UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Michael S. McManus
Bankruptcy Judge
Sacramento, California

July 11, 2016 at 10:00 a.m.

1.	15-29600-A-11	ANTIGUA CANTINA & GRILL,	MOTION FOR
	RCO-1	INC.	RELIEF FROM AUTOMATIC STAY
	CHARLES N. TRAVERS VS.		4-28-16 [41]

Tentative Ruling: The motion will be denied without prejudice.

The movant, Charles N. Teavers IRA #887220801 (un undivided 300/625 interest) and Charles N. Travers Money Purchase Plan #887221940 (an undivided 326/625 interest), seeks relief from the automatic stay as to the debtor's sole real property in Sacramento, California.

11 U.S.C. § 362(g) provides that:

"In any hearing under subsection (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section—

"(1) the party requesting such relief has the burden of proof on the issue of the debtor's equity in property; and

"(2) the party opposing such relief has the burden of proof on all other issues."

In other words, the moving creditor has the burden of persuasion as to the value of and lack of equity in the property while the debtors have the burden of persuasion as to necessity to an effective reorganization. United Sav. Ass'n of Texas v. Timbers of Inwwod Forest Assocs., Ltd., 484 U.S. 365, 375 (1988). The standard in a chapter 11 proceeding is a showing that "the property is essential for an effective reorganization that is in prospect." This means, that there must be "a reasonable possibility of a successful reorganization within a reasonable time." Timbers at 376. While bankruptcy courts demand a less detailed showing during the four months of exclusivity, "even within that period[,] lack of any realistic prospect of effective reorganization will require § 362(d)(2) relief." Timbers at 376.

The movant has proffered evidence that the value of the property is $765,700 and the encumbrances against the property total approximately $1,207,135. The movant's evidence of value is based on a broker's price opinion and an accompanying declaration of Michael Murphy. Docket 45, Ex. C.

On the other hand, the debtor has submitted its own evidence of value for the property. The debtor's "as is" value of the property is $2,059,516.95.

The court is not persuaded that the movant has met its burden of persuasion on the value of the property. The declaration in support of the movant's broker's price opinion does not state that Mr. Murphy, the appraiser, inspected the

inside and outside of the property. His declaration merely states that he "prepared a Broker's Price Opinion and value analysis of [the property] for the purpose of arriving at an opinion of value." Docket 45, Ex. C at 1. Further, there is over a $1 million discrepancy in the two valuations of the property and the movant has filed no reply to the debtor's opposition attempting to reconcile the discrepancy.

The movant has not met its burden of persuasion on value and equity in the property. The motion will be denied.

2. 15-27210-A-13 MARTIN/MARIA DEL CARMEN — MOTION TO
16-2063 ORTEGA — DISMISS ADVERSARY PROCEEDING
ORTEGA ET AL V. COLLINS — 5-2-16 [8]
JUDGMENT RECOVERY SERVICES ET

Tentative Ruling: The motion will be granted in part and denied in part.

Defendant U.S. Bank seek dismissal of all the claims in the subject complaint pursuant to Fed. R. Civ. P. 12(b)(6).

Collins Judgement Recovery Services holds a pre-petition claim against the plaintiffs, Martin and Maria Ortega, the debtors in the underlying chapter 13 case filed on September 14, 2015.

The complaint asserts that "[d]efendants have continued to hold, and refuse to release said funds [$26,469.99], thereby conducting and continuing post-petition collection efforts against Debtors/Plaintiffs, and failed to cease and desist after numerous communications by Debtors' counsel." Docket 1 at 4.

The plaintiffs obtained an order confirming a 60-month chapter 13 plan on March 2, 2016. Case No. 15-27210-A-13J, Docket 52. The plan revests the estate's property in the plaintiffs. Docket 42 at 5. The plaintiffs filed this adversary proceeding on March 30, 2016.

The complaint seeks declaratory relief and damages for alleged violations of the automatic stay and the discharge injunction.

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 discharge violation claim will be dismissed because the plaintiffs have not obtained a bankruptcy discharge. Their 60-month chapter 13 plan in the underlying bankruptcy case was confirmed only on March 2, 2016, just little over three months ago.

The court sees no basis to dismiss this claim with leave to amend. The plaintiffs have not come forth with a contention that they can amend the complaint to plead a plausible discharge violation claim. The claim will be dismissed with prejudice.

The stay violation claim will be denied.

According to the complaint, U.S. Bank is not a creditor of the plaintiffs.

11 U.S.C. § 362(a) provides that:

"*Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of—*

"*(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;*

"*(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;*

"*(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate.*"

"*(4) any act to create, perfect, or enforce any lien against property of the estate;*

"*(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;*

"*(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;*

"*(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and*

"*(8) the commencement or continuation of a proceeding before the United States Tax Court concerning a tax liability of a debtor that is a corporation for a taxable period the bankruptcy court may determine or concerning the tax liability of a debtor who is an individual for a taxable period ending before the date of the order for relief under this title.*"

The court rejects U.S. Bank's contentions that section 362(a)(1) does not apply to it.

Section 362(a)(1) prohibits "the . . . continuation . . . of . . . administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title . . . ."

With respect to the subject garnishment, U.S. Bank is not a creditor of the plaintiffs or their chapter 13 estate. It is a garnishee bank, associated with Collins' collection of its claim. However, by refusing to honor its promise to pay the $26,469.99 deposit, U.S. Bank is effectively continuing the garnishment proceeding against the plaintiffs. The complaint is clear that *both* defendants

are "continu[ing] to hold, and refuse to release said funds [$26,469.99], thereby conducting and continuing post-petition collection efforts." Docket 1 at 4.

Section 362(a)(1) does not require the person who "continu[es]" the action or proceeding in question to have started the action or proceeding. The statute prohibits only the "continuation" of the action or proceeding. There is no exemption in the statute for "innocent" parties.

U.S. Bank's reference to Citizens Bank of Maryland v. Strumpf, 516 U.S. 16, 21 (1995) is unhelpful with respect to the section 362(a)(1) discussion, as that decision addressed only stay violations under section 362(a)(3) and (6).

Further, $17,425 of the funds in question have been claimed as exempt by the plaintiffs in their bankruptcy case, meaning that the plaintiffs - aside from the bankruptcy estate - have standing to prosecute the stay violation claim against U.S. Bank. Case No. 15-27210-A-13J, Dockets 11 & 48, Schedule C.

U.S. Bank then may be held liable for stay violations under section 362(a)(1).

The court finds it unnecessary to address any of the other provisions of section 362(a).

The court also disagrees that the complaint fails to allege an injury sustained as a result of the alleged stay violation. The defendants have been deprived of the $26,469.99.

11 U.S.C. § 362(k)(1) provides that an individual injured by willful violation of the automatic stay "shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages."

An award for damages for a willful violation of section 362(a) is mandatory. Eskanos & Adler, P.C. v. Roman (In re Roman), 283 B.R. 1, 7 (B.A.P. 9th Cir. 2002); Tsafaroff v. Taylor (In re Taylor), 884 F.2d 478, 483 (9th Cir. 1989).

The "[movants] ha[ve] the burden of proof under § 362(k), which requires a showing (1) by an individual debtor of (2) injury from (3) a willful (4) violation of the stay." Harris v. Johnson (In re Harris), Case No. 10-00880-GBN, WL 3300716, at *4 (B.A.P. 9th Cir. Apr. 7, 2011) (citing to Fernandez v. G.E. Capital Mortg. Servs. (In re Fernandez), 227 B.R. 174, 180 (B.A.P. 9th Cir. 1998)).

To the extent the complaint states a claim for declaratory relief based on violation of a bankruptcy discharge it too is dismissed.

3. 15-27210-A-13 MARTIN/MARIA DEL CARMEN — STATUS CONFERENCE
16-2063 ORTEGA — 3-30-16 [1]
ORTEGA ET AL V. COLLINS
JUDGMENT RECOVERY SERVICES ET

Tentative Ruling: None.

4. 15-25213-A-11 BLU COMPANIES, INCORPORATED
UST-1

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.

5. 12-35921-A-12 HARMINDER HEER — OBJECTION TO CLAIM
JPJ-1 — 5-17-16 [176]
VS. YOLO SOLANO AIR QUALITY MANAGEMENT DISTRICT

Tentative Ruling: The objection will be sustained.

The chapter 12 trustee objects to the $7,000 proof of claim of Yolo Solano Air Quality Management District, filed on October 25, 2013. The basis for the objection is that the proof of claim was filed late. The deadline for claims by governmental entities was February 27, 2013.

The District opposes the objection, contending that it "was added to the Debtor's schedule by amendment and was notified verbally by counsel for the Debtor of this amendment on October 14, 2013." Docket 180 at 1.

But, the District's factual allegations are not supported by admissible evidence. There is no declaration in support of the opposition, substantiating the District's factual assertions and authenticating its attached exhibits.

Further, the opposition does not say that the District did not know of this bankruptcy case until October 14, 2013. The District merely says that it did not know of the amendment to the debtor's schedules until October 14, 2013.

6. 16-23827-A-11 LOBBY BAR, LLC — MOTION FOR RELIEF FROM AUTOMATIC STAY
OCHOYUNO INVESTMENT COMPANY VS. — 6-16-16 [6]

Final Ruling: The motion will be dismissed without prejudice.

The movant has provided only 25 days' notice of the hearing on this motion. Nevertheless, the notice of hearing for the motion requires written opposition "within eleven 11 days from the date of service of the motion." "Objections to a motion for relief from stay shall be served upon the Movant, named Respondents and the U.S. Trustee within eleven 11 days from the date of service of the motion for relief from stay and notice." Docket 6 at 2.

Motions noticed on less than 28 days' notice of the hearing are deemed brought

pursuant to Local Bankruptcy Rule 9014-1(f)(2). This rule does not require written oppositions to be filed with the court. Parties in interest may present any opposition at the hearing. Consequently, parties in interest were not required to file a written response or opposition to the motion. Because the notice of hearing stated that they were required to file a written opposition, however, an interested party could be deterred from opposing the motion and, moreover, even appearing at the hearing.

Also, a motion placed on the calendar by the moving party for hearing must be given a unique docket control number as required by Local Bankruptcy Rule 9014-1(c). The purpose of the docket control number is to insure that all documents filed in support and in opposition to a motion are linked on the docket. This linkage insures that the court as well as any party reviewing the docket will be aware of everything filed in connection with the motion.

This motion was filed without a docket control number. Therefore, it is possible that documents have been filed in support or in opposition to the motion that have not been brought to the attention of the court. The court will not permit the movant to profit from possible confusion caused by this breach of the court's local rules.

Accordingly, the motion will be dismissed without prejudice.

7.	15-29136-A-12 MAS-2	P&M SAMRA LAND INVESTMENTS LLC	MOTION TO DISMISS CASE 6-13-16 [155]

Tentative Ruling: The motion will be denied without prejudice.

Creditor Ag-Seeds Unlimited moves for conversion to chapter 7 (with consent from the debtor) or dismissal, on the basis of unreasonable delay that is prejudicial to creditors.

The debtor and creditors IRA Services Trust Co. CFBO, Shankuntala D. Saini, The Socotra Fund, L.L.C., Gary E. Roller, Trustee of the Gary E. Roller Profit Sharing Plan and Pettit Revocable Trust, dated March 29, 1999, oppose dismissal.

11 U.S.C. § 1208(c)(1) provides that "on request of a party in interest, and after notice and a hearing, the court may dismiss a case under this chapter for cause, including - (1) unreasonable delay, or gross mismanagement, by the debtor that is prejudicial to creditors."

Conversion of a chapter 12 case to chapter 7 may be granted pursuant to a request by the debtor under 11 U.S.C. § 1208(a) or pursuant to a request by a party in interest, such as a creditor, under 11 U.S.C. § 1208(d). The court may convert the case on a motion by a party in interest only "upon a showing that the debtor has committed fraud in connection with the case." 11 U.S.C. § 1208(d).

The court has seen nothing in the record before it suggesting that the debtor has committed fraud in connection with this case.

On the other hand, dismissal of the case is not in the best interest of the debtor's creditors. It may be in the best interest of the movant creditor. But, it is not in the best interest of the debtor's other creditors, as it is evident from the creditors' responses to this motion. The court then is not

inclined to dismiss the case.

More, the movant has other remedies for the debtor's failure to obey court discovery orders, including, without limitation, relief under Fed. R. Bankr. P. 2005 and further sanctions against the debtor and the debtor's counsel. The motion will be denied without prejudice.

8. 14-20348-A-11 JOE/CAROL MOBLEY — MOTION TO CONVERT TO CHAPTER 7 OR TO DISMISS CASE
UST-1 — 6-10-16 [163]

Tentative Ruling: The motion will be denied.

The U.S. Trustee moves for conversion to chapter 7, pursuant to 11 U.S.C. § 1112(b), arguing: failure to pay post-confirmation quarterly fees to the U.S. Trustee and failure to file post-confirmation quarterly reports.

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 . . . (K) failure to pay any fees or charges required under chapter 123 of title 28 . . . (N) material default by the debtor with respect to a confirmed plan." 11 U.S.C. § 1112(b)(4)(K), (N).

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).

The debtor filed this case on January 15, 2014 and the court confirmed their chapter 11 plan on March 3, 2015. After confirmation the debtors failed to file all quarterly reports and pay the quarterly fees owed to the U.S. Trustee. However, these defaults have been cured. Accordingly, there is no cause for dismissal or conversion.

9. 15-26281-A-13 STEPHEN TRUMAN — MOTION TO DISMISS ADVERSARY PROCEEDING
15-2216 JMB-1 — 6-6-16 [31]
MGM GRAND HOTEL, L.L.C. V. TRUMAN

Tentative Ruling: The motion will be granted in part and denied in part.

The defendant, Stephen Truman, the debtor in the underlying chapter 13 case, seeks dismissal under Rule 12(b)(6) of the subject 11 U.S.C. § 523(a)(2)(A) and (a)(2)(B) claims, arguing that the second amended complaint fails to state a claim upon which relief can be granted.

From July 29, 2014 through August 1, 2014, the defendant borrowed $170,000 from the plaintiff, by negotiating, executing and delivering to it seven negotiable instruments — four markers (totaling $100,000) and three personal checks (totaling $70,000). Markers are negotiable credit instruments under whose terms the defendant promises to repay the borrowed money to the plaintiff.

In connection with the markers, the defendant had executed a credit agreement with the plaintiff, prior to July 29, 2014. In that credit agreement, the defendant made representations about the markers, including, without limitation:

- that "at the time [he] sign[s] any marker, [he has] on deposit in accounts on which [he is] an authorized signatory for all purposes, without restriction, funds sufficient to pay such marker upon demand or presentment;" and

- that "[he] acknowledges that . . . [he has] the ability and intent to legally pay through [his] bank or financial institution the funds represented by the markers signed by [him] and given to [the plaintiff] and its affiliates."

Docket 30 at 2-3.

In each marker, the defendant made further representations, including, without limitation, that: "[he has] funds on deposit in accounts of which [he is] an authorized signatory for all purposes without restriction sufficient to pay this negotiable instrument marker on demand;" [he] authorize[s] [the [plaintiff] to obtain [his] financial information from any source and complete this marker as is necessary for the marker to be presented for payment."

Docket 30 at 2-3.

Although each marker was executed between July 29 and August 1, 2014, the markers are dated January 4, 2015. Docket 30 at 4. None of the negotiable instruments were paid, upon the plaintiff's presentment of the instruments. Docket 30 at 5-6. The markers were presented for payment on January 5, 2015. The checks were presented for payment on August 1, 2014. Docket 30, Ex. 2.

When the defendant signed each negotiable instrument, he did not have, and knew he did not have, the funds to pay each such instrument. The defendant's representations to the plaintiff that he had the funds on hand to pay the negotiable instruments were false. Docket 30 at 5-6.

The defendant filed his bankruptcy case on August 6, 2015. The plaintiff filed this adversary proceeding on November 13, 2015, asserting two claims, a claim under section 523(a)(2)(A) and a claim under section 523(a)(2)(B). The second amended complaint asserts that the plaintiff suffered damages in the amount of $206,414.53. Docket 30 at 6.

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).

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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."'"

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"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.*"

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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).

Turning to the 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;" or "(B) use of a statement in writing- (i) that is materially

false; (ii) respecting the debtor's or an insider's financial condition; (iii) on which the creditor to whom the debtor is liable for such money . . . reasonably relied; and (iv) that the debtor caused to be made or published with intent to deceive."

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 requirements of section 523(a)(2)(B) have been stated to be: (1) a representation of fact by the debtor *in writing*, respecting the debtor's or an insider's financial condition, (2) that was material, (3) that the debtor knew at the time to be false, (4) that the debtor made with the intention of deceiving the creditor, (5) upon which the creditor relied, (6) that the creditor's reliance was reasonable, and (7) that damage proximately resulted from the representation. Candland v. Insurance Co. of N. America (In re Candland), 90 F.3d 1466, 1469 (9th Cir. 1996).

First, whether or not the checks are factual assertions for purposes of the section 523(a)(2)(A) claim is not dispositive of that claim as the complaint makes yet other allegations of misrepresentations, namely that "[d]uring the time that [the defendant] signed the Negotiable Instruments, he represented to [the plaintiff], through its casino representatives who witnessed his signature, that he had sufficient funds to pay the Negotiable Instruments." Docket 30 at 5, ¶ 33. Also, "[the defendant] represented to [the plaintiff] representatives that he had the funds on hand to pay the Negotiable Instruments." Docket 30 at 5, ¶ 39.

In other words, in addition to the defendant's representations in the negotiable instruments, the defendant made further representations of having sufficient funds to the plaintiff's "representatives who witnessed his signature."

At this time, the court makes no determination about whether the checks were factual representations for purposes of the section 523(a)(2)(A) claim. See Williams v. United States, 458 U.S. 279, 284-85 (1982) (addressing whether checks are factual assertions in a criminal case). Together with the defendant's other representations to the plaintiff's representatives at the time he signed these checks, the checks are plausible factual representations for purposes of the section 523(a)(2)(A) claim.

Second, the section 523(a)(2)(B) claim will be dismissed without leave to amend, to the extent it is based on the subject checks. The court cannot ignore the Supreme Court's decision in Williams, holding that "technically speaking, a check is not a factual assertion at all, and therefore cannot be characterized as 'true' or 'false.'" Williams at 284.

"Petitioner's bank checks served only to direct the drawee banks to pay the face amounts to the bearer, while committing petitioner to make good the

obligations if the banks dishonored the drafts. Each check did not, in terms, make any representation as to the state of petitioner's bank balance." Williams at 284-85.

The complaint alleges only one writing in connection with the checks — the checks. In light of Williams, the checks are not factual representations in writing for purposes of section 523(a)(2)(B). The complaint is also short on facts explaining how or why the checks are a writing respecting anyone's financial condition.

Third, the court will not dismiss the section 523(a)(2)(A) claim as to the markers because, as noted above, the complaint has other allegations of misrepresentations in connection with the defendant's signing of the markers.

"During the time that [the defendant] signed the Negotiable Instruments[,] [including the markers], he represented to [the plaintiff], through its casino representatives who witnessed his signature, that he had sufficient funds to pay the Negotiable Instruments." Docket 30 at 5, ¶ 33. "[The defendant] represented to [the plaintiff] representatives that he had the funds on hand to pay the Negotiable Instruments." Docket 30 at 5, ¶ 39.

More, the defendant's statements in the markers are plausibly both "respecting the debtor's . . . financial condition" and "other than a statement respecting the debtor's . . . financial condition."

On one hand, the defendant states that "[he has] funds on deposit in accounts of which [he is] an authorized signatory for all purposes without restriction sufficient to pay this negotiable instrument marker on demand." Docket 30 at 4. This is a statement respecting the defendant's financial condition.

On the other hand, the defendant also makes promises of payment in the markers, including promises to pay collection costs, for example. Docket 30 at 4. Such promises are not statements respecting the defendant's financial condition. They are statements that can be basis for a section 523(a)(2)(A) fraud claim.

With these facts, the plaintiff should be allowed to pursue liability theories under both section 523(a)(2)(A) and (a)(2)(B).

Finally, the court rejects the defendant's contention that the complaint has no facts to "establish" justifiable or reasonable reliance as to the section 523(a)(2)(B) claim. The plaintiff is not required to establish anything in the complaint. This is an evidentiary issue reserved for a summary judgment motion or trial.

And, the complaint contains facts strongly pertinent to the reliance prong, including the approximately 17-year history of the defendant gambling at the plaintiff's establishment. Docket 30 at 2. The motion will be granted in part and denied in part.

10. 15-26281-A-13 STEPHEN TRUMAN — STATUS CONFERENCE
15-2216 — 5-5-16 [30]
MGM GRAND HOTEL, L.L.C. V. TRUMAN

Tentative Ruling: None.

11. 16-21585-A-11 AIAD/HODA SAMUEL — STATUS CONFERENCE
3-15-16 [1]

Tentative Ruling: None.

12. 16-21585-A-11 AIAD/HODA SAMUEL — ORDER TO SHOW CAUSE
6-20-16 [132]

Final Ruling: The order to show cause will be discharged and the petition will remain pending.

The debtors' estate was given permission to pay the petition filing fee in installments pursuant to Fed. R. Bankr. P. 1006(b). The installment fee in the amount of $429 due on June 13, 2016 was not paid. However, the installment fee was paid on June 30, 2016. No prejudice has resulted from the delay.

13. 16-21585-A-11 AIAD/HODA SAMUEL — MOTION FOR ORDER APPROVING PROPERTY MANAGEMENT AGREEMENTS OR MOTION TO EMPLOY
FWP-4
6-13-16 [114]

Tentative Ruling: The motion will be granted in part and the hearing will be continued in part.

The chapter 11 trustee seeks 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). Sackett Corporation will collect all rents, administer all service contracts for the properties, administer the leases for each tenant, do weekly check runs for all payables, oversee the properties on weekly basis, and 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 as to the Stockton Boulevard and Power Inn Road shopping centers. 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.

As to the Sacramento Avenue shopping center, the hearing on the motion will be continued to July 11, 2016 at 10:00 a.m.

14. 16-21585-A-11 AIAD/HODA SAMUEL — MOTION TO WITHDRAW AS ATTORNEY
TBG-2 — 6-18-16 [133]

Tentative Ruling: The motion will be dismissed without prejudice because the debtors' counsel has not served the motion on Mrs. Samuel at her Texas address. Mrs. Samuel no longer resides at the debtors' address in Elk Grove, California.

In addition, the movant has provided only 23 days' notice of the hearing on this motion. Docket 136. Nevertheless, the notice of hearing for the motion requires written opposition at least 14 days before the hearing, in accordance with Local Bankruptcy Rule 9014-1(f)(1). Docket 134. Motions noticed on less than 28 days' notice of the hearing are deemed brought pursuant to Local Bankruptcy Rule 9014-1(f)(2). This rule does not require written oppositions to be filed with the court. Parties in interest may present any opposition at the hearing. Consequently, parties in interest were not required to file a written response or opposition to the motion. Because the notice of hearing stated that they were required to file a written opposition, however, an

interested party could be deterred from opposing the motion and, moreover, even appearing at the hearing.