UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Thomas C. Holman
Bankruptcy Judge
Sacramento, California

August 12, 2014 at 9:32 A.M.

---

1. 09-35241-B-13 ANTHONY/LILIA DICUS — CONTINUED MOTION TO DISMISS
14-2127 BJK-1 — ADVERSARY PROCEEDING
DICUS ET AL V. ONEWEST BANK, FSB ET AL — 6-11-14 [26]

Tentative Ruling: The motion is continued to September 23, 2014, at 9:32 a.m. On or before August 26, 2014, the moving parties shall file and serve a supplemental brief regarding the applicability of Siegel v. Federal Home Loan Mortgage Corp., 143 F.3d 525 (9th Cir. 1998) and Ah Quin v. County of Kauai Dept. of Transp., 733 F.3d 267 (9th Cir. 2013) to the plaintiffs' claims. The plaintiffs shall file and serve a response, if any, to the moving parties' supplemental brief on or before September 9, 2014.

The court will issue a minute order.

2. 13-35749-B-7 ALEXANDER HOWARD — MOTION FOR ENTRY OF DEFAULT JUDGMENT
14-2084 DL-2
SACRAMENTO MUNICIPAL UTILITY DISTRICT V. HOWARD — 7-11-14 [28]

Disposition Without Oral Argument: Oral argument will not aid the court in rendering a decision on this matter.

The matter is deemed submitted on the papers. The court will issue a written disposition and order.

3. 14-23302-B-7 JAGRAJ SINGH AND SATINDER KAUR — CONTINUED MOTION TO COMPEL ABANDONMENT
CAH-1 — 5-27-14 [16]

Disposition Without Oral Argument: This motion is unopposed. The court issues the following abbreviated ruling.

The motion is granted. Pursuant to 11 U.S.C. § 554(b), the debtors' interests in the Taxi Service listed on line 13 of Schedule B (Dkt. 1 at 14) and the 1995 Honda Accord listed online 25 of Schedule B (Dkt. 1 at 15) are deemed abandoned by the estate. Except as so ordered, the motion is denied.

The debtors allege without dispute that the Taxi Service has a value of $1.00, and the 1995 Honda Accord has a value of $1800.00. The debtors have claimed the entirety of the value of both the Taxi Service and the 1995 Honda Accord as exempt on Schedule C. The court finds that the Taxi Service and the 1995 Honda Accord are of inconsequential value and benefit to the estate.

The court will issue a minute order.

4. 13-34803-B-7 DOMINIC/RENEE SACCA — MOTION TO EMPLOY ESTELA O. PINO AS ATTORNEY
PA-1 — 7-7-14 [22]

Disposition Without Oral Argument: This motion is unopposed. The court issues the following abbreviated ruling.

The motion is granted to the extent set forth herein. Pursuant to 11 U.S.C. §§ 327(a) and 328(a) and Fed. R. Bankr. P. 2014, the chapter 7 trustee is authorized to employ Pino & Associates ("P&A"), as counsel for the estate, effective as of June 9, 2014. P&A's fees and costs, if any, shall be paid only pursuant to application. 11 U.S.C. § 330 and Fed. R. Bankr. P. 2016. Except as so ordered, the motion is denied.

The court finds that P&A does not hold or represent an interest adverse to the estate and is a disinterested person as that term is defined by 11 U.S.C. § 101(14).

The court will issue a minute order.

5. 13-27008-B-11 ALBERTO GONZALEZ — MOTION TO EMPLOY JUDSON H. HENRY AS ATTORNEY
JHH-10 — 7-28-14 [158]

Tentative Ruling: This is a properly filed motion under LBR 9014-1(f)(2). Opposition may be presented at the hearing. Therefore, the court issues no tentative ruling on the merits of the motion.

6. 14-23526-B-7 PEGGY DEAN
HSM-2

MOTION TO EXTEND DEADLINE TO FILE A COMPLAINT OBJECTING TO DISCHARGE OF THE DEBTOR
7-8-14 [19]

Disposition Without Oral Argument: This motion is unopposed. The court issues the following abbreviated ruling.

In the absence of any opposition, the motion is granted. Pursuant to Fed. R. Bankr. P. 4004(b), the deadline for the chapter 7 trustee to file a complaint objecting to the discharge of the debtor is extended to and including September 5, 2014. Except as so ordered, the motion is denied.

The court will issue a minute order.

7. 14-23526-B-7 PEGGY DEAN
HSM-3

MOTION TO EXTEND TIME
7-7-14 [22]

Disposition Without Oral Argument: This motion is unopposed. The court issues the following abbreviated ruling.

The motion is granted. Pursuant to Fed. R. Bankr. P. 4003(b)(1), the deadline for the chapter 7 trustee to object to the debtor's claims of exemption is extended to and including September 5, 2014. Except as so ordered, the motion is denied.

The court will issue a minute order.

8. 14-27528-B-7 KARA SKLAR
FF-1

MOTION TO EXTEND AUTOMATIC STAY
7-25-14 [6]

Tentative Ruling: This is a properly filed motion under LBR 9014-1(f)(2). Opposition may be presented at the hearing. Therefore, the court issues no tentative ruling on the merits of the motion.

9. 13-31040-B-11 JIMMY ALEXANDER — OBJECTION TO CLAIM OF PLACER COUNTY TAX COLLECTOR, CLAIM NUMBER 8
PRE-5 — 7-15-14 [194]

Disposition Without Oral Argument: Oral argument will not aid the court in rendering a decision on this matter.

The objection is overruled without prejudice.

The debtor did not give sufficient notice of the objection. Because the debtor's notice of hearing (Dkt. 195) states that written opposition to the objection is required and must be filed and served no less than 14 days before the date of the hearing, the court treats the objection as one filed under LBR 3007-1(b)(1), which governs objections to claim to which written opposition is required. Such objections must be filed and served at least 44 days before the date of the hearing. The debtor filed and served the instant objection only 28 days before the date of the hearing.

If the debtor re-files the objection, debtor and his counsel are advised to review, at a minimum, two things. First, the debtor and his counsel should review In re Los Angeles Intern. Airport Hotel Associates, 106 F.3d 1479 (9th Cir. 1997) and the definition of "security interest" in 11 U.S.C. § 101(51). Second, the debtor and his counsel should review F.R.Bankr.P. 9011, and in particular F.R.Bankr.P. 9011(b).

The court will issue a minute order.

10. 13-31040-B-11 JIMMY ALEXANDER — MOTION FOR SANCTIONS
PRE-4 — 7-15-14 [189]

Tentative Ruling: The opposition filed by the Placer County Tax Collector (the "County") is sustained. The motion is denied.

The debtor requests that the court impose the sanctions prescribed by Fed. R. Bankr. P. 3001(c)(2)(D), which provides that if the holder of a claim fails to provide information required by Fed. R. Bankr. P. 3001(c), the court may, after notice and a hearing, take either or both of the following actions:

> (i) preclude the holder from presenting the omitted information, in any form, as evidence in any contested matter or adversary proceeding in the case, unless the court determines that the failure was substantially justified or is harmless; or
>
> (ii) award other appropriate relief, including reasonable expenses and attorney's fees caused by the failure.

Fed. R. Bankr. P. 3001(c)(2)(D)(i), (ii).

In this case, few of the subparts of Fed. R. Bankr. P. 3001(c) apply to claim no. 8 ("Claim") filed by the County. The Claim states on its face that it is based on property taxes. Real property taxes in California arise by operation of law. See Cal. Const. Art. XIII, § 1, Cal. Rev. & Tax Code §§ 104, 201, 401. They do not arise pursuant to an agreement or writing between the taxing authority and the taxpayer. Therefore, the requirement of Fed. R. Bankr. P. 3001(c)(1) that a claim based on a writing be filed with a copy of the writing is inapplicable to the Claim. See In re Los Angeles Intern. Airport Hotel Associates, 106 F.3d 1479 (9th Cir. 1997). The debtor has stated on his sworn Schedule A that he owns real property located in the communities of Alta and Weimar in Placer County. The Claim is, on its face, clearly based on property taxes owed with respect to one or more of the parcels of real property owned by the debtor in Placer County.

In addition, because property tax obligations are not based on agreements or contracts, the court concludes that the debtor's argument that the statute of frauds requires the filing of a writing with the Claim to be unavailing. A cursory review of the California statute of frauds, Cal. Civ. Code § 1624, clearly shows that the statute of frauds, as codified in California, applies only to agreements or contracts. It does not apply to tax obligations arising by operation of law.

For similar reasons, the debtor's argument that the County has not shown constitutional or prudential standing because it has not filed a writing with the Claim is also unavailing. "Constitutional standing requires an injury in fact, which is caused by or fairly traceable to some conduct or some statutory prohibition, and which the requested relief will likely redress." In re Veal, 450 B.R. 897 (9th Cir. BAP 2011). This requirement is fairly minimal. The County has constitutional standing in this case because it has suffered an injury (unpaid property taxes) traceable to conduct of the debtor (the filing of the bankruptcy case invoking the prohibitions of the automatic stay) which will likely be redressed by the requested relief (the filing of a claim in the bankruptcy case requesting payment from estate assets). The County has prudential standing by virtue of operation of the California Revenue and Tax Code, which gives the County the authority to assess and levy property taxes on real property within the County. See Cal. Const. Art. XIII, § 1, Cal. Rev. & Tax Code §§ 104, 201, 401. No writing is required to give the County either constitutional or prudential standing.

With respect to Fed. R. Bankr. P. 3001(c)(3), the Claim shows on its face that it is not based on an open-end or revolving consumer credit agreement. Therefore, the requirements of Fed. R. Bankr. P. 3001(c)(3) therefore do not apply to the Claim.

With respect to Fed. R. Bankr. P. 3001(c)(2)(B) and (C) and 3001(d), although the debtor asserts in the motion that the County was required to file evidence of a "lien" and evidence of perfection of a "lien," the requirement of the filing of evidence of perfection of a security interest set forth in Fed. R. Bankr. P. 3001(d) does not apply to a statutory lien. As discussed above, property tax obligations in California are created by operation of statute, not by agreement. Likewise, property tax liens in California arise by operation of law, not agreement. See Cal. Rev. & Tax Code § 2187.

Cursory research would have shown that the term "security interest" is defined by 11 U.S.C. § 101(51) to mean a "lien created by an agreement."

A statutory lien is not a lien created by an agreement, and therefore two conclusions follow: First, evidence of the lien and its perfection is not "information required by . . . subdvision (c)." Second, a failure to file evidence of the statutory lien and its perfection does not expose a claimant to the sanction prescribed by Fed. R. Bankr. P. 3001(c)(2)(D).

Because property tax liens are not "security interests" Fed. R. Bankr. P. 3001(c)(2)(B) and (C) do not apply to the Claim, as those subparts apply only to claims where a security interest is claimed in the debtor's property.

The foregoing leaves only Fed. R. Bankr. P. 3001(c)(2)(A), which requires that if a claim includes interest, fees, expenses, or other charges incurred before the petition was filed that an itemized statement of the interest, fees, expenses or charges shall be filed with the proof of claim. This subpart applies to the Claim. Although the claim states that it is subject to interest pursuant to Cal. Rev. & Tax Code § 506(b) and 11 U.S.C. §§ 506 and 5011, an itemized statement of the accrued interest and any other charges was not included with the proof of claim. However, the court finds that the County's failure to include the itemized statement in this case to be substantially justified and harmless. The debtor has offered no argument in the motion which disputes the amount of the claim or the accrual of statutory interest or fees associated with the Claim, other than his conclusory allegation in the motion, unsupported by any evidence, that "[d]ebtor owes no principal, interest, fees or costs to Placer for any pre-petition secured claim." The court is also unaware of authority, and the debtor cites none, which stands for the proposition that the Claim should be classified as a non-priority unsecured claim because the debtor scheduled the claim as such "because these amounts were taxes owed by the prior property owner and that the alleged debt was incurred over three years prior to the filing of my petition." The debtor may be referring to 11 U.S.C. §507(a)(8)(A), which governs what taxes measured by income or gross receipts are entitled to priority; however, that section has nothing whatsoever to do with real estate taxes or their secured status and there is nothing in the Code which automatically avoids tax liens on real property based on the age of the lien.

The court also does not find that an award of attorney's fees pursuant to Fed. R. Bankr. P. 3001(c)(2)(D)(ii) is justified in this case. This motion displays a fundamental misunderstanding of basic principles of California state law and federal bankruptcy law of which all practitioners undertaking representation of debtors in bankruptcy - particularly debtors in Chapter 11 - should be aware. The court will not award attorney's fees or expenses for what it perceives to be, frankly, legal argument which comes dangerously close to being frivolous as that term is used in Fed. R. Bankr. P. 9011(b)(2).

The court will issue a minute order.

11. 12-20491-B-7 KAR-1 — STEVEN FILLPOT AND TARA SHEEN — MOTION TO REOPEN CHAPTER 7 BANKRUPTCY CASE 7-15-14 [39]

CASE CLOSED 6/1/12

Tentative Ruling: This is a properly filed motion under LBR 9014-1(f)(2). Opposition may be presented at the hearing. Therefore, the court issues no tentative ruling on the merits of the motion.

12. 14-26932-B-7 AEB-1 — REBECCA MORRIS — MOTION TO COMPEL ABANDONMENT 7-15-14 [17]

Tentative Ruling: This is a properly filed motion under LBR 9014-1(f)(2). Opposition may be presented at the hearing. Therefore, the court issues no tentative ruling on the merits of the motion.

13. 14-26932-B-7 UST-1 — REBECCA MORRIS — MOTION FOR APPOINTMENT OF A PATIENT CARE OMBUDSMAN 7-10-14 [13]

Tentative Ruling: The motion is denied.

By this motion, the United States Trustee (the "UST") seeks an order pursuant to 11 U.S.C. § 333(a) and Federal Rule of Bankruptcy Procedure 2007.2(a) appointing a patient care ombudsman to monitor the quality of patient care and to represent the interests of the patients of the debtor's health care business styled "Rebecca's Home." 11 U.S.C. § 333(a)(1) mandates the court to appoint a patient care ombudsman not later than thirty (30) days after the commencement of the case "unless the court finds that the appointment of such ombudsman is not necessary for the protection of patients under the specific facts of the case." 11 U.S.C. § 333(a)(1).

The court has reviewed both the supplement filed by the UST on August 8, 2014 (Dkt. 24) as well as the declaration of Joe Rodrigues ("Mr. Rodrigues") filed on August 8, 2014 (Dkt. 25). In light of Mr. Rodrigues' assertions that the California State Long Term Care Ombudsman Program has determined that an appointment of a patient care ombudsman is not necessary in this case, and in the absence of any other opposition, the court finds that it is not necessary for the protection of the patients of the debtor's business for it to appoint a patient care ombudsman. Accordingly, the motion is denied.

The court will issue a minute order.

14. 14-26608-B-11 DARA PETROLEUM, INC.
BHR-2

MOTION TO DISMISS CASE OR MOTION TO EXCUSE RECEIVER'S TURNOVER UNDER 11 U.S.C. 543 AND FOR RELIEF FROM AUTOMATIC STAY
7-1-14 [48]

Disposition Without Oral Argument: Oral argument will not aid the court in rendering a decision on this matter.

The stipulation filed August 5, 2014 (Dkt. 76) (the "Stipulation") is approved. Pursuant to the terms of the approved Stipulation, this matter is continued to August 26, 2014, at 9:32 a.m. to allow the court to concurrently resolve both the instant motion and the Debtor's Motion Pursuant to 11 U.S.C. § 365 to Assume Stipulation for Entry of Satisfaction of Judgment with HSBC Bank USA, N.A. (Dkt. 29). Opposition to the instant motion is due on or before August 12, 2014. Replies, if any, are due on or before August 19, 2014.

The court will issue a minute order.

15. 14-27252-B-7 RAMONA ESCUDERO
FF-1

MOTION TO COMPEL ABANDONMENT
7-18-14 [7]

Disposition Without Oral Argument: Oral argument will not aid the court in rendering a decision on this matter.

The motion is continued to September 23, 2014, at 9:32 a.m.

As the personal property for which the debtor seeks abandonment (the "Property") is alleged to be of inconsequential value and benefit to the estate solely due to the fact that the Property is claimed as exempt, the court continues the motion to a date after the period for objecting to the debtor's claims of exemption pursuant to Fed. R. Bankr. P. 4003(b)(1) has expired.

The court will issue a minute order.

16. 14-24869-B-7 KIT MANNING
P&A-1

MOTION TO EMPLOY ESTELA O. PINO AS ATTORNEY
7-17-14 [10]

Tentative Ruling: This is a properly filed motion under LBR 9014-1(f)(2). Opposition may be presented at the hearing. Therefore, the court issues no tentative ruling on the merits of the motion.

17. 13-25191-B-7 AJAY CHANDRA
13-2204 BKM-2
CENTRAL VALLEY CONCRETE, INC. V. CHANDRA

MOTION FOR ENTRY OF DEFAULT JUDGMENT
7-10-14 [64]

Tentative Ruling: This motion is unopposed. In this instance, the court issues the following tentative ruling.

The motion is granted in part. Judgment by default will be entered in favor of plaintiff Central Valley Concrete, Inc. (the "Plaintiff"), against defendant Ajay Chandra (the "Defendant") in the amount of $872,136.63. Said amount shall be deemed non-dischargeable pursuant to 11 U.S.C. §§ 523(a)(2). Except as so ordered, the motion is denied.

Procedural History

The Defendant commenced the above-captioned bankruptcy case by filing a voluntary petition under chapter 7 on April 16, 2013 (Bky. Dkt. 1). The Plaintiff commenced this adversary proceeding by filing a complaint on June 20, 2013 (Adv. Dkt. 1) (the "Original Complaint") seeking a determination that the amount of $646,736.51 be deemed non-dischargeable pursuant to 11 U.S.C. §§ 523(a)(2), (a)(4), and that the amount of $734,113.83 be deemed non-dischargeable pursuant to 11 U.S.C. § 523(a)(7). The Defendant failed to file an answer to the Original Complaint. On August 15, 2013, the Plaintiff requested that default be entered against the Defendant (Adv. Dkt. 9). However, the request was rejected due to various procedural defects set forth in the memorandum submitted by the clerk's office on August 16, 2013 (Adv. Dkt. 11). The Plaintiff again requested that the Defendant's default be taken on December 5, 2013 (Adv. Dkt. 25), and default was entered against the Defendant on December 6, 2013 (Adv. Dkt. 27).

The Plaintiff originally filed a motion for entry of default judgment on the claims set forth in the Original Complaint on January 6, 2014 (Adv. Dkt. 29) (the "Original Motion"), which was set for hearing on February 11, 2014, and continued to February 25, 2014. The Original Motion sought a determination that the amount of $872,136.63 be deemed non-dischargeable in the Defendant's bankruptcy case. At the hearing on February 25, 2014, the court issued a tentative ruling granting judgment by default against the Defendant on the 11 U.S.C. § 523(a)(2) claim, but dismissing with leave to amend the 11 U.S.C. § 523(a)(4) claim and dismissing without leave to amend the 11 U.S.C. § 523(a)(7) claim pursuant to Federal Rule of Civil Procedure 12(b)(6). The court determined the amount of $646,783.51 to be non-dischargeable, noting specifically that the court could not grant the Plaintiff the higher amount sought in the Original Motion by operation of Federal Rule of Civil Procedure 54(c), incorporated by Federal Rule of Bankruptcy Procedure 7054 ("a default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings"). However, counsel for the Plaintiff appeared at the hearing on February 25, 2014, explaining that the accrued post-judgment interest on the underlying state court judgment had not been included in the calculation of damages in the Original Complaint. He withdrew the Original Motion, and the court granted the Plaintiff leave to file and properly re-serve a first

amended complaint to address this discrepancy.

The Plaintiff filed a first amended complaint on February 25, 2014 (Adv. Dkt. 43) (the "First Amended Complaint"), seeking a court determination that the amount of $872,136.63, which includes the amount awarded in state court plus post-judgment interest, be deemed non-dischargeable pursuant to 11 U.S.C. § 523(a)(2). The Defendant failed to file an answer to the First Amended Complaint. A request for entry of the Defendant's default was made by the Plaintiff on April 1, 2014 (Adv. Dkt. 52), and default was entered against the Defendant on April 4, 2014 (Adv. Dkt. 57). The instant motion was filed on July 10, 2014 (Adv. Dkt. 64).

Discussion

The facts alleged in the First Amended Complaint include the following. The Defendant was hired by the Plaintiff in 2003 and served in the capacity of controller and later chief financial officer. In these positions, the Defendant worked in the Plaintiff's main corporate office and was extensively involved in the Plaintiff's financial operations and front office management. His responsibilities included supervision of the Plaintiff's accounts payables and management of the Plaintiff's insurance program, which included reconciliation and premium management. The Defendant's employment continued until June 2007.

On June 5, 2007, the Plaintiff was contacted by Bank of Stockton (the "Bank"), which maintained the Defendant's personal bank accounts. The Bank inquired as to whether the Defendant had been authorized by the Plaintiff to deposit into his personal bank account checks written by the Plaintiff to a business vendor. This inquiry spurred an internal investigation in which the Plaintiff determined that the Defendant had embezzled $1,158,855.00 from 2004 to 2007 in a check writing and endorsement scheme. The Defendant admitted that on twenty (20) separate instances, the Defendant had checks, duplicate and otherwise, drawn from the Plaintiff's business account and made payable to existing business vendors of the Plaintiff. Of those twenty checks, nineteen (19) of them represented premium payments payable to large insurance vendors that the Defendant managed, including Chubb Insurance, St. Paul Travelers, Interwest Insurance, and Blue Shield of California. Each check ranged in amount from $7,000.00 to approximately $115,000.00. The Plaintiff did not authorize the Defendant to endorse any checks or deposit them into his personal account.

After discovering the Defendant's embezzlement, the Plaintiff filed a criminal complaint with the Merced County Sheriff's Department and a criminal case, case number MF-46340, was commenced. The Defendant pled no contest to a felony count of embezzlement and was sentenced to four years and four months in prison. The criminal court also issued an order of restitution to the Plaintiff in the sum of $1,511,482.92.

On June 6, 2007, the Plaintiff filed a civil complaint against the Defendant in Merced County Superior Court, case number 150369, alleging, among other things, claims for fraud and conversion. After the case was transferred to San Joaquin County, case number 39-2008-00187429-CU-FR-STK, the San Joaquin County Superior Court granted the Plaintiff summary judgment on its claim for conversion. A judgment was entered in the principal amount of $1,158,000.00 with prejudgment interest for a total sum of $1,424,102.60. Via this judgment, the Plaintiff has been able to recover from the Defendant the sum of $777,369.09. Including interest to

the time of the filing of the Defendant's bankruptcy case, the amount still outstanding totals $872,136.63.

The Plaintiff alleges that the Defendant knew the duplicate checks were unauthorized, falsely drafted, and fraudulently endorsed, yet deposited these improper checks into his personal bank account. The Plaintiff further alleges that it justifiably relied on this misinformation to its detriment and, as a result, the Defendant directly and proximately caused its damages in the amount of $872,136.63.

The court finds that the Plaintiff has in the First Amended Complaint sufficiently pled its claim for relief under 11 U.S.C. § 523(a)(2). "Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading." Fed. R. Bankr. P. 7008(a), incorporating Fed. R. Civ. P. 8(d); Geddes v. United Financial Group, 559 F.2d 557, 560 (9th Cir.1977).

Punitive damages, which are requested in the prayer of the First Amended Complaint, are denied because they are not requested in the moving papers. If they had been requested, awarding them would require an evidentiary "prove up" hearing.

The court will issue a minute order granting the motion. The Plaintiff shall submit a separate judgment that conforms to the court's ruling and complies with Federal Rule of Bankruptcy Procedure 7054, incorporating Federal Rule of Civil Procedure 54(a).

18. 14-21070-B-7 MELFORD HICKS
HSM-5

MOTION TO EXTEND DEADLINE TO FILE A COMPLAINT OBJECTING TO DISCHARGE OF THE DEBTOR
7-3-14 [59]

Disposition Without Oral Argument: This motion is unopposed. The court issues the following abbreviated ruling.

The motion is granted. Pursuant to Federal Rule of Bankruptcy Procedure 4004(b)(1), the deadline for the chapter 7 trustee to file an objection to the debtor's discharge under 11 U.S.C. § 727 is extended to September 5, 2014.

The chapter 7 trustee requests an extension of the deadline to file an objection to the debtor's discharge under 11 U.S.C. § 727. When a request for an enlargement of the time to file a complaint objecting to discharge or dischargeability of certain debts is made before the time has expired, as it was here, the court may enlarge the time for cause shown. Fed. R. Bankr. P. 4004(b) and 4007(c). Here, the chapter 7 trustee states that he needs additional time to investigate certain pre-petition transactions which allegedly occurred between the debtor and his parents. The chapter 7 trustee further states that communications between he and the debtor, through their respective counsel, are ongoing and that he expects to communicate with the debtor's parents within the month. The foregoing constitutes "cause" for purposes of Federal Rule of Bankruptcy Procedure 4004(b)(1).

The court will issue a minute order.

19.	11-40578-B-7 PA-7	JENNE ROSE AND BRIAN SCOTT	CONTINUED MOTION TO APPROVE COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH JENNE E. ROSE, CAULFIELD, DAVIES & DONAHUE, LLP AND MICHAEL E. MYERS 6-17-14 [104]

Tentative Ruling: This motion is unopposed. In this instance, the court issues the following tentative ruling.

The motion is granted, and the chapter 7 trustee is authorized to enter into and perform in accordance with the terms set forth in the Settlement Agreement and General Releases attached as Exhibit "1" to the motion (Dkt. 113, p.3-14) (the "Agreement"). Except as so ordered, the motion is denied.

The court has great latitude in approving settlement agreements. In re Woodson, 839 F.2d 610, 620 (9th Cir. 1988). The court is required to consider all factors relevant to a full and fair assessment of the wisdom of the proposed compromise. Protective Committee For Independent Stockholders Of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 88 S.Ct. 1157, 20 L.Ed.2d 1 (1968). The court will not simply approve a compromise proffered by a party without proper and sufficient evidence supporting the compromise, even in the absence of objections.

The trustee alleges without dispute that the Agreement is fair and equitable and in the best interests of the estate and its creditors. The Agreement will resolve a heavily contested trustee's motion (the "Motion") to hold the following parties in civil contempt of court and to compel those parties to comply with the automatic stay: (1) debtor Jenne E. Rose; (2) Caulfield, Davies & Donahue, LLP and its successor Donahue Davies, LLP; and (3) Michael E. Myers (collectively, the "Donahue Parties"). The Motion also sought turnover of estate property as to debtor Jenne E. Rose only. The trustee asserts that, although he believes he has set forth meritorious claims in the Motion, the Donahue Parties will vigorously defend the Motion and its resolution may require expensive litigation involving extensive discovery and an evidentiary hearing. Additionally, because any order issued by the court would be subject to appeals, the entire matter could be delayed which would propound the amount of attorneys' fees and expenses. By resolving the Motion, there will be a net gain to the estate of $35,000.00 and avoid costly protracted litigation. The court finds that the Agreement is a reasonable exercise of the trustee's business judgment. In re Rake, 363 B.R. 146, 152 (Bankr. D. Idaho 2006). Accordingly, the court finds that the trustee has carried his burden of persuading the court that the Agreement is fair and equitable, and the motion is granted.

The court will issue a minute order.

20. 11-40578-B-7 JENNE ROSE AND BRIAN SCOTT
PA-2
CONTINUED MOTION FOR CONTEMPT, MOTION TO COMPEL AND/OR MOTION FOR TURNOVER OF PROPERTY
2-25-14 [49]

Tentative Ruling: The motion is dismissed with prejudice.

The motion is dismissed with prejudice pursuant to the terms of the Settlement Agreement and General Releases filed July 15, 2014 (Dkt. 113, p.3-14) (the "Agreement"), which was approved elsewhere on today's calendar.

Consistent with the terms of the Agreement, counsel for the trustee shall submit a proposed order which conforms to the foregoing ruling.

21. 11-26042-B-7 TIMOTHY/TANGERIE SHELLS
14-2111
SHELLS V. US DEPARTMENT OF EDUCATION ET AL
USA-1
MOTION TO DISMISS ADVERSARY PROCEEDING
7-2-14 [14]

Tentative Ruling: Plaintiff Tangerie M. Shells (the "Plaintiff")'s opposition is overruled. Defendant United States Department of Education, et. al (the "Defendant")'s motion to dismiss the first amended complaint filed May 28, 2014 (Adv. Dkt. 9) (the "First Amended Complaint") is granted. The First Amended Complaint is dismissed pursuant to Federal Rule of Bankruptcy Procedure 7012, incorporating Federal Rule of Civil Procedure 12(b)(6), with leave given to the Plaintiff to amend. On or before September 2, 2014, the Plaintiff shall file and serve on the Defendant, consistent with the requirements of Federal Rule of Bankruptcy Procedure 7004, a second amended complaint which amends the claim for relief brought under 11 U.S.C. § 523(a)(8). Nothing in this ruling grants leave to amend to add additional parties or additional claims. If the Plaintiff does not file and serve a compliant second amended complaint on or before September 2, 2014, the Defendant may submit a proposed order dismissing the First Amended Complaint without leave to amend.

Background

The facts alleged in the First Amended Complaint include the facts described below. The Plaintiff commenced the above-captioned bankruptcy case by filing a voluntary petition under chapter 7 on March 11, 2011. Among the debts the Plaintiff listed on Schedule F was a student loan obligation owed to the Defendant, account number F810173381 (the "Student Loan"). The Student Loan was incurred to pay the Plaintiff's expenses at California State University, Sacramento, between 1987 and 1997. The Plaintiff graduated in 1997 having obtained both undergraduate and graduate degrees in the field of social work with an emphasis on helping children and families.

The Plaintiff has been employed full time by the Sacramento County Children's Protective Services since April 20, 1998. She is the primary source of income for herself, disabled husband, three children, and elderly mother. The income the Plaintiff earns from employment is barely sufficient to meet the family's basic needs despite the Plaintiff's frugalness.

The Plaintiff has attempted to repay the Student Loan on different occasions, the most recent occurrence being in April 2013 on an income-based repayment plan. However, after four months the Plaintiff could no longer afford making payments on the Student Loan as it caused significant financial strain on her family and forced her to fall behind on other necessary debts. The Plaintiff has attempted to pay the Student Loan since graduation; however, each attempt caused significant financial hardship.

The Plaintiff's husband has been declared permanently disabled and is therefore unable to work again to supplement the family's income. There is no possibility that the Plaintiff's income will change in the near future, and the Plaintiff does not anticipate receiving any other resources which could be used to pay the Student Loan.

Additionally, the interest on the Student Loan has grown exponentially. The original balance on the Student Loan was $40,000.00 for both the Plaintiff's undergraduate and graduate degrees. This sum has grown to a present balance of $137,890.29, an amount that is impossible for the Plaintiff to pay. Interest on the Student Loan continues to accrue.

Legal Standard

The Defendant now moves to dismiss the First Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) on the grounds that it fails to state a plausible claim for undue hardship under 11 U.S.C. § 523(a)(8) and any of the prongs of the Ninth Circuit's test for determining whether a student loan obligation is dischargeable in bankruptcy.

The following sets forth the legal standard for evaluating whether a complaint states a claim upon which relief may be granted:

> The purpose of a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, made applicable here under Fed. R. Bankr. P. 7012, is to test the legal sufficiency of a plaintiff's claims for relief. In determining whether a plaintiff has advanced potentially viable claims, the complaint is to be construed in a light most favorable to the plaintiff and its allegations taken as true. Scheuer v. Rhodes, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974); Church of Scientology of Cal. v. Flynn, 744 F.2d 694, 696 (9th Cir.1984).

Quad-Cities Constr., Inc. v. Advanta Bus. Servs. Corp. (In re Quad-Cities Constr., Inc.), 254 B.R. 459, 465 (Bankr. D. Idaho 2000).

Under the Supreme Court's most recent formulation of Rule 12(b)(6), a plaintiff cannot "plead the bare elements of his cause of action, affix the label 'general allegation,' and expect his complaint to survive a motion to dismiss." Ashcroft v. Iqbal,129 S .Ct 1937, 1954 (2009). Instead, a complaint must set forth enough factual matter to establish plausible grounds for the relief sought. Bell Atl. Corp. v. Twombly, 127

S.Ct. 1955, 1964-66 (2007) ("[A] plaintiff's obligation to provide 'grounds' of his 'entitle[ment] to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do'"). Factual allegations must be enough to raise a right to relief above the speculative level. Id., citing 5 C. Wright & A. Miller, Fed. Practice and Procedure § 1216, at 235-36 (3d ed. 2004) ("[T]he pleading must contain something more...than...a statement of facts that merely creates a suspicion [of] a legally cognizable right of action"). Furthermore:

> A dismissal under Rule 12(b)(6) may be based on the lack of cognizable legal theory or on the absence of sufficient facts alleged under a cognizable legal theory. Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001); Balistreri v. Pacifica Police Dep't., 901 F.2d 696, 699 (9th Cir. 1988)...the Court is not required 'to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.' Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001). Courts will not 'assume the truth of legal conclusions merely because they are cast in the form of factual allegations.' Warren v. Fox Family Worldwide, Inc., 328 F.3d 1136, 1139 (9th Cir. 2003); accord W. Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981). Furthermore, courts will not assume that plaintiffs 'can prove facts which [they have] not alleged, or that the defendants have violated . . . laws in ways that have not been alleged.' Assoc. Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 526, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983).

Toscano v. Ameriquest Mortg. Co., 2007 U.S. Dist. LEXIS 81884 (E.D. Cal. 2007).

If a complaint is dismissed under Rule 12(b)(6), "[the] court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." Lopez v. Smith, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc), citing Doe v. United States, 58 F.3d 494, 497 (9th Cir. 1995). In other words, the court is not required to grant leave to amend when an amendment would be futile. Toscano, 2007 U.S. Dist. LEXIS 81884 (citing Gompper v. VISX, Inc., 298 F.3d 893, 898 (9th Cir. 2002)).

Based on the foregoing, the court will now address the claim for relief set forth in the First Amended Complaint.

Dischargeability of the Student Loan Pursuant to 11 U.S.C. § 523(a)(8)

11 U.S.C. § 523 provides that "(a) a discharge under section 727...of this title does not discharge an individual debtor from any debt - ...

> (8)unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents, for - (A)(i) an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution; or (ii) an obligation to repay funds received as an educational benefit, scholarship, or stipend; or (B) any other educational loan that is a qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986, incurred by a debtor who is an individual."

11 U.S.C. § 523(a)(8)(A)(i)-(B).

The Ninth Circuit has adopted a three-part test for determining whether a debtor may discharge a student loan obligation under 11 U.S.C. § 523(a)(8):

> (1) First, the debtor must establish that she cannot maintain, based on current income and expenses, a "minimal" standard of living for herself and her dependents if forced to repay the loans;
>
> (2) Second, the debtor must show "that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans";
>
> (3) Third, the debtor is required to demonstrate that she "has made good faith efforts to repay the loans..."

United Student Aid Funds, Inc. v. Pena (In re Pena), 155 F.3d 1108, 1111 (9th Cir. 1998) (citing New York State Higher Education Services Corp. v. Brunner (In re Brunner), 831 F.2d 395, 396 (2nd Cir. 1987).

The debtor bears the burden of establishing all three elements of the Brunner test before a student loan obligation can be discharged in bankruptcy. United Student Aid Funds, Inc. v. Nascimento (In re Nascimento), 241 B.R. 440, 445 (9th Cir. BAP 1999); Rifino v. United States (In re Rifino), 245 F.3d 1083, 1087-88 (9th Cir. 2001).

Regarding the first prong of the analysis, the debtor is required to establish more than simply tight finances. Id. (citing In re Faish, 72 F.3d 298, 306 (3rd Cir. 1995). In defining undue hardship, courts require more than temporary financial adversity but typically stop short of utter hopelessness. Id. (citing In re Hornsby, 144 F.3d 433, 437 (6th Cir. 1998). The proper inquiry is whether it would be "unconscionable" to require the debtor to take steps to earn more income or reduce her expenses. Id. The Bankruptcy Appellate Panel for the Ninth Circuit has rejected a rule "that a person must fall below the Poverty Guidelines to discharge a student loan." Education Credit Management Corp. v. Howe (In re Howe), 319 B.R. 886, 889 (9th Cir. BAP 2005) (citing In re Nascimento, 241 B.R at 445). "[T]he federal poverty level is too strict a standard for measuring whether the debtor's standard of living is at a minimal standard level and should not be employed for that purpose." Id. However, a "minimal standard of living" under 11 U.S.C. § 523(a)(8) does not equate to a middle class standard of living. Id. "Application of the first prong of the undue hardship test requires an examination of a debtor's current finances...the meaning of a 'minimal standard of living' must be determined 'in light of the particular facts of each case.'" Id. at 890.

Regarding the second prong of the analysis, the Ninth Circuit has found that "additional circumstances" do not need to be "exceptional" "in the sense that the debtor must prove a 'serious illness, psychiatric problems, disability of a dependent, or something which makes the debtor's circumstances more compelling than that of an ordinary person in debt.'" Educational Credit Management Corp. v. Nys (In re Nys), 446 F.3d 938, 946 (9th Cir. 2006). Rather, "undue hardship requires only a showing that the debtor will not be able to maintain a minimal standard of living now and in the future if forced to repay her student loans."

Id. While it is presumed that the debtor's income will increase to the point where she can make payments on the student loans and maintain a minimal standard of living, "the debtor may rebut that presumption with 'additional circumstances' indicating that her income cannot reasonably be expected to increase and that her inability to make payments will likely persist throughout a substantial portion of the loan's repayment period." Id. In making this determination, bankruptcy courts may look to an unexhaustive list of "additional circumstances" including, but not limited to:

> (1) Serious mental or physical disability of the debtor or the debtor's dependents which prevents employment or advancement; (2) The debtor's obligations to care for dependents; (3) Lack of, or severely limited education; (4) Poor quality of education; (5) Lack of usable or marketable job skills; (6) Underemployment; (7) Maximized income potential in the chosen educational field, and no other more lucrative job skills; (8) Limited number of years remaining in [the debtor's] work life to allow payment of the loan; (9) Age or other factors that prevent retraining or relocation as a means for payment of the loan; (10) Lack of assets, whether or not exempt, which could be used to pay the loan; (11) Potentially increasing expenses that outweigh any potential appreciation in the value of the debtor's assets and/or likely increases in the debtor's income; (12) Lack of better financial options elsewhere.

Id. at 947.

Finally, under the third prong of the analysis, "good faith is measured by the debtor's efforts to obtain employment, maximize income, and minimize expenses." Educational Credit Management Corp. v. Mason (In re Mason), 464 F.3d 878, 884 (9th Cir. 2006) (citing Pa. Higher Education Assistance Agency v. Birrane (In re Birrane), 287 B.R. 490, 499 (9th Cir. BAP 2002). "Courts will also consider 'a debtor's effort - or lack thereof - to negotiate a repayment plan,' although a history of making or not making payments is, by itself, not dispositive." Id. However, whether a debtor made payments prior to filing for discharge is a persuasive factor in determining whether she made a good faith effort to repay her loans. In re Pena, 155 F.3d at 1114.

The court is in agreement with the Defendant that the Plaintiff has failed in the First Amended Complaint to plead sufficient facts that would give rise to a plausible claim for an undue hardship discharge of the Student Loan under the above standard, and therefore dismisses the First Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). To start, the first prong of the Brunner test requires the court to examine the debtor's financial situation individually to determine whether repaying the Student Loan would create an undue hardship. However, the First Amended Complaint fails to plead sufficient facts to allow the court to perform this function. For example, the First Amended Complaint provides no information regarding the Plaintiff's current income and expenses. It states that the Plaintiff is the primary income source for herself, three children, permanently disabled husband, and elderly mother, and that the income she earns is barely sufficient to meeting the family's basic needs. However, there is no information regarding how much money the Plaintiff earns, what expenses the family has which the Plaintiff deems "basic," or any other sources of income for the family. Simply stating that the Plaintiff has been clipping coupons to reduce family expenditures on food, without more, is insufficient.

Additionally, no information regarding the Student Loan has been provided outside of the original balance and the amount of interest which has accrued. For example, the First Amended Complaint fails to state the terms of any repayment options that are available to the Plaintiff, either currently or in the past.

Second, the First Amended Complaint fails to plead "additional circumstances" demonstrating that Plaintiff's financial situation is likely to persist for a significant portion of the repayment period for the Student Loan. As set forth above, there are multiple facts which the court may consider in making this determination. The facts as currently alleged in the First Amended Complaint are insufficient. The court acknowledges the allegation that the Plaintiff's husband is permanently disabled and no longer able to work to supplement the household income. However, the First Amended Complaint does not include any specificity regarding the husband's disability and fails to allege how the husband's disability prevents the Plaintiff from working or advancing. Additionally, the First Amended Complaint fails to state the repayment period for the Student Loan or how much longer the Plaintiff's work life will be, both of which are necessary for a court determination of whether the Plaintiff's state of affairs will continue for a significant portion of the repayment period. Furthermore, the First Amended Complaint provides no specific information regarding the Plaintiff's anticipated future income. It simply makes conclusory statements such as "there is no possibility that the Debtor's income will change in the near future to allow the possibility of repaying the debt," and "The Debtor has no anticipated increase in income or resources with which to pay the aforementioned loan." Without more information, the court cannot determine exactly why the Plaintiff's financial situation will not improve in the future.

Finally, the First Amended Complaint fails to allege specific facts in support of a conclusion that the Plaintiff has made good faith efforts to repay the Student Loan. The First Amended Complaint alleges that the Plaintiff has "attempted to pay the loan beginning on different occasions" and that the Plaintiff defaulted after four months under an income-based repayment plan which began in April 2013 because it caused her and her family significant financial strain. However, the First Amended Complaint fails to address the Plaintiff's efforts to negotiate and obtain various repayment options, what her payments were under the income-based repayment plan she was in for four months or why she defaulted, or what efforts the Plaintiff has made to maximize her income and minimize her expenses. As previously stated, the First Amended Complaint does not get into specifics regarding the Plaintiff's income or income potential, other than to state numerous times that it will not increase in the near future. Additionally, the only effort mentioned by the Plaintiff to reduce expenses is to clip coupons to save money on food. This is alone insufficient to establish that the Plaintiff has made every effort to minimize her expenses in order to make payments on the Student Loan.

The court acknowledges the Plaintiff's attempts in her opposition to supplement the First Amended Complaint with additional factual allegations. Based on the Plaintiff's assertions in her opposition, the court does not believe that an amendment to the First Amended Complaint would be futile. Accordingly, the court grants the Plaintiff leave to amend the First Amended Complaint to allege facts supporting her claim for an undue hardship discharge of the Student Loan pursuant to 11 U.S.C.

§ 523(a)(8). The Defendant's response, if any, to the second amended complaint will be governed by Federal Rule of Bankruptcy Procedure 7015, incorporating Federal Rule of Civil Procedure 15(a)(3).

The court will issue a minute order.