UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Michael S. McManus
Bankruptcy Judge
Sacramento, California

June 27, 2016 at 10:00 a.m.

1.	15-29600-A-11 NCK-1	ANTIGUA CANTINA & GRILL, INC.	MOTION TO APPROVE AMENDED DISCLOSURE STATEMENT 3-22-16 [36]

Tentative Ruling: The motion will be denied.

The debtor seeks approval of its first amended disclosure statement filed on March 22, 2016. Docket 35.

Secured creditor Charles Travers IRA #887220801 et al., the holder of the sole mortgage against the debtor's real property, opposes the motion.

The disclosure statement will not be approved for the following reasons:

(1) The disclosure statement does not contain a table of contents, despite it being 26 pages long.

(2) The disclosure statement contains many vague and superficial statements, unaccompanied with concrete information. For instance, in addressing the debtor's ability to initially fund a plan, the disclosure statement says that the debtor "believes [it] will have enough cash on hand on the effective date of the Plan to pay all the claims and expenses that are entitled to be paid on that date." Docket 35 at 24.

What the debtor believes about its ability to fund a plan is irrelevant. It is the creditors who must make an informed decision about whether the debtor has the cash to initially fund the plan, based on concrete information that includes the debtor's cash on hand and the necessary funds to initially fund the plan.

The same is true with respect to the debtor's ability to fund the plan in the future. While the disclosure statement refers to Exhibit E, where the debtor has made projections spanning the next five years, the projections are mere numbers on a paper. There is nothing in the disclosure statement stating who came up with the projections, whether the person who prepared the projections is qualified to make such financial projections, what are the underlying assumptions of the projections, are the assumptions upon which the projections are based reasonable in light of the debtor's prior performance. Docket 35 at 25; Docket 35, Ex. E.

(3) The disclosure statement says virtually nothing about the debtor's background, including pre-petition business history, operations, financial issues, reasons for its inability to pay creditors pre-petition, etc. Just because the debtor was formed only in November 2015 - one month before filing

this bankruptcy case - purportedly to own and lease a commercial property previously owned and operated by 2019 O Street Investors, Inc., does not mean that the court and creditors should overlook issues with the previous owner of the property.

On its face, the debtor filing for bankruptcy approximately one month after being formed and being the transferee of a real property with substantial encumbrances (totaling over $1.15 million) begs the question of whether the debtor was formed to own and lease the property or it was formed to take the property into bankruptcy.

The above is especially important as the court suspects that the same individual(s) is behind both the debtor and 2019 O Street Investors, Inc.

Also, even though the disclosure statement admits that the debtor acquired the subject commercial real property in November 2015, it does not state whether the debtor acquired the property and assumed the encumbrances on the property with the consent of the voluntary lien holders.

(4) The disclosure statement does not answer a fundamental question about the debtor's ability to fund the proposed plan, namely: if the debtor and its predecessor in interest were unable to make mortgage payments on the real property pre-petition, what is significantly different in the debtor's current operations to allow it to make mortgage payments under the proposed plan?

(5) The disclosure statement admits that the debtor has not completed its investigation of avoidance claims. Docket 35 at 4. Such claims, if any, are an asset of the estate and the creditors are entitled to know their value.

(6) The disclosure statement does not say what the debtor has been doing with the rents it is receiving from the real property post-petition. The debtor has not obtained a court order to use cash collateral.

On the other hand, someone appears to be paying the expenses associated with the debtor's property, including utilities, property, taxes, insurance, etc. If the debtor is not using cash collateral to pay such expenses, the disclosure statement should identify the source of funds for the payment of such expenses post-petition.

(7) The disclosure statement does not apprise of a deadline for the filing of objections to proofs of claim.

(8) The court sees no information in the disclosure statement about the debtor's unexpired leases and executory contracts. While the disclosure statement refers to a section 6.01 for such information, the court has been unable to find this section in the disclosure statement.

Future amendments of the debtor's disclosure statement and plan should be accompanied by black/red-lined versions of the documents.

2.	15-25213-A-11 UST-1	BLU COMPANIES, INCORPORATED	MOTION TO CONVERT OR DISMISS CASE 4-18-16 [35]

Tentative Ruling: The motion will be granted and the case will be converted to chapter 7.

The U.S. Trustee moves for conversion to chapter 7, pursuant to 11 U.S.C. § 1112(b), arguing: (1) unexcused failure to timely file form B26 (report as to value, operations, and profitability of a non-debtor in which the estate owns substantial or controlling share); (2) failure to comply with court order requiring plan and disclosure statement to be filed by February 22, 2016; (3) failure to prosecute the case causing a delay that is prejudicial to creditors; and (4) absence of reasonable likelihood of rehabilitation.

The debtor - a holding company for various investments in other businesses - responds, contending it has been unable to formulate a plan due to uncertainty of when its investments will start producing income. The debtor argues that the motion should be denied because it has negotiated a sale of the debtor's equity interest in Bluon Energy, L.L.C., which would allow the debtor to formulate a plan within 45 days.

11 U.S.C. § 1112(b)(1) provides that "on request of a party in interest, and after notice and a hearing, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause unless the court determines that the appointment under section 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate."

For purposes of this subsection, "'cause' includes- (A) substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation; . . . ; (E) failure to comply with an order of the court; (F) unexcused failure to satisfy timely any filing or reporting requirement established by this title or by any rule applicable to a case under this chapter . . . ." 11 U.S.C. § 1112(b)(4)(A), (E), (F).

The above instances of cause are not exhaustive. Pioneer Liquidating Corp. v. United States Trustee (In re Consolidated Pioneer Mortgage Entities), 248 B.R. 368, 375 (B.A.P. 9th Cir. 2000). For instance, unreasonable delay that is prejudicial to creditors is also cause for purposes of 11 U.S.C. § 1112(b)(1). Consolidated Pioneer at 375, 378; In re Colon Martinez, 472 B.R. 137, 144 (B.A.P. 1st Cir. 2012).

The debtor filed this case on June 29, 2015 but has not yet filed a plan and disclosure statement. The deadline the court set in its August 24, 2015 status conference order was February 22, 2016. Docket 22.

Further, from the debtor's failure to file Form B26 for Bluon Energy (the company representing the debtor's principal investment) in January 2016, the court infers that the debtor either does not know or does not want to disclose the *present* value of its interest in Bluon. As mentioned in the court's ruling on the debtor's sale motion, also being heard on this calendar, the debtor has proffered no evidence in that motion as to the present value of its investment in Bluon either.

And, the debtor's response to this motion does not even attempt to explain its failure to file Form B26 for Bluon.

The delay in filing a plan and disclosure statement, when taken into account with the denial of the debtor's sale motion and its failure to file Form B26 for Bluon Energy, constitutes unreasonable delay that is prejudicial to creditors. Although the one-year anniversary of the petition date is fast approaching, the filing of a plan and disclosure statement is nowhere in sight for the debtor.

The totality of the foregoing also indicates to the court an absence of reasonable likelihood of reorganization, within reasonable time.

The above is cause for dismissal or conversion to chapter 7 under section 1112(b).

As the debtor lists in its schedules approximately $5.36 million in unencumbered personal property assets and it has substantial unsecured debt, totaling approximately $7.253 million, conversion to chapter 7 would be in the best interest of the estate and the unsecured creditors. Docket 1, Schedules B, D, F.

3. 16-20774-A-12 TIMOTHY/JILL PEDROZO — MOTION TO VALUE COLLATERAL
DBL-1
VS. TRI COUNTIES ECONOMIC DEVELOPMENT — 5-9-16 [12]

Final Ruling: The motion will be dismissed without prejudice because the proof of service for the motion states that it was executed on May 16, 2016, whereas the motion, including the proof of service, were filed on May 9, 2016. Given this discrepancy, the date of service is obviously incorrect and there is no proof that the correct persons were given the requisite notice.

Second, although the motion states that TCED's claims are secured by the debtors' residence, equipment/farm implements and farm animals, this is not what the debtors' Schedule D states. Schedule D says that TCED's claims are secured only by the real property.

Third, even assuming TCED's claims are secured by the residence, equipment/farm implements and farm animals, the debtors' valuation of these assets is not based solely on their opinion of value. It is based also on "previous appraisals," which are not identified or part of the record on this motion. Docket 12 at 2. Such opinion then is hearsay. Fed. R. Evid. 802.

Fourth, even assuming TCED's claims are secured by the residence, equipment/farm implements and farm animals, in their valuation of these assets, the debtors have lumped them all together, without identifying and valuing each personal property asset.

From the motion, it cannot be ascertained what equipment and animals are being valued and what part of the valuation is attributable to the real property.

4. 16-20774-A-12 TIMOTHY/JILL PEDROZO — MOTION TO CONFIRM PLAN
DBL-2 — 5-12-16 [17]

Tentative Ruling: The motion will be denied without prejudice.

The debtors are seeking confirmation of their chapter 12 plan filed on May 12, 2016. Docket 19.

The motion will be denied because the court has not granted any of the debtors' valuation motions on this calendar, even though the plan's feasibility is dependent on the granting of those motions. The court also has not seen a motion to value with respect to the claim of Robert Parker.

Further, the proposed plan payments are $7.41 short of all aggregate payments proposed under the plan.

Finally, the debtors have not established feasibility. They admit that their monthly net disposable income pre-petition was only $2,498.61, whereas they are proposing $3,060 in monthly plan payments. They intend to make up the difference by their confidence in that they "can make this payment because [their] feed and water costs have moderated and [they] are producing and selling more cheese." Docket 20 at 2.

However, the court does not have concrete evidence about the source and at least approximate amount of this anticipated additional income. For instance, the debtors do not say: why their feed and water expenses have "moderated," how much extra in income they will be generating due to this "moderation" in expenses, how much extra in income they will be generating from the sale of more cheese, what will be the additional expenses associated with the making of more cheese, whether the increase in demand for cheese is seasonal or is expected to continue–and why.

5. 16-20774-A-12 TIMOTHY/JILL PEDROZO — MOTION TO VALUE COLLATERAL 5-17-16 [22]
DBL-3
VS. USDA FARM SERVICE AGENCY

Final Ruling: This motion has been voluntarily dismissed by the movant. Docket 63.

6. 16-20774-A-12 TIMOTHY/JILL PEDROZO — MOTION TO VALUE COLLATERAL 5-17-16 [27]
DBL-4
VS. USDA FARM SERVICE AGENCY

Final Ruling: This motion has been voluntarily dismissed by the movant. Docket 64.

7. 16-20774-A-12 TIMOTHY/JILL PEDROZO — MOTION TO VALUE COLLATERAL 5-17-16 [32]
DBL-5
VS. SIERRA CENTRAL CREDIT UNION

Tentative Ruling: The motion will be denied without prejudice.

The debtors are seeking to strip down to $2,216 the $4,013.27 claim of Sierra Central Credit Union, secured by a 2003 Ford Focus vehicle.

The motion will be denied. It states that it seeks valuation of the vehicle under 11 U.S.C. § 506(a) and (d). The valuation standard under section 506(a)(2) is "the price a retail merchant would charge for property of that kind considering the age and condition of the property."

Yet, the court does not have evidence of the price a retail merchant would charge for the vehicle. It has evidence only of what the debtors think is the vehicle is worth. Docket 34.

But, the debtors have not been qualified as experts on what a retail merchant would charge for the vehicle. Thus, their opinion of value is an inadmissible lay opinion. See Fed. R. Evid. 701(c) (prohibiting lay witnesses from testifying in the form of opinions based on scientific, technical or other specialized knowledge). The court does not have any other evidence of value.

As the moving parties, it is the debtors who have the burden of persuasion to establish the value of the vehicle. They have failed to do so.

8. 16-20774-A-12 TIMOTHY/JILL PEDROZO — MOTION TO VALUE COLLATERAL
DBL-6
VS. CHICO AUTO FINANCE, INC. — 5-17-16 [37]

Tentative Ruling: The motion will be denied without prejudice.

The debtors are seeking to strip down the claim secured by a vehicle, a 2004 Ford F250.

First, while the motion initially refers to a claim held by Chico Auto Finance, Inc., at the end, the motion refers to a secured claim held by Sierra Central Credit Union. Docket 37 at 3. The court will not speculate about this discrepancy.

Second, the motion states that it seeks valuation of the vehicle under 11 U.S.C. § 506(a) and (d). The valuation standard under section 506(a)(2) is "the price a retail merchant would charge for property of that kind considering the age and condition of the property."

Yet, the court does not have evidence of the price a retail merchant would charge for the vehicle. It has evidence only of what the debtors think is the vehicle is worth. Docket 39.

But, the debtors have not been qualified as experts on what a retail merchant would charge for the vehicle. Thus, their opinion of value is an inadmissible lay opinion. See Fed. R. Evid. 701(c) (prohibiting lay witnesses from testifying in the form of opinions based on scientific, technical or other specialized knowledge). The court does not have any other evidence of value.

9. 16-20774-A-12 TIMOTHY/JILL PEDROZO — MOTION TO VALUE COLLATERAL
DBL-7
VS. SIERRA CENTRAL CREDIT UNION — 5-17-16 [42]

Tentative Ruling: The motion will be denied without prejudice.

The debtors are seeking to strip down to $2,456 the $4,346.67 claim of Sierra Central Credit Union, secured by a 2004 Ford Focus vehicle.

The motion will be denied. It states that it seeks valuation of the vehicle under 11 U.S.C. § 506(a) and (d). The valuation standard under section 506(a)(2) is "the price a retail merchant would charge for property of that kind considering the age and condition of the property."

Yet, the court does not have evidence of the price a retail merchant would charge for the vehicle. It has evidence only of what the debtors think is the vehicle is worth. Docket 44.

But, the debtors have not been qualified as experts on what a retail merchant would charge for the vehicle. Thus, their opinion of value is an inadmissible lay opinion. See Fed. R. Evid. 701(c) (prohibiting lay witnesses from testifying in the form of opinions based on scientific, technical or other specialized knowledge). The court does not have any other evidence of value.

As the moving parties, it is the debtors who have the burden of persuasion to establish the value of the vehicle. They have failed to do so.

Finally, the parties reference to the 910-day period of 11 U.S.C. § 1325(a)

makes no sense. This is a chapter 12 case governed by the chapter 12 provisions of title 11.

10. 16-20774-A-12 TIMOTHY/JILL PEDROZO — MOTION TO VALUE COLLATERAL
DBL-8 — 5-21-16 [47]
VS. COUNTY OF GLENN

Tentative Ruling: The motion will be denied.

The debtors move for an order valuing their primary residence in Orland, California, equipment/farm implements on the property and farm animals, in an effort to strip off four claims ($117,889.30, $15,699.79, $60,517.52, $54,000) secured by the assets, held by Glenn County.

The motion will be denied. The four claims referenced in this motion are the claims referenced in another motion and in the debtors' Schedule D as being held by Tri Counties Economic Development. The court sees no claims held by Glenn County listed in Schedule D. Docket 10.

11. 15-26281-A-13 STEPHEN TRUMAN — MOTION TO DISMISS ADVERSARY PROCEEDING
16-2004 JMB-2 — 5-19-16 [23]
PARTNERS FEDERAL CREDIT UNION
V. TRUMAN

Tentative Ruling: The motion will be denied.

The defendant, Stephen Truman, the debtor in the underlying chapter 7 case, seeks dismissal under Rule 12(b)(6) of the claims under 11 U.S.C. § 523(a)(2)(A), (a)(4) and (a)(6) in Partners Federal Credit Union's first amended complaint, arguing that the complaint fails to state a claim upon which relief can be granted.

As spelled out by the complaint, the defendant applied for membership with the plaintiff. To qualify the defendant for membership, the plaintiff required that the defendant be an employee, retiree, or immediate family member or roommate of an employee or retiree of the Walt Disney Company or one of its subsidiaries. To gain access to a membership with the plaintiff, the defendant used his relationship with his already deceased grandmother, by submitting to the plaintiff her 2013 IRS Form 1099-R. The defendant did not disclose to the plaintiff that his grandmother had passed away. Without knowing that the defendant's grandmother had passed away, the plaintiff granted the defendant membership.

Once the defendant had been admitted as a member, the plaintiff opened a checking account and later applied for and was given a home equity line of credit.

On July 17, 2014, the defendant entered into a branch of the plaintiff in Las Vegas, Nevada, to deposit $229,500 into his HELOC account. In effect, he was paying down the balance of that loan. After the deposit was processed, the plaintiff requested that the transaction be reversed and that the $229,500 be deposited into his checking account. The plaintiff deposited the funds into his checking account. Due to the processing delay of reversing the HELOC transaction, however, the defendant had $229,500 available into his checking account and another $229,500 available into his HELOC account for six days.

Prior to the $229,500 deposit, the defendant had $460 in his checking account

and had a HELOC credit limit of $310,000 and a balance of $229,529.11, leaving $80,470.89 of available HELOC credit.

The defendant discovered the availability of $229,500 in each of his accounts with the plaintiff. It is then that the defendant began making withdrawals from both the checking and HELOC accounts.

On July 18, 2014, the defendant transferred $70,500 from his HELOC account to his checking account and withdrew $300,000 from his checking account by purchasing two cashier checks payable to himself or MGM Grand, one for $200,000 and the other for $100,000. The defendant also withdrew $100 cash from his checking account.

On July 19, 2014, the defendant transferred $2,500 from his HELOC account to his checking account.

On July 20, 2014, the defendant transferred $37,500 from his HELOC account to his checking account and withdrew $429.75 from his checking account via a debit card transaction at the MGM Grand Hotel in Las Vegas.

On July 21, 2014, the defendant transferred $170,000 from his HELOC account to his checking account and withdrew $126,605 cash from his checking account in two transactions, one for $5,000 and another for $121,605.

On July 21 and 22, 2014, the defendant also initiated three payments from his checking account to other creditors. These transactions were reversed by the defendant, however.

From July 18 through July 22, the defendant transferred a total of $280,500 from his HELOC account to his checking account. During that time, the defendant also withdrew, in one form or another, $427,134.75 from his checking account.

The plaintiff did not discover the defendant's representations pertaining to his grandmother, at the time he applied for membership with the plaintiff, until July 24, 2014 or afterward.

The defendant filed the underlying chapter 7 bankruptcy case on August 6, 2015. The plaintiff filed the instant adversary proceeding on January 12, 2016, asserting three claims, a claim under section 523(a)(2)(A), a claim under section 523(a)(4) for larceny, and a claim under section 523(a)(6). After the granting of a motion to dismiss, the plaintiff filed a first amended complaint The complaint asserts that the plaintiff suffered damages in the amount of $150,234 due to the above-identified transactions.

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

"In resolving a Rule 12(b)(6) motion, the court must (1) construe the complaint in the light most favorable to the plaintiff; (2) accept all well pleaded factual allegations as true; and (3) determine whether plaintiff can prove any set of facts to support a claim that would merit relief." See Stoner v. Santa Clara County Office of Educ., 502 F.3d 1116, 1120-21 (9th Cir. 2007); see also

Schwarzer, Tashmina & Wagstaffe, California Practice Guide: Federal Civil Procedure Before Trial, § 9.187, p. 9-46, 9-47 (The Rutter Group 2002).

"*To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' . . . A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. . . . The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully. . . . Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of "entitlement to relief."'*"

Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (Citations omitted).

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

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

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

"*In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.*"

Ashcroft v. Iqbal, 556 U.S. 662, 678-79 (2009) (Citations omitted).

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

The first amended complaint states a claim upon which relief can be granted as

to each of the pleaded causes of action.

11 U.S.C. § 523(a)(2) provides that an individual is not discharged "from any debt for money . . . , to the extent obtained by- (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition."

11 U.S.C. § 523(a)(2)(A) requires a showing that: (1) the defendant made representations; (2) the defendant knew them to be false, when he made them; (3) he made the representations with the intent and purpose to deceive the plaintiff; (4) the plaintiff justifiably relied on the representations; and (5) as a result, the plaintiff sustained damage. Younie v. Gonya (In re Younie), 211 B.R. 367, 373 (B.A.P. 9th Cir. 1997); see also Providian Bancorp. (In re Bixel), 215 B.R. 772, 776-77 (Bankr. S.D. Cal. 1997) (citing Field v. Mans, 516 U.S. 59, 59-60 (1995) (holding that "§ 523(a)(2)(A) requires justifiable, but not reasonable, reliance")). These elements are virtually identical to the elements of common law or actual fraud. Younie, 211 B.R. at 374; Advanta Nat'l Bank v. Kong (In re Kong), 239 B.R. 815, 820 (B.A.P. 9th Cir. 1999).

The amended complaint specifically identifies the defendant's misrepresentation that led to the plaintiff granting the defendant a HELOC and losing $150,234 — namely, that the defendant is an immediate family member of an employee or retiree of the Walt Disney Company or one of its subsidiaries.

The defendant used his familial connection to obtain membership with the plaintiff, even though his grandmother was no longer an employee or retiree of the Walt Disney Company or one of its subsidiaries, as she had passed away over one year prior to the defendant's membership application with the plaintiff. Docket 20 at 2-3. As part of the representation, the defendant provided the plaintiff with his grandmother's 2013 Internal Revenue Service 1099-R form.

The defendant knew that his grandmother was deceased at the time he made the representation to the plaintiff and he "intentionally and purposely allowed Plaintiff to rely on the premise that his grandmother was then living through affirmative representations and intentional failure to disclose to Plaintiff that his grandmother was deceased." Docket 20 at 3.

Within months after granting the defendant a membership, the plaintiff granted the HELOC to the defendant, losing $150,234. For purposes of the section 523(a)(2)(A) claim, the harm caused by the membership qualification misrepresentation was the defendant's failure to repay the credit obtained by him from the plaintiff under the HELOC. The defendant himself argues that he had "legal access" to all the funds he transferred from the HELOC. Docket 23 at 8. The plaintiff then lost $150,234 from the defendant's failure to repay a HELOC he acquired by intentional misrepresentation.

There is nothing unusual or tenuous that the plaintiff relied on the defendant's membership qualifications in the process of deciding whether to grant the HELOC, as the plaintiff has the discretion to assess whether a member is in good standing, especially when deciding to extend loans to members. Docket 20 at 6. As the complaint plainly states, the plaintiff would not have granted the HELOC to the defendant had it known that he acquired the membership by misrepresenting his grandmother's status as a retiree. Docket 20 at 7. If the plaintiff had not granted the HELOC to the defendant, the plaintiff would not have been harmed by losing the $150,234.

The court rejects the defendant's argument that the plaintiff "fails to *show* in

its [first amended complaint] that [he] committed any fraud." Docket 23 at 4. The complaint is not an evidentiary basis for anything. The complaint contains mere allegations of fact this court is bound to accept as true in connection with this motion.

Also, section 523(a)(2)(A) does not require the misrepresentation to be made at the time the plaintiff relies on such misrepresentation. As long as it is made prior to the plaintiff's reliance and the reliance is justifiable, the pleading requirements of section 523(a)(2)(A) are satisfied. The plaintiff's discretion to evaluate membership standing, when deciding whether to extend a loan to a member, makes the pleading of justifiable reliance plausible.

The complaint contains adequate allegations of the known misrepresentation, justifiable reliance and causation, stating a plausible claim under section 523(a)(2)(A). The fraud has been alleged with the requisite particularity, as the complaint specifically identifies the nature, means, timing and place of the misrepresentation, and identifies the basis for the plaintiff's reliance on the misrepresentation.

Turning to the larceny claim, 11 U.S.C. § 523(a)(4) provides that an individual is not discharged "from any debt for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny." Larceny does not require the existence of a fiduciary relationship. Transamerica Commercial Fin. Corp. v. Littleton (In re Littleton), 942 F.2d 551, 555 (9th Cir. 1991); see also First Delaware Life Ins. Co. v. Wada (In re Wada), 210 B.R. 572, 576 (B.A.P. 9th Cir. 1997).

Larceny is a "'felonious [(fraudulent and wrongful)] taking of another's personal property with intent to convert it or deprive the owner of the same.'" In re Brown, 331 B.R. 243, 249 (Bankr. W.D. Va. 2005) (citing Johnson v. Davis (In re Davis), 262 B.R. 663, 672 (Bankr. E.D. Va. 2001)); see also Lucero v. Montes (In re Montes), 177 B.R. 325, 331 (Bankr. C.D. Cal. 1994). Larceny requires an intent to steal. In re Lynch, 315 B.R. 173, 179-80 (Bankr. D. Col. 2004) (discussing the requisite intent for larceny).

Larceny is distinguished from embezzlement in that the original taking of the property was unlawful. Welfare Trust Fund for No. California v. Quinones (In re Quinones), 537 B.R. 942, 950 (Bankr. N.D. Cal. 2015).

Initially, despite the defendant's assumption that fraudulent intent is required for larceny in the Ninth Circuit, this issue has not been decided by a Ninth Circuit or any other decision binding on this court.

"*Were we to find that larceny required fraudulent intent, the state court judgment would provide enough information to determine that the court found that his actions amounted to fraud . . . .*"

Ormsby v. First Am. Title Co. of Nevada (In re Ormsby), 591 F.3d 1199, 1206 (9th Cir. 2010).

The defendant knew he had only $460 in his checking account and had only $80,470.89 in unused credit in the HELOC, when he asked that the plaintiff reverse the $229,500 deposit from his HELOC and deposit the funds into his checking account. This is easily inferred from the fact that the defendant was the holder and was obviously in control of both the checking account and HELOC.

Notwithstanding the defendant's knowledge of having only $80,470.89 in unused

HELOC credit, he transferred $280,500 from his HELOC to his checking account, from July 18 through July 22, 2014, after noticing that the reversal of the $229,500 deposit from the HELOC had not been processed yet.

Obviously, the defendant was entitled only to the $80,470.89 in unused HELOC credit. The defendant was not entitled to the remaining $200,029.11 he transferred from the HELOC. Those funds did not belong to the defendant. They were "another's personal property," as the defendant had requested the deposit to be deposited into his checking account and reversed from the HELOC.

From the defendant's taking of funds that he knew did not belong to him, it is reasonable to infer the fraudulent and wrongful aspects of the taking, even assuming fraudulent intent is required for larceny. And, from the defendant's knowledge of how much available HELOC credit he had, it is reasonable to infer that the defendant had the intent to deprive the plaintiff from the additional $200,029.11, when he transferred that sum from the HELOC to his checking account.

Intent cannot be substantiated by direct facts, short of the accused admitting such intent. That is why "[i]ntent may properly be inferred from the totality of the circumstances and the conduct of the person accused." Ormsby v. First Am. Title Co. of Nevada (In re Ormsby), 591 F.3d 1199, 1206 (9th Cir. 2010) (quoting Kaye v. Rose (In re Rose), 934 F.2d 901, 904 (7th Cir. 1991)). The reason for this inference

The court rejects the defendant's contention that his taking of the funds from the HELOC could not constitute larceny because the plaintiff had given him "legal access" to the funds. Docket 23 at 8.

The defendant knew that the plaintiff had not given him legal right to the extra funds in the HELOC because it was the defendant himself who had requested that the plaintiff reverse the $229,500 deposit from the HELOC and deposit the funds into the checking account. The defendant was not legally entitled to the HELOC funds, beyond the $80,470.89 in unused HELOC credit. The defendant did not have "legal access" to the funds. He had merely control or access over the funds, pending reversal of the deposit.

Further, while the defendant had control of the extra funds, he had no possession of the extra HELOC funds until he actually took those funds from the HELOC by transferring them to his checking account. Thus, until the defendant unlawfully took the funds, he had no possession, much less rightful possession to the extra HELOC funds.

The defendant's argument is akin to contending that he could not be charged with larceny for taking a taxi driver's vehicle because he had temporary control of the vehicle as a passenger, while the driver stopped for a quick cup of coffee at a gas station, leaving the vehicle running. The argument makes no sense. Larceny is not defeated by the accused's control – or opportunity to take – over the property taken unlawfully.

Finally, 11 U.S.C. § 523(a)(6) provides that an individual is not discharged "from any debt for willful and malicious injury by the debtor to another entity or to the property of another entity."

To prevail on its 11 U.S.C. § 523(a)(6) claim, the plaintiff must show that the injury was both willful and malicious. Kawaauhau v. Geiger, 523 U.S. 57, 61 (1998); Baldwin v. Kilpatrick (In re Baldwin), 249 F.3d 912, 917 (9th Cir.

2001).

The injury element of 11 U.S.C. § 523(a)(6) necessarily involves harm to the plaintiff's person or property. Quarre v. Saylor (In re Saylor), 108 F.3d 219, 221 (9th Cir. 1997) (citing Snoke v. Riso (In re Riso), 978 F.2d 1151, 1154 (9th Cir. 1992)).

The term willful means a deliberate or intentional injury. Kawaauhau, 523 U.S. at 61. This requires proof not only that the actor intended to act, but that the injury was also intended by the actor. Id.

Determining the intent aspect of a willful injury is a subjective standard, focusing on the debtor's state of mind. Carrillo v. Su (In re Su), 290 F.3d 1140, 1144-46 (9th Cir. 2002); Hughes v. Arnold, 393 B.R. 712, 718 (E.D. Cal. 2008); Ormsby v. First American Title Co. of Nevada (In re Ormsby), 386 B.R. 243, 250 (E.D. Cal. 2008). The debtor must have had the subjective intent to harm or the subjective belief / knowledge that harm is substantially certain to result from his conduct. Su at 1144. "We hold that § 523(a)(6)'s willful injury requirement is met only 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." Su at 1142.

A willful injury though is not necessarily malicious for purposes of 11 U.S.C. § 523(a)(6).

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. Carrillo v. Su (In re Su), 290 F.3d 1140, 1146-47 (9th Cir. 2002) (citing In re Jercich, 238 F.3d 1202, 1209 (9th Cir. 2001)); see also Jett v. Sicroff (In re Sicroff), 401 F.3d 1101, 1106 (9th Cir. 2005).

The allegations in the amended complaint are sufficient to state a claim upon which relief can be granted under section 523(a)(6).

As already discussed above, the defendant knew he had only $460 in his checking account and had only $80,470.89 in unused credit in the HELOC, when he asked that the plaintiff reverse the $229,500 deposit from his HELOC and deposit the funds into his checking account.

Notwithstanding this, the defendant transferred $280,500 from his HELOC to his checking account, from July 18 through July 22, 2014, after noticing that the reversal of the $229,500 deposit from the HELOC had not been completed yet.

Obviously, the defendant was entitled only to the $80,470.89 in unused HELOC credit. The defendant was not entitled to the remaining $200,029.11 he transferred from the HELOC. Those funds did not legally belong to the defendant. They belonged to the plaintiff, given the defendant's request for reversal of the $229,500 deposit from the HELOC.

From the foregoing, the court infers that the defendant had the subjective intent to harm or the subjective belief or knowledge that harm is substantially certain to result from his conduct.

The allegations in the complaint also support the malicious injury element of section 523(a)(6). The taking of the $200,029.11 extra funds from the HELOC, in light of the defendant's request for reversal of the $229,500 deposit, was a series of wrongful acts, done intentionally. The defendant did not

accidentally transfer those funds to his checking account. Over a five-day period, he transferred various amounts from the HELOC to the checking account. Each outgoing HELOC transfer was planned, as then the defendant withdrew the funds from his checking account in cash or by purchasing cashier checks. The complaint has sufficient allegations that the outgoing HELOC transfers were done intentionally and were not accidental. The court is entitled to draw such reasonable inferences from the facts in the complaint on a Rule 12(b)(6) motion. The defendant's wrongful acts actually caused $150,234 in harm to the plaintiff.

The first amended compliant states a claim upon which relief can be granted as to each of the three causes of action asserted by the plaintiff. The motion will be denied.

12. 15-26281-A-13 STEPHEN TRUMAN
16-2004
PARTNERS FEDERAL CREDIT UNION
V. TRUMAN

STATUS CONFERENCE
4-18-16 [20]

Tentative Ruling: None.

13. 16-21585-A-11 AIAD/HODA SAMUEL
FWP-4

MOTION FOR ORDER APPROVING PROPERTY MANAGEMENT AGREEMENTS OR MOTION TO EMPLOY
6-13-16 [114]

Tentative Ruling: Because less than 28 days' notice of the hearing was given by the chapter 11 trustee, this motion is deemed brought pursuant to Local Bankruptcy Rule 9014-1(f)(2). Consequently, the creditors, the United States trustee and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The motion will be granted in part.

The chapter 11 trustee requests approval to employ Sackett Corporation as a property manager for three shopping centers the estate is operating, including Stockton Boulevard, Power Inn Road, and Sacramento Avenue (West Sacramento).

In short, Sackett Corporation will collect all rents, will administer all service contracts for the properties, will administer the leases for each tenant, will do weekly check runs for all payables, will oversee the properties on weekly basis, and will prepare monthly income and expense statements.

The proposed compensation for Sackett Corporation is $650 a month or 5% of the gross rents from the properties, whichever is greater. In addition, Sackett Corporation will be entitled to reimbursement of advanced expenses, not to exceed $500 a month without trustee approval.

The motion asks that Sackett Corporation be employed as a non-professional,

thus permitting payment of the compensation without further court approval.

Subject to court approval, 11 U.S.C. § 327(a) permits a trustee to employ a professional to assist the trustee in the administration of the estate. Such professional must "not hold or represent an interest adverse to the estate, and [must be a] disinterested [person]." 11 U.S.C. § 327(a). 11 U.S.C. § 328(a) allows for such employment "on any reasonable terms and conditions."

The court concludes that the terms of employment are reasonable.

Sackett Corporation is a disinterested person within the meaning of 11 U.S.C. § 327(a) and does not hold an interest adverse to the estate.

11 U.S.C. § 101(14) defines a "disinterested person" as "*a person that— (A) is not a creditor, an equity security holder, or an insider; (B) is not and was not, within 2 years before the date of the filing of the petition, a director, officer, or employee of the debtor; and (C) does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor, or for any other reason.*"

Sackett Corporation is not a creditor, equity security holder, and is not and was not within two years pre-petition an employee of the debtors. Sackett Corporation also does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtors, or for any other reason.

Sackett Corporation is not an insider of the debtors either. 11 U.S.C. § 101(31)(A) prescribes that "*[t]he term 'insider' includes--(A) if the debtor is an individual--(i) relative of the debtor or of a general partner of the debtor; (ii) partnership in which the debtor is a general partner; (iii) general partner of the debtor; or (iv) corporation of which the debtor is a director, officer, or person in control.*"

Sackett Corporation is not a relative or general partner of the debtors and is not a partnership or corporation in which the debtors are directors, officers or persons in control.

It should be noted however that the chapter 11 trustee's father is the founder and partial owner of Sackett Corporation. Nevertheless, the trustee "is not an owner, employee, or other representative of the Sackett Corporation." Docket 114 at 1; Docket 118 at 1.

The employment of Sackett Corporation will be approved. But, to temper the risks of appearance of impropriety due to the close familial connection between the trustee and the founder and part owner of Sackett Corporation, the court will require that the proposed compensation be approved by the court at least once every six months. The motion will be granted in part.

14. 16-21585-A-11 AIAD/HODA SAMUEL — MOTION TO EMPLOY
TBG-1 — 5-15-16 [78]

Tentative Ruling: The court will dismiss the motion pursuant to the request of the movant, Edward Smith, attorney for the debtors.