UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

September 3, 2020 at 11:00 a.m.

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1. 20-20175-E-11 **HERBERT MILLER**
20-2115 **Judson Henry**
MILLER V. JPMORGAN CHASE BANK, N.A. ET AL

MOTION TO DISMISS ADVERSARY PROCEEDING/NOTICE OF REMOVAL
7-16-20 [12]

THIS MOTION WILL BE HEARD ON THE COURT'S 10:30 CALENDAR IN CONJUNCTION WITH THE OTHER MATTERS IN THE MILLER CASE ON THAT CALENDAR FOR THE CONVENIENCE OF THE PARTIES

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Local Rule 9014-1(f)(x) Motion—Hearing Required.

Sufficient Notice Not Provided. The Proof of Service was not provided. The court is unable to determine the parties served.

The Motion to Dismiss Adversary Proceeding has not been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 4004(a). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Motion to Dismiss Adversary Proceeding is denied without prejudice.

Caliber Home Loans, Inc. ("Defendant") moves for the court to dismiss all claims against it in Herbert Miller ("Plaintiff-Debtor") Complaint according to Federal Rule of Civil Procedure 12(b)(6).

The Complaint alleges five causes of action for: Intentional Interference with Economic Relationship; Negligent Interference with Economic Relationship; Wrongful Foreclosure; Intentional Misrepresentation; Quiet Title; Conversion; and Violation of the Automatic Stay. Dckt. 1. The causes of action are based on Debtor's contention that he is the rightful owner of the Subject Property and that Defendant's Trustee's Deed Upon Sale from the wrongful foreclosure is void as prior assignments in the chain of title are void. Plaintiff-Debtor seeks actual, pecuniary damages, damages for emotional distress, interest in amount apportioned to each defendant, reasonable attorney's fees, punitive damages and various declaratory relief.

GENERAL "HOUSEKEEPING" MATTERS

No Docket Control Number

Movant is reminded that the Local Bankruptcy Rules require the use of a new Docket Control Number with each motion. LOCAL BANKR. R. 9014-1(c). Here, the moving party failed to use a Docket Control Number. That is not correct. Counsel is reminded that not complying with the Local Bankruptcy Rules is cause, in and of itself, to deny the motion. LOCAL BANKR. R. 1001-1(g), 9014-1(c)(l).

Notice Fails to Meet the Requirements of Local Rules as to Contents

The court notes that the notice provided does not meet the standard of Local Bankruptcy Rules 9014-1(d)(3)(B)(ii) and (iii). The Notice fails to include the statement about viewability of tentative rulings on court website. Counsel is reminded that failure to comply is cause to deny the motion. LOCAL BANKR. R. 1001-1(g), 9014-1(l).

Certificate of Service

Movant failed to file a Certificate of Service. As such the court is unable to determine whether all the relevant and proper parties received notice of the instant motion.

Pleadings Filed As One Document

Defendant filed the Notice, Motion and Memorandum of Points and Authorities in this matter as one document. That is not the practice in the Bankruptcy Court. "Motions, notices, objections, responses, replies, declarations, affidavits, other documentary evidence, exhibits, memoranda of points and authorities, other supporting documents, proofs of service, and related pleadings shall be filed as separate documents." LOCAL BANKR. R. 9004-2(c)(1). Counsel is reminded of the court's expectation that documents filed with this court comply as required by Local Bankruptcy Rule 9004-1(a). Failure to comply is cause to deny the motion. LOCAL BANKR. R. 1001-1(g), 9014-1(l).

These document filing rules exist for a very practical reason. Operating in a near paperless environment, the motion, points and authorities, declarations, exhibits, requests for judicial notice, and other pleadings create an unworkable electronic document for the court (some running hundreds of pages). It is not for the court to provide secretarial services to attorneys and separate an omnibus electronic document into separate electronic documents that can then be used by the court.

Judicial Notice

Federal Rule of Evidence 201 governs (and allows) judicial notice of certain adjudicative facts. That rule specifies the court may judicially notice a fact that is not subject to reasonable dispute because it (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned. FED. R. EVID. 201(b).

One treatise describes the two categories of facts not subject to reasonable dispute as follows:

> The first category of adjudicative facts subject to judicial notice are facts which are "generally known within the territorial jurisdiction of the trial court." **This category requires that the fact to be noticed be of general notoriety in the geographical area of the court, but not of the United States as a whole**. It is also not necessary that the fact be universally known within the territorial jurisdiction, since such a requirement would seem to eliminate the category, no fact being so well known by every inhabitant within the jurisdiction as to be truly "universal."
>
> **This category is also limited to facts presently generally known within the jurisdiction**. Obviously, as time passes, the character of a jurisdiction in terms of its occupations, etc., will change. Accordingly, what a court might properly take judicial note of in the year 1800 might not be a proper subject of judicial notice in the year 2000.
>
> The combined result of these limitations is that many facts judicially noticed in this category may not seem obvious to an observer from another place and another time. Stated differently, facts judicially noted in this subsection of the Rule may often appear somewhat parochial. Since the standard is somewhat less objective than the standard in the second subcategory, this subcategory may be viewed as more subjective.
>
> Facts judicially noticed which fit within this subcategory are of breathtaking variety. The following are examples of that variety: bingo was largely a senior citizen pastime; major hijacking gangs had preyed on interstate and international commerce at Kennedy Airport; credit cards play vital role in modern American society; newspaper was New Jersey's only statewide newspaper, as well as its largest; incubation period of measles; British authorities in Hong Kong had not undertaken any persecution of persons because of race, religion, or political opinion; method for canning baked beans in New England; most establishments that sell beer also sell tobacco products; escape of ammonia gas from refrigeration coils ordinarily does not happen if coil is properly manufactured and installed; calendars have long been affixed to walls by means of a punched hole at the top of the calendar; the Ohio River is navigable.
>
> The following are some examples of similar facts which have been judicially noticed by state courts: passenger trains and freight trains are customarily separated; specific locations deemed valuable sources of gold; Texas cattle fever

is a contagious disease; Connecticut River not navigable at specific location; proper season for the planting of cotton seed; existence of the Great Depression.

The second subcategory of adjudicative facts are those facts "which are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."

In this subcategory are facts which, while not generally known to persons within the jurisdiction, nonetheless **are of such nature that they can be definitively established by reference to the appropriate sources**. Within this category are facts capable of being determined precisely by astronomical and mathematical calculations, such as the times of sunrise and sunset, moonrise and moonset, the phases of the moon, what day of the week a given date was, and standard actuarial and life expectancy tables. Facts in this subcategory can also often be introduced as information in learned treatises pursuant to Rule 803(17) of the Federal Rules of Evidence.

The following are examples of facts in this subcategory which have received judicial notice: August 6, 1976, was neither Sunday nor a Federal legal holiday; Father's Day, 1979, was June 17; closing stock prices on a specific date; life expectancy tables to calculate damages in persona injury case; present value table; time of sundown on specific date.

60 AM. JUR. PROOF OF FACTS 3d 175 (Originally published in 2001)(emphasis added).

The Federal Rules of Evidence permit courts to take judicial notice of **facts**, not merely documents. Defendant Caliber requests judicial notice of 348 pages of documents. Requests for Judicial Notice is not a tool to be used for when counsel wants to shortcut the filing of documents as exhibits along with a declaration authenticating and explaining the documents. No attempt is made as to what "adjudicative fact" is being asserted by judicial notice for each of the twenty-two documents submitted.

In the Request for Judicial Notice it is asserted that since the exhibits are documents of "public record" and there can be no reasonable dispute, they the are appropriate for judicial notice. Defendant Caliber cites the court to *Lee v. City of Los Angeles*, 250 F.3d 668 (9th Cir. 2001), for the proposition that a party may submit documents to the court and if it is stated that they came from a public record, then they are automatically subject to judicial notice and in evidence.

In making this statement, Defendant Caliber misses the scope of judicial notice clearly stated by the Ninth Circuit Court of Appeals - judicial notice can be taken that a document was filed, but that does not include facts therein:

But the court **did more than take judicial notice of undisputed matters of public record**. The **court took judicial notice of disputed facts stated in public records**. Indeed, the court relied on the validity of Kerry Sanders's Waiver of Extradition in dismissing plaintiffs' § 1983 claims at the pleading stage. As the district court stated: "Sanders personally waived his right to contest extradition and informed the court and counsel that he was, in fact, the Robert Sanders sought

> in New York." On this basis, the court concluded that "the 'moving force' behind the misidentification of [Kerry Sanders] was his waiver of extradition and his right to raise the issue of identity at his extradition hearing."
>
> On a Rule 12(b)(6) motion to dismiss, when a court takes judicial notice of another court's opinion, it may do so "**not for the truth of the facts recited therein, but for the existence of the opinion**, which is not subject to reasonable dispute over its authenticity." *Southern Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Group Ltd.*, 181 F.3d 410, 426-27 (3rd Cir. 1999). Here, the district court incorrectly took judicial notice of the validity of Kerry Sanders's waiver, which was as yet unproved.

The Supreme Court provides several different ways for a party to properly get documentary evidence into a federal court proceeding. If it is a public record, such documents can be certified. Fed. R. Evid. 902(1), (2), (4). Or a witness can testify as to the exhibit, how it was obtained, and why it is what it is asserted to be. Fed. R. Evid. 901. If a party does not want to go to the cost and expense of getting public records certified, in some situations the court has allowed a witness to testify that the witness went to the office where the records are located, obtained a copy of the record from that governmental office, and the exhibit is a true and accurate copy. Doing such has that witness committed under penalty of perjury that the documents are accurate copies of what is in the public record.

Here, no one is testifying as to how the documents were obtained or that they are true and accurate copies of such documents, to the extent that judicial notice is proper. These documents just appear.

REVIEW OF THE MOTION

Minimum Pleading Requirements for a Motion

The Supreme Court requires that the motion itself state with particularity the grounds upon which the relief is requested. FED. R. BANKR. P. 9013. The Rule does not allow the motion to merely be a direction to the court to "read every document in the file and glean from that what the grounds should be for the motion." That "state with particularity" requirement is not unique to the Bankruptcy Rules and is also found in Federal Rule of Civil Procedure 7(b).

Consistent with this court's repeated interpretation of Federal Rule of Bankruptcy Procedure 9013, the bankruptcy court in *In re Weatherford*, applied the general pleading requirements enunciated by the United States Supreme Court to the pleading with particularity requirement of Bankruptcy Rule 9013. *See* 434 B.R. 644, 646 (N.D. Ala. 2010) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545 (2007)). The *Twombly* pleading standards were restated by the Supreme Court in *Ashcroft v. Iqbal* to apply to all civil actions in considering whether a plaintiff had met the minimum basic pleading requirements in federal court. *See* 556 U.S. 662 (2009).

Federal Rule of Bankruptcy Procedure 9013 incorporates the "state with particularity" requirement of Federal Rule of Civil Procedure 7(b), which is also incorporated into adversary proceedings by Federal Rule of Bankruptcy Procedure 7007. Interestingly, in adopting the Federal Rules of Civil Procedure and of Bankruptcy Procedure, the Supreme Court endorsed a stricter, state-with-particularity-the-grounds-upon-which-the-relief-is-based standard for motions rather than the "short and

plain statement" standard for a complaint.

Law and motion practice in bankruptcy court demonstrates why such particularity is required in motions. Many of the substantive legal proceedings are conducted in the bankruptcy court through the law and motion process. These include sales of real and personal property, valuation of a creditor's secured claim, determination of a debtor's exemptions, confirmation of a plan, objection to a claim (which is a contested matter similar to a motion), abandonment of property from the estate, relief from the automatic stay, motions to avoid liens, objections to plans in Chapter 13 cases (akin to a motion), use of cash collateral, and secured and unsecured borrowing.

The court in *Weatherford* considered the impact to other parties in a bankruptcy case and to the court, holding,

> The Court cannot adequately prepare for the docket when a motion simply states conclusions with no supporting factual allegations. The respondents to such motions cannot adequately prepare for the hearing when there are no factual allegations supporting the relief sought. Bankruptcy is a national practice and creditors sometimes do not have the time or economic incentive to be represented at each and every docket to defend against entirely deficient pleadings. Likewise, debtors should not have to defend against facially baseless or conclusory claims.

434 B.R. at 649–50; *see also In re White*, 409 B.R. 491, 494 (Bankr. N.D. Ind. 2009) (holding that a proper motion must contain factual allegations concerning requirements of the relief sought, not conclusory allegations or mechanical recitations of the elements).

The courts of appeals agree. The Tenth Circuit Court of Appeals rejected an objection filed by a party to the form of a proposed order as being a motion. *St. Paul Fire & Marine Ins. Co. v. Continental Casualty Co.*, 684 F.2d 691, 693 (10th Cir. 1982). The Seventh Circuit Court of Appeals refused to allow a party to use a memorandum to fulfill the pleading with particularity requirement in a motion, stating:

> Rule 7(b)(1) of the Federal Rules of Civil Procedure provides that all applications to the court for orders shall be by motion, which unless made during a hearing or trial, "shall be made in writing, [and] *shall state with particularity the grounds therefor*, and shall set forth the relief or order sought." The standard for "particularity" has been determined to mean "reasonable specification."

Martinez v. Trainor, 556 F.2d 818, 819–20 (7th Cir. 1977) (citing 2-A JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 7.05 (3d ed. 1975)).

Not stating with particularity the grounds in a motion can be used as a tool to abuse other parties to a proceeding, hiding from those parties grounds upon which a motion is based in densely drafted points and authorities—buried between extensive citations, quotations, legal arguments, and factual arguments. Noncompliance with Federal Rule of Bankruptcy Procedure 9013 may be a further abusive practice in an attempt to circumvent Bankruptcy Rule 9011 by floating baseless contentions to mislead other parties and the court. By hiding possible grounds in citations, quotations, legal arguments, and factual arguments, a movant bent on mischief could contend that what the court and other parties took to be claims or factual contentions in the points and authorities were "mere academic postulations"

not intended to be representations to the court concerning any actual claims and contentions in the specific motion or an assertion that evidentiary support exists for such "postulations."

Grounds Stated in Motion

Movant has not provided any grounds. The insufficient statement made by Movant is:

> TO THE COURT AND ALL PARTIES AND THEIR COUNSEL OF RECORD: PLEASE TAKE NOTICE that on September 3, 2020, at 11:00 a.m., or as soon as the matter may be heard in the United States District Court for the Eastern District of California, located at United States Courthouse, Sacramento Division, 501 I Street, 6th Floor, Courtroom 33, Sacramento, California, defendant CALIBER HOME LOANS, INC. ("Defendant" or "Caliber") will and hereby does move the Court pursuant to Fed. R. Civ. P. 12(b)(6) for an Order dismissing all claims alleged in the Complaint against Defendant by Plaintiff and Debtor, HERBERT MILLER ("Plaintiff").

That "ground" is merely the notice and request for dismissal of all claims made to the court.

Movant is reminded that "[f]ailure of counsel or of a party to comply with these [Local Bankruptcy] Rules . . . may be grounds for imposition of any and all sanctions authorized by statute or rule within the inherent power of the Court, including without limitation, **dismissal of any action**, entry of default, finding of contempt, imposition of monetary sanctions or attorneys' fees and costs, and other lesser sanctions." LOCAL BANKR. R. 1001-1(g) (emphasis added).

The "Motion" then states that grounds are found in:

A. The Notice of Motion and Motion;
B. Memorandum of Points and Authorities;
C. Request for Judicial Notice; and
D. All pleadings and papers on file in this action, and
E. Such other and further matters as the Court may consider.

The court generally declines an opportunity to do associate attorney work and assemble motions for parties. It may be that Movant believes that the Points and Authorities is "really" the motion and should be substituted by the court for the Motion. That belief fails for multiple reasons.

DISCUSSION

Movant has filed a collection of papers. Movant failed to follow the rules. Movant's motion says nothing as to the grounds for the relief actually requested. No succinct factual or legal grounds are provided. There being no grounds on the Motion and it not complying with neither the Federal Rules of Civil Procedure, Federal Rule of Bankruptcy Procedure, or the Local Bankruptcy Rules, the court declines to do counsel's work.

The court does note that U.S. Bank, whose counsel are the same as Movant, have filed a "Notice of Joinder." Dckt. 18. No legal basis is given for how U.S. Bank can unilaterally elbow its way in and "join" as a movant for this Motion. A review of the authorities for permissive joinder of a party

pursuant to Federal Rule of Civil Procedure 20 discloses that it is the party who has initiated the matter before the court that may join others in. However, a non-party to the matter before the court cannot force joinder, but must seek to intervene. 4 *Moore's Federal Practice - Civil* § 20.02[2][a], [b]. While U.S. Bank may argue that its attorneys are also representing Defendant Caliber so Defendant Caliber will now have to agree to let U.S. Bank join, it has not. The court will not presume that one party will let the other forcibly intervene in that party's motion.

Again counsel, now acting for U.S. Bank, filed a Motion and Points and Authorities all in one document— which as explained above is in violation of the Local Rules. Counsel might want to revise its "Joinder," as no reference to the actual and applicable Federal Rule of Civil Procedure or the correct Federal Rule of Bankruptcy Procedure at issue has been made.

If Movant and U.S. Bank may file a joint motion if they so desire, stating factual and legal grounds, and addressing whether the doctrine of *res judicata* applies. If there are documents the substance of which is presented to the court as an evidentiary basis for granting the relief, such may be properly authenticated.

The Motion to Dismiss Adversary Proceeding is denied without prejudice.

The court shall issue a minute order substantially in the following form holding that:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Dismiss Adversary Proceeding filed by Caliber Home Loans, Inc. ("Defendant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Dismiss is denied without prejudice.

2. **20-20978-E-7 JEFFREY ANDERSEN** **MOTION TO DISMISS ADVERSARY**
20-2111 RK-1 Jeffrey Meisner **PROCEEDING/NOTICE OF REMOVAL**
KELLY V. ANDERSEN ET AL **8-4-20 [25]**
2 thru 3

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Local Rule 9014-1(f)(1) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Plaintiff-Creditor on August 4, 2020. By the court's calculation, 30 days' notice was provided. 28 days' notice is required.

The Motion to Dismiss Adversary Proceeding has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 4004(a). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Motion to Dismiss Adversary Proceeding is denied without prejudice.

Bridgette A. Andersen ("Defendant") has filed a Motion for the court to dismiss all claims against her in Gregory Kelly's ("Plaintiff-Creditor") Complaint according to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction.

DISCUSSION

Review of Minimum Pleading Requirements for a Motion

The Supreme Court requires that the motion itself state with particularity the grounds upon which the relief is requested. FED. R. BANKR. P. 9013. The Rule does not allow the motion to merely be a direction to the court to "read every document in the file and glean from that what the grounds should be for the motion." That "state with particularity" requirement is not unique to the Bankruptcy Rules and is also found in Federal Rule of Civil Procedure 7(b).

Consistent with this court's repeated interpretation of Federal Rule of Bankruptcy Procedure 9013, the bankruptcy court in *In re Weatherford*, applied the general pleading requirements enunciated by the United States Supreme Court to the pleading with particularity requirement of Bankruptcy Rule 9013. *See* 434 B.R. 644, 646 (N.D. Ala. 2010) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545

(2007)). The *Twombly* pleading standards were restated by the Supreme Court in *Ashcroft v. Iqbal* to apply to all civil actions in considering whether a plaintiff had met the minimum basic pleading requirements in federal court. *See* 556 U.S. 662 (2009).

Federal Rule of Bankruptcy Procedure 9013 incorporates the "state with particularity" requirement of Federal Rule of Civil Procedure 7(b), which is also incorporated into adversary proceedings by Federal Rule of Bankruptcy Procedure 7007. Interestingly, in adopting the Federal Rules of Civil Procedure and of Bankruptcy Procedure, the Supreme Court endorsed a stricter, state-with-particularity-the-grounds-upon-which-the-relief-is-based standard for motions rather than the "short and plain statement" standard for a complaint.

Law and motion practice in bankruptcy court demonstrates why such particularity is required in motions. Many of the substantive legal proceedings are conducted in the bankruptcy court through the law and motion process. These include sales of real and personal property, valuation of a creditor's secured claim, determination of a debtor's exemptions, confirmation of a plan, objection to a claim (which is a contested matter similar to a motion), abandonment of property from the estate, relief from the automatic stay, motions to avoid liens, objections to plans in Chapter 13 cases (akin to a motion), use of cash collateral, and secured and unsecured borrowing.

The court in *Weatherford* considered the impact to other parties in a bankruptcy case and to the court, holding,

> The Court cannot adequately prepare for the docket when a motion simply states conclusions with no supporting factual allegations. The respondents to such motions cannot adequately prepare for the hearing when there are no factual allegations supporting the relief sought. Bankruptcy is a national practice and creditors sometimes do not have the time or economic incentive to be represented at each and every docket to defend against entirely deficient pleadings. Likewise, debtors should not have to defend against facially baseless or conclusory claims.

434 B.R. at 649–50; *see also In re White*, 409 B.R. 491, 494 (Bankr. N.D. Ind. 2009) (holding that a proper motion must contain factual allegations concerning requirements of the relief sought, not conclusory allegations or mechanical recitations of the elements).

The courts of appeals agree. The Tenth Circuit Court of Appeals rejected an objection filed by a party to the form of a proposed order as being a motion. *St. Paul Fire & Marine Ins. Co. v. Continental Casualty Co.*, 684 F.2d 691, 693 (10th Cir. 1982). The Seventh Circuit Court of Appeals refused to allow a party to use a memorandum to fulfill the pleading with particularity requirement in a motion, stating:

> Rule 7(b)(1) of the Federal Rules of Civil Procedure provides that all applications to the court for orders shall be by motion, which unless made during a hearing or trial, "shall be made in writing, [and] *shall state with particularity the grounds therefor*, and shall set forth the relief or order sought." The standard for "particularity" has been determined to mean "reasonable specification."

Martinez v. Trainor, 556 F.2d 818, 819–20 (7th Cir. 1977) (citing 2-A JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 7.05 (3d ed. 1975)).

Not stating with particularity the grounds in a motion can be used as a tool to abuse other parties to a proceeding, hiding from those parties grounds upon which a motion is based in densely drafted points and authorities—buried between extensive citations, quotations, legal arguments, and factual arguments. Noncompliance with Federal Rule of Bankruptcy Procedure 9013 may be a further abusive practice in an attempt to circumvent Bankruptcy Rule 9011 by floating baseless contentions to mislead other parties and the court. By hiding possible grounds in citations, quotations, legal arguments, and factual arguments, a movant bent on mischief could contend that what the court and other parties took to be claims or factual contentions in the points and authorities were "mere academic postulations" not intended to be representations to the court concerning any actual claims and contentions in the specific motion or an assertion that evidentiary support exists for such "postulations."

Grounds Stated in Motion

Movant has not provided any grounds, merely unsupported conclusions of law. The insufficient statements made by Movant is:

> A. Nondebtor, through counsel, hereby moves to dismiss the complaint as to her for lack of subject matter jurisdiction and the failure to state a claim upon which relief can be granted

That "ground" is merely a conclusion of law by Movant. Presumably, Movant believed that the court would make those conclusions, but the "grounds" cannot merely state the anticipated conclusions.

Movant is reminded that "[f]ailure of counsel or of a party to comply with these [Local Bankruptcy] Rules . . . may be grounds for imposition of any and all sanctions authorized by statute or rule within the inherent power of the Court, including without limitation, **dismissal of any action**, entry of default, finding of contempt, imposition of monetary sanctions or attorneys' fees and costs, and other lesser sanctions." LOCAL BANKR. R. 1001-1(g) (emphasis added).

The Motion states that grounds are found in:

> A. Memorandum of Points and Authorities.

The court generally declines an opportunity to do associate attorney work and assemble motions for parties. It may be that Movant believes that the Points and Authorities is "really" the motion and should be substituted by the court for the Motion. That belief fails for multiple reasons. One is that under Local Bankruptcy Rule 9014-1(d)(4), a motion and a memorandum of points and authorities are separate documents, even though they may be filed as one document when not exceeding six pages. *See* Local Bankruptcy Rule 9014-(d)(4).

The court notes that it appears that non-debtor questions the bases for why she has been added to the instant adversary proceeding. Debtor's spouse is not a debtor in this case. The Points and Authorities contains only the generic conclusions "None of the 10 types of proceedings [stated in Fed. R. Bank. P. 7001] involve the determination of whether a nonfiling party or spouse is entitled to received a 'hypothetical discharge.'" Points and Authorities, p. 3:3-7; Dckt. 28. Defendant makes no efforts to state what is being asserted against her and why such unstated, unarticulated by Defendant claims should

be blanket dismissed.

Looking at the Amended Complaint, only the Third Cause of Action is asserted against Defendant, in which Plaintiff states he seeks "To Determine 'Hypothetical' Non-Dischargeability of Non-Filing Spouse under 11 U.S.C. § 523(c)(1) (Bridgette)." First Amd Cmpt., p. 10:24-25; Dckt. 11. The reference to 11 U.S.C. § 523(c)(1) is merely that provision of the Bankruptcy Code that states that a creditor must affirmatively seek a determination a debt is nondischargeable based on 11 U.S.C. § 523(a)(2), (4), or (6). Relief is requested under several of those sections against the Defendant-Debtor (Defendant's spouse).

The reference of a "hypothetical discharge" is stated in ¶ 81 of the Amended Complaint to be thus afforded under 11 U.S.C. § 524(a)(3), which affords a non-debtor spouse who is liable on the same obligation as the debtor to have all future community property protected by a discharge obtained by the debtor spouse. This continues so long as there is community property.

It could be that Plaintiff is seeking declaratory relief that if a determination of nondischargeability is made as to the Debtor, then even if the Debtor obtains a discharge as to other debts, the community property is not protected if Plaintiff seeks to enforce obligations owed by the non-debtor spouse.

Or, looking at the provisions of 11 U.S.C. § 524(b)(2)(A), (B), the Plaintiff is asserting that the non-debtor spouse, here Defendant, be denied a hypothetical discharge of the debt, which would make the debt nondischargeable in a future case filed by Defendant.

> (b) Subsection (a)(3) [protection of nondebtor spouse community property interests] of this section does not apply if—
> . . .
> (2)
> (A) the court would not grant the debtor's spouse a discharge in a case under chapter 7 of this title concerning such spouse commenced on the date of the filing of the petition in the case concerning the debtor; and
>
> (B) a determination that the court would not so grant such discharge is made by the bankruptcy court within the time and in the manner provided for a determination under section 727 of this title of whether a debtor is granted a discharge.

Thus, it appears that there is a basis for Defendant to be in this Adversary Proceeding. The court states this without making any determination of the adequacy of the pleadings.

The Motion to Dismiss Adversary Proceeding is denied without prejudice.

The court shall issue a minute order substantially in the following form holding that:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Dismiss Adversary Proceeding filed by Jeffrey A.

Andersen and Bridgette A. Andersen ("Defendant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Dismiss is denied without prejudice.

3. **20-20978-E-7** **JEFFREY ANDERSEN** **MOTION TO COMPEL**
20-2111 **GK-15** **8-24-20 [52]**
KELLY V. ANDERSEN ET AL

No Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(C).

Local Rule 9014-1(f)(3) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor's Attorney on August 20, 2020. By the court's calculation, 14 days' notice was provided.

The Motion to Compel was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). Debtor, creditors, the Chapter 7 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing ----------.

The Motion to Compel is xxxxxxxxxx.

No Posted Tentative Ruling on the Motion to Compel is Provided.

4. **10-27435-E-7 THOMAS GASSNER** **MOTION TO INTERVENE**
19-2006 FWP-1 Paul Pascuzzi **7-29-20 [133]**
HUSTED V. MEPCO LABEL SYSTEMS ET AL

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Local Rule 9014-1(f)(1) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Attorney for Defendant Laura Strombom, Attorney for Defendant MEPCO Label Systems, Carol Gassner and Alfred M. Gassner, Chapter 7 Trustee, and Attorney for the Chapter 7 Trustee on July 29, 2020. By the court's calculation, 36 days' notice was provided. 28 days' notice is required.

The Motion to Intervene has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Motion to Intervene is denied.

Georgene Gassner, who is identified as an Interested Party, ("Movant") requests the court allow her to intervene in this adversary proceeding pursuant to Federal Rule of Civil Procedure 24, made applicable to this proceeding by Federal Rule of Bankruptcy Procedure 7024. Movant seeks to file a "Complaint in Intervention" asserting her own, independent (and competing) rights duplicating what is in the Plaintiff-Trustee's Complaint. Exhibit A, Dckt. 137.

Movant seeks the turnover of certain property of the estate (the Thomas A. Gassner Trust Assets or their value), the dissolution of MEPCO Label Systems ("MEPCO"), and objects to the proofs of claim filed by Carol L. Gassner and Alfred M. Gassner and MEPCO against the estate. These duplicate what the Trustee is prosecuting as the Plaintiff in this Adversary Proceeding.

Movant asserts that as the surviving spouse of, and successor-in-interest to the Debtor Thomas A. Gassner, and as the Successor Trustee of the Debtor and Movant's Family Trust, into which the Debtor transferred his interest in the Thomas A. Gassner Trust, Movant has a significant protectable interest in the property that is the subject of this action, the disposition of the instant proceeding will impair or impede her ability to protect her interest, and no existing party adequately represents her interests.

DISCUSSION

As discussed in Moore's Federal Practice, there is a mandatory three-step criteria for intervention: interest, impairment, and inadequate representation.

> [a] All Three Criteria Must Be Met
>
> In the absence of statutory authority granting a right to intervene (see §24.02), a movant must make a timely motion (see §24.21) and establish all three of the following criteria in order to qualify for intervention of right:
>
> > 1. The movant claims an interest in the subject matter of the litigation;
> >
> > 2. Disposing of the litigation may as a practical matter impair or impede the movant's ability to protect that interest; and
> >
> > 3.The existing parties to the action do not adequately represent the movant's interest.

6 *Moore's Federal Practice - Civil* § 24.03 (2020)

Here, Movant fails this very first step of the criteria. Movant herself has assigned all rights to the Chapter 7 Trustee. Movant has no rights to the stocks subject of the Trust. As for step two, Movant again fails, on the grounds that Movant has no rights or interests; she has a right to surplus only, not a right to administer property of the bankruptcy estate. Lastly, the fiduciary Chapter 7 Trustee for the bankruptcy estate is the party that has all of the rights and interests.

The Chapter 7 Trustee has employed sophisticated, experienced attorneys who are more than capable to fully and completely enforce the rights and property of the bankruptcy estate. To the extent that the Trustee may wish to settle, the judge must approve such a settlement after notice and hearing, at which time Movant can either object or support or advocate for her surplus interest.

As further discussed in Moore's Federal Practice, Movant must have sufficient interest in the action:

> [a] Interest in Property That Is Subject of Action
>
> A movant must demonstrate "an interest relating to the property or transaction that is the subject of the action" in which the movant seeks to intervene. The leading case of *Donaldson v. United States* gave the Rule 24(a) "interest" requirement a very narrow reading. In *Donaldson*, the Court rejected the attempted intervention of a taxpayer who sought to contest his former employer's compliance with an IRS subpoena. Although the taxpayer clearly had a keen concern that the IRS not be able to obtain records relevant to him, the Supreme Court found his "interest" wanting because he lacked a "proprietary interest" and had no "significantly protectable interest."

> In this context, the term *protectable* means legally protectable. A movant's interest must be "direct, substantial, and legally protectable" to satisfy the interest requirement of Rule 24(a)(2).

6 *Moore's Federal Practice - Civil* § 24.03 (2020)

By way of the Complaint in Intervention, Movant seeks to assert the following claims for which relief is requested (Exhibit A, Dckt. 137):

> Count 1 of the Complaint is for Turnover Property of the Estate. Under 11 U.S.C. Section 542, cited in the Complaint, only the Trustee can assert such a claim. This is not a situation where the Trustee is not seeking to recover property of the estate and the Debtor seeks to be given the right to attempt to recover for the estate what the trustee is ignoring. Trustee is actively seeking such recovery.
>
> Count 2 of the Complaint is for Involuntary Dissolution of the Corporation. This particular claim is a right of a shareholder, who will be the Trustee of the bankruptcy estate if the Trustee prevails in enforcing the rights of the estate to 100% of the stock. As previously stated, Movant has given her interest to Trustee; thus she has no right to call for the company to dissolve.
>
> Count 3 of the Complaint is for Objection to Claim 3-1. Here, the Trustee is prosecuting the claim objection.

Movant attempts to create an appearance that the property rights and interests of the bankruptcy estate are not protected, and thereby her right to any surplus (just as it exists for any debtor in every case) is not protected by alleging in the Motion:

> Finally, the Defendants' recently-filed counterclaim includes numerous false allegations against Georgene and the Debtor personally. Georgene must be allowed to have a voice in this adversary proceeding not only to protect her interests and her economic future, but also to defend her own reputation and that of her deceased husband. No existing party adequately represents Georgene's interests in this proceeding. The Defendants are adverse to Georgene's claims and therefore do not represent her interests; and although some of the Plaintiff Trustee's interests are similar to Georgene's, they are not the same and in some ways are, or may be, in conflict.

Motion, p. 3:18-24; Dckt. 133. Movant does not explain how the Trustee's diligent prosecution of this Adversary Proceeding to recover all property of the estate and knock out any claim of the Defendants that is not allowable is in conflict with Movant's rights to any surplus estate.

Movant argues that she should be allowed to intervene and prosecute her own independent Complaint and Objection to Claim because the Defendant's Counterclaim includes some baseless and false statements about Movant and her late husband (the Debtor). To the extent that such issues are relevant to be addressed, Movant can clearly be a witness to counter baseless, false allegations. To the extent that they are not relevant to the adjudication of this Adversary Proceeding, merely because Movant wants to take Defendants to task for making such allegations is not a basis for letting Movant

have an independent complaint for duplicate, and competing, relief against the Plaintiff-Trustee.

Movant also asserts that there could be rulings in this Adversary Proceeding which may negatively impact the Adversary Proceeding she commenced alleging violations of the automatic stay by Defendants post-discharge efforts to reform or rescind the Trust Agreement. Movant does not articulate what such adverse rulings could be. Movant has acquired from the Plaintiff-Trustee the claim for alleged violations of the automatic stay. Upon the discharge being entered in the bankruptcy case, the stay terminated as to the Debtor Thomas Gassner (11 U.S.C. § 362(c)(2)(C)). The stay did remain in effect for property of the bankruptcy estate, which included undisclosed property of the estate notwithstanding the case being closed. 11 U.S.C. §§ 362(c)(1), 554(c), (d). Thus, it appears that the only adverse ruling in this Adversary Proceeding would be a determination that the bankruptcy estate had no interest in the property in the Thomas Gassner Trust due to Defendants' asserted right to reform the Trust Agreement or rescind it in part.

When Movant assigned all of her rights, which were the portion of the spendthrift trust not included in the bankruptcy estate, in exchange for acquiring any claims of the Trustee for violation of the stay, Movant clearly could see that the ability to prosecute alleged violation of the stay was dependent on the Plaintiff-Trustee prevailing in this Adversary Proceeding. Movant willingly turned over the keys to the litigation to determine that the bankruptcy estate was entitled to the property in the Gassner Trust, letting the Plaintiff-Trustee run that show.

In support of the need to intervene and take the litigation reigns away from the Plaintiff-Trustee, Movant makes the following statement:

> As for the Plaintiff Trustee, while it is true that some of the Trustee's and Georgene's interests may be somewhat aligned, they are not the same, and in some ways are, or may be, in conflict. The Bankruptcy Code imposes on the Bankruptcy Trustee the duty to serve several distinct interests. For example, trustees have an interest in the efficient liquidation and administration of estate assets and have a fiduciary duty to creditors of the estate, among others. As a result, the Trustee's main goal may simply be a quick and efficient resolution so that the bankruptcy case can be administered and creditors paid.[2]
>
> ---
>
> 2 This is in no way meant to disparage the Trustee's conduct or efforts in this case; merely to illustrate where differences could potentially exist or arise.

Points and Authorities, p. 11:19-28; Dckt. 135.

This statement is based on an inaccurate statement of law. Further, while attempting to qualify it with a self-serving footnote, Movant's basic assertion is that the Plaintiff-Trustee and counsel for the Plaintiff-Trustee will breach their fiduciary duties to the bankruptcy estate and give away property of the estate for a "quick payoff."

The court makes a special note for Movant that a trustee cannot have a fiduciary duty to creditors at the expense of others and not to the bankruptcy estate. The benefit from the trustee and the professionals hired by the estate in fulfilling that fiduciary duty flows not only to the creditors in there being assets properly administered by the fiduciary, but also to the debtor who receives the surplus that remains from the trustee and professionals hired fulfilling their fiduciary duties to the bankruptcy estate.

Put into context further, if the bankruptcy trustee owed a fiduciary duty to each of the creditors to act in their interests to the detriment of the bankruptcy estate, the trustee could never file an objection to a claim in a case. That would breach a duty to that creditor. A trustee could never propose a plan to alter the payment terms of a creditor to whom the trustee owes a fiduciary duty. That would breach a duty to that creditor.

With respect to a Trustee choosing to not recover all property of the estate, but "take a dive for a quick buck," the Ninth Circuit Court of Appeals discussed the duties of the bankruptcy trustee in *Walsh v. Northwestern Nat'l Ins. Co. (In re Ferrante)*, 51 F.3d 1473, 1477-1478 (9th Cir. 1995), stating (emphasis added):

> As **trustee**, he can, indeed **must, seek to "maximize the value of the estate**." *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 353, 105 S. Ct. 1986, 1992-93, 85 L. Ed. 2d 372 (1985). Were he to do less, he might well be held liable for breaching that duty. *See In re Cochise College Park, Inc.*, 703 F.2d 1339, 1357 (9th Cir. 1983); Restatement (Second) of Trusts § 223(2)(a) (1959) (failure of successor trustee "to take proper steps to redress a breach of trust committed by the predecessor).
> . . .
> Not surprisingly, courts have often held that **trustees' duties extend beyond tending the undisputed assets of the estate**. *See, e.g., In re Sierra Trading Corp.*, 486 F.2d 191, 193 (10th Cir. 1973) (*per curiam*) (trustee was required to account for amounts earned from investment of money belonging to third parties in an adversary proceeding by those parties); *In re San Juan Hotel Corp.*, 847 F.2d 931, 936-38 (1st Cir. 1988) (there is a **broad power to surcharge trustees for forbidden acts which injure the estate or profit the trustee at the estate's expense**); *In re Reich,* 54 Bankr. 995, 1003, 1008-09 (Bankr. E.D. Mich. 1985) (trustee's surety will be held liable where trustee had "actual possession of the property"; whether an asset was technically in or out of an estate was immaterial).
> . . .
> As it said, citing *Mosser v. Darrow*, 341 U.S. 267, 274, 71 S. Ct. 680, 683, 95 L. Ed. 927 (1951), the Supreme Court has "established the general proposition that bankruptcy trustees may be held personally liable for breaches of fiduciary duty . . . . 'The most effective sanction for good administration is personal liability for the consequences of forbidden acts.'" 847 F.2d at 937 (citations omitted).

Going to the First Circuit Court of Appeals *In re San Juan Hotel Corp.* cited by the Ninth Circuit above in *In re Ferrante*, the First Circuit explains:

> Where an exact amount of loss to the estate can be determined, that amount is the correct measure of damages. *See Matter of Combined Metals Reduction Co.,* 557 F.2d 179, 197 (9th Cir. 1977) ("When a trustee has breached his trust, an equity court may hold him liable for any loss or depreciation in the value of the estate resulting from the wrongful act or omission."). Where the fact of harm can be determined but not the exact extent thereof, the estimated amount of harm to the estate should be surcharged.

In re San Juan Hotel Corp., 847 F.2d 931, 938 (1st Cir. 1988).

This fundamental point of the fiduciary duty of the bankruptcy trustee running to the bankruptcy estate is discussed in, *In re Rollins*, 175 BR 69 (Bankr. E.D. Cal. 1994) written by the Hon. Michael S. McManus while serving as a bankruptcy judge in this District:

> A chapter 7 trustee is charged with **securing possession of assets of the estate**, converting non-cash assets into money, **and preserving those assets for the benefit of the creditors and the debtor**. 11 U.S.C. §§ 704(1), (2); *Reich v. Burke (In re Reich)*, 54 Bankr. 995, 998 (Bankr. E.D. Mich. 1985). A trustee who fails to exercise due diligence in collecting and preserving assets of the estate will be personally liable for assets lost through his or her intentional or negligent misconduct. *Reich v. Burke (In re Reich)*, 54 Bankr. at 998; *In re Cochise College Park, Inc.*, 703 F.2d 1339, 1357 (9th Cir. 1983); *United States v. Aldrich (In re Rigden)*, 795 F.2d 727, 730 (9th Cir. 1986); *In re Power*, 115 F.2d 69, 72 (7th Cir. 1940).
>
> A trustee's duty of **care to creditors and the debtor** is measured and defined by the "care and skill . . . a man of ordinary prudence would exercise in dealing with his own property. . . ." *Restatement (Second) of Trusts § 174* (1959). In the words of the bankruptcy court in Reich:
>
> > The measure of care, diligence and skill required of a bankruptcy trustee is that of an ordinarily prudent man in the conduct of his private affairs under similar circumstances and of a similar object in view; and although a mistake of judgment is not a basis to impose liability on a trustee, a failure to meet the standard of care does subject him to liability.
>
> *In re Reich*, 54 Bankr. at 998. See also Daniel B. Bogart, "Liability Of Directors Of Chapter 11 Debtors In Possession: Don't Look Back. Something May Be Gaining On You," 68 *Am. Bankr. L.J.* 155, 202-204 (1994).

In re Rollins, 175 B.R. 69, 74 (Bankr. E.D. Cal. 1994).

To the extent that a fiduciary duty is owed by the trustee to creditors and debtors, it is similar to that of a trustee under a trust - with it being owed equally to all - the debtor as well as the creditors. The trustee will not cheat, the trustee will not steal, and the trustee will not throw away assets.

Movant having transferred all rights and interests in the trust corpus to the Chapter 7 Trustee, the fiduciary of that bankruptcy estate, Movant does not meet the criteria to intervene. Movant has a right to the surplus monies, but only to the surplus monies. Thus, Movant cannot litigate rights that are not hers, but the Plaintiff-Trustee's in this Adversary Proceeding. With respect to the related Adversary Proceeding, Movant has not demonstrated that there are any issues to be determined here that have an impact on the alleged violation of the stay as to property of the bankruptcy estate, other than the Plaintiff-Trustee not being able to prevail on the rights and interest of the bankruptcy estate in the assets of the Thomas Gassner Trust. Movant voluntarily ceded those rights and interest to the Plaintiff-Trustee to prosecute in exchange for getting the Plaintiff-Trustee's rights to prosecute a violation of the automatic stay. Movant having voluntarily giveth, Movant cannot forcibly taketh back.

The Motion is denied.

The court shall issue a minute order substantially in the following form holding that:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Intervene filed by Georgene Gassner, Interested Party ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Intervene is denied.

FINAL RULINGS

5. **20-20168-E-7** **SHAWN MYERS** **MOTION TO DISMISS ADVERSARY PROCEEDING/NOTICE OF REMOVAL**
20-2023 **Len Reynoso** **8-14-20 [23]**
ADRIAN, JR. V. MYERS

Pursuant to prior Order of this court, **the hearing on the Motion to Dismiss has been continued to 11:00 a.m. on September 24, 2020. Dckt. 24.**

6. **20-20715-E-13** **FOUAD MIZYED** **MOTION TO DISMISS ADVERSARY PROCEEDING/NOTICE OF REMOVAL**
20-2016 **JL-2** **Arasto Farsad** **7-9-20 [34]**
MIZYED V. FAY SERVICING, LLC

Final Ruling: No appearance at the September 3, 2020 hearing is required.

Defendant Fay Servicing, LLC having filed a Notice of Dismissal, pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i) and Federal Rules of Bankruptcy Procedure 9014 and 7041, **the Motion to Dismiss the Adversary Proceeding was dismissed without prejudice, and the matter is removed from the calendar.**

7. **17-26125-E-7** **FIRST CAPITAL RETAIL, LLC** **CONTINUED STATUS CONFERENCE**
19-2115 **Gabriel Lieberman** **RE: AMENDED COMPLAINT**
HUSTED V. ESBF CALIFORNIA, LLC **3-20-20 [19]**

Plaintiff's Atty: Aaron A. Avery
Defendant's Atty: Michael W. Davis; Thomas R. Phinney

Adv. Filed: 9/11/19
Answer: none

Amd. Cmplt. Filed: 3/20/20
Answer: none

Nature of Action:
Recovery of money/property - preference
Recovery of money/property - other
Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy case)

Notes:
Continued from 8/13/20 (specially set time) to allow the Parties time to document the reported settlement of the issues in this Adversary Proceeding.

The Status Conference for this Adversary Proceeding is continued to 11:00 a.m. on September 24, 2020, to allow the Parties time to file and obtain approval of the reported settlement of the issues in this Adversary Proceeding.

AUGUST 27, 2020 STATUS REPORT

On August 27, 2020, the parties filed a Joint Status Report requesting the court continue the hearing on the Motion to Dismiss to September 24, 2020 at 11:00 a.m. on the basis that a settlement agreement is now finalized and has been executed by all parties., and the parties anticipate that the motion to approve the compromise will be set for September 24, 2020 at 10:30 a.m. Dckt. 52. Parties also request that with the exception of a status report a week prior to the continued hearing on this motion, no further briefing shall be required and the continued hearing shall be treated as a status conference. *Id.* Moreover, parties request that the specially set Status Conference on the Adversary Proceeding should be continued to September 24, 2020 at 11:00 a.m. *Id.*

8. **17-26125-E-7 19-2115**

FIRST CAPITAL RETAIL, LLC PP-1 Gabriel Lieberman

HUSTED V. ESBF CALIFORNIA, LLC

CONTINUED MOTION TO DISMISS CAUSE(S) OF ACTION FROM AMENDED COMPLAINT AND/OR MOTION FOR MORE DEFINITE STATEMENT
4-3-20 [22]

Final Ruling: No appearance at the August 13, 2020 Hearing is required.

Local Rule 9014-1(f)(1) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Attorney for Plaintiff-Trustee on April 3, 2020. By the court's calculation, 132 days' notice was provided. 28 days' notice is required.

The Motion to Dismiss Adversary Proceeding has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 4004(a). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The hearing on the Motion to Dismiss Cause(s) of Action from Amended Complaint and/or Motion for a More Definite Statement is continued to 11:00 a.m. on September 24, 2020, to allow the Parties time to file and obtain approval of the reported settlement of the issues in this Adversary Proceeding.

AUGUST 27, 2020 JOINT STATUS REPORT

On August 27, 2020, the parties filed a Joint Status Report requesting the court continue the hearing on the Motion to Dismiss to September 24, 2020 at 11:00 a.m. on the basis that a settlement agreement is now finalized and has been executed by all parties., and the parties anticipate that the motion to approve the compromise will be set for September 24, 2020 at 10:30 a.m. Dckt. 52. Parties also request that with the exception of a status report a week prior to the continued hearing on this motion, no further briefing shall be required and the continued hearing shall be treated as a status conference. *Id.* Moreover, parties request that the specially set Status Conference on the Adversary Proceeding should be continued to September 24, 2020 at 11:00 a.m. *Id.*

ESBF California, LLC ("Defendant") moves for the court to dismiss the First, Third, Fourth,

and Fifth Claims for Relief against it in Kimberly J. Husted's ("Plaintiff-Trustee") Complaint according to Federal Rule of Civil Procedure 12(b)(6).

JULY 29, 2020 JOINT STATUS REPORT

On July 29, 2020, the parties filed a Joint Status Report requesting the court continue the hearing on the Motion to Dismiss to September 3, 2020 at 11:00 a.m. on the basis that a draft of their settlement agreement has been prepared and has been circulated for revisions and the parties anticipate that the settlement agreement will be finalized within the next two (2) weeks, with a compromise motion to be filed shortly thereafter. Dckt. 47.