UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Michael S. McManus
Bankruptcy Judge
Sacramento, California

August 20, 2018 at 10:00 a.m.

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1. 16-25217-A-11 UST-1 — WEST LANE PROPERTIES INC. — MOTION TO CONVERT OR TO DISMISS CASE 7-18-18 [114]

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 debtor, 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 and the case will be dismissed.

The U.S. Trustee moves for dismissal, pursuant to 11 U.S.C. § 1112(b), arguing failure to file quarterly post-confirmation reports and failure to pay quarterly fees to the U.S. Trustee (from third quarter of 2017 onward).

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

For purposes of this subsection, "'cause' includes- . . . (F) unexcused failure to satisfy timely any filing or reporting requirement established by this title or by any rule applicable to a case under this chapter; [and] (K) failure to pay any fees or charges required under chapter 123 of title 28." 11 U.S.C. § 1112(b)(4)(F), (K).

This case was filed on August 9, 2016. The court confirmed the debtor's chapter 11 plan on June 5, 2017. Docket 82. The debtor has not filed quarterly post-confirmation reports since the third quarter of 2017. Nor has the debtor been paying the U.S. Trustee quarterly fees. The debtor is at least $1,625 delinquent on such fees. Docket 116.

The foregoing amounts to cause for conversion to chapter 7 or dismissal, under section 1112(b)(1).

As the debtor did not specify otherwise in the plan or order confirming the plan, confirmation of the plan vested all property of the estate in the debtor.

Docket 114 at 6; Docket 82; see also 11 U.S.C. § 1141(b). Given this and the fact that the debtor's claims are virtually all secured by its real property (except for a $823.54 claim of the California Franchise Tax Board), dismissal is in the best interest of the estate. See Docket 82 at 5. The motion will be granted and the case will be dismissed.

2.	17-26125-A-11 18-2030 FIRST DATA MERCHANT SERVICES L.L.C. V. MCA RECOVERY, L.L.C. ET AL	FIRST CAPITAL RETAIL, L.L.C. RBS-5	MOTION TO APPROVE COMPENSATION OF PLAINTIFF'S ATTORNEY 7-5-18 [61]

Tentative Ruling: The motion will be granted in part.

The plaintiff in this interpleader, First Data Merchant Services, L.L.C., seeks $39,506.50 in attorney's fees and $838.18 in expenses, for a total of $40,344.68. The services for which the plaintiff seeks compensation represent:

- initial correspondence ($2,480),
- preference motion ($7,842.50),
- sale motion ($4,139.50),
- interpleader ($19,510.50), and
- fee motion ($5,534).

The defendants First Capital Retail, L.L.C. (also the debtor in the underlying bankruptcy case), 13th Floor/Pilot, L.L.C. (the purchaser of First Capital Retail's assets), and MCA Recovery, L.L.C. oppose the motion, challenging the reasonableness of the requested compensation and necessity of the services.

"*Therefore, we agree with the principle articulated in Lee and now expressly hold that in order to avail itself of the interpleader remedy, a stakeholder must have a good faith belief that there are or may be colorable competing claims to the stake. This is not an onerous requirement. See 4 James Wm. Moore, Moore's Federal Practice § 22.03[1][c] (3d ed. 1997) ('In most cases, it is not difficult for the stakeholder to meet the requirement of a reasonable or good faith fear of multiple litigation, and courts appear to require merely that the stakeholder's concern in this regard be more than conjectural.').*

"*The threshold to establish good faith is necessarily low so as not to conflict with interpleader's pragmatic purpose, which is 'for the stakeholder to "protect itself against the problems posed by multiple claimants to a single fund."' Mack v. Kuckenmeister, 619 F.3d 1010, 1024 (9th Cir. 2010) (quoting Ensley, 174 F.3d at 980). The possibility of double liability is only one such problem; another is the cost of litigation, which does not depend on the merits of adverse claims. Id. (citing Trs. of Dirs. Guild of Am.-Producer Pension Benefits Plans v. Tise, 234 F.3d 415, 426 (9th Cir. 2000)); see also N.Y. Life Ins. Co. v. Welch, 297 F.2d 787, 790 (D.C. Cir. 1961) ('A stakeholder, acting in good faith, may maintain a suit in interpleader to avoid the vexation and expense of resisting adverse claims, even though he believes only one of them is meritorious.')."*

Michelman v. Lincoln Nat. Life Ins. Co., 685 F.3d 887, 894 (9th Cir. 2012).

"*At the same time, the availability of attorneys' fees for interpleader plaintiffs recognizes that by bringing the action, the plaintiff benefits all parties 'by promoting early litigation on the ownership of the fund, thus preventing dissipation.' Schirmer Stevedoring, 306 F.2d at 193. Because the*

interpleader plaintiff is supposed to be disinterested in the ultimate disposition of the fund, attorneys' fee awards are properly limited to those fees that are incurred in filing the action and pursuing the plan's [sic] release from liability, not in litigating the merits of the adverse claimants' positions. Id. at 194. Compensable expenses include, for example, preparing the complaint, obtaining service of process on the claimants to the fund, and preparing an order discharging the plaintiff from liability and dismissing it from the action. See id.; 7 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice & Procedure § 1719 & n. 20 (1986).

"*Because the scope of compensable expenses is limited, attorneys' fee awards to the 'disinterested' interpleader plaintiff are typically modest. See, e.g., Schirmer Stevedoring, 306 F.2d at 194-95 (remanding for reduction fee award of $5,000 from $48,000 interpleaded fund); Prudential Ins. Co. v. Boyd, 781 F.2d 1494 (11th Cir.1986) (awarding attorneys' fees of $1,300 from $63,000 fund); In re Technical Equities Corp., 163 B.R. 350, 360-61 (Bkrtcy. N.D. Cal. 1993) (collecting cases). Moreover, because the attorneys' fees are paid from the interpleaded fund itself, there is an important policy interest in seeing that the fee award does not deplete the fund at the expense of the party who is ultimately deemed entitled to it.*"

Trs. of Dirs. Guild of Am.-Producer Pension Benefits Plans v. Tise, 234 F.3d 415, 426–27 (9th Cir. 2000) (opinion amended on denial of reh'g, 255 F.3d 661 (9th Cir. 2000)).

Courts have discretion in the awarding of attorney's fees to disinterested stakeholders in interpleaders. Abex Corp. v. Ski's Enterprises, Inc., 748 F.2d 513, 516 (9th Cir. 1984).

The plaintiff is a payment card processing company. It facilitates the movement of funds from the company that issued the payment card to the merchant or payee's account at a financial institution. The plaintiff is merely the payment processor for the retail transactions of the debtor. Docket 61 at 2.

If the plaintiff was not holding funds for First Capital Retail and was merely a processor of card payments, how could it freeze $214,932.33 of funds belonging to First Capital Retail upon service of the restraint notice by MCA?

Moreover, the motion does not explain why, if service of the restraint notice was a sufficient colorable competing claim to the funds, an immediate interpleader by the plaintiff was not filed.

The plaintiff should have filed an interpleader before the September 14, 2017 bankruptcy petition, before First Capital Retail filed on November 8, 2017 the motion to avoid preferential transfer, and before the sale of First Capital Retail's assets in March and April 2018. In other words, none of the litigation involving the avoidance motion and sale of First Capital Retail's assets was necessary.

The plaintiff did not file the interpleader until March 22, 2018, nearly eight months after MCA's August 2, 2017 restraint notice. The plaintiff has missed the main objective of interpleader — promoting early litigation on the ownership of the fund, thus preventing its dissipation. Tise at 426.

The plaintiff's attempt to place blame with the defendants for the delay is disingenuous. The standard is not what the defendants think about the filing and prosecution of the interpleader. The standard is whether there is a

colorable competing claim against the funds. "This is not an onerous requirement." Michelman at 894. It is incumbent upon the stakeholder to file and prosecute the interpleader, not on the defendants. Interpleader is as adversarial in nature as is any other proceeding in our judicial system. And, irrespective of what the defendants say or want, this court will not allow compensation that is unreasonable or is for unnecessary services.

The court also rejects the contention that the plaintiff was attempting to save costs and expenses in permitting the defendants "as long as they wanted to try and negotiate a settlement." Docket 96 at 3. Obviously, this is not what happened. Delay led to the plaintiff incurring tens of thousands more than if it had filed the interpleader from the get-go.

For example, the plaintiff incurred $7,842.50 in fees solely in addressing an avoidance motion. The motion by First Capital Retail was directed against the plaintiff and MCA. This indicates that an interpleader was needed early on in the history between the parties. The plaintiff also incurred $4,139.50 in connection with the sale of First Capital Retail's assets.

Much of the litigation involving the plaintiff, both inside and outside the interpleader, would not have happened had the plaintiff filed an interpleader pre-petition or early in the bankruptcy case and then promptly obtained a dismissal and discharge for itself. Much of the litigation costs the plaintiff incurred was unnecessary and self-inflicted. For instance, by waiting as long as it did to file the interpleader, the plaintiff became engaged in litigation relating to the sale of First Capital Retail's assets and involving the buyer of the assets, 13th Floor/Pilot. 13th Floor/Pilot did not come into the bankruptcy case until early 2018.

Further, the plaintiff has never had interest in the funds at stake. The dispute over the funds has always been between First Capital Retail and MCA. By involving itself in matters other than filing and prosecuting an interpleader, the plaintiff has violated a principal interpleader policy of making certain the fee award does not unnecessarily deplete the fund, at the expense of the party ultimately deemed entitled to it. Tise at 427. The court will not award any fees or costs pertaining to litigation as to the avoidance motion and sale of First Capital Retail's assets.

The court will not award such compensation to the plaintiff under its merchant agreement either. The plaintiff claims that paragraph 19.12 of its merchant agreement allows it to recover compensation:

"***19.12 Other Debits.*** *We may also debit your Settlement Account or your settlement funds in the event we are required to pay Card Organization fees, charges, fines, penalties, or other assessments as a consequence of your sales activities. Such debits, shall not be subject to any limitations of time specified anywhere in the Agreement, including, without limitation the following . . . Costs or expenses associated with responding to any subpoena, garnishment, levy or other legal process associated with the your [sic] account in an amount no less than $150.00.*"

Docket 61 at 7.

The court disagrees that this provision allows the plaintiff to provide services that are not necessary for the preservation of the funds. Nor is the provision a license for the plaintiff to charge unreasonable fees for preserving a fund in which it has no interest.

The court is not convinced that the initial correspondence services ($2,480), interpleader services ($19,510.50), and fee motion services ($5,534) are reasonable. It should not have taken $27,524.50 ($2,480 + $19,510.50 + $5,534) for the plaintiff to file this interpleader, obtain dismissal and discharge of itself, and apply for compensation.

The $2,480 of fees for the initial correspondence services are not reasonable. Most of those services included communications about First Capital Retail or with First Capital Retail, after it had filed for bankruptcy. See Docket 63, Ex. 1 at 1. As discussed above, by the time First Capital Retail filed for bankruptcy, there was a colorable competing claim to the funds, warranting an interpleader. The court will decrease the initial correspondence fees to $1,000.

The $5,534 of fees for the instant compensation motion are also unreasonable. The motion is 11 pages long, with a supporting declaration of five pages of narrative and 12 pages of time entries. The motion should not have been difficult to prepare. The court will award $2,000 for the compensation motion.

As to the interpleader, the complaint and one amended complaint filed are nine pages each and are substantially similar in all aspects. Both complaints are form-based, with only approximately one and one-half pages of narrative. The remainder of the complaints are boxes and fill-in-the-blank basic information about the case. Dockets 1 & 39. The facts in the complaint are quite simple and involve little history. Fees of more than $7,000 for filing and prosecuting the action are not reasonable. The court will award $7,000 for the plaintiff's filing and prosecution of the interpleader.

In summary, the court will award fees in the amount of $10,000, plus $755.78 as reimbursement for expenses ($838.18 - $82.40 for Court Call charges on two hearings pertaining to the sale of First Capital Retail's assets), for a total of $10,755.78. The motion will be granted in part.

3. 17-26125-A-11 FIRST CAPITAL RETAIL, L.L.C.
18-2030
FIRST DATA MERCHANT SERVICES L.L.C. V. MCA RECOVERY, L.L.C. ET AL

STATUS CONFERENCE
5-17-18 [39]

Tentative Ruling: None.

4. 15-29136-A-12 P&M SAMRA LAND INVESTMENTS LLC MAS-1
18-2095
P&M SAMRA LAND INVESTMENTS, LLC V. AGSEEDS UNLIMITED

MOTION TO DISMISS ADVERSARY PROCEEDING
7-16-18 [25]

Tentative Ruling: The motion will be granted.

Defendant Ag-Seeds Unlimited seeks dismissal of the complaint for injunctive relief by plaintiff P&M Samra Land Investments, L.L.C. (the debtor in the underlying chapter 12 case), under Fed. R. Civ. P. 12(b)(6), as made applicable here by Fed. R. Bankr. P. 7012(b).

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).

The complaint seeks to enjoin the defendant's efforts to collect judgments from nondebtors. The plaintiff complains that these collection activities are hampering the plaintiff's ability to reorganize in the underlying chapter 12

case. The plaintiff has obtained plan confirmation and its assets are being administered in accordance with the terms of the plan.

The plaintiff complains that the defendant is enforcing judgments entered against the plaintiff, the plaintiff's principals, Manjit Samra and Steven Samra, and another corporation, Stone Lake Farm Enterprises, Inc., also owned and operated by the Samra family. The judgments are being enforced in the context of pending state court litigation.

The plaintiff seeks to enjoin the defendant from continuing with the state court litigation.

The court cannot award relief to parties who are not named as plaintiffs or defendants in this adversary proceeding. Manjit Samra, Steven Samra, and Stone Lake Farm Enterprises, Inc. are not parties to this adversary proceeding. The court cannot award relief in favor of these non-parties because doing so would deprive the defendant of its right to confront them.

Even if the court were to overlook the foregoing, as a general rule, the automatic stay of 11 U.S.C. § 362(a) protects only the debtor, property of the debtor, or property of the estate. It does not protect non-debtor parties or their property. While the Bankruptcy Code provides for a co-debtor stay, it is available only in chapter 13 proceedings. See 11 U.S.C. § 1301(a). This is a chapter 12 proceeding.

Also, nothing in the plaintiff's chapter 12 plan enjoined the defendant from enforcing orders or judgments entered against non-debtor parties. See Case No. 15-29136, Docket 453. Nor is there a basis for such an injunction. See, e.g., 11 U.S.C. § 524(g) (contemplating injunctive relief in connection with a chapter 11 discharge). The underlying bankruptcy case is a chapter 12 proceeding and the plaintiff is far from obtaining a bankruptcy discharge.

In this case, then, neither 11 U.S.C. § 362(a) nor an injunction or release in the plan bars the defendant from proceeding against guarantors, sureties, corporate affiliates, or other non-debtor parties liable also liable for the plaintiff's debts. Boucher v. Shaw, 572 F.3d 1087, 1092 (9th Cir. 2009); Chugach Forest Products, Inc. v. N. Stevedoring & Handling Corp. (In re Chugach Forest Products, Inc.), 23 F.3d 241, 246 (9th Cir. 1994).

The Ninth Circuit has consistently refused to apply the unusual circumstances exception to this rule.

"*We have refused to extend the automatic stay to enjoin claims against a contractor-debtor's surety, even though a surety bond guarantees the contractor-debtor's performance. See In re Lockard, 884 F.2d 1171, 1178-79 (9th Cir.1989). In Lockard, we reasoned that extending the stay was inappropriate because the surety, not the contractor-debtor, puts its property directly at risk of liability to creditors in the event of nonpayment by the contractor-debtor, and therefore a surety bond is not property of the bankruptcy estate. Id. at 1178. We found that this was the case even though allowing a claim against the surety would trigger the surety's right to recourse against the debtor. Id. Similarly, the automatic stay does not protect the property of parties such as officers of the debtor, even if the property in question is stock in the debtor corporation, and even if that stock has been pledged as security for the debtor's liability. Advanced Ribbons, 125 B.R. at 263.*

"*We have never addressed the question whether a company's bankruptcy affects the liability of its individual managers under the FLSA. But our case law regarding guarantors, sureties and other non-debtor parties who are liable for the debts of the debtor leaves no doubt about the answer: the Castaways bankruptcy has no effect on the claims against the individual managers at issue here.*"

Boucher at 1092-93.

The Ninth Circuit has held that the usual preliminary injunction standard applies to stays of proceedings against non-debtors under 11 U.S.C. § 105(a). Solidus Networks, Inc. v. Excel Innovations, Inc. (In re Excel Innovations, Inc.), 502 F.3d 1086, 1094 (9th Cir. 2007).

"*The BAP relied on the 'unusual circumstances' doctrine the Fourth Circuit developed in Piccinin, which provides an exception to the general rule that the automatic stay does not apply to actions against non-debtors. Piccinin held that the automatic stay may be extended if unusual circumstances make the interests of the debtor and the non-debtor defendant inextricably interwoven. 788 F.2d at 998–1004 (affirming stay of actions against debtor's officers under a combination of § 362(a), § 105(a), and the court's inherent equitable powers); see also S.I. Acquisition, Inc. v. Eastway Delivery Serv., Inc. (In re S.I. Acquisition, Inc.), 817 F.2d 1142, 1147–50 (5th Cir.1987) (extending the § 362(a) automatic stay to action against debtor's alleged alter egos). The BAP treated the 'unusual circumstances' doctrine and the usual preliminary injunction standard as separate and distinct bases for affirming the stay. That is error, because the 'unusual circumstances' doctrine does not negate the traditional preliminary injunction standard. As we have noted, stays under the doctrine, 'although referred to as extensions of the automatic stay, were in fact injunctions issued by the bankruptcy court after hearing and the establishment of unusual need to take this action to protect the administration of the bankruptcy estate.' Chugach Forest Prods., 23 F.3d at 247 n. 6 (quoting Patton v. Bearden, 8 F.3d 343, 349 (6th Cir.1993)). Indeed, Piccinin itself applied the usual preliminary injunction standard in affirming the stay. 788 F.2d at 1008.*"

Excel at 1096.

"The majority of circuits that have reviewed injunctions staying actions against non-debtors have applied the usual preliminary injunction standard." Excel at 1094. "We hold that the usual preliminary injunction standard applies to stays of proceedings against non-debtors under § 105(a)." Excel at 1094.

"*We hold that a debtor seeking to stay an action against a non-debtor must show a reasonable likelihood of a successful reorganization. 'The inquiry for a preliminary injunction necessarily focuses on the outcome of a later proceeding, at which time the merits of the questions giving rise to the litigation will be decided.' Commonwealth Oil, 805 F.2d at 1189. Within the confines of the instant adversary proceeding, however, there is no "later proceeding" at which time Excel's claims will reach final disposition. Excel has already received the maximum injunctive relief—a stay until confirmation of a reorganization plan—that the bankruptcy court could grant. See Am. Hardwoods, Inc. v. Deutsche Credit Corp. (In re Am. Hardwoods, Inc.), 885 F.2d 621, 624–27 (9th Cir.1989) (bankruptcy courts lack the power to issue injunctions that outlast plan confirmation). In this context, the most relevant 'future proceeding' is the debtor's reorganization. Because Excel's claim is ultimately*

that arbitration would harm its ability to reorganize, it makes sense to require a showing of a 'reasonable likelihood of a successful reorganization.' Homestead Holdings, Inc. v. Broome & Wellington (In re PTI Holding Corp.), 346 B.R. 820, 826 (Bankr. D. Nev. 2006) (considering likelihood of success in reorganization under merits prong of preliminary injunction inquiry); see also Eagle-Picher Indus., 963 F.2d at 859-60 (same); In re Monroe Well Serv., Inc. 67 B.R. 746, 751-52 (Bankr. E.D. Pa. 1986) (same); Otero Mills, Inc. v. Sec. Bank & Trust (In re Otero Mills, Inc.), 21 B.R. 777, 779 (Bankr. D.N.M. 1982) (same); but see FTC v. First Alliance Mortgage Co. (In re First Alliance Mortgage Co.), 264 B.R. 634, 653 (C.D. Cal. 2001) (collecting conflicting cases). Moreover, because the gravamen of Excel's adversary complaint is that the arbitration would harm the bankruptcy estate, adopting Appellants' approach would collapse the traditionally distinct merits and hardship prongs into a single hardship inquiry."

Excel at 1095-96.

"*In sum, our usual preliminary injunction standard applies to applications to stay actions against non-debtors under § 105(a). In granting or denying such an injunction, a bankruptcy court must consider whether the debtor has a reasonable likelihood of a successful reorganization, the relative hardship of the parties, and any public interest concerns if relevant.*"

Excel at 1096.

The complaint does not state a plausible claim for injunctive relief. There are no factual allegations amounting to plausible assertions that the defendant's enforcement of its judgments are in any way in breach of the plaintiff's confirmed chapter 12 plan.

The plaintiff alleges that what the defendant is doing in the state court litigation will have and/or already has "significant monetary effect" on the plaintiff. "It has diverted financial resources that could be otherwise directed towards the Plaintiff's reorganization." "Enforcement activities . . . will unduly pressure and distract [the plaintiff] from the task of running its operation and working on the many tasks necessary for proper administration of its' [*sic*] Plan." Docket 1 at 7.

However, there are no facts in the complaint to support this conclusory allegation. There are no facts alleged that define and give context to "significant monetary effect," "diverted financial resources," specific "[e]nforcement activities," or "unduly pressur[ing] and distract[ing] [the plaintiff] from . . . its operation and . . . proper administration."

Aside from alleging that the plaintiff will suffer "due to lack of either credit or financing," the complaint does not say what specific harm the plaintiff will suffer if the court does not enjoin the defendant. Docket 1 at 8.

The complaint alleges that the plaintiff has lost "post-confirmation operational financing as result of [the defendant's] action and negative communication against Stone Lake's account at First Northern Bank." Docket 1 at 5. But, once again, the plaintiff and Stone Lake are separate entities. The court knows of no basis for treating them as one entity. The court confirmed a chapter 12 plan for the plaintiff only. The plan does not involve the assets and liabilities of the plaintiff and Stone Lake. And, if Stone Lake is indeed the alter ego of the plaintiff, the plaintiff has misrepresented its

separate corporate identity when prosecuting a chapter 12 bankruptcy without disclosing and including and the assets and liabilities of Stone Lake.

In other words, it is not plausible that the defendant's judgment enforcement actions against an entity distinct from the plaintiff are causing the plaintiff to lose financing from a bank. The plaintiff previously represented that Stone Lake and is a separate legal entity, with separate assets and liabilities. If the plaintiff and Stone Lake are truly separate and independent legal entities, with separate assets and liabilities, and are not the alter ego of one another, debt enforcement actions against one entity should not have an impact on the bankruptcy of the plaintiff.

The exhibits to the complaint, including orders for examination, levy orders, and a bench warrant, concern parties related to the plaintiff (the plaintiff's counsel, Coldwell Banker Yuba City) but not the plaintiff. Docket 1 at 6; Docket 6.

Once again, the court will not award relief as to parties not named in the complaint. And, the complaint does not explain how the defendant's enforcement of a judgment against persons other than the plaintiff has impeded administration of the plaintiff's bankruptcy plan.

The plaintiff has not stated a claim upon which the court can enjoin the defendant in its enforcement of validly entered judgments.

Finally, the court does not have post-confirmation subject matter jurisdiction over the claim, even if adequately pleaded. The plaintiff's plan was confirmed on March 29, 2017, whereas this adversary proceeding was filed on June 17, 2018. The confirmed plan revested all property of the estate back into the plaintiff. Case No. 15-29136, Docket 453 at 9.

As such, the more limited post-confirmation jurisdiction standard of Pegasus and its progeny applies here. See State of Montana v. Goldin (In re Pegasus Gold Corp.), 394 F.3d 1189, 1194 (9th Cir. 2005).

The treatment of the "related to" jurisdiction standard of Pacor by Binder v. Price Waterhouse & Co. (In re Resorts Int'l, Inc.), 372 F.3d 154, 164-65 (3rd Cir. 2004) shows that the post-confirmation jurisdiction test in Resorts and Pegasus was designed to apply only to post-confirmation jurisdiction where there is no bankruptcy estate any longer.

"A bankruptcy court's 'related to' jurisdiction is very broad, including nearly every matter directly or indirectly related to the bankruptcy." Wilshire Courtyard v. California Franchise Tax Board (In re Wilshire Courtyard), 729 F.3d 1279, 1287 (9th Cir. 2013) (quoting Sasson v. Sokoloff (In re Sasson), 424 F.3d 864, 868 (9th Cir. 2005)).

On the other hand, this court's post-confirmation jurisdiction is "necessarily more limited" than its pre-confirmation "related to" jurisdiction. State of Montana v. Goldin (In re Pegasus Gold Corp.), 394 F.3d 1189, 1194 n.1 (9th Cir. 2005).

Under Pegasus, the test for post-confirmation jurisdiction, where there is no bankruptcy estate any longer, is whether "'there is a close nexus to the bankruptcy plan or proceeding sufficient to uphold bankruptcy court jurisdiction over the matter.'" Pegasus at 1194 (quoting In re Resorts Int'l, Inc., 372 F.3d 154, 166-67 (3rd Cir. 2004)).

In applying the close nexus test, the Pegasus court focused on pre-confirmation links, namely, the Zortman Agreement and the plan itself. The Zortman Agreement was a settlement agreement among the debtor, the State of Montana, and other parties, that had been approved by the bankruptcy court few days prior to plan confirmation. Pegasus at 1192.

The Pegasus court concluded that matters affecting the interpretation, implementation, consummation, execution, or administration of the confirmed plan will typically have the requisite close nexus. Pegasus at 1193-94. The court indicated also that when the underlying litigation does not affect implementation of a plan but merely increases assets available for distribution under the plan, related to jurisdiction does not exist. "We specifically note that in reaching this decision, we are not persuaded by the Appellees' argument that jurisdiction lies because the action could conceivably increase the recovery to the creditors. As the other circuits have noted, such a rationale could endlessly stretch a bankruptcy court's jurisdiction." Pegasus at 1194 n.1 (citing Resorts, at 170); see also Battle Ground Plaza, LLC v. Ray (In re Ray), 624 F.3d 1124, 1133-35 (9th Cir. 2010); Sea Hawk Seafoods, Inc. v. State of Alaska (In re Valdez Fisheries Dev. Ass'n, Inc.), 439 F.3d 545, 548 (9th Cir. 2006); Heller Ehrman LLP v. Gregory Canyon Ltd. (In re Heller Ehrman LLP), 461 B.R. 606, 608-10 (Bankr. N.D. Cal. 2011).

In the more recent Wilshire Courtyard decision, the Ninth Circuit revisited the post-confirmation jurisdiction test under Pegasus, stating that:

"*The 'close nexus' test determines the scope of bankruptcy court's post-confirmation 'related to' jurisdiction. Pegasus Gold Corp., 394 F.3d at 1194. As adopted from the Third Circuit, the test encompasses matters 'affecting the "interpretation, implementation, consummation, execution, or administration of the confirmed plan."' Id. (quoting Binder v. Price Waterhouse & Co. (In re Resorts Int'l, Inc.), 372 F.3d 154, 166-67 (3d Cir.2004)). The close nexus test 'recognizes the limited nature of post-confirmation jurisdiction but retains a certain flexibility.' Id.*

"*Applying the close nexus test in Pegasus Gold, we held that 'related to' jurisdiction existed because some claims concerning post-confirmation conduct—specifically, alleged breach of the liquidation/reorganization plan and related settlement agreement as well as alleged fraud in the inducement at the time of the plan and agreement—would 'likely require interpretation of the [settlement agreement and plan].' Id. The claims and remedies could also 'affect the implementation and execution' of the as-yet-unconsummated plan itself. Id.*

"*. . .*

"*The [lower court] BAP 'distill[ed]' too narrow a version of the 'close nexus' test from Valdez Fisheries and Ray: '[T]o support jurisdiction, there must be a close nexus connecting a proposed post-confirmation proceeding in the bankruptcy court with some demonstrable effect on the debtor or the plan of reorganization.' (Citation omitted). Valdez Fisheries and Ray simply applied the Pegasus Gold 'close nexus' test to the unique—and distinguishable—facts of those cases. We reaffirm that a close nexus exists between a post-confirmation matter and a closed bankruptcy proceeding sufficient to support jurisdiction when the matter 'affect[s] the interpretation, implementation, consummation, execution, or administration of the confirmed plan.' Pegasus Gold Corp., 394 F.3d at 1194 (internal citation and quotation marks omitted).*

"*The Pegasus Gold 'close nexus' test requires particularized consideration of the facts and posture of each case, as the test contemplates a broad set of sufficient conditions and 'retains a certain flexibility.' Id. Such a test can only be properly applied by looking at the whole picture.*

"*. . .*

"*Thus, under the 'close nexus' test, post-confirmation jurisdiction in this case extends to matters such as tax consequences that likely would have affected the implementation and execution of the plan if the matter had arisen contemporaneously. This application of the Pegasus Gold test does not prejudice either taxing entities or bankruptcy parties, nor requires the tax consequences to be assessed before transactions are consummated and taxes are due. It merely allows the bankruptcy court to retain jurisdiction over post-confirmation, post-consummation disputes related to the interpretation and execution of the confirmed Plan as if they had arisen prior to consummation. Thus, we reject CFTB's argument that jurisdiction was lacking because the bankruptcy case had been long since closed by the time the tax dispute began, and that neither the Plan nor Reorganized Wilshire could be affected.*"

Wilshire Courtyard at 1287, 1288-89, 1292-93.

This court has no post-confirmation subject matter jurisdiction over the subject claim. There are no facts in the complaint stating why or how the actions of the defendant have affected the interpretation, implementation, consummation, execution, or administration of the chapter 12 plan. Thus, even if there were sufficient facts pleaded, rising to the level of plausible liability under the claim, there is no nexus — much less a close nexus — between the defendant's actions and the plaintiff's chapter 12 plan or bankruptcy proceeding.

The motion will be granted and the complaint against the defendant will be dismissed.

5.	15-29136-A-12 18-2095	P&M SAMRA LAND INVESTMENTS L.L.C. P&M SAMRA LAND INVESTMENTS, L.L.C. V. AGSEEDS UNLIMITED	STATUS CONFERENCE 6-17-18 [1]

Tentative Ruling: None.

6.	17-22851-A-7 17-2142	ABDUL/TAHMINA RAUF PA-7 STOHLMAN AND ROGERS, INC. V. RAUF ET AL	MOTION TO STRIKE OR FOR ENTRY OF DEFAULT JUDGMENT 7-23-18 [90]

Tentative Ruling: The motion will be granted in part.

The plaintiff, Stohlman & Rogers, Inc. (dba Lakeview Petroleum Company), asks the court to strike the answer of the defendant Abdul Rauf, one of the debtors in the underlying bankruptcy case. The plaintiff filed four motions to compel the production of documents, the first two for failure to make initial disclosures and the last two for failure to respond to propounded discovery. The plaintiff dismissed the first motion as a courtesy to the defendant's counsel. The other three motions were granted or granted in part. In its ruling granting the last and fourth motion, the court made the following findings and conclusions, among others:

"*The defendant Abdul Rauf was required to comply with the [court's prior] order [compelling the defendant to produce discovery] by March 2. The defendant did not. The defendant knew of the order when it was entered on February 26. Both defendants and their counsel were served with the order. Dockets 54 & 55.*

"*Further, the plaintiff contacted the defendant through several times after March 2 without any results. The plaintiff's counsel contacted the defendants' counsel about the non-compliance via telephone and email on March 7 and 8. The plaintiff's counsel also conferred about the non-compliance with the defendants' counsel face to face at the April 26 deposition of Tahmina Rauf. The plaintiff sent another letter to the defendant on May 4. The plaintiff's counsel once again conferred about the non-compliance with the defendants' counsel face to face at the May 17 deposition of Abdul Rauf. The plaintiff's counsel called and wrote another email to the defendants' counsel on May 29, once again without a response. The defendant knew of the order and has known of the order all along. Despite repeatedly promising to follow through on compliance with the order, the defendant has done nothing, necessitating the filing of this motion.*

"*The plaintiff has demonstrated that the violation has been willful. The defendant has intentionally ignored the order. The documents have not been produced and the sanction of $772 has not been paid. Nor has the defendant applied with this court for a protective order or some other stay. The defendant has not stated that he is unable to comply with the order.*

"*Given the foregoing, the defendant Abdul Rauf is in contempt. The court will order the defendant Abdul Rauf to pay: $1,000 in attorney's fees and $53.75 in expenses for the plaintiff's attempts to enforce the February 26 order and $1,500 in attorney's fees for the preparation and prosecution of this motion. In addition, the defendant shall comply with the February 26 order no later than July 9. If the defendant does not comply by July 9, the court will strike said defendant's answer on the plaintiff's further motion. These sanctions and relief are intended to coerce compliance with the order. The foregoing sums shall be paid to the plaintiff's counsel by no later than July 9.*"

Docket 79 at 3-4.

The court's entire ruling on the plaintiff's fourth motion to compel is incorporated here by reference. Docket 79.

The court entered an order on the plaintiff's fourth motion to compel on July 5, 2018. Docket 83. Once again, defendant Abdul Rauf has not complied with the order of the court. He has not paid the sums ordered by the court and has not complied with the court's orders directing him to produce discovery propounded by the plaintiff. Accordingly, the court will strike the answer of Abdul Rauf only. See Docket 7. This has no impact on the answer of Tahmina Rauf, the other defendant in this case.

It is difficult to believe the plaintiff incurred $6,280.10 in attorney's fees preparing this motion. The court previously determined that Abdul Rauf was in contempt of court and ordered that "[i]f the defendant does not comply by July 9, the court will strike said defendant's answer on the plaintiff's further motion." Docket 79 at 4. It should have not required more than $1,000 to file a motion explaining that Abdul Rauf has not complied with the court's prior order and to request that his answer be stricken.

The court will not enter a default judgment against Abdul Rauf. Without an answer, the plaintiff may ask the clerk to enter his default. Then, a trial will be scheduled as to the other defendant; the plaintiff may request a judgment at trial against both defendants without Abdul Rauf's participation. The motion will be granted in part.

7. 16-21585-A-11 AIAD/HODA SAMUEL — MOTION TO USE CASH COLLATERAL AND FOR REPLACEMENT LIENS
FWP-6 — 8-6-18 [1139]

Tentative Ruling: The motion will be conditionally granted.

The chapter 11 trustee seeks authority to use cash collateral generated from the rental of a shopping center in Rio Linda, California (obtained prior to its sale in early 2018), for the period of September 1, 2018 through the earlier of December 31, 2018 or the effective date of the trustee's confirmed chapter 11 plan. The trustee proposes to use the cash to pay expenses such as quarterly U.S. Trustee fees, banking fees, trustee fees, estate professional fees (as authorized by court order), etc. The United States is the creditor secured by this cash.

The chapter 11 trustee also seeks permission to use cash collateral generated from the rent of the remaining two residential real properties in the estate (148 Estes Way rented at $1,000 a month and 209 Prairie Circle rented at $1,057 a month), for the same period. The trustee proposes to use the rental income to maintain the properties' condition and pay items such as taxes, insurance, and utilities. JPMorgan Chase Bank and U.S. Bank are the creditors secured by this cash.

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."

The trustee contends that the creditors will be consenting to the proposed cash collateral use. He also says that all creditors are adequately protected. Funds have been set aside to pay the claim of the United States in full and there is equity in the residential properties to protect the interests of JPMorgan Chase Bank and U.S. Bank in the cash.

The proposed use of cash collateral will allow the estate to continue operating and will preserve the going concern of the residential properties, allowing the trustee to continue operating them, pending further administration under the proposed chapter 11 plan.

The trustee proposes to grant the secured creditors replacement liens in further generated cash of the estate. The replacement liens, to the extent applicable, shall not attach to the part of the further cash collateral designated as a "carve-out" for administrative expenses.

While the proposed budget here is similar to the budgets pursuant to which the court has authorized prior cash collateral use, some items in the budget are not adequately explained. For instance, it is not clear:

— why the trustee is making adequate protection payments on the Estes Way

property but he is not making such payments on the Prairie Circle property;

— what is the purpose of the $500 a month for August and September's plumbing repair expenses, for the Prairie Circle property;

— why the excessive $500 a month for August and September's pest control expenses, for the Prairie Circle property;

— what is the purpose of the $1,000 a month for August and September's interior repair expenses, for the Prairie Circle property;

— what is the purpose of the $1,000 a month for September's exterior repair expenses, for the Prairie Circle property.

Docket 1142, Ex. A.

Subject to the trustee explaining the above items, the proposed use of cash collateral is in the best interests of the creditors and the estate. The motion will be conditionally granted.

By authorizing cash collateral use, the court is not approving the compensation of estate professionals, even if such compensation is accounted for in the cash collateral budget.

8.	17-25190-A-7	CARL KAUT	MOTION FOR
	17-2204	LBG-101	SUMMARY JUDGMENT
	MCKINZIE V. KAUT		8-6-18 [29]

Final Ruling: The motion will be dismissed without prejudice because it violates Local Bankruptcy Rule 9014-1(f)(2)(A), which prohibits the alternative 14-day notice procedure to be used in connection with adversary proceedings. This motion was filed and served on August 6, 14 days prior to the August 20 hearing on the motion. Dockets 29 & 32.