have occurred before the debtor obtains the money. In other words, the prescribed conduct must induce the creditor to act.** *See Shah v. Chowdaury (In re Chowdaury)*, 2014 WL 2938274 at *3 (9th Cir. BAP 2014) ("a creditor must establish that it was induced ... to enter into" the subject contract "by means of 'false pretenses, a false representation, or actual fraud.'"). Prescribed conduct that occurs after the debtor obtains money does not count and will not support a nondischargeability claim under § 523(a)(2)(A). *Houng v. Tatung, Co., Ltd. (In re Houng)*, 499 B.R. 751, 766 at n. 49 (C.D.Cal.2013) ("Although the arbitrator found that Houng engaged in fraudulent transfers and diversions of funds from WDE, that conduct occurred after the parties had entered into the PSA. As a result, the arbitrator's findings of fraudulent transactions do not establish that Tatung relied on Houng's statements or conduct when it agreed to enter into the PSA."), *aff'd*, 636 Fed.Appx. 396 (9th Cir. 2016). Here, only two events fall within these parameters and neither support the § 523(a)(2)(A) claim.

The first is Lewis' representation that she could repay the loan by refinancing the Babson Property. Lewis made that representation to Brown, not Wong. However, Lewis did not obtain money from Brown. Inasmuch as the funds for the loan to Lewis came from Wong's separate property account, Lewis obtained money from Wong. Lewis and Wong did not speak before Wong loaned Lewis money from her separate property account. That means Lewis did not (and could not have) obtained money from Wong by a false statement or misrepresentation made to Wong.

> The second is the **failure to disclose—or omission of information** regarding—the Babson Property's refinance history. **Under California law, an omission is fraudulent only if there is a duty on the party making the omission to disclose.** *SCC Acquisitions Inc. v. Cent. Pac. Bank*, 207 Cal.App.4th 859, 864, 143 Cal. Rptr. 3d 711 (Cal. Ct. App. 2012) (quoting *Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC*, 162 Cal. App. 4th 858, 868, 76 Cal.Rptr.3d 325 (Cal. Ct. App. 2008)). Here, the Burns trustee and Wong produced no evidence that Lewis was under any duty to disclose the refinance history of the Babson property to Brown or Wong.

Hopper v Lewis (In re Lewis), 551 B.R. 41, 48–49 (Bankr. E.D. Cal. 2016) (emphasis added).

Analysis

1) Fraudulent concealment relating to the 2000 purchase of the Trading Post Shopping Center, and subsequent income tax preparation related thereto

The allegations here do not rise to the level of an actionable section 523(a)(2)(A) claim upon which relief can be granted.

First, the complaint does not plead this instance of fraud with particularity. Fed. R. Civ. P. 9(b). There are no facts stating how, when, and where Mr. Jorgensen misrepresented to or concealed from the plaintiffs the tax discrepancies in the tax returns. For example, the plaintiffs identify no specific instances of false representations that were directed at them. There are no specific instances of concealments either. The complaint is devoid of dates or places for such instances, the means by which communication was accomplished in such instances (verbally or in writing), and the general circumstances pertaining to such instances.

In short, the "who, what, when, where, and how" of the alleged fraud is absent.

Second, while the complaint says that Mr. Jorgensen was the plaintiffs' long-standing family accountant, there is virtually no information about the scope of the services for which he was retained and he was expected to provide to the plaintiffs. This is important because for concealment or omission to be actionable under section 523(a)(2)(A), it must involve a duty to disclose the information in question. The complaint does not state specific facts defining the scope of the agreed-upon service to be performed by Mr. Jorgensen.

Third, the court cannot reasonably infer from the allegations that Mr. Jorgensen knew of the discrepancies in the tax basis on the plaintiffs' state and federal returns. For him to have misrepresented or fraudulently concealed such discrepancies, he must have been aware of them.

Him signing the returns does not necessarily mean that he was actually aware of the incorrect tax basis in the returns. Him signing the returns is consistent with him being negligent and not intentional in stating the incorrect tax basis. And, the figures could have easily and negligently been carried over from year to year, from one tax return to another, for 14 years.

In fact, Mr. Jorgensen signing the returns is actually more indicative of him not knowing of the incorrect tax basis than it is of him knowing about it, because he did not derive any additional benefit from stating the incorrect tax basis than what he was already being paid to prepare the returns. He was paid for preparing tax returns with incorrect tax basis what he would have been paid to prepare the same tax returns with the correct tax basis. The complaint does not controvert this.

The court cannot reasonably infer knowledge for purposes of actual fraud, just from the defendant's signatures.

The foregoing applies to the incorrect tax basis in all returns, including the incorrect tax basis placed on a federal return in 2014. Once again, the court cannot tell from the complaint the year of this tax return. The complaint does not identify this return by its tax year.

With respect to these allegations, the motion to dismiss will be granted *with* leave for the plaintiffs to amend their complaint.

2) Fraudulent concealment relating to Defendant's records concerning the 2000 purchase of the Trading Post

Here, the alleged misrepresentation about the April 2000 fire was made during the Malpractice Action, after the plaintiffs had already sustained the alleged fraud-related harm from Mr. Jorgensen. And, no actual and proximate causation of the misrepresentation to the harm has been pleaded. There are no facts linking the two. This misrepresentation then is not actionable under section 523(a)(2). *See Lewis* at 48.

Further, the allegation that Mr. Jorgensen had been concealing the fire from the plaintiffs for the last 18 years, if his

representation about the fire is true, is also not actionable. The complaint lacks foundational facts about: (i) why Mr. Jorgensen not telling the plaintiffs about the fire was material during those 18 years, (ii) what was Mr. Jorgensen's duty of disclosure about the fire to the plaintiffs, (iii) what aspect of their relationship gave rise to such duty, (iv) how and what reliance this alleged concealment was intended to induce with the plaintiffs, and (v) what harm was caused by this concealment during these 18 years. The complaint is silent on these points.

The court cannot reasonably infer this missing information from the lone allegation that Mr. Jorgensen had been concealing the fire from the plaintiffs for the last 18 years.

With respect to these allegations, the motion to dismiss will be granted *with* leave for the plaintiffs to amend their complaint.

3) Fraudulent concealment relating to Defendant James's e-filing of Plaintiffs' 2011 federal and state income tax returns

The court cannot reasonably infer from Mr. Jorgensen not receiving document control numbers for the filing of the plaintiffs' 2011 tax returns that he knew he had not filed those returns. It is more reasonable to infer that Mr. Jorgensen was negligent in not filing the returns and then in not following up on the document control numbers.

Given how busy tax firms can be during tax season, negligence on the part of Mr. Jorgensen is a more reasonable inference than that he prepared the returns, received payment for the returns, knowingly did not file the returns, and then concealed the failure to file from the plaintiffs.

Importantly, the complaint does not allege that Mr. Jorgensen reaped some extra benefit, beyond his preparation fee, from not filing returns he had already prepared and received payment for.

The court infers from the complaint that the plaintiffs had already paid Mr. Jorgensen for the preparation and filing of their 2011 returns. The complaint says that the plaintiffs had an expectation that Mr. Jorgensen would file the returns for them.

Further, the complaint also says nothing about how and what reliance this alleged concealment was intended to induce in the plaintiffs. The plaintiffs were obviously sooner or later to find out that the 2011 returns had not been filed. This is

what happened. They were eventually informed by the tax authorities that they had not filed their 2011 returns. The complaint nonetheless references nothing as to which Mr. Jorgensen's alleged concealment of not filing the returns induced reliance in the plaintiffs.

Finally, there is no actionable fraud either with respect to Mr. Jorgensen blaming his software for the failure of filing the returns. Even if the software was not to blame and this is a misrepresentation, it was made after the plaintiffs had already sustained their alleged harm from the failure of filing the returns. The alleged misrepresentation about the software was made by Mr. Jorgensen after the plaintiffs found out that the returns had not been filed and after they confronted Mr. Jorgensen about it. There is no actual and proximate causation of such misrepresentation to the purported harm sustained by the plaintiffs.

The allegations here do not rise to the level of actionable fraudulent concealment or representation.

With respect to these allegations, the motion to dismiss will be granted with leave for the plaintiffs to amend their complaint.

4) Fraudulent concealment relating to Defendant James's transfer of his accounting practice to his son-in-law, an unlicensed CPA

The complaint says that Mr. Jorgensen misrepresented to the plaintiffs that Mr. Justice was already a CPA in June 2015 and/or concealed from the plaintiffs that Mr. Justice had not yet become a CPA, inducing them not to raise concerns or object to the transfer of Mr. Jorgensen's accounting practice to Mr. Justice.

While this may be true, the complaint is silent on how the misrepresentation and/or concealment actually and proximately caused any harm to the plaintiffs. The complaint is silent on both the existence of any harm and the causation of that harm.

The court cannot reasonably infer from the complaint that the representations and/or concealment regarding Mr. Justice's CPA status actually and proximately caused any harm to the plaintiffs.

Finally, there is no actionable fraud either with respect to Mr. Jorgensen's testimony in the Malpractice Action that Mr. Justice became a CPA in approximately 2014. Even if such testimony is a misrepresentation or further concealment of when Mr. Justice actually became a CPA, it was made in the

Malpractice Action, after the plaintiffs had already sustained any fraud-related harm. Thus, there is no actual and proximate causation of such testimony to any fraud-related harm. Additionally, the complaint is silent on how and what reliance this testimony in the Malpractice Action was intended to induce with the plaintiffs.

The allegations here do not rise to the level of actionable fraud.

With respect to these allegations, the motion to dismiss will be granted with leave for the plaintiffs to amend their complaint.

5) Fraudulent concealment concerning Plaintiffs' client records

There is no actionable fraud with respect to the alleged fraudulent concealment by Mr. Jorgensen of working papers pertaining to the plaintiffs' 2011, 2012, and 2013 tax audit.

If this is indeed concealment, it is not actionable because it arose in the Malpractice Action, after the plaintiffs had already sustained any fraud-related harm from Mr. Jorgensen. There is no actual and proximate causation of such alleged concealment to any fraud-related harm to the plaintiffs because, according to the complaint, all such harm was sustained by them prior to the Malpractice Action.

On the other hand, the alleged harm the plaintiffs have sustained due to the alleged concealment of the audit working papers arises directly as a result of that concealment, and not through induced reliance on the part of the plaintiffs. The plaintiffs contend that such concealment has prevented them from establishing their claims in the Malpractice Action. The concealment then is depriving the plaintiffs from valuable records and not fraudulently inducing them into reliance that would lead to harm.

In other words, this alleged concealment is not accompanied by intent to deceive the plaintiffs but by intent to cause them harm. This is not actionable under section 523(a)(2). While it may be actionable under section 523(a)(6), as conceded by the plaintiffs such provision is inapplicable here.

Finally, what the plaintiffs are complaining about is discovery misconduct by Mr. Jorgensen in the Malpractice Action. This is within the exclusive purview of the state court presiding over the Malpractice Action. While the Malpractice Action is pending, this court will not interfere

with the state court, by adjudicating discovery disputes in that action.

The allegations here do not rise to the level of actionable fraud.

With respect to these allegations, the motion to dismiss will be granted *with* leave for the plaintiffs to amend their complaint.

6) Fraudulent concealment and false representations regarding the failed and invalid 1031 exchange in 2015 regarding the Trading Post

The complaint contains facts about how Mr. Jorgensen omitted to warn the plaintiffs about the 1031 exchange "mortgage boot" problem with their transactions selling the Trading Post building and buying another investment property. The plaintiffs allegedly relied on this omission to consummate the transaction, which was eventually declared a failed 1031 exchange due to the "mortgage boot" issue.

However, the court finds it difficult to draw a reasonable inference that Mr. Jorgensen knew of the "mortgage boot" problem and concealed it from the plaintiffs with the intent to inflict them harm. The complaint also has insufficient facts for the court to draw a reasonable inference that the plaintiffs' reliance on Mr. Jorgensen's 1031 exchange advice was justifiable.

The court cannot reasonably infer from the complaint that as an accountant, Mr. Jorgensen had the requisite expertise in 1031 exchanges to provide adequate advice to the plaintiffs or anyone else. The complaint says only that Mr. Jorgensen is an accountant. The complaint does not say that all accountants have the requisite expertise in 1031 exchanges to provide adequate advice to clients on the transfers. Nor does the complaint say that Mr. Jorgensen had the requisite expertise within accountancy in 1031 exchanges to provide adequate advice on such transfers to clients.

The complaint then has insufficient facts about: (i) whether Mr. Jorgensen had 1031 exchange expertise to render adequate advice about such transfers to clients, (ii) the disclosure duties Mr. Jorgensen owed to the plaintiffs when he allegedly advised them on the rules of 1031 exchanges, and (iii) the extent to which Mr. Jorgensen was actually aware of the "mortgage boot" problem with the plaintiffs' transactions, regardless of his expertise with 1031 exchanges.

In other words, if Mr. Jorgensen had only mediocre knowledge of 1031 exchanges, it is reasonably inferred that this was why he provided the plaintiffs with erroneous information.

However, even if Mr. Jorgensen had expertise in 1031 exchanges to provide adequate advice to clients on such transfers, it is reasonably inferred that he negligently provided the plaintiffs with erroneous information because the complaint reveals no additional benefits and/or compensation to him for his omission to warn them of the "mortgage boot" problem, above and beyond what he would have received as compensation if he had warned them of the "mortgage boot" problem.

Overall, malpractice on the part of Mr. Jorgensen is much more plausible under the existing complaint, than is intent to deceive and cause harm to the plaintiffs.

In summary, without more facts, the court cannot reasonably infer that Mr. Jorgensen's failure to warn the plaintiffs of the "mortgage boot" problem amounted to a fraudulent omission or concealment. Without more facts, the court also cannot reasonably infer that the plaintiffs' reliance on Mr. Jorgensen's 1031 exchange advice was justifiable.

Finally, there is no actionable fraud with respect to Mr. Jorgensen's testimony in the Malpractice Action that it was not until mid-2017 when he found out that the plaintiffs had sold the Trading Post building. Even if such testimony is a misrepresentation or further concealment, it was made in the Malpractice Action, after the plaintiffs had already sustained any fraud-related harm. There is no actual and proximate causation pleaded in the complaint of such testimony to any fraud-related harm sustained by the plaintiffs.

With respect to these allegations, the motion to dismiss will be granted *with* leave for the plaintiffs to amend their complaint.

7) Post-petition false statements by Defendant James

There are no facts in the complaint amounting to actionable fraud as to the alleged misrepresentations in the defendants' underlying bankruptcy case, including the:

(i) failure to disclose transfers involving the refinances of the defendants' residence;

(ii) failure to disclose payments on account of legal expenses of co-defendants in the Malpractice Action; and

(iii) failure to disclose Mr. Jorgensen's other property interests.

Such representations, even if false, are not actionable for purposes of section 523(a)(2) because there are no facts of them inducing reliance on the part of the plaintiffs. Also, the plaintiffs have pleaded no resulting harm from these misrepresentations. There are no facts of actual and proximate cause of the alleged misrepresentations to any of the fraud-related harm sustained by the plaintiffs.

With respect to these allegations, the motion to dismiss will be granted *without* leave for the plaintiffs to amend their complaint.

IV. 11 U.S.C. § 523(a)(4) Claim Against James Jorgensen (fraud while acting in a fiduciary capacity)

Law on § 523(a)(4), Fraud

A creditor may bring a claim against a debtor in bankruptcy to except from discharge a debt "for fraud or defalcation while acting in a fiduciary capacity." 11 U.S.C. § 523(a)(4), (c)(1). To prevail on such a claim, the creditor must show more than the debtor's fraud or defalcation; the creditor must also prove that the debtor was acting in a fiduciary capacity when the fraud or defalcation occured. *In re Honkanen (Honkanen v. Hopper)*, 446 B.R. 373, 378 (B.A.P. 9th Cir. 2011). In short, a nondischargeability claim under § 523(a)(4) requires the existence of **(1) an express, technical or statutory trust, (2) a debt caused by the debtor's fraud or defalcation, and (3) the debtor's status as a fiduciary when the debt arose**. *Otto v. Niles*, 106 F.3d 1456, 1459 (9th Cir. 1997), *abrogated on other grounds*, *Bullock v. BankChampaign, N.A.*, 133 S. Ct. 1754 (2013) (emphasis added); *Cal-Micro, Inc. v. Cantrell (In re Cantrell)*, 329 F.3d 1119, 1125 (9th Cir. 2003).

Federal law governs the question whether a person is a fiduciary. *Blyler v. Hemmeter (In re Hemmeter)*, 242 F.3d 1186, 1189 (9th Cir. 2001); *see also Cantrell*, 329 F.3d at 1125. The Ninth Circuit has construed the term *fiduciary* narrowly and established a "limited approach . . . in recognizing fiduciary status, particularly in the § 523(a)(4) context." *Bos*, 795 F.3d at 1011 (citing *Cal-Micro, Inc. v. Cantrell (In re Cantrell)*, 329 F.3d 1119, 1125 (9th Cir. 2003)).

The Ninth Circuit, moreover, has "held that [t]he broad, general definition of fiduciary—a relationship involving confidence, trust and good faith—is inapplicable in the

dischargeability context." *Cantrell*, 329 F.3d at 1125 (internal quotation marks omitted).

Additionally, the Ninth Circuit has established precisely the time at which the debtor must become a fiduciary in this context. "For a debt to be held nondischargeable under § 523(a)(4)'s defalcation provision, the debtor must have been a fiduciary *prior to* his commission of the fraud or defalcation. In other words, the act of wrongdoing that created the debt cannot be the same act that gives rise to the fiduciary relationship." *Bos v. Bd. of Trs.*, 795 F.3d 1006, 1008 (9th Cir. 2015) (emphasis added) (citations omitted) (citing *Blyler v. Hemmeter (In re Hemmeter)*, 242 F.3d 1186, 1190 (9th Cir. 2001)).

Types of Trusts Giving Rise to a Qualifying Fiduciary Relationship

Under this narrow construction of the term, a claim under § 523(a)(4) requires that the fiduciary relationship arise from an express or technical trust. Although "fiduciary" is defined by federal law, the Ninth Circuit has relied in part on state law to ascertain whether the requisite trust relationship exists. *Cantrell*, 329 F.3d at 1125. The elements of an express trust under California law are: "1) present intent to create a trust, 2) trustee, 3) trust property, 4) a proper legal purpose, and 5) a beneficiary." *Honkanen*, 446 B.R. at 379 n.6 (citing Cal. Prob. Code §§ 15201-15205).

California law defines a technical trust as one "arising from the relation of attorney, executor, or guardian, and not to debts due by a bankrupt in the character of an agent, factor, commission merchant, and the like." *Id.* at 379 n.7 (citing *Royal Indem. Co. v. Sherman*, 124 Cal. App. 2d 512, 269 P.2d 123, 125 (Cal. Ct. App. 1954)).

A qualifying trust may also arise by statute. "In general, a statutory fiduciary is considered a fiduciary for the purposes of § 523(a)(4) if the statute: (1) defines the trust res; (2) identifies the fiduciary's fund management duties; and (3) imposes obligations on the fiduciary prior to the alleged wrongdoing." *Hemmeter*, 242 F.3d at 1190.

Types of Trusts Not Giving Rise to a Qualifying Fiduciary Relationship

Trusts serving as remedial devices do not give rise to a fiduciary relationship within the scope of § 523(a)(4). Trusts not giving rise to a qualifying fiduciary relationship include trusts *ex maleficio*, which are trusts arising by

operation of law after a wrongful act. *Hemmeter*, 242 F.3d at 1189. Fiduciary relationships established by constructive, resulting, and implied trusts also do not qualify for purposes of § 523(a)(4). *Id.* at 1189-90.

Fraud under § 523(a)(4)

"'Fraud' under § 523(a)(4) means actual fraud. Actual fraud involves conscious misrepresentation, or concealment, or non-disclosure of a material fact which induces the innocent party to enter into a contract. To prove actual fraud the plaintiff must prove: 1) defendant made a misrepresentation, concealment, or non-disclosure of a material fact; 2) defendant had knowledge that what he was saying was false; 3) defendant intended to induce plaintiff's reliance; 4) plaintiff justifiably relied; and 5) plaintiff suffered damage as a result." *In re Honkanen (Honkanen v. Hopper)*, 446 B.R. 373, 382-83 (B.A.P. 9th Cir. 2011) (citations omitted).

Analysis

The fraud analysis in the portion of this ruling dealing with section 523(a)(2)(A) is incorporated here by reference, with respect to every instance of alleged fraud.

Applicable to every instance of fraud discussed above, the court addresses the existence of a fiduciary relationship between the plaintiffs and Mr. Jorgensen and whether such fiduciary relationship, if any, arose from an express or technical trust.

The complaint states merely that Mr. Jorgensen was the plaintiffs' "long-standing" accountant and that he owed them fiduciary duties with respect accounting, tax preparation, and financial advice services. ECF No. 52.

The complaint does not unequivocally say however what were the services for which the plaintiffs had retained Mr. Jorgensen.

Further, while the complaint says that Mr. Jorgensen was a fiduciary of the plaintiffs, the complaint is silent on what gave rise to that fiduciary relationship. Specifically, the complaint says nothing about the form of trust that gave rise the alleged fiduciary relationship.

And, the court cannot reasonably infer a fiduciary relationship merely from the fact that Mr. Jorgensen was an accountant for the plaintiffs. "General fiduciary obligations are not sufficient to fulfill the fiduciary capacity requirement in the absence of a statutory, express, or technical trust." *Honkanen* at 381.

"[I]n the absence of an express, technical, or statutory trust and a clear identifiable trust res[,] the fiduciary capacity requirement of § 523(a)(4) is not satisfied." *Honkanen* at 382.

Accordingly, the plaintiffs have not stated a claim upon which relief can be granted with respect to the requirement that the fraud must have been committed while the defendant acted in a fiduciary capacity to the plaintiff.

With respect to the "while acting in a fiduciary capacity" requirement of section 523(a)(4), the motion to dismiss will be granted *with* leave for the plaintiffs to amend their complaint, except where the motion has been granted as to fraud under section 523(a)(2)(A) without leave to amend.

CIVIL MINUTE ORDER

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

The defendants Donald Aluisi and Karen Aluisi's motion has been presented to the court. Having considered the motion to dismiss, opposition, and reply thereto, if any,

IT IS ORDERED that the motion is granted in part with leave to amend, granted in part without leave to amend, and denied in part. Dismissal is granted with leave to amend as to instances of fraud (1), (2), (3), (4), (5), and (6), with respect to the 11 U.S.C. §§ 523(a)(2)(A) and 523(a)(4) claims against the defendant James Jorgensen.

IT IS FURTHER ORDERED that dismissal is granted without leave to amend as to instance of fraud (7), with respect to the 11 U.S.C. §§ 523(a)(2)(A) and 523(a)(4) claims against the defendant James Jorgensen.

IT IS FURTHER ORDERED that dismissal is granted without leave to amend as to all 11 U.S.C. § 523(a)(6) claims, all 11 U.S.C. § 727(a)(2) claims, all 11 U.S.C. § 727(a)(4) claims, and all 11 U.S.C. § 727(a)(7).

IT IS FURTHER ORDERED that dismissal is granted without leave to amend as to the 11 U.S.C. §§ 523(a)(2) and 523(a)(4) claims against the defendant Laura Jorgensen.

IT IS FURTHER ORDERED that dismissal is denied as to the request for dismissal due to the plaintiffs Donald Aluisi and Karen Aluisi's initial failure to complete the adversary proceeding cover sheet.

IT IS FURTHER ORDERED that the plaintiffs Donald Aluisi and Karen Aluisi may file and serve an amended complaint no later than June 13, 2019. Any amended complaint shall address the issues raised by the court in this ruling that are applicable to the claims in the amended complaint and be accompanied by a redline copy showing all amendments, modifications and/or deletions.

IT IS FURTHER ORDERED that the defendant James Jorgensen may file an answer or another appropriate response to the amended complaint no later than July 10, 2019.

IT IS FURTHER ORDERED that if the defendant James Jorgensen files a motion under Rule 12(b) or otherwise, rather than an answer, the motion shall be set for hearing consistent with LBR 9014-1(f)(1) and set for hearing on August 15, 2019 at 9:15 a.m.

IT IS FURTHER ORDERED that the parties shall not enlarge time for the filing of a responsive pleading or motion without order of this court. Such an enlargement may be sought by ex parte application, supported by stipulation or other admissible evidence. In the event that the defendant James Jorgensen fails to file an answer or motion within the time specified in this order, the plaintiffs Donald Aluisi and Karen Aluisi shall forthwith and without delay seek the entry of the defendant's default.

IT IS FURTHER ORDERED that the plaintiffs Donald Aluisi and Karen Aluisi shall comply with all applicable Federal Rules of Bankruptcy Procedure and local rules. Failure to comply with the terms of this order or applicable rules may result in sanctions, including, without limitations, the sua sponte dismissal of the amended complaint.

IT IS FURTHER ORDERED that all the parties shall comply with Fed. R. Civ. P. 10(b) by separating different factual basis for relief into separate counts.