UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Thomas C. Holman
Bankruptcy Judge
Sacramento, California

September 23, 2014 at 9:32 A.M.

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1. 13-30690-B-11 WILLIAM PRIOR — CONTINUED MOTION FOR LIMITED MOTION TO STAY DISCOVERY
13-2288 JWK-2 — 11-20-13 [48]
PRIOR V. TRI COUNTIES BANK ET AL

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

The motion is continued to November 4, 2014, at 9:32 a.m.

The court will issue a minute order.

2. 13-30690-B-11 WILLIAM PRIOR — CONTINUED MOTION FOR PROTECTIVE ORDER
13-2288 NJR-1 — 12-17-13 [76]
PRIOR V. TRI COUNTIES BANK ET AL

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

The motion is continued to November 4, 2014, at 9:32 a.m.

The court will issue a minute order.

3. 13-30690-B-11 WILLIAM PRIOR — CONTINUED MOTION TO AMEND
13-2288 WFH-1 — 2-25-14 [184]
PRIOR V. TRI COUNTIES BANK ET AL

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

The motion is continued to November 4, 2014, at 9:32 a.m.

The court will issue a minute order.

4. 09-35241-B-13 ANTHONY/LILIA DICUS — CONTINUED MOTION TO DISMISS
14-2127 BJK-1 — ADVERSARY PROCEEDING
DICUS ET AL V. ONEWEST BANK, FSB ET AL — 6-11-14 [26]

Tentative Ruling: The plaintiff debtors' opposition is overruled. The motion is granted to the extent set forth herein. The debtors' first claim for relief for violation of the discharge injunction, second claim for relief for declaratory relief and third claim for relief for quiet title are dismissed without leave to amend. The debtor is granted leave to amend the complaint to allege, consistent with the debtors' obligations under Fed. R. Bankr. P. 9011 and this ruling, a claim for declaratory relief regarding only the rights of the parties with respect to whether the debtors were post-petition current on the loan obligation secured by the first deed of trust on their residence as of the date of completion of their chapter 13 plan. The debtors shall file and serve an amended complaint, if any, on or before October 10, 2014, failing which the defendants may file an ex parte application and proposed order to dismiss the adversary proceeding.

BACKGROUND

The court takes judicial notice of the following facts from the record of the docket of this adversary proceeding and the debtors' parent chapter 13 bankruptcy case. The debtors commenced their chapter 13 bankruptcy case on July 22, 2009. Their first amended chapter 13 plan (Parent Dkt. 24), confirmed by order entered November 16, 2009 (Parent Dkt. 34) treated a claim in favor of "Indymac, INC" as a class 1 claim based on a loan secured by a first deed of trust on the Property. The confirmed plan specified a monthly contract installment of $1,148.62, and a monthly dividend to cure pre-petition arrears in the amount of $324.15. The commitment period of the confirmed plan was 36 months.

On October 5, 2009, OneWest Bank, FSB filed a secured claim (the "Claim") in the bankruptcy case in the amount of $320,349.30, which amount included a claim for pre-petition arrears of $9,798.40. On June 1, 2010, the chapter 13 trustee filed a Notice of Filed Claims (Parent Dkt. 41) which included the Claim and indicated that the Claim was classified for purposes of the confirmed chapter 13 plan as being paid as an ongoing mortgage payment and pre-petition mortgage arrears, i.e., through class 1 of the plan. During the pendency of the confirmed chapter 13 plan the debtors did not object to or otherwise challenge the Claim.

On September 11, 2012, the chapter 13 trustee filed an Amended Notice of Final Cure Payment (Parent Dkt. 58), which indicated that OneWest Bank, FSB had been paid through the class 1 "chapter 13 conduit" during the pendency of the case and that the debtors had made the final payment to cure the pre-petition arrears asserted in the Claim.

On October 1, 2012, U.S. Bank, N.A., as trustee for the LXS 2007-4N (U.S. Bank"), as serviced by OneWest Bank, FSB filed a Response to Notice of Final Cure Payment (the "Response") in which it agreed that the debtors had cured the pre-petition arrears asserted in the Claim, but which

disagreed that the debtors were post-petition current on the loan, and that $8,780.90 in post-petition amounts remained due. The Response was filed pursuant to Fed. R. Bankr. P. 3002.1(g) as a supplement to the Claim. The Response was signed by Nickolaus Allan McLemore ("McLemore") as "Authorized Agent for OneWest Bank, FSB." McLemore's signature indicates that he is an employee of Brice, Vander Linden & Wernick, PC (the "Brice Firm"), which is a law firm located in Dallas, Texas.

Following the filing of the Response, the debtors filed a Motion to Deem Current (the "Motion to Deem Current") on October 19, 2012 (Dkt. 69), pursuant to Fed. R. Bankr. P. 3002.1(h). In the Motion to Deem Current, the debtors asserted that OneWest was the "holder of the 1st mortgage" on the Property. The debtors challenged the Response on the basis that they had made all required post-petition payments pursuant to the Claim and that "no notice was ever given to the trustee or the court regarding a change in the payment amount." No opposition to the Motion to Deem Current was filed, and the court granted it by order entered December 10, 2012 (Parent Dkt. 78) (the "Order Deeming Current"). On April 1, 2014, OneWest and Ocwen filed a motion to vacate the Order Deeming Current, which was opposed by the debtors and taken under submission by the court. On September 19, 2014, the court issued a written disposition and order in the debtors' bankruptcy case which vacated the Order Deeming Current as void (Parent Dkt. 146).

On March 1, 2014, the debtors filed a Motion to Sanction Respondents for Contempt for Violation of the Discharge Injunction (Parent Dkt. 101)(the "Sanctions Motion"). The Sanctions Motion alleged that following the entry of the Order Deeming Current Ocwen and/or OneWest continued to assert that the debtors were in post-petition default of their payments on the loan, despite the Order Deeming Current. The debtors alleged that OneWest and/or Ocwen's attempts to enforce the loan based on that purported default constituted a violation of the discharge injunction of 11 U.S.C. § 524(a). Due to the nature of injunctive relief sought in the Sanctions Motion, the court converted the Sanctions Motion to the present adversary proceeding. On May 19, 2014, the debtors filed a first amended complaint (the "FAC") which is the subject of this motion to dismiss. The FAC alleges three claims for relief for 1.) violation of the discharge injunction, 2.) declaratory relief and 3.) quiet title. With respect to the second and third claims for relief, the debtors allege that the promissory note and deed of trust are each invalid and void ab initio, that all subsequent transfers of the note and deed of trust are invalid and that the note and deed of trust should be cancelled as false instruments and that title to the Property should be quieted in their favor. The FAC named OneWest, Ocwen and USB as defendants.

On June 11, 2014, the defendants filed the present motion to dismiss the adversary proceeding on the ground that the court lacked subject matter jurisdiction over the debtors' claims. The court continued the motion once to allow for the filing of the debtors' opposition, which did not appear on the docket at the time that it was served, and a second time to allow the parties to brief the issue of whether claim preclusion or judicial estoppel barred the debtors' claims, particularly the second and third claims for relief.

ANALYSIS

For the reasons set forth herein, the court concludes, pursuant to Fed. R. Bankr. P. 7012, incorporating Fed. R. Civ. P. 12(b)(6), that the FAC

does not state claims upon which relief may be granted.

The following sets forth the legal standard on a motion to dismiss for failure to state a claim on which relief may be granted:

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

Quad-Cities Constr., Inc. v. Advanta Bus. Servs. Corp. (In re Quad-Cities Constr., Inc.), 254 B.R. 459, 465 (Bankr. D. Idaho 2000). In addition, under the Supreme Court's most recent formulation of Rule 12(b)(6), a plaintiff cannot "plead the bare elements of his cause of action, affix the label 'general allegation,' and expect his complaint to survive a motion to dismiss." Ashcroft v. Iqbal, 129 S .Ct 1937, 1954 (2009). Instead, a complaint must set forth enough factual matter to establish plausible grounds for the relief sought. See Bell Atl. Corp. v. Twombly, 127 S.Ct. 1955, 1964-66 (2007). ("[A] plaintiff's obligation to provide 'grounds' of his 'entitle[ment] to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do."). Factual allegations must be enough to raise a right to relief above the speculative level. Id., citing to 5 C. Wright & A. Miller, Fed. Practice and Procedure § 1216, at 235-36 (3d ed. 2004) ("[T]he pleading must contain something more. . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action"). In addition, the court notes the following:

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

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

If a Fed. R. Civ. P. 12(b)(6) motion to dismiss is granted, "[the] court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." Lopez v. Smith, 203 F.3d 1122, 1127

(9th Cir. 2000) (en banc), quoting Doe v. United States, 58 F.3d 494, 497 (9th Cir. 1995). In other words, the court is not required to grant leave to amend when an amendment would be futile. See Toscano, 2007 U.S. Dist. LEXIS 81884 (citing Gompper v. VISX, Inc., 298 F.3d 893, 898 (9th Cir. 2002)).

1. The FAC Does Not State a Claim for Violation of the Discharge Injunction

The debtors allege that the defendants violated the discharge injunction of 11 U.S.C. § 524 because one or all of the defendants have allegedly continued to seek collection of post-petition amounts in default which the defendants allegedly assert came due during the pendency of the debtors' chapter 13 plan but were not paid. The debtors allege that the post-petition amounts in question were discharged when they completed their chapter 13 plan, received a discharge, and obtained the Order Deeming Current. These allegations do not state a claim for several reasons.

First, 11 U.S.C. § 1328(a)(1) provides that a debt provided for in the chapter 13 plan under 11 U.S.C. § 1322(b)(5) is not discharged upon completion of a plan and receipt of a discharge in a chapter 13 case. 11 U.S.C. § 1322(b)(5) contains an exception to 11 U.S.C. § 1322(b)(2), which prohibits modification of a claim secured only by a security interest in real property that is the debtor's principal residence. 11 U.S.C. § 1322(b)(5) allows the chapter 13 plan to modify debts on which the last payment is due after the date on which the final payment under the plan is due to be modified, the prohibition of 11 U.S.C. § 1322(b)(2) notwithstanding, to cure defaults within a reasonable time and to maintain regular monthly payment while the chapter 13 case is pending.

The court takes judicial notice that in this district debts that are modified pursuant to 11 U.S.C. § 1322(b)(5) are provided for in class 1 of this district's form chapter 13 plan. The court also takes judicial notice that the debt which is the subject of this adversary proceeding received such treatment, as debtors' confirmed chapter 13 plan provided for the debt in class 1, providing for a cure pre-petition arrears over the plan term and maintenance of ongoing contract installment payments. Class 1 debts under the confirmed plan are by definition debts on which the last payment is due after the date of the final payment under the plan. The debt that is the subject of this adversary proceeding was provided for under § 1322(b)(5). Therefore, it was not discharged by operation of 11 U.S.C. § 1328(a)(1).

The debtors' assertion in their opposition debt was not provided for under § 1322(b)(5) is incorrect, completely controverted by judicially noticeable facts and comes perilously close to a frivolous legal argument.
The debtors appear to believe that their payment of part of the obligation during the case "discharged" that part which they paid, but they cite no legal authority supporting this novel theory and the court is aware of none. The debtors appear to confuse partial satisfaction of the debt with partial discharge of the debt.

The debtors also appear to believe that the Order Deeming Current somehow effected a discharge of that part of the obligation, but again, they cite no legal authority supporting that argument. Even if the Order Deeming Current were not void, there is nothing in the Bankruptcy Code or the

Federal Rules of Bankruptcy Procedure which even suggests that it effects a discharge; Fed. R. Bankr. P. 3002.1(h) merely provides for a factual determination. It does not provide for any injunctive relief. The debtors and their counsel are advised to review their obligations to the court under Fed. R. Bankr. P. 9011.

2. The Debtors Are Precluded From Prosecuting The Second Claim for Relief For Declaratory Relief

The debtors' second claim for relief for declaratory relief does not state a claim upon which relief may be granted because they are precluded from asserting that claim.

As discussed in the factual background above, the debtors confirmed a chapter 13 plan which provided for the debt under 11 U.S.C. § 1322(b)(5). OneWest filed a proof of claim for the debt, which claim received payments from the chapter 13 trustee out of the debtors' plan payments during the term of the confirmed plan. The debtors did not object to the claim during the term of the confirmed plan. As a result, because no objection to the claim was filed, it was deemed allowed by operation of 11 U.S.C. § 502(a).

In the Ninth Circuit, a claim filed in a bankruptcy case which is deemed allowed pursuant to 11 U.S.C. § 502(a) has the effect of a final judgment for the purposes of claim preclusion, or res judicata. Siegel v. Federal Home Loan Mortg. Corp., 143 F.3d 525, 529-30 (9th Cir. 1998).

> The "doctrine of res judicata bars a party from bringing a claim if a court of competent jurisdiction has rendered a final judgment on the merits of the claim in a previous action involving the same parties or their privies." Robertson v. Isomedix, Inc. (In re Intl. Nutronics), 28 F.3d 965, 969 (9th Cir.1994). Thus, " '[r]es judicata bars all grounds for recovery that could have been asserted, whether they were or not, in a prior suit between the same parties on the same cause of action.' " Id. (alteration in original) (citation omitted). That applies to matters decided in bankruptcy.

Siegel, 143 F.3d at 528-29 (emphasis in original). Whether or not a later claim involves the same cause of action is subject to a four-factor test:

> (1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts.

Siegel, 143 F.3d at 529.

Applying the foregoing to the facts of this case, the court concludes that the debtors are precluded from asserting the second claim for relief. Although they assert a variety of theories in the FAC, the debtors admit in their opposition to the motion that the gravamen of the FAC, from which all of those theories stem, is an attack on (1) the validity of the debt provided for in their chapter 13 plan and asserted in the Claim and (2) SB, Ocwen and/or OneWest's right to recover on the debt. The debtors' attack reaches back to the inception of the loan in

2006, long before the debtors filed their bankruptcy case. The attack is clearly based on claims which could have been asserted in response to the filing of the Claim in the bankruptcy case. The debtors' second claim for relief also involves the same transactional nucleus of facts and involves substantially the same evidence, i.e. the loan documents and evidence surrounding the loan transaction. The debtors' argument that they did not discover their claims regarding the validity of the debt until they undertook an investigation with their present counsel after they completed their chapter 13 plan received a discharge is unavailing. This claim for declaratory relief could have been brought during the pendency of the chapter 13 plan, but it was not. It is now too late for the debtors to attempt to buttress their position that they made all post-petition payments which came due on the loan during the plan by asserting that the debt is not valid.

The debtors' argument that "fraud vitiates everything," i.e. that because they allege that fraud was involved in the loan transaction claim preclusion cannot apply also lacks merit. The case of Carpentier v. Oakland, 30 Cal. 439 (1866), cited by the debtors, is not binding on this court and in any event does not support the debtors' position. Carpentier addresses the scope of a court's ability to determine whether a judgment in a prior proceeding was procured by fraud. The Carpentier court determined that such a determination must be confined to the face of the record in the prior proceeding. It does not stand for the proposition that any allegation of fraud automatically serves as a shield from the doctrine of claim preclusion.

3. The Debtors Are Precluded From Prosecuting The Third Claim for Relief For Quiet Title

The third claim for relief to quiet title to the Property in the debtors' favor does not state a claim upon which relief may be granted for the same reasons that the second claim for relief does not state a claim. In seeking to quiet title to the Property the debtors are attacking the validity of the loan. They are precluded from doing so for the reasons stated above in connection with the second claim for relief.

4. Leave is Granted to Amend

However, although the debtors have alleged no claim for violation of the discharge injunction of 11 U.S.C. § 524, and they are precluded from attacking the validity of the debt itself, the court still recognizes that a dispute exists between the debtors and the defendants as to whether the debtors are in fact post-petition current with respect to the loan obligation. Therefore, leave is granted to the debtors to amend the FAC only to allege a claim for declaratory relief with respect to that factual issue. Leave is not granted to the debtors to allege any other additional claim. Should the debtors wish to add any other claim they must do so by way of a motion to amend, filed and set for hearing on notice to the defendants.

The court will issue a minute order.

5. 14-20059-B-7 ALFREDO HOLGUIN — MOTION FOR A MORE DEFINITE STATEMENT
14-2165 GTB-1 — 7-23-14 [11]
BELL V. HOLGUIN

Tentative Ruling: The motion is denied.

By this motion the defendant debtor Alfredo Holguin requests that the court order the plaintiff chapter 7 trustee John Bell to file a more definite statement of his complaint pursuant to Fed. R. Civ. P. 12(e).

Under Rule 12(e), a defendant may move for a more definite statement "[i]f a pleading is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading . . . ." Fed. R. Civ. P. 12(e). Typically, relief under Rule 12(e) is appropriate when the plaintiff's complaint is so indefinite that the defendant cannot ascertain the nature of the claim being asserted. Gay-Straight Alliance Network v. Visalia Unified Sch. Dist., 262 F.Supp.2d 1088, 1099 (E.D. Cal. 2001). The remedy provided by Rule 12(e) is also appropriate where a pleading "approaches the other extreme of being overly prolix or complex." 2 James Wm. Moore et al., Moore's Federal Practice ¶ 12.36(1) (3d Ed.2011); see also Anderson v. Board of Trustees, 77 F.3d 364, 367 (11th Cir. 1996); Caldwell v. Roseville Joint Unified School Dist., 2005 WL 1561539 at * 2 (E.D. Cal. June 30, 2005)(more definite statement appropriate where complaint does not comply with requirements of Rule 8(a)).

In this case, the motion is denied because it is clear from the motion that the debtor understands the nature of the two claims for relief for denial of his discharge being asserted against him in the complaint. The debtors' motion does not evince his inability to ascertain the nature of the trustee's claims, but instead his disagreement with the viability of the trustee's claims. Such a disagreement may be communicated by denying liability in an answer, or through a dispositive motion such as a motion to dismiss. The court finds that a more definite statement is not required in this case.

The court acknowledges that the trustee did not oppose this motion. However, "entry of default does not entitle a plaintiff to judgment as a matter of right or as a matter of law." In re Meyer, 373 B.R. 84, 88 (B.A.P. 9th Cir. 2007).

The court will issue a minute order.

6. 14-20059-B-7 ALFREDO HOLGUIN — CONTINUED OBJECTION TO DEBTOR'S CLAIM OF EXEMPTIONS
PA-3 — 4-10-14 [35]

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

The motion is removed from the calendar. On September 18, 2014, the

court signed an order dismissing the motion with prejudice pursuant to the stipulation of the trustee and the debtor.

7.	14-23437-B-7 14-2195 TAN ET AL V. MACK	JASON MACK BSB-1	MOTION TO DISMISS ADVERSARY PROCEEDING 8-18-14 [17]

Tentative Ruling: The opposition filed by plaintiffs Hermosa Tan and Romeo Tan is sustained in part. The motion is granted in part and denied in part. To the extent that the motion seeks dismissal of a claim for nondischargeability of a debt pursuant to 11 U.S.C. § 523(a)(6) with respect to the defendant debtor's alleged actions relating to real property located at 1420 Plumas Avenue, Menlo Park, California ("Plumas"), the motion is denied. To the extent that the motion seeks dismissal of a claim for nondischargeability of a debt pursuant to 11 U.S.C. § 523(a)(6) with respect to the defendant debtor's alleged actions relating to real property located at 2328 Clarke Avenue, East Palo Alto, California ("Clarke"), 1008 Bay Road, East Palo Alto, California ("Bay") and 992 Granada Way, San Jose, California ("Granada") the motion is granted. The plaintiffs are granted leave to amend the complaint to allege, consistent with this ruling and their obligations under Fed. R. Bankr. P. 9011, a claim for nondischargeability under 11 U.S.C. § 523(a)(6) with respect to the debtor's alleged actions relating to Clarke, Bay and Granada. The plaintiffs shall file and serve an amended complaint on or before October 10, 2014, failing which the debtor may file an ex parte application to dismiss the plaintiffs' claim as it relates to Clarke, Bay and Granada.

The debtor seeks dismissal of the complaint (Dkt. 1), which alleges a claim for relief for nondischargeability of a debt pursuant to 11 U.S.C. § 523(a)(6), pursuant to Fed. R. Civ. P. 12(b)(6). The following sets forth the legal standard on a motion to dismiss for failure to state a claim on which relief may be granted:

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

Quad-Cities Constr., Inc. v. Advanta Bus. Servs. Corp. (In re Quad-Cities Constr., Inc.), 254 B.R. 459, 465 (Bankr. D. Idaho 2000). In addition, under the Supreme Court's most recent formulation of Rule 12(b)(6), a plaintiff cannot "plead the bare elements of his cause of action, affix the label 'general allegation,' and expect his complaint to survive a motion to dismiss." Ashcroft v. Iqbal, 129 S .Ct 1937, 1954 (2009). Instead, a complaint must set forth enough factual matter to establish plausible grounds for the relief sought. See Bell Atl. Corp. v. Twombly, 127 S.Ct. 1955, 1964-66 (2007). ("[A] plaintiff's obligation to provide 'grounds' of his 'entitle[ment] to relief requires more than labels and

conclusions, and a formulaic recitation of the elements of a cause of action will not do."). Factual allegations must be enough to raise a right to relief above the speculative level. Id., citing to 5 C. Wright & A. Miller, Fed. Practice and Procedure § 1216, at 235-36 (3d ed. 2004) ("[T]he pleading must contain something more. . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action"). In addition, the court notes the following:

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

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

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

The complaint asserts a claim for relief for nondischargeability of a debt under 11 U.S.C. § 523(a)(6). 11 U.S.C. § 523(a)(6) provides that debts arising out of "willful and malicious injury to another entity or to the property of another entity." The "willful and malicious" standard for the purposes of § 523(a)(6) is a two-pronged test and establishes a high bar for a plaintiff to surmount. Khaligh v. Hadaegh (In re Khaligh), 338 B.R. 817, 831 (9th Cir. B.A.P. 2006). Under the first prong, the plaintiff must allege and prove that there was a "willful" injury. "[T]he standard for meeting the willful prong of the two-part test under § 523(a)(6) is high. That is, the creditor must allege and prove that the debtor had the subjective intent to cause harm or the subjective knowledge that harm was substantially certain to occur." Luc v. Chien (In re Chien), No. NC-07-1268-JuMkK at *11 (9th Cir. B.A.P., February 7, 2008)(citing Kawaauhau v. Geiger, 523 U.S. 57 (1998) and Carillo v. Su (In re Su), 290 F.3d 1140 (9th Cir. 2002)). Under the second prong, the plaintiff must allege and prove that there was a "malicious" injury. An injury is "malicious" when it is caused by "(1) a wrongful act, (2) done intentionally, (3) which necessarily causes injury, and (4) [the wrongful act] is done without just cause or excuse."

Jett v. Sicroff (In re Sicroff), 401 F.3d 1101, 1106 (9th Cir. 2005) citing Petralia v. Jercich (In re: Jercich), 238 F.3d 1202, 1209 (9th Cir. 2001), cert. denied, 533 U.S. 930, 121 S.Ct. 2552, 150 L.Ed.2d 718 (2001).

In this case, the court finds that the complaint states a claim for relief under 11 U.S.C. § 523(a)(6) as it relates to the debtor's alleged actions with respect to Plumas. The complaint alleges that the debtor forged a grant deed to put himself on title to Plumas without the plaintiffs' knowledge or consent. The complaint also alleges that the debtor obtained a $500,000.00 loan from Wells Fargo Bank, N.A. ("Wells Fargo") secured by a deed of trust on Plumas, and forged the plaintiffs' signatures on the deed of trust without their knowledge or consent. The complaint alleges that the debtor absconded with the proceeds of the loan and that the encumbrance of Plumas caused the plaintiffs to lose their interest and equity in Plumas. The plaintiffs allege that the debtor's conduct was done willfully and with malice and intent to injure. Those allegations are sufficient to state a claim under 11 U.S.C. § 523(a)(6) with respect to Plumas.

As for the debtor's request that the court take judicial notice of a reconveyance of the deed of trust on securing the aforementioned $500,000 loan from Wells Fargo, that request is denied. Pursuant to Fed. R. Evid. 201(b), the court may take judicial notice of facts generally known within the court's territorial jurisdiction or facts which can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned. The representations set forth in the reconveyance of the deed of trust are not such facts, even if the reconveyance is recorded. The act of recording a document does not automatically make all representations therein facts of the type described under Fed. R. Evid. 201(b), and the debtor has cited no authority which supports that proposition.

However, with respect to the plaintiffs' allegations regarding debtor's alleged actions relating to Clarke, Bay and Granada the court agrees with the debtor that the complaint does not alleges facts sufficient to state a claim under 11 U.S.C. § 523(a)(6). This is primarily due to vagueness and ambiguity in the allegations relating to Clarke, Bay and Granada. The complaint alleges that beginning in 2007, "defendant went on title to plaintiffs' property using fraudulent grant deeds," and that debtor "and his co-conspirators signed the [plaintiffs'] names on the grant deeds with intent to deceive and injure the plaintiffs." The complaint alleges that debtor "intended to defraud the plaintiffs out of interest in their Properties by adding himself on title." The complaint also alleges that "in total, $1,505,000 in fraudulent loans were taken out by the defendant and his conspirators against plaintiffs' properties." The complaint does not allege whether the foregoing allegations apply to one or all of Clarke, Bay and Granada, nor specific actions taken by the debtor with respect to one or all of Clarke, Bay or Granada. When compared to the relatively specific allegations regarding debtor's actions relating to Plumas, the ambiguity with respect to his actions relating to Clarke, Bay or Granada is evident. The court finds that the complaint does not state a claim upon which relief may be granted with respect to Clarke, Bay or Granda.

However, the court grants the plaintiffs leave to amend to state a claim for 11 U.S.C. § 523(a)(6), consistent with the plaintiffs' obligations under Fed. R. Bankr. P. 9011, because it does not perceive that granting

leave to amend would be futile. The complaint alleges that the debtor took some action with respect to Clarke, Bay or Granada, but it is unclear exactly what those actions were and whether they amount to the infliction of a willful and malicious injury on the plaintiffs or their property.

The court will issue a minute order.

8. 12-29353-B-11 DANIEL EDSTROM — MOTION TO EMPLOY JUDSON H. HENRY AS ATTORNEY
JHH-1 — 9-2-14 [235]

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

The motion is dismissed.

The motion is moot. By order entered September 11, 2014 (Dkt. 246), the court converted this case to one under chapter 7. A debtor in chapter 7 does not require court approval for employment of counsel. 11 U.S.C. § 327(a).

The court will issue a minute order.

9. 12-27767-B-11 DOMINIQUE ENGEL — MOTION FOR STIPULATION FOR USE OF CASH COLLATERAL
MLA-7 — 8-27-14 [264]

Tentative Ruling: The motion is denied without prejudice.

The motion appears to be incomplete. The copy of the cash collateral stipulation filed as Exhibit "A" to the motion (Dkt. 267)(the "Stipulation") references a Budget attached to the Stipulation as Exhibit "A." However, no such Budget is attached to the Stipulation.

The motion is also denied because it does not comply with LBR 4001-1(c)(3), which requires a motion for authorization to use cash collateral to recite and identify any provision of the type specified in LBR 4001-1(c)(3)(A)-(L) and to explain the justification for such provision. LBR 4001-1(c)(3) is designed to aid the court and respondent parties in identifying potentially objectionable provisions. Merely copying the terms of the Stipulation into another document and entitling it as a motion, as was done here, does not comply with the foregoing.

Finally, should the debtor file this motion again, the debtor shall, in addition to complying with the requirements of the Bankruptcy Code, Federal Rules of Bankruptcy Procedure and the Local Bankruptcy Rules, explain the justification for paragraph 4 of the Stipulation (requiring debtor to turn over "any remaining rents" to Gold Country Bank (the "Bank") "upon execution of this stipulation"), paragraph 14 of the Stipulation (requiring debtor to turn over all cash collateral to the

Bank on demand upon termination of debtor's authorization to use cash collateral) and paragraph 9 (requiring, inter alia, that a replacement lien granted to the Bank shall "cover" the period from the petition date to July 15, 2014). To the extent that those provisions are intended to provide for payment of "past due" adequate protection payments, the debtor and the Bank should be aware that where adequate protection is required, it is normally available only from the time the creditor requests it. Ahlers v. Norwest Bank Worthington (In re Ahlers), 794 F.2d 388, 395 (8th Cir. 1986) overruled on other grounds sub nom Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 108 S.Ct. 963, 99 L.Ed.2d 169 (1988).

The court will issue a minute order.

10. 13-24401-B-7 DAVID/PAMELA FIRPO — MOTION TO EMPLOY BARRY H. SPITZER AS ATTORNEY AND MOTION FOR COMPENSATION BY THE LAW OFFICE OF BARRY H. SPITZER, TRUSTEE'S PROPOSED ATTORNEY
BHS-1 — 8-29-14 [27]

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

11. 13-24401-B-7 DAVID/PAMELA FIRPO — MOTION TO SELL
BHS-2 — 8-29-14 [21]

Tentative Ruling: This is a properly filed motion under LBR 9014-1(f)(2). Opposition may be presented at the hearing. In this instance the court issues the following tentative ruling on the merits of the motion.

The motion is granted in part. Pursuant to 11 U.S.C. § 363(b)(1), the chapter 7 trustee is authorized to sell the estate's interest in the non-exempt equity in the real property located at 795 Hide Away Loop, Alta, California (the "Property") in an "as-is" and "where-is" condition to the debtors for $6300.00. The net proceeds of the sale shall be administered for the benefit of the estate. The trustee is authorized to execute all documents necessary to complete the approved sale. The 14-day stay of Fed. R. Bankr. P. 6004(h) shall not apply to the order granting the motion. Except as so ordered, the motion is denied.

The sale will be subject to overbidding on terms approved by the court at the hearing.

The trustee has made no request for a finding of good faith under 11 U.S.C. § 363(m), and the court makes no such finding.

The court will issue a minute order.

12. 14-22276-B-7 SHAWNA EMERY
14-2169 KWY-1
BEARDMORE COMPANY, LLC V. EMERY

MOTION TO DISMISS ADVERSARY PROCEEDING AND/OR MOTION FOR MORE DEFINITE STATEMENT
8-14-14 [9]

Tentative Ruling: None.

13. 14-26608-B-11 DARA PETROLEUM, INC.
NSK-2

MOTION TO INCUR DEBT
8-22-14 [100]

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

The motion is dismissed.

The motion is moot. The bankruptcy case was dismissed by order entered September 5, 2014 (Dkt. 113).

The court will issue a minute order.

14. 14-27919-B-7 ROSA CEBALLOS
TOG-3

MOTION TO COMPEL ABANDONMENT
9-8-14 [14]

Tentative Ruling: This matter is continued to October 7, 2014, at 9:32 a.m.

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

The court notes that the notice of hearing (Dkt. 15) does not comply with the requirements of the Local Bankruptcy Rules. When, as here, fewer than twenty-eight (28) days' notice of a hearing is given, Local Bankruptcy Rule 9014-1(f)(2) requires that the notice of hearing instruct parties-in-interest that no written opposition to the motion is required and that opposition may be presented at the hearing on the motion. If opposition is presented, or if there is other good cause, the court may continue the hearing to permit the filing of evidence and briefs. LBR 9014-1(f)(2)(C). The debtor has failed to satisfy the foregoing requirements, which is grounds to deny the motion. LBR 1001-1(g). In this instance, because the court is continuing this matter to October 7, 2014, at 9:32 a.m., the debtor is instructed to file and properly serve, consistent with the applicable requirements of the Local Bankruptcy Rules

and Federal Rules of Bankruptcy Procedure, an amended notice of hearing which complies with the noticing requirements of the Local Bankruptcy Rules. A failure to comply with the foregoing will result in denial of the motion.

The court will issue a minute order.

15. 14-23526-B-7 PEGGY DEAN — MOTION TO EXTEND TIME
HSM-4 — 8-25-14 [31]

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

The motion is granted in part. Pursuant to Federal Rule of Bankruptcy Procedure 4003(b)(1), the deadline for the chapter 7 trustee to file an objection to the debtor's claims of exemptions is extended to and including November 4, 2014. Except as so ordered, the motion is denied.

The trustee alleges without dispute that he requires additional time to review a complex asbestos litigation settlement arrangement involving the debtor's late father, pursuant to which the debtor has received settlement payments for many years, and to confirm that arrangements have been made for certain future distributions to be paid to the bankruptcy estate. While the trustee has been in contact with the class action plaintiff's attorney handling the asbestos litigation, the trustee has been provided limited information concerning the distribution arrangement. Further information may require formal discovery. The court finds that the foregoing constitutes "cause" under Federal Rule of Bankruptcy Procedure 4003(b)(1).

The court will issue a minute order.

16. 14-25650-B-7 KERRY RUSH — MOTION TO AVOID LIEN OF GCFS, INC.
MOH-1 — 8-21-14 [19]

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

The motion is granted pursuant to 11 U.S.C. § 522(f)(1)(A), subject to the provisions of 11 U.S.C. § 349. The judicial lien in favor of GCFS, Inc., a California corporation, recorded in the official records of Butte County, Document Number 2013-0014121, is avoided as against the real property located at 3825 Windermere Lane, Oroville, California 95965 (the "Property").

The Property had a value of $126,322.00 as of the date of the petition. The unavoidable liens total $70,518.00. The debtor claimed the Property as exempt under California Code of Civil Procedure Section 704.730, under which he exempted $175,000.00. The respondent holds a judicial lien created by the recordation of an abstract of judgment in the chain of

title of the Property. After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is no equity to support the judicial lien. Therefore, the fixing of this judicial lien impairs the debtor's exemption of the Property and its fixing is avoided.

The court will issue a minute order.

17. 11-41052-B-7 PEQ-1 — ROOF TOP METAL PRODUCTS, INC. — MOTION FOR COMPENSATION FOR RYAN, CHRISTIE, QUINN & HORN, ACCOUNTANT(S) 8-18-14 [206]

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

The motion is granted. Pursuant to 11 U.S.C. § 330 and Fed. R. Bankr. P. 2016, the application is approved on a first and final basis in the total amount of $5,245.00 for services rendered and costs incurred during the period of May 14, 2012, through and including August 7, 2014. The foregoing amount is payable to Ryan, Christie, Quinn & Horn ("RCQH") as a chapter 7 administrative expense. Except as so ordered, the motion is denied.

The debtor commenced the above-captioned bankruptcy case by filing a voluntary petition under chapter 11 on August 29, 2011 (Dkt. 1). The case was converted to one under chapter 7 by order entered January 24, 2012 (Dkt. 130). By order entered July 9, 2012 (Dkt. 179), the court authorized the chapter 7 trustee to employ RCQH as accountant for the estate, with an effective date of employment of May 14, 2012. The applicant now seeks approval of compensation for services rendered and costs incurred during the period of May 14, 2012, through and including August 7, 2014. The court finds that the approved fees and costs are reasonable compensation for actual, necessary services.

The court will issue a minute order.

18. 14-27252-B-7 FF-1 — RAMONA ESCUDERO — CONTINUED MOTION TO COMPEL ABANDONMENT 7-18-14 [7]

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

19. 12-33556-B-7 GMR-3 — WILLIAM/FELICIA LASSITER — MOTION FOR COMPENSATION FOR GABRIELSON & COMPANY, ACCOUNTANT(S) 8-13-14 [65]

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

The motion is granted to the extent set forth herein. The court's order entered April 5, 2013 (Dkt. 36) (the "Order") will be amended to specify an effective date of employment of March 20, 2013. Pursuant to 11 U.S.C. § 330 and Fed. R. Bankr. P. 2016, the court approves on a first and final basis compensation for the bankruptcy estate's accountant, Gabrielson & Company ("G&C"), in the amount of $7,297.50 in fees and $176.57 in expenses, for a total award of $7,474.07, for services rendered and costs incurred during the period of March 20, 2013, through and including August 10, 2014, payable as a chapter 7 administrative expense. Except as so ordered, the motion is denied.

On July 23, 2012, the debtors commenced the above-captioned bankruptcy case by filing a voluntary petition under chapter 7 (Dkt. 1). Pursuant to the Order, the court granted the trustee's request to employ G&C as accountant for the bankruptcy estate. The Order does not specify an effective date of employment, so G&C's employment was effective April 5, 2013. The application for an order authorizing G&C's employment was filed on March 25, 2013 (Dkt. 32). This department does not approve compensation for work prior to the effective date of a professional's employment. DeRonde v. Shirley (In re Shirley), 134 B.R. 930, 943-944 (B.A.P. 9th Cir. 1992). However, the court construes the present application as requesting an effective date in the order approving G&C's employment retroactive to March 20, 2013, the first date on which G&C rendered services to the trustee according to the attached billing records (Dkt. 67). The request for that effective date is granted. Due to the administrative requirements for obtaining court approval of professional employment, this department allows in an order approving a professional's employment an effective date that is not more than thirty (30) days prior to the filing date of the employment application without a detailed showing of compliance with the requirements of In re THC Financial Corp, 837 F.2d 389 (9th Cir. 1988)(extraordinary or exceptional circumstances to justify retroactive employment). In this case, the court grants an effective date of March 20, 2013.

In the absence of an objection from any party in interest, the court finds that, as set forth in the application, the approved fees and expenses are reasonable compensation for actual, necessary and beneficial services.

G&C shall submit an amended form of employment order which is identical to the Order, but which shall in addition specify an effective date of employment of March 20, 2013. Upon entry of the amended employment order, the court will issue a minute order granting the motion as set forth above.

20. 11-37885-B-7 MERLE HOWARD
SSA-10

MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH MERLE R. HOWARD
8-5-14 [108]

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

The motion is granted, and the chapter 7 trustee is authorized to enter into and perform in accordance with the terms set forth in the Settlement Agreement and Release Agreement attached as Exhibit "1" to the motion (Dkt. 111, pp.2-7) (the "Agreement"). Except as so ordered, the motion is denied.

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

The trustee alleges without dispute that the Agreement is fair and equitable and in the best interests of the estate and its creditors. The Agreement will resolve a dispute between the trustee and debtor regarding the debtor's unauthorized sale of certain real property as well as his retention of the sales proceeds and rent payments thereon. The trustee asserts that the Agreement will avoid potentially expensive litigation which would not achieve a better result than what is provided for by the Agreement. The trustee further believes that the Agreement will enhance the assets of the estate and provide for a speedier administration for the benefit of creditors as the debtor has already turned over to the trustee the sales proceeds and rent payments he was previously holding. In the absence of opposition, the court finds that the Agreement is a reasonable exercise of the trustee's business judgment. In re Rake, 363 B.R. 146, 152 (Bankr. D. Idaho 2006). Accordingly, the court finds that the trustee has carried his burden of persuading the court that the Agreement is fair and equitable, and the motion is granted.

The court will issue a minute order.

21. 14-26585-B-7 CARLOS SANTANA
SLC-1

OBJECTION TO DEBTOR'S CLAIM OF EXEMPTIONS
8-22-14 [12]

Tentative Ruling: The debtor's opposition is overruled. The trustee's objection is sustained for the reasons set forth therein. All claims of exemption in property of the debtor pursuant to Cal. Code Civ. P. § 703.140(b) are disallowed.

The debtor's opposition is unpersuasive as he has provided no evidence that either (1) the state court entered a final divorce decree on or before the petition date in this bankruptcy case, or (2) that both he and his wife have executed the required spousal waiver form. His "sincere belief" that his divorce was finalized on or around October 29, 2013, is insufficient. Although the court acknowledges the proposed dissolution judgment that would be effective October 29, 2013, there is no evidence that the state court has approved this.

The court will issue a minute order.

22.	14-27495-B-7 LRR-1	TRYPHINE PUCKETT-BIER	MOTION TO AVOID LIEN OF ALEJANDRO JESUS PEREZ 7-30-14 [15]

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

The motion is granted pursuant to 11 U.S.C. § 522(f)(1)(A), subject to the provisions of 11 U.S.C. § 349. The judicial lien in favor of Alejandro Jesus Perez, recorded in the official records of San Joaquin County, Document Number 2014-009784, is avoided as against the debtor's interest in real property located at 4883 East Harvest Road, Acampo, California 95220 (the "Property").

The Property had a value of $532,500.00 as of the date of the petition. The debtor alleges without dispute that he holds a one-fourth fee simple interest in the Property totaling $133,125.00. The unavoidable liens as to the debtor's interest in the Property total $91,849.25. The debtor claimed his interest in the Property as exempt under California Code of Civil Procedure Section 704.730(a)(3), under which he exempted $41,276.00. The respondent holds a judicial lien created by the recordation of an abstract of judgment in the chain of title of the Property. After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is no equity to support the judicial lien. Therefore, the fixing of this judicial lien impairs the debtor's exemption of his interest in the Property and its fixing is avoided.

The court will issue a minute order.

23.	13-34754-B-11 WSS-3	CIELO VINEYARDS & WINERY, LLC	MOTION TO CONVERT CASE TO CHAPTER 7 8-27-14 [192]

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

24.	14-22155-B-11 MLG-7	KU-RING-GAI RIDGE VINEYARDS LLC	OBJECTION TO CLAIM OF AMERICAN EXPRESS BANK, FSB, CLAIM NUMBER 11 8-14-14 [113]

Tentative Ruling: This is a properly filed motion under LBR 3007-1(b)(2). Opposition may be presented at the hearing. Therefore, the court issues no tentative ruling on the merits of the motion.