UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

Honorable Fredrick E. Clement
Fresno Federal Courthouse
2500 Tulare Street, 5th Floor
Courtroom 11, Department A
Fresno, California

PRE-HEARING DISPOSITIONS

DAY: WEDNESDAY
DATE: AUGUST 22, 2018
CALENDAR: 10:00 A.M. CHAPTER 7 ADVERSARY PROCEEDINGS

Each matter on this calendar will have one of three possible designations: No Ruling, Tentative Ruling, or Final Ruling. These instructions apply to those designations.

No Ruling: All parties will need to appear at the hearing unless otherwise ordered.

Tentative Ruling: If a matter has been designated as a tentative ruling it will be called. The court may continue the hearing on the matter, set a briefing schedule or enter other orders appropriate for efficient and proper resolution of the matter. The original moving or objecting party shall give notice of the continued hearing date and the deadlines. The minutes of the hearing will be the court's findings and conclusions.

Final Ruling: Unless otherwise ordered, there will be no hearing on these matters. The final disposition of the matter is set forth in the ruling and it will appear in the minutes. The final ruling may or may not finally adjudicate the matter. If it is finally adjudicated, the minutes constitute the court's findings and conclusions.

Orders: Unless the court specifies in the tentative or final ruling that it will issue an order, the prevailing party shall lodge an order within 14 days of the final hearing on the matter.

1. 18-10136-A-7 **IN RE: DAVID/KARRIE WHEELER**
18-1015

CONTINUED STATUS CONFERENCE RE: COMPLAINT
4-12-2018 [1]

EMERSON ET AL V. WHEELER
ROBERT KRASE/ATTY. FOR PL.

Final Ruling

The status conference is continued to September 18, 2018, at 10:00 a.m. If judgment has not been entered, not later than September 4, 2018, the plaintiff shall file a status report.

2. 18-10136-A-7 **IN RE: DAVID/KARRIE WHEELER**
18-1015

MOTION FOR ENTRY OF DEFAULT JUDGMENT
7-17-2018 [16]

EMERSON ET AL V. WHEELER
ROBERT KRASE/ATTY. FOR MV.

Final Ruling

Motion: Entry of Default Judgment
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Granted
Order: Prepared by movant consistent with this ruling
Judgment: Prepared by the movant consistent with this ruling

ENTRY OF DEFAULT

The clerk has entered default against the defendant in this proceeding. The default was entered because the defendant failed to appear, answer or otherwise defend against the action brought by the plaintiff. Fed. R. Civ. P. 55(b)(2), *incorporated by* Fed R. Bankr. P. 7055. The plaintiff has moved for default judgment.

DEFAULT JUDGMENT

Under Federal Rule of Civil Procedure 8(b)(6), the allegations of the complaint are admitted except for allegations relating to the amount of damages. Fed. R. Civ. P. 8(b)(6), *incorporated by* Fed. R. Bankr. P. 7008(a). Having accepted the well-pleaded facts in the complaint as true, and for the reasons stated in the motion and supporting papers, the court finds that default judgment should be entered against the defendant consistent with this ruling. Fed. R. Civ. P. 55(b)(2), *incorporated by* Fed. R. Bankr. P. 7055.

Section 523(a)(2)(B)

To succeed on a nondischargeability claim under § 523(a)(2)(B), a creditor must satisfy the requisite elements under that statute. The complaint sufficiently alleges a claim under § 523(a)(2)(B). Judgment shall be entered in favor of the plaintiffs on the § 523(a)(2)(B) claim. As a result, the court need not address the alternative nondischargeability claims under § 523(a)(2)(A) and § 523(a)(6).

Elder-Abuse Claim

In addition, the facts in the complaint, considered along with the declaration of the plaintiffs, constitute a viable claim for elder abuse. Plaintiffs allege treble damages arising from this claim, which claim is alleged to have arisen from the fraud and false representations committed by the defendant, under California Welfare and Institutions Code § 15657.

Financial Abuse of an Elder

To allege a claim for elder abuse under California law, a plaintiff must show that the defendant: "(1) subjected an elder to statutorily-defined physical abuse, neglect, or **financial abuse**; and (2) acted with recklessness, malice, oppression, or **fraud** in the commission of the abuse." *Davenport v. Litton Loan Servicing*, LP, 725 F. Supp. 2d 862, 879 (N.D. Cal. 2010); *accord Von Mangolt Hills v. Intensive Air, Inc.*, No. C06-03300 JSW, 2007 WL 521222, at *2 (N.D. Cal. Feb. 15, 2007).

An elder-abuse claim based on "financial abuse" requires satisfying the applicable statutory elements. Section 15610.30 of the California Welfare and Institutions Code prescribes the circumstances under which financial abuse of an elder occurs. The admitted facts of the complaint also satisfy a claim under Cal. Welf. & Inst. Code § 15610.30 for financial abuse of an elder. The defendant has taken, obtained, and retained personal property of the plaintiffs, who have both been above 70 years of age at all relevant times, including in 2014 when the abuse began. The defendant took, obtained, and retained such personal property with intent to defraud under the same facts giving rise to a valid claim under § 523(a)(2)(B). The facts admitted in the complaint support a claim for financial abuse of an elder.

In addition, Cal. Welf. & Inst. Code § 15610.30(b) and (c) apply in this case. Under § 15610.30(c), the financial abuse is broadly defined to mean the deprivation of any property right of an elder, including taking, appropriating, obtaining, or retaining real or personal property of an elder by means of an agreement (e.g., a loan agreement). And § 15610.30(b) deems a person to have taken, appropriated, obtained, or retained real or personal property for a wrongful use if the person knew or should have known that this conduct is likely to be harmful to the elder.

Because the defendant was an in-home care provider who met with the plaintiffs on more than one occasion, including the occasion when

she initially showed up at the plaintiffs home to request a loan of money, she knew or should have known that her fraudulent conduct was likely to be harmful to the plaintiffs and that the plaintiffs were elders (over age 65). Cal. Welf. & Inst. Code § 15610.30.

Liability for Financial Abuse

The liability for financial abuse of an elder is set forth in California Welfare and Institutions Code § 15657.5. Compensatory damages may be awarded under this statute as well as other remedies provided for by law.

Treble damages are also authorized under § 3345 of the California Civil Code whenever an action is brought by, or on behalf of, a senior citizen to redress unfair or deceptive acts or practices against such senior citizens. A senior citizen is defined as a person who is 65 years of age or older. Cal. Civ. Code § 1761(f).

The court has discretion to award any amount **up to** three times greater than the damages authorized by statute or the damages the court would award in the absence of a finding under Cal. Civ. Code § 3345(b). *See id.* § 3345(b). Under § 3345(b)(1), the court may award **up to** three times damages if the defendant knew or should have known that his or her conduct was directed to one or more senior citizens. Under § 3345(b)(2), the court may award **up to** three times damages "if defendant's conduct caused one or more senior citizens or disabled persons to suffer: loss or encumbrance of a primary residence, principal employment, or **source of income** . . . ."

These statutory conditions for an award of up to treble damages have been satisfied. Given the facts of the complaint and the evidentiary record, the court will award treble damages against the defendant in this case.

AMOUNT OF JUDGMENT

Based on the Supreme Court's decision in *Cohen v. de la Cruz*, all liability (all debt) arising from one of the grounds for nondischargeability under § 523(a)—including elder-abuse liability-is nondischargeable. 523 U.S. 213 (1998). In *Cohen*, the Court held that treble damages and attorney's fees were included within the nondischargeable debt arising from fraudulently obtained rent. *See Cohen v. De La Cruz*, 523 U.S. 213, 218-21, 223 (1998) (interpreting "any debt for" fraud under § 523(a)(2)(A) to mean any liability arising from or on account of debtor's fraud, including a treble damages award and attorney's fees).

In this case, the court will treble the damage award based on the elder-abuse claim and § 3345 of the California Civil Code. This means that the nondischargeable amount of the debt arising from the fraud, § 523(a)(2)(B), includes not only the fraudulent loan obtained by the defendant ($135,594.40 plus interest at the legal rate) but also treble damages and attorney's fees based on elder abuse.

Under California Welfare and Institutions Code § 15657.5, the court may award the plaintiff reasonable attorney's fees and costs. The plaintiff may bring a separate motion for reasonable attorney's fees and costs. The amount so awarded shall be included in the amount of the judgment.

No punitive damages shall be awarded in this case.

In sum, the judgment will be **$406,782 plus prejudgment interest plus attorney's fees and costs.** This amount shall be nondischargeable under § 523(a)(2)(B).

The language of the judgment shall include the required statement provided by § 15657.5(e) of California Welfare and Institutions Code. This statement shall apply to all compensatory damages for the principal balance of the loan plus interest, plus treble damages for the elder-abuse liability arising from the same facts, plus reasonable attorney's fees and costs.

3. 18-11471-A-7 **IN RE: ARTURO/MARIA DE LOS ANGELES MACIAS**
18-1036

STATUS CONFERENCE RE: COMPLAINT
6-21-2018 [1]

CLARK V. MACIAS
BRAD CLARK/ATTY. FOR PL.

No Ruling

4. 17-12272-A-7 **IN RE: LEONARD/SONYA HUTCHINSON**
17-1076

CONTINUED PRE-TRIAL CONFERENCE RE: CROSSCLAIM
9-7-2017 [7]

HUTCHINSON ET AL V. SALVEN ET AL
RUSSELL REYNOLDS/ATTY. FOR PL.

No Ruling

5. 17-13776-A-7 **IN RE: JESSICA GREER**
18-1017

CONTINUED STATUS CONFERENCE RE: COMPLAINT
4-23-2018 [1]

SALVEN V. CALIFORNIA
DEPARTMENT OF FOOD &
SHARLENE ROBERTS-CAUDLE/ATTY. FOR PL.

Tentative Ruling

The status conference will be continued to September 18, 2018, at 10:00 a.m. to allow the State of California to file an answer.

6. 17-13776-A-7 **IN RE: JESSICA GREER**
18-1017 AGO-1

AMENDED MOTION TO DISMISS CAUSE(S) OF ACTION FROM COMPLAINT
6-22-2018 [13]

SALVEN V. CALIFORNIA
DEPARTMENT OF FOOD &
GARY ALEXANDER/ATTY. FOR MV.

Tentative Ruling

Motion: Dismiss (Subject Matter Jurisdiction, Failure to State a Claim)
Notice: LBR 9014-1(f)(1); written opposition filed
Disposition: Denied
Order: Civil minute order

Defendant California Department of Food and Agriculture ("CDFA") moves to dismiss the present complaint against it for lack of subject matter jurisdiction and failure to state a claim upon which relief may be granted. Plaintiff James E. Salven ("Salven") opposes.

FACTS

The facts are straight forward. Jessica Anne Greer ("Jessica") was married to Justin Greer ("Justin"). Justin had an interest in cattle. The cattle were sold and the CDFA is holding proceeds from the sale of that cattle. Jessica, but not Justin, filed a chapter 7 bankruptcy. Salven was appointed the chapter 7 trustee. Salven contends that Jessica has a community property interest in the cattle proceeds and has demanded that CDFA turnover those proceeds to the Estate of Jessica Greer. CDFA has refused to do so and either disputes (or is at least uncertain as to) Jessica's community property interest in the proceeds.

Salven filed an adversary proceeding against CDFA pleading two causes of action: (1) turnover of cattle proceeds, 11 U.S.C. 542;

and (2) declaratory relief that the cattle proceeds are the community property of Jessica. Salven's pleading states, "Trustee is informed and believes and thereon alleges that, at the time that Debtor filed her Chapter 7 case, she had a community property interest in proceeds from the sale of cattle (the "Cattle Proceeds)), in the custody of the California Department of Agriculture (the "CDFA")." Complaint ¶ 10, April 23, 2018, ECF #1.

CFDA moves to dismiss under Rules 12(b)(1) (subject matter) and 12(b)(6) failure to state a claim. The guts of the argument is that sovereign immunity precludes an action against the State of California, or one of its agencies, if there is a dispute over ownership of the property for which turnover is sought.

LAW

Challenges pleadings based on sovereign immunity are frequently raised either by Rule 12(b)(1) and by Rule 12(b)(6).

> Courts differ on whether a state's sovereign immunity defense under the 11th Amendment may be raised by a Rule 12(b)(1) motion. [*Warnock v. Pecos County, Texas* (5th Cir. 1996) 88 F3d 341, 343—claims barred by 11th Amendment sovereign immunity "can be dismissed only under Rule 12(b)(1)"; compare *Andrews v. Daw* (4th Cir. 2000) 201 F3d 521, 525, fn. 2—unclear whether 11th Amendment immunity should be raised under Rule 12(b)(1) or 12(b)(6); and *Smith v. Reyes* (SD CA 2012) 904 F.Supp.2d 1070, 1072—"Dismissal based on Eleventh Amendment immunity is not under Fed.R. Civ.P. 12(b)(1)"].

O'Connell and Stevenson, *California Practice Guide: Federal Civil Procedure Before Trial, California and Ninth Circuit Edits.*, Attacking the Pleadings § 9:76.18 (Rutter Group 2018).

Rule 12(b)(1)

A defendant may challenge jurisdiction by motion under Rule 12(b)(1). Fed. R. Civ. P. 12(b)(1), incorporated by Fed. R. Bankr. P. 7012(b).

The plaintiff bears the burden of proof. *Kokkonen v. Guardian Life Ins. Co. of America*, 511 US 375, 376-378 (1994); *In re Wilshire Courtyard,* 729 F3d 1279, 1284 (9th Cir. 2013). Attacks may be facial (on the complaint) or factual (speaking motions). This motion is of the former variety.

"A Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction may be made on the basis that the complaint (together with documents attached to the complaint and any judicially noticed facts) fails to establish grounds for federal subject matter jurisdiction as required by Rule 8(a)(1)—i.e., lack of federal jurisdiction appears from the "face of the complaint." [*Warren v. Fox Family Worldwide, Inc.* (9th Cir. 2003) 328 F3d 1136, 1139; *Center for Biological Diversity, Inc. v. BP Am. Production Co.* (5th Cir. 2013) 704 F3d 413, 423-424*; Li v. Chertoff* (SD CA 2007) 482

F.Supp.2d 1172, 1175." O'Connell and Stevenson, *Federal Civil Procedure Before Trial* § 9:80 (Rutter Group 2018).

Rule 12(b)(6)

Under Federal Rule of Civil Procedure 12(b)(6), a party may move to dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6), *incorporated by* Fed. R. Bankr. P. 7012(b). "A Rule 12(b)(6) dismissal may be based on either a lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Johnson v. Riverside Healthcare Sys., LP*, 534 F.3d 1116, 1121–22 (9th Cir. 2008); *accord Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001).

The Supreme Court has established the minimum requirements for pleading sufficient facts. "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.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556, 570 (2007)). "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." *Id.* (citing *Twombly*, 550 U.S. at 556).

In ruling on a Rule 12(b)(6) motion to dismiss, the court accepts all factual allegations as true and construes them, along with all reasonable inferences drawn from them, in the light most favorable to the non-moving party. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001); *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337–38 (9th Cir. 1996). The court need not, however, accept legal conclusions as true. *Iqbal*, 556 U.S. at 678. "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Id.* (quoting *Twombly*, 550 U.S. at 555).

In addition to looking at the facts alleged in the complaint, the court may also consider some limited materials without converting the motion to dismiss into a motion for summary judgment under Rule 56. Such materials include (1) documents attached to the complaint as exhibits, (2) documents incorporated by reference in the complaint, and (3) matters properly subject to judicial notice. *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003); *accord Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007) (per curium) (citing *Jacobson v. Schwarzenegger*, 357 F. Supp. 2d 1198, 1204 (C.D. Cal. 2004)). A document may be incorporated by reference, moreover, if the complaint makes extensive reference to the document or relies on the document as the basis of a claim. *Ritchie*, 342 F.3d at 908 (citation omitted).

Bankruptcy Jurisdiction

Bankruptcy Jurisdiction Generally

"At the outset of a chapter 11 case, the bankruptcy court's subject matter jurisdiction extends not only to the case but also to civil

proceedings arising under title 11 or arising in or related to the case. The court also has broad subject matter jurisdiction over all property of the debtor as of the commencement of the case and all property of the estate." *In re Oakhurst Lodge, Inc.*, 582 B.R. 784, 790 (Bankr. E.D. Cal. 2018) (citations omitted).

More specifically, bankruptcy jurisdiction established by § 1334, which provides in relevant part:

> (a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.
>
> (b) Except as provided in subsection (e)(2), and notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.
>
> . . . .
>
> (e) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction--(1) of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate; and (2) over all claims or causes of action that involve construction of section 327 of title 11, United States Code, or rules relating to disclosure requirements under section 327.

28 U.S.C. § 1334.

"Arising under" Jurisdiction

Proceedings "arising under" title 11 "involve a cause of action created or determined by a statutory provision of title 11." *Harris v. Wittman (In re Harris)*, 590 F.3d 730, 737 (9th Cir. 2009). Stated differently, such proceedings are "based on a right or cause of action created by title 11." *Aheong v. Mellon Mortg. Co. (In re Aheong)*, 276 B.R. 233, 243 (B.A.P. 9th Cir. 2002).

"Arising in" Jurisdiction

"A civil proceeding 'arises in' a Title 11 case when it is not created or determined by the bankruptcy code, but where it would have no existence outside of a bankruptcy case." *Harris v. Wittman (In re Harris)*, 590 F.3d 730, 737 (9th Cir. 2009) (citation omitted).

For example, "[a] state law contract claim could exist independent of a bankruptcy case, but 'an action against a bankruptcy trustee for the trustee's administration of the bankruptcy estate could not.' *Id.*

“Related to” Jurisdiction

Generally, a bankruptcy court’s “related to” jurisdiction is broad, “including nearly every matter directly or indirectly related to the bankruptcy.” *Sasson v. Sokoloff (In re Sasson)*, 424 F.3d 864, 868 (9th Cir. 2005) (citation omitted) (internal quotation marks omitted).

The test for determining “related to” jurisdiction is “whether the outcome of the proceeding could conceivably have any effect on the estate being administered in bankruptcy.” *Fietz v. Great W. Sav. (In re Fietz)*, 852 F.2d 455, 457 (9th Cir. 1988) (emphasis omitted) (citation omitted) (internal quotation marks omitted). “An action is related to bankruptcy if the outcome could alter the debtor’s rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate.” *Id.*

Adjudicatory Authority to Render Final Judgments and Orders

“The bankruptcy courts are ‘units’ of the district courts that exercise the district court's jurisdiction under terms specified by Congress. 28 U.S.C. § 157.” *In re Menk*, 241 B.R. 896, 904 (B.A.P. 9th Cir. 1999).

“Section 157 allocates the authority to enter final judgment between the bankruptcy court and the district court. That allocation does not implicate questions of subject matter jurisdiction.” *Stern v. Marshall*, 564 U.S. 462, 480 (2011) (emphasis added) (citation omitted) (citing 28 U.S.C. § 157(b)(1), (c)(1)-(2)).

More specifically, § 157 provides as follows:

> (a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.
>
> (b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.
>
> . . . .
>
> (c)(1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge

> after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

28 U.S.C. § 157(a),(b)(1),(c)(1) (emphasis added).

The Supreme Court has, moreover, held that some of the statutory delegations of authority to the bankruptcy court are not constitutional. *Stern v. Marshall*, 564 U.S. 462 (2011) (holding that bankruptcy court lacked constitutional authority to enter final judgment on a state law counterclaim against a creditor who had filed a proof of claim).

Sovereign Immunity

But federal jurisdiction under 28 U.S.C. § 1334, and by extension 28 U.S.C. § 157, is limited by sovereign immunity. As one commentator noted:

> **Eleventh Amendment (state sovereign immunity):** The "judicial power … shall not … extend to any suit in law or equity … against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State." [U.S. Const., Amend. XI]
>
> The Eleventh Amendment thus prohibits federal courts from hearing suits brought by private citizens against a state in which they do not reside absent the state's consent. [*Sofamor Danek Group, Inc. v. Brown* (9th Cir. 1997) 124 F3d 1179, 1183] And it has also been interpreted as protecting each state from suits brought in federal court by the state's own citizens. [*Pennhurst State School & Hosp. v. Halderman* (1984) 465 US 89, 100, 104 S.Ct. 900, 908; *Hans v. State of Louisiana* (1890) 134 US 1, 13, 10 S.Ct. 504, 506]
>
> > (1) [1:161] **Federal government common law sovereign immunity compared:** The Eleventh Amendment is not applicable to the federal government. [*United States v. Nordic Village, Inc*. (1992) 503 US 30, 33, 112 S.Ct. 1011, 1014] However, a parallel common law principle similarly protects the *United States government* from suit except by its own consent. [See *United States v. Lee* (1882) 106 US 196, 207, 1 S.Ct. 240, 249-250]
> >
> > Nonetheless, Congress has authority to abrogate federal sovereign immunity through legislation and, as discussed, has done so in the Bankruptcy Code with respect to several proceedings (11 USC § 106); *see ¶ 1:147*.
> >
> > (2) [1:162] **No defense to actions based on Bankruptcy Code:** The Eleventh Amendment does *not* prohibit actions against a state (or state agency)

based on provisions of the Bankruptcy Code (e.g., avoidance actions, actions to discharge student loans). "In ratifying the Bankruptcy Clause, the States acquiesced in a subordination of whatever sovereign immunity they might otherwise have asserted in proceedings necessary to effectuate the *in rem* jurisdiction of the bankruptcy courts." [*Central Virginia Comm. College v. Katz* (2006) 546 US 356, 377-378, 126 S.Ct. 990, 1004-1005 (emphasis in original)]

(a) [1:163] **Prior conflicting authority superseded:** *Central Virginia*, supra, expressly disclaims dicta in a prior Supreme Court decision to the effect that Congress did not have the power to waive state sovereign immunity when it enacted the Bankruptcy Clause in Article 1 of the Constitution (*Seminole Tribe of Fla. v. Florida* (1996) 517 US 44, 116 S.Ct. 1114). [*Central Virginia Comm. College v. Katz*, supra, 546 US at 363, 126 S.Ct. at 996—"we are not bound to follow our dicta in a prior case in which the point … was not fully debated"] Thus, cases upholding state sovereign immunity in bankruptcy-based actions under the authority of *Seminole Tribe* are *no longer valid*.

(b) [1:164] **Compare—§ 106 waiver of immunity:** As discussed, the Bankruptcy Code itself waives state sovereign immunity with respect to specified bankruptcy proceedings (11 USC § 106, *¶ 1:147*). The *Central Virginia* decision (above), however, is based on the *Bankruptcy Clause* of the U.S. Constitution—*not* § 106 of the Bankruptcy Code; and language in the Supreme Court's opinion indicates that bankruptcy court jurisdiction over state governmental units in proceedings listed in § 106 exists independently of § 106. [See *Central Virginia Comm. College v. Katz*, supra, 546 US at 362, 126 S.Ct. at 995—enactment of § 106 "was not necessary to authorize the Bankruptcy Court's jurisdiction" over preference action in bankruptcy court against state educational institutions]

March, Ahart & Shapiro, *California Practice Guide: Bankruptcy*, Federal District Court Bankruptcy Jurisdiction, §§ 1:160-164 (Rutter Group 2018).

11 U.S.C. § 106(a) provides:

(a) Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following:

(1) Sections 105, 106, 107, 108, 303, 346, 362, 363, 364, 365, 366, 502, 503, 505, 506, 510, 522, 523, 524, 525, **542,** 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 722, 724, 726, 744, 749, 764, 901, 922, 926, 928, 929, 944, 1107, 1141, 1142, 1143, 1146, 1201, 1203, 1205, 1206, 1227, 1231, 1301, 1303, 1305, and 1327 of this title.

(2) The court may hear and determine any issue arising with respect to the application of such sections to governmental units.

11 U.S.C.A. § 106(a) (emphasis added).

DISCUSSION

Here, the question is whether the relief sought is outside the reach of *Katz* based on a dispute (or at least doubt) as to whether Jessica held community property rights against the cattle proceeds? The answer is "no."

First, as judged by the face of the complaint, the estate's interest in the cattle proceeds is undisputed. The complaint states, "Trustee is informed and believes and thereon alleges that, at the time that Debtor filed her Chapter 7 case, she had a community property interest in proceeds from the sale of cattle (the "Cattle Proceeds)), in the custody of the California Department of Agriculture (the "CDFA")." Complaint ¶ 10, April 23, 2018, ECF #1. This court does not read Salven's demand letter, attached to the complaint, as stating a contrary position.

Second, this court believes that *In re Death Row Records, Inc.*, 2012 WL 952292 (9th Cir. BAP 2012), is on point with respect to this dispute. And it involved a dispute about whether the monies sought were property of the estate and whether that issue could be resolved by the bankruptcy court. There Death Row Records and Marion "Suge" Knight each filed chapter 11 petitions. Later, a trustee was appointed in each case and each case converted to chapter 7. The trustee filed a claim with the California State Controller seeking return of debtor's money that had escheated to the State of California under the Unclaimed Property Law. The Controller refused to refund those monies. Among other things, the Controller contended that prior to the bankruptcy legal and equitable title vested in the State of California, subject to being divested by a verified claim under California's Unclaimed Property Law. From there, the Controlled reasoned that since such a verified claim had not occurred prior to the debtor's petition the property was not part of the bankruptcy estate. The trustee brought a class action suit seeking turnover under § 542. The Controller asserted lack of subject matter jurisdiction based on sovereign immunity. The

bankruptcy court certified the class and the Controller appealed, arguing sovereign immunity. As to the escheated funds (but without interest) the court found that the doctrine of sovereign immunity did not bar the action. This court quotes at length from *Death Row Records*:

> There are three generally recognized exceptions to a State's sovereign immunity in a bankruptcy case. The first, and best settled theory, is that by filing a claim, a State waives its sovereign immunity with respect to its claim. *Gardner v. New Jersey,* 329 U.S. 565, 573–74 (1947). Second, Congress may abrogate a State's immunity if it: (1) unequivocally expresses its intent to do so; and (2) acts pursuant to a valid exercise of its powers. *Seminole Tribe of Fla. v. Florida,* 517 U.S. 44, 55 (1996). Third, in ratifying the U.S. Constitution, which included authorizing Congress to enact uniform laws on the subject of bankruptcies, the States acquiesced to a limited subordination of their sovereign immunity to the federal courts in the bankruptcy arena. *Cent. Va. Cmty. Coll. v. Katz,* 546 U.S. 356, 362–63 (2006).
>
> Here, the second and third exceptions are at issue. We briefly review each in turn.
>
> a) *Congressional Abrogation Under § 106(a)*
> In 1994, Congress passed § 106(a) in an effort to abrogate the sovereign immunity of all governmental units with respect to specifically enumerated sections of the Bankruptcy Code, including sections regarding turnover of assets (§§ 542, 543) and the automatic stay (§ 362). However, the validity of § 106(a) was called into serious doubt by the Supreme Court's decision in *Seminole Tribe.* 517 U.S. at 59. In *Seminole Tribe,* the Supreme Court overturned *Pennsylvania v. Union Gas Co.,* 491 U.S. 1 (1989), and rejected the contention that Congress could abrogate a States' sovereign immunity under its Article I powers, specifically, the Indian Commerce Clause. *Id.* at 66.
>
> The Bankruptcy Clause (U.S. Const. art. I, § 8, cl.4) of the U.S. Constitution is also an Article I power. After *Seminole Tribe,* a number of courts of appeal, including the Ninth Circuit, relied on *Seminole Tribe* to hold that § 106(a) was not a valid abrogation of the States' Eleventh Amendment immunity. *See, e.g., Mitchell v. Franchise Tax Bd. (In re Mitchell),* 209 F.3d 1111 (9th Cir.2000).
>
> The Sixth Circuit, however, came to a different result in *Hood v. Tenn. Student Assistance Corp.,* 319 F.3d 755 (6th Cir.2003) *aff'd, Tennessee Student Assistance Corp. v. Hood,* 541 U.S. 440 (2004). The Sixth Circuit's decision in *Hood* was based on two rationales. The first was that the States waived their sovereign immunity when they collectively agreed in the plan of the Constitutional

Convention to allow uniform federal power in the area of bankruptcy. *Id.* at 752. The second part of the Sixth Circuit's analysis was that the adversary proceeding at issue, a student loan undue hardship discharge complaint, was not a traditional lawsuit in which the state was forced to defend itself against an accusation of wrongdoing. Instead, the adversary proceeding simply allowed the "adjudication of interests claimed in a res." *Id.* at 768. The State could determine if it wanted to assert an interest in the res or it could decline to do so. Under this analysis, the bankruptcy court's jurisdiction extended only to the res and not directly against the State. *Id.*

The Supreme Court granted *certiorari* in *Hood,* but did not decide if Congress had authority under the Bankruptcy Clause to abrogate States' sovereign immunity in § 106(a). Rather, the Supreme Court held that an adversary proceeding intended to determine if a student loan could be discharged was an *in rem* proceeding that did not require the bankruptcy court to assert in *personam* jurisdiction over the State, and consequently, did not impact the State's sovereign immunity. *Id.* at 453.

b) *Waiver By Ratification*
In 2006, the Supreme Court again examined the issue of States' sovereign immunity in bankruptcy proceedings. In *Katz,* the bankruptcy trustee of a bookstore business brought an avoidance and preference action against four state colleges. 546 U.S. 356. Instead of deciding if § 106(a) was a valid abrogation of the States' sovereign immunity, the Court phrased the issue as follows:

The relevant question is not whether Congress has "abrogated" States' immunity in proceedings to recover preferential transfers. *See* 11 U.S.C. § 106(a). The question, rather, is whether Congress' determination that States should be amenable to such proceedings is within the scope of its powers to enact "Laws on the subject of Bankruptcies."
Id. at 379.

Katz held that "[i]n ratifying the Bankruptcy Clause, the States acquiesced in a subordination of whatever sovereign immunity they might otherwise have asserted in proceedings necessary to effectuate the *in rem* jurisdiction of the bankruptcy courts." *Id.* at 378. **While bankruptcy jurisdiction is understood as principally being *in rem,* the jurisdiction of the court's adjudicating rights in a bankruptcy estate includes "the power to issue compulsory orders to facilitate the administration and distribution of the res." *Id.* at 362. Therefore, a federal court exercising bankruptcy *in rem* jurisdiction could also issue ancillary orders in furtherance of that jurisdiction. *Id.* at 371. *Katz* recognized that an order mandating a turnover of property**

> **"although ancillary to and in furtherance of the court's *in rem* jurisdiction, might itself involve *in personam* process." *Id.* at 372. Therefore, to the extent that the exercise of bankruptcy ancillary jurisdiction implicated the States' sovereign immunity, the States agreed in the plan of convention not to assert that immunity. *Id.* at 373, 378.**
>
> ***Katz* did not define the range of proceedings that would qualify as an ancillary proceeding and fall within the States' waiver of sovereign immunity. However, it provided some guidance by setting out three critical *in rem* functions of bankruptcy courts: (1) the exercise of exclusive jurisdiction over all of the debtor's property; (2) the equitable distribution of that property among the debtor's creditors; and (3) the ultimate discharge that gives the debtor a "fresh start." *Id.* at 363–64.**

Id. at * 5-6 (emphasis added).

The point is that notwithstanding the State of California's arguments, based in California law, that it, and not the bankruptcy estate, held title to the escheated funds, the court held that in *Katz* that sovereign immunity was not a defense to the trustee's action, notwithstanding the state's contention that the monies were not property of the bankruptcy estate.

The court went on to find that sovereign immunity did not bar suit against the state to collect the escheated funds, absent interest on those funds. The court stated:

> Nevertheless, the Controller asserts that any challenge to the Controller's alleged policy, even if the policy is based on an interpretation of federal bankruptcy law, must be brought in California state court pursuant to § 106(a)(4). Whatever the scope of Congressional abrogation may be under § 106(a) after *Hood* and *Katz,* the provisions of § 106(a), which exempt States from federal bankruptcy law remain viable. 2 COLLIER ON BANKRUPTCY ¶ 106.03 (Alan N. Resnick & Henry J. Sommer eds., 16th ed.2011). Thus, according to the Controller, § 106(a)(4) requires that denials of trustees' claims to escheated property be heard exclusively in a California state court.
>
> Section 106(a)(4)'s scope, however, is limited to the enforcement of orders against a State. It does not require that state procedures be followed to obtain that order. If jurisdiction is proper, an order may be obtained against a State in federal court. Once the order is obtained, § 106(a)(4) requires that it be enforced, consistent with applicable state law.
>
> The Controller contends that because the Trustee made a claim under the UPL, he acknowledged that he was bound to comply with the UPL's requirements regarding that claim. As a result, the Controller contends that the Trustee's

> only recourse, if he was unhappy with the Controller's decision, was to file an action in California state court. If the Controller's rejection of the Debtor's claims was based on state law, the Controller's argument might be persuasive. **However, once a dispute arises about whether property is property of a bankruptcy estate, exclusive jurisdiction to resolve that question lies with the federal courts.** 28 U.S.C. § 1334(e); *In re Wash. Mut., Inc.,* 461 B.R. 200, 217 (Bankr.D.Del.2011); *Brown v. Fox Broad. Co., (In re Cox),* 433 B .R. 911, 919 (Bankr.N.D.Ga.2010); *In re Roman Catholic Archbishop of Portland in Or.,* 335 B.R. 842, 850–51 (Bankr.D.Or.2005). Because the Class Action is limited to members whose claims are denied because of the purported determination that such funds are not bankruptcy estate property, jurisdiction is proper in the bankruptcy court.

Id. at * 8 (emphasis added).

For each of these reasons, the motion will be denied.

CIVIL MINUTE ORDER

The court shall issue a civil minute order that conforms substantially to the following form:

Findings of fact and conclusions of law are stated in the civil minutes for the hearing.

California Department of Food and Agriculture’s Rules 12(b)(1) and 12(b)(6) motion to dismiss has been presented to the court. Having considered the complaint, the motion, the memorandum of points and authorities, and the opposition,

IT IS ORDERED that the motion to dismiss is denied.

IT IS FURTHER ORDERED that no later than September 5, 2018, the defendant shall file and serve a responsive pleading or motion. The parties shall not enlarge time for the filing of a responsive pleading or motion without order of this court. Such an enlargement may be sought by ex parte application, supported by stipulation or other admissible evidence.

IT IS FURTHER ORDERED that if defendant fails to file timely a responsive pleading or motion, the plaintiff shall seek entry of the California Department of Food and Agriculture’s default.