UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Robert S. Bardwil
Bankruptcy Judge
Sacramento, California

September 7, 2016 at 10:00 a.m.

INSTRUCTIONS FOR PRE-HEARING DISPOSITIONS

1. Matters resolved without oral argument:

Unless otherwise stated, the court will prepare a civil minute order on each matter listed. If the moving party wants a more specific order, it should submit a proposed amended order to the court. In the event a party wishes to submit such an Order it needs to be titled 'Amended Civil Minute Order.'

If the moving party has received a response or is aware of any reason, such as a settlement, that a response may not have been filed, the moving party must contact Nancy Williams, the Courtroom Deputy, at (916) 930-4580 at least one hour prior to the scheduled hearing.

2. The court will not continue any short cause evidentiary hearings scheduled below.

3. If a matter is denied or overruled without prejudice, the moving party may file a new motion or objection to claim with a new docket control number. The moving party may not simply re-notice the original motion.

4. If no disposition is set forth below, the matter will be heard as scheduled.

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1. 15-20600-D-11 SAEED ZARAKANI — MOTION FOR ADMINISTRATIVE EXPENSES
HLC-1 — 8-10-16 [353]

DEBTOR DISMISSED: 06/17/2016

This matter will not be called before 10:30 a.m.

Tentative ruling:

The court will use this hearing as a preliminary hearing and status conference.

2. 13-33804-D-7 RSS-5 — RHONDA STIJAKOVICH-SANTILLI — OBJECTION TO CLAIM OF CYNTHIA POSEHN VANHORNE, CLAIM NUMBER 3 7-13-16 [166]

Final ruling:

This is the debtor's objection to the claim of Cynthia Posehn VanHorne (the "Claimant"), Claim No. 3 on the court's claims register. The Claimant has filed a response. In addition, on August 19, 2016, the Claimant filed an amended proof of claim. The amended claim states specifically that it amends Claim No. 3. As a result of the filing of the amended proof of claim, the debtor's objection to the original proof of claim is moot. The objection will be overruled as moot by minute order. No appearance is necessary.

3. 14-32410-D-7 ASW-1 — MELISSA VUE — MOTION FOR RELIEF FROM AUTOMATIC STAY 8-5-16 [22]
U.S. BANK N.A. VS.

Final ruling:

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed and the relief requested in the motion is supported by the record. The debtor received her discharge on May 9, 2016 and, as a result, the stay is no longer in effect as to the debtor (see 11 U.S.C. § 362(c)(3)). Accordingly, the motion will be denied as to the debtor as moot. The court will grant relief from stay as to the trustee and the estate, and will waive FRBP 4001(a)(3). This relief will be granted by minute order. There will be no further relief afforded. No appearance is necessary.

4. 14-25820-D-11 DMC-24 — INTERNATIONAL MANUFACTURING GROUP, INC. — MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH DARRELL AND DONNA MOORE, ROBERT AND VICKI EILMAS AND WINGS INSURANCE INCORPORATED AND/OR MOTION FOR COMPENSATION BY THE LAW OFFICE OF DIAMOND MCCARTHY LLP FOR CHRISTOPHER D. SULLIVAN, SPECIAL COUNSEL(S) 8-10-16 [901]

Final ruling:

The matter is resolved without oral argument. There is no timely opposition to the trustee's motion to approve compromise of controversy, and the trustee has demonstrated the compromise is in the best interest of the creditors and the estate. Specifically, the motion demonstrates that when the compromise is put up against the factors enumerated in In re Woodson, 839 F.2d 610 (9th Cir. 1988), the likelihood of success on the merits, the complexity of the litigation, the difficulty in collectability, and the paramount interests of creditors, the compromise should be approved. Accordingly, the motion is granted and the compromise approved. The moving party is to submit an appropriate order. No appearance is necessary.

5.	14-25820-D-11 16-2090 MCFARLAND V. CALIFORNIA BANK & TRUST ET AL	INTERNATIONAL MANUFACTURING GROUP, INC. BN-1	MOTION TO DISMISS ADVERSARY PROCEEDING 8-4-16 [35]

Tentative ruling:

This is the motion of defendant ZB, N.A., dba California Bank & Trust ("ZB"), to dismiss the plaintiff's complaint pursuant to Fed. R. Civ. P. 12(b)(6), made applicable in this proceeding by Fed. R. Bankr. P. 7012(b). On August 24, 2016, within 21 days after service of the motion to dismiss, the plaintiff filed a first amended complaint. The first amended complaint was timely filed and was permitted as a matter of course by Fed. R. Civ. P. 15(a)(1)(B), incorporated herein by Fed. R. Bankr. P. 7015.

The first amended complaint supersedes the original complaint. Armstrong v. Davis, 275 F.3d 849, 878 n.40 (9th Cir. 2001), citing Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1546 (9th Cir. 1989). The latter "no longer performs any function and is treated thereafter as non-existent." Ferdik v. Bonzelet, 963 F.2d 1258, 1262 (9th Cir. 1992), citing Loux v. Rhay, 375 F.2d 55, 57 (9th Cir. 1967). Therefore, ZB's motion to dismiss the original complaint will be denied as moot.

The court will hear the matter.

6.	16-24643-D-7 GGM-2	GAVIN MEHL	MOTION TO AVOID LIEN OF FIRST NATIONAL MORTGAGE SOURCES, LLC 8-4-16 [15]

Final ruling:

This is the debtor's motion to avoid a judicial lien held, according to the motion, by First National Mortgage Sources, LLC ("First National"). The motion will be denied for the following reasons. First, assuming without deciding that First National is the actual holder of the lien (see below), the moving party failed to serve First National in strict compliance with Fed. R. Bankr. P. 7004(b)(3), as required by Fed. R. Bankr. P. 9014(b). The moving party served First National (1) to the attention of an Officer authorized to accept service of process; and (2) through the attorneys who obtained the abstract of judgment. Both methods were insufficient because service on a corporation or other unincorporated association that is not an FDIC-insured institution, such as First National, must be by first-class mail, not certified mail. Compare preamble to Fed. R. Bankr. P. 7004(b) with Fed. R. Bankr. P. 7004(h). The second method was insufficient for the additional reason that there is no evidence the attorneys who obtained the abstract are authorized to receive service of process on behalf of First National in bankruptcy contested matters pursuant to Fed. R. Bankr. P. 7004(b)(3) and 9014(b). See In re Villar, 317 B.R. 88, 93 (9th Cir. BAP 2004).

There is an additional problem. As indicated, the motion names the lienholder as First National. However, according to the abstract of judgment, First National was a defendant in the state court action. The entity named in the abstract as the plaintiff and also as the judgment creditor is 770 "L" Street Investment Group, Inc. First National is not named as a judgment creditor and there is no evidence the judgment lien has been assigned to First National. Thus, it appears the motion is directed against the wrong entity. Thus, the motion will be denied by minute order. No appearance is necessary.

7. 16-24846-D-7 ROBERT/KANDAS CORELLA — MOTION FOR RELIEF FROM AUTOMATIC STAY
APN-1 — 8-5-16 [9]
NISSAN MOTOR ACCEPTANCE CORPORATION VS.

Final ruling:

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed and the relief requested in the motion is supported by the record. As such the court will grant relief from stay. As the debtors' Statement of Intentions indicates they will surrender the property, the court will also waive FRBP 4001(a)(3) by minute order. There will be no further relief afforded. No appearance is necessary.

8. 16-21649-D-7 MICHAEL LUEVANO — MOTION TO AVOID LIEN OF SUMMERSET AT BRENTWOOD IV ASSOCIATION
FF-4 — 8-1-16 [56]

Final ruling:

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed and the relief requested in the motion is supported by the record. The court finds the judicial lien described in the motion impairs an exemption to which the debtor is entitled. As a result, the court will grant the debtor's motion to avoid the lien. Moving party is to submit an appropriate order. No appearance is necessary.

9. 13-25654-D-7 KENNETH/APRIL GOORE — MOTION FOR COMPENSATION FOR GABRIELSON AND COMPANY, ACCOUNTANT(S)
KJH-2 — 8-4-16 [86]

Final ruling:

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed. The record establishes, and the court finds, that the fees and costs requested are reasonable compensation for actual, necessary, and beneficial services under Bankruptcy Code § 330(a). As such, the court will grant the motion by minute order. No appearance is necessary.

10. 15-26465-D-7 SCOTT POMEROY — CONTINUED MOTION FOR STAY OF ORDER OVERRULING OBJECTION TO DEBTOR'S CLAIM OF EXEMPTION
GJH-2 — 7-27-16 [79]

11.	16-22769-D-7 LBG-1	MICHAEL/DEBORAH SMITH	CONTINUED MOTION TO COMPEL ABANDONMENT 7-12-16 [11]

Final ruling:

This is the debtors' motion to compel abandonment of real and personal property assets. The hearing was originally set for August 10, 2016. Prior to that date, the court issued a tentative ruling advising the parties it would not consider the motion at that time because it had been served only on the trustee and the United States Trustee, and not on creditors. The hearing was continued to permit the debtors to serve creditors. However, the debtors have since confused matters as regards this motion. Although they filed a notice of continued hearing, they assigned it a new docket control number, LBG-2, whereas this motion bears docket control number LBG-1. They also filed a new motion, albeit virtually identical to the first, to which they also assigned the new docket control number, LBG-2. As the debtors have not served this motion, DC No. LBG-1, on creditors, as required by the court's tentative ruling for August 10, 2016, the motion will be denied. The motion designated DC No. LBG-2 is also on this calendar and will be separately considered.

The motion will be denied by minute order. No appearance is necessary.

12.	16-22769-D-7 LBG-2	MICHAEL/DEBORAH SMITH	MOTION TO COMPEL ABANDONMENT 8-10-16 [18]

13.	15-27270-D-7 15-2253 GRIMES V. LANE ET AL	JOHN/CLASSIC LANE LJC-1	MOTION TO DISMISS ADVERSARY PROCEEDING 8-3-16 [30]

Tentative ruling:

This is the defendants' motion to dismiss this adversary proceeding pursuant to Fed. R. Civ. P. 12(b)(6), made applicable in this proceeding by Fed. R. Bankr. P. 7012(b), for failure to state a claim upon which relief can be granted. The plaintiff has filed a Motion to Proceed with Trial, which the court construes as an opposition to the motion. For the reasons discussed below, the motion will be granted.

In ruling on a Rule 12(b)(6) motion, a court "accept[s] as true all facts alleged in the complaint, and draw[s] all reasonable inferences in favor of the plaintiff." al-Kidd v. Ashcroft, 580 F.3d 949, 956 (9th Cir. 2009), citing Newcal Indus., Inc. v. Ikon Office Solution, 513 F.3d 1038, 1043 n.2 (9th Cir. 2008). The

court assesses whether the complaint contains "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" al-Kidd, 580 F.3d at 949, citing Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949, (2009), in turn quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007).

By his amended complaint,[1] the plaintiff seeks, in essence, a determination that a state court judgment is not dischargeable. The complaint describes what the plaintiff considers to be "fraud, manipulation, lies and misrepresentation" on the part of the defendants, along with "willful and malicious misrepresentation and concealment of information," and breach of contract that was "deliberate, spiteful and dishonest." Thus, the court will construe the complaint as attempting to state causes of action under § 523(a)(2) and (6) of the Bankruptcy Code.

The Significance of the Plaintiff's State Court Judgment

The plaintiff begins the complaint with a reference to a state court judgment, a copy of which is attached to the complaint, in the amount of $19,302.74. The judgment is a default judgment in the plaintiff's favor and against the defendants. The plaintiff claims "[t]he Judgment reflected the Court's understanding of the validity of Plaintiff's case, based on Defendants' continuous fraud, manipulation, lies and misrepresentation, among other ills against Plaintiff." The defendants correctly point out, however, that the complaint on which the state court judgment is based, a copy of which is also attached to the complaint, alleged only breach of contract and no other causes of action. The defendants attempt to parlay the absence of fraud or willful and malicious injury allegations in the state court complaint into a theory of judicial estoppel, res judicata, or the improper splitting of a single cause of action. That is, they contend the plaintiff is precluded by that complaint and the judgment from alleging fraud or willful and malicious conduct in this court. None of these theories applies here and binding case law is contrary to the defendants' position. See Brown v. Felsen, 442 U.S. 127, 132-39 (1979); In re Daley, 776 F.2d 834, 837 (9th Cir. 1985); In re Gross, 654 F.2d 602, 604 (9th Cir. 1981); Zauper v. Lababit (In re Lababit), 2009 Bankr. LEXIS 4524, *18 (9th Cir. BAP 2009).

In the words of the Supreme Court, the proposition suggested by the defendants – that because the state court complaint was for breach of contract, the plaintiff is precluded by the judgment from seeking a determination of nondischargeability based on fraud or other misconduct – "would undercut a statutory policy in favor of resolving [dischargeability] questions in bankruptcy court, and would force state courts to decide these questions at a stage when they are not directly in issue and neither party has a full incentive to litigate them." Brown v. Felsen, 442 U.S. at 134. "In the collection suit, the debtor's bankruptcy is still hypothetical. The rule proposed by [the debtor] would force an otherwise unwilling party to try [dischargeability] questions to the hilt in order to protect himself against the mere possibility that a debtor might take bankruptcy in the future." Id. at 135. Thus, the court rejects the defendants' argument.

Like the defendants, but seeking the opposite result, the plaintiff would also extend the effect of the state court judgment beyond its proper scope by claiming it reflects the state court's understanding of the defendants' fraud and other misconduct. The defendants are correct that the judgment determined only that they had breached their contract with the plaintiff and that they owed him $19,302.74. Those determinations, even if they were preclusive in this adversary proceeding, which the court need not decide, would be insufficient in and of themselves to support a determination that the debt is nondischargeable.

The Plaintiff's § 523(a) Claims

The crux of the matter is the defendants' contention that the plaintiff has failed to plead sufficient facts to support a claim to relief under any subsection of § 523(a). In this, the defendants are correct. To prevail under § 523(a)(2), the plaintiff would have to prove there was "(1) misrepresentation, fraudulent omission or deceptive conduct by the debtor; (2) knowledge of the falsity or deceptiveness of his statement or conduct; (3) an intent to deceive; (4) justifiable reliance by the creditor on the debtor's statement or conduct; and (5) damage to the creditor proximately caused by its reliance on the debtor's statement or conduct." Oney v. Weinberg (In re Weinberg), 410 B.R. 19, 35 (9th Cir. BAP 2009). Of critical importance here, the alleged misrepresentations must have occurred at the inception of the debt as an inducement for the debt. See New Falls Corp. v. Boyajian (In re Boyajian), 367 B.R. 138, 147 (B.A.P. 9th Cir. 2007). Misrepresentations made after the debt has been incurred "have no effect upon the discharge of the debtor." Daniell v. FO-Farmer's Outlet, Inc. (In re Daniell), 2013 Bankr. LEXIS 4759, *16 (9th Cir. BAP 2013).

Here, the plaintiff alleges in his complaint that (1) before seeking relief in the state court, "Plaintiff made more than 50 attempts, over several years, to assist Defendants in repaying the loan/debt"; (2) "Defendants acknowledged the debt on various occasions and agreed to several methods of repayment" but failed to deliver and "continued to defraud Plaintiff with broken promises, deception and disregard for impact of injuries to Plaintiff"; (3) the defendants sought loans "based on the need for their sons to live in a highly popular school district," the plaintiff "wanted to assist them in ensuring that their children had the same educational opportunities as his son," and therefore, the plaintiff delayed seeking a remedy for their failure to pay; (4) the defendants "promised to repay money that was owed" in part by defendant John Lane working as a mortgage loan officer for the plaintiff when he was not qualified as such; and (5):

> **Defendants practiced fraud, as evidenced in willful and malicious misrepresentation and concealment of information that was relevant to their ability to repay and their failure to disclose their true intent to simply lie to Plaintiff and have him to pay for their shelter for several years, despite his financial responsibilities to his own family and household. Defendants made a plethora of false statements in this matter, in an attempt to avoid paying Plaintiff what was owed. Therefore, the loan/debt continued to mount.**

Complaint, DN 18.

All of these allegations pertain to the defendants' failure to repay monies already due the plaintiff. It appears from the attachments to the complaint that the term "loans," as used in the complaint, actually refers to rent the defendants failed to pay the plaintiff under a residential lease. The plaintiff's Motion to Proceed with Trial, filed in opposition to this motion, clarifies the point:

> **As family members related by marriage, Plaintiff was compelled to assist Defendants, who pretended they would repay the loan. Plaintiff allowed Defendants to rent his property, and loaned them money to pay the rent, rather than evict them when they failed to pay. Instead of repaying the loan, they added insult to injury by compound[ing] the debt with a string of broken promises over several years.**

Plaintiff's Motion, DN 34.

As discussed above, promises to repay loans already taken or money already owed for another reason are simply insufficient to support a claim under § 523(a)(2). The fraud must have been "in the inducement"; that is, it must have been undertaken at or before the time the debt was incurred, as a means of inducing the creditor to make the loan or, in this case, to rent the property to the defendants. Thus, the plaintiff was required to allege specific facts which, if proven, would demonstrate the defendants rented the property from the plaintiff with no intention at the time they rented it of paying rent. There are no such allegations in the complaint.

The complaint also refers to "willful and malicious misrepresentation and concealment of information," and the plaintiff's Motion to Proceed with Trial states "[t]he entire debt was incurred as a result of willful and malicious injury to Plaintiff." These allegations suggest a cause of action under § 523(a)(6). To prevail under that subsection, the plaintiff would have to demonstrate that the defendants' conduct was both willful and malicious. Barboza v. New Form, Inc. (In re Barboza), 545 F.3d 702, 711 (9th Cir. 2008). The willfulness component "is met only when the debtor has a subjective motive to inflict injury or when the debtor believes that injury is substantially certain to result from his own conduct." Carillo v. Su (In re Su), 290 F.3d 1140, 1142 (9th Cir.2002). The maliciousness element requires "(1) a wrongful act, (2) done intentionally, (3) which necessarily causes injury, and (4) is done without just cause or excuse." Petralia v. Jercich (In re Jercich), 238 F.3d 1202, 1209 (9th Cir. 2001).

The complaint makes no allegations that would satisfy these requirements; instead, it merely tacks on the words "willful and malicious" to the claim of misrepresentation and recites the words of the statute as a conclusion that the debt was incurred as a result of willful and malicious injury to the plaintiff. "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations . . ., a formulaic recitation of the elements of a cause of action will not do." Twombly, 550 U.S. at 555. Further, although conduct giving rise to a claim under one subsection of § 523(a) may also support a claim under some other subsection (4 COLLIER ON BANKRUPTCY ¶ 523.12[1] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.), a plaintiff attempting to state a claim for willful and malicious misrepresentation; that is, a subsection (a)(6) claim, based on the same conduct he has alleged for a subsection (a)(2) claim, must meet the requirements of subsection (a)(2) to begin with. McCrary v. Barrack (In re Barrack), 217 B.R. 598, 606 (9th Cir. BAP 1998). Where the same facts are alleged for the two causes of action, "which include an intentional misrepresentation, the elements of § 523(a)(2) would also be required in order to state a cause of action under § 523(a)(6)." Id.[2] Because the plaintiff has failed to state a claim to relief under subsection (a)(2), he has also failed to state a claim under subsection (a)(6).

For the reasons stated, "accepting as true all facts alleged in the complaint, and drawing all reasonable inferences in favor of the plaintiff" (al-Kidd, 580 F.3d at 956), the court concludes the complaint, as regards § 523(a)(2) and (6), does not contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Id. (citations omitted). The plaintiff also mentioned § 727 of the Bankruptcy Code in his original complaint; however, he has not mentioned it in the amended complaint, which supersedes the original. Armstrong v. Davis, 275 F.3d 849, 878 n.40 (9th Cir. 2001). In any event, the plaintiff has made no allegations in either complaint that would tend to support a claim to relief under § 727.

The plaintiff states he believes dismissal of the complaint "is tantamount to denying his right to present his case before the court of law." Plaintiff's Motion. He adds "he is put in the precarious position of essentially retrying the case, for which he has already been awarded favorable Judgement. Moreover, Plaintiff should not be denied the opportunity to bring Witnesses and fully present the facts in support of his case." On the contrary. As set forth above, the judgment determined only that a debt is owed for breach of contract. There was nothing in the plaintiff's state court complaint or the judgment that would support a claim that the debt is nondischargeable under any subsection of § 523(a). And although he is representing himself (see below), the plaintiff is held to the same standards of pleading as any other litigant. Here, the plaintiff's original complaint was a single paragraph that failed to come close to stating a claim to relief, and despite having been permitted to amend the complaint almost three months after the original was filed, he has still failed to plead factual allegations sufficient to state a claim to relief under § 523(a). Further, when he filed the amended complaint, the plaintiff failed to serve it on the defendants (or at any rate, failed to file any evidence of such service), and the court gave him an additional two months to serve the complaint. In other words, despite the passage of over eight months since he filed the original complaint, the plaintiff has failed to state a claim upon which relief can be granted.[3]

In addition, the plaintiff's Motion to Proceed with Trial, which constitutes his opposition to the motion to dismiss, fails to suggest any basis on which the court might conclude he would be able to state a claim if permitted to further amend the complaint. Thus, although as a general rule, amendments to pleadings are to be liberally allowed in view of the policy favoring determination of disputes on their merits (see Fed. R. Bankr. P. 7015, incorporating Fed. R. Civ. P. 15(a)(2); Magno v. Rigsby (In re Magno), 216 B.R. 34, 38 (9th Cir. BAP 1997)), the plaintiff has had ample opportunity to submit a complaint that states a claim upon which relief can be granted. The court finds no reason to give him more time, particularly where his complaint, as originally stated, purported to state a claim for denial of the defendants' discharge, and as a result, the defendants' discharge has been held up for over eight months.

Finally, the plaintiff complains in his Motion to Proceed with Trial that, ironically, he is representing himself, "due to lack of financial ability," whereas the defendants, "despite claiming an inability to repay Plaintiff," have retained counsel. The plaintiff claims this puts him at a "tremendous disadvantage, facing a formidable Bankruptcy Attorney who is experienced with the legal wrangling's of Judicial Disputes." Although pro se litigants are held to the same procedural rules and other applicable law as litigants represented by counsel, the court assures the plaintiff the status of the parties as represented or unrepresented has played no part in this decision.

The court will hear the matter.

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1 Unless otherwise indicated, all subsequent references to the complaint will be to the amended complaint, DN 18.

2 "[I]n this case the allegations in count one of the complaint did not meet the required elements under § 523(a)(2). Therefore, count one could not, as a matter of law, meet the requirements of § 523(a)(6). In this respect, the bankruptcy court's specific conclusion was correct that [the plaintiff's] fraud claims could not 'simply be moved over to Section 523(a)(6).'" Id.

3 The plaintiff claims in his Motion to Proceed with Trial that the defendants "missed the deadline of July 14, 2016, ordered by the Court" to file their motion to dismiss. The court has reviewed what transpired at the June 23, 2016 status conference. Although defendant John Lane initially indicated he needed three weeks to file the motion, the only form of deadline actually set was that the motion to dismiss would need to be filed well in advance of the continued September 29, 2016 status conference date.

14. 15-27171-D-7 CAROLE TAYLOR — MOTION TO EMPLOY J. LUKE HENDRIX AS ATTORNEY(S)
DNL-1 — 8-10-16 [20]

Final ruling:

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed and the relief requested in the motion to employ J. Luke Hendrix on a flat fee basis as attorney for trustee is supported by the record. As such the court will grant the motion and the moving party is to submit an appropriate order. No appearance is necessary.

15. 15-27171-D-7 CAROLE TAYLOR — MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH AMERICAN EXPRESS BANK, FSB
DNL-2 — 8-10-16 [15]

Final ruling:

The matter is resolved without oral argument. There is no timely opposition to the trustee's motion to approve compromise of controversy, and the trustee has demonstrated the compromise is in the best interest of the creditors and the estate. Specifically, the motion demonstrates that when the compromise is put up against the factors enumerated in In re Woodson, 839 F.2d 610 (9th Cir. 1988), the likelihood of success on the merits, the complexity of the litigation, the difficulty in collectability, and the paramount interests of creditors, the compromise should be approved. Accordingly, the motion is granted and the compromise approved. The moving party is to submit an appropriate order. No appearance is necessary.

16. 15-28774-D-7 OTASHE GOLDEN — MOTION TO COMPEL AND/OR MOTION TO STAY
16-2031 TGM-1 — 8-4-16 [17]
DAMERON HOSPITAL ASSOCIATION V. GOLDEN

Tentative ruling:

This is the motion of plaintiff Dameron Hospital Association to compel arbitration and to stay this adversary proceeding. Defendant Otashe Golden has filed opposition and the plaintiff has filed a reply. For the following reasons, the motion will be granted in part.

The defendant filed the petition commencing her chapter 7 case in November of 2015. Before that, since 2012, the plaintiff and others, on the one hand, and the defendant and two corporations wholly owned by her, on the other hand, had been litigating their claims against each other through arbitration. The defendant began the litigation by filing a complaint in the federal district court for this district. The claims between the parties arise out of two contracts entered into in 2008, one between the plaintiff and the defendant and the other between the plaintiff and one of the defendant's corporations. Both contracts contained a clause providing for the resolution of disputes arising under them by final and binding arbitration.

By order dated September 19, 2012, the district court ordered many of the claims into arbitration, and following entry of the order, the parties agreed to submit all of their claims to arbitration before retired Judge Richard L. Gilbert. In December of 2012, the plaintiff filed a Complaint for Provisional Remedies Under Contract in Arbitration in Sacramento County Superior Court, and on March 27, 2013, the court issued a preliminary injunction against the defendant and her two corporations. The next day, the defendant caused the corporations to file chapter 7 petitions in this court. The plaintiff obtained relief from stay to continue with the arbitration and both corporate cases are now closed. In November of 2015, on the morning of a scheduled deposition and inspection, pursuant to subpoenas issued by the arbitrator, of two storage facilities apparently containing records of the defendant's corporations, the defendant filed her chapter 7 petition in this court and served a notice of automatic stay. By that time, the arbitration had been going on for three years. At least seven depositions had been taken and business and bank records numbering almost 50,000 pages had been produced by at least nine individuals and entities.

The plaintiff timely filed a complaint in this court to determine that debts owed by the defendant are nondischargeable pursuant to § 523(a)(2), (4), and (6) of the Bankruptcy Code. The plaintiff now seeks to compel arbitration before Judge Gilbert of the entirety of the adversary proceeding, or in the alternative, to compel arbitration of all issues except the legal issues of nondischargeability, and to stay the adversary proceeding pending the outcome of the arbitration.

The Ninth Circuit has recognized the important federal policy favoring arbitration agreements, with the proviso that the policy yields where there is "an inherent conflict between arbitration and the underlying purposes of the Bankruptcy Code." Continental Ins. Co. v. Thorpe Insulation Co. (In re Thorpe Insulation Co.), 671 F.3d 1011, 1020 (9th Cir. 2012), citing Shearson/American Express v. McMahon, 482 U.S. 220, 227 (1987). The court observed that courts generally draw a distinction between core and non-core proceedings in making the analysis, such that "[i]n non-core proceedings, the bankruptcy court generally does not have discretion to deny enforcement of a valid prepetition arbitration agreement" (671 F.3d at 1021), whereas "[i]n core proceedings . . . the bankruptcy court, at least when it sees a conflict with bankruptcy law, has discretion to deny enforcement of an arbitration agreement." Id. This is because "non-core proceedings are unlikely to present a conflict sufficient to override by implication the presumption in favor of arbitration, whereas core proceedings implicate more pressing bankruptcy concerns." Id. (citation and internal quotations omitted).

However, although the core/non-core distinction is important, it is not dispositive. Thorpe Insulation, 671 F.3d at 1021. Thus, "even in a core proceeding, the McMahon standard must be met—that is, a bankruptcy court has

discretion to decline to enforce an otherwise applicable arbitration provision only if arbitration would conflict with the underlying purposes of the Bankruptcy Code." Thorpe Insulation, 671 F.3d at 1021. The analysis is fact-specific. Thus, "the bankruptcy judge [must] evaluate the nature of the underlying claims and their effect upon the bankruptcy proceedings before determining whether he ha[s] the discretion to deny arbitration." New Cingular Servs. v. Burkart (In re Wire Comm Wireless, Inc.), 2008 U.S. Dist. LEXIS 79273, *9 (E.D. Cal. 2008). The party opposing arbitration "has the burden of proving 'that Congress intended to preclude a waiver of judicial remedies for [the particular claim] at issue.'" Ackerman v. Eber (In re Eber), 687 F.3d 1123, 1129 (9th Cir. 2012), citing McMahon, 482 U.S. at 227.

In Eber, the Ninth Circuit addressed the issue in the context of a § 523(a)(2), (4), and (6) complaint. In that case, the creditors commenced an arbitration proceeding against the debtor and less than a month later, the debtor filed a chapter 7 petition. The creditors filed an adversary complaint to determine nondischargeability and a motion for relief from stay to proceed with the arbitration. The bankruptcy court denied the motion. On appeal, the Ninth Circuit first reiterated that determinations of dischargeability under § 523(a)(2), (4), and (6) fall within the bankruptcy court's exclusive jurisdiction (687 F.3d at 1128 (citations omitted)) and emphasized that dischargeability under those subsections is "a core bankruptcy issue." Id. at 1130. The court then "agree[d] with the district court's conclusion that implicit in the bankruptcy court's reasoning is the conclusion that allowing an arbitrator to decide issues that are so closely intertwined with dischargeability would 'conflict with the underlying purposes of the Bankruptcy Code.'" Id. at 1130-31. "When a bankruptcy court considers conflicting policies as the bankruptcy court did here, we acknowledge its exercise of discretion and defer to its determinations that arbitration will jeopardize a core bankruptcy proceeding." Id. at 1131, citing Thorpe Insulation, 671 F.3d at 1022-23.

The Ninth Circuit emphasized, however, that "[o]ur holding in no way extends beyond the particular facts of this case or to all cases in which a bankruptcy judge makes this determination prior to the commencement of an arbitration." Eber, 687 F.3d at 1131. The Eber court distinguished, for example, In re Hermoyian, 435 B.R. 456 (Bankr. E.D. Mich. 2010), in which the parties had been in litigation for a year and a half before the debtor filed bankruptcy (the parties had stipulated to arbitration shortly before the trial date) and where "the business relationship had extended over a lengthy period and involved multiple entities." Eber, 687 F.3d at 1132. The Ninth Circuit noted that in Hermoyian, "[w]hile the arbitration with the debtor and creditor never began because the debtor filed for Chapter 7 bankruptcy first, the arbitration between the creditor and business entities had proceeded for four and a half days until the business entities filed bankruptcy petitions of their own." Id.

> Therefore, although the bankruptcy court granted the creditor's motion for relief from the automatic stay to allow the parties to proceed with arbitration, judicial economy was served given the particular facts of the case. The arbitrator was already familiar with the facts surrounding the state court lawsuit because the arbitration between the debtor and the business entities had gone forward. In addition, the creditor and debtor stipulated to arbitration just prior to trial in an attempt to resolve their dispute. The same persuasive facts do not exist here where the bankruptcy judge was more familiar with the dispute between [the creditors and the debtor] than an arbitrator in an arbitration that had

not yet begun.

Eber, 687 F.3d at 1132 (citation omitted).

In the present case, the arbitration had been ongoing for three years by the time the defendant filed for bankruptcy, although it had been previously interrupted by the defendant's filing of the two corporate chapter 7s. The plaintiff obtained relief from stay in both of those cases in January of 2014 and the parties then proceeded with the arbitration for another 21 months before the defendant filed her chapter 7 case. The defendant emphasizes that no evidentiary hearings have been held in the arbitration and no testimony has been given. The plaintiff, however, contends Judge Gilbert has "substantial working knowledge" of the facts, a contention the defendant does not dispute. Further, in the court's view, it would be naive to believe an arbitrator does not develop some meaningful familiarity with the issues during the course of a three-year arbitration. And although the parties might be able to use some or all of the information and documents they have obtained in discovery if this court were to deny the motion, the court is nevertheless persuaded that denial of the motion would mean a waste of a significant portion of the resources already devoted to the arbitration. In short, as in In re Snake River Dairyman's Ass'n, 2004 Bankr. LEXIS 2481, *19 (Bankr. D. Idaho 2004), "the parties have made substantial progress towards preparing for an arbitration hearing, some of which effort may be duplicated if this Court were to adjudicate the claims."

The defendant has received her discharge in this case; thus, continuing the arbitration will not cause any delay in that process. The issues underlying the § 523(a) claims; that is, the issues in the arbitration, are matters of state law which Judge Gilbert is familiar with, almost certainly more so than this court. Thus, he will be in a position to resolve those issues "without resort to interpreting the Bankruptcy Code or Rules." See Snake River Dairyman's Ass'n, 2004 Bankr. LEXIS 2481 at *19. The defendant's concerns she is unable to afford the costs of the arbitration are effectively countered by the plaintiff's statement in its reply that it "will agree to be solely responsible for the fees and costs of the arbitrator . . ., without waiver of the right to a final judgment that includes arbitrator fees as costs." Plaintiff's Reply, DN 36, at 3:19-21. Finally, as the defendant points out, this court has exclusive jurisdiction to determine nondischargeability of a debt under § 523(a)(2), (4), and (6); thus, the plaintiff's request that the entirety of this adversary proceeding be arbitrated, including those issues, will be denied.

The defendant's citations to In re Saigon Plaza, 2007 WL 3357641 (Bankr. N.D. Cal. 2007), and MCI Telecommunications Corp. v. Gurga (In re Gurga), 176 B.R. 196 (9th Cir. BAP 1994), are unavailing. The defendant cites the first for the proposition that "[e]nforcing pre-dispute agreements to waive the right to have bankruptcy law issues determined by the bankruptcy court would be contrary to the purposes for which the bankruptcy court was created." 2007 WL 3357641 at *___. However, the court made that statement with respect to a chapter 11 debtor's claims against a creditor, asserted in an adversary proceeding, for lien avoidance, turnover, and avoidance of fraudulent transfers under various provisions of the Bankruptcy Code. The court granted the creditor's motion to compel arbitration of its claims against the debtor and the debtor's claims against the creditor for breach of contract, fraud, and unfair competition.

The defendant cites Gurga as having "determined that the contract claim in that case was subject to arbitration but excluded, as not subject to arbitration, certain specified rights created in the Bankruptcy Code, including the right to a

discharge." Defendant's Opposition, DN 32 ("Opp."), at 9:8-10. In fact, the panel made no such determination in Gurga. None of the claims in that case involved the debtor's right to a discharge or a determination of dischargeability. The panel made only this general observation in granting the creditor's motion to compel arbitration: "It is not the right to bankruptcy, to discharge or to any substantive right created in the Bankruptcy Code that would be arbitrated. Instead, the right to have a contract claim decided in the bankruptcy court is at issue." 176 B.R. at 199.

Finally, the court rejects the defendant's position that, in essence, this court has no discretion to permit the arbitration to continue. In the defendant's view,

> the Bankruptcy Code requires that a determination of whether a debt is dischargeable demands the expertise of a Bankruptcy Judge. Debt dischargeability is such an integral and fundamental component of the entire Bankruptcy process that its determination simply cannot be delegated to an arbitrator who lacks the authority to make a dischargeability finding. Pursuant to §523(c)(1), only a Bankruptcy Judge has this authority.

Opp. at 9:26-10:3. While it is true that bankruptcy courts have exclusive jurisdiction to make determinations of dischargeability under § 523(a)(2), (4), and (6), it is simply not the case that other forums may not determine the underlying factual issues. In Lakhany v. Khan (In re Lakhany), 538 B.R. 555 (9th Cir. BAP 2015), a creditor the debtor had failed to schedule in his chapter 7 case, upon learning about the case, filed an adversary complaint under § 523(a)(2), (4), and (6) and a motion for relief from stay to add the debtor as a defendant in a state court action the creditor had filed against other defendants before the chapter 7 case was filed. The creditor advised the bankruptcy court that after he had obtained a judgment in the state court action, he would file a motion for summary judgment in the adversary proceeding. The bankruptcy court granted relief from stay and the debtor appealed.

The Bankruptcy Appellate Panel rejected the debtor's contention that "the exclusive jurisdiction of the bankruptcy court to determine dischargeability somehow bars establishing the predicate facts for that determination in a state court (or, presumably, any other nonbankruptcy forum)." 538 B.R. at 560 (footnote omitted).

> This is a fundamental misunderstanding: bankruptcy courts regularly make non-dischargeability determinations, via issue preclusion, on facts determined elsewhere. For example, in Grogan v. Garner, the Supreme Court reversed a circuit court's reversal of a bankruptcy court's judgment of nondischargeability under § 523(a)(2) predicated on issue preclusion (using older terminology, "collateral estoppel") from a state court's fraud judgment, thereby upholding the bankruptcy court.

Id. The panel then affirmed the bankruptcy court's decision. Id. at 563.[1]

For the reasons stated, the court finds that in the particular facts of this case, there is no inherent conflict between arbitration of the issues of liability and amount of the debt and the policies or purposes of the Bankruptcy Code. Thus, the court will grant the motion in part and compel arbitration, on condition that if an award is issued in the plaintiff's favor, the plaintiff will return to this court for a determination of the dischargeability of the award and on the further

condition that the plaintiff may not seek to confirm or otherwise enforce an arbitration award without further order of this court.

Finally, the parties have raised a side issue concerning the adequacy of the defendant's answer to the complaint in this adversary proceeding. The plaintiff began the debate by pointing out in its motion that the answer includes a number of statements to the effect that the defendant was not required to and therefore was not answering allegations of the complaint that constitute legal conclusions or allegations the defendant contended were included in documents that speak for themselves. In response, the defendant filed a declaration of attorney Judith Whitman, who states she inadvertently failed to comply with the pleading requirements of Fed. R. Civ. P. 8 when she prepared the answer. She asks the court to allow her to file an amended answer. The plaintiff has responded with an evidentiary objection to the declaration and a motion to strike it. The plaintiff states the issue of whether to permit the filing of an amended answer is not before the court and should be left to the arbitrator.

The court does not agree that the matter should be determined by the arbitrator. What is at stake is the defendant's answer in this adversary proceeding, not any of her pleadings in the district court action being arbitrated. Thus, the arbitrator will have no need to determine the issue. In the event there is an award in the plaintiff's favor in the arbitration, the defendant may file a motion in this court for leave to amend her answer. The plaintiff's evidentiary objections to the declaration, except as to paragraphs 19, 20, and 21, are sustained. Most of the statements in the declaration are plainly beyond the declarant's personal knowledge and the court has not considered them.

The court will stay this adversary proceeding pending the outcome of the arbitration. The court will hear the matter.

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1 Noting that the automatic stay had expired when the debtor received his discharge, the panel "recast the Order for Relief from Stay as a declaratory judgment that the discharge injunction of § 524 does not enjoin [the creditor's] attempt to establish [the debtor's] liability for a nondischargeable debt in the State Action." Id.

17. 16-22878-D-12 SNM-1 PAUL TU VS.

THOMAS/JOY GALINDO

MOTION FOR RELIEF FROM AUTOMATIC STAY
8-4-16 [38]

Final ruling:

This matter is resolved without oral argument. This is * motion for relief from automatic stay. The court records indicate that the debtors filed a statement of non-opposition and no other timely opposition has been filed. The motion along with the supporting pleadings demonstrate that there is no equity in the subject property and the property is not necessary for an effective reorganization. Accordingly, the court finds there is cause for granting relief from stay. The court will grant relief from stay and will waive FRBP 4001(a)(3). This relief will be granted by minute order. There will be no further relief afforded. No appearance is necessary.**

18. 16-25087-D-7 NOAH SILVA
APN-1
GATEWAY ONE LENDING & FINANCE VS.

MOTION FOR RELIEF FROM AUTOMATIC STAY
8-8-16 [9]

Final ruling:

This matter is resolved without oral argument. This is Gateway One Lending & Finance's motion for relief from automatic stay. The court records indicate that no timely opposition has been filed. The motion along with the supporting pleadings demonstrate that there is no equity in the subject property and the property is not necessary for an effective reorganization. Accordingly, the court finds there is cause for granting relief from stay. The court will grant relief from stay by minute order. There will be no further relief afforded. No appearance is necessary.

19. 15-29890-D-7 GRAIL SEMICONDUCTOR
16-2088 MF-1
CARELLO V. STERN ET AL

MOTION FOR SUMMARY JUDGMENT
8-3-16 [81]

Tentative ruling:

This is the motion of defendants Donald Stern, Frank Bauder, Billion Hope International Limited ("BHI"), and MOM OS, LLC (the "defendants") for judgment on the pleadings as to the sixth claim for relief in the plaintiff's first amended complaint, DN 22, pursuant to Fed. R. Civ. P. 12(c), incorporated herein by Fed. R. Bankr. P. 7012(b). The plaintiff, who is also the trustee in the underlying chapter 7 case in which this adversary proceeding is pending (the "trustee"), has filed opposition and the defendants have filed a reply. For the reasons discussed below, the court intends to deny the motion.1

"Judgment on the pleadings is proper when, taking all the allegations in the pleadings as true and construed in the light most favorable to the nonmoving party, the moving party is entitled to judgment as a matter of law." Living Designs, Inc. v. E.I. Dupont de Nemours & Co., 431 F.3d 353, 360 (9th Cir. 2005). Thus, the court looks to the pleadings.

The trustee's first through fifth claims for relief are against defendants Stern and BHI only for the avoidance and recovery of alleged preferences (first claim) and/or fraudulent transfers (second through fifth). The sixth claim for relief – the one that is the subject of this motion – is for turnover of property of the estate pursuant to § 542(a) of the Bankruptcy Code. The sixth claim begins by incorporating the allegations in paragraphs 1 through 40 of the complaint, which consist of the general allegations and the first five claims for relief. The defendants' argument is that the sixth claim for relief is precluded by the first five claims because § 542(a) provides for turnover of property of the estate only, whereas property preferentially or fraudulently transferred does not become property of the estate until it has been recovered.

The defendants cite several cases from courts outside the Ninth Circuit in which the courts held that "property that has been fraudulently or preferentially transferred does not become property of the estate until it has been recovered."

Savage & Assocs., P.C. v. Mandl (In re Teligent, Inc.), 325 B.R. 134, 137 (Bankr. S.D.N.Y. 2005); see also Andrew Velez Constr., Inc. v. Consol. Edison Co. of N.Y., Inc. (In re Andrew Velez Constr., Inc.), 373 B.R. 262, 273 (Bankr. S.D.N.Y. 2007); Savage & Assocs., P.C. v. BLR Servs. SAS (In re Teligent, Inc.), 307 B.R. 744, 751 (Bankr. S.D.N.Y. 2004). Thus, at least one court has held that "in order to state a claim for turnover of property under § 542, a plaintiff must allege that transfer of the property has already been avoided or that the property is otherwise the undisputed property of the bankruptcy estate." Stanziale v. Pepper Hamilton LLP (In re Student Fin. Corp.), 335 B.R. 539, 554 (D. Del. 2005).

> The trustee counters that her § 542 claim is pled in the alternative; that is, as an alternative to her preference and fraudulent transfer claims, as permitted by Fed. R. Civ. P. 8(d), incorporated herein by Fed. R. Bankr. P. 7008.2 3 The trustee argues that her claim for turnover is based on allegations in the complaint that would support a finding of conversion by defendant Stern of the transferred funds. Because the plaintiff's ownership or right to possession of personal property is an element of a conversion cause of action under California law (Oakdale Village Group v. Fong, 43 Cal. App. 4th 539, 543-44 (1996)), the trustee reasons that allegations of conversion may support a claim for turnover under § 542.

The trustee relies on the allegations in paragraphs 15 and 16 of her complaint as supporting her claim for turnover separate and apart from her preference and fraudulent transfer claims. In those paragraphs, the trustee alleges that, at defendant Stern's direction, about $2.75 million was posted to an account held by Stern and BHI, a sham company of Stern; that those monies were taken from the proceeds of the debtor's settlement with Mitsubishi and deposited into an account at The Hongkong and Shanghai Banking Corporation Ltd.; that portions were then transferred by Stern to defendants Bauder and MOM OS LLC; that the transfer of the funds was not approved by the debtor; but instead, that at a special board meeting, the debtor's board was deadlocked on and postponed the decision whether to issue payment to Stern from the settlement proceeds on account of an earlier agreement with Stern. The trustee's sixth claim for relief itself adds the allegations that "[t]o the extent that the Debtor retained a legal or equitable interest in the Transferred Funds or the proceeds thereof after the transfer, such interest is property of the bankruptcy estate that the Trustee may use, sell, or lease" (Compl. at ¶ 42) and that "[e]ach defendant either has control of or possession of the Transferred Funds, and has the capacity to turn over the funds." ¶ 43.

The defendants did not originally challenge the sufficiency of these allegations to support a claim for turnover. Instead, in their motion, their only theory was that property alleged to have been transferred by way of preferences or fraudulent transfers is not property of the estate until it has been recovered. In their reply, however, the defendants contend that in order to state a claim for turnover, the trustee must allege, and has not alleged and cannot allege, that the funds are indisputably property of the estate. He cannot do so, the defendants assert, for the simple reason that the defendants would dispute the allegation. In other words, because the defendants dispute that the funds are property of the estate, the trustee cannot allege they indisputably are not, and thus, he cannot state a claim for turnover.

The court disagrees. First, the theory, when stated plainly – that a trustee cannot assert a claim for turnover when there is any dispute about the status of the property as property of the estate – would, in many instances, including here, leave a trustee without a remedy because the defendant could simply dispute the property's

status and that would be the end of it. Or at best, the theory would force a trustee to file a complaint to determine the property to be property of the estate, and if he prevails on that complaint, he would then be able to file a complaint or motion for turnover of the same property. Such a duplication of effort would be illogical. Second, the case law cited by the defendants does not support their proposition.

The defendants cite Shapiro v. Henson, 739 F.3d 1198 (9th Cir. 2014), in which "the question of whether or not the target property . . . was property of the estate was not in question." Defendants' Reply, DN 111, at 2:23-24. That is a true statement: in that case, the defendant did not dispute that the property the trustee sought to recover was property of the estate. That fact, however, is a far cry from a holding that the trustee must be able to state unequivocally that the property is property of the estate and if he cannot, because the defendant disputes the issue, he cannot state a claim for turnover.

In fact, the second case cited by the defendants, Newman v. Schwartzer (In re Newman), 487 B.R. 193 (9th Cir. BAP 2013), proves the point. In attempting to fit Newman into their analysis, the defendants in the present case characterize the property-of-the-estate issue in that case as being "not seriously in question" (Reply at 2:25) because the debtor "did not dispute that a portion of [an] undisclosed tax refund was property of the estate and there was no actual dispute that the refund was community property and, hence, property of the estate." Id. at 2:26-28. In fact, the debtor took the position that "the tax refund of the nondebtor spouse was not property of the estate subject to turnover" (487 B.R. at 196), and the panel analyzed the issue under federal and state law and concluded the spouse's portion was property of the estate. Id. at 198. If the defendants were correct – that the trustee could not state a claim for turnover so long as the property-of-the-estate issue was in dispute – the panel would never have reached the issue at all because the trustee would not have been permitted to assert it in the first place.

The defendants' choice to cite two other decisions, Boyer v. Davis (In re U.S.A. Diversified Products, Inc.),193 B.R. 868 (Bankr. N.D. Ind. 1995), and Boyer v. Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A. (In re USA Diversified Products, Inc.), 100 F.3d 53 (7th Cir. 1996), is also confusing because in both of those cases, as in Newman, the defendants clearly contended the property in question was not property of the estate.4 Finally, the defendants cite MCI Telecommunications Corp. v. Gurga (In re Gurga), 176 B.R. 196 (9th Cir. BAP 1994), as "holding that 'turnover proceedings involve return of undisputed funds.'" Reply at 3:12-13, quoting Gurga, 176 B.R. at 199. In this court's view, that was not a holding of the case. The defendant argued that the claim of a chapter 11 debtor-in-possession for turnover of funds, included with his claims for an accounting, breach of contract, conversion, and breach of fiduciary duty, all arising out of a pre-petition contract, turned what the panel found to be a non-core proceeding into a core proceeding, for purposes of the defendant's motion to compel arbitration under an arbitration clause in the pre-petition agreement. The panel held the inclusion of the turnover claim did not render the adversary proceeding non-core where the amount owed the debtor by the defendant was in dispute and the dispute "rest[ed] on breach of contract issues." Gurga, 176 B.R. at 199. The panel reversed the bankruptcy court's order denying the defendant's motion to stay the adversary proceeding pending arbitration. The panel's statement that "turnover proceedings involve return of undisputed funds" was not a holding that a trustee must be able to make that allegation, without dispute from the defendant, before he can state a claim for turnover.

Finally, the defendants cite Diamond v. Friedman (In re Century City Doctors Hospital, LLC), 466 B.R. 1 (Bankr. C.D. Cal. 2012), in which the court found, on a motion for summary judgment, that the trustee had "made no allegations in the complaint or submitted any evidence in opposition to the summary judgment motion to suggest that the transferred funds are indisputably estate property subject to the turnover requirements under § 542" (466 B.R. at 19), and held that "there simply is no legal basis for a stand-alone 'turnover' claim in this case." Id. This case comes the closest to supporting the defendants' position in the present case. However, when it reached that finding and that conclusion, the court had already granted summary judgment for the defendant on all of the trustee's other claims for relief, including those for recovery of fraudulent transfers, unlawful distribution of partnership funds, and unjust enrichment, leaving nothing standing except the bare turnover claim. Thus, the statement that there were no allegations the funds were "indisputably estate property" has no bearing here.

The court concludes the trustee's claim for turnover is based on allegations of conversion or theft by defendant Stern independent of the trustee's allegations of preferential or fraudulent transfers. The defendants are free to challenge the sufficiency of those allegations to support a turnover claim; as of this time, however, they have not done so.

For the reasons stated, the defendants have not established on the face of the pleadings that no material issue of fact remains to be resolved as to the plaintiff's sixth claim for relief and that they are entitled to judgment as a matter of law. Accordingly, the motion will be denied. The court will hear the matter.

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1 The court notes that the defendants failed to serve the other defendant in this action, The Hongkong and Shanghai Banking Corporation Limited, as appears to have been required by Fed. R. Civ. P. 5(a)(1)(D), incorporated herein by Fed. R. Bankr. P. 7005.

2 Rule 8(d)(2) permits the pleading of alternative claims; Rule 8(d)(3) permits the pleading of inconsistent claims.

3 The prayer to the complaint lists accounting and turnover as a form of relief "as alternatively pled herein." Trustee's Complaint, DN 22, at 9:16.

4

> The question of whether the money in Carlton, Fields' trust account was or was not property of the estate, results from a dispute over who owned the Merrill Lynch account from which those funds were wired to the defendant - the debtor or debtor's principal, Paul Davis. Carlton, Fields contends that Davis was the owner of the account, primarily because of Davis' statement to Johnson that the wired funds were his money. Despite this statement, the court finds that the debtor was the owner of the Merrill Lynch account.

Boyer v. Davis, 193 B.R. at 873-74. As the defendants point out, the circuit court, on appeal, found that argument "border[ed] on the frivilous" (Boyer v. Carlton, Fields), 100 F.3d at 55; it nevertheless addressed and resolved the issue on the merits.

20. 13-29398-D-7 DAVID/CAROLYN SOWELS MOTION TO AVOID LIEN OF PACIFIC COAST SUPPLY, LLC
TJW-15 8-4-16 [129]

Final ruling:

This matter is resolved without oral argument. This is the debtors' motion to avoid an alleged judicial lien held by Pacific Coast Supply, LLC ("Pacific Coast"). The motion will be denied because, for two reasons, the moving parties have failed to provide evidence establishing their factual allegations and demonstrating that they are entitled to the relief requested, as required by LBR 9014-1(d)(7). First, the lien sought to be avoided is a statutory lien, not a judicial lien. Second, the lien did not attach to the property as to which the debtors seek to avoid it; it attached to an entirely different property as to which the debtors have made no claim of exemption.

Section 522(f)(1)(A) of the Bankruptcy Code provides that a debtor in bankruptcy may avoid a lien to the extent it impairs an exemption to which the debtor would have been entitled, if the lien is a judicial lien.[1] The Code defines a "judicial lien" as one "obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding." § 101(36). A "statutory lien" is one that arises "solely by force of a statute on specified circumstances or conditions, . . . but does not include security interest or judicial lien . . . ." § 101(53). Thus, the definitions are mutually exclusive – a nonconsensual lien is either a judicial lien or a statutory lien; it cannot be both. See In re Harpole, 260 B.R. 165, 171 (Bankr. D. Mont. 2001), citing H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 312 (1977).

The motion refers to Pacific Coast's lien as a "judgment lien" and to an "abstract of judgment" recorded in Solano County, California. Neither is an accurate depiction of Pacific Coast's lien or the creation of its lien. First, the lien was not created by the recording of an abstract of judgment; it was created by the recording of a mechanic's lien on June 25, 2008. Ex. A to Debtors' Ex. 1. In fact, the lien attached even before the recording of the mechanic's lien. "A mechanic's lien attaches to the improved property when the first labor or construction material is furnished for the construction work." Forsgren Associates, Inc. v. Pacific Golf Community Development, LLC, 182 Cal. App. 4th 135, 146-47 (2010); Wachovia Bank v. Lifetime Industries, Inc., 145 Cal. App. 4th 1039, 1051 (2006) ["although the claim of lien may be recorded after the work is completed, the lien relates back to the date the first labor or material was furnished for the work of improvement . . . ."]. Although Pacific Coast later recorded a certified copy of a Judgment and Decree of Foreclosure of Mechanic's Lien, that did not operate to create a lien. It was merely an enforcement mechanism.[2]

Thus, mechanic's liens are statutory liens, not judicial liens and may not be avoided under § 522(f). In re Thames, 349 B.R. 659, 666-67 (Bankr. D. Idaho 2005); In re Green, 1999 Bankr. LEXIS 1798, *5 (Bankr. D. Idaho 1999).[3] "Mechanics' liens are entirely of statutory creation, and the statute must be looked to both for the right to the lien and the mode by which it can be enforced." Sukut Construction, Inc. v. Rimrock CA LLC, 199 Cal. App. 4th 817, 824 (2011).

Pacific Coast's lien is a statutory lien. As such, it is not subject to avoidance under § 522(f)(1)(A).

Further, the lien did not attach to the property the debtors have claimed as

exempt and as against which they seek to avoid the lien. Thus, the lien does not impair their exemption and is not subject to avoidance under § 522(f)(1)(A). The mechanic's lien laws "provid[e] that contractors and other specified workers who provide labor, materials, equipment and other services to a work of improvement, shall have a lien on the property on which they worked for the value of such labor done or materials furnished … ." T.O. IX, LLC v. Superior Court, 165 Cal. App. 4th 140, 144 (2008) (emphasis added; citation omitted; internal quotation marks omitted); see also Wachovia Bank, 145 Cal. App. 4th at 1050 (emphasis added) ["Under California's mechanic's lien law, a mechanic's lien attaches to any interest in a work of improvement and the real property on which it is situated."].

The debtors have claimed as exempt their residence on Congressional Circle in Fairfield, California. By contrast, the mechanic's lien states that Pacific Coast "claims a mechanics' lien upon the following described real property . . .: 4094 Suisun Valley Rd., Fairfield, CA . . . ." The judgment and decree of foreclosure states that Pacific Coast shall recover from the debtors a total of $15,419.96, "which said amount to be adjudged a lien in favor of [Pacific Coast] upon the real property described in Exhibit 'A' and on the land upon which the buildings and improvements are situated . . . [the property named in the mechanic's lien; that is, the property on Suisun Valley Rd.]." Debtors' Ex. A. The debtors have provided no evidence or authority for the proposition that Pacific Coast has a lien on their property on Congressional Circle.[4]

For the reasons stated, the motion will be denied by minute order. No appearance is necessary.

1

> There are four basic elements of an avoidable lien under § 522(f)(1)(A): First, there must be an exemption to which the debtor would have been entitled under subsection (b) of this section. 11 U.S.C. § 522(f). Second, the property must be listed on the debtor's schedules and claimed as exempt. Third, the lien must impair that exemption. Fourth, the lien must be . . . a judicial lien. 11 U.S.C. § 522(f)(1).

In re Goswami, 304 B.R. 386, 390-91 (9th Cir. BAP 2003), citing In re Mohring, 142 B.R. 389, 392 (Bankr. E.D. Cal. 1992) (emphasis added).

2 "The lien held by Schwartz arises solely by statute and is clearly a statutory lien. In other words, no legal or equitable process or proceeding is required to determine whether Schwartz is entitled to her lien. The mere fact that enforcement of a lien may require resort to the courts does not transform the lien into a judicial lien." In re Strobbe, 2007 Bankr. LEXIS 2962, *6 (Bankr. D. Mont. 2007).

3 "'A statutory interest is only one that arises automatically, and is not based on an agreement to give a lien or on judicial action. Mechanics' [construction], materialmen's and warehousemen's liens are examples." Strobbe, 2007 Bankr. LEXIS 2962 at *6, quoting H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 314 (1977).

4 However, even if the debtors could establish the lien attaches to the Congressional Rd. property, it is nonetheless a statutory lien and not subject to avoidance under the Bankruptcy Code.

21.	10-42050-D-7 HLC-49	VINCENT/MALANIE SINGH	CONTINUED OBJECTION TO CLAIM OF KESHWAR AND SAVITA SINGH, CLAIM NUMBER 49 7-25-16 [649]
22.	10-42050-D-7 CDH-20	VINCENT/MALANIE SINGH	MOTION TO APPROVE WITHDRAWAL OF PROOFS OF CLAIM 8-24-16 [677]
23.	16-21659-D-7 GFZ-1	TRONG NGUYEN	MOTION TO COMPEL ABANDONMENT 8-15-16 [56]
24.	14-27267-D-7 HSM-17	SARAD/USHA CHAND	MOTION FOR COMPENSATION BY THE LAW OFFICE OF HEFNER, STARK & MAROIS, LLP FOR HOWARD S. NEVINS, TRUSTEES ATTORNEY(S) 8-17-16 [310]

25.	14-27267-D-7 HSM-18	SARAD/USHA CHAND	MOTION TO SELL AND/OR MOTION FOR COMPENSATION FOR PMZ REAL ESTATE, BROKER(S) 8-17-16 [316]