UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Michael S. McManus
Bankruptcy Judge
Sacramento, California

July 20, 2015 at 10:00 a.m.

1.	15-24727-A-11 MLA-5	RCK CONSERVATION CO-OP, L.L.C.	MOTION TO USE CASH COLLATERAL 6-25-15 [37]

Tentative Ruling: The motion will be denied.

The debtor seeks to use the cash collateral of Teresa Jones and Charles Hawley, who hold a first deed of trust in the debtor's two contiguous parcels of land. Since the petition date, June 11, 2015, the debtor is holding $21,654 in cash that is collateral for the claim encumbering the debtor's two real property parcels. Docket 39 at 2.

11 U.S.C. § 1107(a) provides that a debtor-in-possession shall have all rights, powers, and shall perform all functions and duties, subject to certain exceptions, of a trustee, "[s]ubject to any limitations on [that] trustee." This includes the trustee's rights under 11 U.S.C. § 363. 11 U.S.C. § 363(c)(2)(B), (c)(3), (e) provides that, when the secured claimants with interest in the cash collateral do not consent, after notice and a hearing, "the court . . . shall prohibit or condition such use [of cash collateral] . . . as is necessary to provide adequate protection of such interest."

First and most important, the motion ignores that the debtor's prior chapter 11 case. It was dismissed on June 9, 2015, because of the gross mismanagement of the debtor's managing member, David Majors, a diminution of the estate, and the absence of a reasonable likelihood of rehabilitation.

"*The court also notes that the operating reports reflect aggregate losses of $10,714 for January, February, and March 2015 (negative $4,960, negative $2,373, and negative $3,381). Dockets 147, 154, 157. The positive cash balance for April 2015 is $6,813.*

. . .

"*The above amounts to diminution of the estate and absence of a reasonable likelihood of rehabilitation.*

. . .

"*Further, under the watch of the debtor's managing member, David Major, a member of the debtor, now former member, Beau Green, withdrew $31,500 from the DIP bank account. He had no authority to do this. Mr. Green also returned the $8,400 lease deposit to Dana Packard (or Pickard), lessee, without authority. Docket 164 at 3.*

"*While the opposition contends that a $30,000 disbursement is being reversed,*

stating that "it returned the bulk of the funds and is working on returning the small remaining balance," there is no evidence from the debtor supporting this factual assertion. Docket 175 at 4. Also, even if there were admissible evidence of this assertion, it explains nothing. The court does not understand what the debtor means by stating "it returned the bulk of the funds," when it was Mr. Green who withdrew, not $30,000 but $31,500, and he is no longer a member of the debtor.

"*More, Mr. Major admitted at the June 9 hearing on this motion that he was the one who granted Mr. Green access to the debtor's bank account. Yet, Mr. Major did not explain why he granted Mr. Green access of the account.*

"*The opposition also does not explain how the debtor will recover the now returned $8,400 lease deposit to Ms. Packard (or Pickard).*

"*Moreover, the debtor's March 2015 operating report states that the debtor's counsel received $13,500 from the debtor in the form of a retainer. Docket 157 at 2. Yet, the court has not authorized the payment of a post-petition retainer to counsel and his Rule 2016 Statement filed July 22, 2014 reflects that he received only a $4,000 retainer prior to the July 8, 2014 filing of the case. He further agreed to total compensation of $8,000. Docket 15 at 24. The debtor has not explained why it transferred $13,500 to its counsel in March 2015. If the March operating report is a reference to the pre-petition retainer, the debtor has not explained the discrepancy between a $4,000 retainer and a $13,5000 retainer.*

"*Members of the debtor also appear to be in a violent conflict with one another. Apparently, Mr. Major fired a weapon at one of the other members, Glen Culpepper. The opposition does not even attempt to address this.*

"*At the June 9 hearing on this motion, Mr. Major admitted to discharging a weapon in connection with a visit to the debtor's property by Mr. Culpepper. Although the court does not reach any conclusions about who did exactly what and when, or about who is right and who is wrong in the conflict, it is clear from the record that there is a significant rift among the debtor's members. And while Mr. Mahor stated that Mr. Culpepper is not a member of the debtor, he is listed as a member of the debtor in the original and amended statements of financial affairs filed by the debtor in the course of this case. Dockets 15 & 104, SFA, items 21.*

"*The foregoing constitutes gross mismanagement of the debtor under section 1112(b)(4)(B) and it is cause for conversion or dismissal under section 1112(b)(1).*"

Case No. 14-27083, Docket 190 at 2.

The debtor had been in the prior bankruptcy case, attempting to reorganize, for approximately one year before the dismissal. Yet, the instant motion makes no effort to address, or much less acknowledge, the debtor's shortfalls in the prior case.

Nothing has changed for the debtor since the dismissal of the prior case.

David Major is still in control of the debtor. He is the debtor's managing member. His mismanagement of the debtor in the prior case - including, without limitation, his giving control to others of the debtor's DIP account, returning

a lease deposit after an alleged breach of a lease, discharging a weapon in his confrontation with another member of the debtor, etc. - does not convince the court that the debtor is able to manage the secured creditors' cash collateral in this case.

The debtor is still relying on operational income from leases that do not provide the debtor with regular income, much less certain income. The debtor's lease arrangements proved to be unreliable in the prior case. The prior case was dismissed in part because the debtor's two leases had been purportedly breached. It was then also that it came to light that at least one of the leases involved a previously undisclosed insider, Cynthia Vandiver, a.k.a. Peggie Salazar, an officer of the debtor. Case No. 14-27083, Docket 162 at 4, n.1.

Given the foregoing, the court is not persuaded in the debtor's ability to reorganize in this case, is not persuaded in the debtor's ability to manage the creditors' cash collateral, and simply does not believe the debtor's representations, as made by David Major. The motion can be denied on this basis alone.

Second, the motion makes virtually no effort to brief the standard for the allowance of use of cash collateral. While the motion mentions 11 U.S.C. § 363, it does not discuss the standard for allowance of use of cash collateral.

Third, while the motion says that the debtor needs the cash collateral to pay "among other things, employees, suppliers, utilities" this is not adequately supported by the record. Docket 37 at 2. Although Exhibit B to the motion lists mortgage fees, legal fees, insurance, and other expenses, the necessity for those expenses has not been explained. The supporting declaration of the debtor's managing member, David Major, merely refers to Exhibits A and B. Docket 39 at 2. Exhibit B lists the above expenses without any explanation about why they are necessary or how they relate to the real property.

Fourth, while the motion refers to a "monthly adequate protection payment," no figure is provided. Even though the court suspects that the figure is the amount of $3,040 labeled as "Rent/mortgage" on Exhibit A, the court should not have to speculate.

Fifth, the court cannot determine whether the creditors' interest in the cash collateral will be adequately protected. The court has no information about the value of the real property and about whether and to what extent there is equity in the property. The court then cannot tell whether and to what extent the lenders' interest in the cash collateral is adequately protected. The motion is devoid of an "adequate protection" analysis.

Given the foregoing, the motion will be denied.

2. 15-24727-A-11 RCK CONSERVATION CO-OP, L.L.C. — STATUS CONFERENCE 6-11-15 [1]

Tentative Ruling: None.

3. 14-30833-A-11 SHASTA ENTERPRISES — MOTION TO SELL 6-18-15 [320]
FWP-13

Tentative Ruling: The motion will be granted in part.

The chapter 11 trustee requests authority to sell for $680,000 the estate's interest in six bare land parcels in Redding, California, 468 Hemsted Drive, 444 Hemsted Drive, 333 Knollcrest Drive, 311 Knollcrest Drive, 332 Knollcrest Drive, 348 Knollcrest Drive, and all plans or test fit drawings related to any of the subject parcels, to The Cerami Family Trust 2014.

The parcels are subject to a mortgage held by Central Valley Community Bank, for $810,711.50. The bank has agreed to accept $610,000 from the sale in full satisfaction of its claim, thus waiving any deficiency claims against the estate, regardless of an increase in the purchase price due to overbidding.

The bank has also agreed to a $30,000 credit or reduction "of any future dividend or distribution . . . to [the bank][,] . . . [to] be deducted from the amount of any future distribution(s) . . . on account of [the bank's] allowed claim(s) . . . for [its] 'Aircraft Loan' (filed as Proof of Claim No. 4) [which] shall be available to the Trustee to pay costs of administration, for distribution to other creditors other than [the bank], or for any other use other than payment to [the bank]." "[I]n the event that the sale price for the Real Property is increased above $680,000[,] . . . the amount of the winning overbid in excess of [$680,000], up to the first additional $30,000, shall be credited to reduce the amount of the [$30,000] Estate Contribution dollar-for-dollar." Docket 320 at 8.

The trustee expects the bank's deficiency claim to exceed $1 million and for any distribution on account of the bank's aircraft loan to exceed $30,000.

The trustee also asks for waiver of the 14-day period of Fed. R. Bankr. P. 6004(h), asks for a good faith finding under section 363(m), and asks for approval of the payment of the real estate commission.

The trustee anticipates paying following items from escrow: outstanding property taxes in the amount of approximately $3,142, other property taxes prorated through the date of closing, the seller's customary closing costs, a 6% real estate broker commission, and $610,000 to the bank. The trustee expects the estate to generate a net of approximately $35,833 from the sale.

The trustee does not expect any "material tax claims" as a result of the sale.

11 U.S.C. § 1107(a) provides that a debtor-in-possession shall have all rights, powers, and shall perform all functions and duties, subject to certain exceptions, of a trustee, "[s]ubject to any limitations on [that] trustee." This includes the trustee's right to sell property of the estate pursuant to section 363. 11 U.S.C. § 363(b) allows the trustee to sell property of the estate, other than in the ordinary course of business.

The sale will generate some proceeds for distribution to creditors of the estate. Hence, the sale will be approved pursuant to 11 U.S.C. § 363(b), as it is in the best interests of the creditors and the estate. The court will waive the 14-day period of Rule 6004(h) and will authorize payment of the real estate commission in accordance with the employment terms of the estate's real estate broker.

The court will also make a good faith finding under section 363(m), provided the final buyer is identified at the hearing relative to the debtor, the trustee, and the estate's professionals.

Approval of the sale under section 363(f) is unnecessary because of the bank's

agreement to accept less than the full amount of its claim from escrow. Moreover, the bank's lien will not survive the sale, meaning that the proposed sale under section 363(f)(2) (*i.e.*, the creditor's consent), makes no sense. There will be no lien to attach to any proceeds from the sale. The net proceeds the estate will receive will be free and clear of the bank's lien.

As a final note, the court would like the trustee to clarify why he expects the bank's deficiency claim to be in excess of $1 million, when the bank's proof of claim is only for $810,711.50. Also, the court would like to know what has happened with lot 19, the one parcel that is not part of this motion, but it is collateral for the bank's loan. The last-modified deed of trust attached to the bank's proof of claim lists lots 13, 14, 16, 17, 19, 20, and 21 as collateral for the bank's loan, while only lots 13, 14, 16, 17, 20, and 21 are part of this motion. POC 3-2 at 20.

4.	15-20034-A-11 ET-6	C & N LANDSCAPE MAINTENANCE, INC.	MOTION TO USE CASH COLLATERAL 6-18-15 [56]

Final Ruling: This motion has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the creditors, the U.S. Trustee, and any other party in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered as consent to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument.

The motion will be granted.

The debtor is seeking interim approval through September 30, 2015 of a stipulation with the IRS for its use of cash collateral securing an $85,054 claim held by the IRS.

Under the terms of the stipulation, the debtor will be allowed to use the cash proceeds from its operation to fund continual business operations. In exchange, the IRS shall have a replacement lien on post-petition cash proceeds, to the same extent, priority, and validity of the lien on cash collateral as of the petition date, to the extent such cash collateral is utilized by the debtor. The debtor shall also pay all post-petition taxes of the business, as incurred. The stipulation also requires that the debtor keep all cash collateral, after payment of monthly ordinary business expenses, in the DIP operating account.

As the stipulation allows the debtor to continue operating, while providing ongoing protection for IRS' interest in the cash collateral, and the IRS consents to this arrangement, the motion will be granted and the stipulation will be approved. The court will allow cash collateral use through September 30, 2015, under the terms of the subject stipulation.

5.	13-34541-A-11 15-2070 6056 SYCAMORE TERRACE L.L.C. V. BOZORGZAD	6056 SYCAMORE TERRACE L.L.C. CAH-2	MOTION FOR ENTRY OF DEFAULT JUDGMENT 6-20-15 [13]

Tentative Ruling: The motion will be denied without prejudice.

The plaintiff, 6056 Sycamore Terrace LLC, also the debtor in the underlying bankruptcy case, seeks the entry of a default judgment against the defendant, Mahboob Bozorgzad, declaring the plaintiff's ownership interest in its sole real property superior to a deed of trust granted to the defendant sometime before the petition date, in connection with the marital dissolution of the defendant and the plaintiff's principal, Hossein Bozorgzad.

Specifically, the plaintiff is seeking declaratory relief that the defendant holds no claim against the plaintiff's underlying bankruptcy estate and that the defendant is not a creditor within the meaning of 11 U.S.C. § 101(10). The defendant filed a proof of claim on November 7, 2014 for $1,398,000, $1,106,000 of which is secured by the plaintiff's real property. POC 6.

In approximately October 2007, the defendant acquired a deed of trust against the plaintiff's sole real property, which was owned at the time by Mr. Bozorgzad. The deed secured the claim reflected in proof of claim no. 6, owed by Mr. Bozorgzad under the terms of the couple's marital settlement agreement.

The defendant never recorded the deed of trust. In approximately April 2012, Mr. Bozorgzad formed the plaintiff and transferred the real property to the plaintiff. On November 14, 2013, the plaintiff filed the underlying chapter 11 case. As of the petition date, the defendant still had not recorded the deed.

The plaintiff/debtor instituted this adversary proceeding against the defendant on April 7, 2015. The defendant's default was entered on May 21, 2015. Docket 9.

Fed. R. Civ. P. 55(b)(2) provides that:

"A default judgment may be entered against a minor or incompetent person only if represented by a general guardian, conservator, or other like fiduciary who has appeared. If the party against whom a default judgment is sought has appeared personally or by a representative, that party or its representative must be served with written notice of the application at least 7 days before the hearing. The court may conduct hearings or make referrals — preserving any federal statutory right to a jury trial — when, to enter or effectuate judgment, it needs to:

(A) conduct an accounting;
(B) determine the amount of damages;
(C) establish the truth of any allegation by evidence; or
(D) investigate any other matter."

The factors courts consider in determining whether to enter a default judgment include: (i) the possibility of prejudice to the plaintiff, (ii) the merits of the plaintiff's substantive claim, (iii) the sufficiency of the complaint, (iv) the amount at stake, (v) the possibility of a dispute over material facts, (vi) whether the default was due to excusable neglect, and (vii) the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits. Valley Oak Credit Union v. Villegas (In re Villegas), 132 B.R. 742, 746 (B.A.P. 9th Cir. 1991).

While the relief sought by the plaintiff in its complaint quotes 11 U.S.C. § 544(a)-(b)(1), the instant motion makes no mention of section 544, much less of which subsection of section 544 is applicable here. The complaint is not clear

about that either. It only quotes section 544(a)-(b)(1).

"*(a) The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by--*

"*(1) a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists;*

"*(2) a creditor that extends credit to the debtor at the time of the commencement of the case, and obtains, at such time and with respect to such credit, an execution against the debtor that is returned unsatisfied at such time, whether or not such a creditor exists; or*

"*(3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.*

"*(b)(1) Except as provided in paragraph (2), the trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502(e) of this title.*"

See also 11 U.S.C. § 1107(a) (providing that a debtor-in-possession shall have all rights, powers, and shall perform all functions and duties, subject to certain exceptions, of a trustee, including the trustee's rights under 11 U.S.C. § 544).

The court will not speculate about the subsection under which the plaintiff is seeking its interest to be declared superior to that of the defendant. Accordingly, the motion will be denied.

6. 10-24351-A-13 ROBERT/MICHELLE REID — MOTION FOR SUMMARY JUDGMENT 6-17-15 [183]
12-2392
REID ET AL V. WELLS FARGO BANK, N.A. ET AL

Tentative Ruling: The defendants' motion for summary judgment will be granted in part and denied in part. The plaintiffs' motion for summary judgment will be denied.

The defendants, Wells Fargo Bank and Nationstar Mortgage, seek summary judgment on the three causes of action asserted in the second amended complaint of the plaintiffs, Robert and Michelle Reid, who are the debtors in the underlying bankruptcy case.

The plaintiffs oppose this motion and have themselves filed a motion for summary judgment. This ruling addresses both summary judgment motions.

The plaintiffs, whose residence is in El Dorado Hills, California, filed the underlying chapter 13 case on February 24, 2010. Case No. 10-24351. Their chapter 13 plan was confirmed on April 19, 2010. Case No. 10-24351, Docket 25. The court's order confirming the plan was amended on June 25, 2010. Case No. 10-24351, Docket 40.

The claims bar date for nongovernmental creditors was June 30, 2010. Case No. 10-24351, Docket 14 at 1.

As of the petition date, the plaintiffs' real property was subject to two mortgages, the first in favor of Bank of America, acting as agent or servicing agent for Wells Fargo Bank, and the second in favor of National City Bank.

This dispute pertains to the first mortgage and Bank of America's payment of pre-petition property taxes that were being paid through the plaintiffs' confirmed chapter 13 plan.

The plan provides that El Dorado County's $22,549.85 pre-petition property tax claim would be paid through the plan. Docket 84 at 4; see also Docket 41 at 6. From November 2010 through 2011, the plaintiffs kept receiving from El Dorado County delinquency and tax sale notices on account of their unpaid property taxes. Docket 84 at 4-5. When the plaintiffs called the County, they would be told to ignore the notices, given the ongoing administration of their confirmed chapter 13 plan.

In October 2011, Bank of America sent a letter to the plaintiffs, telling them that the bank paid all their outstanding property taxes, including pre-petition property taxes that were to be paid via the plaintiffs' confirmed chapter 13 plan, and that an escrow account was established for future property taxes. Docket 84 at 6. Bank of America had paid over $20,000 in back property taxes to the County in October 2011.

In another letter, dated about the same time (October 2011), Bank of America told the plaintiffs that their escrow balance had a shortfall of $34,736.69. As a result, Bank of America informed the plaintiffs by a November 14, 2011 letter that their monthly payments were being increased to $6,630.50. Docket 84 at 6. Bank of America later told the plaintiffs in another letter that their monthly mortgage payments were being increased to $6,766.14 as of January 1, 2012. Docket 84 at 3-7.

The plaintiffs were unable to resolve the increase of mortgage payments with Bank of America and the bank began sending collection notices to the plaintiffs, when they did not pay the increased mortgage payment amount. Docket 84 at 8-9.

The plaintiffs filed this complaint against Bank of America and the County on June 19, 2012. Docket 1.

Bank of America relinquished its servicing interests in the mortgage to Nationstar in September 2013. Docket 153 at 2.

On November 12, 2012, Bank of America filed a proof of claim for Wells Fargo Bank, disclosing a pre-petition arrearage, based on a late charge incurred in January 2010, for $135.64. POC 15-1. On February 14, 2013, Wells Fargo Bank filed a notice of post-petition mortgage fees, expenses, and charges, adding a $300 fee to its claim for preparation of the proof of claim. POC 15-1. On September 23, 2013, as part of POC 15-1, a notice of transfer of claim was

filed, informing the court that Wells Fargo Bank is transferring some interest in the claim to Nationstar Mortgage, L.L.C. POC 15-1; see also Docket 113.

On September 29, 2014, the plaintiffs filed a second amended complaint, adding Wells Fargo Bank and Nationstar as defendants, and dismissing the County from the complaint. Docket 84.

The second amended complaint asserts three causes of action against defendants Bank of America, Wells Fargo Bank and Nationstar:

(1) violation of the automatic stay,

(2) objection to the defendants' proof of claim (for violation of Fed. R. Bankr. P. 3001, 3002.1 and 3007), which is now in the name of Nationstar (POC 15-1), and

(3) breach of contract, breach of the chapter 13 plan and breach of the covenants of good faith and fair dealing. Docket 84 at 15-20.

The second amended complaint also contains a fourth claim, exclusively asserted against Bank of America, under the Real Estate Settlement Procedures Act. Docket 84 at 20. But, the plaintiffs dismissed all claims against Bank of America on July 7, 2015, thus leaving only Wells Fargo Bank and Nationstar as defendants. Docket 209.

On April 6, 2015, the court entered orders denying Wells Fargo Bank's dismissal motion and overruling Wells Fargo Bank's objection to the chapter 13 trustee's final report and account in the underlying chapter 13 case. Case No. 10-24351, Dockets 147, 149, 151, 152. On April 14, 2015, the court entered an order approving the trustee's final report and account, and discharging the trustee. Case No. 10-24351, Docket 156. On April 15, 2015, the court entered its notice of intent to enter chapter 13 discharge for the plaintiffs. Case No. 10-24351, Docket 155.

On April 30, 2015, the court denied the defendants' motion for judgment on the pleadings. Dockets 173 & 175.

Summary judgment is appropriate when there exists "no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The Supreme Court discussed the standards for summary judgment in a trilogy of cases, Celotex Corporation v. Catrett, 477 U.S. 317, 327 (1986), Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), and Matsushita Electrical Industry Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

In a motion for summary judgment, the moving party bears the initial burden of persuasion in demonstrating that no genuine issues of material fact exist. See Anderson at 255. A genuine issue of material fact exists when the trier of fact could reasonably find for the non-moving party. Id. at 248. The court may consider pleadings, depositions, answers to interrogatories and any affidavits. Celotex at 323.

In this case, the parties seeking summary judgment each have a burden of persuasion under Rule 56(c) to demonstrate that no genuine issue of material fact exists as to each of the three causes of action.

The defendants' motion will be granted in part and denied in part.

The automatic stay did not expire upon the confirmation of the plaintiffs' chapter 13 plan. The plan did not revest property of the estate in the debtor, thus continuing the bankruptcy estate's administration of the case, in accordance with the terms of the plan. Docket 6 at 5; see also 11 U.S.C. § 362(a)(1)-(3).

The defendants' motion and reply ignores the plaintiffs' evidence that Wells Fargo Bank received assignment of the note and deed of trust in September 2005, years before the underlying bankruptcy case was filed on February 24, 2010. Docket 196 at 111. This raises a substantial issue of material fact as to whether Bank of America violated the stay in its capacity as agent for Wells Fargo Bank, thereby making Wells Fargo Bank also liable for Bank of America's misconduct.

It is perplexing that Wells Fargo Bank largely ignores Bank of America's admission that it transferred the note and deed of trust to Wells Fargo Bank in September 2005. Docket 196 at 111. The issue is not successor liability, as the defendants have tried to frame it. The issue is principal liability, *i.e.*, whether Wells Fargo Bank should be held liable - as a principal - for the stay violations of its agent, Bank of America.

This, along with Wells Fargo Bank's refusal to disclose its history of ownership of the loan in discovery to the plaintiffs, is another reason for denial of Wells Fargo Bank's motion as to the stay violation claim. Docket 196 at 154-55. The court will not grant summary judgment to Wells Fargo Bank because it failed to disclose during discovery information relevant to the claim as to which it is seeking summary judgment. Id.

Furthermore, the fact that Nationstar may not have attempted to affirmatively collect on the pre-petition claim for property taxes from the plaintiffs, or even contact the plaintiffs, is not conclusive as to Nationstar's non-liability. Nationstar acquired loan servicing rights in September 2013, and the court has seen no evidence that Nationstar has reversed the stay violations committed by Bank of America on behalf of Wells Fargo Bank, namely, removing the escrow charges for pre-petition taxes from the plaintiffs' mortgage account.

A creditor who has violated the automatic stay is required to reverse the actions constituting stay violations. The stay obligates the creditor to maintain or *restore* the status quo that existed as of the petition date. In re Johnson, 262 B.R. 831, 847-48 (Bankr. D. Idaho 2001) (quoting and citing Franchise Tax Board v. Roberts (In re Roberts), 175 B.R. 339, 343 (B.A.P. 9th Cir. 1994)).

The plaintiffs did not owe the subject pre-petition property taxes to the defendants on the petition date.

The stay violations here then are not limited only to the defendants attempting to collect on their claim. The charge for pre-petition taxes against the plaintiffs' mortgage account is an ongoing stay violation.

The evidence shows that the plaintiffs contacted Nationstar about their loan. Docket 183 at 6. Yet, there is nothing in the record about Nationstar adjusting the plaintiffs' escrow account balance.

As to the second cause of action, the court will grant summary judgment with respect to the purported violation of Fed. R. Bankr. P. 3001. Bank of

America's payment of the property taxes to the County did not constitute a transfer of the County's claim, within the meaning of Rule 3001(e). There was no transfer agreement. Bank of America simply paid the claim on behalf of the plaintiffs. Thus, there was no necessity for a notice of transfer.

While Bank of America unilaterally increased the plaintiffs' mortgage payments without filing and serving a notice of change under Rule 3002.1(b), that rule was made effective in December 2011, after the bank's November 14 letter to the plaintiffs, increasing the payments. Thus, Rule 3002.1 could not have been violated at the time the payments were increased as it was not in effect.

Accordingly, the court will grant summary judgment for the defendants with respect to the asserted Rule 3001 and Rule 3002.1 violations.

But, the proof of claim filed on November 12, 2012 by Bank of America for the pre-petition late charge was untimely. The claims bar date was June 30, 2010. The plaintiffs have completed their confirmed chapter 13 plan and the funds that they had allocated for payment of pre-petition arrears under the plan, such as the defendants' proof of claim and the back property taxes, have been disbursed to general unsecured creditors already. The court then will deny summary judgment with respect to an objection under Rule 3007.

Summary judgment will be denied with respect to the third cause of action. There is evidence in the record that Wells Fargo Bank has owned the instant mortgage throughout the underlying bankruptcy case and this adversary proceeding, meaning that it has always been in contractual privity with Robert Reid, the mortgagee, including when Bank of America's purported misconduct took place.

The court disagrees that the defendants have no successor liability. As discussed earlier, Wells Fargo Bank's liability is likely principal and not a successor liability.

But, even if successor liability is at issue, it is the agreement with the successor in interest that controls successor liability. The court has no evidence from the defendants that any agreements they executed as successors in interest absolve them from any liability here. Even though Nationstar acquired an interest in the mortgage after Bank of America's alleged misconduct, it is the assignment agreement Nationstar executed that should determine its liability under the mortgage documents.

Yet, the defendants' motion is devoid of details about the terms of the agreement executed by Nationstar. The court cannot tell then what is Nationstar's successor liability under its agreement to acquire interest in the mortgage. It is incumbent on the defendants to prove the absence of a genuine issue of material fact on this point. They do not prove this by merely stating that "plaintiffs do not and cannot demonstrate that movants can be held liable for any alleged wrongdoing under the theory of successor liability or that moving defendants breached any contract with plaintiffs." Docket 183 at 21.

Although Nationstar acquired rights and obligations in the mortgage after Bank of America had already committed the actions giving rise to this dispute, the court has no evidence that Nationstar will somehow not be bound to a judgment against Wells Fargo Bank, the owner of the mortgage. Even as a partial successor in interest, Nationstar cannot ignore the contractual obligations owed to Mr. Reid.

The plaintiffs did not have to enter directly into contract with Wells Fargo Bank or Nationstar in order for them to have contractual privity with the defendants. The defendants acquired the original mortgagee's rights and obligations under the loan. Contractual privity exists.

The court agrees that Michelle Reid is not a party to the subject note and deed of trust (Docket 195 at 4-5, SUF 12 & 13), meaning she has no contractual privity with the defendants. Nevertheless, she is a debtor in the underlying bankruptcy case and is a party to the confirmed chapter 13 plan, to which the defendants are also parties. They have identified themselves as creditors. Consequently, while Mrs. Reid may not have standing to assert a breach of contract action, she has standing to assert a breach of the chapter 13 plan.

Additionally, to the extent the defendants have fashioned their motion as seeking summary judgment based on the plaintiffs' failure to state a claim upon which relief can be granted, the motion will be denied as this is not the standard for summary judgment. This is the standard for a Rule 12(b)(6) motion. And, the deadline for such a motion expired long ago, before or at the time the defendants filed their answers. Nationstar filed its answer to the second amended complaint on October 30, 2014. Docket 94. Wells Fargo Bank filed its answer to the second amended complaint on December 1, 2014. Docket 96.

Lastly, the court once again rejects the defendants' judicial estoppel arguments. The court incorporates by reference its ruling on judicial estoppel for the defendants' motion for judgment on the pleadings. Docket 173 at 3-4.

Next, turning to the plaintiffs' summary judgment motion, it will be denied as to the stay violation claim.

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)).

While there may be other genuine issues of material fact also, the court is primarily concerned with the actual and proximate causation elements of the stay violation claim, *i.e.*, whether the violations actually and proximately caused the harm suffered by the plaintiffs. The plaintiffs' principal injuries are: their mortgage payments increased beyond what they could pay; and the funds they had allocated under their plan for repaying the property taxes were redirected to general unsecured creditors, thus disabling them from repaying the taxes to the defendants.

But, while Bank of America's actions did play a role in precipitating the above-outlined injuries, the plaintiffs were not without a timely remedy to

prevent their monstrous mortgage default and prevent the redirection of the funds allocated for repayment of the property taxes under the plan.

The plaintiffs could have filed a proof of claim on behalf of Bank of America/Wells Fargo Bank or filed an objection to their existing claim, assuming there was one. They also could have filed the 11 U.S.C. § 362(k) claim promptly, as a motion. The plaintiffs learned of Bank of America's conduct in October 2011.

Instead, however, the plaintiffs chose to wait until June 19, 2012 to file the instant action.

The foregoing raises a genuine issue of material fact as to the causation requirements within the stay violation claim. As such, the court will deny summary judgment on that claim.

The court will deny summary judgment on the third cause of action as well, on the same basis. The asserted breaches of contract and of the chapter 13 plan raise substantial causation issues with respect to, once again, the damages sustained by the plaintiffs, as the result of such breaches. Accordingly, summary judgment will be denied.

The court does not address summary judgment with respect to the Rule 3007 objection, as the plaintiffs have not sought summary judgment under that rule.

7. 10-24351-A-13 ROBERT/MICHELLE REID — MOTION FOR SUMMARY JUDGMENT
12-2392 WW-11 — 6-22-15 [193]
REID ET AL V. WELLS FARGO BANK, N.A. ET AL

Tentative Ruling: The motion will be denied in accordance with the ruling posted for the related summary judgment motion by the defendants in this proceeding, also being heard on this calendar.

8. 15-20368-A-7 ALICE QUIZON — CONTINUED STATUS CONFERENCE
15-2080 — 4-22-15 [1]
QUIZON V. CALIFORNIA STATE BOARD OF EQUALIZATION

Tentative Ruling: None.

9. 15-20368-A-7 ALICE QUIZON — MOTION TO DISMISS AND FOR ABSTENTION
15-2080 CDR-2 — 6-2-15 [11]
QUIZON V. CALIFORNIA STATE BOARD OF EQUALIZATION

Tentative Ruling: The motion will be granted and the adversary proceeding complaint will be dismissed.

The defendant, the California Board of Equalization, seeks dismissal under Fed. R. Civ. P. 12(b)(6) of the plaintiff Alice Quizon's sole claim for dischargeability under 11 U.S.C. § 523(a)(1) and § 507(a)(8)(E). In the alternative, the defendant asks for the court to abstain.

Before filing the underlying bankruptcy case on January 20, 2015, the plaintiff was the president of a corporation, Bulacan Foods, Inc., which operated a fast food restaurant. The plaintiff operated the restaurant business from July 2007

until December 2014.

The defendant discovered that the plaintiff's company under-reported its gross receipts for the period of January 1, 2010 through December 31, 2012. As a result, the defendant imposed a tax liability on the company.

The plaintiff filed the underlying bankruptcy case as a chapter 13 proceeding, on January 20, 2015. On January 30, 2015, the plaintiff converted the case to chapter 7. On March 18, 2015, the trustee filed a report of no distribution.

Although the defendant has not yet assessed any tax personal liability against the plaintiff, on April 22, 2015, the plaintiff instituted this adversary proceeding seeking a declaration that any debt owed to the defendant on account of Bulcan Foods' tax liabilities is dischargeable under 11 U.S.C. § 523(a)(1) and § 507(a)(8)(E). The debt consists of sales taxes that were not paid by Bulacan Foods. As of the bankruptcy petition date, the outstanding taxes totaled approximately $188,168.

The court entered the plaintiff's chapter 7 discharge on May 12, 2015.

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).

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).

11 U.S.C. § 523(a)(1) prescribes that "*A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt-- (1) for a tax or a customs duty--*

(A) of the kind and for the periods specified in section 507(a)(3) or 507(a)(8) of this title, whether or not a claim for such tax was filed or allowed;

(B) with respect to which a return, or equivalent report or notice, if required--

(i) was not filed or given; or

(ii) was filed or given after the date on which such return, report, or notice was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition; or

(C) with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax."

11 U.S.C. § 507(a)(8)(A) & (E) provides that "*The following expenses and claims have priority in the following order . . . (8) Eighth, allowed unsecured claims of governmental units, only to the extent that such claims are for--*

(A) a tax on or measured by income or gross receipts for a taxable year ending on or before the date of the filing of the petition--

(i) for which a return, if required, is last due, including extensions, after three years before the date of the filing of the petition;

(ii) assessed within 240 days before the date of the filing of the petition, exclusive of--

(I) any time during which an offer in compromise with respect to that tax was pending or in effect during that 240-day period, plus 30 days; and

(II) any time during which a stay of proceedings against collections was in effect in a prior case under this title during that 240-day period, plus 90

days; or

(iii) other than a tax of a kind specified in section 523(a)(1)(B) or 523(a)(1)(C) of this title, not assessed before, but assessable, under applicable law or by agreement, after, the commencement of the case;

. . .

(E) an excise tax on--

(i) a transaction occurring before the date of the filing of the petition for which a return, if required, is last due, under applicable law or under any extension, after three years before the date of the filing of the petition; or

(ii) if a return is not required, a transaction occurring during the three years immediately preceding the date of the filing of the petition."

The plaintiff is personally liable for the sales taxes owed by Bulacan Foods under Cal. Rev. & Tax. Code § 6829(a), which states that:

"*Upon the termination, dissolution, or abandonment of the business . . . any officer, member, manager, partner, or other person having control or supervision . . . charged with the responsibility for the filing of returns or the payment of tax, or who is under a duty to act . . . shall . . . be personally liable for any unpaid taxes and interest and penalties on those taxes, if the . . . person willfully fails to pay . . . any taxes due from the [business] . . . pursuant to this part.*"

See also Cal. Rev. & Tax. Code § 6051 (outlining the sales taxes imposed on retailers' gross receipts for the privilege of selling tangible personal property).

A debtor's responsible person liability to the California Board of Equalization has been determined a "tax" for purposes of 11 U.S.C. § 523(a)(1). And, a sales tax is a tax "on or measured by gross receipts" under 11 U.S.C. § 507(a)(8)(A). Ilko v. California State Board of Equalization (In re Ilko), 651 F.3d 1049, 1050 (9th Cir. 2011); see also George v. California State Bd. of Equalization (In re George), 95 B.R. 718 (B.A.P. 9th Cir. 1989) aff'd 905 F.2d 1540 (9th Cir.1990); Raiman v. California State Bd. of Equalization (In re Raiman), 172 B.R. 933 (B.A.P. 9th Cir. 1994).

As in Ilko, here the plaintiff's personal liability under section 6829(a) is a tax for purposes of nondischargeability under section 523(a)(1).

More, it is a tax of the kind specified in section 507(a)(8)(A), as it is measured by Bulcan Foods' gross receipts, as expressly provided for by section 6051. Section 507(a)(8)(A)(iii) applies given that the tax was not assessed but it remains assessable post-petition.

The plaintiff does not dispute that the tax remains assessable. But, at this point, the defendant has not assessed any taxes against the plaintiff personally.

Also, importantly, as recognized by Ilko, the tax contemplated by section 507(a)(8)(A) does not exclude an excise tax. "[W]e conclude that the 'tax' referred to in § 507(a)(8)(A) could very well be an excise tax or any other

type of tax." Ilko at 1056.

The plaintiff attempts to distinguish the Ilko case, contending that her personal liability on account of the unpaid sales taxes arose upon the termination or abandonment of the business, which in this case was December 31, 2014. On the other hand, she argues, the debtor in Ilko continued to operate post-petition.

However, the distinction is inapposite as the issue of nondischargeability is relevant only to pre-petition debt. In other words, the issue of nondischargeability for the debtor in Ilko was only on his pre-petition liability for the sales tax. Any post-bankruptcy taxes arising from post-bankruptcy sales were never subject to a discharge under 11 U.S.C. § 524(a). Hence, any discussion of an exception to discharge under section 523(a)(1) necessarily included only pre-petition taxes arising from prebankruptcy sales. Only pre-petition debts are dischargeable in a chapter 7 liquidation proceeding subject to the exceptions in section 523. Thus, just like here, the issue of nondischargeability in Ilko was limited to pre-petition sales tax liability.

"Debtor argues that debtor's personal liability for EAS's unpaid sales taxes, if a tax at all, is a dischargeable excise tax under § 507(a)(8)(E) because the look back periods had expired *pre-bankruptcy*." Ilko at 1055.

Accordingly, the plaintiff's liability on account of the sales tax is nondischargeable as a matter of law. The motion will be granted and the adversary proceeding complaint will be dismissed.

10. 14-31393-A-11 GAJENDRA/MUNA ADHIKARI — MOTION TO EXTEND EXCLUSIVITY PERIODS 3-20-15 [19]
DRE-2

Tentative Ruling: The motion will be denied without prejudice.

The debtors are asking the court to extend the time for filing their chapter 11 plan and disclosure statement by 60 days.

The motion will be denied for several reasons.

First, the motion has not been served on all creditors. It was served only on the United States Trustee.

Second, the motion does not say which deadline the debtors are seeking to have extended, the court-imposed deadline for filing a plan and disclosure statement or the exclusivity deadline. The motion does not even identify the actual deadline the debtors are seeking to have extended. Thus, the court cannot tell whether this motion is timely. See Fed. R. Bankr. P. 9006(b)(2) (requiring a showing of excusable neglect when the motion is made after expiration of the specified period).

Third, the basis for the extension is to allow the debtors to negotiate with the IRS, their largest creditor, for dismissal of the case.

However, the debtors do not need IRS' consent for dismissal of the case. They need to make a motion under 11 U.S.C. § 1112(b) and have the court dismiss the case. Only the may the case. The debtors then have brought the wrong motion. They should have filed a dismissal motion and not this motion.