**UNITED STATES BANKRUPTCY COURT**
Eastern District of California

Honorable Robert S. Bardwil
Bankruptcy Judge
Sacramento, California

**May 27, 2015 at 10:00 a.m.**

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**INSTRUCTIONS FOR PRE-HEARING DISPOSITIONS**

**1. Matters resolved without oral argument:**

**Unless otherwise stated, the court will prepare a civil minute order on each matter listed. If the moving party wants a more specific order, it should submit a proposed amended order to the court. In the event a party wishes to submit such an Order it needs to be titled 'Amended Civil Minute Order.'**

**If the moving party has received a response or is aware of any reason, such as a settlement, that a response may not have been filed, the moving party must contact Nancy Williams, the Courtroom Deputy, at (916) 930-4580 at least one hour prior to the scheduled hearing.**

**2. The court will not continue any short cause evidentiary hearings scheduled below.**

**3. If a matter is denied or overruled without prejudice, the moving party may file a new motion or objection to claim with a new docket control number. The moving party may not simply re-notice the original motion.**

**4. If no disposition is set forth below, the matter will be heard as scheduled.**

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1. 15-21702-D-7 PLG-1 — TIFFANY HELMS — CONTINUED MOTION TO DISMISS CASE 3-26-15 [10]

2. 15-20803-D-7 PD-1 — VINCENT/JANICE AYULE — MOTION FOR RELIEF FROM AUTOMATIC STAY 4-28-15 [17]
U.S. BANK, N.A. VS.

**Final ruling:**

**This matter is resolved without oral argument. This is U.S. Bank, N.A.'s motion for relief from automatic stay. The court records indicate that no timely opposition has been filed. The motion along with the supporting pleadings demonstrate that there is no equity in the subject property and the property is not**

**necessary for an effective reorganization. Accordingly, the court finds there is cause for granting relief from stay. The court will grant relief from stay by minute order. There will be no further relief afforded. No appearance is necessary.**

3. 15-21905-D-7 RONALD CARVER — MOTION TO COMPEL ABANDONMENT
BLF-1 — 4-24-15 [11]

**Final ruling:**

**This is the debtor's motion to compel the trustee to abandon certain property of the estate. The motion will be denied for failure to give adequate notice of the hearing. The notice begins with the admonition that if a party does not want the court to order the abandonment, or if a party wants the court to consider his or her views, the party should appear at the hearing. Thus, the notice begins as a notice pursuant to LBR 9014-1(f)(2). However, it goes on to state that if a party mails a response to the court for filing, the party must mail it early enough so the court will receive it before the date of the hearing, and must mail copies to the debtor's attorney, the chapter 7 trustee, and the United States Trustee.**

**The local rules make no provision for such a requirement in a notice pursuant to LBR 9014-1(f)(2), and the incorporation of such a requirement is in essence a combining of the provisions of LBR 9014-1(f)(1) and (f)(2). The local rules do not permit attorneys to combine the two types of notices or to pick and choose portions of one and portions of the other. The notice concludes with the admonition that if the party or his attorney does not take these steps, "the Court may decide that you do not oppose this action and may grant the Motion, in some circumstances, without even conducting an actual hearing." This language clearly is inappropriate in a notice pursuant to LBR 9014-1(f)(2).**

**The notice is also defective in that it gives the correct courtroom number in the caption but an incorrect one in the text. The proof of service gives the date of service as October 6, 2014. Finally, the moving party failed to serve the IRS, the Franchise Tax Board, the Employment Development Department, and the State Board of Equalization at their addresses on the Roster of Governmental Agencies, as required by LBR 2002-1.**

**As a result of these service and notice defects, the motion will be denied by minute order.**

4. 09-33808-D-11 KIP/ILLA SKIDMORE — MOTION FOR FINAL DECREE AND ORDER CLOSING CASE
RLC-1 — 4-16-15 [669]

5. 14-32410-D-7 MELISSA VUE — MOTION TO DISMISS ADVERSARY PROCEEDING
15-2025 GTB-1 — 3-9-15 [7]
MONEYGRAM PAYMENT SYSTEMS, INC. V. VUE ET AL

**Tentative ruling:**

**This is the motion of the defendant, who is the debtor in the underlying chapter 7 case (the "debtor") to dismiss the plaintiff's complaint pursuant to Fed. R. Civ. 9(b), incorporated herein by Fed. R. Bankr. P. 7009, for failure to plead fraud with sufficient particularity, and pursuant to Fed. R. Civ. P. 12(b)(6), incorporated herein by Fed. R. Bankr. P. 7012(b), for failure to state a claim upon which relief can be granted. The plaintiff has filed opposition, and the debtor has filed a reply. For the following reasons, the motion will be conditionally granted.**

**In ruling on a Rule 12(b)(6) motion, a court "accept[s] as true all facts alleged in the complaint, and draw[s] all reasonable inferences in favor of the plaintiff." al-Kidd v. Ashcroft, 580 F.3d 949, 956 (9th Cir. 2009), citing Newcal Indus., Inc. v. Ikon Office Solution, 513 F.3d 1038, 1043 n.2 (9th Cir. 2008). The court assesses whether the complaint contains "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" al-Kidd, 580 F.3d at 949, citing Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949, (2009), in turn quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 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. Iqbal, 556 U.S. at 678, citing Twombly, 550 U.S. at 556, 570.**

**By its complaint in this adversary proceeding, the plaintiff alleges that the debtor and her spouse, who is named as a co-defendant in the proceeding (collectively, the "defendants"), sold the plaintiff's money orders and related instruments to the defendants' customers at their store for cash, but failed to pay the cash to the plaintiff by depositing it into a separate account for the benefit of the plaintiff, as agreed; that the plaintiff honored those money orders and related instruments; that the defendants retained, misappropriated, and have failed to account for the cash received in exchange for the money orders and related instruments; and that as a result, the defendants owe the plaintiff $32,795.26. The plaintiff seeks a judgment in that amount, plus attorney's fees and costs, and (1) a determination that the judgment is nondischargeable in this or any other bankruptcy case, pursuant to § 523(a)(4) of the Bankruptcy Code as incurred through embezzlement; (2) a determination that the judgment is nondischargeable pursuant to § 523(a)(6) of the Bankruptcy Code, as incurred through willful and malicious injury; and (3) denial of the debtor's discharge pursuant to § 727(a)(3) and (a)(5) for failure to satisfactorily explain loss of assets and failure to maintain adequate books and records.**

**By this motion, the debtor contends, first, that the complaint "lacks particularity because it joined Debtor's non-debtor separated spouse and pled all the allegations against both collectively as 'defendants.'" Motion to Dismiss, filed March 9, 2015 ("Mot."), at 2:5-6. This objection needs to be viewed as two separate objections. First, the debtor contends § 524(a)(3) and (b)(2), referred to in the complaint as the basis for the joinder of the debtor's spouse as a defendant, "do not . . . function as authorization for permissive joinder of a non-debtor as a defendant in a non-dischargeability case." Mot. at 2:14-15. Separate and apart from that argument, the debtor complains that the allegations against her and her**

spouse collectively are too confusing to answer because they are stated collectively.

The court will begin with § 524(a)(3) and (b)(2). The former provides that a bankruptcy discharge bars the collection of a community debt from interests of the debtor and the debtor's spouse in community property acquired post-petition, except a community debt that is excepted from discharge under § 523 or would be so excepted in a case concerning the non-debtor spouse commenced on the date of filing of the debtor's case. § 524(a)(3). The second subsection, § 524(b)(2), provides that the first, § 524(a)(3), does not apply if the court would not grant the non-debtor spouse a discharge in a chapter 7 case concerning the spouse commenced on the date of filing of the debtor's case. § 524(b)(2)(A). The court is to make that determination – of whether it would grant the non-debtor spouse a discharge – within the time and in the manner provided for a § 727 determination as to the debtor. § 524(b)(2)(B).

This so-called community property discharge was explained well in Rooz v. Kimmel (In re Kimmel), 378 B.R. 630, 634-37 (9th Cir. BAP 2007), in which the panel also noted that a creditor may raise nondischargeability issues and § 727(a) issues against the non-debtor spouse. Id. at 636-37. Both types of actions must be brought within the time allowed for the filing of dischargeability and bar to discharge complaints in the case of the debtor spouse. Id. at 637. In short, in order to preserve his or her rights against the community property of a non-debtor spouse, a creditor may seek a determination that a community claim would be excepted from discharge under § 523 in a case concerning that spouse commenced on the date of filing of the debtor's case (§ 524(a)(3)), and/or a determination that the court would not grant that spouse a discharge in a chapter 7 case concerning the non-filing spouse commenced on the date of filing of the debtor's case. § 524(b)(2)(A).

This appears to be what the plaintiff intended to do in this case. The complaint alleges that the debtor's spouse is not a debtor, and that the plaintiff "joins him as a defendant in response to § 524(a)(3) and (b)(2) of the Bankruptcy Code." Plaintiff's Complaint, filed Jan. 30, 2015 ("Compl."), at 2:1-2. The plaintiff also states that its claim is a community claim. The factual allegations are made against the defendants collectively, and the § 523(a) claims for relief end with the statement that "Plaintiff's judgment against Defendants in this case should be determined not to be dischargeable or discharged in this bankruptcy case or any other bankruptcy case . . . ." Id. at 4:12-13, 5:3-4.

However, the § 727(a) claims for relief are less clear. Although the factual allegations name the defendants collectively, the request is that "[t]he discharge of the Debtor should be denied . . . ." Id. at 5:17, 6:5. Thus, the complaint does not purport to seek a determination that the discharge of the non-debtor defendant would be denied in a chapter 7 case concerning him commenced on the date of filing of the debtor's case. The prayer to the complaint makes matters worse. First, the plaintiff "requests judgment against Defendant [singular] as follows" (Compl. at 6:7) – not against the non-debtor defendant. Second, the prayer does not reiterate the earlier requests that the judgment against "Defendants" (plural) be determined to be nondischargeable. Third, the prayer requests a judgment "[d]enying the discharge of the Debtor" (id. at 6:9). The court will give the plaintiff an opportunity to amend its complaint to specifically assert proper claims for relief against the non-debtor spouse under § 524(a)(3) and (b)(2) and to amend the prayer to clarify the forms of relief sought and the defendant or defendants against whom they are sought.

Next, the court agrees with the debtor that the allegations against the defendants are confusing because they are made collectively. The complaint alleges that the defendants sold the money orders and related instruments; that the defendants received the cash; that they failed to pay the cash to the plaintiff by depositing it into a separate account or otherwise; that they retained and misappropriated the cash; and so on. Virtually all the allegations are made against the defendants jointly. The court agrees with the debtor that the collective nature of the allegations makes it difficult for the debtor to answer them and also, arguably, forces her to answer for her non-filing spouse.

"Rule 9(b) does not allow a complaint to merely lump multiple defendants together but require[s] plaintiffs to differentiate their allegations when suing more than one defendant . . . and inform each defendant separately of the allegations surrounding his alleged participation in the fraud." Swartz v. KPMG LLP, 476 F.3d 756, 764-65 (9th Cir. 2007) (citation omitted). The same is true even where claims other than fraud are involved. "A plaintiff suing multiple defendants must allege the basis of his claim against each defendant to satisfy [Fed. R. Civ. P.] 8(a)(2), which requires a short and plain statement of the claim to put defendants on sufficient notice of the allegations against them. Specific identification of the parties to the activities alleged by the plaintiffs is required to enable a defendant to plead intelligently." Yost v. Nationstar Mortg., LLC, 2013 U.S. Dist. LEXIS 128504, *7 (E.D. Cal. 2013) (citation omitted). The court will give the plaintiff an opportunity to amend the complaint.

The court disagrees with the debtor's next contention – that the "fraud" allegations are not sufficiently pled because the complaint fails to state "the who, what, when, where, and how" of the fraud. The argument misses the mark for the simple reason that the complaint does not purport to state a claim for fraud, but for embezzlement and willful and malicious injury.

The debtor next contends the plaintiff has insufficiently pled the third element of its embezzlement claim – the existence of circumstances indicating fraud.[1] In the debtor's view, the plaintiff should have included allegations such as "whether [the plaintiff] waived the cash segregation requirement" and allegations about "how Debtor ran the business." Mot. at 3:15. For this proposition, the debtor cites In re Littleton, 942 F.2d 551 (9th Cir. 1991), in which the court affirmed the bankruptcy court's decision that the creditor had not met its burden of proof on its embezzlement claim. 942 F.2d at 556. Referring specifically to the third element, the court held that "[g]iven the bankruptcy court's finding that the debtors applied their entire effort and resources to make the business survive and that this was their dominant motivation, it was not clearly erroneous for the BAP to hold that the debtors did not act with the intent to defraud Transamerica." Id.

The debtor's reliance on Littleton is misplaced because it was decided after trial, not on the pleadings. At that pleading stage, whether the plaintiff waived the segregation requirement and whether the defendants had legitimate reasons for failing to segregate and turn over the cash are matters of the defendants' defenses, not the plaintiff's case.

The debtor also relies on Littleton for her contention that the plaintiff's willful and malicious conduct claim is insufficiently pled. The debtor contends the claim is conclusory and "without any specific factual allegations of the sort that were important to the Littleton court with respect to malice, such as how Debtor's acts 'necessarily' caused harm; why Debtor did not have a 'just cause' or 'excuse,' or did Debtor sincerely hope to keep her business going . . . ." Mot. at 3:26-4:1.

Again, Littleton is of no help to the debtor because it did not concern the adequacy of pleadings.

The debtor also cites Daniell v. FO-Farmer's Outlet, Inc. (In re Daniell), 2013 Bankr. LEXIS 4759 (9th Cir. BAP 2013), in which the Bankruptcy Appellate Panel held that, in order to state a claim for relief under § 523(a)(6), the creditor "must separately plead and prove that [the debtor] acted both willfully and maliciously." 2013 Bankr. LEXIS 4759, at *27; see also Van Zandt v. Mbunda (In re Mbunda), 484 B.R. 344, 357 (9th Cir. BAP 2012). These elements differ as follows. A "willful" injury is "a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury." Kawaauhau v. Geiger, 523 U.S. 57, 61 (1998). The "willful" injury element is satisfied "when the debtor has a subjective motive to inflict injury or when the debtor believes that injury is substantially certain to result from his own conduct." Carillo v. Su (In Re Su), 290 F.3d 1140, 1142 (9th Cir. 2002). "A 'malicious' injury involves (1) a wrongful act, (2) done intentionally, (3) which necessarily causes injury, and (4) is done without just cause or excuse." Id. at 1146-47.

The plaintiff's second claim for relief separately alleges that the defendants "acted deliberately and intentionally, believing that injury was substantially certain to occur as a result of their conduct" (Compl. at 4:23-24) and that "[s]aid wrongful acts were done intentionally, necessarily caused injury to plaintiff and were done without just cause or excuse." Id. at 4:24-25. The claim also alleges that the defendants "knew that they were required to remit said cash to plaintiff, knew that they had no right to use said cash for their own purposes and knew that by converting said cash for their own use and benefit, that plaintiff would necessarily be injured." Id. at 4:26-28. Except for the collective nature of the allegations, discussed above, these allegations are sufficient to state claim under § 523(a)(6).

Finally, the debtor contends the complaint does not adequately state a claim for relief under § 727(a)(3) or (a)(5). The only allegations that go beyond a mere parroting of the language of the two subsections are that the defendants had a cognizable interest in the cash proceeds of the money orders and other instruments itemized in the complaint but no longer have the cash, as reflected in the debtor's bankruptcy schedules, and that the plaintiff intends to attempt to trace the cash through discovery and is informed and believes the defendants' books and records "are not sufficient to substantiate what happened to said cash." Compl. at 6:4.

"[T]he tenet that [in ruling on a Rule 12(b)(6) motion] a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Iqbal, 556 U.S. at 678, citing Twombly, 550 U.S. at 555. This principle applies to § 727(a) complaints. See Kubick v. FDIC (In re Kubick), 171 B.R. 658, 660 (9th Cir. BAP 1994); Yadidi v. Herzlich (In re Yadidi), 274 B.R. 843, (9th Cir. BAP 2002) [both discussing the rule in the context of § 727(a)(3)].

The plaintiff's complaint here provides very little beyond quotations of the statutory language, and as such, is insufficiency to state a claim for relief under either subsection. Again, the court will allow the plaintiff to amend.

For the reasons stated, the court will conditionally grant the motion and dismiss the complaint unless the plaintiff files an amended complaint within 30 days from the date of the order on this motion. If the plaintiff does not file an amended complaint within that time, the complaint will be dismissed without further

**notice or hearing. If the plaintiff files an amended complaint within 30 days from the date of the order, the defendants shall file an answer or other response in accordance with applicable rules.**

**The court will hear the matter.**

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**1 "Embezzlement . . . requires three elements: (1) property rightfully in the possession of a nonowner; (2) nonowner's appropriation of the property to a use other than which [it] was entrusted; and (3) circumstances indicating fraud." In re Littleton, 942 F.2d 551, 555 (9th Cir. 1991).**

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| 6. | 13-30317-D-7<br>JDC-1 | JAMES COREY | OBJECTION TO CLAIM OF DAN HOWE-INDIAN VALLEY AUTO PARTS, CLAIM NUMBER 8<br>4-1-15 [97] |

**Final ruling:**

**The court finds that a hearing will not be helpful and is not necessary. This is the debtor's objection to the claim of Dan Howe – Indian Valley Auto Parts (the "Claimant"), Claim No. 8 (the "Board"). The objection will be overruled because the debtor served the Claimant at the address listed on his proof of claim as the address where payments should be sent, and not at the address listed on the proof of claim as the address to which notices should be sent. The court noted this defect in its ruling on an earlier objection to this same claim; the debtor has not remedied the service defect with this new objection.**

**As a result of this service defect, the objection will be overruled by minute order. No appearance is necessary.**

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| 7. | 13-30317-D-7<br>JDC-2 | JAMES COREY | OBJECTION TO CLAIM OF FRANCHISE TAX BOARD, CLAIM NUMBER 4<br>4-1-15 [103] |

**Final ruling:**

**The court finds that a hearing will not be helpful and is not necessary. This is the debtor's objection to the claim of the Franchise Tax Board, Claim No. 4 (the "Board"). The Board has not filed opposition. However, for the following reasons, the objection will be overruled.1**

**The debtor has failed to submit evidence sufficient to shift the burden to the Board to prove the validity of its claim. "Upon objection, [a] proof of claim provides 'some evidence as to its validity and amount' and is 'strong enough to carry over a mere formal objection without more.'" Lundell v. Anchor Constr. Specialists, Inc., 223 F.3d 1035, 1039 (9th Cir. 2000) (citation omitted). "To defeat the claim, the objector must come forward with sufficient evidence and 'show facts tending to defeat the claim by probative force equal to that of the allegations of the proof[] of claim [itself]. . . . If the objector produces sufficient evidence to negate one or more of the sworn facts in the proof of claim, the burden reverts to the claimant to prove the validity of the claim by a**

preponderance of the evidence.'" Id. (citation omitted, emphasis added).

The debtor requests the claim be disallowed "because the Debtor's records reflect that $0.00 is owing and that the amounts claimed were indeed paid pre-petition." Debtor's Motion and Objection to Claim, filed April 1, 2015, at 3:14-15. On an earlier objection to the same claim, the court found that the debtor had failed to submit evidence sufficient to shift the burden to the Board to prove the validity of its claim. With the present objection, the debtor has included some additional exhibits, which in and of themselves, make it clear the debtor has failed to pay the Board the full amounts due for taxes, interest, and penalties. Among the exhibits the debtor has included this time are summaries he received from the Board for the tax years 2004 through 2012. These summaries show balances due for 2004, 2005, and 2011, the same years for which amounts are included in the Board's claim in this case. The amounts shown for interest differ slightly from the amounts on the proof of claim because interest on the summaries is shown through the date they were issued, January 26, 2015, which is later than the petition date, which was the "through" date used on the proof of claim for calculation of interest. The other amounts shown on the summaries – for tax, penalties, and costs – are the same on the summaries as on the proofs of claim. In short, the summaries support the proof of claim.

The debtor has also included copies of several checks he claims were payments to the Board. He has itemized those checks in a running accounting he calls Payments Made to CA Franchise Tax Board Account 121-27377-37. In the accounting, the debtor lists the amounts due from him to the Board for the tax years 2004 through 2011, along with the amounts he claims to have paid the Board, coming up with a running "credit" he claims is owed him by the Board, in the amount of $4,191.24. The problem is that two of the checks for which the debtor gives himself credit were not made payable to the Board at all. The first, for $5,139, the debtor made payable to the Internal Revenue Service. The second, for $992.70, does not have a payee at all – instead, the debtor wrote the amount of the check, "nine hundred ninety-two and 70/100" dollars, on both the amount line and the payee line. Thus, those two amounts, $5,139 and $992.70, do not appear in the Board's summaries, and the debtor has submitted no evidence the payments reflected by those checks were ever received by the Board.

Finally, the debtor identifies his Exhibit E as his 2004, 2005, and 2007 "amended tax returns." They are not. They are nothing more than cover letters from his tax preparer, Snelling Bkkg. & Tax Service, Inc., by which Snelling forwarded the debtor's tax returns to him. In each case, Snelling opined that the debtor would receive a particular refund from the Board: $4,415, $2,543, and $1,966, respectively. These exhibits are hearsay, conclusory, and without foundation, and will not be considered. The debtor's last exhibit is a series of e-mails from him to his then attorney, Mo Makarram, which are irrelevant to this matter.

To conclude, the debtor's own exhibits disprove his conclusion that he has met his initial burden to show facts tending to defeat the claim by probative force equal to that of the allegations of the proof of claim. He has not. Accordingly, the objection will be overruled by minute order. No appearance is necessary.

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1 As a preliminary matter, although in general, debtors do not have standing to object to claims unless there is likely to be a surplus after payment of creditors in full (Heath v. Am. Express Travel Related Servs. Co. (In re Heath), 331 B.R. 424, 429 (9th Cir. BAP 2005)), where the claim objected to is on account of a debt that

**will not or may not be discharged, the debtor has standing to object to the claim. See Wellman v. Ziino (In re Wellman), 2007 Bankr. LEXIS 4291, *5 n.5 (9th Cir. BAP 2007); Vandevort v. Creditor's Adjustment Bureau, Inc. (In re Vandevort), 2007 Bankr. LEXIS 4919, *12 n.9 (9th Cir. BAP 2007). In this case, the trustee has a pending adversary proceeding to deny the debtor's discharge. As a result of that proceeding, the debtor has standing to object to claims.**

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| 8. | 13-30317-D-7<br>JDC-3 | JAMES COREY | OBJECTION TO CLAIM OF INTERNAL REVENUE SERVICE, CLAIM NUMBER 7<br>4-1-15 [93] |

**Final ruling:**

**The court finds that a hearing will not be helpful and is not necessary. This is the debtor's objection to the claim of the Internal Revenue Service, Claim No. 7 (the "IRS"). The IRS has filed opposition. For the following reasons, the objection will be overruled.**[1]

**On an earlier objection to the same claim, the court found that the debtor had failed to submit evidence sufficient to shift the burden to the IRS to prove the validity of its claim. With the present objection, the debtor has included some additional exhibits, but has still failed to demonstrate that the payments he made to the IRS represented the full amounts due, as of the time of the payment, of taxes, interest, and penalties. For example, it is clear from a comparison of the dates of payment, as listed by the debtor himself on his Exhibit C, with the type of tax and tax period, that all of the payments were made late. Further, from the evidence the IRS has submitted, in the form of a declaration of a Senior Insolvency Specialist plus exhibits, it is clear the payments were in amounts either equal to or less than the total tax due, and did not include any interest or penalties. Thus, the payments the debtor cites are insufficient to demonstrate that he paid the full amounts of interest and penalties due, and in some instances, the full amount of the tax.**

**The debtor has also included an invoice from his tax preparers, Snelling Bkkg. & Tax Service, Inc., dated February 1, 2008, which includes this notation:**

> **Jim, this is a progress billing on the reconciliation of tax due project we have been working on over the past year. This billing is (at your request) to cover time spent on the IRS/Social Security Admin reconciliation of the 2005 discrepancies between W2, W3 and Quarterly employer reports (941 Forms). IRS has now reconciled on this issue. A reduction of tax owed by about $22,857..!!**

**Debtor's Ex. H. Along with this alleged evidence, the debtor claims he "has met IRS representatives in Quincy four times over this same issue," that "[t]he IRS record keeping is unable to produce the correct payment history," and that "Debtor has been assured that the status of his payment history would be resolved and corrected to show all his payments and the reduction of tax by approximately $22,857.00." Debtor's Motion and Objections to Claim, filed April 1, 2015, at 5:2-7. The debtor provides no names of the individuals he claims made these representations to him; even with names, the alleged statements would be hearsay, and the court does not consider them. The statement by Snelling Bookkeeping & Tax about a "reduction of tax owed by about $22,857" is similarly hearsay and will not be considered. It is also conclusory and without foundational details that would allow the court to**

accept it as evidence.

The debtor identifies his Exhibits I, J, and K as his 2004, 2005, and 2007 "amended tax returns." They are not. They are nothing more than cover letters from Snelling Bookkeeping & Tax by which Snelling forwarded the debtor's tax returns to him. In each case, Snelling opined that the debtor would receive a particular refund from the IRS: $10,213, $22,253, and $6,679, respectively. These exhibits are hearsay, conclusory, and without foundation, and will not be considered.

Having considered the admissible evidence, the court disagrees with the debtor's conclusion that he has met his initial burden to show facts tending to defeat the claim by probative force equal to that of the allegations of the proof of claim. He has not. Nevertheless, the IRS has chosen to respond not only with a similar conclusion as to the burden of proof, but also with admissible evidence of the amounts comprising its claim. Thus, for two reasons – because the debtor has failed to meet his burden of production and because the IRS has submitted evidence refuting the debtor's position, the debtor's objection will be overruled.

Finally, the IRS notes that in March of this year, well after its proof of claim was filed, the IRS entered into a stipulation with the trustee under which the IRS agreed that the penalty portion of its secured claim, a total of $13,725.85, is void as to the trustee and is preserved for the benefit of the bankruptcy estate. The remaining amount of the IRS's secured claim is $5,034.54. Thus, the IRS requests its claim be allowed in the amounts of $5,034.54 secured, $5,236.83 unsecured priority, and $1,306.53 general unsecured, for a total of $11,577.90. This relief is not appropriate on the debtor's objection, in which the court was asked only to disallow the claim in its entirety. For the reasons stated above, the court will overrule the objection by minute order. The IRS may wish to adjust its claim by way of an amended proof of claim. No appearance is necessary.

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1 As a preliminary matter, although in general, debtors do not have standing to object to claims unless there is likely to be a surplus after payment of creditors in full (Heath v. Am. Express Travel Related Servs. Co. (In re Heath), 331 B.R. 424, 429 (9th Cir. BAP 2005)), where the claim objected to is on account of a debt that will not or may not be discharged, the debtor has standing to object to the claim. See Wellman v. Ziino (In re Wellman), 2007 Bankr. LEXIS 4291, *5 n.5 (9th Cir. BAP 2007); Vandevort v. Creditor's Adjustment Bureau, Inc. (In re Vandevort), 2007 Bankr. LEXIS 4919, *12 n.9 (9th Cir. BAP 2007). In this case, the trustee has a pending adversary proceeding to deny the debtor's discharge. As a result of that proceeding, the debtor has standing to object to claims.

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| 9. | 13-30317-D-7<br>JDC-4 | JAMES COREY | OBJECTION TO CLAIM OF KIM KALBAUGH, CLAIM NUMBER 6<br>4-13-15 [133] |

Final ruling:

The court finds that a hearing will not be helpful and is not necessary. This is the debtor's objection to the claim of Kim Kalbaugh ("Kalbaugh"), Claim No. 6 (the "IRS"). Kalbaugh has filed opposition. For the following reasons, the objection will be overruled.1

Kalbaugh's claim is based on a pre-petition judgment he obtained in the Plumas

County Superior Court following a trial at which the debtor was represented by counsel and presented evidence.[2] The debtor filed a notice of appeal from the judgment on April 8, 2013; the appeal remains pending. The debtor requests Kalbaugh's claim in this bankruptcy case be disallowed "because the Debtor's records reflect that $0.00 is owing." Debtor's Motion and Objections to Claim, filed April 13, 2015, at 3:18-19. Specifically, the debtor claims "that the judgment for the claim as filed is against California State Law" (id. at 3:19-20), that the debtor's exhibits in support of the objection comprise evidence "that was ignored by the trial court judge in [the state court action]" (id. at 3:20-21), that the trial judge "failed to calculate the credits due to the Debtor" (id. at 3:25), and that "[i]f this calculation of credits due was factored into the amount that the judge had declared due to Mr. Kalbaugh, it offsets the amount rendered at judgment and nullifies any monies owed to Mr. Kalbaugh." Id. at 3:25-4:1. The debtor asks the court to take judicial notice of a number of documents he submitted at the trial of the Plumas County action, along with the trial court's ruling on the debtor's objections to its tentative ruling.

The debtor's attack on the state court judgment falls squarely within the Rooker-Feldman doctrine; as a result, this court does not have subject matter jurisdiction over the objection. The Rooker-Feldman doctrine "is a powerful doctrine that prevents federal courts from second-guessing state court decisions by barring the lower federal courts from hearing de facto appeals from state-court judgments." Bianchi v. Rylaarsdam, 334 F.3d 895, 898 (9th Cir. 2003). "If claims raised in the federal court action are 'inextricably intertwined' with the state court's decision such that the adjudication of the federal claims would undercut the state ruling or require the district court to interpret the application of state laws or procedural rules, then the federal complaint must be dismissed for lack of subject matter jurisdiction." Id. "The integrity of the judicial process depends on federal courts respecting final state court judgments and rebuffing de facto appeals of those judgments to federal court." Id.. at 902. The doctrine '"[applies] to state judgments even though state court appeals are not final." Worldwide Church of God v. McNair, 805 F.2d 888, 893, n.3 (9th Cir. 1986).

The doctrine does not apply in "bankruptcy proceedings that invoke substantive rights under the Bankruptcy Code or that, by their nature, could arise only in the context of a federal bankruptcy case" (Sasson v. Sokoloff (In re Sasson), 424 F.3d 864, 871 (9th Cir. 2005)), such as actions to avoid preferences or fraudulent transfers and actions to determine dischargeability. Id. Nothing of that sort is involved here; all that is involved is the debtor's request for this court to review the evidence submitted to the state court and reach a different conclusion. Thus, the matter is unequivocally covered by Rooker-Feldman. "The clearest case for dismissal based on the Rooker-Feldman doctrine occurs when a federal plaintiff asserts as a legal wrong an allegedly erroneous decision by a state court, and seeks relief from a state court judgment based on that decision . . . ." Henrichs v. Valley View Dev., 474 F.3d 609, 613 (9th Cir. 2007). Accordingly, the objection will be overruled for lack of subject matter jurisdiction by minute order. No appearance is necessary.

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1 As a preliminary matter, although in general, debtors do not have standing to object to claims unless there is likely to be a surplus after payment of creditors in full (Heath v. Am. Express Travel Related Servs. Co. (In re Heath), 331 B.R. 424, 429 (9th Cir. BAP 2005)), where the claim objected to is on account of a debt that will not or may not be discharged, the debtor has standing to object to the claim.

**See Wellman v. Ziino (In re Wellman), 2007 Bankr. LEXIS 4291, *5 n.5 (9th Cir. BAP 2007); Vandevort v. Creditor's Adjustment Bureau, Inc. (In re Vandevort), 2007 Bankr. LEXIS 4919, *12 n.9 (9th Cir. BAP 2007). In this case, the trustee has a pending adversary proceeding to deny the debtor's discharge. As a result of that proceeding, the debtor has standing to object to claims.**

**2 The court takes judicial notice of the judgment and amended judgment, copies of which are filed as attachments to Kalbaugh's proof of claim in this case.**

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| 10. | 15-21617-D-7<br>APN-1<br>WELLS FARGO BANK, N.A. VS. | TIM/CARISSA ALDRICH | MOTION FOR RELIEF FROM AUTOMATIC STAY<br>4-20-15 [20] |

**Final ruling:**

**This matter is resolved without oral argument. This is Wells Fargo Bank, N.A.'s motion for relief from automatic stay. The court's records indicate that no timely opposition has been filed. The motion along with the supporting pleadings demonstrate that there is no equity in the subject property and debtors are not making post petition payments. The court finds there is cause for relief from stay, including lack of adequate protection of the moving party's interest. Accordingly, the court will grant relief from stay by minute order. As the debtors are not making post-petition payments and the creditor's collateral is a depreciating asset, the court will also waive FRBP 4001(a)(3). There will be no further relief afforded. No appearance is necessary.**

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| 11. | 14-31725-D-11 | TAHOE STATION, INC. | CONTINUED STATUS CONFERENCE RE: VOLUNTARY PETITION<br>11-30-14 [1] |

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| 12. | 14-31929-D-7<br>MPD-5 | MEDICI LOGGING, INC. | MOTION FOR COMPENSATION FOR WEST AUCTIONS, AUCTIONEER(S)<br>4-28-15 [49] |

**Final ruling:**

**The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed and the relief requested in the motion for compensation for West Auctions is reasonable compensation for services rendered and is supported by the record. As such the court will grant the motion for compensation for West Auctions. Moving party is to submit an appropriate order. No appearance is necessary.**

13. 13-29030-D-7 WILLIAM/JANET CHENG MOTION TO OPPOSE TRUSTEE RICHARDS WRONGFULLY DISCHARGE HIMSELF FROM HIS CRIMINAL ACTS 4-6-15 [802]

**Final ruling:**

**The court finds that a hearing will not be helpful and is not necessary. The matter is resolved without oral argument. On April 6, 2015, the debtors filed two documents entitled, respectively, "Chengs' William Cheng and Janet Cheng Opposition and Objection to Trustee Richards Wrongfully to Discharge Himself From His Criminal Acts" and "William Cheng and Janet Cheng Notice of Motion and Motion to Oppose Trustee Richards Wrongfully Discharge Himself From His Criminal Acts." The documents appear on the court's docket as DNs 801 and 802. It appears the debtors interpreted the Notice of Filing Trustee's Final Account and Distribution Report, Etc. as requiring the filing of both an objection and a motion, whereas the notice required the filing of an objection and a notice of hearing. Based on their content, the court will interpret the "Notice of Motion and Motion," DN 802, as a notice of hearing, and the "Opposition and Objection," DN 801, as an objection.**

**The objection is a litany of allegations the debtors have made relentlessly throughout the course of this case, disguised by the debtors as "undisputed facts." Far from it. The trustee has consistently challenged these allegations, and the court has repeatedly refuted them. There is nothing new here and certainly nothing that would tend to support the debtors' conclusions that the trustee's final report is "deceptive, fraudulent, willful, immoral, unethical, [and] oppressive" (Obj., DN 801, at 4:21-22) and that, by the final report, the trustee is seeking to discharge himself from criminal acts. Further, as regards the final report itself, the trustee points out that the court approved his final report, over the objection of the debtors, before the trustee made the payments to creditors. The court's order was filed October 23, 2014; it was supported by a ruling contained in the court's minutes for the October 22, 2014 hearing on the trustee's motion, DN 677. The debtors' present demands that the trustee be required to produce all checks issued by him or his attorney, and to document all cash withdrawn by his attorney, including from his own personal account, are frivolous.**

**Finally, the debtors have made the allegations that they "are now homeless [and] facing eviction," and have "no fund for health insurance etc." Obj., DN 801, at 3:18-19. The trustee's administration of the estate in this case resulted in a 100% dividend on all allowed claims and a surplus of $412,993.76 for the debtors, who declined to negotiate their check, and the trustee has paid the unclaimed funds into the court registry, pursuant to § 347(a) of the Bankruptcy Code. These facts do not support the conclusion that the debtors are homeless, that they are facing eviction, or that they have no funds to pay for health insurance or other expenses.**

**For the reasons stated, the motion will be denied by minute order. No appearance is necessary.**

14. 15-22734-D-7 DOUGLAS MORRIS
APN-1
SANTANDER CONSUMER USA, INC.
VS.

MOTION FOR RELIEF FROM AUTOMATIC STAY
4-28-15 [11]

**Final ruling:**

**This matter is resolved without oral argument. This is Santander Consumer USA, Inc.'s motion for relief from automatic stay. The court's records indicate that no timely opposition has been filed. The motion along with the supporting pleadings demonstrate that there is no equity in the subject property and debtor is not making post petition payments. The court finds there is cause for relief from stay, including lack of adequate protection of the moving party's interest. Accordingly, the court will grant relief from stay by minute order. As the debtor is not making post-petition payments and the creditor's collateral is a depreciating asset, the court will also waive FRBP 4001(a)(3). There will be no further relief afforded. No appearance is necessary.**

15. 14-25148-D-11 HENRY TOSTA
TH-1

MOTION FOR COMPENSATION FOR THOMAS H. TERPSTRA, SPECIAL COUNSEL
4-28-15 [416]

**Final ruling:**

**The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed. The record establishes, and the court finds, that the fees and costs requested are reasonable compensation for actual, necessary, and beneficial services under Bankruptcy Code § 330(a). As such, the court will grant the motion. Moving party is to submit an appropriate order. No appearance is necessary.**

16. 15-22549-D-7 MICHAEL/CASSANDRA PRADO
VVF-1
AMERICAN HONDA FINANCE CORPORATION VS.

MOTION FOR RELIEF FROM AUTOMATIC STAY AND/OR MOTION FOR ADEQUATE PROTECTION
4-22-15 [17]

**Final ruling:**

**This matter is resolved without oral argument. This is American Honda Finance Corporation's motion for relief from automatic stay. The court's records indicate that no timely opposition has been filed. The motion along with the supporting pleadings demonstrate that there is no equity in the subject property and debtors are not making post petition payments. The court finds there is cause for relief from stay, including lack of adequate protection of the moving party's interest. Accordingly, the court will grant relief from stay by minute order. As the debtors are not making post-petition payments and the creditor's collateral is a depreciating asset, the court will also waive FRBP 4001(a)(3). There will be no further relief afforded. No appearance is necessary.**

17. 14-32452-D-11 JOHN RODRIGO CONTINUED STATUS CONFERENCE RE: VOLUNTARY PETITION 12-30-14 [1]

**Tentative ruling:**

**This is a continued status conference in this chapter 11 case. The court does not ordinarily issue tentative rulings for chapter 11 status conferences; however, the court has several concerns that have been raised earlier that have not been satisfactorily addressed, as well as new concerns.**

**The court issued a tentative ruling in advance of the initial status conference, which was held February 18, 2015, in which the court pointed out a number of deficiencies in the debtor's procedural compliance with the scheduling order and in the debtor's schedules. Thus, the court continued the hearing and required the debtor to serve the scheduling order, the status conference report, and a notice of continued status conference on those creditors who had not been previously served. The debtor was also required to serve the Notice of Chapter 11 Bankruptcy Case, Meeting of Creditors, & Deadlines (the "341 Notice") on the creditors who were not previously served. These requirements were spelled out expressly in the ruling, yet the debtor complied only partially. On February 23, the debtor filed a notice of continued status conference and served it, together with the 341 Notice, on all creditors who had been scheduled by that date (see below). He did not serve the scheduling order or his status conference report, as required by the ruling.**

**In its ruling for the February 18 status conference, the court also observed that, although the debtor operates an elder care facility in Palm Springs and owns two rental properties in Palm Springs and five in Hawaii, on his Schedule G, where required to list all executory contracts and unexpired leases, the debtor had answered "None." The court posited that the debtor likely has tenants in the rental properties and executory contracts with the individuals or entity operating the elder care facility, as well as contracts with persons or entities providing food, laundry service, housekeeping, and health care. The ruling noted that, given the very broad definition of "creditor" under the Bankruptcy Code, all tenants must be scheduled, even those with month-to-month leases, and added that the debtor was required to schedule his tenants by name and address and to give them notice of this case.**

**On February 27, the debtor filed an amended Schedule G on which he listed his tenants in the Palm Springs and Hawaii rental properties. He failed to amend his master address list to include them and failed to serve them with the notice of continued status conference he had filed and served four days earlier or with the 341 Notice. Thus, the debtor's tenants have, so far as the record reveals, never received notice of this case in the almost five months it has been pending.**

**Further, on his amended Schedule G, the debtor failed to list any contracts regarding the elder care facility – no leases or executory contracts with residents, no management company, no employees, and no providers of linens, food, health care, or housekeeping services. The debtor's counsel will need to explain to the court whether the amended Schedule is accurate.**

**The United States Trustee's motion for the appointment of a patient care**

**ombudsman reveals that the debtor testified at the meeting of creditors that the elder care facility has three employees and provides residents with a bed, food, vital monitoring, medicine dispensing, and transportation to doctors. He also testified the facility had four residents as of the time of the meeting of creditors, on January 29, 2015, and that a fifth had left five or six days earlier. Thus, the debtor's facility apparently had five residents as of the petition date, with whom the debtor presumably had executory contracts, yet none has ever been listed on the debtor's schedule of unexpired leases and executory contracts or been given notice of this case, as least so far as the record reveals. Nor have the debtor's three employees or other persons or entities providing the facility with food and supplies been scheduled or notified. This apparent omission will need to be explained and addressed.**

**In short, the debtor failed to fully comply in the first instance with the requirements of the scheduling order, failed to fully comply with the requirements spelled out in the court's ruling for the initial status conference, and appears to have failed to file full and complete schedules, either originally or as amended. In addition, although he has filed monthly operating reports for January and February (both late), the debtor has not filed a report for March, which was due April 14, or for April, which was due May 14. Finally, in his status conference statement filed January 23, 2015, the debtor stated he intended to file a cash collateral motion, motions to value his rental properties, and motions to abandon certain vacant parcels of land. He also stated, "Debtor can file a plan upon resolution of the motions to value. Debtor believes a plan can be filed within 90 days." Four months later, the debtor has done only one of those things – on May 18, he filed a motion to use cash collateral, which he set for hearing on June 24. Thus, as of this date, the debtor has been using the rents from his seven rental properties and the elder care facility without court approval and apparently without creditor consent.**

**Debtor's counsel will need to address all of the issues at the status conference.**

**The court will hear the matter.**

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| 18. | 14-30752-D-7<br>15-2032 | ANDREW BRUNT<br>MAS-1 | MOTION FOR SUMMARY JUDGMENT<br>4-29-15 [14] |
| | CLIFF ELECTRONIC COMPONENTS, LTD. UK V. BRUNT | | |

**Tentative ruling:**

**This is the plaintiff's motion for partial summary judgment. The defendant has not filed opposition. For the following reasons, the motion will be granted.**

**The plaintiff holds a judgment against the defendant, who is the debtor in the underlying chapter 7 case (the "debtor"), issued by a Kansas state court on the plaintiff's complaint for trademark infringement, false designation of origin, unlawful importation, and unfair competition. The judgment, as it has since been domesticated in California, is for $296,101.17. (The Kansas judgment and the California sister-state judgment will be referred to collectively as the "Judgment.") By its complaint in this adversary proceeding, the plaintiff seeks a**

judgment denying the debtor's discharge, pursuant to § 727(a) of the Bankruptcy Code, and determining the Judgment to be nondischargeable, pursuant to § 523(a)(6). By this motion, the plaintiff seeks judgment on its § 523(a)(6) cause of action, leaving the § 727(a) cause of action for another day.

In considering a motion for summary judgment, the court looks beyond the pleadings and considers the materials in the record, including depositions, documents, declarations, discovery responses, and so on. Fed. R. Civ. P. 56(c)(1), incorporated herein by Fed. R. Bankr. P. 7056. "The court need consider only the cited materials, but it may consider other materials in the record." Fed. R. Civ. P. 56(c)(3). The moving party bears the burden of producing evidence showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Celotex v. Catrett, 477 U.S. 317, 322-23 (1986). Once the moving party has met its initial burden, the non-moving party must present affirmative evidence showing the existence of genuine issues of fact for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256-57 (1986).

Relying on the doctrine of issue preclusion, the plaintiff contends the issue of whether its claim arose from willful and malicious injury by the debtor was conclusively determined by the Judgment, and thus, that there is no genuine issue of material fact and the plaintiff is entitled to judgment as a matter of law. Issue preclusion, formerly known as collateral estoppel, applies in nondischargeability actions. Grogan v. Garner, 498 U.S. 279, 285 n.11 (1991). In assessing the preclusive effect of a state court judgment, the court looks to the law of the state in which the judgment was rendered. 28 U. S. C. § 1738; Gayden v. Nourbakhsh (In re Nourbakhsh), 67 F.3d 798, 800 (9th Cir. 1995), citing Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373, 380 (1985).

Under Kansas law, there are three requirements for application of issue preclusion: "(1) a prior judgment on the merits which determined the rights and liabilities of the parties on the issue based upon ultimate facts as disclosed by the pleadings and judgment; (2) the parties must be the same or in privity; and (3) the issue litigated must have been determined and necessary to support the judgment." Venters v. Sellers, 293 Kan. 87, 98, 261 P.3d 538, 547 (2011).

The Judgment satisfies these elements. It is based on detailed findings and conclusions set forth in an 86-page Memorandum Opinion and Order issued by the Kansas state court on cross-motions for summary judgment by the plaintiff and the debtor. Although the debtor was a co-defendant in the action with a corporation of which he was the president, a director, and a 40% owner, it was undisputed that he ran the corporation's day-to-day operations, and there was no evidence of participation by anyone else in the infringing conduct engaged in by the corporation. The court made express findings supporting its conclusion that "the extent of Mr. Brunt's direct activity in conducting the infringing conduct otherwise here clearly identified does not seem subject to doubt and, hence, his ultimate liability seems beyond dispute by such direct involvement." Memorandum Opinion and Order, Plaintiff's Ex. C, at p. 83. The court went on to make additional findings to support its conclusion that "such facts satisfy, beyond dispute, any test for personal liability on this personal participation theory." Id. at pp. 84-85.

There is ample authority in the Ninth Circuit for the proposition that trademark infringement is an intentional tort falling within the scope of § 523(a)(6). See Smith v. Entrepreneur Media, Inc. (In re Smith), 2009 Bankr. LEXIS 4582, *37 (9th Cir. BAP 2009); Frye v. Excelsior College (In re Frye), 2008 Bankr. LEXIS 4686, at *31-32 (9th Cir. BAP 2008) (copyright infringement); Partners for

Health & Home, L.P. v. Seung Wee Yang, 488 B.R. 109, 118-19 (C.D. Cal. 2012); Symantec v. Kwong Mann (In re Kwong Mann), 2009 Bankr. LEXIS 2844, at *22 (Bankr. C.D. Cal. 2009); Star's Edge, Inc. v. Braun (In re Braun), 327 B.R. 447, 450-52 (Bankr. N.D. Cal. 2005) and cases cited therein (copyright infringement).

The court is aware of the Ninth Circuit's decision in Barboza v. New Form, Inc. (In re Barboza), 545 F.3d 702, 712 (9th Cir. 2008), in which the court reversed and remanded a bankruptcy court decision applying preclusive effect to a pre-petition district court judgment for copyright infringement. The Court of Appeals noted, first, that "willful," as used in copyright infringement cases, is not the same as "willful" for purposes of § 523(a)(6). 545 F.3d at 707. This is because "willful" copyright infringement "can be based on either 'intentional' behavior, or merely 'reckless' behavior" (id.), whereas "injuries resulting from recklessness are not sufficient to be considered willful injuries under § 523(a)(6) of the Bankruptcy Code and are therefore insufficient to merit an exemption to dischargeability." Id. at 708, citing Kawaauhau v. Geiger, 523 U.S. 57, 64 (1998).

In Barboza, the district court had instructed the jury it could find willful infringement if the defendants either knew they were infringing or acted with reckless disregard as to whether they were doing so. The Ninth Circuit held that in light of that jury instruction, as well as evidence presented in the nondischargeability action that could have supported a finding of recklessness as opposed to knowing infringement, the bankruptcy court erred in giving preclusive effect to the district court jury's finding of willful infringement. 545 F.3d at 709-11. The Ninth Circuit also held that the bankruptcy court erred in failing to consider the "malicious" element of § 523(a)(6) separately from the "willful" element. Id. at 711.

The court has carefully considered the Kansas court's Memorandum Opinion and Order, and is satisfied it is sufficient for preclusion purposes on both the "willful" and "malicious" elements. The Kansas court carefully weighed all of the evidence, including that submitted by the debtor, and there is nothing in the opinion to suggest the court was basing its findings on recklessness as opposed to knowing infringement. Further, although the court did not use the term "malicious," the opinion is sufficient to satisfy the four-prong test for that element, as set forth in Carillo v. Su (in Re Su), 290 F.3d 1140, 1146-47 (9th Cir. 2002): "(1) a wrongful act, (2) done intentionally, (3) which necessarily causes injury, and (4) is done without just cause or excuse." The court finds the present case to be more akin to Smith, supra, than to Barboza. In Smith, the Bankruptcy Appellate Panel affirmed the decision of another department of this court giving preclusive effect, for purposes of § 523(a)(6), to a federal district court judgment for trademark infringement. See Smith, 2009 Bankr. LEXIS 4582, at *22-36.

To conclude, the plaintiff has sufficiently shown that the Judgment satisfies the requirements of Kansas law for issue preclusion, and that the debtor's conduct, as determined by the state court in its Memorandum Opinion and Order, was sufficient to meet the requirements for nondischargeability under § 523(a)(6). According, the motion will be granted.

The court will hear the matter.

19. 13-25654-D-7 KENNETH/APRIL GOORE — MOTION TO SELL
HSM-3 — 4-17-15 [60]

20. 15-23055-D-7 MARGAURENA YONKO — MOTION FOR WAIVER OF THE CHAPTER 7 FILING FEE OR OTHER FEE
4-15-15 [4]

21. 14-23773-D-7 NEFTALI GONZALEZ — MOTION FOR SUMMARY JUDGMENT
14-2212 DL-1 — 4-16-15 [20]
SACRAMENTO MUNICIPAL UTILITY DISTRICT V. GONZALEZ

**Tentative ruling:**

**This is the motion of the plaintiff, Sacramento Municipal Utility District ("SMUD"), for summary judgment.[1] The defendant, who is the debtor in the underlying chapter 7 case (the "debtor"), has filed opposition, and the plaintiff has filed a reply. For the following reasons, the motion will be denied.**

**By its complaint in this adversary proceeding, SMUD claims that in August of 2009, "a request was made to SMUD for electrical service to be provided to [certain premises in Sacramento] by SMUD in the name of Defendant" (Compl. at 2:15-16); that in response to the request, SMUD established utility service at the premises in the debtor's name; that in April of 2010, SMUD disconnected electrical service to the premises after it discovered there had been power theft, hazardous conditions, and illegal wiring at the premises; and that between August of 2009 and April of 2010, the debtor was in control of the premises and was the only customer of record for SMUD's electrical service at the premises. SMUD claims the use of unauthorized electrical service at the premises constitutes power theft, which is defined in SMUD Rule and Regulation 1, and which SMUD claims is larceny, pursuant to Cal. Penal Code § 484, et seq.[2] By the present motion, SMUD seeks a determination that the debt evidenced by a pre-petition judgment of the Sacramento County Superior Court against the debtor in the amount of $105,826.97 (the "Judgment") is nondischargeable, pursuant to § 523(a)(4) and (a)(6).**

The debtor, in turn, submits the Judgment is not entitled to preclusive effect. As to the factual issues, he has submitted a declaration in which he testifies he was homeless and eating out of trash cans during the entire period of the alleged power theft; that he never received notice of SMUD's state court lawsuit until after the Judgment was entered; that his wallet, with is identity papers, was stolen from him in the summer of 2009 and returned by a "friend" two weeks later; and that he did not open any account and was never responsible for any SMUD account serving the premises. The debtor has also submitted printouts from calwin.org [3] showing the debtor as the recipient of EBT benefits (formerly food stamps) on a monthly basis during the period of the alleged power theft.

In considering a motion for summary judgment, the court looks beyond the pleadings and considers the materials in the record, including depositions, documents, declarations, discovery responses, and so on. Fed. R. Civ. P. 56(c)(1), incorporated herein by Fed. R. Bankr. P. 7056. "The court need consider only the cited materials, but it may consider other materials in the record." Fed. R. Civ. P. 56(c)(3). The moving party bears the burden of producing evidence showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Celotex v. Catrett, 477 U.S. 317, 322-23 (1986). Once the moving party has met its initial burden, the non-moving party must present affirmative evidence showing the existence of genuine issues of fact for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256-57 (1986).

Relying on the Full Faith and Credit Act, 28 U.S.C. § 1738, and the doctrine of issue preclusion, SMUD contends that the issues of whether its claim arose as a result of larceny on the part of the debtor and from willful and malicious injury by the debtor were conclusively determined by the Judgment, and thus, that there is no genuine issue of material fact and SMUD is entitled to judgment as a matter of law. Issue preclusion, formerly known as collateral estoppel, applies in nondischargeability actions. Grogan v. Garner, 498 U.S. 279, 285 n.11 (1991). In assessing the preclusive effect of a state court judgment, the court looks to the law of the state in which the judgment was rendered. 28 U. S. C. § 1738; Gayden v. Nourbakhsh (In re Nourbakhsh), 67 F.3d 798, 800 (9th Cir. 1995), citing Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373, 380 (1985).

Under California law, the elements of issue preclusion are:

> First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding.

Diruzza v. County of Tehama, 323 F.3d 1147, 1152 (9th Cir. 2003), quoting Lucido v. Superior Court, 51 Cal. 3d 335, 341 (1990). The burden of proof as to all of these is on the party asserting that collateral estoppel applies. Id.

SMUD has not sufficiently shown that the Judgment satisfies the second and third elements; that is, that the issues necessary to support its § 523(a)(4) and (a)(6) claims were "actually litigated" and "necessarily determined" by the Judgment. The debtor testifies he never received notice of SMUD's lawsuit. The docket of the state court action, which SMUD has submitted as an exhibit and of

which the court takes judicial notice, reveals that a few weeks after the complaint was filed, SMUD filed an application for an order for service by publication, supported by declarations that the debtor had not been served because he could not be found. The application was granted, and the only evidence of service on the docket is a proof of service by publication.

SMUD cites Younie v. Gonya (In re Younie), 211 B.R. 367, 375 (9th Cir. BAP 1997), in which the Bankruptcy Appellate Panel held that a California default judgment satisfies the "actually litigated" requirement. There are two problems. First, the defendant in that case claimed he had failed to answer the state court complaint, and thus that his default was entered, because he relied on his attorney's erroneous advice. In the present case, in contrast, the debtor was served only by publication, and claims he was never made aware of the lawsuit. Second, in Younie, the fraud issues necessary to the plaintiff's § 523(a)(2) claim were found to have been "necessarily decided" where the state court judgment contained factual findings regarding the fraud counts of the plaintiff's complaint, with no findings on the plaintiff's breach of contract count. "The judgment clearly determined, therefore, that Debtors had committed fraud and that the judgment was an adjudication of the fraud issue. Such a judgment necessarily included a determination of all of the facts required for actual fraud under California law." 211 B.R. at 374. In this case, in contrast, the Judgment states only that it is adjudged, ordered, and decreed that SMUD recover from the defendant [the debtor] $102,723.97 plus fees and costs, and that "[t]he Clerk is ordered to enter the judgment in the amount of . . . ($105,826.97)." SMUD's Ex. C.

Both of these distinctions are significant under California law, as interpreted by the Ninth Circuit. In Harmon v. Kobrin (In re Harmon), 250 F.3d 1240 (9th Cir. 2001), the court recognized the general rule that a default judgment may be entitled to preclusive effect. 250 F.3d at 1246, citing Estate of Williams, 36 Cal. 2d 289, 293 (1950). There are, however, two limitations on the general rule. First, "a defendant may be precluded from relitigating issues raised in a complaint on which a default judgment was granted only if the defendant 'has been personally served with summons or has actual knowledge of the existence of the litigation.'" 250 F.3d at 1247, quoting Estate of Williams, 36 Cal.2d at 297. In this case, as in Estate of Williams (see 36 Cal.2d at 290-91), the debtor was served only by publication. He was not personally served, and SMUD has submitted no evidence he had actual knowledge of the litigation.

> The second limitation concerns which issues are 'actually litigated' in actions resulting in default judgments. The Williams' Estate Court limited the principle that a defaulting defendant is presumed to admit all the facts which are well pleaded in the complaint by allowing an issue to have preclusive effect only where the record shows an express finding upon the allegation for which preclusion is sought. Thus, a court's silence concerning a pleaded allegation does not constitute adjudication of the issue.

Harmon, 250 F.3d at 1247, citing Estate of Williams, 36 Cal. 2d at 293-96. Thus, in Harmon, the Ninth Circuit found that, although the defendant had actual knowledge of the litigation, thus satisfying the first Estate of Williams limitation, "the state court made no express finding concerning Harmon's allegedly fraudulent actions. Because there was no express finding in respect to fraud (or anything else for that matter), we cannot conclude that the state court considered and decided the issue. Under Williams' Estate, then, we cannot conclude that the issue was actually litigated." 250 F.3d at 1247-48.[4]

Here, SMUD's state court complaint contained causes of action for conversion, power theft, and account stated. Only the first two could support a complaint for nondischargeability under § 523(a). The Judgment included no findings at all; thus, under Harmon and Estate of Williams, the issues necessary to render the Judgment preclusive as to conversion and power theft were not actually litigated or necessarily decided, and the Judgment is not entitled to preclusive effect under the doctrine of issue preclusion.

To conclude, SMUD has failed to demonstrate that the debtor was either personally served with the summons and complaint in the state court action or had actual knowledge of the action. It has also failed to demonstrate that the issues essential to its § 523(a)(4) and (a)(6) claims were actually litigated and necessarily decided by the Judgment. According, the motion will be denied.

The court will hear the matter.

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1 It is actually a motion for partial summary judgment, as permitted by Fed. R. Civ. P. 56(a), incorporated herein by Fed. R. Bankr. P. 7056, in that SMUD seeks judgment on the second and third claims for relief set forth in its complaint, and not on its first claim for relief.

2 This code section defines "theft." It makes no mention of power theft in particular or of larceny. There is a statute providing that "[w]herever any law or statute of this state refers to or mentions larceny, embezzlement, or stealing, said law or statute shall hereafter be read and interpreted as if the word 'theft' were substituted therefor." Cal. Penal Code 490a. However, that does not mean the elements of those various crimes are identical; in fact, far from it. See People v. Williams, 57 Cal. 4th 776, 781-90 (2013).

3 Calwin.org is an online system of the CalWIN Consortium (California Work Opportunity and Responsibility to Kids Information Network), "a modern technological solution for efficiently administering public assistance programs and providing quality service to the communities." http://www.calwin.org/ (last visited May 22, 2015).

4 Compare Baldwin v. Kilpatrick (In re Baldwin), 249 F.3d 912, 919 (9th Cir. 2001):

> [A]lthough the state default judgment contains no explicit findings, Kilpatrick's sole claim against Baldwin was that he acted intending to cause him injury, either by violently striking him, or assisting others in doing so. Under these circumstances, the state court could not have granted judgment to Kilpatrick unless it found that Baldwin intentionally acted so as to injure Kilpatrick. Therefore, we conclude that the state court necessarily decided that Baldwin intentionally acted so as to injure Kilpatrick. It follows that the issue of whether Baldwin intentionally acted so as to injure Kilpatrick was actually litigated.

22. 14-26673-D-7 JENNIFER KRUGER-HURST — AMENDED MOTION FOR COMPENSATION FOR BYRON LEE LYNCH, TRUSTEES ATTORNEY(S)
BLL-4 — 5-4-15 [62]

**Final ruling:**

**The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed. The record establishes, and the court finds, that the fees and costs requested are reasonable compensation for actual, necessary, and beneficial services under Bankruptcy Code § 330(a). As such, the court will grant the motion by minute order. No appearance is necessary.**

23. 15-21884-D-7 JAMES/BREANNA HAMILTON — MOTION FOR RELIEF FROM AUTOMATIC STAY
APN-1 — 4-20-15 [15]
WELLS FARGO BANK, N.A. VS.

**Final ruling:**

**This matter is resolved without oral argument. This is Wells Fargo Bank, N.A.'s motion for relief from automatic stay. The court's records indicate that no timely opposition has been filed. The motion along with the supporting pleadings demonstrate that there is no equity in the subject property and debtors are not making post petition payments. The court finds there is cause for relief from stay, including lack of adequate protection of the moving party's interest. Accordingly, the court will grant relief from stay by minute order. As the debtors are not making post-petition payments and the creditor's collateral is a depreciating asset, the court will also waive FRBP 4001(a)(3). There will be no further relief afforded. No appearance is necessary.**

24. 14-31685-D-7 CATHERINE PALPAL-LATOC — OBJECTION TO DEBTOR'S CLAIM OF EXEMPTIONS
SDB-1 — 3-5-15 [48]

**Final ruling:**

**This is the objection of creditor Eugenio Albalos, Jr., to the debtor's claim of exemption of certain real property. No party-in-interest has filed opposition. However, the court is not prepared to consider the objection at this time for the following reasons: (1) the objection, notice of hearing, and exhibits were filed March 5, 2015, but were not served until April 27, 2015; thus, the proof of service was not filed until April 27, 2015, whereas the local rule requires that a proof of service be filed concurrently with the documents served or not more than three days after the documents are filed (see LBR 9014-1(e)(2)); and (2) the debtor was served at P.O. Box 581, Hercules, CA, whereas her address of record is P.O. Box 5581.**

**The court will continue the hearing to June 24, 2015 at 10:00 a.m., the creditor to file a notice of continued hearing and serve it, together with the objection and all supporting declarations and exhibits, not later than June 10, 2015. The notice of continued hearing may be a notice pursuant to LBR 9014-1(f)(1) or (f)(2) depending on the amount of notice given.**

**The hearing will be continued by minute order. No appearance is necessary on May 27, 2015.**

25. 15-23086-D-7 JANET WHITFIELD — MOTION FOR WAIVER OF THE CHAPTER 7 FILING FEE OR OTHER FEE
4-16-15 [5]

26. 15-20096-D-7 DAVID KUMAR — MOTION TO AVOID LIEN OF JERRY ESIO
CAH-1
4-17-15 [19]

**Final ruling:**

**The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed and the relief requested in the motion is supported by the record. The court finds the judicial lien described in the motion impairs an exemption to which the debtor is entitled. As a result, the court will grant the debtor's motion to avoid the lien. Moving party is to submit an appropriate order. No appearance is necessary.**

27. 15-22196-D-7 WILFORD/BARBARA PROSCH — MOTION FOR RELIEF FROM AUTOMATIC STAY
JHW-1
DAIMLER TRUST VS.
4-24-15 [16]

**Final ruling:**

**The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed and the relief requested in the motion is supported by the record. As such the court will grant relief from stay. As the debtors' Statement of Intentions indicates they will surrender the property, the court will also waive FRBP 4001(a)(3) by minute order. There will be no further relief afforded. No appearance is necessary.**

28. 15-21798-D-7 PATRICIA KERWIN — MOTION TO AVOID LIEN OF AMERICAN EXPRESS CENTURION BANK
ET-2
4-15-15 [21]

**Final ruling:**

**The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed and the relief requested in the motion is supported by the record. The court finds the judicial lien described in the motion impairs an exemption to which the debtor is entitled. As a result, the court will grant the debtor's motion to avoid the lien. Moving party is to submit an appropriate order. No appearance is necessary.**

29. 15-22299-D-7 RIGOBERTO CORDOVA AND MOTION FOR RELIEF FROM
PD-1 MARISOL GOMEZ AUTOMATIC STAY
FEDERAL HOME LOAN MORTGAGE 4-22-15 [26]
CORPORATION VS.

**Final ruling:**

**This is Federal Home Loan Mortgage Corporation's (the "Movant") motion for relief from stay. The Movant asserts that it foreclosed on the real property that is the subject of this motion pre-petition. Movant further asserts that as a result of this pre-petition foreclosure sale the debtor has only have a possessory interest in the property. Accordingly, cause exists for relief from stay under Bankruptcy Code § 362(d)(1). There is no opposition to the motion.**

**As Movant has established it foreclosed on the property pre-petition and the debtor has only a possessory interest in the property, cause exists for granting relief from stay under Code § 362(d)(1). Accordingly, relief from stay will be granted and the court will waive 4001(a)(3) by minute order. No appearance is necessary.**

30. 15-21905-D-7 RONALD CARVER ORDER TO SHOW CAUSE - FAILURE
TO PAY FEES
5-8-15 [17]

**Final ruling:**

**The deficiency has been corrected. As a result the court will issue a minute order discharging the order to show cause and the case will remain open. No appearance is necessary.**

31. 15-21609-D-7 SARINA BOWEN MOTION TO EMPLOY J. RUSSELL
DNL-1 CUNNINGHAM AS ATTORNEY(S)
5-13-15 [32]

32. 15-21710-D-7 PATRICIA PALACIOS CONTINUED TRUSTEE'S MOTION TO
KJH-1 DISMISS FOR FAILURE TO APPEAR
**Final ruling:** AT SEC. 341(A) MEETING OF
CREDITORD
4-13-15 [24]

**This is the trustee's continued motion to dismiss case. The hearing was continued to allow the debtor to appear at the continued 341 meeting of creditors on May 18, 2015. The court's docket indicates that the debtor appeared at the continued meeting of creditors, the meeting was concluded, and the trustee issued a report of no assets. As a result the court will deny the motion by minute order. No appearance is necessary.**

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| 33. | 13-30317-D-7<br>JRR-3 | JAMES COREY | CONTINUED MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH KIM HOOVEN KALBAUGH<br>4-8-15 [128] |
| 34. | 15-21617-D-7<br>DNL-1 | TIM/CARISSA ALDRICH | MOTION TO EMPLOY J. RUSSELL CUNNINGHAM AS ATTORNEY(S)<br>5-13-15 [31] |
| 35. | 14-31725-D-11<br>FWP-5 | TAHOE STATION, INC. | CONTINUED MOTION TO USE CASH COLLATERAL AND/OR MOTION FOR ADEQUATE PROTECTION , MOTION FOR REPLACEMENT LIENS PURSUANT TO STIPULATION<br>4-3-15 [115] |
| 36. | 14-31725-D-11<br>FWP-5 | TAHOE STATION, INC. | FINAL HEARING RE: MOTION TO USE CASH COLLATERAL AND/OR MOTION FOR ADEQUATE PROTECTION , MOTION FOR REPLACEMENT LIENS PURSUANT TO STIPULATION<br>4-3-15 [115] |

37. 09-29162-D-11 SK FOODS, L.P.
SH-315

CONTINUED OBJECTION TO CLAIM OF STEVE SAMRA FARMS, CLAIM NUMBER 357
2-24-15 [5495]

38. 09-29162-D-11 SK FOODS, L.P.
SH-315

CONTINUED OBJECTION TO CLAIM OF STEVE SAMRA FARMS, CLAIM NUMBER 357
2-24-15 [5495]

**This is a duplicate of item no. 37 above. Matter removed from calendar.**

39. 09-29162-D-11 SK FOODS, L.P.
SH-315

CONTINUED COUNTER MOTION TO ALLOW LATE FILED CLAIM
4-1-15 [5598]

40. 15-22196-D-7 WILFORD/BARBARA PROSCH
FF-1

MOTION TO COMPEL ABANDONMENT
5-11-15 [26]